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Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas

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**Concentration of Media Ownership
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for the Americas**

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Gustavo Gómez**

An invitation to debate

More than three centuries ago, the thinker, poet and British politician John Milton published one of the most important and famous texts against censorship: *Areopagitica*. It was one of the catalysts for a major debate on the protection of freedom of expression and press.

Many centuries before him, the Greeks formed solid arguments on the importance of *doxa* (opinion) for democracy.

Discussions on the centrality of freedom of expression and access to information and knowledge for democracies, development, protection and promotion of other human rights are far from new.

However, there is no doubt that the advancement of new information and communication technologies, in particularly the growth of Internet, offers a unique and unprecedented dimension to these discussions.

As a result of this technological upsurge, we can observe impacts on the protection and promotion of human rights, on the consolidation of democracies, on fostering development, on decision-making processes, on public policies as well as on the everyday lives of citizens.

The advancement of knowledge societies is closely linked to the extensive discussions on the universal right to freedom of expression and access to information; in an increasingly connected world. Press freedom, media development, privacy, the role of ICTs in public policies, open governments, preservation of documentary heritage, media and information literacy are among the many issues that are on the table.

The UNESCO Office in Montevideo, seeking to enhance its role as laboratory of ideas, is now offering its stakeholders this Communication and Information Discussion Papers.

Written by leading experts from each field, the main objective is to provide inputs for decision makers and policy makers so they can take into account the different angles of the current issues on the international agenda, always having as a main line the international standards.

These papers do not intend to be the final word. Instead, they aim to contribute to an ever increasing, plural and well-informed debate on key issues of yesterday, today and tomorrow.

Happy reading!

Is Big Beautiful?

For the New Yorker columnist James Surowiecki in the October 31st, 2011 issue of the magazine, this wasn't a question; it was a statement. He was polarizing with another train of thought, also very persuasive, "Small is Beautiful".

Regardless the correct answer, assuming there is one, the point is that in any sector of a given economy, there is a legitimate concern about the size (either Big or Small) of businesses and companies and their potential positive or negative impacts on different societies.

This discussion paper, written by three leading experts in the area of media regulation and issues related to freedom of expression - Toby Mendel, Ángel García Castillejo and Gustavo Gómez, is debating this very topic, in relation to the media sector.

If Is Big Beautiful? is a valid question when analyzing the impacts of industries, it is especially valid when examining the media companies. Diversity and Pluralism are two fundamental characteristics that democracies expect from the media sector, which are challenged due to media ownership concentration.

In the acclaimed 2003 documentary film 'The Corporation', the filmmakers address media ownership concentration and pose the following question: "In a world economy where information is filtered by global media corporations, keenly attuned to their powerful advertisers, who will defend the public's right to know? And what price must be paid to preserve our ability to make informed choices?"

Michael Copps, who served two terms with the Federal Communications Commission in United States, highlights "Owning a station has a lot to do with the kind of programming that's going to be on that station. Diversity of ownership and diversity of viewpoint, I think, go hand in hand."

Reverberating these concerns, this discussion paper shows how International Standards on Freedom of Expression have dealt with this fundamental issue in the past 70 years. The authors have also enumerated a list of recommendations media regulatory frameworks should follow in order to act upon the issue of media ownership concentration within the boundaries of international standards.

The main conclusions of this paper were debated in November 2015, during a multi-stakeholder International Seminar organized by UNESCO, the Interamerican Human Rights Commission's Special Rapporteur on Freedom of Expression, ANTV-Colombia, CIMA, DW Akademie, Observacom, PRAI, FNPI and GFMD with the support of Swedish and French cooperation.

These inputs will also contribute to the continuous work of the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights (CIDH) in developing the best standards to guarantee the exercise of freedom of expression in a diverse and plural media environment through the Inter-American jurisprudence and the thematic reports that address these issues.

We hope this text can strengthen the central discussion on media development in Latin America, which for many decades has been a concern for many sectors in the region including academia, civil society, the private sector and media regulatory bodies.

Enjoy your reading!

The Editors

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Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas

Introduction

The subject of media ownership and control, and how to regulate it is fraught with legal and political complexity. At one level, it is intuitively obvious that undue concentration of ownership of the media is harmful to freedom of expression. If one or two individuals control the media, they control the modern equivalent of the public square, the place where social discussion and debate takes place. This clearly undermines both democracy and freedom of expression. In other words, undue concentration of media ownership limits the free flow of information and ideas in society, to the detriment of everyone. Furthermore, it also undermines basic principles of competition, which are essential for the success of any market.

Looked at from another perspective, however, the exercise of the right to freedom of expression implies a right to take advantage of all available means of communication to express oneself. In other words, the right to found and use all types of communications media is part of the right to freedom of expression and limits on this are restrictions on that right. Furthermore, history is replete with examples of governments trying to crack down on powerful media owners in ways that are clearly political in nature and hence offensive to the protection of freedom of expression. Indeed, it is probably fair to say that in every case where a significant attempt has been made to address the very serious problems of undue concentration of media ownership that exist in many countries in Latin America, this has been driven at least as much by political as by public interest goals.

This creates a conundrum whereby something which is clearly a problem would also seem to be a right. The situation is rendered more complex by the fact that legislators and other decision-makers, sometimes even including international courts, have not always made it clear, when considering rules relating to media ownership concentration, what either the jurisprudential basis or social justification for this has been.

Despite this, international law does provide a clear basis for regulating undue concentration of media ownership, namely in the dual protection of the rights to freedom of expression of the speaker and also the listener. The latter serves as the jurisprudential underpinning of the notion of media diver-

sity¹ and, as part of that, the prevention of undue concentration of media ownership.

In many cases, rules affecting freedom of expression impact in a similar way on both speaker and listener and, in such cases, assessment of the legitimacy and importance of the rules generally depends on the countervailing interests involved (such as privacy or national security). International courts have developed clear tests and approaches to undertaking such assessments and, while commentators may dispute individual decisions, the core approach to the balancing exercise is widely accepted. The matter becomes more complex in cases where the rights of the speaker and of the listener are pitted against each other. The matter then becomes a question of assessing one freedom of expression interest against another, and approaches designed to balance freedom of expression against other interests do not always work well in such situations.

The importance of understanding the international principles engaged in such cases is growing, given the tendency for media markets to trend towards ever-greater concentration of ownership. Such trends, which have long been present in Latin America, have been counteracted only in very limited ways in most countries in the region, leading to a situation where concentration of media ownership is in practice higher in the region than in most other parts of the world.

This policy paper seeks to clarify international standards in this area and to provide an overview of approaches adopted at the national level to implement those standards. The first part outlines the main ways in which undue concentration of media ownership affects the free flow of information and ideas in society, which is ultimately what lies at the heart of the right to freedom of expression. The second, and main part, provides an overview of the key international standards in this area, including the jurisprudence of leading international courts relevant to the issue.

Part three looks at the anti-monopoly measures relating to the media that have been put in place in some established democracies around the world so as to mitigate concentration of media ownership and its consequences, while part four describes the main trends in this area in Latin America. Finally, part five provides a number of conclusions and recommendations to guide decision-makers and others in this area.

1 The terms pluralism and diversity are both used commonly and largely interchangeably in this context, although some commentators do posit a difference between them. In this report, the term diversity is preferred on the basis that it is broader in nature and that it is the preferred term of leading experts, including the special international mandates on freedom of expression (see, for example, their Joint Declarations, available at: <http://www.osce.org/fom/66176>).

1. Undue Concentration of Media Ownership and How it Affects the Free Flow of Information and Ideas

1.1 Defining Undue Concentration of Ownership of the Media

At some level, the idea of undue concentration of media ownership is simple, referring to the idea that one individual, or a corporate body, exercises control over an important part of an overall media market. Concentration of media ownership had been defined as “an increase in the presence of a company or a reduction in the number of media companies in any market as a result of several possible processes: acquisitions, mergers, agreements with other companies or even the disappearance of competitors.”² However, beyond that very general idea, there is a lot of complexity to the notion.

In part, complexity in this area is driven by the hugely dynamic media or communications environment today, with an apparently ever-growing range of sources of information being made available to citizens. At the same time, an important part of the population in most countries still relies on the traditional media – television, radio and newspapers – as its key source of news and current affairs information. Furthermore, if one makes a distinction between significant independent or original news sources or news generators, and entities which merely redistribute or rebrand, or in some cases interpret, news from original generators, the picture changes considerably, and the number of sources is currently at an all-time low in many countries. The situation is particularly serious in terms of investigative journalism, which is being undertaken at considerably lower levels in many countries today than even in the relatively recent past.³

Convergence of distribution platforms is also adding a layer of complexity to the question of concentration of media ownership. Concentration is traditionally measured in defined markets and, in the past, it was possible to separate out various media markets, such as daily newspapers, radio and television. While divisions still exist, convergence is starting to trench on them, with news-

papers providing audio-visual content and broadcasters providing increasing amounts of written material. Convergence, along with the transition to digital broadcasting, has also introduced new concepts of vertical integration, and a more robust separation of content production and distribution in theoretical and many regulatory frameworks. Convergence and more intense commercial competition have also brought new forms of horizontal integration, for example through product diversification and/or internationalisation.

It has been noted that both horizontal and vertical concentration, as well as links between media industries and other types of businesses, create new risks of the abuse of dominant positions through the wider business networks that owners enjoy.⁴ It is also important to take into account the fact that centralisation of power over the media does not necessarily depend on direct ownership but can be achieved through the ability to exercise significant control over the media, even though formally they are not owned by one person or company. This often happens in Latin America through the use of so-called “front men” who lend their names in terms of formal ownership or the formation of economic groups that handle media owned by different people. These arrangements can circumvent limits on ownership and obscure real control.⁵

Historically, concentration has been measured using four main metrics, namely: share of the advertising market (traditionally the main source of income for media outlets); overall revenue; audience share; and a simple assessment of the number of different stations owned or controlled by one player in any given audience market (such as FM radios in a particular city). Each has its own strengths and weaknesses. The latter, for example, while rather crude (because it excludes any assessment of the size of a player) is relatively simple to apply from a regulatory perspective, thus reducing pressure, capacity strain and potential pushback on oversight bodies.

