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## The Global Explosion of Freedom of Information Laws

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# THE GLOBAL EXPLOSION OF FREEDOM OF INFORMATION LAWS

JOHN M. ACKERMAN & IRMA E. SANDOVAL-BALLESTEROS \*

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## INTRODUCTION

A global wave of innovation in administrative law has gone virtually unnoticed by the community of legal scholars. Twenty years ago only ten nations had laws that specifically guaranteed the rights of citizens to access

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government information. Since then, 56 countries have passed Freedom of Information (FOI) laws, resulting in a total of 66 nations by October 2005. This impressive display of policy innovation at a global level demands explanation and understanding.

The “third wave” of transitions to democracy<sup>1</sup> has been amply studied. Over the last two decades, scholars have produced hundreds of texts that compare, contrast, and draw lessons from the world phenomenon of democratization.<sup>2</sup> One of the central lessons of the more recent texts is that new democracies are plagued with problems of accountability.<sup>3</sup> Despite the fact that they are democratically elected, leaders of state tend to behave like short-term dictators; they often act without informing the public and, for the most part, are not subject to sanctions for wrongdoing.<sup>4</sup> Some

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1. This term originally comes from SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 3-30 (1991), and refers to the global spread of free and fair elections during the past 30 years as the principal mechanism for deciding who holds government power. Starting in the mid 1970s, picking up steam in the 1980s, and culminating in the 1990s, a series of democratic transitions swept throughout the world. In 1974 António Salazar, dictator of Portugal, was removed from office by a group of progressive generals who then relinquished power to a democratically elected government. During the following decade transitions followed in Spain, Greece, Uruguay, Brazil, and Argentina. Then, during the late 1980s and early 1990s, the former Soviet states, Nicaragua, Chile, El Salvador, Guatemala, and the Dominican Republic all followed suit. Finally, in more recent years, long time authoritarian holdouts like Indonesia, Mexico, and South Korea have joined this movement toward electoral democracy.

2. For some of the most important examples, see *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 4 (Guillermo O’Donnell, Philippe C. Schmitter & Laurence Whitehead eds., 1986); Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 55-69 (1994); JUAN LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* (1996); *THE SELF RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999). See also DIETRICH RUESCHEMEYER ET AL., *CAPITALIST DEVELOPMENT AND DEMOCRACY* (1992) (speaking about the historical process of democratization in the world); *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* (Bernard Manin, Adam Przeworski & Susan Stokes eds., 1999) (analyzing the relationship between elections and accountability); SUSAN STOKES, *MANDATES AND DEMOCRACY: NEOLIBERALISM BY SURPRISE IN LATIN AMERICA* (2001) (examining policy switches and their implications for democracy and questioning O’Donnell’s concept of “delegative democracy”).

3. See O’Donnell, *supra* note 2 (explaining the characteristics of Latin America’s new democracies); LINZ & STEPAN, *supra* note 2, at 55-83; *SELF RESTRAINING STATE*, *supra* note 2, at 29-74 (expounding on the notion of government accountability and the challenges of strengthening accountability in new democracies); *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 2, at 1-26 (examining the relationship between elections and accountability); STOKES, *supra* note 2, at 1-24 (examining the process of economic liberalization and its implications for the quality of democracy in Latin America).

4. Providing information to the public and being subject to sanctions are two minimum requirements for democratic accountability, although broader definitions include many more aspects. There is a wide debate on the topic that we will not summarize here. See JOHN M. ACKERMAN, *SOCIAL ACCOUNTABILITY IN THE PUBLIC SECTOR: A CONCEPTUAL DISCUSSION* 2-7 (2005), available at [http://siteresources.worldbank.org/WBI/Resources/Social\\_Accountability\\_in\\_the\\_Public\\_Sector\\_with\\_cover.pdf](http://siteresources.worldbank.org/WBI/Resources/Social_Accountability_in_the_Public_Sector_with_cover.pdf) (debating the concept of accountability); see also Richard Mulgan, *Accountability: An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555 (2000) (examining the scope and meaning of accountability as it has been applied to official behavior); Andreas Schedler, *Conceptualizing Accountability*, in

scholars have gone so far as to claim that many new democracies are best termed “delegative democracies”<sup>5</sup> since the public is left virtually powerless between elections.

FOI laws are a crucial step toward the solution of the accountability deficit. Nevertheless, the cure has not received the same attention as the sickness. There are only a couple of comparative surveys in print, as well as a great number of case studies and activist accounts on the Internet that speak to the issue of freedom of information.<sup>6</sup> There is a pressing need to systematically study the existing information and collect fresh data using a more self-conscious social science perspective.

This Article is a first step towards this end. It brings together the existing information on the topic of FOI laws and sets an agenda for future research and policymaking. The first Section discusses the theory and practical impact of FOI laws in particular and transparency in general. It discusses the sources of these laws, their relationship to laws that regulate freedom of expression and citizen participation in government, and their impact on political, economic, and bureaucratic performance. The second Section then reviews existing FOI laws. It identifies common elements as

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SELF-RESTRAINING STATE, *supra* note 2, at 13-28 (offering a definition of government accountability particularly apt for analyzing the situation of new democracies); ROBERT BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 1-21 (2001) (surveying the multiple ways in which academics and public servants think about accountability).

5. See TRANSITIONS FROM AUTHORITARIAN RULE, *supra* note 2, at 55-57.

6. The book length, broad-based comparative study, PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION (Norman Marsh ed., 1987), is now outdated. For two important, contemporary surveys of Freedom of Information (FOI) legislation, see DAVID BANISAR, *FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD* (2004), available at [http://www.freedominfo.org/survey/global\\_survey2004.pdf](http://www.freedominfo.org/survey/global_survey2004.pdf), and TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* (2003), available at [http://portal.unesco.org/ci/en/file\\_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom\\_info\\_laws.pdf](http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf) (describing established international standards in FOI). Additionally, several Internet sources publish case studies and activist accounts. See generally ARTICLE 19, <http://www.article19.org> (last visited Feb. 7, 2006) (discussing an international human rights organization that defends and promotes FOI); Freedominfo.org, <http://www.freedominfo.org> (last visited Feb. 7, 2006) (providing an online source for FOI advocates); Freedom of Information Advocates Network, <http://www.foiadvocates.net> (last visited Feb. 7, 2006) (promoting the adoption of FOI laws in countries that lack such legislation); Open Society Institute Justice Initiative, <http://www.justiceinitiative.org> (last visited Feb. 7, 2006) (pursuing law reform activities grounded in the protection of human rights and access to information); Privacy International, <http://www.privacyinternational.org> (last visited Feb. 7, 2006) (monitoring surveillance and privacy invasions by governments and corporations); Transparency International, *Anti-Corruption Handbook, Good Practice, Access to Information*, [http://www.transparency.org/ach/strategies/access\\_info/good\\_practice.html](http://www.transparency.org/ach/strategies/access_info/good_practice.html) (last visited Feb. 7, 2006) (organizing a global nongovernmental group devoted to combating corruption); Corisweb, *Access to Information*, <http://www.corisweb.org/article/archive/246> (last visited Feb. 7, 2006) (charting the implementation of FOI laws internationally); Alasdair S. Roberts, *FOI Resources*, <http://faculty.maxwell.syr.edu/asroberts/foi/index.html> (last visited Feb. 7, 2006) (providing resources related to Roberts' current research on access to information).

well as differences in their content and origins. The third Section outlines the pending challenges in the design and implementation of FOI legislation and suggests possible areas for future research.

#### I. THEORY AND IMPACT OF FREEDOM OF INFORMATION LAWS

Sweden passed the first FOI law in 1766.<sup>7</sup> This statute, entitled *Freedom-of-Press and the Right-of-Access to Public Records Act*,<sup>8</sup> was enacted 23 years before the U.S. Revolution and 13 years before the French Revolution. The principal sponsor of this law, clergyman and Congressman Anders Chydenius, had been inspired by Chinese practice. According to Chydenius, China was “the model country of the freedom of the press” and set the example for other nations to follow.<sup>9</sup> This scholar-politician also admired the Chinese institution of the Imperial Censorate, which was “an institution founded in humanist Confucian philosophy [whose] main roles were to scrutinize the government and its officials and to expose misgovernance, bureaucratic inefficiencies, and official corruption.”<sup>10</sup> He was particularly impressed by the fact that Chinese emperors were expected to “admit their own imperfection as a proof for their love of the truth and in fear of ignorance and darkness.”<sup>11</sup> The origins of government accountability are not in the West, but in the East at the high point of the Ch’ing Dynasty.<sup>12</sup>

It is no coincidence that the first FOI act also assured the freedom of the press. Access to government information and freedom of expression are intimately linked. In order to form opinions that are worthy of being expressed, individuals must have access to relevant government information. For instance, Article 19 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>13</sup>

7. See BANISAR, *supra* note 6, at 81 (referring to the world’s first FOI act, named the “Freedom of the Press Act,” which required that official documents be made available immediately upon request for no charge).

8. Tryckfrihetsförordningen [TF] [Constitution] (Swed.) [hereinafter FPA Sweden], available in English at [http://www.presscouncils.org/library/Swedish\\_Press\\_Law.doc](http://www.presscouncils.org/library/Swedish_Press_Law.doc) (last visited Feb. 9, 2006).

9. ANDERS CHYDENIUS, BERÄTTELSE OM CHINESISKA SKRIFF-FRIHETEN, OFVERSATT AF DANSKAN (A Report on the Freedom of the Press in China) (1766), reprinted in Stephen Lample, *Freedom of Information, A Finnish Clergyman’s Gift to Democracy*, 97 FREEDOM INFO. REV. 2, 3 (2002), available at [http://www.foi.law.utas.edu.au/foi\\_rev.html](http://www.foi.law.utas.edu.au/foi_rev.html).

10. *Id.*

11. *Id.*

12. *Id.*

13. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf> (last visited Feb. 7, 2006).

A number of scholars acknowledge the international rise in FOI laws. As Roberto Saba has cogently argued, freedom of expression and opinion are not only about the defense of personal autonomy or the right of the individual to communicate his or her thoughts.<sup>14</sup> These freedoms are also about guaranteeing that the users of information have access to “the widest possible diversity of points of view on a particular issue.”<sup>15</sup> Ernesto Villanueva puts this same point in a different way. For Villanueva, the overriding “Right to Information” which includes, but goes beyond, freedom of expression and access to information consists of three elements: (1) the right to seek and receive (“*atraerse*”) information, (2) the right to inform, and (3) the right to be informed.<sup>16</sup>

Mark Bovens goes further. He characterizes Information Rights as the fourth great wave of citizens’ rights, equivalent to the civil, political, and social rights outlined in T.H. Marshall’s classic text.<sup>17</sup> With the decline of the industrial era and the rise of the “information society,” the world needs to update its constitutional frameworks to take into account the new universal right to information.<sup>18</sup> Bovens makes a crucial distinction between transparency as a question of “public hygiene” and information rights as an issue of “citizenship”:

The current rules on open government are for the most part mainly a question of *public hygiene*. This regulation is intended to increase the transparency of public administration, with a view to better democratic control and social accountability of government. By contrast, the information rights are most of all an element of *citizenship*. They concern first and foremost the social functioning of citizens, not only in relation to the public authorities, but also in their mutual relations and their relations with private legal entities. Information rights should be part of the civil rights chapter of constitutions, together with the other individual rights.<sup>19</sup>

Thus, Bovens’s distinction recognizes that open government without an informed populace is meaningless.

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14. Roberto Saba, *El Derecho de la Persona a Acceder a la Información en Poder del Gobierno*, 3 DERECHO COMPARADO DE LA INFORMACIÓN 45, 153 (Jan.-June 2004), available at <http://www.juridicas.unam.mx/publica/librev/rev/decoin/cont/3/art/art7.pdf> (last visited Feb. 7, 2006) (translation by Ackerman & Sandoval).

15. *Id.* at 153.

16. ERNESTO VILLANUEVA, DERECHO DE ACCESO A LA INFORMACIÓN PÚBLICA EN LATINO AMÉRICA: ESTUDIO INTRODUCTORIA Y COMPILACIÓN 17 (2003).

17. See Mark Bovens, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 317-41 (2002) (adding FOI to the list of ancient civil rights).

18. See *id.* (discussing how access to information has now become a question of social justice).

19. *Id.* at 327.

Alasdair Roberts also argues that information rights should be seen as essential parts of basic political participation rights, including but going beyond the right of freedom of expression.<sup>20</sup>

The task of providing critical public services that affect basic rights may be given to governmental organizations, but citizens cannot evade their own responsibility for ensuring that these agencies do their work properly. . . . [There is] an obligation to monitor the conduct of agencies, and a right of access to information could be justified as a mechanism for allowing citizens to fulfill this obligation.<sup>21</sup>

According to Roberts, citizen participation in holding government to account is not just a productive possibility under democracy.<sup>22</sup> It is a duty and a responsibility.<sup>23</sup>

These perspectives invite us to conceptualize liberties of the press and of citizen participation as positive freedoms and not merely negative rights. Negative freedoms allow us to be independent from oppression and external controls. They are “freedoms *from*” the control of some external force.<sup>24</sup> Positive freedoms allow us to realize ourselves as full human beings. They are “freedoms *to*” achieve some particular end.<sup>25</sup> Once we see freedom of expression and participation as rights *to* be informed and not only as rights *from* censorship and control we would argue that we have immediately moved into the realm of the overriding Right to Information, which requires a right to access government information as one of its central elements.

