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The Enabling Environment For Free and Independent Media

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COLLEGE LAW

This volume seeks to show why media matters. But understanding why media matters depends on the mode of operation of the press and the particular context in which the media exist. Shaping an effective democratic society requires many steps. The formation of media law and media institutions is one of the most important. Laws are frequently looked at in isolation and as interchangeable parts that are separately advanced for the creation of effective and democracy-promoting media. They are also often analyzed and discussed with attention paid merely to their wording. However, each society has a cluster of activities, interactions of laws and the setting in which they exist, that make those laws more or less effective. Different states, at different stages of development, require different strategies for thinking about the role of media and, as a result, for thinking about the design and structure of the environment in which they operate.

Media can only matter – we would argue – in an environment (an "*enabling environment*") that allows for a vigorous, demanding and informative press. It is significant, then, to identify components of the complex legal process that enables media to advance democratic goals.

THE LINK BETWEEN FREE AND INDEPENDENT MEDIA AND DEMOCRATIC INSTITUTIONS

The notion of *'free'* media relates to ownership: something other than total ownership by the state. Media 'independence' goes beyond this, to indicate an optimal degree of editorial discretion, not subject to outside interference whether public (or even private to some extent), in the production of content. Frequently, the essence of transitions to greater democracy is the fragmentation or destruction of a previous monopoly or oligopoly of power, including the monopoly over information as a critical element of the monopoly over power. In many societies, reform means ensuring that there is access for a group of voices not previously included in the public marketplace of ideas. The question then is how the market is opened and to whom. Put differently, what new or additional suppliers in the market for loyalties are supported by what sources of power or money and with what objectives.

Some may wish free and independent media for their own sake. But most tie the claim - certainly the geopolitical claim - for unencumbered media to their role in

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reinforcing or fostering democracy. Because there are democratic societies with different profiles of the media, no specific matrix of press development can be considered "*essential*" as part of the project of democratization. Development of "*free and independent*" media can itself take many forms, and freedom and independence can have many gradations. It is important to know what kind of press in what kind of society will perform the functions necessary for the process of building democratic institutions to proceed healthily.

The Study of the late 1940s Hutchins Commission, "*A Free and Responsible Press,*" identified five possible functions as criteria for the assessment of press performance. The press could do one or more of the following:

- Provide "*a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning,*" a commitment evidenced in part by objective reporting;
- Be "*a forum for the exchange of comment and criticism,*" meaning in part that papers should be "*common carriers*" of public discussion, at least in the limited sense of carrying views contrary to their own;
- Project "*a representative picture of the constituent groups in the society*";
- "*Present and clarify the goals and values of the society*"; and
- Provide "*full access to the day's intelligence,*" thereby serving the public's right to be informed.

The Commission also identified summary tasks that are central to the press's political role: to enlighten the public so that it is capable of self-government, and to serve as a watchdog on government. It might be said that there is often an additional function of the press, namely to provide to various segments of the society a sense that they are represented in the public sphere.

As Professor C. Edwin Baker has written, different conceptions of democracy demand somewhat different functions of the press. Visions of a democratic society that emphasize citizen participation, for example, would underscore the need for media that, as Baker puts it, "*aid groups in pursuing their agendas and mobilizing for struggle and bargaining.*" On the other hand, a more elitist version of democracy requires principally that the media provide sufficient information for those who participate in the public sphere to function rationally, and, of course, perform a watchdog function. In some models, the media has a responsibility to assist in inculcating and transmitting "*proper values.*"

Assuring the existence of free and independent media may require providing, in the marketplace of ideas, instruments for articulating values and summoning public support that are not wholly dependent on the state. Moving towards free and independent media early in the process of transition may also provide a building block for the future stable set of democratic institutions. Even if the media do not perform the function of effective watchdog, of engaging in information-providing and value-transmitting functions in the early days, that may be because of lack of experience. Starting the media early on the right road means that when the watchdog and other functions are necessary, the media will be more prepared. Free and independent media may organically arise in a mature democracy, but artificial steps are necessary in many transition contexts.

Finally, one might argue that the emergence of democratic institutions in transition societies will come faster and with greater public support and involvement if there are free and independent media to develop and inspire public opinion.

THE LIMITS OF FORMAL LAW

Laws that create the structural underpinnings for independent media are necessary for the development of civil society, but they alone do not guarantee how media will function. For free and independent media to "*work,*" the community in question must value the role that the media play. Law alone, efforts of aid-givers alone, or efforts by the host government alone (by subsidy, delivery of newsprint, or control over the means of distribution) rarely ever determine how free, pluralistic, and independent the media can be (though all of these structural aspects are important). What is true across the board is that there is a close interaction between what might be called the legal - institutional and the socio-cultural, the interaction between law and how it is interpreted and implemented, how it is respected and received. In this sense, another important factor for the enabling environment is the response of the citizenry. For example, readership of the serious press declined precipitously in post - Soviet Russia, even though newspapers enjoyed greater freedoms. Though this happened in large part because of price increases at the newsstand, a socio-cultural factor of note is that after a period of euphoria, in some societies, the zest for news about public events, at least in the print media, had declined.