There are also different methodologies for measuring the different metrics (apart from the last one, which is fairly straight-forward). For example, Albarran and Dimmick identify the following main methods of measuring media concentration: concentration indices or the concentration ratio (CR), the Lorenz curve and the Herfindahl-Hirschman

2 Sánchez-Taberner, A., Denton, A., Lochon, P. Y., Mounier, P. and Woldt, R.: *Concentración de la Comunicación en Europa. Empresa comercial e interés público* (Barcelona: Centre d'Investigació de la Comunicació, 1993), p. 30. Original Spanish version: “un incremento en la presencia de una empresa o de un reducido número de compañías de comunicación en cualquier mercado como consecuencia de varios procesos posibles: adquisiciones, fusiones, convenios con otras compañías o, incluso, la desaparición de competidores”.

3 See, for example, House of Lords, *The future of investigative journalism* (2012), available at: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm> and Mary Walton, “Investigative Shortfall”, September 2010 *American Journalism Review*, available at: <http://ajrarchive.org/article.asp?id=4904>.

4 See, for example, Becerra, M., *Concentración de medios y libertad de expresión* (Lima: The Carter Center, 2014), p. 11.

5 See Becerra, M. and Mastrini, G., *Los dueños de la palabra. Acceso, estructura y concentración de los medios en la América latina del Siglo XXI* (Buenos Aires: Prometeo Libros, 2009).

index (HH).⁶ The European Commission has funded a number of studies looking at the issue of concentration of media ownership, including a major study in 2009 focusing on indicators for measuring this.⁷

1.2 The Impact of Undue Concentration of Media Ownership on Freedom of Expression and Democracy

Concentration of media ownership has been identified with a number of problems. Undoubtedly the most significant of these is the threat it poses to freedom of expression and democracy. The core idea here is that active citizenship, upon which democracy depends, requires the presence of many voices and perspectives in public debates and that undue concentration of media ownership threatens that, given the central role of the media in providing the forums in which public debates take place. Put differently, concentration threatens the ability of the media system as a whole to reflect the variety of ideas, viewpoints and opinions that exist in society and to represent all political, cultural social groups. According to the Special Rapporteur for Freedom of Expression: “It is clear that the concentration of ownership of the media leads to the uniformity of the content that they produce or disseminate.”⁸

Numerous statements by leading commentators have attested to this threat, of which a few are provided here. The High Level Group on Media Freedom and Pluralism in Europe was established by European Commission Vice-President Neelie Kroes in October 2011. Its January 2013 report, *A free and pluralistic media to sustain European democracy*, described the role of the media in democracy as follows:

Democracy requires a well-informed, inclusive and pluralistic public sphere; the media are, to a large extent, the creators as well as the “editors” of this public sphere. In this they become the holders of considerable power and may come to assume the status of a “fourth estate” within society. At the same time, the public service aspect and democratic function of media

*can come under threat either through political interference, undue commercial influence, or increasing social disinterest and indifference on the part of the general public.*⁹

Or, as the matter was put by Ben Bagdikian, author of *The Media Monopoly* and Pulitzer Prize winning journalist and professor:

*Modern democracies need a choice of politics and ideas, and that choice requires access to truly diverse and competing sources of news, literature, entertainment and popular culture.*¹⁰

Along the same lines, in a 2003 report on Guatemala, the Special Rapporteur for Freedom of Expression of the IACHR noted:

*In modern societies, the mass media, such as television, radio and the press, have an unquestionable power in the instruction of the people in aspects such as culture, politics, religion, etc. If these media are controlled by a reduced number of individuals, or by only one individual, this situation would create a society in which a reduced number of individuals, or just one, would exert control over the information and, directly or indirectly, on the opinion received by the rest of the people. This lack of plurality in sources of information is a serious obstacle for the functioning of democracy. Democracy requires the confrontation of ideas, debate and discussion. When this debate does not exist, or is weakened by the lack of sources of information, the main pillar for the functioning of democracy is harmed.*¹¹

A fourth quote on this issue, which focuses more on the challenges, comes from Edward Herman and Noam Chomsky's famous book, *Manufacturing Consent: The political economy of the mass media*:

Perhaps this is an obvious point, but the democratic postulate is that the media are independent and committed to discovering and reporting the truth, and that they

6 See Albarran, A. and Dimmick, J., “Concentration and economies of multiformity in the communication industries”, 1996, 9(4) *The Journal of Media Economics*, pp. 41-50.

7 See The Media Pluralism Monitor (MPM), at: <https://ec.europa.eu/digital-agenda/en/media-pluralism-monitor-mpm>. See, specifically, *the Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach*, available at the same site.

8 IACHR. Special Rapporteur for Freedom of Expression. Standards for Free and Inclusive Broadcasting. 30 December 2009, Par. 117.

9 See page 10. Available at: <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>. The High Level Group undertook a very extensive process of study and consultation before it published its report. Its members were Professor Vaira Vīķe-Freiberga (Chair), Professor Herta Däubler-Gmelin, Ben Hammersley and Professor Luís Miguel Poiares Pessoa Maduro.

10 *The Media Monopoly* (Boston: Beacon Press, 1983), p. 3.

11 *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, 29 December 2003, para. 419. Available at: <http://www.cidh.org/countryrep/Guatemala2003eng/TOC.htm>.

do not merely reflect the world as powerful groups wish it to be perceived. Leaders of the media claim that their news choices rest on unbiased professional and objective criteria, and they have support for this contention in the intellectual community. If, however, the powerful are able to fix the premises of discourse, to decide what the general populace is allowed to see, hear and think about, and to 'manage' public opinion by regular propaganda campaigns, the standard view of how the system works is at serious odds with reality.¹²

In terms of specific modalities, undue concentration of media ownership impacts on the public sphere in a number of different ways. At the most direct level, reducing the number of sources of news and information undermines the quality of public debate by reducing the number of perspectives and ideas that fuel it.

Theoretically, internal diversity, which refers to the idea of one media outlet providing a range of different perspectives, could act as an antidote to the problem of undue concentration of media ownership. According to this theory, larger media outlets operating in a context of concentrated media ownership could provide the same range of perspectives as a number of smaller media outlets. In practice, however, this simply does not happen for a number of reasons. These include the impact of editorial policies and orientations in 'homogenising' the output of a single media outlet, as well as competition and efficiency considerations, which also work against diversity. Less innocently, as suggested above, the power that comes with concentration of media ownership impacts negatively on diversity as owners use their power to influence public debate in accordance with their own political outlook and/or vested interests. And these effects increase as the number of media outlets trends downwards.

The negative impact of ownership concentration on media diversity operates at a number of levels. For example, in a number of countries, concentrated ownership patterns have emerged in local (city) newspaper markets. Core economic considerations mean that a far greater percentage of syndicated stories appear in such newspaper chains, to the detriment of local news stories, due to the significant efficiency gains from this (i.e. it is much cheaper to re-print a story in a number of newspapers than to produce original stories for each newspaper).

There are also more overtly political aspects to this. The media exerts considerable political influence due to its power over the 'public sphere'. Concentration of media ownership leads to the concentration of this power, which can then be

used to undermine core democratic values. Where media owners are prepared to use their clout for political ends, this can unbalance checks and balances and lead to undemocratic results. In other words, the considerable influence of the media over political opinion can, where it is unduly controlled by one or a small number of players who are prepared to use that influence for political purposes, skew political power. This can take place directly – with media owners putting pressure on leading political players to do what they want – or indirectly – through media owners using their power to skew political debates.

This is in many ways antithetical to core democratic concepts. As the High Level Group noted:

A fundamental principle of democratic systems is that equal rights are accorded to all citizens, with the possibility of their direct or indirect participation in collective decision-making, especially through free elections, the choice of political representatives and the power to hold elected officials accountable. If citizens are to exploit these rights to the fullest, however, they must have free access to information that will give them sufficient basis for making enlightened judgements and informed political choices.[2] If not, control over the flows of information and manipulation of public opinion can lead to a concentration of power, the ultimate form of which is seen in authoritarian and totalitarian systems, which use both censorship and propaganda as tools for staying in power.

[2] O'Neil, 1998, quoted in Andrea Calderaro & Alina Dobrev, 2012, 'Exploring the current state of media pluralism and media freedom in the European Union – Political and Social Aspects'¹³

The range of possible impacts of undue concentration of media ownership is essentially unbounded. In some cases, owners seek to influence policy-making relating to their core media businesses. This sort of influence can, of course, exacerbate the problem of undue concentration as existing owners seek to prevent others from threatening their positions.

In extreme cases, individuals with undue control over the media have been able to lever the power this creates to attain the highest governing positions. This has, for example, happened in Italy (under Berlusconi) and Thailand (under Thaksin). In both cases, this led to serious political problems, with Thaksin ultimately being removed by a military coup. While this has happened only very rarely in Latin America, at the national level, the region is redolent with examples of very powerful

12 *Manufacturing Consent: The political economy of the mass media* (New York: Vintage books, 1988), p. xi.

13 *A free and pluralistic media to sustain European democracy*, note 10, p. 10.

media owners being able to exert a significantly disproportionate influence over politics and over individual politicians. The political influence of the Clarín group in Argentina is widely credited with opposition to it by the Kirchner government.¹⁴ Furthermore, when focusing on local politics, there are clear parallels with the case of Berlusconi; the British weekly, *The Economist*, for instance, has called the Brazilian local media owners “mini-Berlusconis.”¹⁵

The High Level Group identified eight main “Challenges to media freedom and pluralism at Member State level”, of which five were explicitly or implicitly related to concentration of media ownership. There is significant overlap between these challenges, particularly the first two, and the issues noted above regarding the impact of media concentrations on the political sphere, but a number of other ideas are also introduced. These five challenges are as follows:

- Excessive influence of media owners or advertising clients on politicians and government and the covert manipulation of political decisions in favour of hidden economic interests;
- The concentration of ownership of commercial media and the influence this might have in the political space, whether concentration of ownership in the hands of ruling politicians, concentration of all media in a country within the hands of a single owner, or (especially dangerous in the case of small countries) concentration of all media in the hands of foreign owners;
- The effect of media concentration and changing business models in reducing the quality of journalism (investigative or otherwise), restricting the degrees of editorial freedom and the erosion in the quality of working conditions and job security for journalists;
- The lack of media ownership transparency and opacity of funding sources;
- Potential conflicts of interest arising from journalists’ closeness to business interests.¹⁶

These challenges identify to a number of threats from undue concentration of media ownership over and beyond its impact on the political sphere. The first, found in the third challenge, is the risk of “reducing the quality of journalism”. As the challenge itself makes clear, this threat does not arise solely from media concentration but also from changing business models, in particular growing

fragmentation of advertising revenues and increased overall competition, creating ever-greater pressure to cut costs, especially the high cost of paying for quality journalists. However, this risk is far greater in a concentrated market, which is normally characterised by reduced competition, due to the fact that dominant players face fewer risks from reducing quality (which might otherwise lead to a loss of market share).

