

The State and beyond: activating (non-)media voices

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I. Introduction

Genuine media pluralism rarely occurs naturally or spontaneously. Rather, it is a goal to be aspired to and worked towards. Its realisation requires effort; sometimes considerable effort and most often concerted and continuous effort. States have traditionally played a very influential role in the realisation of this goal at the national level. They can, as the title of this conference so eloquently puts it, “activate voices”, by developing legislation and mechanisms to prevent concentrations of media ownership and to facilitate access to the media. Paradoxically, States can also thwart the realisation of media pluralism by silencing voices, through discriminatory licensing regimes for broadcasting and disproportionate legislation governing content-restrictions, for example.

This article will explore some legal/human rights aspects of the evolving role of the State in activating not only *media* voices – the typical focus of media pluralism discussions – but a wider range of *non-media* voices that ought to be heard in public debate. The argument driving this exploration is twofold. First, the media are no longer what they used to be, and second, the media no longer dominate public debate as they used to. In keeping with the theme of this section of the book, the exploration will extend beyond the role of the State and examine the relevance of European human rights law for the evolving role of the State. Particular attention will be paid to the European Convention on Human Rights (hereafter, ‘ECHR’), as interpreted in the case-law of the European Court of Human Rights (hereafter, ‘the Court’). It is hoped that this cursory reflection on selected human rights issues will provide useful initial input into a broader, multi-stranded policy discussion on how the State can best activate a diverse range of voices in an increasingly digitized world. That policy discussion is still incipient, but increasingly urgent. So far, the human rights thread has not been as prominent as it should be.

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II. Role(s) of the State

The relationship between the State and freedom of expression is typically cast in negative terms. Article 10(1), ECHR, for instance, guarantees everyone the “freedom to hold opinions and to receive and impart information and ideas without interference by *public authority* and regardless of frontiers” (emphasis added). This clearly places States under a negative obligation not to interfere with individuals’ right to freedom of expression. The obligation is, however, not absolute, as Article 10(1) also stipulates that States shall not be prevented from “requiring the licensing of broadcasting, television or cinema enterprises”. Article 10(2) then states that since the exercise of the right to freedom of expression carries with it duties and responsibilities, restrictions on the right may be permissible as long as they are “prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others”, etc. Article 10(2) can therefore be said to reduce the scope of the individual right to freedom of expression and/or to provide states with a limited (but explicit) basis for interference with the right.

The conception of freedom of expression as “primarily a negative liberty” (Barendt, 2005: 105) – freedom from State interference - also features prominently in academic literature. This negative conception is characteristic of a liberalist perspective on freedom of expression and it is grounded in a deep-seated distrust of government. The greater society’s suspicion of governmental motives and actions, the greater the need society will feel to ensure that governments cannot interfere with free expression.

While typical, this conception of freedom of expression is nevertheless incomplete. Besides creating a general duty of non-interference for States, the right to freedom of expression also gives rise to *positive* obligations for States (see further: Mowbray, 2005: 78). The nature and extent of State obligations vary in accordance with the role being performed by the State in relation to freedom of expression. The State can and does assume different roles in this regard: it can “limit or suppress discussion”; “encourage better and more extensive communication”, or participate in public communication (Commission on Freedom of the Press, 1947: 136).

Under Article 1, ECHR, States are obliged to “secure” for everyone within their jurisdiction a range of human rights, including the right to freedom of expression. This obligation necessarily involves ensuring that the right – like all other rights guaranteed by the ECHR - is not “theoretical or illusory”, but “practical and effective” (ECtHRs, 1979, § 24). As the Court has stated: “Genuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]” (ECtHRs, 2000a, § 43). Positive me-

asures are, for instance, required in order for States to be able to fulfil their positive obligations to protect everyone's right to life; investigate fatalities, and prevent torture and ill-treatment (grouping borrowed from Leach, 2013: 8-11). States are also required to take positive measures to safeguard (media) pluralism and to create an enabling environment for freedom of expression.

