Domestic Isomorphic pressures in the design of FOI oversight institutions in Latin America

Abstract

Even though many countries in Latin America have adopted FOI Laws, there are significant differences in the institutional design of FOI oversight institutions. Most explanations highlight the role of political competition in motivating political actors to design strong de jure FOI oversight institutions. The design of FOI oversight institutions in Chile, Peru and Uruguay, however, cannot fully be explained by political competition. We show how isomorphic pressures help explain variation in the de jure strength of the FOI oversight institutions. Our findings highlight the importance of considering domestic constraints on the diffusion of one-size-fits-all models. To analyze each case, we conducted a systematic process-tracing analysis. Our in-depth analysis allowed us to assess different theories concerning the specific institutional design of FOI oversight institutions.

Introduction

What determines the strength of Freedom of Information (FOI) oversight institutions? In the last two decades, many countries around the world have adopted FOI laws (Banisar 2006, Mendel 2009, Darch and Underwood 2010). This wave of legislation has shown differences in terms of the characteristics of the laws and in their institutional design. A first group of studies on the expansion of FOI laws has emphasized the conditions leading to the enactment of these laws (Darch and Underwood 2005, Michener 2010, Berliner 2014, Worthy 2017). However, the expansion of FOI laws was not uniform,

especially in terms of the de jure strength and de facto enforcement. The diversity of FOI oversight institutions has been addressed by a second group of studies (Michener 2015a, b, Scrollini 2015, Worthy 2017). These studies have significantly contributed to our understanding of the enactment and development of FOI laws.

In this paper, we theorize one crucial dimension of relevant variation of the institutional design of FOI laws, the de jure strength of the oversight institution, and we analyze this dimension in three different cases. We show how country differences in the de jure strength of FOI oversight institutions are driven by domestic isomorphic pressures. This implies the existence and influence of, on the one hand, institutional models in comparable areas within each country (e.g., oversight agencies of public administration and data access) and, on the other, jurisprudential customs specific to each country, which place constraints on the scope of institutional designs. Preexisting institutional templates operate as constraints; veto players use them to deny institutional innovation. We argue that, while alternative theories that seek to explain the enactment and strength of FOI laws are valid, the institutional design of such laws is also shaped by domestic isomorphic pressures.

We analyze the cases of Chile, Peru, and Uruguay, countries that represent three different models in the design of FOI oversight institutions. Even though cases might vary in terms of the extent of the right or in the power of oversight institutions, our cases only vary significantly regarding the de jure strength of FOI oversight institutions. Chile has built an institution, the Consejo para la Transparencia (Council for Transparency, CPLT) that enjoys a greater degree of autonomy and enforcement authority than do analogous institutions in Peru and Uruguay. The Peruvian Autoridad Nacional de Transparencia y Acceso a la Información Pública (National Authority of Transparency and Access to Public Information, ANTAIP) has low autonomy and enforcement authority. However, Peru also

has a Tribunal de Transparencia y Acceso a la Información Pública (Court of Transparency and Access to Public Information), which is the last administrative body that adjudicates in cases where public institutions do not comply with information requests. The FOI law in Uruguay established an institution without sanction authority and that is not autonomous because it is housed within an agency that promotes and oversees the consolidation of different electronic government policies that, in turn, depend on the Presidency.

To analyze each case, we conducted a systematic process-tracing analysis. We collected pieces of evidence using a systematic review of articles in the press; documents from various state institutions, NGOs, and international organizations; public records of legislative debates; and in-depth interviews with experts, civil society actors, and politicians.[1] The detailed information collected allowed us to analyze how the specific institutional design of FOI oversight institutions came to be. This is crucial to explain the de jure strength of FOI oversight institution in each country. We have developed an extensive Appendix that contains the pieces of evidence that are relevant to our analysis and we assess their probatory nature for each hypothesis. Throughout the empirical analysis, we introduce specific cross-references to the Appendix.[2]

We find that domestic isomorphic pressures explain variation in the institutional design of FOI oversight institutions in Chile, Peru, and Uruguay. Specifically, the preferences held by promoters of FOI rights and the arguments of opponents are mediated by coercive and mimetic domestic isomorphic pressures. Our study highlights the

[1] The pre-analysis plan is posted to the study registry of the EGAP network. Available at: https://osf.io/n9ef5.

[2] The Appendix is available at: https://doi.org/10.7910/DVN/KD30CT

importance of unpacking conditions theorized as domestic isomorphic pressures to advance understanding of the design of otherwise similar initiatives in different contexts. Those in international organizations or think tanks who promote FOI laws often neglect the role these domestic constraints play and offer solutions ill-suited to the existing institutional setting. As a result, either the initiative dies out or becomes heavily contested on legal grounds. Whereas previous authors have focused on local political actors' incentives to promote effective strategies to advance FOI initiatives, our approach highlights the importance of considering domestic constraints on the diffusion of one-size-fits-all models.

The paper proceeds as follows. We first review existing theories on the enactment of FOI laws. Second, we identify two main strands of scholarship and discuss our contribution to this literature. Third, we discuss the methodological details of our study. Fourth, we present the observed outcome in each case, i.e., we describe the FOI oversight institutions in Chile, Peru, and Uruguay. Fourth, we present the results of our process-tracing analysis and show the role of isomorphic pressures in explaining the nature of the FOI oversight institution in each case. Finally, we return to the theoretical implications of our study and conclude.

