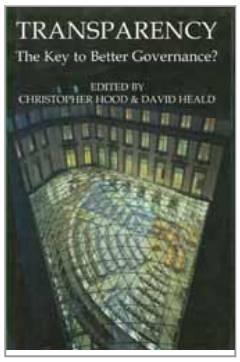

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Christopher Hood and David Heald

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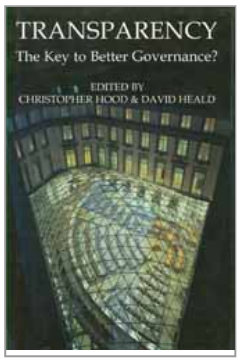

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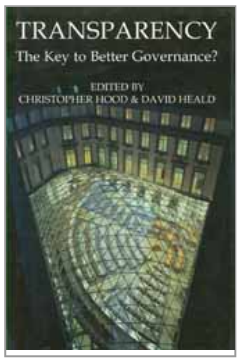

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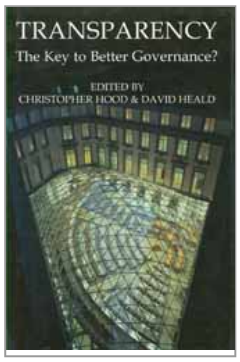

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(p.x) Preface

TRANSPARENCY HAS BECOME a widespread nostrum of ‘good governance’ in many different contexts today. But its meaning and history are obscure and so are its consequences. So the aim of this volume, which brings together scholars and practitioners from economics, law, accounting, politics and government, public management, and information technology studies, is to examine the theory and practice of the doctrine of transparency in three ways.

One is to trace out the history of ‘transparency’ and cognate doctrines in government and public policy. Where did this now pervasive idea come from? Is transparency an exclusive preoccupation of modern times and democratic government, or does it have an earlier life or lives?

A second is to collect and compare ideas about transparency across some different disciplines and fields. Who means what by this term? Do the meanings add up to a single idea, or are they multiple or even contradictory?

A third is to take discussions of transparency beyond exchanges or statements of first principles. What does the introduction of transparency in one or other of its forms do to decision-making processes? How do institutions respond to measures intended to increase transparency and with what consequences, for instance in memory, candour, or cost of service?

As will become apparent, different scholars vary in their enthusiasm for transparency as well as what aspects of transparency they choose to emphasize, but this volume brings out at least three things. First, despite its widespread currency over the past twenty years, transparency is new neither as a term nor as a doctrine. It has been in currency at least since the days of Rousseau, Bentham, and the French revolutionaries as a way of conducting government and politics. Second, if some transparency is good, more is not necessarily better. Bentham’s famous dictum that ‘the more strictly we are watched the better we behave’ appears to be only a half-truth. Indeed, as Andrea Prat shows in Chapter 6 using modern agency theory, there are circumstances in which the more strictly we are watched the worse we are likely to behave. Third, the road to transparency **(p.xi)** through freedom of information (FOI) law and similar ‘openness’ provisions can be a winding and rocky one because of the force of dynamic conservatism in institutions. Freedom of information often means more expensive information because of accompanying

charging regimes, and it often seems to result in more centralized control of official information than before, in spite of protestations about new cultures of openness.

Part I of this volume consists of two scene-setting chapters on the theme of transparency as a term, an idea, and a movement. Christopher Hood gives an account of the history of the doctrine of transparency and David Heald distinguishes some of the different forms that transparency can take. Part II consists of a set of contrasting positions on transparency as a problem and a solution. Patrick Birkinshaw puts the case for transparency as a human right, while David Heald argues that it is or should be an instrumental value. Onora O'Neill argues that transparency measures without an effective ethic of two-way communication can be a cure that is worse than the disease, and Andrea Prat argues that, even from a principalagent perspective in economics, it is not always in the interests of a principal to have access to all available information about the activities of an agent.

Part III concentrates on empirical accounts of institutional behaviour in relation to transparency. Reviewing the experience of freedom of information laws in several countries, Alasdair Roberts argues that such laws are typically launched with bold claims that they will increase trust in government and herald a new culture of openness in executive government, but that the outcome in practice tends to be the very opposite. Andrew McDonald, who was centrally involved in the development of the UK's FOI law, points to the potential advantages of coming late to freedom of information. He also discusses the implications of developing FOI laws after privacy laws, and of developing FOI after rather than before the advent of the modern IT age, as the United Kingdom did. James Savage reviews the tricky issues of the 'compliance information regime' for member-state budgetary transparency in the Economic and Monetary Union, and David Stasavage looks at the evidence for the difference that transparency can make, mainly in the context of decision-making in the European Union Council of Ministers.

In Part IV we turn to the specific issues that information-age technology poses for transparency. Jean Camp examines the implications of open or closed software for effective government in a democracy—a dimension of transparency that has a bearing on matters as central to **(p.xii)** modern democracy as the operation of the voting system, government's ability to control its own executive arms, and the ability of citizens and their representatives to investigate the workings of government. Helen Margetts takes a broader look at the link between digital-age technology and government, and argues that the digital age has contradictory effects on transparency, making government more transparent in some ways while making it less so in others.

Finally, in the Conclusion, Christopher Hood returns to the broader picture. What accounts for the preoccupation with transparency at the present time? Is transparency one of those ideas that gains its appeal because it means different and contradictory things to different people, or is it simply part of some democratic *Zeitgeist*? And what can we learn about its scope and limits from the different disciplinary perspectives that are represented in this volume?

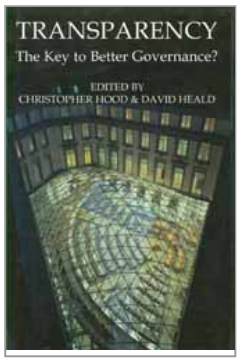
The volume originated in a one-day workshop in London in January 2005, co-sponsored by the British Academy and the Economic and Social Research Council Public Services Programme. That workshop was timed to coincide with the coming into force of the public access part of the UK Freedom of Information Act, and it became clear that the doctrine of transparency offered a fruitful topic for critical discussion across a range of disciplines. The workshop filled a gap in critical institutional analysis of transparency, generated a fruitful and well-balanced discussion, and arrived at several non-obvious conclusions, which we aimed to develop further in book form.

Accordingly, we held a small follow-up editorial workshop in the summer of 2005 to consider the drafts of papers for this volume and have had many exchanges by email as well.

We have many debts to acknowledge. We are grateful to the British Academy and Economic and Social Research Council Public Services Programme for sponsoring the original workshop (and in the case of the ESRC some of the follow-up work). We would like in particular to thank Angela Pusey and Joanne Blore of the British Academy for the excellent work they did in supporting the workshop, and James Rivington and Amrit Bangard for encouragement and help with preparing this volume. We are grateful to the staff of the ESRC Public Services Programme, Rachel Criswell, Rikki Dean, Andrew Fairweather-Tall, and Clare Griffith, for the help they provided in the initial workshop and in the subsequent long march to book publication. As academic editors, we are greatly indebted to Susan Milligan for her impeccable copy-editing and control over the production process. We also thank Gillian Hood for compiling the index. We are very grateful to those who commented on the **(p.xiii)** papers in the original workshop and at a later stage as they started to take shape as book chapters. Most of those functioned as anonymous referees and even (perhaps especially) in a book on transparency we do not name them, but we are none the less grateful for their help and the care they took. We can however mention Vernon Bogdanor, Robert Hazell, Martin Lodge, and especially Albert Weale, for the valuable help they offered. Naturally, any errors that remain are our own responsibility, but there would have been many more without their efforts.

Christopher Hood and David Heald

Oxford and Sheffield, 2006



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Transparency in Historical Perspective

Christopher Hood

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[–] Abstract and Keywords

Transparency is a term that has attained quasi-religious significance in debate over governance and institutional design. Today, it is pervasive in the jargon of business governance as well as that of governments and international bodies, and has been used almost to saturation point in all of those domains over the past decade. This chapter maps out some of the different strains and meanings of the term and doctrine. Like many other notions of a quasi-religious nature, transparency is more often preached than practised, more often invoked than defined, and indeed might ironically be said to be mystic in essence, at least to some extent. The English philosopher Jeremy Bentham seems to have been the first to use ‘transparency’ in its modern governance-related sense in English. The chapter also discusses transparency in international governance, transparency in national and sub-national government, and transparency and corporate governance.

Keywords: Jeremy Bentham, transparency, governance, governments, corporate governance

1. Transparency: A Word and a Doctrine

TRANSPARENCY IS A TERM that has attained quasi-religious significance in debate over governance and institutional design.[1] Since the 1980s the word has appeared in the litanies of countless institutional-reform documents and mission statements. Indeed, it has become institutionalized in the form of Transparency International, the high-profile international anti-corruption organization that was founded by Peter Eigen in 1993 and whose blessings and curses are widely considered to count for something. It is nowadays pervasive in the jargon of business governance as well as that of governments and international bodies, and has been used almost to saturation point in all of those domains over the past decade (Hood 2001: 700–4). We might almost say that ‘more-transparent-than-thou’ has become the secular equivalent of ‘holier than thou’ in modern debates over matters of organization and governance.

Why this term came from obscurity to become a pervasive cliché of modern governance and whether it deserves the uncritical reverence it so often gets, are questions dealt with later in

this book. This chapter is more concerned with mapping out some of the different strains and meanings of the term and doctrine. Like many other notions of a quasi-religious nature, transparency is more often preached than practised, more often invoked than defined, and indeed might ironically be said to be mystic in essence, at least to some extent. The word is plainly of Latin origin (in a verb rarely used except in compound forms) and has apparently been in **(p.4)** use in English to denote 'perviousness to light; diaphaneity; pellucidity' (*OED*) since at least the fifteenth century. But it is not easy to find a user-friendly definition or account of the history of the idea in its now ubiquitous governance-related sense in some of the standard tomes of authority, such as the *Oxford English Dictionary*, the *Encyclopaedia Britannica*, the *International Encyclopedia of the Social and Behavioral Sciences* and the *New Palgrave Dictionary of Law and Economics*.[2]

It is true that those who look beyond those sources can find definitions and entries for the term as it applies to governance, though even then they are likely to discover little about the history of the term or how it rose to fame. For instance, an Internet search-engine trawl for 'transparency' will produce numerous instances of the term in its governance-related sense, heavily dominated by information about Transparency International and its activities, but little or nothing about where the term came from or any critical debates surrounding it.

In a representative definition drawn from such sources, coming the Asian Development Bank, transparency is defined as referring to 'the availability of information to the general public and clarity about government rules, regulations and decisions'.[3] The *Oxford Dictionary of Economics* (Black 1997: 476) goes very slightly further in defining 'transparent policy measures', albeitin a rather casual single-paragraph entry that givesnoclue to the history of the term or the key champions of the doctrine:

> Policy measures whose operation is open to public scrutiny. Transparency includes making it clear who is taking the decisions, what the measures are, who is gaining from them, and who is paying for them. This is contrasted with opaque policy measures, where it is hard to discover who takes the decisions, what they are, and who gains and who loses. Economists believe that policies are more likely to be rational if they are transparent than if they are opaque.

If seekers after transparency happen upon *The Encyclopedia of Democratic Thought*, they will find an entry from the present author (Hood 2001: 701) that says:

> **(p.5)** In perhaps its commonest usage, transparency denotes government according to fixed and published rules, on the basis of information and procedures that are accessible to the public, and (in some usages) within clearly demarcated fields of activity….

So far, so banal, it may be thought. Such sources would suggest that those who believe in transparency as a doctrine of governance have more than one characteristic in mind: for instance, decisions governed by clearly established and published rules and procedures rather than by *ad hoc* judgements or processes; methods of accounting or public reporting that clarify who gains from and who pays for any public measure; and governance that is intelligible and accessible to the 'general public'. Later in this volume we distinguish some of the terms that relate to transparency (such as openness and freedom of information) and some of the different types of transparency. But this chapter aims to explore where transparency as a doctrine of government comes from and how it has developed. Do the various ideas that go under the name of transparency add up to a single all-encompassing doctrine or to different ideas that may

conflict with one another in some cases? And are there heresies or counter-doctrines to these apparently unexceptionable ideas?

2. Some Pre-Twentieth-Century Transparency Ideas

While the term and many of the doctrines associated with it did not come into widespread use for governance until well into the twentieth century, ideas about transparency, often but not always *avant la lettre*, can be traced back well before that. Indeed, it seems possible to identify at least three strains of pre-twentieth-century ideas as partial forerunners for modern ideas about transparency. These are the notions of rule-governed administration, candid and open social communication, and ways of making organization and society 'knowable'.

First, the doctrine that government should operate according to fixed and predictable rules is one of the oldest ideas in political thought. It is found, for instance, in the doctrines of Chinese legalists such as Shen Pu-hai (Kamenka 1989: 38), in classical Greek ideas that laws should be stable (Sparta) or documented (Athens), and in that strain of Western thinking that is epitomized in the ideal of 'a government of laws and not of men' (contained in Article XXX of the Massachusetts constitution of 1780) or the notion of the *Rechtsstaat* in nineteenth-century Germany. **(p.6)** In similar vein is Adam Smith's 1776 argument in *The Wealth of Nations* (book 5, chapter 2) that taxes 'ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear to the contributor and to every other person.' This notion of government by non-discretionary rules is opposed to the equally longstanding view, for instance in the Confucian tradition or Aristotle's *Nicomachean Ethics*, that good governance depends on the skilful and intelligent use of discretion on a case-by-case basis by professionals or morally upright rulers. That contrary view is summed up in Samuel Johnson's adage that 'A country is in a bad state, which is governed only by laws; because a thousand things occur for which laws cannot provide, and where authority ought to interpose' (Boswell [1785] 1909: 159).[4]

The doctrine of government by rule and rote (Hood 1986: 20–1) is often associated with a particular form of liberal democracy, but it can also be part of a broader logic of organizational and political power within executive government. Rulers and overseers of all kinds tend to demand open and rule-governed processes from those they oversee, while often claiming a cloak of privacy or confidentiality for the way they work themselves.[5] Indeed, it is probably no accident that finance departments, international funding bodies, and economic regulators tend to be champions of a style of administration that follows published rules and is open to general scrutiny. That sort of executive-government logic may explain why elements of transparency in the sense of rule-governed administration often develop in pre- or non-democratic states, as in Ernst Fraenkel's classic analysis (1941) of the combination of arbitrary rule and rule-of-law predictability in the Nazi state, which he described as a 'dual state' in that sense.

Second, some pre-twentieth-century theorists of the good society have also espoused the doctrine that social affairs more generally should be conducted with a high degree of frankness, openness, and candour. As Onora O'Neill notes in Chapter 5 below, Immanuel Kant argued against secret treaties in his 1795 essay 'Toward Perpetual Peace'. Jean-Jacques Rousseau, writing a little before Kant, also had much to say about transparency in matters of culture and morals: he seems to have equated **(p.7)** opaqueness with evil and saw transparency as a lost state of nature, the opposite of obfuscation or the sort of veils associated with civilization (Starobinski 1997: 12–14, 66–8). But he seems to have been ambiguous about the efficacy of transparency in government and politics. For instance he saw the integrity of public officials as the only effective check on misuse of public funds, arguing that 'Books and auditing of accounts,

instead of exposing frauds, only conceal them; for prudence is never so ready to conceive new precautions as knavery is to elude them' (Rousseau [1762] 1993: 154).

On the other hand, he seems to have thought that openness was a way of securing such integrity. In his *Social Contract* and specifically in his constitutional plans for Poland, Rousseau argued that public servants should operate 'in the eyes of the public', and that a transparent society, in which no one's private conduct can be veiled from the public gaze, is a key mechanism for avoiding destabilizing intrigues and cabals (Putterman 2001: 489). Indeed, echoing Spinoza ([1670, 1677] 1951), Rousseau ([1772/1782] 1985: 72) declares:

> I should like each rank, each employment, each honorific reward to be dignified with its own badge or emblem. I should like you to permit no office-holder to move about *incognito*, so that the marks of a man's rank or position shall accompany him wherever he goes…if the rich man wants to shine in his fatherland, let him have no choice but to serve it…and to aspire…to posts that only public approbation can bestow on him and that public blame can take away from him at a moment's notice.

Such ideas perhaps go with that strain of reformed-church thinking within Christianity that put the emphasis on candour and frankness in discussion and openness in church governance and practice—the stool-of-repentance[6] and church-meeting tradition that contrasts with the Roman Catholic convention of the secrecy of the confessional and of the conclave in which the College of Cardinals elects the Pope.[7] The town meeting tradition of local governance in New England (conventionally said to have started at Salem in 1636), which involves face-to-face deliberation between office-holders and citizens, reflects this ideal of open dealing and direct mutual accountability (Bryan 2004). And the feminist ethics approach that grew out of the Western feminist political movement of the 1960s and 1970s might be argued to be in the same sort of **(p.8)** tradition, since it gave transparency a central place as both a moral and epistemic principle, a means of 'making visible gendered arrangements that underlie existing moral understandings, and the gendered structures of authority that produce and circulate these understandings' (Walker 1996: 286; see also 287).

Somewhere between the first and second strains of ideas and practice is the Scandinavian tradition of press freedom and freedom of information, ordinarily dated as stemming from Sweden's 'Tryckfrihetsförordningen' (Freedom of the Press Act) of 1766 to give statutory rights of access to government records.[8] Here too there might appear to beareformed-church link, since the architect of this famous act was a Lutheran clergyman, Anders Chydenius. But Chydenius himself declared his inspiration to have been the creation of the Chinese Imperial Censorate by Emperor Tai Zhong (627–49), to record official government decisions and correspondence and to act as a public interest watchdog in the absence of modern media and parliamentary institutions (Lamble 2002: 5–6).

A third and also related idea is the notion, foundational to many eighteenth-century ideas about social science, that the social world should be made knowable by methods analogous to those used in the natural sciences. For Bahmueller (1981: 44), describing—and perhaps caricaturing—Jeremy Bentham's views, 'The persons and objects of that [social] world must be weighed and counted, marked out and identified, subjected to the brightness of the public light, the better to be seen by the public eye. Only then could they be controlled and security made possible; and only then might the mad reign of contingency be brought to a close.' Eighteenth-century 'police science' (such as Nicholas de La Mare's famous *Traité de la Police* of 1713) which saw street lighting, open spaces with maximum exposure to public view, surveillance, records, and

publication of information as key tools of crime prevention, reflects a perhaps more engineering approach to social transparency (Hume 1981: 44–5), and one that has been much highlighted in Michel Foucault's ideas about 'governmentality' (1977), for instance in plague-ridden towns, and James Scott's notion of 'seeing like a state' (1998). Foucault also emphasizes the French revolutionaries' embrace of the notion of a 'transparent' society (mixing ideas from Rousseau and Bentham) as one in which there was no **(p.9)** space for the sort of social darkness in which they assumed injustice or unhappiness would breed (Ratakansky 1991: 3; Foucault and Gordon 1977: 146–65). Such ideas have their modern equivalents, both in the form of the elaborate accounts and informational demands placed on many kinds of organizations, and in developments such as the installation of cameras in public places (pioneered in Britain in the late 1980s, Brin 1998) and registers of paedophiles, available to the public on demand (or even at a mouse-click) in some US states since the passing of 'Megan's law' in 1994, and subsequently imitated by several other governments.

Indeed, arguably all three of these strains of thought came together in the ideas of the English philosopher Jeremy Bentham, who seems to have been the first to use 'transparency' in its modern governance-related sense in English. Bentham ([1790s] 2001: 277) declared, 'I do really take it for an indisputable truth, and a truth that is one of the corner-stones of political science—the more strictly we are watched, the better we behave.' In his famous essay 'On Publicity' Bentham boldly declared that 'Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government.'[9] And, perhaps more than Rousseau, Bentham seems to have coined the term transparency in its modern political sense, as part of his proposals for entrenching the rule of law in the organizations of executive government. Bentham's various principles for public management and executive government changed from time to time in the voluminous works that he produced over his long lifetime, but the principle of 'transparent-management or publicity' always seems to have been high on the list (Hume 1981: 4, 161). In line with that principle is Bentham's advocacy of publication of public accounts and fees for office, to expose expenditure and income to general scrutiny—a process in which 'the worst principles have their use as well as the best; envy, hatred, malice, perform the task of public spirit' (Bentham [1802] 1931: 411).

Transparency in that sense was at that time counterposed against the idea that honesty in public affairs could be secured by the administration of oaths. Bentham's patron, the Earl of Shelburne (first minister 1782–3), wrote, 'Publicity is the grand principle of economy, and the only method of preventing abuses…Instead of oaths of secrecy, there should be an obligation to print at the end of the year every expenditure and every **(p.10)** contract, except in cases of Secret Service' (quoted in Fitzmaurice 1912: vol. 2, 226). More specifically, Bentham thought transparency was best combined with paid office-holders, whose conduct would be likely to encourage close scrutiny or suspicion. In his famous *Panopticon; or, the Inspection House* of 1791, he declared, 'Jealousy is the life and soul of government. Transparency of management is certainly an immense security; but even transparency is of no avail without eyes to look at it. Other things equal, that sort of man whose conduct is likely to be most narrowly watched, is therefore the properest man to choose' (p. 381).

Those ideas—of making individuals responsive to those who oversee them through what he called inspective-architecture,[10] elaborate reporting and quantification of persons, activities and objects, employing malice and jealousy for the public good, and procedural rules designed to make interest run with duty, ran through much of Bentham's work on executive government. For instance, in his plan for a 'National Charity Company' (a proposal for a company modelled on the

institutional form of the British East India Company to run a form of ‘workfare’ and public relief), both the managers and the managed were to be subjected to maximum visibility. For the managers of the company, every decision and every action was to be recorded, no secret decisions were to be made and—foreshadowing by nearly two centuries the 1976 US Government in the Sunshine Act that required every portion of every meeting of every government agency headed by a collegial board to be open to public observation—every ‘official act’ was to be exercised in a ‘common room’ where it could be observed by others (Bahmueller 1981: 106).[11]

(p.11) 3. Twentieth-Century Transparency Ideas: Seven Doctrines

The preceding section sought to show that neither the word nor several of the key doctrines of transparency that are canvassed today are an invention of the twentieth century. But transparency figured in numerous twentieth-century doctrines of governance, well before the word itself came into its current prominence in the last two decades of the century. Such ideas developed at the level of international affairs, concerning the way states should relate to one another and to inter- or supra-national bodies; they developed at the level of individual states, concerning the way the state should relate to citizens in the way it makes decisions or keeps accounts; and they developed in the domain of business affairs, concerning the way that managers should relate to stockholders and the financial market in the way that they conduct and record their affairs. That makes at least six or seven different forms of ‘transparency’ doctrine in play for debates over governance, briefly discussed below.

3.1 Transparency in International Governance

The conduct of international affairs seems to have been the object of at least two, perhaps three, doctrines of openness. One consists of the recurring ideal of a ‘new diplomacy’ conducted in the open rather than through secret agreements, on the assumption that such openness will tend to foster international stability and peace. The best-known instance of this doctrine emerged after World War I, when US President Woodrow Wilson—perhaps drawing on the reformed-church strain of ‘openness’ doctrine discussed in the previous section,[12] or on Kant’s ideas referred to earlier—blamed the war in part on secret treaties and, in the first of his 1918 ‘fourteen points’ for the postwar political settlement, called for ‘open covenants of peace openly arrived at, with no secret international agreements in the future’. What exactly was meant by ‘openly arrived at’ seems to have been highly ambiguous, since at the 1919 peace conference **(p.12)** Wilson insisted that privacy was necessary for the negotiating process (Hecksher 1991: 517) and agreed to a distinction between ‘plenary sessions’ at the Quai d’Orsay, which were to be public, and ‘conversations’ in the conference room, where there was to be a news blackout (ibid.; also Clements 1992: 172: this distinction echoes David Heald’s distinction between process and event transparency in Chapter 2). The British diplomat Sir Harold Nicolson (1934: 387) also saw openness as one of the key differences between pre- and post-World War I democracy, and observers such as Davenport (2002: 7) see ‘open covenants’ as a recurring doctrine for diplomatic reformers.

Closely related though perhaps not identical to the ‘open covenants’ doctrine of diplomacy is the idea that governments should be obliged by treaty to produce intelligible and auditable statements and accounts for international bodies of various kinds, in the interests of making international policy regimes effective. This doctrine is behind what James Savage in Chapter 9 describes as compliance information regimes in international relations (see also Mitchell 1998). Two notable instances of this doctrine are the information requirements on governments arising from international trade agreements, dating in modern times from the original GATT

arrangements of 1947, and the informational requirements implied in arms-control or disarmament treaties (Mitchell 1998: 111). As for the former, transparency as a word does not appear in the original GATT which came into force in 1948, but that agreement provided for what would now be called transparency in its Article 3 on the publication and administration of trade regulations, which requires 'laws, regulations, judicial decisions and administrative rulings of general application', together with international trade agreements, to be published 'promptly in such a manner as to enable governments and traders to become acquainted with them', in advance of their taking effect. By the 1994 GATT (Article XXIV) such requirements (and later developments in a variety of trade treaties) had come to be labelled as 'transparency' obligations, to mean notification and submission of information about trade policies (including updates) to the WTO.

As for the second notable instance mentioned above, arms-control or disarmament treaties have long imposed requirements of mutual information, as in the 1922 Washington Naval Treaty signed by the United States, Japan, France, Italy, and the United Kingdom, which (perhaps in the spirit of Wilson's 'open covenants') imposed a duty on the contracting powers to 'communicate promptly' to one another detailed statistical **(p.13)** information about the building of any new warships of specified types.[13]Post-World War II arms-limitation treaties have developed similar obligations, particularly after the creation of the International Atomic Energy Agency in 1956, which added obligations to submit to inspection by an agency to those of volunteering information among a set of governments. And the same idea has applied to a range of other international regimes (for instance, on torture) that involve doctrines of mutual information, open documentation of policy and practice, and submission to international review or inspection.

The doctrine of states producing intelligible and auditable statements and accounts for international bodies has been heavily emphasized in the European Union in various directives, including its *soi-disant* 'transparency directives' and related policy measures.[14] The common theme running through these measures is the desire to put the financial and regulatory relationships between governments at all levels and firms, public enterprises, and other bodies onto an arms-length basis, involving rules stipulated in advance and detailed accounts that separate different forms of expenditure. This EU notion of 'transparency' contrasts sharply with the 'town meeting' tradition of face-to-face accountability that was discussed in the previous section, in so far as it (ironically) involves arcane rules that are only intelligible to lawyers and accountants and conventions of reporting from one expert bureaucracy to another.

3.2 Transparency in National and Sub-national Government

Doctrines of openness in dealings between governments and between states and international bodies have heavily overlapped with doctrines about openness in dealings between executive government and citizens (or **(p.14)** citizens' representatives) at national and sub-national level; and that is not surprising, since democratization could be expected to have such an effect. Again, at least two and possibly three strains of such doctrine can be distinguished, including the idea of government according to predictable rules, the idea of openness of government information to citizens and the idea of government accounting and institutional arrangements that prevent covert cross-subsidization or opaque relationships between governments and their satellites, particularly state-owned enterprises.

Perhaps the broadest doctrine of openness is the doctrine that the general conduct of executive government should be predictable and operate according to published (and as far as possible non-discretionary) rules rather than arbitrarily. That doctrine goes back to the pre-twentieth-

century ‘legalist’ ideal of government by rule and rote that was discussed in the previous section, and the opposition by many pre-twentieth-century democracy movements to government by secret laws and decrees. But the extension of ideas of liberal democracy in the twentieth century meant that transparency in that sense was central to ideas about liberal jurisprudence that developed after the downfall of fascist regimes in World War II, for example in Lon Fuller’s classic *Morality of Law* (1964). In the last days of the USSR, a move towards more openness or transparency (*glasnost*) was a central plank of Mikhail Gorbachev’s reform programme (1987: 136), and that doctrine developed further with the fall of communist regimes and extended US hegemony after 1989.

The idea of freedom of information in dealings between citizens and executive government can be seen as an entailment of that general idea, although it forms a specific subset with its own epistemic community. As noted earlier, there are pre-twentieth-century forerunners of modern freedom of information laws, notably in the Swedish Freedom of the Press Act of 1766, which gave citizens statutory rights of access to government documents. But the ideas and practices of the United States seem to have been central to twentieth-century developments, notably with its 1946 Administrative Procedures Act, followed by the 1966 Freedom of Information Act and the 1976 Government in the Sunshine Act. The 1966 Act was copied by most of the world’s developed democracies and some developing countries over the next few decades, from Denmark and Norway in the early 1970s to the United Kingdom in 2000 (Lamble (2002) lists twenty-seven states adopting FOI since 1966). In France, the phrase *transparence administrative* seems to have come into currency in the mid-1970s as part of a general reaction against the traditional secrecy of executive government (Chevallier 1988: 239).

(p.15) The US Government in the Sunshine Act of 1976, which also has pre-twentieth-century intellectual antecedents—in so far as it harks back to Bentham’s transparent-management doctrine that office-holders should not have secret dealings with one another outside the official forums and possibly to other ‘transparent society’ ideas mentioned in the previous section—seems to have been less widely imitated in general laws elsewhere. But the idea that organizations of various kinds should arrive at policies or collective decisions in open sessions has been widely adopted in regulatory practice, for instance in risk management, and the idea of decisions and consultations being taken in open forums by regulators and other public authorities has also been favoured, both by theorists such as Kirstin Shrader-Frechette (1991), in her self-avowedly ‘populist’ recipe for community decision-making over complex technological risks, and in laws and practice.[15] A closely related idea, which is touched on by David Stasavage in Chapter 10, is the recent wave of writing on deliberative democracy, which argues the case for openness and publicity on the grounds that government and citizens have a responsibility to give reasons to one another (see, for instance Gutmann and Thompson 2004).

A rather different strain of ideas that has come to be called ‘transparency’ is linked to the EU usage of the term and comes from a different intellectual stable, namely that of government accounting and associated issues of organization, which is linked to the corporate-governance strain of thinking about ‘transparency’ to be discussed in the next sub-section. This is the doctrine that government should operate accounting regimes that separate out different kinds of activities, specifically to make it possible to identify who pays and who benefits from particular programmes and measures, and to distinguish the financial and other activities of different ‘cost centres’ within government. The basic idea is far from new in the field of public service management, where the idea that loss-making activities should be clearly identified and specifically subsidized rather than concealed in covert cross-subsidies—the so-called recoup

doctrine—goes back at least as far as the practices developed for its railway management by the Australian state of Victoria in the 1880s, according to Roger Wettenhall (1966). The same idea was developed in public enterprise management in the 1960s, for instance in **(p.16)** the invention of 'public service obligations' in the management of British nationalized industries, and evidently amounts to 'transparency' *avant la lettre*, though that term was not used to denote such an approach to government accounts at that time and does not appear in David Heald's much-quoted 1983 book on public expenditure theory and practice.

It seems to have been in the 1980s that the term 'transparency' came into widespread usage to denote a 'cost centre' approach to government accounting. A notable instance of that doctrine was a landmark 'economic rationalist' document from the New Zealand Treasury (1987: 40), associated with a radical shift in the design and operation of government machinery. Linking the doctrine of government by predictable rules with that of 'cost centre' accounting, that document argued:

> there is a need for greater transparency and consistency in government policies and to increase the certainty and credibility of policy stances. This is an important objective to the extent that the complex government interventions such as taxes, regulations and subsidies increase the information problems facing private actors. This complexity may discourage economic activity. For example complex regulations on the use of land may reduce value-maximizing transactions owing to the uncertainty they create. The source of this uncertainty is the information cost of discovering rights and obligations, and the potential for policy changes.

The same document (p. 48) argued that transparency meant not only openness and predictability in policy and objectives, but also in the means used by government, meaning that any subsidies in government operations should be explicit rather than hidden. But the New Zealand reformers of the 1980s seem to have been much less keen on Bentham's transparency principle of publication of fees of office, in that salaries and perks of top public servants became much more opaque than previously over that period.

3.3 Transparency and Corporate Governance

Closely related to both the EU's notion of transparency and the notion of transparency as cost centre accounting within government, is the development of debates concerning openness and predictable operation in corporate governance. One of the central themes of 'corporate governance' developments in both theory and practice has been the attempt to limit information asymmetries or specify information flows between some of the central players: in general corporate managers and stockholders or **(p.17)** the financial market, but more specifically the various officers of the corporation, such as executive and non-executive directors, chair and chief executive, board and audit committee. Andrea Prat in Chapter 6 deals with some of the core transparency issues in this domain, and the treatment here is necessarily brief.

What is called 'transparency' in other fields tends to go under the title of 'disclosure' in the (English) language of accounting[16] though the word transparency entered the lexicon of corporate governance late in the twentieth century (see for instance Lowenstein 1996). And, as with those other fields, the idea of disclosure or transparency in corporate governance pre-dates the twentieth century. The notion of transparency in the sense of the obligation of firms or agents to disclose their financial circumstances for the benefit of their creditors or principals goes back at least to the French 'Ordonnance de Commerce' of 1673 (Jönsson 1988: 2) and it developed substantially along with the corporate institutional developments in the nineteenth

century, when the obligation to post publicly accessible accounts became a condition of limited liability status and stock market listing.

However, in the twentieth century, extensions of the obligations on corporations to disclose and publish information about themselves came steadily with the advance of regulation and with audit and accounting reforms ostensibly intended to produce ‘reassurance’ (Power 1997) in the aftermath of corporate failures and scandals. And the quantum extension of trading in securities in the twentieth century led to ever-increasing pressures on corporations to produce open and comparable information on all aspects of their activity for the benefit of investors or their agents, increasing prohibitions on ‘insider trading,’ and for ‘segmentation’ of their accounts. For Jönsson (1988), it was the increasing size and number of groups in the financial markets with an interest in more transparent reporting that led to increasing disclosure requirements. Windows of opportunity to introduce such measures were provided by high-profile corporate failures (from the 1929 stock market crash that led to the establishment of the Securities and Exchange Commission, to the 2002 Sarbanes-Oxley Act in the aftermath of the Enron and Worldcom **(p. 18)** collapses of 2001) that exposed information asymmetries between managers/executives and stockholders, regulators, and other key players in financial markets.

The extension of disclosure obligations in corporate governance is in part a reflection of the twentieth-century development of ideas about ‘information asymmetry’ by institutional economists working on transaction-costs theory and principal-agent theory to extend the theory of the firm away from the traditional fiction that the firm could be treated as if it were a single actor. Early developments such as Berle and Means’s famous analysis of the division of ownership and control in corporations (1932) and James Burnham’s idea of the rise of a managerial class (1942) were developed into formal theories of managerial discretion particularly in the 1960s and 1970s (see for example Alchian and Demsetz 1972; Liebenstein 1976; Holmström 1979), which built heavily on information disparities between principals and agents.[17] Legal thinkers also started to ‘look inside’ corporations and devise doctrines and systems of regulation that focused on information flows around corporations, for instance in the kinds of information that had to be reported to the company board and the kind of expertise that had to be represented there (see, for example, Stone 1975).

Similar developments took place in the world of accounting and auditing, and the policy application of that sort of approach perhaps reached its peak in the development of new corporate governance codes at the end of the century, such as the UK Cadbury report of 1992[18] in the wake of various corporate scandals in the late 1980s and early 1990s, which is said to have been the world’s first publicly enacted code of corporate conduct and which placed ‘openness’ (along with integrity and accountability) at the centre of its recommendations. Thinking about the governance of private corporations cannot be isolated from thinking about governance of public organizations, and the peak of modern ‘transparency talk’ in both of these spheres seems to have been reached at the same time in the 1990s.

(p.19) 4. Discussion

This chapter began by suggesting that transparency seemed to have established some kind of quasi-religious authority as a contemporary doctrine of governance. That simile might seem casual or flippant, but it could perhaps be extended in some less obvious ways, and indeed this brief historical perspective on transparency as a term and a movement suggests three possible reflections on transparency as a doctrine of administrative salvation.

First, as anyone who attempts to invent a new religion is liable to find out, most of the obvious ideas have been tried before. As has already been shown, neither the word nor the concept of transparency is wholly new in its application to the governance of organizations, executive government, and indeed society more generally. Both the word and the doctrine have origins that go back well before the twentieth century, at least to Rousseau, Bentham, and the French revolutionaries. But it is hard to identify any institutional line of continuity from Bentham and Rousseau to the present day, and transparency seems to be more like an idea that has been reinvented after having been left aside, like some of Bentham's other ideas. And even though the doctrine might have been around before, and even though its use today may consist to some extent of a relabelling of earlier doctrines and practices, its revival and development still needs to be accounted for. What was it that made 'transparency' apparently so attractive as a ruling idea across so many domains of governance in the late twentieth century, and what explains its diffusion to saturation point as an international catchword over the past twenty years or so? We shall return to that issue in the final chapter of this volume.

Second, as with the fissiparous doctrines and ideas that emerged within Protestantism after the Reformation in Europe, transparency is an idea that embraces many different strains. But those different doctrines tend to live in different literatures and policy domains, and it is at least debatable how far those different strains add up to a single 'big idea'. At some level they all translate into some view of openness about rules and behaviour, but those to whom they apply—citizens, governments, organizations—are different, and the underlying doctrines of governance that they reflect may be conflicting. Indeed, it may be that much of the allure of transparency as a word and a doctrine may lie in its potential to appeal to those with very different, indeed contradictory, attitudes and worldviews. For instance, as already noted, there is an obvious tension between the 'town meeting' vision of transparency as direct face-to-face **(p.20)** accountability of public officials to ordinary citizens on the ground, and the accounting vision of transparency as a set of arcane bookkeeping rules governing the way big bureaucracies relate to one another, to experts in the financial markets, or to regulators and auditors over reporting of cost centres or asset valuation. Transparency is thus a doctrine that can be espoused in some form or other from a wide range of political positions.

Third, transparency obviously runs up against rival, contradictory doctrines of governance, and indeed just at the time in the late twentieth century when 'transparency' was so widely canvassed as a cure-all for better governance across a range of different domains and institutional settings, rival doctrines were also becoming institutionally entrenched, and here too the rival anti-transparency doctrines were espoused from many different and indeed contradictory political and social positions. For instance, the widespread outsourcing and privatization of many functions once carried out in-house by government bureaucracies in many states over the last two decades meant that the doctrine of commercial confidentiality could be invoked to counter and often trump transparency claims. Resistance to terrorism and insurgency meant that—conveniently for some—the doctrine of state security could be invoked to counter egalitarian demands for government-in-the-sunshine-type processes. And (as happened with radical Protestantism, where the idea of the individual being accountable to God alone rubbed up against the strict-communion church-meeting strain of thought as well as that of the priestly confessional), the notion of individual privacy could be asserted against what might be seen as the over-joined-up, 'seeing like a state' propensities of government bureaucracy (Raab 1995). Indeed many modern democracies have enacted privacy laws at much the same time (shortly before or shortly after) they have introduced freedom of information laws, producing a legislative balancing act (see Hazell 1998 and Andrew McDonald in Chapter 8 below). There is

no doctrine of governance without its counter-doctrines, and, unexceptionable though it may seem at first sight, transparency is not an exception to that rule.

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Notes:

([1]) Many definitions of the terms 'governance' and 'government' have been offered, especially in recent years, but it has become conventional to use governance as a term of broader reference than government. Here governance is used to denote the activity of controlling and steering organizations of all kinds, while government is used mainly to denote the executive of the state (though it is still conventional to speak of 'church government').

([2]) It is true that the *Encyclopaedia Britannica* (online version) includes a brief description of Transparency International and a reference to its website; an online search in the *International Encyclopedia of the Social and Behavioral Sciences* reveals seven entries in which the word appears (though no entry for the word itself); and a query on the online *Stanford Encyclopedia of Philosophy* produces eighty-six hits, many of them on representational theories of consciousness and perception. It is also true that Webster's *New World College Dictionary* nominated 'transparency' as its word of the year in 2003 (defined as 'a policy with a positive spin, promising uncensored exposure of records, moral conduct, and virtue').

([3]) See http://www.adb.org/Documents/Policies/Governance/gov340.asp (accessed 3 March 2004).

([4]) Echoing Aristotle (*Nicomachean Ethics*, Book 5, p. 317) on 'cases for which it is impossible to lay down a law'.

([5]) Brin (1998: 12) declares that 'whenever a conflict arises between privacy and accountability, people demand the former for themselves and the latter for everybody else' and argues that that conflict runs through every contemporary 'knowledge dispute'.

([6]) That is, the seat on which sinners, particularly adulterers, were obliged to sit in front of the congregation on communion Sundays in some reformed churches.

([7]) Of course there was no single reformed-church position on issues of candour and openness, but this is one important strain (Philp 2000).

([8]) 'Sweden' then included Finland, which later became a Grand Duchy within the Russian Empire before becoming independent in 1917. The 1766 Act had been preceded by a 1707 Act to

compel indexing and archiving of government-held documents—an act, ironically, intended to facilitate censorship (Lamble 2002: 3).

([9]) Bentham admitted three significant exceptions to this principle, namely if publicity favours the projects of an enemy, if it hurts the innocent, or if it inflicts unduly harsh punishment on the guilty. Taken together, those exceptions potentially create a huge hole in the principle (Bok 1984: 171, 174).

([10]) Indeed, according to Bahmueller (1981: 158) even the toilet facilities in Bentham's Panopticon were not to be shrouded from central inspection. Later parallels to this idea can be found in the intersection of political and architectural thought. For instance, Barnston (2005) shows how transparency has been a central theme of democratic architecture in German thought, with the assumption that transparency in parliamentary and governmental buildings translates into openness, accessibility, and greater democracy.

([11]) In the twentieth century, the notion of exercising control over individual employees by making them work in a common room subject to surveillance by their peers was associated with the Japanese tradition of open-plan offices, and was widely copied in the West in the second half of the twentieth century (Sennett 1977: 15). But Bentham had advocated the use of such a mechanism more than a century earlier.

([12]) Woodrow Wilson (said by Link (1969: 2) to have been 'the prime embodiment, the apogee, of the Calvinistic tradition among all statesmen of the modern epoch') had made much of the need for openness in government in his presidential election campaign of 1912, arguing that 'government ought to be all outside and no inside' and that 'there ought to be no place where anything can be done that everybody does not know about' (quoted in Bok 1984: 171).

([13]) Including dates of laying the keels and completion, standard displacement, and principal dimensions: see Conference on the Limitation of Armament, Washington, November 12 1921—February 6 1922, Treaty Between the United States of America, the British Empire, France, Italy, and Japan, Signed at Washington, February 6, 1922, Chapter 2, Part 3, Section 1 (b) (see http://www.ibiblio.org/pha/pre-war/1922/nav_lim.html).

([14]) Examples include: Commission Directive 80/723/EEC (amended by Directive 85/413/EEC (2) and Directive 93/84/EEC) on financial reporting for public enterprise; the effort under the 1988 reform of the EU Structural Funds to adopt accounting arrangements to ensure member states used EU funding to augment and not replace their own regional-policy spending; Council Directive 89/105/EEC on medicinal product pricing; Council Directive 90/377/EEC on charges for gas and electricity; and Directive 91/440/EEC on operational autonomy of railway operators.

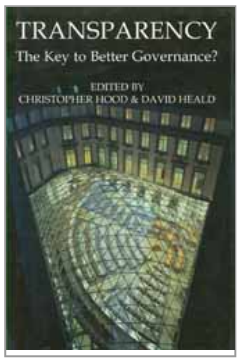
([15]) For instance, for Stirton and Lodge (2001), transparency means 'ensuring that citizens' rights are upheld and ensuring citizens participate in decisions which affect their lives and interests' and they say public services may be described as transparent when they are responsive to service users as well as answerable to them.

([16]) For example, neither the *Oxford Dictionary of Accounting* (1995) nor the *Bloomsbury Dictionary of Accounting* (3rd edn, 2004) contains entries for 'transparency', but both have one or more entries for 'disclosure'. Strictly, in the language of accounting, disclosure refers to items such as contingent liabilities that are not referred to in the financial statements but are revealed

in notes to the accounts, but the term has come to have a broader sense in general financial debate.

([17]) Later economists started to sharply distinguish observability and verifiability as informational elements that bear on the enforceability of contracts (see for instance Grossman and Hart 1986) but that distinction is not central to the purpose of this chapter.

([18]) Report of the Committee on the Financial Aspects of Corporate Governance (Chairman Sir Adrian Cadbury), London, Gee and Company 1992.



Transparency: The Key to Better Governance?
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Varieties of Transparency

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[–] Abstract and Keywords

Although the purpose of this chapter is to construct an anatomy of transparency, it is essential to address the triangular relationship between transparency, openness, and surveillance. The first question is whether a clear distinction can be drawn between transparency and openness. The second question concerns the relationship between transparency/openness and surveillance. This chapter examines transparency, focusing on directions and varieties of transparency and how they interact with their habitat and with each other. It distinguishes four directions of transparency and maps its varieties. The chapter also emphasizes the importance of examining the habitats within which transparency operates. Finally, it draws some brief conclusions, stressing the implications of the analysis for the measurement of transparency. The aim is to identify different directions and varieties of transparency in relatively neutral terms. Abstracting from the issue of direction, transparency can be analysed by means of a set of three dichotomies: event transparency versus process transparency; transparency in retrospect versus transparency in real time; and nominal transparency versus effective transparency.

Keywords: transparency, openness, surveillance, habitat, event transparency, process transparency, transparency in retrospect, real time, nominal transparency, effective transparency

1. Introduction

THE SUSPENDED AUDITORIUM WITHIN THE COURTYARD of the former Ministry of Posts and Telecommunications building that now houses the Flemish Parliament has a convex glass roof that is said to symbolize the Parliament’s transparency to its people. The architecture of Lord Richard Rogers’ new building for the National Assembly of Wales ‘is meant to be as transparent as possible, evoking and encouraging the notion of open government’ (Glancey 2005). Transparency as physical construction carries symbolic power, quite apart from its metaphorical use in discourse about the ways in which government, business, and public affairs should be conducted.

