

This is not an ADB material. The views expressed in this document are the views of the author/s and/or their organizations and do not necessarily reflect the views or policies of the Asian Development Bank, or its Board of Governors, or the governments they represent. ADB does not guarantee the accuracy and/or completeness of the material's contents, and accepts no responsibility for any direct or indirect consequence of their use or reliance, whether wholly or partially. Please feel free to contact the authors directly should you have queries.

A decorative graphic on the left side of the slide consists of overlapping colored squares (blue, red, yellow) and a black crosshair.

Making Access to Information a Meaningful Right: The FOI Program One Year On

Manila, 5-6 December 2017

**Toby Mendel
Executive Director
Centre for Law and Democracy**



**Session 5-International Experiences: Institutionalizing FOI
Implementation**

2:45-3:50, 5 December 2017

Toby Mendel



Core Concepts

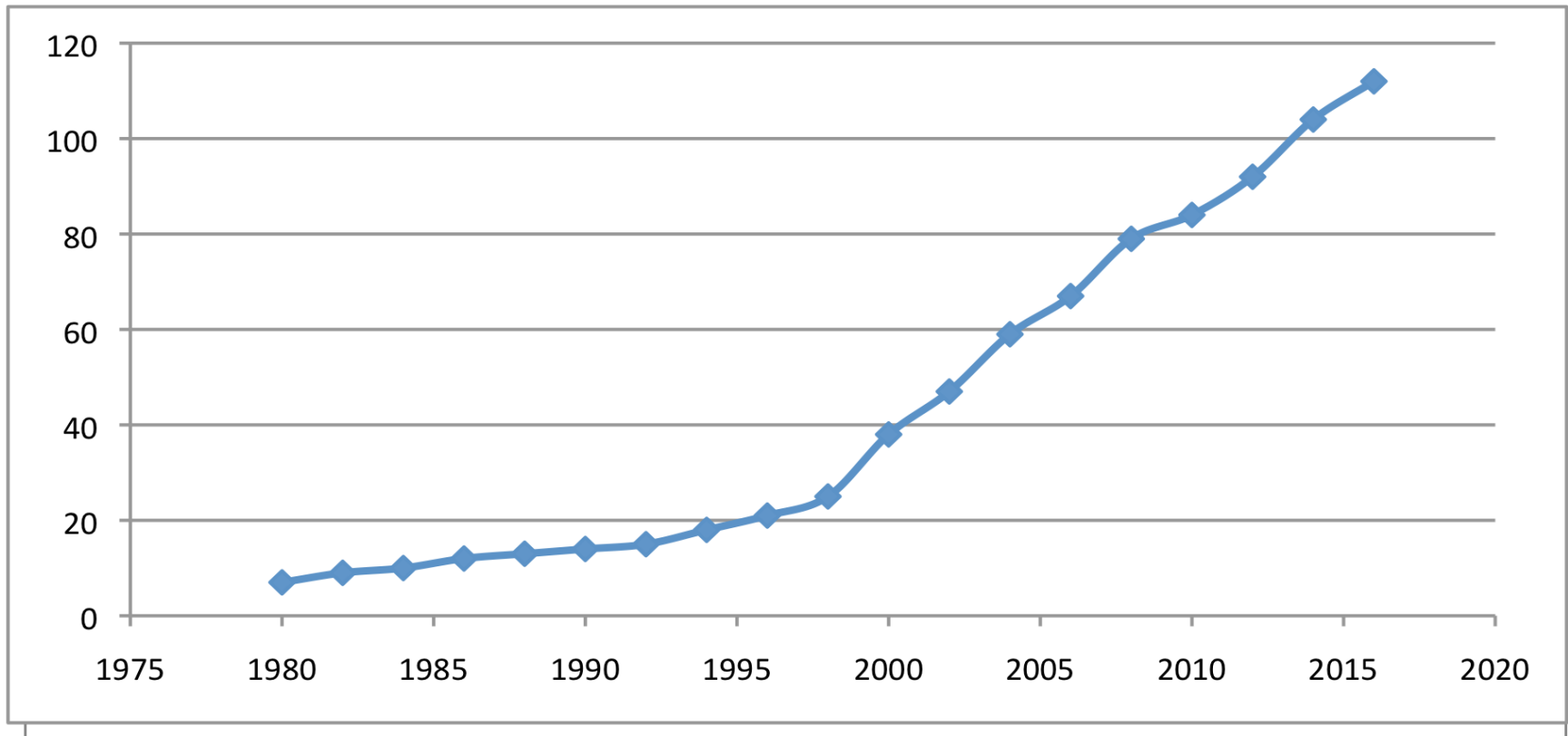
- What is RTI
- Right to request information
 - Right to access information held by public bodies
 - Presumption in favour of openness: reversal of previous presumption
 - Core idea: public bodies hold information for citizens
- Proactive Disclosure – reaching out
- Open government or open data
 - Making data available in machine processible formats
 - For free and for open reuse



