



EXPORTING THE MATRIX

The Campaign to Reform Media Laws Abroad

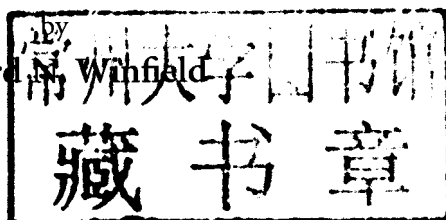
Edited by
Richard N. Winfield

Exporting the Matrix

The Campaign to Reform Media Laws Abroad

Edited for the
International Senior Lawyers Project

Richard N. Winfield



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Preface

Richard N. Winfield

How universal is the yearning for the right to speak freely? A Chinese student from a Beijing law school recently gave me a glimpse into the depths of that yearning. She was a compelling advocate, competing for her law school team in the Price International Media Law Moot Court Competition at Oxford University.

Her team was assigned to argue the appeal in the following hypothetical case: in the mythical Republic of Cabengo, a courageous journalist investigated, documented, and accurately exposed in a news story a pattern of corruption by the all-but-permanent President. The government indicted the journalist for criminal defamation; it tried, convicted, and sentenced him to prison. After the journalist exhausted his appeals in the courts of Cabengo, he appealed to the mythical Universal Human Rights Court, asserting that his rights to free expression, guaranteed by Article 19 of the International Covenant on Civil and Political Rights, had been violated. Arguing before that Universal Court, the Beijing law students represented the applicant journalist; a team of Ukrainian students from a Kiev law school argued for the government of Cabengo.

The young Chinese woman launched into a vigorous, no-holds-barred attack on the government of Cabengo, citing its systematic repression of human rights, its politicized courts, and, specifically, its laws that produced the grotesque treatment of her journalist client. She argued that Cabengo had failed to adopt the actual malice standard announced by the U.S. Supreme Court in the famous case of *New York Times Co. v. Sullivan*, the landmark case that provides the press with powerful protections against defamation suits by public officials.

The law student was allowed twenty minutes to present her oral arguments. She devoted the final five minutes to the *Sullivan* case. She recited from memory, with only an occasional glance at her notes, the stirring passages from Justice William Brennan's opinion in *Sullivan*. With an intensity bordering on passion, she quoted verbatim some memorable excerpts from that opinion:

there exists “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”; “that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive’”; a rule is required “that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”; and “would be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court or fear of the exposure of having to do so.”

It was a bravura, courageous, and emotional moment. The law student’s ardor was unmistakable. Also unmistakable was the fact that she was, of course, not speaking about a mythical republic called Cabengo.

She undoubtedly recognized the truth of another powerful Supreme Court pronouncement written by Justice Benjamin Cardozo in 1937: “Freedom of thought and speech ... is the matrix, the indispensable condition, of nearly every other form of freedom.” Not coincidentally, we have adopted that metaphor as the title for this anthology.

As that law student and her teammates can testify, theirs is an uphill struggle to realize the promise contained in the words of those Supreme Court justices. Consider some of the obstacles faced in much of the developing world by law students, journalists, lawyers, human rights activists, and civil society generally: censorship, surveillance, repressive laws, unreliable courts, authoritarian governments, powerful corporate interests, sophisticated blocking and filtering Internet technology, and legal and regulatory environments hostile to a free and independent press.

The figures from the Freedom of the Press survey published by Freedom House for 2010 show that 40 percent of the world’s population lives in suffocating regimes not too dissimilar from the People’s Republic of China that the young law student so artfully denounced. Another 44 percent of the population lives in countries with an only partly free press. The fact that she is not alone, that there are millions of like-minded men and women in these regimes, among them journalists and their lawyers, stands as a challenge to media lawyers in the mature democracies. The challenge is to offer to provide them with encouragement, friendship, expert assistance, tools, and precedents. The challenge is for our media lawyers to work side by side with their counterparts abroad in pursuing those reforms that will in time create an enabling environment for a free and independent press.

The authors of the essays in this anthology are among the most active, committed, and effective practitioners in this global campaign. Several authors describe their observations and experiences while pursuing reforms of media laws in the Middle East from 2007 through 2009. Their prescient essays, written in the months before the Arab uprising in early 2011, provide snapshots of repressive political cultures that were experiencing challenges and beginning to undergo seismic tremors. In these societies, the authors identify the conflicting forces of change and resistance to change. What emerges from their observations is the centrality of the reformers' demands for freedom of expression and information to the irresistible drive toward democratic self-rule and freedom. Their observations prove that Justice Cardozo was right: freedom of expression is, after all, the matrix, the indispensable condition of nearly every other freedom. It is a matrix worth exporting.

