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COMMENTARY: ACCESS OF PERSONS BELONGING TO NATIONAL MINORITIES TO THE MEDIA *

INTRODUCTION

This conference, *Filling the frame*, has a very definite purpose, namely to scrutinise the successes and failures of the monitoring of the Framework Convention for the Protection of National Minorities (FCNM) throughout its short history. This workshop also has a very definite focus: the many aspects of the theme, ‘Persons belonging to national minorities and the media’. However, before zoning in on the sub-theme of access to the media and on how it has been dealt with in the monitoring process, consideration will be given to the broader context in which this topic is situated.

I. ISSUES: THEORIES AND PRACTICE

Article 10, ECHR

The context in question is that of a particularly strong conception of democracy; one in which the principles of pluralism, tolerance and broadmindedness reign supreme.¹ It correctly perceives the right to freedom of expression, information and opinion as empowering and facilitative. Conceptually, it styles freedom of expression as the “touchstone” of all other human rights;² a constitutive right which is instrumental in securing the realisation of other rights. This is a conception of democracy in which Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a dominant role:

Article 10 - Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the

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¹ *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

² United Nations General Assembly Resolution 59(1), 14 December 1946.

prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Of course, by Article 10, I mean not only the letters set in stone, but the vast and vigorous case-law that has been developed by the European Court of Human Rights on freedom of expression and information. This has been described as “one of the great glories of the European Court”.³ Whether one agrees fully with this description or not, there can be no denying that it does contain a substantial truth. Many important battles in the war of principles have been won, such as: the public’s interest in receiving information via responsible investigative media; in robust political debate, and in the free exchange of information or ideas “that offend, shock or disturb the State or any sector of the population”.⁴ It is likely that the next battles to be fought will be somewhat localised. This is not so much a reference to geographical localisation (although it remains a truism that more work on freedom of expression has to be done in some countries than in others); rather it refers to a kind of thematic localisation. Building on some of the advances already registered in the Article 10 case-law, issues such as technology, access and language are likely to feature more prominently on the Court’s agenda in the future. Just as they are likely to feature increasingly in the context of minority rights and therefore on the agenda of the Advisory Committee as well.

Article 9, FCNM

The linkage between Article 10, ECHR and Article 9, FCNM, is very explicit. The latter was cast in the mould of the former, and the resultant textual similarities are acknowledged in the Explanatory Report to the Framework Convention.⁵

Article 9

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.

³ Gerard Hogan, “The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland”, 4 *The Bar Review* pp. 205-211 (No. 4, 1999), at p. 206.

⁴ *Handyside, op. cit.*

⁵ See the Explanatory Report to the Framework Convention for the Protection of National Minorities, in particular, paras. 56 & 58.

However, Article 9 is not simply a carbon copy of the European prototype for freedom of expression. In some respects, it builds on the original model and introduces greater specificity as regards dimensions to the right to freedom of expression that could be of particular importance for persons belonging to national minorities.⁶ Article 9(4) foregrounds, in an explicit manner, issues that are clearly of relevance to freedom of expression and to national minorities, but which have hitherto been subsumed in more general aspects of the Article 10 jurisprudence of the European Court.⁷ The goals of striving towards tolerance and cultural pluralism – outcrops of the Article 10 jurisprudence of the European Court – are clearly remindful of Article 6, FCNM.⁸

Issues of language and access are clearly recurrent in the text of Article 9, FCNM; perhaps even preoccupational. A number of factors tend to influence minorities' access to the media, particularly in their own languages,⁹ including:¹⁰

- Linguistic topography
- Official recognition of minorities/languages
- Market sustainability
- Licensing of broadcasters (*)
- Regulation of broadcasting output (*)
- Transfrontier dimension
- Temporal and qualitative criteria (*)
- Facilitative measures

In practice, these factors tend to ebb and flow into one another through tentatively-drawn definitional demarcations, and thereby defy neat categorisation. Nevertheless, it is useful to examine the influence they can wield over access to the various stages of the printing/broadcasting process. As discussed in greater detail *infra*, the Advisory Committee on the FCNM has been alert to the importance of these factors in its Opinions.

Linguistic topography

⁶ See, for example, *ibid.*, paras. 56 & 59.

⁷ See, in particular, *ibid.*, para. 62.

⁸ Article 6, FCNM reads:

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.

