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Volume 7, Number 2 2017–2018

SYMPOSIUM

FREEDOM OF INFORMATION LAWS ON THE GLOBAL STAGE: PAST, PRESENT AND FUTURE

SOUTHWESTERN LAW SCHOOL

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Editor's Note

This issue is entirely devoted to articles and essays generated from our 2016-2017 symposium, *Freedom of Information Laws on the Global Stage: Past Present and Future*. This is the second of two issues from the conference and, like the first set of articles, the contents underscore the breadth and depth of scholarship from that symposium.

The first article, "Migration of Civilian and National Security Access to Information Norms," by Ádám Földes, applies Sujit Choudry's metaphor of migration of norms to the intersection of civilian and national security fields on national and international levels. A legal advisor at the International Secretariat of Transparency International in Germany, Földes shows how access to information norms evolve through national legislation, international treaties, and the decisions of national and regional courts.

"Access to Government Information in South Korea: The Rise of Transparency as an Open Society Principle" examines the conceptual and theoretical framework of the right to information in South Korea. Revised and expanded from an original presentation by Professor Kyu Ho Youm, the Jonathan Marshall First Amendment Chair at the University of Oregon, with additional contributions from Korea-based media law scholars Inho Lee and Ahran Park, the article engages the manner in which access to information is guaranteed as a constitutional and statutory right in Korea.

From China comes "Circumventing Transparency: Extra-Legal Exemptions from Freedom of Information and Judicial Review in China," by Clement Yongxi Chen. Chen, a post-doctoral fellow at the University of Hong Kong, explores the complicated relationship between China's 2007 Regulation on Open Government Information, which established a right of access, and pre-existing state authorities that have power to control information. For Chen, transparency reform ultimately depends on the role of the Chinese courts in settling conflicts involving the flow of information in China.

Included in this issue are two outstanding essays that serve as an introduction to the articles—and to the symposium. The first is "Challenges to Freedom of Information in the Digital Age," by David Kaye, the U.N. Special

Rapporteur on the Promotion and Practice of the Right to Freedom of Opinion and Expression. Kaye, a professor at University of California, Irvine, School of Law, delivered a compelling keynote address about the often-fraught state of information access around the world, upon which this essay is based. Dr. Jonas Nordin, the Secretary of the Research Council at The National Library of Sweden, provides his scholarly observations upon the 200th anniversary of Sweden's Freedom of Information Law, the world's first. We are grateful to the Barbro Osher Pro Suecia Foundation for its generous support, which made it possible to bring Dr. Nordin to the proceedings.

As we look forward to Volume 8, I am pleased to report that our January 2018 symposium conference, entitled *Fake News and "Weaponized Defamation": Global Perspectives*, drew scholars from around the world to a packed lecture hall at Southwestern Law School in Los Angeles. Organized in partnership with the *Southwestern Law Review* and *Southwestern International Law Journal,* the symposium's Call for Papers yielded submitted abstracts from more than 100 scholars and practitioners. The *Journal of International Media & Entertainment Law* is looking forward to publishing papers from January's symposium in our next volume. In the interim, readers can learn more about what happened at the conference by going to www.swlaw.edu/globalfakenewsforum.

As always, your comments, suggestions, and feedback of any kind are welcome.

Professor Michael M. Epstein
Supervising Editor

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Challenges to Freedom of Information in the Digital Age

David Kaye*

We live in an age marked by massive contradictions. It should be the age of transparency, a time during which our access to information globally is unparalleled in history, both a byproduct and objective of the digital age. And yet, it is also an age of secrecy in which governments restrict access to information using a wide range of tools, from over-classification of security information, to a failure to devote resources to freedom of information processes and requests, to the punishment of sources and whistleblowers.

I want to discuss one part of this issue, using the framework of international human rights law to address the serious pressures on, and major contributions made by, sources and whistleblowers.

THE SPECIAL RAPPORTEUR MANDATE

I will start by explaining my mandate as Special Rapporteur. The United Nations Human Rights Council operates as the central human rights body of the UN. It aims to develop human rights norms and ensure implementation of the rules of human rights law. The Human Rights Council has adopted over fifty mandates relating to human rights law, most typically relating to rights guaranteed under the UN Covenant for Civil and Political Rights and, the Covenant on Economic, Social and Cultural Rights (known collectively as "Special Procedures").[1] A UN mandate is typically used to refer to a long-

* David Kaye, U.N. Special Rapporteur on the Promotion and Practice of the Right to Freedom of Opinion and Expression, gave this keynote speech at Southwestern Law School's symposium commemorating "Freedom of Information Laws on the Global Stage: Past, Present and Future" (November 4, 2016).

1. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en); *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en).

term international mission which has been authorized by the United Nations General Assembly or the UN Security Council. The mandate on freedom of opinion and expression was established in 1993, and I am the fourth rapporteur to enjoy this particular mandate.[2]

Special rapporteurs typically have three mandated functions:

1. Report annually to the Council and General Assembly. The annual reporting has given the Human Rights Council a way to generate normative reports on matters of concern to States. While the Council may indicate substantive areas of interest, mandate-holders have significant discretion to identify the major areas deserving of normative development.[3]

2. Communicate with governments. While governments, academics, and activists often pay close attention to the normative reports of Special Procedures, rapporteurs also communicate directly with governments about matters of immediate concern. The Office of the High Commissioner for Human Rights collects all of these communications and reports them to the Council before each Human Rights Council session, and they are available publicly thereafter (including the government responses).[4]

3. Conduct country visits. In order to do a close evaluation of a country's compliance with specific human rights norms, mandate-holders will conduct fact-finding missions that enable conversations with government officials, judges, lawyers, activists, journalists, and others. These include reports to the Human Rights Council which often feed into the Council's overall review of a State's human rights behavior in the Universal Periodic Review.[5]

I would characterize these functions as typically involving normative development and protection, functions that often merge in the day-to-day work.

2. *See Special Rapporteur on the promotion and protection of the right to opinion and expression*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx (last visited December 5, 2017).

3. *Freedom of Opinion and Expression – Annual Reports*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx (last visited December 5, 2017).

4. *Communications reports of special procedures*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx (last visited December 5, 2017).

5. *Freedom of Opinion and Expression – Country Visits*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Visits.aspx (last visited December 5, 2017).

SOURCES, WHISTLEBLOWERS AND ACCESS TO INFORMATION

The following offers some substantive thoughts related to these topics. As is well known, the similar versions of Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights guarantee everyone's right to seek, receive, and impart information and ideas of all kinds, and provides the foundation for the international right of access to information held by public authorities.[6] This right was developed for specific and valuable reasons to: enable everyone to participate in public life on an equal basis, to enable individuals to challenge public policy, develop fully their opinions and ideas, and hold accountable those responsible for wrongdoing.

Of course, governments may legitimately keep certain information secret on the grounds provided in Article 19(3) of the Covenant. Article 19(3) is strict, however. Mere assertions of a governmental interest in protecting rights or reputations of others, national security, public order, public health, or morals, are insufficient. To be lawful under the Covenant, any restriction must actually be necessary to achieve a specified interest, and it must be proportionate to that goal.

Secrecy cannot be a shield to prohibit public discussion on matters of public interest in democratic societies that value the rule of law, or at least those that lay claim to that status, and it must never be an obstacle to justice. This is where sources and whistleblowers play a crucial role. Many States protect source confidentiality and whistleblowers as a matter of their domestic law. International instruments, such as the Convention Against Corruption, specify these protections.[7] Nonetheless, it remains all too common for governments to restrict access to information beyond what is necessary to protect a legitimate interest under the Covenant. It typically falls to ordinary citizens, reporters, civil society organizations, sources, and whistleblowers to step up in the public interest and disclose that information.

Not all disclosures are comfortable for governments, political leaders, and even societies. Of course, there are also times when disclosure may indeed harm a legitimate state interest. Yet, while many States may see that effective protections for sources and whistleblowers are crucial to public

6. UNITED NATIONS GENERAL ASSEMBLY, *The Universal Declaration of Human Rights*, adopted by the UN General Assembly on December 10, 1948, by resolution 217A, at Art. 19 (http://www.un.org/en/universal-declaration-human-rights/); *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV4&chapter=4&clang=_en).

7. UNITED NATIONS GENERAL ASSEMBLY, *The United Nations Convention against Corruption*, adopted by the UN General Assembly on October 13, 2003, by resolution 58/4 (https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

debate and accountability in democratic societies, they too often resist protections and call for penalties for disclosures, even those in the public interest.

I have pleaded with governments, and want to emphasize here as well, that we not demonize the whistleblower or the confidential source, who often takes great personal risks – to family, career, and livelihood – in the good faith hope of bringing to light that which should not be hidden from public view. Will some deserve some form of accountability, and face the music for unauthorized disclosures? Perhaps. But in the interest of democratic debate and rule of law, governments ought to weigh in the balance these foundational interests, even when considering specific cases.

Last year, in my report to the UN General Assembly, I drew upon a review of national and international norms and practices, benefiting from twenty-eight State submissions and nearly a dozen from civil society.[8] I drew a number of conclusions, including the following:

- First, despite improving legal and policy frameworks, Governments and international organizations, including the UN, are failing to ensure adequate protections to whistleblowers and sources of information. Countless sources and whistleblowers around the world are intimidated by officials, co-workers, and others, depriving everyone of information that may be critical to public debate and accountability.

- Second, the problem of source protection extends beyond traditional journalists to bloggers, citizen reporters, NGO researchers, authors, academics, and many others. They often struggle to carry out investigative work when they cannot extend the basic assurances of confidentiality to their sources.

- Third, the problem of whistleblowers' harassment extends beyond States. The UN and most international organizations have adopted rules for enabling whistleblowing and prohibiting retaliation. Yet, allegations of wrongdoing and retaliation are rarely protected effectively.

- Fourth, as noted above, States may restrict access to information in specific areas and narrow circumstances, yet the disclosure of

8. DAVID KAYE, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNITED NATIONS GENERAL ASSEMBLY, Seventy-First Session, September 6, 2016 (https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

> information relating to human rights or humanitarian law violations should never be the basis of penalties of any kind.

DIGITAL AGE RISKS

The digital age poses additional questions and risks, among them are surveillance practices and mass releases of documents.

Surveillance: State practices related to bulk collection of individual data and targeted surveillance are undermining the security of the reporting process. In the United States, the ability to identify one government whistleblower depended in large part on metadata analysis which led to journalists directly. Just yesterday, the Federal Court of Canada issued a scathing judgment, taking the national spy agency to task for its collection and use of individual data on journalists outside the scope of warrants, and beyond the notification of the judiciary. And today, Quebec launched a commission of inquiry to look into spying on reporters.

Mass releases of documents: Even as surveillance allows for easier identification of sources and whistleblowers, the digital age enables secure sharing of documentation. This is to be celebrated, but it also encourages, to a certain extent, releases that fail to protect the rights and security of others – whether we are talking about the private data of public officials, in which no public interest is furthered by disclosure, or the engagement of activists and others. My main fear about such releases is that, when done without proper protection or curation, they undermine the broader respect for the role of sources and whistleblowers. It is critical to find solutions that advance such releases while protecting other human rights equities, but I am afraid that this genie is out of the bottle and will be exceptionally difficult to put back in.

RECOMMENDATIONS

I urged States and international organizations to adopt or improve laws and practices – and to foster the necessary political and social environments – that provide genuine protection to sources and whistleblowers. Such protections should be adopted not only by governments but also international organizations, such as the United Nations.

These recommendations included the following eight items:

Ensure national legal frameworks provide for the right of access to information in accordance with international standards: National legal frameworks establishing the right to access information held by public bodies should be aligned with international human rights norms. Exceptions to disclosure should be narrowly defined, clearly provided by law, and

necessary and proportionate to achieve one or more of the above mentioned legitimate objectives.

Adopt, or revise, and implement national laws protecting the confidentiality of sources: Laws guaranteeing confidentiality must reach beyond professional journalists, and include those who may be performing a vital role in providing access to information of public interest, such as bloggers, "citizen journalists," members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest. Protection should be based on function, not a formal title.

Adopt, or revise, and implement national legal frameworks protecting whistleblowers: State laws should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of domestic or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.

Internal institutional and external oversight mechanisms should provide effective and protective channels for whistleblowers to motivate remedial action: In the absence of channels that provide protection and effective remediation, or that fail to do so in a timely manner, public disclosures should be permitted. Disclosure of human rights or humanitarian law violations should never be the basis of penalties of any kind.

Protections against retaliation should apply in all public institutions, including those connected to national security: Because prosecutions generally deter whistleblowing, penalties should take into account the intent of the whistleblower to disclose information of public interest and meet international standards of legality, due process, and proportionality.

Establish personal liability for those who retaliate against sources and whistleblowers: Acts of reprisals and other attacks against whistleblowers, and the disclosure of confidential sources, must be thoroughly investigated and those responsible for these acts must be held accountable. When these attacks are condoned or perpetrated by authorities in leadership positions they consolidate a culture of silence, secrecy, and fear within institutions and beyond, deterring future disclosures. Leaders at all levels in institutions should promote whistleblowing and be seen to support whistleblowers. Particular attention should be paid to the ways in which authorities in leadership positions encourage retaliation, tacitly or expressly, against whistleblowers.

Actively promote respect for the right of access to information: Law enforcement and justice officials must be trained to ensure the adequate implementation of standards establishing protection of the right to access information, and the consequent protections of confidentiality of sources and whistleblowers. Authorities in leadership positions should publicly recognize

the contribution of sources and whistleblowers sharing information of public relevance and condemn attacks against them.

All of these principles apply to the United Nations and other international organizations: The UN and international organizations should adopt effective norms and policies of transparency to enable the public greater access to information. Specific norms protecting whistleblowers should follow similar criteria provided in the recommendations for States: wide scope of application, promotion of disclosure of information in the public interest, and clarity in the mechanisms for reporting and requesting protection. Particular attention must be paid to the effectiveness and independence of existing reporting and justice mechanisms, given the lack of access of whistleblowers to any other formal justice system.

CONCLUSION

The Human Rights Council is getting in on the act and is moving towards strong statements of protection. In its 33rd session held this fall, it made two points that are worth quoting in full (this is resolution 33/2):

> 12. … calls upon States to protect in law and in practice the confidentiality of journalists' sources, in acknowledgement of the essential role of journalists in fostering government accountability and an inclusive and peaceful society, subject only to limited and clearly defined exceptions provided in national legal frameworks, including judicial authorization, in compliance with States' obligations under international human rights law;
>
> 13. *Emphasizes* that, in the digital age, encryption and anonymity tools have become vital for many journalists to exercise freely their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies, with any restrictions thereon complying with States' obligations under international human rights law;[9]

These are both helpful, as they move beyond the mantra and establish offline rights that apply online as well. This is substantive. But now, the work must focus on national implementation of these norms.

In conclusion, all of these standards are critical to develop at the international level, but they will mean nothing – and indeed breed cynicism about international processes – if they cannot be converted to real protections for people in their local and national environments. Attaining real protection will continue to be the most important work.

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9. Human Rights Council, *Thirty-Third Session, The Safety of Journalists*, UNITED NATIONS GENERAL ASSEMBLY (September 26, 2016), http://www.adidem.org/images/4/44/UN_resolution_A-HRC-33L.6_Safety_of_Journalists.pdf.

The Swedish Freedom of Print Act of 1776 – Background and Significance

Jonas Nordin*

The first Swedish Freedom of Print Act was adopted on 2 December 1766. Thus, it celebrated its 250th anniversary in 2016.[1] It was the first legislation in the world with clearly determined limits for the freedom of print. Its contemporary importance is illustrated by the fact that it was promulgated as a constitutional law.

The Swedish Freedom of Print Act contained fifteen paragraphs outlining the extent and limits to the press in detail.[2] The law was formulated according to an exclusivity principle: only those offenses that were clearly specified in the law could be indicted. If a topic was not explicitly excluded it could be freely discussed in print without fear of reprisal.

The exceptions in the law were four (§§1–3). Everything was allowed to print, except for: challenges to the Evangelical faith; attacks on the constitution, the royal family or foreign powers; defamatory remarks about civil servants or fellow citizens; and indecent or obscene literature.

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* Jonas Nordin, Secretary of the Research Council, Kungliga biblioteket/The National Library of Sweden, gave this speech at Southwestern Law School's symposium commemorating "Freedom of Information laws on the Global Stage: Past, Present and Future" (November 4, 2016).

1. In 2016 the Swedish Parliament (Sveriges Riksdag) published an extensive scholarly volume relating to the anniversary. Twenty-two experts treat the story of freedom of print in Sweden from 1766–2016 in various historical, legal, and cultural viewpoints. An English translation is due to be published in 2017: *Press Freedom 250 Years. Freedom of the Press and Public Access to Official Documents in Sweden and Finland – a living heritage from 1766*.

2. The Ordinance exists in two expert translations, one by Peter Hogg, another by Ian Giles & Peter Graves. They vary in their approach. Whereas Hogg has strived for a verbatim translation in keeping with the eighteenth-century original text, Giles & Graves has endeavored a "cultural" approach aiming at making the content of the Ordinance more comprehensible to modern readers. *See His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (1766)* (Peter Hogg trans. 2006), *in* The World's First Freedom of Information Act: Anders Chydenius' Legacy Today 8-17 (Juha Mustonen ed., 2006), http://www.chydenius.net/pdf/worlds_first_foia.pdf; and His Majesty's Gracious Ordinance Regarding the Freedom of Writing and of the Press (Ian Giles & Peter Graves trans. 2016), http://www.peterforsskal.info/documents/1766-translation.pdf.

These qualifications might seem far-reaching, but except for religious matters the very same limitations, translated into twentieth-century language, are in fact accepted in the European Convention on Human Rights, adopted in 1950.[3] An important provision for all limitations to free speech is that they are clearly defined in law, just like in the Swedish Freedom of Print Act.

However, the freedom to print was not the most remarkable feature of the 1766 law. In the eighteenth century there was a fairly extensive de facto freedom of print recognized in, for example, Great Britain and the Netherlands, although in neither of these countries was it protected by law, and book printers still operated under arbitrary conditions.[4] What was truly unique with the Swedish law was the extensive public access it gave to official documents. It was a Freedom of Information Act as much as it was a Freedom of Print Act. Indeed, many scholars – including myself – hold that the public access to official records was the main purpose of the law. The chief objective with the ordinance was to vitalize political discussions. To achieve this objective, it was essential that the citizens had access to official documents in order to see how the state was run.

Seven of the ordinance's fifteen paragraphs were dedicated to outlining in the detail extent of this public access (§§5–11). In short, access was granted to all documents and proceedings from the courts, public authorities, and the Diet (the Swedish Parliament). As a rule, negotiations with foreign powers should also be open to public scrutiny. Exemptions were made for records that needed to be kept secret (especially in foreign affairs), and working papers from deliberations still in progress. Since 1766 public access has been the norm, while secrecy is the exception. All citizens were allowed to access and copy official documents at cost price, and without having to state the purpose of doing so. Public documents were also free to print without limitations.

Public access was not total, however, and the limits were somewhat undefined. Most importantly, the ordinance does not mention minutes from the Council of the Realm (the government) or the Justice Revision (a division of the Council of the Realm acting as Supreme Court). In both instances, the ordinance only mentions the members' votes, which would include any reservations to the majority vote expressed in the minutes, but it is not clear whether this would also include verbatim accounts from the proceedings. It is a fact, however, that minutes from both the government and the Supreme

3. *Convention for the Protection of Human Rights and Fundamental Freedoms*, EUROPEAN CONVENTION ON HUMAN RIGHTS (November 4, 1950), Article 10(2), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

4. Frederick Seaton Siebert, Freedom of the Press in England 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL, CH.15-18 (1965); RIETJE VAN VLIET, ELIE LUZAC (1721–1796): BOOKSELLER OF THE ENLIGHTENMENT, Ch. 5 (2009).

Court were published quite regularly in the years that followed, so obviously the authorities chose to interpret the regulations liberally.[5]

In spite of this ambiguity, it is clear that the public access to official documents became more extensive than in any other European country at the time. It should be remembered that only from 1771, at the earliest, was it possible to publish accounts of the debates in the British parliament, and this was not expressly permitted by law, but only tolerated for practical reasons.[6]

CONVENTIONAL IDEAS IN AN UNCONVENTIONAL POLITICAL SETTING

What caused the exceptional and early Swedish legislation on this matter? An explanation has to take both intellectual and institutional circumstances into account.

On the intellectual side Sweden experienced the same transformation that affected the mental climate all over the Western World in the eighteenth century. It was the birth of liberal theory, which is the one true paradigm shift in European society since Antiquity. It can be summarized in three opposing pairs:

- Whereas pre-modern society rested on a divine order, liberal theory is profoundly secular.
- Whereas pre-modern society was altogether socio-centric, liberal theory regards the individual as the essential component to society.
- Whereas pre-modern society strived to accomplish the stability that was imminent in the perfect divine order, liberal theory considers perpetual change to be a natural consequence of humanity's aspiration for constant betterment of society.

Few, if any, Swedish politicians from the period are counted among the vanguard of European intellectuals, but they adopted and responded to the same ideas as the rest of the Western World. Yet, in one important respect, Swedish politicians had an advantage compared to their colleagues elsewhere in Europe. During the eighteenth century Sweden had a peculiar political system that made it possible to actually put many of the radical ideas *en vogue* into practice.

Between the death of the absolute King Charles XII in 1718 and the coup d'état of King Gustav III in 1772, supreme power in Sweden was exercised by the Diet, which was composed of four estates: the nobility, the

5. Johan Hirschfeldt, *1766 Års Tryckfrihetsförordning Och Offentlighetsprincipens Utveckling*, 1-28 (December 2, 1996), https://johanhirschfeldt.files.wordpress.com/2008/12/1766tf.pdf.

6. PETER THOMAS, JOHN WILKES, A FRIEND TO LIBERTY, Ch. 8 (1996); ARTHUR CASH, JOHN WILKES. THE SCANDALOUS FATHER OF CIVIL LIBERTY, 277-78 and 286-87 (2006).

clergy, the burghers, and the peasantry. Political discussion took place within the four estates, but also within two competing parties: the Hats and the Caps. Roughly sixty percent of the adult male population was allowed to participate, directly or indirectly, in the elections to the Diet, which made it by far the most widely participatory political system anywhere in Europe. Executive power was exercised by the Council of the Realm, which had to answer to the Diet, whereas the king was reduced to a mere figurehead, whose personal signature was occasionally replaced by a dry stamp. This era was referred to as the Age of Liberty – *frihetstiden* – even by contemporaries.[7]

It is true that the same grand ideas will not be found among Swedish eighteenth-century intellectuals as among the French. Where French philosophers had to argue on a general level because their influence on actual politics were virtually non-existent, Swedish authors could actually put their ideas into practice through the Diet. Swedish authors did not write any eloquent *Traités sur la tolerance* that people still read today, but they did formulate detailed ordinances on freedom of print and on freedom of information, whose core values have transcended down through the centuries. Even though minute legislative regulations rarely display literary qualities they may nevertheless contain radical ideas and be pioneers for change. The Freedom of Print Act achieved the immediate result that was intended, and the political climate severely intensified. About 75 percent of the Swedish political pamphlets from the eighteenth century were printed in the years 1766–1772, and there was at least a twelvefold increase in annual production compared to the immediately preceding years.[8]

Not only were the political discussions considerably invigorated by the freedom of print, they were also radicalized. Most important was the increased emphasis on civil rights, including freedom of trade and equality before the law. The aristocracy came under fierce attack and the noble privileges were all but abolished in a few years' time. Several bills for equal civil rights for all citizens were drafted. The first was presented to the Diet in 1770 by Alexander Kepplerus, representative of the town Lovisa in Finland. The noble privileges were placed on a level with constitutional law and could therefore not be altered without the consent of the nobility. The solution found by the commoners was to make them redundant by extending them to all citizens – a privilege pertaining to everyone is no longer a privilege, but

7. *See* MICHAEL ROBERTS, THE AGE OF LIBERTY: SWEDEN 1719–1772 (1986); Michael F. Metcalf, *Parliamentary Sovereignty and Royal Reaction, 1719–1809*, *in* THE RIKSDAG: A HISTORY OF THE SWEDISH PARLIAMENT (1987).

8. There are no proper statistic computations of print output in these years. These figures are an estimate based on the number of archive capsules under the subject headings "Politics" and "Political Economy" at the National Library of Sweden. *See also* STIG BOBERG, GUSTAV III OCH TRYCKFRIHETEN 1774–1787, 79 (1951).

rather a general law. Kepplerus, therefore, wanted the clergy, the burghers, and the peasantry to be able to enjoy, on equal footing with the nobility, the rights and liberties which had "always belonged to Swedish men and inhabitants of the realm as freeborn from time immemorial." [9] His draft affirmed that:

> all non-nobles, regardless of status, age and sex, will be under the protection of the law and not by other subjects or any one private person, and they should be free from all force regarding their persons, their business, and their property, so that each and every one, by consent and free will, may enjoy the liberty of himself and his person, as far as the written constitution of Sweden permits.[10]

This proposition was presented to the Diet by a representative of the Burghers, but it was soon adopted and adapted by the peasantry as well.[11] In February 1771 the impotent King Adolf Fredrik died and was succeeded by his son, Gustav III, who was determined to restore the monarch's power. For half a century the nobility had been the monarchy's strongest adversaries, but their urge to protect their social and economic prerogatives made them shift alliance and side with the king. This was a necessary condition for the success of the coup d'état, staged by Gustav III in August 1772. In one blow the noble privileges were restored and all constitutional laws that had been adopted since 1680 were abolished, among them the Freedom of Print Act.

THE FREEDOM OF PRINT IS RESTRICTED BY THE KING

The freedom of expression was immediately curbed, more through authors' caution and self-censorship, it seems, than through actual coercion exercised by the authorities. To codify a fait accompli the abrogated Freedom of Print Act was replaced in early 1774 by a new print ordinance, which was an edited version of the former one.[12] Gustav III had sensed the popularity of the former print ordinance and wanted to appear as an enlightened and benevolent ruler, or as "the first citizen among a free people," as he styled

9. ALEXANDER KEPPLERUS, BORGMÄSTARENS OCH RIKSDAGS-FULLMÄGTIGENS IFRÅN LOVISA STAD, HERR A. KEPPLERI MEMORIAL, RÖRANDE PRIVILEGIER FÖR BORGARE- OCH BONDE-STÅNDEN, §§1 and 3 (1770). I have elaborated extensively on this proposition and its context in Jonas Nordin, *Ett fattigt men fritt folk. nationell och politisk självbild i Sverige från sen stormaktstid till slutet av 1700-talet* [A People of Poverty and Liberty: National and Political Self-image in Sweden from the Late Age of Greatness to the End of the Age of Liberty (c.1660-177)], 396 (Bokförlag Symposion, 2000).

10. *Id.*

11. Nordin, *supra* note 9, at 401–08.

12. Henrik Fogut, Kongl. Maj:ts Nådiga förnyade förordning och påbud angående skrif- och tryck-friheten. Gifwen Stockholms slott, then 26 april 1774 (1774), http://weburn.kb.se/eod/6660/NLS12A006660.pdf (last visited December 5, 2017).

himself in his opening address to the Diet in 1771. Through small, barely discernible changes he completely reversed the essence of the ordinance. Earlier everything was allowed to be printed if it was not expressly forbidden, but with Gustav III's new law anything that was not expressly allowed to be printed ran a potential risk of being brought to court. The law continued to allow a basic public access to official documents, but all government records were exempted. This did not prevent the king from boasting about the Swedish freedom of print in a draft letter to Voltaire:

> Vous trouverez sans doute dans cet édit que la liberté de la presse est plus étendue en Suède que dans aucun pays, même en Angleterre, puisque les registres du conseil d'État, que nous appelons la revision de la Justice, sont permis d'imprimer.
>
> [In this ordinance you will without doubt find that the liberty of the press is far more extensive in Sweden than in any other country, including England, because here even the proceedings of the State Council – which we call the Justice Revision – are allowed to be printed.][13]

This was a deliberate attempt at deception because Voltaire probably had no knowledge of the former, liberal ordinance. However, there is no proof that this letter was ever sent – perhaps the royal lawmaker became aware of his own impudence. Gustav III was no tyrant, but saw himself as a progressive monarch with humane ideals. Nevertheless, no matter how benevolent a ruler, autocracy has, throughout history, proven itself to be profoundly incompatible to civic liberty. Certainly it was during his reign that the minutes of the Diet began to be published, but this was in spite of, not thanks to, royal politics.[14]

Gustav III was assassinated in an aristocratic conspiracy in 1792. A renewed Freedom of Print Act was issued soon after, but in contrast to former ordinances it was a declaration of principles rather than a proper law. Its force was soon reduced by the new king, Gustav IV Adolf, who was inclined to autocracy and was dethroned and expatriated in 1809. Proper freedom of print was once again introduced and the access to public documents was extended to its former range. A new Freedom of Print Act was issued in 1810 and revised in 1812. This was to be in force, with consecutive amendments, until 1949, when the present Freedom of Print Act was adopted. Even if there have been ups and downs during these years the right to public access has formed an integral part of state administration in Sweden from 1809, and it

13. *Gustave III par ses lettres,* Gustav III to Voltaire, undated (spring 1774) draft, 151 (Gunnar von Proschwitz ed.,1986).

14. The Nobility, Burghers, and Peasantry began printing their minutes from 1786, whereas the Clergy delayed until 1810, when it became mandatory.

has been vital in shaping a culture of rational bureaucracy with a low degree of corruption and a high degree of public trust.[15]

Swedish citizens' trust in fellowmen as well as in public administration and government services tend to stand out in international comparisons.[16] It is a sociological fact that is frequently dismissed as naïve, or even ridiculed among observers from countries where state bureaucracy is more often regarded to be in opposition rather than in line with the interest of the people. However, this high level of trust in Swedish authorities has developed through many generations and it is a result of actual experience. Today, there are signs that this public trust is diminishing and Sweden is becoming more and more like other European countries.[17]

THE CONTINUING LEGACY FROM 1766

To conclude, I would like to point at some elements where the 1766 print ordinance still makes a mark in Swedish legislation; many of these elements are also peculiar to the way freedom of expression are regularized in Sweden.

First, there is the fact that freedom of print is still minutely regulated in a separate constitutional law.[18] There are four constitutional laws in Sweden of which one regulates freedom of print and another regulates freedom of expression in audiovisual and digital media (the other two constitutional laws are the Instrument of Government and the Order of Succession, since nominally Sweden is still a monarchy).[19]

Secondly, the principle of public access to official records is still inscribed in the Freedom of Print Act. Exemptions from publicity can only be made on grounds that are stated in this constitutional law, and this exclusivity principle also survives from 1766. Another such remnant is the single responsibility. In violations against the freedom-of-print laws, only one person can be held accountable: either the author or the publisher. To acquire the protection that the constitution provides, a periodical publication

15. Hirschfeldt, *supra* note 5.

16. *See* Richard Wike & Kathleen Holzwart, *Where Trust is High, Crime and Corruption are Low*, PEW RESEARCH CENTER (April 15, 2008), http://www.pewglobal.org/2008/04/15/where-trust-is-high-crime-and-corruption-are-low/.

17. Susanne Wallman Lundåsen & Dag Wollebæk, *Diversity and Community Trust in Swedish Local Communities*, 23 J. OF ELECTIONS, PUB. OPINIONS AND PARTIES, 3 (2013).

18. *Tryckfrihetsförordningen, Svensk författningssamling 1949* [The Freedom of the Press Act, 1949] (Sweden), http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-freedom-of-the-press-act-2015.pdf (last visited December 5, 2017).

19. *Yttrandefrihetsgrundlagen, Svensk författningssamling 1991:1469* [The Fundamental Law on Freedom of Expression, 1991:1469] (Sweden), http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-fundamental-law-on-freedom-of-expression-2015.pdf (last visited December 5, 2017).

must have a legally responsible publisher, an idea that was implied although not fully realized already in 1766. This construct – which I believe is rather unique for Sweden – means, for example, that a journalist cannot be prosecuted for anything he has written in a newspaper. Only one person can be held liable for the newspaper's content, and that is the responsible publisher.

If a publisher is convicted – a rare occurrence – it is normally not for what he has published, but because he has revealed a source. The most original idea introduced in Swedish print legislation since 1766 is the principle that public access to official documents makes it legal for state employees to reveal irregularities in the public sector to journalists, even if this involves the disclosure of classified information. The authorities are prohibited to search for the identity of the informant, and journalists are forbidden to reveal their source. Whistleblowers enjoy constitutional protection even when revealing state secrets. The fact that it is illegal to try to uncover whistleblowers' identities, is often one of the hardest things for Swedish lawyers to explain when talking to foreign colleagues about Swedish FOI legislation.

Migration of Civilian and National Security Access to Information Norms

Ádám Földes*

INTRODUCTION

Since the end of the Cold War, freedom of information has been blossoming. The number of countries endorsing the right to seek, receive, and impart information has grown from fourteen countries to over a hundred countries. Moreover, freedom of information has been acknowledged as a human right.[1] At the same time, the new era has not only brought more transparency in the decision-making and spending of public bodies, but also resulted in restructuring the fields of national security and defense. The dissolution of the Soviet Union and the Warsaw Pact, along with the aftermath of 9/11 have significantly altered national security and defense policies worldwide.

The expansion of freedom of information consolidated the principles of transparency and enhanced the accountability of public authorities. Indeed, this development can be observed on a limited scale even in such countries where neither transparency nor democratic accountability has much history. Any right to information law adopted by any country implies that, with few exceptions, the functioning of any public entity or any decision of a civil servant can be analyzed in detail and discussed in public. These new laws bring significant changes to the functioning of public administrations and bureaucratic cultures. Even in well-established democracies it can be a long and tenuous process to make transparency a part of the everyday practice of public administrations. Ultimately, a right that, for most of the world, has only existed in international treaties for only some decades has now turned into an enforceable right for everyone.

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1. Right to information and freedom of information are used synonymously in this article.

Parallel to the spread of freedom of information laws, another wave of law-making engulfed Western democracies first and, after the fall of the Berlin Wall, former Soviet-bloc countries. Since the mid-1970s, in most Western democracies, non-executive accountability and oversight of national security bodies have slowly evolved. After the Cold War, countries that went through democratic transition had to reform their armed forces and intelligence services. In the Soviet-bloc, these agencies were not transparent at all, they ignored human rights, and were only held accountable to decision-makers without any democratic legitimacy. Post-Cold War national security policy reforms and rearrangement of alliances were translated into hard and soft law norms, applicable to the functioning of security bodies on a national level, as well as to standards of international cooperation in the field of security (for the purposes of this article the term "national security" also covers the field of defense).

