

## ABHANDLUNGEN / ARTICLES

### Access to Information as a Human Right and Constitutional Guarantee. A Comparative Perspective

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**Abstract:** Since the 1990s, there has been a “global explosion of freedom of information” as new constitutions have enshrined the right to information, legislators have enacted access to information acts, and courts have enforced and expanded individual guarantees to seek information from public authorities. Activists, journalists and citizens have welcomed access to state-held information (ATI) as a leverage right that empowers the powerless and improves democracy. The burgeoning scholarly literature on ATI culminates in the claim that freedom of information is part of a fourth wave of rights, equivalent to civil, political and social rights.

This overview article takes stock of the existing ATI scholarship, identifies gaps and methodological weaknesses in extant literature, and lays out an approach for future research. It argues for a methodological approach to ATI research that combines a context-sensitive comparison across the North-South divide with socio-legal methods and a multi-level perspective. This approach indicates that conceptually, ATI should be understood as a multi-level and multi-functional guarantee, shaped by an interplay of multiple levels of law and the multiple social functions it performs. Theoretically and empirically, ATI has emancipatory potential to shift power relations in individual cases but is less effective in destabilizing entrenched power structures and inequalities. Findings on ATI contribute to general debates among constitutional lawyers, international law scholars and comparatists about the globalization of law and the transformation of rights in the information society.

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#### A. Introduction

Brazil, Germany, India, South Africa, the European Union, the Inter-American and the European Court of Human Rights, and the UN Human Rights Committee all share a com-

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mon legal feature: They have recognized “access to information” as an individual right since the turn of the millennium. Since the 1990s, there has been a veritable “global explosion of freedom of information”<sup>1</sup> as new constitutions have enshrined the right to information, legislators have enacted access to information acts, and courts have enforced and expanded individual guarantees to seek information from public authorities. Activists, journalists and citizens have campaigned for these new rights and welcomed access to state-held information (ATI) as an unqualified good: It empowers citizens for the information age, perfects democracy, promotes development, and even represents “India’s final liberation from colonialism”.<sup>2</sup> Empirical examples seem to confirm these assumptions: In South Africa, access requests helped uncover the misuse of public funds by President Jacob Zuma and contributed to his ultimate demise.<sup>3</sup> The enthusiasm about ATI is echoed in a burgeoning body of scholarly literature, which culminates in the claim that freedom of information is part of a fourth wave of rights, equivalent to civil, political and social rights.<sup>4</sup>

After two decades of ATI enthusiasm, it is time to take stock. This overview article, which introduces a journal special issue on the right to information, synthesizes existing ATI scholarship, identifies gaps and methodological weaknesses in extant literature and lays out an approach for future research. To do so, it brings together different disciplinary strands of ATI scholarship in constitutional and international law, legal and political theory, as well as comparative law and social science. The main argument is methodological: ATI

1 *John Ackerman/Irma Sandoval-Ballesteros*, The Global Explosion of Freedom of Information Laws, *Administrative Law Review* 58 (2006), p. 85.

2 Cf. *Aradhana Sharma*, State Transparency after the Neoliberal Turn: The Politics, Limits, and Paradoxes of India’s Right to Information Law, *VRÜ* 50 (2017), in this special issue (citing the Indian newspaper “Herald Deccan”).

3 *Richard Calland*, Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa, *VRÜ* 50 (2017), in this special issue.

4 *Mark Bovens*, Information Rights: Citizenship in the Information Society, *Journal of Political Philosophy* 10 (2002), p. 317. From the literature see *C. Weeramantry*, Access to Information: A New Human Right, *Asian Yearbook of International Law* 4 (1994), p. 99; *Richard Calland/Alison Tilley* (eds.), The right to know, the right to live, Cape Town 2002; *Ackerman/Sandoval-Ballesteros*, note 1; *Ann Florini* (ed.), The right to know, New York 2007; *Toby Mendel*, Freedom of Information, Paris 2008; *Colin Darch/Peter Underwood*, Freedom of information and the developing world, Oxford England 2010; *Roy Peled/Yoram Rabin*, The Constitutional Right to Information, *Columbia Human Rights Law Review* 42 (2011), p. 357; *Sarah Holsen/Martial Pasquier*, What’s wrong with this picture? The case of access to information requests in two continental federal states – Germany and Switzerland, *Public Policy and Administration* 27 (2012), p. 283; *Richard Calland/Fatima Diallo* (eds.), Access to Information in Africa, Leiden 2013; *Maeve McDonagh*, The Right to Information in International Human Rights Law, *Human Rights Law Review* 13 (2013), p. 25; *Jonathan Klaaren*, The Human Right to Information and Transparency, in: *Andrea Bianchi/Anne Peters* (eds.), Transparency in international law, Cambridge 2013, p. 223; *Sean Fraser*, The Role of Access to Information in Promoting Development, in: *Hassane Cissé/Madhava Menon/Marie-Claire Cordonier Segger* (eds.), Fostering Development through Opportunity, Inclusion, and Equity, 2014, p. 189; *Tarlach McGonagle, Yvonne Donders* (eds.), The United Nations and Freedom of Expression and Information, Cambridge 2015.

research should combine context-sensitive comparison across the North-South divide with socio-legal methods in a multi-level perspective. This approach sheds light on key questions of ATI research: How should ATI be conceptualized legally and theoretically? Can it function as a “leverage right” that shifts power relations between the powerless and the powerful? Does it improve democratic practice, or is it simply a consequence of democratization? Careful comparison suggests some preliminary answers to these questions: Conceptually, ATI should be understood as a multi-level and multi-functional guarantee, shaped by an interplay of multiple levels of law and the multiple social functions it performs. Theoretically and empirically, ATI has emancipatory potential to shift power relations in individual cases but is less effective in destabilizing entrenched power structures and inequalities.

Such comparative findings will not only be of interest to the ATI community but also contribute to general debates among constitutional lawyers, international law scholars and comparatists about the globalization of law and the transformation of rights in the information society. ATI thus offers a fruitful testing ground for theoretical and methodological debates in comparative law and human rights research, expanding the perspective geographically and thematically beyond the prototypical rights that often dominate rights discourse in the information age, be it privacy in Europe or free speech in the US.

To elaborate these arguments, the paper proceeds in four steps. Section B traces the expansion of ATI in legislation, constitutional law and international human rights law, and analyzes its doctrinal evolution into a positive multi-level right. Section C turns to theoretical justifications and critiques of ATI and links them to general theories of and critical approaches to rights. Section D develops a comparative approach to ATI research that draws on functionalist, contextualist and socio-legal methods. Section E concludes with preliminary findings and implications for further research.

## B. Doctrine: Access to information as a positive multi-level right

From the perspective of legal doctrine, freedom of information has undergone a remarkable expansion and evolution. It has evolved from a legislative guarantee in a handful of countries into a globalized, multi-level right enshrined in legislation and constitutions around the world (I.) and recognized as a human right in international law (II.).

### I. The right to information in constitutional law

The starting point for most contemporary discussions is a legal definition of ATI based on historical models. Even comparative pieces typically begin by defining ATI and then set out to find legal institutions that match this definition in different jurisdictions.<sup>5</sup> This historical-doctrinal approach differs from the two main methodological schools in comparative law, functionalism and contextualism, but it shapes most of ATI literature and is thus worth re-

<sup>5</sup> See for instance Peled/Rabin, note 4, p. 357; Ackerman/Sandoval-Ballesteros, note 1, p. 93.

tracing (1.). This perspective shows that ATI has not only expanded geographically but has also acquired the status of a constitutional right in many jurisdictions, especially in the Global South (2.).

### 1. Definition and historical evolution

In the existing literature, the notions of “freedom of information”, “access to information” and “right to information” are often used interchangeably to designate the same legal institution defined by four elements: A subjective right for any individual (1), without particular personal interest or standing (2), to compel disclosure of any information held by public authorities (3), limited only by exceptions explicitly stipulated by law and subjected to independent review (4); or, in short, an individual, positive, unconditional and justiciable right of access to official information.<sup>6</sup> This positive right will be designated as access to information (ATI) or right to information in the following discussion. The term freedom of information will be used in a wider sense that also includes the negative dimension, which protects recipients of information against state interference.<sup>7</sup>

Hence, the adoption of the right to information has significant doctrinal consequences: Government documents and databases are assumed public unless specifically exempt, and information seekers need not justify their requests. ATI thus shifts from a “need to know” principle to a “right to know” principle.<sup>8</sup> In this respect, it differs from other norms that grant access to specific types of information or to specific groups of petitioners: ATI encompasses any information, not just personal data, environmental information, publicity in parliaments, or the publication of laws. Anyone can request access, not just participants in a specific administrative procedure, professional journalists, or members of parliament. Often, ATI is not even limited to citizens or residents, which makes it a potentially cosmopolitan right.<sup>9</sup> It also differs from transparency, which is much broader and can be promoted without granting individual access rights.

This doctrinal understanding of ATI is shaped by two “model” laws that recur in legal debates: a Swedish law on freedom of the press dating back to 1766 and the US-American Freedom of Information Act (FOIA) passed in 1966. The Swedish law informs the standard historical narrative about the “origin” of ATI: 23 years before the French revolution, this

6 Ackerman/Sandoval-Ballesteros, note 1, p. 93.

7 *Ibid.*, p. 90. For classical expositions of the distinction between positive and negative rights and freedoms see *Isaiah Berlin*, Four essays on liberty, London 1969; *Georg Jellinek*, System der subjektiven öffentlichen Rechte, Freiburg 1892. For an evolutionary perspective see *T. Marshall*, Citizenship and social class, Cambridge 1950.

8 Ackerman/Sandoval-Ballesteros, note 1, p. 93.

9 Philipp Dann, Der Zugang zu Dokumenten im Recht der Weltbank, *Die Verwaltung* 44 (2011), p. 313 (in the context of international institutional law).

law required official documents to be disclosed upon request to anyone free of charge.<sup>10</sup> In the 200 years that followed, until the enactment of the FOIA in the US, not much happened. In 1888, Colombia became the second country to enact an access law, albeit limited to local government records; Finland followed suit in 1951.<sup>11</sup> After 1966, the pace of ATI enactments increased and soared in the 1990s. Since the end of the cold war, there has been a veritable “explosion” of ATI legislation. Overall, the number of countries with ATI laws has risen from ten in 1986 to more than 100 in 2017.<sup>12</sup>

What accounts for the global rise of ATI, especially since the 1990s? Possible answers can be gauged based on the three historical contexts in which ATI has emerged and spread: political liberalization, the rise of the administrative state, and the information society. A significant number of ATI norms are adopted in phases of political transition, starting with the Swedish “age of liberty” from 1719-1772 in which the monarchy lost power to the parliamentary opposition.<sup>13</sup> The global rise of ATI in the 1990s coincides with the third wave of democratization, in which access laws were enacted as a response to past authoritarian experiences and present accountability problems.<sup>14</sup> In this perspective, ATI seems to be another element in the “rise of world constitutionalism” and in the “inevitable globalization of constitutional law”.<sup>15</sup> A second historical context is the rise of the administrative state during the 19<sup>th</sup> and 20<sup>th</sup> century. In the USA, the number of civil servants rose from 50,000 in 1871 to 3.8 million in 1945; bureaucracies spread with colonial administration and the emergence of “developmental states” in the Third World.<sup>16</sup> The administrative state mas-

10 *Anders Chydenius*, His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (Peter Hogg, trans.) (1766), in: Juha Mustonen (ed.), *The World's First Freedom of Information Act: Anders Chydenius' Legacy Today*, Kokkola 2006. See e.g. *Gregory Michener*, FOI Laws Around the World, *Journal of Democracy* 22 (2011), p. 145, at 147: “Sweden enacted the world's earliest FOI law in 1766”. For an in-depth discussion see *Darch/Underwood*, note 4, p. 65-72.

11 *Peled/Rabin*, note 4, p. 368-369; *Darch/Underwood*, note 4, p. 81-83; *Alberto Donadio*, Freedom of Information in Colombia, *Access Reports*, February 16, 1994.

