THE ENABLING ENVIRONMENT FOR FREE AND INDEPENDENT MEDIA

Contribution to Transparent and Accountable Governance

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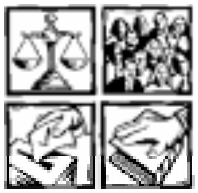

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ABOUT THIS PUBLICATION

This document identifies the main components of the legal environment that enable media to advance democratic goals. Interactions between the legal and media sectors significantly shape the degree of professional independence enjoyed by newspapers and broadcasters, allowing media to provide more accurate information to citizens and elites alike. Thus, a basic understanding of the most pertinent laws, enforcement and judicial practices, administrative processes, ownership structures, and other aspects of the enabling environment can help in the design of more effective strategies for developing free media. This, in turn, reinforces more broadly the effectiveness of democratic institutions.

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ABOUT THE DG OFFICE

The Office of Democracy and Governance is the U.S. Agency for International Development's focal point for democracy and governance programming. The DG Office's role is to provide USAID and other development practitioners with the technical and intellectual expertise needed to support democratic development. It provides this expertise in the following areas:

- **Rule of Law**
- **Elections and Political Processes**
- **Civil Society**
- **Governance**

ACKNOWLEDGMENTS

The publication of this document represents the growing international support for democracy and strengthening free and independent media as a key element in contributing to transparent and accountable governance. One important expression of this interest emanated from the June 1997 Denver G8 Summit meeting where the formal proceedings included discussions of G8 support for democracy. The following September, a meeting of representatives of the G8 countries was hosted by the U.S. State Department to discuss in greater depth how to support democratic development worldwide.

Building on the momentum of these meetings, the State Department's Bureau of Democracy, Human Rights, and Labor took the initiative of funding a proposal submitted to the U.S. Agency for International Development (USAID) for the preparation of a study identifying the legal and institutional requirements for free and independent media. The proposal originated with a conference at the Freedom Forum's Media Study Center in New York co-convened by USAID's Center for Democracy and Governance (now its Office of Democracy and Governance). The conference brought together donor and donee organizations involved in media law reform.

With funding from the State Department and under the technical management of USAID's Office of Democracy and Governance, a grant was awarded to the Nation's Institute to identify the principle characteristics of a legal enabling environment for free and independent media, and to prepare and disseminate a document embodying those elements. This document also builds upon a DG Office technical publication, *The Role of Media in Democracy: A Strategic Approach.*

The grant was coordinated through the Programme in Comparative Media Law and Policy (PCMLP) at the University of Oxford, under a sub-contract with the Nation Institute. A conference was held in June 1998 to help design the studies and develop the materials for this document. This included commissioning a group of essays on media law reform in a wide variety (geographical and in terms of stage of transition) of societies, including Indonesia, Poland, Uruguay, and Uzbekistan.

Peter Krug and Monroe E. Price undertook preparation of this document. Individuals who are involved in media reform in Africa, Latin America, South East Asia, Central and Eastern Europe, and the post-Soviet Republics of Central Asia reviewed and commented on the paper. Among those who were most instrumental in seeing the project to conclusion were Gary Hansen and David Black, USAID Office of Democracy and Governance; Ann Hudock, Department of State; Stefaan Verhulst, Beata Rozumilowicz, and Bethany Davis Noll, PCMLP; and Eric Johnson, Internews.

Programme in Comparative Media Law and Policy, Oxford University
The Programme in Comparative Media Law and Policy was founded in 1996 with a two-year grant from the Markle Foundation and the cooperation of the Howard M. Squadron Program in Law, Media, and Society at the Benjamin N. Cardozo School of Law in New York. It was founded at the Centre for Socio-legal Studies, a constituent part of the Law Faculty of the University of Oxford. The program possesses an invaluable global and interdisciplinary grasp of the massive changes taking place in media and communications systems. Through its vast international network and its unique skills in comparative methodologies the program provides a more sophisticated and nuanced understanding of the playing out of human rights debates in media systems and the impact of media changes on democratic values and economic development. Towards this end, the program concentrates on three main areas: research and publications, technical assistance and building an international network, and involving students and researchers from around the world in the program's activities.

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The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance

1. Introduction 1
2. Law, Media, and Democratic Institutions 3
   - A. The Link between Free and Independent Media and Democratic Institutions 3
   - B. Limitations on Formal Law 4
   - C. The Importance of the Enabling Environment 5
3. Structures of Media and the Enabling Environment 7
   - A. Overview 7
   - B. Balance between Private and Public Service Media 7
   - C. Competition among Media 8
   - D. Foreign Ownership 11
   - E. Media Ownership by Religious or Political Organizations 12
   - F. Viewpoint Domination by a Single Broadcaster or Owner 12
   - G. Access and Right to Impart Information 13
   - H. Government Subsidies 13
   - I. Government as a Market Participant 14
   - J. Government Funding 14
4. Rule of Law 15
   - A. Clarity and Accessibility 15
   - B. Legal Norms 16
   - C. Administrative Process: Fairness, Impartiality, and Objectivity 17
   - D. Judicial Support 17
   - E. Case Study: The Absence of an Enabling Environment and the Rule of Law 18

5. The Legal Environment for News Media Activity 19
A. Overview 19
B. Newsgathering 20
C. Content-based Regulation 29
D. Content-neutral Regulation: Risk of Manipulation 40
E. Protection of Journalists in their Professional Activity 41
6. The Broader Enabling Environment 43
A. New Technology and the Enabling Environment 43
B. Role of Civil Society and NGOs 44
C. Education in the Importance of Rights 45
D. Copyright and the Enabling Environment 45
E. Background and Foreground Factors 46
7. Resources and Techniques for Enhancing the Enabling Environment 47
A. Technical Assistance 47
B. Resort to Constitutions and to International Instruments 47
8. Conclusion 49

1 Introduction

Throughout the world, there is a vast remapping of media laws and policies. This important moment for building more democratic media is attributable to rapid-fire geo-political changes. These include a growing zest for information, the general move towards democratization, numberous pressures from the international community, and the inexorable impact of new media technologies. Whatever the mix in any specific state, media law and policy is increasingly a subject of intense debate.

Shaping an effective democratic society requires many steps. The formation of media law and media institutions is one of the most important. Too often, this process of building media that advances democracy is undertaken without a sufficient understanding of the many factors involved. This study is designed to improve such understanding, provide guidance for those who participate in the process of constructing such media, and indicate areas for further study.

Laws are frequently looked at in isolation and as interchangeable parts that are separately advocated 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 settings in which they exist that makes 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.

We seek to identify components of the complex legal process that contribute to an environment that enables media to advance democratic goals. Understanding the factors that make rules effective can lead to the specific enhancement of the roles that media might play in strengthening democratic institutions. Understanding this "enabling environment" can be helpful to those engaged in building and reinforcing democratic institutions and to those who are advocating free and independent media and who wish to explain the interactions that determine how free and independent a radio or television station or a struggling newspaper is. The enabling environment, of course, cannot substitute for journalistic talent, for an understanding of audience, or for an instinct as to how information relates to increasing the role of the public in rendering democracy more meaningful. But for those who are committed to enlivening the public sphere, a reference to the substantial interactions that affect their goals can be quite productive.

We begin with an outline of areas of law that must be considered. Over time, across societies, it is possible to suggest specific areas of legal development that are essential for media law reform. In the first part of this study, we examine a substantial list of such areas, from defamation rules to freedom of information (FOI). As to each media-specific area and areas of general application, we will provide an indication of how law can contribute or detract from establishing an enabling environment. To the extent possible, we will draw upon experiences in a wide variety of societies and transition states.

In Section 4 we move to a discussion of the rule of law: conditions that make law effective, useful, and just in achieving a media structure that serves to bolster democratic institutions. This discussion addresses considerations such as the separation of powers, independence of the judiciary, and establishment of reliable regulatory bodies that are loyal to enunciated legal principles. We then turn to a somewhat broader set of enabling factors for the media—larger societal issues such as the state of the economy, the extent of demand for information, and the extent of ethnic and political pluralism—before concluding with certain practical considerations on resources and techniques for enhancing an enabling environment.

Most of the study deals with traditional media: print and radio and television broadcasting. But the Internet, with its effect on the public sphere, will be increasingly relevant to the functioning of media in society. It offers new ways of thinking about the enabling environment for development of free and independent media.

2 Law, Media, and Democratic Institutions

A. The Link between Free and Independent Media and Democratic Institutions

Before we turn to the enabling environment itself, it is important to make several cautionary notes. First, existing assumptions about the relationship between free and independent media and the building of stable democratic institutions need clarification. Some may wish free media for their own sake, but most tie the claim—certainly the geo-political claim—for unencumbered media to their role in reinforcing or fostering democracy. Edwin Baker has written that "democracy is impossible without a free press. At least courts and commentators tell us so."[1] In this study, we do not focus on what some believe to be the important chicken and egg question: whether evolution of democratic institutions makes free media possible or whether free media are a prerequisite for meaningful transitions to democratic institutions. Instead, we start with the observation that at some point in every transition, a free and independent media sector is vital.

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. Given modern telecommunications, especially the Internet, and greater and greater cross-border data flow, the functions of traditional media may be complemented but hardly superseded. Only with an understanding of basic elements of structure and function can policies to further a particular right to receive and impart information be evaluated.

A 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: (1) 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; (2) 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; (3) project "a representative picture of the constituent groups in the society;" (4) "present and clarify the goals and values of the society;" and (5) provide "full access to the day's intelligence," thereby serving the public's right to be informed. The commission also identified three summary tasks that are central to the press' political role: to provide information, 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 Baker has written, different conceptions of democracy demand somewhat different functions of a press. Visions of a democratic society that emphasizes 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."[2] 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."

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? Russia in the late 1990s provides an example of a transition in which media companies were, in large part, proxies for major formations of capital and political influence as each formation sought its own group of media entities.

Assuring the existence of free and independent media may require providing 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. If the media do not perform the function of effective watchdog—of engaging in information-providing and value-transmitting functions in the early days, then this may be because of lack of experience. Starting the media on the right road early 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.

B. Limitations on Formal Law

A second caution involves the functioning of 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. Rob Atkinson underscores this problem by stating that "creating a civil society by legal fiat is an impossible bootstrap operation, both practically and conceptually. In both liberal political theory and the history of liberal politics, the rule of law is the product of a prior, pre-legal commitment to civil society."[3] Julie Mertus has written:

> The transplant of legal institutions designed to promote such values as participation and voluntary association will not work in the absence of a prior commitment to such values. On the contrary, the local power structure will reject such a forced imposition as illegitimate and/or misused to serve its own needs. This problem is endemic to the nature of social change and legal transplantation, and the most knowledgeable legal experts will be unable to solve it on their own.[4]

It is one thing to identify a need to alter the old cartel of voices in a society in a direction away from a monopoly or oligopoly. It is another to try to understand what steps or processes allow that to occur and which voices, in the process of change, will be favored as new entrants. In Rwanda, during the early 1990s, international organizations helped demonopolize the media and train voices different from those of the state. But a newly professional, newly skilled independent radio station became the instrument of extremists who favored and indeed induced genocide. Too often, the term "independent media" is used indiscriminately to describe media that contribute to democratic life as well as media that do not fall under a monopoly or oligopoly that restricts a society's set of available voices. These two attributes, contributing to democracy and to voice pluralism, should not be confused.

Law alone, efforts of donors 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 (although 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 to 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. Although this happened in large part due to 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) declines.

Similarly, it is important to compare behaviors of television audiences across transitions. Directors of broadcasting stations (in many transitional countries) soon realized that replays of American films, whether or not they had been properly obtained, were far more successful at drawing audiences—especially in a competitive environment—than the production of documentaries or serious drama. A larger audience or more reliance on the market did not, in this sense, magnify contributions to public discourse. On the other hand, attention to audience and construction of a comprehensive program schedule are vital to the building of an independent medium. In all these ways, it is important to acknowledge the relationship between law and the other elements of building free and independent media. Media law reform is most effective, or perhaps only effective, when it includes efforts to build a reliable tradition of professional journalism, train publishers in marketing and distribution, and develop a public culture that is supportive of the media sector.

C. The Importance of the Enabling Environment

In this study, we discuss specific laws that are important building blocks. Still, we emphasize the surroundings of law and the creation of a culture of effective independent and pluralistic media. After all, 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 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 are those that encourage the productivity and use of information. Good media laws alone do not make a civil society happen, although 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. Institutions such as the Glasnost Defense Foundation, the Committee to Protect Journalists, and Reporters Sans Frontieres were, at critical times in transition societies, vigilant in identifying possible backsliding and bringing it to the attention of the international community. For these entities, the existence of a specific media-friendly law, with grounds for defense resting in its violation, might make the analytic task easier. But even the existence or nonexistence of a law did not determine the nature and scope of scrutiny of these organizations.

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 can be enacted as a drama, a teaching drama that educates the citizenry in the role that the media can play. The process might 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. Some may argue, however, that, in a media environment that is increasingly global, the development of indigenous media is not an essential prerequisite for the emergence of stable democratic institutions. Take, for example, the view that what is important is that the government does not have a monopoly on information (as it often does with respect to the legitimate use of force). Civil society's access, at critical times, to Internet, fax, and phone might sufficiently allow the performance of the media checking function. At the least, this may mean that such a society, where there is an imperfectly developed private media sector but a porous capacity for citizens to gain Internet access, is less in need of intervention or reform than a society that is bereft of both.

