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SECURING FREEDOM OF INFORMATION IN VIETNAMESE GOVERNMENT AND LAW

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ABSTRACT

This research concerns freedom of information (FOI) in Vietnam within the context of global democratisation. FOI may 'oxygenate' democracy by strengthening transparency, accountability and efficiency in the operation of governments and facilitating implementation of human rights. More than half the world's countries have FOI legislation. It has been conceived of as a right and/or a tool for better governance. The research addresses whether Vietnam, a single party state with a moderate level of democracy and a weak economy, is in need of FOI reform and the potential impact of such reform.

FOI regimes do not evolve in a political vacuum, and their adoption cannot be a mechanical 'tick-a-box' borrowing from outside. The approach to FOI is highly context-dependent. With this in mind, and drawing on international experiences (both contemporary and historical) and legal transplantation theories, the thesis examines the desirability and adaptability of FOI reform in Vietnam. It is a contextual and comparative law thesis aimed not at drafting a model FOI bill for Vietnam, but reaching a realistic road map for FOI reform there. This thesis presents comparative legal and institutional analysis in a *dynamic* institutional setting - given Vietnam's transitional openness to democratisation generally and FOI in particular.

The social, cultural and political scene in Vietnam indicates a number of positive and negative features and trends, which will alternately facilitate and inhibit FOI reform in Vietnam. FOI is shaped by the local context but, conversely, it is capable of facilitating improvement in local conditions. Vietnam already has several factors necessary for the establishment of a mechanism for information access. This means that Vietnam can adopt an FOI reform as part of broader ongoing democratic reform. By reforming FOI, a flow of information will be created, enabling public access to public information while eroding public administrative secrecy. Gradually, it is to be hoped, FOI will help strengthen good governance in Vietnam as transparency, efficiency and accountability in the operation of government increase.

The research documents however that enacting a specific FOI law is just the initial step to reforming FOI. As the Vietnamese government and Vietnamese law have many distinctive attributes, the research suggests that it is unrealistic to unrealistic to proceed, initially, with an overly ambitious FOI act. Instead, the Vietnamese government could consider a reform aiming to 'push' public agencies to disclose more information and encourage the public to 'pull' public agencies to extract information.

Such a reform, together with other efforts to improve the cultural, social, economic and political environment, should gradually increase information disclosure and make possible the formation of the free flow of information that is essential for good governance and protection of diverse social interests.

As a tool for good governance, FOI cannot work alone but relies on interaction with other accountability, transparency and efficiency mechanisms and a supportive local context. This thesis emphasises that FOI reform in Vietnam should be accompanied by detailed strategies to accommodate the FOI legislation to its new environment and also to make local conditions more receptive.

Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

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Publications during candidature

No publications.

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None.

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LIST OF ACRONYMS

AAT Administrative Appeals Tribunal (Australia)

APA Administrative Procedure Act (United States)

ATI Access to Information

DOJ Department of Justice (United States)

EC European Community

EU European Union

FOI Freedom of Information

ICCPR International Convention on Civil and Political Rights

MIC Ministry of Information and Communications (Vietnam)

MOF Ministry of Finance (Vietnam)

MOHA Ministry of Home Affair

MOJ Ministry of Justice (Vietnam)

NARA National Archive and Records Administration (United States)

NZ New Zealand

OAIC Office of Australian Information Commissioner (Australia)

OAS Organisation of American States

OECD Organisation for Economic Cooperation and Development

OGIS Office of Government Information Services (United States)

OGP Open Government Partnership

OSCE Organisation for Security Co-operation in Europe

OSJI Open Society Justice Initiative

RTI Right to Information

SOEs State-Owned Enterprises

SPC Supreme People's Court (Vietnam)

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nations

UNDP United Nations Development Programme

US United States of America

VCP Vietnam Communist Party

VFF Vietnam Fatherland Front

WB World Bank

WGI Worldwide Governance Indicators

WJP World Justice Project

CHAPTER 1 INTRODUCTION

I. RESEARCH BACKGROUND

In 1766, for the first time in history, an act granting access to public information was passed in Sweden - it was initiated by a Finnish clergyman channelling enlightenment thinking (Lamble 2002, 2003b). Nearly 250 years later, more than 100 countries have regimes that recognise the right to access information (Freedominfo.org 2015a). Freedom of information (FOI) reflects the fundamental premise that government is supposed to serve the people (Article 19 Organisation 2007, 2009; Birkinshaw 2009). However, there are a number of more practical ideas underlying the recent uptake in the adoption of legislation of this kind. FOI is commonly understood as an efficient tool to heighten democracy and good governance, particularly in regard to the global values of accountability and transparency (Cane and McDonald 2008: 282; Harlow 2006: 187). FOI has been also widely accepted as a human right (Blanton 2002a, 2006:80-97; Article 19 Organisation 2009), having an intimate relationship with freedom of the press and freedom of expression, as well as having the capacity to stimulate other rights (Carlsson 2010; Mendel 2008; UNESCO). Despite similarities in the objectives and the features of FOI laws in different countries, FOI has evolved very differently in reality. This leads to an ongoing debate about whether the effectiveness of an FOI law is closely associated with conditions of politics, economics and culture (Snell 2006: 291-307).

Vietnam is a communist country under single party rule with an immature democracy and a developing economy. The country has a constitutional provision securing the right to be informed and various other legal regulations granting access to government documents (MOJ 2009a, 2010a, 2010c), but these are of limited reach and poorly enforced. A short-lived attempt to adopt an access to information (ATI) law was initiated in 2008 but later failed in 2010. Efforts to enact such legislation have resumed since early 2015.[1]

Given Vietnam's unique political and social context, the significance of the potential adoption and implementation of such ground-breaking legislation attracts interest from not only academics and the public but from law makers as well. They are concerned whether an FOI law is really necessary for Vietnam, what can be expected from it, how it should be drafted, what should be done to make it

[1] Resolution 70/2014/QH13 on Amended Legislative Program for 2014 and Legislative Program for 2015 of the National Assembly term XIII.

work, and how it may impact on both the way the government controls information and on information access in Vietnam. This thesis seeks to address issues surrounding these concerns.

Existing literature suggests that FOI is shaped by political context (Darbinshire 2010; Hazell et al. 2010: 244-51). The present research will be undertaken by adopting a comparative approach attuned to contextual differences between jurisdictions. It proceeds from a belief that FOI is not a legislative luxury suitable only for mature democracies; yet nor should developing countries adopt it as mere window-dressing (an adornment to impress outsiders) or imagine it to be a magic tool (capable of self-enforcement or achieving liberal democracy on its own). This thesis addresses existing problems with information access in Vietnam, identifies challenges for FOI reform, examines the possibility of adopting an FOI law and foresees the potential impact of such reform in the country. By doing so, the thesis seeks to prove that although political context has a decisive influence on FOI performance, if a proper approach to FOI law making is adopted, it is realistic to expect that an FOI regime, even a relatively weak one, can help improve not only the political environment but also legal, cultural and even economic conditions. This thesis will not follow a doctrinaire approach which asserts that completely liberalising the political regime is an essential step to building a participatory and democratic system. Instead, it will argue that it is still possible to strengthen democratisation in countries where radical political reform cannot be expected in the short term, through various less ambitious steps to adopt and nurture democratic ideas and values and gradually make the political system more receptive to democracy. This approach will allow the thesis to examine and analyse, from a realistic lens, the contextual conditions relevant to both FOI generally and Vietnam's capacity to embrace FOI particularly, whilst not ignoring the importance of political liberalisation. The thesis aims to make a contribution to the advancement of knowledge and understanding that Vietnamese lawmakers can consider before accommodating FOI. In addition, it attempts to fill significant gaps in the literature on both FOI and legal transplantation, especially in the public law domain.

II. RESEARCH SCOPE

This study argues that an FOI regime itself and its implementation are largely dependent on the local context. The study attempts to find out how to promote FOI and what needs to be taken into account when initiating FOI reform in Vietnam. Specific and detailed black-letter law recommendations for an FOI law in Vietnam are not the aim of this thesis.

Information is a broad concept, with a number of variations. This thesis concerns 'information' that is related to public affairs, made by and/or in possession of government agencies. The thesis will not cover information that is not related to public affairs or not in the sole possession of public agencies,

such as intellectual property or information made available to the public through the system of libraries and archives. Neither does the thesis discuss the content of people's minds - a kind of information which might be 'stored' but rarely available under FOI. (For instance, the memories and unwritten-down-views of public servants and officials are basiscally inaccessible, except through questioning, which may occur voluntarily in press conferences but more likely, especially with bureaucrats, involuntarily through tribunals, and committees of the legislature.)

Countries and jurisdictions around the world are following different approaches in administering and protecting personal information (i.e. privacy and data protection law). Recognising that personal information has distinguishing attributes concerning its collection, possession and disclosure, whether by private or public agencies, there is a growing trend whereby many countries and international institutions have decided it requires distinct regulation, separate from FOI legislation. Conversely, considering the individual's right to seek information about herself or himself as an integral part of FOI, some other countries are attempting to broaden the inclusion of personal information in FOI coverage (Berzins, 2004). The approach a country or jurisdiction selects, therefore, seems to be less dependent on the pros and cons of each approach than on how each approach fits that country/jurisdiction's contextual conditions and expectations. In Vietnam, where both the management capacity of government agencies and public intellectual knowledge are still limited, the inclusion of personal information in FOI policy is not a good option as its inclusion would lead to voluminous requests and risk harmful disclosure of personal information. Instead, Vietnam has clearly stated that the country will have a distinct privacy law after the enactment of any FOI Law (MOJ 2015l). This thesis, therefore, will offer only limited discussion about personal information where it is relevant to the issue of FOI. Instead, the focus is on FOI as an aspect of public governance.

The concept of FOI did not originate in a vacuum. It is the outcome of social evolution, encompassing philosophical, political and legal contributions. The term 'freedom of information' became popular in the 20th Century but its spirit may be traced back to at least the 18th Century (Shirvastava 2009: 3). Recently the use of this term has changed and become nuanced, with many countries titling their new laws with phrases such as 'right to information', 'right to access to information' or 'access to information', while other states still prefer the term 'freedom of information' (Mendel 2008: 3). Such nuances reveal the different approaches to information access. Although the implications of those terms remain a controversial issue and a subject for further study (Solomon et al. 2008: 322-26), basically, the term 'freedom of information' is used in regimes with more attention to accelerating the free flow of information by requiring proactive disclosure of information by public agencies. Meanwhile 'access to information' (which has been used in Vietnam) suggests regimes by which governments have more power in controlling both proactive disclosure and information provision

upon requests. The term 'right to information' is often regarded as the stronger level of granting information access because it stresses a citizen's entitlement to governmental information. Taking account of Vietnam's current context, which may not yet be suitable for a very strong FOI regime, in this thesis the term 'freedom of information' is selected with the modest ambition to address design issues and contextual factors affecting the adoption and implementation of a regime that first promotes the free flow of information and then establishes a legal foundation for individuals to request information in case such information is not available through a proactive disclosure scheme.

Relatedly, even though the value of FOI as a crucial nurturer of good governance and as an important human right has been recognised, in this thesis more attention will be paid to exploring the benefits of FOI to good governance. This approach both has historical support, and is more consonant with the Vietnamese political and legal cultures. Nevertheless, some observations about FOI as a human right will be presented to elaborate understanding of FOI and its importance.

Alongside access to information provided for in national FOI laws, people can enjoy information access through regional and international instruments granting such access (Vleugels 2011). However, regional and international instruments are not the focus of this research, although they will be discussed to facilitate arguments about the trend in FOI adoption and commonly agreed features and standards of FOI.

Vietnam is an old Asian country that has experienced many historical upheavals, including one thousand years under China's feudal rule, about one hundred years as a French-controlled colony, decades of national division, and years of Indo-Chinese war. In each of these historical periods, Vietnam had a different governmental and legal system. After national unification in 1975, the communist regime led by the Vietnam Communist Party (VCP) was consolidated (Le 2012:145-72; Nicholson 1999). Under this regime, both the governmental and legal systems of the Republic of South Vietnam were totally abolished and the North's systems were applied across the country (Sidel 1996, 2009: 67-82). In 1986, Vietnam adopted a series of economic and political reforms, called *'Đổi Mới'* (literally translated as 'renovation') which attempted to replace the centrally-planned economy with a market-oriented one and which initiated Vietnam's path towards international integration (Gillespie and Nicholson 2005; Le 2012: 104-65; Sidel 1993, 1994, 2008). The 1986 reforms also marked the beginning of FOI in Vietnam, because in its 1991 Political Platform the VCP recognised the right to be informed as a fundamental right for the first time.[2] The right was then recognised in

[2] The political platform on building up the country in the transitional period toward socialism, approved by the National Congress of the VCP in June 1991.

both the 1992 Constitution and the new Constitution of 2013. Considering all these factors and also the central purpose of the thesis - to examine, situate and accommodate FOI in Vietnam - the analysis in this thesis will focus on Vietnamese governmental and legal systems from 1975 to date.

III. RESEARCH QUESTIONS

The main objectives of the research are to examine the desirability and adaptability of a regime of FOI to Vietnamese government and law. Derived from these objectives, research questions which the study seeks to answer are as follows:

1. How has FOI evolved over its history?

This historical question will enable the research to couch FOI in its evolutionary and international contexts. An historical analysis can facilitate a better understanding of FOI's origin and evolution, its importance, and changes in global perceptions of FOI. This also permits us to unveil the complex relationship between an FOI law and its local context, as well drawing attention to the need to seriously consider the local context when adopting and implementing an FOI regime.

2. How can access to information be implemented?

The purpose of this question is to examine different approaches to FOI. The question attempts to explain the theoretical foundations for models to grant free access to information and explore practical experiences in the adoption and implementation of each model. This helps further the understanding that whilst FOI legislation is important, it is not the only way of enabling access to public information. This also develops the argument that local context has a great impact on the effective approach to FOI.

3. What are the core elements of an FOI regime?

This question seeks to find out the essential statutory features of an FOI regime and how they affect the effectiveness of information access in practice. The question allows an investigation of whether Vietnam's current legislation could ever be sufficient to secure free access to government information. Furthermore, this makes possible an assessment of the potential statutory reform that Vietnam should adopt in order to make its legislation meet commonly used standards in other FOI regimes.

4. What are the problems with information access in Vietnam?

Alongside identifying current statutory weaknesses, maladapted implementation measures, and the lack of a proper roadmap to nurture FOI - factors which have thus far restricted information access - this question seeks to address obstacles to FOI that arise from Vietnam's broader context, such as political conservativeness, a fledgling and vulnerable democracy, a lack of accountability, limits on the media and the prevalence of corruption. This will assist in both determining the source of the current limitations on FOI in Vietnam and identifying factors that may generate challenges for FOI reform in the country.

5. How will local conditions challenge FOI reform in Vietnam?

In order to plan a feasible roadmap to improve FOI in Vietnam, it is important to estimate to what extent and in what manner political and other obstacles are likely to affect future reform. The question focuses on not only identifying problems associated with Vietnam's current FOI legislation and practices, but also potential risks for the future of FOI in the country. This will assist in examining the need for a specific FOI law and assessing Vietnam's level of readiness for such legislation.

6. What are realistic objectives and necessary steps to accommodate FOI in Vietnam?

The question is important because it allows discussion about possible FOI reform for Vietnam based on a sound understanding of the country's restrictions and realities. At the same time, the question encourages Vietnamese policy makers to be critically reflective when setting FOI policies and their objectives, as well as to seriously consider a feasible road map to implement FOI legislation.

7. What are the key features of FOI in Vietnam?

This question discusses key features of FOI reform in Vietnam. The tenor of this question is to counsel Vietnamese law makers on the core issues of the policy settings needed to assure the feasibility of FOI reform process in Vietnam. This is also to establish prior awareness about potential failures of the reform if improper policies for FOI are adopted. Moreover, the question will make a contribution to the advancement of knowledge about FOI transplantation. Adopting an FOI reform is neither simply importing FOI provisions from a preferred model nor just making a compilation of existing problematic, piecemeal legislation and calling it a dedicated FOI law. Moreover, an FOI law is merely a first step in FOI reform, following which there is much work to make FOI work effectively in practice.

IV. RESEARCH METHODS

The research explores the connection between the local context and options and models for FOI reform in Vietnam. It seeks to provide a comprehensive evaluation of the existing policies and laws, and the political, theoretical and practical approaches to situating and accommodating an FOI regime. The evaluation is conducted through a number of research methods, including:

1. Literature review and library based research

Much of the research was library based. Research has been carried out utilising academic publications, scholarly writings and published material, both hard copies in libraries and electronic databases. The literature reviews were conducted based on both theoretical foundations and practical experiences of FOI, legal transplantation in general and FOI transplantation in particular.

Both primary and secondary source materials were identified and studied through library based research. Acts, other (subordinate) legislation and relevant official documents of Australia, the United States (US), New Zealand (NZ), Vietnam and a number of other countries were analysed. Secondary sources were critically reviewed. Where required, material available in Vietnam has been critically explored. Unless otherwise indicated, all translation of Vietnamese material was undertaken by the author and all Vietnamese words are written in their full Vietnamese spelling and, where necessary, rendered into English equivalents.

2. Comparative study

The thesis compares the approaches in Australia and Vietnam, as well as the US, NZ, and to lesser extent the United Kingdom (UK) as needed. Australia was selected to be the main comparator because the Australian experience in accommodating FOI law is useful for Vietnam, given the fact that Australia adopted its first FOI Act in 1982 and recently has comprehensively reformed its national/Commonwealth legislation in 2010 (McMillan 2010a, 2010b; McMillan and Popple 2012; Ludwig 2010). In Queensland, following a Report by a government - appointed FOI Independent Review Panel, a new Act was introduced in 2009. This Act adopted the ‘push model’ and offers a useful and modern contrast with the older legislation (Creyke and McMillan 2012: 1003). Although Australia is a developed country with a liberal government and Australia and Vietnam have adopted different political systems, the countries still share some similarity: cabinet/collective government responsibility, for instance. Additionally, as it is natural that governments everywhere prefer being secret, reluctance to fully embrace FOI is a common phenomenon.

In addition to Australia, the US and NZ have been selected as comparators. Such a comparison will facilitate a broader understanding of FOI. The US is the country with the first comprehensive FOI act, one which has not only inspired FOI adoption elsewhere but which has also been borrowed from, by many countries, including Australia, when designing their own FOI legislation. Meanwhile, NZ offers exciting insights in harmonising the desirability and adaptability of an FOI regime. Despite being inspired by the US legislation and having similar governmental system to that of Australia, NZ opted to introduce legislation that fits its political and cultural conditions. The effective performance of NZ's FOI Act has proven that the success of an FOI regime is more dependent on the way it is designed and accommodated than how many progressive black-letter law provisions it borrows from other jurisdictions. Another reason for selecting Australia, the US and NZ is the availability of rich and valuable resources about those countries and their FOI Acts in English - a language I am reasonably fluent in.

No developing countries in Asia, nor any nations which have transited from authoritarian/communist regimes to liberal ones, were selected to be comparators in this thesis. There is a view shared by many FOI practitioners and experts that FOI has been adopted in developing countries mostly due to pressures from international donors, either in a belief that FOI would be a silver bullet for particular problems (corruption for example) or as a window-dressing measure. Lacking critical consideration of both the essential features of FOI and the local conditions, FOI laws adopted in developing countries have been either too weak to enable information access in practice, or conversely, too progressive to be workable in systems with limitations in their accountability structures, financial capacity and cultural outlooks (see discussion in chapter 2). In such systems, FOI has been adopted formally, but without the resources or commitment to implement it well. Accordingly, its failure has been widely observed. Meanwhile, it is a fact that in countries which have moved away from communist regimes and adopted actionable FOI laws, the laws were adopted after radical political change including multiple accountability and democratising measures. It is very hard to examine to what extent such changes impacted on the adoption and implementation of FOI in those countries. Those confounding variables generate confusion over whether adopting a fully liberal regime is a precondition for FOI. Taking one of these countries for comparison would be misleading for assessing FOI reform in Vietnam since, as the thesis will later, argue, the country is not ready for any significant political shift.

Therefore, the thesis does not select any of the above countries for comparison for both pragmatic and methodological reasons. In addition, the thesis is not intended to be directly comparative. Rather, it seeks to learn from more mature FOI systems, which have richer experience with experimenting and applying different models. Nevertheless, the thesis is developed with the understanding that any

lessons should be learnt through a realistic lens, mindful of the difficulties of legal and institutional transplantation, and the need to adapt both the law and expectations to local conditions and limitations.

3. Consultative study

In this project, a consultative approach has been used. A small number of key academics and lawmakers in Vietnam were consulted about the research arguments and findings. Feedback from conference participants on the analysis of information access in general, and information access enforcement measures in particular, was collected. In addition, an investigation of political restraints, legal obstacles, and financial and other concerns that affect the feasibility of an independent body to oversee FOI enforcement in Vietnam, was conducted. Objectives set for the consultation were to ascertain and reflect on the concerns of experts working in the field, as well to seek more evidence for arguments about the adoptable FOI enforcement scheme. More importantly, such consultation provided a valuable opportunity to test the research's tentative hypotheses through discussions with experts on the ground in Vietnam, who were used as 'sounding boards'. This consultation facilitated a more pragmatic, realistic and evidence-based approach for the thesis, particularly the analysis in the chapters 6 and 7.

V. THESIS STRUCTURE

Chapter 2 explores the history of FOI and its importance in an international perspective. It seeks to draw lessons based on critical thinking about the desirability and adaptability of FOI.

The core objectives of chapter 3 are to provide an overview of the broader context of Vietnamese laws and institutions which will significantly affect effective adoption and implementation of FOI, as well as identifying problems and challenges facing FOI in Vietnam.

Chapter 4 carefully examines and evaluates how information access is being enabled around the world. It comprises: (i) an assessment of several methods of achieving FOI goals, namely a regime based on constitutional recognition of FOI, a regime centred on a dedicated FOI act and, a more dispersed (or 'non-FOI regime') approach; (ii) an analysis of the positives and negatives of the 'push' and 'pull' models of FOI; and (iii) discussion about the risks of borrowing a model regime uncritically.

Through a comparison between Vietnamese, Australian, US and NZ legislation, chapter 5 explores the issues of coverage and exemptions, the core issue in any FOI regime. The purpose of the chapter

is to address problems with Vietnamese legislation and its implementation. This discussion facilitates the subsequent examination of whether a statutory reform is necessary.

Reviewing FOI decisions and overseeing FOI implementation are crucial in making FOI regimes work fairly and effectively. Accordingly, chapter 6 examines whether Vietnam has sufficient enforcement capacity and culture to guarantee access, again through comparisons with Australia, the US and NZ and their relevant experiences.

Chapter 7 gathers evidence for possible FOI reform for Vietnam. The chapter critically examines both the need for an FOI law and Vietnam's socio-political readiness for such legislation. It then brings to light restrictions on, and opportunities for, promoting FOI in Vietnam.

Chapter 8 outlines key features for FOI reform in Vietnam. It then considers the necessary steps to adapt FOI and provides some insights for further research in Vietnam.

CHAPTER 2 FREEDOM OF INFORMATION IN INTERNATIONAL CONTEXT

This chapter offers both an overview of the contexts in which the earliest FOI laws in the world were adopted, and explanations for the growth in the number of FOI adopting countries after the Cold War. It highlights problems with the recent spread of FOI. These problems are rooted in the fact that many laws have been imported (or transplanted) from a limited number of FOI models, with ambitious objectives but without regard to local contexts and unaccompanied by proper measures to accommodate them in their new environments. Through examining the history and importance of FOI in the international perspective, the chapter argues that FOI regimes are not formed in a vacuum; their design is not just a technical, tick-a-box process. It is advisable that each country adapts overseas FOI laws and formulates its own recipe for its indigenous FOI regime.

I. THE HISTORY OF FOI AS A CONCEPT

1. First FOI regimes

Early FOI legislation in Nordic countries

The Swedish 1766 Freedom of the Press Act

When Sweden passed the Ordinance relating to Freedom of Writing and of the Press in 1766 (Göthe 1993), the country might have not realised that it was the first in the world to have such ground-breaking legislation. However, the rest of the world now acknowledges that the Swedish Act is the oldest FOI law (Shirvastava 2009: 2).

Sweden's defeat in the Great Northern War, preceded by the death of the warrior king Karl Charles XII, had enabled the passage of a new constitution that established an early form of parliamentarism by abolishing royal absolutism and vesting power and liberty in the Diet. Alongside such political transition, the country witnessed the appearance of Enlightenment thinkers. Among them, Chydenius, a representative for the clergy in the Diet, was not only advancing Enlightenment goals but also fighting for more democratic reforms. Chydenius took the lead in producing a report that included proposals for a new policy to abolish censorship and to grant free access to official documents. After several tough debates, the Ordinance on Freedom of Writing and of the Press (aka the *Freedom of the Press Act*) was adopted, and then came into force by the end of 1766.

In practice, the legislation - with the aim of facilitating political publications - commenced smoothly. Taking the view that lawful freedom of written expression and the press should be respected, the new

policy mitigated censorship, legitimating the freedom to write about any information that was not deemed prohibited and allowing publication of official documents, such as judgements, awards, decisions, instructions, rules, regulations and privileges. Under the new policy, the numbers of political journals and pamphlets rapidly increased, political newspapers were established and Swedish daily newspapers had their first editions. Access to information meant authors and journalists became more measured and responsible in their writings (Manninen 2006: 53). More writing was published and printing companies thereby benefited. At its birth then, FOI assumed a symbolic and practical relationship with free and snowballing media. Notably, at that time, FOI was not intended to be adopted as an individual 'right', but as a collective tool for good governance.

However, the heyday of the Act did not last very long. Soon after its enactment the Act was undermined by prohibitions on criticizing religious dogmas, the Constitution, the Royal family, the Council of the Realm and the Estates. Some months later the Act was further restricted by the royal caution about 'untruthful rumours' and an order issued by the Council of the Realm that banned writing deemed too free 'about matters concerning government' (Manninen 2006: 53). Compounding those external pressures, the Act lacked provisions on freedom of speech. Interestingly, what could be observed from the Swedish FOI story is that without entrenching FOI as a 'right', the ultimate 'good governance' imperative is vulnerable to future governments asserting that less openness is pragmatically needed for better governance.

The 1952 FOI law of independent Finland

Until Finland was ceded to Russia in 1809, the Swedish laws and regulations applied in Finland as the country was part of Sweden. A few months after the declaration of its independence in 1917 Finland endured a civil war. When the war was over, Finland held its first presidential election and officially became an independent republic in 1919. Among the actions taken to reaffirm its independence Finland passed the Constitution Act, extensively following the Swedish system of fundamental rights, including provisions from the Freedom of the Press Act.

As a country with a longstanding tradition of openness springing from the application of Swedish rule, the principles of free access to government documents were implemented without any noticeable objection. However, Finland soon identified the need for a new FOI law. Although the call for a new law was first made in 1939, the law was not adopted until 1952. The resulting Act on Publicity of Official Documents of 1952 has been seen as the first comprehensive information access statute in the western world (Mäenpää 2006: 58-73).

The most progressive aspect of the Act of 1952 was its presumption of openness. The Act also prescribed a statutory right to access official documents held by administrative and judicial agencies. Exemptions were given for secret and internal documents. Agencies also had the discretion to provide access to their draft documents.

However, criticisms of the 1952 Act gradually increased. The broad secrecy grounds for exemptions, the discretion in respect of publishing draft documents, and the lack of compliance with transparent requirements of EU decision-making, were blamed for permitting authorities to apply the Act in a secretive fashion (Mäenpää 2006: 58-73). Poor enforcement of the Act was also believed to be contributed to by its out-dated definition of 'official document', as well as vague provision on privacy and openness (Mäenpää 2006: 58-73). As a result, the Act was replaced by the 1999 Act on the Openness of Government Activities.

The 1964 law and the evolution of FOI legislation in Denmark

With lessons drawn from World War II, Denmark clearly understood the perceived threat from the Soviet Union and decided to abandon its policy of neutrality. Denmark joined the founding membership of the UN in 1945 and enthusiastically took part in important international human rights organisations and activities. Denmark was one of the first 48 countries gathering in Paris in 1948 to sign the Universal Declaration of Human Rights (UDHR). It was also among the original countries signing the European Convention for the Protection of Human Rights and Fundamental Freedoms at Rome in 1950.

Unsurprisingly, Denmark became the third country in Scandinavia (and fourth in the world, behind Colombia) to adopt an FOI law. In 1964, the country passed the Act on Party Access in Administration, allowing parties to administrative cases to access relevant documents (Hermind and Eikard 1996). This is said to be similar to the provisions of the administrative procedure acts of the US and Norway (Green and Karolides 2005: 147). The Danes' first FOI Act was, therefore, a limited law. However, it was a significant initial step to make the government more open and more accountable: given the context of the adoption of a British-style system of government, the country otherwise has a tradition of protecting the autonomy of government. In fact, the Danish Constitutional Act of 1953, with its principal features dating back to 1849, contained no provisions for open government.[3] In 1970, inspired by Article 19 of the UDHR, and after reviewing the Swedish model, the Danish Parliament adopted a new Act, albeit one of limited reach, which itself was replaced in

[3] Official Website of Denmark, The Constitutional Act of Denmark, available at http://www.thedanishparliament.dk/Democracy/The_Constitutional_Act_of_Denmark.aspx, accessed 28/6/2012

1985 by the Access to Public Administration Files Act (Rowart 1982: 62). The Danish experience reinforces the realisation that the journey to open government is an iterative and ongoing one.

Some common features of FOI legislation in Nordic countries

FOI legislation was adopted and implemented in the context of countries with a burgeoning culture of openness. In the 17th century, Sweden (and Finland as part of Sweden at that time) applied early forms of 'checks and balances' or 'supervision' (for example the Constitution of 1634 stated that the Regent would govern the country with support of the colleges and the parliament was to take part in all decisions about new laws and taxes). With the enactment of the law compelling all publishers of printed literature to lodge 'legal deposit copies' of everything they produced with government approved libraries in 1707, about 60 years before the adoption of the FOI Act, literate Swedish citizens had been able to access some government-held documents (Lamble 2002: 2-8). The openness tradition, inherited from Sweden, inspired Finland to think about an instrument to grant public access to official documents after becoming an independent country. In the case of Denmark, the desire for order and transparency, as well as a democratic instinct, had long existed in the country, being expressed in 1683 Danish Law and the 1849 Constitution (Jespersen 2011: 64-88). These factors influenced Denmark's inception of FOI legislation later in the 20th Century.

Adoption of FOI legislation was originally based on an understanding by politicians that openness could help foster public confidence in elected officials and alleviate suspicions about politicians, as well as promoting a more level playing field for them when they were not in power. By the time the Freedom of the Press Act of 1766 was passed, parliamentary rule had been applied in Sweden for a considerable time and the two main political parties had long struggled over the lack of information about state matters and the fulfilment of duties by authorities (Seipel 1996). The idea of extensive publicity of official documents had already been discussed by the previous Diet of 1760-1762 as a means to promote accountability of public officials and judges in making their decisions. Chydenius was successful in persuading the Diet to approve a proposal for the publicity of official documents, by arguing that only publicity could be used as a tool to make accountable people who hold the highest power in government systems (Mannien 2006: 46-50). Finnish FOI legislation was initiated by the first president of the country, to gain public confidence and create a fair political playing ground. The limited FOI legislation passed in Denmark in 1964 reflected the real picture of Denmark at that time with the contradiction between an open, democratic tradition and the need for a more democratic political environment to nourish a multiparty system, and the protective tendency to government secrecy.

Very soon after being adopted, the Nordic legislation, described above, was amended for different reasons and in different ways. The Swedish act was undermined by restrictions on freedom of writing and the press set by the Royalty and, ironically, by the same Diet fearing threats to confidence in the King and the Realm. Conversely, in Finland and Denmark, the legislation was gradually improved as the public appetite for openness grew, while governments came to view the laws as unthreatening.

The 1888 Code of Colombia: the second and the most curious FOI regime

To contemporary eyes it is surprising that Colombia was the second country in the world, and the first nation in the Americas, to introduce an FOI regime. For much of its history, Colombia has been known for political instability and human rights abuse scandals (Osterling 1989; Palacios 2007). The country has been seen as having a weak government plagued by inequality, an absence of public participation, institutionalised corruption, an ineffective legal system (Nagle 2001: 6-16) and, especially, a 'deeply rooted culture of secrecy' (International Media Support 2009). Yet, in 1888, Colombia adopted a Code allowing individuals to request documents held in government agencies and archives, unless release of these documents was specifically forbidden by other laws.

Under the Code of Political and Municipal Organisation, individuals were allowed to request documents held in government agencies and archives, unless specifically forbidden by another law (Dhaka 2010: 17). Some FOI advocates claim that because the Code placed the focus on administrative affairs, it could be regarded as a watershed development in terms of open government (Dalglish et al. 2007: 290-91; Khan 2004). Regrettably, in practice the Code turned out to be toothless, no more than a 'paper act', and its passage effected little clear improvement in governmental transparency, accountability and efficiency, let alone in battling corruption in Colombia.

After the Code, Colombia enacted another FOI regime that was mainly provided for in certain constitutional provisions, especially one granting a right to access information, and by 1985 enacted a law ordering public access to official acts and documents. Besides the establishment of a general right to access information held by public authorities, this Law Ordering the Publicity of Official Acts and Documents failed to facilitate its implementation with no further implementation measures provided (Mendel 2009a: 61). To address the deficiencies of this regime, transparency advocates spent several years developing a bill in the hope that it might constitute Colombia's first effective FOI law (Evans 2011). In March 2014, a new information access law was finally passed with the main objective being fighting corruption (Freedominfo.org 2014a).

Features of Colombian FOI legislation

The 1888 Code is interesting because it was adopted in a country renowned for political upheavals, corruption and human rights violations, rather than for openness, accountability or democratic government. The inception and adoption of the Code are worthy of further research. How and why did such a revolutionary piece of legislation come into being? How and why did it happen then and there? What is known is that with the passage of the Code the country promised openness, yet the Code had longstanding problems with implementation and enforcement (Donadio 1994). In reality, it is not clear that an FOI regime has ever functioned effectively in Colombia (Borkan 2010).

United States: the fifth but most influential FOI statute in the world

Before the passage of its first FOI Act in 1966, a number of efforts had been made in the US to promote openness in governmental activities. For over a century, some states had allowed access to public documents (Banisar 2006: 158). Court files and legislative materials were routinely disclosed for consultation. From 1936, with the publication of the Federal Register - the federal government's official journal - some official information was made available to the public at large. In 1946, in an attempt to require a routine disclosure of government held information at national level, the Congress passed the Administrative Procedure Act (APA), making it mandatory that all the federal agencies keep and maintain records which were available for inspection by the public (DeFleur 1994: 42).

Unfortunately, in practice, little progress was achieved. The release of information, both federal and state, was largely at the discretion of the political executive and heads of government departments and agencies. Due to its shortcomings and loopholes, the APA failed to enable broad access to government records and was, ironically, applied as 'an excuse for withholding information' rather than the 'disclosure statute' it was intended to be (Gold 2012: 25-7). Federal departments and agencies used both the APA and the House Keeping Act of 1787 to withhold information and often blocked information that was unrelated to national security. More extremely, some agencies even found no reason to comply with the obligation to provide access to records under the APA (Gold 2012: 25-7).

The failure of the APA, together with the abuse of executive privilege and frustration over the government's efforts in keeping secrets, only served to intensify the struggle for more transparent and open government. In the 1950s, media groups and Congress started advocating for a more workable law. The American Society of Newspaper Editors formed a committee to fight against government secrecy. A congressional commission was appointed to produce proposals. In 1959, the campaign for open government was further boosted with an open letter of a group of 16 Nobel prize-winning scientists, alleging government secrecy was hindering scientific development. After a long period of

hearings and unsuccessful bills, the Freedom of Information Act (US FOI Act) was passed in 1966, becoming the fifth FOI law in the world (Gold 2012).

The major objectives of the US FOI Act are to guarantee citizens' right to knowledge about the government and to minimise classified information. The Act allows any individual or organisation to access records held by federal government agencies. In case the government agency does not turn over the requested materials, the requester can sue in federal court in order to gain access. Government agencies bear the onus of proving that the document should remain confidential, and information can only be withheld if it falls within one of nine exemptions.

Features of the US FOI Act:

The Act was adopted in the context of a country with a long history of both openness and government secrecy. Such tension is inevitable - and perhaps enduring. In reality, the Act was not only the result of a 10-year campaign, but the result of a long battle between openness and government secrecy that had started early in America's history.

The passage of the Act - an historic victory for the right to know - was practically the outcome of a long fight between political parties. For about 10 years (1955-1965), the Democratic majority had strenuously struggled for access to the deliberations of the Eisenhower administration. The Act would have not been significantly reformed in 1974 either, without the scandal of Watergate. The Act, Blanton has stated, 'was not a product of democratic enlightenment, but rather Democratic partisanship' (Blanton 2002a:52).

The Act has had great influence on other countries' FOI movements. The US adopting a law to elaborate a public right to access government documents generated pressure within other nations to recognise similar rights. Many countries, including those which had already adopted this kind of law, looked to the US model to develop their own legislation. The earliest adherents were Denmark and Norway (1970) and France (1978). Countries with a Westminster-style system of government adopted similar legislation in 1982, including Australia, New Zealand and Canada. By the end of the 20th Century, the number of FOI laws around the world had climbed to upwards of 90. Discussing the dominance of the US model Lamble (2002) argued that the model has generated influence over most FOI laws. Apart from the recent phenomenon of 'Americanisation' of law (Wiegand 1996), the US influence can be explained by the fact that the country is often seen as democratically inspirational.

2. The recent spread of FOI

The past two decades have seen a rapid growth in the number of countries with FOI legislation. Whilst only about a dozen laws existed at the end of the Cold War, today more than 100 countries, ranging from rich or developed, to developing and even underdeveloped nations, with different cultural and political regimes, have national-level FOI laws or regulations in force. It is estimated that the right to obtain information from government has been granted to more than 80 per cent of the world's population (Article 19 Organisation 2015a).

In Europe, a new wave of FOI adoption developed after the collapse of socialism in 1990s. In this wave, formerly socialist Hungary and former Soviet Union member Ukraine were forerunners in adopting FOI laws in 1992. Next came Portugal (1993) and Belgium (1994). The year 2000 was a boom year, when six European countries including Bulgaria, Estonia, Lithuania, Moldova, Slovak Republic and the UK enacted their first FOI laws. In 2009, the Russian Duma finally passed an FOI Law: it involved the longest debate in the recent history of the Duma and took effect on the first day of 2010. Between 1996 and 2014, nearly 30 countries adopted FOI laws, meaning that, today, few European countries lack one. Motivations to legislate for FOI may vary and not every FOI law in Europe is fully functional (Birkinshaw 2002), but this recent, dramatic progress in Europe is linked to the promotion of transparency, accountability and efficiency as an essential means of developing democracy (as advocated by the Organisations for Security Co-operation in Europe (OSCE), the Council of Europe and George Soros's Open Society Institute).

In a similar trend, countries in the Americas have recently shown a strong interest in FOI laws. By the end of the Cold War, the rapid growth of civil society groups demanding access to government information, as well as anti-corruption efforts and pressure from international organisations (especially the World Bank and the Organisation of America States) gave an impetus to the adoption of FOI laws in many countries in the region and nearly every other country has a pending effort. The highlight of FOI in the Americas, if not the world, is the Mexican Federal Transparency and Access to Public Government Information Law of 2002 which has progressive features in terms of both substantive provisions and effective implementation thanks to broad scope of application, strong procedural guarantees and an independent oversight mechanism (Mendel 2009a: 109-17; Limón 2004; UCL Constitutional Unit). Following constitutional reform in 2015 Mexico passed a new FOI law - the General Law of Transparency and Access to Public Information of 2015 - which was touted to bring both advantages and challenges for transparency in the country. The Law provides strong measures to guarantee public access and participation but does not clearly prevail in case of inconsistency with other legislation. Also, the Law fails to establish proper protection of information about human rights violations and crimes against humanity (Serna and Mora 2015).

Countries in Asia, the Pacific region and the Middle East seem more cautious about FOI, demonstrated by the fact that the region still has a low ratio of nations with FOI laws. A modest number, of just over 20 FOI laws, is disappointing for a group of about 55 nations. Problems of implementation, resistance by administrative agencies or undermining by later governments are common everywhere, even in affluent liberal democracies such as Australia and NZ (Article 19 Organisation 2015; Development Dialoge 2002; Snell 2005: 26). Under pressures generated by scandals and with the purpose of reducing secrecy and inefficiencies, South Korea and Thailand passed their FOI laws in 1996 and 1997 respectively; however, the effects of those laws are unclear (Cain 2014; Southeast Asian Press Alliance 2011). Limited FOI legislation can most obviously be found in Pakistan, Indonesia and some former Soviet Union Republics in Central Asia such as Uzbekistan and Tajikistan. Following the implementation of FOI legislation in dozens of states and localities, after long resistance and delay, the two global giants of China and India finally adopted their national FOI regimes but up to now, little sign of significant practical improvement in access to government information in those countries has been seen (Article 19 Organisation 2015a).

Under great pressures to adopt FOI as a tool to combat corruption (Africa Freedom of Information Centre 2015), progress in FOI recognition has been observed in Africa recently, with about ten laws passed recently. The pioneer in the region, South Africa, passed a Promotion of Access to Information Act in 2000 (O'Regan 2000). It is regarded as one of the more progressive FOI laws in the world. Unfortunately, such positive legislation has been practically hamstrung by a lack of funding and poor implementation and the 'climate of secrecy' (Arko-Cobbah 2008; Darcha and Underwood 2005; Right2Know Campaign 2014). In 2002, Angola imported the Portuguese FOI model but the law is yet to be implemented. In Ethiopia, Liberia, Niger, Nigeria, Tunisia, Liberia, Rwanda, Ivory Coast and Sierra Leone the impact of newly-adopted FOI laws remains limited. Zimbabwe went in the opposite direction, in promulgating an act which sought to *suppress* information and control public media rather than to provide information access (the Access to Information and Protection of Privacy Act of 2002). Considering that only 16 FOI laws (excluding Zimbabwe's illiberal law) have been so far adopted, and given every law has problems in terms of implementation, much more work needs to be done to promote FOI in Africa (Africa Freedom of Information Centre 2015).

To draw a broader view of the international evolution of FOI, we need to identify the factors that contributed to its unprecedented uptake in the late 1990s and early 2000s. This uptake is explained by a number of motivations, including: normative 'drivers' of reform (globalisation (Bennett 2001; Blanton 2002a, 2002b), international human right norms (Article 19 Organisation 2009; Mendel 2009a: 3-23; Blanton 2006: 80-97) and the spread of liberal ideology (Consins 2009: 89-93)); instrumental goals (good governance, economic development (Stiglitz 2002: 460-501; Relly and

Sabharwal 2009: 148-157; Islam 2007: 121-159) and anti-corruption (Africa Freedom of Information Centre 2015; Transparency International 2006)); and practical, enabling forces (technological developments assisting record keeping and web publication (Banisar 2006: 18; Lamble 2003b)).

In pragmatic terms, the recent spread of FOI is explained by a variety of internal and external pressures on governments around the world to adopt FOI legislation. In most cases, civil society groups such as human rights, anti-corruption, media and environmental groups have pressured governments to legislate for access to information held by government agencies. In addition to internal pressures, many countries have adopted FOI laws as a way to fulfil transparency and accountability obligations imposed by international and regional organisations, both politically and financially. Occasionally FOI initiatives have come from within governments as the bureaucracies themselves became aware of FOI benefits for good/better governance.

Alongside a dramatic increase in the number of FOI laws adopted, the last two decades have also witnessed significant changes in both governments' and people's understanding of citizens' rights to information. In the past, access to governmental information had been regarded, essentially, as a tool for alleviating corruption, improving transparency and good governance. Increasingly, beyond these instrumental implications, globally FOI is being seen as a fundamental right bestowed on all human beings. In a number of countries and international institutions, access to information is perceived as the way for the public to exercise its entitlement to know about the business of governments and key public institutions.

The striking wave of FOI adoption and reform has, on the one hand, boosted information disclosure around the world and yet, on the other hand, its rapidity has left substantial room for problems to arise, both in FOI adoption and implementation. There have been an extremely limited number of models used to develop FOI legislation. In reality, the most influential model is the US FOI Act, followed by the recent model FOI law produced and recommended by the Article 19 Organisation[4] and the model information access law for African countries (Sendugwa 2013). Despite its originality and a handful of positive features, the Swedish model has been considered exemplary by only a small group of Scandinavian countries (Lidberg 2006). Importing (or, transplanting) an FOI 'product' from limited samples, without serious attention to adapting it to existing political, economic and cultural conditions in the importing country has, predictably, led to serious subsequent problems with FOI implementation. This danger will be discussed further later in the thesis.

[4] This model law can be found at https://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf, accessed 20/02/2012.

3. FOI in the new millennium – the potential for a transparent tomorrow

When Chydenius struggled for freedom of press in Sweden it was, initially, hard for him to convince a sceptical parliament about the benefits of free access to government information. About 250 years later, owing to some good practices from the forerunners in the FOI field and strenuous advocacy activities, governments nowadays, even those that are less democratic, have a better understanding of the benefits of FOI.

Globally FOI has been situated at the very core of the mission of democratic systems and has been considered as essential for good governance. FOI has come to be regarded as a substantial step towards promoting public participation in political dialogue and decision-making, and increasing government accountability while alleviating corruption (Banisar 2005; Bovens 2002; Consins 2009; Puddephatt and Zausmer 2011: 4, Article 19 Organisation 2015). Governments everywhere understand that disclosing information on the one hand signifies a 'nothing to hide' attitude and generates public trust, while, on the other hand, it can make government work better through greater responsiveness, mutual learning and incentives to improve decision-making. Publishing information is also seen as key to ensuring the rule of law is promoted, and helps preserve and protect other legal rights and interests. In practice, government records have been used to bring to light countless instances of human rights abuses, mishandling of government programs and unequal access to public services. The recent dramatic emergence of WikiLeaks with a commitment to tackle secrecy in favour of open governance, followed by strong reactions from governments to the organisation and its publications, however, suggests that FOI, like many other rights and freedoms, is still at risk of being suppressed for such reasons as 'national security' (Zifcak 2012).

