

Are Mexican Legislators Accountable? Measurement and ideas around legislative transparency

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The functioning of a representative democracy has been transformed by the digital era and the transparency rules. While the old idea of political representation is left behind -where representatives are sanctioned or evaluated by citizens at the end of the legislative period- on the digital representation is reconstructed on a daily basis through the interaction between the representative and the represented. This is possible when people are able to know the work of their representatives and feasible accountability mechanisms are in place. This paper seeks to explain how legislative process is influenced by transparency, accountability rules and the use of TICs and identifies obstacles and incentives for an open or secret process. We first determine the extent and evolution of accessibility to parliamentary information in the national and subnational legislatures in Mexico, and the use of TIC during the legislative process. We then use data from the parliamentary openness index to compare transparency behaviour throughout the years 2010, 2012 and 2014. Finally we analyse variations in legislator's behaviour using a focus group with national legislators to understand why it has been difficult to implement a transparency policy in Mexican Congress.

1. Representative democracy and accountability
2. Results from the Sub-national legislative transparency index

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3. Explaining internal and institutional secrecy factors

4. Debate

Introduction

The idea of transparency and accountability are intrinsic to congresses and representative democracies. The moment a representation model was conceived, a communication bridge was needed to be drawn between legislators and society. Either as a communication theory, an open meetings rule, accountability rules, or the publishing of congress debates and results, congresses around the world establish some sort of system to report their work and reach the people. But this effort was never aimless to the process of legislating.

In liberal traditions, the legislative work of representatives is to be legitimized by the public knowledge. But in order to do so, the adoption of rules of openness, transparency and accountability are needed. We believe that all these rules and mechanisms act upon the legislative process according to the congressional system practices in a digital age. By legislative process we understand the steps and actions that yield the enactment of a law or piece of legislation. It comprises negotiation and deliberation among representatives and other branches of government, as well as the arriving to a general consent. Although the publicity of the law resulting from the legislative process comes afterwards, we consider it part of the process.

Freedom of information laws (FOI) around the world has included the congress under the obligations to handle access to information petitions and proactively publish information in their official websites. These laws promote transparency throughout the administrative and financial activities of congress, and touch upon the decision-making and legislative process

as well. Accountability rules can be run through both all congress' functions, but with different goals and rationales. In this paper we focus on the latter, what we call *legislative transparency*, but reckoning that administrative functions overlap the legislative process.

Transparency legislation does not necessarily change the power relations of a chamber, but rather coexist with the internal rules and power influences. In this paper we argue that the successful compliance of transparency legislation depends on the set of internal rules and the power relations of a congress. Mexican national and sub-national congress score low grades in transparency and accountability monitoring and assessment reports. But studies fail to explain the reasons and proxy that lay behind a bad implementation.

We first discuss results of the Sub-national Transparency Index, based on the principles laid out by the Inter Parliamentary Union (IPU), to assess access to information and websites' information across the country. Then we present qualitative results from a focus group of legislators to identify obstacles to transparency, predisposition to openness rules and factors that determine accountability. Finally we present some debate ideas based on our findings, which are useful to adequate transparency rules to practices and power relations inside congress, and we provide insight to foretell accountability outcomes.

1. Representative democracy and accountability

In liberal democracies, parliamentary openness consisted on the people's *interest* in knowing about their representatives through a flowing communication. It was also understood as an interest of public opinion, expressed by the press, which since the sixteenth century has been important to legislatures due to its well-known legitimating force for political decisions. As a result, although legislators did not necessarily have an established legal obligation to fulfill this *interest*, informing their constituents of their acts was taken into account as a duty of legislators' *integrity* (Pole, 1983). So openness was an issue of

parliamentary integrity that gives positive results, since public opinion is an effective controlling force against corruption (Schmitt, 1988). Openness and public opinion are ever since mechanism of democratic control in parliamentary decision-making.

Although the role of parliament in the State is understood within a system of checks and balances, the congress itself needs to have an internal balance in terms of administration and finances. The concept of internal control of powers is taken from Maurice Hauriou, bringing concepts of classical public administration and applying it not only to the executive branch, but also to the legislative. This is an early idea of good governance in the congress that affects all functions, such as the legislative process.

