

Pluralism in FOI Law Reform: Comparative Analysis Of China, Mexico And India

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Abstract

This comparative case study of recent adopters of Freedom of Information ('FOI') Law argues that the proliferation of FOI laws requires a change in approach to, and understanding of FOI. FOI law should be viewed as an 'empty signifier' that needs to be understood in terms of the context and dynamics of each country. The 'empty signifier' of FOI law is filled by particular advocacy bodies campaigning for reform and/or the political and administrative traditions and institutions of an adopting country. India, Mexico and China demonstrate this diversity. Pluralism rather than universalism is a more effective approach to analysing and understanding the public sector transparency that is replacing secrecy as a global norm.

I INTRODUCTION

Transparency has replaced secrecy over the past two decades as the guiding principle of public sector information management.¹ The contemporary rise of public sector transparency globally marks a historical break in state-society relations. Most governments throughout modern history operated on the premise that information should be restricted unless there were specific reasons to release it. However, an increasing number of governments, especially outside the liberal democratic fold, have begun to operate on the principle that information should be available, unless there are specific reasons to withhold it.

FOI laws or policies that guarantee the public a presumptive right of access to government-held information, are considered a good overall indicator of public sector transparency, and have spread to over ninety countries since the 1990s.² The Swedish *Freedom of the Pen and Press Act 1766*, adopted during a unique period of experimentation in liberal

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¹ Tero Erkkilä, *Government Transparency: Impacts and Unintended Consequences* (Palgrave Macmillan, 2012).

² Patrick Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58(1) *Administrative Law Review* 177, 188.

political philosophy, remained an isolated Scandinavian innovation for two centuries, until the adoption of similar legislation in the United States in 1966. Until the late twentieth century and the collapse of the Cold War, FOI diffusion remained confined to wealthy established democracies, including Denmark, Canada, New Zealand and Australia. Beginning in the early 1990s, the rate of adoption increased significantly. New adopters included Hungary (1992), Belize (1994), Thailand (1997), and Israel (1998). An ‘explosion’ of forty countries adopted the law between 1999 and 2006.³ In particular, Eastern Europe and Latin America provided fertile ground for legal reform.

Traditionally a field of study largely restricted to administrative law and a very small handful of scholars, FOI literature has expanded into a body of work framed and informed generally by the wider study of public sector transparency. The literature now includes scholars from law, journalism, political science, anthropology, economics and sociology working on a handful of overlapping analytical themes including:

- legal analysis;⁴
- media analysis;⁵
- government investigation;⁶
- administrative analysis;⁷ and

³ John M Ackerman and Irma E Sandoval-Ballesteros, ‘The Global Explosion of Freedom of Information Laws’ (2006) 58(1) *Administrative Law Review* 85, 98.

⁴ See, eg, S V Anderson, ‘Public Access to Government Files in Sweden’ (1973) 21(3) *The American Journal of Comparative Law* 419; Norman Marsh (ed), *Public Access to Government-Held Information: a Comparative Symposium* (Stevens & Sons, 1987); Donald Rowat (ed), *Administrative Secrecy in Developed Countries* (Columbia University Press, 1979); David Banisar, *Freedom of Information Around the World 2006 – A Global Survey of Access to Government Information Laws* (2006) Freedominfo.org <http://www.freedominfo.org/documents/global_survey2006.pdf>.

⁵ See, eg, Herbert Brucker, *Freedom of Information* (Macmillan, 1949); Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (Ferrar, Straus & Cudahy, 1956); James Wiggins, *Freedom or Secrecy* (Oxford University Press, 1956); Harold L Cross, *The People’s Right to Know: Legal Access to Public Records and Proceedings* (Columbia University Press, 1953).

⁶ See, eg, Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (1995); Access to Information Review Task Force, ‘Access to Information: Making It Work for Canadians’ (Report, Ottawa: Public Works and Government Services, 2002); Committee on Official Information, ‘Towards Open Government’ (General Report, Government Printer, Wellington, 1980).

⁷ See, eg, Rick Snell, ‘Administrative Compliance - Evaluating the Effectiveness of Freedom of Information’ (2001) 93 *Freedom of Information Review* 26; J Gilbert, ‘Access Denied: That Access to Information Act and Its Effect on Public Records Creators’ (2000) 49 *Archivaria* 84; Kerry Badgley, Margaret J Dixon and Paulette Dozois, ‘In Search of the

- socio-legal analysis.⁸

The evolving literature has expanded beyond normative legal parameters to include socio-legal and comparative dimensions. This study continues this trend and examines the way FOI law within India, Mexico and China is understood and defined by idiographic circumstances. India, Mexico and China are selected as case studies because they are three of the largest and most significant recent adopters. They present themselves as a set of comparative cases wherein pluralism in motives and outcomes in FOI law reform may be explored due to the substantial differences they embody in terms of political cultures and institutions. The study concentrates on the significant role played by the elements of administrative reform, media advocacy and social activism in the three countries in influencing variable law reform outcomes.

The current study builds upon recent comparative and socio-legal analysis of FOI law reform with the aim of presenting a qualitative examination of pluralism in reform. The study does not aim to present a model of potential pathways and outcomes; it is not a functionalist study. The study seeks a theoretical and reflective contribution drawn from an interpretive base and built upon existing studies that challenges strongly held beliefs within sections of the FOI community concerning the universal nature of FOI (as embodied by the model law presented and used by the advocacy group Article 19). It presents an integrated comparative analysis removed from traditional case-by-case studies⁹ and explores differences in themes of reform as they are found, to varying degrees, across the case studies of India, Mexico and China. Theoretical concepts from political science are employed in an effort to boost socio-legal understanding and capture the pluralist nature of FOI reform.

The study focuses on what Colin Darch and Peter Underwood¹⁰ call the idiographic character of specific cases of national adoption. This character is informed by social and political contexts and the specific histories of different countries, as well as the different character of particular state structures. The study presents FOI as an ‘empty

Chill: Access to Information and Record Keeping in the Government of Canada’ (2003) 55 *Archivaria* 1.

⁸ See, eg, Alasdair Roberts, ‘Structural Pluralism and the Right to Information’ (2001) 51(3) *University of Toronto Law Journal* 243; John M Ackerman and Irma E Sandoval-Ballesteros, ‘The Global Explosion of Freedom of Information Laws’ (2006) 58(1) *Administrative Law Review* 85; Colin Darch and Peter Underwood, ‘Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience’ (2005) 37 *The International Information and Library Review* 77.

⁹ Andrew McDonald and Greg Terrill (eds) *Open Government: Freedom of Information and Privacy* (Macmillan, 1998); Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007).

