INTERNATIONAL
MODERN MEDIA
INSTITUTE

IMMI status report

9. April, 2012

Abstract

On July 16th 2010 Alþingi[1] unanimously accepted a parliamentary resolution to develop in Iceland advanced legislation for the protection of the rights to information and free speech. Since then, the *Icelandic Modern Media Initiative*, or IMMI, as it was called, has been in development, both inside the government ministries and institutions, and within Icelandic civil society. The originators of the IMMI initiative founded, in 2011, the International Modern Media Institute, a synacronymous civil society organization working towards ensuring that the goals and spirit of IMMI are met in Iceland, and sharing the ideas and developments with the world at large.

It is a common misunderstanding that our task is complete, or that it has stalled. The progress of the previous two years has been in some respect slow, in other respects fast. Our original aspirations for completing within a year were overly ambitious, but it is clear that the project is going on and has great momentum, even as all over the world a massive crackdown on civil liberties and in particular free speech is underway.

This report aims to give a brief but detailed overview of the current status of the IMMI project. Each individual aspect could be elaborated on in far greater detail.

[1] The legislative assembly of the Republic of Iceland

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Icelandic Modern Media Initiative

Subject area	Status	Notes
Source Protection	Complete	Media law + constitution
Freedom of Information Act	Pending ratification	New law replacing older law + constitution
Communications Protection	Pending ratification	Changes to law + constitution
Intermediary Liability Limitations	In development	Changes to law + constitution
Publishing Liability Limitations	In development	Changes to law
Whistleblower Protection	In development	Changes to law + constitution
Prior Restraint Limitations	Pending ratification + In Development	Constitution + regulatory changes
Judicial Process Protections	On hiatus	
Network Neutrality	Pending ratification	Constitution
Virtual Limited Liability Companies	On hiatus	
Freedom of Expression Prize	On hiatus	

Source Protection

The protection of sources refers to measures which forbid journalists from exposing the identity of their sources without the source's permission. The purpose of such measures is to increase the willingness and security of sources who consider themselves to be at risk, when providing information of criminal wrongdoing, corruption, negligence or other socially unacceptable behavior to journalists.

Journalistic source protection was implemented in Icelandic law 38/2011 (the media act). The source protection clause is defined in article 25., which states:

> Employees of media organizations which have been licensed or registered with the media committee are forbidden to expose the identity of source for articles, books, retellings, announcements or other material, regardless of whether it has been published, if the source or the author requested anonymity. Employees of the media organization are also forbidden to release data which contain information regarding the source or author in such circumstances.
> The rule in the 1st paragraph also applies to those who, due to connections to the media organization or the production of the material has gained knowledge of the identity of the source or author, or has attained data to that effect.
> Source protection under paragraphs 1 and 2 can only be relieved with the permission of the source or the author, or on the basis of article 119 of the law on the prosecution of criminal cases, no. 88/2008.

The exception in article 119 of law 88/2008 applies to the case where criminal proccedings for serious offences cannot be resolved without the identity of the source or author being exposed. In such cases, it has been recommended although it is not stipulated in statutes, that the identity first be exposed to the judge *in camera*, so that the judge can appropriately measure the potential risk to the source against the benefit of the source's exposure. This is generally considered an acceptable limitation to the otherwise absolute source protection clause.

In addition to the stipulation in the new media law, the proposed constitution for Iceland contains, in article 16, the statement:

> The protection of journalists, their sources of information and whistle-blowers shall be ensured by law. It is not permitted to breach confidentiality without the consent of the person providing the information except in the process of criminal proceedings and pursuant to a court order.

This provides equivalent protection under the constitution, if ratified, ensuring that the source protection clause would not be removed from law without referendum.

Status: Complete.

Freedom of Information Act

Access to government documents and records is mandated in Iceland by law 50/1996, (the information act). It was enacted in 1996 and has since been amended six times to various degrees. It is mostly modeled after the Danish and Norwegian laws from 1970. The current Icelandic FOI law does not conform to CoE convention, and it does not match the standards set in the Aarhus convention for environmental information.

The Aarhus convention was ratified by law 131/2011.

