

## CONTENTS

<i>Acknowledgements</i> .....	v
<i>List of selected abbreviations</i> .....	xv
Introduction.....	1
<b>Part I</b>	
<b>Theoretical and normative approaches to minority rights.....</b>	<b>17</b>
<b>Chapter 1</b>	
General theories and definitional entrapment .....	19
Introduction.....	19
1.1 Theoretical conundrums and definitional dilemmas.....	19
1.2 Historical and conventional approaches to minority rights .....	26
1.2.1 Numerical inferiority .....	28
1.2.2 Non-dominance.....	29
1.2.3 Nationality.....	30
1.2.4 Range of distinctive, constitutive characteristics .....	30
1.2.5 Sense of solidarity.....	31
1.2.6 Combination of objective and subjective criteria for recognition... <td>32</td>	32
1.3 Troublesome taxonomies and the notion of fixed features .....	33
Conclusions.....	40
<b>Chapter 2</b>	
The shaping of theories through international legal and political frameworks .....	43
Introduction.....	43
2.1 International instruments with focuses on minority rights.....	43
2.1.1 Genocide Convention .....	44
2.1.2 United Nations Charter.....	46
2.1.3 Universal Declaration of Human Rights.....	47
2.1.4 International Covenant on Civil and Political Rights.....	49
2.1.5 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.....	55
2.1.6 UN institutional approaches to minority rights .....	56
2.2 European instruments with focuses on minority rights .....	58
2.2.1 European Convention on Human Rights .....	59
2.2.2 Standard-setting by the Parliamentary Assembly of the Council of Europe.....	67

## Contents

2.2.3	Framework Convention for the Protection of National Minorities (FCNM).....	76
2.2.3(i)	Ceci n'est pas une minorité!.....	81
2.2.3(ii)	Water in the wine and holes in the cheese.....	85
2.2.3(iii)	Proof of the pudding .....	89
2.2.4	Organization for Security and Co-operation in Europe standards..	96
2.2.4(i)	OSCE High Commissioner on National Minorities (HCNM).....	99
2.2.5	European Union .....	105
	Conclusions.....	109

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

Chapter 3		
	Minorities, freedom of expression and of the media .....	113
	Introduction.....	113
3.1	Theories of freedom of expression and of the media .....	113
3.1.1	Rationales for minorities' access to expressive opportunities .....	120
3.1.1(i)	Democratic participation in public life .....	120
3.1.1(ii)	Creating alternative discursive spaces.....	122
3.1.1(iii)	Creating and sustaining (cultural) identities .....	123
3.1.2	Enhanced liberty for the media/the Fourth Estate .....	127
3.1.3	An enabling environment for media freedom.....	130
3.2	Media functionality and media types .....	134
3.2.1	Media functionality.....	134
3.2.2	Media types.....	138
3.2.2(i)	Community media .....	141
3.2.2(ii)	Public service media/content.....	144
3.2.2(iii)	Commercial media.....	152
3.2.2(iv)	Transnational media.....	153
3.2.2(v)	Other types of media .....	155
3.3	New media and new regulatory paradigms.....	156
	Conclusions.....	168

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

	Introduction.....	171
4.1	An underexplored nexus of international law.....	171
4.1.1	Tentative tendencies and attempted couplings in international law	173
4.1.1(i)	Actual couplings .....	173

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

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

	Chapter 5	
	The pluralism <i>problématique</i> .....	237
	Introduction.....	237
5.1	Selected theories of pluralism and tolerance.....	237
5.1.1	Pluralism .....	237
5.1.2	Tolerance .....	238
5.1.2(i)	Notions of tolerance .....	239
5.1.2(ii)	Normative articulations of tolerance .....	241
5.2	Towards a notion of comprehensive pluralistic tolerance .....	244
5.2.1	Minimum moral and ideological commonality .....	246
5.2.2	Pluralistic tolerance, democracy and freedom of expression .....	249
5.3	Comprehensive pluralistic tolerance in practice .....	251
	Conclusions.....	254