On the other hand, important policy decisions are often made locally by political figures subject to local elections. Plural media that may only discuss global events do not provide a sufficient public sphere for those events that are indigenous and otherwise central to the needs of citizens.

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. For example, the existence of the Internet played a crucial role in allowing certain opposition groups in the former Yugoslavia to maintain contact with the outside world at the moment in 1999 when the Serbian government closed down or seized most opposition forms of media and communication. But it was a combination of factors, including assistance over the years and early identification of individuals to be part of an anticipated civil society, that allowed the critical mass with sophisticated media and a worldwide network of relations to develop.

3 Structures of the Media and the Enabling Environment

A. Overview

One might ask which organizational or structural forms for particular media sectors (i.e., television, radio, and print media) help to advance most effectively the development of democracy or prove more consistent with stable democratic institutions. At least three principal regulatory forms have evolved during the history of the print and broadcast media. The first regulatory form is state monopoly ownership and media control. State authorities directly supervise the media system, and no voice can be heard without the permission or consent of the state.

The second is called a public or public service monopoly. In this instance, the media (usually the electronic broadcasting system) is in public, not private, hands, but the governors of the system enjoy substantial autonomy and are not under the direct rule of the executive or legislative branches of government.

Finally, there is private ownership, usually accompanied by some degree of state regulation, the amount of such regulation varying from state to state and from cycle to cycle.

More and more, these three systems overlap substantially and come in various combinations. Although there have been (and continue to be) some cases of pure state monopoly, pure public service monopolies have become rarer, while increasingly mixed systems have arisen in which there are both private and public broadcasters.

B. Balance between Private and Public Service Media

What is the most desirable mix of private and public service media? One frequently asserted view is that the principal goal should be a competitive, privately owned media with low market entry hurdles. However, all but the most ardent of advocates of a private sector recognize a retained and important civic function for public service broadcasting.

Different societies have had different starting points. In the United States, the market has been the main arena for mass media development, and public service broadcasting is designed to compensate for perceived market failure. In Europe, public service broadcasting has been the base, and the private sector evolved to provide effective competition and opportunities for new and different voices (not the least of them commercial ones).

The Internet is viewed as a possible ideal: an infrastructure that allows rapid and inexpensive access for any political party or point of view. It approaches an ideal because it can provide communication among citizens with each other and by groups to individuals, a system of communication and interconnection that will complement and enrich a formal structure of democratic practices.

But patterns of broadcasting and the introduction of new technologies have demonstrated that relating the media to democratic practices is more complicated than summarized above. There have been societies that have had a publicly financed monopoly broadcasting entity that helped to fuel strong democratic practices. In very rare instances [e.g., the British Broadcasting Corporation (BBC)], an autonomous public service broadcaster was created in the sense that it was not answerable to the government. The BBC was not only allowed editorial freedom, but it has also striven to ensure that many viewpoints in the

society were given voice in the broadcasting program. Increasingly however, the growth of private media is seen as a critical aspect of developing a media structure that advances democratic values.

In post-World War II Germany, societal goals were served by an elaborate structure with committees representing many interests in society and a federalized public service broadcasting system established on a federal, rather than unitary, basis. A system evolved under allied occupation that melded elements of the European and U.S. approaches. Pluralism was built into the system, and there were guarantees in the very architecture and design to forestall a monopoly state voice. The German Federal Constitutional Court developed a unique idea: Article 5 of the Basic Law requires that the German broadcasting system, as a whole, fulfill a public service mission. Either public or private broadcasters can fulfill this mission. However, since private broadcasters depend on market revenues, it is presumed that they are less likely to fulfill the public service mission, and imposing strict public service obligations on them would endanger their existence. Therefore, private broadcasters in Germany are only allowed to operate as long as the public broadcaster offers a basic service.

The ideal public service monopoly is often hard to achieve. Throughout the world, state-controlled monopolies are difficult to transform into public service, autonomous, independent, and pluralism-serving democratic institutions. Generally, societies that have moved away from authoritarianism somewhat on the path to democracy have had to cope with just such transformations of a government monopoly broadcaster. This has taken several forms: (1) maintaining the state broadcaster, but permitting significant private competition; (2) privatizing the state broadcaster, in whole or in part, as well as permitting competition; and (3) moving the state broadcaster more to the public service, autonomy model.

Very few post-Soviet or transition societies have decided to abolish the pre-existing centralized broadcasting institutions. Often these institutions are seen as too important in generating national identity or merely as a useful tool of the new incumbents. In some places, the state broadcasting entity is partially privatized, with state ownership diluted with stock provided to investors.

Much more common has been the opening of frequencies for new, often small-scale radio and television stations. NGOs, like Internews and the Open Society Institute, have been critical in making these new competitors better able to enter the market in a wide variety of contexts, from Central Asia to Indonesia. These innovator private entities, often fostered as part of a distribution of power to the newly plural political interests, become harbingers of a free market and, as they mature, often find themselves in joint ventures with foreign investors and larger media companies.

The right to receive and impart information does not wholly depend on the existence of a particular structure of media entities, although some principles of competition have evolved from this human right. For example, a state practice limiting competition even when there are available modes of affording it, such as a law preventing private radio to compete with a monopoly public counterpart, could be a violation of human rights law.

C. Competition among Media

The very structure of media in a country can also be important if a commonly held view is true: that competition among various media fosters increased competition among holders of conflicting and variegated ideas. Accordingly, greater competition of media voices could yield a greater variety of viewpoints in the public domain and a greater sense in the society that various interests are effectively represented.

Those who fear great concentration in the media laud the positive effects of competition. In most cases, the existence of many owners is considered a guarantee that more views will be expressed. Structurally, this argument against the existence of a dominant private player is parallel to the claim that a controlling state media system weakens or bars the development of democratic institutions.

The economic rationale favoring ownership concentration is simple: Due to technology and infrastructure costs in the modern world of global communications, entry costs for companies wanting to participate in the information society are extremely high. Distribution costs are low. These are conditions that lead to rapid and increasing concentration in the telecommunications, media, and information industries.

There are three forms of concentration that are relevant to regulatory issues in the information society: (1) horizontal concentration (e.g., domination in the newspaper sector or among television stations); (2) cross-ownership that occurs between different media sectors, particularly print media and electronic media; and (3) vertical concentration that involves integration of different stages of the production and distribution chain. An example of vertical integration is the ownership of broadcast channels and services and control of the means of distributing them. The convergence of media is reducing the distinctions that made cross-ownership a viable concept.

Structural problems, such as the existence of great concentration in a nation's media, are not immediately apparent in transition societies. Some states seem, at least in the short run, untouched by global developments towards concentration and control by transnational corporations. On the other hand, local monopolies and local versions of vertical integration are found in almost all states. As societies mature and as global corporations seek new markets, large international mergers will certainly affect national policies.

Issues of concentration yield several specific elements that are particularly threatening for media pluralism and access to information. Companies in control of distribution networks might use their position as gatekeepers to distribute information and program services of their own media group, thus limiting free access. If the state is in control of distribution networks, this is a matter of very substantial concern. Some think that operators of network infrastructures on which other program providers depend for distribution of their services to the public should not be allowed to produce their own programs and gain favorable access. Most global communications empires are now heavily vertically integrated. As a result, attention must be paid to techniques that provide assurance of fair access. A particular concern arising from concentration is whether there is room for the development of a local zone of creativity, with the capacity to build expertise in providing information to citizens. As more free market principles are introduced, there is also the need to assure, especially for telecommunications services and basic audiovisual services, that the goal of universal access is, at the least, enunciated.

Structural problems may be compounded where a state entity controls a key element in the information chain (e.g., control of newspaper distribution or transmission facilities for broadcasting). In terms of the actual application of law, the question often is whether general anti-competition laws in place within a society are sufficient to deal with competition within the media, or whether media-specific ownership laws should be created as well. In the United States, for example, generally applicable antitrust laws prohibit monopolies and anti-competitive conduct (except in a few limited circumstances). These laws apply, for example, to the steel industry and the automobile industry and can apply to print media, television broadcasting networks, or news bureaus as well. There is something desirable in ensuring that media entities are subject to such laws of general jurisdiction, recognizing that those who own the media can engage in the same kinds of anti-competitive and harmful practices as the manufacturers of light bulbs or computers.

In addition, the United States has enacted a number of media-specific ownership laws, premised on the idea that media are different and that there are free-speech interests that demand a different way—a more specific way—of organizing or regulating media. A society might find a concentration of power in the field of speech more troubling than a concentration of power in a field with less consequence for democratic values. For example, for a long period, federal regulation extended to questions such as whether the owner of a newspaper could own a broadcaster in the same city, the number of radio stations one person or corporation could own (including the maximum number in one city), and the maximum permissible audience that one corporation could reach. The U.S. Congress and Federal Communications Commission limited the number of local stations that a major network could own and the ownership rights of such a network in the programs that it distributed. All these laws have been undergoing change in the United States, but they are testimony to a notion that the media sometimes warrant specific ownership-related attention.

In a recent study of Uruguay, Roque Faraone argues that tight anti-competitive practices among the owners of the dominantly private press helped block the development of a public forum. Not only are there few owners and not only do agreements among them control the limits of the news, but, he claims, these owners are also closely tied to the government. Furthermore, the state-financed public service broadcasting sector is disadvantaged vis-à-vis its stronger private competitors in funding, program scheduling, and access to high-quality programming. Public service broadcasting in Uruguay thus remains too weak to adequately complement the offerings of the private sector.[5]

The Council of Europe has recommended that not only should there be a public service broadcasting sector, but it should also be protected through the rule of law. The legal framework governing public service broadcasting, in the words of the recommendation, should

[C]learly stipulate their editorial independence and institutional autonomy, especially in areas such as

- The definition of program schedules
- The conception and production of programs
- The editing and presentation of news and current affairs programs
- The organization of the activities of the service
- Recruitment, employment, and staff management within the service
- The purchase, hire, sale, and use of goods and services
- The management of financial resources
- The preparation and execution of the budget
- The negotiation, preparation, and signature of legal acts relating to the operation of the service[6]

There are a significant number of transition societies where too much media ownership is concentrated in the state and/or in the hands of private interests closely tied to the state. Throughout Central Asia, even where private and independent broadcasters were allowed to spring up, the real power lay with state broadcasting and those private entities associated with the government. Structures should be examined to see if media companies, print media, and television stations are still connected to the state through family or other relationships. An enabling environment study takes such factors into account when studying reform policies.

In many transition societies, there are vital questions about the legal environment for increasing private ownership of the media. These include questions of how much spectrum space (or range of radio wave frequencies) will be allocated to private broadcasters, how that spectrum will be awarded, and who will have the most powerful transmitters. Each of these decisions may have profound consequences for the ultimate structure of the electronic media. Government can allocate and distribute spectrum in a way that underscores scarcity and can lead to a high level of concentration. Spectrum assignment can mean an ultimate system that is limited to several national stations. An alternative approach may lead to many local stations or even local competition. Rules concerning how and when licenses can be transferred are a factor in determining whether a decentralized and competitive industry has the potential to survive. Whether one approach or the other fosters pluralism and stronger democratic institutions turns on many circumstances, including demography, requirements imposed on the media, and relationship between regional and national centers in the constitution of politics.

A set of recommendations of the Council of Europe asserts the importance of "the existence of a multiplicity of autonomous and independent media outlets at the national, regional, and local levels generally" because it "enhances pluralism and democracy." The council also maintains that "political and cultural diversity of media types and contents is central to media pluralism." As a result, the council's Committee of Ministers recommended that members of the council "evaluate on a regular basis the effectiveness of their existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field." [7]

The council has also urged transparency. Because "pluralism and diversity are essential for the functioning of a democratic society," the Council of Europe has recommended that "members of the public should have access on an equitable and impartial basis to certain basic information on the media so as to enable them to form an opinion on the value to be given to information, ideas, and opinions disseminated by the media."[8]

D. Foreign Ownership

One area of ownership restriction that is quite common is restrictions on foreign ownership. It is interesting that such restrictions, at least on terrestrial radio and television broadcasting, are frequent, not only in transition societies, but also in the west, including the United States. Fear of foreign ownership goes back to the wartime fear that radio and television could be and are used for propaganda purposes. There is also the assumption that citizens or corporations controlled by citizens are easier to supervise in time of national crisis than those owned by foreign interests. The issue of ownership of media by foreigners thus remains one of the most consistent targets of nationalistic or even xenophobic concern, partly based on the assumption that foreign owners are likely to program a channel differently from their domestic counterparts.

In some transition societies, however, foreign voices are extremely important as a means of leavening what would otherwise be a retained government monopoly or a narrow range of domestic points of view in the media. Pluralizing opportunities for external programming is increasingly possible because of new technology, including satellites and the Internet. But the capacity of foreign investors to own radio and television stations or printed media press can be important in yielding diversity as well. Many countries that prohibit foreign control of terrestrial broadcasting permit greater investment and control of cable television, and most allow foreign ownership of print media. India, on the other hand, has been one of the major democracies to prevent foreign ownership of newspapers, although, even there, the restriction has been called into question.

E. Media Ownership by Religious or Political Organizations

Some societies prevent religious organizations, political parties, or government agencies from owning radio and television stations or newspapers. In others, often those that are in an early stage of transition, channels of communication are controlled, directly or indirectly, by these very entities. As media channels become more and more abundant (through satellite and cable and transfer to digital broadcasting), restrictions on ownership may become less important.

These restrictions represent retained fears about the dominance that can be achieved through control of mass communication instruments. Ownership rules may reflect historic concerns where there has been a radical break from an authoritarian past, or reaction to former modes of control and influence. These ownership rules may specifically deny ownership or control to institutions that were once dominant.