Unfortunately, such interpretations of basic liberal freedoms are by no means universal. The U.S. Supreme Court has been reluctant to interpret the First Amendment of the Constitution, which guarantees the freedom of speech, as implying a full right to information.<sup>26</sup> But the Supreme Court of India has recognized this right:

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20. See Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 U. TORONTO L.J. 262, 243-71 (2001) (noting that access rights are grounded in participation rights in addition to the freedom of expression).

21. *Id.*

22. See *id.* at 264 (describing how FOI would facilitate citizens in their duty to monitor the government).

23. See *id.* (discussing the obligation to monitor the conduct of agencies).

24. See generally Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford (Oct. 31, 1958)*, reprinted in *LIBERTY: INCORPORATING “FOUR ESSAYS ON LIBERTY”* 169-78 (Henry Hardy ed., 2002), available at <http://www.hss.bond.edu.au/phil12-205/Berlin%20Liberty2.pdf> (defining negative freedom as the ability to act unobstructed by others).

25. See generally *id.* (defining positive freedom as the ability to be one’s own master).

26. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”).

Where a society has chosen to accept democracy as its creedal faith, it is elementary that its citizens ought to know what their government is doing. . . . No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role that democracy assigns to them and make democracy an effective participatory democracy.<sup>27</sup>

FOI laws are a further development in age-old struggles for freedom of opinion and of the press, as well as the right to participate in government decisionmaking. In the past, governments had great military and legal authority, but they did not hold the amounts of information that they do today. The rise of the administrative state is a distinctly modern phenomenon, which has fully developed only in the 20th century.<sup>28</sup> For instance, in the United States in 1802 there were only 2,700 civil servants and by 1871 there were still only 50,000.<sup>29</sup> Not until the early 20th century did the U.S. administrative state set itself on more solid footing.<sup>30</sup> By 1945 that number rose to 3,800,000 civil servants, a number “roughly equal to the entire population of the United States in 1787 when the framers wrote the Constitution.”<sup>31</sup>

A similar process occurred throughout the world in both the North and the South. In East Asia and Latin America for instance, the rise of the “Developmental State” during the middle of the 20th century led to a significant strengthening of the bureaucratic apparatus.<sup>32</sup> This phenomenon has become so widespread that scholars like Ira Katznelson have called the rise of the administrative state the “second great macroprocess of modernity” comparable only to the rise of capitalist market relations in the 19th century.<sup>33</sup>

With the rise of the administrative state, the link between freedom of

27. S.P. Gupta v. Union of India (1982), 69 A.I.R. 149, *reprinted in* Roberts, *supra* note 20, at 262.

28. See BERNARD SILBERMAN, CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN 244 (1993).

29. See JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY 29 (1966) (charting the “governmental establishment” in 1802); see also SILBERMAN, *supra* note 28, at 244 (“Between 1792 and 1871, the civil service increased from approximately one thousand to over fifty thousand employees.”).

30. See DAVID ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATION STATE 1946-1999, at 5 (2000) (citing the New Deal and World War II as factors in the explosion of the American bureaucracy).

31. *Id.* at 6.

32. See generally THE DEVELOPMENTAL STATE (Meredith Woo-Cumings ed., 1998) (detailing the evolution of a strong administrative apparatus in developing nations).

33. Ira Katznelson, *Structure and Configuration in Comparative Politics*, in COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE 81-112 (Mark I. Lichbach & Alan S. Zuckerman eds., 1997).



expression, citizen participation in government, and freedom of access to government information becomes more important. Citizens can only be considered to be fully informed and able to participate as democratic citizens if they are able to access the information held about them and on their behalf by the government. In the age of the administrative state, expression and participation become meaningless if the polity is ignorant of the internal workings of government.

In addition to their theoretical links to freedom of expression and the right to citizen participation, FOI and transparency are also justified on more instrumental, pragmatic grounds. FOI laws can have a positive impact on at least three different spheres of society: politics, economics, and public administration. In the political realm, they contribute to the ability of citizens to become aware of and involved in the activities of government.<sup>34</sup> This enables them to transform themselves from passive citizens who occasionally go to the polls into active citizens who call the government to account and participate in the design of public policies.<sup>35</sup> Overall, this raises the level of political debate and leads to a more productive process of policymaking.<sup>36</sup>

In the economic realm, transparency increases efficiency by making the investment climate more reliable and allowing capital to better calculate where and when it can best be invested.<sup>37</sup> Indeed, the market lives and dies on information. Although secrecy and “insider information” is profitable for the few, the health of the market in the long term depends on a steady and reliable flow of trustworthy information.<sup>38</sup>

In the realm of public administration, transparency improves the decisionmaking of public servants by making them more responsive and accountable to the public and controls corruption by making it more difficult to hide illegal agreements and actions.<sup>39</sup> It also improves the legitimacy and trust in government in the eyes of the people, allowing for the more effective implementation of public policies.<sup>40</sup>

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34. See Bovens, *supra* note 17, at 322-33 (equating information rights with civil rights).

35. See *id.* (demonstrating how a politically active public improves government).

36. See *id.* (highlighting positive effects of information on politics).

37. See Daniel Kaufmann & Tara Vishwanath, *Toward Transparency: New Approaches and Their Application to Financial Markets*, 16 WORLD BANK RES. OBSERVER 41, 41-57 (2001) (linking the rise of successful financial markets to access to information).

38. See *id.* at 44 (discounting the arguments against governmental transparency in economics).

39. See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 162-74 (1999) (observing that the following mechanisms have a positive impact on reducing corruption: FOI laws; a press free from political party associations and restrictive libel laws; and available avenues, such as ombudsmen, for lodging individual complaints without fear or retribution).

40. See *id.* at 174 (arguing that governmental transparency and the individual's ability to push for public accountability are essential checks on corruption).

Daniel Kaufmann and Tara Vishwanath summarize the overall benefits of transparency in the following manner:

Lack of transparency can be costly both politically and economically. It is politically debilitating because it dilutes the ability of the democratic system to judge and correct government policy by cloaking the activities of special interests and because it creates rents by giving those with information something to trade. The economic costs of secrecy are staggering, affecting not only aggregate output but also the distribution of benefits and risks. The most significant cost is that of corruption, which adversely affects investment and economic growth.<sup>41</sup>

For instance, the authors argue that financial crises are much more likely when government and private sector financial information is not available to the public.<sup>42</sup> According to Kaufmann and Vishwanath, “[t]heoretically, a greater and less volatile flow of information about the decisions of the central bank should be just as likely to stabilize and rationalize financial markets as it is to disrupt and corrupt them.”<sup>43</sup> They even state that access to information about policy setting by central banks may be positive for the economy.

FOI laws are a fundamental part of the larger project of creating a fully transparent society and economy. But, what exactly is a FOI law? What are the principal elements of such laws? What are the crucial differences between the FOI laws that have been passed at different times and locations? This is the topic of the following Section.

## II. FREEDOM OF INFORMATION LAWS IN PRACTICE

### A. *What Is a FOI Law?*

A FOI law gives citizens, other residents, and interested parties the right to access documents held by the government without being obliged to demonstrate any legal interest or “standing.” Under a FOI law, government documents are assumed to be public unless specifically exempt by the law itself, and individuals can access them without explaining why or for what purpose they need them.<sup>44</sup> In short, FOI laws imply a change in the principle of the provision of government information from a “need to know” basis to a “right to know” basis.

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41. Kaufmann & Vishwanath, *supra* note 37, at 44.

42. *See id.* at 48 (detailing episodes of financial problems tied to lack of public information).

43. *See id.* at 44.

44. *See* ARTICLE 19, FREEDOM OF INFORMATION TRAINING MANUAL FOR PUBLIC OFFICIALS *in* ARTICLE 19, A MODEL FREEDOM OF INFORMATION LAW, app. 2, at 94-110, available at <http://www.article19.org/pdfs/tools/foitrainersmanual.pdf> (last visited Feb. 7, 2006) (providing a prototype for FOI laws).

FOI laws are important even when a country already has constitutional provisions that guarantee the right to information or freedom of expression. Constitutional clauses are difficult to enforce directly without the intermediation of legal statutes. For instance, the numerous clauses guaranteeing the right to work, education, food, and health that are included in the constitutions of the world are almost always left as dead letters.<sup>45</sup> Only when the legislature does the work of grounding principles in statutory law do these clauses gain the status of effective rights for the population that the government is obliged to uphold.<sup>46</sup>

Article 19, a nongovernmental organization, has developed a template that includes the basic elements that any FOI law should include.<sup>47</sup> This template is not intended to impose a single model on all countries but is designed only to serve as inspiration for those countries seeking to pass a new FOI law or modify the law already on the books.<sup>48</sup> As we will see below, it is a much superior model to both the historic Swedish law, which does not include an independent administrative body or a public interest override of exceptions,<sup>49</sup> and the more recent U.S. law, which applies only to “agencies” of the executive branch.<sup>50</sup>

Toby Mendel has summarized well the central guiding principles that should guide any FOI law.<sup>51</sup> These are

MAXIMUM DISCLOSURE: FOI laws should be guided by the principle of maximum disclosure.

OBLIGATION TO PUBLISH: Public bodies should be under an obligation to publish key information.

PROMOTION OF OPEN GOVERNMENT: Public bodies must actively promote open government.

LIMITED SCOPE OF EXCEPTIONS: Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests.

PROCESSES TO FACILITATE ACCESS: Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.

COSTS: Individuals should not be deterred from making requests for information by excessive costs.

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45. See, e.g., Mary Robinson, *Advancing Economic, Social and Cultural Rights: The Way Forward*, 26 HUMAN RIGHTS Q. 866 (2004).

46. See *id.*

47. See ARTICLE 19, *supra* note 44, at 94 (showing a model FOI law).

48. See *id.* Introduction (describing the benefit of this model FOI law).

49. See discussion *infra* Part II.C.2 (describing “public interest overrides”).

50. See Freedom of Information Act, 5 U.S.C. § 552 (2000) (establishing U.S. government procedures for public access to information).

51. See MENDEL, *supra* note 6, at 25-36 (listing guiding principles for FOI laws).

OPEN MEETINGS: Meetings of public bodies should be open to the public.

DISCLOSURE TAKES PRECEDENCE: Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

PROTECTION FOR WHISTLEBLOWERS: Individuals who release information on wrongdoing—whistleblowers—must be protected.<sup>52</sup>

There are a variety of different ways in which countries have actually designed and applied FOI laws. Some live up to these principles better than others, and each country has developed its own organic understanding of what FOI means conceptually and what FOI requires in practice. As we will see below, there are four general areas in which FOI laws vary significantly: (1) Coverage, or whether the FOI law reaches into all aspects of government and all activities that are publicly funded or carried out in the public's interest; (2) Exemptions, or the extent to which the government can withhold information even though it is covered by the law; (3) Enforcement, or the way in which compliance with the law is overseen and assured; and (4) Ease of Access, or the extent to which interested parties are able to get reliable information in an efficient and cheap manner.

### *B. Global Statistics*

The most systematic running count of the enactment of FOI laws in existence has been the responsibility of David Banisar, Deputy Director and Director of the Freedom of Information Programme at Privacy International.<sup>53</sup> He estimates that, as of October 2005, there were 66 different countries with FOI laws on the books.<sup>54</sup> The countries range from Peru to Liechtenstein, and Angola to Thailand, including nations from all five continents. The map<sup>55</sup> below shows the geographical distribution of existing FOI laws.

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52. *See id.* at 25-36 (highlighting the nine principles that FOI laws should embody).

53. *See* About Privacy International, Principal Office Holders and Staff, [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-91569](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-91569) (last visited Feb. 7, 2006).

54. *See* BANISAR, *supra* note 6. Complementary information from David Banisar on Angola, Serbia, Switzerland, Ecuador, Dominican Republic, Uganda, Germany, Antigua, and Azerbaijan is on file with the authors.

55. *See* Privacy International, <http://www.privacyinternational.org/issues/foia/foia-laws.jpg> (last visited Feb. 7, 2006) (showing a map of countries with FOI laws).

Figure 1: National Freedom of Information Laws

[ INSERT MAP HERE ]

[ INSERT LEGEND HERE ]

The map illustrates a concentration of FOI laws in the more developed countries. In fact, 25 of the 66 laws, or 38 percent, are concentrated in Western Europe, the United States, Canada, Japan, South Korea, Israel, Australia, and New Zealand.<sup>56</sup> In addition, the recent wave of passage of FOI laws in the “developing” world has been concentrated in Central and Eastern Europe.<sup>57</sup> Of the remaining 41 laws, 20, or 49 percent, are from this region, and they have all been passed since 1992.<sup>58</sup> Of the other 21 laws in the developing world, ten are in Latin America and the Caribbean—Mexico, Peru, Colombia, Panama, Belize, Jamaica, Trinidad and Tobago, Ecuador, Dominican Republic, and Antigua & Barbuda—six are in Asia—Thailand, Philippines, Pakistan, India, Tajikistan, Uzbekistan—four are in Africa—South Africa, Zimbabwe, Angola, Uganda—and one is in the Middle East—Turkey.<sup>59</sup>

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56. *Id.*

57. *See* Table 1, *infra* (listing countries with FOI laws).

58. *See* Privacy International, *supra* note 55.