Theory

Crucial differences in FOI laws are observed in the de jure strength of the oversight institutions. De jure strength comprises three main dimensions: autonomy from the Executive, legal power and bureaucratic authority to monitor compliance, and adjudication and sanction authority. The differences in de jure strength are influenced by domestic isomorphic pressures in each country. These pressures limit the available options for the

design of new institutions, thus determining the institutional design of new FOI oversight institutions. In the absence of crises related to the legitimacy or efficacy of these types of institutions, the design of FOI oversight agencies will be heavily influenced by existing domestic models. The actors involved in the design of these institutions will not consider other possible alternatives or, if they consider other formats, they will be unable to promote them. The latter occurs because promoters of these laws might not have legal grounds to justify the design of an oversight institution more powerful or autonomous than those that already exist in that general institutional setting. The focus on crucial differences in the design of oversight institutions highlights the relevance of domestic isomorphic pressures.

The growing literature focusing on the origins of FOI laws worldwide discusses the conditions under which FOI policies are adopted. There are two main strands in the literature that explains adoption of FOI laws and its characteristics. First, some scholars have emphasized the role of the international diffusion of these initiatives as a key factor. Second, a body of work has focused on agency explanations, especially on the influence of political coalitions and political competition.

FOI laws emerged in the context of a broader attempt to extend rights and improve government transparency, as a response to a declining trust in democratic institutions. FOI laws were approved in various countries and regions in a wave that also reached Latin America. This triggered the development of theories positing that diffusion plays an essential role in the emergence of FOI laws worldwide (Bennett 1997, Grigorescu 2003, Relly 2012). In an analysis of the adoption of FOI laws in OECD countries, Bennett (1997) showed that there were multiple diffusion channels between early adopters and late adopters of this type of legislation. International organizations and activists have also been mentioned as increasingly important actors in the promotion of transparency and access to

public information (Åström et al. 2012), and in the adoption and correct implementation of FOI laws (Grigorescu 2003, Roberts 2006). In addition, international financial institutions have pressured governments to adopt FOI laws as more or less explicit conditions for accessing direct financial aid or as a normative standard for foreign direct investment (Michener 2015a).

While this literature has been useful for explaining the adoption of FOI laws, diffusion alone cannot account for differences between countries in the adoption of specific FOI regimes (Scrollini 2015). Notwithstanding the international pressure to place these reforms on the agenda, the laws adopted differ in the enforcement institutions chosen and in the implementation of these rights. The diffusion literature has failed to address this substantive variation in FOI institutional design because, on the one hand, it conflates the dependent variable (adoption and strength), thus not capturing the relevant variation among cases, and, on the other hand, it assumes a unique causal path.

A second strand of the FOI literature refers to the strength of coalitions and actors who pushed this type of legislation, and the type of political competition setting (Michener 2011). There is compelling evidence that FOI laws are usually approved when a variety of strong advocates promote them. Civil society organizations thus play an important role in pushing and lobbying governments to be transparent as well as in amplifying the public's concerns about transparency. The presence of active civil society groups has been identified as a factor that promotes the adoption of FOI laws (Grigorescu 2003, Gill and Hughes 2005, Michener 2010, Ingrams 2018).[3] Journalists, media organizations, and institutions of

[3] Conversely, a weak civil society is an obstacle to the adoption of RTI laws (Peekhaus 2011, Relly and Cuillier 2010).

the press have also been identified as having a pivotal role in the passage of FOI laws (Relly and Cuillier 2010, Relly and Sabharwal 2009). Notably, coalitions built around FOI laws can include transnational movements and international organizations that support the adoption of FOI laws (Grigorescu 2003, Stubbs 2012). Despite this general hypothesis, these studies focus on why governments adopt FOI laws but do not identify the role different coalitions play in shaping differences among the institutional design of FOI oversight institutions.

A second type of actor-centered explanation highlights the role political competition plays in the adoption of FOI laws. Since the laws expose politicians to the public, these works claim that politicians—who usually prefer secrecy—will try to avoid this type of legislation (Ackerman and Sandoval-Ballesteros 2006, Banisar 2006, Berliner 2014, Hazell and Worthy 2010, Roberts 2006). However, as Berliner (2014) argues, FOI laws not only bring costs but also provide benefits to politicians. Politicians' support for FOI laws may vary depending on the degree and nature of existing political competition. When political competition is high, the adoption of transparency legislation and FOI laws becomes more likely (Berliner 2014, Hollyer, Rosendorff, and Vreeland 2011). In this scenario, incumbents are willing to pass a FOI law if they perceive they are not likely to be re-elected and want their right to access government information in the future to be guaranteed (Berliner 2014, Berliner and Erlich 2015). FOI laws also allow politicians to make promises of greater transparency more credible (Berliner 2014) and improve their reputation (Busuioc and Lodge 2016). FOI initiatives can thus be triggered by the need of politicians to court voters, especially when there are highly visible government scandals (Grigorescu 2003). In specific political contexts, as in cases of democratic transitions, the absence of political competition is more conducive to the approval of FOI laws than

expected (Ingrams 2018). When civil society or international pressures for transparency are strong, governments might be willing to accept that increased transparency serves their interest in remaining in power.

