

Tarlach McGonagle, 'Representation of Minorities: Rights of Access', in: *Media and Human Rights* (London, Clemens Nathan Research Centre, 2009), pp. 106-126 – pre-publication text, check against printed version.

Representation of minorities: rights of access

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Introduction

The title of this paper demands close definitional scrutiny. Each of its constituent elements is capable of multiple – and sometimes divergent - interpretations. The paper will therefore begin by explaining the (significance of) the various possible meanings of key terms and concepts contained in the title. It will also clarify the definitional parameters for present purposes.

It will then examine the Council of Europe's efforts to create, consolidate and advance rights of access of minorities to the media in its standard-setting work. As such, relevant provisions of its three most salient treaties in this area, i.e., the European Convention on Human Rights (ECHR), the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML), will be analysed. Notwithstanding the *prima facie* differences between the treaties in terms of their respective focuses and objectives, they also usefully complement each other in various ways. The present analysis will briefly show how each of the three treaties has contributed to the goal of ensuring representation in/access to the media for minorities.

I. Definitional dilemmas

(i) Representation

The term, “representation”, requires qualification. In order to ascertain what kind of representation is involved, (at least) two questions must be answered:

1. Does the notion imply the direct representation of groups (in this case, minorities) or merely the representation of their interests and views by intermediaries?
2. Does the notion of representation refer only to programming and content/output, or does it also include representation in editorial, production and managerial structures and processes?

The answers to these questions can have far-reaching implications for law, policy and practice. They are also very relevant for any assessment of the adequacy of measures adopted to promote minority representation in the media. Direct, active, multi-level

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representation obviously makes for high quality participation by minorities in media activities. Such participation can be an important source of empowerment for minorities insofar as it allows them to influence and challenge perceptions of their groups generated and held by dominant sections of society. It helps them to portray themselves on their own terms. In short, effective participation by minorities in media activities is likely to have the net effect of enhancing the diversity of information and opinions circulated by the media and of thereby enriching public debate.

(ii) Minorities

There is no authoritative, binding and universally-accepted definition of “minority” in international human rights law. Attempts to define the term for legal purposes tend to generate highly-charged political discussions. Nevertheless, an approximation of a definition of “minority”, developed in the context of the International Covenant on Civil and Political Rights (ICCPR),¹ has become a standard reference point for relevant discussions. It reads as follows:

[A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.²

It is clear from the cited definition that a considerable hiatus exists between the meaning of “minority” in everyday language and the meaning it has come to acquire under international human rights law. Whereas the former is concerned above all with the status of numerical inferiority, the latter is additionally and expressly concerned with a number of distinctive features that are taken to be characteristic of a minority group, eg. a shared language, religion, culture or ethnicity. As a result of the definitional focuses on nationality, a limited number of constitutive group characteristics, and a sense of purposive solidarity among group members, the term, “minority”, acquires a complexity that it lacks in its ordinary usage. Not all minorities (loosely defined) meet the more specific cumulative criteria of international human rights law. In consequence, not all minorities are entitled to enjoy the *specific* benefits of the international regime for minority rights protection. In a European context, the term “national minority” is commonly used, bringing with it a host of extra definitional complexities (the details of which are beyond the scope of this paper) and circumscribing the applicability of relevant legal norms accordingly.

The foregoing observations apply *mutatis mutandis* to the FCNM and ECRML, which are discussed below as examples of treaties with detailed provisions concerning minorities' access to the media. The range of programmatic measures set out in the FCNM and

¹ Article 27, ICCPR, deals with the rights of persons belonging to minorities.

² This definition was first put forward by Francesco Capotorti, then Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1979. Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (New York, United Nations, 1979), esp. p. 96, para. 568.

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ECRML only apply to certain types of minorities, *viz.*, national and linguistic minorities, respectively. However, the limited application of those treaties does not preclude States from adopting measures to facilitate access to the media for a broader range of minorities, including in ways other than those contemplated by the two treaties.