59. *Id.*

A chronology of the passage of FOI laws is informative:

Table 1: Chronology of FOI Laws<sup>60</sup>

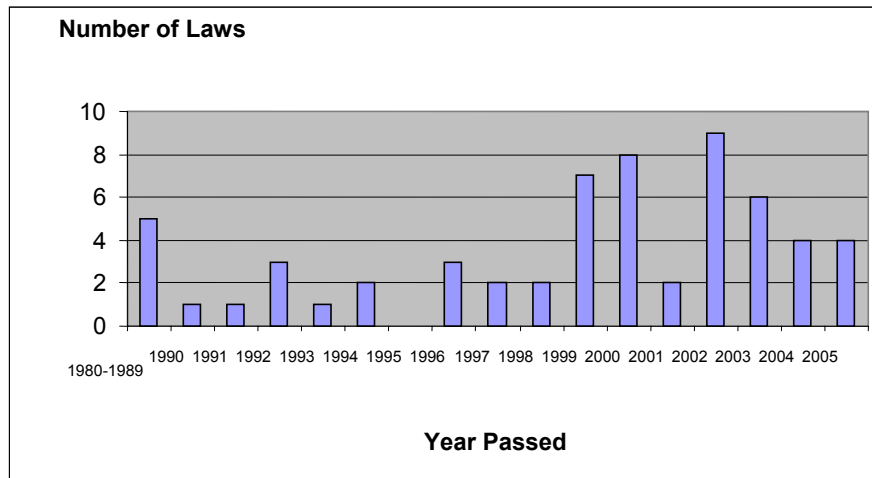
| YEAR | COUNTRY             |
|------|---------------------|
| 1766 | Sweden              |
| 1888 | Colombia            |
| 1951 | Finland             |
| 1966 | United States       |
| 1970 | Denmark             |
|      | Norway              |
| 1978 | France              |
| 1982 | Australia           |
|      | New Zealand         |
| 1983 | Canada              |
| 1987 | Austria             |
|      | Philippines         |
| 1990 | Italy               |
| 1991 | Netherlands         |
| 1992 | Hungary             |
|      | Ukraine             |
|      | Spain               |
| 1993 | Portugal            |
| 1994 | Belize              |
|      | Belgium             |
| 1996 | Iceland             |
|      | Lithuania           |
|      | South Korea         |
| 1997 | Thailand            |
|      | Ireland             |
| 1998 | Israel              |
|      | Latvia              |
| 1999 | Czech Republic      |
|      | Albania             |
|      | Georgia             |
|      | Greece              |
|      | Japan               |
|      | Liechtenstein       |
|      | Trinidad and Tobago |

60. Constructed by the authors based on information in BANISAR, *supra* note 6, and personal communication with David Banisar with regard to the FOI laws passed in Angola, Serbia, Switzerland, Ecuador, Dominican Republic, Uganda, Germany, Antigua, and Azerbaijan between the date of publication of Banisar's study in May 2004 and the date of elaboration of the above map in October 2005. The year refers to when the law was passed by the respective Congress or Parliament.

| YEAR     | COUNTRY                |         |
|----------|------------------------|---------|
| 2000     | South Africa           |         |
|          | United Kingdom         |         |
|          | Boznia and Herzegovina |         |
|          | Bulgaria               |         |
|          | Lithuania              |         |
|          | Moldova                |         |
|          | Slovakia               |         |
|          | Estonia                |         |
| 2001     | Poland                 |         |
|          | Romania                |         |
| 2002     | Panama                 |         |
|          | Pakistan               |         |
|          | Mexico                 |         |
|          | Jamaica                |         |
|          | Peru                   |         |
|          | Tajikistan             |         |
|          | Uzbekistan             |         |
|          | Zimbabwe               |         |
|          | Angola                 |         |
|          | 2003                   | Croatia |
|          |                        | India   |
| Kosovo   |                        |         |
| Armenia  |                        |         |
| Slovenia |                        |         |
| Turkey   |                        |         |
| 2004     | Dominican Republic     |         |
|          | Serbia                 |         |
|          | Switzerland            |         |
|          | Ecuador                |         |
| 2005     | Uganda                 |         |
|          | Germany                |         |
|          | Antigua & Barbuda      |         |
|          | Azerbaijan             |         |

This chronology reveals that the passage of FOI laws has accelerated at a rapid pace in recent years, with an explosion during the last five years. Almost two thirds of all existing FOI laws (40 of 66, or 61 percent) have been passed since 1999.<sup>61</sup>

61. See BANISAR, *supra* note 6 (detailing contries with FOI laws).

Figure 2: Chronology of FOI Laws<sup>62</sup>

### C. Variation in Content of FOI Laws

The specific content of FOI laws varies widely. Although all laws permit broad access to government documents without the need to show legal interest, there are various ways in which this idea has been interpreted.<sup>63</sup> Here we organize the types of variation in FOI laws into four broad categories: coverage, exemptions, enforcement, and ease of access.

#### 1. Coverage

An ideal law should cover all bodies that receive public money, including all branches of government, autonomous agencies, nonprofit organizations, individuals, private contractors, and foundations. It would also open up to public scrutiny any “body” that carries out a function vital to the public interest (for example, private hospitals, schools, prisons), regardless of whether it receives government funding.

Most laws are much more restrictive. It is rare for them to cover government-owned corporations or foundations, let alone contractors or private corporations that carry out government or public responsibilities. Even pioneers like Sweden have limited coverage. Sweden’s FOI law limits public information to documents held by the government.<sup>64</sup> The

62. Constructed by authors with information from BANISAR, *supra* note 6, and personal communication with David Banisar (on file with authors).

63. See discussion *infra* subsections 1-4.

64. See FPA Sweden, *supra* note 8, at 2:3(1) (“A document is official if it is in the



United States has a serious problem here as well. For instance, the widespread use of private prisons in the United States has submerged prison management and conditions in a cloud of opacity since Freedom of Information Act (FOIA) does not allow the public to have full access to information on how these prisons are run.<sup>65</sup> Such limits in coverage are at odds with the basic rationales for the statutes since they remove important areas of public interest information from the public eye.

In contrast, South Africa provides a model FOI law. Chapter 2, Section 32, subsection 1, of the 1996 South African Constitution states, “Everyone has the right of access to (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise or protection of any rights.”<sup>66</sup> The second part is the most important, since it requires private corporations and nonprofit organizations to follow transparency laws as well.<sup>67</sup>

There is also a characteristic weakness in dealing with legislative and judicial bodies. The U.S. FOIA only covers “agencies” of the executive branch.<sup>68</sup> The Mexican FOI law covers all of the government although it leaves significant autonomy to the Judiciary and Congress to decide how to apply the law.<sup>69</sup>

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keeping of a public authority, and if it can be deemed under the terms of Article 6 or 7 to have been received, prepared, or drawn up by an authority.”)

65. See Roberts, *supra* note 20, at 266 (discussing the limits that commercial confidentiality exemptions impose on access to information on how private prisons are run). Roberts also discusses the particular problems that arise when private prisons in some states house inmates from neighboring jurisdictions and the private prison does not have a contract relating to the inmates’ home jurisdiction. *Id.* In this situation there is no opportunity for the home jurisdiction to impose access requests to records under the terms of the contract. *Id.*; see also Alred C. Aman Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 *IND. J. GLOBAL LEGAL STUD.* 511 (2005) (arguing that domestic administrative law potentially offers a means for addressing human rights problems arising from privatization, particularly privatization in the United States dealing with prisons).

66. See S. AFR. CONST. 1996, available at <http://www.info.gov.za/documents/constitution/index.htm>.

67. *Id.*

68. See 5 U.S.C. § 552 (2000) (stating that “each agency shall make available to the public information as follows”). See also discussion *infra* Part II.E for the origins of the U.S. FOIA.

69. See Kate Doyle, In Mexico, A New Law Guarantees the Right to Know (July 9, 2002), <http://www.freedominfo.org/reports/mexico1.htm> (“Although [the law] is explicit about the executive’s obligations to transparency, [it] takes only a half-hearted stab at establishing the same kind of standards for Congress and the judiciary.”); see also Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [Federal Transparency and Access to Public Government Information Law], *Diario Oficial de la Federación* [D.O.], 6 de Noviembre de 2002 (Mex.) [hereinafter FTA Mexico], available at <http://www.freedominfo.org/reports/mexico1/laweng.pdf>. Section Two outlines a detailed set of procedures and requirements for access to information in the executive branch and sets up a federal information commission to supervise the application of the law here, while Section Three only sets out a brief, general outline for access to information in agencies that are not a part of the executive branch. *Id.*

Another issue of coverage involves the definition of “public information” itself. Again, there is wide variation in the definition among FOI laws. Some countries like Pakistan define public information in an extremely limited way, restricting it to documents that deal with a previously set list of types of official documents instead of setting up an initial blanket coverage for the FOI law.<sup>70</sup> Other countries like Thailand define information more liberally to include “any record held by a public authority, regardless of form or status, including whether or not it is classified.”<sup>71</sup>

## 2. Exemptions

The question of exemptions is generally the most debated aspect of FOI laws. A badly written set of exemptions can gut the law by allowing the authorities to withhold information at their discretion. Typical exemptions include the protection of national security, personal privacy, public security, commercial secrets, and internal deliberations.<sup>72</sup> The central issues are precisely *how* these concepts are defined, *who* gets to decide whether a particular piece of information is covered by an exemption, on *what grounds* this decision is made (for example, whether there is an explicit “harm test”) and whether there is a “*public interest override*” that

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70. See Freedom of Information Ordinance, 2002 No. XCVI of 2002. F. No.2(1)/2002-Pub. Islamabad § 7 (Pak.) [hereinafter FIO Pakistan]. This statute is available at [http://www.crcp.sdnpk.org/ordinance\\_of\\_2002.htm](http://www.crcp.sdnpk.org/ordinance_of_2002.htm). According to the law of Pakistan, “public records” are exclusively those records with the following characteristics:

- (a) policies and guidelines; (b) transactions involving acquisition and disposal of property and expenditure undertaken by a public body in the performance of its duties; (c) information regarding grant of licenses, allotments and other benefits and privileges and contracts and agreements made by public body; (d) final orders and decisions, including decisions relation to members of public; and (e) any other record, which may be notified by the Federal Government as public record for the purposes of this Ordinance.

The Pakistani law therefore significantly limits the range of possibly available information even before formal exemptions are applied. *Id.* Subsection (e) allows for the incorporation of new documents on the decision of the federal government, but it does not even come close to a blanket provision that all documents in the hands of the government should theoretically be public, as does the Swedish law. *Id.*; see also FPA Sweden, *supra* note 8 (defining document as “any representation in writing, any pictorial representation, and any record which can be read, listened to, or otherwise comprehended only by means of technical aids”).

71. See MENDEL, *supra* note 6, at 124 (comparing Pakistan’s law which restricts the scope of information regardless of whether it is classified); see also Official Information Act, B.E. 2540 § 4 (Thail.) (1997) [hereinafter OIA Thailand], available at [http://www.oic.thaigov.go.th/new2/ver4/oicnewweb2/content\\_eng/act.htm](http://www.oic.thaigov.go.th/new2/ver4/oicnewweb2/content_eng/act.htm).

72. There are also additional exemptions, like the reference to “harm to financial, economic or monetary stability” included in the Mexican FOI law. Unfortunately, the precise meaning of these terms is not specified in the Mexican law, leaving their definition to the discretion of the government agencies and the Information Commission. See FTA Mexico, *supra* note 69, at ch. III, art. 13, § III.

could make exempted information public if the issue were important enough.

The organization Article 19 has proposed an interesting three-part “public interest test” for exemptions. The fourth principle of its document *The Public's Right to Know: Principles on Freedom of Information Legislation* states: “The [restricted] information must relate to a legitimate aim listed in the law; disclosure of the information must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.”<sup>73</sup>

According to Article 19's principles, information may be withheld only when all three conditions are satisfied.<sup>74</sup> This is consistent with the Johannesburg Principles developed by more than 35 leading experts from every region of the world at a meeting in South Africa in October 1995.<sup>75</sup> Principle 1, Subsection (d) states:

No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.<sup>76</sup>

Principle 1.3 then expands on this requirement:

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;

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73. See ARTICLE 19, THE PUBLIC'S RIGHT TO KNOW: PRINCIPLES ON FREEDOM OF INFORMATION LEGISLATION 5 (1999), available at <http://www.article19.org/pdfs/standards/ri ghttoknow.pdf> (stating that a refusal to disclose is not justified unless the public authority can show that the information meets this test).

74. See *id.* at 6 (explaining that restrictions, with the main purpose of protecting governments from embarrassment or the exposure of wrongdoing, can never be justified).

75. See Toby Mendel, *National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles*, in CAMPBELL PUBLIC AFFAIRS INSTITUTE, NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 1, 8-9 (2003) (discussing goals and the process of the Johannesburg Principles). See generally ARTICLE 19, JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION, available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (stating that the principles adopted in October 1995 are based on international and regional law, as well as standards relating to the protection of human rights, evolving state practice, and the general principles of law recognized by the community of nations).

76. See ARTICLE 19, *supra* note 73, at 6-8 (desiring to promote a limited scope of regulations on FOI that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of freedoms).

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.<sup>77</sup>

These principles have been taken up by the United Nations (UN). In 1996, the UN Special Rapporteur on Freedom of Opinion and Expression recommended that the UN Commission on Human Rights endorse the principles.<sup>78</sup> They have been taken into account in the annual resolutions of the Commission on Freedom of Expression every year since then.<sup>79</sup>

Unfortunately, most FOI laws do not include such rigorous tests. For instance, the laws of the United Kingdom of Great Britain and Northern Ireland (UK) include harm tests for some exemptions, but government ministers are given power to override the decisions of the Information Commissioner, allowing them to decide in the final instance whether the issue or document passed the harm test.<sup>80</sup> The UK law is also worrisome since it has a very extensive list of exemptions including “communications with Her Majesty.”<sup>81</sup> The Swedish law does not include any public interest override.<sup>82</sup>

Pakistan is a striking example of an extremely deficient exemption regime, excluding information such as “notings on the file,” “minutes of meetings,” “intermediary opinions or recommendation,” and “any other record which the Federal Government may, in public interest exclude from the purview of this ordinance.”<sup>83</sup> These exclusions are not subject to any harm test or public interest override.<sup>84</sup> The Pakistani law further allows the government to refuse information when the applicant is “not entitled to receive such information,” adding an additional loophole.<sup>85</sup> In contrast, progressive laws, like those of South Africa, subject all exemptions to public interest overrides.<sup>86</sup>

77. *See id.* at 8-9.

