Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas

Tarlach McGonagle
# CONTENTS

**Acknowledgements** ................................................................. v  
**List of selected abbreviations** .................................................. xv  

Introduction. ................................................................................. 1

**Part I**  
**Theoretical and normative approaches to minority rights** .......... 17

Chapter 1  
General theories and definitional entrapment ............................... 19

Introduction. ................................................................................. 19  
1.1 Theoretical conundrums and definitional dilemmas ................. 19  
1.2 Historical and conventional approaches to minority rights ...... 26  
  1.2.1 Numerical inferiority .............................................................. 28  
  1.2.2 Non-dominance ................................................................. 29  
  1.2.3 Nationality ......................................................................... 30  
  1.2.4 Range of distinctive, constitutive characteristics ................. 30  
  1.2.5 Sense of solidarity ......................................................... 31  
  1.2.6 Combination of objective and subjective criteria for recognition... 32  
1.3 Troublesome taxonomies and the notion of fixed features ....... 33  
Conclusions. ................................................................................. 40

Chapter 2  
The shaping of theories through international legal and political frameworks .... 43

Introduction. ................................................................................. 43  
2.1 International instruments with focuses on minority rights ...... 43  
  2.1.1 Genocide Convention .......................................................... 44  
  2.1.2 United Nations Charter ....................................................... 46  
  2.1.3 Universal Declaration of Human Rights ......................... 47  
  2.1.4 International Covenant on Civil and Political Rights .......... 49  
  2.1.5 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ......................... 55  
  2.1.6 UN institutional approaches to minority rights ................. 56  
2.2 European instruments with focuses on minority rights .......... 58  
  2.2.1 European Convention on Human Rights ....................... 59  
  2.2.2 Standard-setting by the Parliamentary Assembly of the Council of Europe ................................................................. 67
2.2.3 Framework Convention for the Protection of National Minorities (FCNM) .............................................. 76
2.2.3(i) Ceci n'est pas une minorité! .......................... 81
2.2.3(ii) Water in the wine and holes in the cheese ......... 85
2.2.3(iii) Proof of the pudding ................................. 89
2.2.4 Organization for Security and Co-operation in Europe standards .............................................. 96
2.2.4(i) OSCE High Commissioner on National Minorities (HCNM) ............................................. 99
2.2.5 European Union ........................................... 105
Conclusions ......................................................... 109

Part II
Theoretical and normative approaches to freedom of expression and minority rights ........................................ 111

Chapter 3
Minorities, freedom of expression and of the media ......................................................... 113

Introduction ......................................................... 113
3.1 Theories of freedom of expression and of the media ......................................................... 113
3.1.1 Rationales for minorities' access to expressive opportunities ........................................ 120
3.1.1(i) Democratic participation in public life .............. 120
3.1.1(ii) Creating alternative discursive spaces ............ 122
3.1.1(iii) Creating and sustaining (cultural) identities ..... 123
3.1.2 Enhanced liberty for the media/the Fourth Estate .... 127
3.1.3 An enabling environment for media freedom ....... 130

3.2 Media functionality and media types ......................................................... 134
3.2.1 Media functionality ........................................ 134
3.2.2 Media types .................................................. 138
3.2.2(i) Community media ...................................... 141
3.2.2(ii) Public service media/content ....................... 144
3.2.2(iii) Commercial media .................................. 152
3.2.2(iv) Transnational media ................................. 153
3.2.2(v) Other types of media ................................. 155

3.3 New media and new regulatory paradigms .................. 156
Conclusions ......................................................... 168

Chapter 4
The coupling of freedom of expression and minority rights ......................................................... 171