Moreover, in this digital era, advances in information communication technology have opened up more opportunities for adoption and implementation of FOI laws. Internet and mobile platforms allow publication of information at low cost and on a large scale, alleviating concerns about the burden on government agencies having to provide information - a significant factor that previously inhibited many countries from adopting FOI laws. Developments such as the semantic web and linked data offer direct access to both routine and obscure documentation, making the free flow of information more possible and, accordingly, the objectives of FOI laws more achievable. The emergence of the internet as an alternative means for disseminating knowledge is also changing the relationship that people have with information and the way they access and interact with it. In practice, under the impact of technological progress, a new wave of open data initiatives (demand by elements of civil society and aimed at making governments publish more information as machine-readable datasets

which can be exploited by the community) has spread and there are more and more countries using information technology to facilitate free access to government information (aka Data.Gov).

Unfortunately, there are still numerous challenges and obstacles faced by FOI regimes and transparency reform in the new century. The first and perhaps the highest barrier that FOI encounters is the culture of secrecy that remains prevalent in many countries. It is natural that government officials everywhere and in every era have an inclination towards secrecy. Secrecy equates to power and is an indication of authority; it also maximises freedom of governmental action. Because of this attitude to secrecy, governments around the world, even highly democratic ones with notionally progressive FOI regimes, are still not inclined to full transparency. In addition to a culture of secrecy, FOI also confronts the inadequacy of legal frameworks guaranteeing access to public information. In reality, many FOI laws were adopted in response to political pressure, or were just a product imported from a limited number of models with over-ambitious objectives but without regard to local contexts and unaccompanied by proper measures to facilitate transplantation into their new environments. Necessary measures include sufficient training for public officialdom about FOI so as to embed FOI and its associated values in public decision-making cultures, as well as various advocacy activities to raise the public's awareness about the benefits of FOI. Improper implementation measures and lack of public awareness are thus key factors weakening the impact of FOI.

Another challenge for FOI is the risk of being undermined by other legislation. Heightened security concerns after the September 11 terrorist incident in the US, protection of privacy, security of intellectual rights and the nebulous 'public interest' are understandable reasons for narrowing the right to access information held by governments. Yet governments are also attempting to disable FOI laws or undercut access using these rationales as justifications. Moreover, threats to FOI can also come from market-based transformations of the paradigm, or scope, of government, including through outsourcing and privatisation. The Canadian experience provides one example where access to government documents has been undercut due to the transfer of governmental functions to private contractors, reduction in public spending and attempts by government to sell information as well as to increase FOI fees (Robert 2000: 308-20). In Australia, immigration detention centres in Australia, and offshore on Nauru and Manus Island, which are run by private organisations on behalf of the Australian Government (O'Flynn 2014), are not under obligation to provide information under the FOI Act, and their operations remain largely concealed from the public.

Therefore, in this new millennium, both the adoption and implementation of FOI regimes are driven, shaped and constrained by cultural and technical factors. The law on paper and formal processes are, by themselves, not enough to facilitate a smooth implementation of the principles of FOI. Recent

striking stories around the world raise a number of practical issues in relation to enforcement and administration of FOI regimes. For example, in the UK, it took about a decade for a journalist to pursue his legal battle to gain access to Prince Charles's letters to government ministers in the period of 2004-2005 (Hunt 2015). Disclosure of the Prince's letters was repeatedly refused for the fear that 'it would undermine his neutral political status' (Hunt 2015). The UK Supreme Court's judgment which found the Attorney-General's certificate against disclosure unlawful, was saluted as a victory for journalists but regarded as a disappointment by the government (Hunt 2015). The factors dragging out such a long case reached far beyond the formal FOI legal framework and largely represented political motivations and sensitivities. In the US, Hillary Clinton was pressured to release work related emails sent from her personal server during her term as Secretary of State (Hammit 2015). Her case leaves many questions unanswered about the way emails by politicians and public officials (public information) are stored and treated. Meanwhile, a war veteran in Australia has had his broad FOI requests rejected on the practical ground of 'substantial and unreasonable diversion of resources'.[5] It was successfully argued that the requested documents would require a significant amount of time and effort to process and that would take many of the Australian War Memorial's staff away from their normal duties. Accordingly, the decision to refuse access was deemed lawful.

Lessons for countries which have introduced, or intend to introduce FOI legislation

FOI is not related merely to promoting transparent or better government but also to democracy and human rights. As the original Swedish model intended, FOI can help improve democratic participation and facilitate better understanding about the workings of governments, making government agencies work with more transparency, accountability and efficiency, as well as promoting the enforcement of many other civic, economic and political rights.

Like many other kinds of legislation, FOI laws should be seen not merely as a toolkit of autonomous concepts readily transferable in time and space, but as cultural artefacts embedded in the society in which they function. Many FOI laws today are merely 'paper laws' because they have been adopted in response to international or national pressures and largely based on some imported 'model' laws.

The adoption of an FOI law is only the first step: post-adoption, there is much work to be done to make the law properly functional. In reality, statutory weaknesses, together with non-compliance by government agencies, a lack of demand for information from the public, and the absence of an efficient accountability and administrative and/or judicial oversight mechanisms have led to significant failures in FOI implementation. Granting free access at the same time means having a free

[5] Tate and Director, Australian War Memorial [2015] AATA 107.

flow of information and creating an open government regime. This requires both political will and public willingness. While government agencies have to change their cultures and make themselves more accountable, citizens also need to be more aware of their rights and the benefits of having access to information. There also needs to be a competent and committed body of bureaucrats that can implement and manage open government systems. Additionally, vibrant media (Balkin 1999; Besley and Burgess 2001; Black and Tenkate 2008) and proper record management systems (Sebina 2004, 2006; Glover et al. 2006) need to evolve to facilitate the free flow of information. Last, but not least, the gradual updating of FOI regulations to reflect social and technological improvements is a requirement if progress is to be maintained.

II. THE IMPORTANCE OF FOI

In most countries FOI legislation has been adopted as a part of the legislative framework for improving democratic processes. Enabling greater access to information about the working of government can help to increase transparency and accountability of government and to create a better informed public and establish the basis for fuller participation of individuals and groups in the governance process (Birkinshaw 2002, 2009; OECD 2003, 2005). A properly informed public and a transparent and accountable government are integral dimensions of good governance. This section examines the potential benefits of FOI to good governance from both theoretical and practical perspectives, to facilitate a more critical understanding of FOI and legal transplantation.

1. Good governance - a definition

'Governance' is a living concept. Discussion of 'governance' dates back to ancient India when a treatise describing the 'art of governance' was introduced to the King. However, so far no strong consensus about the definition of 'good governance' has been achieved (Kaufmann and Kraay 2008: 5). One of the international institutions interested in defining the concept, the World Bank (WB), has adopted different positions on good governance. In 1992, it defined good governance blandly as 'the manner in which power is exercised in the management of a country's economic and social resources for development' (WB 1992). But two years later it introduced a new and more detailed definition that sees good governance as 'epitomized by predictable, open and enlightened policy making; a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law' (WB 1994). Other international institutions such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the European Union (EU) have also been developing and applying principles of good governance for improving structures and procedures of

both international cooperation and national level administration. Regardless of their variability, definitions and criteria of good governance are grounded in the process of decision making and implementation and the term 'governance' is increasingly taken into account in development and management literature (Belvir 2007: 360-4).

In the most common sense, 'good governance' is 'participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law' and the term can be used in different contexts including reference to corporate governance, international governance, national governance and local governance (UN 2009). As the overall objective of this research concerns adoption of a national FOI regime, in this thesis analysis is focused on governance and within the context of development and implementation of national policies and decisions.

In governance, government is the core actor, while other actors vary according to what level of government is under discussion and may be grouped as part of 'civil society'(UN 2009). Good governance at national level, therefore, reflects the interaction between government and civil society during the process of performing state functions (Karpen 2010: 16-31). In practice, even if no exhaustive definition of good governance is achievable, there is a strong consensus on the importance of 'a capable government operating under the rule of law' (Kaufmann and Kraay 2008: 2). In other words, without 'a good government' there would be no way for good governance to be achieved and sustained.

What are 'good government' requirements within a governance perspective? The widely accepted requirements, as systematised by the UN Commission on Human Rights in Resolution 2000/64, include:

- *Accountability:* public officials must be answerable for government actions and subject to legal review and political accountability;

- *Responsibility:* Government needs to produce results that meet the needs of its society while making the best use of resources, creating equal opportunities for people to improve their well-being, adopting and implementing fair legal frameworks that protect human and minority rights, and ensuring different interests and viewpoints are mediated and broad consensus is reached in the best interest of the whole community;

- *Transparency:* Government is obliged to make information available to the general public, providing clarity on government decisions and helping to prevent corruption;

- *Participation:* Government must involve citizens in policy-making processes as well as taking informed choices;

- *Responsiveness:* Government agencies must serve the people within a reasonable timeframe.

From the above discussion, 'good government' is an application of good governance to the particular sphere of governmental decision-making, requiring a participatory, transparent, accountable, responsible government that works under the rule of law and respects human rights. In practice, 'good government' is sometimes replaced by several variations, for example 'open government', a term that accentuates accountability, with particular attention being paid to enhancing transparency and reducing corruption (Hunt and Chapman 2006: 3; OECD 2003).

With such laudatory principles, it is widely believed that good governance is a fundamental ingredient of sustainable economic and social development. Nevertheless, it is also apparent that good governance is an ideal which is difficult to achieve fully. Many efforts have been made, both internationally and nationally, to develop indicators measuring states' adherence to good governance, as well as to promote it. For example the Worldwide Governance Indicators (WGI) project led by the WB has measured and reported good governance indicators of countries in the world from 1996.[6] The main indicators of good governance have been separately assessed and/or advocated by different organisations such as the rule of law index and the open government index by the World Justice Project[7] and the corruption perception index by Transparency International.[8] Despite those efforts, it is an unpleasant fact that few countries have moved close to achieving the totality of good governance.

2. Potential benefits of FOI

In the maiden days of FOI, the father of FOI - Chydenius - considered the right to access public information an indispensable part of a freedom of the press that is 'the apple of the eye of a free realm' (Chydenius as quoted in Manninen 2006). In contemporary times, information has been described variously as; 'the oxygen of democracy' (Article 19 Organisation 1999), 'the lifeblood of accountability' (Cane and McDonald 2008: 282), a core element of open government (Francoli 2011:

[6] WB (2014), *Worldwide Governance Indicators*, available at http://info.worldbank.org/governance/wgi/index.aspx#doc accessed 02/4/2015

[7] World Justice Project, *The World Justice Project Rule of Law Index*, available at http://worldjusticeproject.org/rule-of-law-index, accessed 23/2/2014

[8] Transparency International (2014), *Corruption Perceptions Index Overview*, available at http://www.transparency.org/research/cpi/overview, accessed 2/11/ 2014

16-29), a key tool facilitating effective business practice (Belvir 2007: 360-4), and an essential right for every person (Wadham and Griffiths 2005: 4-9).

The existing literature offers a strong affirmative justification of FOI as essential for participatory, accountable, transparent and responsible public administration; or, in short, good government. In view of Locke's social contract theory and with his own analysis of the importance of information to both citizens and states, Birkinshaw (2010) contends that access to information is a component of transparency (a concept with a wide meaning) and an ultimate requirement of openness (a similar concept to transparency). The idea that FOI has the capacity to stimulate governmental transparency and accountability is also strongly supported by Banisar (2005, 2006), Piotrowski (2007) and Stiglitz (2002).

From the viewpoint of administrative law, Cane and McDonald (2008) see freeing information as at the centre of 'the concept of giving an account' and as involving various mechanisms for making information available about the work of the government, such as proactive disclosure by public agencies, parliamentary process, media questioning and investigations, committee inquiries, whistle-blowing, and the work of ombudsmen. This argument accords with the views of other administrative law experts and FOI practitioners including Paterson (2005, 2007, 2008 and 2009), Lane and Young (2001, 2007), Solomon et al. (2008), Bayne (1984), Chadwick (1985) and McMillan (2008, 2012). Giving 'open government' a position of fundamental doctrinal importance in democratic government, the existing literature also argues that open government is designed to facilitate the flow of information about activities of government and accordingly promotes public accountability (see Otenyo and Lind (2004); Grigorescu (2003); McMillan (2005); Chapman and Hunt (2006); Banisar (2004, 2006); Fancoli (2011), Mendel (2008); and Snell (2006)).

FOI can nourish an accountable, transparent and effective government

To achieve a transparent, accountable, and effective government, the public needs the ability to scrutinise the actions of elected officials, especially while in government. When the public can regularly access information on the government's policies and day-to-day activities, FOI makes government directly accountable on a regular basis rather than just periodically at election time through the ballot box. Such regular scrutiny ideally compels government agencies to work more responsibly and at the same time, to use public resources more cost effectively. Meanwhile, being properly informed about the state of the economy, social issues and other matters of concern, citizens are more likely to have a better assessment of their government's performance. Nader (1970) insisted

that, ‘a well-informed citizenry is the lifeblood of democracy; and in all arenas of government, information, particularly timely information, is the currency of power’.

Indeed, unpacking information held by governments is one of the most effective ways of addressing poor governance, particularly with regard to wrongdoing. Thus, FOI law is also a key tool in combating corruption and irregularities. Working under supervision of the people, government agencies have to become accustomed to providing evidence and justification for their actions and, at the same time, to avoiding wrongdoing and corruption. Investigative journalists and watchdog NGOs can use rights to request information to expose misconduct by government officials. Besides civil society, other governmental institutions (the courts and parliament) also can utilise information available under FOI legislation to facilitate their work. As US Supreme Court Justice Louis Brandeis (1914) famously wrote: ‘Sunlight is the best disinfectant’.

FOI increases the quality of decision-making

When government is required to disclose information, decisions and policies made public will be more likely to be based on objective and justifiable evidence. FOI procedures allow public officials to have a better idea about what information is already held by other agencies of government, for better policy analysis. With positive and direct means to access government information, the public can be properly informed about the manner in which their elected officials’ policies are being translated into executive actions. Policies and decisions, therefore, are more informed and better adapted to the needs of the public. James (2006) argues that there are at least four ways in which FOI can help to improve decision-making. The first is its possible use in consultation procedures involving a well-informed public. The second is the safeguarding of probity that encourages government to produce more defensible, evidence-based policies. The third is the increased accountability of the public officials when they get involved in decision-making activities. The final way is the promotion of rationality in decision-making since decision-makers have to both clearly and logically explain themselves and to think more carefully before acting.

FOI encourages democratic participation and trust in government

Arguing that FOI has a crucial role to play in encouraging public participation, Banisar (2006) noted that unless citizens are well-informed about policies and activities of the government, they cannot be truly able to take part in political dialogue and the decision-making process. This view is strongly supported many other scholars such as Darbishire (2010), Gold (2012), Mendel (2008) and Puddephatt et al. (2011). Although James (2006) insists that ‘making government information publicly available does not necessarily mean that the public is able to easily influence public

decisions', he does believe the timely release of relevant information is essential for people to engage in full and open debates about the affairs of government.

Building on democratic values of openness and accountability, FOI is expected to open up the kind of communication between civil society and state channels which may be crucial to reduce suspicion and misunderstanding and to increase public trust in government. When campaigning for FOI in the UK, Falconer (2004) signified FOI as a tool that can incrementally increase trust in government since 'each and every release will contribute, day by day, towards our long-term vision of a more transparent government, in which the people feel greater confidence'. Moreover, in countries transitioning from repressive regimes to democracy, opening up information may be a way for governments to break away from the past and to be better understood by the public. Admittedly, it is difficult for FOI on its own to achieve this and it is almost impossible to disentangle this effect from other initiatives for improving public trust in government (James 2006: 17-32). There is also the potential that a cynical (or partisan) media may misuse FOI to increase distrust in the government/elected officials (or a *particular* government), especially in advanced democracies.

FOI strengthens the rule of law

In liberal democracies, the rule of law is promoted by an independent and impartial judiciary, and a culture where laws and other policies are obeyed closely and enforced equally (Kaufman et al. 2009). Evidently, better understanding and then better compliance with laws and other policies can be reached when information on laws and policies are published in a timely fashion. Under the World Justice Project (WJP), disclosure of laws, their drafts and official information, are among the important indicators used to measure a country's adherence to rule of law. Since 2008, the annual assessment by the project has consistently highlighted the mutually enforcing relation between the rule of law and open government (WJP 2015).

FOI facilitates other civil and political rights

In many ways, FOI can help underpin other more first-order human rights. Citizens can use their rights under FOI to assert other fundamental rights or safeguard their interests. For instance, to argue against government regulation citizens need to gather evidence about reasons for the regulation and the degree to which it is inconsistent with or obstructionist of other rights before calling for deregulation. Information is needed to refuel freedom of the press and freedom of expression. In the same way, voters need information to enable more discerning or deliberative democratic debate and choice about social and economic policies and law reform. Individuals need information to participate effectively in decision-making that affects them, while businesses need information to facilitate

effective practices. Therefore, the more information about governments' activities and services that is provided, the better are the chances and opportunities created for members of the community to utilise other rights and freedoms, engage with governance and development activities.

3. Evaluation of the impact of FOI laws

Every country has its own reasons for adopting FOI and so each country may differ in its legislative objectives. In the recent uptake of FOI, as evidenced by international trends, most countries have adopted FOI with a strong belief in its effect as an evolutionary force for good governance. However, given many FOI laws have been 'paper laws' with little usage and impact on good governance, the question must be asked whether ambitious FOI goals are realistic. What are the underlying factors that hinder FOI laws from achieving their objectives?

Impact of FOI laws in reality

To begin with, it should be noted that most current efforts to research FOI have focused on the text of the law and the potential benefits of FOI, rather than examining, empirically, its impact in practice (Hazell et al. 2010). Recently, due to increasing concerns regarding the underperformance of FOI laws around the world, more attention has been paid to developing methods to evaluate FOI implementation, as well as to encourage more systematic research on the matter (Islam 2003; OECD 2005). In 2010, for the first time, a systematic evaluation of FOI impact was published by the Constitution Unit of University College London. Since then, the Carter Center launched pilot projects to assess FOI implementation in several countries but its assessments are not comprehensive (Freedominfo.org 2014b).

The University College London evaluation attempted to seek answers to the question of whether the UK FOI Act has achieved its objectives and changed the culture of the central government. It found that FOI has achieved the core objectives of increasing transparency and accountability, evidenced by the increase in proactive disclosure and government becoming more open about its operation - though the latter only in particular circumstances (Hazell et al. 2010). However, the evaluation did not find FOI impacting on other issues including decision-making by government, public understanding, participation, and trust in government, due to the fact that those issues are driven by a complex of other factors and that the benefits of FOI had been overstated for political purposes. (Hazell et al. 2010). With regard to its impact on government, as FOI is not intended to change key functions of the government, FOI has no impact on the way government agencies deliver public services, or work with others. FOI to date has done nothing either way in terms of the working of UK government or the fear that FOI would undermine anonymity of public servants and collective cabinet

responsibility (Hazell and Glover 2011: 1664-1681). Given the fact that the UK is a late adopter of FOI legislation and could learn from the experiences of other countries, especially the US and pioneers with Westminster systems, and given the UK FOI Act is considered to be a relatively open and progressive regime, these early findings are rather disappointing.

In seeking a proper understanding of the importance of FOI in achieving good governance, a number of less systematic evaluations of the impact of FOI have been pursued at various levels. General findings indicate that FOI may have only a modest influence on good governance. FOI helps increase transparency, accountability and responsiveness, but it is difficult to distinguish and evaluate the impact of FOI from the impact of other initiatives for better government (Open Society Institute 2006; Open Society Justice Initiatives 2004). From an economic perspective, cross-country regression estimates show that countries with better information flow govern better; however, a correlation, let alone a causation between FOI law, transparency and better governance still remains to be identified (Islam 2006). Although a couple of promising signals have been observed here and there (for instance, in 1995 the former premier of Victoria said the state's FOI Act had significant progressive impact on the quality of decision-making (John Cain, quoted in Marsh 2000:9)), FOI has been seen in practice as not powerful enough to advance public participation, government effectiveness or the quality of decision-making alone (Hazell et al. 2010; Relly and Sabharwal 2009; Paterson 2005; Lidberg 2006). Where there has been a low rate of FOI use by the public, there has been doubt about the capacity of FOI to facilitate other rights (Darcha and Underwood 2005: 77-86; Relly and Cuillier 2010: 360-79). FOI cannot guarantee to function as a corrective measure for corruption, because corruption cannot be reduced merely by adopting a good FOI law (Tandoc 2013; Costa 2012). On the other hand, there are some optimistic findings that there is a clear link between a country's adherence to the rule of law and the effectiveness of its openness legislation, including FOI legislation (WJP 2015).

Reasons for FOI's modest impact on good governance

Are such sobering findings unexpected? They were foreseen by commentators who thought critically about FOI and the preconditions for its success. With regard to the UK Act, Birkinshaw (1997, 1999, 2002, 2009) has repeatedly expressed his sceptical view of the benefits that FOI could bring as well as the obstacles that it would face in practice; meanwhile, James (2006) has warned about the difficulties for achieving FOI objectives and doubted the capacity of FOI to increase public confidence in government. In a broader context, discussing transparency, Florini (1999) is concerned that one of the strongest hurdles that transparency faces is opposition from those under scrutiny, who naturally have strong incentives to avoid providing information. Others have suggested that in addition to challenges associated with the long and strong culture of secrecy (Belgrave 2006; Banisar

2006; Blanton 2002), FOI outcomes would be hampered by the lack of public awareness about the right to access (Puddephatt and Zausmer 2011; Bovens 2002) and the absence of good record management (Snell and Sebina 2007; Sebina 2006). Also, many have agreed about the risk of FOI failing where there is not an effective monitoring mechanism (Neuman and Calland 2007), or an enabling environment for free and dynamic media (WB Institute Development Studies 2002; Paterson 2008; Balkin 1999; Besley and Burgess 2001).

Explaining their assessment of the limited effect of the UK FOI Act, the University College London report said this was not evidence of a failure of the Act itself, but that the objectives set for FOI were too ambitious (and, conversely, fears of FOI were overstated). FOI is not a powerful revolutionary force as it has been sometimes believed, or even feared, to be. The possibility of achieving FOI objectives depends significantly on the political context under which FOI is adopted and implemented (Hazell et al. 2009). Governmental resistance to information disclosure in the UK is understandable, given the culture of administrative secrecy that has persisted in that country for a long time and the fact that top-level political support for FOI is inconsistent. Within UK government bureaucracies, the Act is considered an 'annoying thing' by many public servants (Wintour 2012). At the grassroots level, ordinary people are not the main users of FOI, but rather it is politicians, academics and media. Lack of interest, frustrating procedures, long delay in information provision, and high rates of refusal may be reasons for this lack of use (Wintour 2012).

Practical experience thus suggests a cluster of reasons that many FOI laws have not applied as their drafters envisioned. The reasons include the following seven:

(a) Lack of readiness for FOI

The impetus for governments and legislatures to adopt FOI laws ranges from civil society campaigns, to pressure from international institutions which often place a premium on transparency in anti-corruption initiatives. Governments attempting to win the trust of their citizens have, however reluctantly, taken steps to respond to demands for information. Often FOI laws, particularly those driven by external motivations or as 'political sweeteners', are passed without much consideration of the adopting countries' readiness for FOI or, at least, without consideration of a roadmap for making them feasible. Armenia has had an FOI law in force since 2003, even though as late as 2002 the meaning of the basic concept in that country was still very poor (Pearlman 2002). In developing countries in Asia, such as Indonesia (Freedominfo.org 2012a, 2012c) and Bangladesh (Ferdous and Chakma 2011), prior unsolved problems (including a lack of political freedom, the existence of societal and cultural barriers, as well as technological and economic disadvantages) have made it

impossible for FOI laws to be fully implemented. FOI adopting countries' unpreparedness and negligible measures to both improve their systems of record management and increase awareness about their laws, are key factors undermining the performance of FOI (Freedominfo.org 2012b, 2012d).

(b) Lack of political will

Clearly, just passing an FOI law is not enough to ensure its aims. For the law to live up to its objectives requires political will and buy-in from politicians. However, in practice, even some democratic countries with well-established FOI regimes and strong commitments from top-level politicians have experienced political backlash, allegedly in the interests of national security, privacy or for other reasons. Moreover, the fears that FOI may annoy the working of government and undermine the neutrality and creativeness of public officials also makes governments institutionally more cautious and less enthusiastic to publish information. The desire to prevent the release of much information illustrates that governments and their officials are under great pressure when faced with extra scrutiny and so may seek ways to minimize that scrutiny, even when an intellectual wish for openness prompted them to legislate for FOI in the first place.

(c) The culture of secrecy

FOI is conventionally regarded as a powerful force to battle the culture of secrecy and develop openness. But, as noted above, practice reveals different stories where a culture of secrecy has impeded the implementation of FOI laws (Australian Law Reform Commission 2009; Banisar 2007a, 2007b; Privacy International 2007; Roberts 2000a, 2000b, 2006a). A recent report identified a dominant culture of secrecy in countries in the Middle East and North Africa, including those that have adopted FOI laws (Almadhoun 2012). It is natural that secretive governments do not find any incentives to disclose information or to take further steps to facilitate FOI law enforcement. Nor do they wish to have effective oversight bodies, free media and political freedom. A culture of secrecy may permeate not just in government but whole societies as well. Limited use of FOI law due to apathy illustrates this. Where a culture of secrecy prevails, there is less chance for FOI law to be implemented, much less to drive cultural change.

(d) Weak institutions

FOI impact is determined by the interaction of FOI laws and the quality of a country's institutions - the weaker the institutional settings, the fewer benefits of FOI can be anticipated. Oddly, FOI may be closely associated with an *increase* of corruption in some developing countries (Escaleras et al. 2009;

Tavares 2007) and this can be explained by the fact that in those countries, state functions are handled by public institutions with limited working capacity. Theoretically, FOI can improve outsiders' information access, including information about key decision-makers, thereby enhancing incentives to establish connections for the purpose of corruption. Meanwhile, the limited capacity of public institutions does not allow them to realise these risks or to apply effective measures to prevent such connections. Without preventive measures, these undesired effects may dominate and increase corruption. Thus, paradoxically, adoption of FOI laws alone is not a panacea for the problem of corruption in the public sector but may actually exacerbate the problem.

(e) Lack of awareness and lack of demand

Low use of FOI due to a lack of awareness and a lack of demand is one of the toughest challenges encountering FOI in its execution. In many countries, even in those with a long history of FOI, understanding of FOI laws is restricted, not only amongst the public but also amongst public officials. Having limited knowledge of their rights is a reason the public may not express a high demand for information. Even if the public are aware of their legal rights to access information, they may still feel disinclined to use those rights due to cumbersome procedures, delayed responses, high fees, and high rates of refusals. Instead, the public may rely on information disclosed via other sources, especially the media, while journalists may prefer to rely on their relationships with public officials to obtain information.

(f) Lack of an effective oversight body

Monitoring FOI forms an important component in any successful implementation strategy. Most nations with FOI laws have introduced a mechanism to oversee such work. The traditional internal oversight mechanism has been criticised for its lack of neutrality because administrative bodies tend to defend decisions by their subordinate members. Thus, it is common practice to establish bodies independent of the administrative bureaucracy to engage in both FOI review and supervise implementation. However, the FOI Advocates Network has observed that 'in some countries, there have been attempts to undermine the effectiveness of oversight bodies - for example, through reducing their independence or funding - while other countries have refused to establish such bodies in the first place' (FOIA Net 2012).

(g) Statutory weaknesses

The global push towards transparency has led to a number of countries having FOI laws in name but not in sprit. Some repressive countries have adopted FOI laws. Even in some more democratic

countries, FOI laws have still been adopted reluctantly. Moreover, a number of laws have been out of date since they were adopted due to old thinking of the era of big government and rudimentary information technologies (Stewart 1999b; Freedominfo.org 2012b). Typical weaknesses of FOI laws include their narrow scope of application, over-broad exception regimes, poor oversight and appeals mechanisms, and lack of legal requirements to promote public awareness of the right to access information (FOI Rating). In addition to shortcomings in the drafting of FOI laws, such acts can be undermined by other regulations that undercut the fundamental principles of free access. The stories of Russia (Elder 2012) and China (Chomhaill et al. 2015; Xiao 2011), where information suppressing measures, particularly those for internet censorship, were adopted very quickly after the enactment of FOI laws, offer two striking examples.

In summary, FOI can help increase transparency and accountability but a genuinely transparent and accountable regime depends on a political context conducive to open government as well widespread knowledge of and demand for access to information. Additionally, it is widely acknowledged that good governance is not a goal that can be achieved overnight. Nor can transparency or accountability be achieved by simply having an FOI regime. Although FOI laws provide legal access to government information in principle, there is still the problem of actually obtaining it, as disclosure is often at the discretion of the officials in charge of providing information. Finally, it may be that the full positive impact of any law will not be known until many years later, after they are used regularly, as more information is passed to citizens, and as cultural change is advanced.

The updated result of the Global Right to Information Rating,[9] hereinafter referred to as FOI Rating, shows that Serbia's FOI law holds the top position with 135 points out of a possible total of 150. Austria languishes in bottom place, with 32 points, while approximately 90% of countries have over 60 points. The results may be encouraging news for FOI adopters. However, this is not a comprehensive or convincing assessment because the FOI Rating focuses solely on legal frameworks whilst ignoring implementation. Do FOI regimes that are rated highly on formal legal grounds function in practice and facilitate good governance? The rating conductors are vague on the issue, but practice provides some answers. Practical experience shows that strong legislation alone is not enough to assure good implementation regimes in reality. FOI ebbs and flows over time and is highly dependent on a country's democratic maturity and the wider context. It also varies across the globe with different governments with different political regimes and cultures reacting and dealing differently with FOI and other priorities such as security and privacy. In short, FOI laws and their

[9] The Rating is conducted by Access Info Europe and the Centre for Law and Democracy and can be found at http://www.rti-rating.org/country_rating.php, accessed 28/9/2015

implementation are shaped by the political environment. Moreover, the fate of FOI is closely tied to the information revolution and may well be transformed as technologies alter expectations and capabilities. Hence, without political and logistical support, there is a probability that an FOI law, even a progressive one, might be ineffectual.

III. RECIPE FOR A WORKABLE FOI REGIME

Discussing the recipe for an effective FOI regime, Sebina (2006) believes that an effective FOI regime is a result of a combination of democracy, accountability, trust, and record management. From this starting point, he argues for a fusing of FOI with each of these elements. In each combination, he sees the potential for mutually enforcing relationships between FOI legislation and each respective 'ingredient'. He reasons that even in a democratic country where government is both politically and legally accountable and trusted by the people and where an efficient record management system already exists, there is still a need to legislate rights to access and to raise public awareness about such rights. Sebina advocates using those ingredients as benchmarks to evaluate the readiness for adoption of FOI legislation in his own country, Botswana.

Sebina well describes the interactive relationship between FOI legislation and the context under which FOI legislation works. However, he assumes that everything will work to its best potential and always interact with other elements positively. Moreover, the combinations of each single 'ingredient' were analysed separately and assumed the existence of all other 'ingredients' as well as their full and positive impacts. This leads to a recipe which is ideal, but unreal. In reality, FOI must embrace, or work with the good, the bad, and the ugly as do democracy, accountability, trust and record management. No country has been seen to possess all the laudable values: good FOI legislation, democracy, accountability, trust and a good system for record management. In reality the complex relations between FOI and other values, and the collective consequences of those relations are unpredictable. In ideal circumstances, FOI and other values (accountability, for example) promote each other, but in other circumstances, FOI may undermine accountability (e.g. FOI may hamper internal discussion and reduce the creativity of public servants if they fear that their initial ideas will be subject to public judgment).

Reflecting the fact that most attention has been paid to legal issues rather than political context, the Article 19 Organisation has created and recommended a set of principles to reflect both international standards and common features of more progressive FOI laws. The Organisation also developed a model law that it recommends for every country. Putting aside the issues of political and cultural differentiation among countries, the Organisation argues that a strong FOI law is at least a good

starting point to protect the right to know. This thinking is understandable, given the Organisation's self-committed mandate to work for 'a world where people are free to speak their opinions, to participate in decision-making and to make informed choices'.[10] Moreover, it is, to some extent, supported by the view that adoption of a strong law is essential to achieve the goals of the Open Government Partnership (Karanicolas and Mendel 2012). That analysis, however, concedes that a good law is not enough to ensure the right to information if proper implementation of the law, both in the formal legal sense and in the wider sense of implementation in good faith if positive political will is lacking (Karanicolas and Mendel 2012, Mendel 2015).

More critically, Puddephatt and Zausmer (2011) emphasise the importance of contextual conditions motivating actors to adopt FOI legislation and the 'standards' of an FOI regime. They believe the momentum for FOI needs to come from three set of actors: top level politicians, middle level public officials and civil society. They also warn about the dependent relation of the FOI approach to local contexts and point out the need to tailor the approach to local conditions. In their view, FOI laws and implementing mechanisms are equally important. Above all, they recommend that in contemporary times proactive disclosure of information is an effective way to make the law work efficiently with fewer resources and greater benefits (Puddephatt and Zausmer 2011).

Puddephatt and Zausmer's arguments are convincing but still somewhat theoretical. In practice, it is hard to ensure the participation of all required actors from the initial point in the FOI reform process. Achieving a strong political consensus on the necessity of FOI is a long journey requiring strenuous efforts, since it is highly dependent on the preferences of each set of actors and conflicts of interest among the actors are always present. Moreover, it is also equally hard to maintain a consensus on FOI among politicians, public officials, and civil society. In practice some politicians come to regret adopting FOI,[11] while some FOI laws become irrelevant due to public apathy.

Obviously, FOI regimes do not evolve in a political vacuum, and their adoption cannot be a mechanical 'tick-a-box' borrowing from outside. There are a number of factors driving the adoption and implementation of an FOI regime (Trapnell and Lemieux 2014). Each country needs to make its own recipe for an FOI regime based on the common experience that all reform processes, including adoption and implementation, are determined by the political environment, in which political support is an integral part. Alongside political will, there needs to be a set of competent and committed public

[10] Article 19 Organisation, 'Who We Are', available at http://www.article19.org/pages/en/who-we-are.html, accessed 30/8/2012

[11] In his book, Tony Blair - the Bristish former Prime Minster - considered FOI adoption in 2000 as one of the worst mistakes. See Blair 2010.

officials to create and manage the record system to back up the free flow of information. Just as important is the engagement of a strong civil society to put pressure on government and raise public awareness. Additionally, the environment needs to include pre-existing components of openness, democratic values and a healthy relationship between media and government. Such broader tendencies within the political culture will not only help FOI achieve more of its objectives, but will themselves positively impact, particularly on levels of public trust in government, and participation and interest in politics.

None of this is to say that an FOI law should not be adopted in a country if any of the required factors is missing or not present. Nor should it be said that when developing its own FOI regime, a country only needs to consider its political context, ignoring widely accepted minimum FOI standards. Here our purpose, in examining the readiness of a country like Vietnam for FOI, is to identify critical factors that are lacking, to address other obstacles as well as to seek possible solutions and to draw a roadmap for a feasible FOI regime. At the same time, understanding a country's readiness will help not only to produce a good FOI law that both fits the political environment and meets international standards, but that also sets realistic objectives and expectations for the legislation and its administration.

IV. CONCLUSION

Experience demonstrates that governments tend to remain resistant to supporting openness because of the fear that it will limit their power. Passing an FOI law may be hard, but it is much harder still to make the law work. There is little evidence supporting the idea that a strong FOI law alone will ensure its effective implementation and be likely to achieve its objectives. FOI law and its implementation are shaped by the local context. There is also a risk that FOI laws can be easily undermined by other regulations. In practice, full establishment of the principle of public access requires a transformation in not only law, but also in practices and attitudes.

FOI is not a legislative luxury for advanced democracies only. It can produce good governance benefits. But it should not be used as a window-dressing nor assumed to be a silver-bullet, by developing democracies. Impetus for FOI needs to be based on a realistic understanding of its attractions and limitations, its pros and cons. Full acknowledgement of a country's economic, cultural, and political factors is a precondition for developing a workable FOI regime. A workable regime, in turn, requires serious consideration of its compatibility with international standards, values and experience, and to this extent comparative law and practice can lend insights if not models. The regime also needs to be implemented with a road map, with political support and with, as much as

possible, a willingness to change not only on the side of government but also on the side of civil society.

CHAPTER 3 VIETNAM - GOVERNMENTAL CONTEXT AND FOI TO DATE

This chapter aims to provide an overview of the broader political and cultural context of those Vietnamese laws and institutions which shape the terrain of FOI adoption and implementation, as well as to identify problems and challenges facing the effective implementation and administration of FOI in Vietnam, a socialist country in transition. In 2013, in response to the need for political and economic reforms, Vietnam passed a new Constitution replacing the 1992 Constitution. However, hopes for significant change were dashed as the new Constitution, which took effect on the first day of 2014, was little different from the previous version (Nguyen 2013). Analysis in this chapter is confined to the relevant constitutional provisions which remained unchanged. In-depth discussion about the broader impact of recent constitutional reform and its possible impact on the future of FOI in Vietnam will be presented in later chapters.

In addition to surveying the Vietnamese political context relevant to FOI, this chapter includes a section discussing the existing literature on legal transplantation. The purpose of this discussion is to draw attention to the issue of legal transplantation when reforming FOI in Vietnam. Awareness of transplantation challenges helps reinforce the view that Vietnamese legal and cultural conditions are far from ideally adapted to FOI so any reform should be adopted with realistic consideration of its objectives and the measures necessary to accommodate FOI.

I. VIETNAM: A SINGLE PARTY SOCIALIST COUNTRY

This section is devoted to unpacking Vietnamese political, cultural and economic factors that present challenges to democratic process in general and FOI reform in particular. Therefore, the total and absolute leadership by the Vietnam Communist Party (VCP) over the state and society, the principles of integration of state power under the VCP leadership, cosmetic elections, state-owned and party controlled media, and prevalence of corruption are the central issues for discussion.

1. Absolute and total leadership by the VCP

Founded in 1930, through the merging of a number of communist organisations, the VCP has been widely acknowledged for its leadership role in toppling feudalism, waging resistance against the colonial French, waging war against the US and in unifying the country. Over its lifetime of more than 80 years, the VCP has used every opportunity to consolidate its legitimacy and to build its credibility with the public, based on its achievements, its role in the country's socio-economic development (Le 2012) and preservation of cultural traditions (Gillen 2011: 272-281). The VCP has sought all measures to exercise its total leadership, which has been enhanced by a wide variety of

legal documents, including Art.4 of the consecutive Constitutions recognising that the Party is the predominant force leading the State and society.

In practice, the role of the VCP has delivered and entrenched ever greater influence as the Party's leadership nucleus is established in state agencies, mass organizations and within the military force as well.[12] Policy making and implementation in Vietnam remains a closed process performed by the VCP as the sole actor in the whole process (Thayer 2010: 423-444). The VCP sets the policies and then assumes the leadership role in enforcing and monitoring their implementation, as well as in dealing with irregularities and wrongdoing. It also reserves the right to decide on the appointment, discipline and dismissal of public officials; procedures subsequently performed by state agencies which serve just to formalise the prior personnel arrangements by the Party.[13] Challenging a Party decision or policy is more or less impossible, except in cases where the VCP itself wishes to adopt a change, or, very rarely, when it realises its mistakes at a very late stage. In case a decision by a state agency is found to be inconsistent with the party's policies, such decisions are repealed, unless otherwise decided by the VCP. However, there is little possibility for inconsistency to occur since policies are followed through with Party involvement in every stage and activity.

The intimate relationship between the VCP and the state in Vietnam is thus clear. The Party and the state are in theory two parallel systems, but in practice are overlaid and intertwined. This is evidenced by the fact that the Party Committee is present in every state agency and their subordinated units, and most senior Party members are dual-role elites who simultaneously hold leadership positions in the Party and state institutions. Accordingly, overseas scholars see the Vietnamese political system as 'mono-organisational socialism' (Thayer 1995: 39-64) while Vietnamese dissidents hold the view that the VCP and the state are 'intertwined into one' (Hà 2012).

A demarcation line between the VCP and the state was first drawn up by *Đổi Mới* in 1986 (Gillespie 2006; Thayer 2010; Le 2012) but this line remains fragile (Gillespie 2006:105-30). In reality, there is some evidence of a transition to separation, however, the relationship between the VCP and the state remains one-way, with the VCP maintaining its grip on hegemonic leadership over the state and the Party resolutions and directives remaining supreme and unchallengeable (Fforde 2012: 176-85; Bui 2013b). As admitted by a retired senior leader, the Vietnamese political system exhibits a structural problem that distorts the rule of law and allows convergence and centralisation of state powers in the hands of the VCP (Tuần Việt Nam 2010).

[12] Art.25 of the VCP's Charter of 2011.

[13] Art.2 of the VCP's Charter of 2011.

The leadership by the Party over the state and society is also entrenched through the utilisation of mass organisations.[14] Under the Constitution, mass organisations are given a status as 'the political base of the people's government', and are tasked with 'encouraging the people to exercise their rights as masters'.[15] In practice, the operations of mass organisations are all funded with public budgets and the leadership positions in each organisation are nominated by senior Party members. Discussing the role of mass organisations, some scholars hold the view that despite paying lip service to the representation of group interests, mass organisations are, in truth, instruments to serve the VCP's leadership at all levels (Turley 1993: 260-2; Thayer 1995; Trang 2004:137-60). However, there has been some evidence suggesting that mass organisations are transforming and tending to shift away from dependency on the VCP (Gillespie 2006: 124-6; Bui 2013a).

2. Absence of a separation of powers and the dominant role of the government

The structure of the Vietnamese governmental apparatus constitutes a unitary state system that involves five major stakeholders: the National Assembly (the legislature), the State President (the head of the state), the government (the executive), the courts (the judiciary) and the procuracy (responsible for prosecutions, having similar functions to that of a prosecutor's office/attorney general). The Constitution confirms that state power is integrated and performed through an allocation of roles and cooperation among legislative, executive and judicial branches.[16] Alongside the absence of a separation of state powers, this constitutional principle leads to a weak legislature, a strong government and a dependent judiciary.

A weak National Assembly

Adopting the principles of 'taking people as the base' and unitary centralisation of power**,** the directly elected National Assembly is defined as the highest representative body of the people and also the highest organ of state power. Constitutionally, the Assembly is the sole body to draw up, adopt and amend the Constitution and laws. The Assembly has the power to decide the most important policies and plans of the country, to elect and remove top positions of the state, as well as to exercise supreme oversight of the performance of all other state institutions.[17] Theoretically, this involves great power

[14] Vietnam Fatherland Front (2012), 'List of the VFF Member Organisations', data updated in 2012 by the VFF, available at http://www.mattran.org.vn/, accessed 02/11/2012

[15] Art.9 in both the previous and current constitutions.

[16] Art.2 in both the previous and current constitutions.

[17] Art.84 of the 1992 Constitution, Art.70 of the 2013 Constitution.

covering a wide variety of fields, and many (mostly from within the government) suggest that too much power is vested in the Assembly (MOJ 2011a, 2014).

However, in practice, the power of the Assembly is nominal, not real. To exercise such extensive power, the Assembly convenes just twice a year, each session lasting for about one month, while most members work on a past-time basis (despite being increased, the number of full-time delegates accounts for merely 30.8% of all delegates to the Assembly).[18] In addition, the limited capacity of the members, rooted in the principle that the representative composition of the Assembly is established on the basis of gender, ethnic group, and sectors,[19] inhibits the Assembly in performing its duty. Moreover, even though the Assembly is branded as the organ with the most political power, it is still subject to the VCP leadership and follows pre-figured party policies (Bui 2013b, 2014). The Assembly thus makes decisions in a passive fashion rather than via deliberation at its discretion.

Additionally, a number of other formal powers are merely tokenistic, as those powers are not actually fully vested in the Assembly. The power to elect national leaders is merely a set of decisions which formalise the VCP's intention. The Assembly is given the authority to oversee the operation and performance of other state agencies, however no sufficient mechanisms have been established for the Assembly to deal with unlawful regulations, decisions or wrongdoing by officials. The most effective action at the disposal of the Assembly is to repeal regulations it finds unconstitutional or contrary to law, or conduct a vote of confidence against, and then to dismiss, a wrongdoer.[20] In any event, taking such action is something the Assembly avoids because under the principle of cooperation in exercising state power, the Assembly is deemed to also hold joint liability for wrongful actions. Moreover, since the VCP accords great weight to political stability, it always prefers to have any wrongdoing dealt with internally within the Party. Accordingly, in reality the Assembly has never overridden any regulation nor dismissed any official.

A robust government

In comparison with other branches in the state apparatus, the executive government holds relatively moderate power. The Constitution defines the government as the executive arm of the National

[18] General statistics on the National Assembly Election from Term I to Term XIII], available at http://na.gov.vn/htx/Vietnamese/C1454/?cateid=1455#Wk2VukNRTQzH, accessed 01/11/2012

[19] Art.8 of the Law on Election of the National Assembly delegates of 1997/Arts. 7 and 8 of the new Law on Election of delegated of the National Assembly and the People's Council of 2015.

[20] Arts. 10 and 13 of the Law on Supervisory Activities of the National Assembly of 2003/ Art.21 of the new Law on Supervisory Activities of the National Assembly and the People's Councils of 2015.

Assembly, and accountable to the Assembly. The government is to report to the Assembly and the State President. On many occasions, such mechanisms of accountability and reporting have been assessed by the government as an inhibition to its creativity and flexibility in managing and implementing the activities of the state. However, the reality suggests otherwise.

Firstly, although the National Assembly is supposed to be the legislature, as in the Westminster systems, the government is in fact the body which formulates policies subsequently enshrined in bills. In draft laws proposed to the Assembly (which account for more than 90% of the total), ministries integrate policies that are favoured by the government. Due to the fact that the government and Assembly are jointly accountable to the VCP and public consultation is ineffective, even if the proposed legislation is controversial it is for the these two bodies to come to a compromise. In case the Assembly and the government have significantly different viewpoints on a bill, and opinions from the Party Politburo need to be sought, it is still more likely that the Politburo will issue a final decision in favour of the government. This is because the Politburo members who also serve in the government are at least four times more numerous than those who also serve in the Assembly, and the majority of the remainder are under the influence of the government. Additionally, ministries and the government as a whole may also seek to increase their power by by-passing the Assembly's review and introducing a general law whereby the Assembly delegates to the government/ministries full authority to provide elaboration for implementation (Đinh 2006). Therefore, in fact, most socio-economic policies are determined in the way sought by the government.

