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**COMMITTEE OF EXPERTS ON ISSUES RELATING TO THE PROTECTION OF
NATIONAL MINORITIES
(DH-MIN)**

**COMMENTS ON THE REPORT ON
'ACCESS OF NATIONAL MINORITIES TO THE MEDIA:
NEW CHALLENGES'**

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Preface

These comments have been prepared at the request of the Council of Europe's Directorate General of Human Rights, and seek:

- to comment on the draft study ["Access of National Minorities to the Media: New Challenges", prepared by Prof. Tom Moring] while taking into account the latest developments in the area of access of national minorities to the media, in particular with regard to new advancements in the media sector;
- to refer to results of the monitoring bodies of the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages while providing the comments;
- to contribute to the identification of issues where some further reflection at an intergovernmental level would be needed and outline possible steps that the DH-MIN may want to take in further advancing European cooperation on the said issues.

The comments will first propose an important additional dimension to the conceptual framework for the identification and discussion of relevant priorities. The ensuing responses to Prof. Moring's draft study (hereinafter "the draft study") will be provided within the context of the expanded overarching framework.

At the very outset, the author would like to put on record his appreciation of the content and focuses of the draft study, and also welcome the comments provided by Dr. Karol Jakubowicz (which he has also had the benefit of consulting). However, in keeping with the contractual specifications set out above, these comments will focus primarily on the draft study (and therefore only occasionally refer to Dr. Jakubowicz's comments). These comments will also endeavour to avoid unnecessary overlap with the two aforementioned contributions.

Introduction

The analytical approach to the topic, “access of national minorities to the media: new challenges”, advocated here is both *integrated* and *integrative*. It is *integrated* in several senses. First, it insists that the point of analytical departure must be an integrated conception of all human rights. Second, it proposes that the analysis integrate expertise and experiences drawn from a number of discrete disciplines (in particular, human rights law, public policy, media sociology and technology studies). Third, it pleads for an integrated analysis of existing *and* emergent (and even prospective) challenges facing persons belonging to national minorities as they seek to effectively exercise their right to freedom of expression via the media.

The analysis is *integrative* in the sense that it ultimately envisages input from a diversity of interested parties.

Relevant human rights and their interplay

The conception of all human rights as being necessarily integrated is famously and forcefully articulated in Article 5 of the Vienna Declaration,¹ as follows:

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.

The interface between the right to freedom of expression and other rights of persons belonging to national minorities nicely illustrates the importance of an integrated conception of human rights. It is therefore apposite to recall a number of elementary observations about the right to freedom of expression² before exploring that interface further.

First, the right encompasses the right to hold opinions and to receive and impart information and ideas. Second, individual priorities and perspectives can differ, depending on whether an individual is imparting or receiving a message, or indeed, is merely a third-party to the expressive act (but is somehow affected by it). Third, the right to freedom of expression is simultaneously a constitutive right and an instrumentalist one (to the extent that it facilitates the realisation of other rights). Fourth, notwithstanding

¹ World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993).

² The most detailed provision in the FCNM concerning freedom of expression is Article 9, which reads:

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

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

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

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

Article 7 is also of relevance; it reads: “The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.” See also, Article 6, quoted *infra*.

the general interdependence of all human rights, the right to freedom of expression has a particularly high level of valency with certain, specific rights such as non-discrimination/equality, participation, religious and associative rights, cultural and linguistic rights. This is best explained by their contiguous nature and frequently overlapping purposes.

It is useful to dwell on the role of the rights to non-discrimination/equality and participation in strengthening the flanks of the right to freedom of expression. When deployed together with the right to freedom of expression, both of these rights can serve to strengthen the exercise of the right to freedom of expression for persons belonging to national minorities. In order for the rights to equality and participation 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 often involve engaging with impediments to the realisation of freedom of expression that somehow relate to association with a national minority and/or are deeply embedded in societal and institutional structures.

The broader context of the interplay of human rights is not limited to the actual rights themselves: it is also coloured or informed by values that define the optimal matrix in which human rights can be realised. Those values typically include democracy, the rule of law, pluralism and tolerance.

