

## CHAPTER V

### INDIRECT VIOLATIONS OF THE FREEDOM OF EXPRESSION: THE IMPACT OF THE CONCENTRATION OF MEDIA OWNERSHIP<sup>1</sup>

#### A. Introduction

1. Continuing its study of indirect violations of the freedom of expression, the Office of the Special Rapporteur for Freedom of Expression has prepared the following report on the concentration of media ownership and its impact on the free circulation of ideas. This study aims to describe initial approaches to the issue, considering that it merits special attention, and proposes joint efforts for the Member States to develop measures on the concentration of media ownership.

2. In recent years, the Office of the Special Rapporteur has been receiving a steady flow of reports of certain monopolistic and oligopolistic practices related to media ownership in some of the Member States.<sup>2</sup> In effect, in its previous report covering 2003, the Office of the Special Rapporteur for Freedom of Expression insisted that concentration of media ownership is a practice that runs counter to democracy and pluralism, as it impedes the diverse expression of the various sectors of society.<sup>3</sup>

3. This report consists of two parts. In the first part we review and spell out some basic conceptual issues concerning concentration of media ownership and freedom of expression; this will enable us, in the second part, to evaluate the extent to which this human right is negatively impacted by such concentration, and consequently to provide insight for seeking solutions. The second part analyzes the main problems that have arisen in the European and inter-American systems for the protection of human rights in relation to the concentration of media ownership, to then draw some conclusions taking stock of the main challenges, all with a view to making suggestions and recommendations to help address them.

4. Along these lines, this report seeks to further a current of opinion favorable to the full observance of the freedom of expression, reaffirming that its exercise is not only an

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<sup>1</sup> A preliminary draft of this chapter was initially researched and written by Carlos J. Zelada, a recent graduate from the Masters of Law program at Harvard University, and an attorney with a law degree from the *Pontificia Universidad Católica del Perú*. He did the research for this report while working as an intern with the Office of the Special Rapporteur for Freedom of Expression in 2004. The Office is grateful for his valuable contribution.

<sup>2</sup> See: Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter IV: Evaluation of the Situation of Freedom of Expression in the Hemisphere/Guatemala, para. 120; Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere/Guatemala, paras. 114-117 / Honduras, para. 155; Annual Report of the Inter-American Commission on Human Rights 2002. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere, para. 20 / Guatemala, para. 55; Inter-American Commission on Human Rights 2003. *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala*. Chapter VII: *La Situación de la Libertad de Expresión*, pp. 193-195, paras. 415-419; Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere / United States, para. 107 / Honduras, para. 184 / Mexico, Annex 7: Press Releases, PREN/89/03: Preliminary Observations of the Special Rapporteur for Freedom of Expression, upon Concluding his Official Visit to Mexico, p. 301.

<sup>3</sup> Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere, para. 17.

expression of human dignity, but also one of the essential pillars of the democracy. The analysis set forth herein may be supplemented in the future by specific studies on certain situations.

## **B. Part I: Basic issues**

### **1. Direct and indirect violations of the freedom of expression**

5. In its previous report,<sup>4</sup> the Office of the Special Rapporteur on Freedom of Expression noted that in terms of violations of the freedom of expression, one often finds conduct which over time has been considered “typical” of violations of this right. All of these are measures which have been designed to impose direct restrictions on the exercise of the freedom of expression.

6. As the Inter-American Court of Human Rights has noted, these occur

when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control.<sup>5</sup>

7. The assassination of journalists is also included in this category. Most of the instruments that refer to the freedom of expression, under both domestic and international law, have been framed in these terms.

8. Over time, however, indirect forms of restricting the freedom of expression have appeared. In this respect, the American Convention on Human Rights notes at Article 13(3):

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

9. These measures, unlike the previous ones, have not been designed strictly speaking to restrict the freedom of expression. In effect, *per se* they do not constitute a violation of this right. Nonetheless, in practice they have an adverse impact on the free circulation of ideas which is rarely investigated, and, accordingly, harder to detect. The concentration of media ownership is one such indirect restriction on or threat to the freedom of expression.

### **2. The freedom of expression as a foundation for plurality in information**

10. For several years it has been said that the concentration of media ownership is one of the greatest threats to pluralism and to the diversity of information. The freedom of expression is closely related to the problem of concentration of ownership, though this is

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<sup>4</sup> Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter V: Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity, pp. 187-209

<sup>5</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism [hereinafter: “Compulsory Membership of Journalists...”] (Articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, para. 53.

sometimes hard to perceive because of the subtle nature of the connection, which has to do with what we know as “plurality” or “diversity” of information.

11. In this respect, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>6</sup>

12. Similarly, the Declaration of Principles on Freedom of Expression drawn up by the Office of the Special Rapporteur for Freedom of Expression of the OAS in 2000 notes in the first part of Principle 1:

Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, **it is an indispensable requirement for the very existence of a democratic society.**<sup>7</sup>

13. Along the same lines, in 2001, the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression of the OAS signed a joint declaration in which they stated:

Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves;

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<sup>6</sup> I/A Court H.R., Compulsory Membership of Journalists..., op. cit., para. 70. The emphasis is in the original.

