New draft legislation due

While there still is no official statement on part of the government when a new draft will be presented, individual statements suggest that it cannot take long. In August, a Green Party spokeswoman was quoted by the news service 'Spiegel Online' with a promise of a 'short, modern, understandable' law, the Chancellor apparently personally gave a 'go' as part of his quest for new, voter-friendly reform projects, and Minister of the Interior Otto Schily surprised those parts of the audience that knew what he was talking about at a Bertelsmann Foundation conference in September with the sober words: '... and we will pass a Freedom of Information Law'.

The 'short, modern, understandable' law deserves closer scrutiny, as it indicates that the new draft will be rather remote from the old one that was discarded in 2002 before the elections (another irony with respect to this law: the new draft is treated as a state secret). The previous draft had neither been short nor modern, to say the least. Complete ministries had demanded to be exempt from any transparency obligation, thereby leading to a law that was too soft for FoI advocates to be acceptable.

The Ministry of Economic Affairs had argued that all fiscal action should be exempt from access requirements. It demanded the consent of all affected parties for any supply of information concerning the business of economic enterprises. The protection of business secrets also took a strange form of administrative self-protection. Apart from protecting business, it allowed administrative entities to declare themselves 'third parties.' Thus, the very entities which the law obliges to be transparent can easily withdraw from their obligation by referring to a vague concept of trade secret. If an administrative unit declares its fiscal activities a secret, the very area where abuse and corruption is most likely to take place gets excluded from any transparency obligations. Other areas to be exempted were the Ministry of Defense and the intelligence services, working under the auspices of the Chancellor's Office.

Beyond that, the right to access information was restricted in the case of ongoing administrative proceedings. As citizens are particularly interested in those proceedings that they can still influence, this restriction would have undermined the idea of citizens' participation on which FoI is based in the first place.

Another shortcoming of the old draft was that it did not specify how much time the administration had to reply to an FoI request. After three months without obtaining information, applicants could have taken legal action through recourse to general administrative procedural law. They were not, however, granted any specific rights stemming from FoI legislation.

In addition, with administration fees of up to €500 (plus copies and other expenses), a massive deterrent to making use of the law would have been put into place. The Ministry of Finances demanded that fees should in principle cover all costs of assembling, editing, and supplying information — even beyond the limit of €500.

There is hope that these massive shortcomings will be corrected in the new draft. Enough information was available to the parliamentarians and bureaucrats in charge of the text. An extensive international comparison of formulation and implementation of access laws, designed and conducted by the Bertelsmann Foundation with the sole purpose of being useful for the public decision-makers, was presented in early 2004. An 'FoI checklist' indicated the critical points within any proposed FoI law and how they could be resolved for Germany.

Germany will probably have a national freedom of information law by the end of the next election period in 2006.

Note

Information on the Bertelsmann Foundation's Freedom of Information project is available (in German and English) at <www.informationsfreiheit.info>.

The international comparison has been published as: T. Hart, C. Welzel, H. Garstka (eds), Freedom of Information: The 'Transparent Administration' as a Civic Right? Verlag Bertelsmann Stiftung 2004, in parts available in English at <http://www.informationsfreiheit.info/en/general_information/own_reports_and_analysis/00069.php>

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Is there a role for comparative Freedom of Information analysis?: Part 1

Law in general is human reason, insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied.

Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.

Montesquieu, *The Spirit of the Laws* 1748

Introduction

It had been my intention in 2005 to write a major piece for the *FoI Review* on undertaking comparative freedom of information studies. The article would look at my experiences in this area since 1996 — in terms of writing, teaching and talks in a variety of countries about the essential elements of FoI design, practice and compliance. The untimely demise of the *FoI Review* and the unexpected delay in a promised article has encouraged me to undertake an early work in progress ahead of the proposed schedule.

The core of this first version of the article comes from a public lecture I presented to the New Zealand Institute of Public Law in April 2002.[1] The talk was presented six years after my first significant foray into comparative freedom of information study and eight months before presenting my first undergraduate course on comparative freedom of information.

Readers of the *FoI Review* will be well aware of my calls for increased multi-disciplinary and comparative studies in FoI and information management. A number of contributors to the *FoI Review* such as Alasdair Roberts, Greg Terrill, Chris Berzins and Stephen Lamble have all made significant contributions in pursuit of this mission. In addition, the number of single country case studies published in the *FoI Review* had increased, providing strong foundations for more studies and for a variety of comparative studies in the future.