In some instances, it is precisely where religious influences have been so strong that restrictions on sectarian ownership of stations might be prohibited. Where a society is emerging from a statist, authoritarian regime, a reaction may be to swing wholly toward private ownership. In other instances, however, the new society often has derivative forms of the old, as where new government institutions stand in the stead, although now with more democratic purposes, of their predecessors.

F. Viewpoint Domination by a Single Broadcaster or Owner

Another mode of structural regulation, relevant to the enabling environment, is the extent to which any single broadcaster or owner of licenses can reach large segments of the population. If the goal is to have competition and many voices, it is also important to have some sort of end game vision. What if the result of privatization is that there are two remaining broadcasters and that the stronger of the two gains 70 percent of the audience? That may not necessarily be inconsistent with democratic norms, but such a dominant position should raise alarms. A government committed to a competitive and independent media structure must have the tools to define and enforce an explicit model of the role that broadcasting and the press should play. An enabling environment analysis would ask not only about concentration but whether the state voice is controlling and what pattern exists for access by minority and opposition views within the society.

Many of these questions arose in the consideration of a revised media ownership law for Russia. A draft law was prepared that limited the extent to which one company or interrelated group could own stations that reached too high a percentage of the Russian audience. On the other hand, much of the criticism of the Russian broadcasting structure was that industrial groups, including banks, oil companies, and other natural resource corporations, controlled most major components of the media. From an enabling environment perspective, one important question was whether the stations were independent of the government. Even though they were privately owned, the condition of their ownership and the relationship of the owners to government meant that true independence was difficult to achieve.

Indeed, the very importance of a major conglomerate, owner of the independent television network NTV, meant that government efforts to enforce tax or other laws against its owner could credibly be interpreted as an attack on the press in general. Concentration meant delicate relationships that were hard to untangle.

Even there, however, it could be said that there was competition of a sort: Industry was organized into an oligarchy, with several powerful groups. There was competition among these groups and, as a result, among the broadcasting empires that they controlled. A media outlet that is tightly controlled by an oligarchy of industrial and banking interests may not, however, serve other aims that lead to stable

democratic institutions. Citizens may perceive a lack of opportunity to use the media for change if the media are deemed oligarchy-controlled. One response to this situation may be to facilitate the development of strong competitors or to tolerate the oligarchical approach, but prohibit anti-competitive or abusive practices.

It is virtually impossible to obtain a media structure in which every voice, every large-scale worldview has control of a significant broadcasting enterprise. Since this state is unrealistic (except maybe in the idealized world of the Internet), premising a set of enabling laws for media reform on such an outcome would be deceptive. There will always be strong broadcasting enterprises in a society and because of the costs of broadcasting successfully, the pressures toward consolidation often seem irrepressible.

G. Access and Right to Impart Information

For these reasons and others, some states' enabling environments include structural approaches that seek to assure access or other opportunities to exercise a right to impart information. For example, a privately owned station may have a rule-based government obligation to provide time for all political candidates at the time of an election or to set aside time for minority groups in the society to promulgate their views or present cultural or other programming. Similarly, a state may require a cable television operator to carry the public service broadcasting stations or the stations of particular groups, including minority voices, to enhance pluralism.

There are those who consider these kinds of structural regulations more consistent with democratic goals and less intrusive than content regulation (e.g., regulation that turns on the nature of particular communications). The general idea is that, if competition and independence can be achieved through these basic organizing rules, then progress toward the goals of pluralism and recognition of various political viewpoints will be enhanced.

Structural regulation does not require government, generally, to make invidious interventions, deciding whether certain programming is fair or not fair or whether certain political viewpoints have been adequately expressed. These issues are dealt with, at least abstractly, by the theory that supports a diversity of owners (or, a diversity of voices through rules designed to guarantee access to media outlets) as one of the most important ways to reinforce democratic institutions.

H. Government Subsidies

Policies and practices regarding subsidies are also factors in an enabling environment study. Governments may appear to have, formally, a neutral approach to particular speakers, but they may, through the use of financial support (sometimes hidden), render one group or one medium far more powerful than others. Discriminatory access to a monopolized distribution scheme is one method that can be used for this purpose. Favored accreditation for compliant reporters is another.

There are a thousand tricks or devices. Costly duties on newsprint or computers can have a substantial impact on the capacity of independent media to develop. States can discriminate in terms of access by students to the gateways of the profession: universities, training programs, and travel abroad. States can interfere with access to transmission facilities by media that are too independent or engage in surprise audits or other forms of harassment.

In harsh economic circumstances, the way government allocates newsprint or access to printing facilities may be a strong determinant of power within the society. Miklos Haraszti, in his book, *The Velvet Prison*,

describes how benefits to favored journalists (e.g., membership in clubs, apartments, or trips abroad) served to enhance a kind of control that was as invidious as censorship.

I. Government as a Market Participant

More comprehensive and systematic modes of using state power to structure the media are also often present. The state can use its purchasing power to place advertising only with those media that are supportive, and the state's advertising budget may dwarf that of any competitor. Also, state broadcasting may use its subsidized position to undercut private media in the market for advertising, rendering it difficult for free and independent media to develop. In late 1999, for example, the Croatian National Parliament House of Representatives voted to allow the state broadcaster to expand the number of advertising minutes it was permitted to sell. The advertising market was limited, and, if the amount of advertising in the society is limited, then enlarging what the public service broadcasting entity can do might harm its private competitors. That argument led critics to claim that the move would suffocate commercial television by depriving it of revenue.

J. Government Funding

The question of the role of state television or public service broadcasting is frequently important in assessing the enabling environment for media reform in transition societies. For example, the very mode of financing such a broadcaster is vital. Two years after the handover of Hong Kong to China, legislators called for more permanent funding of Radio Television Hong Kong to assure that it would not have to seek year to year financing from the government of what was now a special administrative region.

Some believe that a media entity that is funded through a license fee, paid by each user of a receiving set, is likely to possess greater autonomy and independence than one that is funded entirely by the government. However, such license fees are increasingly under attack as the state or public broadcasters rely, as well, on advertising revenue or otherwise engage in commercial activity. Private competitors complain that this creates an uneven playing field, as they struggle against entities that have access to commercial profits as well as government support, government promotion, access to government information, and government subsidies. Some countries have re-thought their support for television possibly in response to such complaints. In November 1999, the government of Spain announced that it would change the financing of Television Española (TVE). The state budget would only cover the TVE operations considered a public service, while its purely commercial activity would be left to the market.

Some systematic structural interventions occur when states have policies that shape media development. These kinds of interventions may be ubiquitous and only in certain instances have deleterious impacts. For example, a state may determine that it wishes to preempt the market for multi-channel video distribution by investing billions in cable television on the assumption that cable is easier to control than direct broadcasting. A state may thus take the market away from competing multi-channel distribution where that could open up the competition to less controlled competitors.

One major point emerges. The media structure that results in any society (whether one that encourages a plethora of free and independent broadcasters and print media or one that places emphasis on the state broadcaster) is usually not an accident. It can be a matter of evolution or it can be a purposive, significant element of design. It is a characteristic of most transitions that each step is a movement from one set of media structures to another. These are windows of opportunity, moments to think through what kind of media the society needs. These are moments when those within and without the society develop laws that partly establish whether the transition proceeds from the current forms of media structure to ones more consistent with democratic society.

4 Rule of Law

Much of this paper is about the kind of law that media enterprises will face in transition societies. At least as important is a concept that is framed as the "rule of law." 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.[9]

The Organization for Security and Cooperation in Europe (OSCE) outlines several requirements for the rule of law. The government has a duty to act in compliance with the constitution and the law. The military and police are accountable to civilian authorities. Legislation should be considered and adopted by transparent procedure. Administrative regulations must be published as the condition for their validity. Effective means of redress against administrative decisions and the provision of information to the person affected by the remedies, an independent judiciary, protection of the independence of legal practitioners, and detailed guarantees in the area of criminal procedure must be available. However, the OSCE emphasizes that the rule of law does not mean merely a formal legality that assures regularity and consistency in the achievement and enforcement of democratic order. There is also an element of justice based on the recognition and full acceptance of the supreme value of the human personality, guaranteed by institutions providing a framework for its fullest expression.[10]

The rule of law is independent of the nature of the specific substantive law and even of specific institutional arrangements. In other words, the rule of law concept contains certain tenets that are essential components of an enabling environment for the development of effective, independent media, regardless of the substantive legal norms adopted in a legal system and regardless of the specific institutional structure within which those rules exist.

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; administrative process of fairness, impartiality and objectivity; and judicial support.

A. Clarity and Accessibility

The only legal rules available for enforcement are those that are adopted according to systematic procedures and are accessible to the public. In an enabling environment, the generally applicable normative acts that govern the conduct of public authorities and private persons must be accessible and transparent. They must be promulgated according to established procedures and be accessible to the public. As to the first of these requirements, the only public bodies empowered to promulgate enforceable legal norms should be those to whom such authority is expressly and visibly delegated as part of the fundamental legal order. Then, secondly, only transparent provisions are eligible for enforcement by the administrative authorities. In legal systems not committed to the rule of law, the authorities may enforce non-transparent rules known only to themselves: In such circumstances, the predictability and fairness necessary for the free development of independent media are lacking.

On a practical level, this means that it is of great importance that those public bodies to whom legislative powers have been delegated 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.

In examining whether the rule of law exists in a particular society, in connection with the media, one can ask several key questions: How clear and accessible are the rules? How well supported are they administratively? How well are they supported judicially? These considerations are intrinsically linked to the notion of separation of powers—that state functions should be divided among the legislative (norm creation), executive and administrative (law execution and enforcement), and judicial (law interpretation and application) branches.

For example, a fundamental tenet of the rule of law is that the governmental institution that enacts a legal norm should not also be the branch that enforces it, since it is feared that it could not be impartial in the law's execution. Thus, the legislature should not be permitted to engage in the execution of its laws. At the same time, the laws must bind the executive branch. Those who apply the laws much act pursuant to the legal authority prescribed by the legislature. In both cases, there must be sufficient oversight, exercised with sufficient authority by an independent judiciary or some other independent institution, to insure the observance of these principles.

There are three main benchmarks for evaluating the language 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. In the United States, this idea of simplicity and understandability is captured by the "void for vagueness" doctrine, and, especially in speech-related matters, clarity is considered to be essential for the proper operation of legislation. A statute that can be interpreted in a way that is overbroad presents special challenges in a free speech framework.

Dissemination and accessibility of a statute are essential. Rules that are not known to the community to be regulated are, almost by definition, not rules at all. They are merely tools that may allow the authorities to act in an arbitrary fashion. Draft legislative or administrative acts intended to serve as generally applicable legal norms should be made public to elicit comments from interested citizens and media organizations. Because judicial interpretations of the statute become, as it were, part of the law itself, the same principles that apply to notice of the rule should also apply to notice of the decision.

It is possible that these issues of dissemination and interpretation might be less important in societies where the scope of press-related regulation is limited. But in many transition societies, where there might be complex rules about matters such as ownership of an instrument of mass communication, steps needed for registration, concentration or cross-ownership between radio and television, media coverage of political campaigns, and circumstances in which liability will be imposed for defamation, disclosure of state secrets, or other violations of content requirements, these principles become more important.

B. Legal Norms

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, and it must, therefore, 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.

All laws are functions of the administration that enforces or supervises them. In many transitions, a licensing commission is established to determine who, among competitors, should gain the right to broadcast, but the principal operators of television signals seem to obtain the right through mechanisms outside the formal process. For an administrative system to work properly there must be a clear demarcation of responsibilities between agencies that have overlapping jurisdiction as well as coordination between them. For example, in many of the states of the former Soviet Union, a broadcaster had to obtain a license to broadcast and a permit from a telecommunications agency for the use of the assigned frequencies. Too often, these tasks were neither demarcated nor coordinated, and the result was arbitrary interference and inadequate support for broadcasting enterprises.

To be sure, effective broadcasters are businesses as well as instruments of speech and are 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 holdings in real estate. 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.

C. 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 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. Thus, if two applicants seek a single broadcast license, the authorities making this decision should be required to apply transparent standards to both applicants in an impartial fashion. These should include the opportunity to be heard.

D. Judicial Support

An independent, effective judiciary is essential for the oversight required under the rule of law. We shall see, for example in the material on access to information and content regulation, how important a role the judicial system can play in determining the meaning and impact of media laws. Here it is important to distinguish the rule of law role of the judiciary. The issue is whether there is an independent voice in the society to whom an aggrieved party can turn, especially to obtain a review of acts of other branches of government. Of course, a judiciary that is merely another administrative branch of the government is insufficient, especially if it lacks the willingness or jurisdiction to play a meaningful review function. Judges must be prepared to rule against the public authorities if they act improperly. They must enjoy job security: If judges are easily removable, they cannot perform their functions impartially. There must also be a public perception that the courts operate in an impartial manner consistent with the rule of law. Judicial systems can be evaluated for their impartiality and independence, both from government interference and financial vulnerability. In many transition societies, the relatively low salaries of judges can hinder judicial independence.

The judicial system can also be evaluated through the effectiveness of a decision reviewing (adversely) a government order. In many systems, the courts lack the authority to gain effective enforcement or observance of their decisions reversing illegal acts. A related indicator of the effective operation of the rule of law is the ability of a successful litigant to recover monetary damages that have been awarded in a court decision.