An updated information act was proposed at Alþingi in 2011. Over the course of parliamentary debate, upon receiving feedback from multiple civil society actors including IMMI, the bill moved substantially closer to the ideal. However, due to end of term in late September 2011, the bill did not complete the third reading in parliament and was therefore dropped. It has since been reintroduced with many of the changes merged in and multiple improvements made, however, the newly proposed version does not meet the high standard the bill had previously achieved.

IMMI submitted a 8 page report and a 84 page change comparison of the two bills to the constitutional- and regulatory committee of Alþingi in February 2012[2], criticizing the government's backpedaling against the changes that had previously been proposed in parliamentary committee. At the moment, the committee work is proceeding.

Cautious optimism suggests that the committee will once again restore the bill to its former state and that

[2] http://immi.is/images/f/f3/2012-02-21_Umsögn_um_366_140_Frumvarp_til_upplýsingalaga.pdf

it will be accepted. If this is the case, the norm for access to information in Iceland will be altered from being a 'publish on request' regime to 'publish by default' regime, meaning that instead of FOI requests having to be made for each document individually in order to obtain a private copy for dissemination, which is a slow and complicated process, the rule will become that government publishes all documents publicly by default, for instance in an online database. Then, any documents which are not published can be at least listed along with information about why it has been held back, and FOI requests can be made for those documents specifically. This change is the most important alteration of many.

In the meantime, the new proposed constitution of Iceland has, in article 15, has guaranteed information rights in the following manner:

> Everyone is free to gather and disseminate information.
> Government administration shall be transparent, and documents, such as minutes of meetings, shall be preserved and any submissions, their origins, process and outcome, shall be recorded and documented. Such documents shall not be destroyed except in accordance with law.
> Information and documents in the possession of the government shall be available without evasion and the law shall ensure public access to all documents collected or procured by public entities. A list of all cases and documents in public custody, their origin and content shall be available to all.
> The collection, dissemination and surrender of documents, their preservation and publication, can only be restricted by law for a democratic purpose, e.g. in the interest of protecting personal privacy, the security of the nation or the lawful work of regulatory authorities. It is permitted to restrict access by law to working documents, provided that no further steps are taken than necessary to preserve the normal working conditions of government authorities. As regards documents which are subject to confidentiality by law, information shall be available as regards the reasons for the confidentiality and the limits on the time of confidentiality.

IMMI considers this to be a substantial improvement, and awaits ratification of the law and the constitution with great anticipation.

Status: Pending ratification

Network Neutrality

Network neutrality is a very broad concept, but generally refers to the idea that each node operating on the network should be considered equal to all others in terms of access. Numerous governments and corporations have instantiated various forms of censorship and containerization[3]. Due to technical limitations of the IPv4 space, almost every end-user of the Internet can be considered in an aberration of the end-to-end principle often from NAT (Network Address Translation), this makes their nodes second class citizens of the Internet. There is a lot to be done in terms of network neutrality.

[3] Also referred to as "bubbling": differential data access, meaning that different Internet endpoints see different amounts of data. This is frequently done for geographical or personalized targeted search results, advertising, service pricing or product availability, or jurisdictional restrictions on access to material taken down towards certain countries due to intellectual monopoly violations.

This is going to be a topic for many years, but for now IMMI has decided to take the first steps. Article 14 of the proposed constitution creates an obligation for the government to protect the Internet, with the same constraints as those on free speech in general. Although those limitations should definitely be questioned, this must be considered a substantial victory, as no country currently even mentions the Internet in its constitution, let alone defends it:

> The government shall guarantee conditions that are conducive to open and informed public discussion. Access to the Internet and information technology shall not be curtailed except by a decision of a court of law and on the same substantive conditions that apply to restrictions on the freedom of expression.

Status: Pending Ratification

Communications Protection and Communications Data Retention

In the interests of protecting privacy and source confidentiality, protection of communications is a vital ingredient to any coherent information regulation strategy.

The protection of communications is a wide project that can be roughly split into two tasks. On the one hand, removing existing threats to communications protection from law, and on the other hand establishing new protections for communications.

In January 2012, as Alþingi was debating the adoption of the European Union's Data Retention Directive, IMMI produced a report outlining the dangers of blanket data retention. In committee, IMMI's views got the support of the Privacy Directorate, and this led to the parliamentary committee requesting that the directive be postponed indefinitely and that the foreign minister inform the European Union that Iceland would not be implementing the directive.