<sup>7</sup> Emphasis added.

Broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference.<sup>8</sup>

14. Plurality is the essential characteristic of the freedom of expression in democracy. The freedom of expression is a condition for transparency, the effective existence of alternatives, accountability, and the rational participation of citizens in political systems. In this regard, the free circulation of ideas is guaranteed “when the citizen finds himself or herself in the position of being able to form an opinion on the decisive issues and when he or she knows enough about the conduct of the authorities to be able to approve or reject their performance in office. The freedoms of expression and information guarantee the existence of free and plural public opinion, this being an essential condition for the existence of a plural and democratic society, without which freedom of conscience and the dignity of the person are unthinkable.”<sup>9</sup>

15. In effect, the media enable individuals to be able to form their own political opinion and then to compare it with the opinions of others. Only an informed individual can make an assessment and freely embrace one or another position in the political spectrum. The need for more information, together with the freedom to be able to express and exchange points of view, are of vital importance in the decision-making processes in which the various members of society take part. The exercise of the freedom of expression by the citizens of a state depends directly on the media providing information freely and independently.

16. It is important that the mass media “can truly be an instrument for freedom of expression. It is the mass media that makes the exercise of freedom of expression a reality and therefore the media must adapt itself to the requirements of this right.”<sup>10</sup>

17. Following this trend, in recent years it has been understood that one of the fundamental requirements of the freedom of expression is the need for a broad plurality of information and opinions available to the public. And this is why monopolistic or oligopolistic control of the media may have a serious detrimental impact on the requirement of plurality in information. When the sources of information are seriously reduced in number, as in the case of oligopolies, or when there is a single source, as in the case of monopolies, the possibility that the information being disseminated will have the benefits of being compared with information from other sectors is limited, imposing a *de facto* limitation on the right of all society to information.<sup>11</sup> The existence of monopolies or oligopolies, public or private, thus constitutes a serious obstacle to the dissemination of one’s own thinking, and to receiving different opinions.

18. In effect, if these media are controlled by a limited number of individuals or social sectors, or just one, the result is a lack of plurality that hampers the functioning of democracy. Democracy requires a confrontation of ideas, debate, and discussion. When this debate is non-

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<sup>8</sup> Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 5: International Mechanisms for Promoting Freedom of Expression, Joint Declaration: Challenges to Freedom of Expression in the New Century, pp. 167-168.

<sup>9</sup> Juan José Solozabal, *Aspectos Constitucionales de la libertad de expresión y el derecho a la información*. In: *Revista Española de Derecho Constitucional* No. 23, 1988, p. 141.

<sup>10</sup> Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Declaration of Principles on Freedom of Expression, p. 33, para. 53.

<sup>11</sup> *Id.*

existent or is weakened because of a limited number of sources of information, the “the main pillar of democratic government” is being attacked.<sup>12</sup>

19. As the Inter-American Court of Human Rights has noted,

... freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice “means tending to impede the communication and circulation of ideas and opinions.”<sup>13</sup>

20. Yet the freedom of expression also implies that the citizens are able to accede to diverse sources of information, including opinions and ideas, as well as a variety of forms and outlets for artistic and cultural expression. As has been noted, “culture in a broad sense influences society in subtle ways, building the basis on which we form our opinions.”<sup>14</sup> Uniformity in the mass media strengthens conformity and discourages evaluation of other perspectives and opinions.

21. As will be examined below, this is how the problem is understood in the European system for the protection of human rights. In the European regional framework, the domestic and international instruments initially used to report only direct violations have been reinterpreted with singular efficacy in order to combat these new forms of restrictions on the freedom of expression.

### **3. Concentration of media ownership**

#### **a. Introduction**

22. It is common to find that diverse competitors in a market engage in a variety of operations—such as mergers and acquisitions—to improve their market position and to reach a larger number of consumers. In many cases, the number of competitors in a market is quite limited. This may occur naturally; in other cases, however, it is the result of operations that seek to concentrate control of the market in a few hands. The second case has been called “concentration,” a concept that applies to the mass media market.

23. There is an intense struggle among the media to keep the attention of their audience (readers, television viewers, or radio listeners). Competition among the various media is often responsible for the way in which information is presented to the public, at times giving priority to form (for example advertising or sensationalism) over content. Despite the large amount of information processed in the press rooms of the daily newspapers, radio stations, and television networks, at times members of the public have the impression that they are reading, hearing, or seeing the same headlines everywhere. In some cases this is due to the

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<sup>12</sup> Inter-American Commission on Human Rights 2003. *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala*. Chapter VII: *La Situación de la Libertad de Expresión*, p. 195, para. 419.

<sup>13</sup> I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, par. 56.

<sup>14</sup> Council of Europe. Media diversity in Europe. Report prepared by the AP-MD (Advisory Panel to the Council of Europe Steering Committee on the Mass Media (CDMM) on media concentration, pluralism and diversity questions). Strasbourg, December 2002, para. 12. Available at [http://www.coe.int/t/e/human\\_rights/media/5\\_Documentary\\_Resources/2\\_Thematic\\_documentation/Media\\_pluralism/H\\_APMD\(2003\)001%20E%20Media%20Diversity.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Media_pluralism/H_APMD(2003)001%20E%20Media%20Diversity.asp#TopOfPage)

fact that these media only repeat the information that has been previously provided by local or foreign news agencies. In others, the media simply focus their attention on a limited number of events, to the exclusion of all others.