Although the purpose of this chapter is to construct an anatomy of transparency, it is essential to address the triangular relationship between transparency, openness, and surveillance. The first question is whether a clear distinction can be drawn between transparency and openness. In terms of general usage, the answer appears to be negative. The Nolan Committee (1995: 14) in the United Kingdom formulated 'Seven Principles of Public Life', which it believed should apply to all in the public service: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. Of these, 'openness' is closest to transparency. Nolan stated: 'Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands' (p. 14). If the Nolan Committee had reported in 2005 rather than in 1995, 'transparency' might have replaced 'openness' as one of these seven principles. Transparency appears to have become the contemporary term of choice, though there are many occurrences of 'openness and transparency' and 'open and transparent', as though the two words carry distinguishable **(p.26)** meanings.[1] A possible explanation for the popularity of dual use is that these words, though (near) synonyms, are directed at different audiences—'open' being included for the benefit of the non-specialist reader or listener. Another is that the frequent occurrence of both terms used together is often a linguistic device to emphasize the point rather than signifying any difference between the two terms.

However, some authors make a distinction between these two terms. Birkinshaw (2006: 189–91) considers that openness and transparency are close in meaning, and both convey something wider than access to (government) information. He points to the way in which 'open government' has sometimes been used in a derogatory sense in the United Kingdom, with 'openness' being claimed by governments as a means of 'providing access to information under nonlegally binding codes that do not create rights' (p. 190), thus avoiding the creation of enforceable legal obligations. According to Birkinshaw, 'Openness means concentrating on processes that allow us to see the operations and activities of government at work—subject…to necessary exemptions' (p. 190). The way in which transparency extends beyond openness, in his view, is that law-making and public processes should be made as accessible as possible, with complexity and disorder, as well as secrecy, being obstacles to transparency. Larsson (1998: 40–2) advances a similar distinction: transparency extends beyond openness to embrace simplicity and comprehensibility. For example, it is possible for an organization to be open about its documents and procedures yet not be transparent to relevant audiences if the information is perceived as incoherent. Openness might therefore be thought of as a characteristic of the organization, whereas transparency also requires external receptors capable of processing the information made available.

The second question concerns the relationship between transparency/ openness and surveillance. One obvious point about surveillance is that someone/something is doing the watching, and this explains why the term, as well as being used technically and neutrally, carries menace. These relationships are explored later in this chapter after a suitable terminology has been developed. In the meantime, the analysis will focus on clarifying the meaning of transparency.

(p.27) Accordingly, this chapter sketches out an anatomy of transparency, exploring directions and varieties of transparency and how they interact with their habitat and with each other. Section 2 distinguishes four directions of transparency and Section 3 maps varieties of transparency. Section 4 emphasizes the importance of examining the habitats within which transparency operates. Finally, Section 5 draws some brief conclusions, stressing the

implications of the analysis for the measurement of transparency. The aim here is to identify different directions and varieties of transparency in relatively neutral terms. In Chapter 4, it will be argued that transparency should be conceived of as an instrumental value rather than as an intrinsic value.

2. Directions of Transparency

In debates about the benefits and costs of transparency, the various directions that transparency can take are often left implicit. Figure 2.1 is a Venn diagram that brings out four such directions:

- *Transparency upwards* can be conceived of in terms either of hierarchical relationships or of the principal-agent analysis that underlies much economic modelling. Transparency upwards means that the hierarchical superior/principal can observe the conduct, behaviour, and/or 'results' of the hierarchical subordinate/agent.
- *Transparency downwards* is when the 'ruled' can observe the conduct, behaviour, and/or 'results' of their 'rulers'. The rights of the ruled in relationship to their rulers figure prominently in democratic theory and practice, often under the umbrella of 'accountability'.[2]

Where upwards and downwards transparency co-exist, there is symmetrical[3] vertical transparency (represented by the area of intersection in Figure 2.1).[4] Otherwise, vertical transparency is either completely absent or asymmetrical.

(p.28) The third and fourth directions relate to horizontal transparency:

- *Transparency outwards* occurs when the hierarchical subordinate or agent can observe what is happening 'outside' the organization. The ability to see outside is fundamental to an organization's capacity to understand its habitat and to monitor the behaviour of its peers and/or competitors.
- *Transparency inwards* is when those outside can observe what is going on inside the organization. Transparency inwards is relevant to freedom of information legislation (Birkinshaw 2005: 16–73), and also to mechanisms of social control that enforce behaviour patterns. Tinted car windows are illegal in Saudi Arabia (Salah Tahi 1997: 188) because their opaqueness prevents the police and militias from seeing whether a woman is driving. Transparency inwards has the connotation of surveillance and being watched by peers. Lloyd (2005) observed that the former East Germany was a highly transparent society in the sense that citizens were observed by other citizens reporting to the authorities. Much discussion of privacy involves setting limits on transparency inwards.

(p.29) Where outwards and inwards transparency co-exist, there is symmetrical horizontal transparency.[5] Otherwise, horizontal transparency is either completely absent (‘steamy windows’ in den Boer’s evocative phrase, 1998: 91) or asymmetrical.

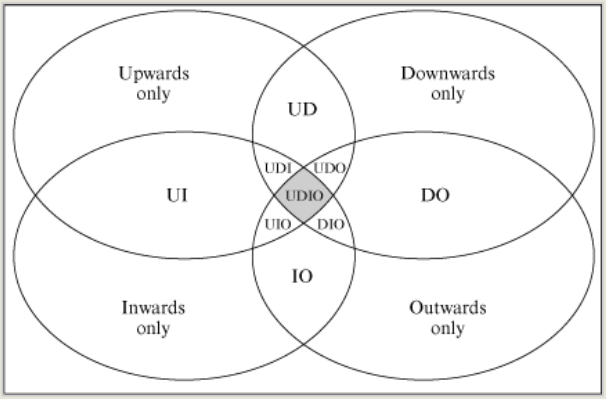

Figure 2.1. Four directions of transparency.
Note: With four directions, two combinations (UO and ID) cannot be shown in this two-dimensional representation. No significance is to be attached to which two combinations are not represented in Figure 2.1; this entirely depends on the labelling of the four circles. The shaded diamond-like area (UDIO) denotes the simultaneous presence of all four directions of transparency (fully symmetrical transparency).

The diamond-shaped area (UDIO) denotes the simultaneous presence of all four directions of transparency (fully symmetrical transparency). At this stage no normative evaluation is made of the relative desirability of different areas in Figure 2.1, but such analysis clarifies why views about transparency are often ambivalent in practice. For example, Brin (1998: 3–5) posits two cities, one characterized by top-down surveillance and the other by surveillance of citizens by each other, which can be interpreted, respectively, in terms of upwards transparency and symmetrical horizontal transparency. It is obvious from this discussion of directions of transparency that certain asymmetrical combinations may be uncomfortable to experience.

3. Varieties of Transparency

Abstracting from the issue of direction, transparency can be analysed by means of a set of three dichotomies. These generate varieties of transparency whose characteristics and consequences can be analysed. This approach surmounts the obstacles to clarity that are generated by the multitudinous appeals to transparency that characterize contemporary discussion of many public policy areas. The three dichotomies are: event versus process transparency; transparency in retrospect versus transparency in real time; and nominal versus effective transparency. A fourth issue, concerning the timing of the introduction of transparency, is also examined in this section. These analytical distinctions are briefly illustrated by practical examples, which convey the distinctions intuitively, notwithstanding the risk that the ‘facts’ relating to those examples may be controversial.

Central to the analysis is the distinction between event and process transparency, each of which can be disaggregated. In the case of event transparency, the objects of transparency (that is, what is to be viewed) can be inputs, outputs, or outcomes. In the case of process transparency, the components are procedural and operational aspects. In both cases, **(p.30)** there are issues relating to: whether transparency operates retrospectively or in real time; whether there is a transparency illusion; and the timing of the introduction of (greater) transparency. These distinctions are now considered in turn.

3.1 Event versus Process Transparency

Figure 2.2 portrays the distinction between event and process transparency with reference to public service production. It adopts the standard framework of distinguishing between inputs,

outputs, and outcomes. Each of these is characterized as ‘events’ and represented by a rectangle. ‘Events’ represent points/states that are externally visible and—at least in principle—measurable. Events are linked by ‘processes’, with the three rectangles being connected by two ellipses, labelled as ‘transformation’ (inputs into outputs) and ‘linkage’ (outputs into outcomes) (Heald 2003: 729–30). Processes are not measurable in the same way as events, though they can be described, if the information is available. Generally, transformation processes are better understood than linkage processes, not least because intervening variables are more important and unpredictable in the latter.

(p.31) For example, traditional public expenditure systems largely concentrated on inputs. In recent years, huge efforts have been made to measure public service outputs, though these measurement attempts are controversial and the distinction between outputs and outcomes does not always receive sufficient attention. In terms of healthcare, outputs are usually proxied by activity levels (for example, the number of operations of particular types) that are measurable at the provider level. Significant efforts have been made to set up monitoring systems tracking proxy measures of output. These have contributed to the growth of provider league tables, which are often deplored but avidly watched by those affected. Outcomes (for example, improved health status) are difficult to measure; changes, whether improvements or deteriorations, are affected by many factors other than healthcare provision (for example, lifestyle and income). For the focus to be solely on event transparency, the inputs, outputs, and outcomes have to generate measurements sufficiently credible to keep political attention focused on performance issues and not on the measurement system itself.

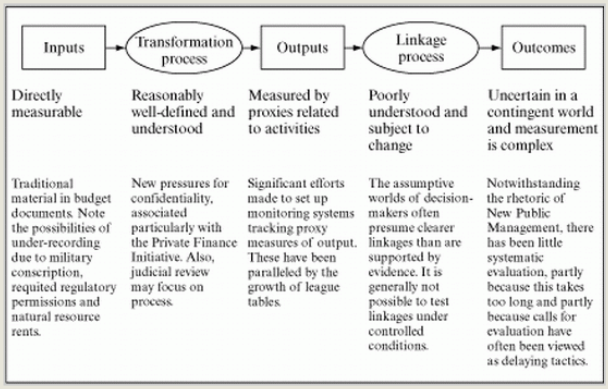

Figure 2.2. Event versus process transparency illustrated with reference to public service production.

Source: Heald 2003: 729.

In Figure 2.2, event transparency focuses attention on the rectangles, leaving the ellipses largely unexplored. This neat arrangement is difficult to sustain. In the competitive private sector, where the focus is on marketed outputs, the transformation process can be treated as a ‘black box’, protected from the gaze of outsiders. This insulation is believed to be an important source of efficiency gains. However, once resource allocation comes into the political arena, it is remarkably difficult to protect transformation processes from becoming politicized. Transparency of process may sometimes be damaging to efficiency and effectiveness, because it directly consumes resources and because it induces defensive behaviour in the face of what is perceived as oppressive surveillance.

At this juncture, it is essential to disaggregate process transparency into its procedural and operational components, as these are anticipated to have divergent implications. ‘Procedural’ relates to the rules, regulations, and procedures adopted by an organization being placed in the public domain. This can be thought of as the ‘rule book’, the implications of which can be illustrated by the following examples. Tax authorities operate complex tax codes. Universities have procedures for selecting students for admission and for determining degree classifications.

Academic journals and research funding bodies use peer review. Employers have recruitment and promotion procedures that use referees. Social housing providers have procedures for deciding which potential tenants secure subsidized housing. Hospital Accident & Emergency departments have **(p.32)** procedures for determining the priority classification accorded to patients. In each of these cases, there can be quality assurance procedures which, *inter alia*, assess whether the procedures have been consistently followed. Being explicit about procedures and about compliance with them will impose costs on organizations. Furthermore, organizations may have concerns that transparency will lead to these procedures being (a) (deliberately) misrepresented by third parties and/or (b) used by third parties as levers to expose operational matters.

The operational component of process transparency includes the application of these rule books to particular cases. Thus, information about taxpayers, students, employees, tenants, and patients may be categorized as confidential, being subject to data protection laws, and only published in aggregated and/or anonymized formats. Parallel issues arise with regard to the individual returns sent by businesses to statistical agencies, which operate on well-established principles of statistical confidentiality (Office for National Statistics 2004: 3). In addition to these confidentiality restrictions on access to data, there may be efficiency and effectiveness costs associated with the release of information about the day-to-day operation of organizations. Efficiency losses may arise because additional resource costs are incurred, both direct (providing the information) and indirect (more expensive working practices are adopted for defensive reasons). Effectiveness losses may arise because induced changes in working practices reduce efficiency or are dysfunctional to the achievement of policy objectives.

3.2 Transparency in Retrospect versus Transparency in Real Time

Transparency in retrospect (for example, rendering an *ex post* account of stewardship and management) allows an organization to conduct its business and then, at periodic intervals, to release information relevant to its performance, on which assessment will actually or potentially be based. In contrast, transparency in real time means that the internal processes of the organization are continuously liable to disclosure,[6] making it likely that these may be significantly modified in a defensive way, unlikely to be conducive to the efficient performance of key tasks.

(p.33) A contrast is made here between a reporting cycle (that is, transparency in retrospect) and the continuous surveillance that characterizes transparency in real time. Under the former, there is an operating period followed by a reporting lag, during which the organization prepares its ‘account’, in the broadest sense of that term. There follows an accountability window during which the organization renders its account to relevant stakeholders. The reporting lag and accountability window overlap the next operating period but, when that window closes, the organization can focus entirely on its productive activities for the rest of that operating period. Then the cycle repeats itself. An example of a reporting cycle is the publication by quoted companies of their audited report and accounts. Although the frequency of quoted company reporting has been increasing, the principle of regular reporting cycles remains intact.

In contrast, under transparency in real time the accountability window is always open and surveillance is continuous. There is never any time when the organization can focus exclusively on its productive activities. The operating process is likely to be affected by the choice between these two models. It is probably less costly for organizations to set themselves up for the discrete and repeated accountability windows than for the ever-open window. Which of these

two models is appropriate for a particular activity has to be judged on the circumstances of each case.

The time sensitivity of information is inherent in the reporting-window model. Although not always effective, private sector financial regulators seek to enforce time confidentiality, the breach of which facilitates fraudulent activities (for example, insider trading) and reduces trust in financial markets. In contrast, there has been a loss of respect for time confidentiality in UK government. Still-confidential reports are spun by governments or other bodies seekingtoexert agenda control, or leaked into the public domain by disaffected insiders. The UK Treasury has leaked drafts of international reports, for example by the International Monetary Fund and Organisation for Economic Co-operation and Development, either to secure more favourable drafting or to use favourable comments, sometimes out of context, for its own media management agenda.[7]

Breaches by the UK government of time confidentiality have weakened the sanctions against breaches by others. Sometimes it is unclear **(p.34)** who is doing the spinning/leaking. For example, the unauthorized disclosure by person(s) unknown of an advance copy of the Hutton Report[8](2004) to the *Sun* newspaper occurred, notwithstanding Lord Hutton's vigorous attempts to preserve the confidentiality of his findings until the time of formal publication (Sear 2004: 2). The report of the Pensions Commission (2005) was leaked ahead of publication, as was private correspondence from the Chancellor of the Exchequer opposing certain recommendations. Responsibility for these breaches of confidentiality was variously attributed to the Chancellor of the Exchequer (or his aides) and to others within the Labour Government wishing to discredit him by creating the appearance of his responsibility. Such disregard for time confidentiality was not always the case in UK government: breaking the time confidentiality of his 1947 Budget Speech ended the Chancellorship of Hugh Dalton (Pimlott 1985: 520–40).

3.3 Nominal versus Effective Transparency

There can be a divergence between the path of nominal transparency and that of effective transparency, the gap being described as the 'transparency illusion'. The intuition behind the transparency illusion is that, even when transparency appears to be increasing, as measured by some index, the reality may be quite different. Notwithstanding the high scores that it would gain on all IMF measures, there is widespread concern about fiscal transparency in the United Kingdom.[9] Certain key factors can be identified. There is Executive domination of information release: for example, the transformation of the Budget 'Red Book' into a propagandizing document, and the pre-release of material to favoured newspapers. There has been extensive criticism of the off-balance sheet treatment of Private Finance Initiative assets, including inconsistent accounting treatment across different parts of the public sector, and of the treatment of the infrastructure operator Network Rail as a private **(p.35)** sector company. (Network Rail had been 'designed' by the Treasury 'around the rules' of national accounts scoring.)

For transparency to be effective, there must be receptors capable of processing, digesting, and using the information. Parliament's weakness in fiscal scrutiny, some of which is structural to the UK political system and some of which is self-inflicted, is indulgent of Executive agenda control. For example, the Treasury schedules Spending Review announcements in July, just before the summer Parliamentary Recess, and overwhelms the absorptive capacity of Parliament at Budget times with document overload. This also adversely affects 'intermediate users' (Rutherford 1992: 271–8), who interpret such material for a wider audience, thus acting

as receptors. Information overload, accentuated by artificially constructed deadlines, not only obfuscates the message but also discourages the sustained effort that effective fiscal scrutiny requires.

A striking example of transparency illusion arose in March 2006 in connection with the funding of political parties. After the Labour Government had set up an elaborate system of rules and institutions for the reporting of donations to political parties, the Labour Party funded much of its expenditure at the May 2005 general election through non-reportable loans claimed to be at commercial rates of interest. Some of those making these loans were later nominated by the Prime Minister for peerages, thus prompting allegations of 'cash for peerages'. The elected Treasurer of the Labour Party (Jack Dromey) had not been informed about the loans and learned about them from newspapers. Although different in setting from the fiscal examples, this again highlights the setting of rules followed by the positioning of activities/transactions to evade the spirit of those rules; form takes precedence over substance.

3.4 Timing of the Introduction of Transparency

A fourth issue concerns the timing of the introduction of transparency. Sudden and unforeseen moves to transparency may disrupt expectations. In some circumstances, these may have the characteristic of an 'Act of God', when some exogenous development suddenly changes objective realities. Alternatively, some policy actor may choose the timing, as though assuming the role of theatre director ordering scene changes. Such conscious control over timing may generate suspicions of malevolence, whether well-founded or not. In relationships that can be analysed in principal-agent terms, or characterized in terms of unequal power, the **(p.36)** timing of the introduction of transparency may have material impacts on the distribution of costs and benefits. Moreover, anticipation of these impacts may affect the behaviour of those involved, sometimes in advance of the actual events.

For example, the allegations that *FRS 17* (Accounting Standards Board 2000), the relatively new UK accounting standard on pensions, has contributed to the closure of final salary pension schemes illustrate deep-seated ambivalence about transparency when it is seen to contribute to 'unwanted' outcomes. A telling criticism is that those now arguing for transparency did not make this case when pension funds had surpluses. Transparency was introduced only after their underlying financial positions had been eroded, during periods of high stock market valuations, by employer pension holidays and by the use of pension funds as a mechanism for subsidizing early retirement and redundancy. The winding-up of private sector final salary schemes is now used as part of an argument, advanced on horizontal equity grounds, for retrospectively reducing entitlements accrued in public sector pension schemes.

Another fiscal example concerns privatization programmes in transition economies. Although there might not be agreement about the substantive effects of Russian natural resource privatizations, it does seem to be widely accepted that the process whereby the so-called oligarchs purchased state assets way below market value was corrupt and inequitable. In situations like this, there is the question of whether (and, if so, when) a line is drawn under past events—'moving on' in the language of political discourse—on the basis that there will be transparency in future. An affirmative answer might be given, in terms of not disrupting the functioning of the Russian market economy. A negative answer might also be given, on the basis that calls 'to move on' without redress are opportunistic and that such action might encourage those wishing to emulate the oligarchs.

There is a final point to be made about timing.[10] Unless transparency is seen to make a difference, introducing or increasing transparency may have damaging rather than beneficial effects. Imagine a regime in which ministers and civil servants take bribes, but the extent of corruption, though rumoured, is not known. Transparency about the extent and depth of corruption will be seen as beneficial if its introduction leads to **(p.37)** the cessation/reduction of that corruption and/or punishment of offenders. However, if corruption continues unabated, public knowledge arising from greater transparency may lead to more cynicism, indeed perhaps to wider corruption. In certain countries there may be generations of officials, politicians, and other public figures tainted by collaboration with a former totalitarian government, by personal financial corruption or by involvement in illegal party financing. Building institutional capacity is necessary if there is to be a successful long-term exit from such pathological conditions; a sudden injection of transparency may not be sufficient.

4. The Habitat of Transparency

Hood (1994: 10–13) emphasized the role that might be played by the ‘loss of habitat’ of particular policies, invoking the analogy of the extinction of dinosaurs. Particular policies may have fitted a particular social ‘ecosystem’ that later disappeared, perhaps as a consequence of growing affluence and changes in social structure. Changes in habitat (for example, decline of deference and changes in media markets) may have made secrecy more difficult to sustain, thus being a factor in the emergence of transparency (as Christopher Hood describes in Chapter 13). As is con firmed by the literature on policy transfer and lesson-drawing, there are important interactions between country context and the effectiveness of particular policy instruments. As an extreme example, the publication of information about top salaries may strengthen incentives in stable industrialized democracies but encourage blackmailers and kidnappers in countries where organized crime is rampant.

Directions of transparency are clearly related to how particular habitats are characterized and understood. Downwards transparency is a feature of democratic societies but not of totalitarian ones. Upwards transparency is present to varying extents in all functioning states. Contemporary debates about public administration are couched in terms of greater freedom of information about government (downwards and inwards), but also about intensifying forms of upwards transparency within the public sector. A significant feature of New Public Management is the willingness to use markets as instruments of hierarchy, a position well removed from markets as inherently decentralizing devices. This raises the question as to whether changes in public sector organizational relationships and financial control styles (Ezzamel 1992: 10–16) are to be viewed as evidence of a weakening of the state, or whether this is another **(p.38)** manifestation of the interconnection between the free economy and the strong state (Gamble 1994: 38–45).

The impact of varieties and mixes of varieties of transparency may be conditioned by habitats, and indeed may lead to changes in habitats. These interdependencies become important in the context of attempts to compare transparency through time in the same country, and across countries at a common date. For example, the UK government is much more transparent about fiscal matters than it was twenty years ago, but these improvements, which shine through on formal scoring systems, coexist with intense pressures for governments and political parties to be ‘disciplined’ and speak with ‘one voice’. Consequently there is a gulf between what organizations say, and what people within them actually think. A contemporary UK example relates to the Private Finance Initiative, on which what is said in private often departs markedly from what is said in public. The personal and organizational costs of dissent have increased; the

collapse of Arthur Andersen following the Enron audit scandal vividly illustrates the fragility of reputational capital. Paradoxically, the pressures for greater transparency lead to more intense management of information flows (as discussed by Alasdair Roberts in Chapter 7), impeding unofficial channels and explicitly seeking to stop information percolating out of the 'sides' of organizations. Simultaneously, receptors outside the organization may have become disabled because of, for example, overload and their inability to match the resources now put into information management.

These developments can be situated in a broader context. Power (1997: 142–7) has characterized the expansion of audit and inspection as the 'audit society', developments mostly affecting the public sector and organizations on its fringes that have private status. However, the growth of the regulatory state (Moran 2003: 92–4, 135–8) has complicated the position of private sector companies, affecting not just those firms undertaking activities moved into the private sector through privatization. New or intensified regulatory agendas have emerged: for example, competition, environmental, health and safety, and employment discrimination. Business complaints about the costs of regulation are loud and insistent, leading to government reviews of how to reduce regulation (Hampton 2005). However, in these areas, both government and business are subject to media and lobby group agendas. Consequently, private firms are drawn into process transparency to a greater extent than might otherwise have been expected. This increased attention to transparency is, in part, attributable to the far-reaching habitat change that Majone (1997: 140–6) **(p.39)** describes as the transition from the 'positive state' to the 'regulatory state', which places more reliance on watching and steering than on doing.

'Surveillance'—the label currently used for much upwards transparency—is an important part of the emergence of the regulatory state, at both micro- and macro-levels. It is presented with positive connotations, as in the IMF's programmes of Article IV consultations and country Reports on Observance of Standards and Codes (ROSCs) (IMF Policy Development and Review Department 2005: 6–8), in which transparency and surveillance are seen as going hand-in-hand. In contrast, there is an intellectual tradition deriving from Michel Foucault, originally in philosophy but now spread across the humanities and social sciences (Loft 1995: 34–6). On this view, transparency would be seen as a new disciplinary technology, supplementing or supplanting earlier techniques of surveillance of individuals. Extending the notion that management accounting enables the 'managing of managers' (Hopper and Armstrong 1991: 405–7, 433–5), transparency might be interpreted as facilitating the 'managing of public organizations' (in a domestic setting) and the 'managing of countries' (in an international setting).

How this managing of public organizations and of countries is conducted will clearly affect effectiveness and legitimacy. Mitchell (1998: 113–23) characterizes international-treaty regimes on two dimensions. The first is whether they are compliance-oriented (focusing on the behaviour of individual countries) or effectiveness-oriented (focusing on overall effects). The second refers to the style of reporting, where he distinguishes between self-reporting, other-reporting (under which countries report on the behaviour of others), and problem-reporting (where reports focus not on country behaviour but on the identification and tracking of problems).

On the basis of this framework, Mitchell develops predictions about country behaviour according to whether they support regime goals and/or meet promulgated standards. On the Mitchell schema, the IMF's ROSC system might be categorized as compliance-oriented, with a strong, though not exclusive, element of self-reporting (Allan and Parry 2003: 14–17).

Contemporary examples of surveillance are to be found at the micro-level in terms of UK government funding agency relationships with universities, and at the macro-level with European Commission and European Central Bank oversight of country performance against the standards set out in the Stability and Growth Pact. Unintended conseuences of these surveillance techniques have been prominent. The **(p.40)** 'Transparency Review' (essentially a cost accounting exercise splitting teaching and research costs in UK higher education institutions) indicated the extent of central government control, albeit exercised at arm's length through the funding agencies, yet also allowed UK universities to turn this surveillance device back against central government, using its results as evidence of 'under-funding'. The audit society can be seen to operate at many different levels, as more issues are formulated, explicitly or implicitly, in principal-agent terms. Multiple principals wish to monitor the behaviour of multiple agents, with the direction of the agency relationship sometimes in dispute. The Stability and Growth Pact has had an unfortunate history, notable for inconsistent application between the powerful and less powerful and discredited by fraudulent reporting, most recently by Greece (Savage 2005: 33–4, 147; Chapter 9 of this volume). Whether such surveillance is viewed as benevolent or damaging is likely to depend both on the views adopted about the fiscal role of the state (Buchanan and Musgrave 1999: 11–49) and on the beholder's location in the system.

5. Conclusion

Whenever transparency is seriously analysed, two questions figure prominently. Is transparency good or bad? Is it possible to measure transparency so that there can be an unambiguous comparison of two situations, whether separated by time or location?

This chapter does not give definitive answers to these questions but provides an analytical framework for answering them. First, whether transparency is good or bad cannot be answered without regard to the directions and varieties of transparency that are under consideration, and the habitats in which they are situated. The sunlight metaphor ('sunlight is the most powerful of all disinfectants'),[11] which also brings into view the danger of over-exposure, is a valuable starting point. However, it narrows the analysis to the question of 'more or less' transparency when the real question concerns the directions and varieties of transparency. This **(p.41)** should not be taken as a negative conclusion about the potential contribution of transparency, but as an indication that thoughtful policy design and implementation are essential.

Second, this chapter urges caution in the face of contemporary enthusiasm for the construction of indexes of transparency. This activity encounters a fundamental difficulty, arising from the multiple directions and varieties of transparency and the mediating effects of habitat. A high score on an index may be the result of combining desirable and 'wrong' kinds of transparency (Prat 2005: 862–4, 869–70, and Chapter 6 of this volume). Moreover (changes in) habitat may condition the effects of directions and varieties of transparency. In particular, a high index score may arise when the formal requirements of transparency are met but the expected benefits do not materialize because the receptors have been disabled by overload and/or government spin.

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Notes:

([1]) As a quick indicator of dual use, a search on www.google.co.uk (19 March 2006) recorded: about 1,570,000 matches for ‘open and transparent’; about 522,000 for ‘openness and transparency’; about 202,000 for ‘transparent and open’; and about 203,000 for ‘transparency and openness’. The number of occurrences is rapidly increasing.

([2]) In their analysis of accountability relationships in public sector audit, White et al. (1994: 7–9) conceptualized government being accountable as agent to the electorate as principal. Although, from a constitutional perspective, it may seem odd to conceive, in a democracy, of rulers as principals and ruled as agents (upwards transparency in Figure 2.1), this is a more illuminating formulation in the analysis of transparency.

([3]) Instead of ‘symmetrical’, Brin (1998: 55) uses the term ‘reciprocal transparency’.

([4]) Symmetrical vertical transparency is represented in Figure 2.1 by the areas UD, UDI, UDO and UDIO.

([5]) Symmetrical horizontal transparency is represented in Figure 2.1 by the areas IO, UIO, DIO and UDIO.

([6]) In the case of real-time transparency, the distinction between events and processes may collapse, as events are more narrowly defined in ways that track processes (transformation and linkage in Figure 2.2) rather than outputs and outcomes.

([7]) This is well known in the relevant policy community but rarely put on the public record. In a *Financial Times* interview with the outgoing Secretary-General of OECD (Donald Johnston), Giles and Thornhill (2005) report: ‘Staff said the UK and the Australian governments were particularly adept at watering down reports about their economies.’

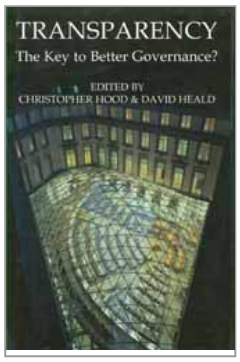
([8]) This inquiry was appointed by the Prime Minister (Tony Blair) following the death of Dr David Kelly, a Ministry of Defence civil servant who had been identified as the source of criticisms of the Government’s Iraq war policy that were broadcast on BBC Radio 4’s *Today* programme.

([9]) Alt and Lassen (2006) devised an index of budgetary transparency for 1999 that places the United Kingdom third out of nineteen OECD countries, behind only New Zealand and the United States. In contrast, Benito et al. (2005) placed the United Kingdom very close to the mean of

forty-one countries. The specification of the content of indexes is clearly important, and they are likely to be more effective at capturing nominal rather than effective transparency.

([10]) I am indebted to Dr Graham Harrison (Department of Politics, University of Sheffield) for this point, which he initially made at a Political Economy Research Centre seminar and then developed in private correspondence.

([11]) This is often associated with Justice Louis Brandeis (1856–1941) (Freund 1972: 61), though Christopher Hood in Chapter 1 above traces its ancestry back to Jean-Jacques Rousseau and Jeremy Bentham. The sunlight metaphor is restated by Stiglitz (1999: 11–13), constituting the instrumental part of his case for transparency/openness (he uses these terms interchangeably, p. 26). Like Birkinshaw (Chapter 3 below), but unlike Heald (Chapter 4 below), Stiglitz (p. 27) holds transparency to have intrinsic value.



Transparency: The Key to Better Governance?
Christopher Hood and David Heald

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Transparency as a Human Right

Patrick Birkinshaw

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[–] Abstract and Keywords

‘Transparency’, ‘openness’, and access to government-held information are widely applauded as remedies for the deficiencies and operations of government where government claims to be democratic but falls short of its rhetoric. This chapter examines whether transparency is a human right, focusing on one of its specific features: access to government information, or freedom of information (FOI). It explains what is meant by FOI and argues that within the framework of internationally agreed concepts of human rights, FOI deserves to be listed with those rights. Not only is FOI instrumental in realizing other human rights such as freedom of speech and access to justice, or other desiderata such as accountability, it is intrinsically important: the right to know how government operates on our behalf. The chapter also discusses constitutionalism and the struggle for information in the United Kingdom.

Keywords: United Kingdom, freedom of information, freedom of speech, constitutionalism, transparency, openness, government information, human rights

WE LIVE IN THE AGE OF HUMAN RIGHTS—even in the United Kingdom, where there has been perennial scepticism about the existence of human rights, fundamental, second or third generation, or otherwise. This chapter addresses the question of whether transparency is a human right. The focus is on a specific feature of transparency: access to government information, or freedom of information (FOI). What is meant by FOI will be explained. I will make no argument for the existence or nature of human rights generally. I will simply say that within the framework of internationally agreed concepts of human rights, FOI deserves to be listed with those rights. Not only is FOI instrumentally important in realizing other human rights such as freedom of speech and access to justice or other desiderata such as accountability, it is intrinsically important: the right to know how government operates on our behalf.

On one thing we should be certain: FOI is never interpreted to mean access to all information without restraint. Although there should be a presumption of access in FOI laws, there are always qualifications. FOI means controlled access under independent oversight; it does not mean indiscreet or irresponsible disclosure betraying trust or goodwill. While the claims and

provisions for FOI have grown, so have claims for other rights built on privacy and confidentiality, as well as privilege and immunity. Confidentiality is being moulded into a right of protection for private information (*Campbell* v. *MGN* [2004] UKHL 22). The Data Protection Act 1998 is a requirement of EU law. It is built not only on protection of privacy but also, and enigmatically, on the facilitation of the free flow of personal data transnationally. A balance has to be struck between public information and access thereto and private information. The boundaries are constantly shifting as adjustments have to be made to public interest and private autonomy. In relation to the right to pass on and receive information and the right to privacy, the Law Lords ruled in *Campbell* that both human rights **(p.48)** are of equal value. Neither trumps the other automatically. They have to be balanced in the context of specific facts and circumstances.

1. The Background

'Transparency', 'openness', and access to government-held information are widely applauded as remedies for the deficiencies and operations of government where government claims to be democratic but where it falls short of its rhetoric. The United Nations subscribed to freedom of information in its famous Resolution of the General Assembly of 14 December 1946: 'Freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated' (United Nations 1946). Article 19 of the Universal Declaration of Human Rights adopted by the UN Assembly in 1948 gave 'the right to seek, receive and impart information and ideas through any media and regardless of any frontiers'. The right in question was rooted in a right to seek and pass on information rather than a right to government-held documents (Radcliffe 1953).

In the Council of Europe, a Recommendation of the Committee of inisters on access to documents has existed since 1981. The European Convention on Human Rights (ECHR), in force from 1953, has many implications for openness and information, although it does not provide in Article 10 a right of access to information held by governments. The rights which may involve obtaining information are primarily directed to other rights such as the right to life (Article 2), access to justice (Article 6), family and private life (Article 8), and free speech (Article 10).[1] *McGinley and Egan* v. *UK* ((1998) 27 EHRR 1) affords graphic illustration of how access may attend other rights (Sedley 2000: 239). Members of the British forces did have a right under Article 8 to have access to documentation on the effects of experimental atomic explosions on those **(p.49)** who had witnessed them—although, on the facts, a breach of Article 8 had not occurred. The following from the judgment is pregnant with potential:

> When a government engages in hazardous activities such as those in issue…which might have hidden adverse consequences on the health of those involved…Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

'Transparency' has been in widespread use in the European Union (formerly European Community) since the early 1990s, leading to initiatives on access to documents dating from 1993. Over fifty states possess access to information laws; international bodies such as the EU have passed access to information laws based on Treaty provisions (Article 255 EC) and access laws feature in three parts of the draft Treaty on the EU constitution (EUC): as constitutional measures, as fundamental human rights, and as provisions within the revised treaties under Part III of the draft EUC. The direction of reformers is increasingly turning towards the global dimension of access to information.

This new bearing is occurring at a time when there has been a considerable reversal in FOI fortunes at the national level. Many in the Anglo-Saxon world took inspiration from the FOI laws in the United States which originate from 1966. In the United Kingdom, there was no domestic inspiration in legislation or government practice: official secrecy protected by draconian laws was the culture. The 1966 Act was ‘invigorated’ by subsequent reforms, which opened up meetings of departments and agencies and federal advisory committees to the public—the open government aspects. Since the attacks on the World Trade Center and the Pentagon of 11 September 2001, the USA has taken the lead in withdrawing from FOI commitments, most notably by the Homeland Security Act, the Critical Infrastructure Information Act, and other measures (Seifert and Relyea 2004). George W. Bush’s presidency will be remembered for his attack on freedom of information.

Are open government and freedom of information necessary for democracy? If so, what form of democracy? As democracy is a form of government that purports to treat all equally in terms of a right to equal and appropriate respect and consideration in the exercise of governmental power, so we find that in democratic government protection of human rights has become universally accepted—if not maintained. With one notable exception, statements of fundamental human rights, however, rarely contain a right of access to information. Several constitutions **(p.50)** in Europe, it is true, make provision for access to government information a constitutional measure in various forms. But the constitutions of the United States, the United Kingdom, France, and Germany do not. The prescient Resolution from the United Nations in 1946 that freedom of information is a fundamental human right is rarely repeated elsewhere.

The question then arises: should freedom of information be considered a human right? If it is, where does FOI stand in relation to other human rights and other basic features of democratic government? If it is a human right, is it one that only comes with a developed sense of democratic entitlement, and with social and public structures that are capable of sustaining its onerous claims? Is FOI necessarily predicated by democratic development from simple representative models to advanced participatory ones? Does FOI, in other words, only arise in advanced democracy? If so, can it make valid claims to universality?

2. Freedom of Information

David Heald, in Chapter 2, has outlined the various meanings and forms that the terms transparency and openness take. It is necessary to state what FOI means. Freedom of information means access by individuals as a presumptive right to information held by public authorities. Reasonable and clearly defined time-limits for the right must be in operation. In some regimes it is restricted to citizens or residents within the jurisdiction. The right must be defined in law to be a right. It imposes duties on others. The right is invariably limited by exemptions to protect the public welfare or safety, or to protect items such as commercial secrecy or individual privacy. The tests for establishing the exemptions are invariably demanding and the onus is on the public authority to justify its claim. Frequently there are public interest tests allowing disclosure, where a greater public interest is served by disclosure even though the information is exempt. The right covers access to information, however stored, that is held by public authorities. More recent laws have moved the target of attention to private bodies that perform public functions or which are designated as ‘public’ by a Minister (UK) or to private bodies that interfere with human rights of individuals (South Africa). Reasons for exemptions to the right of access typically include national security, personal privacy, commercial secrecy, defence, international relations, interference with criminal investigation and prosecution or law enforcement. There is invariably an independent arbiter to determine contested claims. FOI is a

component **(p.51)** of openness and transparency, although the latter are much wider (Heald, Chapter 2 above).

2.1 Arguments Against FOI and Openness

Today, openness, meaning open processes, and access to information are readily acknowledged as necessary components of responsible and responsive government. But the arguments used to oppose them, and which have gained in currency, centred around the belief that they undermined representative democracy and efficient and effective government by exposure to tendentious or scurrilous criticism. They would drive decision-making into ever more secret recesses or expose individuals to danger or unjustified invasions of privacy. Information overload corrupts wisdom and knowledge and descends to spin and spam. Most dramatically, openness involving too much access to information could endanger public and national security. ‘National security’ is, inevitably, afforded the widest of exemptions, even exclusions from access, under FOI laws.

2.2 Some Arguments in Favour of FOI and Open Government

Information held by governors is held on trust to be used in the public interest. Reliable information is essential for accountability. It is essential to test efficiency and effectiveness of governmental policies and programmes. Access to information used for us or about us is a central feature of human integrity and autonomy. Power wielders who are better informed than subjects are able to exploit and abuse less well-informed individuals. The opposite to openness, secrecy, is a cloak for arbitrariness, inefficiency, corruption. Secrecy is a way to ‘silence…the voice of the critic and hide the knowledge of the truth’ (Lord Shaw, in *Scott* v. *Scott* [1913] AC 417, 477). Access to information enhances legitimacy. Secrecy may be necessary; but it has to be justified. Justification is a part of transparency.

3. Constitutionalism and the Struggle for Information: From a Right of Institutions to a Right for Individuals

FOI came late to the United Kingdom. To allow for a transition to a new culture of openness in the UK, the Prime Minister delayed the **(p.52)** operation of access rights for over four years from the date of enactment in November 2000—the Act allowed a maximum delay of five years. The Act focuses on our individual rights of access and has now been added to by regulations allowing access to environmental information and on the re-use of public sector information. But institutional conflict for information features pervasively in English constitutional history.

That history illustrates a struggle over information rights, a right to be better informed. I have written elsewhere about how the principles that became the benchmarks on the road to constitutionalism were established (Birkinshaw 2001). I would continue that the public require rights of access to engage fully as citizens and to make democracy meaningful. This we can refer to as participatory democracy. In the representative model of democracy, the struggle over the centuries was about Parliament being informed, and being properly informed. The institutional struggle is one that will never end. But it does not exhaust the question of access.

The themes of openness also pervade the common law. The common law was not concerned with giving access rights to individuals, exceptin the special circumstances of doing justice in litigation. The requirements of justice in a court of law could not be used as a template for governmental practice as a whole. The common law was concerned with the publication of law and with legal certainty, setting limits to arbitrary actions that undermined individual security and which were made more potent by dark and unpublished practices. Numerous judgments display a constitutional preoccupation with openness, or, as we would say today, transparency,

although judges were sometimes reluctant advocates of open government. But the traditions of publicity, that is, making public the law and the authority under which powers are exercised, go back centuries. *Entick* v. *Carrington* ((1765) XIX *State Trials* 1029) established that the 'the ancient immemorable law of the land, in a particular matter' could not 'be proved by the practice of a private person' (p. 1068). 'If it is the law, it will be found in our books. If it is not to be found there, it is not the law' (p. 1045). The 'private person' was the Secretary of State. Denying public access to our courts as a constitutional right would be, said Lord Shaw in 1913, 'to shift the foundations of freedom from the rock to the sand' (Lord Shaw in *Scott* v. *Scott* [1913] AC 417, 477). Lon Fuller has famously written of the inner morality of law. By this he meant the procedural necessities that must be pursued for a legal system to exist and to be called 'legal'. Publication of law is one of these necessities (Fuller 1964). He does not mention access to information but all the procedural necessities relate in one way or another to transparency and openness of laws and legal processes.

(p.53) Despite Lord Shaw's ringing endorsement, courts do not always sit in public and various statutory provisions prohibit the reporting of judicial proceedings. Furthermore, even though the openness of court proceedings and informing parties of relevant information in litigation are both components of the human right under Article 6 ECHR (the right to a fair trial), the fight against serious crime and terrorism has forced inroads into the amount of information that defendants and their legal advisers may be entitled to receive. Access to information held by the Crown may be denied on grounds of public interest immunity in both civil and criminal trials. Since the 1960s, the courts have ruled that they are the final arbiters on claims to immunity and on striking the balance between access and secrecy (*Conway* v. *Rimmer* [1968] AC 910). The courts can make their balance after examining the contested documents themselves. The sensitivity of information about terrorism and judgments from the Court of Human Rights criticizing the UK practice of withholding information have been responsible for the introduction in the UK of a procedure known as the 'special advocate'. Under this procedure, those who are the subject of intelligence information and who are facing proceedings before the Special Immigration Appeals Commission may have a special advocate appointed to represent their interests. S/he may discuss the case with the detainee and their lawyers but not after sensitive or 'closed' information is given to the special advocate. The procedure has attracted much criticism (Constitutional Affairs Committee 2005), and in a 3:2 majority judgment of the House of Lords, the procedure was extended, controversially, to hearings before the Parole Board for non-terrorist offences (*R (Roberts)* v. *Parole Board* [2005] UKHL 45 concerning Article 5(4) ECHR).

4. Freedom of Speech and Freedom of Information

The relationship between freedom of speech and freedom of information has been the subject of a series of essays edited by Beatson and Cripps (2000). Freedom of speech has been lauded as the quintessential freedom by the senior judges on numerous recent occasions. Lord Steyn (in *R* v. *Secretary of State for the Home Department ex p Simms* [1999] 3 All ER 400 at 408 (HL)) has spoken of the centrality of freedom of speech. He echoed the sentiments and fears of Lord Bridge in the *Spycatcher* litigation ('that first casualty under a totalitarian regime', in *AG* v. *Guardian Newspapers* [1987] 3 All ER 316, 346), but his speech **(p.54)** is really a declaration of the importance of information: 'In a democracy it is the primary right: without it the rule of law is not possible…[freedom of speech] is intrinsically important…it is also instrumentally important [serving] a number of broad objectives…it tests truth by the competition of the market…Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve…'. And through freedom of speech the freedom of the press is guaranteed. That has not prevented the right being couched in negative

terms: it does not involve a right of access to a TV channel (Lord Hoffmann in *R (ProLife Alliance)* v. *BBC* [2003] 2 All ER 977, paras 56–58).

What is the point of freedom of speech if one is poorly informed? The reason why the secret British state relied upon censorship was because the criticism too often hit the spot. It was well informed, or possessed insight. It revealed arbitrariness, corruption, or repression. All the more reason to suppress it! Today our circumstances are less dramatic. FOI legislation has been widely accepted as a necessary companion to democracy. FOI as a human right is seen, however, as too emphatic. Both Lord Woolf and Sir Richard Scott, the latter of *Spycatcher* and Matrix Churchill fame,[2] gave evidence to the Commons Select Committee on public administration in its investigation into government proposals for an FOI statute in 1999. Neither believed that FOI was a human right although Lord Woolf was more circumspect: not now, he said, but I may be educated otherwise in the future (Public Administration Committee 1999: 923–5).

Like freedom of speech, I would argue that FOI is also both intrinsically and instrumentally good. It is good in itself because it fulfils that relationship of trust that government must have in the people—not just **(p.55)** its 'own people'—those who are 'one of us', but all the people. I repeat, what is the value of freedom of speech if people are badly informed; if they lack the information base to make sensible, intelligent, or accurate judgements on which to express ideas or to make statements of 'fact'? Government is the largest repository of information, information which it holds on its own activities and deliberations, on others, and on us. An informed citizenry is a citizenry better able to contribute to governmental processes sensibly; better able to understand and accept the basis of decisions affecting them; better able to help shape the context—social, political, and environmental—in which they live. In the past, the first victim of totalitarian regimes was freedom of speech. One wonders whether the first victim of totalitarianism is now to be freedom of information. Individuals who are informed are more fully equipped to expose inconsistencies, weaknesses, and sheer 'double-talk'. They are also individuals who are better equipped to sympathize with the difficulties of government. If government is arrogant and cares little about what individuals think so long as it can muster enough support to win an election, freedom of information will be the first victim. Other victims of this arrogance will then swiftly follow.