This however was not enough, as Iceland has in law a data retention clause (paragraph 3, article 42, of the telecommunications act, 81/2003, amended in 2005), which predates the EU's Data Retention Directive by a year. IMMI has argued against this clause, both in newspapers and in opinions to parliament, and has drafted a bill for the removal of the act.

More recently, IMMI was asked to submit proposals for improvement of certain articles of the telecommunications act being added to introduce a Computer Emergency Response Team (CERT) in Icelandic law, so as to better balance against privacy concerns. In these proposals, IMMI included the following proposal:

> Paragraph 3 of article 42, requiring the retention of telecommunication data, is dropped.
>
> Appended to article 42 is a new paragraph:
> Parties other than the sender and the receiver of electronic packet-switched communications are forbidden to inspect or electronically process the payload of the packets. Headers and metadata of packet-switched communications shall only be stored for the period needed to resolve the routing of the communications and security measures as per article 47. a.

This would effectively remove the data retention provisions from law, if adopted, and simultaneously

improve the communications protection by making it a criminal offense to intercept and inspect communications, by methods such as Deep Packet Inspection. It is our hope that this provision be adopted in law.

In addition to this development, the proposed constitution of Iceland contains a clause in article 11 expressly forbidding the search of communications, except with a valid court order (our italics):

> Bodily or personal search, or a search of a person's premises or possessions, is permitted only in accordance with the decision of a court of law or specific permission by law. The same applies to the examination of documents and mail, *communications by telephone and other telecommunications*, and to any other comparable interference with a person's right to privacy.

Status: Pending ratification & in further development

Intermediary Liability Limitations

The original idea for limited liability for telecommunications intermediaries comes from the development of the Communications Decency Act in the United States around 1996. Since then, the European Union has adopted the e-Commerce Directive, which implements similar limitations. The directive is implemented in Iceland as the electronic commerce and other electronic services act (30/2002), and has equivalent measures.

Immediately on exploring the intermediary liability limitations (ILLs) in the Icelandic law, a striking flaw presents itself in the form of "general court orders". This phrasing is very vague and more importantly lends itself to being understood that district sheriffs, who in Iceland have injunctive powers, can issue takedown orders. IMMI has an interest in tightening this language, and intends to make proposals to do so in the coming months.

More importantly though, ILLs have been under attack globally in recent years. A great many changes in strategies relating to intellectual monopoly enforcement, protection of official secrets and political attempts at opening doors for corruption have revolved around eroding ILLs. In order to counteract this trend, IMMI has partnered with several organizations to explore what can be done to define a legal and technical defense of both Internet endpoints and intermediaries that can better withstand political attempts at erosion. This work is in early stages, but some results are scheduled for July 2012.

Status: In development

Libel Tourism Protection

Libel tourism is the act of a company or individual chosing to pursue lawsuits against individuals or companies in a country with a low threshold for libel lawsuits. Legal extortion schemes have been perpetuated with companies being tried in countries such as England and Wales even if the defendant resides elsewhere in the world. This is a form of forum shopping. Implementing laws that prevent or diminish the effects of libel tourism in Iceland will protect Icelandic citizens and residents from this kind of forum shopping. It's fairly important that people can predict with some certainty where, if anywhere, they will be taken to court. This also applies to companies, who base a lot of their operational security on knowing the legal environment. In this way, ending libel tourism will encourage foreign investment and provide financial security for companies operating here already.

For now, Iceland has a mechanism. As a signatory of the Lugano treaty, Icelandic courts can decide not to uphold foreign court verdicts which go against the rule of law in Iceland. This means that a libel verdict from a foreign country can be challenged in an Icelandic court on the basis of article 34 of the Lugano treaty if it comes from a country with a substantially different burden of proof for libel than Iceland does. This has not been tested, but is currently our best bet.

In the meantime, British libel reform efforts are going well, and coupled with a well written libel law in Iceland, may be sufficient to put an end to libel tourism - at least in Iceland. When that is finished, the bigger issue of International Forum Shopping remains.

Status: Complete / Untested solution

Libel Reform and Publishing Liability Limitations

The media law from 2011 introduced new rules regarding media liability. However, since its adoption, a number of court cases have been heard in Reykjavík which cast a shadow on the reform, and point at a deeper structural fault in the current libel regime.

