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MEDIA AND DISABILITY
ISSUES OF PORTRAYAL AND ACCESS

This thesis is submitted to the National University of Ireland, Galway in
fulfilment of the requirement for the degree of

Doctor of Philosophy

By

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Dedicated to the memory of Bríd Doyle

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INTRODUCTION

“All our knowledge has its origins in our perceptions”¹

Over the last 500 years, the influence of mass media has grown exponentially owing to advancements in technology. Today, most people rely on information and communication delivered through multiple platforms to keep themselves informed and to fulfil their needs. To a great extent, people depend on mass media for current news and facts; a sense about what is and is not important; in essence, as communicators of politics, culture and information. In this regard people trust the media as an authority for news, information, education and entertainment. It could be said therefore that mass media is an important force in modern culture. The degree of that powerful influence however depends on the availability and pervasiveness of the medium. Traditional mass media, in particular broadcasting, still has a great power over people’s lives, albeit the extent and type of influence it holds has been much debated. Broadcasting as a form of media has been explicitly identified as an activity of vast political and social significance.² Beyond providing entertainment, television for instance vastly increases both the availability of information about the outside world and exposure to other ways of life. According to some commentators, our public understanding of each other and our shared social issues are built upon a continually evolving construction provided by the media over the entire length of our lives.³ Varona places emphasis on the “unparalleled influence” of broadcasting in shaping our “culture, identity and values.”⁴ He asserts that television at its best plays the role of “equaliser and educator” (due to its power to act as a bridge between people), while at its worst, television is “littered with exploitative programming that does more to pollute than enrich our democracy and culture.”⁵

¹ Leonardo Da Vinci

² Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press 1995) 1.

³ L J Kenix, *Alternative and Mainstream Media: The Converging Spectrum* (Bloomsbury, 2011) 10-11.

⁴Anthony E Varona, ‘Changing Channels and Bridging Divides: the Failure and Redemption of American Broadcast Television Regulation’ 6 *Minnesota Journal of Law, Science and Technology*, 1, 3 (2004).

⁵ibid

Attitudes towards people with disabilities can be a key facilitator or a serious barrier to their inclusion and participation in society.⁶ Research on the issue has shown that in the absence of personal experience and contact with persons with disabilities on the part of many members of the public, the media may play a considerable role in shaping attitudes and knowledge towards disability and, in these circumstances, the need for an enlightened, responsible and non-discriminatory media culture becomes more important.⁷ It is submitted that in terms of disability representation in programming, this can have significant implications for viewing audiences.⁸

Historically, persons with disabilities have been consigned to the margins of society with the effect that their social, political, cultural and economic rights have been denied to them. Attitudes towards people with disabilities have been identified as a key facilitator or a serious barrier to their inclusion and participation in society. Symptoms of disability discrimination, such as stigma, stereotyping and prejudice are still common and corrosive influences which place persons with disabilities on an unequal footing with others in society today. Disabled people over the years have also been marginalised within and through media. Yet, given their influence and pervasiveness, the media, and the broadcast media in particular, have enormous power to either perpetuate stereotyping and prejudice, or educate the public to have a more understanding, positive attitude towards people with disabilities.

It is against that background that the objective and research questions for this thesis are set.

OBJECTIVE AND RESEARCH QUESTIONS

This thesis begins with the premise that freedom of expression is the cornerstone of a democracy and any limitation on it must be prescribed by law, be in support of a legitimate aim and be necessary in a democratic society. Freedom of expression is a right of everyone, including persons with disabilities and the media, the latter in an instrumental sense, as the media fulfils its task of informing the public and contributing to public debate.

⁶National Disability Authority of Ireland (NDA), *A National Survey of Public Attitudes to Disability in Ireland* (NDA October 2011) 2.

⁷Frances Hannon, *Literature Review on Attitudes towards Disability*, Disability Research Series 9, (NDA 2007) 4.

⁸For persons with disabilities and the non-disabled as viewing audiences.

In relation to the wider rights of persons with disabilities, including their right to freedom of expression, the thesis begins with the premise that the universal nature and reach of the UN Convention on the Rights of Persons with Disabilities (CRPD)⁹ is the key driver in the articulation and attainment of the rights of persons with disabilities.

A primary research question of the thesis, therefore, is to what extent these two major premises are compatible and if or where they are not, how can they be reconciled? How can the power and influence of the media be harnessed in order to enhance a broad swathe of rights of persons with disabilities without infringing on the media's editorial freedom? In order to address these central research questions, a number of sub-questions arise:

- What new issues relevant to broadcast media does the CRPD raise?
- What steps or mechanisms to address difficulties or issues emanating from the CRPD would be compatible with freedom of expression principles and freedom of the media?
- To what extent are people with disabilities currently represented in television programming?
- How are people with disabilities portrayed in the media?
- What are the main issues concerning portrayal/ depiction of persons with disabilities in various types of television programming?
- What measures (legislative, policy and practice) are in place or contemplated to ensure that persons with disabilities are represented on a non-discriminatory/ equal basis with other members of society in television programming?
- What measures of redress are available to persons with disabilities / non-disabled viewers where they feel there has been a breach of broadcast codes / standards /guidelines in relation to programme content?
- What barriers hinder or thwart disabled persons' access/accessibility to broadcast and audiovisual media and their respective content?

⁹The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. The Convention and Optional Protocol entered into force on 3 May 2008.

- What accessibility measures (legislative, policy and practice) are in place or considered to facilitate disabled viewers' access to and enjoyment of such content on a non- discriminatory/ equal basis with other members of society?

The objective of this thesis, therefore, is to use freedom of expression theory and jurisprudence, along with the theory and practical expression of disability rights contained in the CRPD, to examine the extent, if any, to which the rights and interests of persons with disabilities are or can be safeguarded and promoted in broadcast media in terms of both their portrayal and access to the medium. The thesis explores and questions whether and how such protection can be achieved. The aim is to provide a thoroughly researched and clearly analysed critique of the relevant media, and disability, regulatory and policy frameworks and practice approaches that have been adopted at national, European and international levels. Importantly, the critique considers and appraises the challenges presented in such frameworks and the way in which those challenges might be reconciled with the right to freedom of expression and broadcast freedom.

FRAMEWORK

Finding an appropriate framework for this thesis was not without its challenges. In particular, bringing together the two separate subject areas and the associated concepts and issues related to “Media” and “Disability” was arduous. While the thesis was initially envisaged as a media law study, the centrality of the Convention on the Rights of Persons with Disabilities (CRPD) and its related goals and requirements necessitated an integrated framework, as far as possible. To this end, where appropriate, the thesis takes the CRPD as its focus and tests in particular broadcasting/audiovisual (and to lesser extent disability) and related regulatory frameworks against it and vice versa. In light of a certain overlap between the rights espoused in the CRPD and the right to freedom of expression and associated rights of broadcasters, the overall examination endeavours to adhere to a human rights framework.

While the thesis aims to indicate measures to safeguard persons with disabilities in broadcast media mainly at national and regional (European) level broader consideration is given throughout of the situation of persons with disabilities in various international jurisdictions. Owing to space constraints, wider attention to

themes such as media literacy; media and children or media and women, and media in developing countries as they specifically relate to disability are largely outside the scope of this thesis and may form the basis for future research in the area.

In terms of approach and layout, the thesis will briefly trace the historical development of disability representation in broadcast media. It will focus on the recent shift from a medical model to a social model of disability as espoused in the United Nations Convention on the Rights of Persons with Disabilities, incorporating notions of non-discrimination, equality and citizenship. In addition, disability and its representation will be considered in light of the ongoing developments in broadcasting and the challenges and opportunities presented by an ever-evolving broadcasting landscape.

In the case of broadcast media, the thesis identifies two areas of ‘representation’, which can serve as barriers to the inclusion of persons with disabilities and consequently affect their right to participate in political and cultural life on an equal basis with others in society. The first is the area of **portrayal**, which includes negative portrayals, under-representation and the absence of persons with disabilities both on and off air.

The second area identified as presenting a potential barrier to the inclusion of persons with disabilities in broadcast media is the limited or lack of **access** to the medium, which again can prevent disabled people from exercising their rights to participate with others on an equal basis in society.

However, while the issue of the **portrayal** of persons with disabilities and the issue of disabled persons’ **access** to broadcast media overlap to a large extent, the thesis treats them independently for a number of reasons, particularly the replete amount of material on each, coupled with their respective complex regulatory frameworks and associated policies. Chapters One to Four, therefore, place primary emphasis on the **portrayal** of persons with disabilities in broadcasting media content and the issues associated with such portrayals. While there are some references to **access** issues in those chapters, Chapter Five deals exclusively with the issue of access / accessibility of persons with disabilities to broadcasting.

Nevertheless, in regard to the two areas of portrayal and access, a common approach is taken, involving primarily an examination and evaluation of broadcasting and disability legislation, of regulatory and voluntary codes of practice and guidelines and of commissioned and academic research. Legislative, industry and sector-based measures will be considered in specific jurisdictions and at both national, regional (European) and international levels. Other initiatives taken by regulators, broadcasters, broadcast representative associations and disability organisations will also be considered and the manner in which such measures and initiatives are utilized and subsequently monitored, assessed and reviewed to determine their effectiveness will be explored throughout the thesis.

From this examination and evaluation the thesis will then seek to identify the main policy and practice considerations, both positive and negative, and the role of any key players which may go towards safeguarding disabled persons' interests in broadcasting.

METHODOLOGY

The nature of the study is both theoretical and applied. The principal methodological tool utilised is that of advanced legal research methods. Employing such methods, I was able to undertake an in-depth analysis of primary and secondary legal material, focusing mainly on the regulation of broadcast / audiovisual media and comparable materials related to disability. Library based research, in conjunction with comprehensive searches of all available legal and non legal databases, facilitated the identification of materials relevant to persons with disabilities in the broadcasting/ audiovisual media services environment. An assessment of the relevant materials located led to the creation of a comprehensive bibliography which assisted in the classification of key theorists, academic commentators, policymakers and researchers in both areas of media and disability. Whereas this thesis approaches the issues relating to persons with disabilities in the broadcasting / audiovisual media environment primarily from a legal perspective, the importance of research grounded in disability studies and in the social sciences cannot be overstated.

Personal contact was made with various government and non government agencies as well as with academics and other professionals (national and international) both

helping to update and supplement existing empirical material and confirm or inform practical aspects of the study where required.

While the thesis aims to indicate measures to safeguard persons with disabilities in broadcast media mainly at national and regional (European) level, as aforementioned broader consideration is given throughout Chapters Two and Five of the situation of persons with disabilities in various international jurisdictions as evidenced in the reports on the CRPD of those countries to the UN Committee on the Rights of Persons with Disabilities which has a monitoring role under the CRPD. The motivation for this selected approach is multifaceted. Firstly, the material evidenced at various levels was replete and warranted an in –depth examination.

In Chapter Three, there is significant focus on EU media law and policy by virtue of the legally binding nature and centrality of those instruments. Chapter Three also deals to a lesser extent, with relevant law and policy at Council of Europe level. The purpose of this inclusion is to highlight the dichotomous rationales underlying both institutions namely the EU and Council of Europe and the legally and non-legally binding effect of their respective laws and policy and their potential impact on disability in media.

Likewise, in Chapter Four, it was decided that in dealing with the examination of complaints regarding disability discrimination in broadcasting content, to focus on comparative data from three jurisdictions namely Ireland, Canada and the United Kingdom. The rationale for this approach centred *inter alia* on the distinct respective regulatory frameworks in those jurisdictions in addition to previous research carried out by this author, which had indicated those jurisdictions as models of best practice in terms of advancing the disability agenda in media.

Chapters Two and Five of this thesis consider and examine a number of reports submitted by State Parties to the Convention on the Rights of Persons with Disabilities. At the time of writing all available reports submitted to and by the Committee on the Rights of Persons with Disabilities were considered with the exception of those reports which were not available in English. The reports examined included the ‘Initial Reports’ and ‘Replies to the List of Issues’ of various State Parties submitted to the Committee on the Rights of Persons with Disabilities

and the ‘List of Issues’ and ‘Concluding Observations’ made by the Committee to State Parties. In addition some of the Shadow Reports of Disabled Persons Organisations (DPOs) which were available at the time of writing were considered in light of Article 8 CRPD.

Key Terms and Concepts

The key terms and concepts explored in this thesis include the following democracy, citizenship, freedom of expression, broadcasting and audiovisual media. The Chapters in which they arise are indicated in each case.

OUTLINE OF THESIS

Chapter 1 of the thesis outlines some of the theoretical underpinnings, themes and definitional issues which emerge throughout the thesis and the manner in which they pertain to the media, principally broadcasting, and disability. It briefly considers a number of key themes, such as the manner in which disability is conceptualised and expressed and the powerful impact such interpretations have on the understanding, attitude, and approach of others toward the human rights of persons with disabilities. In particular, it takes into account the paradigm shift or change in ideas or methods from those espoused by a medical model of disability toward those advocated by a social /human rights model of disability. It considers the effect that this development has on the representation of disability in the media.

Following from there the chapter examines interrelated concepts which are central to media and media policy, namely “freedom of expression,” “democracy,” “citizenship,” and the “public sphere”. It commences from the premise that the inclusion of, and emphasis on, such concepts in themselves and in their position within media philosophy and policy can significantly impact on the representation of persons with disabilities in the broadcast media in terms of their portrayal in and access to the sector. The Chapter advances the argument that in spite of the interconnectedness of these concepts problems may occur when they are construed in light of the rationales underlying various institutional divisions within the broadcasting sector, particularly public service and commercial broadcasting. The challenges presented by ongoing technological developments, technological convergence and the movement towards a more entertainment-centred market driven media are also taken into account. In this regard, the impact of the issues and

challenges facing broadcasting, as traditionally understood, are outlined and considered. Moreover, their potential impact on the representation of persons with disabilities within broadcasting, is contemplated.

Chapter 2 focuses specifically on Article 8 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which deals with “Awareness Raising”. Article 8 CRPD is pertinent to the media in terms of the creation of awareness and the portrayal of persons with disabilities. The Chapter commences with a general discussion of the Convention and introduces some primary concepts about disability contained therein. An introduction to Article 8 CRPD and the manner in which it relates to the media is then provided, which traces the Article’s historical development through the various instruments which buttressed its initiation and led to its subsequent development. The chapter provides a critical analysis of Article 8 CRPD and the manner in which it relates to the broadcast media in particular. The analysis seeks to show the commonalities and disparities amongst the various instruments examined, while bearing in mind the parallel shifts that were taking place in disability studies in general. The chapter concludes with an appraisal of the future of Article 8 CRPD, with reference to its progress to date and the manner in which it may be implemented and monitored by member states that ratify the Convention. A number of recommendations are then made.

Chapter 3 is divided into two parts and outlines and critically assesses the extent to which persons with disabilities are considered in both broadcasting and disability policy within Europe. The chapter distinguishes between policy measures taken by the European Union (EU) and those taken by the Council of Europe (CoE).

Part One of the chapter undertakes to assess whether the measures adopted in the European regulatory broadcasting system are sufficient in addressing issues concerning the portrayal of persons with disabilities. Specific regard is given to the European Union’s Audiovisual Media Services Directive 2010/13 EC10 (hereafter AVMSD) and its provisions as they apply to broadcasting content. An assessment of the potential effect of such provisions as they apply to disability representation is provided. The chapter examines whether the provisions of the AVMSD are sufficient in their own right in addressing the issue of disability representation.

Part Two of the chapter considers the effect of European disability policy on disability representation in broadcast media. Again the distinction is made between the instruments and policies of the EU and CoE. In light of the EU's ratification of the CRPD, part two of the chapter first considers the extent of the EU's competence as it pertains to disability and broadcasting under the CRPD. It then takes into account the EU's Disability Strategy 2010-2020. The relevant provisions of the Council of Europe's Action Plan on Disability 2006-2015 with regard to disability representation in broadcast media are then considered. Following from there an assessment of the Action Plan's progress to date is provided, having regard to the CoE's report on its implementation.

Chapter 4 deals with Freedom of Expression, Content Regulation and Disability in Broadcast Media and is divided into two parts. The object of this chapter is to examine and discuss the issues surrounding regulation and the extent to which national regulatory frameworks can safeguard the interests of persons with disabilities in respect of broadcast content. It considers the quandary that such regulation generates between the necessity for intervention in order to protect the interests of the viewing public on the one hand and considerations for freedom of expression on the other. The introduction sets the backdrop to the chapter, recalling the principles of non-discrimination and equality, which are embedded both explicitly and implicitly in the CRPD and other international human rights instruments, in addition to the multifaceted concept of tolerance which is interlinked with those principles. It poses the question as to whether the justifications for intervention which promote non-discrimination, equality and tolerance can be reconciled with consideration for freedom of expression. Correspondingly, where such interventions are warranted, it enquires as to the level of such interventions, depending on the nature of the speech involved. In this regard it endeavours to highlight the differences between discriminatory and hateful expression, illustrating that the line between the two types of speech is often difficult to draw and, in view of that, can make regulatory responses complex.

Part One of the chapter sets out the framework in relation to the right to freedom of expression and the potential limitations of the right pertaining to content matters. It first outlines some of the main issues and debates surrounding the theoretical rationales underlying the right to freedom of expression in different jurisdictions.

From there it continues with a general discussion on the right to freedom of expression and outlines the approach taken principally by the European Court of Human Rights. Whether disability should be included as a ground for protection under policies which deal with extreme speech such as “hate speech” is also considered.

Part Two of the chapter proceeds to a more specific inquiry into the traditional regulation of broadcast media content at national level and the manner in which it protects the interests of persons with disabilities without violating the right to freedom of expression. It focuses on regulation and the extent to which the interests of persons with disabilities are addressed in practice. This section contemplates various regulatory responses incorporating legislative, policy and best practice measures, which have been adopted by the media/communications sector primarily at national level. It subsequently takes into account the manner in which those measures go towards advancing positive and non-discriminatory representation of persons with disabilities in broadcast content; how those measures are monitored and implemented and the manner in which they can be balanced with the principle of freedom of expression.

Chapter 5 The primary object of this chapter is to outline and discuss a number of issues which hinder or thwart the **access** of persons with disabilities to broadcast and audiovisual media and their respective content. The chapter also contemplates the policy considerations which go towards safeguarding disabled viewers from such barriers or enabling them to overcome them. In this regard, particular attention is given to the medium of television (linear broadcasting), with specific focus on the provision of accessibility measures which facilitate disabled viewers’ access to and enjoyment of such content. The chapter first considers definitional issues surrounding the terms and concepts of “access” and “accessibility”. It then outlines various potential barriers in accessing television in the contemporary media environment and the challenges they present in relation to the access of disabled persons as viewers of broadcast and television content in developed countries.

A key focus of the chapter is on an examination of the “accessibility” provisions contained in the Convention on the Rights of Persons with Disabilities (CRPD). This examination is employed in order to establish an appropriate benchmark, against

which all provisions relating to the “access to” or the “accessibility” of television content and services should aspire to be measured and achieved, particularly at national level. Specific focus is placed on Articles 9, 21 and 30 of the Convention, and the manner in which those articles relate to the provision of accessible television. The chapter considers throughout how such measures might be employed in practice. An examination of State Parties’ initial reports to the Committee on the Rights of Persons with Disabilities will be provided, in order to ascertain how the provisions in the CRPD are currently being adopted and implemented. This examination considers the similarities and disparities in those reports and the various issues involved with such reporting under the CRPD’s reporting guidelines. It also considers the Committee’s responses and concluding observations to those reports to date. A brief examination of accessibility measures at European level, including the European Union’s Audiovisual Media Services Directive (AVMSD) is also provided. The Chapter ends with a number of conclusions and recommendations.

Chapter 6 concludes the thesis, providing overall conclusions for the previous five chapters which draw and expand on chapter specific conclusions. The overall conclusions aim to indicate the larger general issues in relation to portrayal and access surrounding persons with disabilities in broadcasting media and the most appropriate means of addressing them.

CHAPTER ONE

Media and Disability: Theoretical Underpinnings

Introduction

The object of this chapter is to give an overview of some of the theoretical underpinnings and themes which emerge throughout the dissertation and the manner in which they relate to the media, particularly broadcasting, and disability. An important theme underlying much of the subject matter of the dissertation concerns the manner in which the concept of disability is defined and expressed. Such definitions and expressions can powerfully influence the understanding, attitude, and approach of others toward the human rights of persons with disabilities. This chapter begins, therefore, by briefly considering the theoretical issues relating to disability and particularly the paradigm shift from a medical model of disability toward a social /human rights model of disability, and the manner in which such a shift impacts on the representation of disability in the media.

Following from consideration of issues about disability, this chapter proposes to explore interconnected concepts such as “freedom of expression,” “democracy,” “citizenship,” and the “public sphere”, which lie at the heart of media and media policy. The chapter begins from the premise that the inclusion of, and emphasis on, such concepts in themselves and in their position within media philosophy and policy can significantly impact on the representation of persons with disabilities in the broadcast media in terms of their portrayal in and access to the sector. It is advanced, however, that despite the inter-relatedness of such concepts in media and media policy, difficulties may arise when they are interpreted in light of the rationales underlying various institutional divisions within the broadcasting sector, particularly public service and commercial broadcasting. In addition, running parallel to such issues, are the challenges presented by ongoing technological developments, technological convergence and the movement towards a more entertainment-centred market driven media. In this regard, the impact of the issues and challenges facing broadcasting, as traditionally understood, will be outlined and considered. Moreover, their potential impact on the representation of persons with disabilities within broadcasting will be contemplated.

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Models of Disability

“How you define and express the concept of disability strongly impacts the understanding, attitude, and approach of others toward the human rights of persons with disabilities.”¹

Disability is a multifaceted concept and as yet, there is no single definition of disability that has attained international consensus.² Traditionally, “disability” has been used either as a synonym for “inability” or as a reference to legally imposed limitations on rights and powers.³ Consequently, it is difficult to reconcile questions about the definition of “disability”. Moreover many different characteristics are considered disabilities. Autism, blindness, deafness, depression, diabetes, epilepsy, depression, paraplegia, HIV and obesity⁴ among other things, have all been classified as “disabilities.” The term embraces diverse conditions⁵ and there appears to be little about the functional or experiential states of people with these various conditions to justify a common conception; certainly, there is at least as much variation among “disabled” people with respect to their experiences and bodily states as there is among people who lack disabilities.⁶

Notwithstanding the fact that persons with disabilities are entitled to all human rights, disabled people frequently encounter serious discrimination based on attitudes, perceptions, misunderstandings and lack of awareness which prevail in society. Societal attitudes are significant since they determine to a large degree the extent to which the personal, social, educational and psychological needs of persons

¹Janet Lord *et al.*, *Human Rights. Yes!: Action and Advocacy on the Rights of Persons with Disabilities*, Human Right Education Series, Topic Book 6 (University of Minnesota Human Rights Resource Centre 2007) 15.

²*ibid.* See also Rannveig Traustadootir, ‘Disability Studies, the Social Model and Legal Developments’ in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities; European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 3.

³David Wasserman *et al.*, ‘Disability: Definitions, Models, Experience’ *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed).

<<http://plato.stanford.edu/archives/fall2013/entries/disability/>>. See also Aimee Mullins, ‘The Opportunity of Adversity’ *TED Talks*, October 2009, 00:13- 02:58.

<http://www.ted.com/talks/aimee_mullins_the_opportunity_of_adversity?language=en>

⁴Case C-354/13 FOA, acting on behalf of *Karsten Kaltoft v. Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, Opinion Of Advocate General Jääskinen delivered on 17 July 2014.

⁵Wasserman *et al.*, (n 3), state that disability includes “...conditions such as the congenital absence or adventitious loss of a limb or a sensory function; progressive neurological conditions like multiple sclerosis; chronic diseases like arteriosclerosis; the inability or limited ability to perform such cognitive functions as remembering faces or calculating sums; and psychiatric disorders like schizophrenia and bipolar disorder”.

⁶*ibid*

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with disabilities will be realized.⁷ The history of disability has been characterised by the progressive development of several models of disability which includes *inter alia* religious, medical, social and rights based models of disability.⁸ These models or constructions of disability have established the parameters for society's responses to people with disability. Clapton and Fitzgerald maintain that, through time, these models have become more sophisticated, yet their essence remains constant, namely otherness.⁹ While a detailed analysis of all models of disability is outside the confines of thesis, the two most widespread models will be considered in the sections following.

Medical and Social Models of Disability

One of the most consequential and prevalent myths affecting the human rights of persons with disabilities is the idea or belief that disability is a medical problem that needs to be solved or an illness that needs to be cured.¹⁰ Over the past few decades, disabled people and their advocates have organised to challenge the discrimination and exclusion of disabled people from mainstream society and have specifically castigated the enduring, over medicalised, pathological and individualist accounts of disability.¹¹

Michael Oliver, a British academic and disability rights activist, has conceptualised models of disability as the binary distinction between what he chooses to call the individual (bio-medical) and social models of disability. He points out two issues in relation to the individual bio-medical model of disability. Firstly, it locates the 'problem' of disability within the individual and secondly, it observes the causes of this problem as stemming from the functional limitations or psychological losses

⁷Chomba Wa Munyi, 'Past and Present Perceptions Towards Disability: A Historical Perspective' (2012) 32 (2) *Disability Studies Quarterly* <<http://dsq-sds.org/article/view/3197/3068>>

⁸Jayne Clapton and Jennifer Fitzgerald, 'The History of Disability: A History of Otherness' *New Renaissance Magazine*, 1, state that bodily difference has for centuries determined social structures by defining certain bodies as the norm and defining those which fall outside the norm as "Other"; with the degree of "Otherness" being defined by the degree of variation from the norm. Consequently this has created an 'artificial paradigm of humanity' into which some people fit neatly and others fit very poorly.

⁹For example in the post-industrial and post-enlightenment era, disability in Western society has been regarded as individual affliction predominantly cast within scientific and medical discourses. Consequently "disability" came to be defined and signified as a power-neutral, objectively observable attribute or characteristic of an "afflicted" person. According to this model of disability, it is the individual and not society who has the problem and different interventions aim to provide the person with the appropriate skills to rehabilitate or deal with it.

¹⁰Lord *et al.*, (n 1) 18.

¹¹Traustadootir (n 2) 3.

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which are assumed to arise from disability.¹² Additionally these two points are underlined by what might be called ‘the personal tragedy theory of disability’, which suggests that disability is some terrible chance event which occurs at random to unfortunate individuals.¹³ Oliver asserts, however, that the ‘medicalisation’ of disability is inappropriate because disability is a social state and not a medical condition. Consequently, under an individual (bio-medical) model the problems of disability are located in the wrong place; within the individual rather than in society.¹⁴

Over the past few decades the disabled people’s movement has focused its attention on social oppression and environmental barriers which affect persons with disabilities, which has led to the adoption of a new social-contextual understanding of disability referred to as the “social model” of disability. Generally speaking,¹⁵ this understanding shifts the attention away from the individual and the impairment toward the environment and the impact of cultural, social and environmental barriers on persons with disabilities.¹⁶

The United Nations Convention on the Rights of Persons with Disabilities, (hereafter CRPD) represents a paradigm shift in approaches to disability, moving from a model where persons with disabilities are treated as objects of medical treatment, charity and social protection and welfare (medical model) to a model where persons with disabilities are recognized as subjects with human rights, active in the decisions that affect their lives and empowered to claim such rights (social model). This approach

¹²Michael Oliver, ‘The Individual and Social Models of Disability’(Paper presented at joint workshop of the Living Options Group and the Research Unit of the Royal College of Physicians, Dublin, 23 July 1990) 2.

¹³ibid

¹⁴ibid

¹⁵The interpretation of the social model of disability has taken different forms most notably in the UK and North America and it has not been without its critics. While a detailed analysis of such models is outside the confines of this thesis, critics such as Shakespeare and Watson claim that while they agree that under a British social model approach to disability, that the priority should be social change and barrier removal, there is no reason why appropriate action on impairment, and even various forms of impairment prevention, cannot co-exist with action to remove disabling environments and practices. They assert that people are disabled both by social barriers and by their bodies, “... [T]his is straightforward and uncontroversial. The British social model approach, because it ‘over-eggs the pudding’, risks discrediting the entire dish.” Tom Shakespeare and Nicholas Watson, ‘The social model of disability: an outdated ideology?’ (2002) 2 *Research in Social Science and Disability*, 9-28.

¹⁶Traustadootir (n 2) 8. See also Michael Oliver, ‘Re-Defining Disability: A Challenge to Research’ in John Swain and others (eds), *Disabling Barriers: Enabling Environments* (Sage Publications 1993) 61-68; Colin Barnes and Geof Mercer, *Exploring the Divide: Illness and Disability* (Disability Press 1996) 11-16.

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views the barriers which confront persons with disabilities, and which are created by society and its environment, as the main obstacles and hindrance to the full enjoyment of their human rights. Such obstacles include physical, informational and communicational barriers and negative attitudes.¹⁷

Under a social model of disability, viewing people with disabilities as ‘subjects’ rather than ‘objects’ involves providing them with access to the comprehensive benefits of basic freedoms that most people take for granted and doing so in a manner that is respectful and accommodating of their difference. It means discarding the tendency to perceive people with disabilities as problems and viewing them instead in terms of possessing human rights, including civil, political and cultural rights, on an equal basis with others.¹⁸ This approach to disability is a central theme underlying this thesis.

Disability and Media

One of the main causes put forward for negative social attitudes towards disabled people, resulting in the denial of their basic values and rights is the manner in which disability is portrayed and interpreted in society.¹⁹ The social construction of disability has been identified as a barrier to social inclusion. The theory of social construction attempts to explain the process by which knowledge is created and assumed as reality.²⁰ The theory contends that meanings are created, learned and shared by people and then reflected in their behaviour, attitudes and language.²¹ When these roles are made available to other members of society to enter into and play out, the reciprocal interactions are said to be institutionalised. In the process of this institutionalisation, meaning is embedded in society. Knowledge and people's conception (and belief) of what reality is becomes embedded in the institutional fabric of society. Reality is therefore said to be socially constructed. Accordingly,

¹⁷This is reflected in the Preamble to the CRPD which states that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.

¹⁸Gerard Quinn, Theresia Degener *et al.*, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (Office of the United Nations Commissioner for Human Rights, United Nations 2002) 13.

¹⁹Frances Hannon, *Literature Review on Attitudes towards Disability*, Disability Research Series 9, (National Disability Authority 2007) 27.

²⁰*ibid*

²¹*ibid*

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understanding social constructions of disability and impairment can help to explain why people with disabilities have been marginalised and discriminated against and can draw attention to what needs to be done to eliminate negative attitudes.

In the absence of personal experience and contact with persons with disabilities, the media play a considerable role in shaping attitudes towards and knowledge of disability.²² The media, and particularly broadcasters, are involved in the construction of reality through the processes of socialisation, legitimisation and agenda setting. Different types of broadcasters (public service, commercial and private and community) operating under various rationales and broadcasting ethos have their own agendas, stylistics, requirements and objectives which can impact on the provision of broadcasting services and broadcasting content and the manner in which it communicates ideological values and norms, attitudes and beliefs. In its role as a conduit of persuasion, the media, particularly broadcast media, can be seen to exert an influence on identity formation and correlated issues around stigma, self-esteem, social relations, economic and political positions.

According to Stadler, in considering the relationship between media and disability a number of aspects need to be considered which includes: media content (representations, stereotypes, absences), media technologies (issues of access and technological determinism) and media policies (which addresses language, technology, content and scheduling). Media content, technologies and policies all convey discourses about disability that frame the manner in which disability is constructed and viewed in society.²³

Taking media content for instance, it is proposed here that there are a number of distinct yet inter-related factors which can both create and contribute to negative attitudes, discriminatory practices and misunderstanding of persons with disabilities. Broadly speaking and more specifically in terms of broadcast media, such factors include *inter alia*: the manner in which disability is constructed through use of various models, which can vary in different cultures; the use of disabling language and terminology to describe persons with disabilities; stereotyping and the under-

²²ibid 4.

²³Jane Stadler, 'Media and Disability' in Brian Watermeyer *et al.*, (eds), *Disability and social change: a South African agenda* (Human Rights Research Council 2007) 373.

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representation or the exclusion of persons with disabilities in a variety of contexts including in their media content.

Culture, Constructions of Disability and Media

A review of the literature relating to disability indicates that the manner in which disability is constructed through various models plays a significant role in the way disability is stereotyped not just in the media but in all facets of society.²⁴ Culture, for example, may play a role in the manner in which disability is constructed and presented in the media. Soffer *et al.* make the crucial point that when attempting to address what may be the origins and meaning of the discrepancy between legislation, policy and media conceptualisations of disability, one needs to account for both the universal genesis of negative perceptions of disability in addition to the more particularised culture bound meaning of disability within a national symbolic framework.²⁵ For instance a report by the World Bank in 2007 on persons with disabilities in India, indicated that much of the literature on disability in India has pointed to the importance of the concept of karma in attitudes to disability, with disability perceived either as punishment for misdeeds in the past lives of persons with disabilities, or the wrongdoings of their parents.²⁶ The report further states that at a more mundane level, people with disabilities are traditionally perceived as somehow inauspicious.²⁷ Consequently, these constructions of disability have impacted on disability portrayal on screen.²⁸ Munyi observes that variations in the treatment of persons with disabilities are manifest in Africa as in other parts of the world.²⁹ He states, citing a study from 1985, that Africans in general, and Nigerians

²⁴*E.g.* in legislation, policy, in court settings, among the judiciary *etc.*,

²⁵Michal Soffer *et al.*, 'Media and the Israeli Disability Rights Legislation: Progress or Mixed and Contradictory images?' (2010) 25(6) *Disability and Society* 687, 688.

²⁶Human Development Unit South Asia Region Report, 'People with Disabilities in India: From Commitments to Outcomes' (World Bank May 2007), 21. The report states in this regard as two Indian authors have cited "[A]t a profoundly serious spiritual level, disability represents divine justice." Additionally research from urban and rural Andhra Pradesh in the early 2000s asked people whether disability was a punishment or a curse from God. The researchers found that 40 per cent of respondents agreed with that it was with the share of people hold such views increasing with age, being higher among women, higher for lower socio-economic groups and higher for those who were illiterate.

²⁷*ibid*

²⁸*ibid* 22. For instance, in Bollywood films featuring persons with disabilities several common images of disabled men and women emerge ... Disabilities of hero(ine) for instance are typically acquired after birth rather than congenital, "normalizing" the actor somewhat and disability is quite frequently cured during the course of the film.

²⁹Wa Munyi, (n 7) citing JB Amoako, *Integrating the disabled into the community* (University of Cape Coast 1977) <<http://dsq-sds.org/article/view/3197/3068>>

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in particular, attribute causes of disabilities to *inter alia* “witchcraft, juju, sex-linked factors, God /supernatural forces.”³⁰ The legacy of such perceptions is still prevalent almost three decades later in many parts of Africa. In 2010, the UN Committee on the Rights of the Child expressed its extreme concern at the reportedly widespread practice of the witchcraft stigmatization of children, including children with disabilities, in Nigeria and reports that these children are tortured, abused, abandoned and even killed as a result of such stigma and persecution.³¹ The Committee was particularly concerned at the reported roles of certain churches and the film industry in promoting the belief in child witchcraft and that already vulnerable children, including disabled children, are at greater risk of witchcraft stigmatization.³² In the Democratic Republic of Congo (DRC) a recent report by UN-Habitat in 2014, revealed that religious television channels run weekly shows where “child witches” are identified during public mass meetings and the persecution of witch children in the streets of Congo’s towns and villages is becoming disturbingly common.³³ In January 2015, Tanzania banned witchdoctors to try and stem a surge in murders of albinos, whose body parts are sold for witchcraft.³⁴

From the various studies reviewed, it would appear that outmoded cultural interpretations of disability can and are being further promulgated by media. The literature also indicates that such interpretations are more prevalent in developing countries. This is a significant issue as billions of people continue to depend on radio and television as their primary sources of news and information and entertainment in developing countries.³⁵ The extent of the harm caused by the effect of specific cultural interpretations of disability on audiences in developing countries, with restricted access to broadcasting services and alternative discourses in media content, is unknown. Questions abound however, as to the limits, if any, on media to freely express such outmoded discourses. These questions will be considered more broadly

³⁰ibid citing Oke Chigorom Abosi and ED Ozoji, *Educating the blind: A descriptive approach* (Spectrum Books 1985).

³¹Committee On The Rights Of The Child, Fifty-Fourth Session Consideration Of Reports Submitted by States Parties Under Article 44 Of The Convention: Concluding Observations: Nigeria, CRC/C/NGA/CO/3-4, 11 June 2010, §67.

³²ibid

³³UN Habitat, ‘The State of African Cities 2014’ (UN Habitat 2014) 211.

³⁴Kizito Makoye, ‘Tanzania bans witch doctors to deter albino killings: TRFN’ *Reuters* (United Kingdom 14 January 2015). <<http://news.yahoo.com/tanzania-bans-witch-doctors-deter-albino-killings-trfn-114234288.html>>

³⁵ITU, ‘Partnership on Measuring ICT for Development Final WSIS Targets Review: Achievements, Challenges and the Way Forward’ (ITU 2014) 237-269.

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in Chapter Four which deals with freedom of expression and media content regulation.

Although it is outside the confines of this thesis, cultural constructions of disability including those based on *inter alia* religious and ancient belief systems raise interesting questions in the ongoing debate on “traditional values” advanced by the UN Human Rights Council and the manner in which such values can contribute to human rights protection.³⁶ Protecting human rights under a “traditional values” rubric has been criticised as being synonymous with majoritarian, conservative and mono-cultural conceptions of what some people think human rights should be and in essence, are a smokescreen to obscure and legitimise the exclusion of minority and disfranchised groups in society.³⁷

Disabling Language and Terminology and Media

“Words are, in my not-so-humble opinion, our most inexhaustible source of magic. Capable of both inflicting injury, and remedying it.”

~Albus Dumbledore (*Harry Potter*)

According to Mc Bride, it is almost unfeasible to evade the historical legacy of the language deployed in the conversation about persons with disabilities³⁸ and not least its utilisation in the media. Language is a powerful tool in shaping attitudes towards and perceptions of persons with disabilities as both reflect and alter social attitudes.³⁹ Discriminatory language, whether outright verbal use or thoughtless stereotyping, has just as much power to exclude as other forms of marginalisation and on a deeply personal, stigmatising level.⁴⁰ Mandinkos and Vario assert that it is common for people to be categorised in conversation by their race, religion, sexuality or disability

³⁶The UN Human Rights Council, has adopted several resolutions on “the promotion of human rights and fundamental freedoms through a better understanding of traditional values of humankind”. In addition, there have been workshops, studies, and invitations to states, academic institutions and civil society organisations to contribute with views and experiences on the way traditional values reaffirm and support human rights. See Resolutions 12/21; 16/3, and 21/3.

³⁷See Maggie Murphy, ‘Traditional values’ vs Human Rights at the UN’ openDemocracy, 18 February 2013, <<https://www.opendemocracy.net/5050/maggie-murphy/traditional-values-vs-human-rights-at-un>>

³⁸Stephanie McBride, ‘The Media and People with Disabilities’ (Research Paper for the Commission on the Status of People with Disabilities, Dublin, August 1995) 32.

³⁹Mark Priestley, ‘Discourse and identity: disabled children in mainstream schools’ in Mairian Corker and Sally French (eds), *Disability Discourse* (OUP 1999) 92.

⁴⁰Nanette Gottlieb, ‘Disability and Language in Japan’ (2001) 16 (7) *Disability and Society* 981, 983.

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(i.e. ‘the black guy,’ ‘the lesbian,’ or ‘the little boy with Down’s’).⁴¹ Accordingly, this generates a division in society, by creating the perception that a particular group is not normal.⁴² The predilection to exploit people with disabilities as an index of the “anti-norm” has promoted negative attitudes and is seen as precluding persons with disabilities from an equal citizenship.⁴³

Disability activists are now facing the task of re-creating a culture which celebrates and embraces difference. Haller *et al.* argue “that looking at terminology is significant as it gives us a way to understand whether a more disability-aware ...society is manifesting itself in changes in media behaviours...”⁴⁴ The suggestion here is that even something as mundane as the words used to refer to a group are important because they have ramifications both for the self perception of people with disabilities and what the general public believes about disability.⁴⁵ For instance the language used in the media to describe disability often reveals a perception of disability as an abnormality, an illness or a tragic loss of ‘normal, healthy functioning.’⁴⁶ Such terminology arises from the medical and charitable models of disability, which contribute to a discourse of disability that is disabling and disempowering of disabled people.⁴⁷ The manner in which the power of language is

⁴¹Bridget Cullen Mandikos and Amber Vario, ‘Sticks and Stones’: The lack of disability vilification law in Australia’ (2010) 35(2) *Alternative Law Journal* 72, 73. See also Colin Barnes, *Disabling Imagery and the Media An Exploration of the Principles for Media Representations of Disabled people: The First in a Series of Reports* The British Council of Organizations of Disabled People (Ryburn Publishing 1992), Part 3, where he states that in the same way that lesbians, gay men, black people members of minority ethnic groups and women have identified the power of language in the promotion of heterosexism, homophobia, racism and sexism, so too disabled people are sensitive to the ways in which worlds cultivate institutional discrimination.

⁴²ibid

⁴³McBride (n 38).

⁴⁴Beth Haller *et al.*, ‘Media labelling versus the US disability community identity: a study of shifting cultural language’ (2006) 21(1) *Disability and Society* 61, 62.

⁴⁵ibid. Take for example the complaints by the UK Charity Changing Faces to Ofcom regarding the title of the show *The Undateables* discussed in Chapter Three.

⁴⁶Stadler (n 23) 373, citing Nora Gold and Gail Auslander, ‘Newspaper coverage of people with disabilities in Canada and Israel: An international comparison’ (1999) 14 *Disability and Society* 709 - 731.

⁴⁷Haller *et al.*, (n 44), identify types of negative terminology that are utilised in the media in different genres of programmes which emphasise a “sick role” or the “medicalisation” of the disability identity. For example, news media sometimes refer to people who had contracted polio earlier in life as having been ‘stricken’ with polio. People with Aids are sometimes referred to as “AIDS sufferers”, “suffering from AIDS” or “AIDS patients” or “victims of AIDS”. They note that people with disabilities however have rejected the terms ‘victim’ and ‘patient’ to describe their relationship to their conditions and instead have chosen terms with dignity which underline their personhood primarily and their condition second as in “people with HIV” or “people with disabilities.”

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utilised to influence public perceptions is therefore an extremely important issue for disability advocates.⁴⁸

Likewise Stadler states that categorising people as either able-bodied or disabled is problematic as it produces an illusory binary opposition between “us” and “them”.⁴⁹ Describing one normative state by relation to another can result in one normative state being regarded as inferior or undesirable.⁵⁰ Many people without impairments regard their corporeal state as the natural and correct state of being.⁵¹ Disabilities are understood to be distinct or the opposite of able-bodied, and hence regarded as something unfortunate and negative.⁵² Consequently media messages, representations and ways of using language that naturalise and reinforce this opposition, convey a distorted picture of disability by failing to acknowledge that disabilities are situated on a continuum of impairments and forms of disadvantage.⁵³ In this way they can contribute to stigma and misunderstanding.⁵⁴ Stadler explains that this occurs because it naturalises perceptions of people with disabilities as victims who require help, treatment and rehabilitation. Accordingly this perspective does not recognise the individuality, agency and abilities of disabled people.⁵⁵

Research has shown that language and terminology are key issues in improving the portrayal of people with disabilities in broadcasting.⁵⁶ In brief, the findings from various studies reveal that the use and understanding of offensive terms relating to disability can change over time and words which were once considered to have a particular derogatory meaning may not carry the same meaning or even be understood by later audiences. Moreover, the acceptability of certain potentially

⁴⁸Paul Harpur, ‘From Disability to ability: changing the phrasing of the debate’ (2012) 27 (3) *Disability and Society* 325, 327.

⁴⁹Stadler (n 23) 374.

⁵⁰Harpur (n 48) 329.

⁵¹*ibid*

⁵²*ibid* 330.

⁵³*ibid*

⁵⁴*See also* Colin Barnes, *Disabling Imagery and the Media An Exploration of the Principles for Media Representations of Disabled People* (The British Council of Organisations of Disabled People, Ryburn Publishing, 1992).

⁵⁵Stadler (n 23) 374.

⁵⁶Broadcasting Commission of Ireland (BCI) and the National Disability Authority (NDA) ‘Representation of Persons with disabilities in Irish Broadcast Media: A Review of Other Jurisdictions’ (BCI/ NDA 2009) 117; *See also* updated report BAI/NDA, ‘Representation of Persons with disabilities in Irish Broadcast Media: A Review of Other Jurisdictions’ (BAI/ NDA 2013).
<<http://www.bai.ie/index.php/documents/research-publications/>>

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offensive words and discriminatory language⁵⁷ depends upon the context in which they are used. Such contexts include the use of terms in different genres of programming such as news programming and also their impact on different audiences, for instance, in children's programming.⁵⁸ Research undertaken regarding the manner in which mental illness is portrayed in children's television in New Zealand, for instance, found a high frequency of references to mental illness in children's television particularly during animated cartoons, with almost 50 percent of all the programmes surveyed containing references.⁵⁹ That research further revealed that the vocabulary used was mainly negative with a common implication of loss of control.⁶⁰ According to Wilson *et al.* these behavioural examples may contribute to children learning how to separate, alienate, or put others down by bullying, intimidation or verbal harassment.⁶¹

Stereotypes and Negative Portrayals of Disability and Media

Much research has also been carried out on the media's continuing role in perpetuating stereotypes of persons with disabilities through negative and disempowering portrayals. Such stereotypes are habitually at the very core of overt and covert, direct and indirect and persistent discrimination against persons with disabilities and consequently can affect their right to equality.⁶² They translate into practical policies, laws and practices that cause harm to persons with disabilities. In sum, the effect of negative stereotypes on persons with disabilities is to deprive them of equal knowledge, exercise and enjoyment of fundamental rights and fundamental freedoms.⁶³ At European level, the Parliamentary Assembly of the Council of Europe (PACE) has stated that: "[T]he fight against ... stereotypes should be seen as

⁵⁷Discriminatory language in this regard relates to language which targets specific individuals or groups based on the grounds such as age, disability, gender, race, religion, beliefs and sexual orientation.

⁵⁸A survey carried out in Ireland, for example, found that 57 per cent of respondents found that strong negative statements being made about people with disabilities by someone being interviewed on television news report would be "totally unacceptable."

⁵⁹Claire Wilson *et al.*, 'How mental illness is portrayed in children's television: A prospective study' (2000) 176 *The British Journal of Psychiatry* 440, 442.

⁶⁰*ibid.* The frequent and casual use of fundamentally disrespectful words such as 'crazy', 'mad', 'nuts', 'twisted', 'wacko' or 'looney' demonstrated for children that such expressions are acceptable or even funny.

⁶¹*ibid.*

⁶²NDA, *A Strategy for Equality: Report of the Commission on the Status of Persons with Disabilities* (Department of Justice, Equality and Law Reform 1996).

⁶³*E.g.* lower levels of work opportunities, poverty, can hinder persons with disabilities in developing their abilities, making their own independent choices and personal autonomy and pursuing careers.

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part of the fight against discrimination and the promotion of ...equality, all of which are fundamental values of the Council of Europe.”⁶⁴ In *Aksu v Turkey*, the ECtHR recognised that stereotypes are “dangerous because they reflect or even induce an implicit discrimination.”⁶⁵

Many studies have identified common stereotyped portrayals of persons with disabilities in television and other media.⁶⁶ Colin Barnes, for example, has identified eleven such recurring media stereotypes of persons with disabilities, which include the disabled person as: pitiable and pathetic, as an object of violence; as sinister and evil; as an atmosphere or curio; as a super cripple,⁶⁷ as an object of ridicule; as their own worst enemy; as a burden; as sexually abnormal; as incapable of participating fully in community life and as normal. These stereotypes provide an overall view of disabled people which is decidedly negative and a threat to the well being of the non-disabled community.⁶⁸ Longmore, for example, notes that the model of the person with a disability who overcomes his or her own social maladjustment serves the cultural ethos of a person’s character as the determinant of success or failure.⁶⁹ Research on disability sport and the media in 2007, for example, contended that elite

⁶⁴It has further added that: “[R]espect for human dignity ... and the elimination of discriminatory practices must take precedence over freedom of expression. Moreover...equality must be seen as a key component of freedom of expression...” PACE, Combating sexist stereotypes in the media Report Committee on Equality Opportunities for Women and Men Doc 12267, para. 4.

⁶⁵*Aksu v. Turkey* App No 4149/04 and 41029/04 §2, Merits, 27 July 2010 (Judges Tulkens, Tsotsoria and Pardalos, dissenting). This case was referred to the Grand Chamber which delivered judgment in the case on 15/03/2012.

⁶⁶Barnes (n 54). See also Paul K Longmore, ‘Screening Stereotypes: images of disabled people in television motion pictures in Alan Gartner and Tom Joe (eds) *Images of the Disabled, Disabling images* (Praeger 1987) 65-78 identified five common portrayals of persons with disabilities in television and motion pictures e.g. as evil criminals with no soul; as monsters; as maladjusted; as heroes; as sexually deviant, asexual or sexually incapacitated wither physically or emotionally.

⁶⁷ibid

⁶⁸ibid. The television documentary series “My Shocking Story” originally broadcast on the Discovery Channel UK, which documented unusual or shocking medical ailments and conditions provides a clear example of such stereotypes in action. This particular series could be described as one of Barnes’ stereotypes, i.e. presenting the disabled person as atmosphere or curio. Related to this type of stereotype is the view of disabled people as exotic. In the same way that John Merrick [the elephant man] was publicly humiliated in fair grounds over a century ago, disabled people are still put on display in so called ‘freak shows’. Even the show’s various episode titles “Half-Man Half-tree,” “Octoboy”, “Human Spider Sisters”, “Real Wolf Kids”, “Freak Show Family” and “Which Sex Am I” are illustrative of the stereotype. According to Barnes, such exhibitions represent little more than disability voyeurism because they encourage lewd fascination with impairment.

⁶⁹Longmore (n 66) 9, as cited in Tanya Temkin, ‘Representations of Blind People in Films and Television’ in Mass Media and Disability Final Report of the International Experts Meeting Moscow, Russia, September 26-29, 2002, 19.

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Paralympian athletes continued to be depicted as ‘supercrrips’, and as ‘exceptionals’ who overcome insurmountable odds to conquer their disability.⁷⁰

Research in various jurisdictions also reveals that different disabilities including *inter alia* mental illness and developmental and intellectual disabilities, are also depicted in stereotypical ways in various genres of programming. For instance, Watson and Corrigan state that research has identified four sets of stereotypes that are especially problematic for mental illness; these are: that people with mental illness are dangerous and should be avoided; they are to blame for their disabilities that arise from weak character; they are incompetent and require authority figures to make decisions for them; they are viewed as childlike and profit from parental figures to care for them.⁷¹ Research carried out in Australia in 2005 which assessed the impact of film and television drama portrayals of mental illness on the lives of persons with mental illness and their families,⁷² indicated that the manner in which mental illness is depicted in dramas is perceived as having a major, negative effect on those living with a mental illness.⁷³ Such negative effects include feelings of distress, increased experiences of stigma and discrimination and self-stigmatisation. Similarly, a study carried out by *Wilson et al.* on how mental illness is portrayed in children’s television found that, in the six animated characters chosen,⁷⁴ the characters, whether comic or villainous, were stereotypically and blatantly negative and served as objects of amusement, derision or fear.⁷⁵ The generic nature of the illnesses portrayed and the lack of specificity of symptoms or diagnosis in the depictions were also found to have invited viewers to generalise all individuals with a mental illness.⁷⁶

⁷⁰Howard L Nixon, ‘Constructing diverse sports opportunities for people with disabilities’ (2007) 31(4) *Journal of Sport & Social Issues* 417, 424.

⁷¹See also Nancy Signorielli, ‘The Stigma of Mental Illness on Television’ (1989) 33 *Journal of Broadcasting and Electronic Media* 325, stated that the few existing studies focusing upon the image of mental illness in the media revealed a cultural image of unpredictability, irrationality, danger, evil and avoidance.

⁷²SANE Australia, ‘Make it Real! A Report on Consumer Impressions of and Responses to Film and Television Portrayals of Mental Illness and Suicide’ (2005), 6.

⁷³ibid 3. The survey found that 95% of consumers believed that negative portrayals of mental illness in drama had an effect on them and 80% reported that the effect was negative.

⁷⁴Wilson (n 59) 442 the sample characters were chosen from *Tiny Toon Adventures* an animated cartoon produced by Steven Spielberg for Warner Brothers which is broadcast globally.

⁷⁵ibid

⁷⁶ibid. The study did suggest, however, that a variety of studies (sample and reception studies) on the issue are necessitated in order to ascertain what specific impact, if any, such negative televised references and depictions have on children’s appreciation of mental illness.

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The harmful effects of the depictions of many other disabilities have also been acknowledged. Stevenson *et al.* in 2011, found that society's proclivity for depicting autism as a disability of childhood poses a formidable barrier to the dignity and well-being of people with autism of all ages.⁷⁷ Adults with disabilities in general, and those with developmental disabilities in particular, have long been treated as childlike entities, deserving fewer rights and incurring greater condescension than adults without disabilities.⁷⁸ They note that the stereotype of the "eternal child" has burned a disturbing path through history and continues to wreak havoc in arenas ranging from employment discrimination to forced sterilizations.⁷⁹ Carter and Williams in their assessment of television coverage of the Special Olympics in 2009 contend that much of the coverage reproduced and reinforced dominant discourses concerning people with learning disabilities, that these are largely 'sympathetic', normatively passive, dependent people who deal bravely with their impairments and rely profoundly upon the assistance of others.⁸⁰

Research carried out in Ireland in 1995, for example, stated that practices in media representation of people with disabilities across categories tended to be structured on principles of sympathy and sentimentality partly due to the manner in which definitions of disability are constructed.⁸¹ The research suggested that a strong normative and social dimension is involved in definitions of disability and in the beliefs and attitudes which non-disabled people hold about people with disabilities.⁸² The research proposed that this has implications for how predominantly non-disabled decision makers in the media will use disability in their output.

The above examples raise issues regarding the appropriate manner in which broadcasting regulatory frameworks, including regulators and broadcasters, can address the issue of combating stereotypes and negative portrayals and the use of

⁷⁷Jennifer Stevenson *et al.*, 'Infantilizing Autism' (2011) 31 (3) *Disability Studies Quarterly*. <<http://dsq-sds.org/article/view/1675>>

⁷⁸*ibid*

⁷⁹*ibid*

⁸⁰Neil Carter and John Williams, 'A genuinely emotional week: learning disability, sport and television: notes on the Special Olympics GB National Summer Games 2009' (2012) 34 *Media Culture and Society* 211, 224.

⁸¹McBride (n 38)13-14.

⁸²*ibid*

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disabling language and terminology to describe disabled people in broadcast media and content and these issues will be addressed in Chapter Four.

Under-Representation / Absence of Persons with Disabilities in Media

In addition to mis-representation and stereotypes, research carried out in various jurisdictions has identified the under-representation or absence of persons with disabilities in broadcast content as a specific concern.⁸³ For instance research carried out by the BBC⁸⁴ suggests that viewers and listeners appreciate programmes that are representative of the diverse society in which they live. If there is an under-representation, the use of stereotypes and caricatures or the discussion of difficult or controversial issues involving that community may be seen as offensive in that it is viewed as creating a false impression of that minority.⁸⁵ There is a general agreement that a diverse media workforce more accurately reflects the make-up of society and inevitably produces richer and more relevant output. This in turn makes media services more compelling and attracts a wider audience. Younge suggested recently that in the BBC Trust's service review of the BBC's television channels, findings of ratings' underperformance among Black Asian and Minority Ethnic (BAME) audiences as well as poorer and young audiences "is an indicator that programmes are not reflecting the reality of life."⁸⁶ He states that the reason for this poor portrayal is that too few BAME people are involved in producing and, in particular, commissioning what's broadcast. He further asserts that this is not just a problem for the BBC but also for the industry. A report published by the Creative Diversity Network in August 2014, on the most popular programmes on a number of TV channels in the UK, found that women and older people are still starkly under-represented on television and that disabled contributors are barely seen on some of

⁸³BCI/ NDA (n 56).

⁸⁴BBC, 'Taste, Standards and the BBC: Public attitudes to morality, values and behaviour' (June 2009), 69 citing research on the issue. *See also* Shinichi Saito and Reiko Ishiyama, 'The invisible minority: under-representation of people with disabilities in prime-time TV dramas in Japan' (2005) 20(4) *Disability and Society* 437. The study analysed 607 serial dramas or drama series aired on commercial TV broadcasting networks between 1993 and 2002. Of these disabled people appeared in 67 (at 443). *See also* Creative Diversity Network (CDN), '2009-2010 Progress Report: Channel 4's Chairmanship of the CDN, 1. <<http://www.creativediversitynetwork.org/how.php>>

⁸⁵*ibid*

⁸⁶Pat Younge, 'For TV diversity, we need to change those who pick the shows' (*BBC Media Blog*, 20 August 2014). <<http://www.theguardian.com/media/media-blog/2014/jul/20/television-diversity-channels-bame-young-audiences>>

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the UK's biggest-rating shows.⁸⁷ The regulatory responses to under-representation will be addressed in more detail in Chapters Two and Four.

Conclusion

The images, depictions and narratives of persons with disabilities based on particular constructions and perceptions of disability in the media can have both negative and positive influences on societal attitudes towards disability. Riley highlights how the social construction of disability has had a more positive influence on the media and pinpoints a number of factors which have influenced the shift towards a more social model. He states that the fact that the Americans with Disabilities Act (ADA) 1990 does not specify particular medical conditions, as previous laws did, reflects a shift from a medical to a 'civil rights' view of disability.⁸⁸ He states that the term disability as defined in the ADA is viewed as a 'social', 'socio-political', or 'civil rights' model as opposed to the old-fashioned, stigmatizing 'medical' or 'impairment' model. For a journalist, he posits, this type of definition is:

“the abracadabra unlocking a vastly broader range of story possibilities, all of which lend greater interest and dignity to the people with disabilities profiled because they are suddenly business leaders, artists, teachers, farmers, and real people engaged in the same enjoyable or infuriating activities we all share instead of remaining in the passive position of being patients ‘for’ whom something needs to be done.”

It is submitted that in a democratic society, all citizens should have the expectation of seeing the national media reflect their experience.⁸⁹ Research suggests that viewers and listeners appreciate programmes that are representative of the diverse society in which they live. If there is an underrepresentation, use of stereotypes and caricatures or the discussion of difficult or controversial issues involving that community, it may be seen as offensive in that it is viewed as creating a false impression of that minority.⁹⁰

⁸⁷Guy Cumberbatch *et al.*, 'Diversity Monitoring: the top TV Programmes' (Report prepared for Creative Diversity Network August 2014). <<http://creativitydiversitynetwork.com/news/monitoring-demystified/>>

⁸⁸Charles A Riley, *Disability and the Media: Prescriptions for Change* (University Press of New England 2005) 7.

⁸⁹In this context, the concept of access to the various media needs to move beyond the limited idea of physical barriers to embrace two key elements, namely the concept of people with disabilities as audiences consuming media meanings, and as producers and makers of media meanings, as contributors and as media workers and practitioners.

⁹⁰BBC (n 84) 69.

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The manner in which disability is conveyed through media content, media technologies and media policies can have serious implications for societal attitudes towards disability. Hannon states that “old stereotypes and misunderstandings of disability need to be replaced by new social constructions.”⁹¹ She asserts that until this happens “it is difficult to establish societies where public representatives and ordinary citizens alike systematically take diversity into account and welcome and cater for differences so that people with disabilities are supported as required to access the basic conditions required to live as free and responsible citizens”.⁹²

Raising awareness and challenging negative attitudes are often first steps towards creating more positive attitudes and accessible environments for persons with disabilities. Chapter Two of this thesis considers Article 8 of the CRPD, which deals with “Awareness-raising” and contains a positive obligation on State Parties to the Convention to “adopt immediate, effective and appropriate measures” in order to “raise awareness throughout society regarding persons with disabilities”⁹³ and to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities... in all areas of life.”⁹⁴ Article 8 outlines the types of measures to achieve this end, which include *inter alia* “by encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention.”⁹⁵ The various barriers faced by persons with disabilities in accessing the broadcasting environment are considered in Chapter Five of this dissertation.

⁹¹Hannon (n 19) 32.

⁹²*ibid*

⁹³Art 8(1) (a) CRPD.

⁹⁴Art 8 (1) (b) CRPD.

⁹⁵Art 8 (2) (c) CRPD.

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Theoretical Issues – Broadcasting

Freedom of Expression and Democracy

At its most basic level, freedom of speech is the freedom to speak freely without being censored. The term ‘freedom of expression’ is often used synonymously with ‘freedom of speech’, but as generally understood in international and national laws, includes any act of seeking, receiving and imparting information or ideas, regardless of the communication medium used. The right to freedom of expression is probably the most universally accepted human right⁹⁶ and is recognized in countless international and regional human rights law instruments. In practice, however, the right is not absolute and is subject to limitations.⁹⁷

The notion of freedom of expression is intimately linked to political debate and the concept of democracy.⁹⁸ The term democracy comes from the Greek (*dēmokratía*) “rule of the people”, which was coined from the terms (*dēmos*) “people” and (*Kratos*) “power,” in the middle of the 5th-4th century BC, to denote the political systems then existing in some Greek city-states, most notably Athens. Democracy can assume many different forms,⁹⁹ and while there is no universally accepted definition of democracy, equality and freedom have both been identified as important characteristics of democracy since ancient times. These principles are reflected in the notion of all citizens being equal before the law and having equal access to legislative processes. Consequently, democracy can be interpreted as a form of government in which all people have an equal say in the decisions that affect their lives.

According to Fiss, freedom of expression and freedom of the press are indispensable elements of democracy which can be generally defined as a “system of government

⁹⁶Mark W Janis *et al.*, *European Human Rights Law: Texts and Materials* (Clarendon Press 1995) 157.

⁹⁷Even in the United States, the First Amendment to the U.S. Constitution which provides that: “Congress shall make no law ...abridging the freedom of speech, or of the press; ...” is interpreted as not absolute but as allowing very limited restrictions, particularly on content. For restrictions to the right in international human rights instruments see Article 10 (2) ECHR and Article 19 (3) ICCPR.

⁹⁸In an ideal world, this includes equal (and more or less direct) participation in the proposal, development and passage of legislation into law. It can also encompass social, economic and cultural conditions that enable the free and equal practice of political self-determination.

⁹⁹Types of democracy include *inter alia* representative or parliamentary democracy, direct democracy, constitutional or liberal democracy. For further discussion see Karol Jakubowicz, ‘Media and Democracy’ in Karol Jakubowicz (ed), *Media and Democracy* (Council of Europe Publishing 1998) 15-24.

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that assigns the ultimate responsibility to the public to decide how it wishes to live, but presupposes that the public is fully informed when it makes that judgement.”¹⁰⁰ Thomas Gibbons asserts that freedom of speech is considered to be an important principle, not only because its protection may be regarded as a consequence of securing liberty for the individual in general¹⁰¹ but also because it is considered to safeguard in particular the values of “... participating in a democracy and promoting human dignity.”¹⁰²

The European Court of Human Rights has consistently stated that freedom of expression, as enshrined in Article 10 of the European Convention on Human Rights (ECHR), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.¹⁰³ In addition, various institutions at European and international level continuously assert that freedom of expression and information in the media is an essential requirement of democracy. Accordingly, they have adopted many policies and strategies and have outlined the role of media in extending that participation in democracy.¹⁰⁴ At international level, for example, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), promotes freedom of expression and freedom of the press as a basic human right, through sensitization and monitoring activities; by fostering media independence and pluralism as prerequisites and major factors of

¹⁰⁰Andras Sajó and Monroe Price, (eds) *Rights of Access to the Media* (Kluwer International 1996) 92.

¹⁰¹One of the difficulties inherent in freedom of speech is that it contains what libertarians often describe as the paradox of freedom. The classical exposition of this paradox was that of John Stuart Mill in his essay *On Liberty in Utilitarianism* (London, 1910) 83 “. . . there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it might be considered.” This is probably best encapsulated in the paraphrase of Voltaire, “I disapprove of what you say, but I will defend to the death your right to say it.”

¹⁰²Tom Gibbons, *Regulating the Media* (Sweet and Maxwell 1998) 21-22.

¹⁰³*E.g. Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A, No.24; 1E.H.R.R.737 (1979-80).

¹⁰⁴At European level the Council of Europe, for example, has adopted various recommendations and resolutions e.g. Parliamentary Assembly of Europe (PACE) Recommendation 1407 (1999) on Media and democratic culture (*Text adopted by the Assembly on 29 April 1999* (15th Sitting)); PACE Resolution 1636 (2008) “Indicators for media in democracy” which states at para 1, “[P]ublic participation in the democratic decision-making process requires that the public is well informed and has the possibility of freely discussing different opinions.” See also Council of Europe, ‘Strategies of public service media as regards promoting a wider democratic participation of individuals, :Compilation of good practices’ Report prepared by Group of Specialists on Public Service Media in the Information Society (MC-S-PSM), November 2008 (Directorate General of Human Rights and Legal Affairs Council of Europe, June 2009).

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democratization; by providing advisory services on media legislation and by sensitizing governments, parliamentarians and other decision-makers.¹⁰⁵

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) recognises the right to freedom of expression and opinion and access to information and it examines the specific issues impacting on the ability of people with disabilities to enjoy the right on an equal basis with others.¹⁰⁶

Citizenship

Jakubowicz states that at the foundation of democracy there is undoubtedly the notion and practice of citizenship.¹⁰⁷ Dahlgren asserts that citizenship can be a more complex and disputed matter than may first be apparent. It is concerned with belonging, with inclusion, and that to be a citizen is to be a member of something we (metaphorically) call a community. It also has to do with participation in that community.¹⁰⁸ He highlights, however, the fact that throughout modern history, the membership and participation of various categories of people in their communities have been restricted and even denied.¹⁰⁹ To be a citizen means to be included civically and socially, not just politically. This in turn points to issues of the material foundations of that inclusion, the economic prerequisites for participation. Moreover, citizenship touches on the allocation of cultural as well as material resources.¹¹⁰

Jakubowicz, citing Marshall's classic analysis of citizenship, indicates three of its dimensions; namely, the exercise of civil,¹¹¹ political¹¹² and social rights.¹¹³ Civil

¹⁰⁵<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/>

¹⁰⁶Art 21 CRPD.

¹⁰⁷Jakubowicz (n 99) 11.

¹⁰⁸Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (Sage Publications 1995) 136.

¹⁰⁹Citing David Held, 'Between State and Civil Society: Citizenship' in Geoff Andrews, (ed) *Citizenship* (Lawrence and Wishart 1991) 20, he states that 'citizenship requires us to think about the very nature of the conditions of membership and political participation. These conditions of membership and participation, the processes which determine inclusion/exclusion and which accord or deny participation, must be understood broadly.'

¹¹⁰Dahlgren (n 108) 136.

¹¹¹ibid. Civil and political rights are a class of rights that protect individuals' freedom from unwarranted infringement by governments and private organizations, and ensure one's ability to participate in the civil and political life of the state without discrimination or repression. Civil rights include ensuring of peoples' physical integrity and safety; protection from discrimination on grounds such as physical or mental disability, gender, religion, race, age, sexual orientation, etc., and individual rights such as the freedoms of thought and conscience, speech and expression, religion, the press, and movement.

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citizenship has to do with the legal rights protecting the individual's freedom.¹¹⁴ Political citizenship addresses the individual's rights to participate in politics and the exercise of political power. Social citizenship has to do with a whole range of rights, which include the right to minimal economic security and welfare, so that one can, in Marshall's words, 'live the life of a civilised being according to the standards prevailing in the society.'¹¹⁵ Accordingly, it is not possible to enjoy all those rights fully unless one lives in a democratic system. It has been stated that it could be assumed that the long hard struggle for these rights is what has created democracy as it is understood today.¹¹⁶ Consequently, citizenship and democracy can be viewed as the two sides of the same coin.¹¹⁷ To this Born and Prosser add a fourth dimension, that of the concept of 'cultural citizenship,' and specifically accentuate the role of media in this regard. Here the media are not just an 'informational space' but also provide a cultural space whereby they are 'involved in the construction of common identities and universalistic solidarities, in multiple publics.'¹¹⁸ From this perspective broadcasting has an increasingly major function of mediating the identities of both individuals and collectivities, and so in influencing the cultural and identity frameworks of citizenship.¹¹⁹

At this point it is necessary to establish how the concepts outlined above may be interpreted in relation to the media and broadcasting in particular. Murdock highlights the importance of broadcasting in the life of democracy and citizenship:

¹¹²Political rights include natural justice (procedural fairness) in law, such as the rights of the accused, including the right to a fair trial; due process; the right to seek redress or a legal remedy; and rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defence, and the right to vote. Civil and political rights form the original and main part of international human rights. They comprise the first portion of the Universal Declaration of Human Rights (UDHR) 1948, (with economic, social and cultural rights comprising the second portion).

¹¹³Economic, social and cultural rights are socio-economic rights, such as the right to education, right to housing, right to adequate standard of living and the right to health. Economic, social and cultural rights are recognised and protected in international and regional human rights instruments. State Parties have a legal obligation to respect, protect and fulfil economic, social and cultural rights and are expected to take progressive action towards their fulfilment, *e.g.* Article 30 CRPD.

¹¹⁴Civil Citizenship began to emerge in the seventeenth century, as the absolute state began to wane and basic rights guaranteeing such things as a fair trial were institutionalized.

¹¹⁵Dahlgren (n 108) 137.

¹¹⁶Jakubowicz (n 99) 11.

¹¹⁷*ibid*

¹¹⁸Georgina Born and Tony Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' (2001) 64 (5) *Modern Law Review* 657, 674, citing Jeffrey Alexander and Ronald Jacobs, 'Mass communication, ritual and civil society' in Tamar Liebes and James Curran, (eds) *Media, Ritual and Identity* (Routledge 1998) 23.

¹¹⁹Born and Prosser (n 118) 674.

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“Full and effective citizenship requires **access** to the range of information, insights, arguments, and explanations that enable people to make sense of the changes affecting their lives, and to evaluate the range of actions open to them both as individuals and as members of a political community. **Without these resources, they are excluded from effective participation.** They become the victims not the subjects of change, unable to pursue their rights and press for their extension. Precisely because of its centrality the television ... has become a key site on which the struggle to secure and develop resources for citizenship takes place.”¹²⁰

While Murdock’s analysis is universally applicable, it is of particular pertinence to persons with disabilities, which is the topic of this thesis. His key points regarding “access” to the tools or the “resources” necessary for the attainment of “full citizenship” so as to enable “effective participation” rather than become the “victims” of change resonate strongly in relation to persons with disabilities. The central role played by television recognised by Murdock, although he was writing in 1990, still pertains today, although the exact nature of its role may have changed with developments in technology. These issues will be discussed throughout this thesis in the specific context of persons with disabilities and, in particular, their intersection with the first legally binding human rights instrument concerning the rights of persons with disabilities, namely the CRPD, will also be considered.

Dahlgren points out that although democracy cannot be reduced to the issues of the media, the dynamics of democracy are intimately linked to the practices of communication, and societal communication increasingly takes place within the mass media.¹²¹ He states that, in particular, it is television which has gained a prominent position within the political systems of the modern world. He posits that concern for democracy automatically necessitates a concern about television.¹²²

The Public Sphere and Broadcasting

Another concept which is entrenched in the notions of “freedom of expression,” “democracy” and “citizenship” is the notion of what is termed the “public sphere.”

¹²⁰Graham Murdock, ‘Television and Citizenship: In Defence of Public Broadcasting’ in Alan Tomlinson (ed), *Consumption, Identity and Style, Marketing, Meanings and Packaging of Pleasures* (Routledge 1990) 78. [**Emphasis added**]

¹²¹Mass media refers collectively to all media technologies, including the Internet, television, newspapers, film and radio, which are used for mass communications, and to the organizations which control these technologies.

¹²²Dahlgren (n 108) 2. See also Reuters ‘Digital News Report 2015’

<<http://www.digitalnewsreport.org/survey/2015/executive-summary-and-key-findings-2015/>>

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The public sphere or public space in essence thematizes the role of interaction among citizens in the political process. The notion of the public sphere can be traced back to the ancient Greeks. Greek democracy was a type of direct participation of all free individuals in legislation, jurisdiction and political decisions. The public forum, or *agora* or town square where citizens held court in their capacity as equal and fully fledged reasonable human beings, had to be a place of political virtues and had to be protected against the spirit of merchandising, and the ambition of fulfilling one's own private desires.¹²³ In modern terms, Habermas's most oft cited conceptualization of the public sphere is that of a realm of social life where the exchange of information and views on questions of common concern can take place so that public opinion can be formed.¹²⁴ The public sphere takes place when citizens exercising the rights of assembly and association gather as public bodies to discuss the issues of the day, especially those of political concern. Since the scale of modern society does not permit more than a relatively small number of citizens to be physically co-present, the mass media are the chief institutions of the public sphere.¹²⁵

Jakubowicz emphasises the fact that on a day to day basis, media institutions and their portrayal of reality and society constitute a particularly important component of the public sphere.¹²⁶ Their role is to disseminate the information necessary for citizens to make an informed choice at elections; to facilitate the formation of public opinion by providing an independent forum for debate and to enable the people to shape the conduct of government by articulating their views.¹²⁷ In performing that role, they can potentially become very powerful and seek to dominate public life. It is the media which assign significance to issues, confer status and legitimacy (or disrepute) on the people they bring to public attention, select what events are likely

¹²³Herman Van Erp, 'The Media and the Public Interest' in Eoin Cassidy and Andrew G McGrady, *Media and the Marketplace Ethical Perspectives* (Institute of Public Administration 2001) 71.

¹²⁴Dahlgren (n 108) 7.

¹²⁵ibid 7-8. Of course Dahlgren was writing in 1995 when broadcasting could be categorised as the leading institution of the public sphere. Current debates on the issue indicate that opinion is divided as to whether the internet and social media (digital agora) have now surpassed broadcasting in light of Habermas' theory.

¹²⁶Jakubowicz (n 99) 13.

¹²⁷ibid

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to be communicated to the public and provide a context which gives meaning to what is said and done, and as such they can be a channel of persuasion.¹²⁸

It is submitted that the wielding of such power by the media has clear ramifications for the representation of people with disabilities in broadcasting both in positive and negative ways, which will be considered throughout this dissertation.¹²⁹ At this point, however, it is important to state that this issue was highlighted by a research paper on the topic in Ireland in 1995. The report stated:

“A significant element of media influence is embedded in the power of the media to construct versions of social reality for audiences. Whether coming from a news or current affairs category, or the drama or feature department of a broadcasting company for example, the power to set agendas about what is discussed and how it is discussed and the portrayal (or equally significantly, the absence) of different social groups contribute to the way in which we view and make sense of society. The communications media and particularly broadcasting define what is of political, economic and cultural importance and set agendas for how issues are discussed (or ignored) in society. The dominance and prevalence of certain opinions and representations over time can lead to certain definitions of the social world being privileged and to the marginalisation or exclusion of alternative definitions- the outcome being a limited, partial view of society and culture.”¹³⁰

The latter observations demonstrate that the broadcast media’s power to “set agendas” raises a number of serious issues for the representation of persons with disabilities in terms of both their access to and portrayal in the medium. With citizenship comes identity. Roger Silverstone posits that television grants us a sense of personal identity and a feeling of continuity of that identity.¹³¹ This security is established through “remote trust”, a sense of ontological security without real life experience.¹³² Television (by means of its technological capabilities) links us to the world and gives us a sense of “remote trust” to the truth that it represents. Accordingly, television offers remote trust which helps us sustain our faith in reality without directly experiencing it.¹³³

¹²⁸ibid. See also Gregory Ferrell-Lowe, *The Role of Public Service Media for widening Individual Participation in European Democracy* (Report for the Council of Europe’s Group of Specialists on Public Service Broadcasting in the Information Society (MC-S-PSB) (Council of Europe 2008) 12, on the notion of a “European Public Sphere,” which identifies four aspects of Hannu Nieminen’s 2006 analysis as to what the construction of a European Public Sphere entails.

¹²⁹See Chapter Four, section on ‘Disability discrimination in Broadcast Content – Main Issues’; Chapter Five on “Access/ Accessibility”.

¹³⁰McBride (n 38) 7.

¹³¹Roger Silverstone, ‘Television, ontological security and the transitional object’ (1993) 15 *Media, Culture & Society* 573-598.

¹³²ibid

¹³³ibid

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Broadcasters are involved in the construction of reality through the processes of socialisation, legitimisation¹³⁴ and agenda setting.¹³⁵ It is submitted that through their active and pivotal role in setting the agenda for public debate and shaping public opinion on issues, broadcasters exercise a constant and cumulative influence over culture, social mores and standards of conduct through their programming and advertisements.¹³⁶ Such agenda setting is accomplished through selective exposure, limited range of options or established priorities.¹³⁷ According to Fleras, the mass media not only codify and shape perceptions of reality; they constitute a constructed reality of diverse forces, internal and external constraints, and personalities. This constructed character, however, imposes restrictions on what the media may or may not do.¹³⁸

One of the most prevailing constraints is perhaps best encapsulated in Dahlgren's assertion that "despite the fact that television is the dominant medium of the public sphere, 'public sphering' is clearly not television's dominant purpose and television's institutional logic greatly conditions its role within the public sphere."¹³⁹ This contention principally concerns the broadcast media's functioning as an industry and the policy framework under which it operates in a contemporary mass media setting.¹⁴⁰ Here, citizens' interests are being extensively cultivated to

¹³⁴Legitimation in this regard refers to the process of making something acceptable and normative to a group or audience.

¹³⁵Augie Fleras, "Please Adjust Your Set:" Media and Minorities in a Multicultural Society' in Benjamin D Singer (ed), *Communications in Canadian Society* (4th edn, Nelson 1995) 406-431.

¹³⁶Des Butler and Sharon Rodrick, *Australian Media Law* (LBC Information Services 1999) 410; *See also* Karol Jakubowicz, 'Public Service Broadcasting: Proud Past, Interesting Future?' (Part I of a Paper presented at the seminar on *The Death of Broadcasting*, organised by the European Regional Association of the World Association for Christian Communication (WACC), Denmark, 6 November 1998) 5, where he states that: "[M]eaningful agenda setting" involves "directing the public's attention to events, developments and issues of real importance to them as citizens, and to their communities and society as a whole. On the part of reporters, commentators and makers of current affairs programmes, this requires high professionalism, profound understanding of the issues and an ability to interpret developments and put them into context."

¹³⁷*ibid*

¹³⁸*ibid*

¹³⁹Dahlgren (n 108) 148.

¹⁴⁰Although Dahlgren was writing in 1995, reports from the United Kingdom, such as Ofcom's 'Children and parents: media use and attitudes report' (October 2011) 3 confirm his view stating "while there has been an increase in the take up and use of the internet and of smartphones... television remains the most consumed medium across each age group."; *See also* Ofcom, *UK Adults' Media Literacy* (Ofcom April 2011) 59, which states that "[W]atching television remains the dominant media activity, with no change since 2009 in the proportion of adults stating they regularly watch television (both 95%). Just one activity sees an increase in 2010: using the internet (67% vs. 64%), with this activity increasing at each wave of the survey since 2005. "...Nine in ten agree that they have learned useful things from both television (88%) and the internet (91%). Most users agree

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encompass economic and consumerist values, as broadcasters strive to pursue the canons of profit and audience maximization.¹⁴¹ These current dominant values are increasingly permeating media law and policy at national, European and international levels.¹⁴²

Eliza Varney gives the example of the Communications Act 2003, in the United Kingdom, which entrusts the broadcasting regulator Ofcom, with the dual task of protecting citizenship and consumer interests.¹⁴³ Varney states that this legislation neglects the fact that these interests are not always one and the same.¹⁴⁴ The concept of citizenship comprises wider democratic values such as equality between the members of society.¹⁴⁵ When acting as citizens, people tend to take into account the interest of others, rather than being confined to the pursuit of self-interests;¹⁴⁶ conversely, the notion of consumers reflects a restricted perception of the public, as people who tend to act in the pursuit of individual goals.¹⁴⁷

Running parallel, yet in tandem, with issues associated with the dichotomy between citizen and consumer in broadcasting policy, are the conflicting rationales behind

that these media are influential in shaping public opinion about political and other important issues: 86% for television and 76% for the internet. Television is therefore more likely than the internet to be rated as influential by users.”

¹⁴¹This dichotomy between the competing values of the citizen and consumer is prevalent in *e.g.* the UK’s Communication Act 2003 and the European Union’s Audiovisual Media Services Directive (AVMSD) 2010/13 EU which is discussed *infra*.

¹⁴²The European Union’s role in the audiovisual field, for instance, is to create a single European market for audiovisual services. An ‘audiovisual media service’ is a service provided by a media service provider. This service can either be a linear programme with a programme schedule (on TV or over the internet as IPTV) or an on-demand service (video on demand or catch-up TV). The aim of EU’s AVMSD 2010/13EU is “to provide a modern, **competition-friendly** set of rules for Europe’s providers of TV and TV-like services, by **giving more flexibility for financing** audiovisual content with new forms of advertising... While continuing to **ensure a high level of consumer protection**, the new Directive also **creates a level playing field for all companies** that offer on-demand audiovisual media services, **allowing them to profit from Europe's single market**, regardless of the technology they use to deliver their services. **[Emphasis added]**

<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/803&format=HTML&aged=1&language=EN&guiLanguage=en>>

¹⁴³Eliza Varney, ‘Reality Television’ and Content Regulation: Perspectives and Challenges’ (2009) 7 (1) *Entertainment and Sports Law Journal* para 39. The Communications Act 2003 does make reference to citizenship interests in the communications sector. According to s. 3(1) of the Act, it is the ‘principal duty’ of Ofcom to ‘further the interests of citizens in relation to communications matters’ (s. 3(1)(a)) and to ‘further the interests of consumers in relevant markets’ (s. 3(1)(b)).

¹⁴⁴*ibid*

¹⁴⁵*ibid*. The principle of equality is a fundamental principle which lies at the heart of the international protection of human rights, not least the rights of persons with disabilities. See UN Convention on the Rights of Persons with Disabilities (CRPD), which will be discussed in Chapter Two.

¹⁴⁶Varney (n 143) 54, citing Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1990) 58.

¹⁴⁷*ibid*

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public service and commercial broadcasting.¹⁴⁸ Born and Prosser question whether broadcasting is best considered as a commercial activity or as an expression of cultural norms and expectations and assert that the palpable answer is that it is both.¹⁴⁹ However, these two distinct notions of the character of broadcasting have created an inherent tension in broadcasting law and policy and any resolution of that conflict is at the very least ambiguous.¹⁵⁰

The primary mission of public service broadcasting is that of public service, speaking to and engaging as a citizen, a vital constituent of the public sphere.¹⁵¹ It generally comprises single mass-audience transmissions which disseminate public service broadcasting content that reaches the widest range of viewers most cost-effectively.¹⁵²

Commercial broadcasting, on the other hand, considers the market place as the proper mechanism for the satisfaction of individual and social needs. Here, media goods or services can be purchased and the law of supply and demand, together with the profit motive, ensures provision of such goods and services. Under this rationale, public sector involvement in meeting these needs is unnecessary and unwelcome.¹⁵³

Berry asserts, however, that the private and public sector have co-existed peacefully since the dawn of modern broadcasting, even supplying similar services, and there seems no reason *a priori* why this should not continue in an expanded media environment.¹⁵⁴

Another correlated issue is that of recent technological developments resulting in convergence and the consequences of the movement towards more entertainment-

¹⁴⁸Public Service Broadcasting includes radio, television and other electronic media outlets whose primary mission is public service. Public broadcasters receive funding from diverse sources including license fees, individual contributions, public financing and commercial financing.

¹⁴⁹Born and Prosser (n 118) 657.

¹⁵⁰*ibid*

¹⁵¹UNESCO, *Public Broadcasting Why? How?* (Sector of Communication and Information Division of Communication Development 2001) 6. *See also* Toby Mendel, *Public Service Broadcasting: A Comparative Legal Study* (2nd edn, UNESCO 2011).

¹⁵²*ibid*

¹⁵³Karol Jakubowicz, 'Public Service Broadcasting: a new beginning, or the beginning of the end?' (Knowledge Politics 2007) 8.

<http://www.coe.int/t/dghl/standardsetting/media/doc/PSB_Anewbeginning_KJ_en.pdf>

¹⁵⁴*ibid* 5

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centred market driven media.¹⁵⁵ Such advances offer many ways to access, disseminate and receive information and representations, as outlined by McBride *supra*.¹⁵⁶

Generally speaking however, the corporatist nature of the media puts a bureaucratic clamp on organisational outputs often at the expense of conventional social values.¹⁵⁷ This raises questions as to the individual roles played by commercial and public service broadcasters in both their provision of accessible broadcasting services and of broadcast content which offers a diverse range of opinions and representations, which are essential for functioning democracies.¹⁵⁸

Following from the issues outlined, if the mass media are the chief institutions of the public sphere, then this begs the question as to which, if any, of the above facets of broadcasting policy and /or their rationales best fulfil the needs of persons with disabilities in terms of their access to and portrayal in broadcasting. These issues will be considered in the sections following.

i. The ‘Citizen’ and ‘Public Service Broadcasting Ethos’ - Impact on Disability Representation

The distinction between public and commercial broadcasting is a historically complex and evolving one which is set within several theoretical contexts. It derives

¹⁵⁵Convergence refers to the interlinking of computing and other information technologies, media content, and communication networks that has arisen as the result of the evolution and popularization of the Internet, as well as the activities, products and services that have emerged in the digital media space. The rise of digital communication in the late 20th century has made it possible for media organizations (or individuals) to deliver text, audio, and video material over the same wired, wireless, or fibre-optic connections. At the same time, it has inspired some media organizations to explore multimedia delivery of information. *See e.g. Sky Go* which is an online television service from *Sky TV*. Launched in 2006, the service allows users to watch live and on demand video content from their personal computer, mobile phone or Xbox 360 via a broadband or Wi-Fi internet connection.

¹⁵⁶McBride (n 38). *See also* Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media (*Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers’ Deputies*). Developments in information and communication technologies and their application to mass communication have led to significant changes in the media ecosystem, It has allowed for new ways of disseminating content on a large scale and often at considerably lower cost and with fewer technical and professional requirements. New features include unprecedented levels of interaction and engagement by users, particularly through the so called social media, offering new opportunities for democratic citizenship.

¹⁵⁷Fleras (n 135).

¹⁵⁸James Curran *et al.*, ‘Media System, Public Knowledge and Democracy: A Comparative Study’ (2009) 24 *European Journal of Communication* 5, 7, state that in recent years the rise of satellite and cable television and web-based journalism has weakened social responsibility norms. In addition they state that the assumption is that the citizens must be adequately exposed to public affairs programming if they are to cast informed votes, hold government to account and be properly empowered.

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from political, economic and legal conditions as well as socio-cultural customs. A detailed examination of such theories will not be addressed here; instead, a general outline of the notion of the “citizen” will be considered, as it relates to the underlying rationales and ethos of “public service broadcasting.”

The notion and practice of citizenship as it correlates to the foundation of democracy has been emphasised *supra*. It encompasses wider democratic values such as equality between the members of society.¹⁵⁹ Commentators such as Murdock highlight the significance of broadcasting in the life of democracy and citizenship, which is worth reiterating here.¹⁶⁰ Full, effectual citizenship necessitates access to a range of information, insights, arguments and explanations that empowers people to give meaning to the changes influencing their lives, and to evaluate the series of actions available to them both as individuals and as members of a political community. However, people are excluded from effective participation when they are devoid of such resources.¹⁶¹

The whole concept of citizenship, which concerns the status of a citizen with rights and duties, is extremely pertinent to persons with disabilities in terms of their access to and portrayal in broadcast communications. It echoes the underlying core of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁶²

The Convention affirms that persons with disabilities enjoy the same human rights as everyone else and are able to lead their lives as full citizens who can make valuable contributions to society if given the same opportunities as others. Such rights and opportunities include *inter alia* the right to participate in political and public and cultural life, and the right to freedom of expression.¹⁶³ In addition, the CRPD’s general principles provide guidance to States Parties and other actors on interpreting

¹⁵⁹Varney (n 143) para 39.

¹⁶⁰Murdock (n 120) 77-101.

¹⁶¹*ibid*

¹⁶²The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted by the United Nations General Assembly on 13 December, 2006.

¹⁶³Arts 21, 29 and 30 CRPD. *See also e.g.* Council of Europe, Recommendation CM/Rec (2011) 14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life (*Adopted by the Committee of Ministers on 16 November 2011 at the 1126th meeting of the Ministers’ Deputies*), 2.3, which states: “[M]ember States should require political parties, associations, broadcasting corporations and other bodies in receipt of state subsidies or funding to be accountable for the active measures adopted to ensure that persons with disabilities have access to information on political debates, campaigns and events which fall in their field of action.”

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and applying the Convention.¹⁶⁴ These relate *inter alia* to respect for inherent dignity and autonomy, including the freedom to make one's own decisions;¹⁶⁵ the independence of persons; non-discrimination;¹⁶⁶ respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;¹⁶⁷ full and effective participation and inclusion in society;¹⁶⁸ and accessibility.¹⁶⁹ The Convention will be considered throughout this thesis; however, a more detailed analysis of some of its specific provisions as it relates to the representation of persons with disabilities in broadcast media will be provided in Chapters Two and Five.

According to Murdock, because of its critical role, television, in particular, has become a crucial location on which the battle to secure and develop resources for citizenship are realised.¹⁷⁰ Consequently, it is submitted that broadcasting communications can act as a conduit through which persons with disabilities can acquire and cultivate such resources in order to ensure their effective participation in democracy as citizens. Democracy, however, requires informed citizens, and their ability to produce intelligent arguments by democratic means can be nurtured only when citizens enjoy equal and open access to diverse sources of opinion.¹⁷¹

Ferrell-Lowe observes that in a democracy the individual is always situated in a social context and every individual's capacity to participate is affected by constraints and opportunities which are socially constructed.¹⁷² It follows that when access to the fundamental resources necessary for full and effective participation is denied,¹⁷³

¹⁶⁴ Art 3 CRPD.

¹⁶⁵ Art 3 (a) CRPD.

¹⁶⁶ Art 3 (b) CRPD.

¹⁶⁷ Art 3 (d) CRPD.

¹⁶⁸ Art 3 (c) CRPD.

¹⁶⁹ Art 3 (f) CRPD.

¹⁷⁰ Murdock (n 120) 78.

¹⁷¹ John Keane, *The Media and Democracy* (Polity Press 1991) 176. *E.g.* broadcasting facilitates pluralistic public debate by providing a platform for politicians and spokespersons for other causes and interest groups (through various forms of access and the involvement of a representative cross-section of society via a whole range of programming) across a diverse range of views, as well as between power holders and mass publics.

¹⁷² Ferrell-Lowe (n 128) 9.

¹⁷³ Such as equal and open access to diverse sources of opinion, information, insights, arguments and explanations. Lord *et al.*, (n 1) 61, point out that the ability of disabled people to participate in political and public life, such as through voting and public service, would be severely hampered if candidates could not express their views and voters could not access information about the issues.

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people “become the victims not the subjects of change unable to pursue their rights and advocate their expansion.”¹⁷⁴

It could be said that this approach to citizenship and broadcasting is almost reflective of the recent shift in disability policy from what was the historically dominant *medical model* understanding of disability towards the *social model* understanding of disability, which was discussed *supra*. Under a social model understanding, disabled people experience disability as a social restriction. Disability is recognised as the consequence of the interaction of the individual with an environment that does not accommodate that individual’s differences and limits or impedes the individual’s participation in society,¹⁷⁵ for example, through the absence of or inadequacy of accessibility standards in broadcasting, or the existence of persistent and negative attitudes and stereotyped depictions in broadcasting content.

The Convention on the Rights of Persons with Disabilities endorses a “social model” of disability and advances it by explicitly recognising disability as a human rights issue.¹⁷⁶ Viewing disability from a human rights standpoint involves advancement in thinking and action by State Parties to the Convention and all sectors of society so that persons with disabilities are no longer thought of as being recipients of charity or objects of others’ decisions but holders of rights.¹⁷⁷ A rights-based approach endeavours to find ways to respect, support and celebrate human diversity by creating the conditions necessary to allow for meaningful participation by a wide range of persons, including persons with disabilities.¹⁷⁸ Protecting and promoting the rights of disabled persons is not only about making available disability-related services, it is also about employing measures to transform attitudes and behaviours that stigmatize and marginalize.¹⁷⁹ Furthermore, persons with disabilities need to be provided with the opportunities to participate fully in society and with the adequate means to claim their rights.¹⁸⁰ Accordingly, it is submitted that broadcasting is one route through which persons with disabilities can claim and realise such rights,

¹⁷⁴Murdock (n 120) 78.

¹⁷⁵United Nations, *Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors Professional Training Series No. 17* (Office of the UN High Commissioner of Human Rights 2010) 13.

¹⁷⁶*ibid* 8.

¹⁷⁷*ibid* 9.

¹⁷⁸*ibid*

¹⁷⁹*ibid*

¹⁸⁰*ibid* 10-11.

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subject to the proviso that the policy framework under which it operates accommodates a rights based methodology.¹⁸¹

Proponents of the neo-liberal approach to broadcasting, however, consider the market place as the proper mechanism for the satisfaction of individual and social needs.¹⁸² Conversely, it is proposed that leaving the needs of the individual and society, not least persons with disabilities, at the exclusive peril of the market can lead to social inequality on a number of levels and also creates a potential risk to diversity in media output, and will be discussed *infra*.

At national level, Hoffmann-Riem asserts that the German Federal Constitutional Court, for example, “apparently does not believe that private, market-oriented broadcasting can in the long run serve as a trustee for all societal interests and protect vulnerable values sufficiently, and it has therefore taken great pains to ensure such a lasting, trusteeship role for public broadcasting to provide sufficiently broad, high-quality programming for all sections of the population.”¹⁸³

At European level, the Council of Europe, for instance, has stressed the specific role of the broadcasting media, especially public service broadcasting, in modern democratic societies, which is “to support the values underlying the political, legal and social structures of societies and in particular respect for human rights, culture and political pluralism.”¹⁸⁴ While “Public Service Media” is the term most often

¹⁸¹Quinn, Degener *et al.*, (n 18) 21 which states “Human rights are not merely about protecting people against the abuse of power, they are also about giving people access to power. Human rights doctrine envisages an active citizenry that participates in the political life of the polity. Hence the intimacy of the link between human rights and democracy, a link which can be understood in two ways. First, human rights may be viewed as the prime achievement of democratic polities. The greater the say people have in shaping their common destiny through access to political power, the more they tend to respect rights. Second, human rights may be perceived as the bedrock on which democratic societies are built and function, helping to forestall any slide towards despotism.”

¹⁸²Under this model of broadcasting, increased commercialisation, deregulation and liberalisation of the market, while offering an abundance of choice to “consumers”, dependent on their purchasing power, can also lead to social inequality among ‘citizens’ and threatens diversity in media output.

¹⁸³Wolfgang Hoffmann-Riem, ‘Protecting Vulnerable Values in the German Broadcasting Order’ in Jay G Blumler (ed) *Television and the Public Interest: Vulnerable Values in West European Broadcasting* (Sage Publications 1992) 46-47.

¹⁸⁴Recommendation Rec (2003) 9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (*Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies*); Recommendation Rec (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society (*Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies*).

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used to include not just broadcasting but also newer forms of media, the focus throughout this dissertation will be on public service broadcasting.

In order to assess the potential impact of public service broadcasting (PSB) in fulfilling the needs and rights of persons with disabilities as “citizens”, it is first necessary to consider the remit and core values of PSB and analyse how they might go some way towards fulfilling and advancing those needs and rights.

Karppinen asserts that the remit of public service broadcasting is especially intangible and normative, embedded in the ideas of public sphere, citizenship, pluralism, creativity, and national culture, all values that are notoriously difficult to define in an unambiguous way let alone measure empirically.¹⁸⁵

There is no single definition of public service broadcasting. At the very heart of the idea of PSB is the goal of serving the interests of the public.¹⁸⁶ Mendel states that public service broadcasting represents a public sphere for discussion and the dissemination of information and ideas, essential for the proper functioning of a democratic society.¹⁸⁷ In that sense, PSB is of the public, for the public and by the public.¹⁸⁸ Anthony Smith described it as being so important that it has “probably been the greatest of the instruments of social democracy of the century.”¹⁸⁹

International bodies such as UNESCO have defined public service broadcasting as a meeting place where all ‘citizens’ are welcome and considered equals.¹⁹⁰ It is an information and education tool, accessible to all and meant for all, whatever their

¹⁸⁵Bernie Grummell, ‘The Educational Character of Public Service Broadcasting: From Cultural Enrichment to Knowledge Society’ (2009) 24 *European Journal of Communication* 267, 281, citing Kari Karppinen, ‘Media Diversity and the Politics of Criteria. Diversity Assessment and Technocratisation of European Media Policy’ (2006) 27 (2) *Nordicom Review* 53, 58.

¹⁸⁶Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, Asia Pacific Institute for Broadcasting Development, 2000) 1.

¹⁸⁷*ibid*

¹⁸⁸*ibid*

¹⁸⁹Cited in Graham Murdock and Peter Golding, ‘Common Markets: Corporate Ambitions and Communication Trends in the UK and Europe’ (1999) 12 (2) *The Journal of Media Economics* 122. See also Jakubowicz (n 136) Denmark, which states that: “by their nature PSB media are at the heart of the public sphere; they are the public arena where the processes of democracy unfold and are perceived and scrutinised by everyone. In a democratic system, PSB is primarily a public sphere and civil society institution, though often with some indirect and sometimes ambiguous ties to the State. It both depends on a democratic context to exist and contributes to the preservation and development of democracy. It is part of an interrelated whole of a carefully balanced system of checks and balances needed to maintain democracy.”

¹⁹⁰UNESCO, (n 151) 7.

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social or economic status.¹⁹¹ UNESCO adds that PSB's mandate is not restricted to information and cultural development: "public broadcasting must also appeal to the imagination, and entertain. But it does so with a concern for quality that distinguishes it from commercial broadcasting."¹⁹²

Harrison and Woods note that discussions regarding PSB and what it should entail are inclined to refer to an agreed set of goals, albeit abstract ones.¹⁹³ Citing McQuail, they add that, despite broad agreement about what PSB should entail, there has never been a generally accepted 'theory' of PSB, just national variants which have different operational scopes and remits.¹⁹⁴

Born and Prosser discern three fundamental normative principles for public service broadcasting: citizenship (augmenting, developing and serving social, political and cultural citizenship); universality; and quality of services and of output.¹⁹⁵ Barendt identifies six basic features of public service broadcasting: general geographical availability; concern for national identity and culture; independence from both the state and commercial interests; impartiality of programmes; range and variety of programmes and substantial financing by a general charge on users.¹⁹⁶

Generally speaking, a number of key features of public service broadcasting can be distilled from the various commentators. It is submitted that two of these key elements (universality and diversity) may have a particularly significant influence on the manner in which disabled persons are represented in broadcast media both in terms of their portrayal in and access to the media. These features will be addressed in the sections following.

Universality

The first distinguishing characteristic of public service broadcasting is a direct consequence of the public nature of the service and concerns the principle of

¹⁹¹ibid

¹⁹²ibid

¹⁹³Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press 2007) 32.

¹⁹⁴ibid. See also Indrajit Banerjee and Kalinga Seneviratne (eds), *Public Service Broadcasting: A Best Practices Sourcebook* (UNESCO, 2005) 13.

¹⁹⁵Born and Prosser (n 118) 671.

¹⁹⁶Eric Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press 1993) 52.

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universality.¹⁹⁷ It starts from the premise that public service broadcasting must be available and accessible to every citizen throughout a given territory. It requires access to platforms and the availability of broadcasting content.¹⁹⁸ Mendel points out that in terms of ‘general geographic availability’, it would not be appropriate to offer a public service to only part of the population, for instance those living in cities, even though different regions will not necessarily receive identical services.¹⁹⁹

Another facet of universality as it applies to PSB concerns the issue of technical accessibility. The issue of accessibility will be addressed in particular detail in Chapter Five; however it can be said at this point that the importance of technical solutions to ensuring universal access to broadcasting, for instance through the provision of *inter alia* broadcasting access services such as subtitling, audio description and sign language, universal design of television equipment and electronic programme guides are essential for both the social integration of and promotion of equal opportunities for persons with disabilities. At European level, for instance, the role that public service broadcasters play in making such access services available to persons with disabilities has been described as “vital”.²⁰⁰

The notion of universality is a profoundly egalitarian and democratic aim insofar that it places all citizens on the same footing, whatever their social status or income, and is therefore of particular relevance to persons with disabilities.²⁰¹ It compels the public broadcaster to “speak to” the entire population and seek to be utilised by the largest possible number.²⁰² This does not imply that public broadcasting should

¹⁹⁷*E.g.* PACE, Rec 1407(1999) (n 104) para 8 states that: “public service broadcasting has traditionally been considered as a guarantee that all segments of the public, including minority groups are provided with programmes that are impartial and varied, free of government or partisan interference, comprising information, education, culture and entertainment.”

