Living together

a handbook on Council of Europe standards on media's contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation

Media and Information Society Division
Directorate General of Human Rights and Legal Affairs

LIVING TOGETHER

A handbook on Council of Europe standards
on media's contribution to social cohesion,
intercultural dialogue, understanding, tolerance and
democratic participation

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Preface

Dear readers,

The book you hold in your hands is about precious principles of our life – peace, diversity and social cohesion.

We, the authors, the contributors and the co-ordinators welcome your interest in the newly published handbook of the Council of Europe *Living together. The media and social cohesion...* focusing on the significant role of the media in advancing dialogue and solidarity among people and the role of the Council of Europe in promoting standards and good practice.

I recall the meetings and the discussions which nourished this worthwhile and timely initiative. They date back to 12-15 June 2007, when at the 5th meeting of the Steering Committee on the Media and New Communication Services (CDMC), the Secretariat of the Committee proposed a new project of a publication tentatively named "Living together". The general heading was chosen to encompass the essential Council of Europe standards which relate to living together in a democratic society and notably to the positive contribution of the media to this valuable goal. More precisely, it covered topics crucial for the peaceful coexistence in complex multicultural societies such as freedom of speech, social cohesion, diversity, pluralism, tolerance, dialogue and democratic participation, and the prevention of hate speech and conflicts.

A working group started to develop this idea and decided to prepare a booklet entitled "Living together", which would include and explain in an accessible language the Council of Europe standards in the area of the media and social cohesion, illustrating them by various examples, quotations from judgments of the European Court of Human Rights (ECtHR) and good practices. On this basis, the working group agreed on the following main points:

- To prepare a concise reference tool on Council of Europe standards concerning the contribution of the media to harmonious living among different communities and groups in a democratic society.

- This publication would aim to serve a wide audience – policy makers, governments, educators, media professionals, non-governmental organisations, various communities, students, and so forth. The text would be informative, readable and capable of assisting all interested parties in the practical implementation of the standards concerned.
- In order to benefit from both external knowledge and internal expertise the text would be written by both outside (e.g., experts, journalists) and inside (e.g., members of the CDMC and its subordinate groups) contributors. An outside co-ordinator/editor would be engaged for the collection and editing of the contributions.
- The objective would be to launch the printed version at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services which will take place in May 2009 in Reykjavik, Iceland and thus draw public attention to the role of the media and the Council of Europe in intercultural dialogue, integration and understanding.

Now that the handbook has been completed, I sincerely believe that we have managed to achieve the aims we had set ourselves. "Living Together" provides guidance to the freedom and responsibilities of the media in pluralist societies, the standards set by the Council of Europe and the judgments by the European Court of Human Rights. As such, it allows us to comprehend the complex role of – and maybe need for – the media as regards contributing to diversity, dialogue and understanding. The book therefore also follows the goals of the Council of Europe *White Paper on Intercultural Dialogue* which was launched by the Ministers of Foreign Affairs of the 47 member states of the Council of Europe in May 2008. Faced with challenges of multiculturalism, technology and fast-paced modern communication, it is necessary to build bridges, crossroads and links between cultures, traditions and lifestyles.

As the CDMC co-ordinator of the project, I hope that the booklet will inspire you to create a colourful and interactive environment friendly for all.

Finally, I would like to acknowledge the invaluable contribution of our team – the editor-in-chief, the authors and the co-ordinators – and in this respect I would like to thank heartily Yasha Lange, Tarlach McGonagle, Eugen Cibotaru and Franziska Klopfer for their devoted and highly professional work without which this book would not have been possible. I would like to express particular gratitude to Ivan Nikoltchev, who first proposed the publication, then brought us together and eventually improved the text.

Bissera Zankova
Media expert, member of the CDMC,
CDMC co-ordinator of the project "Living together"

List of abbreviations

CDMC	Steering Committee on the Media and New Communication Services
CM	Committee of Ministers
EC	European Council
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECRML	European Charter for Regional or Minority Languages
ECTT	European Convention on Transfrontier Television
EUMC	European Monitoring Center on Racism and Xenophobia
FCNM	Framework Convention for the Protection of National Minorities
ICT	Information and Communication Technology
NGOs	Non-governmental Organisations
PACE	Parliamentary Assembly of the Council of Europe

Free expression and respect for others

Tarlach McGonagle

Introduction

The right to freedom of expression has been referred to as a precious herit-age as well as a dangerous instrument, and rightly so. It can be a great source of empowerment but, conversely, it is also open to abuse. In terms of relevant Council of Europe standards, the question is not so much *whether* there should be limits to the right to freedom of expression but *how* those limits should be determined or *where* they should be positioned. This is because the Council of Europe does not see freedom of expression as an absolute right or examine it in a vacuum. Instead, it situates the right in the broader context of a system of human rights, all of which are closely inter-twined.

Relevant Council of Europe standards seek to ensure the "translation" of *principles* relating to freedom of expression into *law*, *policy* and *practice*; they aim to give meaningful and *effective* application to the right.

> The European Court of Human Rights has consistently held that the European Convention on Human Rights "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".*

* *Airey v. Ireland (1979), §24.*

This translation involves a variety of strategies and mechanisms, ranging from the legal and political to the socio-cultural and educational. Viewed collectively, the Council of Europe's standards are largely coherent, but indi-vidual treaties and other texts clearly reflect different priorities and empha-

ses. It is important to be aware of the substantive and formal differences between standards, as well as their inter–relationship and their respective contributions to the bigger picture. For present purposes, the most relevant texts and mechanisms involved include:

Texts	Mechanisms/nature of work
European Convention on Human Rights (ECHR)	European Court of Human Rights/ case-law
European Convention on Transfrontier Television (ECTT)	Standing Committee/texts
Framework Convention for the Protection of National Minorities (FCNM)	Advisory Committee/monitoring work
European Charter for Regional or Minority Languages (ECRML)	Committee of Experts/monitoring work
Non-treaty-based standard-setting texts (recommendations, resolutions, etc.)	Committee of Ministers (CM), Parliamentary Assembly (PACE), Venice Commission, European Commission against Racism and Intolerance (ECRI)
European Ministerial Conferences on Mass Media Policy	Ministers of member states

Freedom of expression and information — a fundamental human right

Scope of freedom of expression

The dynamic tension between the core right to freedom of expression and a number of other factors gives real meaning and shape to the notion of freedom of expression in a pluralist, democratic society. Those factors will be examined in this sub–section; they include:

• the duties and responsibilities governing the exercise of the right to freedom of expression;

- specified, legitimate grounds for restricting the exercise of the right to freedom of expression;
- the prevention of abuse of rights;
- interplay between the right to free expression and other human rights.

The Council of Europe's flagship treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, or ECHR), is crucially important for the protection and promotion of the right to freedom of expression. Article 10, ECHR, reads:

> 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 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.

Article 10 (1) sets out the right to freedom of expression as a compound right comprising the freedom to hold opinions and to receive and impart information and ideas. As such, there are three distinct components to the right, corresponding to different aspects of the communicative process, i.e., holding views, receiving and sending content. We usually refer to the right to freedom of expression as an all-in-one concept. In practice, however, the rights of speakers, listeners and third parties can differ from or even be in competition with one another. A speaker's "right" to utter racially abusive remarks, for example, would be pitted against a listener's "right" to be protected from racism. All this would have to be weighed up against third parties' "right" or interest not to allow racist utterances in public.

The right to *seek* information and ideas is not explicitly mentioned in Article 10, ECHR (unlike Article 19 of the International Covenant on Civil and Political Rights). In practice, however, the European Court of Human Rights has recognised the importance of this dimension, especially in the context of journalistic freedoms (see further below, page 12).

Article 10 (1), ECHR, does not prevent states from regulating the audiovisual media by means of licensing schemes. Article 10 (2) then proceeds to set limits to the core right set out in the preceding paragraph. It does so by enumerating a number of grounds based on which the right may legitimately be restricted, provided that the restrictions are prescribed by law and are necessary in a democratic society. The Court justifies this approach by linking the permissibility of restrictions to freedom of expression with the existence of duties and responsibilities which govern its exercise. Of all the enumerated grounds, it is perhaps the protection of the rights of others that is most relevant for intergroup relations in a pluralistic democratic society.

Whether restrictions are imposed on the right to freedom of expression, they must be prescribed by law and necessary in a democratic society. They must be used only when strictly necessary and should always be interpreted narrowly. In other words, the right to freedom of expression is always the norm and any restrictions on it, the exception.

Aside from the permissible restrictions envisaged by Article 10 (2), ECHR, the right to freedom of expression may also be limited on the basis of Article 17, ECHR. Entitled "Prohibition of abuse of rights", it reads:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

As such, Article 17 can be regarded as a safety mechanism, designed to prevent the European Convention on Human Rights from being misused or abused by those whose intentions are contrary to the its letter and spirit. It has been applied consistently by the Court to ensure that Article 10 protection is not extended to racist, xenophobic or anti-Semitic speech; statements denying, disputing, minimising or condoning the Holocaust, or (neo-)Nazi ideas. The Court's decision in *Norwood v. the United Kingdom* is one of many examples where such kinds of expression are denied protection under Article 10, ECHR.