E. Case Study: The Absence of an Enabling Environment and the Rule of Law

One way of looking at the desiderata for an enabling environment is to look at its opposite—a context in which there was perceived, by the international community, to be a substantial need for change. For example, the Information Law was adopted in Serbia in October 1998. The law made it possible for media to be accused of slander, lies, and other offences. Moreover, the determination of whether a newspaper violated the law could be decided in quick and summary legal proceedings without elaborate due process. In the year after implementation, four independent papers and a dozen radio and TV stations in Serbia were closed. Many independent papers were required to pay fines, substantial compared to their assets and income. A report by the Serbian news agency Beta suggested that "enormous penalties (ranging from 50,000 to 80,000 dinars) envisaged by the Information Law financially threaten almost all important independent print media."[11] In some cases, papers were denied the right to be sold on newsstands.

During the 1999 conflict with NATO, a number of Serbian papers were fined or closed for activities that were inconsistent with public policy on the war. The government argued that those who are not engaged in the "reconstruction of the country" were traitors.

The Information Ministry brought more than 50 legal actions against a printing house, ABC Glas, and against its director, Slavoljub Kacarevic, in lower courts in Belgrade. The ministry claimed that the printing office and its director violated the Information Law by printing a bulletin of the opposition Alliance for Change and that the publication had not been registered. The court rejected defense arguments that the publication was not a registrable publication, but merely a party bulletin. In October 1999, Vice Premier Vojislav Seselj, leader of the Serbian Radical Party, charged the editor-in-chief of Belgrade-based *Danas* with violating the Information Law and tarnishing his reputation. The *Danas* trial lasted an hour, and the paper was fined 280,000 dinars (approximately $28,000).

The Serbian example underscores the potential impact of harsh defamation and criminal libel laws, and their potential for abuse in times of crisis or their misuse whenever government feels threatened.

5 The Legal Environment for News Media Activity

A. Overview

Here the focus shifts from questions of structure to the identification of those elements of a legal system (its laws and practices) that have an impact on the content of the media product—the information and opinions—that is disseminated to the public. This subject goes to the heart of concerns about the core elements of a legal setting that either impede or advance the establishment of an enabling environment supportive of independent media.

This discussion will be structure neutral. In other words, the points made will be applicable regardless of the media structure in a given society. For the most part, the focus is on what might be called traditional media: print, radio, and television, but these questions are now coming into focus with respect to the Internet. As a mode of communication, journalistic use of the Internet requires exactly the same level of attention to freedom of expression as traditional modes.

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 (e.g., on the basis of legislative acts or judicially-created norms) or through extra-legal means (e.g., 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 represents 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 (i.e., are content-neutral on their face). They instead 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.

Several points apply to the entire discussion in this section. First, an important tool for analyzing content regulation by legal means is the recognition that content regulation is exercised by both laws of general applicability (those laws that apply to all persons within the jurisdiction of the legal systems and do not explicitly target the media) and media-specific laws. Among other things, this perspective might be significant in determinations regarding the constitutionality of particular governmental acts: It might be much more difficult to challenge the constitutionality (regarding press freedoms) of a generally applicable law on its face, than it might a media-specific law. This distinction is highlighted in the material below. Laws of general applicability represent those points at which news media activities intersect with the core legal system. Two categories emerge among media-specific laws: (1) mass media laws or laws on the press (press laws) that are the foundation laws of media regulation in many countries; and (2) legislative acts relating to more specific, narrow topics, such as regulation of broadcasting or journalists' rights and duties.

Second, it is important to note that, while this discussion focuses on state acts, the private sector also plays a role in the legal environment for news media activity. For example, an important question for newsgathering is the amount of access to information about individual entities and individuals. As to direct influence on content, private entities and natural persons have the right in all legal systems to initiate legal action for perceived violations of their rights by the media. As to indirect influences on control, private persons and concentrations of private power, as well as the state, have a substantial say, particularly where the media are privately controlled.

Finally, the discussion of legal norms is expansive. It encompasses not only legislative acts, but normative administrative acts as well, along with consideration of potentially applicable constitutional and international norms.

B. Newsgathering

One can conceive of a system in which journalists are independent in that they can print what they wish, but are severely hampered because they have constricted access to information. Of course, all journalists are hampered. They have deadlines that prevent as much investigation as they desire. They have budgetary constraints. They have editors who limit their travel or the direction of journalistic inquiry.

It is still possible to examine the nature of a state's enabling environment specifically in terms of the capacity of the journalist to gather information and be effective. Information gathering by journalists is a vital component of freedom of information. Without access to information, journalists are engaged primarily in the presentation of opinions. While openness in the statement of opinions is an important element of democratic society, it is not sufficient for its development and maintenance. The possibility for an informed citizenry depends on the ability of journalists to have access to sources. Without this kind of journalistic effectiveness, a society can have free and independent media, but its utility toward advancement of democratic institution-building might be severely limited. In addition, a state's determination to license the practice of journalism will also have implications for the news media's role in a democratic society.

There are obvious elements of a state's enabling environment in access to information. Some states use the power to accredit journalists restrictively, ensuring that few have access to the press briefings of the government or to the processes of the legislature. Many countries close important public institutions, such as prisons, military facilities, and, increasingly even in the most democratic societies, certain judicial trials, to the public and to the press. These restrictions can be justified with concerns of national security, privacy, or integrity of the policy-making process. Whatever the justification, the closest examination of these restrictions is necessary.

The enabling environment also includes access to the world's databases. A state can limit this form of access by imposing a tariff structure, constraining Internet service providers, or creating the fear that there is state monitoring of what database a journalist seeks to use. The extent to which public libraries are maintained and updated is also a mode of affecting the capacity of a journalist to gather news.

Certainly, the policy of the government toward journalistic access to information, which may be a matter of informal access and informal policy rather than law, is key to the functioning of a press. One of the most important areas for access to information is a state's attitude towards its records, documents, proceedings, and institutions. Rules concerning access to documents and institutions are examples of the positive use of law to promote media independence and effectiveness.

1. Access to Information (Documents)

An essential condition of effective and professional journalism is the ability of journalists to gather information in tangible files, often dusty and hard to find, which are held by or controlled by public authorities. A legal enabling environment will include legal guarantees for the conduct of this gathering activity. Often, such guarantees are found in generally applicable legislation that recognizes the rights of public access to documents. Although these laws often do not expressly cite the rights of journalists, news media representatives share the rights of access with the general public. An environment in which such guarantees are absent will lack an element essential for journalistic effectiveness, particularly in those legal settings where criminal law prohibits disclosure of government documents and imposes sanctions on public custodians who violate this norm.

Access to information generally requires affirmative legal guarantees. A law protecting a journalist against censorship is not sufficient. Even the presence of constitutional and/or applicable international norms will not normally be sufficient since there is not sufficient development of an international principle providing such access to journalists. Fundamental norms are vague on this score, and may require detailed implementation in the form of legislation that recognizes and supports the access principle and supporting regulations that address the many practical questions that arise in this area. An important articulation of fundamental principles on access is found in the *Johannesburg Principles on National Security, Freedom of Expression, and Access to Information*. This document was adopted in 1995 at a meeting of specialists in international law convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand.

What are the elements that should be present for an FOI regime to be effective? Several clusters of issues—structural, operational, and enforcement—should be taken into account.

a. Structural Aspects of Access to Documents

Presumption of Openness. The fundamental characteristic of FOI legislation is an expressly articulated presumption of openness. The presumption of openness is grounded in this principle: An item in the control of the public authorities is public unless it is covered by an exception expressly set forth in a legislative act. This places the burden of justification for refusal to disclose on the public custodian.

Most legal systems impose some kind of standard on persons who request access to documents, such as a requirement that they demonstrate that the requested information affects their rights and legal interests or that it is of a particular level of importance. The effectiveness of FOI legislation will be significantly reduced if, instead of a presumption of openness, great burdens are imposed on requesters. The problem

with such requirements is that they create an opportunity for arbitrary refusals to disclose, grounded in the custodian's assessment of the status of the requester or the importance of the document. Regarding the latter, of course, there would be an inclination for a custodian to be more reluctant to disclose documents which might be deemed "important" and perhaps damaging to governmental or corporate interests: a situation which would be counter-productive for the FOI goals.

Application of Freedom of Information to Public Institutions. Effective FOI legislation must apply broadly to public institutions. The broader the scope of public access rights, the more democratic an FOI law will be. For example, are legislative bodies covered? If so, a comprehensive right of access to legislative documents would include a right of access to draft legislation and hearings at the legislative committee level, not just at plenary sessions of the legislature. This would give journalists the opportunity to inform the public of crucial determinations made at the committee level, rather than only at the plenary level when the important policy debate might already have been concluded. A broadly based FOI law would also include a general right of access to documents in judicial proceedings.

A number of specific issues might arise in regard to documents produced or under the control of particular branches of government. For example, a right of access to legislative documents should be general and not include specific categorical exclusions based on status of the document, but only on its subject matter. For example, not only the minutes of legislative sessions should be available, but also written reports considered in the legislative proceedings, unless they are insulated under a specific subject matter category exception. In addition, minutes of legislative committee meetings, as well as those of the plenary legislative body, should not be shielded from disclosure. Finally, at the heart of democratic governance, an effective FOI regime must permit ready access to draft legislation.

Exceptions to the Right of Access. Exceptions to the right of access must be limited to those that are expressly and narrowly defined in legislation, and are necessary in a democratic society to protect legitimate interests that are consistent with international norms. It is universally recognized that FOI access rights are not absolute—that their existence does not automatically mean unlimited and unconditional access to public sector information. Instead, it is accepted that protection of certain countervailing secrecy interests will constitute exceptions to those rights of access.

At the same time, however, any exception to the presumption of openness should satisfy certain requirements. First, it must be prescribed in legislation. This means that the legislature has the exclusive power or competence both to identify the secrecy interests to be protected and to define the particular parameters of the exception. In addition, it means that the exceptions must be set forth in detail and cannot be presumed simply on the basis of perceived legislative intent or ambiguous language in the law. Thus, the legislative norms must be carefully defined, not open-ended. As to national security, for example, a common legislative practice is to prohibit disclosure of state secrets. However, a regime inclined toward democratic principles will permit the use of this exception only when a particular category into which the document in question falls has been identified in advance.

Some sort of measuring stick, by which appropriateness and compatibility with democratic principles can be measured, should govern the selection and application of exceptions. All branches of the government mechanism should observe this standard: the legislative, executive, and judicial branches. A standard applied in a number of systems is that an exception must be "necessary," an assessment standard with which a reviewing body must determine whether the need for the exception outweighs the presumption of openness and is limited to protection of the specific secrecy interest.

Thus, in order to satisfy the necessity in a democratic society requirement, a restriction on the right of access must be targeted to counter a serious threat to a legitimate public interest and place no restrictions

other than those, which are directly related to protection of that interest. For example, if the interest to be protected is national security, a restriction will not be necessary in a democratic society unless its purpose and application is to protect against the use or threat of external or internal force against the country's territory, institutions, or representatives. Therefore, a restriction that insulates the government or its individual members from exposure of illegal acts would not satisfy this standard. In addition, for a restriction to be legitimate—in other words essential to democratic governance—it must be grounded in the goal of maintaining democratic institutions and procedures. In this regard, a number of countries explicitly prohibit the designation of certain categories of information as a "state secret." For example, generally not eligible for status as a state secret is information relating to matters which are deemed of a public nature: disasters that threaten public health and safety; conditions of the natural environment, public health institutions, education, culture, and agriculture; illegal acts by state institutions and public officials; and violations of human rights.

Constitutional and international norms might place constraints on the legislature, in effect placing contours on the notion of what constitutes a legitimate public interest deserving of protection against an open-ended right of access. For example, the International Covenant on Civil and Political Rights, Article 19, dictates that state parties recognize a right to seek information, and it specifies the only grounds upon which exceptions to access can be made.

The European Convention on Human Rights, Article 10.1, requires the contracting states to guarantee the right to freedom of expression, which includes the freedom to "receive" information "without interference by public authority." The jurisprudence of the European Court of Human Rights does not provide definitive guidance on the contours of Article 10.1 in the FOI context. However, Article 10.2 of the convention requires that restrictions on Article 10.1 rights must be necessary in a democratic society for the advancement of enumerated legitimate aims, including national security, public safety, prevention of crime, protection of health or morals, protection of the reputation or rights of others, prevention of disclosure of information received in confidence, and maintenance of the authority and impartiality of the judiciary. Of particular importance in the context of freedom of information are the requirements that restrictions should be (1) proportionate to the legitimate aim pursued, and (2) capable of accomplishing that goal—doing so without infringing on the exercise of other rights of free expression.

In regard to these questions, it is possible to identify certain core secrecy interests that are generally deemed necessary in a democratic society. Exception categories can be said to fall into two general groups: those that seek to advance general or public secrecy interests and those that protect the interests of particular legal or natural persons. Examples of the former are national security, state economic or financial interests, law enforcement, internal administration of government departments, and protection of policy-making deliberations. Examples of the latter are personal privacy and commercial confidentiality.