12 *Michener*, note 10, p. 148; *Peled/Rabin*, note 4, p. 370ff.; *Darch/Underwood*, note 4, p. 47-48; *Ackerman/Sandoval-Ballesteros*, note 1, p. 85 f., 95-98, 109-115. See also *L. Esquivel*, One hundred ATI law in the world, now what?, *Open Government Partnership Blog*, World Bank, 10.10.2014, <https://www.opengovpartnership.org/stories/one-hundred-ati-laws-world-now-what> (1.11.2017).

13 *Darch/Underwood*, note 4, p. 64-67.

14 *Michener*, note 10, p. 145; *Peled/Rabin*, note 4, p. 370-372; *Ackerman/Sandoval-Ballesteros*, note 1, p. 86 f.

15 *Mark Tushnet*, The Inevitable Globalization of Constitutional Law, *Virginia Journal of International Law* 50 (2009), p. 985; *Bruce Ackerman*, The Rise of World Constitutionalism, *Virginia Law Review* 83 (1997), p. 771. But see the critical response by *Heinz Klug*, Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism", *Wisconsin Law Review* (2000), p. 597. For discussion see below part D.

16 *Ackerman/Sandoval-Ballesteros*, note 1, p. 91 f. See generally *Ira Katznelson*, Strong theory, complex history: Structure and configuration in comparative politics revisited, in: Alan S. Zuckerman/Mark Irving Lichbach (eds.), *Comparative politics*, 2009, p. 96.

sively increased its official capacity to collect information while hiding large amounts of governmental activity inside arcane, anonymous bureaucracies, which in turn created demand for openness. A third context that shaped ATI is the “information society”.<sup>17</sup> Especially since the 1990s, technological innovations and changes in societal self-descriptions have exponentially increased the availability and value of information in social, economic and political life. ATI thrives in a political culture characterized by transparency ideals, public scandal and secret leaking.<sup>18</sup> In this context, the legal value of ATI has also risen to constitutional status.

## 2. Constitutionalization: Surging from the South

Since the 1990s, ATI has increasingly been recognized as a fundamental right in constitutional orders around the world. New democracies have included explicit provisions in their bills of rights. Constitutional courts have re-interpreted older guarantees such as freedom of expression or freedom of information as implying a positive entitlement to state-held information. Currently, more than 60 constitutions recognize ATI as a fundamental right, the majority of them in the Global South.<sup>19</sup> Established democracies are more reluctant with constitutional recognition. The US Supreme Court refused to interpret the First Amendment as a positive constitutional right to governmental information.<sup>20</sup> Similarly, the German Constitutional Court continues to interpret freedom of information as a negative guarantee against government interference; positive rights to access information held by the federal government only came with the 2005 Freedom of Information Act.<sup>21</sup> Thus, if there is a fourth wave of fundamental rights, it seems to surge from the South.

Constitutional guarantees of the RTI have three main effects: They typically mandate the adoption of ATI legislation that enables the effective exercise of the right; they limit the restrictions that such legislation can impose on individual access; and they enable constitutional courts to police existing laws and to grant access even in the absence of legislative enactments. ATI laws, in turn, have a dual function: On the one hand, they effectuate access by providing request procedures, deadlines, appeals and enforcement mechanisms, as well as sanctions for non-compliance and pro-active publication duties. On the other hand, legislation restricts the fundamental right to information by limiting coverage, imposing costs

17 Foundational *Daniel Bell*, The coming of post-industrial society, New York 1973.

18 *Darch/Underwood*, note 4, p. 53 f., 85-90; *Ackerman/Sandoval-Ballesteros*, note 1, p. 124.

19 „Global South“ is both a geographical and a political notion. Geographically, it is used to designate developing and transition countries in the former “Third World”. Like this latter term, Global South can also be understood as a project of political emancipation and critique of socio-political marginalization. Cf. *Jean Comaroff/John Comaroff*, Theory from the South, London 2018.

20 *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978): “There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy [...] The Constitution itself is neither a Freedom of information Act nor an Official Secrets Act”. On this and subsequent case law see *Peled/Rabin*, note 4, p. 375-378.

21 *Holsen/Pasquier*, note 4.

and laying down exceptions such as privacy or national security.<sup>22</sup> Existing ATI laws vary considerably in strength: Restrictive exceptions, strict timelines, low costs and independent enforcement characterize strong *de jure* laws. Enforcement is particularly important and can involve administrative appeals, ombudspersons, judicial review or information commissioners with their own powers to release documents, which tend to be most effective.<sup>23</sup>

By this measure, strong *de iure* access regimes are particularly prevalent in the Global South. South Africa and India are frequently cited as leading jurisdictions. The highest concentration of strong ATI regimes can be found in Latin America: More than half of the jurisdictions in this region have elevated ATI to constitutional status. Legislation establishes exceptionally powerful enforcement institutions, such as the Information Commissioner in Mexico. Some jurisdictions provide electronic platforms that greatly simplify access, for example in Brazil. Several laws prohibit the classification of information that is required for investigating human rights violations or for realizing such rights, for instance in Brazil, Colombia, Peru and Uruguay. Although *de jure* strength does not necessarily guarantee effective implementation, it can be safely said that strong “law on the books” translates into a rich ATI practice and literature.<sup>24</sup>

Some of the strengths and weaknesses of Latin American ATI regimes are illustrated by Brazil. The Brazilian Constitution of 1988 established an individual right of access to information held by public agencies, except for information whose secrecy is essential to the security of society and of the State (Art. 5-XIV and XXXIII). The provision remained largely moot, however, until Congress enacted the Law on Access to Information in 2011. The law applies to all three branches and to all levels of government, and even extends some obligations to private entities if they receive public funds. It establishes an individual request procedure and requires public agencies to create specialized “Citizen Information Service” units. Enforcement, however, is largely entrusted to an internal administrative appeals process within the executive branch, which tends to interpret exceptions to disclosure broadly. Since these interpretations are rarely challenged in the courts, ATI remains a “controlled right” thus far.<sup>25</sup>

22 *Mendel*, note 4, p. 33 ff.; *Ackerman/Sandoval-Ballesteros*, note 1, p. 99-108.

23 *Ackerman/Sandoval-Ballesteros*, note 1, p. 105 f.

24 *Gregory Michener*, Assessing Freedom of Information in Latin America a Decade Later, *Latin American Politics and Society* 57 (2015), p. 77, 79 f.; *Terezinha Silva/Thiago Eirão/Raphael Cavalcante*, Relacionando la legislación sobre acceso a la Información de los países del MERCOSUR, *Biblos* (2015), p. 28; *Inter-American Commission of Human Rights*, National jurisprudence on freedom of expression and access to information, 2013; *Inter-American Commission of Human Rights*, The right to access to information in the Americas, 2012; *Darch/Underwood*, note 4, p. 146 f., 182-196; *Toby Mendel*, The Right to Information in Latin America, Paris 2009; *Roberto Saba*, El Derecho de la Persona a Acceder a la Información en Poder del Gobierno 3 (2004), p. 145; *Ernesto Villanueva*, Derecho de acceso a la información pública en Latinoamérica, Mexico 2003.

25 *Marcio Cunha Filho*, The Right to Information in Brazil: tensions between transparency and control of information, VRÜ 50 (2017), in this special issue; *Article 19*, Os 5 anos da Lei de Acesso à

Courts play a more significant role in India, the poster child of ATI activism. The Indian Supreme Court ruled as early as 1982 that a positive right to information was implicit in the right to free speech in Art. 19(1)(a) of the Constitution. Hence, disclosure of information about the functioning of Government had to be the rule and secrecy the exception “justified only where the strictest requirement of public interest so demands”.<sup>26</sup> In practice, however, the fundamental right to information, judicially decreed from above, lay largely dormant until it met with a wave of activism from below. In the early 2000s, a broad social movement led by the grassroots organization MKSS (*Mazdoor Kisan Shakti Sangathan*/Association for the Empowerment of Workers and Farmers) successfully campaigned for the legislative enactment of a Right to Information (RTI) Act, which was eventually passed in 2005. The RTI Act enabled ordinary citizens to file individual requests and thus opened up administrative information that had been systematically protected under the colonial Official Secrets Act of 1889. Hailed as a “great and revolutionary law”<sup>27</sup>, the RTI Act has generated a massive caseload for the “Public Information Officers” whom every agency is required to designate. It has also led to frequent appeals to the “Central Information Commission” in New Delhi and to litigation in the courts.<sup>28</sup>

A spectacular success is attributed to ATI activism in South Africa: Investigative journalists used access requests to uncover misspending of public funds on president Jacob Zuma’s private property, leading to his conviction by the Constitutional Court and precipitating his eventual political demise by the African National Congress (ANC) in early 2018.<sup>29</sup> The legal basis for this case was the Promotion of Access to Information Act (PAIA) adopted in 2000. Its enactment was mandated by the South African Constitution of 1996, whose Section 32 guarantees access to information. The provision is special because it was one of the first constitutional norms that extended access rights horizontally to privately held information if that information is required “for the exercise or protection of any rights”.<sup>30</sup> Unlike the laws in Brazil and India, however, the implementing legislation did not initially envisage a system of specialized administrative review but rather channeled appeals directly into lengthy High Court litigation. This gap was addressed only in 2013 with the estab-

Informação, 2017; *Marcio Cunha Filho/Vitor Xavier*, Lei de Acesso à Informação, Rio de Janeiro 2014; *Salete Oro Boff/Felipe Veiga Dias*, O tratamento jurisdiccional das liberdades comunicativas na sociedade da informação no brasil, Boletín Mexicano de Derecho Comparado 46 (2013), p. 573.

26 S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 234 (India), para. 55.

27 *Alasdair Roberts*, A Great and Revolutionary Law? The First Four Years of India's Right to Information Act, *Public Administration Review* 70 (2010), p. 925.

28 *Sharma*, note 2; *RaaGroup et al.*, Tilting the Balance of Power. Adjudicating the RTI Act, Delhi 2017; *Prashant Sharma*, Democracy and transparency in the Indian state, Milton Park 2015; *Sudhir Naib*, The Right to Information in India, Delhi 2013.

29 *Calland*, note 3.

30 *Fola Adeleke*, Constitutional domestication of the right of access to information in Africa: Retrospect and prospects, in: Richard Calland/Fatima Diallo (eds.), *Access to Information in Africa*, Leiden 2013, p. 83; *Klaaren*, note 4.

lishment of an Information Regulator under the new Protection of Personal Information Act.<sup>31</sup>

## *II. The human right to information in international law*

As ATI expanded in national law, it also gained increasing recognition as an international norm in international environmental law, international economic law and in the law of international institutions.<sup>32</sup> International human rights law, however, represents the oldest and widest trajectory of ATI beyond the state. At the universal level (1.) and in regional systems (2.), “freedom of information” has evolved from a sub-component of the right to freedom of expression into a self-standing right of access to state-held information. At the same time, ATI has expanded from a negative right, subject to an obligation to respect, into a positive right imposing a duty on the state to fulfill the right by way of disclosing government-held information.<sup>33</sup> ATI thus transcends the porous boundary between civil-political and socio-economic rights and mirrors the wider trend from negative to positive rights in international human rights law.<sup>34</sup>

### 1. Freedom of information in the UN system

The UN’s early engagement with freedom of information is a largely forgotten episode in international legal history but was nevertheless defining for the fledgling organization: At its very first session in 1946, the UN General Assembly called for a conference on freedom of information, recognizing that “[f]reedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>35</sup> The conference, held in 1948 in Geneva, adopted no less than 43 resolutions, three conventions,

31 *Calland*, note 3.

32 *Jean Ashukem*, Access to environmental information in the context of development activities in the legal framework of Cameroon, VRÜ 50 (2017), in this special issue; *Michael Riegner*, The international institutional law of information, *International Organizations Law Review* 12 (2015), p. 50; *Andrea Bianchi/Anne Peters* (eds.), *Transparency in international law*, Cambridge 2013; *Ulrich Beyerlin/Thilo Marauhn*, *International environmental law*, Oxford 2011, p. 236-238. The Council of Europe Convention on Access to Official Documents, adopted in 2009 as the first freestanding international legal instrument on access to information, has not yet entered into force.