## Contents

<b>Chapter 6</b>	
Delineating the limits of permissible expression under International Human Rights Law .....	257
Introduction.....	257
6.1 Global instruments: asymmetries and conundrums .....	257
6.1.1 Genocide Convention .....	257
6.1.2 International Bill of Rights .....	271
6.1.3 ICERD.....	280
6.1.4 UNESCO standards .....	290
6.1.5 Other UN standards and mechanisms .....	291
6.1.5(i) World Conference against Racism and Review Conference.....	291
6.1.5(ii) Work of Special Rapporteurs on Freedom of Expression .....	293
6.2 Council of Europe instruments: contrived consistency?.....	294
6.2.1 European Convention on Human Rights .....	294
6.2.2 Other relevant Council of Europe treaties .....	301
6.2.2(i) Cybercrime Convention and its Additional Protocol ..	301
6.2.2(ii) European Convention on Transfrontier Television .....	303
6.2.2(iii) Framework Convention for the Protection of National Minorities.....	303
6.3 Other European standards: an ancillary normative dimension .....	304
6.3.1 European Union standards .....	304
6.3.1(i) General.....	304
6.3.1(ii) The Audiovisual Media Services Directive.....	309
6.3.2 OSCE standards .....	314
Conclusions.....	315
<b>Chapter 7</b>	
“Hate speech” and intolerance targeting minorities.....	317
Introduction.....	317
7.1 Irruption of “hate speech” into international human rights law and discourse .....	317
7.1.1 The effectiveness of “hate speech” laws.....	323
7.1.2 Critical race theory .....	328
7.2 A square conceptual peg in a round normative hole?.....	331
7.2.1 Rough coherence of principles .....	336
7.2.2 Contextual variables .....	338
7.2.2(i) Impact of publication.....	341
7.2.2(ii) Specificity of genre .....	344
7.2.2(iii) Proportionality of sanctions.....	346
7.2.2(iv) New doctrinal directions? .....	347

7.3	Specific current controversies as stress tests for the right to freedom of expression .....	351
7.3.1	Denial or trivialisation of genocide and other crimes against humanity .....	351
7.3.2	“Defamation” of religions .....	363
7.3.3	Protection of founders of religions .....	375
	Conclusions .....	379

**Chapter 8**  
**Integrated approaches to countering “hate speech” .....** 381

	Introduction .....	381
8.1	Theoretical foundations for an integrated approach to countering “hate speech” .....	381
8.2	An integrated approach in practice: case study of the Council of Europe ..	385
8.2.1	Framework Convention for the Protection of National Minorities ..	385
8.2.1(i)	Studying the chemistry between Articles 6 and 9 .....	386
8.2.1(ii)	Affirmation of the AC’s approach .....	394
8.2.1(iii)	Conclusions .....	394
8.2.2	Non-treaty-based approaches to hate speech .....	395
8.2.2(i)	Standard-setting by the Committee of Ministers .....	395
8.2.2(ii)	Standard-setting by the Parliamentary Assembly .....	403
8.2.2(iii)	European Ministerial Conferences on Mass Media Policy .....	405
8.2.2(iv)	The European Commission against Racism and Intolerance (ECRI) .....	408
8.3	Evaluation of integrated approaches to countering “hate speech” .....	420
	Conclusions .....	424

**Part IV**  
**Regulation and facilitation of expression to promote minority rights .....** 427

	<b>Chapter 9</b>	
	Media-related pluralism .....	429
	Introduction .....	429
9.1	Connecting pluralistic tolerance to media-related pluralism .....	429
9.2	Media-related pluralism: structural and substantive considerations .....	431
9.2.1	Conceptual confusion .....	432
9.2.2	Structural considerations .....	433
9.2.2(i)	Source/Ownership .....	434
9.2.2(ii)	Outlet .....	438
9.2.3	Substantive considerations .....	440
9.2.4	Gauging media-related pluralism .....	441