> In the *Norwood* case, the applicant, a regional organiser for the British National Party (a far-right-wing political party) displayed in the window of his flat a poster showing the Twin Towers in flame, the words "Islam out of Britain — Protect the British People" and a symbol of a crescent and star in a prohibition sign. The applicant had been convicted of a public order offence by the domestic courts.
>
> The European Court of Human Rights concluded that his conviction did not violate Article 10, ECHR because: "[...] the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination".*

* *Norwood v. the United Kingdom (2004)*

The scope of the right to freedom of expression is defined not only by the provisions of Articles 10 (2) and 17, ECHR. It is also determined by its relation to other Convention rights. Strong protection for freedom of expression allows for better exercise of freedom of assembly and association, freedom of religion, educational, cultural and linguistic rights, because each of those rights includes important expressive elements.

Freedom of expression, the media and democracy

Numerous rationales can be advanced for safeguarding the right to freedom of expression. They vary considerably in character and include:
- individual self-fulfilment
- discovery of truth and avoidance of error
- effective participation in democratic society ("argument from democracy")
- distrust of government in regulation of expression
- promotion of tolerance and understanding and conflict prevention.

Of the foregoing, it is the so-called "argument from democracy" that enjoys pride of place in the case-law of the European Court of Human Rights relating to Article 10. A clear *leitmotiv* in this case-law is the importance attached to furthering democratic principles and practices, especially open debate on matters of public interest.

The Court has repeatedly stressed the important role of the media for the achievement of these aims. The media can contribute significantly to public

debate by disseminating information and ideas and thereby help opinion-forming processes within society. As the Court consistently acknowledges, this is particularly true of the audiovisual media because of their reach and impact. The media can also serve as fora for public debate. This applies especially to new media technologies which have considerable potential for high levels of individual and group participation.

In a democratic society, we often call the media a "public watchdog". In other words, they should monitor what governments do and publicise any wrong-doing on their part. In that respect and also more broadly in respect of matters of public interest, the Court has held time and again that:

> Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[1]

In the light of the important democratic functions which the media can fulfil, the case-law of the Court tends to acknowledge enhanced freedom for journalists (as opposed to ordinary individuals). The same can be said of the relevant standard-setting texts adopted by the Council of Europe.

This enhanced freedom comprises legal recognition and protection of specific journalistic practices and realities: freedom to report and comment on matters of public interest; presentational and editorial freedom (including recourse to exaggeration); protection of sources of information and intellectual property rights. On another level, this enhanced freedom includes protection against searches of workplaces and domiciles and seizure of materials as well as protection against physical violence and intimidation.

In the case of *Özgür Gündem v. Turkey*, the applicant newspaper claimed that it (and its staff) had been the subject of attacks and harassment which had eventually forced its closure. The European Court of Human Rights affirmed that "genuine, effective exercise" of freedom of expression "does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals".*

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1. *The Sunday Times v. the United Kingdom* (1979), §65.
   The implications of this statement of principle are explored further in Chapter 3, "Participation in democratic society" on page 35.

> It found that the Turkish authorities had failed in their positive obligation to protect the newspaper's freedom of expression by taking "steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence".†

*   *Özgür Gündem v. Turkey (2000)*, §43.
†   *Ibid*. §45.

Together, these freedoms help to safeguard the operational autonomy necessary for the fulfilment of journalistic tasks in a democratic society.

Determining violations of freedom of expression

There are a number of steps in the test developed by the Court to determine whether Article 10, ECHR, has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must:

*   Be prescribed by law – i.e., adequately accessible and reasonably foreseeable in its consequences;
*   Pursue a legitimate aim – i.e., correspond to one of the aims set out in Article 10 (2);
*   Be necessary in a democratic society – i.e., correspond to a "pressing social need" and be proportionate to the legitimate aim pursued.

States have a certain amount of discretion in how they regulate free expression. The extent of this discretion, which is subject to supervision by the European Court of Human Rights, varies. States have a narrow margin in respect of political expression and a wider one in respect of public morals, decency and religion. This is usually explained by the absence of a European consensus on whether or how such matters should be regulated. The European Court of Human Rights does not take the place of the national authorities, but reviews the decisions taken by the national authorities, taking into account their margin of appreciation under Article 10, ECHR. Thus, the Court looks at the expression complained of in the broader circumstances of the case and determines whether the reasons given by the national authorities for the restriction and how they implemented it are "relevant and sufficient" in the context of the interpretation of the Convention.[2]

The Court recognises different categories of expression, notably political, artistic and commercial. Of these, political expression enjoys the most pro-

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2. See for example *Otto–Preminger–Institut v. Austria* (1994).

tection and commercial the least. The usefulness of this rough system of cat-
egorisation is, however, somewhat limited due to the frequent blurring of
boundaries between categories and the hybrid nature of many types of
expression. For instance, a painting may be artistic expression but can also
convey a controversial political message and contribute to public debate.

Media pluralism and diversity

A democratic society needs space for public debate. However, democratic
society is not without its rough edges and public debate necessarily involves
disagreement, dispute and confrontations between opposing viewpoints.
Such disagreement and confrontation – even when expressed in strong
terms – are ordinarily protected by Article 10 (because it safeguards not
only the substance of information and ideas, but also the form in which
they are conveyed).

As the European Court of Human Rights famously stated in the *Handyside*
case, information and ideas which "offend, shock or disturb the State or any
sector of the population" must be allowed to circulate in order to safeguard
the "pluralism, tolerance and broad-mindedness without which there is no
'democratic society'."[3]

Pluralism, however, demands a certain balancing of the (sometimes) com-
peting interests of majority and minority groups in society. As the Court has
held on several occasions:

> 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.[4]

The Court views freedom of expression, pluralism and tolerance as very
important for effective political democracy. The underlying principle is that
in a democratic, pluralist society, everyone should be able to participate
effectively in public debate.

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3. *Handyside v. the United Kingdom* (1976), §49.
4. *Young, James and Webster v. the United Kingdom* (1981), §63.

In the *Steel & Morris* case (popularly known as the *McLibel* case), members of a small environmental organisation had distributed leaflets criticising McDonald's. The leaflets contained very serious allegations, which were presented as statements of fact rather than as opinions. The environmentalists Steel and Morris were convicted of defamation by the UK courts. The European Court of Human Rights, however, considered this a violation of their freedom of expression. It attached greater importance to the public interest in the topic under discussion and in the need for procedural fairness in defamation proceedings, than to the need for complete accuracy of specific details published in the leaflets.*

The Court found 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 [...]"†

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*   *Steel and Morris v. the United Kingdom (2005).*
†   *Ibid., § 89.*

The above examples clearly relate to the "argument from democracy" for freedom of expression. The promotion of tolerance, understanding and conflict prevention, however, is also an important argument. The more that different groups know about each other and interact, the less the risk of societal tensions. By disseminating information widely and serving as fora for exchange and dialogue, the media can play a very important role in promoting pluralism and tolerance in public debate.

Media pluralism has been a long-standing concern of the Council of Europe. According to the case-law of the European Court of Human Rights, the state is the "ultimate guarantor" of pluralism in the media sector.

For public authorities, this principle has practical implications which have been developed partly in the case-law of the Court, in the European Convention on Transfrontier Television (ECTT), and especially in various standard-setting texts adopted by the Committee of Ministers, the Parliamentary Assembly of the Council of Europe (PACE) and the European Commission for Democracy through Law (better known as the Venice Commission, the Council of Europe's advisory body on constitutional matters).

Article 10*bis*, ECTT, is entitled "Media pluralism" and it requires states to "endeavour to avoid that programme services transmitted or retransmitted [...] within their jurisdiction [...] endanger media pluralism". The wording

of the provision is vague and the obligation it creates is merely to "endeav-our to avoid". Nevertheless, it flags the importance of the issue.[5]

Greater detail and sense of purpose are provided by various texts from the Committee of Ministers. An early example of engagement with the issue is the *Declaration on the freedom of expression and information* (1982), which provides that states "should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions". The declaration sets the objective for states to achieve "the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions".

An important milestone was reached with the adoption of *Recommendation R (99) 1 on measures to promote media pluralism*. That text has, however, since been superseded by the very detailed and expansive approach taken by *Recommendation (2007) 2 on media pluralism and diversity of media content* and the *Declaration on protecting the role of the media in democracy in the context of media concentration.*

Recommendation (2007) 2 distinguishes between structural pluralism and diversity of content and addresses both in a way that reflects the specificities of new technologies. It also shows awareness of the importance of relevant capacity building measures to ensure the effective use of media technologies and singles out the particular needs of minorities and other groups.

> Recommendation (2007) 2 sets out important general principles for the pro-motion of (i) structural pluralism of the media, and (ii) content diversity: member states should seek to ensure that a sufficient variety of media out-lets provided by a range of different owners, both private and public, is available to the public, taking into account the characteristics of the media market, notably the specific commercial and competition aspects.

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5. As regards this and other references to the ECTT, note that the Convention is currently being revised so as to harmonise it with the EU Audiovisual Media Services Directive (AVMSD), which might mean changes to the content of the ECTT.

> Pluralism of information and diversity of media will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, member states should define and implement an active policy in this field, including monitoring procedures, and adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public.

The general mandate of public service media requires them to serve all sections of society. Very often, their mandate also includes the specific requirement to promote tolerance and understanding among various groups in society. As such, the contribution of public service media – both potential and real – is considerable and its importance is duly recognised in numerous Council of Europe texts, as discussed in Chapter 2.

The Parliamentary Assembly of the Council of Europe, too, has consistently expressed its concerns about trends towards media concentration. It has issued recommendations relating to the subject in general,[6] as well as in respect of specific countries (*Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy*). Media concentration in Italy has been examined by the Venice Commission as well. Media pluralism was also included in the recommended indicators for media in a democracy (as set out in the Assembly Resolution of the same title – No. 1636 (2008).