It is my anticipation that access to information will be seen as a human right in the sense described. Furthermore, its centrality in maintaining accountability, legitimacy, other human rights, and even democracy itself will become increasingly apparent. The realization of these objectives through FOI makes FOI instrumentally important.

5. Conclusion

The argument for human rights is based upon protection for individuals against inefficient, oppressive, or even bullying government. They are the rights that are necessary for our individual integrity, for our acceptance by the state and civil society as full members of that community, for our right to belong. When power is exercised on our behalf, or our sufferance, we are not treated as full members of that community if power wielders deny us information about why they used or are using their powers the way they did or are doing. We are not treated as full members when government fails to provide us with information about the justification for the exercise of such powers and about the effect and outcomes of decisions made under those powers. We are not treated as full members of that community when government fails to provide information on the use **(p.56)** of resources that made the exercise of those powers possible. In Western developed countries with a free press and media, we are used to critical reports and analyses of government and its actions. But the power of the state can still be mobilized for ill-

conceived and oppressive purposes. Its powers of patronage and subordination, and its ability to conceal, are virtually all-conquering. In the United Kingdom's FOI laws the Minister possesses a veto over any disclosure (although an extra statutory concession undertook that this would be a Cabinet decision), and some exemptions to access are 'absolute'.

FOI is a right of citizenship. It is fundamental to all other human rights and is to that extent instrumental in their realization. FOI is necessary to protect the form of democracy that developed through the twentieth century. But such laws have more basic uses. One of the means of confronting corruption in Third World recipients of Western aid has been seen in the adoption of freedom of information laws to trace the payments of money, the number and locations of transactions involved in transforming money into goods, and the amount of aid supposedly distributed. Here, FOI is seen as a necessary means of survival to help trace the transactions through corrupt officials.

The right to information in all these examples is fundamental to my membership as a full member of the human race. Information held by governments, or those private bodies used by governments, is fundamental to my position as a citizen and a human being, fundamental to my treatment with equal concern and respect by power wielders. It is also fundamental to my rights as a beneficiary of the information held by the government on my behalf. Information in these cases is intrinsically important.

The chapter must end with the qualification made in the introduction. No human right—with one exception—is absolute. Rights to information must inevitably be balanced against other human rights: the right to privacy and the right to life, for example. The one human right regarded as absolute, the right not to be tortured, was seen to be compromised when the English Court of Appeal ruled it lawful for the Home Secretary to make use of information in judicial proceedings allegedly extracted by torture overseas, and provided British officials had not been involved in the torture, in the interests of national security. This majority decision was unanimously overruled by the House of Lords, which, while regarding torture and its fruits with abhorrence, nonetheless acknowledged limits on judicial supervision of intelligence gathering (*A, B etc* v. *Secretary of State* [2004] EWCA Civ 1123 and [2005] UKHL 71).

(p.57) References

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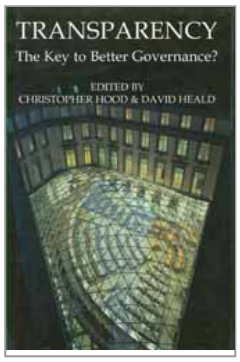
Notes:

([1]) See *Gaskin* v. *UK (1989)* 12 EHRR (EHCR [CONVENTION] 36 (Art 8); *Guerra* v. *Italy* (1998) 26 EHRR 357 (Art 8); *Oneryildiz* v. *Turkey* (2004) 39 EHRR 12 (Art 2); *Roche* v. *UK* Application No 32555/96 (2005) European Court of Human Rights (ECHR Art 8) *The Times* October 27 (2005). On the relationship between freedom of speech and freedom of information: *Fressoz and Roire* v. *France* (2001) 31 EHRR 2. Despite this limit on Article 10 ECHR and access to information, arguments have been presented to the Inter-American Court on Human Rights for the first time in relation to access to information based on Art 13 IACHR—the analogue of Article 10: Marcel Claude Reyes v. Chile, at 1–4, Case 12.108, *Claude Reyes* v. *Chile* (2005), available at www.justiceinitiative.org/db/resource2/fs/?file_id=15384.

([2]) Scott J, as he then was, gave the seminal judgment in the *Spycatcher* litigation (*AG* v. *Guardian Newspapers (No 2)* [1988] 3 All ER 545). In these proceedings the Crown sought to obtain an injunction permanently preventing publication by the press of the contents of *Spycatcher*, the memoirs of Peter Wright, a former member of MI5. Scott J refused to award the injunction because no harm to the public interest in publication of press reports had been established. In 1996, Sir Richard Scott VC reported on his inquiry into *The Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* HC 115 (1995–96) Vols I-V and Index. It emerged that the government had changed relevant guidelines on export control (to favour Iraq over Iran) without informing Parliament or the public. Ministers also knew that the individuals who were prosecuted for breaching export controls (one of whom was an MI6 informer) were exporting such goods and a Minister had advised them on the exports. The prosecution sought (unsuccessfully) to keep relevant evidence secret by use of public interest immunity certificates. When the documents were revealed it led to the unravelling of the role of Ministers and the collapse of the trial.



Transparency: The Key to Better Governance?
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Transparency as an Instrumental Value

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[–] Abstract and Keywords

This chapter discusses whether transparency should be valued intrinsically or instrumentally, or both. Put differently, it considers whether transparency is a core concern or a building block for other valued objects sought by public policy. The chapter argues that transparency should be valued instrumentally, and that attempts to elevate it to instrinsic value should be resisted. It proceeds on the basis that transparency – the sunlight metaphor – brings great benefits to economies, governments, and societies. However, there has to be sophistication about directions and varieties of transparency and also subtlety about the specific habitats within which they are situated. In general terms, at very low levels of transparency, more transparency is likely to be beneficial. The trade-offs are most apparent when transparency is already high, in which circumstance the direction and variety, not just the amount, of the incremental transparency will strongly influence the relationship between benefits and costs. The tradeoffs analysed in this chapter relate to: effectiveness; trust; accountability; autonomy and control; confidentiality, privacy and anonymity; fairness; and legitimacy.

Keywords: transparency, sunlight metaphor, anonymity, accountability, legitimacy, confidentiality, privacy, trust, fairness, effectiveness

1. Introduction

WHEREAS CHAPTER 2 OF THIS BOOK analysed directions and varieties of transparency, this chapter addresses a single question. Is transparency to be valued intrinsically or instrumentally, or both? Put differently, is transparency a core concern or is it a building block for other valued objects sought by public policy? There is not necessarily a single answer to this question, but posing it will make it easier to assess the contemporary claims made in the name of transparency.

This chapter argues that transparency should be valued instrumentally, and that attempts to elevate it to instrinsic value should be resisted. It proceeds on the basis that transparency—the sunlight metaphor—brings great benefits to economies, governments, and societies. However, as Chapter 2 demonstrated, there has to be sophistication about directions and varieties of

transparency and also subtlety about the specific habitats within which they are situated. In general terms, at very low levels of transparency, more transparency is likely to be beneficial. The trade-offs are most apparent when transparency is already high, in which circumstance the direction and variety, not just the amount, of the incremental transparency will strongly influence the relationship between benefits and costs.

2. Potential Trade-Offs and Synergies

It is useful to conceptualize transparency as a set of contested relationships with other objects that themselves may be valued intrinsically and/or instrumentally. Because of non-linearities, these contested relationships are sometimes trade-offs (one must be sacrificed to gain more of the other) and sometimes synergies (more can be gained of each). **(p.60)** Although other lists of valued objects might have been made, the tradeoffs considered here relate to: effectiveness; trust; accountability; autonomy and control; confidentiality, privacy, and anonymity; fairness; and legitimacy.

There are two distinct literatures that suggest reasons why there might be limits to beneficial transparency. The first generates the proposition that there may be an optimal level of transparency that is less than maximum transparency. This kind of theorizing reflects the influence of economists' approaches to the analysis of social and political issues. Heald (2003: 725–9) represented this view as the working out of the tradeoff between the value of sunlight and the danger of over-exposure. Arguably, the greater the level of transparency, the steeper these trade-offs become. A linked issue concerns the resource and compliance costs of transparency that need to be considered within this optimizing framework of analysis.

The second is a sociological view, propounded by Moore and Tumin (1949: 788–94), that ignorance (imperfect dissemination of existing knowledge or lack of transparency in today's terminology) may contribute positively to social functioning (Hood 2001: 703–4). Their enumeration of such functions is neutral as to whether the effect is benign or malign, with the purpose being to show that efforts to eliminate ignorance may have complex effects, some of which may be unintended and unwanted. Moore and Tumin identified a set of 'social functions of ignorance', some of which now seem dated, though others still resonate, including those relating to the operation of bureaucracies. A lack of transparency may be one of the pillars of pre-established social orders, whether religious or secular, whose sweeping away may have unpredictable effects. Such an order may now have shaky foundations, for example being based on myths that are no longer sustainable if openly challenged. A lack of transparency may avoid jealousy over unequal rewards. Transparency of salaries in the public sector might discourage applicants as the same does not apply for most working in the private sector, where media coverage is generally less intrusive and hostile. Conflict resolution in divided communities may only be achievable when there are differentiated messages to each constituency; managing down conflict in Northern Ireland is a good example of where recourse to differentiated messages is not just hypocrisy. Lloyd (2004: 31–4) cited the case of Gillian Tett, a *Financial Times* journalist working in Tokyo, who was caught up in the desire of a Japanese corporation to manage dual lines of communication to foreign and domestic audiences, without realizing that a **(p.61)** message sent out in her world might bounce back to its own. Some measure of dissimulation can be a characteristic of bargaining games; the traditional example is the trade union leader condemning a pay offer as inadequate whilst selling it to the membership. In many spheres, technological change has severely limited the possibility of exploiting dual lines of communication to manage different stakeholders.

In many ways, the sociological view can be interpreted as suggesting reasons why the economists' trade-offs arise. The optimal level of transparency might be regarded as the result of the trade-off between transparency and the seven other objects; these are now briefly examined in turn.

First, transparency can be counterpoised with *effectiveness*; the relationship is generally perceived to be positive (limiting corruption and malfunctioning of markets, whether financial or product markets) (Vickers 2002: 8–14), but that might have limits ('excessive' or the 'wrong kind' of transparency disrupts organizational functioning). There is the notion that transparency is positively connected to performance, primarily because exposure to public view is presumed to act as a stimulus. However, transparency about operational aspects of process (see Chapter 2) can affect behaviour in unanticipated ways. A famous university destroys exam scripts soon after the examination to prevent student access and disclosure. This defensive behaviour destroys the evidence base on which the path of standards over time might be monitored. Resource-intensive blind double-marking, which enhances reliability but exposes examiners to media ridicule, may be abandoned as too risky. Similarly, potential disclosure of job references or assessments is likely to make them bland, and perhaps encourage 'forgetfulness' on the part of those asked to supply them.

Whilst parliamentary scrutiny of the executive has eroded, public policy decisions now have to be taken under the constant gaze of continuous news and media comment. Policy formulation in public—and measured challenging of policy proposals—has become more difficult because of the inability (reduction in the number of specialist correspondents) and/or unwillingness (competitive pressures and ideological positioning) of much of the media to analyse policy issues seriously. This hampers rational policy-making by making the process vulnerable to interest groups oversimplifying complex issues and to opposition politicians jumping on populist bandwagons. Even the remaining specialist correspondents with accumulated sectoral knowledge face pressure for 'exclusives', which may mean becoming the conduit for government **(p.62)** plants or leaks by disaffected employees. A likely result is that real policy-making shifts backwards into secret confines, with proposals less subject to challenge (knowledgeable persons/organizations are excluded) and poorly documented (less is written so that less can be leaked and working documents are later shredded or deleted). The 'wrong' varieties of transparency (Prat 2005: 863–4) may encourage conformity to expectation, such as herd-like behaviour in financial markets (Persaud 2000: 1), thus making the net effect on effectiveness difficult to predict.

Second, transparency can be counterpoised with *trust*, a term in even greater current usage than transparency. Trust is conventionally viewed as an essential component of social capital. In the transparency literature focusing on fiscal and monetary issues, transparency is expected to contribute positively to trust by building credibility (Alt and Lassen 2006). For example, the fact that budget numbers and monetary rules are documented in the public domain reduces the cost of capital to private actors (Glennerster and Shin 2003: 4–7, 30–6). Decision-making benefits would also be expected for national economies and for public organizations. In contrast, O'Neill's Reith Lectures (2002: 63–79) emphasized the damage that transparency can inflict on trust, particularly through the undermining of professional judgement. O'Neill is generally negative about transparency, proposing that, to enhance trust, the objective should be to reduce deception and lies rather than to embrace transparency. Whilst O'Neill's negative view of transparency runs against the overall argument of this chapter, one passage resonates:

> Increasing transparency can produce a flood of unsorted information and misinformation that provides little but confusion unless it can be sorted and assessed. It may add to uncertainty rather than to trust…Transparency can encourage people to be less honest, so increasing deception and reducing reasons for trust; those that know that *everything* that they say or write is to be made public may massage the truth. (O'Neill 2002: 72–3)

Finel and Lord (1999: 319–22) make a similar point, in connection with why certain but not all international crises lead to war. They distinguish between information availability and information assessment, the latter requiring processing capacity held by external receptors (see also Chapter 2 of this volume). Nor can it be safely assumed that better information will lead to more satisfaction or higher trust; not least, it may suddenly expose publics to the uncertainties hitherto hidden beneath professional mystiques and to the professional errors that inevitably occur in, for example, healthcare and examination systems. Whilst provider league tables may bring strong pressures for improved performance, **(p.63)** they may simultaneously spread insecurity among both providers and customers/clients. At the level of the individual, improved knowledge of genetic code may not only bring new medical treatments but may render some individuals uninsurable and raise family tensions, for instance in generating pressures to prove biological relationships.

Third, transparency can be counterpoised with *accountability*: the relationship is strongly argued to contribute to political accountability, though the fact that it can encourage centralism is evidenced by UK policies on higher education, health, and local government. Under the media spotlight, central government politicians and departments pull in powers, whatever the rhetoric about devolution and 'new localism'. Sectoral convergence is taking place between public and private sectors in operational procedures (for example, accounting, human resource management, and operations management), with most of the movement coming from the public sector. Yet 'codes of accountability' remain divergent and their relative emphases contingent (Gray and Jenkins 1993: 62–4). Who should be accountable to whom and for what is disputed in the public sector. This is at the heart of what Gray (1998: 12–13) means by the public sector being 'business-like, but not like a business'. Transparency in the public sector inevitably raises issues about the distribution of power and resources. As well as generating outputs and outcomes, public service providers are expected to demonstrate process values (such as due process, equity, participation, and deliberation).

Nevertheless, experience with private sector accounting regulation and corporate governance indicates that the private sector position is less clear-cut than is often portrayed. Controversy has raged in the United Kingdom about mandatory, as opposed to voluntary, Operating and Financial Reviews in listed company annual reports.[1] Such developments raise the question of whether disclosure is viewed as a benefit or a cost and, if the latter, as an implied cost of limited liability status or as an implied cost of raising capital on public capital markets. If only the latter, 'going private' affords a mechanism for private firms to deny information to 'outside' shareholders and to stakeholders who are not shareholders (Gamble and Kelly 2000: 42–7). For example, whereas accounting **(p.64)** standards become more rigorous and better enforced, some quoted companies (such as Littlewoods Stores and DFS) are taken 'private', in part to avoid the transparency associated with listing. Audit developments after US scandals such as Enron, including the US Sarbanes-Oxley Act with its international reach, have imposed substantial transaction costs, thus adding to the 'the costs of being public' (that is, listed on stock markets). Moreover, the institutionalization of share ownership, through intermediaries such as pension funds and hedge funds, have led prominent business leaders to demand

transparency on the part of shareholders, in particular with regard to lending and borrowing shares. Large companies appear to be more concerned about trading patterns that (they consider) destabilize their share price than about the transaction costs of meeting the accounting and other regulations attached to listed status (Sunderland 2005: 6–7).

Fourth, transparency can be counterpoised with the set of issues, much discussed in the literature on public organizations and enterprises, that falls under the rubric of *autonomy and control*. Transparency can be an instrument of external hierarchical control, paradoxically operating in a non-transparent manner, for example, through opportunistic intervention in forms conducive to blame deflection. It may thus allow control to be directed from 'outside' the organization, calling into serious question where organizational boundaries really lie. It may be necessary to look at the system or network of organizations to understand where control lies and thus to define appropriate boundaries (for example, for purposes of accounting consolidation and for accounting for privately financed public assets that are often kept off public sector balance sheets) (Froud and Shaoul 2001: 261–2). The working out of the conflicting tendencies generated by control systems raises complex issues, best pursued on a case-by-case basis. Pressure to perform may stimulate but it may also undermine (Otley 1987: 44–6). Using public money inevitably introduces constraints not present in genuinely competitive private markets (Heald and McLeod 2002: para 483); avoiding those constraints may sometimes constitute an argument against public sector involvement, but in many cases the tensions will have to be managed. Moreover, the role of transparency will vary according to habitat and the style of control (Dunsire 1990: 6–10; Finkelstein 2000: 2–7).

Fifth, transparency can be counterpoised with a set of related but distinct objects, conveniently labelled *confidentiality, privacy*, and *anonymity*. In government, confidentiality is in part enduring (though the legal commitment of ministers and civil servants is breached in memoirs), but **(p.65)** much is a matter of time-confidentiality (for example, about the content of Budgets and Select Committee reports).[2] The acceptance of confidentiality obligations can be threatened by government spinning that weakens the moral sanctions constraining others. Privacy relates to the affairs of the individual; kiss-and-tell stories in tabloids and proposals to publish the tax returns of the rich (Monbiot 2004) illustrate common confusion between what the public may wish to know and what it has a right to know.[3] Indeed, a judgment by Lord Woolf (then Lord Chief Justice of England and Wales) concerning tabloid revelations of adultery by a professional footballer, contributed to the blurring of the public interest with what the public is interested to know:

> In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest (*A* v. *B & C* (2002) EWCA Civ 337).[4]

Anonymity is an important principle in voting, whether in ballots and elections or in the making of collective decisions that have to be externally defended (such as interviewing committees, examination boards, political group meetings and Cabinet meetings). But anonymity is widely abused in the UK media's coverage of government and politics, with much material unsourced

and made available for questionable motives, and such abuses may lead anonymity to be challenged.[5] Even this limited range of examples shows how difficult it is to strike a balance between **(p.66)** state, civil society, and the individual; some demands for transparency are intimidatory in effect, even if not in intent.[6] The private sector counterpart to these issues concerns the release of market-sensitive information, with strong prohibitions against unstructured and non-universal release because of the opportunities for insider trading and false markets. Organizations, public and private, are now more sensitive about their media portrayal, thereby limiting the freedom of speech of those working for them. They have acquired a harder shell, emphasizing employee obligations of confidentiality. Except for those willing to adopt the exposed status of whistleblower, the position is vulnerable; it is intriguing to watch how people clam up or reach for the organizational shield, if asked on the record about their own organizations.[7] Vulnerability is compounded when there are also doubts about their ability to talk through issues in private within the organization, without fear of opportunistic disclosure at a later stage, for example to undermine those who have subsequently accepted the collective position.

Sixth, transparency can be counterpoised with *fairness*. This poses fundamental questions about the substantive content of fairness, as distinct from its rhetorical power. For instance, fairness can be conceptualized in terms of rights, deserts, or needs. In political debate, however, fairness is often taken to mean less inequality. The conventional view might be that transparency reduces inequality, concern about unequal rewards leading to tax policy changes and the exposure of abuses prompting correction. On a negative interpretation, transparency might generate envy that damages incentives in the market economy and thus economic performance. During the UK Chancellorship of Gordon Brown (1997 to the time of writing), a counter-view has appeared in media coverage. Polly Toynbee (*Guardian* journalist) and John Grieve Smith (Cambridge University and occasional *Observer* commentator) have both defended stealth as an agenda-shifting means to do good by financing poverty reduction. Quite apart from differences in value judgements and perceptions of efficiency-equity trade-offs, the measurement issues relating to the empirical assessment of fairness are formidable. A modern welfare **(p.67)** state involves a complex web of subsidies and cross-subsidies, some of which churns across individual lifetimes and some of which is interpersonal and intergenerational (Glennerster 2003: 5–6; Hills 2004: 90–4). Moreover, there can be large differences between expected and actual patterns of redistribution.

Seventh, transparency can be counterpoised with *legitimacy*. Kay (2002) observed: ‘Legitimacy is the answer to the question: “What gives them the right to do that?”.’Legitimacy can be derived from operational mechanisms such as funding formulae being transparent in both their results and numerical working (McLean 2005: 168–76). At the micro-level, it maybe possible to predict reasonably accurately university shares of UK government research funding after the 2008 Research Assessment Exercise, without actually undertaking suchanexercise (Knight 2004). Nevertheless, without such a process, the legitimacy of dramatically unequal allocations would be much more difficult to defend. This is a separate but related point to the consideration that some form of due process is required before ‘historic entitlements’ can be withdrawn;a feature of formula funding is its potential to ‘abolish the history’ that has generated existing allocations. At the macro-level, the development of international surveillance of national public finances by the International Monetary Fund, World Bank, Organisation for Economic Co-operation and Development, and European Commission, raises issues about the legitimacy as well as effectiveness of upwards transparency. Domestic governmental organizations such as quangos, supranational organizations such as the European Union, and international

organizations such as the IMF and the World Bank, that are seen to lack direct democratic credentials, may adopt transparency as a legitimization strategy (Curtin 1998: 107–10). Certain kinds of private organization may do likewise. Although the content is unimpressive, the inaugural Transparency Report of KPMG International (2005), aco-operative registered in Switzerland and run from Amsterdam, demonstrates the importance that this Big 4 financial services firm attaches to reasserting its legitimacy after its US tax scandal. The worst feasible out come of that scandal would have been the destruction of KPMG, as indeed happened to Arthur Andersen, the erstwhile fifth Big 5 firm, as a direct result of the Enron scandal.

Two polar views might be taken of these seven relationships between transparency and other concepts. Transparency might be seen as a core concern, to be intrinsically valued, or as something to be valued instrumentally, as a building block that underpins the seven intrinsically valued concepts. On that view, transparency is presumed to make a non-negative contribution to each of these ‘higher’ concepts.

(p.68) Alternatively, transparency and the other seven objects might be classified as higher level and lower level. Disciplinary background and ideological disposition are likely to affect an individual author’s view of the desirable hierarchy of the eight objects. The present author would rank four (effectiveness; accountability; fairness; and legitimacy, in no particular order) above four (transparency; trust; autonomy and control; and confidentiality, privacy and anonymity, in no particular order). The contention behind this ranking is that the second four are in large part means to the first four. The ‘right’ varieties of transparency are valued because they are believed to contribute, for example, to effective, accountable, and legitimate government and to promoting fairness in society. Where government is ineffective, unaccountable, and illegitimate, and where society is characterized by unfairness, the researcher can look for evidence of shortfalls in the second group of four. Governments that are corrupt and/or spy on their citizens will not satisfy the first four objects. Although others would certainly disagree with this hierarchy, couching the debate in these explicit terms focuses attention on otherwise obscured trade-offs and synergies.

3. Limits to Transparency

The seven exercises in counterpoising help to identify not only the benefits of transparency but also how ‘limits to transparency’ may be required in order to contain resource consumption (both direct and compliance costs) and to ensure that other objectives are met. Three distinct arguments for limiting transparency can be identified.

First, inappropriate varieties of transparency—mostly operational aspects of process, in the terminology of Chapter 2—can impose heavy costs in terms of the achievement of other objectives. For example, inappropriate varieties can impede effectiveness and undermine privacy. As in the case of the Hutton Inquiry’s release of government and BBC memoranda and emails (Hutton 2004),[8] knowledge that private discussions may at some future date be exposed to public ridicule and/or legal process is likely to alter working methods, accentuating the gap between **(p.69)** formal and informal decision-making processes. Similarly, the Railtrack legal case,[9] in which government emails and memoranda were disclosed in open court, highlights the possibility that the prospect of disclosure may modify working practices in the direction of less record-keeping and less record preservation. The notion that transparency involves every discussion, memorandum, email, and phone call being liable to disclosure is threatening. Another difficulty is that, when accounts of incidents affecting individuals (for example, patients, students, employees, clients and so on) receive media coverage, the continuing obligations of confidentiality owed by the organization may inhibit a frank response (for example, correcting

facts and misrepresentations). These circumstances are bound to have significant effects on individual and organizational behaviour, some of which will not enhance efficiency or effectiveness.

Therefore, decision-making space needs to be protected, and the way in which this is done by providers operating under surveillance may impair efficiency and effectiveness. In a parallel literature on transparency in international negotiations between states, there has been considerable attention to the need for negotiating space within which mutually beneficial outcomes can be constructed but whose formulation may involve the sacrifice of public commitments. Whilst all parties may be able to defend the final deal, revelation of negotiating offers, especially those that were not finally required, might undermine support for the deal among the parties' own constituencies.

Second, all varieties of transparency might work against the 'social functions of ignorance', particularly in terms of ignorance sustaining pre-established social orders and preserving social harmony. For example, there are situations in both international and domestic politics when a large amount of ambiguity and fudge about process and expected outcomes may lubricate peace initiatives, whether in Palestine or Northern Ireland. Very little can be said at a general level; attitudes to limiting transparency for such reasons (for example, differentiated messages to Israeli and Palestinian publics, or letting the Irish Republican Army non-transparently dispose of its weaponry) are contingent on specific circumstances.

(p.70) Third, transparency does not mean a free-for-all, in terms of immediate and/or complete satisfaction of demands for governmental information. It certainly does not include spinning by governments or leaking by the disaffected. Allen (2000) noted: 'A vital part of transparency is discipline in the release of information.' Unauthorized disclosure of market-sensitive information will reduce trust in capital markets, in contrast to the beneficial effects of regulated disclosure. Some limits on transparency may afford some protection against centralized political power and/or intrusive media, especially when these have developed close manipulative relationships. Even when the political repercussions of 'exposure' of personal 'scandals' are modest, the capacity to wound and disrupt is significant. Information may centralize power, removing 'space' for 'subordinate' actors and creating the illusion that everything can be settled centrally. Moreover, inappropriately structured arrangements for transparency can result in harassment and game-playing, reflecting organizations' vulnerability to opportunistic behaviour and their defensive responses. The UK media environment does not permit disinterest at the centre of government, which finds itself ridiculed if it is not seen to be 'in charge' of everything. Paradoxically, the media induce the intensification of centralization whilst denouncing existing centralization.

There is sufficient force in these limits to urge caution about claims made for transparency. Specifically, transparency should not be elevated to an intrinsic value. If more transparency of a particular direction or variety would enhance, for example, government effectiveness and accountability, then the case should be made on those grounds. Some of the official enthusiasm of organizations such as the IMF for transparency strikes a discordant note in the light of the past views and practices of such organizations, and indeed in the light of some current practices, such as the process for appointing the IMF Managing Director. In terms of the setting of monetary policy by central banks, Thornton (2003: 478–9) is absolutely explicit that the test of transparency over secrecy is superior effectiveness. If the contingent world has changed, and present circumstances mean that transparency in information release supports policy objectives, the case for transparency can be made on those grounds.

4. Conclusion

Governments need to construct an effective framework for transparency which combines respect for time sensitivity with maximum feasible **(p.71)** recourse to event transparency, and is restricted, where appropriate, to only the procedural aspects of process transparency. Such frameworks for transparency will be conditioned by the constitutional framework within which a particular government is located. The work of executive government often has to be done in a context of conflict with the media. This leads to concerns that public organizations might not be able to 'think' and that there will therefore be an inferior consideration of policy options. Moreover, self-protection both against centralizing forces within the public sector, most notably from the core of central government, and against (what is perceived to be) unfair media portrayal, is one reason why public organizations have been developing harder shells, seeking to prevent unauthorized disclosure of information or position-taking by their employees. Institutional weakness not only contributes to policy and implementation failure but also damagingly opens up operational aspects of process. A practical advantage for governments is that proactive disclosure often kills stories, which otherwise feed upon government being portrayed as concealing information.

Technological advances (see Helen Margetts in Chapter 12 of this volume) have clearly reduced the direct costs of transparency, as the incremental costs of making existing documentation available are often minimal. The reduction of logistical obstacles to transparency heightens the importance of determining which directions and varieties of transparency are appropriate for particular organizations and habitats. The indirect costs of transparency are more difficult to assess. When sunlight becomes searchlight it can be uncomfortable and when it becomes torch it may be destructive. Therefore the synergies and trade-offs discussed in this chapter need to be evaluated carefully. This kind of reflection is more likely to occur if it is remembered that transparency should be regarded as an instrumental value.

The beneficial nature of transparency is contingent upon the directions and varieties of transparency that occur and on the habitat with which they interact. This is a much more optimistic conclusion than is reached by Onora O'Neill in Chapter 5, though there are echoes here of some of her concerns. It is vitally important that claims to transparency are tested rather than allowed to go unchallenged, and that the system design issues, particularly about the respective roles of upwards and downwards transparency, are addressed.

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Notes:

([1]) To widespread astonishment, though to the delight of the CBI which had lobbied against mandatory OFRs, the abolition of the mandatory requirement was announced in the December 2005 Pre-Budget. At the time of writing, it is not clear what is going to happen: the Accounting Standards Board has reissued its guidance on OFRs in a different category of pronouncements and many companies may not regard them as ‘voluntary’.

([2]) Freedom of information is extensively discussed elsewhere in this volume, especially by Birkinshaw (Chapter 3), Roberts (Chapter 7) and McDonald (Chapter 8).

([3]) An indication of the importance of habitat and cultural expectations is provided by the fact that in Finland it is possible to visit the local tax office and find out the amount of income an individual has declared and the amount of central and local taxes paid. However, individuals are

identified only by name and year of birth, not by identity card number or home address (information supplied by the National Board of Taxes, Helsinki).

([4]) Rozenberg (2004: 14) noted that ‘these remarks by Lord Woolf were *obiter dicta*—incidental observations not material to the case, and therefore not binding on other judges’.

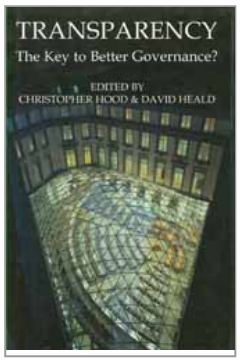
([5]) In Chapter 6 below, Andrea Prat discusses differences in attitude to transparency between the Bank of England (minutes and voting records are published a month in arrears) and the European Central Bank (ECB records remain secret for fifteen years); he provides a possible explanation in terms of the Bank of England having a single principal (UK government) and the ECB having multiple principals (i.e. Eurozone member-state governments).

([6]) Montagnon (2005a, b) argues against mandatory disclosure of how company shareholders vote their shares, in part on this ground: ‘One fear is that mandatory disclosure could lead to unfair pressure on institutions from single-issue campaigners who might have a worthy cause but are themselves unaccountable. A mix of serious campaigners, zealots and eccentric busybodies is undoubtedly already preparing to wade in’ (Montagnon 2005b).

([7]) One element in Power’s ‘social construction’ of the auditee (2003: 200–1) is that ‘she hears the rhetoric of excellence in official documents but lives a reality of decline’.

([8]) This inquiry was appointed by the Prime Minister (Tony Blair) following the death of Dr David Kelly, a Ministry of Defence civil servant who had been identified as the source of criticisms of the Government’s Iraq war policy that were broadcast on BBC Radio 4’s *Today* programme.

([9]) Railtrack plc, the privatized railway infrastructure owner, went into administration on 7 October 2001, a decision in which the Department of Transport and the UK Treasury were involved. Railtrack plc was replaced by Network Rail, a company supported by the UK government but classified to the private sector by the Office for National Statistics. Some shareholders brought a case in the courts for misfeasance by the government, but lost the case (Adams and Tait 2005).



Transparency: The Key to Better Governance?
Christopher Hood and David Heald

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Transparency and the Ethics of Communication

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[–] Abstract and Keywords

Transparency is widely supposed to make institutions and their officeholders both more trustworthy and more trusted. Yet in the United Kingdom many institutions and office-holders on whom transparency requirements have been imposed across the last fifteen years are now seen as less trustworthy, and are apparently less trusted than they were before the requirements were introduced. Does this suggest that transparency does not improve trustworthiness? Or that it increases trustworthiness without increasing trust? Or is the supposed evidence for declining trustworthiness and declining trust misleading? How confident can we be that transparency supports either trustworthiness or trust? Government, corporations, and their critics seemingly converge in seeing transparency as indispensable for accountability and good governance, for preventing corruption and improving performance, and for increasing trustworthiness and trust. But does transparency have these desirable effects? Transparency requirements may fail to improve either trustworthiness or trust because they set a one-sided standard for public, corporate, or other communication. Although transparency demands too little for effective communication, it is an effective antidote to secrecy.

Keywords: United Kingdom, transparency, communication, secrecy, trust, trustworthiness, accountability, good governance

1. Introduction

TRANSPARENCY IS WIDELY SUPPOSED to make institutions and their officeholders both more trustworthy and more trusted. Yet in the United Kingdom many institutions and office-holders on whom transparency requirements have been imposed across the last fifteen years are now seen as less trustworthy, and are apparently less trusted than they were before the requirements were introduced. Does this suggest that transparency does not improve trustworthiness? Or that it increases trustworthiness without increasing trust? Or is the supposed evidence for declining trustworthiness and declining trust misleading? How confident can we be that transparency supports either trustworthiness or trust?

These questions have immediate practical importance. As noted by Christopher Hood in Chapter 1, there is no doubt that requirements for transparency in public, professional, and corporate life have been greatly increased in many parts of the world, and certainly in the United Kingdom, in recent years. In the UK transparency was identified as one of the basic standards for conduct in public life by the Committee for Standards in Public Life (The Nolan Committee) set up under John Major's government in 1995; it has been endorsed in all their subsequent reports.[1] Transparency has now become a standard component of corporate governance, and has been built into the complex regulatory culture **(p.76)** that penetrates so much of institutional and professional life (Moran 2003). It is endorsed by the Better Regulation Task Force, which was set up in 1997 to comment critically on the adequacy of that burgeoning culture, and is central to all their reports.[2] Transparency is also the guiding principle of the Freedom of Information Act 2000, whose purpose is to 'make provision for the disclosure of information held by public authorities or by persons providing services for them'.[3] Government, corporations, and their critics seemingly converge in seeing transparency as indispensable for accountability and good governance, for preventing corruption and improving performance, for increasing trustworthiness and trust. But does transparency have these desirable effects?

There is quite a large measure of consensus about the way that transparency is supposed to work. It is supposed to discipline institutions and their office-holders by making information about their performance more public. Publicity is taken to deter corruption and poor performance, and to secure a basis for ensuring better and more trustworthy performance. If transparency supports more trustworthy performance, it should also, it seems, support trust in that performance. Those who are required to provide others with evidence for judging their performance face strong incentives to earn others' trust, rather than to seek it by underhand, deceptive, or corrupt means, or by playing on public gullibility. If this view of the merits of transparency is convincing, we would expect strengthened transparency requirements to support both more trustworthy performance *and* increased trust in the institutions and office-holders of whom transparency has been required. Yet this does not seem to have happened.

On the contrary, the introduction of transparency requirements in the United Kingdom appears to have coincided with reducing rather than increasing levels of public trust in the very institutions and office-holders subjected to those requirements. During the last decade, it is constantly said, public life in the UK has become mired in a crisis of trust, and trust in many institutions and their office-holders has declined. Opinion polls are supposed to provide one of the main sources of evidence for this **(p.77)** decline in trust. The polling organization MORI lists nearly 500 entries under the heading of *trust* on its website, and many of them offer evidence that we say that we do not trust people of this or that sort very much, and in particular that we say that we trust politicians and journalists very little.[4]Suspicion and cynicism about institutions and their office-holders have become commonplace in media and public discussion of political, corporate, and institutional activity. On the surface this is surprising. If more institutions and office-holders are being held to higher standards of transparency, surely we might expect the reverse? Should not transparency lead to more trustworthy performance, and more trustworthy performance be reflected in rising rather than declining public trust?

One rather optimistic explanation of these discrepancies might be that there has not yet been enough time for the public to respond to recent increases in transparency in public and corporate life, or to other measures taken to improve trustworthiness. On this view the persistence—indeed increase—in mistrust merely reflects the fact that old habits die hard. Those who have already become suspicious remain suspicious, and a great deal of evidence of change

will be needed before they change their minds. Moreover, those who are now required to be more transparent may not yet be very good at it, or may even make unwarranted use of the exemptions in FOI legislation to hide information, resulting in the persistence of a culture of secrecy in certain areas, and these institutions will take time to improve or fall into line. On views such as these, the beneficial effects of a more transparent institutional and public culture will emerge, but we must all be very patient. Transparency is the right remedy, but has not so far been pursued for long enough, or with sufficient vigour. Although mistrust—not to mention apathy and ignorance—have grown as transparency requirements have been extended, the proper remedy is nevertheless to increase the dose by introducing even stronger requirements for transparency, applying them more widely and enforcing them more rigorously.

2. Explaining Discrepancies

There may, however, be other, less temporary reasons why transparency, trustworthiness, and trust are not better correlated. One rather popular **(p.78)** view of persisting mistrust is that institutions and office-holders have not in fact become more trustworthy, and that growing public mistrust is a wholly proper response to the growing untrustworthiness of institutions and their office-holders. Yet is this explanation at all convincing? It is, of course, always easy to find examples of untrustworthy public, corporate, and professional action. Some recent and not so recent cases of untrustworthy action have been so well publicized that they can be evoked by a single word—Maxwell, Enron, Shipman, BCCI—or the names of actually or supposedly untrustworthy politicians. But while the hypothesis that the current decline in trust is a reasonable response to a decline in trustworthiness is popular, indeed a journalistic truism, it is hard to test claims that trustworthiness has declined. Often we have no more than patchy information about past trustworthiness; even when we have some evidence, it can be hard to compare past and present levels of untrustworthiness. Is untrustworthy action now more common? Do we tend to see the past through rose-tinted spectacles? Do we dismiss or condone past untrustworthiness? Were past scandals more often brushed under the carpet or hushed up —possibly because there were fewer or less stringent requirements for transparency?

Moreover, if we could establish that untrustworthiness has increased during the very years in which requirements for transparency have increased, this would undercut central arguments for requiring transparency. It would show that transparency requirements do not work, or that they work less well than enthusiasts suppose, or that they do not work in all circumstances. Transparency is taken to support trustworthiness because it requires institutions and office-holders to reveal what they do, so providing a basis for others to judge and (where necessary) sanction their performance. It is supposed to provide evidence for reproaching, penalizing, or dismissing those whose performance is poor, and for reforming or disbanding failing institutions. Transparency creates reasons for institutions and their office-holders to be more trustworthy, and reduces their chances of securing undeserved trust by playing on public gullibility. If transparency does not have these effects, the case for requiring it is greatly weakened.

A quite different, but no less problematic, way of looking at the coincidence of increasing transparency with declining trust might maintain that transparency at least increases trustworthiness, and that we can explain away the lack of any commensurate increase in trust. On one version of this view, many claims to mistrust are merely verbal, and are not reflected in what people do. Again, there is some evidence for this. For **(p.79)** example, many people systematically rely on those whom they claim not to trust. They may claim not to trust newspaper journalists, yet believe what they read in the papers (including what journalists report about a crisis of trust!); they may claim not to trust professionals, but use their services.

On this view, words and action point in different directions, and claims not to trust should not be taken at face value. They are simply a culturally respectable façade that is widely adopted in a world that derides misplaced trust more than it derides misplaced suspicion. Once we understand the cultural changes that have made it so useful or fashionable to disown the trust we in fact continue to place in others, we will find little evidence of any actual decline in trust. Those who accept this view can consistently maintain that transparency improves trustworthiness, and explain away the apparently concurrent decline in trust by construing it as a matter of superficial attitudes rather than underlying commitments.

This approach is commonly taken by those who think of trust as a matter of attitude or culture. For example, pollsters' questions typically try to elicit a single response to a wide range of cases and situations. They are questions about attitudes. Questions such as 'Do you trust journalists (politicians, nurses etc.)?' or 'Do you trust journalists (politicians, nurses etc.) to tell you the truth?' preclude well-judged answers of the form 'I trust some but not others, in some matters, but not others'. By *demanding* answers that are detached from any specific evidence, such questions *require* respondents to report undifferentiated attitudes, and to suppress the discrimination that they would bring to judging real situations, in which they would aim to place and refuse trust intelligently. This conception of trust as an individual attitude is also found in some philosophical writing (Baier 1996; Jones 1996).

A parallel, non-individualistic view of trust is common in the sociological literature. It sees trust as rooted in (inherited) culture, rather than as linked to the assessment of evidence or to congruent action. This literature often depicts trust as a reservoir of 'social capital' possessed by fortunate, high-trust societies, but missing or depleted in low-trust societies (Fukuyama 1995; Putnam 1995 and 2000). On this view, trust once squandered is hard to restore. It is based on social rather than individual virtues, on inherited culture rather than individual judgement, on a dense network of intermediate institutions rather than on information about specific cases. Individuals in low-trust societies are driven to 'co-operating only under a system of formal rules and regulations, which have to be negotiated, agreed to, litigated, and enforced, sometimes by coercive means' (Fukuyama 1995: 27). Once trust is dissipated, the only way to **(p.80)** support co-operation is by imposing formal systems of accountability, which include transparency requirements, despite the fact that they impose large transaction costs and create damagingly perverse incentives. On this view, systems of accountability are seen as *replacing* or *bypassing* trust but supporting trustworthy performance.

However, those who see trust in these ways may find it hard to explain *how* transparency can increase trustworthiness without increasing trust. Transparency requirements cannot increase trustworthiness unless they convince institutions and their office-holders that information about their performance will be made public. Yet if evidence of their performance is made public, will it not provide others with a better basis for placing and refusing trust? If so, should not increased transparency lead *both* to more trustworthiness (by creating incentives) and to more trust (by making evidence available)? If transparency works, then it seems that trustworthiness and trust should vary together.

3. Communication and Secrecy

Each of these approaches to explaining away the combination of increasing transparency with declining trust is unsatisfactory in certain ways. The thought that the discrepancy is merely due to a time lag is wearing thin after many years of increasing transparency requirements. The thought that transparency has improved neither trustworthiness nor trust casts doubt on the basic reasons for demanding greater transparency. The thought that transparency has increased

trustworthiness without increasing trust overlooks the fact that transparency is meant to work by making the very evidence needed to place or refuse trust intelligently more available and more public.

A fourth line of thought may offer more. Perhaps we have expected too much of transparency, which may offer a rather limited basis either for trustworthiness or for trust. Transparency requirements may fail to improve either trustworthiness or trust because they set a one-sided standard for public, corporate, or other communication. By this I do not mean only that office-holders and institutions in public and corporate life are generally required to work transparently, while their critics are not. It is true that transparency requirements have been imposed on government, business, and their office-holders, but not on journalists and campaigners, or on members of the public who criticize government and business. This allows people who do not face the disciplines of transparency in their **(p.81)** own working lives or institutions to criticize others for failing to meet standards which they need not and do not meet—sometimes, no doubt, with misplaced and unattractive self-righteousness. This double standard may be distasteful and exasperating to those who find themselves criticized by others who work to less demanding standards. However, it is not the most troubling one-sidedness of transparency requirements. (For discussion of one-sided or asymmetric transparency, see David Heald in Chapter 2 above.)

Contemporary transparency requirements are one-sided in a further and more fundamental way, which has nothing to do with their scope. They are one-sided because they over-emphasize one aspect of communication, and can be met without any communication whatsoever actually taking place. Transparency mandates *disclosure* or *dissemination*, but does not require effective communication with any audience. An emphasis on transparency encourages us to think of information as detachable from communication, and of informing as a process of 'transferring' content, rather than as achieved only by speech-acts that communicate with specific audiences. This way of thinking may represent the 'flow' of information as analogous to a flow of water, which can be ensured or prevented, interrupted or increased, accelerated or cut off, and above all directed by those who control the supply. It then becomes natural to see informing mainly as a matter of disclosure and/or dissemination by those in control of information, and to overlook or downplay the fact that effective communication must reach audiences. Transparency can be achieved without taking account of the audiences it is meant to benefit, or of the epistemic and ethical norms that are indispensable for adequate communication.

A more complete view of communication would see it as audience-directed, and as failing if it ignores the epistemic and ethical norms required for successful communicative acts. It would take account of the reality that information can be disclosed without being seen, read, or understood by any, let alone many, others—indeed without being comprehensible to any, let alone many, others—so may find no audience at all. Huge quantities of information are now made public in order to meet transparency requirements, but a great deal of it is not actually communicated to anyone.

Some ways of complying with transparency requirements aim to disclose matters only to relatively expert audiences. For example, company reports and government websites typically disclose documents that cannot be read without considerable professional expertise. Other ways of **(p.82)** complying with transparency requirements are supposedly suitable for 'lay' audiences. They may offer simplified information, such as league tables and rankings. Both sorts of information are readily disseminated by contemporary information technologies. Disclosure

and dissemination both of expert and of ‘lay’ information can be achieved at the click of a mouse.

Yet effective communication is no easier than it ever was. Good communication still has to be directed to specific audiences, so must be audience-sensitive. Audience-sensitive communication must still meet epistemic and ethical standards well enough for its audiences to understand and assess what is communicated, and (if they choose) to respond. However, transparency requirements and the technologies that support them do not require and often do not help institutions and officeholders to meet these standards. It is possible to be transparent, yet cavalier or neglectful about the constitutive norms for successful communication. Yet unless material that is disclosed or disseminated can be followed and assessed by its supposed audiences, it will not reach them; and unless it is actually grasped by them, it may neither improve incentives for trustworthy performance nor provide evidence for placing trust intelligently.

