

APPROACHING DEMOCRACY THROUGH TRANSPARENCY: A COMPARATIVE LAW STUDY ON CHINESE OPEN GOVERNMENT INFORMATION

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I. OPEN GOVERNMENT INFORMATION IN CHINA (SINCE 1985)

A. TRANSPARENCY IN VILLAGES AND ENTERPRISES

One of the most important consequences of China's economic reform, which began in its rural provinces in 1978, is the practice of transparency.¹ Disclosure of information related to public affairs first occurred in 1985, when Villagers' Committees ("VCs")—autonomous organizations that manage the public affairs of villages²—made fiscal, land use, and home planning records available to interested villagers.³ Despite the adoption of open village affairs by several provinces, including Jiangsu, Shandong, and Henan, the practice was not codified until much later, when, in late 2004, the General Office of the Central Committee of the

1. For more information on these reforms, see Jinglian Wu, *Understanding and Interpreting Chinese Economic Reform* 104-27 (2005) (discussing, among other things, the adoption of "contracting" and "responsibility").

2. *Cunmin Weiyuanhui Zuzhi Fa* (村民委员会组织法) [Law on the Organization of Villagers' Committees] (promulgated by the Standing Comm. of the Nat'l People's Cong., Nov. 4, 1998, effective Nov. 4, 1998) art. 2 (China), translated in <http://www.chinalawedu.com/news/23223/23228/22926.htm>.

3. See Zhonghua renmin gongheguo minzheng bu jiceng zhengquan he shequ jianshe si (中华人民共和国民政部基层政权和社区建设司) [Bureau of Basic-Level Admin. & Cmty. Constr.], *Quanguo xietiao xiaozu bangongshi* (全国协调小组办公室) [Chinese Ministry of Civil Affairs], *Cun wu gongkai* (村务公开) [*Open Village Affairs*] 11-12 (2004).

Communist Party of China (“CPC”) and the General Office of the State Council issued the Notice on Open Village Affairs and Democratic Management in the Countryside, “proving” its “positive achievements.”⁴ The Notice also included suggestions on how to perfect open administration of village affairs, demonstrating a desire by the government and the governing political party to push transparency forward after nearly ten years of “self-governance” on the issue.⁵ Transparency in rural areas progressed remarkably, lifting the “Bamboo Curtain” on public affairs from autonomous villages and then government administration.

In the late 1990s, transparency spread from rural to urban areas, affecting state-owned and collectively owned enterprises (“SOEs” and “COEs,” respectively)⁶ as well as other public organizations. As a confirmation of the pioneering wave of open government affairs and as a guide to the future operation of transparency, the General Offices of the CPC Central Committee and of the State Council promulgated the Notice on Further Openness in the Affairs of SOEs, COEs, and Their Holding Companies on June 3, 2002.⁷ Later that

4. See *Guanyu Jianquan Wanshan Cunwu Gongkai He Minzhu Guanli Zhidu de Yijian* (关于健全完善村务公开和民主管理制度的意见) [Notice on Open Village Affairs and Democratic Management in the Countryside] (promulgated by the General Office of the Cent. Comm. of the Communist Party of China [CPC] & the St. Council, June 22, 2004, effective June 22, 2004) [hereinafter Notice on Open Village Affairs], available at http://news.xinhuanet.com/zhengfu/2004-07/12/content_1591421.htm.

5. See *id.* (outlining procedures to improve rural governance by creating a group to monitor and implement “village affairs,” as well as to give farmers a voice in decisions regarding land use, land transfer, financing, among others).

6. See *Zhongyang Jilu Jiancha Weiyuanhui Shuji Wei Jianxing Daibiao zhongyang Jilu Jiancha Weiyuanhui Changwu Weiyuanhui Suozuo De Gongzuo Baogao* (中央纪律检查委员会书记尉健行代表中央纪律检查委员会常务委员会所作的工作报告) [CPC Comm’n for Discipline Inspection], “*Jia da lidu, biaoben jianzhi, tuidong fan fubai douzheng shenru kaizhan*” de gongzuo baogao (《加大力度, 标本兼治, 推动反腐败斗争深入开展》的工作报告) [1998 Annual Report] (delivered by Sec’y Wei Jianxing on Jan. 13, 1999), reprinted in *THE PEOPLE’S DAILY*, Mar. 1, 1999, at 3, available at <http://www.people.com.cn/GB/channel11/20000804/172106.html>.

7. See *Guanyu Zai Guoyou Qiye, Jiti Qi Ye Ji Qi Konggu Qiye Shenru Shixing Changwu Gongkai Zhidu de Tongzhi* (关于在国有企业、集体企业及其控股企业深入实行厂务公开制度的通知) [Notice on Further Openness in the Affairs of State-Owned Enterprises, Collectively Owned Enterprises and Their Holding Companies] (promulgated by the CPC Cent. Comm. & the St. Council, June 3, 2002, effective June 3, 2002), available at http://www.gov.cn/gongbao/content/2002/content_61564.htm (mandating

same year, the National Panel on Coordination of Open Enterprise Affairs estimated that over 250,000 enterprises, including over 190,000 public organizations (SOEs and COEs)⁸ as well as over 57,000 private enterprises had introduced transparent management.⁹

The first official statement on government transparency appeared in 1988, when the Secretariat of the CPC Central Committee proposed disclosure of all administrative regulations, procedures, and decisions in preparation for democracy.¹⁰ By the late 1990s some laws and regulations began to contain principles of openness.¹¹ In his 1997 report to the Fifteenth National Convention of the CPC Central Committee, then-General Secretary Jiang Zemin stressed the “principles of fairness, justice and openness.”¹² Thereafter, the

publication of all development plans as well as reform and merger proposals, and other similar events, so that workers can participate in the decision-making).

8. See generally *2002 Nian chang wu gongkai dashiji* (2002 年厂务公开大事记) [*Chronicle of Events in Factory Affairs, 2002*], QUANGUO CHANG WU GONGKAI MINZHU GUANLI WANG (全国厂务公开民主管理网) [THE NETWORK FOR DEMOCRATIC MANAGEMENT] (Nov. 15, 2007), <http://www.cwgk.org/template/10001/file.jsp?cid=10&aid=8>.

9. *Id.*

10. See LIU JIE (刘杰), ZHIQING QUAN YU XINXI GONGKAI FA (知情权与信息公 开法) [THE RIGHT TO KNOW AND LAWS ON INFORMATION DISCLOSURE] 246 (2005).