## Contents

9.2.4(i)	State obligations . . . . .	441
9.2.4(ii)	Media responsibilities . . . . .	447
9.3	Interrelationship of international legal standards . . . . .	449
9.3.1	United Nations standards . . . . .	450
9.3.2	Council of Europe standards . . . . .	452
9.3.2(i)	European Court of Human Rights . . . . .	452
9.3.2(ii)	European Convention on Transfrontier Television . . . . .	457
9.3.2(iii)	Non-treaty-based standard-setting . . . . .	459
9.3.2(iv)	Framework Convention for the Protection of National Minorities . . . . .	461
9.3.2(v)	European Charter for Regional or Minority Languages . . . . .	462
9.3.3	European Union standards . . . . .	463
9.3.3(i)	Charter of Fundamental Rights of the European Union . . . . .	463
9.3.3(ii)	European Court of Justice . . . . .	465
9.3.3(iii)	Other regulatory measures . . . . .	471
9.3.3(iv)	European Commission . . . . .	471
9.3.3(v)	European Parliament . . . . .	472
	Conclusions . . . . .	474

## Chapter 10

	Cultural and linguistic diversity . . . . .	477
	Introduction . . . . .	477
10.1	Connecting pluralistic tolerance and media-related pluralism to cultural and linguistic diversity . . . . .	477
10.1.1	Defining culture and cultural rights . . . . .	478
10.1.2	Defining cultural diversity . . . . .	481
10.1.3	Rationales for the promotion of cultural diversity . . . . .	482
10.2	Universal standards: centrality of UNESCO instruments . . . . .	484
10.2.1	UNESCO Declaration on Cultural Diversity . . . . .	484
10.2.2	UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions . . . . .	486
10.2.3	World Summit on the Information Society (WSIS) . . . . .	494
10.2.4	Joint IGO Special Mandates' Declaration on Diversity in Broadcasting . . . . .	495
10.3	European-level measures concerning cultural diversity . . . . .	495
10.3.1	Council of Europe standards . . . . .	496
10.3.1(i)	Treaty-based standards . . . . .	496
10.3.1(ii)	Non-treaty-based standards . . . . .	501
10.3.2	European Union standards . . . . .	506
10.3.2(i)	Audiovisual Media Services Directive . . . . .	507
10.3.2(ii)	Public service broadcasting/media . . . . .	514

10.3.2(iii) Community broadcasting .....	515
10.3.2(iv) Must-carry regulation .....	515
10.3.3 OSCE standards .....	521
Conclusions.....	521
 Chapter 11	
Access rights.....	523
Introduction.....	523
11.1 Rights-based theories of access to the media .....	523
11.1.1 Freedom of expression and access rights .....	524
11.1.2 Interplay between rights .....	528
11.1.3 Dynamism of rights.....	532
11.1.4 Prognosis for the future development of access rights .....	536
11.2 General “taxonomy” of access rights .....	539
11.2.1 Right of reply as a form of access.....	540
11.2.2 Public access channels .....	545
11.3 Development of rights of access to the media for minorities under international law .....	547
11.3.1 FCNM: factors affecting minorities’ access to the media .....	547
11.3.1(i) Linguistic topography .....	548
11.3.1(ii) Official recognition of minorities/languages.....	548
11.3.1(iii) Market sustainability .....	549
11.3.1(iv) Licensing of broadcasters .....	550
11.3.1(v) Regulation of broadcasting output.....	551
11.3.1(v)(a) Broadcasting in general .....	551
11.3.1(v)(b) Public service broadcasting .....	553
11.3.1(vi) Transfrontier dimension.....	554
11.3.1(vii) Temporal and qualitative criteria.....	555
11.3.1(viii) Facilitative measures .....	555
11.3.2 ECRML: factors affecting minorities’ access to the media .....	557
11.3.2(i) Official recognition of languages .....	557
11.3.2 (ii) Active access to media.....	559
11.3.2(iii) Market sustainability .....	560
11.3.2(iv) Facilitative measures .....	560
11.3.3 New technology-driven challenges for the FCNM and ECRML ..	562
Conclusions.....	564
 Summary and conclusions .....	567
<i>List of academic works consulted.</i> .....	585
<i>International instruments</i> .....	635
<i>General and thematic comments and recommendations</i> .....	645
<i>Table of cases</i> .....	649
<i>Index</i> .....	655