Developments

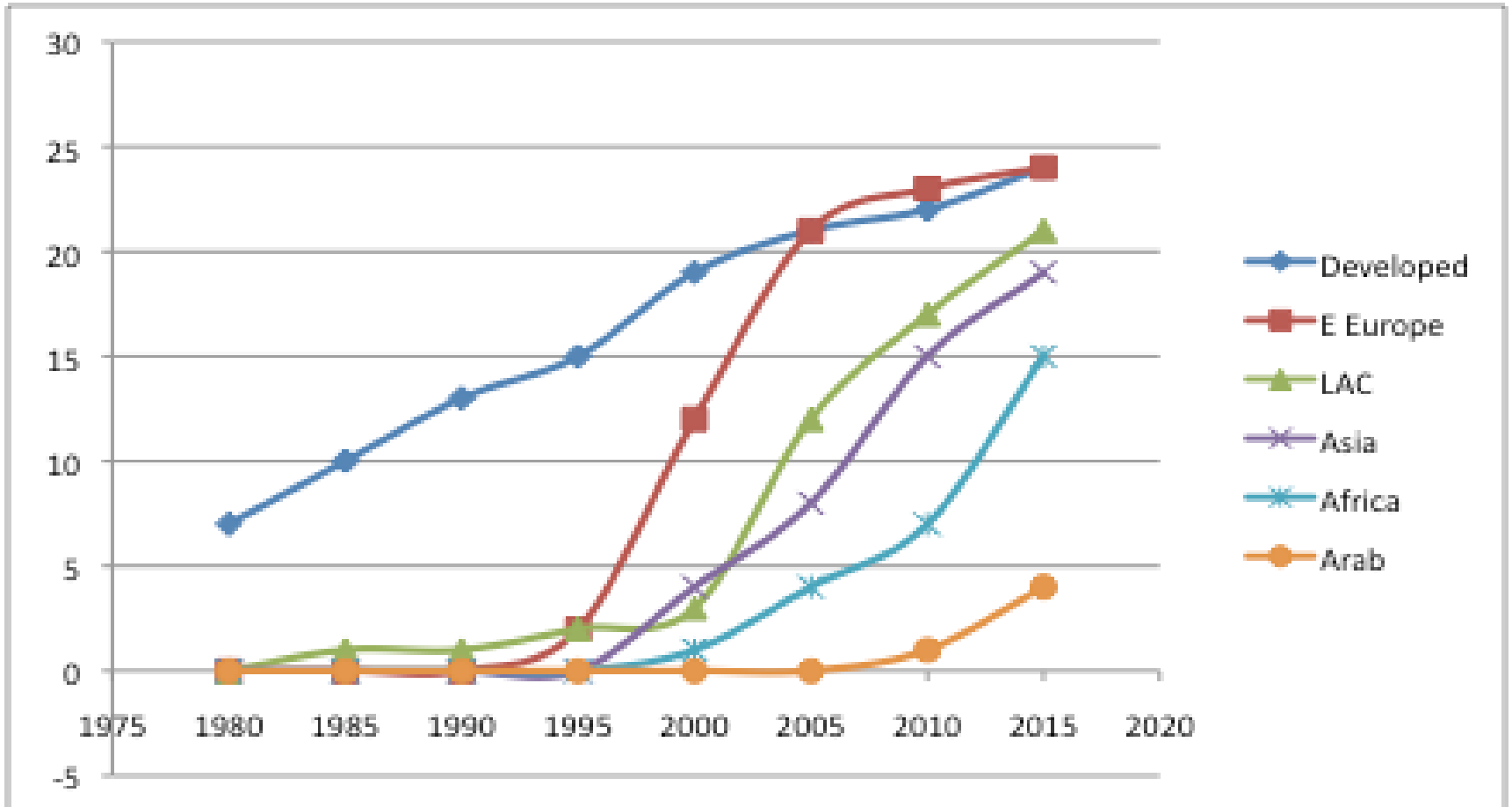
- Laws: 14 to 116 and counting:
 - West => all regions
 - Rate: 1/year => 4/year
- IFIs; CSOs; parallel movements (IATI; PWYF; EITI; OGP)
- Recognition as a human right

Adoption of Laws by Year



Source: [RTI Rating](#) by the [Centre for Law and Democracy](#) and [Access Info Europe](#).

Adoption by Region





Jurisprudential Basis

Article 19 of the UDHR:

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.