33 On this evolution see *McDonagh*, note 4. From the literature see further *Kimberli Kelmor*, Legal Formulations of a Human Right to Information: Defining a Global Consensus, *Journal of Information Ethics* 25 (2016), p. 101; *Tarlach McGonagle, Yvonne Donders* (eds.), note 4; *Klaaren*, note 4; *Cheryl Bishop*, Internationalizing the right to know: Conceptualizations of access to information in human rights law, *Ann Arbor* 2011; *Toby Mendel*, Freedom of Information: An Internationally Protected Human Right, *Comparative Media Law Journal* 1 (2003), p. 1; *Weeramantry*, note 4.

34 *Sandra Fredman*, *Human rights transformed*, Oxford 2009.

35 *UNGA*, Res. 59(I), Calling of an International Conference on Freedom of Information, 14.12.1946, U.N. Doc. A/229, p. 95.

and draft articles for inclusion into an international bill of rights.<sup>36</sup> The conference's draft articles on freedom of information were included without major changes in the Universal Declaration of Human Rights in 1949, whose Art. 19 states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This formulation, later carried over into Art. 19 of the International Covenant on Civil and Political Rights (ICCPR), reversed the original relationship of the two ideas in previous UN discourse: Initially, freedom of information had been the overarching concept; now freedom of expression became the umbrella, and freedom of information its subcomponent. This relationship favored the interpretation as a negative right in subsequent UN practice, as did a historical interpretation of freedom of information as a reaction to totalitarian propaganda that had also banned access to foreign news sources and "enemy" radio.<sup>37</sup>

This interpretation started to change in the late 1990s in a process that is exemplary for evolutive interpretation in international human rights law. Regional and universal human rights institutions began to derive a positive right of access to state-held information from other human rights. In 1998, the Special Rapporteur on freedom of opinion and expression, Abid Hussain from India, declared that "the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own" and asserted that this freedom "imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government".<sup>38</sup> In subsequent UN practice, other Rapporteurs and treaty bodies also derived ATI from socio-economic rights, such as the right to health or the right to food.<sup>39</sup> States mostly supported this expansive interpretation, as newly democratic governments recognized ATI at home and sought to "lock in" newly found freedoms beyond the state to protect themselves from

36 *Tarlach McGonagle*, The development of freedom of expression and information within the UN: leaps and bounds or fits and starts?, in: *Tarlach McGonagle/Yvonne Donders (eds.)*, *The United Nations and Freedom of Expression and Information*, Cambridge 2015, p. 1, 10-19. For a historical perspective see *John Whitton*, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, *AJIL* 43 (1949), p. 73.

37 *McGonagle*, note 36, p. 6; *Jan Burgers*, The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century, *Human Rights Quarterly* 14 (1992), p. 447. On the continuing significance of the UDHR see *Jochen v. Bernstorff*, The Changing Fortunes of the Universal Declaration of Human Rights, *EJIL* 19 (2008), p. 903.

38 *UN Commission on Human Rights*, Promotion and protection of the right to freedom of opinion and expression - Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26, UN Doc. E/CN.4/1998/40 1998, para 11, 14.

39 *Yvonne Donders*, The International Covenant on Economic, Social and Cultural Rights: Accessibility and the Right to Information, in: *Tarlach McGonagle/Yvonne Donders (eds.)*, *The United Nations and Freedom of Expression and Information*, 2015, p. 89; *Committee on Economic Social and Cultural Rights*, General Comment No. 14, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 2000, paras. 3, 11, 44(d).

backslding.<sup>40</sup> During the first six years of the Universal Periodic Review in the Human Rights Council, 27 out of 28 member states accepted recommendations to guarantee ATI in legislation and in practice.<sup>41</sup>

The Human Rights Committee initially hesitated but eventually followed suit. In 2009, it still rejected an individual application by a human rights activist from Kyrgyzstan as inadmissible *actio popularis* because the applicant had not explained, “why exactly he, personally, needed the information [on death sentences]”.<sup>42</sup> Only two years later, the Committee reversed itself in another case concerning Kyrgyzstan: It held that the applicant’s right to seek and receive information about death sentences had been violated because Art. 19 ICCPR entailed the right to receive state-held information, “without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied”<sup>43</sup>. This new view was generalized in the Committee’s new General Comment No. 34 on freedom of expression issued in 2011.<sup>44</sup> The new text opines that Art. 19(2) ICCPR “embraces a right of access to information held by public bodies” and recommends that states “enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation”.<sup>45</sup> Such legislation should provide that access requests be processed in a timely manner, that fees remain reasonable, and that refusals be justified and subject to appeal.<sup>46</sup>

## 2. Regional systems and multi-level interplays

This evolution in universal human rights law occurred in the context of similar developments at the regional level. In a comparative international law perspective, the Inter-American

40 On “lock in” as an explanation for international human rights instruments *Simon Zschirnt*, Locking In Human Rights in Africa, *Hum Rights Rev* 19 (2018), p. 97; *Andrew Moravcsik*, The origins of human rights regimes, *International Organization* 54 (2000), p. 217.

41 *Fraser*, note 4, p. 198.

42 *HRC*, B. v. Kyrgyzstan (1877/2009), CCPR/C/96/D/1877/2009 (2009), para. 4.2.

43 *HRC*, Toktakunov v. Kyrgyzstan (1470/2006), CCPR/C/101/D/1470/2006 (2011), para. 6.3, 6.5. On these cases, *McDonagh*, note 4, p. 31 f.

44 For an overview see *Michael O’Flaherty*, International Covenant on Civil and Political Rights: interpreting freedom of expression and information standards for the present and the future, in: *Tarlach McGonagle/Yvonne Donders* (eds.), *The United Nations and Freedom of Expression and Information*, Cambridge 2015, p. 55. On the instrument of General Comments in general *Philip Alston*, The Historical Origins of ‘General Comments’ in Human Rights Law, in: *Laurence Boisson de Chazournes/Vera Gowlland-Debbas/Georges Abi-Saab* (eds.), *The international legal system in quest of equity and universality*, The Hague 2002, p. 764; *Helen Keller/Leena Grover*, General Comments of the Human Rights Committee and their legitimacy, in: *Helen Keller/Geir Ulfstein* (eds.), *UN human rights treaty bodies*, Cambridge 2012, p. 116-198.

45 *HRC*, General Comment No 34: Freedom of expression (art 19), 12 September 2011, CCPR/C/GC/34, para 18 f.

46 See further *Sarah Joseph/Melissa Castan*, *The International Covenant on Civil and Political Rights*, Oxford 2013, p. 599-603; *O’Flaherty*, note 44, p. 73-82.

can system emerges as the true groundbreaker, trailed by the UN Human Rights Committee and the European Court of Human Rights (ECtHR).<sup>47</sup> As early as 1985, the Inter-American Court of Human Rights (IACtHR) interpreted Art. 13 of the American Convention on Human Rights (ACHR) in a way that placed the “freedom to seek, receive and impart information” on a par with freedom of expression: “For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”<sup>48</sup>

In 2006, the IACtHR became the first international court to recognize access to state-held information as a human right in *Reyes v. Chile*, which has become the leading case on ATI around the globe.<sup>49</sup> In this case, the Chilean government had refused to disclose commercial information about a private company, which had won a tender for a large-scale deforestation project. The IACtHR held that Art. 13 ACHR “protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.”<sup>50</sup> Chile had violated this right not only by withholding information in the particular case, but also because it had not enacted adequate legislation capable of justifying the denial of access. The Court thus ordered Chile to adopt an access law and to train public agents in handling access requests.<sup>51</sup>

In comparison, the ECtHR has pursued a more restrictive interpretation of Art. 10 ECHR, whose wording protects the freedom “to receive and impart” information but not “to seek” it. The Court long construed freedom of information as a negative right and only derived a limited right to personal and to environmental information from the right to private life in Art. 8 ECHR.<sup>52</sup> In 2012, the Grand Chamber eventually reversed this jurispru-

47 On the revival of the comparative international law tradition see *Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier, Mila Versteeg* (eds.), Comparative International Law, Oxford 2018; *Ugo Mattei/Boris Mamyluck*, Comparative International Law, Brooklyn Journal of International Law 36 (2011), p. 386.

48 IACtHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 13.11.1985, para. 32. On the IACtHR’s expansive interpretation methods see *Lucas Lixinski*, Treaty Interpretation by the Inter-American Court of Human Rights, EJIL 21 (2010), p. 585.

49 IAGMR, Claude-Reyes et. al v. Chile, 19.9.2006. From the literature see *Laurence Burgorgue-Larsen* et al., The Inter-American Court of Human Rights, Oxford, New York 2013, p. 544; *Peled/Rabin*, note 4, p. 390-392; *Pablo Contreras*, National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights, Northwestern Journal of International Human Rights 11 (2012), p. 28, 78; *Johannes Seidl*, Meinungsfreiheit in der Rechtsprechungspraxis des Inter-amerikanischen Gerichtshofs für Menschenrechte, Tübingen 2014, p. 224.

50 IAGMR, note 49, para. 77.

51 IAGMR, note 49, para. 89-103, 161-174.

52 ECtHR, *Gaskin v. The United Kingdom*, App. No. 10454/83, 7.7.1989, para. 37; ECtHR, *Leander v. Sweden*, App. No. 9248/81, 9.26.3.1987, para. 74.

dence and recognized a general access right based on Art. 10 in *Gillberg v. Sweden*, whose exact contours remain to be clarified.<sup>53</sup> In the African human rights system, ATI has been recognized at the level of the African Commission on Human and Peoples rights, which has also issued a model law on access to information.<sup>54</sup> In sum, there remain considerable differences between regional systems, and understanding and explaining these differences and mutual influences between regional approaches remains a future task for comparative international law.

The immediate consequences of the recognition of a human right to information is that state parties are compelled to adopt legislation to give effect to the right and to justify exceptions. Besides, national law is interpreted in light of the international obligations and case law. The *Reyes* case led to a cascade of adoptions in Latin America: In 2007, Chile's constitutional court re-interpreted freedom of information in the national constitution to imply ATI, and in 2008, legislatures in Chile, Uruguay and Guatemala passed ATI acts.<sup>55</sup> Conflicts between international and national law remain, however, especially with respect to exceptions. Exceptions must be orderly established in law, be precise and proportionate. International doctrine seems to converge around the view that exceptions that restrict access to information about potential human rights violations can never be justified, even if such information is classified under national law, as is often the case.<sup>56</sup> Moreover, exceptions must not discriminate on the basis of gender, race, language, religion, national origin, or any other grounds prohibited in Art. 2(1) ICCPR, Art. 2(2) CESCR and similar provisions. This is a problem namely in women's access to information about reproductive health. Information about contraception and, especially, abortion is not freely available in numerous jurisdictions and public health care systems. In Germany, "advertising" medical abortion services to women is even a criminal offence.<sup>57</sup> In contrast, the ECtHR and UN human rights institutions have repeatedly found that specific bans on information about reproductive health disproportionately restrict freedom of information and the right to health and can have a

53 ECtHR (Grand Chamber), *Gillberg v. Sweden*, Appl. No. 41723/06, 3.4.2012, para. 93. See also ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Appl. n. 18030/11, 6.11.2016; EGMR, Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary, 14.4.2009, para. 35 f. On this case law see *Peled/Rabin*, note 4, p. 386-389; *Martha Spurrier*, *Gillberg v. Sweden: towards a right of access to information under Article 10?*, European Human Rights Law Review 5 (2012), p. 551; *Elena Carpanelli*, *Sul diritto di accesso alle informazioni di interesse pubblico detenute dallo Stato*, Osservatorio Costituzionale (2017), p. 1.

54 *Klaaren*, note 4, p. 232.

55 *Peled/Rabin*, note 4, p. 392.

56 *Inter-American Commission of Human Rights*, note 24; *Inter-American Commission of Human Rights*, The Inter-American legal framework regarding the right to access to information, 2012.