Both processes received significant attention from legal scholars and political scientists during the last two decades. However, few studies focused on the differences of the information policies and norms underlying the two processes, or on their interaction.

Freedom of information, which is both a human right and a precondition for a democratic society, provides for transparency and accountability of any public entity, including national security bodies. These bodies are also subject to specific regulations of the national security field. While these national security regulations satisfy the requirement that they be passed by decision-makers that enjoy democratic legitimation, they follow a logic that is fundamentally different from a rights-based approach.

The interaction between the two sets of norms is visible through the following: policies and legal standards of civilian administration have been gaining ground in national security administrations by increasing expectations of transparency and accountability, and by influencing the pertinent rules and practices (examples include evolvement of democratic oversight over intelligence bodies, or the increase in transparency of military budgets). At the same time, national security policies and rules infiltrate civilian law-making, judiciary and governance (e.g. the adoption of new protection of classified information laws by countries that joined the NATO during the last three enlargement rounds). These actions and reactions have implications on national and international levels both in civilian and national security administrations.

MIGRATION OF HUMAN RIGHTS NORMS AND METHODOLOGY TO EXAMINE THEM

The phenomenon that legal concepts and ideas, that are present in one legal field or legal system, reappear in another is fairly common. There is a

rich literature of comparative constitutional law on which norms are moving, why they are moving, and how they are moving. Is it a transplant of legal norms? Borrowing? Migration? Choudhry carefully recapitulates the strengths and weaknesses and differences of these metaphors in his compilation of studies which examine the constitutional migration from numerous aspects (the terms of moving, migrating and transplanting are used as synonyms in this article).[2]

Migration of norms is observable in both law-making and in legal interpretation methods and approaches. The literature also covers migration between areas of constitutional law in the jurisdiction of a given country, between national jurisdictions, domestic law and international law, emergency law and civilian law, as well as the migration of unconstitutional ideas.[3]

The present article examines the migration of access to information norms between the civilian and national security fields on national and international levels. These norms are migrating by national legislation, international treaties, and through the decisions of national and regional courts.

The migration of the civilian and national security access to information norms can be described by the following statements:

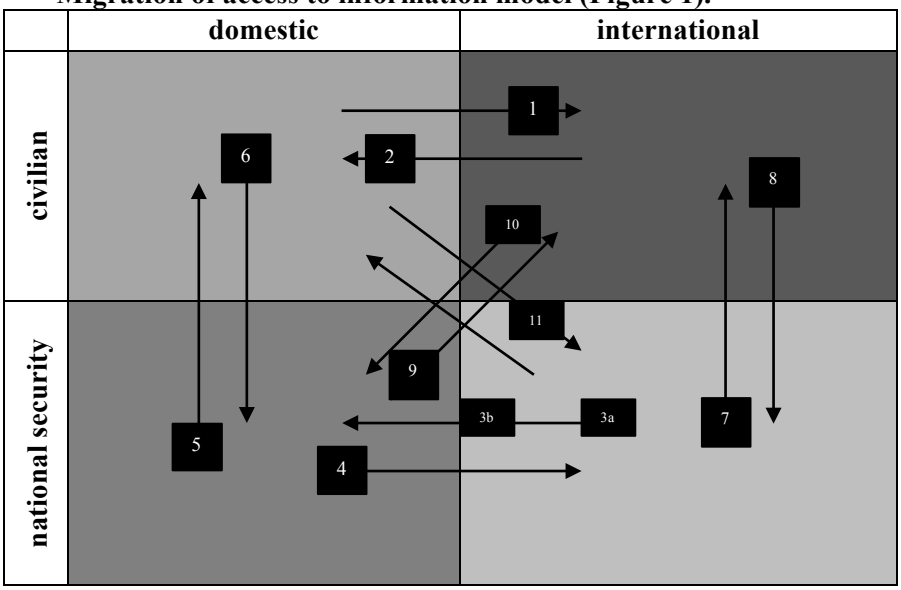
1. There are norms on national and international levels.
2. Civilian and national security fields can be distinguished.
3. There are norms both in civilian and national security fields, and on national and international levels, which means there are four areas to which norms can be assigned.
4. The four areas are not isolated from each other.
5. Access to information norms are moving between the four areas.

A model of the four areas and the direction of movements will help to prove these statements (Figure 1). In the present article the term "migration of norms" is used to describe the phenomenon when a norm that was present in a particular legal field or in a particular jurisdiction appears in another legal field or in another jurisdiction where it was not present before.

2. SUJIT CHOUDHRY, Migration as a New Metaphor in Comparative Constitutional Law, THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 13-25 (Sujit Choudhry ed., 2006); See also ROBERT C. BLITT, The Bottom Up Journey of 'Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional ideas, 56 STUDIES IN LAW, POLITICS AND SOCIETY 121 (2011).

3. OREN GROSS, 'Control Systems' and the Migration of Anomalies, in THE MIGRATION OF CONSTITUTIONAL IDEAS 403-05 (Sujit Choudhry ed., 2006); KIM LANE SCHEPPELE, The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency, in THE MIGRATION OF CONSTITUTIONAL IDEAS 347 (Sujit Choudhry ed., 2006).

Migration of access to information model (Figure 1).



Possible directions of migration of access to information norms:

1. Domestic civilian norms influence or become international norms

International civilian norms having effect on national legislation and practice

3a., 3b. International level norms of defense/national security influence domestic civilian and national security norms

4. Domestic military rules of a country define the rules of a military alliance

5. Emergency (martial) laws or military rule norms applied in civilian jurisdiction

6. Application of civilian access to information norms to national security administration

7. International level norms of defense/national security influence international civilian norms

8. International civilian norms influence international defense/national security norms of access to information

9. Domestic defense/national security norms influence international civilian norms of access to information

10. International civilian norms influence national level norms of defense/national security

11. Domestic civilian norms of access to information influence international defense/national security norms of access to information

There are a number of authors who have provided detailed methodological guidance for comparative studies on migration of constitutional norms that can be directly applied to migration of access to information norms.[4] For the purposes of this article, the evaluative tools designed by Tebbe and Tsai are the most useful. The four tools are: (a) fit, (b) transparency, (c) completeness, and (d) yield.

These four criteria implement basic assumptions about the rule of law. First, the notion of fit complies with the sense that the law's substance (including borrowed material) should be compatible with existing arrangements. Second, a preference for transparency endorses the expectation that arguments appeal to reason and further a public purpose. Third, completeness is related to substantive fidelity and deliberative values, necessary features of a purposively designed legal system. Fourth, the idea of yield acknowledges that above all, the rule of law must solve problems of practical governance (and therefore, an act of borrowing must not frustrate self-rule but aid it). Once borrowing is understood as a presumptively legitimate practice most concerns that arise have to do with how well particular legal ideas fit together – how open and notorious the borrowing is, what is lifted and what is left behind, and what yields that creative act.[5]

To benefit from the application of these tools, the migrating norms, the circumstances of migration, their origins, and the new contexts must be analyzed. There was sufficient information available from several cases for this exercise. However, there are other cases that are included only to illustrate a direction of migration, but a proper evaluation was not available due to lack of information.

MIGRATION OF ACCESS TO INFORMATION NORMS

The following sections will provide examples of the migration of access to information norms. As shown in Figure 1, there are twelve possible directions of migration of access to information norms, but real life examples for three of the possible directions are still missing.

4. RAN HIRSCHL, *On the Blurred Methodological Matrix of Comparative Constitutional Law, in* THE MIGRATION OF CONSTITUTIONAL IDEAS 39 (Sujit Choudhry ed., 2006); NELSON TEBBE & ROBERT L TSAI, *Constitutional Borrowing*, 108 MICH. LAW REV. 459-522 (2009); A MOMIROV & AN FOURIE, *Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law*, 2 ERASMUS L. REV. (2009).

5. Tebbe & Tsai, *supra* note 4, at 459-522.

Domestic Civilian Norms Influence or Become International Norms

It is among the most obvious forms of migration when international law draws on domestic norms. Both the Universal Declaration of Human Rights (hereinafter, "UDHR") and the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), enshrine "the freedom to seek, receive and impart information." However, the origin of the freedom of information in these instruments cannot be traced back to domestic legislations. When the UDHR was adopted, Sweden was the only country that already had a freedom of information law.[6] The ICCPR was adopted in 1966 and by that time Finland had become the second country that had a freedom of information law in force. There is nothing in the travaux préparatoires of the UDHR that would indicate any influence of the laws of either countries on this right.[7]

The Council of Europe Convention on Access to Official Documents (hereinafter, "Tromsø Convention")[8] is the only comprehensive multilateral access to information treaty, although it has not entered into force yet. There are other instruments of international law that regulate access to information, though limited to certain areas, such as the United Nations Convention on Access to Information; Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, "Aarhus Convention").[9] Or, the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. Furthermore, there is a great number of international hard and soft law that contain access to information norms.

Because of its unique position, it is particularly interesting to analyze how domestic norms migrated into the Tromsø Convention. Notwithstanding this approach, the United Nations Convention against Corruption (hereinafter, "UNCAC") resisted the migration of national access to information norms.[10]

6. ANDERS CHYDENIUS, *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press* (1766), translated and reprinted in THE WORLD'S FIRST FREEDOM OF INFORMATION ACT - ANDERS CHYDENIUS' LEGACY TODAY, (Juha Mustonen ed., 2006).

7. WILLIAM A. SCHABAS, The Universal Declaration of Human Rights - The Travaux Préparatoires, (ed., 2013).

8. COUNCIL OF EUROPE CONVENTION on *Access to Official Documents*, June 18, 2009, C.E.T.S. No. 205.

9. UNITED NATIONS CONVENTION on *Access to Information*, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, 450-72.

10. UNITED NATIONS Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

(A) Council of Europe Convention on Access to Official Documents

The Tromsø Convention builds on a number of sources. In its preamble it refers to international law that is relevant for Council of Europe members, such as the European Convention on Human Rights and the Council of Europe data protection convention.[11] It also refers to the United Nations sources, the UDHR and the Aarhus Convention. It recalls the relevant soft law of the Council of Europe – however, it does not mention two more fundamental sources in the text of the convention.

The jurisprudence of the European Court of Human Rights and the national access to information laws of the Council of Europe members are the ones that may have influenced the Convention the most and these are mentioned only in the Explanatory Report of the Tromsø Convention:

> [T]he Steering Committee for Human Rights (CDDH), instructed by the Committee of Ministers of the Council of Europe to draft the present Convention, was guided by the concern to identify, amongst the various national legal systems, a core of basic obligatory provisions reflecting what was already accepted in the legislation of a number of countries and that, at the same time, could be accepted by States that did not have such legislation.

The Explanatory Report also points out that "[a]lthough the European Court of Human Rights has not recognized a general right of access to official documents or information, the recent case law of the Court suggests that under certain circumstances Article 10 of the Convention may imply a right of access to documents held by public bodies."[12] Just prior to the signature of the Tromsø Convention, the European Court of Human Rights rendered two judgments in access to information cases which proved that Article 10 of the Convention not only may, but in fact, implies a right of access to documents when public watchdogs or historians request access.[13]

It may be among the most complex exercise of legal transplant to draft a multilateral treaty in a legal field, where the potential parties to the treaty already have existing domestic legislation and practice (especially since the parties select and agree on these norms with the intention that the norms of

11. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 005; Council of Europe CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA of 28 January 1981, ETS No. 108.

12. Citing Sdružení Jihočeské Matky v. Czech Republic, App. No. 19101/03, decision on admissibility of 10 July 2006.

13. Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, (ECtHR 2009) (The author was executive board member of the non-governmental organisation Társaság a Szabadságjogokért and prepared the applicant's observations in Társaság a Szabadságjogokért v. Hungary); Kenedi v. Hungary, App. No. 31475/05, (ECtHR 2009).

the treaty will migrate into the legal systems of the signatories when the parties implement the treaty). Each party may carefully examine from which legal systems they are willing to transplant and carefully select which norms to be transplanted into the treaty, as any norm that they are required to include in their domestic laws may strengthen or weaken this right and such changes could be contrary to the actual policy considerations of the negotiating government.

(i) Fit and Completeness

In the case of multilateral treaties, the questions of fit and completeness cannot be separated. Out of forty-seven members of the Council of Europe, thirty-nine already had an access to information law in force by the time the convention was adopted in 2009. As the Explanatory Report of the Tromsø Convention describes, the drafters of the convention had to balance which norms are present in the laws of a "number of countries" what can be made obligatory to the parties of the convention, and at the same time what could be realistically accepted by those states that did not have such legislation.[14] As there were only eight Council of Europe countries without any access to information legislation, the main challenge in this process was building consensus concerning a convention that would give standards for the thirty-nine countries already having legislation in this area and for the eight countries that would be joining the treaty. The content of national access to information legislations concerning each norm addressed in the treaty varies a lot, such as scope, exemptions and reviews. Access to information laws are defined, among others, by the breadth of the right of access to information, the legal traditions, the constitutional structure of the country and means of democratic representation, the quality of the codification and the actual policies of the government proposing the law and of the Parliament adopting it.

"[T]he notion of fit complies with the sense that the law's substance (including borrowed material) should be compatible with existing arrangements."[15] The aim of the drafters of the convention was identifying a "core of basic obligatory provisions." This core could have been significantly above the standards that a signatory had in 2009, or it could have been far below the domestic access to information norms already in force. In the former case, the bar could be set too high compared to already available norms, and if the lawmakers do not want to meet these standards, they may

14. THE GROUP OF SPECIALISTS ON ACCESS TO OFFICIAL DOCUMENTS (DH-S-AC), representing 15-17 member states at their meetings, http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp (last visited November 15, 2017).

15. Tebbe & Tsai, *supra* note 4, at 495.

never join the convention. If the bar is too low, then those countries that already have higher standards may become disinterested, as the international standards do not require to bring any improvement to their legislation. At the same time, other members of the multilateral organization with weaker norms are not inspired to improve their legislations either. Moreover, there is always a risk that if weak standards become the standards sanctioned by international consensus and subsequently law, because these standards may serve as an excuse for future governments that are not supportive of the right of access to information to weaken their domestic norms.

(ii) Transparency

The drafting of an international treaty that draws on national laws is fully transparent for the future parties of the treaty, as they can be involved in the drafting process. The documentation of the drafting, such as the reports of the expert/drafting groups, the explanatory note of the treaty, and the Travaux Preparatoires of the treaty negotiations also provide for a significant level of transparency for the public and countries that join the treaty later (which can be instrumental for acceptance of the final text, including any borrowed ideas).

(iii) Yield

It may be fruitful to ask whether an instance of borrowing is intended to promote or resist the law's development along its present path, and to what extent it is successful in terms of the borrower's aims. Such purposes and consequences collectively constitute the yield of an act of borrowing.[16]

A detailed comparison of the adopted text of the convention and the national laws of the parties that were represented in the Group of Specialists on access to official documents would exceed the limits of the present article, but it is worth mentioning an example where the yield of borrowing was called into question.

The Information Commissioner of Slovenia addressed her letter to the members of the Group of Specialists on Access to Official Documents.[17] She voiced her concerns that drafting the first legally-binding document regulating the field of freedom of information is a historical moment and the convention should not set weaker standards than the relevant

16. Tebbe & Tsai, *supra* note 4, at 507.

17. Letter from the Nataša Pirc Musar, *Info. Comm'r, Slovn., To The Members of the Group of Specialists on Access to Official Docs.* (Sept. 20, 2007), THE COUNCIL OF EUROPE STEERING COMMITTEE FOR HUMAN RIGHTS at 32.

Recommendation of the Council of Europe.[18] She explained that, "Slovenia adopted effective legal model also resulting from standards defined by the Recommendation (2002) No. 2 of the Council of Europe which has, in combination with the Explanatory Memorandum, importantly contributed to the development of higher standards in access to public information," and went into further details on where the draft's standards diluted the norms included in the Recommendation and in the Slovenian law.[19]

(B) Article 13 of the United Nations Convention against Corruption and Article 19 of UDHR

It is clear from the text of the UNCAC and its travaux preparatoires that the convention prescribes obligations for States Parties concerning access to information, but it does not provide any right to individuals. [20] Scheppele points out "the idea of 'borrowing' always signals that something positive is being transferred without alteration, which takes attention away from the cases in which one country draws negative implications from another country's experience."[21] In the case of the UDHR, the agreement on the text of its Article 19, which includes the freedom "to seek, receive and impart information and ideas by any means and regardless of frontiers" due to the "deep incompatibilities between the communist and liberal approaches to the functions of the press" was "a considerable achievement."[22] More than half a century passed between the drafting of the UDHR and the UNCAC, and 38 further countries adopted laws on freedom of information, still the preservation of the status quo between the liberal and the restrictive approaches defined the text of Article 13 of UNCAC.

In regards to UDHR, it cannot be stated with certainty that the core of the freedom of information "to seek, receive and impart" was not inspired by any piece of existing national legislation, but according to the travaux préparatoires, neither the drafting committee, nor the Sub-Commission on Freedom of Information and of the Press included the representative of Sweden.[23] Furthermore, the language of Article 19, despite the similar content, does not align with the Swedish Freedom of the Press Act. Freedom of information norms as enshrined by the UDHR, and by the ICCPR (of

18. Council of Europe Recommendation Rec 2 of the Committee of Ministers to Member States on Access to Official Documents, Adopted by the COMMITTEE OF MINISTERS (2002).

19. *Id*.

20. UNITED NATIONS OFFICE ON DRUGS AND CRIME, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Corruption (2010).

21. Scheppele, *supra* note 3, at 348.

22. WILLIAM A. SCHABAS, *Introductory Essay*, *in* The Universal Declaration of Human Rights - The Travaux Préparatoires, lxxi, cii-ciii (ed., 2013) (quoting John P. Humphrey, Human Rights & the United Nations: A Great Adventure, 36 (Transnational Publishers 1984).

23. Schabas, *supra* note 7, at 1373-74.

which drafting started in conjunction with the drafting of UDHR), seem to be an original piece of international law-making.

In 1948, the drafts and the final text of UDHR were adopted through a vote. It resolved the issue that the Soviet-bloc countries were concerned about the negative implications on their system caused by this freedom's unrestricted phrasing and content, and the (Western) liberal states were concerned by the restrictive language proposed by the Soviet-bloc countries. In 2002, the drafting process of the UNCAC did not use a voting method, which meant consensus was needed on every single word of the convention, and the consensus was not furthering the right to information.

The migration of access to information norms within a single area of the model (Figure 1) is not examined in this article; still it is worth looking at the interplay between UDHR and UNCAC. It provides an example when the status quo is upheld as it also demonstrates a case of resisting migration of norms from national laws.

(i) Fit and Completeness

Transparency is a key criterion of corruption prevention and it is present in practically each article of Chapter II of UNCAC that deals with preventive measures. The main prerequisite of transparency is freedom of information. The linkage between the UNCAC and the UDHR and ICCPR is clear and it is appropriate that the UNCAC explicitly refers to the freedom of information. According to Article 13 of UNCAC, "participation should be strengthened by such measures as: …Ensuring that the public has effective access to information; …Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption."[24] Following these provisions, the UNCAC repeats most of paragraph 3 of Article 19 of the ICCPR, which stipulates the possible restrictions of freedom of information.

(ii) Transparency

The total correspondence of the restrictions of freedom of information in the UNCAC and in the ICCPR leaves no doubt about the origin of the text. Furthermore, the travaux preparatoires of the UNCAC explains in a footnote that:

> It was agreed that the travaux préparatoires would indicate that the intention behind paragraph 1 (e) of article 13 is to stress those obligations which States parties have already undertaken in various international instruments

24. UNCAC, *supra* note 10, at 152-53.

> concerning human rights to which they are parties and should not in any way be taken as modifying their obligations.[25]

(iii) Yield

"It may be fruitful to ask whether an instance of borrowing is intended to promote or resist the law's development along its present path, and to what extent it is successful in terms of the borrower's aims."[26] Considering the rapid development of the freedom of information field, including the dozens of new laws adopted after the end of the Cold War, "the present path" seemed to be the further extension of this freedom when the UNCAC was drafted in 2002. The UNCAC could have taken up the role of promoting freedom of information with a view of enhancing corruption prevention through transparency, but the negotiating parties stuck to the status quo and did not endeavor to extend or establish individual rights at all.

International Civilian Norms Having Effect on National Legislation and Practice

When a country becomes party to a regional human rights convention and accepts the jurisdiction of the court established by the convention, its intention seems to be clear: signing up to the human rights standards embodied in the convention and securing the exercise of these rights and freedoms. How these international norms become part of a national legal system varies significantly. Without going into the details of monist and dualist legal systems, and the question of direct effect, it is fair to say the norms of these conventions migrate into national legal systems.

Countries often join a human rights convention to improve their national legislation and its implementation, to demonstrate that their domestic norms are or will be in line with international standards, and to expect the same from other countries with which they have manifold relationships. Amendments of domestic laws and changes in applying the law are often needed over time, even in cases where the country's law is completely compatible with the convention standards at the time of joining the convention. The content of the norms of the human rights conventions are not stable, the jurisprudence of the human rights courts constantly shape them and countries have to follow.[27] Bringing in line the domestic norms with international law is a form of migration of legal norms.

25. UNODC, *supra* note 19, at 144 n.20.

26. Tebbe & Tsai, *supra* note 4, at 507.

27. *See* ALEC STONE SWEET & HELEN KELLER, *Assessing the Impact of the ECHR on National Legal Systems*, *in* FACULTY SCHOLARSHIP SERIES, 677 (2008).

International human rights norms can migrate a number of ways into the domestic legislation and into the application of laws by the judiciary and the executive. In the field of right of access to information, the most influential case so far is the Claude Reyes and Others v. Chile, adjudicated by the Inter-American Court of Human Rights (hereinafter, "IACHR").[28] This decision influenced countries beyond Chile and inspired right to information legislation in Nicaragua (2007), Chile (2008), Guatemala (2008), Uruguay (2008), El Salvador (2011), Brazil (2011) and Argentina (2016).[29] The Bill of the access to information law of Argentina even has a direct reference to the Clause Reyes judgment.[30]

(A) Claude Reyes and Others v. Chile

The IACHR held in its judgment, concerning the refusal of an information request on the Río Condor logging project, that Chile violated the complainants' right of access to information in Article 13 of the American Convention on Human Rights (hereinafter, "ACHR"). It also held that Chile has to adopt measures to guarantee the right of access to information, remove laws and practices that violate and enact laws and practices "leading to the effective respect for these guarantees. In particular, this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention's parameters and restrictions may only be applied for the reasons allowed by the Convention."[31] Before this judgment, in 1999, 2003 and 2005 the Chilean Executive and Legislative had only enacted symbolic reforms in this field when "[t]he Court ordered Chile to 'adopt, within a reasonable time, the necessary measures to ensure the right of access to state-held information.' The embarrassing ruling [Claude Reyes and Others v. Chile] highlighted a glaring policy lacuna in the region's least corrupt country."[32]

28. Reyes v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am.Ct.H.R. (ser. C) No. 151, (2006).

29. EVIDENCE AND LESSONS FROM LATIN AMERICA, THE LATIN AMERICAN APPROACH TO TRANSPARENCY AND ACCESS TO INFORMATION, 5 (2012); CENTRO DE ARCHIVOS Y ACCESO A LA INFORMACIÓN PÚBLICA, VENCIENDO LA CULTURA DEL SECRETO, 26 (2011).

30. *Proyecto de Ley de Acceso a la Información Pública* [Bill of the Law on Access to Public Information] (2016).

31. *Id.* at §101.

32. ROBERT GREGORY MICHENER, THE SURRENDER OF SECRECY: EXPLAINING THE EMERGENCE OF STRONG ACCESS TO INFORMATION LAWS IN LATIN AMERICA, 349-59 (2010).

(i) Fit

Although Chile had ratified the ACHR in 1990, the various Chilean administrations showed little interest in adopting a right to information law until the 2006 IACHR judgment. Chilean administrations "could afford to shirk real reform; the news media never took a strong interest in the issue, and both Presidents enjoyed legislative majorities and high approval ratings. Hence successive administrations had few incentives to please a limited constituency of right-to-public information advocates."[33] Two months after the judgment President Bachelet announced the Pro Transparency Agenda of her government, which included the right to information law.

> [T]he press faced the choice of either ignoring the issue or doing its civic part and providing coverage. In contrast to Ecuador, Guatemala, Mexico, Nicaragua, and Peru, the Chilean news media followed the lead of government, rather than vice versa. This represents an important point of differentiation. Even though the Chilean media ultimately followed the government's lead and provided significant coverage of the right-to-public information law, a strong argument can be made that concentrated news media ownership played a significant role in more than half a decade of relative media indifference.[34]

Surveys conducted by the Chilean Transparency Council (Consejo para la Transparencia), representative of Chile's population, show that between 2011 and 2015 an increasing percentage of the population became aware of the transparency law. The surveys also show that between 2012 and 2015 an annually increasing number of Chileans requested information from public bodies.[35] These statistics indicate that the migration of freedom of information norms into the Chilean legal system resulted in domestic norms that are accepted and used by average citizens.[36]

(ii) Transparency and Completeness

The process of migration of the freedom of information norms was very transparent. The IACHR requested the State publish the most important parts of the judgment "in the official gazette and in another newspaper with extensive national circulation" and made clear the State's "obligation to adopt the legislative and other measures necessary to make these rights and freedoms effective."[37] Jaime Gazmuri Mujica, one of the two senators

33. *Id.* at 350-52.

34. *Id.* at 358.

35. *Consejo para la Transparencia*, ESTUDIO NACIONAL DE TRANSPARENCIA SÉPTIMA MEDICIÓN ANÁLISIS DE RESULTADOS, 37-38, 48 (2015).

36. *Id.* at 54.

37. *Reyes v. Chile*, at paras.160-61.

introducing the Bill of the Law on Access to Public Information, recalled in his presentation of the Bill that the IACHR judgment gave a new impulse of the adoption of the law.[38]

The IACHR judgment detailed features of the law that needed to be adopted. The court outlined that "these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials."[39] Such level of detail goes far beyond "the freedom to seek, receive, and impart information" of Article 13 ACHR, but is in line with Article 2 ACHR. Article 2 requires "legislative or other measures as may be necessary to give effect to those rights or freedoms." The Law on Access to Public Information provides for the right required by Article 13 ACHR and includes the components requested in the IACHR judgment.[40]

(iii) Yield

The right of access to information has taken root in Chile since Reyes v. Chile and the adoption of the Law on Access to Public Information. The right to information laws introduced are known and used by a significant part of the country's population. The Chilean Transparency Council is building up a solid right to information jurisprudence. The state of Chile that refused access to environmental information and resisted the disclosure throughout the eight years of litigation is now, in 2016, a promoter of the right to information. In the negotiation of a regional agreement on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in Latin America and the Caribbean, Chile is an active participant, supporting a broad right of access to information.[41] The country also hosted the fourth meeting of the negotiating committee.[42]

38. Biblioteca del Congreso Nacional de Chile, Historia de la Ley Nº 20, 285 SOBRE ACCESO A LA INFORMACIÓN PÚBLICA 166 (2008).

39. *Reyes v. Chile*, at para. 163.

40. *Law No. 20285*, *Chile*, Sobre Acceso a la Información Pública 166 (2008).

41. *Text Compiled by the Presiding Officers Incorporating the Language Proposals from the Countries* (third version), http://repositorio.cepal.org/bitstream/handle/11362/39051/S1600429_en.pdf?sequence=7 (last accessed November 20, 2017).

42. UN ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Santiago de Chile Será Sede de Nueva Ronda de Negociación Para Acuerdo Regional Sobre Derechos de Acceso en Asuntos Ambientales,* August 9, 2016, http://www.cepal.org/es/comunicados/santiago-chile-sera-sede-nueva-ronda-negociacion-acuerdo-regional-derechos-acceso.

International Level Norms of Defense/National Security Influence Domestic Civilian and National Security Norms

There are numerous bilateral and multilateral security alliances, which vary greatly in form and content.[43] NATO provides an example, from among this group, of how access to information norms of a security alliance can influence civil and national security norms of its members and partners. For NATO, this impact was felt in the Cold War and post-Cold War eras. Although information available on NATO access to information norms is limited, it is still worth examining this example of norm-migration, as the relevant rules of other military alliances are even less accessible.

Any country that is invited to join NATO is required to "implement measures to ensure the protection of NATO classified information."[44] For example the Sub-Committee on Central and Eastern Europe of the NATO Parliamentary Assembly in 2004 reported that Estonia "amended legislation on the protection of classified information, to bring it into line with NATO standards."[45] A country's access to information laws are published and available for everyone, including NATO member states' laws concerning national level protection of classified information. However, it is still not clear what the NATO standards are and what "bringing [national laws] into line" with the standards means.

Since 2006, when the Hungarian government started to draft a new Act on Protection of Classified Information (introduced to the Parliament in August 2008), the relevant NATO standards have become clearer.[46] The reasoning of the Bill explained that, the "experiences of applying the Act LXV of 1995 on State and Service Secrets and the duties originating from the NATO membership, as well as the new obligations originating from the integration into the European Union" brought about a general review of the State and Service Secrets Act.[47] The reasoning of the Bill also highlighted that C-M(2002)49, Security within the North Atlantic Treaty Organization NATO (hereinafter, "NATO Security Policy") was among the international law norms providing the basis of the new Act.[48]

43. STEFAN BERGSMANN, *The Concept of Military Alliance*, *in*SMALL STATES AND ALLIANCES 20–31 (2001).

44. *NATO Enlargement*, April 9, 2009, http://www.nato.int/summit2009/topics_en/05-enlargement.html.

45. SUB-COMMITTEE ON CENTRAL AND EASTERN EUROPE OF THE NATO PARLIAMENTARY ASSEMBLY, *Alliance Partnerships: Projecting Stability Beyond NATO's Central and Eastern Borders*, para. 67, 153 PCCEE 04 E rev 1 (May 13, 2004).

46. T/6147 Számú Törvényjavaslat a Minősített Adat Vedelméről (Bill No. T/6147 on the Protection of Classified Information).

47. Act LXV of 1995 on State and Service Secrets was the predecessor of the Act CLV of 2009 on Protection of Classified Information.

48. *Id.*

Alasdair Roberts described five basic features of NATO's secrecy policy, based on the C-M(55)15(Final) version of the policy issued in July 1964. For the purposes of this article, it is worth summarizing four of them. The principle of *breadth* implies that "the policies a member state adopts regarding security of information should govern all kinds of sensitive information, in all parts of government. It eschews narrower approaches that would be limited, for example, to information received through NATO, or information held within military or intelligence institutions."[49] The principle of *depth* underpins "[t]he policy [that] errs on the side of caution when determining what information should be covered by secrecy rules."[50] According to the *need to know* principle, "individuals should have access to classified information only when they need the information for their work, not 'merely because a person occupies a particular position, however senior'."[51] The *principle of originator control* sets out that "information may not have its classification reduced, or be declassified, without the consent of the government from which the information originated."[52]

These principles are present in both the 1964 and the 2002 versions of the NATO Security Policy and only the principle of breadth underwent alteration. The earlier version of the NATO Security Policy requested from each country "a common standard of protection . . . to the secrets in which all have a common interest."[53] In contrast, the new version holds that "NATO nations and NATO civil and military bodies shall ensure that the agreed minimum standards set forth in this C-M are applied to ensure a common degree of protection for classified information exchanged among the parties."[54] The newer version no longer implies that NATO's security of information policy should govern all types of sensitive information in all parts of government. However, "classified information exchanged among the parties" covers a lot more than national security matters. NATO parties cooperate in countless areas such as criminal justice, public finance, or foreign policy through a variety of frameworks including the European Union or the International Monetary Fund. This cooperation inevitably involves the exchange of classified information unrelated to their NATO membership and duties. Any country that implements the principle of

49. Alasdair Roberts, *NATO, Secrecy, and the Right to Information*, 12 E. EUR. CONST. REV. 86, 88 (2003).

50. *Id.* at 88.

51. *Id.* at 89.

52. *Id.* at 89.

53. *Id.* at 88.

54. *Security Within the North Atlantic Treaty Organization* (NATO) C-M(2002) 49, at Point 9(a) of Enclosure B, http://nbf.hu/anyagok/jogszabaly/C-M%282002%2949.pdf (last visited November 20, 2017).

breadth as required by the NATO Security Policy transplants the NATO's "agreed minimum standards" into both civilian and national security legislation, and into the application of laws. The migration of the four principles included in the 2002 version of the NATO Security Policy can be examined in terms of fit, transparency, completeness and yield.

(i) Fit

Both international law and national legislation recognize the protection of national security as a ground for the restriction of the right of access to information. Countries joined NATO "for collective defence and for the preservation of peace and security."[55] These goals clearly pertain to the field of national security. When NATO's access to information rules are applied on information within the purview of collective defense and the preservation of peace and security, it can have two outcomes. Some restrictions stemming from NATO's Security Policy will harmonize with the national level legislation on (right of) access to information, while others will result in a conflict of norms.

For example, the principle of *depth* can become part of national access to information legislation without conflict when it is limited to a narrow information set and includes additional systemic safeguards against over-classification. In contrast, the principle of *need to know* cannot be reconciled within the same regulatory system with the right to know (right of access to information) and neither the principle of *originator control* with the right to impart information, which is a partial right of access to information enshrined by Article 19 of the UDHR and the ICCPR. The principle of *breadth* that would require the application of NATO minimum standards for the protection of – and as the other principles show rules of access to – all classified information exchanged among NATO states. Such a requirement will almost always conflict with domestic right to information provisions, as well as with provisions of other instruments of international law on exchange of information. As two or more contradicting set of standards cannot be applied at the same set of information at the same time, a conflict will almost always arise.

(ii) Transparency

It is mandatory for all NATO member states to apply the NATO Security Policy. Although the NATO Security Policy shapes the domestic legislation of any country that joins the organization, it was not accessible for the public until 2006, with only archival versions being made available for research

55. North Atlantic Treaty Pmbl., Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

purposes. This means by 2006, 26 of the 28 NATO countries became NATO members without letting the public know what NATO membership would mean for national legislation and its application.[56]

When NATO norms become part of any national legal system they have to appear in some form of domestic law. It is an axiom of any modern democratic system that laws should be public and accessible for anyone to take any effect on individuals. The requirement that laws be accessible and clear is present in the jurisprudence of the European Court of Human Rights, the United States Supreme Court and the Supreme Court of Canada. The jurisdiction of these courts covers all NATO member states.[57] Despite this, the transplant of the NATO Security Policy into national legislations lacked transparency for the vast majority of NATO countries.

