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## Freedom of Information Law in Action: From Global Explosion to Erosion in the Realm of Government Transparency

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Article Information	Abstract
Received: May 23, 2022	Drawing from 63 reports from journalists and non-governmental agencies spanning 25 countries, we qualitatively examine regressive trends that erode freedom of information laws. We elaborate on elements associated with FOI policy transfer successes and failures using Dolowitz and Marsh's framework for policy transfer. We also identify factors limiting the effectiveness of FOI laws and elaborate on the enactment of other laws that undermine FOI, which we interpret using Ericson's (2007) notion of counter-law (laws that undermine other laws). We reflect on what these findings mean for transparency, and we contemplate other strategies for gaining access to government records to foster public engagement in civic affairs.
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## Introduction

Freedom of information (FOI) laws provide a means of scrutinizing government records and decision-making, and have now been introduced in more than a hundred countries. Ackerman and Sandoval-Ballesteros<sup>1</sup> refer to this as a global explosion of FOI laws. The authors review global statistics on FOI laws, cross-national similarities, the operation of FOI law in countries with different political systems, and discuss prospects for the future of transparency. With the rise of FOI globally, we have seen a corresponding expansion of ways of rating and ranking transparency that is indexed to freedom of information. For example, Lidberg<sup>2</sup> reflects on the International Freedom of Information Index and how it measures the functioning of FOI law in relation to a number of political and compliance factors.<sup>3</sup> The global Right to Information (RTI) rating similarly ranks facets of FOI law in any given country.

Due to issues such as low levels of compliance by government bodies, a number of challenges can emerge,<sup>4</sup> even with FOI regimes that score highly in the International Freedom of Information Index and the global Right to Information rating. As Ackerman and Sandoval-Ballesteros<sup>5</sup> note, FOI is still a political phenomenon subject to the influence of powerful political players and even private influences, meaning there are no guarantees that access to information will improve over time. While FOI laws are expanding globally, we argue we are at the same time witnessing an erosion of FOI, as FOI laws become counteracted by entrenched bureaucratic cultures of secrecy. As our analysis of real-world examples of FOI law implementation suggests, the erosion of the law is also partly due to policy “failures.”<sup>6</sup> The erosion of a law refers to a decline in its efficacy over time due to identifiable and enduring factors.<sup>7</sup> In this paper, we identify common factors contributing to the erosion of FOI laws deriving from a sample of 25 countries with the newest FOI laws that generally score high on the global Right to Information ranking. This paper identifies barriers and challenges that are undermining FOI effectiveness in multiple jurisdictions, even those with high transparency ratings or scores. We identify practical challenges

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<sup>1</sup> John M. Ackerman, & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006).

<sup>2</sup> Johan Lidberg, *The International Freedom of Information Index: A Watchdog of Transparency in Practice*, 30 NORDICOM REV. 167 (2009).

<sup>3</sup> See Johan Lidberg et al., *The Freedom of Information Index: Measuring the Gap between the Promise and Practice of Freedom of Information Legislation*, 108 FREEDOM OF INFO. REV. 88 (2003).

<sup>4</sup> See Daxton R. Stewart, *Let the Sunshine In, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL’Y 265 (2010); Aradhana Sharma, *State Transparency After the Neoliberal Turn: The Politics, Limits, and Paradoxes of India’s Right to Information Law*, 36 POLAR: POLITICAL & LEGAL ANTHROPOLOGY REV. 308 (2013); Jeannine E. Relly et al., *More than a Decade in the Making: A Study of the Implementation of India’s Right to Information Act*, 136 WORLD DEV 105088 (2020); A.Jay Wagner, *Inherent Frictions and Deliberate Frustrations: Examining the Legal Variables of State FOI Law Administration*, 3 J. CIVIC INFO. 2, 29 (2021); Amy Sanders & Daxton “Chip” Stewart, *Ghosted by Government: Why Government Entities Should be Required to Respond to Public Records Requests*, 3 J. CIVIC INFO. 3, 1 (2021); Julia Amerikaner, *Determinants of Fiscal Transparency and Right to Information Reforms: A Study of Provincial Governments in Argentina*, 3 J. CIVIC INFO. 4, 1 (2021); David Cuillier, *Glocal FOI: Local Government Transparency Across the World*, 3 J. CIVIC INFO. 4, i-ii (2021).

<sup>5</sup> See Ackerman & Sandoval-Ballesteros *supra* note 1.

<sup>6</sup> David Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policymaking*, 13 GOVERNANCE 1, 5-23 (2000).

<sup>7</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2014); Pernille Boye Koch & Rikke Gottrup, *Reversible Transparency: A Study of the New Danish Access to Information Act*, 25 EUROPEAN PUB L. 2, 205-227 (2019).

that newer FOI regimes experience and their real-world implications for transparency and democratic legitimacy. To do so, we examine journalistic and non-governmental reports on emerging problems with these FOI regimes, which not only suggest that the FOI rankings could be misleading, but point to the erosion of FOI laws and the need for continued advocacy in the realm of government transparency to strengthen FOI practices worldwide.

We begin by reviewing the literature on FOI laws, cultures of bureaucracy and secrecy, and FOI compliance testing in an international comparative perspective. We then elaborate on our understanding of the Right to Information rating system, followed by the research design and methods we use. The data for our analysis is derived from 63 reports identifying challenges of using FOI laws in countries with generally high RTI scores. In our analysis we focus on the following themes: (1) lack of resources that exacerbates lack of training of public officials, their misunderstanding of FOI laws, and lack of FOI office funding; (2) implementation issues that emphasize problems with procedural and administrative delays, lack of (or absence of) independent oversight bodies, and the shortfall of legal protection for whistleblowing; (3) barriers to public awareness that relates to the problems of favoritism, lack of FOI campaigns, numerous request barriers, and public distrust; and (4) barriers to transparency, including state bureaucracy, cultures of secrecy, and counter-laws.

We find these factors to be the main catalysts contributing to what we call the erosion of FOI law that reflects Dolowitz and Marsh's framework for policy transfer. Dolowitz and Marsh suggest that either a successful or unsuccessful policy transfer is dependent on three factors. These factors are uninformed transfer or lack of knowledge about the policy being transferred; incomplete transfer or the lack of full transfer of the institutional structure; and inappropriate transfer or lack of ideological, political, and social backgrounds considered.<sup>8</sup> Even for countries that score high on the global RTI index, problems with the functioning of FOI law are apparent in what journalists and non-governmental agencies indicate about FOI law in their respective countries. Contributing to comparative literature on access to government records<sup>9</sup>, our analysis reveals how these three policy transfer factors guide successes and failures of FOI laws. These findings identify areas where erosion of FOI is happening and could encourage further participation in civic affairs. In the discussion, we reflect on what these findings mean for literatures on FOI, law, and government transparency. We conclude by reflecting on the need for greater advocacy, social movement mobilization, and strengthening of FOI practices and policies, as these dimensions of civil society are as important as the letter of FOI law.

## From explosion to erosion

There is no shortage of literature on challenges with FOI implementation and functioning.<sup>10</sup> Saez-Martin and colleagues<sup>11</sup> examine FOI in Spain and assess the rhetoric and reality of FOI in a local setting. They suggest that there are many delays among local authorities and that the political

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<sup>8</sup> See *supra* note 6.

<sup>9</sup> See generally Hermann-Josef. Blanke & Ricardo Perlingeiro, *Essentials of the Right of Access to Public Information: An Introduction*, In *THE RIGHT OF ACCESS TO PUBLIC INFORMATION 1* (Hermann-Josef. Blanke & Ricardo Perlingeiro eds., 2018); Gregory Michener et al., *Are Governments Complying with Transparency? Findings from 15 Years of Evaluation*, 38 *GOV'T INFO. Q.* 4 (2021).

<sup>10</sup> See *supra* note 1.

<sup>11</sup> Alejandro Saez-Martin et al., *Freedom of Information in Local Government: Rhetoric or Reality?* 43 *LOC. GOV. STUD.* 245 (2017).

ideology of a governing party can hinder FOI functioning. Sheaff<sup>12</sup> looks at how government agencies attempt to manage information and how FOI requests can falter when local government officials do not take the administration of FOI seriously. Birkinshaw<sup>13</sup> and Bouhadana<sup>14</sup> track the rise of FOI in multiple countries, comparing those laws and outlining best practices. Berliner and colleagues<sup>15</sup> write about FOI law in relation to a parallel movement for open government, which would create direct access to government records and government decision making.

The literature on secrecy law and bureaucratic structures contributes to understandings of how FOI barriers emerge. Goldberg<sup>16</sup> considers how FOI can be hindered from the outside by private influence, while Brownlee<sup>17</sup> reflects on the ways that FOI can be hindered from the inside by influence of bureaucrats within a government body or agency. Given the numerous ways that FOI can be impeded in Canada, Clément<sup>18</sup> claims the idea of freedom of information is a misnomer. Examining the perspectives and perceptions of FOI coordinators, Kimball<sup>19</sup> assesses the issue of barriers to FOI from inside government. Writing about FOI in Canada, Roberts<sup>20</sup> has discovered a number of ways in which FOI law is undermined due to bureaucratic cultures of secrecy. This raises questions about whether FOI can live up to the ideal of transparency that it is based on. In this vein, Kazmierski<sup>21</sup> suggests that the potential of FOI is diminished by bureaucratic cultures of secrecy and that the implications for democracy are serious insofar as FOI is one of the only means by which citizens can access information about government conduct. Similarly, Koningisor<sup>22</sup> writes about “secrecy creep,” emphasizing how the mechanisms of federal secrecy protection become transferrable to lower jurisdictions in local and state contexts in the United States. Shepherd and colleagues<sup>23</sup> look at the nuances of record management and suggest that it is difficult to achieve high levels of FOI compliance and transparency, given the complexity and sheer immensity of bureaucracy and issues of access.<sup>24</sup>

International comparative literature on freedom of information and compliance provides insights into how well FOI regimes are functioning, although authors working in this area note that

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<sup>12</sup> Mike Sheaff, *Constructing Accounts of Organisational Failure: Policy, Power and Concealment*, 37 CRITICAL SOC. POL’Y 520 (2017).

<sup>13</sup> PATRICK BIRKINSHAW, *FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL* (4<sup>th</sup> ed. 2010).

<sup>14</sup> Irène Bouhadana, *The Right of Access to Public Information: An Analysis of International Conventions*, 2 REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS 1 (2016).

