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Mexico's Access to Information Index

The Right to Information (RtI) is a fundamental right and is a necessary condition for the existence of participatory democracy. It empowers and enables informed individuals to participate actively in public decision-making that directly affects their quality of life.

RtI was first recognised by an access to information law (AtI) in Sweden with the publication of the Freedom of Press Law in 1776. By 1990 only 13 countries had followed Sweden's example and adopted legislation for enabling AtI. Since 1990, the push for democratisation has been accompanied by an unprecedented development in AtI legislation. At present, there are more than 80 national AtI laws, over a dozen of which are in Latin America.

In Mexico, RtI is entrenched in the Constitution and there is a Federal Transparency Law which gives effect to this right. However, because Mexico is a federal republic, in order to effectively protect this right, each one of its 32 local state congresses must approve their own AtI legislation.

In Mexico, the Federal Law of Transparency and Access to Government Public Information was published in the *Official Journal of the Federation* on 11 June 2002 and by 2007 all federal entities in the country had published AtI laws on transparency. Legal recognition of RtI is understood to be just one of the many challenges that exist to ensuring freedom of information. However, it is also recognised that even though: *“a good law is not sufficient to deliver the right to information, it is a necessary precondition, the platform upon which the full realisation of this right must build.”*¹

The motivation for ARTICLE 19's 'Access to Information Index for Mexico' is the recognition of the importance of transparency and AtI laws for the full enjoyment of RtI. A common expression states that what is not measured will not improve. It is from this standpoint that the Access to Information Index for Mexico seeks to measure, firstly, the development of the thirty-two pieces of legislation of the federal entities and the Federal Law on Transparency and Access to Information in relation to the constitutional mandate and national legislative development with a basis in the minimum protection criteria of RtI². Secondly, the intention of this Index is to ascertain

¹ Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey*. United Nations Educational, Scientific and Cultural Organisation. EC/2008/CI/PI/13, 2008.

² The Constitutional Amendment of the Sixth Article focussed on identifying the minimum criteria for observance within the federal sphere which would allow the operationalisation of the right of access to information in Mexico. The amendment had as its purpose the establishment of a national minimum which would make the exercise of the fundamental right of access to information congruent, coherent and uncontradictory. Parliamentary Gazette, Chamber of Deputies, Number 2207-II, Tuesday, March 6, 2007, Decision of the United Commissions on Constitutional Points

the level of development of these laws, starting with the framework of reference provided by international human rights instruments, and by national and international principles and standards in this area, as well as best practices.

The Index offers a parameter for measurement which establishes international human rights law as the ideal to strive for. It is through compliance with international standards in this area, by following established principles and best practices, that the ideal type of protection for RtI is determined.

The Index proposes a series of indicators which allow adequate measurement of the level of protection for RtI in Mexico, and of the level of progressiveness³ of federal and local legislation on transparency and AtI.

In summary, the Index is an instrument of measurement which allows comparisons to be made between pieces of legislation of the federal entities, and which demonstrates, among other things, the state of the RtI nationwide, the degree of individual development of each piece of legislation and its internal coherence, its trends and omissions, and which informs about legislative performance in areas such as the construction of institutional guarantees, the regulation of procedures or the incorporation of criteria to regulate the administration of access to public information.

Methodology

and of the Civil Service with the Project of Decree by which the Sixth Article of the Political Constitution of the United States of Mexico is amended (Dictamen de las Comisiones Unidas de Puntos Constitucionales y de la Función Pública con Proyecto de Decreto por el que se reforma el Artículo Sexto de la Constitución Política de los Estados Unidos Mexicanos) in the Federal Institute for Access to Public Information, Amendment of the Sixth Constitutional Article which establishes access to public information as a fundamental right of all Mexicans. (Reforma al Artículo Sexto Constitucional que establece el acceso a la información pública como un derecho fundamental de los mexicanos.) Available at: www.ifai.org.mx/descargar.php?r=/pdf/

³ The concept of progressiveness that is used here stems from the development of international human rights law. It refers to the extension of the sphere of protection of human rights insofar as is possible and in accordance with the principle of *pro homine*. The concept of the progressiveness of human rights was defined at the Second World Conference on Human Rights (Vienna, 1993), whose purpose was to determine the progress of human rights. This principle supposes that human rights are a social construction, that they advance at a determined moment and reflect the political, economic and cultural context. Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also establishes the principle of progressiveness. National public institutions are responsible for complying with the terms of the second article of the ICESCR which states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The principle of progressiveness contained in the Covenant should not be understood to mean that economic, social and cultural rights may be achieved only once a certain level of economic development is reached in a country. It suggests that States should advance as soon as possible towards the realisation of human rights.

For its part, the Limburg Principles establish the way in which States should comply with the international standards which constitute the principle of progressiveness. It is correct when it states that the phrase "achieving progressively" in the ICESCR does not mean that States have the right to indefinitely postpone their efforts to ensure the enjoyment of the rights contained in the Covenant. This sort of delay would be contrary to international human rights law. However, it establishes the obligation to promote and protect all human rights and fundamental liberties. "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." See General Observation No. 3 of the Committee for Economic, Social and Cultural Rights, in *The Nature of the Obligations of the State Parties*, par. 9, UN document E/CN.4/1987/17: The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, par. 21.