(iii) Completeness

As NATO's access to information norms have never been made entirely accessible, it is not possible to assess the completeness of the migration of these norms into domestic legislations.

(iv) Yield

The differences between the 1964 and the 2002 versions of the NATO Security Policy are negligible from a right of access to information point of view. In the 1950s, when the first version of the NATO Security Policy was adopted, the British, Canadian, Danish, and Norwegian governments raised significant concerns regarding the policy.[58] With the exception of Luxembourg, all of the NATO member countries adopted right to information laws. Some were NATO members before adopting right to information laws, others were not yet members. In both scenarios, the access to information standards of NATO did not contribute to higher standards of right to information and eventually compliance with the NATO norms even resulted in the deterioration of the right in some countries. The lack of transparency around the NATO requirements means it is not possible to fully evaluate how these standards influenced domestic legislation. Beyond the

56. In 2006 the author of the present study requested and obtained through an information request from the Hungarian National Security Authority the Security Within The North Atlantic Treaty Organization (NATO) C-M (2002) 49 document and some further pieces of the rules that define the protection of classified information within the NATO, but a significant part of the relevant regulations remained inaccessible for the public.

57. Comm. for the Commonwealth of Canada v. Canada, (1991) 1 S.C.R. 139; Grayned v. City of Rockford, 408 U.S. 104 (1972), 108-09; The Sunday Times v. United Kingdom*, ECHR §*A. No. 30 (1979), para. 49.

58. Roberts, supra note 49, at 90-91.

concerns of NATO founding states discussed above, the NATO accession rounds of 1999 and 2004 produced various examples where governments either followed actual NATO requirements or used them as a pretext, with the result that right to information laws in their countries weakened.[59]

Domestic Military Rules of a Country Define the Rules of a Military Alliance

It is not surprising that the United States, as the leading NATO power, initiated and was successful in setting the NATO protection of classified rules to reflect their domestic standards. "The NATO standards adopted in the late 1950s were not released by NATO until 2003."[60] "The criteria were closely modelled on those contained in an executive order on security clearances approved by President Eisenhower in November 1953."[61]

It is unclear how the Soviet Union influenced the Warsaw Pact's rules on the protection of secrets and whether the Warsaw Pact set such rules. What can be seen, are the traces of the secrecy regime of the Soviet Union in laws of many former Soviet Bloc countries, even after these countries went through a democratic transition. The Soviet classification system was constructed so that "'[a]ll articles, documents and information are divided into three categories according to the degree of secrecy: 'of particular importance', 'top secret' or 'secret.' Information 'of particular importance' and 'top secret' constitutes a state secret, and 'secret denotes as official secret'."[62]

There is a significant difference between the available examples of migration of domestic access to information norms to international level. In the civilian field, when the Tromsø Convention of the Council of Europe was drafted, the text of the treaty drew on the laws of a number of countries in a transparent process and the final text was adopted on a consensus basis. Contrary to this approach, in the national security fields when NATO set its Security Policy the member states either agreed to accept the United States rules or risked their NATO membership. The scarcity of accessible NATO norms does not allow a detailed analysis of this transplant. However, the fact that relevant NATO rules were not at all accessible for decades and that the reluctance of the UK to accept rules of the United States as NATO Security Policy could only be reconstructed through archival documents half a century

59. *Id*. at 86-87.

60. *Id*.

61. ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE, 272 n.12 (2006).

62. VASILIY MITROKHIN, *KGB Lexicon: The Soviet Intelligence Officer's Handbook*, 366 (2002).

later, shows the migration was not transparent.[63] Completeness of the migration of norms cannot be assessed as NATO never made its access to information norms entirely accessible. As regards the fit and the yield, considering that NATO already had 12 members when it was founded, it is hard to see why taking the rules of one-member state was the best choice when these rules had to match the diversity of all the member states.

Emergency (Martial) Laws or Military Rule Norms Applied in Civilian Jurisdiction

Emergency laws are as old as any form of separation of powers, and are addressed by both domestic constitutional law and international human rights instruments.[64] Emergency laws (or martial laws) provide extraordinary powers to the executive to address an emergency threatening the life of the nation. These powers are exercised in particular by civilian and/or military entities, typically, to uphold security and public order. "Originally the term 'martial law' was often identified with what is known today as military law, i.e., a system of military justice that is designed to guarantee discipline and order in the army and the governance of military."[65] When a country proclaims a state of emergency there is a clear switch from *normal* laws (and the institutions that apply these laws) to emergency laws applied by executive bodies. By this proclamation national security norms become the norms to be applied in civilian matters too.

The ICCPR, the ACHR and the ECHR allow for a temporary derogation of the right to information in time of emergency. However, the African Charter on Human and Peoples' Rights does not contain any provision that would allow for the derogation of any right. National level emergency laws are rather diverse and the derogation of the right to information is a possible feature of these rules. Whether an emergency law that restricts the right to information is applied in practice is a further question. Thailand provides an example for this.

The 1997 and 2007 Constitutions of Thailand recognized "the right to receive and to get access to public information in possession of a government

63. Roberts, *supra* note 49 at 128-29.

64. *See* International Covenant on Civil and Political Rights, Art. 4, Dec. 16, 1966; S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; AMERICAN CONVENTION ON HUMAN RIGHTS, Pact of San Jose, Costa Rica(B-32), Art. 47, July 18, 1978, 1144 U.N.T.S. 144; *European Convention on Human Rights*, EUR. CT. HUM. RTS., Art. 15 http://www.echr.coe.int/Documents/Convention_ENG.pdf.

65. Oren Gross, *'Control Systems' and the Migration of Anomalies*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 403, 404-05 (Sujit Choudhry ed., 2006).

agency."[66] The Official Information Act was adopted and entered into force in 1997.[67] The civilian laws of Thailand provide for the right to seek, receive and impart information.[68] In 2014 General Prayut Chan-o-cha announced that "to maintain peace and order and bring back peace into all groups and all sides as soon as possible, I used law section 2 and 4 on Martial law 2457, to announce martial law all over Thailand."[69] The Martial Law 2457 adopted in 1914 was amended several times over the last century and unsurprisingly contains provisions empowering the military authority, among others, to "prohibit the issuance, disposal or distribution or dissemination of any book, printed material newspaper, advertisement, verse or poem."[70] Less than a year after the proclamation of martial law it was lifted and replaced by an order issued by General Prayuth Chan-ocha in his capacity as Head of the National Council for Peace and Order. The new provision does not materially differ from the one contained in the Martial Law.[71] Although this provision is not formally martial law, (it has been lifted and the order was issued in line with the emergency provisions of the 2014 Interim Constitution) it remains that "the concept of martial law has always been rather vague as were its operative and implementations guidelines."[72]

Application of Civilian Access to Information Norms to National Security Administration

Since the end of the Cold War there has been a growing consensus on the need for democratic oversight of security and intelligence services. Regional and global international organizations have adopted and proposed a wide range of norms in this field.[73] A parallel development is that democratic oversight and anti-corruption measures not only alter security and intelligence administrations, but also alter military administrations. These

66. Constitution of the Kingdom of Thailand, B.E. 2540 (1997), §58; *see also* Constitution of the Kingdom of Thailand, B.E. 2550 (2007) § 56.

67. Official Information Act, B.E. 2540 (1997).

68. Constitution of the Kingdom of Thailand B.E. 2550 (2007) §45, contains a provision, "A person shall enjoy the liberty to express his opinion, make speech, write, print, publicize, and make expression by other means."

69. ARIRANG NEWS, *Thailand's army declares martial law*, YOUTUBE (MAY 20, 2014) https://www.youtube.com/watch?v=Vw6dFOhBooc.

70. Martial Law B.E. 2457 (1914), §11 para. 2.

71. Order number 3/2558 (3/2015) issued by General Prayuth Chan-ocha in His Capacity as Head of the National Council for Peace and Order (NCPO), unofficial translation, http://www.prachatai.com/english/node/4933 (last visited November 20, 2017).

72. Gross, *supra* note 65, at 404.

73. HANS BORN AND IAN LEIGH, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, 14 (2005), http://www.dcaf.ch/sites/default/files/publications/documents/making-intelligence.pdf.

measures are mainly exercised by the legislative and judicial branches of power and by the independent institutions such as court of auditors or ombudspersons. However, thanks the surge of the right to information, ordinary citizens are gaining access to national security information of unprecedented quality and quantity.[74] Although varying from country to country, there is a sizeable group of countries that brought transparency into this field and among others publish their intelligence and security services' annual reports, conduct open public procurement tenders for a wide range of goods and services, publish supreme audit institutions' reports on national security entities and civilian courts adjudicate civil, administrative or military cases of the sector.

The right of access to information enables oversight by individuals, journalists, NGOs and other legal persons in two main areas: the exercise of public authority and the use of public funds. In over 100 countries that adopted the right to information laws everyone has the right to find out the how civilian administration spends public funds and manages public assets. Contrary to the civilian administration in most countries, details of defense budgets were traditionally considered to be sensitive national security information as budgets may reveal the capabilities of armed forces. Numerous countries such as Egypt, China, the Kyrgyz Republic, and Saudi Arabia follow this logic.[75] At the same time there are countries that strike a different balance between national security and democratic accountability. South Korea, for example, follows a gradual approach in disclosing defense budget information.[76] "NATO members and partner countries, for example, are required to submit defense spending information on an annual basis. The merit of such practices is now pushing other regions to create similar

74. *See Transparency International UK, Defence and Security Programme: Government Defence Anti-Corruption Index*, http://government.defenceindex.org (last visited November 15, 2017).

75. Hans Born, European Parliament – OPPD: Parliamentary Oversight of the Security Sector*, 55* (2013), *quotes* William J. Dobson, The Dictator's Learning Curve: Inside the Global Battle for Democracy, 209 (2012), http://www.dcaf.ch/Publications/Parliamentary-Oversight-of-the-Security-Sector7; Transparency International UK, *Defence and Security Programme: The Transparency of National Defence Budgets*, 7 (2011), http://ti-defence.org/wp-content/uploads/2016/03/2011-10_Defence_Budgets_Transparency.pdf.

76. "One important change introduced by the new civilian government in 1993 was to divide the defense budget delivered to the National Assembly into three categories: category A budget items are aggregated and are presented to the entire National Assembly; category B items are disaggregated and are revealed without restrictions to the members of the National Assembly Committee of National Defense; and category C items are further disaggregated and revealed to the Committee of National Defense with certain restrictions. The entire defense budget was previously deliberated as a lump sum." JCHUL CHOI, *Chapter 6: South Korea, in* ARMS PROCUREMENT DECISION MAKING VOLUME I: CHINA, INDIA, ISRAEL, JAPAN, SOUTH KOREA and THAILAND, 196 (Pal Singh R ed. 1998).

initiatives", such as the members of the South American Defense Council which result in increased regional security and stability.[77]

International Level Norms of Defense/National Security Influence International Civilian Norms

A clear example of an international level migration of defense/national security norms into the civilian domain is the replacement of the European Union's protection of classified information rules with NATO norms. Tony Bunyan, the director of the civil liberties NGO Statewatch, described the "Summertime Coup" in which under the leadership of Javier Solana;[78]

> the top-level committee of Brussels-based permanent representatives of the 15 EU member states, COREPER, agreed in secret to replace the 1993 Code of access to EU documents with a new code of access to meet the demands of NATO for secrecy. Only three countries voted against - the Netherlands, Finland and Sweden. This decision was formally approved by another secret process – "written procedure", whereby a telexed text is agreed unless a EU government objects - on 14 August 2000.[79]

These amendments affected public access to the Council's documents. At that time, the Council consisted of the ministers of all European Union member states and was an essential decision-maker of the EU. It had legislative functions and also held the executive power of the EU. The amendments resulted in several major changes. The following assessment builds largely on the analysis prepared by Statewatch.[80]

First, the public cannot have access to Council documents classified as TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIE. The new Article 1 also made it clear "[w]here a request for access refers to a classified document within the meaning of the first subparagraph, the applicant shall be informed that the document does not fall within the scope of this Decision."[81] This Decision functioned as the right to information law

77. TRANSPARENCY INTERNATIONAL UK, *Defence and Security Programme: The Transparency of National Defence Budgets*, 9 (2011), http://ti-defence.org/wp-content/uploads/2016/03/2011-10_Defence_Budgets_Transparency.pdf (last visited October 30, 2017).

78. Javier Solana was Secretary General of the NATO from 1995 to 1999 and subsequently the High Representative for the Common Foreign and Security Policy, Secretary General of the Council of the European Union between 1999 and 2009.

79. Tony Bunyan, *26 July 2000 - The Day of the Infamous "Solana Decision" - How Did Mr Solana Reply to a Letter He Had Not Received?*, http://www.statewatch.org/news/2002/mar/16solana.htm (last visited October 30, 2017).

80. *See* Council Decision of 20 December 1993, *Public Access to Council Documents*, OJ L 340, 31.12.1993, 43-44, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993D0731.

81. *Id*.

of the Council, which means practically, if a document is not under the scope of the law the right cannot be exercised.

Second, the amendments meant that any Council document that in any manner refers to any classified information regarding matters of security and defense, military or non-military crisis management, can be made available to the public only with "the prior written consent of the author of the information in question."[82] Such author may be NATO or other third parties. Statewatch pointed out that the "general inclusion of 'non-military management of crises' is particularly deceptive. This includes the use of EU police forces in the role of an EU para-military force, as agreed at the Summit concluding the Portuguese Presidency, some 5,000-strong (with 1,000 on stand-by), in third world and EU locations."[83]

Third, decisions on access to documents are to be prepared by the same public officials (in the relevant law enforcement and security fields) who are authorized to access these documents in any case. Quite likely are the same persons whose findings, opinions, proposals may be challenged in public if the information is disclosed.

Fourth, according to the rules preceding the above changes, as the main rule the public register of the Council included references "to the document number and the subject matter of classified documents."[84] There was also an exception if disclosure of the document number and the subject matter could undermine various public and private interests, such as public security, international relations, protection of privacy (listed in the same document), then it prescribed that no reference shall be made to the subject matter."[85] Following the amendment "the public register of Council documents contains no reference to documents classified TRÈS SECRET/TOP SECRET or SECRET or CONFIDENTIEL."[86] These changes allow for an assessment of the migration of NATO norms into the EU legal system.

(i) Fit

The three countries that voted against the proposed changes held that "the confidentiality of Council documents on the common European security and defense policy (ESDP) can be guaranteed without the a prior exclusion

82. *Id*.

83. *Analysis of the Working Document to Change the 1993 Code of Access to EU Documents*, http://www.statewatch.org/news/jul00/05solana3.htm (last visited October 30, 2017).

84. COUNCIL DECISION (EC) No. 23/2000 of 6 Dec. 1999, *Improvement of Information on the Council's Legislative Activities and the Public Register of Council Documents* (1999).

85. *Id.*

86. Council Decision of 14 August 2000 *amending* Decision 93/731/EC Public Access to Council Documents and Council Decision and 2000/23/EC, Improvement of Information on the Council's Legislative Activities and the Public Register of Council Documents.

of documents from the scope of the Council Decisions on public access to Council documents and on the public register of Council documents."[87] The circumstances of the introduction (i.e. the lack of transparency) of the rules on access to Council documents and the objection of three member states out of fifteen, indicate that this transplant of norms was not a good fit.

(ii) Transparency

The lack of access to the text of the NATO Security Policy meant that a substantive part of the norms to be transplanted, namely the NATO requirements with which the EU rules were supposed to be brought in line, was not accessible for the public. Moreover, not only was the substance of the access to information rules inaccessible, but also the process excluded the public.

> In the public arena the Commission, Council and European Parliament were engaged on a process of adopting a new Regulation on the citizens' right of access to documents to meet a commitment in the Amsterdam Treaty. In the secret confines of the Council here was the top official, working to meet NATO requirements, to permanently exclude whole categories of documents from public access.[88]

(iii) Completeness

Since NATO has never made its access to information norms entirely accessible, it is not possible to assess the completeness of the migration of these norms into EU law.

(iv) Yield

It is beyond the scope of this article to assess how this instance of transplant of NATO rules helped the development of the cooperation of the EU and NATO. What is clear is that these changes of EU law resulted in a significant erosion of the right of access to information held by the Council of the European Union.

87. *Statement by the Danish, Netherlands, Finnish and Swedish Delegations,* COUNCIL OF THE EUROPEAN UNION, 10782/00 LIMITE, INF 96 JUR 271, July 31, 2000, http://www.statewatch.org/newcode5.htm.

88. Tony Bunyan, *Chapter 6: The "Solana Decision"*, *in* SECRECY AND OPENNESS IN THE EUROPEAN UNION - THE ONGOING STRUGGLE FOR FREEDOM OF INFORMATION, http://www.statewatch.org/secret/freeinfo/ch6.htm.

International Civilian Norms Influence International Defense/National Security Norms of Access to Information

There is no example available for this direction of migration, when of international level civilian access to information norms influence defense/national security norms. Such a case would be, for example if the United Nations right to information norms would influence NATO's access to information norms.

Domestic Defense/National Security Norms Influence International Civilian Norms of Access to Information

There is no real life example available for this direction of migration, when one or more countries' domestic defense/national security norms on access to information would migrate into international level civilian law.

International Civilian Norms Influence National Level Norms of Defense/National Security

Decisions of Council of Europe bodies show two cases of international civilian access to information norms influencing domestic national security norms. Both cases concerned human rights violations committed by intelligence agencies.

(A) Illegal Transfers and Secret Detentions in Europe

The Council of Europe's investigation into illegal transfers and secret detentions in Europe, examined the US Central Intelligence Agency's Detention and Interrogation Program in Council of Europe member states.[89] This is an example of international civilian access to information norms interacting with domestic national security norms.

In 2009, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (hereinafter, "PACE") started an inquiry into the illegal transfers of detainees and secret CIA detentions. The rapporteur faced two main challenges. First, the lack of cooperation by governments and authorities that participated in these human

89. *The Council of Europe's Investigation into Illegal Transfers and Secret Detentions in Europe: a Chronology*, http://www.assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=362 (last visited October 30,2017); S. SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO.113-288 (2014).

rights abuses, and second the excessive state secrets regulations.[90] The PACE pointed out in the resolution originated from this report "[i]t is unacceptable that activities affecting several countries should escape scrutiny because the services concerned in each country invoke the need to protect future co-operation with their foreign partners to justify the refusal to inform their respective oversight bodies."[91] The PACE also called on the Council of Europe member and observer states to set up parliamentary oversight for secret services, "while ensuring that it has sufficient access to all the information needed to discharge its functions while respecting a procedure which protects legitimate secrets."[92] It also requested "an adversarial procedure before a body allowed unrestricted access to all information, to decide, in the context of a judicial or parliamentary review procedure, on whether or not to publish information which the government wishes to remain confidential."[93]

The resolution was accompanied by a set of recommendations to the Council of Europe Committee of Ministers which included that the Committee of Ministers should draw up recommendations, among others, on state secrecy. In particular, the resolution stressed the importance that human rights abuses can be properly investigated, perpetrators held accountable, victims can get reparations and the public can learn about these violations.[94] In its reply, the Committee of Ministers invited "member States to review, where necessary" their rules on the procedures of "facilitating the establishment of special procedures," which would allow for the examination of such human rights abuses.[95] This reply could not have been weaker and unsurprisingly the Committee of Ministers have not drawn up any recommendations to address these issues since 2012. The question whether any of the forty-seven Council of Europe member states amended any legislation as a result of the resolution exceeds the limits of this article and would require a comprehensive survey. In this case, however, the legal transplant of access to information norms seems to be incomplete.

90. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Explanatory Memorandum*, https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12952&lang=EN (last visited November 5, 2017).

91. *Id.*

92. *Id.*

93. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Resolution 1838* (2011), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18033&lang=en (last visited November 5, 2017).

94. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Recommendation 1983* (2011).

95. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations*, Doc. 12969, June 26, 2012.

(B) R.V. and Others v. the Netherlands

In 1984 an anti-militarist activist group raided the offices of a team of Dutch counter-intelligence detachment (450-CID) and disclosed the documents they found in the office, revealing among others, names of civilians and organizations that were noted on the "planning board of the so-called Infiltration-Influencing Outline (Infiltratie Beïnvloedings Schema; IBS) as dangerous to the State. Fifteen of these civilians were denoted by a red tag as hazardous to a military mobilisation."[96] Dutch nationals whose names were on the planning board wanted to find out what information were held on them by intelligence or security services. In "subsequent debates in Parliament in March 1985, it became apparent that the 450-CID may have over-stepped its authority by investigating persons and organisations active in the so-called 'Peace Movement'."[97] In 1988, after unsuccessfully requesting information under the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur; Wob) from the Minister of Defense and the Minister for Home Affairs and exhausting domestic remedies, ten individuals filed applications before the European Commission of Human Rights seeking remedy for the violation of their rights under Article 8 of the European Convention of Human Rights.[98] Parallel with the court domestic procedures, the Royal Decree that regulated intelligence and security services was replaced by an act of the Parliament that entered into force on 1 February 1988. The application was filed with the European Commission of Human Rights (hereinafter, "ECoHR") in July and August 1988. The report prepared by the ECoHR moved on to further instances of the Council of Europe, while in 1994 the Council of the State of the Netherlands found in two judgments that the provisions of the new Act were still not in conformity with Article 8 and 13 of the European Convention on Human Rights and the government of the Netherlands initiated a further legislative reform. [99] In these judgments the Council of State relied on the ECoHR's report and referred to the case-law of the ECtHR. "After this decision, requests for access to security service

96. *Id.* at. §II (A).

97. *Id*.

98. R.V. and Others v. The Netherlands, Applications Nos. 14084/88, 14085/88, 14086/88, 14087/88, 14088/88, 14109/88, 14173/88, 14195/88, 14196/88, and 14197/88 (admissibility) (Eur. Comm'n on H.R.), http://hudoc.echr.coe.int/eng?i=001-836 (last visited November 5, 2017).

99. *Interim Resolution DH (2000) 25*, Human Rights Application No. 14084/88, R.V. and Others v. the Netherlands (Adopted by the Committee of Ministers on February 14, 2000 at the 695th meeting of the Ministers' Deputies), http://hudoc.echr.coe.int/eng?i=001-51733 (last visited November 20, 2017).

files were to be examined under the Government Information (Public Access) Act (Wet openbaarheid van bestuur; Wob)."[100]

As a result of the sixteen year long legal battle at the domestic and international level the new Intelligence and Security Services Act that entered into force in 2002, included

> the procedure for the treatment of requests for access to security service is outlined in the Act, as well as the instance competent to receive appeal. The Act lays an obligation on the security services to publish an annual report which is submitted to Parliament, in which areas of specific attention of the services for the past and coming year are outlined.[101]

Domestic Civilian Norms of Access to Information Influence International Defense/National Security Norms of Access to Information

There is no real life example available for the direction of migration when a country's civilian access to information laws influence international level defense/national security norms of access to information. A theoretical example could be where NATO revokes its access to information regime and replaces it with a member state's right to information law.

CONCLUSION

This article showed through a number of concrete examples that access to information norms of the civilian and national security administrations are distinct and that these norms are moving between the two fields on the national and international level in nine of the twelve possible directions. Further research may identify examples for the remaining three directions of migration of norms. The migration of access to information model can be easily reused for the examination of comparable movements between civilian and national security fields. These movements include the migration of norms of right to privacy, procedural rights (civilian court and court martial), and labor rights.

The four evaluative tools of Tebbe and Tsai functioned well in the field of analyzing migration of access to information norms. These tools highlighted crucial aspects of the migration of norms which provide a basis for further analysis concerning questions of legitimacy of adopting and using transplanted norms. Some norms do not fit very well into their new environment and sometimes this can be foreseen before transplanting act

100. *Final Resolution CM/ResDH (2007) 86*, Human Rights Application No. 14084/88, R.V. and Others v. the Netherlands (Adopted by the Committee of Ministers on June 20, 2007, at the 997th Meeting of the Ministers' Deputies), http://hudoc.echr.coe.int/eng?i=001-81529 (last visited November 20, 2017).

101. *Id.*

takes place. In other cases, the migration is not very transparent and raises questions about the democratic authorization of the decision-makers to transplant norms in an obscure manner. Completeness and yield brings up the question "was it worth it?" The answer is not always positive. In the field of access to information, which is one of the fundaments of democratic rule of law systems, major shortcomings identified by any of these tools ought to raise serious concerns.

The reasons behind each example of migration of norms featured in this article deserve further research in the field of information policies. Policy, lawmakers, and everyone else taking part in public debate concerning the right of access to information and national security would benefit from a clearer picture of why these norms are moving and which entities have a role in transplanting access to information norms.

Access to Government Information in South Korea: The Rise of Transparency as an Open Society Principle

Kyu Ho Youm, Inho Lee and Ahran Park*

Access to government-held information, often known as "freedom of information" (FOI), is more widely recognized than ever. In the past nearly thirty years, freedom of information as a right to know has emerged as a newfound area of freedom of expression. The leading FOI expert Toby Mendel, former law program director of ARTICLE 19, an anti-censorship organization in London, noted "a veritable revolution" in the right to information in 2008:

> Whereas in 1990 only 13 countries had adopted national right to information laws, upwards of 70 such laws have now been adopted globally, and they are under active consideration in another 20-30 countries…. In 1990, the right to information was seen predominantly as an administrative governances reform whereas today it is increasingly being seen as a fundamental human right.[1]

From an FOI perspective, South Korea is a fascinating case study. As a thriving democracy, Korea has institutionalized the checks and balances among the three branches of government since 1993, when the Korean government was taken over by a civilian president for the first time in thirty-

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1. Toby Mendel, *Freedom of Information: A Comparative Legal Survey* 3 (2nd ed. 2008) (Mendel analyzes the FOI laws of fourteen countries and the international law of FOI). *See also Chronological and Alphabetical lists of countries with FOI regimes*, FREEDOMINFO.ORG, http://www.freedominfo.org/2016/06/chronological-and-alphabetical-lists-of-countries-with-foi-regimes/ (notes that 114 countries had recognized FOI as a legal right) (last visited on November 30, 2017).

two years.[2] Korea represents a rule-of-law nation in which citizens and the government resort to the courts, not extra-legal mechanisms, to resolve disputes. In this context, the FOI law in Korea has been one of the key liberalizing statutes that "make the government increasingly transparent."[3]

Given that South Korea is often touted as a model case for the United States in exporting democracy abroad, Korea's evolving experience with freedom of information deserves a systematic analysis.[4] This is all the more compelling, considering that 2016 marks the 20th anniversary of the Act on Disclosure of Information by Public Agencies [Official Information Disclosure Act] in Korea (hereinafter, "Official Information Disclosure Act").[5] This statutory framework on access to government records is the Korean version of the U.S. Freedom of Information Act (FOIA) of 1966. Especially noteworthy is the growing relevance of the Korean FOI law to international and comparative law, as showcased by American legal scholars' discussion of the 1989 case of the Korean Constitutional Court.[6]

In its 2016 report on Korea's FOI law, ARTICLE 19 credited the "activist" Korean judiciary for the Official Information Disclosure Act that facilitated the Korean government's embrace of "a series of democratic reforms" in the late 1980s-90s.[7]

As an increasingly "monitory democracy," Korea has become more open as a society in recent years. The Korean FOI law has considerably liberalized the governing process in the Asian country.[8] But its critics assert that the law has not resulted in the kind of transparency that its proponents envisioned for Korea in the mid-1990s.

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2. D.S. Choi et al., *Korea*, *in* INTERNATIONAL LIBEL & PRIVACY HANDBOOK 159 (Charles J. Glasser Jr. ed., 2009).

3. AGNÉS CALLAMARD, SPEAKING OUT FOR FREE EXPRESSION: 1987-2007 AND BEYOND 165-66 (2008).

4. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 577 (2002); *See* mail from Sandra Coliver, Senior Legal Officer for Freedom of Information and Expression at the Open Society Justice Initiative (Sept. 25 2007, 9:47:17 PM PDT) (on file with author) ("I know that Korea has some good case law on the right to know. I wonder if the case law has continued to develop in a positive way").

5. *Gonggongkikwan jeongbo gong-gae beob* [Official Information Disclosure Act], Act No. 5242, Dec. 31, 1996, *amended by* Act No. 11991, Aug. 6, 2013 (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=29982&lang=ENG.

6. *See* SVITLANA KRAVCHENKO & JOHN E. BONNIE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY 244-47 (2008).

7. ARTICLE 19, *Country Report: The Right to Information in South Korea* (Jan. 21, 2016), https://www.article19.org/resources.php/resource/38242/en/country-report:-the-right-to-information-in-south-korea (last visited Dec. 2, 2017).

8. For discussion of "monitory democracy," see generally MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975 at 234-41 (2015).

Regardless, access to information is now indisputably entrenched as a right for Koreans as part of their open government. transparency-oriented "Government 3.0" policy of President Park Geyun-hye (2013-17) was called "a paradigm change in all state affairs," one that prioritizes people over the State as its mode of operation.[9] Koreans have seen a dramatic increase (250 percent) in the FOI requests from 1998, when the Official Information Disclosure Act came into force, to 2015.[10] The number of FOI requests has grown since 2006, when FOI submissions were allowed online.[11]

Korea is now experiencing the fourth phase of FOI, which started in 2004 with the wholesale revision of the Official Information Disclosure Act. The Korean government proactively releases official records without request. During the 1998-2004 period, the third FOI phase for Koreans, the government was reactive to the citizens' requests for public records. The infantile FOI era in Korea lasted from 1989-1998, when the Constitutional Court's recognition of the citizen's right to information precipitated the partial access to government information. Korea was "dark" on informational disclosure prior to 1989, when secrecy pervaded the government.

This article examines how and why freedom of information in South Korea has emerged as a defining element of moving Korean society to a new level of participatory democracy. From a comparative perspective, the ongoing Korean experience with FOI should serve as a frame of reference for those interested in Korea's development as an "impossible country" in the global 21st century.[12]

The present study focuses on the right to information in South Korea as it has evolved since the late 1980s, when the right was first read into the constitutional guarantee of freedom of expression.[13] Three questions provide the main focus of the study. First, what is the conceptual and theoretical framework of the right to information in Korea? Second, how is the right to information guaranteed as a constitutional and statutory right in Korea? And finally, how has the right to information been interpreted by Korean courts?

9. Ministry of the Interior, *Open Government Partnership Self-Assessment*, *in* REPUBLIC OF KOREA, NATIONAL ACTION PLAN 2014-2016, 1 (2015).

10. *Annual Report on Open Information*, MINISTRY OF THE INTERIOR (Sept. 5, 2016), http://www.moi.go.kr/frt/bbs/type001/commonSelectBoardArticle.do?bbsId=BBSMSTR_000000000012&nttId=55966.

11. SANG-WOON AHN, FREEDOM OF INFORMATION LAW (Korean) 18 (2015).

12. *Id.*

13. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989 (S. Kor.).

THE RIGHT TO INFORMATION: A CONCEPTUAL AND THEORETICAL FRAMEWORK

It is widely accepted that one of the signature characteristics of a representative democracy hinges on whether citizens can access State-held information.[14] This informational access for citizens as a democratic principle is geared toward open and participatory politics. As American FOI specialist Martin Halstuk of Pennsylvania State University noted, it enables citizens to "hold government responsible for its actions and make informed decisions pertaining to self-rule."[15]

From a freedom of the press perspective, access to information as an affirmative right to know for journalists is considered crucial to the "enabling environment" for free and independent media.[16] The media, without laws on public access to government agency records and meetings, are usually hindered from functioning as an active, informative channel of communication for the public.[17]

When the South Korean government adopted a series of sweeping political reforms in 1987, access to information was one of the defining agendas for those who clamored for more than a negative freedom of expression from the State.[18] Two Korea observers argued: "If the press is to play a positive role by contributing to an informed and politically active electorate in a democracy, the government should go further than abolishing or revising suppressive laws; it should establish institutional mechanisms for positively enhancing press freedom."[19]

The underlying argument for freedom of information in Korea parallels "one of the principal *positive* justifications for the free speech principle: the importance of freedom of speech of an active democracy."[20] This argument resonated with many Koreans, whose authoritarian rule-by-law

14. *See* Anthony Mason, *The Relationship Between Freedom of Expression and Freedom of Information, in* FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION: ESSAYS IN HONOUR OF SIR DAVID WILLIAMS 225 (Jack Beatson & Yvonne Cripps eds., 2002).

15. Martin E. Halstuk, *Freedom of Information*, in 5 THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION 1889 (Wolfgang Donsbach ed., 2008). For an informative theoretical discussion of access to information as a right to know in American law, see Sigman L. Splichal, *The Right to Know*, *in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 3-22 (Charles N. Davis & Sigman L. Splichal eds., 2000).

16. *See generally* Monroe E. Price & Peter Krug, *The Enabling Environment for Free and Independent Media* 41-47 (2000).

17. GLOBAL JOURNALISM: TOPICAL ISSUES AND MEDIA SYSTEMS 58 (Arnold S. De Beer ed., 5th ed. 2009).

18. Kyu Ho Youm & Michael B. Salwen, *A Free Press in South Korea: Temporary Phenomenon or Permanent Fixture?* 30 ASIAN SURVEY 314-17 (1990).

19. *Id*.

20. ERIC BARENDT, FREEDOM OF SPEECH 108 (2nd ed. 2005).

administrations viewed their management of government records as a means to "control the people" underlying their Government 1.0.[21]

Citizens in a newly democratic Korea wanted to be more assertive and less passive in consuming the information from their government agencies. They demanded a more effective free speech system that "depends upon an abundance of law materials feeding into the system."[22] Access to information enables public bodies to be more accountable to citizens by allowing them to participate fully in public discourse.