<sup>15</sup> Daniel Berliner et al., *The Future of FOIA in an Open Government World: Implications of the Open Government for Freedom of Information Policy and Implementation*, 63 VILLANOVA L. REV. 867 (2019).

<sup>16</sup> David Goldberg, *Access to Information Laws in Scotland and England: Close Freedom of Information (FOI) Encounters of the Third Kind*, 8 COMP. MEDIA L. J. 33 (2006).

<sup>17</sup> Jamie Brownlee, *Contract Faculty in Canada: Using Access to Information Requests to Uncover Hidden Academics in Canadian Universities*, 70 HIGHER EDUC. 787 (2015).

<sup>18</sup> Dominique Clément, *‘Freedom’ of Information in Canada: Implications for Historical Research*, 75 LABOUR/LE TRAVAIL 101 (2015).

<sup>19</sup> Michele Bush Kimball, *Shining the Light from the Inside: Access Professionals’ Perceptions of Government Transparency*, 17 COMM. L. & POL’Y 299 (2012).

<sup>20</sup> Alasdair Roberts, *Administrative Discretion and the Access to Information Act: an Internal Law on Open Government?* 45 CANADIAN PUB. ADMIN. 175 (2002) [hereinafter Roberts, *Administrative Discretion*]; ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006) [ROBERTS, *BLACKED OUT*].

<sup>21</sup> Vincent Kazmierski, *Accessing with Dinosaurs: Protecting Access to Government Information in the Cretaceous Period of Canadian Democracy*, 25 CONST. F. 57 (2016).

<sup>22</sup> Christina Koningisor, *Secrecy Creep*, 169 UNIV. PA. LAW REV. (2021).

<sup>23</sup> Elizabeth Shepherd et al., *Information Governance, Records Management, and Freedom of Information: A Study of Local Government Authorities in England*, 27 GOV’T INFO. Q. 337 (2010).

<sup>24</sup> Mark Weiler, *Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want*, 7 J. INT’L MEDIA & ENT. L. 101 (2017).

compliance rates are difficult to measure. The following representation of international comparative literature illustrates a trend of declining FOI efficacy. Cuillier<sup>25</sup> examines different approaches to compliance testing in the context of FOI in the United States. In an attempt to test the levels of FOI compliance through placing FOI requests and surveying journalists in the United Kingdom, Žuffová<sup>26</sup> describes challenges such as delayed responses or silence from authorities and refusals to release records, deterring the free flow of information between the government and journalists. Almanzar and colleagues<sup>27</sup> examine FOI in Mexico and how FOI compliance intersects with other dimensions of government policy, including Mexico's war on drugs. Similarly, Schapper and colleagues<sup>28</sup> identify barriers to successful access to information by conducting research on FOI compliance in the context of urban governance in Australia. Darch and Underwood<sup>29</sup> assess FOI compliance in South Africa. Nkwe and Ngoepe<sup>30</sup> examine poor levels of compliance with FOI legislation at provincial and municipal levels in South Africa, while Guy and Oberlin<sup>31</sup> reflect on the importance of FOI audits. There are many insightful studies of FOI compliance that include audit components.<sup>32,33</sup> For example, Michener<sup>34</sup> assesses FOI in 16 Latin American countries, drawing from audit-based studies. It is important to look at FOI in comparative perspective, as McDonagh<sup>35</sup> notes, because such approaches reveal the condition or health of FOI regimes. Worthy<sup>36</sup> and Van Wyk<sup>37</sup> suggest the political nature of FOI reveals the health of FOI regimes.<sup>38</sup> Likewise, Rees<sup>39</sup> argues that depending on a leading party's political interests, FOI can become a tool to deter the flow of information between the government and its citizens. Thus, the literature assessing FOI compliance recognizes a trend of declining efficacy of FOI laws across the world. Few studies compare FOI effectiveness cross-nationally, which we do

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<sup>25</sup> David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 COMM. L. & POL'Y 203 (2010).

<sup>26</sup> Mária Žuffová, *Fit for Purpose? Exploring the Role of Freedom of Information Laws and Their Application for Watchdog Journalism*, INT'L J. PRESS POLIT, 1 (2021).

<sup>27</sup> Tanya Almanzar et al., *Freedom of Information in Times of Crisis: The case of Mexico's War on Drugs*, 31 GOVERNANCE: INT'L J. POL'Y, ADMIN. & INSTITUTIONS 321 (2017).

<sup>28</sup> See Jake H. M. Schapper, Sam McLeod, Dave Hedgecock & Courtney Babb, *Freedom of Information for Planning Research and Practice in Australia: Examples, Implications, and Potential Remedies*, 39 URBAN POL. RES. 106 (2021).

<sup>29</sup> Colin Darch & Peter G. Underwood, *Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience*, 37 INT'L INFO. & LIBR. REV. 77 (2005).

<sup>30</sup> Marcia Nkwe & Mpho Ngoepe, *Compliance with Freedom of Information Legislation by Public Bodies in South Africa*, 38 GOV'T INFO. Q. 1 (2021).

<sup>31</sup> Melissa Guy & Melanie Oberlin, *Assessing the Health of FOIA after 2000 through the Lens of the National Security Archive and Federal Government Audits*, 101 LAW LIBR. J. 331 (2009).

<sup>32</sup> Robert Hazell & Ben Worthy, *Assessing the Performance of Freedom of Information*, 27 GOV'T INFO. Q. 352 (2010).

<sup>33</sup> Paul Lagunes & Oscar Pocasangre, *Dynamic Transparency: An Audit of Mexico's Freedom of Information Act*, 97 PUB. ADMIN. 162 (2019).

<sup>34</sup> Gregory Michener, *Assessing Freedom of Information in Latin America a Decade Later: Illuminating a Transparency Causal Mechanism*, 57 LATIN AM. POL. & SOC'Y 77 (2015).

<sup>35</sup> Maeve McDonagh, *The Impact of Freedom of Information on Irish Local Government*, In FREEDOM OF INFORMATION: LOCAL GOVERNMENT AND ACCOUNTABILITY 73 (Richard Chapman & Michael Hunt eds., 2010).

<sup>36</sup> BEN WORTHY, THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER (2017).

<sup>37</sup> Toerien Van Wyk, *Assessing Information in South Africa*, In FREEDOM OF INFORMATION AND SOCIAL SCIENCE RESEARCH DESIGN, 24 (Kevin Walby & Alex Luscombe eds., 2019).

<sup>38</sup> See *supra* note 9.

<sup>39</sup> Ann Rees, *Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada*, In BROKERING ACCESS: POWER, POLITICS, AND FREEDOM OF INFORMATION PROCESS IN CANADA 35 (MIKE LARSEN & KEVIN WALBY EDS., 2013).

in part using the global Right to Information rating as an indicator of government transparency as well as civic engagement in government affairs.

The global Right to Information (RTI) Rating provides an indication of the strength of FOI laws for 136 nations, as of publication of this manuscript in November 2022. The rating system looks at the legal framework or the letter of the law for any FOI law, then provides a rating based on 61 indicators from seven main assessment categories: right of access; scope; requesting procedures; exceptions and refusals; appeals; sanctions and protections; and promotional measures.<sup>40</sup> Though the rating does not refer to compliance in action, the Right to Information rating is interesting and controversial in the context of FOI law globally because the ratings are used to communicate and promote transparency by governments and represent their democratic legitimacy. The RTI rating is, therefore, a limited way of making sense of the functioning of FOI law in real-life practices. Mendel<sup>41</sup> argues more research is needed on gaps in the RTI reporting and rating system and suggests comparing RTI ratings to actualities of FOI law on the ground in any given country, which we do here. Contributing to understandings of gaps between FOI law on the books and in action, below we examine several of the newest FOI regimes globally. We refer to the *Global Right to Information (RTI) Rating Map*<sup>42</sup> and select those countries that adopted FOI laws between 2010 and 2021 (at the time of this publication, November 2022, no rated FOI law was adopted in 2022). The countries that legislated FOI laws within this timeframe imported existing FOI legislation in the hopes of improving transparency and democracy. Many of the selected countries appear to rank high on the *RTI Rating Map*. However, after considering policy transfer successes and failures using Dolowitz and Marsh's framework,<sup>43</sup> our analysis demonstrates that a higher ranking on the *RTI Rating Map* does not necessarily reflect effective implementation and functioning of FOI laws. Our analysis of media accounts and reports on the use of FOI laws reveals a different story than what the ratings alone indicate. Drawing from media accounts and reports, we provide examples where FOI law is undermined by other laws, such as national security laws – a phenomenon Ericson calls counter-law.<sup>44</sup> By analyzing these reports, we find discrepancies between FOI laws on the books and how the laws are applied in action, which can lead to FOI law erosion over time. This discrepancy deserves attention because not only do the high scores on RTI rating scales misrepresent government transparency and democratic legitimacy, but it can mask FOI compliance and discourage effective and practical use of the law. The practical use of the law can, in fact, be an indicator of government transparency and democratic legitimacy, but we argue the RTI rating score only accounts for the law on the books. We offer a note on our methodology in the next section before sharing the results and conclusions.

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<sup>40</sup> See Toby Mendel, *The Fiftieth Anniversary of the Freedom of Information Act: How it Measures up Against International Standards and Other Laws*, 21 COMM. L. & POL'Y 465 (2016).

<sup>41</sup> *Id.*

<sup>42</sup> Access Info & Centre for Law and Democracy, GLOBAL RIGHT TO INFORMATION RATING MAP, <https://www.rti-rating.org/country-data/>.

<sup>43</sup> See *supra* note 6.

<sup>44</sup> RICHARD V. ERICSON, CRIME IN AN INSECURE WORLD (2007).

## Design and methods

We decided to examine the countries that have implemented FOI since 2010 as more recent laws achieve, in general, better RTI scores compared to FOI laws enacted before 2010.<sup>45</sup> There are 51 countries that have enacted FOI/ATI/RTI/APD<sup>46</sup> laws since 2010. For our analysis, we collected and studied media reports/news coverage, non-governmental organization (NGO) reports and advocacy statements, as well as social science case studies on FOI function.