78. *See Mendel, supra* note 75, at 9 (stating that the principles aim to be at the cutting edge of international standards).

79. *See id.* (noting that they have also been referenced by many courts around the world and used by numerous decisionmakers, NGOs, academics, and others).

80. *See* Freedom of Information Act 2000, ch. 36, pt. I, § 53 [hereinafter FIA UK], available at <http://www.opsi.gov.uk/acts/acts2000/20000036.htm> (giving the authority to keep information secret upon certification that such person has reasonable grounds).

81. *See id.* at pt. II, § 37 (exempting information if it relates to communications with Her Majesty or other members of the British Royal Family or Royal Household).

82. *See* FPA Sweden *supra* note 8, at ch. 2, art. 2 (listing exceptions that do not include a public interest override).

83. *See* FIO Pakistan, *supra* note 70, § 8. The exclusions in § 8 are in addition to the more formal “exemptions” included in §§ 14-18. *Id.*

84. *See id.* § 8 (listing exceptions that do not include a public interest override).

85. *Id.* § 13(c).

86. *See* Promotion of Access to Information Act 2 of 2000 s. 46 (S. Afr.) [hereinafter PAI S. Afr.], available at <http://www.info.gov.za/gazette/acts/2000/a2-00.pdf> (permitting disclosure if “the public interest in disclosure clearly outweighs the harm contemplated”).

One hotly debated topic in the area of exemptions is the issue of internal deliberations. To what extent should the public be allowed to view not only the final decisions of public officials but also the process that led to the decision? The tendency has been to restrict public view to completed decisions in the interest of efficiency. Nevertheless, experts have argued that both democracy and government effectiveness are aided by making deliberations as well as final decisions public.<sup>87</sup> For instance, Thomas Ellington writes that “official secrecy poses a risk of diminishing the quality of deliberations, because it limits input to insiders alone and may create an atmosphere hostile to criticism and an echo-chamber effect, in which only proponents of a particular course of action have a voice.”<sup>88</sup>

Another crucial aspect of FOI laws is privacy, since many FOI laws are also simultaneously laws for the protection of personal information. This is particularly true in the countries of Central and Eastern Europe, where there is a history of state intervention in the personal affairs of its citizens.<sup>89</sup> For instance, the Hungarian FOI law is entitled the “Protection of Personal Data and Disclosure of Data of Public Interest Act.”<sup>90</sup> The central question becomes where to draw the line. Are the opinions expressed by the advisory council or commission of a government agency during their meetings personal opinions or are they public? Are the resumes of government employees personal or public information? Recently, the authors have been denied both the minutes of the meetings of the citizen Advisory Council and the resumes of top officials of the Mexican Human Rights Commission.<sup>91</sup>

National security is another central topic, particularly since the spread of a new type of “national security state” after the terrorist attacks of September 11, 2001.<sup>92</sup> On the one hand, as Rodney Smolla has pointed

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87. See ARTICLE 19, *supra* note 75, at 6 (affirming the notion that a truly democratic society is achieved only when people have access to the decisions of their government).

88. See Thomas Ellington, Presentation at the 2004 Annual Meeting of the Canadian Political Science Association: Opening Doors: The Role of Freedom-of-Information Laws in Protecting and Expanding Democracy, June 3-5 (2004), at 8, available at <http://www.cpsa-acsp.ca/papers-2004/Ellington.pdf> (citing SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 196 (1984)).

89. See SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND 24-36 (2005) (discussing how the history of socialism affected the formation of new democratic institutions).

90. Protection of Personal Data and Disclosure of Data of Public Interest Act, Act LXIII of 1992 (Hung.) [hereinafter PPD Hungary], available at [http://www.privacy.org/pi/countries/hungary/hungary\\_privacy\\_law\\_1992.html](http://www.privacy.org/pi/countries/hungary/hungary_privacy_law_1992.html).

91. See Comité de Información, Secretaría Técnica de la Comisión Nacional de Derechos Humanos, *Oficio No. CI/ST/96/04* (2004) (on file with the authors); Secretaría Técnica del Consejo Consultivo de la Comisión Nacional de Derechos Humanos, *Oficio No. 1697* (2004) (on file with authors).

92. See generally Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261 (2003) (discussing the unnecessary expansion of

out, “[H]istory is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.”<sup>93</sup> On the other hand, the new international context most definitely requires innovative responses on the part of government to deal with new threats.

### 3. Enforcement

A FOI law without enforcement is doomed to be a dead letter, since the culture of bureaucracy typically works against the automatic implementation of openness.<sup>94</sup> The ideal arrangement is to create a special public body responsible for receiving appeals and generally enforcing the right to freedom of information. Without an independent body, all appeals must go to the courts, which entail a very slow process and high monetary costs.<sup>95</sup>

But only 12 of the 62 countries with FOI laws have independent Information Commissions at the national level,<sup>96</sup> including Belgium, Canada, Estonia, France, Hungary, Ireland, Latvia, Mexico, Portugal, Slovenia, Thailand, and the UK.<sup>97</sup> There is also an important variation between these different commissions. Some, like the Hungarian Commissioner for Data Protection and Freedom of Information, are only

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governmental secrecy since September 11, 2001); see also Thomas Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in CAMPBELL PUBLIC AFFAIRS INSTITUTE, NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33 (2003) (detailing the history of the modern incarnation of FOIA). The use of the expression “national security state” to refer to the present context comes from Susanne Jonas and Catherine Tactaquin, *Latino Immigrant Rights in the Shadow of the National Security State: Responses de Domestic Preemptive Strikes in 31 (no.1-2) Social Justice* 67.

93. Mendel, *supra* note 75, at 7 (citing RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 319 (1992)).

94. See, e.g., *Out of the Darkness*, ECONOMIST, Jan. 1, 2005, at 41 (referring to the supposed “‘British disease’—an obsession with official secrecy”); Transparency International, Transparency International Marks Right to Know Day (Sept. 28, 2005), [http://www.transparency.org/in\\_focus\\_archive/right\\_to\\_know\\_day.html](http://www.transparency.org/in_focus_archive/right_to_know_day.html) (referring to the “entrenched culture of secrecy” that predominates in governments around the world).

95. For instance, as discussed above, *supra* note 69, in Mexico the independent Information Commission only has jurisdiction over compliance in the executive branch. This has led to the quick release of information originally classified as confidential in this branch (with over three quarters of the appeals found in favor of the complainant (1,508 of the 2,040 substantive complaints filed) since the Information Commission started its work in 2003). See MARIA MARVAN, TRANSPARENCIA Y ACCESO A LA INFORMACIÓN A DOS AÑOS DE VIGENCIA DE LA LEY 17 (2005) (on file with authors). In contrast, requesters of information from those agencies who are not subject to the jurisdiction of the Information Commission are forced to go through much longer and tedious channels. For instance, a complaint filed over two years ago against the refusal of the National Human Rights Commission to reveal information contained in its files has yet to be finally resolved by the courts. See MIGUEL SARRE, SE PROMUEVE JUICIO DE AMPARO CONTRA LA COMISIÓN NACIONAL DE DERECHOS HUMANOS (2003) (on file with authors).

96. BANISAR, *supra* note 6, at 6.

97. *Id.*

Ombudsmen, without the capacity of making binding legal decisions.<sup>98</sup> Others, like the Mexican Federal Institute for Access to Information, have the power of an administrative court.<sup>99</sup> In still other cases, as in Ireland, a powerful Information Commissioner can also be the general Ombudsman, giving the Commission added clout.<sup>100</sup> In New Zealand the Human Rights Ombudsman is also responsible for overseeing the implementation of FOIA legislation.<sup>101</sup>

In general, Roberts has outlined three different approaches to enforcement.<sup>102</sup> These are:

- (a) Individuals are given a right to make an “administrative appeal” to another official within the institution to which the request was made. If the administrative appeal fails, individuals may appeal to a court or tribunal, which may order disclosure of information.<sup>103</sup>
- (b) Individuals are given a right of appeal to an independent ombudsman or information commissioner, who makes a recommendation about disclosure. If the institution ignores the recommendation, an appeal to a court is permitted.<sup>104</sup>
- (c) Individuals are given a right of appeal to an information commissioner who has the power to order disclosure of information. No further appeal is provided for in the access law, although the commissioner’s actions remain subject to judicial review for reasonableness.<sup>105</sup>

Each of these options requires the support of an independent judiciary and the operation of the public service in a professional manner. FOI laws can

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98. See PPD Hungary, *supra* note 90, art. 24 (assigning the duties of the data protection commissioner to include controlling the observation of the laws, considering reports submitted, and keeping the data protection register).

99. See FTA Mexico, *supra* note 69, arts. 33-39 (creating the Federal Institute for Access to Public Information and charging it with interpreting the Act, overseeing appeals, making recommendations, and providing guidelines and advice).

100. See Freedom of Information Act of 1997, § 33 (Ir.) [hereinafter FIA Ireland], available at <http://www.irishstatutebook.ie/ZZA13Y1997.html> (establishing the office of Information Commissioner and acknowledging that the offices of Commissioner and Ombudsman may be held by the same individual).

101. See Official Information Act 1982, Act No. 156, pt. 5 (N.Z.), available at [http://www.legislation.govt.nz/browsevw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browsevw.asp?content-set=pal_statutes) (follow the hyperlink for the letter O in “A-Z Contents” on the left side of the page and then select the name of the Act) (conferring authority on the Ombudsman to investigate and ensure compliance regarding official information requests).

102. Alasdair Roberts, *Access to Government Information—An Overview of the Issues* (The Carter Center, Working Paper, 1999), available at [http://www.transparency.org/working\\_papers/roberts/roberts.foi.html](http://www.transparency.org/working_papers/roberts/roberts.foi.html).

103. *Id.* This is the case for all of the countries with FOI laws except for the 12 countries mentioned above which have independent commissions especially designed to enforce the application of the law.

104. *Id.* In Hungary and New Zealand, the law grants a right of appeal to an administrative body and then to a reviewing court. See *supra* notes 98 and 101.

105. Roberts, *supra* note 102. Mexico is the exemplary case of this form of enforcement. See *supra* note 99.

only operate effectively within a friendly institutional enabling environment.<sup>106</sup>

Another important variable is the extent to which agencies can delay before providing information. Some countries, like Sweden and Norway, have an exceedingly short period of time to respond—24 hours.<sup>107</sup> Others, like Canada, India, Ireland, and South Africa, allow up to 30 days.<sup>108</sup> The original U.S. FOIA, passed in 1966, did not set any time limits at all.<sup>109</sup> Some developing countries have feared that short time limits might overburden already weak bureaucracies and make access to information even more difficult as time limits expire without government response, prompting citizens to appeal to the courts and, consequently, burden court dockets.<sup>110</sup> Nevertheless, a recent comparative study conducted by the Open Society Institute has shown that short time limits are actually quite effective at making FOI laws work.<sup>111</sup>

One particularly complicated issue in the area of enforcement arises when government agencies tend to circumvent transparency laws by using informal, unofficial communication channels for discussions that previously took place through more formal channels. The experience with the Administrative Procedure Act (APA) in the United States is an important example in this regard.<sup>112</sup> Due to the complex and time-consuming procedures the APA requires for formal rulemaking, agencies often prefer to rely on informal adjudication and interpretive rules.<sup>113</sup> The problem with employing these methods is that such decisionmaking

106. Roberts, *supra* note 102.

107. OPEN SOCIETY INSTITUTE, JUSTICE INITIATIVE ACCESS TO INFORMATION MONITORING TOOL: REPORT FROM A FIVE-COUNTRY PILOT STUDY 15 (2004), available at [http://www.justiceinitiative.org/db/resource2?res\\_id=102207](http://www.justiceinitiative.org/db/resource2?res_id=102207) (click on .pdf file entitled “Access to Information Tool: Overview 2003 (text)”).

108. *Id.*

109. Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (1966) [hereinafter U.S. FOIA]. Today there is a 20 working day limit for agencies to respond to requests. Section 552(a)(6)(A) of Title Five, U.S. Code, states that:

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall (i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination.

Nevertheless, there are no firm time limits for the actual provision of the information, only that agencies should make records available “promptly.” In addition, the U.S. FOIA states that, “Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(C)(i) (2000).

110. OPEN SOCIETY INSTITUTE, *supra* note 107, at 15.

111. *Id.*

112. 5 U.S.C. §§ 551-559, 701-706 (2000).

113. Stephen Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277, 282-89 (1998).



strategies do not have the same publication requirements, leading to the development of a large body of shadow law, distant from the public eye.<sup>114</sup> This produces the paradoxical result of a law designed to open up government but actually pushing it into obscurity. Such a phenomenon challenges information commissioners, ombudsmen, and courts to take a proactive stance in their interpretation of the law, evaluating not only the response of public servants to specific information requests but behaviors designed to avoid the law altogether.