24. The concentration of media is not new in contemporary societies. As has been noted in a recent study in Europe: "Media concentration is not a new phenomenon characteristic of modern societies. What is actually new is an almost 'incestuous relationship between politics and the media.' Politicians use (and abuse) media for their own political promotion. Today it is virtually impossible to seize power without the help from the media. Media owners, on the other hand, use media in their possession to promote and advocate their own political standpoints, and exploit politicians to realize their private (corporate) interests. By answering the question of who the biggest media owners are we answer the question of who holds the reins of power."<sup>15</sup>

25. In view of these arguments, the Office of the Special Rapporteur expresses its concern over the danger that the concentration of media ownership may pose to the formation of public opinion.

#### **b. Economic dimensions**

26. Concentration is essentially an economic phenomenon. When concentration is not adequately regulated in a given sector, it becomes an oligopoly, and in extreme cases, a monopoly. Concentration has a paradoxical impact on the efficiency of the markets. On the one hand, it reduces the number of market participants; on the other hand, it allows for the existence of larger economic units, which in many cases are financially and structurally better equipped to take on the demands and risks of a globalized economy.

27. Concentration may be vertical. In such cases integration is through a company that controls the whole set of independent economic entities at the different levels of production of a given product. For example, in the mass media it happens when a single company controls all the other companies that (1) produce (newspapers, magazines, books, films, and television production studios), (2) distribute (local distribution networks and cable companies), and (3) distribute (telephone companies, cable and satellite systems) information to consumers.<sup>16</sup>

28. Concentration may also occur horizontally, when the different companies on the same level of production merge. For example, when a single company controls all or most of the networks that distribute information to consumers in a given area, keeping competitors from carrying out their activities. Even though there may be competitors, they cannot compete with the larger company, for sooner or later they will begin to experience losses, precisely because of the larger company's dominant market position.

#### **c. Political dimensions**

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<sup>15</sup> Sandra B. Hrvatin. Citizens before Corporations, p. 33. Round Table on Media Pluralism, Zagreb (Croatia), 28 November 2003. Challenges and Opportunities for Media Diversity and Pluralism: Controlling Concentrations and Ensuring Transparency. Organized by the Institute for International Relations, Zagreb and Media Division, and the Council of Europe. Available at [http://www.imo.hr/culture/conf/medconf02/Media\\_Diversity\\_and\\_Pluralism.pdf](http://www.imo.hr/culture/conf/medconf02/Media_Diversity_and_Pluralism.pdf)

<sup>16</sup> The example is drawn from Ben H. Bagdikian. The Media Monopoly (6th edition, 2000), pp. xvi-xvii.

29. Concentration also entails a political dimension. Under certain circumstances, the dominant position of a company in the market may be of great interest for certain groups in society. For example, the state may place different administrative obstacles in the way to keep new competitors from having access to the media market. This is especially important for the competitors already in the market. These mechanisms, commonly called forms of “structural censorship,” pose a grave threat to the freedom of expression.

30. This phenomenon is often repeated in the cases of vertical concentration, where, for example, all the machinery for the production and distribution of daily newspapers is in the hands of a few firms, making it almost impossible for new competitors to access the market. As has been noted, “concentration raises the entry barriers for new companies and is thus stifling competition. The inter-dependency of politics and the media tends to block any form of creative media policy.... Concentration is also a clear and present danger to media pluralism and diversity.”<sup>17</sup>

31. In addition, this threat may be posed when the state-owned or public companies decide to withdraw their investments in publicity in newspapers and in radio and television stations.<sup>18</sup> In some small markets, economic independence may be negatively affected by concentration of ownership. To protect the markets in general, and the mass media in particular, certain regulatory mechanisms have been introduced, proposing, for example, percentage limits on equity ownership in a given company.

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<sup>17</sup> OSCE, Representative on Freedom of the Media. *The Impact of Media Concentration on Professional Journalism* (2003), p. 30.

<sup>18</sup> Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter V: Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity, loc. cit.

#### d. Conceptual notes

32. Though there is no final definition, major contributions have been made in Europe that have allowed for the emergence of a certain consensus regarding the definition of the concentration of media ownership. Of all the proposals put forth, the “operative” definition of the Council of Europe has won the widest acceptance. It notes:

In relation to media concentrations, the notion of pluralism is understood to mean the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through media. Pluralism may be internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organisation, or external in nature, through a number of such organisations, each expressing a particular point of view.<sup>19</sup>

33. This definition of concentration of media ownership is considered negative precisely because it is counterposed to the idea of plurality in the dissemination of ideas.<sup>20</sup> Concentration is seen, then, as the negation of plurality, which is a hallmark of the freedom of expression. In this framework, it has been noted that “without plurality of voices and opinions in the media, the media cannot fulfill their contributory role in democracy.... Pluralism is thus a basic general rule of European media policy.”<sup>21</sup>

34. According to a recent study by the OSCE,<sup>22</sup> the foregoing definition provides us with two key concepts. First, that the concentration of media ownership cannot be determined by traditional economic factors, such as ownership alone. Second, if pluralism and diversity of media should be protected, a certain level of concentration can be allowed to the extent that it enables the companies engaged in media operations to offer better services in the marketplace.