What's the "right to know" as a concept? Constitutional law professor Kun Yang, who has served as the chair of the Korean government's Board of Audit and Inspection, stated in 2014:

> The right to know is categorized as two rights, depending on its characteristics. First, it's a right to know in its negative sense: a right not to be impeded in accessing information. This is a right to liberty, as explicitly stated by the Basic Law of Germany .... Secondly, it's a right to know in its positive sense: a right to petition to the government for informational disclosure. This is a right to petition. Our country's Official Information Disclosure Act provides for the right to know in this sense, and it is comparable to the Freedom of Information Act of the U.S.[23]

Professor Yang's insights on the right to know are similar to the theoretical and conceptual framework of the right to information, as articulated by the Constitutional Court of Korea in 1992, when it recognized the right to know as emanating from freedom of speech and the press.[24] As if it applied the U.S. free speech theory to Korean law on access to information, the Court held that such a right was vital to any democratic society because it promotes individual and societal values such as self-fulfillment, search for truth, participation in political decision-making, and the balancing of stability and change.[25] The Court also recognized that by making the government responsive to the people, the right to know provides an important "checking value."[26]

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21. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 209 (2003) (Rule by law is differentiated from rule of law in that the former allows law to be used "as a tool of the rulers, not a constraint on them," while the latter allows law to constrain the rulers); Zin-Im Jung & You-Seung Kim, *The Government 3.0 Era: Issues in the Freedom of Information System*, 39 KOREAN JOURNAL OF ARCHIVAL STUDIES (Korean) 45, 50 (2014).

22. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 671 (1970).

23. KUN YANG, CONSTITUTIONAL LAW LECTURE (Korean) 576 (4th ed. 2014).

24. Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992 (S. Kor.).

25. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1966); Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992.

26. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. B. FOUND. RES. J. 521-649 (1977).

As the Constitutional Court of Korea indicates, the *negative* free speech argument is relevant to FOI.[27] For a practical exercise of freedom of speech, the government should *not* inhibit citizens from knowing what public authorities are doing and how they are doing it. In this context, the right to receive information about and from government and public authorities is primarily a liberty in the sense of "freedom from."

CONSTITUTIONAL AND STATUTORY FRAMEWORK ON THE RIGHT TO INFORMATION

The Constitution of Korea has no specific provision on the right to information.[28] As already noted, however, freedom of information has been inferred from freedom of expression: "All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association."[29] The Constitutional Court has recognized the implied "right to know" as a constitutional right to free speech.[30] It is one of the notable examples in Korea's constitutional law in which the Constitutional Court has been boldly innovative in recognizing new rights by reading the text of the Constitution broadly.[31]

The law governing the access to information in Korea is the Official Information Disclosure Act enacted in 1996.[32] The FOI statute was wholly amended in 2004 to remedy various defects of the law while promoting citizens' right to know and ensuring the transparency of the governing process within the context of the Korean government.[33] The revised law proclaims its purpose as:

> [T]o ensure people's rights to know and to secure people's participation in state affairs and the transparency of the operation of state affairs by prescribing matters necessary for people's requests for the disclosure of information kept and controlled by public institutions and the obligations of public institutions to disclose such information.[34]

The State agencies among the public institutions under the FOI law encompass the three branches of the government—that is, the National Assembly, the judicial branch, and the executive branch—and the

27. Const. Ct., 89 Hun-Ka 104, Feb. 25, 1992 (S. Kor.).

28. *Daehanminkuk hunbeob* [Constitution] (S. Kor.).

29. *Id.* Art. 21(1).

30. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989, (S. Kor.).

31. Ginsburg, *supra* note 21, at 226; DAE-KYU YOON, LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987, at 86-90 (2010).

32. Official Information Disclosure Act.

33. *Id*.

34. *Id.* Art. 1.

Constitutional Court, and the National Election Commission.[35] So, it is wider in its scope than the Freedom of Information Act of the United States, which does not apply to Congress and the federal courts.[36]

The Korean law defines "information" as "matters recorded in documents (including electronic documents …), drawings, pictures, films, tapes, slides, and other media corresponding thereto that are made or acquired, and managed by public institutions for the performance of their duties."[37]

Korean law requires government institutions to *actively* release "any information" that they keep and manage to the public, in compliance with the people's right to know.[38] In ensuring the people's right to access government information, the public institutions have to modify relating statutes and regulations and "actively endeavor" to disclose information that the public "needs to know."[39]

Most significantly, the amended Official Information Disclosure Act mandates that the central administrative agencies and the public institutions (prescribed by the Presidential Decree) disclose information classified for public release, to the public through the information and communication network, "even when no request for information disclosure is made."[40]

Significantly, the broadcasting media, *both* public and private, are subject to disclosure of information under the Broadcasting Act.[41] The access to information requirement of the Broadcasting Act applies to all the broadcasting stations, except KBS (Korean Broadcasting System), a government-invested corporation, and EBS (Educational Broadcasting System), which was established under the Korean Educational Broadcasting System Act. KBS and EBS as public institutions are subject to the Official

35. *Id.* Art. 2. "Public institutions" are defined as: The term "public institution" means any of the following institutions: (a) State agencies; (b) Local governments; (c) Public institutions under Article 2 of the Act on the Management of Public Institutions; and (d) Other institutions prescribed by Presidential Decree.

36. *See* 5 U.S.C. §551(1) ("agency" means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include: (A) Congress, (B) the courts of the United States . . .").

37. Official Information Disclosure Act, Art. 2.

38. *Id.* Art. 3.

39. *Id.* Art. 7(2).

40. *Id.* Art. 8(2).

41. *See Bangsong beob* [Broadcasting Act], Act No. 3878, Nov. 28, 1987, *amended by* Act No. 10856, July 14, 2011, Art. 90(5) (S. Kor.), *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=2828&lang=ENG.

Information Disclosure Act.[42] Not surprisingly, freedom of the press has been at issue when FOI requests were rejected by the broadcasting media.[43]

While no specific government agency or public institutions are exempted from the access to information obligations under the Official Information Disclosure Act, the Act is sweeping in exempting "any information" collected or created by national security agencies in order to analyze national security interests.[44] This national security agency exemption raises a presumption of secrecy for agency records in contradiction to the Act's priority of disclosure.

In recognition of the conflicting interests involved, the Act stipulates several grounds of exemptions to information disclosures:

(1) Information specifically exempted by the Act and other laws;[45]

(2) Information relating to national security, national defense, unification, diplomatic relations, etc.;

(3) Information harmful to the protection of individuals' lives, physical safety, and properties;

(4) Information relating to ongoing trials, to crime investigation and prevention, institution and maintenance of indictments, or the execution of sentence and security disposition;

(5) Information relating to audit, supervision, inspection, tests, regulations, tendering contract, the development of technology, the management of personal affairs, decision-making processes and internal review processes, etc.;

(6) Information relating to resident registration numbers and other private information of individuals;

(7) Information relating to management and trade secrets of corporations, organizations, or individuals;

(8) Information relating to real estate and the acts of cornering and hoarding real estate.[46]

42. Official Information Disclosure Act.

43. For a discussion of the judicial interpretation of freedom of the press vs. access to information, see *infra* notes 104-111 and accompanying text.

44. Official Information Disclosure Act, Art. 4(3).

45. Among the statutes that classify certain information as secret or closed to the public and thus to be exempt from the Official Information Disclosure Act are: *Hyongsa sosong beob* [Criminal Procedure Act], Act No. 341, Sept. 23, 1953, *amended by* Act No. 14179, May 29, 2016 (S. Kor.), Art. 47 (S. Kor.); *Hwangyong bunjaeng jojong beop* [Environmental Dispute Adjustment Act], Act No. 5393, Aug. 28, 1997, *amended by* Act No. 13602, Dec. 22, 2015, Art. 25 (S. Kor.); *Gukka jeongbowon beop* [National Intelligence Service Act], Act No. 3313, Dec. 31, 1980, *amended by* Act No. 12948, Dec. 30, 2014, Arts. 6 and 12 (S. Kor.); *Gukhoe beop* [National Assembly Act], Act No. 4015, June 15, 1988, *amended by* Act No. 14840, July 26, 2017, Art. 118(4) (S. Kor.).

46. Official Information Disclosure Act, Art. 9.

What exemptions are involved, how the exemptions are invoked by the public institutions, and how the courts interpret the exemptions have been the frequent grounds for the growing FOI litigation.

Where information might relate to "commercial secrets" of non-government entities, the government agency may consult with the affected party. Article 11(3) of the Official Information Disclosure Act states and in the event that any public institution is aware that the requested information "pertains, in whole or in part, to a third party, the pubic institution shall inform the third party of the fact without delay and may, if necessary," hear that party's opinion on the information.[47]

The Korean law does not discriminate against non-citizens in accessing government records. Foreigners may also file FOI requests to the government bodies and public institutions that are subject to the law. However, their requests have to comply with a relevant presidential decree.[48]

There is no limitation on the format of access requests. Requests may be filed electronically as well as in writing or in person. The Enforcement Decree for the Official Information Disclosure Act provides for postal, fax, or electronic submission of requests for information disclosure.[49] The public institutions under the FOI law can charge for the actual cost of disclosing information.[50] But the charges are limited to the processing cost of inspection and reproduction of information and of mailing the information.[51] No charges are permitted for other activities associated with handling information requests, such as the cost of consulting with third parties or the time spent for assessing whether the requests fall within the exemptions. "Where the purpose of using information subject to application for disclosure is deemed necessary for maintaining and promoting public welfare, the expenses referred to in paragraph (1) may be reduced or exempted."[52]

The purpose of requesting government information is to maintain and promote public welfare if the requested information is:

1. Necessary to non-profit academic or public organizations or corporations to conduct academic and scholarly research or to monitor government agencies;

2. For a professor, teacher or student for purposes of their research after their request is certified by their supervisor;

47. *Id.* Art. 11(3).

48. *Id.* Art. 5(2).

49. *Gonggonggigwan jeongbo gonggae beob sihaeng lyeong* [Enforcement Decree of the Official Information Disclosure Act], Presidential Decree No. 27670, Dec. 13, 2016, Art. 6 (S. Kor.), *translated in* http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=40266&type=sogan&key=15.

50. Official Information Disclosure Act, Art. 17.

51. *Id*.

52. *Id.* Art. 17(2).

3. Determined by the head of a public agency to be necessary for maintenance and promotion of public welfare.[53]

The deadlines for handling FOI-related matters are ten days for answering the request from the date when the request was received and twenty days for refusing the request for information.[54]

A government agency, when receiving a request for information that is controlled by another agency, "shall transfer without delay the request to the latter and then promptly" notify the requester in writing, explicitly referring to the public agency in charge of the request and the grounds for transferring the request.[55] The statute also provides for an extension of time limits for the consideration of access requests under "unavoidable" circumstances.[56]

Meanwhile, the law disallows the requests for "voluminous" information. If the FOI requests are so voluminous as to be abusive of the right to information, the Civil Act applies,[57]and the requests can be denied. Korean courts have been justifiably keen to ensure that the alleged "abuse" of the FOI right is not misused by government offices to sidestep their FOI obligations.[58]

When a public institution decides not to disclose information, it must "promptly" notify the requester in writing of its nondisclosure decision.[59] In the case of a refusal of access, the Act requires that the reasons for the decision be explained to the requester.[60] Even if the third party refuses to authorize access to information it has supplied to the government, the public body can make its own decision on whether to allow the access to the information. Third parties cannot exercise a veto over the FOI decisions by government authorities. There is no such thing as the reverse FOI application of the exemptions to denial of access requests.[61] The FOI statute states:

53. Broadcasting Act, Art. 17(3).

54. Official Information Disclosure Act, Art. 11(1-2).

55. *Id.* Art. 11(4).

56. Broadcasting Act, Art. 7.

57. *Minbeob* [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 11728, April 5, 2013, Art. 2, *translated in* Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG (Article 2 states: "(1) The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith; (2) No abuse of rights shall be permitted.").

58. For a discussion of the judicial rulings on the abuse of the FOI law in Korea, see *infra* note 87 and accompanying text; for a discussion of the legislative effort to deal with the abusive use of the Official Information Disclosure Act by prison inmates, see *infra* note 133 and accompanying text.

59. Official Information Disclosure Act, Art. 13(1).

60. *Id.* Art. 13(4).

61. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (Although not identical to American law on third parties' innovation of various FOIA exemptions, Korean law is similar to the Supreme Court's reasoning.).

> Notwithstanding the request made by the third party not to disclose the information …, if any public institution decides to disclose such information, such public institution shall promptly notify in writing the third party of its decision to disclose the information, explicitly indicating
>
> the reason for deciding to disclose the information as well as the date of information disclosure, and the third party may raise an objection in writing to the relevant public institution or file for an administrative appeal or an administrative hearing.[62]

The denial of access requests may be appealed administratively. The requester may ask the government agency to reconsider its initial denial of his or her FOI request. The internal appeal may be filed within thirty days after the requester is notified of the agency's decision to reject his or her request in whole or in part.[63] The internal appeal must be decided within seven days. If an agency cannot respond to the internal appeal due to unavoidable circumstances, the agency has an extended deadline of seven days.[64]

If an agency's reply to the appeal is not acceptable, the requester may use an administrative appeal under the Administrative Appeals Act.[65] The administrative appeal may be filed without following the internal appeals under the Official Information Disclosure Act.[66]

Individuals whose information requests have been denied may seek redress by filing for an administrative hearing under the Administrative Litigation Act.[67] More Koreans and public interest groups resort to the Administrative Litigation Act to challenge the denials of their access requests. More often than not, Korean courts rule against the agency's action against the disclosure of the requested information.

JUDICIAL INTERPRETATIONS OF THE RIGHT TO INFORMATION

Since the Constitutional Court created access to government-held information as an implied right to freedom of expression in the late 1980s, the right to know has resulted in a substantial body of case law. Freedom of information has emerged as a popular area for lawsuits since the enactment of the Official Information Disclosure Act in 1996.[68]

62. Official Information Disclosure Act, Art. 21(2).
63. *Id.* Art. 18(1).
64. *Id.* Art. 18(3).
65. *Id.* Art. 19(1).
66. *Id.* Art. 19(2).
67. *Id*. Art. 20.
68. *Id.*

A. The Korean Constitutional Court Reads FOI into Freedom of Expression

The "Forests Survey Inspection Request" case of the Constitutional Court was the first FOI case in Korea.[69] The case came eight years before the National Assembly passed the Official Information Disclosure Act.

In this landmark FOI case, the Constitutional Court extended Article 21 of the Constitution on freedom of expression to access to government records.[70] The Court held:

> Freedom of speech and press guaranteed by Article 21 of the Constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of right to know is people's right to know with respect to the information held by the government, that is, general right to request disclosure of information from the government (claim-right).[71]

Hence, if the complainant requested disclosure of information with legitimate interest in it, and the government failed to respond without any review, the Constitutional Court found that his freedom of speech and freedom of expression under Article 21 was abridged.[72]

The Court stated, however, that the right to know is not absolute and it can be reasonably restricted by balancing the interest secured by the restriction and the infringement on the right to know: "Generally, the right to know must be broadly protected to a person making the request with interest as long as it poses no threat to public interest.[73] Disclosure, at least to a person with direct interest, is mandatory."[74]

In another important FOI case, the Constitutional Court affirmed that a sufficient guarantee of access to information makes freedom of speech and the press a reality.[75] Interestingly, the Court drew upon the U.N. Declaration of Human Rights as well as the Constitution of Korea for its conclusion that the right to know is naturally included in the freedom of expression.[76]

Further, the Court linked access to information to liberty and the right to petition. The right to liberty, the Court said, includes the freedom "not to be

69. Const. Ct., 88 Hun-Ma 22, Sept. 4, 1989 (1 KCCR 176) (S. Kor.).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Const. Ct., 90 Hun-Ma133, May 13, 1991 (1 KCCR 176) (S. Kor.).
76 *Id.*

impeded by the government in obtaining access to, collecting, and using information."[77] The right of petition allows citizens to request that the government eliminate restrictions on access to information. If release of the requested records "would not conflict with the fundamental rights of those concerned or violate the national security, maintenance of law and order, and public welfare interest," the Court held, disclosure of the records would be a "faithful" execution of the government's duty to guarantee the basic constitutional rights of its citizens.[78]

B. The Supreme Court and Lower Courts Applying the FOI Law

According to a 2009 study of the Korean Supreme Court rulings during the first 10 years of the Official Information Disclosure Act, nearly 80 percent of the 89 cases in 1998-2007 arose from the rejection of FOI requests by public institutions on the basis of various statutory exemptions.[79] In balancing the right to know with its conflicting interests, the study found, the Supreme Court tended to prioritize informational disclosure over informational non-disclosure.[80] Some of the pro-access court decisions are illustrative.

In an FOI case of 2004, the Supreme Court set forth a balancing test in ruling on when access requests are denied by the government.[81] Chung Dong-yon v. Chief Public Prosecutor, Seoul District Prosecutor's Office, stemmed from an FOI request by Chung, who participated in the Kwangjoo Democratization Movement of 1980, to Seoul District Prosecutor's Office.[82] Chung asked the records of his and others' unsuccessful damage lawsuit against the prosecutors who refused to prosecute former Presidents Chun Doo Hwan and Roh Tae Woo in connection with their illegal military revolt of 1979 and the bloody Kwangjoo movement of 1980.[83]

The Prosecutor's Office rejected Chung's request on the ground that he had no legitimate interest in accessing the information because the lawsuit he initiated against the prosecutors had already been completed. Chung

77. *Id.*

78. *Id.*

79. Jung-Kun Bae, *Limitations of the Realization of the Right to Know Through the Official Information Disclosure Act: The Supreme Court Rulings on the Act's Non-Disclosure Clauses Analyzed*, 53 KOR. J JOURNALISM & COMM. STUD. (Korean) 368-90. (2009).

80. *Id*.

81. Chung Dong-yon v. Chief Public Prosecutor, Seoul District Prosecutor's Office, S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

82. *Id.*

83. *See* Jerome Alan Cohen & Edward J. Baker, *U.S. Foreign Policy and Human Rights in South Korea, in* HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 188-96 (William Shaw ed., 1991).

disagreed, contending that the rejection of his FOI request violated the Official Information Disclosure Act.

In upholding a lower court's ruling in favor of Chung, the Supreme Court drew the line on when information requests can be denied. The requests are rejected, the Court stated, when they collide with the State and societal interests in national security, maintaining law and order, and ensuring public welfare or when they violate the basic rights of criminal suspects and witnesses to safeguard their reputation, private secrets, life and physical safety and tranquility.[84] Also, the Court said that if the FOI requester aims to harass government officials or agencies, the FOI requests may be denied.[85]

Indeed, the Supreme Court held in 2014 that the Official Information Disclosure Act does not cover the abusive, not bona-fide requests for official information.[86] The Court stated: "The right to information is justifiably not permitted, when, in actuality, the requester has no intent to obtain and use the public information involved and only has an intent to acquire various socially unacceptable illegitimate benefits through the informational disclosure system, or when the requester is determined to badger the government officials in charge. This is a clear case of abusing the right."[87]

When rejecting the information requests, the government must establish which exemption clause(s) of the FOI law to apply after specifically checking and examining the requested investigatory records. The Court ruled that government agencies should not use overly broad reasons for denying the access altogether.[88]

The Supreme Court held in 2006 that access to government documents under the Official Information Disclosure Act should be treated differently than that under the Military Secrets Act.[89] The FOI case on access to military secrets arose from a request for disclosure of the secret reports of the Board of Audit and Inspection (BAI) on the ROK Ministry of Defense's research and development project for the Korean multi-purpose helicopters.[90] BAI denied the access to its reports, claiming that the reports were military secrets and, if disclosed, would be feared to injure the vital national interests.

In interpreting the Official Information Disclosure Act that allows withholding the information that other laws have designated as secret or confidential, the Court held that the FOI law and the Military Secret

84. S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

85. *Id*.

86. *Id.*

87. S. Ct., 2014 Du 9349, Dec. 24, 2014 (S. Kor.). *See also* S. Ct., 2013 Du 25603, Jan. 29.2015 (S. Kor.); Seoul High Ct., 2015 Nu 35965**,** July 10, 2015 (S. Kor.).

88S. Ct., 2003 Du 1370, Sept. 23, 2004 (S. Kor.).

89. *Id.*

90. S. Ct., 2006 Du 9351, Nov. 10, 2006 (S. Kor.).

Protection Act are entirely different from each other.[91] Unless special rules override the difference between the two laws, the FOI request cannot be handled in such a restrictive way as the request for disclosure of military secrets is under the military secrets law.[92]

In 2007, the Supreme Court clarified the contents and scope of the requested information under the FOI law. In the *Korea National Housing Corp.* case, the request at issue was for information about the cost of certain purchasing housing lots and "all the related materials," about the original price of developing the lots and "all the related materials" about the sale price of the lots and "all the related materials" about all the contracts with a construction company and its direct construction cost and "all the related materials" about the calculation of the actual building cost such as the construction expenditure, design and supervision cost, incidental cost, and the margin of the project's profits, and "all the related materials."[93]

The request was denied because it did not contain the relevant information that would identify the contents of the requested information and the method of disclosing the information. The request was found to be too vague and overbroad because it was only for "all the related materials" and specified no particulars. Accordingly, there was no way to disclose the information at issue.[94] The Supreme Court delineated how to apply the FOI law to overly vague information requests:

> When a government agency rejects the information request because the request is too sweeping or vague for an ordinary person to ascertain its contents and scope, a court should specify the contents and scope of the request by ordering submission of the requested information for its in-camera inspection. If the request's specificity remains still elusive, the court should separate the unspecified portion of the information from the rest. When the denial of the request for the now specified information was illegal, the court should split the unspecified portion of the information and dismiss the challenge to the denial of access to the information.[95]

The privacy of government officials collided with access to information in a 2004 case of the Supreme Court.[96] The Citizens' Coalition for Participatory Autonomy in North Chungchong Province wanted to inspect the receipts of the expenditure for meetings sponsored by the Governor of North Chungchong Province and the receipts of the expenditure of the governor for those who assisted in publicizing the provincial administration and for the

91. *Id.*
92. *Id.*
93. S. Ct., 2007 Du 2555, June 1, 2007 (S. Kor.).
94. *Id.*
95. *Id.*
96. S. Ct., 2003 Du 8302, Sept. 20, 2004 (S. Kor.).

needy neighbors and the disaster victims. The Governor's office refused the FOI request, arguing that the information was exempt from disclosure because it would identify individuals in violation of their privacy.

The Supreme Court balanced the public's right to know against a person's right of privacy. The Official Information Disclosure Act exempts from disclosure the personally identifiable information (PII) such as name, resident registration number, and others, of a particular individual. The Court held, however, that the law does not cover information that was created or obtained by a public institution and whose disclosure is necessary for the public interest and for protection of a person's right.[97]

"In determining whether certain information should be released in the public interest," the Supreme Court stated, "courts should make an individual judgment based on the specific facts by balancing the benefit of protecting an individual's privacy through non-disclosure with the public interest in guaranteeing the people's right to know through the disclosure and in ensuring the people's participation in, and the transparency of, the governing process."[98]

Under this balancing standard, the Court found that the information about the attendees of the Governor's events, including the public officials who participated in the events as their official conduct, was the kind of information to be released for the public interest. The Court continued, however, that the public officials' resident registration numbers and the information about the public officials who attended the events as private individuals should not be disclosed in protection of the public officials' privacy.[99]

Does a local government have a right to request information from a central government agency? The Seoul Administrative Court answered no.[100]In January 2005, the Ward of Songpa in Seoul asked the Seoul Election Commission for a report that the Ward had violated the Public Officials Election Act when hosting an event in honor of elderly people. The Ward wanted to know what had led the Election Commission to suspect the Ward of a violation of the election law.

The Election Commission rejected the request, maintaining that the disclosure of the requested information was prohibited by the election law on protection of those who confidentially reported on election-related crimes, and thus the information would be exempt from disclosure under the FOI law.

97. *Id.*

98. *Id.*

99. *Id.*

100. Seoul Administrative Court, 2005 Kuhap 10484, Oct. 12, 2005 (S. Kor.).

In its appeal to the Seoul Administrative Court, the Ward of Songpa argued that if the information in question was exempted under the information disclosure law, the Election Commission should separate the exempted from non-exempt information and release the non-exempt information. The Ward continued that the Commission's vague, complete denial of the request for the information was a violation of the FOI law.[101]

The Seoul Administrative Court held that when examining whether the local government institution possesses the essential elements of the right to know as a citizen's basic right, the court should consider various factors. First, the right to know is derived from freedom of expression as part of an individual's "psychological freedom," that is, a human dignity and the right to pursue happiness. Second, the right to access information is the right for citizens to access and request disclosure of the information in the possession of the national and local government institutions, which enables citizens to participate in the governing process. Third, even when the local government is denied the right to access information, the denial does not interfere with the constitutionally guaranteed autonomy of its administration. And finally, the local government as a public authority with official power can protect the citizen's right to know.[102]

These factors work against the local government in asserting access to information as its basic right because the Official Information Disclosure Act does not recognize the local government as the "people" entitled to access to government records. Rather, it makes the local government an entity with an obligation to disclose information to the people, not the requester of the information.[103]

An FOI request to the Korean Broadcasting System (KBS), the public television network in Korea, raised a freedom of the press issue.[104] A supporter of Dr. Hwang Woo-Suk, a disgraced biomedical scientist who fabricated stem cell research in Seoul, requested a temporary tape for an edition of the KBS TV's "Tracking 60 Minutes."[105] The tape was initially prepared for an investigative news program on Hwang's widely publicized research fabrication. The tape was edited by a KBS TV producer without authorization, but it was not used for any KBS broadcasting.

101. *Id*.

102. *Id*.

103. *Id*.

104. Seoul High Court, 2007 Nu 24731, July 2, 2008 (S. Kor.).

105. For the archival website of the New York Times on Dr. Hwang Woo-suk, see "Hwang Woo Suk: News about Hwang Woo Suk, including commentary and archival articles published in The New York Times," at http://nyti.ms/2eBbw0K (last visited Dec. 2, 2017).

The KBS did not respond to the FOI request for the tape for 20 days, which amounted to the KBS's denial of the request.[106] One of the key issues in the case was whether the release of the requested tape violate the KBS's freedom of the press under the Constitution and the Broadcasting Act? The Seoul High Court ruled that it would not. The FOI request at issue was for disclosure of the information from KBS, not for broadcasting of the information, the court said. "So, we cannot consider it a direct restriction to or interference with the KBS's freedom of the press and the KBS's programming freedom and independence. Besides, the public institution (such as the KBS) must disclose the requested information unless it is exempted by the information disclosure law."[107] The court further noted that if the KBS's free press argument does not fall within any of the exempted categories under the Official Information Disclosure Act, freedom of the press cannot constitute a ground for rejection of the information request.[108]

On appeal, the Supreme Court disagreed. The Supreme Court held that the "unlimited mandatory disclosure" of the information about the planning, organization, and production of a broadcasting program would discourage broadcasting activities.[109] This would hurt the broadcasting company's management and business interests and further affect the broadcaster's "freedom and independence of broadcasting."[110] The Court stated that the KBS's refusal of the information in question fell within the trade secret exemption under the Official Information Disclosure Act and protected its own "legitimate interest."[111]

In Lee Kon-young v. Head of Dongjak Ward, Seoul Metropolitan City,[112] the Supreme Court held that the Dongjak Ward had rightly denied Lee's request for information about a redevelopment project. The Court reasoned that the records requested bore on an individual's privacy and property and thus its release would violate the person's privacy and freedom,

106. *Official Information Disclosure Act*, Art. 11(5), states: "In the event that any public institution does not decide on whether or not to disclose information within 20 days from the date on which a request is made for disclosing such information, such public institution shall be deemed to have decided not to disclose the information."

107. *Id*.

108. *Id*.

109. S. Ct., 2008 Du 13101, Dec. 23, 2010 (S. Kor.). For a thoughtful analysis of the case, see Inho Lee, *The Conflict Between the Public Broadcaster's Freedom of Broadcasting and the Official Information Disclosure Act: Focusing on the Informational Request to KBS on "Tracking 60 Minutes,*" *in* 12 PUB. L.J. (Korean) 277-314 (2011).

110. *Id.*

111. *Id.*

112. Lee Kon-young v. Head of Dongjak Ward, Seoul Metropolitan City, S. Ct., 96 Nu 2439, May 23, 1997 (S. Kor.).

while the processing of the *voluminous* (9,029 pages) records would considerably affect the administrative function of the government agency.[113]

In a pro-access case of 1999, the Supreme Court reversed a denial by a government agency of a request for investigatory records.[114] The request was from a complainant in an appeal of his criminal case to inspect and copy the records relating to the prosecutor's investigation of him. The prosecutor denied the request while offering no concrete reasons.

In ruling against the Prosecutor's Office, the Supreme Court stated that even when the exercise of the right to access investigatory records exceeds its accepted boundaries, a government agency cannot reject the request for overly broad reasons. The Court further said that the denial should be based on the proof that the government agency has specifically checked the records and determined which records would conflict with what interests and rights.[115]

Lawyers for a Democratic Society requested the copies of the released U.S. government documents about the political situation in South Korea in 1979 and 1980. The Ministry of Foreign Affairs denied the information request, arguing that the contents of the U.S. documents have been already reported by Korean news media. Thus, the plaintiffs could use them to form their own opinions, and their right to know was not violated. It also maintained that when the U.S. government provided the documents to the Ministry of Foreign Affairs, the U.S. government expressed its wish that Korean citizens would ask the U.S. government for access under the U.S. law.[116]

In September 1999, the Supreme Court in Lawyers for a Democratic Society v. Ministry of Foreign Affairs disagreed with the Ministry of Foreign Affairs.[117] In affirming its balancing test in FOI, the Court held: "There are certain limits on the citizens' right to access to information based on the people's right to know. But the benefits from the limitations should be weighed against those from their restrictions."[118] The Court concluded that there was no evidence that the damage to the State interest would arise from the release of the U.S. government records, and that the lawyer group's request for the records had overstepped the citizens' right of access to information through the right to know.[119]

113. *Id.*
114. S. Ct., 98 Du 3476, Sept. 21, 1999 (S. Kor.).
115. *Id.*
116. S. Ct., 97 Nu 5114, Sept. 21, 1999 (S. Kor.).
117. *Id.*
118. *Id.*
119. *Id.*

DISCUSSION AND ANALYSIS

The ongoing Korean experience with access to information as a right to know epitomizes the global trend of the FOI movement that has swept the world since the late 1980s. As in other countries that have adopted access laws, it is one of the most significant developments in the steadily expanding freedom of expression for Koreans. It is hardly an overstatement that the Constitutional Court's recognition in 1989 of freedom of information as a constitutional right was revolutionary and the National Assembly's enactment in 1996 of the Official Information Disclosure Act was a threshold event in Korea's institutional step forward to a full democracy. Korea is much closer than ever to embracing the policy of openness embodied in the FOIA of the United States—disclosure is the rule and secrecy is the exception.[120]

According to the latest Korean government FOI report, a total of 1,464 FOI cases were filed with the Korean administrative courts in 1998-2015.[121] As of Nov. 2, 2016, 298 "information disclosure" cases are listed in LawnB, South Korea's Westlaw and LexisNexis combined.[122] The Supreme Court of Korea has ruled on fifty-four cases; the intermediate high courts on sixty-five; and the district courts on 179.[123] Although the lower court FOI cases are less impactful, the Supreme Court decisions are especially significant.

When it comes to unsuccessful access requests, appeals to government agencies are far more frequent than formal administrative appeals or administrative litigation. In 2015, for example, slightly more than 18,000 FOI denials were challenged administratively and judicially. Of the FOI challenges, 19.7 percent were through petition to the agencies involved. Only 9.4 percent and 0.88 percent of the challenges were through administrative appeals and administrative litigation, respectively.[124] One reason for the infrequency of judicial challenges to the request denials is that the litigation is so time-consuming that those who win against the government agencies find its practical value limited. This is because the timeliness of information requested is lost in the litigation process, and the FOI litigation deserves judicial priorities. More importantly, the FOI administrative appeals are structurally friendly to FOI petitioners. Since public institutions cannot

120. Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 949 (4th Cir. 1974).

121. MINISTRY OF THE INTERIOR, *Annual Report on Public Disclosure in 2015* (Korean), at https://www.open.go.kr/pa/info/openData/annualReport.do (last visited Oct. 12, 2017).

122. The authors conducted a caselaw search using "information disclosure" in Korean on Nov. 2, 2016, through the major legal database LawnB in Korea at http://www.lawnb.com/lawinfo/info_total_search.asp.

123. Ministry of the Interior, *supra* note 121.

124. *Id*.

challenge the pro-disclosure results of the appeals, the state institutions are required to release the documents in questions.

Several contentious issues remain for the Official Information Disclosure Act. For example, "any information" collected or created by State intelligence agencies is not subject to the disclosure law.[125] So, certain information in the possession of the National Intelligence Service (NIS) is presumptively excluded from public access, which directly contradicts the objective of the FOI statute. Furthermore, there is no independent judicial determination of whether the NIS information relates to national security interests. The "state secrets privilege" abuse by government agencies in Korea is more probable than apparent if the U.S. experience is a disturbing real-life guidance.[126]

The Act also requires public institutions to prepare and maintain a list of agency records so that the public can easily understand the list, and to publish the list through the information disclosure system.[127] It does, however, broadly exempt "any information" that may not be disclosed by the Act or any other laws from this listing requirement.

Meanwhile, no punishment is imposed upon those who deliberately refuse to disclose information in violation of the FOI statute by ignoring the requests or obstructing the requests. Nor does the law provide for any punitive actions against those who deliberately release misleading information or, for no plausible reason, transfer the information requests to other government agencies.

Fortunately, Korean judges have been refreshingly libertarian in interpreting the access law. They have been willing to uphold the spirit of the law when ruling on challenges to the access denials by government authorities. The pro-disclosure rulings have been the rule, not the exception, and Korean courts have read the exemptions to the FOI law in a limiting way.

125. *See* Official Information Disclosure Act, Art. 4(3) ("This Act shall not apply to any information that is collected or produced by agencies in charge of information pertaining to the national security and security services for the purpose of analyzing information pertaining to the national security: Provided that the same shall not apply to the production, provision and disclosure of the information provided for under Article 8(1) [on making and keeping the list of government information].").

126. In the United States, the government has invoked the "state secrets" privilege, which protects classified government information from disclosure in judicial proceedings. In recognizing the state secrets privilege, the Supreme Court held in United States v. Reynolds*,* 345 U.S. 1 (1953), that if disclosure of the classified documents is proved to pose "a reasonable danger" to national security, the government can withhold the documents from the judges. For an informative background on the state secrets privilege in U.S. law, see Electronic Frontier Foundation, *State Secrets Privilege*, at https://www.eff.org/nsa-spying/state-secrets-privilege (last visited Dec. 2, 2017). For an in-depth case analysis of the state secrets privilege in the United States, see Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV**.** 99, 99-132 (2007).