#### 4. *Ease of Access*

An open government is not sufficient to achieve full accountability. It is not enough for public servants to leave their ledgers open on their desks so that citizens can catch a glimpse of their reports. Accountability demands that they actively inform and explain what they are doing and perhaps even provide plain language justifications for their actions.<sup>115</sup> As a result, the section of FOI laws that refer to the obligation to publish is absolutely crucial. For instance, the exemplary Article 7 of the Mexican FOI law states that all of the entities subject to the law must publish in a comprehensible form the full information about their internal structure; the duties of each administrative unit; a directory of public servants; the salary of all positions; the goals and objectives of each administrative unit; the services it offers; a list of all forms, requirements, and procedures; information about the budget assigned and the use that has been made of it; the results of all audits performed; the permits, concessions, and contracts the agency has entered into; the mechanisms of citizen participation in place, and further information.<sup>116</sup>

Most countries do not have such a complete list, thereby requiring citizens to go through the process of a formal request in order to acquire basic information.<sup>117</sup> For instance, the new law in Japan does not include any “obligation to publish” in its law.<sup>118</sup> The new law in the UK leaves the list of information to be published up to the discretion of each agency.<sup>119</sup>

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114. *Id.*

115. See ACKERMAN, *supra* note 4, at 3-7 (examining the concept of government accountability and suggesting that being active in a process and justifying governmental actions are essential to accountability).

116. See FTA Mexico, *supra* note 69, art. 7.

117. 5 U.S.C. § 552(a)(1) states that the only information U.S. government agencies are required to make public (by publishing in the *Federal Register*) independently of whether a formal FOIA request has been filed is the information on how to request information and how these requests are processed.

118. See Law Concerning Access to Information Held by Administrative Organs, Law No. 42 of 1999, ch. 2 (Japan) [hereinafter LCA Japan], available at <http://www.soumu.go.jp/gyoukan/kanri/translation3.htm>.

119. See FIA UK, *supra* note 80, § 19 (requiring authorities to publish information but allowing for an exception when the agency considers it appropriate).

Although the list of information needs to be approved by the Information Commissioner, this opening in the law leaves an important area exposed to discretionary use of the law.<sup>120</sup>

Additional elements in the debate over public access to information are the fees and costs to the public to obtain information. There are at least four different areas in which costs are incurred by freedom of information requests: searching, reviewing, reproducing, and sending. Some countries, like the UK, allow agencies to charge for all four steps of the process.<sup>121</sup> Other countries, like Mexico, only charge for the reproduction and sending of the information.<sup>122</sup> The recently passed law in Japan charges a fixed fee of 300 yen for each request—approximately two U.S. dollars—plus 100 yen to view every 100 pages of a requested document, and sometimes also 20 yen per page for photocopying.<sup>123</sup> The amount of fees charged is crucial for determining the real level of accessibility of information. Although there is clearly a justification for inhibiting frivolous requests, high user fees exclude large segments of the population from having access to public information.

Finally, it is important to note that some laws that are called FOI acts are actually designed to limit, not open up, freedom of speech and access to government information. For instance, Zimbabwe's Protection of Privacy and Access to Information Act imposes strict controls on journalists and makes it extremely difficult for the public to access information.<sup>124</sup> Further, in Paraguay "the Parliament adopted a FOI law in 2001 which restricted speech and was so controversial that media and civil society groups successfully pressured the government to rescind it shortly after it was approved."<sup>125</sup>

#### D. Categories of Countries with FOI Laws

We can identify four broad categories of countries with FOI laws. First, there are the historic pioneers, which include the ten countries that passed laws before the worldwide wave of democratization of the 1980s.<sup>126</sup> These include the four Nordic countries—Sweden, Finland, Denmark, and

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120. *Id.*

121. *See id.* § 9 (allowing agencies to charge for providing information).

122. *See* FTA Mexico, *supra* note 69, art. 27 (permitting fees for obtaining information but limiting them to only the cost of reproducing and sending the information).

123. Lawrence Repeta, *Government Transparency: Japan's Information Disclosure Law of 2001*, 106 FREEDOM INFO. REV. 56, 57 (2003).

124. *See* Access to Information and Protection of Privacy Act, pts. III, VII, XI, XII (2003) (Zimb.), available at <http://www.kubatana.net/html/archive/legisl/030611aippaamd.asp?sector=LEGISL> (maintaining control of the accreditation of journalists in the country and what information journalists are allowed to obtain).

125. BANISAR, *supra* note 6, at 7.

126. *See supra* Table 1.

Norway—four ex-British colonies—Canada, Australia, New Zealand, and the United States—as well as France and Colombia.<sup>127</sup>

The laws in these countries tend to be intensely used by the public and function relatively well, but they do not stand out as particularly innovative or progressive. The Swedish law, for instance, does not include any of the recent innovations in FOI law.<sup>128</sup> Similarly, the U.S. FOIA does not cover a great number of important government offices, including Congress, the courts, the White House Chief Counsel, or private bodies and contractors that receive public monies.<sup>129</sup> Moreover, the U.S. FOIA does not provide public interest overrides,<sup>130</sup> nor does the law have solid constitutional footing as previously discussed.<sup>131</sup>

There are important differences among the historic pioneers, particularly between the Nordic and the Anglo countries. For instance, a quick comparison between the Swedish and U.S. models reveals many crucial distinctions.

Table 2: The Swedish and U.S. Models of FOI Legislation<sup>132</sup>

| Model                          | Sweden   | United States   |
|--------------------------------|--|---|
| Influences                     | 7th to 18th century Chinese culture, Lutheran church, academe, liberal/libertarian ideals of individual freedoms and a free press, emerging democratic concepts. | Press interests, the United Nations, post WWII democratic ideals, desire by Congress and the executive to stop public service from becoming a fourth arm of government. |
| FOI Constitutional Requirement | Yes.   | No.   |

127. *Id.*

128. See FPA Sweden, *supra* note 8, ch. 3, art. 2 (lacking independent oversight commissions, public interest overrides, and applications to the private sector).

129. See 5 U.S.C. § 552(f)(1) (2000) (defining agency as “any executive department, military department, Government corporation, Government controlled corporation or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency”).

130. See *id.* (neglecting to highlight the importance of public interest).

131. See *id.* § 552(b) (listing circumstances in which the provisions do not apply); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 14-15 (1978) (discussing the lack of a right of access to government information under the First and Fourteenth Amendments).

132. Adapted from Stephen Lamb, *United States FOI Laws Are a Poor Model for Statutes in Other Nations*, 106 FREEDOM INFO. REV. 51, 53 (2003) (outlining the history and scope of various countries’ FOI laws).

| Model, Cont'd.   | Sweden  | United States  |
|--|---|--|
| Perceptions and Attitudes of Legislators and Officials | A cultural tradition of administrative openness. Strong expectations of transparency as a natural right.                | Ranging from enthusiasm to obstruction. A deep and long-standing pre-FOIA tradition of administrative secrecy, which was reinforced by the Cold War. |
| Cost   | Free. No access or processing fees.   | Often expensive. Nearly always processing and photocopying charges.  |
| Processing Time for Requests                           | Short, often within hours.  | Generally drawn out, usually takes at least a month and possibly much longer.  |
| Public and Media Awareness of FOI rights               | Generally very high.  | Generally poor to mediocre.  |
| Possibilities for Appeal                               | Broad, either through an ombudsman or direct to a court. The vast majority of such appeals have been won by appellants. | Often a matter of official discretion or administrative appeal at first but can then go to court in many cases, although outcomes are unpredictable. |

This table reveals the many advantages that the Swedish system has over the U.S. system, including support in the constitution, origins in the free speech movement as opposed to the anti-government movement, shorter processing times, lower costs, and broader possibilities for appeal. Nevertheless, the U.S. system is the one normally taken as a model for contemporary FOI laws.<sup>133</sup> The Swedish system has only been explicitly used as a model by Finland, Norway, Denmark, and the United States itself, while the U.S. model has been taken up by over 35 countries including South Africa, Japan, Thailand, Australia, Canada, and others.<sup>134</sup> According to Lamble, using the U.S. FOIA as a model law is a mistake: “[W]hile the U.S. legislation works relatively well within its own jurisdiction . . . its statutes do not provide the most appropriate template in many other nations and they generally do not work well in other political

133. *See id.* (finding that a number of foreign countries have based their FOI laws on similar laws in the United States).

134. *See id.* (comparing the minimal number of countries that have taken Swedish FOI laws as a model versus the sizeable number that have used U.S. laws as a model).

systems.”<sup>135</sup> But it is not clear whether the Swedish model is the best one for contemporary governments to take up either. There are many other more progressive examples of FOI legislation that have emerged in newly democratic countries that may be even more inspiring.<sup>136</sup>

The second category of countries includes the 29 countries that have passed FOI laws as part of a process of democratic transition and/or the drafting of a new constitution.<sup>137</sup> These include the Philippines, Spain, Portugal, South Korea, Thailand, South Africa, Mexico, and the 22 countries that have previously been part of the Soviet Union or the Soviet Bloc—19 from Central and Eastern Europe plus Tajikistan, Uzbekistan, and Azerbaijan.<sup>138</sup> In this latter subcategory, Hungary and Ukraine were a step ahead, passing laws in 1992 shortly after the fall of the Soviet Union.<sup>139</sup>

These laws tend to be the strongest on paper since they represent a reaction to previous authoritarian rule. For instance, the South African FOI law stands out in its blanket application to all “bodies” in both the public and private sectors.<sup>140</sup> This is in many ways a response to the iron-tight commitment to state secrecy that existed during the apartheid governments.<sup>141</sup> The recent Mexican law stands out for the strength of its relatively independent Access to Information Commission,<sup>142</sup> strong guarantees on process including strict and short time horizons,<sup>143</sup> an extensive list of information that is required to publish,<sup>144</sup> and special provisions for access to information related to human rights violations.<sup>145</sup> The legislation in Thailand stands out for its liberal definition of public information.<sup>146</sup>

135. *Id.* at 51.

136. See, for example, the recent laws in Mexico, South Africa, and Thailand discussed *infra*, which provide broad access to a wide variety of government documents.

137. See *supra* Table 1 (noting the years when these countries passed FOI laws and suggesting that these were periods of democratic transition in these countries).

138. *Id.*

139. See *id.* (setting forth the years in chronological order and showing that Hungary and the Ukraine passed laws before the other countries).

140. See PAI S. Afr., *supra* note 86, pt. 1, ch. 2, § 3 (making the Act specifically applicable to “a record of a public body” and “a record of a private body”).

141. See Ian Currie & Jonathan Klaaren, *An Update on Access to Information in South Africa: New Directions in Transparency*, 107 FREEDOM INFO. REV. 72, 73 (2003).

142. See FTA Mexico, *supra* note 69, at ch. 2 (endowing the “Access to Information Commission” with significant powers).

143. See *id.* ch. 3 (requiring liaisons to aid individuals in preparing information requests, mandating response to requests within 20 days, and providing for an automatic positive response to the request if no formal response is given—“positive ficta”).

144. See *id.* ch. 2, art. 7 (listing numerous areas of required disclosure and excepting only classified and confidential information).

145. See *id.* ch. 3, art. 14 (stating that “information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake”).

146. See OIA Thailand, *supra* note 71, § 4. The FOI of Thailand defines information as:

In practice, the successful application of laws in these newly democratic countries depends on the progress of democracy and on other external pressures that may limit the spread of the freedom of information.<sup>147</sup> For instance, the desire of many of the newly independent nations of Eastern Europe to join NATO has led them to increase the reach of “state secrets” laws even as they pass new FOI legislation.<sup>148</sup>

The third category of countries is comprised of 13 wealthy countries with long democratic histories that have been swept up in the move towards FOI over the past two decades.<sup>149</sup> These countries include Austria, Italy, Netherlands, Belgium, Iceland, Ireland, Israel, Japan, Greece, Liechtenstein, the UK, Switzerland, and Germany.<sup>150</sup> The first four countries were early starters, passing their laws between 1987 and 1994, while the latter nine countries have all passed their laws since 1996.<sup>151</sup>

These countries have been characterized by a somewhat schizophrenic stop-and-go process of FOI reform. It appears that the long democratic traditions in these countries make the passage of a FOI law a natural move. Given the global wave of FOI laws, it would be very difficult for such countries to justify not adopting some form of FOI legislation. Nevertheless, the fact that they have been late to come on board may indicate that there are also important internal resistances to transparency from within governments. The specific reasons for the existence of such resistances are fertile ground for future research.

The laws in these countries therefore tend to be less innovative and progressive than those passed by newly democratic countries.<sup>152</sup> In addition, the implementation of the laws appears to run up against particularly strong resistance in these countries. The delay in the full implementation of the law in the UK until 2005,<sup>153</sup> the strong resistance of

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a material which communicates matters, facts, data, or anything, whether such communication is made by the nature of such material itself or through any means whatsoever and whether it is arranged in the form of a document, file, report, book, diagramme, map, drawing, film, visual or sound recording, or recording by a computer or any other method which can be displayed.

*Id.*

147. See Alasdair Roberts, *NATO's Security of Information Policy and the Right to Information*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 149, 149 (Campbell Public Affairs Institute ed., 2003) (noting that 11 Central and Eastern European countries “have adopted laws to restrict access to information that has been classified as sensitive”).

148. See *id.* at 149, 151 (detailing the chronology of the passage of right to information laws and state secret laws in various Central and Eastern European countries and their NATO status).