Pluralism and tolerance are among the most powerful animating principles of the Council of Europe – and especially the European Convention on Human Rights (ECHR), the FCNM and (to a lesser extent³), the ECRML. Time and again, the European Court of Human Rights has averred in its case-law on freedom of religion that [societal] pluralism has been hard-won over the ages and that it is indissociable from democratic life. In the same vein, the Court has consistently held in its case-law on freedom of expression that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. Pluralism entails diversity and divergence, which in turn can often involve a certain amount of contention and even antagonism.⁴ This is all part of the democratic experiment;⁵ the cut and thrust of debate that is free, robust and uninhibited.⁶ Thus, as famously stated in the *Handyside* case, information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broadmindedness” that underpin “democratic society”.⁷ In principle, this vigorous conception of freedom of expression applies to all matters of general public interest, including religious beliefs and affairs.

But the concepts of pluralism and tolerance, as developed by the European Court of Human Rights, are clearly intertwined. Together, they imply a certain degree of reciprocal respect between the different constituent groups of any democratic society. The existence of dialogical opportunities and structures are necessary preconditions for the attainment of societal tolerance. The media are of vital importance for such inter-group communicative processes, and by extension for the advancement of pluralistic tolerance.

³ See, for example, Article 7(3), ECRML.

⁴ See, among other jurisprudential authorities: *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 19 April 1993, para. 33.

⁵ Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

⁶ Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷ *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

This point will prove recurrent throughout these comments, but it is important to acknowledge at this juncture how it has been articulated in Article 6, FCNM:

1 The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

2 The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Under the monitoring processes for the FCNM, the Advisory Committee's approach to the promotion of tolerance, intercultural dialogue, respect and understanding is comprehensive and considered. It pivots mainly on Article 6, FCNM. It recognises: (i) the complexity of attitudinal and behavioural patterns in society, and (ii) that attitudes and behaviour are shaped by a multitude of contextual factors.⁸

A rights-based approach to relevant public policy objectives

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 ample and adequate expressive opportunities for everyone. In contemporary times, that translates as the existence of free, independent and pluralistic media which operate in a non-discriminatory and inclusive manner. The European Court of Human Rights has described the "role of the press in a State governed by the rule of law" as "pre-eminent".⁹ This is because of the media's "vital role of public watchdog".¹⁰

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".¹¹ In light of this function of the corrective or supervisory role of the media, 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. 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".¹² 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

⁸ See further, Tarlach McGonagle, "The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities", in Peter Molnar, Ed., *Hate Speech and its Remedies* (provisional title) (forthcoming, 2006).

⁹ *Thorgeir Thorgeirson v. Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, no. 239, para. 63.

¹⁰ *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.

¹¹ *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.

¹² *Bladet Tromsø & 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.

provocation”.¹³ However, alongside the enjoyment of journalistic freedom – as defined by the Court - are concomitant duties and responsibilities.¹⁴

These considerations have important corollaries for policy-making in general and international standard-setting in particular. Of particular relevance is the following consideration, which guided the Council of Europe’s Committee of Ministers in its decision to adopt separate Recommendations to deal with the logically complementary goals of countering hate speech¹⁵ on the one hand, and using the media to promote a culture of tolerance¹⁶ on the other hand:

As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.¹⁷

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 collective imaginary and resources for the collective agency. This is the context in which minorities and their media need to be understood [...]¹⁸

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

¹³ *Prager & Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 26 April 1995, Series A, No. 313, para. 38.

¹⁴ See Article 10(2) of the European Convention on Human Rights.

¹⁵ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech” (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies).

¹⁶ Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies).

¹⁷ Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

¹⁸ 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).

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.

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-related pluralism: content, source and outlet.¹⁹ 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). Persons belonging to national 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 effective participation in public life. 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. The interest of persons belonging to national 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.

The European Court of Human Rights has underscored the importance of safeguarding adequate and effective expressive opportunities in the face of dominant political, commercial and media forces. For example, it has held that:

in 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 [...]²⁰

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.²¹

Considerations from media sociology

This section seeks to introduce some sociologically-informed observations into the analysis.

As is pointed out in the draft study, the term “media” is used as a generic concept in both the FCNM and the ECRML. The monitoring processes of both treaties very often also use the term in an undifferentiated manner. This approach offers useful flexibility, without precluding the possibility of employing greater

¹⁹ 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.

²⁰ *Steel & Morris v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 15 February 2005, para. 89.

²¹ 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.

semantic specification in particular circumstances. In other words, particular media can be ear-marked for special treatment whenever that is deemed necessary by the monitoring bodies. This point is of particular relevance for dealing with the qualitative differences entailed by some technological features pertaining to modern media (see further, *infra*).