Secondly, the government is given substantial discretion in exercising its power without being subject to oversight through an effective checks-and-balances system. The Supreme People's Court (SPC) is given no power to judicially review the government's administrative decisions or to impeach government members for misfeasance or corruption. Meanwhile, as mentioned, the powerful jurisdiction of the Assembly, vis-a-vis repealing unconstitutional regulation or unlawful decisions by the government, has never been employed. Thus, the government's accountability and reporting to the Assembly are tokenistic. In many instances, the government's addresses or responses to the Assembly just serve as a means for the government to exaggerate its achievements or to deliver evasive advocacy of its failures, rather than constituting responsive acts vis-à-vis the supervisory activities of the Assembly.

Thirdly, the government administers all national resources and manages the whole national administration. Although the Assembly has statutory power to endorse the national budget, as in the Westminster system, the government is the real driver because it plays the role of both draftsman and

administrator of the approved budget.[21] The government enjoys absolute authority in determining the staffing plan for the administrative system and has a very important say in the staffing plans of all other state agencies and public budget users.[22] At local levels, whilst heads of administrative agencies are elected by the People's Councils, they remain largely subject to the government and the ministries' management in terms of profession and administration.[23] Decentralisation of administrative management falls under the jurisdiction of the government and ministries, leading to a strong reliance by local governments on the central government and ministries. As a result, the central government significantly influences every public institution at both national and local levels.

Additionally, as the manager of all state-owned enterprises (in the context that the state continues to play a dominant role in the economy and hold monopolies in all essential industries), the government also can have an immense impact on society through interventions in the market, or via adjusting the prices of commodities, at its discretion (Tran and Walker 2012; Kim et al. 2010; Le and Le 2000).

A dependent judicial system

The current Constitution prescribes, in Art.103, that 'in adjudication, judges and assessors shall be independent and merely observe the laws'.[24] However, the Constitution is inconsistent with itself in providing, in Art.2, that state power is integrated and performed through a mechanism of allocation and cooperation among legislative, executive and judicial bodies. In addition, Art.105[25] provides that the apex of the judicial system - the SPC - is accountable to the National Assembly and its Standing Committee. The SPC is not given the jurisdiction to examine the constitutionality of laws, other legal documents and decisions of the legislative and executive bodies, nor the authority to impeach state leaders (Nguyễn 2009:135-44; Nicholson 1999, 2002). With temporary appointment (of five years) and Party membership, it is clear that judges are lacking independence and are beholden to the VCP and the state, rather than being independent and impartial decision-makers with responsibility for interpreting and applying the law authoritatively/with finality (as is customary in liberal democracies) (Nicholson 2001:37-58, 2007). In practice, the courts and judges remain largely subject to external

[21] Art.20 of the State Budget Law of 2002/Art.25 of the new State Budget Law of 2015.

[22] Chapter VI of the Law on Public Servants of 2008 and Art.47 of the Law on Public Employees of 2010.

[23] Art.7 of the Law on Organisation of the People's Councils and the People's Committee of 2003/Art.8 and 9 of the new Law on the Organisation of Local Governments of 2015.

[24] Art.130 of the previous Constitution.

[25] Art.135 of the previous constitution.

leadership and Party interventions (Việt Anh 2005) and that inevitably leads to wrong or unfair decisions and judgments from time to time (Trịnh 2012; Vnexpress 2001).

Recently, the lack of judicial independence and its consequences have been straightforwardly acknowledged by both state agencies and academics (To 2006; Lưu 2012). However, as the new Constitution maintains the principle of integration of state power, Vietnam remains some way from the goal of judicial independence and impartiality.

3. Delay in political reform and yearning for democracy

The VCP has noticed, for a long time, the need for economic and political reforms, but at the same time it has not been ready to undertake radical reform. In 2001, amendments to the 1992 Constitution were expected to produce a breakthrough renovation of the political system. Nonetheless, apart from a slogan 'establishing a socialist rule of law state', all other components such as the organisational structure and distribution of state power remained intact. Ten years afterwards, the 11th VCP National Congress (2011: 99-100) reaffirmed the goal of 'comprehensive reforms of both economics and politics', implying clearly that constitutional amendments should aim at reforming the political system and promoting human rights. However, as the Party decided that its leadership and principles of integration of state powers should be preserved, the new Constitution was finally passed without any significant reform in political and economic policies (Nguyen 2013; Human Right Watch 2013; Bui 2014). To some foreign observers, the ongoing situation in Vietnam suggests an even more pessimistic outlook for the Vietnamese political system, compared with previous eras (Kerkvliet 2012). Being realistic then, the following factors highlight the immaturity of democracy in Vietnam:

Party-led elections

In Vietnam, the entire election process is under the leadership of the VCP. However, instead of directly taking part in the process, the Party has the Vietnam Fatherland Front (VFF) - the most notable among its mass organisations - act as its executive arm involved in every electoral activity. The VFF is tasked with screening, selecting and arranging candidates for constituencies as well as arranging all contacts with voters and handling all election procedures.

Although the Constitution provides that citizens aged from 21 who meet the defined qualifications are eligible to be candidates, in reality only those handpicked by the VCP are electable. Most candidates enlisted by the VFF are Party members who are nominated through state agencies, mass organisations or communities where they work or reside. Self-nominated candidates may still be nominated on the ballot, but their chance of success is extremely limited. Typically, election statistics

indicate that turnout is very high (often more than 99%) and that delegates, particularly party and high ranking state leaders, are elected with high proportions of the votes - about 70-80% (Nguyễn 2011). In explaining these outcomes, domestic scholars suggest the public has every opportunity to fully participate in the election process: candidates appeal to voters, and voters cast their ballots with responsibility, mindfulness, unity and solidarity for their own and national interests (Nguyễn 2011). Overseas scholars, however, think such outcomes 'indicate conclusively that the leaders are largely predetermined prior to the election' (Malesky and Schuler 2008, 2010).

Party-led elections with pre-determined winners trigger concerns about democracy and accountability in Vietnam. In reality, voters have no real chance to select their representatives/leaders and this gives them no motivation to pay attention to their franchise. It is not unknown for voters to get their family members, relatives, friends or even election staff to cast ballots on their behalf (Malesky and Schuler 2008). Voters also easily accept 'suggestions' to vote for 'favourable' candidates. Therefore, high turnouts or a high rate of formal ballots are by no means indicative of democracy in general or democratic elections in Vietnam.

Such pre-determined elections are also one of the main factors that impinge on the accountability of delegates who are otherwise regarded as representatives of the people and supposed to safeguard the public interest. Communist delegates (the majority of the National Assembly and the People's Councils) remain more accountable to the VCP, as it has the decisive say in arranging and securing their seats, than to voters who cast ballots but have no power to dismiss the government in reality. VFF-organised consultations with voters prior to and after regular meeting sessions of the Assembly/the People's Councils aim at propagandising for Party policies rather than creating a chance for voters to raise inquiries or concerns about their delegates' performance as representatives of the constituency. At such meetings, the delegates just inform voters about the working agenda, policies and laws to be passed. Obeying all instructions by the VCP will grant a delegate not only recognition of his completed duty but also freedom from any future liability for his performance as a representative of the people. The resulting lack of political accountability is one of the most severe barriers to democratisation in Vietnam today.

Party and State controlled media

In Vietnam, all media is state-owned and led by the Party. The Law on the Press of 1989 grants media a role as 'the voice of the VCP, the state and mass organisations, and the forum for the public' and the task to propagandise, advocate and impart policies of the VCP and the state to the people.[26] The

[26] Arts.1 and 6.

Law sets strict but ambiguous qualifications for both heads of press agencies and journalists,[27] as well as prohibiting them from disseminating information that is not consistent with state sentiments or which damages public solidarity, and warns that any violation may result in criminal or administrative liability.[28]

Apart from managing press agencies and journalists, the VCP exercises its control over the press through guidelines for journalism. Party-made regulations provide a tool for guiding and orienting journalistic information so that it can be accurate, timely in addressing political issues in line with laws and Party policies, and fit the interest of the country and the Party.[29] Such intervention has been justified as a way of creating advantageous conditions for the press to operate (Nguyễn 2010). However, it is strongly arguable that such interference and control hampers the neutrality and independence of the press.

Nevertheless, whilst the press is strictly controlled, recently it has begun to aim for more neutral and dynamic ways to reflect and provide information. Several newspapers are brave enough to post articles including critical commentary on the policies of the Party and the state (Wells-Dang 2010: 93-112). The press sector also contributes to unravelling corruption (Transparency International 2012; Lindsey and Dick 2002) and fraudulent acts by public officials, by foiling plots to cover up fraud (Sidel 2008: 119-40). However, publishing such critical opinions on contentious issues is not possible without the backing of a powerful interest group or political source. In the absence of such support, news organisations and journalists are vulnerable to administrative/criminal punishments justified by vague and ambiguous charges which can be interpreted in many ways under the Law on the Press and other legislation dealing with violations in the press sector (Robertson 2012).

The fact that the media are bound to write and publish articles and news in accordance with Party guidelines and instructions, has led to a boom in informal news channels. When it is inconvenient to express their true viewpoints on state controlled media, a number of journalists have resorted to individual blog-sites for their expression. More and more blogs operate under both pseudo and real names to provide free room for information sharing and discussion and analysis of the Party and the state's policies (Thayer 2010).

[27] Arts. 13 and 14.

[28] Arts. 10 and 28.

[29] Regulation on Directions and Guidelines for Politics, Ideology and Sensitive Information on Journalistic Activities, attached to Decision157-QĐ/TƯ dated 29/4/2008

This all means that in Vietnam people are overwhelmed by two flows of information. One is official information provided under the strict control and orientation of the VCP and the state. The other is information shared freely, but which cannot be used officially. Information reliability, in both instances, is difficult to verify. The need for trustworthy and official information in Vietnam is an urgent concern.

Prevalence of corruption

Corruption in Vietnam is a prevalent problem and has been growing more acute. This observation is not only felt by citizens, foreign investors and businessmen, but is also recognised by key leaders of the VCP and the state. In 15 successive years (2001-2015), in the Corruption Perceptions Index Vietnam has been perceived as highly corrupt (Transparency International 2015). The Government Inspectorate of Vietnam, in a joint effort with the WB, has released the outcome of a survey indicating that corruption in Vietnam is of a very severe magnitude (Government Inspectorate of Vietnam and the WB 2012). Vietnamese anti-corruption officers admit corruption is both subtle and blatant (Sơn Hà and Mai Huy 2011; Lê 2012). In consultations with voters, both the VCP Leader (Nguyên Hà 2012) and the State President (Thái Thiên 2011) acknowledge the prevalence of corruption in all state sectors.

In assessing corruption in Vietnam, most official views agree on its prevalence and severity but disagree on the sectors affected. The VCP Internal Affairs Commission (2005), the Government Inspectorate and the WB (2012) seemingly agree on a number of areas where corruption is most vicious - such as traffic police, customs service, and land management. However, discussing the issue from both a theoretical and a practical perspective, a former Assembly delegate and academic believes that the area most corrupted and damaging is policy-making, because ‘even a single signature to approve a policy in favour of a certain interest group can earn millions of dollars’ (Hoàng Sơn 2012). This view is supported by an official report suggesting that the long battle against corruption has not achieved much, as most corruption cases unveiled are relatively small ones, committed at low levels of government. Conversely, severe corrupt activities by central level officials go uncovered (National Assembly Justice Committee 2010).

Despite the fact that corruption is getting more severe, the anti-corruption system in Vietnam remains inept, complicated and ineffective. Numerous regulations including Party-made legislation, a dedicated law and dozens of decrees overlap, are inconsistent and vague and have failed to generate any significant positive impact beyond the establishment of several anti-corruption institutions. In 2012, the Central Steering Committee for Anti-Corruption, headed by the Prime Minister, was judged

by the VCP as poorly designed and poorly performing and failing to undertake designated assignments, it was, therefore, subordinated to the VCP. This structural change aims to enhance effectiveness in anti-corruption practice through improving the Party leadership (National Assembly Standing Committee 2012) and lessening the role of the government as a corruption fighter. However, the government may yet maintain a strong role in dealing with corruption as the function of state management of anti-corruption activities is still designated to a government minister.[30] With the government's continuing role in this work, the transfer of the Central Steering Committee for Anti-Corruption to direct the VCP leadership has not proven to be a solution. In the meantime, corruption continues to be a rampant problem and remains a significant challenge to the VCP leadership and state governance.

3. The bottom line of the Vietnamese governmental context

Overall, the predominant feature in Vietnam's political spectrum is the intimacy between the VCP and the state. In addition to mass organisations, the VCP employs the state as a tool to enforce its policies and ideology. The principle of integration of state power under the VCP leadership and the absence of a separation of powers has led to a powerful executive, a weak legislature and a dependent judiciary. Meanwhile, an effective opposition cannot be established because of a cosmetic election system and the fact that the media is state-owned and under strict control by the VCP, whilst opportunities for public participation outside the VCP are very limited. Inevitably, all of these problems are also aggravated by excessive power or abuse of power in the entire process of policy setting and implementing. The situation is vulnerable to serious manipulation and interference from self-interested and politically conservative groups (Vuving 2010: 367-91), especially when the Party gives more weight to maintaining political stability. As a result, corruption, lack of accountability, low transparency, and a cumbersome and ineffective bureaucracy are continuing conditions in Vietnam.

It is even more unfortunate for Vietnam that such a murky socio-political situation is also coupled with poorly managed economic reforms and ineffective restructuring of badly performing state corporations, leading the economy into a spiral of economic crisis and public debts. In this context Vietnam may again find a superficially compelling excuse for delaying political reforms, e.g. that it needs to focus resources on fixing its economic problems. In such a context, promotion of FOI shall depend in large part on perceptions, motivation and the will of the highest-ranked leaders of the VCP. These issues will be discussed in more detail in chapters 7 and 8.

[30] Decree 83/2012/NĐ-CP on the functions, tasks and organisation of the Government Inspectorate.

II. FOI IN VIETNAM: AN HISTORICAL BACKGROUND

The history of FOI in Vietnam is associated with changes in both the perceptions, and reform policies of the VCP. As mentioned earlier, it was not until 1991 that the VCP recognised the right to be informed as an aspect of citizens' rights. Despite being recognised in both the 1992 and 2013 Constitutions, the right however remains nominal. In the combat against corruption, the VCP initially realised the need for a FOI law to promote accountability, transparency and prevent corruption.[31] However, the VCP later showed reluctance to purse FOI when development of a law was underway, halting it by reasoning that further studies were needed to ensure its feasibility.

This brief overview will: (i) outline the limited current regulations on FOI law and practice; (ii) identify the goals and failings of the current regulations; and (iii) identify the key problems facing FOI in Vietnam. These themes will be explored in more detail in later chapters.

1. Current regulations and practices on access to information

As a signatory to several international treaties referring to information access, Vietnam has several legal norms and regulations on the right to access information. The current legislation includes a constitutional provision recognising the right to access information and a number of other provisions enshrined in laws and bylaws that oblige administrative agencies to publish certain information about their operations. Among them, some agencies (those in charge of land, construction and public health management, for example) are required to release information regarding the areas they look after such as land use, urban development or food safety plans (MOJ 2010a, 2011b, 2015f). As reviewed by the MOJ, at present, there are about 80 pieces of legislation containing some provisions on information and information access. However, this legislation possesses many limitations.

Firstly, the scope of information to be released is very narrow. Information to be released covers only general information about state agencies, such as their duties and organisational structures, legal texts, working agendas and contact details. Such information is further narrowed by the Ordinance on Protection of State Secrets of 2000 which defines a vague and broad range of secrecy,[32] even including information that agencies have not published as well as information they deem it necessary to keep secret.[33]

Secondly, state agencies are given broad discretion over disclosing information. The legislation

[31] Resolution of the Meeting Session 3, the CPV Central Executive (Term X), 2011

[32] Arts. 5 and 6.

[33] Art. 1 and 7.

generally provides that information is to be published by state agencies pursuant to the law. Meanwhile, the law is then construed under regulations made by the agency that holds the information; inevitably agencies take advantage of this to craft regulations at their convenience. Accordingly, in practice, state agencies themselves may not only decide to publish or withhold information, but may also regulate the time and manner of its release.

Thirdly, the right to request information is stipulated in a very restricted manner, so that it becomes almost impracticable. Restrictions include the fact that few kinds of information are open to request (essentially information about hazardous chemicals, business licences, approved urban planning, land use planning, environmental protection, the state budget, and food hygiene and safety); a limited number of people are eligible to lodge information requests (only those who work for the information holding agencies); and there are exhaustive, cumbersome procedures for requesting information (a requester has to provide ID, justifying reasons for their request, and give purposes for possible usage).

Fourthly, current legislation does not contain any specific provision for monitoring information disclosure or appeal procedures. Such shortcomings have made any obligation to disclose information somewhat meaningless - it is really a discretionary procedure that agencies can opt to follow or not.

The shortcomings of the existing regulations contribute to inhibiting awareness of FOI as well as its practicality (MOJ 2011b, 2015f). Often, state agencies publish favourable information, withhold unfavourable information or disclose in an inefficient and non-transparent manner. Whilst they tend to publish information on their websites, online information is brief, general, and not updated.

2. Ambitions for statutory reform and the failure of the proposed access to information law

In 2008, the government assigned the MOJ the task of proposing an access to information (ATI) law with very high expectations. It was suggested that when information access was safeguarded, it would facilitate the implementation of other rights (Thái 2009) and that adopting such a law would mark a significant step towards Vietnam's democratisation (Hà Vân 2009). Law reformers hoped that the law could be a foundation for improved public participation, enhanced democracy, increased accountability and reduced corruption (MOJ 2009b, 2009c). In the belief that information is power, and that more transparent operations of public authorities should be a lever to boost economic development, policy makers envisaged the potential benefits of FOI as the furthering of economic development and poverty reduction (MOJ 2010d, 2010e; MOJ Party Executive Committee 2010). Potential benefits for foreign affairs were also identified when the MOJ persuaded the Politburo that the law would be convincing evidence of Vietnam's accomplishment of international commitments under international law and other agreements on transparency and efforts in establishing a socialist

rule of law state with well-off people, a powerful nation and democratic, equal and civilised society (MOJ Party Executive Committee 2010).

With the support of international experts, all of whom were FOI advocates, and borrowing the strongest provisions in FOI laws around the world, an initial and relatively progressive bill was drafted very quickly. Model principles of FOI recommended by the Article 19 Organisation were adopted and incorporated into the draft. The draft proclaimed that state agencies shall be obliged to give maximum disclosure of public information in their possession. Institutions in charge of disclosing information ranged from state agencies to organisations providing public services and state-owned enterprises. Exceptions were defined in a very limited number of cases. A public interest test was to be used for the sake of information publication. Procedures to request information were very simple and convenient to the extent that information could be requested via telephone, facsimile or email and reasons for request were not to be required. State agencies were to respond to requests within 15 working days, with a possible extension of another 15 days for complicated cases. Individuals were to have a right to take legal action against state agencies for failure to provide information, delayed provision or provision of inappropriate information. State agencies were to appoint information officers. Establishment of an independent oversight body was also one of the options proposed (MOJ 2009c).

However, during discussion in the middle of 2009, some provisions of the bill were opposed by several government ministers for fear of their sensitivity and the burden of information disclosure for state agencies (Office of the Government 2009a). The MOJ was required to revise the bill before submitting it to the Prime Minister for final decision.[34]

Over a period of a year from 2009 and 2010, the MOJ made strenuous efforts to revise the bill to satisfy the government. In that time, instead of a strong FOI law, the Ministry looked at less progressive options. As a result, after several amendments were made, the bill was changed into a relatively weak one with a very strict policy on information access. The final draft turned into a mere consolidated version of existing regulations on information disclosure.[35]

Unfortunately, even such a watered-down bill was not approved by the VCP. The Prime Minister then requested the MOJ to consult the Politburo for final decision. By April 2010 the Politburo decided to postpone the bill until further research was carried out.

[34] Resolution 32/NQ-CP of 2009; Office of Government 2009b, 2010.

[35] The draft ATI law submitted to the Politburo on March 18, 2010.

3. Identifying the real problems with FOI in Vietnam: its need, challenges and significance

From a neutral point of view, it is fair to say that postponement of the ATI law in 2010 was not a disappointment. The Politburo may have halted the law because it found no reason for the free flow of information or was afraid of negative impacts the law might generate for the Party's legitimacy and power. However, if the draft law had been approved, it could have ended up similarly to FOI laws in some countries that have not brought any expected benefits or, worse, have generated undesired impacts. In the course of drafting, the MOJ did not accord enough importance to assessing the political and socio-economic situation in Vietnam to facilitate a better path or more appropriate objectives for the law. In reality, the Ministry did review the legal system to find regulations concerning information provision and conduct regulatory impact assessment; however, those efforts were aimed at justifying the draft rather than making choices based on evidence from deep analysis of the current political, and socio-economic conditions of Vietnam. At that initial stage, under the influence of international donors and experts, the draft was shaped under a belief that FOI is vital and that the stronger the law is, the more benefits it could bring. Yet, when facing critical comments from other parts of government, the MOJ could not argue its case and capitulated. The final draft, as a mere codification of existing rules, was obviously unnecessary.

Is there any hope for a stronger FOI law in Vietnam? Could an FOI law work in a country with single party rule, a fledgling democracy and a weak economy? Obstacles and challenges to FOI in Vietnam are significant because they come from both political persistence and cultural and economic disadvantages. A weak FOI law will not help promote democracy, transparency and accountability. Yet, given existing conditions in Vietnam, even a superficially powerful FOI law is at risk of being neutralized. Currently, the necessity of an ATI law is still confirmed by the VCP, but without much enthusiasm. Together with some other laws which have been delayed for decades, an ATI law has been shifted to become part of the legislative program for 2015. As the initiator of the law, the MOJ has resumed the drafting work since early 2015 and has published several drafts for consultation.[36] Disappointingly, the MOJ admits that other than some minor revision on definition of information, information of limited access and conditions for information access, the new bill restores most of provisions of the ill-fated bill of 2010 (MOJ 2015a, 2015b, 2015d, 2015e, 2015k; Government 2015a, 2015b). Given that the VCP's attitude to a new law remains ambiguous while the MOJ appears

[36] Drafts available at MOJ website at http://moj.gov.vn/dtvbpl/Lists/Danh%20sch%20d%20tho/View_Detail.aspx?ItemID=253, accessed 02/07/2015

incapable of making a better bill, even though the draft law has been submitted to the National Assembly, the future of FOI remains uncertain.

So is there any chance for reform in Vietnam? Or is an FOI law unnecessary for Vietnam? The answer depends on both how the law is drafted and how the contextual conditions in Vietnam evolve. Practical experience suggests that both adoption and enforcement of FOI depend largely on internal pro-active changes (political will, development of a democratic regime) and improvement of external factors (socio-economic conditions). However, both internal and external changes require long term efforts and cannot be guaranteed to happen simultaneously. Therefore, any journey to FOI in Vietnam will be longer and more challenging than in many other countries.

FOI, and in a broader sense a democratic regime, will not be established without initial steps which entail undertaking reforms, including those which are small-scale and incapable of addressing comprehensive issues. Democracy cannot be achieved overnight by merely importing and transplanting progressive laws. To achieve FOI objectives - and furthermore the democratisation goal - requires renewed ongoing effort to both accommodate FOI and improve the local context so that it is more receptive to FOI. It is, therefore, necessary for Vietnam to establish a suitable roadmap to FOI with proper goals set for each reform stage. Measures and solutions for improvement of both FOI and the local context need to be based on thorough comprehension of the actual conditions and situation. In turn, any country seeking to adapt legal principles and structures first developed abroad needs to be aware of the challenges of legal transplantation.

III. LEGAL TRANSPLANTATION

The rise in scholarly interest in legal transplantation has been explained with reference to a number of drivers such as the growth of international trade and legal modernisation, especially in developing countries (Nelken and Feest 2001). Despite its breadth, most of the current literature emphasises the development of legal systems by transferring a rule or even a whole legal system from ‘western’ countries (Gillespie 2008:657-721). This section of the thesis provides a brief overview of the controversies and issues raised in the existing literature, including terminological variations, approaches to understanding legal transfers, and methods to measure or test the effect of transfers. Through a discussion of theoretical issues, this section of the thesis concludes that legal transplantation can be an effective means to reform FOI in Vietnam, but only if serious attention is paid to relevant theories of legal transplantation, to local context, and to good practices both in FOI evolution and legal borrowing. Detailed and in-depth analysis of current scholarship on legal transplantation will be presented later in the discussion of particular issues in chapters 4-8.

1. Terminological understanding of legal transplantation

The term 'legal transplant' was first used in 1974 by Watson (1974) and Kahn-Freund (1974) to indicate the moving of a rule or a legal system from one country to another (Watson 1976:79-94). Gillespie observes that legal transfers are much older and are commonly understood as the movement of laws (either a single legal norm or an entire system of regulation), either horizontally (state to state) or vertically (international institutions to state members), imposed or voluntarily, regardless of similarity and difference in cultures (Gillespie 2008). In practice, different terminology is used depending on the objectives and the issues under discussion and each has its advantages and disadvantages (Gillespie 2008). Typical variations are 'legal transfer' (Gillespie 2008), 'legal borrowing' (Nolan 2009), 'legal harmonisation' (Jarrod 2002: 245-67), 'legal adaption' (Nelken and Feest 2001: 7-54), and 'legal transplantation' (Gillespie 2006). Within this thesis, the term 'legal transplantation' will be used broadly, as the FOI reform process in Vietnam may involve all aspects of legal transfers, such as borrowing legal norms and principles from other countries, incorporating and harmonising the international requirements of human rights and openness to Vietnamese practice, and adapting and accommodating the transferred norms and principles.

2. Different approaches to legal transplantation

Largely based on socio-legal theories that consider law as an element of a broader social system, in searching for the appropriate approaches to legal transplantation most commentators focus on the question of how laws that evolve in specific circumstances in one country can be transplanted into different conditions in other countries. Hoecke insists that if the purpose of legal transplantation is to shape political, economic, moral and other patterns of behaviour, then the fitness or the comportment of the transplantation to conditions in the recipient countries should be taken into account (Hoecke 2002: 37-39). Sharing this view, but taking it a step further, Gillespie believes that the autonomy of law from society and the openness of the recipients' legal systems are the main factors that will determine the transferability of law (Gillespie 2006).

Approaches to legal transplantation in contemporary scholarship can be divided into four main traditions: legal evolution; limited legal autonomy; legal autonomy; and systems theory. However, as we shall see, the division is not absolute, but relative. Centrally concerned with issues of the process of legal evolution, legal evolutionists do not pay primary attention to the link between legal development and legal transplantation. However, they sometimes examine whether there is any correlation between the transferability of foreign laws/principles and the social and economic evolution in the borrowing countries (Stein 1980: 23-9). The evolutionists recognise a trend whereby

less developed legal systems will be likely to develop following the experiences of more mature and efficient systems (Friedman 1996: 70-2).

Legal autonomy and limited legal autonomy are two schools of thoughts deriving from the degree of the tightness of the relationship between law and local context. Those who share the view that law is autonomous from local context and has its own 'life and validity' (Watson 1978: 314) find themselves in favour of the legal autonomy approach, whilst those who think that law is limited in autonomy and closely connected to the contextual conditions lean towards the limited legal autonomy approach. Departing from such different standpoints, consequently legal autonomy and limited legal autonomy followers hold very different notions of legal transferability. Legal autonomy supporters believe that laws from one country can easily travel to and be implemented in other countries. They insist on the relative simplicity of legal transplantation (Watson 1976), as well as on the notion that transferral of a rule indicates nothing more than the acceptance of the rule's desirability (Watson 1978: 314-36).

By contrast, limited legal autonomy adherents are concerned about the problems that may arise when a law of one country is imported and implemented in countries with different social conditions. Supporting Montesquieu's scepticism that 'laws cannot traverse cultural boundaries' (Montesquieu 1989: 8), extreme limited legal autonomy theorists argue that legal transplantation is impossible since 'rules cannot travel' (Legrand 1997: 111-24), while others fear that when a rule is applied in a new environment, it is likely to act as an irritant that generates unforeseen consequences (Teubner 1998: 11-32). A less extreme variant of this view admits some degree of legal transferability but, at the same time, emphasise the importance of local contexts in deciding both the transferability of a rule and the successfulness of the transferral (Freund 1974). Some scholars hold the view that for rules that are globally recognised, the possibility of successfully traversing boundaries is higher (Phạm 2010). Several studies have suggested that apart from local context, comparative law and legal transplantation are still highly dependent on the type of law. For instance, it is much more complex to borrow a norm of public law than one from private law because of the tighter relationship between public law and local political contexts (Shapiro 1993: 37-64). Several theorists go even further in arguing that comparative law should be dealt with within private law only (Zweigert and Kotz 1998), however, this view is rejected by other scholars for the reason that public law is the product of political choices over time and it is thus 'amenable to comparative political and history study, not just purely legal analysis' (Ackerman and Lindseth 2010; Perju 2012).

The final approach to legal transplantation is developed by employing systems theory. Systems theory proposes a way to understand human society as a biological system maintained through self-replicating organic subsystems (autopoiesis) that are created by communication. Visually, society is

seen as composed of fragmented subsystems, each of which operates with its own codes and programs that enable the system's members to communicate and have their own perception of society (Luhmann 1988: 21-35). Such operating process makes each subsystem 'operationally closed' but 'cognitively open' (Luhmann 1988: 17-47). As a subsystem of society, the legal system deploys a similar process. The legal system of a country is open to external knowledge including both social facts from other subsystems such as politics, culture and economics, and norms from legal systems of other countries (cognitive openness) that are later internally processed and integrated into the systems according to legal criteria (operational closure) (Paterson 2006: 13-35). From this perspective, it is believed that laws are transferred, interpreted and given meaning through communicative acts by people. In other words, legal transplantation is made possible by legal elites through communication. Communication is conducted following a mutually comprehensible code or grammar that is based on a binary division between 'legal' and 'non-legal'. Thus, processing successive events of communication is the way in which legal structures in recipient countries are changed.

A notable feature of systems theory is that it does not support the notion that legal transferability is determined by the 'fit' or 'congruence' between the transferred law/principle and the contextual conditions in the recipient state. Believing that humans are always actively involved in processing reality (Fish 1989), instead of being passive receivers of already made information about external reality, systems theorists argue that the real key to a law/legal principle being transplanted rests in the meaning that the law/principle conveys to social actors in recipient countries, rather than other factors such as the law/principle's autonomy, universality, and endurance as many legal positivists have believed. The transplanting process starts by influencing local understanding of the meaning of transplanted law/principle and then gradually forms part of the contingent practices, assumptions, objectives and categories of thought in the recipient countries. In that process, the only benefit that understandings of the correspondence or fit between legal transfers and local conditions can provide is to indicate what information is being transferred. Therefore, in view of systems theorists, the central concern about legal transplantation is how recipients understand and deploy the transplantation (Gillespie 2008).

3. Looking for an appropriate approach to FOI transplantation in Vietnam

As mentioned earlier, the division of approaches to legal transplantation in existing scholarship is relative, rather than absolute. Gillespie observes that no approach is completely coherent and in practice most scholars take elements from several approaches (Gillespie 2006). In an effort to search for a more accurate approach to understanding legal transplantation, he argues that legal transfers are

regulatory conversations, and employs this to help analyse how legal transfers shape both the legal knowledge and practice in recipient countries. In his approach, Gillespie adopts discourse analysis as a methodology to construct legal transplantation as a series of regulatory conversations. Broadly based on systems theory's attempt to understand legal transfer by reference to communication from a broader perspective (social systems), discourse analysis explains legal transfer by emphasising 'regulatory conversations'. In regulatory conversations, communicative acts play a regulatory function, both passively reflecting perception about legal transfer and actively shaping behaviour. Gillespie argues that 'discourse analysis brings human agency into the law making calculus' [and] 'discussion about legal transfers regulate behaviour' (Gillespie 2008). Particularly, through his work on legal transplantation into East Asia, he believes that interpretation, selections, adaptation, and implementation of transferred law all involve discourse and regulatory conversations as the principal conduit through which legal norms/principles are transferred. From a number of streams of discourse analysis, Gillespie synthesises three different methodological tools to understand how legal transplantation is processed through communicative acts. With these tools, discourse analysis may help understand why, when, and how legal transplantation takes place.

Gillespie's theories were later supported by Le (2012), who conducted research about competition law transplantation in Vietnam. Le adopted three of Gillespie's methodological tools to investigate how borrowed competition law has been interpreted and applied in Vietnam. For Le, systems theory is the most promising theoretical framework for research, whereas Gillespie's approach is typified as one based largely on systems theory but with reference to a number of elements of legal autonomy theory (Le 2012). The research by Gillespie and Le is by far the most comprehensive and prominent literature to date to have explored the issues of legal transplantation in Vietnam.

Both Gillespie's theories and Le's arguments are persuasive, to the extent that their research concerns legal transplantation from a private law perspective, with commercial law and competition law respectively as case studies. As commerce and competition relate to business activities, where private parties can set rules to govern their relationships, commerce/competition law may travel from one legal system to another without significant obstacles generated by cultural, economic and especially political differences. It is also easier to explain the global phenomenon of borrowing commercial or competition law from existing systems, given the fact that the economic pressure for uniform contract and commercial law has influenced all countries that wish to join the global markets. Moreover, both Gillespie and Le attempt to understand the commercial/competition law transplantation process in a retroactive way, after Vietnam had already adopted the reform. Thus, their studies are limited to the extent that they provide some understanding about the commercial/competition law transplantation process in Vietnam, without offering new (*ex ante*) insights, or lessons, on either a theoretical

framework or practical knowledge for importing a functional commercial/competition law, let alone other kinds of law into Vietnam.

FOI is a discrete form of public law and it reflects the fundamental premise that government is supposed to serve the people. Various studies have been conducted to understand the ideas underlying the spread of this kind of legislation around the world as well as explaining that FOI has evolved very differently despite similarities both in the objectives and the features of FOI laws in different countries. This leads to an ongoing debate about whether the effectiveness of an FOI law is closely associated with conditions of politics, economics and culture - a more intricate contextual web than private law transplantation typically faces (Snell 2006: 222-3). From practical experiences in adopting and implementing FOI, many scholars have contended that effectiveness of an FOI law is highly dependent on local context, and this includes not just legal, economic and cultural conditions, but also political will and the power of the culture of secrecy. FOI laws, in short, require political support to be effectively transplanted (Hazell et al. 2010).

The existing literature offers several ideas that help establish an appropriate approach to examine FOI transplantation in Vietnam. Theoretically, legal evolution, legal autonomy, limited legal autonomy and social system theories all have explanatory potential and benefit. Therefore, a more critical view of FOI principles/laws and local conditions will be adopted in examining the adaptability of FOI in Vietnam. In their studies, when emphasising regulatory communications, Gillespie and Le cannot deny the role of the 'autonomy' of the transferred law and the openness of the legal system in the recipient countries to the transferability of the law. In fact, their studies are also developed based on the four typical approaches to legal transplantation and with attention paid to the transferred law under discussion (commercial/competition law) and local context (focused on communications among stakeholders involved in the transferring process). A number of recent studies suggest that, in practice, the degree that a law is globalised (which often reduces to Americanised) is not the same for all types of law (Shapiro 1993). These studies provide practical, supporting evidence for the proposition that there exists a connection between the degree of autonomy of a given law and its transferability. Other researchers find that the effectiveness of a transplanted law is associated with local conditions, including the degree that the population has been already aware and familiar with the basic principles underlying that law (Berkowitz et al. 1999).

Consistent with the view that transplantation of legal ideas and principles can be an effective measure to promote and develop progressive legislation, and cognisant of the need to balance adaption of the borrowed system to local context (without sacrificing the core principles motivating reform), the present thesis will be developed with reference to elements derived from the various legal transplant

theories discussed above. The theories will be used to understand how the internal motivation for an FOI law and the features of the borrowed FOI law affect the efficacy of the law's adoption and implementation in the borrowing country. They are employed to identify which FOI regulations are core principles that can and should be imported without any reservation, which norms require adaptation, and which are simply not transferable to Vietnam. Additionally, all the theories will be utilised to examine how the social and political systems, as well as the perception of FOI in Vietnam, shape FOI reform. Attention will be also paid to the theories when analysing the interaction between government and the population in the course of borrowing, adapting and implementing FOI. In addition to relevant theories of legal transplants, this thesis will also be developed with regard to practical experience to establish a viable and sensible approach to FOI reform in Vietnam.

4. Methods to test the effect of legal transplantation

Alongside the different theories of legal transplantation, the literature also discusses methods to test the effectiveness of the transplant. A number of efforts have been made to account for the fact that laws seem to more easily transplant into some systems than into others. Some scholars raise a concern that assessing the success of legal transfers is hard, because it is difficult to establish proper criteria and outcomes will depend greatly on from whose perspective success is measured (Gillespie 2008). Meanwhile, many scholars argue that in order to test the effectiveness of a law in a certain country we should understand both the 'legal family' in that country and the way the law is adopted. Other scholars believe that the effect can be tested by measuring receptivity, via two criteria: the degree of embeddedness of the transplanted law in any features of the law of the principal country, and the fit of the adapted law to the context of the borrowing country (Berkowitz et al. 2003: 163-203).

Measuring the legal transplantation effect not only helps to understand how the transplanted law works in the receiving country but also offers useful ideas for estimating potential impacts the law may generate in the society. That latter utility is of relevance to this thesis. The issue of testing transplantation effect will be revisited in later chapters when discussing features of FOI reform in Vietnam.

CHAPTER 4 DIFFERENT REGULATORY APPROACHES TO FOI

FOI is most commonly associated with the right of citizens to access information held by public agencies. Governments around the world have adopted different laws to govern and enforce information access. In many countries, the adoption of a specific law to grant access is selected as the key measure, while in other countries more dispersed methods are utilised. Entrenching FOI in a written constitution or basic law is another path that many countries have opted to follow. In an attempt to assess whether and to what extent FOI laws help promote open communication between governments and citizens, this chapter will examine these three main approaches to enabling FOI. These are: (1) the constitutional guarantee of FOI, (2) the adoption of a dedicated FOI act, and (3) the application of more dispersed methods.

Practically, in countries without specific FOI laws, some degree of free access still can be possible through a mixture of alternative regimes such as constitutional recognition of the right to information, access to information as a part of freedom of expression, and information dissemination via various media. Conversely, in countries with specific FOI laws, such legislation is not always an assurance of free access because, in addition to any substantive weaknesses which may exist in the legislation, local conditions may also detract from the effectiveness of information access. Thus, in countries with a long culture of openness and advanced democracy, free access to government information may be more effective, even if those countries lack dedicated FOI laws or that have laws that are under-used.

In discussing ways to enable FOI, this chapter identifies that FOI regimes are differentiated in their approaches to information. Many countries follow a ‘push model’ that requires greater proactive and routine disclosure of information by government agencies, and other countries prefer a ‘pull model’ that stresses citizen-initiated access or more reactive disclosure of information by government agencies. In order to facilitate understanding of what factors shape the functionality of an FOI regime, this chapter investigates how the two models work in practice, and also considers their advantages and disadvantages from the perspectives of both the public and government.

In addition, this chapter explores trends in the development of and advocacy for model FOI laws. It agrees with the idea that a model FOI law may help the establishment of a regime that, notionally, meets commonly accepted features and standards. However, in recalling lessons learnt from the spread of FOI, and also legal transplantation theories and practice, this chapter will argue that such a

model may contribute to the formalistic adoption of an FOI regime without regard to conditions in the receiving country, risking a mere 'paper' form of legislation.

I. OVERVIEW OF DIFFERENT FOI REGIMES

1. Regimes based on constitutional guarantees of FOI

As noted in chapter 2, the idea that FOI is not only an important element of democratic government, but also a fundamental human right, has been increasingly accepted. In many countries, FOI finds strong support in specific constitutional recognition, while in other countries superior courts have discovered or implied a constitutional guarantee of FOI. By underpinning FOI with constitutional protection, states signify and accept that information is an integral element of political system. This section examines how constitutions around the world guarantee FOI, and discusses the advantages and limitations of FOI regimes that are based on constitutional protection.

Constitutional recognition of FOI

Sweden was not only the earliest country to have an FOI act but it was also the pioneer in constitutionally recognising informational freedom. As the Freedom of the Press Act (also known today as the FOI Act) is part of the Swedish Constitution (Graänström, 1998: 317-18), for more than 240 years in Sweden FOI has enjoyed constitutional protection. Besides Sweden as an exceptional case, there have been an increasing number of countries adopting specific constitutional provisions recognising FOI. As assessed by the Right2Info.org (2012a), constitutions of 59 countries have provisions guaranteeing a general right of access to information. That may be an under-estimate, since it does not include many other constitutions that provide for the right to access particular categories of information (personal or environmental information for example), or which confine the right to access information to just certain categories of people (journalists for example). Nor does it include constitutions which merely enshrine a right to seek and receive information, or which only recognise FOI as a component of freedom of expression. Applying such strict criteria, the Constitution of Vietnam - which contains a clause securing both the right to be informed and freedom of expression - was not included. In another study, in 2006 more than 80 countries were observed as constitutionally recognising some form of FOI. This study identified two trends: (i) that most countries in political transition adopting new written constitutions have a constitutional provision on information access; and (ii) in many countries with long standing constitutions, FOI has been recognised in recent constitutional amendments (Banisar 2006: 17). For the purpose of this thesis, a broader concept of constitutional recognition of FOI will be adopted than that used by the Right2Info.org, covering even

constitutions which use different terminology to encompass FOI (for instance, a 'right to be informed', as in the case of the Vietnamese Constitution).

In some other countries, courts have implied FOI guarantees through judicial interpretation of constitutions or basic laws. In most cases, the interpretation has been based on other freestanding constitutionally recognised rights, particularly freedom of expression (Banisar 2006: 17). For example, Canadian courts have held that the right to receive and impart information is implied in the freedom of expression which is enshrined in the Canadian Charter of Rights and Freedoms (Right2Info.org 2012a). And in Japan, the Supreme Court has established that, alongside freedom of expression, the constitution also guarantees FOI (Repeta 1999:3). Reasoning that one ultimate condition for free speech is the possibility of information access, the Constitutional Court of South Korea similarly stated that the constitutional protection of free speech necessarily includes the protection of FOI (Constitutional Court of South Korea 2001: 132). Courts in other countries have held that implications of FOI are to be found in guarantees of other rights, such as the right to life (in India)[37] and the assumption of official accountability (in Argentina).[38] Discussing implied FOI right via guarantees of other constitutional rights, FOI experts have raised concerns that judicial implication may limit FOI to just those instances where information access is needed to exercise and realise the freestanding rights (Karanicolas and Mendel 2012: 11).

The significance of the constitutional protection of FOI has also been examined in the existing literature. Interestingly, experts from different fields exhibit different schools of thought on its significance. Strong consensus is found amongst human rights experts that protection under a constitution indicates that FOI is recognised as a fundamental human right (Mathiesen 2008; Mendel 2009; Karranicolas and Mendel 2012; McDonagh 2013). However, equally strong is the belief expressed by some public law scholars who see constitutional recognition as a way governments may proclaim that they have committed to FOI, when openness in day-to-day governance is the true litmus test (Bovens 2002: 317-41; Sebina 2006: 91-2). In a more comprehensive approach, constitutional commentators believe that constitutional provisions on FOI are desirable in relation to administrative transparency, the public right to information and the obligations of public agencies in disclosing information (Peled and Rabin 2011: 401). In accordance with its scope and objectives, this thesis will pay more attention to the latter two schools of thought.

[37] Right2Info.org, *S.P. Gupta v. President of India*, 21/08/2012, available at http://www.right2info.org/cases/plomino_documents/r2i-s.p.-gupta-v.-president-of-india, accessed 10/09/20123

[38] Karanicolas, M. and Mendel, T. (2012), *Entrenching RTA: An Analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy, p.11

Common features of constitutional recognition of FOI

Among countries having constitutional protection of FOI, South Africa is adjudged as the country which has the best constitutional provision on FOI, given its breadth and comprehensiveness (Banisar 2006: 17). The South African Constitution of 1996 grants a right of access both to public information and any information held by another person (provided that the access is necessary for the exercise or protection of any other rights).[39] Kenya adopted a similar comprehensive right of access in its Constitution of 2010.[40] Due to the presumption of openness enshrined in the provision stating that all government documents are publicly available unless a statute expressly provides otherwise, the Swedish FOI Act is considered to have not only the oldest, but also one of the strongest, provisions for FOI. Based on the criteria of extensive and comprehensiveness of FOI protection, strong constitutional provisions are also found in countries such as Finland, Croatia, Norway, and Moldova.[41]

In contrast, limited constitutional recognition of FOI can be found in a number of countries. In Latin American countries, 'habeas data' provisions[42] enshrine a right to access personal information only. In some countries in Europe and Asia citizens are, constitutionally, given access to environmental information or information that relates to 'their right and interests' (Banisar 2006: 17). The 1992 Constitution of Vietnam stated that the right of citizens to be informed (which was later upgraded to the right to access to information by the 2013 Constitution) shall be secured. But from an FOI

[39] Section 32 of the Constitution of South Africa, available at http://www.info.gov.za/documents/constitution/1996/index.htm, accessed 12/02/2012

[40] Art.35 of the Constitution of Kenya, available at http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf, accessed 12/02/1012

[41] For example, Art.34 of Moldova's Constitution reads:

'(1) Having access to any information of public interest is everybody's right that may not be curtailed.

(2) According to their established level of competence, public authorities shall ensure that citizens are correctly informed both on public affairs and matters of personal interest.

….

(4) The State and private media are obliged to ensure that correct information reaches the public. …'

[42] The literal translation of 'habeas data' into English is 'you should have the data'. 'Habeas Data' indicates constitutional rights that are designed to protect, by means of an individual complaint presented to a constitutional court, the image, privacy, honour, information self-determination and freedom of information of a person. It is a new type of constitutional protection of personal data in Latin-American countries. For more information see Guadamuz, A. (2000), 'Habeas Data: The Latin-American Response to Data Protection', *The Journal of Information, Law and Technology* (2) *(JILT)*

perspective, it is arguably a relatively weak guarantee because it could be interpreted as meaning that citizens only play a passive role in information access (Mendel 2009b).

One of the most common features of constitutional protection of FOI is a recognition of FOI as an individual right. At the most expansive level of protection, many constitutions generally state that the right to information shall be guaranteed or that everyone shall have the right to access information held by public agencies (for example, the constitutions of Sweden, Finland, South Africa, Kenya, Albania and Montenegro). In some other countries, recognition of FOI as an individual right is enshrined in more detailed constitutional clauses which, for instance, state that everyone has the right to look for, acquire, transfer, prepare and distribute information (for example, the constitutions of Azerbaijan and Switzerland). From an FOI advocacy perspective, the latter cases may embody a weaker recognition of FOI because the level of guarantees in these cases may be hampered by literalistic judicial interpretation (Karanicolas and Mendel 2012: 9).