The political competition literature goes beyond explaining the enactment of FOI laws and also focuses on accounting for their levels of enforcement. The variation in the strength of FOI laws and their enforcement level has also been analyzed by Michener (2015b). The author explains differences in de jure and de facto dimensions of FOI regimes among Latin American countries. Michener (2015b) holds that "…the interactive effect of legislative and cabinet conditions (…) determines patterns of FOI strength" (78). There are four different scenarios derived from the combination of two variables: first, whether there is a coalition or a single party government and, second, whether the government has a majority in Congress or not. FOI regimes are expected to be stronger in majoritarian coalition governments and minority single-party governments. According to Michener (2015b), in the former, the government promotes FOI laws to control coalition partners. In the latter, the opposition manages to approve FOI laws and pressures the government to implement them as a means to exert control over it. In the two remaining scenarios, governments have no incentives to promote this legislation and its implementation, and the opposition has no capacity to pursue it.

While Michener makes theoretical progress in seeking to explain differences among FOI institutional regimes beyond the enactment of the laws, his work does not address domestic isomorphic pressures. Once actors set their preferences, their strategic steps could be understood as a response to the normative force of existing models. Therefore, domestic isomorphic pressures play a role in the process of institutional innovation and design. We argue that, in the absence of an acute legitimacy crisis where institutional settings are

severely questioned, the de jure strength of new FOI oversight institutions will be affected by domestic isomorphic pressures.

Diffusion, political competition, and coalitions of promoters are important factors in explaining the enactment of FOI laws and their implementation. However, to account for variation in the de jure strength (autonomy from politics and sanctioning power) of FOI oversight institutions, it is crucial to also consider the limits imposed by the way these types of institutions usually are adapted to each country. Available domestic institutional models, styles, and traditions constrain the design of new oversight or regulatory institutions (Landwehr and Böhm 2011, Yesilkagit and Christensen 2010). Isomorphic pressures operate through two of the three mechanisms identified by DiMaggio and Powell (1983): coercive and mimetic. Coercive isomorphism derives from the legal environment that affects organizational behavior and structure (DiMaggio and Powell 1983). Mimetic isomorphism originates from contexts of uncertainty about how best to efficiently comply with a function or achieve a goal. In such contexts, legislators need to be coherent with the design of already-established oversight institutions in related fields. While theories of isomorphism initially conceived the public sector as a driver of convergence in private-sector organizations (DiMaggio and Powell 1983, Fligstein 1990, Meyer and Rowan 1977), Frumkin and Galaskiewicz (2004) showed that public-sector organizations are also shaped by isomorphic pressures.

Disruptive innovation in the design of oversight bodies carries greater risk of failure associated with legal hurdles or the lack of will to implement it on the part of the government. As Frumkin and Galaskiewicz (2004) note, “One of the easiest ways to change [institutions] is to adopt those routines and structures that are defined by law or government agencies as legitimate. To do so may ensure survival by minimizing conflict” (286).

Disruptive institutional designs are more likely to be confronted with both political and legal arguments by supporters of the status quo. Promoters of new FOI legislation take this into account both in a preemptive way or directly when they are confronted in the parliamentary debate. Even in contexts where bold ideas from abroad are present, promoting coalitions are strong, and the political competition scenario is favorable, isomorphic pressures could hamper the innovative spirit of actors. In different countries, isomorphic pressures give opponents weaker or stronger legal and political arguments (related to coherence with 'how things are done' in each country). Therefore, variation in the de jure strength of FOI oversight institutions cannot be understood if these pressures are not considered. Analyzing isomorphic pressures that influence de jure strength is important because these pressures establish the limits within which certain types of FOI institutions become viable.

Methods and data

The analysis in this paper is based on three in-depth case studies of Chile, Peru, and Uruguay. Each case provides a thick description of the specific FOI oversight institutional models developed. We used process tracing to describe the causal mechanisms that led Chile, Peru, and Uruguay to adopt different de jure features in their FOI oversight institutions. Process-tracing tests are used to assess the value of our causal process observations (CPOs) (Brady and Collier 2010). To do this, we defined ex-ante the necessary and sufficient evidence and the potential sources of such evidence, trying to avoid bias in selecting sources of information. This allowed us to empirically assess the existence of each mechanism, including the type of support each CPO lent to our

hypotheses (Van Evera 1997). We attempt to make an inference that provides a sufficient causal explanation to account for the de jure design of FOI oversight institutions in each country (see Appendix). We registered the pre-analysis plan before reviewing the evidence.[4]

To test whether isomorphic pressures are responsible for differences in the de jure strength of FOI oversight institutions in the three countries, we looked for evidence of judicial or constitutional opinions based on previous regulations determining the way FOI laws are designed in each country. We also looked for previous laws, norms and regulations influencing the design of FOI laws in each country. This influence can be observed in the resemblance between FOI oversight bodies and other existing institutions or in the explicit references made by policymakers. Finally, we searched for specific references by experts to the importance of considering previous administrative models in the design of FOI oversight institutions in each country. The detailed evidence and its relevance for this hypothesis is presented in Table A.1. in the Appendix.

Regarding the alternative hypotheses (diffusion, political coalitions and political competition) we looked for evidence that could be neccesary or sufficient to test whether the design of FOI oversight institutions in each country were shaped by the diffussion of ideas, the pressure of political coalitions favoring or opposing particular design features, or the context of political competition. Tables A.2-A.4 in the Appendix contain the detailed evidence and its relevance for each hypothesis.