THE IMPORTANCE OF THE ENABLING ENVIRONMENT

"It may never be known what elements exactly contribute most - or even essentially - to the creation of a culture of democratic values. Perhaps it is the existence of a vibrant non-governmental sector that is vital: organizations that are sensitive, at any moment, to infringements of journalistic rights."

What is it that makes one society open and tolerant and one not? What is it that produces a citizenry that not only has the sources to be informed but also, in fact, avails itself of them? It is easier and clearer to see what negative steps preclude society from allowing such a culture to develop. The tools of speech repression are easier to identify than those that encourage the productivity and use of information. Good media laws alone do not make a civil society happen, though a legal framework may be helpful. Many are the authoritarian regimes that mastered the language of openness. It may never be known what elements exactly contribute most - or even essentially - to the creation of a culture of democratic values. Perhaps it is the existence of a vibrant non-governmental sector that is vital: organizations that are sensitive, at any moment, to infringements of journalistic rights.

Media law reform and other steps that are taken must be evaluated in a specific way. They should be viewed substantially as helping to constitute a media – sensitive society and evaluated in the way they contribute to this process. Taking laws off the shelf of another society and plugging them into the processes of transition will certainly, alone, be insufficient. The public acts of drafting and debating media laws must be enacted as a drama, a teaching drama that educates the citizenry in the role that the media can play. The process must encourage a rise in consciousness about the value and functioning of free speech and its operation in the society. The very idea of an enabling environment for media reform assumes the importance of particular forms of law for free and independent media. It also presumes the necessity of a certain kind of media structure, sometimes including a prerequisite that the media be indigenous, for the development of democratic institutions.

It is difficult, if not impossible, to measure the effectiveness of a specific intervention designed to render the media more vibrant contributors to a transition toward democratic institutions. It is easier to suggest what range of efforts is more appropriate than another in particular circumstances and at a specific moment in time.

RULE OF LAW

"The rule of law does not simply provide yet one more vehicle by which government can wield and abuse its awesome power; to the contrary, it establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules."

Neil Kritz

Law can be either an instrument of unbridled public authority, or a mechanism that impedes the free exercise of arbitrary rule while at the same time providing the state the tools to pursue legitimate public objectives. As Neil Kritz has written, "*The rule of law does not simply provide yet one more vehicle by which government can wield and abuse its awesome power; to the contrary, it establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules.*"

The goals of a legal system committed to the rule of law are predictability and fundamental fairness. Rule of law is therefore intrinsically linked to values associated with democracy and legality, and its focus is very much on process. As such, the rule of law, at a minimum, incorporates clarity and accessibility, legal norms, an administrative process of fairness, impartiality and objectivity, and judicial support. In an enabling environment, the generally applicable normative acts that govern the conduct of public authorities and private persons must be accessible and transparent. Those public bodies to which legislative powers have been delegated must be equipped with the necessary assistance and skills to develop coherent, clear legal rules. Thus, great attention should be devoted to the development of legislative drafting expertise. There are three main benchmarks for evaluating the language and context of media-related statutes in terms of the rule of law: simplicity and clarity, dissemination, and accessibility laws designed to foster media independence may hinder it by increasing the possibility of abuse if they are unclear, confusing, or contradictory.

Furthermore, public administration must conform to legal norms and act only under their authority. The administrative acts of public institutions must be grounded in a legal basis. The purpose of public administration is to facilitate the achievement of legislative objectives. Therefore it must operate pursuant to this fundamental principle of "*legality.*" Perhaps the gravest threat to the exercise of media freedoms comes not from bad laws, but from administrative acts that apply the laws arbitrarily or are completely outside the boundaries of the laws.

Effective media enterprises are businesses as well as instruments of speech, and often quite substantial businesses. They cannot function in an environment in which it is impossible to operate as an enterprise. All the laws regulating business must operate as smoothly as possible. If a special license is necessary for the opening of a foreign bank account, then such a license should be issued or denied based on the application of transparent and consistent criteria. Broadcasters and press enterprises depend on reliable rules concerning property ownership and control. And, of course, as they become more successful, these entities depend on laws relating to the issuance of ownership shares, the development of credit, and the capacity to have secured interests or to insure that the parties with whom they deal are proper financial partners.