⁹ For a more detailed analysis, see: 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 (Programme in Comparative Media Law and Policy (PCMLP), University of Oxford & the Institute for Information Law (IViR), University of Amsterdam, 2003), especially the section entitled 'Overview', pp. 1-31. The Overview points out which factors are of relevance in which countries. This study is available online at: <http://www.ivir.nl/index-english.html>.

¹⁰ Some of the factors listed here apply exclusively or almost exclusively to the broadcast media – they are denoted by asterisks. The discussion of the enumerated factors is consciously weighted in favour of the broadcast - as opposed to print - media as the former tend to have to operate in an environment that is comparatively more complicated in terms of regulatory permutations and combinations and technological considerations.

The linguistic topography of a State is as it is. It has inevitably been shaped by myriad historical, geographical, demographic, political, economic, sociological, cultural, religious and other influences. So, it is easiest simply to concede that “it is what it is” and deal with the reality at hand. More often than not, States are multilingual rather than monolingual, but this term, “multilingualism”, is - of course - capable of having endless shades of meaning. It is how a State chooses to deal with its linguistic make-up that is crucial.

Official recognition of minorities/languages

The recognition of some minorities/languages, but not of others, either by constitutional or legislative means, or even as a general principle of public policy, can have very practical and concrete consequences - for the distribution of the allocative resources of the State, for instance. To what extent should issues such as the numerical strength,¹¹ the geographical concentration, the internal organisational structures or the lobbying initiatives of minorities or linguistic minorities influence the distribution of a State’s available financial resources? Express recognition does not necessarily have to be more effective than tacit, assumed or *de facto* recognition. Nor does recognition (of any kind) offer any guarantee of preferable or even adequate measures to further the use of minority languages in broadcasting. Conversely, though, non-recognition does not - of itself - preclude the adoption of effective measures in this regard. The Advisory Committee has homed in on the need for equality in the distribution of available resources, as exemplified by the following pronouncement:

“The Advisory Committee is concerned, however, at the uneven distribution of resources, concerning both television and radio programmes, among the various minorities. It considers the present situation problematic, since one of the main minorities, the Roma community, seems to have far less airtime than the others, particularly for programmes in its own language. Some programmes for Roma also appear to have been dropped. It is therefore important that the authorities look into this matter, and try to revise the balance - but without cutting airtime for other minorities.”¹²

Market sustainability

This topic requires little elaboration. 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”¹³) 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 (see further, ‘Facilitative measures’, *infra*), all

¹¹ This is one key aspect of a broader question which has been referred to as “Problems of Numbers”: see John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell & Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Hague, M. Nijhoff Publishers, 1999), pp. 223-273, at p.260.

¹² Advisory Committee Opinion on Romania, adopted on 6 April 2001, para. 46.

¹³ 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.

with a view to adequately catering for the needs and interests of persons belonging to national minorities. As noted by the Advisory Committee:

‘[...] In so far as the national minorities encounter difficulties in financing their publications, the Advisory Committee urges the authorities to increase the relevant State support and to pay particular attention to the numerically smaller minorities, who do not have sufficient resources to sustain their publications.’¹⁴

Licensing of broadcasters

Licensing is a regulatory tool and sometimes a licensing/regulatory authority can be expressly ascribed the task of upholding of freedom of expression, diversity, pluralism, the public interest and other key values in broadcasting. The principles of licensing may have to reflect these preoccupations, or even to stimulate programming for minorities. Such goals can be pursued by adopting and implementing distinct licensing policies for different types of broadcasting.

Responsiveness to the needs and interests of the target community is a standard feature of the licensing regime in many States. An ability to add to existing diversity in the broadcasting sphere can be a criterion affecting the licensing process. The likely benefits for the development of cultures of ethnic and other minorities can also be considered.

Insofar as it is employed as a licensing criterion, preference for the use of a particular language can be an advance specification for a public tender. Otherwise, linguistic commitments can be agreed upon and formalised in an individualised manner, and later becoming binding, for example, by their incorporation into a broadcaster’s *cahier des charges*.