(iii) Rights of access

Although it has not been specified, the object of the access contemplated in the title of this paper is presumably the media: a convenient, amalgamated concept that comprises content, structures and processes alike. Access to each of those components of the media is assured in different ways, which makes it useful to frame the broader discussion of access in terms of a “taxonomy of access”.³ Such an approach allows the different modalities of access to be set out and examined individually. This disaggregation is particularly useful in light of the rapidly changing nature of the media, which are generally becoming increasingly immediate, international and interactive.⁴

The description of access to the media as a “right” is bold, unless further nuance is supplied. Whereas “access” can hardly be described as a human right (and in any case not access to a *particular* medium or a *particular* type of content), it can be a crucial factor in rendering the human right to freedom of expression effective in practice. If an individual does not have access to a forum or channel in or via which s/he can receive and impart information and ideas, then his/her right to freedom of expression is clearly not effective in practice. A guiding principle of the European Court of Human Rights is that the ECHR seeks to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”.⁵

II. The European Convention on Human Rights

Relevant Council of Europe standards aim to give meaningful and *effective* application to the right to freedom of expression. They seek to ensure the “translation” of *principles* relating to freedom of expression into *law*, *policy* and *practice*. This translation exercise involves a variety of strategies and mechanisms, ranging from the legal and political to the socio-cultural and educational. Although first principles inform, and are articulated in, Article 10, ECHR, they are not self-executing. The substance and scope of the principles need to be – and in practice are – further developed by the European Court of Human Rights in its case-law. Article 10 reads as follows:

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

³ Monroe E. Price, *Television The Public Sphere and National Identity* (New York, Clarendon Press, 1995), p. 194. See also: Monroe E. Price, “An Access Taxonomy”, in Andras Sajó, Ed., *Rights of Access to the Media* (The Netherlands, Kluwer Law International, 1996), pp. 1-28.

⁴ See generally, Karol Jakubowicz, *A new notion of media?: Media and media-like content and activities on new communications services* (Strasbourg, Council of Europe, April 2009).

⁵ See, *inter alia*, *Airey v. Ireland*, Judgment of the European Court of Human Rights of 9 October 1979, Series A, no. 32, para. 24.

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authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Thus, the right to freedom of expression, as safeguarded by Article 10, comprises three main elements: the right to hold opinions; the right to receive information and ideas and the right to impart information and ideas.

The ECHR does not provide explicitly for the protection or promotion of minority rights. Article 14, ECHR, states that the rights and freedoms set forth in the Convention shall be enjoyed without discrimination on a number of grounds. One of those impermissible grounds of discrimination is “association with a national minority”. This formula is also used in Protocol No. 12 to the ECHR, which extends the right to non-discrimination beyond the rights set forth in the Convention to “any right set forth by law”. In those States which have ratified Protocol No. 12, the right to non-discrimination no longer has to be invoked in conjunction with another Convention right.

The omission of a specific provision on minority rights from the ECHR was by no means an oversight on the part of the drafters. The formal record of the drafting process shows that there was a clear sense of the importance of minority rights protection. Nevertheless, instead of including minority rights in “an immediate international guarantee”, it was decided that the question should be examined subsequently, “with a view to defining more exactly the rights of national minorities”. That was the drafters’ preferred *general* approach to the protection of minority rights. Interestingly, though, a couple of proposals focused *specifically* on the expressive rights of minorities. The first proposed that various rights, including “freedom of speech and expression of opinion generally”, be secured for all citizens, “and particularly for any minority [...]”. The second proposed that national minorities should not be restricted from giving “expression to their aspirations by democratic means”. These brief examples drawn from the drafting history of the ECHR could be described as portentous insofar as they anticipated issues which were later to arise in the case-law of the European Court of Human Rights (see further, below).⁶

Notwithstanding the textual limitations of the ECHR, the European Court of Human Rights has managed to develop a “burgeoning”,⁷ if “equivocal”,⁸ body of case-law

⁶ For further details of the drafting history of the ECHR, see generally: A.H. Robertson, Ed., *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (The Hague, Martinus Nijhoff Publishers, 1975). For commentary on the same, see: Tarlach McGonagle, *Minority rights and freedom of expression: a dynamic interface* (Ph.D. Thesis, University of Amsterdam, 2008), pp. 212 *et seq.*

⁷ Geoff Gilbert, “The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights” 24 *Human Rights Quarterly* (2002) 736-780.