We use a multiple case study approach to identify trends across the countries.<sup>47</sup> This approach is used to explore similarities and differences across different cases. With a single unit of analysis (FOI law functioning), this design allows us to compare multiple reports from different countries. News items and NGO reports were collected using a keyword search (FOI implementation in [country], FOI effectiveness in [country], FOI functioning in [country]) through open search engines and websites (such as Google search, Human Rights Watch, Article 19, Democracy Reporting International, Transparency International, and Access Info Europe). The case studies were further explored through a university library database using a keyword search (FOI implementation, FOI effectiveness, FOI functioning). We located 63 reports published online between 2010–2022 from 25 countries (40 news items, 13 NGO reports, and 10 social science case studies).

Even though we conducted an open search for all countries that enacted FOI laws since 2010, we were only able to locate items for 25 countries at the time of data collection conducted between 2020-2022 across Africa, South America, Eastern Europe, and Asia. Table 1 below represents a list of the sample countries that were chosen for our analysis.<sup>48</sup>

Nations with FOI laws since 2010 not included in this study because of insufficient public writings about the laws were generally more remote or smaller, including: Andorra, Guinea, Kuwait, Saudi Arabia, Fiji, Luxembourg, Seychelles, Costa Rica, Cyprus, Malawi, Vanuatu, East Timor, Togo, Benin, Burkina Faso, Mozambique, Palau, Guyana, Ivory Coast, Rwanda, South Sudan, Yemen, Monaco, Niger, San Marino, and Liberia. This means that there were problems associated with insufficient coverage of FOI implementation and effectiveness in some countries, particularly smaller ones, that passed FOI laws after 2010.

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<sup>45</sup> Sweden being the oldest country passing an FOI law in 1766, ranks 39. The United States (1966) ranks 74, and the United Kingdom (2000) ranks 42. See Access Info & Centre for Law and Democracy, GLOBAL RIGHT TO INFORMATION RATING MAP <https://www.rti-rating.org/country-data>.

<sup>46</sup> Access Info & Centre for Law and Democracy, GLOBAL RIGHT TO INFORMATION RATING MAP – KOSOVO. <https://www.rti-rating.org/country-data/Kosovo/>.

<sup>47</sup> See Pamela Baxter & Susan Jack, *Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers*, 13 QUALITATIVE REP. 544 (2008) (for an example of the methodology used).

<sup>48</sup> Note that the RTI rating score of Malaysia is not recorded in the global *Right to Information Rating Map* by Access Info & Centre for Law and Democracy. Only Selangor and Penang states of Malaysia have mandated FOI legislation in 2011. Reports about FOI functioning in Selangor and Penang states informed our analysis.

**Table 1:** Right to information ranking of sample countries with FOI laws since 2010

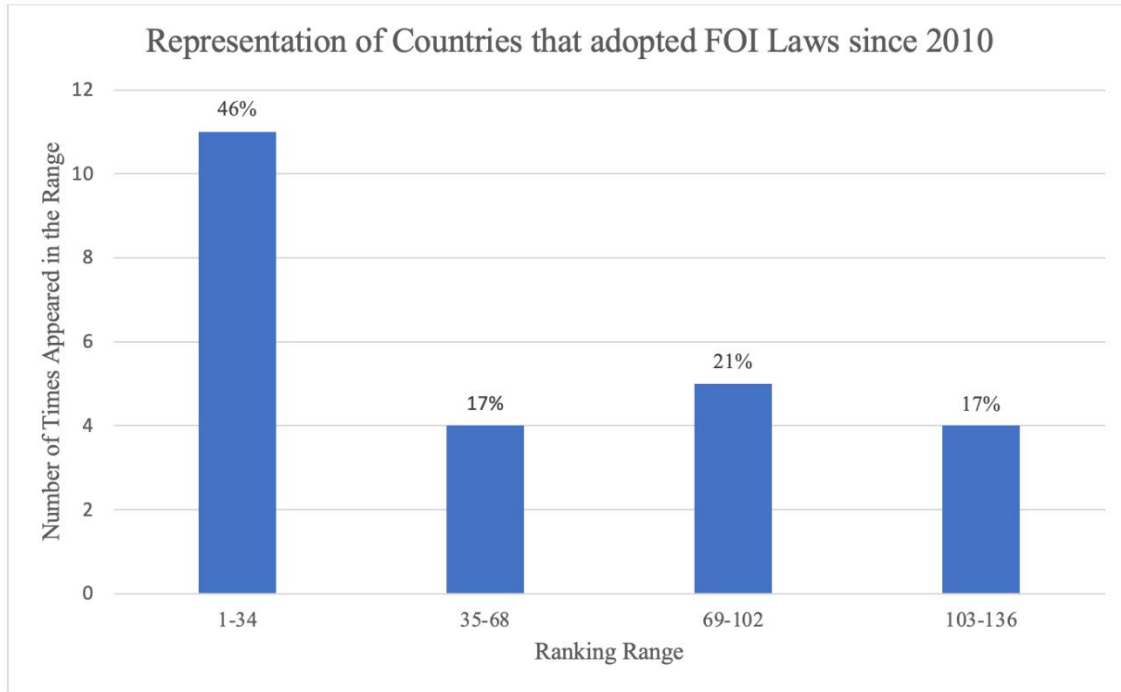
RTI Ranking	Country (in alphabetical order)	Year of FOI Law Adoption
1	Afghanistan	2014
36	Bahamas (the Commonwealth of)	2017
29	Brazil (the Federative Republic of)	2011
12	El Salvador (the Republic of)	2011
7	The Gambia (the Republic of The Gambia)	2021
44	Ghana (the Republic of)	2019
116	Kazakhstan (the Republic of)	2015
21	Kenya	2016
31	Kosovo (the Republic of)	2019
100	The Lebanese Republic	2017
22	Maldives (the Republic of)	2014
64	Mongolia	2011
92	Morocco (the Kingdom of)	2018
62	Nigeria	2011
118	Paraguay (the Republic of)	2014
131	Philippines (the Republic of)	2016
17	Saint Kitts and Nevis (the Federation of Saint Christopher and Nevis)	2018
11	Sierra Leone	2013
94	Spain	2013
4	Sri Lanka (the Democratic Socialist Republic of)	2016
113	Sudan (the Republic of)	2015
95	Tanzania	2016
15	Tunisia (the Republic of)	2011
87	Vietnam	2016
	Malaysia (Selangor and Penang States)	2011

Figure 1,<sup>49</sup> below, illustrates the prevalence of strong laws passed since 2010 in our chosen sample – about 46% of the countries landing in the top quartile of the RTI ratings. Yet, there was still solid distribution of law strength through the sample: 17% were countries that ranked 35-68; 21% ranked 69-102, and 17% ranked 103-136.

<sup>49</sup> Because Malaysia's RTI law performance is not recognized by the global *Right to Information Rating Map*, Figure 1 consists of sample of 24 countries (excluding Malaysia).



**Figure 1:** Percentage of sample countries appearing in 4 different ranking ranges



Rather than organizing the analysis by case or country, we organize the sections below by the themes that emerged from our data, guided by the multiple case studies method. We used thematic analysis to categorize the identified similarities into our core themes of lack of resources, implementation, public awareness, and transparency sections described below.<sup>50</sup> We analyzed texts by country and identified the emerging four themes with 13 subthemes (or issues) related to the application of the law through open coding. By locating these themes, we detect problems with FOI law across multiple countries discussed in greater details next.

## Results

### Theme 1: Lack of resources

The first theme is a lack of resources in terms of insufficient training of FOI officers; misinterpretation of the law by public officials; and lack of funding for FOI offices. The principal challenge in implementing FOI laws relates to a lack of training of FOI officers. Providing full training for FOI public officials is inherent to producing effective responses.<sup>51</sup> Our findings

<sup>50</sup> See Gery W. Ryan & H. Russell Bernard, *Techniques to Identify Themes*, 15 *FIELD METHODS* 85 (2003).

<sup>51</sup> Kimball *supra* note 19.

suggest this training is lacking in many jurisdictions. Reporters from Kenya,<sup>52</sup> Ghana,<sup>53</sup> Tanzania,<sup>54</sup> Vietnam,<sup>55</sup> and the Bahamas<sup>56</sup> repeatedly insist that public bodies lack clarity and efficiency when executing FOI laws. Moreover, the lack of human capital and financial resources are deterrents to the effective implementation of the law in Morocco. Ahmed Jazouli, a Moroccan policy expert involved in the training programs of civil service agents, claims, “The main obstacle is the culture of retaining information by civil servants. They should be trained on releasing information and on the proactive publication of data. It is essential to focus on changing the dominant culture among public servants.”<sup>57</sup> Likewise, an investigation from Balkan Investigative Reporting Network (BIRN) on Kosovan central and municipal governing bodies revealed “a lack of classification of documents, lack of capacities of responsible officials in addressing requests for access to public documents, and a lack of will among law enforcement institutions, which together resulted in violations of the right of access to public documents.”<sup>58</sup>

Sheremeti,<sup>59</sup> a reporter from Kosovo, flagged another barrier leading to non-disclosures: *ad hoc* administrative measures by public institutions that result from misinterpretation of the law. Similarly, Democracy Reporting International in Lebanon<sup>60</sup> showed that local authorities in Lebanon provide selective information on an *ad hoc* basis, while municipal unions publish only 10% of the information relating to budgets. When public officials misunderstand the law or do not follow procedures, the result is non-disclosure.

The study conducted by the Centre for Policy Alternatives<sup>61</sup> on *Right to Information Act* in Sri Lanka found that a referral to another public authority was partially due to the misunderstanding of the law and extends the mandated response time of 14 days. Similarly, an inquiry from Human Rights Watch, Tunisia, reports FOI officers face the problem of not being able “to get the information from colleagues who have it.”<sup>62</sup> Case studies in Brazil suggest mixed results. On one hand, the Freedom of Information Advocates network (FOIANet) indicates an 85%

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<sup>52</sup> See Peter Gathu & Henry Kahindi, *Access to Information in Kenya*, 4 ADILI 1 (2015).

<sup>53</sup> Adizato Moro Maiga, *Ghana’s RTI Implementation: How Prepared Are We?* MEDIA FOUNDATION FOR WEST AFRICA (Dec. 18, 2019), <https://www.mfwa.org/ghanas-rti-implementation-how-prepared-are-we/>.

<sup>54</sup> See TWaweza, DRAFT ANALYSIS OF THE ACCESS TO INFORMATION BILL (2016) (2017).