ADMINISTRATIVE PROCESS: FAIRNESS, IMPARTIALITY, AND OBJECTIVITY

The administrative process must be grounded in a commitment to fairness for all participants. Rule of law precepts should permeate the fabric of governmental decision making. It is of course inherent in the nature of administrative decision making that it involves the exercise of discretion However, this freedom must be restricted along basic tenets of fairness. The process for licensing news media

outlets such as radio or television broadcasters must be open, objective, and fair, with the authorities acting according to prescribed legal procedural standards and substantive criteria that are applied impartially to all participants in the process. And an independent, effective judiciary is essential for the oversight required under the rule of law.

THE LEGAL ENVIRONMENT FOR NEWS MEDIA ACTIVITY

Four aspects of the legal environment in which news media operate and where law is a factor either promoting or impeding news media independence and effectiveness warrant attention:

(1) newsgathering; **(2)** content-based regulation; **(3)** content-neutral regulation that has the potential to influence content indirectly; and **(4)** protection of journalists in their professional activity, including protection against physical attacks.

Newsgathering, a key function of the press in a democratic society, is an essential condition of news media effectiveness. Laws concerning newsgathering include those that recognize and guarantee public access to government - controlled information and institutions, with limited exceptions for national security, protection of personal privacy, crime prevention, and other goals. Laws concerning the licensing and accreditation of journalists also relate to this question of effectiveness.

Another set of laws deals with content-based regulation, which we view as intervention by the public authorities, either through "*legal*" means (that is, on the basis of legislative acts or judicially-created norms) or through "*extra - legal*" means (governmental acts that are not grounded in legislative or judicial norms directly targeted at content). These laws, which seek to advance a range of state, social, and individual interests, operate through forms of prior review censorship, conditions of market entry, and regimes of subsequent punishment for perceived abuses of journalistic freedoms. The scope of such content-related concerns and their methods of enforcement represent a useful yardstick by which to measure whether an enabling environment exists.

The third category comprises laws that are not targeted directly at editorial content (that is, are content - neutral on their face), but which have an incidental impact and therefore create the risk of external manipulation in their application, or else laws that are intended to shield media from external influence.

Finally, there is an examination of issues related to protection of journalists in their professional activity. There are at least two components of this category. The first relates to the matter of journalists' job security, and focuses on "*internal press freedom*" or the relationship between journalists and media owners. The second concerns the matter of physical security: journalists often must endure the threat or the reality of physical attacks upon them from either public or private persons, and the extent to which the legal system protects them is also a key element in an enabling environment.

Increasingly, access to the information bases of the Internet is a major indicator of the openness of a society. One question is whether domestic journalists and editors have sufficient access to inform their publications and make them more attractive to readers. This is a question of training, availability, and cost. Restrictive states have sought ways to ration access to the Internet, through high transmission fees, limited licenses for Internet Service Providers, or specific approval for use of such facilities. An enabling environment would promote the use of access to the Internet by the press, as well as by citizens at large.

The Internet appears, at least for the elite, to be one of the least expensive means of gaining a wide variety of views without the intermediation of the state.

Internet cafes can become the new coffeehouses of political discourse. On the other hand, they can, and in some societies do, mask a policy in which access is restricted to particular physical locations, and the computers have access to a highly censored series of websites and servers.

The regulation of access to signals from satellites, including direct broadcast satellites, is another "*new technology*" set of rules with implications for transitions to democracy. These rules include prohibitions on satellite dishes or policing of dishes that are pointed to prohibited satellites or a satellite that is carrying undesirable channels. In modern democratic societies, the process of developing appropriate and stable institutions increasingly relies on associations and groups that are independent of government. A strong civil society also demands and oversees legal constraints on state power and the accountability of state actors.

The increased role of civil society marks a shift from "*government*" to "*governance,*" with governance involving a far larger group of participants and players. According to the World Bank,"*Good governance is epitomized by predictable, open and enlightened policy making, a bureaucracy imbued with professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs. Poor governance is characterized by arbitrary policy making, unaccountable bureaucracies, unenforced or unjust legal systems, the abuse of executive power, a civil society unengaged in public life, and widespread corruption.*"

One important element of the enabling environment is continuing attention to public understanding, public perceptions, and public demand that undergirds a society hospitable to free and independent media. The very functioning of the rule of law in the media field has its own educational benefits. But as free speech norms are fragile even in the most stable or democratic systems, their acceptance cannot be taken for granted. In the United States, non - governmental organizations like the Freedom Forum are constantly testing the public pulse on attitudes regarding free speech principles. Segments of the press, large newspapers, broadcasters, and motion picture companies invest in campaigns to educate and foster tolerance, acceptance, and comprehension of the complexities of living in a free society.