Be that as it may, as “media” is a generic or amalgamated concept, media practice and performance can only meaningfully be evaluated after the concept has been disaggregated and its constituent parts essentialised. The effectiveness of particular media can only be assessed in terms of their specific objectives and characteristics, for example, between mainstream media and minority media. These terms are admittedly roughly-hewn and are probably more suited as short-hand phrases than as tools for clinical definition²² (some of the differences that distinguish different types of newest modern media boast superior refinement²³). 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 features²⁴ 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?²⁵

Mainstream media

- Public sphere – more opinions lead 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

²² For instance, for analytical purposes, it could be more meaningful to probe the distinctions between public, commercial and community media (especially broadcasting).

²³ For specific examples, see the draft study and Dr. Jakubowicz’s comments.

²⁴ Not all of these features necessarily apply in all cases – the purpose of the lists is to be illustrative rather than prescriptive or exhaustive.

²⁵ Roger Silverstone & Myria Georgiou, “Editorial Introduction: Media and Minorities in Multicultural Europe”, *op. cit.*, at 436-437.

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 interaction between different groups in society. This involves accommodating as wide a spectrum of minority views and interests as possible, on equitable terms, within mainstream 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.²⁶

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

A main motivation for the establishment and maintenance of minority media is often 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”.²⁷ 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 communication.

The foregoing discussion shores up the very insightful analysis provided in the draft study of notions such as the institutional and functional completeness of the media landscape. The need for functional completeness on top of institutional completeness is consistent with a disaggregated conceptualisation of the media. Varying preferences for media use (in terms of production and consumption) between and, crucially, *within* minorities²⁸ further underscore the importance of guarantees of media pluralism at all levels. In the context of the functional completeness of the media landscape, pluralism of outlet (corresponding to the term “supply” in the draft study) stretches towards pluralism (or diversity) of content, at least to the extent that both include concerns for pluralism of programme genres. The draft study’s exposition of analytical concepts such as needs and preferences, *normalitizacio*, and in particular, the application of the strict preference condition, is again very lucid and helpful. The essential evaluative

²⁶ See, for example, Milica Pestic, “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.

²⁷ Niamh Hourigan, *Escaping the Global Village: Media, Language & Protest* (USA, Lexington Books, 2003), p. 143.

²⁸ The draft study correctly rejects sweeping essentialist assumptions and emphasises instead the possibility – if not likelihood – of internal differentiations within discrete minorities.

criterion here is whether the media offer actually corresponds to effective opportunities for minorities to communicate (i.e., send and receive) information and ideas and in some circumstances whether the offer entails meaningful choice for minorities as regards the same.

A related consideration that is tackled by the draft study concerns distinctions in media usage that are broadly reflective of constitutive differences between “autochthonous” and “migrant” minorities.²⁹ In practice, the distinctions manifest themselves in terms of needs and preferences in media use. Questions surrounding heavy reliance by migrant minorities on transfrontier media and the extent to which such reliance can and does stimulate the growth of isolated *sphericules* in the country of residence of those migrants are very pressing for policy-makers. Those questions lead to the heart of debates concerning societal integration as they implicate relationships between “the new host society, the migrant society residing in the host society and the society of origin”.³⁰ The draft study usefully raises those questions, even if, *prima facie*, immigrant populations and their languages might appear to fall outside the personal scope of the FCNM and ECRML respectively. However, this presumption about the non-applicability of the two treaties fails to stand up to closer scrutiny.

The draft study calls for “a broader view on diversity and investments to support media projects of the migrant populations rather than to prevent transborder or diasporic media from reaching them”. It suggests framing the issue in terms of “participation within a local and national public sphere”. The point is well taken, but it would acquire an extra string to its bow if it were also to be advanced in terms of Article 6, FCNM. The encouragement and development of media initiatives for migrant minorities that would lead to engagement with other societal elements in their new countries of residence would – due to a number of the roles played by the media, such as providing information, fora for discussion, opportunities for advancing cultural identities, promoting intercultural dialogue and understanding, etc. (see further, *supra*) – fall squarely within the aims of Article 6, FCNM. For the sake of convenience, Article 6(1) is cited here:

The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

The Advisory Committee has repeatedly insisted that Article 6 “has a wide personal scope of application, covering also asylum seekers, migrants and other persons belonging to groups that have not traditionally inhabited the country concerned”.³¹ While the language varies from Opinion to Opinion (eg. sometimes reference is made instead to “immigrants and refugees”³² coming within its scope), the essential point remains the same: the objectives set out in Article 6 are to be striven for also in respect of new or non-traditional minorities, or in other words, “all persons living on the territory”³³ of a Contracting State.³⁴ In this sense, the personal scope of Article 6 is more far-reaching than that of most other provisions of the FCNM.³⁵

²⁹ Despite some reservations about the term “migrant” because of its connotations of transience, these comments follow the appellation used in the draft study in the interests of overall consistency.