<sup>55</sup> See Transparency International, *Ensuring the Right to Information in Vietnam — One Step of Many*, TRANSPARENCY INT’L: REAL LIVES, REAL STORIES (Mar. 13, 2020), <https://voices.transparency.org/ensuring-the-right-to-information-in-vietnam-one-step-of-many-a698e5a83547>.

<sup>56</sup> See Lisa Benjamin, *Freedom of Information Acts in the Developing World: Lessons from the Caribbean for the Bahamian Experience*, 23 INT’L J. OF BAHAMIAN STUD. 7 (2017).

<sup>57</sup> Marwa Shalaby & Sylvia Bergh, *Power to the People? The Right to Information Law in Morocco*, CARNEGIE ENDOWMENT FOR INT’L PEACE: SADA (Sept. 30, 2020), <https://carnegieendowment.org/sada/82835>.

<sup>58</sup> BALKAN INVESTIGATIVE REPORTING NETWORK (BIRN), FREEDOM OF INFORMATION AND JOURNALISTS IN THE WESTERN BALKANS: ONE STEP FORWARD, TWO STEPS BACK, at 25 (2019), [https://balkaninsight.com/wp-content/uploads/2019/12/FOI\\_Report\\_En.pdf](https://balkaninsight.com/wp-content/uploads/2019/12/FOI_Report_En.pdf).

<sup>59</sup> Furtuna Sheremeti, *Kosovar Journalists Need to Demand Implementation of their Access to Information Rights*, OSSERVATORIO BALCANI E CAUCASO TRANSEUROPA (Feb. 8, 2017), <https://www.balcanicaucaso.org/eng/Areas/Kosovo/Kosovar-journalists-need-to-demand-implementation-of-their-access-to-information-rights-177508>.

<sup>60</sup> Sabine El Hayek & Andre Sleiman, *How Access to Information can Help Tackle Corruption in Lebanon*. DEMOCRACY REPORTING INT’L (Aug. 4, 2020), [https://democracy-reporting.org/dri\\_publications/how-access-to-information-can-help-tackle-corruption-in-lebanon/](https://democracy-reporting.org/dri_publications/how-access-to-information-can-help-tackle-corruption-in-lebanon/).

<sup>61</sup> CENTRE FOR POLICY ALTERNATIVES. STUDY ON INFORMATION REQUESTS SUBMITTED TO PUBLIC AUTHORITIES AND RESPONSES RECEIVED UNDER THE RIGHT TO INFORMATION ACT (2018), <https://www.cpalanka.org/wp-content/uploads/2018/09/Research-Report-On-RTI-ENGLISH.pdf>.

<sup>62</sup> Tunisia: *Citizens Testing Right-to-Information Law. Law’s Reach Depends on Enforcement*, HUMAN RIGHTS WATCH (Feb. 15, 2019), <https://www.hrw.org/news/2019/02/15/tunisia-citizens-testing-right-information-law>.

positive response rate from the federal government from over 460,000 reports in the first six months of law implementation (the law came into force in 2011).<sup>63</sup> On the other, the Public Transparency Program report of 2016 indicates 57% of 20 jurisdictions did not comply with FOI requests and lacked understanding of the law or transferred requests to the wrong agencies due to training gaps.<sup>64</sup> A referral of an FOI request from one department to another leading to non-disclosure reflects the lack of information officer training and misinterpretation of the law by officers, pointing to low levels of FOI compliance as a result of uninformed policy implementation.<sup>65</sup>

Even though insufficient training can result in non-disclosure, we also observed that governments can effectively disclose information by developing pro-active disclosure of information on their websites.<sup>66</sup> Prime and Russomanno<sup>67</sup> advocate for establishing a centralized government records database to produce quality and timely disclosures. In doing so, the public can benefit from this disclosure by accessing governmental records at any time (regardless of citizenship status). For example, the government of Brazil promotes proactive publishing of budgetary information online, which enables public media to monitor functions of their government.<sup>68</sup> As a result of an investigation after financial material was published online, some measures have been taken against politicians and ministries in Brazil.<sup>69</sup> Moreover, the electronic access to information platform developed by the federal Comptroller General (known as the e-SIC) in Brazil has become a means to access information as requesters are capable of monitoring the status of their FOI requests, the status of appeals, and responses to their requests through the e-SIC online platform, which ensures procedural transparency.<sup>70</sup> However, some countries lack this technology. Most administrations in Lebanon have not implemented digitized systems for record keeping and record tracking. As a result, the public does not have access to the state's annual reports, decisions, and financial transactions, despite being entitled to access such records.<sup>71</sup> Reporters Shalaby and Bergh<sup>72</sup> also note the need for Moroccan municipalities to publish their financial data and development plans online as mandated by the *Right to Information Law* of 2018. These are examples of how access to information can be hindered by lack of record keeping and record tracking infrastructure, which is a matter of funding and resources.

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<sup>63</sup> See Máira Martini, *Right to Information Laws: Impact and Implementation*, 10 U4 EXPERT ANSWER (2014), <https://www.u4.no/publications/right-to-information-laws-impact-and-implementation.pdf> (Citing FOIANET, GLOBAL RIGHT TO INFORMATION UPDATE: AN ANALYSIS BY REGION (2013)).

<sup>64</sup> See Gregory Michener et al., *From Opacity to Transparency? Evaluating Access to Information in Brazil Five Years Later*, 52 REVISTA DE ADMINISTRAÇÃO PÚBLICA, RIO DE JANEIRO 610 (2018) (Citing, LOCAL TRANSPARENCY IN BRAZIL: EVALUATING COMPLIANCE WITH THE ACCESS TO INFORMATION LAW IN THE STATES AND LARGEST CITIES. (Gregory Michener ed., 2016)).

<sup>65</sup> See *supra* note 6.

<sup>66</sup> See *supra* note 15.

<sup>67</sup> Tyler Prime & Joseph Russomanno, *The Future of FOIA: Course Corrections for the Digital Age*, 23 COMM. L. & POL'Y 267 (2018).

<sup>68</sup> Martini *supra* note 63.

<sup>69</sup> *Id.* (Citing Jorge Antio Alves & Patrick Heller, *Accountability from the Top Down? Brazil's Advances in Budget Transparency despite a Lack of Popular Mobilization*, In OPEN BUDGETS: THE POLITICAL ECONOMY OF TRANSPARENCY, PARTICIPATION, AND ACCOUNTABILITY (Sanjeev Khagram et al. eds., 2013)).

<sup>70</sup> See Michener et al. *supra* note 64.

<sup>71</sup> *Lebanon: Access to Information Law Stalled Many Authorities Don't Comply; No Enforcement*, HUMAN RIGHTS WATCH (Sept. 27, 2019), <https://www.hrw.org/news/2019/09/27/lebanon-access-information-law-stalled#>.

<sup>72</sup> Marwa Shalaby & Sylvia Bergh, *Power to the People? The Right to Information Law in Morocco*, CARNEGIE ENDOWMENT FOR INT'L PEACE: SADA (Sept. 30, 2020), <https://carnegieendowment.org/sada/82835>.

The inability of governing bodies to train ATI officers and the inability of governments to pro-actively publish information on their websites reflect in part a lack of funding. Journalists working in Afghanistan report poorly administered technical facilities due to the lack of budget as the “shortcomings” regarding the implementation of the law.<sup>73,74</sup> Ojo<sup>75</sup> connects the lack of funding for FOI in African states to African governments’ main focus on funding infrastructure, education, and healthcare, which can displace the issue of FOI. The effectiveness of the *Right to Access to Information* in Sierra Leone has been evaluated as “[u]nder-resourced, under-utilized and cash-strapped.”<sup>76</sup> The Chairman of the Right to Access to Information Commission in Sierra Leone stated that “up to now [to date to 2017], we have not received a dime for the 2017 budgetary allocation.”<sup>77</sup> If these states had funding to disclose information online and train FOI officers, there would be fewer barriers to the functioning and implementation of FOI laws.

## Theme 2: Implementation issues

We define implementation issues as procedural and administrative challenges that countries may face after enacting FOI laws.<sup>78</sup> Below we focus on the following interconnected implementation issues, some of which reflect Dolowitz and Marsh’s<sup>79</sup> policy transfer framework: procedural and administrative delays; lack of independent oversight bodies; and lack of legal protection of disclosures in good faith. Previous research has drawn attention to the minutiae of implementation<sup>80</sup> and how poor implementation can hinder FOI performance.

Administrative delays and procedural barriers have obstructed FOI implementation in African, South American, and Southeast Asian countries. For example, journalists Ben Saga and Benabou<sup>81</sup> investigated an event in Morocco where FOI law implementation has been delayed for more than a year [dating to March 2019] due to institutional and administrative unpreparedness. The extent of delays associated with “unpreparedness” leads journalists to question the accountability mechanisms. The Government of Gambia has delayed the adoption and implementation of their FOI law for two years for logistic and administrative reasons.<sup>82</sup> Similarly,

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<sup>73</sup> TOLONews, *Access To Information Law Still Not Implemented*. TOLONews (May 15, 2016), <https://tolonews.com/afghanistan/access-information-law-still-not-implemented>.

<sup>74</sup> Radio Free Europe / Radio Liberty, *Afghan Media Watchdog Demands More Access to Information*, RADIO FREE EUROPE / RADIO LIBERTY (Feb. 5, 2022), <https://www.rferl.org/a/afghan-media-watchdog-demands-more-access-to-information/30418533.html>.

<sup>75</sup> Edetaen Ojo, *Freedom of Information: Current Status, Challenges and Implications for News Media*, UNESCO (n.d.), <http://www.unesco.org>.

<sup>76</sup> A.R. Thomas, *Sierra Leone’s Right to Access Information Commission – a crippling institution*, SIERRA LEONE TELEGRAPH (Oct. 19, 2017), <https://www.thesierraleonetelegraph.com>.

<sup>77</sup> *Id* (Citing the Chairman of the Right to Access to Information Commission).

<sup>78</sup> Guy & Oberlin *supra* note 31; Hazell & Worthy *supra* note 32.

<sup>79</sup> *See supra* note 6.

<sup>80</sup> Cuillier *supra* note 25; Guy & Oberlin *supra* note 31; Hazell & Worthy *supra* note 32.

<sup>81</sup> Ahlam Ben Saga & Mohamed Amine Benabou, *El Othmani: Morocco’s New Law on Access to Information Will Succeed*, MOROCCO WORLD NEWS (Mar. 15, 2019), <https://www.morocoworldnews.com/2019/03/268098/el-othmani-morocco-law-information/>.