35. Even so, in the European context, though one may expect some positive consequences from concentration, these will be possible only if the information offered to the public is independent. In this regard: “Although concentration in the mass media sector has some advantages (the preservation of media enterprises threatened with closure, the establishment of groups capable of confronting international competition, etc.), the phenomenon of media concentrations, in particular as regards its multimedia form, may reach a threshold beyond which pluralism of information sources (freedom of information and expression) may be threatened.”<sup>23</sup>

36. In the inter-American system, major efforts have been made inspired by this perspective. The Office of the Special Rapporteur for Freedom of Expression has stated that “a plurality of media and the prohibition of any monopoly in this area, whatever form it should take, is indispensable for the exercise of freedom of expression ... with a view to providing a full

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<sup>19</sup> Council of Europe. Pluralism and Media Concentrations in the Internal Market. The Green Paper (1992).

<sup>20</sup> OSCE. The Impact of Media Concentration ..., *op. cit.*, p. 30.

<sup>21</sup> Council of Europe, Media Diversity..., *op. cit.*, Executive Summary and para. 10.

<sup>22</sup> OSCE. The Impact of Media Concentration ..., *op. cit.*, pp. 30-32.

<sup>23</sup> Council of Europe. Committee of Experts on Media Concentrations and Pluralism. Cited by: OSCE. The Impact of Media Concentration..., *op. cit.*, p. 31.



guarantee for the exercise of freedom of expression and information for all of ... society.”<sup>24</sup> Similarly, the Rapporteurship has stated that “assignments of radio and television broadcast frequencies should consider democratic criteria that guarantee equal opportunities of access for all individuals.”<sup>25</sup>

37. In addition, and on the occasion of a joint declaration signed in 2001 by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of Media of the OSCE, and the Special Rapporteur for Freedom of Expression of the OAS, it was noted: “Effective measures should be adopted to prevent undue concentration of media ownership.”<sup>26</sup>

38. Similarly, the Declaration of Principles on Freedom of Expression prepared by the Office of the Special Rapporteur for Freedom of Expression of the OAS in the year 2000 notes in the first part of Principle 12:

Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information.

39. Principle 5 notes in its second part:

Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.

40. Certain considerations are required by the very nature of each type of media outlet. In the case of electronic media, the administration of the radio spectrum by the state presupposes a positive posture on the part of the state—the concession of radio frequencies – which could have a direct impact on the greater or lesser concentration of the media. This is not the case of the written media, for example, where the principal posture of the state is negative, i.e. refraining from taking action.

### **C. Part II. The economic concentration of media ownership in the European and inter-American frameworks**

#### **1. The concentration of media ownership and international instruments**

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<sup>24</sup> Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 7: Press Releases, PREN/89/03: Preliminary Observations of the Special Rapporteur for Freedom of Expression, upon Concluding his Official Visit to Mexico, p. 301.

Earlier the Office of the Special Rapporteur had stated that “the existence of monopolistic practices in the mass media, whether in television, radio, or the written press, is not compatible with the free exercise of the right to freedom of expression in a democratic society.” See: Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 2: Press Releases, PREN/24/00: Preliminary Evaluation of Freedom of Expression in Guatemala, p. 139, para. 20.

<sup>25</sup> Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 7: Press Releases, PREN/91/03: Upon concluding his visit to Honduras, the Special Rapporteur urges the government to abolish the required association of journalists and the crime of *desacato*, p. 309.

<sup>26</sup> Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 5: Institutional Mechanisms for Promoting Freedom of Expression, *op. cit.*, p. 168.

41. In the first efforts to legislate on human rights related to the media, the freedom of expression was understood as the right to have a written press system free of any government influence. The greatest fear was precisely that governments would subject the print media to prior censorship. When radio and television were incorporated into the field of communication, this right progressively came to encompass these sectors. All these fears, however, referred to direct violations of the freedom of expression.<sup>27</sup>

42. The main international human rights instruments that refer to the freedom of expression, both universal and regional, and which address the concentration of media ownership tend to treat it as primarily related to indirect violations of the freedom of expression.

43. As we will see below, with the exception of the American Convention, none of the general instruments—universal or inter-American—explicitly embraces this perspective. In one way or another, however, it is possible to find some nuanced references referring to plurality in the other instruments. In the regional sphere, some of them have taken up this aspect, especially in the European system.

44. There is no mention of the concentration of media ownership in the American Declaration of the Rights and Duties of Man (1948)<sup>28</sup> or in the Universal Declaration of Human Rights (1948).<sup>29</sup>

45. A more detailed formulation can be found in the International Covenant on Civil and Political Rights (1966), which states at Article 19(2):

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<sup>27</sup> Francisco Fernández Segado, *El Sistema Constitucional Español* (1991) p. 318. The freedom of expression has been recognized by various international human rights instruments, which “to the letter” adopt a “unifying” position in relation to the content of the freedom of expression, without distinguishing it from the freedom of information. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights all provide for the right to freedom of expression formulated basically in these terms. The regional instruments in the European and inter-American systems were also designed fundamentally to address direct violations of this right. The most recent constitutional theory, however, tends to distinguish the two rights, assuming a “dual” position that affirms that they are generic manifestations of a right to free communication.