Even though a large number of constitutions share a similar approach in recognizing FOI as a right, they guarantee the right to different extents. While most constitutions grant the right to 'everyone', several constitutions limit the right to citizens only,[43] whilst some others remain unclear on this point. With regard to the scope of information to be accessed, other than the few constitutions which expressly extend the right of access to information held by even private entities, most constitutions only purport to cover access to information held by public agencies. In some countries, alongside recognition of FOI, constitutions establish procedures to enable direct enforcement of FOI by courts, as in some Latin American countries where FOI can be implemented via 'habeas data' petition or 'amparo'.[44] In comparison, in countries such as South Africa and Fiji, constitutions require enactment of legislation to make FOI enforceable.[45]

[43] These include constitutions of Egypt, Georgia, Poland, Sweden, Kenya, Morocco, Mozambique, Tanzania, Uganda and some other countries. Art.47 of the 2012 Constitution of Egypt states: 'Citizens have the right to access information...'

[44] 'Amparo' is a specific judicial remedy for the protection of constitutional rights in Latin America. It allows judicial proceedings such as taking suit, action, or recourse to protect constitutionally recognised rights. The spread of the writ of amparo throughout Latin American has led to its adoption in the American Convention of Human Rights. For more information see Brewer-Carlas, A.R. (2008), *Constitutional Protection of Human Rights in Latin America*, Cambridge University Press.

[45] The constitution of South Africa reads: '... National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state'.

Constitutional protection of FOI: advantages and limitations

The advantages of constitutional protection of FOI are well canvassed in the existing literature. Reasoning that a 'constitution is a supreme law of a country and everything captured in it is a reflection of its importance to a particular country', Sebina (2006: 100-3) stresses that the constitutional recognition of FOI confirms FOI's importance as a fundamental right, whilst at the same time explicitly imposing obligations on governments. In contrast, FOI laws without a constitutional basis may just be 'symbol without substance'. Sebina reasons that constitutionally recognised FOI is supreme, enforceable through courts and entrenched (that is, it can only be amended following strict procedures set for constitutional amendment). He goes further to argue that in terms of authority, FOI laws without constitutional recognition will be weaker than those with such guarantees (Sebina 2006: 100-1).

In supporting constitutional recognition of FOI, academics and FOI practitioners suggest various benefits. The constitutional guarantee of FOI may be a way in which a system not only safeguards an FOI regime, but gives it the impetus to develop with greater public participation (Karanicolas and Mendel 2012). From a theoretical perspective, it is arguable that the significance of a constitutional guarantee of FOI lies in its role as an essential condition for a proper functioning democratic regime, of which FOI itself is an integral part (Peled and Rabin 2011: 359-70). Furthermore, the embedding of FOI in constitutions may help 'to render the constitutional state an appropriate accommodation for the information society', because the embedding clearly imposes on governments the duties to respect, give substance to, protect, and promote FOI (Bovens 2002). Sharing similar views, when discussing FOI recognition under the South African Constitution, that country's scholars maintain that such recognition on the one hand ensures citizens' right to know about the workings of government, and on the other hand makes sure that public power is properly exercised (O'Regan 2000). Finally, a constitutional guarantee can have educative, symbolic or expressive value.

Nevertheless, there are a number of critical views about the significance of constitutional recognition of FOI. Even though such recognition offers protection of FOI in the sense that, in theory, citizens can bring a law suit to obtain information, practical access is still reliant on numerous factors beyond the last resort of litigation. The first concern is whether the constitutional provision is enforceable on its own (Banisar 2006: 17). Thus far, there are only about nine countries in which courts have ruled that FOI provisions in their constitutions are directly enforceable in court, absent additional laws to

The Constitution of Fiji requires: 'As soon as practicable after the commencement of this Constitution, the Parliament should enact a law to give members of the public rights of access to official documents of the Government and its agencies.'

implement them (Right2Info.org 2012a). In other countries it is either required explicitly by the constitution or courts have reasoned that legislation must be adopted to implement FOI. If there is insufficient substance in the implementing law, the constitutionally recognised FOI may merely be 'a symbol protected by the constitution' (Sebina 2006: 103). More critically, practice suggests that regardless of whether a constitutionalised FOI provision can be directly enforced by court action, or an FOI law has been enacted to facilitate FOI implementation, the practicality of information access is still largely dependent on judicial interpretation and implementing legislation because the constitutional recognition is 'simply an expression of an idea' (Sebina 2006: 104), 'rather minimalistic in nature, leaving most aspects of the rights to be defined by legislation' (Karanicolas and Mendel 2012: 17).

Given the fact that many constitutions recognise FOI as a component of other rights or freedoms, another matter of concern is that FOI may be undermined by constitutional interpretation or elaborating legislation. Taking freedom of expression as an example, when FOI is constitutionally guaranteed as an implication of freedom of expression (itself a common feature of international human rights law), FOI might be limited by reference to international jurisprudence focused only on the right to seek and receive information *in order to exercise* the right to express or exchange opinion and ideas. In this way, implied constitutional guarantees of FOI as an enabler of other rights may narrowly restrict FOI to the minimum level needed for proper exercise of those specific rights (Karanicolas and Mendel 2012: 11). It is also concerning that there are a number of constitutions which have been enacted mechanically by importing or parroting wording from international law, ignoring the nature and the importance of FOI, and this kind of borrowing forms no guarantee against undue limitations on information access (Karanicolas and Mendel 2012: 17).

Accessibility to courts may generate further challenges for the practicality of constitutional guarantees of FOI. Costly, time consuming and cumbersome judicial procedures are among the main factors that discourage citizens from pursuing a law suit to gain access to information. Whilst this may also be a problem for a specialised FOI act reliant on general courts for enforcement, a specialised act can at least establish a dedicated administrative review or appeals tribunal for FOI cases. Litigation may also be deterred where national precedents reveal a judiciary which devalues the importance of FOI (Sebina 2006: 105). In the worst case, courts are not formally accessible for FOI litigation if there is no judicial remedy established for citizens to protect their constitutional rights.

Other factors that may undermine the practicality of the constitutional recognition of FOI are a lack of awareness by both public servants and the public, and a culture of secrecy (Sebina 2006: 106).

Given that constitutional protections are, typically, brief, sometime ambiguous and often lack sufficient elaborating legislation (Karanicolas and Mendel 2012: 16), it is hard for both public servants and the public to understand what they should do to materialise the constitutional mandate for FOI. Also, particularly in countries that have transitioned from less democratic regimes, governments retain an adherence to a culture of secrecy. This creates obstacles to effective reliance upon constitutional provisions.

It is clear that the degree of limitation of the constitutional recognition of FOI varies, depending on both the nature of the recognition itself and the local context in the relevant countries. Sadly, the case of FOI in Vietnam discussed in chapter 3 is a good example of most of the problems previously identified. Even though the Constitution guarantees FOI and some provisions on information access are enshrined in other legislation, there are a lot of impediments in implementing FOI, including the impracticality of the constitutional provision. Statutory and practical experience suggests that it is hard, if not impossible for the constitutional provision recognising 'the right to be informed' to function as its advocates desire. Currently, the statutory framework in Vietnam remains unclear about the enforceability of the constitutional provisions through the courts, while citizens are not personally allowed to bring a lawsuit to exercise their constitutionally recognised rights. In truth, Vietnamese courts are politically dependent and not designated to deal with such litigation or to interpret the Constitution.[46] Accordingly, besides waiting for implementing legislation to be enacted as the preferable option, the only other way for the Vietnamese people to exercise their constitutional rights is to participate in a far-reaching and complicated legislative process.[47] Poor implementation of the constitutional right to be informed is understandable, given it is almost solely reliant on legislative activities that are under the total leadership and direction of the VCP. In addition, the lack of awareness of, and official resistance to, openness has contributed considerably to the poor implementation of the constitutional right.

Over time, both the advantages and limitations of constitutional recognition of FOI have been taken into account by governments and political systems developing legislative and administrative regimes to implement FOI. In practice, many countries which already had constitutional provisions on FOI have resorted to adopting FOI legislation, while other states have sought ways to constitutionalise FOI after the enactment of specific FOI laws. Constitutional recognition of FOI is desirable, given

[46] In Vietnam, the task of interpreting the Constitution and laws (both enacted by the National Assembly) is vested in the National Assembly's Standing Committee.

[47] As already mentioned in chapter 3, to protect constitutionally recognised rights, rather than via judicial proceedings, citizens are required to participate in a far-reaching and complicated legislative process.

that it signifies the importance of FOI and is capable of enabling access in some instances. But a constitutional guarantee itself is not enough to render FOI practical: further measures are required to facilitate effective implementation. These measures include enacting a dedicated FOI law and/or the application of more dispersed methods. These approaches will now be discussed in the following sections.

2. Regimes centred on a dedicated FOI act

As noted in chapter 2, over 100 countries, including most of those with actionable constitutional provisions guaranteeing FOI, have adopted national FOI legislation, ordinances or regulations. The primary purpose of such FOI laws is to regulate the mechanisms that enable public access to information held by public agencies. Commonly, FOI statutes grant individuals a right to request information from public agencies. Many FOI laws also place obligations on public agencies to release information even without being requested to do so.[48] Because the issues relating to FOI adoption (such as motivations for FOI, common features of FOI laws, opportunities and challenges facing FOI) have been discussed in earlier chapters and will be revisited in later chapters, this section is, primarily, reserved for an overview of the pros and cons of regimes based on a single FOI act.

FOI has both positive and negative aspects. So too, then, does any dedicated legislation providing FOI policies. The most prominent reason for adopting a dedicated FOI act rests on the notion that such legislation can help improve society by increasing democratic transparency, accountability and efficiency in the working of government (Craig 2008). Under legal obligations imposed by an FOI act, government must be accountable for its actions, and this is difficult if it has a 'monopoly' over the information in its possession. Conversely, with entitlements given by the law, individuals and civil groups are able to access information held by government and may participate more effectively in the democratic process.

In a democratic sense FOI laws are, thus, considered to be desirable as essential for good governance and to improve citizen participation (Banisar 2006; OECD 2003; UNESCO). At the very least, an FOI act can present a whole-of-government recognition of the importance of FOI, by creating an

[48] For example, the US FOI Act imposes obligations on public bodies to make information available to the public on a proactive basis through the Federal Register. The information a public body is required to proactively publish includes: 'a description of its central and field organisation; the manner in which and from information may be requested; an overview of its functions and of all formal and informal procedures; rules of procedure and a description of all forms and papers produced; statements of policy and legal rules of general applicability; and any amendment to the above' (paragraph a (1)).

opportunity for the public to access government-held information. Compared with a constitutional provision, a dedicated law is likely to more effectively implement FOI, because the law can express clearer policies and provide more detailed operational procedures. There is a significant difference between FOI law and other regulatory schemes: FOI law enables members of the public to take the initiative in actively seeking information, rather than merely being its passive recipients. More importantly, as the fundamental principle of FOI law is the presumption in favour of disclosure, the law concretises the principle of public access to government-held information, particularly information that governments prefer not to release. (It should be noted that the presumption is typically implicit rather than expressed: the extent to which an FOI law can open up governmental activities to public gaze still greatly depends on how the provisions of the law are interpreted and enforced.)

In practice, dedicated laws to ensure FOI have been advocated as essential almost everywhere. In countries where constitutional recognition of FOI and/or dispersed legislation is still lacking or insufficient, a dedicated FOI law is considered advisable as the best way to have a public right to know taken seriously by government and the public service (Saner 2012). Even in cases where constitutional recognition and/or topic specific statutes have had some positive impact, FOI legislation can still be crucial. An ideal FOI law possesses features, such as being more principled, having a longer shelf-life and embracing a whole- of- government scope than any particularistic regulation. A dedicated law can help promote FOI in particular and also democratisation in general, through: (i) innovative information access provisions maximising the benefits of FOI; (ii) opening the approach to public information and official secrets; and (iii) expressing adherence by the adopting country to openness. Because an FOI act can challenge government secrecy, and help further the democratic process, some authors contend that it is better to have a limited law on the books than to have no dedicated law at all (Thái 2009; Snell and Xiao 2007: 44-7). As long as a single FOI act is adopted for the purpose of promoting information access, the existence of the law can be seen as an indication of significant movement to democratisation. Yet, without commitment to that purpose, a lone FOI statute offers nothing but symbolic value, it may be aimed at gaining political capital rather than establishing a regime for a free flow of information.

A dedicated FOI act has many positives relative to imprecise constitutional recognition of FOI or more diffused legislation. But the question of its disadvantages needs addressing. A dedicated FOI act establishes a clearer (in comparison with constitutional provisions) and more generalised (in comparison with other topic-specific legislation) mechanism for public access to a broad range of government-held information. One downside however is the possibility that the legislation overlooks different types of sensitive information, such as privacy (e.g. health records), national security, and

commercial-in-confidence material. The ambiguity in the definition of the concept 'information' found in many FOI laws plays a part in this regard. Once a dedicated FOI law is enacted, there can be overlaps or, worse, conflict between the FOI law and other legislation, and subsequent confusion regarding which law takes priority. Implementation costs are another crucial issue to consider for all countries, particularly poor nations, because a dedicated, government-wide FOI act often requires significant resources, both human and financial, for the establishment, operation and administration of a system for information provision. For instance, it was estimated that in the period of 1982-2011, Australian agencies spent about $498 million in administering its national FOI Act, of which only 2.08% was recovered by FOI fees and charges (Creyke et al. 2012: 1007-8).

Furthermore, the effectiveness of a single FOI act is dependent upon a number of variables. Apart from statutory features, implementation of the law is also shaped by the way it is administered by officials and the surrounding political environment. Although FOI legislation is an innovative step, its adoption is not always accompanied by any significant changes in the structure and culture of government institutions and the delivery of government services. Some governments even find ways to undermine FOI through subsequent amendments to the FOI act or via other legislation. Therefore, in addition to the risk of it being a 'paper statute', another potential difficulty for an FOI law is the risk of falling short of its objectives. This can occur if no appropriate measures are taken to ensure that the accommodation of the law itself does not lose the sight of the fundamental objectives of FOI.

3. FOI regimes based on dispersed methods

FOI does not exist in isolation: rather, it is a part of a suite of policy measures designed to secure public participation, good governance and openness. Thus, in countries without dedicated legislative or constitutional protection for FOI, it is still possible for people to access information held by governments in different ways. Even in countries with a dedicated FOI regime, alternative methods are utilised to bolster the effectiveness of FOI regulations. This section, briefly, summarises three popular methods that have been applied to facilitate the public's access to government information: (i) access to information through freedom of expression; (ii) access to information via a free media; and (iii) access to information under other legislative provisions.

Access to information through the exercise of freedom of expression

FOI and freedom of expression share an intimate and dynamic relationship. As noted in this chapter, this relationship has been enshrined not only in many constitutions but also in a number of major international legal instruments. Since the styles of constitutional recognition of FOI, as a component

of freedom of expression, have been discussed earlier, this section will instead focus on the issue of implementing FOI through freedom of expression under international law.

From an international law perspective, FOI and freedom of expression are inherently related. FOI is recognised as an integral part of the fundamental right of freedom of expression by Resolution 59 of the UN General Assembly (1946) and Art.19 of the Universal Declaration of Human Rights of 1948 (UDHR). Reaffirming the principles enshrined by previous international instruments, Art.19 of the International Convention on Civil and Political Rights (ICCPR) indicates/implies the inclusion of FOI in freedom of expression. Apart from these UN treaties, the dynamic and multi-faceted relationship between FOI and freedom of expression has been recognised in a number of regional treaties, particular those of the EU, the Organisation of American States (OAS) and the African Union (Daruwala 2003: 30).

Given this recognition by international treaties, it might be expected that FOI should be more or less currently enabled and promoted in the states that are signatory to those treaties, regardless of whether those members have adopted specific FOI legislation to elaborate it (Janis et al. 2008: 831-45). It is also arguable that, under international law, FOI is entitled to strong protection as its implementation is subject to international forces: monitoring and supervision (Banisar 2006). Moreover, in practice the protection under international law has made FOI possible across borders, allowing a citizen in one country to get access to information that is available in other countries (Mendel 2003, 2009a).

Nevertheless, as FOI scholars have observed, several problems arise from the international recognition of FOI as a corollary of freedom of expression. The first and most challenging for FOI is that its implementation might be constrained due to political resistance to freedom of expression: a common phenomenon among governments around the world (Karanicolas and Mendel 2012). Implementing FOI under international law is also greatly dependent on whether member states perceive it as an independent right or just a part of freedom of expression. In this sense, as noted earlier, it is easy for FOI to be limited if information access is only allowed when access is necessary for the exercise of freedom of expression (Karanicolas and Mendel 2012). Indeed, not only FOI but freedom of expression itself will remain symbolic in member states where international treaties are not self-executing if no domestic legislation is enacted to implement and 'give effect' to the rights in good faith.

Another problem which may arise from such recognition is whether domestic legislation creates a right of access, or merely confirms the right of access which is already recognised in international law independently of the legislation. The difference between confirming rights and creating FOI is

crucial. While the latter means citizens are entitled to statutory protection of FOI, the former implies that granting FOI is at the discretion of governments. Consequently, if an international FOI norm is merely 'confirmed', a government is not obliged to provide the public with a statutory right to access information; or, worse, the government may enact legislation for the purpose of information management, to restrict the right of access (Mo 1991: 59-60).

It is apparent that FOI and freedom of expression are interrelated and that both are essential aspects of democracy. FOI facilitates freedom of expression and, in turn, freedom of expression nourishes FOI. However, FOI should not be subsumed as a mere subset of freedom of expression. To enable functional FOI, it is necessary for FOI to be protected by a separate regime, one that is similar to that accorded to freedom of expression. This protection, in the view of many scholars, should include a sufficient mechanism for its effective implementation (Sebina 2006: 72).

Access to information via the media

The origin of the oldest FOI act in the world presents an interesting lesson about the intimate relationship between FOI and the media. As discussed in chapter 2, the Swedish Act of 1766 was originally drafted as a measure to promote freedom of the press. The legislative drafters strongly believed that freedom of the press and FOI shared a tight relationship, in the way that information held by public agencies should be open to the public and the press needed public information to operate more effectively. The Act was finally compiled with a number of provisions on publication of information held by public agencies through the press (that is also the reason that in practice it is referred to by both names, as the Freedom of the Press Act or the FOI Act). Over the course of its history, the Swedish Act was always highly valued by academics for its provisions on both freedom of the press and FOI.

Nowadays, developments in the media have introduced exciting opportunities for a more effective and freer flow of information. Mass media offers an effective means of information dissemination. Real-time, accurate and reliable broadcasting helps bridge the distance between governments and citizenry. Opening up government information through mass media remains a very common phenomenon. In developed countries advanced information technology, high levels of connectivity and a vibrant mass media have played important roles in regularly imparting well-targeted messages to the broad populace. Even in developing countries, radio and television penetrate and provide an inexpensive means of spreading government-held information to the public (Daruwala 2003: 59). In Jamaica, radio shows have helped educate citizens about the legal system, while in South Africa

community radio has been effectively utilised to bring important information to remote areas (Daruwala 2003: 58- 9).

Government-held information is the lifeblood of the news media. At the same time, the media plays an equally crucial role in making government information available in the public domain (Paterson 2008). The availability of information to the media, as well as the effectiveness and vibrancy of the media in publishing information are, however, determined by the levels of government control over both information and the media (Paterson 2008), and the levels of diversity of media ownership. Ideally, all information of public interest is available to the public via the media and the media is capable of proactively accessing and publishing information without government interference (Tandoc 2013). However, there are always two negative dynamics in an FOI regime reliant on the media. One is the possibility that governments by intervention and manipulation of the media are able to control how or when information is published - a problem being experienced by many countries, even where the media is relatively independent. The other problem is media bias and inattention. In both cases, the reliability of the information published is questionable if information is filtered and distorted. Additionally, given the fact that the media has a short attention span generally, and often focuses on what is scandalous rather than what might be considered socio-economically important, it is not always a reliable means for public dissemination of information. As the main concern of this thesis is a workable FOI regime for Vietnam - a country with state-controlled media - attention will not be focused on the issues of the media's attributes, but on governmental influence on the workability and neutrality of publishing information.

It is natural that governments everywhere prefer secrecy and crave favourable publicity. These inclinations motivate governments, repressive governments in particular, to do their best to withhold information in their possession (Roberts 2000: 3-5). Equally, much effort is expended to have the media either under the control of, or to work for, government. In a great number of countries, governments exercise control over large portions of the media (Daruwala 2003). In more extreme cases, such as in countries like China and Vietnam, aside from internet blogging, the media, including the press, is state-owned and under the leadership of both governments and political parties. Accordingly, the media may be used as a tool to champion the government's decisions and policies rather than to present the public with important information in an independent and impartial manner. In such scenarios, the reliability of information is questionable, given that information may have been edited to secure government confidence. In other scenarios, the media and journalists may face hurdles and constraints in accessing government information (Muller 1988: 34-5; Lidberg et al. 2003: 90-1; Lidberg 2006) or, even worse, are at risk of being punished for disclosing information that may harm the image of government.

Therefore, the workability and neutrality of the media in publishing government information, as well as the possibility of the public gaining access to government information via the media, is heavily dependent on the political environment. To make this possible requires both free media and FOI - two democratic tools that many governments still find ways to avoid (Water 1998: 66-67). In the short term, greater obligations should be imposed on governments to establish proper mechanisms to maximise the use of the media for publishing information in a timely fashion. In the long run, much more effort is required to adopt, accommodate and nurture meaningful freedom of the press and FOI in the ongoing journey toward democracy. This issue will be discussed further in later chapters.

Access to information through a variety of legislative enactments

In an effort to further open government, improve informed participation and inspire confidence, alongside FOI laws progressive governments are introducing legislation that establishes extra channels for the public to get information about the workings of the government. In a number of countries, such as the US and NZ, 'government in the sunshine' laws are important additional measures to complement FOI acts. Commonly 'sunshine' laws require meetings, records, votes, deliberations and other actions of governmental bodies to be available for public observation, participation and inspection. To secure the public's ability to access government meetings, some laws also provide that except in cases of emergency, meetings must be held with sufficient advance notice and at times and places that are convenient and accessible to the public (Hammitt 1986: 46). Many scholars believe access to information under 'sunshine' laws on the one hand helps to build better citizenry relationships at the grassroots level and, on the other hand, nurtures both a free press and FOI because journalists and the public are able to acquire information without currying favour (Daruwala 2003: 56).

Similarly, even where there is no specific FOI law, it is still possible for the public to get access to information held by government agencies by using specific particular laws. As discussed in chapter 3, Vietnam has dozens of legislative instruments containing information access provisions. For instance, environmental laws mandate that the Vietnamese Department of Natural Resources and Environment disseminates reports of impact assessments as well as environmental data about particular areas.[49] Anti-corruption legislation requires the publication of information relating to the operation of government agencies and the workings of public officials.[50] Unfortunately, in practice this legislation suffers from poor implementation and remains of symbolic value only (MOJ 2015h:

[49] Art.31 of the Law on Environmental Protection of 2014.

[50] Art.11 of the Law on Anti-Corruption of 2005 (revised in 2007 and 2012).

32). In other countries, administrative procedure laws make it a legal requirement that information must be provided in sufficient fashion so that the public is able to scrutinise the whole process of making and implementing administrative decisions.

Lately, there have been an increasing number of countries around the world which have adopted e-government initiatives (Jaeger and Thompson 2003: 389). Despite the fact that it is a very recent phenomenon, e-government has proved its strength as an effective tool for exchanging information between government agencies and citizens. Applying information and communication technologies, e-government not only offers a cheap and fast means for government to release information, but it also allows the public to get involved in the governmental process by joining in direct dialogue and providing feedback (Jaeger 2002: 366). However, for poorer countries struggling with high illiteracy rates, low levels of technological advancement and financial shortages, e-government remains a long term objective, not a feasible measure for improvements to openness and transparency in the short term (Jaeger and Thompson 2003: 390-2).

One traditional way in which the public can get access to government information is through the system of libraries and archives. In most countries, especially those which still lack effective regimes for information access, legislation regulating public libraries and archives plays an important role in making it possible for the public to obtain government documents (Mathiesen 2009). Nevertheless, since such archival legislation focuses on regulating access to information that is declassified, if the information sought is not in the 'open' period or is still confidential, the public has to resort to provisions enshrined in other legislation, including FOI laws.

II. FOI REGIMES: PUSH MODEL VERSUS PULL MODEL

Previously this chapter has focused on the *forms* of laws enabling FOI. Now attention turns to the related question of the basic *means* by which the law might mandate the flow of information. Deriving from the primary purpose of FOI, there are two major ways by which governmental information becomes accessible to the public. First, individuals (or groups or corporations) must request the information from agencies that hold the information and then receive the information provided. Second, government agencies anticipate the public's demand for information and then proactively make the information available for public access. FOI regimes with stronger provisions on proactive disclosure by public agencies are referred to as following the 'push model', while those that put more weight on the right to request for information are deemed as followers of the 'pull model'.[51] By

[51] A full and enlightening discussion of the 'push' and 'pull' models can be found in Solomon et al. 2008

examining the 'push' and 'pull' models, this thesis seeks to identify which factors would play significant roles in making an FOI regime work effectively.

1. Right to request information as the last resort in the 'push model'

Recently the phrase 'push model' has emerged as a concept used more and more frequently by academics and FOI practitioners. It is used to indicate FOI regimes that require greater proactive and routine disclosure of information by government agencies. Taking the US FOI Act as an example of the 'push model', with an emphasis on proactive publication of information, a 'push model' requires government agencies 'to anticipate the demand for information and to use internet technology to make broad categories of information available for access' (Paterson 2005: 498). FOI experts also argue that, to promote 'proactive transparency', it is the duty of governmental agencies to make information publicly available through various communicative formats, ranging from official publications to mainstream media coverage (Darbishire 2010). Moreover, as routine disclosure and active dissemination are so significant, FOI statutes should enable regular publication of information from which private data has been excised, and high demand information should proactively be made available for public access (Stewart 1999a). There is a strong and common agreement that the 'push model' places more obligations on public agencies to publish information, particularly to proactively disclose information.

With the aim of enabling easy and equal access to information for the public, adoption of the 'push model' is often linked to more progressive FOI regimes. Setting proactive disclosure as an integral part of FOI law is perceived as a way for government to project a willingness to be open (Mendel 2008). Older FOI laws are sometimes deemed to achieve limited openness because they do not recognise proactive disclosure as the main means by which governments make information public (Darbishire 2010: 15). Stronger provisions on proactive disclosure tend to be found in newer FOI laws, owing to the changes in perception of how to best facilitate FOI. The FOI laws of both Mexico and India clearly define categories of information that public agencies must proactively release, in addition to the agencies' responsibility to provide information upon request (Darbishire 2010). In countries such as the US, Slovenia and Mexico, FOI laws also provide that proactive disclosure policies can be shaped by the public through requests for information, which help governments determine what the public wants to know. If a particular document is requested frequently, governments then consider making it public so that future information seekers do not need to file a request, a less wasteful process for both government and the public (Darbishire 2010).

From both citizen and government perspectives, FOI regimes with an emphasis on the push model can enhance the benefits of FOI implementation. On the one hand, proactive disclosure offers the public quicker and easier access to information (Solomon et al. 2008). On the other hand, it also eases the burden of information provision for public agencies by reducing the workload to process information requests while improving information management (Darbishire 2010). The rise in the use of the internet in imparting information is a particular fillip for the 'push model' as it has made it possible to publish and disseminate information on a large scale but at a low cost. Other significant advantages of the 'push model' are that every member of the public will have roughly equal access to information and such access provides security through anonymity, because no-one has to identify themselves through a formal request for information that may displease powerful interest groups or bureaucratic figures (Puddephatt and Zausmer 2011: 16). In the long term, the model also facilitates the creation of an effective information cycle in which information is reused to create new information and knowledge (Puddephatt and Zausmer 2011).

In an FOI regime adopting the 'push model', proactive disclosure by governments is the main source of public access to information while filing requests for information plays a supplemental role in furthering information access. Under such a regime, the right to request information is a last resort that citizens use to gain access to information (Solomon et al. 2008). Such regimes can enable equal, cheap and quick access to information. They may make it simpler to manage FOI legislation, because the legislation no longer has to cover broad holdings of government information (Solomon et al. 2008). Overall, there is an increasing, worldwide trend to FOI regimes incorporating proactive disclosure as a clear requirement (Darbishire 2010; Mendel 2009a).

However, the feasibility of the 'push model', apart from technological conditions, depends on other important factors such as the presence or absence of a culture of secrecy and the financial capacity and human resources of the governments concerned. Illiberal governments, in particular, are resistant to supporting strong FOI laws, thus the 'push model' is more likely to be found in countries where more impetus for information disclosure comes as the result of a publicly-instigated campaign and struggle for information access. A proactive scheme for information disclosure may also be problematic if it is misused by governments or public agencies to 'snow' the public with information. This can arise either by governments' unnecessarily publishing information which the public has no interest in, or by dumping great loads of detail on the public, as opposed to providing targeted or tailored information which the 'pull model' is more likely to elicit. Proactive disclosure also requires a huge workload for governments to set up, maintain and monitor the information sifting and publishing system. Accordingly, it comes at high cost, particularly at the start up stage (Puddephatt and Zausmer 2011). If there is no organic demand for the information released, these costs may not

seem worthwhile. Significant human and financial resources, lying behind a proactive disclosure system, are essential to its effective functioning. Therefore, a functional FOI law needs to contain proper provisions that sufficiently enable proactive disclosure yet at the same time are suitable to the government's capacity to govern and the particular conditions of the adopting country. It also needs to be assisted by active monitoring efforts and collaborative support from different stakeholders in the implementing stage (Solomon et al. 2008).

Additionally, alongside FOI laws, countries with a 'push model' regime often adopt another set of national and even international initiatives and programs to facilitate openness, such as OGP and e-Government (McMillan 2013; Popple 2011). It is hard, if not impossible, to distinguish the benefits brought by a 'push model' FOI law from the benefits brought by such efforts. This fact is also evidence that a progressive FOI law alone may not be the comprehensive solution for all problems with transparency and openness in public administration.

2. Right to request information as the essential tool in the 'pull model'

Despite the emerging trend toward the 'push model', many countries continue to prefer the traditional 'pull model' that requires citizen-initiated access and a more reactive disclosure of information by government agencies. In the 'pull model', governments are legally obliged to provide information upon request; in other words, 'information must be *pulled* out from agencies' (Breit et al. 2012) and proactive disclosure by governments is not the focus of the FOI policy. In this model, filing requests for information is an essential tool for the pubic to access information because governments provide information in a reactive manner.

As the primary aim for an FOI regime is to establish a right to access information held by governments, most FOI acts do include relatively clear provisions confirming that right, and in many cases offer various measures to accelerate and secure the exercise of the right. This fact alone does not mean that most countries with FOI regimes only employ the inactive disclosure or 'pull model'. Even when a dedicated FOI law does not include any provision on proactive disclosure, there may still be other mechanisms established for proactive disclosure. For instance, the Swedish FOI Act does not include any particular obligation on public agencies to proactively release information, but Sweden has other laws and rules imposing on public agencies an obligation to proactively publish information and, in practice, public agencies do publish a large amount of information on a proactive basis (Mendel 2008: 104). It is, therefore, more important to judge whether an FOI regime is shaped on the 'push model' or 'pull model' based on an broad assessment of laws and policies governing public bodies and not by merely looking at provisions incorporated in a single FOI instrument.

The ‘pull model’ is linked to greater control by government over information and information release, and is more likely found in countries with older FOI laws or in countries where more impetus for FOI comes from governments. Nearly 30 years after its first enactment, the Australian FOI Act was upgraded from a ‘pull model’ to a ‘push model’ in 2009 (McMillan 2010a, 2010b). Before this significant change, the 1982 FOI Act, which focused on provision of information in response to individual requests, was criticized for its strong dependency on the ‘pull model’ (Paterson 2005; Lane and Dicken 2010), and the lack of sufficient pressure on governments to engage in proactive disclosure of information (Creyke and McMillan 2012) both of which were believed to have resulted in little usage of the Act (Lamble 2004; Paterson 2005).

In Japan, it was 30 years after the Supreme Court set out the principle that the right to know is protected as a part of freedom of expression,[52] that national FOI legislation was finally adopted, in 1999, to grant the public the right to request information held by public agencies. The Japanese FOI law provides that any person can lodge a request to a public body for the disclosure of administrative documents (Freedominfo.org 2009; Article 19 Organisation 2015b). It does not, however, give any specific requirement on proactive disclosure of information at the initiative of a public agency (Mendel 2008:70-1). Since the Japanese legislation came into effect in 2001, tens of thousands of requests have been filed annually to obtain information (Freedominfo.org 2009). Despite these positive figures, openness and transparency have become issues of growing concern in Japan, with criticisms of the FOI legislation for its reliance on information disclosure upon request and lack of sufficient mechanisms for proactive information publication, as well as criticism of Japan’s lack of interest in the OGP (Rheuben 2013; Article 19 Organisation 2015b).

South Africa is another FOI regime that stresses information disclosure in response to request. Under the South African FOI law, proactive publication of information is an aspirational standard, not a priority. Instead, the bulk of the law contains generous provisions giving the public the right to demand access to a very broad scope of information (Mendel 2008: 94-7). In practice, however, the South African legislation has been poorly implemented. Apart from a lack of public awareness, the high rate of disregarded requests and low rate of positive responses to information requests have apparently discouraged people to use their right to request information (Banisar 2006).

The ultimate benefit of a right to request information is that it gives the public a *legally enforceable* means of seeking particular information, especially when it is accompanied by a right to appeal

[52] Kaneko vs. Japan, 1969. Details of the case are available at http://www.right2info.org/cases/plomino_documents/r2i-kaneko-v.-japan-201chakata-station-film-case201d, accessed 10/09/2015

decisions regarding information access made by relevant public agencies. This right is essential for the public to obtain information when the information required has not been disclosed. Under schemes of providing information at requestor initiative, focused information is accessible to the right people. In that sense information provision seems be more focused and efficient. From the perspective of governments, releasing information on an individual request basis may help to reduce the cost of managing and providing information, as well as conserving other resources, such as establishment of databases and training for staff. Most of all, by providing information upon request, governments can enjoy greater control over the information in their possession, especially information which, if published, may breach public or private interests.

However, an FOI regime that relies too much on the provision of information at requestor initiative presents a number of drawbacks for the public. Costs inevitably accrue for preparation and lodgement of applications for information access. Information seekers may have to pay lodgement and search fees, as well as being charged other fees such as those for duplication of the documents or a postal charge. More importantly, the public may miss out on timely information, because it takes time for requests to be processed. In many countries, the right to request information is little more than a symbolic right due to procedural barriers, poor administration and other hurdles such as ignorance by public officials or threats from powerful interest groups that are not in favour of the information disclosure (Puddephatt and Zausmer 2011).

The foregoing drawbacks may be the main reasons that the 'pull model' has failed in a significant number of countries. In Indonesia, poor performance of the FOI Act in general, and the low rate of successful requests in particular, are caused by structural problems with request processing procedures (Freedominfo.org 2012c). Meanwhile, disappointment over the highly anticipated FOI law in Bangladesh has led to calls for government to further proactively disclose information instead of waiting for requests (Goswami 2013).

Nevertheless, it is worth noting that in some cases, low usage of an FOI law is not an indication of its failure, but on the contrary a reflection of a transparent political system and openness culture that may have pre-dated the enactment of the law. For example, in a study published in 2009, the lack of use of the Swiss federal Law on Transparency which gives access to official documents upon request was explained by some scholars with reference to low public awareness of the law and resistance to disclosure by administrative staff (Holsen 2009). Yet other scholars believe that the political context in Switzerland has shaped the uptake of the law. According to these scholars, in Switzerland the model of direct democracy already facilitates a wide range of information, a dynamic political environment enables a very transparent political system, and the government is ranked amongst the

least corrupt and most trusted in Europe. Under such circumstances, a limited desire to formally request information is understandable (Hazell et al. 2010: 251-52).

The disadvantages and failures of the 'pull model' identified above in some countries are not an argument for devaluing the importance of providing information upon request. Nor is it to say that an FOI regime must focus on proactive disclosure. Both ways to make information in the governments' possession available in the public domain are integral parts of an ideal FOI regime, and if one of them is lacking, the regime may be insufficient to guarantee meaningful access. It is a false dichotomy to pose the question as a choice between a 'push' or 'pull' model: it is important for law makers to acknowledge that effective promotion of FOI requires more than a single way of providing information and no tailored regime can be established without a thorough understanding of both FOI and local conditions (Francoli 2011: 152-65). More importantly, it should be noted that adoption of FOI is just the beginning; an FOI regime cannot work on its own let alone magically bring about transparency and openness (Privacy International 2007).

III. MODEL FOI LAWS: PROS AND CONS FROM A LEGAL TRANSPLANTATION PERSPECTIVE

Most FOI regimes are broadly similar. In part, this is because governments around the world have drawn on the same FOI laws, primarily those adopted early on, as models when drafting their own legislation (Banisar 2006: 20). Borrowing constitutional provisions and/or other dispersed legislation is also a way drafters in many countries have developed their FOI regimes.

The most influential model is the US FOI Act, followed by the Swedish FOI Act which has been drawn upon in Scandinavian countries (Lamble 2002). Recently, FOI advocates have been paying more attention to two new models. They are the Model FOI law developed by the Article 19 Organisation and the Model FOI Law for African countries produced by the African Commission on Human and Peoples' Rights. Notably, the 'habeas data' provisions in Latin American countries were inspired by European constitutional rights, especially the German Constitution and the right to information (Guadamuz 2000).

There are a number of underlying reasons for a country to borrow FOI provisions from other jurisdictions. Putting aside political and diplomatic issues, the most likely reason for the US and Swedish laws being selected as models is the perception that either instrument is a good and time-honoured law, is working well in the originating country and would work well in the borrowing country (Lamble 2003a: 51). In recent times, it is more common for new FOI laws to be enacted

under the influence of international donors. Since 2006, the Article 19 Organisation has been making great efforts to promote its Model FOI Law.

In Africa, the idea that many countries in the continent are desperately in need of guidance to fulfil their commitment to strengthen FOI has instigated the recent model FOI law (Sendugwa 2013). The Article 19 and African movements reveal model laws driven by external influence and an explicit attempt to universalise the value of FOI. However, as mentioned in earlier chapters, despite sharing many similarities, FOI laws perform very differently in different political systems. It is generally observed that the US FOI legislation operates quite effectively in its homeland but its duplicates do not function as expected in other jurisdictions (Lamble 2003a: 51). But some FOI legislation has suffered from being mere 'paper law', with little public usage and generating few of the positive impacts their drafters envisioned (McIntosh 2015). This raises concerns over whether mechanically importing an FOI regime is an appropriate and effective way to establish FOI in a new country.

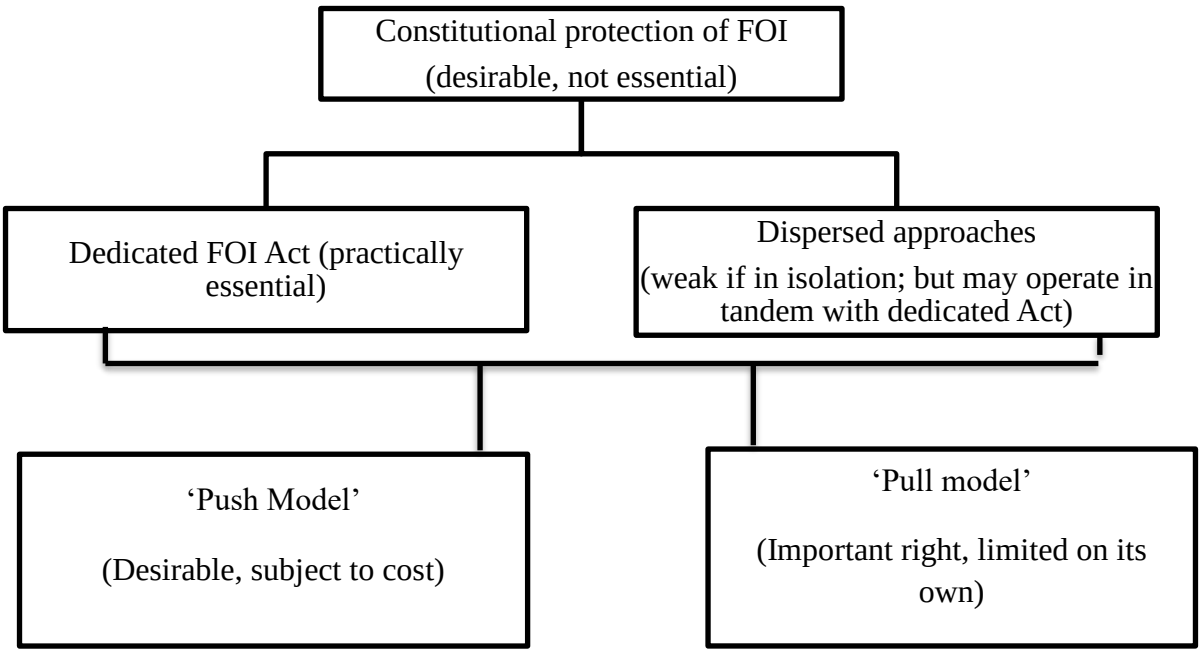
A number of factors have been identified as contributors to the failures of imported FOI law. In addition to differences in constitutional and legal systems, other differences in motivations for FOI, attitudes to FOI, and governmental and political systems are among the main suspected factors. Even when newer model FOI laws have been recommended as based on common standards and good FOI practice, there is still much uncertainty about their practicality (Freedominfo.org 2012b, 2012d). It is hard, if not impossible, for an FOI law that was designed to work in a particular political system to succeed in quite different socio-politico circumstances elsewhere (Lamble 2003a: 55). In many cases, particularly in developing countries, FOI models were copied without consideration of their suitability to the local context, because of external pressure and for political purposes (Puddephatt and Zausmer 2011:11). Inappropriate legislation, together with unpreparedness for FOI, lack of political will, and the power of the culture of secrecy have accordingly led to failures in FOI performance in many countries.

Therefore, the danger for FOI implementation lies in establishing an FOI regime following a simple transplant. It is unrealistic to expect that there be a standardised FOI law that can fit in and work well in every circumstance. To make sure that FOI laws have more than expressive or symbolic value, they should be drafted to reflect some common standards and good practice in FOI promotion. But it is also vital that any approach to FOI is tailored to the local context. Most importantly, it should be noted that adopting legislation is just a significant departure point, not the whole journey or end-point. The mechanisms/administration to make FOI laws work are as important as the laws themselves. More discussion of these issues will be presented in later chapters.

IV. CONCLUSION

Governments around the world have adopted different approaches to FOI. Constitutional protection of FOI, adoption of a dedicated FOI act and application of dispersed methods are the means by which governments have established FOI regimes. An FOI regime can be established based on either the 'push' or 'pull' models, depending on the adopting country's local context, including the information management policy and other conditions. The graphic below summaries features, pros and cons of those forms and means.

Figure 1. Forms and Means of FOI regimes



Implementing FOI offers governments a means to strengthen good governance, speed up development and enhance democracy. FOI can be enabled through a variety of legal regimes, from explicit constitutional guarantees and dedicated FOI legislation to administrative directives or orders that allow for information access. Adopting a dedicated FOI law is not the only way to make access to information functional. Even where there has never been an FOI law adopted, access to information may be possible through the enactment and effective application of other legislation.

A dedicated FOI law is highly desirable, but alone it is not enough. By itself, legislation will do little to transform a closed, secret, elitist governance environment into one of open democracy. Strong political resistance, inconsistent legislative frameworks, process and systems constraints and lack of

awareness of the law by the bureaucracy and the public, may all create hurdles and obstacles on the road from secrecy to openness. Practical experience suggests that a more effective, responsive and citizen-centric FOI scheme is not the sole, or even the best, way of creating a culture of FOI, but it is a necessary pre-requisite (Snell 2007:7).

Establishing any FOI regime faces formidable challenges, and warrants careful and detailed design. A future-proofed FOI regime for any country is strongly dependent on the answer to the question of what that the country desires to preserve and advance (Paterson 2011). The difficulty in designing such a regime lies in the fact that it is, in part, determined by the ambitiousness of any objectives for, and the extent to which there is any political, cultural commitment or opposition to, FOI. Furthermore, under the strong influence of the political environment, if an FOI regime is just based on a single approach to information publication, however well it is designed it will not be sufficient to substantively ensure an open regime, let alone to tackle an adverse political context and realise change.

So what is the proper way to develop an FOI regime, especially in a country like Vietnam which is only just beginning to develop a liberal culture? The FOI legislation initially adopted in Vietnam may have to be moderated to fit the prevailing political conditions, and then subject to later improvements in tandem with increasing transparency and openness. Accountability, transparency and openness are processes rather than states, therefore, the constant use of legal, cultural and political tools to both create and enhance them is required. In other words, achieving accountability, transparency and openness in the exercise of power will never be complete and will always be subject to political/institutional resistance; its achievement will be measured not only by the adoption of legislative instruments - and the intelligent and consistent use of them - but also by concomitant changes in the political and social culture.

CHAPTER 5 COVERAGE AND EXEMPTIONS: THE HEART OF AN FOI REGIME

Chapter 5 explores the issues of FOI coverage and exemption. Most FOI regimes contain explicit provisions regarding what they cover and what is exempt from their application. The coverage of, and exemptions from, an FOI regime define the scope of information that is accessible and the agencies which are responsible for releasing or publishing such information. Coverage and exemptions are important and must be studied closely as they indicate how the right to access information is limited and the level of formal 'openness' in each FOI-adopting country. From an advocacy perspective, strong FOI legislation should have broad coverage and few exemptions. However, practice suggests that the presumption of broad coverage and few exemptions needs to be adapted to local conditions, and even if met, that presumption is by no means sufficient to fully guarantee the workability of a free flow of information. In this chapter, the issues are analysed through a comparison between Vietnamese, Australian, US and NZ legislation. The analysis will facilitate an assessment of the sufficiency of Vietnamese legislation, and whether major reform needs to be adopted to promote FOI in Vietnam.