Criminal, Civil, and Administrative Liability. Journalists should be insulated from criminal, civil, or administrative responsibility for publication of secret documents or information from those documents, unless they knowingly participated in a scheme to obtain the documents in an illegal fashion and knew that the documents were lawfully protected against disclosure. Moreover, an effective FOI regime will shield a journalist from liability even in circumstances of knowing participation, if the public interest in disclosure outweighs the harm threatened or caused by such disclosure. In certain of these cases, a journalist will obtain documents that are legally protected from disclosure. In such circumstances, a blanket imposition of liability for publication of such documents or information from them would tend to have a chilling effect on the exercise of press freedoms that would be detrimental to the goal of democratic governance.

b. Reasonable Administrative Requirements and Costs: Operational Aspects

Logistical or cost considerations must not impede exercise of the right of access. There should be a deadline for response to requests, a requirement of written statement of reasons for refusal (important for review by a higher administrative body and/or a court), and opportunity for copying, with limitations on costs to be imposed for this service.

c. Effective Means of Enforcement

Articulation of rights of access must be accompanied by effective means of enforcement of those rights. This requirement has several elements: effective remedies; effective, independent review of custodial denials of disclosure; threat of sanctions for willful violation by public officials; and designation of an independent FOI "umpire."

An effective FOI regime must have adequate enforcement remedies, including appeal to court or some other review body outside the administrative structure. In this regard, a public access law should require that a written statement informing the requester of the opportunity to file an appeal with the independent reviewing body accompany a denial of access. The nature of the reviewing body's enforcement authority is also important. A scheme that simply imposes monetary penalties on the custodial body will not be effective; instead, a court or other reviewing body should have the power to order the custodian to fulfill the requester's original request: to make the information in question available.

At the same time, legislation should also provide for sanctions against illegal refusals to disclose documents. It advances the purposes of freedom of information if either the right of access legislation or the criminal codes contain provisions that buttress the rights of access found elsewhere by establishing liability for public officials who unlawfully deny requests. In this regard, however, the use of sanctions should be approached with caution, lest it have a counter-productive effect. Should public officials be exposed to liability even in those cases where they might in good faith have believed that they were following the dictates of the law? If so, the danger exists that custodians will tend simply to disregard the FOI law as inapplicable or inequitable. This is particularly true where custodians find themselves in a quandary as to particular requests for access, caught between their potential liability for illegal denials and their potential liability for illegal release of protected documents (e.g., state or commercial secrets) under other applicable legislation. In an attempt to resolve this, one option would be the inclusion of a legislative provision that public officials are to be held responsible only when they have willfully or knowingly ignored the law's requirements.

An important component in making freedom of information effective is the designation of an independent official who is empowered to mediate disputes and provide effective interpretations, so that public employees do not find themselves subject to personal liability for decisions they have made in good faith. Such a step would avoid wasteful adversarial disagreements between requesters and custodians over interpretation and application of the law. The law should state that, if a public official is able to demonstrate that he or she sought such advice in a particular case, this would serve as evidence that the official had not acted willfully or knowingly and, therefore, would be free from personal responsibility if a court were later to determine that access was warranted.

2. Access to Government-controlled Proceedings and Institutions

In addition to access to documents, an enabling environment requires that news media representatives have reasonable opportunity to observe, and therefore report to the public on, the workings of

governmental agencies, including legislative bodies, the executive branch, and the courts. However, because of logistical concerns, access to these governmental activities will probably differ from rights associated with requests for documents. Journalists in their pursuits perhaps must enjoy greater rights than those of the general public because, for example, the number of persons attending a meeting or judicial proceeding must be limited. In such circumstances, greater rights for journalists are justified under the notion that, by means of their newsgathering and reporting, they function as the eyes and ears of the public. These considerations, meanwhile, raise questions about the authorities' scope of discretion to decide which journalists are eligible to gain such access.

a. Presumption of Openness

As in the case of access to documents, the most satisfactory norms from the point of view of journalistic effectiveness are those which establish a presumption of openness, subject to clearly defined, narrowly tailored exceptions grounded in legitimate public and private interests whose protection is necessary in a democratic society.

b. Self-governance of the Journalistic Profession

Effective self-governance within the journalistic profession can play an important role in advancing development of an enabling environment. The establishment of voluntary ethical codes of professional conduct and systems for professional self-governance can be important steps in promoting journalists' public responsibility and thereby advancing the goal of journalistic independence.[12]

An impetus for state legal regulation and other forms of interference with media content is often found in a public perception that journalists must be held accountable for dissemination of false, unsubstantiated, or unbalanced reporting. Otherwise, without some constraints on journalists, the irresponsible acts of a few members of the profession can perhaps undermine the work of honest public servants and legitimate institutions, threatening the development of fragile democratic governance. By making a visible effort to establish systems for effective self-policing of irresponsibility within the profession, journalists can pose a credible alternative to forms of content control that threaten journalistic independence and the right of the public to receive information.

Journalists' professional organizations in many countries, as well as the International Federation of Journalists, have adopted voluntary codes of conduct that articulate accepted professional ethical standards.[13] Among the topics commonly addressed in such codes are the duty to verify information; limitations on reporting information about individuals' private lives; respect for the honor and dignity of individuals; and observance of the principle of presumption of innocence. The latter principle, for example, establishes self-imposed limits on the reporting of facts and commentary regarding criminal proceedings until announcement of the court's judgment.

As to procedures of self-regulation, formal systems for hearing public complaints against alleged violations of ethical standards operate in a number of countries. Sanctions imposed on journalists found guilty of breaches of their professional duties include issuance of public statements of censure and orders that the journalists publish retractions of their offending statements.

In some cases, professional bodies exercise quasi-judicial power, issuing decisions that are binding on the complainant and the journalist who is the subject of the complaint. For example, the Lithuanian Ethics Commission of Journalists and Publishers exercises formal power and acts on the basis of delegated legislative authority. The commission is comprised of information media representatives elected by

journalists' organizations, and its activity and the Code of Ethics of Journalists and Publishers are incorporated directly into the Lithuanian Law on Public Information (Arts. 23–25). The formal complaint mechanism establishes a method for the presentation and resolution of complaints presented on behalf of individuals by the inspector of journalist ethics, a specialized ombudsperson for complaints against the mass media. This effort to have complaints evaluated by professional peer review closely resembles systems of voluntary information media self-regulation in a number of other countries. Either party to a dispute before the ethics commission may appeal its decision to a court.

Journalists' professional organizations generally play a key role in the development of professional ethics and procedures of self-governance; therefore, support for their efforts can be an important component in creating and sustaining an enabling environment. In order to fulfill this function, such organizations must be able to operate independently, free of coercion or manipulation by public officials or third parties. Thus, in a broader sense, an effective enabling environment will be one in which the autonomous activity of professional organizations is secured by legal guarantees and in which practicing journalists, scholars, and legal practitioners work together to buttress the social legitimacy of journalistic practice. Conversely, legal prohibitions against the establishment of professional organizations or trade unions, or other forms of pressure or control that impede their independent activity, will be detrimental to the creation or maintenance of an enabling environment for free and independent media.

Systems of professional self-regulation will never obliterate the possibility that individuals will abuse journalistic freedoms. However, in a legal setting providing an enabling environment for free and independent media, such systems should be in the forefront of efforts to promote the practice of journalistic responsibility. The existence of an opportunity to pursue such efforts successfully can help reduce the occurrence of acts of unethical journalistic practice and, therefore, the circumstances in which intervention by the legal system in the form of content regulation is deemed necessary to address the concerns of aggrieved parties.

c. Journalists' Right of Access to Legislative Proceedings

Few exceptions should exist to journalists' right of access to legislative proceedings. Legislative activity—the creation and amendment of legal norms by the representatives of the people—lies at the heart of democratic governance. Therefore, an effective enabling environment should be one in which the public is fully informed of the legislature's activity on an ongoing basis. Some constitutions establish a principle of openness of legislative proceedings. However, this principle is sometimes set forth as a norm of legislative process, not as a right of access guaranteed to the mass information media or the public as a whole. As a result, the constitutional provisions also provide the legislatures with unlimited discretion to close particular sessions—not a situation conducive to democratic governance. Such a presumptive right of access should also apply to proceedings of legislative committees, as well as the legislature when it meets in plenary session.

d. Live Broadcasting of Legislative Sessions

While it is perhaps not essential to an enabling environment, governments should strongly consider permitting live broadcasting of legislative sessions. Some countries have addressed the questions related to television or radio broadcasting of legislative activities. In some of these countries, state broadcasters are required by legislation to make a certain amount of airtime available to the legislature. In others (Georgia, for example), the legislature decides whether to permit live broadcasting of particular sessions.

e. Presumptive Right of Access on Executive Proceedings

A presumptive right of access should also apply to executive branch proceedings and institutions under the control of the executive branch. This includes administrative agencies, where important policy decisions are often made (e.g., a session of the broadcasting licensing authority).

f. Presumptive Right of Access on Judicial Proceedings

A presumptive right of access should also apply to judicial proceedings. This area strikes at the core of some very sensitive currents of public concern, often creating direct conflicts of countervailing constitutional and legal rights. For example, impetus to close judicial proceedings can arise from legitimate concerns about the protection of the rights of criminal defendants or other participants in the criminal process. For example, particularly in those legal systems where lay persons act as finders of fact (either on all-lay person juries or mixed courts with professional judges), there is the concern that pre-trial publicity might overwhelm the presumption of innocence and influence the outcome. As to other participants in the judicial process, it is widely held that closure might be necessary to secure the physical safety or personal dignity of other participants, such as witnesses. For example, closure might be required during the testimony of a victim of crime, so as to protect the confidentiality of that person's identity or dignity while testifying as to sensitive matters. In addition, it might be that a particular category of defendants, such as minors, might require closed proceedings in furtherance of certain public interests in rehabilitation. On the other hand, closed criminal trials can result in abuse of defendants' rights, allowing the authorities to act without regard to public scrutiny.

An enabling environment will be one in which an effort is made to balance these sensitive concerns, rather than failing to take the public interest in openness into account. As a result, this area demonstrates the importance of the question as to whether a constitutional theory of the freedom of the press is a significant component of an enabling environment. In this regard, a legal system might have normative provisions that require that judicial proceedings shall be open to the public. Despite this widespread articulation of a principle of openness, however, the existence of numerous exceptions in many states demonstrates that countervailing considerations associated with judicial process frequently take priority over the principle.

In sum, there should be some mechanism of circumscribing unlimited latitude extended to courts to close judicial proceedings, and to legislatures to authorize such closure. This mechanism should be grounded in a notion that openness advances the rights of the public under constitutional guarantees of freedom of expression to receive information through the mass media.

3. Protection of Confidential Sources

a. Recognition of the Societal Value of Protecting Confidential Sources

An enabling environment recognizes the societal value of journalists' protection of confidential sources and information obtained from those sources. Laws and professional codes of conduct in many legal systems reflect the conclusion that protection of journalists' sources is a fundamental condition of effective newsgathering in democratic society. Without confidence that journalists will not be compelled to disclose their identity, sources of information may be deterred from providing information on matters of public interest, thereby diminishing the effectiveness of the media's watchdog role. This situation can take on a constitutional dimension—that of the public's right to receive information from the news media.

b. Exceptions

Exceptions to journalists' protection of confidential sources, if permitted at all, should be prescribed in law, narrowly defined, and available only for advancement of interests necessary in a democratic society. Under optimal conditions for an enabling environment, a journalist's protection of confidential sources is absolute, with disclosure not justified in any circumstances. However, many legal systems do establish an exception to a legal or ethical duty not to disclose when certain public authorities have ordered disclosure. In such circumstances, an enabling environment will require that only a court, in a decision grounded in legislative norms, issue such an order.

However, the goals of democratic governance will not be advanced if courts enjoy open-ended discretion to compel disclosure. A judicial power that is not strictly circumscribed will result in placement of a burden on the journalist to demonstrate why disclosure should not be made. Instead, if the courts are empowered to order disclosure only in narrowly defined circumstances, the burden will properly be placed on the proponent of disclosure to show why it satisfies the standard for an exception.

The most commonly found exceptions to confidentiality are those that seek to advance the public interest in the right to a fair trial of criminal defendants. For example, a criminal defense might be based on the ability to identify a key witness whose identity is known to a journalist. If an exception to confidentiality is deemed justified in such circumstances, an enabling environment will require that a journalist be compelled to make disclosure only if the information is relevant to the criminal proceeding, is capable of being determinative (material) in regard to the defendant's case, and is not available from any source other than the journalist. Thus, the court would be required to show with particular specificity that the information sought is necessary to the proceeding before it, including examination of the possibility of obtaining the information from a source other than a mass information media outlet.

A controversial question is whether such an exception should be available if the prosecution makes a similar standard for disclosure, or if the authorities believe that disclosure is necessary in order to prevent the commission of a crime. Here, the threat to journalistic credibility is compounded by the danger that journalists might be perceived as instruments of the public authorities if they can be compelled to turn over such information. In any case, if disclosure is deemed warranted in such circumstances, the stringent standard described above should be applied.

Another controversial question is whether any public interest would ever be of sufficient weight to require a journalist to disclose a confidential source in a non-criminal proceeding. The European Court of Human Rights confronted this issue in its March 27, 1996, decision in the case of *Goodwin v. the United Kingdom*. In that case, a confidential source provided a journalist with detailed information from confidential records of a business enterprise that tended to reflect the company's precarious financial position. Because of the perceived threat of harm to the company resulting from public disclosure of the information, the English courts ordered the journalist and his publication not to make the information public. They also required the journalist to identify the confidential source, who was believed to have obtained the information illegally.

Reviewing the English courts' orders, the European court found that they constituted an interference with the journalist's exercise of rights under the free press guarantees of Article 10 of the European Convention on Human Rights and that the interests advanced by disclosure were not of sufficient weight to be necessary in a democratic society. The court stated that limitations on the confidentiality of journalistic sources call for the most careful judicial scrutiny.