We iterated between theory and evidence with the aim of building a sufficient causal explanation for each case. Since our objective was to unpack the causal

[4] See Pre-analysis plan at https://osf.io/n9ef5.

mechanism(s) that led each country to a specific design for its FOI oversight institution, our inferences are valid only within each country. However, we do compare the cases to increase analytical leverage (George and Bennett 2005, Goertz and Mahoney 2012). We relied on different types of evidence, including press and legislative records, documents prepared by civil society organizations, media and international organizations, and in-depth interviews with key actors in the design of FOI laws in each country. We developed a detailed Appendix with a complete set of pieces of evidence for each hypothesis in each case.

Unpacking the de jure strength of FOI oversight institutions

FOI laws may vary in terms of the scope of the right and on the de jure strength of the oversight institution. In the former, the range of variation is associated with: a) the breadth of information that citizens can request or that public institutions must make publicly available; b) the type and number of institutions included by the FOI provisions; and c) the existence of barriers (i.e., rules governing who can request information and how it should be requested). In the most open designs, the information that is excluded from FOI is the exception (e.g., classified information) and governments cannot discretionally classify information, almost all public institutions fall within the scope of the FOI law, any individual can request information without disclosing the reason for the request, and there are accessible ways to request information.

The second source of variation in FOI laws might be the de jure strength of the oversight institution. McAllister (2010) and Scrollini (2015) define the strength of the oversight institution as the interaction of two dimensions: autonomy and the authority to

adjudicate and sanction noncompliance.[5] Autonomy refers to independence in terms of the appointment and survival of authorities whose decisions are not subject to administrative reconsideration by a higher authority (i.e. decisions are free from Executive control). Authority to adjudicate and sanction noncompliance refers to the legal power and bureaucratic authority to monitor compliance, as well as to define and sanction non-compliers accordingly.

[TABLE 1 ABOUT HERE]

[TABLE 2 ABOUT HERE]

Table 1 describes the scope of the right and Table 2 describes the de jure strength of FOI oversight institutions in our three cases. Taken together, these tables describe the two dimensions of the dependent variable for each case. The three countries do not vary in the first dimension; they all enacted FOI laws that granted a broad scope of the right. However, there is significant variation in the strength of FOI oversight institutions.

As noted above, Chile has built an institution that enjoys a greater degree of autonomy and enforcement authority than do analogous institutions in Peru and Uruguay.

[5] There is a rich literature that problematizes and surveys the level of autonomy germane to states (c.f. Evans, Rueschemeyer, and Skocpol 1985) and, in particular, the capture of regulatory agencies (Dal Bó 2006), though this literature focuses mainly on autonomy from social class and economic interests. In this case, however, we are focused on a regulatory agency that oversees political and bureaucratic activity.

In 2008, Chile passed the 20,285 law, called the Ley sobre Acceso a la Información Pública (Access to Public Information Law), which establishes that all government offices (national, regional, or municipal), the armed forces, ministries and other administrative offices must comply with the obligation to provide access to public information. The law created a new institution, the CPLT, a juridically and budgetarily autonomous body that oversees compliance with the law, resolves complaints, issues instructions, and proposes new transparency standards. The CPLT is led by a four-member council appointed by the President after approval by two-thirds of the Senate. Their appointment is for six years and it can be renewed once. The Chilean CPLT can adjudicate appeals regarding non-compliance with requests (through the writ of protection). It can also sanction the highest authority of each institution with a fine that spans from 20 to 50 percent of the person's salary.[6]

FOI oversight institutions in Peru and Uruguay are weaker than those in Chile and exhibit less autonomy. In 2008, Uruguay approved the 18,381 Ley de Accesso a la Información Pública (Access to Public Information Law). The law established the Unidad de Acceso a la Información Pública (Access to Public Information Unit, UAIP) as an institution under the Agencia para el Gobierno Electrónico y la Sociedad de la Information (Agency for Electronic Government and Information Society, AGESIC). AGESIC, in turn, reports directly to the Presidency, affecting its autonomy. The UAIP is headed by a three-member council, formed by the Director of AGESIC, and two other members designated by the Executive, who rotate in their role as President. The members are appointed for four

[6] If the denial persists, the penalty can be doubled, and the official can be suspended for five days.

years, with the opportunity to renew their contracts for an additional four-year term. Although the law establishes that the UAIP in Uruguay has technical autonomy, the unit lacks a guaranteed and independent budget. At the same time, while it has the role of overseeing FOI and making recommendations in case of noncompliance with information requests, it cannot settle claims against institutions that do not comply with the law. Sanctions for civil servants who arbitrarily obstruct access to public information can proceed only through the judiciary.