11. *Zhonghua Renmin Gongheguo Xingzheng Chufa Fa* (中华人民共和国行政 处罚法) [Law on Administrative Penalty] (promulgated by Nat'l People's Cong. , Mar. 17, 1996, effective Oct. 1, 1996) (China), *translated in* 1996 P.R.C. LAWS art. 4, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383613.htm (“Administrative Penalty shall be imposed in adherence to the principles of fairness and openness Regulations on administrative penalty to be imposed for violations of law must be published; those which are not published shall not be taken as the basis for administrative penalty.”). Article 31 requires parties to be notified of both “the facts, grounds and basis on which the administrative penalties are to be decided” and the rights of remedy which are required before a decision of penalty is imposed. In addition, Articles 42 and 43 of the Law provide a right to and prescribe a procedure for public hearings. The Temporary Regulations on State Civil Servants also stated the principle of openness in the employment of civil servants. See *Temporary Regulations on State Civil Servants*, art. 2 (promulgated by the St. Council in 1993, superseded by the *Civil Servants Law* on Jan. 1, 2006).

12. Jiang Zemin (江泽民), Pres., Report at the 15th Nat'l Cong. of the Communist Party of China: Hold High the Great Banner of Deng Xiaoping Theory, for an All-Around Advancement of the Cause of Building Socialism with Chinese Characteristics in the 21st Century 12 [江泽民在中国共产党第十五次全国代表 大会上的报告: 高举邓小平理论伟大旗帜, 把建设有中国特色社会主义事业 全面推向二十一世纪](Sept. 12, 1997), *translated in*

practice of open government started to blossom throughout the country, almost simultaneously with the assistance of “e-government.”¹³

Government transparency and economic reform in modern China, as a consequence of the earlier reforms in rural China, is no coincidence. Transparent administration of government affairs, a prerequisite for public participation and oversight,¹⁴ is a basic necessity of market economies. Later practice of transparency in SOEs and COEs also evinces the link between economic reform and information disclosure. Managers of both villages and firms distributed information related to fiscal and administrative affairs to their members to meet the demands of democratic management and, therefore, to make villagers or workers more productive.¹⁵ However, the consequences of transparency experiments in economic matters went well beyond the bounds of economic affairs, penetrating public organizations and, eventually, administrative agencies.

B. LOCAL EXPERIMENTS

The Rules on Open Government Information of Guangzhou Municipality (“2003 Guangzhou Rules”)¹⁶ are generally credited as the first official legislation on open government information

<http://www.fas.org/news/china/1997/970912-prc.htm>, available at http://news.xinhuanet.com/zilia/2003-01/20content_697189.htm.

13. See LIU *supra* note 10, at 247-48 (reporting a surge in laws and judicial decisions supporting the need for government transparency).

14. See Notice on Open Village Affairs, *supra* note 4, § 1. In fact, in the early 1980s, attempts at open village affairs were always followed by public participation and supervision. See LUOPING HAN (罗平汉), CUNMIN ZIZHI SHI (村民自治史) [HISTORY OF VILLAGERS’ SELF-GOVERNANCE] 112-16 (2006) (describing the implementation of open village affairs in various provinces in China).

15. See Notice on Open Village Affairs, *supra* note 4, § 3 (elaborating openness as precondition of villagers participation and supervision).

16. Guangzhou Shi Zhengfu Xinxi Gongkai Guiding (广州市政府信息公开规定) [Rules on Open Government Information of Guangzhou Municipality, hereinafter “2003 Guangzhou Rules”] (promulgated by No.8 Executive Order, Nov. 6, 2002, effective Jan. 1, 2003) (China), <http://www.people.com.cn/item/flfgk/dffg/1992/D442053199204.html> [hereinafter 2003 Guangzhou Rules], reprinted in The China Law Center, Yale Law School, www.freedominfo.org/documents/provision.pdf (last visited Sept. 1, 2011) (Jamie P. Horsely trans.) (stating that the law was formulated specifically “to protect the right to know . . . , standardize the making public of government information, [and] increase the transparency of administrative activities”).

("OGI"). Although the city of Guangzhou did spawn the government transparency movement, this actually happened ten years prior to the 2003 Guangzhou Rules—in 1992. The Temporary Rules on Open Government of Guangzhou Municipality ("1992 Temporary Rules")¹⁷ not only confirmed early transparency efforts undertaken by government agencies (albeit without binding legal effect), but also provided supporting authority for future administrative action. The Rules defined "open government" (Article 3), delineated the scope of openness (Article 7), and prescribed basic procedures for openness (Articles 9 to 20).¹⁸

With more than ten years of experimental practice, the Guangzhou Municipal government was well prepared to take the leap to the 2003 Guangzhou Rules.¹⁹ For the first time in China's history, the "right to know" was provided formally by statute.²⁰ The principle of openness was also proclaimed.²¹ The 2003 Guangzhou Rules set forth two means of information disclosure: agencies may release government-held information upon their own initiative²² or upon request.²³ Moreover, agencies should disclose requested information unless

17. Guangzhou Shi Renmin Zhengfu Gongkai Zhengwu Huodong Shixing Banfa (广州市人民政府公开政务活动试行办法) [Temporary Rules on Open Government of Guangzhou Municipality] (promulgated by Executive Order No. 67, July 9, 1992, effective July 9, 1992, expired Jan. 1, 2003) (China), available at <http://www.chinalawedu.com/news/1200/21752/21754/21766/21791/2006/4/pa24055224334600212000-0.htm> (Chinese version). The Rules were abolished on January 1, 2003, the day on which the 2003 Guangzhou Rules came into effect.

18. See *id.* arts. 3, 7, 9-20.

19. No official translation into English yet exists for the 2003 Guangzhou Rules. The Chinese version is available at the official website of the Guangzhou Municipal Government: <http://www.gz.gov.cn/vfs/content/newcontent.jsp?contentId=233199&catId=4099>. For an introduction to and commentary on the Rules in English, see Jamie P. Horsely, *Guangzhou's Pioneering Foray into Open Government*, CHINA BUS. REV., July-Aug., 2003, available at www.chinabusinessreview.com/public/0307/horsely.html (using the SARS epidemic as an example of China's continued struggle against its culture of secrecy and renewed commitment to transparency).

20. 2003 Guangzhou Rules, *supra* note 16, art. 1 (describing the protection of the "right to know" as a purpose of this statute).