<sup>82</sup> The African Freedom of Expression Exchange, *Gambia’s Journey to Access to Information Legislation, and the Uncertain Road Ahead*, THE AFRICAN FREEDOM OF EXPRESSION EXCHANGE, (Dec. 17, 2021), <https://www.africafex.org/access-to-information/gambias-journey-to-an-access-to-information-legislation-and-the-uncertain-road-ahead>.

Jones reported that the implementation of the law would take up to five years in the Bahamas due to the needed administrative reform in the public services.<sup>83</sup>

As it regards procedural barriers, there have also been reports of waiting for hours in a lobby to submit an FOI request, as requesters in Maldives found in 2014, in addition to not being acknowledged with proof of the request submission by state officials, per *Right to Information Act* of Maldives.<sup>84</sup> Low levels of preparedness, as well as administrative and procedural delays are central to unsuccessful policy transfer, in this case what Dolowitz and Marsh call uninformed policy transfer.<sup>85</sup>

In addition to the procedural difficulties, legal frameworks for FOI often lack effective independent external oversight mechanisms. This means that FOI requesters are unable to appeal to higher administrative bodies when their requests have been denied. In the Philippines, external appeal to an administrative body is non-existent or procedures are spelled out unclearly, with an option of appealing to a person in the office next higher in the authority, which is completed internally and dependent on the upper echelon of the governing body.<sup>86</sup> To mitigate negative effects brought on by a similar challenge in Selangor and Penang States (the only jurisdictions in Malaysia with FOI legislation), FreedomInfo recommends a procedure to appoint members of the Appeals Board.<sup>87</sup> The absence of independent and external monitoring deters the flow of information to the public, while concealing underperformance of public authorities.

In addition to procedural delays associated with the absence of independent monitoring, the issue of legal protections for whistleblowers – provision of legal protection for those disclosing information of wrongdoings in *bona fide* manner – has become another limit of access law that requires reform.<sup>88</sup> While countries such as El Salvador<sup>89</sup> and Kazakhstan<sup>90</sup> do not have distinct laws for FOI and for whistleblowing, in some countries these laws are integrated. There are no legal protections for whistleblowing in Sudan, and releasing information can result in various punishments including fines, imprisonment, or both. In 2014, a former police officer went public with information on the corruption of the Sudanese police, and was “sued for defamation, stripped of his rank, fined, and sentenced to four years in prison.”<sup>91</sup> According to an independent legal analysis conducted by Twaweza (an NGO that promotes active civic engagement for residents of

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<sup>83</sup> Royston Jones, *FOIA Advancing: 10 Agencies and Ministries First Up in Phased Freedom of Information Implementation*, EYEWITNESS NEWS, (Feb. 11, 2022), <https://ewnews.com/foia-freedom-of-information-act-advancing-10-government-agencies-and-ministries-first-up-in-phased-freedom-of-information-implementation-bahamas>.

<sup>84</sup> See ÁDÁM FÖLDES, ET AL., *RIGHT TO INFORMATION IN ASIA PACIFIC: HOW 11 COUNTRIES PERFORM ON SDG, 16.10 24-9* (Julis Hinks & Nicole Pope eds., 2018).

<sup>85</sup> See *supra* note 6.

<sup>86</sup> See Article 19, *Philippines: Right to information law must follow Executive Order*, ARTICLE 19: RESOURCES (Aug. 17, 2016), <https://www.article19.org/resources/philippines-right-to-information-law-must-follow-executive-order/>.

<sup>87</sup> FreedomInfo, *Second Malaysian State Approves FOI Legislation*, FREEDOMINFO: NEWS (Nov. 28, 2011), <http://www.freedominfo.org/2011/11/second-malaysian-state-approves-foi-legislation/>.

<sup>88</sup> Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006).

<sup>89</sup> Access Info & Centre for Law and Democracy, *GLOBAL RIGHT TO INFORMATION RATING MAP*, <https://www.rti-rating.org/country-data/El%20Salvador/>.

<sup>90</sup> OSCE: Organization for Security and Co-operation in Europe, *OSCE Media Freedom Representative Welcomes New Law on Access to Information in Kazakhstan, but Says Drawbacks Still Exist*, OSCE: NEWS (Nov. 25, 2015), <https://www.osce.org/fom/203606>.

<sup>91</sup> Mohamed Suliman, *The Case for Reforming the Sudanese Access to Information Act: The Current Law Restricts and Blocks Access to Information*, ADVOK: GLOBAL VOICES (Aug. 28, 2019), <https://advok.globalvoices.org/2019/08/28/the-case-for-reforming-the-sudanese-access-to-information-act/>.

Tanzania, Kenya, and Uganda), whistleblowers in Tanzania are sentenced to 3-5 years in prison,<sup>92</sup> despite its FOI legislation having a legal clause to protect whistleblowers.<sup>93</sup> The failure of legal protection for whistleblowers makes the law less practicable, as the implicit message for whistleblowing becomes clear. Those who hold the requested information will avoid disclosure because a whistleblower can potentially lose their freedom as punishment.

However, in addition to the above-mentioned case of Brazil benefitting from technological advancement easing administrative delays, three cases from Sri Lanka, Spain, and Tunisia represent how effective implementation of FOI laws can be better achieved. The impact of the implementation of FOI law in Koomankulam, a village located in the Northern Province of Sri Lanka, was significant. After the civil war, the villagers of Koomankulam were able to track the status of their recovery compensations from the government with help from the Open Government Partnership.<sup>94</sup> Likewise, a journalist's use of FOI in Spain revealed unlawful government and corporate activity in the fishing industry. An FOI request helped reveal "how fishing companies engaged in illegal activity continued to receive public funding."<sup>95</sup> A Ministry of Defence response to an FOI request in Tunisia has helped a requester (a citizen of Tunisia) calculate compensations issued to soldiers injured on duty.<sup>96</sup> These examples demonstrate that while the erosion of FOI is uneven, there are best practices and progressive examples that show achieving government transparency is possible.

While the examples of positive implementation indicate policy transfer success, issues of implementation can also be upended by national or global events. Health crises, such as COVID-19, may have become an opportunity to weaken FOI laws in Brazil, El Salvador, and Spain. With COVID-19 cases surging, the government of Brazil suspended the legal deadline of 30 days to respond to FOI requests, in addition to banning appeals of the cases where access to information was denied.<sup>97</sup> In FOI news coverage during the pandemic, Phillips<sup>98</sup> reports that the government of Brazil also shut down the official site that shared data on COVID-19. Although the Supreme Court struck down these provisions, they had violated the right to access information and compromised government transparency at the time of a state emergency.<sup>99</sup> We see a similar trend in Spain, where administrative bodies in some regions denied RTI requests on the basis of a public

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<sup>92</sup> Twaweza, *Clause 6, Draft Analysis of the Access to Information Bill* (2017), <https://twaweza.org/download/twaweza-ati-act-analysis/>.

<sup>93</sup> Twaweza, *Clause 22, 23, 24, Draft Analysis of the Access to Information Bill* (2017), <https://twaweza.org/download/twaweza-ati-act-analysis/>.

<sup>94</sup> *Sri Lanka – Citizens Use the RTI Law to Retrieve Government Compensation*, OPEN GOV'T PARTNERSHIP: BLOG (July 11, 2019), <https://www.opengovpartnership.org/stories/sri-lanka-citizens-use-the-rti-law-to-retrieve-government-compensation/>.

<sup>95</sup> FOIANET, *GLOBAL RIGHT TO INFORMATION UPDATE: AN ANALYSIS BY REGION* (2013), [https://www.access-info.org/wp-content/uploads/global\\_right\\_to\\_information\\_update\\_28-8-2013.pdf](https://www.access-info.org/wp-content/uploads/global_right_to_information_update_28-8-2013.pdf).

<sup>96</sup> See *supra* note 69.

<sup>97</sup> See Committee to Protect Journalists, *Brazil restricts Access to Government Information amid COVID-19 Emergency*, CPJ NEWS (Mar. 26, 2020), <https://cpj.org/2020/03/brazil-restricts-access-to-government-information/>; See Mark Frary, *How FOI Laws are Being Rewritten During the COVID-19 Crisis*, INDEX: VOICE OF FREE EXPRESSION (May 1, 2020), <https://www.indexoncensorship.org/>.

<sup>98</sup> Dom Phillips, *Brazil Stops Releasing Covid-19 Death Toll and Wipes Data from Official Site*, THE GUARDIAN (Jun. 7, 2020), <https://www.theguardian.com/world/2020/jun/07/brazil-stops-releasing-covid-19-death-toll-and-wipes-data-from-official-site>.

<sup>99</sup> See Toby McIntosh, *Governments Delay Access to Information Due to COVID-19*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (Mar. 31, 2020), <https://gijn.org/2020/03/31/governments-delay-access-to-information-due-to-covid-19/>; Lisandra Paraguassu et al., *Brazil Restores Detailed COVID-19 Data After Supreme Court Ruling*, REUTERS (Jun. 9, 2020), <https://www.reuters.com/article/instant-article/idUSL1N2DM17K>.

state of emergency.<sup>100</sup> As Human Rights Watch<sup>101</sup> reports, not only did the Salvadoran government stop releasing public information on government emergency spending, it denied the citizens of El Salvador access to information, including results of COVID-19 cases, self-isolation guidelines, and emergency spending, despite ranking 10<sup>th</sup> on the RTI scale.<sup>102</sup> Information was withheld during the pandemic in El Salvador, Spain, and Brazil, when it should have been available. Our analysis of implementation issues and lack of resources reveals that central governments are responsible for successful policy transfer. With the next theme, we elaborate on public perception of the law and central governments' roles in promoting public awareness of the law.

### Theme 3: Barriers to public awareness

We define public awareness as the familiarity citizens have with FOI law and their knowledge of filing FOI requests. Public awareness depends on the government's promotional work on educating the public about FOI legislation. Kimball<sup>103</sup> stresses the importance of showing the public how to file FOI requests while also showing government workers how to comply with FOI requests. Our findings suggest much of the public remain unaware of FOI laws due to reasons such as favoritism; political unwillingness to promote the law; pessimism about fees imposed upon requests; possible infringement of fundamental rights; as well as public distress associated with the fear of their governments.<sup>104</sup> The policy transfer framework shows how public awareness becomes one of the catalysts interfering with the full functioning of FOI legislations. Lack of public awareness thus becomes another challenge for effective functioning of FOI law.