In this article I want to briefly touch on some of the key issues and areas of interest for comparative FoI study. In view of its hasty composition there will be many areas where my analysis will be incomplete or too sweeping in its generalisations. I beg the reader's indulgence and ask that you treat this more as an extended public talk than a carefully scripted academic contribution. It is my intention to complete Part 2 of the article for the last issue of the *FoI Review*. Part 2 will critically examine the existing — albeit small — pool of comparative FoI studies and analyse the direction(s) comparative study should follow over the next decade.

The beginnings

My experiences with comparative FoI began innocently in April 1996 with a visit to New Zealand. In the traditional way, of most unsuspecting and unsophisticated comparativists I had naively decided to learn a little more about the New Zealand *Official Information Act*. I had come to New Zealand at the invitation of Paul Walker, the first Director of the New Zealand Institute of Public Law, to be the inaugural visiting fellow of the newly formed Institute.

Prior to my arrival I had read the small amount of readily available material on FoI in New Zealand. I had plotted out an intensive round of documentary research in conjunction with a range of interviews with key figures. At that point and for most of my stay in New Zealand the focus had been to understand the *Official Information Act* on its own terms and within its own context.

Paul Walker, now a QC in London, suggested that I present two lectures to his undergraduate public law students on FoI in Australia and New Zealand. I was mortified but too beholden to Paul's generosity (in the invitation) and nascent friendship (which has now extended to our spouses and children) to refuse. Yet how to compact 13 years of Australian FoI experience and federal/state differences into a single 50 minute lecture? Even more confronting how to present a lecture on New Zealand FoI when my understanding was still so primitive and barely informed?

In the end I simply followed the advice I had so freely given to my students, namely, when undertaking comparisons, find criteria on or around which to organise your comparisons. The criteria I chose (the night before) for my first lecture were eventually used in a modified form in the article *Kiwi Paradox*.[2] At a later point Reitz in an instructive article about approaches to comparative law wrote:

> **Comparative law scholarship should be organized in a way that emphasizes explicit comparison.**
>
> Finally I come to the nitty-gritty detail of organization. I do not wish to dictate matters of form narrowly. Good writers find the organization that best fits their subject. However, I want to encourage the use of organization for comparative writing that emphasizes the comparative task being accomplished. There are all too many examples of comparative books and articles in which the comparative exploration of a subject (antitrust, for example) is organized in the following way: a detailed description of the antitrust law of country A, followed by a detailed description of the antitrust law of the country B, followed by a brief section that attempts to draw the chief comparisons. But this last section is inevitably too short and too lacking in detail to be effective comparison, not only because the writer has run out of steam at the end of the work, but also because, if he were to support his comparative analysis with all the rich detail, he would have to repeat much of the first two sections. It is as if the writer said to the reader 'Here is all the raw data about this subject in the two legal systems I am studying. Now you do the comparison according to these general guidelines I am giving you!'
>
> Instead of the simplistic, ineffective, and inefficient three-part approach, I advocate trying as much as possible to make every section comparative. For example, if the subject is antitrust law, one section might compare and contrast the development of antitrust law in each country, another the two countries' treatment of horizontal restraints of trade, another the vertical restraints, another the enforcement mechanisms and remedies, etc. Try to break the subject down into the natural units that are important to the analysis and then describe each country's law with respect to that unit and compare and contrast them immediately. Let the contrasts documented in each section build toward your overall conclusion. Of course, for certain subjects it may be necessary to describe the law of one country in a block before comparing it. This seems especially likely, for example, when what is being compared is the historical development of a field or legal system. But the shorter these blocks, the more effective will be the comparison.[3]

After my first lecture and before the second I accepted an invitation from Judge Anand Satayanand, one of the New Zealand Ombudsmen to join him and a few staff members for morning tea. That seemingly innocent invitation changed my thinking, my life, the type of career I have lead as an academic and added new dimensions to discussions about FoI reform in several countries. The ideas and insights generated from that invitation have flowed onto talks, and policy discussions in Canada, South Africa, United Kingdom, Ireland, Bermuda, Indonesia, Philippines and Malaysia. Discussion about FoI reform in Australia since 1996 has been heavily influenced by the lessons and insights derived from the New Zealand experience.