21. *Id.* art. 6.1 (providing the general rule that government information shall be made public).

22. *Id.* arts. 9-11 (obligating disclosure of government decisions, for example, procedures, resolution of major matters, finances, and government personnel).

23. *Id.* art. 13.1 (allowing persons to request the disclosure of information not listed in Articles 9 through 11).

such disclosure is clearly prohibited by law.²⁴

The 2003 Guangzhou Rules gave rise to a new round of the local transparency movement. The cities of Shenzhen, Chengdu, Shanghai, Chongqing, Wuhan, Datong, Hangzhou, Changchun, and Ningbo followed up successively the following year by promulgating similar rules or regulations; provinces also joined this wave of OGI legislation, thus making 2004 the “year of government transparency.”²⁵ These rules and regulations served as the main legal authority for disclosure of government information by local government until 2008, when the central government promulgated a new regulation, discussed below in Part II.

C. INFLUENCES FROM INTERNATIONAL LAW

In addition to domestic motivations for government transparency, where economic factors yielded a legal-political result, international law also significantly influenced China’s march towards transparency. On one hand, access to the World Trade Organization (“WTO”) pushed, if not triggered, Chinese OGI legislation at both the local and the national level; on the other hand, experiences of other countries also provided examples for China to reference when considering reforms.

1. WTO Regulations

As China approached its accession to the WTO in the late 1990s, its study of the WTO extended beyond academia; the officers and staff of nearly every government agency were busy educating themselves about the WTO. When people began to view the WTO Agreements from a legal perspective, rather than a “purely economic” one, the obligations that the WTO might impose on the Chinese government, and the legal consequences arising therefrom, attracted public attention. Scholars, and later officers, began to realize that the WTO’s influence would inevitably affect many aspects of Chinese administrative law even though the WTO

24. *Id.*

25. For detailed information of local legislation of government information disclosure, see generally LIU WENJING (刘文静), *WTO TOUMINGDU YUANZE YU WOGUO XINGZHENG GONGKAI ZHIDU* (WTO 透明度原则与我国行政公开制度) [*The WTO Principle of Transparency and China’s Institution of Open Government*] 40-50 (2008).

Agreements were originally written to regulate only domestic laws relating to international trade.²⁶ It became evident that it is almost impossible to differentiate between laws and regulations relating to international trade from those not; especially because a WTO Member's government must adjust its domestic legislation to "comply" with its WTO obligations.²⁷ The WTO principle of transparency, for example, has played a major role in the reform of Chinese administrative law. The principle, found in almost every covered agreement, was enunciated in Article 2(C)(1) of Protocol on the Accession on the People's Republic of China²⁸ and later interpreted in Article 324 of the Report of the Working Party on the Accession of China.²⁹ In carrying out reform, China sought to ensure the compliance of legislation closely related to international trade (for example, the 2003 Law on Government Procurement)³⁰ as well

26. See LIU WENJING (刘文静), WTO GUIZE GUONEI SHISHI DE XINGZHENGFA WENTI (WTO 规则国内实施的行政法问题) [IMPLEMENTING WTO REGULATIONS IN CHINA: ITS INFLUENCES ON CHINESE ADMINISTRATIVE LAW] 48-56 (2004). This book discusses the influences of WTO regulations on important aspects of Chinese administrative law, including uniform administration and allocation of administrative powers, transparency, standard and scope of judicial review, and administrative licensing, viewing WTO regulations as "international administrative law." chs. 1, 3-6.

27. See Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 98 (2003) (noting that law professors have welcomed the pressures that WTO membership imposes on transparency because it moves China's government to a more limited and transparent form).

28. See World Trade Organization [WTO], *Protocol on the Accession of the People's Republic of China*, ¶ 2(C)(1), WT/L/432 (Nov. 10, 2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf> (permitting China to enforce only the "laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange" that are published or made available to other WTO Members, individuals, and enterprises).

29. See WTO Ministerial Conference, *Report of the Working Party on the Accession of China*, ¶ 324, WT/MIN(01)/3 (Nov. 10, 2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002144.pdf> (alleging that, at this point in the accession process, China's laws have not reached the level of transparency necessary to comply with the WTO Agreement and Draft Protocol, and encouraging China to use the Internet to make its laws publicly available).

30. See Yao Zhenyan (姚振炎), Vice Chairman, Fin. Econ. Comm., Nat'l People's Cong., Address at the 9th Nat'l People's Cong. Standing Comm., "Guanyu Zhonghua Renmin Gongheguo Zhengfu Caigou Fa (Caoan) de Shuoming" (关于《中华人民共和国政府采购法(草案)的说明》)

as general legislation on government transparency (for example, the 2003 Guangzhou Rules).³¹ The influence of the WTO Agreement can be seen not only in the “General Provisions” chapter of a particular statute, where the principle of openness or transparency is articulated,³² but also in local legislation on government transparency.

2. Experiences of Other Countries

The implementation and practice of government transparency in China has been influenced greatly by other countries’ experiences. With the introduction of statutes on administrative procedure by tens of other countries (many of them were translated into Chinese by scholars) since the late 1990s, and with the important role played by academic experts at almost all levels of legislation, the experience of other countries has been merged into newly established Chinese laws and regulations related to government transparency, as well as to other aspects of administrative procedure. Legislators and officers, often lacking legal expertise, sought help from professors more and more frequently in drafting bills.³³ When a bill dealt with the procedure of public participation, law professors and other legal experts would offer comments and suggestions that were informed by foreign experiences. Sometimes, foreign experts made suggestions directly. Perhaps the best example is the collaboration between the Office of Legislative Affairs of Guangzhou Municipal

[Interpretation of the Government Procurement Law (Draft)] (Oct. 22, 2001), available at <http://www.law-lib.com/fzdt/newshtml/20/20050710215503.htm> (mentioning the impact of the WTO on Chinese procurement).

31. See Guangzhou Municipal Gov’t, Legal Affairs Office, *Introduction to Open Government Information Work by the Guangzhou Municipal Government*, 23 GOV’T INFO. Q. 1, 11 (Mar. 20, 2006) (noting that comprehensive compliance with WTO requirements necessitates openness of government information).

