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Chapter 4 – Theories of freedom of expression for minorities

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Introduction

Whereas Chapter 3 includes extensive focuses on the added value of a minority dimension to a number of rights that relate in different ways to the right o freedom of expression, Chapter 4 examines the added value of a minority rights dimension to the right to freedom of expression proper. It commences with a rehearsal of some of the more common rationales for freedom of expression and lends them different emphases reflecting various specificities of the aforementioned minority dimension to the right. The instrumental role of the media in the realisation of the right to freedom of expression is then examined, first in general terms and subsequently from the perspective of persons belonging to minorities. The need to engage with media functionality and to differentiate between different media types is stressed. Particular attention is paid to the suitability of community, public service, commercial and transnational media for fulfilling the diverse communicative and informational needs and preferences of persons belonging to minorities.

If the media do not operate in a favourable environment (constitutional, legal, political and societal), it is likely that they will be unable to perform the various democratic functions ascribed to them, eg. public watchdog, contribution to opinion-formation and public debate, provision of fora for public debate. The final focus of this chapter is the extent to which technology-driven changes have conditioned new technological realities and communicative possibilities, behavioural patterns of media usage and consequently the emergence of new regulatory paradigms.

4.1 Overview of main theories of freedom of expression

As a general rule, the right to freedom of expression does not discriminate. It is a fundamental right for everyone. Therefore, any attempts to plead the case for an enhanced right to freedom of expression for members of certain groups in society, for example minorities, would appear

to be misguided and problematic *ab initio*. A more promising way to ensure that the right to freedom of expression for minorities is not just sterile and theoretical, but real and effective, would be to examine the interplay between the right to freedom of expression, specific minority rights and general rights with particular relevance for minorities. To do so, our enquiry must first be situated in an appropriate frame of reference.

The frame of reference chosen for present purposes is that of international human rights law, where freedom of expression takes its place in a catalogue of rights. It has already been explained in the Introduction that freedom of expression is not only a constitutive right, but an instrumental one as well. As such, its interaction with a number of other rights vouchsafed by international human rights law is notably dynamic. Although there is a tendency to perceive the interaction of freedom of expression with other rights as frictional (eg. the right to enjoy one's good name, the right to privacy, the right not to be subjected to racism, etc.), this is a lop-sided perspective and an unfortunate tendency. The interactional relationship between freedom of expression and other rights often generates enhanced understandings and applications of the rights in question. The focus here will, however, be limited to the impact of such interaction in respect of minority rights. As already discussed in Chapter 3.1.1, the potential for synchronicity and synergy, rather than competition and conflict, is particularly evident in the case of the interaction of the right to freedom of expression with religious, linguistic, cultural and educational rights. Those rights were loosely classed as object-oriented, but it was stressed that their optimal realisation is dependent on the optimal realisation of other rights, loosely described as process-oriented, such as the right to non-discrimination/equality, associative and participatory rights. Again, freedom of expression is certainly capable of ameliorating the realisation of these process-oriented rights as well.

Before exploring some of the particular interfaces between freedom of expression and other rights, it is important to stress that the grounding of the right alongside other human rights enshrined in international law makes for welcome internal and external consistency in the interpretation and implementation of human rights. In other words, it is conducive to the coherent interpretation of discrete instruments setting forth guarantees of human rights, but also facilitates heightened levels of coherence across such instruments. To the extent that freedom of expression is interpreted in keeping with this perspective, it serves to underscore the universal, indivisible, interdependent and interrelated nature of human rights, as affirmed *inter alia* in the Vienna Declaration of 1993 (see further, s. 3.1.1, *supra*).[1]

Rationales for the protection of freedom of expression are numerous, rich and varied. As noted by Lucas A. Powe, Jr.:

> Each of the theories has explanatory power. Each has serious weaknesses. Each one, taken on its own, fails to provide an adequate basis for heightened protection of freedom of expression. […] the whole is stronger than the sum of its parts. There is a synergy among the various explanations for freedom of expression that is lost when the discussion deals with the strengths and weaknesses of a single theory. Hence, when only one theory of freedom of expression is put forward, the claim

[1] World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993). See, in particular, Article 5 of the Declaration, which reads: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

> for heightened protection will be weaker than if the full panoply of justifications were brought to bear on the problem […][2]

Rather than have to choose between the various theories and to seek to ground freedom of expression in any "unitary principle"[3] (which would be a very subjective, ambitious and futile exercise anyway[4]), the analytical framework of positive international human rights law has much pragmatic appeal. It provides a context that is well-suited to conducting legal analysis, while at the same time offering the possibility to draw eclectically on the philosophical sophistication of distinct theories of freedom of expression. Given that the various theoretical justifications of the right to freedom of expression are "occasionally mutually exclusive, but more often just compatibly different" and that the right serves a number of purposes, it would not be unusual if several of those purposes were to "coalesce around a particular grouping of circumstances".[5] In such a scenario, the right to freedom of expression and other rights could be implicated, thereby emphasising their interdependent character. This choice of framework does not negate or even diminish the importance of the right to freedom of expression; as already stated, it merely ensures a particular contextualisation.

A venerable line of scholars have – in their own ways – argued that freedom of expression merits special consideration, even compared with other freedoms. This argument is grafted onto one of the quintessential liberalist theses of a negative conception of rights (see further, s.3.1.2, *infra*, for a more extensive discussion of this concept – and its implications for freedom of expression). Under this conception of rights, special reasons must be adduced in order to justify the imposition of any constraint on individual rights. It demands "a maximum degree of non-interference [with individual liberty] compatible with the minimum demands of social life".[6] As Ronald Dworkin has argued, for example, "once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based".[7]

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[2] Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (University of California Press, California, 1991), p. 240. See also Powe's further quip on p. 252: "By ignoring the synergy among rationales [for freedom of expression], they [a number of named scholars] mistakenly treat a division as if it were a platoon." Other authors do indeed appear to reject the view that the different rationales for freedom of expression are necessarily bound together in a synergic whole: for instance, Susan Brison is dismissive of the most commonly advanced rationales for freedom of expression on the basis that they are too consequentialist: Susan J. Brison, "The Autonomy Defense of Free Speech", *Ethics* 108 (January 1998): 312-339, at 321-322.

[3] Frederick Schauer, "Free Speech and the Argument from Democracy", in J. Roland Pennock & John W. Chapman, Eds., *Liberal Democracy: Nomos XXV* (USA, New York University Press, 1983), pp. 241-256, at 242. He continues: "But it is more likely that 'freedom of speech' is a bundle of interrelated principles, related by no more than a family resemblance. These principles may each have their own justification, and the scope and strength of the principles will be determined by those justifications." See also, Frederick Schauer, *Free speech: a philosophical enquiry* (USA, Cambridge University Press, 1982), p. 14.

[4] Some authors have, nevertheless, sought to group relevant rationales for freedom of expression under an expansive version of particular rationales, eg. the autonomy-based "persuasion" principle (i.e., the State may not restrict expression on the basis of its ability to persuade those encountering it to act in ways contrary to the State's interests). See, for example, David A. Strauss, "Persuasion, Autonomy, and Freedom of Expression", 91 *Colum. L. Rev.* 334.

[5] Frederick Schauer, "Public Figures", 25 *William and Mary Law Review* p. 905 (1984), at p. 930, "Public Figures". See fn. 38, p. 910.

[6] Isaiah Berlin, "Two Concepts of Liberty", in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp.166-217, at 207. Berlin associates this demand in particular with Mill and Constant, to whom he refers as "the fathers of liberalism", *ibid*.

[7] Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth & Co. Ltd., 1977), p. 200.

More specifically, as regards freedom of expression, Dworkin rejects "the suggested principle that the Government can simply ignore rights to speak when life and property are in question", continuing: "So long as the impact of speech on these other rights remains speculative and marginal, it must look elsewhere for levers to pull."[8] This is central to his famous "rights-as-trumps" approach; an approach which, incidentally, should not be mistaken as absolutist. Dworkin himself willingly concedes that "arguments of principle, which support a particular constraint on liberty on the argument that the constraint is required to protect the distinct right of some individual who will be injured by the exercise of the liberty".[9] Frederick Schauer, too, has utilised the same metaphor to make essentially the same point: under a "Free Speech Principle", "free speech is a good card to hold"; "It does not mean that free speech is the ace of trumps".[10]

When other interests (as opposed to specific individual rights) are pitted against the right to freedom of expression, however, the superior weighting attached to the latter ought to be readily brought to bear on the balancing exercise. Thus, whenever the (perceived) competing interest is based on an "argument of policy" (as opposed to "an argument of principle"),[11] to use Dworkin's phrase, the balancing exercise is conducted "with our thumbs on the free speech side of the scales",[12] to use Schauer's. The conclusion prompted by this qualitative distinction between rights and interests is that rights can act as veritable side-constraints on the right to freedom of expression, whereas it is considerably more difficult for assumed societal or public interests to lay claim to such a power of curtailment.[13]

The special consideration afforded to the right to freedom of expression results from the strength of the conceptual premises on which it rests. All those premises – varied as they are – style freedom of expression as a vital vector for the advancement of individual autonomy or self-fulfilment, or for the advancement of democratic practices or societal interests. The main rationales for freedom of expression could be briefly (but non-exhaustively) summarised as:

- self-fulfilment/self-realisation/self-actualisation/individual autonomy;[14]
- the advancement of knowledge/discovery of truth/avoidance of error;
- effective participation in democratic society; self-government;[15]
- distrust of government/slippery slope or camel's nose in the tent arguments;
- societal stability and progress;
- tolerance and understanding/conflict prevention;
- the enablement of other human rights, and
- a variety of derivative rationales.[16]

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[8] *Ibid*., p. 204.
[9] *Ibid*., p. 274. Frederick Schauer makes a similar point: "The Free Speech Principle is important in all cases within its scope, but it is only necessarily more important in cases where no identifiable individual right is present on the other side of the balance.", *Free speech: a philosophical enquiry*, *op. cit*., p. 134.
[10] Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit*., p. 9.
[11] Ronald Dworkin, *Taking Rights Seriously*, *op. cit*., p. 274. See also, Ronald Dworkin, "Is the Press Losing the First Amendment?", 27 *New York Review of Books* (No. 19, 4 December 1980), pp. 49- 57.
[12] Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit*., p. 133.
[13] For a topical example, see the discussion on offence based on religious convictions, s. 6.3, *infra*.
[14] See, for example: Susan J. Brison, "The Autonomy Defense of Free Speech", *Ethics* 108 (January 1998): 312-339.
[15] See, for example: Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948); William J. Brennan, "The Supreme Court and the Meiklejohnian Interpretation of the First Amendment", 79 Harv. L. Rev. 1 (1965).
[16] For a concise elaboration of the content of these theories, see Chapter 2, *supra*, and Tom Campbell, "Rationales for Freedom of Communication", in Tom Campbell & Wojciech Sadurski, Eds., *Freedom of*

It is the argument from democracy that dove-tails with the present argument from inter-related human rights to the greatest extent. Furthermore, it is Eric Barendt's elaboration of the argument from democracy that most approximates the argument from inter-related human rights. Barendt's characterisation of the argument as being "from citizen participation in a democracy"[17] is more refined than the conventional treatment given to the argument, which tends to be limited to the importance of ideas and information for the processes of opinion-forming and decision-making by the body politic. As such, Barendt deep-links to the essential features of the argument, *viz*., equality and participation. However, he stops short of incorporating them into a broader rights-based argument, such as the one advanced here.

Nevertheless, it is useful to reflect on the specific structural connection between the rights to non-discrimination/equality and participation (see further, s. 8.1, *infra*). Within "the liberal conception of equality", Ronald Dworkin discerns the existence of two different rights: to equal treatment and to treatment as an equal. The right to equal treatment entails a right "to the same distribution of goods or opportunities as anyone else has or is given".[18] The right to treatment as an equal, on the other hand, involves a right "to equal concern and respect in the political decision about how these goods and opportunities are to be distributed"[19] – participatory rights, for want of a better description. Dworkin regards the right to treatment as an equal as more fundamental to the right to equal treatment.

It is also useful to dwell on the specific role of the rights to non-discrimination/equality and participation in strengthening the flanks of the right to freedom of expression. The central thesis here is that other rights – especially those process-oriented rights of non-discrimination/equality and of participation – when deployed in conjunction with the right to freedom of expression, can serve to reinvigorate the exercise of that right for members of minority groups, without adulterating the indiscriminate character of the right itself. It will be recalled from Chapter 2 that the operative notions of "equality" and "participation" under international human rights law are better described as "effective equality" and "effective participation". In order for both notions to be effective in the context of freedom of expression, they will have to be applied in such a way as to furnish and safeguard expressive opportunities for minorities. This will usually involve engaging with impediments to the realisation of freedom of expression that are deeply embedded in societal and institutional structures (see further, Chapter 8).

A conflation of socio-political and economic circumstances can have a determinant effect on individuals' ability to exercise their right to freedom of expression. The high incidence of members of minority groups suffering socio-political and economic disadvantage makes it

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Communication (England, Dartmouth Publishing Co. Ltd., 1994), pp. 17-44. For a more detailed exposition of their content, see: Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit*., pp. 3-86; Eric Barendt, *Freedom of Speech* (2nd Edition) (United Kingdom, Oxford University Press, 2005), pp. 1-23. By way of aside, it is interesting to note that in the first edition of Prof. Barendt's *Freedom of Speech* (1985), he enumerates three basic theories of free speech: "Mill's argument from truth"; "Free speech as an aspect of self-fulfilment", and "The argument from citizen participation in a democracy" (pp. 8-23 of the first edition). In the second edition of his book (2005), the first theory has been broadened into "Arguments concerned with the importance of discovering truth" and a fourth theory has been added. The "new" theory can therefore be considered a conclusion of mature reflection on the fortunes of freedom of expression in democratic politics over a time-span of two decades. The fact that the period in question was book-ended by Thatcherism and Blairism might go some way towards explaining why the "new", fourth theory is: "Suspicion of government".

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

[18] Ronald Dworkin, *Taking Rights Seriously*, *op. cit*., p. 273.

[19] *Ibid*.

more difficult for them to enjoy access to the media, thereby compounding their political disenfranchisement, social exclusion and inability to effectively exercise their right to freedom of expression. However, of themselves, those adverse circumstances militating against minorities' ability to fully exercise their right to freedom of expression do not amount to an infringement of that right. Factual circumstances may leave the subjects of the right in a position of incapacity, but incapacity cannot ordinarily be construed as an infringement of rights, absent other considerations that might transform the evaluation.

Examples of transformative considerations would include situational inequality directly resulting from exclusionary or discriminatory institutional practices or a history of persecution. Degrees of intensity and permanency are highly relevant here. This can be usefully elucidated by drawing on the concept of "durable inequality",[20] or better, "durable but preventable inequality", from which certain minority groups suffer. Michael Walzer describes the "deepest and most enduring inequalities" as being "not primarily economic in their origins", but as having "their roots in cultural and racial/ethnic differences and in the political exploitation of these differences".[21] Members of groups disadvantaged by "durable inequality" are "categorized and stigmatized collectively, not individually, and then they are systematically discriminated against socially and economically",[22] according to Walzer. The right to non-discrimination/equality is triggered – in a strictly legal sense – by any of a combination of factors: when the discrimination/inequality is perpetrated institutionally (thereby implicating the vicarious liability of the State for the actions of its civil servants); repetitive patterns of preventable discrimination/inequality (thereby implicating State liability for acquiescence or failure to take positive measures to prevent the discrimination/inequality), etc.