149. See *supra* Table 1 (laying out the passage of FOI laws in various countries over the years).

150. *Id.*

151. *Id.*

152. See *infra* UK, Japan, and Ireland examples discussing opposition to FOI laws.

153. See, e.g., Rob Evans, *At Last, Whitehall Declares Opening Time*, GUARDIAN (U.K.),

the Japanese bureaucracy to FOI law,<sup>154</sup> and the recent gutting of the Irish FOI law<sup>155</sup> are examples of this opposition.<sup>156</sup>

Finally, there are 14 countries from the developing world that have not experienced recent democratic transitions.<sup>157</sup> These include six countries that used to form a part of the British Empire—India, Pakistan, Jamaica, Belize, Antigua and Barbuda, and Trinidad and Tobago—four other countries from the Latin America and Caribbean region—Peru, Panama, Dominican Republic, and Ecuador—three countries from Africa—Angola, Zimbabwe, and Uganda—and finally the only middle eastern country with a FOI law—Turkey.<sup>158</sup> With the exception of Trinidad and Tobago (1999) and Belize (1994), all of these countries have passed their FOI laws since the year 2002.<sup>159</sup>

In general, these countries seem to have weaker FOI legislation, especially when the government has less than full democratic credentials, as in Pakistan, Angola, and Zimbabwe.<sup>160</sup> Pakistan has an extremely restrictive exemptions regime.<sup>161</sup> In Zimbabwe, the law was designed to actually limit freedom of expression: “While the title refers to FOI and privacy, the main thrust of the law is to give the government extensive powers to control the media by requiring the registration of journalists and prohibiting the ‘abuse of free expression.’”<sup>162</sup> This restraint is worrisome,

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Dec. 30, 2004, at 11 (recalling that the Labour Party first promised a FOI act in 1974 but that one was not passed until 2000 by the Blair government that then delayed its introduction for five years).

154. See Repeta, *supra* note 123, at 58; see also discussion *infra* § III (discussing how the law needs more use by journalists and members of civil society to promote government accountability).

155. See Meave McDonagh, *The Honeymoon is Over: Ireland Rows Back on FOI*, FREEDOM INFO. REV. 78-84 (2003); see also discussion *infra* § III (arguing that the new Irish FOI law seems to be a step back from the original law of 1997).

156. Further research should be conducted to evaluate whether there is an overarching reason for why these countries appear to resist the full implementation of FOI legislation.

157. See *supra* Table 1 (laying out the chronology of the passage of the FOI laws in various countries).

158. *Id.*

159. *Id.*

160. Freedom House, an independent, nongovernmental organization, annually ranks nations based on the political rights and civil liberties they afford their citizens. Freedom House civil and political rights rankings (1 = most free and 7 = less free) for these countries are: Pakistan = 5.5, Angola = 5.5, and Zimbabwe = 6.5. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2006, available at <http://www.freedomhouse.org/uploads/pdf/charts2006.pdf> (charting the ratings for various countries). Pakistan’s elected government was overthrown by a military coup in 1999, and today its democracy remains unstable and under heavy influence from the military. Angola’s government has been rife with civil war, and its elections remain questioned and unstable today. Zimbabwe’s government has had a tumultuous history and struggles with democracy.

161. See FIO Pakistan, *supra* note 70, § 8 (excluding many items such as meeting minutes, notes on files, and intermediary opinions or recommendations from becoming part of the public record). These exclusions included in § 8 are in addition to the more formal “exemptions” in Articles 14-18.

162. BANISAR, *supra* note 6, at 96.

although it is by no means the universal rule in these countries. For instance, the laws in Peru clearly live up to international standards.<sup>163</sup>

Any broad based comparative-historical analysis of FOI laws would need to take into account these four categories of countries.<sup>164</sup> Although there is a great deal of diversity within each category, our hypothesis is that one should be able to discover general underlying patterns within each category that characterize both the origins and the experience with the implementation of FOI laws.

### *E. Comparative Historical Lessons*

Taking a step back from the specific categories, a look at the overall history of the passage of FOI laws allows us to hazard a few propositions with regard to their origins and nature. First, FOI laws are political creatures.<sup>165</sup> It would be a mistake to imagine that freedom of information is a natural outgrowth of economic development. Although economic growth may create some pressures in favor of freedom of information, the decisive factors with regard to whether a FOI law will be passed are political.<sup>166</sup> Second, the mobilization of civil society plays an absolutely central role in the passage of FOI laws.<sup>167</sup> Although there are plenty of examples of truly honest and open government officials, it is rarely in the interest of government as a whole to reveal its inner workings to society. Society stands to gain much more from the passage of FOI laws and tends to be the driving force behind their passage. Third, international actors have played an especially significant role, particularly in the most recent wave of creation of FOI laws.<sup>168</sup> Below, we discuss each one of these propositions in turn.

#### *1. FOI Laws Are Political Creatures*

A great number of countries with FOI laws are relatively well off economically.<sup>169</sup> Nevertheless, it would be a mistake to attribute their FOI laws to this fact. FOI laws do not grow organically and functionally out of

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163. See BEATRIZ BOZA, ACCESO A LA INFORMACIÓN DEL ESTADO: MARCO LEGAL Y BUENAS PRACTICAS 19-70 (2004) (accenting the virtues of Peruvian FOI laws).

164. See *infra* Part II.D (discussing in detail the four categories of countries that have FOI laws).

165. See *infra* Part II.E.1 (discussing that political factors are the primary contributors to creating FOI laws).

166. See *infra* Part II.E.1 (discussing that economic factors are important with regard to the passage of FOI laws).

167. See *infra* Part II.E.2 (discussing how civil society has played a significant role in the passage of FOI legislation because FOI laws significantly empower civil society).

168. See *infra* Part II.E.3 (discussing in depth the three relevant categories of international actors that strongly supported the adoption of FOI laws in recent years).

169. See Table 1 (listing the countries that have FOI laws and the year in which they were adopted).



economic development. In fact, economic development and modernization can sometimes go along with extremely restrictive policies on government information and freedom of speech. As Sheila Coronel has noted:

Singapore is the most wired country in the world after the United States . . . . Singapore also boasts the highest penetration of newspapers, radio and television in the region [of Southeast Asia]. Its citizens are among the best educated in the world. Singapore is a player on the global stage and the darling of international investors. It is the regional trading, media and financial hub. Yet . . . draconian laws, a paternalistic state and a culture that puts a premium on comfort and conformity keeps Singaporeans in the dark about what is going on where it matters most: their own country.<sup>170</sup>

Modern day Singapore is a case in point, since it is highly developed economically but does not have an FOI law.

The numerous poor countries that passed FOI legislation provide further evidence of the lack of a clear correlation between development and freedom of information. Jamaica and Uzbekistan are much poorer than Singapore but are much further ahead with regard to access to government information. The large numbers of newly democratic countries with radically different levels of economic development (from Spain and Portugal to Thailand and Estonia) that have passed FOI laws speak to the importance of politics over and above economic development. In the end, it appears that political factors are much more important in explaining the presence or absence of FOI laws in any given country.

The history of the passage of the FOIA in the United States is a case in point. The FOIA arose out of two fundamentally political sources. First, Congress sought to reinforce its capacity to control and supervise the executive branch.<sup>171</sup> With the explosion of the administrative state during the first half of the 20th century, Congress started to lose authority in favor of the executive branch.<sup>172</sup> Congress did not take the consolidation of executive power lightly. They quickly began to protest and to demand their constitutionally mandated place as the central political authority of the nation. For instance, Congressman John Jennings (R-TN) complained that,

The Federal Government now touches almost every activity that arises in the lives of millions of people who make up the population of this country. The chief indoor sport of the Federal bureaucrat is to evolve out of his own inner consciousness, like a spider spins his web, countless

170. SHEILA CORONEL, *THE RIGHT TO KNOW: ACCESS TO INFORMATION IN SOUTHEAST ASIA* 8-10 (2003).

171. See ROSENBLOOM, *supra* note 30, at 8 (citing the increase in the number of agencies and in administrative power as the root of Congress's concern of oversight).

172. See *id.* (discussing how the increase in administrative agencies, which Congress created in order to delegate some of its responsibility, gave the executive branch more authority).

confusing rules and regulations which may deprive a man of his property, his liberty, and bedevil the very life out of him.<sup>173</sup>

Representative Hamilton Fish (R-NY) followed suit in his comment on the Hoover Commission Report that recommended centralizing power over the bureaucracy. Fish wrote that the Report is “a step to concentrate power in the hands of the President and set up a species of fascism or nazi-ism or an American form of dictatorship.”<sup>174</sup>

Congress then moved beyond words. The first effort made by Congress to tame the overgrown bureaucracy was the passage of the APA in 1946.<sup>175</sup> This act sought to force agencies to “adhere to legislative values when they make rules, and to judicial values when they adjudicate and enforce.”<sup>176</sup> It also tried to make agencies more transparent in publicizing information about their organizational structure, rules, and decisions.<sup>177</sup> As Senator Homer Ferguson (R-MI) argued in support of the Act, “In my opinion, there will be fewer complaints because of the activities of governmental agencies if they will attempt to live within the rules and regulations laid down by Congress. After all, the Congress is the policy-making body of the United States.”<sup>178</sup>

The core of the APA was, and continues to be, the obligation of federal agencies to publish proposed rules and decisions and open them up for “public comment.”<sup>179</sup> During the comment period, individuals and groups may “participate in the [rulemaking] through submission of written data views, or arguments . . .”<sup>180</sup> Afterwards, when the agency issues its rules it must provide “a concise general statement of their basis and purpose.”<sup>181</sup> The rules, decisions, and justifications can then be appealed to the federal courts, which can judge their constitutionality, procedural regularity, and conformity to statute.<sup>182</sup>

173. *See id.* (arguing that the federal government was too involved in the activities of the people of the country and cautioned that, because the federal government was so large, it could impinge upon the liberty of its people).

174. *See id.* at 18 (arguing that the concentration of power in the President and executive branch is a form of dictatorship).

175. 5 U.S.C. §§ 551-559, 701-706 (2000).

176. ROSENBLOOM, *supra* note 30, at 38.

177. *See id.* at 48 (emphasizing that a concern raised in the congressional debate of the Administrative Procedure Act (APA) was the need to provide information to the public in order to ensure that democracy is not undercut).

178. *Id.* at 39.

179. *See* § 553(b) (outlining that a general Notice of Proposed Rulemaking needs to be published in the *Federal Register* and further detailing what this notice shall include).

180. *See* § 553(c) (discussing how the agency must give the public the opportunity to participate in the rulemaking process).

181. *See id.* (outlining agencies’ actions following their creation of a rule).

182. *See generally* § 554 (imparting the provision that applies to adjudication by the federal courts).

As administrative law scholar Jerry Mashaw observed, the APA demands that bureaucrats “must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous. ‘Expertise’ is no longer a protective shield to be worn like a sacred vestment. It is a competence to be demonstrated by cogent reason-giving.”<sup>183</sup> The APA therefore brings societal actors into the most intimate chambers of the state and forces bureaucrats to face up to and justify themselves before society. Through the APA, Congress “responded to its own relative impotence by giving outsiders access not only to the bureaucracy but also to the courts.”<sup>184</sup>

The U.S. FOIA grew out of the same distrust in the power of administrative agencies that had stimulated the passage of the APA. As Thomas Blanton remarked, the secrecy with which the executive branch managed its affairs during the Cold War created congressional distrust in and fear of the executive:

Secrecy turned into the bureaucracy’s defense mechanism and, at the same time, it helped the President when he had to confront a critical Congress. A key moment occurred when, at the beginning of the Eisenhower administration, the Executive Branch announced the firing of various employees out of suspicion that they were communists, but refused to give Congress the papers which documented the way in which the action had been taken.<sup>185</sup>

A law which explicitly required the executive branch to reveal information would help Congress reconstruct its lost authority over the overgrown administrative, national security state, empowering it to carry out its oversight tasks more effectively.

Nevertheless, the FOI law passed in 1966 was deficient because it did not have any “teeth.” The law did not establish a fixed response time to requests or any sanctions for the failure of an agency to comply with its obligation.<sup>186</sup> It took the Vietnam War and the Watergate scandal to oblige

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183. See Jerry Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 26 (2001) (noting that American administrative law brings the power to reason into politics).

184. See SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* 16 (1995) (referring to environmental statutes as examples containing provisions for citizen suits).

185. See Thomas Blanton, *La Experiencia de Estados Unidos con Respecto a la Ley de Libertad de Información: Activismo del Congreso, Liderazgo de los Medios de Comunicación y Política Burocrática*, 2 *DERECHO COMPARADO DE LA INFORMACIÓN* 13 (2003), available at <http://www.juridicas.unam.mx/publica/librev/rev/decoinc/cont/2/art/art1.pdf> (authors’ translation).

186. See FOIA, Pub. L. No. 89-487, 80 Stat. 250 (1966) (showing how the FOIA does not list any sanctions for noncompliance within the Act).

Congress to strengthen the law in the 1970s.<sup>187</sup> This new law was promptly vetoed by President Ford and only passed after a two-thirds majority overrode his veto.<sup>188</sup>

In addition to conflict between the branches of government, the second political source of the FOIA was interparty politics.<sup>189</sup> The origins of the FOIA came from the activism of Democratic Congressman John Moss, who chaired the Special Subcommittee of Public Information and was a great critic of the Republican Eisenhower Administration.<sup>190</sup> The FOIA was finally passed in 1966 when it gained the support of Republican Congressmen interested in overseeing the Democratic Administrations of Kennedy and Johnson.<sup>191</sup>

## 2. *The Centrality of Civil Society*

The founding debates about the origins of democratic transitions de-emphasized the role of civil society. For instance, the classic text written by Guillermo O'Donnell and Phillippe Schmitter describes the transition process as one essentially guided by elites.<sup>192</sup> This involves two different claims. On one hand, the idea is that the transition process is inaugurated by a split in the regime elites between “hard-liners” and “soft-liners.”<sup>193</sup> “We assert that there is no transition whose beginning is not the consequence—direct or indirect—of important divisions within the authoritarian regime itself, principally along the fluctuating cleavage between hard-liners and soft-liners.”<sup>194</sup> Here, the hard-liners are those who “believe that the perpetuation of authoritarian rule is possible *and* desirable”<sup>195</sup> and the soft-liners are those who are aware that “the regime they helped to implant . . . will have to make use, in the foreseeable future,

187. See Blanton, *supra* note 185, at 18.

188. *Id.*

189. See HERBERT FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 21-27 (1999) (identifying a key event in the creation of the FOIA as the confrontation between a conservative former public relations man, Honaman, and a liberal newspaper editor, Wiggins, that spawned tension between the Democratic Congress and the Republican Eisenhower Administration).