These documents thus embrace a unitary conception of the freedom of expression, which broadly speaking would include both the free communication of ideas and opinions, and the freedom of information, whose purpose is the transmittal of facts or data.

The Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85, has recognized that the freedom of expression has a dual nature, having both an individual dimension and a social dimension: Para. 31: “In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through ‘any... medium,’ it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely...” Para. 32: “In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”

<sup>28</sup> Which notes at its Article IV: “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

<sup>29</sup> Which indicates at its Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart **information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>30</sup>

46. Of the regional instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is an important point of reference. Article 10 of the European Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

47. Finally, the American Convention on Human Rights (1969) notes at Article 13(1) that:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas **of all kinds**, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.<sup>31</sup>

48. It should be noted that the American Convention on Human Rights has a distinct feature at Article 13(3), the only provision of the general human rights instruments that expressly condemns violations of the freedom of expression by indirect means. It reads:

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

49. As we will see in the section on the caselaw of the inter-American system, the Inter-American Court has been able to develop some of the problems provoked by concentration in terms of hampering the free circulation of ideas.

50. None of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms refers expressly to a right to plurality and diversity in the mass media. Nonetheless, it is widely accepted in the caselaw of the European Court of Human Rights that without free and independent media, the fundamental rights of citizens to expression, opinion, and information may be dangerously limited.

51. We must note, moreover, that membership in the European Union is conditioned on compliance with certain democratic standards, including those referring to the freedom of

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<sup>30</sup> Emphasis added.

<sup>31</sup> Emphasis added.

expression. Article F.2 of the Treaty of the European Union incorporates the provisions of the European Convention on Human Rights as general principles of European Community law.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

52. The legal gap in the Council of Europe context has been partially covered with the adoption, in the framework of the European Union, of the Charter on Fundamental Rights, a document which, and which notes that freedom of and plurality in the mass media should be respected. Including plurality as part of the freedom of expression in the framework of the European Union, and in the general standards on free competition, introduces an important methodological standards for domestic and regional legislation. The Charter of Fundamental Rights of the European Union (2000) states at Article 11 that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

53. In 1997, the Office of the Representative on Freedom of Media was established in the context of the OSCE, in recognition of the fundamental role of the freedom of expression for European democracies. Its mandate recognizes:

The participating States reaffirm the principles and commitments they have adhered to in the field of free media. They recall in particular that freedom of expression is a fundamental and internationally recognized human right and basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government.<sup>32</sup>

54. Similarly, in 1998 the Inter-American Commission on Human Rights created the Office of the Special Rapporteur for Freedom of Expression. In establishing the Rapporteurship, the Commission sought to stimulate awareness of the importance of full observance of freedom of expression and information in the Hemisphere, given the fundamental role it plays in the consolidation and advancement of the democratic system and in ensuring that other human rights are protected and violations reported.”

55. Under its auspices, the Declaration of Principles on Freedom of Expression were drawn up; Principle 12 refers explicitly to economic concentration of media ownership.

## **2. The European experience**

### **a. The caselaw of the European system**

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<sup>32</sup> OSCE, Mandate of the OSCE Representative on Freedom of the Media. Decision N° 193 of the Permanent Council of November 5, 1997.

56. In Europe, Article 10<sup>33</sup> of the European Convention on Human Rights sets forth the basic framework for pluralism in the mass media. The cases that will be examined below are merely some of those available from the extensive caselaw of the European Court of Human Rights.

57. As we have already indicated, the text of Article 10 of the European Convention on Human Rights contains no explicit reference to diversity or plurality in the media as elements of the freedom of expression. This approach has been arrived at through interpretations of Article 10 by the European Court of Human Rights.

58. On some occasions the Court has made reference to the freedoms of “broadcasting” and of the “press” in this context. In both cases, the references were based on the second sentence of the first paragraph of Article 10. Initially, the European Court interpreted Article 10(1) to establish that the freedom of “broadcasting” derived from the freedom of expression as well as freedom of enterprise, i.e. from the freedom to privately pursue broadcasting activities.<sup>34</sup>

59. Subsequent judgments of the Court show a trend to express the freedoms linked to the media as part of an individual right to freedom of expression established at Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms.

60. A more functional approach to these freedoms, i.e. taking them as means of promoting the freedom of information and democracy strictly speaking, has also been recently applied, but in connection with the second paragraph of Article 10. In effect, under Article 10(2), the Court has been pointing out the importance of plurality in the freedom of expression as a decisive element for consolidating democracy.