57 § 219a Federal Criminal Code; *Amtsgericht (Local Court) Gießen*, judgement of 24.11.2017, Az. 507 Ds 501 Js 15031/15. On Brazil *Article 19*, note 25, p. 45 ff.

discriminatory effect on underprivileged women.<sup>58</sup> Bans on abortion information are thus particularly problematic where they affect pregnant migrants and refugees.

### C. Theory: Justifications and critiques

The global rise of ATI also raises questions for legal theory. How can its expansion in positive law be justified theoretically? Are there dark sides to recognizing ATI as a fundamental or human right? The following section discusses the main theoretical justifications (I.) and critiques of ATI (II.) and links them to broader theoretical debates about rights, democracy and development.

#### I. Theoretical justifications: Liberalism and beyond

Since the 1990s, a growing body of literature has sought to justify ATI in theoretical terms. These debates have not identified one underlying principle but rather a panoply of justifications. Theoretical contributions on ATI distinguish between instrumental and intrinsic justifications<sup>59</sup> – a key debate in general legal theory and political philosophy of rights<sup>60</sup> – but concrete arguments for ATI are almost always instrumental: They derive it from other rights or normative ideals, such as liberty and equality (1.), or democracy and development (2.).

##### 1. Liberty and equality

Freedom of information has deep roots in liberal thought. In this lineage, it is conceived as a precondition for freedom of opinion and expression: “Freedom of information is the blood which runs in the veins of freedom of expression,” as an Australian judge put it.<sup>61</sup> If access to information makes forming opinions meaningful, then access to *governmental* information is particularly important for opinions regarding public affairs.<sup>62</sup> This instrumental

58 *Johanna Westeson*, Reproductive health information and abortion services: Standards developed by the European Court of Human Rights, *International journal of gynecology and obstetrics* 122 (2013), p. 173; *Joanna Erdman*, Access to information on safe abortion: A harm reduction and human rights approach, *Harvard Journal of Law and Gender* 34 (2011), p. 413; *ECtHR*, Open Door Counselling and Dublin Well Woman v. Ireland, App. Nos. 14234/88 & 14235/88, 23.9.1992; *UN*, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest, attainable standard of physical and mental health, *UN Doc. A/66/254* 2011, para. 17, 22, 26, 31, 37, 56 f., 62, 65.

59 *McDonagh*, note 4, p. 26-28.

60 Cf. *Thomas Nagel*, Personal Rights and Public Space, *Philosophy & Public Affairs* 24 (1995), p. 83. For the classical instrumental argument see *Jeremy Bentham*, *Introduction to the Principles of Morality and Legislation*, London 1789; *Stuart Mill*, *Utilitarianism*, London 1863.

61 *Victorian Civil and Administrative Tribunal*, *XYZ v. Victoria Police* [2010] VCAT 255, 16.3.2010.

62 *McGonagle*, note 36, p. 3; *Richard Calland*, Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information, *Theoria* 61 (2014), p. 73-75; *Bishop*, note 33, p. 43 ff.

reasoning has been extended to other rights, especially positive socio-economic entitlements: Exercising the rights to health or food, for instance, requires information about health services or food programs.<sup>63</sup> In this vein, ATI is conceptualized as a generalized “leverage right” used to shift the balance of power between marginalized communities on the one hand and unresponsive bureaucracies failing to deliver services on the other.<sup>64</sup> ATI’s liberal genealogy has arguably evolved into an “egalitarian praxis” in the pursuit of substantive equality.<sup>65</sup> In Bangladesh, for instance, a widowed mother used ATI legislation to uncover that her application for a social benefits card had been denied arbitrarily due to a corruption scheme and ultimately compelled the administration to issue her a card.<sup>66</sup>

While such cases illustrate the theoretical argument, they do not empirically prove it in a social-scientific sense. For an egalitarian *theory*, further generalization and abstraction would be required. Such theoretical work could draw on positive conceptions of freedom as popularized by Amartya Sen, but would need to pay attention not only the material but also to the informational conditions that enable individuals to exercise their rights in practice.<sup>67</sup> There are, however, also doubts about instrumental reasoning as such. Firstly, deriving new rights from older rights leads to a proliferation of rights. This is a concern for critics who worry that an inflation of human rights might ultimately devalue them as a currency in legal and political argument. They thus advocate human rights minimalism focused on gross violations, or at least “quality control” before “conjuring up new human rights”.<sup>68</sup> This is all the more important for international courts whose precarious authority is currently facing increasing backlash from states, even democratic ones.<sup>69</sup> Whether ATI contributes to “inflation” or passes “quality control” depends on where one draws the line between a “new” ATI right and legitimate evolutionary interpretation of an “old” one, i.e., freedom of information. Furthermore, even a minimalist approach limited to gross violations may involve ATI. One of the diverse contexts in which access rights emerged was precisely the quest for es-

63 See e.g. *Donders*, note 39; *Klaaren*, note 4, p. 327 f.; *Peled/Rabin*, note 4, p. 363 f.

64 *S. Jagwanth*, The Right to Information as a Leverage Right, in: Richard Calland/Alison Tilley (eds.), *The right to know, the right to live*, 2002, p. 3, drawing on the classical typology of rights as claims, liberty/privileges, immunities and power rights developed by *Wesley Hohfeld*, *Fundamental legal conceptions as applied in judicial reasoning*, New Haven 1919. See also *Darch/Underwood*, note 4, p. 43-45.

65 *Calland*, note 62.

66 *World Bank Institute/Commonwealth Human Rights Initiative*/et al., *The Power of Using the Right to Information Act in Bangladesh: Experiences from the Ground*, 2012, p. 5-7.

67 Cf. *Fredman*, note 34, p. 10 ff.; *Amartya Sen*, *Development as freedom*, Oxford 1999; *Peled/Rabin*, note 4, p. 363, citing *Berlin*, note 7, p. liii-iv.

68 *Philip Alston*, *Conjuring up New Human Rights*, *AJIL* 78 (1984), p. 607. On minimalism *Michael Ignatieff*, *Human rights as politics and idolatry*, Princeton 2001, p. 90. Specifically on ATI *Peled/Rabin*, note 4, p. 359.

69 Cf. *Andreas Føllesdal/Johan Schaffer/Geir Ulfstein* (eds.), *The legitimacy of international human rights regimes*, Cambridge 2015; *Armin v. Bogdandy/Ingo Venzke*, *In Whose Name? An Investigation of International Courts Public Authority and its Democratic Justification*, *EJIL* 23 (2012), p. 7.

tablishing the truth about systematic torture and forced disappearances under civil-military dictatorships in Latin America, as discussed below.

Besides inflation, there is a more fundamental problem with instrumental justifications. If ATI is only justified by some ulterior objective, why does the access right persist even if that objective has already been achieved? Why is ATI content-neutral rather than being limited to information that is relevant for achieving other objectives? Intrinsic justifications may provide a more systematic answer to these questions. In the realm of free speech, intrinsic accounts tend to be content-neutral, i.e., they protect speech irrespective of the importance of the speaker or the speech for other values.<sup>70</sup> This is echoed by the idea that in the information society, all data and information is intrinsically significant, regardless of its content or its immediate social benefits – be it because of its constitutive role for personality formation and citizenship or because any piece of information can become socially relevant if combined with other data in new ways.<sup>71</sup> Further theoretical research may deepen this intrinsic line of thinking, which is underdeveloped thus far.

## 2. Democracy and development

The democratic justification extends the instrumental reasoning from individual liberty to collective self-determination. This is captured in the IACtHR's dictum that “a society that is not well informed is not a society that is truly free”.<sup>72</sup> Liberal democratic theory has long postulated that self-government requires informed voters and public debate in a competitive marketplace of ideas.<sup>73</sup> Contemporary proponents of ATI cite James Madison, who wrote as early as 1822: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>74</sup> This idea also resonates with deliberative and participatory theories of democracy. Jürgen Habermas' discursive theory rests on the idea of an egalitarian public sphere in which citizens freely exchange information and rea-

70 *Nagel*, note 60, p. 83, 87, 96.

71 *Engin Isin/Evelyn Ruppert*, *Being Digital Citizens*, London 2015; *Roberto Saba*, *El Derecho de la Persona a Acceder a la Información en Poder del Gobierno*, 3 *Derecho Comparado de la información* 45 (Jan.-June 2004), p. 153.

72 *IACtHR*, note 48, para. 70.

73 *Peled/Rabin*, note 4, p. 360-363. On the marketplace idea see *Justice Stevens*, dissenting, *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978). The democracy argument also made by contemporary activists and NGOs see e.g. *Mendel*, note 4, p. iii-iv; *David Banisar*, *Freedom of information around the world* 2006, p. 6f.; *Article 19*, *Freedom of Information Training Manual for Public Officials*, 2004.

74 Cited after *Gaillard Hunt* (ed.), *The Writings of James Madison*, 1910, p. 103. This quote was used in US Congressional debates on the Freedom of Information bill in 1965, cf. *Peled/Rabin*, note 4, p. 360-363.

sons to find consensus on collective decisions.<sup>75</sup> To be meaningful, public deliberation and opinion formation must be based on adequate information about public affairs, much of which is held by government. The democracy argument is neatly illustrated by case law from India. In a series of cases since 2002, the Indian Supreme Court interpreted the constitutional right to information as requiring candidates for elected office to disclose financial assets, criminal convictions and educational background to voters.<sup>76</sup>

The Indian example, however, also points to a classic counterargument against constitutionalizing rights, namely their counter-majoritarian effect. As a court-enforced constitutional and human right, ATI limits the ability of democratic majorities to regulate the governmental flow of information. This argument would imply that electoral democracy not only justifies normative authority but also a certain cognitive hierarchy between rulers and the ruled.<sup>77</sup> Yet, the opposite argument can also be made: The African Commission on Human and People's Rights, for instance, has developed the idea that information is held by government in a trusteeship for the people to whom it ultimately belongs.<sup>78</sup> Both views explain some aspect of ATI law. On the one hand, ATI allows for exceptions and thus does not delegitimize informational hierarchies as such. On the other hand, a constitutional right to information does shift the burden of justification from citizens to government.<sup>79</sup> In the end, a political economy consideration may prove the Indian Supreme Court right: Constitutional rights remain required where lawmakers cannot be expected to (self-)regulate effectively, namely when it comes to disclosing information about themselves.<sup>80</sup>

A third line of justifications links ATI to desirable social outcomes such as economic development, effective service delivery and corruption control. Following Brandeis' dictum

75 Jürgen Habermas, Three normative models of democracy, *Constellations* 1 (1994), p. 1; *ibid.*, Between facts and norms, Cambridge 1996, p. 287 ff.

76 Union for Civil Liberties (PUCL) and Another v. Union of India and Another, AIR [2003] SC 2363; Union of India v. Association for Democratic Reforms and Another (2002), AIR 2112; 2002 (3), SCR 294. On these cases *Manoj Mate*, India's participatory model: The right to information in election law, *George Washington International Law Review* 48 (2016), p. 377, 379-380; *Fraser*, note 4, p. 205.

77 *Patrick Birkinshaw*, Freedom of Information and Openness: Fundamental Human Rights, *Administrative Law Review* 58 (2006), p. 177. For a general discussion see *Jeremy Waldron*, Law and disagreement, Oxford 1999, p. 209 ff.

78 *African Commission on Human and Peoples' Rights*, Declaration of Principles on Freedom of Expression in Africa, 2002, 41 ACHPR/Res.62(XXXII)02, art. IV, para. 1: "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.". See also *Peled/Rabin*, note 4, p. 365 (citing an Australian law reform commission: "Government and officials are, in a sense, 'trustees' of that information for the Australian people.").

79 On the justificatory function of ATI see *Calland*, note 62, p. 77; *Klaaren*, note 4, p. 226 f. referring to *Rainer Forst*, The right to justification, New York 2014.

80 On attempts by the Indian parliament to thwart candidate disclosure requirements see *Fraser*, note 4, p. 205.

that “sunlight is the best disinfectant”<sup>81</sup>, ATI is credited with reducing corruption and improving accountability, rule of law and service delivery more generally.<sup>82</sup> From an economic perspective, adequate information is instrumental for the efficient functioning of markets. More generally, putting governmental information in the public domain can generate new knowledge if information is inserted in new contexts where it is relevant for recipients, thus increasing the cognitive capital of society as a whole. Taken together, these factors arguably contribute to economic development.<sup>83</sup> This line of argument runs into familiar problems of “law and development”: The potential of law as an instrument of social change and economic development depends on contextual conditions which law itself cannot guarantee.<sup>84</sup> These conditions cannot be discerned through legal theory, but only through an empirically informed comparison of different contexts.