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concerning minority rights. It has done so by exploring the *minority-specific* dimension to selected rights safeguarded by the Convention and enjoyed by everyone. Examples include non-discrimination/equality, enjoyment of a particular way of life, association, religion, education, expression. It is worthy of note that the Court's recognition of minority rights is not predicated on the somewhat restrictive understandings of "minority" and "national minority" which generally inform international and European human rights law.

The jurisprudential trend to develop minority rights is consistent with the Court's vision of democratic society, in which the safeguarding of pluralism, diversity and tolerance are central objectives. A number of general principles from its case-law emphasise that pluralism demands a certain balancing of majority/minority interests and the democratic accommodation of the latter. The Court has, for instance, repeatedly found that:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁹

This general approach to the interests of minorities has been followed by the Court specifically in respect of the expressive and informational interests of minorities. It has held, for instance, 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 [...]¹⁰

In the *Appleby* case, the applicants argued that a shopping centre, to which they sought to gain access in order to collect signatures for a petition, should be regarded as a "quasi-public" space because it was *de facto* a forum for communication. The Court held that:

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

⁸ Patrick Thornberry, "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 137-167, at 167.

⁹ *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

¹⁰ *Steel & Morris v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 15 February 2005, para. 89.

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*been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.*¹¹

In *Khurshid Mustafa & Tarzibachi v. Sweden*,¹² the applicants – Iraqi immigrants living in Sweden – were effectively prevented from receiving television programmes in Arabic and Farsi transmitted by satellite from their native country or region. A clause in the applicants' tenancy agreement prohibited, *inter alia*, the installation of “outdoor antennae and the like”. The applicants had been making use of a satellite dish which had been installed prior to their tenancy of the flat. The landlord demanded that the dish be dismantled and when the applicants did not comply, notice of termination of their tenancy agreement was served on them. The dispute culminated in the landlord taking legal action against the applicants and ultimately securing an eviction order against them.

The European Court of Human Rights acknowledged that it was of “particular importance” for the applicants, as an immigrant family with children, to be able to receive a wide range of information (i.e., not just political and social news, but also “cultural expressions and pure entertainment”) from their country of origin in order to be able to maintain contact with their native culture and language. The significance of this acknowledgement is that it interprets general freedom of expression principles in a minority-specific and minority-sensitive way.

The judgment is also noteworthy for the Court's readiness to focus not only on “the substance of the ideas and information expressed, but also the form in which they are conveyed”.¹³ It found that the applicants:

might have been able to obtain certain news through foreign newspapers and radio programmes, but these sources of information only cover parts of what is available via television broadcasts and cannot in any way be equated with the latter.¹⁴

As such, the Court recognises that media functionality is an important factor for assessing whether particular expressive or informational opportunities are effective for particular groups. The mere existence of other expressive or informational opportunities is not sufficient: they must also be viable opportunities in the sense that they are suited to the expressive or informational purpose of the individual or group relying on the right. Functional equivalence between media cannot simply be assumed.

Whereas in *Appleby*, the effectiveness of the right to *impart* information and ideas was under consideration, in *Khurshid Mustafa & Tarzibachi*, the effectiveness of the right to *receive* information and ideas was central. This usefully demonstrates that access to the

¹¹ (emphasis added) *Appleby and Others v. the United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 6 May 2003, para. 47.

¹² Judgment of the European Court of Human Rights (Third Section) of 16 December 2008.

¹³ See, *inter alia*, *Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A no. 204, para. 57; *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A no. 298, para. 31.

¹⁴ *Ibid.*, para. 45.

