

DEMOCRACY DIALOGUE



Technical Notes From USAID's Global Center for Democracy and Governance

July 1998

To Our Readers:

Democracy Dialogue was launched in 1994 to reflect USAID's commitment to building sustainable democracies worldwide. Each issue carried articles portraying the diverse regional and sectoral components of the Agency's democracy and governance programs. Hereafter, each issue of *Democracy Dialogue* will focus on one technical topic. We see this change as a natural evolution which both elicits and provides a more focused discussion. Please let us know what you think.

Chuck Costello, Center Director

Media Law Reform in New Democracies

"A popular government without popular information or the means of acquiring it is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives." President James Madison

Access to information is essential to the health of democracy for two reasons. First, it ensures that citizens make responsible, informed choices rather than acting out of ignorance. Second, information serves a "checking function" by ensuring that elected representatives uphold their oath of office and carry out the wishes of those who elected them.

The Center for Democracy and Governance has initiated a global media study to better understand how to support media in democracies and in transitional societies. One of the study's goals is to understand the legal environment supportive of media development.

This technical note brings together thinking from people who have been working with USAID to create a legal enabling environment for media development. Descriptions of USAID programming are also included. Most of USAID's media law reform activities have taken place in Central and Eastern Europe and the New Independent States. One innovative example of AID-funded media law reform is the IREX Pro-Media program which provides pro bono legal assistance through a Washington-based law firm (see p. 7).

In Russia, by the end of 1995, USAID/Moscow had invested approximately \$15 million in programs to help develop independent media including about \$11 million to Internews, a U.S. nonprofit organization which has provided professional training, quality programming, modern equipment, and Western production techniques to approximately 200 fledgling independent television stations in the former Soviet Union. Internews, in partnership with the Russian-American Press and Information Center, has also undertaken efforts to create freedom of information organizations and media law and policy institutes. Eric Johnson, Internews project director for Central Asia and the southern Caucasus, offers his conclusions regarding what makes a good media law (see pp. 2-3).

Country context and historical circumstances are key factors in creating the legal conditions for a free and independent media. Professor Monroe Price, an international media law specialist at Cardozo School of Law in New York, provides a theoretical sketch of the connections between legal rules and supporting institutions, and how these affect media development (see p. 3).

The best practices and lessons learned through media law activities in Central and Eastern Europe can be applied, hopefully, in Latin America, Africa, and Asia, where restrictive legislation often restrains free speech and the development of a vibrant media.

The purpose of this document is to stimulate discussion and to share experiences in the area of legal enabling environments for media development. Comments and concerns should be directed to: Dr. Ann C. Hudock, ahudock@usaid.gov.

USAID's Role

The U.S. Agency for International Development has supported many efforts to encourage the development of free media. Training journalists in countries as diverse as Angola, El Salvador, and West Bank/Gaza; helping to start-up independent media outlets; creating distribution systems where the press has been controlled by the government as in Armenia and Belarus; supporting a journalism school in Indonesia; introducing polling techniques to media in Latin America: all of these demonstrate AID's varied activities.

Media law reform is a specialized area within media support. Many countries have laws and regulations defining what the press can do. If restrictive, these laws inhibit the work of a free press. Restrictive laws also impinge on the success of media support.

Internews

Internews helps private broadcasters throughout the New Independent States (NIS) and elsewhere produce more and better local TV and radio news. USAID has financed most of Internews' programming in the NIS including training, technical assistance, and legal assistance. The mix is different in each country, depending on local needs.

Internews helps private broadcasters organize themselves to have a voice in the way legislation affecting them is drafted and implemented, for example, in Armenia and Georgia. When broadcast associations, such as NAT in Russia, coalesce, Internews provides assistance to further independent broadcasters' legal agenda on the national level.

Internews also provides assistance to governments. In Kazakhstan, the government invited the group to appoint a representative to the frequency licensing commission. Governments in Tajikistan and the Kyrgyz Republic asked for assistance from Internews in drafting broadcasting laws that govern the licensing process. In Russia, the parliament invited Internews to sit on an advisory board that helps the committee responsible for media-related legislation. In all cases, Internews tries to help governments understand how important a plurality of information sources is to the development of a vibrant market economy.

Defining a Good Media Law

by Eric Johnson, Internews

There may not be a definitive media law, perfect for all countries, but there are legislative principles which affect media, and these principles characterize every good media law. Of course, making sure laws are enforced is as important as passing them.