This can manifest itself in many ways. Journalists are being asked to produce and do more and more in the modern world generally. It may result in a smaller number of journalists working at media outlets. As the challenge makes clear, in many cases journalists are offered fewer benefits and have less job security. There may also be a tendency to orient media content towards cheaper, easier to produce forms of content to the detriment of more substantive and public interest content. This has, as noted above, led to a particularly serious impact on investigative journalism.

There is also a very serious problem globally in terms of “media ownership transparency and opacity of funding sources”. Within Europe, a 2012 report by the Open Society Foundations found that in only 9 of the 19 European countries investigated, and only 4 of the 11 European Union Members covered, was it possible for the public to find out who the actual owners of the media were, from information either provided to media regulators or in general company registers. In most countries, media outlets are not even required to disclose their ownership structure to the regulator.¹⁷

Keeping information about beneficial ownership of the media secret has two important consequences. First, it renders it impossible to address concentration of ownership issues, especially when even the regulator cannot discover who owns the media. Second, it means that it is difficult or impossible for even media literate readers, viewers and listeners to factor the possible biases of the owner into their own understanding of media reporting.

Another concern voiced by the High Level Group was “conflicts of interest arising from journalists’ closeness to business interests”. Although the Group did not explicitly link this to media concentration, it is obvious that contexts of high concentration of media ownership render this type of problem far more serious. This is because where there is healthy competition in the media sector, such conflicts are both far more likely to be exposed and less likely to have a serious impact on the public (since only certain media interests will be compromised).

14 See, for example, “Argentina’s president and Grupo Clarín go head-to-head over media law”, 20 August 2013, *The Guardian*, available at: <http://www.theguardian.com/world/2013/aug/20/argentina-supreme-court-media-law>.

15 <http://www.economist.com/node/12474610>

16 *A free and pluralistic media to sustain European democracy*, note 10, pp. 15-16.

17 *Transparency of Media Ownership in Europe: A report for the High-Level Group on Media Freedom and Pluralism* (2012). Available at: <https://www.opensocietyfoundations.org/reports/pluralism-and-freedom-media-europe>.

Observers have noted that there is a tendency for concentration of ownership to intensify over time, absent countervailing regulatory or other measures (such as support for diverse media). Economies of scale are a recognised business efficiency in any market, but these are particularly pronounced in the media market, where costs are heavily concentrated on content product as opposed to distribution, with the result that the per unit cost of providing content drops dramatically as the audience increases (i.e. because it costs virtually the same amount to provide given content to a small or a large audience). Smaller companies also face challenges in keeping up with ever-changing technologies, including new modes of reaching out to audiences.¹⁸

2. International Standards

The right to freedom of expression is protected in Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹⁹ the leading statement of international human rights. As a UN General Assembly Resolution, the UDHR is not formally legally binding on States but parts of the UDHR, including Article 19, are widely regarded as having acquired legal force as customary international law.²⁰

Formal legal protection for freedom of expression is found in the *International Covenant on Civil and Political Rights* (ICCPR),²¹ a treaty ratified by 168 States as of October 2015. As with the UDHR, the guarantees of freedom of expression in the ICCPR are found at Article 19, which states:

- (1) Everyone shall have the right to freedom of opinion.
- (2) 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.

Freedom of expression is also guaranteed in all three of the main regional treaties on human

rights, specifically at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),²² at Article 13 of the *American Convention on Human Rights* (ACHR),²³ and at Article 10 of the *European Convention on Human Rights* (ECHR).²⁴ The guarantee at Article 13(1) of the ACHR is substantively identical for our purposes to that found at Article 19(2) of the ICCPR.

Two characteristics of this right are of particular importance here, one apparent from the very language of the guarantees and one flowing from the manner in which those guarantees have been interpreted by international courts.

First, while the right to freedom of expression prevents States from interfering with or restricting individuals' enjoyment of the right, so-called negative obligations on States (i.e. not to interfere), it also places a positive obligation on States to take measures to promote an environment which supports the free flow of information and ideas in society. International law recognises generally that States must put in place positive measures to ensure rights. Article 2 of the ICCPR requires States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant".²⁵ The specific need for positive measures to ensure respect for freedom of expression has been also recognised.²⁶

These positive obligations can extend to requiring States to take action to prevent third party interferences with freedom of expression. In the Inter-American context, there is a more positivist jurisprudential basis for these types of obligations in the form of Article 13(3) of the ACHR, which prohibits indirect prohibitions on freedom of expression of both a public and private nature. The Inter-American Court of Human Rights has very explicitly linked this to States' positive obligations to prevent third party interferences with freedom of expression as follows:

Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result. This provision

18 See, for example, Petros Iosifidis, *Pluralism, Media Mergers and European Merger Control*. Available at: http://webcache.googleusercontent.com/search?q=cache:CzhcY-4KOFYJ:www.uio.no/studier/emner/hf/imk/MEVIT4350/h15/iosifidis_3.docx+&cd=10&hl=en&ct=clnk&client=safari.

19 United Nations General Assembly Resolution 217A (III), 10 December 1948.

20 See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

21 UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

22 Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.

23 Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

24 Adopted 4 November 1950, in force 3 September 1953.

25 See also Article 2 of the ACHR.

26 See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application no. 24699/94 (European Court of Human Rights), para. 45, and *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

must be read together with the language of Article 1 of the Convention wherein the States Parties “undertake to respect the rights and freedoms recognized (in the Convention)... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms....” 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 13.²⁷

In a recent ruling, the Inter-American Commission on Human Rights endorsed this State obligation in cases where media behavior restriction freedom of expression, given that the American Convention,

“imposes on the State the obligation to ensure rights and liberties, even within the sphere of private relationships, since such Article does not only deal with indirect governmental restrictions, but also with private controls producing the same result”.²⁸

This is because

“[T]he plurality of media or information constitutes an effective guarantee of freedom of expression, the State having the duty to protect and guarantee this supposition, by virtue of Article 1.1 of the Convention, which both through minimizing restrictions on information as well as by seeking a balance in participation, enables the media to be open to all, without discrimination, because it seeks that there ‘not to be individuals or groups that, a priori, would be excluded’.”²⁹

Second, the right is multi-dimensional in nature, protecting not only the right of the speaker (to ‘impart’ information and ideas) but also the right of the listener (to ‘seek and receive’ information and ideas). The Inter-American Court of Human Rights

has explored this dual nature of the right to freedom of expression in some detail in its case law:

[W]hen an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.³⁰

This aspect of the right rules out arbitrary interferences by the State which prevent individuals from receiving information that others wish to impart to them.³¹ However, the rights of the listener, when combined with the idea of positive obligations to protect freedom of expression, also require States to take measures to promote an environment in which a diversity or range of information and ideas are available to the public. Media diversity, a key aspect of this, is elaborated on in more detail below.

According to the Inter-American Court of Human Rights:

“Given the importance of freedom of thought and expression in a democratic society ... the State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism. Under these terms is to be explained the protection of the human rights of those who face the power of the media and the attempt to ensure the structural

27 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 48.

28 Inter-American Court of Human Rights. *Case of Marcel Granier v. Venezuela*. Judgment of June 25, 2015. Par. 164.

29 Inter-American Court of Human Rights. *Case of Marcel Granier v. Venezuela*. Judgment of June 25, 2015. Par. 142.

30 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 28, paras. 30-2. See also *Baruch Ivcher Bronstein v. Peru*, 6 February 2001, Series C, No. 74 (Inter-American Court of Human Rights), paras. 148 and 163, and “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. *Chile*, 5 February 2001, Series C, No. 73 (Inter-American Court of Human Rights), para. 66. See also Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, 30 December 2009, pp. 5-6.

31 See, for example, *Leander v. Sweden*, 26 March 1987, Application no. 9248/81 (European Court of Human Rights), para. 74.

*conditions which allow the equitable expression of ideas*³².

These ideas are consistent with statements by the UN Special Rapporteur on the Right to Freedom of Opinion and Expression:

*"[T]he State holds a superior responsibility. The State must not only protect, but also foster freedom of expression, which entails the duty to introduce proactive public policies for the full enjoyment of those rights. The new paradigm for the State is the rights-based State, one that seeks to enforce human rights and that must take action in order to guarantee that all individuals enjoy those rights."*³³

The implementation of positive measures to promote media diversity can sometimes involve a sensitive balancing between the rights of speakers and those of listeners. A general principle flowing from the right to freedom of expression is that regulatory measures should always be applied by an independent body. This principle is of heightened importance where sensitive balancing of interests is involved.

The *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002,³⁴ clearly establishes a requirement of independence for media regulators stating, at Principle VII(1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

Similarly, the (then) three special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media – noted in their 2003 Joint Declaration:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic na-

*ture, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*³⁵

Within Europe, an entire recommendation of the Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).³⁶ The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

The *Inter-American Declaration of Principles on Freedom of Expression* (American Declaration)³⁷ does not establish the need for broadcast regulators to be independent as explicitly as these other instruments, but it does note the underlying reason for this stating, in Principle 13:

[T]he concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.

The need for independent regulatory bodies has been reaffirmed by the Inter-American Special Rapporteur for Freedom of Expression:

The broadcasting authority in charge of enforcement and oversight must be independent of both government influence and of the influence of private groups linked to public, private/commercial or community broadcasting. It must be a deliberative body that ensures plurality in its composition. It must be subject to clear, public and transparent procedures, as well as to the imperatives of due process and strict judicial review. Its decisions must be

32 IACHR, *Marcel Granier v. Venezuela*. Judgment of June 25, 2015. Par. 144.

33 Dr. Frank La Rue, 2° International Forum on Freedom of Expression, Social Responsibility, and Citizen's Rights," Maldonado, Uruguay, 2011.