In 2002, Peru approved the 27,806 Ley de Transparencia y Acceso a la Información Pública (Transparency and Access to Public Information Law). The 2002 Peruvian law did not create an oversight institution. The application of the FOI law was the responsibility of each government agency and the (occasional and non-mandatory) oversight was delegated to the Presidencia del Consejo de Ministros (Presidency of the Ministers Council, PCM). The Defensoría del Pueblo (Ombudsman) could receive complaints and make recommendations, but could not sanction. Legal complaints against civil servants could, in turn, be channeled through the judiciary. In January 2017, the ANTAIP was created by the 1,353 Executive legislative decree. This decree also created the Dirección General de Transparencia, Acceso a la Información Pública y Protección de Datos Personales (General Directorate of Transparency, Access to Public Information, and Personal Data Protection, DGTAIP), which is the public office that exercises the authority. The DGTAIP is a line organ of the Ministry of Justice and Human Rights; this dependence on the Executive severely limits the institutional autonomy of the ANTAIP. Also, the ANTAIP can only provide recommendations, which are not binding on public entities. Nevertheless, the 2017 legislative decree also created the Tribunal de Transparencia y Acceso a la Información Pública (Court of Transparency and Access to Public Information, TTAIP) and established

a sanction regime.[7] This court functions as the last administrative court that adjudicates in cases where public institutions do not comply with information requests.[8] The Court is also administratively housed within the Ministry of Justice, but as a consultive body to the Minister; thus it is separate from the DGTAIP (and ANTAIP). Both the Director of the DGTAIP and the members of the TTAIP are appointed by the Minister of Justice but selected through an open call. [9] As a result, the Peruvian case stands out in the region as the only case where a plaintiff does not need legal sponsorship to participate in the process and thus can avoid the additional costs that plaintiffs incur in the other two countries. Before the creation of this administrative court, the transparency system lacked any sanctioning power.

[7] The 1,353 legislative decree specifies the types of sanctions (art. 35) and defines possible transgressions (art. 36) and responsibilities (art. 37).

[8] Public entities are obliged by the law to impose sanctions on their personnel if they do not comply with the law. Public servants can appeal these sanctions before the Court of Transparency and Access to Public Information. The court also receives complaints and appeals from citizens whose requests for information have gone unanswered. The Court cannot sanction public institutions (cannot impose fines) and cannot directly sanction public officials. However, the Court can send a proposed sanction to the Civil Service Tribunal. The judiciary and the Constitutional Tribunal can overrule TTAIP's decision on several grounds.

[9] At first, the members of the TTAIP were not paid and only received per diem payments for their attendance at a limited number of meetings per month. A few months later, the Ministry decided that the members of the TTAIP would work full time and be paid accordingly (DS N°007-2018-JUS).

These changes have increased the strength of enforcement. In sum, Peruvian law has developed a 'two-headed' model in which one institution focuses on management (ANTAIP) and a second (TTAIP)— functionally more autonomous than the first—focuses on resolving complaints.

Explaining different outcomes

Chile. In January 2005, Senators Jaime Gazmuri from the Partido Socialista de Chile (Socialist Party of Chile) and Hernán Larraín from Unión Demócrata Independiente (Democratic Independent Union), presented an amendment to modify articles of the Ley Orgánica Constitucional de Bases Generales de Administración del Estado (Organic Constitutional Law of General Bases of the Administration of the State) for the purpose of promoting greater transparency and access to public information. This initiative did not include the creation of a FOI oversight institution. In March 2006, shortly after taking office, President Michelle Bachelet created a group of experts to work on a proposal on "Probity and Efficiency in Public Administration" (see Appendix). Based on their report, the government sent a new draft bill replacing the original bill promoted by Larraín and Gazmuri. In the bill, the government proposed the creation of an Instituto de Promoción de la Transparencia (Institute for the Promotion of Transparency) as an autonomous corporation subject to public law, with legal status and its own resources (see Appendix). This design was in line with the prevailing international models and remained almost unchanged during the parliamentary discussion (see Appendix Chile – AH1.1 and AH1.2). In terms of the political context, the government on one hand faced allegations of corruption while, on the other, was a majority coalition (see Appendix Chile – AH3.2,

AH3.3, AH3.4, and AH3.5). Therefore, the evidence supports the theories that associate these types of contexts with strong de jure designs (Berliner 2014, Michener 2015b). It can be inferred that through the approval of a strong FOI law, the government was showing its commitment to the promotion of transparency. In this context, the government also had incentives to control its coalition partners. However, we do not have conclusive evidence that corruption scandals and political competition mechanisms played a significant role in defining the design of the FOI oversight institution (see Appendix Chile – AH3.2 and AH3.3).

In Chile, the institutional autonomy of the CPLT resembles that of numerous autonomous corporations that already existed in this country (see Appendix Chile – H2). Among these institutions, there are some with oversight functions like the Ministerio Público (Office of the Attorney General), the Contraloría Genreal de la República (General Comptroller of the Republic), the Institución Nacional de Derechos Humanos, (National Human Rights Institute, INDH). In particular, the law that created the INDH was discussed and approved during the same period as was the FOI law. Both have similar institutional formats (see Appendix Chile – H2).[10] There are also several autonomous oversight institutions that regulate other activities in the private sector (see Appendix Chile – H1.2).[11]

[10] See http://s.bcn.cl/231ka (last accessed in September 4, 2020).

[11] Junta Nacional de Auxilio Escolar y Becas (National Board for School Assistance and Scholarships), created in 1964, Law 15,720, Comisión Nacional de Investigación, Ciencia y Tecnología (National Council of Research, Science and Technology), created in 1968, Law 16,746, Junta Nacional de Jardines Infantiles (National Board of Kindergarten),

This evidence indicates an institutional setting that enables autonomous institutions to develop several activities. Chile provided a propitious or supportive environment for the creation of new autonomous institutions.