The premises of accountability and good governance in parliament ensure the dialectic of opinions and ideas, questioning the work of parliament and legislative commissions, scrutiny from the press and ultimately a show of approval by reelecting members of parliament (Kennedy, 1988). In this theoretical view, the better-informed citizens are and the better-prepared society is, the better laws will come from the result of public deliberation. Openness is here a way that qualitatively affects legislative work and moreover legitimizes decisions. From Guizot's rationalist parliamentary tradition, a theoretical concept of parliament was built on three characteristics: 1) that the powers be always driven by discussion and a joint search for the truth; 2) that the openness of political life place the powers under citizen control; and 3) that the freedom of the press allow citizens to search for the truth by themselves and make it known to the powers.

An open debate, deliberation and resulting legislation are the underlying principles that was entrenched in the congress transparency legislation subsequent. Actually, rules of accountability, transparency, openness and access to public information legislation are included in liberal democratic debates. Is no surprise then that parliamentary openness

approach shares the *moral* bases of transparency posed by Kant and Bentham (Hood and Heald, 2006) situating opacity as something evil and openness as always something good. Hence, contemporary access to information and transparency legislation adopted around the world seek to enable social participation by opening the congress actions, whether they are administrative or legislative.

A critical point of view of transparency legislation in congress is rare to find in legal literature, especially when is target to contend the effects of openness in the legislative process. Information technologies and transparency are tools that can build bridges to facilitate discussion and spread knowledge of the decisions and actions that members of the legislative branch are considering (Castillo and Perina, 2009). But the outcomes of this more fluent and open conversation into the deliberative process and the enacted legislation is yet to be explored.

Democratic representation implies vertical accountability, this is, the formalization of the actor's relationship where the representatives inform, explain and justify to the electorate the actions taken under their representation. The relation includes the possibility for the citizens to sanction or reward parliamentary representation (Manin, Przeworski y Stokes, 1999: 29). Nevertheless, in diverse democracies the circle of accountability is rotten (Casar, Marván y Puente, 2010).

Political representation has changed in emerging democracies among may other reasons because society is much more exposed to primary and secondary sources of information than before. Voters more aware with immediate reactions to the legislators performance. Social networks, new communication channels and the efforts made by the legislators themselves keep in touch with citizens not only at year-end of its legislative period, but are permanent links between legislators and voters are consolidated.

There is strong evidence to believe that FOI legislation and accountability mechanisms in Mexico' congresses are destined to fail, since they arise from the presumption that legislative process is followed by the book and institutional rules are power balanced. Our study presents quantitative and qualitative data to discuss the appropriateness of transparency legislation and the expectations around compliance outcomes.

2. Results from the Sub-national Legislative Transparency Index

2.1. Index model

The Index studies political representation focusing on the relationship between voters and members of Congress in order to contribute to understand if legislators are accountable, in a context where there has been a prohibition to be re-elected. If there were no electoral incentives to connect with the constituents, it would be logical that legislators do not make any efforts to open their activities or inform about their performance. However, we have found that despite these institutional constraints members of Congress have developed strategies to be partially accountable and respond to information demands of the people. If they will not be able to appear at the ballot in the immediate following election, they are bounded to cause a good impression to voters because they might elect them for other positions, such as mayors, governors or sub-national legislators.

The Index presents how transparency policies in sub-national legislatures have evolved during the last six years and demonstrates that legislators are slowly increasing their responsiveness (Puente, 2015 forthcoming).

The variable 1 "General Information" refers to the availability of information on integration, functions, structure and internal organization, legal framework and basic legal information for the legislature. It assesses access to public official statistics, press releases, names and curricula of senior administrative officials, as well as information for visitors and historical archives, libraries and information centres.

Variable 2 corresponds to the availability of information regarding the electoral and party system, how members of Congress were elected, parliamentary elections results and the distribution of seats per party group; also assess information about the parties in Congress: internal organization (whips and other officials) and the link to the websites of the parliamentary groups. Even though some elections data is usually public through other government agencies, legislatures do not tend to include the basic data of their parliamentary groups, which constitute the more effective parliamentary organization mechanism in contemporary democracies.

The third variable in the assessment focuses exclusively in the law making process and verifies the availability of the agenda under discussion, drafts and bills approved, the committees reports, roll call voting, the stenographic versions of hearings, and the budget and revenue bills. It also assesses whether the website has the technology for the transmission of plenary sessions and their respective historical record audio and video.