127. Official Information Disclosure Act, Art. 8(1).

The Constitution Court has found the right to information to be more than a constitutional right. Amazingly, the Court views it as a human right under the Universal Declaration of Human Rights.

Amid the explosive FOI litigation in Korea in recent years, few of those access lawsuits have pitted the news media against the government agencies. It is not clear why media professionals and news media in Korea rarely resort to administrative appeals or litigation even when they are denied access to government documents under the FOI law. One can easily argue that Korean news media might have found the FOI law less helpful than expected. More often they might consider law in action to be more efficient in obtaining what they need for their news reporting.

Regardless, the FOI law is more widely used by individuals for private ends than by media or public interest groups. A study of freedom of the press in Korea showed that seventy-four percent of the FOI lawsuits in Korea up to the year 2001 arose when individuals challenged the denial of their information requests. The remaining fifteen lawsuits were initiated by public interest groups when they asked for judicial review of agencies' rejection of their informational access.[128] The author of the study concluded:

> The high percentage of individuals making FOI requests that information of private interest is more likely to be requested in South Korea than that of public interest. These private individuals tend to focus on agency records with little regard for the public good, creating a situation where the major public policy implications of FOI have largely been overshadowed by the actions of private individuals.[129]

128. See Kyu Ho Youm, Freedom of Expression and the Law: Rights and Responsibilities in South Korea, 38 STAN. J. INT'L L. 147, 148 (2002)

129. *Id*. In connection with private individuals and public interest groups' monopolization of FOI lawsuits in South Korea, it is useful to take a comparative look at the application of the FOIA in the United States. A leading treatise on U.S. administrative law noted: "Originally, it was thought that newspaper reporters and public interest groups would be the primary requesters. In fact, the vast majority of FOI requesters are private businesses or their lawyers, generally seeking information on their competitors. In 1981, one estimate was that only five percent of FOIA requests came from journalists, scholars, and authors combined. The rest came from businessmen or their representatives"; *See* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 627 (2nd ed. 2001). *See also* MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 616 (7th ed. 2005) (noting that "[t]he majority of these [FOIA] requests did not come from journalists or scholars, but rather from 'commercial use' requesters…. '[O]nly one out of every twenty FOIA requests were [sic] made by a journalist, scholar or author. In contrast, four out of five requests were made by business executives or their lawyers'" (quoting the General Accounting Office)). For an in-depth analysis of the "contemporary usage patterns" of FOIA in the United States, see Michael Doyle, *The Freedom of Information Act in Theory and Practice* (2001) (unpublished M.A. thesis, Johns Hopkins University) (on file with author).

The fee for FOI requests is relatively lower in Korea than other countries.[130] The low FOI fee seems to induce some people to abuse the FOI system by filing frivolous requests for information.[131] For example, prisoners frequently file FOI requests ostensibly to make complaints, with the real intention of harassing prison officers or for other questionable purposes. In 2008, for example, eighteen prisoners submitted 1,684 FOI requests concerning prison facilities and officers.[132] In response, the National Assembly revised the Administration and Treatment of Correctional Institution Inmates Act in 2010.[133] Now a prisoner may be required to pay in advance if the prisoner has "unjustifiably" withdrawn informal requests more than once during the current confinement or has failed to pay the FOI costs more than once during the confinement.[134] If there is no advance payment by the prisoner, the informational request may not be processed.[135] The Korean legislative approach to prisoners' FOI abuse is conceptually similar to one of the legal actions that Sandra Norman-Eady, the Connecticut Director of Legislative Research, has suggested government agencies should take in handling groundless FOI requests: "charge the maximum allowable fees for copies."[136]

SUMMARY AND CONCLUSION

The theoretical and conceptual framework of access to information as a right to know in South Korea is broad. As an individual value, it is intrinsic to a person's self-realization. At the same time, it is socially functional because it is related to a participatory democracy.

The Official Information Disclosure Act of Korea is more encompassing than the Freedom of Information Act of the United States. The Korean law applies to the three branches of the government while the FOIA is only

130. Seung-Tae Kim, *The Comparative Analysis on the Information Disclosure Act* (Korean), 10 HONGIK L. REV. 353, 383 (2009).

131. The FOI filing cost is generally 30 cents (300 Won) per copy of a record and free for a 1MB electronic file, http://www.open.go.kr/pa/info/openInst/chargeInfo.do (last visited Nov. 2, 2017).

132. Criminal Policy Research Institute, *Annual Report: Analysis on Prisoner's FOIA Request* (Korean) 63 (2009), http://www.prism.go.kr/homepage/researchCommon/retrieveResearchDetailPopup.do?research_id=1270000-200900003.

133. *Administration and Treatment of Correctional Institution Inmates Act* (Act No. 8728/2007) (S. Kor.).

134. *Id.*, Art. 117-2.

135. *Id.*

136. Sandra Normal-Eady, *Frivolous Requests for Records Under the Freedom of Information Act* (Apr. 1, 2004), https://www.cga.ct.gov/2004/rpt/2004-R-0369.htm (last visited Dec. 2, 2017).

limited to the executive branch. There are more similarities than differences between the Korean open records law and the FOIA in their exemptions.

There is no doubt that freedom of information is developing in Korea. It makes the Korean government growingly transparent and responsive to the public. The open records law is readily accepted by Korean courts as one of the foundational mechanisms for ensuring that their government will not retrogress to a rule *by* law. They consider that the law is firmly anchored to freedom of expression as a constitutional right. They even view it as a human right under the Universal Declaration of Human Rights.

Korean courts are increasingly willing to construe their information disclosure law within the context of their nation's liberal democratic principles. They are wary of the inhibiting impact of the disclosure exemptions on the citizens' use of the law. Hence, if the denials of the FOI requests are challenged in court, Korean judges now scrutinize the denials more searchingly. And they err, if they can, on the side of giving the benefit of the doubt to those who want to access government documents. Nonetheless, when national security information is at issue, courts seem to defer to the government's decision to withhold the information. The balancing test guides the Korean courts in applying FOI exemptions, but an increasing number of pro-access decisions lead the government agencies to desist from denying disclosure requests outright or cursorily.

When the right to information collides with freedom of the press for the broadcasting media, Korean courts give priorities to press freedom over informational access. This FOI interpretation should be viewed as the judicial sensitivity to the negative and positive concept of freedom of the press in Korea as a right. Regardless, the Official Information Disclosure Act and its judicial interpretations in Korea should serve as a useful frame of reference for those old and new FOI countries.

Circumventing Transparency: Extra-Legal Exemptions from Freedom of Information and Judicial Review in China

Yongxi Chen*

INTRODUCTION

The 2007 Regulation on Open Government Information (ROGI) established a right of access to information in China, thereby raising expectations that a freedom of information (FOI) regime is now established to increase transparency in a country with an ingrained culture of secrecy. [1] The general, and legally enforceable, right afforded by the ROGI was seen as having the potential to provide an unprecedented channel by which the public could monitor and check on the government. However, the old regimes, controlling the flow of information in the Chinese party-state, persist despite the regulation's entry into effect on May 1, 2008. The government bureaucracy has also designed measures to restrict the inconvenient effects of the ROGI. Together, these old regimes and administrative measures have exerted a considerable impact on the nascent right of access to information, but have largely been ignored by the scholarly literature. This article explores the complicated relation between the ROGI and the norms deriving from the various authorities with information control powers, and reviews the role of the Chinese courts in settling the conflicts therein and thus affecting the outcomes of transparency reform.

Settling conflicts between FOI law and secrecy norms is crucial to the realization of such law's potential to enhance democratic accountability. FOI law is significant primarily because it seeks to establish disclosure, as the rule, and non-disclosure as the exception. To ensure strict observance of that

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1. *Zhong Hua Ren Min Gong He Guo Zheng Fu Xin Xi Gong Kai Tiao Li* (中国人民共和国政府信息公开条例) [Regulation on Open Government Information] (promulgated by the St. Council, April 5, 2007, effective May 1, 2008) St. Council, April 24, 2007, at http://www.gov.cn/zwgk/2007-04/24/content_592937.htm (China).

rule, international think tanks have recommended a number of best practices for the making and enforcement of FOI laws, such as, providing a complete list of the types of information to be exempt from disclosure; other legislation should not be permitted to extend the exemptions created by FOI laws; and all legislation bearing on the withholding of government information should be interpreted in a manner consistent with the principles underlining the FOI laws.[2] Viewed in light of these recommended practices, the ROGI's effectiveness in improving transparency and accountability hinges on the extent to which the primacy of the disclosure requirements it mandates is guaranteed over secrecy norms, which in China are not limited to legal norms. Without comprehending the way in which the relation between various norms is handled, we cannot properly assess the protection afforded to the right to information, nor appreciate the real impacts of China's transparency reform and their implications for comparative legal or political studies of FOI.

Current legal studies of transparency in China tend to view the ROGI as the primary legislation governing the disclosure of information, and thus they often review the regulation's implementation and interpretation in isolation from the country's complex regulatory framework of information control. Similarly, evaluations from the social science perspective tend to focus on bureaucratic performance, with little concern for the legal validity of the grounds used to deny information access. Both lines of research have largely overlooked the norms that are generated by the party-state authorities in parallel with, or in the place of, the ROGI to exempt information from disclosure. From the legal point of view, these norms can be called "extra-legal norms" because they are generally not considered sources of law (or legal norms) under the Chinese legal system. Nevertheless, extra-legal norms are widely adhered to because of their political importance within the party-state governance structure. Uncertainties surrounding these extra-legal norms, however, cloud their applicability, rendering them difficult for the public to resolve conflicts between such norms and legal imperatives of disclosure.

Against this backdrop, this article investigates what solutions are available under the Chinese legal system for resolving conflicts of norms in the FOI context, as well as the extent to which the Chinese courts have enforced those solutions and offered a meaningful remedy to violations of the right to information. The remainder of the article is organized as follows.

2. *See* Toby Mendel, *Freedom Of Information: A Comparative Legal Survey*, 30 (UNESCO, 2nd ed., 2008), https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI_Toby_Mendel_book_%28Eng%29.pdf (citing to the analysis of best practices recommended by Art. 19 and endorsed by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression).

Section II (FOI Exemptions Based on Extra-Legal Norms) introduces the sources of FOI exemption following the ROGI's adoption and identifies three major categories of extra-legal exemptions that significantly restrict the scope of disclosure: (1) documents defining the specific scope of state secrets; (2) directives on the prior approval of information releases; and (3) ROGI implementation measures. It analyzes in depth the nature and validity of each in light of statutory law and legal doctrine on the hierarchy of law. Section III (Judicial Power in Controlling the Validity of Normative Documents) summarizes the judicial powers to scrutinize the validity of norms that contradict upper-level legal norms. Section IV (Judicial Control of Extra-legal Norms of Information Control) then examines, on the basis of representative cases, the judicial review of extra-legal exemptions that fall within categories one and three above but contradict either the ROGI or other laws. By identifying the gaps in the formal hierarchy of law and judicial failure to control invalid norms, the article reflects on how an otherwise promising legal reform in the direction of greater transparency has been impeded by the character of the party-state. Of particular interest is the outstanding issue of the control of extra-legal powers.

It should be noted that, corresponding to the dynamics of politics and law in China, this article combines doctrinal analysis with a legal realist investigation of court decisions. In particular, it examines sample cases that are representative of actual FOI litigation (i.e., judicial reviews of administrative decisions on FOI requests, often named OGI cases by the Chinese courts) for two main reasons. First, unlike in many other jurisdictions, China lacks landmark cases in the sense of establishing a new principle or creating an interpretation of law that the courts are bound to abide by in future. The Chinese judicial system does not follow the principle of *stare decisis*, and no court, including the Supreme People's Court (SPC), acts as the appellate court for all cases. Second, no authority publishes all of the judgments rendered by the thousands of local courts across this vast country without selection or amendments, and there is no comprehensive digest of or indices to Chinese judicial review cases.[3] Therefore, instead of relying on a select group of high-profile cases, this article collects sample cases from three sources.

The first source is the seven case collections published by the SPC, or compiled under its supervision. The cases in these collections are generally called "referential cases," and are widely considered by the Chinese legal community to reflect, to varying extents, the intentions of the SPC and its

3. See Yongxi Chen, *Transparency versus Stability: The New Role of Chinese Court in Upholding Freedom of Information*, 9 TSINGHUA CHINA L. REV. 79, 84-88 (2016) (hereinafter "*Chen, Transparency versus Stability*") (discussing in detail the peculiarities of China's appeal system, as well as issues concerning the publication of judgments).

departments in guiding local courts on the adjudication of a particular type of case or application of the law in a particular field. The second source is mainstream legal databases, including China Judgment Online, the official portal designated by the SPC to publish the judgments rendered by courts at various local levels, and ChinaLawInfo, the country's most comprehensive commercial database of cases. In addition to these two sources, which are often regarded as "primary sources" in legal studies, the third source is news reports on open government information (OGI) cases published in 170+ media outlets, including 152 newspapers, sixteen magazines, and four news websites. OGI cases reported by the media (hereinafter "media-reported cases") are more representative of the status of adjudication in two senses: first, they may encompass cases whose judgments are withheld from online publication by the courts for various discretionary reasons, including the political sensitivity or inconvenience of the case; second, they are more evenly distributed geographically than those retrieved from the aforementioned databases and SPC collections.

FOI EXEMPTIONS BASED ON EXTRA-LEGAL NORMS

(A) ROGI: Ambiguous Scope of Exemption

As general legislation governing public access to government information, the ROGI has two features that distance it from the common model of FOI law: First, its stress on an extensive scope of information subject to proactive disclosure and second, its lack of unequivocal exceptions to disclosure. Article 9 of the regulation provides that governments at the central and local levels, as well as their agencies, should disclose on their own initiative any information that "involves the vital interests of citizens" or "concerns issues which need to be extensively known or participated in by the public." [4] Articles 10 to 12 stipulate the minimum categories of information to be released by agencies at different levels. These categories largely cover the common classes of proactively released information under many FOI laws, including information on government organizations, planning, budgets, public procurement, and public services.[5] Furthermore, these three articles specify information pertaining to certain kinds of government activities that have repeatedly resulted in violations of personal or property rights and the otherwise unfair treatment of individuals over the past two decades (such as rural land-taking, urban housing demolition, the

4. For the common features of FOI law, *see* John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information L.*, 58 ADMIN. L. REV. 85 (2006).

5. Helen Darbishire, *Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities*, *in* THE WORLD BANK 21-22 (2010).

sale of collectively owned enterprises, and the implementation of family planning policies). The extensive scope of the ROGI's proactive disclosure obligation thus suggests an intention to enhance government accountability through transparency. However, the legal liability arising from noncompliance with these obligations is not stipulated.

The ROGI implicitly provides a right to request and obtain information, which constitutes the core of FOI law. Article 13 stipulates that, in addition to the information covered by Articles 9 through 12, citizens "may also, based on the special needs of such matters as their own production, livelihood and research, etc., file requests [to] obtain government information." Contrary to the best practices of FOI law, however, the ROGI does not outline an exhaustive list of exemptions, which is derived from several sources.[6] First, different parts of the ROGI contain exemption clauses that are usually grouped into a dedicated chapter in most FOI laws. For example, Article 14 prohibits agencies from disclosing information involving state secrets, and allows them to discretionarily withhold information on trade secrets and personal privacy. Further, Article 8 (under "General Provisions") provides that the "disclosure of government information shall not endanger national security, public security, economic security and social stability." All of the categories of information listed are left undefined. Second, as it is an administrative regulation, the ROGI must give way to laws promulgated by the National People's Congress (NPC) that contain secrecy requirements. For instance, the Archives Law (1996) seals documents stored in state archives for 30 years.[7] Government documents that are not exempt under the ROGI become inaccessible after being transferred to state archives, as confirmed by the judicial interpretations concerning OGI case trials issued by the SPC.[8] Last, but by no means least, information control measures are further provided under norms that are distinct from laws and the ROGI. Among them, "extra-legal norms," i.e., norms not considered sources of law, create the most problematic exemptions.

6. *See* Mendel, *supra* note 2, at 34-37, 39-40.

7. *Danan Fa* (档案法) [Archives Law] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 1987, effective on July 5, 1996), Art. 19, 1995 STANDING COMM. NAT'L PEOPLE'S CONG. (China).

8. *Zuigao Renmin Fayuan Guanyu Shenli Zhengfu Xinxi Gongkai Xingzheng AnJian Ruogan Wenti de Guiding* (最高人民法院关于审理政府信息公开行政案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Relating to the Trial of Administrative Cases Concerning Open Government Information] (promulgated by Sup. People's Ct., July 29, 2011, effective August 13, 2011) Art. 7(2), 2011, SUP. PEOPLE'S CT. GAZ. (China).

(B) Extra-Legal Norms for Information Control

In view of the variety of extra-legal norms, they are here divided into two groups for ease of analysis. The first group comprises norms explicitly referred to by the ROGI as "relevant provisions of the State." They usually regulate secrecy- rather than disclosure-related issues. The most prominent norms in this group are guidelines defining the scope of state secrets and directives on censorship of the news. The second group of norms seek to regulate OGI issues that complement (or, more precisely, restrict) the ROGI, a typical example of which are ROGI implementation measures. To examine the legal force of extra-legal norms (the "relevant provisions of the State" in particular) and the remedies for conflicts between such norms and the law, an understanding of several concepts used by the Chinese legal doctrine pertaining to the hierarchy of law is required.

1. "Provisions of the State," Guizhang, and "Normative Documents"

The ROGI allows agencies to follow the relevant provisions of the State that require information releases to be approved by the designated authorities. Such provisions revolve around two mechanisms that connect the OGI regime to the pre-existing regimes of information control. Under Article 7(2), the mechanism of "coordinated release" introduces arrangements for news censorship among others. Under Article 14(2), the mechanism of "secrecy examination" brings in the complicated standards of and comprehensive procedures for classification. The subject matter of the two groups of "provisions of the State" is summarized in Table 1, and the nature of those provisions deserve a detailed analysis.

Table 1. "Provisions of the State" referred to by the ROGI

ROGI	Norms referred to	Matters covered	Mechanisms concerned
Art. 7(2)	"Relevant provisions of the State"	release of information subject to prior approval [by authorities]	coordinated release
Art. 14(2)	Laws, regulations and "relevant provisions of the State"	state secrets; submissions of information to relevant government agencies for determination when uncertainties arise concerning whether the information can be disclosed	Secrecy examination

The phrase "provisions of the State" appears frequently in Chinese legislation, and is used mainly for the purpose of making the legislation in question succinct and complementing the stipulated rules with relevant (and supposedly more detailed) norms set elsewhere.[9] However, the nature and scope of such provisions remain obscure, rendering it difficult to identify the specific provisions to which legislators are referring and to ascertain their legal force.[10] In practice, provisions of the State are often understood as norms set by the administrative authorities, consisting primarily of *guizhang* and other normative documents.[11]

9. Ruicong Xia (夏瑞聪), *Woguo "Guojia Youguan Guiding" Guiding de Lifa Wanshan* (我国"国家有关规定"规定的立法完善) [On Enhancing the Legislation Concerning The "Relevant Provisions of the State" in China], NO. 3 J. GUIZHOU POLICE COLLEGE C. (贵州警官职业学院学报) 69, 71-72 (2008).

10. *Id.*

11. *Id.*

Under Chinese law, *guizhang* (sometimes translated as "administrative rules") are rules issued by governments at prescribed levels to regulate administrative matters in their respective jurisdictions or to implement laws, administrative regulations, and local regulations.[12] The enactment of *guizhang* should follow statutory procedures.[13] *Guizhang* are considered a source of law lying at the lowest level of the hierarchy of law, with legal force weaker than that of a law (adopted by the NPC and its Standing Committee), administrative regulation (made by the State Council), or local regulation (adopted by a local People's Congress).[14] *Guizhang* are further divided into departmental *guizhang*, which are set by departments of the State Council, and local government *guizhang*, which are set by governments at the provincial and (selected) municipal levels.[15]

Guizhang have a clear legal status, whereas "normative documents" constitute a doctrinal concept without statutorily defined boundaries. The latter refer to all kinds of norms issued by the administrative authorities that have a general binding effect on private parties.[16] Given the complexity and extensive nature of government affairs, there is an extremely large quantity of normative documents that vary widely in their forms, purposes, and enacting bodies. Their enactment does not necessarily follow statutory procedures.[17] Given the considerable latitude afforded to various bodies in norm-making, normative documents are plagued by the illegitimate pursuit of self-interest. Many such documents are found to contradict the law or unreasonably constrain the rights of private parties.[18] According to Chinese administrative law doctrine, normative documents are excluded from sources

12. *Lifa fa* (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., March 15, 2000, effective July 1, 2000) Art.82, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

13. *GuiZhang Zhiding Chengxu Tiaoli* (规章制定程序条例) [Regulation on the Procedures for Making *Guizhang*] (promulgated by St. Council, November 16, 2001, effective January 1, 2002), 2001 ST. COUNCIL GAZ 322, http://www.gov.cn/gongbao/content/2002/content_61556.htm (China).

14. Mingan Jiang (姜明安), *Xingzhengfa Yu Xingzhengsusongfa* (行政法与行政诉讼法) [Administrative Law and Administrative Litigation Law] 56 (Li Xia (李霞) ed., 5th ed., 2011) (hereinafter "Jiang, Administrative Law and Administrative Litigation Law").

15. *Id.* at 56; *see also Lifa fa* (立法法) [Law on Legislation] Arts. 88-89.

16. Jiang, Administrative Law and Administrative Litigation Law, *supra* note 14, at 176.

17. Haibo He (何海波), *Xingzheng Susongfa* (行政诉讼法) [Administrative Litigation Law], 96 2nd ed. 2016.

18. SPC justices and leading administrative scholars acknowledge that the issue of illegality has persisted in the making of normative documents across the nation. *See* Jiang Bixin (江必新) & Liang Fengyun (梁凤云), *XingZheng Susongfa Lilun Yu Shiwu* (行政诉讼法理论与实务) [Theories and Practices on Administrative Litigation Law] 1061-64 (2nd ed. 2011); Jiang, Administrative Law and Administrative Litigation Law, *supra* 14, at 177; Haibo, *supra* note 17, at 96.

of law, which means that their legal force is weaker than that of *guizhang*.[19] They nevertheless have strong practical force because government agencies are inclined to rely on them directly in making decisions. Furthermore, because enacting bodies differ greatly in terms of their political and administrative authority, the practical force of the normative documents they issue differs correspondingly within the administrative system.[20]

Pursuant to the hierarchy of law, the ROGI has stronger legal force than both *guizhang* and normative documents, and it should thus prevail when inconsistent with the latter. However, by instructing government agencies to refer to the "relevant provisions of the State," which may by nature be *guizhang* or normative documents, the ROGI subordinates its disclosure imperatives to the secrecy requirements imposed by inferior norms. In this regard, the hierarchy of law is circumvented, with provisions of the State generally applicable unless they contradict laws and administrative regulations other than the ROGI.

It is noteworthy that "provisions of the State" may not be limited to administrative norms. It is unclear whether the scope of "State" here encompasses state organs other than the government, such as the courts, Procuratorates, and People's Congresses.[21] A further question, whose answer is less apparent than it seems, is whether the "State" can be understood as the combination of the government and ruling party, and whether the purview of state provisions therefore extends to rules created by the Chinese Communist Party (CCP). The CCP officially declared the principle of the "separation of the party from the government" in the late 1980s, and the government system has since exercised administrative powers on its own and gradually adhered to the principle of law-based administration. However, the CCP and its organs still exercise powers in formulating policies and regulating social relations, and such powers may be considered to fall within the jurisdiction of the government (or even legislature) in non-party-state countries. This phenomenon is rarely addressed in mainstream Chinese administrative law doctrine that presumes the government's exclusive enjoyment of administrative power. As the CCP has long regarded information control as important to the maintenance of the socialist regime, it has been directly involved in regulating the flow of information and generating regulatory norms. Insofar as those norms are concurrently set by the government (the

19. Jiang, Administrative Law and Administrative Litigation Law, *supra* note 14, at 180, 383.

20. Mang Zhu (朱芒), *Lun Xingzheng Guiding de Xingzhi – Cong Xingzheng Guifan Tixi Jiaodu de Dingwei* (论行政规定的性质——从行政规范体系角度的定位) [On the Nature of Administrative Provisions: From the Perspective of the System of Administrative Norms], No.1 CHINA L. SCI. (中国法学) 33, 37 (2003).

21. It is also unclear whether the "State" here refers only to central-level state organs (in particular the State Council and its departments) or also includes local-level public bodies that exercise state powers.

administrative branch of the State), they may be considered to fall within the purview of "provisions of the State." Two kinds of state provisions reflect the sharing of norm-making power between the ruling party and government in China, as analyzed below.

2. State Provisions on Classification

"State secrets" is the foremost category of information that is exempt from disclosure under the ROGI, although the category is principally governed by the Law on Guarding State Secrets (LGSS). Despite amendments to the LGSS in 2010 and passage of the Implementation Regulation of the LGSS in 2014, the confines of state secrets remain ill-defined and expandable to concealing information on the vital interests of citizens. The 2010 LGSS retains the old law's definition of state secrets, providing for only one substantive element in determining what constitutes a state secret: matters involving "the security and interests of the State whose divulgence may jeopardize state security and interests in the areas of politics, economy, defense, foreign relations, etc."[22] That element has a much broader meaning than that of "national security interests," which acts as the basis for classification in many countries, because the "interests of the State" exist in virtually everything that sustains the State.[23] Corresponding to this catch-all definition, the LGSS enumerates six broad categories of matters that can be classified, encompassing not only national defense, foreign affairs, and criminal investigations, but also domains more closely linked to private interests, such as economic and social development and science and technology.[24] Secret matters of political parties falling into the aforementioned categories can also be identified as state secrets.[25] The LGSS entrusts the State Administration for Guarding State Secrets (SAGSS) to create additional categories of classifiable matters.[26] It also empowers the SAGSS, together with other relevant organs of the central government and CCP, to formulate provisions governing "the specific scope of state secrets [under each category] and the respective levels of classification."[27] Given the lack of operable standards for classification under the LGSS and its

22. *Baoshou Guojia Mimi Fa* (保守国家秘密法) [Law on Guarding State Secrets] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 1988, amended April 29, 2010, effective October 1, 2010) Art. 2, 1988 STANDING COMM. NAT'L PEOPLE'S CONG GAZ (China) (hereinafter "Law on Guarding State Secrets").

23. *See*, for example, David Banisar, *Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States* 15-17 (2007).

24. Law on Guarding State Secrets, *supra* note 22, at Art. 9(1)(a)-(f).

25. *Id.* at Art. 9(2).

26. *Id.* at Art. 9(1)(g).

27. *Id.* at Art. 11.

Implementation Regulation, these clauses grant the SAGSS almost unfettered discretion in determining the normative scope of state secrets.

As of 2011, the SAGSS, together with other organs, had issued over ninety documents concerning the specific scope of state secrets in various areas of work (usually called the Scope of Classified Matters) and covering almost every type of government function.[28] These documents are the most important classification standards because, by convention, state organs cite them as the principal legal basis for their classification decisions.[29] Although rarely questioned in practice, the legal nature of the Scope of Classified Matters is obscure because of the dual status of the SAGSS. The SAGSS is concurrently the Office of the CCP's Central Secrecy Commission and the bureau in charge of secrecy under the State Council, but is organizationally administered within the CCP's central-level system.[30] This unique way of functioning indicates the merger of party power with the State's administrative power, which also exists in certain other areas (such as the supervision of party and state officials, administration of the military, and archive administration) and is usually labeled "one institution [with] two names." Similarly, the state secrecy agencies at the local level are simultaneously party organs and government agencies.[31] This dual status

28. *See* Luo Jianghuai (罗江淮), *Jianli Yange, Zhoumi, Kexue de Guojia Mimi Dingmi Jizhi* (建立严格、周密、科学的国家秘密定密机制) [Establishing A Strict, Thorough and Scientific Mechanism of Determining State Secrets], No. 6 SCI. AND TECH. FOR GUARDING ST. SECRETS (保密科学技术), 30 (2011). Some of the *Scope* is itself classified. The covered areas of work include not only national security, defense, and agency personnel management, but also the enforcement of law (e.g., the work of the courts and police) and regulation of industries and businesses (e.g., shipbuilding, forestry, tourism, railways). They even extend to the provision of public services (e.g., education, health, family planning, environmental protection, disaster relief, social security, sports, culture, etc.); *See* YONGXI CHEN, AN EMPTY PROMISE OF FREEDOM OF INFORMATION? ASSESSING THE LEGISLATIVE AND JUDICIAL PROTECTION OF THE RIGHT OF ACCESS TO GOVERNMENT INFORMATION IN CHINA, 186-87 (2013) (unpublished Ph.D. Thesis, The University of Hong Kong) (hereinafter "Chen, An Empty Promise of Freedom of Information?").

29. Qi Sun (孙琦), *Baomi Shixiang Fanwei Zhiding Gongzuo Zhong de Jige Wenti* (保密事项范围制定修订工作中的几个问题) [Certain Issues concerning the Work of Determining and Amending the Scope of Secret Matters], No. 7 WORK OF GUARDING STATE SECRETS (保密工作), 26 (2011); WRITING GROUP, GUIDEBOOK FOR SECRECY EXAMINATION IN OPEN GOVERNMENT INFORMATION (信息公开保密审查工作手册) 78 (2009) (Most contributors to this guidebook are working staff of the SAGSS.)

30. *See* SCOPSR, *Guowuyuan Jigou* (国务院机构) [Organs of the State Council] (2017), http://www.scopsr.gov.cn/zlzx/jggk/gwyjg/index.html (China) (The nature, function, and internal structure and positions of each state organ (and party organ) are determined by the Central Commission for Institutional Establishment, which itself is jointly established by the CCP Central Committee and the State Council).

31. *Shanghaishi Guojia Baomi Ju* (上海市国家保密局) [Shanghai State Administration for Guarding State Secrets], *Zhonggong Shanghai Shiwei Baomi Weiyuanhui Bangongshi (Shanghaishi Guojia Baomi Ju) Jigou Ji Zhineng* (中共上海市委保密委员会办公室（上海市国家保密局）机构及职能) [The Institution and Functions of the Secrecy Commission Office of the CCP Shanghai

prompts the question of whether the activities of state secrecy agencies constitute administrative activities that should be governed exclusively by administrative law.[32] As that question remains outstanding in legal doctrine, and as judges deem themselves not legally authorized to review the decisions of party organs, the courts refuse to hear challenges to the classification decisions made by state secrecy agencies.[33] It is also unclear whether norms set by the SAGSS are administrative norms, particularly because many of the provisions under the Scope of Classified Matters (hereinafter "the Scope"), as well as those under other SAGSS norms regarding the conditions and procedures for classification, apply to both state and party organs.[34] In the same way that the state agencies in charge of secrecy are not purely administrative authorities, provisions under the Scope can be regarded as provisions of the State that go beyond administrative norms and bear the characteristics of political norms set by the ruling party.

However, it is reasonable to recognize certain provisions under the Scope as administrative norms, insofar as such provisions cover only matters of the government. They result from the joint exercise of the norm-making power of State Council departments and the SAGSS in their respective capacities as administrative authorities. In this regard, provisions under the Scope so prescribed are either *guizhang* or normative documents, depending on whether their issuance has followed the statutory procedures for *guizhang*-making. The validity of such provisions also hinges on their compatibility with laws and administrative regulations.

The provisions of the State concerning classification are not limited to the Scope, and many classification standards under its auspices remain vague and malleable.[35] Hence, some departments of the State Council have issued

Committee (Shanghai State Administration for Guarding State Secrets)] (2014), http://www.shbmj.gov.cn/bmj/2013bmj/jgzn/jggk/u1a812.html (China).

32. *See* Hanhua Zhou (周汉华), *"Baoshou Guojia Mimifa" Xiugai Suping* (《保守国家秘密法》修改述评) [A Commentary on the Amendment of the Law on Guarding State Secrets], No. 3 JURISTS REVIEW (法学家) 51 (2010) (On the unsettled debate over the legal nature of the SAGSS); Lei Zheng (郑磊), *Lunding Mishouquan de Guifan Neihan* (论定密授权的规范内涵) [On the Connotations of the Norms Concerning the Authorization of Classification Power], NO.10 LEGAL SCIENCE (法学) 118, 125-26 (2013).

33. Lei, *supra* note 32, at 125; Dong Gao (董皞) & Wang Lingguang (王凌光), *Shilun Dingmi Zhenyi Zhi Jiejue* (试论定密争议之解决) [On Resolving Disputes over Classifications], NO. 3 ADMINISTRATIVE LAW JOURNAL 108-09 (行政法学研究) (2016).

34. *E.g.*, *Guojia Mimi Dingmi Guanli Zanxing Guiding* (国家秘密定密管理暂行规) [Interim Provisions on Determination of State Secrets] (promulgated by St. Secret Admin., March 9, 2014, effective March 9, 2014) Art. 44, 2014 ST. SECRET ADMIN. GAZ. 1 (China) (stipulating that the "central-level State organs" and "provincial-level organs" provided under this Provisions include, respectively, CCP organs at the central level and CCP provincial committees).

35. *See* Chen, An Empty Promise of Freedom of Information?, *supra* note 28, at 188-96. Most of the Scope standards provide for categories of "work secrets" in parallel with the categories of "state secrets," and mandate the non-disclosure of information identified as the former. Although

complementary measures,[36] and it is not rare for local government agencies to issue detailed guidelines to implement the Scope in their respective jurisdictions.[37] When such measures or guidelines are repeatedly applied with binding effects in the administrative system, they become normative documents that are of no less practical importance than the Scope, and they often exert a direct impact on the disclosure of information. Their validity is thus an important issue, and is discussed below in the section on judicial review.

3. State Provisions on Prior Approval

Whereas the provisions of the State concerning classification mainly derive from central-level agencies, the SAGSS in particular, the provisions concerning the prior approval of information release come from more diverse sources. Article 7(2) of the ROGI requires government agencies to follow the "provisions of the State," according to which the release of prescribed information should be approved in advance. Article 7(1) provides that when the information to be released involves other agencies, the confirmation of those agencies is required prior to information release to ensure the "accuracy and consistency" of the information released by different agencies. To illustrate state provisions, the ROGI drafters listed several laws and administrative regulations that designate specific authorities to examine and approve the release of critical statistics, such as those pertaining to economic censuses, plans for the prevention of geological hazards, and the surveying

the formulation of such provisions lacks statutory authorization from the LGSS, the Law on Civil Servants and several other administrative regulations stipulate that civil servants should guard work secrets. The nature of work secrets and their relation to the "provisions of the State" on classification are important issues to be discussed elsewhere because of the word limit for this paper. *See* Liang Yi (梁艺), *Gongzuo Mimi Buyu Gongkai de Hefaxing Fansi* (工作秘密不予公开的合法性反思) [Reflections on the Legality of Prohibitions on Disclosing Work Secrets], NO.2 PRESENT-DAY LEGAL SCIENCE (时代法学) 48, 48-55 (2015).