Introduction ......................................................... 171
4.1 An underexplored nexus of international law .................. 171
4.1.1 Tentative tendencies and attempted couplings in international law 173
4.1.1(i) Actual couplings ....................................... 173
4.1.1(ii) Attempted couplings: United Nations .......... 175
4.1.1(iii) Attempted couplings: Council of Europe .......... 177
4.1.1(iv) Attempted couplings: assessment ............ 179
4.1.2 Qualifying State obligations .................. 182
  4.1.2(i) International human rights treaty law ......... 185
  4.1.2(ii) Differentiated roles and duties of States regarding
            expression .................................. 188
4.2 New trends in the development of the nexus under international treaty
     law ............................................. 191
  4.2.1 Filling the interstices of international treaty law ...... 191
  4.2.2 Modesty of scope and content of international treaty law . 194
  4.2.3 Under-utilisation of international treaty law ........ 199
4.3 Emergence of differentiated protection for minorities' right to freedom
     of expression .................................... 201
  4.3.1 Framework Convention for the Protection of National
       Minorities (FCNM) .......................... 202
  4.3.2 European Charter for Regional or Minority Languages
       (ECRML) .................................. 211
  4.3.3 Conceptual over-stretch and non-treaty-based standard-setting .. 218
  4.3.4 Guidelines on the use of Minority Languages in the Broadcast
       Media ...................................... 223
4.4 Interplay with other human rights .......................... 226
  4.4.1 Added value of minority dimension to human rights .... 229
Conclusions ............................................ 231

Part III
Regulation and Restriction of Expression to Protect Minority Rights ......... 235

Chapter 5
The pluralism problématique .................................. 237

Introduction ............................................. 237
5.1 Selected theories of pluralism and tolerance .................. 237
  5.1.1 Pluralism .................................... 237
  5.1.2 Tolerance .................................... 238
    5.1.2(i) Notions of tolerance ..................... 239
    5.1.2(ii) Normative articulations of tolerance .... 241
5.2 Towards a notion of comprehensive pluralistic tolerance ............ 244
  5.2.1 Minimum moral and ideological commonality .......... 246
  5.2.2 Pluralistic tolerance, democracy and freedom of expression .. 249
5.3 Comprehensive pluralistic tolerance in practice .................. 251
Conclusions ............................................. 254
Contents

7.3 Specific current controversies as stress tests for the right to freedom of expression

7.3.1 Denial or trivialisation of genocide and other crimes against humanity

7.3.2 "Defamation" of religions

7.3.3 Protection of founders of religions

Conclusions

Chapter 8
Integrated approaches to countering "hate speech"

Introduction

8.1 Theoretical foundations for an integrated approach to countering "hate speech"

8.2 An integrated approach in practice: case study of the Council of Europe

8.2.1 Framework Convention for the Protection of National Minorities

8.2.1(i) Studying the chemistry between Articles 6 and 9

8.2.1(ii) Affirmation of the AC's approach

8.2.1(iii) Conclusions

8.2.2 Non-treaty-based approaches to hate speech

8.2.2(i) Standard-setting by the Committee of Ministers

8.2.2(ii) Standard-setting by the Parliamentary Assembly

8.2.2(iii) European Ministerial Conferences on Mass Media Policy

8.2.2(iv) The European Commission against Racism and Intolerance (ECRI)

8.3 Evaluation of integrated approaches to countering "hate speech"

Conclusions

Part IV
Regulation and facilitation of expression to promote minority rights

Chapter 9
Media-related pluralism

Introduction

9.1 Connecting pluralistic tolerance to media-related pluralism

9.2 Media-related pluralism: structural and substantive considerations

9.2.1 Conceptual confusion

9.2.2 Structural considerations

9.2.2(i) Source/Ownership

9.2.2(ii) Outlet

9.2.3 Substantive considerations

9.2.4 Gauging media-related pluralism
Contents

9.2.4(i) State obligations .................................................. 441
9.2.4(ii) Media responsibilities ........................................... 447