¹⁹⁸*E.g.* Public Service Broadcasters should be present on different digital platforms such as cable, satellite and terrestrial.

¹⁹⁹Mendel (n 186) (2000) 6. Mendel, discussing Barendt’s first characteristic of PSB, asserts that “[I]t is also a significant justification for public service broadcasting organisations since it serves to ensure that the public’s right to know is satisfied in equal measure throughout the whole territory.”

²⁰⁰Council of Europe, *Contribution of public service media in promoting social cohesion and integrating all communities and generations: Implementation of the Committee of Ministers recommendation Rec (97) 21 on the Media and the promotion of a culture of tolerance*, (Report prepared by the Group of Specialists on Public Service Media in the Information Society (MC-S-PSM), November 2008) 15.

²⁰¹UNESCO, (n 151) 11.

²⁰²*ibid.* For example, s.114 (1) Broadcasting Act 2009 sets out the principal objects and associated powers of RTE, which are: “(a) to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, be a free-to-air service and be

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endeavour to optimise its ratings constantly, as commercial broadcasting does, but instead that it should undertake to make the whole of its programming accessible to the whole population.²⁰³ It follows, therefore, that universality is not just confined to issues of geographical and technical accessibility and availability, but also involves the guarantee that everyone can comprehend and follow its programming.²⁰⁴ Consequently, public service broadcasting has a specific role as a uniting factor and force, capable of offering a wide choice of programmes and services to all sections of the population and in this regard is a conduit for the promotion of social cohesion, cultural diversity and pluralist communication accessible to everyone.²⁰⁵ It is submitted, therefore, that the uniting power of PSB can perhaps function as a counter to the audience segmentation / fragmentation / social polarization engendered under a consumer and commercial ethos of broadcasting which will be discussed *infra*.

The CRPD, for instance, explicitly recognises that to enable persons with disabilities to live independently and participate fully in all aspects of life, State Parties that ratify the Convention “shall take appropriate measures to ensure that persons with disabilities have access, on an equal basis with others... to ...services open or provided to the public, both in urban and in rural areas.”²⁰⁶ Likewise the Convention ensures that persons with disabilities can exercise their right to freedom of expression and opinion and obliges State Parties to take measures which include *inter alia* “[P]roviding information intended for the general public to persons with disabilities in accessible formats and technologies...”²⁰⁷ Additionally in recognition of the right of persons with disabilities to participate in cultural life, the CRPD states that State Parties have a duty to ensure disabled persons enjoy access to television programmes...in accessible formats.”²⁰⁸ The CRPD therefore recognises the importance of both geographical and technical universality in the provision of public services for persons with disabilities.

made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.”

²⁰³ UNESCO, (n 151) 11.

²⁰⁴ *ibid*

²⁰⁵ s.114 (2) Broadcasting Act 2009.

²⁰⁶ Art 9 (1) CRPD.

²⁰⁷ Art 21 (a) CRPD.

²⁰⁸ Art 30 (1) (b) CRPD.

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Recent technological developments, particularly the emergence and development of cable and satellite broadcasting and digitalization, have had a significant impact on broadcasting, which includes extending audience reach to remote areas. The notion of geographical and technical availability is of particular importance in developing countries. In these countries, PSB can be particularly instrumental in promoting access to education and culture, cultivating knowledge, and fostering interactions among citizens. For the majority of the world population, comprising inhabitants of huge rural areas and illiterate people, radio and television remain the most available and widespread ICTs.²⁰⁹

The United Nations Development Programme asserts that public service broadcasting has a key role to play in strengthening democracy and democratic governance in addition to poverty reduction efforts by ensuring that marginalised and disempowered groups (those with neither political nor economic influence nor power) have access to information.²¹⁰ According to a study by the World Bank, people with disabilities in developing countries are “over-represented” among the poorest people and have been largely disregarded in the development agenda so far.²¹¹ Poverty causes disabilities and can also lead to secondary disabilities for individuals who are already disabled, as a result of the poor living conditions, health endangering employment, malnutrition, poor access to health care and education opportunities and so on.²¹²

It is submitted that given the crucial role that media can play in strengthening democratic governance, and the fact that disabled persons living in poverty are more likely to be excluded from information, power, resources and access than any other

²⁰⁹UNESCO, Approved Programme and Budget, 2004-2005, UNESCO General Conference 32nd Session, 2003. See also Ndubuisi Goodluck Nwaerendu and Gordan Thompson, ‘The Use of Educational Radio in Developing Countries: Lessons from the Past’ (1987) 2 (2) *The Journal of Distance Education* 43-54. The use of radio to disseminate information is particularly valuable because of the wide range of people it can reach. In developing countries, many rural villages do not have access to electricity or television, but battery operated radios are commonplace. <<http://www.ijede.ca/index.php/jde/article/view/315/209>>

²¹⁰United Nations Development Group: *Supporting Public Service Broadcasting: Learning from Bosnia and Herzegovina’s Experience* (Paper developed by the Bureau for Development Policy, Democratic Governance Group, October 2004) 12.

²¹¹Sophie Mitra et al., *Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey*, Social Protection Discussion Paper No. 1109 (Washington D.C.: The World Bank April 2011) 44.

²¹²See World Bank website, “Poverty and Disability” section. <<http://www.worldbank.org/results/>>

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group of society, leaving these kinds of fundamental informational needs solely to the market could be detrimental for democracy.

In India, for example, one of the most significant influences in the broadcasting sector has been media mogul Rupert Murdoch, whose pan-Asian network Satellite Television Asian Region (*Star*), has transformed news and entertainment on television in India.²¹³ The liberalisation of the TV sector in India tends to follow a news agenda which appears to champion the benefits of a free market with the result that the news on *Star* has an unmistakable urban and metropolitan bias in its reporting, not just in the themes it covers but also the way that they are framed. According to Thussu, the increasing marketisation of television seems to have left out of the picture the majority of India's citizens, the poor, especially those living in the countryside.²¹⁴ Additionally, its news bulletins rarely, if ever, carry detailed reports on education or health and instead focus on the "three C's": crime, cricket and cinema.²¹⁵ Thussu states that in a market driven media environment the populism associated with *Star News* may be "undermining the quality of public debate".²¹⁶ More importantly, the ideological underpinning of such a media system can orientate the media discourse in a direction that may not be the most suitable one for a developing country.²¹⁷

It is submitted that the latter example of *Star News* demonstrates the inherent weaknesses of a commercial ethos of broadcasting. The restricted geographical reach of *Star News*, coupled with its lack of impartial news and diverse range of high-quality content, fails to meet the needs of a wide variety of audiences in India, particularly those who are most marginalised and disadvantaged. To this end *Star News* indicates how market driven broadcasting can create both democratic and social deficits. It further highlights the vital role that public service broadcasters'

²¹³Daya Kishan Thussu, 'The 'Murdochization' of news? The case of Star TV in India' (2007) 29 *Media Culture & Society* 593, 594.

²¹⁴ibid 607.

²¹⁵ibid

²¹⁶ibid 608.

²¹⁷India is the largest democracy in the world. According to Census of India 2011, there are 1.2 billion people in the country, out of which, about 833 million people live in rural areas. At the time of writing, the census 2011 data on disability in India has not been publicised. However, based on the United Nations estimates, 10% of the population has a disability; therefore there are approximately 120 million people with disabilities in India. In September 2012 India issued a draft Bill on the Rights of Persons with Disabilities.

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play through their special mandate in supporting non-commercial, general interest objectives such as social progress, public interest and the ability to engage with democratic processes and societal integration.²¹⁸

According to a *World Report on Disability*, the information and communication environment is usually constructed by corporate bodies with significant resources, a global reach and, sometimes, experience with issues of accessibility.²¹⁹ However, the report notes that even with the rapid development of information and communication technology (ICT), accessibility can be limited by unaffordability and unavailability. It emphasises that as new technologies are created in rapid succession, there is a danger that access for people with disabilities will be overlooked.²²⁰ Such lack of access can exclude people with disabilities, or make them dependent on others.²²¹

Similarly in developed countries, lack of access to broadcasting services and ICT generally has the potential to increase the so-called digital divide.²²² Ferrell-Lowe asserts that any digital divide implicitly signals a neglect of universalism in the provision of access to new media. This especially impacts on those who are already disadvantaged by economic or social status, and quite often both.²²³ The development of digital technology, for example, has augmented the variety of services likely to be available, but access to such services will require new and frequently updated equipment which will come at a cost. In addition access to premium content, as discussed *supra*, may also come with a price tag. Furthermore, the issue of equal access to broadcasting infrastructure services is also a concern for persons with different disabilities, *i.e.* access to programming which is subtitled or audio described for those who have sensory disabilities.

The *World Report on Disability* indicates that countries with strong legislation and follow-up mechanisms tend to achieve higher levels of information and

²¹⁸See *e.g.* Declaration of the Committee of Ministers on Public Service Media Governance (*Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies*), at para. 14.

²¹⁹World Health Organisation, *World Report on Disability* (WHO Press 2011) 169.

²²⁰*ibid* 170, *e.g.* "expensive assistive technologies will be opted for, rather than universal design."

²²¹See Chapter 5 'Identifying Potential Barriers to Access in the Broadcasting Environment'.

²²²Tsatsou Panayiota, 'Digital Divides Revisited: What is new about Divides and their research?' (2011) 33 *Media, Culture & Society* 317, 318.

²²³Ferrell-Lowe (n 128) 15.

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communication technology access, but regulation needs to keep pace with technological innovation.²²⁴

The rapid proliferation of commercial and other forms of broadcasting are posing new and dynamic challenges to publicly-funded public service broadcasters.²²⁵ This was noted by the Director General of Ireland’s public service broadcaster RTE;

“The challenge is to ensure, amid profound technological, societal and economic change, that RTÉ continues to be a public good, accessible to all, trusted, and relevant to the everyday lives of Irish people...”²²⁶

The Council of Europe (CoE) stresses the potential of digital television for bringing the information society into every home and the importance of avoiding exclusion, notably through the availability of free-to-air services and transfrontier television services.²²⁷ It also states that the principle of universality, which is “fundamental” to public service media, should be addressed having regard to technical, social and content aspects and member states of the CoE should, in particular, ensure that public service media can be present on significant platforms and have the necessary resources for this purpose.²²⁸ The specific role of public service broadcasting regarding universality therefore is of particular significance to persons with disabilities.

Diversity

The second distinctive feature of PSB, which complements “universality,” is diversity.²²⁹ Diversity and pluralism in the media are fundamental principles of international law.²³⁰ According to Mendel, the need for plurality stems from the right

²²⁴WHO, ‘Summary World Health Report on Disability’ (WHO 2011) 15.

<http://whqlibdoc.who.int/hq/2011/WHO_NMH_VIP_11.01_eng.pdf>

²²⁵Mendel (n 151) 4.

²²⁶Noel Curran, ‘The Future of Public Service Media in Ireland’ (public lecture delivered by the Director General RTÉ, Dublin City University, 17th October 2011) 4.

<<http://www.rte.ie/news/2011/1018/noelcurran.pdf>>

²²⁷Rec (2003) 9 (n 184).

²²⁸Rec (2007) 3 (n 184) II.a.4.

²²⁹Diversity is a complex notion and includes diversity of output (types of media), and source (types of ownership) in addition to diversity of content (media output).

²³⁰Mendel (n 151) 12. See *e.g.* The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, 2 February 2010, which emphasises “... the fundamental importance of freedom of expression, including the principles of diversity and pluralism, both inherently and as an essential tool for the defence of all other rights and as a core element of democracy.” It states further that “public service and community

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to seek and receive information and ideas.²³¹ Central to this facet of the right to freedom of expression is the notion that citizens should have access to a broad range of different perspectives and analyses through the media, namely access to a diverse media.²³² McQuail asserts that the principle of freedom of communication presupposes an abundance of channels and choices as desirable conditions for a free democratic society.²³³ It is through the availability of a range of viewpoints that individuals can exercise full citizenship, choosing between competing perspectives as they engage in public decision making.²³⁴

As aforementioned, market and other private sector forces, although they have a useful role, as discussed *infra*, cannot independently satisfy all public informational interests and needs and thereby increase the risk of democratic and social deficit. Conversely, public service broadcasters play a crucial role in promoting broader democratic debate and participation by the provision of quality content, a forum for public discussion open to diverse ideas and convictions in society, and a platform for disseminating democratic values.²³⁵

Public service media are also subject to constant public scrutiny and must be accountable and transparent when carrying out their functions as they have a duty to serve the public in all its diversity, including minority communities that would not be served in a purely commercial market.²³⁶ Acting as a “trusted guide of society”,

broadcasters can play a very important role in providing public interest programming and in supplementing the content provided by commercial broadcasters, thereby contributing to diversity and satisfying the public’s information needs.” See also Joint Declaration on Diversity in Broadcasting, 7-8 December 2007, para 7

²³¹*ibid*

²³²*ibid*

²³³Dennis McQuail, *Media Performance, Mass Communication and the Public Interest* (Sage Publications 1992) 175.

²³⁴*ibid*

²³⁵PSB also creates a mechanism for holding officials accountable for how they exercise power, thereby eliminating any democratic deficit. In addition to its vital role in educating active and responsible citizens, the role of PSB is to foster citizens’ interest in public affairs through the provision of adequate information about the democratic systems and democratic procedures by encouraging participation not only in elections but also in decision-making processes and public life in general.

²³⁶Declaration of the Committee of Ministers on Public Service Media Governance (*Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers’ Deputies*). For example s.114 (2) (a) Broadcasting Act 2009 requires RTE to “be responsive to the interests and concerns of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland, and have special regard for the elements which distinguish that culture and in particular for the Irish language.”

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public service broadcasters bring concretely useful knowledge into the life of individuals of different communities in society.²³⁷ The importance of PSB's remit in this regard has been highlighted at European level:

“Public service media should integrate all communities, social groups and generations, including minority groups, young people, old persons, the most disadvantaged social categories, persons with disabilities, while respecting their different identifies and needs. In this context, attention should be paid to the content created by and for such groups, and their access to, presence and portrayal in, public service media.”²³⁸

In terms of the manner and the specific ways in which public service broadcasters contribute to diversity, it has been asserted that the services offered by public broadcasting, should be diverse, in at least three ways: in terms of the genres of programmes offered, the audiences targeted and the subjects discussed.²³⁹

Diversity in Genres of Programming

Ultimately the goal of PSB is to inform, educate and entertain. Public service broadcasting must reflect the diversity of public interests by offering different types of programmes such as news, information, educational, cultural, sports and entertainment programming.²⁴⁰ It is through general interest programming, which often deals with matters of current or practical interest to people, that PSB connects with people's specific needs. Likewise PSB's entertainment programming intended for the wider public such as drama and soap operas can provide an opportunity to deal with contemporary matters of interest to people.

²³⁷Rec (2007) 3 (n 184).

²³⁸ibid

²³⁹UNESCO, (n 151) 20-21. *See also* Born and Prosser (n 118) 676, who interpret diversity as types of universality, *e.g.* ‘social and cultural universality’ relates to the range of programming which should cater for and reflect the tastes and interests of all citizens. They also mention a third category; ‘universality of genre, whereby a mixed range of programming is provided that educates and informs citizens, as well as entertains them.’

²⁴⁰*E.g.* s. 114 (3) Broadcasting Act 2009 requires RTE to: “(a) provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island of Ireland and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity, (b) provide programmes of news and current affairs in the Irish and English languages, including programmes that provide coverage of proceedings in the Houses of the Oireachtas and the European Parliament...” *See also RTE's Public Service Broadcasting Charter* (Dublin: Dept of Communications, Marine and Natural Resources, 2004), which contains a statement of principles that clarifies what is expected of RTÉ as the national public service broadcaster, including RTÉ's accountability to its audience.

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As discussed above, proponents of the neo-liberal approach to broadcasting argue that the market is the best arbiter or determinant of what the public wants.²⁴¹ They contend that if public broadcasters cannot produce programmes that people want to hear and watch in large numbers then they are not producing a public service.²⁴² This argument appeals to ‘populist’, supply and demand type programming associated with “consumers” under a commercial ethos of broadcasting. With the advent of digital services and emphasis on augmenting specialised services where consumers can pick and choose what they want to watch on niche channels (at a cost), the traditional concept of free to air mixed programming on mass channels appears to be discounted. Born and Prosser highlight that programmes appealing to non-mainstream consumers under a commercial ethos of broadcasting become “ghettoised”, thereby defeating the pluralist principle of PSB that diverse and minority programming should be available not only to the audience immediately envisaged but to the wider audience.²⁴³ The decision by niche sports channel *ESPN* not to cover the London Paralympics 2012, and the low coverage of the games by commercial broadcaster and US rights holder *NBC*, which will be discussed *infra*, demonstrates the argument in practice.

In contrast, in the UK public service broadcaster Channel 4, “nervous having committed to 500 hours of coverage of its first Paralympics Games”, had to clear its daytime schedule and shift popular programmes to other channels “to feed the Paralympic appetite.”²⁴⁴ Channel 4 invested £600,000 in training a fresh band of TV presenters and reporters with disabilities and Paralympic sporting experience to work alongside experienced anchors.²⁴⁵ Following from that success Channel 4 pledged to spend a further £250,000 in search of more disabled talent to host programmes on subjects beyond the world of sport.

²⁴¹Banerjee and Seneviratne (n 194) 112.

²⁴²*ibid*

²⁴³Born and Prosser (n 118) 677.

²⁴⁴Ian Burrell, ‘Paralympic coverage beyond ‘wildest dreams’ says governing body as they appeal for continued coverage of sports’ *The Independent*, Monday, 10 September 2012. He states that the success of the media coverage has been questioned as being perhaps ‘an anomaly’ owing to the success of Team GB at the Olympics and London’s position in the global economy.

²⁴⁵Maggie Brown, ‘Paralympics 2012: Channel 4 trains reporters with disabilities’ Observer Section, *The Guardian*, Sunday, 19 August 2012.

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Diversity of Audience

Unlike other forms of broadcasting, PSBs that make an attempt to have a dialogue with their audience generate a great amount of understanding of what the audience members and the general public feel are important programme areas and types.²⁴⁶

According to Jakubowicz, it is the definition of the listener/viewer which sets public service broadcasting apart from other forms of broadcasting.²⁴⁷ In essence, public service broadcasting perceives its listener /viewer as a complete human being.²⁴⁸ In a broadcasting environment that treats the public as a body of clients or consumers, the role of public broadcasting is to address people as citizens.²⁴⁹

This definition of audience requires public service broadcasters to address themselves to satisfying the needs of citizens who need to be fully informed when they make daily judgements about how they wish to live.²⁵⁰ In this regard PSB empowers people through the provision of access to information and knowledge through diverse media content reflecting the needs, concerns and expectations of various target audiences.

Jakubowicz states, however, that PSB's distinctive definition of the audience goes far beyond its political role as citizens.²⁵¹ Firstly, PSB broadcasters recognise that individuals are members of different social groups distinguished by age, sex, education, disability and so on and, by offering internally pluralistic programming, endeavour to reflect their way of life and meet their special interests and needs.²⁵²

Secondly, provision of the type of programming PSB specialises in must involve the supposition that the audience have alert, lively and inquisitive minds, are interested in finding out new things, having new experiences, experimenting with ideas and acquiring new knowledge.²⁵³ It must also involve an assumption that the audience has a broad range of interests. Jakubowicz asserts that the socio-psychological 'profile' that PSB has of its audience is very different to that of commercial broadcasting. In contrast to commercial broadcasting, public service broadcasting is

²⁴⁶Banerjee and Seneviratne (n 194) 56.

²⁴⁷Jakubowicz (n 136) Denmark.

²⁴⁸ibid

²⁴⁹ibid citing Marc Raboy, 'The World Situation of Public Service Broadcasting: Overview and Analysis: Report to UNESCO' May 1995, 9.

²⁵⁰ibid

²⁵¹Jakubowicz (n 136) Denmark.

²⁵²ibid

²⁵³ibid

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conceived as a ‘merit good’ something that is considered to be intrinsically desirable, uplifting or socially valuable for other people to consume, independent of the actual desires or preferences of the consumer himself.²⁵⁴

Diversity of Subjects Discussed

Through the diversity of the subjects discussed, public broadcasting can also seek to respond to the varied interests of the public and so reflect the whole range of current issues in society. PSB has an obligation to promote alternative views for the purpose of enabling and encouraging debate vital for the functioning of democracy. This means facilitating different groups’ access to the media airwaves through supporting programme production on themes and subjects that are of importance to them.

Ireland’s Public Service Broadcaster, RTÉ, for example, has recognised that:

“RTÉ’s core position in Public Service Media provision will ensure that this society continues to have rich conversations with itself, that the marginalised will be included in those conversations and that all will be represented.”²⁵⁵

ii. The ‘Consumer’ and ‘Commercial Broadcasting Ethos’ - Impact on Disability Representation

Broadcasting policy is considered as either something that operates in the interest of public service, operates in the interest of economic freedom or attempts to resolve both.²⁵⁶ In essence, two arguments proceed in parallel: those based on economic concerns; and those based on non-economic concerns.²⁵⁷

Neo-liberalism is a contemporary form of economic liberalism that emphasizes the efficiency of private enterprise, liberalized trade and relatively open markets to promote globalization.²⁵⁸ Neo-liberal initiatives are characterized as free market

²⁵⁴Banerjee and Seneviratne (n 194) 114.

²⁵⁵Curran (n 226) 34.

²⁵⁶Harrison and Woods (n 193) 4.

²⁵⁷ibid

²⁵⁸Globalization or (Globalisation) refers to the increasingly global relationships of culture, people and economic activity. Most often, it refers to economics: the global distribution of the production of goods and services, through reduction of barriers to international trade such as tariffs, export fees, and import quotas. Dissemination of knowledge (and technology), information and technology exchange is an integral aspect of globalization. R W McChesney, ‘Global Media, Neo-liberalism and Imperialism’ (March 2001) 52 (10) *An Independent Socialist Magazine*, 1 states that “[I]n conventional parlance, the current era in history is generally characterized as one of globalization, technological revolution, and democratization. In all three of these areas media and communication play a central, perhaps even a defining, role. Economic and cultural globalization arguably would be impossible without a global commercial media system to promote global markets and to encourage consumer values. The very essence of the technological revolution is the radical development in

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policies that encourage private enterprise and consumer choice, reward personal responsibility and entrepreneurial initiative.²⁵⁹ Neo-liberal ideology has increasingly framed ‘citizens’ as ‘consumers’ in a political marketplace. This can be challenging because “citizen” implies active participation in civic affairs, while “consumer” implies the more private and passive role of material consumption. In democracies, citizens are in principle equal; in market economies, consumers are unequal, their access to commodities dependent on their purchasing power.²⁶⁰

Neo-liberal principles developed in the United Kingdom in the 1980s and 1990s under the leadership of Margaret Thatcher.²⁶¹ The Broadcasting Act, 1990, in the U.K. for example, indicated a determination to facilitate increased competition in the field of broadcasting and sought to ensure that the regulation of commercial broadcasting would in future be characterized by a ‘light touch.’²⁶² Increasingly, within neo-liberal circles, broadcasting in Britain came to be seen as a tradable service or commodity, best submitted to the market disciplines applying to all other privately traded services or commodities.²⁶³

digital communication and computing.” He further asserts that the focus of neoliberal policies is invariably a call for commercial media and communication markets to be deregulated. What this means in practice is that they are ‘re-regulated’ to serve ‘corporate interests.’ <<http://www.designingasociety.org/evergreen/wp-content/uploads/2010/04/Global-media-neoliberalism-imperialism.pdf>>

²⁵⁹RW McChesney, ‘Noam Chomsky and the Struggle against Neoliberalism’(1999) 50 (11) *Monthly Review: An Independent Socialist Magazine*, 40, 41, states “[T]he economic consequences of these policies have been the same just about everywhere, and exactly what one would expect: a massive increase in social and economic inequality, a marked increase in severe deprivation for the poorest nations and peoples of the world, a disastrous global environment, an unstable global economy, and an unprecedented bonanza for the wealthy.”

²⁶⁰Ferrell-Lowe (n 128) 12.

²⁶¹As early as 1973, the EU recognised broadcasting was a service for the purpose of the free movement of services pillar in EU law in Case C-155/73 *Italian State v. Guiseppe Sacchi*, 1974 E.C.R. 409. Aspects of EU Law will be discussed in Chapter 3.

²⁶²Sylvia Harvey, ‘Ofcom’s first year and neoliberalism’s blind spot: attacking the culture of production’ (2006) 47 (1) *Screen* 91, 94. See also Alan Peacock *et al.*, *Report of the Committee on Financing the BBC* (London: HMSO, 1986) on the introduction of the notion of consumer sovereignty in 1989, which stated that British Broadcasting should move towards a sophisticated market system based on consumer sovereignty. That is a system which recognises that viewers and listeners are the best ultimate judges of their own interest, which they can best satisfy if they have the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible.

²⁶³*ibid.* Harvey (n 262), states that “[I]n the USA the Telecommunications Act of 1996 had addressed some of the same issues, moved by the prospect of an increasing overlap between telecommunications, computing and broadcasting and seeking to reposition the state as promoter of the big ‘D’: the world of digital communication that promised increased choice for audiences and threatened slow death for network broadcasters.”

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Corcoran asserts that in the Ireland of the 1990s, one effect of the increasing opening up of Irish society to global influences was that the ideology of neo-liberalism began to assert itself very strongly, especially in the new media that are themselves the product of neo-liberal deregulation.²⁶⁴ He states that variants of neo-liberalism embrace the argument that new technology will deal with all social needs by offering such a plethora of television channels that viewers will be able to find anything they want (and pay for what they consume) without being required to pay for publically funded free-to air generalist television channels.²⁶⁵

According to Corcoran, in the wake of developments in the Regan-Thatcher era, the post Cold-War revival of the ideology of market liberalisation was on a roll, sweeping through policy-making and media spaces alike, accusing its critics on the left of being out of date and out of step with the times.²⁶⁶ The audiovisual sector in Europe took on an entirely new guise at the end of the 1980s, with the rapid growth in broadcasting by cable and telecommunications satellites and the emergence of the first European direct broadcasting satellites.²⁶⁷ National markets in the Member States, however, were too restricted to be in a position to offer the equipment and programmes required by the new technologies and the proliferation of channels at competitive rates. This created a barrier for the European audiovisual sector, which was anticipated to be one of the principal service sectors in the 21st century.²⁶⁸

Moussis says in summary that in their restricted national markets, European producers found themselves in circumstances of unequal competition in the international arena as far as costs were concerned.²⁶⁹ Europe had to unify its audiovisual market to enable European producers to partake profitably in the

²⁶⁴Farrel Corcoran, *RTE and the Globalisation of Irish Television* (Intellect Books 2004) 223.

²⁶⁵*ibid.* Corcoran also states that “[B]roadcasting overspill into Ireland from transmitters in Northern Ireland and the rest of England has been part of the Irish experience of radio and television from the very beginning. As new technologies of distribution arrived, cable, microwave, deflectors (legal and illegal and satellite, British television channels reached ever deeper into Irish villages and valleys.” (p 15) See also Helen Shaw *et al.*, *Irish Broadcasting Landscape: Economic and Environmental Review* for the Broadcasting Authority of Ireland (BAI) (Athena Media 2010).

²⁶⁶*ibid* 13.

²⁶⁷Nicholas Moussis, *Access to the European Union: Law, Economics, Policies* (19th edn, European Study Service 2011). The term Audio-Visual (AV, or A/V) may refer to works with both a sound and a visual component, the production or use of such works, or to equipment used to create and present such works. Slide tape presentation, films and television programmes are examples of audio-visual presentations.

²⁶⁸*ibid*

²⁶⁹Moussis (n 267).

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technological revolution; otherwise European producers were doomed to disappear or be confined in their national markets.²⁷⁰

The European Union took an active part in the move towards the neo-liberal agenda by introducing the Television without Frontiers Directive in 1989, which remained (as amended in 1997) the cornerstone of European television policy for nearly two decades and dealt with *inter alia* the principles of free trade.²⁷¹ A new Audiovisual Media Services Directive (AVMSD) replaced the old “Television without Frontiers” Directive in 2009 but preserved the core principles of the existing television rules and adapted them to the new audiovisual environment.²⁷²

Rapid technological development and increasing commercialisation have provided new challenges for regulators and policymakers, who seek to exploit the potential of new technology to offer a regulatory environment that is for the good of everyone.²⁷³

The benefits of digital television switchover provided such an example. Digital television switchover is the name given to the process by which analogue television broadcasting was converted to and replaced by digital television.²⁷⁴ Digital switchover represented a window of opportunity to harness the inherent flexibility of digital television technology to make television more accessible for example by providing a greater range of possible access services such as captioning, signing, audio description etc.²⁷⁵

²⁷⁰*ibid.* If it had not done so it would have been dependent on the powerful American and Japanese audiovisual industries.

²⁷¹The Television without Frontiers Directive 89/552/EEC as amended in 1997.

²⁷²AVMSD 2010/13 EU. A more in-depth discussion of European broadcasting will be provided in Chapter 3.

²⁷³*ibid*

²⁷⁴Television signals can be received via an aerial, satellite, cable or broadband connection. Most terrestrial television in Europe until recently was an analogue service. Digital Switchover, which was required to take place throughout the EU by the end of 2012, involved the transition from analogue to digital broadcasting. Digital TV offers higher quality sound and picture. It uses less broadcast space which means that there is more room for new services such as High Definition Television (HDTV).

²⁷⁵United Nations, *Making Television Accessible* (Report by International Telecommunication Union (ITU) 2011) 55. In general terms, analogue terrestrial television broadcasting was less flexible than its digital equivalent. This had implications for persons with disabilities in terms of their access to television programmes. *E.g.* in most cases, accessible analogue television meant open access service *i.e.* open captioning (subtitling) that everyone had to see, or open visual signing which everyone had to watch. Digital distribution on the other hand offers the possibility for “closed” access services where the viewer has a choice whether to turn them on or off. A more detailed discussion will be provided on Accessibility in Chapter 5.

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Some outcomes of digital switchover have been clearly positive for the consumer, with consumer choices increasing with regard to distribution mode, technology and content, as a result of digitalization.²⁷⁶ Consumers are now able to watch more television channels with enhanced quality technologies such as high definition (HD), wherever (at home or on the move), and whenever (DVRs²⁷⁷ and video on demand). Although the benefits for ‘consumers’ are visible, there is some doubt as to whether all ‘citizens’ benefit.²⁷⁸ Societies as a whole benefit from the increase in bandwidth for digital media, the digital upgrade of households and the possibility of participating in a pan-European, communal digital television culture.²⁷⁹ The drawback, however, is that not all of these services are likely to be available to everyone.²⁸⁰ While not all consumers have equal purchasing power, citizens’ interests are poorly served in terms of access to a universal service, since many offerings now are niche or special interest, offered on a personalised basis, thus fragmenting the audience.²⁸¹

Television programmes have become international commodities traded by commercial companies in fierce competition in an expanding and increasingly global market.²⁸² For political economists, a shift in the provision and distribution of cultural goods from being public services to becoming private commodities signals a substantial change in the opportunity for different groups in the population to have access to them.²⁸³ If television channels, or individual programmes are only accessible by price, as in subscription systems, then the consumption of television services will be significantly governed by the distribution of household incomes.²⁸⁴ The growth of multiple channel television and pay-per-view services imposes

²⁷⁶Petros Iosifidis, ‘Growing pains? The transition to digital television in Europe’ (2011) 26 (1) *European Journal of Communication* 3.

²⁷⁷DVR (Digital Video Recorder), sometimes referred to by the merchandising term ‘personal video recorder’ (PVR), is a consumer electronics device that records audio and video input, typically from a television signal, on to a hard disk.

²⁷⁸Iosifidis (n 276) 6.

²⁷⁹ibid

²⁸⁰Iosifidis (n 276) 6-7.

²⁸¹ibid

²⁸²Christian S Nissen, *Public Service Media in the Information Society* (Media Division Directorate General of Human Rights Council of Europe February 2006) 12.

²⁸³Natalie Fenton, ‘Bridging the Mythical Divide: Political Economy and Cultural Studies: Approaches to the Analysis of Media’ in Eoin Devereux, (ed) *Media Studies: Key Issues and Debates* (Sage Publications 2007) 14.

²⁸⁴Graham Murdock and Peter Golding, ‘Culture Communications and Political Economy’ in James Curran and Michael Gurevitch, (eds) *Mass Media and Society* (4th edn, Hodder Arnold 2005) 76.

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increasing demands on limited disposable incomes and will increasingly differentiate the range of material accessible to various groups across the income gradient, including people with disabilities.²⁸⁵

The United Nations (UN) states that data on persons with disabilities is difficult to acquire and that specific data on their employment situation – and therefore their income - is even more challenging to source.²⁸⁶ The UN has however collected data from the media and various reports to provide an anecdotal picture of the current situation of the employment levels of persons with disabilities. In developing countries, 80% to 90% of persons with disabilities of working age are unemployed, whereas in industrialized countries the figure is between 50% and 70%.²⁸⁷ In most developed countries the official unemployment rate for persons with disabilities of working age is at least twice that for those who have no disability.²⁸⁸ Persons with disabilities are two to three times more likely to be unemployed than others.²⁸⁹

A more recent report by the World Health Organisation which cites a study covering twenty-one upper-middle and high-income countries shows higher poverty rates among working-age people with disabilities than among working-age people without disabilities in all but three countries.²⁹⁰ The study found that the relative poverty risk (poverty rate of working-age disabled relative to that of working-age non-disabled people), was the highest, more than two times higher, in Australia, Ireland, and the Republic of Korea, and the lowest, only slightly higher than for nondisabled people, in Iceland, Mexico, and the Netherlands.²⁹¹ Working-age people with disabilities were found to be twice as likely to be unemployed. When employed, they are more

²⁸⁵:*ibid*

²⁸⁶ See UN Enable “Fact Sheet on Disability and Employment,”

<<http://www.un.org/disabilities/default.asp?id=255>>; see also Art 31 CRPD which provides that State Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention.

²⁸⁷:*ibid*

²⁸⁸:*ibid*. In Europe, for example, there are approximately 40 million persons with disabilities, and of these 43% to 54% were of working age in 1998.

²⁸⁹:*ibid*

²⁹⁰ These countries are Norway, Slovakia, and Sweden. See WHO, (n 219) 39, citing OCED *Sickness, Disability and Work: Keeping on Track in the Economic Downturn* (Organisation for Economic Co-operation and Development 2009 (Background Paper)).

²⁹¹:*ibid*

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likely to work part-time and unless they are highly educated, they have low incomes.²⁹²

Although these statistics are subjective, they do to some extent indicate that with such low levels of income amongst the population of persons with disabilities, when broadcasting policy is couched in terms of ‘consumer’ and the consumption of television services is governed by the distribution of income, this poses some major concerns for disability representation in and access to broadcast media.

The impact of such issues on persons with disabilities under a ‘consumer’ and ‘commercial ethos’ of broadcasting policy is likely to lead to social inequality and social exclusion in a number of ways. Due to disparities in the distribution of income leading to economic inequality, persons with disabilities experience social inequality because their lack of financial resources potentially prohibits them from accessing broadcasting services and programming as consumers under the commercial model of broadcasting. This may be compounded further by the fact that persons with disabilities may need additional adaptive technologies to access such services and programmes, which may incur additional costs.²⁹³

Commentators state that the trajectory towards pay TV is expected to persist and prove influential, with television content increasingly being perceived as a commodity that must, in one form or another, be paid for.²⁹⁴ Harrison and Woods point out that although some digital television will be broadcast free to air, such as digital terrestrial television (DTT), it is by no means certain that this will be the general pattern across the European Union for instance.²⁹⁵

²⁹² *ibid*

²⁹³ For example some persons with disabilities, *e.g.* visually impaired, may need an adaptive enhanced set-top box (STB) for digital television which provides accessibility solutions, such as advanced technology which allows the programme guide and menu items to be spoken to the user.

²⁹⁴ Harrison and Woods (n 193) 5. See, however, Global TV 2010, ‘Markets, Trends Facts and Figures’ (Research Paper, France, IDate Consulting and Research 2010) 14, which states that “[C]ompetition from the Internet, which opens up access to a broad array of professional and amateur content, and rapidly-changing consumption patterns such as mobile or time shifted viewing pose a real threat to traditional players in the pay-TV segment. These television broadcasters, commercial and/or technical operators are now competing in a race to differentiate their offerings and to create a new value proposition. The goal is to make their services more attractive in an effort to curb the loss of subscribers that some are already facing.”

²⁹⁵ In the UK, DTT service is known as *Freeview*, and in Ireland is known as *Saorview* (Gaelic for freeview).

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Blumler makes a powerful statement in his assertion “[T]hough a highly consumer-orientated good, television programming is very different from most other such goods (like cars, toasters, washing machines, electricity...). Whereas the latter provide the means, the former trades in the meanings of life.”²⁹⁶

A consumer and commercial ethos of broadcasting policy prioritises trade values in a system which is geared towards content that satisfies the consumer rather than the citizen. Although the commercial model of broadcasting may appear to provide more choice of programme content to the consumer, it is less clear about or concerned with the substance of that choice.²⁹⁷

In a less regulated market environment, the circulation of content of varying quality, appealing to different tastes and cultures, becomes a matter of supply and demand.²⁹⁸

Broadcasting services in the digital and online worlds are becoming increasingly customised and personalised, thereby reducing their ability to reach the masses as before.²⁹⁹ The cultural unity of mass audience has been displaced by specialised niche media catering for ever more specific interests, repositioning the viewer as an individual consumer with precise interests and preferences.³⁰⁰

Sunstein has misgivings about the damaging consequences that such individualising trends will have on democracy. The propagation of niche markets, the waning of public trust in general interest intermediaries and the rising frequency of advance individual selection of news sources are all operating to insulate the citizen from broader influences and ideas. He argues that this is corrosive to the democracy ideal, or at least to the ideal of deliberative (and thus participative) democracy.³⁰¹

²⁹⁶Jay G Blumler, ‘Introduction: Current Confrontations in West European Television’ in Jay G Blumler (ed), *Television and the Public Interest: Vulnerable Values in West European Broadcasting* (Sage Publications 1992) 3.

²⁹⁷In some jurisdictions such as Ireland, however commercial broadcasters have a number of public service obligations set out in legislation.

²⁹⁸Brian O’Neill and Colin Barnes, *Media Literacy and the Public Sphere: A Contextual Study for Public Media Literacy Promotion in Ireland* (Centre for Social and Educational Research, Dublin Institute of Technology 2008) 60.

²⁹⁹Susanne Nikoltchev, ‘Changing Aspects of Broadcasting New territory and New Challenges’ *IRIS Plus* (2001)-10, 5.

³⁰⁰O’Neill and Barnes (n 298) 12, citing Peter Iosifidis, ‘Public television in small European countries: Challenges and strategies’ (2007) 3 (1) *International Journal of Media & Cultural Politics* 65, 76.

³⁰¹Cass Sunstein, as cited in Nikoltchev (n 299); Also cited in Tarlach McGonagle ‘Does the Existing Regulatory Framework for Television Apply to the New Media’, Expert Seminar on ‘The European

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A survey on the Irish television marketplace confirms Sunstein's suspicions in its observation that "[T]he Irish television marketplace is now more fragmented, and the combined share of audience going to these niche services has grown as digital choice has expanded..."³⁰²

Other commentators note that economic pressures on broadcasters, driven by channel expansion in the European Union, for instance, have resulted in increased competition for viewers. This, in turn, has had an impact on broadcasting content and formats, with successful formats and popular content tending to dominate programme schedules, arguably reducing choice and diversity of content available to viewers.³⁰³

Nissen also points out that it is self-evident that such a market will have a tendency to become homogenous, leaving little room either for content of an experimental character or for programmes catering for national and regional cultures and, it is submitted here, catering for minority programming.³⁰⁴ This has the potential to impact on disability representation in television programming in terms of the portrayal and the participation of persons with disabilities in the sector. The issue here is best captured by O'Neill's point that the purposive cultivation of a diversity of voices in public communication ensures the protection of 'positions and voices that are in danger of being silenced or marginalised.'³⁰⁵

An example of both Nissen and O'Neill's observations in practice is the broadcasting coverage in the United States of the world's second largest sporting event, the London 2012 Paralympics Games.³⁰⁶ The American commercial broadcasting television network, the *National Broadcasting Company (NBC)*, held the US rights to coverage of the games; however, it failed to broadcast any live action from the

Convention on Transfrontier Television in an Evolving Broadcasting Environment', Strasbourg, 6 December 2001, citing Cass R Sunstein, *Republic.com* (US Princeton University Press 2001) 8- 9.

³⁰²Shaw *et al.*, (n 265) 31. The report states, however, that despite this competition Irish terrestrial broadcasters enjoy relatively strong and stable audiences.

³⁰³Harrison and Woods (n 193) 5, state that "[A]gainst this background, policymakers in the Union are under pressure to remove regulatory constraints from broadcasters in a commercialised environment so as to reduce their costs, which could also have an adverse impact on the quality and reach of content available to viewers."

³⁰⁴Nissen (n 282) 12. See also Born and Prosser (n 118) 677.

³⁰⁵Onora O' Neill, 'Practices of Toleration' in Judith Lichtenberg, (ed) *Democracy and the Mass Media* (Cambridge University Press 1990) 167. See quote from McBride (n 38) 7-8.

³⁰⁶The London 2012 Paralympics had 4,200 athletes from 165 countries.

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event. Instead *NBC* scheduled only four (hour-long) highlights' programmes on its *NBC Sports Channel*, followed by one 90-minute round up. *NBC* defended its position, stating that the total of five and a half hours represented an improvement on the 2008 Paralympics in Beijing, when viewers got a single 90-minute highlights package. As a result of the low coverage, the International Paralympic Committee stated that it would scrutinise potential broadcasters more carefully in the future.³⁰⁷ Likewise *ESPN* the American global cable television network and worldwide leader of sports-related programming, disregarded the Paralympics. The editor in chief of *ESPN* stated that when it came to "parcelling out coverage consideration for what the Paralympics were going up against had to be taken into consideration." This evidently included more popular content among *ESPN's* consumers such as "the start of college football, the NFL, the U.S. Open, the baseball pennant races" and so on.³⁰⁸ As a result, the presence of athletes with disabilities competing in the Paralympics was either poorly covered or not covered at all in the U.S. in stark contrast to the coverage of the able-bodied Olympics. More recently it was revealed that despite one in twenty children in the UK having a disability, major commercial channels such as *Disney* and *Nickelodeon* fail to feature any prominent disabled characters.³⁰⁹

Some of the foregoing issues have proceeded on the assumption that owing to economic inequality, the commercial broadcasting market by itself is not the proper mechanism for the satisfaction of the individual and social needs of persons with disabilities, as regards their representation in the sector. However, it is submitted that even assuming that persons with disabilities as consumers possessed the financial resources to pay for commercial broadcast services and niche programming, this nevertheless would not guarantee their access to those services or programme content.

³⁰⁷See 'Extra scrutiny for Paralympics TV deals' (*BBC News Entertainment and Arts*, 10 September 2012) <<http://www.bbc.com/news/entertainment-arts-19544410>>

³⁰⁸Josh Levin, 'ESPN's Lack of Coverage of the Paralympics Is Totally Indefensible' *Slate.com* posted Friday, 7 September 2012. Levin criticises *ESPN* stating that the network's "... outright neglect is not a legitimate journalistic strategy. Given, the scope and importance of the event, the athletes' remarkable stories, and the fascinating cultural and technological angles, *ESPN*, could have spared a single blogger to cover the Paralympics."

³⁰⁹Tim Smedley, 'Children's TV pretends disability doesn't exist' *The Guardian* 28 July 2015. <<http://www.theguardian.com/sustainable-business/2015/jul/28/childrens-tv-representation-disability-nickelodeon-disney-bbc>>

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According to a European Study carried out in 2007, in the case of television, the basic eAccessibility yardstick is the extent to which disabled people (in so far as is technologically possible) have access to and can enjoy the same choice of programming as everyone else.³¹⁰ The study indicated a substantial lack of availability of key accessibility provisions and a range of factors (*e.g.* lack of awareness, lack of information and, in some cases, high costs) that act as barriers to take-up of solutions that are available, as well as a perception of limited and slow progress in general.³¹¹

The study further showed that, on average, less than one-third of the national language broadcasts by main public broadcasters across European Member States were subtitled to ensure that they were accessible for people with hearing impairments.³¹² The comparable figures for commercial channels were very much lower. Public broadcasters in only five Member States provided any audio description to enable accessibility for people with visual impairments,³¹³ and only in one country did any of the main commercial broadcasters provide any audio description.

Further mapping studies of accessibility policies towards television access services and the role played by broadcasting regulators' policies EU member states were carried out by the European Platform of Regulatory Authority (EPRA) in 2009 and 2013 respectively.³¹⁴ In the most recent study, thirty regulatory authorities who responded to EPRA's questionnaire unanimously reported the existence of provisions dealing with the access of persons with disabilities to audiovisual media services within their national legal frameworks. The study indicated considerable progress in the recognition of accessible television services within those frameworks

³¹⁰European Commission, *MeAC-Measuring progress of eAccessibility in Europe: Assessment of the Status of Accessibility in Europe* Main Report (European Commission October 2007), which states that: "eAccessibility" concerns the design of information and communication technology (ICT) products and services so that they can be used by people with disabilities, whether of a permanent or temporary nature, and by older people with age-related changes in functional capacities. It further states that eAccessibility requirements arise across the full spectrum of ICT products and services, including telecommunications services and equipment, TV services and equipment, public and commercial websites, computer hardware and software etc.

³¹¹*ibid* at iii.

³¹²*ibid* with levels of provision varying from almost none to more than 95% across countries.

³¹³*ibid* and, where they do, the levels provided amount to very small percentages of programming.

³¹⁴ERPA, Working Group 3 'Round Table on Access to Audiovisual Media Services for persons with disabilities: Comparative Background Document' (Revised Public Version, 8 July 2013, 37th Meeting).

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since EPRA's first study in 2009. Conversely, the 2013 report indicated that only ten out of 30 countries reported obligations with regard to the (combined) level of subtitling, the level of sign language interpretation and the level of audio description.³¹⁵

The issue of accessibility will be discussed in detail in Chapter Five. However, it is submitted that such unsatisfactory levels of accessibility services and measures are a result of the often conflicting and perplexing regulatory frameworks and rationales under which they operate at international, European and national levels.

For instance, the United Nations Convention on the Rights of Persons with Disabilities devotes a full article to accessibility, which covers information and communication technologies.³¹⁶ In addition, the Convention states that State Parties shall take appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats and specifically mentions the enjoyment of access to television programmes in accessible formats.³¹⁷ Article 9 CRPD stipulates that State Parties to the Convention must "[E]nsure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities," a stipulation, which it is submitted, covers commercial sector broadcasters.³¹⁸

At European level, the Audiovisual Media Services Directive 2010/13EU (AVMSD) recognises that the right of persons with disabilities to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. It states that the means to achieve

³¹⁵ibid 6.

³¹⁶Art 9 CRPD provides "To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment... to information and communications, including information and communications technologies and systems..."

³¹⁷Art 30 CRPD which deals with 'Participation in cultural life, recreation, leisure and sport' provides that: 1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: a) Enjoy access to cultural materials in accessible formats; b) Enjoy access to **television programmes**, films, theatre and other cultural activities, in accessible formats." [Emphasis added]

³¹⁸Art 9 (2) b CRPD. See Chapter Five for a more detailed analysis of the CRPD's provisions regarding accessibility.

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accessibility should include, but need not be limited to, the provision of sign language, subtitling, audio-description and easily understandable menu navigation.³¹⁹ Unlike the CRPD, which contains a positive obligation to “ensure” that persons with disabilities have access “on an equal basis with others” to information and communication technologies... and to other facilities and services open or provided to the public,³²⁰ Article 7 AVMSD provides that member states need only “encourage” media service providers under their jurisdiction to ensure that their services are “gradually made accessible” and confines the ambit of the measure to “people with a visual or hearing disability.” The AVMSD therefore does not establish mandatory obligations on media service providers; nor does it establish specific targets or indicate a sense of urgency for action.

At national level, in Ireland, the broadcasting regulator, the Broadcasting Authority of Ireland (BAI), initiated a number of public consultations which led to the adoption of *Access Rules* for broadcasters. The rules were adopted by virtue of section 43 of the Broadcasting Act 2009.³²¹ The Broadcasting Act 2009 requires the BAI to “provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities.”³²² The rules govern the level of subtitling, sign language and audio description that Irish television broadcasters must offer to the public.³²³

The *Access Rules* are aimed at making television more enjoyable and accessible for people who are deaf, hard-of-hearing, partially sighted or blind. The Access Rules 2015 have been developed taking into account a review of the Access Rules 2012.³²⁴

The *Access Rules* 2015 specify percentage targets and timeframes in relation to the level of subtitling, Irish Sign Language and audio description to be provided by each television broadcaster (public, commercial and community). The rules also apply a

³¹⁹Recital 46 AVMSD 2010/13/EU.

³²⁰Art 9 (1) CRPD which includes “information and communications technologies and systems.”

³²¹The BAI *Access Rules* 2012 were published on 14th May, 2012 and were in operation up to 1st March 2015. See also “BAI launches Public Consultation on Access Rules” 6 December, 2011.

³²²s. 25 (2) g Broadcasting Act 2009.

³²³BAI *Access Rules* 2015 replace the BAI’s *Access Rules* 2012 which had updated and replaced the *Access Rules* 2005 taking into account changes that had taken place in broadcasting schedules and technology.

³²⁴The Broadcasting Act 2009 requires the BAI to review the Rules every two years.

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number of requirements in terms of the quality of access provision as well as requirements to consult with users of access services and to promote access provision available on the relevant broadcasting service.³²⁵

The target ranges for subtitling for Ireland's public service broadcasters are much higher than for commercial service providers in the jurisdiction.³²⁶ Interestingly, targets for Irish Sign Language and audio description are only set for RTE services and the consultation paper states that "[T]he setting of audio description and Irish Sign language targets only for RTÉ reflects a European-wide approach whereby only Public Service Broadcasters are required to provide these two types of access service."³²⁷ Whilst sign language is culturally specific, it is difficult to understand why commercial broadcasters are not to attain targets as regards audio description. This invariably has to do with cost and highlights the lighter touch regulation associated with neo-liberalism.

The consultation paper, however, stated that the revised Access Rules seek only to "encourage" any other broadcasters who wish to provide Irish Sign Language (ISL) or Audio Description (AD) to do so.³²⁸ In the consultation of the *Access Rules* in 2012 the BAI consultation paper stated with regard to ISL and AD that "[W]hile it is not suggested that a target be set for other broadcasters, were they to provide any audio description or Irish Sign Language it is proposed that this would be off-set against the subtitling target for that year."³²⁹ Owing to the unanimous opposition

³²⁵BAI, 'Access Rules 2005: Statement of Outcomes' (BAI 2014) 2. These rules apply to broadcasters under the jurisdiction of the Republic of Ireland or those who make use of a frequency or satellite capacity or up-link based in the Republic of Ireland.

³²⁶BAI *Access Rules* 2015, 9, e.g. RTE 1 channel subtitling target for 2015 is 84-89%; whereas the subtitling targets for the commercial channels are: *TV3* 45-49%; *3e* 19-23% and *Setanta Ireland* 9-11%. An examination of an appendix to the Draft Revised Access Rules 2014 by this author evidenced that although the commercial channel TV3 achieved the higher target range of 45% set by the BAI for subtitling in its programming in 2013, its sister channel 3e failed to reach its target range of between 13-17% by achieving only 9% of subtitling in its programming.

³²⁷BAI, 'Access Rules Review Public Consultation May 2014' 18. cf. EPRA (n 314) 19, which states that "[A]ccessibility provisions, as a rule apply to both public and commercial TV broadcasters. There is a clear trend towards the extension of access service obligations to commercial broadcasters. Nevertheless, legal provisions on accessibility are generally more stringent for public service broadcasters." See also comments in Chapter Five on the controversy surrounding the off-setting of access service quotas for subtitling and audio description and sign language in the BAI's Access Rules consultation 2012.

³²⁸Section 7 (5) of the BAI *Access Rules* 2015 provides: "There are no Irish Sign Language or audio description requirements in respect of other broadcast services at this time. Requirements in this regard will be reviewed periodically. However, other services may choose to provide audio description and/or Irish Sign Language."

³²⁹BAI, (n 327) 13.

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from access service users to the proposal of offsetting AD and ISL against subtitling, the BAI did not include the offsetting proposal in the Access Rules 2012. However, the regulator did recognise the “particular situation” in respect of community broadcasters and continues to allow community broadcasters to provide their access provision targets by a combination of subtitling, AD or ISL and this situation remains unchanged in the 2015 Rules.³³⁰

Generally speaking, the Access Rules of 2012 and 2015 were met with considerable consternation from disability advocacy groups, who described them as constituting “a lessening of efforts towards a fully inclusive broadcasting landscape” by virtue of *inter alia* the lessening of targets in relation to the various access services to be provided by the various broadcasters.³³¹ According to the submission made by DeafHear,³³² on the BAI’s draft Access Rules 2012 they were “extremely disappointing” and reflected “a minimalist approach which places the broadcasters rather than the viewers at the centre of the process.”³³³ DeafHear’s submission to the regulator asserted that “[A]ccess features of programmes are portrayed as an additional cost burden on rather than a means to ensure fair and equitable access to the enjoyment of television programmes by all citizens.”³³⁴ Deaf Hear echoed similar sentiments in its recent submission to the BAI on the revised access rules 2015 and the targets set for public service broadcaster RTE which is considered further in Chapter Five.³³⁵

Considering the economic and social inequality already faced by persons with disabilities, it is submitted that the lack of emphasis and obligations on the provision of accessible broadcasting services under a consumer and commercial broadcasting ethos, has the potential to fragment broadcast audiences further, thereby expanding

³³⁰See BAI ‘Access Rules Statement of Outcomes’ (BAI, May 2012) 5. BAI *Access Rules* 2015, Rule 7 (5) and (6).

<http://www.bai.ie/wordpress/wpcontent/uploads/201205BAIAccessStatementOutcomesMay12_RWPDF.pdf>

³³¹BAI, ‘Access Rules Review 2011 Public Consultation: Submission by the TV Access Coalition’ (January 2012) 2. <http://www.bai.ie/wordpress/wp-content/uploads/201205_BAI-Access-Rules2012.pdf> See also Chapter 5.

³³²DeafHear is a voluntary, non-profit organisation and a registered charity which provides a range of services to over 32,500 Deaf and Hard of Hearing people and their families in Ireland annually.

³³³DeafHear, ‘Submission to the Broadcasting Authority of Ireland Access Rules Review’ (DeafHear 2012) 2.

³³⁴*ibid*

³³⁵DeafHear, ‘Submission to the BAI: Access Rules Review Public Consultation 2014-2018’ (Deaf Hear 2014).

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what is known as the ‘digital divide’. Generally speaking, the “digital divide” refers to any inequalities between groups, broadly construed, in terms of their access to, use of, or knowledge of information and communication technologies, which includes traditional and new broadcasting technologies.

There is no shortage of utopian rhetoric about the potential of information and communication technologies³³⁶ and new communications media to transform personal, social and political life.³³⁷ Surveys on access to and the use of digital media in developed countries have found that disabled people are half as likely as non-disabled people to have a computer at home, and even less likely to have Internet access at home. The concept of the digital divide refers not only to physical access to computers, connectivity, and infrastructure but also to the geographical, economic, cultural and social factors, such as illiteracy, that create barriers to social inclusion.³³⁸ The study conducted by the European Commission on accessibility noted *supra* indicated a substantial lack of availability of key accessibility provisions and a range of factors that act as barriers to take-up of solutions that are available.³³⁹ In a report on the European Commission’s project *Digital Television for All (DTV4All)*,³⁴⁰ it is observed that “...the technologies and solutions for broadcast television are mature, and the outstanding challenges are predominantly organizational, political or economic in nature.”³⁴¹ The report further notes “[Y]et the access service field is riddled with ignorance and misconceptions that lead to poorly-documented business cases.”³⁴²

The whole concept of media literacy represents an important policy response to changes in the audiovisual and digital communications environment. Media Literacy

³³⁶ Accessible information and communication technology covers the design and supply of information and communication technology products (such as computers and telephones) and services (telephony and television) including web-based and phone-based services.

³³⁷ O’Neill and Barnes (n 298) 55.

³³⁸ European Commission (n 310).

³³⁹ *ibid*

³⁴⁰ *DTV4All*, is a project funded by the European Commission to facilitate the provision of access services on digital television across the European Union. The project promotes making television accessible by focusing on the use of resources and technologies that are already in place to make television accessible to viewers with functional impairments.

³⁴¹ Peter Olaf Looms *et al.*, ‘EC D2.6 -Recommendation on the Effectiveness and Efficiency of Existing Services Improvements’ (Report, Competitiveness and Innovation Framework Programme, ICT Policy Support Programme (ICT PSP) 30 November 2010) 3. <<http://www.psp-dtv4all.org/>>

³⁴² *ibid*. The report also noted that, in terms of achievements, there is a lack of solid statistics needed to assess progress in television access services, although the European Broadcasting Union (EBU) has taken steps to fill this gap with surveys of European Broadcasters.

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is a pre-requisite for effective participation in technologically advanced societies in which rapid change and information and communications services have become the norm.³⁴³ Failure to acquire a broad range of competences in new and traditional media which allow citizens to play a part in today's society will mean an increasingly fragmented society and a growing digital divide.³⁴⁴

The AVMSD, for example, states that 'Media literacy' refers to skills, knowledge and understanding that allow **consumers** to use media effectively and safely.³⁴⁵ The Directive goes on to state that "[M]edia-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material."³⁴⁶

The wording of the relevant recital to the AVMSD makes assumptions about the capacities of the viewer, in this case the "consumer", to access and use technology and broadcasting services. However, it can be stated that under a consumer and commercial ethos of broadcasting policy the assumed competence of the viewer in using technology to create individualised viewing is especially accentuated and, it is submitted, does not consider the diverse competencies associated with numerous disabilities.

³⁴³O'Neill and Barnes (n 298) 5.

³⁴⁴ibid 13.

³⁴⁵**Emphasis added.**

³⁴⁶Recital 47 AVMSD2010/13/EU.

CHAPTER TWO

Media and Disability: Awareness Raising

Introduction

The object of this chapter is to focus specifically on Article 8 of the CRPD, an article of “general application”¹ which deals with “Awareness Raising”. It is relevant to the media in terms of the creation of awareness and the portrayal of persons with disabilities. Article 8 (1) of the CRPD states that;

- “State Parties undertake to adopt immediate, effective and appropriate measures:
- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities and to foster respect for the rights and dignity of persons with disabilities;
 - (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
 - (c) To promote awareness of the capabilities and contributions of persons with disabilities.”

Article 8 (2) of the CRPD provides that;

- “Measures to this end include:
- (a) Initiating and maintaining effective public awareness campaigns designed:
 - (i) To nurture receptiveness to the rights of persons with disabilities;
 - (ii) To promote positive perceptions and greater social awareness towards persons with disabilities;
 - (iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
 - (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
 - (c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
 - (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.”

The chapter will begin with a general discussion of the CRPD and introduce some primary concepts about disability as contained in the Convention. This will be followed by an introduction to Article 8 CRPD and how it relates to the media. It will trace the historical development of Article 8 CRPD and the instruments that buttressed its initiation and consequent development. The chapter will provide a critical analysis of the article and how it relates to the broadcast media in particular. This analysis will seek to show the commonalities and disparities amongst the

¹Michael A Stein and Janet E Lord, ‘Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities’ in Oddný Mjöll Arnardóttir and Gerard Quinn, (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 28.

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various instruments, while bearing in mind the parallel shifts that were taking place in disability studies in general. The chapter will then conclude with an assessment of the future of Article 8 CRPD, with reference to its progress to date and how it may be implemented and monitored by member states that ratify the Convention. A number of recommendations will also be made.

Other provisions and measures contained in the Convention which directly impact on the representation of persons with disabilities in the broadcast media in terms of their access and portrayal within the sector will be referred to *infra* and discussed elsewhere within the thesis and will include: accessibility;² freedom of expression and opinion, and access to information;³ participation in political and public life⁴ and the right to take part on an equal basis with others in cultural life.⁵

United Nations Convention on the Rights of Persons with Disabilities

Overview

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter CRPD) is a unique international treaty as it is the first human rights convention of the 21st century and the first legally binding instrument with comprehensive protection of the rights of persons with disabilities.⁶ The object of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁷ To date there have been 159 signatories to the Convention (including Ireland), and 154 ratifications by state parties.⁸ The Convention heralds a “paradigm shift” in attitudes and approaches to persons with disabilities. Furthermore it has been described as taking ‘... to a new height the

²Art 9 CRPD on “Accessibility” will be discussed in Chapter Five.

³The right to freedom of expression is contained in Art 21 CRPD. It includes the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication. Freedom of expression as it relates to broadcast content, and accessibility, will be discussed in Chapters Four and Five respectively.

⁴Art 29 CRPD.

⁵Art 30 (1) CRPD provides that state parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, by placing an obligation on State Parties to take appropriate measures to ensure that persons with disabilities *inter alia* enjoy access to cultural materials in accessible formats, which includes access to television programmes in accessible formats. See Chapter Five for further discussion.

⁶While the CRPD does not establish new human rights, it sets out with much greater clarity the obligations on States to promote, protect and ensure the rights of persons with disabilities.

⁷Art 1 CRPD.

⁸The most recent ratifications being by Gambia on 7 July 2015 and Trinidad and Tobago on 25 June 2015. Gambia also ratified the Optional Protocol.

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movement from viewing persons with disabilities as “objects” of charity, medical treatment and social protection towards viewing persons with disabilities as “subjects” with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.’⁹

The Convention is a complement to existing international human rights treaties. It does not recognise any new human rights of persons with disabilities, but instead makes clear the obligations on State Parties in respect of all human rights of all persons with disabilities.¹⁰ The CRPD identifies areas where adaptations have to be made so that persons with disabilities can exercise their rights and areas where the safeguarding of such rights must be reinforced because those rights have been habitually breached.

The Convention itself does not include a definition of “disability” or “persons with disabilities” *per se*. However, certain aspects of the Preamble and Article 1 afford guidance which explains the application of the Convention.

Having regard to the term “disability” the Preamble to the Convention recognises that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”¹¹

Article 1 of the Convention provides that:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers

⁹See UN Enable website < <http://www.un.org/disabilities/default.asp?navid=12&pid=150>>

¹⁰See Stein and Lord, (n 1) 23-24, “[T]he CRPD is modelled after recent United Nations human rights conventions and especially the Convention on the Rights of the Child (CRC) in two significant substantive ways. Firstly, adhering to the central objective of the human right to development, the Convention holistically melds civil and political rights with economic, social, and cultural rights. Put another way, the CRPD aspires to manifest the mandate that human rights are ‘indivisible, interrelated and interconnected.’” Stein and Lord also point out that the CRPD “also emulates the CRC by articulating a comprehensive catalogue of human rights obligations within the circumstances of a particular group, here, persons with disabilities.” Secondly, the structure of the CRPD is similar to that of CRC. The Convention’s Articles are introductory (Preamble, Arts 1-2), of general application, (Arts 3-9), including Art 8 on awareness raising; enumerate substantive rights (Arts 10-30) and set forth implementation and monitoring provisions (Arts 31-40) and promulgate rules to govern the operation of the Convention (Arts 41-50).

¹¹Preamble, CRPD.

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may hinder their full and effective participation in society on an equal basis with others.”

The Secretariat¹² for the Convention on the Rights of Persons with Disabilities states that several elements of the above provisions are important to emphasise.¹³ Firstly, there is the acknowledgment that “disability” is an evolving concept resulting from attitudinal and environmental barriers hindering the participation of persons with disabilities in society. Accordingly, the notion of “disability” is not fixed and can vary, depending on the prevailing environment from society to society. A handbook for Parliamentarians on the CRPD and its Optional Protocol expands further on this point and states that a person with disabilities may be considered as such in one society or setting, but not in another.¹⁴ It states that “in most parts of the world, there are deep persistent negative stereotypes and prejudices against persons with certain conditions and differences. These attitudes determine who is considered to be a person with a disability and perpetuate the negative image of persons with disabilities.”¹⁵

The handbook points out that the language used to refer to persons with disabilities plays a significant role in creating and maintaining negative stereotypes.¹⁶ Terms such as “crippled” or “mentally retarded”¹⁷ are clearly derogative. Others, such as “wheelchair bound” emphasize the disability rather than the person. In addition it states that historically, society has often failed to use the terms that persons with

¹²The CRPD its Optional Protocol are serviced by a joint Secretariat, consisting of staff of both the United Nations Department of Economic and Social Affairs (DESA), based in New York, and the Office of the High Commissioner for Human Rights (OHCHR) in Geneva.

¹³See “Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities.” <<http://www.un.org/disabilities/default.asp?navid=23&pid=151#sqc3>>

¹⁴United Nations (UN), *From Exclusion to Equality: Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (Geneva: UN Office of the High Commissioner for Human Rights, 2007) 3.

¹⁵ibid

¹⁶ibid

¹⁷Up until recently such derogatory terms were used in legal settings in some jurisdictions. In *Atkins v. Virginia*, 536 U.S. 304 (2002), a case in which the Supreme Court of the United States ruled 6-3 that executing the “mentally retarded” violates the Eighth Amendment of the U.S. Constitution’s ban on cruel and unusual punishments. In 2010, President Barack Obama signed into law “Rosa’s Law,” which will change references in federal law from “mental retardation” to “intellectual disability” and references to a “mentally retarded individual,” to an “individual with an intellectual disability.” See Rosa’s Law (Pub. L. 111-256), 111th Congress, 5th October 2010, [S. 2781]. In April 2015, persons with disabilities and their families admonished the Irish Government in failing to deliver on its promise to change the 144-year-old Lunacy Act 1871 and introduce modern human-rights-compliant legislation for persons with intellectual disabilities. The Act refers to people as ‘idiot’, ‘lunatic’ and ‘unsound mind’. <<http://www.gpo.gov/fdsys/pkg/PLAW-111publ256/pdf/PLAW-111publ256.pdf>>

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disabilities use to define themselves or has forced people to define themselves using terms with which they are uncomfortable.¹⁸

Secondly, disability is not regarded as a medical condition, but rather as a consequence of the interaction between negative attitudes or an unreceptive environment with the condition of particular persons.¹⁹ The Secretariat states that “by dismantling attitudinal and environmental barriers, as opposed to treating persons with disabilities as problems to be fixed, those persons can participate as active members of society and enjoy the full range of their rights.”²⁰

Thirdly, the Convention does not restrict its scope to particular persons; instead, it identifies persons with long-term physical, mental, intellectual and sensory disabilities as beneficiaries under the Convention. The reference to “includes” assures that this does not confine the application of the Convention and States parties could also ensure protection to others, for example, persons with short-term disabilities or those who are perceived to be part of such groups.²¹

One important feature of the CRPD is the inclusion of an article that sets forth general principles.²² Enunciated in Article 3, the principles recognise a core set of concepts that underlie disability rights issues and are of particular import in the disability context. They include: respect for inherent dignity, equality, non-discrimination, full and effective participation and inclusion in society, equality of

¹⁸UN, (n 14) 3-4. *See also* Chapter Four, section on “Disabling Language and Terminology.”

¹⁹(n 13). *See also* Stein and Lord, (n 1) 25, which states that Art 1 CRPD “...firmly grounds the disability classification in the social model of disability, by stating that as a condition it arises from ‘interaction with various barriers [which] may hinder their full and effective participation in society on an equal basis with others’ rather than as an inherent limitation.”

²⁰*ibid.* *See also* UN, (n 14) 4, “[T]he drafters of this Convention were clear that disability should be seen as the result of the interaction between a person and his/ her environment, that disability is not something that resides in the individual as the result of some impairment. This Convention recognizes that disability is an evolving concept and that legislation may be adapted to reflect positive changes within society.”

²¹(n 13). *See also* UN, (n 14) 2-3, which states, regarding the term “persons with disabilities” as espoused in the Convention, “... this is not an exhaustive definition of those who may claim protection under the convention; nor does this definition exclude broader categories of persons with disabilities found in national law, including persons with short-term disabilities or persons who had disabilities in the past.”

²²Lord *et al.*, *Human Rights. Yes!: Action and Advocacy on the Rights of Persons with Disabilities*, Human Rights Education Series, Topic Book 6 (University of Minnesota Human Rights Resource Centre, 2007) 23.

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opportunity and respect for difference.²³ These principles are acknowledged overtly at the beginning of the text to make sure that all of the rights articulated in the Convention are “construed through the lens of these particular principles.”²⁴

Article 4 sets out the Convention’s general obligations and clearly delineates the specific actions governments must take to ensure that the rights of persons with disabilities²⁵ are respected, protected, and fulfilled.²⁶ Countries that join in the Convention engage themselves to develop and carry out policies, laws and administrative measures for securing the rights recognised in the Convention and abolish laws, regulations, customs and practices that constitute discrimination.²⁷

Article 5 of the CRPD contains equality and non-discrimination provisions. In conjunction with Article 4 (1) (b) of the Convention, Article 5 obligates State Parties to prohibit discrimination on the basis of disability and provides that States are to guarantee “equal and effective legal protection against discrimination on all grounds.”²⁸ “Discrimination on the basis of disability” is identified in Article 2 of the

²³Art 3 CRPD on “General principles” states that: “[T]he principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women;(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”

²⁴Lord *et al.*, (n 22) 11.

²⁵Arts 10-30 CRPD cover the rights guaranteed to persons with disabilities and include *inter alia*: the right to life; equal recognition before the law, access to justice, freedom of expression and opinion and access to information; respect for privacy, right to health; right to work and employment; the right to participation in political and public life and the right to participation in cultural life, recreation, leisure and sport.

²⁶Lord *et al.*, (n 22) 9, assert that respecting, protecting and fulfilling human rights entails a number of obligations on state parties to the Convention: “The obligation to ‘respect’ human rights means that States must not interfere with the exercise and enjoyment of the rights of people with disabilities. They must refrain from any action that violates human rights. They must also remove laws, policies, and practices that oppose human rights.” The obligation to ‘protect’ human rights denotes that the “State is required to protect everyone, including people with disabilities, against abuses by non-State actors, such as individuals, businesses, institutions, or other private organizations.” The obligation to ‘fulfil’ human rights indicates “that States must take positive action to guarantee that everyone, including people with disabilities can put into effect their human rights. States therefore must implement laws and policies that advance human rights. They must develop programmes and undertake other measures to realise these rights. In doing so, they must assign the essential resources to enforce laws and fund programmatic efforts.”

²⁷Art 4 CRPD. <<http://www.un.org/disabilities/default.asp?navid=15&pid=162>>

²⁸Art 5(2) CRPD. The additional grounds on which persons with disabilities should not be discriminated against are not detailed in Article 5. Instead they appear in paragraph (p) of the Preamble, which lists them as: “... race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.”

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CRPD as meaning any “distinction, exclusion or restriction on the basis of disability” that has the “purpose or effect of” damaging or denying the enjoyment or the exercise of human rights and fundamental freedoms by persons with disabilities in the political, economic, social, cultural, civil or any other field.²⁹

While many of the general obligations in the CRPD are mutual to other human rights conventions, the general obligations of States with respect to the rights of persons with disabilities embrace certain distinctive requirements that are not referred to in other human rights instruments.³⁰ These include commitments such as endorsing universal design for goods and services,³¹ undertaking or promoting research on accessible and assistive technologies and “giving priority to technologies at an affordable cost,”³² obligations, it is submitted, which are particularly important in terms of access to media and its content.

In addition Article 4 stipulates that, under the terms of the Convention, States are obliged to “closely consult with” and “actively involve” persons with disabilities, including children with disabilities, through their representative organisations, when developing and implementing legislation and policies to effectuate the Convention and on all other decision making processes concerning issues relating to persons with disabilities.³³ This seminal and participatory obligation extends to the monitoring process of the Convention also.³⁴

Lord *et al.* state that “it is crucial to understand that the principles contained in Article 4 are foundational, overarching obligations that are applicable to every other subject within the CRPD.”³⁵ One objective of this comprehensive article on “general obligations,”³⁶ is to offset the historic failure of States to truly understand their

²⁹Art 2 CRPD states that the failure to provide “reasonable accommodation” is a form of discrimination. Reasonable accommodation is defined in Article 2 CRPD as a process through which necessary and appropriate modifications, adjustments, or provisions are made, in order to accommodate the accessibility needs in a particular case. As Articles 5 and 2 CRPD have repercussions regarding the provision of accessible of broadcasting services, the issue will be dealt with in further detail in Chapter Five.

³⁰Lord *et al.*, (n 22) 12.

³¹Art 4 (1) (f) CRPD.

³²Art 4 (1) (g) CRPD.

³³Art 4 (3) CRPD.

³⁴Art 33 (3) CRPD also provides that persons with disabilities and their representative organisations “shall be involved and participate fully in the monitoring process.”

³⁵Lord *et al.*, (n 22) 12.

³⁶Art 4 CRPD.

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obligations to persons with disabilities as fundamental human rights obligations. According to Lord *et. al*, States have been inclined to consider these duties as indicating exceptional treatment or special social measures, not as vital requirements under human rights law.³⁷ Explicitly stating them as general obligations in the Convention is an imperative step toward reversing this detrimental way of thinking.³⁸

From the brief synopsis given of the CRPD, it can be deduced thus far that disability is a human rights issue and not a medical issue. It is an evolving concept and is not restricted to specific persons.³⁹ Disability is a consequence of the interaction between negative attitudes or an unreceptive environment with the condition of particular persons. Deep historic and culturally persistent negative stereotypes and prejudicial attitudes toward persons with certain conditions and differences propagate the negative image of persons with disabilities. Moreover, the language used to describe or depict persons with disabilities plays a decisive role in creating and perpetuating such harmful and damaging preconceptions. Persons with disabilities can participate as active members of society and benefit from the comprehensive range of their rights when such attitudinal and environmental barriers are broken down and they are treated as “subjects” and holders of those rights and not “objects” of pity or charity.

All human rights are indivisible, interdependent, and interrelated,⁴⁰ and all of the articles in the CRPD are significant and are strongly correlated to each other. Nonetheless, specific articles are “fundamentally cross-cutting” and have “a broad

³⁷Lord *et al.*, (n 22) 12.

³⁸*ibid*

³⁹*E.g.* The United Nations Enable website on the CRPD notes that persons with mental and psychosocial disabilities represent a significant proportion of the world’s population. “Mental health problems, including alcohol abuse, are among the ten leading causes of disability in both developed and developing countries. In particular, depression is ranked third in the global burden of disease, and is projected to rank first in 2030. Persons with mental and psychosocial disabilities often face stigma and discrimination, as well as experience high levels of physical and sexual abuse, which can occur in a range of settings, including prisons, hospitals and homes.”

<<http://www.un.org/disabilities/default.asp?id=1545>> In terms of the types of disability represented in broadcast media, research carried out in the UK in 2005 found that the most commonly represented disabilities in the sampled programmes have generally been those that are most easily recognised (mobility, sensory impairment and disfigurement/physical impairment). See Ofcom, *The Representation and Portrayal of People with Disabilities on Analogue Terrestrial Television- Content Analysis Report* (13 December 2005) 2, para 1.5.

⁴⁰Lord *et al.*, (n 22) 12. By “indivisible” it means human rights cannot be separated from each other; by “interdependent” it means human rights cannot be fully realized without each other; by “interrelated” it means human rights affect each other.

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impact on all other articles.”⁴¹ These articles, often referred to as articles of ‘general application’, are placed at the start of the Convention to emphasise their importance. The aforesaid articles on general principles and general obligations are articles of ‘general application.’ The other articles of general application in the CRPD, which continually intersect with the principles and obligations of the Convention, and which are pertinent to the media, can be found in Articles 3 through to Article 9 and include: equality and non-discrimination,⁴² awareness raising⁴³ and accessibility.⁴⁴

Article 8 CRPD - Awareness-Raising⁴⁵

Article 8 of the CRPD has been described as focusing on some of the primary factors which influence or cause disability discrimination, namely the predominant negative attitudes towards persons with disabilities in many societies. The entire article is dedicated to requiring State Parties to raise public awareness, in support of which it provides a non-exhaustive list of illustrative measures.

Article 8 (1) of the CRPD states that;

- “State Parties undertake to adopt immediate, effective and appropriate measures:
- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities and to foster respect for the rights and dignity of persons with disabilities;
 - (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

⁴¹ibid

⁴²Art 5 CRPD. Lord *et al.*, (n 22) 17, point out that the principles of equality and non-discrimination “not only interact with each other, they are also fundamentally indivisible, interrelated, and interdependent with all other human rights.” They cite an example: if a State enacted a law denying people with disabilities the right to work, this would not only “constitute a violation of the right to work,” but it would also denote “an explicit form of discrimination and a violation of equality.”

⁴³Art 8 CRPD.

⁴⁴Art 9 CRPD. The remaining two articles of ‘general application’ deal with ‘Women with Disabilities’ (Art 6 CRPD) and ‘Children with Disabilities’ (Art 7 CRPD) respectively.

⁴⁵See UN, *Chapter on UN Convention: Notes on Draft Convention*, Committee on Comprehensive and Integral Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (New York, 16-27 June 2003) 6.

<<http://www.un.org/esa/socdev/enable/rights/wgsuma5.htm>> Art 8 CRPD was initially Draft Article 5, which was entitled “Promotion of Positive Attitudes to Persons with Disabilities”. It was proposed by Mexico that it be entitled “Elimination of Stereotypes and Prejudices.” Mexico had recognised the need for a more detailed provision on increased awareness and the role of other actors with respect to non-discrimination. The European Disability Forum (EDF), amongst others, suggested at the drafting stage of Article 8 that some reflection should be given to the wording ‘Positive attitudes,’ as this might continue to lead to stereotyping. The EDF suggested that “Awareness raising measures on the rights of persons with disabilities,” might be a more appropriate phrasing. The final text of Article 8 CRPD entitled “Awareness-Raising”, embraces a wider approach, concentrating on awareness-raising more generally, whereby promoting positive perceptions is just one facet.

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(c) To promote awareness of the capabilities and contributions of persons with disabilities.”

In summary, Article 8 (1) CRPD thus provides that State parties, who ratify the CRPD, undertake to adopt immediate, effective, and appropriate measures to combat stereotypes and prejudices and promote awareness of the capabilities of persons with disabilities.

To this end, the Convention outlines a number of “pragmatic and action oriented measures” to be undertaken,⁴⁶ which include *inter alia* the initiation and maintenance of effective public awareness campaigns⁴⁷ and encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the Convention.⁴⁸

Article 8 (2) of the CRPD provides that;

“Measures to this end include:

- (a) Initiating and maintaining effective public awareness campaigns designed:
 - (i) To nurture receptiveness to the rights of persons with disabilities;
 - (ii) To promote positive perceptions and greater social awareness towards persons with disabilities;
 - (iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- (b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
- (c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
- (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.”

The first observation is that “awareness raising” or the creation of awareness about the human rights of persons with disabilities and the provisions of the Convention, is not a right in itself, albeit a central objective of the CRPD.

However, it has also been recognised *supra* that specific articles known as articles of ‘general application,’ are “fundamentally cross-cutting” and have “a broad impact on all other articles,”⁴⁹ which includes Article 8 CRPD and its provisions.

⁴⁶Art 8 (2) CRPD.

⁴⁷Art 8 (2) (a) CRPD.

⁴⁸Art 8 (2) (c) CRPD.

⁴⁹Particularly Arts 3 and 4 CRPD, which contain the general principles and general obligations of the Convention.

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It is submitted that the “Awareness Raising” provision of the CRPD is unlike other articles of ‘general application’, which appear to engage directly with rights and values such as the right to equality and non-discrimination⁵⁰ and the rights of women and children with disabilities,⁵¹ although Article 8 CRPD is interlinked with all those rights and values.⁵² However, it is proposed that it could be inferred that Article 8 CRPD in itself derives from and engages other important rights such as the right to freedom of expression,⁵³ and the rights to participate in political and cultural life,⁵⁴ in addition to its central function in championing all other recognized rights in the Convention.⁵⁵

The right to freedom of expression and opinion includes the freedom to seek, **receive** and **impart information and ideas** on an equal basis with others and through all forms of communication.⁵⁶ The protection of freedom of expression may be regarded as a consequence of securing liberty for the individual but also considered to safeguard in particular the values of participating in a democracy and promoting human dignity. The European Court of Human Rights has consistently stated that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.⁵⁷

The term “Awareness” means consciousness devoid of ignorance. It is the state of knowingness or wakefulness. It means to be “cognizant, conscious, awake, alert, watchful, and vigilant”, adjectives that mean being mindful or heedful of something. Awareness implies knowledge gained through one’s perceptions, and the attitudes of others.⁵⁸ The term “Raising” has many different connotations all of which involve taking action in some way; it can mean creating, nurturing, improving, increasing and elevating. It will be argued *infra* that Article 8 is more than just a “cross-cutting”

⁵⁰Art 5 CRPD.

⁵¹Arts 6 and 7 CRPD.

⁵²Art 9 CRPD.

⁵³See Chapter One for further discussion.

⁵⁴*ibid.* In this regard, freedom of expression is linked to the notion of citizenship and to be a citizen means to be included politically, civically and socially and culturally.

⁵⁵*ibid.* Chapter One.

⁵⁶**[Emphasis added].**

⁵⁷*E.g. Muller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) §33. See also Chapter One, sections on ‘Freedom of Expression and Democracy,’ ‘Citizenship,’ and the ‘Public Sphere and Broadcasting.’ See also Chapter Four, sections on ‘Freedom of Expression.’

⁵⁸<<http://www.best-quotes-poems.com/awareness-quotes.html>>

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and a “broad impact” article and should be in fact prioritised as a fundamental prerequisite towards the realisation of the principles, objectives and rights contained in the CRPD.

It has been acknowledged that countries that ratify the Convention pledge themselves to develop and carry out policies, laws and administrative measures for securing the rights recognized in the Convention and to abolish laws, regulations, customs and practices that constitute discrimination by virtue of Article 4 of the CRPD.⁵⁹ Since Article 8 CRPD concentrates on some of the key reasons which influence or cause disability discrimination, it can act as a conduit for shifting prejudicial attitudes and stereotypical perceptions towards persons with disabilities and promoting the rights of persons with disabilities through the media.

Article 8 CRPD and Broadcast Media – Analysis

i. Article 8 CRPD - “Immediate, Effective and Appropriate Measures”

While it is accepted that Article 8 is an article of ‘general application’ whereby a ratifying state undertakes to adopt “immediate, effective and appropriate measures” to raise awareness and combat stereotypes and prejudices *etc.*, about persons with disabilities,⁶⁰ it is submitted that a shortfall of the Convention and its accompanying handbooks⁶¹ is that they give little or no guidance as to what constitutes ‘effective’ or ‘appropriate measures’ or how such measures should be carried out by a ratifying State.

For instance Article 8 (2) (a) provides that such measures should include the “initiation and maintenance of effective public awareness campaigns” by including content which nurtures receptiveness to the rights of persons with disabilities;⁶² promotes positive perceptions and greater social awareness towards persons with

⁵⁹Art 4 (1) (b) CRPD.

⁶⁰Art 8 (1) CRPD.

⁶¹And accompanying literature on the Convention to date *e.g. see* UN, (n 14) and UN, *Monitoring the Convention on the Rights of Person with Disabilities: Guidance for Human Rights Monitors Professional Training Series No. 17* (Office of the High Commissioner for Human Rights 2010).

⁶²Art 8(2) (a) (i).

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disabilities;⁶³ and promotes recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market.⁶⁴ It is further submitted that whilst the three guidelines given in relation to the content of such awareness campaigns seem straightforward in theory, in reality the media, and in particular the broadcast media, have the power to distort images and offer contradictory interpretations of information.⁶⁵ It is proposed therefore that some (collective) guidance is necessary for the media of member states⁶⁶ so as to ensure that the forces intervening between fact and reception do not distort the final message.⁶⁷

To this end, the CRPD may offer an inbuilt safeguard mechanism in that it requires member states to “closely consult with” and “actively involve persons” with disabilities through their organisations in policies to implement the Convention, which is essential in the creation and development of such campaigns.⁶⁸

However, close consultation and active involvement of persons with disabilities does not automatically guarantee positive perceptions or portrayals of disability in awareness campaigns, as demonstrated in the instance of a television advertisement by a motor neurone disease association which was restricted in the United Kingdom in 2009.⁶⁹ The ninety second advertisement which was “designed to be shocking” featured a woman with motor neurone disease sharing her story:

⁶³Art 8(2) (a) (ii).

⁶⁴Art 8(2) (a) (iii).

⁶⁵Mitzi Waltz, ‘Images and narratives of autism within charity discourses’ 27(2) *Disability & Society* 219, 222, *e.g.* makes the point that “...many images that disabled people perceive as negative are seen as positive by non-disabled people and *vice versa*.” See also Bethany Klein, ‘Entertaining ideas: social issues in entertainment television’ (2011) 33 (6) *Media, Culture & Society*, 905-921. The article considers how television writers, directors and producers understand their roles and how they balance the goal of making entertaining television with the responsibility of providing a rare media space for unconventional representations of social issues including disability. The article considers the tug between two roles of media producers *i.e.* the “creative” and the “instructive” whereby the producers interviewed were hesitant to view their work as educative and were insistent that teaching is not the primary goal.

⁶⁶*i.e.* for both public and private sectors.

⁶⁷This also applies to all television content and should not be confined to just public awareness campaigns which include persons with disabilities and disability related issues.

⁶⁸Art 4 (3) CRPD.

⁶⁹See also Waltz, (n 65) 223-224, who questions *e.g.* what constitutes ‘awareness’ in the context of charity advertising and cites the example of an advert from the US organisation Autism Speaks in 2009, which makes the reader aware of the prevalence of autism by using an appeal to fear, claiming that “your child is more likely to become autistic than to be an Olympic athlete.” The advert lists three ‘warning signs’ to watch out for. Waltz asserts “what these advertisements do more successfully than

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“In its opening scene a young woman walks into a room to be confronted by a wheelchair. As she gazes quizzically at it a steel door behind her slams shut. In an instant her body is smashed against a wall. Choking and struggling for breath, she is thrown around the room like a rag doll as her clothes are stripped off, leaving her thrashing on the floor. Her limbs, twisted now and wasted, writhe in agony as she is pulled along the floor. A close-up of her ravaged body, clad only in underwear, reveals a pitifully thin and withered frame. In the final scene she sits slumped and twisted in the wheelchair, unable to speak or move.

It is only then that we learn what the advertisement – screened as ‘Sarah’s Story’ – is about, as a voice tells us: ‘Now you know how it feels to get motor neurone disease. Help us fight back.’”⁷⁰

The charity organisation⁷¹ submitted the advertisement to Clearcast, a company in the UK that undertakes pre-transmission examination and clearance of television ads and advises on ads for video on demand, seeking permission to air the ad.⁷² As part of their licensing agreements with broadcasting regulator Ofcom, broadcasters are required to clear advertising before it is broadcast.⁷³ In this instance Clearcast refused clearance to air the television ad on the basis that broadcasters “felt the level and amount of distressing and disturbing images went too far for television broadcast, even late at night.”⁷⁴ Clearcast asserted that the integrity of the cause was not in question, any more than the candour of the visuals and that the broadcasters’ apprehensions related solely to the distressing nature of the images shown in what was a lengthy ad, with no understanding of what the ad was about until right at the very end.⁷⁵

educating... [is] setting up a negative image and placing the named charity as the solution to the problem. This is more basic brand awareness than disability awareness.”

⁷⁰See Olga Craig, ‘Banned MND advert: is my pain really too shocking for television?’ *The Telegraph*, (London, 25 July 2009). <<http://www.telegraph.co.uk/news/health/news/5907895/Banned-MND-advert-is-my-pain-really-too-shocking-for-television.html>>

⁷¹Motor Neurone Disease Association (MND).

⁷²Clearcast is not a regulator, it is owned by six of the UK’s largest commercial broadcasters. The UK’s broadcast advertising is co-regulated with the industry taking on responsibility (through the advertising levy funded self regulatory body ASA) for governance by agreement with statutory regulator Ofcom. The Advertising Standards Authority (ASA) administers these Codes and investigates complaints, later publishing its adjudications. <<http://www.asa.org.uk/>>

⁷³Ads transmitted on UK terrestrial and satellite channels are submitted to Clearcast for approval. Clearcast then review the ads against The UK Code of Broadcast Advertising (BCAP Code) The BCAP Code applies to all ads on radio and television services licensed by Ofcom and explicitly holds broadcasters responsible for the content of advertising on their channels.

⁷⁴See ClearCast, ‘Press Release Motor Neurone Disease Association’, 23 June, 2009.

⁷⁵ibid. <<http://www.clearcast.co.uk/motor-neurone-disease-association-june-2009.html>>

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Interestingly, when the same advertisement was aired in the cinema, a number of complaints were submitted to the UK's advertising standards regulator, the Advertising Standards Association (ASA).

While acknowledging that some viewers may have found the ad distressing, the ASA noted that the Motor Neurone Disease Association had sought to portray the physical and emotional effects of the disease on the sufferer, and that the testimonials sent confirmed it did so accurately. In the context of an advertisement aimed at raising awareness about the physical and emotional effects of motor neurone disease, the ASA considered the hard-hitting sequence featuring 'Sarah's Story' was justified. Although considering it distressing to some, the ASA concluded that the ad was suitable to be shown before 15 rated films and the content was justified given the nature of the message.⁷⁶

The above example demonstrates the complex nature of broadcasting advertising campaigns even where persons with disabilities are "actively involved in" and closely "consulted with" in the development of a campaign. It highlights the competing claims to freedom of expression and the fine line to be drawn in media regulation. It also raises issues regarding the CRPD's notion of persons with disabilities as "rights holders" versus persons with disabilities as "objects of charity" in that it engages Sarah's right to freedom of expression, as contained in CRPD,⁷⁷ to tell her story about the physical and emotional effects of motor neurone disease as experienced by her in raising awareness about the topic, albeit the aim of the advertisement was to "shock" but also to raise awareness and raise funds for charity.⁷⁸

⁷⁶The ad was considered under CAP Code (Edition 11) under clauses 5.1 (Harm and Offence): "communications avoiding serious or widespread offence on grounds of *inter alia* disability" and 5.2 (Decency and public sensitivities) and 9.1 (Fear and distress) but was not found in breach of them. ASA Adjudication of Motor Neurone Disease Association <http://www.asa.org.uk/ASA-action/Adjudications/2009/6/Motor-Neurone-Disease-Association/TF_ADJ_46357.aspx>

⁷⁷Art 21 CRPD.

⁷⁸According to the judgments of the European Court of Human Rights (ECtHR), freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of Article 10 of the ECHR, *e.g. Handyside v United Kingdom* App no 5493/72 (ECtHR 7 December 1976) §49. *See also* for an interesting discussion on the issue of stigma Nicole Quackenbush, 'Speaking of, and as, Stigma: Performativity and Parkinson's in the Rhetoric of Michael J. Fox' (2011) 31 (3) *Disability Studies Quarterly*. <<http://dsq-sds.org/article/view/1670/1601>>

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While it could be said that the content of the advertisement “nurtures receptiveness to the rights of persons with disabilities,”⁷⁹ namely Sarah’s right to freedom of expression, and perhaps created greater “social awareness”⁸⁰ about the effects of motor neurone disease, it is highly doubtful whether the advertisement “promotes positive perceptions towards persons with disabilities”⁸¹ given that the intention of the ad was to “shock” and the content of the advertisement was acknowledged and deemed by the pre-broadcasting screener and the advertising regulator as “disturbing” and “distressing” respectively. In addition the advertisement did not “promote the recognition of the skills, merits and abilities of persons with disabilities.”⁸² While it is accepted that what is deemed as offensive can differ between cultures and can alter over time, nevertheless, the media industry and disability organisations could only benefit from guidelines on Article 8 CRPD for direction on such issues.⁸³

It is submitted that, from its outset, Article 8 CRPD does not specify how such awareness campaigns be even “initiated”, let alone “maintained” or actually be “effective.” Moreover, it is suggested that the Article does not take into account differing media systems in different countries, *e.g.* in developing countries. The progressive realisation obligation contained in the CRPD gives State parties, particularly developing countries, some flexibility in achieving the objectives of the Convention with regard to taking measures to realise economic, social and cultural rights.⁸⁴ Article 4, however, does not absolve State Parties of the responsibility to protect those rights. Unlike economic, social and cultural rights, civil and political rights are not subject to progressive realization. In other words, States must protect and promote these rights immediately.⁸⁵

⁷⁹Art 8 (2) (a) (i) CRPD.

⁸⁰Art 8(2) (a) (ii) CRPD.

⁸¹Art 8 (2) (a) (ii) CRPD.

⁸²Art 8 (2) (a) (iii) CRPD.

⁸³See discussion *infra*.

⁸⁴Art 4 (2) CRPD states that: “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present convention that are immediately applicable according to international law.”

⁸⁵UN, (n 14) 19-20.

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As discussed *supra*, the creation of awareness is not a right;⁸⁶ however, the Convention places an obligation on State Parties to create awareness about persons with disabilities and their rights *etc.* Furthermore, establishing a right is not the same thing as ensuring that a right is realized. This is why the Convention obliges State parties to provide the appropriate enabling environment so that persons with disabilities can fully enjoy their rights on an equal basis with others. It is submitted that the power of the media in its ability to shape attitudes and create awareness is surely an appropriate enabling environment and a prerequisite for the realisation of such rights.

Whether the creation of awareness in developing countries is subject to progressive realization is not clear. What is apparent is that broadcast media is extremely expensive to produce and the differences between resources and technological advances in member states whose broadcasting systems are well established and those in developing member states can be vast in terms of resources.⁸⁷ To this end the allocation of funding for public awareness campaigns in less developed countries should be prioritised through international cooperation.⁸⁸

While it is left to each member state to ensure an enabling environment for the creation of awareness about persons with disabilities and their rights, it is submitted that basic guidelines directed at media and disability organisations sharing best practice should be issued by the United Nations on the issue. Furthermore, continuous research into the media's ability to shape societal attitudes towards persons with disabilities and the impact of such campaigns should be carried out by

⁸⁶See pp 83-86.

⁸⁷*E.g.* Digital Television.

⁸⁸Art 32 (1) CRPD makes provision for International co-operation in support of national efforts for the realization of the purpose and objects of the Convention, including measures "facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices" Art 32 (1) (b) CRPD. See Katherine Guernsey *et al.*, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, (Social Protection Working Paper No. 0712, 2007) 10, para 4.13, which states that "[C]lient countries that are States Parties to the CRPD may need bank assistance in order to help implement their obligations under Article 8. In addition, where other projects seek to be inclusive of persons with disabilities, engaging in some of the activities addressed in Article 8 may assist in enhancing the overall efficacy of such projects. For example, where an education project seeks to be inclusive of persons with disabilities, the addition of a public awareness-raising component to the project could be beneficial in helping to dispel stereotypes or inaccurate assumptions, e.g. of teachers and/or parents, regarding persons with disabilities in educational environments. Thus, compliance with Article 8 could be viewed as a tool for enhancing the achievement of wider development objectives."

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member states in an effort to identify the main areas such campaigns may need to target.⁸⁹

It is submitted that approaches to such awareness campaigns might be exemplified by the *Your Mental Health* campaign in Ireland, as a model of best practice. Here the Irish Health Service Executive published a report in 2007 which provided an overview of how people view mental health in Ireland.⁹⁰ The research was conducted to provide an insight into the general public's awareness and attitudes around mental health in order to inform an effective public information campaign, directed at areas which were identified in the report as lacking, e.g. education around mental health and mental health problems. It also considered campaigns and initiatives on mental health from other jurisdictions such as Scotland and Australia.⁹¹ The report resulted in a media campaign '*Your Mental Health*'⁹² developed by the HSE National Office for Suicide Prevention, in collaboration with partner agencies in the voluntary and statutory sector, and featured advertisements on television, radio and billboards. The campaign was extended and is maintained through a dedicated website, which offers further information and resources.

One of the many principles that the CRPD espouses is that of "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity."⁹³ In this regard, the CRPD does "not seek to prevent disability, which is a medical approach, but rather to prevent discrimination on the basis of disability."⁹⁴ Accordingly, it is submitted, member states should also bear this in mind in the development of any other public service campaigns relevant to public safety and health, for example road safety campaigns. As is often the case, such campaigns are promoted in the context of persons with disabilities, and disability is perceived in negative terms, shifting attention away from respect for difference and diversity, as

⁸⁹See Conclusions and Recommendations *infra*.

⁹⁰Health Service Executive, *Mental Health in Ireland: Awareness and Attitudes* (Report commissioned by the HSE National Office for Suicide Prevention (NOSP), 2007). This campaign was also a key part of the implementation of the general population level actions in *Reach Out*, the National Strategy for Action on Suicide Prevention.

<<http://www.healthpromotion.ie/hp-files/docs/HSP00612.pdf>>

⁹¹*ibid* 10.

⁹²'Your Mental Health.' <<http://www.yourmentalhealth.ie/>>

⁹³Art 3 (d) CRPD.

⁹⁴UN, (n 61) (*Guidance for Human Rights Monitors*) 22 -23.

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well as from combating discrimination, which is the primary focus of a human rights model.⁹⁵

ii. Article 8 CRPD - “Portraying persons with disabilities in a manner consistent with the purpose of the Convention”

Article 8 (2) (c) CRPD specifically states that “all organs of the media” should be **encouraged**⁹⁶ “to portray persons with disabilities in a manner consistent with the purpose of the...Convention.”⁹⁷

The purpose of the Convention “is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

Article 8 (2) (c) begs the question as to how a State party, on ratifying the Convention, adopts as per Article 8 (1) “immediate, effective and appropriate measures” to ensure the broadcast media, for instance, encourage the portrayal of persons with disabilities in a manner consistent with the purpose of the Convention?

It is interesting to note that at the draft stages of this article, Ireland pointed out that the use of the word “encourage,” with respect to the media, takes into account that states are restricted in what they can request their media to do. “States should clearly ‘encourage’ the media to follow through on their demands, but states cannot create

⁹⁵ibid 23. See e.g. *Embrace Life*, 2010, the award winning online advertising campaign to promote road safety which went viral globally. The innovative online video smashed expectations and received over a million views on YouTube in its first fortnight. Within five weeks it had reached 129 different countries, and had become the most top rated YouTube film of all time in the education category. The film has not been shown on television thus far as part of a road safety campaign; it was primarily designed for and its spread has been almost entirely through the internet. *Embrace Life* reflects its focus on life rather than the death and injury often associated with car crashes. <<http://www.youtube.com/watch?v=h-8PBx7isoM>> cf Road Safety Authority television campaign *The Faster the Speed the Bigger the Mess* <<https://www.youtube.com/watch?v=Lw8GPiiOCpI>>

⁹⁶[**emphasis added**]

⁹⁷At the drafting stages of the text of the CRPD, the World Federation of the Deaf Blind (WFDB) asserted that the portrayal of persons with disabilities in the media should be included in the awareness campaign section of this article. “Persons with Disabilities are either portrayed as victims or heroes, not simply as normal people. The WFDB stated that it is important to educate the public, through the media, about the lives, skills and contributions to society made by persons with disabilities.” See UN Enable, Annex I, Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons, Summary of Discussion of Working Group, *Daily Summary related to Draft Article 5 Promotion Of Positive Attitudes To Persons With Disabilities* Vol 3 (Prepared by Landmine Survivors Network, 13 January 2004) 7, on ‘The Role Of The Media.’ <<http://www.un.org/esa/socdev/enable/rights/wgsuma5.htm>>

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obligations of the media in this respect.”⁹⁸ This observation was made clearly on freedom of expression grounds and such issues will be discussed further in Chapter Four. However, it is submitted that despite the fact that the Convention does not place a legal obligation on State Parties to ensure their media provide positive portrayals of persons with disabilities, if lack of awareness regarding such portrayals is a determinant of discrimination then it is imperative that some guidance should be introduced for state parties, their media and disability organisations as to how such portrayals should be achieved.

The Convention, when read in isolation, gives little guidance as to how State parties are to encourage such portrayals in media content. The CRPD however, in addition to being influenced by other international human rights instruments,⁹⁹ builds upon, and works in synergy with two previous, non-legally binding, disability-specific international texts related to persons with disabilities, namely:

- The United Nations World Programme of Action Concerning Disabled Persons, 1982 (hereinafter WPA).¹⁰⁰
- The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1994 (hereinafter the Standard Rules).¹⁰¹

⁹⁸ibid

⁹⁹Stein and Lord, (n 1) 19-20. For instance, according to the Ad-Hoc Committee on Comprehensive and Integral Convention On Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Draft Art 5 (now Art 8 (1) (a) CRPD) is related to Art 42 of the Convention on the Rights of the Child, 1989 (CRC); Art 7 of the Convention on the Elimination of Racial Discrimination, 1965 (CERD); and Art 3 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW); all articles oblige parties to adopt immediate and effective measures with a view to combating prejudices and the elimination of stereotypes. In addition the notes also state that Draft Art 5 (1) (b), now Art 8 (1) (b) CRPD, is related to Art 7 CERD; Art 5 (a) and 10 (c) CEDAW. In addition Draft Art 5 (2) (a), (now Art 8 (2) (a) CRPD), is related to Art 42 CRC. See UN Enable website, <<http://www.un.org/esa/socdev/enable/rights/wghrefa5.htm>>

¹⁰⁰United Nations World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, U.N. G.A.O.R., 37th Sess., Supp. No. 51 at 185, U.N. Doc. A/RES/37/52 (1982). The WPA, adopted by the UN General Assembly in 1982, was initiated following The International Year of Disabled Persons 1981, and was a milestone in the long history of the struggle of people with disabilities against discrimination and segregation, and for equal rights. The WPA was the outcome of the co-operative work by Governments and organizations, which recognised disabled persons “first and foremost as citizens vested with all the rights and obligations that this implied.”