I. FOI COVERAGE: LEGISLATIVE AND PRACTICAL EXPERIENCES

This section of the thesis will analyse the issue of FOI coverage by considering its substantive provisions and application in several different countries. It reveals there is a connection between the adopting country's expectations for FOI and the breadth of FOI coverage. When FOI is considered to be a tool for promoting accountable and transparent government, it is more likely to be directed at public agencies, particularly the executive. In countries where more attention paid to FOI as an important human right its coverage will be defined with more attention paid to the nature of the information, expanded to a greater range of public and even private bodies[53] holding information that is in the public interest. Through a comparative analysis, the thesis argues that without a critical consideration of local contexts and a serious observation of the principle of openness, even an FOI law with broad coverage cannot assure its substantive strength, let alone its effective implementation. Yet, with appropriate attention paid to both local conditions and best practices, even an FOI law of limited scope may be capable of contributing to a feasible FOI regime.

1. Overview of FOI coverage in different jurisdictions

[53] FOI may apply to private bodies performing a public function and/or receiving significant public funding.

While most FOI regimes just focus on the executive and administrative agencies as information providers, some FOI laws state that they cover all public entities, including the judiciary and the legislature.[54] More rarely, a few statutes extend their coverage to private bodies that perform a public function or receive significant public funding.[55] In other instances, instead of having a general definition of their coverage, some FOI legislation includes schedules that list bodies positively covered or excluded.[56]

Besides stipulating the agencies that are to publish information, FOI legislation defines what is accessible. Definitions vary depending on the ways lawmakers use terminology to describe 'information'. While older laws tend to refer to 'information' as official documents, files, or records, newer laws are more likely to just use the terms 'information' or 'documents'. Generally, FOI applies only to information that is recorded. In practice, the definitional variations are not insignificant because most FOI laws are intended to guarantee access to public information, regardless of the form in which information is stored. It should be noted, however, that some customised definitions have their own implications. For example, the definition of 'official documents' under the Swedish FOI Act implies that accessible information does not include any documents that are being prepared or which are not used in final decisions by public agencies. In India, the public is allowed to request even samples of food distributed or materials used to make roads. Meanwhile, in NZ it is possible for individuals to get access to information that is known to agencies but not yet recorded. For example, ideas that informed government decisions that were documented. In such a case, it is required that agencies record the information if it is relevant to the request (Banisar 2006: 22).

In Australia, at the level of the national government, as the Commonwealth Constitution offers no guarantee of FOI, the main sources of FOI legislation are the FOI Act and the Australian Information Commissioner Act of 2010. After nearly three decades since its passage in 1982, and several subsequent amendments, the FOI Act was significantly reformed in 2010 with greater expectations for its benefit to open government. These recent FOI reforms in Australia were assessed as a welcome effort to update the Act and embed new policy settings for better governance (McMillan and Popple 2012: 1).

Since its inception, the Australian FOI Act has signalled its purpose of promoting government accountability and transparency by giving 'every person a legally enforceable right to obtain access

[54] For instance the FOI Acts of Serbia, India and Slovenia.

[55] For instance the FOI Act of South Africa.

[56] For instance the FOI Act of Ireland.

to a *document* of an agency or an *official document* of a minister, unless the document is exempt'.[57] The Act covers all departments of the Australian Public Service, most government agencies and the Administration of Norfolk Island.[58] Some agencies, such as the six intelligence agencies, are excluded from the FOI Act.[59] All agencies are exempted from the Act in relation to 'intelligence agency documents' and 'defence intelligence documents'. Some agencies are exempt in relation to particular documents, such as the Australian Broadcasting Corporation in relation to program material. A number of agencies, such as the courts and the Office of the Governor-General, are only covered by the Act in respect to administrative documents. [60] This is because trials are generally open to the public and whilst the Governor-General has (rare) reserved powers of a constitutional and political nature, he/she otherwise only has a ceremonial role. According to a submission by the Office of the Australian Information Commissioner (OAIC), the Australian FOI Act offers clear, detailed, and relatively broad coverage which ranges from government ministers to the courts and now extends even to a contracted service provider delivering services to the public on behalf of an agency (McMillan and Popple 2012), although different obligations are imposed on these agencies. In addition, a *document* is defined in a large range of formats including both hard and soft copies of writing, images or sounds and any article from which it is possible to produce sounds, images or writing (McMillan and Popple 2012). These features are considered a strong point of the Act (FOI Rating).

There is a strong assumption in the existing literature that the Australian FOI Act was a legal transplant largely based on the US experience (Snell 2000: 581-2). The assumption is reasonable, given the contemporary phenomenon of the Americanisation of law (Shapiro 1993) and the similar circumstances surrounding the adoption of FOI in the two countries: namely, that there was no constitutional protection of free access in either country, and the belief that a strong legislative measure was needed to improve governmental transparency and accountability (Mendel 2008).

In the US, the FOI Act allows access to *records* held by federal government agencies, including executive and military departments, government corporations and other entities performing government functions.[61] However, the US FOI Act is criticised by advocates for having limited

[57] S.11(1).

[58] S.4(1), supplemented by Part 2 of the Guidelines to the FOI Act.

[59] S.7(1) and s7(1A).

[60] For more information about agencies covered by FOI Act see Part 2 - 'Scope of the application of the FOI Act in Guidelines to the FOI Act 1982 issued under s 93A of the FOI Act and the chart in FOI Agency Resource 12 - Defining an agency', available at www.oiac.gov.au

[61] S7 (f)(1).

coverage as it is restricted to the executive branch, and does not cover the legislature (the Congress), the courts or private bodies that are substantially funded by or which undertake public functions (Mendel 2008). Furthermore, it is also a concern that the definition of records as 'any information... maintained by an agency in any format'[62] may has been narrowed by a Supreme Court finding that information must be under the control of the public body when a request is lodged (Mendel 2008).

NZ is another Commonwealth country that adopted an FOI Act in 1982. Interestingly, instead of borrowing the US model, NZ opted to craft a regime to suit its local conditions. The NZ Official Information Act was enacted with the aim of creating a regime for information access in order to tackle the strong habit of secrecy in government (Snell 2000). At the time of its adoption, the Act was seen as a poor compromise between an official secrets act and an FOI statute (Snell 2000). However, subsequent developments in the legislation, especially the implication of a quasi-constitutional guarantee of FOI in 1990,[63] and the adoption of the Local Government Official Information and Meetings Act in 1987, together with robust implementation efforts, have enabled a functional FOI regime in NZ (Mendel 2008; Snell 2000; Water 2008).

Similar to many other jurisdictions, NZ legislation allows the public to request official information held by government departments and organisations, ministers of the Crown, local authorities, state-owned enterprises, or other bodies performing public functions (Ministry of Justice of NZ). Official information held by the legislature, the courts and private entities is not included. What makes the NZ FOI regime different from its counterparts in many other countries, including Australia and the US, is that it starts with the principle of openness which assumes official *information* (as opposed to documents/records) should be available.[64] That the Act offers a wide definition of 'official information' (any information held by public agencies) is seen as its most outstanding feature as it facilitates a wide interpretation broadening the scope of the whole Act (Elwood 2000).

As mentioned in earlier chapters, there has been an overwhelming perception, including by the VCP leadership, that FOI is an important human right (Thái 2009). Such a perception is evidenced by the fact that the Vietnamese Constitution recognises 'the right to be informed' and a range of legislation facilitates the exercise of this constitutional right. However, although FOI in Vietnam has been founded on this long-standing constitutional protection and an array of legislation, it remains an immature regime without a specific FOI law, while the existing legislation has been poorly

[62] S7(f)(2)

[63] S14 of the Bill of Rights of NZ recognises the right to freedom of expression that includes the right to seek, receive and impart information.

[64] S5 of the NZ Act.

implemented (recall chapter 3). Substantive deficiencies, especially the unclear coverage of FOI law, are said to be one of the main reasons for the ineffectiveness of FOI in Vietnam (MOJ 2009c, 2010b, 2010c, 2010d; MOJ Executive Committee 2011b).

The notion that access to information is a constitutional right has influenced the making of the Vietnamese legislation which targets a variety of agencies and types of information. Where lawmakers have decided that information in the possession of any entity may be of interest to the public, information has been extended to that entity. Accordingly, the legislation does not provide any general definition of either the agencies or types of information that are covered. The nearest Vietnam has so far to general legislation on information access is a government decree that merely requires that government ministries and people's committees, at district and provincial levels (i.e. administrative agencies), must post on their websites basic information relating to their workings, such as organisational structure, working agenda, legal normative documents,[65] news and journal articles about the agencies' operations, and staff contact details.[66] In relation to certain information, such as the use of state property for example, it is a legal requirement that state agencies using or managing state property must publish financial reports[67] and information about their spending and use of the property.[68] A similar requirement is stated in the Anti-corruption Law.[69] Because all state agencies in Vietnam are operating on state budgets, such legislation may be interpreted to cover not only administrative agencies, but also the legislature, the courts and other public bodies including even the VCP. Arguably, the Vietnamese legislation also extends to impose some disclosure obligations on the private sector. For example, it demands that a cooperative of organisations or individuals, running a chemical business with local authorities, distribute information on chemical safety;[70] it requires real estate agents to make available all information about real estate for sale.[71] However, in the view of academics and legal practitioners, the scope of the Vietnamese legislation is

[65] In Vietnam, legal normative documents are the main, if not the only source of the legal system. Legal normative documents are defined as documents issued state agencies and containing provisions of general application. There are dozen types of such documents, including the Constitution, laws promulgated by the National Assembly, decrees by the Government, decisions by the Prime Minister, circulars by minister and decision by the local governments.

[66] Art.10 of Decree No.43/2011/ND-CP of 2011.

[67] Art.32 of Law on Accounting of 2003.

[68] Art.26 of the Law on the Use and Management of State Property of 2008.

[69] Arts.13-16 of the Anti-Corruption Law of 2005.

[70] Art.58 of the Law on Chemicals of 2007.

[71] Art.11 of the Law on Real Estate Business of 2006.

vague, inconsistent and piecemeal, creating many obstacles for implementation (MOJ 2015b, 2015d, 2015e, 2015g, 2015h).

In comparison with other FOI regimes, the Vietnamese legislation fails to impose either proactive disclosure obligations on state agencies or generally grant the public a general right to request access to information. Even though there are a few provisions providing that individuals and organisations can request information in relation to certain issues, such as anti-corruption,[72] urban development plans[73] or poisonous chemicals,[74] the legislation has never defined the agencies where such information requests can be lodged, nor has it detailed what types and forms of information the public can ask for. These deficiencies are understandable, given that all of these access regulations originated from a constitutional provision guaranteeing a 'right to be informed', which implies that the public is passively receiving information.

2. Comparative analysis of FOI coverage

The brief comparison above demonstrates that in all four countries surveyed FOI is to some extent both a legal privilege/right/benefit (of the public) and legal obligation (on public agencies). The comparison indicates that, with regard to the issue of FOI coverage, the national legislation in these countries presents both consistency and divergence. By analysing the legislation, this section of the thesis considers whether there is any association between the breadth of coverage and the effectiveness of an FOI regime.

The most significant similarity in the FOI legislation of the four countries compared is the recognition of the public's access to information held by public agencies, with the focus on the executive branch. Potentially, Vietnam offers a wide-ranging notion of FOI application as the country expands its (admittedly limited) FOI coverage to all branches of government and even to private entities carrying public functions. Australian law has fairly broad scope, including most government agencies but with a lot of exemptions; while the US and NZ legislation focuses solely on the executive. In Vietnam and NZ, local governments are subject to national FOI regulations but that is not the case in Australia and the US, which are federal systems that leave the issue to state legislation. Interestingly, in all four countries publicly owned corporations are required to publish information, although this varies widely. In addition to the schemes by which their public agencies have to release information on a proactive basis, the Australian, US and NZ acts each grant individuals the general right to request

[72] Art.32 of the Law on Anti-corruption of 2005.

[73] Art.55 of the Law on Urban Development Plan of 2009.

[74] Art.47 of the Law on Chemicals of 2007.

information held by public agencies. The legislation in the three western countries supplies a relatively clear definition of information that should be released through these request schemes. In contrast, Vietnam's legislation remains unclear on this point, failing to provide a general definition of 'information', and failing to establish a sufficient scheme for information provision, either through proactive disclosure or by information request.

Counting the number of agencies covered by FOI legislation is not a useful way to judge the breadth of the scope, nor the progressiveness of an FOI regime. An FOI regime with a broad scope may not necessarily be a functional one. In many instances, a broad FOI scope may be nothing more than the result of window-dressing or evidence of poor law-making capacity. Even though the initial intention may have been to establish broad FOI coverage, discretion may have been left for governments to narrow it down either by adding exemptions or employing a loose 'public interest' exemption to justify non-disclosure.

In Australia, even after the 2010 reform, substantive weaknesses, including problematic coverage, have been said to hinder the implementation of the FOI Act (McMillan and Popple 2012). Although the Act encompasses a large range of accessible public documents, other provisions provide numerous exemptions for documents held by non-exempt agencies but which relate to commercial activities, security and defence intelligence or which originated from agencies that are exempt.[75] As mentioned earlier, either because they are not politically accountable, or because a significant part of the information about their workings is already publicly available, the Act has only limited application to courts, tribunals and the Office of the Governor-General, merely requiring these bodies to respond to requests for information on 'matters of an administrative nature'.[76] After fierce debate amongst politicians and academics (Neilsen 2013), the attempt to include the three parliamentary departments (the Department of the House of Representatives, the Department of the Senate and the Department of Parliamentary Services) in the list of prescribed authorities subject to the FOI Act was cut short in 2013 when these departments were explicitly exempted from the FOI Act. The reason for such amendment was that the departments are supposed to be 'responsible to the Australian parliament rather than the government of the day' (Neilsen 2013). Also, the independence of the parliament from the executive will be at risk if the departments provide professional advice and support for the parliament independently of executive government (their statutory requirement), and at the same time have to release information as an executive agency as required by the FOI Act (Neilsen 2013).

[75] S7(2).

[76] S5 and 6.

In addition, the Australian FOI Act contains a number of exemptions for documents which can be withheld without the need for a harm test (such as cabinet documents, documents affecting law enforcement and public safety, and documents subject to secrecy provisions). These exemptions have weakened the presumption of public interest to be overridden, in turn creating a precedent to add further exemptions. Accordingly, the Australian FOI legislation is rated by advocates at an average level of progressiveness with a poor rating for the formal scope of the legislation (FOI Rating).

The US FOI Act does not cover the legislature and the courts, excludes the central offices of the White House, contains many exemptions that, in many instances, do not require a harm test, and offers only a limited public interest override. Interestingly, it is still evaluated as having a fairly broad scope and scores higher than its Australian counterpart (FOI Rating). Similarly, despite the limited scope and potential for other legislation to classify information, the NZ Act earns average points for its scope and is estimated as the strongest FOI act among developed, English speaking countries (FOI Rating). Ultimately, it is claimed that both the US and NZ's laws are functioning far better in practice than their legal frameworks would suggest (FOI Rating).

In practice, the unclear coverage of information access in Vietnam is undermined further by other legislation and in its administration. The Ordinance on the Protection of State Secrets of 2000 potentially disables almost all information access provisions. This is achieved by defining any information as a state secret which has not been officially published by state agencies and which, if published, would harm the Socialist Republic of Vietnam.[77] In addition to such a sweeping definition, the Ordinance allows public agencies to classify information in their possession. Furthermore, it prescribes that the protection of state secrets is an important task of not only the state agencies but also social organisations and citizens[78] and that any effort to collect or release state secrets is strictly forbidden.[79] The ambiguity of the legislation on information access itself, together with this secrecy legislation, makes a workable scheme of information access in Vietnam under current regulations almost impossible. State agencies have no incentive to make information publicly available, given the cost and other burdens incurred as well as the risk of revealing poor performance or wrongdoing. Even if such agencies have nothing to hide, the fear of infringing the secrecy regulations makes it difficult to determine which information to disclose and which to withhold: accordingly, they often opt to keep information confidential (MOJ 2015g, 2015h). Without clear and consistent guidelines, it is equally hard for the public to ascertain which information they can access and where they can ask

[77] Art.1

[78] Art.2

[79] Art.3

for information (MOJ 2015h). In practice, information access in Vietnam is toothless, little more than symbolic.

Paradoxically, then, while FOI in Vietnam and Australia ostensibly covers more government branches, the schemes for information access in the two countries are less effective than those in NZ and the US. The reasons for such a paradox are complex and cannot be explained with reference only to the scope of FOI legislation. Putting aside the matter of design, other factors such as, government structure, legal system and the culture of secrecy in each country, must be taken into account and weighed up. Any such study needs to look at the importance of adapting legal norms, and legislation regulating democracy in particular, to the local environment.

3. International principles and practical experiences with FOI coverage

The Article 19 Organisation in 1999 introduced a set of principles for FOI legislation which were later supported by many international organisations and FOI advocates (Mendel 2008, 2009; Puddephatt and Zausmer 2011). These principles were developed based on best practice, in the belief that adopting them in developing FOI would help prevent 'paper' or symbolic FOI laws (Puddephatt and Zausmer 2011:11). With regard to FOI coverage, the principles set out that both 'information' and 'public bodies' should be defined broadly, to the extent that the definition of information must include all records, including those that have been classified and regardless of their format, source or date of production. Moreover, the definition of 'public bodies' must include all branches and levels of government, any other government or quasi non-government body and even private bodies which exercise public functions or hold information of public interest (Article 19 Organisation 1999). In an effort to promote the principles, evaluation of the quality of existing FOI regimes was undertaken. According to the FOI Rating, which was first canvassed in chapter 2, the maximum score of 30 points for the best FOI scope was given to a dozen countries including Liberia, Russia, Nicaragua and Latvia. Australia, the US and NZ received only 10, 18 and 16 points respectively for the scope of their FOI legislation. Since Vietnam has no specific FOI law, its piecemeal legislation on information access was not considered.

As discussed before in chapter 2, the validity of such rating is questionable, given the fact that it was based merely on the formal legal framework and without consideration of implementation/administration issues. In practice, the breadth of legislation alone is not capable of ensuring its effective implementation. Alongside the implementation effort, the suitability and adaptability of the openness provisions in the local environment play an important role in making any legislation work effectively. This helps explain why the imported US model has not worked well in

Australia, while NZ's Act has been far more successful than Australia's despite similarities in their origins (being adopted at similar times, aiming at similar objectives, and operating within Westminster systems of government with a fusion of legislative and executive institutions). It also helps explain why the Vietnamese model, which ostensibly recognises FOI as a fundamental constitutional right, remains immature with very limited achievements in term of both legislation and implementation.

That the Australian FOI Act does not work as well as the FOI Act in the US is an example of transplantation failure due to the lack of consideration of the differences in the two countries. Regarding the issue of FOI coverage, the most significant difference that should be discussed here is the different political systems. While in the US the whole system of government workings under a strong tradition of a clear three-way separation between the judiciary, legislature and executive, Australia has an incomplete form of separation of powers (Lamble 2003a). In Australia, as a Westminster system, the repositories of legislative and executive power are combined together in the parliament. The executive arm of government - which is effectively controlled by the cabinet - is in theory responsible to the parliament under a structure known as 'representative democracy' (Brennan 1997) yet can control the lower house of parliament. Therefore, while the judicial branch is separate and independent, no clear institutional separation between the legislature and the executive can be observed. By contrast, the US Constitution confirms that the president is the repository of executive power and separate from the Congress - the legislature. As the head of the public service, the president acquires authority to exercise executive power via direct election by the people, not from the legislature. Accordingly, in the US, a stricter separation between government institutions - the executive, legislature and judiciary - is provided. The difference between the Australian and US political systems is significant to the workability of FOI in the two countries. Given that in Australia cabinet members play dual roles as parliamentarians and heads of different public service departments and are all bound by rules of cabinet confidentiality, it is arguable that there is greater potential for legislators and public servants to work together in secrecy and to restrict the administration of FOI legislation (Lamble 2003a). In the US, the form of complete separation with the core principle of checks and balances in the operation of government branches, which requires greater information sharing by government agencies and prevents potential interference in the administration of information access, would enable a publicly available flow of information even without a dedicated FOI Act.

In addition, as mentioned in chapter 4, the US has the Sunshine Act that effectively supplements the FOI regime, requiring open meetings of agencies, including certain federal government agencies (primarily those with governing boards), Congress, federal commissions, and other legally constituted

federal bodies (Hammitt 1986: 46). Furthermore, the flow of information in the US is also secured by the work of a vibrant media (Freedom House 2013). In contrast, FOI in Australia has experienced many obstacles: the minimal separation between the executive and the legislature gives government agencies less incentive to make information public (Lamble 2003a, 2003b; Paterson 2005), a media lacking diversity is less attentive to government information (Blackall and Tenkate 2008: 31-4; Paterson 2005, 2008), and open meetings of government agencies are not yet a legal requirement. From the legal transplantation perspective, it is arguable that FOI was imported into Australia with little regard to local conditions and not followed by sufficient accommodation effort. Legal transplantation theories, in particular the legal evolution and system theories have not been seriously observed. That the imported US FOI model is not working as well in Australia as it is in its birthplace is, therefore, understandable.

Additionally, there are a number of reasons why, despite their contextual and political similarities, the Australian FOI Act is less successful than the legislation in NZ. In the case of these two countries, the different approaches to designing the legislation are the key. While Australia was attracted to the US model, NZ decided not to import a legal framework but just to borrow the idea of open government to create its own legislation based on local socio-legal conditions and needs. The NZ legislation was made through comprehensive analysis of open government principles, the local conditions, objectives and expectation set for FOI and adaptation strategies. It appears that all the issues surrounding FOI adoption and theories of legal transplantations were thoroughly examined, even though the NZ designers have never claimed to have done so. Accordingly, the NZ legislation could be implemented more efficiently with less effort made to adjusting it to accommodate local conditions. The initial version of the Act was considered to be a limited FOI law with a narrow scope; however, its core principle of openness, and subsequent improvements favouring information disclosure through the principle of pro-disclosure and the general public interest test, have enabled not only an effective information flow but built a progressive framework in NZ.[80] In addition, whilst FOI is also impeded by the weak separation of powers in NZ, as it is in Australia, this has not prevented it being supported by gradual improvements both in the legislation and the culture within government agencies (Snell 2000; Lamble 2003a, 2003b).

The problems with implementation of the borrowed FOI Act in Australia are inevitable, given the significant efforts needed to accommodate the legislation and the fact that, due to the designers' expectation of a hostile reception, the legislation was made with features inimical to openness

[80] An in-depth analysis design and implementation divergences of Australia and NZ's FOI legislation can be found in Snell 2000.

(examples include the limited target of access to ‘documents’ only, the narrow interpretation of the right to access information, and the application of a public interest test in limited cases only (Snell 2000). Long awaited FOI reform took place in 2010 but there is no doubt that FOI in Australia is still struggling with the legacy of a culture of official secrecy which is reflected in other laws such as the Broadcasting Act, Australian Security Intelligence Organisation Act, Intelligence Service Act and Telecommunications Act (FOIA net 2013: 38). In practice, findings from a number of studies suggest that NZ is ahead of both the US and Australia in implementing FOI and those studies credit the effective combination of good implementation efforts, good support from the media and a political commitment to openness (Snell 2000; Banisar 2006; Lamble 2003a, 2003b).

Experiences in other countries (Australia in particular) can help to explain the poor performance of FOI in Vietnam. The constitutional recognition of FOI as a human right, which was imported without good understanding of both FOI and legal transplantation and accordingly leads to a nominal extension of FOI coverage to government branches, public bodies and private entities, is obviously too ambitious for a socialist regime with an immature democracy. The minimal demarcation between the National Assembly and the government, the absence of a strict separation of powers, the principle of collective responsibility in government operation and the lack of media diversity may be the main cause of the problems with FOI implementation in Vietnam. In addition, apart from being hindered by the absence of a free media or competitive activities of different political parties, FOI in Vietnam is also facing great resistance from government agencies - a problem which occurs in any country lacking a strong culture of openness.

In the context of its implementation of FOI thus far, as Vietnam contemplates a dedicated FOI law, the lessons drawn from US, Australian and NZ experiences are invaluable. It is clear that political and cultural differences and design approaches all need to be taken into account when developing and implementing an FOI regime. With regard to the scope of FOI, a broad scope is more legislatively desirable than practically feasible. It is, therefore, crucial that policy makers consider the local context to establish an appropriate scope, instead of importing a definition of broad scope from other countries just to reach a perceived ideal. Given the context in Vietnam where the VCP holds the supreme leadership over the whole country and state-owned enterprises play a dominant role in the economy, no reform would be regarded as ground-breaking if the role of the party and the enterprises as information providers is ignored. Further discussion about these aspects of the Vietnamese context, possible FOI reforms and adaptation strategies will be presented later.

II. FOI EXEMPTIONS: LEGISLATIVE AND PRACTICAL EXPERIENCES

Despite the primary purpose of FOI legislation being to create a legal framework for information access, all FOI laws contain provisions describing categories of information that can be withheld from disclosure. Exemptions establish the limits of the right of access to information under law and are considered an important part of the backbone of FOI legislation (Glover et al. 2006: 22). Through comparative analysis of FOI exemptions, this part of the thesis seeks to address the interrelationship between an FOI regime's exemptions and its effectiveness, as well as the key issues which need to be taken into account so that FOI legislation enables a free flow of information whilst protecting sensitive information. This part explains the necessity of exemptions and examines international standards on exemptions. In addition, it argues that it is not the scope of exemptions but the ways in which the exemptions operate that will have the most influence on the workability of an FOI regime.

1. Overview of FOI exemption schemes in different jurisdictions

Most FOI laws set out exemptions by providing that access to information does not extend to exempt agencies or classes of documents, or to sensitive information that needs to be kept confidential. FOI laws commonly define exemptions based on consideration of the following: the content of the information (for example, whether it is private or commercially confidential); the effect that disclosure might have (such as on national security, law enforcement or cabinet solidarity); the source of the information (for example, whether the information received is from agencies exempted from FOI law application); and the purpose for which the information was recorded (for example for internal discussion). FOI exemptions operate in various ways and can be different in type and scope. Generally, they can be divided into two main categories: absolute and qualified. If an exemption falls in the absolute category, there is generally no further obligation on the part of a public agency to consider releasing the information. With regard to qualified exemptions, deliberation to balance the public interest in, versus the potential harm of, disclosure is required. In such circumstances, information will be released if there is evidence that the public benefit in knowing the information outweighs harm that may arise from the disclosure.

In some jurisdictions, exemptions are not compulsory and that means public agencies may release the information at their discretion (Mendel 2008). In many FOI laws, exemptions are 'class' based, meaning that if any information is grouped in a certain class of information (for example, information relating to personal privacy or information obtained in confidence), that information is exempt from disclosure, at least without permission of the person or commercial body concerned. Some laws refer to exemptions by more fundamental terms such as 'exclusions' or 'exceptions', stating that

information held or created by certain public agencies is excluded from the application of FOI legislation.

To protect sensitive information, the Australian FOI Act prescribes a considerable number of exemptions. Under the Act, two types of exemptions are defined: 'exempt' and 'conditionally exempt' documents. While agencies or ministers can baldly refuse to release exempt documents, they can only withhold conditionally exempt documents if the public interest test suggests that disclosure of the document would be contrary to the public interest. Exempt documents include: documents affecting national security, defence or international relations; Cabinet documents; documents affecting the enforcement of law and the protection of public safety; documents to which secrecy provisions in other legislation apply; documents subject to legal professional privilege; documents containing material obtained in confidence; Parliament Budget Office documents; documents the disclosure of which would be in contempt of Parliament or in contempt of court; documents disclosing trade secrets or commercially valuable information; and electoral rolls and related documents.[81]Eight categories of conditional exemptions relate to the following: Commonwealth-State relations; deliberative processes relating to agencies' or ministers' functions; the Commonwealth's financial and property interests; certain operations of agencies (such as audits); personal privacy; business affairs; research (by CSIRO or the Australian National University); and Australia's economy.[82] In the event that an agency or minister refuses to disclose a document which falls within one of the exempt or conditionally exempt categories, that agency or minister must provide reasons in their notice of refusal.[83] If exempt information can be deleted from part of a document, an edited copy of the document can be released.[84]

Exemptions under the US FOI regime are defined both by the legislation and judicial interpretation. Similar to the Australian FOI Act, the US Act sets out nine primary categories of exempt records, including those related to national defence and foreign policy, internal agency rules, information exempted by other legislation, business information, law enforcement, personal information and policy advice.[85] None of the exemptions under the US Act are mandatory and agencies at their discretion can disclose information. The Act also has a severability clause allowing the disclosure of the remainder of a record after deleting the exempt part.[86] However, a considerable difference

[81] Ss. 33, 34, 37, 38, 42, 45, 45A, 46, 47, 47A of the 1982 FOI Act.

[82] Ss.47B, 47C, 47D, 47E, 47F, 47G, 47H and 47J of the 1982 FOI Act.

[83] Ss.25 & 26 of the 1982 FOI Act.

[84] S. 22 of the 1982 FOI Act.

[85]S.7b of the US FOI Act.

[86] S.2 of the US FOI Act.

between the two jurisdictions is that the US Act does not contain a public interest test *per se*. Rather, the principle of the public interest was balanced in the formation of the exemptions (Glover et al. 2006). The US does not have a significant harm balancing test either, except in the case of privacy. Accordingly, US agencies do not have to administer a public interest test or a harm test when applying exemptions. Before releasing information, however, they must conduct a full examination of the institutional, commercial, and personal privacy interest implications that may arise from the disclosure of the information.[87]

Like many other FOI laws, including those of Australia and the US, the NZ Act recognises a general exemption for information which other legislation exempts from disclosure.[88] However, unlike the acts of Australia and the US which establish exemptions based on categories of information, the NZ legislation defines exemptions by focusing on the likely consequences of disclosure (Bunchanan 1991: 2-6). That approach requires public agencies, when processing an information request, to make a judgment on whether the likely consequences of releasing the information would be such that withholding is necessary to protect certain specified interests and processes, rather than simply considering whether the requested information belongs to any exempt category. In the first set of exemptions, the NZ Act defines conclusive reasons for withholding information the release of which would harm national security and international relations; information provided in confidence by other governments or international organizations; information that is needed for the maintenance of the law and the protection of any person, and information that would harm the economy of NZ.[89] Special reasons for withholding information related to the Cook Islands, Tokelau, Niue, or the Ross Dependency are provided.[90] In another set of exemptions, information can be withheld for good reason unless there is an overriding public interest. These exemptions include information that could intrude into personal privacy, commercial secrets, privileged communication and confidences; and information that if disclosed could damage public safety and health, economic interests, constitutional conventions and the effective conduct of public affairs, including 'the free and frank expression of opinions' by officials and employees, etc.[91]

In comparison with legislation in the three other countries, the legislation in Vietnam lacks a concrete and comprehensive regime of exemptions. As the legislation allowing access does not define any

[87] The Attorney General's Memorandum dated 12/10/2001

[88] S.18c(1) of the 1982 Official Information Act.

[89] S.6 of 1982 Official Information Act

[90] S.7 of 1982 Official Information Act.

[91] S.9 of 1982 Official Information Act.

exempt information, exemptions are only implied in a limited number of other acts such as the Ordinance on the Protection of State Secrets (discussed earlier in this chapter) and the Civil Code of 2005.[92] The secrecy provisions in the Ordinance imply that information relating to important issues in political affairs, national defence and security, foreign affairs, economy, science, technology and other sectors, which has not been published by state agencies or which, if published would harm the State of Vietnam, is exempt from public access.[93] Such a broad scope of exempt information is further extended by fact that public agencies are allowed to classify information in their possession to protect state confidentiality. Neither the harm test nor the public interest test has ever been employed as a legal requirement by public agencies when applying secrecy legislation. In contrast, the Civil Code offers protection to privacy, but at the same time the Code allows disclosure of personal information if such disclosure is decided by a competent agency or organisation.[94] The Vietnamese legislation, in reality, overly protects state secrets but does not provide sufficient safeguards for other kinds of sensitive information, particularly information relating to law enforcement, trade secrets and privacy. This fact is understandable given the legislation is designed following the rational approach within a collectivist state and command economy where liberal interests (such as personal privacy, reputation or commercial information) are deemed subordinate.

2. Comparative analysis of FOI exemptions

Different countries recognise different legitimate aims which may be the subject of FOI exemptions and this issue remains a subject of controversy. Assessing the legitimate scope of FOI exemptions is very complicated. An excessive system of exemptions can seriously undermine the free flow of information and the public's right to know. Conversely, it is obviously important that all legitimate interests are adequately catered for; otherwise public agencies will legally be required to disclose information even though this may cause disproportionate harm to legitimate interests. A robust and fair scheme of FOI exemptions, therefore, is not a scheme with either the fewest or the most exemptions but the one which best balances FOI and the protection of legitimate confidentialities. In addition to the aim of understanding the reasons for FOI exemptions, the comparative analysis undertaken in this section seeks to identify the progressive and regressive features of exemptions in the four countries.

[92] In 2015 this Code was replace by a new Civil Code which will take effect on 01/01/2017.

[93] Art.1 & 3 of the Ordinance on Protection of State Secrets of 2000.

[94] Art.38 of the Civil Code of 2005.

Despite the fact that the piecemeal legislation in Vietnam does not offer sufficient provisions on FOI exemptions, it is still possible to observe a number of similar features between the Australian, US, NZ and Vietnamese legislation. Figure 2 below illustrates both the similarities and divergences of FOI exemptions in the four countries:

Figure 2. FOI exemptions under the legislation in Australia, US, NZ and Vietnam

Indicators	Australia	US	NZ	Vietnam
Recognition of secrecy provisions in other legislation	Yes (a list of legislation is contained in Schedule 3)	Yes (with some restrictions)	Yes (information will be withheld if disclosure would be contrary to the provisions of other legislation)	Not applicable as Vietnam has no specific FOI law. However, public agencies are allowed to classify information
Common exemptions: national defence, international relations, information provided in confidence, law enforcement, privacy information and policy advice	Yes	Yes	Yes	Broader scope of information defined as state secrets (political affairs, national defence and security, foreign affairs, economy, etc.) Weak protection for privacy No per se protection for law enforcement.
Nature of exemptions	Discretionary	Discretionary	Permissive	Substantively unclear, practically mandatory
The public interest test and public interest override	Yes (applies to conditional exemptions only)	No public interest test per se, but the public interest test is said to be incorporated in the exemptions.	Yes (in certain circumstances)	Not mentioned (The Ordinance on Protection of State Secrets defines state secrets as information of

				which disclosure would harm the State of Vietnam but no further elaborating provisions have been issued)
Existence of a severability clause allowing disclosure of non-exempt part of the information	Yes	Yes	Yes	Not mentioned
Obligations of public agencies to give reasons for refusing provision of information and advice of relevant appeal procedure	Yes	Yes	Yes	Not mentioned

Vietnam must be treated as a special case, where state secrets are broadly defined and protected by ambiguous and inconsistent provisions in a variety of legislation, whereas the other three countries all delineate protection for some kinds of information consistently with international standards. The recognition of the application of secrecy provisions in other laws is judged as a weak point by FOI advocates who insist FOI legislation should 'trump restrictions on information disclosure in other legislation to the extent of any conflict' (FOI Rating), but its absence in the Vietnamese legislation is an indication of a legislative shortcoming rather than a signal of substantive progressiveness.

As information accessibility is shaped by the culture of openness within public agencies, it is unlikely that the difference in the nature of FOI exemptions (discretionary or compulsory exemptions) is a crucial factor in deciding the strength of FOI regimes. However, the 'consequential exemptions' which are derived from the overall principle of the presumption of openness under the NZ Act make it completely different to categorical exemptions in Australia, the US and Vietnam. In NZ, public agencies can refuse to provide information only if they raise sufficient justification of the potential harm of the disclosure to the legitimate interest. Meanwhile, at their discretion public agencies in Australia and the US can decide either to release or withhold information if they deem it falls within

exempt categories. In Vietnam, as long as the information falls within the definition of a state secret, public agencies have no discretion and, therefore, have no option but to withhold the information. Such exemption frameworks in Australia, the US and Vietnam lead to information seekers taking the predominant role in demonstrating that the requested information is not covered by any particular exemption or a public interest test is required before the information can be released. Therefore, the NZ Act has a more progressive exemption framework that helps prevent defensive attitudes within public agencies when they process information requests (Eagles et al. 1992).

The public interest test is seen as a necessary tool to balance the interest in withholding information against the public interest in disclosure, and there are an increasing number of countries employing the test. The inclusion of the test and the principle of public interest override in Australia's and NZ's acts is a notable legislative improvement (FOI Rating). At the same time the explanation for the absence of a concrete provision dealing with the public interest test and the principle of public interest override (see discussion about US FOI Act at pages 119 and 121) in the US FOI Act is unpersuasive (Hammitt 1991: 26-8). The Australian, US and NZ legislation are all praised for their similar 'redactability' clauses (allowing access to the remainder of a document/record after the exempt information has been deleted), their provisions requiring public agencies to explain the reasons for refusing a request for information, and the requirement to advise applicants about appeal procedures. The silence of the Vietnamese legislation on these issues is a demonstration of its shortcomings.

Assessing the appropriateness of an FOI exemption scheme is extremely complex. The complexity is shaped by the fact that every country has its particular secrecy interests and is also shaped by the complexity of each scheme itself: with regard to exemptions, the operation of the scheme and its impact on the way a government controls information, and the exercise of the public's right to information. Furthermore, any assessment is always driven by the different perspectives from which assessors judge the exemption scheme.

Generally, academics and FOI advocates have reached a consensus with regard to some progressive features of the exemption schemes in Australia, the US and NZ. They all agree that the positive points of these acts are the internationally standardised exemptions, the 'redactability' clauses and the requirements that public agencies provide the legal grounds of their refusal and advise applicants about the relevant appeal procedures. However, they are divided on other issues involving the exemption schemes. With regard to the Australian Act, FOI advocates criticise the application of the secrecy provisions listed in its Schedule 3, claiming them to be a blanket exemption over all FOI provisions, and criticise the excessively broad exemptions including Cabinet documents, deferments and deliberative documents. They also regret that the public interest test merely applies to

conditionally exempt documents which could lead to the possibility that information is inappropriately withheld (FOI Rating). Meanwhile, regarding the importance of the 2010 reforms to the Act, academics and practitioners in Australia insist that the existing exemptions are 'adequate to provide protection for government information that legitimately warrants protection against disclosure under the FOI Act' (McMillan and Popple 2012). In their view, the application of a single public interest test to conditional exemptions is sufficient to facilitate the presumption of openness, and if problems occur in implementing the exemption provisions, they are piecemeal rather than a reflection of any substantive legal shortcoming and should be solved through review procedures by the Information Commissioner (McMillan and Popple 2012).

Similarly, controversy is brewing around the US scheme of exemptions. Advocates see the exclusion of the public interest test and the general principle of public interest override in the US Act as a serious loophole and see some exemptions (such as internal personal records, geological and geophysical information and data including maps concerning wells, and foreign intelligence records) as being excessively broad (FOI Rating). On the other hand, the legislative drafters defend the appropriateness of the scheme by referring to the discretionary nature of exemptions and arguing that withholding information is, therefore, permitted but is not required. In addition, they emphasise recent developments such as the adoption of a presumption in favour of disclosure in FOI decisions and a stronger commitment to openness, believing this will encourage agencies not to withhold information even though it might be lawful to do so (Stevens 2010: 2).

In the case of the NZ Act, the mixed views among commentators about the exemption scheme centre around the issue of the public interest test and the principle of public interest override. According to some advocates, the regrettable feature of the NZ regime is that it does not require the application of a public interest test or a principle that the public interest should override categorical exemptions in all cases (FOI Rating). Conversely, many others, including independent commentators, insist that that it is necessary that the Act has nuanced approaches to different interests (Law Commission 2012). Some interests, such as the security or defence of NZ, are so important that they should be absolute and withholding information in these cases should be conclusive. But other interests, such as 'maintenance of the law', need to be grouped in qualified exemptions to which the public interest test is applicable because the interest has less important implications (in comparison with national security or defence), or because it is difficult to see how an interest would be prejudiced if the information was disclosed (Law Commission 2012: 126). Furthermore, some academics refer to the approach that requires public agencies to assess the likely consequence of disclosure as being strong evidence of the progressiveness of the NZ scheme, saying that it demonstrates a stronger commitment to open government (Snell 2000).

As FOI remains an under-researched topic in Vietnam, the available literature in the country does not offer any substantial discussion on the scheme of exemptions under the existing legislation. From the perspective of state secret protection, government officials believe that the definition of 'state secret' is too narrow and should be extended by adding political, social, and economic organisations, in addition to the state, as entities for which the disclosure of information may have a negative impact (Mai 2013). More extremely, others insist that the current imbalance between the protection of state secrets and the right to access information can be improved by tightening the secrecy legislation to allow state agencies more discretion to withhold information (Phan 2010). Given the fact that exempt information in Vietnam has been defined for the primary purpose of state secret protection and lacks the 'spirit' of FOI, the absence of essential elements for an exemption scheme in the Vietnamese legislation, as well as the limited scholarship in the Vietnamese literature, is understandable.

3. International standards and practical experiences of FOI exemptions

In its 1999 report the Article 19 Organisation recommended a limited scope of exemptions as one of the key principles for FOI legislation. According to this principle, exemptions should be defined so that no agencies should be completely exempt from the application of the legislation and any exemptions should be clearly based on legitimate grounds for refusing to disclose information. Exemptions should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety and the effectiveness and integrity of government decision-making processes (Article 19 Organisation 1999). The organisation also believes that all exemptions should be subject to strict harm and public interest tests. In all cases a mandatory public interest override should be applied, meaning even if the disclosure of information would cause substantial harm to a protected aim, that information must be still be disclosed if the benefit of such disclosure outweighs the harm.

Employing criteria and indicators developed based on this principle, the FOI Rating considered exemption schemes under different FOI laws. This solely legislative-based rating gave the maximum score of 30 points for the best exemption scheme to no regime. Instead, more than 40 laws scored in the low range, between 2 and 15 points out of 30. While the Vietnamese legislation did not qualify for the rating, the exemption schemes under the legislation of Australia, the US and NZ earned just 15, 16 and 18 points respectively (FOI Rating).

According to available official statistics in Australia, for the year 2013-2014 the proportion of Commonwealth FOI requests refused was 13.3%. During that year, 48.7% FOI requests were determined without any exemption claim. The personal privacy exemption was the most-claimed

exemption, being employed in 20.6% of FOI requests, followed by certain operations of agencies (7.4%) and document affecting the enforcement of law and the protection of public safety (6.4%), and documents to which secrecy provisions in other legislation apply (2.4%). The well-known cabinet documents exemption was in fact little-used, with only 61 FOI decisions (0.3%) referring to the exemption (OAIC 2014: 135-6).[95] In the US, the report for fiscal year 2014 shows that 9% of the total requests were denied in full based on exemption (Department of Justice 2014). Similarly to Australia, the two most used exemptions in the US were those protecting privacy: information about individuals containing in 'personnel and medical files and similar files' - exemption 6 (26.76%) and personal information and 'information complied for law enforcement purposes' - exemption 7C (26.30%). The next most claimed exemption was the one safeguarding law enforcement techniques, procedures and guidelines (21.28%). The exemption for geological and geophysical information concerning wells was the least used exemption (0.01%) (Department of Justice 2014). Notably, the trends in using exemptions by public agencies in both Australia and the US have remained almost the same over several reporting years.

The reported figures in Australia and the US demonstrate that a single exemption is the most frequently used reason that public agencies refuse an information request. That exemption is privacy, suggesting that the public has a high demand for access to information which includes private material while public agencies are sensitive to protecting it from disclosure. The relatively low percentage of overall requests refused due to exemption suggests two possible stories. It might be that the fear of FOI being undermined by overly broad exemptions has been overstated. Alternatively, there is the possibility that when exemptions are wide, many and frequently-used, they will become well-known and self-policing; if so in mature and established FOI systems like that of Australia and the US, the percentage of refused requests would naturally decline over time. From a practical perspective, having the public interest test and public interest override *per se* seems not to make the Australian exemption scheme more progressive than the US scheme, given the fact that the proportion of successful requests in Australia was smaller than the proportion of successful requests processed for exemption applicability in the US (86.7% vs. 91%). In addition, in spite of the fact that the newly-reformed public interest test was applied, Australia witnessed a decrease in successful requests in the year 2013-2014 (86.7% of determined requested were granted access in the year) compared to previous years (93.9% in 2008-2009, 92.5% in 2009-2010 and 90.6% in 2010-2011, 88.4% in 2011-2012 and 89.4% in 2012- 2013) (OAIC 2014). Therefore, it is questionable whether, without a strong culture of openness and the fundamental principle of openness being incorporated in the FOI Act, a single public

[95] Perhaps because the exemption is well known and strict.

interest test is sufficient to ensure information is not unnecessarily withheld. It is also a practical lesson that the successful transferal of legal ideas, including those have proved functional in different jurisdictions, would not be realised in a short time or without subsequent efforts to improve both the public interest test's operation and the local conditions.

It is unfortunate that no similar statistics are available for NZ and Vietnam to help draw a fuller picture of FOI exemptions in practice. However, in NZ there are a number of studies on the performance of the FOI Act that are of help. A study in 2003 found that a high rate of successful requests created a broad consensus among requesters. Most believed the Act was a powerful tool for them to get important information. Although there were some problems recognised in the process of handling requests, these were seen as matters of poor training rather than either bad faith or legislative shortcoming (Price 2003: 11-4). Similarly, findings from other research conducted between 2004-2006 shows that many NZ requests were processed without any difficulty; however, more training about the Act was needed within public agencies (White 2007: 91-3). With reference to these findings, a recent comprehensive review of the NZ FOI regime conducted by the Law Commission pointed out that the fundamental principles on which the legislation is based have helped strengthen the effectiveness of its implementation. The Law Commission (2012) recognised that the presumption in favour of openness has had a very positive impact on the culture within government, while the approach by which each case must be assessed on its merits strengthens the NZ regime. Although these studies shared the view that most problems can be solved through improvement in training and guidance, they included comments that the management of the balance between openness and protecting legitimate aims is crucial but difficult work. The Commission went into further detail to recommend that some additions, including financial and competitive considerations, should be made to the information withholding grounds, but at the same time more prominence should be given to the concept of an overriding public interest as well.