34 At the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

35 Adopted 18 December 2003. The special mandates, now four with the addition of the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have adopted a Joint Declaration on a different freedom of expression theme every year since 1999. On the question of independence, see also their 2007 Joint Declaration on Diversity in Broadcasting. All of the Joint Declarations are available at: <http://www.osce.org/fom/66176>.

36 Adopted by the Committee of Ministers on 20 December 2000.

37 Adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000.

public, in accordance with existing legal norms, and adequately justified. Finally, the body must be accountable for and give public account of its activities. In regard to the enforcement authority, the Inter-American Commission has indicated that, “it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight. [footnotes omitted]”³⁸

2.1 Diversity and pluralism

If the principle of independence conditions the manner in which broadcast regulation should take place, the principle of media diversity describes an important goal of such regulation. As noted above, jurisprudentially the idea of a positive State obligation to promote media diversity derives from the fact that freedom of expression protects the rights of both the speaker and the listener (to ‘seek and receive’ information and ideas).

The obligation on States to promote media diversity has received extremely broad endorsement as an aspect of the right to freedom of expression from both regional and international human rights mechanisms. At the international level, the UN Human Rights Committee, which is responsible for overseeing compliance with the ICCPR, issued General comment No. 34: Article 19: Freedoms of opinion and expression in 2011, which provided a broad interpretation of the scope of freedom of expression. The General comment stated:

*40. The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”.*³⁹

For UNESCO, diversity is central to its very concept of media freedom. The leading UNESCO statement in this area, the *Declaration of Windhoek*, was adopted on 3 May 1991 at the Seminar on Promoting an Independent and Pluralistic African Press, which refers to this idea in its title. The first substantive provision in the Declaration declares:

*Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.*⁴⁰

Ten years later, UNESCO sponsored another conference on World Press Freedom Day at the same city, the Windhoek Conference, at which the *African Charter on Broadcasting 2001* was adopted to supplement the original Windhoek statement, which had focused on the print media.⁴¹ The Charter included the following statement in Part I: General Regulatory Issues:

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.

The 2005 UNESCO-sponsored *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* also includes important statements about media diversity.⁴² For example, Article 1 sets out the objectives of the Convention, including:

(h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory

Article 6.2(h) describes measures that States may take, including:

(h) measures aimed at enhancing diversity of the media, including through public service broadcasting

In their 2001 Joint Declaration, the special international mandates for freedom of expression stated:

Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as

38 *Freedom of Expression Standards for Free and Inclusive Broadcasting*, 2009, para. 48. Available at: <http://www.oas.org/en/iachr/expression/docs/publications/Broadcasting%20and%20freedom%20of%20expresion%20FINAL%20PORTADA.pdf>. Also see SALOMON, Eve – *Independent regulation of broadcasting: a review of international policies and experiences*. Available at: <http://unesdoc.unesco.org/images/0024/002460/246055E.pdf>.

39 12 September 2011, CCPR/C/GC/34, para. 40.

40 The Declaration was endorsed by the UNESCO General Conference at its twenty-sixth session in 1991.

41 Adopted 5 May 2001. Available at: http://portal.unesco.org/ci/en/files/5628/10343523830african_charter.pdf/african%2Bcharter.pdf

42 Adopted 20 October 2005, in force 18 March 2007.

*well as equal opportunity for all sections of society to access the airwaves.*⁴³

As the title of the special mandates' 2007 Joint Declaration on Diversity in Broadcasting suggests, it focused exclusively on diversity in broadcasting. The preamble highlighted the importance of media diversity as follows:

*Stressing the fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression;*⁴⁴

The principle has found strong endorsement within the Inter-American system of human rights. For example, the 2015 Annual Report recommended that Member States:

*Promote effective policies and practices that permit access to information and the equal participation of all sectors of society so that their needs, opinions, and interests will be contemplated in the design and adoption of public policy decisions. Additionally, adopt legislative and other measures that are necessary to guarantee pluralism, including laws that prevent the existence of public or private monopolies and undue or excessive concentration of the media.*⁴⁵

In her 2009 report, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, the Special Rapporteur expanded on these ideas, stating:

In the analysis of the legitimacy of the purpose pursued in broadcasting regulation, equality in the exercise of freedom of expression requires three components: plurality of voices (anti-monopoly measures), diversity of voices (social inclusion measures) and non-discrimination (equal access to processes that apportion frequencies).

...

*In this sense, the regulation of broadcasting must be part of a proactive policy of social inclusion that tends to reduce pre-existing inequality in access to the media. This means that when in the act of regulating broadcasting, States must take into particular consideration groups with difficulties gaining access. Indeed, one purpose of regulation must be to promote equal conditions of competition among all sectors of society by guaranteeing special rules that allow access to groups traditionally marginalized from mass communication.*⁴⁶

The Inter-American Court of Human Rights has also endorsed this idea, stating:

*Freedom of expression requires 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.*⁴⁷

The African Declaration also supports the idea of a positive obligation to promote diversity, stating:

*Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.*⁴⁸

Within the European Union, the primary guarantee of freedom of expression found at Article 11 of the Charter of Fundamental Rights of the European Union refers, in its second paragraph, explicitly to media diversity:

*2. The freedom and pluralism of the media shall be respected.*⁴⁹

The Council of Europe, which embraces the broader European region, has adopted a specific document on the issue of media diversity, Recommendation 2007(2) on Media Pluralism and Diversity of Media Content.⁵⁰ The whole Recommendation is devoted to the question of the importance of diversity in the media and measures to promote it. The first clause of the Recommendation states, in part:

Member states should seek to ensure that a sufficient variety of media outlets provid-

43 Adopted 30 November 2001. Available at: <http://www.osce.org/fom/66176>.

44 Adopted 12 December 2007. Available at: <http://www.osce.org/fom/66176>.

45 Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015, Conclusions and Recommendations, par. 28.

46 Note 39, paras. 26 and 29.

47 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 28, para. 34. See also *Ríos et al. v. Venezuela*, 28 January 2009, Series C, No. 194, para. 105 and *Granier and Others (Radio Caracas Televisión) v. Venezuela*, 22 June 2015, paras. 142 and 144.

48 Principle III.

49 Official Journal of the European Communities, 18 December 2000/C 364/01.

50 Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

ed by a range of different owners, both private and public, is available to the public.

This finds strong support in the jurisprudence of the European Court of Human Rights, which has frequently noted: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”⁵¹

In a case decided in 2012 by a Grand Chamber,⁵² the European Court elaborated on its historic rulings on this issue as follows:

129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated....

130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

...

134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.⁵³

There are a number of different elements that contribute to media diversity. As the High Level Group

noted in *A free and pluralistic media to sustain European democracy*:

Media pluralism is a concept that goes far beyond media ownership ... It embraces many aspects, ranging from, for example, merger control rules to content requirements in broadcasting licensing systems, the establishment of editorial freedoms, the independence and status of public service broadcasters, the professional situation of journalists, the relationship between media and political actors, etc. It encompasses all measures that ensure citizens' access to a variety of information sources and voices, allowing them to form opinions without the undue influence of one dominant opinion forming power.[6]

[6] EU Media Futures Forum, Final Report – September 2012, ‘Report for European Commission Vice-President Neelie Kroes’⁵⁴

The 2007 Joint Declaration of the special international mandates identified three distinct aspects of diversity: content, source or ownership, and type of outlet or sectoral diversity.⁵⁵ Diversity of content – the provision of a wide range of content that serves the needs and interests of all group and members of society – is ultimately the most important type of diversity. But it can only be achieved when the other two types of diversity exist. For broadcasting, outlet diversity refers to the idea of creating an environment in which all types of broadcasters – public service, commercial and community – can flourish. This report focuses on source diversity, or broad media ownership.

2.2 Concentration of Ownership and Control

It is abundantly clear that the positive obligation on States to promote media diversity under international law includes an obligation to prevent undue concentration of media ownership.

All of the key international players and systems have reinforced the idea that States need to take action to prevent or address undue concentration of ownership of the media in private hands. In its 2011 General comment, the UN Human Rights Committee stated:

[E]ffective measures are necessary to prevent such control of the media as would

51 See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

52 A case goes to a Grand Chamber either effectively on appeal from a decision of a regular Chamber (a referral) or when a regular Chamber refers a complex or important matter to a Grand Chamber (relinquishment). Grand Chambers consist of 17 judges and their judgments are considered to be particularly authoritative.

53 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application no. 38433/09.

54 Note 10, p. 13.

55 See also: Thomas Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry”, in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

interfere with the right of everyone to freedom of expression. ... Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views. [footnotes omitted]⁵⁶

As noted above, the *Declaration of Windhoek*, adopted under the auspices of UNESCO, endorsed the idea of media pluralism and went on to indicate:

By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.⁵⁷

Similarly, in their 2001 Joint Declaration, the special international mandates on freedom of expression stated:

Effective measures should be adopted to prevent undue concentration of media ownership.⁵⁸

Within the Americas, the Special Rapporteur on Freedom of Expression has frequently highlighted the need to address the problems of undue concentration of media ownership. For example, the 2014 Annual Report of the Office of the Special Rapporteur for Freedom of Expression stated:

For over twenty years now, the IAHRS [sic] has been building and reaffirming standards in two respects: ... monopolies or oligopolies in the ownership or control of the media run counter to democracy by restricting the plurality and diversity that ensures the full exercise of the right to freedom of information. When the State's omission leads to the existence of monopolies or oligopolies or hinders the free flow of ideas, it gives rise to a form of indirect restriction. The States have the obligation to intervene where there is excessive concentration, by the means authorized under the Convention, and to bring the operation of the media that use frequencies into line with the requirements of freedom of expression. In this respect, the existence of

a commercial media sector is insufficient, per se, for there to be a democratic system with a diversity and plurality of voices; therefore, it is necessary to promote the coexistence of media of different types and different forms of ownership.⁵⁹

This finds support in the jurisprudence of the Inter-American Court of Human Rights. In its landmark case on freedom of expression, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the Court noted:

[T]he right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mould public opinion by giving expression to only one point of view. ... [T]here 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. ... [F]reedom 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."⁶⁰

In its 25 June 2009 judgment, *Granier v. Venezuela*, the Court reaffirmed these principles by underscoring the need for States to take an active role in the matter. Within the obligations set by the framework of the American Convention on Human Rights, "given the importance of pluralism in a democratic society..., the protection of pluralism is not only a legitimate aim in itself, but an imperative one."⁶¹

According to the African Declaration:

States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.⁶²

This also means that States may not maintain a public monopoly over broadcasting. In a series of cases, the European Court of Human Rights has

56 Note 40, para. 40.

57 Note 41, para. 3.

58 20 November 2001.