¹⁰¹United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, at 202, G.A.O.R., 48th Sess., Supp. No. 49 at 68, U.N. Doc. A/RES/48/96 (1993). The Standard Rules were adopted by the UN General Assembly in December 1993. The Standard Rules summarise the message of the World Programme of Action and state preconditions for equal opportunity. They also target areas of equal participation and promote implementation measures and monitoring mechanisms.

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Article 8 CRPD - International Disability Architecture – Guidance

The *Preamble* to the CRPD recognises the importance of the principles and policy guidelines contained in both the WPA and the Standard Rules in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at national, regional and international levels to further equalize opportunities for persons with disabilities. According to Stein and Lord “[T]he drawbacks to these initiatives are that they lack legally binding character, and also set forth an outmoded, medical and charity-based understanding of disability.”¹⁰² While this author concurs for the most part with the preceding statement, an analysis of both the WPA and Standard Rules as they relate to the media provides a constructive insight by comparing the commonalities and disparities in how both instruments relate to Article 8 CRPD and will be discussed the sections following.

The World Programme of Action Concerning Disabled Persons, 1982 (WPA)

The WPA was formulated and adopted as a global strategy to enhance disability prevention, rehabilitation and equalization of opportunities, which relates to full participation of persons with disabilities in social life and national development.¹⁰³ It emphasises the need to promote disability from a human rights perspective. The instrument provides an analysis of principles, concepts and definitions relating to disabilities and sets out recommendations for action at national, regional and international levels. Having regard to awareness raising¹⁰⁴ and portrayal of disability in the media, the WPA encourages development of guidelines for media in consultation with disability organizations, training in self-advocacy for persons with disabilities in dealing with the media and informed education and training within the media sector in order to improve disability portrayal.

As regards public awareness campaigns, the WPA states that:

¹⁰²Stein and Lord, (n 1) 22.

¹⁰³In order to strengthen public awareness on disability topics in 1982, the UN General Assembly adopted the WPA, and declared at the same time the United Nations Decade of Disabled Persons, 1983-1992 which was reviewed at its mid point during the Global Meeting of Experts which was held in Sweden in August 1987. The meeting recommended the importance of recognizing the rights of persons with disabilities after the Decade. Since the pace of progress during the first five years had not been as fast as initially expected, the experts agreed that the disability issues should be further addressed within a wider interdisciplinary context, namely a comprehensive well-coordinated information and evaluation campaign; establishment of a database on disability; and creation of technical cooperation programmes.

¹⁰⁴The WPA refers to public awareness campaigns as a “public information programmes.”

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“Member States should encourage a comprehensive public information programme about the rights, contributions and unmet needs of disabled persons that would reach all concerned, including the general public. In this connection, attitude change should be given special importance.”¹⁰⁵

Article 8 (1) of the CRPD echoes the WPA which targets “all concerned, including the general public” by stating that state parties “**undertake** to adopt immediate effective and appropriate measures: (a) “to raise awareness throughout society including at family level regarding persons with disabilities...”¹⁰⁶

Similarly, Article 8 of the CRPD reiterates the WPA’s objective about creating awareness about the rights and contributions of persons with disabilities.¹⁰⁷

Likewise, the WPA’s emphasis on the notion of the “special importance of attitude change” in such awareness campaigns is continued in Article 8 CRPD,¹⁰⁸ which as discussed *supra* deals with state parties’ obligations to adopt measures with the purpose of combating stereotypes, prejudices and harmful practices and designing effective public awareness campaigns “to promote positive perceptions and greater social awareness towards persons with disabilities.”

In contrast however, the WPA merely “**encourages**” member states to create public information programmes, whereas Article 8 CRPD obliges state parties to adopt immediate, effective and appropriate measures to create awareness about persons with disabilities.¹⁰⁹ This is a reflection of the non-legally and legally binding nature of both instruments respectively. It is also an indication of the fact that creating awareness about persons with disabilities has now become a crucial priority in advancing the situation of persons with disabilities since the WPA was adopted almost three decades ago.

Additionally the WPA encourages the development of public information programmes about the “unmet needs” of “disabled persons.”¹¹⁰ This is a possible reflection of the charitable and medical understanding of disability, as critiqued by

¹⁰⁵The reference to “disabled persons” in the WPA would appear to reflect outmoded language, the accepted terminology according to the Convention is ‘persons with disabilities.’ See UN, (n 61) 50. However see also Paul Harpur, ‘From Disability to ability: changing the phrasing of the debate’ (2012) 27 (3) *Disability & Society* 325, 327.

¹⁰⁶[**Emphasis added**]

¹⁰⁷See Art 8 (1) (a), Art 8 (1) (c) and Art 8 (2) (a) (i) and (ii) CRPD.

¹⁰⁸Art 8 (1) (b) and Art 8 (2) (c) (ii) CRPD.

¹⁰⁹[**Emphasis added**]

¹¹⁰UN, (n 100) 39, para 149.

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Lord and Stein, in its promotion of a negative, disempowered image of people with disabilities who are in need. This can be contrasted with Article 8 CRPD which casts disability as a political, social and environmental problem in its focus for instance of “promoting the recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and labour market.”¹¹¹

Article 8 CRPD further reflects the social model of disability as espoused in the Convention in its consideration of “important aspects of media bias against specific sections of the disabled community,”¹¹² by its obligation to combat stereotypes relating to persons with disabilities “including those based on sex and age, in all areas of life.”¹¹³ Moreover, Article 8 CRPD also includes the creation of awareness among “children from an early age” and “fostering an attitude of respect for the rights of persons with disabilities” which did not feature in the WPA.¹¹⁴

The WPA however recommends that “Guidelines” should be developed in consultation with organisations of disabled persons “to encourage the news media to give a sensitive and accurate portrayal of as well as fair representation of and reporting on, disabilities and disabled persons in radio, television, film, photography and print.”¹¹⁵ This recommendation appears to be outdated in the respect that the portrayal and representation of persons with disabilities seems to be confined to a particular genre of programming *i.e.* “news media” and “reporting.” It is submitted that this may have been for two reasons. Firstly, it was probably more contemplative of that particular era in television¹¹⁶ compared to the diversity of programming and vast content available through digital television and convergence today. Secondly, the on-air presence of persons with disabilities generally was most likely to have been confined to news stories and charity based programming.

¹¹¹Art 8 (2) (a) (iii) CRPD.

¹¹²*E.g.* Art 8 (1) (b) CRPD deals with combating “stereotypes, prejudices and harmful practices relating to persons with disabilities, **including those based on sex and age, in all areas of life.**” [**Emphasis added**]. Colin Barnes, *Disabling Imagery and the Media: An Exploration of the Principles for Media Representations of Disabled People the First in a Series of Reports* (Ryburn 1992) 4, states that “[T]he way media ignores sexual, ethnic and racial divisions within the disabled community as a whole, and generally undervalues the role of disabled women are ... important examples,” of such media bias against particular sections of the disabled community.

¹¹³Art 8 (1) (b) CRPD.

¹¹⁴Art 8 (2) (b) CRPD. The creation of awareness among children was introduced in Standard Rules *i.e.* Rule 1.8 and Rule 1.9.

¹¹⁵UN, (n 100) 39, para 148.

¹¹⁶*i.e.* 1980s.

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Following from the WPA, and “mindful of the media’s ever-expanding role in shaping society’s views of itself,” the United Nations convened a working group of specialists from around the world to formulate guidelines for the inclusion and portrayal of disabled people in the media.¹¹⁷ This group worked in Vienna and drafted guidelines that were then distributed to individuals and agencies in 77 countries for critical review. The result of the efforts culminated in a booklet being produced entitled *Improving Communications about People with Disabilities*.

The guidelines were developed to assist media personnel in improving public perception of persons with disabilities and the ramifications of life with a disability.¹¹⁸ In *Improving Communications about People with Disabilities* every attempt was made to formulate guidelines that could be adapted by individuals working in all forms of media in different countries and situations.¹¹⁹ It further indicates that the guidelines are not rules that must be rigidly adhered to in the same manner by everyone but are “instead suggestions designed to facilitate the accurate and appropriate portrayal of disabled individuals in a variety of media while still encouraging the range of creativity and individuality that is inherent in the media industry.”

A separate set of guidelines were also developed and included in the publication for organisations of and for persons with disabilities for the same purpose.¹²⁰ These guidelines highlight the fact that “such organisations which, because of their own experience, have knowledge, information and insights concerning the problems of disability, must accept a special responsibility to ensure that media present people with disabilities and the issues related to disability in ways that are constructive.”¹²¹

The overall objective of the guidelines in *Improving Communications about People with Disabilities* is to “present people with disabilities in ways that, wherever

¹¹⁷United Nations, *Improving Communications about People with Disabilities* (Recommendations of a United Nations Seminar, 8-10 June 1982, Vienna) 5. This publication is out of print and has been sourced by the author from the UN Reference Team in the UN Headquarters, New York.

¹¹⁸ibid. The Introduction to the booklet states that “several primary considerations must be appreciated in order to make full and effective use of the guidelines.”

¹¹⁹ibid

¹²⁰It further recommends that each organisation should ensure that all its media outreach, including fundraising campaigns, publications and other presentations be models in their attention to the dignity of people with disabilities.

¹²¹UN, (n 117) 18.

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possible, demonstrate their varied, positive and multidimensional participation in society.”¹²²

The guidelines aimed at the media cover a range of topics which embrace *inter alia* the inclusion of persons with disabilities in mainstream and disability specific programming; measures on portrayal and depiction of persons with disabilities, such as the avoidance of stereotypes; the use of language and terminology used to describe persons with disabilities; and multi-dimensional portrayal issues. Crucially, they also recommend the inclusion of people in all aspects of media production through the creation of opportunities and participation of persons with disabilities in the sector.¹²³

An analysis of the guidelines illustrates that they are outmoded in several respects, presenting a medical based understanding of disability. For instance, one of the guidelines states that “information should be provided to the public about prevention and treatment of impairments that lead to a disability...”¹²⁴ This clearly opposes the CRPD’s principle of “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity”, as discussed *supra*.

Another example in the publication which typifies the medical model is in the language/terminology used to describe people with intellectual disabilities as “individuals who are mentally retarded.”¹²⁵ In a final section of the booklet entitled “some comments about the media and disability” one observer asserts that “care should be exercised to ensure that not only those disabled people who are strong, athletic and physically attractive are highlighted, but also those who may be weaker, or plainer.”¹²⁶

As aforementioned, *Improving Communications about People with Disabilities* also contains guidelines “developed for organisations of and for persons with

¹²²ibid 5.

¹²³The guidelines also encourage establishing effective professional contacts to consult with the media and the facilitation of access by persons with disabilities to the media and feedback from persons with disabilities on the evaluation of media products.

¹²⁴UN, (n 117) 15.

¹²⁵ibid 12.

¹²⁶ibid 17.

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disabilities.”¹²⁷ These guidelines provide for “**effective**” measures for improving the perception of persons with disabilities in the media and are worth reciting here. They include *inter alia*:

- the promotion of the guidelines and making them widely available and encouraging organisations to communicate the same for those developing and producing media.
- the provision of monitoring mechanisms by which media presentations about persons with disabilities can be systematically and critically examined and consequently both positive and negative presentations are regularly reported to the media
- the collation and publication of models of best practice of such representations and creation of awareness for media on such issues;
- the organisation of seminars in collaboration with media representatives in order to develop and implement plans for promoting public awareness and understanding of people with disabilities, such plans to be reviewed and revised regularly.
- the development of a network to encourage and train people with disabilities to participate on all levels and in all forms of media. Include in training programmes, seminars, workshops in which persons with disabilities may develop their skills in all fields related to the media.
- ensuring that all institutions and organisations dealing the training and research in fields associated with the media incorporate disability-related subjects as a regular part of their work.
- the encouragement of the inclusion of persons with disabilities and their families as participants in media activities.¹²⁸

Whilst the WPA may be criticised for being outdated and representative of the so called ‘medical model of disability,’ it is submitted that the ideas and initiatives contained therein are valuable and provide a constructive point of reference for the possible development of analogous contemporary guidelines, despite the fact that they were developed almost three decades ago.

A review and appraisal of the WPA by the United Nations carried out in 2008,¹²⁹ outlined a number of international measures and initiatives with regard to the portrayal of persons with disabilities in broadcast media, which are currently active. Amongst these was the inclusion of activities taking place at European level in the

¹²⁷ibid 18.

¹²⁸ibid [**Emphasis added**].

¹²⁹UN General Assembly, *Fifth Quinquennial Review and Appraisal of the World Programme of Action Concerning Disabled Persons* (Report of the Secretary General, A63/183, 28 July 2008).

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form of the Council of Europe's Action Plan to promote the rights and full participation of people with Disabilities in Society 2006-2015, which will be discussed in the Chapter following.¹³⁰

UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1994¹³¹

The priorities contained in the World Programme of Action were developed into a plan with the adoption of the Standard Rules in 1994. The Standard Rules represent “a strong moral and political commitment of Governments to take action to attain equalization of opportunities for persons with disabilities.”¹³² The purpose of the rules is to ensure that all persons with disabilities may exercise the same rights and obligations as others in society. Although superseded by the CRPD, the Standard Rules are still an important advocacy tool for the disability community, and many of the principles contained in the Rules served as a basis for drafting the Convention.¹³³

A Special Rapporteur on Disability was appointed to monitor the implementation of the Rules and he/she reports to the Commission for Social Development annually. Sheikha Hissa Khalifa bin Ahmed al-Thani,¹³⁴ who was responsible for the monitoring and implementation of the Standard Rules¹³⁵ from 2003-2009, stated that Articles of the CRPD mirror the rules in the Standard Rules in terms of content and substance, dealing with the same issues that are important to the lives of persons

¹³⁰Recommendation Rec (2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, (*Adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers' Deputies*), which contains sections relating to the media and disability.

¹³¹UN, Standard Rules (n 101). The twenty-two Standard Rules serve as an instrument by which policy makers can form technical and human rights cooperation within and among States, and between international organizations and governmental agencies. The Rules include a monitoring mechanism to support their implementation. They call for the appointment of a Special Rapporteur who would establish a direct dialogue between Member States, local non-governmental organizations and other intergovernmental bodies in order to implement the Standard Rules. In 1994, Mr. Bengt Lindqvist (Sweden) was appointed as the first Special Rapporteur on Disability of the Commission for Social Development by the Secretary-General.

¹³²See UN Enable, Standard Rules, < <http://www.un.org/disabilities/default.asp?id=26>>

¹³³Lord *et. al.*, (n 22) 14.

¹³⁴Sheikha Hissa Khalifa bin Ahmed al-Thani was replaced by the appointment of the current Special Rapporteur, Shuaib Chalklen of South Africa in August 2009.

¹³⁵More recently the Special Rapporteur's mandate was extended to include the promotion and advocacy of the CRPD. The UN Economic and Social Council, in resolutions 2008/20 and 2011/27, requested the Special Rapporteur on disability to raise awareness of the Convention on the Rights of Persons with Disabilities, the Standard Rules and other disability-specific instruments.

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with disabilities.¹³⁶ According to the Rapporteur, the Standard Rules function as a detailed checklist on what needs to be done and how it should be approached in order to ensure that the rights enshrined in the Convention are safeguarded.¹³⁷

The Standard Rules assert that raising awareness at all levels of society is a pre-requisite to the implementation of all other measures necessary to achieving equalization of opportunities for persons with disabilities.¹³⁸ This includes Member States' encouragement of positive portrayals of persons with disabilities by the mass media in consultation with disability organisations.¹³⁹ The Standard Rules do not elaborate on how such portrayals should be achieved.

Resembling the World Programme of Action and the CRPD, the Standard Rules endorse the initiation and support of public information campaigns concerning persons with disabilities and disability policies, "conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation," although they do not explicitly refer to the media.¹⁴⁰

Here the notion of persons with disabilities as 'citizens' with rights is introduced even though, interestingly, the Standard Rules do not explicitly address the right to freedom of expression and opinion. However, Lord *et. al* point out that several of the Standard Rules address preconditions to equality of participation that are relevant to the enjoyment of this right, which include awareness raising "which can positively impact the attitudinal barriers faced by people with disabilities when trying to exercise their right to freedom of expression and opinion."¹⁴¹

¹³⁶UN, Report of the Special Rapporteur on Disability of the Commission for Social Development, 46th Session [E/CN.5/2007/4] 5, para 12.

¹³⁷*ibid*

¹³⁸UN Standard Rules, I. Preconditions for Equal Participation, Rule 1 Awareness-raising. Rule 1.2 provides that: "States should initiate and support information campaigns concerning persons with disabilities and disability policies, conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation."

¹³⁹Rule 1.3 UN Standard Rules.

¹⁴⁰Rule 1.2 UN Standard Rules.

¹⁴¹Lord *et al.*, (n 22) 66-67. They also point out other provisions in the Standard Rules which are interlinked with the right to freedom of expression and opinion *e.g.* Rule 4 addresses support services and the provision of assistive devices and services that could be useful to people with disabilities in enjoyment of the right; Rule 5 addresses accessibility, including access to information and communication; Rule 10 notes the need to ensure accessibility of literature, films, and theatre for people with disabilities to fully enjoy culture, which echoes similar provisions in the CRPD.

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The Standard Rules further advocate that awareness-raising should be an important part of the education of children with disabilities.¹⁴²

A Global Survey on Government Action on the Implementation of the Standard Rules was carried out in 2006 for the Office of the UN Special Rapporteur.¹⁴³ The objective of the survey, which was conducted by a questionnaire, was to assess to what extent UN Member States Governments' commitment to the Standard Rules has resulted in actual implementation. In other words, the survey sought to understand how commitment to each one of the rules had been translated into real action.¹⁴⁴

The survey found that "Awareness Raising is an area still lacking in sufficient measures to achieve the desired goals. Without governmental, societal and individual awareness of the needs and rights of persons with disabilities, there could be little improvement made on the ground with regard to all the other issues."¹⁴⁵

In addition, it stated that according to the Standard Rules, raising awareness at all levels of society is a prerequisite to the implementation of all other measures necessary to achieving equalization of opportunities. In the absence of awareness of the needs and rights of persons with disabilities there can be no real change in their situation.¹⁴⁶

In order to fully achieve awareness-raising as stated by Rule 1, the survey asserted that nine measures needed to be undertaken, about which the respondents were asked, which included "drafting guidelines for use by the media."¹⁴⁷

¹⁴²Rule 1.8. See also UN Enable, (n 97), which indicates that at draft stages of the CRPD, Ireland highlighted the need for measures sensitising children at an early age to disability awareness as crucial, as attitudes learned by children are pursued into an adult life.

¹⁴³*Global Survey on Government Action on the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, (Report by the South-North Centre for Dialogue & Development Amman, Jordan, for the Office of the UN Special Rapporteur on Disabilities, 2006). <<http://www.un.org/disabilities/default.asp?navid=8&pid=183>>

¹⁴⁴ibid 11. Additionally two organisations for persons with disabilities in each of the Member States were identified as respondents in the survey. The purpose of this was to diversify the sources of information within the same country and the hope of the Special Rapporteur in administering the survey in this way was to initiate a debate between governments and organisations of persons with disabilities.

¹⁴⁵ibid 13.

¹⁴⁶ibid 25.

¹⁴⁷ibid. Table T1-Rule 1.

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In this regard only 35 out of 114 countries stated that they had drafted guidelines for use by media in raising awareness, while 79 out of the 114 countries stated that they had failed to draft guidelines.¹⁴⁸ Additionally, the survey concluded that awareness raising campaigns remained limited to attitudes and behaviour towards persons with disabilities without exploring the issues, rights, potentials and contributions inherent in the concept of equalization.¹⁴⁹ Consequently, this explained why persons with disabilities, for the most part, remained marginalised in important areas of education, employment, and other aspects of full participation in society.¹⁵⁰

The global survey, however, is deficient in that it yielded results on only 60% of the countries examined, with no information on the remaining 40% of countries.¹⁵¹ By its own disclosure, “the responses cannot be considered comprehensive by any means... Additionally there are inescapable issues with bias, over or under-reporting for some of the countries.”¹⁵² Accordingly, the survey’s value lies in the “responses and the analysis which “constitute a unique framework on which to base further investigation.”¹⁵³

In contrast the CRPD, unlike the Standard Rules and the WPA, is a legally binding instrument which, through a series of mechanisms, places mandatory obligations on member states with respect to monitoring and reporting on the Convention’s implementation, thereby ensuring formal accountability concerning member states’ responsibilities towards persons with disabilities. These procedures will be examined and discussed *infra*.

The Standard Rules on the Equalization of Opportunity for Persons with Disabilities was the first international instrument to recognise that the rights of persons with disabilities are greatly affected by the legal, political, social, and physical environment.¹⁵⁴ It is submitted that the value in the Standard Rules, regarding raising

¹⁴⁸ibid. These nine measures are: adopting policies; passing legislations [*sic*]; adopting programmes; drafting guidelines to be used by the media; training personnel; disseminating materials in the form of brochures, posters...; introducing awareness raising into the school curriculum; educating the public; consulting and cooperating with organisations of persons with disabilities.

¹⁴⁹ibid 26.

¹⁵⁰ibid

¹⁵¹ibid 13.

¹⁵²ibid 19.

¹⁵³ibid

¹⁵⁴Lord *et al.*, (n 22) 14.

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awareness about persons with disabilities, their rights and subsequent portrayal in broadcast media, lies in its emphasis that awareness raising is a pre-requisite for all other actions and that much is dependent on it if change is to be realised. Its import also lies in its principal aim, to promote the achievement of full participation and equalization of opportunities through raising the level of awareness concerning the rights, potential and contributions of persons with disabilities. Effectuating such awareness in this regard leads to increased self-reliance and empowerment, which, is indispensable in assisting persons with disabilities to take advantage of the opportunities available to them.

Implementation and Monitoring of the Convention - Overview

Like all other legally-binding international human rights treaties, the CRPD has a monitoring component. The procedure outlined in the Convention promotes constructive dialogue with States to ensure that the Convention's provisions are implemented effectively. The CRPD includes both national and international monitoring mechanisms. At national level, Article 33 identifies a number of mechanisms that are significant for the implementation and monitoring of the Convention, which have been described as "especially valuable"¹⁵⁵ and the "key to ensuring that the convention can become an engine of law reform."¹⁵⁶

First, it requires States to designate one or more focal points within government for matters relating to implementation.¹⁵⁷ Second, States have to give due consideration to the establishment or designation of a coordination mechanism to facilitate actions across sectors and at different levels.¹⁵⁸ Gerard Quinn describes this second mechanism as an innovation for many countries which, if deployed correctly, should provide a practical corrective to the propensity in all Governments to fragment disability policy depending on departmental priorities (the so called silo effect).¹⁵⁹

¹⁵⁵Gerard Quinn, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour' in OM Arnardottir and G Quinn, (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 254.

¹⁵⁶Gerard Quinn, 'The CRPD as an Engine of Domestic Law Reform' (Presentation at the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, UN Headquarters New York City, 31 October 2008) 4.

¹⁵⁷*E.g.* in the United Kingdom, the Office for Disability Issues (ODI), is the focal point required by Art 33 (1) CRPD for co-ordinating the work of the Convention.

¹⁵⁸Art 33 (1) CRPD.

¹⁵⁹Quinn, (n 155) 254. *See also* Gerard Quinn, 'Implementing the UN Convention on the Rights of Persons with Disabilities - The Institutional Architecture for Change' (Keynote Address, Jacobus

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Third, state parties are required to set up a national monitoring mechanism *independent* of government, which usually takes the form of an independent human rights institution.¹⁶⁰ According to Quinn, there is no need for national human rights institutions to wait until ratification by their respective countries to step up to their new responsibilities and begin seriously championing the rights of persons with disabilities.¹⁶¹ This is due to the fact that the Convention confirms general rights in the context of disability rather than creates new rights and since relevant general obligations already exist, then there is no reason why national Human Rights Institutions should not already be engaged.¹⁶² The duty of these institutions will be to *promote*, to *protect* and to *monitor* the implementation of the Convention.¹⁶³ Quinn states that the language here is somewhat open-ended and is an example of constructive ambiguity to bring along Governments that do not see accountability in quite the same positive light.¹⁶⁴ He states, however, that the intent of this mechanism is clear. The intent is to harness an independent body in the process of ensuring the norms are real and not rhetorical.¹⁶⁵

tenBroek Disability Law Symposium NFB Headquarters' Baltimore, Maryland, USA, 17 April 2009) 11, stating that Art 33.1 CRPD "in its demand for the existence of a **Focal Point** as well as a **Coordination mechanism** within government gets at and seeks to unravel the silo phenomenon whereby most governments in the world disperse responsibility for disability across many departments and even within departments. The predictable result is the 'tragedy of the commons' whereby no entity takes lead responsibility and the chaos that ensues creates massive cracks into which ordinary people fall." [Emphasis added]

¹⁶⁰Art 33(2) CRPD. See Gerard Quinn, 'Added value of the UN Convention on the Rights of Persons with Disabilities' (Presentation at the EECL Seminar in Drammen, Norway, 12 September 2008) 5. See also Gerard Quinn, 'The Importance of National Monitoring Mechanisms under the United Nations Convention on the Rights of Persons with Disabilities' (Address to the New Zealand Parliament Wellington, New Zealand, 19 February 2009) 5-6, where he states that the vanguard role of these Human Rights commissions is not just due to their undisputed independence but also because of the scope of their remit which flows well beyond the traditional field of equality and non-discrimination. Moreover, they appear ideally suited since "it is hardwired into their DNA to keep a window open to international law in order to constantly frame the relevant domestic question in terms of the contours of international law."

¹⁶¹Quinn, (n 156) 7 (NYC).

¹⁶²ibid. In the United Kingdom, for example, the four equality and human rights commissions have been designated as the independent monitoring and reporting frameworks required by Article 33.2. They are The Equality and Human Rights Commission, the Northern Ireland Human Rights Commission, the Equality Commission Northern Ireland and the Scottish Human Rights Commission. The Commissions work together on the Convention for the UK as a whole, as well as on their national remits for England and Wales, Northern Ireland and Scotland respectively.

¹⁶³Art 33 (2) CRPD.

¹⁶⁴Quinn, (n 160) 5 (Norway).

¹⁶⁵Quinn, (n 159) 12 (Baltimore US).

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Article 33(3) CRPD requires that the monitoring by the appropriate independent body is to be carried out in active consultation with persons with disabilities and provides that:

“The full participation of civil society, in particular persons with disabilities and their representative organizations are essential in the national monitoring and implementation process.”

This recognises the crucial role and involvement of persons with disabilities in society and echoes the obligation in Article 4 of the Convention which requires States parties to “closely consult with” and “actively involve” persons with disabilities in decision making processes related to them.

The United Nations Guidance for Human Rights Monitors states that Article 33 (3) has implications in terms of both process and substance. In terms of process, persons with disabilities must be involved in monitoring activities, for example by having persons with disabilities among monitors. By way of substance, the voices and experiences of persons with disabilities must be central in monitoring reports by state parties, which will be discussed *infra*, in recognition of the fact that persons with disabilities are experts on their own situation.¹⁶⁶

At international level, monitoring is achieved via the Committee on the Rights of Persons with Disabilities and the Conference of States Parties.¹⁶⁷ The Committee on the Rights of Persons with Disabilities is the body of independent experts which monitors implementation of the Convention by the States Parties.¹⁶⁸ All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented.¹⁶⁹ Each state party is obliged to submit an initial comprehensive

¹⁶⁶UN, (n 14) 33-34.

¹⁶⁷Art 34 CRPD deals with The Committee on the Rights of Persons with Disabilities. Art 40 CRPD deals with the Conference of State Parties. The Conference of State parties is made up of signatories to the Convention and has the authority to consider any matter relating to the implementation of the Convention. The CRPD does not elaborate on the modalities or functions of the Conference of State parties; however Quinn, (n 155) 253 -254, states that it is anticipated that this body will become a fruitful avenue for the sharing of information as well as know-how among the States parties. Since 2008, the Conference of State Parties have held seven sessions with the latest having taken place in United Nations Headquarters in June 2014 which included thematic discussions on incorporating the CRPD provisions into the post-2015 development agenda; Youth with disabilities; and National implementation and monitoring.< <http://www.un.org/disabilities/default.asp?id=1535>>

¹⁶⁸The Committee meets in Geneva and normally hold two sessions per year. To date, the Commission has held thirteen sessions. *See* Committee on the Rights of Persons with Disabilities, <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>>

¹⁶⁹Art 35 CRPD. By way of note, Art 1(1) of the Optional Protocol to the Convention gives the Committee competence to examine individual complaints or group complaints with regard to alleged

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report on measures taken and progress achieved to implement the Convention within two years of accepting the Convention¹⁷⁰ and thereafter every four years, with further reports if the Committee requests them.¹⁷¹ The Committee has issued guidelines on the reports to be submitted by states parties of the Convention, which will be discussed *infra*.¹⁷²

By virtue of Article 36 (1) CRPD, the Committee examines each report and is sanctioned to make “suggestions” and “general recommendations” on the reports that it considers appropriate and shall forward these to the State Party concerned.¹⁷³ The purpose of the periodic reporting is to provide a way of promoting States’ compliance with their obligations under the Convention, and a means of allowing the Government, national human rights institutions, and civil society “to appraise the level of respect for the human rights of persons with disabilities in the country.”¹⁷⁴

To date, seventy-nine countries and the European Union have issued their initial comprehensive reports on measures taken and progress achieved to implement the Convention.¹⁷⁵ At the time of writing, the Committee have issued a list of issues

violations of the Convention by States parties to the Protocol. These complaints can be submitted by or on behalf of individuals or groups. After examining a complaint, the Committee formulates its views and recommendations, if any, on the complaint (“communication”) and sends them to the State in question. Those views and recommendations appear in the Committee’s public report to the General Assembly. *See* for further discussion on the Optional Protocol; UN, (n 14) 28-37; Quinn, (n 160) 6.

¹⁷⁰Art 35(1) CRPD. The purpose of reporting guidelines is to advise States Parties on the form and content of their reports, so as to facilitate the preparation of reports and ensure that these are comprehensive and presented in a uniform manner by States Parties. Compliance with the reporting guidelines will also reduce the need for the Committee to request further information under article 36 and under rule 36, paragraph 3, of its rules of procedure.

¹⁷¹Art 35(2) CRPD.

¹⁷²Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities*, (Second session, Geneva, 19–23 October 2009, UN.Doc. CRPD/C/2/3). <<http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-2-3.pdf>>

¹⁷³Art 36 (1) CRPD. By virtue of Art 36 (5) CRPD, the Committee may also transmit the reports to the Specialized Agencies and other funds within the UN System in order to address a request or indicate a need for further technical assistance or advice. *See* UN, (n 14) 29- 30, which states that there are many UN agencies whose mandates include activities relevant to the rights of persons with disabilities, such as UNESCO, International Labour Organisations, World Health Organisation, United Nations Development Programme (UNDP) *etc.* “By engaging these and other organisations, States and the Committee can help ensure that periodic reporting leads to sustained improvement in the realization of the rights of persons with disabilities.”

¹⁷⁴UN, (n 14) 28.

¹⁷⁵The State Parties Initial Reports date in ranges from 2010 up to January 2015.

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29>

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concerning the initial reports to thirty-one countries and the EU.¹⁷⁶ Twenty-two countries have replied to those lists of issues and the Committee have made concluding observations on twenty-seven countries.¹⁷⁷ While a detailed analysis of all these reports is outside the confines of this thesis, a summary examination of a number of these reports as they relate to Article 8 CRPD will be discussed *infra*.

Article 8 CRPD – Implementation

As aforementioned, the Committee on the Rights of Persons with Disabilities (hereinafter “the Committee”) is the body of independent experts which monitors implementation of the Convention by the States Parties. Each state party to the Convention must submit to the Committee an initial comprehensive report on measures taken to implement it. One of the purposes of periodic reporting before the Committee is that it raises awareness about the Convention and the situation of the rights of persons with disabilities in a country.

According to the guidelines on the content of reports, the first report must be “comprehensive”; in other words, it must cover the implementation of **all** the provisions of the Convention.¹⁷⁸

The Committee’s guidelines on Article 8 CRPD state that Article 8 CRPD “establishes the obligation of States Parties to conduct effective awareness raising policies to promote a positive image of persons with disabilities.”¹⁷⁹

States Parties should report on:

- Public-awareness campaigns directed to general society, within the education system and actions undertaken through mainstream media.
- Actions undertaken to raise awareness and inform persons with disabilities and other parts of society on the Convention and the rights it includes.”¹⁸⁰

A number of observations can be made in relation to the Committee’s guidelines. Firstly, it states that the initial report should contain “information on the measures

¹⁷⁶The Committee’s List of Issues on the initial reports to Countries date from 2010 up to April 2015 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=18>

¹⁷⁷<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5>

¹⁷⁸Committee on the Rights of Persons with Disabilities, (n 172) 1, paras 2, and 4, para A. 4.2.

¹⁷⁹*ibid* 8.

¹⁸⁰*ibid*

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State Parties take to raise awareness of persons with disabilities, to foster respect for their rights and dignity, their capabilities and contributions, and to combat stereotypes, and prejudices against them.”¹⁸¹ It then goes on to specifically state that State Parties should report on “public awareness campaigns directed to general society, within the education system and actions undertaken through mainstream media.”¹⁸² This guideline, it is submitted, is vague in its request in that it may be open to two different interpretations.

The first interpretation may be a more restricted one in that it appears to request that State parties report only on public awareness campaigns directed to general society, those within the education system¹⁸³ and “actions undertaken through mainstream media,” meaning that State parties should report on public awareness campaigns undertaken in the press, television, radio, billboards public places *etc.*

The second interpretation may be broader in application in that it requests State Parties to report on public awareness campaigns again directed to general society and within the education system and that “actions undertaken through mainstream media” is not confined to public awareness campaigns taken in mainstream media but involves other measures and activities, for example actions undertaken to encourage the media to portray people with disabilities in a manner consistent with the purpose of the Convention, such as through the development of guidelines for media in portraying people with disabilities, and training persons with disabilities and media organisations on those issues.¹⁸⁴

It is submitted that if the Committee’s guidelines on reporting are interpreted in the narrow sense by confining their application to reporting only on public awareness campaigns then this is insufficient, as public awareness campaigns will not of themselves fulfil the obligations of the CRPD and raise awareness throughout society about persons with disabilities and their rights.

¹⁸¹ *ibid*

¹⁸² *ibid*

¹⁸³ *E.g.* the reference to education here is clearly reflective of Article 8 (2)(b) CRPD concerning measures to raise awareness including by “[F]ostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities.”

¹⁸⁴ Art 8 (2) (c) CRPD.

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If however the Committee's guidelines are interpreted in the broader sense to mean actions undertaken by mainstream media, then this requires State Parties to report on all measures undertaken through media, or actions which have been undertaken and developed by media organisations, or regulators for media practitioners and disability organisations. In order to get a clear picture of the situation of persons with disabilities in the media and the attitudes towards persons with disabilities in the media, it is submitted that this broader interpretation is the one State Parties should be requested to report on and will be discussed *infra*.

It is submitted, however, that in whatever way the Committee's guidelines are construed, they need to be revised for the reasons outlined. An examination of the initial reports submitted to and considered by the Committee, subsequent lists of issues and the replies to those list of issues by State Parties and concluding observations by the Committee gives a clearer indication of why the re-issuing or amending of those guidelines for state parties on reporting of Article 8 CRPD is necessary. The section following outlines what State Parties are reporting under Article 8 CRPD in order to identify if common issues are emerging. In addition it provides a synopsis of the approach of the Committee in addressing the issues regarding reporting under Article 8 and commonalities and /or disparities in their approach. It also considers areas/issues identified in the reports that may necessitate accentuation by the Committee and/or where State Parties can improve in their reporting.

Examination of the Initial Reports submitted to and considered by the Committee on the Rights of Persons with Disabilities

As stated, between November 2010 to April 2015, seventy-nine countries and the European Union submitted their initial reports to the CRPD Committee. An examination of those reports by this author reveals the types of awareness measures adopted. The object of the examination is to identify the State Parties' understanding and interpretation of the reporting guidelines and to ascertain whether the focus of the reports centred more on public awareness campaigns rather than measures undertaken through media, particularly broadcast media. The analysis reveals that all State Parties have detailed some kind of awareness measure(s). In general, the extent of those measures is broad and can be divided into a number of categories including:

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Public Awareness Campaigns;¹⁸⁵ Action plans encompassing awareness actions;¹⁸⁶ Actions and promotional activities at national level corresponding to international and regional (European) disability days; round table discussions, seminars and awareness raising workshops on the CRPD and measures specific to media.

Public Awareness Campaigns / National Action Plans/ Disability Days

In terms of public awareness campaigns, State Parties reported on campaigns carried out in different types of media (including radio, television, print, billboard and social media). Generally speaking such campaigns embraced different themes such as raising awareness in society about the principle of equality of rights and promoting the integration of persons with disabilities in different aspects of civil, professional and family life (Italy and China)¹⁸⁷; other campaigns were directed at changing societal attitudes and behaviours that limit opportunities for disabled people. In addition a number of countries detailed plans for future campaigns and future funding for such campaigns which incorporate themes of disability and employment, education and accessibility (Argentina and China)¹⁸⁸. Other campaigns focused on specific disabilities such as mental illness.

Some countries reported awareness initiatives which had been carried out or planned through national action plans (Germany).¹⁸⁹ Poland, for example, detailed actions in its National Action Programme for Equal Treatment 2013-2016 aimed at changing the discriminatory media image of disabled people by holding a debate concerning such representations in media.¹⁹⁰

A number of countries described actions and different forms of promotional activities carried out at national level which, by and large, coincided with international days associated with persons with disabilities. Such actions embraced topics incorporating children with disabilities and international days celebrating different disabilities for instance, international day of the deaf, world day in defence of linguistic identity, World Down Syndrome Day etc.

¹⁸⁵ Austria (CRPD/C/AUT/1), New Zealand (CRPD/C/NZ/1), China (CRPD/C/ CHN /1), Brazil (CRPD/C/BRA/1), Italy (CRPD/C/ITA/1) and the European Union (CRPD/C/EU/1).

¹⁸⁶ Poland (CRPD/C/POL/1) and the European Union (CRPD/C/EU/1).

¹⁸⁷ Italy (CRPD/C/ITA/1) 6 §14 and China (CRPD/C/CHN/1).

¹⁸⁸ Argentina (CRPD/C/ARG/1) 16 §§88-92.

¹⁸⁹ Germany (CRPD/C/DEU/1).

¹⁹⁰ Poland (CRPD/C/POL/1) 10 §60.

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Awareness Measures Specific to Broadcast Media

The reports identified a number of measures which explicitly dealt with broadcast media. The scope of measures in this regard was broad albeit the overall number of individual countries reporting on such measures was limited. In a small number of State Parties' reports, for example, legal obligations stemming from broadcasting and/or disability law on broadcasters to promote diversity and non-discrimination were detailed. In terms of broadcast content expressly dealing with disabilities and/or persons with disabilities, radio and television programmes were specified. Radio and television programmes broadcast (both daily and/ or weekly) were described in many different formats from magazine type programming, documentary, talk shows, to TV and radio series, educational and news programmes. A variety of disability topics were specified in relation to the content of such programmes which incorporated children with disabilities, the social inclusion of persons with disabilities, current, cultural and sports events involving disabled people, compliance with disability regulations, adaptations and obstacles to disabilities and positive life stories about persons with disabilities. Some programmes were described as targeting disabled audiences while others were aimed at wider audiences. In some cases such programmes were broadcast by state owned broadcasters and/or associated government departments, particularly in less developed countries; while public service broadcasters were responsible for broadcasting other programmes. The reports of Slovenia, Mongolia and Slovakia detailed instances of broadcast content produced by persons with disabilities in radio and television.¹⁹¹ The Ministry of Social Welfare and Labour in Mongolia, for instance, made an agreement with a studio operated by persons with disabilities to produce a series of TV programmes which were broadcast on Mongolian TV (MNTV) and five other commercial channels.¹⁹²

¹⁹¹Slovenia (CRPD /C/ SVN/1) 13 §25, detailed an example of good practice in the National Council of Disabled People's Organisations of Slovenia and the Association of the Disabled – Slovenia Forum (NSIOS) "...weekly shows broadcast by local radio stations across Slovenia." Mongolia (CRPD/C/MNG/1) 22 §66. Mongolia also reported on 'FM Radio for the Blind' under Article 27 CRPD of their initial report. See also Slovakia (CRPD/C/SVK/1) 11 §42, reported a heightened awareness and more positive attitudes towards persons with hearing impairments through *inter alia* appearances in the mass media in particular "... in Television club for persons with hearing disability broadcast by Radio and Television Slovakia."

¹⁹²Mongolia (CRPD/C/MNG/1) 22 §66.

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El Salvador reported an awareness raising workshop on the CRPD conducted at five universities for students of journalism and communications and Serbia detailed a round table discussion that focused on reporting on the implementation of the CRPD which included *inter alia* media representatives.¹⁹³ Having regard to training initiatives for journalists and media representatives, Mauritius reported training for media representatives and college students on disability issues in the production of programmes, while Moldova's report stated that it had issued a guide book for journalists to communicate with and report on persons with intellectual disabilities.¹⁹⁴ Two countries reported on journalist awards for covering disability issues in broadcast and other media (Czech Republic and Armenia).

Other Observations on Initial Reports

It was observed that several countries' reports under Article 8 CRPD were very vague¹⁹⁵ and at times perplexing. Paraguay for instance described a public health campaign about road safety and the use of helmets entitled "Use your head, use your helmet", the object of the campaign being the *prevention* of disability.¹⁹⁶ In its initial report to the Committee on Article 8 CRPD, Tunisia reported that "with a view to combating stereotypes, discrimination and mistreatment on the basis of disability, as well as on the basis of gender and age, Tunisia has conducted sensitization and awareness campaigns on disability through radio, television and print media. National and regional broadcasters air 20 spots per week on this issue."¹⁹⁷ However, it is unclear from the report whether this applies to actual programming or the adaptation of media and communications to the needs of persons with disabilities in order to facilitate their use by persons with disabilities, *e.g.* by introducing subtitling and sign language thereby enabling such persons to access and receive

¹⁹³El Salvador (CRPD/C/SLV/1) 14 §50.

¹⁹⁴Mauritius (CRPD/C/MUS/1) 16-17, Republic of Moldova (CRPD/C/MDA/1) 10 §49. Spain's initial report on Art 8 CRPD (CRPD/C/ESP/1) 8 §38, for instance, also mentions a "Style Guide on Disability for Media Professionals" which has been published and which is "designed to disseminate knowledge of the terminology used when referring to persons with disabilities and to update it and render it more positive, with a view to achieving standardization, in the light of the rapid changes which have taken place within that group of persons in recent years."

¹⁹⁵Denmark (CRPD/C/DNK/1), Germany (CRPD/C/DEU/1), Costa Rica (CRPD/C/CRI/1), Paraguay (CRPD/C/PRY/1) and Turkmenistan (CRPD/C/TKM/1).

¹⁹⁶Paraguay (CRPD/C/PRY/1) 6 §20.

¹⁹⁷Committee on the Rights of Persons with Disabilities, *Implementation of the International Convention on the Rights of Persons with Disabilities: Initial report submitted by States parties under article 35 of the Covenant – Tunisia* (1 July 2010, UN Doc. CRPD/C/TUN1) 17, para 69.

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information.¹⁹⁸ In addition Tunisia's report on Article 8 CRPD states that there have also been a number of forums and seminars on the capacities of persons with disabilities; however it is not made clear by the report whether these forums and seminars were directed toward media personnel.¹⁹⁹

Other countries reported awareness raising measures under different articles of the CRPD. Azerbaijan, for example, reported under Article 29 regarding special programmes about the life of disabled children with impaired health.²⁰⁰ In addition it stated that the government provided technical and financial assistance to press associations of persons with disabilities.

A few countries criticised the lack of initiatives regarding awareness raising. Gabon, for instance, highlighted that certain sections of society such as employers had not yet been targeted through awareness raising campaigns and that no literature had been thus far produced on reasonable accommodation for persons with disabilities.²⁰¹ The South African report stated that evidence on awareness campaigns of government institutions, independent institutions promoting democracy, the Public Service Commission and Commission on Gender and Equality as well as organisations of and for persons with disabilities submitted during the consultative process of South Africa's report was "generally anecdotal, inconsistent and unmeasurable".²⁰²

While the implementation and monitoring of the Convention are still in the early stages, it is submitted, on the basis of the examination of the reports to the Committee, discussed above, that guidelines on reporting of Article 8 CRPD should be revised or amended and should request State Parties to submit information which is not just confined to public awareness campaigns but any measures which go towards encouraging, increasing or improving representations of disability in media, particularly broadcast media due to its powerful attributes, as discussed *supra*.

The Committee's guidelines on State Parties' initial reports require that:

¹⁹⁸ *ibid* paras 136-141.

¹⁹⁹ *ibid*

²⁰⁰ Azerbaijan (CRPD/C/AZE/1) 43 §306.

²⁰¹ Gabon (CRPD/C/GAB/1) 14 §53.

²⁰² South Africa (CRPD/C/ZAF/1) 19 §60.

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“A State Party should deal specifically with every article of the Convention; in addition to information contained in the common core document, a detailed analysis of the impact of legal norms on persons with disabilities’ factual situation and the practical availability, implementation and effect of remedies for violations of provisions of the Convention paying special attention to particularly vulnerable population groups such as women and children should be provided and explained in the Convention-specific document.”²⁰³

It further states that the initial report “should outline any distinctions, exclusions or restrictions made on the basis of disability, even of a temporary nature, imposed by law, practice or tradition, or in any other manner on the persons with disabilities’ enjoyment of each provision of the Convention.”²⁰⁴ In addition it provides that the initial report should contain sufficient quotations from, or summaries of, the relevant constitutional, legislative, judicial and other texts which guarantee and provide remedies in relation to the rights and provisions of the Convention, in particular when those are not attached to the report or are not available in one of the working languages of the United Nations.²⁰⁵

Having regard to the media, and bearing in mind the reporting obligations outlined above, it is submitted that State Parties’ initial reports, as regards Article 8 CRPD and awareness raising, should report on *all* measures in the media which may create awareness and influence disability representation in media content. Such measures should include those which establish the constitutional, legal and administrative framework of the implementation of the Convention. For instance, Constitutional provisions relating to media and freedom of expression should be reported.²⁰⁶ In addition, broadcasting legislation pertaining to *inter alia* content and non-discrimination should also be documented.²⁰⁷ The Communications Act 2003, in the UK for example contains a number of provisions²⁰⁸ relating to persons with disabilities, such as an obligation on the regulator Ofcom to take steps to ensure the

²⁰³Committee on the Rights of Persons with Disabilities, (n 172) 4, A. 4.2.

²⁰⁴*ibid* A.4.3.

²⁰⁵*ibid* A.4.4.

²⁰⁶*E.g.* Art 40.6.1.i Bunreacht na hEireann on the right to freedom of expression.

²⁰⁷*E.g.* s. 25 (2) (g) Broadcasting Act 2009, requires the Broadcasting Authority of Ireland to “provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities,...”

²⁰⁸Under s.3 (4) Communications Act, Ofcom has legal obligations to promote equality of opportunity for disabled citizens and consumers.

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equalisation of opportunities in the employment and training of disabled people in television and radio.²⁰⁹

Likewise State Parties' initial reports should contain any regulatory measures adopted by broadcasting regulators such as codes of programming standards, which deal with disability. In Ireland, the BAI, Code of Programme Standards 2015 which applies to all broadcasters,²¹⁰ provides that the manner in which persons and groups in society are represented shall be "appropriate and justifiable and shall not prejudice respect for human dignity."²¹¹ Principle 5 of the Code provides that programme material shall not "stigmatise, support or condone discrimination or incite hatred against persons or groups in society" in particular on the basis of *inter alia* disability.²¹² In fulfilment of this Principle, the Code states that broadcasters shall only emphasise disability when such references are justified, having regard to the principles of the Code, in particular the importance of context.²¹³ Broadcasters must also recognise that the use of terms, references and images that could be considered offensive to persons and groups in society and associated colloquial terms of abuse aimed at any group requires editorial justification for their inclusion in programming.²¹⁴

State Parties should also report on any policies and programmes adopted to implement each of the Convention's provisions. Public awareness campaigns and/or any other initiatives adopted by media organisations, disability organisations, and educational institutions, for instance, should be documented. These could include *inter alia* training seminars for media and persons with disabilities; work and employment opportunities for persons with disabilities in media; disability portrayal and representation monitoring by broadcasters; research into public attitudes towards

²⁰⁹s. 27 Communications Act 2003. Also, by virtue of s.337 of the Communications Act 2003, Ofcom requires broadcast licence holders to make arrangements for the equalisation of opportunity and training for disabled people.

²¹⁰The Code applies to public, commercial and community broadcasters.

²¹¹BAI Code of Programme Standards 2015, Principle 5 which deals with 'Respect for Persons and Groups in Society'. The Code came into effect on 1st March 2015 and replaces the BCI Code of Programme Standards 2007. s.42 (1) of the Broadcasting Act 2009 requires the BAI to prepare and revise codes governing standards to be observed by broadcasters.

²¹²*ibid*

²¹³*ibid*

²¹⁴*ibid*

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persons with disabilities in media and educational modules which include disability such as in journalism and media courses.

State Parties should also identify any progress made in the realisation of the rights of persons with disabilities as a result of the ratification and implementation of the Convention.²¹⁵ Any research, information, and/or statistics which have been undertaken in relation to media and disability should be recorded.²¹⁶

It is asserted here that a model of best practice in this regard is the research which was commissioned by Ireland's National Disability Authority and the Broadcasting Commission of Ireland and published in 2009, with an update in 2013. The research entitled *The Representation of People with Disabilities in Irish Broadcast Media: A Review of Other Jurisdictions* centres on the law, policy and practice in a number of countries including Australia, New Zealand, the United Kingdom and other European countries.²¹⁷ The study takes the form of country reports whereby the relevant disability legislation and broadcasting legislation as it pertains to disability is outlined. In addition the role of the broadcasting regulator is briefly explained and the main public service and private broadcasters in television and radio are identified. The provisions of relevant codes and guidelines are then examined in detail. Other initiatives taken by the regulator, broadcasters, broadcast representative associations or disability organisations or networks are then considered, focusing on how they are implemented and subsequently monitored, assessed and reviewed to determine their effectiveness.

It is submitted that this type of examination is imperative in analysing disability in media content and is not just confined to how people with disabilities are depicted in public awareness campaigns but also what provisions protect them and their rights in media content. This report provides a framework within which all countries or State

²¹⁵UN, (n 14) 27.

²¹⁶*E.g.* research into the effectiveness of public awareness campaigns regarding disability.

²¹⁷BAI/ NDA, *The Representation of People with Disabilities in Irish Broadcast Media: A Review of Other Jurisdictions* (Report Commissioned by the BAI and NDA, 2009). This study formed one part of three research projects commissioned on the 'Representation and Portrayal of People with Disabilities in Irish Broadcasting'. The second and third projects involved: a survey of Irish people's attitudes to the representation of people with disabilities in Ireland and a content and discourse analysis of Irish Broadcasting. <<http://www.bai.ie/index.php/representation-of-people-with-disabilities-in-irish-broadcast-media/>>

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parties to the CRPD and their monitoring bodies can report on media awareness of disability in a precise manner taking all relevant factors into consideration.

The effectiveness of the model outlined in the study is demonstrated by comparing the research findings with, for example, the United Kingdom's initial report to the Committee on the Rights of Persons with Disabilities submitted in 2011. The United Kingdom's initial report was prepared by the Office for Disability Issues (ODI), which reports to the Minister for Disabled People and works closely with the policy department and devolved governments.²¹⁸ As regards Article 8 CRPD and how it relates to the media, the report states that in the UK the "Convention is reinforcing a wide range of existing activities to raise awareness of disability issues; and promote positive images of disabled people, the use of appropriate language and combat stereotypes."²¹⁹ Apart from a reference to a Scottish Government Campaign (*See Me*) which included advertisements on television in order to tackle the stigma and discrimination of mental health conditions and change public attitudes and behaviour, in particular employers' attitudes toward such conditions, the UK report states that the Government "is" using the unique platform presented by the 2012 Olympic and Paralympics Games to support a number of initiatives "which are aimed at transforming the perception of disabled people in society,"²²⁰ albeit it does not specifically mention any types of media or give examples as to how such initiatives would achieve their goals. In contrast, the study commissioned by the BCI/NDA of Ireland published in 2009 and updated in 2013 and further research by this author, revealed that the representation of persons with disabilities in the UK's broadcast media at the time of the UK's initial report to the Committee was very much a prevalent and evolving topic.²²¹ The BCI/NDA report(s) reveal that disability equality obligations embedded in both disability and broadcasting legislation have

²¹⁸ODI is the UK Government's designated focal point within government for matters relating to implementation of the CRPD as required by Article 33 CRPD. The Office of Disability Issues website contains a section on "Inclusive Communications." It includes a section on "Representation" which involves representing disabled people positively but is confined to government communications. This however was not referred to in the UK's initial report.

²¹⁹United Kingdom of Great Britain and Northern Ireland, *Initial Report on UN Convention on the Rights of Persons with Disabilities* (CRPD/C/GBR/1) 15, para 78.

²²⁰*ibid* para 79.

²²¹BCI/NDA, (n 217) 168.

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compelled the UK's broadcasting sector (both public and private) to adopt a series of extensive measures aimed at advancing such representation both on and off air.²²²

Channel 4,²²³ for example, monitors disability representation in programmes and on production teams and *inter alia* funds a number of initiatives aimed at increasing the employment of disabled people in production.²²⁴

Likewise in 2011, the BBC, in addition to publishing its Diversity Strategy 2011-2015 which was "heavily informed" by the views of audiences and employees including those with disabilities, was also leading the Creative Diversity Network (CDN).²²⁵ The CDN is the industry partnership of the main broadcasters (both public and commercial) in the UK and various other media companies, including those from the independent sector and it exists to promote diversity, including disability, both on and off air.²²⁶

It can be gleaned from BCI/NDA reports and measures adopted since, that duties, both general and specific, are placed on public bodies such as the communications regulator (Ofcom) and public service broadcasters in the United Kingdom to have regard to the needs of people with disabilities in areas such as employment and

²²²ibid

²²³Channel 4's Diversity website and policy echoes the provisions of Article 8 CRPD in its statement that "[I]n everything we do, we seek to respect people for who they are, not what they are. We judge people only for the way they do their jobs and for what they can contribute. We aim to foster an environment which is inclusive for all. An environment without labels, a place that everyone feels free to contribute to without fear and to maximise their potential."

²²⁴Channel Four Television Corporation, 2011 *Report On Compliance with The General Equality Duty* 3. Under the Equality Act 2010, Channel 4 has a 'General Equality Duty', when carrying out its internal functions. The report on Compliance with the general equality duty focuses on Channel 4 employees only; Channel 4's programme-related activities and its other commercial activities are exempted from the requirements of the Equality Act. According to the report, Channel 4 worked hard to understand how issues affected disabled employees. This work led to a positive action initiative being adopted as part of the Channel 4 Apprenticeship Programme, resulting in the hiring of a disabled candidate. Externally, Channel 4's 2011's Production Trainee Scheme also targeted disabled candidates specifically for four 12 month placements. Of those who declared their employment monitoring information in 2011, 1.17% of staff declared themselves with a disability. This represents a 67% increase on 2010 figures."

<http://www.channel4.com/media/documents/corporate/C4_Equality_Duty_Compliance_Report_2011.pdf>

²²⁵Until the end of 2012.

²²⁶See CDN website <<http://www.creativediversitynetwork.org/how.php>> The BBC's diversity centre is available online and one of its aims is to create TV and radio programmes and online content which reflect the diversity of all of the BBC's audiences and which offer something for everyone. The Diversity Centre's website contains links to radio and television "picks of the week", which detail programmes dealing with diverse subjects such as disability. See BBC Diversity On-Air and Online <<http://www.bbc.co.uk/diversity/On-Air-Online.html>>

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training in the sector, access to services and broadcast content standards. The BCI /NDA reports concluded that in terms of the detail in its approach, the United Kingdom stands out in its adoption of very detailed regulation and extensive consultation, analysis and review processes.²²⁷ However, not one of these measures was specifically mentioned in the UK's initial report to the Committee on the Rights of Persons with Disabilities.

In order to explain this anomaly, contact with the ODI was established to ascertain how the UK's report to the Committee was devised.²²⁸ It transpires that in drafting the UK's first report on the implementation of the CRPD, the Office for Disability Issues followed the guidelines set by the UN Committee on the Rights of Persons with Disabilities which examines the reports. According to the ODI, these guidelines asked countries to focus on specific areas and set a strict limit of sixty pages.²²⁹

The ODI stated that they worked closely with disabled people and their organisations in producing the report, which included making a draft version of the report available for public comment during a 10 week period between May and July 2011.²³⁰ A summary of issues was raised in the report, which included disabled people's view that there needed to be more positive representation of, and language used about disabled people in the media.²³¹ However, further investigation by this author revealed that the ODI did not ask the Department of Communications Media and Sport (DCMS), the government department responsible for broadcasting policy and the UK's broadcasting framework, for contributions in respect of media portrayal of disabled people.²³² It is submitted that this omission, coupled with strict text restrictions, goes some way to explaining why a comprehensive report on Article 8 CRPD was not furnished to the Committee. It is further submitted that this incongruity demonstrates in practice the problems associated with the so called silo-effect as emphasised by Gerard Quinn,²³³ to which a designated focal point such as

²²⁷BCI/NDA, (n 217) 183.

²²⁸Email from Sarah Dunn, Rights, Legislation and International Team, Office for Disability Issues, London to author (25 April 2012).

²²⁹*ibid*

²³⁰*ibid*

²³¹*ibid*. The summary of issues is contained in Annex B of the report.

²³²(n 228).

²³³Quinn, (n 160) 5 (New Zealand).

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the ODI “if deployed correctly,” should provide a “practical corrective to the propensity of the silo phenomenon.”

The ODI indicated that it is currently working closely with other government departments, including the DCMS and disabled people and their organisations, on how to address the issue of positive portrayal of disabled people in the media and elsewhere.²³⁴

Developments on Reporting to the Committee since the First Initial Reports

In September 2013, the Committee adopted a simplified reporting procedure for periodic reports due in 2014 and beyond. According to this procedure, “...the Committee prepares and adopts lists of issues to be transmitted to State parties, and the replies of the State party to this list of issues are deemed to constitute the State party’s report.”²³⁵ The procedure aims to facilitate the States Parties’ reporting process; strengthen their capacity to fulfil their obligations in a timely and effective manner; provide the committee with more targeted periodic reports; improve the effectiveness of the treaty monitoring system by reducing the need to request supplementary information before considering a report, and to allow the Committee to plan in advance its work. Prior to September 2013, the Committee issued a list of issues on the initial reports of eight countries.²³⁶ The Committee have since issued subsequent lists of issues to twenty-two countries and the European Union up to April 2015. While a detailed examination of all the ‘Lists of Issues’, ‘Replies to the Lists of Issues’ and ‘Concluding Observations’ by the Committee since the first initial reports up to the present date is outside the confines of this thesis, a number of comments can be made in relation to some of those.

Lists of Issues on Country Reports by the Committee

Generally the Committee requested more information from State Parties regarding awareness raising campaigns more so than specific measures in relation to media. It was noted by this author that in a number of initial reports considered by the Committee where countries had given very little information on awareness raising measures in terms of campaigns and/or measures specific to media, the Committee

²³⁴(n 228).

²³⁵<<http://www.ochr.org/EN/HRBodies/CRPD/Pages/Simplifiedreportingprocedure.aspx>>

²³⁶i.e. between November 2010 and May 2013.

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did not raise this with the respective countries when issuing their list of issues under Article 8 CRPD. The initial reports of Australia and New Zealand provide two examples in this regard.²³⁷ Likewise Germany detailed very little with regard to awareness measures under Article 8 CRPD and yet the Committee did not list any issue with its report under the Article. Interestingly, however in 2015, the Committee made concluding observations on Germany's report under Article 8 stating that it is concerned that the measures put in place by Germany to reduce stigma faced by persons with disabilities, especially persons with psychosocial and /or intellectual disabilities, have been ineffective.²³⁸ The Committee recommended that in consultation with disabled peoples organisations (DPOs), Germany should develop a strategy to raise awareness and eliminate discrimination, ensuring that its preparation and implementation are evidence based, and that its impact can be measured, and that the public and private media are involved.²³⁹

Comments on Concluding Observations by the Committee

An examination of the Committee's concluding observations on the twenty-seven country reports to date identified a number of themes emerging regarding awareness campaigns and measures specific to the media. The Committee, for instance, placed heavy emphasis on promoting the rights of persons with disabilities and combating negative stereotypes in planned and ongoing campaigns. They specifically highlighted that a number of countries had failed to promote the image of persons with disabilities as rights holders and to publicise the CRPD in addition to informing persons with disabilities and "society at large" (e.g. Sweden) about their rights.²⁴⁰ Campaigns which were based on the prevention of disability were criticised because of their tendency to create a negative image of disabled persons.²⁴¹ Particular censure was given by the Committee where medical and charitable models of disability were still prevailing in policies and campaigns²⁴² and where countries had failed to recognise the paradigm shift in viewing disabled persons as rights holders.²⁴³ The

²³⁷ Australia (CRPD/C/AUS/1) and New Zealand (CRPD/C/NZL/1).

²³⁸ Germany (CRPD/C/DEU/CO/1) 4 §19.

²³⁹ *ibid* §20(a).

²⁴⁰ Sweden (CRPD/C/SWE/CO/1) 3-4 §22.

²⁴¹ Ecuador (CRPD /C/ ECU/CO/1), Mongolia (CRPD/C/MNG /CO/1) and Paraguay (CRPD/C/PRY/CO/1).

²⁴² Croatia (CRPD /C/HRV/CO/1), Mexico (CRPD /C/MEX/CO/1), China (CRPD /C/CHN/CO/1) and Belgium (CRPD /C/BEL/CO/1).

²⁴³ Paraguay (CRPD /C/PRY/CO/1).

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Committee, for example, criticised both Peru and Mexico for reporting (private) fundraising initiatives in the form of telethons as campaigns which go towards raising awareness, where disabled persons were viewed as “objects of charity”. In this regard the Committee drew the attention of the State Party to the fact that “far from promoting rights and empowering persons with disabilities, these campaigns perpetuate and reproduce stigma and thus hinder the possibility of constructing a culture in which persons with disabilities are recognised as part of human diversity and society.”²⁴⁴ Such disapprovals were not just confined to the reports of developing countries.²⁴⁵

The Committee also admonished country reports which were confined to awareness on physical disability and which gave inadequate attention to other forms of disability such as intellectual and psychosocial disabilities.²⁴⁶ Moreover it addressed and recommended that awareness campaigns be given specific regard under themes and articles of the CRPD. For instance the Committee urged Argentina to develop a public policy to promote the inclusion of persons with disabilities in the labour market through the launch of awareness-raising campaigns targeting the private sector and the public at large under Article 27 CRPD dealing with work and employment.²⁴⁷ The Committee recommended that Sweden ensure that voter education through mass media is made accessible under Article 29 CRPD on the right to participate in political life and public life. Furthermore, the Committee recommended to a number of countries the need to create awareness regarding reasonable accommodation under both Articles 5 and 8 CRPD.²⁴⁸

Concluding Observations on Measures Specific to Media

It was noted on examination of the Concluding Observations that the Committee placed less emphasis on specific measures which could be taken by the media. The Committee however did make some recommendations in this regard particularly in more recent reports in 2014 and 2015. The Committee for instance asked Croatia in its list of issues to outline the measures taken by mass media which would bring

²⁴⁴Peru (CRPD/C/PER/CO/1) 4, para 18.

²⁴⁵Belgium (CRPD/C/BEL/CO/1) and Austria (CRPD/C/AUT/CO/1).

²⁴⁶Sweden (CRPD/C/SWE/CO/1) 3-4 §22, Peru (CRPD/C/PER/CO/1), Germany (CRPD/C/DEU/C/1) 4 §§19-20 and Spain (CRPD/C/ESP/C/1) 3 §20.

²⁴⁷Argentina (CRPD/C/ARG/CO/1) 7 §44 .

²⁴⁸Spain (CRPD/C//ESP/CO/1) 3 §20, Sweden (CRPD/C/ SWE/CO/1) 3 §21 and Denmark (CRPD/C/DNK/CO/1) 4 §§24-25.

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reporting in line with the CRPD. The Committee then stated its concern in its Concluding Observations at the insufficiency of Croatia's awareness raising measures on the rights of persons with disabilities and the fact that medical and charity models of disability still prevail in mass media. To this end, it issued a more broad recommendation that Croatia in cooperation with various stakeholders undertakes public awareness campaigns to reinforce the positive image of persons with disabilities as rights holders although it did not specify how this was to be achieved. Training programmes on the CRPD were also recommended and a call to introduce awareness and initiatives and training media practitioners to modify society's perceptions of disabled persons as being in need of protection and portraying a positive image of persons with disabilities as rights holders in the Committee's Concluding Observations on Azerbaijan. In its more recent concluding observations on Belgium, the Committee specifically recommended that Belgium encourage print and broadcast media professionals to take account of diversity in their code of ethical conduct and provide them, and all relevant professionals, with appropriate training and awareness-raising to ensure better representation of persons with disabilities in the media.

Conclusions and Recommendations - Research Findings and Issues

While the success of the United Nations Convention on the Rights of Persons with Disabilities is largely dependent on the manner by which a State Party implements its provisions at national level, a number of conclusions from the foregoing analysis can be made with regard to Article 8 CRPD in terms of its relationship to broadcast media.

While Article 8 CRPD is an article of "general application" with "cross-cutting" impact on all other articles, it is submitted that it is an imperative and powerful provision in the CRPD and its importance should not be undervalued. Its potential power lies in its focus and ability to dismantle some of the most important factors which impact on or cause disability discrimination, *i.e.* the predominantly negative attitudinal barriers which hinder persons' with disabilities participation in society.

Given the dominance of the media, particularly broadcast media, its universal reach, pervasiveness and its ability to influence both positive and negative attitudes towards persons with disabilities, it is submitted that awareness raising in broadcasting

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should be prioritised as a pre-requisite for the fulfilment of the rights contained in the CRPD when being implemented at national level.

As regards the initiation and maintenance of “effective” public awareness campaigns and encouraging the media to portray people with disabilities in a manner consistent with the purpose of the Convention, the CRPD and literature on the issue in relation to media gives little, if any guidance, as to how such measures are to be ‘initiated’ let alone be ‘maintained’ or be ‘effective.’

To this end it is submitted that the United Nations should draw from their experience in drafting the two non-legally binding instruments that buttressed the CRPD’s instigation, as outlined *supra*,²⁴⁹ and convene a similar working group of specialists from around the world to formulate *inter alia* guidelines for the inclusion and portrayal of persons with disabilities in the media.²⁵⁰ Such collective guidelines should be devised in a manner in which they could be adapted by individuals working in all forms of media (print, broadcast, *etc.*) and should be cognizant of the media culture in different countries and situations.

In consultation with persons with disabilities and media personnel²⁵¹ such guidelines should address and educate the broadcasting sector about inappropriate and insensitive language and terminology used to describe people with disabilities.

Additionally they should inform the media sector regarding presenting people with disabilities in stereotypical and stigmatising ways, for example as dependent or pitiful. Other stereotypes to be avoided include presenting people with disabilities as inherently saintly or asexual, gratuitously dangerous or uniquely endowed with special skills due to a disability.

In order to address negative attitudes and misperceptions about persons with disabilities and to influence the public and audiences in such a way as to encourage such attitudinal shifts, the expert group, through guidelines, should suggest ways to

²⁴⁹The World Programme of Action and the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.

²⁵⁰The Committee on the Rights of Persons with Disabilities could perhaps consider establishing a “task force” on awareness raising. The Committee has established task forces, for example, on accessibility under Article 9 and legal capacity under Article 12. Another task force on access to public transportation and airline policies was also established and will report to the Committee.

²⁵¹And under the State Parties’ obligation contained in Arts 4 and 33 CRPD.

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increase the presence, portrayal and participation of persons with disabilities in broadcast media both on an off–screen. Such proposals should include but not be confined to: that the broadcasting production sector take steps to identify the talent pool of performers and creators with disabilities and consult with disability groups and experts about characterisation; that disability representation is monitored in programming by broadcasters, including at production level and in different genres of programming; that broadcasting personnel and disability organisations receive training on disability and media; facilitation of workshops and seminars on the issue; carrying out research on attitudes towards persons with disabilities in broadcast content. In addition, broadcasting and media regulators have a role to play in assessing and reviewing codes of programming standards and ensuring that they contain measures with a view to respect for diversity and combating discriminatory material in broadcast content.

The Committee on the Rights of Persons with Disabilities have issued guidelines to State Parties on the reporting of and the implementation of the articles of the Convention. It is submitted that the guidelines give little information as to how countries should report on the implementation of Article 8 CRPD and seem particularly confined to general public awareness campaigns to the exclusion of the mass media.

It is conceded that the Committee can only make observations and recommendations on the information they receive in the initial reports. It was observed in some instances however that some shadow / parallel reports submitted to the Committee by DPO's had given more comprehensive reports in relation to Article 8 CRPD and the media. The Belgian DPO *GRiP* report for instance, was particularly commendable and clearly outlined the issues regarding media and disability. In light of the Committee's concluding observations on countries to date it would seem that the Committee could place more emphasis on how State Parties to the CRPD should report on Article 8 (2) c "encouraging media to portray disability in a manner consistent with the Convention." It is suggested that the Committee revise the reporting guidelines to ensure that State Parties to the CRPD report on all measures taken in this regard prior to the submission of their reports.

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While it is accepted that there is no legal duty on State Parties to oblige broadcasters to provide such portrayals, it is submitted that there are many other measures and ways to encourage and attain such portrayals without breaching the right to freedom of expression and State Parties should be obliged to report on those measures. It is submitted that a framework model of best practice in this regard for monitoring bodies is the framework outlined in the BCI/NDA Report on the *Representation of Persons with Disabilities in Irish Broadcast Media: A Review of Other Jurisdictions*. It is submitted that by reporting on and compiling measures regarding disability representation in broadcast media using this model, each state party is given a clear and uniform framework of reference to work towards and each State Party can learn from the measures taken in different countries and can share international best practice. Likewise countries that have already issued their reports could also benefit from utilising this framework in future follow-up reports to the Committee.

It is further recommended that Governments should fund more public awareness campaigns regarding disability through mass media and indicate the most recent campaigns in their reports.

Having regard to the Committee's Concluding Observations on Article 8 to date, the foregoing analysis evidenced a gap in those observations both generally and with regard to specific measures to be taken by the media in raising awareness about persons with disabilities. It is recommended that the Committee should harness the power of the media and place more emphasis on reporting specific measures to be taken, particularly by broadcast media in raising awareness, when considering the reports of State parties to the Convention. The Committee should ensure that each State party report under Article 8 clearly outlines and provides up to date measures taken with regard to awareness raising and disability in the media. The examination revealed that while the Committee did make some recommendations in this regard, such recommendations were aimed at individual states based on their initial reports.

It is submitted that **all** State Parties can only benefit from the various recommendations made by the Committee in their concluding observations to date. These recommendations include *inter alia* the need to highlight the shift in awareness from medical / charitable models of disability to a social/ human rights models of disability; the need for training programmes on the CRPD and the

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introduction of awareness measures and initiatives in training media practitioners in challenging society's perceptions of persons with disabilities, especially as rights holders in different facets of life including employment and participation in political and cultural life. Moreover the Committee should encourage broadcast media professionals to take into account diversity in developing their ethical codes of conduct. The Committee should also advocate that such professionals should provide relevant stakeholders with appropriate training and awareness raising in relation to better representation of disabled people in the media. It is further recommended that the Committee should consider the shadow reports of DPO's where such DPO's have outlined issues and made recommendations in relation to media and disability.

Given the broadcast media's ability to perpetuate stereotypes or conversely to educate the public to have more understanding of persons with disabilities, their rights, potential and contributions to awareness raising should be prioritised as a pre-requisite condition in the Convention's implementation at national level.

The importance of awareness raising and positive portrayals of disability through media cannot be overstated. The impact of awareness measures and positive portrayals on viewing audiences (both disabled and non-disabled), are crucial elements in reinforcing social participation. In terms of self-identity, the media are needed to help create and reinforce a particular group's preferred identity. Consequently inadequate or one-sided negative representations of persons with disabilities in media content not only constitute a gravely prejudicial form of injustice but can also generate an overwhelming feeling of frustration and alienation for audiences with disabilities. The media play a fundamental role in mobilising public support and involvement to help create awareness about persons with disabilities and to prevent and combat discrimination.

CHAPTER THREE

Broadcasting and Disability: Europe

Introduction

According to the European Union's Disability Strategy 2010-2020, one in six people in the European Union (EU) have a disability that ranges from mild to severe, making around 80 million who are often prevented from taking part fully in society and the economy because of environmental and attitudinal barriers. The EU and its Member States have a strong mandate to improve the social and economic situation of people with disabilities.¹

In the context of media and disability representation, television has been recognised as a vital means of social participation.² In 2009, a survey on discrimination in the EU highlighted that a significant proportion of Europeans did not feel that diversity was sufficiently represented in the media. This was particularly a concern in relation to disability, with forty-four per cent of Europeans feeling that diversity on this aspect was not adequately reflected in the media.³ The study emphasised that raising awareness among Europeans with regard to discrimination laws was an issue of high importance.⁴ An EU report in 2011 indicated that television remains considerably the most popular medium with Europeans.⁵ A further survey carried out in 2013 also found that most Europeans still watch television predominantly on a television set,

¹European Commission, 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions European Disability Strategy 2010-2020: A Renewed Commitment To A Barrier-Free Europe' COM (2010) 636 final 3. The EU ratified the UN Convention on the Rights of Persons with Disabilities in 2010; *See also* Arts 21, 26 of the Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 (hereafter CFREU).

²NDA, 'Submission on the EU Proposal Regarding Television Without Frontiers' (NDA June 2006). <[http://www.nda.ie/cntmgmtnew.nsf/0/4AB06E4C50C645B380257185003E1C91/\\$File/tv_without_frontiers.htm](http://www.nda.ie/cntmgmtnew.nsf/0/4AB06E4C50C645B380257185003E1C91/$File/tv_without_frontiers.htm)>

³European Commission, *Discrimination in the EU in 2009 Report*, Special Eurobarometer 317, (Conducted by TNS Opinion & Social at the request of European Commission, Directorate-General Communication Survey co-ordinated by the European Commission, Directorate-General Communication) November 2009.

⁴*ibid* 118. The report stated that having a disability is the only ground of discrimination among others that was seen by Europeans as being more widespread than in 2008, with 53% in 2009 compared to 45% in 2008.

⁵European Commission, *Media Use In The European Union*, Standard Eurobarometer 76, (Conducted by TNS Opinion & Social at the request of European Commission, Directorate-General Communication Survey co-ordinated by the European Commission, Directorate-General Communication 2011) 5.

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perhaps indicating the continuing importance of more traditional linear broadcasting, despite “...Internet television gaining a little ground”.⁶

In its first report on the implementation of the Convention on the Rights of Persons with Disabilities the EU detailed the results of a survey on discrimination that provided insight into the changing perceptions, attitudes, knowledge and awareness of discrimination.⁷ The study, carried out in 2012, shows that almost every second European (46%) still believes that discrimination on the grounds of disability is widespread, although this is seven percentage points less than in 2009. However, the survey also evidenced that respondents with a disability are far more likely (64 % as compared with 46%) to believe that discrimination on the grounds of disability is widespread in their Member State.⁸

Taking into account the conclusions reached by the latter studies, the object of this chapter is to outline and critically assess the extent to which persons with disabilities are considered in both broadcasting and disability policy within Europe. The chapter will endeavour to assess whether the measures adopted are sufficient in addressing issues concerning the portrayal of persons with disabilities in Europe’s broadcasting system.

In examining the level of protection afforded to persons with disabilities in various audiovisual and disability policy instruments, this chapter provides a continuation and supplement to Chapters One and Two. The Chapter draws on some of the theoretical themes which were outlined in Chapter One, namely that of the role of citizen and consumer under both public service and private broadcasting ethos particularly in European Union policies. Moreover the analysis of Article 8 CRPD proffered in Chapter Two provides a benchmark against which all European policies

⁶European Commission, *Media Use In The European Union*, Standard Eurobarometer 80, (Conducted by TNS Opinion & Social at the request of European Commission, Directorate-General Communication Survey co-ordinated by the European Commission, Directorate-General Communication, Autumn 2013) 5.

<http://ec.europa.eu/public_opinion/archives/eb/eb76/eb76_media_en.pdf>

⁷European Commission, *Discrimination in the EU in 2012*, Special Eurobarometer 393 (Conducted by TNS Opinion & Social at the request of European Commission, Directorate-General, Communication Survey co-ordinated by the European November 2012) 16. At the time of writing the 2013 report was not available.

⁸*ibid* 54. The 2012 survey indicates that 28 % of Europeans with a disability say they have experienced such discrimination. Data shows that in all Member States an absolute majority of respondents consider limited accessibility to be a form of discrimination.

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that consider the representation of persons with disabilities in broadcasting / audiovisual content both directly and indirectly may be assessed. The chapter will be divided into two parts. Part One will deal with the broadcasting regulatory framework within Europe and will outline and consider the extent to which it pertains to and considers the representation of persons with disabilities in terms of measures which deal with the regulation of broadcasting content. It will focus on the regulatory measures specific to broadcasting adopted by various institutions and will include an examination and assessment of provisions which deal with disability in this regard both directly and indirectly.

The main initiatives in the creation of a European legal system for television broadcasting have been taken by the European Union and the Council of Europe. For the purposes of this chapter, therefore, measures and issues as they relate to broadcasting and disability policy within the European legal system will distinguish between the European Union and the Council of Europe.

Specific regard will be given to the European Union's Audiovisual Media Services Directive 2010/13 EU⁹ (hereafter AVMSD) and its provisions as they apply to broadcasting content. An assessment of the potential effect of such provisions as they apply to disability representation will be provided. The chapter will examine whether the provisions of the AVMSD are sufficient in their own right in addressing the issue of disability representation.

The main Council of Europe (hereafter CoE) instrument concerning the regulation of broadcasting is the European Convention on Transfrontier Television (hereafter ECTT).¹⁰ Although "the Council of Europe and the European Union were products of the same idea, the same spirit and the same ambition,"¹¹ the difference between the two institutions is recognised by the Council in a Recommendation on the

⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95/ 1–24 (hereafter AVMSD 2010/13/EU).

¹⁰European Convention on Transfrontier Television 1989 as amended according to the provisions of Protocol (ETS No. 171) which entered into force, on 1 March 2002.

¹¹Council of Europe - European Union: 'Sole ambition for the European Continent' (Report by Jean Claude Juncker, Prime Minister for the Grand Duchy of Luxembourg to the attention of the Heads of States or Government of the Member States of the Council of Europe 11 April 2006) 1. <http://www.coe.int/t/der/docs/RapJuncker_E.pdf>

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‘regulation of audio-visual services.’¹² The Recommendation states that the European Union’s AVMSD has the main objective of ensuring freedom of services within the internal market of the European Union in accordance with primary European Community law.¹³ This approach differs from the ECTT, which has the aim of ensuring freedom of transmission and retransmission of broadcasting in Europe, regardless of frontiers, in accordance with Article 10 of the European Convention on Human Rights (ECHR) which deals with freedom of expression.¹⁴ A series of proposed revisions to the ECTT,¹⁵ which would have brought the Convention in line with the Audiovisual Media Services Directive, were ceased in 2011.¹⁶ The proposed revisions, had they been adopted, would have resulted in the development of a coherent approach to transfrontier audiovisual media services.

In January 2014, the Parliamentary Assembly of the Council of Europe recommended to the Council of Ministers that work on the revision of the ECTT and negotiations with the EU on the matter, be resumed and, if necessary, the drafting of a new convention focusing on freedom of expression aspects of media regulation be considered.¹⁷ On 23 September 2014, the Committee of Ministers of the Council of Europe informed that “(it) has not allocated any resources to work on the European Convention on Transfrontier Television over the last three years and sees no reason to review its position for the time being”. In view of those developments, the ECTT will be referenced but not specifically addressed in this Chapter.¹⁸

¹²Parliamentary Assembly of the Council of Europe (hereafter PACE), Recommendation 1855 (2009) on the regulation of audio-visual media services, (*Text adopted by the Assembly on 27 January 2009 (3rd Sitting)*).

¹³*ibid* Recital 9, 1. *See also* (n 11) 2, where the Council of Europe has been described as “[A] full-scale factory for democracy, playing an indispensable and unrivalled part in steering Europe in the right direction.” It puts specific emphasis on the democratic and human rights development with its main body the European Court of Human Rights and key instrument European Convention on Human Rights (hereafter ECHR).

¹⁴*ibid*

¹⁵*See e.g.* European Convention on Transfrontier Television Drafting Group on the Revision of the European Convention on Transfrontier Television (T -TT-GDR) 6th Meeting, 11 and 12 September 2008, Istanbul (Turkey)), *Draft Explanatory Report to the revised European Convention on Transfrontier Television updated following the Consultation on 25-27 February 2009*, Strasbourg, 27 February 2009, T-TT-GDR (2008)002Rev5 and all other background documents for further discussion. <http://www.coe.int/t/dghl/standardsetting/media/t-tt/default_EN.asp>

¹⁶*See* Council of Europe, Standing Committee on Transfrontier Television (T-TT), “Transfrontier television: the revision of the Convention discontinued,” Press Release, 4th February, 2011.

¹⁷PACE, Recommendation 2036 (2014) Revision of the European Convention on Transfrontier Television, *Text adopted by the Assembly on 31 January 2014 (9th Sitting)*.

¹⁸Chapter Four however will address other CoE standard setting documents in addition to the relevant articles of the European Convention on Human Rights as they relate to media and disability representation.

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Part Two of the Chapter will consider the effect of European disability policy on disability representation in broadcast media. In late December 2010, the European Union ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁹ Prior to ratification, the EU declared its competence in matters governed by the CRPD.²⁰ In the fields of *inter alia* discrimination and the free movement of services, which includes broadcasting services, the Union shares competence with its member states.²¹ The extent of that competence as it pertains to disability and broadcasting will be considered here. The EU's Disability Strategy 2010-2020, will also be addressed. Additionally this section will take into account the relevant provisions of the Council of Europe's Action Plan on Disability 2006 - 2015 with regard to disability representation in broadcast media. It will assess the Action Plan's progress to date having regard to the report on its implementation.²²

While measures in various instruments which expressly deal with issues concerning the access of persons with disabilities to broadcasting services and content will be referenced in this chapter, such issues within Europe's broadcasting and disability regulatory frameworks will be dealt with in further detail in Chapter 5.

¹⁹The EU deposited the instruments of conclusion/formal confirmation at the UN on the 23 December 2010 so the Convention entered into force for the EU on 22 January 2011.

²⁰Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) [2010] OJ L 23, 35–36.

²¹*ibid* Annex II, 'Declaration Concerning The Competence Of The European Community With Regard To Matters Governed By The United Nations Convention On The Rights Of Persons With Disabilities' 55, para 2, 22.

²²Recommendation Rec (2006) 5 of the Committee of Ministers to Member States on the Council of Europe's Action Plan to promote the rights and full participation of people with disabilities in society; improving the quality of life of persons with disabilities in Europe 2006-2015, (*Adopted by the Committee of Ministers on 5 April 2006 at the 961st Meeting of the Ministers Deputies*).

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PART ONE: BROADCASTING REGULATION - EUROPE

The European Union

The European Union (hereinafter “EU”)²³ is an economic and political union of 28 member states that together comprise much of the continent. The “European Union” was established by the Treaty of Maastricht in 1993 upon the foundations of the European Communities.²⁴ The EU has developed a single market/common market (now internal market since the Lisbon Treaty) through a standardized system of laws which apply in all member states, and ensures the free movement of people, goods, services, and capital. It is a body with conferred powers and can only act within the provisions of its constituent treaties.²⁵ In the context of broadcasting, it is the free movement of services which is the most significant.²⁶

Case C-155/73 *Italian State v. Guisepppe Sacchi*, 1974 E.C.R. 409,²⁷ was the first case on broadcasting to come before the European Court of Justice (hereafter “ECJ”).²⁸ In that case, the ECJ found that the broadcast of television programmes was a service as described in Article 49 EC Treaty. Article 49 EC Treaty provides that restrictions on freedom to provide services are to be prohibited in respect of nationals of member states who are established in a State of the Community other

²³The Treaty of Lisbon amending the Treaty of on European Union and the Treaty Establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

²⁴The Treaty of Maastricht was signed in 1992 and came into effect in November 1993.

²⁵Treaty of Lisbon (2009); Treaty of Nice (2003); Treaty of Amsterdam (1999); Treaty of the European Union (Maastricht Treaty) (1993); Single European Act (1986); Merger Treaty (Brussels Treaty) (1967); Treaties of Rome, EEC and EURATOM treaties (1958) and the Treaty establishing the European Coal and Steel Community (1952). The Treaty of Lisbon renamed the Treaty of Rome to the Treaty on the Functioning of the European Union TFEU in 2008.

²⁶The primary source of EU law is the EU's treaties. These are power-giving treaties which set broad policy goals and establish institutions that, amongst other things, can enact legislation in order to achieve those goals. The legislative acts of the EU come in two forms: regulations and directives. Regulations become law in all member states the moment they come into force, without the requirement for any implementing measures, and automatically override conflicting domestic provisions. Directives require member states to achieve a certain result while leaving them discretion as to how to achieve the result. The details of how they are to be implemented are left to member states. EU legislation derives from decisions taken at the EU level, yet implementation largely occurs at a national level. The principle of uniformity is therefore a central theme in all decisions by the European Court of Justice, which aims to ensure the application and interpretation of EU laws does not differ between member states.

²⁷Hereafter *Sacchi*.

²⁸Following the entry into force of the Treaty of Lisbon on 1 December 2009, the ECJ's official name was changed from the “Court of Justice of the European Communities” to the “Court of Justice” although in English it is still most commonly referred to as the European Court of Justice. The Court of First Instance was renamed as the “General Court,” and the term “Court of Justice of the European Union” (CJEU) officially designates the two courts.

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than that of the person for whom the services are intended.²⁹ “In recognising the authority of the monopoly status of broadcasters granted by the state, the ECJ in *Sacchi* endorsed ‘dualism’ as a principle of broadcasting policy: broadcasting services exist for the purpose of remuneration; but also to fulfil social and democratic functions.”³⁰ Since the 1970s, the ECJ has developed comprehensive case law concerning the broadcasting sector. It covers both the application of general principles of the Treaty, in particular the free provision of services, and interpretation of the Television without Frontiers Directive 1989, which, following various reviews and amendments, is now the Audiovisual Media Services Directive 2010/13/EC (hereafter AVMSD).³¹

A general outline of EU primary and secondary law as it relates to audiovisual media and which incorporates provisions related to disability will be provided in the sections following. In particular, the development of the various recitals and articles in the lead up to the currently enacted AVMSD and their potential impact on broadcasting content as they relate to disability and persons with disabilities are detailed.

Primary Law

Audiovisual policy in the EU is primarily governed by Articles 167 and 173 of the Treaty on the Functioning of the European Union (TFEU).³² The Treaty of Rome did not grant any explicit powers in the area of audiovisual and media policy, and neither does the TFEU. Jurisdiction over media policy is drawn from a range of articles within the TFEU in order to formulate policies for the various media and communication technology sectors and to proffer guidance on fundamental features

²⁹Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press 2007) 64. Additionally Arts 81 and 82 EC Treaty (now Arts 101 and 102 TFEU) prohibit anti-competitive agreements and the abuse of a dominant position, respectively, so as to prevent the distortion of competition in the single market. These provisions constitute the central planks of Union competition policy and are principally aimed at private actors.

³⁰David Ward, *The European Union Democratic Deficit and the Public Sphere* (IOS Press 2004) 55, as cited in Harrison and Woods (n 29) 93.

³¹The Television without Frontiers Directive (TWFD) was adopted in 1989 (IP/91/898) and amended for the first time in 1997 (IP/97/552). In December 2007, an amending Directive was adopted (see IP/07/1809, MEMO/08/803). In March 2010, the provisions of the original TWFD were merged with the provisions contained in the amending directives to form the codified version of the newly entitled Audiovisual Media Services Directive 2010/13/EU.

³²Treaty on the Functioning of the European Union consolidated version OJ C 115/47 of 9 May 2008. The object of Article 173 TFEU is the creation of the best possible conditions for competitiveness in industry.

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that underscore media policy.³³ In recent years, nevertheless, express consideration has been given in treaty revisions to shaping audiovisual policy. The legal bases for the development of audiovisual and media policies are consequently diverse and draw on numerous sources. This is a requirement deriving from the complex nature of media goods and services, which can be defined neither solely as cultural goods nor simply as economic goods. In accordance with Article 167 TFEU, the EU encourages cooperation between Member States and, if necessary, supports and supplements their action in the area of artistic and literary creation, including the audiovisual sector.³⁴ The EU's function in the audiovisual field is to create a single European market for audiovisual services. It is also obliged to take cultural aspects into account in all its policies.³⁵

In terms of anti-discrimination measures, the Treaty of Lisbon 2009 requires the EU to combat discrimination based on *inter alia* disability when defining and implementing its policies and activities (Article 10 TFEU) and gives the EU the power to adopt legislation to address such discrimination (Article 19 TFEU).

Charter of Fundamental Rights of the European Union (CFREU)

The initial treaties of the European Communities did not contain any reference to human rights or their protection.³⁶ It was not considered that the establishment of an area of free trade in Europe could have any bearing related to human rights.³⁷ Nonetheless, as cases started to emerge before the European Court of Justice (ECJ) claiming human rights breaches instigated by Community law, the ECJ developed a body of judge-made law known as the 'general principles' of Community Law.³⁸ According to the ECJ, these general principles would evince the content of human rights protection found in national constitutions and human rights treaties, especially

³³The legal basis is contained in the TFEU in the form of Articles 28, 30, 34, 35 (free movement of goods); 45-62 (free movement of persons, services and capital); 101-109 (competition policy); 114 (technological harmonisation, or the use of similar technological standards, for instance, in internet productions); 165 (education); 166 (vocational training); 167 (culture); and 173 (industry).

³⁴Art 167 (2) TFEU.

³⁵Art 167 (4) TFEU.

³⁶European Agency for Fundamental Rights (hereafter FRA), *Handbook on European non-discrimination law* (Publications Office of the European Union 2011) 15.

³⁷*ibid*

³⁸*ibid*. The European Court of Justice is now referred to as the 'General Court' after amendments introduced by the Lisbon Treaty. However, this dissertation will continue to refer to the ECJ in order to avoid confusion since most existing literature that practitioners may wish to consult was published before the entry into force of the Lisbon Treaty in December 2009.

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the ECHR.³⁹ The ECJ asserted that it would guarantee the conformity of Community Law with these principles. In the acknowledgement that its policies could have an influence on human rights and in an attempt to make “citizens” feel ‘closer’ to the EU, the EU and its Member States pronounced the Charter of Fundamental Rights of the European Union in 2000.⁴⁰ The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties such as the UN Convention on the Rights of the Child.⁴¹

When the Treaty of Lisbon, entered into force in 2009, it altered the status of the Charter of Fundamental Rights to make it a legally binding document.⁴² As a result, the institutions of the EU are bound to comply with it. EU Member States are also bound to comply with the Charter, but only when implementing EU law.⁴³

Article 11 of the Charter of Fundamental Rights of the European Union (hereafter the Charter) provides for the right to freedom of expression and information and clearly states that “[T]he freedom and pluralism of the media shall be respected.”⁴⁴

³⁹ibid 17. All member states of the EU have joined the ECHR. The ECJ looks toward the ECHR for inspiration when determining the scope of human rights protection under EU law. The Charter of Fundamental Rights of the European Union which will be discussed *infra* also reflects (though is not limited to) the range of rights in the ECHR. Accordingly, EU law, even though the EU is not yet actually a signatory to the ECHR, is largely consistent with the ECHR. The Lisbon Treaty contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR amends it to allow this to happen. It is not yet clear what effect this will take in practice, and in particular what the future relationship between the ECJ and the ECtHR will be, as the negotiations for EU accession may take several years. However, it will at the very least allow individuals to bring the EU directly before the ECtHR for failure to observe the ECHR. See Xavier Groussot, Tobias Lock and Laurent Pech, ‘EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession agreement of 14th October 2011’ *European Issues* no.218 (Foundation Robert Schumann 2011) for further reading on the issue. In December 2014, the ECJ ruled that a draft agreement for the accession of the EU to the ECHR is incompatible with EU Law. The ruling temporarily halts the EU’s progress to accession. See CJEU, **Opinion 2/13 of the Court** (Full Court), 18 December 2014.

⁴⁰ibid. The Charter, as adopted in 2000, was merely a ‘declaration,’ which means that it was not legally binding, although the European Commission (the primary body for proposing new EU legislation) stated that its proposals would be in compliance.

⁴¹The CFREU (2000/C 364/01) sets out in a single text, for the first time in the European Union’s history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

⁴²Art 6(1) of the Treaty on European Union (TEU). In addition, Art 6(3) TEU reaffirms that fundamental rights as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States are general principles of EU law.

Art 6(2) TEU.

⁴³FRA, (n 36) 15. See also European Commission, ‘Communication From The Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ COM (2010) 573 final, 3.

⁴⁴Art 11 (2) CFREU, 2010/C 83/02, O.J. (C 364), 9.

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Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by Article 10 ECHR. The limitations which may be imposed on Article 11 may therefore not exceed those provided by Article 10(2) ECHR, which is discussed in further detail in Chapter Four.⁴⁵ Article 11 of the Charter also corresponds to the constitutional provisions of the Member States, all guaranteeing freedom of expression as one of the key fundamental human rights.⁴⁶

Article 21 of the Charter contains a prohibition on discrimination on various grounds including disability.⁴⁷ The Charter explicitly recognises persons with disabilities in Article 26 and provides for their integration and participation in the life of the community by providing that:

“The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”⁴⁸

According to Cristina Bachmeier, Article 21 of the Charter must be interpreted in conjunction with Article 26, which ‘protects persons with disabilities’ and emphasises their ‘independence’.⁴⁹ The aim is to ensure disabled persons’ ‘social and occupational integration’ and ‘participation in the life of the community.’ Bachmeier suggests that possible ways of bringing about that integration include the provision of training opportunities and a guarantee of barrier-free access to the media.⁵⁰ Article 26 of the Charter is contravened if the EU limits the measures taken by member

⁴⁵Freedom of expression, as enshrined Article 10 (1) ECHR, is subject to a number of restrictions outlined in Article 10 (2) ECHR. The European Court of Human Rights has consistently emphasised that the values set forth in Article 10 (2) are to be viewed as exceptions, which must be strictly interpreted and not as principles to be balanced against the freedom of expression. Accordingly a respondent State must establish that any restriction must be (i) ‘prescribed by law’, (ii) it must pursue a legitimate aim (namely, one of those enumerated in Article 10 (2) ECHR , and (iii) it must also be ‘necessary in a democratic society’ to promote that aim.

⁴⁶EU Network Of Independent Experts On Fundamental Rights, ‘Commentary of The Charter Of Fundamental Rights Of The European Union’ (June 2006) 116 states that “[T]he level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level acceptable by the ECHR.” < http://ec.europa.eu/justice/fundamental-rights/document/index_en.htm >

⁴⁷FRA, (n 36) 15. Accordingly, individuals can make a complaint about EU legislation or national legislation that implements EU law if they believe the Charter has not been respected. National courts can obtain direction on the proper interpretation of EU law from the ECJ via the preliminary reference procedure.

⁴⁸Art 26 CFREU.

⁴⁹Christina Bachmeier, ‘Barrier-free access to audiovisual content: A fundamental human right’ in Susanne Nikoltchev (ed), *Enabling Access to the Media for All*, IRIS plus 2014-3 European Audiovisual Observatory 2014, 17.

⁵⁰ibid

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states to safeguard persons with disabilities or if their situation is not considered when decisions are taken that have adverse affects.

Secondary Law

The Audiovisual Media Services Directive (AVMSD) 2010/13/EU - Overview

The principal piece of legislation for audiovisual policy, described as the “backbone of EU Media Regulation”,⁵¹ is the Audiovisual Media Services Directive 2010/13/EU. The AVMSD became law across the European Union in December 2007 after its formal adoption by the European Parliament and the European Council. Member States were given two years in which to bring its provisions into effect at national level.⁵²

Up until then, the Television without Frontiers Directive (TWFD) 1989, as amended, was the cornerstone of the European Union's audiovisual policy.⁵³ It rested on two basic principles: the free movement of European television programmes within the internal market and the requirement for TV channels to reserve, whenever possible, transmission time for European works (“broadcasting quotas”). The TWFD also safeguarded certain important public interest objectives, such as cultural diversity, the protection of minors⁵⁴ and the right of reply.⁵⁵

The issue of disability in broadcasting (and subsequently audiovisual media) services was not addressed in the ‘Television without Frontiers Directive (TWFD) 1989, nor its amending Directive in 1997. It was not until 2003 that disability was acknowledged in a Communication adopted by the European Commission on the

⁵¹European Parliament resolution of 22 May 2013 on the Implementation of the Audiovisual Media Services Directive (2012/2132(INI)).

⁵²See Commission of the European Communities, ‘First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU “Audiovisual Media Service Directive,” Audiovisual Media Services and Connected Devices: Past and Future Perspectives’ {SWD(2012) 125 final}COM (2012) 203 final, 4.

⁵³Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ L 298/ 23–30; Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202 /60-70.

⁵⁴Art 22 TWFD 97/36 EC.

⁵⁵Art 23 (1) TWFD 97/36/EC.

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future of European regulatory audiovisual policy.⁵⁶ The recognition of disability however was confined to issues of accessible broadcasting services and not as it related to the regulation of broadcast content. The Communication highlighted that while the issue of accessibility for people with a disability to television did not fall within the remit of the TWFD, the Commission would promote accessibility matters with Member States to co-ordinate and complement national actions and measures.⁵⁷

- **General Principles**

The AVMSD governs EU-wide coordination of national legislation on all audiovisual media services and incorporates both traditional television broadcasts and on-demand services.⁵⁸

The main objective of the revision of the TWFD was to take account of technological developments and changes in the structure of the audiovisual market.⁵⁹

The AVMSD therefore updates the European Union's rules on broadcasting to face the challenges of the digital age and creates rules on the use of different audiovisual media services to ensure better legal protection for European television viewers.

- **Technological Neutrality**

The Directive covers all services with audiovisual content irrespective of the technology used to deliver the content (content neutrality). The rules apply whether, for example, news or other audiovisual content is watched on television, on the Internet or on a mobile phone.⁶⁰ However, taking into account the degree of choice

⁵⁶Commission of the European Communities, 'Communication from the Commission to the Council, The European Parliament, the European Economic And Social Committee And The Committee Of the Regions on the Future of European Regulatory Audiovisual Policy' COM (2003) 784 Final.

⁵⁷ibid 11. This would be carried out by the Contact Committee established by the Television without Frontiers Directive. The Communication stated that in particular, enriching content with audio description, audio subtitling, subtitling and sign language would be further discussed.

⁵⁸Art 1.1 (a) AVMSD 2010/13/EU defines an 'audiovisual media service' as "a service as defined by Articles 56 and 57 of the TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph."

⁵⁹See Recital 4 AVMSD 2010/13/ EU. Recitals to the AVMSD explain the background of the Directive and its aims and objectives; however they do not require actual transposition into the law of member states.

⁶⁰Recital 27 AVMSD 2010/13EU, states that: "[T]elevision broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service." In general, for

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and user control over these services, the AVMSD makes a distinction between linear (traditional television broadcasts)⁶¹ and non-linear (on-demand) services.⁶² In establishing a new demarcation line by distinguishing between ‘linear’ and ‘non-linear’ services the determining factor is not the individual choice of users accessing the services but whether the information available on a platform is of a ‘programmatic’ nature.⁶³

- Graduated Regulation

The distinction between linear and on-demand services is the basis for a graduated regulatory approach. The Directive adopts a two-tier system of rules, and acknowledges a set of core societal values applicable to all audiovisual media services providing, for example, that these services must be directed at the general public and intended to inform, entertain and educate under the editorial responsibility of a media service provider.⁶⁴ The Directive provides for lighter regulation of on-demand services where the users have a more active, “lean-forward” approach and decide on the content and the time of viewing.⁶⁵ In addition, the Directive introduces a new term to describe forms of promotion in audiovisual media.⁶⁶ “Audiovisual

television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of the Directive are deemed to be met by the fulfilment of the requirements applicable to the television broadcast, *i.e.* linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

⁶¹Art 1.1(e) AVMSD 2010/13/EU provides that: “‘television broadcasting’ or ‘television broadcast’ (*i.e.* a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;” Here programmes are ‘pushed’ to television viewers to a set programme schedule whereby the viewer has no choice when to watch them.