On July 8th the Reykjavík district court found journalist Jón Bjarki Magnússon guilty of libel for an article he wrote in Icelandic newspaper DV about the case of an Icelandic woman, Hjördís Aðalheiðardóttir, who had lived with the plaintiff, Kim Gram Laursen, in Denmark along with his three young daughters. They separated and share custody, but the woman took the children to Iceland in October, possibly violating the custody order from the Danish court.

The case was tried over remarks quoted in the article from an interview the reporter did with Hjördís Aðalheiðardóttir and her sister, Ragnheiður Rafnsdóttir, which they both affirmed to in court as being their own. The comments refer to Laursen as violent and aggressive. The disputed quotes were both direct, enclosed in quotation marks; and indirect, as references to remarks made by the interviewee.

The journalist, Magnússon, was made to pay damages and Laursen's court costs, totaling 1.250.000 Icelandic kronas (around €7500) for having printed the comments made by his interviewees. The case was tried under a statute of the 1956 print law. According to the verdict, Magnússon's demand for the case to be tried under the new media law from 2011 was rejected on the grounds that the publication occurred before the new law took effect, and that grandfathering is typically not done in civil cases. According to the media law, journalists can not be held liable for the comments of their interlocutors, but according to the judge, Kolbrún Sævarsdóttir, the new media law does not contain an article clarifying the liability for written material; a baffling statement given article 51.a of the new law, which states that "if written material correctly quotes a person, that person is liable for the statements made, if the person has agreed to the disclosure of those statements."

Magnússon claims that this verdict will cost him bankruptcy. "I don't know what Laursen and his lawyer can get out of me if I go bankrupt," he said in a statement. As he is a student at the University of Iceland working part time as a journalist for DV, he claims that his total worldly possessions amount to "a old rickety desk."

The case has caused much anger amongst journalists for various reasons. Before Magnússon's article was released in the print edition, another journalist, Jóhann Hauksson, had released an interview with Hjördís Aðalheiðardóttir over the same issue in the online edition of the same paper. There she is similarly quoted as accusing Laursen of violence. However, as the online edition is not regulated under the 1956 law, a libel ruling is harder to achieve. "I can only assume that it is the application of ink that is illegal, not the mediation of the words," Magnússon says.

Hjálmar Jónsson, chairman of the press association, said in a press release that this verdict makes it impossible for journalists to do their job. But as he points out, this is not a new result in Icelandic libel cases. Currently there are cases pending in Strasbourg, such as case 5265/2009, where journalist Erla Hlynsdóttir was found guilty of having included a slanderous quote from Davíð Smári Helenarson in her article. The quote refers to Rúnar Þór Róbertsson, who had been found guilty in the same court for cocaine smuggling, as a "cocaine smuggler" and given a 10 year sentence.

In a related case, journalist Björk Eiðsdóttir was found guilty in the supreme court for having quoted a libelous statement from an employee at the strip bar Goldfinger. In both of these cases and various others, the 1956 law is used as a basis for the verdict.

Journalists in Iceland see this case as an affront to the freedom of expression. "If this verdict is upheld by the supreme court it is a death sentence for freedoms of speech and expression in Iceland, and a severe burden for journalists that cover difficult topics," wrote Friðrik Indriðason in an article on visir.is. "The question arises whether the court is sending a message to society or whether this is an arbitrary decision made by a single judge."

An outdated approach to libel in Iceland has been problematic for decades. The groundbreaking case was Þorgeir Þorgeirson's victory in Strasbourg. He had been found libelous in district and supreme courts under an article of the criminal code stating that public criticisms of civil servants were illegal. In the aftermath of Þorgeirson's case the article was repealed, but more importantly, at the behest of the human rights court, the Icelandic constitution was changed to include a human rights chapter based on the European Convention on Human Rights.

Although it seems that this case was rightly tried under the 1956 law, the judge's statement that the 2011 media law doesn't contain a sufficient liability clarification is worrying. It could imply that future verdicts may rely on the severely outdated 1956 law, which amongst other things requires that a copy of any publication of six pages or less be provided to the local police chief. The goal of the 2011 law was to update and replace various aspects of the print and broadcast laws, to create a unified legal context for media regardless of their medium. Articles 50 and 51 of the new media law specifically deal with liability for statements made in audiovisual broadcasting and written word, respectively, and do not appear to be unclear in that regard.