Meanwhile, the uncertainties attending the legislation in Vietnam, together with the lack of both implementing effort and a culture of openness, has resulted in two apparently contradictory observations: first, that there is no chance for public access to any information which is deemed a state secret by public agencies; and second, that there is inappropriate disclosure of other kinds of information including personal information, business information and information relating to ongoing investigation of breaches of the law (MOJ 2010, 2015). The broad and vague definition of state secrets has enabled the executive - the most powerful branch - to enjoy freedom from public scrutiny by describing any information it does not want to disclose as a state secret. Meanwhile, the lack of consideration of the public interest has led to the fact that even though state-owned enterprises play a dominant role in the economy and consume a large amount of the state budget, there has been no

feasible way for the public to check such enterprises' operations under either the guise of being taxpayers or affected individuals. At the same time, personal information or trade secrets held by state agencies are always at risk of being publicly available because the related legislation gives lots of chance for 'authorised' agencies, organisations and individuals, including even journalists, to have access to such information. From the experiences in Australia, the US and NZ, such contradictions in the Vietnamese picture can easily be explained by the lack of the basic elements of an explicit exemption scheme, problems in bureaucratic training, and abuse of the secrecy legislation by bureaucrats. Furthermore, the legislation in Vietnam is not backed by general principles of openness, open government initiatives or, most importantly, a culture of openness.

From a practical perspective, the operation of exemptions under different legislative schemes proves that a limited scope of exemptions is desirable but not sufficient to secure a progressive scheme of FOI. In addition to the scope of exemptions, the method and procedures by which the exemptions operate significantly affect the public's opportunities for access to information. Furthermore, accepting a standardised scheme of exemptions may just help FOI legislation appear progressive in legislative terms rather than being feasible in practical terms, because in different countries it will be influenced by different contexts. In all circumstances it should be noted that balancing legitimate aims and FOI must be one of the core requirements of FOI legislation and a free flow of information cannot materialise without careful regard to the local context.

Therefore, the lesson to be drawn from comparative experiences, which may be instructive for Vietnam, is the necessity of a clear and consistent scheme of exemptions that will work and evolve alongside other improvements in local conditions. The scope of exemptions may cover any aim as long as that aim is rationally justified given the need to balance the protection of legitimate interests of the state, community and individuals with the public benefits of freer information. A clear and appropriate scope of exemptions will help meet objections to imposing a general obligation to provide information on the VCP and state-owned corporations by minimising the risk of revealing sensitive information held by those bodies. Given that the existing Vietnamese legislation includes nothing more than an ambiguous definition of what is not accessible, ignoring almost all other legitimate interests except for the state secrecy, in order to establish a suitable scheme of exemptions research is needed to determine not only an appropriate range of exemptions but also other essential elements for an exemption scheme and fundamental principles of an FOI regime in general.

III. CONCLUSION

The review of legislation and practice in this chapter demonstrates that coverage and exemptions are

integral to the feasibility of the free flow of information that underpins good governance. While a mechanical borrowing of a lofty framework from another jurisdiction may result in poor implementation in the borrowing country, it turns out that a less ambitious, domestically-made act can function without considerable difficulty. The international standards for coverage of, and exemptions to, FOI regimes are profound and desirable, but they are by no means an assurance of the effectiveness of implementation of the FOI legislation in different jurisdictions. In any jurisdiction, the culture within public agencies will have a significant and decisive impact on the operation of FOI legislation.

It is possible to conclude that the Vietnamese legislation has both substantive shortcomings and implementation weaknesses. It is particularly unfortunate that the legislation is accompanied by a strong culture of secrecy within government agencies, and at the same time is not supported by either a clear separation of powers or any additional significant initiatives for transparent and accountable government. The analysis also proves that FOI coverage and exemptions need to be reformed with regard to both local conditions and international standards. Besides looking at current best practices, possible reforms for the Vietnamese framework should be designed with consideration of the political landscape, legitimate but competing social aims and the limited resources for implementation. In order for the right coverage and exemptions to be 'incorporated into' the legislation, consideration also needs to be given to how such coverage and exemptions would impact on both the way that government controls information and the practicality of the public's right to information.

CHAPTER 6 FOI ENFORCEMENT

Chapter 6 discusses how FOI is enforced. For FOI to be implemented and capable of offering any benefit to good governance or liberal democracy, it is essential that policy makers design and implement effective mechanisms for enforcing the law, ideally by including such mechanisms in the ambit of the law. Enforcement of an FOI regime relates to processes of both FOI ongoing administration and policy making. This includes, but is not limited to, the issues of interpreting coverage and exemption rules, information request and publishing procedures, review and oversight, and sanctions, protections and promotional measures. This chapter is centred on the issues of FOI review schemes and oversight bodies - two factors which are most relevant to the issue of good governance and which, along with culture, determine FOI enforceability. In enforcing FOI legislation, review and oversight are separate but complementary processes: review provides opportunities for revisiting the merits of individual decisions and to the specific application of the legislation by agencies; oversight involves the overall supervision of systemic issues - the implementation of the system and policy development in relation to future practices and policies.

Comparing FOI regimes reveals a variety of schemes for FOI review and oversight. These include internal and external administrative review, judicial review and enforcement or oversight by independent specialist bodies. It is the generally held view of experts that a good FOI regime should employ multiple tiers of FOI review including internal review, independent administrative review (external merits review) and judicial review, as well as having an independent body to oversee the whole FOI regime (Article 19 Organisation 1999). In practice, the effectiveness of these different schemes varies greatly and is strongly influenced by the local context (Mendel 2008). Chapter 6 will, therefore, examine whether Vietnam has sufficient enforcement capacity and socio-political conditions to guarantee access, again through comparisons with Australia, the US and NZ.

I. FOI REVIEW: LEGISLATIVE AND PRACTICAL EXPERIENCES

As a principle derived from administrative law, it is widely recognised that people have the right to request a review of decisions affecting their rights and interests made by public officers and agencies. Existing FOI laws face a conflict of interest and duty: they recognise a civil right of access to government-held information and impose a duty on government agencies to disclose information; but it is unrealistic to expect that the interest and hence tendency to secrecy within government will disappear overnight. The risk of biased or self-protecting decisions by agencies, therefore, is inevitable. The importance of FOI review lies in the opportunities it provides for FOI decisions to be

revisited and overturned, after independent consideration when necessary. On the one hand, FOI review, similarly to other review processes, helps prevent 'institutional bias' and ensures the final decision is fair, correct or preferable, and reached in accordance with the maxim of *'nemo judex in sua causa*'.[96] On the other hand, it can facilitate cultural changes within agencies by offering educative experience for agency officers. In short, FOI review ideally promotes fair, correct and lawful decision making practices. An effective FOI review scheme, hence, is capable of boosting good governance as well as assisting individual requestors feel that justice has been done.

FOI laws generally provide that when applicants are unsatisfied with the decisions made in response to their information request, they can either make a complaint or appeal the decision. The complaint and appeal options, as well as the effectiveness of the review system differ greatly across countries. Through analysing the connection between the complaint and appeal options and the practicalities of FOI review systems, this thesis seeks to identify the factors influencing the effectiveness of FOI review in particular and the functionality of FOI regimes in general.

1. Overview of FOI review systems in different jurisdictions

One of the similarities shared by most FOI laws is that they provide a variety of options for complaints and appeals. Internal review, review by an independent oversight body and judicial review are popular options. In some countries, completing internal review is a prerequisite to appealing to independent bodies or courts (Mendel 2008). Believing that external review by an independent oversight body is more objective than internal review and costs less than judicial review, many countries have adopted some sort of external administrative review (Mendel 2008). Although judicial review is available in most FOI regimes, it remains an option for only a limited number of applicants due to the time, money and effort involved in court action.[97]

The FOI review system has experienced dramatic changes in Australia. Under the original 1982 Act, FOI reviews were processed with the involvement of different agencies. Until the 2010 reforms, internal reviews were conducted by the minister or the head of the public authority. If still dissatisfied with the outcome of the internal review, applicants could request merits review by the Administrative

[96] 'No-one should be judge in her own case'. An interesting discussion about the benefit of 'nemo judex in sua causa' rule in preventing biased decisions can be found in Jones (1977).

[97] For instance, in number of FOI lawsuits were found relative low in comparison with the number of requests which remains in potential of dispute after internal review. Cost for and delay in federal litigation was identified as the primary reason. It is also recorded that the most frequent plaintiffs were advocacy organisations, followed by other sort of organisations such as businesses, law firms, media, FOIA- requester websites. There were two individuals engaging in more than 10 suits over the same period. For more information see Grunewald and Morefield 2014: 1-31

Appeals Tribunal (AAT) where binding decisions could be issued. After review by the AAT, applicants could pursue a statutory appeal to the Federal Court of Australia on the narrow ground of errors of law. In addition to those procedures, complaints could be made at any time about FOI administration to the Commonwealth Ombudsman, whose recommendations and findings are not formally binding.

In 2010, the Office of the Australian Information Commissioner (OAIC) was established with the dedicated role of conducting both FOI review and oversight functions.[98] It was hoped that it would be a successful transferal and the Office would accelerate the effectiveness of the FOI Act, particularly the performance of the review scheme (Ludwigh 2010; McMillan and Popple 2012). Since then, there have been up to four levels of FOI review available for applicants: internal review, OAIC review, AAT review, and appeal to federal courts on questions of law as well as complaints on FOI administration to the Commonwealth Ombudsman.

However, within just a few years, the FOI review system with the OAIC's involvement has come to be seen by the conservative Australian government as complicating and creating unnecessary delays (Attorney-General 2014). The government announced in May 2014 its intention to close the OAIC and spread its roles over other agencies: merits review to the AAT and complaints on FOI administration to the Commonwealth Ombudsman (the Attorney-General 2014). Such reform, unaccompanied by broad consultation, has been opposed as unjustified by many politicians, FOI experts and advocates (Farrell 2014, Farrell and Evershed 2015). According to those critics, the plan is 'unworkable' (Farrell 2014), showing a tendency to 'secrecy, rather than open and transparent government' (Farrell 2015b) and would offer just 'a minor saving at the cost of Australians access to information' (Dreyfus 2014). Up to this time the plan has not been realised: the amending legislation has not been passed by the Senate and hence the OIAC's functions formally remain, however its fate is unclear (Mulgan 2015; Farrell 2015c).

In the US, no significant reforms have been undertaken in the FOI review system even though the FOI Act has evolved substantially. In essence FOI review at the national level in the US starts with an internal review process. Applicants must first appeal decisions to refuse information to the head of the relevant public agency. If the appeal is denied either in whole or in part, the agency must notify the applicants of their right to pursue litigation in the federal courts.[99] If applicants receive no response from relevant agencies within the stipulated time limit, they can directly appeal to a court.

[98] The Australian Information Commissioner Act of 2010.

[99] clause [a](6)(A)(ii) of the US FOI Act.

The courts examine the matter *de novo* and the burden of proof is placed on the public agencies (FOI Rating). However, the courts are required to handle appeals with thorough consideration of whether the requested information falls within the scope of exemptions. In case the appeal relates to the issue of fee waiver, the court considers the matter *de novo*, but based only on the record before the public agencies (Banisar 2006).

The lack of a non-judicial mechanism for independent external review has been seen as a significant shortcoming of the US model. That was, however, partly addressed by the establishment of the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA) in 2007. [100] Among other tasks, the OGIS is required to make recommendations for FOI reform and to mediate disputes to alleviate the need for litigation.[101] However, the OGIS just acts as a mediator and its service is not a formalised appeal process.

Unlike in the Australian and US systems, the FOI review system in NZ includes no option for internal review and centres on the Ombudsman. The Ombudsman is the first port of call for applicants to complain about decisions they find unsatisfactory. There are two kinds of complaints made to the Ombudsman under the NZ Act: complaints in relation to requests for access to official information, and complaints in relation to requests for personal information or information about the ground of a decision made 'in respect of any person or body of persons in his or its personal capacity'. The grounds for complaints by requesters can cover: refusal to release information; charges and methods of information provision; conditions limiting the use, communication and publication of information; notice which neither confirms nor denies the existence of requested information; and extensions of time limits for dealing with a request.[102] Even broader grounds are set for complaints based on personal information requests. The Act allows a general right to complain about any decision made relating to personal information.[103] Those two kinds of complaints are handled by the Ombudsman under different jurisdictions and procedures provided for in the FOI Act and the Ombudsman's Act. The outcomes of Ombudsman's recommendations are also different: recommendations in relation to complaints about official information requests are binding if not vetoed by the Governor-General in Council, but those relating to personal information are not binding. The explanation for such differences is the concern that it would be inappropriate if the Ombudsman could issue binding

[100] The OGIS was created by the Open Government Act which amended the FOI Act (5 U.S.C. § 552).

[101] More information about responsibilities and work of the OGIS is available at https://ogis.archives.gov/about-ogis.htm, accessed 2/10/2014

[102] S.28 of the 1982 Official Information Act.

[103] S.35 of the 1982 Official Information Act.

recommendations on questions about legal rights (Danks Committee 1980). It should be noted that in the traditional view, as an agency acting as an avenue of last resort for aggrieved citizens, Ombudsmen are non-judicial bodies separate from administrative agencies and generally do not make enforceable decisions (Eagles et al. 1992). As no other merits review tribunal for FOI was established in NZ, its lawmakers gave the NZ Ombudsman the power, at least in relation to official information (and subject to any override), to make binding decisions. In practice, most of the workload for the NZ Ombudsman is to review denials of access. Although the Ombudsman's recommendations are not binding in all cases, and only limited sanctions are imposed for non-compliance, there have been only a few cases where public agencies have not seriously observed recommendations by the Ombudsman (Law Commission 2012). It is believed that the work of the Ombudsman, together with other implementation efforts, has made possible a noticeable shift in the focus of information policy from withholding information to considering under what circumstances and in what manner information, particularly that which might be seen as politically sensitive, should be released (Banisar 2006; Law Commission 2012).

Legislation in NZ does not explicitly provide that the Ombudsman's recommendations are open to judicial review. In fact, the legislation deliberately limits court involvement in FOI matters (Danks Committee 1980). In limited cases where applicants find themselves dissatisfied with the Ombudsman's recommendation or an overriding Order in Council they can bring a case to the High Court based on the ground that the Ombudsmen acted either beyond power or went wrong in law. [104] In practice, very few cases have been brought before the courts and the courts do not offer any significant guidance about FOI legislation in NZ (Law Commission 2012).

The piecemeal nature of legislation in Vietnam does not offer any specific process for FOI review but any FOI complaints or cases could be deemed to be an administrative dispute and the provisions of the Law on Complaints and Law on Administrative Procedures would apply.[105] Under these laws, the same grounds are set for both making a request for internal review of a decision and pursuing a lawsuit at court. The general grounds include an applicant's disagreement with the decision made by the state agency/court and an agency/court's failure to respond to an application within the stipulated time limit. At the earliest stage, when a citizen or an organisation does not agree with a decision by a public agency they can either file a request for review directly with the agency, or initiate a lawsuit against that decision in the administrative court.[106] In scenarios where the public agency or the court

[104] S.32b of 1982 Official Information Act.

[105] Art.1 of the Law on Complaints of 2011.

[106] Art.7 of the Law on Complaints of 2011.

fails to respond within the prescribed time limit or their decision is unsatisfactory, the complainant can file a second appeal, either to the higher public agencies or higher courts.[107] After that, based on similar grounds, complainants can take further action to lodge another appeal to the administrative court. [108] Yet, despite the seemingly broad grounds for citizens to challenge decisions by administrative agencies, there have been only a limited number of administrative cases and apparently no information access cases, due to a number of factors including the narrowness of information available and the non-litigious culture in Vietnam (MOJ 2015g, 2015k, 2015h; Supreme Court of Vietnam 2014).

2. Comparative analysis of FOI review systems

The above overview demonstrates the diversified approaches to FOI review in Australia, US, NZ and Vietnam. This divergence in FOI review systems is understandable, given the differences in legal systems, FOI policies, political environments and cultural settings. FOI experts share a belief that 'an effective, inexpensive and timely mechanism for reviewing decisions refusing access lies at the heart of a successful FOI regime' (Snell 2000: 604). Apart from exploring the reasons behind different FOI review systems, based on both regulatory and practical aspects, this section will critically discuss how and to what extent the systems influence the performance of FOI regimes. It also seeks to explain which factors have more impact on the functionality of a regime: strong provisions for FOI review or broader political and cultural conditions.

Figure 3 below offers a comparison of FOI review systems in the four countries:

Figure 3. FOI review systems under the legislation in Australia, US, NZ and Vietnam

Processes of FOI Review	**Australia**	**US**	**NZ**	**Vietnam**
Internal Review	Yes Before November 2010: prerequisite for external review From November 2010: optional	Yes (prerequisite for judicial review)	No	Yes (optional)

[107] Ibid.

[108] Ibid.

Review by External Independent Administrative Oversight Body	Yes Before 11/2010: the AAT for merit review, Commonwealth Ombudsman for complaints From 11/2010 to 31/12/2014: OAIC or AAT (at applicants' option) for merit review, complaints to Commonwealth Ombudsman Proposal for 2015 onwards: the AAT for merits review, Commonwealth Ombudsman for complaints	No The OGIS acts as a mediator. Review by OGIS is not a formalised process	Yes Ombudsman	No
Judicial review	Yes	Yes	Yes	Yes

At a glance, Australia seems to have the most progressive legislation offering all feasible mechanisms for FOI review, including internal review, review by an external independent administrative oversight body, and judicial review, plus the mechanism for the Commonwealth Ombudsman to assist with FOI complaints. The US and Vietnamese legislation provides no formalised mechanism for external independent administrative review, while NZ skips internal review. While Australian legislation highlights the route of external independent review (both specialist FOI Commissioner and general merits review tribunal), the legislation in NZ and US focuses on the Ombudsman and courts respectively. Vietnam remains a special case where dispersed legislation applies and treats both internal review and judicial review as equally important. In all these countries, judicial review is offered as a last resort for handling FOI disputes and complaints. Understanding what drove the adoption of these approaches and how FOI review systems perform in the four countries is necessary to identify the features of a good review system.

In comparison with the other three countries, Australia has proven the most active in reforming its FOI review system. When it adopted the FOI Act for the first time, unlike other Commonwealth

countries, Australia decided to take the internal review option believing that it would be a quick, cost-effective way to resolve conflicts between public agencies and applicants (Snell 2000). Internal review was expected to be successful and capable of preventing litigation because it gives a chance for the original decisions to be revisited and corrected relatively quickly, cheaply and at the source of the information. Additionally, internal review would be subject to a mechanism of external merits review which was believed to be an incentive for public agencies to act fairly at an early stage. Therefore, until 2010, lodging an internal review request was the first step that dissatisfied applicants had to take. However, in the course of implementation, mandatory internal review revealed a number of downsides, such as associated expenses and long delays in processing the review work. These factors were believed to have discouraged many people from using their review rights. That was a reason for the 2010 reform to define internal review as optional, allowing applicants to seek external review directly.

With regard to external review, Australia has followed an approach that is different from both the US model and its Commonwealth neighbour NZ. Australia designed its first model of external review with two objectives: avoiding procedural complications which were evidenced in the US system (Sheridan and Snell 1997), and enabling a cheap and effective scheme for reviewing FOI decisions (Snell 2000). As a result, a complex array of external review processes was created involving different bodies: the Ombudsman, the AAT, and the courts. That was expanded further by the 2010 addition of a mechanism for Information Commissioner merits review which offered a quicker time line and was free of charge, compared to the AAT. The Information Commissioner addition, however, was recently deemed by the government to create unnecessary overlaps and delays in resolving FOI cases.[109] The latest proposal is thus to restore the former model by disbanding the OAIC and restoring direct access to the AAT and Commonwealth Ombudsman. Amongst other purposes such as budget savings, removing unnecessary overlaps, and improving administrative efficiencies, the move is said to bring the FOI review system in line with the comprehensive reform of administrative dispute resolution which adopts a one-stop-shop model centred on the AAT (Attorney-General 2014).

Given its background as a common law country with a litigious culture (Hammitt et al. 2004), it is understandable that the US employs an FOI review system with judicial review as a focus. As time is critical for any FOI case, allowing applicants to directly appeal to the courts after internal review was seen as an advantage of the US regime because it enables applicants to receive an authoritative outcome in a shorter time. Another good feature of the judicial review mechanism under the Act is that it requires the courts to judge on a *de novo* basis so other issues, which have not been raised in

[109] FOI Amendment (New Arrangements) Bill 2014: Explanatory Memorandum.

the internal review, can also be examined if necessary. Additionally, as the burden of proof is placed on the public body to justify non-disclosure and a responsible officer would be liable to contempt of court if they fail to abide the court decisions,[110] other than resolving FOI cases, judicial review is also intended to improve both compliance and the culture of openness within public administration.

However, there is no doubt that litigation is a difficult and costly process that not every applicant can afford. Court fees and complicated judicial procedures are considered to be a deterrent to FOI review (FOI Rating). The FOI review system in the US has, therefore, been criticized for the lack of independent administrative review - a middle-ground and less daunting mechanism that would offer applicants, particularly those with simple cases, a cheaper and quicker way to solve their disputes. In an effort to address that problem, the OGIS was created as a mediator to help parties solve their FOI disputes. In addition, to ensure that meritorious applicants are not deterred from FOI litigation by fear of potential cost, the FOI Act stipulates that where the appellant 'substantially prevails', the courts may require the government to pay both reasonable lawyer fees and other litigation expenses.[111] However, in the view of many experts, such solutions are still incomplete and insufficient because mediation by the OGIS is just an informal process while FOI litigants are not only deterred by financial concern but also by other frustrations such as time and procedural complication (Mendel 2008).

Unlike the Australian preference for internal review, NZ rejected the internal review option believing it would make the FOI review system more complicated, expensive and slower (Rowart 1993: 218-9). There, the designers of the Act also feared that if internal review was employed, it might negatively impact as decision-makers would know their decisions could be reviewed later by senior officials in their own departments so that junior officials would play it safe and issue restrictive decisions. That would jeopardise the core objective of the Act: to facilitate open government (Law Commission 2012).

NZ shared the Australian and US view that, in order to establish and secure a culture of openness across public administration, it was crucial that FOI decisions by public agencies be reviewed by an independent body. However, NZ did not nominate courts or tribunals to play a central role in resolving FOI disputes but instead appointed the Ombudsman to handle the job as an experiment (Snell 2000). Alongside the experience of the Ombudsman in dealing with information related matters (Danks Committee 1980), other reasons for taking that option were an expectation that the Act and its

[110] subparagraph (a)(4)(G)

[111] subpragraph (a)(4)(E).

administration would be improved over time. Under the Act, the Ombudsman was given a role, not only to resolve FOI disputes, but also to serve a more general objective of gradually reducing the amount of unpublished information in a long process towards a more open government (Danks Committee 1980). More than 30 years of work by the Ombudsman in dealing with FOI matters (Banisar 2006: 113) has convinced the NZ government that it has taken the right option. Yet whilst the workability of the Ombudsman model is proven and there is always the option for applicants to seek judicial review if the Ombudsman's decision is unsatisfactory, many experts still find the review system in NZ to be problematic (FOI Rating). In their view, without internal review both applicants and public agencies lose the opportunity to correct any error in the original decision at lower cost and at an earlier stage. The experts also criticised judicial review as being of little help to complainants because the courts exhibit a high level of deference to the Ombudsman's rulings (FOI Rating). Such deference is understandable, given the judges' belief in the Ombudsman's expertise and experience, particularly when the courts have a minor role in FOI matters relative to their broader work (Law Commission 2012: 296).

Prior to the passage of the new Law on Complaints in 2011, in Vietnam internal review was the first avenue for applicants to complain about decisions by state agencies. During that time, the experience shared by most applicants was that internal review was a time-consuming, cumbersome and stressful process that often ended nowhere, or with a new decision affirming the original one. That fact, together with the prescribed condition that judicial review can only be sought after completing internal review, has discouraged applicants to engage in any legal battle to protect their legitimate interests and rights (Nguyễn 2011). The new law has attempted to address these problems by allowing applicants either to request internal review or to make a complaint directly to the administrative court. However, having their cases handled by courts is something many applicants would rather refrain from, given the costly, lengthy and complicated nature of legal proceedings, while the recently established administrative courts remain infamous for a shortage of expertise and independence, ensuring a protective attitude to public agencies (Quinn 2003). Nearly three years since the enforcement of the new law, except for an increase in the number of complaints lodged (the majority of which are related to land disputes), it has been reported that previous problems such as an unreasonable transferal of complaints, delays in handling complaints and limited accessibility to administrative courts remain (National Assembly Legislative Committee 2014). The reformed legislation has failed to live up to expectations. Once again, Vietnam evidences the need for improvement in its complaints and appeal handling mechanisms (Nguyễn 2014: 15-7).

To understand Vietnam's dilemma, it is important to note that public law and procedures in the country are driven by a belief that it is generally better to have a drafted decision thoroughly checked

than review a decision already finalised and issued (Hoàng 2002). That explains the orthodoxy that there are hundreds of laws prescribing detailed procedures for pre-examination and numerous bodies are tasked with such screening, but post-examination (merits review and judicial review) is almost ignored. Merits review and judicial review are assumed to be used just in case errors have not been detected through an earlier examining process (Uông 2002). In practice, dealing with complaints/appeals is one of the most undesirable jobs for public officials, including judges (Lam Hiếu 2014). Poorly-operated internal review, generating many frustrating anecdotal stories, discourages applicants from complaining about a decision to the very agency which has issued that decision. Meanwhile, appealing the decision to administrative courts is something beyond most applicants' abilities and means, especially when it is a statutory requirement that the appellant/plaintiff shall bear the burden of proof of substantive and legal errors that they think have occurred.[112] The administrative review system in Vietnam, therefore, is still experiencing serious problems: bad legislative design, poor implementation and widespread apathy. Taking all of these into account and given that the culture of secrecy remains dominant, it is arguable that if there had been any FOI case ever brought, it would have fallen into the same dilemma as many other administrative cases have done.

3. International standards and practical experiences of FOI review systems

As mentioned, FOI advocates commonly insist that to facilitate information access, an FOI review system should include several mechanisms: internal review, quick and cheap independent administrative review, and judicial review (Article 19 Organisation 1999). Internal review should be simple, quick, free of charge and, wherever applicable, needs to be done by a higher official or unit within each public agency with sufficient power to review and override, or to remit, the original decision. The role of conducting independent review can be placed with an existing body such as the Ombudsman, Human Rights Commission, general merits review tribunal or a specific body established for FOI review purposes. In all cases, the independence of the reviewers must be guaranteed both formally and financially and they should have sufficient powers to perform their functions and issue binding decisions. Judicial review should be a broadly-grounded option available to every applicant. To ensure that the cost to applicants does not deter FOI review, all kinds of review need to be free of charge, should not require legal assistance (judicial review aside) and the burden of proof must be placed on public agencies (Article 19 Organisation 1999).

[112] Art.8 of the Law on Administrative Procedures of 2010.

Based on the above standards and indicators, the FOI Rating was designed to evaluate review systems provided for in FOI laws around the world. The rating was formulated to give a maximum score of 30 points to the best scheme. According to the rating, the highest points of 29 were given to legislation in only three countries (Serbia, India and Maldives). Meanwhile, more than 40 other laws were listed in the low-range group, scoring between 2 and 15 points out of 30. Due to the exclusion of independent external review, the US FOI Act was placed in that group with only 14 points. The legislation in Australia and NZ both include independent non-judicial external review so each received 23 out of 30. As earlier noted, the Vietnamese legislation was not considered.

It should be noted that these legislative standards and rating indicators for FOI review systems were developed from the perspective of FOI advocates looking at formal legal processes, with very limited consideration of practical issues such as the cost for government and cultural restraints. The Australian and NZ systems were rated the same but that does not mean in reality that the two systems perform at the same rate or in a similar fashion. Nor does the US system receiving a lower score indicate that it is less successful. To develop a truly effective FOI review system, it is crucial to consider whether a good system in legislative design is actually capable of securing the functionality of an FOI regime.

Australia's first FOI review system which defined the roles of the AAT and Ombudsman was adopted in line with other common law systems. Realising that a willingness to embrace the new legislation could not be expected from public agencies in the early stages, and that a lot of refusals could be anticipated, Australian designers referred to the US litigation model and felt that poor compliance by public agencies should be dealt with in the open and public forum of an independent and enforceable tribunal. Finding no appropriate agency with the potential to accomplish the job but wishing to avoid resorting to complicated and costly judicial proceedings, Australia played it safe (Snell 2000). The Australian system had all the desirable mechanisms for FOI review: internal review, independent external merits review and judicial review. However, in the course of implementation, this system revealed many limitations: mandatory internal review created unnecessary obstacles because applicants had to complete internal review before seeking external review; AAT merits review was criticized for being costly and time consuming as that tribunal became quasi-judicial, with complex and cumbersome proceedings and formality but not always good quality decisions (Australian Law Reform Commission 1995: 117-8); Ombudsman investigation was not effective due to insufficiencies of both power and resources (Australian Law Reform Commission 1995: 121-2); and judicial review was little used as it took too long and cost too much (Law Society's Government Solicitors Committee 2011). The review system was criticised as a 'purely legalistic structure' capable of addressing only

a part of the broader problem in information management policy at different levels, including the bureaucratic, legal and political levels (Snell 2000: 608).

To fix problems with the existing system as well as reflecting growing global trends, the 2010 Australian reform established the OAIC as a dedicated independent agency for free of charge FOI review to share the FOI guardian role with the AAT and the Ombudsman. The two-tier system of external merits review was expected to be a breakthrough step in promoting FOI, capable of giving applicants a quicker, simpler and more cost effective mechanism for resolving FOI disputes, while at the same time reserving the chance for both applicants and agencies to resolve FOI matters via the AAT, the agency which had gained the most experience in dealing with FOI matters (Australian Government 2013). The 2014 plan to close the OAIC was seen as a retrograde step by those who argue that dismantling the OAIC would offer no help with the national budget problem, nor benefit either FOI applicants or administrative agencies (Timmins 2014). Studying the history of FOI against the broader Australian background offers an insightful picture into the FOI review system. The issue of FOI enforcement, particularly the performance of the review system, has been addressed from different points of views and purposes shaped by the policy of the party in government at various times. Before 2010, the Labor Party argued that cost and excessive delay in AAT review were the main causes of the ineffectiveness of the review system and were significant factors undermining the benefits of FOI (Australian Government 2013). By creating the OIAC the Labor Party advertised itself as a party with a strong and consistent commitment to democracy and good governance (Ludwig 2010). In 2014 the newly elected Coalition government cited budget deficits and efficient government to explain its plan to close the OIAC; many observers however allege these rationales mask a conservative tendency to resist FOI and open government (Tiffen 2014). FOI experts and advocates believe that problems in the review system are not linked to the OIAC model but are related rather to insufficient resources and lack of support from government (Mulgan 2014). Dismantling the OIAC, therefore, is more likely to be a step toward undermining transparency and accountability rather than a solution to improve FOI (McMillan 2015). Such differing views suggest the underlying problems with FOI transplantation and enforcement in Australia remain unclear: whether administrative efficiency in reality is code for less transparency; or whether two tiers of review (internal and AAT review) will suffice. Interestingly, regardless of the plan to close the national OIAC, the model of a specialist independent agency is retained in many states of Australia such as New South Wales, Queensland and Western Australia. Not only does that indicate Australia's dilemma in accommodating FOI but also it helps reaffirm the proposition that apart from the local context, the effect of any transplanted legal idea is greatly dependent on how the legal elites understand the idea and deploy the transplantation.

In the US, the judicially centred FOI review system remains almost unchanged since the enactment of the FOI Act. It was considered to suit the legal system and culture of the country. The model, however, later revealed some procedural hurdles as applicants, instead of having their dispute solved in a quick and simple process, have to engage in a long, costly and complicated court battle to gain access to information (Mendel 2008). It is also of concern that public agencies are still struggling with a backlog of appeals[113] and that under the impact of the recent battle against terrorism the courts show reluctance to confront the government's justification for withholding information when it asserts national security grounds (Fuchs 2006). In an effort to reduce the burden on applicants when applying for FOI review, apart from reforming court proceedings and requiring the government to pay court fees and other expenses when it loses, the OGIS was established to help applicants and public agencies to resolve disputes. Other measures are also being undertaken within public agencies to improve their capacity to deal with appeals, reducing both appeal processing time and backlogged appeals (Summary Annual FOIA Report for Fiscal Year 2014: 18-9).

Despite its weaknesses and detractors, the FOI review system in the US is working tolerably well and has improved over time. This is not to say that US internal review is a very effective mechanism, however it deserves praise for its low rate of delays and short processing time (Mendel 2008). The work of the OGIS as a mediator has practically reduced the amount of litigation, giving a chance for both applicants and public agencies to solve their disputes without going to court. The creation of the OGIS is the signal that the US system has started looking for a way to reform the FOI review process. A draft amendment to the FOI Act proposes that the advisory role of the OGIS should be enhanced and expanded so that the Office would be more capable of delivering its services (Center for Effective Government 2015). Given the strong role the judiciary plays in the US constitutional balance, it is arguable that the weight of judicial review does influence both applicants and public agencies: applicants are more confident to start litigation to gain access, while public agencies pay more attention to ensuring the correctness and fairness of their decisions in order to prevent court review. However, internal and judicial review in the US would not work so well without other factors - some of which have been discussed in other parts of the thesis - such as the strength of checks and balances, judicial independence, a culture of openness, a litigious society and a vibrant media (chapters 2, 4 and 5).

The FOI scheme in NZ was designed with much consideration given to its compatibility with the local context. Internal review has never been made an option while judicial review is just used as a last resort. Over the history of FOI in NZ, even though there were concerns about the design and

[113] For example, by the end of financial year 2013 there were 3,116 administrative reviews backlogged.

operation of the review system, no significant change has been made. In the view of some critics, internal review should be an option for information-seekers and public agencies to resolve their conflict before starting any external review. Other commentators fear that choosing a parliamentary officer (the Ombudsman) over the courts to do the main job may undermine dispute resolution under the Act because the Ombudsman does not have sufficient power to handle disputes (Eagles et al. 1992: 574).

However, using an experienced and respected Ombudsman to play a central role in handling FOI appeals has proven a good choice in NZ. The Ombudsman's office has employed broad processes to uphold the public interest while reprimanding public agencies for excessive delay and poorly processed requests (Law Commission 2012: 222). As envisaged by the Act's designers, expensive and lengthy judicial review is not a feasible option for most requesters and in fact the courts have been little used (Law Commission 2012). Similarly, the lack of a mechanism for internal review is unlikely to cause any great trouble in a country with a small population like NZ because the number of FOI complaints (around 1,000 a year) is within the working capacity of the Ombudsman (Law Commission 2012). Apart from appropriate legislative design, the success of the FOI review system in NZ would never have been achievable without flexible procedures and sufficient power being vested in the Ombudsman (such as the power to conduct investigations, and that decisions are binding in some instances) and, more importantly, without an increasing culture of openness.

For many years it has been observed in Vietnamese administration that both internal and judicial review have not been functioning effectively. The Law on Complaints and the Law on Administrative Procedures were adopted to provide a system for reviewing administrative decisions, but in fact inconsistencies between the two laws make the system malfunction. With regard to internal review, local officials can utilise the inconsistencies to suppress and dismiss complaints, for example by issuing ambiguous decisions so applicants are unable to find any reason to complain (Nguyễn 2011: 9-12). Meanwhile, filing appeals in the courts is extremely difficult due to procedural complications and the courts' inclination to avoid administrative cases (Nguyễn 2012: 19-26). Without judicial independence it is understandable that the courts often try to interpret their jurisdiction in a narrow way to refuse administrative appeals, while judges are also reluctant to remit decisions to administrative agencies (Quinn 2002: 248). The poor performance of the review system in Vietnam, therefore, has resulted from both legislative deficiencies, administrative limitations and a limited separation of powers.

Adoption of an FOI law will put further strain on the Vietnamese review system. If no proper administrative review reform takes place, it is unlikely that the current problematic system can work

to enhance FOI. As internal and judicial review both face significant legislative and implementation hurdles in Vietnam, alongside addressing those limitations it is worth considering the possibility of employing another mechanism for external independent review. The lessons in legislative design and actual operation of the review systems from Australia, the US and NZ appears consistent: an effective mechanism is the one that could offer objective and efficient (timely and cost-effective) review. If independence, power and professionalism decide the reviewing agencies' ability to give unbiased judgment, and review cost and procedures shape an applicant's practical access to review, it is obvious that the level of political support for any particular review mechanism will be strongly driven by expenditure requirements and tension between that scheme and the interests of executive government. Any mechanism, therefore, regardless of it being borrowed from outside or domestically made, should be preceded by a thorough cost-benefit analysis from the perspectives of both citizens and government and with careful regard to the local context. While strong and progressive legislation is desirable, it is not sufficient. Improvements in the implementation of the law, in the administrative system and in the courts remain critical challenges particularly as a culture of secrecy is still strong in most government agencies.

II. FOI OVERSIGHT BODIES: LEGISLATIVE AND PRACTICAL EXPERIENCES

FOI legislation is typically adopted with high expectations about its potential benefit to good governance and citizens' rights. However, similar to other democratic policies, poor implementation and failure to adapt to changing circumstances are hurdles for the objectives of FOI to be achieved. Ongoing oversight of FOI legislation, therefore, is crucial to achieving the legislative goals. Alongside different schemes for FOI review, an essential feature of FOI legislation is that some entities must be given power to oversee the overall implementation and ongoing development of the legislation. Discussion in this part of the thesis will focus on different models of oversight in the four countries surveyed and to what extent the models influence the implementation of FOI. In addition, the thesis also seeks to understand what factors would undermine - or boost the effectiveness of - an oversight body.

1. Overview of FOI oversight bodies in different jurisdictions

Among more than 100 FOI laws that have been adopted, ombudsmen and information commissioners are the two most popular models of oversight body. The model of ombudsman is more likely to be found in countries with older FOI laws, while information commissioners are often seen in countries with newer laws where the commissioner is assigned to play a specialist role dealing only with FOI matters (Mendel 2008). In some other countries, oversight activities are carried out by different type

of organisations, including courts, tribunals, government ministries or a combination of different institutions (Mendel 2008).

The 1982 FOI Act in Australia was not accompanied by the creation of a specialist agency to oversee the Act. Instead the Attorney-General was assigned to administer the Act, the Commonwealth Ombudsman was in charge of handling general complaints and the AAT was tasked with reviewing particular denials of access. In addition, the Administrative Review Council, which was established well before the FOI Act to give advice on development of administrative law generally,[114] was also expected to express its view on FOI issues. Nearly 30 years later the OAIC was established, being headed by the Australian Information Commissioner and supported by two other commissioners: the Freedom of Information Commissioner and the Privacy Commissioner. The OIAC's job was to look after FOI, information policy and privacy law. For the FOI functions, other than conducting reviews, the OAIC's jobs involve promoting awareness and understanding of the FOI Act; assisting agencies to publish information; providing information, advice, assistance and training on how to implement the Act; making reports and recommendations for legislative reform; monitoring, investigating and reporting on compliance; and collecting information and statistics to produce an annual report on the operation of the FOI Act.[115] The Office was thus an independent statutory agency to administer the FOI Act.

As discussed earlier, the conservative government is proposing to restore the pre-2010 model of oversight by dismantling the OIAC. It is proposed that the responsibilities of the OIAC will be transferred to different agencies: the task of providing advice, guidelines, and annual reports to the Attorney-General's Department; conducting merits review to the AAT; and handling FOI complaints to the Commonwealth Ombudsman. For the privacy function, it is expected that a new Office of the Privacy Commissioner will be created.[116] Other than budgetary saving and streamlining review, the plan is said to be a necessary step to improve the effectiveness of oversight activities.

Since a central independent oversight body has never been erected in the US, administration of its FOI Act is mostly decentralised. At agency level, public agencies are required to review and evaluate their FOI implementation. The agencies are to make annual report on their activities under the FOI Act to the Attorney-General, in effect to the Department of Justice (DOJ). Beside summary annual FOI reports, the DOJ is tasked with providing guidance and training for public agencies and representing the agencies in most court cases. Additionally, the DOJ must report to Congress on civil

[114] The establishment of the Council was stated in the AAT Act of 1975.

[115] The Australian Information Commissioner Act of 2010.

[116] FOI Amendment (New Arrangements) Bill 2014: Explanatory Memorandum.

actions under the FOI Act as well as to report on implementation of the Act. More than four decades after the enactment of the Act, the US established the OGIS to be a bridge between information-seekers and public agencies. The main responsibilities of the Office include: (i) reviewing compliance and policy and recommending policy reform to Congress and President; (ii) providing mediation services to requesters and agencies when they have disputes; and (iii) soliciting and receiving comments on the administration of the Act.[117] In late 2013, an FOI Advisory Committee was formed with a view to accelerate the advisory work of the OGIS. With members selected from both governmental and non-governmental sectors, the Committee is set to conduct research and provide advice and recommendations for improvement of FOI legislation and its implementation. In the view of many experts, the responsibilities placed on the OGIS are no different from the work of an agency with a central role in promoting FOI and FOI compliance (Holsen and Pasquier 2012: 223). The Office proudly claims that it is referred as 'the Federal FOI Act Ombudsman' by Congress. In fact, the OGIS has been playing an increasing important role in administering the FOI Act.

In the early days of the NZ Act, instead of relying on the existing Ombudsman (which reviews individual complaints), NZ recruited a new body to administer the Act, thinking that only an independent and empowered body would be capable of effectively promoting information disclosure. In addition to the State Service Commission, to which an information unit was attached to assist and advise other agencies on FOI matters, an Information Authority was created. It was given a five year working term and assigned both regulatory and monitoring functions, including reviewing legislation and practical issues and proposing action for greater publication of information. Despite bearing such a huge workload within a very limited time (with most of its members working on a part-time basis), the Authority was seen to do a good job, releasing an impressive number of discussion and background papers of broad range and high quality (Snell 2008). The Authority was, however, not continued when its term expired. At the same time, the NZ State Service Commission was no longer assigned any specific statutory function under the Act. The administration function was instead given to a new Information Unit within what became the Ministry of Justice, where the function was treated as low key. Later reforms in 1997 have ensured the Ministry of Justice plays a more coordinating role in administering the Act while the Ombudsman has become more involved in oversight activities. Apart from the unique statutory responsibility of conducting FOI reviews, the Ombudsman has engaged in policy review and education, including issuing guidelines and running seminars and training. There is a paradox that the Ministry of Justice has the main legislative function of administering the Act, yet most of the oversight work is now practically done by the Ombudsman.

[117] More information about the OGIS is available at the NARA website http://www.archives.gov/about/organization/summary/ogis.html, accessed 12/4/2015

With increasing engagement in FOI issues, the NZ Ombudsman in reality has been working as an independent oversight body which plays a role like that of the OIAC in Australia.

In Vietnam, the Constitution and laws state that the executive government shall be responsible for the general administration of every law. In doing this job each government ministry is assigned to administer legislation in the sector that ministry looks after. These responsibilities include drafting legislation, undertaking measures to implement existing legislation, providing guidance, conducting internal reviews of policy and legislation and reporting on implementation. Without any dedicated FOI legislation, the administrative work of information access is decentralised and implicitly vested in each sectoral ministry. There is, however, a more general role in the Ministry of Information and Communication (MIC), which is in charge of issues concerning publishing, post, telecommunications, and the internet, information technology, and general media such as broadcasting, the press and publishing houses.[118] The main objective of the MIC is, however, to ensure publication of information by state agencies advocating the state and party's policies,[119] rather than promoting the public's access to information.

2. Comparative analysis of FOI oversight body models

It is noticeable that the four countries compared here follow very different approaches in assigning the FOI oversight function. Distinct from Australia and NZ where the OIAC and Ombudsman bear the most oversight work, FOI administration in the US and Vietnam is shared among different institutions, focusing on government ministries. Interestingly, oversight bodies in the three western countries with dedicated FOI acts have changed considerably as the oversight responsibilities have been transferred between different institutions. Through comparative analysis of the status and operation of oversight bodies in the four countries, this section of the thesis seeks to understand and explain the factors that drive the effectiveness of oversight bodies and the conditions in which such bodies can work best to contribute to the success of an FOI regime.

The initial Australian model of FOI oversight, shared between the Attorney-General's Department and the Ombudsman, came to be seen as problematic. On the one hand, oversight activities were primarily focused on resolving individual claims, ignoring the other important tasks of generally monitoring and advocating for FOI. In fact, this model left the FOI oversight function fragmented. Further, there was always the risk of biased interference within oversight activities because the Attorney-General's Department was not independent from the executive government. Given that

[118] Art.2 of Decree on functions, duties and organisational structure of the MIC of 2013.

[119] Ibid.

agencies were still heavily inclined to secrecy and an independent oversight body was lacking, it was difficult for systemic problems with the Act or with its administration to be detected in a timely fashion. Problems were only identified in a piecemeal fashion, when information-seekers had sufficient means and will power to invoke an external review. All of these factors contributed to the underperformance of the regime and the FOI Act was thereby undermined.

After tireless campaigning, the OAIC was finally established in 2010. The establishment of this Commissioner as a permanent, dedicated, independent monitor and advocate for FOI was expected to be a breakthrough, capable of solving flaws in the regime. In addition to privacy and information issues, the multiple tasks assigned to the Office included scrutinising FOI administration by agencies, upholding a proactive disclosure culture within agencies, promoting public awareness of FOI, and recommending policy reform to government. Being resourced with just under 80 staff and a budget of around $10 million each year, the OAIC managed to deal with an increasing workload, resolving more than 1500 review applications and complaints, handling thousands of other enquiries and releasing various publications and submissions (OAIC 2014). However, as noted the OIAC is to be closed. Such a shutdown is understandable because the executive government is looking for budgetary savings and expects that the previous model of various non-specialist bodies, with some minor reforms, should be sufficient to carry out the oversight functions (Neilson 2014). From a different perspective, FOI experts believe any problem in the existing model is attributable to the fact that the OAIC has not been sufficiently resourced to fulfil the responsibilities of both a review and an independent oversight body (Mulgan 2014). The establishment of the OAIC and the controversial plan to close it present an example of how legal reform and its effect are dependent on political perception and support.

Similar to the Australian story, in the US the lack of a central independent oversight body was criticised as a serious shortcoming hampering the FOI Act. As the head of the DOJ, the Attorney-General is the chief law enforcement officer and the chief lawyer of the government, and can be nominated and dismissed at any time by the president. It is, therefore, arguable that the DOJ lacks the necessary independence to exercise its FOI oversight functions, let alone provide objective opinions on FOI matters, particularly those which are not favourable to the incumbent executive government. In addition, it is common in the US that different presidential administrations hold different views on FOI, so their instructions for implementing the Act are very different. Accordingly, oversight activities undertaken by the DOJ are more likely to reflect the pleasure of the government of the day than to promote and protect the core objectives and principles of FOI.