The Council of Europe Steering Committee on the Media and New Communication Services (CDMC) has been examining questions of media diversity in member states. They have in particular looked at policy responses to media concentration.

Finally, it should be acknowledged that other normative texts can and do make viable contributions to the promotion of media pluralism. For example, by promoting the access of national minorities and speakers of regional or minority languages to the media, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, respectively, contribute to media pluralism by helping to diversify media outlets and content.

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6. Recommendation 1506 (2001) on freedom of expression and information in the media in Europe and Recommendation 1589 (2003) on freedom of expression in the media in Europe.

Speak freely but respect my dignity

Although the European Convention on Human Rights does not explicitly recognise human dignity as a distinct right as such, upholding human dignity is clearly consistent with the Convention's overall objectives. Indeed, the Court has stated that the "very essence of the Convention is respect for human dignity and human freedom".[7] It has also stated that "tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society".[8]

The Court has dealt with the notion of human dignity in the context of various provisions, including the prohibition of torture. "Racial violence" is considered to be "a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction". The Court has repeatedly acknowledged the negative impact that "hate speech" can have on human dignity. In the same vein, Holocaust denial is routinely seen as hurting the dignity of its victims and therefore not entitled to protection under the European Convention on Human Rights.

> Article 7 (1), ECTT, insists that broadcast material must (in its presentation and content) "respect the dignity of the human being and the fundamental rights of others".

The lack of a clear and binding definition makes it difficult to determine what kinds of expression are rightly considered to infringe "dignity". For that reason, an assessment of relevant Council of Europe standards should focus not only on specific references to human dignity, but also on other provisions which could potentially undermine dignity, for instance "hate speech".

Summarising this large set of standards, we can identify two main sides of the Council of Europe's approach: (1) the prevention, prohibition or punishment of certain types of expression (e.g. incitement to hatred, racist expression), and (2) the promotion of tolerance, understanding and inter-group and inter-cultural dialogue.

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7. *Pretty v. the United Kingdom* (2002), §65.
8. *Gündüz v. Turkey* (2004), §40.

This two-pronged approach can be traced to the European Court of Human Rights' seminal finding in support of media freedom in *Jersild v. Denmark*.

> The *Jersild* case concerned the conviction of a Danish journalist for aiding and abetting in the dissemination of racist statements. The journalist had conducted a televised interview in which the statements in question were uttered by members of a group known as the "Greenjackets". The journalist was convicted largely because he had failed to contradict or distance himself from the statements of the interviewees.*
>
> The European Court of Human Rights held that the journalist's right to freedom of expression had been infringed, *inter alia*, because it was not for the courts to determine journalistic techniques to be used. The Court ruled that "the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed".†

*   *Jersild v. Denmark (1994)*.

†   *Ibid*. § 31

This key principle is fundamental for relevant standard-setting activities across the Council of Europe, e.g. in the country-specific monitoring work of the FCNM and ECRI. The principle was consolidated and further developed in two key recommendations adopted by the Committee of Ministers in 1997: *Recommendation (97) 20 on "hate speech"* and *Recommendation (97) 21 on the media and the promotion of a culture of tolerance*.

Even though the recommendations cover similar subject matters, it was decided to prepare two separate texts, one dealing with the negative role which the media may play in the propagation of hate speech; the other with their possible positive contribution to countering such speech. The main reasoning behind this decision was explained as follows:

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

In a non-prescriptive way, Recommendation (97) 21 encourages the media to adopt measures or best practices aimed at sensitising media professionals to multiculturalism and tolerance. These include organisation training programmes, facilitation access to the media for different groups in society, promotion of intercultural programming, avoidance of negative reporting and stereotyping of particular groups.

Specific attention is also paid to the need to protect human dignity in a changing technological environment, e.g. in *Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting* and the *Declaration on a European policy for new information technologies* (1999).

Other recommendations focus on the protection of dignity in specific contexts, for instance concerning the portrayal of violence in the electronic media, the democratic and social contribution of digital broadcasting, and so forth. Also of note, in respect of particular television formats (especially reality television), is the *Statement issued by the Standing Committee on Transfrontier Television* in 2002 focusing on the need for television programmes to uphold human dignity and the fundamental rights of others.

In conclusion, robust, open debate in a democratic, pluralist society cannot be achieved without strong, prior safeguards for the right to freedom of expression. Under relevant Council of Europe standards, even restrictions on the right are devised to serve the best interests of a democratic and pluralist society. The approach taken across relevant treaties and other normative standards seeks to open up space for critical engagement and debate between differently minded and differently situated groups in society, but to also ensure that this space remains tolerant and is not crushed by hatred.

Dialogue, understanding and social cohesion

Bissera Zankova

Introduction

Peaceful coexistence in a pluralist Europe depends on dialogue and understanding, as repeatedly affirmed by the Council of Europe.

In 1993, at the First Summit of Heads of State and Government, it was declared that cultural diversity characterised Europe's rich heritage and that tolerance guaranteed an open, flourishing society. In 2005 the Third Summit of Heads of State and Government underlined that *intercultural dialogue* was the primary means for the prevention of conflicts and for ensuring integration and social cohesion.

The media play a crucial role in this – ideally positively, as called for in the milestone *Recommendation (97) 21 on the media and the promotion of culture of tolerance*.

The appendices to Recommendation R (97) 21 detail the role of the media:

– to report accurately about racism and intolerance;

– to depict individuals and groups in a balanced manner showing their unique perspectives;

– to alert the public to the negative social consequences of intolerance and educate people to be open and appreciate difference as a source of enrichment.

In particular the powerful broadcast media should contribute to social cohesion and draw attention to dialogue in multicultural societies. Broadcast media should dedicate airtime to the life and traditions of various ethnic, religious and other communities and put effort into the promotion of multiculturalism.

A regulatory framework, self-regulation, multi-ethnic journalistic teams and training are considered needed to achieve this.

Intercultural dialogue and social cohesion

The *White Paper on Intercultural Dialogue* (2008) defines intercultural dialogue as "an open and respectful exchange of views between individuals, groups with different ethnic, cultural, religious and linguistic backgrounds and heritage on the basis of mutual understanding and respect. It operates at all levels – within societies, between the societies of Europe and between Europe and the wider world".

Intercultural dialogue is meant to be more than merely an exchange of views. It is also presumed to contribute to a better and deeper understanding of the other groups' ideas and behaviour. As such, it is vital for social cohesion, too.

In the case of *Gorzelik and Others v. Poland* a teacher from Katowice complained that a decision not to register a "Union of People of Silesian Nationality" violated his right to freedom of association, guaranteed under Article 11 of the Convention.*

The Court underlined the importance of cultural and religious pluralism for fostering social cohesion in a democracy. In its verdict, it held that:

"Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the 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.

[...]

> For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."†

*   *Gorzelik and Others v. Poland (2004).*
†   *Ibid. § 90ff.*

Intercultural dialogue depends on a fair application of the rule of law, respect for human rights, and requires efforts from all sectors in society. This interpretation first appears in the *Faro Declaration* (2005) adopted by the ministers deputies on the 50th anniversary of the European Cultural Convention. The document signifies the commitment of European States "to promoting a model of democratic culture, underpinning the law and institutions and actively involving civil society and citizens, and to ensuring that diversity is a source of mutual enrichment, by promoting political, intercultural and inter-religious dialogue."

More recently, the wider policy dimensions were laid down in the *Declaration for the Promotion of Intercultural Dialogue*, adopted at the Conference of Ministers of Culture in Baku (December 2008). Intercultural dialogue, it was stated, requires a coherent interplay between different policy sectors and the full participation of different stakeholders including public authorities, the media and civil society.

Interreligious dialogue is an essential element of dialogue in modern day societies. The annual Council of Europe exchanges on the religious dimension of intercultural dialogue is an innovative and promising initiative to improve understanding, reduce tensions and increase mutual respect. Its underpinning is that religious groups and cultural communities should tolerate critical statements provided that they do not amount to intentional insult and hate speech, or represent incitement to violence, discrimination or breach of public peace and order.

The Parliamentary Assembly outlines this balance between two possibly conflicting rights in its *Resolution 1510 (2006) on freedom of expression and respect for religious beliefs*. It states that there are no special limitations to freedom of expression – other than those already mentioned under Article 10 of the ECHR – for religious groups. At the same time, attention is drawn to the fact that hate speech against religious groups is not compatible with the ECHR and the case-law of the Court.

This "balancing act" puts further emphasis on intercultural and inter-religious dialogue for peaceful coexistence, as stressed by the Venice Commission's report on the relationship between freedom of expression and freedom of religion.[9] One of the conclusions affirms that "it is not exclusively or even primarily for the Courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers".

Hate speech and racism

While the media may contribute to dialogue and understanding, they can also be a factor in generating social tension through stereotyping and inaccurate reporting. Worse, the media can disseminate "hate speech" or remarks based on racial or ethnic discrimination. Naturally, this is not desirable in an inclusive society, possibly even intolerable. The question is where to draw the line between freedom of expression, hate speech and the right not to be discriminated against.

> In its Recommendation (97) 20, the Committee of Ministers defines hate speech as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".