## II. Critical theory: Dark sides

The expansion of ATI has also met with critiques that point to dark sides of rights in general and of legally formalizing informational relationships in particular. These critiques stem from two main quarters: from critical legal studies on the one hand (1.), and from postcolonial theory and Third World Approaches to International Law on the other (2.).

### 1. Critical legal studies

A first critique of ATI draws on critical legal studies. In the US-American context, critical legal scholars have long argued that rights are too individualistic and too indeterminate to achieve significant social change for disadvantaged groups.<sup>85</sup> Critical international lawyers are similarly skeptical of human rights, given their indeterminacy, their depoliticizing ef-

81 *Louis Brandeis*, Other people’s money and how the bankers use it, New York 1914, p. 92.

82 *John Gaventa/Rosemary McGee*, The Impact of Transparency and Accountability Initiatives, *Development Policy Review* 31 (2013), p. 3-28; *Richard Calland/Kristina Bentley*, The Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information, *Development Policy Review* 31 (2013), p. 69-87; *Robert Vaughn*, Transparency in the administration of laws: The relationship between differing justifications for transparency and differing views of administrative law, *American University International Law Review* 26 (2011), p. 969; *Peled/Rabin*, note 4, p. 366-370; *Ackerman/Sandoval-Ballesteros*, note 1, p. 92 f.; *Darch/Underwood*, note 4, p. 35-43.

83 *Darch/Underwood*, note 4, p. 15-25; *World Bank*, Knowledge for Development, Washington D.C 1999.

84 See only *David Trubek/Marc Galanter*, Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States, *Wisconsin Law Review* (1974), p. 1062 and below, D.II.2.

85 See only *Duncan Kennedy*, The Critique of Rights in Critical Legal Studies, in: *Wendy Brown/Janet Halley* (eds.), *Left legalism/left critique*, Durham 2002, p. 178.

fects and their abuse by powerful actors to justify, for instance, humanitarian intervention.<sup>86</sup> Against this background, critics of ATI worry that transparency rights do not empower those who need information most but rather benefit those forces that oppose progressive public policies and promote a neoliberal agenda, privileging information relevant for global markets and investors.<sup>87</sup> Empirical support for this argument is drawn from the fact that in the USA, the most frequent user of freedom of information legislation is the corporate sector – and not the media or ordinary citizens.<sup>88</sup>

As with many arguments about rights in general, these critiques require differentiation.<sup>89</sup> In comparison with other rights, ATI can by definition be exercised by a much broader range of rights-holders and is much less bound to market contexts than, say, the right to property. At the same time, the rise of ATI does imply a shift away from mass media towards an individualization of informational relationships between citizens and the state. Once individualized, citizens' informational demands may face pitfalls of legalization: Where law is used as a means of social change, the "haves" tend to come out ahead, unless the "have-nots" are specifically empowered to bring effective legal claims.<sup>90</sup> In this regard, anthropological studies from India indicate that where citizens would challenge administrators in oral hearings beforehand, they now need to file a carefully drafted legal request.<sup>91</sup> Yet, empirical research also shows that access rights are often exercised collectively by social movements, political activists, opposition parties, or journalists who are repeat players.<sup>92</sup> Especially when exercised collectively, ATI may very well have the potential to reverse power asymmetries in specific cases. This may, however, not be enough from the perspective of critical legal studies, which is concerned not only with individualized power *relations*, but with embedded power *structures* and inequalities. What is required is thus not only a *leverage* right but a *destabilization* right. Roberto Unger, in particular, has developed the concept of a destabilization right, understood as a claim to disrupt established institutions and forms of social practice that have become insulated against challenge and have

86 Ben Golder, Beyond redemption? Problematising the critique of human rights in contemporary international legal thought, *London Review of International Law* 2 (2014), p. 77; Martti Koskeniemi, *The Politics of International Law*, Oxford 2011, p. 133; David Kennedy, *The dark sides of virtue*, Princeton 2004.

87 Clare Birchall, Radical Transparency?, *Cultural Studies ↔ Critical Methodologies* 14 (2014), p. 77.

88 On these statistics Kathleen Radez, The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-crash Regulatory Environment, *Columbia Business Law Review* (2010), p. 102, 109 f. Similar data is reported for Japan by Ackerman/Sandoval-Ballesteros, note 1, p. 127 f.

89 See generally Patricia Williams, Alchemical Notes: Reconstructed Ideals From Deconstructed Rights, *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987), p. 401.

90 Marc Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, *Law and Society Review* 9 (1974), p. 95.

91 Sharma, note 2.

92 Calland, note 62, and below part D.

encouraged the undemocratic entrenchment of social hierarchy and division.<sup>93</sup> Initially developed in the context of equal protection in the US, the notion of a destabilization right might also provide a productive perspective for future critical research on the potential of ATI to effect social change.

## 2. Postcolonial and Third World critiques

A second critique comes from the perspective of the Global South and draws on postcolonial legal theory and Third World Approaches to International Law (TWAIL).<sup>94</sup> This critique has two concerns with human rights that potentially apply to ATI: hegemonic (ab)use and Eurocentrism.<sup>95</sup> In the hands of powerful states, rights can be used as a tool to relativize the sovereignty of weaker states. In this regard, ATI has been used as a conditionality by international financial institutions, and political scientists explain the rapid diffusion of ATI laws in Latin America, the region with the largest World Bank portfolio, as an attempt to control fiscal opacity and governmental overspending in the interest of international lenders.<sup>96</sup> Makau Mutua's critique of human rights discourse as dominated by conventional-doctrinalist and instrumentalist approaches from the "West" is also reflected to some extent in ATI debates: At least the early literature on ATI largely emanated from NGOs, donor organizations and academics based in the Global North, and at least some of it conveyed a largely uncritical Eurocentrism.<sup>97</sup>

A postcolonial critique of Eurocentrism turns theoretical disputes about the foundations and the universality of human rights into questions of genealogy.<sup>98</sup> The genealogy that locates the "origins" of ATI in 18<sup>th</sup> century Sweden is certainly Europe-centered. Arguments that locate antecedents of the Swedish law in imperial China, intended to counter the Eurocentrism critique, fail to historicize the Swedish "ATI" law of 1766 in the specific context of the Swedish "age of liberty" and European enlightenment. The parliamentary sponsor of the Swedish access law, clergyman Anders Chydenius, did claim to have been inspired by

93 Roberto Unger, *The critical legal studies movement*, London 2015, p. 123, 133 ff.

94 For overviews see Philipp Dann/Felix Hanschmann, *Post-colonial Theories and Law*, VRÜ 45 (2012), p. 123; James Gathii, *TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography*, *Trade, Law and Development* 3 (2011), p. 26.

95 José-Manuel Barreto (ed.), *Human rights from a Third World perspective*, Newcastle upon Tyne 2013; Upendra Baxi, *The future of human rights*, New Delhi 2012.

96 Michener, note 24, p. 81; Alasdair Roberts, *Blacked out*, Cambridge 2006, p. 111.

97 Cf. Darch/Underwood, note 4, p. 5 f., referring to a typology of human rights discourse developed by Makau Mutua, *The Ideology of Human Rights*, *Virginia Journal of International Law* 36 (1996), p. 589. From that literature see e.g. *World Bank Institute/Commonwealth Human Rights Initiative/et al.*, note 66; *Article 19*, note 73.

98 José-Manuel Barreto (ed.), note 95; Samuel Moyn, *The last utopia*, Cambridge, Mass. 2012. See also Florian Hoffmann, *Foundations beyond law*, in: Conor Gearty/Costas Douzinas (eds.), *The Cambridge companion to human rights law*, Cambridge 2012, p. 81.

advanced legal developments in China, his “model country of the freedom of the press”.<sup>99</sup> This reference, however, is probably less evidence of an actual Chinese practice than a historical instance of atypical Othering. At that time, Sinophile enlightenment debates in Europe used an idealized image of China to argue for modernization of European monarchies at home.<sup>100</sup>

Despite these problems with the use of history in ATI debates, carefully crafted historical arguments remain relevant to theory building. This applies in particular to functional theories of human rights that ground rights in political practice and concrete experiences of injustice – an approach widely shared in the North and South. These theories derive human rights – the *universal ought* – from concrete historical struggles against abuses of power.<sup>101</sup> In that sense, there is a way from *is* to *ought* – or more precisely: from *was* to *ought*. But if this *ought* is to be universal, the *was* cannot be one parochial history but must unfold in decentered global histories of multiple struggles against the abuse of power.<sup>102</sup> Rather than othering China, such pluralized histories might look to the Latin American tradition of ATI, beginning with the Colombian legislation dating back to the late 19<sup>th</sup> century. Such a move pluralizes the theoretical understanding of ATI, drawing attention to the jurisprudence of the IACtHR according to which the individual rights of freedom of expression and information imply “a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”<sup>103</sup> In contemporary practice, ATI has certainly been appropriated by collective grassroots activism, social movements and “guerilla auditors”. The

99 *Stephen Lamble*, Freedom of Information: A Finnish Clergyman’s Gift to Democracy, *Freedom of Information Review* 97 (2002), p. 2, 3.

100 *Darch/Underwood*, note 4, p. 64-71, citing *Zhang Longxi*, The myth of the other: China in the eyes of the West, *Critical Inquiry* 15 (1988), p. 117: “the use of China serves a purpose that is obviously not concerned with China per se but with learning about the self in the West”.

101 *Baxi*, note 95, p. 19 (arguing for a departure from Humean philosophy and for deriving “the moral *ought* from the *inhuman is*”); “radical evil is the womb that nurtures the embryo of ‘contemporary’ human rights”); *Joseph Raz*, *Human Rights Without Foundations*, in: *Samantha Besson/John Tasioulas* (eds.), *The Philosophy of International Law*, Oxford 2010, p. 321; *Ignatieff*, note 68, p. 83 (“there is nothing sacred about human beings, nothing entitled to worship or ultimate respect. All that can be most said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical”).

102 *Luis Eslava/Michael Fakhri/Vasuki Nesiah* (eds.), *Bandung, Global History and International Law*, Cambridge 2017; *Thomas Duve*, *Global Legal History – A Methodological Approach*, Max Planck Institute for European Legal History Research Paper Series 2016-04; *Alexandra Kemmerer*, Towards a Global History of International Law?, *European Journal of International Law* 25 (2014), p. 287; *Martti Koskeniemi*, Histories of International law: Dealing with Eurocentrism, *Rechtsgeschichte* 19 (2011), p. 152.

103 *IACtHR*, note 48, para. 30. See further *Contreras*, note 49, p. 77 f. A similar argument is made by *Weeramantry*, note 4, p. 103. On the contribution of Latin America to human rights law in general *Kathryn Sikkink*, Latin America’s protagonist role in human rights, *Sur - International Journal on Human Rights* 12 (2015), p. 207; *Mary Glendon*, The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea, *Harvard Human Rights Journal* 16 (2003), p. 27.

prototypical example is the Indian MKSS movement. Its successful campaign for the Right to Information Act in India is well documented, although recent research has cast some doubt on the subaltern credentials of the movement.<sup>104</sup>

Third World critiques have the merit of making such collective activism visible while also highlighting differences in the enabling context in which such activism takes place. Maybe most importantly, the potential of ATI to shift power relations and destabilize undemocratic power structures depends on whether it has resonance in a wider public sphere. Traditional conceptions of public opinion and democratic deliberation in Europe and North America, however, do not account for the distortions and inequalities that characterize post-colonial public spheres in the Global South.<sup>105</sup> Where mass media are concentrated in a few hands or cater to the interests of a thin middle class with purchasing power, public opinion does not perform the functions Habermas would like it to. Feminist critics and postcolonial theorists have long pointed to the exclusion of important sections of society from political debate and have challenged the very notion of one unitary public sphere with the idea of multiple subaltern counter-publics.<sup>106</sup> These counter-publics predate the Internet and digitalization but are now reconstituted online, especially in social media where they circumvent traditional gatekeepers and hierarchies but also encounter new digital divides.<sup>107</sup>

#### **D. Method: Towards a context-sensitive, socio-legal comparison**

Doctrinal and theoretical arguments about ATI are frequently based on an explicit comparison or implicit comparative assumptions. When lawyers find doctrinal convergence across jurisdictions, theorists generalize findings from specific cases, and critics call attention to differences in context, they all make some form of comparative argument. The underlying comparative method, however, is rarely made explicit – even though the method predetermines the findings of comparison. A more self-reflected comparative approach to ATI can draw on methodological debates in comparative law and socio-legal studies. The following subsection thus outlines a comparative approach to ATI that combines context-sensitive comparison (I.) with socio-legal methods (II.). The ultimate goal is a mix of methods that

104 *Sharma*, note 28; *Shekhar Singh*, India: Grassroots Initiatives, in: Ann Florini (ed.), *The right to know*, 2007, p. 19. For another example see *Kregg Hetherington*, *Guerrilla Auditors*, Durham 2011.