In such a situation, the establishment of the OGIS was seen as a welcome effort to address the shortcomings of the US FOI framework. Congress, having enough experience with executive-branch resistance to FOI, finally managed to have the OGIS attached to the NARA, separate from the DOJ, to share the oversight job. In contrast to the DOJ, which is tasked with defending federal agencies in FOI litigation and providing guidance and training to ensure agencies' compliance, the OGIS works to check if agencies comply with the FOI Act, recommends measures to improve the Act's administration and mediates FOI disputes between agencies and the public. Given a very limited budget of about US$1 million, six full–time staff and its few years of operations (Government Accountability Office 2013), it is understandable that the Office is still struggling with its job. However, its active and effective involvement in overseeing the FOI Act has impressed both the public and government. Strengthening the OGIS with greater independence and resourcing, expanded responsibilities and increased reporting requirements, is one of the core objectives of FOI reformers in the US (Westwood 2015). It is, therefore, arguable that the US has followed a gradual accommodation approach through which any reform of FOI review and oversight system has been transplanted with a cautious view of both the needs and conditions in the country.

Under the NZ legislative framework, FOI oversight work has been shared among the Ministry of Justice, the State Services Commission and the Ombudsman. However, in reality the Ombudsman bears the workload. The State Services Commission just plays a nominal role and the Ministry of Justice has in fact never undertaken some of its responsibilities (Law Commission 2012). By contrast, while the primary responsibility of the Ombudsman is to deal with FOI review and complaints, the body has gone much further than the legislation requires, being actively engaged in promoting, supporting and training for better awareness and implementation of the OIA (Law Commission 2012). Indeed, the Ombudsman's work has increasingly involved systemic issues and fostered public sector capability, revealing some of capacities of an independent oversight body. This is similar to the change of Ombudsmen in Australia and some other countries, where Ombudsmen have evolved from the classical role of handling individual complaints to embrace a systemic oversight role (Stuhmke and Tran 2007: 234-5).

Whilst this evolutionary adaptation has had some success in NZ, the lack of any explicit assignment of the oversight function to a particular agency has caused problems with the oversight and implementation of the NZ Act. Without a whole -of-government oversight, public agencies face a lot of difficulties in implementing the Act because crucial facilitators, such as central co-ordination, central statistics, and sharing of common operative issues, are missing. At the same time the purpose of the Act is not monitored and the role of championing open government is not vested in any one

body or person. That fact, in the view of the Law Commission (2012), has hindered the efficiency of the oversight function in particular and the effectiveness of the FOI regime in general.

In Vietnam, administration of general legislation on the distribution of information (both public and non-public) is among the responsibilities of the MIC. With regard to the distribution of information by state agencies, the responsibility of the Ministry is limited to drafting legislation and providing implementation guidance which is focused on the publication of information on websites and the application of information technology in the operation of state agencies (MIC 2014). As the legislation under the MIC's administration simply aims to prevent state agencies from disclosing any information that may harm the policies and reputation of the party and the state, the Ministry has almost no role in citizen-driven information access. In reality, the MIC acts like a public information guardian, not an information access champion. Even in playing that role, the Ministry is not allowed to work independently but must follow the lead of relevant units of the VCP. It is, therefore, very hard if not impossible to estimate whether the MIC could offer any advantages to information access. The work of the MIC does involve that of an oversight body but the Ministry is not sufficiently independent from the government. Given that fact, even if dedicated FOI legislation with more appropriate oversight functions was designed, it is questionable whether the Ministry would be the appropriate agency to carry out the job or some other more specialist and independent agency ought to be engaged.

3. International standards and practical experience

In the view of the Article 19 Organisation and other FOI advocates, to facilitate information access an independent administrative body should be established under FOI legislation, both to review decisions and oversee the legislation. On the one hand, the body should be given sufficient power to deal with FOI appeals. This includes, but is not necessarily limited to, power to conduct investigations, order appropriate remedies, and issue binding decisions. On the other hand, the body must have the overall responsibility of administering FOI legislation and be the central body responsible for FOI policy development, performance reports, education and promotion. In all cases, whatever the name or the model of the oversight body is, it is crucial that its independence be secured both politically and financially. In the FOI Rating scheme, the model of oversight body was measured as a part of the overall FOI review question. As mentioned earlier, among legislation in the countries that were qualified to be rated, the US received lower scores than Australia and NZ.

It is understandable that advocates insist on the status, power and independence of FOI oversight bodies. However, by itself, all features of FOI legislation need to be designed with regard to its

interaction with other legislation and broader political, social, cultural and financial conditions. From the perspective of good governance, FOI's mandate is to facilitate not only more accountable and transparent government but ultimately more efficient and effective government. Any FOI initiative, therefore, needs to be adopted with serious consideration of its feasibility and efficiency. In this way, with regard to oversight bodies, apart from the status, power and independence of the oversight body, it is also important to take into account its feasibility and efficiency, not only within FOI matters but also the broader context of its fit with administration and good governance. In other words, any model for an oversight body should only be selected through critical analysis of its costs and benefits from the perspective of both government and the public. The experiences in the countries surveyed here prove this.

Among the four countries, Australia appears to have learnt the most lessons in designing FOI oversight. In the past, the absence of a central, independent oversight body was identified as an impediment to administration of the FOI Act. At that time, a belief shared among politicians, academics and FOI advocates was that an independent OAIC would help address this problem. More recently the much anticipated OAIC has been perceived by government as creating unnecessary overlaps and procedural hurdles. The closure of the OAIC is proposed for reasons of resources efficiency and the office's effectiveness. From a neutral point of view, it is fair to say that it may benefit the public as a whole, but is not without cost to have the OAIC as an extra agency to oversee FOI in addition to the Attorney-General's Department and the Ombudsman and to review decisions in addition to the AAT. The hasty plan to abandon it, without a comprehensive cost-benefit analysis makes people wonder whether an independent information commissioner is unnecessary or is simply out of favour with the current government. Conversely, the current call in the US for FOI reform involves having more oversight responsibilities centralised in a sufficiently independent body. Over recent years, a reduction has been observed in the DOJ's role as an assistant for individual requests. That reduction is understandable, as people seeking information would not normally choose a public body, which represents other public bodies in FOI cases, as a source of neutral assistance, particularly when the OGIS, which represents no agencies, has a distinct and separate role in FOI promotion and compliance and is not located within any other executive agencies, is already in place to help. Although the Office is still facing challenges in accomplishing its responsibilities, its operation has been positive, given the small number of staff and limited budget. The increasing recognition of the benefit of the OGIS has motivated a plan to expand both the size and responsibilities of the Office so that it can work more effectively and independently (Government Accountability Office 2013). That said, establishing an office of information commissioner as a central independent oversight body is not an option that the US is considering.

The NZ model of oversight shows both legislative and practical benefits. The legal framework assigns the oversight function to different agencies but it has evolved in practice to be focused in the Ombudsman. Unlike the Ministry of Justice, the Ombudsman has statutory status and citizen service experience, both advantages in dealing with FOI matters. The benefit of an Ombudsman rests in its role of an independent mediator who generally understands both citizens and administrative needs, can work on systemic problems and does not publish reasons. Furthermore, as compared to a government ministry, the Ombudsman is the preferred option for most individual applicants, given the Ombudsman is not under the influence of government. In practice, the Ombudsman has done much more than the workload imposed by the legislation while the Ministry of Justice is inactive. To some extent, the Ombudsman has actually acted as a central, independent oversight body. Although the idea of having the oversight function centred on an agency is strongly supported in NZ, different views are expressed in relation to options for the agency in charge. The Office of Ombudsman is not recommended by the Law Commission as it prefers to have the Ombudsman's role focused on complaints and guidance, separated from responsibility for overseeing the Act's overall implementation and development. The view by the Law Commission is sensible, given the concern about the principle of 'nemo judex in sua causa' when a body is given the roles of both day-to-day complaints handler, and overall overseer and reformer. It is unrealistic to expect a body would critique its own review job, regardless of how rich its expertise and experience are. Meanwhile, a standalone information commissioner is not supported by the NZ government, which doubts the efficiency of such a body given the significant financial cost relative to its small population (Cunningham 2013).

With no home-grown experience in FOI oversight, Vietnam would benefit from the experiences gained in Australia, the US and NZ, particularly given that Vietnam is seeking to promote FOI and the model of oversight and accountability to adopt is one of the more controversial issues. Experience suggests that oversight functions should not be fragmented and a specific agency needs to be nominated to play a central role in carrying out those functions. A government ministry may be a budget-conscious option but does not seem to be apt, since the dependency relationship with government would diminish its neutrality in carrying out its oversight activities. Ombudsmen, who work in a quasi-judicial role to protect individuals 'where there is a substantial imbalance of power',[120] appear to work quite well in reviewing decisions under FOI legislation, but the model might only be workable in countries with an existing ombudsman with status and tradition. Even in some countries where ombudsmen are available, that office is not given oversight powers because that could cause conflict between the complaints jurisdiction and oversight function (the latter

[120] More discussion about the role of ombudsmen around the world available at http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php, accessed 02/03/2014.

involving assessment of the former). An independent information commissioner has become the preferred option in many countries; however, it is an option requiring attention to financial, legal, cultural and political restraints. Other alternatives may be worth considering, depending on the conditions in the country under discussion. Even though Vietnam is a country with a unique political, social and economic background, whatever the model of the oversight body Vietnam may adopt, it needs to be analysed with regard to not only cost versus benefit, but also how the model will align with the existing governmental system and whether the selected institution is sufficiently independent to undertake an oversight function.

III. CONCLUSION

Like other policies, the success of FOI legislation is largely measured by its performance in practice. Review and oversight of FOI are not only important in the way they may facilitate or hinder FOI performance but also to the extent they define the benefit of FOI to good governance and citizens' rights. Accordingly, there should be a mechanism under which individual FOI decisions of public agencies, or frustration caused by the legislation and its implementation, can be complained about or proactively detected and dealt with by a legitimate, independent, authority capable of exercising impartial review. It is also required that implementation of the legislation be closely monitored so any shortcomings in either the legislation itself or its implementation can be addressed in a timely manner. An efficient FOI review scheme and a proper oversight model, therefore, are among the key factors guaranteeing the effectiveness of the legislation.

The multiple- levels of FOI review and various models for a permanent, independent oversight body are ideal- types. There is, however, insufficient evidence to make a conclusion as to which review or oversight system is the most effective or efficient means for enforcing FOI. Despite campaigns globally to encourage adoption of 'standardised' FOI legislation, almost no effort has ever made to develop cross-national best practice for enforcing the legislation in countries with different political systems and different economic conditions. It is risky when legislative ideals are transplanted amidst high expectation but with little consideration of practical issues. In such cases, disappointment is inevitable.

The comparative study of legislation and practice in this chapter establishes that FOI review and oversight are two of most crucial tasks operationalising an FOI scheme. An appropriate legislative framework for FOI enforcement is a precondition for the functionality of the legislation. To make that happen, any option of FOI review and oversight should be studied with serious consideration of its pros and cons from both government and the public perspectives, and the local political and

cultural context, including financial and other resource requirements and related legal barriers. We also need to keep in mind that FOI can either underpin or undermine transparency and accountability, depending on the way FOI is understood, transplanted and accommodated. A weak oversight scheme is incapable of facilitating FOI enforcement but excessive administration may not help because accountability of administration can be overdone: just as plants cannot grow 'well if we constantly uproot them to demonstrate that everything is transparent and trustworthy' (O'Neil 2002: 19). Nevertheless, since FOI is about information, not decision-making power as such, its very purpose is to facilitate accountability and transparency. It is, hence, less of a concern to have strong FOI review and oversight systems than to have, for instance, too many avenues to appeal or delay a government decision.

Apart from the existing legislative and operational weaknesses, hurdles for FOI review and oversight in Vietnam also arise from the country's distinct challenges. Being an overpopulated, developing country, cost factors for any review and oversight mechanism will be a significant concern for Vietnam. It is not realistic for Vietnam to adopt a model that may involve large compliance costs, either to government or the public. In addition, as the court system is seen as an arm of government rather than being an independent branch, and the government and political system tend to secrecy and the idea of a single public interest rather than pluralism, full independence of FOI review and oversight cannot be expected in Vietnam in the short term. The idea of an 'integrity branch of government', which suggests that a variety of institutions should have a function to ensure 'integrity' in government, helping different organs of government act for their proper purposes (Spigelman 2004), is useful for Vietnam when considering the model of agencies to administer FOI. The Australian and NZ approaches in which the OAIC and Ombudsman exist independently of all government ministries, and review or investigate practices within such ministries, offer worthy experiences. Nevertheless, it is crucial for Vietnam that any objectives set for FOI review and oversight should be realistic and based on serious consideration of their alignment with both actual conditions and the possibilities of their potential for future improvement. This crucial issue will be discussed further in chapters 7 and 8.

CHAPTER 7. A SITUATIONAL ANALYSIS OF FOI REFORM IN VIETNAM

This chapter examines the potential for FOI reform in Vietnam. The chapter will assess both the need for legislative reform and Vietnam's readiness for such reform. It will then bring to light restrictions on - and opportunities for - promoting FOI in Vietnam.

The chapter will present an assessment of assorted problems associated with Vietnamese legislation and practices. This is followed by a critical review of both non-FOI tools, and objectives for FOI in Vietnam. The purpose of this critical assessment and review is to determine the best solution for the current problems with FOI. This enquiry suggests that, from a regulatory perspective, legislative reform is necessary. An examination of Vietnam's readiness for such reform is considered, both to ensure reform via legislation is the right option and to identify other factors required to effect the journey to FOI in Vietnam.

I. EXAMINATION OF THE NEED FOR LEGISLATIVE REFORM IN VIETNAM

1. Identification of problems with Vietnam's current FOI legislation and practices

Analysis in earlier chapters suggests information access in Vietnam is being hindered by both cultural and legal (legislative and administrative) weaknesses. The following three sub-sections summarise the problems which have been identified with the Vietnamese legislation and practices:

Legislative shortcomings

The existing piecemeal legislation does not provide an explicit definition of information and clear coverage, but instead offers a broad and vague definition of exemptions, infeasible review processes, and insufficient oversight. In addition, the legislation fails to facilitate the exercise of an individual right to request public information held by state agencies.[121]

Implementation failures

As access to information is dispersed and incorporated in a variety of pieces of legislation, information access is not a focused issue, and almost no efforts have ever been made to make it effective. Without soft-law (and in particular, guidance on implementing procedures), state agencies are free from the obligation to disclose information while the public is blocked from actively

[121] The shortcomings of the existing legislation on information access in Vietnam have been discussed in detail in chapters 3, 5 and 6.

requesting information disclosure. Levels of awareness about access to information remain low, with both state agencies and the public having a very limited understanding about their obligations and rights under the legislation.[122]

Unfavourable conditions

The dispersed legislation on information access is not enhanced by the local context, given that Vietnam is a developing, populous country with a weak economy and an immature democracy, evidenced by poor accountability and transparency mechanisms, a state-controlled media, and limited elections.[123]

Restricted by the factors described above, the disclosure of public information held by state agencies remains very limited. Proactive publication of information has not been seriously undertaken by state agencies. Meanwhile, passive reception is the primary formal way for citizens to get access to information. The limited availability of public information has failed to stimulate good governance, given that the public does not have sufficient means to check on the work of government, while government lacks incentives to be accountable, transparent and efficient.

Given that the poor performance of the existing regulatory framework is rooted in the substantive insufficiency, lack of implementation efforts and disadvantages created by the local context, it is crucial that FOI reform in Vietnam should be adopted as a package with attention paid to all of these matters. Dealing in a piecemeal manner with formal or legislative issues while ignoring the wider context will be insufficient and destined to fail.

2. A surgical look at non-FOI tools

Below is a brief and critical review of non-FOI tools that are expected to facilitate the flow of information in Vietnam, drawn from foregoing discussion in chapters 3 and 4.

Constitutional protection of FOI

In Vietnam, a constitutional provision cannot be self-enforced through the courts; rather a legislative regime is required whereby a statute must detail implementation measures to enact the relevant constitutional principle. Without a specific law, other than representing an expressive value, the constitutional recognition of 'the right to be informed' has proven incapable of guaranteeing practical

[122] Arguments about Vietnam's FOI implementation failures are presented in chapters 3, 4, 5 and 6.

[123] Refer to chapter 3 for detailed discussion about Vietnamese local context.

access to information.[124] In 2013, the new Constitution re-titled its, in principle, recognition of 'the right to access to information' in the hope that this linguistic change would enable a significant shift in information policy and practice: information access is no longer to be understood as an entitlement 'to be informed', but as a right that empowers people to proactively request state agencies to release information. However, as no follow-up legislation has been adopted, the constitutional protection of the right to access information remains in name only.

Piecemeal legislation

The legislation requiring state agencies to make public information for certain purposes (such as on the introduction of new legislation, the conduct of public consultation about construction plans, or the live broadcast of important meetings of the government and the National Assembly) has failed to work as an alternative to FOI legislation. The inconsistencies, ambiguities and restrictiveness of the existing, piecemeal legislation allow state agencies to either publish or withhold information at their discretion.[125] This has led to routine publication of information not becoming a procedural requirement for state agencies, and the flow of information being highly dependent on the will of each agency. In addition, the Ordinance on Protection of State Secrets, with its broad and unclear definition of state secrets, is an effective road block for any initiatives to encourage state agencies to disclose information. Hence, without appropriate measures to deal with that Ordinance, any reform of FOI in Vietnam will be significantly hampered.

Freedom of expression and freedom of the press

These fundamental freedoms are incapable of indirectly achieving an acceptable level of disclosure in Vietnam as there is a continual struggle to implement them. Freedom of expression remains nominal because, other than a single constitutional clause which has no direct effect, there has been no other legislation or any further political step taken to facilitate the exercise of the freedom. Meanwhile, the constitutional protection of the press has been practically undermined by a bundle of restrictions against the media and journalists established by and under several pieces of legislation including the out-of-date Law on the Press. Therefore, nominal freedom of expression, a dependent media and monitored journalists are additional issues to consider when designing FOI reform.

It is apparent that in Vietnam non-FOI tools have failed to work when assessed against their primary objectives, let alone to stimulate a proper information flow. However, this is not to say that non-FOI

[124] Refer to discussion in chapters 3 and 4.

[125] Chapters 3 and 5.

tools are worthless, but rather that the evidence in Vietnam to date indicates that these liberal mechanisms are seriously suffering from both legislative and administrative inadequacies, in addition to a lack of political support. Given this fact, and given the best practices discussed earlier in chapter 4, it is arguable that improvement of non-FOI tools is an integral part of improving information access, but improving non-FOI tools alone will not necessarily suffice to promote FOI in Vietnam.

3. Objectives of FOI reform in Vietnam

Inappropriate objectives set for information access were among the underlying reasons for the failures of earlier attempts to reform FOI in Vietnam. As the primary legal framework for FOI, the 1992 Constitutional recognition of the citizens' right to be informed was expected to be a breakthrough enabling the public's access to information so that it could effectively play the role of 'supreme master' of the nation, and to promote human rights and democracy (Nguyễn 2012). However, in practice, the right turned out to be ineffective and far removed from achieving any of its objectives. From the perspective of legal transplantation, the failure of the right can be explained in the following way:

Firstly, the recognition of the right to be informed was not motivated by a genuine desire to promote human rights. It should be noted that when the 1992 Constitution was designed, socialism had collapsed in many countries, and Vietnam, which had just adopted the Đổi Mới policy, was eagerly expanding its friendships with western countries and joining international organisations (Nguyễn 2012). Recognising human rights was largely used by Vietnam as a means to convince the international community of its new policy and commitment to human rights and democracy. However, in doing so, Vietnam merely referred to several key international treaties, borrowed the language of rights (Nguyễn 2012) and modified and recognised them in the new constitution without consideration of the nature of those rights and the local context. Other than that recognition, Vietnam is yet to make any concrete efforts to enforce those rights, let alone to accommodate them in Vietnamese political and cultural conditions. In this regard, FOI was simply imported into Vietnam as a broad ideal without any subsequent means for its evolution. Given these facts, it is arguable that the recognition of rights, including the right to be informed, was made to gain public confidence and international support for Vietnam as a short-term political project, rather than a far-reaching strategy of advancing human rights or better governance.

Secondly, the core principles of the principal right were not observed. In both the UDHR 1948 and the ICCPR 1966, the right 'to seek, receive and impart information' (i.e. FOI) is laid down as a human right with the following core principles: everyone has the right (universal eligibility); right holders

can get access to information either by actively requesting public agencies to disclose information or by passively receiving information publicly available (complete entitlements); and the right must be not limited in any way, unless otherwise provided by law as necessary to protect the rights or reputation of others, national security, public health or morals and must be provided by law (strict conditions for limitation).[126] Meanwhile, under the Vietnamese Constitution, FOI was reduced to 'the right to be informed', offering restricted eligibility (only Vietnamese citizens are eligible) and limited entitlements (rights holders are deemed to be passive receivers of information, not in a position to actively ask for information from public agencies). Unfortunately, such a limited right is even further undermined by broad grounds for limitations (the limitations are as provided by any laws, a broad category of override, including those issued by a government minister, chairman of a commune or even a senior executive official, regardless of the purposes for such limitations). Hence, the Vietnamese constitutional right to be informed presents different features and appears to be defined as a group or collective interest, than the strict or enforceable 'right' as FOI envisaged by international law.

Thirdly, the benefits and principles of FOI were misrepresented. On the one hand, Vietnamese legal elites set apparently ambitious goals for FOI as an important human right capable of not only ensuring citizen mastery over the state and society, but also of accelerating other human rights and democracy in Vietnam. On the other hand, they intentionally narrowed FOI by defining it as a mere 'interest' of the citizenry and putting extreme restraints on its performance: citizens can only collectively exercise the 'right' by receiving information provided by state agencies; but any agency or official in charge can impose restrictions on such provision, without any obligation to provide grounds for such restrictions. In addition to the paradox between ambitious objectives and limited recognition, the 'right to be informed' was further weakened by the fact that the Vietnamese designers totally ignored the local context, adopting the concept with more attention to political purposes rather than its practicality. In the existing literature in Vietnam, although FOI is constitutionally recognised as a 'right' of the citizenry, it is largely described as a human right (Thái 2010). However, because a prejudice against 'human rights' prevailed amongst politicians and legal elites traditionally, there was a lack of political support for FOI. In fact, over more than 20 years of FOI recognition, Vietnam has shown little enthusiasm for FOI enforcement: the country has neither enacted any dedicated legislation to implement it, nor has it changed the unwritten principle that the constitutional provision is not enforceable via courts.

[126] Art.19 of the UDHR 1948 and the ICCPR 1966.

Fourthly, the constitutional recognition of the right to be informed was designed to be the centre of the FOI regime in Vietnam. Unfortunately, it has been clearly proven that whilst a constitutional protection of FOI may be desirable, it is neither essential nor self-sufficient in securing information access (chapter 4). In reality, without adequate support from legislation on information access and other dispersal methods, FOI under the 1992 Constitution has proved nothing more than recognition in name only.

In view of the above discussion, it is suggested that the way Vietnam adopted 'the right to be informed' is problematic, without any awareness of legal transplantation theories and practices. The motivation for the right was deliberately exaggerated by political elites whilst neither legal autonomy nor limited legal autonomy of FOI was respected. The systems and legal evolution theories were not considered either, given the right was imported without both thorough understanding of FOI and the Vietnamese legal, political and cultural conditions and sufficient accommodating effort. Poor performance of the right to be informed was, therefore, inevitable.

In the context that even to date the literature about legal transplantation remains poor in Vietnam, it is understandable that none of the dominant legal transplantation theories was taken into account by the 1992 Constitution's designers. In 2013 the new Constitution was regarded as including a welcome measure to address the problems with FOI in Vietnam. In addition to attempting to create a chance for citizens to request information by labelling the value as a 'right to access information', it is believed that other constitutional reforms such as strict conditions for placing limitations on human rights and citizen rights which are to only be allowed when necessary to protect 'national defence, national security, public order, the security of society, or social morality' will better enable the effective protection of FOI in Vietnam (MOJ 2014). Admittedly, the new constitutional recognition of FOI in Vietnam has adopted most of the core principles of FOI under the UDHR and ICCPR. Regrettably however, these changes were proposed and approved by merely looking at problems from a practical perspective (MOJ 2014), not the outcomes of a sound understanding and serious consideration of FOI, the Vietnamese context and legal transplantation. As the concept of collectivism maintains a strong influence, the new Constitution ignores a proper respect of constitutional rights, not listing 'respect for rights of others' as a condition for the exceptional limitation of rights. Without the principle of respecting others' right, if there is any conflict in execution of different rights, any right could be at risk of being prejudiced. For example, personal information (privacy) might be unfairly disclosed in response to an information request. In addition, the Constitution retains a narrowing focus on FOI as a citizen's right. Accordingly, even though FOI is constitutionally now stated to be an individual right, it practically remains as a group interest subject to the whim of the party rather than legal means of redress, for which implementation is much restricted. As long as the

constitutional provisions have no direct effect, significant change in the local conditions or perception of FOI cannot be expected in a short time. It is therefore not likely that the recent constitutional reform alone can solve the problems with FOI in Vietnam.

In addition to constitutional recognition being at the centre of the existing FOI regime, information access in Vietnam is regulated through a variety of legislation. In these cases, the primary objectives of information provision are to serve the central but limited interests of the legislation (for instance, publication of laws is to assist law enforcement, disclosure of land use plans is to provide legal grounds for land acquisition, while information provided by media is to advertise the party's and the state's policies). The objectives of information access in existing legislation, therefore, are variable and in some case even opposed to those commonly set for FOI (MOJ 2015a, 2015b, 2015d, 2015e, 2015g, 2015h). Given that provisions for information access are enshrined in different documents, issued under different circumstances and are without any consistent, unifying goal for the promotion of information access, their substantive inconsistencies, insufficiency and poor implementation is understandable.

Currently, Vietnam is working on a new draft of a Law on Information Access (ATI Law). The MOJ has been assigned to take the lead, and has enthusiastically proposed a bundle of objectives for the Law, saying it will not only fix all the substantive and implementation problems with FOI in Vietnam, but also stimulate protection of human rights and other citizen's rights, promote participation and better decision-making, strengthen the rule of law, and even facilitate the improvement of the business environment, the advancement of the economy and the fostering of international integration (MOJ 2015a, 2015b, 2015d, 2015e, 2015k; Government 2015a, 2015b). The Ministry claims that the Law is being developed based on the constitutional recognition of FOI as a liberal right for citizens and emphasises the right to request information. It is unclear whether the Vietnamese designers simply misinterpret FOI and its interrelation with the local context, or whether they intentionally exaggerate the benefits of FOI to signify the importance of the Law. However, it is questionable whether such ambitious objectives are presently achievable, given Vietnam's immature democracy and developing economy.

As outlined in Chapter 3, as FOI in Vietnam faces many challenging disadvantages (notably the local economic and cultural conditions and variable political support), it is unrealistic to expect that all the potential benefits of FOI can be achievable for Vietnam. The objectives of FOI reform, therefore, need to be carefully tailored with regard to the country's existing conditions and prospects for improvement. Also, the objectives should be determined through critical thinking about FOI and its benefits, not merely looking at idealised expectations. Considering the current political and cultural

conditions in Vietnam, it is arguable that the objective of implementing FOI as a human right is not feasible. Meanwhile, the indirect benefits of FOI to economic growth or international integration should not be overstated since FOI is one among countless secondary factors that might contribute to these advancements. Instead, considering the culture of collectivism with its only very nascent liberal democratic tendencies, as well as political will and fit with embedded institutional structures, it would be a more realistic aim to emphasise the role of FOI in 'good governance'. That particular objective is also congruent with legal transplantation theories and practices,[127] which require realistic expectations of FOI and attention to the local context rather than unthinking transplantation (Nelken and Feest 2001).

Given that information access in Vietnam presently suffers both substantive legal and bureaucratic impediments, and that the constitutional recognition of FOI has only indirect value and its current dispersed implementation is limited, enactment of a specific FOI law is an essential step toward FOI in Vietnam. Such a law however should not be considered as a tool merely to implement the constitutional recognition of the right to access information, but to create and nurture an official, regular and sufficient flow of information. On the one hand, the law must be substantively sufficient to create a legal framework for proactive disclosure of information by state agencies. On the other hand, it must correct the limitations of the constitutional protection for information access, ensuring that individuals have the right to request state agencies release information. Overall, by making more and more information publicly available, such an FOI law ought to gradually improve governmental processes, enabling a better flow of information to promote good governance.

With a dedicated FOI statute with the primary mission of facilitating good governance, FOI in Vietnam can in theory have the common features of a feasible FOI regime: it will be centred on a practically essential law, backed up by a desirable but less practical constitutional guarantee and other dispersed methods. Practically, such a dedicated law will facilitate a change in both public and politicians' perception of FOI as a mechanism for improved transparency, accountability and efficiency rather than a guarantee of an individualised human right, a concept still somewhat foreign to Vietnamese legal culture. Further, even though the core objective of this FOI reform would be good governance, it is still realistic to anticipate that the reform will have some future contribution to liberalisation - as an 'epiphenomenon' - to the extent that Vietnamese people may start to see themselves less passively, as citizens with a meaningful and legally implemented entitlement to require things from government (in this case certain information). It is also possible that as more

[127] See discussion in chapter 3.

information becomes publicly available, this will help create more functional and dynamic non-FOI tools (such as a more active media) that in turn will effectively underpin the flow of information.

II. EXAMINATION OF VIETNAM'S READINESS FOR LEGISLATIVE REFORM

This section examines whether Vietnam is ready for effective reform of FOI. The examination is based on analysis of a number of issues that are closely interrelated to the adoption and implementation of an FOI regime. Even though the present thesis has identified slow progress in the democratisation process, a degree of unwillingness on the part of the government in terms of accountability, unclear public trust in government and poor record management, nonetheless it still finds a degree of readiness to support the adoption of new FOI legislation in Vietnam.

1. The democratisation process

Since Đổi Mới beginning in 1986, the VCP has insisted that democratisation is one of the main objectives of economic and political reforms in Vietnam. As mentioned in chapter 3, in spite of apparently strong rhetorical commitments, democracy remains primarily a political slogan, challenged by the maintenance of a single-party state with limited elections, controlled media, a culture of secrecy, a lack of accountability, the prevalence of corruption and a reluctance to drive political reform. Nevertheless, the democratisation movement continues and gives hope for FOI reform, given the following set of recently emerging factors.

The new Constitution and its potential benefits to democracy

In the view of many onlookers, the 2013 Constitution is another example of Vietnam's refusal to reform politically (Nguyen 2013; Bui 2014). Disappointment is generally expressed over its maintenance of the VCP leadership, the model of state apparatus and power distribution, VCP-controlled elections and a limited recognition of human rights (Ponnudurai 2013). However, it is undeniable that the Constitution does contain some new features that may benefit the process of democratisation in Vietnam. The most noticeable reform is a stronger protection for constitutional rights. The Constitution now allows only the National Assembly to enact laws to limit the exercise of human rights and citizen rights, and clearly states that any limitation should be subject to conditions. By doing so, the 2013 Constitution has corrected shortcomings in the previous constitutional arrangement, which allowed dozens of government agencies to enact such laws with no conditions applied. Substantively, with both grounds and authorisations for limitations of rights being narrowed, the constitutional guarantee of rights in Vietnam moves closer to international standards. Technically, the restricting the exercise of rights is no longer at the discretion of state agencies but must be

grounded on prescribed conditions and follow a strict legislative process. Despite human rights in Vietnam still being regarded as social attributes rather than individual rights (Gillespie 2014), such change is a good starting point, although there is still much work to do to fully implement the constitutional recognition of rights.

In addition to rights protection, some other constitutional amendments can be seen as progressive reforms in substantive terms. For instance, in the execution of state powers, the Constitution for the first time requires 'control' among legislative, executive and judicial agencies,[128] which allows some level of 'checks and balances' among these agencies (MOJ 2014). The responsibilities of the National Assembly and the government are redistributed with a view to removing overlaps and to increase efficiency (MOJ 2014). Within the executive branch, collective responsibility can no longer be used to overlook poor performance by individual officials because individual responsibilities are clearly defined, being separated from the responsibility of the government as a whole.

However, it should be noted that these constitutional reforms and their benefits are assessed based on their substantive promise only. As the Constitution does not have direct effect, and it will be a considerable time before implementation laws are enacted and enforced, it will take many years before we can determine whether the 2013 reforms bring actual benefits to democratisation. In addition, it is important to keep in mind that the actualisation of such reforms is highly dependent on how the political scene and other contextual factors (e.g. the economy and civil society) in Vietnam evolve.

Softened official attitude towards democracy and human rights

In 1990s, driven by Đổi Mới and the need for global integration after the collapse of the Union of Soviet Socialist Republics and the Eastern European regimes, democracy and human rights were first recognised in Vietnam. However, as a socialist country with a long acceptance of Confucian culture and conserving collectivist Marxist-Leninist ideals, instead of promoting a democratic society in which human rights are respected, Vietnam has in practice continued to consolidate a collective society where national unity and solidarity override other interests (Gillespie 2014). With 'thick conceptions of human rights' and other democratic values restrained (Gillespie 2014), the Vietnamese government has often used cultural difference, economic weakness and limited public education as excuses for the limited development of human rights and democracy in Vietnam. Another reason for the political resistance to human rights is the fear that the party leadership might be challenged by the

[128] Art.1 of 2013 Constitution.

people once human rights are adopted as individual rights enforceable against the government (Thayer 2013).

Nevertheless, in tandem with these formal political commitments and constitutional reforms, recently there have emerged a number of prominent reformists among party members, who publicly blame the political system for both slowing the economy and blocking the democratisation movement (Thu Hà 2015). In an unusual action, top VCP leaders have officially admitted to and apologised for those weaknesses and failures, which have contributed to inequality, corruption, economic stagnation and social instability (Thu Hà 2012). Notably, during the historic visit to the US, the head of VCP joined the US President in committing to promote and protect of human rights and strengthen democracy (White House 2015). In the context of Vietnam's political system, where all significant reforms must be initiated at the top level, once party leaders have started to embrace a common view of human rights and democracy, a shift in overall party thinking can be expected. The consequent re-direction of will can then create an environment conducive to embracing more specific ideals that will enable government to take a reform path. These ideals include the following.

Emergence of a more dynamic civil society

Despite the fact that civil society has been widely transplanted and there are a number of decrees and laws providing the legal framework for the establishment, function and interaction of individual organisations with government agencies, the concept of civil society is yet to be officially recognised in any legislation in Vietnam (Bui 2013a: 77-93). Disagreement is widely expressed over core issues, such as what should be defined as civil society and what role civil society would play (Kurfürst 2012). Meanwhile, the relationship between civil society and the state is sometimes strained by the fact that the government reserves the right to restrict the work by any organisation or association that may negatively impact on the confidence of the party and the state (Kepa 2011). Putting aside the dominant Marxist-Leninist ideology, it is believed that the model of a single party state, rampant corruption and the lack of transparency are significant environmental factors inhibiting the improvement of a stronger civil society in Vietnam (Nørlund 2007: 68-90).

However, many important changes are enabling civil society to move from the background to the forefront of the political theatre in Vietnam. One of the most important changes is the approach to the relationship between the state and civil society. In the past, all organisations were supposed to entwine with each other and with the state, working to promote the policy of the party and the state (Kepa 2011). But the Đổi Mới, with its liberal reforms, has allowed organisations to take different forms, have different functions and pursue different objectives (Nørlund 2008: 4). In that time, many

organisations have grown or been established independently from the state and with many features close to those of civil society organisations in the common or western sense (Hannah 2005), being engaged in more challenging advocacy about democracy and transparency (Nørlund 2007). Without doubt, the perception and role of civil society in Vietnam has started to change and efforts have been made to find new and more pluralist roles as well as to give more space for civil society initiatives. At some level, civil society has been accepted by the state and the party (Bui 2013a). Although civic organisations do not have a strong voice to influence governmental policy directly, their impact has been real, being as one of the instigating factors for changes in the overall direction of the country (Nørlund 2006).

2. Public trust and the willingness of the government to be accountable

Public trust is generally defined as 'holding a positive perception' of the operations of government, and is driven by the expectation of government performance and experiences with service delivery (OECD 2013). It is very hard to precisely measure trust, and the level of trust does not necessarily reflect the level of democracy and economic activity in any country one cares to assess.[129] That is why many researchers seek to identify an optimal level of trust instead of attempting to assess the level of trust in particular countries (OECD 2013: 26).

Trust is one of the crucial elements in governance everywhere. Open policies with a focus on FOI are widely recognised as a potentially valuable tool for governments to build public trust (OECD 2014). Within the context of government in Vietnam, public trust and FOI reform are also interrelated. As a public policy, any FOI initiative depends not merely on political support but on public confidence, cooperation and compliance. On the one hand, public trust is needed to secure FOI reform and its utilisation. On the other hand, by adopting an effective FOI regime which proves strong political willingness to openness, the Vietnamese government may gain some more confidence and support from the public. An increased level of trust from the public, accordingly, would help to improve the efficiency and effectiveness of the work of government.

In a survey taken in 2007, about 91% of participants in Vietnam said they had confidence in the national government (Naurath 2007). Such a high level of confidence was explained by referring to prior improvements in living standards and economic optimism. The survey suggested that the Vietnamese would continue to accept economic growth as an excuse for sacrificing basic freedoms

[129] A recent study shows that public trust in the OECD countries is experiencing a slowdown and average percentage of the confidence in national governments in OECD in 2012 is just 40%, even slower than in BRIICS countries (54%) in the same year (OECD 2013).

(Naurath 2007). From cultural and other contextual perspectives, the finding of a Vietnamese preference for economic growth over freedoms is understandable. In the context that many people still recall the horror of the famine of 1945 (Gunn 2011) and the pain of the subsequent wars (Richardson 2015), while others are still struggling with poverty and other hardships (UNICEF VietNam), a desire for future economic growth and a higher living standard is natural. Still, the high level of confidence in the survey is questionable given it was taken through face-to-face interviews, as Vietnamese people may hesitate to openly express their views about government. In addition, a lower level of confidence in government might be expected if a similar survey were conducted today, because disappointment in government is likely to have increased over recent years due to the economic slowdown, exposure of widespread corruption and an escalation in South China Sea disputes. Moreover, as it is more important to judge confidence in government based on the quality or depth of such confidence, and not merely the number of respondents who baldly say they trust their government (OECD 2013: 26), the 2007 survey results do not prove that the Vietnamese government is doing a good job, let alone that the Vietnamese people believe in and support every policy and program initiated by government.

It remains important to consider the level of trust in government as evidence of Vietnam's readiness for FOI reform. Since FOI seeks to establish a more open, transparent, efficient and effective process in governmental operations that benefit society broadly, it is likely that most Vietnamese people will welcome FOI reform as long as it is not undertaken just for appearance or political gain. FOI reform should be focused on improving confidence to a certain optimal level, rather than reaching the unreasonable levels of confidence. FOI reform should be adopted as a feasible measure for good governance, not as a way to advertise government. Therefore, designs for FOI reform need to be considered with attention to their feasibility, instead of theoretical benefits. Once a feasible FOI regime has evolved, it is likely to contribute to the overall improvement of public trust, both in degree and kind.

In addition to public trust, accountability is another issue relevant to assessing Vietnam's readiness for FOI reform. Accountability in this context refers to the process whereby government agencies are supposed to account both politically and legally for their performance and the public, who trust or delegate the agencies to exercise state power, has sufficient means to check the work of government (Sebina 2006). Information access is a useful tool for enabling accountability, especially where government agencies proactively release information about their work and at the same time the public has the right to request the agencies to publicly disclose information. In turn, if a culture of accountability is generated, more information will be made publicly available or be publicly requested.

Despite attracting more interest in Vietnam, accountability remains a long-term problem inhibiting political and economic reform. As long as policies and processes leave broad room for government agencies and officials not to be held accountable for their work, a lack of governmental accountability is inevitable. Chapter 3 listed a number of obstacles to effective accountability mechanisms in Vietnam, including the VCP's absolute leadership that overrides any accounting process; the restricted election process which makes elected positions more accountable to the party than to voters; the dual roles of party members and public servants and their overlapping responsibilities which are often used as excuses for the poor delivery of public service; the government's half-hearted approach which undermines the anti-corruption effort; and the lack of opposition due to the limitation of basic freedoms, particularly freedom of association, freedom of the press, freedom of expression and FOI. In a number of international studies, governance in Vietnam, particularly as measured on an accountability index, was rated very low.[130]

Nevertheless, an improvement of accountability mechanisms in Vietnam is not a hopeless quest. Overlapping responsibilities among agencies are likely to reduce because the main legislative shortcomings (such as the absence of checks and balances in the execution of state power, and unclear definition of powers and duties that leave room for politicians and leaders to enjoy freedom from accountability) have been partly addressed by the 2013 Constitution and subsequent laws concerning the roles of the National Assembly, the People's Courts, the People's Procuracy and the Government.[131] An increase in accountability is to be expected, given that the newly-adopted mechanism of personal accountability makes government officials now subject to individual scrutiny. In addition, basic freedoms might be eventually implemented as a number of bills, including an Access to Information Law, a revised Law on the Press, a Law on Association and a Law on Demonstrations, are being prepared for approval by the Government and the National Assembly.[132] These mooted reforms are practical steps along the road to greater accountability for Vietnam.[133]

Moreover, although Vietnam is a single party state, a certain level of accountability can still be observed in the operation of government. A recent study suggest that in comparison with China, despite having a similar political regime, Vietnam has better accountability and equality mechanisms

[130] For comprehensive profile and assessment of Vietnam economic indicators, See 'Vietnam Economic Indicators' available at http://www.theglobaleconomy.com/Vietnam/, accessed 07/07/2015

[131] These laws were enacted in 2014 and 2015 as tools to implement the constitutional reforms.

[132] The Legislative Program for the year 2015-2016.

[133] These reforms are particular important, given the political context that the vote of confidence in senior party and government leaders has not yet proven to be an effective tool for improving accountability (Abuza 2014), while revolutionary political reform cannot be expected in a short time.

because the use of vertical checks somehow constrains the party leadership, and policy-making requires broader coalitions and follows more competitive selection processes (Malesky et al. 2011). The Worldwide Governance Indicators also recognise an improvement in Vietnam's accountability index in recent years, though it still remains at a low level (WB 2013). Besides, if openness is considered as an indicator of accountability, it is arguable that low accountability is not a phenomenon across the whole Vietnamese administrative system. Rather, the willingness to openness and transparency varies and is largely driven by the sensitiveness of the sector that the relevant agency is looking after (MOJ 2015h). There is also a trend toward agencies and officials increasingly publishing information to encourage cooperation from the public in the execution of government policies and programs (MOJ 2015h).

3. Practical and logistical issues

Along with the political environment, the feasibility of any FOI reform is dependent on practical and logistical factors. Assessment of practical and logical issues ensures that FOI reform will take effect without undue, unforeseen troubles arising from cultural, financial and other logistical conditions. This section examines whether Vietnam is ready for FOI reform, focusing on the issues of record management, public service law and financial affordability.

Record management

As a factor underpinning good governance, record management supports other tools for good governance, particularly FOI (Snell and Sebina 2007). When information is hard to find public agencies are less willing to release information because of the increased cost, time and effort required. A good record management system, therefore, is an additional condition for the adoption and implementation of an effective FOI regime. Conversely, a good FOI regime will effectively mandate agencies to establish and maintain good systems of record management, and will also enable a culture change where agencies embrace better practices in both record management and information disclosure.

In Vietnam, the role of record management has been constantly emphasised by the top leaders and policy-makers (Thương Huyền 2013). It is often argued that public information must be recorded and well managed so that government agencies can later refer to it for better decision-making (Lã 2013). This perception has led to the enactment of dozens of pieces of legislation prescribing record-keeping

responsibilities, procedures and technical standards.[134] Other efforts have been also made to improve record management. For instance, record-keeping staff are employed in all divisions within state agencies while a separate unit responsible for record management is attached to every state agency. Additionally, the National Department for Records Management and Archives has been established in the Ministry of Home Affairs (MOHA). State agencies are required to regularly report about their record keeping activities to the MOHA. Inspection of record management matters can be conducted either by state agencies or the MOHA at any time so that problems can be addressed in a timely fashion. In addition, information technology is increasingly employed for record management purpose in all state agencies (Nguyen 2007). As a result, a noticeable improvement has been achieved, particularly in recent years (MOHA 2009). Nevertheless, there are also some identified problems, including legislative shortcomings, limited financial and human resources, technological weaknesses, and lack of compliance (MOHA 2009).

It appears that both the benefits of and problems with record management in Vietnam have been viewed largely from the governmental/bureaucratic perspective, without recognising the need for information sharing with the public or the public interest in accessing recorded information. This is the reason that record management in Vietnam is oriented toward internal access and administered with attention only to governmental efficiency rather than the broader requirements for good governance which also involve openness, transparency and accountability in government process. This also explains why the current project to develop the ATI Law does not include any detailed assessment of the current record management system and its need to improve for FOI purposes.

Although record management in Vietnam has been undertaken for non-FOI purposes, its existence and recent improvement should be considered a positive for FOI reform. It may be anticipated that a lot of the compliance costs, feared when developing countries consider FOI reform, will be avoided, given that there is already a system of record management in which information is systemised and easy to retrieve, and staff with experience and knowledge in both record keeping and information are already employed. Additionally, with the availability of both recorded information and specialist staff, the burden of providing information is reduced and, therefore, more likely to be acceptable to state agencies. Moreover, adopting FOI reform could benefit record management in Vietnam in many ways. At the initial stage, FOI reform would provide an additional opportunity for revisiting existing problems with record management. In the longer term, by allowing public access to recorded information, FOI would not only correct the limited view of the purpose of record management, but

[134] A list of current legislation on record management is available at http://www.archives.gov.vn/content/law/Pages/Default.aspx?CategoriesID=3, accessed 10/09/2015

also facilitate its gradual improvement, provided record management is subject to public examination through which state agencies must be more serious about creating, recording and storing information.

Public service law and public servants' attitude to openness

The level of transparency in public service and the attitude of public servants to openness play very important roles in smoothing the work of an FOI regime (Sebina 2006; Mendel 2008). It is necessary then to examine whether the public service and public servants in Vietnam are at a level of readiness for the additional task of dealing with information provision.