⁶²Art 1.1 (g) AVMSD 2010/13/EU provides that “‘on-demand audiovisual media service’ (*i.e.* a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.” *See also* Stephen Ridgway, ‘The Audiovisual Media Services Directive: What does it mean, is it necessary and what are the challenges to its implementation?’ (2008) 14 (4) *Computer and Telecommunications Law Review*, 108, 109, states “an on-demand service is a service which allows viewers to determine what they watch and the time they do so by “pulling” programmes from a catalogue of services selected by a media service provider. The most obvious example is video-on-demand services...”

⁶³cf. Art 1 TWFD 97/36 EC and Art 1 AVMSD 2010/13/EU.

⁶⁴*See* Art 1.1 (a) (i) AVMSD 2010/13/EU; Art 1.1 (c) AVMSD 2010/13/EU provides: “‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;”

⁶⁵Recital 58 AVMSD 2010/13/EU.

⁶⁶Recital 22 AVMSD 2010/13/EU, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication.”

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commercial communication” is a term that describes forms of promotions, including product placement⁶⁷ which is regulated by EU law for the first time. This reflects the Directive’s increased scope, covering television, on-demand services and emerging advertising techniques.

- **Respect for Fundamental Rights and Principles**

The Audiovisual Media Services Directive states that it enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union.⁶⁸ The Directive places particular emphasis on Article 11 of the Charter which deals with “freedom of expression and information,” stating that the AVMSD should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.⁶⁹ Moreover, in terms of content regulation, it states that any measures taken to protect the physical, mental and moral development of minors and human dignity should be “carefully balanced” with the fundamental right to freedom of expression as laid down in the Charter.⁷⁰ Harrison and Woods state that the right of minors to be protected from material that may impair their development, (Articles 27 and 12), the ban on incitement to hatred (Article 6), and the right of reply (Article 22) are all linked to the protection of human dignity, which itself is recognised as a general principle of Union law.⁷¹ Moreover for those member states that recognise human dignity as a constitutional principle, it becomes a universal European postulate, which sets qualitative standards in the field of the media.⁷² They state that the desire to respect human dignity within broadcasting content may, however, at times conflict with the particular interests of broadcasters often expressed in terms of freedom of expression⁷³ adding further that:

“[T]he values attributed to freedom of expression can mean that concerns about harmful speech, even that infringing human dignity, can be outweighed. The issue is made more difficult because different cultural and moral values within member states mean that pan-Union agreement about

⁶⁷Art 1.1 (m) AVMSD 2010/13/EU, defines ‘product placement’ as: “...any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration;”

⁶⁸Recital 16 AVMSD 2010/13/EU.

⁶⁹ibid

⁷⁰Recital 60 AVMSD 2010/13/EU.

⁷¹Harrison and Woods (n 29) 220.

⁷²ibid

⁷³ibid

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what constitutes ‘harmful’ content, and what the boundaries of permissible speech are, is difficult to achieve”.⁷⁴

- **Audiovisual Media Services as Cultural Services**

While the primary objective of the AVMSD is to create a barrier free market for audiovisual media services, the Directive recognises that “[A]udiovisual media services are as much cultural services as they are economic services.”⁷⁵ It further acknowledges the growing importance of audiovisual media services for societies, democracy, in particular by ensuring freedom of information, diversity of opinion and media pluralism, education and culture, thereby justifying the application of specific rules to such services.⁷⁶ Additionally the Directive recognises that “the right of persons with a disability to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services.”⁷⁷ To this end, the AVMSD sets out a vague standard of accessibility to be achieved in audiovisual media services by member states in Article 7 which provides that member states “...shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual and hearing disability.”

The AVMSD further acknowledges that the TFEU 2009⁷⁸ requires the Union to take cultural aspects into account in its actions under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures.⁷⁹ The Directive notes that the European Parliament supported the UNESCO Convention on

⁷⁴ibid 221.

⁷⁵Recital 5 AVMSD 2010/13/EU.

⁷⁶ibid. See also Ellen Wauters *et al.*, ‘Media Pluralism in the EU- Comparative analysis of measurements systems in Europe and US’ (Steunpunt Media 2013) 7, states that various dimensions of media pluralism have been defined by an EC Study on Indicators for Media Pluralism which includes *inter alia* cultural, political, and geographical media pluralism. “[C]ultural media pluralism refers to fair and diverse representation of and expression by (*i.e.* passive and active access) the various cultural, linguistic, religious, ethnic groups, disabled people, women and sexual minorities in the media. It comprises plurality and a variety of themes and voices brought to the media, socialisation through multiple forms of media access and participation, choice between different forms of interaction and representation of diverse values, viewpoints and roles, in which citizens belonging to various national, ethnic, cultural, linguistic groups, including women, disabled people and sexual minorities, can recognise themselves.” <http://www.steunpuntmedia.be/wp-content/uploads/2014/03/Steunpunt-Media_...>

⁷⁷Recital 46 AVMSD 2010/13/EU.

⁷⁸The TFEU came into force on 1 December 2009 following the ratification of the Treaty of Lisbon, which made amendments to the Treaty on European Union and the Treaty establishing the European Community (TEC). The TFEU is an amended and renamed version of the TEC. The TFEU includes developments to the social dimension of the European Union and adds the non-discrimination principle (Article 10 TFEU).

⁷⁹Recital 6 AVMSD 2010/13/EU; Art 167(4) TFEU, 2009.

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the Protection and Promotion of the Diversity of Cultural Expressions, 2005.⁸⁰ The UNESCO Convention states in particular that ‘cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value.’⁸¹ Chapter One highlighted the social significance and influence of broadcasting in shaping culture, identity and values and in particular the need for self- recognition and identity in media content for persons with disabilities through accurate and realistic portrayals.⁸² Accordingly, it is submitted, the recognition in the AVMSD of audiovisual media services as having cultural value and in conveying identities, values and meanings bears significance in terms of the promotion of diversity and the identity and self recognition of disabled persons in broadcast media content.

AVMSD2010/13/EU - Audiovisual Content Considerations

i. Protection of Minors and Human Dignity

The AVMSD 2010/13EU, as stated above, contains restrictions on the broadcasting of content which may be damaging to minors and human dignity in order to provide a minimum threshold of protection for viewers.⁸³ The Directive does not outline the type of content which may, for example, “prejudice respect for human dignity.”⁸⁴ From the mid 1990s to 2006 however, various bodies of the European Union⁸⁵ have been involved in the development and subsequent adoption of a series of instruments aimed at combating the dissemination of content offensive to human dignity and the protection of minors against exposure to content that is harmful to their

⁸⁰UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005. The European Union acceded to the Convention on 18 December 2006.

⁸¹Recital 7 AVMSD 2010/13/EU, which cites Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved the UNESCO Convention on behalf of the Community. The Convention entered into force on 18 March 2007.

⁸²See Chapter One ‘Media and Disability: Theoretical Underpinnings’.

⁸³Recital 59 AVMSD 2010/13/EU *e.g.* provides that “[T]he availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors *as well as* human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary.”

⁸⁴Art 9 .1 (c) (i) AVMSD 2010/13/EU *e.g.* provides that Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction...shall not: ...prejudice respect for human dignity...”.

⁸⁵The Commission of the European Union, the European Parliament and the Council.

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development.⁸⁶ These non-legally binding instruments have primarily taken the form of Recommendations, and are of persuasive value only. A detailed analysis regarding the development and evaluation⁸⁷ of such instruments is outside the confines of this thesis.⁸⁸ Nonetheless a number of general observations regarding the interpretation of the types of broadcasting content that may be offensive to human dignity can be extracted from them. For instance, the European Commission has in the past identified contents offensive to human dignity as:

“illegal contents which are prohibited to the whole of society regardless of age and medium, and which strike at the very foundations of society and human dignity...” (for example, child pornography, extreme forms of violence, incitement to racial hatred and xenophobia).⁸⁹

Furthermore, content which incites not merely to hatred but also to discrimination on various grounds including disability has also been of concern to the protection of human dignity.⁹⁰ Moreover the concept has been interpreted to extend to the right of privacy and protection of reputation.⁹¹

⁸⁶See e.g. Commission of the European Communities, ‘Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services’ COM (1996) 483, final; Council, Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (98/560/EC) OJ L 270/48; ‘Proposal for a Recommendation of the European Parliament and the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry’ COM (2004) 341 Final.

⁸⁷See Commission of the European Communities, Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity /* COM/2001/0106 final*; Commission; Second Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity /* COM/2003/0776 final.

⁸⁸In summary, examination of the Recommendations and subsequent evaluation reports revealed more of a pre-occupation with measures to protect minors particularly in light of technological advances and the internet, rather than on measures to protect human dignity.

⁸⁹Commission of the European Communities, ‘Commission Communication to the European Parliament, the Council and the Economic and Social Committee on the follow-up to the Green paper on the protection of minors and human dignity in audiovisual and information services - Proposal for a Council recommendation concerning the protection of minors and human dignity in audiovisual and information services’ COM (1997) 570, final (18 November, 1997), fn3.
<[<http://ec.europa.eu/avpolicy/docs/reg/minors/com1v-en.htm#\(3\)>](http://ec.europa.eu/avpolicy/docs/reg/minors/com1v-en.htm#(3))>

⁹⁰See e.g. Commission of the European Communities, *Green Paper* (n 86) 13; See also (n 86) COM (2004) 341 Final, 6-7. This proposal recommended that Member States foster a climate of confidence which would promote the development of the audiovisual and information services industry by “encouraging” industry to avoid discrimination based on grounds *inter alia* of disability in all media and to combat such discrimination. It further recommended that the industries and parties concerned develop effective measures to avoid discrimination based on various grounds, including disability, in all media and to combat such discrimination and promote a diversified and realistic picture of the skills and potential of women and men in society.

⁹¹Opinion of the European Economic and Social Committee on the Proposal for a European Parliament and Council Recommendation on the protection of minors and human dignity and the right

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The AVMSD 2010/13EU recognises the Recommendation of the European Parliament on the protection of minors and human dignity and on the right of reply 2006,⁹² in a number of its recitals.⁹³ The Recommendation suggests the need for the European Community to “act with greater determination” regarding the aim of adopting measures “to protect consumers from incitement to discrimination based on *inter alia* disability and in combating any such discrimination.”⁹⁴ However, it also states that any action in this regard should strike a balance between the protection of individual rights on the one hand and the freedom of expression on the other. The need for a balance is particularly emphasised in the Recommendation with respect to Member States’ responsibility for defining the notion of incitement to hatred or discrimination in accordance with their national legislation and moral values.⁹⁵ Having regard to the regulation of content which aims to protect human dignity, the Recommendation accentuates co-regulation, with a particular onus on member states, who are “encouraged” to adopt provisions without infringing freedom of expression.⁹⁶ This is to be achieved, for example, by drawing up codes of conduct in co-operation with professionals and regulatory authorities at national and Community Level.⁹⁷

ii. Proscription on Incitement to Hatred (Article 6)

Notwithstanding the latter recommendation, Article 6 AVMSD sets down a legally binding minimum standard of content regulation to be achieved in all audiovisual media services across the EU. The article provides that the authorities in every EU country must ensure that audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality. The standard applies to *all*

of reply in relation to the competitiveness of the European Audiovisual and information services industry (COM(2004) 341 final - 2004/0117 (COD)) [2005] OJ C221/87, para 4.2.1. According to the EESC, “protecting human dignity in the media cannot be confined to banning all forms of discrimination.” It added “that programmes with content that could undermine anyone’s privacy or fundamental rights must also, where this is justified by the potential effect on society be discussed by the competent national authorities.”

⁹²Recommendation of the European Parliament and of the Council of the 20 December 2006 on the protection of minors and human dignity and on the right of reply on the in relation to the competitiveness of the European audiovisual and on-line information services industry, (2006/952/EC), [2006] OJ L378/72. The European Commission subsequently adopted the Parliament’s Recommendation in 2006.

⁹³Recital 46 AVMSD 2010/13 EU.

⁹⁴Rec (n 92) 72, para (5).

⁹⁵*ibid*

⁹⁶*ibid* 74, para (18) and 3. (a).

⁹⁷*ibid* 74, para 3. (c).

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“audiovisual media services” and therefore covers hateful content in both traditional broadcasts and on demand services. The Directive does not state what constitutes “incitement to hatred” thereby leaving it to member states to define/interpret the term in accordance with their national laws and moral values and, in doing so, to provide a careful balance between any parallel measures taken to protect freedom of expression. The European Commission accentuates the balance requirement in EU Member States’ implementation of Article 6 AVMSD for the reason that “banning a television channel outright is such a radical move, it must remain a last resort.”⁹⁸ Interestingly, the initial proposal for Article 6 AVMSD included disability as a ground to be protected against hateful content; however disability was omitted in the final text. The development of this Article will be discussed *infra*.

iii. Audiovisual Commercial Communication (Article 9)

Article 9 AVMSD also contains restrictions on certain advertising practices (audiovisual commercial communications), in order to provide a minimum threshold to safeguard “consumers.”⁹⁹ Such restrictions include both positive and negative obligations on Member States to “ensure”, for example, that audiovisual commercial communications “shall not include or promote” any discrimination based on *inter alia* disability, sex, race, age, ethnic origin, religion and so on.¹⁰⁰ Article 9 also provides that such communications shall not “prejudice respect for human dignity.”¹⁰¹ The AVMSD provides that member states are however free to impose more stringent standards with respect to television advertising, and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.¹⁰² The Directive also contains substantive provisions for extra restrictions on television advertising and teleshopping.¹⁰³

Audiovisual Media Services Directive 2010/13/EU and Disability

An analysis of the AVMSD in the sections following will examine the extent to which the EU’s audiovisual policy provides protection from and combats

⁹⁸European Commission, Audiovisual and Media Policies website, ‘Prohibition of Incitement to hatred’. <http://ec.europa.eu/avpolicy/reg/tvwf/incit/index_en.htm>

⁹⁹Art 9 AVMSD 2010/13EU.

¹⁰⁰Art 9.1(c) (ii) AVMSD 2010/13EU.

¹⁰¹Art 9.1 (c) (i) AVMSD 2010/13EU.

¹⁰²Art 4 AVMSD 2010/13/EU; Recital 83. *See also* Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law* (2nd edn, Edinburgh University Press 2006) 212-213.

¹⁰³AVMSD 2010/13/EU, Chapter VII, Arts 19-26.

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discrimination for persons with disabilities in broadcast media. The AVMSD contains four explicit references to “disability” and /or “persons with disabilities” which are contained in both the recitals to and particular substantive provisions of the Directive.¹⁰⁴ As aforementioned, these refer to the rights of persons with a disability to participate in the social and cultural life of the Union through the provision of accessible audiovisual media services; “promoting the rights of persons with disabilities”; ensuring a high level of protection of those rights as “objectives of general interest”, in audiovisual media services;¹⁰⁵ and ensuring that persons with disabilities are not discriminated against on grounds of their disability in the content of audiovisual commercial communications.

- Accessible Audiovisual Media Services (Recital 46 and Article 7)

Recital 46 recognises non-economic issues such as the right of persons with disabilities and of the elderly to participate and be integrated in the social and cultural life of the Union.¹⁰⁶ It further provides that this right is “inextricably” linked to the provision of accessible audiovisual media services. The recital outlines such services as including subtitling, audio-description and sign language.¹⁰⁷ Recital 46 is then bolstered in the substantive provision Article 7 AVMSD, which sets down a vague minimum standard for EU member states regarding the provision of accessible audiovisual media services for people with a visual or hearing disability. It is submitted that there are a number of inherent difficulties with Article 7 and its accompanying recital. For instance, the objective of the recital concerns the “right of persons with a disability” to participate and be integrated in the social and cultural life of the Union which is inseparable from the provision of accessible audiovisual media services. However, Article 7 confines the duty to provide such services to persons “with a hearing or visual disability.” Consequently, the discrepancy between

¹⁰⁴Recitals 46 and 104 and Arts 7 and 9 AVMSD 2010/13/EU respectively.

¹⁰⁵Commission, (n 86) COM (1996) 483, final 2. The Green Paper acknowledged that general interest considerations in the field of broadcasting basically concern the content of broadcasts and are linked to moral and democratic values such as pluralism, information ethics and protection of the individual. It stated: “[W]hatever the weight given to freedom of expression, the protection of minors and human dignity has always been a fundamental concern of media regulation. The appearance of new media in no way alters the need for that protection.”

¹⁰⁶Recital 46 provides that; “The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.”

¹⁰⁷ibid

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the aim of the recital and the actual duty imposed on member states in the substantive provision results in the exclusion of other persons with different types of disability.¹⁰⁸ It is submitted that in light of the EU's involvement in the negotiation of the CRPD it is perhaps an oversight that the current Directive creates almost a hierarchy of disability in its confinement of the provision to two specific types of disabilities.¹⁰⁹ A more detailed critique on the issue of accessibility and Article 7 AVMSD will be provided in Chapter 5.

A report carried out by the European Parliament in 2013 on the implementation of the AVMSD points out that the Commission's first report on its implementation does not fully address the issue of accessibility, nor does it assess the effectiveness of the implementation of the appropriate provisions in individual Member States. With regard to the report's unsatisfactory conclusions, the Parliament calls on the Commission to monitor the situation regarding the provision of media services to people with visual or hearing impairments. It further asserts that it is vital for the Member States to encourage broadcasters to gain a better understanding of "the needs of these people" and to undertake further work to develop technologies that will assure wider access to programmes for all citizens through further developments in, *inter alia*, audio description, audio/spoken subtitles, sign language and menu navigation, with specific reference to electronic programme guides (EPGs).¹¹⁰

AVMSD 2010/13/EU - Content Regulation and Disability

Recital 104 of the AVMSD 2010/13/EU, specifically recognises *inter alia* that the promotion of the rights of persons with disabilities is an objective of general interest which "must receive a high level of protection." Recital 104 provides that:

"Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive,

¹⁰⁸For example, persons with an intellectual disability or dexterity impairment. See Chapter Two for interpretation of the concept of disability.

¹⁰⁹See for further discussion Gráinne de Búrca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 (2) *European Law Review* 174.

¹¹⁰European Parliament, 'Report on the Implementation of the Audiovisual Media Services Directive' 2012/2132(INI), 28 February 2013. This report was not mentioned in the EU's Report on the CRPD in 2014.

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be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.”

Recital 104 is an example of where the European Union does not have exclusive powers, and as such contains references both to subsidiarity *stricto sensu* and to proportionality.¹¹¹ Generally speaking, the principle of subsidiarity is defined in Article 5 of the Treaty on the European Union.¹¹² It ensures that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at Union level is justified in light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the Union does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties.¹¹³

With regard to the media sector, the questions relating to media content are, by their very nature, mainly national, given their direct and close link to the cultural, social and democratic needs of a given society.¹¹⁴ In accordance with the principle of subsidiarity, regulation of content is thus mainly the responsibility of the Member States. The European Commission however promotes greater use of different policy

¹¹¹See *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*, (2003, as corrected in 2009), 10.15.4. <<http://eur-lex.europa.eu/en/techleg/10.htm>> . See also *Legislative Drafting A Commission Manual*.

<http://ec.europa.eu/governance/better_regulation/documents/legis_draft_comm_en.pdf2>

¹¹²See *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, Official Journal C 83 of 30.3.2010.

¹¹³< http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm>. See also Protocol On The Application Of The Principles Of Subsidiarity and Proportionality, Protocol 2, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0207:0209:EN:PDF>

¹¹⁴Hans-Bredow-Institut, ‘Final Report Study on Co-Regulation Measures in the Media Sector’ (Study for the European Commission, Directorate Information Society and Media Unit A1 Audiovisual and Media Policies, June 2006) 155 citing the Fourth Report from Commission on the Application of TWF Directive 89/552 COM (2002) 778 final, 40.

<http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf>

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tools like co-regulatory mechanisms at both national and Community levels.¹¹⁵ Such measures are a good example of application of the principle of subsidiarity.¹¹⁶

There is only one explicit reference to “disability” in the AVMSD pertaining to restrictions on broadcasting content. This restriction is contained in Article 9 AVMSD on audiovisual commercial communications and will be discussed *infra*. However, during the drafting phase of the AVMSD a number of submissions were made to the European Commission, which considered the regulation of broadcast content dealing with disability on a broader scale. The proposed measures had the potential to directly and indirectly affect “disability” and its portrayal in broadcasting content.¹¹⁷ Although a detailed outline and appraisal of such proposed measures in the AVMSD is outside the scope of this thesis, the section following will provide a summary of the proposed measures and the different contexts in which they were considered by various bodies.

Travaux Préparatoires

Commission of the European Communities

The initial proposal of the Commission of the European Communities (hereafter The Commission), for amending the TWF Directive in December 2005 is of particular interest. In this proposal the Commission proposed the inclusion of disability as a ground under the Directive’s prohibition on incitement to hatred provision which applied to all audiovisual media services. The initial proposal also contained a provision prohibiting discrimination in audiovisual commercial communications. This latter provision, however, was confined to discrimination based on grounds “of race, sex, or nationality” and did not include “disability.”¹¹⁸

¹¹⁵ibid 156. Recital 44 AVMSD 2010/13/EU states: “...Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation...” This is bolstered by the substantive provision in Article 4 (7) AVMSD which provides that: “[M]ember States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.”

¹¹⁶ibid

¹¹⁷*E.g.* Opinions expressed by various Committees in the reports of the European Parliament and public consultations during the drafting stages of the AVMSD.

¹¹⁸See ‘Proposed Article 3g (c)’ in European Commission, ‘Proposal for a Directive of the European Parliament and Of The Council Amending Council Directive 89/552/EEC...’ (2005) COM 646 final, 24.

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European Disability Forum (EDF)

In May 2006, the European Disability Forum (EDF),¹¹⁹ an independent European organisation of disabled people, made a number of observations and suggested amendments to the Commission's initial proposal for the AVMSD.¹²⁰ These proposed amendments concerned the regulation of audiovisual media content pertaining to disability in a number of different contexts. Firstly, the EDF observed that "disability" was only addressed in the Commission's proposed article dealing with incitement to hatred.¹²¹ Secondly, it called attention to the exclusion of "disability" as a ground under the proposed article prohibiting discrimination in audiovisual commercial communications. Moreover the EDF noted that the Commission's latter proposal on the regulation of discriminatory content was confined to audiovisual commercial communications and did not apply to general "audiovisual media services," which would have included all broadcasting content (both linear and non linear).¹²²

While the EDF was satisfied with the insertion of a general provision prohibiting 'incitement to hatred' on grounds of disability in all audiovisual media services, it "called for the extension of the prohibition of 'discrimination' beyond audiovisual commercial communications and for the inclusion of 'disability' as one of the grounds for protection."¹²³

Significantly, the EDF was concerned that the portrayal of persons with disabilities, including those with intellectual disabilities, "continues to be patronising and disrespectful of their human dignity and right to equality."¹²⁴ On this basis the EDF

¹¹⁹The EDF is an independent NGO that represents the interests of 80 million Europeans with disabilities. It is the only European platform run by persons with disabilities and their families. The EDF was created in 1996 by its member organisations to make sure decisions concerning disabled people are taken with and by disabled people.

¹²⁰European Disability Forum (EDF), *EDF response to the Proposal for a Directive amending the Directive on Television Without Frontiers*, (COM (2005) 646 final), DOC EDF-06-04, May 2006.

¹²¹ibid 8. Here, the EDF were referring to 'Proposed Article 3e' in European Commission, (n 118) (2005) COM 646 final, 24. 'Proposed Article 3e' provided that Member States "shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

¹²²ibid. The EDF stated that "[T]he current Commission's proposal only extends the prohibition of discrimination to 'audiovisual commercial communication', *i.e.* advertising, not general 'audiovisual media services'. Moreover, even there, discrimination is only prohibited on limited grounds, excluding disability."

¹²³ibid 7.

¹²⁴ibid

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recommended that a provision be included in the Directive that promoted a shift of attitudes towards persons with disabilities in all audiovisual media programmes.¹²⁵

The EDF's response paper to the Commission's proposed Directive recalled the Commission's commitment to mainstream disability issues in relevant Community policies and existing processes and its focus, in particular, on the area of accessibility of goods, services and the built environment.¹²⁶ It stated that "explicit prohibition of discrimination on the grounds of disability in the future Audiovisual Media Services Directive could demonstrate this commitment by extending the rights-based approach to disability in its policies."¹²⁷

The EDF's proposed new article, which would have come under a heading of General Provisions in the proposed AVMSD, is worth reiterating here:¹²⁸

"Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdictions:

- (a) do not include any discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- (b) do not contain any incitement to hatred based on the above-mentioned grounds;
- (c) do not portray persons with disabilities in a stigmatising way in the violation of their human dignity and integrity."¹²⁹

In summary, the EDF's recommendation in 2006 extended the Commission's discrimination prohibition in audiovisual commercial communications to include

¹²⁵ibid

¹²⁶ibid, here it was referring to the European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Equal opportunities for people with disabilities: A European Action Plan' COM (2003) 650 final, 13.

¹²⁷ibid

¹²⁸Owing to the fact that the CRPD, which the EU has since ratified, places a general obligation on State parties in Art 4 (3) CRPD which provides that : "[I]n the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations". See also de Búrca (n 108) 181-182, states that in the negotiation of the CRPD, it seems the influence of disability NGO's, and "particularly of the umbrella... EDF on the European Union was very significant, and maybe led to the development of a more cohesive and well-co-ordinated EU approach in the end."

¹²⁹EDF, (n 120) 7-8, referring to European Commission COM (2003) 650 final, 13 'Proposed General Provision Article 3 e'.

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disability. Furthermore it recommended that this provision apply to **all** audiovisual media content.¹³⁰ The final text of the current AVMSD includes disability as a ground to be protected from discrimination; however, this provision applies to audiovisual commercial communications only (Article 9).

The EDF's recommendation also called for the retention of the Commission's proposal on the incitement to hatred provision which included disability as a ground under its protection. In contrast, the current AVMSD omits disability as a ground to be safeguarded in its equivalent provision (Article 6) albeit it was the Commission itself who initially proposed that disability should be included in the provision.

The EDF's recommendation also included a negative obligation regarding stigmatising portrayals of persons with disabilities, linking such portrayals to "the violation of the human dignity and integrity of persons with disabilities." Again this latter provision was to apply to all audiovisual media content. However, the current AVMSD does not contain any similar provision.

European Parliament and Standing Committees

Likewise, in a report by the European Parliament in November 2006¹³¹ on the European Commission's first proposal for the new AVMSD in 2005, several of the European Parliament's standing committees suggested amendments to the Commission's proposal. While a detailed analysis of all these revisions is outside the confines of this thesis, a number of the proposals are worthy of note as an indication of the line of thinking regarding disability in audiovisual media content.

For instance, the European Parliament and most of the standing Committees supported the retention of "disability" as a ground to be safeguarded in the incitement to hatred provision initially proposed by the Commission. The effect of the Commission's initial proposed revision on incitement to hatred would have directly brought the text into line with the provisions of primary law as laid down in

¹³⁰*i.e.* in audiovisual media services and audiovisual commercial communications.

¹³¹European Parliament, "Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/20052005/0260(COD))
<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2006-0399+0+DOC+XML+V0//EN>>

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Article 13 EC (now Article 19 TFEU) of the Treaty which deals with discrimination.¹³² This was one such justification offered by the Committee on Civil Liberties, Justice and Home Affairs (CLHJA) for its explicit inclusion of a negative obligation on member states regarding discrimination in addition to incitement to hatred based on *inter alia* disability in the proposed article.¹³³

The Committee on Economic and Monetary Affairs (CEMA) also justified the list of prescribed grounds which included disability “as being in the interest of a uniform standard of protection for all audiovisual media services and audiovisual commercial communications.”¹³⁴ The CEMA was also of the opinion that human dignity “which should be given paramount consideration”, should also be included in the article, as it was in the Charter of Fundamental Rights of the EU.¹³⁵

Likewise the Committee on Women’s Rights and Gender Equality (CWRGE) proposed adding disability as grounds to be protected against hateful and discriminatory content in its proposed text.¹³⁶ The CWRGE’s proposed new article also contained a provision containing a negative stipulation that audiovisual media services and audiovisual commercial communications “... do not portray persons with disabilities in a stigmatising manner that violates their human dignity and integrity.”¹³⁷ The CWRGE were of the opinion that the aim of measures taken to protect the rights of minors and human dignity in addition to respecting freedom of expression should also ensure an adequate level of protection of the rights of minors, women and groups facing discrimination .¹³⁸ This aim was justified in

“Considering the important role played by the media in the way people form their opinions, and the de facto power it has on the public it is essential that a

¹³²ibid 95, ‘the initial text proposed by the Commission Article 1, Point 6, Article 3e, (Directive 89/552/EEC), provided that “Member States shall ensure by appropriate means that **audiovisual media services and audiovisual commercial communications** provided by providers under their jurisdiction **do not contain any incitement to hatred based on ...disability....**” [Emphasis added]

¹³³ibid 95-96, the text of the proposed Article 1, Point 6, Article 3e (Directive 89/552/EEC), by the CLHJA, Article 1, would have provided that: “[M]ember States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdictions **do not contain any discrimination or incitement to hatred based on ...disability...and guarantee respect for human dignity and integrity.**” [Emphasis added]

¹³⁴ibid 129.

¹³⁵ibid

¹³⁶ibid 232.

¹³⁷ibid The CWRGE’s proposed new article also dealt with accessible audiovisual media services for persons with disabilities.

¹³⁸ibid 222.

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balance should be found between the right to freedom of expression and respect for human rights as recognised by the EU and its Member States.”¹³⁹

The European Parliament and the standing committee CLJHA also proposed that a new recital regarding the aim of measures taken to protect minors and human dignity be added. They proposed that the text of this recital not only be carefully balanced with freedom of expression but explicitly recognise that persons with disabilities, including those with intellectual disabilities, were a class that should be protected from content that may undermine or psychologically upset and disturb them by programmes comprising scenes of verbal, physical or moral violence or by scenes that offend against human dignity, or incite racial hatred or any other form of discrimination.¹⁴⁰

In sum therefore, the Parliament and various standing committees expressly connected the proposed provision on incitement to hatred to discrimination and the protection of human dignity. The justifications proffered for the consideration of disability in such provisions included: that it was in the interests of applying a uniform standard to all audiovisual media content; that such measures would bring the provisions into line with EU primary law on discrimination; the significant role and power of the media, and its influence on the public and the manner in which people form attitudes. Additionally it considered the harm (physically or psychologically) that the different types of content – including content that offends against human dignity, incites (racial) hatred or any other form of discrimination—could have on persons with disabilities, including those with intellectual disabilities.

AVMSD 2010/13 EU – Article 6 and the Exclusion of Disability

Despite all the considerations outlined above, the final text of Article 6 AVMSD excludes disability as a ground to be safeguarded in audiovisual media services. The

¹³⁹ibid 223.

¹⁴⁰ibid 29-30 “[M]inors and the vulnerable and disabled, including the mentally disabled, may be particularly undermined and psychically [sic] or psychologically upset and disturbed by programmes comprising scenes of verbal, physical or moral violence or by scenes that offend against human dignity, or incite racial hatred or any other form of discrimination. Insofar as one of the objectives of this Directive is to protect such persons in general, Member States are strongly encouraged to remind audiovisual media service providers of this overriding need and to require them to clearly indicate the particular nature of such programmes prior to their broadcasting. There is clear scope for self and co-regulation in this area.” The European Parliament justified the inclusion of this proposed new recital on the grounds that “[T]he protection of minors and the vulnerable and disabled must remain one of the main focuses of concern for both European and national law-makers.” See also CLHJA 85; Similar proposed new recital 32 by the EDF, (n 120) 6.

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upshot of this omission is that the AVMSD does not set a legally binding minimum threshold of protection for European citizens/viewers against content which incites to hatred on grounds of disability. Consequently, there is no legal onus on EU Member States to ensure such protection in all audiovisual media services. The proscription of content which incites to hatred on grounds of disability is a contentious issue which will be discussed in more detail in Chapter Four. It is submitted that the (presumed) motive for its omission was on the grounds that the initial proposal may have had a disproportionately adverse affect on freedom of expression which would be unjustifiable and undesirable. However, it is submitted that the exclusion exposes a defect in the drafting of the AVMSD through the improvident manner in which disability was expelled from Article 6; with no logical deliberative justification for its omission. It would appear that the difficulty lies in the interrelated yet distinct concepts of incitement to hatred and discrimination both of which are related to and are concerned with the protection of the indeterminate notion of human dignity.

It is accepted that while all hateful content is discriminatory not all discriminatory content can be regarded as hateful. Consequently, adopting a uniform standard regarding the regulation of both hateful and discriminatory content in a single provision, as suggested at drafting stages,¹⁴¹ would have been extremely problematical on a number of theoretical and practical levels. Firstly, placing restrictions on content which is hateful and content which is discriminatory, calls for different regulatory responses. The regulation of speech which incites to hatred more often than not calls for its proscription through primary laws owing to the level of its harm. Conversely, the regulation of discriminatory content is not subject to such severe restrictions and generally calls for the placement of negative obligations on media service providers to avoid broadcasting such content through soft law measures. These measures are primarily in the form of codes of practice and implemented through co-regulatory mechanisms, which also provide methods of redress for those who are offended by discriminatory content.

However the above justification regarding the difficulties in juxtaposing discriminatory and hateful content does not explain why the Commission proposed the inclusion of more expansive grounds, including disability, in its initial proposal

¹⁴¹*E.g.* as suggested by the CEMA Committee.

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on the incitement to hatred provision. It is further submitted and accepted that there are interpretative issues which present difficulties regarding the grounds to be protected in Article 6 AVMSD. The interpretation of the concept of hatred is of itself equivocal and varies across EU member states' legal moral and cultural traditions. The Directive does not state what constitutes "incitement to hatred" thereby leaving it to member states to define/interpret the term in accordance with their national laws and moral values and, in doing so, to provide a careful balance between any parallel measures taken to protect freedom of expression. However it is submitted that the initial proposal offered the EU an ideal opportunity to engage in a debate as to whether grounds including disability contained in discrimination legislation should be expanded to and included in incitement to hatred legislation or simply omitted. Additionally the express linkage and differences between the theoretically burdened notions of hateful and discriminatory content and their relationship to content which offends against human dignity could have been identified. Instead, the distinction between those notions and issues surrounding them with regard to disability is completely ignored in the background documents.¹⁴² In 2013, the Committee on Civil Liberties, Justice and Home Affairs issued an opinion for the Committee on Culture and Education on the implementation of the AVMSD and stated that it regretted the fact that not all the grounds identified in Article 21 of the Charter of Fundamental Rights, which includes disability, are mentioned in Article 6 AVMSD. Accordingly the Committee invited the Commission to consider extending the scope of that article, to bring it into line with the Charter.¹⁴³

AVMSD 2010/13 EU – Audiovisual Commercial Communications (Article 9)

The next substantive reference to 'disability' in the text of the AVMSD is contained in Article 9, which concerns 'audiovisual commercial communications'. The AVMSD defines "Audiovisual commercial communications" as:

"images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing

¹⁴²Tarlach McGonagle, 'Safeguarding Human Dignity in the European Audiovisual Sector' (2007) *IRIS Plus* Issue 6, 6, succinctly asserts regarding the initial proposal by the Commission, "the juxtaposition of hatred and discrimination has conceptual and practical implications. The conceptual differences between hatred and discrimination would ordinarily have been troublesome but they are all the moreso here because they are disregarded. The ambiguity of the notion hatred is also problematic."

¹⁴³Opinion of the Committee on Civil Liberties, Justice and Home Affairs (31.1.2013) for the Committee on Culture and Education on the Implementation of the Audiovisual Media Services Directive (2012/2132(INI)), para 4.

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an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes”¹⁴⁴

Broadly speaking, the term covers: television advertising, sponsorship, teleshopping, product placement, promotion, for example, via announcements preceding individual programmes,¹⁴⁵ trailers, and invitations to take part in a competition. Television advertising and teleshopping¹⁴⁶ are subject to the basic rules in the updated Directive. “Television advertising” is defined as and means:

“any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment...”¹⁴⁷

Recital 83 to the AVMSD states that in order to ensure that the interests of “consumers” as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards. This recital is reinforced in the substantive provision in Article 9 AVMSD which provides that member States shall “ensure” that audiovisual commercial communications provided by media service providers under their jurisdiction comply with certain requirements.¹⁴⁸ To this end Article 9 (1) c provides that: “audiovisual commercial communications shall not:

- (i) prejudice respect for human dignity;
- (ii) Include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, **disability**, age or sexual orientation;”

Having regard to Article 9 (1) c (i), Tarlach McGonagle observes that “this wording is confoundingly vague: neither ‘prejudice’ nor ‘respect’ is self-explanatory and

¹⁴⁴ Art 1(1)(h) AVMSD 2010/13/EU.

¹⁴⁵ Recital 96 AVMSD 2010/13/EU provides that it is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels. In particular, trailers consisting of extracts from programmes should be treated as programmes. See “Jury voor Ethische Praktijken inzake Reclam, Adverteerder: VRT, Product/dienst: Studio Brussel, 21.09.2010 (Jury for Ethical Practices Concerning Advertising, complaint against VRT, 21 September 2010), where a promotional television spot to promote a youth radio programme was held not to be discriminatory against physically disabled persons - discussed *infra*.

¹⁴⁶ Art 1(1)(l) AVMSD 2010/13/EU “Teleshopping”... means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;...”

¹⁴⁷ Art (1) (1) i AVMSD 2010/13/EU.

¹⁴⁸ Art 9 (1) AVMSD 2010/13/EU.

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relating them jointly to the already indeterminate notion of ‘human dignity’ greatly exacerbates the interpretative difficulties in question.”¹⁴⁹ The EDF, in a toolkit on the transposition of the AVMSD into national law,¹⁵⁰ states, that it “... defines ‘prejudice’ as a process of ‘prejudging’ something or someone.”¹⁵¹ It states further that disabled people are frequently victims of social stereotypes owing to a lack of knowledge and fear towards disability. The EDF highlights that the social participation of disabled people is undermined by the image they are given in the media.¹⁵² It notes that people with disabilities are under-represented and given a negative image in audio-visual media and are often portrayed as people to be pitied or feared. It further highlights that the media also sustain “a stereotyped, sensationalist and negative image of people with mental health problems, making it even harder for them to gain social acceptance.”¹⁵³

The EDF assert that in the scope of the Directive, discrimination should be understood as the exposure of a negative image of persons with disabilities or envisaging a disability in a humiliating way and hurting the dignity of persons with disabilities.¹⁵⁴

Article 9 (1) (c) (ii) AVMSD contains both positive and negative obligations in that Member States are to ‘**ensure**’ that audiovisual commercial communications provided by media service providers under their jurisdiction **shall not** include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, **disability**, age or sexual orientation.

The Directive does not elaborate on the type of content that could be regarded as discriminatory on grounds of *inter alia* disability, thereby leaving it open to member states to decide and to implement and adopt stricter rules for media service providers

¹⁴⁹McGonagle (n 142) 6.

¹⁵⁰EDF, *Toolkit for the Transposition of the Audiovisual Media Services Directive into National EU Member States Law*, (EDF September 2008).
<http://cms.horus.be/files/99909/MediaArchive/EDF_Toolkit_for_the_Transposition_of_AVMS_Directive.pdf>

¹⁵¹*ibid* 8.

¹⁵²*ibid* 9.

¹⁵³*ibid*

¹⁵⁴*ibid*. The EDF create a link therefore between content which offends human dignity and the concept of discrimination.

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under their jurisdiction if they see fit.¹⁵⁵ A Commission document accompanying the first report on the application of the Directive, notes that the AVMSD “prohibits commercial communications which undermine respect for human dignity and include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.”¹⁵⁶ The document states that “the systematic stereotyping or non-representation of certain categories of the population can amount to overall discrimination.” Therefore it can be gleaned from the document that systematic stereotyping and non-representation of persons with disabilities in audiovisual commercial communications are capable of amounting to overall discrimination and being in breach of Article 9 AVMSD. As stated above, these basic rules apply to television advertising and member states are free to impose stricter rules on media service providers under their jurisdiction. An examination of three complaints relating to disability in television advertising from three different EU Member States demonstrates how various standards are applied at national level.

Ireland

In Ireland, for example, the broadcasting regulator, the BAI have issued a number of codes of practice in relation to commercial communications. These Codes offer a comprehensive protection against discriminatory content covering general commercial communications and children’s commercial communications.¹⁵⁷ The BAI’s *General Commercial Communications Code* 2011 and revised in 2013, for example, provides broadcasters with a comprehensive code that “does not impede in

¹⁵⁵Recital 83 AVMSD; Art 4 (1) AVMSD 2010/13/EU provides that: “[M]ember States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.”

¹⁵⁶Commission Staff Working Document, Staff Working Document Attached to The First Report From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions On The Application Of Directive 2010/13/EU ‘Audiovisual Media Services’ Accompanying the document First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive" Methodology for monitoring the qualitative aspects of advertising SWD (2012) 125 final, 9.

¹⁵⁷Statutory Instrument no 258 of 2010 (“SI”) entitled European Communities (Audiovisual Media Services) Regulations 2010, published in June 2010, gave effect to the transposition of certain elements of the AVMSD. See BAI *General Commercial Communications Code* 2011; BAI *Children’s Commercial Communications Code* 2011 (revised in 2013) The various codes have been developed by the Broadcasting Authority of Ireland in accordance with its statutory obligations under s. 42 of the Broadcasting Act 2009. In addition the BAI has issued rules under section 43 of the Broadcasting Act 2009 e.g. BAI *Rules on Advertising and Teleshopping (Daily and Hourly Limits)* July 2010.

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an unwarranted manner their right to communicate commercial messages.”¹⁵⁸ The Code also provides guidance to the general public on the standards they can expect from commercial communications in broadcasting services.¹⁵⁹ The Code covers different forms of commercial communications which includes advertising, teleshopping, sponsorship, product placement and other forms of commercial promotion. Section 3.2 of the Code which deals with “Offence, Harm and Dignity,” contains negative obligations for broadcasters in relation to human dignity and discrimination. The code provides that: “[C]ommercial communications shall not prejudice human dignity, cause harm or cause serious or widespread offence.”¹⁶⁰ The Code also provides that “[C]ommercial communications shall not include, support or condone discrimination against any person or section of the community, in particular on the basis of ...disability...”.¹⁶¹ The BAI have also issued guidance notes on the *General Commercial Communications Code*.¹⁶² The Guidance Notes state that the “principle” of “Offence, Harm and Dignity” “...is intended to set out basic standards in relation to commercial communications in light of the offence and harm that commercial communications can potentially cause to viewers and listeners.”¹⁶³

A complaint by an individual with a visual impairment in 2012,¹⁶⁴ taken under *inter alia* the BAI’s *General Commercial Communications Code*,¹⁶⁵ demonstrates the Code’s operation in practice and the manner in which such complaints are adjudicated. The complaint concerned a television advertisement that showed a woman who, it would appear, was waiting to meet her partner or boyfriend at a train station. Having waved at him from a distance, she then rushed up to a complete stranger, mistaking him for her partner/boyfriend and proceeded to give him a passionate kiss. It was clear she had made a mistake because of her poor vision but

¹⁵⁸BAI *General Commercial Communications Code* 2011, 3.

¹⁵⁹:*ibid*

¹⁶⁰:*ibid* Section 3.2.1, 8.

¹⁶¹:*ibid* Section 3.2.2, 8.

¹⁶²BAI *General Commercial Communications Code*, Guidance Notes, 2011, 1, states that the Guidance notes are, with the exception of direction in respect of product placement rules, non-binding and are provided to assist broadcasters, advertisers and the general public to interpret and apply the Code.

¹⁶³:*ibid*11.

¹⁶⁴BAI, Broadcasting Complaint Decisions, October 2012, 33-34, Complaint Reference, No.65/12.

¹⁶⁵*ibid* 33, the complaint was submitted under the Broadcasting Act 2009 section 48(1)(d)(*General Commercial Communication Code*) section 3 (3.1.1; 3.1.3 3.1.5 protecting the individual and society) 3.2.(3.2.1; 3.2.2.; 3.2.7 offence, harm and human dignity); and 8.2. (8.2.4; 8.2.5; 8.2.7 medical treatment).

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the advert affirms this interpretation by stating “she should have gone to Specsavers”. The complainant believed that if a person’s vision is that bad they are vision-impaired or legally blind and they should not be made the object of ridicule by marketing teams. The complainant was of the view that being made the butt of advertising jokes does not help everyday independent living and only reinforces prejudice and stereotype ignorance in the minds of the public who have no reason to know any better.¹⁶⁶

In reaching their decision, the BAI’s Executive Complaint Forum was of the view that the content of the advertisement was intended to be humorous and not to be taken seriously. The mistake by the woman in the advert was meant to portray that she could benefit from an eye test. In this regard, it was unlikely to cause undue offence.¹⁶⁷ The Forum acknowledged that facets of life are often dealt with through humour and was of the view that audiences are familiar with such comedic approaches and would be aware that aspects of life are, and can be, subjected to humour.¹⁶⁸ While the Forum acknowledged the complainant’s visual impairment and his sense that this advert offended him, they concluded that “nothing in the advert set out to reinforce prejudice in the minds of the viewing public in relation to those visually impaired.”¹⁶⁹ Consequently the Forum established that the complaint did not breach any of the Codes as submitted by the complainant.¹⁷⁰ In finding that the complaint did not raise potential issues that warranted further investigation, the Forum deemed the matter resolved.¹⁷¹

Belgium

In Belgium, in 2010, The Belgian Jury voor Ethische Praktijken inzake Reclame (Jury for Ethical Practices Concerning Advertising)¹⁷² issued a decision on a complaint, lodged by a member of the public, against the Flemish public broadcasting corporation VRT. The VRT had produced and broadcast a television spot promoting the radio programme “All Areas”, which reported live from various

¹⁶⁶ibid, the complainant found the advert offensive and thoughtless and believed it breached all of the above sections of the Code.

¹⁶⁷ibid 34.

¹⁶⁸ibid

¹⁶⁹ibid

¹⁷⁰ibid

¹⁷¹ibid

¹⁷²The Jury is the self-regulatory authority of the advertising and marketing sector in Belgium.

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music festivals for the public broadcaster's youth station "Studio Brussel." The spot displayed two friends attending a music festival, one of them sitting in a wheelchair and the other one doing his best to look after his disabled friend and providing him with drinks. At a certain moment, the disabled person stood up from his wheelchair and confessed to his friend that he had been tricking him for five years. According to the complaint, there was nothing humorous about the spot, as it did not show respect for real wheelchair users. The Jury in a very short decision were of the opinion that the advertisement depicted an unrealistic situation (five years of deceit, during which the friend failed to notice anything) and contained no disdainful elements regarding wheelchair users.¹⁷³ It found that on the contrary, the wheelchair user was shown as attending music festivals, was very well cared for and treated with respect. Because of the spot's humorous nature and the fact that the advertisement was intended to promote a youth station "Studio Brussel" (known for its funny campaigns), it could not be found to be shocking or pejorative. As the Jury could find no violation of legal or self-regulatory norms, it decided not to formulate any remarks. The standard in Belgium would seem to indicate therefore that the threshold is that the advertisement must be "shocking or pejorative" in order to be discriminatory, taking all factors into account.

Sweden

The Belgian case above can be compared to a complaint regarding another television advertisement in Sweden which caused a debate within the advertising business.¹⁷⁴ The complaint was lodged against the Council on Market Ethics, Marknadsetiska Rådet-(MER). The MER, which is a self-regulatory board composed of several Swedish associations and companies, adjudicates on good business practice. Its decisions are not legally binding. The issue concerned a TV commercial for the OLW Sverige AB company.¹⁷⁵ In the commercial, a one-legged person asks a three-legged person if the latter wants to share. Bringing forward a packet of crisps, the three-legged person then responds, "Av det här goda?" (meaning "is this good?").¹⁷⁶

¹⁷³Jury for Ethical Practices Concerning Advertising, complaint against VRT, 21 September 2010

¹⁷⁴*MER:s Uttalande 34/2008 - Dnr 37/2008* (Statement from Council on Market Ethics 34/2008 - Reg. no. 37/2008) as cited in Michael Plogell and Erik Ullberg, 'Sweden: Complaint Lodged Against Council on Market Ethics for Claiming TV Commercial was Poor Advertising', in *IRIS* 2009-1:18/30.<: <http://merlin.obs.coe.int/iris/2009/1/article30.en.html> >

¹⁷⁵ibid

¹⁷⁶ibid

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The MER stated that Article 1 of the ICC (International Chamber of Commerce) Code of Advertising and Marketing Communication Practice applied to the commercial. Article 1 provides *inter alia* that all marketing communication should be inoffensive, should be prepared with a due sense of social and professional responsibility and should conform with the principles of fair competition, as generally accepted in business. Furthermore, the article provides that no communication should be such as to impair public confidence in marketing. According to MER, it was obvious that the one-legged person's question related to the third leg of the other person.¹⁷⁷ MER's previous rulings show that, in some cases, acceptable grounds may exist for illustrating a disability, but such illustration may never amount to humour based on disabilities.¹⁷⁸ Therefore, in such cases caution is required. MER concluded that the commercial was demeaning towards disabled people. However, it did not rest there, but went on to hold that the commercial constituted an example of such bad taste and poor advertising that it impaired public confidence in advertising and marketing in general.¹⁷⁹

Implementation and Reporting (Article 9)

As guardian of the Treaty, the Commission ensures that the provisions of the Directive are properly implemented and complied with by audiovisual media service providers established in EU countries.¹⁸⁰ Pursuant to Article 33 AVMSD 2010/13/EU, the European Commission has the obligation to report on the application of the Directive and, if necessary, make further proposals in the light of recent technological developments.¹⁸¹ The TWF Directive 97/36/EC established the Contact Committee¹⁸² to monitor the implementation of the Directive and the

¹⁷⁷ *ibid*

¹⁷⁸ *ibid*

¹⁷⁹ See MER:s Uttalande 34/2008 - Dnr 37/2008 (Statement from Council on Market Ethics 34/2008 - Reg. no. 37/2008) <<http://merlin.obs.coe.int/redirect.php?id=11494>>

¹⁸⁰ In general, the Commission endeavours to discuss issues of interpretation and application of the rules of the Directive with the Member States and their regulatory authorities, notably at Contact Committee and Regulator meetings organized in Brussels. The Commission also continuously provides for relevant information and indicators in the framework of its reporting obligations in line with the 2002 Communication on improving the application of the monitoring of European Union law. However, in some cases, the Commission has to pursue infringement proceedings against a particular Member State in case of incorrect transposition or application of the Directive.

¹⁸¹ The first report by the Commission was due by 19 December 2011, and the Commission are obliged to report on the application of the Directive every 3 years thereafter. The European Parliament however criticised the Commission for submitting its application report with a significant delay on 4 May 2012.

¹⁸² Chapter VIa, Art 23a TWFD 97/26/EC now Art 29 AVMSD 2010/13/EU.

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developments in the sector and as a forum for the exchange of views.¹⁸³ In May 2012, the First Report on the Application of the AVMSD was issued by the Commission.¹⁸⁴ In its summary on the application of Article 9 AVMSD, the report highlights that an analysis of sex discrimination and gender stereotypes in the hundred most frequently broadcast advertising spots in eight Member States was made. A working staff document accompanying the report states that for the first time, the qualitative provisions on advertising were monitored separately in order to assess their effective implementation and level of compliance with the Directive.¹⁸⁵ “[T]his monitoring has made it possible to evaluate the effectiveness of the protection provided by the current legal framework in relation to the Directive’s objectives.”¹⁸⁶ However, while such monitoring is welcomed, it is submitted that it is defective in that the report carried out which generally speaking is imprecise at best, is confined to discrimination based on sex and gender stereotypes and ignores disability and other grounds safeguarded under article 9 AVMSD. While it is accepted that this was the first report of the Commission on the application of the AVMSD, it is recommended that the Commission carry out or commission a comprehensive study to assess whether the provisions contained in Article 9 AVMSD on prejudicial and discriminatory content in audiovisual-commercial communications have afforded persons with disabilities the level of protection required. Such a study could include a monitoring component of advertising spots across all EU member states to evaluate the effectiveness of the protection offered in current legal frameworks. It is further suggested that the European Platform of Regulatory Authorities (EPRA) may be the ideal body to conduct the study owing to its expertise on media regulation, its knowledge of best practice across member states and its independent status. Since a second report on the application of the AVMSD is due in 2015, it is unlikely that such a study is feasible in 2015. However the Commission could consider such an analysis as part of its future work programme.

¹⁸³It deals not only with the existing audiovisual policy but also with the relevant developments arising in this sector. The Committee will also help the Member States with their national reports which have to be written every two years.

¹⁸⁴European Commission, (n 52) COM (2012) 203 final, 8.

¹⁸⁵European Commission, (n 156) SWD (2012) 125 final, 3.

¹⁸⁶ibid

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Chapter Three: Part One Conclusion

Part One of this Chapter has endeavoured to assess whether the provisions of the AVMSD are sufficient in their own right in addressing the issue of disability representation in the broadcasting regulatory framework of the European Union. It is submitted that from the foregoing analysis that the answer to that question must be in the negative for a number of reasons. The examination has shown that the AVMSD sets a minimum harmonising standard with regard to the regulation of broadcasting content in **all audiovisual media services**.¹⁸⁷ This standard is set down in Article 6 AVMSD which places a negative obligation on all EU member states to refrain from broadcasting material which may incite to hatred on the basis of a number of grounds including race, sex, religion and nationality. It is submitted that this standard of itself, not least owing to its high threshold, is dubious but is made all the more so by its complete disregard for disability, despite support for its retention as a proscribed ground at draft stages by the European Parliament and the European Disability Forum. It is contended that the unacceptability of the provision however lies not in its actual exclusion of disability *per se* but perhaps in the imprudent manner in which it was considered in the perplexing *mélange* of draft and associated documents leading to its eventual omission in the Directive. Of particular note in this regard, is the express linkage in those documents, which appose the rather indeterminate and conceptually fraught notions of human dignity and incitement to hatred, to the issue of discrimination.

Taking issue with the development and subsequent adoption of Article 6 is not to deny the import of the fundamental right to freedom of expression. Nor does this author reject the difficulties inherent in various member states' legal, cultural and moral traditions; or the theoretical and practical difficulties associated with establishing a uniform minimum threshold of protection in all audiovisual media services against content which incites to hatred or discriminates on grounds of disability. However, the EU's involvement in the negotiations of the CRPD and its subsequent ratification of the Convention must also be borne in mind, as must its legal obligations under the Charter and primary law in the form of the Lisbon Treaty and the rights contained in those instruments which the EU has committed to and is legally bound to protect. It is submitted therefore that the lead up to the Directive

¹⁸⁷ **Author emphasis added.**

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presented a missed opportunity on behalf of the EU to, at the very least, engage in a robust and comprehensible dialogue regarding hateful and /or discriminatory content in relation to disability in all audiovisual media services and not just in audiovisual commercial communications. The upshot of such a disregard is that the AVMSD does not provide a minimum harmonising standard with regard to the regulation of harmful content as it relates to disability despite one of its objectives being to ensure that promoting the rights of persons with disabilities receives a high level of such protection.

The analysis has shown, however, that AVMSD sets a legally binding minimum standard for EU member states to refrain from broadcasting content which discriminates on various grounds including disability in audiovisual commercial communications. Article 9 therefore establishes a minimum level of protection in commercial communications for EU “consumers”, as opposed to “citizens”, and is probably indicative of the Directive’s primary aim, namely the creation of a barrier free internal market. This welcomed provision covers a wide range of commercial communications which includes television advertising. Another positive facet of the AVMSD in this regard is that it does not preclude member states from applying stricter rules with regard to television advertising on media service providers in their respective jurisdictions.

The success of implementing and maintaining the minimum standard set down by AVMSD can only be achieved through frequent monitoring and reporting practices on the part of both member States and the EU. While the AVMSD provides for such monitoring and reporting, nonetheless the analysis reveals that the report to date would appear to indicate the issue of disability discrimination in audiovisual commercial communications has largely been ignored. On this basis it was recommended *supra* that the EU Commission should carry out or commission a study to consider the effectiveness of the provisions contained in Article 9 AVMSD on prejudicial and discriminatory content in audiovisual-commercial communications and whether such provisions have safeguarded persons with disabilities.

An ongoing evaluation of the AVMSD is expressly referred to as part of the EU Commission’s Work Programme 2015, in order to “modernise” EU legislation on

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audiovisual media services.¹⁸⁸ According to some commentators, the manner in which this procedure will advance is still uncertain, but it is being carefully followed by regulators and stakeholders.¹⁸⁹ The Commission in a recent Communication announced that the AVMSD would be revised in 2016.¹⁹⁰ In light of the EU's ratification of the CRPD, it is submitted that this evaluation could provide a unique opportunity for the Commission to consider a number of key issues in relation to protecting the interests of persons with disabilities in the AVMSD. Firstly, the Commission should consider bringing the Directive in line with the CRPD by including the interpretation of persons with disabilities as laid down in the Article 1 CRPD to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Secondly, the Commission should re-consider including disability as a ground to be afforded protection in all audiovisual media services under the incitement to hatred provision in Article 6 AVMSD, thus bringing the AVMSD in line with Article 21 of the CFREU. Thirdly, the Commission should consider re-evaluating Article 7 AVMSD on the accessibility of audiovisual media services for a number of reasons which will be discussed in further detail in Chapter Five.

At the time of writing the Commission launched a public consultation on the AVMSD.¹⁹¹ The public consultation focuses on a number of areas including *inter alia* 'User protection and prohibition of hate speech and discrimination' and "Strengthening media freedom and pluralism, access to information and accessibility to content for people with disabilities".¹⁹² The consultation provides an opportunity

¹⁸⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2015 - A New Start' COM (2014) 910 final, Annex 3, 5. The evaluation is expected to conclude in 2016.

¹⁸⁹Maja Cappello (ed), 'The protection of minors in a converged media environment' *IRIS plus*, European Audiovisual Observatory, 2015, 56.

¹⁹⁰European Commission, 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Digital Single Market Strategy For Europe {Swd(2015) 100 Final}' (Brussels (COM) 2015 192 final 11.

¹⁹¹The consultation was launched on the 6th July and runs until 30 September 2015. A review of the AVMSD will take place in 2016. <<https://ec.europa.eu/digital-agenda/en/news/questions-and-answers-public-consultation-avmsd>>

¹⁹²European Commission, 'Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD): A media framework for the 21st century, Questionnaire' (6 July 2015).

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for individual viewers to make their voice heard and consumer organisations, market players from the whole value chain and public administrations at all levels are all encouraged to contribute. As part of that consultation, the Commission have issued a questionnaire which sets out a number of questions and multiple choice type answers in relation to the current Directive. The questionnaire contains a section on ‘User protection and prohibition of hate speech and discrimination’.¹⁹³ It points out that the AVMSD lays down a number of rules aimed at protecting viewers/users, minors, people with disabilities, prohibiting hate speech and discrimination. However, the questionnaire merely asks whether the “overall level of protection afforded by the AVMSD still relevant, effective and fair?” and for further comments. It further asks if respondents are aware of issues (e.g. related to consumer protection or competitive disadvantage) stemming from the AVMSD's rules? It is submitted that the consultation provides an opportunity for persons with disabilities and their organisations to air their views in relation to the Directive; conversely, this will depend on the level of awareness regarding the consultation and whether responses can be submitted within the limited time-frame of the consultation.¹⁹⁴

<<https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st?>>

¹⁹³ibid 10.

¹⁹⁴For example a search of the EDF’s website news section at the time of writing revealed no mention of the consultation.

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PART TWO: DISABILITY POLICY - EUROPE

European Union – Disability Policy

The European Union and Fundamental Rights

Part One of this Chapter outlined the EU's relationship to various universal human rights treaties and fundamental rights found in both the EU's primary and secondary laws and the Charter of Fundamental rights.¹⁹⁵ The TFEU, for example, requires the EU to combat discrimination based on disability when defining and implementing its policies and activities.¹⁹⁶ Moreover it gives the EU the power to adopt legislation to address such discrimination.¹⁹⁷

In 2011, in the case of *M.S.S. v. Belgium and Greece*,¹⁹⁸ the European Court of Human Rights stated that under the Treaty on the European Union,¹⁹⁹ as amended by the Treaty of Lisbon, fundamental rights, as guaranteed by the ECHR are part of European Union law and are recognised in these terms:²⁰⁰

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities...”²⁰¹

The Court further acknowledged that the EU recognises that the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union²⁰² have the same legal value as the Treaties.²⁰³

In summary, the rights protected under the Charter include: human dignity, which must be “respected and protected” (Article 1);²⁰⁴ the right to freedom of expression

¹⁹⁵CFREU (2000/C 364/01).

¹⁹⁶Art 10 TFEU (Lisbon Treaty).

¹⁹⁷ibid Art 19 (TFEU).

¹⁹⁸*M.S.S. v. Belgium and Greece*, App. no. 30696/09, Strasbourg, 21 January 2011, §57.

¹⁹⁹(as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

²⁰⁰ibid para 57.

²⁰¹ibid Art 2 TEU.

²⁰²Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007.

²⁰³ibid Art 6 TEU and also at para 3, “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

²⁰⁴The Preamble to the Charter provides that: “[C]onscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

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and the freedom and pluralism of the media (Article 11);²⁰⁵ the prohibition on discrimination on various grounds including disability (Article 21).²⁰⁶ In addition, the Charter explicitly recognises persons with disabilities and provides for their social and occupational integration and participation in the life of the community (Article 26). The analysis in Part One revealed however that in the adoption of measures relating to the protection of viewers from broadcasting content which offends against human dignity, be it hateful or discriminatory on grounds including disability, the EU places a heavy emphasis on finding a balance in such measures in order to respect freedom of expression. Accordingly, with the exception of Article 9 AVMSD, it is left largely up to EU member states to adopt their own rules regarding such content. The section following will consider the extent of the EU's obligations under the Convention on the Rights of Persons with Disabilities (CRPD), and the manner, if any, in which those obligations, translate in protecting persons with disabilities in broadcast content.

The European Union and the UN Convention on the Rights of Persons with Disabilities (CRPD)

In January 2011, the European Union acceded to the CRPD.²⁰⁷ It is the first comprehensive human rights treaty to be ratified by the EU as a whole. The CRPD, as discussed in Chapter Two, sets out minimum standards for protecting and safeguarding a full range of civil, political, social, and economic rights for people with disabilities. The EU's ratification of the CRPD indicates the EU's broader commitment to building a barrier-free Europe for the estimated 80 million disabled persons in the EU by 2020, as set out in the European Commission's disability strategy, which will be discussed below.²⁰⁸ Chapter Two outlined the specific provisions which relate to media and disability in the CRPD which include *inter alia* Article 8 (Awareness' Raising); Article 9 (Accessibility); Article 21 on freedom of

²⁰⁵ Art 11(2) CFREU.

²⁰⁶ See FRA, (n 36) 15-16. This means that individuals can complain about EU legislation or national legislation that implements EU law if they consider the Charter has not been respected. National courts can request guidance on the standard interpretation of EU law from the ECJ through the preliminary reference procedure.

²⁰⁷ The EU signed the CRPD on the 30th March 2007. Member States gave a mandate to the European Commission to negotiate and sign on behalf of the Community on matters falling under Community competence. However, the EU member states themselves have also signed the CRPD individually. Signature constitutes the first step of becoming a formal party to the Convention. At the time of writing, the CRPD has been signed by all 28 EU Member states and has been ratified by 25 of them.

²⁰⁸ The European Disability Strategy 2010-2020 (n 1) and supporting documents.

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=933&furtherNews=yes>

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expression and opinion and access to information and Article 30 the right to participation in cultural life.²⁰⁹

EU High Level Disability Group

Prior to the signing and subsequent ratification of the CRPD, the EU Commission set up a High Level Group on Disability (hereafter HLGD), whose mandate is to monitor the latest policies and priorities of Governments concerning people with disabilities, to pool information and experience, and to advise the Commission on methods for reporting in future on the EU-wide situation with regard to disability.²¹⁰

The HLGD focuses its attention in particular on empowering people with disabilities for participation in society and mainstreaming the disability perspective into all relevant sectors of policy formulation. In addition it accentuates enabling people with disabilities to participate fully in society by removing barriers and nurturing public opinion to be receptive to the abilities of people with disabilities and towards strategies based on equal opportunities.²¹¹

In a series of reports the HLGD recognised that the “[A]wareness Raising Activities at various levels of governance are very important for proper implementation of the UN Convention.”²¹² Although the details of each report as they relate to awareness raising across various sectors is outside the scope of thesis,²¹³ on examination, the

²⁰⁹Other CRPD articles include Art 3 (general principles); Art 4 (non discrimination) and Art 4(3) (consultation with persons with disabilities in developing and implementing policies in relation to them); Art 5 (equality and non-discrimination); Art 29 (Participation in political and public life) and Art 30 (Participation in cultural life).

²¹⁰As proposed by the Commission in its Communication (COM (96) 406 final). In its First Report on the UNCRPD Implementation, the High Level Group identified nine areas of mutual interest for the EU and its Member States relating to the Convention. These areas are: Accessibility (Art 9 CRPD); Legal Capacity (Art 12); Access to Justice (Art 13); Independent Living (Art 19) and Adequate Standard of Living (Article 28); Voting Rights (Article 29); Monitoring Mechanisms (Arts 33 and 35) and Empowering of Persons with Disabilities (Art 3). European Foundation Centre (EFC), ‘Study on challenges and good practices in the implementation of the UNCRPDVC/2008/1214: Final Report’ (EFC 2010) 35, asserts that some of the matters addressed by the HLGD are beyond the scope of EU legal competence to act.

²¹¹The HLGD in particular focuses its attention on the orientations set out in Section II of the Resolution adopted by the Council and representatives of governments on 20 December 1996.

²¹²HLGD, ‘First Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities’ (2008) 21. As of October 2014, there have been six reports issued by the Disability High Level Group. The most recent report was published in September 2013.

²¹³Each report details awareness raising measures taken in each EU member state and awareness raising measures taken by various stakeholders e.g. disability organisations. The awareness raising actions cover a range of topics related to disability e.g. awareness campaigns on building accessibility in the Flanders region of Belgium (Third Report, 18); seminars giving overviews of the Convention by disability organisations such as the National Disability Authority of Ireland (First Report 2008, 23); European Disability Forum (EDF) campaign 1million4disability’ and the EDF 10 years

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six reports to date detail very little as to awareness raising actions which may impact on disability representation, particularly as it relates to broadcast media.²¹⁴ A notable example which dealt directly with the issue was reported by Greece, which detailed that seminars, lectures and conferences are organized on a regular basis covering subjects related to disability.²¹⁵ One such conference held under the title of “People with Disabilities and Media” was organised by the Secretariat of Communication which aimed to promote positive attitudes towards people with disabilities in the sector.²¹⁶

Another example from the reports directly related to broadcast media is from Hungary. Here an ongoing campaign for raising public awareness of disabled people was financed by the Prime Minister’s office.²¹⁷ During this campaign, one-minute long TV spots showed the problems experienced by people with autism, visual and hearing impairments, mental health issues and issues faced by wheelchair users. The aim of the campaign was to make people aware of the needs of people with disabilities as well as the necessity for stronger social integration.²¹⁸

Extent of EU Competence under the CRPD

The CRPD commits state parties to ensuring that people with disabilities can enjoy their rights fully on an equal basis with all other citizens. For the EU, this means ensuring that all legislation, policies and programmes at EU level comply with the Convention's provisions on disability rights, within the limits of EU competencies.²¹⁹ Article 44(1) of the CRPD requires the EU to declare the extent of its competence with respect to matters covered by the Convention. In an Appendix to the European

Declaration, an awareness tool focused on disability rights and based on the rights contained in the UN Convention. It targets not only EDF members but also the general public. Several initiatives have been taken in many EU countries in the framework of the campaigning, including collection of signatures at film festivals, fairs, radio and press information etc., (First Report, 2008, 32).

²¹⁴However many of the explicit references to broadcast media in such reports detail accessibility measures in broadcast services taken at member state level in relation to e.g. subtitling, audio – description etc.,

²¹⁵HLGD, ‘Third Disability High Level Group Report on the Implementation of the UNCRPD’ (HLGD 2010) 33.

²¹⁶ibid. The Conference was held in 2007 in Athens.

²¹⁷ibid 48.

²¹⁸ibid

²¹⁹Ratifying countries, such as the EU Member States, are required to take action in the following areas: access to education, employment, transport, infrastructures and buildings open to the public, granting the right to vote, improving political participation and ensuring full legal capacity of all people with disabilities. This means that all legislation and policy in the EU must comply with the provisions of the CRPD.

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Council Decision concerning the conclusion by the EU of the UN Convention on the Rights of Persons with Disabilities, 2009,²²⁰ a list of community acts are provided which illustrate the extent of the areas of competence of the European Union in accordance with the Treaty establishing the European Community.²²¹ The Appendix states that the “European Community has exclusive competence in relation to some matters,” whereas in others, competence is shared between the Community and the Member States.²²² It further provides that the extent of its competency ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establishing common rules are affected by the provisions of the Convention.²²³ Among the “acts” included in the area of EU competence is the Audiovisual Media Services Directive as discussed *supra*. Under the Appendix to the Council Decision 2010/48 /EC, the AVMSD comes under the specific category entitled “regarding access to information”.²²⁴

According to EU Agency for Fundamental Rights (hereafter FRA), as both the EU and its member states are separate contracting parties, and each has competence in the fields covered by the CRPD, the Convention is a mixed agreement in the context of the EU.²²⁵ All CRPD provisions falling within EU competence are binding on the EU institutions. In addition, EU law obliges Member States to implement the Convention to the extent that its provisions fall within EU Competence. Accordingly, it must then follow that the relevant provisions of the CRPD which fall within EU competence with regard to Audiovisual Media Services must relate to Article 9 (Accessibility), Article 21 (Freedom of Expression) and Article 30 CRPD dealing with the rights of persons with disabilities to participate in cultural life. Since Article 8 CRPD on awareness raising is a cross cutting provision, as discussed in Chapter Two, it is submitted that the obligations under Article 8 CRPD also apply to

²²⁰Council Decision (2010/48/EC) (n 20).

²²¹*ibid* Annex II Appendix, 57.

²²²*ibid*

²²³EFC, (n 210) 38, asserts that that only existing legislation (meaning legislation that is currently in force) is listed in the Council Decision 2010/48 EC but that this *does not* prevent the Union from implementing the Convention within areas that (according to the EU Treaty and the Lisbon Treaty) fall under its competence but are not yet covered by existent legislation.

²²⁴*ibid* Official Journal of the European Union L 23/59. Other categories in the Appendix deal with EC Competency e.g. “accessibility” which contains references to universal services directive, independent living and social inclusion, work and employment, personal mobility; statistics and data collection.

²²⁵FRA, ‘Implementing the United Nations Convention on the Rights of Person with Disabilities (CRPD): An overview of legal reforms in EU Member States’ (FRA May 2015) 2.

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the EU. The FRA explains that implementation of the CRPD in areas not under EU competence rests exclusively with the Member States.²²⁶ Notwithstanding their different competences, “the Union and its Member States are subject to a duty of sincere co-operation” when fulfilling the obligations set out in such ‘mixed agreements.’²²⁷

In its first report on the implementation of the CRPD in June 2014, the EU reported its obligations under Article 9 CRPD (Accessibility) and Article 21 CRPD (right to freedom of expression) jointly. However in detailing provisions regarding the accessibility of audiovisual media services i.e. Article 7 AVMSD, the EU reported those measures under Article 30 CRPD.

Article 21 CRPD provides for the right to freedom of expression and opinion and to “access information on an equal basis with others” through all forms of communication. It further “encourages” the mass media, including providers of information through the internet, to make their services accessible to persons with disabilities.²²⁸ Article 7 AVMSD to a large extent echoes article 21 CRPD providing that member states are to “encourage” audiovisual media services providers under their jurisdiction to “ensure” their audiovisual media services are “gradually made accessible” to people with a visual or hearing disability. The explicit use of the word “encourage” in both CRPD and Article 7 AVMSD clearly indicates that both instruments recognise that there are limits as to the obligations that parties to the Convention can place on media in terms of freedom of expression. The full extent of the EU’s accessibility obligations under the CRPD is discussed in more specific detail in Chapter Five.

European Union - Monitoring Obligations under CRPD

Article 4 CRPD imposes both obligations of conduct and obligations of result on member states.²²⁹ Specifically the provision enumerates the obligations on state parties to adopt legislative, administrative and other measures to implement the

²²⁶ *ibid.*

²²⁷ *ibid* citing European Commission, ‘Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union’ SWD 2014) 182 Final.

²²⁸ Art 21(4) CRPD.

²²⁹ Arts 4(1) (a) and (b) CRPD. See EFC, (n 210) 47.

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Convention and to abolish or amend existing laws, regulations, customs and practices that discriminate against persons with disabilities.²³⁰

According to a study by the European Foundation Centre (EFC), on the challenges and good practices in the implementation of the CRPD in 2010, it follows logically that the CRPD requires state parties to conduct some form of “screening exercise,” in order to measure compliance with the CRPD across legislative and regulatory schemes, as well as reviews of customs and practices.²³¹ In addition to Member States, the obligation of a screening exercise applies with “equal force to the European Union upon ratification”.²³² Among the more important of these general obligations Article 4(1) implies an ongoing process of reflection with regard to existing laws (Union *acquis*) and policies conforming to the requirements of the CRPD.²³³ The study points out that the EU is not exempted from this obligation stating that:

“In other words, the argument that the EU has limited competence for matters related to the implementation of the Convention is not sufficient to show that the EU is exempted from the obligation to examine and, if *necessary*, to modify existing legislation with regard to matters covered by the convention and falling under EU competence. To argue otherwise would militate against the plain meaning of the text and frustrate one of the main objects and purpose of the UNCRPD, which is to challenge the legacy of the past.”²³⁴

The study also made a number of recommendations including that such screening exercises at both EU and Member state levels should be horizontal in order to ensure that all legislation, policies and programmes are reviewed and evaluated, and should consider the Convention not only article by article, but also holistically recognising the interdependence and indivisibility of human rights.²³⁵ It is submitted that the inference from this study is that the EU, in addition its member states themselves, should conduct screening exercises in order to assess whether the AVMSD is in compliance with the CRPD.

²³⁰See also EFC, (n 210) 47.

²³¹*ibid*. The study emphasised that the conduct of a “screening exercise” should be a matter of first priority for the CRPD implementation.

²³²*ibid*

²³³*ibid* 51.

²³⁴*ibid*

²³⁵*ibid* 15. It also proposed that the outcomes of such screening processes should be made publically available and disseminated in accessible formats.

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In addition the study recommended that EU and member states should ensure that all legislation and policy springs from the social model of disability and should thus be reflected in the overall statement of guiding principles for law and policy reform or development.²³⁶ The supposition here it is suggested is that the provisions in the AVMSD regarding the accessibility of persons with disabilities to audiovisual media content should not be just confined to those with sensory impairments. While it is recognised that EU legislation is implicitly based on a rights based approach to disability, the study suggested that the EU lead by example or use soft law measures, such as communications, guidelines and so on, in order to provide guidance for the Member States on how to approach disability, and effectively implement the principle of equal treatment and equal opportunity.²³⁷

Although the study did not address Article 8 CRPD, as regards the media, it suggested the setting up of a new Ad hoc Body whose mandate should be to promote, protect (within limits), and monitor the implementation of the CRPD in the European Union, on the basis of the competences reflected in the Council decision for the conclusion of the CRPD by the Union (which as discussed *supra* includes the AVMSD).²³⁸

Currently, there are five members in the European Union that jointly form the EU Framework responsible for monitoring the CRPD in Europe. These are: the Commission, the European Parliament, the European Ombudsman, the FRA and the European Disability Forum (EDF). The EU Framework's mandate covers only areas of EU competence and complements the national frameworks and independent mechanisms which bear responsibility in member states. The EU Framework carries out CRPD promotion, protection and monitoring with respect to EU legislation and policy and implementation of the CRPD by EU institutions and bodies. In matters of EU competence, both the national frameworks and the EU framework play a role and are complementary. The EDF, independently, undertakes systematic monitoring of the EU's implementation of the CRPD through law and policies, including by

²³⁶ibid 15.

²³⁷ibid. The study states that if the wording of EU or national legislation is open to more than one interpretation, the EU and Member states should adhere, as far as possible, to the interpretation that renders the provision most consistent with the CRPD. Here, the training of judiciary and public servants is suggested.

²³⁸ibid 169, on the basis of Art 33(2) CRPD.

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examining new legislative proposals, estimation of progress, stagnation or retrogression in the enjoyment of rights over a certain period of time.

Although the EFC study was carried out in 2010 its recommendations regarding the responsibilities of its proposed Ad-Hoc body proffers useful guidance on the issues that should be addressed by the current European Union Framework responsible for monitoring the CRPD in Europe. For instance the EFC study recommended that the Ad-hoc body's responsibilities should include undertaking awareness raising measures on the CRPD within the EU institutions, EU country offices, agencies and bodies and ensure that in all relevant EU awareness raising campaigns and actions, in particular any human rights education programmes, the rights of persons with disabilities are adequately reflected. In addition it recommended that the Ad-hoc body would provide information to EU wide media on the rights of persons with disabilities.²³⁹

In its final recommendation for policy makers the study suggested practices for the initial implementation phase. It stated that the "...process of ratification offers a great opportunity for awareness-raising and promoting understanding of the CRPD."²⁴⁰ It recommended :

- that EU and its Member States launch awareness campaigns at European and national levels, in order to inform all people about the rights of persons with disabilities, and obligations deriving from the ratification of the CRPD.
- the effective use of the media, to obtain the views of members of the public on the implementation of the CRPD particularly in large and geographically dispersed countries.²⁴¹
- the utilisation of radio, television and the internet to disseminate information about the CRPD and processes of ratification, as well as implementation and to obtain input from the public.
- attention should be given to accessibility, to ensure that all sectors of the disability community have the opportunity to receive information and provide inputs on implementation, in line with the CRPD.²⁴²

²³⁹:ibid

²⁴⁰:ibid 175, para 3, under 6.1 'Suggested Practice for the Initial Implementation Phase'.

²⁴¹:ibid 176.

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In light of latter recommendations the section following examines the EU's Report on the implementation of the Convention to see where or if any of the recommendations made have been carried out.

EU Report to the Committee on the Rights of Persons with Disabilities 2014

EU Report on Article 8 CRPD Awareness Raising

On 5 June 2014, the European Union published its first report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD). In its summary of measures under Article 8 CRPD, the EU's report notes the important role that awareness raising plays in its Disability Strategy. It states that the EU further supports and supplements national public awareness campaigns on the rights of people with disabilities and on their capabilities and contribution to society and the economy. However the report does not give any information as to how the EU supports and supplements such campaigns. Having regard to specific examples of awareness raising measures, the report highlights the Commission's launch of the 'For Diversity: Against Discrimination' campaign, to raise awareness of discrimination, including on the grounds of disability, and improve understanding of EU equality legislation. However this campaign was carried out in 2009, five years before the EU's initial report. The report details the campaign's inclusion of the organisation of 'diversity days' and a journalist award. It further adds that disability was also addressed in annual calls for proposals between 2010 and 2013 aimed at supporting national authorities in their fight against discrimination and the promotion of equality. The report, however, fails to furnish any more detail on these issues. It does not indicate for instance, which media have partaken in the campaign nor how these campaigns were implemented.²⁴³ Given the broad nature of the Diversity for All Campaign, where disability is not considered in isolation, and the lack of information on Awareness Raising measures after 2009, it is submitted that this raises a cause for concern. For instance, the lack of detail regarding awareness raising measures or campaigns by the EU after 2009 suggests that the EU may not have carried out awareness raising campaigns since then. However even if the latter assumption is incorrect and awareness measures have been carried out, it is submitted that the implication is that there are problems regarding the monitoring,

²⁴²ibid

²⁴³A search of relevant European websites by this author revealed that there have been awareness measures adopted by the EU; however these are only detailed up to the year 2010.

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compilation and subsequent reporting on the application of the CRPD under Article 8.

A third interpretation of the EU's report under Article 8 may infer that the EU sees that those responsible for the monitoring and reporting of the EU Disability Strategy, that is the European Commission's High Level Disability Group, assume the role for reporting on those measures. The Disability Strategy and reports by the High Level Disability Group will be addressed *infra*. The European Disability Forum (EDF) has criticised the EU's initial report to the CRPD Committee stating it "...regrets the limited visibility of the report; it is as a missed opportunity by the EU to raise awareness on the rights of persons with disabilities, as well as to hold a public debate with the involvement of the Council and the Parliament." Among other issues, the EDF states that the EU's report does not address the "diversity of persons with disabilities" and lacks "self-criticism" in the sense that it outlines adopted measures but does not incorporate an evaluation of their actual implementation nor of the budget available to do so.

In May 2015 the Committee on the Rights of Persons with Disabilities issued a list of issues to the EU. Under Article 8 CRPD, the Committee asked the EU to indicate what concrete and systematic awareness raising and training initiatives it has taken since EU's ratification of the CRPD to ensure that it is known and used at all EU levels and within all institutions and agencies, including for example the European Economic and Social Committee (EESC) and Committee of the Regions (COR).²⁴⁴ In its reply to the Committee²⁴⁵ the EU detailed a number of awareness raising measures it had taken including *inter alia* an annual conference discussing themes relevant to the CRPD, the organisation of training on disability and non-discrimination and accessibility, equality and diversity awards and employment initiatives. However each awareness raising action related to measures taken or proposed within the EU institutions themselves.²⁴⁶ It is submitted that the reply fails

²⁴⁴Committee on the Rights of Persons with Disabilities, 'List of issues in relation to the initial report of the European Union' CRPD/C/EU/Q/1 (15 May 2015) 2, para 12.

²⁴⁵Committee on the Rights of Persons with Disabilities, 'List of issues in relation to the initial report of the European Union Addendum Replies of the European Union to the list of issues' (CRPD/C/EU/Q/1/Add.1) (8 July 2015) 13-14, paras 44-49.

²⁴⁶*ibid*

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to address awareness raising measures on the CRPD to the public of the European Union or any awareness raising measures actions taken or proposed through media.

The EDF have voiced its concern over the EU's reply and state that the development of a comprehensive and well-organised campaign on raising awareness on the CRPD and on fighting stigma and prejudice against persons with disabilities, particularly that faced by women and girls with disabilities is necessitated for persons with disabilities in Europe.²⁴⁷ Moreover the EDF highlight the need for a strategy for communication on the CRPD across all EU institutions, bodies and agencies covering all the EU's mainstream communication channels, including on EU websites and in all EU communication tools, speeches, events, campaigns and trainings.

EU Report on Article 30 CRPD Participation in Cultural Life

The only other express reference to media in the EU report is under Article 30 CRPD, where a mere paragraph is dedicated to the Audiovisual Media Services Directive. The report outlines that accessibility is a key objective of the Directive whereby Member States are, in the text of Article 7 AVMSD 2011/13EU "... to encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability". The report states that the Commission published its first report on the application of the AVMSD, which describes how EU Member States have introduced rules to improve the accessibility of audiovisual media services for persons with visual or hearing impairments; however the report remains silent on the findings of its report on the application of AVMSD. The only other reference to the AVMSD in the EU's Report on the implementation of the CRPD is with regard to a second application report of the AVMSD which it states is due in the first half of 2015. This second application report will "...assess the current state of play as regards accessibility services for audiovisual media services, with special focus on on-demand services".²⁴⁸ Having regard to accessibility of audiovisual media services, it is submitted that the EU's report falls short of the requirements of its reporting

²⁴⁷EDF, 'Answers To The List Of Issues On The EU Report To The UN Committee On The Rights Of Persons With Disabilities'(EDF July 2015) 7.

<http://www.edf-feph.org/Page_Generale.asp?DocID=13855&thebloc=34335>

²⁴⁸CRPD/C/EU/1, 52, para 172.

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obligations under the CRPD owing to its scant outline of the relevant provisions of the AVMSD and the lack of details regarding its findings on its assessment, monitoring and implementation of the Directive. The report will be discussed further in Chapter Five.

European Union Disability Strategy 2010-2020

In November 2010 the European Commission adopted a new strategy to break down the barriers that prevent persons with disabilities from participating in society on an equal basis with others.²⁴⁹ The core elements of the EU Disability Strategy 2010-2020 combine anti-discrimination, equal opportunities and active inclusion. The strategy outlines how the EU and national governments can empower people with disabilities so they can enjoy their rights. The rights recognised by the CRPD, as previously discussed, cover almost all policy fields and the EU Disability Strategy aims to ensure its full implementation. The overall aim of the Strategy is to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market.²⁵⁰ The Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, and statistics and data collection. This Strategy focuses on eliminating barriers. The Commission identifies eight main areas for action: Accessibility, Participation, Equality, Employment, Education and training, Social Protection, Health, and External Action.²⁵¹

²⁴⁹Prior to the EU Disability Strategy 2010-2020, in order to capitalise on the momentum of the 2003 European Year of People with Disabilities (EYPD), a Commission Communication was adopted in October 2003 which provided the basis for the European Disability Action Plan 2003-2010 (EU DAP). The ultimate objective of the EU DAP was to ‘boost equal opportunities for people with disabilities’ so as to create a ‘sustainable dynamic for the full inclusion of people with disabilities into society’. The EU DAP 2003-2010 set out three strategic objectives in order to achieve this overarching aim: (i) the effective implementation of the Equal Treatment in Employment Directive (2000/78/EC); (ii) mainstreaming disability issues across all EU policies, legislation and programmes from design and implementation through to monitoring and evaluation; and (iii) improving “Accessibility for all”. The Action Plan committed the European Commission to reporting on the situation of disabled people in the European Union (EU) every two years. For more information *see* European Commission, ‘Mid-term Evaluation of the European Action Plan 2003-2010 on Equal Opportunities for People with Disabilities Final Report’, June 2009.

²⁵⁰European Commission, COM (2010) 636 final, (n 1) 4.

²⁵¹*ibid.* These areas were selected on the basis of their potential to contribute to the overall objectives of the Strategy and of the UN Convention, the related policy documents from EU institutions and the Council of Europe, as well as the results of the EU Disability Action Plan 2003-2010, and a consultation of the Member States, stakeholders and the general public. The references to national

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European Union Disability Strategy 2010-2020 - Accessibility

The action in the strategy dealing with accessibility considers how to use standardisation, public procurement or state aid rules to make all goods and services accessible to people with disabilities while fostering an EU market for assistive devices (“European Accessibility Act”). While a more detailed analysis of accessibility as it relates to the broadcast media will be considered in Chapter 5, Article 9 CRPD on Accessibility is of particular relevance to EU disability policy. Lord points out that there are various conceptions of accessibility which have overlapping dimensions.²⁵² These include non-discrimination, which expresses the notion that facilities, goods and services (e.g. broadcasting) must be accessible to all people, in particular persons belonging to especially marginalized groups without discrimination. Physical accessibility expresses the idea that facilities, goods and services should be physically accessible. This is broadly interpreted in the CRPD and includes access to broadcasting television programmes using sign language and subtitling etc. Informational accessibility expresses the idea that accessibility includes the right to seek, receive and impart information and ideas. Here the CRPD makes a substantial contribution to information accessibility, building on existing human rights law.²⁵³ Article 9 CRPD deals with a broad spectrum of accessibility concerns including physical, technological, information, communication, economic and social accessibility.²⁵⁴ Lord further points out that the forms that barriers to accessibility take can be many and varied.²⁵⁵ Of particular significance to disability representation in broadcast media is attitudinal barriers in relation to persons with disabilities, which she describes as “[P]erhaps the most pervasive barrier.”²⁵⁶ She adds that the relationship between Article 9 (Accessibility) and Article 8 CRPD (Awareness Raising) in this regard becomes a most important issue for the Committee on the Rights of Persons with Disabilities to address.²⁵⁷

actions are intended to supplement action at EU level, rather than to cover all national obligations under the UN Convention. The Commission will also tackle the situation of people with disabilities through the Europe 2020 strategy, its flagship initiatives and the re-launch of the single market.

²⁵²Janet E Lord, ‘Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and content of the Accessibility Principle and Duty under the CRPD’ (Presentation for the General Day of discussion on Accessibility, CRPD Committee UN Geneva October 7, 2010) 5.

²⁵³ibid

²⁵⁴ibid 7.

²⁵⁵ibid 8.

²⁵⁶ibid 9.

²⁵⁷ibid

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The EU Disability Strategy asserts that people with disabilities and their families should be able to participate on an equal basis with others in all aspects of social and economic life. They need to be able to exercise their rights as citizens, including the right to free movement, to choose where and how they live, and to full access to cultural, leisure and sport activities.²⁵⁸

European Union Disability Strategy 2010-2020 - Awareness Raising

Awareness Raising in the Disability Strategy comes under the action on the “Implementation of the Strategy.”²⁵⁹ The object of this action line in the strategy is to raise society’s awareness of disability issues and foster greater knowledge among people with disabilities of their rights and how to exercise them. It provides that the Commission will work to ensure that people with disabilities are aware of their rights, paying special attention to accessibility of materials and information channels. It will promote awareness of ‘design for all’ approaches to products, services and environments. To this end it states that EU action will support and supplement national public awareness campaigns on the capabilities and contributions of people with disabilities and promote exchange of good practices through the Disability High Level Group (DHLG).²⁶⁰ The strategy therefore does not explicitly mention that media (print, broadcast, electronic) will be used to raise awareness in such campaigns and the emphasis seems particularly to be on accessibility measures, which is in line with the EU competencies as laid out in the Council Decision discussed *supra*.

It is submitted that if the eradication of barriers is a pre-requisite to the participation of persons with disabilities in society then the elimination of barriers as regards access to broadcast media and access to information is crucial and is addressed in the Disability Strategy to some extent. In addition, taking a holistic approach as suggested by the study on challenges and good practices in the implementation of the CRPD, such barriers must also include attitudinal barriers which, as discussed in Chapter Two, can be eradicated to some extent by increasing and improving the portrayal of persons with disabilities in broadcast media.

²⁵⁸< <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0636>>

²⁵⁹European Commission, COM (2010) 636 final (n 1) 9.

²⁶⁰ibid

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Council of Europe and Disability

Council of Europe

The Council of Europe is one of the oldest international organisations working towards European integration.²⁶¹ It has a particular emphasis on legal standards, human rights, democratic development, the rule of law and cultural co-operation. The Council of Europe has 47 member states with approximately 800 million citizens. It is distinct from the European Union (EU) which has common policies, binding laws and only twenty-seven member states.²⁶² The most eminent body of the Council of Europe is the European Court of Human Rights (hereafter ECtHR), which enforces the European Convention on Human Rights (hereafter ECHR).²⁶³ The Council of Europe's work has resulted in standards, charters and conventions to facilitate cooperation between European countries and further integration and it is through these it exerts its influence. Its statutory institutions are the Committee of Ministers²⁶⁴, the Parliamentary Assembly of the Council of Europe (hereafter PACE),²⁶⁵ and the Secretary General.²⁶⁶

The Council of Europe has adopted a range of international treaties and other normative standards which include both fundamental and supplementary focuses on freedom of expression and the media. While this body of standards is generally harmonious in terms of its overall aims and approaches, each individual text is characterised by its own particular objectives, emphases, (legal) status and procedural possibilities. This has resulted in considerable diversity in the range of strategies devised by the Council to promote freedom of expression and of the

²⁶¹The Council of Europe was founded in 1949. Article 1(a), Statute of the Council of Europe, ETS No. 1 (as amended), London, adopted on 5 May 1949; entry into force: 3 August 1949 provides that its principal aim is to “achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”

²⁶²While the member states of the EU transfer national legislative and executive powers to the EU Commission and Parliament in specific areas under EU law, the Council of Europe member states maintain their sovereignty but commit themselves through conventions (i.e. public international law) and co-operate on the basis of common values and common political decisions. Those conventions and decisions are developed by the member states working together at the Council of Europe. In contrast, secondary EU law is set by the organs of the EU. Both organisations function as concentric circles around the common foundations for European integration, with the Council of Europe being the geographically wider circle.

²⁶³The European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe. It entered into force on 3 September 1953. All Council of Europe member states are party to the Convention.

²⁶⁴Comprising the foreign ministers of each member state.

²⁶⁵Composed of MPs from the parliament of each member state.

²⁶⁶Heading the secretariat of the Council of Europe.

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media.²⁶⁷ The main Council of Europe treaties containing provisions concerning freedom of expression and the media, include the European Convention on Human Rights and the European Convention on Transfrontier Television (ECTT).²⁶⁸

Committee of Ministers of the Council of Europe

The Committee of Ministers of the Council of Europe is the Council of Europe's decision-making body and "organ which acts on behalf of the Council of Europe."²⁶⁹ It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly (PACE), it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings. Its main functions include:²⁷⁰ concluding conventions and agreements; issuing recommendations to member states; monitoring (human rights) commitments of member states; supervision of the execution of the judgments of the European Court of Human Rights.²⁷¹

The Committee of Ministers is empowered to issue recommendations to member states. Recommendations are not legally binding on states, but they do have "moral authority" and are politically persuasive.²⁷² Recommendations generally centre on a specific (human rights) topic in a comprehensive manner and refer to existing legally

²⁶⁷Tarlach McGonagle, 'Freedom of Expression and the Media: Standard-setting by the Council of Europe's Committee of Ministers' *IRIS Themes Series* (Vol. 1) 3.

²⁶⁸Others include the European Charter for Regional or Minority Languages; the Framework Convention for the Protection of National Minorities; the Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Chapter Four will address other CoE standard setting documents in addition to the relevant articles of the European Convention on Human Rights as they relate to media and disability representation.

²⁶⁹McGonagle (n 267) 1, Art 13, Statute of the Council of Europe. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg.

²⁷⁰See Council of Europe website, "Committee of Ministers",
<http://www.coe.int/t/cm/aboutCM_en.asp>

²⁷¹In accordance with Article 46 of the Convention as amended by Protocol No. 11, the Committee of Ministers' essential function is to ensure that member states comply with the judgments of the ECtHR. The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Both kinds of Resolutions are public.

²⁷²McGonagle (n 267) 2, citing Florence Benoît-Rohmer and Heinrich Klebes, *Council of Europe law: Towards a pan-European legal area* (Council of Europe Publishing 2005) 108-109. This is largely explained by the fact that recommendations are usually adopted unanimously and therefore represent a common European position on the subject matter they address.

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binding standards.²⁷³ As the name implies, a recommendation usually advocates particular courses of action to be taken by member states but is not legally binding on member States.²⁷⁴ Of particular relevance to disability is the CoE's Recommendation on the Council of Europe's Action plan to promote the rights and participation of persons with disabilities, which will be discussed in the sections following.

CoE Action Plan to Promote the Rights of Persons with Disabilities 2006-2015

The Committee of Ministers Recommendation to Member States on the Council of Europe's Action Plan to promote the rights and full participation of people with disabilities 2006-2015 is of particular significance to media and disability.²⁷⁵ The action plan seeks to translate the aims of the Council of Europe with regard to human rights, non-discrimination, equal opportunities, full citizenship and participation of people with disabilities into a European policy framework on disability.²⁷⁶

Its primary objective is to operate as a functional tool to develop and implement practical strategies to bring about the full participation of people with disabilities in society and ultimately mainstream disability throughout all policy areas of Council of Europe member states.²⁷⁷ To this end, it provides a comprehensive framework of specific recommendations flexible enough to be adaptable in order to meet country-specific conditions.²⁷⁸ One of its many aims is to help member states to promote active policies which prohibit discrimination and promote the right to equal opportunities with effective means of redress if those rights are infringed.²⁷⁹

²⁷³McGonagle (n 267) 2, states that they are occasionally supplemented by explanatory memoranda which, among other things, outline the case law of the ECtHR and/or standards of the Council of Europe pertaining to their subject matter.

²⁷⁴ibid. In addition to its recommendations, the Committee of Ministers also adopts guidelines, which in theory serve the same purpose as recommendations, and declarations, which are used, for example, "to set out principles, establish strategic goals and outline future perspectives for the action of the organisation in a given field."

²⁷⁵Rec (2006) 5 (n 22).

²⁷⁶ibid 10.

²⁷⁷ibid 5.

²⁷⁸ibid 8. In addition to taking due account of the geographic, economic, cultural and social diversity of member states, the Action Plan also takes account of transition processes that are taking place in various member states.

²⁷⁹ibid 10. See also e.g. Angela Kerins, Chairperson of Ireland's National Disability Authority (NDA), "International developments will impact on status of people with disabilities in Ireland," 3 October, 2007, "[T]he Convention on the Rights of Persons with Disabilities and the Council of Europe Action Plan further underpins the National Disability Strategy and the effective implementation of the strategy in a way that delivers a measurable difference to the lives of people with disabilities."

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Furthermore, it offers a constructive source of motivation for private enterprise, non-governmental organisations and other international organisations.²⁸⁰

The action plan does not contain a definition of “disability,” as the Committee concluded that this is a matter for individual member states and their national policy.²⁸¹ However, the influence of existing legal treaties and instruments, standards and policies which support the equal treatment and human rights of people with disabilities at both European and International levels is explicitly evident in its formulation.²⁸² The need to facilitate the paradigm shift from a medical model to a social and human rights based model of disability is further advanced in the action plan. It emphasises the requirement of not seeing disabled persons as patients in need of care who do not contribute to society, but instead considering them as people who need barriers removed in order to take their rightful places as fully participative members of society.²⁸³ Specifically, it acknowledges that such barriers include attitudinal and social, legal and environmental barriers.²⁸⁴ Moreover, it addresses aspects of vulnerable groups of persons with disabilities who confront specific barriers or face two-fold discrimination and problems that require a cross-cutting response.²⁸⁵

Similar to Article 4 of the CRPD, it regards non-governmental organisations of persons with disabilities to be proficient and expert partners in policy development who therefore should be consulted as stakeholders in decision making processes which affect their lives.²⁸⁶

²⁸⁰Rec (2006) 5 (n 22) 5.

²⁸¹ibid 11.

²⁸²ibid 9-10. Such instruments at European Level include: Recommendation R (92) 6, of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities, (*Adopted by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Ministers' Deputies*); Revised Strategy for Social Cohesion (*approved by the Committee of Ministers of the Council of Europe on 31 March 2004*).

²⁸³ibid 8.

²⁸⁴ibid

²⁸⁵ibid 7. It considers women and girls with disabilities, people with disabilities in need of a high level of support, children and young people with disabilities, aging people with disabilities and people with disabilities from minorities and migrant communities who have a higher risk of exclusion and generally have lower levels of participation in society than other disabled people.

²⁸⁶ibid 10. It states “...most importantly, the Action Plan promotes the essential concept that disabled people and their representatives need to be consulted as stakeholders in decision-making processes which affect their lives, from national policy design to more individual subjects.” It explicitly mentions that the European Disability Forum played an important and active role in the elaboration of the Council of Europe Disability Action Plan.

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The Action Plan has a broad scope and covers all significant areas of the life of people with disabilities. These key areas are considered in 15 Action lines which set out the main aims and specific actions to be implemented by member states.²⁸⁷ The Action Lines cover *inter alia* areas which have specific pertinence to media such as participation in political and public life, participation in cultural life; information and communication; in addition to actions on education; legal protection and research and development.²⁸⁸

Action Line on Awareness Raising

Of particular relevance to the media is the action line on Awareness raising, which is emphasised as a key issue that underpins the whole Action Plan.²⁸⁹ In this regard, it stresses that discriminatory behaviour and stigmatisation should be “opposed” and replaced by accessible and objective information on the consequences of impairments and disabilities in furtherance of promoting a better understanding of the needs and rights of people with disabilities in society.²⁹⁰ The provisions relating to accessibility measures in the Action plan will be discussed in Chapter 5.

The Action Plan proposes that action should be aimed at changing negative attitudes towards persons with disabilities, pointing out that most disabled people consider society’s attitude to be the biggest barrier to their full integration.²⁹¹ It asserts that persons with disabilities are still confronted with unacceptable attitudes based on existing prejudices, fear, low expectations and distrust in their abilities.²⁹² While it recognises that many member states have advanced anti-discrimination legislation and have promoted social policy initiatives which contribute to the integration of disabled people into their local communities, it states that this alone is insufficient.²⁹³ The action plan proposes that these attitudes could be transformed through effective awareness raising strategies involving a range of stakeholders. It proposes that in furtherance of advancing activities in this area, member states should ensure co-

²⁸⁷ *ibid* 5.

²⁸⁸ *ibid*, Action Lines 1-4 and 12 and 14 respectively.

²⁸⁹ *ibid* 29 -30, ‘Action Line No. 15 Awareness raising’.

²⁹⁰ *ibid* 7.

²⁹¹ *ibid* 29.

²⁹² *ibid*

²⁹³ *ibid* 13.