Article 29 UDHR:

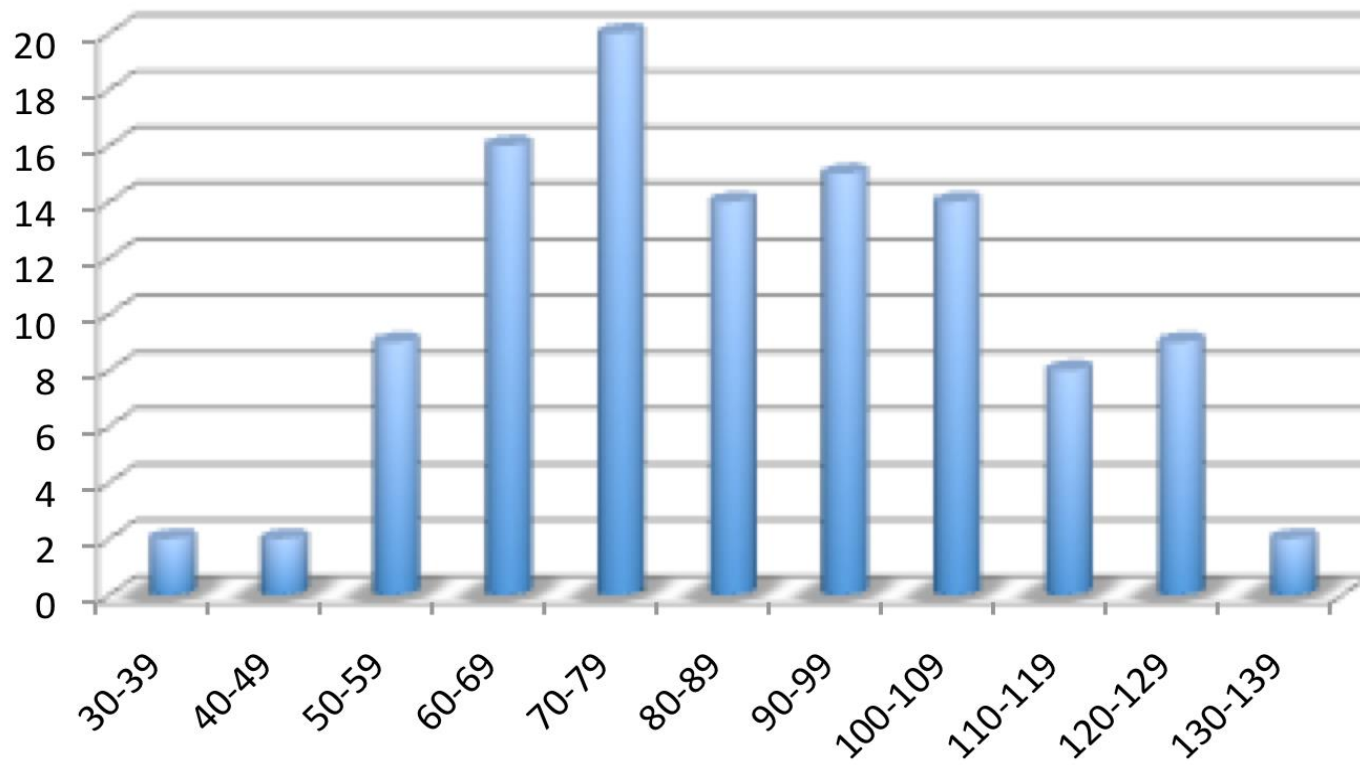
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.



Jurisprudential Basis, cont'd

- Seek and receive
 - Not just speaker but also listener
- Right imposes both negative and also positive obligations on States
 - For example, to regulate broadcasting so as to foster diversity
- Broader idea of freedom of expression as protecting the free flow of information and ideas in society
 - Deemed to include right to access information held by public authorities as key part of that free flow

Distribution of Scores





Key Drivers: General

- Natural idea (hold information for people)
- Expectations around participation
- Changing relations with information
- Globalisation
- Recognition as human right



Key Drivers: National Level

- Rapid process of democratic transition
 - Window of opportunity
 - Revolutions: MENA; E&C Europe; South Africa; Indonesia
 - Myanmar
 - Political shifts: Mexico; Thailand; United Kingdom
- Pressure/support from international community
- Civil society
 - Global movement (FOIANet)
 - Regional/national movements



Why Important

- Main rationale: hold information on behalf on public
- Democracy and participation: good decisions, ownership and implementation
- Accountability and good governance
- Advocacy
- Better service delivery
- Controlling corruption
- Personal goals
- Good business



Key Legal Features: Presumption

- Broad presumption in favour of disclosure
- Scope of information covered
 - Swedish cookies
 - Information and documents
- Bodies covered
 - All three branches, all levels
 - Constitutional and statutory bodies
 - Owned, controlled or funded
 - Public function
- Who may make a request



Key Legal Features: Request Procedures

- Boring but fundamental
- Lodging requests: how, what information, assistance, reasons, receipts, fees
- Processing requests: timelines and extensions, transfers,
- Responding to requests: form in which information provided, fees and waivers, notice, reuse