If disclosure can be required in non-criminal cases, this might have important implications for proceedings in civil litigation, including defamation lawsuits against news media defendants. Some legal systems recognize an exception to confidentiality in those circumstances where a defamation plaintiff is unable, without disclosure by the defendant journalist, to identify persons who might have knowledge about the journalist's degree of fault in making a false statement. As in the case of criminal proceedings, if disclosure is to be permitted in such circumstances at all, it should be only if the information is indeed material to the plaintiff's claim and is not available from any other source.

4. Licensing of Journalists and Democratic Governance

Licensing of journalists poses risks to democratic governance. A number of countries, many of them in response to proposals from UNESCO in the 1970s, have recognized the practice of journalism as a licensed profession. According to its proponents, licensing promotes journalistic ethics and responsibility and takes the form of prohibitions against the unlicensed practice of journalism and the establishment of qualifications in the form of educational standards, such as graduation from a recognized journalism training program. On the other hand, detractors of licensing maintain that it can operate as a form of censorship by allowing the authorities to license only those journalists who do not incur the government's displeasure.

In 1985, the Inter-American Court of Human Rights in an advisory opinion ruled that journalist licensing laws in general are not compatible with the individual and collective rights guaranteed under Article 13 of the American Convention on Human Rights. In that case, the government of Costa Rica advanced three arguments in support of its statutory licensing scheme: (1) that licensing is the normal method of regulating the practice of professions; (2) that licensing of journalists is necessary to promote the public interest in journalistic ethics and responsibility; and (3) that licensing serves as a means to guarantee the independence of journalists from their employers. While recognizing that these goals fell into the general category of ensuring public order—one of the legitimate interests supporting restrictions on the exercise of rights under the convention, the court concluded that none was sufficient to serve as a legitimate interference with journalistic freedoms. In response to Costa Rica's first argument, the court concluded that journalism differs from the practice of other professions because it entails activity expressly protected under the convention.

The court also rejected the claim that a restriction on freedom of expression could serve as a means of guaranteeing it, concluding instead that the greatest possible amount of information is essential to the public welfare. Finally, while articulating its agreement with the goal of protecting the independence of journalists, the court found that this goal could be achieved without placing limits on who may enter the practice of journalism.

C. Content-based Regulation

Universally, it is understood that freedoms of speech and of the press are not absolute. All legal systems tolerate content regulation to some extent, in order to advance certain state, collective, and individual interests. Much such regulation takes place through the mechanism of direct regulation of content, effected through legislative, executive, and judicial acts. A broad view of content regulation perceives it as any form of external intrusion into the professional activities of gathering, editing, and reporting public sector information, and the dissemination of opinion on public matters. In this regard, it is again important to emphasize that an enabling environment will be one in which this takes place according to the rule of law.

1. Fundamental Propositions

Before we examine specific issues that arise in the context of the range of public and private interests that are advanced in the imposition of limitations on news media activity, one should bear in mind some fundamental propositions, which are described below. Although rights of free expression are not absolute, an enabling environment is one in which the political culture recognizes the value for democratic society of the free flow of information and ideas. This recognition of the centrality of freedom of expression to fundamental values and democratic society has been expressed on numerous occasions by the European Court of Human Rights:

> [F]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment…It is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[14]

Of particular significance is the court's recognition of the "essential function" that the news media—both print and electronic—play in advancing the goals of democratic society:

> One factor of particular importance...is the essential function the press fulfills in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[15]

According to the court, this essential role informs not only the rights of news media organizations and their representatives, but also the right of the public to receive the information and ideas that the news media have imparted. In this regard, the court has cited the news media's "vital role" of "public watchdog" in imparting information of serious public concern. In addition, the court has emphasized that freedom of the news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

Manifestation of this recognition of value should be found throughout the normative structure, including international, constitutional, and legislative norms, and in their application in executive and judicial acts. Indeed, it can be said that an enabling environment should include textual recognition of news media freedoms in international instruments to which the state is a party, and in the state's constitution. Moreover, these norms must be directly applicable by the courts and superior to any legislative or administrative acts.

In an enabling environment, restrictions on news media freedoms must be closely defined and narrowly circumscribed, limited to those which are necessary in a democratic society. In addition, the proponent of a restriction should bear the burden of justifying its imposition. Law must prescribe any restriction on expression or information. This means that the restriction must exist in the form of a written law which must be accessible, unambiguous, drawn narrowly, and sufficiently precise so as to enable an individual to foresee the consequences of his or her actions to a degree that is reasonable in the circumstances. In their application of interference of news media freedom, the authorities must act in a lawful and non-arbitrary manner on the basis of objective criteria. In addition, an enabling environment will view such

restrictions as exceptions to the general principle of news media freedom; therefore, the burden of justifying the interference must be placed on the proponent of a restriction, and the exceptions must be interpreted narrowly.

In an enabling environment, the legal system will provide adequate safeguards against abuse, including prompt, full, and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal. As stated above in the section on the rule of law, the application of legal norms containing interferences with news media freedoms must be subject to independent judicial control.

An enabling environment will take a broad view as to what acts—governmental or private—constitute an interference with the exercise of news media freedoms. An interference with news media activity is not in itself a violation of fundamental standards of media freedoms. But without recognition that certain acts can be a potential violation of news media rights, it is easy for a political and legal order to limit severely the exercise of protected news media freedoms. Thus, under a narrow construction of the concept of interference, only a state's direct intervention to block the flow of information or ideas prior to dissemination would qualify.

However, it is of central importance to evolving international standards on the relationship among news media, state, and society that this narrow characterization be rejected. Instead, systems of prior review as well as a broad range of other actions by the public authorities that have an impact on expressive activity should be recognized as interferences. These include a variety of post-publication sanctions imposed on the basis of content, as well as the use of generally applicable legal rules that have an indirect effect on the exercise of editorial discretion.

The broad scope given to interferences reflects the position that all acts of public authorities—the legislative, executive, and judicial branches of government—that have a practical impact on news media activity will also potentially include a fundamental freedom of expression dimension which must be taken into account as a matter of law. This does not mean that freedom of expression will always prevail in a clash with other fundamental rights or public interests. Such an approach would make free press rights absolute, which they are not. Rather, it means that free press rights must be taken into account in determining the legitimacy of state action.

An enabling environment is one that recognizes that self-censorship poses a threat to democratic governance. The threat of legal liability imposes a so-called "chilling effect" on those persons engaged in news media activity. A key element in the advance of news media freedoms in relationship to content regulation has been the courts' recognition that the role of the news media is of such fundamental importance to democratic governance that media representatives must to a reasonable extent be insulated from self-censorship.

An enabling environment will recognize that private acts can also implicate the exercise of news media rights. It is important that the legal system recognizes what is called the "third-party effect"—that fundamental guarantees of news media freedoms are broader in scope than simply offering protection against acts by those who are in public authority. Instead, the principle of third-party effect provides, for example, that a news media organ should not automatically lose its constitutional protection as a threshold matter in a lawsuit against it, simply because that lawsuit has been initiated by a private person and not a public entity.

2. Forms of Content Regulation

a. Pre-publication Review

Systems of formal pre-publication review are incompatible with the basic principles of free press and democratic governance. In the second half of the 20th century, it became recognized as a matter of international human rights law that, as a categorical matter, formal administrative censorship is inconsistent with fundamental tenets of human rights and democracy. This principle is explicitly expressed, for example, in Article 13(1) and (2) of the American Convention on Human Rights:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure
>
> • Respect for the rights or reputations of others
> • Protection of national security, public order, or public health or morals

In accordance with this recognition of the incompatibility of prior censorship with democratic governance, most states no longer employ such structures. Instead, as the American Convention on Human Rights permits, they employ regimes of subsequent punishment of perceived abuses of news media freedoms.

b. Subsequent Punishment

Systems of subsequent punishment must be consistent with generally applicable international standards governing criminal and civil procedure. Systems of subsequent punishment for alleged abuses of news media freedoms are often found in the form of criminal sanctions, thereby triggering the need for recognition of international standards in criminal law and procedure (including presumption of innocence). In addition, as to protection of individual interests, they are often in the form of civil procedure. It is subsequent punishment that poses the threat of self-censorship; therefore, the fundamental propositions of fairness, impartiality, and objectivity set forth above are applicable.

c. Registration Systems

Media registration schemes in which content is a criterion under which the authorities in their discretion may refuse registration are suspect in an enabling environment. A number of legal systems require some form of registration of media outlets. However, in most systems, this registration is not subject to discretion by the authorities on the basis of the applicant's anticipated content. Systems in which registration is subject to discretion based on an official's judgment concerning the content of the media organ are suspect in an enabling environment, and they will be incompatible with it unless accompanied by effective rule of law protections, including a right of appeal to an independent judiciary.

3. Protection of State Interests

Throughout history, governments have sought to impose controls on the flow of information and opinions in furtherance of a range of state interests. This is to be expected, because much of constitutional law

represents the effort to find a balance between the exercise of constitutional rights and the state's perceived duty to serve the public interest by measures such as the protection of national security and the preservation of public order. Thus, these public interests include restraints in the name of national security, sanctions against violence and public disorder, and protection of the honor of state institutions, officials, and symbols.

These controls have often been imposed by means of formal systems of pre-publication censorship. But even where formal censorship is absent, they are advanced by criminal laws providing for subsequent punishment. In addition, they have found another area of application in a number of media registration laws, which prohibit the granting of approval to operate a news outlet if the authorities conclude that the content of the applicant will constitute an abuse of free press rights.

a. National Security

Governments everywhere, as well as international principles, recognize that national security can be a basis for regulating free expression. At the same time, governments can enlist this broad, ambiguous concept to stifle or suppress free expression and criticism. The *Johannesburg Principles on National Security, Freedom of Expression, and Access to Information*, a compilation of fundamental propositions adopted in 1995 by a group of experts in international law, national security, and human rights, closely address the sensitive matter of national security. For example, Principle 1.2 states: "Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest." Principle 1.3 states:

> To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.

Finally, in Principle 2, the question of a legitimate national security interest is addressed.

> A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

b. Prevention of Disorder, Including Criminal Prosecution of Virulent Expression

The degree of virulence expressed should not in itself be the criteria for prosecution under criminal laws prohibiting incitement to violence or disorder. Under international standards, it is recognized that inflammatory speech can be responsible for inciting violence and disorder. Therefore, those standards permit restrictions on such speech.

Enforcement of a broadly stated and construed criminal law against incitement (to violence, disorder, or hatred) can be an effective means of imposing self-censorship on news media representatives. It will not

be conducive to an enabling environment if the authorities impose or threaten to impose criminal sanctions based solely on the degree of virulence in the expressive activity in question. Instead, the dispositive question in a democratic society is not the degree of virulence, but instead the question of whether the speaker is advocating violence and whether it can be expected that his or her statements would produce a violent result.

The European Court of Human Rights has developed a substantial body of jurisprudence in this area. In a number of these cases, the applicants were found guilty in their domestic legal systems of publishing or broadcasting statements that were construed as incitement to violence. The court has ruled in a number of cases that criminal liability and sentencing decisions in the domestic courts have violated news media freedoms guaranteed in Article 10 of the European Convention on Human Rights, despite the virulence of many of the communications in question, unless the statements constituted appeals to violence. For the European court, the decisive question has been whether the prosecution in the domestic legal systems was necessary in a democratic society. In making this determination, the court has examined the language of the statements in question, the context in which they were made, and the nature of the sanctions imposed against the applicants to determine their proportionality in relation to the perceived societal harm.

c. Laws Protecting Honor of Government Institutions, Officials, and Symbols

Many countries have criminal laws that seek to protect the honor of state institutions, officials, and symbols against insult. In this field of law, often called "seditious libel," the perceived harm is not in the presentation of false factual assertions, but instead the disparagement or degradation of symbols of state power or national unity.

*I*n an enabling environment, such laws and their application must be presumed to be incompatible with fundamental human rights and employed, if ever, only in extreme circumstances. Perhaps more than any other area, seditious libel laws criminalizing insult of state institutions and officials have been subject to abuse by public officials seeking to insulate themselves from the scrutiny and criticism of the news media and the public.

An important aspect of these laws generally is that truth of the statement is not a defense, and the indeterminacy of insult lends itself to arbitrary enforcement. Progress toward an enabling environment will not be enhanced by the existence and enforcement of laws that are not limited to protection of individual dignity or reputation, but instead are available to shield the authorities as a class from criticism. The key perspective from which seditious libel should be approached is whether application of such laws is necessary in a democratic society. In this regard, an enabling environment will recognize that the limits of permissible criticism should be even wider with respect to the government than with individual public officials.

d. Election Laws

A vital element of the enabling environment for stable democratic institutions is to design institutions that minimize the abuse of government authority during elections. One element of the enabling environment directly affects the political process—election-related media law. There are several aspects of such laws: access by candidates, editorializing and expressions of bias by the broadcaster, manipulation of the broadcasting system by the government, and rules concerning political advertisements. In some countries, there are regulations on the broadcasts of public opinion poll results. For example, dissemination of poll results in a period shortly before the election itself may be prohibited.

The Council of Europe has called on the governments of its member states to "examine ways of ensuring respect for the principles of fairness, balance, and impartiality in the coverage of election campaigns by the media, and consider the adoption of measures to implement these principles in their domestic law or practice where appropriate and in accordance with constitutional law."[16] The council encouraged self-regulatory measures by media professionals themselves, in the form of codes of conduct which would set out guidelines of good practice for responsible, accurate, and fair coverage of electoral campaigns.