It should also be noted that the promotion of the official/State language is often encountered as one of the stated goals of the licensing process. Again, the Advisory Committee has shown keen awareness of the interplay between such a goal and other relevant issues:

‘[...] While recognising that the Russian Federation can legitimately demand broadcasting licensing of broadcasting enterprises and that the need to promote the state language can be one of the factors to be taken into account in that context, the said article appears to be overly restrictive as it implies an overall exclusion of the use of the languages of national minorities in federal radio and TV broadcasting. The Advisory Committee considers that such an *a priori* exclusion is not compatible with Article 9 of the Framework Convention, bearing in mind, *inter alia*, the size of the population concerned and the fact that a large number of persons belonging to national minorities are dispersed and reside within several subjects of the federation.’¹⁵

A quick addendum to this consideration of licensing would do well to focus on the *prima facie* neutrality of the licensing system. Groups using less prevalent/dominant languages typically lack the financial and technological resources which would allow them to meet the – seemingly neutral and egalitarian – licensing specifications. Always of relevance, this rift between theoretical equality and effective equality is more acute in some States than in others.

Regulation of broadcasting output

¹⁴ Advisory Committee Opinion on Lithuania, 21 February 2003, para. 52.

¹⁵ Advisory Committee Opinion on the Russian Federation, 13 September 2002, para. 76.

(i) Broadcasting in general

Promotion of official/State language(s)

A recurrent feature of language regulation in broadcasting is the goal of promoting the official/State language. The legitimacy of such a goal (often to promote national identity, social cohesion, etc.) is unlikely to be challenged (*inter alia* because it is widely considered to fall under the margin of appreciation doctrine), as long as it is tempered, proportionate and non-discriminatory in its design or effects. However, sometimes the goal of promoting a particular language is pursued with such zeal that the relevant provisions insist upon the mandatory use of the official/State language, or its high-mandatory use. Such zealous approaches are a cause of grave concern.

In most of the States where provision is made for the mandatory use/promotion of the official/State language, limited exceptions are countenanced by relevant legislation, thus significantly mitigating the effect such provisions would otherwise have. Commonly, such exceptions include: programmes intended for minorities; educational or foreign-language programmes; musical programmes; live broadcasts from abroad, and translation requirements.¹⁶

It is obviously a constant concern that translation requirements (i) do not entail excessive financial, administrative or practical burdens for broadcasters operating in minority languages, and (ii) can be implemented in a flexible manner (i.e., choice of technique). This concern has not escaped the attention of the Advisory Committee either:

‘[...] The Advisory Committee agrees that it is often advisable, and fully in the spirit of the Framework Convention, to accompany minority language broadcasting with sub-titles in the state language. However, the Advisory Committee considers that, as far as private broadcasting is concerned, this goal should be principally pursued through incentive-based, voluntary methods, and that the imposition of a rigid translation requirement mars the implementation of Article 9 of the Framework Convention by causing undue difficulties for persons belonging to a national minority in their efforts to create their own media [...].’¹⁷

While translation requirements are often perceived in a negative light, they need not necessarily be a limiting factor. For example, subtitling practices, coupled with the use of modern technology, can facilitate the simultaneous reception of programmes in several languages.

General prescriptions requiring that a ‘reasonable’, ‘significant’ or ‘main part’ or ‘considerable proportion’ of programmes be in a given language are commonplace. More specific (i.e., percentaged) provisions or quotas are also frequently encountered and these can vary greatly from country to country.¹⁸ Of course, the key concern here is to determine – in light of all relevant circumstances – the cut-off point at which a prescription favouring the use of one language begins to become a restriction on the use of others. This is quite an instrumentalist approach to the question of language-choice. As has been cogently argued by

¹⁶ See further, the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE, op. cit.*, pp. 14-17.

¹⁷ Advisory Committee Opinion on Estonia, adopted on 14 September 2001, para. 38.

¹⁸ For a more detailed analysis, the reader is referred once again to the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE, op. cit.*: see, in particular, pp. 13-14.

one commentator: “Restricting the use of certain languages simply cuts off potential audiences or makes it more difficult to reach them, and that harms one of the core interests underlying freedom of expression on any plausible account.”¹⁹ The Advisory Committee is again clearly attuned to such concerns:

“[...] The Advisory Committee considers that, bearing in mind its implications for persons belonging to national minorities and the fact that excessive quotas may impair the implementation of the rights contained in Article 9 of Framework Convention, this practice needs to be implemented with caution. Furthermore, it would need to be rooted in a more precise legislative basis than what is contained in the above-quoted provision [...]”²⁰

Promotion of minority languages

In a number of States, provisions for the use of minority languages in broadcasting are styled as the obverse of provisions for official/State languages. Where specific obligations concerning minority languages do not exist, another frequently-exploited way of pursuing the same goal is the existence of provisions for the promotion of minority cultures or (general) interests. Although some States lack statutory provisions for the use of minority languages in broadcasting which are applicable across the boards, it can be deceptive not to examine other contextual considerations thoroughly. Legislative provisions may only apply to certain designated broadcasters (PSBs, for instance) or at certain (geographical) levels. Furthermore, legislative provisions may serve to affirm opportunities rather than stipulate prescriptions in concrete terms. Having said all that, legislation in a number of States does require broadcasters in general to provide for minority-language broadcasting (or at least for the languages of certain minorities (as defined by law)).