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operation both in the domain of media and in other domains of activity that could assist in effectuating a change in such attitudes.²⁹⁴

The Action Plan emphasises that the presence of persons with disabilities in media content is necessary as it is instrumental in bringing about attitude change;

“Disabled people need to be present in advertisements, on screen, on radio and in print to bring about a paradigm shift in the perception of disability and disabled people; a real change in attitudes by all members of society can then become a reality.”²⁹⁵

In addition it states that society needs to be made aware of the fact that persons with disabilities have the same human rights as all other people and that there are many barriers in society which hinder or prevent them in the enjoyment of these rights.²⁹⁶

This is analogous to the CRPD, discussed in Chapter Two, in that the Convention does not confer new rights on persons with disabilities, but makes clear the obligations on member states in respect of all human rights of persons with disabilities.²⁹⁷

The Action Plan asserts that the elimination of barriers will not only benefit persons with disabilities but society in general. Furthermore, it maintains that it is essential to show the positive contribution that all persons with disabilities, regardless of the degree of their disability, make as active and full members of society.²⁹⁸

The objectives to be achieved by member states in their media are predominantly contained in the Action Line on Awareness Raising.²⁹⁹ These include improving attitudes towards people with disabilities as active and full members of society through a wide range of actions; raising awareness about disability and the rights of people with disabilities to equality of opportunity and protection against discrimination and combating any negative attitude against disabled persons that could harm the image and interests of people with disabilities.³⁰⁰

²⁹⁴ibid 29.

²⁹⁵ibid

²⁹⁶ibid 30.

²⁹⁷See Chapter Two.

²⁹⁸Rec (2006) 5 (n 22) 30.

²⁹⁹ibid

³⁰⁰ibid

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Specific actions to raise awareness and improve attitudes towards people with disabilities

In contrast to other instruments which consider media and disability,³⁰¹ the Action plan explicates seven specific actions to be taken by member states in order to achieve the aim of raising awareness and improving attitudes towards people with disabilities in the media. These are:

- i. To mainstream images of disability in all government advertising and publicity to bring about a change of attitudes in society;
- ii. to encourage all media and media organisations to increase and improve the portrayal of people with disabilities as full citizens in their media broadcasting and written communications, for example by introducing ethical guidelines related to the dignity of people with disabilities;
- iii. to encourage television channels and radio stations to discuss issues relating to persons with disabilities in general programmes and, where appropriate, in specialised programmes;
- iv. to undertake, where possible, regular national awareness raising campaigns on the rights, potential and contributions of people with disabilities;
- v. to use innovative and other practical means to highlight to children, young people and adults the issues faced by disabled people;
- vi. to encourage people with disabilities and their organisations to publicise themselves locally and nationally by making available guidance on dealing with the media;
- vii. to support and promote the distribution of examples of good practice in all areas of life to raise awareness in education, working environment and the community.

While a detailed examination of all those actions is outside the confines of this thesis the sections following consider the manner in which the Action Plan is to be implemented and monitored and appraise the only report to date on its implementation.

COE Action Plan Implementation and Monitoring

According to the CoE Action Plan, the governments of member states have the primary responsibility for implementing disability policies at national level, and in particular for implementing the specific actions referring to them under each action line.³⁰² Moreover, the governments of member states have the primary responsibility for the follow-up to be given to the Council of Europe Action Plan at national level, where they decide on appropriate review and follow-up arrangements. To this end,

³⁰¹*E.g.* CRPD.

³⁰²Rec (2006) 5 (n 22) 34, section 5.2 on 'Implementation'.

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the plan asserts that member states should consult with relevant stakeholders, in particular non-governmental organisations of people with disabilities.³⁰³

The Action Plan states that at European level the follow-up should focus on strengthening co-operation in the field of disability and should allow for effective exchange of information, experience and best practice in a structured way.³⁰⁴ Additionally, it affirms that effective follow-up to the Action Plan requires member states to regularly provide the Council of Europe with relevant information. In that context, national government reports to parliament, as well as reports and surveys provided by non-governmental organisations, are of particular interest and relevance.³⁰⁵

The Action Plan further states that the Committee of Ministers will designate an appropriate forum to manage the follow-up process and can recommend that member states analyse specific priority issues in depth.³⁰⁶ The follow-up requires member states to provide the designated forum with relevant information on a regular basis.³⁰⁷ Such designated forums will ensure that the Committee of Ministers is regularly informed about the progress made in the implementation of the Disability Action Plan and can also suggest to member states specific priority issues to be analysed in depth.³⁰⁸

Council of Europe Disability Action Plan Mid-Term Review Report

To date there has only been one mid-term review report of the CoE Disability Action Plan which was carried out in 2010. The mid-term review was based on the replies by 44 member CoE states to a questionnaire issued by the European Co-Ordination Forum for the Council of Europe Disability Action Plan 2006-2015 (CAPAH). Although the report states that member states have made good, continuous and in some cases substantial progress and are developing activity and plans to promote and deliver on the rights of people with disabilities, it states that the extent to which progress has been made depends on a number of factors and cites in this regard, for example, political will. Having regard to the Action Line on Awareness Raising, the

³⁰³ibid section 5.3 on 'Follow Up'.

³⁰⁴ibid

³⁰⁵ibid

³⁰⁶ibid 8.

³⁰⁷ibid 8.

³⁰⁸ibid 35.

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report states that “member states consistently report activity to develop positive attitudes towards disabled people and raise awareness of the rights of persons with disabilities.”³⁰⁹ It further states that these activities are often being directed towards specific influential actors, such as professionals and employers. The individual reports from member states however are not publicly available. Accordingly, any progress made by member states in relation to the Action plan, and in particular its action line on awareness raising, cannot be properly assessed. It is submitted that this is regrettable, as, having regard to all disability policies examined in this thesis, the Council of Europe Action Plan provided comprehensive, concrete and specific practical actions in terms of creating awareness in broadcasting media. These actions could be undertaken by member states in implementing the plan and it is submitted that such actions would also go towards achieving the obligations of those member states that ratified the Convention. It remains to be seen in 2015, however, when the action plan ceases, whether a final report on the extent and nature of its implementation will regard it as having been successful.

Chapter Three: Part Two Conclusion

The object of Part Two of this Chapter was to examine disability policy in Europe and to analyse what effect, if any, it has on disability representation in broadcasting media. The first part of this section examined disability policy in the European Union. It noted that the EU has obligations under primary law in the form of its constituent treaties and its Charter of Fundamental freedoms. These obligations oblige it to take issues such as human dignity, non-discrimination and protecting the rights of persons with disabilities into consideration in all its policies. The EU, having ratified the CRPD, also has obligations with respect to some of its laws, which include particular provisions of the AVMSD. The extent of those obligations would appear to primarily concern, although not explicitly stated, the right of persons with disabilities to access to accessible audiovisual media services. While those obligations will be discussed further in Chapter Five, it is submitted that those specific obligations do not negate the EU’s general obligation under Article 8 CRPD

³⁰⁹Council of Europe, ‘Council of Europe Disability Action Plan 2006-2015 (Recommendation Rec (2006) 5) Mid-term Review Report’ CAHPAH (2010) 8 final 10 September 2010, 17, adopted by CAHPAH at its 4th Meeting, Strasbourg, 27-29 September 2010. Document obtained by personal correspondence between this author and Thorsten Afflerbach, Head of Social Cohesion and Integration Division, Council of Europe, 16 May 2012.

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to initiate, create and promote the rights of persons with disabilities through awareness raising measures. It is submitted that based on the analysis of its various policies, which both directly and indirectly affect persons with disabilities, that a gap has been identified in such policies regarding the creation of awareness in broadcast/ audiovisual media. It is proposed that the EU could and should be doing a lot more to expose and close this gap at both EU Level and member state level and to “encourage” broadcasters and providers of audiovisual media services to create more awareness and promote the rights of persons with disabilities.

It is recommended that the EU should conduct a screening exercise focusing on the AVMSD and its various disability policies and among various EU institutions regarding compliance with Article 8 CRPD as suggested by the study by the European Foundation Centre. Such an exercise should outline and highlight the issues and the manner in which raising awareness can be achieved by governments, disability organisations, broadcasters and audiovisual media service providers at both EU and member state level.³¹⁰

It is suggested that the EPRA, given their expertise in the area of audiovisual media services in their relevant jurisdictions, in conjunction with the European Commission, would be the most appropriate body to conduct such a screening exercise measuring the AVMSD obligations at member state level. EPRA could then follow up by reporting and making recommendations to the Commission and Contact Committee responsible for overseeing the implementation of the AVMSD. Such a screening exercise, as similarly highlighted in Chapter Two, could measure the extent to which, for example, member states encourage their broadcasters to portray persons with disabilities in the manner consistent with the CRPD (Article 8 (2) c) and the extent and nature of any public service campaigns carried out regarding persons with disabilities in their respective jurisdictions. It is recommended that a similar screening exercise and/or study be conducted at European level to assess the EU’s various policies’ compliance with Article 8 CRPD. Drawing from such studies the effectiveness of awareness campaigns in different media should be measured and could inform future awareness campaigns. It

³¹⁰The EU has an obligation under Article 33 CRPD to collect statistics and data collection duties.

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is suggested that the Fundamental Rights Agency would be the most appropriate body to carry out such a study.

The second section of part two examined the Council of Europe's Disability Action Plan. It submitted that the Council of Europe's Action Plan on disability is a purposeful instrument which proffers a constructive guide for member states to benchmark media representation of disability, particularly through its specific actions on Awareness raising. As outlined *supra*, it covers both portrayal and awareness issues through such actions, covering broadcasting content and the various organisations involved in media production and regulation. Moreover it deals with governmental and educational aspects of disability representation in the respective media, in addition to the employment of persons with disabilities both in "front of and behind the microphone." Its emphasis on the social and human rights model of disability and its insistence on consultation with organisations of persons with disabilities offer an appropriate prospect/potential for member states to move toward both improved and increased and more accurate portrayals of persons with disabilities in the media.

However the success of the CoE Action Plan, like all other disability policies discussed, depends on its monitoring and implementation at both national and CoE levels. The mid-term report reveals that more detail is needed, as well as an updated report into the levels of implementation regarding the various action lines taken by member states.

CHAPTER FOUR

Freedom of Expression, Content Regulation and Disability in Broadcast Media

Introduction

The object of this chapter is to examine and discuss the issues surrounding regulation and the extent to which regulatory frameworks can safeguard the interests of persons with disabilities in respect of broadcast content. Policy makers often justify intervention in broadcasting content on the basis of the significant level of influence that the media has on our lives.¹ Generally speaking however, such regulation produces a quandary between the requirement for intervention in order to protect the interests of the viewing public on the one hand and considerations for freedom of expression, which also safeguards certain interests both public and private, on the other. Given the power of broadcast media, a viewing audience, for example, should have an expectation of a certain range and quality of programming, information or content. Regulation in this regard may be necessitated to ensure pluralism and diversity, respect for human rights and non-discriminatory access to media. Conversely, it is important for democratic societies to have a wide range of independent and autonomous means of communication, without interference from a public authority, in order to be able to reflect a diversity of ideas and opinions.

Of course the right to freedom of expression is not absolute but as a recent general comment by the United Nations Human Rights Committee points out “...when a State ...imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself...”² The important consideration is that “the relation between right and restriction and between norm and exception must not be reversed”.³

International standards are set out in Article 19 ICCPR, which the General Comment concerns, and in regional treaties such as the ECHR. Thus, most broadcasting regulators in Europe and elsewhere have obligations, normally included in national legislation, to uphold freedom of expression but also to have regard to matters such

¹Eliza Varney, ‘Reality Television’ and Content Regulation: Perspectives and Challenges’ (2009)7(1) *Entertainment and Sports Law Journal*, 1.

The power and influence of the media has been discussed in Chapter Two.

²United Nations Human Rights Committee, General Comment No. 34; Article 19: Freedoms of opinion and expression International Covenant on Civil and Political Rights (*Adopted at 102nd session Geneva, 11-29 July 2011*) CCPR/C/GC/34, 5.

³*ibid*

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as pluralism and diversity and to ensure that adequate protection from harmful and offensive material is provided to members of the public. Such obligations often embrace provisions relating to persons with disabilities.

It will be recalled from Chapter Two, that Article 8 CRPD requires member states *inter alia* to combat stereotypes, prejudices and harmful practices relating to persons with disabilities but merely by “encouraging” all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the Convention.⁴ However the prohibition of discrimination is fundamental to the protection of human rights and pervades all international human rights instruments.⁵ It is closely intertwined with the principle of equality which values every person as an individual who is free and equal in dignity and rights.⁶ A crucial tenet of the CRPD is respect for the principles of non-discrimination and equality.⁷ Similarly, Article 26 ICCPR, not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law. It guarantees to all persons equal and effective protection against discrimination on any ground including *inter alia* race, sex, religion, political or other opinion, birth or other status.⁸ Under the ECHR, protection from discrimination is provided in Article 14 ECHR. It differs from Article 26 ICCPR in that it is not a free standing right and can only be invoked in relation to another Convention right.⁹

Likewise, the multifaceted concept of tolerance which is interlinked with the principle of non-discrimination and equality is embedded both explicitly and implicitly in international human rights instruments.¹⁰ Tolerance has been defined as, among other things, “respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human.”¹¹ It has been

⁴Art 8 (2) c CRPD.

⁵It has also inspired specialist treaties such as ICERD, CEDAW and CRC.

⁶Arts 1, 2, 6 and 7 Universal Declaration of Human Rights (UDHR).

⁷Arts 4 and 5 CRPD.

⁸See United Nations Human Rights Committee, General Comment No. 18; Non-Discrimination (*Adopted at Thirty-Seventh session Geneva, 10 November 1989*), para 10, where it is emphasised “...that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”

⁹Art 14 ECHR is often described as being a ‘dependent’ or ‘accessory’ right under the ECHR because of this characteristic.

¹⁰Art 26 (2) UDHR.

¹¹UNESCO, Declaration of Principles on Tolerance, 16 November 1995, Art 1.1.

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construed as the responsibility that upholds human rights, pluralism (including cultural pluralism), democracy and the rule of law.¹² It involves the rejection of bigotry, prejudice and absolutism and affirms the standards set out in international human rights instruments.¹³ Tolerance is advanced *inter alia* by knowledge, openness, communication, and freedom of thought, conscience and belief. It is not only a moral duty, but also a political and legal requirement. According to UNESCO “T]he practice of tolerance means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are.”¹⁴ Additionally it has been interpreted to mean that “...one’s views are not to be imposed on others”.¹⁵ The communications media have been underscored as being in a significant position to play a constructive role in facilitating free and open dialogue and discussion, disseminating the values of tolerance, and highlighting the dangers of indifference towards the spread of intolerant ideologies and groups.¹⁶

The question remains, therefore, as to how the justifications for intervention which promote non-discrimination, equality and tolerance can be reconciled with consideration for freedom of expression. Similarly, if such interventions are warranted, questions abound as to the level of such interventions depending on the nature of the speech involved. Hypothetically speaking for instance, a narrowly drawn provision that proscribes extreme expression against a member of an identifiable group, such as persons with disabilities, may be perceived as insufficient by those who are concerned about the persistence of prejudice and inequality in the community. Such a ban may not preclude the dissemination in society of less extreme, yet discriminatory expressions in the form of linguistic discrimination, unfair and stereotyped depictions of and false or erroneous assertions about disabled people. In addition, it is debatable whether the latter forms of discriminatory speech frequently disseminated by the broadcast media are more harmful because their

¹²ibid Art 1.3.

¹³ibid

¹⁴ibid

¹⁵Intolerance may take the form of marginalization of vulnerable groups and their exclusion from social and political participation, in addition to *inter alia* discrimination against them.

¹⁶Council of Europe, Recommendation No. R (97) 21 of the Committee Of Ministers to Member States on the Media and the Promotion of a Culture of Tolerance, (*Adopted By The Committee Of Ministers On 30 October 1997, At The 607th Meeting Of The Minister's Deputies*).

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audience tends to be larger and their discriminatory message more insidious.¹⁷ The line between the two types of speech is often difficult to draw and accordingly can make regulatory responses complex.

Against this probing backdrop, this chapter will be divided into two parts. Part One sets out the framework in relation to the right to freedom of expression and the potential limitations of the right pertaining to content matters. The chapter first outlines some of the main issues and debates surrounding the theoretical rationales underlying the right to freedom of expression in different jurisdictions. From there it continues with a general discussion on the right to freedom of expression and outlines the approach taken principally by the European Court of Human Rights. Whether disability should be included as a ground for protection under policies which deal with extreme speech such as “hate speech” is also considered.

Following on from this discussion, Part Two proceeds to a more specific inquiry into the traditional regulation of broadcast media content at national level and the manner in which it protects the interests of persons with disabilities without violating the right to freedom of expression. It focuses on regulation and to what extent the interests of persons with disabilities are addressed in practice. This section therefore contemplates various regulatory responses incorporating legislative, policy and best practice measures, which have been adopted by the media/communications sector primarily at national level. It subsequently takes into account the manner in which those measures go towards advancing positive and non-discriminatory representation of persons with disabilities in broadcast content; how those measures are monitored and implemented and the manner in which they can be balanced with the principle of freedom of expression.

¹⁷Richard Moon, *Report to the Canadian Human Rights Commission concerning Section 13 of the Canadian Human Rights Act and Regulation of Hate Speech on the Internet* (October 2008) 30.

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PART ONE: FREEDOM OF EXPRESSION, CONTENT REGULATION AND DISABILITY

Rationales for Freedom of Expression

In order to understand the various judicial approaches taken regarding restrictions on the right to freedom of expression, it is first necessary to contemplate the rationales underlying the right, particularly as a prelude to consideration of restrictions on speech which may be discriminatory or hateful towards persons with disabilities. A discussion will be provided of some universally accepted approaches to the principle. This discussion will consider a number of contentions surrounding the arguments for protecting freedom of expression in a bid to ascertain the scope and limits of such arguments.

i. Argument from Truth

The first of three commonly held arguments for the principle of free speech is the argument in pursuit of truth. This argument is most commonly associated with J.S. Mill who argued that suppression of opinion was wrong, because it is only by the ‘collision of adverse opinions that truth is discovered or confirmed.’¹⁸ Such an approach risks the circulation of ideas which are false. However from this perspective even where speech is false it must be permitted because the promulgation of false ideas performs the function of forcing those who hold the truth to defend their views.¹⁹ Accordingly, even where an opinion or idea is in error, its circulation fulfils a vital function in that it compels a rethinking of accepted opinions.²⁰ An example of this in relation to disability might be the idea espoused by

¹⁸Andrew Nicol *et al.*, *Media Law and Human Rights* (2nd edn, Oxford University Press 2009) 2-3. The general idea that free speech should be tolerated because it will lead toward the truth has a long history. This argument had been advanced two centuries earlier by John Milton in his work *Areopagitica and Of Education* 1, 50 (Harlan Davidson, Inc. 1951) [1644]. Fredrick Siebert echoed the idea that free expression is self-correcting quoting John Milton: “Let all with something to say be free to express themselves. The true and sound will survive. The false and unsound will be vanquished. Government should keep out of the battle and not weigh the odds in favour of one side or the other.” Fred S Siebert, ‘The Libertarian Theory’ in F.S Siebert *et al.*, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* (University of Illinois Press 1963) 45.

¹⁹Eoin Carolan and Ailbhe O’Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 4, para 1.11.

²⁰*ibid.* For example, in 2012, an Irish Clinical psychologist, Dr Tony Humphreys, wrote an article in *The Irish Examiner* newspaper, which suggested a link between autism and parents who do not show enough love and affection to their children. The article sparked outrage from parents with autistic children, the Psychological Society of Ireland and Irish Autism Action. The Irish Minister for Health and Children, James Reilly, also criticised the psychologist's remarks. Dr Humphreys however stated he never blamed parents but questioned whether the condition actually exists. *The Irish Examiner*

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some contemporary proponents of the psychogenic theory of autism, who continue to claim that the condition is a result of *inter alia* poor parenting, despite medical research having provided greater understanding of the biological basis of autism and other conditions.²¹

The argument from truth rationale has been less influential in the jurisprudence of the European Court than in the United States and Canadian Supreme Courts.²² The argument has played some part in the conjectures of American judges and Barendt asserts that there are a number of versions of the argument.²³ In the case of *Abrams v. United States*²⁴ for instance, Holmes J., in a dissenting opinion, asserted that all truths were relative and that they can only be judged ‘in the competition of the market.’ Holmes J. was of the opinion that the best test of truth is the power of the thought to get itself accepted in the competition of the market.²⁵ The phrase ‘marketplace of ideas’ is often used as a metaphor of this long-standing rationale for freedom of expression.²⁶ The argument puts forward that freedom of expression is not an end in itself but a means of identifying and accepting truth.²⁷ The contention involves scepticism both of the state and of accepted beliefs and ‘acknowledged truths.’²⁸

removed the article from its website. The Article however is still available on the internet. <http://www.broadsheet.ie/2012/02/08/that-tony-humphreys-autism-article-in-full/>

²¹It is submitted that this demonstrates the argument from truth in operation, not least because it could be argued that it forced those who hold the truth to defend their views but more importantly because the circulation of and subsequent criticism of the article itself fulfilled a vital function compelling a re-consideration of some accepted opinions. See Ronan McGreevy, ‘Reilly claims autism claims outrageous’ *The Irish Times* Dublin, 14 February 2012. See also The Journal.ie, ‘Controversial autism article should be retracted – PSI’. However such types of expression may under ECHR law and US law be protected on various grounds e.g. research and academic discourse.

²²Nicol *et al.*, (n 18) 5. The First Amendment to the U.S. Constitution protects even the most offensive and contentious speech from government suppression, and allows regulation of speech only under certain limited and narrow circumstances. The U.S. system is built on the idea that the free and open exchange of ideas encourages understanding, advances truth-seeking and allows for the refutation of falsehoods. For a more detailed discussion on the truth argument see Kent Greenawalt, ‘Insults and Epithets: Are They Protected Speech?’ 42 *Rutgers Law Review* 287 (1990).

²³Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 7.

²⁴*Abrams v U.S.* 250 US 616, 630-1 (1919).

²⁵*ibid* 630, Holmes, J. (dissenting) stated “[B]ut when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas... that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely can be carried out”.

²⁶Carolan and O’Neill, (n 19) 5, para 1.15, albeit the phrase does not actually appear in Holmes’s opinion. See further Frederick Schauer, ‘Facts and The First Amendment’ (2010) 57 *UCLA Law Review* 897, 909 (2010).

²⁷Nicol *et al.*, (n 18) 3.

²⁸*ibid*

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Barendt identifies many criticisms that can be made of Mill's argument. He states *inter alia* that its principal weakness is its questionable assumption that free discussion necessarily leads in a democratic society to the acceptance of truth, or at least the adoption of better or more liberal policies.²⁹

Take for instance the case of Virginian Republican politician, anti-abortion activist and Catholic, Bob Marshall, who was the subject of controversy in February 2010, when he made a statement regarding disabled children at a press conference to oppose state funding for Planned Parenthood.³⁰ The statement was to the effect that children with disabilities are God's punishment for abortion.³¹ Marshall stated:

“The number of children who are born subsequent to a first abortion with handicaps has increased dramatically. Why? Because when you abort the first born of any, nature takes its vengeance on the subsequent children... In the Old Testament, the first born of every being, animal and man, was dedicated to the Lord.”

Following criticism in various media,³² Marshall subsequently posted a statement on his website apologising for the comment, stating it was not his intention to communicate such an offensive notion.³³

It is submitted that Marshall's self acknowledged “offensive” statement provides a good example of the operation of the argument for truth in practice, not least for its demonstration of the inherent complexities in regulating such speech.

It is open to suggestion that despite his protestations regarding the intent of his “offensive” statement, Marshall appeared to use his initial statement to induce fear in order to promulgate an anti-abortion agenda.³⁴ It could be further suggested that his offensive statement and subsequent apology may also be attributed to his religious

²⁹Barendt (n 23) 11. *See also* Schauer (n 26) 919.

³⁰Planned Parenthood Federation of America or “Planned Parenthood” (PPFA) is a non-profit organization providing reproductive health and maternal and child health services.

³¹*See* ‘VA Christian Press Conference Feb-18-2010’ video posted by [delegatebobmarshall_23](http://www.youtube.com/watch?v=OqKeiAOA7Z8) February, 2010. <<http://www.youtube.com/watch?v=OqKeiAOA7Z8>>

³²*See* Brian Montopoli, ‘Va. Lawmaker: Disabled Kids are God's Punishment for Abortion’ *CBSC News* 22 February 2010. <http://www.cbsnews.com/8301-503544_162-6232759-503544.html>

³³*See* Bob Marshall Republican Delegate Web site Press Release, ‘Statement on Recent News Story by Capitol News’. <<http://delegatebob.com/news/statement-on-recent-news-story-by-capital-news-service>>

³⁴*E.g.* during the 2012 legislative session, Marshall and other Republicans supported a measure to require women in Virginia to undergo a trans-vaginal ultrasound procedure before being allowed to have a legal abortion. *See* Matthew Ward, ‘Virginia Senate passes ultrasound law minus vaginal probe’ *Reuters* (US, 29 February 2012). <<http://www.reuters.com/article/2012/02/29/us-abortion-virginia-idUSTRE81S0DR20120229>>

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beliefs. Either way, it is suggested here that Marshall's comment targeted and was offensive to two groups, namely women and persons with disabilities.

It is further advanced that Marshall's statement is possibly reflective of a religious / moral model of disability which, historically, is the oldest and least prevalent model of disability today. Broadly speaking, a religious/ moral model of disability regards disability as a punishment inflicted upon an individual or family by an external force. It can be due to misdemeanours committed by the disabled person, someone in the family or community or group. There are many cultures that associate disability with sin and shame, and disability is often associated with feelings of guilt, even if such feelings are not overtly based in religious doctrine.³⁵ According to Kaplan, for an individual with a disability, this model is particularly burdensome and its harmful effects include "general social ostracism and self-hatred."³⁶ It is frequently argued that such harms are commonly associated with the psychological injuries inflicted by the most pernicious forms of extreme or hateful expression.³⁷

Barendt asserts that the best argument for restricting such speech is undoubtedly that the state has a compelling interest to protect members of targeted groups against the psychological injuries or even physical injuries inflicted on members of that group.³⁸ Such injuries have been recognised by Canadian courts in relation to racial and religious hatred³⁹ and by the Canadian Human Rights Tribunal in relation to hate speech regarding disability on the internet;⁴⁰ however the US Supreme Court is less inclined to give much credence to such injuries in adjudicating cases concerning hate expression.⁴¹

³⁵Deborah Kaplan, 'Definition of Disability: Perspective of the Disability Community' 3 *Journal of Health Care Law & Policy* 352, 354 (1999- 2000).

³⁶ibid. See also e.g. Marshall's apology which linked disabled children as being "special blessings" from God. Kaplan points out that under a religious/ moral model of disability persons with disabilities were also signified as reflecting the 'Suffering Christ' and were often perceived to be of angelic or beyond human status to be a blessing for others.

³⁷Barendt (n 23) 174. See also Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling' (1982) 17 *Harvard Civil Rights and Civil Liberties Law Review* 133, 136-137.

³⁸Barendt (n 23) 174-175. See also critical race theorist Charles R Lawrence, 'If he hollers let him go: Regulating Hate Speech on Campus' (1990) *Duke Law Journal* 431, 462.

³⁹*Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at 918; *R. v Keegstra* [1990] 3 SCR 697 at 746-747.

⁴⁰The Canadian Human Rights Tribunal is an administrative tribunal established by the Canadian Human Rights Act in 1977.

⁴¹For example in *Snyder v. Phelps* 562 U.S._ (2011), Roberts C.J. delivering the opinion of the US Supreme Court stated that: "Speech is powerful. It can stir people to action, move them to tears of

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The Canadian Supreme Court for instance noted that research indicated “that hate propaganda can operate to convince listeners, even if subtly, that members of certain ...groups are inferior.”⁴² Accordingly, “[T]he result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services and facilities, and even incidents of violence.”⁴³ The Canadian Supreme Court re-affirmed its recognition of the harm caused by hate speech not only to targeted groups, but also to society at large, in the case of *Saskatchewan Human Rights Commission v. Whatcott*, which dealt with hate speech on the basis of sexual orientation.⁴⁴ If a group of people are considered inferior, sub-human or lawless, it is easier to justify denying the group and its members equal rights or status. As the majority become desensitized by the effects of hate speech, the concern is that some members of society will demonstrate their rejection of the vulnerable group through conduct.⁴⁵

However, defenders of freedom of expression, such as Richard Moon, state that critical views cannot be constrained simply because they affect the manner in which an individual is regarded by others in the community and the manner in which that individual sees himself or herself.⁴⁶ The standard freedom of expression position is that ideas cannot be censored simply because it is feared that members of the community may find them persuasive or that an individual’s self understanding or self-esteem may be negatively affected.⁴⁷ In this regard the listener and not the speaker is responsible for his/her actions.

Whether Marshall’s statement can be interpreted as extreme speech or merely insulting, is both subjective and moot; nonetheless it is clear that the effect of his

both joy and sorrow, and, as it did here, inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course, to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

⁴²*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 918, citing the Cohen Committee Report, Special Committee on Hate Propaganda in Canada. *Report of the Special Committee on Hate Propaganda in Canada* (Queen’s Printer 1966). In this case the research referred to hate propaganda in relation to racial or religious groups.

⁴³ibid

⁴⁴*Saskatchewan Human Rights Commission v. Whatcott* (SCC) (Judgment 27 February 2013) para [74], per Rothstein, J., “Hate Speech lays the groundwork for later, broad attacks on vulnerable groups ... These attacks can range from discrimination, to ostracism, segregation ... violence and in the most extreme cases, to genocide.”

⁴⁵ibid

⁴⁶ibid

⁴⁷ibid 83.

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statement is discriminatory and potentially harmful to persons with disabilities both as individuals and as part of a group.

However, when analysed in context, the jurisprudence from courts in numerous jurisdictions reveals that expressions like Marshall's may be justified. For instance, Marshall's comment can be regarded as political speech, as it was made in the context of opposition to state funding for *inter alia* abortion. The argument from truth theory holds that political speech is afforded "special protection" in various jurisdictions, albeit the ECtHR has stated that it is "crucially important" that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance.⁴⁸

Likewise the argument from truth extends to ideas of philosophy, such as religiously motivated expression. For instance in the case of *Snyder v. Phelps*, (2011), the US Supreme Court upheld the Westboro Baptist Church's right to picket a military funeral to communicate its belief that "God hates the United States for its tolerance of homosexuality, particularly in America's military."⁴⁹ A majority of the Court determined that the words on Westboro's picket signs dealt with "matters of public import" and were therefore protected by the First Amendment. Signs like "America Is Doomed" and "Fag Troops" and "Priests Rape Boys," in the Court's view, highlighted issues like "the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy."⁵⁰ Although the Supreme Court recognised that other signs held by the picketers such as "You're Going to Hell" and "God Hates You" and "Thank God for dead soldiers" contained messages related to the deceased and/ or his family

⁴⁸In *Snyder v. Phelps* (n 41), Roberts, C. J., in his opinion cited *Connick v. Myers*, 461 U. S. 138, 145 (1983), which stated that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." The ECtHR stated in the case of *Erbakan v. Turkey*, App. No. 59405/00, §64, 10 November 2005, (First Section) that "freedom of expression in the context of political debate should be attached the highest importance and political discourse should not be restricted without imperious reasons". However in its analysis of context the ECtHR has noted the relevance of the speaker's status /role in society; being a politician does not give an individual absolute free speech rights as it "is crucially important that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance." See also United Nations, Rabat Plan of Action 2013, para 24 which states that "[P]olitical and religious leaders should refrain from using messages of intolerance or expressions which may incite to violence, hostility or discrimination but also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech. It should be made clear that violence can never be tolerated as a response to incitement to hatred."

⁴⁹*Snyder v. Phelps* (n 41), 1.

⁵⁰*ibid* 2.

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specifically, in the Supreme Court's view that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Similarly the ECtHR, in *Nur Radyo Ve Televizyon Yayıncılığı A.Ş v. Turkey*, found that statements of a proselytizing nature, in that they accorded religious significance to a natural disaster, were likely to instil superstition, intolerance and obscurantism, and although shocking and offensive, they did not in any way incite violence and were not liable to stir up hatred against persons that were not members of the religious community in question.⁵¹ In that case the applicant company *Nur Radyo* had complained about the temporary broadcasting ban imposed on it by the broadcasting regulator, RTÜK. In particular, *Nur Radyo* stated that it had put forward a religious explanation for an earthquake, which all listeners were free to support or oppose.⁵² *Nur Radyo's* argument for freedom of expression is one proffered by the marketplace of ideas theory, namely the ability of an idea to get accepted or rejected. As to the regulatory intervention regarding such ideas, Moon argues, specifically in the case of racially prejudiced claims, for instance, that they "should be responded to not with censorship, but by offering competing views that make the case for equal respect or by creating more avenues for marginalised groups to express themselves."⁵³ From an argument from truth perspective then it would appear that the answer to Marshall's statement would be not to censor such speech⁵⁴ but rather to highlight and offer competing views to his religious/moral model of disability⁵⁵ in a bid to reveal the disempowering nature of such models and also to gain understanding of disability issues and also the perspective held by those creating and applying the models. The Canadian Supreme Court in *Saskatchewan Human Rights Commission v. Whatcott*, has stated however that "[F]raming speech as arising in a moral context or within a public policy debate does not cleanse it of its

⁵¹*Nur Radyo Ve Televizyon Yayıncılığı A v. Turkey*, App. No. 6587/03, §30, 27 November 2007.

⁵²The European Court acknowledged the seriousness of the offending comments and the particularly tragic context in which they were made. The Court reiterated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of interference. It therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued, and constituted a violation of Article 10 of the Convention.

⁵³Moon (n 17) 24.

⁵⁴An example of censoring in this regard for instance could mean removing the offensive contents from the video of the conference which was posted by Marshall and is still publically available on Youtube.

⁵⁵For example by highlighting the social/ human rights based models of disability.

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harmful effects” and acknowledged that “... history demonstrates that some of the most damaging hate rhetoric can be characterised as ‘moral’, ‘political’ and ‘public policy’ discourse.”⁵⁶

Barendt conversely asserts that one may legitimately question whether free speech always leads to truth, but better decisions are likely to emerge from uninhibited discussion than from a process regulated by the state.⁵⁷

However one criticism of the argument from truth is that the marketplace is not in practice open to everyone who wants to communicate his /her ideas.⁵⁸ As Barendt points out, some views are widely disseminated by the media, others hardly figure in public discussion and differences in the availability of ideas have little to do with the truth.⁵⁹ It is submitted that Barendt’s latter observations are especially true for persons with disabilities, who have been denied the right to enjoy participation in both political and public and cultural life on an equal basis with others.

Another criticism of the truth arguments is that they assume attitudes of sincerity and truthfulness on the part of speakers. However, the media may, for instance, market their products to attract large audiences in order to make a profit; therefore the truth may be subordinated to other considerations. For instance, research carried out in the UK in 2011, criticised “...television media ... for reinforcing rather than challenging stereotypes.”⁶⁰ These stereotypes included persons with disabilities. The research revealed that “[I]t was believed that negative portrayals were more

⁵⁶*Saskatchewan Human Rights Commission v. Whatcott* (SCC) (Judgment 27 February 2013), at paras.[116]- [117] the Supreme Court stated “[F]inding that certain expression falls within political speech does not close off an enquiry into whether the expression constitutes hate speech...Political expression contributes to our democracy by encouraging the exchange of opposing views. Hate speech is antithetical to this objective in that it shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse. Speech that has this effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate.”

⁵⁷*ibid.* Take, for example, Russia, which came under international criticism in June 2013, for passing an anti-lesbian, gay, bisexual and transgender (LGBT) propaganda law, which ostensibly was to preclude the dissemination of "non-traditional sexual relationships" ideas among minors. The law creates administrative offences that discriminate against LGBT people by amending an existing child protection law. The law has been condemned for being a de facto criminalisation of LGBT culture, as well as the efforts for LGBT rights.

⁵⁸*ibid* 12.

⁵⁹*ibid*

⁶⁰TW Research, *Report on findings from Research Informing the development of the BBC’s Diversity Strategy* (Commissioned by the BBC and the BBC Trust, April 2011) 27. Comments by NBC Olympic president, <<http://www.hollywoodreporter.com/news/nbc-olympics-president-defends-paralympics-coverage-400182>>

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sensational and therefore more likely to be ratings hits.”⁶¹ Carolan asserts that such profit motivation detracts from the value of the speech contributed by the media.⁶² Similarly the US Commercial Network NBC, which had exclusive rights to the London Paralympics 2012, was criticised for not broadcasting any live action of the games. Following criticism, NBC’s Olympic president emphasised that “NBC is a commercial broadcaster,” and signalled that he was “open to discussions with organisers on how to make the Paralympics a better business proposition.”⁶³ It can be argued that regulation of mass media, therefore, is justifiable to ensure that a variety of views such as those of persons with disabilities can be heard in the marketplace.⁶⁴

ii. Argument from individual self-fulfilment and personal development

The second rationale for free speech is as an aspect of individual self-fulfilment⁶⁵ or to allow ‘personal growth and self-realisation.’⁶⁶ Under this theory freedom of expression is an integral aspect of each individual’s right to self development and fulfilment. A right to express beliefs and political attitudes reflects what it is to be human. Barendt indicates that from this standpoint “restrictions on what we are allowed to say and write ... to hear and read inhibit our personality and its growth.”⁶⁷ In the United States Supreme Court case of *Procunier v. Martinez*⁶⁸ Marshall-Thurgood, J. asserted that:

“[T]he First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.”⁶⁹

⁶¹ibid

⁶²Carolan and O’Neill, (n 19) 6, para 1.18. See also Tarlach McGonagle, ‘Wrestling Wrestling (Racial) Equality From Tolerance Of Hate Speech’ (2001) 23 *Dublin University Law Journal*, 21, 23 fn 134, citing Stephen Sedley, ‘The First Amendment: A Case For Import Controls?’ in Ian Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Hart Publishing 1998) 23-28, 26. Sedley highlights the information and communication based power of the media “[T]he Mass media too have possession of large funds of information, and their power to manipulate or withhold it is no less than that of government [...] There are today repositories of corporate power as capable as any State of invading the rights of individuals”.

⁶³Georg Szalai ‘NBC Olympics President Defends Lack of Paralympics Live Coverage’ *The Hollywood Reporter* 28 September 2012. < <http://www.hollywoodreporter.com/news/nbc-olympics-president-defends-paralympics-coverage-400182>>

⁶⁴ibid

⁶⁵Barendt (n 23) 13.

⁶⁶Nicol *et al.*, (n 18) 4, para 1.07.

⁶⁷Barendt (n 23) 13.

⁶⁸*Procunier v. Martinez* 416 U.S. 396 (1974).

⁶⁹ibid 427.

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Similarly, the ECtHR has consistently stated that the guarantee of freedom of expression under Article 10 ECHR “constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and self-fulfilment of the individual.”⁷⁰

The self-fulfilment rationale affirms that there is an individual right to freedom of expression; even though its exercise may be inimical to the welfare of society. The advantage of this theory is that it captures the importance of speech to the speaker regardless of its value to the audience.⁷¹ However, a speaker centred approach to freedom of expression has the potential to defend speakers and speech which may infringe the human dignity or the rights of other persons affected by speech to be treated with equal respect and concern. Thus a white supremacist internet site that contains material that describes people with severe mental or physical disabilities as “parasites” and “genetic throwbacks” who must be “culled from the herd” could, technically speaking, be justified under the self-fulfilment argument.⁷²

Under the self-fulfilment rationale for freedom of expression is the belief that if a government proscribes speech, then it takes sides and abandons the neutrality it must show if it is to honour equality and respect and concern for all members of the public.⁷³ Restrictions on speech therefore may infringe on the rights of publishers of hate speech to be treated with equal respect and concern, whereby their contributions to public discourse are discounted, which shows them disrespect. Consequently, there may be a danger that the existence of these laws may deter or chill valuable political speech.⁷⁴

⁷⁰See *Muller v. Switzerland*, App. No. 10737/84, §33, 24th May 1988; *Lingens v. Austria*, App. No. 9815/82, Series A no. 103, 8 July 1986; *Sener v. Turkey*, App. No. 26680/95, 18 July 2000; *Thoma v. Luxembourg*, App. No. 38432/97, ECHR, 2001-III 7; *Rekvényi v. Hungary* [GC], App. No. 25390/94, §42, ECHR 1999-III).

⁷¹Carolan and O’Neill (n 19) 9, para 1.27.

⁷²See *Center For Research-Action On Race Relations and Canadian Human Rights Commission v. WWW.BCWHITEPRIDE.COM and - John Beck* [2008] C.H.R.T. 1.

⁷³Barendt (n 23) 32, asserts however that the argument does not mean that hate speech laws are necessarily incompatible with freedom of expression; it means that courts should interpret and apply them with regard for the values of free speech and not allow them to be abused.

⁷⁴Madame Justice McLachlin in her dissenting judgment in the Canadian Supreme Court of *R. v. Keegstra* [1990] 3 SCR 697 at 859-860, echoed concerns about the “chilling effect” of “drawing a line” in hate speech cases. In essence, she asserted that an individual may be hesitant to publish material, even valuable material that should not and probably would not be restricted because he /she is unwilling to take the risk that it might fall within a criminal prohibition that does not have a clear and uncontested scope. An individual who may be critical of the members of a particular group or who engages in research concerning the different characteristics of racial ethnic groups will “think

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Given the paramount importance of freedom of expression in society, any speech regulation must be cautiously drafted. Commentators argue that, if restrictions on hate speech, for example, are only directed at the most “odious” messages, they will be dealing with the more superficial aspects of the problem of group prejudice and hatred, for the most odious are likely to be the least effective in accomplishing their purposes.⁷⁵ Consequently such restrictions can affect only the most blatant and crudest forms of expression; the more subtle, thus potentially more invidious, hate expression will survive. “[G]roup prejudice and hatred when packaged in subtle or sophisticated communication wrappings,”⁷⁶ are not usually, therefore, susceptible to legal sanction. An example often cited in this regard is the claim or assumption that there are genetically based differences in intelligence between “racial groups”.⁷⁷ It is arguable that more moderate or mainstream forms of discriminatory speech are more harmful because their audience is bigger and their discriminatory message more dangerous.⁷⁸ Another contention is that suppression of hate propaganda drives such

twice” about what he says and may even decide to remain silent because he fears that his expression might fall within a vague prohibition.

⁷⁵McGonagle (n 62) 21, 22 citing Franklyn S Haiman, *Speech and the Law in a Free Society* (University of Chicago Press 1981) 94. See also Nadine Strossen, ‘Regulating Racist Speech On Campus: A Modest Proposal’ *Duke Law Journal* 484, 560 (1990).

⁷⁶See e.g. *BBC News Africa*, ‘Kenya cracks down on hate speech ahead of poll’ 26 February 2013. In order to avoid a repeat of nationwide violence following previous elections, the Kenyan authorities restricted campaign methods which use “hate speech” to whip up ethnic tensions. Kenya's independent Media Council continuously monitored 80 radio stations, TV channels and newspapers to clamp down on “retrogressive utterances”. Colourful rallies full of populist rhetoric and jokes are a feature of Kenya's campaign culture. In order to circumvent the new rules, politicians resorted to using coded language and ethnic stereotyping during rallies, “whose subtleties are often appreciated only within the community.” Mobile phones, the primary medium used to spread violent messages in the last election, became the subject of tight guidelines. Anyone found guilty of stirring up hatred through text messages faced a hefty fine of up to \$56,000 or three years in jail. <<http://www.bbc.co.uk/news/world-africa-21538412>>

⁷⁷See also *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06, 13 July 2012, on the notion of genocracy.

⁷⁸Moon (n 17) 30. For example a study carried out in the UK by Emma Briant *et al.*, ‘Bad News for Disabled People: How the Newspapers are Reporting Disability’ (Strathclyde Centre for Disability Research and Glasgow Media Unit, University of Glasgow 2011) demonstrated an increase in the number of articles over a certain period which documented the claimed ‘burden’ that disabled people are alleged to place on the economy, with some articles even blaming the economic recession itself on incapacity benefit claimants. The report noted (pp.68-6) that the “vitriolic approach” adopted by articles in some of newspapers and the manner in which they reported disability and disabled people in the period following the UK Government’s Comprehensive Spending Review 2010, added further weight to these claims. It also cited the use of pejorative language, the reluctance to explore the impact of the proposed cuts on disabled people’s quality of life, the reluctance to criticise government policy on these issues and the frequent representation of some disabled people as undeserving of benefits as “potentially contributing to what could become a highly inflammatory situation.” It noted that “[W]hile there is as yet no direct evidence to support the claim that these reports are leading to the reported increases in hate crimes, newspapers should take much greater care in this area...that the increased pejorative coverage of disability may have long term effects.”

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attitudes underground and may in the long run be as likely to expose society to a risk of violence as tolerance of its dissemination.⁷⁹

Critical race theorist, C.R. Lawrence, contends that the overwhelming emotional response combined with the institutionalisation of hate speech effectively silences the targets of hate speech, leaving them with little or no defence:⁸⁰ “When one is personally attacked with words that denote one’s subhuman status and untouchability, there is little (if anything) that can be said to redress either the emotional or reputational injury.”⁸¹ Thus a victim’s right to equality is affected by hateful expression, as is their ability to respond and participate in public discussion which is itself a right of free expression.⁸² The Canadian Supreme Court echoed these sentiments when it asserted that “a particularly insidious” effect of hate speech is that it inhibits the expression of the targeted group.⁸³

iii. Citizen participation in Democracy

The next rationale for freedom expression, which is the argument from citizen participation in a democracy, has been described as “probably the most easily understandable and certainly the most fashionable free speech theory in modern Western democracies.”⁸⁴ Free speech and democracy go hand in hand, albeit they have a somewhat ambivalent affiliation. From the birth of modern democracy, it was accepted that the right of people to criticise government, laws, and social conditions was intrinsic in the notion of the rule by the people.⁸⁵ This rationale has been touched upon in Chapter One. Under this rationale, the right to freedom of expression is framed in terms of active citizens who have an equal right to engage in public discourse and to exchange ideas and information. The argument is particularly

⁷⁹Barendt (n 23) 172.

⁸⁰Lawrence (n 38) 453. Mari J Mastuda *et al.*, (eds) *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder Westview 1993) 108-109, for example notes the silencing power of racism and refutes the usefulness of the market place of ideas and individual self-fulfilment theories.

⁸¹*ibid*

⁸²Sionaidh Douglas- Scott, ‘The Hatefulness of Protected Speech: A Comparison of the American and European Approaches’ 7 (2) *William & Mary Bill of Rights Journal* 305, 332 (1999).

⁸³*Saskatchewan Case* (n 44), [75].

⁸⁴Barendt (n 23) 18.

⁸⁵James Weinstein and Ivan Hare, ‘General Introduction: Free Speech, Democracy and Suppression of Extreme Speech Past and Present’ in Weinstein and Hare, (eds) *Extreme Speech and Democracy* (Oxford University Press 2009) 1.

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associated with the writings of Alexander Meiklejohn in the United States.⁸⁶ Meiklejohn was of the opinion that the primary purpose of the First Amendment is to protect expression because it facilitates citizens in understanding political issues and thus their effective participation in the working of democracy.⁸⁷ He argues that the notion of democracy is that of self-government by the people. For such a system to succeed, an informed electorate is necessary. In order to be suitably informed, there must be no limitations on the free flow of information and ideas. According to Meiklejohn, democracy will not be true to its essential ideal if those in authority are able to influence the electorate by withholding information and suppressing criticism. Meiklejohn acknowledges that the desire to manipulate opinion can stem from the motive of seeking to benefit society. However, he argues, choosing manipulation negates, in its means, the democratic ideal.⁸⁸

Likewise it is the so called ‘argument from democracy’ that enjoys pride of place in the case law of the ECtHR relating to Article 10 ECHR.⁸⁹ According to McGonagle, 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 importance of the role of media for the achievement of these aims.⁹⁰ The media in this regard play a significant role by disseminating information and ideas and thereby help opinion forming processes within society.⁹¹ The ECtHR has consistently recognised that this is particularly true of the audiovisual media due to their reach and impact. Additionally the media can serve as “fora for public debate” especially in relation to contemporary media

⁸⁶Barendt (n 23) 18.

⁸⁷Carolán and O’Neill (n 19), para 1.20. The First Amendment to the US Constitution provides: “[C]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

⁸⁸Randal Marlin, *Propaganda and the Ethics of Persuasion* (Broadview Press 2002) 226–227.

⁸⁹Tarlach McGonagle, ‘Free Expression and respect for others’ in *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, April 2009) 11.

⁹⁰*ibid.* See e.g. *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88, §63, 25 June 1992, the ECtHR stated that “... it is incumbent on the press to impart information and ideas on matters of public interest.”

⁹¹See e.g. *Lingens v. Austria*, App. No. 9815/82, Series A no. 103, 8 July 1986, where the ECtHR underlined the importance of freedom of the press in political debate. The Court held that freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and consequently, the freedom of political debate is at the very core of the concept of a democratic society. This is why the Court affords political debate by the press a very strong protection under Article 10.

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technologies which have “considerable potential for high levels of individual and group participation.”⁹² In the *Sunday Times v. United Kingdom*,⁹³ the ECtHR stressed that:

“Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”⁹⁴

Thus the media have a role in a democratic society to monitor the actions of governments and to report any wrongdoing on their part.⁹⁵

Barendt states that the argument from democracy is appealing largely because it is relatively easy to understand. To some degree it rests on the rules, values and commitments explicitly stated in the particular constitutional document, in addition to the more abstract philosophical theorizing which characterises the arguments from truth and the right to self-fulfilment.⁹⁶

Commentators emphasise that a number of aspects of the argument are worth noting.⁹⁷ The principal objection to this theory is that it is under-inclusive. By viewing expression as a purely instrumental means of safeguarding the effectiveness of democracy, the theory ignores speech which does not contribute to that goal. Barendt states that insofar as the argument is couched in terms of the need to expose citizens to a wide variety of views and to provide it with enough information to hold government to account, a free speech clause “would only cover political expression and there would be little justification for extending its protection to literary and artistic discourse, let alone sexually explicit material or commercial advertising.”⁹⁸

⁹²McGonagle ‘Free Expression and respect for others’ (n 89) 12.

⁹³*The Sunday Times v. The United Kingdom* Case (No. 2) App. no. 13166/87, 26 November 1991.

⁹⁴ibid §50 (b).

⁹⁵By way of example the investigative and covert filming by Ireland’s public service broadcaster RTE in December 2014 entitled *Áras Attracta-Inside Bungalow 3: Prime Time Investigations Unit 9* which exposed a pattern of serious abuse at a residential home for people with intellectual disabilities is illustrative of the media’s role as a “public watchdog.” A similar programme by the UK’s public service broadcaster, BBC in 2011 entitled *Under Cover Care: The Abuse Exposed* which also exposed a pattern of grave abuse at a residential home for people with learning disabilities and autism prompted the United Kingdom’s government to review the Care Quality Commission’s (CQC) failure to investigate a whistleblower’s account of the systematic abuse that left vulnerable people to face months of physical and verbal abuse. Cf the Prime Time - Leas Cross nursing home case in Ireland: *Cogley and Aherne v RTE* [2005] 4 I.R. 79, Clarke J.

⁹⁶Barendt (n 23) 18.

⁹⁷ibid; Carolan and O’Neill (n 19).

⁹⁸Barendt (n 23) 18.

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According to this theory, speech which advocates, for example, the overthrow of the democratic system may not be deserving of the protection.⁹⁹

Another difficulty with this rationale is that if the maintenance of democracy is the foundation for free speech, how can one argue against the regulation or even suppression of speech by democracy acting through its elected representatives?. Fredrick Schauer, for instance, notes that the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty and thus demonstrates the recognition of an independent principle of freedom of speech.¹⁰⁰ Such a majoritarian approach to constitutional principles is opposed to the more modern understanding of the democratic state and the role of constitutional principles such as free speech.¹⁰¹

A modern conception of the democratic state formulated by *Dworkin* is one in which political and legal institutions must respect the right of all citizens to be treated with equal respect and concern. The majority is therefore seen as a temporary one, subject to change depending on the outcome of the political process.¹⁰² If this view is taken then the right to free speech is too fundamental to be subject to the whims of the elected majority. Everyone, including members of minority groups and parties, is entitled to participate in public discourse and debate, as a result of which temporary political majorities are formed.¹⁰³

Barendt, citing Richards, states that it would be wrong for the majority to suppress the right of minorities to express their dissent. On this perspective, defamatory attacks on public officials, hate speech and extremist speech challenging the legitimacy of existing institutions must all be tolerated, because the state is not free to determine the boundaries of public discourse.¹⁰⁴ The right of everyone to participate in society through the exercise of free speech rights is part of the foundation of democracy.¹⁰⁵ This version of the third rationale for freedom of speech contains elements from the two rationales already considered. First, the rights of

⁹⁹Carolan and O'Neill (n 19) 7, para 1.21.

¹⁰⁰Schauer 'Facts and The First Amendment' (n 26).

¹⁰¹Carolan and O'Neill (n 19) 7, para 1.21. *See* Barendt (n 23) 19.

¹⁰²*ibid*

¹⁰³Barendt (n 23) 19.

¹⁰⁴*ibid* 19-20.

¹⁰⁵*ibid* 20.

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minorities to contribute to political debate should be respected, partly because they may have better ideas than those of the elected majority. This view accords with the truth rationale in respect of the ability of ideas to get accepted in the marketplace. Second, the right of all people to equal respect and concern, which underlies their right to engage in public discourse, has close links to arguments for free speech from dignity and self-fulfilment. It also emphasises that government should not be permitted to delimit the contours of public discourse; otherwise it could privilege the speech of some individuals by ruling the contributions of others as it were out of bounds.¹⁰⁶

Drawing from Barendt, Weinstein argues that speech in this regard is speech that includes more than ‘political speech in the narrow sense’ and embraces ‘speech concerning the organisation and culture of society’, this core democratic speech often being referred to as ‘public discourse’ by commentators and by courts.¹⁰⁷ However democratic governments claim that speech can be appropriately suppressed when it becomes so extreme as to pass beyond the limits of legitimate protest. This is reflected in the regulation of extreme speech such as hate speech.

Historically, the law has restrained the individual right of free speech in the name of some state interest such as maintenance of public order or the successful prosecution of a war. In contrast contemporary regulations narrowly limit the rights of the speaker in order to protect the rights of other individuals not to suffer an affront to their dignity on the basis of a characteristic central to their personality, such as their race, ethnicity, religion or sexual orientation.¹⁰⁸ Weinstein states that this rationale raises several crucial questions, including whether in a democratic society one truly has a right (as opposed to an inchoate interest) not to be demeaned by public discourse on bases such as these; if so, a further question arises as to why vindication of the right not to be demeaned justifies the infringement of the right of the speaker to participate in a political process.¹⁰⁹ Dworkin states that “...in a democracy, no one, however powerful or impotent, can have a right not to be insulted or offended.”¹¹⁰

¹⁰⁶ibid

¹⁰⁷ibid.

¹⁰⁸Weinstein and Hare (n 85) 7.

¹⁰⁹ibid

¹¹⁰Ronald Dworkin, ‘Even bigots and Holocaust deniers must have their say’ *The Guardian*, London, 14 February, 2006; He states: “[T]hat principle is of particular importance in a nation that strives for

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He further asserts that, “If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to respect.”¹¹¹

The Canadian Supreme Court, however, pointed out that a particularly dangerous aspect of hate speech is that it acts to cut off any path of reply by the group under attack.¹¹² It does this not only by attempting to marginalize the group so that their reply will be ignored; it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspect of democracy. It is submitted that this argument for instance could be applied to assertions such as the one made by Senator Marshall *supra*, that disability is God’s punishment for abortion. Under the argument this type of statement means that persons with disabilities are instantly marginalised as a group and are forced to defeat the absolutist position that disability is an actual manifestation of divine retribution, in order to justify a level of societal standing that would then permit participation in the larger debate of whether abortion should be legalised. In this manner, the expression inhibits persons with disabilities from interacting and participating in free expression and public debate.

It is clear from the foregoing discussion that the common justifications for freedom of expression are not without their difficulties. The judicial approaches in various jurisdictions¹¹³ would seem to indicate that elements from all three rationales are incorporated into decisions. Feintuck and Varney point out that “[W]hatever the combination of any or all of the three lines of argument is or are accepted, the centrality of freedom of communication to liberal democratic beliefs is demonstrated, though disputes over its precise nature and extent continue.”¹¹⁴ Ultimately, all three arguments advance a fundamental trust in the value of

racial and ethnic fairness. If weak or unpopular minorities wish to be protected from economic or legal discrimination by law, if they wish laws enacted that prohibit discrimination against them in employment, for instance, then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult may legitimately adopt such laws.

¹¹¹*ibid.* See also Ronald Dworkin, ‘Should Wrong Opinions be banned?’ *The Independent Sunday*, 28 May, 1995.

¹¹²*Saskatchewan Human Rights Commission v. Whatcott* (SCC) (Judgment 27 February 2013), para [75].

¹¹³US, Canada and European Court of Human Rights.

¹¹⁴Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law* (2nd edn, Edinburgh University Press 2006) 13-14.

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permitting individuals and groups to have access to a broad range of information and views (both political and cultural).¹¹⁵

However, it is submitted that an inherent flaw in the rationales, particularly as they relate to persons with disabilities, is the ideology and presupposition that conventional accessibility to the media is assured. There are many barriers which persons with disabilities face in terms of accessing media and these are addressed in the chapter following. However at this point it can be said that the denial of or non-availability of access to media and media services, and consequently access to a wide range of information, effectively marginalizes and excludes people, not least persons with disabilities, from participating as citizens in a democracy. Moreover it has the potential to interfere with *inter alia* their right to freedom of expression and their right to participate in both the political and cultural life of society.

For example, the argument from truth suggests that instead of suppressing speech that is harmful, responding to it with divergent views is a solution. However this presupposes that persons with disabilities as speakers and audience members have access to such views or have access to media to challenge such views. It follows that lack of communicative power for persons with disabilities may effectively exclude or place them in an unequal position in the marketplace of ideas. The denial of access of persons with disabilities in broadcast media will be addressed in detail in Chapter Five.

Likewise, having regard to the self-fulfilment argument, if persons with disabilities do not have access to media to express their views or challenge views which may be harmful to them, then their self-esteem is harmed and their right to freedom of expression is effectively infringed. In terms of broadcast media, the self-fulfilment argument also raises issues. In the absence of regulation of broadcast media disseminating ideas, broadcasters in pursuit of economic gain may effectively exclude minorities.

It is submitted that the issues outlined highlight the need, particularly at national level, for a public policy and regulatory framework for media which promotes the right of different communities, including persons with disabilities, to freely access

¹¹⁵ibid

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and use media and information and communications technologies both for the production and circulation of their own content as well as for the reception of content produced by others. This framework should be implemented by *inter alia* promoting universal and affordable access to the means of communicational reception of media services including broadcasting.

It is submitted that owing to the lack of effective communicative power, regulatory intervention in media frameworks may be necessitated, in order to ensure a diversity of views and to enable persons with disabilities to challenge various forms of discriminatory expression in order to assert their right to freedom of expression. However difficulties arise in relation to the level of intervention in the regulation of various types of discriminatory expression, particularly extreme or hateful expression. The various theories presented also highlight, through the case law discussed and the critical commentary, that courts and most theorists agree that government can regulate speech when the potential harm of allowing the expression seriously outweighs the potential harm of suppressing it. The disagreements thus spring from different estimations of the degree and nature of the harm in hate speech and the harm in its suppression, which arise from competing visions of the world and the ideal conditions to which we should aspire. As Massaro states: “[U]nderstanding these underlying assumptions and perfectionist aims is an essential first step toward a sensitive response to the hate speech dilemma.”¹¹⁶

Protecting Freedom of Expression

Freedom of expression is generally accepted to be a crucial feature of constitutional democracies.¹¹⁷ It has been included as a fundamental value in a number of international conventions and other instruments including the Universal Declaration of Human Rights (UDHR),¹¹⁸ the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹¹⁹ and the United Nations Convention on the Rights

¹¹⁶Toni M Massaro, ‘Equality and Freedom of Expression: The Hate Speech Dilemma’ 32 *William and Mary Law Review* 211, 222 (1991).

¹¹⁷Carolan and O’Neill (n 19) 1, para. 1.02.

¹¹⁸Art 19 UDHR. See also Art 19 International Covenant on Civil and Political Rights (ICCPR); First Amendment to the United States Constitution; UN Human Rights Committee, General Comment No. 34, Freedoms of Opinion and Expression, CCPR/C/GC/34 (*Adopted at 102nd session Geneva, 11-29 July 2011*).

¹¹⁹Art 10 ECHR; see also Article 40.6.1i Irish Constitution 1937; Art 19 ICCPR; Art 5 (d) viii ICERD.

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of Persons with Disabilities (CRPD).¹²⁰ Freedom of speech is the political right to communicate one's opinions and ideas *via* speech. The terms “freedom of expression” or “free speech” are sometimes used synonymously, and in general include any act of seeking, receiving and imparting information or ideas, regardless of the medium used (*e.g.* press, radio, television and internet). In addition to oral and verbal communications, the free speech principle also embraces conduct which “produces comparable offense or harmful effects...”.¹²¹ For instance, commercial advertising and public meetings held on the streets are covered by freedom of speech. In a well-known passage from its judgment in *Handyside v. United Kingdom*¹²², the European Court of Human Rights described the essence and scope of the principle stating that:

“Freedom of expression constitutes one of the essential foundations of ...a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”¹²³

According to McGonagle, the right to freedom of expression has been referred to as “a precious heritage as well as dangerous instrument.”¹²⁴ It can be a great source of empowerment but conversely it is also open to abuse.¹²⁵ Unlike the freedom of thought (inner conviction or *forum internum*), the right to freedom of expression (external manifestation or *forum externum*) is not an absolute right.¹²⁶

Article 10 (1) ECHR for example “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”¹²⁷ and provides that:

¹²⁰ Art 21 CRPD on “Freedom of expression and opinion, and access to information”.

¹²¹ Barendt (n 23) 7.

¹²² *Handyside v. United Kingdom*, App. No. 5493/72, 7 December 1976.

¹²³ *ibid* §49. This quote encapsulates two of the main theoretical rationales for the protection of expression, namely freedom of expression as an integral aspect of each citizen’s right to self-development and fulfilment and freedom of expression as it enables citizens to participate effectively in a democracy, which are discussed *supra*.

¹²⁴ McGonagle ‘Free Expression and respect for others’ (n 89) 7.

¹²⁵ *ibid*

¹²⁶ Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing 2009) 1.

¹²⁷ McGonagle (n 89) 9.

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“Everyone has the right to freedom of expression. This right shall include freedom of 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.”

The sphere of application of Article 10 ECHR is very broad and under its terms the right applies to “everyone”.¹²⁸ Additionally there are three distinct parts to the right which are analogous to the different aspects of the communicative process, i.e. holding views, receiving and sending content. Even though the right to freedom of expression is generally referred to as an “all-in-one concept”, in practice, however, the rights of speakers, listeners and third parties can be at variance with or even be in contest with one another.¹²⁹ As McGonagle states, a speaker’s ‘right’ to utter racially abusive remarks would be set in opposition to a listener’s ‘right’ to be protected from racism. All of this would have to be weighed up against third parties’ ‘right’ or interest not to allow racist utterances in public.¹³⁰

The concept of “information” has been extensively interpreted by the European Court of Human Rights (ECtHR), as including not only hard facts and raw data or matters of public interest dealt with by the press, but also photographs¹³¹ and radio¹³² and television programmes.¹³³ Additionally the ECtHR acknowledged in *Müller and others v. Switzerland*¹³⁴ that the right incorporates “freedom of artistic expression, notably within freedom to receive and impart information and ideas, which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.”¹³⁵ The right also includes the freedom to communicate information of a commercial nature.¹³⁶ The ECtHR held in *Autronic A.G. v. Switzerland*,¹³⁷ that the right to freedom of expression concerns not only the

¹²⁸In *Autronic A.G. v. Switzerland*, App. No. 12726/ 87, §47, 22 May 1990, Series A No. 178, the ECtHR stated that Article 10 “... applies to ‘everyone’, whether natural or legal persons”.

¹²⁹McGonagle (n 89) 9.

¹³⁰*ibid*

¹³¹*Von Hannover v. Germany* [2004] 40 EHRR 1; *Egeland and Hanseid v. Norway*, App. No. 34438/04, 16 April 2009.

¹³²*Radio Twist A.S. v. Slovakia*, App. No. 62202/00, 19 March 2007.

¹³³*Jersild v. Denmark*, App No. 15890/89, 23 September 1994.

¹³⁴*Muller* (n 70) §27.

¹³⁵*ibid*. See also *Karatas v. Turkey*, App. No. 23168/94 (ECHR 1999-IV, 8 July 1999), the artistic expression in this case was poetry, albeit with a political dimension.

¹³⁶*Markt intern Verlag GmbH v. Germany*, App. No. 10572/83, 20 November 1989.

¹³⁷*Autronic* (n 128).

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content of the information but also the means of transmission or reception since “any restriction imposed on the means necessarily interferes with the right to receive and impart information.”¹³⁸

Limits on the right to freedom of expression are set out in Article 10 (2) of the ECHR which details a number of grounds on which the right may be legitimately restricted. The provision stipulates that the right carries with it “duties and responsibilities,” and may be subject to “formalities, conditions, restrictions or penalties.”¹³⁹ These limitations however, must be “prescribed by law” and be “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 health¹⁴⁰ or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Court of Human Rights - Article 10 ECHR

The ECtHR has developed a test in order to determine whether Article 10 has been infringed. In short, whenever it has been established that there has been an interference with the right to freedom of expression that interference must firstly be “prescribed by law.”¹⁴¹ This requires that the impugned measure should have some basis in domestic law; in other words there must be a specific legal rule or regime which authorises the interference. It also means that the citizen must have adequate access to the law in question¹⁴² and the law must be formulated with sufficient precision to enable the citizen to foresee the circumstances in which the law would or might be applied.¹⁴³

¹³⁸ibid §47.

¹³⁹ Art 10 (2) ECHR.

¹⁴⁰There are some ways in which broadcast content can be harmful to public health. For instance, there is potential for direct physical harm caused by flashing lights in broadcast content which may trigger seizures for those with photosensitive epilepsy. Some jurisdictions have laid down standards for broadcasters in relation to the dissemination of such content, which could form the basis for further research in the area. *See e.g.* Ofcom, Broadcasting Code, Harm and Offence Section 2.12. *See also* Mark Sweeney, ‘Citroen advert banned after causing epileptic seizure’ *The Guardian*, 18 January 2012, <<http://www.guardian.co.uk/media/2012/jan/18/citroen-ad-epileptic-seizure>>

¹⁴¹Article 10 (2) ECHR; *Lingens v. Austria*, App. No. 9815/82, Series A no. 103, 8 July 1986 para 35.

¹⁴²*The Sunday Times v. United Kingdom* (1979) 2 EHRR 245, §65.

¹⁴³*Malone v. United Kingdom* App. No. 8691/79, 13 July 1981.

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Secondly, the Court will ask does the interference “pursue a legitimate aim?” That is to say, the interference must pursue one or more of the legitimate aims referred to in Article 10 (2). For instance, three categories of restrictions to the exercise of freedom of expression which have been previously outlined may be permitted in this regard; to protect general interests such as public safety and health or morals, to protect other individual rights such as the right to privacy and reputation and to maintain the authority and impartiality of the judiciary.

The Court then considers the third part of the test which is whether the interference is “necessary in a democratic society”? In this regard the Court will consider whether the interference corresponds to a “pressing social need” which must be proportionate to the legitimate aim pursued. States have a certain amount of discretion in how they regulate free expression.¹⁴⁴ The level of discretion, which is subject to supervision by the ECtHR, is varied. States, for instance, have a narrow ‘margin of appreciation’ in respect of political expression¹⁴⁵ and a wider one in respect of public morals, decency and religion.¹⁴⁶ This is commonly justified by lack of a uniform European consensus on whether or how such matters as morals should be regulated.¹⁴⁷ It is important to note that the ECtHR does not assume the position of the national authorities; instead it appraises the decisions taken by such authorities, taking into account their margin of appreciation under Article 10 ECHR. Therefore the Court examines the impugned expression in the broader circumstances of the case and decides whether the justifications given by the national authorities for the restriction, and the manner in which they employed it, are “relevant and sufficient” in the context of the interpretation of the Convention.¹⁴⁸

The enumerated ground of the protection of the “rights of others”¹⁴⁹ is conceivably the most relevant for intergroup relations in a pluralistic democratic society and, it is submitted, possibly the most relevant as regards restrictions on “potentially”

¹⁴⁴The European Court has established a “margin of appreciation” in accordance with the principle of subsidiarity of the ECHR’s human rights protection mechanism.

¹⁴⁵Weber (n 126) 32, *e.g.* notes that “[O]n the whole, the Court’s supervision is at its most strict when it concerns statements that constitute an incitement to hatred”.

¹⁴⁶*See Wingrove v. United Kingdom* App. No. 17419/90 (ECHR, 1996-V, no. 23, 25 November 1996) §58.

¹⁴⁷*ibid*

¹⁴⁸*ibid* §59.

¹⁴⁹Art 10 (2) ECHR.

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offensive discriminatory /hateful expressions relating to persons with disabilities in broadcasting content.

The case of *Sigma Television and Radio Ltd v Cyprus* (hereafter *Sigma*)¹⁵⁰ demonstrates the European Court's application of its Article 10 test in practice. It is submitted that the case also provides a constructive insight into the manner in which the ECtHR approaches and assesses the potential infringement of a broadcaster's right to freedom of expression through sanctions imposed on it for discriminatory broadcasting content relating to groups in society and may, therefore, be pertinent to persons with disabilities.

The *Sigma* case concerned a complaint by a broadcasting company regarding a number of decisions by the Cyprus Radio and Television Authority (hereafter CTRA) which had imposed fines on the company for violations of broadcasting legislation. In one instance, the Authority had imposed a fine on the broadcasting Company for racist and discriminatory remarks made in an episode of a fictional television entertainment series which the company had itself produced.¹⁵¹ The CTRA found the remarks to be in violation of three provisions of Cyprus' Radio and Television Stations Regulations.¹⁵² The broadcasting company submitted that the imposition of this fine among others constituted an interference with its right to freedom of expression under Article 10 (1) of the Convention.

Having established that the interference with the company's freedom of expression was "prescribed by law" and pursued one of the "legitimate aims" in Article 10 (2), namely protection of the rights of others, the Court considered whether the interference had been "necessary in a democratic society"? In this respect the Court observed that the series in question was an entertainment series which "appeared to have been fictional." The ECtHR noted that the remarks in question had been made in an episode in the context of a dialogue between characters of the series and were "considered by the CTRA to be, in sum, offensive and disrespectful to the residents of two local towns, and to Arabs, Russian women and women in general, as well as undignified in respect of both sexes." It also took note of the CTRA's concerns about

¹⁵⁰*Sigma Radio Television Ltd v. Cyprus*, App. Nos. 32181/04 and 35122/05, 21 July 2011.

¹⁵¹*ibid*

¹⁵²Regulations 21 (3) and (4) and 26 (1).

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the racist and discriminatory tone of the remarks made. The ECtHR emphasised “...the vital importance of combating racial and gender discrimination in all its forms and manifestations.”¹⁵³ It noted that even though the remarks in question were made in the context of a fictional entertainment series, it considered in view of their content, and in the absence of sufficiently detailed information about the programme and specific observations on the part of the broadcast company, that the CRTA could not have been found to have overstepped its margin of appreciation in view of the profound analysis at the national level. In this regard however the Court attached importance to the fact that the broadcaster did not make any submission in the proceedings before the regulatory Authority and nor did it submit observations before the Court disputing the necessity of the interference with its right to freedom of expression in so far as this programme was specifically concerned.

Having regard to the penalty imposed on the broadcaster, the Court found that the fine had been proportionate to the aim pursued, bearing in mind that the Authority had taken into account the repeated violations by the company of the relevant provisions in other episodes of the same series. Accordingly, the ECtHR held that there had been no violation of Article 10 ECHR.

A number of observations can be made in relation to the *Sigma* case regarding restrictions on discriminatory content pertaining to groups in society and the ECtHR’s assessment of whether a broadcaster’s right to freedom of expression has been violated. It is submitted that the ECtHR in *Sigma* clearly acknowledges two issues. First it acknowledges that content restrictions on discriminatory speech targeting groups may be permitted in State broadcasting legislation provided such restrictions satisfy its three step test. Secondly, it acknowledges that sanctions imposed on broadcasters for breach of such restrictions may not infringe a broadcaster’s right to freedom of expression provided such sanctions are proportionate to the aim pursued. The case further suggests that had discriminatory comments been made regarding persons with disabilities in the episode at issue, the ECtHR may have reached a similar conclusion for a number of reasons. First, the Cypriot Regulations which were “prescribed by law” specifically recognised persons

¹⁵³*Sigma* (n 150) §208.

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with disabilities as a protected category/group¹⁵⁴ and secondly the Court emphasised the vital importance of combating “...discrimination in *all its forms* and manifestations.” The Court’s reference to all “manifestations” suggests that such discrimination should be combated, even in the context of a dialogue between two fictional characters in a television programme.

However, it is submitted that caution must be observed in drawing inferences that the *Sigma* case is authority for the proposition that the ECtHR will find, in every case concerning sanctions imposed on broadcasters for discriminatory broadcast content that such sanctions *will not* amount to an infringement of Article 10 ECHR. For instance, the European Court did not assume the position of the Broadcasting Regulator and the national Cypriot Court; instead it appraised the decisions taken by those two bodies, taking into account their margin of appreciation under Article 10 ECHR. However it is submitted that had the discriminatory remarks been made in the context of political speech or on a debate on questions of public interest, the ECtHR may not have afforded the State such a wide margin of appreciation. The ECtHR took into consideration that the CRTA could not have been found to have overstepped its margin of appreciation in view of the profound analysis it had carried out at national level.¹⁵⁵ However the ECtHR also conceded that this was owing to the absence of sufficiently detailed information about the programme and lack of specific observations from the broadcast company.¹⁵⁶ Thus it is suggested that had the Broadcasting Company provided information on the programme or had it contested the CRTA’s initial decision¹⁵⁷ in finding a breach or contested that the interference was not necessary at national court level, the outcome of this case might have been different.

Thus while the ECtHR in *Sigma* recognised that an interference with a broadcaster’s right to freedom of expression may be necessary in a democratic society to protect the rights of others from discriminatory content based on race and gender, it further

¹⁵⁴*E.g.* Regulation 26 (1) specifically incorporates “persons with special needs.” Likewise the obligation contained in Regulation 21 (3) “extends to every individual or the image of a person as an individual or a member or a group”.

¹⁵⁵*Sigma* (n 150) §208.

¹⁵⁶*ibid*

¹⁵⁷*Sigma* (n 150) Annex 26, Point F., 81 notes that the Broadcasting Company did not attend the hearing before the CTRA.

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demonstrates that any restriction on freedom of speech must be examined in light of the case as a whole taking all factors into consideration.

Article 10 Conflict with other Rights in the ECHR

Where there is a conflict between the right to freedom of expression and another right in the Convention, the European Court will engage in an appropriate balancing exercise. For instance, the Grand Chamber has stated as a matter of principle that Article 10 and Article 8 (respect for private life) deserve “equal respect”.¹⁵⁸ Consequently, the European Court may be required to verify whether domestic authorities have struck a “fair balance” when these two values come into conflict. In *Von Hannover no. 2* for example, the Court confirmed that Articles 8 and 10 are of equal value. However, under the margin of appreciation doctrine, the ECtHR made it clear that the Court will require “strong reasons” to substitute its view for that of the domestic courts where a balancing exercise between Article 10 and 8 has been undertaken at the domestic level.¹⁵⁹ Another essential factor in these balancing cases may be whether the expression contributes to a debate of general interest, a notion which is broadly interpreted by the European Court of Human Rights and which will depend on the circumstances of each case.¹⁶⁰ The ECtHR has however recognised in its assessment of Article 8, that the notion of personal autonomy is an important principle underlying that Article’s interpretation and can embrace multiple aspects of a person’s physical and social identity including ethnic identity.¹⁶¹ Furthermore it acknowledged in the case of *Aksu v. Turkey*, that any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self worth and self confidence and therefore it can affect the private life of the members of the group.¹⁶² Moreover, the Court stated that Article 8 does not merely compel a State to abstain from arbitrary interference with an individual’s private life, but could also give rise to positive obligations to adopt

¹⁵⁸*Von Hannover v. Germany (No. 2)*, [GC] App. Nos. 40660/08 and 60641/08, §106, 7 February 2012.

¹⁵⁹*ibid* §107.

¹⁶⁰*Axel Springer Verlag AG v. Germany*, [GC] App. No. 39954/08, § 90: “what constitutes a subject of general interest will depend on the circumstances of the case.”

¹⁶¹*See also Mc Donald v U.K.*, App. No. 4241/12, Fourth Section, 20 May 2014, §46 where the court held that “private life” is a broad concept, including a person’s physical and psychological integrity; (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B and *Botta v. Italy*, 24 February 1998, § 32, Reports of Judgments and Decisions 1998-I); the right to “personal development” (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I); and the notion of personal autonomy (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III).

¹⁶²*Aksu v. Turkey*, App. Nos 4149/04 and 41092/04, 15 March 2012, §58.

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measures designed to secure respect for private life. The *Asku* case concerned the alleged discrimination of Roma people. It was contended that certain passages and expressions included in two government funded publications (a book and a dictionary) reflected clear anti-Roma sentiment. The main issue for the Court was whether the impugned publications containing the racial insults constituted interference with the applicant's right to respect for his private life, and if so, whether the interference was compatible with the said right (Article 8), even though the offensive content did not directly target the applicant. As regards the book "The Gypsies of Turkey", the Court noted that the passages complained of when read in isolation appeared to be discriminatory and insulting. However, examined as a whole, the book did not allow a reader to conclude that the author had any intention of insulting the Roma community. The Court found that it was made clear in the conclusion to the book that it was an academic study, which conducted a comparative analysis and focused on the history and socio-economic living conditions of the Roma people in Turkey. The Court highlighted the importance of the fact that the passages complained of were not the author's comment but examples of the perception of Roma people in Turkish society. The Court in balancing both rights, the right to academic freedom (Article 10) and the applicant's right to private life (Article 8) and taking all factors into account, concluded that no violation of Article 8 had taken place. It is submitted that the benefit of the Court's decision here lies in its explicit sensitivity to the harm of stereotyping of different groups and therefore may be pertinent to persons with disabilities in future cases involving both Article 8 and Article 10.

Article 14 - Discrimination

The prohibition on discrimination is guaranteed by Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention. It provides that the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The ECtHR has recognised disability as a ground under Article 14.¹⁶³ Conversely, the article's protection is

¹⁶³*Alajos Kiss v. Hungary*, App.No. 38832/06 20 May 2010; *Kiyutin v. Russia*, App. No.2700/10, 10 March 2011; *Glor v. Switzerland*, App. No 13444/04, 30 April 2009.

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restricted in that it only prohibits discrimination with respect to rights under the Convention. The ECtHR in a number of judgments concerning Article 14 has highlighted the negative impact of stereotyping of persons with disabilities including persons with intellectual and psychosocial disabilities and also those living with HIV.

Application of Article 17 ECHR

Apart from the permitted restrictions envisaged by Article 10 (2) ECHR, the right to freedom of expression may also be constrained on the basis of Article 17 ECHR. By applying Article 17, which is entitled “Prohibition of abuse of rights”, the Court can decide to exclude the expression in question from the protection offered by the Convention. Article 17 provides that:

“ [N]othing 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.”

This provision is not only directed at States but also at groups or persons. “In concrete terms, it means that where freedom of expression is asserted as a cover for extreme speech such as hate speech, it will not be afforded protection under Article 10 (1)...” and as a result, the restrictions laid down in Article 10 (2) will not be ‘mobilised.’¹⁶⁴ McGonagle states that Article 17 can be regarded “as a safety mechanism, designed to prevent the ECHR from being misused by those whose intentions are contrary to its letter and spirit.”¹⁶⁵ Likewise Weber asserts that the aim of Article 17 is to guarantee the permanent maintaining of the system of democratic values underlying the Convention; most particularly the article is inclined to prevent totalitarian groups from exploiting, in their own interests, principles set out by the Convention.¹⁶⁶

Article 17 has been applied consistently by the Court to ensure that Article 10 protection is not extended to racist,¹⁶⁷ xenophobic or anti-Semitic speech;¹⁶⁸

¹⁶⁴Françoise Tulkens, ‘When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights’ (Paper delivered on Seminar on Human Rights for European Judicial Trainers, European Judicial Training Network, Strasbourg, October 2012) 4.

¹⁶⁵McGonagle (n 89) 10.

¹⁶⁶Weber (n 126) 23.

¹⁶⁷See, for example, *Norwood v. UK*, App. No. 23131/03 (admissibility decision), 16 November 2004).

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statements denying,¹⁶⁹ disputing, minimising or condoning the Holocaust or (neo) Nazi ideas.¹⁷⁰

It is submitted that it would be highly unlikely that the ECtHR would categorically exclude specific instances of extreme expression directed against persons with disabilities under Article 17. Nonetheless, it would be open to the European Court to consider extreme expressions against disabled people if such expressions constituted part of broader extremist expression relating to the Holocaust or justifying a pro-Nazi policy. For instance, extreme expression denying, disputing, minimising or condoning Action T4, Nazi Germany's "Euthanasia programme", whereby at least 200,000 people with physical and mental disabilities were killed by medication, starvation, and in gas chambers, might fall within the scope of Article 17. The Court would nonetheless have to examine such a case on its particular facts.

Cannie and Voorhoof argue that applying Article 17 "in order to deal with and legitimise the criminalisation of the *worst* kinds of speech is not a desirable project for the further development of democracy in Europe."¹⁷¹ They argue *inter alia* that such an approach eliminates substantial (procedural) guarantees for applicants seeking their right to freedom of expression at ECtHR level, leaving too broad a discretionary margin for member States, and removing the applicant's particular protection against disproportionate interferences.¹⁷²

Other factors considered in the assessment of restrictions on freedom of expression under Article 10 ECHR

In a sequence of cases however, the ECtHR has accepted that much harmful expression falls within the scope of protection of Article 10 (1), but is subject to the permissible grounds for restriction under Article 10 (2). In the respective jurisprudence, the ECtHR has taken a case by case approach to assess the need for

¹⁶⁸See, for example, *Pavel Ivanov v. Russia*, App. No. 35222/04 (admissibility decision), (ECHR, 20 February 2007).

¹⁶⁹*Garaudy v. France*, App. No. 65831/01, (admissibility decision), 24 June 2003.

¹⁷⁰McGonagle (n 89) 10. *Lehideux and Isorni v. France* App. No. 55/1997/839/1045, 23 September 1998.

¹⁷¹Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' (2011) 29 (1) *Netherlands Quarterly of Human Rights* 54, 82.

¹⁷²*ibid*

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the restriction of the expression “in light of the case as a whole.”¹⁷³ From an analysis of the jurisprudence, it appears that the Court will take a number of other factors into consideration in adjudicating whether Article 10 (2) applies. Such factors include the intent of the speaker, the content of the harmful expression and the context in which it is expressed.¹⁷⁴

Elements of the contextual setting in which speech is expressed

i. Intent of the speaker

The intent of the applicant is central to the Court’s determination. As the intent or original aim of the author of a harmful statement may be difficult to determine, the Court assesses intent by referring to the content of the expression and the context in which it is uttered. Thus, whether an individual intended to disseminate harmful expression or contribute to a debate in the public interest will be central in the Court’s assessment. In *Aksu v. Turkey*¹⁷⁵ for instance, the Chamber noted that, although the impugned passages and remarks cited by third parties, when read on their own, appeared to be discriminatory or insulting, when the book was examined as a whole it was not possible to conclude that the author acted with bad faith or had any intention to insult the Roma community.

ii. Content of the expression

Having regard to the content of the expression, particular import may be attached to political discourse or matters of public interest, and therefore the Court will be disinclined to impose restrictions in this regard. In *Gündüz v. Turkey*, the ECtHR observed, firstly, that the television programme in question was about a sect whose followers had attracted public attention. The applicant, who was regarded as the leader of a sect and whose views were already known to the public, was invited to take part in the programme for a particular purpose, namely to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was widely debated in the Turkish media and concerned a matter of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed. Accordingly, the Court considered that, in balancing the interests of free speech and those of

¹⁷³*Sunday Times v UK (No 2)*, 1991, November 26, Series A No 217 §50 (d).

¹⁷⁴*See Gündüz v. Turkey*, App. No.35071/97, 4 December 2003, §42.

¹⁷⁵*Aksu* (n 162) §57.

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protecting the rights of others under the necessity test in Article 10 (2) of the Convention, it was “appropriate” in this case to “attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion.”¹⁷⁶

iii. Context in which the speech is expressed

In its analysis of the context of the expression, the ECtHR has noted the importance of a number of factors including the speaker’s role in society. For example, the Court has taken into consideration whether the speaker is a politician, a journalist¹⁷⁷ or a public official such as a teacher and the level of influence that the speaker’s expression may have on its potential audience.¹⁷⁸ In considering the dissemination of extreme speech by politicians the Court may, in some instances, adopt a stricter approach and insist on a politician’s special responsibility in not using language which may fuel intolerance.¹⁷⁹ In taking into account the dissemination of harmful speech by journalists, the Court has distinguished between a situation where a journalist is the author of a statement, which may not be tolerable, or whether they are intermediaries in imparting statements made by others which they do not make themselves or endorse, which may be tolerable.¹⁸⁰ The Court may also have regard to the status of persons targeted by the expression at issue¹⁸¹ or it may for instance have regard to the existence of institutionalised discrimination against a group or

¹⁷⁶*Ibid* §49.

¹⁷⁷*Jersild* (n 133) §35, “[T]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”

¹⁷⁸*See Karataş v. Turkey* App. No. 23168/94, 8 July 1999, 25 (Joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve) in assessing Article 10 questioned whether “... the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words?”

¹⁷⁹*See, for example, Féret v. Belgium*, App. No. 15615/07, 16 July 2009; *See also Le Pen v. France* App. No. 18788/09 (admissibility decision) 20 April 2010.

¹⁸⁰*Jersild* (n 133).

¹⁸¹*Vejdeland and Others v. Sweden*, App. No. 1813/07 § 43 (Fifth Section), 9 February 2012: “where children and adolescents are concerned certain restrictive measures may be necessary to prevent pernicious effects on the morals of that group.”

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groups.¹⁸² Likewise the Court may consider some target groups in need of wider protection, for example minorities or children or adolescents or homosexuals.¹⁸³

Other contextual factors which the Court has taken into account in its assessments under Article 10 include the dissemination and potential impact of the harmful expression. The ECtHR has specifically recognised in a number of cases that audiovisual media, such as radio and television, have a “particularly important role” in democracy because of their power to convey messages through sound and images, and as such they have a much more immediate and powerful effect than print media.¹⁸⁴ The Court has observed that “[T]he function of television and radio as familiar sources of entertainment in the intimacy of the listener or viewer’s home further reinforces their impact.”¹⁸⁵ Similarly the accessibility of the medium has been considered by the Court. In *Manole v. Moldova* for instance, the Court noted that “[P]articularly in remote regions television and radio may be more easily accessible than other media”.¹⁸⁶

In the case of harmful expression made in broadcast media, the ECtHR may consider the format or the type of the programme in which the statements were broadcast; the probable impact on the audience, and the manner in which the statements were framed in the context of broader public interest debate. The Court may also take other factors into consideration, such as whether a programme was live,¹⁸⁷ and whether contentious expressions were counterbalanced by intervention of other participants.¹⁸⁸ In the *Jersild* case, for example, the Court noted that the impugned item was “broadcast as part of a serious Danish news programme and was intended

¹⁸²*Aksu* (n 162) §75, according to its established case-law, the Court “...reiterated that the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases.”

¹⁸³*Vejdeland* (n 181) §7, Concurring Opinion of Judge Spielmann Joined by Judge Nussberger, “[I]t should also not be forgotten that a real problem of homophobic and transphobic bullying and discrimination in educational settings may justify a restriction of freedom of expression under paragraph 2 of Article 10.”

¹⁸⁴*Manole and others v Moldova*, App. No. 13936/02 § 97, 17 Sept 2009. *See also Jersild* (n 133) §31.

¹⁸⁵*ibid* §97.

¹⁸⁶*ibid*

¹⁸⁷*Gündüz* (n 174).

¹⁸⁸*Weber* (n 126) 41. In *Jersild* (n 133) §31, the ECtHR stated that “[T]he Court’s assessment will have regard to the manner in which the ...feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme.”

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for a well informed audience,”¹⁸⁹ and that it was preceded by an introduction by the programme’s presenter who referred to the recent public debate and press comments on racism in Denmark. In *Grunduz v. Turkey* the ECtHR noted that the “format of the programme was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers' attention.”¹⁹⁰ It further noted that in so far as the debate concerned the presentation of a sect, and was limited to an exchange of views on the role of religion in a democratic society, it gave the impression of seeking to inform the public about a matter of great interest to Turkish society.¹⁹¹

The Court also noted that the applicant’s statements were made orally during a live television broadcast and he had had no possibility of reformulating, refining or retracting them before they were made in public.¹⁹²

Likewise if a broadcaster can distance himself from the author of discriminatory expression, the Court may take this into consideration. In *Jersild*, for example, the Court was of the opinion that “[B]oth the TV presenter’s introduction and the applicant’s conduct during the interviews clearly dissociated him from the persons interviewed...”.¹⁹³ The dissenting opinions, however, did not consider that these measures were sufficient and added that “... it was absolutely necessary to add at least a clear statement of disapproval” of the racist remarks made by persons interviewed.¹⁹⁴

The ECtHR has also considered other forms of expression in the form of artistic expression such as satire,¹⁹⁵ and harmful speech made in the context of academic commentary.¹⁹⁶ Additionally it has taken into account the popularity and accessibility of the medium in which the harmful expressions have been

¹⁸⁹ *Jersild* (n 133) §34.

¹⁹⁰ *Gündüz* (n 174) §44.

¹⁹¹ *ibid.* The ECtHR also pointed out that the applicant's conviction resulted not from his participation in a public discussion, but from comments which the domestic courts regarded as “hate speech” beyond the limits of acceptable criticism.

¹⁹² *ibid* §49.

¹⁹³ *ibid* §34.

¹⁹⁴ *ibid* §3, Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Spielmann and Loizou.

¹⁹⁵ *Vereinigung Bildender Künstler v. Austria*, App. no. 68354/01, 25 January 2007; *Alves da Silva v. Portugal*, App. No. 85641, 20 October 2009.

¹⁹⁶ *Aksu* (n 162).

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disseminated.¹⁹⁷ For instance the ECtHR has held that satire is “...a form of artistic expression and social comment which, by exaggerating and distorting reality, is intentionally provocative.”¹⁹⁸ Accordingly, any interference with an artist’s right to such expression must “be examined with particular care”.¹⁹⁹ It is submitted that this suggests that satirical and exaggerated speech directed at particular groups including those with disabilities may be tolerated on grounds of freedom of expression, depending on the context.

iv. Nature and severity of the penalties imposed

Another important factor that the ECtHR takes into account when assessing the proportionality of interference under Article 10 ECHR is the nature and severity of the penalty imposed. Generally speaking the European Court exercises particularly strict supervision in cases where criminal sanctions have been imposed by a State. In many cases it has found that the imposition of a criminal conviction, irrespective of the nature or severity of the sentence, is enough to violate the proportionality principle.²⁰⁰

In terms of severity of penalties imposed on broadcasters for discriminatory content, the Court found in *Sigma* that the fines imposed for breach of broadcasting regulations were proportionate to the aim pursued. However, in the case of *Nur Radyo Ve Televizyon Yayincili i A v. Turkey*²⁰¹ the Court considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued. The Court has also found that even in a case which involved broadcasting expression which “presented a risk of inciting hatred or hostility amongst the population” there may be “no pressing social need” for the interference and a sanction suspending the broadcaster’s licence for 365 days.²⁰² The Court has

¹⁹⁷*Karatas* (n 135) §52, the Court observed that the applicant was a private individual who expressed his views through poetry, which by definition is addressed to a very small audience, rather than through the mass media, a fact which limited their potential impact on “national security”, “[public] order” and “territorial integrity” to a substantial degree. *Sigma* (n 150) §§174 and 175.

¹⁹⁸*Vereinigung* (n 195) §33.

¹⁹⁹*ibid*

²⁰⁰See *Jersild* (n 133); *Karatas* (n 135); See also *Otegi Mondragon v. Spain*, App. No. 2034/07, 15 March 2011 [Section III].

²⁰¹*Nur Radyo Ve Televizyon Yayincili i A v. Turkey*, App. No. 6587/03, §30, 27 November 2007.

²⁰²*Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey*, App No. 11369/03, 4 December 2007 (French Translation Only).

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also recognised the “existence of other means of intervention and rebuttal, particularly through civil remedies”.²⁰³

In summary, the case law outlined demonstrates that the European Court of Human Rights has recognised the possibility for States to adopt restrictions on freedom of expression, provided they satisfy the strict requirements of Article 10 ECHR, as discussed *supra*. In assessing cases, however, the Court has pointed out that any restriction on freedom of speech must be examined in light of the case as a whole and it will examine and take numerous factors into consideration in its assessment. It is submitted that the *Sigma* case may be the exception rather than the rule owing to the specific merits of that case which have been outlined. Generally speaking, in terms of possible restrictions on media freedom, not least broadcast media, even regarding speech which “offends, shocks or disturbs” or in some instances speech which “presents a risk of inciting hatred or hostility amongst the population”²⁰⁴ the ECtHR appears to adopt a stricter approach in its assessments owing to the vital role the media plays in democratic societies.

The case law also reveals that the ECtHR recognises the existence of a certain narrow category of extreme or hateful expression which may be categorically excluded from protection under Article 10 ECHR by Article 17. Nonetheless the case law indicates that in the majority of cases involving extreme speech, the ECtHR will assess such speech under Article 10. Generally speaking, however, persons with disabilities are excluded as a category from hate speech provisions at State level in Europe and most of the European Court’s case law deals with extreme speech relating to racial, ethnic and religious hatred. In the case of *Vejdeland and Others v. Sweden*²⁰⁵ the European Court declared valid a restriction on inflammatory speech against homosexuals. In this case the Court stressed that “discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour.”²⁰⁶ The Court has also emphasised,

²⁰³*Lehideux and Isorni v. France*, (case no. 55/1997/839/1045), App. No. 24662/94, Publication 1998-VII, no. 92) §57, 23 September 1998.

²⁰⁴See Dirk Voorhoof, ‘Cases of *Nur Radyo* and *Özgür Radyo v. Turkey*’ IRIS 2008-3:4/3. <<http://merlin.obs.coe.int/iris/2008/3/article3.en.html?>>

²⁰⁵*Vejdeland* (n 181).

²⁰⁶*ibid* §55, citing, *inter alia*, *Smith and Grady v. the United Kingdom*, App. Nos. 33985/96 and 33986/96, §97, (ECHR 1999-VI).

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“that tolerance and respect for the equal dignity of *all* human beings constitute the foundations of a democratic, pluralistic society. That being so, 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), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”²⁰⁷

The ECtHR’s reference to “hate speech which may be insulting to particular individuals or groups” and their particular emphasis on “tolerance and respect for the equal dignity of *all* human beings” begs a number of questions. The first is whether anti-hate / incitement speech provisions can or should be extended to include and protect persons with disabilities? Secondly, if the answer to the first question is in the affirmative, it follows that questions abound as to the appropriate level of state intervention in combating such speech; for instance, whether such speech should be prohibited outright or merely sanctioned? Thirdly, the question arises as to whether such proscriptions or penalties, if warranted, should apply to the media, and not least to broadcast media, in consideration of their fundamental role in democratic societies?

These questions are laden with dilemmas. For instance, in the absence of a clear cohesive definition of “hate speech” at international, European and national levels, what constitutes “hate speech” as opposed to less extreme forms of discriminatory, offensive, yet equally harmful expression against persons with disabilities, may be difficult to discern. For instance, in Canada the author of an article on an internet website who expressed the opinion that the ‘severely retarded and brain damaged’ do not qualify as ‘net contributors to society, but [are] a tragic drain on their families and society as a whole’, was found to have incited to hatred on grounds of disability.²⁰⁸ The Canadian Human Rights Tribunal dealing with the case found that the underlying message was that the disabled, by their very existence, are presented as harming the rest of society, as a ‘parasitic’ drain.²⁰⁹ However it is open to suggestion whether a similar, underlying message can be discerned through the less odious expression of an author in *Forbes* magazine discussing disability benefit

²⁰⁷*Erbakan v. Turkey* App No. 59405/00 6 July 2006, §56. *Gündüz v. Turkey*, App. No. 35071/97, § 40; *Sürek v. Turkey* (no. 1) [GC], App No. 26682/95, §62, ECHR 1999-IV). [Author emphasis added].

²⁰⁸*Center For Research-Action On Race Relations and Canadian Human Rights Commission v. WWW.BCWHITEPRIDE.COM and - John Beck* [2008] C.H.R.T. 1., paras.[32] and [54].

²⁰⁹*ibid* para. [32].

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fraud in America's Social Security Disability program (SSDI) when he stated: "[A] record one in fourteen workers is now on the SSDI dole. It's like checking in a hotel and never leaving. Of the 653,877 souls that departed the program in 2011, 36% departed by being gracious enough to die ..."[sic]. Following from a discussion of the relevant statistics and issues surrounding the SSDI programme the author concluded with the assertion that "[I]f not addressed in a meaningful way, our profligacy will one day in the not too distant future destroy our country."²¹⁰

Similarly, it is arguable whether less extreme forms of discriminatory expression, which pervade broadcast media, are more detrimental owing to the frequency and insidious nature of such discriminatory messages. The ECtHR, in the Chamber judgment of *Aksu v. Turkey*, for instance, acknowledged that stereotypes are "dangerous because they reflect or even induce an implicit discrimination."²¹¹ Many studies have identified common stereotyped portrayals of persons with disabilities in television and other media.²¹² It has been asserted that these stereotypes provide an overall view of disabled people which is decidedly negative and as a threat to the well being of the non-disabled community.²¹³ Equally, detrimental language, where disability is used as an expression of contempt and derision, is commonplace. When terms like 'retarded' and 'handicapped' and 'mong' are employed, even if they are referring to acts or ideas and not to people at all, the stigma associated with disability is perpetuated. Consequently, it may be impossible to establish clear and effective rules for the exclusion of such habitual discriminatory expression. Additionally any attempt to exclude such harmful expression against persons with disabilities from public discourse would require extraordinary intervention on the part of the State. It is submitted that while it is vital that such expression be confronted and the media undoubtedly need to be held accountable when they disseminate such expression, censoring such speech raises grave concerns as to the right to freedom of expression.

²¹⁰Richard Finger, 'Fraud and Disability Equal a Multibillion Dollar Black Hole for Taxpayers' *Forbes Magazine*, 14 January 2013. <<http://www.forbes.com/sites/richardfinger/2013/01/14/fraud-and-disability-equal-a-multibillion-dollar-black-hole-for-taxpayers/>>

²¹¹*Aksu v. Turkey* App. Nos. 4149/04 and 41029/04, §2, 27 July 2010, Second Section, Referral to the Grand Chamber, 22 November 2010, Joint Dissenting Opinion of Judges Tulkens, Tsotsoria and Pardalos.

²¹²See e.g. Paul K Longmore, 'Screening Stereotypes: images of disabled people in television motion pictures' in Alan Gartner and Tom Joe, (eds) *Images of the Disabled, Disabling images* (Praeger, 1987) 65-78, which identified five common portrayals of persons with disabilities in television and motion pictures e.g. as evil criminals with no soul; as monsters; as maladjusted; as heroes; as sexually deviant, asexual or sexually incapacitated whether physically or emotionally.

²¹³ibid

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Moreover it is questionable whether targeting the most obnoxious messages and isolated incidents of hate speech directed at persons with disabilities will do much to combat the systemic discrimination and prejudice that the disabled community face in society. On the other hand, the harms caused by hateful expression contribute and add to that existent prejudice and should not be tolerated. The CRPD recognises that both discrimination and negative attitudes prevent persons with disabilities from fully enjoying their rights on an equal basis with others. Consequently removing these barriers is an integral part of State Parties' obligations under the CRPD.

The United Nations pointed out that, the broader the definition of incitement to hatred and discrimination in domestic legislation, the more it opens the door for arbitrary application of such laws.²¹⁴ In addition, national approaches to addressing and sanctioning such speech vary between civil and criminal law provisions. In many countries, incitement to hatred gives rise to criminal offence(s); in some countries, it is dealt with under both criminal and civil law or only civil law.

The ECtHR and other human rights bodies have stated that criminal sanctions related to unlawful forms of expression should be seen as a last resort. Moreover the associated quandaries associated with hate speech raise questions as to the extent to which the media should be regulated to deal with such matters. The Council of Europe, for instance, has explicitly noted regarding hate speech that "such forms of expression may have a greater and more damaging impact when disseminated through the media"; however it also recognises that most media cannot be blamed for such expressions.²¹⁵ In a non-legally binding recommendation on "Hate Speech" the Council of Europe (CoE), stated that the governments of member states, public authorities and public institutions²¹⁶ have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech or as speech likely to produce the effect of legitimising, spreading or promoting *inter alia* other forms of discrimination or hatred based on intolerance.²¹⁷

²¹⁴See UN, Rabat Plan of Action 2013 on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

²¹⁵Council of Europe, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (*Adopted By The Committee Of Ministers On 30 October 1997, at the 607th Meeting Of The Minister's Deputies*).