I turned up at the New Zealand Ombudsmen's Office to have my cup of coffee and a few biscuits, intrigued by the large number of staff gathered and the semi-formal seating arrangements. I was horrified when, as I finished my coffee I was asked to give my comparison between the Australian *FoI Act* and the *Official Information Act* with the provocative request from Judge Satayanand 'and tell us which is the best and why'. I find it difficult to recall the detail of my impromptu, 15-minute talk but I have no problem with remembering the galling (for an Aussie) conclusion — New Zealand's *Official Information Act*.

Since that impromptu talk and the two undergraduate lectures I have been exploring the field of comparative FoI and trying to find the tools to exploit that exploration. In the words of Otto Kahn-Freund:

> A comparative lawyer must make many decisions entirely for himself; decisions on the field he wishes to cultivate, and decisions on the tools and implements he wishes to use in cultivating it. More than that he must set out on a voyage of discovery to find the fields and on another voyage to find the tools.[4]

The rest of this article is an exploration of some of those potential fields and tools. Up to the moment of that New Zealand epiphany my intent had been to learn about the *Official Information Act* as a beast peculiar to New Zealand and at most write an article explaining the *Official Information Act* to an Australian audience.

Since that first hesitant effort of trying to create a comparative analysis from scratch, my primary mission has been to try and construct a comparative law research methodology in the general area of administrative law but, in particular, the areas of access to information and ombudsmen. My secondary mission has been to try and help in some minor way to shape, guide and inform reform attempts to existing FoI frameworks (Australia – both Commonwealth and State — and countries like Canada) or pending adoptions (South Africa, Bermuda, United Kingdom, Indonesia and the Northern Territory of Australia) heavily influenced by my understanding of the differences between FoI in Australia and New Zealand.

By the time of my return visit to the New Zealand Institute of Public Law, this time courtesy of Professor Matthew Palmer in April 2002, my thoughts and exposure to comparative FoI had developed more fully. Over the following 12 months I would give talks and/or teach courses in comparative FoI and administrative law in several countries. The rest of this article and Part 2 concentrate on the ideas, questions and problems raised by that post April 2002 experience.

Taking the comparative path

I want to explore whether comparative FoI analysis can add anything to the rapid law reform process which is underway around the globe in relation to open government. Do the lessons of FoI in countries like Sweden, the United States, Australia, Canada and New Zealand have any relevance to those countries seeking to build democratic and civic infrastructure? Is there a need and/or movement towards comparative administrative law in general?

The comparative study of administrative law offers an interesting and informative means of studying and shaping one of the most rapid developments in legal policy transfer — namely the rapid uptake of freedom of information or access to information schemes. That rapid uptake has created a demand for information about the design, development and implementation, and review of such access schemes, information that, to date, is limited. FoI has received only limited study as a marginal subject in a marginal field — administrative law. Indeed FoI is rarely covered in administrative law courses (or at best receives a fleeting mention amongst other topics like the role of an ombudsman that are given a few minutes at the end of a course for the sake of completeness), sometimes in media law units, increasingly in journalism courses and occasionally in information management courses.

To what extent can a comparative/multi-disciplinary approach to FoI be undertaken? What can we learn from it? How can we apply the material gathered from Canada, Australia, United States, Sweden and New Zealand to the comparative study of FoI in countries like Ireland or in countries in transition? Comparative administrative law itself is a relatively unexplored field let alone comparative FoI which is a particularly rich area of study due to:

- the number of jurisdictions — 60+
- the similar legislative architecture in many of the jurisdictions
- the similar imperatives responsible for uptake — democratic, social and economic
- the similar outcomes/expectations (functions assigned/ missions given).