The European Court of Human Rights has stated that it "is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations".[10] The Court also held that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)."[11] In other words, hate speech is not tolerable. Likewise, the fact that some speech cannot be considered "hate speech" is essential when judging whether inter-

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9. Venice Commission Report: *The issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred* (Venice, 17-18 October 2008).
10. *Jersild v. Denmark* (1994).
11. *Gündüz v. Turkey* (2003), § 40.

ferences with the right to freedom of expression are necessary in a democratic society.[12]

In Recommendation (97) 20, the Council of Europe recommends that member states take appropriate steps to combat hate speech, including hate speech disseminated through the media, by introducing a sound and comprehensive legal framework, reconciling freedom of expression and freedom from discrimination. To protect freedom of expression, limitations to this right have to be narrowly circumscribed, applied in a non-arbitrary manner and subject to *ex post* judicial control.

Different European bodies deal with discrimination and hate speech, and focus on media and social cohesion as well.

The European Fundamental Rights Agency (FRA) was established by the EC in February 2007, to take over the work of the European Monitoring Centre on Racism and Xenophobia (EUMC). The FRA continues to do research into racism and xenophobia in Europe[13] and in its work it co-operates with national and international bodies and organisations, in particular with the Council of Europe.

The European Commission against Racism and Intolerance (ECRI) is the specialised Council of Europe monitoring body dealing with racism, xenophobia, anti-Semitism and intolerance. It publishes country reports and it has adopted 11 general policy recommendations with the purpose to assist member states in drafting anti-discrimination policies.

One of ECRI's activities is to collect examples of "good practices" for combating racism and intolerance in member states, including in the media. ECRI publishes these examples in a series to serve as a source of comparison and inspiration.[14] In November 2006 ECRI organised a seminar on "Combating

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12. *Ergin v. Turkey* (2006), §34; *Han v. Turkey* (2005), § 32.
    For more information on the European Court on Human Rights' case-law on hate speech, please consult Weber, Anne, (2009) "Manuel sur le discours de haine", Council of Europe Manuals, *Human Rights in Culturally Diverse Societies*, Leiden, Boston: Martin Nijhoff Publishers; Steering Committee for Human Rights (CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), *Report: Human Rights in a Multicultural Society – Hate Speech*, http://www.coe.int/t/e/human_rights/cddh/3._committees/
    04.%20development%20of%20human%20rights%20%28dh-dev%29/
    04.%20meeting%20reports/36thAReport_en.asp#TopOfPage.
13. cf for example information on the RAXEN project http://fra.europa.eu/fraWebsite/research/raxen/raxen_en.htm.
14. For the collection of best practices in the media see http://www.coe.int/t/e/human_rights/ecri/1-ECRI/3-General_themes/2-Examples_of_good_practices/2-Media/ecri00-19%20Good%20practice%20Media.pdf.

racism while respecting freedom of expression". One of the main conclusions of the seminar was that the balance between these two fundamental rights needs to be defined in the legislation, though with appropriate safeguards and applied sensitively.[15]

Conflicts and resolution

Social tension and conflicts can jeopardise free expression in a time when communication and understanding are needed most. However, the media are often the first victims in such crisis situations – with freedom of speech limited and the security of journalists put in danger.

What constitutes a crisis is defined in the *Guidelines of the Committee of Ministers on protecting freedom of expression and information in times of crisis* (2007): *force majeur* situations such as wars, terrorist attacks, natural and man-made disasters, i.e. "situations in which freedom of expression and information is threatened (for example, by limiting it for security reasons)".

In such extraordinary circumstances, it is vital for the media to inform the public about events such as violations of human rights. This is at the core of *Recommendation (96) 4 of the Committee of Ministers on the protection of journalists in situations of conflict and tension*. The document recommends that member states undertake actions and policies that focus on prevention, such as adequate insurance, hot lines and favourable and secure working conditions. Also, it calls upon states to alert media organisations, journalists and professional organisations to take important preventive measures for the protection of the physical safety of journalists.

Importantly, while regular access to information is often restricted in times of crisis, the subsequently adopted *Guidelines of the Committee of Ministers on protecting freedom of expression and information in times of crisis* actually call for openness, since free access to information can help to effectively resolve conflicts and expose the abuses they entail (Chapter V, principles 17 and 18). The guidelines also call upon the media to observe professional standards.

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15. http://www.coe.int/t/dghl/monitoring/ecri/activities/22-
    Freedom_of_expression_Seminar_2006/NSBR2006_proceedings_en.pdf.

Hence, the Committee of Ministers demands openness in combination with responsibility, as a means to crisis resolution.

The *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis* (2007) view the media as a *solution* in crisis situations, provided they live up to ethical standards. The guidelines state:

"Convinced not only that media coverage can be crucial in times of crisis by providing accurate, timely and comprehensive information, but also that media professionals can make a positive contribution to the prevention or resolution of certain crisis situations by adhering to the highest professional standards and by fostering a culture of tolerance and understanding between different groups in society

[...]

Media professionals need to adhere, especially in times of crisis, to the highest professional and ethical standards, having regard to their special responsibility in crisis situations to make available to the public timely, factual, accurate and comprehensive information while being attentive to the rights of other people, their special sensitivities and their possible feeling of uncertainty and fear."

New technologies and new challenges

The Internet offers unprecedented opportunities for individuals to create, produce and distribute content, to actively participate in social networks and to acquire new skills and knowledge. As such, the Internet reinforces communication, information and democratic processes. Yet at the same time, the widespread introduction of new technologies also incurs risks: the protection of privacy and human dignity, the fast and borderless distribution of false information, decreasing professional standards in journalism, or limited access for certain groups.

The *Declaration of the Committee of Ministers on human rights and the rule of law in the information society* (2005) outlines these positive and negative consequences of ICTs on human rights and on society in general. *Recommendation (2007) 16 of the Committee of Ministers on measures to promote the public service value of the Internet* stresses the social and ethical dimensions of the information society. It highlights in particular the public service value of

the Internet as an essential tool for people's everyday activities and for the entrenchment of a culture of dialogue and mutual respect.

The protection and promotion of these values require a concerted effort: access to information, the protection of human dignity and minors, consumer protection and protection of privacy need to be secured by national authorities, the private sector, civil society and the media themselves. Access to ICTs, for instance, should be non-discriminatory, reliable and available at an affordable price in order to protect cultural and linguistic diversity. Training on ICT usage and information literacy is required for less advantaged groups.

Beyond the access for certain groups and the protection of the dignity of minors, the Internet poses other challenges related to human rights and peaceful coexistence. The European Commission against Racism and Intolerance (ECRI) passed a general policy recommendation on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet (2000). It points out possible negative effects of the Internet, especially in spreading racist content across borders and calls upon governments of Council of Europe member states to take appropriate action.

The ECRI *Recommendation on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet* called in 2000 for the co-operation between law enforcement authorities and confirmed that "what is not allowed offline, is not allowed online either". It called upon member states to:

"Take the necessary measures for strengthening international co-operation and mutual assistance between law enforcement authorities across the world, so as to take more efficient action against the dissemination of racist, xenophobic and anti-Semitic material via the Internet;

Ensure that relevant national legislation applies also to racist, xenophobic and anti-Semitic offences committed via the Internet and prosecute those responsible for this kind of offences;

Undertake sustained efforts for the training of law enforcement authorities in relation to the problem of dissemination of racist, xenophobic and anti-Semitic material via the Internet."

At the same time, the Recommendation also underlined the unprecedented means of facilitating cross-border communication on human rights and anti-discrimination issues, and of setting up educational and awareness raising networks in the field of combating racism and intolerance.

Public service media – bringing people together

Public service broadcasters are considered an important element in democratic societies, catering to the needs of all people. The Council of Europe has long emphasised the value of public service broadcasting, and supported its role in diversifying information, fostering democratic participation, and promoting social cohesion.

The role cut out for public service broadcasters is reflected in its remit, referred to in different acts of the Council of Europe. Their main mission is to "support the values underlying the political, legal and social structures of democratic societies".

Recommendation (2007) 3 of the Committee of Ministers on the remit of public service media in the information society states that public service broadcasters are expected to be a reference point for all members of society, to be a forum for democratic debate (thus fostering democratic participation) and to be a factor in social cohesion and integration of individuals and communities.

Moreover, public service broadcasters are supposed to be a source of impartial, diverse and independent news and information, to provide high quality innovative audiovisual content and to contribute to the production of audiovisual material relevant for national and European cultural heritage.

In doing so, public service broadcasters need to attract a large audience (demonstrating their relevance and role in social cohesion) while producing distinctive content which may not be aired on commercial channels (diversity, quality and pluralism). These seemingly contradictory goals mark the boundaries of the remit and functioning of public service broadcasters.

Public service broadcasters pursue this by providing different content, on different platforms to different groups in society.

- They should offer news, educational, cultural, sports and entertainment programmes catering for the views and tastes of all segments and groups – thus contributing to pluralism, cohesion and understanding. By encouraging audiovisual creativity, public service broadcasters promote cultural diversity and identity.
- Further, public service broadcasters should integrate all communities and groups, including minority groups, young and old persons, disadvantaged and underprivileged, by reflecting their problems, portraying them and promoting the content created for and by them. Through such diver-

sified programming public media fosters a sense of co-responsibility and mutual trust.

- And finally, they should do so using new technologies, interactive services and digital platforms.[16] The opportunities presented should be used to support social inclusion and democratic debate: through effective use of interactive services, public broadcasters can mobilise young people for dialogue and reach potentially marginalised citizens such as minorities, asylum seekers, migrants and immigrants.

As illustrated by the last point, the proliferation of content on the Internet and on other digital channels has an impact on the remit of public service broadcasters. Some argue that public service broadcasters may become redundant in such an era, yet the Council of Europe has repeatedly held the opposite: more than ever, there is a need for media serving the public as a whole.