59 P. 30.

60 Note 28, paras. 33, 34 and 56. See also Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, 30 December 2009, pp. 81-82.

61 IACHR, *Marcel Granier v. Venezuela*. Judgment of June 25, 2015. Par. 142.

62 Note 23, Principle XIV(3)..

indicated this, stating, in *Informationsverein Lentia and others v. Austria*:

*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.*⁶³

Similarly, the UN Human Rights Committee's 2011 General comment notes: "The State should not have monopoly control over the media".⁶⁴ And the African Declaration states: "A State monopoly over broadcasting is not compatible with the right to freedom of expression."⁶⁵

2.3 Measures to Prevent Undue Concentration of Ownership

It is one thing to hold that States are obliged to take measures to address concentration of ownership and another to indicate what types of measures should be taken to this end. In 2007, the special international mandates on freedom of expression adopted a Joint Declaration on Diversity in Broadcasting which included the following statement:

*In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.*⁶⁶

This identifies four different means of addressing concentration of media ownership:

1. Putting in place anti-monopoly rules, both within a media sector and across media sectors (cross-ownership).

2. Putting in place rules on transparency of media ownership and reporting of major proposed combinations.
3. Taking ownership issues into account in the licensing process for broadcasters.
4. Actively monitoring ownership concentration, coupled with the power to prevent major combinations.

The first of these finds support in Principle 12 of the American Declaration, which provides, among other things: "Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws".⁶⁷ A 2007 Recommendation of the Committee of Ministers of the Council of Europe addresses this issue in some detail, providing:

1.2. Where the application of general competition rules in the media sector and access regulation are not sufficient to guarantee the observance of the demands concerning cultural diversity and the pluralistic expressions of ideas and opinions, member states should adopt specific measures.

...

2.3. These rules may include introducing thresholds based on objective and realist criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights.

*2.4. These rules should make it possible to take into account the horizontal integration phenomena, understood as mergers in the same branch of activity – in this case mono-media and multi-media concentrations –, as well as vertical integration phenomena, that is, the control by a single person, company or group of some of the key elements of production, distribution and related activities such as advertisement or telecommunications.*⁶⁸

As this makes clear, in respect of the media, it may be necessary to adopt special anti-concentration rules, over and above the rules that apply to all commercial sectors. The main reason for this is that it is recognised, for reasons noted above, that media diversity goes beyond simply ensuring an appropriately competitive commercial environ-

63 Note 53, para. 39.

64 Note 40, para. 40.

65 Note 23, Principle V(1).

66 Adopted 12 December 2007.

67 Note 38.

68 Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007, Part I. Measures promoting structural pluralism of the media. See also the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, 31 January 2007.

ment to serving as an underpinning of democratic choices and of an informed, engaged citizenry.

The second type of measure, rules on transparency of media ownership, really serves as a precondition for the application of the other measures, as well as for citizens to be able to understand the orientation of the media content they are receiving (i.e. as an element of media literacy). This is supported by the 2007 Declaration of the Committee of Ministers of the Council of Europe on protecting the role of the media in democracy in the context of media concentration, which identifies the “necessity of having regulatory measures in place with a view to guaranteeing full transparency of media ownership”.⁶⁹ The 2007 Recommendation of the Committee of Ministers identifies a number of specific types of transparency, including in relation to:

- “the persons or bodies participating in the structure of the media and on the nature and the extent of the respective participation of these persons or bodies in the structure concerned and, where possible, the ultimate beneficiaries of this participation”;
- “the nature and the extent of the interests held by the above persons and bodies in other media or in media enterprises, even in other economic sectors”;
- “other persons or bodies likely to exercise a significant influence on the programming policy or editorial policy”; and
- “the support measures granted to the media”.⁷⁰

As for the third measure identified by the special mandates, several instruments refer to the need to take diversity of media ownership into account in the licensing process for broadcasters. For example, Principle 12 of the American Declaration notes: “The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.”⁷¹ Similarly, the Inter-American Special Rapporteur for Freedom of Expression has noted:

*Specifically, the States must prevent monopolies or oligopolies and consider the existence of such conditions when determining the allocation or renewal of licenses.*⁷²

This assertion finds support in the UNESCO Media Development Indicators.⁷³ Alongside measures to avoid concentration of ownership, other measures to promote media diversity and pluralism are also imperative, including: the legal acknowledgement of the existence of the three types of broadcasters (commercial, public, and community), although this is not applicable, for instance, to the online sphere; frequency spectrum reservation for community and non-profit actors; and avoiding excessive requirements or discriminatory procedures that would directly or indirectly undermine the equality of opportunity for all sectors to participate in broadcasting.

At the same time, licensing allocation or renewal processes which consolidate or expand undue concentration of ownership, either by granting more licences to concentrated media groups or approving the automatic renewal of their licences, should be avoided. Automatic renewal of licences, for example, can lead to permanent concession periods which, in turn, can undermine efforts to address concentration of ownership.

In the same vein, the *African Charter on Broadcasting 2001* notes, in clause 5 of Part I: “Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.”⁷⁴ In practice, in many countries diversity is an explicit criterion to decide between competing licence applications, and this includes a consideration of concentration of ownership.

The 2007 Recommendation of the Committee of Ministers of the Council of Europe is also very explicit about the need for regulatory authorities to be given the necessary powers to address situations of undue concentration of media ownership:

2.6. Whether they are, or are not, specific to the audiovisual and written media, the authorities responsible for the application of these rules should be vested with the powers required to accomplish their mission, in particular, the power to refuse an authorisation or a license request and the power to act against concentration operations of all forms, notably to divest existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is threatened. Their

69 Note 69, clause II.

70 Note 69, Part III. Media transparency, clause 1. See also *Transparency of Media Ownership in Europe: A report for the High-Level Group on Media Freedom and Pluralism*, note 17.

71 Note 38.

72 Note 39, para. 119.

73 See UNESCO Media Development Indicators: “State measures to ensure a diverse mix of public, private and community broadcasters and print media present a chequered picture internationally.”, page 37. Available from: <http://unesdoc.unesco.org/images/0016/001631/163102e.pdf>.

74 Note 42.

competences could therefore include the power to require commitments of a structural nature or with regard to conduct from participants in such operations and the capacity to impose sanctions, if need be.

Special considerations may come into play in the context of the digital switchover. As the OSCE Representative on Freedom of the Media has noted: “If there are already monopoly and dominance problems, these may be increased by digitalization. Such issues must be addressed without delay.”⁷⁵ In their 2013 Joint Declaration on the Protection of Freedom of Expression and Diversity in the Digital Terrestrial Transition, the special international mandates on freedom of expression pointed to some means of counteracting this threat:

*Special measures should be put in place, as necessary, to prevent the digital terrestrial transition from promoting greater or undue concentration of media ownership or control. This might include regulatory measures regarding the way in which multiplexes are run, clear pricing and competition rules regarding multiplexes and distribution networks, and the separation of distribution and content operations within the same business, among other things.*⁷⁶

In his recent report, *Freedom of Expression Standards for the Transition to a Diverse, Plural and Inclusive Free-to-Air Digital Television*, the Inter-American Special Rapporteur noted, in respect of the digital transition, that,

... it is necessary to establish principles that guide the issuance and implementation of laws regulating this process, in order to regulate technical aspects but also to promote pluralism and remove cultural or linguistic barriers to access to different sources of information and prevent or reduce the concentration of media in the hands of a few operators.

...

*One aim of the process of implementing digital television should be to bring about a more diverse and plural system of television media than the one that exists with analogue technologies.*⁷⁷

3. Regulation of Broadcasting to Address Ownership Concentration in Europe and North America

In practice, most democracies do have special rules to address the issue of undue concentration of ownership of the media. In many countries, specific anti-monopoly rules are in place to deal with media concentrations, given the important democratic and wider social role of the media. According to the *Independent Study on Indicators for Media Pluralism in the Member States – Toward a Risk-Based Approach: Final Report*, prepared for the European Commission:

*The majority of EU Member States have adopted regulations in the area of media ownership, since limitations on the influence which a single person, company or group may have in one or more media sectors, as well as rules ensuring a sufficient number of diverse media outlets, are generally considered to be important for assuring pluralistic and democratic representation in the media.*⁷⁸

Annex III of the Media Pluralism Indicators Report contains the Country Reports, and a series of tables at the end of that Annex provides an overview of the legal and policy approaches taken in the 27 European Union countries.⁷⁹ Table 6. Pluralism of ownership/control, is the most relevant for our purposes. It indicates that 22 countries take ownership into consideration at the point of licensing broadcasters, while 17 apply supervisory measures to mergers and acquisitions, and 12 undertake ongoing monitoring of ownership concentrations. In terms of the scope of the rules, 20 countries apply restrictions within a media sector (i.e. with the radio or television sector), while 16 have rules on cross-media ownership.

A variety of criteria for measuring ownership concentration are used in different countries, with many countries employing more than one or even several criteria. The results are summarised in the table below.

75 OSCE Representative on Freedom of the Media, *Guide to the Digital Switchover* (Vienna, OSCE, 2010), p. 51. See also the 2014 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, 9 March 2015, Chapter III: Freedom of Expression Standards for the Transition to Open, Diverse, Plural, and Inclusive Free-To-Air Digital Television, para. 6.

76 Adopted 3 May 2013, clause 3(h).

77 9 March 2015, paras. 5 and 19. Available at: http://www.oas.org/en/iachr/expression/docs/publications/Transition_to_Digital_TV.pdf.

78 European Commission Directorate-General Information Society and Media, Leuven, 2009, p. 31.

79 Annex III, pp. 779-788. Available at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/part_3.pdf.

Criteria	Number of Countries Using
Number of licences	17
Market shares	8
Circulation and audience shares	9
Capital shares	11
Voting shares	7
Advertising revenues	2
Involvement in number of media sectors	5

This shows that the number of licences, which in most cases is directly linked to the number of media outlets and often the number of channels, is by far the most popular approach, no doubt given the relative ease of applying it. At the same time, only three countries rely exclusively on number of licences, given the limited nature of looking only at this factor which, for example, says nothing about the actual reach of the media as reflected in market or audience share.