In Vietnam, the principles of openness, transparency and accountability in the operation of the public service have been formally adopted in public service management, but it targets at the lower level of public service delivery rather than policy or law-making in government as a whole. Recent reforms, which replaced the decree of 1998 by two laws in 2009 and 2010,[135] further clarify these principles and seek to promote an accountable, open and transparent administrative system. The new laws state that public services must be delivered with an assurance of publicity, transparency and submission to supervision by the people. Under the laws, greater transparency is set for public service management with clearer criteria and procedures of recruitment, promotion, and training and development strategies (Poon 2009: 10). Although no explicit responsibility to ensure transparency is imposed on individual public servants, it is prescribed that public servants shall undertake duties and responsibilities as provided by laws or assigned by their managers.[136]

These developments suggest that the public service in Vietnam is already operating with increased transparency. This is supported by the fact that different monitoring mechanisms have been adopted while state agencies and public servants are aware that their work is subject to scrutiny through inspection by competent agencies and public supervision. In addition, public agencies and public servants are all well familiar with the responsibility of records keeping. However, the existing public service law has not legislated information access as a transparency mechanism through which public agencies are required to publish information about the service they are delivering. The dispersed information access legislation remains vague about the information to be published and the procedures of information publication. At the same time, as discussed in chapter 3, given that the secrecy legislation sets very clear and firm requirements for state secrets protection, public agencies and public servants are left in a dilemma without knowing how to legally make information publicly

[135] These are the Law on Cadres and Public Servants of 2008 and the Law on Public Employees of 2010

[136] Art.9 of the Law on Public Servants of 2008, Art.17 of the Law on Public Employees of 2010.

available. Accordingly, information disclosure is dependent on the willingness of each public agency and therefore varies greatly across the administrative system (Nguyễn 2015).

In such a context, FOI reform is clearly necessary to correct the shortcomings of the current legislation and further promote transparency in public service. FOI reform will formalise information access as a transparency requirement for the public service and make it a legal requirement for public service providers to publish information. At the same time, the reform would delineate the balance to be struck between confidentiality, official secrets and access, as well as providing clearer procedures and processes for access. In the meantime, it can be expected that the transparency principle in the operation of the public service, which is accompanied by better awareness about transparency requirements, will be of help to FOI reform. The existing transparency principle may reduce prejudice against FOI reform as it may not be perceived as creating an additional burden for public agencies and public servants. When information access is recognised as a formalised mechanism of transparency, it will be a less pressing and cumbersome process in comparison to other processes of investigation and examination. Moreover, as public servants are working under both the state's laws and party's rules and are accountable directly to their superiors both in the state and party system, their attitude to openness and the way they keep records of their work will be highly influenced by the attitude and direction of those superiors in certain situations. The willingness to adopt FOI in Vietnam, therefore, is a matter to be driven from the top and political resistance is likely to be a bigger hurdle than any tendency to secrecy of individual public servants.

Financial affordability

A common experience among countries with FOI regimes is that the cost of adopting and implementing FOI represents a significant expenditure for government, although some of the costs incurred can be recouped by FOI charges (McMillan and Popple 2012). As most of the costs of FOI are taxpayer funded, it is very important to ensure that those costs are affordable and in line with community standards and expectations. Accordingly, FOI reform must be designed with full understanding of its financial implications, as well as with an understanding of the capacity of both governments and the public to afford the potential costs of the reform.

In preparing the proposed ATI Law, the MOJ (2015c, 2015f) has conducted a qualitative assessment which is based on the assumption that the reform’s benefits will outweigh its costs. The MOJ makes a good point in arguing that much of the costs can be saved as Vietnam has good information infrastructure, well-managed databases and human resources ready for the reform. In its view, the incremental costs would mainly be those required for maintaining the information system, processing

requests and training staff. Unfortunately, the MOJ fails to mention the additional costs required for refining and upgrading of both IT and record management systems so that they may be used for the additional purposes of information disclosure, given that both the IT and records systems were originally employed for internal use within the administrative system. In addition, to ensure the public's effective and efficient access, the internet should not be relied on as the sole way for state agencies to disclose information, even though the number of internet users in Vietnam is increasing rapidly.[137] Therefore, some costs should be anticipated for other, 'hard-copy' methods of information publication and distribution. More importantly, expenses also need to be estimated for the establishment and operation of an FOI oversight system. In Australia, the cost of about AU$10 million per year for the operation of the OIAC has been considered too high and used by the government as the reason for the agency's disbandment.

It is a positive indicator that FOI reform in Vietnam will not require significant investment for new systems of information technology or records keeping. However, other costs incurred in adopting and implementing reform still have significant financial implications that should be carefully estimated, particularly in the context that the developing economy is currently struggling and the state budget deficit is unduly high (Association of Vietnam Banks 2012; BBC 2012; Tuoi Tre News 2015). It is therefore necessary that a more comprehensive and detailed costs assessment of FOI reform should be undertaken to ensure its immediate and ongoing affordability. The assessment should also anticipate any potential increases in costs for other related reforms such as record management, public service and media, or for further evolution of the FOI regime itself when local conditions are improved.

III. CONCLUSION

The discussion above suggests that the current social, cultural and political scene in Vietnam indicates a number of positive and negative features and trends, which will alternately facilitate and inhibit FOI reform in Vietnam. In relation to democracy, in addition to a stronger commitment to and protection of human rights, recent constitutional reform bringing new requirements relating to the execution of state power and clearer accountability mechanisms has, at least, provided political support for improving accountability. At the same time, the emergence of civil society, a high level of trust and increasing levels of accountability in practice are positive for furthering government openness. In addition, the availability of a reliable system of record management, as well as the information

[137] It is estimated that there are more than 43 million internet users in Vietnam in 2014. Over 15 years (2000-2014), the percentage of internet user has increased from 0.25% up to 42.97% of the population). More information about Vietnam Internet Users is available at http://www.internetlivestats.com/internet-users/vietnam/, accessed 15/07/2015.

infrastructure and the desire for further transparency in the delivery of public service are other signs of Vietnam's readiness for FOI reform. Nevertheless, there are several significant factors which are challenges for promoting FOI in Vietnam. In the Vietnamese context it will remain a struggle for constitutional guarantees to be implemented, and political commitments are often sloganeering rather than made with genuine intent. The lack of a formalised opposition, free press, transparency culture and the existence of corruption are problems that cannot be addressed in a short time. There are also practical and logistical limitations that need to be taken into account so that either a proper solution is drawn or the expectations of FOI are not overstated.

As argued in Chapter 2, FOI is strongly dependent on the local context but, conversely, FOI is capable of facilitating improvement in local conditions. This means that a country, even without favourable conditions for FOI, may adopt an FOI law as a first step in a longer road towards more comprehensive democratic reform. Vietnam already has several factors necessary for the establishment of a mechanism for information access. By adopting FOI reform, a flow of information will be created, enabling public access to governmental information while weakening the culture of secrecy. Gradually, it is to be hoped, FOI may help strengthen good governance in Vietnam by enhancing, if only incrementally, transparency, efficiency and accountability in the operation of government.

CHAPTER 8 A ROAD-MAP FOR FOI REFORM IN VIETNAM

Chapter 8 offers a roadmap for FOI reform in Vietnam. It commences by proposing some substantive features desirable for FOI reform in Vietnam. Keeping in mind the importance of considering a law from its interaction with other disciplines and institutions (Head and Mann 2009) and assessing all the statutory issues and contextual matters, this chapter suggests that, at the initial stage, it may be a wiser choice for Vietnam to adopt modest proposals, and pragmatic, incremental steps. The country should consider reforms that are appropriate for the country's socio-political-economic conditions at present. This may take the form of a specific law that facilitates the free flow of information by imposing on state agencies more obligations to disclose information in a proactive fashion, and by granting citizens the right to request information where the information is not exempted and is not available through proactive disclosure and other schemes. It is important to note that such law is just an initial step in ongoing FOI reform. Apart from enacting a specific FOI law, Vietnam needs to undertake other measures, both to adapt such a law to its new environment as well as to make local conditions more receptive. Later, Vietnam also needs to gradually improve the legislation once conditions liberalise.

Chapter 8 is also a conclusion to the thesis. In addition to a summary of my research's background, methods and findings, the chapter provides suggestions for further studies.

I. POSSIBLE LAW REFORM

A free flow of information is a crucial tool for good governance. Meanwhile, critical thinking of how a legal idea would operate and interact with other policies and instititutions is a key to put the law into perspective.

Experience from around the world and especially in the countries compared in this research suggests that an effective FOI regime should not be measured by its formal legal provisions but by its capacity to guarantee practicality of access within the conditions of the adopting country. Adopting an FOI regime, therefore, requires much more effort than just simply borrowing FOI legislation 'off-the-rack'. While legal substance is needed for an FOI regime, it is more important to ensure that the legislation is workable in the local environment and accompanied by adaptation strategies.

The existing FOI regime in Vietnam is based on the emblematic constitutional recognition of the right to access to information, piecemeal legislation on information access, inoperative dispersal methods and a lack of support from the local context. The regime has not worked. The FOI regime is suffering

both legislative weaknesses and contextual disadvantages. As argued earlier, enacting a dedicated FOI law is a key option for Vietnam, but only on the understanding that such legislation is just one component of FOI reform, which is itself part of a longer road to good governance and democracy. Moreover, the legislation must be framed with regard to the broader context of government and law in the country. This section gathers insights from those understandings for FOI reform in Vietnam.

1. Pull versus push model?

Before sketching key features of FOI reform for Vietnam, it is useful to consider the core policy behind the legislative framework which drives both the legislative design and overall structure, and also the 'robustness' of any new legislation. Theoretically, the selection of either a 'pull' or a 'push' model should be done prior to any detailed design of FOI policy as that selection will shape both policy formulation and implementation. Where the main policy focus is on a right to request information, a 'pull' model is adopted, reflecting countries where there is a strong perception of FOI as an individual human right, or governments that have close control over information (Paterson 2005; Mendel 2008). Alternatively, focusing on proactive disclosure by public agencies, the 'push' model is evident in countries which understand FOI to be an effective tool for a transparent, accountable and open governmental system (Solomon et al. 2008). There is, therefore, a growing perception that a push model is a better option for the purpose of stimulating a free flow of information (Mendel 2008; Xiao 2010). However, as argued in chapter 4, there is not enough evidence to prove that a 'push' regime is more capable of guaranteeing practical access than a 'pull' regime. There are instances where information access is effectively protected in countries with old, pull-model FOI laws but remains poor in countries where new, seemingly strong push-model laws nevertheless appear ineffective (Hazel et al 2010). The local context, in particular a culture of openness, is thus identified as a key element in the success or failure of any FOI regime.

Referring to features of access in both 'pull' and 'push' models, it may be observed that the existing legislation in Vietnam is seemingly closer to the 'push' model. With clear overtones of passive access by citizens, the previous constitutional recognition of the entitlement 'to be informed' strongly implied proactive disclosure. Grounded on that constitutional recognition, the current dispersed legislation merely emphasises information publication by certain state agencies. However, apart from imposing an obligation to disclose information on a number of public agencies, the legislation does not sufficiently elaborate an implementation process. Rather, it simply provides an unclear definition of the information to be disclosed, broad and vague exemptions, limited access mechanisms and unfeasible oversight schemes. The legislation fails to promote information disclosure in Vietnam, and indeed diminishes citizen-initiated access.

The failure of the legislation raises larger questions about Vietnamese government and law than simply whether the 'push' model is a proper option. It has been pointed out that the original premise of FOI in Vietnam - the right 'to be informed' - was transplanted without regard to any of the systems, limited legal autonomy or legal evolution theories. Proactive disclosure can be a means by which reactive disclosure can be avoided, allowing state agencies to stay in a proactive position by controlling information. The present legislation is in fact not a 'push' model adopted with a deep understanding of FOI and its benefits. Neither is it a 'pull' model in legislative terms, as it still leaves broad discretion for the state to monitor and restrict information. As a result of lacking a proper legal framework, support from local conditions and measures to accommodate FOI, information flow in Vietnam is very poor and remains under strict control by the government.

Believing that the lack of citizen-initiated access has been the main cause of its problems with FOI, Vietnam decided to fix the issues by shifting the central policy from proactive disclosure to information on request. Constitutional reform was the first and most important attempt to recognise citizens' proactive role in information access by replacing 'the right to be informed' by 'the right to access to information'. Following this constitutional reform, which promotes FOI as a human right, an ATI Law is officially confirmed as having been drafted to create a practical mechanism for citizens to require information (MOJ 2015d, 2015e, 2015k, 2015l; Government 2015a, 2015b). Paradoxically, the different drafts circulated to date offer little chance for citizens to request information, given that the drafts have only proposed a limited coverage of accessible information yet very broad exemptions and complicated request procedures.[138] At the same time, although proactive disclosure is said to stay as a main method of information access, limited mechanisms for disclosing information are maintained whilst no principle of maximum disclosure has been considered (MOJ 2015k, 2015l). Accordingly, it is very hard to identify which model of FOI legislation the MOJ is currently advocating. If its present proposals are accepted, it is very likely that the framework for FOI in Vietnam, even with a dedicated FOI law, will not address the problems caused by the existing dispersed legislation, let alone improve practical access as is intended.

Indeed, the different drafts of an ATI Law reflect Vietnam's dilemma in selecting FOI objectives and core policy, not political hesitation about FOI adoption. Vietnamese designers insist on the recent constitutional recognition of the 'right to access to information' as the benchmark for contemporary FOI reform without sufficient consideration of whether the local environment is ready to embed it. Despite signifying the right to request information, the designers admit that information provision upon request would be a troublesome option, given that it is difficult to anticipate the number of

[138] This issue will be discussed in detail in the next section.

requests, and that greater resources must be invested for processing such requests and related matters such as administrative (internal) review and judicial review (MOJ 2015f, 2015k, 2015l; Government 2015a). The concerns about such associated difficulties have led the designers to return to proactive disclosure (MOJ 2015f, 2015k, 2015l; National Assembly Legislative Committee 2015). Ironically, keeping in mind that the ATI Law is ostensibly focused on the right to request information, its designers are reluctant to work for a better mechanism of proactive disclosure. So, at present the designers are merely attentive to the constitutional clause, ignoring other important issues such as local conditions, broader legislative frameworks, FOI principles and adaptation strategies.

In fact, there are sufficient constitutional grounds for promoting FOI as a tool for good governance in Vietnam. The Constitution clearly aims for good government by requiring that state agencies and public servants act under public supervisions and for transparent and efficient government.[139] Additionally, the National Assembly is empowered to enact laws not only to implement the Constitution but also to decide important issues for the country.[140] Consequently, enactment of an FOI law with the objective of boosting good governance is firmly in line with constitutional provisions and aspirations. To avoid an unworkable law, Vietnamese designers would be better to reconsider their FOI reform strategy, setting the primary goal as good governance: an aim that in itself is capable of both facilitating human rights and furthering the democratisation process.

In promoting good governance, it is fundamental to ensure that information is publicly available, except for information necessarily withheld for good reason (such as national security). Proactive release is a better way to publish information as it will efficiently enable the creation and evolution of a free flow of information. However, as government agencies everywhere are inclined to secrecy, it is important to ensure that individuals have the right to request that public agencies release information. This approach appears to have been employed by the US and NZ in their FOI Acts (Banisar 2006, Mendel 2008). In practice, these Acts are considered to be working better than Australia's 1982 FOI Act which at the time was considered as a regime centred on reactive disclosure and later shifted its focus to proactive disclosure in its 2010 reform (Snell 2008; FOI Rating).

In Vietnam the government operates with the parallel involvement of the one-party system and the state apparatus, and accountability and transparency mechanisms remain limited and the culture of

[139] Art.8 of the 2013 Constitution states:

'Public agencies and public servant must show respect for the people, conscientiously serve the people, maintain close contact with the people, listen to their opinions and submit to their supervision; resolutely combat corruption, waste, and all manifestations of bureaucracy, arrogance and authoritarianism.'

[140] Art.69 of 2013 Constitution.

openness is still very fragile. Given this context it is, therefore, unrealistic to expect a strong willingness to proactively publish information on the part of state agencies at the outset. Meanwhile, the political and cultural conditions, even though they have started to improve, are still insufficient to support using citizen requests as the primary mode of information access. Therefore, at this initial stage, it is not so important for Vietnam to focus on either a 'push' or 'pull' model with perfunctory thinking about their dissimilar features. Rather, it needs to employ legal transplantation theories to develop a legislative framework to feasibly promote FOI. Based on the insight from limited legal autonomy,[141] it is arguable that FOI reform should be designed with a view to encouraging proactive release by state agencies through clear and consistent policy on principles, strategies and standards of information provisions. Also, the reform must create a 'pull' mechanism as a secondary mechanism for people to efficiently request information in the possession of state agencies. From the viewpoint of systems theory and legal evolution theory, it can be anticipated that by using both streams of proactive and reactive access, reform should be able to ensure that public information is sufficiently provided, whilst also helping to build a practice and culture of openness in government and helping to change the mindset that the public should play only a passive role in information access and other governmental processes.

2. Key features of any legislative reform

This thesis has argued that a dedicated FOI law is a necessary first step to reforming FOI in Vietnam. Local conditions suggest that Vietnam is not ready for a progressive regime which maximises both proactive and reactive disclosure. But it is also clear that a weak regime will be incapable of addressing access problems, let alone contributing to good governance in Vietnam. The critical discussion in this thesis concluded that FOI reform should be sensitive to the political, economic and cultural conditions but not ignore the core principles and elements of good governance. Vietnam might begin reform process with a less progressive FOI law with some politically acceptable limitations on information access. To ensure its feasibility, and to nurture the mutually beneficial interrelation between FOI and the local context, the law should be accompanied by a strategy for further accommodation and adaptation of FOI. Consequently, this section of the thesis is therefore devoted to recommending key features of the legislative reform for Vietnam with regard to the earlier analysis of legal transplantation and comparison of FOI regimes.

Redefining FOI coverage

[141] See discussion about legal autonomy theory in chapter 3 of this thesis.

To address the vague coverage under the existing legislation, the draft ATI Law designers have been attempting to provide a detailed list of all agencies responsible for information disclosure. The inclusion in the list of all legislative, administrative and judicial agencies, at all their levels, has been justified by reference to the mixed experience from a number of countries (MOJ 2015d: 14). Meanwhile, the designers argue that the exclusion of other public entities, state-owned enterprises and private bodies performing public functions is warranted because FOI concerns the state-citizen relationship only (MOJ 2015d). The proposed coverage of the draft ATI Law is said to be the outcome of careful research in which both general principles of FOI and provisions in FOI laws from other countries are borrowed and modified (MOJ 2015d; Government 2015a, 2015b). The law's designers are confident that such a detailed list, together with a definition of 'information' that specifies what is regarded as information, is sufficient to ensure fair and feasible coverage (MOJ 2015d: 14). Clearly, the designers have made a great effort to ensure the future law is both transparent and broad in its coverage. Legal transplantation theories, particularly the theory of limited legal autonomy, have been employed in order to analyse, borrow and tailor other countries' FOI policies for the FOI scheme. However, what is regrettable is that the borrowing process has been done by merely looking at the substantive features of overseas FOI models without careful regard to the rationales behind the policies as well as their operation - or, in other words, without effective consideration of systems and legal evolutionary theories.

Theoretically, clear and broad coverage is desirable for any FOI regime. However, as noted earlier there are lessons to be learned from comparative experiences that suggest clear and broad coverage does not necessarily lead to better access in practice. The comparative study in chapter 5 proves that, despite their clarity of coverage, the coverage under the FOI acts of the US, Australia and NZ undermines the operations of those acts in many critical ways.[142] It is also noted that an FOI regime with a greater number of agencies notionally covered is not necessarily more capable of guaranteeing information disclosure. Hence, it is very important to make sure that the FOI coverage is reasonably defined in respect of the information held by certain agencies and how its disclosure or withholding would be beneficial to the public, individual citizens and good governance. In the context of Vietnam, it is also necessary that FOI reform sets a framework for information disclosure by agencies and organisations that can act as exemplary in providing information and inspire a culture of openness in the country.

With that in mind, and looking at the governmental system in Vietnam, it is arguable that, at the beginning, FOI reform would be best focused on the executive branch. This is because the powerful

[142] See chapter 5 of the thesis.

executive government and its subordinate agencies hold most of the information that is likely to be of public interest, and their performance should be closely and routinely checked by the people. By contrast, other agencies either possess little information of public interest or the information in their possession needs to be published through separate mechanisms. For instance, the State President mainly performs ceremonial functions,[143] while both the National Assembly and the courts have employed different mechanisms to release information about their operations, especially their law-making activities and outcomes (including courts' judgments).[144] Therefore, unless the addition of these agencies to FOI coverage would not cause greater objection to FOI, such agencies might become involved at a later stage when FOI has become more embedded in Vietnamese law and administration practices.

Meanwhile, due to the unique features of the Vietnamese political system, it is suggested that the roles of the VCP and the state-owned enterprises (SOEs) in providing information should be taken into account. In spite of the recent reduction in their numbers, SOEs still dominate the national economy, making the economy more vulnerable while leaving considerable space for corruption (Vietnam Briefing 2014). To promote fair competition, secure economic stability and control corruption, there must be different transparency mechanisms (apart from economic reforms) through which SOEs are subject to public scrutiny (Kim et al. 2010). For that reason, some information disclosure obligation needs to be imposed on SOEs, either in a dedicated FOI law or relevant legislation on SOEs.

In the case of the VCP, the importance of having the VCP as an information provider does not lie in the information held by the party organisation but in the benefit of the VCP as an inspiration for the whole political system. Given the party has recently shown more adherence to transparency and accountability, by increasing its efforts to battle against corruption and reduce public suspicion and by publicising more information about its operation (even allowing disclosure of its spending),[145] it is likely that the VCP may be persuaded to engage with information disclosure. However, it may be anticipated that the VCP will only accept this challenge on the conditions that information provision

[143] Chapter 6 of 2013 Constitution.

[144] Laws and other legislation in Vietnam are published in the Official Gazettes and websites of the National Assembly, the Government, government ministries and local governments. Courts' judgments are increasingly publicised via the courts' websites and exclusive publications.

[145] For instance, the spending for the Central Office of the VCP in the year 2014 is publicised by the Ministry of Finance on 15/12/2014 at http://www.mof.gov.vn/portal/page/portal/mof_vn/1351583/2126549?p_folder_id=2201669&p_recurrent_news_id=154659037, accessed 15/08/2015

must be under its control, there be no threat to its leadership, and the risk of harassment associated with its obligation to publish information be minimised. It is thus unrealistic to expect the VCP to be an active information provider. But as the most powerful political force, having significant influence both on the government system and on the society, the party will effectively play the advocacy role for FOI reform and indeed other liberalising mechanisms. Accordingly, the obligation of information provision proposed for the VCP must be tailored with fewer burdens and more exemptions.

Reconciling FOI exemptions

A core element of any FOI law, as discussed in chapter 5, is the grounds on which information is either disclosed or withheld. The existing, dispersed legislation in Vietnam represents a very inconsistent policy and practice of information access, and has greatly contributed to its poor performance. On the one hand, the legislation names some types of accessible information but on the other hand that information is significantly limited by blanket provisions in the Ordinance on Protection of State Secrets which (nonsensically) defines state secrets as any information that has not been published by state agencies. One of the core tasks of FOI reform, therefore, is to adopt a proper methodology to ensure information disclosure or information withholding is determined under a consistent, fair, and timely and cost-effective FOI policy. Unfortunately, along with the previous flawed approach, the ATI Law designers have been presently unsuccessful in establishing consistent grounds for both information disclosure and withholding. The designers appear to be trying to make clearer the scope of accessible information by defining three groups of information: information that state agencies have to publish; information that is provided through requests; and information to which access must be refused (Draft ATI Law of 2015a, 2015b, 2015c, 2015d). Disappointingly, they persist in the notion that state agencies must refer to the definition of ‘state secret’ under the Ordinance on Protection of State Secrets in order to determine whether they can release information or not. If this approach is approved, there is no doubt that the current problems caused by the broad and ambiguous FOI exemptions will persist.

Appropriately balanced FOI laws assume that some public information can be withheld if there are good reasons to do so. Generally, FOI exemptions are legitimate when the need to protect other public (societal) interests outweighs the benefit of information access. As FOI laws are to promote accountability, transparency and efficiency in government decision-making processes through information disclosure, it is crucial to ensure that exemptions do not subvert the core principle of maximum disclosure. That explains the great similarities of FOI exemptions under many FOI laws, which balance public interests such as national defence, international relations, law enforcement and privacy against disclosure (core/popular exceptions). Nevertheless, since different countries may

respect different, alternate, legitimate interests, it is equally necessary that each country works on its unique FOI exemptions (adaptable exceptions) without neglecting the importance of information disclosure.

Chapter 5 identified that FOI exemptions under the US, Australian and NZ legislation have some positive features but there is still much room for improvement. Setting exemptions, or in other words delineating the balance to be struck between access and non-access, is difficult and may not be set-in- stone at the point of the initial FOI act. Vietnam may quote the social systems and limited legal autonomy theories when opting to set its own FOI exemptions, but that does not mean the country can ignore the core principles and practice of FOI (the seed of the legal principle which is stressed by legal autonomy theory). Vietnam should first deal with the Ordinance on Protection of State Secrets by replacing its blanket definition of state secrets with a clear and narrow one that no longer contradicts or undermines FOI legislation and other transparency mechanisms. Besides the core/popular exemptions that Vietnam can directly import from a progressive FOI law of its choice, any other exemptions the country wishes to adopt should be selected and adapted through a weighing exercise, balancing information access and other legitimate interests. Since the existing legislation does not provide any feasible mechanism to protect privacy and information about law enforcement, it is very important to ensure that personal information and information about law enforcement be treated as FOI exemptions. In order to embrace the principle of maximum disclosure, the use of the public interest test should also be taken into account.

Employing the public interest test

The primary purpose of the public interest test is to achieve the right balance between FOI and the protection of legitimate interests (Lane and Dickens 2010). In practice, more and more FOI laws are employing the public interest test as a procedure for balancing different interests for and against disclosure of information. In some countries, the public interest test is even used at later stages by appellate agencies to consider whether exempt information can be released for the sake of the public interest (Mendel 2008). The public interest test essentially operates in the following way: FOI exemptions are classified as either absolute/standalone exemptions which are not accompanied by a public interest test, or as alternatively conditional/limited exemptions which are accompanied by a public interest test. When the information falls within the former classification, its disclosure is absolutely excluded. However, if the information falls in the latter classification, further consideration is required as to whether the information's disclosure is contrary to the public interest. The information is then only withheld if there is a reasonable judgment that its disclosure would be against the public interest.

Whereas both Australian and NZ acts have clearly a public interest test, its absence in the US Act is explained by claims that the Act itself was drafted and enacted with consideration of the public interest. Vietnamese drafters appear to be attempting to include some form of public interest test, for the first time, in the draft ATI Law. The law's designers suggest that state agencies should disclose information which is not produced, but merely held by state agencies, or information they are not otherwise obliged to publish, if the disclosure is necessary to protect the public interest and public health (MOJ 2015a, 2015d; Government 2015a, 2015b). In addition, citizens may be allowed to access internal documents or policy advice if such access is necessary to protect their legitimate rights and interests and does not prejudice the rights and interests of others (MOJ 2015d; Government 2015a). Through comparison with the public interest test, it is arguable that the proposed test in Vietnam would be very difficult to apply, given that the test does not expressly contain a list of FOI exemptions but ambiguously refers to undefined information, while the burden of providing evidence for the necessity of access is placed on requesters. Such a test, therefore, cannot qualify as a public interest test, even in its most limited form.

Obviously, as an effective mechanism for balancing legitimate and compelling interests, the public interest test is utilised to not only protect FOI but other interests as well. Making more information publicly available does not mean sacrificing legitimate governmental and private interests at any cost. Equally, the need to protect legitimate interests should be reasonably measured with consideration of the necessity of information disclosure. It would be very risky to have an FOI law which fails to provide a clear, consistent and feasible mechanism through which both information disclosure and other legitimate interests are properly determined. In the context of Vietnam where, paradoxically, information access remains very poor while some legitimate interests such as business secrets and personal information are always in danger of being leaked, the inclusion of an appropriate public interest test in FOI policy is vital. It is apparent that Vietnamese lawmakers are attempting to utilise such a test in any FOI law, but it remains vague its precise form. The priority for Vietnam is to improve understanding, particularly amongst legal elites, about the principles behind and operation of the test. Then, as the public interest test and the exemptions are integrated, more work will be required to redesign both of them, following a consistent policy formed in light of both local conditions and international experiences and standards.

Revisiting review schemes

Through analysis of legal frameworks and performance of FOI review schemes, chapter 6 defined the major features of an effective review mechanism as one that is accompanied by sufficient independence, power, expertise and political support. That chapter pointed out how legislative and

practical hurdles have inhibited the administrative review system in Vietnam. Improvements to the system, in addition to reinforcing the system as a whole, are urgently needed for the important task of FOI review.

Under the draft ATI Law, the existing administrative review system (see discussion in chapter 6) is to be applied to FOI cases. It is proposed that requesters have the right to appeal (on the merits of a decision) against state agencies if their request is refused or ignored, if the information provided is not the information they requested, or if a fee is illegally charged. There will be several options for the requesters: requesting review by either the relevant agency or a higher agency, or pursing a lawsuit at court (MOJ 2015e, 2015k, 2015l). Also, individuals ought to be entitled to denounce illegal acts committed by officials in charge of information provision. Denunciations (similar to public whistleblowing in western legal systems) will be determined internally by the head of the agencies where those officials work.[146]

FOI is about information, not decision-making power as such, and its very purpose is to aid accountability and transparency. From a governmental perspective, it is less of a concern to have strong FOI than to have too many avenues for individuals to appeal decisions against disclosure or delay a government decision-making. From the public's perspective, it could be preferable to have a good government that serves the people well on a day-to-day basis than to have a greater availability of mechanisms to challenge FOI decisions made by government agencies. Reform of the FOI review system, therefore, is part of a set of comprehensive, systematic reforms that Vietnam must undertake to improve good governance.

The lack of neutrality and independence is the main factor currently deterring individual complaints, denunciations and appeals against administrative decisions in Vietnam currently. Therefore, maintaining these flawed mechanisms and applying them to FOI cases in the future will not establish a fair and effective FOI review scheme, let alone facilitate overarching reforms for good governance. Due to the culture among state agencies of protecting one another, it is unlikely that requesters can expect their complaints about or denunciations of information officials to be handled independently, without bias, through administrative review. Simultaneously, judicial review will be significantly deterred by judicial dependence[147] and other hurdles such as the costs of litigating, and the burden of proof, which is laid on those who appeal to the courts. It is therefore worthwhile to consider an alternative avenue for FOI review. In many countries, to ensure the objectivity and efficiency of FOI

[146] Art.12 of the Law on Denunciations of 2011.

[147] See chapter 3 of the thesis.

review, alternative review mechanisms have been adopted. Those mechanisms vary greatly across countries, such as the Ombudsman in NZ and the OAIC in Australia. In the Vietnamese context, whichever alternative mechanism of FOI appeal is considered, it should be examined with regard to its cost and to establishing a norm of independence, as even courts are seen as an arm of government rather than being separate to government, and the political system has tended to secrecy and the idea of a single public interest rather than pluralism. Further discussion of this issue will be presented in the next subsection.

Appointing an oversight body

Appointing an agency to carry out oversight functions is another key issue to be considered when adopting FOI (McMillan 2007). Despite there being a growing trend toward creating an independent body dedicated to the job, countries around the world follow different approaches in creating an agency authorised with FOI oversight as well as establishing its powers and procedures (Banisar 2006; Mendel 2008; FOI Rating). It is common that the overseeing activities are jointly carried out by different institutions. In the US, Australia and NZ, FOI administration has been evenly distributed amongst different institutions (as noted in chapter 6). Although there is no ideal model of oversight body that fits every country, it is arguable that effective administration is achievable only if the oversight body is sufficiently independent of the government agencies and properly resourced.

Until recently, an FOI oversight body has not been a concern of Vietnamese policymakers when work on a dedicated FOI law commenced. Administration of an ATI Law has been considered with the key actor suggested being the MIC, a ministry with particular expertise in management of information technology and information distribution (MOJ 2015a, 2015d; Government 2015a, 2015b). The National Assembly, the people's local councils and the Vietnam Fatherland Front (VFF) are also potentially to be involved but with nominal supervising roles (MOJ 2015a, 2015d; Government 2015a, 2015b). It is apparent that Vietnamese designers have no intention of creating a specialised scheme for FOI administration, but instead use the existing oversight regime which generally applies to all legislation and which involves a government ministry, the legislative body and a politico-social organisation.

Practices of FOI administration abroad suggest that the responsibility of oversight should not be discharged by different institutions. The proposed regime for administering an ATI Law is problematic because the central role is given to the MIC, which is greatly dependent on the executive government, while other agencies with greater independence from the executive are intended to have just limited participation in overseeing FOI. In addition, since the MIC's primary mission is to

monitor information distribution, rather than to guarantee access, there is always a risk that its powers over FOI administration may be used to supress information rather than promote access.

Therefore, in order to secure the effectiveness of FOI oversight and the feasibility of the FOI regime, it is important that the appointment of an independent oversight body in Vietnam should be reconsidered. Any agency selected to play the central role should be carefully examined to determine its independence from government and capacity to oversee the administration and implementation of the legislation. It is important to acknowledge that FOI itself is a liberal process that needs some time and space to be accommodated and grow; hence it is crucial that the administration should facilitate FOI, not to inhibit it (chapter 6). Moreover, since governments everywhere must promote integrity through governance arrangements, it is equally important to encourage joint efforts from different agencies to make FOI work so that its objectives can be achieved.

As noted in chapter 6, the Australian and NZ approaches of assigning the administration of FOI legislation may be a useful model for Vietnam. In the beginning of FOI reform, it is recommended that an agency appointed by the National Assembly, and uninfluenced by the government, should be entrusted with a focus on FOI administration. Comprehensive examinations of the existing institutions attached to the Assembly, the availability of human and financial resources, and the potential workload must be undertaken in order to determine whether a new agency should be created or whether an existing agency can be nominated to take over the oversight responsibility. In addition to such an Assembly empowered agency, which would take the lead if government ministries, the VFF and other agencies are involved (as in the administration of other laws), they should each have clear and non-overlapping aspects of oversight. In doing its job, apart from systematic activities to promote compliance, the National Assembly's agency would handle FOI review and issue recommendations which state agencies would need to observe. There could be three options for requesters to complain about or challenge FOI decisions: internal review, external review by the National Assembly's agency and judicial review. By offering a more objective (compared with internal review) and less costly (compared with judicial review) mechanism for FOI review and complaints, review by the National Assembly's agency would encourage Vietnamese people to be more proactive in protecting their own rights and interests, and this may help build a culture of respecting rights. This kind of administrative review accords with this thesis's earlier recommendation of limiting the FOI coverage to administrative agencies and to a lesser extent, party organisation. From the VCP's perspective, it will be more appealing to be subject to FOI legislation when the risk of being subject to judicial review is reduced.

II. ADAPTATION STRATEGIES

As Vietnamese government and law have many distinctive attributes, it is unrealistic to expect the initial FOI law to be overly ambitious. Instead, the Vietnamese government should consider a specific law aiming to both 'push' public agencies to disclose more information and to encourage the public to 'pull' public agencies to extract information. Such a law, in tandem with other efforts to improve the cultural, social, economic and political environment, should gradually increase information disclosure and make possible the free flow of information that is essential for good governance and the protection of diverse social interests. As a tool for good governance, FOI relies on interaction with other liberalising (accountability, transparency and efficiency) mechanisms and on a nurturing local context. A dedicated FOI law in Vietnam, therefore, should be accompanied by detailed strategies (detailed below) not only to accommodate the new legislation to its new environment but also to make local conditions more receptive.

There are a number of specific measures the Vietnamese government can adopt. To begin with, a comprehensive review should be conducted by the MOJ to determine the fate of the existing piecemeal legislation on information access. Presently an ATI Law is being drafted and considered with a view to preserving that earlier piecemeal legislation because it provides a legal framework for information provision in specific areas. However, if an ATI Law is passed preserving the existing, problematic legislation, then existing problems with FOI will subsist. It is a better option to amend and codify the existing legislation within the new law so a systematic and consistent policy on information disclosure can be established. Where the retention of principles in the existing legislation is demanded, more work needs to be done to solve the differences between the legislation and the more expansive principles in a new law to ensure that information access will not be undermined.

Given the politics and culture of collectivism, state secrets will continue to be treated as a priority interest in Vietnam. It is, therefore, impractical to abolish altogether the Ordinance on Protection of State Secrets, with its broad and ambiguous definition of state secrets. Instead, FOI reform should provide better mechanisms for balancing state secrets and information access. In addition to adopting an appropriately limited definition of state secrets, that Ordinance should be revised to eliminate any ambiguity and inconsistency in the application of both FOI and secrecy legislation so that state secrets are effectively protected and information disclosure is not unreasonably withheld.

Alongside a dedicated FOI law, other liberalising reforms are needed to improve conditions not only for FOI, but other accountability and transparency mechanisms and good governance as a whole. The

new requirement of 'control' in the execution of state powers[148] should be further clarified in relevant legislation and seriously observed in the daily administration and operation of the whole governmental system to help support a more independent judiciary, accountable executive government and deliberative legislature. While free, multi-party elections are not yet on the horizon, efforts are needed to increase the competitiveness of elections and nominations to other offices through refinements of their criteria and procedures. In addition, precise and transparent guidelines should be introduced to make sure that the separation of collective and individual responsibilities of government members under the Constitution and the Law on the Organisation of the Government will not be misinterpreted and malfunction. Moreover, to facilitate the effectiveness of information provision, public record keeping should be legislated as a general duty of all public servants, while improving record management must be set as a regular obligation of state agencies.

As mentioned above, to implement the new Constitution and fulfil the VCP's commitments, along with a draft ATI Law, the Vietnamese government is hurriedly preparing a set of legislative measures for improving democracy, rights and freedoms.[149] As political parties and bureaucratic governments, particularly those in a country with a single party like Vietnam, often work better in words than deeds, it is unrealistic to expect that such noble aims will be fully manifested in legal reform. It is important to ensure that the 'public interest' restrictions which remain are justifiable and not going to neutralise the core principles and features of democracy, rights and freedoms. Otherwise, this much anticipated legislation will not achieve its primary goals, let alone assist FOI and improve conditions on the ground. Given that FOI and other freedoms (such as freedom of the press, freedom of expression, and freedom of association) are interrelated and share many similarities, the approaches to transplant and adapt FOI discussed in this thesis are useful for Vietnamese drafters to consider.

Since Vietnam will start with a modest and pragmatic, rather than state-of-the-art, FOI law that seeks accommodation within the current conditions in the country, further work will be needed to reform FOI legislation once the local environment has progressed. For example, the coverage of an ATI Law will need to be extended to all government branches and public entities when the culture of openness is strengthened and the incremental costs for such broad coverage are affordable within the state budget. Or, as legal barriers, financial concerns and political reluctance are lessened, an independent body may be established to handle FOI merit review and to conduct FOI investigations. Also required is a detailed plan for staff training to improve understanding of FOI and promote a culture of openness in the government system. Additionally, advocacy measures should be undertaken to tackle the

[148] See chapter 7 of this thesis.

[149] See chapter 7 of this thesis.

secrecy culture in society at large and to increase public awareness about FOI and its benefits. Finally, it is important to remember that FOI reform in Vietnam will not end by the enactment of a specific FOI law, but by a longer process of accommodation and adaptation for the advancement of FOI and local conditions and their mutual interrelationship as well.

III. SUGGESTION FOR FURTHER STUDIES

To further the effectiveness of the process of transplanting FOI into Vietnam, the following issues are subjects worthy of further study:

Reuse of information

The benefit of information access is only achievable when people can exploit the information to work on new ideas, inventions and policies. To realise that, FOI legislation is essential. Meanwhile, effective re-use of information may not only facilitate social and economic development but also nurture the FOI transplantation process in the way it encourages the public to use the legislation to gain more information access. However, FOI alone is not sufficient to secure the effectiveness of information exploitation. FOI generally focuses on creating a framework for the public to access government information without explicitly allowing them to re-use the information. In addition to such limitations, re-use of information might be hindered by high fees for information reproduction and distribution and copyright law and other restrictions on exploitation of specific information. It is therefore necessary to explore different measures to accelerate effective information re-use and its interrelation with FOI transplantation process in Vietnam.

Privatising government functions and FOI

In common with many other countries, Vietnam is extending privatisation of a great number of public services and public service delivery. Increased privatisation can improve efficiency in delivery of public service but from the perspective of FOI it creates more barriers for the public to access public information relating to outsourced services when that information is created, maintained and held by the private sector (Gregorczuk 1009; Michler 1999; Paterson 2004a). Without solutions to this potential oversight deficit, outsourcing public services can significantly undermine the FOI accommodation effort. Therefore, further studies seeking solutions for this particular issue is also recommended.

IV. CONCLUSION OF THE STUDY

The fundamental objective of this thesis has been to evaluate the desirability and adaptability of FOI in the context of Vietnamese government and law. The evaluation has been undertaken by examining both FOI theories and international practices and Vietnamese political, legal, cultural and economic contexts. By examining and adopting legal transplantation theories, and via relevant comparative studies, the research has uncovered and critically explained problems with FOI in Vietnam and canvassed key elements of its reforms.

Through studying the history and philosophy of FOI, the thesis has recognised significant evolution in both motivations behind and approaches to FOI. Though the earliest FOI acts were adopted in countries with a culture of openness, instigated by those working within governments who envisaged the benefits of FOI to the press and open government, much 20th century FOI legislation was inspired by the 1996 US Act with its claimed role of open government and a right uphold greater democracy. In turn, the recent trend to quasi-universal FOI adoption is associated with a variety of motivations and approaches. Besides governmental efforts, FOI has also been adopted as the result of pressure by civil society campaigns or external, international advocacy. In addition to its importance for good governance and the protection of other human rights, FOI is touted as a force to counter specific issues such as corruption and accountability. FOI legislation has thus become adopted in many countries with very different political, economic and cultural conditions.

However, this thesis has found that spread of FOI has left substantial room for problems to arise, both in FOI adoption and implementation. Importing an FOI regime from a limited set of models without serious attention to adapting it to the conditions in the importing country has led to subsequent problems in practice. Some FOI legislation has suffered from under usage while other regimes have not lived up to expectations.[150] In addition to setting overly ambitious objectives for FOI, there are a number of other reasons for its failures, including legislative shortcomings, a society's unpreparedness for FOI, lack of political will, and the power of the culture of secrecy.

In this thesis, an in-depth examination has been undertaken to uncover the pros and cons of different regulatory measures being used to guarantee access to information. The thesis claims that a dedicated FOI Act has advantages over both the constitutional protection of FOI and other dispersed methods in securing practical access for individuals. Although the three measures are closely interrelated, their effective combination in an FOI regime is not a practical goal. As FOI is proven to be highly context dependent, the thesis argued that promoting FOI is not a one-off act of importing an apparently state-

[150] See chapter 2 of this thesis.

of-the-art FOI regime, but a living process which requires not only a feasible framework but ongoing efforts to improve the political and social culture in the adopting country.

This research here has sketched a broad picture of government and law in Vietnam by highlighting the intimacy between the party and the state. The party assumes the leadership over the whole political system and employs both mass organisations and the state as a tool to enforce its policies. The principle of integration of state power under the party leadership has led to a robust executive government, an impotent legislature and a dependent judicial system. Meanwhile, an effective political opposition cannot be established due to cosmetic elections and a controlled media, whilst opportunities for public participation are limited. The research noted the worrying fact that these problems are also aggravated by the limited capacity of policy-setting and implementation, coupled with poorly-managed economic reforms. This explains Vietnam's continuing struggle against lack of accountability, low transparency, ineffective bureaucracy, corruption and economic stagnation.

At present, Vietnam does not have a workable FOI regime. In addition to incoherent policy which is based in a weak, constitutional recognition of the right to access information and piecemeal legislation on information access, the poor performance of FOI in Vietnam to date is attributable to a lack of political support and difficulties in cultural and economic conditions. The failure of information access in Vietnam is a clear example of poor policy design, after FOI ideals were initially imported into the Constitution for political gain rather than intrinsic benefit. That is to say, without regard to core principles, local conditions or legal transplantation theories. Given the serious legislative shortcomings in the existing legislation, this thesis argues that adoption of a dedicated FOI law must be the starting step for Vietnam. Encouragingly, enactment of an FOI law in the present era will be accompanied by a degree of support within and across society where a level of readiness is already observable not only amongst political elites and government agencies, but within civil society.

Vietnam is preparing to adopt an FOI law. But it is doing so with an overly ambitious objective, and it is arguable that once again the country is failing to properly consider the lessons from abroad, local conditions, and legal transplantation theories. Targeting FOI as a human right, in a single party state with a dominant collectivist culture, is not a viable philosophical basis. Instead, good governance should be the driving ideal behind the development of an FOI law which obliges public agencies to publish key information and at the same time creates a feasible legal fall-back for the public to request information. In the initial stage, Vietnam cannot insist on either a 'push' or a 'pull' model or a comprehensively progressive FOI law. Rather, it should aim, more modestly, for workable mechanisms that secure practical access and facilitate the gradual improvement of information flow.

The thesis stresses that FOI reform in Vietnam cannot be achieved by simply adopting a specific law. It demonstrates that the ATI Law presently being drafted will become worthless without effective and realistic adaptation strategies. There is an urgent need to deal with the piecemeal, weak, existing legislation on information access, and the rival legislation protecting state secrets. In the long run, FOI will need support from other mechanisms for transparent, accountable and efficient government, so measures for improvement of those goals must be undertaken. As stronger democracy is a fundamental condition not only for FOI but also other liberalisations, it is important that future policy, particularly those on rights and freedoms, facilitates rather than limits the democratisation process in Vietnam.

The thesis makes it clear that FOI reform in Vietnam is not revolutionary but a process of liberalisation, through which both FOI and local conditions may be gradually improved. Adopting a specific FOI law does not end, but rather commences the FOI reform process. These research findings are consistent with the underlying research objectives which were not to draft a model law but to undertake a contextual and comparative law study aimed at supplying a roadmap to reform FOI as part of a broader process of democratisation in Vietnam. Even if the latest draft ATI law is passed by the National Assembly as it is hoped by MOJ, this thesis can inform the long ongoing process of FOI reform in Vietnam. Additionally, as this is the first research that critically explores ways to adapt FOI to the Vietnamese environment, this thesis offers insights into key issues for Vietnam - a one-party country seeking to open government and liberalise gradually - and other socialist states in transition. The research's contribution is a socio-legal-politico-institutional overview, seeking to draw historical and comparative lessons from the field of FOI law with due realism drawn from transplant theories. In this sense, apart from making a significant contribution to the feasibility of FOI reform, and filling the gap in knowledge about FOI and other kinds of public law transplantation in Vietnam, the research purports to offer new insights for the ongoing debate among comparative legal scholars about FOI transplantation in general, and the complex relationship between the effectiveness of a FOI regime and its local context.

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