36. For example, in relation to the Specific Scope of State Secrets and the Respective Levels of Classification in the Work of Family Planning, jointly issued by the SAGSS and State Commission for Family Planning in 1989, the Commission issued Complementary Provisions in the same year; *See Zhonghua Renmin Gongheguo Baomifa Quanshu* (中华人民共和国保密法全书) [The Complete Companion for PRC Secrecy Law], 368 (Zhidong Li (李志东) & Wenxiang Tan (檀文) eds., 1999).

37. *See* Sun, *supra* note 29, at 27. A rather interesting example is the provisions jointly issued by the General Office of the CCP Jiangsu Provincial Committee and General Office of the Jiangsu Provincial Government stipulating the procedures for and substantive conditions concerning "secrecy examination" for both party organs and government agencies; *See Jiangsushen Dangzheng JiGuan Xinxi Gongkai Baomi Shencha Guiding* (江苏省党政机关信息公开保密审查规定) [Jiangsu Provisions on the Secrecy Examination in Relation to the Disclosure of Information by Party and Government Organs] (promulgated by Jiangsushen Guojia Baomiju, September 29, 2015, effective on May 1, 2008) St. Gov. Jingjiang (China).

and mapping of the sea.[38] In fact, a greater number of the provisions are created primarily for the purposes of media control and propaganda.

The requirements under Article 7 should be understood in light of two other ROGI articles. For example, Article 6 establishes the principle of the "accurate disclosure of information" and urges government agencies to release accurate information to clarify a given situation if they "discover false or incomplete information that affects or might affect social stability or disturb the social management order."[39] In fact, both Articles 6 and 7 echo the government's duty to proactively select and release certain information for the purpose of scotching rumors in times of emergency under the laws concerning emergency response, but they extend that duty to non-emergency contexts.[40] Article 8 of the ROGI provides that the disclosure of information shall not endanger social stability. As the concepts of accuracy and social stability are left undefined, the three articles when read together reflect an inclination toward propaganda and censorship. They encourage government agencies to utilize information disclosure to influence public opinion and maintain "social stability" that they themselves discretionally define.[41]

Concerning the prior examination of news releases, a prominent type of "provisions of the State" are documents created by the State Council or its departments to implement the Emergency Response Law, i.e., contingency plans that prepare government agencies to deal with unexpected events that

38. *Quanguo Jingji Pucha Tiaoli* (全国经济普查条例) [Regulation on National Economic Census] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 2004, effective September 5, 2004) Art. 30, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 415 (China); *Dizhi Zaihai Fangzhi Tiaoli* (地质灾害防治条例) [Regulation on the Prevention and Control of Geologic Disasters] (promulgated by the Standing Comm. Nat'l People's Cong., November 24, 2003, effective March 1, 2004) Art. 11, 2003 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 394 (China); *see* Kangtai Cao (曹康泰)& Qiong Zhang(张穹), *Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli Duben* (中华人民共和国政府信息公开条例读本) [Annotations on the PRC Regulation on Open Government Information] 49-50 (2009). The relevant legal provisions are found in Cehuifa (测绘法) [Law on Surveying and Mapping] (promulgated by the Standing Comm. Nat'l People's Cong., December 28, 1992, amended April 27, 2017) Art.7, 32, 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

39. *Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli* (中华人民共和国政府信息公开条例) [Regulation on Open Government Information] (promulgated by the Standing Comm. Nat'l People's Cong., April 5, 2007, effective March 1, 2008) Art. 6, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 492 (China).

40. *See Zhonghua Renmin Gongheguo Tufa Shijian Yingduifa* (中华人民共和国突发事件应对法) [Emergency Response Law] (promulgated by the Standing Comm. Nat'l People's Cong., August 30, 2007, effective November 1, 2007) Art. 10, 43, 53, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 69 (China) (Art. 53 stresses that the government responsible for handling the emergency concerned should release information on the situation and responsive operations in a "unified, accurate and timely" manner). On the close relation between this ROGI requirement and a variety of similar requirements under the emergency response regime, *see* Cao & Zhang, *supra* note 38, at 45-47

41. *See* Chen, *Transparency versus Stability*, *supra* note 3, at 79-138 (detailing the agencies' extensive and abusive use of the exemption concerning social stability).

may cause serious social damage, including natural or accidental disasters and public health or social safety incidents.[42] Although they are called "plans," many vest the authorities with certain powers and impose obligations on private bodies, notwithstanding their lack of statutory authorization, primarily because the existing legislation fails to address the strong practical need for power distribution and obligation setting.[43] Some national contingency plans designate one particular authority to release information, thereby preventing the citizenry from obtaining "inaccurate" information from the various agencies involved in the emergency response. For instance, the Inter-Ministerial Conference of Environmental Protection has been appointed as the sole authority to release information on environmental emergencies,[44] and the Ministry of Railways is exclusively charged with disseminating information pertaining to serious railway accidents.[45]

More importantly, the authorities concerned are usually required to release only information that meets various standards of political appropriateness. Because those standards embody the propaganda line and policies of the CCP, they are often issued by the party organs in tandem with the government. In its State Contingency Plan for News Releases about Public Emergencies, the General Office of the State Council (GOSC) stresses that the release of information should facilitate the handling of emergencies.[46] In a related move, the General Office of the CCP Central

42. *Zhonghua Renmin Gongheguo Tufa Shijian Yingduifa* (中华人民共和国突发事件应对) [Emergency Response Law], Art. 3 (as of the end of 2011, contingency plans had been issued by all provincial and prefectural governments and 98% of county-level governments, in addition to over a hundred general or special plans at the national level); *See* Zhixi Liu (刘志欣), *Zhengfu Yingji Yuan XIaoli Dingwei Yanjiu* (政府应急预案效力定位研究) [On the Legal Effect of Government Contingency Plan], 29 (2) J. CATASTROPHOLOGY (灾害学) 154 (2014).

43. *See* Hongchao Lin (林鸿潮), *Lun Yingji Yuan de Xingzhi He Xiaoli* (论应急预案的性质和效) [On the Nature and Legal Effect of Government Contingency Plan], No.2 JURIST REV. (法学家) 22, 24-28 (2009) (discussing the study of 18 national-level special contingency plans and 31 provincial-level general contingency plans); *see also* Liu, *supra* note 42, at 155 (discussing the provisions in various contingency plans that create powers or impose obligations).

44. *Guojia Tufa Huanjing Shijian Yingji Yuan* (国家突发环境事件应急预案) [State Contingency Plan for Environmental] (promulgated by the St. Council., December 29, 2014, effective December 29, 2014) Sec. 4.6, 2014 ST. COUNCIL GAZ. 119 (China).

45. *Guojia Chuzhi Tielu Xingche Shigu Yingji Yuan* (国家处置铁路行车事故应急预案) [State Contingency Plan for Environmental] (promulgated by the St. Council., January 23, 2016, effective January 23, 2016) Sec. 4.11, 2006 ST. COUNCIL GAZ. (China).

46. *Guojia Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (国家突发公共事件新闻发布应急预案) [State Contingency Plan for Press Release about Public Emergencies] GOSC (2005) (the full text of the plan is not publicly available); *See* Hong Lei (宏磊) & Tan Zhen (谭震), *Zai Diyi Shijian Qiangzhan Yulunzhi Gaodian ——Guowuyuan Xinwenban Fuzhuren Wangguoqing Tan Xinwen Fayanren Zhidu* (在第一时间抢占舆论制高点——国务院新闻办副主任王国庆谈新闻发言人制度) [Grabbing the Commanding Height of Public Opinion As Soon As Possible], 10 INT'L COMMUNICATIONS (对外大传播) 6-13, 19 (2005). The plan evolved from a directive issued by the

Committee and the GOSC jointly issued Contingency Measures for News Reporting on Public Emergencies, which establishes principles on the control of news releases and the guidance of public opinion.[47] Based on these two central-level documents, a multitude of contingency plans concerning the release of information have been formulated by governments at various levels,[48] often accompanied by restrictive measures jointly issued by governments and party committees at the same level.[49] Certain local plans concerning public security emergencies or so-called "mass events" provide for special arrangements.[50] A common requirement of these local norms is

Propaganda Department of the CCP Central Committee, namely, *Gaijin he Jiaqiang Guonei Tufa Shijian Xinwen Baodao Gongzuo de Ruogan Guiding* (改进和加强国内突发事件新闻报道工作的若干规定) [Several Provisions on Improving and Reinforcing the Work of News Reporting on Domestic Emergencies], Wenhua Yu Xuanchuan (文化与宣传) (Cultural Educ.) (2003).

47. *Tufa Gonggong Shijian Xinwen Baodao Yingji Banfa* (突发公共事件新闻报道应急办) [Contingency Measures for News Reporting on Public Emergencies] 2008 ST. COUNCIL GAZ. (China) (the full text is not publicly available); *see* Canfa Wang (王灿发); *Dangbao Ruhe Zuohao Tufa Shijian de Yulun Yingdao* (党报如何做好突发事件的舆论引导) [How Should Party Organs Guide Well the Public Opinion on Emergencies] No. 27 PEOPLE'S TRIBUNE (人民论坛) (2012).

48. *Xianshi Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (西安市突发公共事件新闻发布应急预案) [Xi'an City Contingency Plan for Press Release about Public Emergencies] (promulgated by the City Comm. Xi'an, October 24, 2007) 2007 CITY COMM. XI'AN GAZ. (China*); Xianshi Changanqu Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (西安市长安区突发公共事件新闻发布应急预案) [Xi'an City Contingency Plan for Press Release about Public Emergencies] (promulgated by the Police Dep't. Xi'an, April 14, 2014) 2014 POLICE DEP'T. XI'AN (China); *see, e.g.*, *Shanxishen Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (陕西省突发公共事件新闻发布应急预案) [Shaanxi Provincial Contingency Plan for Press Release about Public Emergencies] (promulgated by the People's Gov't. Shanxi Province, August 28, 2006) 2006 PEOPLE'S GOV'T. SHANXI PROVINCE GAZ. (China) (discussing the hierarchy of contingency plans in Shaanxi province, which were issued by governments at the provincial, prefectural, and district level).

49. *Changdeshi Renmin Zhengfu Guanyu Yingfa <Changdeshi Renmin Zhengfu Tufa Shijian Xinwen Baodao Shishi Fangan> de Tongzhi* (常德市人民政府办公室关于印发<常德市突发公共事件新闻报道实施方案>的通知) [Notice of The General Office of CCP Changde City Committee and The General Office of Changde City Government on Circulating Changde City Contingency Measures for News Reporting on Public Emergencies] (promulgated by City Council Changde, May 23, 2017) Art. 3.4, 2017 CITY COUNCIL CHANGDE GAZ. 11 (China); *Changdeshi Renmin Zhengfu Tufa Gonggong Shijian Xinwen Baodao Yingji Yuan* (常德市突发公共事件新闻发布应急预案) [Changde City Contingency Plan for News Release about Public Emergencies] (promulgated by the City Council Changde, June 12, 2015) 2015 CITY COUNCIL CHANGE GAZ. (China); *see, e.g.*, Hunanshen Renmin Zhengfu Guanyu Yingfa <Hunanshen Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan> de Tongzhi (湖南省人民政府办公厅关于印发<湖南省突发公共事件新闻报道实施方案>的通知) [Notice of The General Office of CCP Hunan Provincial Committee and The General Office of Hunan Provincial Government on Circulating Hunan Provincial Contingency Measures for News Reporting on Public Emergencies] (promulgated by the People's Gov't. Hunan Province, November 8, 2006, effective November 8, 2006) 2006 PEOPLE GOV'T. HUNAN PROVINCE GAZ. 29 (China); *Hunanshen Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (湖南省突发公共事件新闻发布应急预案) [Hunan Provincial Contingency Plan for News Release about Public Emergencies] (promulgated by the People's Gov't. Hunan Province, July 7, 2008) 2008 PEOPLE'S GOV'T HUNAN PROVINCE (China).

50. See*, e.g.*, *Zhoushanshi Daguimoxing Shijian Yingji Yuan* (舟山市大规模群体性事件应急预案) [Zhoushan City Contingency Plan for Large-scale Mass Incidents] Sec. 5.4 (2008) ("mass

the submission of information for prior examination by high-level officials, invariably including leaders of the CCP propaganda department.[51] Thresholds are also often set concerning the entities (usually media outlets) that can request and collect information on the spot.[52] In practice, press conferences are often the sole means of releasing information, as they afford more direct control over the scope of disclosure.[53] Therefore, through the channel of contingency plans, a dual-track censorship system has been imported into the emergency information disclosure arena. That dual-track system contains not only state agency orders, which are ostensibly based on legislation, but also, and especially, party organ directives that have strong de facto binding force on media organizations.[54] Paradoxically enough, in the emergency context in which the public expects greater access to government

incident" is a term generally adopted by Chinese officials to refer to an activity that is undertaken by a number of persons within a limited timeframe and area to express their discontent over or make claims concerning specific subject matter and that affects social order to varying degrees; in political and legal discourse in mainland China, the term alludes to collective resistance against local authorities); *see* Shizheng Feng (冯仕政), *Shehui Chongtu, Guojia Zhili yu "Quantixing Shijian" Gainian de Yansheng* (社会冲突、国家治理与"群体性事件"概念的演生) [Conceptualizing Public Disorder: State and the Emergence and Evolution of "Mass Incidents" in China], 5 SOC. STUD. (社会学研究) 63, 77-85 (2015).

51. *Fenghuashi Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (奉化市突发公共事件新闻发布应急预案) [Fenghua City Contingency Plan for News Release about Public Emergencies] (promulgated by the People's Gov't Fenghua, October 14, 2014) Sec. 5, 2014 PEOPLE'S GOV'T FENGHUA GAZ. 120 (China); *see, e.g.*, *Abazhou Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (阿坝州突发公共事件新闻发布应急预案) [Aba Autonomous Prefectural Contingency Plan for News Release about Public Emergencies] (promulgated by the People's Gov't. Abazhou, September 2, 2009) Pt. IV(i), PEOPLE'S GOV'T ABAZHOU GAZ. (China).

52. *Anshunshi Tufa Gonggong Xinwen Shijian Xinwen Fabu Yingji Yuan* (安顺市突发公共事件新闻发布应急预案) [Anshun City Contingency Plan for News Release about Public Emergencies] (promulgated by the People's Gov't. Anshun City, February 28, 2017) Pt. V (iii), PEOPLE'S GOV'T ANSHUN CITY GAZ. (China); *Quanzhoushi Wenhua Guangdian Xinwen Chubanju Guanyu Jinyibu Chongshen XuanChuan "Sanbao" Zhidu de Tongzhi* (泉州市文化广电新闻出版局关于进一步重申宣传管理泉州市文化广电新闻出版局关于进一步重申宣传管理"三报"制度的通知) [Notice of Quanzhou City Bureau for Culture, Broadcasting, Press and Publication on Re-stressing the System of Three Reports "to Superior Authorities for Approval" in Propaganda Management] (promulgated by the Press and Publication Bureau, June 24, 2013) Pt. I (i), 2013 PRESS AND PUBLICATION BUREAU GAZ. 205 (China); see*, e.g.*, *Kailuxian Tufa Gonggong Shijian Xinwen Baodao Shishi Fangan* (开鲁县突发公共事件新闻报道实施方案) [Kailu County Contingency Measures for News Reporting on Public Emergencies] (promulgated by the People's Gov't Kailu County, April 30, 2015, effective July 1, 2013) Art. 3.8, 2015 PEOPLE'S GOV'T KAILU COUNTY GAZ. (China).

53. Ye Hao (叶皓), *Tufa shijian de Yulun Yingdao* (突发事件的舆论引导) [Guiding Public Opinion about Emergencies] 163-76 (2009).

54. Weiwei Liu (劉偉偉), Politics, *Zhengzhi, Shichang Yu Dangbao de Yingxiangli* (政治, 市場與黨報的影響力) [Market and the Influence of Party Organs], 10 TWENTY-FIRST CENTURY (二十一世紀) 121, 121-27 (2009); *see* ROGIER CREEMERS, ROUTLEDGE HANDBOOK OF MEDIA LAW: MEDIA CONTROL WITH CHINESE CHARACTERISTICS, 275-78 (Monroe E. Price, Stefaan G. Verhulst*, et al.*, *ed*., 2013) (discussing the dual-track system).

information, it is often able to obtain less information than in the non-emergency context because of the contingency plans referred to by the ROGI.

Similar to the uncertainty over the legal nature of the Scope provisions issued by the SAGSS with dual status, confusion clouds the legal nature of contingency plans that are jointly issued by party committees and governments at various levels.[55] Insofar as those plans are formulated by the latter in exercising their administrative power, they can arguably be regarded as administrative norms with the qualification of "normative documents." From a legal point of view, provisions in any normative document that create powers or impose obligations in the absence of authorization by the law are *ultra vires* and should be considered invalid. However, no PRC law explicitly protects freedom of speech or freedom of the media, and the party-state regime of news control remains in operation despite the constitutional changes made since 1949.[56] As a consequence, before the ROGI's introduction, there was no institutional channel through which private parties could seek a review of the norms regulating the collection, processing, and release of news.[57] As of the end of 2015, there had been no reported challenge, in the FOI context, to the legality of jointly issued contingency plans referred to as "provisions of the State" in Article 7 of the ROGI. This lack of challenges is not surprising, as the parties most affected by such plans are journalists. Journalists in China tend to be rather reluctant to confront the authorities (whether party organs or government agencies) in charge of news censorship, as those authorities also exert control over journalists' professional qualifications and remuneration.[58]

4. Implementation Measures Imposing New Exemptions

Although "provisions of the State" are the most problematic sources of exemption owing to their fluid scope and uncertain nature, documents

55. *See* Lin, *supra* note 43, at 23-24 (discussing the introduction to the debate surrounding the nature of contingency plans).

56. *See* H.L FU & RICHARD CULLEN, MEDIA LAW IN THE PRC (1996) (discussing the approaches of media control through secondary regulations and ad-hoc administrative notices in China).

57. Because political freedoms and rights are not "lawful rights and interests" that can be protected under the Administrative Litigation Law, issues concerning news censorship cannot be brought before the courts through judicial review proceedings. *See Xingzhengsusongfa* (行政诉讼法) [ALL (Administrative Litigation Law)], Art. 11 (1989); Qibo Jiang and Yulin Li (姜启波 And 李玉林), *Anjian Shouli* (案件受理) [Case Acceptance] 56 (2008).

58. Dongxiao Li (李东晓), *Jujian Zhengzhi Zhong Guo Meiti Fanfu de Shehuixue Kaocha* (居间政治:中国媒体反腐的社会学考察) [Intermediary Politics : A Sociological Study Of Anti-Corruption Initiatives Of Chinese Media] 215-16, 220 (2012) (discussing the authorities' measures to control journalists in various ways); *See* Qinglian He, The Fog Of Censorship: Media Control In China 32-33, 36-38, 40-48 (Paul Frank trans., 2008).

created by government agencies for the sole purpose of handling OGI matters also produce exemptions whose validity is doubtful.

Compared with the pioneering local *guizhang* on OGI promulgated before 2007, the ROGI seemingly provides for fewer categories of exemption.[59] However, motivated by the practical need to withhold additional categories of information and inspired by the lessons of overseas FOI laws, a host of local governments and central departments have created extra exemptions when setting administrative norms that purport to implement or interpret the ROGI. Most of these extra exemptions cover three categories of information: (1) information concerning the internal administration of government agencies, (2) information on issues deliberated within government agencies, and (3) information whose disclosure would impede law enforcement.[60] According to comparative studies of FOI laws by Chinese scholars, the second exemption helps to ensure the frankness of discussions among policy- and decision-makers, whereas the third helps to protect the efficiency and fairness of law enforcement.[61] In view of the international experience, government officials contend that the ROGI should not have omitted these exemptions, and thus it is reasonable to include them in the implementation measures.[62]

Governments at various levels appear particularly eager to exclude information related to the deliberative process. At the central level, for instance, the Ministry of Education, State Administration of Taxation, and State Audit Office stipulate in their respective departmental *guizhang* on OGI that information on the processes of investigation, deliberation, and handling (hereinafter "process information") should be exempt from disclosure.[63] The provincial governments of Heilongjiang, Fujian, Yunnan, and Shanghai and city governments of Nanjing, Ningbo, and Hangzhou provide for a similar

59. Hanhua Zhou (周汉华), *On the Legal Questions of Local Legislation on Open Government Information* (地方信息公开规定法律问题探讨——写在《政府信息公开条例》实施一周年之际) NO. 4 E-GOVERNMENT (电子政府) 52, 52-53 (2009).

60. *Zhiqinquan yu Zhengfu Xinxi Gongkai Zhidu Yanjiu* (知情权与政府信息公开制度研究) [Research on The Right to Know and Open Government Information Regime] 104-06, 168-83 (Wang Wanhua (王万华) ed., 2013) (hereinafter "Research on the Right to Know").

61. Weidong Yang (杨伟东), *Zhengfu Xinxi Gongkai Zhuyao Wenti Yanjiu* (政府信息公开主要问题研究) [Research on Major Issues in Open Government Information] 173-74 (2013); Research on the Right to Know, *supra* note 60, at 178-81.

62. Yang, *supra* note 61, at 175.

63. *Jiaoyubu Jiguan Zhengfu Xinxi Gongkai Shishi Banfa* (教育部机关政府信息公开实施办法) [Implementation Measures on Open Government Information in the Organs of the Ministry of Education], Art. 14 (issued on May 2008); *Guojiashuwuzongju yi Shenqing Gongkai Zhengfu Xinxi Guicheng* (国家税务总局依申请公开政府信息规程) [Procedures of the State Administration of Taxation for Disclosure of Government Information upon Request], Art. 13 (issued on April 2, 2008); *Shenji Jiguan Zhengfu Xinxi Gongkai Guiding Shixing* (审计机关政府信息公开规定 试) [Provisions on Open Government Information by Audit Organs for Trial Implementation], Art. 11 (issued on April 30, 2008).

exemption in their local OGI *guizhang*.[64] According to official annual reports, of the decisions rejecting OGI requests by citing exemptions, 18.9% of those in Fujian province between 2008 and 2012 and 30% of those in Yunnan province between 2010 and 2012 were based on the exemption of process information.[65]

Although there are reasonable grounds for exempting process information under certain circumstances, it is obvious that the ROGI provides no basis for the exemptions introduced by the aforementioned local and departmental *guizhang*. Because *guizhang* can only provide detailed implementation measures within the confines of upper-level legislation, these provisions on extra exemptions are invalid. The illegal expansion of exemptions is, rather surprisingly, further supported by the GOSC, which the ROGI designates as the department responsible for promoting and supervising OGI work throughout the nation. The GOSC successively issued three opinions regarding ROGI implementation (hereinafter "GOSC Opinions"). In addition to setting out concrete measures concerning proactive disclosure and secrecy examination, the Opinions also establish substantive standards on both the standing of OGI requesters and scope of government information.

GOSC Opinion No. 36 (2008) restricts the eligibility of OGI requesters and imposes a need-to-know condition:

> An administrative organ may refuse to provide the government information that [is] irrelevant to the requester's special needs such as his own production, living, scientific research, etc.[66]

Some officials believe that this proscription is inspired by Article 13 of the ROGI, which stipulates that citizens may file GOI requests based on their own special needs.[67] However, that article does not explicitly identify such

64. *See* Ying Huang (黄莹), *Xingzhengjuguan Guocheng Xing Xinxi Gongkai Huomian Fanwei Zhi Jieding* (行政机关过程性信息公开豁免范围之界定) [On Defining the Exemption of Process Information of Administrative Organs], SICHUAN JINGCHA XUEYUAN XUEBAO (四川警察学院学报) [JOURNAL OF SICHUAN POLICE COLLEGE] 21, 25-26 (2013) (discussing local guizhang with exemptions related to information on the processes of investigation, deliberation, and handling).

65. These calculations are made by the author based on the annual OGI reports released by the governments of Fujian and Yunnan.

66. *Guowuyuanbangongting Guanyu Shixing Zhonghuarenmingongheguzhengfu Xinxi Gongkai Tiaoli Ruogan Wenti de Yijian* (国务院办公厅关于施行《中华人民共和国政府信息公开条例》若干问题的意见) [Opinion of the General Office of the State Council on Several Issues Concerning the Implementation of the PRC Regulation on Open Government Information], Point 14 (issued on April 29, 2008).

67. Zhongle Zhan & Yu Su (湛中乐 & 苏宇), *Lun Zhengfu Xinxi Gongkai Paichu Fanwei de Jieding* (论政府信息公开排除范围的界定) [On the Scope of Exemptions from Open Government Information] NO. 4 XINGZHENG FAXUEYANJIU (行政法学研究) [ADMINISTRATIVE LAW JOURNAL] 43 (2009).

special needs as a precondition for the exercise of the right to information. Although the provision's wording creates some ambiguity, that ambiguity could be resolved through contextual or systematic interpretation. The mention of special interests is to allow requesters to gain access to information based on their private interests and needs. Accordingly, disclosure upon request differs from proactive disclosure, which is based primarily on the need to promote the public interest. By requiring an examination of requesters' needs, Opinion No. 36 turns special needs into a restriction on the right to information and makes them a de facto exemption.

GOSC Opinion No. 5 (2010) confirms the needs test created by Opinion No. 36, and further redefines the concept of government information:

> Government information to be provided [to] requesters should be formal, accurate and complete; such information can be put to official use by the requesters in their production, daily lives and research, and can be used as documentary evidence in litigation or administrative procedures. Therefore, government information that should be disclosed under the ROGI does not include, in general, information concerning internal administration that is generated or obtained by agencies in their daily work, or process information that is in the course of discussion, deliberation or investigation.[68]

These proscriptions are again unduly restrictive interpretations of the scope of government information. Article 2 of the ROGI defines government information as "information made or obtained by administrative agencies in the course of exercising their responsibilities and recorded and stored in a given form." There is clearly no restriction on the completeness of information or suitableness of information for purposes concerning "official use" or "documentary evidence," as stipulated by the GOSC. It is therefore unjustifiable to exclude internal information or process information from the scope of government information subject to disclosure.

Pursuant to the administrative law doctrine, the GOSC is an internal organ of the State Council rather than a department with a full legal personality. As a consequence, norms set by the GOSC are normative documents rather than *guizhang*.[69] The opinions at issue are, by their nature, interpretations made by an administrative agency regarding a piece of legislation, and hence are binding only on the agency's subordinate bodies,

68. *Guowuyuanbangongting Guanyu Zuohao Zhengfu Xinxi yi Shenqing Gongkai Gongzuo de Yijian* (国务院办公厅关于做好政府信息依申请公开工作的意见) [Opinion of the General Office of the State Council on Undertaking Well the Work of Disclosing Government Information Upon Request], Point 2 (issued on January 12, 2010).

69. Xiangjun Kong (孔祥俊), *Falu Fanggalun Diyi Juan Faluguifan de Xuanze yu Shiyong* (法律方法论（第一卷）——法律规范的选择与适用) [Legal Methodology (Vol. I): The Choice and Application of Legal Norms] 56-58, 387 (2006).

not on the courts.[70] In theory, those opinions should be rendered invalid insofar as they contradict the ROGI, and citizens have solid grounds for obtaining a judicial remedy for decisions that reject OGI requests concerning them. However, the political authority of the GOSC within the administrative machinery and its status as chief supervisor of ROGI implementation are causes for concern to the courts when they are dealing with challenges to the validity of exemptions based on GOSC Opinions. Similarly, the prevailing political line is also a matter of concern when the courts are invited to scrutinize provisions of the State that introduce exemptions on politically sensitive issues. Uncertainty thus surrounds the judiciary's handling of conflicts between the ROGI and the extra-legal norms analyzed above.

JUDICIAL POWER IN CONTROLLING THE VALIDITY OF NORMATIVE DOCUMENTS

According to mainstream administrative law doctrine and Law on Legislation, as noted above, "normative documents" lie at the bottom of the legal hierarchy. These "normative documents" become invalid (i.e., lose their binding force) if they contradict the provisions of higher-level enactments of legislation, including laws, administrative regulations, local regulations, and *guizhang*. However, the Chinese courts' role in controlling the validity of normative documents is rather restricted.

Generally, courts in Western countries enjoy the power to supervise the validity of the normative basis of administrative decisions.[71] In contrast to Western supervisory power, in China scholars divide power into three components: (1) the power to determine the validity of the norm at issue, (2) the power to refuse to apply an invalid norm, and (3) the power to publicly declare a norm invalid.[72] The Chinese courts do not enjoy the third component of supervisory power, but can be said to enjoy the first and second, as discussed below. Chinese courts can exercise supervisory power through the reviewing the validity of a norm only incidentally when reviewing the legality of an administrative decision made on the basis of that norm.[73] Citizens cannot directly litigate a norm's validity as a principal cause

70. Jiang, Administrative Law and Administrative Litigation Law*, supra* note 14, at 185-87.

71. *See* Carlo Guarnieri, Patrizia Pederzoli, et al., The Power of Judges: A Comparative Study of Courts and Democracy 144 (2002).

72. *Fagui Shencha yu Fagui Pingjia Yanjiu* (法规审查与法规评价研究) [A Study of The Review and Assessment of Regulations] 184-87 (Jiang Ming 'an (姜明安) ed., 2014); *see* Wu Peng (吴鹏), *Zhongguo Xingzhengsusong Falu Shiyong Zhongdi Faluguifan Shencha* (中国行政诉讼法律适用中的法律规范审查) [Review of Legal Norms in the Application of Legislation in China's Administrative Litigation] No. 2 Faxue Zazhi (法学杂志) [Law Science Magazine] 139, 140 (2007).

73. The powers to annul or alter various types of regulations and guizhang are distributed by the Law on Legislation to various non-judicial authorities, including the State Council, NPC and its

of action because the creation of norms (whether in the form of *guizhang* or normative documents) is considered an "abstract administrative act," and thus excluded from the scope of case acceptance for judicial review.[74]

The judicial power to conduct an incidental review of the validity of norms is implied by the 1989 Administrative Litigation Law (ALL),[75] and further provided for by the SPC. Two separate provisions of the ALL allude to validity control. First, the "incorrect application of laws and regulations" constitutes grounds for judicial review.[76] Errors in application encompass not only the application of an incorrect legal norm but also the application of a legal norm whose content is invalid, the latter of which entails examination of the norm's validity.[77] Second, the courts are not bound by all types of legal norms: they should try cases "according to" (依据) laws, administrative regulations, and local regulations,[78] but "refer to" (参照) *guizhang*.[79] Courts that refuse to recognize the validity of *guizhang* that contradict laws and regulations can use the distinction between guizhang and higher-level legal norms to do so.[80] Legislators have made it clear that *guizhang* are excluded from the compulsory criteria for trials (审判依据) for two reasons.[81] First, many *guizhang* are relatively poor in quality, and they often deviate from higher-level norms. Second, if a government agency issuing *guizhang* is sued, and if the *guizhang* it sets are adopted as the criteria for adjudicating

Standing Committee, and governments and People's Congresses at prescribed levels. The courts can, via the SPC, refer norms deemed invalid to those authorities. *See* LoL, Arts. 87 and 88 (2000). For a summary of the competent authorities for the annulment of norms, *see* He, *supra* note 17, at 90.

74. To stress the incidental nature of validity reviews by the courts, ALL, as amended in 2014, stipulates under Art. 53 that if a citizen believes a normative document issued by a department of the State Council or local government to be illegal, he or she can request that the court incidentally review that document when bringing administrative litigation against an administrative decision; *Xingzhengsusongfa* (行政诉讼法) [ALL (Administrative Litigation Law)], Art. 12(2) (promulgated by the NPCSC, April 4, 1989, amended November 1, 2014, effective May 1, 2015).

75. ALL was amended in 2014. Because all of the cases discussed in this article were adjudicated or resolved in accordance with the pre-amended ALL, only the provisions in the 1989 ALL are cited and analyzed hereinafter.

76. "The people's court shall quash a specific administrative act in any of the following cases: [w]here the application of laws and regulations were incorrect;" *See* ALL, Art. 54(2)(b).

77. *See Xingzheng Shenpan yu Xingzhengshifa Shiwu Zhiyin* (行政审判与行政执法实务指) [Practical Guidance on Judicial Review and Administrative Enforcement of Law] 675-80 (Cai Xiaoxue (蔡小雪) ed., 2009) (hereinafter "Practical Guidance on Judicial Review").

78. ALL, Art. 52 (1989).

79. ALL, Art. 53 (1989).

80. Bixin Jiang & Fengyun Liang (江必新 & 梁凤云), *Xingzhengsusongfa Lilun yu Shiwu* (行政诉讼法理论与实务) [Theories and Practices on Administrative Litigation Law] 1043-44, 1054-56 (2nd ed. 2011).

81. *Zhonghuarenmingongheguo Xingzhengsusongfa Jianghua* (《中华人民共和国行政诉讼法》讲话) [Lectures on the Administrative Litigation Law] 179 (HU Kangsheng (胡康生) ed., 1989).

the lawsuit, then that agency would actually become the judge of its own case, which goes against the principle of fairness.[82] For similar reasons, it is generally accepted by SPC justices and scholars alike that, with regard to normative documents, the courts should apply them in accordance with their conformity to higher-level legal norms.[83] Moreover, given that a normative document is not a source of law, in practice, the courts accord less deference to normative documents than to *guizhang*.[84]

In judicial interpretations of the ALL issued in 1999, the SPC stipulates that the courts can quote *guizhang* and other normative documents in judgments if these norms are "valid."[85] Since the 1990s, the SPC has expressed through a series of judicial replies (批复) the steady policy that judges should directly apply superior legal norms (such as laws and administrative regulations) when they conflict with inferior norms (such as local regulations and *guizhang*).[86] In 2004, the SPC further issued a comprehensive judicial document concerning the application of law entitled Minutes of the Symposium on the Application of Legal Norms in The Trial of Administrative Cases (hereinafter "the Minutes").[87] The Minutes make it

[82] *Id.* at 176-177.