The relationship between the issues broached in the preceding two paragraphs and freedom of expression for minorities will be discussed in greater detail in Chapters 5-8. What is important for immediate purposes is to make clear that the right to non-discrimination/equality, notwithstanding its cross-cutting tendencies, should not be perceived as a panacea for all the ills and injustices of society – a certain circumstantial threshold must be reached before the right will take effect in such a way as to impose positive obligations on States authorities (see further, the discussion on negative and positive conceptions of liberty, s. 5.2.2, *infra*). Thus, while it may have been characteristically astute of Rousseau to posit that, "Precisely because the force of circumstance tends always to destroy equality, the force of legislation ought always to tend to preserve it",[23] from the perspective of the international protection of human rights, the question is unfortunately not quite so straightforward.

4.1.1 Application of main theories of freedom of expression in international law

These issues are by no means alien to the international law-making arena. The drafters of the ICCPR did consider a proposal to the effect that "measures shall be taken to promote the freedom of information through the elimination of political, economic, technical and other

[20] Michael Walzer develops this concept, the coinage of which he attributes to Charles Tilly, *Durable Inequality* (Berkeley, University of California Press, 1998). See further: Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (New Haven & London, Yale University Press, 2005?), pp. 29 *et seq*.
[21] Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism*, p. 29.
[22] *Ibid*., p. 30.
[23] Jean-Jacques Rousseau, *The Social Contract* (Trans. Maurice Cranston) (England, Penguin, 2004), p. 59.

obstacles which are likely to hinder the free flow of information".[24] The proposal - and another colourably similar one[25] - "were rejected mainly on the grounds that they dealt with temporary situations or technical problems, rather than the right to freedom of expression itself, and should not, therefore, be included in a universal instrument of a lasting character".[26] Experience has shown that the drafters underestimated the transient nature of structural impediments to the realisation of the right to freedom of expression. Nevertheless, their reluctance to prescribe legally-enforceable State obligations to ensure favourable conditions for the exercise of the right to freedom of expression lives on to this day (again, see further, the discussion on negative and positive conceptions of liberty, s. 5.2.2, *infra*).

Considerations raised by durable inequality and the legacy of historical discrimination have also been featured at the international level, but more successfully than attempts to eradicate obstacles to the free flow of information. In fact, they have brought about a particular pro-equality doctrine that is cognisant of the specific plight of traditionally-subjugated minorities. The UN Human Rights Committee has referred to the need to address and redress "historical inequities"[27] – or, in other words, accumulated injustices and discrimination - suffered by particular minority groups. Similarly, but more searchingly, some commentators have argued for enquiries to go beyond an unquestioning assumption of historical injustice and to examine the extent to which such injustice is perpetuated by existing societal and institutional systems.[28] This approach captures what should be regarded as the true *telos* of the "historical inequities" doctrine and accordingly casts it as "'historical inequities' *and the continuing effects thereof*".[29] Such a view attaches high importance to current realities, but in a historically contextualised way. It is therefore more refined than the stock arguments which rely too heavily on the injustices of the past, on the one hand, and those which are overly dismissive of the long-lasting consequences of those self-same injustices, on the other hand.

Moving, then, from specific issues to more general ones as this section winds to a close, it should be noted that the UN Human Rights Committee has stated its own preference to present the right to freedom of expression on a broader canvas of rights and interests for examination. This approach is therefore consistent with the analytical frame of reference adopted in this study, i.e., the interdependence of all human rights. The importance of relational aspects of human rights is best explained in terms of their ability to reveal the potential for synergic interaction between rights, which helps to render their exercise more effective in practice. The Committee's concern is also not so much for the theoretical right, as for "the precise regime of freedom of expression in law and in practice"; "the interplay between the principle of freedom of expression and such limitations and restrictions which

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[24] Proposal submitted by the Yugoslav Republic, E/CN.4/SR.167, para. 70, cited in Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, *op. cit*., p. 396.

[25] The gist of the second proposal was that nothing in the article on freedom of expression should prevent a State Party from taking "measures which it deems necessary in order to bring its balance of payments into equilibrium": E/CN.4/SR.162, para. 33 (GB); E/CN.4/SR.163, para. 6 (AU), cited in Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, *op. cit*., p. 396.

[26] Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, *op. cit*., pp. 396-397.

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

[28] See, for example, Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990), p.

[29] (emphasis added) Alfred de Zayas, "The Examination of Individual Complaints", in Gudmundur Alfredsson *et al*., Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 67-122, at 113.

determines [*sic*] the actual scope of the individual's right".[30] To this end, it has requested States Parties to furnish adequate information in their periodic reports "about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right".

To conclude, a proper appraisal of the interaction between freedom of expression and other rights and interests demands a root-and-branch approach. While the appropriateness of the overarching analytical framework of international human rights law has already been explained, it has also become increasingly evident that the right to freedom of expression should be regarded as having central structural importance in that framework. Thus, we can advisedly explore the theory and workings of the right, after the fashion of Thomas Emerson, in terms of an entire "system of freedom of expression".[31] This casts the subject of our scrutiny as an "interrelated set of rights, principles, practices, and institutions", which has a discernible "overall unity of purpose and operation".[32] Such a two-tiered analytical framework allows for full consideration of the myriad forces – ideological, legal, socio-political, cultural, economic, etc. – that pummel the right to freedom of expression into its actual shape.

4.2 Rationales for access to expressive opportunities

The importance of active access to the media can be grounded in several rationales, including participation in democratic procedures and public debate, and the advancement of cultural and linguistic objectives. Flowing from these two rationales, in particular, access can be taken as having a crucial, controlling influence on expressive opportunities, the breadth and depth of public debate and the shaping of cultural and political narratives.[33] Effective access to the media therefore facilitates countermajoritarian posturing by minority groups, as well as the correction of biases in dominant cultural and political discourse. This line of reasoning prompts the conclusion that the kind of pluralism regarded as a hallmark of democratic society is well-served by effective, active access to viable expressive opportunities (see further, Chapter 8).

4.2.1 Democratic participation in public life

It has already been demonstrated how both the right to freedom of expression and the right to participate in public life are heavily reliant on the prior existence of a vibrant public sphere. In turn, the existence of a vibrant public sphere is necessarily predicated on the existence of free, independent and pluralistic media. This is because of the media's watchdog role on the one hand, and their forum-providing role on the other hand. In modern democratic society, the media provide vital fora for public discussion to take place. When they assume such a role or when such a role is thrust upon them, they become powerful gate-keepers to the extent that they can control access to public debate. Their power also derives from their ability to mediate and thereby influence content. These observations explain the edginess about

[30] UN Human Rights Committee, General Comment 10, Freedom of expression (Article 19), 29 June 1983, para. 3.
[31] Thomas I. Emerson, *The System of Freedom of Expression* (New York, Random House, 1970), esp. pp. 3 *et seq*.
[32] *Ibid*., p. 4.
[33] See, *inter alia*, Owen M. Fiss, "Silence on the Street Corner", XXVI *Suffolk University Law Review* (No. 1, Spring 1992), pp. 1-20, at 19; Monroe E. Price, *Television The Public Sphere and National Identity*, *op. cit*.

concentrations of media power and the absence of media-related pluralism which prevails in Chapter 7.

It is hard to come up with a more lucid articulation of the importance of access to the media for the principle of participation in democratic society than that provided by T.M. Scanlon:

> Access to means of expression is in many cases a necessary condition for participation in the political process of the country, and therefore something to which citizens have an independent right. At the very least the recognition of such rights will require governments to insure that means of expression are readily available through which individuals and small groups can make their views on political issues known, and to insure that the principal means of expression in the society do not fall under the control of any particular segment of the community.[34]

In his seminal article, "Access to the Press – A New First Amendment Right",[35] Jerome Barron likens the denial of access rights to prior or previous censorship,[36] which is generally anathema to most stalwart proponents of freedom of expression.[37] The reason for taking such a dim view of *ex ante* censorship is its drastic nature; its ability to totally foreclose both expression and expressive opportunities. In both cases – denial of access to the media and prior censorship – information and ideas are prevented from being aired or heard. However, denial of access, especially if systemic in nature, is the more drastic of the two, because prior censorship is usually directed at specific types of content, whereas the (systemic) denial of access is more likely to be content-neutral. The denial of access to the media – when no alternative expressive opportunities are available – can lead to information and ideas being nipped in the bud and the right to freedom of expression being thwarted.

Barron's central argument – that the interests of fairness dictate that some form of mandatory access to the media should be available to counter information and ideas purveyed by the media - is cogent and merits careful consideration, but it becomes more difficult to sustain when the denial of access is not blanket in nature, but applicable only to particular media. As explained in s. 8.1.1, *infra*, international law does not recognise a right of individuals or groups to access particular media. Only "contingent" rights of access are admitted, otherwise – to formulate the pragmatic argument for this state of affairs - the way would be open "for such overload and chaos as to constitute a virtual reductio ad absurdum".[38] This is particularly true because every medium has its own inherent restrictions (eg. temporal, spatial, etc.) and under what Owen Fiss has termed the "dynamic of displacement",[39] a decision to broadcast

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[34] T.M. Scanlon, "A theory of freedom of expression", in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 6-25, at 22.

[35] Jerome A. Barron, "Access to the Press – A New First Amendment Right", 80 Harv. L. Rev. 1641 (1967). Barron is often credited with being the first (academic) to develop the case for access rights under the US First Amendment; this article was repeatedly referred to by the US Supreme Court in the *Red Lion* case and in its jurisprudential progeny.

[36] See also in this connection, Owen M. Fiss, "Silence on the Street Corner", *op. cit*.

[37] For example, Alexander Bickel has quipped that a "criminal statute chills, prior restraint freezes" – Alexander Bickel, The Morality of Consent (New Haven, Yale University Press, 1975), p. 61. It should, however, also be noted that Frederick Schauer, Eric Barendt and others have explored persuasive arguments which contend that *ex post facto* censorship and sanctioning are capable of matching the drastic effects of *ex ante* proscriptions: [citations!]. Barendt, for instance, argues that publishers may prefer not to risk criminal prosecution and that in such cases ex post facto sanctions can have a deterrent effect that freezes. It is submitted here that ex ante proscriptions are more drastic, because they do not even give the publisher the option of risking criminal prosecution (such an option remains open to the publisher in Barendt's example; he can partly be the author of his own fate).

[38] Judith Lichtenberg, "Introduction", in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 1-20, at 17.

[39] Owen M. Fiss, "Free Speech and Social Structure", 71 *Iowa Law Review* 1405 (1986), at p. 1415.

particular content necessarily entails a decision not to broadcast other content. As such, the power of the media to determine what to broadcast or publish "subtracts from public debate at the very moment that it adds to it".[40]

From the point of view of democratic theory, a deeper-scooping and more purposive argument would focus on the Meiklejohnian assertion that: "What is essential is not that everyone shall speak, but that everything worth saying shall be said".[41] Moderation or mediation is therefore required in order to ensure effective public deliberation though the avoidance of "unregulated talkativeness".[42]

Although Meiklejohn envisaged the State as playing the role of moderator of public debate, it should not be precluded that the media – as majorly significant agents for the propagation of information and ideas – could provide mediation in public debate. Indeed, *de facto*, one of their quintessential roles – the selection, presentation and treatment of issues – is inescapably mediatory in nature. The outstanding issue is therefore whether their mediation in public debate is grounded in altruism: "The free press must be free to all who have something worth saying to the public, since the essential object for which a free press is valued is that ideas deserving a public hearing shall have a public hearing."[43] However, it should be noted that such an ascribed role for the media is changing (at least for some media) due to technological developments and resultant changes in patterns of media usage (see further, s. 4.5, *infra*).

4.2.2 Creating alternative discursive spaces

The importance of the media can also be gauged in terms of their discussion-fostering/forum-providing role. In modern democratic society, the media provide vital fora for public discussion to take place. When they assume such a role or when such a role is thrust upon them, they become powerful gate-keepers to the extent that they can control (the terms of) access to public debate.

Furthermore, the power of the media also stems from their ability to influence public debate – through initial agenda-setting, but also through their mediation of ensuing discussion. Roger Silverstone and Myria Georgiou have elucidated the dynamics at play in the mediation of public debate by the media as follows:

> Mediation is a political process in so far as control over mediated narratives and representations is denied to individuals and groups by virtue of their status or their capacity to mobilise material and symbolic resources in their own interests. Mediation is also a political process in so far as dominant forms of imaging and story-telling can be resisted, appropriated or countered by others both inside media space, that is through minority media of one kind or another, or on the edge of it, through the everyday tactics of symbolic engagement, in gossip, talk or stubborn refusal.
>
> The media, seen through the lens of these contested processes, provide frameworks for identity and community, equally contested of course, but significantly available as components of the

[40] *Ibid*.
[41] Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948), p. 25.
[42] *Ibid*.
[43] The Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago, University of Chicago Press, 1945?), p. 129 (Appendix).

> collective imaginary and resources for the collective agency. This is the context in which minorities and their media need to be understood […][44]

Given the far-reaching influence of the media on public deliberation and – by extension - the formation of public opinion, concerns about the implications for democracy of concentrations of media power and the absence of media-related pluralism seem well-founded. The threats posed by such concentrations of media power to the workings of democracy are blatant and they are often invoked as a principal justification for the need to safeguard media pluralism and diversity.

4.2.3 Creating and sustaining (cultural) identities

"Identity", as posited by Asbjorn Eide, "is essentially cultural",[45] but coupling together the concepts of "culture" and "identity" does not make the sum of their parts any easier to define. Cultural identity is the product of an attempted synthesis of elements that are - all at once - subjective and objective; factual and aspirational; latent and active; historical and contemporary. To compound matters further, in order to determine the nature of the relationship of individual identity to group identity, the concept of the situated self must also lock horns with the notion of libertarian individualism. While the Sisyphean task of reaching an adequate definition of cultural identity is beyond the scope of this thesis, a selection of relevant general remarks and references would nevertheless offer welcome conceptual contextualisation.

Benedict Anderson has famously defined/described a nation is "an imagined political community" that is limited [by physical boundaries] and sovereign.[46] Anderson's description of a nation as "imagined", places it very consciously in oppositon to Ernest Gellner's characterisation of a nation as an invention.[47] For Anderson, invention rhymes with 'fabrication' and 'falsity', whereas 'imagining' and 'creation' would actually be closer to the mark. He explains: "In fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined."[48]

But nations – and indeed other communities – can be imagined in different ways, including ways which are less contingent on geo-political limitations. These imaginings can incorporate a diasporic dimension,[49] a term which itself comprises a high level of internal differentiation.

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[44] Roger Silverstone & Myria Georgiou, "Editorial Introduction: Media and Minorities in Multicultural Europe", 31 *Journal of Ethnic and Migration Studies* (No. 3, May 2005), pp. 433-441, at 434. For a lengthier discussion of relevant issues, see generally: Monroe E. Price, *Television, The Public Sphere, and National Identity* (Oxford, Clarendon Press, 1995).

[45] Asbjorn Eide, "Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes", in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 83-97, at 97.

[46] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised Edition) (USA, Verso, 1991), p.6.