²¹⁶*ibid.* It is submitted that public institutions in this regard could refer to *e.g.* public service broadcasters.

²¹⁷*ibid* Principle 1.

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Such statements should be prohibited and publicly disavowed whenever they occur.²¹⁸ In a separate recommendation on media and the promotion of tolerance, the CoE in emphasising the positive role the media can play in promoting tolerance and countering such speech, asserts that regulation in this respect calls for measures of *encouragement* rather than legal measures, almost echoing Article 8 (2) c CRPD regarding portrayal of persons with disabilities in the media.²¹⁹

²¹⁸*ibid*

²¹⁹CoE, Rec (97) 21 (n 16), para 12, 'Explanatory Memorandum'. Art 8 (2) c CRPD is discussed in Chapter Two.

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PART TWO: REGULATION OF BROADCAST MEDIA WITH REGARD TO DISABILITY

The availability of a wide range of content serving the needs and interests of all different groups in society is a fundamental concept to both democracy and to the protection of freedom of expression. Part One highlighted *inter alia* that the realisation of the right to freedom of expression facilitates vibrant, multi-faceted public interest debate giving voice to divergent perspectives and viewpoints. However, it also acknowledged that a State in which only a privileged few can effectively communicate their opinions cannot be said to be a free society. Such a situation contravenes not only the rights of those who are unable to make themselves heard, but also the right of each individual citizen to be well-informed and receive information from a range of sources. When people, such as those with disabilities, are denied public and cultural participation and voice, their issues, experiences and concerns are rendered invisible, and they become more vulnerable to bigotry, prejudice and marginalisation.²²⁰

Research in the UK, which looked at the lives of disabled people and examined the barriers to taking part in different areas of life, confirmed that views towards disabled people are influenced by: personal relationships; the media; and role models.²²¹ Additionally, the research revealed concern by persons with disabilities regarding their portrayal in the media and the manner in which media messages can reinforce or promote negative perceptions of disabled people.²²² The study also identified an “especially marked” employment rate gap of disabled people “in the arts and media...”²²³ Thus, the manner in which disabled people are represented in terms of their accessibility to, presence, participation and portrayal in broadcast media and content is crucially important to the realisation of their right to and enjoyment of equality and non-discrimination and the right to freedom of expression.²²⁴

²²⁰ibid

²²¹ODI, ‘Fulfilling Potential: Building a deeper understanding of disability in the UK today’ (February 2013). <www.odi.gov.uk/fulfilling-potential>

²²²ibid 74.

²²³ibid 46.

²²⁴For instance Art 21 CRPD, requires States Parties to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas *on an equal basis with others and through all forms of communication of their choice.* [Emphasis added]

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As indicated at the beginning of the chapter, Part Two now proceeds to a more specific inquiry into the traditional regulation of broadcast media content at national level and the manner in which it protects the interests of persons with disabilities without violating the right to freedom of expression of broadcasters. It therefore considers various regulatory responses incorporating legislative, policy and best practice measures, which have been adopted in the media/communications sector primarily at national level.

Using practical examples, the following section considers the various roles that broadcasting regulators and broadcasters play within such frameworks, having regard to their legislative obligations and/or other statutory remits relating to the protection of persons with disabilities in broadcasting content. Following from that the main issues which create and contribute to negative attitudes, discriminatory practices and misunderstanding of persons with disabilities in broadcast content will be considered through an analysis of a number of sample complaints. Finally, overall conclusions arising from Parts One and Two of the Chapter will be provided.

Legislation

In most countries worldwide, broadcasting legislation sets out the regulatory framework for broadcasting services and typically includes programme content rules. A detailed analysis of all such legislation however is outside the confines of this thesis. A study published in 2009 which examined broadcasting legislation in nine jurisdictions, found that only in some countries did broadcasting legislation contain specific references to disability.²²⁵ In Ireland, for instance, the Broadcasting Act 2009 deals with almost all aspects of regulation and the provision of broadcasting services and was the main vehicle for transposing the European Audiovisual Media Services Directive. The Act provides for the establishment of a single independent content regulator, the Broadcasting Authority of Ireland (BAI),²²⁶ among whose objectives is to provide a regulatory environment that facilitates "...the development of a broadcasting sector in Ireland that is responsive to audience needs and in

²²⁵Broadcasting Commission of Ireland (BCI) and the National Disability Authority (NDA) 'Representation of Persons with disabilities in Irish Broadcast Media: A Review of Other Jurisdictions' (BCI/ NDA, 2009); See also updated report BAI/NDA, 'Representation of Persons with disabilities in Irish Broadcast Media: A Review of Other Jurisdictions' (BAI/ NDA, 2013).
<<http://www.bai.ie/index.php/documents/research-publications/>>

²²⁶The Act established the BAI to assume the roles which were previously held by the BCI (Broadcasting Commission of Ireland) and the BCC (Broadcasting Complaints Commission).

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particular is accessible to people with disabilities”.²²⁷ While the reference to persons with disabilities in the Act makes explicit mention of their accessibility to the sector, the legislation sets down several other crucial functions to be carried out by the regulator and broadcasters which, it is submitted, may have an indirect bearing on disability representation in broadcast content. The Act, for instance, explicitly provides that the BAI develop and revise broadcasting codes and rules governing standards and practice relating to broadcast content which must be observed by all broadcasters.²²⁸ It requires that provisions be included in such codes which relate *inter alia* to impartiality and objectivity in news and current affairs programming; the protection of audiences, including minors, from harmful or offensive material and respect for privacy of individuals in broadcast material.²²⁹ Section 43 of the Act expressly provides for the development and revision of access rules/ standards for persons with sensory impairments. The legislation also contains a number of stipulations pertaining to public service broadcasters, RTE and TG4. While these latter provisions do not explicitly refer to persons with disabilities, they incorporate a duty on public service broadcasters to “be responsive to the interests and concerns of the whole community,” and to “ensure that programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland”.²³⁰ The Act also protects the interests of the viewing and listening public through a number of redress and accountability mechanisms. Such mechanisms include a right of reply procedure and the establishment of a complaints process authorising the BAI to investigate and decide upon complaints concerning alleged breaches of provisions of the Act including broadcasting codes. Under the Act, all broadcasters are obligated to prepare and implement a code of practice on complaints handling.²³¹ Moreover, the Broadcasting Act 2009 provides for the establishment of an audience council(s) by public service broadcasters with the principal function of representing the views and interests of the general public. In considering appointments to such councils,

²²⁷s.25 (2) (g) Broadcasting Act 2009.

²²⁸s.42 Broadcasting Act 2009.

²²⁹s.39 of the Act sets out the duties of broadcasters. s.39 (1) d contains negative obligation on each broadcaster to ensure that anything which may reasonably be regarded as causing harm or offence is not broadcast.

²³⁰The Act also sets up the framework for two new public service broadcasters (an Irish film channel and Oireachtas channel).

²³¹Sections 47- 49 Broadcasting Act 2009 inclusive.

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specific reference is made in the legislation to “persons with a sight or hearing disability”.²³²

Regulators

The power to regulate broadcasting at national level is generally entrusted under statute to an independent administrative body (broadcast regulator) in order to guarantee the freedom of the media, whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests. In most liberal democracies, broadcast regulators, ideally independent of government²³³ and publically accountable, typically undertake a number of key functions prescribed by broadcasting legislation some of which, it is submitted, are pertinent to the disabled community both directly and indirectly. Such functions embrace protecting pluralism and diversity through the distribution of broadcast frequencies; establishing and frequently reviewing standards in broadcasting services and content through the development of relevant codes/ rules; the power to investigate and adjudicate complaints and alleged breaches of standards in relation to broadcast content and services and the authority to issue sanctions where breaches of such standards have occurred. In order to ensure accountability in broadcasting regulation, regulators usually have a mandate to provide and monitor redress procedures and complaint mechanisms for the general public. In addition, regulators may have a duty to undertake research relating to broadcasting matters in order to inform such matters. Moreover, some broadcast legislation in a few jurisdictions such as the UK and Canada contains obligations to promote the diversity of their broadcasting workforces.²³⁴ The sections following consider a number of these various functions and the manner in which they may impact disability representation.

²³²s. 96 (4) Broadcasting Act 2009.

²³³s. 24 Broadcasting Act 2009 provides for the BAI and its statutory committees to be independent in the performance of their functions. *See also* Council of Europe, Appendix to Recommendation (2000) 23 on the “The Independence and Functions of Regulatory Authorities for the Broadcasting Sector” (*Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies*) at para. 1.

²³⁴s. 27 of the UK's Communications Act 2003 for instance, provides that Ofcom should take steps as considered appropriate for promoting the equalisation of opportunities in the employment and training of disabled people in television and radio. Under s.337 of the Act, Ofcom requires broadcast licence holders to make arrangements for the equalisation of opportunities in employment and training for disabled people. In Canada, s. 3(1) (d) (iii) Broadcasting Act 1991 states that the Canadian Broadcasting system should “through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian, men women and children, including equal rights ... and the multicultural nature of Canadian Society ...”

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- Protecting Pluralism and Diversity in Broadcast Services and Content

The first function of regulators is usually allocating broadcasting frequencies through, for example, the award of licences.²³⁵ This function is directly related to the protection and promotion of pluralism and diversity, which has been recognised by the ECtHR as a fundamental goal of state regulation of broadcasting. It is generally achieved through broadcasting legislation whereby regulators are mandated to make equitable allocation of broadcasting resources and frequencies.²³⁶ Safeguarding pluralism and achieving content diversity necessitates a diversity of broadcasting organisations (public, commercial and private), and a plurality of ownership of those organisations.²³⁷ In line with the importance of promoting diversity, an important licence criterion is often the extent to which the proposed broadcasting is likely to contribute to meeting the needs of diverse groups in society, taking into account existing content availability. In Ireland, for instance the broadcasting regulator, the Broadcasting Authority of Ireland (BAI), is obliged under broadcasting legislation to ensure the provision of open and pluralistic broadcasting services. In carrying out its functions it must also “... ensure that the number and categories of broadcasting services made available in the State best serve the needs of the people of Ireland bearing in mind their languages and traditions their religious, ethical and cultural diversity.”²³⁸

It is submitted that while the latter provision does not explicitly refer to the needs of persons with disabilities, their inclusion may be inferred from the reference to “cultural diversity”. Cultural diversity in media content and services embraces different conceptual levels and is not just confined to “cultural canons” in the sense of collective belonging or the promotion of cultural works. Cultural diversity can also be interpreted as relating to pluralism of lifestyles, values and languages of specific social groups and their socio-cultural heritage, including minorities, women

²³⁵s.26 (1) (c) Broadcasting Act 2009.

²³⁶s.26 (1) Broadcasting Act 2009 which deals with the principal functions of the BAI provides at (c) that the Authority must liaise and consult with the Communications Regulator (COMREG) in the preparation of the allocation plan for the frequency range dedicated to sound and television broadcasting and also in considering applications for sound broadcasting contracts.

²³⁷This involves putting in place effective measures to prevent undue concentration of media ownership.

²³⁸s.25 (1) (a) and (c) Broadcasting Act 2009. In the UK s. 3(4) (i) Communications Act 2003, explicitly requires the Communications regulator, Ofcom, to have regard, in the performance of its duties, “to the needs of people with disabilities, as appears to them to be relevant in the circumstances”.

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and persons with disabilities. Pluralism of information and diversity of media content, however, will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, a diversity of viewpoints represented in the programmes carried by broadcasters may be necessitated so that together they represent the full range of cultures, communities and opinions in society including the disabled community.²³⁹

The Broadcasting Act 2009, for example, places a positive obligation on the BAI to stimulate the provision of high quality, diverse and innovative programming by commercial, community and public service broadcasters and independent producers.²⁴⁰ The special remit of public service broadcasting was outlined in Chapter One. It highlighted the vital role such broadcasters play with regard to their contribution to pluralism and diversity in the provision of broadcast content and services, which serves the interests of the public as a whole and particularly minority audiences (such as those with disabilities), who may not be served by commercial stations.²⁴¹ The Broadcasting Act 2009 introduced three new reporting requirements on public service broadcasters, namely RTÉ and TG4. Each public service broadcaster must publish a “Public Service Statement”, a “Statement of Strategy” and an “Annual Statement of Performance Commitments”. All three reports outline the diversity commitments of both public service broadcasters which are overseen by the BAI and the Minister of Communications, Energy and Natural Resources.²⁴² From the examples of obligations and commitments above, it is submitted that regulators can play a pivotal role in facilitating, promoting, implementing and monitoring diversity relating to broadcast content and services and, accordingly, are in an influential position to set the agenda for the inclusion of groups such as those with disabilities under/through their various statutory duties.

²³⁹Council of Europe, Recommendation 2007 (2) on media pluralism and diversity of media content (*Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies*) recommends that member states define and implement an active policy in the field of content diversity, which should not be considered to be automatically guaranteed by the multiplication of the means of communication offered to the public.

²⁴⁰s.25 (a) Broadcasting Act 2009.

²⁴¹See CoE, Rec 2007 (2) (n 239), 3.2, “Member states should encourage public service media to play an active role in promoting social cohesion and integrating all communities, social groups and generations, including minority groups,...the elderly,...disabled persons...while respecting their different identities and needs. In this context, attention should be paid to the content created by and for such groups, and to their access to, and presence and portrayal in, public service media. ...”

²⁴²s.102 Broadcasting Act 2009.

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- Setting Standards in Broadcasting Services and Content - Relevant Codes

A key and salient function, in terms of disability representation, undertaken by broadcast regulators is usually via a mandate to develop and/or apply codes / guidelines / standards of some type relating to broadcasting conduct, which normally deal with a range of content and broadcast practice issues to which broadcasters must adhere.²⁴³ Most codes or guidelines result from broadcasting legislation but do not have the force of law; rather they are co-regulatory (established and implemented through the co-operation of regulators and broadcasters²⁴⁴) or self-regulatory (where broadcasters are encouraged to draw up codes or guidelines themselves, to monitor compliance and provide a complaints mechanism).²⁴⁵

In general, the codes are intended to provide a framework within which broadcasters can make measured decisions regarding the standards of programme material intended for viewing and listening audiences. Moreover, they aim to provide guidance for members of the public concerning the standards they can expect from programme material. Accordingly, the codes provide certainty and predictability to the broadcasting industry and to viewers and listeners about expected standards. Such codes typically deal with a wide range of programming issues such as the protection of audiences, particularly minors, from harmful and offensive material,²⁴⁶ the treatment of sensitive themes such as the portrayal of sex and violence;²⁴⁷ the requirement of balance and impartiality in the coverage of news and current affairs;²⁴⁸ privacy;²⁴⁹ and advertising.²⁵⁰

²⁴³Generally speaking at national level in most jurisdictions there is varied usage of terms to describe codes such as guidelines, standards, principles etc.,

²⁴⁴In Canada for instance, the Canadian Broadcasting Standards Council (CBSC) is an industry funded self regulating organisation created by the Canadian Association of Broadcasters (CAB) to administer standards established by its own members, Canada's private broadcasters. The Canadian Radio and Telecommunications Commission (CRTC), which regulates all broadcasting (both public and private) in Canada, approved the CAB *Equitable Portrayal Code (EPC)* in 2008 and made the code a mandatory condition of licences for all radio and television licensees. See CRTC, "Regulatory Policy Equitable Portrayal Code", Broadcasting Public Notice CRTC 2008-23, Ottawa, 17 March 2008.

²⁴⁵*E.g.* Free TV Australia, 'Commercial Television Industry Code of Practice 2010' which is currently under review. <http://www.freetv.com.au/content_common/pg-code-of-practice.seo>

²⁴⁶Broadcasting Act 2009, s. 42 (2) (f) (i) requires the BAI in developing the code of programme standards to ensure that audiences are protected from harmful and offensive material in respect of programme material broadcast by a broadcaster.

²⁴⁷*ibid* s.42 (2) (f) (ii).

²⁴⁸*ibid* s.42 (2) (a) and (b).

²⁴⁹*ibid* s. 42 (2) (d).

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Research carried out in Ireland into the representation of persons with disabilities in broadcast media which examined *inter alia* such codes, revealed that many of the codes or sets of guidelines relating to programming standards in the various European and international jurisdictions considered in that study,²⁵¹ while general, are broad enough to encompass disability; while others specifically embrace disability. Some of the relevant provisions relating to these codes have been outlined previously in Chapters Two and Three and their application and assessment as they relate to disability will be discussed *infra* under the sample complaints section. On the whole, most of the codes examined contain negative obligations on broadcasters, regarding the prevention of discrimination, stereotyping, prejudice and /or denigration of groups / individuals in society and standards relating to the use of potentially offensive language.

As freedom of expression is a key value in all liberal democracies, the primary goal of broadcasting codes is to set standards rather than to punish broadcasters for breaches. The codes normally set out clear principles and rules, which allow broadcasters freedom for creativity and audiences freedom to exercise viewing and listening choices, while securing the wider requirements of broadcasting legislation. The BAI, for example, is obliged in preparing and revising a broadcasting code, to have regard to the desirability of maintaining the independence of editorial control over programme content.²⁵² Accordingly, while the rules / standards in such codes seek to ensure that members of the public are adequately protected from the broadcast of harmful and/or offensive material, any requirement that amounts to an intrusion on the freedom of expression of broadcasters and programme makers necessitates justification. Consequently, most codes contain exceptions to the requirements, whereby anything said or done in good faith or for academic, artistic or scientific purposes, fair comment or opinion and in furtherance of any other

²⁵⁰ibid s. 42 (2) (g). The codes are usually accompanied by guidance notes which are non-binding and are provided to assist broadcasters and the general public in the interpretation and application of the codes.

²⁵¹BCI/NDA, (2009) (n 225). These countries included the United Kingdom, Sweden, Spain, Germany, Malta, Australia, New Zealand and Canada. The exception to this however was the United States which does not have broadcasting legislation containing content rules, as intervention with regard to programming content is prohibited by the strong guarantee of freedom of speech in the First Amendment to the US Constitution.

²⁵²s. 42 (3) (f) Broadcasting Act 2009.

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identifiable public interest would, generally speaking, not be considered to be a breach of a code.²⁵³

As outlined earlier in this chapter, at European level Article 10 (2) ECHR and the case-law of the ECtHR have established the tests that apply to the imposition of obligations (restrictions) on broadcasters, which must *inter alia* be necessary in a democratic society and proportionate to the legitimate aim.²⁵⁴

While a regulator cannot direct a broadcaster to broadcast disability related content, it is submitted that their power to develop and revise programme standards can have a considerable effect and influence on advancing the disability agenda and affording protection to both disabled audiences and members of the general public. This can be achieved through the inclusion of both general and/ or specific provisions relating to discrimination on grounds of disability in the respective codes. The inclusion of such provisions also goes towards realising Article 5 CRPD which contains a positive duty on Parties to the Convention “...to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective (legal) protection against discrimination on all grounds”. An analysis of disability related complaints later in the chapter illustrates the point in practice.

- Accountability and Transparency

In order to ensure public accountability and transparency, broadcasting codes developed by regulators are often developed in close consultation with broadcasters, other stakeholders and civil society and this is generally provided for in broadcast legislation. In Ireland, for instance, the Broadcasting Act requires the BAI to make available for inspection on request a draft of the broadcasting code and to have regard to any submission made regarding it before it comes into operation.²⁵⁵ In the

²⁵³BCI/ NDA, (2009) (n 225) 176.

²⁵⁴s. 25 (3) (b) Broadcasting Act 2009 requires the BAI in performing its functions to ensure that measures taken by the Authority are proportionate having regard to the Authority’s objectives.

²⁵⁵s.44 (1) Broadcasting Act 2009. *E.g.* in July 2014, the BAI launched a public consultation on its website containing proposals for a revised draft ‘Code of Programme Standards’ applying to all Irish broadcasters. The consultation sought the views of the public, broadcasters and interested organisations on the revised code. In preparing the draft Code, the BAI undertook a review of the effect of the Code of Programme Standards 2007. The review encompassed a number of strands of research including a jurisdictional review of regulation in other countries and attitudinal research to explore Irish people’s attitudes to matters of harm and offence. The draft Code was also informed by Irish and European legislation.

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development of Ireland's Code of Programme Standards 2007,²⁵⁶ the National Disability Authority (NDA) was invited by the then regulator the Broadcasting Commission of Ireland (BCI), to make observations on it. The NDA was of the view that the most promising route to a more equal and effective representation in broadcasting media of the disabled community was through the Code.²⁵⁷ It stressed that it was imperative to ensure that the Code recognised the impact of negative and misrepresentative descriptions and portrayals of disabled people and that it supported the utilisation of descriptions which reflected the social model of disability in all programmes, particularly news reports.²⁵⁸ The importance of this consultative duty echoes Article 4 CRPD, which provides that in the development and implementation of legislation and policies to implement Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, through their representative organizations.²⁵⁹ However, in the development of the BAI's current Code Programme of Standards 2015, no submission was made by the NDA on the draft code.²⁶⁰ The specific provision relating to persons with disabilities contained in the 2007 Code²⁶¹, which will be considered in the sample complaints section *infra*, has now been replaced by a more generic provision in the new code under Principle 5 dealing with "Respect for persons and groups in society" which was outlined in Chapter Two.

Another crucial factor in achieving accountability for programming decisions and the content of broadcasts is through the provision of redress procedures and measures whereby members of the public can lodge complaints against programmes, which

²⁵⁶BCI, Code of Programme Standards 2007.

²⁵⁷See NDA, 'Response to Broadcasting Commission of Ireland (BCI) Code of Programme Standards: Phase 1' 28 October 2005.

<<http://www.nda.ie/cntmgmtnew.nsf/0/427216FA4C3A166B8025719B0047256D?OpenDocument>>

²⁵⁸ibid 3.

²⁵⁹It also goes towards fulfilling the obligations contained in Article 33 CRPD on State Parties to the Convention which provides that "[C]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process."

²⁶⁰Personal Communication between the author and Roger Woods, Senior Executive Engineer, BAI, 28th June 2015.

²⁶¹s 3.4.3 BCI Code of Programme Standards 2007 provided that: "Broadcasters shall take measures to ensure that programme material does not stereotype or stigmatise those people with a disability. Broadcasters shall have particular regard to the treatment of people with a disability in programmes, including the language used during programming. The use of colloquial terms of abuse during programme material shall require strong editorial justification".

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can then be assessed against codes.²⁶² Such procedures/ measures are often mandated by broadcasting legislation requiring broadcasting regulators and /or other broadcasting standards bodies to investigate and adjudicate such complaints.²⁶³ The Council of Europe, for instance, has recommended that regulatory authorities should have the power to consider complaints, within their field of competence, concerning the broadcasters' activity and to publish their conclusions regularly.²⁶⁴

Sanctions for breach of broadcasting codes are normally aimed in the first instance at reforming behaviour, and so consist of a warning or requirement to broadcast a message recognising the breach.²⁶⁵ More serious measures, such as fines or suspensions, are applied only after repeated and serious breaches, when warnings and milder sanctions have failed to redress the problem.²⁶⁶ Specific complaints will be considered below/ later in the chapter.

- Undertaking Research relating to Broadcasting Matters

An important ancillary function of broadcasting regulators, which is pertinent to the protection of standards regarding disability representation in broadcast content and other related broadcasting activities, is the requirement to initiate, organise, facilitate and promote research relating to broadcast matters.²⁶⁷ Such research keeps

²⁶²Complaints normally have to be lodged in the first instance with the broadcaster in question and if no remedy is provided a complainant can then submit his/ her complaint to the relevant authority dealing with broadcasting standards. In both Ireland and the UK, broadcasters themselves are required to establish their own procedures for the handling and resolution of complaints. See Broadcasting Act 2009, Part 4 – Redress sections 47-49 and s.325 (1) of the Communications Act 2003.

²⁶³*ibid*

²⁶⁴Council of Europe Committee Of Ministers Recommendation No. R (2000) 23 of The Committee Of Ministers To Member States on the Independence and Functions of Regulatory Authorities For The Broadcasting Sector (*Adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies*), para. 21.

²⁶⁵Section 4 BAI, Compliance and Enforcement Policy (November 2014). *E.g.* In the UK by virtue of s.325 Communications Act 2003, the regulator Ofcom is responsible for adjudicating complaints under the Ofcom Code of Programme Standards and requires the regulator to establish procedures for the handling and resolution of complaints about the observance of standards set under s.319 and broadcasters are required by the terms of their licences to observe those standards in the provision of their services. See also CoE, Rec (2000) 3 (n 256), para 23, “[A] range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.”

²⁶⁶See Part 5 Broadcasting Act 2009 and Section 4 BAI, Compliance and Enforcement Policy November 2014. *E.g.* in 2012, the BAI, fined RTE €200,000, following from a determination of the seriousness of the breaches under s. 39 of the Act for a programme it broadcast entitled “Prime Time Investigates – Mission to Prey”. The programme had defamed a priest, Fr. Kevin Reynolds. <<http://www.bai.ie/index.php/2012/05/bai-publishes-statement-of-findings-and-report-of-investigating-officer/>> See also *Sigma* (n 150).

²⁶⁷s. 26 (2) (c) Broadcasting Act 2009.

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regulators, and consequently policy makers, broadcasters and members of the public updated and informed on various matters including regulatory trends and generally accepted standards relating to broadcasting at international, regional and national levels.²⁶⁸ For example, there has been a great deal of research carried out on offensive language and terminology used to describe disability in broadcast media. Various studies have also been undertaken regarding the representation of persons with disabilities in broadcast media in terms of their portrayal and participation in the medium.²⁶⁹ The research has been undertaken at regular intervals by *inter alia* broadcasting regulators, broadcasters and other media and disability related organisations. The research is used to inform, *inter alia* broadcasting codes and standards and policies laid down by regulators and broadcasters. In Ireland, for instance, the BAI and NDA together commissioned research on the portrayal and access of people with disabilities in broadcast media prior to, and in order to inform, various codes.²⁷⁰ Moreover some research has also been used in adjudicating broadcasting complaints by various regulators and standards bodies.²⁷¹ It is submitted that this research requirement also goes toward satisfying the obligation of State Parties under Article 31 CRPD to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention.

²⁶⁸BCI/NDA Report 2009; BAI /NDA Report (2013) (n 225).

²⁶⁹CAB, *Final Report on the Presence, Portrayal and Participation of Persons with Disabilities in Television* (September 2005), was instigated by the CRTC in Canada. See Guy Cumberbatch *et al.*, 'Diversity Monitoring : the top TV Programmes' (Report prepared for Creative Diversity Network August 2014) iv, which found that a total of 204 participants out of 8,050 in over 205 hours of the top five TV programmes on UK television were portrayed as disabled, representing 2.5% of the television population (versus more than one in five in the real world). See also Creative Skillset, 'Workforce Survey 2014- Television' (Creative Skillset May 2015) 4, which found disabled people are still under-represented in the UK's TV workforce at just that 5% which is still much lower than in the economy as a whole and has not improved for 10 years.

²⁷⁰BCI/NDA, Report 2009 (n 225). The aim of this collaboration was to carry out research that would inform broadcasters, policy makers and the public (including people with disabilities) and would be used in the development of voluntary guidelines on the fair and accurate representation of people with disabilities in broadcast media. The research involved three separate projects and an executive summary on the representation and portrayal of people with disabilities in broadcasting: A review of legislation, policy and practice in other jurisdictions; A survey of Irish people's attitudes to the representation of people with disabilities in Ireland and a content and discourse analysis of Irish broadcasting.

²⁷¹See *e.g.* Ofcom (UK) and CBSC (Canada) complaints decisions under sample complaints discussed *infra*.

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- Diversity of Workforce

Another function of regulators, often contained in broadcasting legislation, which is pertinent to protection of persons with disabilities within the broadcasting framework, is a duty to consider equal opportunities for the disabled community in the broadcasting sector. Ofcom in the U.K., for instance, has a general duty under the Communications Act 2003 to have regard to the needs of persons with disabilities in the performance of its duties.²⁷² Additionally, it has an obligation to take steps considered appropriate for promoting the equalisation of opportunities in the employment and training of disabled people in television and radio²⁷³ and requiring broadcast licence holders to make arrangements regarding the same.²⁷⁴ Furthermore, equality legislation in the form of the Equality Act 2010, introduced a Public Sector Duty for public bodies in the UK, including Ofcom, to advance equality of opportunity for *inter alia* persons with disabilities. The Act provides for equal treatment of people who access employment and goods, facilities or services to be protected from direct discrimination on the basis of a protected characteristic which includes disability. The purpose of the Public Sector Duty is to eliminate unlawful discrimination and to foster good relations between persons with disabilities and the non disabled. Moreover, Ofcom has a duty to encourage persons with disabilities to participate in public life or in any other activity in which their participation is disproportionately low. In order to ensure public accountability and compliance with the Public Sector Duty, an additional duty was placed on public bodies to set and publish equality objectives at least every four years and to publish relevant proportionate information to demonstrate their compliance with the equality duty, at least annually.²⁷⁵

In Canada, a diversity obligation contained in the Broadcasting Act 1991 provides the bedrock for all of the ongoing developments relating to person with disabilities within the Canadian broadcasting sector.²⁷⁶ The CRTC is responsible for setting the

²⁷²s.3 (4) (i) Communications Act 2003.

²⁷³s.27 Communications Act 2003.

²⁷⁴s.337 Communications Act 2003.

²⁷⁵Generally speaking, if a public body fails to give due regard to the duty, it could be challenged through a judicial review made by an individual or by the Equality and Human Rights Commission (EHRC).

²⁷⁶s. 3 Broadcasting Act 1991.

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agenda²⁷⁷ and ensuring that all licensees take measures to ensure that they implement their diversity obligation in relation to persons with disabilities.²⁷⁸ To achieve this, the CRTC placed an obligation on commercial broadcasters to develop corporate diversity plans and file annual diversity reports outlining their progress in achieving their diversity obligation in relation to persons with disabilities.

In some countries, such as the UK and Canada, there is a legislative requirement not only on regulators but also on individual broadcasters to have regard to the diversity of their workforce and some legislative provisions make explicit reference to persons with disabilities.²⁷⁹ As referred to above in the UK, this obligation stems from a duty contained in the Equality Act 2010. The equality duty applies to public bodies; accordingly, public service broadcasters such as the BBC, S4C and public service commercial broadcaster Channel 4 are legally obligated to comply with the Act's provisions. However, the duty is not extended in respect of those broadcasters' respective functions relating to the provision of a "content service" within the meaning of section 32 (7) of the Communications Act 2003. It does not, therefore, cover the part of the workforce engaged in content-related activities.²⁸⁰ However, broadcasters themselves have committed to increasing and improving the on-screen presence through their own various voluntary policies and initiatives. An example of best practice in this regard is provided by the BBC. In July 2014, the BBC

²⁷⁷s. 5 Broadcasting Act 1991.

²⁷⁸ibid

²⁷⁹*E.g.* The Employment Equity Act 1995 in Canada has a direct influence on efforts to improve the on-air presence of broadcasting employees with disabilities in Canada's broadcasting sector. The CRTC has stated that it expects licensees to ensure that the on-air presence of the four groups designated under the Act, including persons with disabilities is reflective of Canadian Society and that members of this group are presented fairly, accurately and in a manner that is non-stereotypical. CRTC Broadcasting Public Notice 2004-2 Introduction to Broadcasting Decision CRTC 2004-6 to 2004-27 renewing the licenses of 22 specialty services.

²⁸⁰According to the BBC, the government's intention in not applying the duty to content related activities is "to ensure the BBC does not compromise its editorial independence." The BBC's view is that the duty does not apply to activities such as commissioning, production, editorial policy and scheduling." Likewise Channel 4's editorial decision making processes are exempt from the anti-discrimination obligations in the Act also. This means that a viewer could not, for example, bring a claim for discrimination against Channel 4 in relation to editorial decisions about what programmes to commission; on what day a specific programme should be shown; or what character should appear in a particular programme. In addition, in order to ensure that Channel 4's editorial independence from Government is not compromised, Channel 4's content related activities are exempted from the public sector equality duty and the specific obligations required in order to meet it. This means that the Act does not require Channel 4 to promote equality in, for example, its news and current affairs output. That is not to say that Channel 4's output is unregulated; it is required to comply with the Ofcom Broadcasting Code. It is submitted that the "content service" provision is included to protect the broadcasters' right to freedom of expression.

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announced a range of measures to be used to radically change representation on air, and to make the BBC a leading employer for people with disabilities. The measures include: quadrupling the on-screen representation of disabled people by 2017; a pan-BBC Disability Executive to champion disabled talent and projects; developing the BBC's existing schemes to recruit and retain disabled staff and opening up even more opportunities for disabled people to work for the BBC.²⁸¹ All these measures go towards advancing and fulfilling the obligations contained in Article 27 CRPD on "Work and Employment" for persons with disabilities. In addition to creating awareness about disability in the broadcasting sector, such policies and initiatives aim to address the absence of and /or under-representation issues associated with persons with disabilities in the broadcasting sector both on and off air.

In June 2015, the Equality and Human Rights Commission (EHRC), the independent statutory body and authority on equality legislation which is responsible for protecting and promoting equality and human rights in Great Britain, launched a new government backed project aimed at "unlocking economic and creative potential" by increasing the diversity of people working in the UK's television sector.²⁸² The EHRC will be providing expert legal guidance on what is permissible under the law for employers, commissioners and others working within the sector in a bid to facilitate broadcasters to expand the talent pool from which they find the best candidates. Such guidance will cover areas including employment, commissioning, broadcasting, programme making and procurement practices. The project is supported by the Department for Culture, Media and Sport (DCMS) and will see the EHRC work with Ofcom, the CDN, broadcasters, independent production companies, trades unions and bodies representing those working in the television sector. In conjunction with the legal guidance, the EHRC is working with Ofcom on a toolkit for the sector which will provide examples of practical steps to increase diversity. It is submitted that this project provides an example of best practice towards the fulfilment of Article 8 CRPD as the EHRC is designated by Article 33(2) CRPD as the UK's Independent Mechanism to promote, protect and monitor

²⁸¹BBC Media Centre, 'BBC announces ambitious plan to improve representation of disabled people on and off screen' 16 July 2014, <<http://www.bbc.co.uk/mediacentre/latestnews/2014/representation-disabled-people>>

²⁸²EHRC, 'Commission announces new project to increase diversity in the television sector' EHRC website 11 June 2015, <<http://www.equalityhumanrights.com/commission-announces-new-project-increase-diversity-television-sector>>

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the implementation CRPD in the UK.

Broadcasters

To a large extent the previous sections have outlined the various duties and obligations on broadcasters to protect the interests of persons with disabilities in broadcast content. These duties have been shown to include diversity obligations embedded in legislation, which are administered by regulators. They also contain negative duties to refrain from broadcasting discriminatory content relating to disability through codes of programme standards. In some jurisdictions, such as the UK and Australia, research has shown that some broadcasters have set their own voluntary codes or editorial policies which contain guidance on dealing with discriminatory content such as language and terminology used to describe persons with disabilities and negative portrayals. Under broadcasting/communications legislation, broadcasters have undertaken to provide remedies for persons with disabilities through the establishment of complaints handling mechanisms and redress procedures. Likewise, the interests of persons with disabilities have been afforded further protection through broadcasting legislation and/or voluntary initiatives by broadcasters via the establishment of audience council(s) and their respective appointment provisions, with the principal function of representing the views and interests of the general public including the disabled community.

The broadcasting regulatory framework has also provided examples of duties (both legislative and voluntary) on broadcasters to provide equal opportunities for persons with disabilities in the broadcasting sector. The unique remit of public service broadcasters has also been shown to provide further protection to persons with disabilities in terms of their representation both on and off air.

Disability Discrimination in Broadcast Content – Main Issues

Generally speaking, research indicates that there are three main issues which contribute to discriminatory representation of persons with disabilities in broadcast content. These issues include offensive language and terminology used to describe persons with disabilities; negative and stereotypical portrayals and the absence or under-representation of persons with disabilities both on and off air. The previous section on “Diversity of Workforce” considered some measures which go towards improving on /off screen representation. The section following now considers,

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through a number of sample complaints, the manner in which broadcasting codes and complaints mechanisms advance the protection for persons with disabilities in broadcast content.

Sample Complaints

As seen above, the primary method by which broadcasting regulatory frameworks protect persons with disabilities from disabling language and terminology and stereotype portrayals in broadcast content is via the development of broadcasting codes. It is submitted that the monitoring and implementation of such codes is imperative in providing audiences and members of the public generally with a mode of redress, which is consistent with *their* right to freedom of expression.²⁸³ Moreover, complaint mechanisms and decisions keep both the public and broadcasters regularly informed on contemporary and social mores and which types of content are acceptable or may fall foul of the codes.

In order to ensure that such protection measures in codes are being translated from rhetoric to action, an examination of a sample number of complaint adjudications under broadcasting codes in the United Kingdom, Canada and Ireland, regarding potentially offensive content relating to persons with disabilities, was carried out by this author. These three jurisdictions were chosen owing to the particular nature of their codes, which incorporate both specific and general provisions relating to disability, in some instances under co-regulatory and in others, self regulatory, frameworks. The complaints are the total published disability-related content complaints which were documented and assessed by the relevant regulator /standards body in the three jurisdictions selected from August 2007 to January 2012. Of an overall total of fourteen complaints assessed, nine emanate from the United Kingdom. This may result from several factors. Firstly, this author identified a higher frequency of complaints received and documented by the broadcast regulator Ofcom in that jurisdiction during the period examined.²⁸⁴ Secondly, the UK has been

²⁸³The broadcasting regulator in Canada, the CRTC, for instance has stated that “[C]omplaints-driven codes allow the viewing and listening public to act as an important barometer for how well licensees are upholding their responsibilities in the areas these various codes aim to address.” See CRTC, Broadcasting Public Notice CRTC 2008-23, Ottawa, 17 March 2008, §27.

²⁸⁴*E.g.* from May 2010 Ofcom began tracking the number of complaints in their Broadcast Bulletins relating to “disability /discrimination offence” in programmes which were held not to be in breach of the Broadcast Code in a section entitled “Other Programmes Not in Breach”. An examination of those numbers by this author revealed that from May 2010 to January 2012 the total amount of complaints

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identified in previous research, carried out *inter alia* by this author, as a model of best practice in having adopted very detailed regulation and extensive consultation, analysis and review processes regarding the representation of people with disabilities in broadcast media.²⁸⁵ Only two complaints from Canada were identified following searches of published decisions in that jurisdiction during the specified dates, while the remaining three complaint decisions stem from Ireland.²⁸⁶

All of the fourteen complaints selected were assessed by the relevant regulator /or standards body (or one of its panels in the case of Canada) in each jurisdiction under their respective codes.²⁸⁷ The object of the appraisal here is to consider the manner in which such complaints are assessed; the type of content which may potentially infringe upon or conflict with the respective broadcasting codes; and to discern whether there are any commonalities or disparities in the approaches of the various regulators/ standards bodies in their adjudication. More specifically, the examination provides an insight into the way in which regulators balance a broadcaster's right to freedom of expression with an audience member's right to be protected from harmful / offensive content relating to disability.

In order to provide a more comprehensive appraisal, the decisions chosen here deal with complaints regarding material from both radio and television programming, aired by both public and private broadcasters.²⁸⁸ In addition, the decisions cover a number of genres of programming, including magazine type programmes, live television programmes, comedy programming, drama (soap opera) and current affairs. Moreover, a number of the complaints from the UK were the subject of

in "Other programmes not in Breach" relating to "disability /discrimination offence" came to a total of 272. Further examination by this author identified that from mid July 2011 Ofcom began tracking an additional list of complaints which after careful assessment Ofcom decided not to pursue because they did not raise issues warranting investigation in a section entitled "Complaints Assessed, Not Investigated". The total number of complaints assessed "but not further investigated" regarding disability / discrimination offence from mid July 2011- January 2012 came to a total of 65.

²⁸⁵BCI /NDA (n 225).

²⁸⁶In Ireland, the three complaints chosen were decided by the Broadcasting Complaints Commission (BCC) under the Broadcasting Commission of Ireland (BCI) Code of Programme Standards 2007. The 2007 Code has been superseded by the BAI Code of Programme Standards 2015. To date, no complaints have been adjudicated under the new code which came into effect in March 2015.

²⁸⁷In general, the CBSC deals with complaints regarding ethics under the CAB *Code of Ethics* (2002) and the manner in which identifiable groups are portrayed under the CAB *Equitable Portrayal Code (EPC)* (2008). The first of two complaints examined here was adjudicated under the CAB *Code of Ethics*; the second complaint was examined under both the CAB *Code of Ethics* and the *EPC*. Both complaints concerned offensive material which was broadcast on radio only.

²⁸⁸There were a total of three complaints decisions in relation to radio programming and eleven complaint decisions regarding television programming.

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considerable controversy, leading disability advocates and campaigners, in one particular instance, to have the regulatory body Ofcom ‘overrule’ a prior decision and ultimately uphold a complaint as being in breach of the relevant broadcasting Code.²⁸⁹

Types of Content Subject to Complaint

While a detailed outline of each of the complaints chosen and their respective evaluation is outside the scope of this thesis, a number of general observations can be made in relation to the decisions examined. By and large, the greater part of complaints made in all three jurisdictions relate to content contained in entertainment programming. Of particular note in this regard was the UK, where content in late night entertainment programming, particularly comedy, provided for the more contentious decisions involving potentially offensive /discriminatory content pertaining to disability.²⁹⁰

i. Use of specific words, derogatory phrases and/or offensive comments

The study revealed that the majority of complaints concerned the use of “potentially” offensive and/ or discriminatory language and terminology often used to describe persons with disabilities. Such offensive content included the use of specific words such as “retard/ retarded”,²⁹¹ “mong / mongoloid”,²⁹² “basket case”,²⁹³ and “cute, little crippled crier boy/girl”.²⁹⁴ Such terms were often used directly to describe persons with disabilities²⁹⁵ or to describe non-disabled persons or both.²⁹⁶

Other complaints considered the use of derogatory phrases and/or offensive comments associated with disability in various contexts and in different types of

²⁸⁹See Ofcom, *Celebrity Big Brother’s Big Mouth*, (Broadcast Bulletin, Issue 158, May 2010), albeit the complaint was held to be resolved.

²⁹⁰ibid. See also Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) *Channel 4* (Broadcast Bulletin Issue 179, 4 April 2011); Ofcom, *Ricky Gervais Science, Channel 4* (Broadcast Bulletin, Issue 198, 23 January 2012).

²⁹¹E.g. Ofcom, *This Morning, ITV1* (Broadcast Bulletin, Issue 198, 23 January 2012).

²⁹²CBSC, Quebec Regional Panel, *CKAC-AM re an Episode of Doc Mailloux* (CBSC Decision 05/06-0642); Ofcom, *Ricky Gervais Science* (n 290).

²⁹³BCC, *Prime Time, RTE One* (Complaint made by Ms Angela Hunter, Ref. No. 242/07, 30 August 2007).

²⁹⁴CBSC, Ontario Regional Panel, *“Spencer the Cripple” segment on the Dean Blundell Show* (CBSC Decision-08/09-0650).

²⁹⁵E.g. the word “retard” was used to describe persons with Down Syndrome and the words “mong” and “mongoloid” were used to describe both persons with Down Syndrome and a person with an intellectual disability.

²⁹⁶Ofcom, *Nemone, BBC 6 Music* (Broadcast Bulletin Issue 123, 8 December 2008).

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programming. For instance, in one complaint from Ireland, the use of the phrase “coming at you like an epileptic”²⁹⁷ by a character in a television soap opera to describe the actions of another non-disabled character, was found by the regulator to be a “colloquial term of abuse” and to be in breach of the broadcasting code.²⁹⁸ Likewise, in a number of complaints from the UK, offensive comments, although not directly targeted at any disabled individuals, were also considered and deemed by the regulator as indirectly ridiculing people in society with different disabilities. For example, remarks made by a presenter of a light entertainment motoring programme aired on the *BBC*, who criticised a car’s physical appearance by directly comparing it to a “simpleton” and further stating that it should have been called “special needs”, were held to be in breach of Ofcom’s broadcasting code.²⁹⁹ In that decision, the regulator found that while the comments were obviously intended as a joke and not aimed directly at an individual with learning difficulties, they could easily be understood as ridiculing people in society with a particular physical or learning disability.³⁰⁰ Such findings were not confined to content aired by public service broadcasters. Similarly, in another decision, Ofcom found that a derogatory comment made by one of the judges on a live television programme, describing the facial expression and performance routine of a competitor during an ice-skating competition as being “...almost like you’re missing a couple of chromosomes”, would more likely have been interpreted by viewers as being associated with human chromosomal disorder and therefore demeaning to people with such disorders.³⁰¹ Consequently, Ofcom found the commercial broadcaster *ITV* to be in breach of the code.

ii. Use of material directly targeting persons with disabilities

In several of the complaints, the regulator/standards body examined offensive comments which directly targeted persons with disabilities. For instance in Canada,

²⁹⁷The phrase was used in general conversation by a character in a soap opera to elaborate on a story of how her mother would let her know she was coming into a room by rattling a tray of cups.

²⁹⁸BCC, *Fair City, RTE One*, (Complaint made by Brainwave (Irish Epilepsy Association) Ref. No. 256/07, 19 September 2007).

²⁹⁹Ofcom, *Top Gear, BBC 2* (Broadcast Bulletin Issue 168, 25 October 2010).

³⁰⁰*ibid*

³⁰¹Ofcom, *Dancing On Ice, ITV* (Broadcast Bulletin Issue 179, 4 April 2011). Ofcom received 242 complaints about the comment. *See also* Ofcom, *America’s Next Top Model Sky Living HD*, (Broadcast Bulletin, Issue 189, 12 Sept 2011) 59, where comments by a judge in a modelling competition who described a contestant as “walking like you have spina bifida” was deemed to be in breach of the Ofcom Code as it could be seen as ridiculing people in society with a particular disability. This complaint however was deemed resolved.

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the CBSC examined various comments made by three hosts in a segment of a popular morning radio programme, the Dean Blundell show, about the personal hygiene habits and sexual life of Spencer Miller, a man with cerebral palsy and a wheelchair-user, who was a regular participant and contributor to the show.³⁰² The CBSC appraised the complaint under clauses of the CAB Equitable Portrayal Code (EPC), relating to “abusive comment”,³⁰³ “stereotyping”,³⁰⁴ stigmatization and victimization”,³⁰⁵ and “degradation”,³⁰⁶ as well as the “human rights” clause of the CAB Code of Ethics.³⁰⁷ The regulator concluded that the segment in the show violated all of those clauses because the hosts “unrelentingly made Miller the target of jokes and mockery” by *inter alia* graphically challenging his ability to present himself as normal. The CBSC found that the hosts’ comments specifically in the areas of personal hygiene and sexual performance inappropriately portrayed Spencer Miller, as a result of his disability, as helpless and incapable.³⁰⁸ This decision is significant because the CBSC considered, for the first time, the negative portrayal of physical disability under the *EPC*. Furthermore, the regulator found that the assessment of such portrayals under that particular code are not just confined to television programmes but can also be applied to radio programmes.

Likewise in the UK, Ofcom upheld a complaint in relation to two contentious jokes made by a comedian in a stand-up comedy programme which “appeared to directly target and mock the mental and physical disabilities of Harvey Price, a known eight year old child, who was the son of a famous parent but who had not himself chosen to be in the public eye.”³⁰⁹ One of the jokes centred on the notion that in a custody battle, the parent acquiring custody of Harvey would lose. The regulator concluded that the inference from the comedian’s joke was that Harvey’s disability would be a

³⁰²CBSC, Ontario Regional Panel (n 294). Spencer Miller, who referred to himself as “Spencer the Cripple”, regularly participated on the programme to speak frankly about life with a disability.

³⁰³CAB, Equitable Portrayal Code 2008, § (2) Human Rights.

³⁰⁴*ibid* § (4).

³⁰⁵*ibid* § (5).

³⁰⁶*ibid* § (7).

³⁰⁷CAB, Code of Ethics, 1998, § (2).

³⁰⁸*ibid*. In addition they also found such comments to be “reproachful, insulting and condemnatory...”

³⁰⁹Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290) 10. Solicitors acting on behalf of Harvey and his mother Katie Price complained to Ofcom that the comments were “discriminatory, offensive and humiliating.” The solicitors also informed Ofcom of Harvey’s condition which is entitled septo-optic dysplasia, and that he is also on the autistic spectrum. Ofcom received approximately 500 complaints about the comments including complaints from Mencap, a learning disability charity and the Royal London Society for the Blind.

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burden to the parent in question.³¹⁰ Ofcom also considered a second joke made by the comedian regarding Harvey's large size, which is commonly attributed to his mental and physical disability.³¹¹ Ofcom found that the inference from the joke was that Harvey's disability involved a threat to his mother's safety, resulting from a tendency towards rape, incest and sexual violence. On the whole the regulator found Channel 4 to be in breach of the broadcasting code.

Conversely, in another decision where a comedian, Ricky Gervais, mocked a well known singer with a disability by referring to her on several occasions as a "mong", Ofcom held that the broadcaster, Channel 4, did not contravene the code, in light of the context in which the comments were made.³¹² Despite having recognised that these comments could cause "considerable offence",³¹³ the regulator found that on balance, the potential offence was justified by the context of a provocative comedy routine challenging the evolution of words, and broadcast with a warning as part of a late night comedy show.

iii. Stereotype portrayals of disability through use of imagery and action

An examination of all complaints, for the period specified, indicated that the relevant standard bodies received fewer complaints regarding the actual visual portrayal of disability. A total of three complaints were noted, two from the UK and one from Ireland. All three complaints dealt with the imitation/ impersonation of stereotyped characteristics of persons with disabilities by non-disabled people through use of various actions (physical and verbal) and imagery. Such imagery and actions were used to depict both mental and physical disabilities. However, none of the depictions directly targeted specific individuals with disabilities. In Ireland, for example, the regulator found that a comedy sketch, contained in a candid camera type programme, that portrayed a person in a straitjacket outside a mental hospital, to be in breach of

³¹⁰ibid. See also Ofcom, *Nemone*, (n 296) 26, where it found a comment by a comedian who described Down's syndrome as a form of punishment from God to be "highly offensive".

³¹¹The comedian's jokes were made in the context of Harvey's celebrity mother and former glamour model Jordan (Katie Price) who was going through a custody battle with her first husband (Peter Andre) and had married her second husband Alex Reid, a celebrity cage fighter. In the second joke the comedian stated that: "I have a theory that Jordan married a cage fighter because she needed someone strong enough to stop Harvey from fl*cking her."

³¹²Ofcom, *Ricky Gervais Science* (n 290) 50-51.

³¹³ibid 51. During the show, Gervais went on to say that he did not mean Boyle had Down's Syndrome, and argued the word 'mong' was no longer associated with persons with Down's Syndrome.

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the relevant provision of the broadcast code.³¹⁴ The programme, *I Dare Ya*, was presented by two comedians and part of a series based on dares. The dare in this case was that one of the comedians would stand outside a mental hospital in a straitjacket, call a taxi and the reaction of the taxi driver would be recorded. When the taxi man arrived, the comedian in the straitjacket refused to get into the car, ran away and hid behind a tree, then lay on the ground and refused to get up. The other comedian and the taxi driver “cajoled” him to get up and into the car. The regulator noted that the butt of the humour in the material was not the unsuspecting member of the public (the taxi driver) but rather the comedian in the straitjacket. They found that the “joke” was the “mental disability” of the comedian, who was portraying the “mad man”. In addition to its observations on the dialogue used in the sketch, the regulator also noted the background music accompanying the sketch entitled “When you’re strange”.³¹⁵ The regulator was therefore of the opinion that both the language and the visuals of the piece were of a stereotypical nature.³¹⁶

In the UK however, a comedy sketch contained in a programme, which according to the regulator, some viewers “may have understood to mock people with mental health problems by inferring that they are likely to have violent tendencies”, was not found to have violated the broadcast code.³¹⁷ Ofcom considered *inter alia* that the intention of the sketch was to use satire and controversy to make a joke about society’s attitudes to mental health, which it claimed would have been well understood by the majority of the audience.³¹⁸

In another controversial decision, Ofcom considered the use of both offensive dialogue and action related to disability on a live entertainment television discussion

³¹⁴BCC, *I Dare Ya, RTE Two*, (Complaint made by Headline (Ireland’s national media monitoring programme), Ref. No. 367/07, 17 December 2007).

³¹⁵*ibid.* Additionally it noted that the title of the dare itself could be considered to stereotype a person with a mental disability.

³¹⁶*ibid.*

³¹⁷Ofcom, *Frankie Boyle Tramadol Nights* (mental health sketch), *Channel 4* (Broadcast Bulletin Issue 179, 4 April 2011). The sketch showed a man calmly talking to camera, in what appears to be his kitchen. He said the following: “I have mental health problems. There’s a lot of stigma attached to mental health, a lot of people are unfairly stigmatised when their conditions allow them to lead perfectly normal lives”. The camera then pulls out to reveal the man holding a knife and images of his dead wife and three dead children covered in blood on the floor. He then says: “who the f%?k am I talking to?”

³¹⁸The Broadcaster in this case, Channel 4, submitted that the intention of this particular sketch was to satirise an established public campaign “Time To Change” which aimed to stop discrimination against people with mental health problems.

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programme *Celebrity Big Brothers Big Mouth*.³¹⁹ In this instance, a celebrity guest used an offensive phrase “she was walking like a retard”, to describe the manner in which a presenter was walking. The celebrity guest’s comment was then followed up by a demonstration impersonating the presenter’s walk in which he proceeded to walk with difficulty.³²⁰ This was followed by a retort from the presenter who laughed and stated that she did “not walk like a retard”. Initially, Ofcom did not uphold the complaint against Channel 4; instead it proffered guidance to the broadcaster on the issue. However two of the complainants requested a review of the decision and the case was eventually referred to Ofcom’s Broadcasting Review Committee on the basis that the reasoning of the original decision was insufficient.³²¹ What is noteworthy is that the rationale for this review was facilitated through the impetus and collaboration of a UK learning disability charity, Mencap, and a disability rights campaigner (Nicola Clark). Ms Clark had requested an on-air apology following the initial broadcast and when no apology was forthcoming, she, along with the support of Mencap, initiated a campaign to have the decision overturned.³²² To this end they commissioned a poll on the use of the word “retard” and mobilised supporters through social media. The campaign included the development of an online mechanism to send letters of complaint to Ofcom’s chief executive and to local newspapers. This enabled people with learning disabilities to express their views via press releases and statements. In addition, charities for the learning disabled protested outside Ofcom offices and handed a letter voicing their concerns on the matter to the regulator.³²³ The campaign was covered by a host of newspapers and BBC websites and in the trade press. Clark contributed a piece to *The Guardian*

³¹⁹Ofcom, *Celebrity Big Brothers Big Mouth* (n 289) 32. See also Ofcom, *America’s Next Top Model Sky Living HD*, (n 301) where a judge on a show walked in an exaggerated style as if to mimic the contestant’s walk which he had described as walking like someone with spina bifida.

³²⁰The celebrity guest (Vinnie Jones) also distinguished the presenter (Davina Mc Call) from another guest who, as he described it, walked “lovely”.

³²¹The Broadcasting Review Committee is a sub-committee of the Ofcom Board consisting of members of the Ofcom Content Board. It reviews the decisions of the Ofcom Executive in fairness and privacy investigations, broadcasting standards investigations and other licence-related cases where either the complainant or licensee is able to demonstrate that the decision is materially flawed.

³²²Ofcom ruled that Clark’s complaint should not be upheld as the word had not intended to offend and was not at odds with the ‘established nature’ of *Big Brother*. Clark then appealed against the ruling twice. See Cathy Bussey, ‘Campaigns: Voluntary Sector: Mencap tells C4 to watch its language’ *PR Week UK*, Friday 10 September, 2010. See also Mencap Website “Mencap Channel 4 On air Apology Campaign” <<http://samedifference1.com/mencap-channel-4-on-air-apology-campaign/>>

³²³These charities were the Elfrida Society and Respond. See Elfrida Society, Annual Report 2009-2010, 2. <<http://www.elfrida.com/documents/annual-report/elfridaAR0910.pdf>>

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website.³²⁴ The issue was discussed on the *Five* show *The Wright Stuff*, *BBC One's Jeremy Vine Show*, and on *BBC Radio Five Live*.³²⁵ Regional publications covered the poll results. More than 750 people sent emails of complaint to Ofcom,³²⁶ and the regulator responded stating it would review its decision not to uphold the complaint.³²⁷ Clark and Mencap were invited to provide evidence for Ofcom's Broadcasting Review Committee (BRC).³²⁸ The presenter of the programme at issue, Davina McCall, subsequently issued a public apology on her website.³²⁹ Having reviewed all the factors in the complaint, Ofcom found the broadcast to have breached generally accepted standards; however, it deemed the matter resolved in light of the various actions taken by the broadcaster, which will be discussed *infra*.

Significance of Intent

In general, the examination of complaints showed that despite a lack of specific intention on the part of the speaker/ broadcaster in using words / terminology which may be potentially offensive and harmful, this may not absolve the broadcaster of violating a broadcasting code. In Ireland, for instance, the three decisions analysed revealed “....that the question posed by the regulator under the Code was not whether offence was intended but whether the use of a certain term/ phrase could stigmatise and / or whether it was a term of colloquial abuse.”³³⁰ If the answer to this question is in the affirmative then the next question is whether it can be justified by the context, having regard to all other contextual considerations, as discussed above.

In one UK decision however, Ofcom considered the intent of a sketch in a comedy programme that inferred that people with mental illness are violent and which, overall, was generally misleading.³³¹ As referred to above, Ofcom noted the broadcaster's submission that the intention of this particular sketch was to satirise an established public awareness campaign 'Time to Change', which aimed to stop

³²⁴*ibid.* See also Nicola Clark, 'Getting a Laugh Out of disability' Comment is Free *The Guardian*, Wednesday 28th April 2010.

³²⁵*ibid*

³²⁶*ibid.* See also 'Mencap's Campaign to email Ofcom'

<<http://e-activist.com/ea-campaign/clientcampaign.do?ea.client.id=78&ea.campaign.id=6022>>

³²⁷See also Christina Martin, 'Don't Defend Disablist language in the name of free speech' *The Guardian*, Tuesday 1 June, 2010.

³²⁸Although this author notes that no reference was made to such evidence in the BRC's review.

³²⁹See Same Difference, 'Davina Mc Call makes official statement of apology'

<<http://samedifference1.com/2010/03/22/davina-mccall-makes-official-statement-of-apology/>>

³³⁰E.g. BCC, *Fair City* (n 298).

³³¹Ofcom, *Frankie Boyle Tramadol Nights* (mental health sketch) (n 317).

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discrimination against people with mental health problems.³³² Ofcom was of the view that the campaign itself was unlikely to be widely enough known to the audience for the sketch's particular intention to be clear to viewers. Notwithstanding the latter observation, the regulator considered that, while the material had the potential to cause offence, most viewers would have been likely to understand the nature of the sketch and that its intention was not to ridicule those who have mental health problems, but to target public information campaigns of this nature, and society's unease about dealing frankly with the subject of mental health. Moreover Ofcom was of the opinion that the sketch did not go beyond what would normally be expected in a programme of this type, particularly taking into account the nature of other material in the series, which also frequently used satire and controversy to derive humour from society as a whole or its attitudes to particular issues.³³³

Complaints Handling - Commonalities Identified between Regulators

The approach taken to the assessment of complaints by the relevant standards bodies in the three jurisdictions examined highlighted a number of commonalities and methodologies. In general, the approach revealed a two-step test. Firstly, regulators establish whether the broadcast material, subject to the complaint, is offensive. The study found that in all thirteen decisions the broadcast material in question could be found to be offensive and in some cases, the degree of offensiveness was underlined.³³⁴

Having answered the first question affirmatively, regulators then proceed to the second part of the test, which is to determine whether the inclusion of the offensive material can be justified by context. In this regard each regulator/ standard body adopted a methodology akin to that of the ECtHR outlined *supra* and considered whether there were any contextual factors which might limit the potential for offence and thereby justify the inclusion of the offensive material. Here assessors were guided by their respective codes of programme standards. For instance in Canada, the CAB *Equitable Portrayal Code (EPC)*, contains a provision (Clause 10) which

³³²*ibid.* Channel 4 had argued that the sketch set out to reverse the concept of the original campaign, which attempted to challenge the stereotype that those with mental health conditions are violent.

³³³Ofcom's approach here is reflective of the ECtHR's approach to satire as outlined earlier in the chapter.

³³⁴Ofcom, *Dancing On Ice* (n 301) 36, stated that the derogatory remarks subject to complaint were capable of being "highly offensive to some viewers".

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stipulates that breaches of the code may be justified when their context reflects legitimate artistic usage,³³⁵ intellectual treatment³³⁶ or acceptable comedic usage.³³⁷ Additionally, the CBSC has noted in its decisions that there may be circumstances in which broadcasting may reflect or include discriminatory or hurtful content that targets identifiable groups without offending codified standards. However it also indicated, as noted in the EPC's provision on the comedic, humorous or satirical content, that it does not in any way constitute "an absolute defence with respect to the proscriptions of the EPC."³³⁸

In the UK, the Ofcom Code of Programme Standards states that in applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Having regard to the "context", the Code explicitly sets out a non-exhaustive list of matters which are pertinent to the assessment, which include *inter alia*: the editorial content of the programme, programmes or series; the service on which the material is broadcast; the time of broadcast; what other programmes are scheduled before and after the programme or programmes concerned; and the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description.³³⁹

Similar provisions, as outlined above were included in the broadcasting Code of Programme Standards 2007 in Ireland, under which complaints subject to discussion here were adjudicated. The code, provided *inter alia* that the manner in which persons and groups in society are represented shall be "appropriate and

³³⁵CAB, *Equitable Portrayal Code (EPC)* 2008, (10) a.

³³⁶*ibid* 10 (c). Intellectual treatment, which includes programming for academic, artistic, humanitarian, journalistic, scientific or research purposes, or otherwise in the public interest, may be broadcast, provided that it: is not abusive or unduly discriminatory; does not incite contempt for, or severely ridicule, an enumerated group; and is not likely to incite or perpetuate hatred against an enumerated group.

³³⁷*ibid* (10) b provides that "[A]lthough the comedic, humorous or satirical intention or nature of programming is not an absolute defence with respect to the proscriptions of this Code, it is understood that some comedic, humorous or satirical content, although discriminatory or stereotypical, may be light and relatively inoffensive, rather than abusive or unduly discriminatory;..."

³³⁸CBSC, Broadcasting Public Notice CRTC 2008-23, CAB, *EPC* 10 (b).

³³⁹Ofcom, Broadcasting Code 2011, Rule 2.3 Section Two: Harm and Offence; other contextual factors include: the likely size and composition of the potential audience and likely expectation of the audience; the extent to which the nature of the content can be brought to the attention of the potential audience, for example by giving information, and the effect of the material on viewers or listeners who may come across it unawares.

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justifiable”.³⁴⁰ The 2007 Code, which has since been replaced by a new code,³⁴¹ made explicit reference to persons with disabilities, and provided that broadcasters had a positive obligation to take measures to ensure programme material did not stereotype or stigmatise them. Moreover it provided that broadcasters should have particular regard to the treatment of people with disabilities in programmes, including in the language used during programming. According to the code the use of “colloquial terms of abuse” during programme material “requires strong editorial justification.”³⁴² Having regard to the assessment of the code, the regulator was required to assess programme material “in whole and in context.”³⁴³ To this end the Code outlined a number of contextual factors that the regulator was required to take into account in the assessment of complaints, similar to those set out above in the Ofcom code.³⁴⁴ While a detailed analysis of all contextual factors is outside the scope of this thesis, a number of common themes and considerations identified in the overall review of complaints in all three jurisdictions are set out below.

Contextual Factors in Complaint Appraisals

Context - Type of Programme

The analysis evidenced that broadcasting complaint decisions in all three jurisdictions took into account particular genres of programmes and the distinction between them in assessing the context in which offensive material was included, and that often this had a bearing on the overall decision.

(a) Drama

For instance, in Ireland, the regulator took into account the fact that drama (soap opera) regularly deals with public issues which may include offensive material necessary to develop storylines and characters.³⁴⁵ In its *Fair City* decision, the regulator noted that the phrase “coming at you like an epileptic” to describe someone

³⁴⁰BCI, Code of Programme Standards 2007, Rule 3.4.1.

³⁴¹BAI, Code of Programme Standards 2015.

³⁴²BCI, (n 340) section 3.4.3.

³⁴³ibid section 2.4 on ‘Content Principles’.

³⁴⁴ibid. Such factors include *inter alia* the time of broadcast; the type of programme; the use of audience information and guidance; the channel/service type and whether the inclusion of material is editorially justified, in addition to the likely composition of the audience listening to or watching the programme

³⁴⁵Likewise in Canada the CBSC elaborated that dramatic, documentary or journalistic programming may portray discriminatorily offensive hate-filled characters or plots without falling foul of the provision of the Equitable Portrayal Code. CBSC, Ontario Regional Panel (n 294).

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rattling a tray of tea cups, had no significance in terms of storyline or character development and was unnecessary; it had been used gratuitously and as such was a colloquial term of abuse.³⁴⁶ In considering whether it could be justified by context, the regulator noted that *Fair City* is pre-scripted and pre-recorded and the scriptwriters should have exercised more care as the use of the phrase was inappropriate and unjustified on this occasion.³⁴⁷

(b) Current Affairs

Regulators in both Ireland and Canada emphasised the serious nature of current affairs programmes which deal with matters of public interest. For instance, in Ireland the regulator found that the repeated and casual use of the term “basket case” to refer to persons with mental illness in the context of a debate on drugs by a panel in a serious current affairs programme was inappropriate and could not be editorially justified.³⁴⁸ The regulator was of the opinion that panel members could have used alternative terms or words.

Similarly, the CBSC in Canada noted the importance of the context in which derogatory comments were made by a presenter on a public affairs morning radio talk show, *Doc Mailloux*.³⁴⁹ The comments included the presenter’s continual referral to people with trisomy 21 (persons with Down Syndrome) as “mongoloids”. In reaching its conclusions, the CBSC referred to another decision on which it had adjudicated, which involved the same presenter making disparaging, insulting and abusive comments about other groups in society.³⁵⁰ Drawing from that decision, the CBSC were of the opinion that the matter was made all the more serious because the programme in question was a morning public affairs programme, “...on which a reasonable listener could expect that the topics of discussion would be serious”.³⁵¹ A primary concern for the regulator here was that the listener might take exchanges of this kind quite seriously and give more credibility than he/ she would if they took place in a different context. Accordingly, the decisions examined appear to indicate

³⁴⁶BCC, *Fair City*, (n 298).

³⁴⁷*ibid*

³⁴⁸BCC, *Prime Time* (n 293).

³⁴⁹CBSC, Quebec Regional Panel, (n 292).

³⁵⁰Canadian Radio-television and Telecommunications Commission (CRTC), complaint concerning the broadcasting of abusive comments on *Bonjour Montréal*, a program on Montréal radio station CKAC, Broadcasting Decision 2005-258 (although those were considered under Section 3(b) of the Radio Regulations 1986).

³⁵¹*ibid*

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that there may be a higher expectation from broadcasters in relation to potentially offensive content in current affairs programming, owing to the nature of the content in such programming and the audience's expectation.³⁵²

(c) Comedy

In all three jurisdictions a distinction was made as to the nature of comedic and other types of humorous /satirical programming. In a number of decisions from the UK, for example, Ofcom took into account the long history of British television and radio broadcast comedy “tackling difficult issues and deliberately pushing boundaries of contemporary taste”, particularly when broadcast well after the watershed. Ofcom also acknowledged that, generally, audience interpretation of comedy is subjective and can vary widely.³⁵³ However, it also recognised that comedy, about mental health for instance, has the potential to be very offensive to some viewers, as it might be interpreted as singling out groups of people, or individuals, with particular mental health issues in a derogatory, discriminatory or demeaning manner.³⁵⁴ Similarly, in another decision, the regulator noted that simply because humour is absurd or surreal does not, in itself, lessen its potential to offend.³⁵⁵

In Canada, when considering whether a complaint regarding the *Dean Blundell Show* (above) fell into the exceptions under the *EPC's* comedic humours or satirical intention provision, the regulator asserted that the requirement in the case of comedic humours or satirical content is for the comedy to be “light and relatively inoffensive, rather than abusive or unduly discriminatory.”³⁵⁶ To this end the CBSC looked to another previous decision that had considered the comedic usage provision and found that the comments made by three hosts regarding Spencer Miller in the *Dean Blundell Show* (above) were not examples of “acceptable humour banter” whereby “humour pokes fun but does not bludgeon, tickles but is not nasty”.³⁵⁷ On the

³⁵²There was no current affairs programming in the UK samples for the period specified; however, in a decision in 2013 concerning *Today*, the BBC's Radio 4's flagship morning national news and current affairs programme, Ofcom found the use of the word ‘retard’ and ‘retards’ by one of the programme's guests to be in contravention of the broadcast code. See Ofcom, *Today*, *BBC Radio 4*, (Broadcast Bulletin Issue 232, 17 June 2013).

³⁵³Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290) 9. Ofcom, *Frankie Boyle Tramadol Nights* (mental health sketch) (n 317) 41.

³⁵⁴Ofcom, (n 317) 41.

³⁵⁵Ofcom, (n 290) 9. See also Ofcom, (n 317) 10.

³⁵⁶CBSC, Ontario Regional Panel (n 294).

³⁵⁷CBSC, *CHFI-FM re The Don Daynard Show* (CBSC Decision 94/95-0145, March 26, 1996).

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contrary, the regulator found that “the humour did not tickle; it was nasty.” Consequently, the CBSC concluded that the comedic usage consideration did not mitigate its conclusions regarding the violations of the *EPC* as outlined *supra*.

Audience Expectation / Time of Broadcast/ Pre-Transmission warning

Linked to the genre of programme is also the contextual factor of audience expectation. In this respect, regulators in all jurisdictions took into account the format of a programme, noting, as seen above, that audience expectations would be higher for more serious programmes, such as current affairs and programmes broadcast pre-watershed. Viewers’ and listeners’ familiarity with programme formats was also observed. Ofcom noted in a number of its decisions regarding both radio and television programmes that listeners and viewers may be familiar, for instance, with the “irreverent style” of a programme’s presenters and guests or its “outspoken humour and studio banter”. In such cases, the regulator took into account that the audience would expect the programme to contain more challenging content or humour. Consequently, the audience may not find the use of particular words in such programmes as offensive. Other factors taken into consideration by regulators included whether a programme was broadcast live, aimed at an adult audience, broadcast well after the watershed or whether it was preceded by a warning, or heavily publicised in the weeks leading up to its broadcast to help inform viewers of the nature of the content. In such cases, again, regulators were of the view that audience members would expect more challenging content. However, the analysis demonstrated that despite the presence of all such factors in an impugned programme, there may be circumstances where their consideration is insufficient to justify the inclusion of “extremely offensive” material.³⁵⁸ In Ofcom’s decision regarding jokes made about Harvey Price discussed (above), for example, the regulator found that the comedian’s comments “went beyond what would have been expected by the majority of viewers of a late night comedy show broadcast on Channel 4.”

³⁵⁸Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290). Ofcom, *Frankie Boyle Tramadol Nights* (mental health sketch) (n 317) 41.

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Author of the Comments

The reputation of the author of potentially offensive comments was another contextual factor considered in the assessment of complaints. In several of the UK decisions, Ofcom took into account the fact that comedians, for example, may have a reputation for “controversial” or a “provocative style of humour” which is “dark”, “challenging or satirical” and which therefore may be sufficient to justify its inclusion in programme material. However, even where the audience is likely to expect a speaker’s comments to be “acerbic and negative” or made fleetingly in an off the cuff manner, for instance in a live unscripted broadcast, some decisions have indicated that the regulator will not consider these contextual factors as being sufficient to justify the inclusion of offensive content.³⁵⁹

Interestingly, in Canada, the CBSC considered the professional standing of a psychiatrist and presenter of a morning current affairs programme, Dr. Pierre Mailloux, who made a series of derogatory remarks about people with Down’s syndrome, to whom he referred as “mongoloids”. The CBSC noted a particularly extreme example of his disrespect to persons with Down Syndrome in his assertion to a caller to the show that “it is dangerous, unhealthy and inappropriate to claim that gifted individuals have the same value as a severely handicapped individual”. The CBSC looked to two other upheld complaints involving comments made by Dr. Mailloux, where he had adopted a similar “attitude” towards other groups, namely “immigrants”³⁶⁰ and “black persons”.³⁶¹ Overall, the CBSC found that:

“[T]he host with a microphone is by definition a powerful figure. He or she is in a position of credibility, underscored in this case by the professional qualification of Doctor Pierre Mailloux.”³⁶²

Taking this factor into account the CBSC in their conclusion explicitly expressed their concern about the danger of “public desensitisation” which may have resulted from Dr. Mailloux’s comments. They found that comments of this type are at “risk of ‘sticking’, that is, of leaving audience members with a sense of accuracy or

³⁵⁹Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290) 12.

³⁶⁰CBSC, Quebec Regional Panel, (n 292).

³⁶¹Canadian Radio-television and Telecommunications Commission (CRTC) *Complaint concerning the broadcasting of abusive comments on Bonjour Montréal, a program on Montréal radio station CKAC*, Broadcasting Decision 2005-258 (considered under Section 3(b) of the Radio Regulations 1986).

³⁶²CBSC, Quebec Regional Panel, (n 292).

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legitimacy, which represents a danger of the identifiable group being disparaged, if not reviled.”³⁶³

Import of Freedom of Expression in Adjudication of Complaints

While balancing freedom of expression is a key objective which is evident in the assessment of complaint decisions in all three jurisdictions, it was observed that regulators in the UK and Canada make explicit reference to the significance of this right in all of their evaluations.³⁶⁴ In a number of its decisions, Ofcom stressed that in compliance with the fundamental right to freedom of expression and Article 10 ECHR, the broadcasting code does not prohibit the use of any words after the watershed,³⁶⁵ the use of offensive or discriminatory language or the use of broadcast content from referring to any particular topic, subject or group of people.³⁶⁶ Moreover, it asserted that “...broadcasters must be permitted to enjoy the freedom to explore controversial and challenging issues and ideas, and the public must be free to view and listen to those ideas, without interference”.³⁶⁷ Accordingly, broadcasters may be able to justify the broadcasting of language and material which the audience may find offensive. The regulator also highlighted the specific “unique remit of public service broadcasters” to produce programmes that are “diverse and innovative.” However, Ofcom has also remarked that while a “channel’s remit clearly requires it to produce such programming, it does not negate the fact that the channel must nevertheless work within certain boundaries.”³⁶⁸

In Canada, the CBSC noted that the codifiers of the *Equitable Portrayal Code (EPC)* anticipated that there may be three categories of programming which may reflect or include discriminatory or hurtful content that targets identifiable groups without offending codified standards as aforementioned.³⁶⁹ In the *Dean Blundell Show*

³⁶³ibid

³⁶⁴E.g. see Ofcom, *Ricky Gervais Science* (n 290) 48.

³⁶⁵ibid

³⁶⁶ibid

³⁶⁷ibid

³⁶⁸Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290) 11. Ofcom stated that Channel 4’s programmes must comply with the Code, and Channel 4 must apply generally accepted standards to the content of its programmes.

³⁶⁹CBSC, Ontario Regional Panel (n 294) noted e.g. dramatic, documentary or journalistic programming may portray discriminatorily offensive or hate-filled characters or plots without falling afoul of the provisions of the *EPC*. So, too, such categories of programming may reflect academic, artistic, humanitarian, journalistic, scientific or research purposes, or otherwise be in the public interest without breaching the *EPC*.

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decision (above), which involved a forthright discussion of a person's physical disability, the CBSC stated that "there is no inherent problem in any discussion of that subject, nor even with the injection of humour in connection with such dialogue".³⁷⁰ Furthermore, the CBSC were of the view that there is an "extremely positive aspect to heightening the awareness of the general public to the "infrequently discussed issues associated with persons with disabilities."³⁷¹

Regulators in both the UK and Canada, nonetheless, have also pointed out that while there is significant room for innovation, creativity and challenging material within programming, broadcasters do not have "unlimited" licence in terms of offensive material.³⁷² The threshold in Canada in assessing complaints under the respective codes, for example, is that such material must not be "abusive or unduly discriminatory". The CRTC have noted that the use of the word "unduly" and the inclusion of the exceptions in Clause 10 recognise that not all stereotypes are automatically harmful and that there are likely to be circumstances in which the use of stereotypes is permissible or even necessary.³⁷³ Consequently, the CBSC must always "measure such commentary on the continuum that extends from harmless to harmful discriminatory mentions."³⁷⁴ Nonetheless, the CBSC has asserted, for instance, that when a "presenter holds identifiable groups up to ridicule and disrespect by making abusive or unduly discriminatory comments, he crosses the line of entitlement and loses the benefit of the shield of free expression."³⁷⁵

³⁷⁰ibid the panel emphasised an "appropriate level of humour".

³⁷¹ibid

³⁷²Ofcom, *Ricky Gervais Science* (n 290) 48.

³⁷³(CRTC Public Notice 2008-23).

³⁷⁴CBSC, Quebec Regional Panel (n 292). See also CBSC, Ontario Regional Panel (n 294) where the CBSC distinguished between abusive discriminatory content and content which was in bad taste which is a matter for the listener's on/off switch. The new BAI Broadcasting Code of Programme Standards 2015, 9 distinguishes between the distinct concepts of harm and offence. It states that "[I]ndividuals should not be harmed by programme material and the Code aims to prevent harm to viewers and listeners". The code notes that "... there is no right not to be offended". However the code responds to offence in two ways. First it ensures that viewers and listeners are equipped with sufficient information to make an informed choice as to what they listen to or view through the provision of pre-warnings the scheduling of programming by broadcasters according to audience expectations of that type of content or of a particular channel or service. Secondly, the Code also guards against undue offence which is programme material that, taking into account contextual factors such as editorial justification and public interest, could still be regarded as having crossed a line that has resulted in the viewer or listener being unduly offended. While acknowledging that these are two distinct concepts, the Code also accepts that offence can become harmful in certain circumstances.

³⁷⁵CBSC, Quebec Regional Panel, (n 292).

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Use of Research to inform approaches to complaints

It was observed that in assessing the offensiveness of particular words and depictions pertaining to disability, regulators in both the UK and Canada took into account relevant research conducted on the issue. In a number of Ofcom's decisions, for instance, the regulator referred to qualitative research it had commissioned on audience attitudes towards offensive language on television and radio. The value of the research is that it not only assists in providing a picture of acceptability in relation to offensive words but also reveals that viewers and listeners consider a number of factors, or principles, when judging how offensive language is, when broadcast. These principles guide Ofcom's views on the acceptability of such language when investigating complaints made by the public.³⁷⁶ For instance in the *Ricky Gervais Science* decision, Ofcom referenced its research which considered *inter alia* the use and different meanings of the word "mong." In coming to its decision, the regulator, citing the research, highlighted the fact that the meanings of words change over time. Ofcom noted that while the research suggested some people were not aware of the word's association with disability, it also clearly demonstrated that the word has potential to cause considerable offence to those who are. Ofcom then proceeded to assess the manner in which the word was used in this particular instance and was of the view that it was used by a comedian to refer to the physical appearance and abilities of a celebrity singer, which would have led some viewers to believe that he was using the word "mong" intentionally to refer to Down's Syndrome in a derogatory manner.³⁷⁷ However, despite the regulator concluding that this material clearly had the potential to cause offence, following consideration as to whether it was justified by the context and taking all other factors into account, Ofcom did not uphold the complaint as being in breach of the Code.³⁷⁸ It, nonetheless, took the opportunity to warn broadcasters that the word has the potential to be "highly offensive" to many people and for that reason "broadcasters should take great care with its use".

³⁷⁶It was also noted that regulators often reference dictionaries regarding the meaning of particular words which is reflective of the ECtHR's Article 10 references to dictionary meanings.

³⁷⁷Ofcom, *Ricky Gervais Science* (n 290) 48. Interestingly in Ofcom, *Frankie Boyle Tramadol Nights* (comments about Harvey Price) (n 290) 10, Ofcom noted that in the same research participants thought that potentially offensive or discriminatory language or treatment of disability was "particularly unacceptable" when targeted towards a group or a known individual with a disability, even in the context of comedy programming.

³⁷⁸Ofcom, *Ricky Gervais Science* (n 290) 51.

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Similarly, in interpreting various clauses of the *CAB Equitable Portrayal Code*, the CBSC took guidance from the research findings of its report on the presence, portrayal and participation of persons with disabilities in television programming, which underpins the code. In the CBSC's *Dean Blundell Show* decision (above), for instance, the regulator referenced the report's observations in interpreting Clause 5 of the EPC which deals with "Stigmatization and Victimization". The report states that stereotypically, persons with disabilities are "frequently portrayed in ways that perpetuate myths about life with a disability or feature inaccurate information about disabilities, or emphasize such qualities of life as helplessness or misery." According to the CBSC, persons with disabilities are, in that general sense, often victimized, "portrayed as vulnerable or weak." In assessing the various comments made by the show's hosts against the clause, the CBSC found that the commentator's routine in relation to personal hygiene was "not merely in bad taste (that being an issue for the listener's on-off switch), but was also a form of victimization and stereotyping." The CBSC observed that one of the unnecessary and utterly inappropriate examples of this was the host Dean Blundell's accusation: "I don't think you can wipe your own bum. Admit It!" The comment, in the CBSC's view, was a "cruel, harsh, finger-pointing differentiation for what is for most adults a basic (if generally un-discussed) activity." Similarly, the CBSC noted derogatory comments made at the expense of Spencer Miller when the hosts' subject switched to the topic of sex. In the CBSC's opinion the hosts' graphically challenged Miller's ability to present himself as at all normal in this regard and the comments made on both subjects inappropriately portrayed Miller as a result of his disability as helpless and incapable and was therefore in breach of the stigmatization and victimization clause of the *EPC* among others.³⁷⁹

Significance of Measures taken by Broadcasters to mitigate breaches of broadcasting codes

It was observed in some of the complaint adjudications, particularly in the UK, that regulators took into account various measures taken by broadcasters which could mitigate breaches of their respective broadcast codes. Such measures included actions taken at different stages including before, during and post broadcast. In all three jurisdictions, regulators considered various presenters'/ co-hosts'/ panellists'

³⁷⁹CBSC, Ontario Regional Panel (n 294).

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interjections and corrections, where derogatory remarks had been made. In one UK decision, the interjection and explicit disapproval made by a head coach in a live ice skating competition programme was acknowledged by Ofcom as mitigating, to some extent, derogatory remarks made by a judge on the programme.³⁸⁰ Nonetheless, the regulator found the interjection was insufficient to justify the inclusion of the comment, given its potential to be “highly offensive”.

In the *Doc Mailloux* decision, outlined *supra*, the CBSC tried to find balances between the doctor’s impugned commentary and his co-host’s counterpoint to the discriminatory content. The CBSC referred to previous complaints involving the doctor and noted that while his co-host’s interjection had the effect of “balancing his rants”, they did not have the effect of exculpating him from his specifically focused abusive and discriminatory comments. Likewise, the lack of intervention and reprimand by a presenter regarding a derogatory term used by panellists on a current affairs programme was highlighted by the regulator in Ireland.³⁸¹

It is of particular note in the UK decisions that, despite having found various broadcasters to be in contravention of the code, consideration of mitigating factors led the regulator to deem five out of the nine complaints resolved and no further action was required from the broadcaster. Such mitigating measures included actions taken post broadcast. For instance, in the *Top Gear* decision these included: the acceptance by the BBC that the material had caused offence; the voluntary removal of the offending material from repeat programmes and from the BBC’s iplayer version of the programme and an apology underlining that there was no intent to make fun of those with special needs.³⁸²

Conversely, it was observed that Ofcom and the CBSC considered that a breach of their respective codes could be aggravated in certain circumstances. In the *Celebrity Big Brother’s Big Brother Mouth* decision, the regulator noted that the actions of presenter Davina Mc Call, in repeating the offending word “retard” and failing to reprimand or acknowledge the offensive comments and actions of the guest who had

³⁸⁰Ofcom, *Dancing On Ice* (n 301) 36. In Ofcom, *America’s Next Top Model Sky Living HD*, (n 301) 60, Ofcom noted Sky’s sincere regret that the incident occurred and its immediate decision to remove the offensive comment from the programme from future transmissions considered the complaint resolved.

³⁸¹BCC, *Prime Time* (n 293).

³⁸²Ofcom, *Top Gear* (n 299) 22.

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made them, had the effect of heightening the offence. Similarly, the CBSC, in the *Doc Mailloux* decision, found that, despite the co-host's interjections and assertions, the term "mongoloid" was inappropriate and pejorative, and the presenter's continued use of that term and the term "mongolism" had the effect of "adding insult to injury".

Differences in Approaches of Regulators to Complaints

In the overall analysis, a number of different approaches to complaint adjudications were evidenced as between the three jurisdictions. In Canada, for instance, of particular note in the two decisions analysed was the CBSC's reference to previous decisions involving the broadcast of offensive material, which were taken into account when assessing complaints. In essence these prior adjudications provided guidance and proffered a useful comparator on a number of issues such as the interpretation of various clauses under the *EPC* and the respective exception clauses contained in that code; and the history, track record or reputation of the particular speaker in other decisions for making derogatory comments disparaging groups in society.

The main difference in approach identified between UK decisions and the decisions by regulators in Ireland and Canada is primarily in the area of redress measures, where breaches of a Code have taken place. It was observed in some UK cases that even where a breach of the broadcasting code has been found by the regulator, they were more likely to deem the matter resolved in light of measures which broadcasters have taken to mitigate the breach, as outlined *supra*. Such a finding requires no further action on the broadcaster's part such as broadcasting or issuing an apology. In some instances such findings have caused consternation among complainants, the public and disability groups which suggests that there may be more awareness on the part of the public/disability groups regarding the Codes and decisions by Ofcom.³⁸³

³⁸³Ofcom, *Celebrity Big Brother's Big Mouth* (n 289).

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Monitoring of Complaints

Having regard to the monitoring of complaints relating to disability in all three jurisdictions, it was observed that each regulator publishes its findings regularly as mandated by respective legislation. It is submitted, however, that Ofcom provides a model of best practice with regard to monitoring of disability complaints. In addition to reporting on the outcome of investigations into alleged breaches of its codes, Ofcom publishes a monthly broadcast bulletin which is readily available online listing complaints which, after careful assessment, Ofcom has decided not to pursue because they do not raise issues warranting investigation. In this regard the regulator tracks the number of complaints received, in addition to detailing the programme and channel on which the alleged disability /discrimination” offence occurred. It is submitted that such detailed tracking could prove useful for further studies into the types of programmes and channels under which complaints are being taken, in addition to the actual number of complaints received on the issue of disability discrimination / offence by members of the public.³⁸⁴

Other Observations

It is noteworthy from the examination, that the Canadian regulator, the CBSC, in the reporting of its decisions, used dubious language, reflecting an outdated medical model of disability. For instance in the *Doc Mailloux* decision the CBSC made several references to “those afflicted with trisomy21” and when referencing the dictionary regarding the term “mongolism”, it stated that the term was routinely used to “designate this illness”.

One possible justification for the inclusion of such terminology may be that the original decision was in French and that the translated version designated such terms. However, similar descriptors were used in the published adjudication of the *Dean Blundell Show* decision to describe Spencer Miller. These observations highlight the importance of raising awareness, even among regulators, as to appropriate terminology to describe disability in their adjudications.³⁸⁵

³⁸⁴However it is noted that Broadcast Regulators do document the number of complaints received in their Annual reports; however not in as much detail.

³⁸⁵See also CBSC, Quebec Regional Panel, *RDS re 5 à 7 (“Laprise branché!”)*(CBSC Decision 11/12-0649) Issued July 24, 2012 whereby the CBSC found that the broadcast of a video clip on a sports magazine programme that showed a man with dwarfism being used as a bowling ball constituted programming that was abusive and unduly discriminatory with respect to a “physical

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Summary

Although the conclusions here are tentative and more detailed research on the issue is required, the analysis of complaints has shown that offensive and/or discriminatory content relating to disability and persons with disabilities in broadcasting is a live issue in the UK.³⁸⁶ However the analysis also reveals that the volume of complaints relating to disability in both Canada and Ireland is low. It is submitted that the low volume of complaints in the latter jurisdictions may be indicative of a number of reasons. It could denote for instance, that there is an under-representation of disability in television content. Conversely, it could indicate that the track record of broadcasters in respect of disability representation is good.

Overall disability discrimination complaints are being brought to light and are being dealt with owing to the fact that respective broadcasting codes contain provisions, both general and specific, safeguarding the interests of persons with disabilities, which set a minimum standard for acceptable content in broadcasting output. Accordingly, the inference is that there is stated awareness in all three jurisdictions of the codes and the redress mechanisms accompanying them. However, it was noteworthy in the analysis that the majority of complaints made to the various regulators were by various disability organisations. It is submitted that this observation has both positive and negative implications. From a positive perspective, it demonstrates that such organisations are utilising the codes and in some cases, particularly in the UK, disability organisations have mobilised both persons with disabilities and the public in objecting to controversial decisions by Ofcom. Whether this awareness has been catalysed by the awareness of disability rights since the inception of the CRPD is unknown; however, it is submitted that the CRPD is likely to have been a contributing factor. The value in such objections is that they proffer a useful demonstration of persons with disabilities utilising their right to freedom of

handicap”, namely dwarfism. The clip was found to be in contravention of Clause 2 of the CAB Code of Ethics and Clause 3 of the *EPC* because it presented on air a negative portrayal of individuals based on a “physical handicap.” Despite the man of short stature being a willing participant in the clip, the Panel concluded that the broadcast violated all of those Code provisions because “the segment presented persons of small stature as mere objects of humour and ridicule.” cf CBSC, Quebec Regional Panel, *TVA re Les galas « Juste pour rire » 2011 : Le party à Mercier* (CBSC Decision 11/12-2033 Issued January 23, 2013) where the CBSC found that a joke about fat women which involved the participation of large woman in the audience who was part of the joke did not violate the CAB Codes as obesity is not considered a disability for the purposes of the Human Rights clauses of the CAB Codes.

³⁸⁶See (n 284) where the total number of complaints considered by Ofcom relating to disability discrimination / offence during the period examined came to 351.

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expression in creating awareness regarding the harm and offence caused by negative discourses related to disability in broadcast media. From a negative perspective, it is less clear whether there is a stated awareness or concern amongst the general public regarding offensive content and associated complaint mechanisms relating to persons with disabilities. However, caution must be drawn from such inferences as the analysis detailed only a small number of sample complaints from the three jurisdictions. It is submitted that in order to get a clear indicator of whether such awareness exists among the general public, regulators could benefit from the model of best practice proffered from Ofcom in tracking, detailing, and publishing all complaints even where alleged breaches of codes have reached investigative stages. Such information could also benefit State Parties in their obligation under Article 31 CPRD to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention. It could also be used to help assess the implementation of States Parties' obligations under Article 8 CRPD.

The analysis of complaints relating to disability in all three jurisdictions has demonstrated that there is no hard and fast rule regarding complaint assessments and their subsequent outcomes. It is evident that broadcast regulators examine each complaint on the basis of its individual merit, regardless of whether codes contain specific provisions relating to disability (Canada and Ireland) or whether disability comes under more general standard provisions, as in the UK. However, similar methodologies can be discerned in the approaches to the assessments. The methodologies adopted involve a careful balancing exercise between a broadcaster's right to freedom of expression and an audience member's right to be protected from harmful material. The context in which a particular portrayal issue arises is a critical element in ascertaining whether the portrayal is in fact likely to expose persons with disabilities to some form of harm.

Conclusion

Part One of the Chapter considered the various rationales underlying the right to freedom of expression and the various judicial approaches taken to it in different jurisdictions both internationally and at European level. It found that taken individually, the rationales do not lend themselves to safeguarding the interests of

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persons with disabilities from discriminatory and/or extreme expression, for a number of reasons. The principal difficulty with the rationales taken in isolation, is that they rest upon the fallacious premise that persons with disabilities have equal communicative power which enables them to both defend and assert their free speech rights and positions. However, as will be demonstrated in Chapter Five of this dissertation, research has shown that conventional accessibility to media for persons with disabilities is far from assured.

What can be gleaned from all three rationales is that pluralistic and diverse multi-faceted debate is essential for free speech. However, research has shown that negative and extreme discourses about disability can have harmful effects on persons with disabilities and are a key facilitator in discriminatory practices against the disabled community. Accordingly it was submitted that regulatory intervention may be necessitated to ensure a diversity of views and to enable persons with disabilities to challenge various forms of discriminatory expression in order to assert their own right to freedom of expression on an equal basis with others. However it was also observed that difficulties arise in relation to the level of intervention in the regulation of various types of expression, particularly extreme or hateful expression. In the absence of any specific case law on extreme speech relating to persons with disabilities in both the U.S. and in the ECtHR, it could be gleaned from the various judicial approaches that discriminatory, offensive or even hateful expression directed towards persons with disabilities would more likely be tolerated in the US owing to the robust protection afforded to the right in the First Amendment.

At European level, an examination of the case law under Article 10 ECHR relating to both discriminatory and more specifically extreme speech directed at other marginalised groups in society frequently subjected to discrimination, concluded with a number of observations. Firstly, the general approach taken by the ECtHR in adjudicating Article 10 cases is that any restriction on the right to freedom of expression is the exception rather than the norm. Secondly, if restrictions are imposed on the right they must be prescribed by law, necessary in a democratic society and proportionate to the (legitimate) aim. Moreover the assessment of cases taken under Article 10 ECtHR revealed that the European Court decides each case

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on its individual merit and will have regard to a number of contextual issues when considering content that offends the public interest or an individual's rights.

Part One also questioned whether disability can or should be included as a specific category under hate speech proscriptions? It concluded that in the absence of any clear definition of hate speech more research was needed in the area. Part One also endeavoured to make a distinction between isolated incidents of hateful expression directed towards persons with disabilities and less extreme forms of expression such as discriminatory language and terminology and stereotype portrayals which seem to pervade the media. In this regard it questioned whether less extreme forms of discriminatory expression are more detrimental to persons with disabilities owing to their frequency and insidious nature. Part One concluded that it may be impossible to establish clear and effective legal rules for the exclusion of such habitual discriminatory discourses; however this author submitted that it was vital that such expression be confronted and the media be held accountable for disseminating it.

Part Two of the Chapter enquired as to how broadcasting regulatory frameworks at national level can protect the interests of persons with disabilities from offensive or discriminatory matter without unduly impeding the right to freedom of expression. Owing to the particular nature of broadcasting (as a public resource and on account of its power), restrictions on it are generally permitted and even necessitated. Such restrictions are legitimate once they have been prescribed by law, are necessary in a democratic society and are proportionate to their legitimate aim.

Part Two identified the three main concerns regarding offensive discriminatory content, namely disabling language and terminology, stereotype portrayals and the under-representation of persons with disabilities in broadcast content. It found that traditional broadcasting regulatory frameworks can protect persons with disabilities both indirectly and directly in terms of their representation both on and off air. It is submitted that this involves a multi-layered approach and many balancing acts involving a myriad of players such as policy makers, regulators, broadcasters, disability organisations and the public. This is achieved through legislation and policy by ensuring a diversity of broadcast services, of ownership of those organisations and of the viewpoints carried in their programming.

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It was submitted that broadcasting regulators, independent of government, have a particularly important role to play in ensuring that persons with disabilities are protected from content offensive to them both directly and indirectly. It was put forward that this can be accomplished through a number of important legislative functions conferred on regulators through broadcasting law. Such functions include administering diversity objectives through licensing, setting standards for programming and monitoring and implementing those standards. Other ancillary functions, such as research in broadcasting matters and the promotion of equal opportunities, also contribute to on screen diversity and representation. It was submitted also that broadcasters, particularly public service broadcasters, given their unique statutory remits, have a unique role to play in promoting diversity in broadcast content and advancing the agenda for disabled persons. Internal standard setting and the promotion of equal opportunities bolstered by equality legislation also go towards protecting persons with disabilities in broadcast content and initiatives such as the proposed project by the UK's EHRC was put forward as a model of best practice in this regard .

Overall, a key method observed in affording protection for persons with disabilities in traditional broadcasting regulatory frameworks is through having the main principles such as diversity and harm and offence, set out in primary legislation, with more detailed rules contained in secondary legislation, or Codes, created by the regulatory body. It is submitted that this enables rules to be varied more easily and quickly to meet changing circumstances, and allows for additional guidance to be offered, explaining the basic statutory requirements. In particular this method guarantees, promotes, protects and respects a broadcaster's freedom of expression.

CHAPTER FIVE

Access to Broadcast Content - Disabling Barriers

Introduction

“It is axiomatic that no one can enjoy a human right to which they do not have access, and the barriers that currently prevent people with disabilities from fully enjoying their human rights are ubiquitous.”¹

Mass media such as television, radio and the internet are an integral part of the fabric of society.² Since the emergence of mass communication, the media have been the most important instrument for freedom of expression in the public sphere, enabling people to exercise their right to seek, receive and impart information.³ Freedom of expression, and its corollary, freedom of the media, are indispensable for genuine democracy and democratic processes.⁴ In a democratic society, people must be able to contribute to and participate in the decision-making processes which affect them.⁵ All content provided by the media has the potential to impact on society, regardless of the value ascribed to it.⁶ The denial of conventional access to the media therefore effectively marginalizes and excludes people, not least persons with disabilities, from participating as citizens in a democracy⁷ and has the potential to interfere with *inter alia* their right to freedom of expression and their right to participate in both the political⁸ and cultural life⁹ of society. Such marginalization and exclusion can have

¹Janet Lord, ‘Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty Under the CRPD’ (Presentation for the General Day of Discussion on Accessibility, CRPD Committee, United Nations, Geneva, 7 October, 2010) 1.

²International Telecommunications Union (ITU), Radio Communications Sector, ‘Accessibility to broadcasting services for persons with disabilities’ (Report ITU-R BT. 2207-1, May 2011) 2.

³Council of Europe (CoE), Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media (*Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers’ Deputies*) §1. See also UNHRC, *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, §13.

⁴CoE, (n 3) para 1. See also UNHRC, *Freedom of Opinion and Expression: Resolution 12/ 16* (Adopted by the Human Rights Council, 12 October 2009), (A/HRC/RES/12/16) 1. <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=16180>

⁵CoE, (n 3) §2.

⁶*ibid*

⁷See CoE, Recommendation CM/ Rec (2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life, (*Adopted by the Committee of Ministers on 16 November 2011 at the 1126th Meeting of the Ministers’ Deputies*) §2, provides: “[P]articipatory democracy for persons with disabilities involves accessibility of services and goods ... information and communications.”

⁸*ibid*.§2.3, states that Member States should require *inter alia* broadcasting corporations and other bodies in receipt of state subsidies or funding to be accountable for the active measures adopted to ensure that persons with disabilities have access to information on political debates, campaigns and events which fall within their field of action.

⁹The right of persons with disabilities to participate in the cultural life and its linkage to the provision of accessible television/ audiovisual media services is explicitly recognised at both international and European levels. See e.g. Art 30 CRPD; Art 7 AVMSD 2010/13/EU.

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numerous detrimental effects on persons with disabilities, including restrictions on life-choices,¹⁰ personal independence and fulfilment, sense of identity, enjoyment and social cohesion.¹¹

The primary object of this chapter is to outline and discuss a number of issues which hinder or thwart the access of persons with disabilities to broadcast and audiovisual media and their respective content.¹² The chapter will also address the policy considerations which go towards safeguarding disabled viewers from such barriers or enabling them to overcome them. In this regard, particular attention will be given to the medium of television (linear broadcasting), with specific focus on the provision of accessibility measures which facilitate disabled viewers' access to and enjoyment of such content.¹³

The chapter will first consider definitional issues surrounding the terms and concepts of "access" and "accessibility". It will then outline various potential barriers in accessing television in the contemporary media environment and the challenges they present in relation to the access of disabled persons as viewers of broadcast and television content in developed countries.

A key focus of the chapter will be on an examination of the "accessibility" provisions contained in the United Nations Convention on the Rights of Persons with Disabilities, (CRPD) 2007. This examination will be employed in order to establish an appropriate benchmark, against which all provisions relating to the "access to" or the "accessibility" of television content and services should aspire to be measured and achieved, particularly at national level. Specific focus on Articles 9, 21 and 30 of

¹⁰Janet Lord *et al.*, *Human Rights. Yes!: Action and Advocacy on the Rights of Persons with Disabilities*, Human Rights Education Series, Topic Book 6 (University of Minnesota Human Rights Resource Centre 2007) 38, assert that the lack of accessible information about political processes not only inhibits the ability of people with disabilities to enjoy the right to participate in political and public life, but it can also make it difficult to make informed choices about issues affecting other rights.

¹¹ITU, (n 2) 2. See also Ofcom, 'Experience of people with upper-body mobility and dexterity impairments in the communications market' (Research Report prepared by GfK NOP, September 2009) 39, on the reliance of television as a source of social inclusion.