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<sup>33</sup> Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>34</sup> This perspective is at odds with the “functional” approach to the media under the constitutional courts in Germany and Italy. In general, at this level the right to broadcast is perceived as “a liberty that serves other purposes,” i.e. as a right “functional” in nature. This is based on the idea that the freedom to broadcast, like other freedoms in the realm of the mass media, is aimed at ensuring the right to information, and, therefore, should allow public access and the free flow of information, in the interest of democracy. No connection whatsoever is established with some of the rights to free enterprise. For these constitutional courts, freedom in the communications media implies that society should have access to a free system of communication that provides balanced, objective, and varied information, as demanded by democracy. The founding principle is that such a free system guarantees diversity in the media. The state is obligated to take regulatory measures that ensure in the broadest terms a framework for private communications media, if, as a practical matter, this has not been attained in fact.

61. The following cases have been selected to illustrate the European Court's interpretation of the right to freedom of expression in the framework of the plurality to which we have been referring in this report.<sup>35</sup>

62. A first especially representative case in the European context is *Lentia Informationsverein et al. v. Austria* (Judgment of November 24, 1993). In this case, the Court addressed a series of petitions brought by natural and juridical persons against Austria in relation to alleged violations of Article 10 of the European Convention on Human Rights. The petitioners' application to establish radio and television stations in Austria had been rejected, for under the domestic laws and regulations, that right was restricted to the Austrian Broadcasting Corporation. The complainants alleged that it constituted a monopoly incompatible with Article 10 of the European Convention.

63. The Court initially considered that having rejected applications to establish radio and television stations constituted "interference" with petitioners' right to impart information and ideas. Yet this was not sufficient to determine a violation of Article 10 of the European Convention. The underlying issue was whether the interference with the exercise of this right was justified, in precise terms, within the framework of the freedom of expression.

64. The petitioners alleged that the monopoly established on behalf of the Austrian Broadcasting Corporation was detrimental to pluralism and artistic diversity. They argued that "true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programs."<sup>36</sup>

65. The Court held that the monopoly in place in Austria was incompatible with Article 10 of the Convention:

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.

Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

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<sup>35</sup> The complete text of these cases can be examined at the website of the European Court of Human Rights, available at <http://www.echr.coe.int/>

Some of the cases mentioned in this report are summarized in: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III: Jurisprudence, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression, pp. 103-130, paras. 1-72.

<sup>36</sup> Para. 31: "... the rules in force in Austria, and in particular the monopoly of the Austrian Broadcasting Corporation, essentially reflect the authorities' wish to secure political control of the audio visual industry, to the detriment of pluralism and artistic freedom." Para. 37: "...to protect public opinion from manipulation it was by no means necessary to have a public monopoly.... On the contrary, true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programs...." Para. 38: "this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee to the Austrian Broadcasting Corporation advertising revenue, at the expense of the principle of free enterprise."

...

The Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society.<sup>37</sup>

66. Since then, and quite consistently, the Court has been highlighting the role that the freedom of expression and especially pluralism play in a democratic society. For example, in the case of *Piermont v. France* (Judgment of April 27, 1995),<sup>38</sup> the Court noted:

...freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."<sup>39</sup>

67. Similarly, in *Perna v. Italy* (Judgment of May 6, 2003), the Court emphasized:

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. 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.<sup>40</sup>

68. In the matters of *Castells v. Spain* (Judgment of April 23, 1992),<sup>41</sup> *Thorgeir Thorgeirson v. Iceland* (Judgment of June 25, 1992), *Bladet Tromsø and Stensaas v. Norway* (Judgment of May 20, 1999),<sup>42</sup> *Fressoz and Roire v. France* (Judgment of January 21, 1999),

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<sup>37</sup> Para. 38: "The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor."

Para. 39.: "Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restriction means that they can only be justified where they correspond to a pressing need."

Para. 43. "The Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society."

<sup>38</sup> The summary of the case can be found at Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 108-109, paras. 18-19.

<sup>39</sup> Para. 76.

<sup>40</sup> Para. 39.

<sup>41</sup> A summary of the case may be found at: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 120-121, paras. 44-46.

<sup>42</sup> A summary of the case can be found at: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 122-124, paras. 51-53.

*Janowski v. Poland* (Judgment of January 21, 1999), and *Scharsach and News Verlagsgesellschaft* (Judgment of November 13, 2003), the Court has continued to reaffirm the above-mentioned principles, especially the fundamental public watchdog role of the media in democracies.

69. In these more recent judgments, the European Court of Human Rights has been according priority to the role the mass media play in a social, political, cultural, and democratic context. This has been done mainly through the provision of Article 10(2).

70. As has been noted: "The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system ... which justifies restrictions on fundamental freedoms. Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy."<sup>43</sup>

#### **b. The concentration of media ownership in Europe: Institutional framework**

71. The concept of pluralism as part of the freedom of expression has been recognized both in the Council of Europe and in the European Union. While most of the decisions of the Council of Europe have been merely policy guidelines based on general principles, the directives of the European Union, once ratified by the national legislatures, become binding on their members.

#### **The European Union**

72. The European Union's approach is framed within the obligation to guarantee cultural diversity in Europe. This is why the community directive "Television Without Frontiers (TWF) was introduced in 1989. Through it, the European Commission required that at least half of the programming of broadcasters be of European origin. Nonetheless, this measure was not that well received by the European governments. In effect, even if the national authorities wanted to limit the process of economic concentration, they also pursued other objectives, such as preserving their domestic markets."<sup>44</sup>

73. The dilemma faced by the European Union Member States requires that they strike a balance between an appropriate level of concentration that would enable them to protect their local broadcasting markets and the need to place limits on concentration to preserve pluralism in information.