During the parliamentary debate on the bill, different experts on constitutional and administrative law and delegates from civil society organizations were invited to give their opinion. They raised no concerns over the possibility of creating an autonomous institution. In fact, some argued in favor of creating an autonomous FOI oversight institution such as the CPLT (see Appendix Chile – H3). In May 2005, shortly after senators Gazmuri and Larraín presented their bill, Pedro Anguita, a Professor of Law from the Universidad Santo Tomás, argued for the creation of an autonomous FOI oversight institution with adjudication and sanctioning power (Senate's Commission of Government, Decentralization and Regionalization, Bulletin 3773-06, 17). In the same vein, Miguel Ángel Fernández from Fundación ProAcceso (ProAcceso Foundation), argued that it seemed reasonable to create an autonomous institution with the necessary prerogatives to be able to enforce its function in relation to all the entities of the state (Senate's Commission of Government, Decentralization and Regionalization, Bulletin 3773-06, 24). In May 2007, once the Executive presented the new bill, Felipe Solar Agüero, from the Universidad Adolfo Ibáñez, argued that it was necessary to have an institution that oversees compliance with the FOI law (Senate's Commission of Constitution, Legislation and Justice, Bulletin 3773-03 S).

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created in 1970, Law 17,301, Municipalidades (Municipalities), created in 1988, Law 18,695

Regarding the possibility of creating new autonomous institutions, Paulina Veloso, Minister Secretary General of the Presidency at the time, said in a personal interview, that "…In Chile there are several institutions that are autonomous (…) it is a public administration culture …"[12] From Paulina Veloso's point of view, the available institutional setting in Chile did not block the creation of an autonomous FOI oversight institution but did, in fact, favor its creation.

Given the features of the original institutional design that was drafted and finally approved, isomorphic pressures are colinear with the role played by the preferences of the promoting coalition, the diffusion of international experiences and the context of political competition. Therefore, it is impossible to disentangle the influence of each mechanism in shaping the resulting institutional design. Nevertheless, the Chilean case shows that domestic isomorphic pressures were present.

Peru. As opposed to the cases of Chile and Uruguay (see below), in Peru the law that granted access to public information (approved in 2002) did not include an oversight institution. After ten years, in 2012, a coalition formed by the Ombudsman and civil society organizations promoted the idea of an autonomous FOI oversight institution. A draft bill was prepared by the Ombudsman and submitted to the PCM requesting the creation of an Autoridad Nacional para la Transparencia y el Acceso a la Información Pública (National Authority for Transparency and Access to Public Information) as an Organismo Técnico Especializado (Specialized Technical Body, OTE) (see Appendix Peru–AH2.1). This type

[12] Personal interview with Paulina Veloso, Former Minister Secretary General of the Presidency (September 10, 2020).

of institution was not the first preference of the promoting coalition, for whom the Chilean CPLT and the Mexican Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales (National Institute of Transparency, Access to Information, and Personal Data Protection, INAI) were model institutions. However, achieving the level of autonomy that these institutions hold in Chile and Mexico would have required in Peru the creation of an Organismo Constitucional Autónomo (Autonomous Constitutional Body, OCA). This would have entailed a constitutional reform. The approval of a constitutional reform requires a supermajority in two consecutive legislative terms or a referendum. Therefore, domestic isomorphic pressures shaped the initial proposal of the promoting coalition (see Appendix Peru– H2). After a series of rounds, in 2017, the Legislative Decree 1,353, created the ANTAIP and TTAIP. Unlike the cases of Chile and Uruguay, the creation of FOI oversight institutions was not directly debated and approved in Congress. Instead, it was discussed and defined in the Executive, exercising an authority delegated by Congress to address corruption and transparency issues. The resulting FOI oversight institutions have less autonomy than was envisioned by the promoters and the experts who took part in a working group called by the Executive to draft a bill (see Appendix Peru– AH2.1).

Even though there were available institutional models of autonomous institutions in Peru (as OTEs) such as the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (National Institute for the Defense of Competition and the Protection of Intellectual Property, INDECOPI) and others (see Appendix Peru– H2), the approved FOI oversight institution was the result of a confrontation between the promoting coalition and high-level bureaucrats, who opposed the level of autonomy included in the initial bill (see Appendix Peru– AH2.1, and AH2.3).

In the case of Peru, domestic isomorphic pressures allowed for the possibility of building a FOI oversight institution with autonomy (see Appendix Peru– H2, H3). However, a coalition of high-level bureaucrats in the Executive blocked this solution and forced an institutional design with lower levels of autonomy and oversight power (see Appendix Peru– AH2.1). In any case, the argument used by bureaucrats opposing greater levels of autonomy also was grounded in domestic isomorphic principles. They based their opposition to creating an OTE on the need to be coherent with the level of autonomy that institutions with comparable functions enjoy. Thus, they claimed that the type of activities needed for the FOI oversight institution did not justify the creation of an OTE and the resources that would entail (see Appendix Peru– AH2.1).[13] The oversight of the right to access public information remained, as with many other state activities, in the hands of an office of a ministry.