Although transparency demands too little for effective communication, it is an effective antidote to secrecy. So if the *only* problem with public communication were excessive secrecy, transparency would provide a remedy. As Christopher Hood shows in Chapter 1, many earlier arguments for transparency saw the reduction of secrecy as its principal point and merit, especially in affairs of state. Over two hundred years ago in his essay ‘Toward Perpetual Peace’, Immanuel Kant claimed that secret reservations in treaties nullified their force: ‘No treaty of peace shall be held to be such if it is made with a secret reservation’ (Kant [1795] 1996: 8.343). And as noted in Chapter 1, in 1918 Woodrow Wilson began his famous fourteen points with an even stronger demand for transparency in diplomacy by calling for ‘open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view’. Excessive secrecy in government still lingers in the United Kingdom, even in the post-Cold War era, and was criticized in the 2004 report *An Independent Review of Government Communications* (the Phillis Report, see Cabinet Office 2004).

However, it is absurd to imagine that the *sole* way in which communication can fail is excessive or misplaced secrecy. Communication can fail **(p.83)** in many ways that have nothing to do with secrecy or opacity. It may fail because it flouts one or more of the elementary epistemic and ethical standards that are essential for specific audiences to understand and assess what is communicated. Communication will fail epistemically if it is unintelligible to intended audiences, or so heavily cluttered with irrelevance that they cannot discern which bits matter. Communicators who meet these elementary standards often fail in further ways. In particular, they may fail in accuracy (by making false truth claims) or in honesty (by making truth claims they believe to be false). As is well known, not all inaccuracy is dishonest, and not all dishonesty leads to inaccuracy, but communicators who fail in either respect very often fail in both by dishonestly putting forward inaccurate truth claims. The picture is complicated because inaccuracy and dishonesty come in many forms. Inaccuracies can range from gross distortion, to casual but significant omission, to trivial errors of fact. Dishonesties can range from outright lies, to economy with the truth, to subtle failure to include qualifications (Williams 2002).

Of course, it will be said, all of this is well known and those who advocate greater transparency *take for granted* that what is disclosed or disseminated will meet these (supposedly) elementary epistemic and ethical standards. This comment is, I think, both false and naïve. It is false because a great deal of institutional and official communication, including much that is

disseminated in the name of transparency, does not meet these standards. The comment is naïve because these standards are far from trivial. Meeting them is far more difficult than meeting transparency requirements. Transparency can be achieved even when the material disseminated is defective, or flouts the constitutive norms for adequate communication. In such cases transparency is more likely to multiply than to remedy problems. Those who seek to communicate effectively must still fashion their speech-acts with care, must still be sensitive to the actual capacities of their intended audiences, and must still meet a range of epistemic and ethical norms that are constitutive of adequate communication. Where those norms are met, transparency can indeed extend communication by ensuring that specific information reaches a wider audience. Where they are not, transparency can have quite different effects. (For a discussion of nominal versus effective transparency, see Helen Margetts in Chapter 12 below.)

Transparency that is decoupled from the discipline of the epistemic and ethical norms required for adequate communication may produce many unfortunate effects. Mere transparency may worsen communication **(p.84)** by spreading confusion, superstition, false and misleading beliefs, misinformation, and even disinformation—'spin' is after all no more than epistemically undisciplined dissemination. Dodgy political information, bogus news stories, inaccurate 'scientific' claims, and misleading product information can be disseminated all too easily—and doing so may spread confusion and misinformation, and fuel responses ranging from unwarranted panic to unreasonable complacency, from free-floating mistrust to promiscuous credulity. Needless to say, some effects of undisciplined transparency cause great harm. Confused, irrelevant, misleading, and false claims are not self-correcting, and their transparent dissemination does not ensure that they will be tested, refuted, or rejected—or even ignored. Information is not like a homing pigeon: it does not wing its way to relevant and receptive audiences. Although some dissemination that fails to meet adequate epistemic or ethical standards achieves a degree of communication, and although some misleading claims are corrected, other defective material that is transparently disseminated is neither corrected nor recalled. Even when it is corrected, and the corrections are disseminated, they may not reach those who received and accepted the original defective communication, and may not correct false impressions or beliefs, or mitigate their consequences.

It follows that transparency by itself is a very incomplete remedy for corruption, untrustworthiness, or poor performance in public and corporate life. It can achieve rather little unless the material disseminated is made accessible to and assessable by relevant audiences, and actually reaches those audiences. It cannot reach those audiences or provide a basis for supporting non-corrupt, trustworthy or proper performance unless it meets minimal epistemic and ethical standards. Although advocates of transparency do not mean to endorse the dissemination of defective or misleading material in the name of achieving transparency, they too often take for granted that what is disseminated will meet adequate epistemic and ethical standards. By emphasizing dissemination rather than communication, with its constitutive epistemic and ethical norms, they can lose sight of the basic demands of adequate communication. In consequence they may ignore the danger that communication itself may be corrupt, or defective, and may fail to discipline or deter such communication.

Unsurprisingly, communicating with intended audiences, especially about complex matters, has not become less demanding. Those who aim to communicate must still fashion their speech-acts with care; they must still take account of the actual capacities and beliefs of their audiences; **(p. 85)** they must still meet a range of epistemic and ethical norms that are constitutive of adequate communication. Where those norms are met, transparency may extend communication

by making information available to some audiences. Where they are not, transparency may worsen communication by spreading confusion, uncertainty, false beliefs, and poor information.

4. Trustworthiness without Trust

These realities suggest some reasons why transparency requirements cannot prevent trustworthiness and trust from drifting apart. Transparency can support trustworthiness, by making it (more) likely that those on whom transparency requirements are imposed believe that *at least some others* will come to know what they do—or fail to do. However, transparency requirements can support trust only if those whose trust is sought or desired actually come to know about the performance—or failure—of those on whom the requirements are placed. Unsurprisingly, transparency requirements by themselves are often too little to enable others to place or refuse trust intelligently.

Transparency may go some way to secure trust when it is tied to communication with actual audiences with relevant expertise. This can be illustrated by considering one of the older transparency requirements. A requirement on companies and public bodies to have their accounts audited and to publish them generally achieves a degree of communication about financial performance to certain others with the necessary expertise and time, who are paid to attend to the material. This is likely to ensure that institutions and their office-holders realize that their performance will be scrutinized, and to encourage them to be more trustworthy. Even if published accounts are arcane, indeed incomprehensible, to most of the world, audit requirements ensure that financial information is provided to and read byanexpert audience, so provides strong incentives for financial trust-worthiness.[5] Although the communication presented in auditors' reports is **(p.86)** limited and formalized,[6] it provides some check on the effectiveness and probity of financial management. Managers or directors may still be able to defraud, but audit makes it more likely that malpractice will be discovered and penalized, and deters corrupt or poor performance by creating strong incentives for those who are audited to behave properly.

By contrast, those without expertise or duties to examine accounts—including most members of the public and most shareholders—will be ill-placed to make any direct judgement of company or other accounts, even when transparency requirements are fully met. They will be in a position to decide whether to trust the integrity of accounts only if they can make a second-order judgement that audit has taken place, and has imposed a genuine discipline. They may, for example, know that financial audit provides a way of judging company accounts for those with the proper training. They may know that publication of company reports is preceded by detailed professional scrutiny of accounts by professional auditors, and by internal audit committees (led by non-executive directors). They may know that opportunities to question those reports are available to shareholders, and even to interested members of the public. If members of the public can make these second-order judgements, they may find some reason to trust the first-order judgements made by those with professional expertise, and trust may correlate with trustworthiness—up to a point.

However, what works (more or less) in the case of standardized requirements to publish company accounts may not work for transparency requirements that are not linked to systems of accountability with which members of the public are indirectly familiar. The mere fact that arcane requirements for disclosure and dissemination have been imposed on those performing complex tasks—even if widely known—offers a pretty meagre basis for deciding whether to place or to refuse trust. Since most members of the public who lack expertise and time to understand or assess information made available in the name of transparency for themselves (not to mention

an interest in doing so), transparency may not offer them much basis for judging where to place and where to refuse trust. If they trust material that is made available in **(p.87)** response to transparency requirements, this is likely to be because they can make a second-order judgement that it has been subjected to some form of independent scrutiny with which they have at least a vague familiarity (by auditors, monitors, inspectors, examiners), rather than because the results of that scrutiny have been disseminated.

This suggests that transparency is a fifth wheel on the wagon of public, commercial, and professional accountability. Complex activities are mainly held to account by other methods, such as professional certification, meritocratic appointment procedures, complaints procedures, or independent scrutiny of performance by those with time and expertise. It is these procedures and practices that generally support trustworthy performance. The transparent dissemination of the results of these forms of accountability may offer some *indirect* support for members of the public to place and refuse trust intelligently, if—but only if—they have indirect, second-order evidence that these procedures are effective and properly used. Transparency by itself provides too little for expert judgement, where genuine communication that meets epistemic and ethical standards is needed, hence too little for securing trustworthy performance. But transparency also provides too little for 'lay' judgement, which needs simpler, even if indirect evidence of the adequacy of relevant forms of control. It follows that transparency provides an incomplete basis either for securing trustworthy performance or for placing and refusing trust.

5. *CUI BONO*: Who Gains from Transparency?

Why then have transparency requirements become so prominent in contemporary public, commercial, and professional life? What is their real appeal, if transparency is at best one element of the practices needed to support trustworthiness and expert trust, and only indirectly relevant to supporting public trust? A full and differentiated answer to these questions would require more serious historical evidence and judgement than I can offer. However, I think it is possible to identify two major advantages that transparency requirements currently offer to specific groups. One advantage benefits expert 'outsiders'. They benefit when others are subjected to transparency requirements, because they gain access to information that might otherwise have been unavailable to them. The other advantage benefits powerful 'insiders', who can use forms of transparency to transfer liability and risk to others.

(p.88) Transparency requirements can benefit expert 'outsiders' by enabling them to access information about the performance of institutions and their office-holders. This is particularly helpful to expert critics of government, business, and professional performance. Expert critics often have the time and ability to grasp and use information in ways that the wider public does not. Transparency is therefore particularly useful to the media and to campaigning organizations, who can discover information that bears on others' performance (while they themselves are generally exempt from like transparency requirements). Some of them may use that information for partisan purposes, others may use it to provide the wider public with second-order reasons to place trust in the trustworthy, and to refuse it to the untrustworthy. Where the first use predominates, it is not at all surprising that transparency does not support the intelligent placing and refusal of trust.

Transparency also benefits powerful 'insiders' by allowing them to avoid or transfer liability, and so to reduce risk. In many commercial transactions, disclosure is deemed sufficient to transfer liability, and thereby certain risks, from those who provide products and services to those who purchase or use them; in other cases disclosure is seen as enough to transfer certain risks or liabilities to the general public. So whereas mere dissemination or disclosure without adequate

communication cannot support the intelligent placing and refusal of trust, it is (perhaps surprisingly) taken to be enough to limit liability. Where *caveat emptor* is the rule, mere disclosures count as disclaimers. This use of transparency to benefit 'insiders' is particularly common in commercial life, where companies can use disclosures to limit their liabilities. Such disclosures are treated as if they were a form of communication, and are (misleadingly) assumed to inform and warn, even if most consumers or most members of the public do not, or cannot, read or understand them.

Indeed, it is often all too plain that the real aim of certain practices of disclosure is *not to communicate*. Standard practices such as using print so small that many will find it hard to read, or terminology so arcane that most will find it hard to follow, suggest that warnings, documents, and labels are meant to *transfer liability* without *communicating risks effectively*. The disclosures made in the small print of insurance policies, in the product leaflets for prescription drugs, and in the product labels on ordinary consumer goods are typical examples of this approach. Information is disclosed, transparency is achieved: but what is going on is not really communication with customers or with the public, but a form of defensive risk management, by which companies can claim to have warned **(p.89)** those who buy their products, so reducing blame and litigation in the event of mishap, while avoiding genuine communication with those whom they supposedly warn. Similarly bogus 'warnings' are often posted in facilities used by the public with the aim of ensuring that those who own or manage the facilities are not held liable for mishaps. The real purpose of such uses of transparency is (it seems) not to protect the public or customers, but to protect providers and others by transferring liability for damage or injury (Power 2004).

Transparency has few enemies, but it also offers fewer and more limited benefits than is widely assumed. Like other forms of one-sided 'communication', dissemination and disclosure need not meet the epistemic and ethical standards required for successful communication with actual audiences. Disclosure and dissemination may leave 'audiences' unaware that there has been any communication, unable to understand what was communicated, unable to see whether or how it was relevant to them, or (at worst) misinformed or disinformed. The fact that some others—often the more expert—can grasp what is disclosed in order to achieve transparency, especially where they are trained and paid to do so, may help encourage trustworthiness, but is unlikely to be enough for placing and refusing trust intelligently. For even where information and informants are trustworthy, transparency *by itself* may leave many with little reason to trust, because it does not even aim to put themin a position to judge matters for themselves, or to follow, check, or challenge the information disclosed.

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(p.90) Putnam, R. 1995. ‘Bowling Alone: America’s Declining Social Capital’, *The Journal of Democracy*, 6(1), 65–78.

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Notes:

([1]) The Committee promulgated ‘Seven Principles of Public Life’, which were to apply to all public service. They are: selflessness, integrity, objectivity, accountability, openness (i.e. transparency), honesty, and leadership. Openness is taken as meaning that ‘Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.’ See www.public-standards.gov.uk/.

([2]) The Better Regulation Task Force was established by the Blair Government as an independent body to advise on action needed to make regulation and its enforcement accord with ‘the five Principles of Good Regulation’, which it identifies as Proportionality, Accountability, Consistency, Transparency and Targeting. The task force has now been reorganized as the Better Regulation Commission. See www.brc.gov.uk.

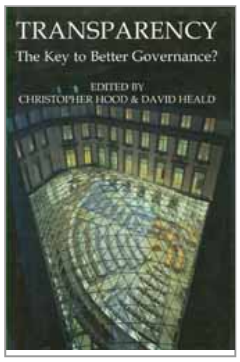
([3]) For the text of the Freedom of Information Act, 2000 see www.opsi.gov.uk/acts/acts 2000/00036--a.htm#1 (accessed 29 March 2006). For background to the legislation and its enforcement see www.dca.gov.uk/foi/bkgrndact.htm (accessed 29 March 2006).

([4]) For MORI poll findings and related information, see www.mori.com/.

([5]) However, the notorious corporate accounting scandals of recent years have been scandalous *not* because of failure to publish accounts, but because the accounts published were misleading. The failure was *not* in the first place a failure of transparency, but rather evidence that transparency can only produce its supposed benefits if the material disclosed or disseminated is intelligible, relevant, accurate and honest.

([6]) For good reasons. Power (2004: 48) points out that ‘These reports tend to be short with “boilerplate” descriptions of the audit process. The opinion only means as much as the terms of art through which it is expressed. Auditors know much more of course, and could in principle

say more publicly. But they argue that without some relief from exposure to unlimited liability, it is rational for their public reports to be cautious and coded.’



Transparency: The Key to Better Governance?
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The More Closely We Are Watched, the Better We Behave?

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[–] Abstract and Keywords

This chapter provides a brief survey of the economic literature on transparency. The conceptual tool used by economists is the principal-agent model, a game-theoretic setting in which transparency corresponds to the ability of the principal to observe what the agent does. Holmström (1979) provides a powerful and general rationale for full transparency. One can argue that the increase in accountability is not sufficient to offset other drawbacks such as the violation of privacy, the direct cost of disclosure, or the revelation of sensitive information. Alternatively, one can attack the link between transparency and accountability: it is not necessarily true that more disclosure makes the agent behave better. Holmström showed that, in a world of complete contracts, the more the principal knows about the agent, the better the agent behaves. Some objections to Holmström – the right to privacy, the direct cost of disclosure, the risk that hostile parties learn sensitive information – are perfectly valid, but they find limited application in politics, corporate governance, and other important areas.

Keywords: transparency, principal-agent model, principal, agent, accountability, contracts, disclosure, privacy, politics, corporate governance

TRANSPARENCY IS A COMPLEX ISSUE, which can be approached from many angles and with various conceptual tools. This chapter providesa brief survey of the economic literature on transparency. The conceptual tool that economists use is the *principal—agent model*, a game-theoretic setting where a principal (for example, the citizen, shareholder) wants an agent (for example, the government, the CEO) to perform a certain task. In this setting, transparency corresponds to the ability of the principal to observe what the agent does. We can then ask what happens when transparency improves.

The survey begins with the key theoretical result in this area. Holmström (1979) provides a powerful and general rationale for full transparency. More information about the agent's behaviour makes the agent more accountable and more likely to work for the common good. The rest of the contribution discusses a long list of objections to this result, from both a conceptual and a practical viewpoint. Given that Holmström asserts that transparency improves

accountability, possible criticism belongs to two broad classes. First, one can argue that the increase in accountability is not sufficient to offset other drawbacks such as the violation of privacy, the direct cost of disclosure, or the revelation of sensitive information. Alternatively, one can attack the link between transparency and accountability: it is not necessarily true that more disclosure makes the agent behave better. We will discuss both classes of objections, with a particular emphasis on the latter because it can be analysed within the principal—agent setting. The survey concludes with a tentative appraisal of the validity of the Holmström benchmark and its relevance for politics and corporate governance.

(p.92) 1. The Principal—Agent Model

The economic model that is most useful to analyse transparency comes from game theory. There is a *principal* (conventionally, she), who requires a certain service but does not have the time or the ability to take care of it directly. She therefore enters a contractual relation with an *agent* (he), who can potentially provide the service. First, the principal offers a contract to the agent, which the agent accepts or rejects. The contract is designed by the principal and it specifies a payment from the principal to the agent, which may be contingent on observable outcomes. Once the agent knows the contract, he takes an action (or a series of actions) on behalf of the principal. The action may involve effort or other forms of disutility on the part of the agent, and it produces, perhaps stochastically, an observable outcome which will then determine the agent's compensation on the basis of the contract in place.

To make things more concrete, let us look at a simple principal—agent relation. The principal is a retail investor who is looking to invest her savings in the stock market, but does not have the time and the inclination to do it personally. The agent is a mutual fund manager who can make investment decisions on behalf of the investor. In principle, the investor can design a variety of contracts. For instance, she could make the payment to the fund manager contingent on the return on the fund. One should expect that the willingness of the fund manager to spend effort and resources in trying to find the right investment strategy depends on the kind of monetary incentives that he is offered.

Table 6.1. The principal—agent model.

Principal	Agent	Action
Car owner	Mechanic	Repair car
Patient	Doctor	Perform tests, choose therapy
Employer	Worker	Perform job
Shareholders	CEO	Manage company
Investors	Fund manager	Choose portfolio
Citizens	Government	Choose policy

As we can see from Table 6.1, the principal–agent model applies to a number of interesting economic relations. Typically, the principal does not observe the details of the agent's action. Holmström (1979) assumes that the principal can observe a list of variables, and that the contractual payment can be contingent on those variables. The transparency result is then immediate: *adding one more observable variable can never hurt the* **(p.93)** *principal*. The principal is free to make the payment contingent on that additional variable, and she will do so if and only if it increases her net expected utility (expected benefit from the agent's action less expected payment to the agent).

Holmström makes this result more precise. He provides a mathematical condition on the information provided by the additional variable such that the principal is strictly better off if and only if such condition is satisfied. Basically, an additional variable is useful if it provides more information on the action that the agent takes.

The principal benefits from more transparency, but can the agent be hurt? In general, the agent benefits from the presence of an informational asymmetry between himself and the principal. His ability to keep his action hidden forces the principal to offer high monetary payments for positive outcomes. If the informational asymmetry reduces, the principal may be able to reduce payments. In the limit case, where the agent's action is perfectly observable, the agent will only be paid a wage that compensates for the disutility of effort.

However, the expected cost to the agent is never larger than the expected benefit to the principal. For every improvement in transparency, there exists a monetary amount such that, if the improvement is accompanied by the payment of that amount from the principal to the agent, then both the principal and the agent are better off.

2. The Full-Transparency Principle in Practice

In real life, we observe systematic deviations from full transparency in several areas. Take the fund management example discussed above. Investors are typically supplied with limited information on the composition of the fund they own. Currently, the US Securities and Exchange Commission (SEC) requires disclosure every six months, which consists of a portfolio snapshot at a particular point in time and can easily be manipulated by readjusting the composition just before and after the snapshot is taken—a well-documented practice known as *window dressing*. It would be easy and almost costless to have more frequent disclosure by requiring mutual funds to publicize their portfolio composition on the Internet. Yet there is strong resistance from the industry to proposals in the direction of more frequent disclosure (Tyle 2001).

In corporate governance, violations to the transparency principle are so widespread that some legal scholars argue that secrecy is the norm **(p.94)** rather than the exception in the relation between shareholders and managers:

> Corporations—even the largest among them—have always been treated by the legal system as 'private' institutions. When questions about the availability of corporate information have arisen, the inquiry has typically begun from the premise that corporations, like individuals, are entitled to keep secret all information they are able to secure physically unless some particular reason for disclosure…could be adduced in support of a contrary rule. So deeply embedded in our world view is this principle that it is not at all uncommon to hear serious discussions of a corporate 'right to privacy'. (Stevenson 1980: 6)

In politics, the principle of open government has made great inroads in the last decades, but there are still important areas in which public decision-making is, by law, protected by secrecy. For instance, all Freedom of Information Acts include circumstances in which the government can legally withhold information from citizens. And as events related to the 2003 Iraq war have shown, democratic governments can be expected to claim a need for secrecy in extremely controversial circumstances.

Why is there not more transparency in practice? The Holmström Principle may be a bad predictor of actual policy for two reasons. First, full disclosure may indeed be the right thing to do from a normative viewpoint, but there may be strong entrenched interests that prevent more transparency. As we saw earlier, the agent stands to lose some of his rents from an increase in disclosure and he should be expected to fight against a change in policy. There is no doubt that such a struggle exists in all the examples seen above. Principals (investors, shareholders, citizens) have been asking for more transparency for decades and have encountered varying degrees of resistance from their respective agents. Typically, the devil is in the detail: agents pay lip-service to the principle of openness but then make it onerous or impossible for the principal to get hold of the most sensitive information.

However, there is a second class of explanations. Full disclosure may not be the optimal policy, at least in certain cases. One can think of a number of reasons. First, a certain degree of privacy is a basic human right. While this argument is important for certain principal—agent relations, it does not seem to be central to the points debated in finance, politics, and governance.

Second, there may be a direct cost of information disclosure. While in the past disclosure occurred through paper publication, the Internet has greatly reduced the direct cost of making information public. It is **(p.95)** difficult to imagine that direct cost plays a determinant role in most cases of interest.

Third, the agent may be unable to communicate a certain piece of information to the principal without other hostile parties learning of it as well. The leading example of this ‘third-party’ rationale for secrecy is of course military intelligence. The British government cannot keep the British people fully informed about security operations without divulging these details to potentially hostile organizations. Similarly, a company that follows a full-disclosure policy may end up revealing non-patented information to competitors, or a fund manager who publicizes his trading strategy may be ‘front-run’ by other funds.

This is potentially a strong rationale for secrecy. However, in many of the instances under debate there is a simple way around it. Information should be fully disclosed, but with a delay that is sufficiently long to make it of little value to hostile parties (and sufficiently short to allow the principal to keep the agent accountable). For instance, the SEC has proposed that mutual funds make the daily composition of their portfolios public, but with a sixty-day time-lag.

Fourth, sometimes agents refuse to disclose information to principals on the grounds that the principals would not evaluate it ‘in the right way’. This argument is usually supported by the observation that investors/shareholders/citizens are not fully rational. CEOs, especially European ones, keep complaining about investors’ short-termism. For instance, the ousting of Werner Seifert from Deutsche Börse in 2005 prompted an avalanche of accusations against allegedly myopic investors.

This line of defence of secrecy may have some truth in it, but the argument that the principal is not fully rational is insufficient. The agent needs to argue that the errors that the principal could make are more damaging (to the principal) than the errors (or voluntary damage) that the agent himself can make. There is no evidence to support the thesis that principals misuse information in a way that is very costly to themselves. Instead, there is a large body of evidence that insufficiently monitored agents can ruin their principals. With more transparent accounting systems, disasters like Enron and Parmalat could have been avoided. Viewed in this light, the ‘principal’s irrationality’ argument lacks plausibility. While corporate leaders appear to stick to

this line of defence, most democratic governments seem to have abandoned it, if only because a government that accuses its citizens of irrationality would face a serious re-election challenge.

(p.96) Fifth, and finally, excessive transparency may create incentives for the agent to behave in ways that damage the principal. If that is the case, the principal would want to commit not to observe certain variables in order to avoid the damaging behaviour. This line of argument is the most subtle, and potentially the most convincing. We devote the next section to it.

3. Can Excessive Transparency Make the Agent Behave Badly?

We now go back to the principal—agent model to make one important modification. In Holmström the principal can make her payment contingent on every observable piece of information. In other words, contracts are *complete*. Every observable variable can become part of the contractual arrangement. In practice, this is not the case: contracts are far from complete. In politics, if contracts were complete, citizens could offer the prime minister a monetary payment contingent on all kinds of observable variables, like the GDP growth rate or health indicators. This never happens in practice. A typical high-ranking official is simply offered a fixed salary independent of any outcome. Similarly, in the United States most mutual fund managers are offered a percentage of funds under management, independent of the return they generate for their investors (this is due to SEC restrictions, which explain why hedge funds are usually incorporated outside the US).

The fact that contracts are not directly contingent on outcomes means that the agent must be kept accountable in a different, and more complex, way. The principal has an implicit threat: if she is unhappy with the agent, she can replace him with another agent. Citizens can vote for another party; shareholders can oust a CEO; and investors can take their money to another fund. This creates a dynamic game between the principal and the agent, often referred to as the *career concerns model*, and was first discussed by Holmström (1999).

We assume that the contract between the principal and the agent involves a flat fee for a given term (one could complicate the model without changing the results substantially). At the end of the term, the principal can either keep the agent (and offer a flat fee again) or replace him with a new agent (and offer a flat fee to him). For simplicity, suppose that the world ends after two terms (but see Holmström (1999) for an infinite-horizon formulation). The agent is characterized by a *type*, that is, a set **(p.97)** of personal characteristics that determine his ability, vision, willingness to put in effort, intrinsic honesty, political preferences, and so on.

In the second term, the agent is unaccountable and his behaviour is dictated purely by his type. A lazy agent would make no effort, a dishonest one would steal, and so on. The principal cannot observe the agent’s type directly, but she tries to infer it from the agent’s action in the first period. If she then feels that the agent’s type is ‘bad’, she will replace him before he can do further damage in the second term. The agent wants to keep his job and he realizes that the principal is watching him. He has an incentive to behave in the first term in a way that will convince the principal that he is a ‘good’ type. For instance, a lazy agent may want to look active in the first term in order to hide his laziness from the principal. In equilibrium (formally, a perfect Bayesian equilibrium), the principal has expectations on how the agent behaves, and such expectations are correct.

Career concerns models generate rich and interesting equilibrium behaviour on the part of the agent. From our viewpoint, they can be used to study the role of transparency. The question is:

what is the effect of letting the principal observe an additional variable at the end of the first term, before she decides to keep or replace the agent?

The answer depends on what the type of the agent is. As we shall see, two cases yield starkly different results. If the agent's type is his ability to exert effort, then more transparency benefits the principal, because it induces the agent to exert more effort in the first period and it allows the principal to identify and fire bad agents. If instead the type is the agent's ability to make the right decision, then more transparency can create an incentive for the agent to behave in a conformist way, which is highly damaging to the principal.

Let us begin with the case where the type is the ability to exert effort, developed in Holmström (1999). With small modifications, this case also encompasses situations where the type represents laziness (the lazy type is the one who experiences more disutility from work) and dishonesty (the dishonest type is the one who experiences more utility from stealing). At the end of the first period, the principal receives a signal on the output produced by the agent. The output is given by a sum of the agent's innate ability, the effort exerted by the agent, and a stochastic component. Holmström shows that, when the signal becomes more accurate (the variance of the stochastic component decreases), the agent puts more effort in the first period and the principal's information on the agent's type becomes more precise.

(p.98) Holmström's result is intuitive. I know that my boss is watching my output to understand whether I am an able worker. The quality of my output depends on how able I am, how hard I work and some factors that are not under my control, but the boss cannot distinguish between these three components. If she observes a high-quality output, she will ascribe part of this success to my innate ability and she will be less likely to fire me. However, if the factors not under my control play an important role, a high-quality output is more likely to be due to luck rather than my effort, and the boss will not give me a lot of credit for it. The more important the luck component, the less incentive I have to work hard to impress my boss. Conversely, if the factors that are not under my control are negligible, the channel that links my personal characteristics to the final output is less noisy and I have a strong incentive to work hard. Moreover, the principal will be able to form a more precise view on my ability after she observes my output and she will be more likely to fire (or reward) me when I am a bad (or good) worker.

Holmström's result is not universal, even when the agent's type is his ability to exert effort. There are cases where an increase in transparency leads to less, rather than more, effort on the part of the agent. An example is provided by Dewatripont et al. (1999). Suppose a teacher is trying to maximize the effort that her students put in to work on her course. At the end of the course, all students take an exam which provides a mark between 0 and 100. The score is observed by potential employers who use it to evaluate the expected on-the-job productivity of students (which is assumed to be correlated to their scholastic productivity). Hence, the higher the score, the higher the wage that the student can expect to receive. Dewatripont and his colleagues show that, under certain circumstances, the teacher may elicit more effort from her students if she commits to revealing a pass/fail mark rather than the complete score. That is, the principal sets a threshold score and she only communicates to employers whether a student is above or below the threshold. If the threshold is chosen carefully, a pass/fail mark acts as a strong incentive for the bulk of students to exert high effort in order not to be lumped with the fail group. However, the authors also show that the counter-example is somewhat special. With mild regularity conditions on the information structure, such a situation does not arise and more disclosure induces the agent to make more effort.

Let us now turn to the other case, when the agent's type is his ability to make the right decision. This assumption may be a more accurate representation of agents who are entrusted with high-level tasks, such as **(p.99)** prime ministers, CEOs, and fund managers, while the ability to exert effort is more important for jobs that involve less responsibility. Specifically, we assume that there is a stochastic *state of the world*, which the principal does not observe directly (What is the effect of different policies? What is the effect of different business strategies? What stocks are going to go up next year?). The agent's task is to observe the state of the world and take the appropriate decision (adopt the right policy or business strategy; buy promising stocks). The ability of the agent consists in the precision with which he observes the state of the world: a *smart* agent is one who receives an accurate signal.

In this set-up there are two classes of variables that the principal can observe: decisions (policies, business strategies, portfolios) and outcomes (statistics, profits, returns). Prat (2005) studies the effect of increased disclosure over these two classes of variables. Transparency over outcomes is uncontroversial: it plays the same role as transparency in Holmström (1999), inducing the agent to use his information efficiently and enabling the principal to screen agents more accurately. However, transparency over decisions may have detrimental effects. If the agent knows that his decision is scrutinized, he may choose to disregard his private information about the state of the world in order to look smart.

Consider mutual funds. Suppose that a smart fund manager has private information about future stock returns (that the rest of the market does not possess), while a dumb one has no private information. Under standard assumptions, the optimal decision for a dumb manager is to select a neutral portfolio (basically, one that reflects the composition of the market). Instead, a smart manager should deviate from the neutral portfolio to weight his holdings in favour of stocks he deems promising. This can be the equilibrium behaviour if returns are observed but portfolio decisions are not. Instead, if portfolio composition is observed as well, we have a contradiction. A dumb fund manager who chooses a neutral portfolio is immediately revealed for what he is, and will lose his investors. Hence, he has an incentive to pretend that he is a smart manager by deviating from the neutral portfolio. In equilibrium, all fund managers—dumb and smart—deviate from the neutral portfolio. Smart managers are more likely to obtain high returns, but the dumb ones too may be lucky. In this case, the investor may gain from committing to observing the portfolio return only, in order to ensure that dumb managers behave optimally. Dasgupta et al. (2005) analyse data on US institutional investors from 1984 to 2002 and provide evidence of widespread conformist behaviour on the part of institutions: institutions tend **(p. 100)** to buy (or sell) stocks that other institutions have bought (or sold) in the recent past and such stocks do worse (or better) than the rest of the market in the medium term.

The logic of the example can be extended to politics and business. Suppose that, faced with a crisis, a leader can adopt a radical solution or keep the status quo. A smart leader is more likely than a dumb leader to understand the cause of the crisis and to identify the right radical solution. If leaders behaved optimally, smart ones would adopt radical policies more often than dumb ones would. But from the argument seen above, this is not an equilibrium. Leaders who keep the status quo would be perceived as more likely to be dumb and would be replaced. Hence, every leader, dumb or smart, tends to adopt radical policies even when they are not necessarily optimal.

Prat (2005) also shows that transparency over decisions goes handin-hand with transparency over outcomes. If the principal can observe the output in an accurate and timely manner, then

disclosing the agent's decision has less negative effects because his desire to behave in a conformist manner is tempered by the risk that his decision turns out to be wrong. If instead final outcomes are difficult to observe, the principal runs the risk of facing extremely conformist agents and will want to reduce or delay disclosure of the agent's decision. This rationale is enshrined in one of the most important exceptions to the open government principle: the exemption of pre-decision information. These are documents that are prepared at an early stage, before a policy is formulated and hence implemented. If such documents were made public, citizens could observe nothing about outcomes and there would be a serious risk that advice is less candid or forthcoming.

We conclude this section by discussing another reason why in career concerns models transparency may have detrimental effects. This happens when there are multiple principals and multiple agents. The leading example is the European Central Bank (ECB). Members of the Governing Council are selected by national governments. While nominal members should only be concerned by the interests of the whole Eurozone, in practice the future of their careers depends on their ability to further national interests. There has been an intense debate on whether the minutes of the meetings of the Council should be made public (see, for instance, the exchange between Buiter (1999) and Issing (1999)). At this stage, they are still secret, and there is a strong rationale behind such a policy. If the discussions at meetings were public, it is feared that national members would have an incentive to pander to their **(p.101)** home audiences by taking adversarial stances, which would make the decision-making process slow and cumbersome. The ECB disclosure policy is in contrast with that of other central banks, like the Bank of England and the Federal Reserve Bank, who do not have a transnational composition and therefore do not face the same risk. Both those institutions have chosen a much higher level of transparency on their monetary policy decision process.

The multiple-agent rationale for secrecy can be extended to other transnational organizations. The minutes of the Council of the European Union are usually kept secret. This is in sharp contrast with the legislative bodies of most of the member countries, which hold open-door meetings. Multilateral organizations like the World Bank and the International Monetary Fund have been criticized for the lack of transparency in their decision-making process. While the multiple-agent argument is applicable to all these cases, it is clear that the policy on transparency is only a small part of the more general, and extremely controversial, issue of what the mandate of such multilateral organizations should be. It is impossible to form a view on the optimal level of transparency of a particular body before we decide to whom and in what forms the body should be accountable.

4. Conclusion

On the issue of transparency, economics provides a strong argument in favour of complete disclosure and a list of potential objections to that argument. As Holmström showed, in a world of complete contracts, the more the principal knows about the agent, the better the agent behaves. Some objections to Holmström—the right to privacy, the direct cost of disclosure, the risk that hostile parties learn sensitive information—are perfectly valid but they find limited application in politics, corporate governance and other important areas. Others object that information should not be disclosed because there is a risk that people may misunderstand it or misinterpret it, but there is no sign that such risk is comparable to the well-documented damages that secrecy has created in the past.

A potentially more relevant class of objections arises when we move to a world of incomplete contracts. A career concerns model applied to agents whose job is to take decisions on behalf of their principals shows that a certain kind of transparency creates perverse incentives. An agent **(p.102)** who knows that his decisions are closely scrutinized before the consequences of the decisions are fully known has an incentive to behave in the way that the principal expects him to behave rather than in the optimal way. Another interesting case arises when there are multiple principals and multiple agents. However, the scope of this kind of objection appears to be limited as well. The only three documented cases where transparency may be detrimental to the principal are the disclosure of portfolios of mutual funds, the publication of the minutes of the ECB Governing Council, and increased transparency in the proceedings of the European Council of Ministers (discussed by David Stasavage in Chapter 10 below).

In sum, there are a number of potential objections to the full-transparency principle, but at this stage they all appear to have a limited scope of application. Available economics research supports the idea that full transparency should be the default option. In politics, this principle has been accepted with the passage of the Freedom of Information Act. In corporate governance, we are extremely far from it: the default option is secrecy. The law allows companies to withhold all information from stakeholders, except a small class of aggregated accounts. The same can be said about international organizations as well as most of the nonprofit sector. Now that the principle of open government has been accepted, the next frontier is open governance.

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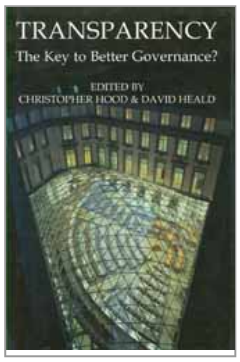

Transparency: The Key to Better Governance?
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Dashed Expectations: Governmental Adaptation to Transparency Rules

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[–] Abstract and Keywords

In January 2005, the United Kingdom's Freedom of Information Act (FOIA) came into force, providing British citizens with a limited but justiciable right to government information. The Blair government promised that the new law would make two important contributions to British political life. The first would be a fundamental change in the predispositions of officials regarding the release of government information. Lord Chancellor Charles Falconer predicted that the FOIA would lead to ‘a new culture of openness: a change in the way we are governed’. This fundamental ‘change in the way we are governed’ was expected to produce a follow-on effect: the restoration of public trust in government. The linkage between a ‘vigorous commitment to freedom of information’ and the ‘renewal of trust’ was often made in the months before implementation of the law. The critical point is that the FOIA does not reduce the political salience of complaints about governmental secrecy and lack of transparency in the public sector.

Keywords: United Kingdom, Freedom of Information, government information, openness, secrecy, trust, freedom of information, transparency

1. Two Bold Claims

IN JANUARY 2005, THE UNITED KINGDOM’S FREEDOM OF INFORMATION Act came into force, providing British citizens with a limited but justiciable right to information held by public bodies. The Blair Government promised that the new law would make two important contributions to British political life.

The first would be a fundamental change in the predispositions of officials regarding the release of government information. It had become commonplace to blame major policy failures—such as mismanagement of the BSE crisis (BSE Inquiry 2000: 248; Department for Environment 2001: 110) and the deaths of young patients at Bristol Royal Infirmary (Bristol Royal Infirmary Inquiry 2001: 271)—on the ‘culture of secrecy’ within the public service, and hence to regard the promotion of a ‘culture of openness’ as a critical reform. Tony Blair himself promoted the FOIA as a tool to break down the ‘traditional culture of secrecy’ within the UK government and produce a ‘fundamental and vital change in the relationship between government and

governed' (United Kingdom 1997: Preface). In 1999, Home Secretary Jack Straw lauded the law as a landmark in constitutional history that would 'transform the default setting' of secrecy in government (Straw 1999). Shortly before its implementation, Lord Chancellor Charles Falconer presented the FOIA as a 'challenge to a culture that was deeply ingrained in all too many parts of the public sector'. The statute, he predicted, would lead to 'a new culture of openness: a change in the way we are governed' (Falconer 2004a).

This fundamental 'change in the way we are governed' was expected to produce a follow-on effect: the restoration of public trust in government. As in most of the other advanced market democracies, trust has **(p.108)** been on a long decline in the United Kingdom (Pharr, Putnam et al. 2000; Beetham 2005: 61–8). Measures to encourage openness were expected to encourage a reversal of the trend. FOI legislation, Lord Falconer said in February 2004, would let the public see 'that the Government has nothing to hide', and this would lead to 'increasing trust in our public institutions' (Falconer 2004b). The linkage between a 'vigorous commitment to freedom of information' and the 'renewal of trust' (Falconer 2003) was often made in the months before implementation of the law.

British policy-makers were not alone in claiming that FOI legislation would produce these two benefits. In the Anglo-American democracies that had already adopted similar laws, it was commonplace to suggest that the aim was to encourage a 'culture of openness' in public institutions. ('The culture of FOI', said an Australian High Court justice, 'is a culture which asks not why *should* the individual have the information sought, but rather why the individual *should not*' (Kirby 1997).) Shortly after the adoption of the Irish FOIA, Information Commissioner Kevin Murphy observed:

> The Freedom of Information Act has been variously described as heralding 'the end of the culture of public service secrecy' and as a 'radical departure' into a brave new world of public service openness and transparency.…[I]t is a fact that the enactment of the FOI Act does mark a radical departure from one style or culture of public service to another. (Murphy 1998)

Similarly a series of studies by the Organisation for Economic Co-operation and Development promoted the adoption of FOI laws by OECD states as one way to restore flagging trust in government (OECD 2000; OECD 2002).

In practice, the probability that the adoption of an FOI law will lead to cultural change or improve trust is small. Experience has shown that the governing institutions in Westminster systems are particularly resilient, and capable of rejecting alien transplantations such as FOI laws, or of developing new routines designed to minimize the disruptive effect of these new laws. The new right to information is either curtailed or grudgingly conceded. Nor does the statutory acknowledgment of a right to information necessarily lead to improved trust. Perversely, an FOI law may encourage the emergence of a policy community whose campaigning persuades the general public that government institutions continue to be as secretive as ever before. Steps to improve governmental openness may encourage, rather than satiate, the demand for greater transparency.

Yet the FOIA may fail to achieve either of these benefits and still prove a worthwhile venture. The law *will* result in the release of information **(p.109)** that was previously withheld by government. Citizens and non-governmental groups will find FOIA to be a useful tool for extracting details about governmental decision-making. In this way, FOIA will deter arbitrary

bureaucratic behaviour and create new opportunities to intervene in the process of governmental policy-making. Nonetheless, we should not forget the critical point: the FOIA is principally a tool for regulating the struggle for control of government information. It does not eliminate this conflict, or reduce the political salience of complaints about governmental secrecy.

2. How Governments Adapt

In making these broad claims about the likely effect of FOIA, policymakers have underestimated the resilience of governmental systems. We know from experience that public institutions have an impressive capacity to resist innovations which challenge the status quo (Hay and Wincott 1998). Actors whose influence is threatened by a new policy do not cease to resist its impositions after its formal adoption. Rather than overturning institutional practices and cultures, new administrative procedures required by law may simply be tailored to fit within them. We have seen these patterns of resistance and adaptation in countries with older FOI laws.

The systemic responses that have followed the introduction of FOI laws in the Anglo-American democracies can be broken into two broad categories. The first comprises responses which attempt a direct challenge to the right to information, by amendment of the law or regulations. The second, less easily observed but perhaps more important, consists of informal administrative responses which, while maintaining a public pretence of conformity to the law, have the effect of limiting its significance in practice.

2.1 Formal Challenges to the Right to Information

Formal challenges to the right to information comprise those efforts which are aimed at an explicit elimination or restriction of the entitlement. Because these challenges sometimes require legislative approval, or at the very least (as in the case of regulatory changes) public notification, they often attract substantial public attention. They are, therefore, a politically costly way of resisting the demand for transparency.

(p.110) 2.1.1 Legislative Amendment

Some governments have attempted to amend the legislation that creates a right to information. One illustration is the recent decision of the Irish government to restrict its FOIA, only adopted in 1997. The amending bill was introduced in March 2003, weeks before a provision of the law allowing access to five-year-old Cabinet records was scheduled to go into effect. The amended law extended the delay in releasing Cabinet records to ten years, and broadened the Cabinet confidentiality rule to include advisory committees that did not include a Cabinet minister at all. Ministers were allowed to block requests for information relating to other deliberative processes within the public service, and national security restrictions were toughened as well (McDonagh 2003).

The Irish amendments also introduced new fees for information requests: 15 euros for an application, 75 euros to have a department reconsider its decision to deny information, and 150 euros for an appeal to the Information Commissioner. The fees had a predictably sharp impact on the demand for information. A year later, the Commissioner reported that requests for information had declined by over 50 per cent. Requests by journalists dropped more precipitously—over 80 per cent within the space of a year (Information Commissioner of Ireland 2004: 14–19).

The tactic of raising fees to squelch demand has been employed elsewhere. In 1995 a newly elected Conservative government in the Canadian province of Ontario used financial exigency as a pretext for amending its FOI law to increase fees, causing a one-third decline in the volume of

requests (Roberts 1999). A decision by the Nova Scotia government to increase fees for making requests or complaints about the refusal of information produced a comparable drop in usage (Auld 2003).

Security concerns have also created a ‘window of opportunity’ (Kingdon 2003) for policy-makers to restrict FOI laws. After the attacks on the World Trade Center and the Pentagon of 11 September 2001, US security and intelligence agencies renewed their efforts to have certain classes of ‘operational records’ excluded from the US FOIA. The Homeland Security Act of 2002 included restrictions designed to ensure that certain kinds of ‘homeland security information’ would be protected from disclosure under the FOIA as well (Roberts 2004). In 2002, the Canadian government also amended its Access to Information Act (ATIA) to allow the Attorney General to block any independent review of decisions to withhold national security information.

(p.111) 2.1.2 Interpretation and Litigation

Policy-makers may also attempt to restrict the meaning, if not the actual language, of FOI legislation. In Canada, for example, the Liberal government of Prime Minister Jean Chrétien exploited ambiguity in the language of the ATIA relating to the coverage of ministerial offices under the law. In 2001, the government issued a formal notice that it considered many ministerial advisers to be exempt from the law (Treasury Board Secretariat 2001); it then engaged Canada’s Information Commissioner in prolonged and costly litigation to attain judicial support for its position (Roberts 2002: 654). In the United States, Attorney General John Ashcroft issued a directive in October 2001 to government departments that they should take a restrictive view of their obligations under the law; Ashcroft’s Justice Department then engaged in a series of court cases intended to affirm a narrow interpretation of the US FOIA and other open government laws (Podesta 2003). As Patrick Birkinshaw notes in Chapter 3 above, Ashcroft’s efforts were part of a broad effort by the Bush administration to reverse a variety of disclosure requirements imposed on the executive branch of the US government over the preceding three decades.