Indeed, the preamble of the *Recommendation (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society* refers to "the emergence of public service media as a new convergent phenomenon".

The Recommendation contains a number of guiding principles, and calls for an *extended and diversified* remit incorporating new communications services and platforms. Member states are called upon to provide the technical, legal and financial conditions to enable public service media to fulfil this role. To assist member states, a "Compilation of good practices: how member states ensure the legal, financial, technical and other appropriate conditions required to enable public service media to discharge their remit" has been prepared by the CDMC working group on public-service media in the information society (MC-S-PSM).[17]

Training of journalists

Education and training is a long-lasting priority for the Council of Europe. In various documents, the organisation mentions the key role of education for social cohesion and understanding, and in practice the organisation is

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16. See further the report on public service media and the promotion of wider democratic participation of individuals prepared by the CDMC working group on public service media in the information society (MC-S-PSM) at http://www.coe.int/media.

17. The report will be available soon at http://www.coe.int/media.

closely involved in training media representatives on a wide variety of issues.

The Parliamentary Assembly of the Council of Europe in its *Recommendation 1789 (2007) on the education and training of journalists* calls upon member states to support professional training courses of journalists nationally and through the Council of Europe, possibly in co-operation with media and their professional organisations, and to engage universities, creating network training centres and organising exchanges of journalists with educational institutions and media companies through joint programmes with the European Union.

The *White Paper on Intercultural Dialogue* specifically points to the importance of intercultural competences – media professionals should demonstrate sufficient comprehension of human rights, expertise in history and understanding of different cultures to appropriately tackle reporting in a multicultural society. Training for journalists from mainstream media may focus on sensitising them towards reporting on minorities. Journalists belonging to minorities can be trained in linguistic skills, as well as the production of content, including in regional and minority languages.

The various parties involved – governments, civil society, media owners, professional associations of journalists, educational institutions – are called upon to ensure that access criteria for these courses are fair so that journalists from minorities and mainstream media can enter. Overall, the curricula of these trainings should reflect the pluralist nature of European societies and thus contribute to dialogue and understanding through the media.

Community media

In 2007 the Committee of Ministers adopted two standard-setting documents which point out the need of developing different types of media contributing to pluralism and diversity: the *Declaration on protecting the role of the media in democracy in the context of media concentration* (31 January 2007), and the *Recommendation on media pluralism and diversity of media content* (CM/Rec (2007). Both documents highlight the capacity of community, local, minority or social media to provide a space for dialogue, while responding to the specific needs or requests of certain groups in civil society and serving as a factor of social cohesion and integration. In 2009 a Declaration by the Committee of Ministers followed which addressed specifically the

community media: the *Declaration on the role of community media in promoting social cohesion and intercultural dialogue*.

There is no one single definition of community media in Europe, given the differences of local contexts and modes of functioning of these media. There is no unified terminology on the matter either: community media are also referred to as "third sector", "minority media", or "social or civic media". This being said, the above-mentioned Declaration defines community media as "media which may share some of the following characteristics: independence from government, commercial and religious institutions and political parties; a not-for-profit nature; voluntary participation of members of civil society in the planning and management of programmes; activities aiming at social gain and community benefit; commitment to inclusive and intercultural practices."

Community media constitute a distinct sector. They are complementary to public service media and commercial media, and this is precisely why sometimes they are referred to as "third sector media". They operate in many Council of Europe member states and, reportedly, in over 115 countries worldwide. By their very nature, community media are close to their audiences: for instance, by using the language of their public, they are able to reach out effectively to minority audiences. They serve many societal needs and perform functions that neither commercial nor public service media can meet or undertake fully and adequately.

In today's radically changed media landscape, community media can play an important role, notably by promoting social cohesion, intercultural dialogue and tolerance, and by promoting culture of understanding between different ethnic, cultural and religious groups in civil society.

The *Declaration on the role of community media in promoting social cohesion and intercultural dialogue* stresses that community media are able to boost public debate, political pluralism and awareness of diverse opinions, notably by providing various groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas. According to the Declaration, community media have also the capacity of fostering community engagement and democratic participation at local and regional level.

Recognising the positive role for social cohesion and intercultural dialogue that community media can play, the Council of Europe points out in the Declaration that at the same time community media may also, in certain cases, contribute to social isolation or intolerance. To avoid this risk, com-

munity media should always respect the essential journalistic values and ethics common to all media. With regard to this the Declaration invites the community media to be aware of their mission in promoting dialogue and understanding and to this end elaborate and adopt professional codes or internal guidelines and ensure that they are respected.

Taking into account the added value of community media and their positive role for social cohesion and intercultural dialogue, the Committee of Ministers of the Council of Europe in the Declaration declares its support for community media and highlights the necessity to examine the question of how to adapt legal frameworks which would enable the development of community media and the adequate performance of their social functions.

According to the Declaration, the proper functioning of community media depends on a number of concrete *technical*, *financial and educational* elements. This means that the state has to ensure that there is a sufficient number of terrestrial radio frequencies, both in analogue and digital environments and adequate funding should be made available at national, regional and local level to support the sector, directly and indirectly, while duly taking into account competition aspects.

Member states should examine practical possibilities to help community media to develop further and perform their role in promoting social cohesion and intercultural dialogue. It is up to each country to decide on the *specific* (practical) steps to be taken, depending on concrete national contexts and the degree of development of community media sector.

Participation in democratic society

Tarlach McGonagle

Introduction

Participation in democratic society is determined by the effectiveness with which a whole cluster of rights can be exercised. Those rights include, first and foremost, freedom of expression, assembly and association, the right to vote and stand for elections, and so forth. Although the European Convention on Human Rights (ECHR) does not explicitly provide for a right to participation in democratic society, such a right is recognised in other treaties, for instance the Framework Convention for the Protection of National Minorities (FCNM). It is also a recurrent objective of various texts concerning the media adopted by the Committee of Ministers and the Parliamentary Assembly.

Whereas formal participation in *official* democratic structures and processes is clearly of central importance for any democratic polity, the importance of participation in *unofficial* democratic practices, e.g. public debate, including in the media, should not be underestimated. The societal impact of the latter can be very significant. This chapter will therefore focus on both dimensions to participation in democratic society: formal and informal participation.

Unravelling the notion of participation in democratic society

Scope of the right to participation

The notion of participation in democratic society is broad and includes participation in a range of activities (political, social, cultural and economic) which together make up public affairs. In other words, even though democratic society cannot exist without political participation, the importance of participation in other realms of public life should not be downplayed either.

> In *Bowman v. the United Kingdom*, a case arising out of a prosecution for distributing anti-abortion leaflets in the run-in to political elections, the European Court of Human Rights held that "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system".*

* *Bowman v. the United Kingdom (1998), §42.*

The ability to participate in the full range of public affairs is often contingent on the ability to freely assemble and associate and freely express oneself for relevant purposes. In the case of *Gorzelik and others v. Poland* the Court held that:

> It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.[18]

Although the European Convention on Human Rights does not specifically provide for a right to participation, its essence can be derived from several articles in the Convention. Moreover, the Court repeatedly refers to the importance of democratic society, which would be a hollow concept without effective participation.

Nevertheless, in the absence of an express Convention right to participation, the right is primarily assured in the Council of Europe context by the European Charter of Local Self-Government, as well as by Article 15 of the Framework Convention for the Protection of National Minorities. The latter provides as follows:

18. *Gorzelik and Others v. Poland* (2004), §92.

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

This article provides for a right of effective participation for persons belonging to national minorities generally, as well as a more specific right where issues affecting them are at stake. The insertion of the adjective, "effective" in Article 15 is of huge potential significance. It implies that consultation or representation of minorities that is merely symbolic is not sufficient. Their participation must be real and effective.

Participation and ICTs

The European Convention on Human Rights is not a static document, but should be interpreted in a "dynamic and evolutive" manner.

> The European Court of Human Rights has consistently held that the European Convention on Human Rights is a "living instrument" which "must be interpreted in the light of present-day conditions".

By taking this interpretive approach, the European Court of Human Rights has recognised that rights are dynamic and that their content can develop over time. Similarly, factors influencing the effectiveness with which rights are exercised are also liable to change over time, especially under the influence of societal and technological developments. This is particularly true of the right to participation, as this depends increasingly on the ability of people to use modern communications technology.

For example, so-called e-democracy is gaining ground in order to encourage formal participation. Yet, the more governmental services are provided online, the more important it will become for all members of society to have full access to ICTs. Importantly in this regard, *Recommendation (2007) 11 on promoting freedom of expression and information in the new information and communications environment* views access to the Internet as instrumental for accessing information and therefore also as "participation in public life and democratic processes".

Similar principles inform *Recommendation (2007) 2 on media pluralism and diversity of media content*.

Effective participation in democratic societies increasingly requires a bridging of the so-called digital divide – to overcome the disparity between those with access to (digital) information, and those without. Various Committee

The *Recommendation on media pluralism and diversity of media content* includes a specific focus on "Promotion of a wider democratic participation and internal diversity". It zooms in on the role of the media in fostering democratic participation. It states that member states should, while respecting the principle of editorial independence, encourage the media to:

"supply the public with a diversity of media content capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations;

contribute to intercultural and inter-religious dialogue, so as to promote mutual respect and tolerance and to prevent potential conflicts through discussions".