105 *Mate*, note 76, p. 377 f.; *Boaventura de Sousa Santos*, Public Sphere and Epistemologies of the South, *African Development* 37 (2012), p. 43.

106 *Divya Dwivedi/Sanil V*, The public sphere from outside the west, New York 2015; *Neeladri Bhattacharya*, Notes towards a conception of the colonial public, in: *Rajeev Bhargava/Helmut Reifeld* (eds.), *Civil society, public sphere, and citizenship*, 2005, p. 130; *Nancy Fraser*, Rethinking the Public Sphere, *Social Text* (1990), p. 56.

107 *Anita Chan*, *Networking peripheries*, Cambridge, Mass 2013; *Amir Ali*, The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond, *Harvard Human Rights Journal* 24 (2011), p. 185.

enables mid-range conclusions about ATI that eschew both theory-laden overgeneralization and empiricist particularism.<sup>108</sup>

### *I. Comparative methods: Functions and contexts*

A context-sensitive comparative approach can draw on methodological debates between the two main schools of comparative law: functionalism and contextualism. While pure functionalism needs to be contextualized (1.), contextualism has to be moderated to allow for meaningful comparison across legal orders (2.).

#### 1. Functionalist comparison contextualized

In the existing literature, comparison typically starts with a legal definition of ATI and defines the purpose of ATI in relation to universalizing values such as liberty, equality or democracy. From this perspective, the spread of ATI across legal orders seems to indicate global convergence of positive law and underlying values. The global picture looks different, however, with a different comparative method: Functionalist comparison begins not with the legal institution but rather with the social function it performs across legal orders. Contextualist comparison emphasizes that legal institutions have different meaning in different legal cultures and social contexts.<sup>109</sup>

From a functionalist perspective, ATI is not a doctrinal construct but a societal response to specific problems. These problems can be used as invariant *tertium comparationis* to compare different legal institutions. One main insight of this approach is that ATI can have different social functions in different legal orders, and that the functions ascribed to ATI can be performed by different, functionally equivalent legal institutions. This insight allows for more careful generalizations about ATI without losing specificity.<sup>110</sup> But functionalism also begs a series of questions: How universal are social problems? At what level of abstraction should the social function be defined? And from whose perspective? These questions are central to contextual comparison. Contextualists do not use similar social functions of ATI as a starting point, but emphasize the importance of legal culture, difference and “odd de-

108 Tom McClean, Book Review: Freedom of information and the developing world, *Governance* 24 (2011), p. 745.

109 For an overview of methodological debates see Mathias Siems, Comparative law, Cambridge 2014, 11ff.; Maxim Bönnemann/Laura Jung, Critical Legal Studies and Comparative Constitutional Law, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Comparative Constitutional Law, 2017, online; Ralf Michaels, The Functional Method of Comparative Law, in: Reinhard Zimmermann/Mathias Reimann (eds.), The Oxford handbook of comparative law, New York 2006, p. 340.

110 Michaels, note 109, p. 363-367.

tails".<sup>111</sup> The comparatist is called upon to take a self-reflexive, self-critical position that avoids interpreting ATI from the "unquestioned vantage point of one's own legal experience".<sup>112</sup> From this standpoint, ATI looks like a case of "IKEA constitutionalism": It has become a standardized furniture item in the global warehouse of constitutional ideas, where it is first stripped of its context and then re-contextualized without regard for local circumstances.<sup>113</sup> While attention to context avoids premature assumptions of similarity, the key question for contextualism is how to determine the relevant social context. Ultimately, contextualism faces the opposite challenge of functionalism: How can culture and context be defined in a way that still allows for meaningful comparison? While the critical ATI literature draws attention to differences in context, even critics do not abandon comparison but rather advocate a more empirically grounded approach.<sup>114</sup>

Therefore, the challenge is to find a pragmatic mix of methods that draws on the strengths and avoids the weaknesses of either method. This leads to a pragmatic approach that might be termed "context-sensitive functionalism" and be based on three methodological tenets: It seeks to define not one, but a range of social functions performed by ATI in different contexts (1), does so at an intermediary level of abstraction (2), and cross-checks findings with the help of contextual comparison and socio-legal methods (3). The first tenet acknowledges that legal institutions are rarely mono-functional and allows for consideration of functional equivalents and latent functions that are context-dependent. The second tenet aims for mid-range generalizations, while acknowledging that social problems are not ontological universals but heuristic devices constructed for the purpose of comparison. The third tenet ensures that problem constructions are empirically plausible across contexts and uses interdisciplinarity as a self-critical check on the comparatist's own preconceptions.<sup>115</sup>

Thus, the social function of ATI should neither be defined in relation to highly abstract concepts such as "democracy" nor should it restate the concrete content of positive law ("ATI solves the problem of how citizens get access to state-held information"). Instead, to reach a workable intermediary level, the definition should proceed from the abstract to the

111 See generally *Günter Frankenberg*, In Verteidigung des Lokalen – Odd Details als globalisierungskritische Marker im Verfassungsvergleich, *VRÜ* 49 (2016), p. 263; *Esin Örüctü/David Nelken* (eds.), Comparative law, Oxford 2007; *Pierre Legrand*, The Same and the Different, in: *Pierre Legrand/Roderick Munday* (eds.), Comparative legal studies: traditions and transitions, Cambridge 2003, p. 240.

112 *Günter Frankenberg*, Critical Comparisons: Rethinking Comparative Law, *Harvard International Law Journal* 26 (1985), p. 411; *Susanne Baer*, Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz, *ZaöRV* 64 (2004), p. 735. At this point, a self-reflective caveat is in order: This comparison is practiced by a male white German public lawyer socialized within German legal culture with some exposure to legal systems in the US, India and Brazil. To make potential preconceptions transparent, the comparison also includes references to German law.

113 *Günter Frankenberg*, Constitutional transfer: The IKEA theory revisited, *ICON* 8 (2011), p. 563.

114 *Darch/Underwood*, note 4; *McClean*, note 108.

115 For a discussion of some of these elements see *Michaels*, note 109, p. 351 f., 362-369.

more concrete in several steps: Abstractly formulated, the function of ATI is to regulate informational relationships between actors in a way that resolves a “social problem”. This problem, in turn, depends on the context. Contexts typically differ at the most concrete level but tend to converge the more abstractly they are described. Where contexts converge at an intermediary level, the social function of ATI can serve as *tertium comparationis* and draw attention to functionally equivalent legal institutions. At this intermediary level, the social function of ATI can be related to three types of situations: individuals seeking personally relevant information, information that has the character of a public good, and inter-institutional relationships.

A first way of describing the social function of ATI is to say that it corrects the problem of informational asymmetries between individuals and bureaucracies in respect of information that is personally relevant to the requester. Information can be intrinsically or instrumentally relevant to individuals. Personal data has intrinsic relevance, which is why data protection law protects it in many legal orders. Where such laws exist, they typically entitle individuals to gain access to their personal data held by governments. But many legal orders do not recognize such a specific entitlement. In its absence, access to information law is used as a functionally equivalent mechanism to access personal information. This constitutes the bulk of the day-to-day work that ATI performs, for instance, in the US legal system.<sup>116</sup> Besides personal data, ATI can concern information that is instrumentally relevant to individuals. This is namely the case when citizens seek to access benefits delivered by a bureaucracy, e.g., when they make social rights claims like the Bangladeshi women mentioned above. In these cases, ATI fulfills a function that is performed by the law of administrative procedure in other legal systems. In Germany, for instance, an application for social benefits would trigger an administrative procedure in which the applicant has the right to inspect relevant records.<sup>117</sup> Functionally equivalent provisions might also be found in the law of evidence, as indicated by a court case from South Africa. When a widow sought access to a report about nursing standards in a hospital where her spouse had died, the Court of Appeals held that she should instead seek access through discovery mechanisms in a litigation for damages.<sup>118</sup>

A second social function of ATI concerns information that has the properties of a public good. Typically, this is the case with information about widely dispersed environmental pollution or about large-scale political corruption.<sup>119</sup> In these situations, information benefits a large group of persons, but its individual members have limited incentives to initiate litigation whose benefits would be shared widely. ATI thus performs another specific function: It enlarges the group of rights bearers and potential litigants and allows for an *actio*

116 *Bishop*, note 33, p. 101-128; *Darch/Underwood*, note 4, p. 57.

117 The general norm is § 29 Verwaltungsverfahrensgesetz (Administrative Procedure Law).

118 *Unitas Hospital v. Van Wyk and Another* 2006 (4) SA 436 (SCA). For a critical discussion of this case see *Calland*, note 62, p. 84 f.

119 See generally *Bishop*, note 33, p. 129-161.

*popularis* by specialized third parties and repeat players, such as NGOs and journalists. In fact, the South African example shows that journalists frequently use ATI legislation in their investigations.<sup>120</sup> This, in turn, indicates that ATI may be a functional equivalent to provisions in press and media law in other jurisdictions that legally require public authorities to respond to inquiries from journalists, as is the case, for instance, in Germany.<sup>121</sup> The opposite may also be true: In societies where mass media function differently or less effectively than in established liberal democracies, ATI laws enable other societal actors to take on some of their social functions. However, these differences should not be overstated, given that leaking and whistleblowing can be regarded as an informal functional equivalent for both media investigations and ATI in the North and South.<sup>122</sup>

A third social function concerns informational relations between public institutions. Despite the prevailing rhetoric about citizens, ATI is often used by public agents in inter-institutional relations. This reveals a latent function of ATI in addressing informational asymmetries in separation-of-powers contexts. In the US presidential system, Congress enacted the FOIA not only to empower citizens vis-à-vis the administration, but also to make its own oversight of the executive more effective. ATI enabled a form of decentralized “fire alarm” control mobilized by individuals that is functionally equivalent to, but potentially more effective than, centralized “police patrol” control by Congressional information requests and hearings.<sup>123</sup> In South Africa, empirical studies show that one of the main users of ATI legislation is the parliamentary opposition.<sup>124</sup> In the context of the ANC’s quasi-one-party system, there had been no demand for a specialized system of oppositional information rights, such as the one that emerged in multi-party democracies like Germany.<sup>125</sup> When effective opposition parties did emerge in South Africa, they started to use ATI in functionally equivalent ways. Conversely, functional equivalence is one explanation as to why established democracies such as Germany took so long to adopt an ATI law: The relevant social problem was already addressed, at least partly, in institutional legal provisions. This finding indicates that it may be more insightful to relate ATI to the intermediary notion of separation of powers rather than the more abstract idea of democracy.

120 *Calland*, note 3.

121 See e.g. § 4(1) Berliner Pressegesetz; *Federal Constitutional Court/BVerfG*, 1 BvR 857/15, NJW 2015, 3708.

122 *Christopher Hood*, From FOI World to WikiLeaks World: A New Chapter in the Transparency Story?, *Governance* 24 (2011), p. 635; *William Harwood*, Secrecy, transparency and government whistleblowing, *Philosophy & Social Criticism* 43 (2016), p. 164. On non-legal functional equivalents, *Michaels*, note 109, p. 364.