[47] Ernest Gellner, *Thought and Change*, p. 169.

[48] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, *op. cit*., p. 6.

[49] See further: Kevin Robins, "Beyond Imagined Community? Transnational Media and Turkish Migrants in Europe", in Stig Hjarvard, Ed., *Media in a Globalized Society* (Denmark, Museum Tusculanum Press/University of Copenhagen, 2003), pp. 187-205. See also: David Morley & Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (London, Routledge, 1995).

Whether communities are imagined as nations, or in sub-, inter-, or extra-national terms, or whether groups are constituted on the basis of ideological or other affinities or objectives (see Chapter 1), an appropriate, formal framework is necessary to ensure the protection and promotion of their identities.[50]

Discrete group identities are optimally engendered against a background of not only tolerance, "but also a positive attitude of cultural pluralism by the state and the larger society",[51] according to Eide. Both the acceptance of, and respect for, "the distinctive characteristics and contribution of minorities in the life of the national society as a whole"[52] are required, in his view. The importance of this triumvirate of pluralism, tolerance and participation for minority rights generally can hardly be overstated. Indeed, as has already been observed in Chapter 2, some commentators regard participation as one of the best gauges of tolerance in pluralist society.[53]

States have a particularly high level of responsibility for assuring the protection and promotion of their component cultural identities. As regards protection, policies and measures with harmful or assimilatory aims or effects must be avoided, or if already in place, discontinued. As regards promotion, States can reasonably be expected to actively and purposefully faciltitate "the maintenance, reproduction and further development of the culture of the minorities".[54] Appropriate facilitative initiatives should be pursued across the spread of areas falling within State competence.

The media, for their part, have a crucial role to play in the consolidation and legitimisation of group identity. They can, for instance, become agents of "cultural consecration" in the sense of the term intended by Pierre Bourdieu.[55] The foregoing characterisation of the media as autonomous discursive spaces suggests that the media are a logical choice of locus for the pursuit of the project of imagining a community's identity. They constitute a forum in which various – and often competing – visions and versions of shared elements of identity can be put forward, explored, debated and ultimately rejected or validated. The media are often the handmaidens of – especially fledgling or divided - States seeking to assert national identities.[56] As such, they can be saddled with the responsibility of propagating a politically-determined image of the nation or community.

According to Anderson: "processes by which the nation came to be imagined, and, once imagined, modelled, adapted and transformed."[57] In other words, what is involved here is an ongoing process of imagining; a dynamic force. Inherent in any definition of culture is its propensity for further development. As such, the media must prove responsive to the changing identities of groups, to imaginative alterations/revisions and adjustments.

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[50] Stig Hjarvard, "Introduction", in Stig Hjarvard, Ed., *Media in a Globalized Society*, *op. cit*., pp. 7-14(?), at p. 11.
[51] Asbjorn Eide, "Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes", *op. cit*., p. 97.
[52] *Ibid.*
[53] See, for example, T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), esp. pp. 194-195.
[54] Asbjorn Eide, "Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes", *op. cit*., p. 97.
[55] Pierre Bourdieu, *Language and Symbolic Power* (Polity Press, United Kingdom, 1991), p. 121.
[56] [Price – market for loyalties; Greenwalt – symbols; give concept of "Turkishness" as extreme example of this – mention dropping of charges against Pamuk]
[57] Anderson, p. 141.

By running their own media outlets, minorities and other communities of shared interests acquire considerable autonomy. In itself, this is an important step to the realisation of such groups' rights to participation and the enjoyment of cultural life, in particular, as well as non-discrimination and equality. It presents them with the opportunities and space in which they can explore and define their identities. However, minority media and the discursive spaces which they are instrumental in creating, tend to be distinctive and self-contained. As such, they – by and large – do little to inform or educate society as a whole about the particular identities of the groups in question. They are also of limited value in advancing the goals of inter-community communication and the promotion of tolerance. They are not designed to build societal bridges. However, that is not to say that they cannot and do not build such bridges. Cooperation between minority and majority groups, or various minority groups can prove workable and mutually beneficial (eg. *TG4* in Ireland, *Omrop Fryslan* in the Netherlands). In some instances, minority broadcasters may even pursue deliberate strategies of securing "a hybrid audience beyond the grassroots ghetto":[58] in the interests of broader cultural legitimation as well as for economic reasons.

Linguistic identity

Tensions between the freedom and regulation of language use (especially where the latter rhymes with restriction) have great capacity for creating unity and division (if not polarisation) in society. This is hardly surprising, for a variety of reasons. First, it is a well-established tenet of international law that language is an impermissible ground for discrimination.[59] It is often argued, however, that non-discrimination should not be seen as an end-goal in itself and that equality is the preferred paradigm to be strived for. The notion of "effective equality" which permeates the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) is increasingly *de rigueur*. Allied to this is the particular reading of relevant international law provisions which holds that the purpose of such provisions is "to go beyond a guarantee of non-discrimination towards a more positive notion of conservation of linguistic identity."[60] In short, all of this leads to a more assertive, pro-active role for the law in the protection of language.

Second, language can be a vehicle for consolidating a sense of national identity or, more accurately, perhaps, the majoritarian identity of a given State. On the other hand, it can equally be a mechanism for asserting minority or non-majoritarian identitites. A third reason is that language is inextricably bound up in cultural matters. Indeed, the same is also true of the relationship between language and education; language and the media, and language and participation in public life generally. The nature of these highly sensitive relationships can have a determinative effect on society, leading alternately to greater cohesion or fragmentation (or even ghettoisation), depending on the line of argumentation pursued. The writer, Hugo Hamilton, epigrammatically captures the immanent complexities, sensitivities and symbolisms of these relationships, when he quotes his father as averring: "your language is your home and your country is your language and your language is your flag".[61]

[58] Chris Atton, *Alternative Media* (Sage Publications, London, 2002), p. 144.
[59] Ample evidence of this is provided by Article 2(2), ICCPR and ICESCR; Article 14, ECHR (and Protocol No. 12 to the ECHR (when it enters into force)); Article 21 of the Charter of Fundamental Rights of the European Union (as incorporated into the Draft Constitution for the European Union), all of which cite language as one of the prohibited grounds for discrimination (see further *infra*).
[60] Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991), p.197.
[61] Hugo Hamilton, *The Speckled People* (London, Fourth Estate, 2003), p. 3.

4.3 Role of the media

The foregoing sections have attempted to explicate the most important rationales for access to expressive opportunities. As the media very often constitute the most effective expressive opportunities available, this section will largely synthesise and synopsise the rationales already outlined and consider them in terms of the media as an institutional force in democratic society. Roger Silverstone has captured the multi-layered importance of the media with characteristic verve:

> It's all about power, of course. In the end. The power the media have to set an agenda. The power they have to destroy one. The power they have to influence and change the political process. The power to enable, to inform. The power to deceive. The power to shift the balance of power: between state and citizen; between country and country; between producer and consumer. And the power that they are denied: by the state, by the market, by the resistant or resisting audience, citizen, consumer. It is all about ownership and control: the who and the what and the how of it. And it is about the drip, drip, drip of ideology as well as the shock of the luminous event. It is about the media's power to create and sustain meanings; to persuade, endorse and reinforce. The power to undermine and reassure. It is about reach. And it is about representation: the ability to present, reveal, explain; and also the ability to grant access and participation. It is about the power to listen and the power to speak and be heard. The power to prompt and guide reflection and reflexivity. The power to tell tales and articulate memories.[62]

The foregoing points clearly to the need to study and comprehend the media's "power of definition, of incitement, of enlightenment, of seduction, of judgement".[63]

4.3.1 Media functionality

Assessments of the media's pervasiveness, power and influence are often prone to hyperbolic descriptions. Nevertheless, strong statements may very well be required to capture the full extent of their reach in all three of the aforementioned respects. If not totally ubiquitous, the media certainly come close to ubiquity and have properly been described by Roger Silverstone as "an essential dimension of contemporary experience".[64] Furthermore, as Silverstone has also noted, "Our daily passage involves movement across different media spaces and in and out of media space".[65] It is perhaps axiomatic to state that different media can and do perform different functions, and that they do so with varying degrees of effectiveness. It is precisely this differentiated functionality of various types of media that explains our daily "movement[s] across different media". The choice of media used at any given moment is influenced by purposive and behavioural considerations. Time-use and other studies tend to show that different media are used for different purposes and with different levels of intensity, depending on the setting and time of day.[66]

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[62] Roger Silverstone, *Why Study the Media?* (London/Thousand Oaks, CA/New Delhi, SAGE Publications, 1999), p. 143.
[63] *Ibid.*
[64] 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.
[65] *Ibid*., p. 8.
[66] 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., forthcoming: May 2007), pp. 17-33, at p. 23.

Without wishing to detract from the idiosyncratic nature of individual preferences for particular media, it is also relevant to consider preferential patterns of media usage among groups, notably minorities. Such a group-oriented enquiry is relevant to the extent that persons belonging to minorities may share certain collective characteristics that would profoundly influence their individual media preferences. A shared language would be the best example of such a characteristic. The linguistic specificity of particular group inevitably shapes the media preferences of persons belonging to such groups – one way or another. Most people in a linguistic group may very well prefer to use media in their own language – to the extent that such media are available (although it cannot be discounted that some members of such groups may – for various reasons – have a preference for media employing dominant societal languages). This can facilitate their access to information, on the one hand, or their access to, and ability to participate effectively in, discursive fora on the other.

Such a group-oriented enquiry is also relevant to the extent that persons belonging to minorities are similarly structured in social terms and are therefore similarly affected by situational factors. General literacy levels within particular groups would be a good example of a situational factor of this kind: if average literacy levels within a particular minority group are very low, print media could be considered a less viable type of media than various broadcasting options. The same arguments apply *mutatis mutandis* to levels of familiarity with new media technologies (and of course the extent of their penetration in minority groups). Groups with strong oral traditions might conceivably exhibit preferences for types of media that best accommodate orality. Another example would be whether the group is territorially compact or dispersed, as such geographical facts could influence the suitability of different media for the entire group.

A further group-oriented approach has been developed by Tom Moring. He usefully applies the general notion of "institutional completeness", defined by Will Kymlicka as a minority group having "a full range of social, educational, economic, and political institutions, encompassing both public and private life",[67] specifically to the media sector.[68] For Moring, institutional completeness in respect of the media denotes "the level of completeness of a media system that serves a particular minority" and he proposes that such completeness is best measured in terms of: (i) the availability of different types of media, and (ii) the availability of different formats [within available media types].[69] To the extent that it is not already included in the notion of "formats", an additional means of measurement could be thematic orientations of content. The focus on formats/thematic orientations of content is important in the context of minority media (especially in minority-language broadcasting) because in the context of limited airtime and scarce financial resources, there is a tendency to prioritise certain formats/themes. In practice, this generally leads to the predominance of news/information programmes, programmes about cultural events of relevance to minorities and sometimes educational or children's programmes too.[70] To the extent that other

[67] Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (New York, Oxford University Press, 1995), p. 78. Similarly, Raymond Breton has described the notion as the ability of a community to "perform all the services required by its members": Raymond Breton, "Institutional Completeness of Ethnic Communities and the Personal Relations of Immigrants", Vol. LXX *The American Journal of Sociology* (No. 2, 1964), pp. 193-205, at p. 194.

[68] 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. For a lengthier discussion, see generally: Tom Moring, "Functional Completeness in Minority Language Media", *op. cit*.

[69] *Ibid.*

[70] Tom Moring, "Functional Completeness in Minority Language Media", *op. cit*., at p. 25.

formats/themes are neglected, it is not realistic to speak about full institutional completeness in the media sector (or functional completeness – see further, *infra*).

Returning briefly to the more general notion of institutional completeness, it is important to note that the notion is sometimes perceived to be a crucial feature of schemes for minority rights protection. Although not legally-binding, the Advisory Opinion of the Permanent International Court of Justice in the *Minority Schools in Albania* case[71] provides valuable insights into relevant thinking. It expressly links the need to achieve "perfect equality" between minority and majority sections of the population with the need to ensure for minorities "suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics".[72] It reasons:

> These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[73]

Later in the same Advisory Opinion, the Court refers to the minority institutions as being those "which alone can satisfy the special requirements of the minority groups".[74] Obviously, the quoted statements relate first and foremost to the facts of the case under consideration by the Court. Nevertheless, the general line of argumentation does have broader appeal. It argues that it is indispensable for minorities to have their own key institutions in the interests of ensuring equality for members of the minority group with members of the majority population and of sustaining the minority group as a group. Such an approach could be described as being based on principles of group autonomy or internal self-determination.

The goals of this reading of institutional completeness can also be applied to institutional completeness in the media sector. However, the question of whether or not those (and other relevant) goals are realised in practice does not depend solely on the extent of a minority group's institutional completeness. To complement the quantitative focus of the notion of "institutional completeness", Moring introduces the notion of "functional completeness" as its qualitative counterpart. The latter notion 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).[75] In practice, for a host of reasons – not least linguistic, political and economic, minority groups are unlikely to enjoy "perfect" institutional completeness in the media sector. Only in very rare cases will the degree of institutional completeness actually attained correspond to functional completeness for members of a minority group.[76] This is because the question of functionality depends on the viability of the overall range of media types and formats (including thematic orientations) for the fulfillment of the minority group's various communicative needs. If the overall range of media types and formats is *a priori* incomplete, the likelihood of the range being functionally sufficient is reduced accordingly. This would obviously not hold true if the limited range of media types and formats available correspond to the media preferences of members of the minority group – whether by virtue of a well-conceived media policy for the minority group, or simply by happenstance.

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[71] *Minority Schools in Albania*, PCIJ, Advisory Opinion, 6 April 1935, Series A/B, No. 64, pp. 4-36.
[72] *Ibid*., p. 496.
[73] *Ibid*.
[74] *Ibid*., p. 499.
[75] Tom Moring, *Access of National Minorities to the Media: New Challenges*, *op. cit*., at p. 9.
[76] Tom Moring, "Functional Completeness in Minority Language Media", *op. cit*., at p. 19.

Finally, as regards functional completeness in the media sector, consideration should additionally be given to the concepts of needs and preference.[77] Needs in respect of the media vary per group and within groups. Any evaluation of the functionality of available media will inevitably be contingent on whether relevant needs are understood as giving primacy to the minority language in broadcasting, setting it on an equal footing with the majority language, or using it as a complementary language. Individual media preferences have already been discussed, *supra*, but consideration should also be given to preferences of groups (to the extent that they are ascertainable): if a majority of members of a minority group are not in favour of sustaining certain levels of minority-language broadcasting, the viability of measures geared towards such ends might be brought into question. This has been referred to as the "strict preference condition".[78]

If, in practice, the range of media types and formats that is available to a particular minority group is not viable for the fulfilment of their various communicative needs, this could give rise to a violation of a State's obligations both in terms of freedom of expression and minority rights. Under such an approach, functional completeness could be used as a means of assessing whether members of a minority group enjoy an *effective* right to receive and impart information. Relevant State obligations could, in accordance with the tripartite typology of State obligations in respect of human rights (see s. 5.2.3, *infra*), be regarded as "fulfillment-bound" obligations insofar as they require the State to secure the requisite existential status for members of the minority group whereby they could effectively exercise their right to freedom of expression.[79]

4.3.2 Media types

The notion of mass media rests on the prior notion, widely used in sociological studies, of *Gesellschaft* – a large, undifferentiated and impersonal society. The term, coined by Ferdinand Tönnies, is generally used in its dichotomization of *Gemeinschaft*, a community or "primary group bound by intimate ties regulating itself through the force of tradition and opinion".[80] "Mass" is capable of multiple – often evaluative and politically-tinctured - interpretations,[81] but for present purposes, it is its descriptive function that must be retained. It describes, first and foremost, the ability of the media to reach a societal mass. As such, it emphasises the point-to-multipoint nature of the media. This consideration is vitally important when it comes to assessing the influence of the media and the development of regulatory policies and measures. Although the term "mass" usefully conveys the idea of wide reach, at the same time, it also suffers from one of the general shortcomings of theories of mass society[82] by its inability to illuminate relational dynamics within the "mass" to which it refers.