Jón Bjarki Magnússon says that it is clear that the verdicts of the last few years, much like his own case, have the effect of discouraging journalists from covering certain topics for fear of damage to their finances or the financial security of their family. "A prerequisite for journalism and critical discussion is unconditional respect for the freedom of expression and the role of journalists in mediating information."

At the core of this issue lies the broad scope of the current libel law. Although media liability is defined in the print law and superseded by the media law, the terms of libel itself are defined in chapter XXV of the criminal act, which treats violations of privacy and libel as equal criminal offenses. Under the criminal act, it is illegal to make truthful accusations, to offend somebody publicly or privately, or to make unfavorable comments about deceased persons. As these are criminal offenses, they have assigned imprisonment penalties from 1 to 4 years, as well as fines, although imprisonment is rarely used in practice.

The global trend in libel law is to move it away from criminal sanctions and into tort law, making it a civil offense, punishable only by fines. Alongside this, the scope of libel is to be narrowed, making the truth a valid defense and ensuring that people cannot be brought to charge for making value judgements against another's character. It should be legal to call a person a jerk, although it is questionable whether you can call somebody a murderous jerk without backing it up with evidence.

IMMI has completed the basic research needed to implement these changes and drafted a bill which aim to alleviate at least most of the existing concerns. Due to parliamentary scheduling rules, it cannot be introduced until the autumn of 2012.

Status: Pending

Whistleblower Protection

A whistleblower is a person that tries to disclose or report information on situation's affecting the public that may evidence of criminal activity. Protection for individuals reporting institutionalized corruption is paramount. They may be providing relevant information to the public record, such as data or testimony about relevant matters like public health, passed incidents, crime, government biases, democracy undermining practices, violations of constitutional rights, corruption and bribery.

Threats to Whistleblowers come from corporate interests, governmental interests, criminal activities, biases inherent in legal and judicial officials and systems. Whistleblower protections must include a right to anonymity, physical, financial and social security.

As the threat models, institutional settings and personal complexities of whistleblowing vary widely, this is perhaps the most complicated of IMMI's tasks. While a lot of development work has been put into this issue already, we feel that the adequate protection of whistleblowers cannot be completed without deep investigation.

As one core issue, the idea of corporate personhood must be challenged. Disregarding other arguments for doing so, it is very important that it not be decided that companies and other corporate vehicles have a right to privacy, as this would pit whistleblower activities up against privacy and data protection law, the sanctity of which is of equal importance. It's a fight nobody should have to fight. That said, there has been no such ruling in Iceland and it is not foreseeable that that will change; it's merely one issue of many that must be monitored and pro-actively taken action on.

Apart from that, there must be a witness protection system and a mechanism to protect the physical safety of a whistleblower. There needs to be some form of financial protection and/or employment protection. This is mostly already covered by the unemployment benefits system and trade unions, but there might be reason to codify an explicit term of financial security protection for those who expose corruption.

There need to be protections against character assassination, which blends closely with the libel reform activities previously mentioned. The idea of making truth a defense is important here, as it goes both ways and reduces the space for conflict.

The establishment of trusted intermediaries, such as an ombudsman, public concern network or government accountability office is important, as a lot of hostility towards whistleblowers can be eliminated by guaranteeing internal whistleblowing mechanisms that serve to protect the companies or institutions where corruption or illegal activity is taking place as well as the whistleblower - so that corrupt officials, executives, and others can be held to account privately.

There may be reason to introduce monetary incentives for whistleblowers, such as a right to a percentage of money reclaimed when corruption, embezzlement or mismanagement of public funds is exposed. This is a complicated subject, as whistleblowing should be an act of morality rather than a moneymaking scheme, and introducing "embezzlement bonuses" of this kind may open the system up to abuse. As another issue, there should be a strong incentive not to make "mistakes", balanced against a need to allow whistleblowers the benefit of the doubt.

As can be seen, there are a number of complexities which make this one of the most complicated tasks. Already, IMMI has developed an internal draft, focusing on government whistleblowing. We aim to expand it to cover corporate activities too, as well as complete a gap analysis to see if there are any points of contention. It is of particular interest to IMMI that whistleblower protection does not unsettle the balance with regard to regulatory investigations, privacy rights or national security considerations, or unduly bias against legitimate reasons for secrecy, but at the same time the goal is to promote civil enforcement of transparency.