Variable 4 "Congressional leadership" refers to the accessibility of information in the Speaker's office and government committees, their powers and functions, contact details and curriculum. The variable 5 "legislators" evaluates the accessibility to basic information of

members of congress, such as experience, committee membership, roll call voting per legislator, district or constituency, political party, any other activities they develop. Variable 6 assess the degree of accessibility to committee's information such as the list of members, web pages, records of meetings and attendance record, name and curriculum of staff, budget, activities and calendar, and contact information.

The variable 7 "Administrative Transparency" is *ad hoc* for the Mexican case since it corresponds to the issues that are, in most cases, required by the Transparency Law enacted in 2002 and subsequent reforms. This refers to information like the directory, monthly remuneration of officials, expenses report, and members on the transparency committee, contracts, and internal procedures.

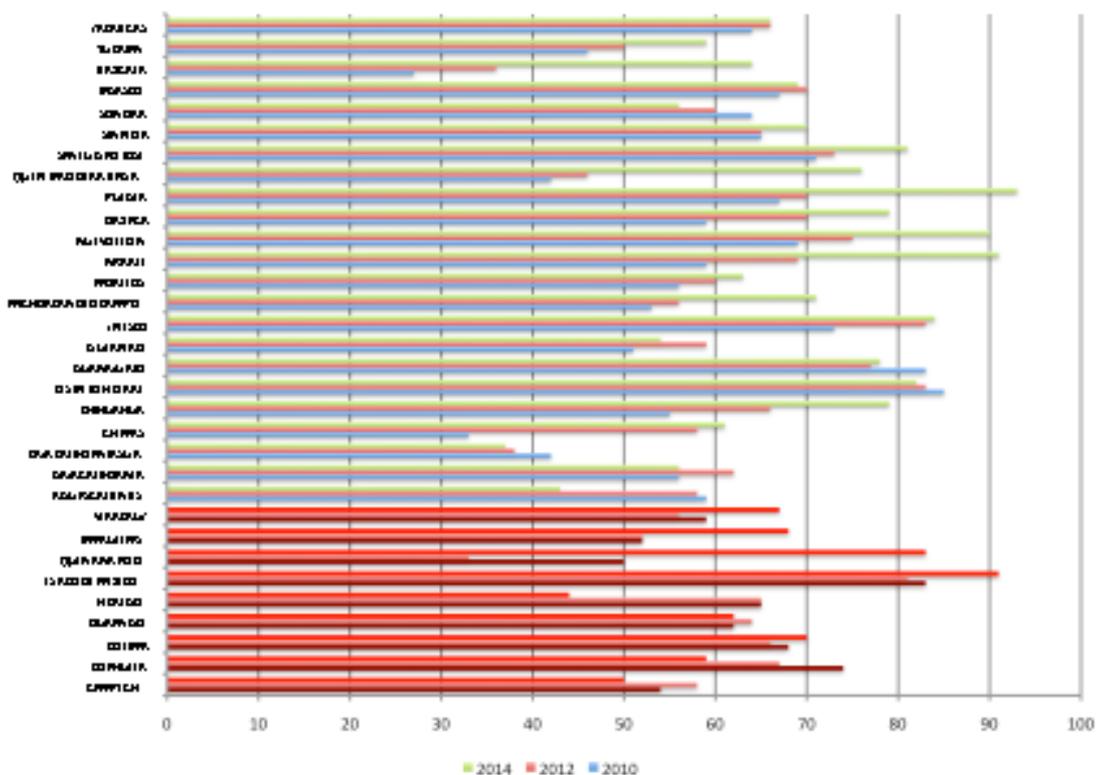
The variable 8 corresponds exclusively to three indicators suggested by the IPU in order to verify whether the official publications of the legislature are made public or restricted. Thus, it is checked whether there is a list of systematized and updated publications, if they can be obtained electronically without justifying legal reason and if there is a procedure for obtaining or, where appropriate, purchase some specialized material produced by the legislature.

In the variable 9 we assesses the availability of information in the Oversight bodies that are responsible for the scrutiny of public finances. In Mexico there is a semi-independent agency specialized in each legislature (see Pelizzo and Stapenhurst, 2012). The information that these agencies must provide to the public is the list of staff members, legal framework, a public curriculum of the director, audits, reports on the public account and the official's expenses.

We observe that accessibility behaviour throughout congresses is unequal; having very high grades in the index and others very low grades. But mostly, results allow us to rule out some factors that typically explain openness in parliaments. New FOI legislation has influenced accessibility but is not decisive; alternation of power at States, where opposition groups seek control mechanisms through the imposition of transparency rules, is proven to be neither an efficient tool nor a determinant variable to trigger parliamentary openness (as shown below).