(ii) Public service broadcasting

The playwright Arthur Miller once remarked that a good newspaper is a nation talking to itself. By analogy, so too is a good PSB, which is arguably a more obvious vehicle for the advancement of socio-cultural and linguistic objectives than other types of broadcasters. This argument grows from traditional perceptions and expectations of PSBs, including that they would: deliver quality of services and output; boast general geographical availability; provide a wide range and variety of programmes and show concern for national *and* minority identities and cultures. The last-listed expectation is crucial. It demonstrates very clearly that PSBs have to tread a very fine line by trying to satisfy majority and minority sections of the population simultaneously. This is also true of the linguistic demands and preferences of any population. The challenge is therefore to provide general programming in mutually comprehensible languages so that inter-community communication can be safeguarded, while also catering for the extant linguistic specificities in society to the greatest extent possible.

As with the regulation of broadcasting in general, the language obligations on PSBs are also twofold: the official/State language and other languages. The focus here will be on the latter. General PSB obligations to ensure programming in various languages exist in some States, while elsewhere, the practice has been developed to a limited degree without it actually being required by law. Specific prescriptions exist in a number of States too: as determined by boards of directors; in temporal terms; in quantitative terms; dedicated channels; well-established practices of non-State languages being used. Also of relevance here are general

¹⁹ Leslie Green, “Freedom of Expression and Choice of Language”, in W.J. Waluchow, Ed., *Free Expression: Essays in Law and Philosophy* (Oxford, Clarendon Press, 1994), pp. 135-152, at p. 144.

²⁰ Advisory Committee Opinion on Ukraine, 1 March 2002, para. 46.

requirements that PSBs must devote specified amounts or percentages of their broadcast time to minority groups, without any linguistic stipulations being applicable. While this approach does not preclude some of the available time being used for programming in minority languages, it has the advantage of showing greater deference to the editorial autonomy of those making use of the slots.

Transfrontier dimension

For reasons of geographical proximity; cultural affinity; ethnic dispersity; the hard facts of recent history or economic realities (if not to say vulnerabilities), or any combination of the above, bilateral agreements and cooperative initiatives can play a hugely significant role in securing access to the media, especially in relevant languages. Examples of bilateral agreements which are general in character and contain sections on broadcasting are legion. Aside from such general treaties, States also adopt bilateral treaties specifically on broadcasting. In a number of countries, according to available means, technology is being harnessed in order to enhance transfrontier broadcasting targeting minorities.

All of this is built on the premise that the ability to receive broadcasting from abroad should not obviate the need or responsibility for States to keep their own houses in order as regards the fostering of domestic (minority-language) broadcasting. Concern must also attach to any attempts by States to impose restrictions on the reception of broadcasts from other States (either from specific States or generally). In the words of the Advisory Committee:

“[...] The Advisory Committee [...] considers that availability of such programmes from neighbouring states does not obviate the necessity for ensuring programming on domestic issues concerning national minorities and programming in minority languages.”²¹

Temporal and qualitative criteria

What is crucial here is ensuring a satisfactory response to the ‘needs and interests’ of the target audience. Some States have made legislative provision for programming (i) catering for the needs and interests of persons belonging to national minorities, and (ii) in the languages of persons belonging to national minorities, to be broadcast at certain times. Less specific provisions have been adopted elsewhere, but share the same aim: for example, where a ‘fair balance’ has to be struck between minority groups/languages, including in the allocation of broadcasting slots.

Facilitative measures

A consideration of measures that promote access to, and the use of minority languages in, broadcasting is a problem-solving exercise; an invitation to think outside the box. Put briefly, it is the search for best practices, forwarding-looking and often experimental initiatives.

²¹ Advisory Committee Opinion on Albania, 12 September 2002, para. 50. See also: “[...] the Advisory Committee underlines that the availability of foreign broadcasting in Estonia in a language of a national minority does not eradicate the need for, and importance of, domestically produced broadcasting in that language.” - Advisory Committee Opinion on Estonia, *op. cit.*, para. 37.