¹⁰ Colin Darch and Peter Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Chandos, 2010).

signifier'¹¹ that is largely filled within the context of a particular advocate or adopter. The 'empty signifier' of FOI law is shaped by local demands, political and administrative context and the influence of particular advocacy bodies campaigning for reform and/or political and administrative involvement of national institutions. The combination and relationship of these elements informs and shapes both adoption and implementation. The outcome of FOI reform are linked to this interplay. Mexico's *Federal Law of Transparency and Access to Public Government Information* was defined by a sense of democratic urgency driven by the newly independent media, whereas China's limited Open Government Information Regulations were defined by an authoritarian regime seeking to improve administrative efficiency and economic growth. India's FOI laws were profoundly shaped by a vigorous and demanding grassroots social activism.

There is no single meaning and purpose for public sector transparency, especially with its diffusion to a wide range of countries. A pluralist perspective rather than universalism is a more useful approach to the analysis of FOI laws and practice. Central to this pluralism is a tension of defining values, particularly intrinsic and instrumental values, within and across cases. Intrinsic values link access to information to freedom of speech/expression and democratic participation; they support deep transparency as being inherently good.¹² In contrast, instrumental values, link access to information with efficiency, management and quality; they support transparency to the extent it produces positive, measurable outcomes.¹³ Arguably, such values are likely to find a unique balance within certain historical and socio-political contexts now that transparency has replaced secrecy as the international norm. This work supports the findings of Erkkilä that there has been a shift in ideas about transparency and that there now exists a number of contradictory policy ideas and paradoxes that play out across 'differing national traditions and institutional trajectories'.¹⁴ As Meijer et al indicate there is wide diversity in the treatment and understanding of the concepts of openness, transparency and participation.¹⁵ The focus of this study is centred on the issues dealing with FOI law.

¹¹ Ernesto Laclau, *Emancipation(s)* (Verso, 1996).

¹² Patrick Birkinshaw, 'Transparency as a Human Right' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 47.

¹³ David Heald, 'Transparency as an Instrumental Value' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 59.

¹⁴ Erkkilä, above n 1, xi.

¹⁵ Albert J Meijer, Deidre Curtin and Maarten Hillebrandt, 'Open government: connecting vision and voice' (2012) 78(1) *International Review of Administrative Sciences* 10, 12.

II COMPARATIVE FOI STUDIES

Comparative studies are a relatively marginal aspect of the FOI literature. Calls for increased comparative analysis have been made for a number of years.¹⁶ The field of comparative FOI studies has gradually grown in size, sophistication and importance alongside the diffusion of FOI law. The literature has become a broad field that incorporates not just legal and institutional, but also cultural, social and political concerns in two overlapping generations of studies. The first generation, emerging in the early 1990s, focused predominantly on established Western democracies—the early, trend-setting adopters—initially comparing legal and institutional matters and evolving to compare legal architecture and interpretation and the institutional design of review bodies, in terms of their efficacy in providing information access. Second generation FOI studies, beginning in the 2000s, moved beyond legal and institutional variation to examine ‘contextual’ elements in response to the widespread, international diffusion of legal reform. They highlight the importance of similarities and differences in cultural, social and political matters in relation to the make-up and functionality of FOI law. Meijer has noted that academic attention seems to be lagging well behind political and media attention to government transparency and developments.¹⁷ There is much to be gained from the encouragement by Meijers and others for wider transparency scholarship and for that analysis to be adopted and applied to comparative FOI studies in the future.

A First Generation Comparative FOI Studies

The beginning of first generation comparative FOI studies is marked by two edited books¹⁸ that capture the tone of the initial phase of FOI analysis with a primary concern for a limited number of established democracies, focused on technical and legal matters. Comparison in those early works is more implicit rather than explicit. The work of David Banisar,¹⁹ although it reflects the contemporary widespread diffusion of

¹⁶ Rick Snell, ‘The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand’ (2000) 28(3) *Federal Law Review* 575; Rick Snell, ‘Using Comparative Studies to Improve Freedom of Information Analysis: Insights from Australia, Canada and New Zealand’ (Paper presented at the 6th National and 2nd International Congress on the Right to Information, Mexico, 7-11 November 2005). Available at <<http://www.juridicas.unam.mx/sisjur/informac/pdf/4-203s.pdf>>; Colin Darch and Peter Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Chandos, 2010).

¹⁷ Albert J Meijer, ‘Introduction to the special issue on government transparency’ (2012) 78(1) *International Review of Administrative Sciences* 3.

¹⁸ Donald Rowat (ed), *Administrative Secrecy in Developed Countries* (Columbia University Press, 1979); Norman Marsh (ed), *Public Access to Government-Held Information: A Comparative Symposium* (Stevens & Sons, 1987).

¹⁹ David Banisar, *Freedom of Information Around the World 2006 – A Global Survey of Access to Government Information Laws* (2006)

FOI law, continues the tradition, comparing legal and institutional elements across FOI regimes in fifty seven countries.

First generation comparative FOI studies gradually became more concerned with assessing differences and similarities from the perspective of users and utility, especially as the influence of human rights and journalism advocates increased with the growing momentum of the global FOI movement. A 2003 (updated 2008) comparative legal survey produced by Toby Mendel²⁰ in association with United Nations Educational, Scientific and Cultural Organisation ('UNESCO') focuses on comparative practices reflected in national legislation, but also as reflections of international standards. The study evaluated national FOI regimes in fourteen countries in relation to procedural guarantees, duties to publish, exceptions, promotional measures and appeals. Additionally, the 2006 Open Society Justice Initiative report centred on discovering 'how government officers and agencies in fourteen countries... respond to specific requests for information'²¹ and designed an Access to Information Monitoring Tool to manage the collection and analysis of data to yield statistically valid comparative results. Importantly, the study found: FOI laws increase responsiveness to requests; mute refusals are a significant problem; regional variation exists; and the involvement of civil society helps facilitate access.

B Second Generation Comparative Studies

Second generation comparative FOI studies emerged alongside the global diffusion of FOI, as commentators, academics, activists and policy makers, grappled with the increased diversity in experience and practice.²² These studies focus less on the instruments of access and more on the context of access, exemplified by the difference between Colin

<http://www.freedominfo.org/documents/global_survey2006.pdf>.

²⁰ Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2008) United Nations Educational, Scientific and Cultural Organization <http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf>. See also: Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (2009) United Nations Educational, Scientific and Cultural Organization <<http://unesdoc.unesco.org/images/0018/001832/183273e.pdf>>.

²¹ Open Society Justice Initiative, *Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries (September 2006)* (2006) <<http://www.opensocietyfoundations.org/publications/transparency-and-silence-survey-access-information-laws-and-practices-14-countries>>.

²² See, eg, Alasdair Roberts, 'Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada' (2005) 83(1) *Public Administration* 1; Toby Mendel, 'Implementation of the Right to Information: Ideas for India from Canada, Mexico, and South Africa' in Vikram Chand (ed), *Public Service Delivery in India: Understanding the Reform Process* (Oxford University Press, 2010).