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[77] Tom Moring, *Access of National Minorities to the Media: New Challenges*, *op. cit*., at p. 10.
[78] *Ibid*.; ???, Tom Moring, "Functional Completeness in Minority Language Media", *op. cit*., at pp. 28-30, and more extensively in: François Grin & Tom Moring, with Durk Gorter, Johan Häggman, Dónall Ó Riagáin and Miquel Strubell, Support for Minority Languages in Europe, Final Report on a project financed by the European Commission, Directorate Education and Culture, 2003, p. 190.
[79] Rolf Künnemann, "A Coherent Approach to Human Rights", *op. cit*., at p. 328.
[80] Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (USA, Basic Books, 1999), p. 383. See further: Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (Revised Edition) (New York, The Free Press, 1962), p. 27.
[81] Daniel Bell, for instance, distinguishes between mass as: undifferentiated number; the judgment by the incompetent; the mechanized society; the bureaucratized society, and mob – *The End of Ideology*, *op. cit*., p. 22.
[82] Daniel Bell, *The End of Ideology*, *op. cit*., p. 38.

It does not lend itself to recognition of, or responsiveness to, the compositional complexities of the societal mass which is its object.

But even without being qualified by "mass", the "media" is an amalgamated concept and it would be methodoligcally remiss at this juncture to attempt to analyse its objectives and impact in macro terms. Instead, it is necessary to disaggregate the concept and essentialise its constituent parts in order to emphasise the different objectives pursued by each. These objectives span an entire spectrum: informational, social, (politically) deliberative, creative, entertainment, etc. The effectiveness of particular media can only be assessed in terms of their specific objectives and any discussion of the equivalence of particular media should avoid comparing apples and pears.

First of all, one may distinguish between mainstream and alternative media, with radical media[83] being counted as a subset of the latter. Distinctions between levels of geographical operation are also pertinent: international, national, regional, local and community. The last-named category is, however, rarely understood in a purely geographical sense: it is also laden with additional qualitative goals and features which frequently happen to coincide with its geographical reach (see further, 4.3.2(i), *infra*). A final cleavage involves majority and minority media. These two appelations are vague, expansive terms, and as such are more suited as short-hand phrases than tools for clinical definition. Nevertheless, the distinction that they point up is important for the purposes of analytical orientation. The expressive objectives and strategies of persons belonging to minorities can differ hugely, depending on whether mainstream or minority media are used. This is illustrated by the non-exhaustive selections of features[84] of mainstream and minority media listed below. The strategic importance of mainstream and minority media – and the dilemma of choosing which one to espouse – is captured well by Silverstone and Georgiou:

> Media representation involves both participation and recognition. And participation is a matter of the capacity to contribute to the mainstream, to enable the minority voice or visibility on national channels or the national press, but it is also a matter of the capacity to gain a presence on one's own terms on the nationally owned spectrum or on the global commons of the internet. Participation ultimately involves the equal sharing of a common cultural space. There are different issues here, and different politics, but both raise the questions of whether or how to enable minorities to speak, but also, and this is crucial, to enable them to be heard. Who is speaking and on behalf of whom? Do journalists from ethnic minorities speak as members of that ethnic group or as disinterested and professional journalists? But we must ask, too, who is listening and with what consequences?[85]

Mainstream and minority media

Given the documented shortcomings of the classic, unitary public sphere as elaborated by Habermas, much critical thinking and writing has been devoted to the co-existence of a variety of public spheres. Against this backdrop, the contrasting merits of majority and minority media will now be considered, as well as the necessary complementarity between them. Different rights and interests, aims and strategies are at play on each level, but as we shall see, this does not mean that they are mutually exclusive.

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[83] See, for example, John Downing, *Radical Media: the Political Experience of Alternative Communication* (Boston, MA, South End Press, 1984).

[84] Not all of these features necessarily apply in all cases – the purpose of the lists is to be illustrative rather than prescriptive or exhaustive.

[85] Roger Silverstone & Myria Georgiou, "Editorial Introduction: Media and Minorities in Multicultural Europe", *op. cit*., at 436-437.

Mainstream media

- Public sphere – more opinions leads to debate that is more inclusive and more representative
- Elimination of discrimination and promotion of equality
- Participation in general affairs of State and society
- Intercommunity communication
- Fostering of mutual understanding and tolerance
- Expression of distinct cultural identities and challenging of (negative) stereotypes
- Promotion and validation of (minority) ways of life and traditions

Minority media

- Creation of alternative public spheres/own discursive spaces
- Empowerment of minority groups at local level
- Participation in own affairs
- Own institutions as a means of eliminating discrimination and promoting equality
- Promotion of language, culture and religion of minorities
- Validation of history, heritage and creative activities of minorities
- Positive impact on minority communities – creation of network of information exchange; social capital, etc.
- Employment opportunities and economic spin-offs

By providing for the expression of increasingly varied opinions, the media render the public sphere more inclusive and representative of diverse societal elements. Mainstream media should therefore strive to achieve a state of discursive toing and froing. This involves accommodating as wide a spectrum of minority views and interests as possible within majoritarian structures. Proponents of such accommodations frequently point out the risks of intellectual and cultural ghettoisation and isolation that inhere in alternative or minority media structures.[86]

It is widely accepted that the main motivation for the establishment and maintenance of minority media is to prevent assimilation and shape distinctive discursive spaces for minorities and other groups in society. A discursive space can be defined as: "a site of cultural production where the process of representation is shaped by the discursive construction of power relations between producers, participants, audiences and regional, national and international flows within a global mediascape".[87] As such, the independence of such discursive spaces is of paramount importance. So, too, is the number of actors required to give shape to discursive spaces. These spaces are shaped and controlled by the groups themselves, and not by dominant societal groups. Within such spaces, cultural identities can blossom without being in the shadow of dominant cultures. In the same vein, ideologies and stereotypes nurtured and reinforced by dominant groups and the mainstream media can be countered. Furthermore, minority languages can be promoted as the medium of programming

[86] See, for example, Milica Pesic, "Commentary: Media representation of national minorities and the promotion of a spirit of tolerance and intercultural dialogue", in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 139-143, esp. at 140.

[87] Niamh Hourigan, *Escaping the Global Village: Media, Language & Protest* (USA, Lexington Books, 2003), p. 143.

and communication. In short, the goal of advancing intra- and inter-group definition is well-served by the existence of autonomous discursive spaces.

4.3.2(i) Community media

Certain types of minority broadcasting can be considered to be "community broadcasting" by virtue of the objectives and strategies they have in common. Various definitions of community broadcasting have been propounded in academic and NGO circles and among broadcasters themselves. Although the term is often defined and the practice regulated by legislation at the national level, there is no authoritative, legally-binding definition of the term at the international level (notwithstanding UNESCO's extensive engagement with the topic). Nevertheless, a broad consistency can be detected across the variety of definitions emanating from the various contexts just mentioned. For instance, it has been described as:

> independent broadcasting that is provided for the good of members of the public in a specific location or for a particular community of interest and whose primary purpose is to deliver social gain rather than to operate on a commercial basis or for the private gain of individuals linked to the service.[88]

The World Association of Community Radio Broadcasters (AMARC), an association "favouring consultation, coordination, cooperation, exchange and promotion of community radio broadcasters", explains in its Articles of Association that the term "community radio broadcaster" means: "a non-profit radio broadcaster who, in accordance with the fundamental principles of AMARC, offers a service to the community in which it is located or which it serves, while promoting community expression and participation." AMARC's Declaration of Principles, alluded to in the foregoing quotation, states, *inter alia*, that members of AMARC:

- Contribute to the expression of different social, political and cultural movements, and to the promotion of all initiatives supporting peace, friendship among peoples.
- Recognize the fundamental and specific role of women in establishing new communication practices.
- Express through their programming:
  - The sovereignty and independence of all peoples;
  - Solidarity and non-intervention in the internal affairs of other countries;
  - International cooperation based on the creation of permanent and widespread ties based on equality, reciprocity, and mutual respect;
  - Non-discrimination on the basis of race, sex, sexual preference or religion;
  - And respect for the cultural identity of peoples.

On the basis of the foregoing (and other) definitions and descriptions of community (radio) broadcasting, its key features can be said to include:

- In service of community (both local communities and communities of interest[89])
- Individual participation in all stages of broadcasting
- Independent and non-profit status

"Community media", it has been noted, "have at their heart the concepts of access and participation".[90] Three prime advantages of community broadcasting for minority

[88] Steve Buckley, Toby Mendel *et al*., *To Give People Voice*, (Penn University Press, 2007), p. 161 (of draft manuscript, on file with author).
[89] Downing/Husband…

communities are: (i) autonomy over all stages of the broadcasting process, the preparation and transmission of programmes; (ii) fostering of community cohesion; (iii) democratisation of intra-community communicative structures and processes. All of these advantages flow from one of the central underlying assumptions about community communication, i.e., "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".[91] As community broadcasting is generally less institutionalised than other forms of broadcasting, the accessibility of its structures and operations to members of the community is more easily assured.

In practice, licensing authorities often apply different criteria to applications for community licences than to other types of licences.[92] They tend to focus on the extent to which the proposed service matches identifiable or expressed community interests, the representativeness of those proposing the service *vis-à-vis* the community as a whole, provision for inclusive participation, feasibility of management and financial structures and plans. The assessment of prospective services is sometimes carried out in consultation with representatives of the communities themselves. Performative standards are also usually different in respect of community broadcasting, thereby reflecting the specificity of its objectives and strategies. Impact assessment, again frequently involving representatives of the target communities, is also a common procedural feature of regulatory supervision of licensed community broadcasters.[93]

4.3.2(ii) Public service media/content

Broadcasting and public service in the broadest sense of the term can both boast long and strong traditions in Europe. They are capable of mutually-exclusive existence, owing to their distinctive aims, yet interaction between the two has great synergic effects on society and democracy. As posited by one commentator: "Public service in the spirit of democracy demands an unqualified commitment to the common good. Nothing less will do; nothing more is needed".[94] Of course, it is the ascertainment of "the common good" that remains vexing. How public service is assured via broadcasting can be explained to the philosophies animating public service broadcasting.

The extensive traditional rationales for public service broadcasting have been elaborated authoritatively by many commentators[95] and it is not intended to reproduce the full extent of other analyses here. It would, however, be useful to note that Georgina Born and Tony Prosser identify three essential normative criteria for public service broadcasting: citizenship

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[90] *Chris Atton, Alternative* Media (London, Sage Publications, 2002), p. 17.

[91] 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.

[92] For a (now dated) survey of the theory and practice of community broadcasting across a wide sample of European countries, see: Nick Jankowski, Ole Prehn & James Stappers, Eds., *The People's Voice: Local radio and television in Europe* (London, John Libbey & Co. Ltd., 1992).

[93] Slot in a few references to broadcasting law and its application in Ireland. Mention incorporation of AMARC definition in Irish legislation.

[94] Louis C. Gawthrop, *Public Service and Democracy: Ethical Imperatives for the 21st Century* (New York, Seven Bridges Press, LLC, 1998), p. 101.

[95] See, for example, E. Barendt, *op. cit*., Chapter III 'Public Broadcasting', pp. 50-74 and T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, Malaysia, 2000).

("enhancing, developing and serving social, political and cultural citizenship"), universality and quality of services and of output.[96] Eric Barendt, for his part, identifies six basic features of public service broadcasting:

- general geographical availability;
- concern for national identity and culture;
- independence from both the state and commercial interests;
- impartiality of programmes;
- range and variety of programmes and
- substantial financing by a general charge on users.[97]

A more detailed recipe for public service broadcasting is also given by Born and Prosser (while acknowledging that not all of the proposed ingredients would command universal support):

- universal access or availability;
- mixed programming or universality of genres;
- high quality programming in each genre, including innovation, originality and risk-taking;
- a mission to inform, educate and entertain; programming to support social integration and national identity;
- diverse programming catering to minorities and special interest groups, to foster belonging and counteract segregation and discrimination;
- programming reflecting regional identities;
- provision of independent and impartial news and fora for public debate and plurality of opinion;
- commitment to national and regional production, and to local talent;
- a mission to complement other broadcasters to enrich the broadcasting ecology;
- affordability; and
- limited, if any, advertising.[98]

The foregoing provides a clear idea of what public service broadcasting entails and of its potential for minorities in terms of accessibility of participatory mechanisms and the availability of targeted programming. The details of specific structures and practices to enhance the value of PSB for minorities are explored in the section of this study focusing on the monitoring mechanisms of the FCNM and the ECRML (Chapters 7 and 8). Two major issues currently faced by PSB are the extent to which its remit ought to be developed in respect of new media platforms and the nature of its relationship to media markets (and its ultimate position and role in those markets). The resolution of these issues will affect the future shape of PSB and its relevance as a primary source of broadcasting for minorities.

One of the most vigorous sources of encouragement for public service broadcasters to harness the full potential of new media services has been the (not distinterested) European Broadcasting Union. It has stated:

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[96] G. Born & T. 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 p. 671.
[97] *Op. cit.*, p. 52.
[98] *Op. cit.*, p. 671.

> Public broadcasting organizations have always been at the forefront of innovation in the broadcasting field, both on the technical side and in terms of diversifying their programming offer. In line with this tradition, and except where expressly and exceptionally stipulated otherwise, they continue to be entitled, and indeed are obliged, to make their programme offer available to the public in the most appropriate manner and form suggested by the changing viewing and listening habits of the public in an evolving audiovisual environment. This includes a complementary and diversified programme offer (thematic channels), its technical delivery (digital transmission, bouquets, on-line delivery) and its mode of funding (pay-TV, pay-per-view). As long as the additional programme offer is provided by the public broadcasting organization itself, the same legal principles of funding apply as in the case of its traditional core service.[99]

PSB's position in relevant markets could be: (i) a neo-liberal approach trumpeting the primacy of the market and calling for the abolition of PSB; (ii) pure PSB as a niche broadcaster, "offering only broadcast content and services which private broadcasters find commercially unrewarding",[100] and "whatever the market may offer, the community still has a duty to provide broadcasting services free from the effect of the profit motive, offering the individual a 'basic supply' of what he/she needs as a member of a particular society and culture, and of a particular polity and democratic system".[101] The abolition of PSB would, needless to say, have drastic consequences for minorities, but either of the other two approaches would preserve its potential.

The following two sub-sections provide an overview of the detailed regulatory provisions governing PSB at the European level, first those developed by the EU and secondly those developed by the Council of Europe.