Favoritism is one barrier contributing to low public awareness of FOI laws and access to information. Using a survey method to gather data on public opinion about exercising the right to information in Lebanon, Hounari<sup>105</sup> concluded that while 51% of 100 interviewees from different professional backgrounds (including business owners, members of civil society organizations, and journalists) were aware of their rights to information, 72% of the interviewed professionals stated that "it is very difficult to access information in Lebanon." In the same study, when asked to determine the most successful methods of obtaining information, 82% of respondents identified the "*wasta* – favoritism of kinship and provision of personal services based on kinship in exchange for political loyalty and support [emphasis added] – and political pull" method, followed by another 23% of respondents identifying "making a payment" method to be the easiest way for information access. It is noteworthy that 80% of the members of parliament surveyed in the same study identified the "*wasta* and political pull" method to be the most effective approach that people use for access to information.<sup>106</sup> The survey refers to the trend of FOI requests being available through personal connections with government employees, as opposed to it being open and transparent to everyone. Similarly, Piyawadani stated that the public, including the members of

<sup>100</sup> Access Info Europe, *Spain Must Guarantee Right to Access Information During Coronavirus Crisis*, LIBERTIES: STORIES (May 29, 2020), <https://www.liberties.eu/en/stories/spain-must-guarantee-right-access-information-during-coronavirus-crisis/18651>.

<sup>101</sup> *El Salvador: Broad Powers Limit Accountability*, HUMAN RIGHTS WATCH (Jun. 9, 2020), <https://www.hrw.org/news/2020/06/09/el-salvador-broad-powers-limit-accountability>.

<sup>102</sup> Access Info & Centre for Law and Democracy, GLOBAL RIGHT TO INFORMATION RATING MAP, <https://www.rti-rating.org/country-data/>.

<sup>103</sup> Kimball *supra* note 19.

<sup>104</sup> See Darch & Underwood *supra* note 29; See Kazmierski *supra* note 21; See Weiler *supra* note 24.

<sup>105</sup> Guita Hounari, *Survey Report on Access to Information in Lebanon*, Lebanese Transparency Association (LTA), Carthage Center for Research and Information (CCRI) and Lebanese Development Network (LDN), 2012.

<sup>106</sup> *Id.*

the Parliament, are not aware of their rights to request information as well as they lack an understanding of FOI laws in Sri Lanka.<sup>107</sup> We also note that corruption and nepotism discourage effective implementation of the law among Mongolians: “government money is government’s money” is a widespread belief among the public that creates distrust in the government, which in turn results in decreased use of the FOI law.<sup>108</sup> In support of Kimball’s argument about FOI coaching and awareness, Banisar and Tepina claim that the citizens of Mongolia as well as public officials in Mongolia lack the knowledge about the law and are not aware of how to file FOI requests.<sup>109</sup> In the same vein, Cuillier and Pinkleton<sup>110</sup> reveal people who are cynical or jaded about government tend to support transparency, which in the case of Mongolia translates into a willingness to participate in public affairs that can start with the coaching of citizens and government officials as it regards FOI requests.

Although Sierra Leone ranks 11 on the global RTI scale, little work has been done to make the public aware of their rights. This is partly due to the fact that investments in civic education for promoting a culture of openness and access to information are non-existent.<sup>111</sup> A local journalist reported that while the *Right to Access Information Act* and the corresponding Commission were enacted and established in 2013 and 2014, respectively, the Commission has received only 42 requests since its establishment due to lack of public awareness campaigns.<sup>112</sup> Alhassan reports that citizens of Ghana and a large party of journalists in the country are to receive training for effective use of the law.<sup>113</sup> An examination of the FOI legal framework in Sudan illustrates that “[i]n a country where almost half of its citizens face poverty, such fees [fees associated to file FOI requests] represent a real barrier that deters citizens from using their right to freedom of information.”<sup>114</sup> Lack of any public awareness campaign as well as pessimistic views about fees imposed upon requests discourages FOI requesters to engage in civic affairs.

Article 19 of the Universal Declaration of Human Rights which states: “[e]veryone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers”<sup>115</sup> highlights the significance of seeking and accessing information by any individual. However, this fundamental right to “seek, receive, and impart information of every individual” is diminished by legislations passed in the Philippines,<sup>116</sup> the Bahamas,<sup>117</sup> and Mongolia because the

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<sup>107</sup> Piyawadani, *Q&A: Sri Lanka’s Right to Information Act ‘Must Be Implemented by People,’ Official Says*, GLOBAL PRESS JOURNAL (Aug. 29, 2016), [https://globalpressjournal.com/asia/sri\\_lanka/qa-sri-lankas-right-information-act-must-implemented-people-official-says/](https://globalpressjournal.com/asia/sri_lanka/qa-sri-lankas-right-information-act-must-implemented-people-official-says/).

<sup>108</sup> GLOBE INTERNATIONAL CENTER, BASELINE SURVEY SUMMARY (May 17, 2013), <https://www.gic.mn/en/post/r/989https://www.gic.mn>.

<sup>109</sup> Compare Kimball *supra* note 19 with DAVID BANISAR & POLONA TEPINA, ASIA DISCLOSED: A REVIEW OF THE RIGHT TO INFORMATION ACROSS ASIA (Oliver Spencer-Shrestha ed. 2015).

<sup>110</sup> David Cuillier & Bruce E. Pinkleton, *Suspicion and Secrecy: Political Attitudes and their Relationship to Support for Freedom of Information*, 16 COMM. L. AND POL’Y 227 (2011).

<sup>111</sup> Cf. Proscovia Svård, *Freedom of Information Laws and Information Access: The Case of Sierra Leone*, 33 INFO. DEV. 190 (2017).

<sup>112</sup> See Thomas *supra* note 76.

<sup>113</sup> R. Alhassan, *Are Ghanaians Ready to Take Advantage of the New Right to Information Law?* DEUTSCHE WELLE (DW) (Jan. 30, 2020), <https://www.dw.com/en/are-ghanaians-ready-to-take-advantage-of-the-new-right-to-information-law/a-52171600>.

<sup>114</sup> See Suliman *supra* note 91.

<sup>115</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) art. 19.

<sup>116</sup> See Article 19 *supra* note 86.

<sup>117</sup> Aram Khaghaghordyan & Stephanie Trapnell, ANALYSIS OF PUBLIC ACCOUNTABILITY MECHANISMS IN SIX CARIBBEAN COUNTRIES: THE BAHAMAS, THE CAYMAN ISLANDS, GUYANA, JAMAICA, ST. KITTS AND NEVIS, AND



filing of FOI requests is limited to citizens and permanent residents only (migrants, immigrants, and foreign nationals are excluded).<sup>118</sup> The right to “seek, receive, and import information” is also restricted in Morocco due to the production of FOI disclosures in Arabic only, despite the government’s willingness to disclose information to foreign nationals upon request.<sup>119</sup> FOI laws should ensure government openness to everyone regardless of one’s citizenship status. This can further limit initiatives that would boost public awareness.

Some requesters fear that the collection of information makes them vulnerable to being monitored by individuals who benefit from non-disclosure of information. Discrimination based on profession is yet another challenge. For instance, several reporters in the Philippines,<sup>120</sup> Maldives,<sup>121</sup> Brazil,<sup>122</sup> and Selangor State of Malaysia<sup>123</sup> indicate that the requirement of providing their intent for requesting information could prevent them from actively submitting additional FOI requests. Open Knowledge Brazil<sup>124</sup> explores a case whereby a failure to indicate one’s professional identity resulted in the refusal of disclosure. Moreover, the FOI legislation in the Philippines, Maldives, Brazil, and Mongolia<sup>125</sup> asks requesters to provide copies of their national identification, telephone number, personal e-mailing and mailing addresses (if submitting a request on behalf of an organization), and even fingerprints (in the case of the Maldives), while retaining the discretion to accept or reject requests. Though the law encourages citizens to increase their governments’ accountability<sup>126</sup> as a means of exercising their right to access to information, these governments have undermined FOI laws by monitoring citizens and by potentially invading their privacy. These barriers prevent people from participating in public affairs and exercising their right to information. Not only does the failure to maintain anonymity of requesters hinder the public from submitting more requests, but it also creates public distrust, skepticism, and fear of government.<sup>127</sup>

#### Theme 4: Barriers to transparency

While transparency is the main purpose of FOI laws, the concealing of public records and releasing of heavily redacted or “politically-convenient” information is prominent in many jurisdictions.<sup>128</sup> Structured state bureaucracy, cultures of secrecy,<sup>129</sup> and counter-laws (laws that

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TRINIDAD AND TOBAGO, (2020). [https://knowledgehub.transparency.org/assets/uploads/kproducts/Helpdesk\\_CariPAM\\_TI\\_2020.pdf](https://knowledgehub.transparency.org/assets/uploads/kproducts/Helpdesk_CariPAM_TI_2020.pdf).

<sup>118</sup> *Id.*; See BANISAR & TEPINA *supra* note 109.

<sup>119</sup> Said Essoulami, *Morocco’s Right to Access Information Law is at Risk of Being Ineffective [Opinion]*, YABILADI. (Mar. 15, 2020), <https://en.yabiladi.com/articles/details/90587/morocco-s-right-access-information-risk.html>.

<sup>120</sup> See Article 19 *supra* note 86.

<sup>121</sup> See Földes et al. *supra* note 84.

<sup>122</sup> Open Knowledge Brazil, *Brazil’s Information Access Law and the Problem of ‘Un-Anonymous’ Request for Public Information*, OPEN KNOWLEDGE BRAZIL FOUNDATION: BLOG (July 19, 2017), <https://blog.okfn.org/2017/07/19/brazils-information-access-law-and-the-problem-of-un-anonymous-request-for-public-information/>.

<sup>123</sup> See Iqbal Harith Liang, *Freedom of Information in Malaysia*, UNIVERSITY OF MALAYA L. REV.; LEX IN BREVE (Feb. 2018), <https://www.umlawreview.com/lex-in-breve/freedom-of-information-in-malaysia3869206/>.

<sup>124</sup> See Open Knowledge Brazil *supra* note 122.

<sup>125</sup> See BANISAR & TEPINA *supra* note 109.

<sup>126</sup> See e.g., Stewart *supra* note 4.

<sup>127</sup> See Cuillier & Pinkleton *supra* note 110.

<sup>128</sup> See Prime & Russomano *supra* note 67.