Key Legal Features: Proactive Disclosure

- List
- Challenge because capacity-aspiration gap
 - India study: 5% achievement
- Idea of leveraging up over time
 - UK proactive publication schemes
 - Proposals to meet obligations over period of time
- Parallel sectoral obligations



Key Legal Features: Exceptions

- Difficult challenge
- Relation with secrecy laws/classification
- List
- Harm
- Public interest override
- Application of tests
- Other features: third parties, severability, overall time limits



Key Legal Features: Oversight

- Three levels:
 - Internal review (time limits)
 - Administrative oversight
 - Courts
- Administrative options:
 - Existing body, limited powers: South Africa
 - Existing body, complaints powers: Pakistan
 - Dedicated body(ies):
 - With binding powers: Mexico, India, UK
 - Without binding powers: Canada



Key Legal Features: Oversight cont'd

- Independence
 - Central to ability to discharge mandate: i.e. review refusals to provide information by public bodies
 - Means: appointments, tenure, prohibitions, reporting/responsibility lines, budget allocation,
- Powers:
 - To investigate: review classified documents, inspect premises, call witnesses
 - To make orders: binding, both remedial (declassification) and structural (e.g. to appoint officers, to train)
- Appeals: free of charge, broad grounds, clear procedures, burden on government



Key Legal Features: Sanctions and Protections

- Sanctions
 - Individuals (criminal, administrative)
 - Bodies (fines?)
- Protections
 - Good faith, pursuant to law
 - Whistleblowers (often different law)



Key Legal Features: Promotional Measures

- Appoint information officers
- Central body with overall promotional role (often oversight body)
- Public awareness-raising: central, individual bodies
- Training/capacity-building
- Reporting (by individual bodies, centrally)
- Record management



Indonesian Experience

- 2008 law, in effect in 2010
 - Did not do much so unprepared in 2010
- Key features (101 points, 31st globally):
 - No constitutional guarantee
 - Very broad scope: three branches, SOEs, public funding but only citizens
 - Weak on procedures (no assistance, nothing on format, poor fee regime)
 - Exceptions: does not override other laws but limited exceptions, harm tested and broad public interest override
 - Independent and empowered oversight body
 - Very strong on promotional measures



Indonesian Experience, cont'd

- Initially weak on requests (demand side)
- Slow start on supply side as well – not enough awareness, IOs not appointed
- Gradually grown in strength
- IC: increasing number of appeals, promotional activities
 - But challenge about institutional independence
- Used OGP process to strengthen implementation
- Overall: middle of the road player



Indonesian Experience, cont'd

- Fees: only for costs of photocopying and sending
 - But in some cases has been a challenge to collect
- As in other countries, exceptions most difficult part – important role of Commission in clarifying over time (lots of appeals successful)
 - Odd exception about natural wealth – do not disclose EITI contracts
- Challenge to train all officials; somewhat random with lots of players involved (e.g. CLD); not fully integrated into central training systems
- Public outreach has been mainly civil society with some support from Commission



Sri Lankan Experience

- 2016 law, in effect in Feb. 2017
 - Very short time (6 months) but made a lot of progress during that time, e.g. regulations, IOs)
- Key features (131 points, 3rd globally):
 - Constitutional guarantee
 - Very broad scope: three branches, SOEs, public funding but only citizens
 - Strong on procedures
 - Exceptions: overrides other laws; limited exceptions, harm tested and broad public interest override
 - Independent and empowered oversight body
 - Very strong on promotional measures and protections



Sri Lankan Experience, cont'd

- Mad rush to implement but did it: regulations and rule adopted (one day before deadline); IOs appointed; some training – has continued
- Immediate flow of requests: many from rural and disadvantaged sectors but also from central CSOs and media: government claims 100 per day
- IC: 600 appeals in 9 months, promotional activities and support to public bodies but increasingly occupied with appeals
- Decentralised IO structure (1000s of them) – training challenge



Sri Lankan Experience, cont'd

- Difficult cases: e.g. request for asset declarations of PM and President (processing, citizenship, backlash)
- Army requests: claimed internal but IC overrode
- Request for inquiry report claimed to be missing: currently searching through boxes in archives
- Resistance from some public bodies: threatened criminal measures and this has worked
 - Pakistan: KP – fines and then criminal threats
- Overall: better practice performer



Sri Lankan Experience, cont'd

- Fees limited to reproduction and sending and set centrally, but rules give first four pages for free which covers a lot of requests
 - Some public bodies giving for free
 - Idea of fee waivers for poor but not yet implemented
- As noted, some pushing and pulling around exceptions
- So far, training for officials focused on IOs but it is being integrated into regular courses
- As with Indonesia, outreach has mainly come from civil society



Thank you

Toby Mendel, Executive Director, Centre for Law
and Democracy

toby@law-democracy.org

www.law-democracy.org