³⁰ Draft study, p. [16], referring to Kevin Robins, *The challenge of transcultural diversities: cultural policy and cultural diversity* (Council of Europe, 2006).

³¹ Advisory Committee Opinion on Ireland (First Monitoring Cycle), adopted on 22 May 2003, para. 61.

³² Advisory Committee Opinion on Spain (First Monitoring Cycle), adopted on 27 November 2003, para. 49.

³³ Advisory Committee Second opinion on the Czech Republic, adopted on 24 February 2005, para. 87.

³⁴ Another slight variant on the formulation crops up in the context of the AC’s Second opinion on Italy, adopted on 24 February 2005, where the scope of Article 6 is stated as applying to all persons living on the [national] territory, including “asylum-seekers, refugees and persons belonging to other groups that have not traditionally inhabited the country concerned”: para. 77. The usefulness of this particular wording lies in its neatly suggested coverage for immigrants and migrants alike.

³⁵ See also, in this connection, Article 4, FCNM.

To round off this point, then, greater efforts to enable media initiatives for migrant minorities could be grounded in Article 15, FCNM,³⁶ or Article 6, FCNM, or both. Moreover, the draft study has also stated the potential relevance of transfrontier considerations set out in Articles 17 and 18, FCNM, to this question. As such, the monitoring processes of the FCNM could prove a useful context for the exploration of this underexplored, but highly topical and pressing, social question.

Access to the media

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 a range of cultural and linguistic objectives. Flowing from these 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.³⁷ Effective access to the media therefore facilitates counter-majoritarian posturing by minority groups, as well as the correction of biases in dominant cultural and political discourse.

Before providing a brief overview of regulatory and other factors that influence minorities' access to media (traditional and new), the relevance of contextual factors that indirectly impinge on access deserves mention. These factors stretch from the legal/regulatory through the political, the social and the cultural, to the economic. As such, many of them have already been introduced in the conceptual framework, *supra*.

The so-called "enabling environment" for media development is of primary importance; this refers to the wider political, economic and social conditions in which media law and policy operate. 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. Indeed, 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".³⁸ The openness, transparency and inclusiveness/representativeness of legislative processes (especially where the legislation affects the interests of minorities) and regulatory paradigms for broadcasting are crucial. The internal dynamics of discrete minority groups and their level of integration into mainstream society are obviously important variables. The prevalence of transfrontier relations involving minorities is similarly of great contextual importance. The linguistic topography of a State is also a significant determinant of minorities' freedom of expression and other rights. Market conditions inevitably affect the sustainability of minority-oriented media ventures.

Karol Jakubowicz has usefully distinguished "a number of levels and forms of access and participation: at the level of (i) programming, (ii) work-force, (iii) editorial control and management, (v) ownership of media, (vi) regulation and oversight of the media, (vii) legislation, etc."³⁹ It should also be noted in passing that access is sometimes understood in a more passive sense, i.e., as the (physical, technological or financial) ability to receive broadcasting services.⁴⁰ While this is very important for minorities' ability to

³⁶ Article 15 reads: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."

³⁷ 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.*

³⁸ 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.

³⁹ Karol Jakubowicz, "Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)", in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 113-138, at 116.

⁴⁰ *Ibid.*, pp. 129-130.

receive information and ideas, scrutiny here will lean slightly towards access in a more “active” sense of the term.

A number of (regulatory) measures are capable of exerting direct influence on minorities’ access to the media (especially broadcasting), and *ipso facto* on the effectiveness of their right to receive and impart information and ideas. A selection would include:

- Licensing of broadcasters and frequency allocation
- Participation in policy- and decision-making processes
- Public service broadcasting: specific remit
- Language prescriptions and translation requirements
- Temporal and structural criteria
- Existence or absence of promotional and other support mechanisms