Bennett²³ and Rick Snell.²⁴ Bennett focuses on ‘lesson drawing’ between established democracies and argues that local learning, ‘lesson drawing’ from overseas policy experience is a key feature in the early diffusion of FOI law. Snell argues that while lesson drawing can be a positive feature of adoption, there is a need to localize foreign experience to suit national context. He suggests New Zealand’s *Official Information Act* generally functioned with more success than Australia’s *Commonwealth Freedom of Information Act* because of a difference in original design principles:

Australian officialdom looked to the paradigm of the past and grudgingly accepted a muted US model adapted for local conditions. The New Zealanders focused on information and policy trends and tried to create an access regime that would respond to future developments and needs. This difference in design beginnings was to prove critical.²⁵

Similarly, Stephen Lamble²⁶ highlights two basic models of FOI law reform—the Swedish and the American—and criticizes a widespread acceptance of the American legalistic model. He argues that while it works relatively well within its own jurisdiction, it does not provide the most appropriate template for other political systems, because such systems differ in important structural terms (e.g. the extent and operation of separation of powers).

Recent comparative FOI studies seek to examine links between context, experience and outcome. A range of studies examine the importance of political economy, the significance of the relationship between media and the executive, the role of civil society, and the challenges of implementation. The value of civil society and media advocacy in ensuring positive reform is highlighted by Greg Michener,²⁷ who demonstrates, in an examination of Mexico and Argentina, the constructive impact that activism, especially by the media, may have on the strength of legislation, as well as the importance of power dispersion between social and political actors in determining reform. Political economy is another prevalent theme in recent studies. Tom McClean²⁸ examines the differences in information flows between corporatist and

²³ Colin Bennett, ‘Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability’ (1997) 10(3) *Governance: An International Journal of Policy and Administration* 213.

²⁴ Rick Snell, ‘The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand’ (2000) 28(3) *Federal Law Review* 575.

²⁵ Ibid 584.

²⁶ Stephen Lamble, ‘United States FOI Laws Are a Poor Model for Statutes in Other Nations’ (2003) 106 *Freedom of Information Review* 50.

²⁷ Greg Michener, *The Surrender of Secrecy: Explaining the Emergence of Strong Access to Information Laws in Latin America* (2010)

<<http://gregmichener.com/Greg%20Michener%20Dissertation--The%20Surrender%20of%20Secrecy%20in%20Latin%20America--2010.pdf>>.

²⁸ Tom McClean, ‘Who Pays the Piper? The Political Economy of Freedom of Information’ (2010) 27(4) *Government Information Quarterly* 392.

pluralist systems. Using the ‘exemplary’ cases of Germany and the United States he contends that corporatist, coordinated market economies tend to restrict access within the sphere of the state and peak representative bodies, whereas pluralist, competitive market economies generally allow for a wider flow of information as the numerous actors seek access. This finding is qualified with ‘problematic’ cases—Sweden and the United Kingdom—as both rebuke the notion that corporatism equals restriction and pluralism equals dispersal. McClean does not believe these cases disprove the notion, but rather, highlight its limitations.

Darch and Underwood²⁹ explicitly challenge many of the assumptions of FOI literature and the lack of social theory within that literature. Darch and Underwood studied two sets of cases: first, a set of transitional states in various regions (Russia, Guatemala, Bolivia, Brazil, China and the Philippines); and second, a set of African states (Zimbabwe, Nigeria, Angola, Mozambique, and South Africa). The first set focused upon the apparent link between economic liberalization and development with FOI and transparency and the authors contend these cases demonstrate the idiographic character of the development of FOI reform. The authors present evidence to temper popular associations between capitalist development and political openness. In the second African set, the authors conclude that post-colonial cases are faced with a range of challenges when it comes to the implementation of a functioning FOI regime, including a general lack of organizational and bureaucratic capacity. A recent study by Erkkilä examines the dimensions and extent of ‘openness’ and transparency in Finland within a broader tradition of Nordic openness.³⁰

The current study extends Darch’s and Underwood’s analysis. It is concerned with social histories and the idiographic nature of the meaning and purpose of FOI law within different national contexts and systems. Like Darch and Underwood,³¹ this research rejects universalistic claims commonly expounded by advocates, who attempt to present a one-size-fits-all model of FOI that provides specific benefits relating to public administration, public participation and economic growth. Instead, this research starts, as Darch and Underwood did, from the point made by Thomas Blanton who argues ‘... the history of freedom of information in practice in the world is extremely varied and complex’.³² Comparing FOI

²⁹ Darch and Underwood, above n 10.

³⁰ Erkkilä, above n 1.

³¹ Darch and Underwood, above n 10, 13–46.

³² Thomas Blanton, *The Internationalization of Japan and Open Government* (Robert Wampler trans, Japan-United States Symposium, 1996) George Washington University <<http://www.gwu.edu/~nsarchiv/japan/1995foiaconferencetranscript.htm>>.

in China, Mexico and India allows a study of the variable dynamics at play within each case and how these dynamics contribute to the development of unique, idiographic national FOI regimes.

C *FOI as an 'Empty Signifier'*

A fundamental question that necessarily informs the nature of comparative FOI studies is how FOI law is defined or understood. In other words, researchers must explicitly or implicitly make an initial decision about what it is they are comparing. A typical response to this inquiry, informed by the dominant legal tradition within FOI literature, suggests what is under comparison is the access instrument/mechanism. FOI is, from this perspective, the letter of the law and FOI laws are compared according to their provisions. Key questions relate to legislative provisions and how they compare with other legislation, best practices and international standards. Thus, national legislation may be compared according to a commonly applied architecture consisting of objectives and principles, scope of the law, automatic publication, process, exemptions and appeal procedures. FOI laws may then be judged on the extent to which they meet certain 'best practice' criteria, including maximum disclosure, obligation to publish, facilitative access, limited exceptions, minimal cost and open government promotion.³³

While this line of thought, with its normative legal foundation, is important and essential for comparative FOI studies, it does not account for cultural, social or political factors that inform the letter of law or how law functions in relation to broader structural contexts. It generally overlooks comparative differences in legislation, especially as they may differ from prescribed models, as oversights that need correction. To move away from this restrictive perspective and appreciate what Darch and Underwood understand as the idiographic character of the development of FOI reform, a socio-legal definition of FOI law is needed. The object under comparison is not defined by its legal parameters, but by its essence as a social phenomenon. For example, democracy may be defined in procedural terms (free and fair elections, freedom of speech, etc.) or it may be defined in terms of social history (the values it embodies and what it means for the actors involved). The same is true for FOI law. Comparative FOI studies traditionally compared legal mechanisms according to normative values; only recently have authors begun to explore the contested social definition of FOI.