To these ends, it calls for the development by the media of policies to accommodate the participation of minorities and responsiveness to "dynamic technological changes", including for the promotion of digital media literacy.*

* *See further: "Availability and accessibility of media" on page 45.*

of Ministers' recommendations and other standard-setting texts aim to promote this objective.[19]

In sum, relevant standards of the Council of Europe promote participation in democratic society in a broad sense, but they also contain numerous specific emphases on the role of the media in promoting individual and group participation in public affairs. The media's ability to contribute to public debate, as enhanced by continuing technological advances, is of foremost importance in this connection.

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19. For instance: Recommendation No. (99) 14 on universal community service concerning new communication and information services; Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting; Declaration on human rights and the rule of law in the information society (2005); Recommendation CM/Rec (2007) 2 on media pluralism and diversity of media content; and Recommendation CM/Rec (2007) 11 on promoting freedom of expression and information in the new information and communications environment.

Access to information

Participation requires not only the right to disseminate information, but also the right to gather information. The availability and accessibility of information are therefore prerequisites for any well-functioning democratic society. The right to receive and impart information of all kinds, regardless of frontiers, is commonly safeguarded in international human rights treaties of a generalist nature. In respect of Council of Europe standards, Article 10, ECHR, is the key provision.

In its settled case-law, the European Court of Human Rights has held that the freedom to receive information, as guaranteed by Article 10, ECHR, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander v. Sweden*).

According to the Court, the freedom to receive information *cannot* therefore be understood as imposing on a state obligations to:

* grant access to information relating to an individual's private or family life (*Gaskin v. the United Kingdom*)
* collect and disseminate information of its own motion (*Guerra and others v. Italy*)
* disclose to the public any secret documents or information concerning its military, intelligence service or police (*Sirbu and others v. Moldova*).

These examples demonstrate a certain reluctance on the part of the Court to recognise positive state obligations to disclose or disseminate information in a range of different contexts.

Another line in the Court's case-law dealing with the right to receive information concerns cases involving restrictions on freedom of the press. In that respect, "it has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest".

The focus here is on public access to official information held by governmental authorities. At the present time, most member states of the Council of Europe have put in place laws, structures and procedures allowing for varying levels of access to official documents. As such, it is possible to acknowledge the developing nature of the right to information at the national level.

This trend is also apparent in relevant Council of Europe standards: (1) to a limited extent in the case-law of the Court, but more explicitly and exten-

sively in (2) *Recommendation (2002) 2 on access to official documents* and (3) the European Convention on Access to Official Documents.

Case-law

The above examples are cases in which the Court did not find positive obligations on the state to provide access to information. However, its decision in *Matky v. the Czech Republic* is more promising as regards the granting of legal recognition to a right of access to information. The background to the case was the refusal to grant a request by an ecological NGO for access to information about the construction of a nuclear power plant.

Although the applicants were not successful before the Court, the fact that the Court declared Article 10 applicable in the particular circumstances of the case, is regarded by some commentators as a potentially significant development.

Recommendation

In the Preamble to its *Recommendation (2002) 2 on access to official documents*, the Committee of Ministers considers that "wide access to official documents, on a basis of equality and in accordance with clear rules":

– allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging informed participation by the public in matters of public interest;

– fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption;

– contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities.

Having presented a selection of rationales for promoting access to official documents, the recommendation proceeds, like many other CM recommendations, to attempt to operationalise these principles in order to make access to official documents workable and effective in practice.

All of these focuses on practical details contribute to the shaping of an effective regime for access to information, incorporating relevant procedural safeguards.

Recommendation (2002) 2 on access to official documents goes beyond principles and contains practical details.

Firstly, it offers a definition of "public authorities" and affirms a general principle of access to official documents, before setting out quite expansively possible limitations to the general principle.

Secondly, it examines procedural questions. For instance, it distinguishes between different forms of access, and stresses the desirability of ensuring that the consultation of original official documents is (in principle) free of charge and that charges for copying documents are reasonable and do not exceed the actual costs incurred. This is important for reducing potential procedural obstacles to the processing of information requests.

Thirdly, the importance of an independent review process for refusals of requests for information is also underscored.

Convention

On 27 November 2008, the Council of Europe adopted the European Convention on Access to Official Documents, which it presented as the first binding international instrument recognising a general right of access to official documents held by public authorities.

The explanatory report to the Convention states: "Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights."

Despite the historic nature of the text, it has been criticised by a range of international NGOs active in the field for not going far enough. Some of their specific criticisms and comments were echoed in relevant texts adopted by the Parliamentary Assembly of the Council of Europe. While generally welcoming the draft convention, the Assembly nevertheless firmly advocated:

• "broadening the definition of 'public authorities' to include a wider range of activities of public authorities and hence widening the scope of the information made available."

- "including a time-limit on the handling of requests" (due to the perishable nature of information).
- "clarifying and strengthening the review process" provided for in the draft text.

In the end, the Committee of Ministers proceeded to adopt the draft convention without taking on board the Parliamentary Assembly's recommendations.

Finally in this section, it should be noted that the policy objective of promoting greater access to information is often included in the broader policy objective of promoting better governance. Viewed in such an optic, the accessibility of information is instrumental for ensuring transparency in government and public services. In turn, transparency is instrumental for ensuring accountability. Furthermore, ready access to official documents leads to the kind of informational empowerment that can enhance co-regulatory processes (i.e., regulatory processes involving various parties in addition to state actors, thereby making them more inclusive than traditional, state-dominated regulatory models). These kinds of linkage are also applicable to other dimensions to public life beyond official structures.

Our say on what the media say

The media enjoy power as well as a certain amount of legal protection and privileges to allow them to fulfil their democratic functions. The public then should therefore have adequate opportunities to react to the information and ideas disseminated by the media.

The public should also know who owns and controls the media. This transparency is an important condition for enabling the public to act in an informed manner.

> As stated in Recommendation (94) 13 on measures to promote media transparency: "Members of the public should have access on an equitable and impartial basis to certain basic information on the media so as to enable them to form an opinion on the value to be given to information, ideas and opinions disseminated by the media."

The importance of transparency in the media sector is not limited to the details of ownership and organisational structures of media bodies, but

extends to information about broadcast licensing processes. These concerns are recurrent across relevant Council of Europe standard-setting texts.

Traditionally, one of the best-known mechanisms for reacting to media output is the so-called "right" of reply. This mechanism can be an important safeguard for fairness, balance, impartiality, accuracy and reputational interests. It allows those affected by particular media coverage or statements to respond to claims made, to challenge biases or to correct inaccuracies.

Apart from the corrective function of the right of reply in respect of individual statements or particular media coverage, it can also serve a broader purpose. Committee of Ministers *Recommendation (2004) 16 on the right of reply in the new media environment* therefore holds that it is "in the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information". This thinking underscores the important role of the media in providing information to the public and assisting the opinion-making process.

The *European Convention on Transfrontier Television* (ECTT) is the only Council of Europe treaty (as opposed to other, non-legally-binding standard-setting measures) that provides for a right of reply. The provision in question reads as follows:

ECTT Article 8 — Right of reply

1   Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction, within the meaning of Article 5. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.

2   For this purpose, the name of the programme service or of the broadcaster responsible for this programme service shall be identified in the programme service itself, at regular intervals by appropriate means.

Whereas Article 8, ECTT, concerns television broadcasts, *Recommendation (2004) 16 on the right of reply in the new media environment* seeks to promote the right of reply in respect of a wider range of media. The recommendation applies to all "means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspa-

pers, periodicals, radio, television and web-based news services". It deals with issues such as the promptness with which replies should be published, the prominence they should be given and the desirability of keeping them free of charge. It also sets a list of permissible exceptions to the right of reply against safeguards for the effective exercise of the right.

The particular importance of political debate in democratic society is also taken into account in the context of the right of reply. One of the principles set forth in *Recommendation (2007) 15 on measures concerning media coverage of election campaigns* states:

> Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply or equivalent remedies under national law or systems should be able to exercise this right or equivalent remedies during the campaign period without undue delay.

Increasingly, reactions to media output are enabled by online discussion – in which readers, viewers and users can comment – often hosted and moderated by the media themselves. The levels of moderation of such fora tend to vary in practice. Similarly, the growing online presence of the media in general has facilitated the practice of sending feedback to the media. The familiar convention of sending "letters to the editor" can now be achieved with the ease of touching a button.

Moreover, it should be noted that the right of reply – and other mechanisms for the promotion of public participation in the media – do not depend exclusively on regulatory measures by state authorities. Relevant Council of Europe standards recognise the usefulness of, and consistently invite consideration of the desirability of, promoting self- or co-regulatory measures in order to achieve these goals. This amounts to important acknowledgement of the value of sector-specific input into regulatory and policy processes and even their ability in some circumstances to pre-empt traditional, state-dominated regulation. Initiatives and practices nurtured from within the media sector are often those which enjoy the greatest chance of uptake and effective implementation. In such instances, standards can reflect valuable sector-specific expertise and a sense of (part) authorship can bring a feeling of ownership too, thus strengthening commitment to the standards and their application.

Availability and accessibility of media

The participatory potential of the media, as well as their effectiveness for communicative purposes depend (at least) on their:

- availability
- affordability
- accessibility
- functionality.

In the first place, *availability* implies that the public is able to receive information, ideas and opinions disseminated by the media. This includes the ability to receive content, regardless of the technical means of distribution used. In order to realise this goal, a number of Council of Europe standard-setting texts promote the introduction and development of particular types of media, e.g. digital broadcasting or ICTs. Relatedly, *availability* is often affected by *affordability*: the high costs associated with the introduction of new technologies can hinder their penetration in society and thereby their overall availability.