European Union

A regulatory framework for PSB does exist at the European level, but it really is a framework: the Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States recognises that it is largely for each Member State to confer, design and organise the remit for PSB in their own countries.[102] This is because "the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".[103] The Protocol also sets out that State funding for PSB must be tied to the fulfilment of the broadcasters' public service remit.

A Resolution concerning public service broadcasting adopted by the Council of the European Union in 1999 was more expansive when outlining the importance of PSB.[104] It notes that "in view of [PSB's] cultural, social and democratic functions which it discharges for the common good, [it] has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity". It continues by "stressing that the increased diversification of the programmes on offer in the new media environment reinforces the importance of the

[99] "The Public Service Broadcasting Remit: Today and Tomorrow", Statement by the European Broadcasting Union (Legal Department) of 29 April 1998, available at: http://www.ebu.ch/leg_public_service.pdf.
[100] Karol Jakubowicz, "Public Service Broadcasting: A Pawn on an Ideological Chessboard", in Els de Bens, Ed., *Media Between Culture and Commerce* (Bristol, UK/Chicago, USA, Intellect Books, 2007), pp. 115-141, at 115.
[101] *Ibid*., at 116.
[102] Protocol to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ C 340/109 of 10 November 1997.
[103] *Ibid.*
[104] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30/1 of 5 February 1999.

comprehensive mission of public service broadcasters". In consequence, it positively encourages PSB to branch out into new media services and to exploit the potential of the new technological opportunities on offer in furtherance of their mandate.

Further guidance on the question of State funding for PSB is provided by the aforementioned Council Resolution (1999) and, in greater detail, the European Commission's Communication on the application of State aid rules to public service broadcasting.[105] The Communication requires States to provide a clear and precise definition of the public service remit, where such a definition is not already in existence. It allows States to define this remit, and to provide for the financing and general organisation of the public broadcasting sector, in a manner that would give due recognition to relevant national specificities. All of this is, however, subject to the important proviso that any measures adopted for the financing of public service broadcasters will have to conform to certain standards of transparency in order to allow for the assessment of the proportionality of such measures.[106]

The criteria established by the ECJ in its *Altmark* judgment are also crucial – they reiterate and build on the aforementioned requirements:[107]

> - first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
> - second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
> - third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those options;
> - fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The Commission recently launched a public consultation on the future framework for State funding of PSB.[108] The development of the public service remit in the new media environment has been identified as one of the important focuses of the consultation exercise.[109]

The regulatory picture that has been sketched here shows that it is largely for Member States to define and develop the remit of PSB in their own countries and that they may finance PSB as long as a certain number of procedural and other criteria are met. There is strong

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[105] Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04).

[106] See further, T. McGonagle, "European Commission – State Aid Rules to Public Service Broadcasters Clarified", IRIS 2001-10: 4.

[107] Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Judgment of the Court of Justice of the European Communities of 24 July 2003, Rec.2003, p.I-7747, esp. paras. (87, 88), 89-94.

[108] As announced in the European Commission's press release, "State aid: Commission launches public consultation on the future framework for State funding of public service broadcasting", IP/08/24, 10 January 2008. See also: Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (n.d.), available at: <http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf>.

[109] *Ibid*. See, in particular, s.2.2.1 of the second-named document in the previous footnote.

encouragement for the continuation and development of PSB activities on new media platforms.

Council of Europe

The approach to PSB taken by the Council of Europe is determined primarily by relevant standard-setting texts adopted by the Committee of Ministers. Numerous Recommendations are relevant, and the key definitional elements were conveniently synthesised in a Recent Recommendation on the remit of public service broadcasting in the information society[110] and portray PSB as:

a) a reference point for all members of the public, offering universal access;
b) a factor for social cohesion and integration of all individuals, groups and communities;
c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

These "key elements underpinning the traditional public service remit" are broadly consistent with the theoretical discussion *supra*. Each of them is elaborated upon in the Recommendation and the section on diversity is discussed in greater detail, *infra*, s.7.4… It is noteworthy that the title of the Recommendation refers to "public service media", which acknowledges that other media platforms are increasingly being used to pursue public service objectives.[111] Further recognition of that trend is provided by a subsequent Recommendation adopted by the Committee of Ministers – on measures to promote the public service value of the Internet.[112]

The Recommendation's central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by:

- "upholding human rights, democracy and the rule of law […] and promoting social cohesion, respect for cultural diversity and trust" in respect of the Internet and other ICTs;
- setting out parameters for the roles and responsibilities of all key stakeholders within clear legal and other regulatory frameworks;
- promoting awareness in the private sector of the ethical dimension to relevant activities and the adjustment of practices in light of human rights concerns;
- encouraging, where appropriate and on an inclusive basis, "new forms of open and transparent self- and co-regulation" enhancing accountability for key actors.

The suggested measures for attaining the central objective of the Recommendation should be considered in light of the guidelines elaborated in the detailed and extensive appendix to the

[110] Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007.
[111] See further, in this connection: OFCOM, *A new approach to public service content in the digital media age: The potential role of the Public Service Publisher*, Discussion Paper, 24 January 2007 & Summary of responses, 13 June 2007.
[112] Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, 7 November 2007.

Recommendation. The guidelines focus first on human rights and democracy. In order to uphold human rights in the specific context of the Internet and ICTs, the rights to freedom of expression and association and assembly should not be subject to any restrictions beyond those provided for in the European Convention on Human Rights. The need to uphold the right to private life and correspondence on the Internet, proprietary rights (including intellectual property) and educational rights (including "media and information literacy") is similarly stressed. So too is the importance of other values and interests, such as "pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication via the Internet and other ICTs". Civic engagement in e-democracy, e-participation and e-government, and the development by public administrations of diverse communicative possibilities, are advocated under the rubric, 'Democracy'.

The second structured focus of the guidelines is 'Access'. It calls for: strategies promoting affordable access to ICT infrastructure, including the Internet; "technical interoperability, open standards and cultural diversity in ICT policy covering telecommunications, broadcasting and the Internet"; diversification of software models, including proprietary, free and open source software; affordable Internet access for everyone, especially those with particular needs arising from various situational specificities; public access points to the Internet and other ICT services; integration of ICTs into education; media and information literacy and training.

The guidelines then address 'Openness'. The key concern here is to safeguard freedom of expression and the free circulation of information on the Internet. To this end, they promote: active public participation in the creation of content on the Internet and other ICTs (specifically by refraining from imposing licensing requirements on individuals and from applying general blocking or filtering measures; facilitating re-use of existing digital content resources in accordance with intellectual property rights and of public data); "public domain information accessibility via the Internet"; adaptation and extension of the remit of public service media specifically to the Internet and other ICTs.

'Diversity' is the fourth main focus of the guidelines and it strives for equitable and universal involvement in the development of Internet and ICT content. As such, it encourages: developing a cultural dimension to digital content production, including by public service media; preserving the digital heritage; participation in "the creation, modification and remixing of interactive content"; measures for the production and distribution of user- and community-generated content; capacity-building for local and indigenous content on the Internet; multilingualism on the Internet.

The final focus of the guidelines is 'Security' - a more catch-all category than its title suggests. It underscores the importance of: the Cybercrime Convention and its Additional Protocol; network and information security; legislative measures and appropriate enforcement agencies to deal with spam; enhanced cooperation between ISPs; protection of personal data and privacy; combating piracy in the field of copyright and neighbouring rights; improving transparent and effective consumer protection; promoting safer use of the Internet and ICTs, especially for children.

This synopsised overview of some of the main strands to the Council of Europe's approach to PSB confirms its suitability for the advancement of the communicative and informational needs and interests of minorities. This is clear from the objectives and strategies involved.

4.3.2(iii) Commercial media

Whereas media with purely commercial objectives are not usually vaunted for their contribution to the advancement of the right to freedom of expression of persons belonging to minorities, that does not mean that they are without importance for the realisation of that goal.

First, in some countries, commercial media (especially broadcasters) are subject to certain public service commitments. These can be public service obligations set out in regulation and applicable to all (or a wide selection of) broadcasters, or they can be specific obligations taken on voluntarily by individual broadcasters in return for remuneration. The former practice has always existed (to varying degrees) and the latter appears to be becoming more commonplace of late. Despite the extension of public service obligations to the commercial sector by broadcasters voluntary subscription to contractual obligations, there remains, as Monroe Price has correctly pointed out, a certain tension or contradiction between the forced cohabitation of overall commercial objectives and a limited amount of public service objectives.[113] In concrete instances of both sets of objectives conflicting with one another, it is far from certain that the public service objectives would be able to hold their own, to the extent that they only account for a small, contractually-defined portion of the broadcaster's overall activities and services.

Second, the prioritisation of profits does not presumptively favour the informational preferences of minoritites, but at the same time, it does not preclude the possibility that minority preferences could be served by them. As John Keane has noted, commercial publishers of opinion are "primarily concerned to satisfy the demands of audiences within the boundaries of market competition".[114] Thus, "Media entrepreneurs certainly provide choices, but they are always within the framework of *commercially viable* alternatives".[115] It is well-documented that certain minority groups can constitute lucrative niches in the broadcasting market, eg. satellite channels serving certain ethnic groups in the UK. The commercial attractiveness of a particular group is then determined by commercial calculations: critical mass; definable interests that are translatable into content terms; established patterns of media usage; general level of affluence, etc. Presence on commercial media (whether as slots on general/mainstream channels or as dedicated channels) can often enhance the public prestige of the interests/languages/cultures involved to a greater extent than comparable presence on PSB channels. While the general potential of commercial media to advance minority preferences in media output should not be overlooked, it should not be overstated either. The coincidence of minority interests and commercial viability is the exception rather than the rule and commercial media rarely provide proactively for unpopular programming based on altruistic motivations.

Third, it is important to recognise the negative impact that the failure of commercial media to cater for minorities' programming preferences can have. As commercial media very often reach large audiences, their influence on the formation of public opinion and indeed, the framing of issues for public discussion, is significant. The non-inclusion of programming involving and directed at minorities has ramifications far beyond the act of exclusion: questions of participation, equality and non-discrimination, cultural, linguistic, religious and other identities are all implicated. As explained by Myria Georgiu: "Identities are not shaped

[113] Monroe Price, …
[114] John Keane, *The Media and Democracy* (UK, Polity Press, 1991), p. 91.
[115] *Ibid.*

only through positive and creative processes of participation and communion, but also in processes of exclusion, marginalization and regressive ideologies".[116] This third general observation can be related back to the reference at the beginning of this subsection to certain obligations and standards that apply across the board to all media or all media within a given sector (eg. broadcasting). Such measures can help to prevent exclusionary tendencies and practices in respect of commercial broadcasting.

4.3.2(iv) Transnational media

Given the political economy of international media, it is little wonder that analysts should express scepticism as to their ability to enhance the right to freedom of expression of persons belonging to minorities. The business plans on which their economic and political might depend are often rightly perceived as anathema to the communicative needs and interests of persons belonging to minorities. Moreover, objectives of cultural imperialism are also imputed to dominant players on the international media scene. These issues are considered in further detail, *infra*, in the context of diversity in the media. For present purposes, however, the dangers posed by the globalising and homogenising potential of international media are not contested as such, but the attention will focus instead on the countervailing potential of international media to satisfy *certain* communicative needs of *certain* minority groups. Some of the reluctance to accept the validity of this proposition is clearly the result of conceptual associations with particular terminological choices.

By way of illustration, references to the international media instantly evoke dominant media players, such as the "Big Five".[117] On the other hand, references to "transfrontier" media conjure up an alternative framework, especially in Europe, where the term takes on a specific meaning given the regulatory predominance of the EU's Television without Frontiers Directive and the CoE's European Convention on Transfrontier Television. Another terminological variant is "transnational" media, which is (at least in European academic writing) increasingly being used in respect of media products and services originating outside of Europe, but which can be received within Europe.[118] The reason for alluding to these terminological differences is to advance three related points. First, each of the terms mentioned could be taken to the mean essentially the same thing, i.e., media that operate across State borders. Second, patterns of usage have emerged which have, in effect, attached different connotations to different terms. Thus, while there is considerable potential overlap between the different terms, in practice, each has its own distinctive conceptual ballast. Third, once these (admittedly imperfect) distinctions between the relevant terms have been flagged, and their acquired emphases explained, the question of whether "international media" can be

[116] Myria Georgiou, *Diaspora, Identity and the Media: Diasporic Transnationalism and Mediated Spatialities* (Cresskill, New Jersey, Hampton Press, Inc., 2006), p. 9.
[117] Ben H. Bagdikian, *The New Media Monopoly* (Boston, Beacon Press, 2004), p. 3 – discussed at greater length, *infra*.
[118] See generally: Jean K. Chalaby, "Deconstructing the transnational: a typology of cross-border television channels in Europe", 7 *New Media & Society* (No. 2, 2005), pp. 155-175; Philip Schlesinger, "Wishful Thinking: Cultural Politics, Media, and Collective Identities in Europe", 43 *Journal of Communication* (No. 2, Spring 1993), pp. 6-17; Jean K. Chalaby, Ed., *Transnational Television Worldwide: Towards a New Media Order* (I.B. Tauris, London/New York, 2005); Jean K. Chalaby, "Television for a New Global Order: Transnational Television Networks and the Formation of Global Systems", 65 *International Communication Gazette* (No. 6, 2003), pp. 457-472; John Sinclair, Elizabeth Jacka & Stuart Cunningham, *New Patterns in Global Television* (Great Britain, Oxford University Press, 1996).

considered suitable communicative outlets for persons belonging to minorities, becomes much more nuanced and meaningful.

The importance of these media can be gauged, *inter alia*, by their ability to satisfy informational needs of minorities no longer resident in their kin-States or diasporic minorities. 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".[119] Furthermore, the importance of the transnational dimension is crucial for the universality of human rights, in general, but the right to freedom of expression, in particular.[120] Its importance is also attested to by the inclusion of express provisions safeguarding cross-border exchanges in both the FCNM and the ECRML. The specific importance of the media has been explained in terms of their ability to "renegotiate and represent diasporic copresence and a common past through images, which shape the (selective) renewed and contemporary collective memory and provide repertoires for the construction of new individual and communal identities".[121] This explanation also holds true in respect of kin-State minorities.

Finally, it should be noted that to the extent that certain minority groups rely heavily on the informational output of transfrontier media, it can be argued that such media make viable contributions to existing diversity in terms of source, outlet and content.

4.3.2(v) Other types of media

The list of different types of media presented above is by no means exhaustive. The Internet and other new media technologies may appear conspicuous by their absence, but they are considered in detail in s. 4.5, *infra*. Other omissions include "alternative media" (including grassroots and alternative advocacy media[122]) and "radical media" (i.e., media that are "generally small-scale and in many different forms, that express an alternative vision to hegemonic policies, prioirities, and perspectives"[123]), both of which[124] are linked to social movement theory.[125] Their omission is explained by the fact that they are not dealt with as distinct types of media in relevant international legal texts.