The meaning of the term 'FOI' is to a large degree filled within the context of a particular adopter or advocate. The term can be thought of as

³³ See, eg, Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2008) United Nations Educational, Scientific and Cultural Organization <http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf>.

a 'floating concept' or 'empty signifier',³⁴ because the object the term signifies is relative. FOI, like democracy, may be thought of as an 'essentially contested concept'.³⁵ There is widespread agreement on the concept, but not on its best realization. There is agreement that democracy means rule by the people, but substantial disagreement on how the people can best rule modern democratic systems and this leads to variation in the design of electoral processes and systems of representation. A similar situation is visible in FOI (although naturally on a smaller scale) with widespread agreement on the essential principle of access to government-held information, which exists alongside considerable disagreement on how best to achieve the principle. Comparative variations exist on a range of technical issues, including constitutional protection, public/private application, scope of exemptions, and nature and function of oversight bodies. These variations are not simply architectural oversights or exceptions, as understood from a normative legal perspective, but products of the context of adoption and implementation. This is a theme of Erkkilä's study of transparency where he argues the shifting information strategies of the state produces different national outcomes, contradictory policy ideas and paradoxes (within and between states) but all within a clear 'shift from old ideas of publicity to the new performance-driven ideas of transparency'.³⁶ Whilst Erkkilä's focus is Eurocentric, in particular Nordic centric, this paper explores similar themes and ideas in three very different countries namely China, Mexico and India.

The 'empty signifier' of FOI law is filled by particular advocacy bodies in campaigning for the law and/or the political and administrative traditions of an adopting institution. McClean captured this relativity of signification at the first Global Conference on Transparency Research, noting that:

[t]he political value of official information in any given country depends in part on the institutional structure of its political system. This does not mean that comparative studies should be abandoned, but rather that they should be undertaken with due awareness of possible variations in the kinds of information which drive the uptake in these laws, the interests at stake, and the relative capacities of the various stakeholders to influence the course of events – in short, with the fact that freedom of information means different things in different contexts.³⁷

³⁴ Laclau, above n 11.

³⁵ Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings from the Aristotelian Society* 167.

³⁶ Erkkilä, above n 1, xv.

³⁷ Tom McClean, *Institutions and Transparency: Where Does Freedom of Information Work Best?* (April 2011) School of Public Affairs and Administration Rutgers University – Newark, 1

Similarly, Megan Carter and Lv Yanbin observe that ‘one must continually remember that FOI practices exist within each state’s governmental culture’.³⁸ In some countries FOI law is best understood with reference to administrative law reform, in other countries with reference to democratization, and in still other countries with reference to development and modernization. In the case studies of China, Mexico and India, the law reform process has been fundamentally informed by the unique political, social and cultural traditions of the actors and institutions involved in each country, leading to comparatively different outcomes in the overall understanding of the law and its purpose.³⁹

The way in which the empty signifier is filled informs what Laura Neuman and Richard Calland⁴⁰ call the ‘transparency triangle’, a process made-up by ‘passage’, ‘implementation’ and ‘enforcement’. While Neuman and Calland suggest there is a universalistic method to enacting FOI law through the process of a ‘transparency triangle’ that involves the replication of established processes, the ‘transparency triangle’ may also be used to examine the various stages of development in particular FOI law as an empty signifier, as demonstrated in China, Mexico and India. In each case, the passage, implementation and enforcement of the law are fundamentally informed by the ‘governmental culture’ and national context of each adopter. FOI regulations in China have been exclusively enacted and implemented by the Chinese Communist Party (‘CCP’) and this unique factor has a flow on effect into the strength of reform and enforcement. In Mexico and India, media advocacy and social activism have tied the law to democratic accountability and community development objectives and the laws adopted are relatively robust, although enforcement is hampered by issues of governmental culture.

<http://spaa.newark.rutgers.edu/images/stories/documents/Transparency_Research_Conference/Papers/McClean_Tom.pdf> [Note: website now removed. Paper can be downloaded at: Tom McClean, *Institutions and Transparency: Where Does Freedom of Information Work Best?* (April 2011) Academia.edu

<http://www.academia.edu/470155/Institutions_and_Transparency_Where_does_Freedom_of_Information_Work_Best>.]

³⁸ Megan Carter and Lv Yanbin, *Access to Government Information in Europe and China: What Lessons to Be Learned?* (November 2007) Yale Law School, 6 <http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-OGI-FOIA_Hart-English.pdf>.

³⁹ Cf Paul Hubbard, ‘China’s Regulations on Open Government Information: Challenges of Nationwide Policy Implementation’ (2008) 4(1) *Open Government: A Journal of Freedom of Information* 1.

⁴⁰ Laura Neuman and Richard Calland, *Establishing a Robust Transparency Regime: The Implementation Challenge – Theory and Practice* (2007) Initiative for Policy Dialogue <http://policydialogue.org/files/publications/Establishing_Robust_Transparency_Neuman_Calland.pdf>.

III COMPARATIVE FOI REFORM: CHINA, MEXICO AND INDIA

The empty signifier of FOI law/regulation in China, Mexico and India is populated and modified by certain national dynamics important in the passage, implementation and enforcement of FOI in each country. The key factors were – administrative reform (China), media advocacy (Mexico) and social activism (India). While there was a mixture of influences in each country, major points of difference are evident which flow into subsequent national implementation and enforcement approaches. The three countries pose different challenges to the universalism approach to FOI and support a more pluralistic analysis. China represents a largely top down-governmental oriented reform in a functional authoritarian political system. The end result is a ‘push’ model reform that emphasizes proactive publication more so than a ‘right to know’.⁴¹ Mexico reflects a post-authoritarian demand by the press and opposition parties for greater democracy and checks and balances on the exercise of executive power. The process produced a strong FOI regime, considered to be amongst the best in the world.⁴² On the other hand, India offers a case study of a largely homegrown grassroots advocacy for a form of FOI targeted towards its developmental and human rights capacities. The Indian *Right to Information Act* is also considered amongst the world’s best in terms of legal framework.⁴³ In contrast to Rigg’s advocacy for more empirical, nomothetic and ecological approaches to comparative studies of public administration this study is squarely placed as a normative and idiographic approach.⁴⁴

A Administrative Reform

In China, internal administrative reform was of central importance in the adoption of an FOI regime. FOI regulation in China represented ‘another self-revolution’⁴⁵ by the CCP. This ‘self-revolution’ in transparency, which produced a unique FOI regime with ‘Chinese characteristics’, was conducted as a matter of official priority in response to perceived failures of the Russian ‘glasnost’ policy: officials wanted to avoid the turmoil caused in Russia by the sudden freeing of information flows.⁴⁶

⁴¹ Weibing Xiao, ‘China’s Limited Push Model of FOI Legislation’ (2010) 27(4) *Government Information Quarterly* 346.

⁴² Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2008) United Nations Educational, Scientific and Cultural Organization
<http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf>.

⁴³ Ibid.

⁴⁴ Fred W Riggs, ‘Trends in the Comparative Study of Public Administration’ (2010) 76(4) *International Review of Administrative Sciences* 750.

⁴⁵ Weibing Xiao, *Freedom of Information Reform in China: Information Flows Analysis* (Routledge, 2012) 9.

⁴⁶ Ibid 39–40.

Gradualism and control were key features of Chinese transparency reform. Indeed, the prominence of control by the state is visible in the fact that the 'transparency law' reform agenda first emerged in attempts to revise the *Law on the Protection of State Secrets*⁴⁷ to improve classification systems and better utilize scarce government resources.