The representation of minorities in general and linguistic minorities in particular, on relevant authorities and decision-making bodies greatly enhances the development of policies and norms which cater for their needs and interests. Active, or better still, pro-active consultation with such groups by the relevant authorities and decision-making bodies is another way of pursuing the same goal. As such, these practices can be perceived as outgrowths of more general democratic principles. Perhaps the best relevant paradigm is that elaborated by Karol Jakubowicz: ‘representative participatory communicative democracy’.²² This involves the application of principles of participatory democracy to broadcasting (structures). The basic idea is that while not every individual member of a group can actually broadcast, the organisational structures of the broadcasting entity should strive to facilitate maximum participation by all members in influencing policies and fixing goals.

There are only very sporadic examples of broadcasting authorities incorporating concern for minority language interests into its structures (eg. by means of the instatement of a minority language officer or committee); more common are provisions guaranteeing general representation for persons belonging to national minorities in their composition. Ensuring the meaningful involvement of persons belonging to national minorities in the various stages of the legislative process²³ is also a priority concern:

‘[...] the Advisory Committee encourages the authorities to take account of the needs of persons belonging to national minorities when preparing and adopting this legislation. In its view, the Government should consult with national minority representatives in order to ensure that any support it provides will be sufficient to meet the needs and to strike an appropriate balance among the various national minorities in terms of media access and presence [...]’²⁴

In some States, language advisory councils have been established within PSB structures. In others, PSB audience councils, programming councils and advisory committees perform more general advisory roles, often as regards regional or local programming or programme schedules. It is interesting to compare the variety of approaches adopted by such advisory organs in different countries and to consider the extent to which they actively liaise with relevant audiences, including national minorities. The Advisory Committee has also considered relevant issues:

‘[...] It notes that the absence of such programmes is explained by the fact that no request to that effect was ever made, but points out that a formal request to that effect is not a legal precondition for considering the implementation of such a facility [...]’²⁵

Notions of social and special-interest broadcasting can, when properly calibrated and applied, play an instrumental role in the promotion of minority languages in broadcasting. This concept is recognised in a number of countries and it leads to particular regimes applying to types of broadcasting dedicated to fulfilling specific societal missions or meeting stated niche interests (including those of linguistic minorities).

²² Karol Jakubowicz, “Access to the Media and Democratic Communication: Theory and Practice in Central and Eastern Europe”, in András Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 139-163, at p. 145.

²³ A number of definitions for co-regulation exist. Loosely put, it is a practice which involves both traditional law-makers and interested parties/representatives of civil society in the regulatory process. See further, *Co-Regulation of the Media in Europe, IRIS Special* (Strasbourg, the European Audiovisual Observatory, 2003).

²⁴ Advisory Committee Opinion on Armenia, 16 May 2002, para. 54.

²⁵ Advisory Committee Opinion on Denmark, adopted on 22 September 2000, para. 30.

Another variant on this theme concerns special treatment for particular genres of broadcasters in terms of access to infrastructure and technology that would ordinarily be beyond their financial reach. It is fairly typical for such practices to involve the sharing of channels and frequencies between broadcasters in order to defray start-up and operational costs. They can also involve the hosting of minority-interest broadcast output by established broadcasters. A rich mine of potential could be tapped into here:

[...] The Advisory Committee also notes that digital, cable and satellite broadcasting will bring with it new and further possibilities for meeting demands. Encouragement should be given to opening up broadcasting further to national minorities, using for example opportunities offered by the implementation of new technologies.²⁶

The aforementioned study, *Minority-language related broadcasting and legislation in the OSCE*, also documents the vast array of other measures that could broadly be categorised as facilitative of (i) improving access to broadcasting for persons belonging to national minorities, and (ii) the use of minority languages in broadcasting. These include flexible and favourable financing schemes and fiscal regimes and the placing of firm emphasis on capacity-building; a notion of wide embrace which could include ensuring greater support for the education and training – in their own languages – of (i) students of journalism and (ii) media professionals. The promotion of programme production and distribution can also make an important contribution to the creation of a healthier climate in which the goal of (qualitatively and quantitatively) increased broadcasting by and for persons belonging to national minorities, including in minority languages, can be achieved. Needless to say, the above all rings true for publications which share the same objectives as their audiovisual counterparts.