32. See Zhonghua Renmin Gongheguo Zhengfu Caigou Fa (中华人民共和国政府采购法) [Law on Government Procurement] (promulgated by Presidential Order No. 68, June 29, 2002, effective Jan. 1, 2003), translated in 2002 P.R.C. LAWS, available at http://www.gov.cn/english/laws/2005-10/08/content_75023.htm (prescribing that “[g]overnment procurement shall be conducted in line with the principle of openness, transparency” (Article 3) and that “[b]id invitation and tendering activities shall be conducted in compliance with the principles of openness” (Article 5)).

33. Anne Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 1 (1996) (commenting on the use of American lawyers in drafting twenty-two laws for the People’s Republic of China under the United Nations Development Programme).

Government and The China Law Center of Yale Law School, who together drafted the Guangzhou Municipal Measures on Public Participation in Formulating Rules in 2005.³⁴

II. THE STATE COUNCIL'S OGI REGULATIONS

Promulgated by China's State Council in 2008, the Regulations on Open Government Information ("State OGI Regulations") summed up the early experiences of earlier local legislation, establishing a uniform procedure for administration of OGI for localities and administrative agencies.³⁵ While the State OGI Regulations is clearly far from perfect, it nonetheless stands as a striking mark for further steps toward government transparency.

A. ACHIEVEMENTS

1. *Special Office for OGI Works*

The State OGI Regulations prescribes that special offices for OGI work—being designed by local governments and their departments at

34. Legal experts who collaborated at the July 2006 workshop titled "Public Participation in Rulemaking," in Guangzhou, China, July 2006, include: Professors Jamie P. Horsley and Jeffrey P. Prescott of The China Law Center, Yale Law School; Professor Jeffrey S. Lubbers of the Washington College of Law, American University; Mr. Neil Eisner, Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation; as well as several Chinese law professors, including the author of this article. For a brief introduction to this collaboration, see *Is China's Government Becoming More Open?: An Interview with Jamie Horsely, Deputy Director of The China Law Center at Yale Law School* (Aug. 15, 2006), available at <http://www.law.yale.edu/intellectuallife/3061.htm> (remarking that Guangzhou Province's experimental use of "both open information and public participation mechanisms [was] adapted in part from U.S. practice"). See generally Guangzhoshi Guizhang Zhiding Gongzhong Canyu Banfa (广州市规章制定公众参与办法) [Measure on Public Participation in Formulating Rules of Guangzhou Municipality] (promulgated by No. 4 Executive Order, June 27, 2006, effective Jan. 1, 2007) art. 1 (China) (The China Law Center trans.), available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-PP-Final_GZ_PP_MeasuresFinal_tr9-4-09_%28Eng%29.pdf ("These measures are formulated in order to promote and standardize the work of public participation in the course of formulating rules . . .").

35. Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli (中华人民共和国政府信息公开条例) [Regulations on Open Government Information] (promulgated by the St. Council, Jan. 17, 2007, effective May 1, 2008) (China) [hereinafter State OGI Regulation], available at <http://www.greenlaw.org.cn/files/laws/State%20Council%20Information%20Disclosure%20Regs.pdf>.

the county level and above—undertake specific OGI matters, maintain and update government information, organize the compilation of OGI guides and annual reports, and conduct examinations for secrecy for the administrative agency to which the special office belongs.³⁶ The establishment of special offices for OGI in fact made government information disclosure more convenient and smoother, as well as more standardized and, thus, more easily supervised.

2. *Scope of Disclosure*

Local rules on OGI, before the 2008 State Regulations, differed in listing the assorted information that should be disclosed. Those differences were actually due to the myriad, confusing ways of classifying government information. For example, some local rules classified very specific administrative decisions such as “requisition of land [and] documents about house demolition,”³⁷ or “series numbers of permits for the Middle School Entrance Exam and University Entrance Exam, and the scores of the examinees.”³⁸ Others listed comparatively abstract categories, such as “powers on decision-making,” “fiscal administration,” or “personnel.”³⁹

The 2003 State Regulations provided a uniformed way of

36. *See id.* art. 4.

37. *See* Shanghai Zhengfu Xixi Gongkai Guiding (上海市政府信息公开规定) [Rules on Open Government Information of Shanghai Municipality] (promulgated by Executive Order No. 19, Jan. 20, 2004, effective May 1, 2004) art. 8(B)(3) (China) (The China Law Center trans.), *available at* http://www.law.yale.edu/documents/pdf/Shanghai_Municipal_Provisions.pdf; *see also* Chengdushi Zhengfu Xixi Gongkai Guiding (成都市政府信息公开规定) [Rules on Open Government Information of Chengdu Municipality] (promulgated by Executive Order No. 105, March 29, 2004, effective May 1, 2004) art. 10(9) (China); Wuhan Shi Zhengfu Xixi Gongkai Guiding (武汉市人民政府信息公开暂行规定) [Temporary Rules on Open Government Information of Wuhan Municipality] (promulgated by Executive Order No. 156, May 31, 2004, effective July 1, 2004) art. 7(2)(4) (China). Both Shanghai and Chengdu revised their Rules in 2008, bringing the relevant provisions in compliance with the State OGI Regulation.

38. *See* Shenzhen Shi Zhengfu Xixi Wang Shang Gongkai Banfa (深圳市政府信息网上公开办法) [Rules on Open Government Information On Internet of Shenzhen Municipality] (promulgated by Executive Order No.130, Feb. 25, 2004, effective April 1, 2004, superseded by Shenzhen Shi Zhengfu Xixi Gongkai Guiding (深圳市政府信息公开规定) [Rules on Open Government Information of Shenzhen Municipality], Sept. 1, 2006) art. 7(X) (China).