123 *Calland*, note 62, p. 74. See generally, *Matthew McCubbins/Thomas Schwartz*, Congressional Oversight Overlooked: Police Patrols versus Fire Alarms, *American Journal of Political Science* 28 (1984), p. 165.

124 *Calland*, note 3.

125 Cf. *Jelena v. Achenbach*, Parlamentarische Informationsrechte und Gewaltenteilung in der neueren Rechtsprechung des Bundesverfassungsgerichts, *Zeitschrift für Parlamentsfragen* (2017), p. 491.

In sum, context-sensitive functionalist comparison helps to uncover multiple functions and functional equivalents of ATI. These findings indicate that ATI may converge globally at the level of positive law, but not necessarily at the level of its social function, which differs across contexts. Findings of functional equivalence may also point to different options for legal reform or indicate that a social problem has already been resolved without an ATI law. What functionalism cannot tell very well, however, is how effectively ATI performs its function in practice, or which of two functionally equivalent institutions performs its function better.<sup>126</sup> Answering these questions requires deeper contextual and socio-legal analysis.

## 2. Contextual comparison moderated

While functionalism treats law, culture and society as separate heuristic categories, avowed culturalists deny such separability.<sup>127</sup> This results in particularistic findings that do not claim validity beyond their immediate context. The problem with this approach is that it tends to treat culture as static and context as one-dimensional. A more moderate contextualism would instead be based on a dynamic understanding of culture and a multi-layered notion of context. In this view, the separation of law and culture is a matter of degree, which differs according to time, place and area of law. Such an approach would still use differences as the point of departure but remain open to find similarities where at least one layer of context is comparable. With respect to ATI, four such layers of context seem particularly relevant: legal culture, history, political economy, and the international environment.

Firstly, paying attention to differences in legal culture shifts the analytical focus of comparison of ATI. While existing literature tends to concentrate on the rule of access, contextual comparison would focus on the exceptions: exemptions in ATI legislation, secrecy laws, constitutionally permissible restrictions to the fundamental right to information. These exceptions tell us how legal orders balance openness with other values. For instance, privacy is conceived and weighted differently across legal orders, depending on legal culture, historical experiences and social context.<sup>128</sup> In Sweden, the disclosure of individual taxable income has become culturally ingrained in the context of a relatively safe and egalitarian society characterized by mutual trust. In Brazil, where inequality and violent crime rates are high, courts refused to disclose even the income of public managers in state-owned enterprises for privacy reasons.<sup>129</sup> Exceptions also point to odd details, such as the regulation of “file notings” in India: Since colonial times, Indian bureaucrats use annotations in

126 *Michaels*, note 109, p. 373-380.

127 See on the one hand *Michaels*, note 109, p. 365; and on the other *Frankenberg*, note 112, p. 424.

128 *David Cole/Federico Fabbrini*, Bridging the transatlantic divide? The United States, the European Union, and the protection of privacy across borders, *ICON* 14 (2016), p. 220; *Lee Bygrave*, Data privacy law, Oxford 2014; *Subhajit Basu*, Privacy Protection: A tale of two cultures, *Masaryk University Journal of Law and Technology* 6 (2012), p. 1.

129 *Filho*, note 25.

the margins of files to document administrative workflows, reasoning and decisions. These annotations were protected under the 1889 Official Secrets Act, and bureaucrats fought hard to include them in the exceptions to the 2005 Right to Information Act. Activists insisted on disclosure, and the Information Commission ultimately sided with them, holding that notings are a “paper trail, vital to establish a chain of transparency and accountability”.<sup>130</sup> This seemingly idiosyncratic detail is highly relevant for the effectiveness of ATI in practice.

The fact that legal culture is not static, however, becomes evident when a second layer of context is taken into account: history.<sup>131</sup> The dynamic nature of legal and political culture surfaces in political transitions and lingers on in transitional justice processes, in which ATI plays a historically specific role. Especially in Latin America, ATI has a strong connection to discourses on the “right to truth”, i.e. the idea that victims of former military dictatorships and their relatives have a right to know about the circumstances and perpetrators of torture, killings and forced disappearances. In a case involving the Brazilian amnesty law, the IACtHR found Brazil responsible for violating Article 13 of the American Convention, in relation to Articles 1(1), 8(1), and 25, “for the harm to the right to seek and receive information, as well as to the right to know the truth”.<sup>132</sup> It was in this context that ATI legislation in Brazil was enacted as a package with the law on the truth commission.<sup>133</sup> In this light, one might say that ATI performs the function of establishing historical truth and building collective memory. One may also find other contexts where this is the case, maybe in functionally equivalent archival laws such as the German “Stasi-Unterlagengesetz” (law on the files of the former East German intelligence service).<sup>134</sup> But the notion of “function” may be inadequate to fully grasp the complex processes of truth seeking, collective memory building and democratic identity formation.<sup>135</sup>

A third layer of context is the political economy of the institutional system in which ATI operates. Political competition and incentives not only explain the emergence and strength of ATI norms but also influence their effectiveness in practice. Competition can

130 *Sharma*, note 2; *Michener*, note 10, p. 156.

131 See generally *Michaels*, note 109, p. 360; *James Gordley*, Comparative law and legal history, in: Reinhard Zimmermann/Mathias Reimann (eds.), *The Oxford handbook of comparative law*, New York 2006, p. 753.

132 *IACtHR*, Gomes Lund et al. (*Guerrilha do Araguaia*) v. Brazil, judgement of 24.11.2010, Series C 219 (2010), para. 325. On this case law see *Seidl*, note 49, p. 71-75; *McDonagh*, note 4, p. 33 f.

133 *Marcio Cunha Filho*, *O Desencontro entre Direito à Informação e Direito à Verdade*, Direito, Estado e Sociedade 47 (2015), p. 91, 94; *Jeffrey Davis*, *Seeking human rights justice in Latin America*, Cambridge 2015, p. 111-116.

134 See e.g. *Darch/Underwood*, note 4, p. 166 on the Philippines. On archival laws generally *John D. Ciociari/Jesse M. Franzblau*, *Hidden Files: Archival Sharing, Accountability and the Right to the Truth*, *Columbia Human Rights Law Review*, 46 (2014), p. 1.

135 See only *Davis*, note 133, p. 90 ff.; *Moshe Hirsch*, *Invitation to the sociology of international law*, Oxford 2015, p. 46 ff.; *Uladzislau Belavusau/Aleksandra Gliszczyńska-Grabias* (eds.), *Law and memory*, Cambridge 2017.

occur between branches of government, especially in presidential systems like the USA. Inter-party competition is another factor: The initiative for the FOIA bill came from the Democratic Party to oversee the Republican Eisenhower administration, and it was eventually passed with support from Republican legislators interested in overseeing the Democratic Kennedy and Johnson administrations.<sup>136</sup> ATI enactments are less likely where both branches are controlled by the same political party, as is the case in parliamentary two-party systems. But Mexico indicates that even in these cases, frequent alternation in government can lead to strong laws, as outgoing incumbents attempt to bind the incoming opposition government.<sup>137</sup>

In multi-party coalition governments, explanations become more complicated. Brazil enacted its ATI law when president Dilma Rousseff was ruling with multiple coalition partners in parliament and cabinet. In this situation, Rousseff pushed for the ATI law as a means to monitor loyalty and to spot opportunism in ministries entrusted to coalition partners. Competition within a multi-party government can thus explain ATI laws in countries like Brazil where international and civil society pressure was moderate.<sup>138</sup> Political competition seems to be the least relevant context when there are no real competitors: When the South African ATI act was adopted in 2000, the ANC was the only significant political party, controlling the entire cabinet and the heads of administrative agencies across the country. Further historical analysis, however, might reveal bureaucratic competition to be a relevant contextual factor: While the ANC controlled the upper echelons of government departments, the transition agreements had left in place much of the apartheid bureaucracy. ATI may thus have been an attempt to control lower level bureaucrats with the help of external requesters.

While context is typically conceptualized as a locally bounded phenomenon, a fourth layer, the international environment, highlights a translocal dimension. This dimension becomes apparent in a comparison of the different constitutional statuses of ATI: Why do new democracies constitutionalize the right to information, whereas established constitutional democracies such as Germany and the USA limit it to the legislative level? Legal culture furnishes an explanation in the USA, where it is shaped by negative conceptions of rights and a reluctance to impose positive constitutional obligations on the state.<sup>139</sup> In new democracies such as South Africa and India, a positive right to information articulates much better with a legal culture influenced by transformative constitutionalism, which emphasizes posi-

136 Ackerman/Sandoval-Ballesteros, note 1, Ciorciari/Franzblau, note 134, p. 1. 116-119; and below D.I.2.

137 Daniel Berliner/Aaron Erlich, Competing for Transparency: Political Competition and Institutional Reform in Mexican States, *American Political Science Review* 109 (2015), p. 110; Michener, note 24.

138 Gregory Michener, How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws, *Governance* 28 (2015), p. 77.

139 Peled/Rabin, note 4, p. 378.

tive state obligations and activist courts to overcome socio-economic inequalities.<sup>140</sup> At the same time, this transformative constitutional culture has itself been shaped by international norms. South Africa is only one example for the influence international human rights law has exerted on constitution-making since the 1990s – precisely during the period when ATI began to be recognized as a human right in international practice.<sup>141</sup> Transnational advocacy networks and NGOs like the Open Society Foundation played a key role in this regard: They supported political campaigns, funded issue-specific local NGOs, and they help vernacularize international norms on ATI in local idioms. In other instances, international donor institutions have used conditionalities to incentivize ATI adoption in Pakistan.<sup>142</sup> Under these international influences, “culture” and “context” have acquired a translocal dimension that lends itself to socio-legal comparison.<sup>143</sup>

## II. Socio-legal methods: Comparison and empiricism

Although legal comparison ultimately remains a hermeneutic exercise, socio-legal methods can complement functionalist and contextualist comparison in at least three ways: They enrich the analysis of empirical contexts, they guide systematic case selection and data collection, and they provide a basis for cautious generalization and abstraction of comparative observations. Socio-legal methods, as understood here, mainly comprise empirical methods from political science, comparative politics and anthropology, but can also include hermeneutic approaches from legal history.<sup>144</sup>

140 Oscar Vieira/Upendra Baxi/Frans Viljoen (eds.), *Transformative constitutionalism*, Pretoria 2013; Karl Klare, Legal culture and transformative constitutionalism, *South African Journal on Human Rights* 14 (1998), p. 146. But see Michaela Hailbronner, Overcoming obstacles to North-South dialogue, *VRÜ* 49 (2016), p. 253 (arguing that transformative constitutionalism works across the North-South divide).

141 Peled/Rabin, note 4, p. 371 f. Generally Cheryl Saunders, The Impact of Internationalisation of National Constitutions, in: Albert Chen (ed.), *Constitutionalism in Asia in the early twenty-first century*, 2014, p. 391; Beth Simmons, Mobilizing for human rights, Cambridge, New York 2009; Brun-Otto Bryde, Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts, *Der Staat* 42 (2003), p. 61.

142 Michener, note 24, p. 80 f.; Darch/Underwood, note 4, p. 52, 62; Roberts, note 96, p. 111; Alexandru Grigorescu, International Organizations and Government Transparency: Linking the International and Domestic Realms, *International Studies Quarterly* 47 (2003), p. 643.

143 Sharma, note 2. On the vernacularization of human rights in local contexts see generally Sally Merry/Mark Goodale, *The practice of human rights*, New York 2007.

144 On socio-legal methods in comparison see generally Naomi Creutzfeldt/Agnieszka Kubal/Fernanda Pirie, Introduction, *International Journal of Law in Context* 12 (2016), p. 377; Annelise Riles, Comparative law and socio-legal studies, in: Reinhard Zimmermann/Mathias Reimann (eds.), *The Oxford handbook of comparative law*, New York 2006, p. 775; William Twining, Social Science and Diffusion of Law, *Journal of Law and Society* 32 (2005), p. 203. On the debate about empirical and hermeneutic methods in comparison see on the one hand Ran Hirschl, Comparative matters, Oxford 2014, and on the other Armin v. Bogdandy, *Comparative Constitutional Law as a Social Science?*, *VRÜ* 49 (2016), p. 278.