Finally, it should also be noted in passing that language policy documents are becoming increasingly commonplace; plotting future courses of action; devising development strategies; pursuing progress...or not. This observation is of relevance to the extent that States' language policies help to shape the matrix in which broadcasting and publishing in minority languages takes place, even when the theory and practice are out of sync with one another.

II. MONITORING

(i) General

At the time of its inception, scepticism abounded about the Advisory Committee's ability to overcome what seemed on paper to be formidable restrictions on the latitude within which it would have to operate.²⁷ Since then, the Advisory Committee – through its own pro-activeness and the support of the Committee of Ministers – has managed to carve out increased operational autonomy for itself.

(ii) Advisory Committee

Thematic approach

²⁶ Advisory Committee Opinion on the United Kingdom, adopted on 30 November 2001, para. 69.

²⁷ See, for example, the Council of Europe Committee of Ministers Resolution (97) 10: Rules adopted by the Committee of Ministers on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, 17 September 1997 (especially paras. 29-32; 35-37).

The Advisory Committee's Opinions are structured in such a way that consideration of Article 9 takes place under: 'Specific comments in respect of Articles 1-19'; 'Main findings and comments of the Advisory Committee',²⁸ and occasionally 'Concluding remarks' as well.

The treatment given to Article 9 as part of the article-by-article approach tends to be detailed and discursive and to offer a wealth of information about the prevailing situations in whatever country is under scrutiny. This information is wide-ranging in character: covering general context, legislation and its implementation and a miscellany of practical considerations. Or, to use the terminology of the Outline for the State reports: narrative, legal, state infrastructure, policy, factual.²⁹ As such, it reflects the numerous criteria, discussed *supra*, which affect the access of persons belonging to national minorities to the media, including in their own languages. The comprehensive treatment of country-specific situations in the Advisory Committee's Opinions is their great strength. Ironically, however, the specificity of the analysis can also be a limiting factor, at least to the extent that the scrutiny provided is *prima facie* deprived of a more general character.

However, one can still find a number of interpretative diamonds in the rough. With a little bit of cutting and polishing, excerpts from Advisory Committee Opinions such as those quoted *supra*,³⁰ could be of considerably greater worth, in a wider context than that of the individual circumstances under scrutiny. What is required for each substantive issue addressed is the elaboration of a strong formula with maximum reach and for it to be consistently applied across different country situations. Such an approach would have the merit of enhancing predictability and elevating country-specific analysis to a higher, more general plane on which it would achieve greater impact. Of course, the obvious subtext here is that the quest for consistency, predictability and generality should not be allowed to ride roughshod over the subtleties and sensitivities of specific country-situations. Like in the jurisprudence of Article 10, ECHR, the challenge here is to strike a careful balance between lofty ideals and the hard political and social realities of individual cases. If met squarely, this challenge could lead to immensely instructive and immensely rewarding results, not least for the future monitoring of the FCNM. It should not be shirked.

The evolution of standards from a somewhat lapidary text is crucial and this is another example of parallelism between Article 10, ECHR, and Article 9, FCNM. The focus (*supra*) on how the text of Article 9 of the Framework Convention has evolved in the Opinions of the Advisory Committee is therefore appropriate, given its contribution to our understanding of the full ambit of Article 9. This is particularly true in the continued absence of any other mechanisms for offering authoritative interpretations of the text of the Framework Convention, eg. direct justiciability before the European Court of Human Rights; the possibility of having recourse to the Court for advisory/interpretative opinions, or any kind of mechanism akin to the United Nations Human Rights Committee's capacity to issue General Comments on individual articles of the International Covenant on Civil and Political Rights (ICCPR),³¹ etc.

²⁸ In earlier Advisory Committee Opinions, the corresponding section was entitled 'Proposal for Conclusions and Recommendations by the Committee of Ministers'.

²⁹ Outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities, Appendix 3 (item 4.1), Committee of Ministers Resolution (97) 10, *op. cit.*

³⁰ The purpose of the quoted passages is merely illustrative; it does not in any way seek to give an exhaustive enumeration of points made by the Advisory Committee that could be easily applied beyond the immediate country-situation for which they were originally devised.

³¹ See further, Article 40(4) of the ICCPR.