Driving the 'self-revolution' in transparency were a number of motives that came from throughout the CCP and especially from a group of experts commissioned to develop proposals under the auspices of the Chinese Academy of Social Science.⁴⁸ The long-term driver was an attempt to restructure the Chinese system of government according to post-Mao ideals of socialist democracy. From this viewpoint transparency is viewed as allowing a degree of supervision of officials by the public and other officials in a spirit of democratic management.⁴⁹ However, political reform in post-Mao China consistently lagged behind economic reform, so it is no surprise that early on, Chinese transparency reform was depoliticized and largely presented as an avenue to promote economic efficiency and development.⁵⁰ Transparency was presented as a way to liberalize the vast amount of information held by branches of the state to foster 'informatisation' within the private and public sphere.⁵¹ Additionally, a perception that transparency may reduce corruption within the economy also drove some state officials to support the regulation.⁵²

Chinese transparency law is a reform almost entirely generated by internal administrative reform, not principally as a way of ceding power from the state to society. It is a means of transforming how state power is exercised. FOI reform became a priority as an avenue to transform the way centralized power is conducted in the context of widespread political and economic liberalization. Paul Hubbard found:

[s]incere central political support for the policy based on the promise that popular supervision of the administrative apparatus can aid the center's control of a decentralized government. The regulations are a top-down political project rather than a liberal political reform.⁵³

⁴⁷ Ibid 64.

⁴⁸ Jamie Horsley, 'Toward a More Open China?' in Ann Florini (ed) *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007) 69.

⁴⁹ Xiao, above n 45, 45–50.

⁵⁰ Ibid 43.

⁵¹ Hanhua Zhou, 'Open Government in China: Practice and Problems' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007) 92, 104–107; Jamie Horsley, 'Toward a More Open China?' in Ann Florini (ed) *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007) 54, 60–61.

⁵² Xiao, above n 45, 2–3.

⁵³ Paul Hubbard, 'China's Regulations on Open Government Information: Challenges of Nationwide Policy Implementation' (2008) 4(1) *Open Government: A Journal of Freedom of Information* 1, 2–3.

Regulation is ‘instrumentally valuable’ to the authoritarian regime because of the promise it holds for increased oversight, efficiency and effectiveness within the government.⁵⁴ The switch to a Chinese version of FOI was part of, and supported by, a program of incremental administrative reform. This instrumental value both explains why a Leninist party would adopt a (historically) liberal democratic reform and supports those who challenge the claim that transparency is principally tied to liberal democracy.

Internal state support is a necessary component of the adoption and implementation of FOI law in every jurisdiction; government officials must be involved in the process of law reform. Internal administrative reform processes are critical. While in both Mexico and India administrative reform was ultimately boosted by external pressure from society to ensure the final adoption of FOI law, in China, administrative reform was the overarching factor in the adoption of FOI regulation. Administrative reform contributed to the adoption of FOI law in Mexico as officials and newly elected politicians sought to address the history of corruption under the seventy-year rule of the Institutional Revolutionary Party (‘PRI’). Similarly, administrative reform aimed at openness and transparency to combat maladministration and corruption produced early proposals for reform in India that needed further external stimulus to be achieved. In China, like other policy developments, reform was “centralized.”

The adoption of FOI law in Mexico was in part the product of administrative reform tied to democratization and, in particular, with the first popular election of a non-PRI president, Vicente Fox. A member of the National Action Party, a center-right Christian democrat party founded in 1939, Fox promised a government of change. A major platform in Fox’s election campaign was a pledge to implement anti-corruption measures, and the adoption of FOI law became part of this pledge. Fox promised immediate action and an Inter-Ministerial Commission on Transparency and Against Corruption in the Federal Public Administration was quickly established to develop access to information law.⁵⁵ However, the thrust of internal administrative reform soon faltered. The Commission did not formally meet until roughly nine months after Fox’s election and, problematically, the law reform process became entangled in broader political issues of access to information, especially information with the potential to ‘air out’ past injustices of the

⁵⁴ Ibid 5.

⁵⁵ Greg Michener, ‘Engendering Political Commitment: The Grupo Oaxaca--Expertise, Media Projection--and the Elaboration of Mexico’s Access to Information Law’ (Paper presented at the Southern PSA Conference, New Orleans, 6 January 2005).

PRI, which remained influential in Congress with the power to frustrate reform.⁵⁶

In India administrative reform was, from the start, one of a number of elements contributing to the push for FOI from both within and outside the government. In contrast to China, and more in line with the Mexican experience, the key drivers for reform were outside government and the government's (and its bureaucracy's) response was generally more reactive and focused on managing and modifying the demands for reform.

Proposals promoting FOI on the national agenda were presented in 1996 by the Press Council of India.⁵⁷ The Press Council worked with the newly established 'National Campaign for Peoples' Right to Information' ('NCPRI'), which brought social activists, journalists, lawyers, professionals, retired civil servants and academics together, to produce a proposal. This proposal was made public at a large conference in Delhi attended by representatives of the major political parties; it was discussed in detail and endorsed by participants, including participants from major parties.⁵⁸ Subsequently, the draft proposal was submitted to the government of India, an act that led to the establishment of a working group in 1997 on the Right to Information and Promotion of Open and Transparent Government, the 'Shourie Committee'. The Committee's mandate was to make recommendations regarding any necessary revision of secrecy legislation and the feasibility of introducing a 'full fledged' right to information act.⁵⁹ The Committee reported that access to information was necessary in a democracy for citizens to make informed choices; it also suggested transparency has a cleansing effect on the operation of the public service. A draft proposal was produced. Also in 1997, transparency became a key issue on the agenda of a conference of the heads of state governments within India. The Chief Ministers' conference produced an 'Action Plan for Effective and Responsive Government' that suggested openness was essential to minimizing corruption in the public sector and the ministers collectively endorsed the draft produced by the Shourie Committee.⁶⁰ Ultimately, the work of the Committee was criticized for a lack of public consultation and the draft

⁵⁶ Michener, above n 27; Kate Doyle, "'Forgetting Is Not Justice': Mexico Bares Its Secret Past' (2003) 20(2) *World Policy Journal* 61.

⁵⁷ Article 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (July 2001) Article 19, 71–72
<<http://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf>>.

⁵⁸ Shekhar Singh, *The Genesis and Evolution of the Right to Information Regime in India* (2010)
<<http://freedominfo.org/documents/India2010singhCountry%20Paper%20FINAL.pdf>>.

⁵⁹ Kuldeep Mathur, 'Good Governance and Pursuit of Transparency in Administration: The Indian Efforts' in Pardeep Sahni and Uma Medury (eds), *Governance for Development: Issues and Strategies*, (Prentice-Hall of India, 2003) 48, 53.