Foreword: Lost in Translation

Darian Pavli

I have had the opportunity to experience both ends of cross-border legal assistance. My first exposure to the field was less than encouraging: as a last-year law student at Tirana Law School, I was enlisted into a misguided (if well-intentioned) donor effort to introduce in Albania an agricultural credit regime based on the originally very successful “secured transactions” model of the U.S. Uniform Commercial Code. The transplant turned out to be so alien to the Albanian sociolegal system, and the transliteration of the common law concepts into civil law terminology so tortured, that when the bill reached the floor of the parliament, a good number of members of parliament wondered whether it was a pregnancy promotion scheme—before going on to vote nevertheless for the adoption of something they could barely understand. From what I can tell, the foreign-inspired invention has been largely rejected by the body economic. The experience seemed to be perfectly summed up by a Bosnian joke of the 1990s, which, with the familiar black humor of the Balkans, defined experts as “those who come from afar.”

Thankfully, that was not my only experience with pro bono legal advice from more established democracies. Within a few years, when I was the senior Albanian attorney with the local mission of a European intergovernmental entity, my colleagues and I found ourselves spending more than a few long nights preparing comparative law memos, or actual legislative language, for the main parliamentary drafters—on matters ranging from a new classified information bill to marathon negotiations on a new electoral code before every upcoming election.

From the many sources of solicited advice, there was one helping hand in particular that stays in mind: a network of pro bono experts recruited by the American Bar Association’s initiative for Eastern Europe—not too different from the media law reform group that Dick Winfield chaired for the same entity—who would be available at short notice, and virtually at all times of day

and night, to provide reliable, high-quality advice on almost every aspect of public law. They, of course, did not have all the answers to the quest for building a decent democracy in a country just emerging from five decades of totalitarian madness. But I found that their advice provided, for the most part, some pretty solid indications as to how a democracy should *not* function—which is a bigger gift than it may seem.

In the past decade or so, having found myself in the supply side of legal reform assistance on free speech and right to know questions, I have had the privilege to work with many of the authors of these essays as well as the terrific International Senior Lawyers Project (ISLP) team. Like colleagues and partners who have benefited directly from their assistance, I have been inspired by their commitment and the wonderful richness of their collective wisdom and leadership. From my partial vantage point, I have seen our collaboration with the ISLP network yield some important successes, as when a joint intervention in a case against Russia at the European Court of Human Rights helped persuade that tribunal to practically deny government agencies standing to sue for libel in their institutional name (a favorite tool of Russian authorities for suppressing dissent).

Other times the goals have been more challenging. Thus, as Dan Byron's essay will reveal, the practice of independent journalism continues to be a deadly trade under the thuggish regime that rules the Gambia; and Sierra Leone's colonial-style seditious libel laws remain in effect after the country's Supreme Court rejected a challenge brought by the local journalists' association. But there is hope: West Africa's own regional court recently found the Gambian authorities responsible for the state disappearance of Ebrima Manneh, the critical-minded journalist on whose case Byron worked—with more cases against Yahya Jammeh's government on the way. And in September 2010, the Constitutional Court of Uganda struck down that country's seditious libel provisions, a twin version of Sierra Leone's.

In the early years of my human rights career, I was haunted for a while by the comments of an anti-Soviet dissident who described how his grandmother would not understand why he was more concerned about the lack of free speech than food store lines. (And even though we know now that famines and food shortages have a great deal to do with free speech deficits, rights relativism continues to generate vivid debate in law schools on both sides of the development divide). But having witnessed the struggles for political and personal freedom in some otherwise very different parts of the world, I have come to believe that the human urge to speak one's mind is perhaps as strong as the need to breathe. I see the passion and experiences described in this collection as yet another testament to that idea. And to the fact that experts coming from afar are sometimes no strangers at all.

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Exporting the Matrix

Present at the Creation: The Long Shadow of the Reform Campaign

Monroe E. Price

I

I'll start with a direct answer to the main query: What are some lessons that can be detected from two decades or so of media assistance and its relationship to pro bono activities?

It takes a village. Cowboy public interest advice doesn't quite work. What's emerged is something more like a pro bono law community. This is thanks to some key players, among whom it's not wrong to single out Kurt Wimmer for his work at Covington & Burling and, of course, Dick Winfield, for his law firm contributions and then at the International Senior Lawyers Project. The point is that, over time, individuals build familiarity with the issues and also more comfort in going to distant places and providing advice in complex and novel environments. In recent years, the Center for International Media Assistance, under the direction of Marguerite H. Sullivan, has provided such a home.