<sup>129</sup> See Roberts, *Administrative Discretion*, ROBERTS, BLACKED OUT *supra* note 20; See Kirtley *supra* note 88; See Stewart *supra* note 4; See Kazmierski *supra* note 21.

undermine other laws) pertaining to secrecy and national security<sup>130</sup> can impede disclosure under FOI laws. Our analysis suggests that the political context of the policy-adopting governments can impede the successful adoption and implementation of newly enacted FOI legislations.

One journalistic inquiry illustrates an incident where the Parliament of Sierra Leone passed the *Freedom of Information Bill* in 2012 and in return received financial assistance from a wealthy, foreign organization.<sup>131</sup> According to Kelvin Lewis, president of the Sierra Leone Association of Journalists, the enactment of FOI law made funds (\$44 million USD) from the Millennium Challenge Corporation (MCC) accessible to the government of Sierra Leone.<sup>132</sup> The same source emphasizes the importance of keeping officials' asset records open to the public as a mechanism to implement the Bill.<sup>133</sup> The influence of the international government organization on the internal affairs of the government of Sierra Leone contributed to inappropriate transfer: contextual circumstances of the policy adopting government were superfluous by the exporting policy (the enactment of FOI law).

Politicians and state officials in the Philippines publish their statements of Assets, Liabilities and Net Worth with the purpose of being proactive and open. However, the released financial statements were still heavily redacted after investigative journalists' FOI requests.<sup>134</sup> The Democracy Reporting International in Lebanon<sup>135</sup> indicates that, according to the results of their survey administered to the Central (the offices of the President, Prime Minister, and the Parliament) and municipal offices since 2017, the Central governing offices failed to comply with ATI requests, while municipal authorities complied the ATI disclosures at the rate of 36%. Similar to the case in the Philippines,<sup>136</sup> significant redacting has occurred in Lebanon,<sup>137</sup> where the municipal government released summaries of their achievements rather than releasing documents in their original form. Although the FOI legislation is intended to create government openness and transparency, excessive redaction does not reflect this mandate. Yet, as Prime and Russomanno<sup>138</sup> note in assessing FOI compliance in the United States, the more redaction is used, the lower the quality of the government's responses and disclosures.

The following examples from the Bahamas, Afghanistan, and Kosovo describe how the structured state bureaucracy can impede FOI compliance. The *Freedom of Information Bill* of 2015 enacted by the Parliament of the Bahamas suggests that the extent of an appointment of FOI Commissioner is dependent on the Governor General's decision with the advice of the Prime Minister. The language of this legislation pertains to the power of the Prime Minister who oversees the decisions of the FOI Commission, despite the Commission's mandate to provide independent oversight to FOI functioning.<sup>139</sup> Moreover, even though FOI law in Afghanistan ranks first by all RTI indicators,<sup>140</sup> journalists in Afghanistan are still being denied access to information on cases involving violation of human rights and corruption. The cases include a request for records denied by Supreme Court, the Attorney General's Office, the National Directorate for Security

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<sup>130</sup> See Michener *supra* note 34; See Worthy *supra* note 36; See Lagues & Pocasangre *supra* note 33.

<sup>131</sup> See Thomas *supra* note 76.

<sup>132</sup> *Id.* (Citing Lewis).

<sup>133</sup> *Id.* (Citing Emmanuel Saffa Abdulai – Executive Director of the Society for Democratic Initiative).

<sup>134</sup> Michael Cañares, 'Open Washing': *Flawed Freedom of Information in the Philippines*, WEB FOUNDATION (Sept. 28, 2017). <https://webfoundation.org/2017/09/open-washing-flawed-freedom-of-information-in-the-philippines/>.

<sup>135</sup> See El Hayek & Sleiman *supra* note 60.

<sup>136</sup> See Cañares *supra* note 134.

<sup>137</sup> See El Hayek & Sleiman *supra* note 60.

<sup>138</sup> Prime & Russomano *supra* note 67.

<sup>139</sup> See Benjamin *supra* note 56.

<sup>140</sup> See Access Info & Centre for Law and Democracy *supra* note 89.

Intelligence Agency, the Ministry of Finance, the Central Bank of Afghanistan, and the Ministry of Defense regarding allegations of sexual abuse by government officials and the abduction of two human rights defenders.<sup>141</sup> Exploring outcomes of FOI requests by Kosovan journalists, Camaj<sup>142</sup> finds information was “reserved” for the journalists who work for the government, while access to the same information was denied when independent, investigative journalists made the same requests. Furthermore, when BIRN Kosovo<sup>143</sup> repeatedly submitted complaints about denial of access to public documents between 2017 and 2019 (whereby 122 out of 337 requests to municipalities, ministries, the Telecom Company, the Prosecutorial and Judicial Councils, the Central Government Offices, and the Procurement Review Body were rejected), the Ombudsman imposed the relevant institutions to grant access in all cases of denial. Only 45% of these processes fully complied, while another 20% of requests were only granted partial access. The remaining 35% were still awaiting an answer by December 2019.<sup>144</sup> This is part of a trend whereby the release of information in the Bahamas, Afghanistan, and Kosovo is being centrally controlled by their respective governments.

In countries across Africa, there seems to be a gap between FOI legislation on the books and law in action. In his work on the status, challenges, and implications of FOI for news media in Nigeria, Ojo<sup>145</sup> argues that high ranking officials fear that FOI will make them vulnerable to political opponents who will reveal their misconduct (such as corruption and use of public moneys for personal interests), and most importantly, expose the failure of constituted legislations and policies. Krüger states that the RTI law and its Commission were expected to promote transparency and combat corruption in Morocco. However, the Commission on the Right of Access to Information continues to be vague. Not only does the Commission lack the power to take action against the strong administration of Morocco, but also the government is resistant to changes or structural reforms, “where representatives of the state exceed their authority and act in very authoritarian ways.”<sup>146</sup> Moreover, secrecy plays a role rendering government information out of reach of the public. These two concepts are common in governmental structures of the former colonies of Britain. Egbunike<sup>147</sup> states that most Nigerian public servants “think that everything [in government’s possession] is a secret” resulting in the denial of FOI requests. Associated with this common belief, the Regulation G6(1) of the *Code of Regulations* in Kenya “bans officials from communicating with the media.”<sup>148</sup> Assessing the effectiveness of FOI transparency and the culture of bureaucracy, Stewart<sup>149</sup> points out that public bodies feel more secure when withholding

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<sup>141</sup> *Afghan Government Should Implement Access to Information Law*, AMNESTY INTERNATIONAL: NEWS. (Feb. 5, 2020), <https://www.amnesty.org/en/latest/news/2020/02/afghanistan-implement-access-to-information-law/>.

<sup>142</sup> Lindita Camaj, *Gatekeeping the Gatekeepers: International Community and Freedom of Information in Kosovo*, 9 GLOBAL MEDIA J. (2011).

<sup>143</sup> BIRN *supra* note 58.

<sup>144</sup> *Id.*

<sup>145</sup> See Ojo *supra* note 75.

<sup>146</sup> S. Krüger, *The Right of Access to Information: An Important Step in the Fight Against Corruption in Morocco?* KONRAD ADENAUER STIFTUNG (Dec. 12, 2019), <https://www.kas.de/en/web/auslandsinformationen/artikel/detail/-/content/the-right-of-access-to-information>.

<sup>147</sup> Nwachukwu Egbunike, *Right to Information: With its New Law in Place, will Ghana go the way of Nigeria?* ADVOX: GLOBAL VOICES (May 27, 2019), <https://advox.globalvoices.org/2019/05/27/right-to-information-with-its-new-law-in-place-will-ghana-go-the-way-of-nigeria/>.

<sup>148</sup> Edwin Abuya, *Realizing the Right to Access to Information in Kenya: What should Stakeholders be on the Lookout for?* In ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE 215 (Fatima Diallo & Richard Calland eds., 2013).

<sup>149</sup> See Stewart *supra* note 4.

information with a justification that the perceived risk of releasing information outweighs keeping the information secret. These examples show why FOI laws become undermined by cultures of secrecy, which in turn renders FOI legislation symbolic. The direct outcome of this could be further public apathy and disengagement from public affairs due to a lack of interest in politics or dissatisfaction with government operations.<sup>150</sup>

When FOI laws overlap with other regulations or counter-laws,<sup>151</sup> such as secrecy laws,<sup>152</sup> the implementation of FOI can be further eroded when some laws operate to nullify FOI. Akintomide,<sup>153</sup> a development professional, and Dawodu,<sup>154</sup> a legal associate, claim that the *State Secrecy Law*, the *Evidence Act*, the *Public Complaints Commission Act*, and the *National Securities Agencies Act* have repeatedly been used to suppress information upon request in Nigeria. Likewise, the *State Secrets Act* and the *List of State Secrets Act* deter information disclosure in Mongolia. Under these laws, information can remain classified for 60 years or for an indefinite period.<sup>155</sup> The *Official Secrets Act* of 1972 in Malaysia usurps the adoption of the Freedom to Information legislation on the federal level of governance.<sup>156</sup> There are only two states in Malaysia – Selangor and Penang – with FOI legislation. Ayle and Adunbi<sup>157</sup> illustrate how a counter-law (such as the *Data Protection Act*) in Ghana is passed prior to the enactment of the *Right to Information Act (RTIA)* to restrict access to information that is otherwise openly accessible through RTI requests. As the case illustrates, it took seven years for the legislators in Ghana to pass the *Right to Information Act* in 2019, despite this legislation had been drafted long before the *Data Protection Act* was first brought up for a discussion. Counter-law<sup>158</sup> (or laws that undermine other laws) restricts FOI legislation functioning in Nigeria, Mongolia, Malaysia, and Ghana, which erodes the efficacy of the legislation and undermines its purpose (i.e. the creation of transparency and accountability).

The reports from Brazil, Kosovo, Saint Kitts and Nevis, and the Bahamas further demonstrate how the label of “secrecy” can incapacitate full implementation of FOI law. A new decree added into Brazil’s access to information law proposed to “allow more than 1,200 commissioned officials – including those in temporary posts – to classify information as secret and top secret.”<sup>159</sup> As displayed at Kosovo NGO Balkan Investigative Reporting Network (BIRN) in

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<sup>150</sup> See also Prime & Russomano *supra* note 67.

<sup>151</sup> Ericson *supra* note 44.