39. *See* 2003 Guangzhou Rules, *supra* note 16, art. 9.

classifying government information that should be opened to the general public. It first listed the sorts of information that should be disclosed by the agency, without request. For example, this included information “that involves the vital interests of citizens, legal persons or other organizations,” “that needs to be extensively known or participated in by the general public,” “that shows the structure, function and working procedures of and other matters relating to the administrative agency,” and “that should be disclosed on the administrative agency’s own initiative according to laws, regulations and relevant state provisions.”⁴⁰ The law then prescribed that administrative agencies should “determine the concrete content of the government information to be disclosed on their own initiative within their scope of responsibility”⁴¹ in accordance with the provisions of Article 9 of the State OGI Regulations, and emphasize disclosure of specific government information listed thereafter.⁴²

3. *Methods and Procedures for Disclosure*

Both categories of information disclosure—upon an agency’s own initiative, or from an agency pursuant to a request—are outlined in the 2003 State Regulations. Article 15 states requirements for information disclosure on an agency’s own initiative, through government gazettes, official websites, press conferences, newspapers and other publications, radio, and television.⁴³ State archives and public libraries are required to make access to government information convenient for the general public. Agencies are also encouraged to set up materials request stations, information bulletin boards, and electronic information screens to disclose information.⁴⁴ Agencies are responsible for releasing information that they made or stored⁴⁵ within twenty business days from the date that it was generated or updated.⁴⁶ Moreover, agencies are required to comply and publish OGI guides and catalogues, and to update them in a timely manner.⁴⁷

40. See State OGI Regulations, *supra* note 35, art. 9.

41. See *id.* arts. 10&12.

42. See *id.* arts. 11.

43. See *id.* art. 15.

44. See *id.* art. 16.

45. See *id.* art. 17.

46. See *id.* art. 18.

47. See *id.* art. 19.

Request procedures are also provided, albeit in a primary form that lacks sensitivity to every contingency. Such procedures include format and content requirements,⁴⁸ guidelines for responding under different circumstances,⁴⁹ instructions for dealing with conflicts of interests,⁵⁰ response formatting requirements,⁵¹ and pricing.⁵²

4. *Supervision and Safeguards*

Article 31 of the 2008 State Regulations requires annual reporting by all agencies.⁵³ It elaborated to a certain extent upon other comparatively abstract requirements such as “periodic inspection”⁵⁴ by “the departments in charge of OGI work and supervision agencies.”⁵⁵ Compared to the simple statement of whistleblowing and remedy in Article 33, liabilities caused by agencies’ violation of the Regulations provided in Articles 34 and 35 are more detailed.⁵⁶

B. DEFICIENCIES

1. *Limited Scope of Disclosure*

Chapter II of the 2008 State OGI Regulations establishes the scope of information that should be disclosed on an agency’s own initiative. This chapter implies that there should be no disclosure

48. *See id.* art. 20 (requiring a written application, but allowing verbal requests when there it would be prohibitively difficult to apply in written form).

49. *See id.* arts. 21-22, 24 (signaling that differences arise depending on whether or not it is government information to be disclosed, or when the information does not exist).

50. *See id.* art. 23 (requiring the administrative agency to solicit a third party’s opinion, and, if the third party disagrees with disclosure, the agency may not disclose the information, unless the information serves the public interest).

51. *See id.* art. 26 (providing information in the format the applicant requires).

52. *See id.* arts. 27-28 (allowing the agencies to collect a processing fee for their services).

53. *See id.* art. 31.

54. *See id.* art. 29 (mandating periodic inspection of information disclosure work in various levels of government).

55. *See id.* art. 30 (giving the responsibility of supervising information disclosure to “competent” governments).

56. *Compare id.* art. 33 (providing administrative reconsideration or adjudication for whistleblowers), *with id.* arts. 34-35 (listing numerous crimes such as failing to fulfill disclosure obligations, failing to update contents of previously disclosed information, and charging fees in violation of relevant provisions, together with detailed penalties for an administrative agency that violates the Regulation).

unless the matter explicitly meets criteria found therein. Serving as a general statement on the scope of disclosure, Article 9 uses vague phrases—such as “[information that] involves the vital interests of citizens” and “[information that] needs to be extensively known or participated in by the general public”—that leaves broad discretion to custodial agencies, which are naturally inclined to not release their information.⁵⁷ Similar phrases are found in Articles 10-12, which gave local governments the power to “determine the concrete content of the government information to be disclosed on their own initiative within their scope of responsibility.”⁵⁸ “Information on the approval and implementation of major construction projects” that should be disclosed by government at the county level and above (Article 10(8)), for example, could be held up in a dispute over the meaning of “major construction projects.”⁵⁹ “Important and major matters in urban and rural construction and management”⁶⁰ and “information on the construction of social and public interest institutions”⁶¹ are also ambiguous phrases and it will be easy for agencies to keep the requested information away from the general public.

2. *Unclear Resolution of Conflicts of Interest*

A conflict of interest is likely the toughest issue that an agency will face when fulfilling an information disclosure request. Agencies must withhold information that “involves state secrets, commercial secrets or individual privacy.”⁶² Leaving the big issue of state secrets aside, there are still exemptions on this withholding: the information mentioned above “may be disclosed by administrative agencies with the consent of the rightholder(s) or if administrative agencies believe that non-disclosure might negatively impact the public interest.”⁶³ It’s hard to imagine a serious dispute arising over whether a rightholder gave consent, but disputes seem inevitable over the

57. *See id.* art. 9 (stating that this kind of information must be disclosed, but failing to provide examples).

58. *See id.* arts. 10-12.

59. *See id.* art. 10(8) (failing to provide guidance on what constitutes vital information with regards to a major construction project).

60. *See id.* art. 11(1).

61. *See id.* art. 11(2).

62. *See id.* art. 14(4).

63. *See id.* (allowing disclosure upon the rightholder’s approval or his failure to contest the disclosure).

meaning of “impact the public interest.”⁶⁴ No procedure is provided to guide any possible controversy over the meaning of “major impact,” “public interest,” or more importantly, the balance between the interests of the public and those of the private parties.

Deficiencies stemming from the absence of conflict resolution procedures are evident in Article 23 of the State OGI Regulations, where both grounds for a valid disclosure decision and the procedural protection of privacy and trade secrets appear vague and ambiguous. When agencies believe commercial secrets or privacy might be implicated by a disclosure request, seeking a third party’s opinion is always indispensable. What should be the grounds for withholding the requested information when the third party claims privacy or commercial secrets? The principle: “If the third party does not agree to have the information disclosed, the information may not be disclosed” leaves both agencies and the third parties a possible excuse for nondisclosure. That is, it is the opinion of the rightholder(s), rather than the consideration of the agencies, that stands as the official ground of declining a request.⁶⁵

If the third party’s opinion is not accepted, when should they be informed by the decision-making agency? The State OGI Regulations do not provide a clear answer. Article 14 states relevant information “may be disclosed” without the consent of the rightholder(s)—that is, the third party—“if agencies believe that” the