New challenges

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

A further, important aspect of burgeoning technologies concerns the requisite knowledge and skills to use them. This concern is often explored under the headings of media or Internet literacy.⁴¹ One definition of media literacy is “the ability to access, understand and create communications in a variety of contexts”.⁴² Again, there is good reason to fear that many members of minority groups will lack familiarity and know-how when it comes to the latest communications technologies. However, this need not always be the case: a recent OFCOM study revealed, *inter alia*, that “Overall in terms of usage and general competence, minority ethnic groups have somewhat higher levels of media literacy compared to the UK as a whole across the digital platforms”.⁴³

More substantively, though, technological advances are ushering in some truly transformative changes to the media sector: increased reliance on “pull” (as opposed to “push”) technologies and the concomitant increase in audience choice; proliferation of opportunities to engage in unmediated mass communication; virtual elimination of traditional constraints on communication of temporal and spatial factors, etc. The growth of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas. These individualising trends in new forms of broadcasting also engender social

⁴¹ See, for example, the Council of Europe’s Internet Literacy Handbook (2004).

⁴² This is the definition elaborated by the UK’s converged regulatory authority, OFCOM, after formal consultation with stakeholders.

⁴³ OFCOM, “Media Literacy Audit: Report on media literacy amongst adults from minority ethnic groups”, 3 April 2006, p. 5.

fragmentation, by eroding the potential for shared experience through broadcasting. As Cass R. Sunstein has argued: “[W]ithout shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems.”⁴⁴

Both the draft study and Dr Jakubowicz’s comments provide valuable overviews of the nature of many of the technological advances that are prompting reconfigurations of relevant paradigms in broadcasting regulation and practice. As such, they provide a very useful basis for further analysis of the precise implications of such changes for minorities’ access to the media. Such further analysis would certainly be timely. Although originally uttered a few years ago (already), Beth Simone Noveck’s remark, “Though the future is digital, our thinking about regulation is analogue”,⁴⁵ retains a large degree of validity today, especially in the applied sphere of minority broadcasting regulation and practice.

As already intimated *supra*, these comments advocate an integrated approach to further analysis. In other words, further analysis should include existing and new media instead of ring-fencing new media for special consideration. The reason is that the advent of new types of media has – as is clearly demonstrated in the draft study and is also borne out in Dr Jakubowicz’s comments – so far supplemented existing media (and not replaced them, as such). Therefore, notwithstanding significant new technological opportunities, many of the familiar characteristics of existing media and regulatory and other factors influencing media activities, continue to be *de rigueur*. Moreover, the overarching framework of human rights and fundamental values remains unaltered.

However, this should not in any way downplay the importance of technology-driven changes. Such changes merit careful examination in their own right, but also in terms of the adaptive strategies which they often engender in the more traditional media (again, examples of such strategies are usefully provided in the draft study). Thus, the continued relevance of many regulatory and other factors to minorities’ access to the media may themselves undergo qualitative changes and acquire new focuses of application. Participatory concerns, for example, are likely to shift to the elaboration of digital switch-over strategies, and concerns for visibility of media services are likely to shift to electronic programme guides (EPGs).

Regulatory and policy-making exercises must engage critically with all of these changes and their (likely) wide-ranging implications. The non-exhaustive lists of relevant issues provided earlier in this section could usefully feed into a more comprehensive study or assessment exercise identifying key issues and examining them in terms of their implications for the protection and promotion of the rights of persons belonging to (national) minorities and for policy-making generally. The purpose of these comments is, however, merely one of scene-setting; hence, the lists of relevant topics are merely selective/illustrative.

⁴⁴ Cass R. Sunstein, *Republic.com* (USA, Princeton University Press, 2001), p. 9. See further: Tarlach McGonagle, “Changing Aspects of Broadcasting: New Territory and New Challenges”, *IRIS plus*, Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*, 2001-10.

⁴⁵ Beth Simone Noveck, “Thinking Analogue About Digital Television? Bringing European Content Regulation Into The Information Age”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 37-63 at 38.

Conclusion

The first-ever United Nations General Assembly Resolution referred to the right to freedom of information as the “touchstone” of all human rights.⁴⁶ This recognition of the centrality of the right to freedom of expression in the canon of human rights is borne out by the approaches of the Advisory Committee on the FCNM and the Committee of Experts on the ECRML. Both approaches consistently emphasise the synergies generated by interplay between the right to freedom of expression on the one hand and participatory, non-discrimination/equality, associative, cultural and linguistic rights, on the other. Both approaches also duly recognise the importance of upholding broad principles of media freedom and pluralism in order to facilitate the full realisation of the aforementioned rights for persons belonging to national minorities. The main argument developed in these comments is that such integrated approaches should continue to be applied by the respective monitoring bodies to new media technologies, while at the same time taking due account of the specificities of those technologies, which often have far-reaching implications and require significant shifts in regulatory and policy-making strategies.