<sup>152</sup> David Cuillier, *The People’s Right to Know: Comparing Harold L. Cross’ Pre-FOIA World to Post-FOIA Today*, 21 COMM. L. & POL’Y 433 (2016); See Mendel *supra* note 40.

<sup>153</sup> See Egbunike *supra* note 147 (Akintomide, “described for Global Voices some of the limitations of FOI requests in Nigeria: The FOI Act still clashes with the Official Secrets Act, which remains binding for Nigerian public officers. Thus, since most Nigerian civil servants ‘think that everything is a secret,’ most FOI requests are either ‘ignored or answered superficially’”).

<sup>154</sup> Matthias Oluwole Dawodu, *An Overview of the Freedom of Information Act (an Appraisal from a Lawyer’s Perspective)* (July 29, 2016), <https://www.lexology.com/library/detail.aspx?g=2f3432be-c8ff-4ff1-b396-3cd25682fdee>.

<sup>155</sup> See BANISAR AND TEPINA *supra* note 109.

<sup>156</sup> See FreedomInfo *supra* note 87.

<sup>157</sup> S. Ayle & O. Adunbi, *Whose Freedom? Whose Information? Discourses on Freedom of Information Policies*, 5 J. OF INFO. POL’Y 179 (2015).

<sup>158</sup> Ericson *supra* note 44.

<sup>159</sup> See Article 19, *Brazil: New Access to Information decree undermines government transparency*, ARTICLE 19: RESOURCES (Jan. 30, 2019), <https://www.article19.org/resources/brazil-new-access-to-information-decree-undermines-government-transparency/>; Angelica Mari, *Brazil Changes Freedom of Information Act: Lower-Ranking Public Servants are Awarded Power to Assign Top-Level Secrecy to Documents*, ZDNET (Jan. 24, 2019), <https://www.zdnet.com/article/brazil-changes-freedom-of-information-act/>.

2012, a clash between what is constituted as “secret” and what is deemed to be “public” information resulted in a refusal of disclosure of expenditures (on how taxpayers’ money was spent) by the Office of the Prime Minister.<sup>160</sup> Even after the court’s ruling for disclosure, the Prime Minister’s Office overruled the decision insisting the information remain a state secret.<sup>161</sup> Alhassan reported that “economic information of third parties, information relating to tax, internal working information of public institutions, information relating to parliamentary privilege, fair trial and contempt of court” are exempt from disclosure in the Bahamas.<sup>162</sup> Heads of state and ministers are exempt from financial disclosure and conflict of interest frameworks both in Saint Kitts and Nevis as well as in the Bahamas.<sup>163</sup> Political financing is essentially unregulated in Saint Kitts and Nevis. Treating public information as a state secret and using counter-laws<sup>164</sup> not only impedes access to information but renders governments less transparent, which extends the gap between the letter of FOI law and law in action.

## Discussion and conclusion

There has been an undeniable global explosion of freedom of information laws, as at least 136 countries have now enacted FOI laws.<sup>165</sup> Contributing to literature on FOI law regimes and emerging barriers to access, we have first examined FOI law in global comparative perspective with a focus on 25 countries that have enacted FOI laws in the previous decade. Even though about half (46%) of these countries have the highest RTI ratings,<sup>166</sup> we provided examples of low compliance, lack of resources, poor public awareness, and barriers faced by FOI users. This pattern reveals a regressive trend of low compliance, even in some countries where a high RTI score is recorded. The RTI rating system is thus limited as a measure of FOI efficacy, as it ignores implementation and compliance. A high RTI rating score focuses on the letter of the law<sup>167</sup> as an indicator of government transparency. However, our multiple case study approach and thematic analysis suggests that a stronger indicator for transparency is the actual use and implementation of access to information laws, as opposed to the letter of the law alone. We conclude that FOI laws in action often function differently than intended. Conceiving of these dynamics as an erosion of law, we have seen a pattern within and across countries based on media reports and case studies conducted by NGO organizations.

Our research provides a starting point for more comparative research on FOI that focuses not only on the letter of the law, but law in action. Law in action cannot be assessed through questionnaires with government officials alone, which is why we draw from the reports of journalists and non-governmental agencies as a means of examining FOI law. An evaluation of the implementation of FOI laws drawing from the claims of journalists and non-governmental agencies allows voices from non-governmental advocacy groups to be heard in academia and beyond. For this reason, we did not use interviews or collect government compliance figures as a method of data collection. Instead, we focused on NGO and journalists’ assessments of the

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<sup>160</sup> Sheremeti *supra* note 59.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; See ALHASSAN *supra* note 113.

<sup>163</sup> *Id.*; See Khaghaghordyan & Trapnell *supra* note 117.

<sup>164</sup> Ericson *supra* note 44.

<sup>165</sup> Access Info & Centre for Law and Democracy *supra* note 89.

<sup>166</sup> See Figure 1.

<sup>167</sup> See Mendel *supra* note 40.

effectiveness of FOI in real-life practice. While journalists and non-governmental agencies cannot offer a statistical picture of FOI performance and only provide a snapshot of the issues with FOI compliance, as frequent FOI users they are well situated to report on breaches of FOI laws and patterns in access to civic information. Reliance on government statistical reports alone could potentially mute the voices of journalists and non-governmental groups. The shared experiences of journalists' frustration points toward low levels of FOI compliance and performance that should be tested in future research, either within one country or in cross-country and cross-cultural studies.

Given the apparent low levels of compliance, even in those countries with high RTI ratings, we wonder what the prospects for government transparency really are. The examples involving counter-laws, including national security laws, not only prevent a constitutional recognition of FOI laws in some jurisdictions,<sup>168</sup> but also serve as an indication of erosion<sup>169</sup> of FOI laws where transparency is diminished despite the continued existence of the laws. As Berliner and colleagues<sup>170</sup> note, the future of FOI may soon be moot in countries where open government becomes a possibility. However, as Wang and Sheppard<sup>171</sup> contend, current open government initiatives are also highly rhetorical and controlled by government. The proactively disclosed records are limited for these reasons.

We agree with Pozen<sup>172</sup> that there is a need to conceive of access to information and transparency beyond FOI law, yet FOI law still deserves reform. More funding for FOI regimes, better public education, and better oversight are sorely needed to close the gap between the letter of FOI law and law in action. While Stewart<sup>173</sup> finds that disciplinary penalties are imposed to public bodies in the United States to improve oversight and accountability mechanisms, our analysis reveals there is a lack of government accountability in some countries (even those ranking between 1 and 68),<sup>174</sup> whereby the effectiveness of FOI laws declines due to insufficient independent oversight mechanisms<sup>175</sup> and low civic participation.<sup>176</sup> According to Dolowitz and Marsh, low civic participation can result in unsuccessful or inappropriate legislation transfer due to differences in context and culture.<sup>177</sup>

As we have noted, levels of FOI compliance, performance, and functioning are low in many countries despite these countries enjoying high RTI ratings. Poor FOI compliance and functioning have been exacerbated by the COVID-19 pandemic, which has posed a setback to FOI laws globally and will no doubt result in further erosion of FOI laws. At this juncture, social movements for government transparency and direct democracy are more important than ever. It is crucial for

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<sup>168</sup> Take into consideration the *Official Secrets Act* of Malaysia that usurps the adoption of the Freedom to Information legislation on the federal level of governance, as appeared on p. 24.

<sup>169</sup> For example, the *State Secrecy Law*, the *Evidence Act*, the *Public Complaints Commission Act*, the *National Securities Agencies Act* of Nigeria and the *State Secrets Act* and the *List of State Secrets Act* of Mongolia, as appeared on p. 24.

<sup>170</sup> Berliner *supra* note 15.

<sup>171</sup> Victoria Wang & David Shepherd, *Exploring the Extent of Openness of Open Government Data – A Critique of Open Government Datasets in the UK*, 37 GOV'T INFO. Q. 1 (2020).

<sup>172</sup> David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2016).

<sup>173</sup> Stewart *supra* note 4.

<sup>174</sup> See Figure 1 and Table 1.

<sup>175</sup> For example, above we note the lack of external appeal process in the Philippines and Selangor and Penang States of Malaysia. Also, above we note an example of the lack of independency of an FOI Commissioner from the Office of the Prime Minister in the Bahamas.

<sup>176</sup> See p. 17 for several reasons that deter public participation in civic affairs in the Philippines, Maldives, Brazil, and Mongolia.

<sup>177</sup> See *supra* note 6.

social movements to work with one another to improve public participation by training the public to submit FOI requests, to advocate for improved records management, and to advocate for more training and resources for FOI officers.<sup>178</sup> Our comparative analysis is significant at a practical level because cross movement solidarity is important in this realm as it appears unlikely that governments will concede much on their own either through FOI or through open government without more mass mobilizations.<sup>179</sup> While Clément<sup>180</sup> recommends amending the existing FOI legal framework to address problems of poor record management practices within historical and archival studies, Schapper and colleagues<sup>181</sup> contemplate strategies towards improving transparency in urban governance through FOI requests in Australian urban studies context. The positive cases of FOI practices that we note (cases in Brazil, Sri Lanka, Spain, and Tunisia) illustrate why citizens' concern and participation as well as government compliance are vital. The positive cases of FOI implementation point to successful policy transfer that has significant value in the lives of ordinary citizens and their participation in internal and domestic affairs, which we contend is the true purpose of access to information, transparency, and democratic legitimacy. While fairness and transparency in government will require something beyond FOI law, as Pozen<sup>182</sup> contends, there is still much to do to repair deteriorating FOI regimes worldwide.

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<sup>178</sup> *Learning from Peers: Implementing the Access to Information Law in Paraguay*, THE WORLD BANK: NEWS. (Aug. 11, 2015), <https://www.worldbank.org/en/news/feature/2015/08/11/paraguay-intercambia-experiencias-ley-acceso-informacion>.

<sup>179</sup> See Alexa Capeloto, *A Case for Placing Public-University Foundations under the Existing Oversight Regime of Freedom of Information Laws*, 20 COMM. L. & POL'Y 311 (2015); Jamie Duncan, Alex Luscombe, & Kevin Walby, *Governing Through Transparency: Investigating the New Access to Information Regime in Canada*, THE INFORMATION SOCIETY (2022), DOI: 10.1080/01972243.2022.2134241.

<sup>180</sup> See *supra* note 18.

<sup>181</sup> See *supra* note 28.

<sup>182</sup> Pozen *supra* note 172.