The oversight of FOI in Peru is peculiar because the institution in charge of the technical/normative functions (the ANTAIP) is separate from that in charge of the adjudication functions (the TTAIP). This peculiarity in comparative terms, i.e., the separation of the technical/normative function from the adjudication in administrative law, is a criterion commonly applied for institutional design in Peru—known as the "right to double instance"— (see Appendix Peru– H2). Usually, in OTEs, when there is a need to administer justice in the matter of specialization, a Board of Directors is accompanied by a separate Court which adjudicates, located at the same hierarchical level as the Board in the organization chart (e.g., INDECOPI, SERVIR, or SUNARP). Thus, isomorphic pressures

[13] This argument was also raised in Uruguay by legal experts and bureaucrats (see Appendix).

played a role in the resolution of the conflict between the promoters and the high-level bureaucrats who opposed a strong FOI oversight institution, yielding a two headed design. The pieces of evidence collected for this case show the interaction of domestic isomorphic pressures with the role played by a specific political coalition in explaining the final outcome.

Uruguay. The FOI bill was promoted in 2005 by civil society organizations gathered under the Grupo por el Acceso a la Información Pública (Group for the Access to Publica Information, GAIP)[14] and sponsored by Senator Margarita Percovich[15] from the Frente Amplio (Broad Front, FA). This bill pushed for the creation of an autonomous—non-state public actor—oversight institution, that enjoyed autonomy from the Executive. This model was discarded and the institutional design that was finally approved was less autonomous and was subjected to control by the Executive, as with other similar institutions that already existed in Uruguay (see Appendix Uruguay– H2).

The original institutional design promoted by the GAIP was in line with the prevailing internationally diffused model.[16] It was the preferred design of the promoting coalition. There was neither a coalition against enactment of the right nor any political

[14] GAIP is a civil organization that convenes several organizations around the issue of access to public information (See Appendix for the detailed list of organizations).

[15] The bill was formally presented by the FA's caucus in the Senate.

[16] For example, the Organization of the American States Model Law on Access to Information. See http://www.oas.org/en/sla/dil/access_to_information_model_law.asp (last accessed September 15, 2020).

interest in watering down the autonomy of the projected FOI oversight institution. The analysis of documents (including records of parliamentary debates) and our personal interviews do not allow us to connect difussion, political competition, or any political interest with the resulting design of the FOI oversight institution (see Appendix Uruguay– AH1, AH2, AH3).

During the discussion of the bill, domestic isomorphic pressures operated to set the final institutional outcome (see Appendix Uruguay– H3). Carlos Delpiazzo, a well-known expert lawyer and the authoritative voice on administrative law in Uruguay, expressed two concerns that characterize coercive and mimetic isomorphic pressures. He stated that a non-state public actor,[17] as suggested by the bill's promoters, cannot oversee state institutions: "It does not seem coherent, from an institutional standpoint, nor logical from the institutional architecture point of view, that the control of all state public administrative units, that comprises, among others, the Parliament, the Comptroller Tribunal, the Electoral Court (…) should be in the hands of a non-state public actor." (Congress records, Senate, Education and Culture Commission, 11/23/2006).[18] Delpiazzo also mentioned that the FOI oversight instiutution should not have an institutional status that differs from the institution that oversees personal data protection, established in 2004 (Law 17,838). Specifically, he

[17] In Uruguay, non-state public actors are organizations with a public interest mission. They are created by law. They are usually governed by a board, with members appointed by the Executive and by civil society organizations.

[18] See https://parlamento.gub.uy/camarasycomisiones/senadores/documentos/versiones-taquigraficas/46/1372/0/CON?width=800&height=600&hl=en_US1&iframe=true&rel=nofollow (last accessed in August 20, 2020).

said: “In general, it is common that the same government agency that is in charge of the protection of personal data is also the guarantor of the access to public information and therefore ensures the balance between the two rights.” (Congress records, Senate, Education and Culture Commission, 11/23/2006).[19]

At the time that the FOI bill was being discussed in Congress, the Executive introduced a new bill on the protection of personal data (see Appendix Uruguay– H2). This bill included an oversight instutition for personal data protection, under the Presidency of the Republic, specifically reporting to AGESIC. The protection of personal data bill was elaborated in consultation with the Instituto de Derecho Informático (Institute of Computer Law, IDI) of the Universidad de la República, chaired by Delpiazzo. He mentioned the need to work simultaneosuly on the FOI and the personal data protection bills. This was also emphazised by the Executive when its representatives appeared at the Commission.

Senator Percovich asked AGESIC to work together on the elaboration of a new FOI bill (see Appendix Uruguay– H3). In September, 2007, Percovich presented the new bill that assigned AGESIC the regulatory responsibility in the field of FOI. This new bill was reviewed and re-elaborated to harmonize its main features with the bill on the protection of personal data. The new project defined the final features of the FOI oversight institution.

Percovich, in a personal interview, stressed that there was no way in Uruguay to grant the autonomy that the GAIP envisioned for the FOI oversight institution. She said:

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[19] See https://parlamento.gub.uy/camarasycomisiones/senadores/documentos/versiones-taquigraficas/46/1372/0/CON?width=800&height=600&hl=en_US1&iframe=true&rel=nofollow (last accessed in August 20, 2020). Martín Risso, a constitutional lawyer, expressed similar concerns (See Appendix).

> "There is a problem that we have in Uruguay with the structure of our state, we do not have the legal settings to create truly independent oversight institutions, which are supposed to guarantee the rights of citizens. We had this problem with many bills. Because, in the end, the type of structure the Uruguayan state has implies that everything is defined by the Executive…"[20]

The same perspective is shared by the head of the AGESIC at the time, José Clastornik (see Appendix Uruguay– H3).