The purpose of the above selection is to highlight the differences between common types of media in terms of their purpose, functionality and reach. The foregoing discussion reveals that each of the media types surveyed can contribute in different ways to rendering the right to freedom of expression (in all its component parts) effective for persons belonging to

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[119] Myria Georgiou, *Diaspora, Identity and the Media: Diasporic Transnationalism and Mediated Spatialities* (Cresskill, New Jersey, Hampton Press, Inc., 2006), p. 10.
[120] Article 10(1), ECHR and Article 19(2) both use the formula, "regardless of frontiers".
[121] *Ibid*., p. 13.
[122] Chris Atton, *Alternative Media*, *op. cit*., at 16 (drawing, *inter alia*, on the work of Michael Traber).
[123] John D.H. Downing *et al*., *Radical Media: Rebellious Communication and Social Movements* (Thousand Oaks/London/New Delhi, Sage Publications Ltd., 2001), p. v.
[124] For a typology of alternative and radical media, see: Chris Atton, *Alternative Media*, *op. cit*., at 27.
[125] See further, in this connection: Alberto Melucci, *Challenging codes: Collective action in the information age* (UK, Cambridge University Press, 1996); Doug McAdam, Sidney Tarrow & Charles Tilly, *Dynamics of Contention* (USA, Cambridge University Press, 2001); Doug McAdam, John D. McCarthy, Mayer N. Zald, Eds., *Comparative perspectives on social movements: Political opportunities, mobilizing structures, and cultural framings* (USA, Cambridge University Press, 1996).

minorities. It should not be overlooked that other, less structured media can also play an important role in realising this objective. The foregoing discussion is also important because the monitoring processes of relevant international treaties have so far revealed little awareness of the functional differences between different types of media (see further, *infra*). When the communicative needs and preferences of persons belonging to minorities are optimally served by the functional features of particular types of media, there is a greater likelihood that the they will exercise their right to freedom of expression in an effective manner.

4.4 Enabling environment for media freedom

The concept of "enabling environment" provides an extremely useful analytical frame for issues relating to media freedom.[126] It allows for full-scale ecological examination of the broader legal and policy environment in which the media operate. The concept is also sufficiently capacious to include scope for the evaluation of other extraneous factors affecting media performance, in particular political, socio-economic and cultural factors. The healthiness of the enabling environment in which media operate can be largely determinative of whether or not the media effectively realise their stated goals.

The realisation of an optimal, or at least favourable, enabling environment *for media freedom* is only possible when an optimal or favourable enabling environment *for human rights* in general has already been achieved. The extent to which freedom of expression is protected and promoted in a given society is often regarded both as a prerequisite for other media freedom(s) and as an informal barometer for the existence of other human rights. As consistently argued throughout this thesis, however, the right to freedom of expression is inextricably linked to a broad range of other human rights, in particular the rights of non-discrimination/equality, participation, freedom of religion or belief, cultural identity and heritage, language and education. According to the inter-related and interdependent conceptualisation of human rights espoused here, the antecedent enabling environment for human rights would also necessarily include minority rights. Furthermore, an enabling environment for human rights is necessarily shaped by principles, structures and practices of democracy and the upholding of the rule of law.

A favourable enabling environment for media freedom needs to rest on firm foundations. As well as the human rights grounding already described, it is also influenced in important ways by the operative public values of a given society. Typically, such values would include pluralism and tolerance.

The constitutional enshrinement of freedom of expression and other media freedoms are crucial features of a favourable enabling environment for media freedom. Relevant statutory provisions are also very important, but constitutional provisions boast superior legitimacy and permanency. Media objectives, practices and structures all generally tend to be regulated. The impact of that regulation can be assessed in micro and macro terms. The particular effects of individual regulatory provisions (eg. on journalistic freedoms, security of journalists (professional and physical), access to information, protection of sources, media ownership,

[126] 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.

competition, State subsidies for the promotion of certain public interest objectives etc.) also have an aggregative effect which is a primary force in the shaping of the enabling environment.

The archictecture of State institutions is also very important in this respect: they should ideally be democratic, transparent and accountable and foster interaction with the public. Media regulatory authorities should be independent and representative. Their structures and *modi operandi* should ensure transparency, accountability, participation in policy-formulation and effective appeals mechanisms against official decisions. They should broadly conform to the principles of good governance.

Factors other than the formal laws and institutions of State also shape the enabling environment for media freedom. As Price and Krug have noted, "there is a close interaction between what might be called the legal-institutional and the socio-cultural, the interaction between law and how it is interpreted and implemented, how it is respected and received".[127] The prevailing political culture can also exercise a decisive influence on the ability of the media to carry out their objectives. In democratic countries, traditions of political stability are generally conducive to the existence of free and independent media. In conflict or (immediate) post-conflict situations, a different paradigm operates, in which different roles are assumed by or thrust upon the media.[128] Regulation (to the extent that it can withstand the conflict-related pressures) and public attitudes and expectations are coloured by the ambient political situation. In transitional democracies, too, the media may be susceptible to political vicissitudes and interference.[129] It is important that regulatory measures be tailored to the exigencies of prevailing situations. Very different kinds of regulation are required in very different political contexts.

All too often, the great importance attaching to the enabling environment for media development is understated. The securing in society of the rule of law, freedom of expression (including independence of the media and other related freedoms), human rights generally, democracy, pluralism, tolerance, etc., are necessary prerequisites for media development. This general rule is equally applicable to the use of media by minorities. The Advisory Committee on the FCNM has, on occasion, found that "problems pertaining to freedom of the media and the rights and situation of journalists *in general* may also affect the environment surrounding the media of persons belonging to national minorities".[130]

Guarantees of media-related pluralism are also important for minorities. Thomas Gibbons, in disaggregating the term, has usefully distinguished between three distinct levels of media-

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[127] Monroe Price & Peter Krug, 2007, *op. cit*., at p. 96.

[128] See generally, Monroe E. Price & Mark Thompson, Eds., *Forging Peace: Intervention, Human Rights and the Management of Media Space* (Edinburgh, Edinburgh University Press, 2002).

[129] See further: Jan van Cuilenburg & Richard van der Wurff, Eds., *Media and Open Societies: Cultural, Economic and Policy Foundations for Media Openness and Diversity in East and West* (Amsterdam, Het Spinhuis, 2000); Karol Jakubowicz, *Rude Awakening: Social and Media Change in Central and Eastern Europe* (New Jersey, Hampton Press, Inc., 2007); David L. Paletz & Karol Jakubowicz, Eds., *Business as Usual: Continuity and Change in Central and Eastern European Media* (New Jersey, Hampton Press, Inc., 2003); Monroe E. Price, Beata Rozumilowicz, and Stefaan G. Verhulst, Eds., *Media Reform: Democratizing the media, democratizing the state* (London, Routledge, 2002); Andrei Richter, *Post-Soviet perspective on censorship and freedom of the media* (Moscow, UNESCO, 2007).

[130] (emphasis added) Advisory Committee Opinion on Ukraine (First Monitoring Cycle), adopted on 1 March 2002, para. 96. See also in this connection: Advisory Committee Opinion on Azerbaijan (First Monitoring Cycle), adopted on 22 May 2003, paras. 43 & 52.

related pluralism: content, source and outlet.[131] Of these, content is the most substantive in character, whereas source and outlet are more instrumental (to achieving the aim of securing pluralism at the content level). Minorities have a clear interest in pluralism being guaranteed at all three levels. Pluralism of content ensures that they can draw on a wide range of diverse information, which is particularly important for opinion-forming and decision-making processes and political empowerment. The absence of pluralism at the level of sources (i.e., media ownership) can lead to the constriction of public debate and its domination by powerful political and commercial interests. These dangers have already been alluded to in the previous section, *supra*. The interest of minorities in the maintenance of pluralism among outlets is tied in with what is sometimes referred to as the media functionality principle. The ability to choose between different outlets or types of media increases the likelihood of effectively communicating one's message. In short, the media offer available to the general public is only meaningful for minorities to the extent that the offer includes media outlets that correspond to their real communicative needs.

Concerns for market sustainability are always present in minority media circles. Nowadays, the media have to operate in an increasingly competitive and commercialised environment. This is especially true of the broadcasting sector. In consequence, the need to boost audience shares is growing steadily as a driver of broadcasting policy. Public service broadcasters (PSBs) are also willy-nilly caught up in this vortex, despite the specificity of their mandate. The stark reality is that minority-interest programmes (and especially minority-interest programmes in "less prevalent (national or regional) languages"[132]) almost never command large audience shares. This can have adverse effects on advertising revenues, which in turn can lead to a general reluctance to broadcast minority-language programmes, particularly at peak viewing/listening times. In such an inhospitable climate, a persuasive case can be made for contemplating prescriptive regulation; financial stimulation; administrative relaxation, all with a view to adequately catering for the needs and interests of persons belonging to national minorities.

Another important feature of the enabling environment, also stressed by Price and Krug, and which is also central to any conceptualisation of the role of the media in any healthy democratic society, is the level of public awareness, understanding, credibility and appreciation of the socio-political role and relevance of the media. This demands the generation of "a special kind of literacy […] that encompasses a desire to acquire, interpret, and apply information as part of a civil society".[133]

Finally, it should be noted that the concept of "enabling environment" is increasingly being relied upon in international policy-making circles. The most pertinent example in the context of this thesis is, perhaps, the World Summit on the Information Society, the concluding documents of which give detailed consideration to the importance of favourable enabling

[131] Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.
[132] Bruno de Witte, "Surviving in Babel? Language Rights and European Integration", in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff, 1992), pp. 277-300, at p. 299.
[133] Monroe Price & Peter Krug, 2007, *op. cit*. at p. 99. See further, John Dewey, *The Public and its Problems*, *op. cit.*, at .

enivornment for ICTs.[134] Those documents affirm the importance of ensuring a suitable enabling environment for the Information Society at national and international levels.[135] A key paragraph in the Geneva Declaration of Principles reads:

> The rule of law, accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centred Information Society. Governments should intervene, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance the development of the ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities.[136]

As such, the WSIS documents go beyond pure human rights and legal issues, to address economic and technological issues as well. This makes for comprehensiveness and connectedness in its approach. It is extremely important to include these additional dimensions in the formulation of policies to promote favourable enabling environments for communicative activities.

The foregoing discussion has shown the importance of a favourable enabling environment for the realisation of media freedoms. Its importance can also be gauged in terms of the realisation of freedoms enjoyed, or aspired to, by minority media. The focus will now shift to lines of thinking and normative provisions which recognise the importance of media objectives and seek to enhance the enabling environment for media freedom in light of those objectives.

4.4.1 Enhanced liberty for the media/the Fourth Estate

One of the profound paradoxes of democracy is that if it functions well, criticism of it will thrive. Criticism should pervade throughout society, but it is rooted in the media and, increasingly, civil libertarian and other non-governmental organisations.[137] It is not without reason that many people have come to regard the media as the Fourth Estate; a would-be extra pillar in a radical reworking of Montesquieu's tripartite division of powers. The term, "the Fourth Estate", is one of notoriously imprecise metes and bounds,[138] which perhaps explains why the European Court of Human Rights has never actually used the term even though it has consistently shown great deference to the concept.

The coinage of the term is generally attributed to Edmund Burke, who – the story goes – used it to refer disparagingly to a group of parliamentary reporters in 1787.[139] The evolution of the doctrine has – since the very beginning - been dogged with questions about the democratic credentials of the media. Nowadays, such questions tend to be framed in terms of

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[134] See, in particular, "Building the Information Society: a global challenge in the new Millennium", Declaration of Principles, World Summit on the Information Society, Geneva, 12 December 2003, Doc. WSIS-03/GENEVA/DOC/4-E, s. 6 (paras. 38-50).
[135] *Ibid*., para. 38; Tunis Commitment, World Summit on the Information Society, Tunis, 18 November 2005, Doc. No. WSIS-05/TUNIS/DOC/7-E, para. 9.
[136] "Building the Information Society: a global challenge in the new Millennium", *op. cit*., para. 39.
[137] The European Court of Human Rights has recognised as much, *inter alia*, in *Steel & Morris v. United Kingdom*, when it referred to "the legitimate and important role that campaign groups can play in stimulating public discussion" – Judgment of 25 January 2005, para. 95.
[138] See generally: Chapters 1 and 2 of Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Australia, Cambridge University Press, 1998).
[139] *Ibid*., pp. 49 and 97.

transparency, accountability and standards generally. The democratic aspirations and commercial realities (of ownership, market, etc.) make for very uneasy bedfellows.

The centrality of the (mass) media to the dynamics of democracy has been recognised time and again by the European Court of Human Rights, having ascribed to the media the "vital role of public watchdog".[140] The Court has stated that it is incumbent on the media to impart information and ideas on all matters of public interest. It has also consistently held that "[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them".[141] In light of this function of the media (corrective, curative, supervisory, stabilising – call it what you will), the Court has tended to carve out a zone of protection for the media's right to freedom of expression that is even greater than that of ordinary individuals.[142] This vision of the media ascribes to them an important critical role in democratic society; it envisages them as "criticasters".[143]

One hallmark of the expanded zone of the media's freedom of expression is the notion of journalistic independence. Importantly, this independence filters from the editorial level down to coal-face journalism and reporting. A key pronouncement in this regard reads: "the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists".[144] This commitment to the autonomy of the media in a democratic society goes a long way to guaranteeing operational latitude for journalists. Moreover, this operational latitude stretches to include "possible recourse to a degree of exaggeration, or even provocation".[145]

However, alongside the enjoyment of journalistic freedom – as defined by the Court - are concomitant duties and responsibilities[146] (discussed further in Chapter 4 (Section 1)). Speaking extra-judicially, the former President of the European Court of Human Rights, Luzius Wildhaber, has stated that: "While the Court has rightly stressed the potentially chilling effect of placing restrictions on speech that may be offensive to individuals or sectors of the community, genuine debate may also be stifled by over-aggressive and inadequately researched journalism."[147]

This, as already mentioned *supra*, is the nub of the problem concerning public resistance to a wider endorsement of the Fourth Estate doctrine. More principled scions of the media argue and crave for the media to be defined according to their vigilance in monitoring and divulging

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[140] *The Observer & Guardian Newspapers Ltd. v. United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, No. 216, para. 59.
[141] *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30, para. 65.
[142] This approach by the Court is without prejudice to the level of freedom of expression enjoyed by individuals: *Steel & Morris v. United Kingdom*, *op. cit*., para. 89.
[143] See further, Tarlach McGonagle, "Broadcasters as Criticasters" (forthcoming).
[144] *Bladet Tromso & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999-III, para. 63, drawing on *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298, para. 31.
[145] *Prager & Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 26 April 1995, Series A, No. 313, para. 38.
[146] See Article 10(2) of the European Convention on Human Rights.
[147] Luzius Wildhaber, "The right to offend, shock or disturb? – aspects of freedom of expression under the European Convention on Human Rights", Sixth Annual RTE/UCD Lecture in the series: Broadcasting, Society and the Law, Dublin, 11 October 2001, available at (also published in the *Irish Jurist*).

the excesses of various branches of State and society. Or at least, that's the theory; or, some would say, "the fiction". It's also a theory according to which the defining goal of the media is to leave no stone unturned in their quest for "the best obtainable version of the truth".[148] It's a theory that is perhaps out of kilter with the reality of media professionals chasing sex and sleaze and sensationalism and salaciousness. This prompts the question, paraphrasing Lucas A. Powe: how well does [media] promise match performance? "How well is the press exercising its informing function? Is the press meeting its responsibilities, indeed its sole purpose, in vindicating the public's right to know?"[149] In addressing these questions, it is useful to distinguish between different types of media in terms of their purpose, functionality and reach (see s. 4.3, *supra*).