Legislative Transparency

(Red: States without alternation of power)



3. Explaining internal and institutional secrecy factors

3.1. Methodology

The focus group method was selected to add qualitative analysis to the research. 6 legislators of 4 different political parties of the National Deputy Chamber composed the group. The dominating parties at the Chamber are PRI, PAN, PVEM, and a participant of party MC represents minority groups.

	Political Party
Legislator A	PRI
Legislator B	PVEM
Legislator C	PAN
Legislator D	MC
Legislator E	PVEM
Legislator F	PAN

The conducted discussion was guided by questions about the perceptions and opinions towards the functioning of transparency and accountability rules, the obstacles and power relations that determine compliance, transparency in lobbying groups and legislative transparency overall.

3.2. Analysis

To study transparency through the indexes and measurement indicators has several downsides, such as ignoring qualitative results (Michner, 2015) and failing to explain if legislation is attainable according to reality. The main un-answer questions by indexes about the compliance of transparency rules are those that depict the internal and institutional contexts that hinder an open behavior of legislators and committees. The qualitative question about compliance of transparency rules incorporates the enforcement of institutional rules,

practices and traditions inside a congress. In this chapter we use the results of the focus group with federal legislators centered in the transparency and accountability issues (Puente and Luna Pla, 2015).

In Mexico, the Senate and the Deputies at the national level, but also the State congress, they all have an internal law to define the legislation process. The internal legislation defines the process stages, the sharing of information, the draft legislation handle, the dissemination of the agenda amongst the committees before sessions, the publicity of law initiatives, voting rules on the floor, among other general steps. Besides this rules, all national and state congress chambers have transparency and access to information obligations set by national and state special laws. Despite this framework, the focus group participants agreed that on the one hand, because internal rules are constantly violated by leaders and groups, and on the other, because several budget and expenditure lines are secretly defined, accountability and legislative transparency is rhetorical.

Idea of transparency and accountability

Mexican legislators believe that transparency and accountability are mainly tools to recover the confidence of citizens in their Congress. This was the idea that FOI law advocacy groups used to convince representatives to push legislation. But is also the idea that chambers' public servants have projected upon the press office and information flow policies.

The idea of approving FOI legislation to control opposition groups like in other countries (Michner, 2014) was not yield by the focus group, since it is taken for granted that other legislatures fought that battle in the past (Luna Pla, 2009). In contrast, legislators foresee as a challenge to communicate individual annual reports, chamber' achievements and the relevance of legislation approved by legislatures. They are aware that legislative work is

more difficult to evaluate than the Executive's, so accountability problems are rooted in the type of powers and functions the congress has. Also, that legislative work is less popular and hard for the public to value, especially in sensible topics such as health or tax.

Together with the unpopularity of Mexican representatives, there is the question about how well informed and questioning is the society using media and TICs. Legislator A illustrated the issue with this anecdote: "If I post a picture [in Facebook] of me with my father drinking a tequila I get 1500 likes, but if I post a photo in which I'm voting the transparency and anticorruption law I get 150 likes and something like 200 comments: bunch of thefts, corrupt, etcetera". So even when legislators use social networks and alternative media to reach society and acquire visibility, the effect tends to be contra productive, given the eroded relationship and public image of legislators in Mexico.

In fact, compliance of transparency and access to information often brings to legislators collateral damage effects. These are when the publication of certain administrative information, trips made or decisions taken by one or many legislators, gives rise to media scandals, complicates negotiations, or wipes out previously taken decisions. Hence, the transparency idea in congress is not charged with moral attributes, but instead, is pragmatic and utilitarian.

Institutional imbalances

It is precisely when we analyze the institutional power relations that we can prove that transparency rules and legislation do not change the power relations, but rather is integrated in the institutional conflicts and imbalanced system. It all starts at the upper leadership of each congress chamber, once a new political group is elected and legislators take office. The not elected legislators representing multi-member districts are closer to the Executive'

President, or close to the political party leader. These legislators are considered as elite and they have a lot of power in the chambers, once they take office.