Regarding the FOI oversight institution's lack of sanctioning power, Clastornik mentioned that "…There was a legal discussion (…) the prevailing preference was that the sanctioning power be located in the Judiciary (…) if there was agreement from a legal standpoint, even more so in a context where you are innovating at the legal level, I thought it was understandable."[21]

The FOI bill was voted on in the Senate Commission on Education and Culture on July 10, 2008 and approved in Congress on October 7 of the same year. The article on the oversight institution mimics that proposed by the Executive for the personal data protection bill. The combination of the existence of oversight institutions in related fields and the opinion of legal experts and decisionmakers on the available legal format for the creation of oversight institutions set the limits for the design of the FOI oversight institution. These

[20] Personal interview with Margarita Percovich.

[21] Personal interview with José Clastornik.

two pieces of evidence constitute neccesary and sufficient evidence for the presence of domestic isomorphic pressures on the the design of the FOI oversight institution.

Conclusions

The overarching expansion of FOI rights around the world raises new concerns beyond the adoption of this type of law. Existing theories employ the same framework to explain the adoption, de jure strength, and the de facto implementation of FOI laws. Most of this literature does not distinguish crucial differences in the de jure strength of laws from their implementation. This precludes the capacity to observe substantive variation in the institutional design and to develop nuanced explanations of such differences.

In this paper we analyzed a crucial dimension of relevant variation of the institutional design of FOI laws, i.e., the strength of the oversight institution. We have described and explained this outcome in three cases. In each case, we have identified domestic isomorphic pressures as a source of variation in the resulting design of FOI oversight institutions. While our study focuses on de jure design, the design of these institutions affects their de facto operation (see Appendix for examples of the de facto operation of FOI oversight institutions in each case). Explanations based on domestic isomorphic pressures complement political competition explanations of the de jure strength in each case.

This study highlights the fact that unpacking domestic isomorphic pressures reveals important differences in the design of otherwise similar initiatives that expand FOI rights. Actors' initial preferences regarding the design of FOI oversight institutions can be explained by the diffusion observed in the wave of expansion of these initiatives. Political

competition is also a driving force in the enactment of FOI laws and influences the strength of such laws. However, how these preferences are materialized in the resulting institutional design is mediated by coercive and mimetic domestic isomorphic pressures.

Sociological theories have highlighted the role of isomorphic pressures on the processes of institutional innovation (DiMaggio and Powell 1983, Frumkin and Galaskiewicz 2004). In the absence of crises of legitimacy of institutions, existing institutional models exert significant pressure in the design of new institutions and prevail over innovative models. This reduces political actors' uncertainty about the future performance of institutions. The cases of Chile, Peru, and Uruguay show how available institutional models in each country influenced the design of FOI oversight institutions. In the case of Chile, the existence of autonomous corporations enabled the creation of a highly autonomous FOI oversight institution (the CPLT). In contrast, in Peru and Uruguay, decision-makers raised concerns about the suitability of having an autonomous institution to address FOI oversight needs. In these two countries, the level of autonomy preferred by the promoters is usually reserved for highly demanding functions. In both cases, domestic isomorphic pressures limited the possibility of designing strong de jure FOI oversight institutions. In Uruguay, the promoters adjusted their preferences in line with the usual practice without facing an opposing coalition. In Peru, even though there were examples of autonomous institutions that could have enabled the creation of a strong FOI oversight institution, the same domestic isomorphic pressures interacted with a coalition of high-level bureaucrats to block a strong design. As a result, the Peruvian two-headed institutional design is weaker compared to the initial proposal but resembles the separation of functions characteristic of other oversight institutions in the country.

While our study has analyzed the strength of FOI oversight institutions in three Latin American cases, we believe it lays a foundation for research concerning the role domestic isomorphic pressures play in other cases of institutional design and in policy areas beyond FOI and oversight institutions. For example, the case of the Mexican INAI also illustrates the role of domestic isomorphic pressures. The much-heralded institutional strength of the INAI derives, in part, from its constitutional autonomy, a feature also observed in other oversight institutions in Mexico. The INAI, created in 2014, is one of the most recent autonomous constitutional bodies to have been created in Mexico since 1993, when this type of autonomy was granted to the Mexican Central Bank (Ruíz 2017). The role of domestic isomorphic pressures thus should be considered when analyzing processes of institutional innovation in new policy domains.

The Historical Institutionalism approach has highlighted the fact that many instances of institutional change occur as gradual processes of institutional transformation—e.g. layering or conversion (Mahoney and Thelen 2010). Similarly, we argue that many instances of institutional design occur without crises of legitimacy and, hence, are shaped by domestic isomorphic pressures. However, while the concepts of "layering" or "conversion" denote how existing institutions change, the concept of "domestic isomorphic pressures" refers to the force of existing domestic models and procedures in shaping new institutions.

Theorizing domestic conditions as isomorphic pressures improves our understanding of the factors that help to explain the variation in otherwise similarly internationally diffused institutional designs. These conditions, usually observed as stochastic processes, gain analytical leverage once they are recognized as domestic isomorphic pressures. Promoters of FOI rights frequently underestimate the pervasive role

of these kind of institutional constraints. As a result, many of these proposals are easily thwarted. Thus, the design of strong FOI oversight institutions is not simply a matter of political will or of the political competition structure. Promoters should become versed in the institutional intricacies to promote the best possible institutional model enabled by domestic isomorphic pressures.

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