⁶⁰ *Ibid.*

proposal produced was criticized as ‘diluted’ compared to other proposals championed by civil society.⁶¹

B *Media Advocacy*

Whereas media advocacy was a notable secondary factor in India, it was central in Mexico and almost non-existent in China. Bertoni⁶² and Michener⁶³ have provided detailed analysis of the extensive and often primary role played by media organisations and journalists in the adoption of FOI laws in Latin America. Yet Bertoni recognises that while the relationship between the press and access to information is often strong, it is not always present, nor does it generate the same outcomes.⁶⁴ Commentators generally consider the leak of the draft transparency law, developed by the bureaucracy, as a crucial turning point within the Mexican adoption process.⁶⁵ Critics expressed dismay at the ‘low profile, non-participative and “non-transparent” manner’ in which the law reform was being developed, and they attacked the leaked proposal as flawed.⁶⁶ A conference sponsored by major news organizations, journalistic associations, human rights organizations, various foundations, think tanks and universities was organized in Oaxaca for the public to air their concerns. An alliance, dubbed the ‘Oaxaca Group’ by a *New York Times* columnist, emerged from the conference with a declaration affirming six democratic principles to be applied in the construction of FOI law.⁶⁷ The Group, Michener explains, ‘harboured two goals: apply pressure to the executive branch to encourage the elaboration of robust access to information law; and secure the support of the political opposition for a bill they themselves had elaborated’.⁶⁸

The Oaxaca Group campaigned for reform and championed its own draft access law, securing considerable news coverage with the help of media members of the coalition. Thus, the Group was able to elevate public awareness and importance of access to information law reform in Mexico. Academics in the Oaxaca Group and international experts, along with

⁶¹ Article 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, above n 57, 74–75.

⁶² Eduardo Bertoni, ‘Freedom of Information. Three Harmless Words? The Role of the Media and Access to Information Laws’ (2012) *Derecho Comparado de la Informacion* 29.

⁶³ Michener, above n 27.

⁶⁴ Bertoni, above n 62, 88.

⁶⁵ Zachary Bookman and Juan Guerrero Amparan, ‘Two Steps Forward, One Step Back: Assessing the Implementation of Mexico’s Freedom of Information Act’ (2009) 1(2) *Mexican Law Review* 3, 13.

⁶⁶ Michener, above n 55, 15.

⁶⁷ Ginger Thompson, ‘Mexicans Move to Pry Open Potentially Explosive Files’, *New York Times* (online), 12 October 2001

<<http://www.nytimes.com/2001/10/12/international/americas/12MEXI.html>>.

⁶⁸ Michener, above n 27, 130.

invited political actors, were provided with editorial space to participate in debate and explain the promise of a 'right to know' to the public.⁶⁹ Moreover, the Group presented its own reform proposals informed by international standards and these proposals gained the support of major opposition parties.⁷⁰ The Group was empowered by the opposition parties with the opportunity to negotiate a compromise with the Fox administration between the government's proposal and their own.⁷¹ These negotiations resulted in 'a far better proposal—and one that looks in places very much like the draft' presented by the Oaxaca Group.⁷² The media-based alliance of civil actors in Mexico produced a 'sea change' in the government's original proposal.⁷³ The emergence of the media supported Oaxaca Group, and its campaign, was an important feature in the drive for FOI in contrast to the experiences in India and China.

The key driver in India was civil society, especially the work of Mazdoor Kisan Shakti Sangathan ('MKSS'), literally the Workers' and Farmers' Power Organization. The MKSS was formed in the late 1980s in Rajasthan, a poverty stricken and drought prone area, by a mixed nucleus of experienced and inexperienced activists, all seeking to build an organization for the poor.⁷⁴ The media, especially through the work of the Press Council, was involved with the NCPRI from an early stage⁷⁵ but in contrast to the role played by the media in Mexico, the Indian media was more a support partner rather than a key driver.

C Social Activism

The adoption of FOI law in India is unique in the manner and degree it was driven by progressive grassroots campaigns. The Indian 'empty signifier' was filled with a social dimension associated with national and local concerns of development, poverty, corruption, maladministration and power. Leaders within the movement state clearly, 'The present demands of India's citizens... are no longer for a particular concession,

⁶⁹ Andrew Puddephatt, *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa and the United Kingdom* (2009) World Bank, 17 <<http://siteresources.worldbank.org/EXTGOVACC/Resources/atfCivSocietyFinalWeb.pdf>>.

⁷⁰ Michener, above n 55, 26–28.

⁷¹ Ibid 29–32.

⁷² Kate Doyle, "'Forgetting Is Not Justice": Mexico Bares Its Secret Past' (2003) 20(2) *World Policy Journal* 61.

⁷³ Ibid.

⁷⁴ Rob Jenkins and Anne M Goetz, 'Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India' (1999) 20(3) *Third World Quarterly* 603; Deepak Mahalan, *Transparency and Poverty: Interview with Aruna and Nikhil Dey* (21 March 2003) Worldpress.org <<http://www.worldpress.org/Asia/1014.cfm#down>>.

⁷⁵ Chetan Agrawal, 'Right to Information: A Tool for Combatting Corruption in India' (2012) 3(2) *Journal of Management and Public Policy* 26.

but for a share of governance itself'.⁷⁶ This is a significant shift from a reform aimed simply at improving administrative processes. The force of the social activism behind the adoption and implementation of the *Right to Information Act* in 2005 is visible in its name. Similar laws adopted around the world are typically named 'access to information' or 'freedom of information' and suggest government-held information should be accessible or free from restraint. However, the 'right to information', as a title, firmly conveys the message, inherent in Indian social activism, that members of the public have a 'right to know' to empower themselves with information and that transparency law provides a functional mechanism for this right.

In all three case studies, social activism played an important role but the Indian experience is of a different dimension, quality and significance from that experienced in Mexico and China. In India, social activism, involving an independent grassroots movement led by former public servants and other professionals, provided the driving force for reform and filled the empty signifier of FOI law in association with local needs relating to poverty and development. The depth and degree of this social activism and development imprint is clearly seen in slogans like Right to Know, Right to Live.⁷⁷ Media advocacy in Mexico and the composition of the Oaxaca Group of academics, lawyers and activists directed FOI reform more to an enhancement of middle class political participation; whereas in China, while social activism was present in the formative stages, it was quickly displaced and redirected by the requirements of the state and the CCP.

India is an exceptional case in the adoption of FOI law because of the central importance of social activism. Social activism in relation to Indian FOI was multi-faceted, incorporating a range of actors, including groups such as the Consumer Education Research Council; however, arguably the most important element was grassroots and rural. Harsh Mander and Abha Joshi, Indian activists involved in the campaign for transparency law, explain:

The most important feature that distinguishes the movement for the people's right to information in India from that in most other countries, whether of the North or the South, is that it is deeply rooted in the

⁷⁶ Aruna Roy and Nikhil Dey, 'Fighting for the Right to Know in India' (2002) 1 *Development Dialogue* 78.