Legislators integrating the congress top leadership (*mesa directiva*) as soon as they begin the service period, seek negotiation to hold the chamber's presidency and pull the budget for the next years (Legislator B). This negotiation is pushed by every political party and is usually given to the party in government. It represents a space to influence votes, persuade and share benefits to elected legislators, and also to control the chambers' public image and media strategy. The Deputy chamber has diverse research centers that supposed to provide data and analysis for the law drafting. All these centers are controlled by the leaders and represent many jobs to be tradeoff (Legislator C). The group in the leadership have also the power to learn all the negotiations that political groups make at all levels, access to the agenda and agreements, and account who and what are negotiating (Legislator B). And certainly, they create and perpetuate information asymmetries with legislators integrating legislative committees.

How this power looks like in practice? Participants of the focus groups mentioned that the group in the leadership travels in first class airplane tickets, affords to pay a large staff and usually they travel all together, their salaries sometimes double the amount received by a regular legislator, and controls travel expenses, extra bonus and compensations to all personal, including legislators (Legislator B). Legislator C explained: "I know colleagues that until now have made 27 trips abroad and they are not interested in participating in the floor debates, so the trips are a way for the party leader to keep them quiet and without making trouble". Legislator B mentioned that because she is not close to the leadership group, the office assigned to her is small, next to the restaurant (where is noisy and with kitchen muck) and did not have internet until her last year of service.

The leadership also controls the press office of the chamber and legislators access to the media. Participants asserted that the congress often don't disseminate the annual reports of each legislator, because the communication budget is all destined to political campaigns or to give privilege to some legislators (Legislator B). But party leadership inside congress also controls media, as Legislator B illustrated: [during the service period] I could never appear in *Televisa* and *TV Azteca*¹ because those were spaces saved for other colleagues of the political group, so is very difficult to disseminate the results of ones' work". This is certainly a strong weapon of the groups in power to sanction or even sabotage a legislator when certain behavior is unaccepted.

The pattern and practices of power relations stretches onto the legislative committees as well. Legislator C mentioned: "every legislator wants to be the president of a committee", and this is because he or she manages resources yearly and controls the legislative agendas. Any legislator, with sufficient services portfolio, can become the president of an ordinary or special committee at the Senate or the Deputy chamber, even without the proper preparation on the topics of each commission (Legislator C). Moreover, commonly the presidency of the commissions is assigned to an elected representative that has also conflict of interest in the committee. An example yield by Legislator E was the head of the Transportation Committee at the Deputy Chamber, who is a well-known businessman owner of a company of transports.

Transparency and FOI laws in Mexico, until the reforms of 2015, did not regulated particularly secret budget lines used by the leadership and the committee coordinators to exercise their influence. National parliamentary group leaders receive each year a public fund to distribute among the legislators (*subvenciones*) and this was secret –even to several legislators- until the press uncovered the story in 2010. Legislators manage individually this

¹ *Televisa* and *TV Azteca* are the two broadcasting companies with national coverage and concentrating an approximate of 80 percentage of audience.

fund and expend it on their own districts' infrastructure and procurement. Legislators think this Executive-like power is positive so that they can get closer to electorate, improve perception amongst citizens and report concrete and visible results (Legislator E). But the origin and final destiny of this budget is very much secret and unlawful, since its manage under the discretion of each political party group leader. The internal legislation of Chambers there is no sanctions for legislators' behavior, for mal administration or any other action. The impunity system inside chambers promotes secrecy.

Legislative Transparency

How the internal imbalances affect legislative transparency? The legislature analyzed by our focus group was atypical. During the years 2011 – 2013 the Executive and Legislative branches announced what they called *Pacto por Mexico*, or an agreement for Mexico. It was a political dialogue of high level to commit for the passage of complex pending legislation about: telecommunications, health, education, economic competence and energy. This agreement disrupted the legislative process for most of the productive periods of our group participants but not for all.

The national legislators agreed that the topics that traditionally are difficult to negotiate (electoral reform, energy, telecommunications, health and education) are presented to the floor without a debate proceeding, usually don't even pass through the committees. This was specially the case during the *Pacto por México*, where there was a displacement of the decision making center from the congress to the Executive and the presidents of the four main political parties (PAN, PRI, PRD and PVEM) (Legislator B).

In many of the floor debates that the legislators took part during the *Pacto*, in especial and secret teams, the final versions of the initiatives were not timely disseminated and the President of the committees presented a different version than the one approved on the floor.