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<sup>43</sup> Council of Europe. Media diversity..., *op. cit.*, para. 10: "The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms. Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy."

<sup>44</sup> There is considerable pressure from some regulatory agencies to declare that this is an illegal measure in the context of the European Union. The purpose of this is to have telecommunications be considered as a common commercial activity, subject to free trade agreements in the GATT and WTO framework. Hence the interest of the European Union in having a common framework on these issues for all the European states as soon as possible. A more updated version of the TWF directive is currently being studied, to that end.



74. In 1990, the European Parliament published the resolution entitled *Media Takeovers and Mergers* (OJ C 68/137-138. 15), which placed special emphasis on the need to establish restrictions on the communications media not only for economic reasons, but mainly to guarantee plurality of information and freedom of the press.

75. Nonetheless, several jurisdictional conflicts have arisen in this context. For example, the European Commission Green Book entitled "Pluralism and Media Concentration in the Single Market" (1992) defined the mass media as part of the "services industries of the European Union," and accordingly subjected it to regulation by the European Union organs in charge of ensuring against economic concentration in the region, as well as the "Rules of the Single European Market." Under these instruments, the EU's intervention in media ownership is restricted only when it is guaranteed that the measures to be taken foster greater efficiency in the domestic markets. Pluralism is not the focus.

76. In this context, the domestic laws aimed at ensuring plurality in the mass media are considered by the European Commission a hindrance to achieving an efficient and unified telecommunications market for Europe. In the above-mentioned Green Book the Commission affirmed that safeguarding pluralism in the communications media is not an objective of the Community nor does it fall within its jurisdiction."

77. The European Parliament reaffirmed its position in 1994 with the resolution *On the Commission Green Paper "Pluralism and Media Concentration in the Internal Market"* (OJ C 44/179. 14). Nonetheless, there is widespread resistance on the part of the Member States to accept a common framework regarding economic concentration applicable to the media. The European Parliament continued its negotiations, insisting on the dangers posed by concentration to pluralism of information. As a result, the Commission proceeded to debate a new directive entitled *Media Ownership*.

78. Finally, in 2003 the matter was discussed once again as part of the agenda of both institutions. Once again the Commission's approach was to consider regulation of the media as a strictly economic matter, controlled, therefore, by competition law. This has spurred a broad response by the Council of Europe, the European Parliament, and the OSCE, who believe the approach should accord priority to plurality of information as an essential component of the freedom of expression.

### **The Council of Europe**

79. The Council of Europe has been making major efforts to regulate some aspects related to freedom of expression and the European Convention on Human Rights and Fundamental Freedoms. The goal in this framework is to harmonize principles so as to offer a common framework to the European states. Yet none of these instruments refers to economic concentration directly.

80. The Council of Europe began its first debates on economic concentration in 1989. Like Television Without Frontiers, the goal was to be able to reach certain policy agreements that would make it possible to build a platform for reaching common agreements on regulation, looking to the future. To this end, the Council of Europe Steering Committee on the Mass Media (CDMM) was constituted. Initially the project consisted of examining pluralism

within the common framework for the regulation of mass media and media ownership in each member country. Several questionnaires were distributed to the Member States to achieve this objective. Nonetheless, the methodology used was harshly criticized, ultimately leading to the project's demise.

81. Nonetheless, the Council of Europe has published some studies, statistics, and reports that examine the issue of the economic concentration of the mass media. Only once has a regulatory text been adopted, the Recommendation on Transparency, in 1994.

82. The Council of Europe has set in motion an interesting supervisory mechanism through a network of national delegates in each Member State who report on media structures and regulations related to economic concentration. A Committee of Experts of the Council analyzes and develops the material provided by the national delegates. The Committee can suggest measures to the CDMM, and to other members of the Council, including the Council of Ministers, which is responsible for media policies. Nonetheless, this organ is temporary and may be dissolved at any moment.

83. As we have already seen, in the context of the European Union the approach to media issues is somewhat different, further from the human rights dimension that has characterized the Council of Europe's approach. The European Union perceives the problem in the context of economic integration and the establishment of an internal common market.

84. This perspective, however, is not at odds with the purposes of the Council of Europe. For example, since the late 1980s, the European Parliament has been promoting initiatives to halt the rapid growth of economic concentration in the media, but from the perspective of pluralism as an essential element of European identity. The conflict that has arisen with the European Commission, however, has hindered further progress.

### **3. The inter-American experience**

#### **a. The caselaw of the inter-American system**

85. The Inter-American Court of Human Rights has had the opportunity to address the issue of the concentration of media ownership tangentially, on a few occasions, through its caselaw. Decisions in contentious cases as well as advisory opinions contain references to pluralism and concentration of media ownership.

86. Of key importance in the inter-American sphere is Advisory Opinion OC-5/85, of November 13, 1985, on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, in which the Inter-American Court of Human Rights stated:

If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.

...

Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice "means tending to impede the communication and circulation of ideas and opinions."<sup>45</sup>

87. In the same advisory opinion, the Court held, with respect to "indirect" violations of the freedom of expression, that

Article 13(2) must also be interpreted by reference to the provisions of Article 13(3), which is most explicit in prohibiting restrictions on freedom of expression by "indirect methods and means... tending to impede the communication and circulation of ideas and opinions." Neither the European Convention nor the Covenant contains a comparable clause....

Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result.... Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede "the communication and circulation of ideas and opinions," but the State also has an obligation to ensure that the violation does not result from the "private controls" referred to in paragraph 3 of Article 13.

...

that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.<sup>46</sup>

88. It should be reiterated that Principle 12 of the Declaration of Principles on Freedom of Expression, prepared by the Office of the Special Rapporteur for Freedom of Expression of the OAS, notes that:

Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information.

89. As regards plurality as part of the freedom of expression, in the *Baruch Ivcher Case*, the Inter-American Court of Human Rights held as follows:

Regarding the second dimension of the right embodied in Article 13 of the Convention, the social element, we should indicate that freedom of expression is a medium for the exchange of ideas and information between persons; it includes the right to try and communicate one's points of view to others, but it implies also everyone's right to know opinions, reports and news.<sup>47</sup>

90. In addition, in the case of *Herrera Ulloa v. Costa Rica*, the Court noted:

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<sup>45</sup> I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, paras. 34 and 56.

<sup>46</sup> I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, paras. 47, 48 and 69.

<sup>47</sup> I/A Court H.R., *Baruch Ivcher Case*, para. 148. In its application to the Inter-American Court of Human Rights in the case of Baruch Ivcher Bronstein against the Republic of Peru, Case 11.762, p. 21, the Commission noted: "the free circulation of ideas and news is inconceivable without a plurality of news sources and without respect for the media. But guaranteeing the right to establish or operate media will not suffice. Journalists and, in general, all those who have made the media their career have to have adequate protection for the freedom and independence that this profession demands."

So there is agreement among the different regional systems for the protection of human rights and the universal system in terms of the essential role of the freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, materialized in all its terms, democracy vanishes, pluralism and tolerance begin to break down, the mechanisms for citizen review and complaints become inoperative, and clearly fertile ground begins to be laid for authoritarian systems to take root in society.<sup>48</sup>

## **b. The concentration of media ownership in the Americas in the Declaration of Principles on Freedom of Expression**

91. Principle 12 of the Declaration of Principles prepared by the Rapporteurship in 2000 notes:

Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. **In no case should such laws apply exclusively to the media.**<sup>49</sup>

92. The Rapporteurship specifies that the last sentence should be read and interpreted in light of the object and purpose of Principle 12, which emphasizes the inconsistency between monopolies and oligopolies in the mass media and the freedom of expression and democratic standards that ensure equitable distribution in their ownership.

93. Principle 12 is based on the notion that if there were monopolies and oligopolies in the mass media, only a small number of individuals or social sectors could exercise control over the information that is made available to society. Accordingly, individuals could be deprived of the right to receive information from other sources.

94. The Office of the Special Rapporteur for Freedom of Expression of the OAS considers that this provision does not represent any limitation whatsoever on the duty of the state to guarantee, through its legislation, plurality in media ownership, insofar as monopolies and oligopolies "as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information." Nonetheless, the Office of the Special Rapporteur is of the view that the competition law framework can often prove insufficient, particularly with regard to the awarding of radio frequencies. It does not, therefore, stand in the way of an antitrust regulatory framework that includes provisions to guarantee plurality, mindful of the special nature of the freedom of expression. In light of Principle 12, the states should not adopt special provisions in the guise of antitrust laws for the media whose actual purpose and effect is to limit the freedom of expression.

## **D. Conclusions**

1. The Office of the Special Rapporteur reiterates that monopolistic and oligopolistic practices in mass media ownership have a serious detrimental impact on the freedom of expression and on the right to information of the citizens of the Member States, and are not compatible with the exercise of the right to freedom of expression in a democratic society.

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<sup>48</sup> I/A Court H.R., *Herrera Ulloa Case*, Judgment of July 2, 2004, para. 116.

<sup>49</sup> Emphasis added.

2. The continuous complaints received by the Office of the Special Rapporteur in relation to monopolistic and oligopolistic practices in mass media ownership in the region indicate that there is grave concern in several sectors of civil society with respect to the impact that concentration of media ownership may represent where it comes to ensuring pluralism as an essential element of the freedom of expression.

3. The Office of the Special Rapporteur for Freedom of Expression recommends to the OAS Member States that they take measures to impede monopolies and oligopolies in media ownership, and adopt effective mechanisms for implementing them. Such measures and mechanisms must be compatible with the framework of Article 13 of the Convention and Principle 12 of the Declaration of Principles of Freedom of Expression.

4. The Office of the Special Rapporteur for Freedom of Expression considers it important to develop a legal framework that establishes clear guidelines for defining criteria for a balancing test that accords weight to both efficiency in the broadcasting market and pluralism in information. The establishment of mechanisms for supervising these guidelines will be fundamental for ensuring pluralism in the information that is made available to society.

5. The Rapporteurship for the Freedom of Expression will continue to review these practices as they evolve.