It's surprising what is effective. A decade ago, the United States Agency for International Development (USAID) asked Peter Krug and me to write what became "The Enabling Environment for a Free and Independent Media." The idea of focusing on an "enabling environment" was the idea of a young Fellow at USAID, Ann Hudock. The project director had very clear ideas about the tone of the publication, its length, and the languages in which it would be produced. It became an important template in the field, useful to lawyers both on the giving and receiving end.

Understand the field. I was fortunate with my perch in a law school so that I could write as well as experience the pro bono environment. In 2001, the

World Bank asked for a mapping of the field—a way of describing, as it were, the media assistance industry in which pro bono media law activities fit. This resulted in a study titled *Mapping Media Assistance*, written with Bethany Davis Noll and Daniel DeLuce (http://repository.upenn.edu/cgi/viewcontent.cgi?article=1060&context=asc_papers). It was important to have some foundation material to describe who were donors, who were recipients, and how to conceptualize an environment in which pro bono and other activities might occur.

Move toward an oligopoly of media assistance providers. It's surprising how quickly the field of media assistance became an oligopoly, with the International Research & Exchanges Board (now known as IREX) and Internews Network as principal players and Open Society Institute and some other players involved as well. It was as if the major donors could function more easily with entities that had some scale. It was as if scale was desirable in furthering media assistance goals. And similarly, there was a duopoly, more or less, in the process of evaluating media freedom, with Freedom House and IREX as the main publishers of rankings (others such as Reporters Without Borders were important as well). The pro bono activities played off this concentration of media assistance enterprises, starting with Covington & Burling's early pro bono work with IREX.

Create a news and information backstop for pro bono law activities. During the early years of the Commission on Radio and Television Policy, with Andrei Richter, Peter Krug, and David Goldberg, we published the *Post-Soviet Media Law & Policy Newsletter*. This was designed to provide those working on pro bono questions a context for what was happening in courts and regulatory agencies in various parts of the Commonwealth of Independent States. The newsletter was continued until it evaporated with the direction of Peter Yu, some of its morsels being collected in the book *Russian Media Law and Policy in the Yeltsin Decade: Essays and Documents* edited by Monroe E. Price, Andrei Richter, and Peter K. Yu (The Hague, Netherlands: Kluwer Law International, 2002).

Luxuriate in opportunities for lawyers from various perspectives to meet and discuss law and policy questions together. I think this involvement started, for me, with the International Broadcast Institute and continued with the Commission on Radio and Television Policy. But another event was the first meeting of the MLRDC as it was then known (now the Media Law Resource Center) in London, and the bringing together of British and American lawyers who were happy to be united by a common language. This principle informs, as well, the spirit of the Annenberg-Oxford Media Policy Summer Institute and its progeny.

Be open to the possibility that the U.S. paradigm may be flickering. As wonderful, tried, and true as has been the U.S. media system, a pro bono effort must

recognize that the global system for the supply of information is shifting and that interesting and valuable insights are popping up everywhere. There's a danger of RMS—repetitive mantra syndrome—in which old messages are recycled without awareness of worldwide shifts (in technology, in industry, in patterns of consumption and politics). It's important to understand changes in geopolitical realities—not because of the power attached to particular points of view, but to understand how conflicts, religious shifts, economic development, and other factors affect media systems. Lawyers definitely understand the interplay of these factors with respect to their large-scale and mainframe clients. They have to see these connections in their pro bono work as well.

Be sensitive to the enabling environment. There's always the danger of over-prescription—making recommendations about media law and policy that assume, to some degree, that courts work, that agencies work, that industry follows the rule of law, that licenses are distributed fairly, that journalists are not punished, that democratic elections follow an information-rich electoral campaign. The challenge is how to function and what to recommend when all these areas are in play (as they often are).

Identify successes. In looking out at the field of pro bono or related efforts over the past two decades, there are some outstanding successes. I would list the freedom of information movement as one of the best. I have been impressed with Freedom of Information Advocates Network (FOIANet) and the community of lawyers and advocates who have globally pursued advancement of this tool of free expression. It would be interesting to dissect this effort; one might find a combination of a well-staffed public interest entity, many practitioners, and lone advocates around the world, the unifying and captivating spirit of a few leaders, and a cause that could have widespread support across ideological groups.