In light of the specified parameters of these comments and the terms of reference of DH-MIN, a number of suggestions for future action will now respectfully be proposed. These suggestions necessarily flow from the main points raised in the foregoing discussion. In short, what is required here is the stimulation of further reflection on relevant topics. Such reflection should necessarily be integrated and would accordingly benefit from:

- Mapping and synthesising relevant Council of Europe and other international standards
- Undertaking a detailed study of regulatory and other measures adopted in Council of Europe Member States – at national and sub-national levels – affecting access to the media for persons belonging to national minorities *in light of new challenges* (as per the draft study)/*in the Information Society context* (as per Dr Jakubowicz’s comments).

It is clear that there are a number of ways in which the DH-MIN could potentially make a positive contribution to the further reflection demanded by this priority transversal theme. This is where the process also becomes *integrative* (as announced at the beginning of these comments). Given that the reflection envisaged would be based on considerable information-gathering exercises, the DH-MIN – by virtue of its direct representation of States authorities – would constitute an ideal forum for identifying issues of particular concern to States. The DH-MIN could perhaps also consider commissioning recognised experts/research centres to undertake the studies in question. In any event, on presentation of the information collected, it would be very useful to engage representatives of national minorities and relevant NGOs and IGOs in a discussion on the contents and findings of the research. At that stage, it may be useful to produce a document – based on the research and subsequent exchanges with interested parties – outlining relevant best practices and recommended orientations for relevant “pro-minority” approaches at State level.

A somewhat similar process to the one outlined led to the elaboration of the Guidelines on the use of Minority Languages in the Broadcast Media (2003).⁴⁷ Relevant international standards were mapped; a detailed study of State practice in the 55 OSCE Participating States was undertaken,⁴⁸ and both studies

⁴⁶ United Nations General Assembly Resolution 59(1), 14 December 1946.

⁴⁷ Available at: http://www.osce.org/documents/hcnm/2003/10/2242_en.pdf

⁴⁸ Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-Language Related Broadcasting and Legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities, carried out by the Programme in Comparative Media Law and Policy (PCMLP), Oxford University and the Institute for Information Law (IViR) of the University of Amsterdam, April 2003 (published: September 2003), available at: <http://www.ivir.nl/staff/mcgonagle.html>.

then fed into the elaboration of the actual Guidelines by a group of experts who had been convened at the request of the OSCE High Commissioner on National Minorities.

The proposed research activities would provide comprehensive information on relevant international standards as well as valuable comparative overviews of existing and emergent patterns at the national level. Their general availability to all interested parties and their usefulness for the distillation of relevant best practices would considerably help to advance understanding of, and reflection on, new challenges concerning access to the media for persons belonging to national minorities. The engagement of relevant interested parties would help to refine the findings of the research and tailor them to the needs and interests of minorities. The exercise, as a whole, would be doubly salutary: for generally enhancing understanding of cutting-edge technologies (and their social implications), and for applying that understanding to the context of minority rights, where specific needs and interests necessarily prevail. DH-MIN could subsequently brief all Council of Europe Member States and other relevant IGOs on progress recorded. In the aggregate, then, the outlined suggestions would certainly further enhance European cooperation on this theme, in full accordance with Article 4(iii) of the DH-MIN's terms of reference.

Before concluding, one important caveat should be entered concerning the uses to which the above-mentioned document outlining relevant best practices and recommended orientations for relevant "pro-minority" approaches at State level should be put. While such a document would certainly be of interest and use to the monitoring bodies of the FCNM and the ECRML, there are a number of very good reasons why it should only serve as an additional and non-binding resource for the monitoring bodies. First, both treaties pursue different objectives which would likely broadly coincide with the content of the document, but not necessarily in all respects. Treaties have to follow their own ideological curves, and their monitoring bodies, being organic creations of the treaties, must similarly follow their own consolidation curves in their monitoring and (*de facto*) interpretive functions. Documents extraneous to the treaties should not be prescriptive, lest the autonomy and self-direction of the treaties be compromised or be seen to be compromised.

It is respectfully submitted that the suggested approach for the DH-MIN could play an important role in meeting the pressing challenges ahead:

- promotion of standards at international level;
- consolidation of standards at national level;
- continuation of bench-marking and comparative assessment at both levels.