2.2 Informal Methods of Resistance

Because these direct challenges to the right to information are done in the open, we sometimes think that they constitute the main forms of resistance to FOI law. This is far from being the case. Other changes in bureaucratic practice—in methods of record-keeping, processing FOI requests, and organizing delivery of services—have also had the effect of undercutting the right to information. These effects may be more pervasive and substantial than the more easily observed challenges to the law itself.

2.2.1 Changes in Record-Keeping

For example, the right to information may be subverted by corrosion of the quality of records kept by government institutions. Most disclosure laws do not recognize a right to information that has not been incorporated within a paper or electronic record; to put it another way, there is no right to information which is known to officials but not put down in a record. A disclosure law cannot be effective if records are incomplete or non-existent.

(p.112) 2.2.1.1 Decline in Candour

There is surprisingly little good research on the effect of transparency on the record-keeping practices of public institutions. The widely held view is that transparency causes officials to become more reticent in recording potentially controversial information. There is evidence which bears this out. A recent and small survey of Canadian government officials whose email

had been targeted by information requesters found that a large majority had begun to write messages more carefully (Roberts 2005b). Similarly, a study of the US Federal Reserve's Monetary Policy Committee found that its members became less likely to voice dissenting opinions after the decision was made to publish a record of their discussions (Meade and Stasavage 2004).

The evidence, however, is not always supportive of this view. An early study of the Australian FOIA, based on interviews with government officials, found no significant impact on the frankness of official advice (Hazell 1989: 204). A 2001 study by Canada's National Archives reached a similar conclusion. The archivists' expectation was that the ATIA would be found to have had 'a significant and negative influence on record-keeping' within the federal bureaucracy. However, the researchers were surprised to conclude from their research that there was 'no evidence…that the Access to Information Act has altered approaches to record-keeping in the Government of Canada' (National Archives of Canada 2001).

2.2.1.2 Manipulation of Records

Disclosure laws can also be subverted by the destruction or manipulation of government records. This is an uncommon but not unknown practice. In Canada, officials destroyed tape recordings and transcripts of meetings in which public servants debated how to manage threats to public safety posed by contamination of the blood supply by HIV and hepatitis C in the late 1980s, a few days after receiving an ATIA request for the records (Information Commissioner of Canada 1997). In 1997, another inquiry concluded that Canadian defence officials had altered and attempted to destroy documents relating to the misconduct of Canadian forces in Somalia, which had been sought by journalists under the ATIA and by the inquiry itself (Somalia Commission of Inquiry 1997). In 1998, the Canadian Parliament amended the ATIA to make it an offence for officials to 'destroy, falsify or conceal a record' in an effort to thwart a request for information.

Recently, a third federal inquiry has revealed yet another effort to manipulate records sought under the ATIA. In 2004, the Canadian government appointed a special commission, popularly known as the **(p.113)** Gomery inquiry, to investigate allegations of corruption within major advertising and promotional programmes over the preceding decade. One key issue was the extent to which officials had responded to ATIA requests filed by journalists attempting to cover the story. Testimony uncovered an instance in which officials had *created* expenditure guidelines for release in response to ATIA requests. The guidelines 'had cosmetic values and purposes'; they were intended to convey an impression of bureaucratic regularity regarding a decision-making process that was in fact deeply politicized (Gomery Commission 2004b: 3659).

2.2.1.3 Failure to Create Records

This was only one of the techniques of resistance to the ATIA documented during Canada's recent corruption scandal. A senior official responsible for management of the programme at the heart of the controversy testified in 2004 that he had agreed with Cabinet Office staff that they would keep 'minimum information on the file' to avoid embarrassment through ATIA requests. 'A good general', the official told a parliamentary committee, 'doesn't give his plans of attack to the opposition' (Standing Committee on Public Accounts 2004). Indeed, Canada's Information Commissioner has argued that the 'troubling shift…to an oral culture' within senior levels of the public service constitutes one of the main challenges to the effectiveness of the ATIA (Reid 2005). The Commissioner has suggested that the federal government should adopt legislation

that would create ‘a duty to create such records as are necessary to document, adequately and properly, government’s functions, policies, decisions, procedures, and transactions’ (Information Commissioner of Canada 2001: 66).

Two caveats are needed when considering complaints about the rise of an ‘oral culture’. The first is a matter of causality: the shift, to the extent that there is one, is not attributable only to the advent of FOI laws. The decline of departmental budgets in many countries throughout the 1990s also contributed to a decline in proper record-keeping. A combination of other factors may be important as well—such as the increased pace of work, which may leave less time for thoughtful recording of departmental activities (Scheuerman 2004); the general decline of a print-based culture (Postman 1986); and a similarly broad decline in respect for procedural formalisms. The Canadian Commissioner’s complaint about an ‘oral culture’ is mirrored by concerns about the emergence of a ‘sofa culture’ within the Blair Government, documented by the Butler Review of Intelligence on Weapons of Mass Destruction in 2004 (Butler Committee 2004): a culture in which ‘formal procedures such as meetings **(p.114)** were abandoned [and] minutes of key decisions were never taken’ (Oborne 2004)—and which had apparently taken root well before the implementation of the United Kingdom’s FOIA.

A second caveat relates to the impact of new information technologies on record production. In a sense, concern about the rise of an ‘oral culture’ is profoundly mistaken: by sheer volume, modern bureaucracies generate more digital and paper records than ever before. In part this is because of technologies such as email which capture interactions which had never been recoverable previously: conversations which once might have been undertaken in person or by telephone are now ‘a matter of record’. (On the other hand, journalists have complained that officials now routinely ‘RAD’—that is, ‘read and delete’—potentially sensitive emails (Lavoie 2003; Weston 2003).) Internal databases also make vast amounts of transactional data generated by government officials—such as information about inspections, and regulatory or benefits decisions—more easily available (Roberts 2006: 199–227). It is still possible that certain kinds of critically important documents—such as analytic or summative records which explain the rationale for government policy—are less likely to be produced than in the past; what is less clear is the extent to which this deficiency may be offset by the broader effects of technological change.

Nor is it clear that the Canadian Commissioner’s proposed ‘duty to document’ would be an effective counter to the advent of ‘oral culture’. Many jurisdictions already acknowledge narrowly bounded ‘duties to document’—for example, by requiring the creation of records that describe a department’s organization, the expenditure of public funds, or reasons for official decisions. As Canadian officials have noted, however, a more general duty—encompassing, for example, a duty to describe internal policy deliberations—would be difficult to enforce (Treasury Board Secretariat 2004).

2.2.2 Centralization of Control over Processing

The Gomery inquiry provided evidence of other administrative practices which have the effect of dulling the impact of disclosure law. Testimony by government officials in the department responsible for the programme in which abuse had occurred, Public Works and Government Services Canada, showed that incoming requests were reviewed to determine whether they were ‘interesting’—a euphemism for ‘politically sensitive’. (An ‘interesting’ request was said to be ‘one where media attention had **(p.115)** been paid to the issue or there is a potential for the Minister to be asked questions before the House [of Commons]’.) A list of ‘interesting’ requests

was reviewed weekly by a group that included representatives of the Minister's office and the department's communications office. Especially interesting requests required special handling by communications staff, whose task was to prepare a media strategy to anticipate difficulties following disclosure of information, and also review by ministerial staff before release. 'We lost control…of the process once Communications had it in their process,' the most senior ATIA officer told the inquiry:

> So once [the ATIA office] has completed the processing of the file we would send a package to Communications Branch…They would then circulate it to the deputy's office and the Minister's Office. When that was done we would get a coversheet back—it was a coversheet for their media lines—and that would be our notification that we could make the release. (Gomery Commission 2004b: 3659–65; 2004a: 6537–639)

By 2004 it was clear that all major ministries in Canada's federal government maintained similar procedures. Politically sensitive requests were tagged and vetted by ministerial and communications staff before the release of information, and 'communications products' designed to respond to potential difficulties would be prepared. Requests from journalists and opposition party researchers were routinely tagged for sensitivity. In many cases the process of preparing a communications strategy and allowing ministerial review added substantial delays to the processing of these requests (Rees 2003; Roberts 2005a).

The practice of segregating politically sensitive requests is highly formalized: the Gomery inquiry showed that the Public Works department, like others, had detailed flow charts showing how these requests were to be dealt with. Furthermore, the process of political management is facilitated by technology. Each major department maintains an electronic case management system that is capable of isolating politically sensitive requests. In addition the Canadian government maintains a government-wide database which allows officials in central agencies—including communications staff in the Cabinet Office—to monitor the inflow of requests from journalists and opposition parties. There is, therefore, the possibility of a second level of review, triggered when central agency officials consider that a request may raise political difficulties for the government as a whole (Roberts 2005a).

Other governments with established disclosure laws have developed comparable routines for managing politically sensitive requests. Research has not been done that would determine whether, in countries such as **(p.116)** Australia and New Zealand, these routines are as highly institutionalized as in Canada. Nevertheless the practice of segregating sensitive requests to allow review by political and communications advisers appears to be widespread. Concern over sensitive requests is said to be part of a larger preoccupation with 'spin control' in the parliamentary democracies (Roberts 2006: 82–106).

2.2.3 Other Release Strategies

Some governments have developed even more aggressive tactics for minimizing the political consequences that might flow from disclosure. For example, Irish journalists have complained that government departments have encouraged other reporters to duplicate their requests for documents—a step that improves the department's ability to ensure a 'more sympathetic spin' on the story (Rosenbaum 2004). Ireland's Justice Minister acknowledged in 2004 that he had 'pre-released' information requested by opposition politicians to friendly journalists, telling the Parliament that he would not allow 'my opponents to spin against me without having at least the opportunity to put my side of the story into the public domain' (Dáil Debate, June 1, 2004). One Irish department began posting details about new requests, including journalists' identities, on

its website, a practice which the department defended as an advance in transparency but which journalists condemned as a tactic to reduce the ‘scoop value’ of an information request (Brennock 2003; Lillington 2003).

2.2.4 Under-resourcing of FOI Offices

There are more prosaic ways in which bureaucracies can undercut the right to information. The failure to provide adequate resources for processing FOI requests may mean substantial delays in the disclosure of information. In many cases the value of such information may be sharply diminished as a result of such delays. This is most obviously the case when the information is sought by journalists or opposition researchers for use in a current, but transient, policy debate.

The effect of under-resourcing became clear in Canada’s federal government in the mid-1990s. Budgets for the administration of the ATIA were cut as a part of a broader programme of retrenchment in ‘non-essential’ spending that followed the election of the Liberal government in 1993. The result was a significant lengthening of the time required for processing information requests. By 1997, Canada’s **(p.117)** Information Commissioner regarded the problem of delay as one of ‘crisis proportions’. Paradoxically, the Commissioner’s authority was also undermined by the cutbacks: the increased caseload within his office meant that the time required for resolution of delay complaints also grew (Roberts 2002). Under Canadian law, the Commissioner’s own budget is set by the government as well. The Commissioner has complained for several years that his enforcement powers have been undercut by the unwillingness of central agencies to provide his office with adequate funding (Information Commissioner of Canada 2004: Ch. 6).

2.2.5 Restructuring of Government Services

Finally, FOI laws have been undercut by governmental experiments with new modes of delivering public services. The problem has at least two dimensions. Many countries have experimented with the use of quasi-governmental organizations, including industry-run associations, to provide services or perform regulatory functions. (Canada, for example, transferred air traffic control to a quango known as Nav Canada—one of many set up by the federal government in the late 1990s.) Most FOI laws are not designed to accommodate quasi-governmental organizations. In some countries, governments must make an explicit decision to include newly created organizations under the law, and have refused to do so.

The growing emphasis on contracting-out of service production raises similar difficulties. Most laws do not recognize a right to records held by contractors. Several governments have also negotiated contracts that contain confidentiality clauses intended to prevent the disclosure of contracts themselves. For example, Australian governments were sharply criticized for their willingness to accede to confidentiality restrictions while negotiating contracts for the operation of private prisons in the 1980s and 1990s (Freiberg 1999).

Experiments with private provision of public services have not been driven mainly by the desire to evade disclosure requirements. On the other hand, the emphasis on ‘alternative service delivery mechanisms’ *has* been motivated by a broad frustration with the burden which internal ‘red tape’ is thought to impose on conventional bureaucracies, and disclosure rules represent one part of this burden. The erosion of disclosure law is part of a broader crisis in public law: as the traditional public sector is fragmented into a multiplicity of organizational forms, it is difficult to **(p.118)** decide which forms should be subject to established accountability mechanisms such as FOI law, and which should not (Roberts 2001).

2.3 A Doctrine of Resistance

The effect of FOI law has not been to establish a ‘culture of openness’ in those countries which have had such laws for many years. It may well be that more information is released to journalists, opposition parties, or non-governmental organizations than ever before. But this may simply show that public officials respect the rule of law, and are subject to legal processes that require disclosure. Even when disclosure is made routine—for example, by the ‘proactive’ release of travel and entertainment expenses—this may not be a sign of cultural change within the public service. The establishment of new administrative routines in response to statutory requirements does not necessarily reflect a shift in official attitudes towards transparency.

On the contrary, experience suggests that the passage of time provides officials with the opportunity to develop a broader range of techniques for dulling the disruptive potential of new disclosure rules. Contests over official information are fought as fiercely as they were before the introduction of FOI law; it is simply that the terrain on which the battle is fought has shifted in favour of stakeholders outside government. Except in those areas where the contests over disclosure of information have been settled decisively, we are likely to see—as the Information Commissioner of Canada has recently said—a ‘stubborn persistence of a culture of secrecy’ (Information Commissioner of Canada 2005: 4).

Not only do government officials become more adept in managing disclosure requirements; they become more articulate in expressing their reasons for resistance. The argument, expressed in each country and in intergovernmental forums such as the Organisation for Economic Co-operation and Development, echoes earlier concerns about the ‘crisis of governability’ that was thought to afflict developed democracies thirty years ago. The authority of the state has been weakened by globalization and the decline in public trust, while the surrounding environment is more complex and uncertain, as a result of the proliferation of advocacy groups, the breakdown of traditional media, and the advent of new information technologies. As a 1995 OECD report observed:

> Citizen demand is more diversified and sophisticated, and, at the same time, the ability of governments to deal with stubborn societal problems is being **(p.119)** questioned. The policy environment is marked by great turbulence, uncertainty and an accelerating pace of change. Meanwhile large public debt and fiscal imbalances limit governments’ room for manoeuvre. Traditional governance structures and managerial responses are increasingly ineffectual in this context. (OECD 1995)

The groups that rely on FOI law are not, in this view, victims of state authority; on the contrary, they are more numerous and better organized than ever before, and increasingly skilled in using tools such as FOI law to advance their agenda. (‘Requests are more probing than they used to be,’ a Canadian ATIA officer observed in 2002. ‘There are many more of them and their requests frequently involve far more, and more sensitive, records. The result is that [the Access to Information Act] is much more complex…more challenging for us and more threatening for government-side politicians.’[1]) A sense of feeling beleaguered rationalizes official efforts to constrain the effect of disclosure rules (Roberts 2006: 54–62, 98–103).

3. The Rhetoric of Secretiveness

FOI law will not produce a culture of openness. Nor is it clear the FOI will improve trust in government. Indeed, trust in government declined in both the United States and Canada even after the adoption of their FOI laws. The connection between openness and trust is tenuous for two reasons. The first is that the determinants of trust are multifarious, and it is likely that other

factors—such as the degree of economic uncertainty or physical insecurity felt by citizens—play a larger role in influencing levels of trust. The second reason for caution in positing a correlation between openness and trust lies in political dynamics which will be set in play by the FOIA itself.

First, and most obviously, the sort of news that is generated by FOIA is unlikely to be flattering to government. The newsworthiness of a disclosure hinges on the degree to which it reveals internal bureaucratic conflicts or mismanagement, or contradictions between actual and professed policy; any public satisfaction that might be felt regarding the ability to gain access to this information is likely to be outweighed by indignation at the problems which are revealed. There is, remarkably, no **(p.120)** research which attempts a content analysis of news reports that are generated from disclosures made under well-established FOI laws; but casual observation suggests that the preponderance of coverage is not favourable to government.

The law will also formalize conflicts that will themselves become the object of media coverage. For example, both journalists and advocacy groups will learn that the filing of an FOIA request is itself an event around which a news story can be constructed; similarly a failure to provide information within a statutory deadline, or an outright denial of information, or a decision to appeal against a denial of information, are all pretexts for further news coverage. In several countries, it is common practice for journalists or advocacy groups to conduct ‘audits’ in which information requests are filed simultaneously with several different government agencies, in a test of compliance with statutory requirements; the audit is routinely followed by reportage which emphasizes weaknesses in compliance and the persistence of habitual secrecy.

It is important to note that the processes that generate such news stories are ones that lead, in aggregate, to the disclosure of more information than in the past. The reporting also provides evidence that the conflict over information is now formally structured; journalists and other requesters have statutory rights and ways of enforcing those rights against government. Yet the effect of the news coverage generated by this conflict is likely to reinforce the public perception that governmental secrecy is more deeply entrenched than ever before. In 2005, for example, the Canadian Newspaper Association organized a journalistic ‘audit’ of compliance with federal and provincial FOI laws across Canada. From the point of view of broad policy, the audit was a testament to the extent to which the principle of transparency had become entrenched in public policy: only a few years earlier, there were still provincial governments that had not adopted an FOI law at all. However the news coverage emphasized weaknesses in compliance, presenting readers with the conclusion that the right to information ‘is a farce because of political interference and the culture of secrecy in bureaucracies’ (MacLeod 2005).

We might call this a ‘rhetoric of secretiveness’—a stylized and widely shared way of talking about disclosure of information which tends to emphasize the persistence of secrecy and which construes secretiveness as a deliberate policy—rather than, for example, the result of inadequate training, preoccupation with other tasks, or internal disorganization. The routine operation of FOI law, rather than discouraging this rhetoric, is likely to create more opportunities for it to be expressed in popular **(p.121)** media. To the extent that perceptions of secretiveness corrode trust in government, FOI law may therefore have an effect that is quite contrary to that anticipated by policy-makers.

There is another reason why this may be true. The advent of an FOI law will also encourage the emergence of a specialized ‘policy community’ (Richardson and Jordan 1979) that is skilled in identifying weaknesses in FOI laws and advocating better laws. Some journalists will become FOI specialists; so, too, will researchers in public interest organizations and opposition political

parties. Philanthropists may eventually provide funding to some parts of this community. In the United States, for example, the adoption of a national FOIA, as well as several other disclosure laws, has been followed by the emergence of a substantial and relatively well-funded community of organizations that specialize in the use of the laws (Roberts 2006: 119).

The law contributes to the emergence of this policy community in a more direct way: by creating the office of the Information Commissioner. As a quasi-judicial officer the Commissioner obviously must take a measured position on the question of secretiveness. But most commissioners recognize that they have an 'educative function', and make statements regarding proposed changes to government policy which are taken as cues for advocacy by other members of the policy community (Roberts 1996). The commissioner's rulings will also become the subject of news coverage, particularly when they conform to the rhetoric of secretiveness.

4. Is There a Case for FOI Legislation?

It is difficult to make a case for FOI legislation which naturally appeals to ministers and senior bureaucrats. One of the intended effects of FOI law is to weaken their monopoly over governmental information, and therefore their power; unless bound by an unambiguous promise made while in opposition (as Britain's Labour Government was in 1997) or by the imminent threat of parliamentary defeat (as Canada's Liberal Government was in 2005), there is little incentive for policy-makers to take seriously the notion of introducing or improving law that guarantees a right to government documents.

The two arguments described at the start of this chapter—that FOI law will promote a culture of openness and improve trust—at least had the advantage of assuring policy-makers that they might reap *some* benefit from the law. These arguments seem to promise the advent of a **(p. 122)** world in which conflict over information is superseded. FOI law is expected to produce a new and more harmonious relationship between officials (who give up the practice of questioning why citizens should need access to information) and citizens (who reciprocate by placing greater trust in those officials). The central point of this chapter is that a happy outcome is unlikely to be achieved. The modest gains that ministers and bureaucrats hoped to derive from an otherwise unpalatable initiative will not be realized.

Of course, the general public may still reap substantial benefits from FOI legislation, for all of the reasons that are typically listed by advocates of transparency. Access to information about the formulation of policy allows citizens to exercise their political participation rights more fully. Access to information about adverse government decisions may help citizens to protect their right to fair and equal treatment. Transparency might even allow citizens to protect their health and safety against threats posed by government operations or lax regulation of the private sector. As in so many other areas of FOI law, there is surprisingly little systematic research that shows precisely how large these benefits are, and how widely they are distributed. Nevertheless there is anecdotal evidence to suggest that these benefits are substantial. There are, in addition, benefits which cannot be explained neatly in terms of fundamental citizen rights. For the business community, for example, transparency might produce a working environment that is less compromised by costly uncertainties.

Having said this, it is salutary to maintain a realist's view of the world which FOI legislation is likely to create. It reminds us that policy-makers have strong incentives to find ways of evading disclosure requirements. Reluctant to absorb the political costs associated with an overt challenge to these requirements, policy-makers may rely instead on less easily detected methods of resistance, such as the adaptation of bureaucratic routines for record-keeping or processing

of FOI requests. For advocates of transparency, a degree of vigilance regarding the FOI process itself is therefore required.

In the long run, we might also expect that the tussle over official information will *increase* in intensity, rather than decrease. At the tactical level, information requesters will become more sophisticated in their techniques for extracting documents, and officials will adopt more sophisticated methods of resisting these demands for disclosure. At the level of rhetoric, both parties to the conflict will develop more refined arguments to rationalize these tactics—predicated either in deep distrust of government officials (in the case of requesters) or in a fear about the growing **(p.123)** inability to govern effectively (in the case of officials). The polarization of conflict over access to information may limit the ability of policy-makers and policy advocates to agree on the adjustments that are periodically required in any policy in light of experience and changing circumstances.

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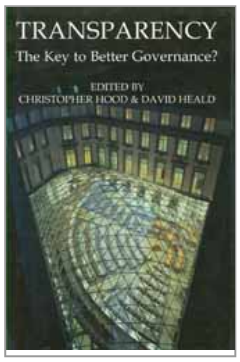

Transparency: The Key to Better Governance?
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What Hope for Freedom of Information in the UK?

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[–] Abstract and Keywords

This chapter assesses freedom of information (FOI) in the United Kingdom. It discusses the terminology associated with FOI, namely, transparency and openness. FOI refers to access to non-personal information; the regulation of personal information is typically governed by privacy or data-protection laws. Some jurisdictions take an integrated approach to both categories of information, but this chapter focuses on information that does not relate primarily to the individual. The family of information statutes – encompassing FOI, privacy, official secrecy and the like – are known collectively as Access to Information laws. Finally, open government is a term close to openness, since both are concerned with systems and delivery.

Keywords: United Kingdom, freedom of information, transparency, openness, privacy, data protection, Access to Information, official secrecy, open government

AT FIRST PASS FREEDOM OF INFORMATION (FOI) is a tempting topic for work in comparative public policy. Many countries have been wrestling with similar problems and have, apparently, resorted to similar remedies. With a bit of ingenuity, access to statutes online, and a travel budget it should be relatively straightforward to draw conclusions on what works and why. Up to a point, Lord Copper. As the noble lord warned Boot, it is important to Be Prepared when travelling abroad. And this advice is as pertinent to the student of comparative FOI as it is to the unsuspecting Boot. Before attempting any comparative assessment of the United Kingdom as a new FOI jurisdiction it would be best to examine some of the methodological pitfalls and to consider how best to avoid them.

1. Comparative Analysis of FOI Jurisdictions

The terminology associated with FOI has hazards of its own, and it is worth starting by establishing some common reference points. *Transparency* has been defined by Patrick Birkinshaw (2006: 189–91) as the conduct of public affairs in the open or otherwise subject to public scrutiny. *Openness* is described as ways of delivering the more transparent conduct of public affairs. I will adopt both definitions here. *FOI* is defined by Birkinshaw in Chapter 3 above as a presumptive right of access to official information, qualified by exemptions and subject to

independent adjudication by a third party. The adjudicator may be a court, tribunal, commissioner, or ombudsman and may have the power to require actions be taken, or to recommend that the parties should act in a certain way. FOI will be taken here to mean access to non-personal information; the regulation of personal information is typically governed by privacy or **(p.128)** data protection laws. Some jurisdictions take an integrated approach to both categories of information (see, for example, the Canadian Access to Information and Privacy regime) but I will focus here on information which does not relate primarily to the individual. The family of information statutes—encompassing FOI, privacy, official secrecy and the like—are known collectively as *Access to Information laws*. Finally, *open government* is a term close to openness, since both are concerned with systems and delivery. But for present purposes, the key point is that open government is a broad concept. Typically, it is understood to encompass measures which empower the citizen to secure information (for example, through an FOI request) *and* proactive measures to put information into the public domain, unprompted by direct citizen action.

It will immediately be apparent from this short discussion that it is easy to confuse these terms and even if we restrict any international comparisons to FOI alone, it is a sufficiently capacious term to allow for much variation. It is clear that it excludes permissive, administrative access codes; and that international surveys of FOI laws would do well to exclude statutes, such as the one adopted in Zimbabwe, which purport to be about improved access but are really about suppression of the press.[1] But the definition still allows for wide variations in scope of coverage, in the breadth of exemptions, in temporal range (is it retrospective on introduction?), and in the enforceability of rights. Indeed, it is arguable that FOI should be taken to include only those statutes which give the adjudicator the power to require remedies from the parties in dispute. But that formula would conceal more than it would reveal. It would exclude, for example, the New Zealand Official Information Act—where the ombudsman can do no more than recommend a remedy—even though the ombudsman's recommendations are customarily followed and the New Zealand statute is one of the more effective in practice. And it would call into question the status of the UK model, which gives the Commissioner powers of determination, but subject to appeal to a tribunal and then on to the courts. And so I will resist this narrowing of the definition of FOI. But the main point is simply made: even if we restrict our analysis to the rights conveyed by statute, we are dealing with a broad spectrum of citizen entitlements.

(p.129) This diversity becomes even more apparent if we consider the evolution of FOI laws. One can argue about the precise pattern of spread of FOI statutes, but three general phases may be discerned. First, the modern adoption of FOI statutes begins with the United States in 1966, as discussed by Christopher Hood in Chapter 1. To all intents and purposes the Swedish Freedom of the Press Act 1766 is irrelevant today (remarkable, but irrelevant). It is the American adoption of an FOI law in 1966, and especially the strengthening of access rights in the wake of the Watergate scandal, that starts the modern history of FOI. Initially the American lead was not followed—at least not outside Scandinavia and northern Europe. The second wave of FOI began in the early 1980s: for various reasons Canada, Australia, and New Zealand all adopted FOI statutes in 1982 and over the next decade the spread of legislation picked up pace in Europe and the Commonwealth. And throughout the decade it is clear that countries were beginning to borrow from one another's experience. But it is not until the 1990s that FOI emerges as an international norm. Championed by the Organisation for Economic Co-operation and Development, the World Bank, the Council of Europe, and other supranational bodies, FOI came to be seen as an essential component of good governance (Birkinshaw 2001).

This narrative allows us to place the United Kingdom in the third wave of FOI development; behind five of its G8 counterparts, but ahead of two.[2] And so we can—and many have—put a stopwatch on how long it has taken the UK to cross the line and who breasted the tape ahead of it. But does this sort of tabulation tell us much? Had we been witnessing a linear narrative in which FOI (Good) ineluctably wins out over Secrecy (Evil) then the exercise would be worth some attention (and celebration). But the story is more complicated. We are undoubtedly witnessing a strengthening of citizens' rights to gain access to information and it would be foolish to suggest that countries have not been influenced by the actions of others—and, latterly, by the encouragement of supranational organizations and donors. But the motives of those adopting FOI statutes vary widely between jurisdictions and across time. Historians of FOI in the 1960s and 1970s correctly point to the intellectual origins of the new laws in the citizens' rights movement, in consumerism, in distrust of an over-mighty bureaucracy, and in the struggle for press freedom. Even if we overlook the differences between these strands of thought, we **(p. 130)** cannot overlook the fact that by the 1990s many countries were adopting FOI for quite different reasons: to win credit with donors and, in particular, to fight corruption. And this is indicative of a broader pattern. Individual FOI statutes are commonly the product of local political struggles, and their design is influenced by the objectives of the campaigners and legislators engaged in those struggles. They do not follow one, universal template. Rather they are tools shaped for particular purposes and crafted in accordance with local compromises and legislative deal-making. The distinctive legislative histories of the FOI statutes in Australia, Canada, and New Zealand—all of them enacted within less than two years—illustrate the point (Terrill 1998; Aitken 1998; Gillis 1998).

And, just as the objectives of reformers have changed over the last forty years, so has the information policy context. The first, and most obvious, development has been the advent of the Information Society itself. Not only is greater economic and social power vested in the control of information flows, but the exercise of that control is more complex. Legislators have to resolve new technical challenges. To take just two examples: what constitutes an original document; and what is deemed to be an electronic record?

But this period has also seen technological, economic, and social change drive a more profound renewal of access laws. The most obvious, and arguably most important, development has been the spread of privacy and data protection legislation governing the uses of personal data and the access which may be given to them. Many of the earlier FOI regimes were established before information privacy laws found their way onto the statute books (as was the case, for example, in the United States and New Zealand). Others have begun life as integrated regimes. And a third, later category, has been enacted in countries well used to data protection. These sequential differences are not trivial. For some jurisdictions, it has meant that privacy—first in the field—has emerged as the dominant value, more likely to trump access rights when the two are in tension. In other cases it means, more pragmatically, that the later, FOI statute has been crafted onto a legislative framework originally designed for data protection.[3] The United Kingdom certainly falls into the latter category: the design of its FOI Act owes (if that is the right word) much to its interface with the Data Protection Act 1998. And the Data **(p.131)** Protection Act has as its source the European Union's Data Protection Directive of 1995. Indeed, the design of the current generation of information access laws, in Europe and beyond, cannot be fully understood without some familiarity with the EU's directive.

And so we have FOI statutes which were conceived for different purposes, which were variously designed to meet local need (or to respond to international pressure or enticement), which make different judgements on the balance between access and release, which reflect local legislative traditions and which respond to a changing information policy context. For these reasons alone we should be cautious about international comparisons which rest on tabulations of exemptions to be found within national statutes or which take those statutes at face value. At most, such surveys are the starting point for an exploration of the contrasting approaches taken by individual jurisdictions.

And so if we are to weigh the merit of FOI statutes—overlooking, for a moment, the normative judgement that involves—we must do so with precision and informed by a careful understanding of each jurisdiction. But I wonder whether we will learn much if all we do is to run a rule over the competing examples of legislative design. There may be some value in identifying the most elegant or most liberal provisions: but surely what matters is whether statutes work in practice. Do citizens know more as a result of their enforcement? And that, as Onora O'Neill argues in Chapter 5 above, is not just a matter of pushing more information in the direction of the citizen: effective communication requires more of the communicator than bulk provision of data of questionable intelligibility and quality.

If one is to reach a judgement on the efficacy of FOI laws in practice then the analysis must include, *inter alia*, an assessment of the speed and quality of response to requests and the speed and quality of the appeals process, including the adherence of authorities to the adjudicator's rulings. But it must surely also embrace a judgement on the information infrastructure of the public authorities within the scope of the legislation. A citizen may be blessed by the most generous statutory provisions in the world, but this will be as naught if his/her government does not create or keep records of its transactions or if it cannot retrieve those records efficiently.

These practical, workaday problems complicate any interpretation of the efficacy of national FOI jurisdictions. These difficulties are felt at their sharpest in any comparative analysis of FOI performance statistics. There are almost as many approaches to performance data as there are **(p.132)** FOI jurisdictions. We soon encounter variations in institutional scope, in coverage, definition of requests, treatment of appeals, and measurement of delays. And those are just the differences in data categories. The one universal truth about FOI data collection is that it is difficult to require it be done to consistently uniform standards: across the FOI world, administrators rise as one to ask which is the priority—the data collection or the FOI requests themselves?

These are not pettifogging details. Fundamental differences in the composition of FOI performance data prevent easy (and, in many cases, any) safe comparisons between those data. The simplest, but most troublesome, hurdle to be cleared is that some national statistics merge figures for data protection/privacy applications and those under FOI statutes. The former are typically more numerous than the latter; they are more commonly made by private citizens than organizations; they are focused on a limited range of agencies—those which hold personal data, such as social security departments and veterans' administrations; they are less likely to be associated with commercial activity; and they are likely to provoke quite different responses from the authorities, who are required to consider a narrower range of issues when deciding whether to grant applications. In short, one is dealing with a quite different request population from the one administered under FOI. Statistics which conflate both access regimes are difficult

to interrogate in themselves. But compare them with data from other jurisdictions—where the data are segregated—and one faces serious difficulties.

Some of these methodological pitfalls are described by Cain, Egan, and Fabbrini (2003) in their discussion of the spread of FOI. And yet their paper also illustrates some of the problems faced by comparative analysis. For example, they propose that usage figures for the Commission d'accès aux documents administratifs (CADA, the commission which oversees the French access system) may be compared with FOI and privacy appeal rates from US federal agencies. But the obstacles to this assumption are formidable: the French system is hard to use and the usage data difficult to obtain (their claim that the French system is 'strong and active' is not explained). CADA, as they note, has both appellate *and* advisory functions; and the US figures, including privacy requests, are of a different order of magnitude. Similar problems beset their comparison between the United States and the European Union. Despite the best efforts of the European Commission, the access rights given by the Amsterdam Treaty to EU citizens are little known and even less understood. Consequently the numbers are tiny (just 989 applications from 1994–6, and only 59 **(p.133)** appeals; Cain et al. 2003: 128–30). This sort of population offers a slender basis for the analysis to which it is subject. In so far as there are similarities with the United States, it may well be for reasons quite other than those suggested by Cain et al. They note that in both jurisdictions 'individuals—as opposed to groups and public entities—tend to make information requests' (pp. 132–3). This conclusion can only be drawn from the EU if one brackets lobbyists and lawyers together with private citizens. But surely a more natural reading would group them with business—and together these three categories would represent more than 46 per cent of applications. This would echo what is known of FOI usage in the United States: for a number of federal agencies commercial requesters make up the largest single constituency among their FOI requesters. One of the few constant themes in the analysis of FOI usage across jurisdictions is that private citizens are customarily minority users.

Does this mean that comparative analysis is necessarily doomed? I would argue not. FOI is fertile territory for comparative policy-making and for comparative policy-analysis. My argument is not that we should abandon the task: quite the contrary, it is that we should set about it rigorously. In doing so I propose two starting points. First, any such comparisons should be informed by an understanding of the political context in which FOI was framed and implemented; the bureaucratic culture within which it is administered; the scope of the legislation (and its relationships with other access provisions); its practical value to applicants (do they get what they request?); and the limitations of FOI statistics. Second, we should acknowledge that there is relatively little empirical research on which we can draw and so any conclusions we may draw now are necessarily provisional. Alasdair Roberts notes in Chapter 7 above that we need more research on the behaviour of bureaucracies in response to FOI. There is much that we do not know about FOI in practice and until rigorous empirical research has been undertaken we should be cautious about any attempts to compile international league tables of FOI virtue.

2. Making Sense of the First Forty Years of Modern FOI Laws

Accepting all this, what are we to make of the first forty years of FOI in the modern era? In most mature democracies we can detect two meta-narratives. One comes from public officials, who mourn the loss of a private space in which policy might be formulated and confidences **(p.134)** protected; who decry the naïvety of the framers of FOI; who point to the limited usage of the statutes by 'real people'; who argue that FOI has done nothing to arrest the continued decline in public trust in government; and who protest that they never get credit from the media for the

information which they do release. The second comes from campaigners for greater openness. All that it has in common with the first is the sense of mourning and regret. Mourning that liberal hopes have been denied; that the bureaucracy has eluded them, dancing away from the snares FOI put in its path; that the public knows little and cares less about FOI; that FOI administration is slow and ineffective; and that a culture of openness has yet to be realized.

I am not going to attempt to adjudicate between these competing narratives. To do so would to be to ignore my own comments on comparative analysis of FOI jurisdictions. But we can draw on the international experience to draw conclusions which are relevant to the challenge now faced by the United Kingdom. First, and most obviously, it has been a bumpy ride. FOI has not defined the boundary between access and retention: it has simply provided the context in which arguments may be had about the release of official information. And, as Alasdair Roberts notes in Chapter 7, there may even have been an intensification in the 'rhetoric of secretiveness': the advent of statutory access rights brings with it unflattering stories about public authorities and a stronger focus in the media on governments' denial of access requests. In short, campaigners complain when they lose, journalists write about government refusals, and government has to suffer the consequences. Stories about governments' virtue in releasing information rarely command headlines.

Just as public usage of FOI is limited, so, it seems, is public understanding of the legislation. One of the few instances in which awareness of FOI is known to creep above 50 per cent of survey respondents is in Scotland, where almost 60 per cent of citizens know about the Freedom of Information (Scotland) Act.[4]

There is evidence to show that governments have taken action which has had the effect of reducing the impact of FOI. Examples include the fee increases introduced in the Australian Commonwealth system in 1986, and the wide-ranging reform package enacted in Ireland in 2003. Both cut the level of FOI requests significantly.[5] Action to draw the sting **(p.135)** of FOI has not always been so explicit. In Canada, for example, the release of papers, in 1986–7, giving the cost of a visit to Paris by Prime Minister Mulroney was followed by official efforts to put the records of ministerial expenses beyond the reach of access requests by taking them outside official record-keeping systems.[6]

These measures, and their consequences for FOI usage, may be easy to chronicle. It is much more difficult to discern whether bureaucracies have been engaging in more subtle resistance to FOI. Alasdair Roberts in Chapter 7 above argues that they have. His charge sheet includes manipulation of the record, failures to create records, centralized control over the processing of sensitive requests, under-resourcing of FOI administration, and failures of FOI to keep up with the restructuring of the public services. And he cites evidence to suggest that these factors may have impacted on the effectiveness of FOI regimes. But some of what he describes is not purposive bureaucratic resistance: instead he is charting changes to the public sector, changes which may have quite distinct origins but which may have an incidental (and deleterious) impact on FOI.[7] Let us take an example from the charge sheet. The disciplines of record-keeping are commonly held to be in decline in Western bureaucracies. But in so far as there is evidence of this decline, it may be explained by the transition to electronic record-keeping—and by the premature removal of posts for staff who kept paper records in order. Bureaucrats may feel the temptation not to document their actions for fear of exposure, but they are also subject to countervailing pressures to leave an audit trail of their actions for fear that they may face charges of maladministration. And, as Helen Margetts suggests in Chapter 12 below, the

document management systems that most bureaucracies now use have far greater capacity to store information than the paper systems which preceded them. It remains an open question whether that information will remain available over the long term, but in the short term it is far from clear that the FOI user is worse off.

Even in those FOI jurisdictions which are deemed to have had the most troubled histories one can point to many thousands of requests which have been satisfied under the legislation and many *causes célèbres* in which access has won out over retention. Australian FOI advocates are **(p.136)** amongst the weariest and the least sanguine about the struggle for greater openness. But here too, citizens and their proxies are routinely securing information about local services, about public policies, and about the communities in which they live. Consider two, diverse examples. In Victoria and Western Australia FOI requests have prompted the decision to publish all government contracts on the Internet. And in Port Kembla, New South Wales a smelter alleged to be polluting the environment was closed down after a chain of events sparked (if that is the right word) by the 1998 release of documents under FOI.[8] No such examples can prove that FOI is working—whatever that might mean. But they do serve as a reminder that, however painfully, and however inadequately, FOI statutes have helped citizens and organizations lay claim to information held by public authorities.

And so it is safe to conclude that FOI has not been a comfortable statute for government, and that it has not delivered all that its advocates may have sought. In assessing British prospects it is important to understand why this should be the case.

The first, and most important, reason is that an FOI statute does not solve anything by itself. Nor is it intended to. It is not like a Finance Act, which states, definitively, that the standard rate of income tax will be set at a certain level. Rather, it frames an argument, or, more accurately, innumerable arguments. It is helpful to think of it as defining the rules for a contact sport. It does not say who will win; but it does rule out certain ploys as illegitimate; and it gives the referee the tools with which to decide between the competing teams.

Seen through a different lens, FOI is a species of those American laws of the 1960s and 1970s in which legislators set out broad—and competing—principles, and then handed the matter over to the courts to decide on individual outcomes. It exemplifies the approach which Kagan has defined as ‘adversarial legalism’ (Kagan 2001: 37–9, 46–8). FOI has been translated to national statute books in many different ways, but the underlying, and unresolved, tension between competing interests is a common feature of such laws.

Consequently, the administration of FOI is inherently unpredictable. Precedents may serve as a guide, but both parties can be surprised by outcomes, not least in those (more recent) systems which require adjudicators to examine the public interest, a concept which, inevitably, evolves over time and is case-specific.

(p.137) If this unpredictability is combined with partisan, oppositional politics and vigorous, competitive news media then FOI will undoubtedly fuel the ‘rhetoric of secretiveness’ alluded to by Roberts. For government opponents, FOI can seem to be an each-way bet. Win and you might secure a disobliging revelation about government. Lose and you have a story about official secrecy.

Stories about increasing transparency rarely command attention, not least if FOI statutes themselves are only used by a small part of the population and if their purpose is little understood by citizens. And if government does not have a clear narrative about the value of FOI its problems are compounded: it is left proclaiming FOI as a public good, but without clear evidence of the benefits that it has delivered to the public. It needs that narrative not just for public consumption, but to maintain its own morale (and resolve) when FOI proves to be uncomfortable, as it surely will. That narrative must develop over time if it is to win out in an ever more complex policy environment, where the merits of FOI are increasingly contested. Some now characterize FOI as a product of a simpler age, when security threats were more predictable, the media less oppositional, and governmentcitizen relations less complex. Advocates of FOI need to renew the narrative—or to modify their policy prescriptions—for the new context.

As if that were not difficult enough for government, it also faces challenges in the administration of FOI. This is not the type of statute that runs itself. It is inherently complex; precedents change over time; it can generate tension between administrators and elected politicians; and it can seem like a distraction from the real business of government. Consequently, a career (or even a job) in FOI administration may seem unappetizing: it is difficult work to do well; it offers conflict with external stakeholders, as well as the prospect of delivering unwelcome advice to senior staff and the sense that one is an unwelcome overhead. For these simple, quotidian considerations, FOI administration has often gone into decline. Starved of resources, central units have been unable to give guidance or to promulgate case notes. Administrative staff unable to cope with the complexity of their casework have been deemed surplus to requirements. In their absence the more difficult cases are either neglected or passed to lawyers, whose early intervention necessarily ‘legalizes’ the case and might also bring with it an element of adversarialism.

In resolving FOI cases, government does not just have to consider its own interests. The information which is sought often originates with third parties or relates to their interests. Statutes customarily cater for this **(p.138)** dimension by giving protection to personal data, to trade secrets, to legally privileged information and the like. And in some cases, as in the Australian Commonwealth system, third parties are given explicit rights over whether release should take place (‘reverse FOI’ provisions). All of this may seem clear on the face of the statute, but unless it is managed carefully in practice (especially at the point of introduction) then relations with third parties can become ambiguous or troubled. Companies may seek to contract out of FOI when they sell services to government. Stakeholders may enquire of Ministers and officials whether a meeting is ‘outside FOI’. The law may recognize neither evasion, but it does not mean that third parties will not try them. Embarrassment and tension may result if such efforts are rebuffed. If they are not, then government may become complicit in secretive dealings with third parties and, if discovered, it may find itself having to explain why it cannot honour the undertakings of confidentiality it had mistakenly given.

It is probably fair to say that it is more difficult to implement FOI successfully now than it was at the time of the US Act of 1966. The delivery of state functions is now in the hands of a much wider range of agencies—many of them outside the boundaries of the formal state. And so legislators are faced with a choice between accepting that FOI will have limited scope and effectiveness, or trying to draw in para-state corporations, private companies, and voluntary sector agencies. The latter option is necessarily difficult, although there have been some successful attempts to do so: the extension of access rights to private agencies paying welfare

benefits in Australia is a case in point.[9] And the information policy context is now much more complex. FOI statutes have to interact with many more access statutes and regulations (originating from local or state government, from nations themselves and from supranational organizations).[10] The statutory regulation of access to information is necessarily more challenging because the Internet has meant that information is stored, managed, and accessed on a scale and in ways which were unimaginable in 1966. Not only does this make the legislator's role more technically demanding but it makes the statutes more difficult to implement and **(p.139)** (not a trite point) it makes it more difficult to explain the *particular* value of FOI legislation. Once it had an iconic value as the tool with which citizens could secure access to information held by government on their behalf. Now our understanding of FOI is more nuanced and FOI is simply one amongst many routes that citizens may use to see the official record.

3. The Prospects for the United Kingdom

Against this backdrop, what might the prospects be for FOI in the United Kingdom? Many are gloomy, seeing the UK as a particularly hard case. It has long been seen as the sick man of the Western world when it comes to transparency in government; and observers still discern the characteristics of a culture of secrecy.

The first point to make is that much has changed over the last twenty-five years. In 1980 Britons had no comprehensive, statutory rights of access to official information. They did not even have statutory rights of access to information about themselves. Releases of official information were still subject to the compendious restrictions of the Official Secrets Act 1911, which had been passed when the country was in a state of high anxiety about espionage by the Kaiser's spies.