1. Level Playing Field

All media (private, governmental, domestic, and foreign) should operate under the same rules, with no tax breaks, no preferential treatment in the license-giving process, and, ideally, a limit on how much advertising income government-subsidized media can siphon-off from the private sector. For example, in the Czech Republic, no more than 5 percent of state TV's income can come from advertising. If government-owned transmitting stations and printing presses are monopolies, they should be subject to tariff regulation and should charge the same rates to all customers whether private or governmental. Ownership of media by anyone in the close family of a high government official should be held in a blind trust.

2. Registration

The best media registration is none at all. But if media must be registered, registration should be done for monitoring purposes only, with no "application" which could be turned down, and no conditions for registration—just fill out a form and hand it in. If a media outlet breaks the law, it is responsible for its actions as any other legal entity is, but registration is irrelevant. Punitive sanctions against a law-breaker in media should be the same as for any other legal entity: fines and jail.

3. Libel

A media outlet should be able to provide any information that it, in good faith, believes to be true and has confirmed to its best ability. If an outlet is taken to court for libel, the burden of proof is on the plaintiff. Claims by public figures (in particular government officials) are held to a higher standard of scrutiny because those figures assent to attention by entering government.

4. Content

Everything is allowable which is not forbidden. Any definition of what is forbidden must be limited to the most egregious violations of dominant cultural standards, and must be tightly defined. Other than the law narrowly defining what is forbidden (presumably pornography, incitement to violence, perhaps some kinds of advertising, and information which would seriously impact national security if published), no one except an outlet's owner should have any say about content.

5. Intellectual Property

The internationally recognized owner of intellectual property rights should be the sole determinant of how that intellectual property can be used, and if said property is used in violation of the owner's desire, the owner should have the legal right to force the violator to cease violation and to pay damages (compensatory as well as a fine).

6. Licensing

Frequencies are owned by the public, and media shall be licensed to use them by an autonomous commission which has no connection with the ministry of communications or any media. The criteria for deciding who gets a license should be

clearly laid out and based on maximizing diversity. The commission's decision-making process should be public and subject to appeal. If there is a financial charge for a license, it should be determined by administrative cost or by an auction. All existing media that were broadcasting when the commission was formed should be granted a license automatically for the frequency they were using and the region to which they were broadcasting. Any requests to increase broadcast region, or to extend a license, should be approved automatically unless the change would interfere with existing transmissions.

7. Access to Information

Government agencies must respond fully and in a timely manner to requests for information from the media.

8. Ownership and Taxation

Ownership and tax issues are more open to debate about what is "good." In a number of NIS countries, tax breaks for media have been proposed, and in some cases, implemented. These usually consist of exemption from value added tax (VAT), and corporate income tax, in order to encourage the growth of private media which is essential to a thriving market and democracy. □

Free Media Depends on Laws, Institutions, and Culture

by Monroe E. Price, Cardozo School of Law

What enabling legal environment supports the development of free and independent media? This problem can be approached in four ways. The question is sometimes defined as involving the formal sets of laws necessary before free and independent media can develop. In other discussions, the necessity of a particular set of laws, leading to substantive outcomes, is recommended. A third approach emphasizes that institutional infrastructure is necessary before a rule of law concerning media can be realized. Finally, the problem can be posed in terms of what social circumstances—independent of law, perhaps—precede the development of independent media.

Laws Alone

The first approach predominated in the early 1990s when cross-national media law advising became relevant in post-communist countries. Following this approach, there are legal modules that promote the existence of a constructive media sphere. Such a legal system might include a defamation and libel law, a broadcasting law, a press law, and a law to protect journalists. It would also include a law governing the licensing of radio and television stations, which could be part of a broadcasting law.

Sets of Laws Leading to Substantive Outcomes

It is an easy step, then, to suggest a second approach: a free and independent press is only possible given a particular set of such laws leading to certain outcomes. Obviously, a set of laws that protects publishers and broadcasters from government interference is a good example of a prerequisite for an independent media sector. A defamation and libel law that protects the press from liability for criticism of public figures is another example. Some might consider it essential

"Formal rules, the mere existence of laws, even formal prohibitions on state intervention in the media will make little difference without the machinery of enforcement."

Latin America

One of USAID's largest efforts in media support was a \$12 million training program for journalists carried out by Florida International University (FIU) from 1987 to 1998.