All Legislators admitted that they were persuaded by their party group coordinator to vote in favor of the initiatives presented during the *Pacto*, except Legislator D of the minority group. The mechanism of coercion was precisely the activation of the leadership controls, that we called internal imbalances in this section.

According to Legislator C, approving legislation under this fashion saves a negotiation process and makes easier the legislators' job; but also has a legitimacy cost and the cost of violating the internal law of the congress proceedings. Actually, Legislator D addressed that the workload of the chamber at the national level makes impossible to read and provide comments to all law drafts, so many of them vote on the floor without even reading the new piece of legislation. Nevertheless, legislators could not pin point the costs on this practices (besides violating the internal rules) and some even thought certain initiatives would never had been tabled if it wasn't for the *Pacto*.

Party discipline is always among the national and sub-national congress work. Parties establish sanctions and benefits to compel representatives to follow party lines (Carey, 2003). Legislator B mentioned that committees' legislators are told when and how to vote an initiative, even under agreements they ignore. And there is a cascade consequence for the rest of the members, Legislator B said: "When a legislator disagrees with the group position knows that if he or she presents this position at the floor, will not have any opportunity to revert the decision and win positions". Party discipline cannot be made transparent and represents a mayor obstacle to accountability, since no documentation trace is left about the rational of legislation once is approved under these circumstances.

The main reason why transparency and accountability legislation in congress is difficult to enforce is because the leaders and power groups would loose privileges to control legislators and control resources, as Legislator F accounted. Legislators admitted that

supporting transparency rules has negative effects for them (Legislator A). When they support FOI legislation or rules to open information about their personal statements, other political groups use private information to expose them. So the question has to be made: which are the incentives for the leadership to act in favor of transparency? According to Legislators C and D, who have seen many other strategies fail, the only effective remedy to open information are the corruption scandals and leaks, that push a different behavior and trigger the transparency reforms.

Once the power relations' problem might be overcome, then there is the question of the convenience of transparency laws. Legislator A believes that an open legislative process can bring uproar, specially because media can manipulate information and promote a public reaction against certain elements of the reform that are necessary but not popular. Indeed, to open the process to citizen participation also can delay agreements and affect parliamentary negotiations. Legislator D said: "a downside of making the legislative process transparent is that violations of the internal rules would be exposed to public [...] that law drafts have many weakness that legislators are hiding, [...] and that at the end leadership and party coordinators decide the process". So there is a strong perception among the focus group, that in most topics of the legislative agenda, the work has to be left to the legislators. Legislator B said: "We are the districts' representatives and we are appointed to legislate" and society groups should trust their representatives' work.

4. Debate

Previous to the access to information and transparency legislation in Mexico, congresses made public only certain information in the daily gazette, such as the agenda and some law initiatives. The voting by each representative or the political group was not

accessible. Most congresses did not have a website. Legislation has been important to push parliamentary openness but not decisive to increase legislative transparency.

Openness has been used by congress to bring popularity to representatives and their work.

The argument of trust and legitimizing it has been taken to the extreme, by drawing a congress driven by the majority's will. Even in this view, the result shows the approval of reforms that make congress more popular –in which the people participate in decision-making and demand accountability– does not increase the institutional “popularity” of congress (Hibbing, 2002).

Legislators conceive transparency rules as double-edge sword, where most of the times collateral damage is payed when opening information. FOI legislation does not changes power relations. The Mexican sub-national congress and national chambers use TICs as a marketing and dissemination tool rather than a participation and inclusion mechanism. The websites lack the necessary information, data sets and tools to build a digital citizenship and open the legislative process to citizen participation.

Upon our observations in this research, we believe the positive influence of information and communication technologies will depend on the system of decision-making, the flow of private and public resources into political parties and representatives, and idiosyncratic practices. Therefore, the rules of openness have to be *ad-hoc* and oriented to the transparency goals, once the legislative process has been understood and mapped. This means changing the theoretical background of transparency laws, to a normative design that seeks to bring together the legislative rationality to the aims of transparency, leaving aside the problem of representation and majority versus minority interests.

There must be indicators to evaluate the impact of laws over time, leading to the possibility of having objective elements to evaluate the work of congress and of legislators in particular. The ICT-Parliament study for the United Nations shows that practically none (just 17%) of the legislative branch websites around the world have documents that measure the impact of laws over time². Results of the Sub-national Legislative Transparency Index should also be crossed with other variables that can explain changes in behaviors through time, such as electoral periods, congress leadership alternation and other power relations indicators.

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