<<http://consumers.ofcom.org.uk/2011/06/disabled-people-and-communications-services/>>

¹²The term "audiovisual content" is a broad term used to cover content with pictures and sound. Television is currently the most widely used audiovisual content. *E.g.* Article 1 (e) AVMSD 2010/13/EU, states that 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.

¹³*E.g.* services such as subtitling, captioning, sign language and audio description.

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the CRPD, and the manner in which those articles relate to the provision of accessible television, will be proffered. It will consider throughout how such measures might be employed in practice.

A summary examination of State Parties' initial reports to the Committee on the Rights of Persons with Disabilities will be provided, in order to ascertain how the access provisions in the CRPD are currently being adopted and implemented. This examination will consider similarities and disparities in those reports and the various issues involved with such reporting under the CRPD's reporting guidelines. It will also take into account the concluding observations made by the Committee in light of those reports. A brief examination of accessibility measures at European level, in particular the European Union's Audiovisual Media Services Directive (AVMSD) will also be provided in order to gauge the extent of the accessibility commitments contained in them. The Chapter will end with a number of conclusions and recommendations.

“Access” and “Accessibility” - Definitional Issues

The term “access” has several different connotations.¹⁴ At a rudimentary level, it denotes *inter alia* the “ability, right, or permission to approach, enter, or use” something.¹⁵ Taking this literal interpretation in terms of access to broadcast media, for example, it could suggest *inter alia* “the right or opportunity to use or benefit from” broadcast content or “the process of obtaining or retrieving information from” broadcast content.¹⁶ The European Disability Forum (EDF), researchers and disability groups advocating the promotion of access to television, have often described access to television as a “fundamental right”.¹⁷ However, “[T]he

¹⁴Lord *et al.*, (n 10) 43, state that prior to the adoption of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, there have been some references to “access” and related concepts found in human rights documents. *E.g.* Art 21(2) UDHR refers to the right of everyone to “equal access to public service in his country”.

¹⁵*E.g.* Directive 2002/19/EC, on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) as amended by Directive 2009/140/EC, recognises that the term ‘access’ has a wide range of meanings. Article 2 (a) provides that: “‘access’ means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services”. It covers *inter alia*: “access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means... access to conditional access systems for digital television services; access to virtual network services...”

¹⁶Oxford Online Dictionary, <<http://oxforddictionaries.com/definition/english/access>>

¹⁷EDF, ‘Answer to the European Commission Consultation on the Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a

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description of access to the media as a ‘right’ is bold, unless further nuance is supplied”.¹⁸ As McGonagle indicates, “[W]hereas ‘access’ can hardly be described as a human right (and in any case not access to a *particular* medium or a *particular* type of content), it can be a crucial factor in rendering the human right to freedom of expression effective in practice.”¹⁹ As underscored *supra*, if an individual does not have access to a forum or channel in or via which s/he can receive and impart information and ideas, then his/her right to freedom of expression is clearly not effective in practice.²⁰

An interrelated and frequently interchangeable concept and principle of “access” is that of “accessibility”.²¹ The term accessibility is often defined as a general term used to describe the degree to which a product, device, service, or environment is available to as many people as possible. Accessibility can also be interpreted as the “ability to access” and possible benefit of some system or entity. An international report on *Making Television Accessible* states that the term “accessibility” is often used to focus on persons with disabilities and their right of access to entities, often through use of assistive technology or access services.²² An “access service” in this regard refers to services such as captioning, audio description or visual signing that improves the accessibility of a television programme for which it was made.²³ The report also asserts that “accessibility” is strongly related to the concept of “universal design” when the approach involves ‘direct access.’²⁴ Accordingly this is about

Digital Single Market’ (November 2011) 4; Broadcasting Commission of Ireland (BCI), “Accessing Television Report” (November 2003), xxii, states dubiously without specific reference that access to television is a fundamental right.

¹⁸Tarlach McGonagle, ‘Representation of Minorities: Rights of Access’ in *Media and Human Rights* (Clemens Nathan Research Centre 2009) 108.

¹⁹*ibid*

²⁰*ibid*.

²¹*E.g.* Rule 5 of the non-legally binding UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, (*Adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993*), provides that: “[S]tates should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. It emphasises that “for persons with disabilities of any kind”, programmes of action should be introduced to make the physical environment accessible and that “measures should be undertaken to provide access to information and communication.” Moreover, it provides that “[S]tates should encourage the media, especially television, radio and newspapers, to make their services accessible.”

²²ITU, G3ict, *Making Television Accessible Report*, (ITU November 2011) 77.

<<http://www.itu.int/ITU-D/sis/PwDs/index.phtml>>

²³*ibid*

²⁴*ibid*. Art 2 CRPD states that: “[U]niversal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

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making things accessible to all people whether they have a disability or not.²⁵ It suggests that an alternative to “direct access” (universal design) is to provide “indirect access” to disabled persons by having an entity (*e.g.* a service) support the use of a person’s assistive technology to achieve access.²⁶

Both the Committee on the Rights of Persons with Disabilities²⁷ and the European Commission recognise that accessibility is a “vital” “precondition for participation in society and in the economy.”²⁸ In its Disability Strategy 2010-2020, the European Commission defines “accessibility” as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications technologies and systems (ICTs)²⁹, and other facilities and services.³⁰ Therefore, it can be inferred from the strategy that at European Union level having access to broadcasting on an equal basis with others, as either a form of service or as an information and communication technology, is a pre-condition for participation in society and in the economy for persons with disabilities.³¹ The EU Disability Strategy notes that there are still major barriers in all of the fields outlined and explicitly asserts that many “television broadcasters still provide few subtitled and audio-described programmes.”³²

²⁵*ibid.* An e-Accessibility Policy Toolkit designed for policy makers implementing the CRPD defines accessibility as “a measure of the extent to which a product or service can be used by a person with a disability as effectively as it can be used by a person without that disability.” ITU, G3ict, *e-Accessibility Policy Toolkit for Persons with Disabilities: A Joint ITU/G3ict Toolkit for Policy Makers Implementing the Convention on the Rights of Persons with Disabilities*. <<http://www.e-accessibilitytoolkit.org/>>

²⁶*ibid*

²⁷Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’ CRPD /C /GC/2 (Eleventh Session 31 March -11 April 2014) 2, para 4.

²⁸European Commission, ‘Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe’ COM (2010) 636 final 6.

²⁹ITU, ‘The ICT Opportunity for a Disability-Inclusive Development Framework: Synthesis report of the ICT Consultation in support of the High-Level Meeting on Disability and Development of the sixty-eighth session of the United Nations General Assembly’ (ITU September 2013) 6, states that: “[W]hile there are several definitions of ICT, all acknowledge that ICT is an umbrella term which includes any information and communication device or application and its content. Such a definition encompasses a wide range of access technologies, such as radio, television, satellite, mobile phones, fixed lines, computers, network hardware and software.”

³⁰European Commission (n 28) 6.

³¹*ibid.* Case 155/73 *Sacchi* [1974] E.C.R. 409 established that broadcasting is a service under EU law.

³²*ibid.* At national level, many countries refer to rules and codes regulating broadcasting services in terms of “access” rules as opposed to accessibility rules. *E.g.* in the United Kingdom, Ofcom refers to its code regulating such services as the *Code on Television Access Services*. In Ireland, the code is referred to as *Access Rules*.

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In summary, therefore, the terms and concepts of “access” and “accessibility” can have several different yet inter-related connotations and interpretations. In terms of access of disabled viewers to television and audiovisual content, it can relate to the availability and the ability to use and benefit from such content and the respective services, equipment and information which facilitate its production and realisation. It can also be construed as a pre-condition for participation in society and the effective and equal enjoyment of different civil, political, social and cultural rights by persons with disabilities. It is submitted that cognizance of these different interpretations is crucial for policy makers and stakeholders in both identifying and addressing any barriers which encumber disabled viewers’ access to television and audiovisual content. An analysis of “accessibility” provisions in the CRPD, specifically as they may relate to television and audiovisual media content will be discussed *infra*. However, a precursory summary of several of those barriers and the manner in which they are addressed in regulatory frameworks is first warranted.

Identifying Potential Barriers to Access in the Broadcasting Environment

The denial of access to television and audiovisual media content can be caused by many different barriers and can take several different forms which frequently overlap, for example, physical, informational, attitudinal, economic (affordability) and institutional.³³ These barriers form part of the concept of disability itself and are explicitly recognised in the Preamble to the CRPD, which states that: “disability is an evolving concept and ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”³⁴ According to the National Disability Authority of Ireland (NDA);

“[A]n accessible product or service is one which can be used by all its intended users, taking into account their differing capabilities. A user's ability to make inputs and perceive outputs may be impaired. This can be either permanent or temporary and may be due to various physical, mental or environmental conditions.”³⁵

³³Lord (n 1) 8-9. *See also* Lord *et al.*, (n 10) 37-48.

³⁴Preamble CRPD at (e).

³⁵NDA, ‘Procurement and Accessibility’ (NDA September 2012) 4.

<<http://www.nda.ie/cntmgmtnew.nsf/0/F9F50A0196E6321480257A85004A4559?OpenDocument>>

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Impairments affect a user's ability to perceive, understand or physically manipulate things,³⁶ and can occur for various reasons, including medical conditions, injury, old age or the environment.³⁷ An e-accessibility Policy Toolkit for policy makers implementing the CRPD, for example, identifies equipment and programme content as two aspects where accessibility considerations and barriers arise for television viewers with disabilities. The following section outlines some of those barriers in relation to those aspects, although the list is non-exhaustive.

Physical

Lord *et al.* state that physical barriers to access include environmental barriers, especially those that exist in the built (in other words, human-made) infrastructure.³⁸ Physical accessibility expresses the idea that facilities, goods and services should be physically accessible for all sections of the population and in particular for the vulnerable and marginalised.³⁹ The equipment a person utilises to watch television for instance depends on the transmission medium. The equipment for cable, satellite or terrestrial television, consists of a television, sometimes a separate receiver in the form of a 'set-top box'⁴⁰ and a remote control.⁴¹ Barriers faced by people with disabilities can occur in the setting up, installation and operation of such communications technologies, particularly televisions.⁴² Qualitative research on the experience of people with upper-body mobility and dexterity impairments in the communications market has found that for many people with such disabilities this

³⁶The Centre for Excellence in Universal Design (CEUD), 'Universal Design for ICT: Introduction to Accessibility'. <<http://www.universaldesign.ie/managing-accessibility/introduction-accessibility>> The CEUD was established by the National Disability Authority (NDA) Ireland, in January 2007 under the Disability Act 2005.

³⁷*ibid*

³⁸Lord *et al.*, (n 10) 37.

³⁹Lord (n 1) 5, citing UN, CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

⁴⁰The digital receiver takes the place of the analogue receiver contained within all traditional analogue TV sets. It decodes the signal and allows the viewer to switch between channels, access additional information and services and change the way things are displayed. The receiver may be built into the television, which is then called an 'integrated television.'

⁴¹Digital television comes in three main forms: cable, satellite and digital terrestrial. The choice of system determines how the signal is delivered to a household, whether through an underground cable, a satellite dish or a traditional television aerial. Once a signal is established in a household, despite its form of delivery, they all essentially function much in the same way. The consumer/viewer needs three additional pieces of equipment, a digital receiver, a remote control and a television. See http://www.e-accessibilitytoolkit.org/toolkit/technology_areas/television.

⁴²See e.g. EDF, 'What is your Dreamed Accessible Television of the Future?: EDF Report on the State of Accessibility of Television for Persons with Disabilities' (EDF November 2012).

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can be extremely difficult.⁴³ The research indicated *inter alia* that poorly designed equipment proved impractical for disabled persons.⁴⁴ For instance, while a vast majority of respondents were able to operate a television; turning it on posed a significant barrier to use.⁴⁵ Consistent with international findings,⁴⁶ the research indicated that the upshot of access barriers in setting up and installing television equipment included dependency, social exclusion⁴⁷ and increased cost of use.⁴⁸

Similarly, inefficiently designed operational equipment such as remote controls can also constitute a barrier to accessing television content.⁴⁹ The button size on such controls for example, can often make it difficult to enter numbers accurately which are essential for accessing programmes⁵⁰ and programme content and services thereby hindering access to such information and content.⁵¹ These barriers are not confined to just those with mobility and dexterity impairments or visual impairments, but can also impact on other disabled persons, such as those with learning disabilities.⁵² Accessible solutions to equipment barriers include *inter alia* the promotion of universal design, the setting of technical specifications and standards⁵³ and of associated products and services, and assisted devices. An example of best practice with regard to universal design, for instance, is the

⁴³Ofcom, (n 11) 30.

⁴⁴*ibid.* For example a majority of participants were unable to lift or move heavy items like televisions.

⁴⁵*ibid.* Many participants did not have the strength or dexterity in their hands to plug items into the mains or connect set-top boxes.

⁴⁶World Health Organisation (WHO), *World Report on Disability* (WHO Press, 2011) 172.

⁴⁷Ofcom, (n 11) 30. *E.g.* for those living alone or who were not confident with technology, set-up could be more problematic.

⁴⁸*ibid.* For example, an inability to turn television on at the mains resulted in people leaving television on all day which increased cost of use.

⁴⁹*E.g.* people with poor grip or who have dexterity problems may require a control that is easy to hold.

⁵⁰*E.g.* remote controls are necessitated as input devices in order to access Electronic Programme Guides (EPGs), which allow television viewers and radio listeners to navigate scheduling information menus interactively, and to select and ascertain programming by time, title, station, or genre.

⁵¹Ofcom, (n 11) 32. Additionally, depending on the particular equipment purchased, for example for digital television, the viewer may have a single remote control that does everything or two separate remote controls, one for the receiver and one for the television thereby creating further barriers to accessing content. It is usually the case, however, that the remote control for the receiver allows access to most if not all of the required functions.

⁵²Ofcom, 'People with Learning Disabilities and Communications Services: Qualitative Research Report' (24 November 2008) 11.

⁵³*E.g.* Recital (1) Regulation (EU) No 1025/2012 of The European Parliament and of The Council of 25 October 2012 provides: "[T]he primary objective of standardisation is the definition of voluntary technical or quality specifications with which current or future products, production processes or services may comply. Standardisation can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems are essential." See also EU, Standardisation Mandate 376, 7 December 2005; Standardisation Mandate 420, 21 December 2007.

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development of a “talking set-top box” in Australia for persons with visual impairments.⁵⁴ The set-top box uses state of the art text to speech technology compatible with all existing televisions and enabling users to utilise the interactive features efficiently. The integration of universally designed voice recognition applications in Digital TV receivers and remote controls may also be of benefit to users with physical impairments or reduced mobility who may be unable to operate a remote control.

An examination of the responses to the physical barriers outlined, which are contained in legislation, policy and practice, indicates that such responses can vary considerably at international, European and national levels⁵⁵ and a number of observations can be made in relation to them. Firstly, they involve a myriad of stakeholders from governments, device manufacturers, broadcasters, disability organisations and the voluntary sector, who often hold competing policy objectives and views.⁵⁶ The EU framework provides a good example of competing policy objectives, as any EU regulation for accessibility must take due care of the principle of free movement of goods inside of the EU. For instance, the US based Information Technology Industry Council (ITI), in a submission on the proposed European Accessibility Act, pointed out that “no one product can be suited to every user” and that requirements that every product have features that address all disabilities “may be undesirable, impractical and needlessly drive up the cost of every product.”⁵⁷ They suggest that any regulation in Europe should be made only at European level,

⁵⁴See ‘Australia Develops talking set-top box for blind TV watchers’. <<http://globalaccessibilitynews.com/2012/05/22/australia-develops-talking-set-top-box-for-blind-tv-watchers/>> E.g. using the on-screen menus, the electronic programme guide and help screens is simple for users to navigate with accurate voice confirmation of all functions.

⁵⁵At national level, in Ireland, for example, there is significant legislation and public policy relating to Universal Design, and a code of practice on accessibility which includes *inter alia* provisions relating to discrimination and accessible procurement obligations for public service bodies. See The Disability Act 2005; The Employment Equality Act 1998; The Equal Status Acts 2000-2004; NDA, *Code of Practice on Accessibility of Public Services and Information by Public Bodies* (NDA 2006). Ireland also has a number of obligations under European policy and legislation to promote non-discrimination and universal design.

⁵⁶E.g. the development of the aforementioned talking set top box involved a number of stakeholders, including assistance from the Australia Federal Government and consultation with Vision Australia, in co-operation with Bush Australia, a leading developer in set top box and PVR and digital radio technology. The set-top boxes form part of the Australian government’s Household Assistance Scheme (HAS) which was rolled out with the Digital Television Switchover program. See ‘Talking Set top box roll out’, 18 May 2012.

<http://www.minister.dbcde.gov.au/media/media_releases/2012/073>

⁵⁷DIGITALEUROPE (DE), ‘ICT Industry Perspectives On e-Accessibility In View of the Upcoming European Accessibility Act’ (DE 2013) 1.

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as member state regulation will lead to fragmentation, increased costs and less choice for consumers. Moreover, they assert that market access requirements inhibit innovation by pushing industry to focus on compliance with a minimum bar. However ITI, along with DIGITAL EUROPE (DE)⁵⁸ advocate a public procurement accessibility policy as an instrument to facilitate advancement in ICT accessibility owing to the fact that a similar policy previously initiated in the United States had a well established record of success. Having regard to setting technical specifications for industry in relation to TV equipment, DE argue against legislation on the matter, advocating instead the adoption of standards which can be adapted faster and serve markets more effectively.

According to the European Platform of Regulatory Authorities (EPRA), policy measures to encourage accessibility of end-user TV equipment are as a rule considered to be outside the scope of broadcasting regulators and a prerogative of governments in the framework of e-accessibility policies.⁵⁹ At EU level, Directive 2002/21 /EC, as amended, on a common regulatory framework for electronic communications states that providers of digital TV services and equipment have only to “co-operate” in the “provision of interoperable TV services for disabled end-users”.⁶⁰ However DE has highlighted that accessibility is not just an issue for manufacturers of television equipment; additionally the provision of complementary access services is equally important and warranted.⁶¹ In other words, any regulation must acknowledge the entire “ecosystem” that may be vital in producing accessible solutions, and limit the requirements on each organisation to only those aspects under the total control of that organisation. DE has asserted that it is important that any regulatory approach drives innovation, supports interaction both horizontally and

⁵⁸DIGITALEUROPE is a European industry body for manufacturers of consumer equipment.

⁵⁹See European Platform of Regulatory Authorities (EPRA), ‘Round Table on Access to Audiovisual Media Services for Persons with Disabilities: Comparative background document’ (37th EPRA meeting Krakow 8-10 May 2013) 12. <<http://www.epra.org/attachments/krakow-wg3-accessibility-comparative-document-final-version>>

⁶⁰Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) (OJ L 337, 18.12.2009, 37–69) 57, 20) (c).

⁶¹DIGITALEUROPE ‘Input to the Impact Assessment Questionnaire for EAA’ (DE 12 Nov 2012), 1, para 3. “[A]ccessibility cannot be guaranteed for example by having buttons on the remote control for subtitles and audio description. The existence of access services is of equal importance and should be required and national broadcasters must respect the AVMS Directive”.

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vertically across the supply chain and enables widening accessibility by improving the accessibility of specific products but also allows niche products and specialization to occur to meet specific, complex needs.

Information and Communication

Accessible equipment is of little use if the content of television broadcasting cannot be understood or navigated. Informational barriers can impede the access of persons with disabilities to broadcast content. This applies to both the form and content of such information. Goldberg asserts that access to media and services are not just desired, they are required to assure that all people can learn, work, and be entertained equally.⁶²

i. Television Access Services

Television that fails to include subtitling,⁶³ captioning,⁶⁴ or sign language interpretation,⁶⁵ for example, may be inaccessible to people who are deaf or have hearing impairments. Similarly, television programming may also be inaccessible to those who have visual impairments or are blind, unless audio description is available.⁶⁶ Although there are some newspapers in braille, people who are blind are

⁶²Larry Goldberg, 'Media Leading the Path to Providing Accessible Information and Deploying Harmonization and Regulations' in G3ict Global Initiative for Inclusive Information and Communication Technologies (ed) *The Accessibility Imperative Implications of the Convention on the Rights of Persons with Disabilities for Information and Communication Technologies* (Atlanta: G3ict 2007) 160.

⁶³BAI, *Access Rules* 2015, 2, defines subtitling as: "...on-screen text that represents what is being said on the screen. Subtitling can be open or closed. Open subtitling is subtitling that remains on the screen at all times. Closed subtitling can be added to the picture or taken away as viewers wish, using, for example...teletext. Subtitling is formatted so as to assist interpretation and understanding of the text and link it more accurately to the on-screen action." <<http://www.bai.ie/index.php/bai-access-rules-2015>>

⁶⁴ibid, states that "[C]aptioning refers to on-screen text that represents what is being said on the television screen. However, while similar to subtitling, it is not as sophisticated and entails a more basic representation of what is being said on screen sometimes having only one colour, verbatim and can have the text only in upper case."

⁶⁵A sign language is a language which uses manual communication and body language to convey meaning. Hundreds of sign languages are in use around the world and are at the cores of local deaf cultures. Irish Sign Language (ISL) is the indigenous language of the Deaf community in Ireland. See BAI, (n 63) 3, which defines Irish sign language as "... a visual, spatial language with its own syntax and complex grammatical structure. Signing must be presented on a television screen through the use of a signer as part of the programme content, or the use of a signer (either a real person or a virtual person generated by computer) acting as an interpreter in a box superimposed in the corner of the screen."

⁶⁶BAI, (n 63) 3, defines "Audio Description" as "...a commentary that gives a viewer with a visual impairment a verbal description of what is happening on the television screen at any given moment, as an aid to the understanding and enjoyment of the programme. The technique uses a second sound track that gives a description of the scene and the on-screen action."

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largely excluded from print media; therefore, radio and television provide important alternative sources of news and information.

Research carried out on the use of communication services in various mediums, including television, revealed that the use of such services is perceived as both “helpful” and “socially beneficial”.⁶⁷ The provision of an audio description service, for instance, enables those with severe or profound visual impairments to comprehend television programme information independently, without having to rely on others to assist in their understanding of programme content.⁶⁸ Moreover, an audio description service can facilitate the ability to engage in conversations about television from which persons with visual impairments have previously been excluded.⁶⁹

The regulatory responses to the provision of television access services vary at international, European and national levels, with obligations often stemming from disability / equality legislation or broadcasting / communications legislation or both. For instance, in Ireland, such obligations stem from broadcasting, disability and equality legislation.⁷⁰ In addition, Ireland has obligations regarding the provision of access services under EU law.⁷¹ Ireland is also a signatory to the CRPD, which contains a number of obligations regarding accessibility which will be discussed *infra*. The broadcast regulator, the Broadcasting Authority of Ireland (BAI), is responsible for setting standards in the form of *Access Rules* and ensuring that broadcasters comply with those rules.⁷² Generally speaking, in jurisdictions where such rules have been developed and adopted they specify percentage targets and timeframes in relation to the level of subtitling, (or captioning), sign language and

⁶⁷Ofcom, ‘People with Visual Impairments and Communication Services’ (25 July 2008) 4. <<http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/visual/>>

⁶⁸*ibid* 4.

⁶⁹*ibid* See also Ofcom, ‘People with hearing impairments and communications services: A study into people with a hearing impairment and their experience of communications services’, Annex 5 (20 November 2007) 20.

⁷⁰s. 43 Broadcasting Act 2009 contains a number of provisions in respect of rules to be made by the BAI to promote the understanding and enjoyment of programmes by persons with sensory impairments such as the blind and deaf. s. 26 and s. 27 Disability Act 2005 requires public bodies, such as public service broadcaster RTÉ, to ensure that their services are accessible for people with disabilities by providing integrated access to mainstream services where practicable and appropriate. s. 5 Equal Status Acts 2000-2004 also prohibits disability discrimination in the provision of goods and services to the public, whether free or for charge.

⁷¹Art 7 AVMSD 2010/13/EU will be discussed *infra*.

⁷²s. 43 (7) Broadcasting Act 2009.

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audio description to be provided by broadcasters. Moreover, the regulator is mandated to oversee their implementation. In some jurisdictions the legal provisions on accessibility apply exclusively to public service broadcasters, while, in others, there are no binding obligations on broadcasters regarding such services.⁷³ In other countries, such as Australia⁷⁴, there are some binding obligations in relation to particular services (captioning) but not in relation to other types of services (audio description). Voluntary policies on access services have also been adopted by broadcasters in several European countries.⁷⁵ EPRA, however, highlighted in 2013, that despite the fact that legal recognition of accessibility issues has clearly progressed at European level, the scope and implementation of the provisions in practice by Member States diverge significantly. EPRA opined that the National Regulatory Authorities (NRAs) play an increasing role in the field of accessibility. The most widespread roles played by regulators are monitoring and enforcing compliance with broadcasters' obligations. In addition many NRAs are involved in awareness campaigns and have implemented systems of periodic consultation of service providers and representatives of disabled end-users.⁷⁶

ii. Transition from Analogue to Digital Television

The switchover from analogue to digital television brings a number of benefits for both broadcasters and viewers. For viewers, the most important of these are more channels, more programmes, extra information and interactivity. Accordingly, with increased choice, viewers need to be guided through the range of services available and information needs to be interpreted for them clearly, accurately and concisely.⁷⁷

The migration to digital television, however, has presented a number of barriers and challenges for persons with disabilities, which were not present in the analogue environment. A Green Paper published by the European Commission in 2013 points out that “[T]echnology offers more possibilities to assist visually, hearing and

⁷³E.g. New Zealand, Turkey, Bulgaria and Luxembourg.

⁷⁴The Disability Discrimination Amendment Regulation 2012 (No.1) inserted a new part (Part 9D) into the Broadcasting Services Amendment (Improved Access to Television Services Act) 2012, introducing new captioning obligations on television broadcasters to improve access to television programmes and emergency warnings for people with hearing impairments.

⁷⁵Including *inter alia* Germany, France, Malta, Turkey, Lithuania, Bosnia and Herzegovina. See EPRA, (n 59) 8.

⁷⁶*Ibid* 20.

⁷⁷Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy*, (Cambridge University Press 2007) 35.

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cognitively impaired persons than ever before. However, these opportunities may be lost if accessible content, i.e. subtitles, sign language or audio-description, is not produced or not made available to end users”.⁷⁸

Disability organisations, such as World Blind Union, have highlighted such problems, claiming that digital technology has begun to render television inaccessible to blind and partially sighted persons who are unable to access on-screen information and navigation features.⁷⁹ On-screen information may also be difficult to access for other disabled and older people who often have to increase their reliance on memory for the order of channels or specific channel codes.⁸⁰ This is compounded by the fact that multi-channel service providers periodically re-order channels, which creates confusion and inconvenience for those depending on memory to find their preferred channels.⁸¹ Furthermore, the repertoire of channels watched can be limited for those who cannot see on-screen information.⁸²

(a) Electronic Programme Guides

Electronic Programme Guides (EPGs) assist and enable television viewers and radio listeners to navigate scheduling information menus interactively, and to select and ascertain programming by various means. They are essential in a digital world, as it would be impractical for broadcasters to try to reach viewers without being listed on an EPG. EPG information can be delivered *inter alia* through a digital TV (or a TV that has a digital receiver installed). EPG interfaces vary between the hardware (TV, set top box or personal video recorder (PVR)) and the service that is used. Likewise the information that is displayed can vary between the type of EPG and the TV receiver. Consequently, EPG providers can exercise considerable control of display information, including over public service channels with universal obligations. This necessitates the regulation of access to EPGs and the manner in which channels may be listed, in order to ensure diversity and pluralism on the one hand and fair competition on the other. More specifically, regulation is warranted to provide the features and information needed to enable EPGs to be utilised by people with

⁷⁸European Commission, ‘Green Paper: Preparing for a Fully Converged Audiovisual World: Growth Creation and Values’ COM (2013) 231 final, 16.

⁷⁹World Blind Union, Submission to the Committee on the Rights of Persons with Disabilities, Day of General Discussion on the right to Accessibility, 7 October 2010.

⁸⁰*ibid*

⁸¹*ibid*

⁸²*ibid*

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disabilities so as to ensure that information included in relation to television programmes indicates which programmes are accompanied by television access services.⁸³

The approach to EPG regulation, however, differs at national, European and international levels.⁸⁴ At national level, broadcasting and communication legislation in both Ireland and the UK, for instance, provides for the regulation of EPGs.⁸⁵ The legislation requires the BAI both and Ofcom respectively to set down standards in the form of rules/codes of practice in relation to EPGs. Section 310(3) Communications Act 2003 for example, explicitly requires that Ofcom's EPG code obliges EPG providers to incorporate such features in their EPGs as are appropriate to enable, so far as practicable, people with sensory disabilities to use the EPGs for the same purposes as people without such disabilities.⁸⁶ Moreover EPGs are also to provide information about assistance in relation to programmes (e.g. how to navigate radio and television listings, and how to operate television access services such as subtitling, signing and audio description), as well as facilities for making use of that assistance.⁸⁷ While Article 7 AVMSD 2013/EU deals with the accessibility of audiovisual media services for those with sensory impairments, it does not explicitly refer to EPGs.⁸⁸

Van der Sloot accentuates the inherent complexities in EPG regulation which balances on a fine line between the laws that pertain to content and access and between media-specific legislation and general competition law.⁸⁹ Legislators in this

⁸³E.g. subtitling, audio description etc.,

⁸⁴Bart van der Sloot, 'Walking a Thin Line: The Regulation of EPGs' (2012) 3 *JIPITEC* 138.

⁸⁵s.74 and s.75 Broadcasting Act 2009 (Ireland); s.74 does not expressly refer to persons with disabilities, however under s. 25 (2) (g) one of the objectives of the BAI is to provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities. At the time of writing the BAI however has not developed rules with respect to electronic programme guide contracts.

⁸⁶Ofcom, *Code of Practice on Electronic Programme Guides* (Ofcom, 2008) 2. In July 2015, Ofcom published a public consultation on ways to make on-screen TV guides more accessible to visually impaired people. Following a request for inputs, and feedback from stakeholders including the RNIB and EPG providers, Ofcom is proposing that EPG providers work with manufacturers to provide better accessibility features. <http://stakeholders.ofcom.org.uk/consultations/epg-accessibility/?utm_source=updates&utm_medium=email&utm_campaign=epg-accessibility-condoc-jul15>

⁸⁷ibid

⁸⁸Recital 46 AVMSD 2010/13/EU however states "...[T]he means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation."

⁸⁹van der Sloot (n 84) 143, para 36.

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context are faced with the choice between maintaining a neutral position and, intervening to promote quality and diversity. This dichotomy is reflected in the regulation of EPGs at European and national levels. At European level, EPGs are regulated under the European Access Directive which means that EPG providers are for the most part seen as access providers. However, national governments are permitted to treat EPGs in whole or in part as providers of content. This distinction is significant as EU law is more focused on competition aspects while national legislation is more concerned with promoting diversity in media content. Consequently, national governments are permitted to introduce EPG regulation based on media, competition or consumer law principles as they see fit. However the manner in which EU countries have used this margin of appreciation differs to a large extent.⁹⁰

(b) Disability Hierarchy in Policy Frameworks

The preceding sections have outlined that potential barriers to accessing television content are faced not only by people with sensory impairments but also by people with cognitive impairments, such as learning disabilities and various other disabilities.⁹¹ Varney points out, however, that regulatory frameworks in both the UK and US, which deal with the adoption of accessibility provisions for digital television, tend to reflect a hierarchy of protection, particularly in favour of those with sensory disabilities, and thus failing to address the needs of persons with other disabilities.⁹²

It is submitted that substantive provisions in media legislation regarding accessibility measures in Irish, European Union, and various other jurisdictions also reflect this hierarchy⁹³ albeit the aims of such regulation often suggest that all disabilities should be taken into account. It is put forward that another issue evident in regulatory frameworks and policy regarding access services is that even where such frameworks exclusively safeguard the interests of those with sensory impairments,

⁹⁰ibid 144, para 38, outlines three distinct approaches to EPG regulation in the UK, the Netherlands and Germany, which emphasise regulation based on media, consumer and competition law respectively.

⁹¹Ofcom, (n 52) 3, the study revealed that television was the most commonly used communication service among people with learning disabilities.

⁹²Eliza Varney, 'A Hierarchy of Disability rights? Digital Television in the USA and UK' (2009) 60 (4) *Northern Ireland Legal Quarterly* 421, 441.

⁹³This hierarchy was also reflected in policy measures adopted in the analogue environment.

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the accessibility solutions are not evenly spread or considered. Findings at various levels have indicated, for instance, that subtitling is the most common accessibility solution, while audio description and sign language remain more marginal.⁹⁴

Attitudinal

Knowledge and attitudes are important environmental factors, affecting all areas of service provision and social life of persons with disabilities.⁹⁵ Lord *et al.* assert that the attitudes of many people towards persons with disabilities are perhaps the most pervasive barrier.⁹⁶ Accordingly, as discussed in Chapter Two, myths and stereotypes held by people about persons with disabilities can cause societies unconsciously to create accessibility barriers.⁹⁷ Attitudinal barriers and institutional barriers also overlap, as research in Ireland on the review of *Access Rules* for television found. In one category, a number of broadcasters tended to view their requirement to provide access services as a “punitive” obligation that provides no return on the necessary and significant investment involved and the only reason they were providing access services was purely to meet the requirements of the *Access Rules*. According to the research, these broadcasters appeared to question the necessity of the *Access Rules* and speculate that there is little if any evidence to suggest that the access services provided are of any real benefit to viewing audiences or are actually availed of by the viewing public.⁹⁸ Similarly, even where access services are provided the level and quality of those services may also impact on perceptions on disability.⁹⁹ The European Commission has also noted that the access

⁹⁴Among the reasons proffered for this disparity is the intrusive aspect of AD and Sign Language for the general public. *See*, for instance, Vision Australia, ‘Tell the Whole Story Campaign’ regarding setting mandatory audio description targets for all broadcasters <<http://www.visionaustralia.org/about-us/advocacy/campaigns/tell-the-whole-story-audio-description-on-tv>> *See also* in Ireland, criticisms levelled at the BAI in July 2015 regarding the absence of Irish sign language in a scheme funded by television licence fees by a number of deaf organisations.

<<https://www.deafhear.ie/DeafHear/newsFeature.html?who=970>>

⁹⁵WHO, (n 46) 6.

⁹⁶Lord *et al.*, (n 10) 38.

⁹⁷*ibid*

⁹⁸BAI, ‘Access Provision: A Human Resource Analysis to Inform Review of Access Rules’ (November 2009) 14.

⁹⁹*See* DeafHear, ‘Submission to the BAI : Access Rules Review Public Consultation 2014-2018’ (Deaf Hear 2014) 3, regarding the ‘dumbing down’, abbreviated nature of News for the Deaf conveying a message to others that a “basic news service is sufficient for Deaf people”, with obvious associated effects.

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service field is riddled with ignorance and misconceptions that lead to poorly documented business cases.¹⁰⁰

Raising awareness and challenging negative attitudes are often first steps towards creating more accessible environments for persons with disabilities.¹⁰¹ Equally creating awareness regarding access to broadcasting services for persons with disabilities is crucial in realising accessibility obligations.¹⁰² It is submitted that creating awareness for television access services and products entails awareness-raising across a range of sectors and stakeholders, spanning policy makers, regulators, broadcasters, industry stakeholders, (including manufacturers of equipment) and disability organisations. For instance, in addition to complying with access targets in terms of programmes, broadcasters are often required to promote access services through use of a symbol or standard acronyms in relation to programmes for which access provision is available.¹⁰³ In Europe many national regulatory authorities are involved in awareness campaigns and have implemented systems of periodic consultation between service providers and representatives of disabled end-users. However, it is submitted that in light of ongoing technological developments, more awareness is necessitated which targets specific areas, for example digital switchover, mainstreaming disability, media literacy and equipment. From an industry perspective, the Global Alliance on Accessible Technologies and Environments (GAATES), for example, have pointed out that a universal weakness in the design implementation of accessible built environments and information and communications technologies is the public's perception that it relates only to people

¹⁰⁰DTV for All, Competitiveness and Innovation Framework Programme, 30 November 2010, 3.

¹⁰¹Lord (n 1) 9, states that the relationship between Article 9 CRPD which deals with "Accessibility" and Article 8 CRPD is a "salient issue" for the UN Committee on the Status of Persons with Disabilities to address and a "core component of realizing Article 9 obligations." Article 9 CRPD will be discussed *infra*.

¹⁰²This applies to creating awareness in society itself and also among persons with disabilities. For example in Ofcom, (n 67) 14, indicated that "[A]wareness of services designed to assist people with visual impairments was often low. Consequently, expectations of services were low and many believed that little could be done to improve access to the services. *See also* Ofcom, (n 11) 4, which found that amongst those with learning disabilities and mobility and dexterity impairments, there was limited awareness of adaptations that may have helped them use communications technology more easily. However, those with visual impairments and hearing impairments tended to be more aware and were more likely to be accessing services such as subtitles or audio description on television. Being part of a wider network supporting people with similar impairments (whether a school, community group, Motability scheme, etc.) affected respondents' awareness of the services and adaptations available to them.

¹⁰³*E.g.* in Ireland BAI, *Access Rules* 2015, 7, Rule 8, deals with the 'Promotion of Access Services.' In addition the BAI has issued separate guidelines for broadcasters on the various access services, such as audio description, subtitling and sign language.

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with mobility impairments, primarily wheelchair users.¹⁰⁴ To this end it suggested that an international awareness campaign about the CRPD and the population of people with disabilities be developed and promoted internationally.¹⁰⁵

Economic

Economic accessibility (affordability) expresses the idea that facilities, goods and services must be affordable for all persons.¹⁰⁶ According to a World Report on Disability, the high cost of many technologies limits access for people with disabilities, particularly in low-income and middle-income countries. In particular, intermediate and assistive technologies are often unaffordable or unavailable.¹⁰⁷

Institutional

Institutional barriers to accessibility have been identified as including legislation, practices or processes that actively prohibit or fail to facilitate access by people with disabilities.¹⁰⁸ It is submitted that in this respect it could be argued that the current dominant economic and consumerist values, which are increasingly permeating media law and policy at national, European and international levels, provide a fitting example. These issues have been addressed in Chapter One, which considered the notion of the disabled viewer as a ‘consumer’ under a ‘commercial broadcasting ethos’ and the potential impact on disability representation both in terms of television programme content and access to such content. To a certain extent this type of institutional barrier overlaps with economic barriers. To reiterate, a consumer and commercial ethos of broadcasting policy prioritises trade values in a system which is geared towards content that satisfies the consumer rather than the citizen. When broadcasting and media related policies are couched in terms of ‘consumer’, and the ‘consumption’ of television services is governed by the distribution of income, this poses significant issues for disabled viewers’ access to broadcast media. Additionally, as submitted in Chapter One, even if disabled viewers possessed the requisite financial resources to pay for premium commercial broadcast services, this

¹⁰⁴Global Alliance on Accessible Technologies and Environments, (GAATES), ‘Annex to submission to the Committee on the Rights of Persons with Disabilities, General Day of Discussion on the Right to Accessibility’ 7 October 2010. Examples of best practice in this regard include the TV Access Coalition in Ireland and the Digital Switchover Scheme in the UK, which created awareness for persons with disabilities about the transition from analogue to digital switchover.

¹⁰⁵*ibid*

¹⁰⁶Lord (n 1) 5.

¹⁰⁷WHO, (n 46) 186.

¹⁰⁸Lord (n 1) 8.

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would not guarantee accessibility to those services or programme content. In Ireland, for example, in the BAI's consultation on *Access Rules 2012*¹⁰⁹ for the provision of access services on television, a number of disability organisations submitted that they were "deeply shocked" by the proposed rules. The TV Access Coalition criticised the regulator (BAI) for acting in a way that was not supportive of consumers' needs and described the tone of the consultation document as sympathetic to broadcasters' difficulties but not to consumer difficulties.¹¹⁰ The DeafHear organisation's submission in 2012 also stated that the rules reflected a minimalist approach which placed the broadcaster rather than viewers at the centre of the process. The rules not only imposed minimalist targets for accessibility services such as subtitling, audio description and sign language for commercial broadcasters but also reduced significantly previous targets for public service broadcasters, despite protestations by disability organisations.¹¹¹ Access features of programmes were portrayed as additional cost burdens on programme makers and an 'optional extra' rather than a means to ensure fair and equitable access to the enjoyment of television programmes by all citizens.¹¹² In 2013, EPRA pointed out that broadcasters as a rule are expected to bear all the required costs, which can be particularly problematic in a context of an economic crisis. Nonetheless, it indicated that accessibility obligations are usually modulated according to the audience share and revenues of broadcasters, thus taking into account their financial situation. In DeafHear's recent submission to the BAI on the current *Access Rules 2015*, it highlighted that the perception of subtitles as an 'add on' access feature of programmes rather than one where subtitles are an 'integral feature of programme production' has remained unchanged.¹¹³

¹⁰⁹BAI, *Access Rules 2012* were in operation up to 1st March 2015.

¹¹⁰BAI, 'Access Rules Review 2011: Public Consultation: Submission by the TV Access Coalition' (January 2012) 1.

¹¹¹The Committee on Economic, Social and Cultural Rights General Comment No. 21 Right of everyone to take part in cultural life (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights) 2009, states at para 65 "[A]ny deliberately retrogressive measures in relation to the right to take part in cultural life would require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

¹¹²DeafHear, 'Submission to the Broadcasting Authority of Ireland: Access Rules Review' (January 2012) 2. <http://www.tvaccess.ie/index.php?option=com_content&view=article&id=95:2011-access-rules-submissions&catid=55:advocacy-articles>

¹¹³DeafHear, (n 99) 2. This document was obtained by the author via personal communication with the Deaf Hear organisation. Contact was made with the BAI who informed the author that only a redacted version of the Deaf Hear's submission would be available on request.

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It is submitted that in addition to ensuring public service broadcasters have adequate government funding to provide high quality services to meet the needs of persons with disabilities, governments, broadcasting regulators and broadcasters should look toward developing more cost effective initiatives regarding television access services. Three examples of international best practice in this regard are initiatives stemming from China, the US and Canada. In 2012 a project to transcribe movies to audio description for people with visual impairments was launched in China.¹¹⁴ Although the project is concerned with film, such a project could be adapted to television programming. The project involves four film organisations who are sponsoring the project and who donated 100 films, with 98 of their staff volunteering to undertake the transcription work.

Likewise Netflix, an American and international provider of on-demand Internet streaming media, launched a subtitling community project on the video captioning service *Amara*, formerly known as Universal Subtitles. The company sought a limited number of volunteers on its site, with a view to utilising crowd-sourced captioning on “popular 80s cartoon and other classic TV programming.”¹¹⁵

In Canada in 2012, the non profit organisation Accessible Media Inc (IMI)¹¹⁶ launched a described Video TV Guide (DV Guide)¹¹⁷ which provides a comprehensive list of most described television programming across Canada. The DV Guide was developed in conjunction with the regulator, Canadian Radio-Television, the Telecommunications Commission’s (CRTC) Described Video Working Group and the Canadian Association of Broadcasters (CAB) to build awareness of described video programming and enable blind or low vision customers to plan their television viewing.¹¹⁸

¹¹⁴See Global Alliance on Accessible Technologies, ‘China launches audio description project’, 19 July, 2012. <<http://globalaccessibilitynews.com/2012/07/19/china-launches-audio-description-project/>>

¹¹⁵See Gigacom, ‘Netflix experiments with crowd-sourced captioning’, 30 July, 2012. <<http://gigaom.com/video/netflix-amara-closed-captions-crowdsourcing/>>

¹¹⁶Accessible Media Inc. (AMI) is a non-profit media organisation specialising in media for the blind, visually impaired, deaf and hearing impaired. <http://www.ami.ca/ami/A.M.I_Home.aspx>

¹¹⁷Described video (DV) is also called video description or described narrative. DV is a narrated description of a program's main visual elements, such as settings, costumes, or body language. The description is added during pauses in dialogue, and enables people to form a mental picture of the program. It works best for pre-recorded programs, such as dramas and documentaries.

¹¹⁸The Guide is available at: <<http://www.ami.ca/ami/Described-Video-Guide.aspx/>>

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Accessibility and the CRPD

The Convention on the Rights of Persons with Disabilities (CRPD) is the first legally binding international instrument to provide an in-depth articulation of the responsibilities of governments and to thoroughly address accessibility so that people with disabilities may “live independently and participate fully in all aspects of life.”¹¹⁹ The following section will specifically examine how such “accessibility” duties may be interpreted and thus how they may impact on measures pertaining to disabled viewers’ access to television/ audiovisual content and establish a benchmark for State Parties to adhere to. Following from a general discussion regarding accessibility in the CRPD, the primary focus of this section will centre on three distinct yet interrelated articles of the Convention which have particular relevance to “accessibility” measures relating to television content.¹²⁰

The first of these articles is Article 9 CRPD, which is an article of general application that explicitly deals with accessibility. Accessibility is also included in several of the specific substantive rights enunciated in the CRPD. Two substantive rights which expressly refer to and are of particular import to accessing media are the right to freedom of expression and opinion, and access to information (Article 21);¹²¹ and the right to participate in cultural life, recreation leisure and sport (Article 30).¹²² Article 21 CRPD contains a positive duty on State parties to ensure that persons with disabilities can exercise their right to freedom of expression *inter alia* by “[E]ncouraging the mass media ... to make their services accessible to persons with disabilities.”¹²³ Article 30 CRPD also contains a duty on State parties to take appropriate measures to ensure that persons with disabilities “enjoy access to television programmes...in accessible formats.”¹²⁴

In May 2014, the Committee on the Rights of Persons with Disabilities issued a General Comment on accessibility duty as contained in Article 9 CRPD and the

¹¹⁹Lord *et al.*, (n 10) 44.

¹²⁰in the form of the provision of access services.

¹²¹Art 21 CRPD. Art 29 CRPD on the right to participate in political and public life, however, does not explicitly refer to the media but it can be inferred that the right to participate in political and public life involves a right to range of different views in order to be able to make choices in the democratic process.

¹²²See also Art 29 CRPD on the right to participate in political life; Art 13 CRPD on Access to Justice; Article 24 CRPD on Education and Art 25 CRPD on Health.

¹²³Art 21 (c) CRPD.

¹²⁴Art 30 (1) b CRPD.

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manner in which it relates to and interacts with other articles and substantive rights in the Convention. The General Comment will also be considered throughout the sections following.¹²⁵

A general overview of the CRPD has been provided in Chapter Two. However, it is necessary in the context of the present discussion to reiterate a number of the Convention's fundamental and distinctive aspects, as the potential impact of such aspects is vital to any consideration of accessibility at policy level.¹²⁶

Firstly, the Convention effectuates a paradigm shift away from viewing and treating persons with disabilities as "objects" to be managed towards viewing them as subjects with equal rights warranting equal respect. Article 4 CRPD requires State Parties to take measures that ensure the promotion and "full realisation of all human rights and fundamental freedoms" for all persons with disabilities while also prohibiting any form of discrimination in their attainment.

Article 4(3) CRPD also obliges State Parties to implement the Convention in the development and implementation of legislation and policies and, in other decision making processes concerning issues relating to persons with disabilities, to: "closely consult with and actively involve persons with disabilities through their representative organisations."¹²⁷

The Broadcasting Authority of Ireland's (BAI) public consultations on proposed rules governing the level of subtitling, sign language and audio description of Irish television broadcasters provides an example of Article 4(3) CRPD in practice. The BAI, in launching the consultations, requested responses from the general public, representative disability groups and broadcasters. For the purposes of the consultations, a range of facilities were developed to enable people who are deaf, hard of hearing, partially sighted or blind to offer their feedback.¹²⁸ Additionally, in past reviews, independent research carried out on behalf of the regulator, which informed the development of the *Access Rules 2012*, sought to determine what

¹²⁵General Comment No. 2 (n 27).

¹²⁶*i.e.* at international, European and national levels.

¹²⁷Art 4 (3) CRPD.

¹²⁸*See* BAI, 'Changes Proposed to Rules on Television Subtitling, Sign Language & Audio Description', 26 May 2014. < <http://www.bai.ie/index.php/2014/05/changes-proposed-to-rules-on-television-subtitling-sign-language-audio-description/>>

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constitutes “good access” in terms of access services provision for the Irish television viewer, by exploring and examining the views, experiences and preferences of those who are deaf, hard of hearing or blind or vision impaired.¹²⁹

Secondly, the preamble to the CRPD states that disability is an “evolving concept” in that it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.” This exemplifies a social model of disability which views persons with disabilities not as problems to be fixed but rather that the external environment problematises people largely because it remains insensitive to human difference. As Kercher asserts:

“If we accept the concept of disability as any concomitant circumstance that complicates an individual’s ability to interface and interact with the environment and with other people (the “social model” of disability), then it is immediately obvious that the right way of eliminating it is not by somehow expecting to alter the individual in question, but by removing the root cause: the obstacles to interaction that litter our environment.”¹³⁰

According to Kercher, this can be accomplished by a correct application of design methodologies and practices, with a clearly stated aim of achieving and enhancing an agenda of social inclusion.”¹³¹ Consequently, by dismantling attitudinal and environmental barriers as opposed to treating persons with disabilities as problems to be fixed, those persons can participate as active members of society and enjoy the full range of their rights.

The preceding section has outlined some of these potential attitudinal and environmental barriers in the broadcasting environment, although it is submitted that the list is non-exhaustive. However, depending on the strength of their broadcasting systems, State Parties may identify different exigent barriers and different methodologies in addressing such barriers. The European Commission, for instance, has pointed out that at European level one size clearly does not fit all when it comes

¹²⁹BAI, ‘Target Audience Consultation Research to Inform Review of Access Rules’ (November 2009) 8. The NDA also assisted the BAI in providing advice on accessibility issues during the consultation phase of the Access Rules 2015.

¹³⁰Pete Kercher, ‘Design for All: changing the world by design’ (Paper delivered at *Design for All Europe*, European Conference ‘Protecting and promoting the rights of persons with disabilities in Europe: towards full participation, inclusion and empowerment’, organised by the Directorate General of Social Cohesion of the Council of Europe, Strasbourg October 2008) 155.

¹³¹ibid

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to access services. Europe is a diverse continent when it comes to national and regional societies, their cultures and economic means. Some territories have come far with access services and are looking to consolidate and optimise them. Others have only just begun to offer more of these services and are feeling their way.¹³² It is submitted that, likewise, respective access solutions that succeed in more technologically sophisticated and developed broadcasting environments may be ineffective in low-resource settings such as developing countries. In developing countries, therefore, initial policy efforts should focus on removing basic environmental and attitudinal barriers.¹³³ Once the concept of accessibility has become ingrained, via the creation of awareness and sharing of best international practice, and as more resources become available, it then becomes easier to raise standards and achieve a higher level of access provisions.¹³⁴

Thirdly, the CRPD does not restrict its scope to particular persons; instead it identifies persons with “long term physical, mental, intellectual and sensory disabilities” as beneficiaries under the Convention.¹³⁵ The textual reference to the word “includes” in Article 1 CRPD, assures that this does not confine the application of the Convention and State parties but could also ensure protection to others *e.g.* persons with short term disabilities or who are perceived to be part of such groups.

It is submitted that this non-restricting classification of those with disabilities is an important factor which policy makers should take into account when formulating rules, policies or guidelines relating to access measures in broadcasting services. Customarily, such guidelines are confined to those with sensory disabilities (i.e. visual and hearing impairments) to the exclusion of those with other disabilities *e.g.* those with cognitive disabilities or those with mobility and dexterity impairments¹³⁶ and, it is submitted, children with disabilities.

¹³²DTV4 All, ‘Digital Television for All: Final Report’ (ICT PSP Project: DTV4All (244944) 2011) 30.

¹³³WHO, (n 46) 193.

¹³⁴Art 32 (1) (b) CRPD: “State Parties recognise the importance of international co-operation in support of national efforts for the realisation of the purpose and objects of the Convention and undertake appropriate and effective measures in this regard ... which include inter alia ... facilitating and supporting capacity building, including through the exchange and sharing of information, experiences, training programmes and best practices.”

¹³⁵Art 1 CRPD.

¹³⁶*E.g.* Varney noted a hierarchy in UK and US broadcasting legislation. Ireland’s *Access Rules* are confined to those with sensory disabilities.

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While it is accepted that the provision of broadcasting access services catering for every individual with a distinct disability is, in practice, universally unachievable, it is important that a hierarchy is not established in the formulation and development of such rules relating to such services. It is important therefore that policymakers, regulators, and broadcasters are made aware that disability is not confined to specific persons with specific disabilities in this regard. Consequently any legislation or policy should be as inclusive and as clear as possible and provide guidance on the issue.¹³⁷

Similarly, it is submitted that care must also be taken in any revision of existing rules, particularly in light of the current economic climate, that policy makers, in order to ease the burden on broadcasters, do not create a hierarchy of disability or even exclude persons with disabilities from existing access service provisions.

The consultation on Ireland's broadcasting *Access Rules* 2012, which were in effect up to March 2015, illustrates the issue. The proposed access rules suggested that a number of non-public service broadcasters that had low subtitling quotas could offset targets for audio description (for visually impaired) and Irish Sign Language (for hearing impaired) against their subtitling targets. However, a submission made by a number of disability organisations to the regulator objected to this, stating that it would pit the needs of one group against another and was therefore "unethical and divisive." In the opinion of the TV Access Coalition, "[I]nclusion is a universal concept and broadcasters should never be encouraged to increase the inclusion of one group at the expense of another."¹³⁸ Having considered the consultation responses the BAI concurred with the view that gains for one group could result in losses for another and therefore did not propose in the final version of its Access Rules that audio description and Irish sign language be offset against subtitling targets for non-public service broadcasters.¹³⁹ However, this led the BAI to establishing targets for only one public service broadcaster, RTE, with the result that

¹³⁷See discussion *infra* of AVMSD, Recital 46 and Article 7, regarding the need for a clear policy in this regard.

¹³⁸BAI, 'Access Rules Review 2011: Public Consultation: Submission by the TV Access Coalition' (January 2012). This submission is no longer publicly available.

¹³⁹See BAI, 'Access Rules, Statement of Outcomes' (May 2012) 5. However, the BAI did recognise the particular situation in respect of community broadcasters and continued to allow such broadcasters to provide their access provision targets by a combination of subtitling, AD or ISL. <http://www.bai.ie/?page_id=2419>

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non-public broadcasters had only to commit to targets regarding subtitling. Consequently the upshot of this policy decision was that the visually impaired could only access programmes with audio description on the public service broadcaster channels. The situation regarding Audio Description (AD) in the BAI's *Access Rules* 2015, remains the same with only RTE obligated to provide the service albeit "...other services may choose to provide audio description and/or Irish Sign Language."¹⁴⁰

The concept of "accessibility" is entrenched in the CRPD but the Convention does not itself define accessibility. Lord asserts that the CRPD, by the terms of its text, is not entirely clear in its characterisation of accessibility.¹⁴¹ For this reason the concept requires some level of extrication and interpretation as it presents itself in various guises throughout the text. Accessibility appears in the preamble to the CRPD, which recognizes its importance to the "physical, social and economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms."¹⁴²

Accessibility also features as a general principle in Article 3 of the Convention. Article 3 CRPD identifies a set of overarching and foundational principles, which guide the interpretation and implementation of the entire Convention. These principles cut across all issues and include *inter alia* the principles of non-discrimination,¹⁴³ full and effective participation and inclusion in society and equality of opportunity.¹⁴⁴ These principles are the starting point for understanding and interpreting the rights of persons with disabilities and for providing benchmarks against which each right in the Convention is measured. Therefore the principle of accessibility contained in Article 3 CRPD acts as both a filter for the assessment of existing law and also as an interpretive tool for its implementation.¹⁴⁵

¹⁴⁰BAI, *Access Rules* 2015, 7, Rule 7.5.

¹⁴¹Lord (n 1) 1.

¹⁴²Preamble CRPD para (e).

¹⁴³United Nations, *Monitoring the Convention on the Rights of Person with Disabilities: Guidance for Human Rights Monitors Professional Training Series No. 17* (Office of the High Commissioner for Human Rights, 2010) 17.

¹⁴⁴*ibid.* cf Chapter Two (n 23).

¹⁴⁵Lord (n 1) 6.

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According to a guide on the Convention, the principle of accessibility aims to dismantle the barriers that hinder the enjoyment of rights by persons with disabilities.¹⁴⁶ The issue concerns not just physical access to places but also access to information, technologies, such as the internet, communication, and economic and social life.¹⁴⁷ The foregoing sections have to some extent outlined some of these potential barriers regarding access to television content for disabled viewers.

The concepts of “full and effective participation and inclusion” and “accessibility” in Article 3 CRPD are interlinked and mean that society, both in its public and in its private dimensions, is organised to enable all people to take part fully.¹⁴⁸ Being fully included in society means that persons with disabilities are recognised and valued as equal participants,¹⁴⁹ whose needs are understood as integral to the social and economic order and not identified as ‘special’.¹⁵⁰ Consequently, to achieve full and effective participation and inclusion, an accessible barrier-free physical and social environment is necessary.

Universal Design

The concept of participation and inclusion is also linked to the notion of universal design, which is defined in the Convention as the “design of products, environments, programmes and services that should be usable by all people to the greatest extent possible without the need for adaptation or specialized design.”¹⁵¹ Lord *et al.* state that “universal design” is just one approach to accessibility which centres on the overall usability of a product or service or environment itself.¹⁵² According to the Global Alliance on Accessible Technologies and Environments (GAATES), there is a “misconception” that the design of accessible information and communication technologies, for instance, can be accomplished with the use of assistive

¹⁴⁶United Nations, *From Exclusion to Equality: Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (UN Office of the High Commissioner for Human Rights 2007) 17.

¹⁴⁷*ibid*

¹⁴⁸UN, (n 143) 22.

¹⁴⁹*ibid*

¹⁵⁰*ibid*

¹⁵¹*ibid* Art 2 CRPD. In other words the design phase should consider the needs of all members of society, to ensure that special adaptations are not required later on.

¹⁵²Lord *et al.*, (n 10) 42.

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technologies. GAATES assert that a more effective approach is to design mainstream technologies to be more accessible.”¹⁵³

It is submitted that such an example may be exemplified by Spain’s introduction of accessible terrestrial television decoders (TTD) which incorporate a pioneering operational system which allows firms to make any devices they manufacture accessible, making Spain the first country to have accessible TTD decoders.¹⁵⁴ The purpose of the project is to take advantage of the possibilities offered by TTD to guarantee persons with disabilities and older persons access to this medium, thereby offering them an effective alternative so that they can make “unimpeded use of terrestrial television decoders”.¹⁵⁵ The measure will benefit some 100,000 visually impaired persons and their families and will facilitate the use of these devices by the more than seven million members of the elderly population.¹⁵⁶

Another example is in France where the broadcasting regulator (Conseil Supérieur de l’Audiovisuel (CSA)) published a study on Digital Terrestrial Television (DTT) devices with voice features. The study was commissioned by the CSA after associations for the blind and visually impaired stated that no DTT device designed for blind people existed in France. The main objective of the study was to ultimately enable the development and commercialization of a DTT device with accessibility features in the French language.¹⁵⁷

Member States who have signed but who have yet ratified the CRPD may not yet be legally obliged to comply with all articles in the Convention; however, this does not exempt them from certain obligations under the Convention which include those relating to universal design.¹⁵⁸

¹⁵³(GAATES), ‘Submission to the Committee on the Rights of Persons with Disabilities, General Day of Discussion on the Right to Accessibility’ 7 October 2010, para 1.

¹⁵⁴Spain, ‘First Initial Report to Committee on the Rights of Persons with Disabilities’ (CRPD/C/ESP/1) 42, paras 228-230.

¹⁵⁵ibid para 229.

¹⁵⁶ibid

¹⁵⁷See EPRA, ‘Access and disability: CSA study on DTT devices with voice features’ (24 June 2012), <http://www.epra.org/news_items/access-and-disability-csa-study-on-dtt-devices-with-voice-features>

¹⁵⁸Ireland, for example, has signed but not yet ratified the Convention. In other words, it has verified its agreement with what the Convention represents, but is not yet legally obliged to comply with all articles in the Convention. With respect to Universal Design, signatory countries are instructed: “To undertake or promote research and development of universally designed goods, services, equipment and facilities, which should require the minimum possible adaptation and the least cost to meet the

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In General Comment No. 2 on Article 9 CRPD¹⁵⁹ the Committee have stated that strict application of the universal design to **all new goods**, products, facilities, **technologies** and **services** should ensure full equal and unrestricted access for all potential consumers, including persons with disabilities, in a way that takes full account of their inherent dignity and diversity.¹⁶⁰ It should contribute to the creation of an unrestricted chain of movement for an individual from one space to another, including movement inside particular spaces, with no barriers¹⁶¹ Furthermore, “[A]ccessibility of information and communication, including ICT, should ...be achieved *ab initio* because subsequent adaptation of ...ICT may increase costs. It is therefore more economical to incorporate mandatory accessibility features of ICT from the earliest stages of design and production.”¹⁶² Conversely, it has been highlighted that universal design is not hitherto employed ubiquitously and may not always be successful in providing access for every individual.¹⁶³ In cases where usability of products or services cannot be provided for every individual, a second approach to accessibility, that of “reasonable accommodation,” is required which is discussed in the section following.¹⁶⁴

Article 5 CRPD (Non-Discrimination) and Reasonable Accommodation

Article 5 CRPD deals with equality and non-discrimination. It stipulates that State Parties to the CRPD must recognise “that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.”¹⁶⁵ Article 5 (2) CRPD in conjunction with Article 4 (1) (b) also prohibits discrimination on the basis of disability and obligates States to guarantee “equal and effective legal protection against discrimination on all grounds.”

Article 2 CRPD states that “discrimination on the basis of disability” means any “distinction, exclusion or restriction on the basis of disability” that has the “purpose

specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.” See Centre for Excellence in Universal Design, <<http://universaldesign.ie/exploreampdiscover/policyandlegislation>>

¹⁵⁹UN, General Comment No. 2 (n 27).

¹⁶⁰*ibid* 5, para 15.

¹⁶¹*ibid*. It further points out that “[T]he application of universal design does not automatically eliminate the need for technical aids.”

¹⁶²*ibid*.

¹⁶³Lord *et al.*, (n 10) 42.

¹⁶⁴*ibid*

¹⁶⁵Art 5 (1) CRPD.

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or effect of “damaging or denying the enjoyment or exercise of human rights by persons with disabilities.” It also specifies that the failure to provide “reasonable accommodation” is itself a form of discrimination. The CRPD defines reasonable accommodation as the “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in particular cases, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹⁶⁶ Accommodation in this regard is the adjustment of a rule, practice, condition or requirement to take into account the specific needs of an individual with disabilities, with the aim of enabling a person to participate fully and equally.¹⁶⁷

The General Comment states that the duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation in order to enjoy her or his rights on an equal basis in a particular context.¹⁶⁸ Consequently it arises only when a person with disabilities attempts to access the service or facility and must be discharged taking into account all the relevant circumstances, choices and preferences of that particular person. This differs from the accessibility obligations imposed by Article 9 which will be discussed *infra*, which apply whether or not any people with disabilities are attempting to access the service or facility and they are duties owed to people with disabilities as a group.

Under the Convention, service providers *inter alia* have a legal obligation to provide reasonable accommodation. In deciding whether a service provider has taken all required measures to accommodate a person with a disability the concept of “disproportionate or undue burden is key.”¹⁶⁹ To establish lawful exemption from the duty to accommodate, a service provider must prove that accommodating the needs of an individual would impose an undue or disproportionate burden on its organisation considering factors such as health, safety or cost.¹⁷⁰

¹⁶⁶Art 2 CRPD.

¹⁶⁷UN, (n 143) 21.

¹⁶⁸*ibid* 8, para 26.

¹⁶⁹*ibid*

¹⁷⁰*ibid*. In Ireland, for example, broadcasting is covered *inter alia* under the Equal Status Act 2000 and Equality Act 2004 which prohibits discrimination on the grounds of disability. These acts require “reasonable accommodation” but for the purposes of these Acts, reasonable accommodation can require no more than a “nominal cost” to the provider, s. 4 (1) and (2) Equal Status Act 2000. *See also*

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The implication here would seem to suggest that broadcasters, as service providers, who are unable or fail to provide access services which are usable to all, have a legal obligation to provide reasonable accommodation for persons with disabilities. This is to be achieved by providing the “necessary and appropriate modifications and adjustments” to ensure persons with disabilities the enjoyment or exercise of their rights on an equal basis with others.¹⁷¹ By inference, broadcasters will only be legally exempted from such an obligation if they can prove that accommodating the needs of an individual would impose an “undue or disproportionate burden” on their organisation considering factors such as cost.

Kallehauge asserts that whether a burden is disproportionate or undue depends on whose duty it is to fulfil the obligation.¹⁷² If it is a duty of a government or public authority or major private company, the burden will have to be extremely heavy before it can be considered disproportionate or undue. On the contrary, if the duty rests upon an individual or a small firm or organisation, the scales will be tipped down much more easily and the burden may be seen as disproportionate or undue.¹⁷³

Generally speaking, the costs of broadcasting production are extremely high. Two surveys carried out by the European Platform of Regulatory Agencies (EPRA) in 2009 and 2013 respectively, indicated that the issue of costs was noted as a major obstacle to increasing access services.¹⁷⁴ In small competitive broadcasting systems such as Ireland, meeting access service commitments and the costs associated with those commitments has become an increasingly significant challenge for many

Equality Authority, ‘Your Equal Rights Explained: Guide of the Equal Status Acts 2000-2008’ (Equality Authority 2010) 7, “[W]hat amounts to nominal cost will depend on the circumstances such as the size and resources of the body involved. If the State provides grants or aids for assisting in providing special treatment or facilities, there may be an onus on the service providers etc. to avail of these grants.”

¹⁷¹E.g. their right to receive information (broadcast content) by virtue of the right to freedom of expression; or the exercise of the right to participate in political and public life or the enjoyment of their right to participate in cultural life.

¹⁷²Holger Kallehauge, ‘General Themes Relevant to the Implementation of the UN Disability Convention into Domestic Law: Who is Responsible for the Implementation and how should it be Performed?’ in Oddný Mjöll Arnardóttir and Gerard Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009) 211.

¹⁷³ibid

¹⁷⁴EPRA, ‘Accessibility of audiovisual media services Workshop’ (EPRA Tallinn Conference - May 7, 2009) 3 < <http://www.epra.org/attachments/tallinn-wg2-access-disability-summary>>; EPRA, (n 60) 17. Interestingly, the Czech Republic response to the EPRA survey in 2009 described how the provision of access services had become a successful economic sector with a flourishing subtitling industry in the Czech Republic cf (EPRA (n 59) 16-17.

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broadcasters in light of the constrained financial, budgetary and economic environments under which such broadcasters are now operating.¹⁷⁵ Therefore in considering policy for quotas and targets to be reached by broadcasters in the provision of access services, policy makers will have to ensure that accommodating such services will not constitute a disproportionate burden on smaller broadcasters.¹⁷⁶ To this end it is submitted that policy makers will have to take factors into account such as the cost of providing access services, the resources of each broadcaster, the broadcaster's remit (*e.g.* public service broadcaster) and the type of programming carried by each channel.¹⁷⁷

The Committee's General Comment on Article 9 states that "[A]ccessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty."¹⁷⁸ In other words a State Party has a duty to provide accessibility before receiving an individual request to use a service. In this regard state parties need to set "broad and standardised" accessibility standards which have been negotiated with organisations of persons with disabilities, and these standards need to be prescribed to service providers and other relevant stakeholders.¹⁷⁹ An example of such standards in this regard would be the BAI's *Access Rules* 2015 in Ireland, or Ofcom's *Code on Television Access Services* in the UK.

The General Comment for instance states that "[I]n the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access."¹⁸⁰ In such cases, reasonable

¹⁷⁵BAI, 'Access Provision A Human Resource: Analysis to Inform Review of Access Rules' (BAI, November 2009) 35. <http://www.bai.ie/?page_id=140>

¹⁷⁶In the USA for example there are exemptions built into the Federal Communications Commission's regulations s.79 1,(d) on closed captioning. These are self implementing exemptions meaning that a provider does not need to seek Commission approval of the claimed exemption. <<http://www.fcc.gov/encyclopedia/economically-burdensome-exemption-closed-captioning-requirements>>

¹⁷⁷*E.g.* live sports content presents different requirements and challenges from pre-recorded programme material). See also Ofcom, *Code on Television Access Services* (Ofcom, May 2015) 8, para 26.

¹⁷⁸General Comment No. 2 (n 27) 7, para 25.

¹⁷⁹*ibid* 7-8, para 25.

¹⁸⁰General Comment No. 2 (n 27) 8, para 25.

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accommodation **may apply**.¹⁸¹ Here, accessibility standards can be an indicator, but may not be taken as prescriptive. In this regard reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Hence a person with a “rare impairment” might ask for accommodation that falls outside the scope of any accessibility standard.¹⁸²

It is suggested that the inference from the General Comment is that if a television viewer with a rare impairment cannot access television content through existing access services that have been prescribed by accessibility standards, it could be open to that viewer to bring a case against a broadcaster on grounds of the duty to provide reasonable accommodation as set out in the CRPD.¹⁸³ Of course any access service sought in this regard could not constitute an undue burden on that broadcaster.¹⁸⁴ As noted, given the high cost of broadcast production and the extensive and diverse audience reach and the associated individual needs of each audience member, it would be impractical if not totally impossible to impose such a burden on every broadcaster.

Another issue to be considered in such a scenario would be whether the imposition of an obligation on a broadcaster to provide an audience member with a rare impairment with a particular access service would be in contravention of a broadcaster’s right to freedom of expression? Article 21 CRPD requires State Parties only to “encourage” the mass media to make their services accessible to persons with disabilities. The scope of Article 21 CRPD will be considered in the section following. In the absence of case law on the issue, it remains to be seen how the duty to provide reasonable accommodation will develop in such situations.

¹⁸¹ Author’s emphasis added.

¹⁸² *ibid* 8, para 26.

¹⁸³ Of course this will depend on the extent to which a state party imposes obligations of reasonable accommodation whether formally (by means of express legislative provisions) or by other measures. For instance in Romania, where the duty of reasonable adjustment does not as such apply beyond employment, rights to information, education and culture have been utilised to require accessible broadcasting for those with speaking and hearing impairments in the case of *Societatea Română de Televiziune* Decision no. 535/2008. See further EU Commission, ‘National protection beyond the two EU Anti-discrimination Directives: The grounds of religion and belief, disability, age and sexual orientation beyond employment’ (EU 2013).

¹⁸⁴ In Ireland, for instance, the duty to provide reasonable accommodation, applies only where such a duty does not give rise to more than a nominal cost- see (n 176).

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Article 9 CRPD - Obligations of State Parties

Accessibility is further elaborated as a separate provision in Article 9 CRPD, which is an article of general application and therefore applicable across the whole text of the Convention.¹⁸⁵ It places a general obligation on State parties to enable persons with disabilities to “live independently and participate fully in all aspects of life” by ensuring their access to the environment.¹⁸⁶ Article 9 CRPD requires Member states to ensure that persons with disabilities are able to access an extensive range of places, facilities and services on an equal basis with others. Such facilities and services explicitly include *inter alia*:

“access to information and communications, including information and communications technologies and systems and to other facilities and services open or provided to the public both in urban and rural areas.”¹⁸⁷

It is submitted that through its explicit recognition of “access to information and communications” including “information technologies and systems” and “to other...services,” Article 9 CRPD requires member states to ensure that persons with disabilities are able to access broadcasting services. The article’s specific reference to services “open or provided to the public” suggests that this duty applies to public service broadcasting and the reference to both “urban and rural areas” suggests that accessibility to such broadcasting services should not be geographically confined, which may be of particular importance in developing countries.

In order to achieve accessibility, Article 9 CRPD specifically requires member states to identify and eliminate barriers to accessibility which expressly includes barriers “...in information, communications and other services...”¹⁸⁸ The provisions in Article 9 that expand the specific measures to be employed are somewhat detailed and endeavour to encapsulate a wide range of access needs of different people with

¹⁸⁵ Arts 3 and 9 CRPD are both articles of general or transversal application. See Chapter Two. *See also* Lord, (n 1) 1-3, states regarding the characterization of “accessibility” “we know it is tagged as a general principle by virtue of its appearance in Article, 3 but its reappearance in Article 9 CRPD requires some disentangling and the interrelationship between accessibility and other core concepts, principles and rules is not explained, although clearly its placement in the text suggests an overarching role.”

¹⁸⁶ European Foundation Centre (EFC), ‘Study on the challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities, VC/2008/1214 Final Report’ (October 2010) 68. <http://www.efc.be/programmes_services/resources/Pages/EFC-publications.aspx?s=Disabilities>

¹⁸⁷ Art 9 (1) CRPD.

¹⁸⁸ Art 9 (1) CRPD.

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disabilities in different contexts.¹⁸⁹ They include *inter alia*: developing and monitoring implementation of minimum accessibility standards and guidelines;¹⁹⁰ providing training on accessibility for stakeholders;¹⁹¹ promoting other “appropriate forms of assistance and support “to ensure access to information;”¹⁹² promoting access to new information and communication technologies and systems, including the internet”;¹⁹³ promoting design, development, production and distribution of information and communications technologies that address accessibility early in their development and that are provided at minimum cost.¹⁹⁴

Article 9 CRPD - Scope

Article 9 CRPD, like other articles in the CRPD, applies to state actors, which include national governments, government agencies and government corporations. In terms of broadcasting, it is submitted that its application will apply to all government departments responsible for telecommunications and broadcasting sectors. It will also apply to state agencies and other departments affiliated to such government departments. In Ireland, for example, an affiliated state agency is the Broadcasting Authority of Ireland (BAI), which regulates certain aspects of both public and commercial broadcasting in the Republic. The Disability Act 2005 places significant responsibilities on public organisations in Ireland to make their services accessible to people with disabilities. Under the Act, public organisations must make sure that their services are accessible for people with disabilities by providing access to mainstream services if this is practical and appropriate.¹⁹⁵ Such public bodies include the Broadcasting Authority of Ireland and public service broadcaster RTE. RTÉ’s services include radio and television channels, online sites, musical performing groups, Aertel (teletext service), transmission networks and publications such as the RTÉ Guide. Furthermore, the Act provides for the designation of an “access officer”

¹⁸⁹ Lord *et al.*, (n 10) 45.

¹⁹⁰ Art 9 (2) (a) CRPD.

¹⁹¹ Art 9 (2) (c) CRPD.

¹⁹² Art 9 (2) (f) CRPD.

¹⁹³ Art 9 (2) (g) CRPD. UN, (n 146) 80, emphasises *e.g.* that the internet provides a crucial link to education, employment opportunities, news and health-care information, and is a channel for civic engagement and social networking. Consequently individuals gain a certain degree of involvement in society through its use and therefore persons with disabilities should have equal access to the internet.

¹⁹⁴ Art 9 (2) (h) CRPD.

¹⁹⁵ Part 3, s. 26 of Disability Act 2005.

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for each public body to provide or arrange for and co-ordinate the provision of assistance and guidance to persons with disabilities in accessing its services.¹⁹⁶

The scope of Article 9 CRPD, however, is not just confined to State actors; it also implicates private actors and requires States to “ensure that private entities that offer facilities and services which are open or provided to the public, take into account all aspects of accessibility for persons with disabilities.”¹⁹⁷ This suggests that while the CRPD is not directly legally binding on private actors, it compels States to take action to ensure that private actors, over whom they exert control, act in a manner consistent with the goals and obligations of Article 9. The inference here, it is submitted, is that “private actors” also includes commercial broadcasters by virtue of the fact that they offer services which are “open and provided to the public.” However, it is unclear whether Article 9 will require States to impose specific duties on commercial broadcasters in this regard. While member states may ensure that commercial broadcasters do not create or fail to remove access barriers, it is less clear whether they will impose a positive duty in this respect. A case in point of not creating barriers in relation to television access services may be illustrated by the BAI’s *Access Rules 2015* whereby when an applicant applies for a licence to provide a new television service, targets indicating the level of access provision on the new service are set at contracting stage rather than the past practice of being allowed to be on air for one year before targets were set.¹⁹⁸

The Committee on the Rights of Persons with Disabilities addressed the issue of accessibility with regard to private entities in the case of *Nyusti and Takacs v Hungary* in 2013.¹⁹⁹ In that case it found that Hungary had failed to ensure accessible banking services for persons with visual impairments and was therefore in violation of Article 9(2)(b) CRPD. The Committee recommended among other things, that the state party establish minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments and create a legislative framework with concrete, enforceable and time bound benchmarks for monitoring and assessing the gradual

¹⁹⁶s. 26 (2) Disability Act 2005.

¹⁹⁷Art 9 (2) (b) CRPD.

¹⁹⁸The new commercial *UTV Ireland* service which commenced operation on 1st January 2015 was subject to this new rule.

¹⁹⁹*Nyusti and Takacs v Hungary (Communication No 1/2010, Views adopted on 16 April 2013).*

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modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones.

The Committee has also expounded on the accessibility duty for private actors in its General Comment on Article 9 CRPD on Accessibility. The General Comment states that it is important that accessibility is addressed in all its complexity, encompassing information and communication, and services. The focus is no longer on legal personality and the public or private nature of those who own information and communication, and services. As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.

The drafters of the CRPD intended Article 9 to be a common reference point for all issues of accessibility.²⁰⁰ As such, Article 9 is intended to inform and assist in the interpretation and implementation of all the rights contained in the Convention.²⁰¹ Consequently, in seeking to implement any of the rights in the CRPD, Article 9 is a suitable reference point for state parties to the Convention to measure their accessibility duties and performance.

In summary, Member States' obligations with regard to accessibility include: an obligation to respect, by refraining from engaging in any act, custom or practice that creates barriers to accessibility; an obligation to protect, by ensuring that non-State or "private actors," such as businesses that offer services to the public *e.g.* commercial broadcasters, do not create or fail to remove barriers to access for people with disabilities; an obligation to fulfil, by affirming that States must take proactive action (as indicated in the provisions outlined in Article 9 CRPD) to ensure accessibility for persons with disabilities.

As noted *supra*, the Committee's General Comment on Article 9 states that "[A]ccessibility is related to groups, whereas reasonable accommodation is related to individuals."²⁰² This means that a State Party has a duty to provide accessibility before receiving an individual request to use a service. In this regard state parties need to set "broad and standardised" accessibility standards and it is of the utmost

²⁰⁰Lord *et al.*, (n 10) 45.

²⁰¹Arts 10-30 CRPD covers the rights guaranteed to persons with disabilities.

²⁰²General Comment No. 2 (n 27) 7, para 25.

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importance to the effectiveness of any efforts to implement Article 9 CRPD that State parties fully involve organisations of persons with disabilities at all stages of the development of these standards.²⁰³ An example of such standards in this regard would be the BAI's *Access Rules 2015* in Ireland, or Ofcom's *Code on Television Access Services* in the UK.

Article 9 is subject to progressive realisation. Accordingly State parties are under an obligation to ensure the access to already existing information and communication services opened to the general public is to be implemented gradually. Therefore State parties should set definite, enforceable, fixed time frames, for monitoring and assessing the gradual modification and adjustment by public and private entities of their previously inaccessible services into accessible ones and allocate adequate resources for the removal of existing barriers.²⁰⁴

The General Comment makes it clear, however, that in accordance with the Convention, States parties are not permitted to use austerity measures as an excuse to avoid ensuring **gradual** accessibility for persons with disabilities.²⁰⁵ It states that the obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities.²⁰⁶

Accessibility Duty and Non-Discrimination

One matter which has become somewhat clearer through both the Committee's jurisprudence and the General Comment regarding the duty contained in Article 9 CRPD is its linkage to non-discrimination. Article 9 requires state parties to take appropriate measures to ensure persons with disabilities have "access" to certain types of information and services "on an equal basis with others."²⁰⁷ A failure to fulfil this obligation therefore would result in inequality of access, which may be expected to constitute discrimination on the basis of disability, which States are required to prohibit by virtue of Article 5 CRPD. The CRPD does not go further in enumerating the circumstances according to which a failure to meet the duty

²⁰³ *ibid* 7-8, para 25.

²⁰⁴ General Comment No. 2 (n 27) 7, para 24.

²⁰⁵ General Comment No. 2 (n 27) 8, para 25. Author emphasis added.

²⁰⁶ *ibid*

²⁰⁷ Art 9 (1) CRPD.

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contained in Article 9 CRPD will constitute discrimination. The Committee however in General Comment No. 2 on Accessibility have stated that “denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity.”²⁰⁸ It further stipulates that accessibility should be provided to all persons with disabilities, regardless of the type of impairment without distinction of any kind such as race, colour, religion etc.,.

The General Comment also explicitly asserts that persons with disabilities who have been denied access to the physical environment, transportation, information and communication technologies, and facilities or services open to the public should have “effective legal remedies at their disposal.”²⁰⁹

There have been some discrimination cases brought in various jurisdictions in relation to broadcast access services. In 2009, for example, in a case before the Czech Republic Defender of Rights, it was found that a private channel Prima TV, despite having fulfilled its requirements under broadcasting law relating to closed captioning or sign language,²¹⁰ only did so partially and therefore this constituted discrimination.

Anna Lawson states that the usefulness of anti-discrimination laws as levers for enhancing accessibility depends both on the content of the obligations and also on issues relating to enforcement (including remedies).²¹¹ She states that imposing legal obligations to make services or goods accessible without clear explanations of what ‘accessible’ means runs the risk of generating vast amounts of litigation and in effect, delegating decisions about the legal definition of accessibility to courts.²¹² It also runs the risk of ineffectiveness because confusion about and inconsistency of

²⁰⁸General Comment No. 2 (n 27) 4, para 13.

²⁰⁹ibid 9, para 29.

²¹⁰ibid, ACT No. 231/2001 of 17 May 2001 on Radio and Television Broadcasting and on Amendment to Other Acts, 32 (2). *See also*, in Australia in July 2015, where a blind television viewer launched a case in the Federal Circuit Court against public service broadcaster ABC claiming that it has unlawfully discriminated against her by not providing a regular audio description service for the blind and vision impaired. *See* ‘Blind woman sues ABC for discrimination over lack of audio narration’ *The Guardian* 7 July 2015, < <http://www.theguardian.com/media/2015/jul/07/blind-woman-sues-abc-for-discrimination-over-lack-of-audio-narration>>

²¹¹Academic Network of European Disability Experts (ANED), ‘Maximising the Impact and Effectiveness of Accessibility Measures for Goods and Services: Learning from National Experience Synthesis Report for the Academic Network of European Disability Experts’ (Prepared by Anna Lawson, University of Leeds on the basis of country reports provided by ANED experts and with assistance from Dr Sarah Woodin, University of Leeds, 2012) 13.

²¹²ibid 34.

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interpretation of accessibility make it difficult for *inter alia* service providers to plan appropriately and to check for conformity.²¹³

In the General Comment on Accessibility, the Committee assert that States parties are obliged to adopt, promulgate and monitor national accessibility standards.²¹⁴

Having outlined the extent of the accessibility duty and the prospective obligations it imposes on State parties in relation to the issue of information and communication, the section following examines that duty in relation to Articles 21 and 30 CRPD, which intersect with Article 9 CRPD on the issue. The object of the evaluation is to assess whether that duty is equivalent when contemplated in light of the right to freedom of expression and the right to participate in cultural life, for example through access to television programmes in accessible formats.

Article 21 CRPD

Article 21 CRPD deals with the right to freedom of expression and opinion and access to information. The right to freedom of expression as contained in various human rights treaties has been outlined in detail in preceding chapters and will not be re-iterated here.²¹⁵ As aforementioned, freedom of expression, and its corollary freedom of the media, is indispensable for genuine democracy and democratic processes. The importance of broadcasting in the life of democracy and citizenship was highlighted in Chapter One. There it was emphasised that full effective citizenship necessitates access to a range of information insights, arguments, explanations that enable people to make sense of the changes affecting their lives and to evaluate the range of actions open to them both as individuals and as members of a political community. It was further asserted that without these resources citizens are excluded from effective participation and become victims, rather than the subjects of change, and are unable to pursue their rights and press for their extension. In this regard broadcasting, owing to its centrality, has become a vital platform on which the fight to secure and develop resources for citizenship takes place.

Consequently, when broadcast media is inaccessible to persons with disabilities, it is submitted that they are effectively excluded from effective participation in

²¹³ *ibid*

²¹⁴ General Comment No. 2 (n 27) 8, para 28. *See also* the Committee's other remarks in para 28.8.

²¹⁵ Art 10 ECHR, Art 19 ICCPR. *See* Chapter Four.

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democracy as citizens. Lord *et al.* state that unless people with disabilities can enjoy their right to freedom of expression and opinion, no State can comply with its legal obligation under the CRPD.²¹⁶ However, whether the right can be extended to include a right to receive information in accessible formats (*e.g.* television programming), by imposing a duty on broadcast service providers to provide such access services, requires further analysis.

Generally speaking, the right to freedom of expression contains a number of elements, such as the right to hold opinions, the right to seek and receive information and ideas and the right to impart information and ideas. According to a United Nations general comment on the right to freedom of expression in the ICCPR, the free communication of information and ideas about public and political issues between citizens implies a free press and other media (such as broadcasting) to be able to comment on public issues without censorship or restraint in order to inform public opinion.²¹⁷ Moreover, it asserts that the public has a corresponding right to receive media output. However the right is not absolute and may carry with it “duties and responsibilities” and may be subject to such “formalities, conditions, restrictions or penalties” as are necessary.²¹⁸ Article 10 (2) of the ECHR details a number of grounds on which the right may be legitimately restricted. These limitations however, must be “prescribed by law” and be “necessary in a democratic society”, in the interests of *inter alia* “...the protection of ... the rights of others.”

In addition to the duty contained in Article 9 CRPD on member states to ensure that persons with disabilities are able to access services open to or provided to the public on an equal basis with others, Article 21 CRPD on the right to freedom of expression and opinion, and access to information also imposes a positive duty on State parties to:

“ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice... including by:”²¹⁹

²¹⁶Lord *et al.*, (n 10) 61.

²¹⁷See UNHRC, (n 3) 3-4, §13 citing the Committee’s General Comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para 25, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V.

²¹⁸cf. Article 19 (3) ICCPR.

²¹⁹“Communication” is defined in Art 2 CRPD and includes languages, display of text, Braille, tactile communication, large print, **accessible multimedia** as well as written, audio, plain-language, human

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Article 21 CRPD then sets out a number of action oriented measures to be undertaken in order to achieve the exercise of the right. It is submitted that the reference to the word “including by” suggests that the manner in which the right is to be achieved may not be restricted just to the measures detailed in Article 21CRPD, and may be open to interpretation that it could be achieved using other “appropriate” measures. However the text does not elaborate any further on the issue.

In outlining the measures to be taken by State Parties, Article 21 (a) CRPD asserts that one such measure includes “providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.”²²⁰

There is no explanation given in the text of the Convention as to what constitutes “information intended for the general public.” Using a broad interpretation, it is submitted that the reference could infer that such measures may extend to public service broadcasters. If so, it suggests that public service broadcasters may have a duty to provide information in accessible formats and technologies. Moreover, the reference to such technologies and formats being “appropriate to different kinds of disabilities” suggests that in the provision of such accessible formats and technologies and services, public service broadcasters should take into consideration different types of disabilities. Additionally these measures would have to be provided in a timely manner and without additional cost to persons with disabilities.

Article 21 CRPD asserts that another means by which the right to freedom of expression for persons with disabilities is to be achieved by State Parties is by “urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities”.²²¹ The reference to “private entities that provide services to the general public” suggests that the provision may apply to the provision of services by commercial broadcasters. The use of the word “urging” however has several connotations including “insisting on,” “or the desire for” or “appealing to”;

reader and augmentative and alternative modes, means and formats of communication, **including accessible information and communication technology**. [Emphasis added]

²²⁰ Art 21 (a) CRPD.

²²¹ Art 21 (c) CRPD.

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however, it is submitted that it does not imply that a State Party impose a positive duty on private entities in this regard.

The final measure listed in Article 21 CRPD to ensure that persons with disabilities can exercise their right to freedom of expression expressly refers to the media. Here State Parties undertake to ensure the exercise of the right to freedom of expression by persons with disabilities by “[E]ncouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;”²²²

It is submitted that the reference here to the word “encouraging” denotes that there is a limit as to what State parties can oblige their broadcasters to do in making their services accessible to persons with disabilities, clearly on the grounds that such limitations would impede on the media’s right to freedom of expression itself.²²³ It is further noted that the measure does not distinguish between public or private service providers in this regard. This provision, as with the latter provisions in Article 21 CRPD, does not indicate how this is to be achieved, *i.e.* how such services can be made accessible.

It is submitted that given the accessibility duty contained in Article 9 CRPD, as discussed *supra*, and the fact that Article 21CRPD requires that state parties are to take all appropriate measures to ensure that persons with disabilities can exercise their right to freedom of expression, including the freedom to receive information and ideas “on an equal basis with others”, the issue is made all the more complex given the connection between the right to freedom of expression and non-discrimination.

It will be recalled that discrimination on the basis of disability means “any distinction, exclusion or restriction, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by persons with disabilities, on an equal basis with others, of all human rights and fundamental freedoms and includes

²²²Art 21 (d) CRPD.

²²³This is similar to the reasons put forward in drafting Art 8 CRPD on awareness raising whereby member states can only encourage mass media to portray persons with disabilities in a manner consistent with the Convention.

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the denial of reasonable accommodation.”²²⁴ Article 5 (2) CRPD prohibits all discrimination on the basis of disability. Likewise Article 4 CRPD requires State Parties to take measures to ensure the promotion and full realisation of all human rights and fundamental freedoms for all persons with disabilities while also prohibiting any form of discrimination in their attainment.

It is submitted that persons with disabilities are effectively restricted if not excluded in both the exercise of and enjoyment of their right to freedom of expression (i.e. the right to receive information) when they cannot access television content in accessible formats. Access in this regard is crucial in rendering their right to freedom of expression effective in practice. It is submitted therefore that the denial of access to television content in accessible formats may constitute a form of discrimination under Article 21 CRPD.

However, Article 21 CRPD, unlike other international treaties which deal with the right to freedom of expression, does not specify the parameters of the right. The non-legally binding UN Standard Rules, which buttressed the CRPD’s initiation, do not deal with the right to freedom of expression; therefore guidance on Article 21 CRPD is limited in this regard.²²⁵ A case from the European Court of Human Rights (ECtHR), however, may provide some guidance in the discussion surrounding the principles pertaining to the effectiveness of the right to receive information and ideas, notwithstanding the fact that the case involved private parties.

In the case of *Khurshid Mustafa & Tarzibachi v. Sweden*²²⁶ the applicants, a husband and wife, who were Swedish nationals of Iraqi origin, were effectively prevented from receiving television programmes in Arabic and Farsi transmitted by satellite from their native country or region. A clause in their tenancy agreement prohibited the installation of “outdoor antennae”. The applicants had been utilising a satellite

²²⁴Art 2 CRPD.

²²⁵Albeit several of the UN Standard Rules address preconditions to equality of participation that are relevant to the enjoyment of this right. Rule 1 deals with awareness raising which positively impacts on attitudinal barriers faced by people with disabilities when trying to exercise their right to freedom of expression and opinion. Rule 4 deals with support services and the provision of assistive devices and services that could be useful to people with disabilities in the enjoyment of the right. Rule 5 addresses accessibility, including access to information and communication. Rule 10 deals with the need to ensure accessibility of literature, films, and theatre for people with disabilities to fully enjoy culture.

²²⁶*Khurshid Mustafa & Tarzibachi. v. Sweden*, App. No. 23883/06, (Third Section), 16 December 2008.

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dish which had been installed prior to their tenancy of the flat. The landlord insisted that the dish be dismantled and when the applicants were not compliant with his request, he issued a notice of termination of their tenancy agreement. On taking legal action against the applicants, the landlord succeeded in securing an eviction order against them. Relying on Article 10 (freedom to receive information) and Article 8 (right to respect for private and family life), the applicants complained that they and their three children were forced to move from their rented flat because they refused to remove a satellite dish. The ECtHR held that it was not necessary to consider the matter under Article 8 ECHR as it concluded that the interference with the applicants' right to freedom of expression (the right to receive information) had not been “necessary in a democratic society” and held unanimously that there had been a violation of Article 10 ECHR.²²⁷

The European Court stated that it was of “particular importance” for the applicants as an immigrant family with children to be able to receive a wide range of information which included not just political and social news but also “cultural expressions and pure entertainment” from their country of origin in order to be able to maintain contact with their native culture and language.²²⁸ McGonagle states that the significance of this acknowledgment by the Court is that it interprets general freedom of expression principles in a minority specific, and minority sensitive way.²²⁹

Additionally, the judgment is significant for the ECtHR’s willingness to focus not merely on the “substance of the ideas and information expressed, but also the form in which they are conveyed.”²³⁰ In this regard the European Court found that even though the applicants might have been able to obtain certain news through foreign papers and radio programmes, these sources of information only covered parts of what is available via television broadcasts and could not in any way be equated with the latter.²³¹ According to McGonagle, the ECtHR recognises here that media

²²⁷The fact that the applicants had effectively been evicted from their home with their three children had been disproportionate to the aim pursued, namely the landlord's interest of upholding order and good custom.

²²⁸*Khurshid Mustafa & Tarzibachi* (n 226) 218, §44.

²²⁹McGonagle (n 18) 6.

²³⁰*ibid*

²³¹*Khurshid Mustafa & Tarzibachi* (n 226) 218, §44. The ECtHR found that the applicants “might have been able to obtain certain news through foreign papers and radio programmes, but these sources

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functionality is an important factor for assessing whether particular expressive or informational opportunities are effective for particular groups:

“[T]he mere existence of other expressive or informational opportunities is not sufficient: they must also be viable opportunities in the sense that they are suited to the expressive or informational purpose of the individual or group relying on the right.”²³²

He asserts that functional equivalence between media cannot simply be assumed.

It is submitted that McGonagle’s observations regarding the supposition of functional equivalence between media could be applied to persons with disabilities. For example, people who are blind or have visual impairments are largely excluded from access to print media. However the mere existence of other expressive or informational opportunities, such as radio, for people with such disabilities does not mean that radio is sufficient; it must also provide a viable opportunity in the sense that it is suited to the expressive or informational purpose of individuals who are blind or have visual impairments. In this regard television which includes audio description might be a more viable opportunity for such individuals. In other words, particular media which one section of society may regard as functional or effective for its expressive and informational needs may be regarded as unsuitable or ineffective by others. Research has shown that television proves to be as vital a part of the cultural and social interactions of visually impaired audiences as it is for sighted viewers.²³³ Additionally it provides an important alternative source of news and information for people who are blind.²³⁴ Television which includes audio description has been found to be “socially beneficial” for those who have severe or profound visual impairments enabling them to engage in conversations about television from which they had previously been excluded.²³⁵ It is submitted therefore that being able to access television through audio description enables social

of information only cover parts of what is available via television broadcasts and cannot in any way be equated with the latter.” There had not been any other means at the relevant time for the applicants to have access to such programmes and the dish could not be placed anywhere else.

²³²McGonagle (n 18) 6.

²³³Elizabeth J Evans *et al.*, ‘Boxed Out: Visually Impaired Audiences, Audio Description and the Cultural Value of the Television Image’ (2009) 6 (2) *Journal of Applied Audience & Reception Studies* 373, 374.

²³⁴BAI, (n 129) 71.

²³⁵Therefore being able to access television with audio description enables social inclusion, fosters independence and allows persons with such disabilities to exercise their right to freedom of expression by sharing and exchanging views.

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inclusion,²³⁶ fosters independence and allows persons with such disabilities to exercise their right to freedom of expression by sharing and exchanging views on such content, thereby effectively rendering their right to participation in both political and public and cultural life.

McGonagle identifies “several upshots” to a selection of statements of principle by the European Court of Human Rights in the *Mustafa* case. Firstly, participation by minorities (broadly defined) in public debate is a pre-requisite for a healthy democracy. Secondly, the ability to participate in public debate is shaped in large measure by the ability to access the channels via which information and ideas are disseminated and the medium on which such debates are carried out. He asserts that the quality and extent of that access tend to be determined by a range of factors *e.g.* demographic, social, economic and technological. Such factors and their impact on communicative practices and patterns are dynamic, and the ECtHR should bear this in mind when interpreting Article 10, ECHR.²³⁷ Moreover, he asserts that the functionality of different media should be examined by the Court from the perspective of the users.

Germany, for example, in its initial report to the UN Committee on the Rights of Persons with Disabilities on the implementation of the CRPD, reported on its accessibility provisions relating to television under Article 21 CRPD.²³⁸ The report asserts that “[A] pre-requisite for enforcing the right of free expression of opinion for persons with disabilities is access to information.”²³⁹ It further states that information and media are to be as accessible as possible for persons with disabilities in the interest of their self-determination and participation. Accordingly, they should be able to access and use media without special difficulty and as a matter of principle without the assistance of others. In this regard the authorities of the German

²³⁶Evans *et al.*, (n 233) 384. The research found that without Audio Description visually impaired audience members felt cut off from a valuable cultural and social resource; lacking the vital information that gave their opinion validity, they felt unable to fully contribute to the communal evaluation of television texts.

²³⁷McGonagle (n 18) 7.

²³⁸United Nations Convention on the Rights of Persons with Disabilities: First State Report of the Federal Republic of Germany adopted by the Federal Cabinet on 3 August 2011, (CRPD/C/DEU/1) 33-34. Germany also reported other accessibility measures under Article 30 CRPD in the Report.

²³⁹*ibid* 33.

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Federation put in place three ordinances relating to the matter in accordance with the Act on Equal Opportunities for Persons with Disabilities.²⁴⁰

The report, under Article 21 CRPD notes that in support of the realisation of freedom to “acquire information”, persons with disabilities may under certain pre-conditions be exempted from paying a television licence fee. It further notes that the provision of German sign language or the promotion of the provision of information for persons with “learning and mental disabilities”, in particular the expansion of subtitling and audio-description, can be considered in order to implement accessibility in film and television. It notes that public-law television corporations which are funded via [licence] “fees” have expanded video text subtitling and audio-description in recent years of films, series and live broadcasts and are continually expanding the service. Furthermore, private operators have also expanded their service albeit at a considerably reduced level. Public-law radio and television corporations and all private operators of nationwide radio stations are “increasingly to include” barrier free services in addition to their existing commitments as they are technically and financially able.²⁴¹

In light of all issues outlined in the foregoing section regarding accessibility and Article 21 CRPD, it remains to be seen how the application of Article 21 and the obligations contained in Article 9 will develop, particularly in the context of how it might relate to discrimination. In the General Comment on Accessibility, the Committee recognises that Articles 9 and 21 CRPD intersect on the issue of information and communication and make a number of related recommendations.²⁴²

²⁴⁰ibid. Communication Aid Ordinance 17 July 2002 (Federal Law Gazette Part i P. 2650) ; Ordinance on Barrier Free Documents in the Federal Administration of 17 July 2002 ; Barrier free Information Technology Ordinance of 17 July 2002.

²⁴¹As prescribed by the Interstate Broadcasting Agreement (Rundfunkstaatsvertrag) 1 June 2009. The Länder, which are responsible under that law for the division of competencies, review this on a regular basis. However, Germany submitted its initial report to the Committee in September 2011. In 2013, Germany introduced a broadcasting levy “Rundfunkbeitrag” on all households. Although the Rundfunkbeitrag is a flat tax, some social exemptions have been put in place which includes exemptions for persons who are blind and for persons with a level of deafness over a certain threshold.

²⁴²General Comment No. 2 (n 27) 11, para 38, where the Committee highlight the necessity of establishing minimum standards in close co-operation with persons with disabilities and encourage State parties to join ITU study groups and actively work at mainstreaming accessibility in the development of international telecommunications and ICT standards and at raising industry’s and governments awareness of the need to increase access to ICT for persons with disabilities.

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Article 30 CRPD

Article 30 CRPD recognises the right of persons with disabilities to take part on an equal basis with others in cultural life. The Article places an obligation on Member states “to take all appropriate measures to ensure that persons with disabilities” *inter alia* “enjoy access to television programmes...in accessible formats.” The Article however does not elaborate as to what comprises such “appropriate measures” nor does it indicate what constitutes “accessible formats.” It is submitted that it may have been the intention of the drafters not to elucidate on what comprises “appropriate measures”, leaving to the State Parties in question to decide what constitutes appropriate measures according to their national regulatory systems. Likewise, the lack of explanation on what constitutes “accessible formats” could possibly indicate reluctance to confine or categorise a list of accessible formats in order to leave the way open for new technologies which offer such features. However it is submitted that some guidance should be given.

The reference to participation “on an equal basis to others” in Article 30 CRPD implies the connection between the right to participate in cultural life and non-discrimination. This suggests that denial of access to television programmes in accessible formats could amount to discrimination on grounds of disability under Article 30 CRPD. However, Article 30 CRPD does not outline the parameters of the right to participate in cultural life.