In its *Informationsverein Lentia* judgment, the Court found, seminally, that the State is the ultimate guarantor of pluralism, especially in the audiovisual media sector (ECtHRs, 1993, § 38). The implications of this positive obligation have since been teased out, most notably in *Verein gegen Tierfabriken v. Switzerland* (ECtHRs, 2001, § 73) and in *Manole & Others v. Moldova* (ECtHRs, 2009c, §§ 98 and 107). In *Verein gegen Tierfabriken*, for instance, the Court held:

It is true that powerful financial groups can obtain competitive advantages in the areas of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely. (ECtHRs, 2001, § 73)

It is important to note in this connection the Court's express linking of freedom of expression, democratic society, pluralism and "especially" the audio-visual media, "whose programmes are often broadcast very widely". If the reason for singling out the audio-visual media is the wide reach of their programmes, then these arguments clearly apply *mutatis mutandis* to Internet-based media and communication. In this linkage, freedom of expression-democratic society-pluralism-media, the crucial connecting element is a diversity of active voices. There is a role for the State not only in activating individual voices, but in activating a sufficient number and range of voices for the composite whole to be genuinely diverse.

Notwithstanding the potential of the State's role as the ultimate guarantor of pluralism in democratic society, the positive obligations engendered by that role do not extend to guaranteeing individuals a so-called "freedom of forum" (ECtHRs, 2003, § 47) or access to a particular medium/service (ECtHRs, 1995, 2000b, 2001, 2002). The applicants in the *Appleby* case argued that the shopping centre to which they sought to gain access should be regarded as a "quasi-public" space because it was *de facto* a forum for communication. The Court held that:

[Article 10, ECHR], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). *Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.* ((emphasis added) ECtHRs, 2003, § 47)

Instead, the Court tends to place store by the existence of viable expressive alternatives to the particular one denied. In determining whether alternative expressive opportunities are actually viable in the circumstances of a given case, it is important to be mindful of the Court's *Khurshid Mustafa & Tarzibachi* judgment (ECtHRs, 2008b, § 45), in which it correctly rejected the assumption that different media are functionally equivalent. Different media have different purposes and are used differently by different individuals and groups in society: they are not necessarily interchangeable (for further analysis, see McGonagle, 2012: 118-124).

Perhaps the most far-reaching positive obligation in relation to freedom of expression to be identified by the Court to date concerns the enablement of freedom of expression in a very broad sense. In *Dink v. Turkey*, the Court stated that States are required to create a favourable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear (ECtHRs, 2010, § 137). This finding contains great potential for further development, including in respect of online communication, although the Court's earlier reluctance to recognise any positive obligation in the *Appleby* case is likely to continue to prove a limitation on that potential (for analysis, see: McGonagle, 2012; Mac Síthigh, 2013). The future development of the positive obligations doctrine will certainly be guided by the Court's gradual but growing appreciation of the specificities of the online communications environment, as well as the realisation that the State can play a variety of roles in relation to freedom of expression.

III. Changing roles of the media and the State

If there ever was a time when the media could accurately have been described as a unified, homogenous entity, it is long gone. Today, heterogeneity in the media is the order of the day. The unitary appearance and catch-all character of the term 'media' masks a more complex range of different media types, the most readily distinguishable of which include public service, commercial, community, local, transnational, etc. While broadbrush and summary, this typology suffices at least to indicate that different media types have different objectives, target audiences and levels of geographical reach.

Moreover, in recent years, due mainly to the advent and relentless growth of the internet, the media have been undergoing profound changes; they are generally becoming increasingly instantaneous, international and interactive (see generally, Jakubowicz, 2009). In tandem, ideas, information and content of all kinds are generally becoming more abundant, accessible and amplified to wider sections of society. As a result of these changes, the current content offering is more plentiful and varied than it has been at any point in history. These developments have prompted observations that internet content is "as diverse as human thought" (US District Courts, 1996, para. 74). There is now a greater range of media at our disposal than ever before, offering wider and more diversified functionalities/capabilities and greater differentiation in types of access, participation and output. As already noted in the introduction, the media are clearly no longer what they used to be.