83. It should be noted that the amended ALL makes the point much clearer. Art. 64 of ALL 2014 explicitly states that when a court finds a normative document to be illegal, it should preclude the document from the basis on which the legality of the administrative decision in question is assessed. Jiang & Liang, *supra* note 80, at 1063-68; *Xingzhengfa yu Xingzhengsusongfa* (行政法与行政诉讼法) [Administrative Law and Administrative Litigation Law] 190, 510 (Jiang Ming'an (姜明安) ed., 5th Ed., 2011); See Practical Guidance on Judicial Review, *supra* note 77, at 660-61.

84. He, *supra* note 17, at 96-97.

85. *Zuigaorenminfayuan Guanyu Zhixing Zhonghuarenmingongheguo Xingzhengsusongfa Ruogan Wenti de Jieshi* (最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释) [Interpretations on Several Issues Concerning the Implementation of the Administrative Litigation Law], Art. 62(2) (adopted by SPC on November 24, 1999, effective March 10, 2000).

86*See* Kong Xiangjun (孔祥俊), *Falu Fangfalun Diyi Juan Faluguifan de Xuanze Yu Shi* (法律方法论（第一卷）——法律规范的选择与适) [Legal Methodology (Vol. I): The Choice and Application of Legal Norms] 211-14 (2006) (detailing an introduction to these replies).

87. *Guanyu Yinfa Guanyu Shenli Xingzheng Anjian Shiyong Faluguifan Wenti de Zuotanhui Jiyao de Tongzhi* (关于印发《关于审理行政案件适用法律规范问题的座谈会纪要》的通知) [Notice of the Supreme People's Court on Printing for Distribution the Minutes of the Symposium on the Application of Legal Norms in the Trial of Administrative Cases] (issued by SPC on May 18, 2004) (hereinafter "Notice of the Supreme People's Court on Printing"). These Minutes tackle the problems concerning the application of law that often occur in judicial practice, and establish a series of standards accordingly. Their aim is to provide a statutory basis for the consensus reached in daily trials and to render that consensus clearer and more operable to ensure that local courts can overcome interference by other authorities when they refuse to apply norms set by the latter in contravention of superior norms. Although the Minutes do not take the form of judicial interpretation, the SPC requires local courts to "refer to and implement" their provisions. Therefore, the Minutes are regarded as a quasi-judicial-interpretation and binding on courts at all levels. *See Kong Xiangjun in* XINGZHENG SIFAJIESHI LIJIE YU SHIYONG (行政司法解释理解与适用) [THE UNDERSTANDING AND APPLICATION OF JUDICIAL INTERPRETATIONS RELATED TO

clear that judges should, on their initiative, review the conformity of the norms applied by a defendant with regard to higher-level legal norms:

> Currently, many specific administrative acts are based on lower-level norms without reference to higher-level norms. In this situation, in order to uphold the unity of the legal system, the people's courts shall judge whether these lower-level norms conform to higher-level norms when reviewing the legality of the specific administrative acts [at issue]. If the courts find that these lower-level norms contradict higher-level norms, [they] should determine the legality of the challenged specific administrative act according to the higher-level norms.[88]

> In the reasoning of the judgment, the people's courts can comment on whether [the] normative document [applied by the defendant] is legal, valid, reasonable or appropriate.[89]

Under to the aforementioned legal provisions and judicial policies, although the Chinese courts are not empowered to invalidate any norm made by the administrative authorities, they nevertheless enjoy the power to identify and refuse to enforce invalid lower-level norms, i.e., *guizhang* and normative documents.[90] Thus, in the context of FOI litigation, the courts have the power to assess the validity of various norms seeking to limit the scope of information disclosure, to refuse to apply the invalid norms and to quash non-disclosure decisions based on those invalid norms.

JUDICIAL CONTROL OF EXTRA-LEGAL NORMS OF INFORMATION CONTROL

To examine the judicial control of extra-legal norms that bar disclosure, this study retrieves cases from the three sources as introduced in the first section. Two kinds of norms are found to have been most frequently challenged and have significant impacts on the right to information's functions. They are (1) provisions issued by local authorities on the scope of state secrets pertaining to the outstanding issues of political campaigns, and (2) a new exemption created by the GOSC concerning the information on decision-making. Although positive signs of legality review can be detected in a few cases concerning other extra-norms, the judicial handling of those

ADMINISTRATIVE CASES] 353 et seq. (SPC Research Office (最高人民法院研究室) ed., 2009) (explicating the drafting background and legal effect of this judicial document).

88. Notice of the Supreme People's Court on Printing, *supra* note 87, at Section II, Point 1, the Minutes.

89. Notice of the Supreme People's Court on Printing, *supra* note 87, at Section I, the Minutes.

90. *See* Hanhua Zhou (周汉华), *Xingzhengsusong zhongdi faluwenti* (行政诉讼中的法律问题) [Questions of Law in Administrative Litigation], *Xingzhengsusongfa de xinfa zhan* (行政诉讼法的新发展) [New Developments in Administrative Litigation] 116 (Lu Yanbin (吕艳滨) ed., 2008).

norms tended to be rather unusual. We will begin with those positive signs to set the stage.

A. Positive Signs of Review of Norms

Two cases retrieved from official sources demonstrate that local courts have confirmed their role in reviewing the applicability of pro-secrecy norms. The first, retrieved from China Judgment Online, is Jiali Industrial (Holdings) Co., Ltd. v. Sanshui District Government of Foshan City (hereinafter "*Jiali Ltd.*"), which concerned a normative document issued by a provincial government.[91] The defendant government had refused to accept an OGI request because the requester was a Hong Kong-based company, and thus located outside the jurisdiction of PRC law.[92] During the trial of the first instance, the government further claimed that its decision was grounded in the Guangdong Provincial Procedures for Open Government Information upon Requests (hereinafter "Guangdong Procedures"), which stipulates that requests made by overseas citizens or legal persons should not be accepted. The plaintiff objected on the grounds that Guangdong Procedures was merely an internal document that had not been published and hence did not constitute a legal basis for the defendant's refusal. The court ruled against the government, holding that because the Guangdong Procedures constitutes neither regulation nor *guizhang*, the court would not rely on it in determining the legality of the government's decision.[93] In other words, the court disregarded the local norm at issue because it contradicted the ROGI, which imposes no restrictions on the requester's location. In an appeal, the defendant government contended that Guangdong Procedures was consistent with another document issued by an internal section of the GOSC stipulating that government agencies may refuse OGI requests made by overseas citizens or legal persons.[94] Instead of addressing that contention involving the GOSC-

91. *See* Jiali Industry Co. Ltd. v. Foshan District Government of Foshan City (嘉励实业 (集团 有限公司诉佛山市三水区人民政府), April 11, 2014 (Guangdong High Ct.) (recounting that a company requested that the defendant government disclose a series of documents concerning the granting and revocation of land-use right pertaining to a golf course). *See also Bu Shouli Xinxi Gongkai Shenqing Sanshui Quzhengfu Zhongshen Baisu* (不受理信息公开申请 三水区政府终审败诉) [Refusing to Handle an OGI Request; Sanshui District Government Lost in The Trial of Final Instance], Southern Metropolis Daily, May 21, 2014, at FB04.

92. As a rule, legislation promulgated by authorities in mainland China do not apply to the Hong Kong Special Administrative Region unless explicitly provided for by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which embodies the principle of "one country, two systems." Therefore, Hong Kong is usually regarded as an "overseas jurisdiction" vis-à-vis the enforcement of PRC legislation.

93. *Jiali Ltd.*

94. The document referred to is a reply made by the GOSC's secretariat to a question from the National Development and Reform Commission. *See Guoquyuanbangongtingbishuju Guanyu Waiguo Gongmin Faren huo Qita Zuzhi Xiang Wo Xingzhengjiguan Shenqing Gongkai Zhengfu*

derived norm, the appellate court followed the court of first instance's approach, stressing that Guangdong Procedures, as a normative document issued by the General Office of the Guangdong Government, was inapplicable in the current case.[95]

Whereas *Jiali Ltd.* involved the direct scrutiny of the validity of a norm issued by a local government, the second referential case, retrieved from an SPC publications, reflects a more cautious approach to the validity of normative documents issued by the GOSC. In Dalian Hualong Holdings Co. Ltd. Tianjin Real Estate Development Co. v. Tianjin Land Resources and Housing Bureau (hereinafter "*Hualong Co.*"), the defendant bureau had withheld requested information by claiming that it constituted "internal managerial information" pursuant to GOSC Opinion No. 5.[96] In its judgment, the court quashed the decision solely on the grounds that the bureau had failed to submit the information at issue for the court's scrutiny and hence failed to satisfy its burden of proof. In the case commentary written by the judge adjudicating the case, he declared that the GOSC Opinion was by nature a normative document and should be referred to by the courts only when it did not contradict laws, regulations, or *guizhang*.[97] This declaration indirectly recognized the necessity of the judicial examination of GOSC Opinions' consistency with other higher-level norms. *Hualong Co.* was thus the first referential FOI case to address the applicability of GOSC Opinions. Nevertheless, the judge proceeded to examine the defendant bureau's argument without any further analysis of Opinion No. 5. Instead, he discussed the appropriate elements of "internal managerial information" and the conditions for its disclosure, which means that he implicitly accepted Opinion No.5's applicability in this case.[98] The obscure review approach reflected in the case commentary in *Hualong Co.*, combined with the judge's sidetracking toward the issue of burden of proof in his judgment, suggests that he was reluctant to recognize the incompatibility between GOSC documents and the ROGI. In the cases concerning other pro-secrecy norms discussed below a similar reluctance is reflected.

Xinxi Wenti de Chuli Yijian (国务院办公厅秘书局关于外国公民、法人或其他组织向我行政机关申请公开政府信息问题的处理意见) [Opinion of the Secretary Section of General Office of State Council on the Handling of Requests for Government Information Made by Foreign Citizens, Legal Persons and Other Organizations] (issued on June 23, 2008).

95. *Jiali Ltd.*

96. *See* Dalian Hualong Group Tianjin Real Estate Development Co. v. Tianjin Land Resources and Housing Bureau (大连龙华企业集团公司天津房地产开发公司诉天津市国土资源和房屋管理局撤销不予公开告知书案) [Re: Annulment of Nondisclosure Decision], MCAC REPORTS 356 (2013).

97. *Id.* at 359.

98. *Id.* at 360-61.

B. Agency-Made Norms Defining State Secrets

The most significant norms barring disclosure are local agency documents defining state secrets. The LGSS provides only vague categories of secrets and authorizes the NAGSS and other central departments to make provisions concerning the specific scope of state secrets in various areas of government work, i.e., the Scope. Although over 90 Scope have been issued at the national level, covering almost every aspect of state governance, the classification standards therein are often inadequately specific, which leaves room for local governments to create more operable standards concerning information generated or handled in the exercise of their powers. Such derivative standards take the form of normative documents issued by agencies with classification power. In practice, these documents become the direct basis for classification decisions, although they are not sources of law. In fact, their compatibility with the law is often questionable because of China's ingrained culture of over-classification and the lack of any channel under the LGSS by which citizens can challenge a classification decision.[99]

The ROGI's implementation provided an unprecedented opportunity for citizens to question the legality of classification standards through FOI litigation, at least in theory. A series of OGI cases concerning the taking of private property during the political campaigns of the 1950s and 1960s reveal the profound impacts of agency-made norms on core FOI values. As we will see, the courts have largely failed to uphold the legal hierarchy.

1. Problematic Norms Concealing Outstanding Historical Issues

In 2006, the Shanghai housing authority issued a notice categorically requiring the classification of all materials concerning *gongfang* (public housing, particularly that taken over from private parties) as state secrets.[100] Relying on this self-made notice (hereinafter "*Gongfang Notice*"), the authority and its subordinate departments rejected a large number of OGI requests filed by individuals wishing to inspect the historical records on the registration and use of *gongfang* that had once belonged to them or close relatives. Insofar as the *Gongfang* Notice requires registration materials on

99. Only state organs and social units are allowed to request a review of classification decisions made by various decision-makers and then appeal to the state secrecy agencies at prescribed levels. *See Baoshou Guojia Mimi fa Shishi Tiaoli* (保守国家秘密法实施条例) [Implementation Regulation of the Law on Guarding State Secrets], Art. 20 (amended by St. Council on January 17, 2014, effective March 1, 2014).

100. *Shanghaishi Fangqu Tudiziyuan Guanliju Guanyu Jiang Benshi Gongfang Ziliao Leiwei Baomi Ziliao de Tonzhi* (上海市房屋土地资源管理局《关于将本市公房资料列为保密资料的通知) [Notice of the Shanghai Municipal Bureau of Housing and Land Resources Regarding Classifying as Confidential the Materials Concerning the Gongfang within the Municipality] (issued in 2006).

citizens' properties to be classified, it contradicts the 2007 Law on Property Rights, which stipulates that "any right holder or interested party may apply to inquire about or copy the registration materials, and the registration organ shall not refuse the application."[101]

The notice was most likely issued in response to the long-standing controversy over the ownership of *gongfang*. *Gongfang* now administered by urban housing authorities include not only state-owned housing confiscated from private owners in accordance with the laws and policies of the early 1950s, but also private housing subject to mandatory leasing by the state in the 1955-1966 period.[102] The second category of housing, called *jingzufang* (state-managed rental of housing), resulted from the Socialist Transformation Campaign of Ownership of the Means of Production, whose goal was the construction of a socially planned economy in the PRC. The central government ordered urban homeowners to hand over any portion of their dwellings that exceeded the State-set quota on the area they were entitled to occupy to increase the housing supply. In 1955 local governments began to manage and rent this housing to the public at a fixed rate, and distributed only part of the rental income to the proprietors. The majority of urban private housing was thus transformed into *jingzufang*, ultimately covering around 100 million square meters and affecting over six million households.[103] The transformation policy was frequently distorted during its implementation. Many private houses that fell within the quota or should otherwise have legally been occupied by the owners were wrongly subject to mandatory leasing.[104] Although *jingzufang* were no longer freely at their owners' disposal, their private ownership nevertheless remained acknowledged by the State and the law of the day. However, during the turbulent Great Proletarian Cultural Revolution (1966-1976), the proprietors were forced to turn over their title deeds to the housing authorities or simply had their housing seized by Red Guards. None have received the nominal rent on their properties in the years since. [105]

101. *Wuquanfa* (物权法) [Law on Property Rights], Art. 18 (2007).

102. *See* Qun Zhang (张群), *Sifang Gaizao Sanbuqu ——Jian Lun Si Quan Yu Renquan* (私房改造三部曲——兼论私权与人权) [The Trilogy of Socialist Transformation of Private Housing: With a Discussion on Private Rights and Human Rights], NO.2 RENDA FALU PINGLUN (人大法律评论) [RENMIN UNIVERSITY LAW REVIEW] 138, 138-50 (2011) (explaining the evolution of policies on the state confiscation and taking-over of private housing before the 1980s); Chenglin Liu, *The Chinese Takings Law from a Comparative Perspective*, 26 WASH. U. J.L. & POL'Y 301, 304-09 (2008).

103. *See* Liu, *supra* note 102, at 140-45.

104. *Jing Zufang Cuo Gai Cunzai Sida Lishi Yiliu Wenti* (经租房"错改" 存在四大历史遗留问题) [The "Wrong Transformation" Concerning State-managed Rental Housing Left Four Issues Unsettled], China Economic Times, April 6, 2005.

105. Liu, *supra* note 102, at 148.

When the ruling party decided to restore legal order and introduced the policy of reform and opening-up in 1978, many *jingzufang* owners (and other proprietors who considered their properties to have been wrongly taken by the state during various political campaigns) filed claims to reclaim their properties. The measures introduced to address those claims differed by locality. In an attempt to attract investment, the governments of some coastal and developed regions gradually began returning *jingzufang* to original private owners who were now identified as overseas Chinese.[106] However, in 1985 the Ministry of Construction issued an opinion declaring that all private housing subject to mandatory leasing was owned by the State[107] despite the Constitution of 1982 stipulating the protection of property rights.[108] The declaration that former owners had lost their ownership has been widely criticized as *ultra vires* by Chinese legal scholars and lawyers.[109] Based on the ministry's opinion, the housing authorities in many cities identified *jingzufang* as state-owned *gongfang*, and continued to rent them out without informing their proprietors and to distribute most of the rental income to themselves. Some housing authorities have even used *jingzufang* to house personnel or other closely connected persons.[110] Rapid urban development

106. *Qiao Fang Santou Teng De Fan Nao* ('侨房:'三头疼'的烦恼') [Houses of Overseas Chinese: Three Worrying Issues], SHANGHAI QIAOBAO WANG (上海侨报网) [SHANGHAI NEWS FOR OVERSEAS CHINESE], (September 29, 2010), http://www.yesqiaobao.com/show.asp?id=2020 (China).

107. *Guanyu Chengshi Siyou Chuzu Fangwu Shehuizhuyi Gaizao Yiliu Wenti de Chuli Yijian* (城乡建设环境保护部印发《关于城市私有出租房屋社会主义改造遗留问题的处理意见》的通知) [Opinion of the Ministry for Urban and Rural Construction and Environmental Protection on the Handling of the Outstanding Issues Caused by the Socialist Transformation of Urban Rented Private Houses] (issued in 1985). *See Bu Fuqian de Shumai* ('不付钱的'赎买) [The Buying-Back Without Payment], CHINA YOUTH DAILY (中国青年报) (December 17, 2003).

108. XIANFA., Art. 13 (1982) (China).

109. Di Wu (吴迪), *Woguo Jing Zufang Quanshu Zhengyi Yanjiu* (我国经租房权属争议研) [On the Dispute over the Ownership of State-Managed Rental Housing in China] 18-29 (2010) (unpublished Master's Dissertation, Nanchang University). Youxi Chen (陈有西), *Jing Zu Bian Zhengshou de Lishi Cuowu Ji Ziu Gaofayuan de Jiuzheng* (经租变征收的历史错误及最高法院的纠正) [The Historical Wrong in Turning State-managed Leasing into Appropriation And the Supreme Court's Correction], YOUXI CHEN'S ACADEMIC WEBSITE (陈有西学术网) (December 27, 2012), http://www.chenyouxi.com/cnweb/html/redianguanzhu/201212272173.html (China). *See* Qun Zhang(张群), *Juzhe You Qi Qu? -- -- 1950 Nian Dai de Zhufang Zhengce Pou Xi* ("居者有其屋"？——1950年代的住房政策剖析) ["Letting Residents Own Their Home"? An Analysis of the Housing Policy in the 1950s], NO. 2 MODERN CHINA STUDIES (当代中国研究) 100 (2009), http://www.modernchinastudies.org/cn/issues/past-issues/104-mcs-2009-issue-2/1096--1950.html (China) (including reviews by legal scholars). *See* Zhisheng Gao (高智晟), *Jing Zufang Zhengce de Falu Diwei Ji Jiehue Chulu de Sikao* (经租房政策的法律地位及解决出路的思考), [The Legal Status of State-managed Rental Housing and Some Thoughts on the Solution], NO. 10 SOUTH REVIEWS (南风窗) (2004), at 45-48 (discussing lawyers' criticisms).

110. Liu, *supra* note 102, at 154; Can the Law on Rights in rem be Expected to Resolve the Problems over State-managed Rental Housing? (物权法可望破解'经租房'难题?), CHINA ECONOMIC TIMES (November 3, 2004) (China).

and renewal since the 2000s have seen the housing authorities of some large cities, such as Beijing and Wuhan, selling *jingzufang* to lessees or other occupants to facilitate the process of housing demolition and relocation. Although the property developers that buy the land at a price lower than the market rate generally award the occupants some compensation, the legal owners are usually kept in the dark.[111]

This ongoing deprivation of *jingzufang*-related property rights in the absence of legal authorization has provoked an outcry from private owners, some of whom have attempted to sue the housing authorities. However, most local courts refuse to accept their cases, relying on a controversial directive issued by the SPC in 1992 which states that real estate disputes deriving from "historical outstanding issues" are not within the courts' jurisdiction.[112] As increasing numbers of *jingzufang* face demolition and their evicted owners suffer from skyrocketing housing costs, an increasing number of those owners have joined the rights defense movement and petitioned the government through "letters and visits."[113] Because their only evidence of ownership – title deeds – are kept in the archives of the housing authorities, owners have been demanding access to the deeds, first by resorting to local OGI *guizhang*, and subsequently to the national ROGI.[114]

It is against this backdrop that the housing authorities in several cities have issued normative documents that classify archival material concerning *jingzufang*, including title deeds and the rental receipts distributed to proprietors.[115] Some of these documents, the Shanghai *Gongfang* Notice in

111. Bo Lu (卢波), *Jing Zhufang Zhong de Liyi Geju* (经租房中的利益格局) [The Landscape of Interest in Respect of Jingzufang], NO.1 MAGAZINE OF ECONOMICS (经济月刊) 41-45 (January 15, 2004).

112. *Zuigao Remin Fayuan Guanyu Fangdican Anjian Shouli Wenti de Tongzhi* (最高人民法院关于房地产案件受理问题的通知) [Notice of the Supreme People's Court on the Problem of Accepting Real Estate Cases] (promulgated by Sup. People's Ct., November 25, 1992), 1992 SUP. PEOPLE'S CT. GAZ. 38 (China); *see* Yukuan Guo (郭宇宽), *Jing Bange Shijie Canquan Jiufen Jing Zufang Wenti Fuchu Shuimian* (经半个世纪产权纠葛 经租房问题浮出水面) [After Half-a-Century Disputes on Ownership, The Issue of Jingzufang Surfaces], SOUTH REVIEWS (南风窗) (2004) (On how the courts in various regions have refused to hear administrative cases concerning *jingzufang*); Jianfeng Zhang (章剑锋), *Jing Zufang Yezhu de Weiquan Zhilu* (经租房业主的维权之路) [Owners' Journey of Defending their Property Rights From Housing Rental], SOUTH REVIEWS (南风窗) (February 15, 2009).

113. *See* Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STANFORD J. OF INT'L L. 103-79 (2006) (discussing the role of letters and visits in China's legal institutions). *See* You-Tien Hsing, *Urban Housing Mobilizations*, *in* RECLAIMING CHINESE SOCIETY: THE NEW SOCIAL ACTIVISM 17, 24-27 (You-Tien Hsing & Ching Kwan Lee eds., 2009) (providing information on *jingzufang* owners' collective protests in recent years).

114. *See* Chen, An Empty Promise of Freedom of Information?, *supra* note 28, at 268-75 (discussing the recent struggles of private owners resorting to local OGI *guizhang*).

115. According to news reports, these "internal documents" were created in the provinces of Hubei, Zhejiang, Jiangsu, Shanxi, and Shandong, among others. *See* Xuming Fu (傅旭明), *Dangan Baomi Zhengce Buyideng Shi Jiejue Jing Zufang Wenti Sida Guanjian* (档案保密政策不一等是解

particular, have been endorsed by the Ministry of Construction.[116] However, it has been reported that some of this classified information can be consulted in the archive divisions of local tax bureaus or the offices responsible for housing demolition.[117] The availability of *jingzufang*-related archives in the public domain, as well as the absence of secrecy requirements governing such archives in many cities, casts serious doubt on the necessity of their classification. The purpose of the classification norms is more likely the preservation of illegitimately vested interests than the upholding of any public interest, particularly when the substantial benefits that housing authorities have obtained from their management of *jingzufang* and the illegality of their continued neglect or denial of private owners' property rights are taken into account. Insofar as such norms conceal both violations of the law or administrative irregularities during the historical housing-taking campaigns and the contemporary process of housing transactions, they go against the general spirit of state secrecy laws and suggest that the norm-makers have abused their classification power. Given that the norms are further incompatible with the Law on Property Rights, their expansive application calls for judicial intervention, and the courts should declare them an invalid basis for OGI decisions.

2. Unanimous Avoidance of Legality Reviews

Twelve OGI cases concerning the *Gongfang* Notification are included in the sample collected from legal databases for this article.[118] In all twelve cases, the courts upheld the housing authorities' decisions, declaring either

决经租房问题4大关键) [Inconsistency in Archives Classification Policies is Among the Four Major Issues for Resolving State-managed Rental Housing Problems], CHINA ECONOMIC TIMES (February 2, 2005) (China).

116. For example, with regard to the aforementioned Shanghai notice on classifying *gongfang* materials, the Ministry issued a reply of endorsement: Reply of the Ministry of Construction on Endorsing the Classification of Gongfang Archives in the Shanghai Municipality (建设部《关于同意将上海市公房档案资料列为保密资料的复函》).

117. Xuming Fu (傅旭明), *"Jing Zufang" Dangan Zhihuo* ("经租房"档案之惑) [Puzzles about State-managed Rental Housing Archives], CHINA ECONOMIC TIMES (MARCH 23,2005).

118. One of the cases was also covered in media reports. *See* Shi Renxing v. Songjiang District Housing Support and Management Bureau of Shanghai Municipality (施仁兴诉上海市松江区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN [Songjiang Dist. People's Ct. of Shanghai Municipality, 2009], which is reported in *Gongfang Ziliao Leiru Mijian Yinfa Susong Songjiangqu Zhineng Bumen Jiti Pangting* (公房资料列入密件引发诉讼松江区职能部门集体旁听) [Classification of Public Housing Materials Caused Litigation; Personnel of the Songjiang District Housing Authority Collectively Observed the Court Hearing], ORIENTAL DAILY (东方早报) (August 12, 2009) (hereinafter "*Shi Renxing Case*").

that the defendants had correctly applied the law without mentioning the notification[119] or implicitly recognizing its legality.[120]

For instance, in a case in which the plaintiff stressed "a lack of legal basis for the defendant's determination" that the requested historical materials on *gongfang* constituted state secrets, the court held that

> [t]his court ascertains that the respondent issued in 2006 [the *Gongfang* Notice] according to the spirit of the Reply of the Ministry of Construction [on Endorsing the Classification of *Gongfang* Archives in the Shanghai Municipality] ....This court finds that according to the Notice, the requested information belongs to classified materials. [T]he respondent has acted properly in identifying the information as a state secret and withholding it from the plaintiff. [121]

In adjudication practice, "acting properly" means that the factual findings of an administrative decision are clear and the application of law correct. In so concluding, the court implicitly accepted the *Gongfang* Notice as valid, but its reasoning is problematic. The notice's compatibility with the Ministry's reply does not guarantee its validity. The reply itself is an individual internal decision concerning a specific issue rather than a classification standard provided by the LGSS as grounds for classification. It contradicts the Law on Property Rights in the same way the notice does, and is likely to have been inspired by a similar need to maintain the Ministry's illegal monopoly over *jingzufang* without private owners' consent.

The courts' failure to ascertain the validity of agency-made classification norms has profoundly affected the procedural fairness of administrative litigation. First, as the plaintiffs in some cases have vociferously complained, the defendant agencies are using norm-making as a means of resisting the

119. *See*, *e.g.*, Pei XX v. Putuo District Bureau for Housing Support and Management of Shanghai Municipality (裴某某诉上海市普陀区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN (Shanghai 2nd Interm. Ct. May 18, 2015) (China).

120. Zhongmoumou Su Shanghaishi Hongkouqu Zufang Baozhang He Fangwu Guanliju (钟某、钟某某诉上海市虹口区住房保障和房屋管理局) [Zhong X & Zhong XX v. Hongkou Bureau for Housing Support and Management of Shanghai Municipality], RENMIN FAYUAN ANLI XUAN, 2011 Shanghai 2nd Interm, Ct. 18 (September 4, 2014) (China). *See e.g.*, Xu Enrong Su Shanghaishi Changningqu Zufang Baozhang He Fangwu Guanliju (徐恩溶诉上海市长宁区住房保障和房屋管理局) [Xu Enrong v. Changing District Bureau for Housing Support and Management of Shanghai Municipality], 2015 Shanghai 1st Interm. Ct. 12 (June 5, 2015) (China).

121. Guomoumou Su Shanghaishi Zufang Baozhang He Fangwu Guanliju (郭某某诉上海市住房保障和房屋管理局) [Guo XX v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2013 Shanghai 2nd Interm. Ct. 166 (April 17, 2013) (China). *See* Guomoumou Su Shanghaishi Zufang Baozhang He Fangwu Guanliju (郑某诉上海市住房保障和房屋管理局) [Zheng X v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2010 Shanghai 2nd Interm, Ct. 10 (November 7, 2012) (China) (another case adjudicated by the same court, the plaintiff was more specific in pointing out that the notice was merely an administrative document and should not be recognized as a legal basis. The court disregarded this argument as well.).

ROGI.[122] When such norms are blindly accepted as legal criteria for adjudicating disputes involving their makers, defendants actually become judges of their own cases, which is the situation that the ALL is precisely intended to avoid. Second, the fact that the *Gongfang* Notice itself is classified makes the case for judicial scrutiny even more compelling. The courts are bound to conduct an in camera review of all evidence involving classified information, whether in FOI litigation or other judicial review proceedings.[123] Shirking that review duty renders the evidential rules meaningless because the plaintiff cannot cross-examine evidence even when he or she doubts that classification actually exists or is warranted.[124] More generally, the courts have also neglected their indispensable role of safeguarding the legality of classification standard-setting. Given the lack of supervision over the delegation of classification power in daily practice, the classification standards formulated by agencies at various levels of government tend to favor over-classification, but are seldom checked by secret-guarding or other government departments.

3. Unjustified Judicial Self-Limitation

Enabling individuals to seek redress for past violations of their rights by the authorities is widely recognized as the main value of the FOI law, and it is as important as the need to subject government decisions to public scrutiny.[125] That value is represented in OGI requests made by *jingzufang* owners to collect evidence in support of their property claims. However, the collective abandonment by the courts of their legality review duty in the sample cases seems to indicate judicial indifference to it, indifference that

122. Ximou Su Shanghaishi Hongkouqu Zufang He Fangwu Guanliju (奚某诉上海市虹口区住房保障和房屋管理局) [Xi X v. Hongkou District Bureau for Housing Support and Management of Shanghai Municipality], RENMIN FAYUAN ANLI XUAN 2012 Shanghai 2nd Interm. Ct 359 (October 18, 2012) (China). See Zhengmou Shanghaishi Zufang Baozhang He Fangwu Guanliju (郑某上海市住房保障和房屋管理局) [Zheng X v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2011 Shanghai 2nd Interm. Ct. 10 (May 6, 2011) (China).

123. Art. 6, Provisions of the Supreme People's Court on Several Issues Relating to the Trial of Administrative Cases Concerning Open Government Information (最高人民法院关于审理政府信息公开行政案件若干问题的规定) (promulgated by Sup. People's Ct. on July 29, 2011, effective August 13, 2011); Art. 37, Provisions on Several Issues Relating to Evidence in Administrative Litigation (最高人民法院关于行政诉讼证据若干问题的规定) (promulgated by Sup. People's Ct. on July 24, 2002, effective October 1, 2002).

124. This classification of the notice was challenged in two cases, although the challenges were not addressed by the courts. See Chen XX v. Baoshan District Bureau for Housing Support and Management of Shanghai Municipality (陈某某诉上海市宝山区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN 2012 Shanghai 2nd Interm. Ct (China); see also Shi Renxing Case, *supra* note 118.

125. See Art. 19, Asia Disclosed: A Review of the Right to Information across Asia, 3 (Free Word Centre 2015) (London); Mendel, *supra* note 3, at 5.

stems in large part from Chinese courts' concern over the impact that broad access to historical records would have on so-called "social stability."

Such concern is mentioned in the reports on FOI litigation published by several provincial high courts, with all of the reporting judges concerned finding that a great proportion of OGI requests have the utilitarian purpose of resolving outstanding issues in other fields of law.[126] The requesters, they claim, are using FOI litigation to place the government under pressure in the hope of "activating" remedial proceedings that have been interrupted for a variety of reasons.[127] The judges also stress the difficulties of handling OGI cases in which the information at issue was generated during a period in which society was "regulated by special political policies" or in which the legal relations to which the information pertains "had been already stabilized."[128] Their belief is that because FOI litigation can contribute little to the resolution of the underlying substantive disputes, it will inevitably give rise to subsequent disputes and cause a "waste of judicial resources."[129] Some high court judges have thus suggested that legality reviews are simply "inappropriate for certain cases."[130] A number of district court judges have further advocated for courts to refrain from "mechanically" applying the law to prevent "unrealistic judgments" from exacerbating the contradiction. Above all, the courts should help to "eliminate unstable factors."[131] Such a stability-overrides-all mentality has affected FOI litigation in numerous respects, and is well exemplified by the lax judicial control over non-disclosure decisions stating that granting access would endanger social stability.[132]

126. In judicial practice, Chinese high courts often provide general guidance for the adjudication of certain types of cases within their provincial jurisdiction.

127. Fengqiang Wang(王凤强) et al., *Investigation on Administrative Cases of Open Information in Henan Province* (河南省信息公开行政案件调查), 51 REFERENCE J.R. 107, 110 (2012); Jiangsu Provincial People's High Court (江苏省高级人民法院), *On Difficult Issues in the Trial of Administrative Cases of Open Government Information* (审理政府信息公开行政案件若干疑难问题研究), 54 REFERENCE J. R. 94, 101 (2012); Beijing People's High Court Administrative Division (北京市高级人民法院行政审判庭), *Research Report on Difficult Legal Issues in the Trial of Open Government Information Cases in Beijing* (北京市审理政府信息公开案件疑难法律问题调研报告), *in* ANNUAL REPORT ON RULE OF LAW IN LOCAL CHINA NO. 1 (中国地方法治发展报告) 120, 122 (Lin Li(李林) & Tian He (田禾) eds., 2015); *see e.g.*, Zhongdong Jiang (蒋中东) & Liangji Ma (马良骥) *Reflections on Practices of Zhejiang Courts Concerning Litigation of Open Government Information* (浙江法院政府信息公开诉讼实践的思考), 49 REFERENCE J. R. 118, 120-21 (2011).

128. Beijing People's High Court Administrative Division, *supra* note 127, at 122.

129. Jiangsu Provincial High People's Court, *supra* note 127, at 101.

130. Beijing People's High Court Administrative Division, *supra* note 127, at 122.

131. Qian Wang (王茜), *On Difficult Issues in Administrative Litigation of Open Government Information* (政府信息公开类行政诉讼案件审判难点调研), 36 REFERENCE J.R. 81, 86 (2009).

132. Regulation on Open Government Information, *supra* note 1, at Art. 8. *See* Chen, *Transparency versus Stability*, *supra* note 3, at 107-22 (analyzing judicial control of the exemption).