As a tailpiece to this sub-section, the importance of the precise usage of terminology ought to be reiterated. The Rapporteur for this session has already stressed the distinction between passive and active access to the media: two very different notions covered by the nebulous term “access”.³² Sensitivity to conceptual and linguistic precision will also be determinative in the ongoing exercise of “filling in the frame” of Article 9, FCNM.

Intertextual references

Occasional references are made in the Opinions of the Advisory Committee to the Committee of Ministers Recommendation (97) 21 on the media and the promotion of a culture of tolerance.³³ It comes as a surprise that this is the only Committee of Ministers Recommendation dealing explicitly with the media to be referred to in an Advisory Committee Opinion’s consideration of Article 9, FCNM! It is submitted here that more frequent references in Advisory Committee Opinions to Committee of Ministers Recommendations on other topics could prove extremely useful: Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting; Recommendation No. R (99) 1 on measures to promote media pluralism, for example. Or, more ambitiously, this “import trade” would not even have to be limited to Committee of Ministers Recommendations.

The Preamble to the Framework Convention states that it was conceived of pursuant to the Declaration of the Heads of State and Government of the Member States of the Council of Europe adopted in Vienna on 9 October 1993. It goes on to list – “in a non-exhaustive way” – “three further sources of inspiration for the content” of the Framework Convention, i.e., the ECHR and various relevant United Nations (UN) and C/OSCE instruments containing commitments for the protection of national minorities.³⁴ The relevant documentary corpus within the UN and OSCE systems is by no means negligible (notwithstanding the fact that some documents are more political than legal in their coloration). But as already mentioned, the crucible of inspiration has a broader circumference than merely the span of the UN and OSCE systems. This point is of cardinal importance.

Thus, insofar as the practice of explicitly referring to international standards is concerned, pertinence should be the guiding principle, thereby inviting the invocation (where appropriate) of other types of “soft law”, for example, the Council of Europe Committee of Ministers Declaration on the Freedom of Expression and Information of 1982; the Oslo Recommendations Regarding the Linguistic Rights of Persons belonging to National Minorities or the recently devised international Guidelines on the Use of Minority Languages in the Broadcast Media.³⁵ This could be a useful way of signposting exemplary or exhortatory standards elaborated in other fora, without having to incorporate large chunks of text from the same standards. In other words, this would involve an exercise of enrichment by reference or intertextuality. It has the further advantage of referring to standards already enjoying the endorsement of other international bodies and the authority that accrues from such endorsement.

³² Karol Jakubowicz, *Persons belonging to National Minorities and the Media* (Workshop 2), Filling the Frame, Strasbourg 30-31 October 2003, pp. 17-18.

³³ For example, in the Opinions on Cyprus, Hungary, Norway and Romania.

³⁴ Explanatory Report to the Framework Convention, *op. cit.*, para. 23.

³⁵ These Guidelines were elaborated by a group of international experts under the auspices of the OSCE High Commissioner on National Minorities and were first floated in public at a conference in Baden-bei-Wien, Austria, on 25 October 2003.

The merits of referring to the aforementioned Guidelines on the Use of Minority Languages in the Broadcast Media deserve particular attention here because their subject matter comprises a range of issues that are instrumental in protecting and promoting the interests of persons belonging to national minorities as regards their access to the media (especially in their own languages). The Guidelines would be eminently suited to achieving synchronicity with the FCNM – at least in terms of their programmatic character. The greater specificity of the Guidelines could help to fill the gaps in the more general wording of Article 9, FCNM; gaps which are inevitably present as a result of the treaty's broader, more sweeping thematic preoccupations. The complementarity quotient here is high.

Scope for use of more pro-active language

The 'Main findings and comments of the Advisory Committee' section of Advisory Committee Opinions also gives treatment to Article 9, FCNM. These findings sift through the extensive information provided in the article-by-article approach and this exercise facilitates the task of prioritising areas for further attention. The *forte* of each finding is that it does not limit itself to merely pointing out a situation or practice that is unsatisfactory. The Advisory Committee goes the extra mile on this: each finding is quickly followed by a suggested line of action for redressing the situation or practice in question. While this forward-looking approach is very laudable, again, with a little extra journeying, it could perhaps gain further in effectiveness. In a similar vein, the suggestions advanced for following up on the Advisory Committee's findings tend to rely on calls to "examine", give "particular attention to", "identify", "take the necessary measures", "place emphasis", "try to meet expectations", etc.