These advances in information and communications technologies can clearly have far-reaching consequences for how information and ideas are disseminated and processed. The internet holds unprecedented potential for multi-directional communicative activity: unlike traditional media, it entails relatively low entry barriers. Whereas in the past it was necessary to negotiate one's way through the institutionalized media in order to get one's message to the masses, this is no longer the case. There is reduced dependence on traditional points of mediation and anyone can, in principle, set up a website or communicate via social media. Messages therefore can - and do - spread like wildfire across the globe. Often, all that is needed for a message to "go viral" is a combination of strategy and happenstance. While there are no guarantees that an individual's message will actually reach vast international audiences, the capacity to communicate on such a scale clearly does now exist for an ever-expanding section of the population. The proverbial camel now has to pass through a considerably enlarged needle-eye. In consequence - and again as already noted in the introduction - the media are no longer the dominant voice in public debate, as they used to be.

These developments have prompted the realisation that a broad range of actors can make viable contributions to public debate. In the past, because of their dominant posi-

tion in the communications sector, the media were effectively the gate-keepers or moderators of public debate. Technological advances have reduced the erstwhile influence/control of the media and made it possible for a greater range and diversity of actors to participate meaningfully in public debate (see generally: Jakubowicz, 2009). The Court's appreciation of the importance of individual contributions to public debate is clear from its judgment in *Steel & Morris v. the United Kingdom*, when it held that:

[I]n a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]. (ECtHRs, 2010, § 89)

This recognition by the Court of the important contribution that groups and individuals (and not only media) can make to public debate has, in effect, expanded the traditional parameters of media and information-related pluralism. Non-media actors have, in principle, been brought in from the periphery of the pluralism discussions. This is very significant, given the proliferation of non-media contributors to public debate in the online environment. It is also very significant because it has implications for the range of voices that the State is required to activate.

IV. The activation of non-media voices

That the media are no longer what they used to be is largely due to technology-driven changes *within* the media. That they are no longer the force that they were in the past is more readily attributable to *extraneous* technology-driven changes, in particular the emergence and continuing emergence of new media actors and non-media actors. Alan Rusbridger, editor-in-chief of *The Guardian*, captures the nature of ongoing shifts in public communication paradigms when he aptly refers to the “Splintering of the Fourth Estate” (Rusbridger, 2010). This splintering process is part of an ongoing, “deeper transformation [...] that challenges the ontology on which the mass communication paradigm was based” (Couldry, 2009: 438). The transformation involves the blurring of previously distinct boundaries between production and consumption of media; professionalism and amateurism and the huge variety in types of media, media services and media content.

In his comprehensive and influential study, *A new notion of media?*, Karol Jakubowicz distinguishes three new notions of media: (i) all media are new-media-to-be;⁴³ (ii) forms of media created by new actors, and (iii) media or media-like activities performed by non-media actors (Jakubowicz, 2009: 19 *et seq.*). Three topical examples of new media actors or non-media actors (depending on how they are defined) are: non-governmental organizations (NGOs), whistle-blowers and bloggers (Traimer, 2012). They contribute to public debate in different ways: by taking on the public watchdog function of the media and by creating forums in which public debate can take place.

The Court has in recent times repeatedly recognised that “when a non-governmental organisation is involved in matters of public interest [...] it is exercising a role as a public watchdog of similar importance to that of the press” (ECtHRs: 2013a, § 103; 2013b, §§ 20, 25), thereby entitling it to “similar Convention protection to that afforded to the press” (ECtHRs: 2009a, § 27; 2013b, § 20). The Court has also introduced the term “social” watchdog to denote civil society organizations carrying out this role (ECtHRs: 2009a, § 36). The Court’s recognition of the value of NGOs’ contribution to public debate (ECtHRs: 2004, 2009a, 2009b) and ability to play the role of public or social watchdog is not surprising. There are numerous similarities between NGOs and journalists or media, after all. NGOs, especially the better-resourced ones, invest in increasingly professional(ised) media and information strategies, often employing (former) journalists for that purpose. Human rights NGOs, in particular, often conduct, and publish the outcomes of, fact-finding missions in ways similar to investigative journalism (Fenton, 2010). And, of course, contemporary media strategies of both mainstream media and NGOs include a strong and active social media presence.