The Index grades a list of the elements which make up the normative provisions of each of the transparency and AtI laws which have been approved in the country. The Index includes a chart for processing this information, which is grouped in terms of three main variables, made up of nine sub-variables, supported by 31 indicators, measured primarily by 199 parameters for the indicators or the criteria for the indicators.

The Index allows us to obtain two measurements, one of which reviews compliance with the Constitution and the other which compares and ensures compliance with the obligations established in the instruments of international human rights law which have been subscribed to and ratified by Mexico. This second measurement also assesses the incorporation in transparency legislation of good legislative practices, international standards developed by supervisory bodies for international agreements, and principles which have developed the content of the right of access to information.

The indicators we propose are registered in a theoretical framework provided by , as mentioned above, the constitutional mandate, instruments of international human rights law, standards and principles on transparency and access to information, as well as best practices.

Structure of the Formula

The primary objective of transparency legislation is the effective protection of RtI. In this regard, the purpose of the Index is to assess the protection of this right provided by legislation in this area. The Index comprises three main variables which we consider to be essential and complementary for ensuring effective protection of RtI. The three main variables are: 1) normative provisions; 2) institutional design; 3) procedures for AtI, filing appeals for review and for the dissemination of public information. Given the importance and the complementary nature of the three main variables, we assign the same value to each of them. We also give equal weight to the sub-variables which constitute and support the three principal variables, as follows:

MAIN VARIABLES	SUB-VARIABLES
Normative provisions	<ul style="list-style-type: none"> -Positivation of the right of access to information -Restricted information -Sanctions for breach of the law
Institutional design	<ul style="list-style-type: none"> - Internal institutions for access to information -Promotion of the right of access to information -Regulatory bodies for transparency and access to information
Procedures for access to information, for filing appeals for review and for the proactive dissemination of public information (transparency obligations)	<ul style="list-style-type: none"> -Procedures for access to information -Procedures for appeal for review -Procedures for the proactive dissemination of public information

The sub-variables which are set out in the table above are composed of indicators, based on criteria which describe the parameters of these indicators. The parameters of the indicators are described in such a way as to permit their evaluation by means of a checklist which determines a value of 0 or 1.⁴ The variables should be read in conjunction with their indicators and parameters or criteria, as set out in the formula for weighting.

The structure of the Index presented here elaborates the interpretation of what are considered to be the basic elements for the effective protection of RtI and of the ways in which they are interrelated. Each of the indicators, sub-variables and main variables has the same weight, as we consider that in order to guarantee effective access to information it is necessary for laws of access to clearly establish the scope of RtI, through normative provisions; to create institutions within public bodies, and regulatory bodies for transparency which are independent and are autonomous in their operations, governance and decision-making; and to ensure that procedures for access to information are transparent. For each of the laws which are evaluated, we will obtain results not only from the general index but also from a number of sub-indexes such as the Sub-index of: 1) normative provisions; 2) institutional design for the implementation of the law; and 3) procedures for access to information, appeals for review and the publication of public information. The results are disaggregated up to the level of the indicators which make up the sub-variables. In this way, application of the Index will make it possible to learn the specific location of the strengths and weaknesses of each of the 33 pieces of AtI legislation which are evaluated in this study.

We seek to relate the theoretical bases with the quantitative results with the goal of promoting a better understanding of the scope of AtI legislation in the full enforcement of this right. It is essential for us not to lose sight of the fact that legislation is not the only factor which ensures enjoyment of RtI.

The following is the structure of the Index.

⁴ For more information see the following table.

								commissioners	
Procedures for access to information, appeals for review and the dissemination of transparency obligations	$\frac{(g) + (h)}{2}$	g) Procedures for access to information	$\frac{(23) + (24) + (25) + (26)}{4}$	23. Methods for submitting requests for access to information					
				24. Requirements for requesting information					
				25. Regulation of the responses of public authorities to requests for access to information					
				26. Reproduction fees for the requested information					
		h) Review procedures	$\frac{(27) + (28) + 29}{3}$	27. Requirements for filing review procedures					
				28. Time limits for filing appeals for review					
				29. Legal guarantees for appeal for review					
		i) Proactive dissemination of public information (Obligations of transparency)	$\frac{(29) + (30) + (31)}{3}$	30. List of information to be published without the need for a request for information	$\frac{(x) + (xi) + (xii) + (xiii)}{4}$	x) Internal organisation of the public entity and regulatory section			
						xi) Information regarding decision-making and the relationship with society			
						xii) Financial information			
xiii) Relevant information									
		31. Methods of dissemination							
		32. Rules for the publication of obligations of transparency							