An Irish proverb says that if you light the wick, you might as well burn the whole candle. By applying the proverb to this context, then, might it not be constructive to go further than identifying areas meriting attention or exploration or examination and to actually suggest possible ways in which such attention could be administered; such exploration or examination carried out? Of course, it would be imperative that such suggestions not be perceived by State representatives as being imposed as some kind of disguised *diktat*. Rather, the presentation of useful reference points (eg. identified best State practices) or palettes of options would be a preferred approach. Given the political acumen that has been displayed in the past by the Advisory Committee, confidence in its ability to rise to this challenge of persuasion would not be misplaced. Meetings with State representatives within the context of the monitoring process would afford the Advisory Committee ideal opportunities for prising open the very centre of pressing questions and situations (including those relating to access to the media) and for assuming a pro-active role in the open and constructive discussion of possible measures to be taken.

(iii) Committee of Ministers

As far as the monitoring of the FCNM is concerned, ultimate control and responsibility rests with the Committee of Ministers.³⁶ However, notwithstanding its officially ascribed role of "assistance" in the monitoring process, the Advisory Committee remains the *de facto* powerhouse for the monitoring activities. This is true by virtue of the extent of its procedural/administrative involvement; its sheer hard graft and its serious engagement with substantive matters. It is therefore imperative that the Committee of Ministers makes greater

³⁶ See Articles 24-26, FCNM.

efforts to harness the full potential for involving the Advisory Committee ‘in the monitoring of the follow-up to the conclusions and recommendations on an *ad hoc* basis, as instructed by the Committee of Ministers’.³⁷

Of the 20 country-specific resolutions adopted by the Committee of Ministers to date, eight did not make specific reference to persons belonging to national minorities and the media.³⁸ However, of the country-specific Resolutions in which the media are mentioned, the relevant treatment of issues is rarely more than cursory. While it could be argued that the brevity of these Resolutions is par for the course because the Advisory Committee Opinions provide superior breadth and depth of analysis, it is nevertheless to be regretted that this opportunity for a more detailed approach to media-related (and other) issues has not been routinely seized by the Committee of Ministers.

Greater specificity is particularly required in the first part (conclusions) of the Committee of Ministers’ country-specific Resolutions. While the recommendation in the second part of such Resolutions that the State Party take appropriate account of the various comments in the relevant Advisory Committee Opinion is laudable, there remains a danger – absent maximum specificity or maximum levels of detail – of individual concerns being inadvertently smothered in this blanket, catch-all approach. Finally, it cannot be gainsaid that the Committee of Ministers ought to bring increased political pressure to bear in relevant quarters in order to ensure a significant strengthening of the Advisory Committee’s financial and human resources.

CONCLUSION

The first part of this paper began by setting out the broader conceptual and legal context in which Article 9, FCNM, operates. It then proceeded to explore a selection of issues which influence the access of persons belonging to national minorities to the media; a focus explained by the desire to highlight the existence of a very diverse gamut of possible influences and the responses they have elicited in practice.

In the second part of this paper, attention switched to the monitoring of the FCNM. The case was made for the need to seek to derive general principles from specific country situations in a more systematic way. The germ of such principles is already contained in the Advisory Committee’s Opinions and if the relevant statements were to be elevated to a higher plane of general application and to constitute a more distinct corpus, they would then offer invaluable interpretative clarity for (Article 9 of) the FCNM. The challenge here would be to marry the goals of showing particular deference to *couleur locale*, while at the same time striving for formulae that would tend towards universal relevance or application.

The need for terminological precision was alluded to and the advantages of undergirding the findings of the Advisory Committee by making increased references to relevant international standards (including so-called ‘soft law’) were also vaunted. The potential impact of political persuasion was considered, especially the usefulness of a pro-active role for the Advisory Committee in making suggestions to States Parties on how to address issues of concern.

³⁷ Committee of Ministers Resolution (97) 10, *op. cit.*, para. 36.

³⁸ In order to avoid drawing disingenuous conclusions from statistics, it should be pointed out that the Resolutions in question on occasion give very summary treatment to the countries under scrutiny (particularly in the case of small countries, for which there may not even be any thematic treatment at all).

The paper rounded off by regretting that references to media-related issues in Committee of Ministers country-specific Resolutions have, to date, been scant and that when such references have been made, they have generally been found wanting in detail. It was suggested that a heightened role for the Advisory Committee in the monitoring process (with the backing of sufficient human and financial resources) could go some way towards offsetting the effect of this perceived shortcoming of Committee of Ministers Resolutions.