The right to participation in cultural life, however, is recognised in several international human rights instruments.²⁴³ At European Level, the Audiovisual Media Services Directive 2010//13/EC recognises that the “right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services.”²⁴⁴ It further states that the means to achieve such accessibility is through provision of access services such as sign language, subtitling, audio-description and easily understandable menu navigation.²⁴⁵

²⁴³Art 27 (1) UDHR states that everyone has the right to freely participate in the cultural life of the community. *See also* Art 5 (e) (vi) ICERD; Art 13 (c) CEDAW; Art 31 (2) CRC; UN Standard Rules para 17.

²⁴⁴Recital 46 AVMSD 2010/13/EU.

²⁴⁵*ibid*

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Likewise the Council of Europe (CoE) recognises that to be fully integrated into society people with disabilities should also be able to participate in the cultural life of that society.²⁴⁶ It further states that appropriate measures should be taken to ensure that people with disabilities can participate *inter alia* in cultural activities and in this regard access to communication and information is a pre-requisite.²⁴⁷

It can be gleaned, therefore, that both the European Union and the Council of Europe recognise the inseparable linkage between the notion of full and effective participation and inclusion and accessible broadcasting/ audiovisual media services.

The UN Committee on Economic Social and Cultural Rights have issued a general comment on the right of everyone to take part in cultural life as contained in Article 15 ICESCR,²⁴⁸ which it is submitted may provide some guidance as to the interpretation of Article 30 CRPD. The General Comment states that cultural rights are “an integral part of human rights and, like other rights, are universal, indivisible and interdependent.”²⁴⁹ It further states that “the full promotion of and respect of cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.”²⁵⁰

The General Comment provides that the right to take part in cultural life as contained in Article 15 ICESR can be characterized as a freedom.²⁵¹ In order for this right to be ensured, it requires from the State party both abstention (i.e. non interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).²⁵² It further states that there are a number of necessary conditions for the full realization of the right of

²⁴⁶Recommendation Rec (2006) 5 of the Committee of Ministers to Member States on the Council of Europe’s Action Plan to promote the rights and full participation of people with disabilities in society; improving the quality of life of persons with disabilities in Europe 2006-2015, (*Adopted by the Committee of Ministers on 5 April 2006 at the 961st Meeting of the Ministers Deputies*) 5.

²⁴⁷*ibid*

²⁴⁸UN, CESCR, *General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.

²⁴⁹*ibid* §1.

²⁵⁰*ibid* §2.

²⁵¹*ibid* §6.

²⁵²*ibid*

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everyone to take part in cultural life on the basis of equality and non-discrimination.²⁵³ Among such conditions are the concepts of availability, accessibility, acceptability, adaptability, and appropriateness.

Availability is the presence of cultural goods and services that are open for everyone to enjoy and benefit from.²⁵⁴ Accessibility consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.²⁵⁵ In this regard, access for older persons and persons with disabilities, as well as for those who live in poverty, should be provided and facilitated.²⁵⁶

Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expression and dissemination.²⁵⁷

Adaptability refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities.²⁵⁸

Appropriateness refers to the realization of a specific human right in a way that is pertinent and suitable to a given culture modality or context, that is respectful of the culture and cultural rights of individuals and communities including minorities and indigenous peoples.²⁵⁹ The General Comment further recognizes persons with disabilities as persons and a community requiring special protection.²⁶⁰

As regards non-discrimination it provides that the Covenant prohibits any discrimination (both direct and indirect) in the exercise of the right of everyone to

²⁵³ *ibid*

²⁵⁴ *ibid* §16 (a).

²⁵⁵ *ibid* §16 (b).

²⁵⁶ *ibid* §16 (c).

²⁵⁷ *ibid*

²⁵⁸ *ibid* §16 (d).

²⁵⁹ *ibid* §16 (e).

²⁶⁰ *ibid* §30. It is submitted that Art 30 CRPD like other rights enshrined in the Convention imposes three types of level of obligations on State parties, i.e. the obligation to respect the right to participate in cultural life which requires State Parties to refrain from interfering directly or indirectly with the enjoyment of the right to take part in cultural life; the obligation to protect which requires States to take steps to prevent third parties from interfering with the right to take part in cultural life; the obligation to fulfil which requires State Parties to take appropriate legislative, administrative, budgetary, promotional and other measures aimed at the full realisation of the right enshrined in Art 30 of the Convention.

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take part in cultural life.²⁶¹ Explicitly, it states that “no one shall be excluded from access to cultural practices, goods and services.”²⁶² It recognises that the elimination of all forms of discrimination in order to guarantee the exercise of the right to partake in cultural life can in many cases be achieved with limited resources by the adoption, amendment or repeal of legislation or through publicity and information.²⁶³ It further states that even in times of severe resource constraints, the most disadvantaged and marginalized individuals and groups can and must be protected by the adoption of relatively low-cost targeted programmes.²⁶⁴

The CRPD itself in Article 4 (2) provides some indication as to how the right to participate in cultural life is to be implemented. This article states that with regard to economic, social and cultural rights,²⁶⁵ such as those contained in Article 30, the CRPD affirms the obligation of States to progressively implement them using the greatest amount of available resources to do so.²⁶⁶ The progressive realization obligation acknowledges that it often takes time to realise many of these rights fully.²⁶⁷ However, while it gives State Parties, particularly developing countries, some flexibility in achieving the objectives of the Convention, it does not absolve State Parties of the responsibility to protect those rights.²⁶⁸ It is submitted, therefore, that the obligation on state parties to take appropriate measures to ensure that persons with disabilities enjoy access to television programmes in accessible formats under Article 30 CRPD is subject to progressive realisation.

Kallenhague observes that if a government declares that it will take no further steps towards full realisation of an economic, social or cultural right which is not yet fully

²⁶¹ *ibid* §21.

²⁶² *ibid*

²⁶³ *ibid* 6, §23.

²⁶⁴ *ibid*, here it refers to the General Comment No. 3 (1990) b Statement by the Committee: an evaluation of the obligation to take steps to the “maximum available resources” under an optional protocol to the Covenant (E/C/12/2007 1).

²⁶⁵ EFC, (n 186) 121. Economic, social and cultural rights also known as solidarity rights which cover those rights whose recognition and enjoyment is a trigger for solidarity, social cohesion and meaningful inclusion in society. Solidarity rights are “key enablers to facilitate freedom and choice for persons with disabilities.”

²⁶⁶ Art 4 (2) CRPD states: “With regard to economic, social and cultural rights, each State party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the Present Convention that are immediately applicable according to international law.”

²⁶⁷ The progressive realization obligation is also recognised in Art 2 ICESCR and Art 4 CRC.

²⁶⁸ UN, (n 146) 19. *See also* UN, (n 143) 29-30.

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realised, it will be a contravention or clear breach of Article 4(2) CRPD.²⁶⁹ He further states that ensuring progress cannot be lawfully abandoned and in this regard a government must continue its work towards full realisation.²⁷⁰

A Handbook for Parliamentarians on the Convention provides further guidance and states that several aspects of the progressive realization of solidarity rights are important for monitoring purposes. The first is that discrimination on any grounds, including disability, is always forbidden, regardless of the level of realization of such solidarity rights. It also asserts that States have an immediate obligation to ensure a minimum level of enjoyment of each economic, social and cultural right.

It is submitted therefore, that by implication State parties to the CRPD have an immediate obligation to ensure a minimum level of provision of television programmes in accessible formats. Additionally, States have an obligation to take steps towards the progressive realization of these rights. Kallehauge states that steps to fulfilment can be great or small and as long as they are taken continuously, they will be seen to be progressive. Whether a step is sufficient depends not only on the resources available but also on an evaluation of the maximum resources in a national context.²⁷¹ In this regard more will be demanded of rich western industrial countries than of developing countries and countries in economic transition.²⁷²

The handbook outlines ways in which Article 30 CRPD can be monitored. In this regard it suggests that States develop a plan of action which should include (a) a time frame for implementing economic, social and cultural rights; (b) time-bound benchmarks of achievement; and (c) indicators of success.

An example of this in practice is the BAI's *Access Rules* 2015. The *Access Rules* determine the levels of subtitling, sign language and audio description that all broadcasters in Ireland (public and private) are required to provide in accordance with their statutory obligations. The Rules set out target ranges for each broadcaster for access service provision to be achieved within a 5 year timeframe. The rules are subject to review every two years. The BAI measures compliance with the rules by

²⁶⁹Kallehauge (n 172) 210.

²⁷⁰ibid

²⁷¹ibid

²⁷²ibid

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requesting broadcasters to submit an annual report of the quantity /level of their subtitling, audio description and sign language (where applicable) they have broadcast; the BAI then verifies the reports through a process of monitoring and spot checks.²⁷³

By way of note, guidance on the CRPD points out that States are forbidden from taking regressive steps or measures that diminish the enjoyment of economic, social and cultural rights.²⁷⁴ It does not however outline what constitutes such regressive steps or measures. Consequently it is submitted that it is open to interpretation, in cases where a State party establishes minimum access services targets for a given period and subsequently revises them by lowering the initial minimum targets, whether this would constitute a regressive step. An example in practice may be illustrated by the Australian case regarding the provision of audio description outlined *infra*.²⁷⁵

Monitoring and Implementation - Articles 9, 21, 30 CRPD and Accessibility

The Committee on the Rights of Persons with Disabilities monitors implementation of the Convention by State Parties at international level. All state parties are obliged to submit regular reports to the Committee on how the rights and provisions in the Convention are being implemented.²⁷⁶ Chapter Two has outlined the various reporting and procedural obligations pertaining to State Parties and the Committee which will not be repeated here.

The Committee has issued reporting guidelines with the purpose of advising State Parties on the form and content of their reports, so as to facilitate the preparation of reports and ensure that these are comprehensive and presented in a uniform manner.²⁷⁷ Stein notes that the role of the Committee in articulating reporting guidelines is a particularly important one and, in following best practices of existing

²⁷³For additional measures taken in this regard see BAI, *Access Rules* 2015, Rules 6.3 and 9.

²⁷⁴UN, (n 143) 30.

²⁷⁵See (n 210).

²⁷⁶Art 35 (1) CRPD. See also Michael A Stein, and Janet E Lord, 'Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential' (2010) 32 (3) *Human Rights Quarterly* 689.

²⁷⁷UN, Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities* CRPD/C/2/3, Second session, Geneva, 19–23 October 2009. <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>>

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treaty bodies, such guidelines should be well tailored to the specific obligations set forth in the Convention.²⁷⁸

The reporting guidelines state that in their initial reports State parties should deal specifically with every article of the Convention. In addition to information contained in the common core document,²⁷⁹ the guidelines state that a detailed analysis of the impact of legal norms on persons with disabilities' factual situation and the practical availability, implementation and effect of remedies for violation of provisions of the Convention should be provided and explained in the Convention specific document.²⁸⁰ The guidelines further state that the initial report should outline any distinctions, exclusions or restrictions made on the basis of disability even of a temporary nature, imposed by law, practice or tradition, or in any other manner on the persons with disabilities enjoyment of each provision of the Convention.²⁸¹

As outlined *supra*, one of the specific obligations contained in Article 30 CRPD, which recognises the “right of persons with disabilities to participate on an equal basis with others in cultural life,” is the obligation on State parties to take all appropriate measures to ensure that persons with disabilities “enjoy access to television programmes ...in accessible formats.”²⁸² However an examination of the reporting guidelines reveals that they fail to include a reporting obligation specifically in this regard.²⁸³ The guidelines state that State Parties should report on *inter alia*:²⁸⁴

“Measures taken to recognize and promote the right of persons with disabilities to take part on an equal basis with others in cultural life, including opportunities to develop and utilize their creative, artistic and intellectual potential”

²⁷⁸Stein and Lord, (n 276) 31.

²⁷⁹Initial reports contain a common core document which provides general information common to all human rights treaties and a Convention specific document. The common core document is a 60-80 page report that contains information of a general and factual nature on the implementation of all the human rights treaties which a State has ratified. The common core document is therefore not disability-specific.

²⁸⁰Stein and Lord, (n 276) 31, paying special attention to particularly vulnerable population groups such as women and children. The treaty-specific document is a maximum of 60 page report and should contain specific information on the implementation in law and in practice of the articles of the CRPD. The report should provide detailed information on substantive measures taken and progress achieved and an article-by-article analysis of the CRPD in accordance with the reporting guidelines

²⁸¹*ibid*

²⁸²Art 30 (1) CRPD.

²⁸³UN, (n 277).

²⁸⁴*ibid* 17.

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On examination this guideline appears to amalgamate the obligations on State Parties contained in Article 30 (1) and (2) of the Convention.²⁸⁵ While it is accepted that the reporting guideline on Article 30 CRPD requires State Parties to report on “measures taken to recognize and promote the right of persons with disabilities to participate in cultural life,” it is submitted that the failure to include a specific reporting obligation for State Parties to report on appropriate measures taken regarding access to television programmes in accessible formats is a considerable oversight. It is further submitted that this broad reporting obligation effectively diminishes the significance of disabled viewers’ access to television programmes in accessible formats, which is explicitly highlighted in the Convention as an essential aspect to the enjoyment of the right to participate in cultural life.

As stated in Chapter Two, between November 2010 and April 2015, seventy-nine countries and the European Union have issued their initial comprehensive reports on measures taken and progress achieved to implement the Convention.²⁸⁶ Thus far, the Committee have issued a list of issues concerning the initial reports to thirty-one countries and the EU.²⁸⁷ Twenty-two countries have replied to those lists of issues and the Committee have made concluding observations on twenty-seven countries.²⁸⁸

An examination of the State Parties’ initial reports to date by this author has found that despite the failure of the reporting guidelines under Article 30 CRPD to request information on provisions regarding access to television programmes in accessible formats, a large proportion of countries’ initial reports have reported on some measures taken toward providing accessible television services.²⁸⁹

²⁸⁵ Art 30 (2) CRPD provides that “[S]tates Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.”

²⁸⁶ State Parties Initial Reports date in ranges from 2010 up to June 2015.

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29>

²⁸⁷ The Committee’s List of Issues on the initial reports to Countries date from 2010 up to April 2015
<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=18>

²⁸⁸ <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5>

²⁸⁹ A total number of eighteen countries reports were unavailable in English and therefore not considered in the examination here bringing the total of initial reports considered to sixty-one. The European Union’s report will be considered in a separate section following.

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The examination further reveals that such measures have been reported under the reporting obligations spanning across Articles 9, 21 and 30 CRPD, but more predominantly under Article 21 CRPD. Some illustrative examples are given below, followed by an overall assessment of the initial reports, and relevant Concluding observations by the Committee on those reports.

State Parties' Initial Reports – Approaches to Reporting Guidelines

In some cases, countries reported relevant measures under one specific article only. Hungary and New Zealand, for example, reported their television access measures under Article 9 CRPD only. Article 9 CRPD as discussed *supra* has been described as an appropriate starting point for any State Party seeking to implement any of the rights in the Convention. The reporting guidelines state that Article 9 CRPD establishes an obligation on State parties to take appropriate measures to enable persons with disabilities to live as independently as possible and to participate fully in all aspects of life. To this end the guidelines request that State Parties should report on a number of issues including *inter alia*:

- Legislative and other measures taken to ensure to persons with disabilities access on an equal basis with others to the physical environment ...information and communications, (including information and communications technologies and systems) and to other facilities and services provided to the public including by private entities, both in urban and in rural areas ...
- technical standards and guidelines for accessibility; as well as on the auditing of their fulfilment and sanctions for noncompliance; and whether resources obtained by means of money sanctions are applied to encourage accessibility actions
- The use of public procurement provisions and other measures that establish compulsory accessibility requirements
- The identification and elimination of obstacles and barriers to accessibility including from “both within the public and private sector and national accessibility plans established with clear targets.”²⁹⁰

Having regard to the above guidelines, Hungary, for example, details its television access measures for public broadcasters. However, it fails to mention any similar standards imposed on private broadcasters, which according to the reporting obligations it should explicitly detail.²⁹¹

²⁹⁰UN, (n 277) 9.

²⁹¹Research identified by this author undertaken in 2009 evidenced that commercial channels in Hungary provided subtitling on a voluntary basis, through a funding scheme for “producing programmes of public benefit” by virtue of s. 84 of the Radio and Television Act 1996. The study

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Denmark reports its measures under Article 30 CRPD only.²⁹² Denmark, indicates its obligations to use different accessible formats but does not indicate any targets in relation to its television access services. The report highlights that the Danish public service broadcaster must be aware of new technological solutions. It also underscores the positive impact of the ratification of the CRPD which has obligated the Danish Broadcasting Corporation to establish a user council for persons with disabilities. However Denmark does not report on the situation of access services within its private broadcasting sector.

The United Kingdom reported accessibility measures it has taken under Article 21 CRPD only. According to the reporting guidelines, this article recognizes the right of persons with disabilities to freedom of expression and opinions, including the freedom to seek, receive and impart information and ideas through all forms of communication of their choosing.²⁹³ The guidelines provide that under Article 21 CRPD, States Parties should report on *inter alia*:

- Legislative and other measures taken to ensure that information provided to the general public is accessible to persons with disabilities in a timely manner and without additional cost.
- Measures taken to urge private entities and mass media to provide their information and services in an accessible form for persons with disabilities, including measures taken to prevent the blocking or restriction of access to information in alternative formats by the private sector.
- Degree of accessibility of mass media and percentage of public websites that comply with the Web Accessibility Initiative (WAI) standards.
- Legislative and other measures taken linked to the official recognition of sign language(s)²⁹⁴

The report cites the UK's commitment to providing access to broadcasting services for disabled people and to ensuring that the services offered to them are of a "consistently high standard."²⁹⁵ As regards the measures it has in place it details the Communications Act 2003, which sets minimum targets for subtitling, signing and

states that a commercial channel (TV2) applied for subsidies for subtitling some of its programmes. However Hungary's initial report to the Committee on the rights of persons with disabilities does not reference this subsidy scheme or whether it is still in existence. *See* further BCI, 'Jurisdictional Review and Regulatory Development regarding Access to Audiovisual Media Services for People with Disabilities Final Report' (Prepared for the Broadcasting Commission of Ireland by Deirdre Kevin and Niall Sheerin September 2009) 38.

²⁹²Denmark, 'Initial Report on the UN Convention on the Rights of Persons with Disabilities' (CRPD/C/DNK/1) 47 §338.

²⁹³UN, (n 277) 12.

²⁹⁴*ibid* 12-13.

²⁹⁵United Kingdom of Great Britain and Northern Ireland, *Initial Report on UN Convention on the Rights of Persons with Disabilities* (CRPD/C/GBR/1) 35 §210.

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audio description on television channels.²⁹⁶ It further refers to its *Code on Television Access Services* produced by the UK communications regulator, Ofcom, stating that the code gives guidance on these targets and how television services should promote understanding and enjoyment of television by people with hearing or visual impairments. It further highlights that the regulator is required to consult disabled people when reviewing or revising the Code.

Additionally it notes that Ofcom's Code requires many channels to provide thirty minutes of sign-presented programming a month or propose alternative arrangements to make more sign presented programmes available to deaf or hearing impaired sign language users.²⁹⁷ As a result, over sixty of the smaller channels jointly contribute funding to the British Sign Language Broadcasting Trust, which commissions sign-presented programmes for the BSL Zone on the Community Channel, which is broadcast on terrestrial, cable and satellite TV.

It is submitted that the UK's report on its television access services provides a comprehensive and clear example of both legislative measures and lighter touch regulation in the form of its specific *Code on Television Access Services*, which its regulator has a duty to develop and implement. In addition it acknowledges that the code sets specific minimum standards for the targets to be achieved in various accessible formats. It also highlights that the regulator is obliged to consult with persons with disabilities in the review or revision of the Code.

Ofcom's *Code on Television Access Services* applies to all broadcasters in the United Kingdom, with lower targets set for commercial broadcasters, although the UK's initial report does not make reference to this demarcation. Additionally the report does not state how the regulator monitors the Code or sanctions it imposes for non-compliance.²⁹⁸ It is submitted, however, that the UK's approach to accessible television services provides a model of best practice in the sense that, overall, UK broadcasters were "exceeding their obligations on the provision of access services".²⁹⁹ This indicates that a well-developed policy is in place, involving relevant stakeholders (regulator, broadcasters and users of services) and it can thus

²⁹⁶ *ibid*

²⁹⁷ *ibid* §211.

²⁹⁸ Although the Code is implemented by the regulator Ofcom.

²⁹⁹ UK (n 295) §211.

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be inferred that effective implementation has had a strong positive impact on such services.

In some instances some countries report on television access service measures under two of the Convention's articles.³⁰⁰ Austria's initial report to the Committee on Persons with disabilities outlines its television access provisions under both Articles 9 and 21 CRPD.³⁰¹ Under Article 9 Austria reports that since 2001, the Österreichischer Rundfunk, ORF, the Austrian national public service broadcaster, has been obliged, insofar as this is financially reasonable, to produce television programmes in such a manner that "it is easier for deaf people and those with impaired hearing to follow them."³⁰² Additionally, as part of a comprehensive amendment in 2010, a legal obligation was introduced to increase annually the proportion of programmes made for persons with impaired hearing or vision in stages "compared to the status quo on 31 December 2009."³⁰³ It further notes also that since December 2009, subtitles are employed during ORF broadcasts of sessions of the Parliament.³⁰⁴ Currently, the ORF broadcasts sign language interpreters during live programmes on ORF 2 Europe and via live streaming. Austria's report explicitly notes that "private audiovisual media providers are also obliged by the law to gradually make their services barrier-free for people with impaired hearing or vision."³⁰⁵

It is advanced that Austria's report provides the most comprehensive report to date under the reporting obligations outlined under Article 21 CRPD. It identifies the measures both legislative and otherwise in practice and obligations on the public service broadcaster the ORF. It further details obligations on private broadcasters and identifies incentives through the form of media subsidies which are offered to radio and television companies to gradually make their content accessible to people with visual and auditory disabilities. It also deals with initiatives for non-linear broadcasting, such as video-on demand, and targets for providing accessible

³⁰⁰ *E.g.* Germany (CRPD/C/DEU/1), Sweden (CRPD /C/SWE/1 and China (Hong Kong) (CRPD/C/CHN-HKG/1) report related measures under Arts 21 and 30 CRPD.

³⁰¹ UN Disability Rights Convention, First State Report of Austria (Adopted by the Austrian Federal Government on 5 October 2010) (CRPD/C/AUT/1) 16.

³⁰² *ibid* 19 §116. s. 5 (2) Federal Act on the Austrian Broadcasting Corporation (ORF Act) as amended.

³⁰³ *ibid*

³⁰⁴ *ibid* 20 §124.

³⁰⁵ *ibid* 19 §116. s. 30 (3) Audiovisual Media Services Act.

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television programmes over the internet. Crucially, it identifies obstacles in practice (although such criticisms are directed at its public service broadcaster the ORF), which are highlighted by various stakeholders such as disability organisations and the Disability Ombudsman.³⁰⁶ It also identifies exclusionary practices including that persons with disabilities are not included in the membership of the public service broadcaster's (ORF) viewers' and listeners' council.³⁰⁷

Assessment of State Parties' Initial Reports

From both the foregoing examination and further assessment of initial reports submitted to the Committee on the Rights of Persons with Disabilities, it is submitted that a number of observations can be made on State Parties initial reports to date, albeit the Committee have yet to consider a number of those reports and make concluding observations on them.

Firstly, notwithstanding the different reporting obligations under various articles that pertain to accessibility measures for television, namely Articles 9, 21 and 30 CRPD, a large proportion of countries from the sample sixty-one countries examined have reported the existence and /or implementation of some kind of measure(s) in relation to television accessibility services.³⁰⁸ It is put forward that this shows the innovativeness of the Convention in capturing the over-arching principle of accessibility which permeates its text. It is further submitted that while the Convention's application is still only in its early stages, the initial reports demonstrate that there is an awareness of the issue among state parties regarding television accessibility, which is encouraging.

Secondly, a number of commonalities can be ascertained in the reports of the state parties despite the different reporting obligations under Articles 9, 21 and 30 CRPD. The first is that most of the countries in the sample have detailed for the most part

³⁰⁶ibid 33-34 §220 -221. It will be recalled, as outlined at the outset of this section, that the reporting guidelines on the Convention state that initial reports should outline any distinctions, exclusions or restrictions made on the basis of disability even of a temporary nature, imposed by law, practice or tradition, or in any other manner on the persons with disabilities' enjoyment of each provision of the Convention. In this regard it is submitted that Austria's initial report on accessibility is noteworthy.

³⁰⁷ibid 34 §222.

³⁰⁸With the exception of Malta (CRPD/C/MLT/1) 21 § 120 and Mauritius (CRPD/C/MUS/1) 31 §189, both of whom quoted constitutional provisions relating to freedom of expression but did not provide any information regarding television access services. Paraguay stated despite the constitutional guarantee of the right to freedom of expression (Art 28) there is no legislation on the "reception of information that takes into account the special needs of persons with impaired hearing and /or vision".

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accessibility provisions relating mainly to public service/state owned broadcasters. In most countries such provisions primarily stem from broadcasting and communication legislation and policies and to a lesser extent from disability legislation and/or both.³⁰⁹ Likewise most countries have failed to identify whether similar provisions exist or whether there is some awareness among its private broadcasters regarding access services.³¹⁰ It is submitted in this regard and in light of its General Comment on Article 9, that the Committee on the Rights of Persons with Disabilities should highlight this disparity and perhaps ensure that subsequent reports detail such information, including whether or not such awareness and/or provisions do or do not exist.

Thirdly, another positive aspect of the sample initial reports examined is that there is also a stated awareness and acknowledgement regarding the importance of having persons with disabilities both involved in and contributing to various audience councils and in consultative roles regarding the development of access guidelines and services.³¹¹ This is both reflective and indicative of the duty under Article 4(3) CRPD which requires state parties to closely consult with and actively involve persons with disabilities in the development and implementation of *inter alia* policies and other decision making processes concerning them.

Fourthly, where countries have indicated obligations on broadcasters to provide access services through, for example, legislation, licences, codes, standards, guidelines, setting targets and so on, the examination of the initial reports reveals that State Parties have not indicated the manner in which such obligations are monitored, or by whom, or sanctions for non-compliance.

Another disparity among the reports is that some countries give more detail regarding accessibility measures than others. For example, in the Cook Islands initial report under Article 21 CRPD, it is stated that by virtue of the freedom of expression

³⁰⁹In a few countries such obligations stemmed from disability legislation *e.g.* the Philippines, or from broadcasting and disability legislation, for instance Rwanda.

³¹⁰With the exception for instance of Austria (CRPD/C/AUT/1), Germany (CRPD/C/DEU/1) and Armenia (CRPD/C/ARM/1). The UK however did not make the delineation between the different types of broadcasters (CRPD/C/GBR/1). Poland indicated that its regulator National Council for Radio and TV Broadcasting is entitled to apply lower proportions for broadcasts with adaptations taking into account different broadcast times, technical capabilities, needs of audience the mode of dissemination and the specialist character of the given broadcast (CRPD/C/POL/1) 34 § 263.

³¹¹*E.g.* Lithuania (CRPD /C/LTU/1, Qatar (CRPD/C/QAT/1).

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provision in their Constitution, “persons with disabilities share the same right as able people to the media whether it be newspaper, television or radio.”³¹² The report further asserts that although there are no measures in place to provide accessible information and services for persons with disabilities, the media is open for awareness and reporting purposes of persons with disabilities.³¹³ However, the report does not elaborate any further on the issue. In other words it identifies the obstacles, namely that there are no measures in place to provide accessible services but does not elucidate on any future plans as to how such obstacles can be eliminated.³¹⁴

Likewise, even where countries have specified provisions relating to access services, it would appear in some instances that they have not given fully comprehensive reports. New Zealand, for example, reported that its government funding agency, *NZ on Air*, provides financial support for some access services in public broadcasting content; however, further research by this author has revealed that some access services are also available on commercial channels but this was not indicated in New Zealand’s report.³¹⁵ Consequently, in light of the exceedingly commercial nature of New Zealand’s broadcasting system, it can be inferred that a full picture of the nature of accessibility measures has not been captured in the report.³¹⁶

Another difference evidenced in the examples provided is that most of the provisions for access services detailed in the reports are primarily related to persons with sensory disabilities. Of considerable note in this regard was the fact that quite a number of developing countries that specified access services, detailed services for the hearing impaired/deaf only, which was achieved chiefly through the provision of sign language and primarily on news bulletins, as their only access services.³¹⁷

³¹²Committee on the Rights of Persons with Disabilities, Implementation of the Convention on the Rights of Persons with Disabilities Initial reports submitted by States parties under article 35 of the Convention Cook Islands, June 2013 (CRPD/C/COK/1) 36 §133.

³¹³*ibid*

³¹⁴*ibid* §38.

³¹⁵For example the New Zealand National Federation for the Deaf indicates that subscription channels such as *SKY TV* provide closed captioning on a number of channels. It also states that *SKY* will continue to evaluate the viability of providing further captions on additional content and channels as the information becomes accessible.

³¹⁶*See also* (n 291) comments regarding Hungary’s report.

³¹⁷Gabon (CRPD/C/GAB/1), Montenegro (CRPD/C/ MNE/1), Nepal (CRPD/C/NPL/1), Iran (Islamic Republic of) (CRPD/C/IRN/1), Rwanda (CRPD/C/RWA/1), The former Yugoslav Republic of Macedonia (CRPD/C/ MKD/1).

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There were however some countries that referred to access services other than those related to sensory impairments. Germany, for instance, reported under Article 21 CRPD that the promotion of the provision of information for persons with “learning and mental disabilities,” in particular the expansion of subtitling and audio-description, can be considered in order to implement accessibility in film and television.³¹⁸ It is submitted that this is another matter which needs to be emphasised regarding access services. It is further proposed that this can be achieved through creating awareness regarding the benefit that access services can have on other groups in the population such as people with physical disabilities, the elderly and children with disabilities.³¹⁹

Likewise the United Kingdom did not indicate in its report that research and measures have been undertaken on the provision of other types of access services for people with various disabilities.³²⁰ For example, the UK’s Digital Switchover Scheme was run by public service broadcaster the BBC, and aimed to help everyone who was eligible, including those who are registered blind or partially sighted or anyone who has lived in a care home for 6 months or more, with everything they needed to switch a television to digital.³²¹ The Switchover Help Scheme also worked with manufacturers to ensure that the scheme’s standard option equipment was easy to use, thereby helping those with dexterity or mobility impairments.³²²

Additionally it is noted that, while some countries indicated the need for awareness regarding new technologies, most countries did not indicate access provisions regarding the transition from analogue to digital television. Such information, it is advanced, may be of benefit for developing countries that have yet to make the switchover.

³¹⁸cf Armenia (CRPD/C/ARM/1).

³¹⁹ANED, (n 211) 40, Anna Lawson states that there is perhaps a risk that the immense impetus provided by the CRPD “...will distract our collective attention from the fact that accessibility is not a disability-specific issue. She states that although it profoundly affects disabled people, it also deeply concerns older people, children, parents and, indeed, the entire population.”

³²⁰E.g. Ofcom, (n 11). *See also*. Ofcom, *Access Services Audio Description: Research into awareness levels* (Ofcom 2 July 2008).

³²¹<http://www.helpscheme.co.uk/en/helpscheme>>

³²²E.g. for those with dexterity or mobility issues the remote control is well designed with large coloured buttons. The remote control is paired to the TV so that only one remote control is needed. Audio description and subtitles can be turned on with one button. The onscreen TV guide is easy to read and easy to use. There is a button on the Help Scheme remote control that brings the user back to BBC One at any time if the user gets lost.

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Some countries detailed funding³²³ or lack thereof³²⁴ for the provision of access services. Lithuania, for example, highlighted that a reduction in government funding in 2009 for its public service broadcaster LRT, meant there was a reduction in the amount of news programmes that LRT broadcast in sign language each week. Lithuania also indicated that government funding was used to acquire subtitling equipment for LRT in 2011 so that “in the future there should be more subtitled TV programmes for people with hearing disabilities.”³²⁵ It is put forward that State parties reports should indicate the level of funding provided for access services particularly for public service broadcasters in light of their particular remits.

Other countries identified obstacles to access services and highlighted their on-going efforts to address those obstacles.³²⁶ A few countries³²⁷ reported initiatives undertaken to improve accessibility.

In summary the main issues identified with state parties’ initial reports are: failure to highlight access measures and obligations in relation to private broadcasters; lack of comprehensive information on access provisions including targets, time-bound benchmarks for implementation and reviews; lack of detail regarding funding for the provision of access services; lack of information on the existence of accessible television equipment and related services and measures implemented or planned in the transition from analogue to digital television. In addition there was an absence of reporting on awareness measures and on training for relevant stakeholders. Perhaps the most crucial gap identified by this author is the absence of any information

³²³Lativa (CRPD/C/LVA/1) 34-35 §213 states that as of 2012, state budgetary resources could considerably extend the broadcast of programmes and movies with subtitles and sign-language on public service broadcaster LTV.

³²⁴For example South Africa (CRPD /C/ZAF/1) 23 §90, indicated that the SABC as the national public broadcaster is required to broadcast information accessible to all but that progress has been slow due to financial constraints.

³²⁵Montenegro (CRPD/C/MNE/1) 28 §161, also indicated that by virtue of its Media Law the state provides partial funding.

³²⁶*E.g.* Seychelles (CRPD/C/SYC/1) 20 §119 recommends that the state needs to promote the provision of information supported by accessibility standards and video and text based communication; Nepal (CRPD/C/NPL/1) 33 §168 states that the Government has “planned to have news broadcast in sign language every day in a gradual manner.”; Kenya (CRPD/C/KEN/1) 22 § 107 reports on-going efforts through Disability Regulations to incorporate Kenyan Sign language in television programming.

³²⁷*See* Phillipines (CRPD/C/PHL/1) 25 §§128-129; Qatar (CRPD/C/QAT/1) 27 §§ 85-86, established Mada (Qatar Assistive Technology Centre) to promote digital inclusiveness through connecting persons to assistive technology that improves the quality of their daily lives and enhances their social integration.

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concerning the monitoring of and compliance with access measures or sanctions for non-compliance.

Lists of Issues on Country Reports by the Committee

As aforesaid, the Committee has issued a list of issues to thirty-one countries and the EU in relation to their initial reports. An examination of those lists of issues reveals that the Committee have requested both general information on the accessibility to information and communication and specific information from some of those countries related to television access measures. Briefly, in terms of general information, the Committee requested information regarding countries' national action/ accessibility plans and the measures contained in them regarding accessibility to information and communication.³²⁸ The Committee asked Belgium, for instance, what positive achievements have been made in the area of accessibility particularly with regard to the framework of its strategic plan 2008-2012.³²⁹ It also requested that Belgium detail what measures have been taken to promote the access for persons with disabilities to new information and communications technologies, including the internet.³³⁰ In some instances the Committee requested specific information on the outcomes of the implementation of comprehensive legal and policy frameworks on accessibility.³³¹ A few countries were asked to detail whether private institutions offering services to the public are required to make their services accessible to persons with disabilities and, if so, what actual steps are taken to ensure this obligation is met.³³²

There were a few instances where the Committee requested specific information regarding accessibility of media/ broadcast from various State Parties.³³³ The Committee asked New Zealand to provide information on any plans to increase the accessibility of television, DVD's, movies and online media, including plans to ensure the progressive increase in the percentage of captioning and audio description

³²⁸These countries included Brazil (CRPD/C/ BRA /Q/1) 2 §11, Qatar (CRPD/C/QAT/Q/1) 2 §9, Denmark (CRPD/C/DNK/Q/1) 2 §9 , Dominican Republic (CRPD/C/DOM/Q/1) 2 §10 and Tunisia (CRPD/C/TUN/Q/1) 2 §10.

³²⁹Belgium (CRPD/C/BEL/Q/1) 2 §9.

³³⁰ibid §10.

³³¹E.g. Kenya (CRPD/C/KEN/Q/1) 2 §8, Ukraine (CRPD/C/ UKR /Q/1) 2 §11 and 3 §23, Costa Rica (CRPD/C/CRI/Q/1) 2 §12 and Turkmenistan (CRPD/C/TKM/Q/1) 2 §9.

³³²E.g. Argentina (CRPD/ C/ARG/Q/1) 2 §7 and Gabon (CRPD/C/GAB/Q/1) 2 §12.

³³³E.g. Gabon (CRPD/C/GAB/Q/1) 3 §23, Mauritius (CRPD/C/ MUS /Q/1) 4 §25 and Ecuador. (CRPD/C/ECU /Q/1) 3 §23.

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provided. Interestingly, Korea was called upon to indicate what measures have been adopted to ensure that content from broadcasting services is accessible to all persons with disabilities, especially those with psychosocial and intellectual disabilities. Australia was also requested to report information on the mechanisms put in place to guarantee freedom of expression by all persons with intellectual or mental, physical, hearing, visual and /or psychosocial disabilities and whether access to public and private information is facilitated in accessible formats. Of particular note was the Committee's request for information regarding Austria's report which was discussed *supra*. The Committee highlighted the criticisms levelled at Austria regarding television access services and on that basis requested further information regarding the issues. It is submitted that this demonstrates the importance of the Committee receiving comprehensive reports by countries and the need for those compiling such reports to furnish accurate and complete information.

Comments on Concluding Observations by the Committee

An examination of the Committee's concluding observations on the twenty-seven country reports to date identified a number of themes emerging regarding accessibility to information and communication and accessibility measures specific to the media. The Committee commended some countries on progress made in relation to the accessibility of information and communication and television access services. Mexico and Paraguay for instance were praised for the introduction of legislation which incorporated the specific needs of persons with disabilities in television access services³³⁴ while New Zealand was applauded for an increase in its captioning in its media. Nevertheless, the Committee in some instances voiced its concern that such efforts were not sufficient and made recommendations for further measures to be implemented. For example, the Committee recommended that New Zealand take further measures to increase the captioning and audio description of television programmes. It also stated in the case of Paraguay that the legislation adopted, which involved the compulsory use of sign language in information and news broadcasts, was insufficient to guarantee freedom of expression in particular in public and private services and institutions for the general public. On that basis it

³³⁴Mexico (CRPD/C/MEX/CO/1) 1 §4(c), adopted the Federal Communications and Broadcasting Act (2014). The provisions of that Act were not detailed in the Concluding Observations but research by this author reveals that they include obligations on broadcasters to provide subtitling services and the dubbing of Spanish and Mexican sign language for people with hearing impairments.

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recommended that Paraguay adopt an Act giving official recognition to sign languages used by persons with disabilities and ensure that all public information is available in accessible forms and formats in accordance with the Convention.

It was further noted by this author that only in one country report did the Committee make a recommendation regarding accessible media and the right to participation in political and public life under Article 29 CRPD. The Committee recommended *inter alia* that Sweden ensure that voter education through mass media is made accessible and that information about elections is provided in accessible formats and electoral campaigns made fully accessible. It is of interest to note that Sweden in its initial report did not outline problems and shortcomings. However further examination by this author of the various alternative reports submitted to the Committee by disability organisations and the Swedish Federation on the Human Rights of Persons with Disabilities revealed criticism levelled at the initial report. In particular the Disability Council International Independent Review on Sweden's initial report specifically highlights under Article 29 CRPD that: [‘T]he report does not specify whether there is an obligation to provide information on the voting via TV in accessible formats with subtitles and sign language interpretation.’³³⁵ It is submitted that this highlights the importance of the parallel reports by disability organisations.

The Committee also noted the level of provision and quality of some access services. The Republic of Korea provides a good example.³³⁶ The Committee observed in particular Korea's standard on quantity of television programmes but absence of standards to ensure quality and on providing adequate accessibility of information through *inter alia* sign language, closed-captioning and audio description.³³⁷

In some cases the Committee emphasised the discrepancies between public and private institutions generally regarding the accessibility of information and communication.³³⁸ For instance, the Committee highlighted its concerns about the lack of binding obligations for private entities, particularly private media, to avoid creating barriers and to eliminate existing barriers in relation to accessibility. With

³³⁵Disability Council, Independent Review (Geneva 2014) 27.

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=909&Lang=en>

³³⁶Republic of Korea (CRPD/C/KOR/CO/1).

³³⁷*ibid* 6-7 §41.

³³⁸*E.g.* Peru (CRPD/C/PER/CO/1) 4 §§20-21, Argentina (CRPD/C/ARG/CO/1) 3-4 §18.

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regard to Germany's inadequate implementation of regulations governing accessibility and universal design, it drew attention to its own General Comment No. 2 and recommended that Germany introduce targeted and effective measures such as obligations, monitoring mechanisms and effective penalties for infringement, to extend accessibility for persons with disabilities in all sectors and areas of life, including the private sector.³³⁹ It further recommended that Germany encourage public and private broadcasting bodies to evaluate their work comprehensively regarding the implementation of the right to accessibility, especially with respect to the use of sign language.³⁴⁰

It was observed by this author that the Committee placed particular emphasis in their more recent Concluding Observations (2015) on the adoption of action plans to improve accessibility with clearly defined and realistic deadlines and indicators.³⁴¹ In so doing, it built upon its observations in General Comment No. 2 in 2014 on the importance of monitoring, training and other mechanisms for the practical implementation of accessibility standards.³⁴²

Implementation CRPD – European Union

As noted *supra* and as discussed in Chapter Three, the European Union has submitted its initial report concerning the implementation of the CRPD to the Committee on the Rights of Persons with Disabilities. While Chapter Three focused on measures safeguarding persons with disabilities in audiovisual media content, the section following now considers the manner in which the EU safeguards the interests of disabled persons' access to such content. In its initial report to the Committee the EU detailed its provisions relating to the accessibility of audiovisual media services under Article 30 CRPD and cited Article 7 AVMSD 2010/13/EU as the primary provision in that regard. This section now assesses Article 7 AVMSD 2010/10/EU and concludes with a number of observations on that provision.

³³⁹Germany (CRPD/C/ DEU (CO/1) 4 §22 (a).

³⁴⁰*ibid* §22(b).

³⁴¹*See* Concluding Observations Mongolia (CRPD/C/ MNG /CO/1) 4 §17, Turkmenistan (CRPD/C/ TKM/CO/1) 4 §18, Germany (CRPD/C/ DEU (CO/1) 2 §8(a) and Croatia CRPD/C/HRV/CO/1) 3 §16.

³⁴²General Comment No. 2 (n 27) 3-4, para 10.

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Audiovisual Media Services Directive 2010/13/EU

In January 2011, the European Union ratified the UN Convention on the Rights of Persons with Disabilities. Article 44 (1) of the CRPD requires the EU to declare the extent of its competence with respect to matters covered by the Convention. Among the “acts” included in the area of EU competence is the Audiovisual Media Services Directive which comes under the specific category regarding access to information.³⁴³

By way of background, the issue of access of persons with disabilities to broadcasting (and subsequently audiovisual media) services was not addressed in the ‘Television without Frontiers Directive (TWFD) 1989, nor its amending directive in 1997. In 2003, the European Commission adopted a Communication on the future of European regulatory audiovisual policy, which stated that the issue of accessibility for people with a disability to television did not fall within the remit of the TWF Directive.³⁴⁴ In spite of this, the Communication highlighted that the Commission would promote accessibility matters with Member States and would co-ordinate and complement national actions and measures through the Contact Committee established by the TWFD.³⁴⁵ The Communication asserted that, in particular, enriching content with audio description, audio subtitling, subtitling and sign language would be further discussed.³⁴⁶ It stated that “[R]egulatory policy in the sector has to safeguard certain public interests, such as cultural diversity, the right to information ... and consumer protection now and in the future.”³⁴⁷

A detailed analysis of the background to the consultation leading up to the current Directive regarding accessibility is outside the scope of this thesis; therefore the analysis here will be confined to the current AVMSD 2010/13/EC and the accessibility provisions contained therein.³⁴⁸

³⁴³Council Decision of 26 November 2009 concerning the conclusion by the EC of the UNCPRD (2010/48) EC.

³⁴⁴European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy’ COM(2003) 784 final, 7.

³⁴⁵*ibid*

³⁴⁶*ibid* 11.

³⁴⁷*ibid* 24.

³⁴⁸Audiovisual Media Directive (Directive 2007/65 EC) amending the TWFD was adopted by the European Parliament in November 2007 and entered into force on 19 December 2007. The Member States had to transpose the new provisions into national law by 19 December 2009. Recital 64 and

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The recitals to the current AVMSD explain the background of the Directive and its aims and objectives.³⁴⁹ Having regard to the issue of accessibility, in audiovisual media services, Recital 46 AVMSD recognises non-economic issues such as the right of persons with disabilities and of the elderly to participate and be integrated in the social and cultural life of the Union.³⁵⁰ It further provides that this right is “inextricably” linked to the provision of accessible audiovisual media services. The recital continues to outline the means to achieve accessibility and states that “it should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.”³⁵¹

This recital is then bolstered by the substantive provision in Article 7, which concerns provisions which apply to all audiovisual media services providers both public and commercial. Article 7 AVMSD 2010/13/EC provides that:

“Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.”³⁵²

A number of observations regarding the latent difficulties inherent in Article 7 AVMSD can be made at this point. Firstly, while the aim of Article 7 is laid out in Recital 46, it is submitted that the wording of the Recital is ambiguous. It states that the means to achieve accessibility in the audiovisual services sector ‘**should include**’ but ‘**need not be limited**’ to sign language, subtitling and audio-description and easily understandable menu navigation.³⁵³ Whilst detailing various methods which could be used to achieve the aim of Article 7 is instructive, it is submitted that conversely, the use of the word ‘should include’ denotes the desirability of accessibility for persons with disabilities but does not appear to stress an obligation on Member States and their media service providers to provide a minimum standard of accessibility.

Article 3c Directive 2007/65/EC are identical to Recital 46 and Article 7 of the current directive AVMSD 2010/13/EU.

³⁴⁹However recitals do not require actual transposition into member states’ law.

³⁵⁰Recital 46 AVMSD 2010/13/EU provides that; “The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.”

³⁵¹ibid

³⁵²Art 7 AVMSD 2010/13/EU.

³⁵³Author emphasis added.

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Secondly, it is submitted that Article 7 AVMSD goes even further in lowering the bar on accessibility standards by its use of contradictory terminology in what is required of Member States, namely they “**shall**” “**encourage**” media service providers in their jurisdiction “**to ensure**” that their services are “**gradually**” made accessible to people with a visual or hearing disability.”

The word “encourage” echoes the inherent tension of placing limits on freedom of expression as discussed under Article 21 CRPD but is further compounded by the words “to ensure” which suggests a positive obligation on ‘media service providers’ in this respect. In addition the word ‘**gradually**’ would seem to suggest the idea of ‘progressive realisation’ by media service providers. However, in the context of EU regulation it is submitted that this proviso is clearly connected with the potential imposition of financial and technical constraints and is perhaps suggestive more of the economic objectives of the AVMSD where obstacles to the freedom to provide services must be limited in order to create a barrier free market.

It is advanced that such ambiguity in the text of Article 7 AVMSD is confounding and thereby diminishes the obligation to make broadcast/ audiovisual services accessible to persons with disabilities. It has been asserted, however, that if the wording of EU or national legislation is open to more than one interpretation the EU and Member States should adhere, as far as possible, to the interpretation that renders the provision most consistent with the CPRD.³⁵⁴

Thirdly, another flaw in Article 7 AVMSD is its confinement of disability to people with a hearing or visual disability, given that the aim of the provision concerns the right of “persons with a disability” to participate and be integrated in the social and cultural life of the Union, which is inextricably linked to the provision of accessible audiovisual media services.³⁵⁵ The European Disability Foundation points out that accessibility measures in favour of people with intellectual disabilities such as easy to understand programmes, concise and jargon free on-screen menus, simple layout and unambiguous navigation features are not covered by the Directive.³⁵⁶ It is submitted that in light of the EU’s involvement as “an active and supportive

³⁵⁴EFC, (n 186) 15.

³⁵⁵Recital 46 AVMSD 2010/13/EU.

³⁵⁶EDF, ‘Toolkit for the Transposition of the AVMSD into National EU Member States Law’ (EDF September 2008) 7.

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participant in the drafting process” of the CRPD³⁵⁷, it is perhaps an oversight that the Audiovisual Media Services Directive uses such limiting language.

It is submitted, nonetheless, that the inclusion of the accessibility provision in the AVMSD is positive in the sense that it encourages more Member State activity on the accessibility of television broadcasts and the provision applies to “media service providers”, which includes both public and commercial broadcasters.³⁵⁸

It is accepted that the nature of EU directives is that they require member states to achieve a minimum level of harmonisation without dictating the means of achieving that result, particularly given the diverse broadcasting systems of the 28 Member States of the EU. However, bearing in mind the EU’s ratification of the Convention, and in particular its obligations under Articles 9, 21 and 30 CRPD, which require *inter alia* that appropriate measures are taken to ensure that persons with disabilities enjoy access to television programmes in accessible formats, the provisions in Article 7 AVMSD do not seem to impose mandatory obligations or establish specific targets or indicate a sense of urgency for action in this regard.

Additionally, the AVMSD does not set a deadline for achieving fully inclusive audiovisual media services. It is submitted that this is a significant shortfall in the Directive.³⁵⁹ While the Directive sets a basic level of implementation and Member States can enhance or extend accessibility provisions, it is submitted that monitoring of compliance mechanisms should be put in place in order to ensure that in the progressive realisation of Article 7 AVMSD member states do not take any regressive steps in this regard. A report on the study and challenges and good practices in the implementation of the CRPD states that “accessibility measures

³⁵⁷Gráinne de Búrca, ‘The EU in the Negotiation of the UN Disability Convention’ (2010) 35 (2) *European Law Review* 174.

³⁵⁸See Article 1 (d) AVMSD 2010/13/EU where the term ‘media service provider’ is wider than just public and private television.

³⁵⁹Note also Recital 94 to this Directive which states that in accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

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should “...include a clear timeframe for conformity and indicate the nature of intervention in cases of non-compliance...”³⁶⁰

Article 33 of the AVMSD requires the EU Commission to submit regularly a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee.³⁶¹ The first report on the application of the AVMSD was issued in May 2012, and covers the period 2009-2010.³⁶² In relation to Article 7 AVMSD the report states that accessibility of audiovisual media services for all EU citizens is a further key objective that the AVMSD pursues by requiring access for hearing and visually impaired people to improve over time. The report indicates that **all** Member States have introduced rules to that effect. The report, however, does not give details in this regard.³⁶³

The first report on the AVMSD states that the implementation of these rules reflects the diversity of market conditions and that while some member states have very detailed statutory or self-regulatory rules, others have only very general provisions or limit the accessibility obligation to the services of public service broadcasters.³⁶⁴

It is submitted that the fact that all member states have introduced rules requiring access for the hearing and visually disabled perhaps indicates that the provision in Article 7 AVMSD has gone some way towards achieving this. It is further submitted that the fact that some member states limit the accessibility obligation to services of public service broadcasters only, indicates a gap in the provision of such services by commercial broadcasters, which needs to be addressed. However, the European Commission in its conclusions does not seem concerned with this deficit, which is reflected in the assertion that “[A]ll in all, the European Regulatory Framework for

³⁶⁰EFC, (n 186) 16.

³⁶¹In 2014, a second monitoring report was carried out by the Commission; however that report is unavailable at the time of writing.

³⁶²See Report from the Commission to the EU Parliament, the EU ESC and the Committee of the Regions First Report from the Commission to the EU Parliament ...on the application of Directive 2010/13/EC AVMSD Brussels, 4th May 2012 Com (2012) 203 final. Developments from 2011 have been covered in the report where appropriate. In its reply to the CRPD Committee’s list of issues in July 2015, the EU indicated that a further monitoring exercise of Article 7 AVMSD had taken place in 2014; however a search by this author revealed that this monitoring exercise is not publicly available. The reply indicated that some member states ensure close to 100% of subtitling on their main channels. It also indicated that in cases of non-compliance by service providers, regulators may impose fines. However the reply did not elaborate any further on the issue.

³⁶³Author Emphasis added

³⁶⁴ibid 5, § 2.3.

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audiovisual media services has struck the right balance and served citizens and businesses well.”³⁶⁵

One other aspect of the Commission’s report warrants note here, although it is not concerned explicitly with the provision of access services for persons with disabilities but has the potential to impact on other types of digital access services and increase the digital divide for persons with disabilities.³⁶⁶ The report highlights that the recent technological evolution and development of the European audiovisual market, such as the transition to Connected TV, might blur the boundaries between broadcasting and over the top delivery of audiovisual content.³⁶⁷ It asserts that the regulatory framework set by the AVMSD will have to be tested against evolving viewing and delivery patterns. It states that there is a need to maintain a consistent level of protection across different audiovisual media environments while taking into account their respective specificities.³⁶⁸ The report highlights that recent studies indicate that consumers suffer substantial detriment when using digital content, including audiovisual media, especially due to problems with accessing the content, unclear or missing information and low quality content.³⁶⁹ The Commission’s report also indicates that an important element in going forward is the level of media literacy. The Commission indicated in monitoring media literacy levels in the EU that there were parts of the population, including those with low income, who had low levels of media literacy and awareness of regulation. As stated in Chapter Three, the European Parliament criticised the first implementation report stating *inter alia* that the Commission report failed to address substantively the issue of accessibility as referred to in Article 7 AVMSD, and that it regretted that the effectiveness of the Member States’ implementing rules in this regard was not addressed.³⁷⁰

In conclusion, it is submitted that the AVMSD should be revised and Article 7 AVMSD should be reworded to oblige Member States and providers of audiovisual media services within the European Union to ensure the accessibility of audiovisual

³⁶⁵*ibid* 11.

³⁶⁶Such online access services include television on demand.

³⁶⁷*ibid* 10.

³⁶⁸*ibid*

³⁶⁹*ibid*, citing Europe economics digital content services for Consumers assessment of problems experienced by consumers 2011.

³⁷⁰European Parliament, ‘Report on the Implementation of the Audiovisual Media Services Directive (2012/2132(INI)) Committee on Culture and Education’ (2012/2132(INI)) (28 February 2013).

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media services and associated content for persons with disabilities. While it is accepted that this duty will necessitate gradual implementation, Member States should be obligated to set accessibility standards which set clear time-frames and benchmarks for full implementation and also outline sanctions for non-compliance. Furthermore, Member States should carry out periodic reviews of their progress on compliance with the AVMSD and report every two years to the Commission on their progress. Since the costs of providing accessible audiovisual media services seems to be a major challenge facing media service providers, it is submitted that the European Union through the Commission should conduct a feasibility study into the associated costs of the provision of audiovisual media services such as subtitling, audio description and sign language. The European Union should also consider allocating a proportion of its funding for the provision of accessibility measures/services/features as part of, for instance, its ‘Creative Europe Programme 2014-2020, the EU Commission’s framework programme for support to the culture and audiovisual sectors. One of the specific objectives of the regulation governing the establishment of that programme, is ‘to promote the transnational circulation of cultural and creative works and transnational mobility of cultural and creative players.... as well as to ... and improve access to cultural and creative works in the Union and beyond, with a particular focus on ... people with disabilities and under-represented groups;’³⁷¹.

As stated in Chapter Three, a review of the AVMSD is featured in the Commission’s Work Programme for 2015, as part of the Regulatory Fitness and Performance Programme (REFIT). The Commission in a recent Communication announced that the AVMSD would be revised in 2016. At the time of writing the Commission launched a public consultation on the AVMSD. As part of that consultation, the Commission have issued a questionnaire which contains a section on accessibility. By way of note the questionnaire confines disabled persons to those with sensory impairments and requests broadcasters to provide an estimate of costs linked to provide services to those with sensory disabilities. The document seeks the views of the public as to what their preferred policy option for accessible services would be.

³⁷¹Art 4 (b) Regulation (EU) No 1295/2013 Of The European Parliament And Of The Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC. Published in the Official Journal of the European Union on the 20/12/2013 (OJ L347/221).

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In this regard respondents have a multiple choice, either to maintain the status quo; strengthening EU level harmonisation of these rules; introducing self and co-regulatory measures (including measures related to subtitling, sign language and audio description; or any other option (to be indicated by the respondents). The Questionnaire explains in relation to strengthening EU harmonisation that instead of encouraging accessibility of audiovisual works EU member states would be obliged to ensure gradual accessibility of those works. The public consultation closes at the end of September 2015.

EU Disability Strategy and Proposed Accessibility Act

The EU Disability Strategy 2010-2020 provides key elements of accessibility policy in the European Union. The strategy, which has been discussed in Chapter Three above, focuses on eliminating barriers in eight main areas, including *inter alia* in the areas of accessibility and participation. The actions at EU level supplement those at national level and determine the mechanisms needed to implement the CRPD at EU level. The action strategy dealing with accessibility considers how to use standardisation, public procurement or state aid rules to make all goods and services accessible to people with disabilities while fostering an EU market for assistive devices. Accessibility is addressed at EU level mainly in three policy areas: Information and Communications Technology (ICT), transport, and the built environment. Equality of opportunities, non-discrimination and accessibility are at the core of the Disability Strategy. The Commission also supports the Academic Network of European Disability experts (ANED), which provides it with analysis of national situations, policies and data.³⁷²

In 2014, The European Union Agency for Fundamental Rights (FRA) and the European Commission, through ANED, collected data from across the 28 EU Member States, which show how the right to political participation of persons with disabilities set out in Article 29 of the CRPD is respected, protected, promoted and fulfilled in the EU.³⁷³ The study indicated that while many EU Member States have established legal accessibility requirements for providers of information over the

³⁷²ANED also administer an Online Tool that provides an overview of the main instruments in the Member States and the EU needed for the implementation of the CRPD. See ANED, 'DOTCOM: the Disability Online Tool of the Commission' <<http://www.disability-europe.net/dotcom>>

³⁷³FRA, 'The right to political participation of persons with disabilities: human rights indicators (FRA 2014).

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internet and the broadcast media, a large number of these requirements only apply to public information providers.³⁷⁴ In practice, however, the research evidenced that election-related media remain largely inaccessible to persons with disabilities. The study found that while there had been an increase in the availability of subtitling that makes television programmes providing election information more accessible to many people with hearing impairments, the availability of audio description or national sign language interpretation was less widespread.³⁷⁵ The study recommended that Member States should consider strengthening legal and policy measures on media accessibility, for example by setting measurable targets for accessibility and broadening the scope of existing legislation to cover private as well as public providers.³⁷⁶

In its initial report to the Committee on the Rights of Persons with Disabilities, the EU reported that in accordance with the Disability Strategy and following consultations with Member States and other stakeholders, the Commission is considering whether to propose a European Accessibility Act.³⁷⁷

On 20 May 2015, the Parliament called on the Commission to present an ambitious proposal for a European Accessibility Act, with the full involvement of persons with disabilities throughout the legislative cycle, and stressed the need for this proposal to include a full range of policy areas with regard to the accessibility of goods and services for all EU citizens, fostering the independent living and full inclusion of people.³⁷⁸

Conclusions

This chapter has considered a number of barriers which hinder or thwart the access of persons with disabilities to broadcast and audiovisual media content. It

³⁷⁴ibid 9.

³⁷⁵ibid 79.

³⁷⁶ibid 9.

³⁷⁷It further indicated that a Eurobarometer survey on accessibility had been carried out in 2012: European Commission, 'Accessibility, Flash Eurobarometer 345' (TNS Political & Social, 2012). This author identified that that survey did not include audiovisual media services. <http://ec.europa.eu/public_opinion/index_en.htm> See however report by ANED (n 211); ANED, 'National accessibility requirements and standards for products and services in the European single market: overview and examples' (Compiled by Mark Priestley on behalf of the Academic Network of European Disability Experts (ANED) 2013).

³⁷⁸European Parliament resolution of 20 May 2015 on the List of Issues adopted by the United Nations Committee on the Rights of Persons with Disabilities in relation to the initial report of the European Union (2015/2684(RSP)) 9.

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highlighted that the denial of access to television and audiovisual content can be caused by many different barriers which can take several different forms and to a large extent overlap. It established that the CRPD, which espouses a social model of disability, recognises that such barriers form part of the concept of disability itself and comprise physical, informational and communicational, attitudinal, economical and institutional barriers. It further acknowledged that barriers that impede access to audiovisual content can affect numerous people with different disabilities and are not merely confined to those with specific disabilities such as sensory impairments, as is often assumed.

In an effort to discern policy considerations which may go toward enabling and improving disabled viewers' access to broadcast content, this chapter identified television equipment, television content (in both its form and presentation) and television access services, as aspects where accessibility considerations arise and which, accordingly, should be targeted in policy frameworks. It emphasised that access barriers to equipment and content are interrelated to issues of availability, usability and functionality, comprehension, affordability and awareness. Additionally it recognised that any solutions in addressing such barriers involve a broad range of stakeholders from policy makers, technology manufacturers, broadcasting and communication regulators and broadcasters to persons with disabilities themselves as both users and viewers of television/ audiovisual content.

Having outlined the various access obstacles and their associated issues, the chapter then examined the relevant provisions of the CRPD. The Convention is the first legally binding instrument to provide an in-depth articulation of the duties of governments to comprehensively tackle the issue of accessibility in order to ensure the full participation and inclusion of persons with disabilities in all areas of life. This examination was undertaken in the interest of establishing an appropriate standard against which any policy consideration of accessibility, particularly at national level, might be realised in practice.

The analysis revealed that the notion of accessibility pervades the whole text of the Convention and its import is highlighted throughout. It is explicitly acknowledged as both a principle and a general duty. Moreover, the concept of accessibility appears to be a quintessential determinant in facilitating and rendering effective substantive

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rights, such as the right to freedom of expression, and the right to participate in both political and cultural life; and access to broadcasting is pertinent to the effective enjoyment of those rights.

In considering the manner in which State parties to the Convention should apply the accessibility duty in relation to those rights, the Chapter found that the Convention itself acts as both a “filter” through which distinct pieces of existing law should be passed in order to assess their conformity with the object and purpose of the Convention and as an “interpretative tool” to guide implementation.³⁷⁹ The Convention insists that each state party identify and remove barriers for persons with disabilities which hinder their access to the ‘environment’. The conceptualisation of environment in the CRPD is expansive insofar as it not only includes buildings and transport but also overtly indicates the importance of access to information and communications as facilitating persons with disabilities to attain full enjoyment of all human rights and fundamental freedoms. By inference “access to information and communications including information technologies and systems and to other facilities and services open or provided to the public,” includes broadcasting and related services. Consequently, access to broadcasting technologies and systems in the form of equipment and content, together with the provision of accessible broadcasting services, as being included, may be deduced from the text. The Convention suggests approaches to combating accessibility barriers through concepts of universal design and, where appropriate, reasonable accommodation although the extent to which the latter concept will be utilised in terms of accessible broadcasting services is moot.³⁸⁰

The chapter then considered how the accessibility duty impacts on specific rights pertinent to broadcasting and media. An examination of Article 21 CRPD on the right to freedom of expression and access to information revealed that while public service broadcasters may have a positive obligation to provide their services in accessible formats and technologies “as providers of information intended for the general public”, the situation is less clear for private broadcasters. Here State Parties have only to “urge” such entities to provide information in accessible and usable

³⁷⁹ Art 3 and Art 9 CRPD.

³⁸⁰ Art 2 CRPD.

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formats. Additionally Article 21 CRPD states that the state parties have only to “encourage” mass media to make their services accessible to persons with disabilities, suggesting a limit on what State Parties can oblige their broadcasters to do. Article 21 CRPD, however, does not outline the parameters of the right to freedom of expression and given that the right is connected to the principle of non-discrimination,³⁸¹ the Committee’s General Comment No. 2 on Article 9 suggested that at the very least, minimum standards should be established by member states in relation to the provision of accessible broadcast services.

The chapter subsequently addressed accessibility as correlated to the right of persons with disabilities to participate in cultural life, through an examination of Article 30 CRPD. The assessment revealed that the right contained in Article 30 CRPD implies that State Parties have an obligation to take measures to ensure that persons with disabilities “enjoy access to television programmes in accessible formats.” Article 30 CRPD, however, does not outline what constitutes such formats nor does it state the limits on the right. However, both the text of the Convention itself and guidance in the form of literature on the Convention establish that State Parties have an immediate obligation to ensure a minimum level of the enjoyment of cultural rights which, by implication, includes an obligation to ensure a minimum level of enjoyment of television programmes in accessible formats. Furthermore, the guidance suggests methods by which the obligation can be monitored. These comprise three measures: the utilisation of time frames for implementation; time-bound benchmarks of achievement and indicators of success. The analysis of Article 30 CRPD concluded with an example of how such monitoring methods may apply in practice to the provision of services related to television programmes in accessible formats.

Following from the examination of Article 30 CRPD, the chapter considered the manner in which the principle and duty of accessibility is currently being monitored and implemented by State Parties. To this end, it examined and summarily appraised sixty-one state parties’ initial reports to the Committee on the Rights of Persons with Disabilities, taking into consideration the reporting guidelines issued to State Parties. In addition it appraised the list of issues and Concluding Observations that the

³⁸¹ Art 5 CRPD.

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Committee sent to State Parties. The analysis identified the commonalities and disparities among the reports and gaps which needed to be addressed, which have been outlined *supra*. Following consideration of the EU's report to the Committee, an analysis of Article 7 AVMSD was proffered in addition to an outline of the various accessibility measures and studies conducted via the EU Disability Strategy. Based on those analyses, a number of recommendations in relation to accessibility as it relates to television and audiovisual content can be made.

Recommendations

On the basis of the analysis outlined in the foregoing sections, the following recommendations should be taken into consideration at international, European and national levels. Having regard to the reporting guidelines for State Parties' initial reports to the Committee, it is proposed that in the absence of a reporting obligation in the current guidelines under Article 30 CRPD to ensure that "persons with disabilities enjoy access to television programmes in accessible formats", this needs to be addressed either by revision of the guidelines or through some other awareness raising measure *e.g.* through *G3ict, Global Initiative for Inclusive Information and Communication Technologies*, an Advocacy Initiative of the United Nations Global Alliance for ICT and Development.³⁸² Likewise State Parties should be encouraged to report on accessibility provisions provided by private broadcasters.

State Parties reporting to the Committee should also be made aware of the need to provide up to date and accurate information regarding accessibility measures undertaken in relation to access to broadcasting equipment and content. Moreover, the importance of efficient communication between relevant government departments in preparing such reports should be accented.

³⁸²G3ict was launched in December 2006 in cooperation with the Secretariat for the Convention on the Rights of Persons with Disabilities at UN DESA. "[I]ts mission is to facilitate and support the implementation of the dispositions of the Convention on the accessibility of Information Communication Technologies (ICTs) and assistive technologies. G3ict, a non profit organisations based in Georgia, USA and headquartered in Atlanta relies on an international network of ICT accessibility experts to develop and promote good practices, technical resources and benchmarks for ICT accessibility advocates around the world. One of its primary aims is to "[R]aise awareness on effective public policies, private sector initiatives, and standardization references. It reaches key stakeholders via conferences and showcases, briefings, web activities, publications and social media." <<http://g3ict.com/>>

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Monitoring mechanisms and any methods of redress in place concerning the provision of access services relating to broadcasting should also be highlighted by State Parties in their reports. For instance, according to the TV Access Coalition submission to the BAI on the *Access Rules 2015*, all audio description targets set by the BAI in the 2012 *Access Rules* had not been achieved and there had been no sanction for non-compliance.³⁸³

Various commentators have asserted that irrespective of the human right in question, discussion of how that right can be fully enjoyed must include consideration of access not just for some but for all people with disabilities.³⁸⁴ State Parties should be made aware that in the identification and elimination of barriers and development of measures related to the access of persons with disabilities to broadcast /audiovisual content, such measures must consider all persons with disabilities and they should not create a hierarchy of disabilities where such measures are already in existence.

At European Level, the European Union should reconsider Article 7 AVMSD in light of its first report on the AVMSD 2010/13/EU, with a view to establishing mandatory minimum standards for its Member States regarding the provision of accessible audiovisual media services. Moreover, such standards should not be merely restricted to persons with hearing and sight impairments. The Commission's revision of the AVMSD and the recently launched public consultation on the AVMSD provide an ideal opportunity for both disability organisations and the public to voice their opinions on the issue. It is further recommended that the Commission should allocate a proportion of its funding for the provision of accessibility measures/services/features and/ or training schemes in relation to the same as part of, for instance, its framework programme for support to the culture and audiovisual sectors. Moreover it is recommended that the Commission should carry out a feasibility study into the provision of cost effective accessible services for audiovisual media services providers. Additionally, it is recommended that the European Commission should consider persons with disabilities in its initiatives to promote media literacy under AVMSD 2010/13/EC.

³⁸³NDA, 'Policy Advice Paper: BAI's Access Rules Consultation' (NDA July 2014) 3, also submitted that stricter compliance was required with AD obligations in relation to RTE. This document is not yet publicly available and was obtained by this author from the BAI.

³⁸⁴Lord *et al.*, (n 10) 38.

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At national level, Article 33 CRPD affirms that State Parties must set up national focal points in governments in order to monitor implementation of the Convention's principles and duties. States must also set up some sort of independent monitoring mechanism, which usually takes the form of an independent national human rights institution. The full participation of civil society, in particular of persons with disabilities and their representative organizations, is essential in the national monitoring and implementation process.³⁸⁵

It is recommended that State Parties, through such focal points or independent monitoring body, should raise awareness among various stakeholders as to the many accessibility initiatives that can be undertaken, such as the aforementioned *G3ict* initiative, which includes an e-policy toolkit for “telecom /broadcasters.” In November 2011, for example, the International Telecommunications Union (ITU) in partnership with the *G3ict* issued a report which identifies accessibility options that enable users of audiovisual content to fully access such content. The report also explains how access services are produced and delivered so that regulators and service providers can better understand the issues and costs and it emphasizes the need to make target users aware of access services. Moreover the report provides a checklist for accessible TV implementation, which would prove useful for State parties in considering broadcasting accessibility measures, as it relates to both television equipment and access services.

Having regard to State parties' initial reports to the Committee, it is recommended that in identifying and eliminating barriers to accessible television / audiovisual content, more accentuation needs to be placed on the measures outlined in Article 9 CRPD. As a common point of reference for all issues of accessibility, Article 9 CRPD, as discussed *supra*, is intended to inform and assist in the interpretation and implementation of all rights in the Convention. Consequently, Article 9 CRPD should serve as a practical checklist and standard in both the establishment of appropriate broadcasting “accessibility” standards and the assessment of existing accessibility measures. It is recommended that State Parties should report subsequently on whether any of these standards have or have not been attained or

³⁸⁵UN Enable website ‘Monitoring and Implementation’.

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whether they are in the process of development, in order to provide a full picture of the situation in each State Party. To recapitulate, these include:

Implementation of Minimum Accessibility Standards and Guidelines - Development and Monitoring

In the development or revision of minimum accessibility standards and guidelines relating to television equipment and television content (in both form and presentation), State parties should take into consideration how such guidelines benefit persons with different types of disabilities and should not be restricted to those with specific disabilities such as sensory impairments. Ireland's Centre for Excellence in Universal Design guidelines on "Digital TV equipment and services" provides a model of best practice in this regard. The guidelines are aimed at broadcasters, consumer equipment manufacturers and policy makers seeking to improve the quality, capacity and appeal of television products and services by adopting or advocating a Universal Design approach. Guidelines or standards on television access services should be developed in consultation with persons with disabilities and should apply to both public and private (commercial) broadcasters. It is recommended that State Parties in their reports to the Committee should indicate whether or not such standards exist and whether they apply to both types of broadcasters and whether they have been developed in consultation with persons with disabilities. Such guidelines should contain time frames for implementation, time-bound benchmarks of achievement and indicators of success and stipulate that State parties should indicate such measures in their reports. Methods of redress for breach of such guidelines should also be indicated in State Parties' reports. It is submitted that an excellent example of best practice in this regard is the ITU's *Model ICT Accessibility Policy Report* which was published in November 2014.³⁸⁶ The policy report is designed as a tool for national policy-makers and regulators to create their own ICT accessibility policy frameworks. The module on television /video programming, for example, provides a framework for countries to put in place a policy which promotes television/video programming accessibility. The focus includes not only content, but also the information and devices needed by people to

³⁸⁶ITU 'Model ICT Accessibility Policy Report' (ITU, GC3it Geneva 2014).
<<http://www.itu.int/en/action/accessibility/Pages/default.aspx>>

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enjoy television.³⁸⁷ All modules in the Report advocate the development of national policies in consultation with persons with disabilities.

Provision of Training on Accessibility for Stakeholders and Awareness Raising

The Committee in General Comment No 2 on Accessibility noted that lack of accessibility is often the result of insufficient awareness and technical know-how. In Ireland's public consultation on the Access Rules 2015, public broadcaster RTE submitted that it did not have the equipment in place for the carriage of audio description on its RTEjr channel. Likewise, the BAI stated that there was a lack of awareness among independent producers of audio description and consequently there was no take up of the funding available for audio description as provided by the regulator's Sound and Vision Scheme. Article 9(2) (c) CRPD requires that State Parties provide training to all stakeholders on accessibility for persons with disabilities. The Committee asserts that Article 9 does not attempt to enumerate the relevant stakeholders; however it points out that any exhaustive list should include *inter alia* broadcasting boards and "ICT licences" [sic], designers, engineers, service providers, members of the academic community and persons with disabilities and their organisations". As awareness raising is one of the pre-conditions for the effective implementation of the CRPD, it is recommended that State Parties should strive systematically and continuously to raise awareness about accessibility among all relevant stakeholders.

In addition it is recommended that State Parties should include persons with disabilities in their media literacy policies and report on the same. Media literacy gives people the confidence and knowledge to get the most out of the many media platforms that now exist.

Promoting other "appropriate forms of assistance and support" to ensure access to information

It is recommended at national level that State Parties should report on and monitor forms of assistance and support to ensure access to information regarding accessibility measures in the broadcasting sector. Ireland is an example of best practice in this regard. Section 26 (1) of the Disability Act 2005, for example,

³⁸⁷ibid 75-90.

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requires a public body to provide access to its services to people with disabilities where practical and appropriate. If a member of the public feels, for instance, that public service broadcaster RTÉ in its provision of services discriminates against a person with a disability, a complaint may be made to its human resources manager. Additionally the National Disability Authority has issued an accessibility toolkit for public sector staff. Broadcast regulators also and broadcasters themselves should consult with disabled user groups in monitoring forms of assistance and support and report on the same.

Promoting Access to New Information and Communication Technologies and systems, including the internet

The initial reports to the Committee on the Rights of Persons with Disabilities contained little or no information regarding the promotion of access to new information and communication technologies. Two areas of particular note in this regard concern television equipment and the processes involved in the digital switchover; and the promotion of different types of television access services. More needs to be done in these two areas. The ITU note that even as households around the world switch over to digital transmission and adopt multichannel television, it bears remembering that there are significant numbers of poor or displaced communities that still have inadequate or no access to basic radio and television services.³⁸⁸ For those communities, access to these services could be their only means of accessing public services and receiving essential relief items.³⁸⁹

With regard to the promotion of different types of television access services, State Parties' initial reports contained very little information on access services such as audio description for persons with visual impairments. The initial reports by State parties to the Committee on the rights of persons with disabilities contained very little if any reporting on promotion of the design, production and distribution of information and communications technologies that address accessibility early on in

³⁸⁸ITU, 'Partnership on Measuring ICT Development Final WSIS Targets Review: Achievements, Challenges and the Way Forward (ITU 2014) 264.

³⁸⁹ibid *e.g.* the World Health Organization "...disseminates health information to refugees and displaced persons through 'low cost, low technology' communication systems such as community radio...".

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their development and that are provided at minimum cost.³⁹⁰ Article 4 (1) (g) CRPD also encourages state parties to undertake or promote research and development of, and to promote the availability and use of, new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.

Funding

Another issue which should be addressed and reported on by State parties is funding for the provision of television access services and the universal design of television equipment through *e.g.* public procurement and /or other initiatives. New Zealand's initial report indicated that its government entity, *NZ On Air*, provides funding of public broadcasting content across television, radio and new media platforms. The ITU's report on *Making Television Accessible*, in collaboration with GC3it, sets out business models for television access service provision and for television receivers. Governments, broadcasting regulators and broadcasters should look toward developing such models and cost effective initiatives.

Precisely because of its centrality, television has become a key site on which the struggle to secure and develop resources for citizenship takes place. The denial of conventional access to the media, therefore, effectively marginalizes persons with disabilities from participating as citizens in a democracy and interferes with *inter alia* their right to freedom of expression and their right to participate in both the political and cultural life of society.

³⁹⁰See Spain's initial report to the Committee (CRPD/C/ESP/1) 42 §§228-230, which detailed the development of accessible digital television decoders in collaboration with various government departments and industry stakeholders, provides an example of best practice in this regard.

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Overall Conclusions

This thesis set out to examine, against a background of freedom of expression theory and jurisprudence, whether the rights and interests of persons with disabilities, as expounded in the UN Convention on the Rights of Persons with Disabilities, can be safeguarded and promoted in broadcast media in terms of both their portrayal in and access to the medium.

To that purpose, in line with the primary research questions set out in the Introduction and in consideration of the tension surrounding freedom of expression and the demands of the CRPD, it began by identifying the relevant issues through an examination of both media and disability regulatory frameworks and associated policies and practices at international, regional (European) and national levels. In a bid to ascertain what new issues relevant to broadcast media the CRPD raises and what steps or mechanisms to address any difficulties or issues emanating from the CRPD would be compatible with freedom of expression principles and freedom of the media, the examination gave due consideration to a number of key themes such as the manner in which disability is conceptualised and expressed and the dichotomous rationales underlying various institutional divisions within the broadcasting sector, particularly public service and commercial broadcasting.

It explored, in light of the right to freedom of expression and broadcast freedom, the possibilities, however limited, surrounding the imposition of restrictions on broadcast content or access to that content, as a way of advancing disability representation. Chapter Four, in particular, enquired as to how the justifications for regulatory intervention in media content which promotes non-discrimination, equality and tolerance can be reconciled with consideration for freedom of expression. Particular emphasis was given to the relevant provisions of the CRPD, where appropriate, in order to assess whether broadcasting/audiovisual (and to a lesser extent disability) and related regulatory frameworks and policies conformed to the standards championed by the Convention.

Overall the examination sought to decipher what the best methods may be for enhancing disability representation in broadcast media and to identify any key players among the various stakeholders including governments, broadcasting

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regulators, broadcasters, disability organisations, technological industry etc. Moreover, the assessment sought to ascertain the strengths and weaknesses of the current regulatory policy and practice regimes at various levels and to pinpoint opportunities for initiatives/innovation as well as any gaps or areas which may need to be addressed in order to improve disabled persons' access to and portrayal in broadcast media. From that investigation a number of specific conclusions were drawn and presented at the end of each chapter. It is now possible, based on the totality of the research, to draw certain overall conclusions based on the distillation of the questions posed in the Introduction to this thesis.

Main issues concerning the portrayal/ depiction of persons with disabilities in various types of television programming

There are a number of distinct yet inter-related factors which can both create and contribute to negative attitudes, discriminatory practices and misunderstanding of persons with disabilities in media content. Broadly speaking and more specifically in terms of broadcast media, these factors have been identified in Chapters One and Four and throughout the thesis as including *inter alia* the manner in which disability is constructed through use of various models, which can vary in different cultures; the use of disabling language and terminology to describe persons with disabilities; stereotyping and the under-representation or exclusion of persons with disabilities in a variety of contexts including in media content.

Extent to which disabled people are currently represented in media content?

It has been asserted that one of the most deeply felt needs addressed to media is that of self-recognition in media content.¹ In some societies where identities are not clearly defined, the media are needed to help create and reinforce a particular group's preferred identity and therefore to help fulfill a deeply felt need, serving practically as an extension of the reference group.² Accordingly, the under-representation or exclusion of disabled persons in media content can have the effect of alienating audience members and can lead to the use of stereotypes or the discussion of difficult or controversial issues which may be seen as offensive in that it is viewed as creating a false impression of that minority. The European Court of

¹Karol Jakubowicz, 'Media and Democracy' in Karol Jakubowicz (ed), *Media and Democracy* (Council of Europe Publishing 1998) 9.

²*ibid*

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Human Rights has recognised that stereotypes are perilous as they signal or even induce an implicit discrimination. Research carried out in various jurisdictions has identified the under-representation or absence of persons with disabilities in broadcast content as a specific concern. Chapter Two also highlighted the need for consideration of different types of disabilities in broadcast content. Nonetheless, there is a general agreement that a diverse media workforce more accurately reflects the make-up of society and inevitably produces richer and more relevant output.

Barriers that hinder or thwart disabled persons' access/accessibility to broadcast and audiovisual media and their respective content?

Chapter Five of this thesis considered a number of barriers which hinder or thwart the access of persons with disabilities to broadcast and audiovisual media content. It highlighted that the denial of access to television and audiovisual content can be caused by many different barriers which can take several different forms and to a large extent overlap. It established that the CRPD, which espouses a social model of disability, recognises that such barriers form part of the concept of disability itself and comprise physical (equipment), informational and communicational (television access services, digital switchover and EPGs), attitudinal, economical (affordability, funding) and institutional barriers (legislation, practices or processes that actively prohibit or fail to facilitate access by people with disabilities). It further acknowledged that barriers that impede access to audiovisual content can affect numerous people with different disabilities and are not merely confined to those with specific disabilities such as sensory impairments, as is often assumed.

In an effort to discern policy considerations which may go toward enabling and improving disabled viewers' access to broadcast content, Chapter Five identified television equipment, television content (in both its form and presentation) and television access services, as aspects where accessibility considerations arise and which, accordingly, should be targeted in policy frameworks. It emphasised that access barriers to equipment and content are interrelated to issues of availability, usability and functionality, comprehension, affordability and awareness. Additionally it recognised that any solutions in addressing such barriers involve a broad range of stakeholders from policy makers, technology manufacturers,

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broadcasting and communication regulators and broadcasters to persons with disabilities themselves as both users and viewers of television/ audiovisual content.

This thesis concludes that the representation of persons with disabilities can be both safeguarded and indeed advanced in and through broadcast media without infringing freedom of expression including the media's editorial freedom. The manner in which this is to be achieved is through a combination of legislative, policy and practice approaches involving a myriad of stakeholders including governments, regulators, broadcasters (public and private), industry, disability organisations, academics and the general public. The section following outlines the steps and /or mechanisms to address difficulties and issues relating to the representation of persons with disabilities in broadcast content and accessible television services which are compatible with the demands of the CRPD.

Measures (legislative, policy and practice) including accessibility and redress measures, in place or contemplated to ensure that persons with disabilities are represented on a non-discriminatory/ equal basis with other members of society in television programming?

i. Broadcasting Regulation

A key method, as observed in Chapters Four and Five, in affording protection for persons with disabilities in traditional **broadcasting** regulatory frameworks is through having the main principles such as diversity, harm and offence, and requirements pertaining to the provision of access services, set out in primary legislation, with more detailed rules contained in secondary legislation, or Codes/Rules/Standards, created by the regulatory body. This system enables rules to be varied more easily and quickly to meet changing circumstances, particularly in a fast-changing technologically-driven media environment, and allows for additional guidance to be offered, explaining the basic statutory requirements. In particular this method also guarantees, promotes, protects and respects a broadcaster's freedom of expression.

Broadcasting regulators independent of government, at both national and regional (European) levels, may have a particularly important role to play in ensuring that persons with disabilities are protected from content offensive to them both directly

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and indirectly and in the development and augmentation of access services. This can be accomplished through a number of important legislative functions conferred on regulators through broadcasting law. Such functions include administering diversity objectives through licensing, setting standards for programming and access services (in consultation with persons with disabilities).

It is submitted, as outlined in Chapters Four and Five, that broadcasting regulators have a pivotal role to play through monitoring and implementing those standards/rules and via the provision of redress measures to persons with disabilities / non-disabled viewers where they feel there has been a breach of broadcast codes / standards /guidelines/rules in relation to programme content and access services.

The comparative sample analysis carried out by this author on a number of complaints from the United Kingdom, Canada and Ireland in Chapter Four, revealed that there is a stated awareness in all three jurisdictions regarding such codes and redress mechanisms in relation to broadcast content. However, it was noted that the majority of complaints made to the various regulators were by disability organisations. A number of inferences both positive and negative were drawn from that finding. For instance, in the case of the UK, while it demonstrated that disability organisations are utilising the codes and in some cases mobilising both persons with disabilities and the public in objecting to controversial decisions by the broadcast regulator Ofcom, it was less clear whether there is a stated awareness or concern amongst the general public regarding offensive content and associated complaint mechanisms relating to persons with disabilities.

It is submitted that in order to get a clear indicator of whether such awareness exists among the general public, regulators could benefit from the model of best practice proffered from Ofcom in tracking, detailing, and publishing all complaints even where alleged breaches of codes have reached investigative stages. It is further submitted that such information could also benefit State Parties in their obligation under Article 31 CPRD to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention and also be used to help assess the implementation of States Parties' obligations under Article 8 CRPD.

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Other ancillary functions of broadcast regulators were highlighted throughout the thesis, such as research into broadcasting matters, funding schemes, and the promotion of equal opportunities, functions which also contribute to on screen diversity and overall representation. For instance, internal standard setting by broadcast regulators and broadcasters themselves and the promotion of equal opportunities bolstered by equality legislation go towards protecting persons with disabilities in broadcast content. In addition, initiatives, such as the proposed project by the UK's EHRC, was identified in Chapter Four as a model of best practice in this regard.

ii. Broadcasting Ethos - Commercial vs Public Service Broadcasting

It is further submitted that broadcasters, particularly public service broadcasters, given their unique statutory remits, have a unique role to play in promoting diversity in broadcast content and the provision of access services and advancing the agenda for disabled persons.

The interrelated concepts of “freedom of expression”, “democracy”, “citizenship” and the “public sphere”, which lie at the heart of media philosophy and policy, lend themselves well to the notion of persons with disabilities as rights holders directly participating in democracy. However, the dichotomous rationales, upon which media policy is based, have enormous potential to impact adversely on the manner in which disabled persons are represented in broadcasting. An exclusively “commercial”/ “consumer” ethos of broadcasting, for example, has the potential to effectively marginalise or exclude persons with disabilities by failing to recognise their specific needs. The decision by niche sports channel *EPSN* not to cover the London Paralympics in 2012 and the low coverage of the games by commercial broadcasting and US rights holder *NBC*, as outlined in Chapters One and Four, are two examples whereby the representational needs of persons with disabilities were left to the perils of the market.

As stated, public service broadcasting, on the other hand, can go a long way towards achieving more equal participation for persons with disabilities as citizens in terms of both their portrayal and accessibility to the medium. This is owing to the special remit of PSB in respect to principles of universal access, affordability, availability and obligations regarding diversity. That is not to say that commercial broadcasting

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can never satisfy the needs of disabled audiences. Indeed recent promising research carried out by the BBC showed that PSB is at its most effective when it not only delivers high quality programmes itself but also exerts pressure on commercial competitors to do the same.³ The research supports the theory that public broadcasters drive a virtuous circle by raising audience expectations of all broadcasters, requiring commercial broadcasters to invest in diverse high-quality output and thereby further challenging PSBs to raise their game. Consequently, public-private competition in the UK market and elsewhere has led not to lower standards and a ‘race to the bottom’ but a race to the top and ever higher levels of innovation and quality.

iii. Media and Discourses of Disability

In considering the issues surrounding the portrayal of persons with disabilities in broadcast media and their access/accessibility to the medium, it is clear that any future formulation of law and policy or any initiatives directed toward protecting disabled persons interests in media must be informed and influenced by contemporary constructions of disability, namely a social/human rights model of disability as espoused in the Convention on the Rights of Persons with Disabilities (CRPD). Media content, technologies and policies all convey discourses about disability that frame the manner in which disability is constructed and viewed through society, as evidenced in Chapters One to Five. There is a crucial need therefore for an enlightened, educated shift in awareness from outdated models of disability among all media stakeholders, including law and policy makers, relevant government bodies, regulators, broadcasters, independent producers, script writers etc., at international, regional (European) and national levels. However, as Quinn cautions, the significance of the CRPD should not be underplayed. It should not be viewed merely as supplying a set of norms against which to measure bad laws and policies. Instead he encourages seeing the Convention as an instrument that can transform the process that makes these laws in the first place.⁴

In terms of the formulation of accessibility policies and the provision of accessible broadcasting services at regional (European) level and national levels, for instance,

³ BBC ‘Public and Private Broadcasters Across the World’ (BBC December 2013) 1-2.

⁴Quinn, Chapter Two, (n 160) 6 (New Zealand).

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the conceptualisation of persons with disabilities effectively as cost “burdens” on broadcasters and service providers, as discussed in Chapters One and Five, is indicative of outmoded models of disability. Instead, creating awareness about viewing persons with disabilities as rights holders, entitled to participate in political and cultural life on an equal basis with others consistent with their right to freedom of expression, should be emphasised. A positive example of a national measure in this regard, as instanced in Chapter Five, is the recently adopted *Access Rules 2015* by the Broadcasting Authority of Ireland. Under these amended Rules, when an applicant applies for a licence to operate a new television service, they must indicate the level of access provision that will be provided on their service; targets are then set for the service at the regulator’s next Review of the Rules.

Likewise in considering the formulation of policies and rules relating to disabled persons in broadcast media, particularly with regard to access services, policy makers at both European and national levels need to be careful not to create a hierarchy of disability, as highlighted in Chapters Three and Five, by confining such policies to those with sensory impairments or, indeed, creating a hierarchy among those with sensory impairments. To this end minimum standards should be put in place setting targets to be achieved by broadcasters (both public and private) for each access service, within reasonable timeframes. Monitoring and redress mechanisms should also be established, as well as sanctions for non-compliance. Similarly, as emphasised in Chapter Two, in considering persons with disabilities in awareness campaigns and broadcast content, adequate attention should be given to different forms of disability and all types of disability and impairments should be considered.

New issues relevant to broadcast media raised by the CRPD

Addressing Attitudinal Barriers

As powerful agents of social influence it is submitted that the media, and in particular broadcast media, have extensive capacity to either perpetuate stereotyping and prejudice or to educate the public to have a more understanding and positive attitude towards people with disabilities. The media have a fundamental role to play in mobilizing public support to help create awareness about persons with disabilities and to prevent and combat discrimination. Owing to their reach and pervasiveness

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and their ability to mould public opinion, they can act as a powerful tool of social change when it comes to creating such awareness and portraying disability.

Recognising that attitudinal barriers play a significant role in the manner in which disabled people are treated in all aspects of society, the importance of the role envisaged in CRPD Article 8 for member states to play in creating awareness about persons with disabilities cannot be overstated or undervalued. Given the dominance of the media, particularly broadcast media, its universal reach, pervasiveness and its ability to influence both positive and negative attitudes towards persons with disabilities, awareness raising in broadcasting should be prioritised, particularly at national level, as advocated in Chapters Two and Five, as a pre-requisite for the fulfilment of the rights contained in the CRPD.

Nonetheless it was indicated that the obligations contained in Article 8 CRPD necessitate some clarification. Having regard to the obligations concerning the initiation and maintenance of “effective” public awareness campaigns and encouraging the media to portray people with disabilities in a manner consistent with the purpose of the Convention, for instance, the CRPD and literature on the issue in relation to media give little, if any guidance, as to how such measures are to be ‘initiated’ let alone be ‘maintained’ or be ‘effective’. As proposed in Chapter Two, the United Nations should draw from their experience and convene a working group of specialists from around the world to formulate specific guidelines for the inclusion and portrayal of persons with disabilities in the media. Such collective guidelines should be devised in a manner in which they could be adapted by individuals working in all forms of media (print, broadcast, *etc.*) and should be cognizant of the media culture in different countries and situations.

A recurring theme running through the analysis in the thesis is the importance for persons with disabilities to be consulted in the development and design of any schemes, training programmes or other initiatives relevant to them in relation to media as in other fields. Thus, such guidelines in respect of Article 8 CRPD, should be drafted in consultation with persons with disabilities and media personnel, and should address and educate the broadcasting sector about inappropriate and insensitive language and terminology used to describe people with disabilities. Additionally they should inform the media sector regarding not presenting people

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with disabilities in stereotypical and stigmatising ways, for example as dependent or pitiful. The expert group should also, through guidelines, propose ways to increase the presence, portrayal and participation of persons with disabilities in broadcast media both on and off–screen. Such proposals should include but not be confined to: that the broadcasting production sector take steps to identify the talent pool of performers and creators with disabilities and consult with disability groups and experts about characterisation; that disability representation is monitored in programming by broadcasters, including at production level and in different genres of programming; that broadcasting personnel and disability organisations receive training on disability and media through the facilitation of workshops and seminars on the issue; and that research be carried out on attitudes towards persons with disabilities in broadcast content. In addition, broadcasting and media regulators have an essential role to play in assessing and reviewing codes of programming standards and ensuring that they contain measures with a view to promoting respect for diversity and combating discriminatory material in broadcast content.

Monitoring and Implementation of Measures Related to Disability Representation in Broadcast Media

A major gap identified in this thesis following analysis of the regulatory policy and practice frameworks relating to the representation of persons with disabilities at international, European and national levels is the failure of relevant stakeholders to monitor and implement standards where established and to outline or enforce sanctions for non-compliance.

At international level, for instance, following an examination of the initial reports and subsequent replies by state parties to the CRPD and the Concluding Observations made by the Committee to date on Articles 8, 9, 21 and 30 CRPD, a number of issues were identified and proposals put forward regarding monitoring and implementation of the CRPD and those articles relating to media.

As proposed in Chapter Two, in order to attain a more comprehensive summary of measures undertaken by State Parties to the Convention, the reporting guidelines on Article 8 CRPD need to be reconsidered if not reworded, since they proffer different interpretations on what a state party was being asked to report. There was little or nothing in the reports on Awareness Raising measures in the media or, where some

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countries had reported issues, a complete or more comprehensive list of measures actually undertaken had not been reported. The UK report compiled by the Office of Disabilities Issues provided one such example (Chapter Two). That report raised the importance of instructions for preparing reports and of effective communication between relevant governmental departments and rights agencies responsible for compiling and submitting such reports (in order to avoid the so called ‘silo effect’). In May 2013, the Committee simplified the reporting procedures for State Parties by issuing lists of issues to include in the reports. An examination of reports and lists of issues since the simplified reporting procedure was introduced showed some improvement in the manner which State Parties are reporting under Article 8 CRPD; however it is concluded that more can be done in this regard.

While it is accepted that there is a limit on the volume of information State Parties can report, a model of best practice for State Parties to the Convention in this regard, as suggested in Chapter Two, would be the framework outlined in the BCI/NDA Report on the *Representation of Persons with Disabilities in Irish Broadcast Media: A Review of Other Jurisdictions* 2007, updated in 2013. Using this model, each state party would have a clear and uniform frame of reference and each State Party could gain knowledge from the measures taken in different countries and could share international best practice on the issue.

A similar proposal emerged from Chapter Five regarding reporting on access service provisions under Articles 9, 21 and 30 of the CRPD. Following from an examination of the reports, an excellent example of best practice for State Parties to the CRPD to use as a reference in this regard noted in Chapter Five, is the ITU’s *Model ICT Accessibility Policy Report* published in November 2014. The module on television/video programming contained in the report provides a framework for countries to put in place a policy which promotes television/video programming accessibility. The module also recognizes that some countries have not yet migrated to digital television and may have legal and regulatory frameworks that refer only to “television” and/or “broadcasting” and it may be pertinent therefore for broadcasting regulatory frameworks in developing countries.

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Shadow Reports to the Committee on the Rights of Persons with Disabilities

A gap was also identified regarding the Shadow Reports of Disabled People's Organisations (DPOs) submitted to the Committee on the Rights of Persons with Disabilities. The examination found for instance, that Article 8 generally speaking, was not addressed in shadow reports examined. It was further evidenced and submitted that the UN Committee on the Rights of Persons with Disabilities should give broader consideration to those reports. Furthermore disability organisations should engage Article 8 critically in their reports. It is put forward that there is scope for future work in this area. The zealous work of the European Disability Forum (EDF) in advancing disability issues has been highlighted throughout this thesis and it is proposed that the EDF could be instrumental in championing this among member states.

At European Level, an analysis of the text of the AVMSD and of European Union's report to the Committee on the Rights of Persons with Disabilities demonstrated (Chapters Three and Five) that the only protection afforded by the EU in safeguarding disabled people from broadcasting content which discriminates against them is in the area of audiovisual *commercial* communications. Article 9 AVMSD establishes a minimum level of protection in commercial communications for EU "consumers", as opposed to "citizens", and is probably indicative of the Directive's primary aim, namely the creation of a barrier free internal market. One positive facet of the AVMSD in this regard is that it does not preclude member states from applying stricter rules with regard to television advertising to media service providers in their respective jurisdictions. While the AVMSD provides for monitoring and reporting, the reporting to date on its implementation indicates that the issue of disability discrimination in audiovisual commercial communications has largely been ignored. It is therefore recommended that the European Commission should carry out further research or provide funding for a relevant regulatory/research body (e.g. EPRA) to conduct research on disability discrimination in audiovisual commercial communications (for example, through monitoring advertising). The Commission should also be doing more to raise awareness regarding disability as a ground to be protected under Article 9 AVMSD.

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Another shortfall of the AVMSD, as evidenced in Chapter Three, is that it does not provide a minimum harmonising standard with regard to the regulation of content that incites to hatred on the basis of disability, despite calls from the European Disability Forum, the European Parliament and various Standing Committees for its inclusion during deliberations on the text of the Directive. Considering the EU's involvement in negotiating the CRPD, its legal obligations under the Charter and under the Lisbon Treaty, it missed an opportunity in determining the terms of the AVMSD at the very least to engage in a robust and comprehensive dialogue regarding hateful and /or discriminatory content in relation to disability in all audiovisual media services.

A revision of AVSMD which is forthcoming in 2016 could provide a unique opportunity for the Commission to consider a number of key issues in relation to protecting the interests of persons with disabilities in the AVMSD. Firstly, the Commission should consider bringing the Directive into line with the CRPD by adopting the interpretation of persons with disabilities in Article 1 CRPD to include those who have long-term physical, mental, intellectual or sensory impairments, which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. Secondly, the Commission should re-consider including disability as a ground to be afforded protection in all audiovisual media services under the incitement to hatred provision in Article 6 AVMSD, thus bringing the AVMSD in line with Article 21 of the CFREU. Thirdly, as submitted in Chapter Five, the Commission should consider re-evaluating Article 7 AVMSD on the accessibility of audiovisual media services with a view to establishing mandatory minimum standards for its Member States regarding the provision of accessible audiovisual media services.

Indeed, the EU has obligations under primary law, in the form of its constituent treaties and its Charter of Fundamental Freedoms to take issues such as human dignity, non-discrimination and protecting the rights of persons with disabilities into consideration in *all* its policies. It also has a general obligation under Article 8 CRPD to initiate, create and promote the rights of persons with disabilities through awareness raising measures. An examination of the EU's report on the CRPD suggests that the EU may not have carried out awareness raising campaigns since

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2009 but even if that assumption is incorrect and awareness measures have been carried out, the implication is that there are problems regarding the monitoring, compilation and subsequent reporting on the application of the CRPD under Article 8 by the EU.

With regard to accessibility of audiovisual media services, the EU's report (Chapter Five) fell short of the requirements of its reporting obligations under the CRPD owing to its scant outline of the relevant provisions of the AVMSD and the lack of details regarding its findings on its assessment, monitoring and implementation of the Directive.

At a practical level, the Council of Europe's action plan on disability was found to be a purposeful instrument which proffers a constructive guide for member states to benchmark media representation of disability, particularly through its specific actions on awareness raising. However the CoE Action plan, like all other disability policies, depends on its monitoring and implementation at both national and CoE levels. An examination of the mid-term report revealed that more accurate and comprehensive detailing on its implementation is essential. The Action Plan is due to conclude in 2015; therefore an updated report detailing and assessing the levels of implementation of the various action lines taken by member states and the overall level of the Action Plan's success should be made publicly available by the Council of Europe.

Recommendations for Additional Research

On the basis of the findings of this thesis, it is submitted that there is broad scope for both continuing and additional research into media and disability and the issues surrounding portrayal and access. For instance, wider attention to themes such as media literacy; media and children or media and women and media in developing countries as they specifically relate of disability were largely outside the scope of this thesis and may form the basis for future research in the area.

It is recommended that further comparative research into the monitoring, adjudication and implementation of codes of programme standards and access rules dealing with complaints regarding programme content and access services and the

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various redress mechanisms developed by broadcast regulators at both national and international levels is warranted.

Moreover, it is proposed and recommended by this author that an international on-line tool be developed detailing the various codes /rules and respective redress mechanisms available to persons with disabilities and their associated organisations with regard to disability discrimination in relation to media content and access services. The online tool could be used to detail current awareness regarding complaints and the manner in which they are adjudicated in various jurisdictions. In addition such a tool could provide a model of best practice for jurisdictions with less developed broadcast systems. It is submitted that such a tool could also profit the general public and various stakeholders through the creation of awareness surrounding disability discrimination in media content and services. State Parties to the Convention and the EU could also benefit from their contributions to the on-line tool in the advancement of their obligations under Articles 31 and 33 CRPD to collect statistical and research data and information regarding national monitoring and implementation of the Convention and to help identify and assess the needs, restrictions and limitations associated with disability and media.

This thesis does not propose that the broadcast media provide a panacea for all the inherent difficulties associated with the issue of disability and disability discrimination. However it does propose that the powerful influence of the media should play a significant role in addressing the prevalent disabling attitudes and the many barriers faced by disabled people. By addressing such attitudes and barriers, the media can provide a conduit through which the rights of persons with disabilities might be realised.

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