Zweigert and Kotz argue that 'function is the start point and basis of all comparative law'.[5] Therefore the potential for comparative study in the area of FoI is high. However, Harlow cautions that 'law is seen not merely as a toolkit of autonomous concepts readily transferable in time and space, but as a cultural artefact embedded in the society in which it functions'.[6]

The need

In a 2002 conference paper delivered in New Zealand, Grant Liddell attempted a quick overview of developments in FoI, personal access and data protection law.[7] His paper highlighted the dramatic increase in the number of countries enacting data protection, privacy and FoI laws. In particular, using the work of David Banisar, from Privacy International, Liddell pointed out that 57 countries (as of March 2002) had enacted or proposed FoI laws and that 10 countries had enacted FoI laws since 2000.[8] Since that date a further 10-15 countries have adopted some form of FoI legislation.[9]

This outbreak of adoption of open government statutes is a surprising phenomenon. In the early 1990s there was only a handful of countries with FoI laws on their statute books. Counting only national laws the figure stood at approximately 13 countries. Indeed some were willing to predict at the start of the 1990s that FoI had seen its heyday and that future adoption would be rare. In most countries there was a feeling as Liddell describes it that these laws were 'for past times'. FoI laws were considered dated, under strain from government restructuring and policy failures in achieving anything other than slow access to personal information.

Yet we are now witnessing a frenetic round of activity that sees proposals for FoI being floated from countries all over the world. Liddell argues that it is the new democracies of Eastern Europe and elsewhere that 'appear to be taking the greatest strides towards open government', whereas countries like the UK, Australia, Canada and the USA (especially since September 11) seem to be resiling from their already lukewarm flirtation with access laws.

On 22 April 2002, President Megawati of Indonesia opened an International Conference on FoI at the Presidential Palace. Her opening speech disappointed many Indonesians, especially those from non-government organisations (NGOs), due to its refrain of 'yes we need FoI but we need to proceed cautiously and protect other values'. What is remarkable is that the President opened the conference and that there are two proposals for FoI being considered by the Parliament (one government

bill and another presented by a number of parliamentary parties). In late September 2004 there was a gathering of NGOs and other civic society activists in Kuala Lumpur that passed a resolution requesting FoI laws for Malaysia.

This flurry of legislative activity and conferences, like that in Indonesia, reveal a major deficiency in the construction of democratic and civic infrastructure, namely, a dearth of comparative studies. At the conference in Jakarta the Indonesians, whether NGOS, government officials, activists or the media were keen to explore the experiences of other countries like Thailand, Japan, South Korea, Sweden and Australia. The discussion was limited by the fact that most of the material presented was single country case studies. In part this deficit in comparative studies is a consequence of the rapid spread of FoI (Thai and Japanese academics have barely had time to realise that FoI legislation is now operational), a general absence of comparative study in the area of administrative law, the general optimism of reformers that open government just needs the right switch (legislation) to be flicked, and that FoI is a readily transplantable law.

There is an urgent need for academics, postgraduates, government officials and NGOs to develop comparative studies in this area which include, but extend beyond, singular case studies or collections of case studies. These studies will not only inform the policy development processes of countries yet to adopt FoI legislation but will also feed back into reforms of veteran jurisdictions like Sweden, Canada, Australia, and the US.

Even the countries which appear to have the best track records on FoI — namely Sweden and New Zealand — have seen strong demands for reform in recent years and comparative experience may provide some guidance to re-energising those jurisdictions.[10]

The problem of rapid law reform

The 60+ countries that have adopted FoI regimes[11] have done so from a limited range of models:

USA

- Australia – Canada
- New Zealand

Article 19 Model Reforms[12]

- Sweden.[13]

Rarely is much time spent on understanding how these models work or do not work in their own legal and political environments before they are recast for a new set of operating conditions. Many of the models have a significant cadre of critics who have well-justified concerns about the efficacy of parts or the entire dynamics of particular FoI systems.

The reforms are implemented with little consideration given to the way that state secrecy operates and the multi-dimensional impact of FoI which can provoke unexpected levels of non-compliance from those charged with administering the reform. A comparative perspective may allow a better understanding of what design choices, legislative architecture, administrative reforms and other steps may be necessary to bed down a successful adoption of open government in the long term.

The US model, and more recently the Article 19 Model Reforms, have tended to be the dominant design models considered by countries when adopting FoI reforms. The US dominance came from a number of sources that have been carefully considered in a recent PhD thesis by Stephen Lamble.[14] The Westminster model (Canada and Australia) has received little comparative treatment, and the New Zealand variant, until the mid 1990s, received little attention either within New Zealand or externally.

Part 2 of this article, to be published in the next issue, will explore the adequacy and types of comparative studies that have been undertaken up to now.

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