64. *Id.*

65. On October 17, 2008, less than six months after the State OGI Regulation had gone into effect, the Commodity Price Bureau of Zhengzhou, Henan Province, denied Zhao Zhengjun’s request for disclosure of financial statements of the Zhengzhou Heating Corp., the provider of heating service to the citizens of Zhengzhou, because the statement contained commercial secrets. The People’s Court of Zhongyuan District, Zhengzhou Municipality, Henan Province overturned the Commodity Price Bureau’s decision on appeal, holding that third-party objection is an insufficient basis for denial of a government information request. *See Zhao Zhengjun v. Zhengzhoushi Wujiaju* (赵正军诉郑州市物价局) [Zhao Zhengjun v. Zhengzhou Mun. Commodity Price Bureau] (Henan People’s Ct. Mar. 26, 2009) (China), available at <http://www.chinacourt.org/html/article/200903/26/350326.shtml>. The court decision is unlikely to deter other agencies from denying a disclosure request on similar ground for at least three reasons: (1) The Chinese legal system, a civil law system, does not follow *stare decisis*; (2) a local district court (basic People’s court in Chinese court system) is unlikely to be persuasive authority to other courts; and finally, (3) media coverage of the case indicates that both lawyers and the general public were more interested in the court’s result than its reasoning. Only time will tell.

public interest may be involved.⁶⁶ Article 23 states: “[The Agency] should disclose the information and notify the third party in writing of the content of the government information it has decided to disclose and the reason therefore.”⁶⁷ Should an agency convey the decision to the third party before the requested information was disclosed to the requester, a sufficient remedy may still exist. But if the third party learns of the decision simultaneously or after the disclosure, damage could be unavoidable. Lacking the procedure of reverse-FOIA litigation, the ambiguous language of Article 23 of the State OGI could add confusion in dealing with interest conflicts.

III. GOVERNMENT POWER VERSUS PRIVATE PARTY FREEDOM—A COMPARISON WITH U.S. FREEDOM OF INFORMATION LAWS

It is not difficult to list many differences in government transparency between China and the United States. Comparisons like this might be helpful to scholars who are unfamiliar with the pertinent institutions of a foreign country, but not for the purpose of a comparative law study. Comparison of the major differences, such as ideals, scope of disclosure and compliance with other laws, and the reason behind the different appearances may be helpful for mutual understanding.

A. MAJOR DIFFERENCES

1. *Openness Versus the Right to Know*

The names of the major statutes on government transparency illustrate the basic difference between the government information policies of China and those of the United States. Chinese OGI suggests that government agencies “open” information by using their administrative powers, whereas U.S. “freedom of information” (“FOI”) emphasizes the right of “any person” to access government information. With economic development being the overwhelming motivation behind almost every institutional construction including transparency in mid-1980s China, the inherent tension between public power and private rights in this sensitive area was almost not

66. See State OGI Regulations, *supra* note 35, art. 14.

67. See *id.* art. 23.

touched either by the general public, or by immature lawyers and academics. Participants in the early transparency movement focused on “openness” as redress for the historically dominant tradition of pervasive secrecy. Unlike the initiation of FOI in the United States, where court precedent and scholarly discourse could support a “right to know” claim,⁶⁸ early transparency experiments in China were conducted by the collective work of villagers, enterprises, public organizations, the governing political party, and government agencies. No specific social class or organization like the U.S. press in the 1950s stood up to represent the people’s right to know and fight against the government’s power to control information.⁶⁹ Because all participants were concentrated on advocating and carrying out the ideal of “openness,” common sense overwhelmed conflicts of interest. Neither conflict between private rights and the national interests nor that between different private rights was considered seriously. Borrowing mainly from the United States, in the early 2000s Chinese scholars began to mention the key phrase “right to know” and tried to bring it into statutes via participating in legislation. The 2003 Guangzhou Rules, drafted by the Office of Legislation of Guangzhou Municipality in collaboration with law school professors,⁷⁰ succeeded for not only being the first statute (being local law according to Chinese Legislation Law) on transparency, but also the first statute that announces the protection of the right to know.⁷¹ Unfortunately, such a right is not found in the State OGI Regulations.

68. See HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 8, 9-14 (1999) (suggesting that the “right to know” is limited to the “right to receive information,” derived from the First Amendment right to freedom of information).

69. See *id.* at 14-18 (detailing the struggle the press encountered during the 1950s in retrieving information from the government); see also KENT COOPER, THE RIGHT TO KNOW: AN EXPOSITION OF THE EVILS OF NEWS SUPPRESSION AND PROPAGANDA xii-xiii (1956) (claiming responsibility for coining the phrase “right to know” and defining it as a citizen’s entitlement to “have access to the news, fully and accurately presented”).

70. See LIU HENG (刘恒), ZHEHNGFU XINXI GONGKAI ZHIDU (政府信息公开制度) [OPEN GOVERNMENT INFORMATION] 192-93 (2004) (reflecting on the collaboration between law professors and government agency to draft the 2003 Guangzhou Rules).

71. See 2003 Guangzhou Rules, *supra* note 16, art. 1 (stating as its purpose the protection of “the right to know”).

2. *Express Scope of Disclosure Versus Specific Exemptions*

Instead of exempting certain information from disclosure, like the U.S. Freedom of Information Act, the State OGI Regulations list what may be disclosed.⁷² Agencies can not only limit the scope of disclosure within the given list, but also enjoy broad discretion to decide whether specific data even falls within the given list because crucial definitions remain unsettled. Take, for example, Article 11(1) of the State OGI Regulations, which permits disclosure of “important and major matters in urban and rural construction and management”; what is “important” or “major”? Of course this determination is left to the discretion of the relevant agencies. Moreover, a list of exemptions implies a presumption of disclosure, which tends to satisfy the right to know, while a listed scope of disclosure implies the withholding of information. Although the 2003 Guangzhou Rules stated that disclosure of government information is a basic principal while nondisclosure is reserved for exceptional cases,⁷³ Guangzhou principals were not transmitted to the 2008 State Regulations to have countrywide effect.