There is no perfect answer, no absolutely correct model for the set of laws that deal with these questions. In the period after 1989, in the first bloom of transition in eastern Europe, there were often recommendations that each candidate receive equal time on a national or regional broadcasting entity. But those who considered that democratic institutions are furthered by a stable contest between a limited number of political parties found this system chaotic and counterproductive. Equal access for all declared candidates may vitiate the importance of election coverage, weaken party structure, and diminish the likelihood that several strong candidates can emerge. Some systems have a two-tiered approach: a mode that assures some access for all candidates, but a sifting process that recognizes that public debate will consolidate around several front-runners and several major issues. Some statutes place greater burdens on the state-owned media, leaving the private broadcasters freer to decide how candidate access should be furnished. Some statutes indicate that, if a station provides time to candidates, it must do so in a nondiscriminatory way. Another technique is to impose a ceiling on the amount of time that can be afforded any individual candidate.

The extent to which the managers of a broadcasting entity can have their own views and use their station to promulgate them during an election is also problematic. In the United States, broadcasters have long taken the position that they have a First Amendment right to state their preferences and to editorialize in favor of one candidate or another.

European licensing regimes have been quite different and have preferred an approach in which the station is thought to be objective and impartial, a position inconsistent with editorializing. European rules, unlike those in the United States, tend to limit or prohibit political advertising, on the grounds that excessive access to the media through paid advertising gives too much of a preference to the candidate of wealth.

The Italian approach serves as a good example. A draft law introduced by the government in 1999 proposed to ban political advertising during an election campaign. The then-opposition, led by Forza Italia leader Silvio Berlusconi, owner of much of Italy's private electronic media, argued that any limits on the right to advertise are an infringement on their freedom. The bill also obliged state television to carry a certain quantity of roundtable debates and discussions among party leaders, but said that carriage of such events on private electronic media would be optional. In 2000, the bill passed; however, it apparently did not hinder Berlusconi's 2001 win in the race for prime minister.

In many of the transitions, there has been little to shield broadcasters—private, public service, or government—from coercion by the ruling party during the election process. To put it differently, many broadcasters, indebted to the government for the availability of their license and their continued vitality, have used their valuable asset to serve their patrons. Few elements of government-broadcaster interaction are more adverse to rule of law notions than the pressured exploitation of the power of radio and television to affect the outcome of elections.

Thus, an enabling environment for stable democratic institutions must seek to design institutions that minimize the abuse of government authority during elections. For example, in 1993, a special arbitration tribunal was established in Russia to receive complaints during the election process, whether complaints

by candidates about the media, or from media about the government. This tribunal, and its successor entity, abolished on June 3, 2000 by President Vladimir Putin, had little power except—as is often the case with such panels—to render a decision and publish it. In addition, in several societies, special election commissions are established that are empowered to impose fines for abuses of privileges by media entities, or to provide sanctions for candidates who seek to circumvent or violate election laws concerning the media.

e. Protection of Judicial Administration

An enabling environment will strive to achieve a balance between protecting the integrity of judicial proceedings as well as the exercise of news media freedoms and the need for public supervision of the work of the courts. Promotion of the impartial, effective administration of justice is a goal of all democratic legal systems adhering to rule of law precepts. In a number of legal systems, penalties can be imposed on news media for the dissemination of information and commentary concerning on-going judicial proceedings. In some cases, these steps are taken to protect the fair trial rights of criminal suspects and defendants. In others, they are viewed as necessary to maintain the orderly administration of justice and public respect for the judicial system.

This is an area that exemplifies the need for recognition and application of the fundamental propositions of fairness, impartiality, and objectivity set forth above. For example, a thin line exists between what might be a legitimate interest in protection of respect for the administration of justice and an illegitimate desire to protect the judiciary from public criticism. In the same way, while protection of the rights of criminal suspects and defendants is widely recognized as a fundamental human right, this principle could be subject to abuse if the authorities seek to shield the criminal process from public scrutiny. In sum, a categorical approach that does not sufficiently take news media freedoms into account in such circumstances will not be compatible with an enabling environment.

4. Protection of Collective Interests

Laws in this broad category seek to accomplish a number of objectives. For example, among the interests found here are protection of public peace and the dignity of identifiable groups by means of hate speech regulation, and protection of public morals and religious beliefs. These are extremely sensitive areas of public policy, to be determined through the democratic process according to a society's values. It is difficult to state as a matter of substantive law that any one particular approach to these matters is more or less indicative of an enabling environment. At the same time, however, it must be remembered that the fundamental propositions of fairness, impartiality, and objectivity must apply.

Perhaps of value in this complex area are the following principles articulated by the Committee of Ministers of the Council of Europe in their recommendation of October 30, 1997 on hate speech:

> Principle 6
> National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyze, and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas.
>
> To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech on the one hand and any responsibility of the media and media professionals contributing to their dissemination as

part of their mission to communicate information and ideas on matters of public interest on the other hand.

Principle 7
In furtherance of principle 6, national law and practice should take account of the fact that

- Reporting on racsism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10, paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in paragraph 2 of that provision.

- The standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10 as established in the case law of the convention's organs, having regard, *inter alia*, to the manner, contents, context, and purpose of the reporting.

- Respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

5. Protection of Individual Interests

Legal systems throughout the world seek to protect what are viewed as the individual personality rights or interests of good reputation, privacy, and dignity. Generally, these protections take the form of criminal and civil proceedings in defamation, privacy protection, and insult. An important feature of this complex area of law is the fact that in many legal systems these interests—similar to the interests in freedom of the news media—rise to the level of fundamental rights guaranteed in constitutional and international norms. Once again, this interaction between competing rights and interests must be subject to the fundamental propositions of fairness, impartiality, and objectivity.

a. Recognition of Sensitive Issues and Values

An enabling environment must recognize the sensitivity of the issues and values at stake in the intersection of free news media and competing individual interests. In the area of individual personality rights protection, a dominant theme throughout the world is the high level of use and visibility of defamation law actions, brought under both criminal and civil law. The prevalence of such actions, including the threat of penal and/or monetary sanctions, poses the threat of self-censorship. It is for this reason that many legal systems have recognized the existence of a fundamental rights dimension in the form of freedom of expression. The European Court of Human Rights, for example, has developed an extensive body of case law that includes significant protections for statements made regarding matters of public interest. These include the maxim that public officials must tolerate considerably more criticism than must private individuals and that the burden of evidentiary proof cannot be imposed on a defendant to prove the truth of a value judgment or statement of opinion. An important determinant for the court is the question of whether the defendant acted "in good faith," a standard that the court appears to interpret as conduct consistent with journalistic standards and the duty to report on matters of public interest.

b. Issues in Defamation Law

It is of fundamental importance in an enabling environment that the legal system recognizes that its application of defamation laws is at the same time an interference with the exercise of news media

freedoms. A defamatory statement is one that is deemed to lower a person's reputation in the community. Defamation laws are found in legal systems throughout the world, and protection of the interest in reputation is recognized in international instruments. Legal norms intended to protect these interests are often found in criminal codes and in civil code or tort law provisions recognizing the interests as civil rights capable of enforcement by means of actions for monetary damages.

However, unless certain protections are available, defamation laws can be instruments of repression of the news media in its reporting on matters of public interest. By its very nature, news media activity will often present information and ideas, which may be construed as depicting individuals in a negative image or may be viewed as invasive of an individual's personal privacy. Unless news media freedoms are taken into account in defamation law, the threat of criminal sanctions or civil money damages awards will effectively cause self-censorship, to the detriment of democratic governance.

In this regard, it is detrimental to news media freedoms if a legal system takes an approach that categorically places false statements of fact or expressions of opinion deemed to be excessively critical completely outside the protection of fundamental guarantees of news media freedoms. An enabling environment will adopt the view that actions in defamation (as well as insult) inherently have a news media freedom dimension, owing to recognition of their inherent chilling effect and its negative consequences for the news media's essential role in democratic society and the public's right to know.

In the seminal case of *Lingens v. Austria*, the European Court of Human Rights in 1986 discussed the threat that self-censorship poses to the public's right to know. In that case, Austria argued before the court that the post-publication sanction of a monetary fine did not "strictly prevent" a journalist from expressing himself. The court, however, concluded that the penalty imposed on the author:

> [N]onetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future. In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[17]

Thus, the European court has consistently held that public officials must tolerate criticism related to matters of public concern to a greater extent than must private persons.

The status of the plaintiff is one of the many crucial variables that should be considered in developing a defamation law approach that is compatible with an enabling environment. Others include the ascertainment of the correct placement of the burden of proof imposed on the parties in regard to the alleged falsity of the statement in question. For example, the European Court of Human Rights recognizes that the placement of a burden on the defendant to prove the truth of a statement of opinion is incompatible with the exercise of news media freedoms under the European Convention on Human Rights. The court's approach is grounded in the position that opinions are personal, and unlike statements of fact, cannot be subject to rectification.

Another important question is whether only defendants who were at fault should be liable for false statements; in recognition of the role of the news media in democratic governance, many legal systems will not impose liability if the journalist was not at fault. In addition, under the test established by the *U.S. Supreme Court in New York Times v. Sullivan* (1964), a finding of liability will be made in cases where the plaintiff is a public official or public figure only if the defendant knew the statement in question as false and purposefully avoided making a determination as to falsity.

c. Protection of Individual Dignity

An enabling environment will seek to balance protection of individual dignity against the threat to news media freedoms by limiting the application of insult laws and treating them with caution. Insult laws carry an inherent threat to the exercise of news media freedoms, due in particular to their ambiguous nature and the absence of truth as a defense. It is widely accepted that protection of individual sense of self-worth can be implicated and perhaps violated by dissemination of personal attacks. Thus, many legal systems have established criminal and/or civil sanctions against insulting statements, in which the crucial question is not the truthfulness of the statement in question, but the intent of the speaker. Insult laws can be dangerous for the exercise of news media freedoms if not construed and applied narrowly, limited strictly to circumstances in which the statement carried no information of public importance, and clearly expressed with intent solely to injure the victim.

d. Protection of Individual Privacy

In adjudicating disputes concerning claimed violations of personal privacy, legal systems must strive to develop standards for determination of distinctions between public and private information. Many legal systems place a high priority on protection of individuals against dissemination of statements that violate their personal or family privacy. Here, the important point is that reasonable construction of the notion of privacy is necessary. It should not be a shield behind which to hide acts of public importance from public scrutiny. A difficult problem here is separating the notions of "public importance" from "public interest", since it is certainly possible that the latter might include information that is legitimately private.

e. Right of Reply or Correction

Legal obligations to provide an opportunity to reply or to demand a correction concerning media content can serve to address perceived abuses of journalistic freedoms in a form that is less threatening to media independence than regulation by means such as defamation lawsuit. However, advancement of an enabling environment will be impeded if such obligations sweep too broadly or intrude too deeply into the exercise of editorial discretion. In many legal systems, legislative acts such as civil codes or mass media laws provide judicial remedies of reply or correction to persons whose legal rights or interests have been violated by dissemination of media content. Under a right of reply, a news media outlet is obliged to disseminate a statement that the injured party prepares. The right of correction (or retraction), on the other hand, requires the media outlet to disseminate its own statement correcting its earlier offending statement. The availability of such remedies is often viewed as a more efficient and effective means of satisfying the concerns of persons who believe they have been injured by offensive media content. It may also be viewed in this way by those who seek access to the mass media for dissemination of their views in opposition to statements previously broadcast or published. In addition, proponents of such remedies believe that they serve as an alternative to intrusive and often expensive defamation litigation that can exert a chilling effect on the exercise of independent editorial discretion. Viewed in this light, the availability of these remedies can serve to advance development and maintenance of an enabling environment by providing the authorities and general public with assurance that the effect of journalistic abuses can be alleviated without unreasonable interference into the exercise of journalistic freedoms.

At the same time, it must be noted that such remedies can in themselves threaten journalistic freedoms if not kept within limits that reflect respect for the rights of journalists and of the public to receive information. The question of whether such rights are appropriate is a very controversial one in news media law. For example, journalistic rights will perhaps be threatened if claimants are entitled to demand a right of reply or correction simply because they disagree with certain facts or opinions expressed by a

media outlet. Without some limits, a news media outlet might be so overwhelmed by such demands that it will lose its own editorial identity and become simply a conduit for the statements of others.

In addition, without such limits, publishers and broadcasters might be forced to reduce the amount of space or time available for paid advertisements, with detrimental impact on their financial independence. Therefore, an enabling environment should be marked by efforts to achieve a balance of rights and interests in this regard. As a threshold matter, if publication of a reply is required, its size should not exceed the volume of the text to which the objection was raised, nor should its position of prominence within the printed matter or broadcast be greater than that of the original statement.

But further considerations should exist beyond these practical concerns. For example, many legal systems that recognize rights of reply or correction limit the exercise of such rights to factual statements in the media, and not to expressions of opinion. Also, perhaps the persons who are allowed to pursue such remedies through the judicial system should be limited to those who can prove that the statement in question was false, and perhaps also that they have suffered an injury to their legal rights. Thus, a claimant might have to prove not only that the statement in question was false, but that it also lowered her or his reputation. Finally, any system of reply or correction should provide a legal defense by relieving a news media outlet of any duty to publish a reply in cases where it will lead to a legal violation. For example, when a reply would constitute a statement defamatory of a third person, the outlet must not be obliged to honor the complainant's claim.