The same table indicates that it is common for countries to impose transparency obligations on media outlets in relation to ownership. Some 11 European Union countries require media outlets to meet transparency obligations directly vis-à-vis consumers, while 18 of the 27 countries impose such obligations vis-à-vis the regulator.

The specific nature of the rules and the ways that they are applied vary considerably among countries. The European Union's *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services* provides some indication of how anti-monopoly rules might be applied, although it is more oriented towards telecommunications than media markets. As the Guidelines make clear, it can be difficult to define not only market share (see the table above) but even the relevant market. Not surprisingly, they note that a dominant position is established at a level of 50 percent market share and is assumed at 40 percent, while a market share of 25 percent is unlikely to create a risk of a dominant market position.⁸⁰

As an example of how these rules work, in **Germany**, a broadcaster is deemed to have a controlling influence if it has achieved "an average annual viewer rating of 30 per cent". In this case, no further licences may be issued to it and it may also not acquire any further broadcasting holdings. Furthermore, no media owner with a dominant market position may acquire a television station with a market share of 25 percent or more.⁸¹

Media mergers are also subject to general anti-trust rules. In general, these rules require approval from the Federal Cartel Office (Bundeskartellamt) for any merger with a total turnover of Euro 500 million, while a de-minimis rule of Euro 10 million applies below which the Federal Cartel Office cannot prevent mergers. For broadcasters, however, special rules apply and these limits are reduced by twenty-fold (i.e. to requiring approval for any merger over Euro 25 million).⁸² In addition, for broadcasting, a special body, the Commission on Concentration in the Media (Kommission zur Ermittlung der Konzentration im Medienbereich or KEK) has been created to supervise undue concentration of ownership, whether created through mergers and/or licensing.⁸³

In **France**, the broadcast regulator is the Conseil Supérieur de l'Audiovisuel (CSA), created by the 1986 Freedom of Communication Act.⁸⁴ Any ownership position which involves ten percent or more of the shares of a media enterprise must be reported to the CSA. No one may own more than 49 percent of a national television station with an average annual audience share of more than eight percent, or more than 15 percent of a second such station, or 5 percent of a third. No one may, at the national level, control more than two of the following: a television station with an audience of 4 million people or more; a radio station with an audience of 30 million people or more; and a newspaper which exceeds 20 percent of the total national circulation of daily newspapers. At the local level, similar rules prevent anyone from controlling more than two of the following within the same geographic area: a national or local TV licence; one or more radio licences with cumulative audience shares of more than 10 percent; and editorial or another form of control over a daily newspaper.⁸⁵

In the **United States**, very detailed and complex rules apply to the issue of media ownership and

80 2002/C 165/03, Official Journal of the European Communities C 165/6, 11 July 2002, para. 75.

81 Interstate Agreement on Broadcasting (Agreement on Broadcasting between the Federal States in United Germany), section 26.

82 See sections 35 and 38(2) of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or GWB) published on 12 July 2005 (Bundesgesetzblatt I, p. 1954). Available in English at: <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.html?nn=3590380>. The limits are reduced by eight times for print media outlets.

83 See Article 35(2)(1) of the Interstate Agreement on Broadcasting.

84 Act No. 86-1067 of 30 September 1986.

85 Freedom of Communication Act, Articles 39-41-2-1. See also Michael McEwen, *Media Ownership; Rules Regulations and Practices in Selected Countries and Their Potential Relevance to Canada*.

cross-ownership. The governing instrument is Section 202(h) of the Telecommunications Act of 1996, which has been elaborated on in regulations adopted by the national regulator, the Federal Communication Commission.⁸⁶

At the national level, a single entity may own any number of commercial television stations, as long as the total audience reach (not share) of the group does not exceed 39 percent of the national television audience.⁸⁷ In practice, no mergers are permitted between any of the four largest networks (ABC, CBS, Fox and NBC).

Local ownership rules are complex. One company may own two television stations with an overlapping reach if (1) the audience share of at least one of the stations is not ranked among the top four stations in the area; and (2) at least eight independently owned and operated television stations would remain after the merger.⁸⁸ For radios, the limits, which are hard-wired into the Telecommunications Act, depend on the total number of players in the relevant market, in accordance with the table below:⁸⁹

Market Size	Maximum Number	Number in Same Service (i.e. AM or FM)
14 or fewer stations	5 stations	3 stations
29 or fewer stations	6 stations	4 stations
44 or fewer stations	7 stations	4 stations
more than 45 stations	8 stations	5 stations

There are also complex cross-ownership rules. For television and radio, a single entity may, within a single market, own two television stations (subject to the rules on local television stations, described above) and one radio station. These limits may be exceeded if at least 10 independently owned “media voices”, whether television, radio or newspapers, would remain after the merger. In this case, and subject to the rules on local television and radio stations, the limits increase to up to two television stations and up to four radio stations. Where at least 20 independently owned voices would remain, the limits increase to up to two television

stations and up to six radio stations, or one television station and up to seven radio stations.⁹⁰

There are also rules restricting cross-ownership between newspapers and broadcasters. The system starts with a presumption against cross-ownership between broadcasters and daily newspapers in an overlapping market and then allows the FCC to override this where the “public interest, convenience, and necessity would be served” by this.

In smaller markets, i.e. those which are not top 20 designated market areas, there is a general presumption that cross-ownership between daily newspapers and broadcasters would not be in the public interest. This presumption may be overcome where the proposed combination involves a failed or failing station or newspaper, or where, following the combination, a broadcaster which was not hitherto providing local news would provide at least seven hours of such news weekly. In any case, the applicant must demonstrate by “clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market”.

For a top 20 designated market area, there is a presumption that a daily newspaper may combine with a broadcast station provided that where the combination involves a television station, at least eight independently owned and operated “major media voices” (full-power television stations and major newspapers) would remain and the television station is not ranked among the top four in the relevant market.

In deciding whether a combination would be in the public interest, the FCC shall consider the following:

- (i) Whether the combined entity will significantly increase the amount of local news in the market;
- (ii) Whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment;
- (iii) The level of concentration in the Nielsen Designated Market Area (DMA); and
- (iv) The financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the proposed owner’s commitment to invest significantly in newsroom operations.⁹¹

86 See Section 73.3555 of the FCC regulations (47 C.F.R. 73.3555).

87 Section 73.3555, note 87, paragraph (e)(1).

88 Section 73.3555, note 87, paragraph (b).

89 Section 202(b). See also Section 73.3555, note 87, paragraph (a).

90 Section 73.3555, note 87, paragraph (c).

91 Section 73.3555, note 87, paragraph (d).

In **Canada**, the regulator, the Canadian Radio-Television and Telecommunications Commission (CRTC), is given very broad powers to regulate broadcasting “with a view to implementing the broadcasting policy” set out in section 3(1) of the Broadcasting Act.⁹² A number of elements of that policy refer to the idea of diversity, including section 3(1)(k), which states, as broadcasting policy, that: “a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available”.

In practice, CRTC has adopted a number of rules governing concentration of media ownership pursuant to its general powers to regulate broadcasters. In every case, the rules are not set out in a rigid form but, rather, as general principles, which the CRTC may waive in appropriate circumstances.

As regards national television, the CRTC will not, “as a general rule”, allow a transaction that gives a single entity control of more than 45 percent of a television market. It will “carefully examine” transactions that result in one entity having a 35-45 percent market share, and it will allow, “barring other policy concerns”, transactions that result in a market share of less than 35 percent.⁹³

Otherwise, for television, CRTC generally does not allow one entity to provide more than one service in one language in a given market. Exceptions are, albeit rarely, approved where two conditions are met, namely there is a need to ensure local programming for smaller cities located adjacent to larger urban centres and the licensee has the capacity to provide such programming.⁹⁴

For radio, different numerical rules apply to markets of less than, or equal to or greater than, eight stations. In the former, no one entity may control more than three stations in any language or two in any frequency band (i.e. AM or FM) while in the latter, one entity may control up to two stations in each band in any language. The same (additional) number of digital stations is also permitted.⁹⁵

Prior to 2008 Canada, rather uniquely among established democracies, did not have any cross-ownership rules. This was addressed in 2008 with a rule that prohibited the ownership or control by a single entity of a radio station, television station and daily newspaper serving the same market.⁹⁶

There are, as the examples above suggest, different ways to apply these rules. In many cases, this is built into the licensing process for broadcast-

ers. In this way, applicants will not be awarded a broadcasting licence if that would in any way breach the rules on concentration of media ownership. Furthermore, this issue is reassessed at the point of licence renewal. Although this would normally be several years later – often between five and ten years – most broadcasting enterprises would not wish to do anything during this period to put themselves in breach of the rules, knowing that if they did there could be potentially very serious consequences in a few years (which might require them to diversify or change their ownership structures).

In many cases, in addition to the general powers of the regulator in the case of broadcast licensing and renewal, broadcasters are prohibited from transferring licences to other parties without the approval of the regulator, which provides an opportunity to assess the impact of the proposed transfer on media ownership patterns. Furthermore, in many cases broadcasters are required to report changes in their ownership to the regulator, even if these do not constitute a formal transfer of the licence (for example, if an investor buys shares in a licence-holding company). In many countries, these reporting obligations are limited to cases where the changes are significant, with five percent sometimes being put forward as a threshold (i.e. where there is a purchase or sale of five percent or more of the shares of the holding company).

In other cases, mergers and acquisitions have to be approved where they reach beyond a certain level (which is much lower for the media in the case of Germany, as noted above). This provides another opportunity for ensuring respect for the concentration of ownership rules for the media, which can apply outside of the context of the licensing process.

In many cases, these rules are applied directly by the body which regulates broadcasters. This is the case, for example, in Canada, France and the United States, where the broadcast regulator both elaborates on (based on the primary legislation) and applies the rules. This has the advantage of bringing specialised media expertise into play, but these bodies may not have the same degree of expertise in relation to monopoly issues as specialised bodies which deal with that issue. In other cases, such as in Germany, the anti-monopoly body applies these rules. In Germany, however, and no doubt in recognition of the fact that the anti-monopoly body does not have specialised expertise

92 S.C. 1991, c. 11.

93 Broadcasting Public Notice CRTC 2008-4, Regulatory policy, 15 January 2008, para. 87.

94 Broadcasting Public Notice CRTC 1999-97, Building on Success – A Policy Framework for Canadian Television, 11 June 1999, para. 17.