The sample cases considered here were adjudicated in line with the self-limiting approach suggested in the aforementioned reports. The concerns expressed therein, however, cannot justify exempting classification norms from judicial scrutiny. First, the status quo of *jingzufang* being dominated by the housing authorities reflects not an established legal relation but an ongoing contravention of the law. Widespread "nationalization" of private properties in accordance with an internal instruction of the Ministry of Construction constitutes evidence of severe violations of fundamental rights that no legal system should ignore. Substantive disputes over property ownership have persisted for years, and are thus by no means caused by OGI requests. Judicial intervention is absolutely necessary and long overdue. If the courts continue to justify their inaction with reference to the need to respect "special political policies" or "stabilized legal status," the residuals of the lawlessness that prevailed during the Cultural Revolution will remain despite the Chinese Constitution's declaration of the need to protect human rights.[133] Second, if the courts consider disputes over *jingzufang* ownership to be too complicated to handle, particularly because of the unavailability of evidence, then surely protecting the right to access relevant historical records will help to secure more evidence and thus render the disputes less difficult to resolve. In this regard, OGI is a cost-effective means of enabling the courts to resolve outstanding problems concerning not only *jingzufang* ownership, but also irregularities in determining the scope of *jingzufang* or in the confiscation of other types of private housing. In contrast, tolerating the housing authorities' attempts to prevent interested parties from collecting evidence by formulating anti-access norms has not stopped *jingzufang* owners from challenging non-disclosure decisions based on those norms. Therefore, the courts' repeated shirking of their review duty has actually contributed to the waste of judicial resources. Third, it is the illegal nationalization policy that is the primary cause of *jingzufang* owners' collective resistance to the housing authorities. Continuing to classify historical records will further agitate rather than appease owners, leading to more petitions and protests (which equate to instability in the eyes of local governments), which the authorities purportedly wish to avoid. Only by upholding the hierarchy of law and safeguarding the citizenry's legal rights can the courts contribute to genuine, and sustainable, social stability. Furthermore, the courts have a constitutional responsibility to strictly apply the law and scrutinize the legality of agency activities. That responsibility should never be overridden by the purported need to "eliminate unstable factors" that are not anticipated or regulated by the law.

133. XIANFA, Art. 4 (1982) (China).

C. GOSC Norms Creating the Exemption of Process Information

If agency-made documents that define state secrets may serve to cover sensitive issues in past political campaigns, the GOSC-imposed additional exemptions can conveniently mask sensitive issues in the governance today. FOI litigation concerning one of the latter, the process information exemption, has increased significantly and posed similarly delicate challenges. In none of the cases collected for this study did the courts address head-on whether it is valid for the GOSC to create that exemption, although some of the courts briefly mentioned the legal nature of GOSC Opinions. On the premise of subtly recognizing the legality of that exemption, the courts attempted to develop different ways of limiting its scope.

1. Referential Cases

In all five of the referential cases adopted in SPC publications, the courts avoided addressing the validity of GOSC Opinion No. 5, focusing instead on defining the concept of process information. It is noteworthy that in certain case reports, the reporting judges (usually members of the collegiate panel that adjudicated the case concerned) prescribe additional limitations on the scope of exemption and associate those limitations with the rationale for withholding process information.

(a) Definitional Restrictions

Exemption was first analyzed as an incidental issue in Shi Lijiang v. Jiangsu Land and Resources Department (decided in 2011), in which the defendant's non-disclosure decision was upheld on other grounds.[134] During the trial, the plaintiff raised the argument that the GOSC had exceeded its authority in barring the disclosure of process information. The collegiate panel adjudicating the case tended to believe that, on the one hand, "exempting process information from the scope of disclosable information conforms better with China's current circumstances as well as the background of the existing system of administrative litigation," whereas, on the other, process information "should be strictly defined."[135] According to

134. Shi Lijiang v. Jiangsu Provincial Department of Land and Resources (史丽江诉江苏省国土资源厅), RENMIN FAYUAN ANLI XUAN 2011 Jiangsu High Ct. (China). Part of the information at issue related to supporting documents for a decision on land appropriation. The court found that the defendant was not at fault for not disclosing that information on the grounds that the request for it was unclear.

135. *See* Xueyan Zhao (赵雪雁), Shi Lijiang v. Jiangsu Provincial Department of Land and Resources (Re: Failure to Perform the Statutory Obligation of Disclosing Land Information) (史丽江诉江苏省国土资源厅不履行土地信息公开法定职责案), (2) 79 SELECTED CASES 31 (2012).

the panel, once a decision has been made, relevant opinions, advice, and/or schemes that were variable during the decision-making process become purely factual information, and hence should be disclosed. Furthermore, if process information has practical impacts on the rights of the parties concerned, it should be disclosed as "an exception to the exemption."[136] The panel's view of the legal basis of process information exemption is untenable. Conformity with the nation's circumstances is not a valid standard of legality. The existing administrative litigation system does not endorse the application of norms that are at odds with upper-level laws and regulations. However, the panel seems to have recognized the potentially negative consequences of applying such an exemption, and suggests ways to alleviate them. First, it proposes imposing definitional restrictions on the concept of process information, including a temporal limit and distinction between facts and opinions. Second, it recommends a balancing test in circumstances in which the requested information affects the requester's rights. These review standards echo the academic debate surrounding the process information exemption, and serve as embryo tests.

These definitional restrictions were confirmed in Xu Zhihao v. Guangzhou City Planning Bureau (2011).[137] The plaintiff, a villager whose house had been demolished during implementation of a redevelopment project affecting his village, had requested the disclosure of the redevelopment plan. The defendant, Planning Bureau, contended that the plan was an "intermediate-stage result of planning research," an alternative expression of process information. The court in this case did not address whether the defendant had a legal basis for exempting process information from disclosure, but looked into the nature of such information.[138] It ruled that the plan at issue was a "terminal result of planning research" rather than a process document for two reasons. First, the defendant had formulated the redevelopment project in accordance with the plan, which meant that the plan had become the basis for an administrative decision on urban planning and was therefore executable. Second, the plan had directly affected the plaintiff's rights. The court appears to have imposed two definitional restrictions on the concept of process information, namely, (1) process information does not exist in finalized administrative decisions and (2) it has no external effects on individuals. The first restriction was followed in two further referential cases decided in the western province of Shaanxi and

136. *Id*.

137. Xu Zhihao v. Guangzhou City Planning Bureau (徐志豪诉广州市规划局), RENMIN FAYUAN ANLI XUAN 2011 Interm. Ct. of Guangzhou City (Chia). *See* Guangyu Li (李广宇), Process Information: Xu Zhihan v. Guangzhou City Planning Bureau (过程信息——徐志豪诉广州市规划局案), 59 REFERENCE J.R. 130 (2013).

138. However, the plaintiff did point out the lack of legal basis concerning this exemption.

south-eastern province of Fujian: Li Liuxue v. Xi'an City Government[139] (2014) and Yao Xinjin et al. v. Yongtai County Land Resources Bureau[140] (2014) (hereinafter "*Li Liuxue*" and "*Yao Xinjin*" respectively). Both cases concerned supporting documents for enforced land-taking decisions. The SPC set *Yao Xinjin* as an example of good practice, making it plain that once a policy or decision has been enacted, the research findings, discussion records, requests for instructions, and reports generated in the process of investigation, deliberation, and handling are no longer process information.[141]

The exemption of materials concerning environmental issues was examined in Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection (2012) (hereinafter "*Xie Yong*").[142] An environmental activist had sought access to the defendant bureau's pre-qualification opinion regarding a company's application for a waste disposal license and to the supporting materials for that application, including environmental monitoring reports on the company. The defendant insisted that both the opinion and materials were process information prepared for the reference of the Ministry of Environmental Protection, which was responsible for deciding whether to grant the license. The court held that the documents were factual materials because the license had already been granted by the Ministry, thereby confirming the first definitional restriction above. It then proceeded to discuss, as the case report reveals, the nature of the application materials if the related decision-making had not been completed.[143] According to the court, documents created in the process of decision-making are not always "variable," but can be definite or concluding, depending on the extent to which the information therein affects the interested parties' rights. It distinguished between the two following scenarios. (1) When the agency responsible for pre-qualification holds the opinion that the applicant is unqualified and refuses to refer the application to the agency responsible for final approval, that opinion has a substantive effect on the applicant and other interested parties, and becomes concluding materials. Hence, such an opinion should be disclosed. (2) If the pre-qualifying agency is of the opinion that the

139. Li Liuxue v. Xi'an City Government (李六学等诉西安市政府), RENMIN FAYUAN ANLI XUAN 2014 Weiyang District Ct. of Xi'an City (China).

140. Yao Xinjin et al v. Yongtai County Land Resources Bureau (姚新金等诉福建省永泰县国土资源局), RENMIN FAYUAN ANLI XUAN 2014 Interm. Ct. of Fuzhou City (China). See *Ten Major Cases Concerning Open Government Information of Chinese Courts* (全国法院政府信息公开十大案例), 65 REFERENCE J.R. 1 (2014), Case 5 (hereinafter "*Ten Major OGI Cases*").

141. Ten Major OGI Cases, *supra* note 140, at 2.

142. Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection (谢勇诉江苏省环境保护厅), RENMIN FAYUAN ANLI XUAN 2013 Interm. Ct. of Nanjing City (China).

143. Junfei Lu (陆俊肆), Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection (Re: OGI), (谢勇诉江苏省环境保护厅政府信息公开案), 85 SELECTED CASES 3 (2013).

applicant is qualified and refers the application to the approval-granting agency, then that opinion does not entail the final approval of the application, and thus constitutes process information of an indefinite nature. In this regard, the court agreed with the ruling in *Xu Zhihao* in terms of imposing the second definitional restriction, that is, process information has to be variable, and an indicator of variableness is the information having no external effects on the interested parties.

(b) Restrictions on underlying interests

The judgments in all of the foregoing referential cases discuss the concept of process information from a technical perspective. It is only in some of the case reports that the judges display consciousness of the incompatibility between the exemption and the ROGI's legislative intent and probe into the policy goals for the withholding of process information. The judge commenting on *Xie Yong* rightly stresses that disclosure of process information in essence opens up the administrative process. He criticizes the tendency among agencies toward disclosing only information on the results of decision-making, denouncing such a practice for reducing the scope of openness expected and going against the ROGI's goals of increasing government transparency and promoting law-based administration.[144] Similarly, the judges commenting on *Li Liuxue* point out that the categorical withholding of information on an administrative process deviates from the principle of open administration recognized by various laws, impedes effective participation in relevant administrative procedures by affected parties, and hampers public scrutiny of the undertaking of administrative acts.[145]

As a remedy, these judges suggest that the exemption be approved only for valid purposes, which they recognize as ensuring the impartiality and integrity of deliberation inside government,[146] ensuring the effective conduct of administrative affairs,[147] and preventing prejudice to the legitimate interests of certain people or the illegitimate enrichment of others.[148] Furthermore, the judges insist that process information should not be absolutely exempt from disclosure, a view explicitly endorsed by the SPC in its comments on *Yao Xinjin*.[149] The judges commenting on *Li Lixue* argue

144. *Id*.

145. Huigen Yuan(袁辉根) & Hui Yuan (袁辉), *Process Government Information Shall Not Be Absolutely Exempt from Disclosure* (政府过程性信息并非绝对不能公开), PEOPLE'S JUDICATURE (人民司法) 91, 91-92 (2015) (hereinafter "*Yuan & Yuan Case*").

146. *Id.* at 93; *Ten Major OGI Cases*, *supra* note 140.

147. *Yuan & Yuan Case*, *supra* note 145, at 93; *Ten Major OGI Cases*, *supra* note 140.

148. *Yuan & Yuan Case*, *supra* note 145, at 93.

149. *Ten Major OGI Cases*, *supra* note 140.

that process information should be disclosed when it affects the intermediate interests of individuals or when its disclosure would enhance procedural fairness and facilitate better decision-making, such as in the case of involving interested parties in hearings and soliciting public comments.[150] The SPC further advises that access to process information should be granted if the needs of disclosure outweigh the needs of withholding.[151]

The foregoing case reports pertain to the substantive issue of balancing the value for and against process information secrecy, which can be seen as progress in the judicial handling of exemptions with problematic policy goals.[152] Nevertheless, the proposed restrictions remain overly concerned with the protection of interested parties in administrative procedures, ignoring the public interest in enabling access to process information by non-interested members of the public. It is noteworthy that the judges commenting on *Li Liuxue* do touch upon the legal nature of GOSC Opinions, regarding them as interpretations of the ROGI and, more specifically, "extensive interpretations of the scope of exempt information."[153] This qualification was expressed for the first time in SPC publications. However, instead of explicitly pointing to the incompatibility between GOSC Opinion No. 5 and the ROGI, the judges advocate only for that opinion's "restrictive interpretation" so as to bring it into accord with the ROGI's intent, which, according to them, is establishing disclosure as the rule and non-disclosure as the exception.[154]

2. Media-Reported Cases

Although the referential cases discussed above demonstrate an increasingly clear policy orientation (particularly those heard after 2011), the attitudes of local courts remain diverse, as demonstrated by the media-reported cases considered in this section. Although attempts were made in these cases to justify the exemption of process information with particular policy reasons, each had its own flaws.

(a) Discordant Definitions of Process Information

Different local courts have defined the concept of process information differently. For example, the definitional restriction concerning the incompleteness of decision-making was adopted in Chu Xiangshan v. Rugao

150. *Yuan & Yuan Case*, *supra* note 145, at 93. The judges justify their argument with reference to Art. 9 of the ROGI, which stipulates the general scope of information to be proactively published.

151. Ten Major OGI Cases, supra note 140.

152. AMIN PASHAYE AMIRI, FREEDOM OF INFORMATION AND NATIONAL SECURITY: A STUDY OF JUDICIAL REVIEW UNDER U.S. LAW 34-35 (Herbert Utz Verlag, 2014).

153. Yuan & Yuan Case, *supra* note 145, at 92.

154. Yuan & Yuan Case, *supra* note 145, at 92.

City Public Security Bureau (2013) (hereinafter "*Chu Xiangshan*"), which pertained to law enforcement records.[155] The plaintiff, a Jiangsu villager, had reported to local police, via a 110 emergency call, that he was being harassed by unidentified persons who were pressing him to accept compensation for the demolition of his house. Without knowing the result of the subsequent police dispatch, he filed a request for the relevant records. The court held that the police have a statutory obligation to keep records on 110 dispatches and that those records do not count as process information once a dispatch has been accomplished.

In contrast, the same restriction was rejected in two other cases. First, in Wu Chongbiao v. Guangdong Provincial Land Resources Department (2013), the court declared that the supporting materials for land-taking submitted by the land authority for the provincial government's approval did constitute process information despite the approval being granted as long ago as 1993.[156] Second, in Zhao Zhengjun v. Commission of Health and Family Planning (2013) (hereinafter "*Zhao Zhengjun*"), a high-profile case concerning food safety, the Beijing first intermediate court ruled that committee deliberation records on national standard-making equated to process information irrespective of whether the standards had been made.[157]

These disagreements over the definition of process information derive from different perceptions of the rationale for protecting such information.

(b) Interpretations Based on Social Stability Concerns

Maintaining social stability is frequently quoted to justify the process information exemption. In *Chu Xiangshan*, the court admitted that "no provision in the ROGI mentions process information or its being exempt from disclosure." Yet it tried to maintain compatibility between Opinion No.

155. Chu Xiangshan v. Rugao City Public Security Bureau (储祥山诉如皋市公安局), RENMIN FAYUAN ANLI XUAN 2014 Interm. Ct. of Natong City (China) (hereinafter "*Chu Xiangshan Case*"). The judgment of first instance was made in 2013. *See 江苏判决首例公安拒绝公开接处警信息案件, 法制日报*, CHINA DAILY, February 4, 2014, http://www.chinadaily.com.cn/micro-reading/dzh/2014-02-24/content_11278273.html.

156. Wu Chongbiao v. Guangdong Provincial Land Resources Department (吴崇彪诉广东省国土资源厅), RENMIN FAYUAN ANLI XUAN 2013 Guangdong High Ct (China). *See 征地审批不公开 村民诉省国土厅案开庭, 南方都市报*, CHINA TRANSPARENCY, August 15, 2012, http://www.chinatransparency.org/article/180/14851.html.

157. Zhao Zhengjun v. National Commission for Health and Family Planning (赵正军诉国家卫生和计划生育委员会), RENMIN FAYUAN ANLI XUAN 2013 1st Interm. Ct. of Beijing (September 18, 2013) (China). See *Beijing First Intermediate Court Rendered First Instance Judgment in the Case Concerning the National Standard for Raw Milk* (北京一中院对生乳新国标会议纪要信息公开案作出一审判决), BEIJING FIRST INTERMEDIATE PEOPLE'S COURT NET (北京市第一中级人民法院网) December 16, 2013, http://bj1zy.chinacourt.org/article/detail/2013/12/id/1445766.shtml (hereafter "Beijing Court Rendered First Instance Judgment").

5 and the ROGI, declaring that the aim of the exemption was to "prevent the disclosure of *uncertain* information from affecting national security, public security, economic security or social stability,"[158] a requirement imposed by Article 8 of the ROGI, echoing the attempts of some local governments to employ that article to justify the exemption of process information, as stipulated by some local OGI *guizhang* but absent from the ROGI.[159]

Such attempts are tenable only if Article 8 provides comprehensible definitions of the policy goals of withholding the information concerned.[160] The extreme vagueness of the concept of social stability makes it infeasible to restrict the corresponding scope of process information. "Causing harm to social stability" has proved to be a widely abused ground for rejecting OGI requests.[161] Further, local courts have largely tended to allow agencies to invoke this ground to obstruct disclosures that might facilitate collective actions to defend property or provoke serious criticism of local governments despite such disclosures usually being crucial to the protection of individuals' "intermediate rights" without affecting the overall social order.[162]

The resort to Article 8 also entails intense scrutiny of how the disclosure of process information might affect social stability, scrutiny that is often evaded by the Chinese courts. We can draw lessons from the ineffective judicial control of a related exemption of process information that is unequivocally based on social stability concerns. The 2008 Shanghai OGI *guizhang* allow agencies to withhold "information in the process of investigation, deliberation or handling whose content is not determined and hence whose disclosure may affect [social] stability."[163] That exemption has been used extensively to withhold supporting documents on land appropriation or housing demolition decisions from the individuals affected by those decisions. A search by the author of the Chinese Judgments Online database for the 2008-2012 period identified seven cases concerning that exemption. In all seven cases, the courts upheld non-disclosure decisions without determining what type of social stability would be harmed by

158. *Chu Xiangshan Case*, *supra* note 155.

159. See discussion in *supra* Section: FOI EXEMPTIONS BASED ON EXTRA-LEGAL NORMS.

160. There are surely scenarios in which the premature disclosure of information created in the process of policy-making would illegitimately enrich certain people with privileges, cause unnecessary fear or disorder in the public, and affect public order and security.

161. *See* Jiangsu Provincial High People's Court, *supra* note 127, at 94; Shipan Lai (赖诗攀), *Wenze, Guanxing Yu Gongkai: Jiyu 97 Ge Gonggong Weiji Shijian de Difang Zhengfu Xingwei Yanjiu* (问责、惯性与公开：基于97个公共危机事件的地方政府行为研究) [Accountability, Inertia and Publicity: A Study of Local Government Behavior Based on Ninety-Seven Public Crisis Cases], 10 JOURNAL OF PUBLIC MANAGEMENT (公共管理学报) 21, 21-24 (2013).

162. *See* Chen, *Transparency versus Stability*, *supra* note 3, at 126-27.

163. *Shanghai Provisions on Open Government Information* (上海市政府信息公开规定) (promulgated by Shanghai Government on April 28, 2008, effective May 1, 2008), Art. 10, Para. 1.

disclosure or how likely it was that such harm would be caused.[164] This indifferent posture was criticized by an SPC justice in a collection of exemplary OGI rulings.[165] In addition, the seven retrieved cases show that the Shanghai courts endorse a broader concept of process information than that framed by the Shanghai OGI *guizhang* of 2004, insisting that process information persists "regardless of whether or not the government decision has been made."[166] In this regard, relying on the need to maintain social stability does not necessarily reduce the scope of process information, and nor is it helpful to distinguish between the reasonable and unwarranted withholding of such information.

(c) Interpretations Aimed at Protecting Deliberation Frankness

In addition to social stability, deliberation frankness is proclaimed by some local courts as an important interest protected by the process information exemption. The discussion on that interest often occurs in cases in which the OGI request is not related to the plaintiff's personal rights. In a typical such case, *Zhao Zhengjun*, a consumer rights activist, requested the meeting minutes of the Review Committee on the National Standards for Raw Milk.[167] Given that the new standards approved by the Ministry of Health differed greatly from previous standards, including a reduction in the required protein content and significant increase in the tolerable number of bacteria colonies, Zhao worried that the standard-setting process may have been unfairly influenced by large raw milk enterprises. He thus approached the Ministry, which had organized the review committee, for information on the parties that had been engaged in drafting or advising on the standards and on the handling of objections to the draft standards by the review committee.[168] At the time the request was made, memories of the melamine-tainted milk scandal of 2008 were still fresh in the public mind, and the public was thus deeply concerned about the potential for the new national standards

164. *See*, Wang Bingting v. Hongkou District Government of Shanghai Municipality (王炳庭诉上海市虹口区人民政府), Shanghai High Ct. 2010.

165. GUANGYU LI (李广宇), 100 SELECTED CASES ON OPEN GOVERNMENT INFORMATION (政府信息公开判例百选) 269 (2013).

166. Meng X v. Hongkou District Housing and Land Administration of Shanghai Municipality (孟某诉上海市虹口区房屋土地管理局) 2008 Hongkou District Ct. of Shanghai Municipality (September 22, 2008). *Shanghai Provisions on Open Government Information* (promulgated by Shanghai Government on January 20, 2004, effective May 1, 2004), Art. 10(4).

167. Li Li (李丽) & Bobo Zhang (张咄咄), *Shengru Xinguobiao Dingde Name Di, Laobaixing Neng Zhidao Juece Guocheng Ma* (生乳新国标定得这么低，老百姓能知道决策过程吗) [As Regards the Low National Standards of Raw Milk, Can the Common People Know about the Decision-Making Process?], CHINA YOUTH DAILY, 7 (2012).

168. Bing Sun (孙斌), *Weishengbu Beipanling Xianqi Dafu Xinxi Shenqing*(卫生部被判令限期答复信息申请) [Ministry of Health Ordered to Reply to Information Request within the Prescribed Period], DAHE DAILY, (2012).

to further undermine the safety of milk products. The media also paid close attention to the controversy.[169] The Ministry of Health rejected Zhao's request on the grounds that the requested record should be disclosed by the review committee rather than the Ministry itself. In the litigation against that rejection, the court held that the committee was a constituent part of the Ministry, and ordered the latter to re-handle the request.[170] The Ministry of Health (which became the Commission of Health and Family Planning in 2013) rejected the request a second time, claiming that the minutes were covered by the process information exemption. Upon hearing the follow-up litigation, the same court accepted this argument.[171]

In its judgment, the court first agreed that "there is no legal basis for categorically exempting information [regarding] the process of administrative decision-making from disclosure" because increasing the transparency of government work and promoting law-based administration are the ROGI's legislative intent.[172] It then pointed out that the "sufficient presentation of different views can ensure the making of correct decisions, and is equally important for achieving the purpose of promoting law-based administration." Because the "disclosure of information on ... exchanges of views inside ... agencies, whether during or after the process of decision-making, can hinder the frank expression of opinions," such information should be exempt from disclosure.[173]

The court in this case resorted to a purposive interpretation of Opinion No. 5 to demonstrate its compatibility with the ROGI, although it did not do so successfully. Law-based administration is a general value that includes different dimensions associated with various exigencies of the law. As a legislative intent of the ROGI, the promotion of law-based administration is realized by subjecting the administration to scrutiny by the public or affected parties. Such promotion is distinct from, and stands in tension with, the promotion of law-based administration that is served by legitimate secrecy. The court confused the two. Although the protection of frankness during deliberation is a desirable policy goal in its own right, it does not fall within the confines of the ROGI's legislative intent.

169. GuangZhou Jian (简光洲), *Naiye Biaozhun Muhou de Liyi Jiaoliang* (奶业标准幕后的利益较量) [Contest of Interests behind Milk Industry Standards], ORIENTAL DAILY (2012), A18.

170. Zhao Zhengjun v. Ministry of Health (赵正军诉卫生部) 2012 1st Interm. Ct. of Beijing Municipality (October 17, 2012).

171. Jian An (安健), *生乳新国标会议纪要信息公开案宣判 消费者起诉原卫生部被驳回* (Judgment Was Pronounced on the OGI Case of Meeting Minutes about the New National Standards for Raw Milk; The Consumer's Litigation against Former Ministry of Health Was Rejected), PEOPLE'S COURT DAILY (2013).

172. *Beijing Court Rendered First Instance Judgment*, *supra* note 157.

173. *Id*.

Setting aside the issue of validity, the court's approach in *Zhao Zhengjun* suffers other substantive defects. First, the disclosure of minutes does not necessarily hinder the frank expression of opinions. If opinions on drafted national standards are disclosed in isolation from information on the identities of the committee members who expressed them, those members would not face personal criticisms or other pressures and, accordingly, would not be deterred from continuing to voice their views in subsequent deliberations. The distinction between pre- and post-decision disclosure is not as insignificant as purported by the court. The post-decision disclosure of minutes exerts much less of an impact on committee members' incentives because different members deliberate on different standards. Second, as framed by the court, the exemption is still categorical in the sense that it is not balanced against other public interests. Given that the government has repeatedly failed to regulate the milk industry to ensure food safety, the public has a compelling need for knowledge of the debates that take place inside the body responsible for setting milk safety standards. Disclosure of that knowledge can thus reduce the room for rent-seeking and correct biases toward parties with vested interests in future standard-making. In this context, public access to meeting minutes is indispensable for reaching correct (in the sense of unprejudiced) decisions on standards, and thus overrides the need to provide a stress-free environment for deliberation. After all, committee members have a statutory responsibility to express views that they believe will serve the public good. The possibility of public criticism is a risk they accept when they accept committee membership. The *Zhao Zhengjun* court's overemphasis on the confidentiality of internal deliberations is based on insufficient consideration of China's complicated governance problems.

Compared with the total submission to local agency-issued norms that classify materials on state infringements of property rights, the courts showed subtle intentions to restrain the norms that conceal information on the process of decision-making. They imposed restraints not through a direct review of the GOSC Opinions' validity – despites their clear contravention of the ROGI, but through restrictive interpretations of the concept of process information. The indirect manner of control stems from the judiciary's reluctance to confront the GOSC which wields high political authority. It also indicates that the courts prioritized the pragmatic needs of the administration over their constitutional responsibility to uphold the unity of the legal system. Some judges claim that it is "substantively reasonable to endorse the formally invalid exemption" because the ROGI fails to incorporate a useful exemption that is available in most FOI laws.[174] The claim clearly violates the principle

174. Yang, *supra* note 61, at180.

of legality on which the whole system of judicial review grounds. And the courts seemed to seek substantive reasonableness only in the measures restricting transparency. The ROGI also fails to follow most FOI laws to unequivocally allow access to information based on all needs. In this regard, it is substantively reasonable as well to remove the needs test imposed by the GOSC, but the courts showed no interest in endorsing that removal.

That said, a handful of local courts expressed concern over the impacts of that exemption on the openness of administrative decision-making process, and undertook initiatives to curb them. The SPC made a recommendable move to synthesize those local initiatives into more systematic definitional restrictions. The distinction between facts and opinions and preclusion of information concerning taken decisions are broadly consistent with the exemptions pertaining to government deliberative process under other FOI laws. In addition, some judges make tentative suggestions to delimit the exemption's purposes and temper the exemption with a balancing test. Whereas the SPC promoted these progressive review approaches to abate the exemption's consequences, adjudication on the ground tended to be rather inconsistent. The media-reported cases reveal judicial refusals to restrict the exemption in different contexts, ranging from land-taking information that directly involves the requesters' substantive rights to food safety information that does not directly relate to the requesters' own rights but concerns the public. The deference was associated with the courts' overemphasis on secrecy in the officials' deliberation; they failed to assess whether deliberation frankness will be truly hampered by disclosure. Although in one media-reported case the court followed the SPC-recommended definitional restrictions, it still linked process information to an absolute need to maintain social stability, a need whose content is highly uncertain and politicized. In all the cases analyzed in this section, no court has ever examined the critical question on how the interest in concealing process information should be evaluated against the countervailing public interests in disclosure, such as making sounder decisions through public participation and better defense of the affected parties' rights.

CONCLUSION

The finding that the courts avoided reviewing the validity of different extra-legal exemptions sheds new light on China's changing regulatory landscape of information access. In this concluding section, it is argued that the courts play no more than a marginal role in controlling extra-legal secrecy norms, and that the unsuccessful resolution of conflicts of norms renders the ROGI fall short of a genuine FOI law. The circumvention of legal imperatives on disclosure can be partly attributed to the party-state dualism in the exercise of powers. To give due effect to transparency law entails not

only legislative amendments but also substantive reforms that champion the supremacy of law in the whole political system.

The Chinese courts have the responsibility and power to uphold the hierarchy of law in the context of government information disclosure, that is, to scrutinize the conformity of pro-secrecy norms to the ROGI and other laws or regulations, and to reject the application of any norm that contradicts the latter. However, they abandoned this responsibility in most of cases analyzed in the preceding sections. Overall, the judicial treatment of exemptions based on invalid norms is closely associated with the political sensitivity of the matters regulated by the norm at issue or to the political authority of the norm-maker. And it is conventional for Chinese judges and officials to consider matters that are highly embarrassing or inconvenient to the CCP or government as politically sensitive. On the one hand, legality review was explicitly undertaken of the norm formulated by a local government that pertained to a procedural question, i.e., the requester's qualification, without involving any substantive issue on the requested information. On the other hand, legality review was completely withdrawn from the norms formulated by a local agency and endorsed by a central department that mandate classification of materials pertaining to the pre-1980 nationalization of private houses. The materials involve not only the rupture of the legal order during past political campaigns but also the nationwide illegal occupations of private houses by agencies till today, and highlight unsettled historical issues that question the ruling party's credibility in securing citizens' property rights. Between these two extremes in the rigorousness of examination lie an evasive review approach, under which the court dodges reviewing the norm's validity but interprets the norm in a restrictive manner. This approach was applied to the invalid exemptions formulated by the central government's general office, a politically powerful organ which the courts hesitate to overtly criticize. By narrowly defining the constituent elements of "internal managerial information" and "process information", the courts seem to share with the GOSC the policy-making role in determining the eventual scope of the two exemptions. However, the judicial restrictions were not realized through the enforcement of the legal hierarchy, but hinged instead on the courts' own discretion which is hardly predictable. Whereas some courts introduced restrictions to align the exemptions with the common standards of other FOI laws, others absolutized the not necessarily justified policy goals of the exemptions and disregarded all the public interests that support disclosure. And the judicial restriction became plainly nominal in a case concerning the controversial milk standard-setting process, whose exposure is likely to arouse public anger at the central authorities' incompetence in guaranteeing food safety. The deference to invalid exemptions on politically sensitive matters indicate that the courts have

largely failed to offer remedy to violations of the right to information which were based on the most significant categories of extra-legal norms.

Given almost free rein, the extra-legal norms that preserve the traditional ways of information control under the socialist system triumph over the transparency requirements under the ROGI, and inhibit the ROGI's democratic functions. The expandable scope of state secrets obstructs the revelation of historical truth and the redress of outstanding wrongs. The unconditional sealing of information concerning deliberative process prevents the public participation in policy-making and hinder the parties affected by administrative decisions from defending their substantive rights. The insistence on prior approval and centralized release of information renders it impossible for the public to use OGI as an alternative channel to access news on maladministration or abuse of power that is otherwise censored. The malleable extra-legal exemptions also erode the ROGI's progressive stipulations on proactive disclosure of information concerning the public's intermediate interests. Thus, the ROGI falls short of a genuine FOI law that mandates disclosure be the rule and permits no exemptions unless they are definite and explicitly prescribed by the law itself. More importantly, an allegedly reformative system of transparency has been assimilated by the pre-existing regimes of information control, at least to a great extent. Based on the general law governing information access, the OGI system had the potential to break through and substitute the variety of information control measures that were primarily based on state policy documents and party directives. Yet it refers or yields to those measures when the information at issue pertains to matters that need to be monitored and participated by the public but are considered sensitive by the CCP and government. The selective enforcement of the ROGI by the courts further gives legal endorsement to the practices of concealment whose legality used to be obscure.

The circumvention of transparency requirements is caused by not only the flaws in the ROGI, but also the peculiar disposition of power in the party-state and the incomplete legal regulation of the exercise of power. First, the ruling party retains the power to make policies to be immediately enforced by state organs in the fields that it esteems vital to maintain the single-party rule, two typical fields being state secrecy and news censorship. The formulation and implementation of policies in those fields are based on the fusion of state powers into the party, and have not been subject to the legal system that regulates formal state powers (in particular the administrative power). The introduction of a law on information access does not change the extra-legal nature of the policies in those fields, but merely presses state organs to adjust the relation between legal rules and extra-legal policies. The policies on information control have prevailed as most officials refrain from questioning the party's yielding of legislative and administrative power.

Secondly, the courts in the party-state are not independent from the party, nor the ultimate arbitrator in resolving the conflicts of norms. In the institutional setting that judicial personnel are controlled by the party and local courts are funded by local governments, judges are tempted to consider the political implications of their rulings and hesitate to unconditionally uphold the primacy of law. And under the constitutional framework, the courts also lack the power to directly invalidate norms conflicting with upper-level legislation, a power that is shared instead between the people's congresses and the governments at different levels.

The ROGI's embeddedness in the Chinese party-state should thus be taken into account for a better understanding of the transparency reform's prospects. Amendments to the ROGI and other laws (e.g. deleting the ROGI's clauses that refer to provisions of the State, and specifying classification standards under the Law on Guarding State Secrets) are undoubtedly necessary for clarifying the legal confines of exemption, but are far from sufficient for curtailing the expanding of exemption in practice. The introduction of FOI-like law is in fact a component of the reform package through which the ruling party seeks to increase government accountability without affecting the fundamental political structure. When the reform touches on the integration of the party and State, in the field of information control in particular, it inevitably faces the political limits set to the whole legal system. In this regard, the efficacy of FOI law, like that of other contemporary legal reform in China, hinges on the extent to which the activities of all political actors, including the party, are subject to legal regulation.

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