D. Content-neutral Regulation: Risk of Manipulation

An enabling environment will be one in which legal institutions are able to provide media with sufficient substantive and procedural protections against indirect manipulation. In all legal systems, an almost limitless range of opportunities exists for public officials or private actors to attempt to manipulate the media, if they are inclined to do so. These opportunities are found in the manipulation of laws that are not explicitly targeted against news media content, but instead are seemingly content-neutral on their face while still capable of influencing the editorial decision-making of the media. Here, even more than with the material above, it is impossible to be exhaustive. There will always be ways to influence media content. There are many ways in which the public authorities can seek indirectly to influence media content. Subsidies, customs regulations, copyright, newsprint availability, costs of doing business with state entities (publishing houses), taxation, general anti-competition laws, public access requirements, and access in election campaign requirements are only a few examples.

These methods of indirect influence can occur by way of both substantive rules and their application. For example, regarding the former, the authorities could establish discriminatory tax classifications that impose higher taxes on some media outlets than are imposed on others. On the other hand, it might be the case that tax classifications as a matter of normative law are equal, but that different media outlets will be subject to selective enforcement—a matter of law application.

Attention must be paid to the tax laws of a state in transition and their enforcement. In too many societies, government authorities have used nonpayment of taxes as a pretext to raid, harass, or close a newspaper. One element of the rule of law, significant when it comes to the press, is a bar on selective enforcement. Of course, no statute is fully enforced against all those who engage in violations, but it is often the case that selective enforcement is the culprit in actions against print media or broadcasting stations.

It is not possible to state simply that such substantive rules should be outlawed in an enabling environment. These measures are enacted as part of the lawmaking and enforcement authority found in all

legal systems. Therefore, the best attributes of an enabling environment in this regard will be the existence of adequate rule of law protections and consideration of the fundamental propositions of fairness, impartiality, and objectivity set forth above.

E. Protection of Journalists in their Professional Activity

1. Internal Press Freedom

An important issue for an enabling environment is the extent of journalists' and media professionals' freedom to exercise their rights and perform their responsibilities in light of disagreement with private ownership. In a number of countries, the legal systems attempt to accommodate these competing interests by providing incentives for the development of an editorial program and the establishment of systems for the reconciliation of disputes.

2. Physical Protection

An enabling environment is one in which the authorities have the willingness and power to prosecute those persons who physically intimidate or attack media representatives, that is, those who seek to act violently against news media representatives will not be able to do so with impunity. It will be extremely difficult for the news media to function effectively if generally applicable criminal laws are not enforced by the authorities, or are done so in an arbitrary, selective fashion.

In a 1996 recommendation, the Committee of Ministers of the Council of Europe addressed these questions, calling on member states to "investigate instances of attacks on the physical safety of journalists occurring within their jurisdiction," and to "use all appropriate means to bring to justice those responsible for such attacks."[18] It should also be noted in this regard that journalists' and media professional organizations can play a positive role by providing a sense of security for their members.

6 The Broader Enabling Environment

A. New Technology and the Enabling Environment

Almost all of this study has dealt with traditional media: print and radio and television broadcasting. Already, however, the extent to which stable democratic institutions are furthered by the media turns on new media technologies as well. In this section, elements of these new technologies, especially satellite and the Internet, are discussed—perhaps too briefly given the growing importance of the subject.

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.

What is often overlooked, however, in the Internet and democratic processes, is the value of ensuring that there is an information policy that affirmatively ensures public access to information points and also seeks to ensure that there is civic information available on the local network. Over the next decade, the Internet may replace (and certainly will complement) broadcasting and print media as the mode through which a society becomes informed. The kind of effort that WorldTel is undertaking in southern India and elsewhere, seeking to establish low-cost access to terminals in Tamil Nadu, is an example of a positive way of reforming, shaping, and creating a more democratic information space. The availability of Internet access may also be a method of raising expectations for the local press. If readers are exposed to a more competitive world standard, they may be more demanding of publishers within the country.

One important mode of encapsulating this idea is universality of access by the public to the media, especially those new media in which information specifically becomes part of public transactions. The United States and Europe have considered a framework for making telephony and now Internet more universally available. The Council of Europe has stated that "states should foster the creation and maintenance of public access points for all to a minimum set of communication and information services in accordance with the principle of universal community service." Within the same set of recommendations, the Committee of Ministers urged that

> Member states should encourage public authorities at central, regional, and local levels to provide the general public through new communication and information services with the following basic content and services:
>
> a. Information of public concern
>
> b. Information about these public authorities, their work, and the way by which everyone can communicate with them via new communication and information services or through traditional means
>
> c. The opportunity to pursue administrative processes and actions between individuals and these public authorities such as the processing of individual requests and the issuing of public acts, unless national law requires the physical presence of the person concerned
>
> d. General information necessary for the democratic process[19]

Public education to increase familiarity with the Internet, comfort with its use, and understanding of its potential is another part of the enabling environment. Singapore, although historically restrictive in many respects, has made it a specific goal to ensure that virtually the entire population has access to the Internet and becomes literate in its use.

An extremely important element of the enabling environment for the Internet is the security of communications. Here, a major question is the extent to which the population thinks that the government monitors websites or collects information on usage by individual citizens or associations. Often, the very architecture of the Internet determines the nature of government control.

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. Turkey, for example, sought to control receipt of the then-Kurdish satellite signal, MED-TV, by forbidding the sale of dishes that could capture it.

Another means of limiting the widespread viewing of certain satellite signals (whether news or entertainment) is the imposition of restrictions on the freedom of choice exercised by cable television operators. India, during one of its conflicts with Pakistan, forbade the carriage and retransmission of Pakistani television on domestic cable television systems. China has taken steps to discourage the downlinking of BBC into its vast terrain.

It is not clear whether any restriction on information circulating on the World Wide Web is possible or desirable as part of a strategy for moving a transition society towards more stable democratic institutions. Still, it is standard in many societies for there to be concerns about certain categories of content, and for those concerns to take the form of regulation. The debate is fierce over whether restrictions that are generally deemed permissible with respect to radio and television can be acceptable where the new technologies are concerned. These include restrictions on hate speech when closely defined, as in *Brandenburg v. Ohio* in the United States, on speech that can be deemed destabilizing to society, or on speech that is subject to the regulatory aims identified as legitimate in paragraph 2 of Article 10 of the European Convention on Human Rights.

B. Role of Civil Society and NGOs

In modern democratic societies, the process of developing appropriate and stable institutions increasingly relies on associations and groups that are independent of government. But as Julie Mertus has written, "Civil society cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government."[20] These associations play a central role in the development of civil society, but they require a set of rule of law mechanisms that permit their independent existence and foster their growth. A strong civil society also demands and oversees legal constraints on state power and the accountability of state actors.

Here, too, the vast increase in the number and effectiveness of NGOs is significant as an element of the enabling environment for free and independent media. NGOs are valuable as part of the armament of leavening government authority and shaping media structures, as part of the process of production of content, and for using media to advance pluralism in a society.

NGOs help assure a vital civil society, and, conversely, a healthy civil society produces effective NGOs. Without a civil society—one that is interested, active, and a user of the media, an enabling environment proper for free and independent media cannot really exist.

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 a 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.[21]

C. Education in the Importance of Rights

There are those who believe that the imposition of a rights structure will only be temporary if such a system did not arise from the expressed willingness of the people. An occupation army can impose a set of laws, put judges in place, and decree a rule of law. When the external force disappears or when the precipitating cause for transition loses its sway, then the particular elements of law and their impact on democratization might begin to weaken.

As a result, one important element of the enabling environment is continuing attention to public understanding, public perceptions, and public demand that undergird 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. 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, NGOs 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.

D. Copyright and the Enabling Environment

An area of growing interest and importance for the enabling environment is copyright law. The practice in many transition societies, particularly by independent media, has been to be relatively cavalier about legal rights of owners of programming, especially films and other programming produced abroad. Cost of programming can be one of the great impediments to the launching of new media enterprises, and the actual costs of obtaining consents may be more than a start-up company can provide.

On the other hand, attention to copyright law has a certain justice to it, and, of course, respect for copyright law is an integral aspect of respect for law generally. In that sense, copyright becomes a key determinant as to whether the society is moving towards becoming a rule of law society. There can be heavy costs associated with being a rogue state with respect to intellectual property.

There is a hazard, in a time that favors protection, of closing off information or making its use too expensive, and copyright law must be fashioned so that individuals have access to a liberal public domain of language and ideas for use in their creations. The doctrine of fair use or its equivalents in other countries is aimed at providing breathing room.

E. Background and Foreground Factors

The character of the citizenry and its capacity to use such available elements of the press 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.

At its broadest, 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.

7 Resources and Techniques for Enhancing the Enabling Environment

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.

A. Technical Assistance

One consequence of the aid pattern is that a number of organizations that specialize in providing technical assistance have developed. 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 (i.e., 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 at home.

B. Resort to Constitutions and to International Instruments

Aside from technical assistance, a number of techniques have been used to encourage states to provide a regime of law and policy more consistent with human rights and free speech principles. Such techniques reflected a characteristic that is often called “conditionality.” An example of this mechanism is the conditioning of eligibility for certain U.S. benefits on compliance with specific copyright objectives. Other important examples of conditionality include the establishment of requirements for adjustment of internal laws so as to receive most-favored-nation treatment, to be accepted in the European Union, or to qualify for membership in the Council of Europe. Another form of conditionality would be the requirement of certain adjustments in laws and practices as a condition for receiving financing from international bodies. Such efforts could be enhanced by the establishment of an institution that would report annually on the state of the enabling environment in different countries.

8 Conclusion

Our effort in this study has been to identify and describe processes of change that move societies toward democratic governance, focusing on the enabling environment for media law reform. Throughout, 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 on-going attention to the developing institutional structure in order to understand how it functions.

In addition, economic issues, such as the questions of state subsidies or tax incentives for both state-owned and private media should be addressed, with recognition of the fact that reforming economic structures often cannot by itself support the development of an economic enabling environment for truly free and independent media. The inevitable imbalances within institutional and economic structures will have an important impact on the evolution of media law, and should be addressed as an important element in this process.

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.[22] Development of one will have to await another day.

Endnotes

[1] C. Edwin Baker, "The Media that Citizens Need," *Communications Law in Transition: A Newsletter*, volume 1, number 1, October, 13, 1999.

[2] *ibid*

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[4] Julie Mertus, "From Legal Transplants to Transformative Justice:Human Rights and the Promise of Transnational Civil Society," 14 *American University International Law Review* 1335, 1384 (1999).

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[8] Recommendation No. R(94) (13) Measures to Promote Media Transparency, Council of Europe (Adopted by the Committee of Ministers on 22 November 1994)

[9] Neil J. Kritz, The Rule of Law in the Postconflict Phase: Building a Stable Peace, in *Managing Global Chaos: Sources of and Responses to International Conflict* 587, 588 (Chester A. Crocker et. al. eds., 1996); see also Richard H. Fallon, Jr., The "Rule of Law" as a Concept in Constitutional Discourse, 97 COLUMBIA LAW REVIEW (1997) (discussing the various definitions of "rule of law"); John Reitz, Constitutionalism and the Rule of Law: Theoretical Perspectives, in *Democratic Theory and Post-Communist Change* 111 (Robert D. Grey ed., 1997).

[10] Conference on Security and Cooperation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, ¶¶ 2, 5.3, 5.6, 5.8, 5.10-5.12, 5.14-5.19, reprinted in 29 *International Law Materials* 1305, 1307-09 (1990).

[11] "Beta Agency Documents Increased Repression of Media," BBC Monitoring World Media, April 11, 1999. Source: Beta News Agency, Belgrade, in English 2108 gmt 3 November 1999.

[12] In this discussion, the term "journalist" is used to encompass print media publishers and electronic media owners and executives, as well as editors, commentators, and reporters.

[13] Two Internet sources containing numerous examples of professional codes, as well as other relevant material, are (1) the "EthicNet" website of the University of Tampere, Finland [http://www.uta.fi/ethicnet]; and (2) the "Media Ethics" website of Professor Claude-Jean Bertrand [http://www.u-paris2.fr/ifp/Deontologie/ethic].

[14] *Nilsen and Johnsen v. Norway* ¶ 43, Judgment of November 25, 1999.

[15] *Bladet Tromso and Stensaas v. Norway* ¶ 59, Judgment of May 20, 1999.

[16] Recommendation No. R (99) 15, Committee of Ministers, Council of Europe, "On Measures Concerning Media Coverage of Elections" (Adopted by the Committee of Ministers on 9 September 1999).

[17] *Lingens v. Austria* ¶ 44, Judgment of June 24, 1986.

[18] Recommendation No. R 96(4), Committee of Ministers, Council of Europe, "On the Protection of Journalists in Situations of Conflict and Tension (Adopted by the Committee of Ministers on 3 May 1996).

[19] Recommendation No. R 99(14), Committee of Ministers, Council of Europe, "On Universal Community Service Concerning New Communication and Information Services (Adopted by the Committee of Ministers on 9 September 1999).

[20] Mertus, "From Legal Transplants to Transformative Justice"

[21] World Bank, *Governance: The World Bank's Experience*, (World Bank, June 1994).

[22] See, e.g. Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins, 1996). See Zbigniew Brzezinski, Polska scena obrotowa, *POLITYKA*, Oct. 29, 1994. Brzezinski's analysis is set forth by K. Jakubowicz in *Media Reform, Democratizing the Media., Democratizing the State* (M. Price, B. Rozumilowicz, and S. Verhulst eds., Routledge, 2001).

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