3. *Compliance with Other Laws and Regulations*

Secrecy suppressed transparency in China until the mid-1980s, when open administration blossomed from villages.⁷⁴ State laws on

72. Cf. Freedom of Information Act, 5 U.S.C. § 552(b) (2006). The nine FOIA exemptions are: (1) classified information; (2) information related solely to internal personnel rules and practices of an agency; (3) information specifically exempted from disclosure by statute; (4) privileged and confidential trade secrets and commercial or financial information obtained from a person; (5) inter- or intra-agency memos or letters which would not otherwise be available by law; (6) personnel and medical files; (7) records or information compiled for law enforcement if disclosure could interfere with enforcement proceedings, the right to fair trial, disclose the identity of a confidential source, disclose techniques or procedures or guidelines which would risk the circumvention of the law, or could endanger the life or physical safety of any individual; (8) information related to an agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data. *Id.*

73. See 2003 Guangzhou Rules, *supra* note 16, arts. 1, 6.

74. The first statute on government information in China after 1949 was the Provisional Regulations on Safeguarding State Secrets (Baoshou Guojia Jimi Zaxing Tiaoli (保守国家机密暂行条例)), promulgated by the State Council in 1951. The Regulations remained in effect until 1989, when the Law on Guarding State Secrets was enacted. See Zhonghua Renmin Gongheguo Baoshou Guojia Mimi Fa (保守国家秘密法) [Law on Guarding State Secrets] (promulgated by

government secrecy were established long before local legislation on OGI. The Law on Guarding State Secrets defined “state secrets” broadly, to encompass “matters that affect the security and interests of the state and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time.”⁷⁵ This definition is illustrated with general categories of information such as secrets “concerning major policy decisions on state affairs,” “secrets in national economic and social development,” and “secrets of political parties that conform with the provisions of the preceding clause of this Article.”⁷⁶ The amendments to the Law in 2010 made the procedure of defining state secrets (classification) and safeguarding them more practical and clear. The general definition of “state secrets,” however, remains almost untouched from the 1989 version.

Archives law helped keep more secrecy in a way that requires “the administration and use of confidential archives, changes in their security classification, [while] the declassification of such archives must be effected according to the provisions of the laws and administrative rules and regulations of the State regarding secrecy.”⁷⁷ At the state level, the average term of declassification of a document kept by the State Archives is 30 years.⁷⁸ Although “archives repositories shall regularly publish catalogues of records that are open to the public [and] create conditions and simplify procedures for the convenient use of archives,”⁷⁹ the frequency of publishing open catalogues is unclear. Access to archives that are not yet open to the public is under the control of the National Archives and competent authorities,⁸⁰ thus leaving broad discretion to

Standing Comm. Nat'l People's Cong., Sept. 5, 1988, effective May 1, 1989, revised April 29, 2010, effective Oct. 1, 2010) (China), available at <http://www.lawinfochina.com/law/display.asp?id=1191>.

75. *Id.* art. 2.

76. *Id.* art. 8(1), (4)-(5).

77. *Zhonghua Renmin Gongheguo Dangan Fa* (中华人民共和国档案法) [Archives Law] (promulgated by Standing Comm. Nat'l People's Cong., Sept. 5, 1988, effective Jan. 1, 1988, revised July 5, 1996) art. 14 (China), available at <http://saac.gov.cn/article.do?method=view&id=ff8080811172649a8011729fc01ca0019>.

78. *See id.* art. 19 (noting that information pertaining to economic, scientific, technological, and cultural topics may be declassified earlier than 30 years).

79. *Id.* (requiring that citizens and organizations possess a lawful identification to use the archives).

80. *See id.* art. 20.

administrative agencies.

Balance between transparency and secrecy is indeed the core value of FOI laws. There should be a series of laws and regulations collaborating to maintain this balance. First, there should be laws and regulations for OGI and open decision-making processes. Second, secrecy should be maintained in a manner that does not jeopardize privacy rights (mainly personal privacy and trade secrets). Third, dispute settlement and remedy procedures should be provided. In the United States, where a comparatively mature government transparency system has been implemented, major statutes, such as FOIA,⁸¹ the Government in the Sunshine Act,⁸² and the Privacy Act,⁸³ function reciprocally to achieve the balance between transparency and secrecy.⁸⁴ Yet in China, where government secrecy has a strong historical tradition and transparency is still in its early phases, OGI legislation should be regarded as a kind of milestone of open governance, and thus make it possible for advancements in transparency as well as in the balance between transparency and secrecy. With the definition of “trade secrets” in the 1993 Anti-Unfair Competition Law and the interpretation by the SAIC afterwards,⁸⁵ protection of commercial interests related to government information disclosure may get substantial legal basis. Yet procedural deficiencies remain to be overcome. Protection of privacy is a weak point in the absence of pertinent legislation. In recent years, scholars have been advocating for a national law to

81. Freedom of Information Act, 5 U.S.C. § 552 (2006).

82. Government in the Sunshine Act, 5 U.S.C. § 552b (2006).

83. *Privacy Act* of 1974, 5 U.S.C. § 552a (2006).

84. Charles J. Wichmann, III, Note, *Ridding FOIA of Those “Unanticipated Consequences”*: *Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1217 (1998) (informing that after the enactment of FOIA, the presumption in favor of disclosure thereby required agencies to defend nondisclosure).

85. Zhonghua Renmin Gongheguo Fan Bu Zhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 10(3) (China), available at <http://www.lawinfochina.com/law/display.asp?id=648>; Guanyu Jinzhi Qinfan Shangye Mimi Xingwei de Ruogan Guiding (关于禁止侵犯商业秘密行为的若干规定) [Certain Regulations of the State Administration for Industry and Commerce on Prohibiting Infringements upon Trade Secrets (1998)] (promulgated by No.41 Executive Decree of the SAIC, Nov. 23, 1995, effective the same day, revised by No. 86 Executive Decree of the SAIC, Nov. 23, 1998, effective the same day), available at <http://wenku.baidu.com/view/e957404c2b160b4e767fcf0f.html>. Article 2 interpreted the term “trade secrets” explicitly.

protect privacy or personal information. Open meetings are being held in some cities on agencies' own initiatives,⁸⁶ which have been lauded by the general public. This could be the overture of future legislation on open government meetings.

B. MAIN FACTORS THAT MAKE THE DIFFERENCES

1. *Who Plays the Leading Role*

Unlike the FOI movement that took place in the United States during the 1950s, led by the press as an agent for the people's "right to know",⁸⁷ information disclosure in China has been mainly conducted under the guidance of the government and the governing political party, though it has been initiated from the bottom-up as well. Although open information of villages and enterprises affairs from the mid-1980s to the mid-1990s was not really concerned with OGI, it warmed up the whole stage of transparency throughout the country. Transparency in villages and enterprises is a kind of testing or preparation for transparency in government agencies. That could be a possible reason for a series of official documents following the unofficial transparency experiments, intentionally trying to guide the further ongoing of the movement. When transparency came into SOEs and public organizations, government information disclosure was inevitably involved.