Whistle-blowers – individuals whom, acting in good faith and for reasons of principle and/or conscience, (illegally) disclose confidential information because of its overriding public-interest value – are quintessential public watchdogs. The importance of their contributions to public debate have been resoundingly demonstrated by the revelations of Edward Snowden over the past months. The so-called “Snowden effect” has forced online privacy onto international and national political agendas and triggered unprecedented levels of public debate on relevant issues. Whistle-blowing websites – most famously *WikiLeaks*, but including other initiatives, like *Publeaks* (<https://www.publeaks.nl/>), a recent collaborative initiative by several Dutch media organisations, facilitate the practice of secure, anonymous whistle-blowing. The importance of whistle-blowers’ contributions to public debate has already been recognised by the Court (ECtHRs 2008a and

43 Whereas the other two new notions of media are self-explanatory, this one may require additional explanation. As Jakubowicz himself writes: “With the digitisation of all media, they may all be transformed into convergent media distributed on broadband networks. Older media will not be substituted for and disappear, but may re-emerge in changed form, as another source of content available on broadband Internet and other broadband networks”: Jakubowicz, 2009: p. 19.

2011) and in other standard-setting work by the Council of Europe (CoE PA 2010a & b) and that recognition is likely to develop further in the future (see further, Austin, 2012, and more broadly, Benkler, 2011).

A burgeoning blogosphere is nowadays the source of myriad contributions to public debate. Of course, not all blogs have the ambition to contribute to public debate. Many blogs are personal in character and as such target personal networks and communities of interest. It is important, therefore, to avoid generalising about the nature, purpose and impact of blogs. Even within the range of blogs that do contribute to public debate, more specific typologies can be useful to further specify the nature of their contribution to news-making. For example, it can be useful to distinguish between media blogs, journalist blogs, audience blogs and citizen blogs (Domingo & Heinonen, 2008: 7 *et seq.*; for further insightful commentary, see Jakubowicz, 2009: 21 *et seq.*). The sub-category, “public watchblog”, has even been put forward to denote blogs that take on the public watchdog role (Oosterveld & Oostveen, 2013). Although the Court has not yet explicitly recognised the value of bloggers’ contributions to public debate (including those of micro-bloggers such as Twitter-users), such a step would be very much in keeping with the Court’s earlier finding in its *Steel & Morris* judgment (cited above).

V. Concluding remarks: the challenge of activating non-media voices

Having recognised the importance of non-media voices for pluralistic public debate, the challenge is now to activate those voices, including through regulatory and policy measures. The foregoing analysis suggests that States are under a positive obligation to (pro-) actively take measures designed to activate a broader range of voices.

In his keynote speech at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services in Reykjavik in May 2009, Karol Jakubowicz challenged the Council of Europe and its Member States to develop a modern and comprehensive policy for digital and legacy media (Jakubowicz 2011: 15-19; see also, Jakubowicz 2009). He urged policy-makers to look more closely at the proliferation of new types of media, how they operate and the context in which they operate, as well as their relationship to freedom of expression. This great challenge for the Council of Europe is by no means unique to the Council of Europe. It is shared by regulators and policy-makers at all levels, and also by academics. The challenge is to move on from the traditional “mass communication paradigm” built on the “one-to-many pattern” (Couldry, 2009: 437-438; see also in this connection: Van Cuilenburg & McQuail, 2003) and to embrace the networked reality of the new communications dispensation.

The Council of Europe attempted to pick up the gauntlet thrown down by Jakubowicz by adopting a new standard-setting text – a Recommendation by the organisation’s Committee of Ministers – on “a new notion of media” in 2011 (CoE CM, 2011). The Recommendation states, amongst other things, that “[a]ll actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards” (*ibid.*, para. 7). It continues by stating that the “response should be graduated and differentiated according to the part that media services play in content production and dissemination processes” (*ibid.*).

With its central focus on (new) media, the Committee of Ministers’ Recommendation does not champion the cause of non-media voices as strongly or as expressly as it could perhaps have done. More generally, while the Recommendation explores a wide array of issues, it does not trace the principles governing those issues from the Court’s relevant case-law in a meticulous, explicit and targeted fashion. The corollary of these critical observations is that the Court’s recognition of the importance of non-media and individual voices for pluralistic public debate has yet to be properly teased out in relevant Council of Europe policy-making circles and political texts.

This brief article has sought to show that the Court’s case-law has a broader relevance for (media) pluralism debates than is often appreciated (c.f. Komorek, 2009). It has also sought to card the human rights law thread of (media) pluralism, before it is properly spun into a truly multi-stranded discussion.

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