According to Charles H. Green, director of the International Media Center at FIU, some workshops on media law reform were not effective because outlet owners and journalists couldn't agree on what a national press law should cover.

Virtually all countries in the region have media laws. Some have restrictive laws dating back to earlier regimes. Costa Rica's press law, for example, was written in 1908, before TV and radio existed, but it isn't benign: A reporter can be jailed for defaming someone and editors are held criminally responsible for article content.

"It's always like a sword over their heads," said Green. "Many news organizations just don't report on things that are controversial, or refuse to dig into issues that will offend someone, because defamation can be claimed so easily."

FIU's media center is now pulling together press laws from Latin America and circulating proposed reforms. Its Web Site includes material on freedom of the press: www.fiu.edu/~pulso.htm.

for a broadcasting and press law to encourage local voices, national production, or diverse ownership. Avoiding a concentration of power might be the goal. For some, it is legitimate for an independent press to be legally required to give equal time to qualified political candidates. Other people interpret independence to imply immunity from such regulation.

There is a wide range of opinions regarding whether a free and independent media sector must be one that is wholly private, if it can be a healthy mix of private and public service broadcasting, and if the nonprivate component should be "public" in terms of the independence of its governing association (or, for that matter, permissibly "statist" if linked with a thriving private component). In the classic, now antiquated BBC model, media freedom might be consistent with a "nonprivate" broadcasting structure insulated from government interference.

Beyond Legal Modules to Institutional Infrastructure

Over the last few years, aside from the concentration on the legal environment, a third approach has led to increased focus on institutions and the institutional infrastructure that makes the rule of law possible. Formal rules, the mere existence of laws, even formal prohibitions on state intervention, make little difference without the machinery of enforcement that gives integrity to law.

An example is the court system. For the rule of law to be effective, especially in an area as contentious and political as the media, many agree that judicial review of government actions is essential. But it is also important to have judges who are themselves sufficiently independent to review government actions, which opens another discourse: the environment necessary to assure a reliable and effective judiciary.

The U.S. perspective tends to link the rule of law and judicial review. In France and the United Kingdom, legal and political traditions vest more authority in commissions, review boards, and specialized tribunals, usually without much opportunity for resort to courts. The rise in importance of European human rights law, and the upcoming incorporation of free speech principles into British domestic law may blur these distinctions. Courts in Hungary, Bulgaria, and elsewhere in the transitional societies have already had an important impact on legislative and administrative practice affecting the growth of free and independent media.

Given the critical role of administrative bodies in the media field, it is noteworthy how important the selection, confirmation, and removal power of their personnel can be. A rich history of legal debate over such questions has taken place in Poland, Hungary, and almost every post-Soviet society, very much like the development of doctrine in the United States. The U.S. Congress had to determine such questions as whether the Federal Communications Commission (FCC) should represent political parties, the role of the President and Senate in the nomination and confirmation of FCC board members, and the shape of employment or lobbying restrictions on former officials.

Governing Bodies

One of the most important topics in considering the legal environment for media independence is the nature of governing boards. In Russia, for example, members of the provisional broadcast radio and television licensing board have sometimes read in the morning press about presidential decisions regarding what entities should get licenses. In Russia, as well, there have been important federalism questions, including how licenses are allocated at the regional or local level. In Poland, much of the political debate over governmental structure in the last five years has been mirrored in disputes over membership on the supervisory boards

for radio and television stations.

An additional issue is the “transparency” of laws and regulations. It is commonly held that fundamental rules must be outlined by the legislative branch providing adequate guidance (about standards to be applied in granting licenses or disciplining violations) to the bureaucracy and to the operators of radio and TV stations. To the extent that third parties—such as political candidates—are affected by such rules, the standards must be both available and clear to them as well.

Ownership Issues

Some societies consider domestic ownership to be an important element of free and independent media. The United States, for example, requires American citizen control of television and radio licenses. Transitional societies seem especially sensitive to this question, and ownership restrictions are a frequent characteristic of new regulations. The notion seems to be that the growth of indigenous democratic institutions can be undermined by foreign control of instruments so important to public debate.

Similarly, a transitional society might reflect concerns about strengthening democracy by examining the ratio of foreign to domestic programming. An abundance of foreign, uncontrolled news programming may be perceived as a favorable aspect of developing free and independent media, but the decline of domestic news reporting may be perceived as a setback. Some states have sought to explore, through law, whether domestic sources can be encouraged. At times, this is in the interest of democratic values; at times, it can be a form of censorship.