Of particular importance in this regard are the aforementioned texts adopted by the Committee of Ministers: *Recommendation (99) 14 on universal community service concerning new communication and information services*, *Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting*, *Declaration on human rights and the rule of law in the Information Society* (2005), and *Recommendation (2007) 11 on promoting freedom of expression and information in the new information and communications environment*.

The Recommendation on universal community service brings together principles dealing with questions of access, content and services, information and training, financing the costs of universal community service and fair competition safeguards. All of these principles are intended to feed into guidelines for a European policy for the implementation of universal community service.

The Recommendation on the democratic and social contribution of digital broadcasting also lays down a set of "basic principles for digital broadcasting". They focus on the switch-over to digital television and issues of orientation in the digital environment. They also concern the activities of broadcasters, especially public service broadcasters, in the digital environment (e.g. questions of remit, universal access and financing). The thematic priorities in the guidelines put forward in Recommendation (2007) 11 are

indicative of its considerable engagement with social and participatory dimensions to new technologies:

- empowering individual users
- common standards and strategies for reliable information, flexible content creation and transparency in the processing of information
- affordable access to ICT infrastructure
- access to information as a public service
- co-operation between stakeholders.

If understood expansively, the notion of availability could also be taken to include the availability of a pluralistic media landscape, the importance of which for freedom of expression and societal cohesion was explored in the preceding chapters.

In turn, the *accessibility* of particular media for certain sections of the public depends on their availability and affordability. It also depends on the ability of the public to use them in an informed way. This requires technological and linguistic knowledge and understanding of how the media work, sometimes referred to as media literacy.

The promotion of media literacy is regularly included in the Committee of Ministers' texts in a general way and sometimes in relation to specific goals. *Recommendation (2006) 12 on empowering children in the new information and communications environment*, for instance, especially concerns children, while Assembly *Recommendation 1466 (2000) on media education* is singularly devoted to the issue of media literacy in general.

Assembly Recommendation 1466 (2000) defines media education as follows: "teaching practices which aim to develop media competence, understood as a critical and discerning attitude towards the media in order to form well-balanced citizens, capable of making their own judgments on the basis of the available information. It enables them to access the necessary information, to analyse it and be able to identify the economic, political, social and/or cultural interests that lie behind it. Media education teaches individuals to interpret and produce messages, to select the most appropriate media for communicating and, eventually, to have a greater say in media offer and output."

The recommendation was drafted in response to the abundance of available information via a huge number and variety of sources in modern society, as well as the difficulty of orientation for (some) citizens. Media education is an important way of promoting media literacy and the Assembly recommen-

dation seeks, among other things, to ensure a "co-ordinated, inter-sectoral approach" to the issue and the promotion of best relevant practices. More concretely, it calls for the development – with the involvement of a variety of stakeholders – of media literacy programmes targeting children, adolescents and adults. It also calls for the incorporation of relevant programmes in teacher training programmes.

Finally and relatedly, from the perspective of users, the *functionality* of the media is largely determined by its accessibility. The question of media functionality is particularly important for persons belonging to minorities. For example, the ready availability of media in a dominant or state language may be of little functional value to a linguistic minority group. In the same vein, local broadcasting facilities may be of little functional value to a group that is dispersed throughout a state, or that has a transfrontier presence. As such, the criteria of availability, affordability and accessibility are prerequisites for (but not necessarily guarantees of) the achievement of media functionality.

In conclusion, ready access to both technology and official information are increasingly important for effective participation in both the official structures and processes of democracy as well as unofficial democratic practices, e.g. public debate in the media. Relevant Council of Europe standards, whether legally binding or not, constitute an important collection of measures aimed at maximising the potential of new communications technologies for enhancing participation in democratic society in general and in public debate via the media in particular.

Conclusions

Yasha Lange

Setting the standards

The standard-setting work of the Council of Europe has had a profound impact, as illustrated in the preceding chapters. A variety of treaties and recommendations on social and cultural issues have provided guidance on the ways and means to ensure a society in which free expression is guaranteed, while tolerance and respect are preserved.

The complex of treaties, conventions, case-law and recommendations collectively demonstrate how conflicting rights and obligations can be balanced: freedom of expression versus privacy or defamation; access to information versus national security; the promotion of democracy and pluralism versus the promotion of tolerance and the prevention of conflicts; the rights of individuals versus the public interest; and so on.

It is through a combination of legally binding texts (conventions and judgments, in particular) and non-treaty-based recommendations that the Council of Europe exerts its influence. In some cases laws are deemed too restrictive, or incompatible with freedom of expression – for instance when promoting tolerance and understanding. Intolerant remarks may, after all, also fall under the right to freedom of expression. In such cases, recommendations are applied to encourage positive examples, define standards and set the (non-binding) boundaries of what is *desirable*.

The wide range of recommendations also provides detailed guidelines for implementation, thus paving the way for workable practice on issues such as the protection of minors, prevention of hate speech, promotion of tolerance, education and literacy, ownership concentration, public service broadcasting, minority media or access to information.

Finally, the Council of Europe follows up on the recommendations by actively and continuously monitoring the performance (of member states, but also of other interested parties) and adherence to these recommendations, and supporting the implementation with targeted assistance.

In doing so, the Council of Europe has demonstrated a continuous and effective commitment to the public interest, by leading the way in three areas:

- freedom of expression and pluralism of opinions;
- respect for human dignity, cultural diversity and the "rights of others", in order to ensure tolerance and understanding;
- participation of all citizens in public affairs, enabling access to information and to the media.

It is exactly these three areas which together define a society's capacity to "live together".

Free expression and pluralism

Freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, may only be restricted if prescribed by law and necessary in a democratic society. In other words: the right is broad, the limitations are narrow. A public interest override is applied, while groups and individuals may be protected – as illustrated by a landmark case.

> *The Sunday Times v. the United Kingdom*. The newspaper intended to run an article concerning a drug given to pregnant women who later gave birth to deformed children. The article aimed to assist the parents in obtaining a more generous settlement. The pharmaceutical company restrained the publication. The Court ruled that the restriction was not justified by a "pressing social need" and could not therefore be regarded as "necessary in a democratic society".*

*   *The Sunday Times v. the United Kingdom (1979).*

The Court recognises that there is no free and democratic society without a free press, and affirms that politicians or companies have to accept the publication of inconvenient and unpleasant information. The Court has repeatedly used the public interest override, even when privacy or so-called classified material was in jeopardy.

The impact of these verdicts is significant. National laws may have to be changed, local jurisprudence brought into line and practice aligned with these new standards.

The effectiveness of the Court and its verdicts in the protection of human rights in general and freedom of expression in particular can barely be underestimated. In the last 2½ years alone, 62 judgments of the European Court of Human Rights relating to freedom of expression under Article 10 of the European Convention on Human Rights were issued.

Beyond freedom of expression, the Court and the Council of Europe have been concerned with preserving and promoting pluralism. The Court accepted early on that information also includes ideas which are "offensive, shocking or disturbing" – they form part of the public debate, and everybody should be allowed to participate. The opinion of the majority does not take precedence over that of an individual. Put simply, most people may not like someone's views, but that does not mean those views should be suppressed.

The state is given special responsibility as the guarantor of pluralism in the media, especially in the recommendations of the Committee of Ministers of the Council of Europe. In a number of texts it is declared that states should adopt policies to "foster a variety of media", thereby "allowing a plurality of ideas and opinions".

The landmark Recommendation on media pluralism and diversity, adopted in 2007, distinguishes between "structural pluralism" and "diversity of content". States should ensure that "a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public". A regulatory framework should provide for this, particularly in times of digitalisation, media integration and ownership concentration. The state should limit "the influence which a single person, company or group" has on the media, and prevent this by "introducing thresholds based on objective and realistic criteria" in order to make space for "other media" as well, "for example community, local, minority or social media".

States should also support content and "adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media". So-called must carry channels could be obliged to produce "diverse content", and support can be given for "the creation, production and distribution of audiovisual, written and all types of media contents which make a valuable contribution to media diversity".

Promoting understanding

To balance freedom of expression and pluralism, the Council of Europe has in its treaties and recommendations repeatedly called for respect for human dignity and tolerance and "fundamental rights of others". Hate speech, incitement to violence and racism are not allowed, while understanding and respect are promoted.

Intercultural dialogue – the "exchange of views between individuals and groups with different ethnic, cultural, religious and linguistic backgrounds" – is referred to directly or indirectly in various texts. It is considered "essential for building a Europe without dividing lines", because it "promotes the exchange of knowledge". As clearly noted in the White Paper on the subject, intercultural dialogue is not an unconditional exchange of views, but should be "on the basis of mutual respect", without prejudice and based on trust and reciprocity.

What this exactly means is detailed in the milestone *Recommendation 97 (21) on the media and the promotion of a culture of tolerance*. The media ought to report accurately and impartially, it is stated, but also be sensitive towards tensions between communities. They should avoid stereotypes, treat individuals as equal human beings "without linking their behaviour to a particular community when this is irrelevant to a case". The latter is especially vital when it concerns ethnic, cultural or religious minorities: unless behaviour – or, for that matter, a criminal offence – is typical for an individual's background, it does not need to be mentioned.

Indeed, with the same commitment as the promotion of understanding, the Council of Europe has combated hate speech, discrimination, racism and xenophobia. Again, a set of documents was adopted to underline precisely this. For instance, a special recommendation by the Committee of Ministers suggests states should take appropriate action to prevent and prosecute hate speech.