### 1. Empirical challenges of ATI comparison

A persistent challenge of comparative law is selecting the objects of comparison. If comparison seeks to generalize and theorize its findings, it needs to be based on a sample of cases that is representative in terms of geography, legal traditions, most-like cases or most-unlike cases, confirming cases and potential disconfirming cases, etc.<sup>145</sup> Traditional comparative law suffers from a case selection problem because it vastly over-represents jurisdictions in Europe and North America.<sup>146</sup> Comparative ATI has a different problem: It typically includes legal orders in the Global South but tends to over-represent the “usual suspects”, i.e. geopolitically relevant jurisdictions with easily accessible legal material such as South Africa and India. Large-sample quantitative comparisons, which avoid selection bias at the cost of under-complexity, are still rare in the field of ATI.<sup>147</sup>

Another problem with empiricism in ATI studies is that case studies and empirical evidence are often anecdotal, ignore counter-cases, and tend to be used instrumentally to support advocacy of stronger laws.<sup>148</sup> Case law provides some data, but is often too selective to allow for generalization and abstraction.<sup>149</sup> To trace the social life of ATI outside the courtroom, more systematic empirical data collection is required. This can be quantitative data, for instance official statistics on the number of access requests whose collection is prescribed by some ATI laws. Additionally, ATI is one rare area of law where real-world experiments are possible: In so-called ATI audits, researchers submit a number of standard requests and record response rates, the quality of responses, and their timeliness.<sup>150</sup> The most frequent approach in empirical ATI research seem to be case studies that use qualitative data collection methods, such as ethnographic observation.<sup>151</sup> All types of case studies pose the challenge of how to interpret the case they observe: Can it be generalized to establish a

145 *Katerina Linos*, How to Select and Develop International Law Case Studies, *AJIL* 109 (2015), p. 475.

146 *Hirschl*, note 144, p. 192 ff.; *Daniel Bonilla Maldonado* (ed.), *Constitutionalism of the global South*, Cambridge 2013; *Cheryl Saunders*, Towards a Global Constitutional Gene Pool, *National Taiwan University Law Review* 4 (2009), p. 1.

147 For a study of Latin America see *Michener*, note 138. Generally *Anne Meuwees/Mila Versteeg*, Quantitative methods for comparative constitutional law, in: *Maurice Adams/Jacco Bomhoff* (eds.), *Practice and theory in comparative law*, Cambridge 2012, p. 230.

148 *McClean*, note 108, p. 747; *Jonathan Fox*, The Uncertain Relationship between Transparency and Accountability, *Development in Practice* 17 (2007), p. 663.

149 *Linos*, note 145, p. 478.

150 *Michener*, note 24, p. 85 f. On experimental research, *Jeffrey Dunoff/Mark Pollack*, Experimenting with International Law, *European Journal of International Law* 28 (2017), p. 1317.

151 E.g. *Sharma*, note 2; *Sharma*, note 28; *Evelyn Ruppert*, Doing the transparent state: Open government data as performance indicators, in: *Sally Merry* et al. (eds.), *A world of indicators*, Cambridge 2015, p. 127; *Fatima Diallo*, Transparency and power relations: Socio-anthropological perspectives on the right of access to information, in: *Richard Calland/Fatima Diallo* (eds.), *Access to Information in Africa*, Leiden 2013, p. 55.

pattern? Can it be abstracted to the level of concepts? Can generalization and abstraction be combined to develop a theory?<sup>152</sup>

## 2. Empirical consequences: Testing the leverage effect

The most crucial empirical question of ATI research is whether the right to information makes a difference in practice. While the theoretical justifications assume that ATI achieves desired social outcomes, they often do so on the basis of untested normative assumptions and under-specified relationships between mechanisms and outcomes.<sup>153</sup> The theory of the “leverage right”, for instance, is based on three assumptions that need to be disentangled and specified before they can be tested empirically: It assumes that ATI is implemented effectively (1), that effective implementation shifts power relations (2), and that shifting power relations improves the realization of social rights or the quality of democracy.

Whether ATI is implemented effectively in practice can be tested to some extent with empirical data. A first approximation can be made with two types of statistical data: the numbers of requests and appeals, and their success rates. The number of requests submitted enables comparison of demand for ATI. For example, in the first year of the ATI law, federal agencies in Argentina received 2543 requests (60 per one million inhabitants), whereas cognate figures were 55000 in Mexico (458 per million) and 93000 in Brazil (466 per million).<sup>154</sup> The Information Commission of the Indian state of Maharashtra received 16000 appeals in 2007 (166 per million), whereas Commissioners in the UK and Canada heard only around 2500 appeals each (81 and 39 per million, respectively).<sup>155</sup> Inferences from these figures are limited, however: Low demand does not necessarily indicate ineffective implementation but may also result from pro-active transparency or functional equivalents in other areas of law.

A more valid indicator may be the rate of successful requests. A large comparative study conducted by the Open Society Institute in 2006 collected data on fourteen countries – seven with ATI laws and seven without. On average, requests were rejected in 58% of all cases in countries with ATI laws, compared to 83% in countries without a law. On average, 47% of rejections were mute refusals (i.e., unanswered requests), compared to 21% in best-performing Mexico, which has a relatively strong law.<sup>156</sup> Official statistics from Brazil show that federal agencies granted 76.5% of requests, with an official mute refusal rate of only 0.2%.<sup>157</sup> What can be inferred from this data is that ATI laws do have a positive effect

152 On these analytical moves see *Christian Lund*, Of What is This a Case?, *Human Organization* 73 (2014), p. 224.

153 *Gaventa/McGee*, note 82, p. 11.

154 *Filho*, note 25; *Michener*, note 10, p. 152 f.

155 *Roberts*, note 27.

156 *Open Society Justice Initiative*, Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries, New York 2006.

157 *Filho*, note 25.

on the success rate, and that the strength of the law is one factor that influences how substantial this positive effect is.<sup>158</sup> Nevertheless, high rejection rates do not necessarily reflect a high level of non-compliance because some rejections may be legally based on exceptions. Mute refusals do show non-compliance, but some of the unanswered requests may still have a leverage effect.

The question of whether ATI law shifts power relations is more difficult to measure. User statistics may give some indication of the social profile of ATI petitioners and possible distributive effects. In this regard, the statistics showing that corporations are the most frequent users in the USA are ambivalent. Such litigation often revolves around access to competitors' business secrets acquired by regulators<sup>159</sup>; in these cases, disclosure may actually enhance transparency of the corporate sector. Further data from Brazil suggests that litigation in ATI cases is frequently initiated by public officials trying to shield their own privacy. Brazilian bureaucrats seem to have engaged in a form of reverse activism against disclosure.<sup>160</sup>

Indeed, bureaucratic culture and administrative capacity emerge as key factors for both effective implementation and leverage effects. Bureaucrats tend to have little interest in exposing themselves to outside scrutiny and have every incentive to use the ATI law to justify rejections rather than to grant access.<sup>161</sup> They may also use informal evasion strategies, as documented in ethnographic studies of the Indian Right to Information Act. Since civil servants lost their battle to keep file notings secret, some write less informative annotations – “seen, discussed, deliberated” is a typical note. Others use temporary post-its that can be removed from files. The ATI law therefore has had the unintended effect of shifting administration from written to oral communication. Ironically, orality was the hallmark of the initial social audits introduced by the MKSS movement: public hearings in which farmers directly questioned officials and exposed problems on the spot. In this case, legally formalizing and bureaucratizing the disclosure of information may even have an adverse effect on power relations between citizens and administrators.<sup>162</sup> Whether such empirical case studies can be generalized, however, depends on how widespread bureaucratic evasion strategies are and whether they are reined in effectively by judicial review. Furthermore, the success of an ATI request in the hands of the bureaucracy is not always a good indicator of its leverage effect. The same ethnographic study from India shows that officials may not respond to an information request but still render the service which the requester was seeking to leverage with the request in the first place.<sup>163</sup>

158 *Michener*, note 10, p. 149.

159 *Radez*, note 88, p. 109 f.

160 *Filho*, note 25.

161 *Filho*, note 25; *Darch/Underwood*, note 4, p. 91 ff.

162 *Sharma*, note 2. On orality as a resistance strategy see *James Scott*, *The art of not being governed*, 2009, p. 220-237.

163 *Sharma*, note 2.

Overall, it seems plausible that ATI has at least some leverage effect where obstacles to effective implementation can be overcome with the help of institutional and societal support structures. Again, the Zuma case is illustrative in this regard: Political accountability ultimately resulted from a combination of ATI activism by professional journalists, formal litigation in the constitutional court, public pressure from media, and political competition within the ANC. Attempts to generalize this case study beyond the South African context will need to address empirical research in political science that questions the causal relationship between public information, opinion formation and “rational” voter choice.<sup>164</sup> In sum, the empirical findings on ATI suggest that it is easier to shift power relations in individual cases than to destabilize entrenched power structures. Such power structures extend beyond the state into society and the economy and thus beyond the reach of ATI, unless constitutional or legislative provisions endow it with horizontal effect.<sup>165</sup> Perhaps the most intriguing sign that ATI upsets power relations but not power structures is the fact that information seekers increasingly face backlash from the powers that be: More than ten attacks on information requesters were reported in 2010, and at least five have been killed since then. Indian environmental activist Amit Jethwa was gunned down in 2010 after he used the RTI law to acquire documents about the destruction of protected forests by an illegal enterprise in the state of Gujarat.<sup>166</sup>

## E. Conclusion

The combination of doctrinal, theoretical and comparative socio-legal perspectives on ATI provides some conclusions and raises questions for further research. An initial conclusion is that ATI has become a multi-level and multi-functional right that evinces doctrinal convergence across legal orders, while social functions and meanings differ across contexts. A second, methodological conclusion is that interdisciplinarity in comparative legal research can have a healthy counterdisciplinary function by subjecting untested assumptions about the causes and consequences of law to critical scrutiny. In this vein, ATI is best understood not as a cause or consequence, but as an indicator of democratic quality: “Whether [ATI] laws function or fail suggests whether the oxygen of democracy is thinning or thickening.”<sup>167</sup> This leads to a fourth conclusion concerning the nature and effectiveness of ATI as a constitutional and human right: It is probably more effective as a leverage right than as a destabilization right. It can shift *power relations* in cases where citizens seek to wrestle a service from the hands of unwilling bureaucrats, but it is less effective in destabilizing en-

<sup>164</sup> Darch/Underwood, note 4, p. 32-34.

<sup>165</sup> Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, Hastings Business Law Journal 9 (2013), p. 261; Alasdair Roberts, *Structural Pluralism and the Right to Information*, University of Toronto Law Journal 51 (2001), p. 243. On traditional authorities and informal power structures see Diallo, note 151.

<sup>166</sup> Michener, note 10, p. 156 f.

<sup>167</sup> Michener, note 24, p. 77.

trenched undemocratic *power structures*. Changing these structures requires the sustained interplay of rights, institutions and social forces that reach beyond state power.

These findings have implications for future research on comparative constitutional law and human rights. For one, they intervene in comparative constitutional law debates about the focus of analysis. While mainstream literature tends to focus on rights and courts, critics demand more attention to the institutional organization of power in the “engine room of the constitution”.<sup>168</sup> The findings on ATI suggest a third avenue for future research: namely, the need to understand the *interplay* of rights and power at the transmission belts between the engine and wheels. Secondly, ATI also points to a path for future human rights research: For a field increasingly concerned with “business and human rights” and the excesses of private power, those legal orders that endow ATI with horizontal effect offer interesting study material. Finally, the necessary interplay of ATI with institutional politics and private power suggests directions for future research on global justice: What is the place of human rights in a multidimensional theory of global justice that acknowledges a variety of vocabularies and struggles against injustice?

<sup>168</sup> For the “engine room” argument see *Roberto Gargarella*, Latin American constitutionalism, 1810-2010, New York 2013.