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media can be crucial in different ways, depending on which component part of the right to freedom of expression is at issue in given circumstances.

There are several upshots to the foregoing selection of statements of principle by the European Court of Human Rights. First, participation by minorities (broadly defined) in public debate is a prerequisite for a healthy democratic society.

Second, the ability to participate in public debate is shaped in large measure by the ability to access the channels via which information and ideas are disseminated and the fora in which debate is conducted. The quality and extent of that access tend to be determined by a range of factors, eg. “demographic, social, economic and technological”. These factors – and their impact on communicative practices and patterns – are dynamic; the Court needs to bear this in mind when interpreting Article 10, ECHR.

Third, the positive obligations on States arising from Article 10 and its interplay with other rights could conceivably include the regulation of property rights when the denial of access to privately-owned property would otherwise prevent “any effective exercise of the right to freedom of expression” or destroy the essence of the right. The recognition of certain rights of access to private property for communicative purposes could therefore be of potential analogous relevance for privately-owned media.

Fourth, the functionality of different media should be examined from the perspective of the users, especially when the users are members of minority communities. Particular media which one section of society may regard as functional or effective for its expressive and informational needs may be regarded as unsuitable or ineffective by others. For example, if a minority group speaks a language that is traditionally and primarily oral in character, the existence of a newspaper in that language may be of little functional value for many members of the minority. Similarly, a local radio station broadcasting programmes intended for a particular minority group may not be effective if the group is dispersed throughout the State, or nomadic, and a majority of its members is therefore unable to receive the broadcasts.

III. Other Council of Europe treaties

General considerations

Aside from the ECHR, other Council of Europe treaties, such as the FCNM and ECRML, develop specific aspects of general freedom of expression principles in accordance with their own thematic priorities and emphases. In other words, they pursue discrete national minority and linguistic agendas in respect of freedom of expression. The specificity of their approaches facilitates consideration of, and engagement with, the precise expressive and informational needs and interests of minorities. This, in turn, helps to make the right to freedom of expression of persons belonging to minorities effective in practice.

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The implementation of both the FCNM and the ECRML is assured by systems of State reporting which are subject to independent expert monitoring. Both monitoring systems allow for scrutiny of the laws, policies and practice in States Parties to the two treaties, an exercise which necessarily enquires into the effectiveness of adopted measures for the operationalisation of relevant first principles.

(i) *FCNM*

The FCNM is, as its title suggests, a framework treaty. Its combination of principles and programmatic measures serves to provide States Parties with a legal framework within which to protect the rights of persons belonging to national minorities. According to the Explanatory Report to the FCNM, because the Convention's provisions are not directly applicable, States are left with "a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account".

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

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

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

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

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

It is modelled closely on Article 10, ECHR and represents a modest extension of scope of the former. The foregrounding, in Article 9(1), FCNM, of non-discriminatory access to the media, is a good example of how it goes beyond the actual wording of Article 10, ECHR, in a way that is informed by: (i) needs and interests of national minorities, and (ii) principles relating to the right to freedom of expression, as developed in the case-law of the European Court of Human Rights. The facilitation of access to the media for persons belonging to national minorities could also reasonably be regarded as a logical outcrop of the Court's case-law on freedom of expression, but its explicit inclusion in Article 9(4) helps to underscore its importance, not least symbolically.

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Welcome and relevant as they are, these references to “access to the media” have given rise to some interpretive difficulties. As already explained in Section I of this paper, the term “access” is vague and encompasses many different modalities of access (to the media). The Advisory Committee on the FCNM – which carries out the lion’s share of the monitoring work on the treaty – now distinguishes between active and passive access, a distinction corresponding roughly to the right to impart and receive information and ideas (via the media). The usefulness of this new terminological *démarche* can be appreciated when assessing the adequacy of State measures to assure access to the media. The observations about participation and representation made in Section I of this paper might helpfully be recalled in this connection.