Political Context

The larger political context plays a role in determining whether a free and independent media exists. It has been suggested that only if there is a viable opposition party can there be a truly independent media. Independence can be measured as the capacity of an opposition to provide a useful critique of the government in power. This raises the question of whether an independent media can exist in a state which has a dominant political party, and what particular guarantees or structure might be necessary in that situation.

Social Circumstances: Media and Civil Society

Another way to think about the larger structural question is to turn to the literature on civil society. A free and independent media might be characteristic of a society that has a large civil society, and an abundance of opportunities for citizens to function in ways not tied to the government. If so, then a possible alternative goal is to assist in the development of civil society with the assumption that, even absent law or legal protection, an independent media will follow. Put differently, the goal of encouraging independent media is reached by achieving other elements of a democratic society.

Still, in some transitional societies, specific steps are necessary to provide media the room to begin to function. For example, there is the question of newsprint, the lifeblood of a free press. If market forces alone determined availability of newsprint in post-Soviet Russia, the beginnings of a dynamic and free press would have been virtually impossible. A transition away from the government monopoly on newsprint was necessary. Special exemptions from customs duties on newsprint were obtained as a way of lowering costs and therefore encouraging a fragile press to stay in business. At vital moments in the transition, actual subsidies to the press seemed tolerable even though this approach (and the favoritism subsidies

“Some people argue that media controlled by large enterprises, like banks or energy companies, with a vested interest in the outcome of public debate, can manipulate the public sphere.”

Southern Africa

USAID's largest financial commitment to media law reform in Africa was a \$400,000 grant awarded in 1996 to the Media Institute of Southern Africa (MISA), a nongovernmental, regional advocacy organization based in Namibia. MISA focuses primarily on the need to promote free, independent, pluralistic media in the Southern Africa region as envisaged in the 1991 Windhoek Declaration.

MISA's objectives include promoting and defending press freedom, taking appropriate steps when and where such freedoms are violated, and removing obstacles to the free flow of information. With USAID's assistance, MISA set up a media legal defense fund.

In collaboration with the Freedom of Expression Institute (FXI) and Article 19, MISA publishes a quarterly newsletter, *Southern Africa Media Law Briefing*. This newsletter is a response to a need for information sharing expressed by media lawyers in the region. The first three editions of the newsletter are on the FXI Web Site which can be accessed through MISA's site: <http://www.misanet.org>.

often yield) might be questionable in the long run.

Distribution systems (including the status of monopolies for the distribution of newspapers) need to be reviewed if such monopolies exist. Tariffs on computers, cameras, and other production equipment need to be examined to see if they create unfair barriers to the development of new entrants into the media field. Advertising laws can be discriminatory, favoring state media over private competitors, thus discouraging the development of a free and independent media.

In some post-Soviet societies, critics argue that a media controlled by large enterprises (e.g., banks or energy companies), with a vested interest in the outcome of public debate, can manipulate the public sphere. These observers have a model of a pluralistic, citizen-involved civil society in mind, one where the right to receive and impart information is controlled neither by the state nor by major economic interests. Enacting model laws, even having an ideal infrastructure, does not guarantee an accessible media industry without barriers to entry. The tradition of the dispassionate publisher, committed to objective and fair reporting, is not the automatic outcome of any particular legal system. In Russia, an environment of seemingly open entry produced a result in which close ties existed between government and economic power. Elsewhere, an enabling environment designed to encourage free and independent media might yield a deregulated press that avoids news and public information and depoliticizes rather than enriches public debate.

Independent media gain support from the long-range contributions of institutions like law schools, journalism schools, associations of journalists, and other entities engaged in developing a strong democratic culture. A robust and boisterous press, suitably checking government power, is more likely to exist in a society where judges and legislators are steeped in a free press tradition and where publishers, editors, and journalists are honored for practices that further democratic values.

Generations of Media Development

Examining the post-Soviet period provides a useful illustration of three stages in the political and technological development of free and independent media. Stage one addresses the tradition of censorship. It involves the very question of whether private media should exist. The first stage usually continues the close ties between government and the news through formal relationships and contacts. In the second stage, government moves to the establishment of licensing commissions to render less arbitrary the assignment of licenses. First efforts are made to privatize the central state media, though ambivalence over losing control often makes this privatization effort partial. Newspapers tend to be freer than electronic media, but this varies from country to country. Emerging private stations seek foreign capital or the means to network and reach larger audiences. Content becomes increasingly similar to programming seen around the world.