4.5 New technologies and new regulatory paradigms

The growth and maturation of the European Court's attitude towards the media can largely be attributed to their function to serve the aforementioned public interest through the provision of information and stimulation of public debate. The Court's attitude would appear to be premised at least in part on the point-to-multipoint nature of mass media communications; on the understanding that information purveyed and disseminated by the mass media will reach a larger section of society than communications between ordinary individuals. The contiguous considerations of impact and influence are key to this conception of the role and activities of the media.

Could or should this state of affairs under which the media enjoy preferential status change in the online world (as broadly defined)? Or, in other words, in a world where the barriers to mass communication are drastically diminished? Or in a world where communications services are becoming increasingly customised, personalised and individualised? Or in a world where the "proliferation of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas";[150] cutting them off from the rough and tumble of democracy; denying them the formative experience of being confronted with unwanted ideas; denying them exposure to situations where tolerance has to be learnt? Or, more poetically, in a world with a diminished incidence of "serendipitous encounters"[151]?

Some of these highlighted trends can contribute to the erosion of shared, collective experience and the reduction of common reference points; thus negatively affecting participatory democracy and engendering social fragmentation.[152] The net result of these trends and tendencies is that individuals are increasingly cocooning themselves in informational and communicational universes of their own creation; potentially leading to a Hall-of-Versailles type of effect where their own views are merely mirrored on all sides and distorted somewhat by virtue of excessive amplification. This stark prognosis is one of the arguments frequently

[148] Carl Bernstein, in E. Hazelcorn & P. Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Dingle, Ireland, Brandon Book Publishers Ltd., 1993), pp. 17-25, at p. 19.
[149] Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkeley & Los Angeles, University of California Press, 1991), p. 257.
[150] T. McGonagle, "Changing Aspects of Broadcasting: New Territory and New Challenges", *IRIS plus* 2001-10, p. 5. For a more expansive treatment of these issues, see generally, C.R. Sunstein, *Republic.com* (Princeton, N.J., Princeton University Press, 2001).
[151] A.L. Shapiro, *The Control Revolution* (USA, Public Affairs, 1999), p. (xvi).
[152] See further, C.R. Sunstein, *op. cit*., especially Chapter 1, "the daily me", pp. 3-22.

invoked in favour of prohibition of websites and chat-groups dedicated to the propagation of hate speech and other types of extremist activities, for example.

Its starkness should not, however, be exaggerated. Filtering trends and proclivities towards self-insulation in the comforting surrounds of like-minded opinions are age-old practices and tendencies respectively. The Internet, like all of its forerunner communications technologies, will take some getting used to, particularly given the sheer diversity of communicative forms involved and the sheer diversity of information and opinions it makes available.[153] It is typical for pioneering technological changes to set a blistering pace; for regulatory responses to lag somewhat behind this *peloton*, gasping for breath, and for cultural changes to remain largely out of the picture, with much ground to make up. Familiarity with the workings and potential of the online world will eventually harness much of the awe and apprehension that have characterised the debate thus far.[154]

Quo vadis, then, for the media? First, is the cherished freedom of expression of the media – as staked out by the European Convention on Human Rights and the European Court of Human Rights – likely to be transposed *en bloc* to the online world? This is by no means sure. Crucially, though, the enjoyment of relevant freedoms by media actors in the off-line world has always been contingent on the simultaneous exercise of certain duties and responsibilities (including, first and foremost, that journalists – in principle – "obey the ordinary criminal law",[155] and also that they act "in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism"[156]). There is nothing to suggest that such a proviso would not (or does not already!) apply online as well.

This line of analysis begs further questions: first, in the online world, where it is much easier for individuals to engage in mass communication, are the above-mentioned distinctions between media actors and ordinary citizens *qua* communicators still valid? The phenomenon of blogging is a perfect example of a communicative practice of major societal significance of which the foregoing question can be asked.[157] On what grounds could such distinctions then be sustained?[158] Would the rationales of impact, influence and service of the public interest, discussed above, be able to survive the transition to the online world?

In any case, it is patent that the Internet holds unprecedented potential for multi-directional communicative activity: unlike traditional media, it entails relatively low entry-barriers for

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[153] See further, the discussion of novel communicative and informational features of the Internet in *ACLU v. Reno*, 929 F.Supp. 824 (11 June 1996), at 842-844.

[154] See generally, Ithiel de Sola Pool, *Technologies of Freedom* (Massachusetts and London, England, The Belknap Press of Harvard University Press, Cambridge, 1983).

[155] *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I, para. 52; see also, *Dupuis & others v. France*, Judgment of the European Court of Human Rights of 12 November 2007, para. 43. It should be noted that the Court found that there had been a violation of Article 10 in the particular circumstances of both these cases.

[156] *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV, para. 53, drawing on *Goodwin v. United Kingdom*, Judgment of the European Court of Human Rights of 27 March 1996, Reports of Judgments and Decisions, 1996-II, para. 39.

[157] See further in this connection: Anne Flanagan, "Blogging: A Journal Need Not A Journalist Make", 16 Fordham Intell. Prop. Media & Ent. L.J. 395; Anne Flanagan, "The blogger as journalist under UK law", 10 *Communications Law* (No. 4, 2005), pp. 125-129; Laurent Pech, "Sur l'affaire O'Grady et al. c/Apple ou de l'art de distinguer entre journalistes, journalistes-blogueurs et simple blogueurs en matière de protection des sources", *Légipresse* No. 237 (December 2006), pp. 161-166.

[158] One suggested approach centres on a test of journalistic process, modelled on the *Reynolds* criteria: Anne Flanagan, "Blogging: A Journal Need Not A Journalist Make", *op. cit*.

speakers and listeners/viewers and it blurs/reduces the distinction between receiving and providing information and other types of content. This has prompted the oft-quoted observation that the Internet is "the most participatory marketplace of mass speech that […] the world" has ever seen. The quotation is perhaps somewhat clumsily formulated, but its essence is certainly accurate. Whether its participatory promise is upheld in practice will depend in part on trends of commodification of information and content and the success of counter-currents at the interface of intellectual property and technology.[159]

The second line of analysis is more oriented towards the practice of journalism in an online environment. With the ease of direct access to original sources of information, including official information and in any case, the information which shapes the news of the day, there may be less of a role to be played by media professionals according to traditional conceptions of straight reporting. However, not everyone will invest the time and effort in checking original sources. Those who do will have to re-examine their approach to the intake and digestion of news and information available online. This need is prompted not only by the explosion of information caused by the advent of Internet-technology, its abundance and availability.[160] This informational boon is captured in the sloganistically-appealing remark, "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought".[161] The need is also by various qualitative features of that information: anonymity of, or lack of information about, the provider; lack of traditional intermediaries processing/providing/packaging the information; resultant difficulties in assessing the credibility of the information, especially when it originates in foreign or unfamiliar institutions, organisations or cultural contexts.[162]

A particular role could perhaps be envisaged here for public service broadcasters if they were to assume the role of intermediaries or trustees by pointing the public towards other online material (extraneous to their own sites) to which they would have awarded a sort of "seal of approval". By doing so, they would vouch for the reliability of content on other websites as being of the same high standards as on their own websites. Such a public-service kite-marking initiative could develop to become a useful navigational tool in the online world; enabling the website of the broadcaster to become a portal which would confer credibility on external content.[163] This "reliability-enhancing"[164] initiative would lead any reputable public service broadcaster to be identified as a "beacon of trust"[165] in the online world.[166]

Overall, the media will have to take on a more intermediary role; place greater emphasis on analysis and interpretation; counter the self-interest agenda of organisations providing information; help to sift facts from rhetoric and comment on the extracted matter. This is no mean challenge for a sector which arguably bears the most responsibility for "the triumph of idiot culture" (i.e., the rise of a media culture in which serious journalism is eclipsed by an

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[159] N. Elkin-Koren & N.W. Netanel, Eds., *The Commodification of Information* (Great Britain, Kluwer, 2002).
[160] See, for example, *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996), p. 881.
[161] *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996), p. 842, para. 74.
[162] See further, Anton Vedder, "Misinformation through the Internet: Epistemology and Ethics", in Anton Vedder, Ed., *Ethics and the Internet* (Antwerpen/Groningen, Intersentia, 2001), pp. 125-132, at p. 128.
[163] *Ibid*., p. 130.
[164] *Ibid*., p. 131.
[165] D. Docherty, "Empires and evolution: public service content in the new media", 27 *Intermedia* (Issue No. 2, May 1999), pp. 20-23, at p. 23.
[166] See further, Tarlach McGonagle, "Changing Aspects of Broadcasting: New Territory and New Challenges", *op. cit.*, pp. 6-7.

obsession with sensation and scandal).[167] This is a call for the media to rediscover their roots; their informative, dissident tradition. They will have their work cut out for them.

An interesting corollary question is often overlooked: what is the likely impact of the inexorable rise of Internet-related communication on the more traditional, off-line media? Will Darwinian theories apply? Will adaptation solely within the confines of the off-line world prove possible? Or will virtually all (mass) media concerns have to reinvent themselves in such a way as to secure footholds in the off- and online worlds?[168] As observed by a leading commentator in the early 1980s: "The new media are not only competing with the old media for attention, but are also changing the very system under which the old media operate".[169] That observation now seems prescient, given its continued validity in respect of the Internet. It is also clear that the relationship between new and traditionally-used media is complex and evolutive and not simply either one of displacement or reinforcement.[170] Whether the impact of new media on existing media will be predominantly additive or substitutive depends in no small measure on the functionality of the technology in question and its ability to fulfil the communicative needs and interests of its users. It also depends on the comparable levels of functionality of different media.[171]

Having "developed by accretion, as piecemeal responses to new technology", contemporary media regulation can be considered "complex and unwieldy".[172] Different regimes often apply to different media and each regime is characterised by its own specificities. In consequence, it can prove difficult to identify or achieve consistency in these different regimes. The reality of ongoing and projected technological changes has already precipitated fresh thinking about the best (regulatory) means of attaining desired objectives; of honouring specific values. This is particularly true in light of trends of convergence and individualisation.[173]

Such is the global and complicated nature of information technology and the modern media in general, that a multitude of additional regulatory difficulties (many of them unprecedented) has arisen. As concisely stated by Lawrence Lessig: "[R]elative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption – all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace."[174] Coupled with this detailed observation is the fact that the innovative features of new information technologies[175] have heightened the exposure of the traditional shortcomings of already-existing regulatory structures. It is at this juncture that the notions of self- and co-regulation (S&CR) have been introduced into the debate.

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[167] Carl Bernstein, in Ellen Hazelcorn & Patrick Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Dingle, Ireland, Brandon Book Publishers Ltd., 1993), pp. 17-25, at p. 20.
[168] See further, on these questions, Colin Sparks, "The Impact of the Internet on the Existing Media", in Andrew Calabrese & Colin Sparks, Eds., *Toward a Political Economy of Culture: Capitalism and Communication in the Twenty-First Century* (Lanham, etc., Rowman & Littlefield Publishers, Inc., 2004), pp. 307-326.
[169] Ithiel de Sola Pool, *Technologies of Freedom*, *op. cit*., at 22.
[170] *Ibid*., at 39-40.
[171] *Ibid*., at 40.
[172] Thomas Gibbons, *Regulating the Media* (2nd Edition) (London, Sweet & Maxwell, 1998), p. 300.
[173] See further, T. McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *IRIS plus* 2002-10, p. 2.
[174] L. Lessig, *Code and other laws of cyberspace* (New York, Basic Books, 1999), p. 166.
[175] See, briefly, *supra*, and very extensively in *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996).

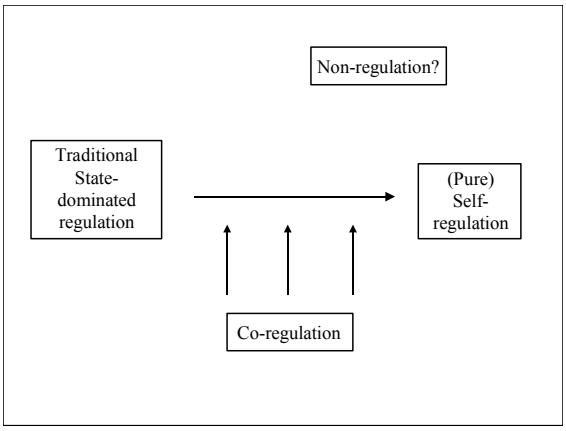
Another impetus for the emergence of the notions of S&CR has been the current debate on, and quest for, better governance at the European level.[176] In this context, the European Commission's White Paper on European Governance has enumerated five key principles of good governance: openness, participation, accountability, effectiveness and coherence.[177] S&CR have been mooted as suitable means of helping to honour these principles in practice.

As demonstrated elsewhere,[178] the notions of S&CR are characterised by their fluidity. This definitional dilemma has been compounded by a lack of consistency in interpretations of the relevant (and other proximate) terms. (Pure) self-regulation is widely regarded as the "control of activities by the private parties concerned without the direct involvement of public authorities".[179] Co-regulation, for its part, refers to the "control of activities by a combination of action from private parties and public authorities".[180] Another term, coined to embrace as wide a selection of co-regulatory practices as possible, is "regulated self-regulation", which describes "a form of self-regulation that fits in with a framework set by the state to achieve the respective regulatory objectives".[181] Another variant on the co-regulatory terminology is "audited self-regulation",[182] a term which tends to enjoy greater currency in the US than in Europe. The least that can be stated with certainty is that the terms indicate "lighter-touch" forms of regulation than the traditional State-dominated regulatory prototype.

It is imperative, however, that one avoids getting bogged down in definitional minutiae. What *is* important, though, is that one grasps that the principle of co-regulation implies a novel approach to regulation, by virtue of its in-built potential for involving an increased number of interested parties (to a greater or lesser extent) in a flexible regulatory process. It might be useful if one were to conceive of regulation in terms of a continuum stretching from the traditional State-dominated model through co-regulation to self-regulation.

Figure 1: Regulatory continuum

[176] See, in this connection, European Governance: A White Paper, Commission of the European Communities, 25 July 2001, COM(2001) 428 final; Mandelkern Group on Better Regulation Final Report, 13 November 2001; both of which were welcomed by the Laeken European Council, 14-15 December 2001.
[177] White Paper on European Governance, *op. cit*., p. 10.
[178] Wolfgang Schulz & Thorsten Held, *Regulated Self-Regulation as a Form of Modern Government* (United Kingdom, University of Luton Press, 2003); Tarlach McGonagle, "Co-regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *op. cit.*; Carmen Palzer, "Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-regulation Frameworks", *IRIS plus* 2002-6; Wolfgang Schulz & Thorsten Held, "Regulated Self-Regulation as a Form of Modern Government", Study commissioned by the German Federal Commissioner for Cultural and Media Affairs, Interim Report (October 2001).
[179] Mandelkern Group Report, *op. cit*., p. 83.
[180] *Ibid*., p. 81; see also, *ibid*., p. 17.
[181] Wolfgang Schulz & Thorsten Held, *op. cit*., p. 85. The coiners of the term elaborate on its flexibility in the following manner: "Thus, all means of governmental influence on self-regulatory processes can be described and phenomena referred to as co-regulation in other contexts are covered as well."
[182] Audited self-regulation has been described as: "the delegation by Congress or a federal agency to a nongovernmental entity the power to implement laws or agency regulations, with powers of review and independent action retained by a federal agency" - D.C. Michael, "Federal Agency Use of Audited Self-Regulation as a Regulatory Technique", 47 *Administrative Law Review* (Spring 1995), pp. 171- 254, at p. 176.