Government's leading role can surely push the movement of transparency forward faster, while it may also weaken contention from civil society. The right to know is in fact the right to challenge the power to control information, and transparency cannot be a dominant principle without this challenge. When government dominates the process for providing transparency, such transparency

86. In Dongguan city, Guangdong Province in South China, Journalists from local media were invited to sit in a meeting held by the City Government of Dongguan on Dec. 17, 2005. That began the open meeting phase for this city. Although auditors are still limited to local media, all meetings of the city government except those dealing with personnel changes are open to journalists. See *Dongguan Shixing Touming Bangong Jian "Yangguang Zhengfu"* (东莞实行透明办公建“阳光政府”) [*City of Dongguan Working To Implement Transparent, "Sunshine Government"*], NANFANG RIBAO (南方日报) [NANFANG DAILY] (Dec. 8, 2005), http://www.sun0769.com/news/dongguan/sz/t20051208_62534.htm.

87. See generally FOERSTEL, *supra* note 68, at 14-35 (outlining the history of the right to know in the United States, including reactions from the press and the government).

becomes an ideal that relies largely on the self-restraint of the government itself. It is easy to understand why the scope of information disclosure tends to be narrow in this situation.

2. *Ideal of Procedural Justice and Relevant Legislation*

U.S. practice demonstrates that legislation of uniform administrative procedure (the Administrative Procedure Act (APA)) not only provides general legal authority for agency action, but also helps on secondary legislation, such as FOI laws and regulations.⁸⁸ Constitutional principles of procedural justice are elaborated upon in the APA, manifested by important guidelines on decision-making and dispute resolution.⁸⁹ If a principle of procedural due process is not stated in a state or national constitution, as in the case of China, administrative procedure statutes are necessary to provide that process. Although the ideal of procedural justice has been embodied in more and more statutes on administrative procedure, the absence of a uniform law on administrative procedure adds to the difficulties of framing as well as enacting OGI laws and regulations. The obvious deficiency of Article 14 of China's 2008 State Regulations shows the fatal procedural weakness that has been clearly seen in Zhao Zhengjun's case, mentioned in Part II, footnote 66, of this essay.⁹⁰

3. *Judicial Review*

In common law jurisdictions, judicial decisions can usually overcome possible weaknesses of statutes. This also helps them to deal with FOI cases more flexibly than civil law courts do. Moreover, significant precedents can also be justification to create a new statute, like what happened in the making of the U.S. FOIA. Civil law courts like Chinese ones are usually much less active, especially when resolving controversies involving new laws and regulations, such as OGI laws. Procedural deficiencies in China's

88. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2006).

89. *See id.* §§ 556-557.

90. *See* State OGI Regulations, *supra* note 35, art. 14 (providing that Chinese government agencies have the discretion to release information containing commercial secrets or privacy "with the consent of the rightholder(s) or if administrative agencies believe that non-disclosure might give rise to a major impact on the public interest").

OGI statutes also obstruct progressive litigation. China's Administrative Litigation Law, enacted 20 years ago (in 1990), had no specific provision on OGI-related litigation. On July 29, 2011, the Chinese Supreme People's Court promulgated a judicial interpretation on OGI litigation.⁹¹ This judicial interpretation provides a clear legal guidance on accepting an OGI lawsuit, which agency should be the defendant, the relevant burden of proof, and what kind of judgment should be made under different circumstances.⁹² Unfortunately, it deals little with disclosure procedure, and therefore does not influence the broad discretion agencies enjoy in pertinent administrative procedure. Moreover, even if judicial interpretation can make up for the procedural deficiencies of the 2008 State Regulations, and provide more effective provisions for courts all over the country, it will not be compulsory in administrative procedures—courts are bound to the judicial interpretations of the Chinese People's Supreme Court, but administrative agencies are not, unless their decision is brought to court. Comparatively passive action of courts limited the reaction from the judiciary branch, thus in turn reinforcing the power of the administrative branch in building (or not building, as the case may be) transparency.

IV.LESSONS LEARNED

The need for the development of greater transparency in China has aroused international concern recently for both economic and political reasons. Reading legal provisions on OGI is an easy way to get a first impression, though is insufficient to understand this newly established institution in China. Reading the statutes through both domestic and international contexts will be helpful to understand transparency in China, as well as to comparative law studies.

First, domestic factors are crucial for the development of transparency in China. Motivated by possible economic

91. See Zuigao Renmin Fayuan Guanyu Shenli Zhengfu Xixi Gongkai Xingzheng Anjian Ruogan Wenti De Guiding (最高人民法院关于审理政府信息公开行政案件若干问题的规定) [Provisions of the Supreme People's Court on Several issues Concerning the Trial of Administrative Cases About Open Government Information] (promulgated by the Supreme People's Court, July 2011, effective Aug. 12, 2011) (China), available at <http://www.lawinfochina.com/Display.aspx?lib=law&ID=8897>.

92. See *id.* arts. 2-12.

achievements through openness (which is helpful to fair and effective management of administration), the common sense of openness was stressed, while conflicts between the right to know and the power to control information were not paid enough attention to at the early time of transparency development.

Second, local government has played (and is still playing) an important role in building the institutions of government transparency. Municipalities and provincial governments can experiment with information disclosure more easily, and successful local legislation can serve as a basis for future state legislation.

Third, careful attention should be paid to influences from international law. Treaties and other international instruments, like the WTO Agreement, can be the international legal source of China's OGI legislation in a sense that the principle of transparency itself is not limited to the context of international trade, but rather extends to all areas in which government regulation is involved. Experiences of foreign countries also have a role to play, particularly as they help form opinions held by influential scholars.

Fourth, an understanding of why these differences exist is more important than an assessment of the legal provisions of different countries under one (therefore simple) standard. Understanding reasons for differences is helpful for making reasonable forecasts for the future of a newly established institution in a developing country.

Finally, lumping democracy together with transparency may appear to oversimplify the meaning and components of democracy. Transparency is fundamental to every aspect of democracy, including electoral procedure and public participation. But because it also lies as a stepping stone on the path to procedural fairness, or due process, transparency is especially important in developing countries like China, where the long journey towards democracy and the rule of law began merely thirty years ago. Without a well-informed citizenry, public participation is impossible; so too are fair elections. Fueled by the information age, transparency is not only developing faster than ever but like democracy, it is becoming harder to reverse.