9. Specific responsibilities	$\frac{2 \times (iv) + (v) + (vi)}{4}$	iv) Protection for civil servants who provide public interest information that is classified
		v) Specific sanctions for civil servants who intimidate applicants
		vi) Sanctions for failure to comply with the obligation to proactively disseminate public information

INDEX		MAIN VARIABLES		SUBVARIABLES		INDICATORS									
I N D E X	0 . 6 2	0 . 5 6	P R O V I S I O N E S	0 . 6 2	0 . 5 7	a) Positivation of RTI	0.69	0.62	1	Conceptualisation and interpretation of the right of access to information	0.42	0.37			
									2	Objectives of access to information legislation	0.65	0.58			
									3.1	Public authorities subject to Laws of Transparency	0.75	0.67	Legislative, Judicial)	1.00	1.00
									3.2				ii) Other public entities	0.50	0.46
									3.3				public funds or carry out public		0.55
						4	Duties of the Obligated Subjects	0.71	0.56						
						5	Subjects of the right Who may request information?	0.91	0.91						
						b) Restricted Information	0.78	0.68	6	Legal criteria for restricting information	0.73	0.63			
									7	List of exceptions	0.79	0.79			
									8.1	Three-part test	0.82	0.60	exceptions	0.82	0.44
			8.2	v) Harm test					0.70						
			8.3	vi) Public interest test					0.67						
			9	Established sanctions	0.70	0.68									
			10	Specific responsibilities and the provision of public interest information	0.06	0.17									
			I N S T I T U T I O N A L	0 . 5 9	0 . 5 2	d) Internal institutions for access to information	0.58	0.49	11	Integration of the Information Offices	0.94	0.56			
									12	Functions of the Information Offices	0.71	0.71			
									13	Integration of the internal review bodies (Information Committees)	0.47	0.47			
									14	Functions of the internal review bodies	0.20	0.20			
						e) Promotion of the right of access to information	0.50	0.50	15	Sensitisation activities	0.62	0.51			
									16	Training	0.64	0.64			
									17	Record keeping	0.55	0.55			
									18	legislative power	0.21	0.31			
			f) Regulatory bodies for transparency and access to information	0.70	0.57	19	Legal nature	0.82	0.82						
						20	Functions of the regulatory bodies	0.57	0.56						
						21	Control bodies for the regulatory bodies	0.70	0.33	vii) Integration of the collegiate body	0.88	0.56			
										of conflicts of interest		0.09			
										commissioners	0.52	0.33			
			P R O C E D U R E S	0 . 6 4	0 . 5 9	g) Procedures for access to information	0.65	0.56	22	Methods for submitting requests for access to information	0.39	0.34			
									23	Requirements for requesting information	0.71	0.71			
									24	Regulation of the responses of public authorities to requests for access to information	0.67	0.62			
									25	Reproduction fees for the requested information	0.85	0.58			
26	Requirements for filing review procedures	0.82							0.82						
h) Review procedures	0.68	0.64				27	Time limits for filing appeals for review	0.60	0.45						
						28	Legal guarantees for appeal for review	0.64	0.64						
						29	List of information to be published without the need for a request for information	0.66	0.66	entity and regulatory section	0.81	0.81			
						29				making and the relationship with	0.59	0.59			
29	xii) Financial information	0.73	0.73												
29	xiii) Relevant information	0.52	0.52												
30	Methods of dissemination	0.82	0.82												
31	Rules for the publication of obligations of transparency	0.23	0.23												

As described before, the Access to Information Index allowed us to generate two types of results: the one that measures the local AtI legislation against the constitutional mandate and good practices (minimal national standards granted) that have been developed in Mexico. We called this measurement the 'Basic Index'. The other type of measurement is against the international standards and best international practices. We called this measurement the 'Progressiveness Index'.

After running the results, the national average of the Index that measures the local RtI legislations against the constitutional mandate and minimal national standards granted, is of 0.62.

Out of the 32 states, 15 presented results that are higher than 0.6. 16 of the 32 local legislations that we considered in the analysis presented results that go from 0.4 to 0.59. The state that got the lowest result is the state of Guerrero.

In regard to the measurement against international standards and best international practices, the national average is of 0.56. In contrast to the Basic Index, only nine of the 32 Mexican states presented results higher than 0.6. 21 local legislations failed under our analysis, obtaining results that go from 0.4 to 0.6. The lowest results that fit in the first category were the states of Baja California Sur and Guerrero.

The federal law obtained a result of 0.65 in the Basic Index and failed under our analysis for the Progressiveness Index with a result of 0.55.

The results of our analysis allow us to identify that there is a serious deficiency in most of the local legislations and the federal transparency law in regard to the methods for classifying information. Several legislations do not incorporate the three-part test to classify information. We also identified that there is a problem with the definition of sanctions for undermining the transparency legislations, and a weakness in the procedures for the proactive disclosure of public information. Besides, we identified a lack of transparent mechanisms for the designation of transparency commissioners and for their removal from office when it is the case. We believe this might severely compromise the necessary independence of the transparency commissions.