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Exploring interesting spaces: The convergence of freedom of expression, diversity and equality: the convergence of freedom of expression, diversity and equality

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25 | Exploring interesting spaces

The convergence of freedom of expression, diversity and equality

Tarlach McGonagle

1 INTERESTING SPACES

Titia Loenen's research interests and my own often converge in interesting spaces. This short piece explores one such interesting space: a space where we can see freedom of expression forging a new alliance with diversity and equality.

2 AN UNLIKELY ALLIANCE

At first glance, this may seem an unlikely alliance. It is all too easy to cast free speech as inimical to diversity and equality or to frame their relationship as one of friction or opposition. Hate-mongers use their 'free speech' – so the argument goes – to propagate discriminatory and hateful ideas and messages. Their hateful words wound; they wound individuals, groups and society as a whole. And those wounds can take a long time to heal. Without free speech, there would be no dissemination of 'words that wound';¹ no dissemination of hate speech. So the argument goes.

There is an important core of truth in this argument (words can – and do – wound!), but it also contains an important flaw. A brand of 'free speech' that would give hate-mongers free reign is a libertarian or absolutist understanding of the right to freedom of expression that is at odds with international and European human rights standards. Under those standards, discriminatory expression may legitimately be limited, when necessary, to protect the rights of others, and hate speech is (ordinarily) not protected. It would therefore be

¹ This phrase is borrowed from leading works in critical race theory: M.J. Matsuda, Ch.R. Lawrence, R. Delgado & K. Williams Crenshaw (Eds.), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Boulder/San Francisco/Oxford: Westview Press 1993; R. Delgado & J. Stefancic, *Understanding Words That Wound*, Boulder, CO: Westview Press 2004.

more nuanced and more accurate to describe discriminatory and hate speech, not as ‘free speech’, but as the misuse or abuse of free speech.

This reflects the understanding that while freedom of expression is a powerful instrument, it is at the same time susceptible to misuse or abuse. The exercise of the right is therefore subject to (special) duties and responsibilities and it may, when (strictly) necessary, be limited in order to safeguard other rights or important public values or interests. Furthermore, the right may not be abused to destroy or to limit other human rights beyond any restrictions envisaged by international human rights treaties. Some treaties oblige states to prohibit or even to criminalize certain types of expression/hate speech. These observations make for a more legally nuanced understanding of the relationship between freedom of expression and discriminatory and hateful expressions.

3 EVOLVING UNDERSTANDINGS OF FREEDOM OF EXPRESSION

Our understanding of the right to freedom of expression is evolving in ways that resonate with the concept of substantive equality, as developed and used by Sandra Fredman and others, including Titia. Fredman has opened up the concept of substantive equality into four dimensions:²

#	Dimension	Action	Pages ³
1	Redistributive dimension	Redressing disadvantage	31-34
2	Recognition dimension	Addressing stigma, stereotyping, prejudice, and violence	34-39
3	Participative dimension	Facilitating participation, social inclusion, and political voice	39-42
4	Transformative dimension	Accommodating difference and structural change	42-44

Each of these dimensions can be discerned in one of the most far-reaching freedom of expression principles developed by the European Court of Human Rights pursuant to Article 10 of the European Convention on Human Rights. In its *Dink* judgment, the Court held that states have the positive obligation to create a safe and favourable environment for everyone to participate freely in public debate, without fear, even when their opinions are contrary to those

² S. Fredman, *Discrimination Law*, Oxford: Oxford University Press 2022 (3rd ed.), p. 29-45.

³ The page numbers in this column have been inserted for the readers’ convenience; they refer to *ibid*.

of the state or other groups in society.⁴ In the next paragraphs, I will point to the presence of the four dimensions of substantive equality within the *Dink* principle. An awareness of their presence could help to strengthen the synergies between freedom of expression and diversity and equality.

1. The *Dink* principle seeks to ensure that everyone – and everyone means everyone, without discrimination or disadvantage – can effectively receive and impart information and ideas and thus participate in public debate. Effectively implies regardless of differentials in material benefits, resources and power across society. Fredman argues that disadvantages arising from material and power imbalances need to be redressed under the *Redistributive dimension*. There needs to be non-discrimination and equality of opportunity for members of outgroups. Opportunities – in this case to participate in public debate – must be viable or realistic for those groups and attuned to their needs.

2. Stigma, stereotyping, prejudice and violence can all contribute to a chilling effect on participation in public debate by members of minority groups; these phenomena can compound feelings of fear and exclusion. The European Court of Human Rights is gradually developing a body of case-law that recognizes that negative stereotyping and discriminatory expressions which reach a certain level of severity or intensity can violate the right to privacy and family life, including identity and dignity. This can trigger States' positive obligations to prevent and/or provide effective remedies for such expressions. This approach is in keeping with Fredman's *Recognition dimension*.

3. The *Participative dimension* is shaped by how specific groups are recognized and how the disadvantages they experience inform the redistribution of opportunities. The Court has previously held that it is very important in pluralist democratic societies for individual, minority and non-mainstream voices to be heard.⁵ This is again in keeping with Fredman's emphases: participation (in the media); social inclusion (through deliberation between diverse actors about matters of general interest in shared forums); and political voice (expressing identities and opinions). The importance of creating access to the media and public debate can help persons belonging to minority groups to counter stigmatizing, stereotyping, discriminatory and hateful narratives. Access opportunities can also help to foster inter-group deliberation, under-

4 ECtHR 14 September 2010, appl. nos. 2668/07 and 4 others (*Dink/Turkey*), § 137; for analysis, see: T. McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?', in: O. Andreotti (ed.), *Journalism at risk: Threats, challenges and perspectives*, Strasbourg: Council of Europe Publishing 2015, p. 9-35; K. Pentney, 'States' positive obligation to create a favourable environment for participation in public debate: a principle in search of a practical effect?', *Journal of Media Law* 2024, p. 1-32.

5 See, for example, ECtHR 15 May 2005, appl. no. 68416/01 (*Steel and Morris/the United Kingdom*) and ECtHR [GC] 17 February 2004, appl. no. 44158/98 (*Gorzelik and Others/Poland*).

standing and tolerance and to prevent conflicts, insofar as such opportunities are in shared communicative spaces. This approach prioritizing pluralistic voices has also gained traction in the context of other international human rights treaties and political standard-setting, eg. the Council of Europe's Framework Convention for the Protection of National Minorities (especially Articles 6 and 9); the Committee on the Elimination of Racial Discrimination's General Recommendation No. 35 on combating 'racist' hate speech; and the OSCE High Commissioner on National Minorities' Tallinn Guidelines on National Minorities and the Media in the Digital Age.

4. The Participative dimension merges into the *Transformative dimension*; for participatory opportunities to be effective, they have to accommodate societal diversity and redress structural power disparities. The *Dink* principle aspires to transformative impact: it looks beyond merely facilitating opportunities towards an environment in which such opportunities are structural. In other words, it aspires to public debate where the values of freedom of expression, diversity and equality are integrated by design.

4 SHORT STEPS FOR NOW; LONGER STEPS WILL FOLLOW TITIA'S ENDURING GUIDANCE

These are very short, exploratory steps into a complex and dynamic space. Titia has, time and again, generously given me teaching and speaking opportunities to take and develop these steps in different directions. I don't dare to go any further on this research journey until I have read the rich and enduring guidance that Titia will provide in her forthcoming monograph. In the meantime, I will continue to enjoy our discussions of the journey ahead.