The last couple of decades have seen change on all fronts (Birkinshaw 2001: 99–159, 238–89). Statutory access to official records has been opened up piecemeal through a number of private member's bills inspired by FOI campaigners. The introduction of an administrative code on access to official records has allowed Whitehall to limber up for a statutory regime. The Official Secrets Act 1911 has given way to the Act of 1989, even if some saw it as the exchange of a blunderbuss for an Armalite. And European Directives on data protection and environmental information have brought into effect statutory regulation of important categories of information.

This is the immediate context for the United Kingdom's FOI Act 2000. It is one part of the transformation of Britain's information access regime—a transformation which is set to continue, not least in response to technological change.[11] The UK statute comfortably fits within our **(p.140)** definition of FOI. It is legislation which is distinctively British: for good or ill it does not borrow self-consciously from other FOI statutes. But the broad architecture of exclusions, exemptions, and adjudication provisions has much in common with other FOI laws. And yet some of its provisions are striking. Its coverage of the public sector is unusually broad, taking in some 100,000 bodies. It also allows for private agencies performing public functions to be brought within the Act. It is fully retrospective, in contrast to the more cautious approach in Ireland and the Commonwealth of Australia. And—a novel feature—a code of practice seeks to address the quality of records management in government.

In short, by the time that the FOI Act was brought fully into force, on 1 January 2005, it could no longer be argued that the United Kingdom was an aberration in the access rights it gives its citizens. This is not a domain where the British can claim, or be granted, exceptional status.

We already know that the enforcement of FOI will not bring to a close public debates about when information should or should not be released. Debate and disagreement will continue—noisily. But can the United Kingdom learn anything from what has gone before—anything which might make the history of FOI in the UK a happier one than it has been in some other countries?

There are a number of reasons for optimism, an optimism informed by the experience of others. First, we know what not to expect. We know that 1 January 2005 did not represent the start of a free-for-all in access to government information in which the population would rise to the last man and woman and start exercising their FOI rights. And the government has been at pains to dispel some of the inflated expectations which have attended the introduction of FOI in other jurisdictions (see, for example, Falconer 2005: 4). It has committed itself to raise public understanding of the new legislation, but its ambitions have been tempered by the experience of other jurisdictions.

Beyond that, there is greater precision than has been the case in other countries about how the legislation's performance will be assessed. Lord Falconer, the Secretary of State responsible for the legislation, suggested that progress be measured according to three criteria: the delivery of good-quality, timely decisions to users; improved public awareness of their new rights; and rising levels of customer satisfaction amongst those who make FOI applications (Falconer 2005: 8). His officials in the Department for Constitutional Affairs were charged with developing ways to assess progress against each of the criteria. In this regard, FOI in the United Kingdom may simply be a product of its time: government is **(p.141)** now expected to define what successful policy outcomes might look like—and to demonstrate whether it has realized them. Lord Falconer's criteria do not by themselves constitute a new narrative for FOI, but they do point us to a real prize: the introduction of precise, objective criteria clearly communicated and understood by all.

Lord Falconer declared that the government would manage FOI proactively. In the run-up to implementation government departments were encouraged to prepare for significant levels of demand and, above all, to put in place resources to manage complex cases which might require judgement calls to be made by senior staff or Ministers. And his Department established a central clearing house to co-ordinate the government's response to cases which engaged interests beyond those of the recipient departments. This unit, which was envisaged as a long-term feature of Whitehall's FOI operation, was also charged with disseminating advice and guidance on the law and practice of FOI. The first edition of the guidance was published in November 2004 and the Department committed itself to update it as case law emerged from the Commissioner and from the Tribunal (Department for Constitutional Affairs 2004).

It is also significant that the United Kingdom's implementation focused on how best to mobilize bureaucratic support for the legislation. Each Department appointed an FOI champion charged to give senior leadership to the implementation effort. And the first steps were taken towards the creation of a community of practitioners. They have access to an e-forum discussion group, they receive a journal giving them up-to-date news of leading cases, they meet regularly, and, in time, they will be able to study for a bespoke university qualification in the administration of information rights.

Is this conclusive proof that the United Kingdom's experience is going to be happier than that of some other jurisdictions? No. Is it evidence that the UK has learned some of their lessons? Perhaps. But this is not the time to answer these questions. Indeed, the UK government itself cautioned all parties against calling judgement in the first few months of the new system. The

success of the government's preparations for implementation—and of FOI as a whole—will only be secured by sustained effort over many years. When those judgements are made, the proposed measures of success offer the best prospect of calibrating progress. Far better to use those tools, prosaic and pragmatic as they might be, than to attempt to judge whether a culture of openness has dawned. Not only does the latter criterion beg all sorts of questions about the measurements to be used, but it sets a peculiarly high standard. For some observers, it is **(p. 142)** not sufficient for officials to release information, but they must do so with a song in their hearts. Sufficient to say that this change may take time to come—and the investigation of officials' humour at the point of release may be an inexact science.

Can we learn anything from the first nine months of FOI which allows us to predict its long-term future? Little—for the reasons that have already been outlined. At the time of writing (September 2005) just the first two quarters of monitoring statistics were available—and their scope was limited to central government.[12] Predictably, their publication prompted all manner of judgements on the perceived health, or otherwise, of the system. On the basis of the early figures we might note simply that there was an initial surge in demand which subsided and that a relatively high proportion of requests were granted in full in the second quarter (59 per cent of those brought to a conclusion; a further 12 per cent were granted in part). Campaigners for greater openness would have been foolish to draw too much comfort too early. But they might, with reason, have celebrated some remarkable individual cases. None was more remarkable than the publication of details of individual grant payments made to farmers under the Common Agricultural Policy.[13] At its simplest, we may conclude that citizens after 1 January 2005 had access to more information. But more informed judgement on the generosity of otherwise of the United Kingdom's system will have to wait.

If the UK were to learn from the experience of others, what might success look like? Taking Falconer's criteria as a starting point, we would see the effective delivery of high-quality, consistent decisions on cases. Users would be engaged by officials, who would help them to define their requests and who would treat them as customers, not as adversaries. And there would be better public understanding of the Act and the balance the government is striking between release and retention.

The public would know more. Information released in response to requests would be set in context and users would be helped to understand it. Information of wider interest would be published, not given exclusively to the requester. And, increasingly, such information would be published before anybody has to make a request.

Unrealistic? It need not be. In its implementation of FOI the United Kingdom has sought to learn from the experience of others and it is **(p.143)** possible that it will escape some of the difficulties experienced by other jurisdictions. That does not mean that the path will be easy, nor that success is assured. The competing interests expressed in the FOI statute will be advocated —in applications, in government, in the Commissioner's judgements and in the media. But, if the UK succeeds in developing greater understanding of what FOI does—and does not—do, there is some prospect of a new, more mature conversation about transparency itself. A public conversation in which the competing interests are discussed frankly. A public conversation in which the UK prepares for its next generation of information access laws. A new generation of laws, which technological change will surely make necessary within the next decade. And perhaps this time the UK might be one of the first countries across the starting line.

Note. Until July 2005 Andrew McDonald was the Constitution Director at the Department for Constitutional Affairs (DCA). In this capacity he was responsible for the implementation of the FOI Act 2000. But the chapter is written in a personal capacity and does not represent the views of the DCA or of HM Government. He is grateful to Robert Hazell, Greg Terrill, Alasdair Roberts, and an anonymous referee for their comments on earlier drafts. The failings which remain are his, and his alone.

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Notes:

([1]) Perversely, the principal international survey recognizes the Zimbabwean statute for what it is—but still sees fit to include it: see www.freedominfo.org/documents/global_survey2004.pdf (accessed 8 June 2006).

([2]) The two bringing up the rear were Germany (where the Schröder Government passed a federal FOI law at the third attempt, just before it left office in 2005) and Russia.

([3]) The significance of the sequencing of FOI and data protection laws is discussed in Hazell (1998).

([4]) See www.itspublicknowledge.info/resources/research/research5.htm (accessed 27 March 2006).

([5]) The reduction in requests in Australia may also have been prompted in part by the decision of some departments to allow access outside the terms of the Act.

([6]) Subsequently, practice in Ottawa has changed and many details of travel expenses are now published proactively.

([7]) This observation is not a criticism of Roberts: he recognizes that some of these phenomena are not the product of deliberate bureaucratic resistance.

([8]) *Hamilton* v. *Environment Protection Agency* (No 367/1997), decided in the District Court of New South Wales at Wollongong, 5 August and 18 September 1998.

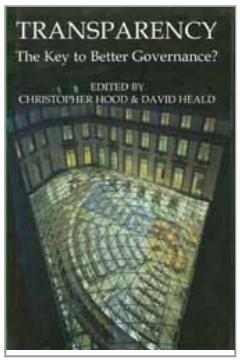
([9]) The extension of these rights was achieved by requiring that the agencies in question manage them as government records, and hence FOI applications could be made for them (see National Archives of Australia (1998)).

([10]) For example the UK FOI Act has to interface with the EU Directive on Environmental Information and with the Aarhus Convention, which are implemented in UK law as the Environmental Information Regulations. The alignment is close but, as can be seen with regard to fees and exemptions, the two systems (FOI and the regulations) give citizens different rights.

([11]) Another part of that transformation is the Freedom of Information (Scotland) Act 2002, whose principal access provisions were brought into force at the same time as those in the UK statute.

([12]) For these statistics see www.foi.gov.uk/stats-janmar05.pdf and www.foi.gov.uk/stats-aprjun05.pdf (accessed 30 September 2005).

([13]) See www.defra.gov.uk/corporate/opengov/inforelease/index.htm (accessed 6 October 2005).



Transparency: The Key to Better Governance?
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Member-State Budgetary Transparency in the Economic and Monetary Union

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[−] Abstract and Keywords

The Maastricht Treaty raised the standards for transparency in the European Union to new supranational levels. Prior to Maastricht, transparency in member-state budgeting depended largely upon domestic institutions, both public and private, to assess the size, composition, and quality of public finance. Transparency at the member-state level served the traditional functions of encouraging democratic political accountability, promoting political control over bureaucratic institutions, crafting fiscal policy, and ensuring probity in financial management. Transparency for ensuring macro-budgetary treaty compliance promotes EU integration while helping to assure an often doubtful European public, international financial markets, and world press that the Economic and Monetary Union's (EMU) convergence process and excessive deficit procedure rely on reasonably credible budgetary data. This chapter discusses macro-budgetary rules and the creation of compliance information systems, transparency through bureaucratic politics, and the role of Eurostat in budgetary surveillance. It also examines the twin challenges to EU budgetary transparency, those of disclosure and interpretation, faced by Greece.

Keywords: European Union, Maastricht Treaty, transparency, budgeting, accountability, fiscal policy, compliance information systems, bureaucratic politics, Eurostat, budgetary surveillance

1. Introduction

THE TREATY ON EUROPEAN UNION, THE MAASTRICHT TREATY, raised the standards for transparency in the European Union to new supranational levels when it declared that specific member-state deficit and debt figures, detailed to tenths of a percentage, would effectively determine which countries would become members of the Eurozone. Prior to Maastricht, transparency in member-state budgeting depended largely upon domestic institutions, both public and private, to assess the size, composition, and quality of public finance. Transparency at the member-state level served the traditional functions of encouraging democratic political accountability, promoting political control over bureaucratic institutions, crafting fiscal policy, and ensuring probity in financial management. Budgetary transparency also fulfilled selected international commitments, such as providing data for informational purposes to international

organizations, such as the Organisation for Economic Co-operation and Development (OECD), the United Nations, and the International Monetary Fund. The Treaty, however, placed new demands for transparent and credible data on EU and member-state institutions for a purpose unlike anything they had experienced before, namely for macro-budgetary treaty compliance. Transparency for this purpose promotes EU integration while helping to assure an often doubtful European public, international financial markets, and world press that the Economic and Monetary Union's (EMU) convergence process and excessive deficit procedure rely on reasonably credible budgetary data.

This chapter presents the argument that, in order to achieve member-state budgetary transparency, the Maastricht Treaty initiated the development of a compliance information system that is administered by the European Commission (EC). Transparency is achieved through enabling **(p.146)** treaty-based and supporting legislation, bureaucratic politics, surveillance techniques, national accounts rule-making and econometric surveillance. The effect of all this activity is manifested in the Commission's national accounts rule-making that helped determine which member states qualified for EMU membership. Despite the building of institutional capacity at both the EU and member-state levels, however, the effectiveness of budgetary surveillance has its limits, as exemplified by later revelations regarding the size of Greece's deficits and debt. In response, the EC recommended changes in regulations that should enhance its surveillance authority and techniques, thereby improving member-state budgetary transparency.

Transparency is a complex and multifaceted concept. As Christopher Hood notes in Chapter 1 above, definitions of transparency vary depending upon time, place and, perhaps most important, function. Hood points out that transparency serves purposes that extend beyond those commonly associated with notions of 'openness', 'accessibility', and 'comprehensibility'. Depending upon the function it supports, transparency often requires the mandatory release of information, active interpretation and analysis of data, the monitoring of institutional actors, and notification of actor compliance and non-compliance. Transparency may benefit only key political actors or it may benefit a broader public; it may be imposed in a top-down fashion or stem from bottom-up pressures. Hood also traces a number of historical interpretations of transparency, including the contemporary 'doctrine' of transparency that is tied to international governance. Transparency in this case provides the information necessary for making international organizations, such as the EU, effective supranational policy regimes. This 'involves arcane rules that are only intelligible to lawyers and accountants and conventions of reporting from one expert bureaucracy to another' (p. 13). At the same time, David Heald in Chapter 4 above notes that to be regarded as credible by decision-makers, the process of achieving transparency must itself encourage the values of effectiveness, accountability, fairness, and legitimacy. Though each or all of these qualities may be reflected in codes and rules intended to promote transparency, the actual task of ensuring that transparency exists is one of public administration.

(p.147) 2. Macro-Budgetary Rules and the Creation of Compliance Information Systems

Table 9.1 Macro-budgetary rules of the US, Japan, and the EU.

	United States	Japan	European Union
Rules	Gramm-Rudman-Hollings 1985 & 1987; Budget Enforcement Act 1990; Balanced Budget Act 1997	Fiscal Structural Reform Act 1997	Maastricht Treaty 1992
Budgetary goals	Combination of deficit and balanced budget targets/ expenditure caps/PAYGO requirements	Deficit and debt targets	Deficit and debt targets
Spending restrictions	Multi-year spending caps	Multi-year programmatic spending limits	None
Budgetary coverage	Applies to central government	Applies to central government	Applies to combined central and local governments of each EU member state
Monitoring agents	For GRH: GAO/OMB/CBO For BEA: CBO/OMB For BBA: CBO/ OMB	Ministry of Finance/Board of Audit	European Commission/ European Monetary Institute
Sanctions	Sequester	None specified	EMU status denied/ Stability Pact financial penalties

Source: Savage 2005: 15.

The use of broad, macro-budgetary rules with deficit restrictions is now commonplace at the nation-state level (Poterba and von Hagen 1999; Tanzi and Schuknecht 2000; Schick 2003). During the 1980s and 1990s, many of the major industrial democracies adopted macro-budgetary rules that superseded standard budgetary procedures in an effort to restrain their deficits and debt. The United States, for example, enacted the Balanced Budget and Emergency Deficit Control Act of 1985 (popularly known as Gramm-Rudman-Hollings), the Budget Enforcement Act of 1990, and the Balanced Budget Act of 1997. Japan enacted the Fiscal Structural Reform Act of 1997, and the Maastricht Treaty was crafted in 1992 (Savage 2000). As shown in Table 9.1, each of these rules set targets or ceilings, some with the goal of achieving balanced budgets, some with the less ambitious goal of restricting the level of deficit spending. The Maastricht Treaty requires that EU member states comply with the 3 per **(p.148)** cent deficit and 60 per cent debt of GDP reference values in order to gain EMU status. Other provisions in these rules outline various types of spending restrictions, such as whether these restraints impose multi-year spending caps, or whether they apply to all levels of government or only to the central government. Each of these rules provides for some sort of monitoring agency or agencies to determine compliance, which is the first step in activating these rules' positive and negative sanctions. The initial and often primary challenge facing these monitors in carrying out their surveillance task is developing transparent budgetary data.

The success of these monitors depends upon their ability to create what international relations scholars describe as a 'compliance information system'. Such a system 'consists of the actors, rules and processes that collect, analyze, and disseminate information on violation and compliance' (Mitchell 1993: 330). Not all compliance information systems are alike. They vary according to their institutional setting; the organization or entity being monitored; the clarity of the rules that outline the type of information required; the administrative capacity of the actor providing the information; the number of state, supranational, and extra-state actors involved;

whether the data are self-reported or produced by outside actors; and whether the data are required for assessing ‘effectiveness-oriented’ rather than ‘compliance-oriented’ behaviour. Effectiveness-oriented behaviour refers to state action that helps produce broad regime goals, where non-compliance does not initiate the use of sanctions. Because there is little threat to the state, co-operation with the monitor and the production of data are readily forthcoming. Compliance-oriented behaviour refers to state action that complies with treaty-based goals, where non-compliant behaviour induces the use of sanctions (Mitchell 1994a, 1994b, 1998). Because the state may be punished, co-operation with the monitor and the production of credible, transparent data are more difficult to achieve. The Treaty’s denial of EMU membership and the Stability and Growth Pact’s imposition of reputational and financial penalties place their surveillance procedures in this latter category.

The effectiveness of a compliance information system depends upon the capacity of the monitor to overcome the twin challenges to budgetary transparency: the problems of disclosure and of interpretation. Problems of disclosure arise when political actors fail to provide credible budgetary data to monitors, either because they intentionally hide information or because they lack the institutional capacity to do so. Problems of interpretation arise when governments intentionally or unintentionally wrongly categorize their data according to existing accounting rules. **(p.149)** Efforts by political actors to evade or manipulate macro-budgetary laws or constraints in this fashion are common, and they include such ‘gimmicks’ as altering tax collection and expenditure dates, extending fiscal years, and employing capital or pension funds to supplement operating expenses. The challenge of achieving transparency, therefore, is one of overcoming information asymmetries, and to succeed the monitor must have the authority, institutional independence, and institutional capacity needed to create and manage an effective compliance information system. There are five major ways in which the EU and the EC, as its agent, promote budgetary transparency among the EU member states: treaty-based rules; bureaucratic politics; administrative surveillance techniques; supranational rule-making; broad economic policy guidelines and econometric surveillance.

2.1 Transparency by Treaty-Based Rules: The Maastricht Treaty’s Legal Framework and the Delegation of Budgetary Surveillance

The demand for budgetary transparency within the EU begins with treaty-based rules. The Maastricht Treaty’s Article 99 (*Official Journal* 2002) grants to the Council of Economic and Finance Ministers (ECOFIN) the authority to issue and monitor ‘broad guidelines’ to ‘ensure co-ordination’ of member-state economic and budgetary policies. This Article offers but a limited sense of transparency, however, as the member states themselves select and provide ‘such information as [the member states] deem necessary’. A more exacting standard emerges from the Treaty’s excessive deficit procedure, outlined in Article 104. This Article declares that member states ‘shall avoid excessive government deficits’, where ‘excessive’ is defined as more than 3 per cent of GDP for budget deficits and more than 60 per cent of GDP for national debt. Recognizing the need for surveillance to ensure compliance, the Treaty delegates to the EC the task of monitoring member states’ budgetary ‘situation’ and ‘stock’ of debt, ‘with a view to identifying gross errors’ to determine their ‘compliance with budgetary discipline’. This surveillance begins the process of imposing sanctions on non-compliant states. If non-compliance with these fiscal reference values is identified, the Commission is delegated the task of initiating the excessive deficit procedure by way of a report to ECOFIN. Through an iterative process of Commission reports and Council judgments, a variety of soft reputational and hard financial sanctions may be imposed. The ultimate **(p.150)** sanction for the Stage II convergence

process would be the denial of EMU membership, with additional financial sanctions imposed by the Stability and Growth Pact during Stage III monetary union.

The Treaty's 'Protocol on the Excessive Deficit Procedure' provides more details about budgetary surveillance. First, the Protocol defines the key terms that characterize the type of information required of the member states. A budget deficit is defined as a member state's 'net deficit' and the debt is calculated as gross debt 'at nominal value outstanding at the end of the year' (*Official Journal* 1992: 84). The convergence criteria apply to 'general government', meaning that all levels of government financial activities are counted, not simply those of the central government. To harmonize these data, the Protocol specifies that the European System of Integrated Accounts (ESA) shall serve as the standard for defining the technical scope and the calculation of what constitutes budgetary deficits, public debt, and general government. The Protocol's Article 4, furthermore, states, 'The statistical data to be used for the application of this Protocol shall be provided by the Commission' (*Official Journal* 1992: 85). Council Regulation 3605/93 (*Official Journal* 1993), the Treaty's implementing regulations for the surveillance procedure, then employs ESA's accounting nomenclature to define in greater detail the key budgetary terms. The Regulation also includes critical surveillance provisions, requiring all member states to submit biannual deficit, debt, and relevant economic data to the EC. To control for variations in national budgetary procedures, the Regulation calls for the reporting of deficit and debt figures in terms of calendar as well as fiscal years, except for the most current budgetary projections, which can be calculated in terms of fiscal years. Armed with these reporting requirements and the specifications of debt, deficits, and related financial information, the EC began its task of monitoring the budgetary actions of the fifteen member states.

2.2 Transparency through Bureaucratic Politics: The Role of Eurostat in Budgetary Surveillance

The Treaty delegated to the Commission the task of monitoring member states' budgetary activities. This monitoring task is consistent with the EC's role as the EU's 'guardian of the treaty'. Yet, it is possible to conceive that during the creation of the Treaty's 'grand bargain', new institutional roles might be assigned to EU organizations for purposes of budgetary surveillance. Prior to Maastricht, for example, the only EU **(p.151)** institution with experience in monitoring, auditing, and evaluating budgets was the European Court of Auditors (ECA), which is responsible for auditing the EU budget. The Treaty might have assigned the ECA with either the direct responsibility for the surveillance task, or delegated to it some advisory function in the process.

There is, however, an explanation for the exclusion of the ECA from the surveillance process, despite its extensive experience as a monitor of government budgets. During the Treaty's drafting, the EC's Directorate General for Economic and Monetary Affairs (DG ECFIN) helped staff ECOFIN, and, for several reasons, it ensured that the Commission was entrusted with the surveillance responsibility, not the ECA (Savage 2005). First, the ECA and EC share a long history of inter-agency bureaucratic strife between auditor and auditee, which greatly diminished the EC's desire for ECA participation (Laffan 1997; Hollingsworth and White 1999). Second, given the intense politics of the convergence process throughout the EU, the DG ECFIN personnel who provided staff support to the drafters of the Treaty sought to avoid embarrassing member states by the type of auditing conducted by the ECA. The ECA's auditing procedures normally evaluate not only the accuracy and probity of government accounts but also the efficiency and content of public finances. As a DG ECFIN officer who staffed the drafting of the Treaty recalled: 'It was never our intention to build up through these ESA figures an auditing dimension' (Savage 2005: 44). Third, by excluding the Court from this function, DG ECFIN

expected that it would automatically assume the surveillance task within the EC. In this regard, DG ECFIN advised the Treaty drafters to employ ESA as the harmonizing standard for measuring budgetary deficits and debt. This advice enhanced DG ECFIN's possible monitoring role, as it had employed ESA for many years in making its econometric models, and it felt quite comfortable in utilizing ESA for surveillance purposes. ESA, it should be noted, is not a true auditing tool. It measures economic and financial transactions, principally to identify the size and nature of financial flows within and between economies, and represents the type of methodology often used for economic planning. In any case, despite DG ECFIN's success in excluding the ECA from the surveillance process, and regardless of its expectations for assuming the lead surveillance role within the EC, this responsibility unexpectedly went to the EU's statistical agency, Eurostat, an EC Directorate General.

Eurostat's participation paradoxically stemmed from DG ECFIN's efforts to include ESA in the Treaty's surveillance procedure. Eurostat **(p.152)** had authored ESA, and its Director General (Yves Franchet) later argued successfully within the Commission for Eurostat, rather than DG ECFIN, to be ESA's interpreter for the surveillance procedure. Franchet convincingly claimed that DG ECFIN lacked Eurostat's expertise in managing ESA, and a strong sense existed among EU authorities that Eurostat would be more independent and impartial in administering ESA. Economic and Monetary Affairs Commissioner Yves-Thibault de Silguy agreed, and authorized Eurostat to take the role as the surveillance institution for the convergence process. By doing so, he introduced into the process Eurostat's own supporting legislation that called for transparency in the creation of EU statistics. Article 285 of the Treaty Establishing the European Community (*Official Journal* 2002: 147) states that 'production of statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality'. This legislation was later supported by additional codification of Eurostat's role, as in Council Regulation 322/97 (*Official Journal* 1997b: 2), which singles it out as the 'Commission department' responsible for producing 'Community statistics'. This Regulation also declares that 'Community statistics shall be governed by the principles of impartiality, reliability, relevance, cost-effectiveness, statistical confidentiality, and transparency.' The principles of transparency invoked by these rules are virtually identical to the epistemic professional norms and values of the European statistical community, which call for transparency in the analysis and dissemination of statistical data (Eurostat 1998a). Thus, the effect of bureaucratic politics, on the one hand, limited the Treaty's budgetary transparency by denying the surveillance procedure the use of an auditing capacity. Yet, on the other hand, almost by chance, the task of budgetary surveillance fell upon the EU agency that cares most about transparency as both a legal and professional value in the production of statistical data.

2.3 Transparency through Surveillance Techniques

The Maastricht Treaty and its supporting legislation delegated to the EC the task of budgetary surveillance, an activity intended to enhance the transparency of member-state budgetary practices and policies. As noted, these rules required member-state self-reporting of specified economic and budgetary information on a biannual basis. Yet, the process of gathering this information from member states, analysing it, ensuring its **(p.153)** harmonization, and conducting the additional monitoring tasks demanded by the Treaty and the Stability and Growth Pact required substantial bureaucratic efforts on the part of the EU and the member states.

Surveillance begins with the assumption of ‘trust’, which is an assumption that the EC often relies upon in its monitoring tasks (Nugent 2001; Savage 2005). The EC assumes that the states themselves value and promote budgetary transparency, and that, consistent with the principle of subsidiarity, they will provide reliable, credible, and accurate budgetary and economic data to the EC. Domestic institutions, moreover, are presumed to guarantee the integrity of these data through their own surveillance activities. These institutions include member states’ national statistical institutes, ministries of finance, budget and finance committees of the legislature, government audit agencies, national central banks, independent credit rating agencies, and domestic and international credit markets. This assumption of trust is reinforced by the Treaty’s own requirement in Article 104 (2)(a) that budgetary monitoring should focus on ‘gross errors’ rather than all statistical differences, and because the EC itself lacks a budgetary auditing capacity. Because of this assumption of trust, Eurostat’s primary surveillance task is to ensure that member states’ budgetary data are properly classified and categorized according to ESA, not to challenge the accuracy of these presumably trustworthy data. Yet, to accomplish this, Eurostat must understand the underlying nature of member states’ economic and financial transactions to certify that they have properly classified their data.

As a result, Eurostat developed a variety of surveillance techniques that promote the transparency of these data. The first of these techniques is derived from the Treaty’s requirement that member states submit their budgetary data on a biannual basis. Eurostat and DG ECFIN created the forms on which these data are entered and sent to Eurostat. In addition to asking for the levels of deficit, debt, and GDP, the forms also call for the member states to explain certain calculations and provide some of the underlying data used in these computations.

Second, Eurostat communicates continuously with member states and their national statistical institutes (NSI), through questionnaires asking for information from all EU governments and more directed correspondence sent to specific member states. Key to this question and answer process is ‘asking the right questions’. The relevance of the technique stems from the fact that extensive learning and institutional capacity building were necessary throughout the EU at the beginning of the surveillance procedure. Surveys and questionnaires assess the NSIs’ **(p.154)** technical and administrative capabilities, and variations among member states provided clues to both forms of capacity. These NSIs are charged with the task of collecting member-state budgetary data from the various ministries of finance and central banks, ensuring they are classified according to ESA, and submitting the biannual reporting forms required by the Treaty to Eurostat. Looking for variations in member states’ responses also alerts Eurostat to those areas of ESA requiring clarification through formal rule-making.

Third, beginning in 1996, Eurostat led mission visits to individual member states. At these meetings, Eurostat focuses on the particular statistical needs of a given member state, asking extensive questions about the member state’s statistical capacities and its classifications of budgetary transactions, while answering the member state’s own questions about how to interpret budgetary actions in terms of national accounts.

Fourth, Eurostat relies heavily upon the press and third-party sources of information. Newspapers, such as the *Financial Times* and *Les Echos*, report on major government economic and budgetary activities, thus alerting Eurostat to new developments. Eurostat is also sometimes notified of misclassified or unreported transactions by disgruntled whistle-blowers within member-state governments. Another form of third-party oversight comes from

international credit review agencies, such as Moody's, Standard & Poor's, and Fitch Ratings, all of which monitor, assess, and rate the quality of member-state public finances.

Fifth, Eurostat's surveillance is enhanced through the training and secondment of member-state statistical personnel. In addition to training these statisticians in the ways of ESA, Eurostat strengthens its professional relations and broadens its contacts within member-state governments. The initial use of these techniques was accompanied by extensive organizational learning and institution building in Eurostat and throughout the European statistical community. Neither Eurostat nor the NSIs were prepared for their new surveillance duties. Prior to the Treaty, they had neither engaged in monitoring member-state budgets nor applied ESA's national accounts framework to budgetary-related data prior to the Treaty. Since then, Eurostat's training efforts have greatly improved the NSIs' technical and administrative capacities.

(p.155) 2.4 Transparency through Supranational Rule-Making: Eurostat's National Accounts Decisions

The Treaty, Protocol, and supporting secondary legislation together provide a basic outline for the surveillance procedure that requires EU member states to submit biannual budgetary and economic data to the EC, harmonized in accordance with ESA. This harmonization, however, proved to be a difficult task for three reasons. First, ESA was never devised for the purpose of interpreting, transforming, or calculating standard government budgetary data. It is an accounting system created to measure the size of a national economy through the classification of economic and financial transactions among its primary sectors. Second, the particular version of ESA designated by the Treaty, ESA 79, was already outdated by 1992 when the Treaty was drafted, as Eurostat was then at work preparing a new version. The incorporation of ESA 79 into the Treaty, despite its dated quality, reflects the fact that neither the Treaty's drafters nor DG ECFIN consulted the EU's statisticians who actually worked with it before specifying its use. Third, even the newest version of ESA, ESA 95, requires constant updating to accommodate continual changes in the development of financial instruments employed in both the public and private sectors. Consequently, rather than apply a cookbook formula to national budgetary data, since the beginning of the convergence process the European statistical community must continually interpret ESA and issue rulings that determine how these data should be classified on a national accounts basis.

Eurostat's rulings, however, are not those of an omnipotent supranational institution. In the years following the Treaty's creation, a process of consultation and shared decision-making emerged in the surveillance process that enhanced transparency throughout the surveillance process. Before issuing its national accounts decisions, Eurostat first consults with the Committee on Monetary, Financial and Balance of Payments Statistics (CMFB). This consists of the representatives of the member states' NSIs, national central banks, Eurostat, DG ECFIN, and the European Monetary Institute (since replaced by the European Central Bank). Member states elect the President of CMFB, which is staffed by Eurostat. Significantly, CMFB is not charged with comitological powers, which means that, by itself, it can neither overturn Eurostat's decisions nor serve as part of the system of committees that oversees the EC's actions (Hix 1999; Christiansen and Kirchner 2000). CMFB is formally only an advisory committee to Eurostat, though, in practice, Eurostat virtually always accepts its recommendations.

(p.156) Eurostat began issuing national accounts rulings in 1994 that, in several cases, decisively affected the ability of member states to enter into EMU. Some of these rulings applied to member-state fiscal activities that generated a good deal of public attention during the

convergence process. These cases include Germany's effort to count as revenues the recalculation of the value of its gold supply, France's effort to count as revenues pension-fund payments from France Telecom, and Italy's effort to count as revenues tax receipts from its temporary 'eurotax'. In addition, a host of other rulings addressed issues such as how to classify revenues derived from interest-rate and currency swaps, linear bonds, zero-interest coupon bonds, deep-discount bonds, and mobile-phone licence sales; how debts created in public-private partnerships for infrastructure should be counted; how to classify an entity as public or private; and whether revenues derived from privatization should be counted towards the deficit and debt calculation. In the critical case of privatization, for example, Eurostat ruled that the receipts derived from most forms of privatization could not be applied to a member state's deficit calculation, but could be used to reduce its level of debt. Although the direct sale of physical assets could be included in the deficit calculation, the sale of equity holdings in publicly owned enterprises may not be counted. Nor could a public enterprise sell equity or physical assets and then transfer to the government the revenues from this sale, with these revenues counted in the deficit calculation. Although Eurostat's rulings never prohibited governments from engaging in these types of budgetary and financial transactions, they could prevent them from being included in the deficit and debt calculation. Thus, by applying the national accounts logic of ESA, Eurostat created European statistical case law that can influence how member states conduct their budgetary policies by ruling whether their budgetary transactions are acceptable or unacceptable for these calculations.

The effect of these rulings, which depended upon the budgetary transparency created by the surveillance process, may be seen in Table 9.2. In March 1998, Eurostat delivered to the European Monetary Institute and senior EU officials its report 'Statistics on Convergence: Assessment by Eurostat' (Eurostat 1998b). This report provided the final deficit and debt levels for each member state. Table 9.2 indicates, first, each member state's official 1997 deficit, and, second, what the deficit would have been without taking into account Eurostat's rulings. The net consequences of the latter reduced France's, Italy's, and Spain's deficits to 3 per cent of GDP or less, thereby enabling these member states to join the EMU.

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Table 9.2. The effect of Eurostat rulings on 1997 EU Member-State deficits.

Member state	Final 1997 deficit as % of GDP without rulings	Final 1997 deficit as % of GDP with rulings	Effect of rulings as improvement (+) or deterioration (−) in budget deficit as % of GDP
Austria	2.77	2.5	+0.27
Belgium	2.13	2.1	+0.03
Denmark	1.48	0.7	+0.78
Finland	0.68	0.9	—0.22
France	3.50	3.0	+0.50
Germany	2.64	2.7	—0.06
Ireland	1.30	0.9	+0.40
Italy	3.79	2.7	+ 1.09
Netherlands	1.28	1.4	−0.12

Member state	Final 1997 deficit as % of GDP without rulings	Final 1997 deficit as % of GDP with rulings	Effect of rulings as improvement (+) or deterioration (−) in budget deficit as % of GDP
Portugal	2.40	2.5	−0.10
Spain	3.73	2.6	+ 1.13
Sweden	0.78	0.8	−0.02
United Kingdom	2.10	1.9	+0.20

Source: Eurostat 1998.

2.5 Transparency through Broad Economic Policy Guidelines and DG ECFIN's Econometric Surveillance

The Treaty and Pact offered other mechanisms for budgetary and economic transparency. The Treaty's Article 99, as noted earlier, grants to ECOFIN the right to monitor 'broad guidelines' for member states' economic policies for convergence purposes. For purposes of the Maastricht Stage II convergence process, however, these guidelines proved to be excessively broad to the point of being vacuous in their lack of specific fiscal-policy direction. They also lacked enforcement power, and were entirely dependent upon member states to provide data they themselves 'deemed necessary'. The Pact, meanwhile, calls upon the member states to bring their budgets close to balance or surplus, and to develop 'stability programmes' showing how their fiscal policies will achieve this goal. Data provided must conform to ESA's classifications, as overseen by Eurostat. These stability programmes are more detailed than the convergence procedure's broad guidelines, and they provide much of the data used for another form of transparency, DG ECFIN's econometric forecasts. The purpose of these forecasts is to alert ECOFIN to potential and actual violations of the Pact and the Treaty's excessive deficit procedure. They are also used in the Commission and ECOFIN's recommendations to **(p.158)** member states on the percentage of GDP that fiscal policies need to be adjusted in order to achieve budgetary compliance. Nevertheless, although both the stability programmes and these recommendations contribute to EU budgetary transparency, they tend to be very broad-gauged and focus on macroeconomic and fiscal activity, rather than actual budgetary accounts and specific transactions. Finally, it is worth noting that while the Treaty mandates the explicit use of ESA as the measure of member-state deficits and debts, there is no such restriction on the type of econometric model employed by DG ECFIN. This allows DG ECFIN far more flexibility in the application of its cyclical models than anything Eurostat may do with ESA.

3. Limits to Eu Budgetary Surveillance: Problems of Disclosure and Interpretation in the Case of Greece

The twin challenges to EU budgetary transparency, those of disclosure and interpretation, are readily apparent in the case of Greece. Though other member states, particularly Portugal and Spain, serve as examples of problems of disclosure and interpretation, Greece is the most egregious. In May 2004, Eurostat revised Greece's 2003 deficit level from 1.7 per cent of GDP to 3.2 per cent, a rate in violation of the Stability and Growth Pact. By November, further assessments produced new and higher deficit figures dating from 1997, indicating that the Greek government had both withheld and misclassified its budgetary figures. Rather than a reported 1.8 per cent deficit in 1999, the year's figures that enabled it to enter monetary union, the truer figure stood at 3.4 per cent (Eurostat 2004a). The stunning implication of these

revelations is that Greece gained its EMU membership in 2000 through deception and a breakdown in the EU's efforts at budgetary transparency.

The response by Greece's leadership during this period is to blame Eurostat and the surveillance procedure. According to Yannos Papantoniou, Greece's former socialist finance minister, the member state's deficit problems stemmed from the reclassification of military expenditures: 'For the years prior to 2000, deficit figures have been further burdened by the retroactive application of new Eurostat rules introduced in that year, contravening the principle of equal treatment established for EMU evaluations' (Papantoniou 2004). Former Prime Minister Costas Simitis similarly declared: 'Upward revisions in the Greek general government deficit were **(p.159)** mainly due to the retroactive application of a new method for estimating defence expenditure. This retroactive application of new rules should be outlawed' (Simitis 2004). The result of this unfair practice, Simitis said, tarnished Greece's international reputation.

Eurostat's report to ECOFIN tells a different story (Eurostat 2004b). Greece's deficit figures had indeed been revised, primarily due to recalculations of its defence expenditures. According to ESA 95, military expenditures must be counted when equipment and other types of purchases are delivered by suppliers to the government. In the event that delivery data are not available, then expenditures are recorded, according to cash accounting, when the government makes its payments to providers. Aside from these technical considerations, the report more importantly indicated that the matter of how to record military expenditures had been an issue between the Greek government and Eurostat since 1994.

'The reliability of Greek deficit and debt statistics', the Commission's report declares, 'has been the object of particular attention by Eurostat in the past. Statistical issues in this field were debated with the Greek statistical authorities far more frequently than with any other Member State' (Eurostat 2004b: 2). As early as 1996, during Eurostat's first mission visit to Greece, government officials informed Eurostat that the Greek military had failed to provide the necessary delivery data to its NSI and Ministry of Finance. Despite repeated requests, by the time the member states were evaluated for EMU status in 1998, Greece was still not forthcoming in presenting the EU with the necessary data. As a Eurostat official noted: 'We did send a mission to Greece, but they had a lot of problems on getting their numbers right. We had to establish a small [working] group which reviewed all of their statistics. All the figures contradicted' (Savage 2005: 137). In 1999, the Greek NSI informed Eurostat that, though details on the military expenditures were not fully available, the debt derived from these expenditures was properly included in the government's overall budgetary figures, which were supplied for Greece's successful candidacy for EMU membership in 2000.

The Greek NSI more confidently reported in 2002 that its military expenditure data based on delivery information complied with and were properly classified according to ESA 95. In response to a survey Eurostat sent to the member states in 2004, however, the Greek NSI acknowledged in April that yet again it was unable to obtain the proper military data, and was therefore still non-compliant with ESA 95. Consequently, 'most military expenditures covered by borrowing were not recorded since the last 7 years' (Eurostat 2004b: 17). As a result, Eurostat finally forced the **(p.160)** reassessment of these expenditure data on a cash basis, in the absence of the required delivery information. This reclassification increased Greece's deficit: by 1.9 per cent of GDP for 2000, to a total deficit of 4.1 per cent; by 1.2 per cent in 2001 to 3.7 per cent; 1.7 per cent in 2002 to 3.7 per cent; and 0.7 per cent in 2003 to 4.6 per cent (Eurostat 2004c). So, there did occur a retroactive reclassification that somewhat fits the charge laid by

Costas Simitis. There was indeed a shift in the national accounts framework, from ESA 79 specified by the Treaty, to an updated ESA 95. Yet, revisions in member-state data to fit the newer version of ESA are not uncommon. Spain's 1998 deficit, for example, was revised in 2000 to 3.1 per cent of GDP from 2.6 per cent. This adjustment, however, lacked the attention of Greece's because of both the magnitude of the Greek revisions and Greece's long-term effort to avoid full disclosure of its data.

So, the twin challenges of disclosure and interpretation are readily apparent in the Greek case. Greece intentionally failed to disclose and then misclassified the data it submitted to the EC. Transparency was defeated on both counts. Only Eurostat's repeated inquiries and mission visits to Greece finally produced some compliance with the Treaty's surveillance procedure. Even Eurostat's efforts, however, are limited by the assumption of trust that exists regarding the submission of budgetary data by the member states, and by Eurostat's lack of auditing capacity and authority to analyse member-state databases.

To remedy these and other deficiencies, in March 2005 the EC proposed recommendations that would improve EU budgetary statistics and the surveillance procedure in three ways (European Commission 2005). First, the Commission proposed amending Council Regulation 3605/93 (*Official Journal* 1993) that would supplement the existing legal framework. These changes would enable Eurostat to audit member-state financial and budgetary documents; enhance the scope of its mission visits; improve transparency through the creation of new budgetary tables; and create explicit rules requiring member states to provide credible data for the surveillance procedure. Second, Eurostat's, as well as DG ECFIN's, surveillance capacities would be strengthened through increased staff and greater budgetary resources. Greater co-ordination and co-operation would be promoted between Eurostat and DG ECFIN. Third, the EU would make efforts to build the institutional capacities and political independence of member states' NSIs through new statistical standards expressed in an appropriate Code of Best Practices. ECOFIN and the European Parliament adopted these recommendations, with ECOFIN declaring that 'The core issue remains to ensure adequate practices, **(p.161)** resources and capabilities to produce high quality statistics at the national and European level with a view to ensuring the independence, integrity, and accountability of both national statistical offices and Eurostat… Imposing sanctions on a Member State should be considered when there is infringement of the obligations to duly report government data' (Council of the European Union 2005: 8).

4. Conclusion

Since 1992, the EU has expanded its requirements for transparency to the budgetary activities of member states. This effort required new institutional rules and arrangements at both EU and member-state levels. The Maastricht Treaty and its secondary legislation provided the formal rules initiating the surveillance procedure. They delegated to the EC the organizational task of conducting the surveillance, and they authorized the use of ESA and the biannual reporting requirement. These rules, however, limited the technical effectiveness of the surveillance by denying it, for bureaucratic and political reasons, the use of a rigorous auditing capacity, depending instead upon ESA. This resulted in the unexpected outcome of Eurostat taking the lead in the surveillance procedure, due to the political entrepreneurship of its Director General and its technical mastery of ESA. Another unexpected outcome is the power of ESA not simply to monitor or audit budgetary transactions, but effectively to determine which member states gained EMU status through Eurostat and the CMFB's interpretation of ESA. Thus, for example, Eurostat's ruling on privatization prohibits member states from including revenues derived from most forms of privatization towards their deficit calculations. Eurostat's creation of a compliance

information system and its surveillance techniques do promote budgetary transparency. Some of these are proactive, such as the use of mission visits, and some are more reactive, including relying on the press and third-party sources of information. DG ECFIN also contributes to broad-gauge macro-budgetary transparency through its econometric modelling, which reflects the added surveillance requirements called for by the Stability and Growth Pact.

During these years of surveillance and efforts at improving member-state budget transparency, significant organizational learning and institution building have taken place throughout the EU. Both Eurostat and NSI personnel have gained experience in applying ESA's national accounts framework to member-state budgets. The EU has made efforts **(p.162)** to strengthen the surveillance procedure's compliance information system and counter the problems of disclosure and interpretation. Legislation has been added to strengthen the legal requirements for statistical transparency, and additional legislation is being developed to grant Eurostat auditing authority and both Eurostat and DG ECFIN administrative resources, while building the political independence and technical capacity of the NSIs. All this budgetary transparency will be urgently needed to monitor an expanded EU, EU member states seeking EMU status, and the candidacy of states seeking to join the EU.

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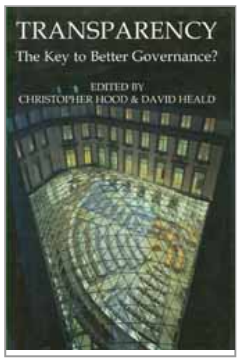

Transparency: The Key to Better Governance?
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Does Transparency Make a Difference? The Example of the European Council of Ministers

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[–] Abstract and Keywords

In the panoply of European institutions that have been criticized for their secrecy and lack of accountability, the European Council of Ministers certainly ranks near the top of the list. However, others insist that the secrecy of the policy process within the European Union is exaggerated, and that the public already has access to plentiful information about decision making. This chapter examines empirical evidence that may be used to determine the extent to which secrecy of the EU Council of Ministers is costly or beneficial. It also discusses the effect of efforts made by the Council since 1993 to become more open in its proceedings. Though the focus of the chapter is on whether contributions of individual members of a decision-making body are observable, there are more basic levels of transparency that might be considered, in particular whether there is a ‘giving reasons requirement’, whereby a decision-making body is obliged to provide an explanation for its decisions.