The text of the FCNM enables States Parties to give due consideration to relevant *couleur locale* when adopting and implementing measures facilitating access to the media for persons belonging to national minorities. By the same token, the treaty’s monitoring system enables the Advisory Committee on the FCNM to consider the adequacy/efficiency of State measures in light of relevant “particular circumstances” obtaining in the State, in any region of the State, or in respect of any minority group in the State. This results in a dialogue which facilitates the identification of issues governing the effectiveness of access to the media for persons belonging to national minorities and, by extension, the effectiveness of their right to freedom of expression. It also facilitates the compilation of relevant best practices.

In the context of its monitoring work, the Advisory Committee has frequently focused on the impact of geographical, technological and market-related factors on the effectiveness of access to the media. Such focuses would, for example, invite consideration of whether the geographical reach of particular media targeting a particular minority group matches the actual demographic concentration of that minority. Useful distinctions in this regard include: sub-national (i.e., local and regional), national and transfrontier reach. Another relevant line of enquiry is the suitability of the means of distribution for media content. In other words, is the distribution platform in question accessible to, and widely used by, members of the target minority group? Finally, as regards market-related factors: media output catering for the interests of national minorities or in their languages is often less lucrative than mainstream equivalents. This fact can make it difficult for media to secure investment capital and advertising, which in turn makes it difficult for them to operate independently and efficiently. Such difficulties militate against the growth of minority (language) media, thereby maintaining access opportunities at a low level.¹⁵

The Advisory Committee also tends to distinguish between access to different types of media, eg. public-service, community and commercial, each of which can serve the expressive and informational needs and interests of persons belonging to national minorities in different ways. Given that the media comprise content, structures and processes, regulation must be both behavioural and structural. The Advisory Committee therefore monitors the calibration of prescriptions of particular types of content, eg. produced by or for minorities, including in their own languages. It also monitors the

¹⁵ See generally: Mike Cormack & Niamh Hourigan, Eds., *Minority Language Media: Concepts, Critiques and Case Studies* (Clevedon, Multilingual Matters Ltd., 2007).

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allocation of time-slots for the same with a view to determining whether they are long enough, frequent enough and scheduled at appropriate times. Subtitling and dubbing practices are also routinely monitored on account of their potential for making content accessible to a wider audience comprising varied linguistic backgrounds. The need for broadcast licensing processes to recognise and accommodate the needs, interests and situational specificities of national minorities, is another recurrent priority theme. The general question of the official recognition of national minorities and their languages (to the extent that the applicability of media laws and policies is conditional on the enjoyment of official status) is often addressed as well.

(ii) *ECRML*

The central purpose of the ECRML is to protect and promote linguistic diversity in Europe. As such, it requires contracting States to undertake various legal obligations, but it does not set out to create rights for either individuals or groups. The extent to which rights for individuals or groups flow from, or are affirmed by, State obligations can therefore be regarded as incidental to the central purpose of the Charter. Article 11 is the Charter's principal article concerning the right to freedom of expression; it reads as follows:

Article 11 – Media

- 1 The Parties undertake, for the users of the regional or minority languages within the territories in which those languages are spoken, according to the situation of each language, to the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field, and respecting the principle of the independence and autonomy of the media:
 - a to the extent that radio and television carry out a public service mission:
 - i to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or minority languages; or
 - iii to make adequate provision so that broadcasters offer programmes in the regional or minority languages;
 - b
 - i to encourage and/or facilitate the creation of at least one radio station in the regional or minority languages; or
 - ii to encourage and/or facilitate the broadcasting of radio programmes in the regional or minority languages on a regular basis;
 - c
 - i to encourage and/or facilitate the creation of at least one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the broadcasting of television programmes in the regional or minority languages on a regular basis;
 - d to encourage and/or facilitate the production and distribution of audio and audiovisual works in the regional or minority languages;