190. See *id.* (asserting the tension that was created by the Honaman-Wiggins confrontation proved the necessity of a subcommittee for information).

191. See Blanton, *supra* note 185, at 15. *But see* FOERSTEL, *supra* note 189, at 39-42 (discussing the background and events that led up to FOIA's passage and signing).

192. See TRANSITIONS FROM AUTHORITARIAN RULE, *supra* note 2, at 19 (discussing the political instability in Argentina and its political cycles); see also Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 COMP. POL. No. 1, 5-6 (1990) (providing that elite factions play key roles in democratic transitions and in determining what type of democracy will be created).

193. See TRANSITIONS FROM AUTHORITARIAN RULE *supra* note 2, at 16 (denoting the difference between the armed forces, or hard-liners, and the civilian supporters of the authoritarian regime, or soft-liners).

194. *Id.* at 19.

195. *Id.* at 16.

of some degree or some form of electoral legitimacy.”<sup>196</sup>

On the other hand, the installation of democracy itself is understood to consist of the successful negotiation of a “pact”<sup>197</sup> between the moderate elites on each side. Once the soft-liners gain leverage over their hard-line colleagues within the regime and once the moderates get dominance over their more radical or “maximalist” colleagues outside of the regime, these two moderate forces are able to ally their strengths to form a winning democratic coalition.<sup>198</sup> At this point, there is the generation of a “subtle but effective, and most often implicit, ‘first-order understanding’—the foundation of eventual pacts between soft-liners and those in the opposition who are preeminently interested in the installation of political democracy.”<sup>199</sup> In other words, the installation of democracy is envisioned to follow the rules of a classic “4-player game” scenario in which centrists from both sides of a conflict find it more in their interest to align themselves with each other than to maintain allegiance to their more radical colleagues. Therefore, elites are the fundamental driving forces behind democratization, both at the beginning and at the end of the process of democratic transition. This position is not unique to O’Donnell and Schmitter. For instance, in a classic piece published in *Comparative Politics*, Terry Karl wrote:

To date . . . *no* stable political democracy has resulted from regime transitions in which mass actors have gained control, even momentarily, over traditional ruling classes. Efforts at reform from below, which have been characterized by unrestricted contestation and participation, have met with subversive opposition from unsuppressed traditional elites . . . . Thus far, the most frequently encountered types of transition, and the ones which have most often resulted in the implantation of a political democracy are “transitions from above.”<sup>200</sup>

In exploring the origins of FOI laws, it would be all but impossible to sustain such top-down hypotheses. Although elite splits and moderation have definitely played a part, civil society groups and leaders have played the leading role.<sup>201</sup> This is perhaps because of the nature of a FOI law

196. *Id.*

197. *Id.*

A pact can be defined as an explicit, but not always publicly explicated or justified, agreement among a select set of actors which seeks to define (or, better, to redefine) rules governing the exercise of power on the basis of mutual guarantees for the ‘vital interests’ of those entering into it.

*Id.* at 37.

198. See TRANSITIONS FROM AUTHORITARIAN RULE, *supra* note 2, at 25.

199. *Id.*

200. Karl, *supra* note 192 at 1, 8-9.

201. ARTICLE 19, PROMOTING PRACTICAL ACCESS TO DEMOCRACY: A SURVEY OF FREEDOM OF INFORMATION IN CENTRAL AND EASTERN EUROPE 15 (2002), available at <http://www.article19.org/pdfs/publications/promoting-access.pdf> (observing that in Romania and

when compared to the nature of a democratic transition. In a democratic transition, a significant group of elites, both inside and outside of government, stand to gain from change. Although free and fair elections disempower elites as a whole by giving power to the masses, they also open up vast future opportunities to those who are able to guide and adapt to the new democratic situation. It is, therefore, in the interest of a significant group of elites to lead a democratic transition.

FOI laws are different. Although in the long run they significantly improve governance, they do not represent an immediate benefit for those who are in power.<sup>202</sup> FOI laws open the government to external scrutiny, making elites much more vulnerable to outside criticism and significantly empowering civil society. There are numerous individual freedom of information pioneers within governments throughout the world. But government leaders “as a group” do not favor FOI laws because it is not in their interest to do so. The picture is totally inverted for civil society. Here, there is a clear net gain and strong incentives to vigorously back FOI legislation.<sup>203</sup> The empirical data seem to bear out this hypothesis. Civil society has played a significant role in the passage of FOI legislation in Central and Eastern Europe<sup>204</sup> as well as in Latin America.<sup>205</sup>

### 3. *The Role of International Actors*

International actors have created a highly favorable context for the adoption of FOI laws in recent years. There are at least three different categories of relevant actors. First, international nonprofit organizations and foundations have been very influential in funding and otherwise backing civil society groups that pressure leaders for the passage of FOI

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Slovakia the participation and cooperation of governments with nongovernmental organizations enabled civil society to be closely involved in the drafting of FOI legislation); see also *infra* notes 228-29 (discussing the problems of implementation of FOI laws).

202. See ARTICLE 19, *supra* note 201, at 14 (noting that FOI legislation is frequently opposed by governments).

203. See *id.* at 13 (identifying FOI laws as a key step in transforming secretive governments into democratic institutions that will guarantee the right to information to their citizens).

204. See generally OPEN SOCIETY JUSTICE INITIATIVE, ACCESS TO INFORMATION TOOL: OVERVIEW 2003, at 1-3, available at [http://www.justiceinitiative.org/db/resource2?res\\_id=102207](http://www.justiceinitiative.org/db/resource2?res_id=102207) (highlighting countries in which the Justice Initiative has helped to create FOI legislation).

205. See ERNESTO VILLANUEVA, SOCIAL PARTICIPATION AND ACCESS TO PUBLIC INFORMATION IN LATIN AMERICA, in ACCESS TO INFORMATION IN THE AMERICAS: A PROJECT OF THE INTER-AMERICAN DIALOGUE 40-42 (The Inter-American Dialogue ed., 2004), available at [http://www.thedialogue.org/publications/programs/policy/politics\\_and\\_institutions/press\\_freedom/AccessReport.pdf](http://www.thedialogue.org/publications/programs/policy/politics_and_institutions/press_freedom/AccessReport.pdf) (discussing the groups of people who formed the “Oaxaca Group,” which was instrumental in the development of FOI legislation); see also Robert Gregory Michener, Engendering Political Commitment: The Grupo Oaxaca—Expertise, Media Projection—and the Elaboration of Mexico’s Access to Information Law (June 2003) (unpublished M.A. thesis, The University of Texas at Austin) (on file with authors).

laws.<sup>206</sup> This has been particularly clear in the case of Central and Eastern Europe, where the Open Society Institute sponsored by George Soros has had an important impact in the promulgation of FOI laws throughout the region.<sup>207</sup> The Open Society Institute has recently begun to work more in Latin America as well, funding civil society initiatives in Mexico and Peru.

Second, interstate diplomatic pressure has played a crucial role in some countries. Once again the countries of Central and Eastern Europe are a case in point. Eager to boost their democratic credentials in order to be considered as possible members of the European Union, elites in these countries have been more willing than otherwise to support FOI legislation.<sup>208</sup> The passage of the Mexican law itself can also be attributed in part to it being viewed favorably by its northern neighbor.<sup>209</sup>

Third, international organizations like the World Bank have also begun to push for increased transparency throughout the developing world. This issue is part and parcel of the larger agenda of controlling corruption. In order to improve the investment climate in a developing country, it is said that governments need to open up their accounts and their transactions to outside eyes.<sup>210</sup> Here the emphasis is more on access of the private sector to government information and procedures and not so much on the access of normal citizens. Nevertheless, this agenda still pushes in the same direction.

There can of course be problems with the role of international actors. As the Open Society Institute has argued, “the proliferation of FOI laws is not . . . without its dangers: states eager to tender their democratic credentials to the international community may adopt substandard laws. Even where laws are excellent on paper, they may not be well implemented

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206. See generally Press Release, Open Society Justice Initiative, Public Information Still Hard To Get, Five Country Survey Finds (Sept. 28, 2004), available at [http://www.justiceinitiative.org/db/resource2?res\\_id=102207](http://www.justiceinitiative.org/db/resource2?res_id=102207) (noting that the Justice Initiative is one example of an organization that promotes the passage of FOI laws).

207. See OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 204, at 2-3 (showcasing Armenia, Bulgaria, and Macedonia as countries where civil society groups have worked with the Open Society Justice Initiative to pass FOI legislation).

208. See ARTICLE 19, *supra* note 202, at 3 (asserting that the adoption of Recommendation (2002) by the Committee of Ministers of the Council of Europe, which establishes a required standard to access of information in Europe, shows potential members of the Council of Europe that access to information is a fundamental right).

209. See generally VILLANUEVA, *supra* note 205 (describing efforts of the U.S. organization, Inter-American Dialogue, to help Latin America create FOI laws).

210. See, e.g., The World Bank, Political Accountability, <http://www.worldbank.org> (follow the hyperlink at the top right of the page titled “Topics” and then follow these subsequent hyperlinks: “Public Sector Governance,” “Topics,” “Anticorruption,” “Increasing Political Accountability,” and finally “Tranparency”) (last visited Feb. 9, 2006) (recommending measures such as opening sessions of parliament; registering lobbying activities; publishing voting and trial records, annual reports, judicial decisions; and fostering a free and vibrant media).

in practice.”<sup>211</sup> In addition, some international actors can actually pressure nation states to restrict information.<sup>212</sup>

### III. CHALLENGES FOR THE FUTURE

The wave of FOI laws that have swept the world over in the past two decades offers great hope for the future. As Blanton has argued “[T]he international freedom-of-information movement stands on the verge of changing the definition of democratic governance. The movement is creating a new norm, a new expectation, and a new threshold requirement for any government to be considered a democracy.”<sup>213</sup> Or, as Roberts commented, “the burden was once on proponents of access rights to make a case for transparency; today, the burden is on governments to make the case for secrecy.”<sup>214</sup> The tables have finally been turned.

In addition, the fact that many developing countries that have not experienced recent democratic transitions have recently passed FOI laws is particularly encouraging.<sup>215</sup> This means that FOI laws are not limited to wealthy countries and are not dependent on the existence of radical regime change. Given the correct political context, FOI laws can be passed in almost any country at any time.

Nevertheless, there are also some important challenges. One major challenge is the new “structural pluralism” that has arisen in public administration throughout the world.<sup>216</sup> As government shrinks, public tasks are increasingly being taken up by private corporations, nonprofit organizations, independent contractors, or quasi-governmental entities.<sup>217</sup> FOI laws have typically developed as a way to control the new administrative state or fourth branch of government that emerged throughout the world during the 19th and 20th centuries. Access to information by the public has been one of the best ways to dynamize and control large, hierarchical bureaucracies and to avoid the threat of being trapped in the threat of immobility and secrecy that they pose. But now the situation is different. According to Roberts, “[T]he old system of administrative controls, built to suit a world in which power was centered

211. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 207, at 2.

212. See Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y 50, 55 (July-August 2002) (“[M]embership in a supranational organization, such as the WTO, does not always encourage transparency—as when NATO refuses to release files without a consensus among all NATO members or requires Poland to adopt a new law on state secrets.”).

213. *Id.* at 56.

214. Roberts, *supra* note 102, at 2.

215. See *supra* note 157 and accompanying text.

216. See Roberts, *supra* note 20, at 243 (introducing Anthony Giddens' use of the term “structural pluralism” as a characterization of the public sector's willingness to experiment with new forms of organization as instruments for the delivery of public services).

217. *Id.*



within government departments and agencies, no longer seems to fit contemporary realities.”<sup>218</sup> He continues, “our understanding of what counts as an abuse of power is expanding, at a moment when power itself is slipping out of the restraints imposed by the post-war regulatory regime.”<sup>219</sup>

It appears that we find ourselves in the paradoxical situation of being swept up in a wave that has passed its time. Just as FOI legislation has started to spread in a worldwide search to hold government accountable, government has found a way to slip out the back door. This poses a major challenge to the achievement of full information rights. While access to government information has always been only a part of the overall search for transparency and accountability in society at large, it is now a smaller part than ever before. The challenge, therefore, is to follow the example of countries like South Africa and to expand the reach of FOI legislation beyond the public sector.<sup>220</sup> For instance, on March 30, 2005, the Mexican Senate’s modification of the FOI law to include government *fideicomisos*, or foundations that receive both public and private monies, was a crucial step in the right direction.<sup>221</sup>

The increasing spread of “disclosure laws” in the United States may hold a partial solution to this challenge. These laws require private corporations to notify the public about the risks involved in their operations or the use of their products, from the emission of toxic pollution to the use of medicine.<sup>222</sup> For instance, Mary Graham has argued that today we are witnessing the emergence of what she calls “technopopulism”:<sup>223</sup>

The combination of new access to standardized information and new technology, especially the growth of the Internet, has set in motion an irreversible process that involves dangers as well as opportunities. Ordinary citizens can now do what government regulators have traditionally done . . . . Armed with the facts, they create pressures for change through what they buy, how they invest, where they work, how they vote, and what groups they join. The expansion of the World Wide Web offers new ways to distribute and personalize information that automatically enhances the power of disclosure.<sup>224</sup>

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218. *Id.* at 270.