This is an outermost circle of the enabling environment: a circle in which citizen preferences are a key to the long-term operability of the rule of law and a system of laws that facilitate the contribution the media can make to the democratization process.

The character of the citizenry and its capacity to use such elements of the press that are available are important when discussing the broader elements of an enabling environment. Indeed, media independence may depend on the capacity of the audience to treat information wisely and critically and draw inferences from it. There is a special kind of literacy that might be demanded, not just literacy in the conventional sense, but literacy that encompasses a desire to acquire, interpret, and apply information as part of a civil society.

To the extent that the independence of media depends on advertising or subscriber support, the state of the economy in general is also significant. Financially struggling media have marked transitions worldwide. Without a viable advertising economy or a vigorous economy that provides workers with salaries that allow them to be potential subscribers – media may become dependent on government subsidy or industry sectors that bias output.

"The major resource for enhancing the enabling environment is indigenous talent because, ultimately, the answers must almost always be local."

At its broadest, of course, what counts is the development of a custom or attitude, a general notion in the society that information about government is available, important, and trustworthy. It is difficult to sustain excellent free and independent media without a public that has a continuous appreciation of the need for its output. Education, literacy, tradition, desire, financial capacity, and public demand are all elements that combine to bring about such a situation.

The major resource for enhancing the enabling environment is indigenous talent because, ultimately, the answers must almost always be local. One approach is to ask what forms of assistance are most useful in strengthening local media and, following that, what tools exist to facilitate an enabling environment for effective media reform. One consequence of the aid pattern is that a number of organizations have developed that specialize in providing technical assistance. To some extent, this specialization has been along industrial lines. Some organizations foster independent broadcasters while others are more expert in dealing with newspapers and other print publications.

There are entities that specialize, as well, by region. One NGO specializes in establishing emergency radio stations in conflict zones where a neutral and objective voice is needed. In a number of countries in central and eastern Europe and the former Soviet Union, techniques employed include training journalists, building associations, giving attention to media infrastructure, building business skills, and addressing the law and policy environments in which the media function.

Media programs financed by USAID ordinarily avoid direct payments to media outlets, instead providing mostly non – material assistance (training, advice, and cooperative projects). Those programs providing greater direct material assistance usually articulate such aid in terms of apolitical professional needs.These precautions are taken because of some of the obvious hazards inherent in making direct payments to stations rather than investing in infrastructure. If a donor country or foundation makes contributions based on the political approach of the print media or television station, it may be charged with precisely the kind of content – based distinction for which a government would ordinarily be condemned with at home.

CONCLUSION

Our effort has been to identify certain key elements of an enabling environment for media law reform, focusing on the enabling environment for media law reform. The objective has been to ask which steps assist in the development of free and independent media. We have sought to identify the relationship between media reform and the growth of democratic societies, examining the specific elements of media law that are part of media reform and the larger context in which these laws are developed.

Thus, we assume that the steps toward an enabling environment are related in some substantial and reciprocal way to the nature of the relevant society's political development. Each step in political and legal transitions contributes to the state of an enabling environment for independent media. At the same time those independent media structures may also promote the achievement of the broader political goals.

In this process, the concept of the enabling environment is central. It is not only particular laws themselves that must be addressed, but the institutional structure which administers those laws, including the courts, regulatory agencies, and the culture of censorship or its absence. In some societies there is little effective law. What we mean by "law" may take the form not just of legislation emanating from a parliament, but other forms as well, including orders or actions of the executive branch.In any society, there will be those who support and those who oppose the public policy assumptions that underlie this effort

Many persons within and without the state who favor development of civil society will look for ways to further the process of incipient change. They will seek

ways to bolster those in power that are inclined to foster openness and reform. They will also seek ways to augment a pluralistic society's access to additional means of communication in order to disseminate information, opinions, and views.

NGOs have employed a variety of techniques to assist willing governments in these transitions. Institutions like the Independent Journalism Foundation have established training institutes. Other NGOs, like Internews and the Open Society Institute, directly fostered the development of independent media. More generally, Western governments have also encouraged a small but significant effort to address more comprehensively the need for legal structures that enable media reform.

In the specific area of legal norms and institutions, strategies or tools which deserve consideration include: the analysis of competing legislative media models; the analysis of how emerging economic legislation will affect the development of media; the assistance of media law specialists in the drafting of legislation; consultation with specialists from countries that have undertaken similar efforts; development of skills in lobbying government effectively for desired legislative solutions; and ongoing attention to the developing institutional structure in order to understand how it functions.

Those committed to developing free and independent media have explored how steps toward change can be specifically related in some substantial way to the nature of the relevant society's political development. There is not yet a Rosetta Stone that decodes how distinct elements of the enabling environment can be related to the stages of a society as it passes, for example, from state control to more democratic forms. Development of one will have to wait one day.

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