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- e i to encourage and/or facilitate the creation and/or maintenance of at least one newspaper in the regional or minority languages; or
 - ii to encourage and/or facilitate the publication of newspaper articles in the regional or minority languages on a regular basis;
 - f i to cover the additional costs of those media which use regional or minority languages, wherever the law provides for financial assistance in general for the media; or
 - ii to apply existing measures for financial assistance also to audiovisual productions in the regional or minority languages;
 - g to support the training of journalists and other staff for media using regional or minority languages.
- 2 The Parties undertake to guarantee freedom of direct reception of radio and television broadcasts from neighbouring countries in a language used in identical or similar form to a regional or minority language, and not to oppose the retransmission of radio and television broadcasts from neighbouring countries in such a language. They further undertake to ensure that no restrictions will be placed on the freedom of expression and free circulation of information in the written press in a language used in identical or similar form to a regional or minority language. The exercise of the above-mentioned freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
- 3 The Parties undertake to ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media.

States Parties to the ECRML enjoy a large measure of discretion in determining their commitments under the Charter.¹⁶ They are required, *inter alia*, to choose and apply at least one paragraph or sub-paragraph from Article 11. Most of the paragraphs and sub-paragraphs contain internal choices between commitments of varying degrees of onerousness. For instance, Article 11(b) offers a choice between the creation of at least one radio station in the regional or minority languages and the broadcasting of radio programmes in the regional or minority languages on a regular basis. Furthermore, the State obligations are obligations of conduct, not of result because States are not even required to assure the targeted outcome: they merely have to encourage and/or facilitate it.

The highlighted features of Article 11, ECRML (in the broader context of the Charter as a whole) offer States a lot of flexibility to determine the precise focus and extent of their commitments in respect of the media. The ECRML's unusually flexible approach was designed to make the Charter attractive to States and encourage its wide ratification. It is debatable whether this strategy has been successful: to date, only 24 of the Council of Europe's 47 Member States have ratified the Charter since its adoption in 1992. In

¹⁶ For details of relevant requirements, see Article 2, ECRML.

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practice, the success of the ECRML depends in the first place on the *bona fide* engagement of States and their willingness to commit themselves to the more far-reaching options available and not just the lowest common denominator.

Notwithstanding the textual weaknesses of the ECRML, its monitoring system has provided a number of principles and insights which are of wider interest and relevance than merely to the particular State to which they are addressed. Many of the key issues identified by the Advisory Committee on the FCNM are also regularly flagged by the Charter's Committee of Experts. Engagement with these issues is similar to the engagement under the FCNM, but predictably with extra scrutiny for their linguistic dimension.¹⁷ Also, as one would expect, there is systematic attention for the impact of general language policy on media activities in regional or minority languages. The impact of the media on the public profile, prominence and prestige enjoyed by regional or minority languages is also a recurrent issue. Arising from Article 11(3), ECRML, the representation of interests of speakers of regional or minority languages in media regulatory/monitoring authorities is frequently addressed.

Conclusion

All three of the Council of Europe treaties surveyed in this paper make valuable contributions to the process of translating general freedom of expression principles into a right that is practical and effective for persons belonging to minorities. The angles of approach of the ECHR, FCNM and ECRML follow their primary aims: the protection of human rights and fundamental freedoms; the protection of national minorities and the protection and promotion of the regional and minority languages of Europe, respectively. Each of the three treaties recognises that effective modalities of access to the media are key to the operationalisation of the right to freedom of expression generally and for persons belonging to minorities in particular. Their combined approach ensures that there is follow-through from statements of principle about the importance of media access questions to the examination and evaluation of (programmatic) measures designed to promote the same. Although it is not formally coordinated, this combined approach is, in practice, largely coherent. This is partly because Article 9, FCNM and Article 11, ECRML, can be regarded as the progeny of Article 10, ECHR. In terms of both substance and style, the general, judicial approach of the ECHR is usefully complemented by the thematically-specific, monitoring-based approaches of the FCNM and ECRML.

¹⁷ See further: Tom Moring & Robert Dunbar, *The European Charter for Regional or Minority Languages and the media* (Strasbourg, Council of Europe Publishing, 2008).