See “law” as broad-gauged and affecting many parts of society. There is an enthusiastic and significant part of the pro bono media law and practice that emphasizes litigation, and this is critical. Even now, having the newly shaped backup and support group the Media Law Defence Initiative is a significant and welcome addition. Pro bono work involves helping to establish media law courses that will turn out advocates of the future; it involves providing for a knowledgeable in-country set of clients (nongovernmental organization staff members and citizens); and it involves improving the regulatory environment as well. All this is back to the “enabling environment.”

Read lots of C. Edwin Baker's work. I'm a big fan of the late Ed Baker. He was one of the best advocates and experts to send abroad. He combined a profound knowledge of the United States system with a deep humility, a willingness to listen, and a deep sense of empathy. His 2002 book *Media, Markets,*

and Democracy is an example. Many people expressed Susan Benesch's sentiments that "After reading Ed for years, it was astonishing to meet him. A guy that brilliant turned out to be so gentle and kind, so willing to debate with anyone." This was the view of law students in Jordan and China as well.

II

How can we unravel the threads that link all our pro bono activities? I will try to offer reflections on this subject, not as a definitive analysis but as a kind of proposal for further study. It would be excellent to have a neat bouquet of meaning on these questions, but that is an unlikely outcome. Yet the subject is an important one because the industry of democracy promotion goes forward—in the Middle East, in Africa, in Central Asia, even within the reaches of Central and Eastern Europe.

I start with a memory of the early 1990s. It could have been Prague or Budapest or Kiev, or other similarly situated cities outside the capitals of the former Soviet Union. In a darkish room, around a group of functional metal tables arranged in a square, sits a delegation from the Council of Europe or the United States, preparing to lecture on the merits of a proper transition in the media sphere. At the table sit one or two of the invariably young, charming, talented figures—proud to serve as bridges between the lately oppressed and the newly triumphant, the fresh holders of knowledge about the world into which their country is marching. Next to them are the ever-present representatives from the United States or Western Europe, toeing the line between arrogance and ignorance—individuals designated as carriers of progress, confident that their media systems hold the key to "democratizing" media in the region, yet unfamiliar with the politics of the location and—just as likely—the complex meanings of their legal practices at home.

This was the early world of media assistance: delegations primarily from the United States, but also France, the United Kingdom, and elsewhere, consisting of journalists, professors, regulators, managers, specialists, and entrepreneurs, sent to talk to their counterparts. One of the jobs of the young representatives in the field was to round up warm bodies to listen and react, with sufficient attention to provide the illusion that wisdom was being proffered and to some extent imbibed. At times, there was advice fatigue. The task, increasingly difficult, was to obtain the critical mass of local influentials and individuals who would turn the gruel of advice into the exactness of legislation or business plans or trainings that would justify the time and expense—flights, hotels, dinners—of the experts. Reports had to be written, donors satisfied

that the expenditure of government or private philanthropic dollars was obtaining results.

Many friendships were fostered during these visits, bonds that have blossomed and endured. Some people at those tables have become parliamentarians, some judges, some legislative drafters, and others academics who continue to ask many of the same questions that have persisted since the early 1990s. And of course, many small and medium differences were made in the media sectors; one can point to major newspapers that would not exist, laws that would not have been passed, journalists who have risen in their ranks who received training. But there remains a perpetually haunting question: Did these efforts make a difference? In the new Europe, is the face of the media, particularly the broadcast media (the focus of much of the attention), any different now from what it might have been absent the media assistance work? What role did the parade of “experts” and advisers to the region have at maintaining or encouraging some drive to change?

One characteristic of the transition period (and beyond) was a search for such metaphors for the instantiation of language and, through language, a weighing of competing models. Countries were investing in the credibility of whole ways of thinking, ways of imagining the future. It was at this moment that the language of change was being negotiated and potential directions were being charted. Metaphors allowed for the translation of complicated concepts into potentially practical realities, and models made debate of these concepts more efficient. Of the metaphors, there was, of course, the “marketplace of ideas,” but also metaphors of “independence,” of “highways of information,” and of “television without frontiers.” Models were constructed of elements that purported to have explicit functions, elements that were characterized in ways that often fit with ideologies. Models set forth were shorthand forms for persuasion. Bandied about were concepts like “the BBC model” of public service, the “U.S. model” of private broadcasting, or “mixed models” taking both elements of public service and rising capitalism.

III

I can’t quite remember when I became an addict of the pro bono media law variety. Undoubtedly, it goes back to the Yale Law School and a class with Telford Taylor who was teaching a seminar on media regulation (of the decidedly domestic variety). We imbibed some notion of public interest law with our dose of statutes and regulations. The consequence was that we were marked for life. In my case, the commitment was sealed by a few post-law school as-