Keywords: Council of Ministers, transparency, secrecy, European Union, costs, benefits, accountability, decision making, giving reasons requirement

1. Introduction

IN THE PANOPLY OF EUROPEAN INSTITUTIONS that have been criticized for their secrecy and lack of accountability, the European Council of Ministers certainly ranks near the top of the list. The Council and its subordinate institutions debate largely in private, and they often arrive at decisions without taking a formal vote. Critics of Europe’s democratic deficit have called for reforms to make the Council more transparent in order to promote the development of democratic politics at the EU level (Follesdal and Hix 2005). Other scholars suggest that the secrecy of the policy process within the EU is exaggerated, and that the public already has access to plentiful information about decision-making (Moravcsik 2002). In this chapter I consider empirical evidence that may help us identify to what extent secrecy of the EU Council of Ministers is costly, and to what extent secrecy might actually be beneficial. I also examine the effect of efforts made by the Council since 1993 to become more open in its proceedings. My

task is inevitably complicated by the fact that because it is a secretive institution, there are limits to the information available about behaviour within the Council of Ministers. As I show, there are nonetheless several recent empirical studies which can be used to draw inferences about the effects of Council secrecy, in addition to a number of enlightening examples.

I begin by developing several theoretical predictions about the effect of having a collective decision-making body deliberate in public or in private. These predictions rely on the principal-agent approach used by Prat in Chapter 6, as well as several other recent game-theoretic contributions (Fingleton and Raith 2005; Levy 2005; and Stasavage 2004a, 2004b). My **(p.166)** predictions are also closely related to several conclusions drawn in contributions on representative government, as well as in negotiation theory. Though the focus of this paper is on whether contributions of individual members of a decision-making body are observable, there are more basic levels of transparency that might be considered, in particular whether there is a 'giving reasons requirement', whereby a decision-making body is obliged to provide an explanation for its decisions (Majone 1998, drawing on Shapiro 1992, has emphasized the establishment of a giving reasons requirement as the primary mechanism to ensure greater transparency in European governance). It should also be acknowledged that, as emphasized by David Heald in Chapter 2, transparency can take on many different meanings for different observers, and as a result I make no pretence to provide a comprehensive treatment of the issue of transparency within the European Union. In the theoretical section of this chapter I argue that when constituents can better observe decision-making, this has the advantage of disciplining representatives, but transparency can also have costs involving increased incentives for representatives to posture and to ignore private beliefs about appropriate policies. I next proceed with a review of available empirical evidence about the costs and benefits of the secrecy that has prevailed within the European Council of Ministers. I conclude by considering whether recent European experience suggests that transparency may sometimes be irrelevant. This could be the case if reforms designed to make deliberations public simply result in the 'real' discussions moving to other venues.

2. Transparency and Incentives

Much of the recent policy-oriented literature on transparency assumes that openness is unambiguously beneficial. When they are exposed to greater public scrutiny, representatives are more likely to take decisions with public, rather than private, interests in mind. While transparency can clearly have this important effect, what is less often considered is that openness may also have costs. These costs have been recognized by theorists of representative democracy, as well as in recent work by scholars using game-theoretic models of relationships between a 'principal' and an 'agent'.[1] Potential costs of transparency have also been identified by **(p.167)** negotiation theorists, and in particular in the canonical contribution by Walton and McKersie (1965). In what follows I provide a brief sketch of how principal-agent models can be used to provide insights about the costs and benefits of transparency.

Consider first a set of assumptions that one could use to construct a game-theoretic model of the costs and benefits of transparency. There is a collective decision-making body (like the European Council of Ministers) where each member (an agent, in game-theoretic language) represents a separate constituency (a principal). Assume also that representatives have two objectives: they would like to implement their preferred policy, and they would also like to convince their constituents that they are 'faithful', 'unbiased', or 'committed' (in game-theoretic terms they would like to convince constituents of their 'type').[2] Each constituency would like its representative to argue and vote for the 'best' policy, given constituent interests. However,

constituents may be uncertain which action is most likely to maximize their interest. There may be two types of uncertainty.

For one, constituents may be uncertain about the link between actions and outcomes. This is the type of uncertainty considered in the contributions on transparency by Prat (2005) and Stasavage (2004b). So, for example, will liberalizing the European service sector ultimately make them better off? In this case, while constituents may have a fixed preference in terms of their ultimate objective (a higher level of personal income), their policy preference is subject to revision. For example, they might initially be dubious about the benefits of liberalization, but they might revise their judgement if given new information by representatives about liberalization's potential benefits.

There is also a second type of uncertainty—constituents may be relatively certain of their preferred policy action (liberalizing or not liberalizing), but they may be uncertain how good a deal their representative can get for them when bargaining with other constituencies who have different views. Here one might consideracase where constituents of country A prefer to liberalize the service sector, constituents of country B prefer not to do so, and each side is uncertain what sort of compromise will be acceptable to the other group. This is a context considered by negotiation theorists like Walton and McKersie (1965) as well as in the game-theoretic bargaining models of Fingleton and Raith (2005) and Stasavage (2004a).

(p.168) Using the above set of assumptions, we can examine how incentives for representatives vary under two different scenarios for decision-making. Under the first scenario, secrecy, constituents observe the policy chosen by the decision-making body, but they observe neither votes nor bargaining positions taken during negotiations by individual representatives. Under the second scenario, publicity, constituents observe both the final outcome and all individual statements and votes made by their representatives. The risk of secret decision-making is that those representatives who are 'biased' will find it easier to pursue private interests without the public being able to directly observe their actions. So, if constituents in country A believe that liberalizing the service sector is undesirable, even if their representative favours this action, perhaps because he or she is influenced by an industry lobby, they will not necessarily know to what extent their representative was responsible for a collective decision to liberalize. Moving to transparent decision-making helps eliminate this problem, because outsiders can trace back from policy choices to stances taken by individual representatives. As a result, transparency can have a beneficial effect of 'disciplining' representatives.

A closer investigation reveals that transparency may also have important costs. When representatives know that their individual bargaining positions and/or votes will become part of the public record, they may have a greater incentive to take positions that will demonstrate loyalty to a constituency, even if this means taking an action that they know is less likely to produce the policy outcome they think is best. In game-theoretic terms, they will use their bargaining positions or votes as a signal. There are two main possibilities here, each of which refers to one of the two types of uncertainty for constituents referred to above.

First, take the case where constituents are certain of their policy preferences but uncertain how good a bargain they can achieve. Under these conditions, transparency can prompt representatives to 'posture' by adopting excessively tough bargaining positions that are designed to demonstrate loyalty to constituencies. The problem with posturing is that it poses the risk of a breakdown in negotiations, and thus a dramatic loss of efficiency. This effect of

public bargaining has long been emphasized by negotiation theorists (Walton and McKersie 1965).

Second, take the case where constituents are uncertain about the merits of a particular policy, but they also have a prior view that one policy option is more likely to be best. Under these conditions, when decisions are made in public, representatives will be less likely to follow their own private beliefs about which policy is best and more likely to follow **(p.169)** prior beliefs held by the public. This stance taken by representatives will again be motivated by the desire to signal that they are committed to their constituents. This strategy is often referred to as 'pandering', though one might prefer to avoid the term since it inevitably invokes negative connotations about the public's level of knowledge. Morris (2001) refers to this strategy as the 'political correctness effect', though this effect differs somewhat from the way that 'political correctness' is employed in everyday usage. Political correctness of this sort can lead to a dramatic loss of efficiency in policy choice. So, for example, if representatives have access to expert information suggesting that liberalizing the service sector will improve overall welfare, to the extent the public has a strong prior belief to the contrary, then the representative may ignore his or her private belief about which policy is best.

In addition to the above arguments, there are also two further potential negative effects that transparency might have on bargaining efficiency. First, under conditions where the problem is not that representatives may be biased, but that certain special interest groups may have undue influence over a decision (say in a WTO negotiation), then secrecy can have the useful effect of shutting such groups out of the initial stages of the process (Koremenos 2004). This is a plausible argument, though it remains to be explained why an interest group that has the strength to block an agreement during the initial stages of a negotiation could not still do the same once a provisional agreement becomes public. A second and similar possibility is that secrecy may be beneficial because it will allow a representative to negotiate a deal which can be better explained to constituents once all provisions are clear.[3]

The above discussion provides several empirical implications. First, the more secretive a decision-making environment, the greater the likelihood that we will see representatives take positions that deviate from the prior views of their constituents about policy. Second, we should also expect that secretive environments help to produce compromises in bargaining. Finally, we should also observe that secretive decision-making environments are more likely to produce frank exchanges of views, and free deliberation about policies when compared with more public venues (Checkel 2005). This is an interesting implication given that the literature on 'deliberative democracy' has placed heavy emphasis on the benefits of having deliberation take place in public (see in particular Habermas 1996, **(p.170)** as well as the application of ideas about deliberation to international institutions by Risse 2000).

3. Decision-Making in the European Council of Ministers

The formal decision-making procedures of the European Council of Ministers and its auxiliary bodies are highly complex. The Council of Ministers is made up of the ministers of EU member states, and it meets under several different configurations depending on what type of subject is being examined. As part of this decision-making process, EU heads of state and government also meet at regular summits as part of the 'European Council'. Work for the Council of Ministers is prepared by another body, the Committee of Permanent Representatives (COREPER), which itself helps to co-ordinate the work of a number of subsidiary and related committees. In what follows, rather than provide a detailed description of Council procedures, I will limit myself to presenting the most salient organizational facts relevant to the subject of this chapter. (For

complete discussions of Council procedures see Westlake 1995, Hayes-Renshaw and Wallace 1997, as well as the general text on EU institutions by Hix 2005).

First, discussions on the Council of Ministers are largely secret, though the extent to which the Council reveals information has evolved over time. Before 1993 the Council published neither the votes of individual members states, nor records of the debates that preceded decisions. In December 1993 the Council decided to make available official documents related to its proceedings, though it specified that they would need to be requested on an individual basis, and access could be refused in order 'to protect the confidentiality of the Council's proceedings' (*Official Journal* 1993). This obviously left very substantial leeway for the Council to maintain secrecy. The subsequent refusal by the Council to deliver a number of documents to a journalist from *The Guardian* newspaper resulted in a court challenge in the European Court of First Instance. In 1995 the Court found against the Council, though the content of its judgment left considerable room to maintain the secrecy of debates, provided that the Council exercised 'proper discretion' when refusing requests for documents.[4]

(p.171) In a series of subsequent decisions, the Council of Ministers has gradually altered its policy regarding document disclosure. Within the Council, Denmark, Finland, the Netherlands, and Sweden appear to have been the strongest advocates of transparency (in some cases supported by the United Kingdom and Ireland), while France and Germany, together with several southern European countries have favoured continuing to limit disclosure (Bjurulf and Elgström 2004). Since 2001 the Council has increased access to documents, but its new rules still leave substantial room for refusing documents for fear that this would impair the 'decision-making process' within the Council (*Official Journal* 2001). In addition to allowing individuals to request specific documents, the Council now also publishes on its website both a monthly 'Summary of Council Acts' which contains the voting positions taken by individual states, and a series of 'Council Minutes'. These minutes are restricted to listing actions and stages of the discussion, with only very limited references to positions taken by representatives of individual member states. As a result, they provide a very incomplete record of debates.

As mentioned above, a second critical feature of Council of Ministers proceedings is that the majority of the decisions taken by the Council are actually negotiated by its subsidiary body, COREPER, which is generally described to be even more insulated from the public eye (Lewis 2005). When the member-state representatives to COREPER have reached a consensus on a given policy, the decision is typically listed as an 'A' point, which is submitted to the Council of Ministers for approval, but which is not actually discussed by the Council or subjected to a formal vote. Policy discussions by ministers are limited to 'B' points on the Council agenda. While estimates vary, it seems clear that the majority of the decisions taken by the Council of Ministers are approved as 'A' items.[5]

One final important feature of Council decision-making is that though voting records of individual member states are now readily accessible, the shift towards publishing votes cannot be said to have resulted in the Council becoming significantly more 'transparent' as an institution. The reason for this is that the Council of Ministers operates on a well-established consensual norm whereby the majority of decisions are taken without a formal vote, and even in those cases where a formal vote is taken, dissents are relatively infrequent (see Mattila and Lane **(p.172)** 2001 and Mattila 2004 for analyses of Council voting). This pattern of presenting a united public front despite clear internal divisions is frequently observed in committee decision-making, in particular in cases like the Federal Reserve's Federal Open Market

Committee (Meade 2005) and the US Supreme Court in the period before 1940 (Epstein et al. 2001). Likewise, Steinberg (2002: 342) has described the norm of consensus in the GATT/WTO as ‘organized hypocrisy’, whereby a procedural fiction of consensus is used as an ‘external display to domestic audiences’.

4. Costs of Council Secrecy

As described above, if the advantage of transparency of discussions is that it allows members of the public to hold representatives accountable, then the main cost of secrecy of debate is that it allows individual member-state representatives to avoid responsibility for the positions they take. It is difficult to provide firm evidence on this phenomenon, precisely because the Council deliberates largely in secret. Nonetheless, there are several recent examples that can be used to illustrate this point.

The most direct example has been provided by a documentary shot by a Danish film crew during the European Council meeting of December 2002. The crew was allowed to film the entirety of the Council’s proceedings, but apparently without the knowledge of participants that the footage would appear on Danish TV the following spring. The film revealed that a number of participants took positions in private that differed significantly from those they had expressed in public. This was most noticeably the case with Germany’s Foreign Minister, Joschka Fischer, who made negative comments about the possibility of Turkey’s joining the EU despite having supported the Turkish application in public (*Financial Times* 2003).

There have also been several recent examples where French government representatives have agreed to a certain policy during a European-level meeting, even if this directly contradicts statements they have made to domestic audiences. The effect of these incidents has been to breed a sense of mistrust on the part of French citizens about the extent to which their government has actively supported their interests in Brussels. In particular, there is a widespread sentiment that the closed-door character of EU deliberations makes it easy for French politicians to say one thing in Brussels and another in Paris.

(p.173) Following an EU summit meeting during the spring of 2002, it was revealed that the two main opponents in the French presidential election campaign, Jacques Chirac and Lionel Jospin, had agreed at a European Council meeting to a declaration in favour of raising the average retirement age by five years. These declarations contradicted both Chirac’s and Jospin’s positions on the issue as stated to the French national press (Leparmentier 2002). Though the Council statement in favour of raising the average retirement age (as opposed to the official retirement age) was public, and though both Chirac and Jospin subsequently responded to French press questions on the topic, there was a clear sense in the French media that the European Council declaration had been prepared in a non-transparent manner. The Frenchdaily *Le Monde* quoted a third presidential candidate, François Bayrou, as observing: ‘Who debated this decision? who was allowed to add their part? which deputy? which parliamentarian was invited to help prepare this major decision? No one’ (ibid.).

A similar incident occurred during the spring of 2005 involving the proposed ‘Bolkestein directive’ on liberalization of services in the EU’s internal market.[6] A draft version of the directive had originally been proposed to the Council and the European Parliament by the European Commission in January 2004. During the course of 2004 the proposed directive was reviewed by COREPER, and in November 2004 it was the subject of a discussion at the ministerial level in Brussels. At this stage, while the French government expressed some reservation about the directive’s ‘country of origin’ principle, subsequent interviews with

participants suggested it nonetheless supported the text (Chaumont 2005a: 18). The minutes of the Brussels meeting were published by the Council, though, as is common, they do not refer to positions taken by individual member states.[7] The French government position quickly changed during the month of January 2005 as opponents of the European Constitution within France seized on the 'Bolkestein directive' as an example of the way in which future European legislation would inevitably result in undesirable competition in the services industry, with potentially severe **(p.174)** implications for public services (Mandraud 2005). As a result of this heavy domestic criticism, the French President, Jacques Chirac, shifted to adopting a public position of suggesting that the 'Bolkestein directive' should be reworked entirely so that it conformed to the 'European social model'. This decision was taken at a summit of EU heads of state and government in March 2005 (Chaumont 2005b). As with the previous incident regarding the retirement age, the episode regarding the 'Bolkestein directive' helped to cement the impression in France that politicians could use the secrecy of EU decision-making to avoid taking public stances on key policy issues.

5. Benefits of Council Secrecy

While the experience of the EU Council of Ministers supports existing notions about the costs of secrecy in government, it has also been observed by EU specialists that the secrecy of the Council and its subsidiary bodies has advantages. Numerous authors have referred to the Council's 'culture of compromise', suggesting that this pattern of behaviour derives directly from the secrecy of the setting. Heisenberg (2005: 68) suggests that secrecy on the Council helps ensure that 'there is less public posturing and little payoff for obstruction'. Lewis (2005), Naurin (2005), and Wallace (2002) provide similar observations.

The most direct evidence in favour of the interpretation that secrecy facilitates bargaining is that provided by the Council of Ministers itself. In response to the legal challenge launched by *The Guardian* newspaper, in 1994 the Council was obliged to provide a justification for its refusal to disclose certain documents. Rather than emphasize the risk of providing information to third parties, or refer to abstract notions of executive privilege, the Council suggested the following:

> The council normally works through a process of negotiation and compromise, in the course of which its members freely express their national preoccupations and positions. If agreement is to be reached, they will frequently be called upon to move from those positions, perhaps to the extent of abandoning their national instructions on a particular point or points. This process, *vital to the adoption of Community legislation*, would be compromised if delegations were constantly mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to these documents, independently of a positive council decision. (Statement of Defence of the Council of the European Union in Case T-194/94, Brussels, 13 July 1994, pp. 23–4)

(p.175) This statement is a surprisingly frank admission of the importance of secrecy for reaching compromises within the Council.

While most discussions of the benefits of Council secrecy focus on a bargaining context, where member states have fixed positions and they seek to reach a compromise, there are also examples where a closed-door format has given governments greater leeway to freely deliberate over policies. Lewis (2005) presents an interesting study of the adoption in 1994 by EU foreign ministers of a local elections directive (*Official Journal* 1994) which established rights for 'non-national' EU citizens to vote in local elections. Precisely because this issue was a politically

sensitive one, a number of European capitals instructed their representatives in Brussels to keep discussions on the local elections directive restricted to the insulated setting of COREPER, rather than having the directive debated by foreign ministers within the General Affairs Council, a setting where there was a greater risk of debates becoming public. Lewis (2005: 37) reports an interview with one representative who was instructed to 'keep it away from the press, where it would have been politicized quickly'.

In addition, Lewis (2005) provides convincing evidence that because negotiations took place in a closed-door setting, negotiations on the local elections directive resembled an actual deliberation rather than a session of hard bargaining. Individual representatives presented logical arguments either for or against granting specific exceptions for specific countries, and it appears that in most of these cases the force of the better argument prevailed. So, Luxembourg received a derogation, given that 30 per cent of its residents are non-nationals, but a number of other requests for derogations were rejected as being unjustified. Lewis (2005: 37) provides another telling quote from a representative who suggested, 'We all knew that if the discussion was put a certain way we never would reach agreement. Because of the press, pressure from national populations, the idea that "We will be run by foreigners".'

The local elections directive example suggests that the only reason deliberation was able to occur was that it took place in private. Recent observers of other EU bodies that are subsidiary to the Council have drawn similar conclusions. The Economic and Financial Committee is characterized by frank exchanges of views about economic policy, precisely because it is a more insulated setting than is ECOFIN, the Council of Ministers of Finance. Likewise, Puetter (2003) has argued that the informal arrangement of the Eurogroup also facilitates deliberative discussions because it meets behind closed doors and holds press **(p.176)** conferences only sporadically. The fact that deliberation might be most likely to occur in a closed-door environment poses a potential complication for theorists of 'deliberative democracy', who emphasize that the benefits of deliberation occur when it takes place in public.

6. Is Transparency Irrelevant?

One feature of decision-making within the European Council of Ministers is that despite a number of changes implemented since 1993 designed to make the Council more transparent, few observers today would suggest that the institution is truly open. One obvious reason for this, already mentioned above, is that even though votes of individual member states are now made public, the fact that most Council decisions are taken without a formal vote nullifies the effect of this reform on transparency. One might also ask, however, whether the problem is more fundamental than this. Is it the case that in any decision-making body that is obliged to become more formally transparent, there are inevitably opportunities for decision-makers to shift their substantive discussions to other venues? Take the example of the game-theoretic model referred to at the beginning of this chapter. Whenever transparency is imposed, if representatives can create a prior round of secret and confidential communications, the official decision-making format (secrecy/publicity) may be irrelevant.

The heavy reliance of the Council of Ministers on subsidiary committees would seem to make the above problem particularly relevant in the European context. To the extent that meetings between actual ministers become more public, there is always the possibility of pushing substantive discussions to COREPER, or to a lower level. For this reason Van Schendelen (1996) suggests that the issue of publishing minutes of the auxiliary bodies is no less important than is publishing minutes of the Council itself, yet critics of the democratic deficit have generally focused on the latter issue. Some observers might suggest that even if all meetings of all

subsidiary bodies to the Council were made public, there would still be a possibility for backroom discussions or for deals to be done over lunch. However, it would seem that even in the extreme case where all substantive discussions were displaced, formal transparency could still have an important effect by forcing individual member states to take public stances on issues. Take the example of the debate over the 'Bolkestein directive'. Even if the policy debate over the directive took place in secret, it might have made a substantial difference for discussions in France if the **(p.177)** French government had been obliged at an earlier date to take a public stance on the proposed reform.

A final possible interpretation of the relative failure of existing transparency reforms on the Council is that they also result from the fact that no one is really listening. Unless developments within the Council of Ministers are actively reported and commented on by media, it may make little difference how nominally 'transparent' the Council is in its activities. One might argue that even the little information already available about Council of Ministers debates is not reported in depth in national media. Information about the 'Bolkestein directive' was available to the French media for almost a year before the issue was raised by major newspapers like *Le Monde*.[8] One might also argue that the fact that few pay attention to Council debates is prompted by the scarcity of international media outlets at the European level. Jürgen Habermas (2001) has argued that, ultimately, overcoming the democratic deficit in the European Union will require the development of a European public sphere that involves the establishment of truly transnational media outlets and discussion.

7. Conclusion

In this chapter I have suggested that the experience of the European Council of Ministers provides a useful example of the costs and benefits of transparency in government. Secrecy of Council proceedings has led to a serious problem of accountability, as representatives are able to say one thing in public and another in private, while evading taking firm positions on policy. At the same time, the closed-door setting for Council decisions has facilitated attempts to strike bargains. Interestingly, we also see evidence that within the Council and its subsidiary bodies, there is a much greater propensity for deliberation to take place in those settings that are the most secretive, such as COREPER and the Economic and Financial Committee. This poses a conundrum for advocates of deliberative democracy within the EU who emphasize the importance of deliberation taking place in public. More generally, the experience of the EU Council of Ministers suggests that advocates of transparency need to consider both the positive and negative impact of such measures.

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Notes:

([1]) Elster (1998, 1991) provides one of the core contributions in democratic theory on the costs and benefits of transparency.

([2]) This distinction between biased and unbiased agents (or representatives) is emphasized in the principal-agent model of Morris (2001) and has been used to consider the costs and benefits of democratic accountability by Maskin and Tirole (2004).

([3]) I would like to thank an anonymous referee for suggesting this possibility.

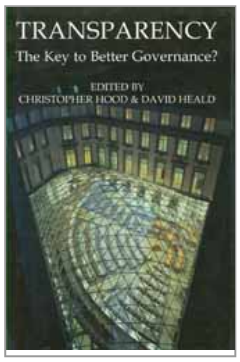
([4]) Judgment of the Court of First Instance (Second Chamber, extended composition) of 19 October 1995, *John Carvel and Guardian Newspapers Ltd v. Council of the European Union*, Case T-194/94.

([5]) Van Schendelen (1996) provides evidence on the use of the ‘A’ point procedure for the Agricultural Council. Andersen and Rasmussen (1998) suggest that the ‘A’ point procedure is less heavily used in the case of environmental policy.

([6]) The full title for the proposed directive is ‘Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market’, Brussels, 5 March 2004.

([7]) The summary of the discussion by the Council presidency observes: ‘The country of origin principle was discussed extensively. Member States supported this principle as an essential element of the proposed Directive. Some Member States expressed specific concerns although they could accept the country of origin principle as a starting point for discussions.’ See Draft Minutes 2624th meeting of the Council of the European Union, held in Brussels on 25 and 26 November 2004.

([8]) A survey of French newspaper reporting from 2004 and early 2005 shows that before January 2005, the ‘Bolkestein directive’ was ignored by all major French newspapers with the exception of the Communist daily *L’Humanité*.



Transparency: The Key to Better Governance?
Christopher Hood and David Heald

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Varieties of Software and their Implications for Effective Democratic Government

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[–] Abstract and Keywords

As governmental processes and judgments become increasingly digital, the transparency of digital systems that implement the processes of government becomes increasingly important. Open code is a necessary but not sufficient prerequisite for maintaining transparency as democracy becomes digitized, and complete openness of process is not appropriate for every domain. This chapter explores some of the complexities in the relationship between openness of code and democratic government. Computer code controls and enables the actions of users, and for users to have true autonomy they must be able to examine, alter, and redistribute the code. A key issue for transparency is the degree to which this observation applies to the activities of government that are embedded in computer code. Free software creates a fundamentally different market structure than closed code. The philosophy of free software argues that the inability to view code that implements governance suggests totalitarian and Kafkaesque control, a constraining complex network of rules and regulations.

Keywords: transparency, democracy, openness, computer code, open code, free software, closed code, governance

AS GOVERNMENTAL PROCESSES AND JUDGMENTS are increasingly digital, the transparency of digital systems that implement the processes of government becomes increasingly important. Open code is a necessary but not sufficient prerequisite for maintaining transparency as democracy becomes digitized, and complete openness of process is not appropriate for every domain. This chapter explores some of the complexities in the relationship between openness of code and democratic government.

1. Transparency in Computer Code

That laws and computer programs are both called ‘code’ is not a coincidence. As first argued by Richard Stallman, the leading advocate of the free and open source movement, computer code controls and enables the actions of users, and for users to have true autonomy they must be able to examine, alter, and redistribute the code (Stallman 1984). A key issue for transparency is the degree to which this observation applies to the activities of government that are embedded in

computer code. Free software, as described in the following sections, creates a fundamentally different market structure than closed code. In free software, the software itself is free, with income resulting from software certification, support, documentation, and other related products.

The autonomy goal of free software is uniquely important in the public sphere, particularly in terms of transparency. Contesting a process requires evaluation of that process. Making a coded process invisible, through closure of code, limits informed discourse. Conversely, the ability to constrain choices is a uniquely legitimate government function. **(p.184)** Some code must not be public, or it would not function. To this degree open code and the logic of effective government are at odds. For example, the exact code used by the American Internal Revenue Service to determine who to audit must be secret to effectively limit tax fraud. Yet recently there has been debate about the IRS decision rubric, as the IRS increasingly audits those too poor to pay taxes, and decreasingly audits wealthy users of complex tax shelters (Allen 2001; Burton 2005). The absence of code did not preclude the debate.

Similarly, the Diebold corporation provides touch-screen voting machines to the American state of Georgia. There is no paper trail. After the 2002 election it was discovered that the company had inadvertently made its software available on a public Internet site before the election, where anyone could have tampered with the software. In fact, shortly before the election a security-compromised patch had been applied to the machines. There is no method to ensure that the machines used in the 2002 or 2004 elections were secure, or reliable. There was no paper audit, and at the time of the election code audit was prevented by closed code (Harris 2004). Computer scientists argue that paper is critical for auditing. Some also argue that free software is necessary as a matter of principle, but no computer scientist argues that free software in such cases would remove the need for a physical paper trail. Free software provides a value distinct from auditing.

This chapter begins by examining the free software perspective. The philosophy of free software argues that the inability to view code that implements governance suggests totalitarian and Kafkaesque control, a constraining complex network of rules and regulations (Camp and Syme 2002). The ability to alter code that implements governance without constraint or detection suggests anarchy (Imhorst 2005).

Solzhenitsyn describes the evolution of a totalitarian legal system in *The Gulag Archipelago*. The Soviet Union was never lawless. However, under the system of gulags the law matured so that it became illegal to be a cousin, friend, friend of a cousin, or cousin of a friend of an enemy of the state. These laws were not publicly discussed because the laws were not subject to scrutiny. Asking for a copy of the legal code was a crime because only criminals would need to examine the law. After all, who would need to look at the law except the person attempting to skilfully evade it?

The same twist of rhetorical logic can be found in discussions of proprietary code. Who would want to look at code except those who wanted to hack it? Malevolence is assumed in requests for code. Openness is **(p.185)** assumed to serve only the criminal. In the United States, the embodiment of copyright law in the Digital Millennium Copyright Act 1998 combined with trusted computing makes examination of code and writing interoperable code a potential felony (Green 2002). Closure of code risks closure of public discourse about how processes are coded in digital government.

Understanding the requirements for open code requires some understanding of what code is and why the licences have democratic implications. So the next section provides the minimal distinction between code types needed to discuss the governance implications. The following section maps the distinctions between licences and governance by describing the implications for licensing in general, and providing vignettes to illustrate potential problems.

The final section argues that open code is necessary but insufficient in governance processes. Indeed, it is argued that open code is not a simple ‘good’ that can immediately generate quality digital processes, ensure citizen activism, and increase trust in government. Open code, like transparency, has been presented as the universal lubricant for smoothly functioning digital government. Yet, the apparently simple questions of ‘what is open code?’, ‘when should code be open or free?’, and ‘how does open code serve the public?’, are in fact complex. The failure to apply the right kind of open code could lead to the same digital distrust in the next quarter century as failures to apply the right definition of transparency have in the last quarter century. Understanding open code is the first and not the final step.

2. Open Code

Just as different organizational forms are appropriate to distinct problems, different forms of code are appropriate for distinct applications. The critical feature of open code is that it can be read by humans. Open code enables informed discourse about digital processes, the decisions made in process application, and the assumptions underlying both.

Code comes in many forms. Closed code is binary code, which is so called because it is represented by ones and zeros, but this is itself a simplification. Computer interactions are the ultimate in arcane communications reporting from one specialized unit to another. To translate the binary code into human terms requires significant effort that is itself, of course, increasingly automated. Humans cannot read open binary code.

(p.186) The layers of simplification constructed upon the underlying hardware since 1959 have enabled the construction of far more complex codes and mechanisms, as the ability for humans to read the underlying binary code has effectively disappeared.[1] Because of this vast increase in complexity, providing binary code does not provide the ability to read or understand that code. Binary code is not transparent in any sense.

Binary code is a black box, with inputs, outputs, and mysterious contents. Illegal transfers of intellectual property and even money have been embedded in binary code running under the noses of auditors. For example, in Israel in 2005 the CEOs of companies specializing in security were arrested for a large-scale industrial espionage project that used Trojan horses hidden in binary code. While the relative security of open versus closed code is beyond the confines of this discussion, the ability to use a company’s own Trojan software against that company, as happened in the case of the Bezos corporation of Israel, suggests something of the difficulty of securing closed code via examination (Grigg 2005).

A process implemented in binary code is a black box: inputs go in and outputs come out. Like a black box, an examination of the inputs and emanations is the only effective method for investigation of the internal processes. The code can be so intricate, that functionality can be hidden inside. The case of Bezos is doubly illustrative. Even though the company had itself a right to view the code, the practice of distributing the code only in closed form prevented some opportunities for examination. As a result, Bezos itself was betrayed by the code of a subsidiary.

Code that is written in form that is readable to humans—code for and by humans—is high-level code, also called source code. For high-level code thereisa range of options. Languages are designed for particular purposes such as artificial intelligence (scheme), web-based data handling (php), security (Java), or the ability to address specific hardware (the C family). Each language is readable to a person who knows that language but does not confer universal literacy, just as knowledge of French does not significantly help with understanding Spanish and certainly would not allow one to read complex Spanish documents. The ‘code is law’ argument suggests that each type of code corresponds to a type of law: administrative, civil, criminal, or corporate. This analogy, though imperfect, is useful in considering the types of possible code.

(p.187) Open code does not guarantee transparency. Just as with natural language, some computer languages are more useful for obfuscation than others. For example, Carnegie Mellon University runs an annual (informal) code obfuscation contest, and professors award the prize to the code that they cannot read. Students submit unreadable, functional code written in a human-readable language. Invariably the winner is written in some form of C. The International Obfuscated C Code Contest (http://ioccc.org/main.html), now in its eighteenth year, offers prizes ranging from best abuse of indentation to best one-liner. Were the exercise of the power of the state at stake, code obfuscation could become far more than a humorous academic exercise. Obfuscated open code is of no more value for transparency than closed code.

Human-readable code is translated into machine-readable code through a compiler. Code can be de-compiled back into high-level languages, but that does not ensure that the resulting code is readable. For example, comments are all deleted, variables’ names lose meaning, and the overall structure of the code is not presented. A metaphor is automated translation between languages—simple phrases are easily translated but complex language becomes garbled. Similarly, translation between computer and more natural languages risks losing not only subtlety but sometimes coherence. For example, a machine translation of ‘the hand that rocks the cradle rules the world’ into Chinese and back into English yielded ‘rocks the cradle regular world’. And Chinese is far closer to English than either is to binary.

Some code is not compiled, but interpreted. Java is an example of an interpreted language running on a virtual machine. This is important because interpreted code is distributed in a form that is always readable but can be run in a trivially easy manner. With the addition of a secure hardware foundation (possible under the many trusted computer implementations) Java code can be distributed in readable form, but not undetectably altered. Thus rules can be set in code, made readable, but not subject to arbitrary alterations (Jin et al. 2004). Interpreted code makes possible the distribution of code that can be read, but also can be run. Running Java is as easy as clicking on the appropriate hyperlink, yet the code itself is readable. Mark-up languages, such as html, are comparable. Reading the encoding of a webpage is quite simple, as viewing the markup of an html document is as simple as choosing ‘CTL U’ in Firefox, the open source browser built on the Mozilla base.

All open source or free software at its core refers to available and readable source code, as opposed to distributions of binary only. There are **(p.188)** many distinctions between various open and free licences. Those differences are equally (in)appropriate in different domains. What all the open and free code options share is that the code itself is readable. Different open and free licences across the spectrum are as different as the regulatory implementation of transparency across the globe. Code may be partially open, as with a limiting contract. Code may be completely free for use, modification, and commoditization. Code may be free for use,

but only those privileged by the licence may close and sell the code; while others must provide their modifications freely. There are degrees of openness in licences and degrees of open code in practice.

Free software and open source are fundamentally different things. The implications of a licence which prohibits any form of closure and one which is agnostic about closure are important. These licences implement very different visions of the role of code in government, and as the roles of government vary widely (from agent of imprisonment, to protector, to simple delivery of the mail) the appropriate licences for code will also vary. For example, the code used to extract potentially suspicious financial transactions for law enforcement is necessarily protected from public view. However, to avoid Trojans or other malicious code, there may be occasional expert review. In contrast, the code used to evaluate the value of a home should be readily accessible by the public, so that debates about any changes can be well informed. Code used to assign individuals to prison cells[2] may be open to allow states to co-operate more effectively, or closed to prevent manipulation by prisoners. The role of the government, as servant or enforcer, and the resulting threats may indicate different licences.

3. Free, Open, and Other

The great business innovation of the 1980s was to close software: to take what had largely been freely available, package it, obfuscate it, and create an owned product from what had previously been readily available information. Some call this the enclosure movement of the twentieth century, though it is debatable whether there were increases in productivity and **(p.189)** efficiency equivalent to those of the agricultural enclosure movement (Gordon 2004). In response there developed two core positions: an open source and a free software position. These disputes turn on the nature of licences in the marketplace. The arguments concern how competition in various sectors should work—for code libraries versus for actual language. That there is such passionate disagreement over the role of code in the marketplace, where there exists competition to address personal choice, indicates how severe the differences may become for government, where individuals must sometimes comply with governmental technical decisions. This section begins with the discussion of free software and moves to open software, as this is how the debate has historically developed.

The implications of the closure of code were not widely discussed in legal circles at the time, but have now been widely examined (Lessig 1999; Branscomb 1994; Litman 2001). At the time Richard Stallman was the one clear voice of dissent (Stallman 1984). Stallman, the founder of the free software movement, presciently pointed to the risks of a world ruled by decisions embedded in processes that are legally protected from examination. Stallman responded to closure by developing a licence for software, creating a large body of coding tools, coding an operating system excluding the kernel, and defining a coherent philosophy that explained his actions.

Stallman’s original free software philosophy has grown into a broad field of philosophical and practical approaches that encompass the development of free and open code. Economic requirements, transparency requirements, user notification, authors’ rights, and issues of liability are all addressed in the licences that are used for applications, languages, and infrastructure code, as described in the following paragraphs.

Stallman’s philosophy of free software was based on ‘four freedoms’, which are essentially political rather than economic. They are: the freedom to view and run; the freedom to alter; the freedom to redistribute; and the freedom to make more free software.

The first of Stallman's freedoms, the right to view and run the code, is the central liberty of free software. The ability to view code can provide a form of audit, as with open books. The inability to view code when a decision-making process is embedded in code results in a decision-making process that is immune from detailed scrutiny.

The second freedom in free software philosophy is autonomy, the right to modify the code. This right is problematic when it comes to government: obviously the ability to modify the code on the voting **(p.190)** machine systems is incompatible with effective electoral administration in a democracy. So in what contexts should it be a right of individuals to modify the processes that implement government? Consider restating the question as 'In what contexts should it be a right for an individual to propose an alternative process for government?' The two questions are the same to the extent that the modification is documented and can be discussed. Yet the answers to the two questions may be very different in different circumstances, as in the voting machine example.

The third freedom in Stallman's free software philosophy is equality, the right to distribute the code in its original or modified form. No single person is the sole distributor with control. Freedom to distribute does not mean a prohibition on charging. Any person is able to contribute. Any person is also able to access the code. Laws are available on file, regulations must be readable, and standards cannot be secret. The public can obtain and share this information. For instance, the distributional effects of different tax policies can be readily explored if individuals are freely able to download the relevant codes and change assumptions to examine the result.

Closed code cannot be shared because the person using the code has a limited end-user licence that constrains secondary use. Some closed code is licensed under the constraint that the users cannot discuss or publish negative reviews of the product, but these components of end-user licences have never been tested in court. A prohibition on discussion is a prohibition on speech, and unlikely to be upheld in court in the United States. Yet there is still uncertainty and no one has sought a test case. The tactic of using the law to harass has been most used against community and environmental activists.

Consider Microsoft's implementation of Kerberos, a security standard developed by the Massachusetts Institute of Technology. Kerberos lets one client (or desktop) talk to many servers. Microsoft has been convicted of illegal leveraging of its monopoly on the desktop (*United States of America* v. *Microsoft Corporation*, CA 98–1232). The Microsoft implementation of the desktop version was incompatible with the free software Apache web server implementation. To prevent the creation of compatible software to limit effective leveraging of the desktop monopoly, Microsoft had to prevent open source programmers from creating compatible software. So, to view the Kerberos source code, each person had to agree not to discuss the code with anyone else. If this constraint had held up, it would have been impossible to co-ordinate a compatible update. Each person working to create a compatible update to Apache **(p.191)** would have had to work alone, not sharing information or progress to the extent that such communication could be construed as releasing information about the Kerberos source.

Stallman's fourth freedom is fraternity—a requirement for reciprocity. The third gives the freedom to distribute, but the fourth ensures that no one can take rights away from the next in the distribution chain. This requirement is radical. The licence is bound to the code. The prohibition on modification of the other freedoms is commonly referred to as inherited because

it remains bound to the code as the code grows. Opponents of free software refer to this element as viral, as it infects other code.

As noted earlier, Stallman's philosophy of free software is an explicitly political approach to the definition of the software market. Free software is at one end of the open code spectrum. At the other end is open source, which endeavours not altogether successfully to be apolitical. The definition of open source has eight elements. Two of them require free distribution and source code availability, as with free software. Thirdly, modified code can be distributed under the same licence. The next four elements (integrity, lack of discrimination, licence discrimination, and non-specificity) say that under an open source licence modified code must be identified as such, the licence should be adequate to run the code, and should apply equally to all people. At this point there is no conflict between free and open software.

The final requirement of open source explicitly rejects the fraternal element of free software. This requirement is that licences must not impose restrictions on modified software, called non-contamination by open source advocates. The open source perspective is that the first step must be to provide open code. After the original provision of open code, however, closure and profits are the optimal result from the perspective of open source proponents. From the open source perspective, free software functions as basic research or infrastructure that, once provided, requires a regulatory change for optimal diffusion.

Software in the public domain is not free software. Software in the public domain may be captured and copyrighted by another person. Public domain software is the most clear application of the enclosure concept in the digital world, from the perspective of the free software movement. Imagine the ability to fence off part of a public park, then charge people to enter or use the park. One might even build a fortress on the park, thus arguably improving it. The result may be investment, but it would entail the loss of a public asset. Similarly, the closure of public domain software or open source may lead to greater investment because **(p.192)** of expectations of greater returns. The free software movement argues that any potential investment must be measured against the loss of a public asset.

4. Open and Transparent

Christopher Hood in Chapter 1 and David Heald in Chapter 2 above show that the definitions of transparency are contested in the governance community; so is the definition of open software in computer science (DeBona et al. 1999). Where the two debates intersect, confusion can be compounded. Thus 'open code leads to transparency' is an assertion that depends upon the definition of not one but two contested terms.

In Chapter 1, Hood identifies at least three major dimensions to transparency: accountability in the distribution of resources, individual interactions characterized by open discourse, and fairness based on consistency of process. But a more mechanistic understanding of transparency, based on democracy as process, is better suited for consideration of the inherently mechanistic implementations of democracy via open code.

In open code, process descriptions as embedded in code are information. In open code, code is speech. In closed code, code is a machine or a service. Closed code is a set of inventions, covered by patent. Closed code is a service, for which the user has a limited licence for use under limited conditions. For open code, the information embedded in the code is governed by

licences and copyright that recognize the code is information. Open code is descriptive or embedded speech. Open code describes the process that is implemented in the digital realm.

In closed code the same processes using the same technology are services or property, not information. One could nomore examine the property embedded in proprietary code than one could walk off with the computer from a government office. Indeed, under most licences even the agents of government who use the code have no rights to examine the code. In the proprietary systems service model, I have no more right to view processes than I do to demand a meal in the parliamentary dining room.

Public sharing of digitized government processes is, in the lexicon and mental structure of proprietary code, *stealing intellectual property* when the process is embedded in closed code. The government buys only a limited licence for a limited number of people to use the code for a limited **(p.193)** time. The government has no rights of ownership. The people have no right to examine the process that is being implemented on behalf of the government in the code. By contrast, in open code the code is dialogue. The code is embedded speech. The code is meant to be shared, discussed, and disassembled. Anyone can examine, share, and test the code.

Accordingly, a key question that links the software debate to the transparency debate in government is whether the processes of government are to be seen as property or as continuous discourse on the function of government. Is the law the sum of the processes, or are the processes the property of the individual with the incentive to code them?

5. Conclusion

Open versus closed digital processes are sometimes presented as a choice between the utopian and dystopian. For code that is proprietary and ruled by a model licence the dystopian elements are clearly present. But it does not follow that the simple adoption of open code implies utopia. Code is not law, and the subtle distinctions in licences and codes may have profound effects, so there is no Boolean choice between ‘open’ and ‘closed’.

Open code makes it possible to ensure that the documented processes are followed, to the extent that the processes are digital and the code is verified. Closed code ensures that the documented processes cannot be examined; and if examined, cannot be discussed. As noted earlier, open code, like software, enables a range of technical and policy options. Open code may be distributed so that it can be altered at will. For example, the UrbanSim project developed a model of Seattle for transit planning (Waddell 2000). Anyone can download the code, change the assumptions, and then use the model to take part in the discourse about planning. In contrast, consultants providing models may offer information about their assumptions, but do not allow the public or government clients to view and alter the models. But that model cannot be applied to all government processes: code that calculates a person’s tax liability should not be subject to rewrite by every taxpayer, lest we all code ourselves refunds. Nevertheless, code that calculates taxation should be provably the same for every taxpayer. Thus a more restrictive licence and even trusted hardware can play a role.

Further, some open source licences enable code to be integrated into a closed product, thus optimizing for private sector investment. For **(p.194)** instance, a government may want to offer code that helps companies evaluate how they can invest in employees and look at return on investment in socially responsible efforts (such as daycare or on-site fitness programmes). This code may be offered as open source, so entrepreneurs can download and then augment the code

into additional products. Unlike the case of public domain code, the entrepreneur cannot then prevent others from making competitive investments in the same code base.

Changes in government's traditional paper-based processes tend to be formal and examined in advance. Changes in code for maintenance, interoperability, and hardware compatibility cannot reasonably be subject to the same level of examination. Any regulation that treats open code as if it were identical to open paper-based processes will either create a systemic inability to function, or fail to provide adequate integrity checks. Yet the current state of affairs allows decisions to be made in closed rooms, by coders who are likely to be unaware of the implications of their replacing human judgement with hard code. Moving decisions from the smoke-filled rooms of power brokers to the caffeine-fuelled rooms of programmers is not progress in terms of transparency.

Indeed, with the ability to develop unique code rather than the ability to adopt generic open code the details of transparency become even more critical. There are practices and procedures that can enhance transparency of coded process regardless of the degree of openness. These include logical testing and outcome testing. Trusted computing offers some promise for the future, but no current deliverables (Jin et al. 2004).

In short, the simple notion that open code is good and closed code bad is only the beginning of a satisfactory debate about the software properties that are appropriate for effective democratic government. While closed code offers nothing in terms of transparency, various levels of visibility, accessibility, and transparency are available with open code. Different licences for open or free code address different elements of transparency and democracy. The development of the appropriate mechanisms for code governance is begun, not completed, with the choice of open code.

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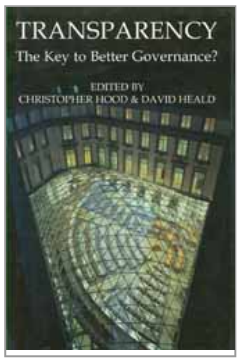
Notes:

([1]) In 1959 Grace Hopper’s COBOL programming language used plain English for the first time, with structures such as ‘for’ as opposed to binary instructions.