The vagueness of what exactly co-regulation entails and the relative shortage of tried and tested models to examine have served to stymie its development, both as a concept and as a practice. While it is understandably difficult to conceive of and develop practical guidelines for co-regulation *in abstracto*, some recent research is likely to make a significant contribution to the concretisation of relevant discussions.[183] One research project examined a variety of S&CR models from different jurisdictions and from that starting point, came up with a "tool-box" of appropriate instruments for "the regulation of self-regulation".[184] Subsequently, some of the persons involved in that research had a central role in the elaboration of a *Study on Co-Regulation Measures in the Media Sector*.[185] This study surveyed existing co-regulatory practices concerning press, broadcasting, online and mobile services and film and interactive games in the (then) 25 EU Member States.[186] The study also spanned the following regulatory objectives: protection of minors and human dignity; advertising; quality ethics, diversity of private media; access, setting of standards. As such, it represents a wealth of descriptive material, facilitating both thematic and geographical comparisons and analysis. A section focusing on impact assessment is a useful empirical component to the study, permitting evaluations of actual co-regulatory practices.[187] Contextualisation is provided by a discussion of co-regulation under the ECHR and under EU law.[188] Notwithstanding the contribution of these and other research projects to general comprehension of the concept of S&CR, a related and perhaps self-evident observation is that some areas and political/legal contexts are better suited to S&CR than others.[189] But the

[183] Wolfgang Schulz *et al*., *Study on Co-Regulation Measures in the Media Sector: Final Report* (Study for the European Commission, Directorate Information Society and Media Unit A1 Audiovisual and Media Policies Tender DG EAC 03/04), June 2006. See also: C.hristopher T. Marsden, "Co-Regulation in European Media and Internet Sectors", 8 *MultiMedia und Recht* (No. 1, 2005), pp. 3-7; Christopher T. Marsden, "Co- and self-regulation in European media and Internet sectors: The results of Oxford University's study www.selfregulation.info", 9 *Communications Law* (No. 5, 2004), pp. 187-195; Scott G. Dacko & Martin Hart, "Critically Examining Theory and Practice: Implications for Coregulation and Coregulating Broadcast Advertising in the United Kingdom", 7 *The International Journal on Media Management* (2006 (?), Nos. 1&2), pp. 2-15.
[184] W. Schulz & T. Held, *Regulated Self-Regulation as a Form of Modern Government*, *op. cit*.
[185] Wolfgang Schulz *et al*., *Study on Co-Regulation Measures in the Media Sector*, *op. cit*.
[186] *Ibid*., pp. 1-2.
[187] *Ibid*., Chapter 4 – Impact Assessment.
[188] *Ibid*., Chapter 5 – Implementation: ss. 5.1 and 5.2, respectively.
[189] For a fuller discussion of the possible thematic ambit of S&CR (including with respect to the independence of journalists; tackling hate speech; the protection of minors; advertising, and technical standards), see T. McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *op. cit*. See also, *IRIS Special: Co-Regulation of the Media in Europe* (Strasbourg, the European Audiovisual Observatory, 2003).

vagueness that has characterised – and to an extent hampered – the debate on co-regulation so far should not be perceived uniquely in a negative light. It is precisely the same vagueness or intangibility that enables the notion to offer so much potential for milking.

The advantages of a committed co-regulatory system are numerous: greater representation and participation would result in the guiding documents commanding the confidence of all parties; the channelling of industry expertise into the regulatory drafting process would lead to greater sensitivity to the realities of the media world; an efficient system of sanctions, again elaborated multilaterally, would also enhance the credibility of the system (unlike State-devised equivalent structures which have traditionally tended to elicit resistance from industry players); procedural efficiency and expeditiousness; regulation would be more flexible, more easily and swiftly adapted to changing realities ushered in by technological and societal developments.

At the European level, there are increasing indications of enthusiasm in regulatory- and policy-making circles for the exploration of S&CR techniques specifically in relation to the media. As regards the European Union, the new Audiovisual Media Services (AVMS) Directive provides a good example of how the erstwhile cautious support for S&CR has quickly grown more confident.[190] The new Article 3.7 introduced by the AVMS Directive reads:

> Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

Of itself, Article 3.7 is of limited substantive relevance. The core obligation it places on Member States - merely to encourage co- and/or self-regulatory regimes […] – is tame. The nature of S&CR is not explained in the Article, nor are any of its key features alluded to. Recital 36 discusses S&CR at greater length, but its explanatory power is also limited. It points to the suitability of S&CR for advancing consumer protection and for the attainment of public interest objectives. The third of Recital 36's three paragraphs is the one dealing most explicitly with co-regulation. It reads:

> Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively.

In addition, both the Directive on electronic commerce (Article 16)[191] and the Data Protection Directive (Article 27)[192] have stressed the importance of codes of conduct; an approach which

[190] Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM (2002) 778 final, 6 January 2003.
[191] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p. 1.
[192] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, p. 31.

represents a tentative move away from traditional regulatory techniques and arguably in the direction of co-regulation.

As regards the Council of Europe, while a formal review of the European Convention on Transfrontier Television has yet to be announced, a 2003 report[193] concludes with a consideration of the architecture of future regulation, including S&CR as possible options. There has been a guarded willingness to countenance S&CR at successive European Ministerial Conferences on Mass Media Policy (eg. Prague, 1994; Thessaloniki, 1997; Cracow, 2000; Kyiv, 2005). The prospect has also been broached in the Committee of Ministers' Recommendation on self-regulation concerning cyber content;[194] the Standing Committee's Statement on human dignity and fundamental rights of others,[195] and perhaps most explicitly, the Council of Europe's Submission to the 2nd Preparatory Committee for the World Summit on the Information Society;[196] the Committee of Ministers' Declaration on freedom of communication on the Internet;[197] the Committee of Ministers' Recommendation on the right of reply in the new media environment;[198] the Committee of Ministers' Declaration on human rights and the rule of law in the Information Society;[199] the Committee of Ministers' Declaration on protecting the role of the media in democracy and in the context of media concentration;[200] the Committee of Ministers' Recommendation on promoting freedom of expression and information in the new information and communications environment.[201]

The level of politico-legal support for S&CR as sketched above seems to be growing independently of any accompanying attempts to define its scope. This has predictably fuelled the criticism that passing textual references to S&CR are no more than lip-service on the part of governmental and intergovernmental organisations in their purported quest to attain high-minded principles for the enhancement of participatory practices in their decision-making processes. It has also fuelled scepticism about the practical appeal of S&CR. While this criticism is persuasive and this scepticism is not without foundation, neither should lead to the routine dismissal of S&CR as regulatory alternatives, without first attempting to engage meaningfully with the substantive issues involved.

Finally, it should be reiterated that the underlying objectives of S&CR can be addressed effectively even without having been formulated in the idiom of S&CR as such. This point is demonstrated by the concern for inclusive, participatory governance of the Internet and its

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[193] Report by Dr Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, Standing Committee on Transfrontier Television of the Council of Europe, Doc. T-TT(2003)002, 24 April 2003.

[194] Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), 5 September 2001.

[195] Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the Council of Europe, 12-13 September 2002. For a fuller discussion of the relevant provisions of these texts, see Tarlach McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *op. cit*.

[196] Democracy, human rights and the rule of law in the Information Society, Contribution by the Council of Europe to the 2nd Preparatory Committee for the World Summit on the Information Society, Doc. WSIS/PC-2/CONTR/32-E of 9 December 2002.

[197] Adopted by the Committee of Ministers of the Council of Europe on 28 May 2003.

[198] Recommendation Rec(2004)16, adopted on 15 December 2004.

[199] CM(2005)56 final, 13 May 2005.

[200] Adopted on 31 January 2007.

[201] CM/Rec(2007)11, adopted on 26 September 2007.

inherent goal-setting, as articulated in the concluding documents of the World Summit on the Information Society:

> The Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.[202]

Remaining concerns

In the preceding section, a number of so-called regulatory alternatives have been canvassed. Another, more fundamental question, is obviously whether there should be regulation at all. Or more aptly, whether there should be additional regulation, for much time and effort have thankfully been spent debunking the all-too-frequently recurring misperception that the online world is unregulated. In regulatory matters, reflex should be replaced by reflection. It is only once the need for specific regulation has been convincingly established that its possible mechanics should be considered. There is a certain unease among critics of S&CR about the sharing (or partial transfer) of regulatory responsibilities that have traditionally been the preserve of the State. The fear that S&CR bodies would lack the authority, accountability and a host of other (procedural) safeguards necessary for ensuring the public service role they would be expected to fulfil is also very palpable.

In response to these concerns, it ought to be pointed out that co-regulation should not be perceived as a result-driven phenomenon. One of the most attractive features of co-regulation is that its structures are designed to optimise quality of governance and it attaches paramount importance to process values. Greater representation and participation in regulatory structures is one of the first of these process values that comes to mind; an inclusiveness of a greater selection of parties. In the same vein, responsiveness to the public and an ability to serve the stated interests and needs of diverse societal groups is another prerequisite. The process should remain transparent and easily accessible to the public. Structures should be in place ensuring user-friendliness as regards complaints and appeals mechanisms, with the possibility of ultimate recourse to an independent arbiter or the courts. Co-regulation offers a structural framework that is particularly conducive to guaranteeing these – and other – process values.

Operational autonomy for the co-regulatory body is also crucial, and adequate, independent financing is a *sine qua non* for the same if the body is to be insulated from powerful political and commercial interests. A co-regulatory system's accountability to the public could be safeguarded by structured evaluation processes (eg. governing the start-up phase which would include the drafting of codes, guidelines, etc., and equally once the system is up and running and the codes, etc., are being implemented). An earnest espousal of these principles – which could be set out in the enabling legislation that would set up the co-regulatory system – would go a long way towards meeting some of the ideals of good governance as set out in the European Commission's White Paper, such as the creation of "a reinforced culture of consultation and dialogue".[203]

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[202] "Building the Information Society: a global challenge in the new Millennium", *op. cit*. para. 48.
[203] *Op. cit*., p. 16.

An increasing openness to the potential of S&CR is now very much a feature of the regulatory *Zeitgeist*. For co-regulation to establish itself as a viable regulatory model, it will need to bridge the gap between theory and practice; a gap of considerable scepticism and resistance. In order to do so, its drivers will have to keep a resolute focus on the primary goal to be achieved: to ensure a more equitable type of regulation which would enhance opportunities for freedom of expression, not curtail them.

Finally, although already mentioned, *supra*, the potential of S&CR for ensuring the effective participation of persons belonging to minorities in regulatory structures and processes governing the media merits reiteration. Effective participation in S&CR mechanisms clearly ripples into the exercise of the right to freedom of expression by persons belonging to minorities. At a general level, Karol Jakubowicz has noted that "A major role can be played by problem definition: whoever defines the problem under discussion can then control the process – set the agenda, determine policy framing and formulation, develop solutions, etc."[204] This is true, *a fortiori*, in respect of problem and issue definition in the realm of media regulation, as was demonstrated in the discussion of the features of an appropriate enabling environment for freedom of expression, *supra*, s. 4.4. Effective participation in S&CR would therefore create equitable opportunities for representatives of persons belonging to minorities to contribute to the setting of parameters for policy formulation and thereby the terms of conceptual and substantive engagement with particular issues, especially those of greatest relevance for their own needs and interests.[205]

Conclusions

This chapter follows through on the rationales for the rights of persons belonging to minorities and examines their relevance in respect of freedom of expression. It sets out the minority-specific dimension to each of the main theories for freedom of expression. It thereby shows that is particularly important for minorities to be able to participate in public life/debate, contest dominant orthodoxies in society, and create, sustain and develop their identities. These particular interests in expressive rights are, of course, shared with non-minority groups, but their importance is appropriately accentuated in respect of minorities owing to their situational specificities (eg. prevalent societal discrimination against them could hinder their access to the media and other communicative fora) or the specificities of their identities (eg. linguistic divergence from other societal groups: specific features of cultural identity may restrict the range of communicative fora or media via which it can viably be transmitted). This discussion provides clear linkage between minority-specific aspects of theory and practice.

The right to freedom of expression clearly cannot be exercised in an effective manner in the absence of expressive opportunities and outlets, the *primus inter pares* of which is the media (which are capable of providing fora and content alike). However, the media is a term that is too general and too amalgamated to be analytically meaningful for present purposes. Different types of media correspond to varying degrees to the various but specific communicative needs and preferences of different groups in different situations. Inevitably, in different sets of circumstances, certain media will therefore be more effective than others. The notion of media functionality is of great analytical value in this connection. This Chapter examines the various

[204] Karol Jakubowicz, "Media Governance Structures in Europe", in Els de Bens, Ed., *Media Between Culture and Commerce* (Bristol & Chicago, Intellect Books, 2007), pp. 197-223, at 197.
[205] See further, in this connection, Chapter 8.3, *infra*.

dimensions to media functionality, first in the context of different types of media, and second, in relation to the specific communicative needs and interests of minorities. The double disaggregation involved in this theoretical approach opens up a level of detail and specificity that is largely absent from conventional interpretive and monitoring approaches to relevant international instruments. As such, its application in practice could greatly enhance interpretive and monitoring approaches and especially assessments of whether the right to freedom of expression of persons belonging to minorities is effective in concrete cases.

Despite the importance of media functionality as a factor influencing the ability of different types of media to render the exercise of the right to freedom of expression effective, other important – and prior – influences must also be considered. The media (in general) are best able carry out the democracy-oriented tasks ascribed to them in a favourable enabling environment. The existence of such an environment implies, at a minimum, respect for rule of law and human rights generally and for the right to freedom of expression and minority rights in particular. Key elements of an appropriate enabling environment include constitutional, legislative and other regulatory standards guaranteeing relevant freedoms, reinforced by official state policies concerning media regulation and minority rights and societal attitudes to both. The extent to which operative public values such as pluralistic tolerance are upheld is also of central importance.

The final focus of this Chapter is on the advent of new communications technologies. These new technologies entail a combination of novel qualitative and quantitative features which have led to new practices and patterns of communication in society, which in turn have given rise to new communicative needs and interests. The impact of these new technologies has affected all groups in society, but not necessarily in identical ways. The most pertinent technology-driven changes include media convergence, participatory models for generation of content, commodification of information, individualisation of choice, explosion of available information. As with the so-called "traditional" media (eg. print media, broadcasting), the suitability of particular technological opportunities for minority groups depends on considerations of media functionality and on their ability to afford and use the technology in question.

Another decisive change concerns a new direction in regulatory thinking, prompted by technological developments and an apparent willingness by States authorities to engage with industry and civil society actors. New co-regulatory approaches to media regulation offer considerable potential for the inclusion of minority perspectives in law- and policy-making exercises and that potential should be thoroughly explored with a view to its maximisation by all interested parties.

There are a number of upshots to the foregoing. The emergence of new technological possibilities and practices has occasioned the need for reappraisals of existing understandings of media functionality and regulatory policy. Chapter 5 makes the case for the extension of these reappraisals to be extended to interpretive and monitoring processes of international instruments containing provisions dealing with freedom of expression.