The third stage concerns marketplace economies. The issues include how the government retains its voice, or a measure of control, in an environment of new owners, whether there should be restrictions on ownership, and whether defamation laws should be modified to protect media institutions. The third stage also opens questions of media globalization and new technology, for example, whether rules should be established concerning the Internet and direct broadcast satellites.

The rule of law implies a society in which legal principles are followed. If the goal is to develop free and independent media, the rule of law also implies a particular set of rules or legal principles, one that fosters a public sphere with the effective capacity to inform public opinion, and to influence and criticize government without forgetting that legal principles exist in the context of institutions, tradition, and technologies. □

Getting the Right Legal Foundation

Democracy Dialogue interviewed Ellen Goodman, a lawyer with the Washington-based law firm Covington & Burling, who analyzes media laws in Central and Eastern Europe and the New Independent States, on a pro bono basis, as part of the USAID-funded ProMedia program managed by IREX.

Q: Describe what you do in analyzing media laws.

A: We ask, is the law in compliance with international and national governing legal standards? Does it chill freedom of expression? Licensing controls, restrictions on ownership, and content controls have been our major areas of interest in the region. We also look at how the libel law in the civil or criminal codes, or in the media law, may be used to inhibit speech.

Q: Why does licensing matter?

A: There are numerous issues around licensing. Who gets broadcast licenses? To what extent does the government have clear standards for issuing licenses? Is there a right to appeal a denial of license? Are licenses granted based on content of programming? If there are government monopolies controlling printing presses or newsprint or broadcast equipment, we'll point out the problem.

Q: What in-country leverage do you have to get unrestrictive media laws?

A: A country's own constitution. Generally, a constitution will have positive language on freedom of the press, but it's not always implemented well. For example, a country might pass a law that freedom of the press shall not be abridged unless the rights of persons are violated. If, in implementing the law, it turns out that insulting a public official is considered a violation of the official's rights, it will chill press freedom. Another version of a restrictive press law is, "freedom of the press shall not be abridged unless state security is threatened," where national security is wide open for political definition.

Q: How do media law reform activities relate to media support activities?

A: If the media don't have the legal foundation to write or broadcast freely, or to get licenses to do those things, the country won't have free media at all. It is sort of the first step but only the first step. If journalists don't want to have state regulation they have to abide by industry standards. Our job is to get the foundation in place, and then journalists have to go on.

Q: What contributions have you made in post-Communist countries?

A: In Bulgaria, our analysis, and local activists, sunk a bad media law which was eventually overturned by the Supreme Court. In Serbia, our analysis caused the government to withdraw a draft press law.

Q: What questions do practicing journalists ask you?

A: There are practical questions, like, how to organize to defend journalists in libel suits. These are very fact-specific cases but we emphasize having defense lawyers involved from the start.

Q: Does every country have a media law?

A: Generally. It is a European convention to have these press laws. We don't have them in the U.S. But we can't go into a situation and impose an American template saying, "What you need is a First Amendment!" We take the best of the European models, especially the Anglo model, which is less regulatory. □

ProMedia

One of USAID's major media assistance programs in Central and Eastern Europe is executed by ProMedia, which has made media law reform a priority:

Bulgaria—ProMedia provided legal assistance to the nongovernmental, nonpartisan Media Law Task Force and the Group for European Media Legislation which have worked with the government to develop a better media law.

Croatia—ProMedia found the Croatian Law on Telecommunications to be inconsistent with Croatia's Constitution as well as international law. So, ProMedia has worked with the Croatian Journalists Association and international donors to train a group of Croatian lawyers to defend journalists whose reporting is challenged by the government.

Serbia and Montenegro—At the request of journalists and independent media outlets, ProMedia analyzed a 1997 draft Law on Public Information and found it inadequate. After meeting with IREX to discuss its conclusions, the Serbian government withdrew the law.

Slovakia—In 1996 the Meciar government tried to pass a media law imposing penalties on journalists and their employers who failed to print or broadcast "the truth" as defined by the government. ProMedia highlighted the inconsistencies in the draft with Slovak constitutional and international norms. Eventually, a substitute for the law was offered.

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