95 See Broadcasting Public Notice CRTC 1998-41, Commercial Radio Policy, 30 April 1998, para. 7 and Broadcasting Public Notice CRTC 2006-160, Digital radio policy, 15 December 2006, para. 42.

96 Broadcasting Public Notice CRTC 2008-4, note 94, para. 64.

on broadcasting, another body has been created, the KEK, which specialises in media mergers.⁹⁷

4. Regulation of Broadcasting to Address Ownership Concentration in Latin America

Historically, broadcasting in most countries in Latin America has been based on a predominantly commercial model, at the expense of public service and community broadcasting. It may be noted that this is very much along the lines of the approach taken in the United States, and the opposite of the dominant approach in Europe, where historically public media benefitted from monopoly positions which were only ceded to commercial players relatively recently. Canada perhaps presents a middle path between these two, with private and public broadcasters co-existing together more-or-less since the advent of broadcasting.

Prior to the political liberalisation that swept Latin America in the 1980s, several countries in the region were run by military dictatorships. Regulatory policies were essentially free market in nature, but government did not tolerate political challenges or even strong criticism from the media, and media actors that refused to accept the political hegemony of the military leaders tended to be sidelined or closed altogether. This led to a media environment in which there was considerable consolidation among key players, laying the basis for what is today of the most concentrated media ownership environments in the world.

With the democratisations of the 1980s came a freer environment for the media in terms of content, but few real changes to the overarching regulatory framework which had an impact on who were the main players. Indeed, the predominantly commercial environment which prevailed at that time in most countries in the region tended to increase consolidation of media ownership as powerful players expanded their remit into more channels, and created both vertically and horizontally integrated conglomerates. This has, if anything, only increased with convergence, although that has also led to a few telecommunications companies such as América Móvil from Mexico and Telefónica from Spain entering into the media market in the region.

With the exception of a few countries, public or State broadcasting has been relatively limited or underdeveloped in nature. This has deprived the broadcasting environment of the influence of public service broadcasting which has, among other things, served to mitigate both undue commercialisation and monopolisation of the broadcasting sector in most European countries. Although community radio claims its origins in the mines of Bolivia, this sector, too, has largely been prevented from assuming a significant role in the broadcasting sector in the region by a combination of factors, including the strong political influence of the powerful commercial broadcasting lobby and the reluctance of governments to open up the broadcasting sector to divergent political forces, which they could not easily control.

Over the last 40 or 50 years, largely in the absence of countervailing regulatory measures, there has been a strong tendency towards increasing concentration of ownership in Latin America⁹⁸. As UNESCO noted in its 2014 publication, *World Trends in Freedom of Expression and Media Development: Regional overview of Latin America and the Caribbean*:

In Latin America and the Caribbean, where a commercial model has traditionally predominated, media ownership has been highly concentrated among very few owners. In much of the region, on average, almost half of the products and services of the information and communications markets of each country were controlled by one provider.⁹⁹

Undoubtedly, the most widespread, longstanding and deepest type of undue concentration in Latin America is private/commercial concentration. The situation has become so serious that a group of civil society organizations stated:

“[C]ommunication and information monopolies, duopolies, or oligopolies not only affect the plurality of information, but, by allowing private individuals, companies or business groups to control information and have it permeate public opinion, they could even gain more power than political institutions. Concentration creates de facto powers that determine the public agenda and the impact that the media have on

97 For additional information on independent authorities, see: SALOMON, Eve – *Independent regulation of broadcasting: a review of international policies and experiences*. Available at: <http://unesdoc.unesco.org/images/0024/002460/246055E.pdf>.

98 For updated information on media concentration in Latin America, see, for instance, http://www.ifj.org/fileadmin/documents/La_concentracion_de_medios_en_America_latina_Su_impacto_en_el_derecho_a_la_comunicacion_n.pdf and NOAM, Eli - *Who owns the world's media?*, available at: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199987238.001.0001/acprof-9780199987238>

99 (Paris, UNESCO, 2014), p. 14. Available at: <http://unesdoc.unesco.org/images/0022/002277/227740e.pdf>.

*political power in order to privilege their own interests.*¹⁰⁰

Some countries in the region, however, have also started recently to create concentrated ownership and control of the media in the hands of the government, either directly through State-owned media or in partnership with like-minded businessmen.

In response, some countries in Latin America and the Caribbean are undertaking profound processes of review and reform of their broadcasting legislation, as a consequence of political changes (constitutional reforms in Mexico, Bolivia, and Ecuador), of the new regulatory challenges posed by new business models (new pay TV laws for new telecommunications companies entering the audiovisual market) and of the emergence or convergence of new technologies (laws for digital TV and telecommunications).

Although many would label these countries as “leftist,” “progressive,” or “populist” (depending on the labeler), identifying these regulatory changes exclusively with this political ideology is not always correct, given that legislative and even constitutional reforms have been introduced not only in countries like Venezuela, Bolivia, and Ecuador, but also in others with very different ideologies, such as Colombia, Peru, and Mexico.

In the past ten years, new laws have been passed in Peru (2004 Radio and TV Law), Venezuela (2004 Law on Social Responsibility of Radio, Television, and Electronic Media), Uruguay (2007 Community Broadcasting Law), Argentina (2009 Audiovisual Communication Services Law), Brazil (2011 Conditional Access Services or Subscription Television Law), Bolivia (2011 Telecommunications Law), Colombia (2012 ANTV Law), Ecuador (2013 Organic Law on Communication), Mexico (2013 Constitutional Amendment on Telecommunications and the Media, and 2014 Federal Telecommunications and Broadcasting Law), Chile (2014 Digital TV Law), and Uruguay (2014 Audiovisual Communication Services Law).

Although they differ in their precise import, these laws all take aim at the strong media concentrations that have built up in Latin America over the years. A few of them call for an equitable allocation of frequencies between the three broadcasting sectors – public, commercial and community – albeit with little thought to the actual needs of the different sectors (for example, even the most developed public broadcasting systems in Europe do not occupy one-third of all of the frequencies allocated to broadcasting). Several of these new laws also impose limits on media ownership by one player.

Today, some countries also have constitutional provisions banning monopolies and undue concentration of media ownership, including Brazil,¹⁰¹ Bolivia,¹⁰² Peru,¹⁰³ Ecuador,¹⁰⁴ and Mexico.¹⁰⁵

In many Latin American countries, such as Peru,¹⁰⁶ Argentina¹⁰⁷ and Uruguay,¹⁰⁸ the law also limits the number of licences that one individual or a company can have. Following the example of the United States and Great Britain, the new law in Uruguay¹⁰⁹ also limits the size of potential audiences in subscription TV services.

Many laws also include provisions to avoid media cross-ownership, i.e., ownership of different types of telecommunications services. In Brazil, the Conditional Access Services Law (for pay TV) includes several provisions aimed at preventing undue concentration of media vertical- and cross-ownership.¹¹⁰

An almost universal problem with these laws is the way that they have been implemented and, in particular, their failure to ensure that implementation systems and practices are insulated against political and commercial interference. In most cases, oversight or regulatory bodies are not sufficiently protected against interference, be it political or commercial, which is absolutely essential in this area given the problems of allocating powers to political actors to distribute licences or deconstruct monopoly ownership situations. This is in most cases exacerbated by the more-or-less

100 Document presented in a hearing before the IACHR by the following organizations: Observatorio Latinoamericano de Regulación, Medios y Convergencia (OBSERVACOM); Artículo 19, from Brazil; Asociación Mexicana de Derecho a la Información (AMEDI); Centro de Archivos y Acceso a la Información Pública (CAINFO); Colegio de Periodistas de Chile; Instituto Centroamericano de Estudios para la Democracia Social (DEMOS); Fundación para la Libertad de Prensa (FLIP); and Intervezes – Coletivo Brasil de Comunicação Social. 2014, page 2.

101 Constitution of Brazil, art. 220

102 Constitution of Bolivia, art. 107

103 Constitution of Peru, art. 61

104 Constitution of Ecuador, art. 17

105 Constitution of Mexico, art. 28

106 2004 Radio and TV Law

107 2009 Audiovisual Communication Services Law

108 2014 Audiovisual Communication Services Law

109 Uruguay, 2009 Audiovisual Communication Services Law, art. 55.

110 Conditional Access Services Law, art. 5.

overtly political way in which these laws have in fact been applied.

At the same time, the serious degree of concentration of media ownership currently in Latin America is largely a result of the weakness of the legal framework, as well as the weak implementation of existing laws and the limited independence of regulatory agencies (when they even exist) vis-à-vis not only political actors but also concentrated media owners. This institutional weakness remains a central feature of Latin American democracies.

Reflecting this, the 2014 UNESCO report noted above highlighted the fact that where reforms have been introduced or proposed, they have tended to increase State control. Furthermore, the report noted that this was a problem not only in relation to the issue of monopolies but also in the very sensitive area of the regulation of content, which is also a target of most of these laws.¹¹¹

5. Conclusion and Recommendations

The idea of rules limiting concentration of media ownership is often cast by media owners as a restriction on their right to freedom of expression. Unfortunately, the behaviour of States in Latin America has often lent support to this perspective, especially when States abuse for political ends their power to provide for regulation of the media.

International law has a clear answer to both of these problems. By protecting the rights of both the speaker and the listener, international law provides an alternative view of the claim that limits on media ownership are simply restrictions on freedom of expression. Instead, by promoting a plurality of voices in the public sphere, such limits enhance the right of listeners to receive a diversity of information and ideas, which is essential to the exercise of full citizenship, political participation, robust cultural expression and many other important values in society. Thus what at first blush may appear as a restriction on the expressive rights of speakers is also a form of protection for the freedom of expression rights of listeners.

To give effect to the latter, international law places a clear obligation on States to put in place systems to promote media diversity, including by limiting undue concentration of media ownership. Such obligations are particularly clear in the Inter-American framework for freedom of expression, which explicitly requires States to take action to prevent indirect restrictions on this right, including where those restrictions result from the actions of private parties.