([2]) Massachusetts developed open source software to select how prisoners are housed, after paedophile and defrocked Roman Catholic priest John Geoghan was killed by his cellmate in February 2004. All information is entered from the prisoner’s record and is not under the control of the prisoner, to prevent manipulation.



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Transparency and Digital Government

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[−] Abstract and Keywords

Digital government refers to the use by government of information and communication technology, including the Internet, both internally and to interact with citizens, businesses, and other governments. This chapter briefly outlines the development of digital government. It suggests three key ways in which digital government could be more transparent than government of the 'pre-digital' era and three ways in which it might become less transparent. The chapter goes on to identify some ways in which these 'barriers' to transparency might be overcome, such as the use of electronic tools like search engines and software. Finally, it discusses the strong variations in the potential for digitally aided transparency across countries, within countries, and within groups of Internet users and non-users. Some non-democratic states have resisted the potential of e-government to promote transparency, and have been more interested in trying to restrict usage of the Internet within their boundaries. This chapter investigates some of these variations in digitally aided transparency.

Keywords: Internet, digital government, transparency, e-government, information and communication, software, search engines

WHAT EFFECT MIGHT THE ADVENT OF DIGITAL GOVERNMENT have upon transparency? Digital government is taken here to indicate the use by government of information and communication technologies, including the Internet, both internally and to interact with citizens, businesses, and other governments. This chapter outlines briefly the development of digital government. It suggests three key ways in which digital government could be more transparent than government of the 'pre-digital' era and three ways in which it might become less transparent. It goes on to identify some ways in which these 'barriers' to transparency might be overcome. Finally, it discusses the strong variations in the potential for digitally aided transparency across countries, within countries, and within groups of Internet users and non-users.

Digital government has developed across governmental organizations in advanced industrialized nations since the 1960s, as large-scale computer systems proved themselves well suited for administrative tasks traditionally performed by government bureaucracy, particularly the processing of financial transactions. Throughout the 1960s and 1970s information systems spread throughout government in (for example) the United States, the United Kingdom, and Japan, to be replaced by networks of personal computers in the 1980s. A key breakpoint for digital government came in the late 1990s, however, with increasingly widespread use of the Internet across society and organizations. The Internet and the World Wide Web allowed governments the possibility of providing citizens with information about their operations that could be accessed from any location at any time, thereby offering potential for transformation of government—citizen interactions through electronic mediation.

The reality of digital government for transparency, however, has been extremely variable across the world. There are numerous international rankings of e-government by international organizations (see United Nations 2003; OECD 2004; Graafland-Essers and Ettedgui 2003; Taylor **(p.198)** Nelson Sofres 2003); private sector consultancies (Accenture 2002–2005, for example) and academic commentators (particularly West 2005; La Porte et al. 2001), most of which focus on transparency as only one small aspect of a wider e-government agenda. One exception is the work of the Cyberspace Policy Research Group of the University of Arizona (La Porte et al. 2001; Demchak et al. 2000; La Porte et al. 2002), which tracked the diffusion and use of the web in nearly 200 governments around the world between 1996 and 2001 using an evaluation system with transparency as one of its key dimensions. Although mostly questionable in their methods, these reports do demonstrate major country differences in e-government performance which would have distinctive implications for transparency. In addition, in many parts of the world Internet penetration is still very low at the time of writing, meaning that even if governments in these places tried to make themselves more transparent using electronic means, few citizens would benefit. Moreover, some non-democratic states have resisted the potential of e-government to promote transparency, and have been more interested in trying to restrict usage of the Internet within their boundaries. The final section of this chapter investigates some of these variations in digitally aided transparency.

1. Transparent Digital Government

Intuitively, we might consider (from its very name) that information technology would have the capability to facilitate more transparent government, in particular since the advent of the Internet. Earlier information technologies were largely internal to governmental organizations, storing and processing information but doing little to make that information more readily available to citizens. But by the twenty-first century in most developed countries, virtually every government department and agency had a website and these sites acted as windows on government—windows that may be partially obscured or opaque or unreachable to some but were nevertheless not there in the pre-Internet era.

First, digital processes can aid the implementation of freedom of information legislation, for example in the ways outlined by Alasdair Roberts in Chapter 7 above. The Internet provides new channels for both capturing and disseminating information, so more information becomes more freely available. It is notoriously difficult to measure the size of domains, but estimates suggest that the UK government domain contains at least 9 million pages, the equivalent Australian government domain at **(p.199)** least 7 million, the Canadian government at least 9 million, and the US federal government domain at least 79 million (Petricek et al. 2006). And Chinese government websites with the domain name ‘gov.cn’ have been estimated as 2 per cent of the

total number on the World Wide Web (Lagerkvist 2005: 9). All these government domains contain information that was not, before the mid-1990s, available to citizens in a form readily accessible from their homes, meaning that access to the Internet accompanied by freedom of information legislation can make available ‘virtually the entire stock of public information generated by governments at the click of a mouse button’ (Perritt 1998, quoted in Lagerkvist 2005: 189).

Second, the automation and ‘digitization’ of internal processes and rules means that such rules have to be formalized in software—and to that extent are less subject to discretion and are more ‘rule-like’ (indeed, Jean Camp in Chapter 11 above makes the linkage between computer code and law). It could be argued that digital government with its codified procedures is more fixed, more defined, and more stable, as it becomes more difficult—or at least more expensive—to make changes. And once such ‘electronic rule-making’ has been fixed, governmental organizations can in principle open it up to the world more generally. For example, the Australian Tax Office has experimented with opening up parts of its databases of tax legislation to citizens, so that they can see the rules and regulations on which the decision made on their case has been based (Dunleavy and Margetts 1999).

Third, digital government is more accessible. Some things are available on websites, not because of specific freedom of information legislation or a culture of openness but simply because the websites are there and citizens’ expectations have changed. As more people become more and more accustomed to finding information on the Internet, it becomes less acceptable for government not to provide it. For instance, in the United Kingdom documents such as government policy proposals, parliamentary reports, and the minutes of commissions and inquiries were once available only for purchase from a very limited number of official stockists. With the advent of the Internet the reports are all now freely available online, usually released to the public shortly after they are released to the press. Thus what was previously a major cultural difference between the UK government and the government of the United States, where many such reports would be mailed to any US citizen for free, has largely been eradicated. Similarly, the international evaluation of e-government in transparency terms noted earlier (La Porte et al. 2001) **(p.200)** found that France was among the leaders in openness in the early days of digital government, in spite of its strong statist traditions and traditional administrative structures.

Thus it could be argued that digital government is more transparent in a number of ways: with more information available and accessible; with more rules fixed and codified and therefore easier for citizens to be aware of and to understand; and with new pressures on government agencies to be more open in respect to documentation. On the other hand, there are also ways in which digital government might be regarded as less transparent.

2. Barriers to Transparency in Digital Government

There is a sense in which government has become steadily less transparent since the 1950s and 1960s when the first computer systems were adopted by the most developed liberal democracies. Once computers appeared on official desktops in the 1970s and 1980s, they produced the standard excuse that ‘I can’t do that, the computer/system won’t let me’, replacing the earlier (and perhaps less definitive) ‘the rules don’t allow that’. Three characteristics in particular of digital government would seem to act as barriers, rather than facilitators, of transparency.

First, there is the inevitable complexity that a major injection of technology brings. In the most general sense, most people are not interested in bureaucracy but would have some knowledge of what it was and how it works. Most are familiar with some kind of hierarchical arrangement with subordinates and superordinates. The same is not true of digital government. Most of us do not even pretend to understand the computer on our desk—there is an element of magic and unpredictability about it. So digital government, relying on a myriad of computers and networks is uncertainty writ large. For those who do not use computers or the Internet, digital government is even more mysterious. In a survey of UK citizens in 2005, for example (Oxford Internet Institute 2005: 53), 63 per cent of the 700 non-users of the Internet gave 'Don't know how to use a computer' as the key reason for not using the Internet, and 56 per cent said that they were concerned that the Internet is 'too difficult to use'.

Second, although rules are defined and codified in software, not many people understand them. In the previous chapter Jean Camp assesses Richard Stallman's argument that for users to have true autonomy, they **(p.201)** must be able to examine, alter, and redistribute the code, and the ideology and commitment of the open source movement is based on the belief that such autonomy is extremely important for the way that the 'Internet era' develops. However, for many people the fact that computer scientists (such as Jean Camp) can read and alter code is of limited value; the overwhelming majority of citizens cannot. In any country in the world, only a tiny proportion of citizens would be able to make much sense of open source code, and in any case much of digital government relies on entangled webs of computer systems ('rats' nests of logic' as one official put it to me), which are even more opaque. Ultimately, the utopian open source world involves putting faith into a different group of skilled experts to translate the language of digital government, rather than contributing directly to transparency.

Third, the very quantity of information that digital government facilitates can lead to confusion, which reduces transparency. The US Department of Defense, formerly one of the more closed and secret of US federal departments, operates around 3,000 websites—does that mean it is more transparent than before? At a seminar of the UK Foreign and Commonwealth Office (organized by the Oxford Internet Institute) in November 2004, for example, officials claimed proudly that their website would increase in size by a multiple of five once they complied with the UK Freedom of Information Act implemented in 2005, but the statement seemed to owe more to a spirit of appeasing FOI troublemakers than to a spirit of transparency and a desire to see people actually use it or navigate around it. The addition by the governments of most developed nations of millions of pages of government domain on the World Wide Web (Petricek et al. 2006) over the last ten years only makes government more transparent if it allows citizens to find more easily information that they require.

3. Overcoming the Barriers to Transparency

So digital government offers barriers as well as facilitators to a more transparent government. How might such barriers be overcome? This section suggests that there may be 'digital mechanisms' for overcoming them and that, to some extent, these barriers are due to the intermediary nature of digital government at the beginning of the twenty-first century.

First, citizens have to become used to the digitization of government just as we have to the digitization of many of the processes of domestic **(p.202)** life, with computers in our washing machines, cars, and televisions, as well as sitting on our tables at home (even by 2002, personal computers were in over 60 per cent of homes in leading OECD countries such as Sweden, Denmark, Germany, Australia, Canada, and the United States: OECD 2004: 144). In some cases, society is way ahead of government in this respect. In a recent survey of UK citizens (Oxford

Internet Institute 2005: 25), 87 per cent of Internet users had looked for goods or services online and 74 per cent had bought online. Such figures suggest that many citizens are becoming more comfortable in dealing with computers and networks in everyday life—and therefore, that they will be part of their dealings with government as well.

Second, there are ways around the opaqueness of software (open source or otherwise) which codifies rules and processes. As noted above, the open source movement has one approach to deal with this problem, but that would do little to make digital government more transparent to most citizens. However, intermediate measures which deal with the problem from a citizen's perspective might also be possible. Research has shown that users like websites which allow you to experiment with different scenarios. For example, the web interfaces of insurance companies allow users to include or not include certain items, clauses, or comprehensiveness of cover, and experimentation will allow users to feel to a limited extent that they know what the rules are and are in control of how they are affected by them. Users like such facilities to be anonymous, so that they do not feel they are somehow exposing themselves to the insurance company by providing evidence that may be held against them at a future date. A similar facility has been suggested for online taxation portals (Margetts and Yared 2003). To some extent, websites which allow citizens to see what benefits they might be entitled to, such as the successful pension forecasting services offered by several governments, are similar examples of enhanced transparency through digital government.

Third, there are ways, already used widely by private sector organizations, of allowing users to cut through the whole range of information available, that might be used more effectively by government. One problem here is that government officials tend to have a rather controlling approach to the Internet, which means they like to feel government itself will be what guides citizens through. So, most governments have developed central portals; the United Kingdom has had three, the optimistically named open.gov.uk (to 1999), ukonline.gov.uk (to 2004), and the current portal, direct.gov.uk, which explicitly aims to take citizens 'straight through to public services' (as advertised on the front page). **(p.203)** Recent 'webmetric' analysis of the current UK portal, however, suggests that crawling from the front page through to nine iterations obtains only 10 per cent of the nine million pages known to be available. In a mystery shopping exercise, it took users fifteen minutes to obtain a visa application form via the portal site, whereas using the search engine Google in the Internet at large it took only two minutes. Indeed, in 2005 a group of the site's critics created www.directionlessgov.com to illustrate how poorly the official portal compared with the search engine. The problem is that search engines, even Google, do not work so well when used internally to portals, because they cannot establish an effective page ranking, so the search engine will not bring the relevant pages to the top of search results. Private companies devote considerable resources to ensuring that their information reaches the top of search engine results and is advertised in the most beneficial places from search engine portals. Government agencies might find that the same strategies need to become an established part of ensuring that digital government is more transparent.

4. Multiple Transparencies of Digital Government

Digital government can only become transparent to a digital society. But not all societies are digital: there are dramatic variations in Internet penetration both across and within countries. As noted earlier, in some countries very few people have Internet access: less than 3 per cent in Africa as a whole; 13 per cent in South America; 9 per cent in Asia as a whole; and only 4 per cent in India. Those governments (such as those in sub-Saharan Africa and the Caribbean) which had few or no nationallevel websites even by 2001 tend to be clustered in these areas with very

low Internet penetration (La Porte et al. 2001). And even in those countries (particularly India) where successful e-government innovations have been developed, they can reach only a tiny percentage of the population and can hardly be said to affect transparency in any significant way as yet.

Even where Internet penetration is higher, digital government is no guarantee of the potential transparency gains outlined above: La Porte et al. (2001) cite Israel, Malaysia, Slovenia, and Pakistan as examples of countries with above average amounts of information contained on government websites yet with low 'openness' evaluations. Indeed, some governments (including Saudi Arabia, Bahrain, and the United Arab Emirates at the time of writing) make a deliberate effort to minimize the Internet's effect on transparency, employing sophisticated devices to **(p. 204)** restrict their citizens' access to parts of the World Wide Web. In China (where Internet penetration was 8 per cent in 2005 but growing rapidly), the goals of top-level advisers for the country's extensive e-government plans are to 'make the authoritarian governing process less opaque to citizens' (Lagerkvist 2005: 189), but concurrently the government's Internet filtering regime is the most sophisticated effort of its kind in the world (Bambauer et al. 2005). It censors content transmitted through webpages, weblogs, online discussion forums, university bulletin board systems, and email messages, such that Chinese citizens will frequently find themselves blocked if they seek access to websites containing content related to Taiwanese and Tibetan independence, Falun Gong, the Dalai Lama, the Tiananmen Square protests, opposition political parties, or a variety of anti-Communist movements.

In other countries governments have avoided the use of digital technologies to increase transparency even where Internet penetration is high and e-government is well developed. The prime example is Singapore, which has long been among the leaders of e-government rankings and where surveys suggest that citizens are more positive than almost any other country in their attitudes towards the effectiveness, efficiency, quality, and accountability of their e-government (Accenture 2005: 86). There is no evidence to suggest that the transparency of the Singaporean government has increased significantly in this digital environment, although it is probably also true that transparency has not been reduced, and the net effect is a transparency gain. In the Internet world, it is simply more difficult for governments to keep secrets from the outside world, and anything disseminated to the Internet world at large is liable to bounce back to that government's domestic subjects at some point.

Even within liberal democracies where Internet penetration is relatively high, the so-called 'digital divide' can work against equitable transparency. If (say) around two-thirds of the population have Internet access (more in the United States, Canada, and most Scandinavian countries, less in the United Kingdom and southern European countries at the time of writing), another third do not and they tend to come from older, poorer, and lower educated groups. They must rely on journalists and other intermediaries for any transparency effect. When questioned in surveys these citizens give a variety of reasons for not using the Internet, such as expense, lack of interesting material on the Internet, and a perception of the Internet and computers more generally as too difficult to use. For digital government to become more transparent to these groups, **(p.205)** governments need to develop a coherent strategy of identifying and informing intermediaries.

Even among Internet users, there are differences in the potential for digital transparency. In most developed countries with over 50 per cent penetration, there appears to be a significant subset that use the Internet as the first port of call for finding information. In the United

Kingdom, for example, when the Oxford Internet Survey (2005: 32) asked, ‘Where would you go first if you didn’t know the name of your MP?’, 52 per cent of Internet users (32 per cent of all respondents) said that they would use the Internet first, rather than going to a physical location such as a library or using the telephone. Considerably more (70 per cent) said they would use the Internet to plan a journey or book a holiday, while fewer (38 per cent) said they would use it to find information they needed on their taxes. Such figures suggest that for this section of the population, digital government could become more transparent provided that governments use the type of strategies outlined above. A second group are also Internet users but their emphasis is on different uses. They will use the Internet for entertainment such as downloading music perhaps, or watching videos, or for shopping, but are less likely to use it to find information or to interact with government. It may be that this group does not need to interact with the government very much. But if governments wish to reach this group or become more transparent to them, they will need to take a more proactive stance, for example by advertising on the types of sites (such as shopping portals and media sites) that they do use and having an information dissemination strategy that incorporates government information into the information offerings of other organizations.

5. Conclusion

This chapter has suggested three ways in which digital government might become more transparent. The amount of information that government obtains and may disseminate becomes greater, at the same time as being more accessible to more people. Meanwhile, the process of digitization involves formalizing and codifying aspects of governmental processes which in turn can become more stable, less discretionary, and hence more transparent. In addition, it might be argued that digital government reduces the need for transparency, by making it easier to ‘join up’ government agencies and services and thereby reducing the need for citizens to understand government. For example, the Australian social security **(p.206)** agency, Centrelink, has been held up as a ‘working model for the whole-of-government approach’ and for being, therefore, entirely citizen-centric ‘in that users could access services and information without having to enter the bureaucratic maze or necessarily understanding how the government agencies and departments are arranged’ (Keys 2004).

This chapter has also outlined some of the barriers to transparency: the uncertainty and unpredictability that electronic processes can engender, the increased complexity, and the difficulty of navigating digital government, by virtue of its size or design. There may be digital ways of overcoming these barriers, which include electronic tools such as search engines and software which allows users to experiment in their interactions with government, thereby gaining insight into the way it operates. But in the end, digital government requires a digital society to understand it. In countries where Internet penetration is low, digital transparency will rely on initiatives to increase usage. In countries with higher levels of penetration, governmental organizations that aim to be more transparent need to recognize the different categories of those who use the Internet and those who do not, rather than focusing on a straightforward digital divide between users and non-users.

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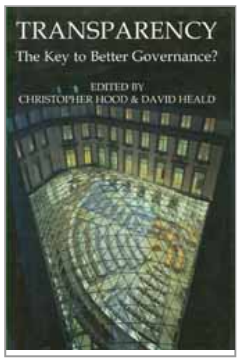

Transparency: The Key to Better Governance?
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Beyond Exchanging First Principles? Some Closing Comments

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[–] Abstract and Keywords

This concluding chapter explores four issues. First, what have we learned about transparency and how has it changed? Second, what seems to affect transparency – what accounts for growth or decline in the phenomenon? Third, what does transparency itself affect – what does it do to organizations or to society more generally? Last, what normative view should we take of transparency? Transparency differs from other closely related concepts, particularly openness and freedom of information. What might have been discussed or labelled as accountability, openness, or due process a generation ago may now be talked of as ‘transparency’, but that relabelling might have no deeper significance except to students of the rise and fall of fashionable words and phrases. If the optimistic view of the effects of transparency provisions is that government ministers and bureaucracies adopt a culture of openness, citizens end up knowing more, and trust in democratic government goes up, the data available for assessing such a view are patchy and hard to interpret.

Keywords: transparency, openness, freedom of information, accountability, trust, democratic government

THIS CHAPTER AIMS TO CONCLUDE THE VOLUME by briefly exploring four issues. First, what have we learned about what transparency is and how it has changed? Second, what seems to affect transparency—what accounts for growth or decline in the phenomenon? Third, what does transparency itself affect—what does it do to organizations or to society more generally? Finally, what normative view should we take of transparency? Is it something to be applauded or decried, something that is good up to a point or in some conditions but not others, or one of the many values that have to be traded off against other competing values?

1. What Exactly is Transparency and has there Been a‘Rise and Rise’ of Transparency?

In the first two chapters we explored where the word and the concept of transparency had come from, and some of the different meanings that are attached to the word today. David Heald in Chapter 2 distinguished between transparency and other closely related concepts, notably

openness and freedom of information. As was suggested at the outset of Chapter 1, it is commonly assumed that we are living today in a special age of transparency, that transparency has sharply risen in importance as a principle of policy and institutional design over recent decades, and that consequently it is the 'rise and rise of transparency' that has to be explained.

Widespread as they may be, such assumptions are far from incontestable. Indeed, at least three qualifications might be made to the notion of the 'rise and rise' of transparency. First, it might be said that what has grown is largely a matter of linguistic usage, the currency of a particular **(p.212)** term or buzzword in international English, as much as underlying doctrine and practice. Just as governments sold off their assets and contracted with firms for services before the momentous term 'privatization' was coined, many requirements for predictable and open policy processes pre-date the common use of the term transparency, as I have shown in Chapter 1. What might have been discussed or labelled as accountability, openness, or due process a generation ago may now be talked of as 'transparency', but that relabelling might have no deeper significance except to students of the rise and fall of fashionable words and phrases. It seems difficult to deny that some, and perhaps much, of the 'rise and rise' of transparency is of this type. But several contributors to this volume have plausibly argued that there is more to it than that. Whatever term we use for it, national and international disclosure requirements on governments and corporations seem to have grown over the last generation; freedom of information laws have spread around the developed world; and law and regulation have also imposed a number of new requirements for 'audit trails' or similar records to accompany a range of decisions or actions, including risk management and employment.

A second possible qualification to the 'rise and rise' interpretation is that while openness may have grown in some respects over a generation or so, it may not have grown or indeed may actually have contracted in others. In particular, before we rush to conclude that we are living in some unique age of transparency, it is worth noting that while formal provisions governing access to information held by public organizations may have become more extensive, transparency in some of the other dimensions identified by David Heald in Chapter 2 may have been reduced.

Indeed, several contributors to this volume have discussed precisely that possibility. For instance, Alasdair Roberts in Chapter 7 claims that transparency initiatives in the form of freedom of information laws have commonly, perhaps even invariably, resulted in tighter central management of information in executive government, rather than the 'new culture of openness' in the bureaucracy that is always promised when such laws are introduced. Likewise, Onora O'Neill argues in Chapter 5 that formal transparency provisions can be counterproductive for effective two-way communication flows if they are carried out in catch-all mechanical ways—and what bureaucracy ever invented dealt with such requirements, except by translating them into tokenistic check-box routines that economize on intelligence? If such observations have any foundation, they point to a 'rise and rise' of nominal but not effective transparency (in the words of Heald in Chapter 2), or *de jure* but not *de* **(p.213)** *facto* transparency. And even nominal transparency is not necessarily a one-way street: for instance, Patrick Birkinshaw in Chapter 3 argues that the shift to transparency in effect went into reverse in the United States after the terrorist attacks of 11 September 2001, as the Bush presidency led the retreat from earlier freedom of information provisions.

Moreover, in a dimension of transparency that was central for Jean-Jacques Rousseau (as noted in Chapter 1) but hardly figures in most of the chapters of this volume—the ability of citizens to

know about one another's identity and activities—transparency has probably declined rather than increased in most Western countries over the past thirty years. The march of individual privacy and data protection laws that has gone in step with the advance of formal disclosure requirements on corporations has probably moved us further away from Rousseau's version of social transparency rather than closer to it. The increasing disposition and ability to opt out of public listings of telephone numbers that were commonplace a generation ago (and perhaps not to meet legal requirements for electoral registration either) may even make it harder for individuals to identify their neighbours than it was a generation ago. And the Internet and IT developments that are commented on by Jean Camp and Helen Margetts in Chapters 11 and 12 have probably increased the ability of citizens to deal with one another behind an electronic mask, even if their email and mobile phone records are in principle available to the security forces operating under special state powers. Rousseau and the French revolutionaries would not have thought it meaningful to describe as 'transparent' a society with Internet chat rooms that are more like a masked ball than an open conversation, and in which you cannot readily find out who your neighbours are. It would be hard to argue that there was any sign of an increase in transparency in this dimension.

Further, with widespread outsourcing and privatization of functions once carried out directly by state bureaucracies, information about development activity and many forms of policy delivery may in some circumstances be able to be shielded behind a cloak of commercial confidentiality. Indeed such information may not even be available to government itself, to the extent that the software implementing its delivery programmes takes the form of closed proprietary codes, as Jean Camp argues in Chapter 11. Andrew McDonald in his discussion in Chapter 8 of the UK Freedom of Information Act points to the standard requirement for firms dealing with government to sign up to FOI requirements, but the Act itself, and most other Freedom of Information Acts, contains (Section 43) an exemption covering release of information likely to **(p.214)** prejudice commercial interests, 'or which would be a breach of confidence' (Section 41). Where private insurance applies to public services, insurers may decline to pay out if public authorities provide information that may affect liability claims (Sagan 1993: ch. 3). Where private firms run facilities such as nuclear power plants, safety or ecological data may likewise come under the convenient umbrella of commercial confidentiality. While private corporations—at least those listed on stock markets—are exposed to more disclosure requirements to financial markets over their financial dealings, commercial confidentiality can still be claimed for much of their substantive activities, and indeed the logic of capitalism probably requires such a doctrine. But when a mix of public bureaucracies and for-profit organizations run public services and government, the proportion of 'government' information that might prejudice commercial interests is likely to grow. So the advance of formal disclosure rules on government has probably been counterbalanced to a significant extent by the accompanying trend to privatization and outsourcing.

2. What affects what type of Transparency?

These points are important, for the obvious reason that what counts as a plausible explanation for the rise of transparency depends on exactly what that 'rise' consists of. To adapt the adage from a nineteenth-century cookery book, 'First catch your dependent variable.' Given that what seems to have happened to transparency is not as straightforward as it might at first appear, some—perhaps much—of what has to be explained is linguistic relabelling, the rise of a word over other words. Some of what has to be explained is substantive in the sense of changes in formal or legal requirements affecting disclosure and record-keeping, but not necessarily underlying behaviour or changes in values and beliefs. And some of what has to be explained is

why transparency has grown in some dimensions but not in others, given increasing emphasis on the doctrine that the 'personal' is private, and the increasing salience of commercial confidentiality in the increasing number of areas where business intersects with government.

Linguistic change that is not accompanied by deep underlying change can seem like a will-o'-the-wisp. Understanding the rise and fall of catch-phrases and buzzwords belongs more in the sphere of contemporary history and cultural analysis than the sort of social sciences represented in this volume. To the extent that such phenomena can be 'explained' at **(p.215)** all, we need historical accounts of where words come from and how they spread, together with some analysis of 'congruence'—why such words or phrases catch the mood of a particular time and place. That calls for the approach of a fashion historian, not a Weber or a Marx. The latter kind of approach, comprising as it does large-scale accounts of the development of rationality and modernity and the decline of magic, social deference, and traditional religious faith, explains too little in this context because it explains far too much. As to that narrow and specific question of linguistic usage, it is not clear exactly how the term came into fashionable use over the last decade or so. The most likely route seems to have been that of 'franglais'—from 1970s French debates about *transparence administrative* (as discussed in Chapter 1), which in turn influenced the European Union's 'transparency' directives of the early 1980s. It received a further large fillip in the early 1990s when Peter Eigen used the word to title an anti-corruption body (Transparency International) which obtained huge publicity and attention with its international rankings of government according to perceptions of levels of corruption.

However, to the extent that the rise of transparency consists of more than ephemeral linguistic usage and comprises a set of changes in formal governance policy for public and private organizations, accompanied by continuing and increasing protection of the privacy of individuals, it is easy to come up with laundry-lists of contemporary social changes and 'usual suspect' explanations. What is much more difficult is to distinguish between the different elements or to assign weights to them. At least three kinds of explanations could be offered—that of the power of particular interests, that of the rise of new cultural configurations, and that of functional adaptation to a new social habitat.

The standard interest-based explanation of the expansion of transparency and disclosure in private corporations since the seventeenth century—that it reflects the power of intermediary organizations in the financial markets (Jönsson 1988)—was noted in Chapter 1, and it seems plausible to see the 1990s corporate-governance changes discussed there as the latest turn of that process in a new phase of globalization (though, as David Heald notes in Chapter 2, there is also a counter-tendency in the sense of companies 'going private' to avoid those disclosure requirements, and various kinds of opaque tactics to keep information away from shareholders and regulators). For governments, international intermediary organizations also seem to have been important in developing disclosure requirements from the creation of the GATT in 1948, as noted in Chapter 1, down to the increased emphasis laid on transparency by the **(p.216)** International Monetary Fund and World Bank after the Asian economic downturn of 1997. But much of the extension in transparency requirements that Onora O'Neill writes about in Chapter 5—increased emphasis on disclosure, audit trails, and published performance data in public and semi-public organizations in a developed country—does not seem to be plausibly explained by pressures from intermediary organizations of that type. For O'Neill, the explanation lies in a broader interest-based explanation of a similar general type, suggesting that it is a group of 'expert outsiders' of organizational functioning that most stands to gain from increased formal

transparency requirements. Andrew McDonald's account in Chapter 8 of the groups who make most use of FOI laws is also possibly compatible with such an explanation.

An alternative view might be that transparency has become so widespread a recipe for good governance over recent decades that it is better seen as reflecting widely distributed attitudes and beliefs rather than interests in a narrow sense. That is why the late Aaron Wildavsky and his colleagues (Wildavsky 1985; Wildavsky and Swedlow 1991) used a broader cultural analysis to account for public policy and public spending changes in the United States and other developed countries since the late 1960s. They claimed that such developments, along with the rise of environmentalism (Douglas and Wildavsky 1983) reflected the rise of a new strain of egalitarian culture that sought to blame those at the top of big public and private organizations for the harm they did to supposed innocents. In principle the growth of transparency as a cure-all for governance problems might be seen as just another part of the same general cultural shift. But as with the interest explanation, not all that we have observed is easy to explain in these terms. The rise in privacy-protection policies that have accompanied the growth of transparency policies for non-personal data makes it harder for citizens to find out information about one another (and still more about the rich and famous), and that rise seems to reflect an individualist culture, not an egalitarian one. Yet if we try to accommodate that sort of anomaly by saying that the culture must be egalitarian for some things but individualist for others, the 'explanation' starts to drift into convenient redescription.

The more functional strain of explanation is that increased transparency is simply a necessary kind of adaptation to prevailing technological and social conditions for governments and many other kinds of organization in the contemporary age. At one level such an explanation may simply be a more innocent version of a power-politics or cultural-shift interpretation, and functional explanations have been disapproved **(p.217)** of in social science graduate schools for more than thirty years—and for good reasons. All the same, it seems hard to dismiss altogether the idea that some aspects of transparency developments have been shaped by some of the technological changes described by Jean Camp and Helen Margetts in Chapters 11 and 12. If digital developments radically reduce the search costs associated with finding individuals in files and registers at the same time that they reduce the cost of disclosing large amounts of organizational data to the public at large, the same development that may increase demands for individual data protection may underpin at least the version of transparency that Onora O'Neill criticizes in Chapter 5.

3. What Transparency affects

When we turn from examining what affects transparency—what explains its rise or decline, in what dimensions—to exploring what transparency affects, the earlier chapters in this volume show that there are several possible answers. In Chapter 7, Alasdair Roberts notes that transparency laws in government are conventionally claimed by their proponents to be a means of increasing public trust in government, and producing a new culture of openness inside governmental organizations. Andrew McDonald in Chapter 8 says that the acid test of formal transparency provisions is not so much what appears on the face of statutes, but simply that citizens end up knowing more than they do without such provisions.

If the optimistic view of the effects of transparency provisions is that government ministers and bureaucracies adopt a culture of openness, citizens end up knowing more and trust in democratic government goes up, the data available for assessing such a view are patchy and hard to interpret. The 'culture of openness' effect is hard to test systematically, but Alasdair Roberts suggests that such an effect does not show up clearly at least from the limited cases he

examined. The ‘trust’ effect is also hard to evaluate, given the difficulties of interpreting survey questions that take trust as an ‘attitude’ (as O’Neill points out in Chapter 5). It is true that such ‘trust’ attitude data as are available indicate a widespread decline of trust in government and other institutions too in a number of developed countries over the past thirty years or so (see, for example, Bromley et al. 2001; Nye et al. 1997; Curtice and Jowell 1995; Lipset and Schneider 1983). And that period happens to coincide with the spread of FOI and other transparency provisions across the developed world, as O’Neill again points out. But whether the association between these **(p.218)** two developments is causal or casual is hard to say, partly because of ‘noise’—everything else that has gone on at the same time (such as generational change, technological change, the spread of education, particular events such as the Vietnam War). The perils of assuming *post hoc* must mean *propter hoc* are well known, but in this case the decline in trust that such data record is not always *post hoc*. The sharpest decline in trust in government in several countries seems to have come in the 1970s, which pre-dates formal transparency provisions in most countries, though it comes after them in the United States. All that we can say with any confidence is that formal transparency provisions at least do not seem to have had the effect of increasing trust on such indicators.

The ‘extended citizen knowledge’ effect, although plausibly argued by Andrew McDonald in Chapter 8 to be the most important one, is the hardest of all to assess because we do not have time-series data even of the problematic nature of that on trust in institutions. McDonald reminds us that the main users of FOI legislation tend to be news media and politicians rather than citizens at large, suggesting that such extension of citizen knowledge as may have come from such legislation is a second-order pattern rather than a result of direct access. But the ‘noise’ problem in assessing increased knowledge on the part of citizens is severe, both because of the massive increase in levels of education in developed countries over the past generation, and because of the onset of the so-called information age. As Helen Margetts reminds us in Chapter 12, technological change in the form of Internet search engines allied to websites has utterly transformed the way that information is gathered by citizens, producing much-discussed phenomena such as the patients who have read more about their complaints than their general practitioners. So trying to determine what formal transparency provisions would have done to citizen knowledge about government and other organizations in the absence of such developments is a bit like Robert Fogel’s famous attempt (1964) to imagine economic growth in nineteenth-century America without railroads—instructive and entertaining but inherently problematic (see also Fischer 1971: 16–17).

Against the optimistic view, there is a range of other views that broadly reflect perceptions of futility, jeopardy, and perversity, in Albert Hirschman’s well-known categorization of stock critiques of progressive public policy measures (1991). The futility argument on transparency is that formal policy measures to make citizens more informed can be nugatory in some conditions, for instance when provisions that exist on paper are not enforced in practice or when institutions make compensating **(p.219)** adjustments to make such provisions ineffective, in a ‘dynamic conservatism’ pattern of reaction. Alasdair Roberts’ discussion in Chapter 7 perhaps comes closest to this approach, in his enumeration of some of the shifts that governments have made to circumvent the professed intent of FOI laws, from destruction of effective records to minimal co-operation approaches. David Stasavage in Chapter 10 and David Heald in Chapter 4 also point to the potential and familiar ‘futility’ effect of formal transparency provisions in shifting substantive discussions to other venues not covered by such provisions—the sort of problem that Bentham tried to deal with by requiring all decision-making to take place in a

common room, and addressed more recently by the US ‘sunshine’ laws, as mentioned in Chapter 1.

Distinct from futility, the jeopardy argument is that policy measures, while effectively achieving some of their objectives, can undermine other important values or goals, at least in some circumstances. A number of contributors to this volume have pointed to this possible effect of formal transparency measures. Andrea Prat in Chapter 6 argues that institutional efficiency and effective control by investors over fund managers in firms is not always served by increasing the principal’s knowledge of the actions of an agent. David Stasavage applies a similar analytic framework to identify costs of transparent bargaining in terms of increased likelihood of deadlock and a lower quality of deliberative debate. David Heald (Chapter 4) and Onora O’Neill also make the latter argument, though it runs counter to a conventional line of argument in the deliberative democracy literature, as Stasavage notes. Elsewhere, critics of measures designed to increase openness in the operation of institutions, such as O’Neill (2002) and Michael Power (1997), have taken a jeopardy line of argument in suggesting that formal transparency measures, unintendedly or otherwise, reduce trust and professional integrity within organizations.

As opposed to futility and jeopardy, the perversity argument is that policy measures such as transparency laws can achieve the very opposite of their intended goals and not merely null effects or undesired side-effects. In this context that would mean, following Andrew McDonald’s test in Chapter 8, that citizens would end up knowing less rather than more as a result of the introduction of transparency provisions. Indeed, an old British civil service joke goes that any policy that does not achieve the exact opposite of its intended goals can be considered a success. Do transparency measures pass even this undemanding test? None of our contributors have made a central argument for the perversity thesis, although Andrew McDonald points to the possibility of such an outcome **(p.220)** in some circumstances by giving the example of Zimbabwean legislation, ostensibly about freedom of information but in fact aimed at reducing press freedom. Some of the other contributors to this volume seem to be trembling on the brink of making a ‘perversity’ argument about formal transparency measures, though none do so explicitly. The final section will briefly return to this issue.

Accordingly, if these admittedly tentative analyses have any force, it would seem that the optimistic view about the effects of transparency provisions is far from proven and the most important element of that view (citizen knowledge) is probably not provable. As for the less optimistic views, it is logically problematic to argue that transparency measures—or any other policy measure—could simultaneously produce futility, jeopardy, and perversity. And in fact none of our contributors have argued strongly either for a purely null effect—the futility thesis—or for a strong perversity effect in which transparency provisions generally produce the reverse of their intended effects. But as we have seen, several of them argue that jeopardy effects of various kinds are a nontrivial effect of formal transparency schemes. How far this conclusion is truly universal, and how far it is contingent on particular types of culture cannot be assessed on the basis of the accounts given here. It would certainly be possible to imagine cultures that did not produce the box-ticking, blame-avoiding responses to formal transparency measures that several contributors complain about. But arguing that such measures can only be effective with a cultural transformation is a bit like Bertolt Brecht’s sly maxim that we should dismiss the public (or in this case the bureaucracy) and get a new one.[1]

4. Is Transparency Good—and Does More Mean Better?

So how should we value transparency? Is it to be seen as a good in itself, irrespective of other benefits or costs it may bring with it? Is it something like efficiency or regulation, to be valued only in so far as it helps societies achieve more fundamental values? Is it a value that has to be traded **(p.221)** off at the margin against other equally important values with which it may come into conflict, and if so what are those values? Or should we see transparency in the way that Aristotle looked at democracy—as something that is good in some forms but not in others?

Among the contributors to this volume, Patrick Birkinshaw in Chapter 3 is the only one to put the case that transparency is the kind of ultimate value, along with life and liberty, that deserves to be counted as a basic human right and not judged according to its consequences—exemptions will seek to avoid harm—or traded off against other lesser values. But, as Birkinshaw shows, even, and perhaps especially, in the world of legal rights that he is writing about, disclosure and access to information rub up against the right to individual privacy, and may conflict with the right to life in conditions of terrorism or war. If you are walking on the street, see a terrified and bleeding child duck into an alley, and shortly afterwards you are accosted by a furious man with a bloodied axe, apparently in hot pursuit, who asks you where the child has gone, how should transparency factor into your response? Many would see it as their duty to lie in those conditions (even if the episode later turned out to be a prank, a psychological experiment, or what was really going on belied appearances in some other way). And it is not just at the level of such individual transactions that some very basic rights can come into conflict with transparency.

But there are also problems with the opposite view, that transparency is rather like efficiency, something that is to be valued only as a means to other primary goals and not by its intrinsic worth (except perhaps by some eccentrics, such as the early management guru Frederick Winslow Taylor, who thought worship of efficiency should replace what he saw as moribund forms of religion: Merkle 1980: 40–1). David Heald in Chapter 4 argues for an instrumental view of transparency and Andrea Prat’s analysis in Chapter 6 also takes an instrumental point of departure, but the purely instrumental view is not problem-free either. Many would share Rousseau’s view that lack of concealment is an intrinsic social value, even if it does not make us richer, avoid conflict, or achieve other goals. Moreover, precisely what is instrumental for what, particularly in the functioning of complex public organizations, is much easier to assert than to prove. Even the honest beliefs of those most closely involved may not be conclusive, and such beliefs are often conflicting rather than unanimous.

It is easy, perhaps too easy, to settle either for the view that transparency has some intrinsic value but has to be traded off against other **(p.222)** values, or that transparency can take ‘good’ or ‘bad’ forms. The difficult question is to identify exactly what those trade-offs are and what are the mechanisms or qualities that distinguish valuable transparency from more negative forms. The values against which transparency has to be traded off are often left implicit, but three main ones identified by our contributors are the appropriateness of judgements or treatments about specific cases in conditions of risk or uncertainty (like the surgeon who declines risky cases if surgeons’ mortality records are published); the ability to conduct mutually beneficial negotiations effectively without deadlock (like the representative who declines to make any compromise if votes or deliberations are made public, as in David Stasavage’s analysis), and more generally what used to be called ‘system maintenance’ in political science (that is the ability to keep everyone happy and prevent institutions falling apart), in conditions when no ambiguity about goals or about who benefits and who pays for what can be admitted.[2]

Several contributors to this volume suggest that such trade-offs cannot be ignored in assessing the value of transparency. But even there, the problems they raise may be time- and place-specific rather than universal. For instance, in the surgeon-mortality case, patients over time may become more sophisticated in reading the data, so that the advantages to be gained by declining riskier cases may come to diminish. Likewise, recriminations after damaging deadlocks in negotiations may lead the 'principals' and 'agents' concerned to adjust their views about the value of horse-trading to do effective deals. And system maintenance through a degree of opacity over who gains and who loses may be more necessary for holding some kinds of societies together than others.

But it may be that there are other rationales for the value of transparency that may be more plausible than either Rousseauian desires for authenticity or the view of access to information as a universal human right. And perhaps the most plausible alternative rationale is that transparency is closely linked to democratic principles, in that democracy is tied to the ability to give public justifications for policies and operations, given the bias that can result when decisions are taken for undisclosed reasons. The deliberative democracy literature that was referred to in Chapter 1 and noted by David Stasavage in Chapter 10 would certainly **(p.223)** stress that sort of view, but it is not necessary to be a card-carrying deliberative theorist to posit a link between democracy and the desire to make government intelligible.

However, if this rationale for the good of transparency is taken, it leads to a potential Hirschmanesque perversity effect that Onora O'Neill hints at in Chapter 5. Since the quantity of data generated can easily drive out the quality and intelligibility of that data—reducing rather than increasing 'information' in the strict cybernetic sense of that which reduces uncertainty—the pursuit of transparency can indeed become self-defeating for the goal of advancing democracy through demystifying government. In principle such a perversity effect could be avoided if there was some way of guaranteeing the quality of the data generated, but that just takes us back to the Brechtian issue noted earlier, of dismissing the public and the bureaucracy and getting a new one.[3]

Finally and relatedly, the notion that transparency is like Aristotle's view of democracy, good in some conditions or manifestations but also capable of taking negative or degenerate forms, is a beguiling one. Implicitly or explicitly, this view suggests culture as the catalyst that determines what 'sign' the social effect of formal transparency measures takes up, particularly in conditions where the values inherent in such measures have not pervaded the institutions that have to apply or respond to them (Laughlin 1991). Several contributors (such as Heald, O'Neill, and Roberts) see blame-conscious bureaucratic cultures as particularly likely to turn transparency measures into standard operating routines that in practice violate the lofty ideals of transparency theorists. At least two mechanisms seem to produce that result in such institutional cultures. One—a feature of bureaucracy identified by writers on bureaucracy since bureaucracy theory began—is the tendency to turn what ought to be deliberative and individually focused responses into low-intelligence box-ticking routines that create alienation and frustration in practice, in spite of the high-minded hopes of transparency advocates. The other—also a very long-standing theme of bureaucracy theory—is the tendency for blame-avoidance considerations to dominate the way that institutions respond to transparency demands, in ways that can produce paradoxical and dysfunctional consequences such as welfare-reducing withdrawal of service (for example, by not offering advice), tokenistic responses that avoid blame by leaving an audit trail or establish due diligence but fail to **(p. 224)** fix the substantive problem, or abandonment of effective record-keeping such that a

convenient amnesia comes to rule the working of institutions (Hood and Rothstein 2001; Hood 2002). It is those kinds of mechanism that are central to Onora O'Neill's argument that formal transparency measures will typically fail to achieve the effect intended by their proponents unless they are accompanied by some fantasy-world Habermasian culture of blame-free communicative rationality.

Of course these issues are not unique to transparency. They also apply to the way that regulation works out in practice as it travels from policy idea to politico-bureaucratic routines, and to the implementation of policy more generally. They are, as noted above, central to those who have offered critiques of bureaucratic society for a century or more. But those issues can also be argued to be central to a grown-up evaluation of the value of transparency measures in a world of bureaucrats and politicians who often see their survival as dependent on their ability to turn blame-shifting and blame-avoidance into an art form. Of course we should not decry the advantages that can be gained from many kinds of openness, and in an egalitarian age the onus is rightly on those who try to defend *arcana imperii* to justify their position. But the devil is always in the bureaucratic detail, and prudence seems to justify a strong element of 'practical scepticism' about the way transparency measures work out on the ground.

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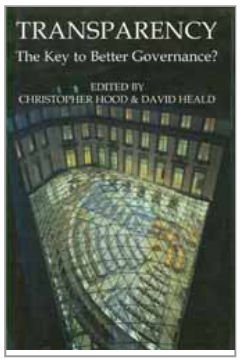
Notes:

([1]) '…Wäre es da / Nicht doch einfacher, die Regierung / Löste das Volk auf und Wählte einanderes?' (Bertolt Brecht, 'Die Lösung', in *Brecht, Gesammelte Werke* (ed. E. Hauptmann), Frankfurt-am-Main: Suhrkamp (1967), p. 1009. Also at http://en.wikipedia.org/wiki/Bertolt_Brecht (accessed November 2005)).

([2]) Strictly, this point refers to the intersection of system maintenance issues with the 'social functions of ignorance' (see Moore and Tumin 1949; and on system maintenance or persistence see Easton 1965: 88–9). Wildavsky (1964: 136–8) made a somewhat similar point about devices intended to increase transparency in budgetary processes.

([3]) I am grateful to Albert Weale for this point, and to Patrick Birkinshaw and David Heald for valuable comments on this chapter.



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