⁷⁷ Sowmya Kidambi, *Right to Know, Right to Live: Building a campaign for the right to information and accountability* (2008) New Tactics in Human Rights <<http://www.newtactics.org/resource/right-know-right-live-building-campaign-right-information-and-accountability>>.

struggles and concerns for survival and justice of the most disadvantaged rural people.⁷⁸

A limited element of grassroots advocacy predated the official reform process in Chinese FOI law reform, but it was secondary to the official process. A unique system of 'open village affairs' emerged in China in the post-Maoist reform era of the 1980s that provided precedence for the Open Government Information Regulations.⁷⁹ Local cadres and brigades formally set up to manage communal production began to collapse with the introduction of family farming and decollectivization under the leadership of Deng.⁸⁰ Many communities degenerated into a state of disorder and paralysis.⁸¹ The vacuum was gradually filled by a system of self-governing village committees, staffed by publicly elected officials, that practiced a new type of *open* public administration.⁸² These committees were a practical solution to a crisis in authority, but they were also an experiment in a new ideology of socialist democracy promoted by the CCP. Throughout the 1980s and 1990s 'open village affairs' were actively investigated, promoted and implemented by central agencies, as a matter of 'life and death' for the long term security and survival of the CCP.⁸³ Various communications and laws were handed down in support of the reform agenda and these functioned as early experiments in government transparency. For example, Article 22 of the *Organic Law of the Villagers' Committees* (1998) requires that village committees publicise laws, regulations and state policies to facilitate understanding among the villagers and apply a system of open administration of village affairs to enable supervision by villagers.

There is little doubt that 'open village affairs' provided precedence for openness in public administration in post-Mao China. The extent to which it represents genuine social advocacy for transparency is debatable. The 'open village' reform agenda originated spontaneously amongst villagers

⁷⁸ Harsh Mander and Abha Joshi, *The Movement for Right to Information in India: People's Power for the Control of Corruption* (1999) RTI Gateway <<http://www.rti gateway.org.in/Documents/References/English/Reports/12.%20An%20article%20on%20RTI%20by%20Harsh%20Mander.pdf>>.

⁷⁹ Xiao, above n 45, 70–79.

⁸⁰ Jean Oi and Scott Rozzelle, 'Elections and Power: The Locus of Decision-Making in Chinese Villages' (2000) 162 *The China Quarterly* 513, 523–527; M Kent Jennings, 'Political Participation in the Chinese Countryside' (1997) 91(2) *American Political Science Review* 361, 361.

⁸¹ Daniel Kelliher, 'The Chinese Debate over Village Self-Government' (1997) 37 *The China Journal* 63, 66.

⁸² Kevin O'Brien and Lianjiang Li, 'Accommodating 'Democracy' in a One-Party State: Introducing Village Elections in China' (2000) 162 *The China Quarterly* 465; Anne Thurston, *Muddling Towards Democracy: Political Change in Grassroots China* (1 August 1998) United States Institute of Peace <<http://www.usip.org/publications/muddling-toward-democracy>>.

⁸³ Tianjian Shi, 'Village Committee Elections in China: Institutionalist Tactics for Democracy' (1999) 51(3) *World Politics* 385, 392.

but was quickly taken up by the CCP as a suitable political concession for reform, directed to the maintenance of the Party.⁸⁴ ‘Open village affairs’ became a localized political reform agenda centrally managed, with substantial involvement of the Ministry of Civil Affairs.⁸⁵ Orchestrated from above by Chinese government agencies, it did not have the same autonomous, activist character as the social activism within India (discussed below). ‘Open village affairs’ were developed and implemented to ensure legitimacy and stability for the CCP in much the same way that transparency would later be perceived on a broader level within China. The gradualist, internally controlled way in which ‘open village affairs’ evolved in China provided a preview of how transparency would be introduced more widely throughout the various levels of governance, especially on the national level.

IV PLURALISM IN THE MEANING AND PURPOSE OF PUBLIC SECTOR TRANSPARENCY

The variation in law reform in China, Mexico and India, and the widening number and diversity of FOI regimes globally, runs contrary to universalistic claims of FOI advocates, who attempt to present a one-size-fits-all model providing specific benefits relating to public administration, public participation and economic growth.⁸⁶ Variation suggests the future meaning and purpose of public sector transparency will be contested. Indeed, public sector transparency may resemble democracy: general consensus on the concept, but with its interpretation open to complexity, contradiction and numerous varieties. In the case of public sector transparency, there is general, widespread agreement that public sector transparency means access to government-held information, but its realization in terms of what, why and how information should be accessible is highly contested, and perhaps *essentially* contested.

FOI systems in China, Mexico and India demonstrate a level of continuity, but also a considerable degree of variation. Each law functions on a basic level as a mechanism to enhance and provide public access to government-held information, address the information flow that exists between society and the state, and attempt to liberalise the type and amount of information the former is able to access from the latter. But the nature and reality of these national mechanisms is unique and this uniqueness informs boundaries of what is accessible and the manner in which it is accessible. Such variation exists across a range of elements, including review mechanisms, exceptions, costs, and request procedures.

⁸⁴ Kelliher, above n 81.

⁸⁵ Ibid.

⁸⁶ Darch and Underwood, above n 10, 13–46.

A fundamental variation between the three cases is the unique nature of the Chinese ‘push model’.⁸⁷ It emphasizes proactive publishing by government departments as an alternative to the traditional avenue of formal information requests. Public sector transparency in China is understood as an instrumental good, useful in modernization and growth—it lacks the Western democratic liberal appreciation of intrinsic individual rights underpinning FOI law.

Such fundamental variation in the way FOI and public sector transparency is understood and executed is not solely dependent on the fact that China is an authoritarian state; subtle undertones of variable normative views are discernable within the wider transparency literature. David Heald⁸⁸ and Patrick Birkinshaw⁸⁹ offer contrasting normative perspectives. Heald frames transparency in terms of instrumental value; he argues support for transparency based on intrinsic merit should be resisted and transparency has value to the extent that it brings benefits to economies, governments and societies. He suggests increased transparency is most beneficial when the starting level is low. Incremental increases in transparency once openness reaches a relatively high level involve trade-offs between effectiveness, trust, accountability, autonomy and control, confidentiality, privacy and legitimacy. Birkinshaw, on the other hand, supports intrinsic evaluations of transparency, arguing FOI is inherently valuable as a liberal democratic mechanism providing essential access to information and a right to know how government operates on behalf of the public. He also recognises transparency has instrumental value as it facilitates the realisation of human rights such as freedom of speech and access to justice.

In addition to foundational variations in instrumental versus intrinsic values, research indicates transparency regimes may differ on a variety of other points. Heald⁹⁰ notes transparency can function in different directions and in different varieties. FOI law provides vertical ‘downwards’ transparency in terms of the state-society hierarchy that allows the ‘ruled’ to observe the conduct, behaviour or results of ‘rulers’, and this ‘downwards’ transparency is ‘inwards’; it allows outsiders (society) to observe conduct, behaviour or results within an organization (the state).⁹¹ Despite this essence, public sector transparency and access laws are open to a number of variations, which Heald characterises as:

- ‘event versus process transparency’;

⁸⁷ Xiao, above n 41.