9.3 Interrelationship of international legal standards .................. 449
9.3.1 United Nations standards ............................................. 450
9.3.2 Council of Europe standards ........................................ 452
  9.3.2(i) European Court of Human Rights .............................. 452
  9.3.2(ii) European Convention on Transfrontier Television ....... 457
  9.3.2(iii) Non-treaty-based standard-setting .......................... 459
  9.3.2(iv) Framework Convention for the Protection of National
             Minorities .......................................................... 461
  9.3.2(v) European Charter for Regional or Minority Languages .... 462

9.3.3 European Union standards ......................................... 463
  9.3.3(i) Charter of Fundamental Rights of the European Union .... 463
  9.3.3(ii) European Court of Justice ...................................... 465
  9.3.3(iii) Other regulatory measures ..................................... 471
  9.3.3(iv) European Commission ........................................... 471
  9.3.3(v) European Parliament ............................................. 472

Conclusions ................................................................. 474

Chapter 10
Cultural and linguistic diversity ......................................... 477

Introduction ................................................................. 477

10.1 Connecting pluralistic tolerance and media-related pluralism to
    cultural and linguistic diversity ..................................... 477
  10.1.1 Defining culture and cultural rights ............................ 478
  10.1.2 Defining cultural diversity ....................................... 481
  10.1.3 Rationales for the promotion of cultural diversity ............ 482

10.2 Universal standards: centrality of UNESCO instruments ......... 484
  10.2.1 UNESCO Declaration on Cultural Diversity ....................... 484
  10.2.2 UNESCO Convention on the Protection and Promotion of the
          Diversity of Cultural Expressions .................................. 486
  10.2.3 World Summit on the Information Society (WSIS) ............... 494
  10.2.4 Joint IGO Special Mandates’ Declaration on Diversity in
          Broadcasting ............................................................ 495

10.3 European-level measures concerning cultural diversity ......... 495
  10.3.1 Council of Europe standards ..................................... 496
    10.3.1(i) Treaty-based standards ....................................... 496
    10.3.1(ii) Non-treaty-based standards ................................ 501
  10.3.2 European Union standards ........................................ 506
    10.3.2(i) Audiovisual Media Services Directive ....................... 507
    10.3.2(ii) Public service broadcasting/media .......................... 514
Chapter 11
Access rights ........................................ 523

Introduction ........................................ 523

11.1 Rights-based theories of access to the media ................ 523
  11.1.1 Freedom of expression and access rights ............ 524
  11.1.2 Interplay between rights .......................... 528
  11.1.3 Dynamism of rights ................................ 532
  11.1.4 Prognosis for the future development of access rights 536

11.2 General "taxonomy" of access rights .......................... 539
  11.2.1 Right of reply as a form of access .................. 540
  11.2.2 Public access channels ............................ 545

11.3 Development of rights of access to the media for minorities under international law .................. 547
  11.3.1 FCNM: factors affecting minorities' access to the media 547
    11.3.1(i) Linguistic topography ........................ 548
    11.3.1(ii) Official recognition of minorities/languages 548
    11.3.1(iii) Market sustainability ....................... 549
    11.3.1(iv) Licensing of broadcasters .................... 550
    11.3.1(v) Regulation of broadcasting output ............. 551
      11.3.1(v)(a) Broadcasting in general ......... 551
      11.3.1(v)(b) Public service broadcasting ............ 553
    11.3.1(vi) Transfrontier dimension ..................... 554
    11.3.1(vii) Temporal and qualitative criteria ......... 555
    11.3.1(viii) Facilitative measures ...................... 555

  11.3.2 ECRML: factors affecting minorities' access to the media 557
    11.3.2(i) Official recognition of languages .......... 557
    11.3.2 (ii) Active access to media .................... 559
    11.3.2(iii) Market sustainability ....................... 560
    11.3.2(iv) Facilitative measures ....................... 560

11.3.3 New technology-driven challenges for the FCNM and ECRML 562

Conclusions ........................................ 564

Summary and conclusions ................................ 567

List of academic works consulted ....................... 585
International instruments ................................ 635
General and thematic comments and recommendations 645
Table of cases ........................................ 649
Index ................................................. 655