219. *Id.* at 271.

220. *See supra* note 66 and accompanying text.

221. Benito Jiménez, *Alaba IFAI apertura de fideicomisos*, REFORMA (Mexico City), Apr. 1, 2005, at 2.

222. *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE, THE RISE OF TECHNOPOPULISM 1-20 (2002) (tracing the development of disclosure as a form of regulation in the United States and focusing on both the substance and mode of communication of disclosure laws).

223. *Id.* at 137-57 (discussing the proliferation of information availability as a result of the Internet as a benefit to public awareness and government accountability as well as potentially dangerous due to misinformation and interpretation problems).

224. *Id.* at 137.

This brings us to a second challenge or, in this case, opportunity for the expansion of the right to information—the Internet. The Internet is a powerful communication mechanism that can be used to facilitate access to government and other information. In particular, with the Internet, the “obligation to publish” sections of FOI laws take on added importance. Since publication on the Internet brings information out into the public domain much more than the printing of a report, these sections should get special attention in new FOI laws and should be reformed in older laws. Once again, the Mexican FOI law sets a positive example in this regard, requiring agencies to publish a large amount of information on the Internet and providing computing centers so that the public at large can have access to the information.<sup>225</sup>

A third challenge is that the implementation of FOI laws is usually much more difficult than the mere approval of a law. As Roberts has argued,

Whether a freedom of information law succeeds in securing the right to information depends heavily on the predispositions of the political executives and officials who are required to administer it. Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation.<sup>226</sup>

Indeed, a recent study conducted by the Open Society Justice Initiative shows that problems with the implementation of FOI laws may be endemic.<sup>227</sup> The study revealed that on average, only 35 percent of requests for information have been fulfilled. In fact, many requests for information were not even accepted or processed.<sup>228</sup> About 36 percent of requests submitted resulted in tacit or “mute” refusals. This pilot survey included five countries—Armenia, Bulgaria, Macedonia, Peru, and South Africa. Two of these—Armenia and Macedonia—do not have explicit FOI legislation on the books.<sup>229</sup> Nevertheless, there was not a significant difference between the countries with FOI laws and without FOI laws in terms of access to government information.<sup>230</sup> In some cases the non-FOI

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225. See FTA Mexico, *supra* note 69, arts. 7 and 9.

226. Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An Internal Law on Open Government?*, 45 CAN. PUB. ADMIN. 175, 176 (2002) (analyzing problems the Canadian system has encountered in attempting to implement information access).

227. See OPEN SOCIETY INSTITUTE, *supra* note 107, at 11-16 (reporting the results of a five-country pilot study in the developing world).

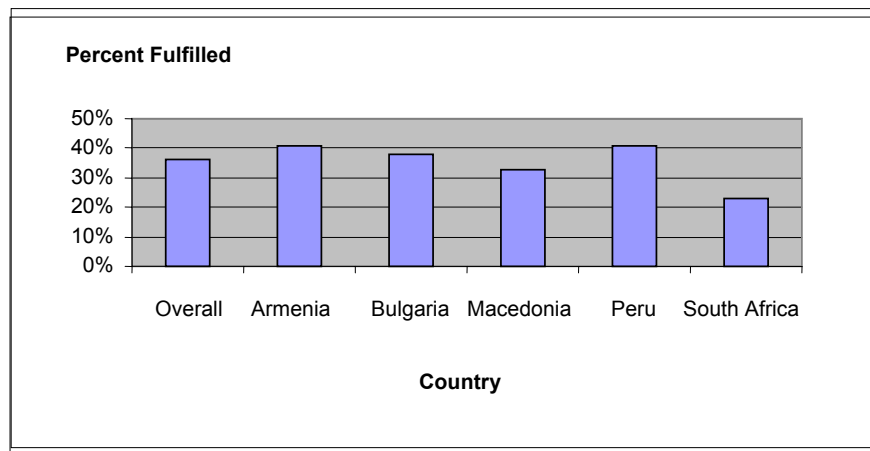
228. See *id.* at 12 (reporting that 15% of attempted requests were unable to be submitted).

229. See *id.* at 2 (“The five countries were selected to represent a spectrum of legislative development and implementation . . .”).

230. See *id.* at 13 (noting that the lack of a formal FOI law was not correlated to lack of openness).

countries ranked higher than the countries with FOI.<sup>231</sup> For instance, 41 percent of the requests were fulfilled in Armenia compared to 23 percent in South Africa.<sup>232</sup>

Figure 3: Fulfilled Requests Country-by-Country<sup>233</sup>



This data is worrisome to the extent it implies that FOI laws are not doing their job.<sup>234</sup> Nevertheless, it can also be read in a positive way insofar as it “underlines the argument, often used by FOI activists, that introduction of an access to information law need not be seen as a threat by public authorities, as they are already practicing a certain amount of openness.”<sup>235</sup>

Independent studies of the implementation of the South African FOI—clearly one of the most ambitious laws on paper—also send some important warning signals.<sup>236</sup> A survey carried out by the Open Democracy Advice Center two years after promulgation of the Act revealed that only 30 percent of public bodies and only 11 percent of private bodies were both aware of the existence of the Act and active in implementing it.<sup>237</sup> In addition, only nine percent of public bodies and six percent of private bodies had begun to compile the legally mandated manual of record.<sup>238</sup> In general, “[u]se of the [FOI Act] by the public in its first two years of

231. *Id.*

232. *Id.*

233. OPEN SOCIETY INSTITUTE, *supra* note 107.

234. *Id.* at 9.

235. *Id.* at 13.

236. See Currie & Klaaren, *supra* note 141, at 74 (reporting on implementation of the FOI law in South Africa).

237. *Id.*

238. *Id.*

operation has been extremely limited.”<sup>239</sup>

In Canada, there also appear to be difficulties with implementation of the FOI law.<sup>240</sup> Roberts performed a study that sampled 2,120 FOI requests carried out between 1999 and 2001 by the Human Resources Development Canada, one of the major Canadian government agencies. This study revealed that requests that came from the media or political parties and those that touched on sensitive areas were processed in a different manner than requests from common citizens.<sup>241</sup> Such requests met with slower responses and the answers given were of lower quality, violating the principle of “equal treatment” inscribed in the Canadian FOI law.<sup>242</sup>

Such studies are extremely useful initial approaches to evaluating the effectiveness of FOI legislation. Nevertheless, in order to permit systematic cross-national and historical comparisons of their effectiveness, it is urgent to develop a common set of indicators that can be used to track the implementation of transparency laws. A group of researchers at Murdoch University in Australia is presently developing such a system. Inspired by “The Corruption Perception Index” of Transparency International and the “Dow Jones Sustainability Indexes,” this group has begun to develop an “International Comparative Freedom of Information Index.”<sup>243</sup> This would begin with an analysis of FOI laws in Australia, Sweden, the United States, South Africa, and Indonesia, and include an analysis of the objectives of the laws, sample requests from journalists, and a survey of the attitudes of leading politicians and public servants toward FOI.<sup>244</sup>

An additional issue with regard to implementation is the question of who most frequently uses FOI laws. The top users of FOI laws are often corporations in search of information that can be of private commercial interest to them. For instance, during the first year of implementation of Japan’s new FOI law, the agency that received the most information requests was the National Tax Agency.<sup>245</sup> This is apparently the case

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239. See Verne Harris, *Using the Promotion of Access to Information Act (PAIA): The Case of the South African History Archive*, 107 FREEDOM INFO. REV. 72 (2002) (questioning effectiveness of the South African FOI Act).

240. See generally Roberts, *supra* note 225 (analyzing aspects of Canadian Access to Information Act).

241. See *id.* at 11-14 (reporting the results of an empirical comparison of sensitive to nonsensitive information requests).

242. See *id.* at 7 (citing the Information and Privacy Commissioner’s concern that disparate treatment of information requests was “unrelated to the requirements of the Act”).

243. See Johan Lidberg, Gail Phillips & Stephen Tanner, *The Freedom of Information Index: Measuring the Gap Between the Promise and Practice of Information Legislation*, 108 FREEDOM INFO. REV. 88, 93 (2003) (rationalizing the necessity for a FOI index for increased political accountability).

244. *Id.* at 90-93 (explaining development of methodology).

245. Repeta, *supra* note 123, at 56.

because this agency holds lists of people with the highest reported incomes, extremely valuable information for merchants.<sup>246</sup> Such information can be highly lucrative since it allows corporations to identify people with large amounts of disposable income, especially if the competition has failed to file a similar request. Such use of FOI laws is not necessarily negative, but it is not the principle reason why most laws are passed. Governments and Information Commissions need to pro-actively promote the use of FOI laws by journalists, academics, and civil society groups in order to help them become more effective sources of government accountability.

A fourth challenge is the tendency toward backlash by government and politicians against strong FOI laws sometimes only a few years after they are passed. For instance, the reforms introduced in 2003 to the Irish Freedom of Information Act<sup>247</sup> represent a significant step back from the original 1997 law. They extend the time limit for disclosure of Cabinet documents from five to ten years, limit access significantly to internal deliberation in government, expand the application of national security exemptions, add new exemptions, limit the definition of “factual information” not subject to crucial exemptions, and increase user fees, among other changes.<sup>248</sup> Interestingly enough, this reform was passed on the eve of the fifth anniversary of the law, when large amounts of government documents would have come to the public eye.<sup>249</sup> These reforms have led scholars to conclude that the “amendment of the Irish FOI Act has altered its character substantially. In its original form, the Act was a relatively progressive measure by international standards. While it would be going too far to say that it has been entirely emasculated by its amendment, it has certainly been weakened considerably.”<sup>250</sup>

In Japan the backlash has been a bit different.<sup>251</sup> In May of 2002, a major national newspaper revealed that government officials from the Defense Agency had put together a list of people who had submitted information requests, “conducted background investigations of those people and then distributed this information” throughout the agency.<sup>252</sup> Unfortunately such behavior is not penalized by Japanese law and has served to intimidate future information requesters.<sup>253</sup>

A final challenge for FOI laws is the increasing concern with national

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246. *Id.*

247. FIA Ireland, *supra* note 100.

248. *See* McDonagh, *supra* note 155, at 84 (itemizing the retreat from earlier more liberal FOI laws in Ireland).

249. *Id.*

250. *Id.*

251. *See* Repeta, *supra* note 123 (surveying freedom of information progress in Japan).

252. *See id.* at 58 (noting the Japanese government’s retributive tactics with regard to individuals seeking information).

253. *Id.*

security since the terrorist attacks of September 11, 2001. As discussed above, the issue of national security exemptions has always been a hot topic in the debate about the nature of FOI laws.<sup>254</sup> The new U.S.-led “War on Terror” makes this issue even more of a central concern. Terrorism seems to make just about any area of government crucial for national security and risks closing down the important progress that has been made in FOI legislation throughout the world over the past two decades.<sup>255</sup> For instance, under pressure to join NATO the wave of new FOI laws in Central and Eastern Europe has been accompanied by a simultaneous wave of new “State Secrets Laws” which restrict public access to government held information (see Table 3 below).

Table 3: FOI Laws and State Secrets Laws in Central and Eastern Europe<sup>256</sup>

| COUNTRY        | NATO STATUS | FOI LAW | STATE SECRETS LAW |
|----------------|-------------|---------|-------------------|
| Albania        | Candidate   | 1999    | 1999              |
| Bulgaria       | Candidate   | 2000    | 2002              |
| Czech Republic | 1999        | 1999    | 1998              |
| Estonia        | Candidate   | 2000    | 1999              |
| Hungary        | 1999        | 1992    | 1995              |
| Latvia         | Candidate   | 1998    | 1997              |
| Lithuania      | Candidate   | 2000    | 1995              |
| Poland         | 1999        | 2001    | 1999              |
| Romania        | Candidate   | 2001    | 2002              |
| Slovakia       | Candidate   | 2000    | 2001              |
| Slovenia       | Candidate   | None    | 2001              |

In order to continue to push forward the worldwide movement toward open government and freedom of information, the contributions of civil society will be absolutely necessary. Without constant pressure and activism, FOI laws will turn into dead letters, and their principle statutes will be slowly eaten away by other concerns. We cannot expect government to change on its own. The winds of modernization and

254. See discussion on exemptions, *supra* notes 74-94 and accompanying text (discussing the difficulties in balancing national security interests with the public’s right to transparency in government).

255. See also ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006). See generally CAMPBELL PUBLIC AFFAIRS INSTITUTE, *supra* note 75 (country case studies).

256. Roberts, *supra* note 147, at 151.

globalization will not automatically transform closed bureaucrats into open public servants. Political action and public debate are the keys to the consolidation of transparency.

This struggle can be aided by further research into the origins and functioning of FOI laws. What sorts of political coalitions and political environments are most likely to facilitate getting a FOI law passed? What explains the large diversity in the content of FOI laws? After passage, do FOI laws have a typical “life cycle”? What are the social, political, and economic conditions that constitute a particularly good “enabling environment” for the consolidation of FOI laws? Only by expanding our knowledge of the origins, nature, and development of FOI laws will we be able to consolidate the right to information at a global level.