⁸⁸ Heald, above n 13.

⁸⁹ Birkinshaw, above n 12.

⁹⁰ David Heald, ‘Varieties of Transparency’ in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 25.

⁹¹ *Ibid* 27–29.

- ‘transparency in retrospect versus transparency in real time’; and
- ‘nominal versus effective transparency’.⁹²

Each variation may find a different balance within each transparency regime depending on the context and perceived meaning and purpose of access. Indeed, from the studies of China, Mexico and India, tension between variable views of public sector transparency that balance Heald’s varieties in different ways are discernable. For example, nominal versus effective transparency has a special understanding in India given widespread illiteracy.

Intrinsic and instrumental divisions, in addition to the divisions identified by Heald, may even be used to ascertain basic types of public sector transparency. China appears to embody an instrumental view of public sector transparency, while Mexico and India present an intrinsic view. China presents a utilitarian viewpoint; a perspective also visible in the way the World Bank emphasizes how FOI law contributes to institutional quality or ‘better quality governance’.⁹³ From this perspective, transparency should be valued instrumentally and applied according to a cost-benefit analysis that may include a reason to limit transparency on the basis that ‘ignorance...may contribute positively to social functioning’.⁹⁴ An instrumental concept of FOI law may provide a form of transparency that is events-based, retrospective and relatively nominal. On the other hand, India and Mexico present an intrinsic view of public sector transparency and this view, value-laden with reference to democratic politics, is also visible in support provided by international human rights advocates such as Article 19, who stress the importance of freedom of expression and political participation.⁹⁵ An intrinsic concept of FOI law may provide a form of transparency that is focused on processes, not just events, in real time with a degree of effectiveness in the use of information.

This sort of variation is a long-term question. Clearly, even without in-depth legal analysis, and from only the key points of variation highlighted above, it is easy to see that China presents one possible standard of access, while Mexico and India present variations of another. Some commentators argue the Chinese FOI regime is in a state of gradual progressive reform towards a Mexican model.⁹⁶ However, such a view is

⁹² Ibid 29–35.

⁹³ Roumeen Islam, *Do More Transparent Governments Govern Better?* (May 2003) World Bank < <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-3077>>.

⁹⁴ Heald, above n 13, 60.

⁹⁵ Birkinshaw, above n 12, 59.

⁹⁶ See Yu Keping, ‘Toward an Incremental Democracy and Governance: Chinese Theories and Assessment Criteria.’ (2002) 24(2) *New Political Science* 181.

debatable, especially given the fact that the CCP has affirmed its right to authoritarian rule on a consistent basis and the fact that relative transparency—the type of transparency embodied by the recent Chinese reform—is sustainable under authoritarian rule.⁹⁷ Assuming the Chinese model represents a relatively stable standard, the real question is how much the type of variation visible between China and Mexico may impact on international standards. Colin Bennett notes, ‘the adoption of FOI legislation in one country has direct consequences for information policies of others’ and ‘there is evidence that freedom of information regimes are becoming increasingly interdependent’.⁹⁸ He suggests such direct interdependence may either produce a ‘trading up’ of FOI standards, or the opposite. Thus, the question is whether the standard among recent adopters will potentially ‘trade down’ and follow the example of China, or ‘trade up’ and follow the example of Mexico?

There is a third option, however, to universal ‘trading down’ or ‘trading up’ of standards: variation in national and regional public sector transparency according to political systems and local contexts. Evidence suggests the law reforms adopted in Mexico, and perhaps China, are influencing more recent adopters in contextual ways. Mexico’s ‘strong’ access law has provided a model for emulation elsewhere in Latin America. For example, Jesse Franzblau of the National Security Archive reports that ‘in a testament to Mexico’s [sic] frontrunner role in the global transparency movement’ the Vice President of Guatemala, led a delegation of officials to discuss implementation issues and the ‘inner workings of Mexico’s [sic] information system’ with officials from Mexico’s progressive oversight body, the IFAI.⁹⁹ Guatemala had passed ‘moderately strong’ access law in September 2008.¹⁰⁰ Such emulation has not been reported for the Chinese OGI Regulations, yet it is probable that other authoritarian regimes may draw from the regulations to develop ‘transparent authoritarianism’¹⁰¹ that provides minimal political concessions while partially satisfying the pressures of advocates and the

⁹⁷ See Garry Rodan, *Transparency and Authoritarian Rule in Southeast Asia: Singapore and Malaysia* (Routledge, 2004).

⁹⁸ Colin Bennett, *Globalization and Access to Information Regimes* (2001) Canadian Access to Information Review Task Force <<http://www.atirtf-geai.gc.ca/paper-globalisation1-e.html>>. [Note: web site now removed. Document copy held by authors].

⁹⁹ Jesse Franzblau, *Guatemala Looks to Mexican Model for Access Implementation* (13 February 2009) Freedominfo.org <<http://www.freedominfo.org/2009/02/guatemala-looks-to-mexican-model-for-access-implementation/>>.

¹⁰⁰ Michener, above n 27, 30.

¹⁰¹ Peter Lorentzen, Pierre Landry and John Yasuda, *Transparent Authoritarianism? An Analysis of Political and Economic Barriers to Greater Government Transparency in China* (2010) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643986&download=yes>.

[Note: web page no longer available. A revised edition can be found here: Peter Lorentzen, Pierre Landry and John Yasuda, ‘Undermining Authoritarian Innovation: The Power of China’s Industrial Giants’ (2014) 76 *Journal of Politics* 182.]

global political economy. Potential emulators may include Singapore or Cambodia, or authoritarian regimes within Africa or the Middle East.

V CONCLUSION

Openness has largely replaced secrecy as the international aspirational norm for state behaviour. It has done so amid a fanfare of claims concerning the apparent social, political and economic benefits derivable from a universalistic model of government transparency. This universalistic understanding of public sector transparency may have helped in the diffusion of legal reform. However, now that greater openness has been 'implemented' in a wide variety of countries, each with unique administrative traditions, political systems and social structures, and each with its own idiographic understanding and execution of transparency, universalism in understanding transparency must give way to pluralism. As the cases of China, Mexico and India demonstrate, public sector transparency or FOI is an 'empty signifier' largely filled within the context of each adopter, and on a more theoretical level, by each activist, supporter or academic. Variation exists on a number of levels, but particularly in terms of values informing access and means of access. An appreciation for these aids categorizing variable cases of public sector transparency.

Greater appreciation for pluralism among transparency regimes enables comparative FOI studies to move past one-size-fits-all analysis that tends towards repetitive normative critique, in the direction of analyses appreciative of similarities and differences in context and understanding. An example of this type of approach is Erkkilä's 2012 critical evaluation of Nordic openness. Moreover, it provides researchers and activists with greater capacities to identify and examine variations as imbedded and persistent ideographic features, not merely mistakes inevitably due to reform according to a universal model.