There is, to be sure, a balance to be struck between the rights of speakers, including as owners of media outlets, and the rights of listeners. Unduly restrictive rules in this area would undermine

the ability of owners to engage in expressive activities without this being appropriately balanced against the benefits to the freedom of expression rights of listeners. Unduly restrictive rules might also impede the development of the media, undermining the rights of both speakers and listeners. International law provides a general framework for balancing the rights of these different parties where they come into conflict, but this has not yet been widely tested through litigation. At the same time, it is clear that even fairly strict rules prohibiting undue concentration of media ownership will pass muster as restrictions on the expressive rights of owners, and that States are in fact required to put in place clear frameworks for restricting undue concentration of ownership, as part of their positive obligation to protect the rights of listeners.

To avoid the risk of political interference in the media, the second problem noted above, it is clear that regulatory powers over the media should be exercised only by a body which is itself sufficiently protected against interference of both a political and commercial nature (i.e. an independent body). This goes beyond formal institutional autonomy (i.e. establishing a body which is not part of a ministry) and includes protection against *de facto* or structural control which may, for example, be exercised via control over appointments to the body or over funding.

For further protection against interference, limits on ownership of the media and other measures to address the problem of undue concentration of media ownership should be set out in a formal law, through clear and express language. The procedures for applying these rules should respect principles of transparency and due process, including the right to have administrative decisions reviewed by the courts.

In practice, established democracies in Europe, along with the United States and Canada, have put in place clear rules limiting concentration of ownership of the media. In most cases, these rules are specific to the media sector and go beyond general anti-competition rules. This is also the case in many Latin American countries. Many democracies around the world also impose limits on media cross-ownership (i.e. ownership of media in different media sectors, such as print and television, or between media and telecommunications services).

These sorts of specific rules on concentration of ownership of the media are based, among other things, on the need, in the media sector, not only to prevent the abuse of dominant commercial positions, the primary goal of 'ordinary' regulation of monopolies, but also the fact that media concentrations threaten media diversity and the human right to receive a range of information and opinions. Put differently, information, communica-

111 (Paris, UNESCO, 2014), p. 14.

tion and cultural goods and services cannot be regarded as mere commodities; anti-monopoly rules need to recognise the importance of meeting the information and voice needs of citizens through diverse range of information channels.

Limits on concentration of ownership can be based on different metrics, such as audience share, revenues or share of the advertising market. While these metrics represent, in important ways, real measurements of media influence, which is what ownership limits aim to address, at the same time they are complex to apply, and especially to apply fairly. As a result, in most cases limits on ownership are applied to the issue of how many different outlets one person or entity controls, which, for broadcasting, may be done via limits on the number of licences or frequencies a person may control.

This is an indirect metric, inasmuch as it does not directly measure the degree of influence vested in a person, since it fails to account for differences between large and small media outlets. But it has the important virtue of being relatively simple and clear to apply, which is fair for owners and also helps prevent political or other types of interference. At the same time, these sorts of limits on media ownership can be avoided by business practices that deceive regulators, for example by vesting formal ownership in 'front men', who are different from the real owners, a common practice in Latin America. This can also be achieved via the formation of economic groups that handle media owned by different people which, when assessed separately, do not violate the legal limitations on ownership. To address this, it is necessary to strengthen the capacity of regulators and their ability to identify those who exercise effective control over the media, beyond the formal owners.

In order to mitigate the inherent weaknesses of these sorts of numerical rules, they are often combined with other metrics which are more closely linked to media influence, such as audience share or geographic reach. At the same time, regulators are often given discretion to waive the rules in appropriate cases where this is in the overall public interest, for example because it increases the provision of local news and other forms of local content.

There are also a number of other ways to promote diversity in the media and to limit the impact of concentration of ownership. For example, key players, in particular distributors, may be subject to must-carry rules (for example for local channels) and/or obligations to share infrastructure. International law requires States to support a three-tier system of broadcasting, which includes public service, commercial and community stations. Other diversity rules may include local and national content production quotas or a prohibition on acquiring exclusive pay-television rights to events of general interest.

Regardless of the specific nature of the rules, transparency of media ownership is an important pre-requisite for their successful application. It is obvious that ownership must be reported to regulatory bodies if they are to be able to apply the rules. But broader transparency of ownership is important both to enlist the support of the wider public in ensuring that the rules are applied properly and to enhance the freedom of expression rights of listeners (i.e. so that they may understand potential biases in the media based on owners' interests).

Different regulatory bodies are responsible for applying the rules limiting ownership of media in different countries, in particular to the broadcasting sector. In practice, the rules are normally applied either by broadcast regulators or by anti-competition bodies and, in a few cases, special bodies focusing on ownership concentration in the media. Regardless of how roles are allocated, it is essential that the responsible regulator has sufficient powers to be effective, in terms both of monitoring/review and of enforcement. This is especially important when the challenge is to reverse a situation of strong concentration by a media group which has not only accumulated media holdings but also wields significant economic and political power and does not want to lose its privileges, which is often the case in Latin America. Attaching enforcement to periodic processes – such as licence allocation and renewal – can be an effective way to ensure the presence of both types of powers.

The debate about rules imposing limits on media ownership in Latin American countries has, all too often, been distorted as a result, on the one hand, of the dominance of the voices of owners in the debate and, on the other hand, the opportunistic abuse by governments of their power to control the media for political ends. The application of clear and fair limitations on concentration of media ownership by independent administrative bodies whose decisions are subject to appeal in the courts can cut through this and create an environment in which the freedom of expression rights of both speakers and listeners are protected. It is time for countries in the region to put in place effective rules to address concentrations of media ownership, along with independent bodies to apply those rules in practice.

Recommendations

Transparency

- Media outlets and distributors – both print and broadcast– should be required to report on a regular basis (for example annually) on their ownership structures. These reports should be made to the body responsible for registering or regulating the relevant media sector (for example, to the body responsible for companies for print media outlets or to the broadcast regulator for broadcasters). For purely online media, such reporting should either be voluntary or be based on their formal recognition – either in law or by a self-regulatory system – as a media outlet.
- This reporting should cover all related operations of media outlets, including their online operations, distribution services and so on.
- This reporting should at least cover the following issues:
 - * Basic information about the media outlet (name, address, contact details and so on).
 - * Information about both direct and beneficial owners, which is at least detailed enough to cover interests of five percent or more. Information on beneficial owners should cover any entity or individual which exercises effective control over the media outlet, regardless of how this is done.
 - * Information on directors, administrators, managers and other individuals who are responsible for the operation or management of the media outlet.
 - * Information about revenues.
 - * Any changes to the above information, within a set and reasonably short period of time (including changes to ownership of five percent or more).
- The bodies which receive such reports should compile the information into user-friendly registers which are made available online, including for download in open formats, as well as on request.

Substantive Rules

- States should put in place substantive rules limiting undue concentration of media ownership which should be designed so as to be effective in preventing and, where necessary reversing, undue control by one person or entity over a media market, while not being so stringent as to undermine the commercial development of the media or the rights of media owners to engage in expressive activities.

- These rules should apply, at a minimum, to the following:
 - * national radio and television channels, both free and pay TV, whether they are distributed terrestrially or via cable or satellite;
 - * local and regional radio and TV channels;
 - * cross-ownership between satellite TV and other audiovisual services; and
 - * cross-ownership in one geographic area between radio and television channels and daily newspapers.
- These rules should also apply, where appropriate, to the following:
 - * daily newspapers, whether national or local;
 - * cross-ownership between free and pay television; and
 - * cross-ownership in the same media sector between content producers, media and distributors.
- The rules may be based on different metrics – such as audience share, revenues, advertising or number of outlets (which may be measured in different ways, including the number of licences or concessions and/or use of the frequency spectrum) – alone or in combination, depending on the media sector and/or the local context. Given its simplicity and clarity, consideration should be given to including number of outlets or licences, or share of the frequency spectrum, as part of the system of rules.
- The rules should go beyond general anti-competition rules and include provisions which are specifically designed to avoid undue concentration of media ownership and to promote media diversity (i.e. beyond ensuring fair commercial competition in the media sector to providing citizens with an appropriate range of sources of information).
- In addition to rules on concentration of media ownership, States should put in place a package of other rules to promote media diversity, including consideration of the following:
 - must-carry rules and infrastructure sharing obligations for dominant distribution operators;
 - local and national, and independent, content production quotas;
 - explicit legal recognition of the three broadcasting sectors (namely commercial, public and community), along with frequency spectrum reservations, simplified licensing procedures and public funds for community broadcasters; and
 - opening up to new television entrants through the digital transition.

Application of the Rules

- Effective systems should be put in place to ensure proper respect for both the transparency and substantive rules.
- Oversight or implementation of the rules should always be done by an independent body (i.e. a body which is protected against interference of both a political and commercial nature). Furthermore, the nature of the rules or the way they are applied should never allow for political interference in the operations of media outlets.
- To be effective, the bodies responsible for these systems need to have adequate both powers and capacity both to monitor/review developments and to enforce the rules in cases of breach. Given its periodicity and general effectiveness, the inclusion of rules on concentration of ownership in licensing systems for broadcasters, both initially and at the time of licence renewal, should be considered.
- Given the complexity of this issue, regardless of the metric(s) used, it will often be necessary to allocate some discretion to the oversight body in the way the rules are applied, which may take the form of building some flexibility into the rules or of giving the oversight body the power to waive the rules in certain circumstances. To limit the risk of abuse, and to promote fairness to all involved, such discretion should be limited, for example by listing factors to be taken into account in the decision-making process.
- Decisions by administrative oversight bodies should always be subject to appeal in the courts.

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Toby Mendel is the Executive Director of the Centre for Law and Democracy, a Canadian-based international human rights NGO that provides legal and capacity building expertise regarding foundational rights for democracy, including the right to information, freedom of expression, the right to participate and the rights to assembly and association. Prior to that, he was for over 12 years Senior Director for Law at ARTICLE 19, a human rights NGO focusing on freedom of expression and the right to information. He has collaborated extensively with inter-governmental actors working in these areas – including the World Bank, the UN and other special international rapporteurs on freedom of expression, UNESCO, the OSCE and the Council of Europe – as well as numerous governments and NGOs in countries all over the world. His work spans a range of areas, including legal reform and analysis, training, advocacy and capacity building. He has published extensively on a range of freedom of expression, right to information, communication rights and refugee issues. Before joining ARTICLE 19, he worked as a senior human rights consultant with Oxfam Canada and as a human rights policy analyst at the Canadian International Development Agency (CIDA).



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