In addition to the convention and recommendation, the European Commission against Racism and Intolerance was set up. Since its inception, it has adopted eleven recommendations concerning anti-discrimination policies on the need to combat racism. One example is the recommendation concerning the Internet,[20] in which states are called upon to combat, by means of

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20. ECRI General Policy Recommendation No. 6 on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet, adopted on 15 December 2005.

> The Recommendation on "hate speech" calls for a comprehensive legal framework, using civil, criminal and administrative law to balance freedom of expression with freedom of discrimination. Importantly, it stresses the imposition of proportional criminal sanctions for those who disseminate violent and gravely abusive hate speech. However, it also recognises that the media themselves are not liable for exposing and analysing the phenomenon of hate speech. In other words, racism is not admissible, but can be reported on.

national and international legislation and policies, racist, xenophobic and anti-Semitic offences committed via the Internet.

Participation

The notion that everybody should be able to participate is the third element repeatedly underlined by the Council of Europe. To promote democracy and human rights, "participation" should be "effective", not just symbolic. It should allow all citizens to genuinely take part in public affairs – be they cultural, social or political; through the media, in associations or individually; and not dependent on financial disposition, age, education, and so forth.

Digital divide

Effective participation requires bridging what is often referred to as the "digital divide" – the gap between those with access to information through new technologies, and those without it. In different texts public authorities, the private sector and civil society are all called upon to promote and enhance access to ICTs and digital broadcasting equipment.

> Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting states that:

> "Given that for consumers, the changeover to digital broadcasting means acquiring new equipment to decode and decrypt digital signals and, therefore, a certain amount of expense, and in order to avoid any form of material discrimination and any risk of 'digital divide' between different social categories, member states should pay particular attention to ways of reducing the cost of such equipment."

Two elements are repeatedly highlighted: to bridge the digital divide, access should be affordable and understandable. This shows concern for those citizens who might not be early adopters, may have limited technical skills, cannot afford the latest technology and might as a consequence be sidelined and not able to exercise their right to receive information and participate fully.

Firstly, Recommendation (2007) 11 on promoting freedom of expression and information in the new information and communications environment underlines the need for *affordable* access. Member states should promote this by "creating an enabling environment for the private sector to invest in ICT infrastructure and services, including a stable legal and regulatory framework" and "facilitating and promoting community-based networks".

Secondly, the ability of citizens to use the media is emphasised. Media literacy is considered a key factor in reducing the risk of a digital divide. It is feared that the "less advantaged sectors of the population" may not understand how the media work or may not have the technical skills to operate new devices (set-top boxes or computers, for instance).

Hence, in *Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting* it is recommended that "the public should be provided with wide-ranging information on the media". Appropriate measures such as "suitable training courses in the use of digital equipment and new services" should be provided to groups at risk, and these measures should be taken by "member states, broadcasters, regulatory authorities or other public or private institutions that are concerned with the transition to digital broadcasting."

Digital dividend

The digital dividend has been called a once-in-a-lifetime opportunity to (re)distribute spectrum and open up the airwaves for a wide variety of new services. Because digital broadcasting is estimated to be six times more efficient, space is created for terrestrial (over the air) technologies such as video

to mobile phones, broadband wireless connectivity covering large areas or high definition television. However, the new possibilities also give rise to concern: will everybody have access to this, and how does this relate to the promotion of pluralism and cultural diversity?

The *Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest* (2008) calls for a balance to be struck between "a purely market-based approach" and public interest objectives such as participation, pluralism, access and linguistic diversity.

It is recognised that the digital switchover and resulting freed radio spectrum is an "excellent opportunity", allowing for the roll-out of new services which could potentially even contribute to bridging the digital divide. However, access should be "effective and equitable for all persons […] especially with a view to preventing digital exclusion." The need to keep an eye on the "common interest" is reiterated.

In particular, it is stressed that member states should "pay special attention to the promotion of innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services in the allocation and management of the digital dividend". In short: innovation is good, but should be used in the widest public interest and without excluding anyone.

Following up

Standards are one thing, implementation is something else. The Council of Europe can call upon states to adopt a sound and comprehensive legal framework and can invite the media to report fairly and avoid stereotypes, but this in itself does not guarantee compliance. Hence, the Council of Europe did not stop at adopting treaties or issuing recommendations.

As mentioned, different bodies were set up to monitor the performance of states and the media – such as the Audiovisual Observatory which oversees the legal framework pertinent to the broadcast media, the European Commission against Racism and Intolerance which monitors racism, xenophobia, anti-Semitism and intolerance or the European Committee of Social Rights which oversees compliance with the Social Charter.

Monitoring often provides particularly comprehensive information on the implementation of standards, comparable by country. Yet besides merely noting or remarking, the reports often also lead to a bilateral dialogue with

public authorities to amend legislation, or written policy guidelines for member states.

> In 1997, the Parliamentary Assembly adopted a resolution to call upon Member States to decriminalise defamation. Put simply: prison sentences for libel should be abolished immediately, abuse of defamation laws should be stopped and the concept of defamation defined precisely to avoid arbitrary application and make sure that "civil law provides effective protection of the dignity of persons". In other words: if someone feels insulted, let him/her go to court (civil law) rather than making it a criminal case.
>
> The Parliamentary Assembly, in the same resolution, singles out specific states, calling upon them to amend their legislation. Turkey should "amend Article 125.3 of its Criminal Code accordingly" and France should "revise its law of 29 July 1881 in the light of the Court's case-law".

Moreover, on the basis of the recommendations and its assistance and co-operation work the Council of Europe has over the past ten or fifteen years played a profoundly important role in shaping the legislative framework for the media, particularly in central and eastern Europe.

A simple logic proved right: the main standard-setting organisation in the field of media freedom and responsibility is also the best placed to provide assistance in application and implementation.

The assistance and co–operation activities have taken different forms, but can roughly be divided between providing expertise on (draft) legislation, and training for public authorities, the judiciary and media representatives.

Media legislation

Following the demise of the Soviet Union, the break–up of Yugoslavia and the subsequent entry into the Council of Europe of many new member states, national legislation often had to be brought in line with Council of Europe standards. The Media Division of the Council of Europe regularly provided quick and comprehensive reviews of draft laws concerning a wide variety of topics. The aim of these reviews (or "expertises") has been, and still is, to assist the member states in the drafting of laws and regulations concerning the media, evaluating draft laws against the standards adopted by the Council.

The expertise of the Council of Europe in this field was often linked to the political leverage of (accession to) the European Union. The impact has thus

been significant, particularly as so many countries were revising their legal framework. In many countries, draft laws were amended based on the comments in the expertises. In a number of countries entirely new laws were prepared on the advice of the experts or as the outcome of assistance activities. And on several occasions draft laws were dropped as they were considered restrictive or contrary to the recommendations set forth by the Council of Europe.

After 1997, most countries of the former Yugoslavia developed a new legal framework for the broadcast media — to improve plurality within the audio-visual sector, to guarantee independence of the former state broadcaster, to introduce a public service concept, and to establish an independent regulatory body to limit direct state control over the broadcast media.

The Council of Europe provided numerous reviews of draft laws along the way, to ensure proposed legislation was aligned with its standards. Not only the legal experts in the countries, but also the public authorities took these expertises particularly seriously, and the recommendations provided almost always led to amendments. New broadcast legislation in Croatia, Serbia, "the former Yugoslav Republic of Macedonia", Montenegro and Bosnia and Herzegovina all bear the hallmark of the Council of Europe.

This kind of work continues in many countries such as Albania, Armenia, Azerbaijan, Georgia, Moldova and Ukraine.

Training

Numerous government officials, parliamentarians, judges and journalists have in the past years participated in events organised by the Council of Europe. The aim: to raise awareness about the standard-setting texts and to instruct on the practical application of the case-law or the conventions. Public authorities were made familiar with the principles of non-interference, yet also with their responsibility for an enabling, diverse and plural media landscape.

Through seminars and round-table discussions, media professionals (from journalists to editors and media managers) were informed about their rights, responsibilities and accountability stemming from the Council of Europe standards. This training covered practical vocational training on applying the case-law in different countries, developing basic skills in reporting fairly and accurately, maintaining respect for minorities and cul-

tural diversity, striking a balance between the right to freedom of expression and the right to private and family life, and so forth.

A number of handbooks were published, translated into different languages and distributed widely – for instance on the case-law of the European Court of Human Rights on Article 10 or concerning the rules and regulations for media in the course of an election campaign.

As a result of these efforts, media law and practice in the member states have come much closer to Council of Europe standards.

About the authors

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Ms. Zankova has published a book published as well as many articles in Bulgarian and foreign journals focusing on freedom of expression and the media.

Annex

Main Background texts

Case-law of the European Court of Human Rights: please visit: http://www.echr.coe.int

Texts adopted by the Committee of Ministers of the Council of Europe (available at www.coe.int/media)

Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue, adopted on 11 February 2009

Recommendation (2007) 3 of the Committee of Ministers on the remit of public service media in the information society

Recommendation (2007) 2 on media pluralism and diversity of media content

Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007

Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted on 31 January 2007

Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting

Recommendation (99) 1 on measures to promote media pluralism

Recommendation (97) 21 on media and the promotion of a culture of tolerance

Recommendation (97) 20 on "hate speech"

The Council of Europe has forty-seven member states, covering virtually the entire continent of Europe.

It seeks to develop common democratic and legal principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

Ever since it was founded in 1949, in the aftermath of the second world war, the Council of Europe has symbolised reconciliation.