Status: In development

Prior Restraint Limitations

Prior restraint is banned under article 73 of the Icelandic constitution. A slightly stronger implementation of prior restraint limitations are introduced in the new constitution, which is pending ratification.

Outside of constitutional guarantees, IMMI also has an interest in protecting against abuse of injunctions by sheriffs, who still have injunctive authorities as a holdover from their now abolished tribunal role. This fits in with the discussion of Intermediary Liability Limitations stated above, and IMMI expects to be able to address these two concerns jointly.

Status: Pending ratification

Virtual Limited Liability Companies

Icelandic corporate law is currently somewhat hostile to foreign ownership from outside the European Economic Area (EEA). The idea of Virtual Limited Liability Companies is to allow for virtually defined corporate entities, whereby the ownership is somewhat ephemeral, as long as the owners adhere to certain Icelandic transparency requirements. In that way, a virtually operated commpany would have tax obligations and operational safe harbor rights in Iceland like any other company, but gets to operate virtually in exchange for some strict guarantees of transparency and such.

This issue has more to do with creating a pleasant investment environment than explicitly improving the information regime in Iceland. For that reason, it has been relegated to the set of the last things we aim to accomplish in this set, and is therefore on hiatus for now.

Status: On hiatus.

Icelandic Prize for Freedom of Expression

Iceland currently hosts no internationally acclaimed prize. The idea of establishing a prize for freedom of expression is a good one, but practical issues must take precedence. For this reason, and the reason that there is currently no funding available for the establishment of such an award, this project has been put on hiatus for now.

Status: On hiatus.

Further Developments and International Cooperation

Activities in the European Union

Over the last two years, the European Parliament has on three occasions accepted resolutions supporting the IMMI project. This has been the foundation for a close collaboration with several members of the European Parliament, and in that role IMMI representatives have participated in a number of public hearings in the parliament, on topics including whistleblowing, access to information, journalism protection, intellectual monopolies and the ACTA agreement.

In order to better formalize the interactions between members of parliament, both in the EP and in the individual parliaments throughout Europe.

IMMI has also been in touch with groups in Spain, Italy, Ireland and Germany, who wish to adopt some of IMMI's goals and methodology to push for implementation in their respective countries. While this collaboration has started slowly, due to time and budgetary constraints, it shows much promise.

Activities on Global scale

IMMI has participated in various international and local forums, seminars, events and media in order

to raise awareness of the serious erosion of freedom of information and speech. Our aim with such participation has been to offer solutions and inspiration based on the IMMI principle, while expanding our operational environment.

IMMI is in the process of establishing a global inter-parliamentary group on the subject of freedom of information, expression, speech, media and privacy.

Digital Rights Watch

IMMI has participated in the development of DiRiWa, the Digital Rights Watch. DiRiWa is a project aiming to collect information about the state of communications and information freedom around the world, generally sorted by legal jurisdiction. It is interested in legal rights regarding communication, surveillance, access to government information, censorship, the use (and abuse) of copyright, patent and trademark legislation, and other issues that either legally or practically threaten the free spread of information.

These issues are important in modern society—any society, really—because so much of what we do is about sending or receiving information. Information about what politicians are doing, for instance, is critical for a functioning democracy. The right to privacy is considered a fundamental human right, but is often violated through extensive monitoring of electronic communications. Copyright legislation can be used to put in place legal environments that subsequently are used to censor political speech. Much of this happens unnoticed by the majority of people.

There is no existing effort to consistently collect, categorise, quantify and compare the status of information-flow environments in countries around the world. This is problematic. Nobody really knows what the situation is like on a global scale. In fact, nobody really knows what the situation is like, even in Europe or the United States; the places where people have been most concerned about these issues. Although we have measures of political corruption, of economic development, of the freedom of the press, but not of the strength of privacy or the right to free communication.

DiRiWa is an attempt to fix this, and to try and find out what the situation is like, both for specific regions and in general. For the time being, we expect to mostly be collecting qualitative data and doing legal analysis. Once the picture becomes clearer, it will hopefully become possible to develop a quantitative measurement of digital rights that can be useful in guiding further activism. This serves IMMI's goals by making it easier for us to get a comprehensive view of the legal situation in any given area, topic or country.

DiRiWa will be launched in April of 2012.