
Introduction

Robert G. Vaughn and Padideh Ala'i

This Research Handbook on Transparency explores the many faces of the concept of transparency in order to understand the contexts in which it is applied and to evaluate its various applications. As with other terms – such as freedom, democracy, corruption, governance, and the market – transparency has many meanings. As the editors of this Handbook, we began with a sense that the term transparency, despite its popularity, concealed rather than exposed the debates and values involved in its invocation.

In the last two decades, transparency has become a ubiquitous, but stubbornly ambiguous, term. We wanted to produce a volume that would uncover the many faces of transparency and provide readers with a view of the uncertainties, inconsistencies, and surprises contained within current conceptions and applications of the term. Transparency is usually seen to promote a number of values, including the rule of law, democratic participation, anti-corruption initiatives, human rights, economic efficiency, environmental protection, and the promotion and growth of trade and investment. By the same token, however, transparency can legitimize bureaucratic power, advance undemocratic forms of governance, aid in the global centralization of power and enable large economic entities, such as multi-national corporations, to consolidate power through rules of trade and investment.

We believe that given the complexities of administrative states and global regulatory regimes, transparency regulations are likely to increase in number and scope. At the same time, resistance to transparency will accompany attempts to limit and redefine it. For example, views of national security and economic protectionism have redefined the character of transparency and strikingly limited its application. To confront such resistance, transparency advocates must recognize its limitations and its inconsistencies.

We believe that a book identifying the different faces of transparency must rely on comparative and international perspectives. Such perspectives identify the weaknesses as well as the strengths of transparency in addressing varying problems and pursuing diverse goals. This comparative and international approach cautions that transparency can become a rubric to promote other and sometimes inconsistent values.

This Handbook provides a framework for considering the varying

problems and diverse goals of transparency. It also explores the complexity of circumstances and values that transparency considers. Of necessity, the book reflects our views of the topic likely to expose the faces of transparency. We also chose the topics and organized their presentation so as to enable readers to rearrange the material presented and to develop their own views regarding the successes and failures, as well as the accomplishments and challenges, of transparency.

The volume is made up of four parts. The first part considers ways of identifying the goals, purposes, and implications of transparency. The second looks at transparency from cultural and national perspectives. The third explores the common legal techniques to advance transparency, including freedom of information laws, whistleblower protection, public financial disclosure by public officials, and citizen participation in the development of administrative rules and regulations. The final part introduces the role of transparency in global governance. Readers will soon see that each part introduces ideas and information related to and connected with each of the other parts. Readers are, therefore, encouraged to develop their own approach to organizing the readings and to draw their own judgments. At the end of the book, the editors share some reflections on the many faces of transparency. The last chapter is not a conclusion, but a reflection on an initial unmasking of the many faces of transparency.

PART I: FRAMEWORKS FOR TRANSPARENCY

There are many frameworks into which transparency can be placed. The four chapters in this part illustrate the many disparate ways in which the justifications for, and effects of, transparency can be evaluated. These chapters generate alternative perspectives for such an evaluation.

In *Transparency and closure*, H. Patrick Glenn asks why the debate regarding transparency is most intense in western democracies and less so “where the need would be greater.” He attributes this paradox to the institutional closure and secrecy of the western state and of corporations, secrecy that is important to their character but also a menace. The corporate character of the state and of corporations creates an inside and an outside, and with that dichotomy follows confidentiality and secrecy. In the west, the debate regarding transparency takes place against a norm of closure.

Glenn describes the opposition of many religions to this type of institutional closure, with the most visible challenges emanating from Islamic thought. Similar strains of thought can be found in Judaism, and in Christianity, despite the corporate character of much of Christianity, par-

ticularly the Roman Catholic Church. Similar opposition to institutional closure can be found in other religions and in Chinese social organization.

Glenn argues that institutional closure relies on the dualism of inside and outside. Of the several developments that Glenn views as challenging institutional closure, one is the advance of logical pluralism that rejects the dualism of western thought on which secrecy and transparency rest and the recognition that there may be *degrees* of secrecy *and* transparency that respond to a variety of circumstances and values.

In *The Relationship between transparency, whistleblowing and public trust*, A. J. Brown, Wim Vandekerckhove, and Suelette Dreyfus explore the relationship between public acceptance of whistleblowing and public trust. This exploration exposes connections between transparency and public trust. The authors use empirical evidence of public attitudes toward whistleblowing to illuminate the role of transparency in sustaining public trust. The authors recognize that powerful institutional interests, both public and private, are arrayed against the assumption that more transparency is better.

Their study considers the relationship between transparency and declining trust in public and private institutions. To what extent is transparency the cause of this distrust and does it “destabilize” institutions by focusing on institutional failures? In particular, the authors identify limits on citizen access to information created by limits on individual’s time and resources, information overload, and continued political opposition to transparency reforms.

Using surveys conducted in Australia, the UK and by a world online Whistleblowing Survey, the authors find support for transparency and whistleblowing; in fact, in Australia and the UK overwhelming majorities did so. The authors describe more extensively the somewhat surprising responses to a variety of issues covered in their survey. Included among these are nuanced views regarding the relationship between internal and public disclosure. The authors present a compelling analysis of the relationship between public attitudes toward transparency, whistleblowing, and trust. Of particular interest are conclusions of whether trust in these societies’ institutions reflects gender, income, education or work status. The authors also examine whether low trust in institutions is connected to support for whistleblowing. They find that, perhaps paradoxically, whistleblowing appears to be more strongly valued by those with a higher trust in institutions. The authors explain how the data uphold the conclusion that transparency supports trust in institutions.

In *Exploring the legal architecture of transparency*, Elizabeth Fisher moves beyond architecture as a metaphor for transparency in government to “analyse how a history of the use of transparency in architecture can

tell us much about the complexity of transparency mechanisms in public administration.” A “clear” example of architecture as a metaphor for transparency is the Reichstag building in Berlin, housing the German legislature. That building, constructed after World War II, is now covered by a large transparent dome, a rebuke to the Nazi state and an affirmation of the openness of Germany’s post-war government.

Fisher discusses how the use of glass in modern architecture rests on normative assumptions about the purpose of its use and phenomenal transparency that comes to grips with the interrelationships of those affected by transparency. She applies this history in identifying similar aspects of the architecture of the specific transparency regime that she examines. Her case study addresses the interpretation of an exemption for “manifestly unreasonable” requests from the obligation of public authorities to release requested environmental information. That case study enables her to draw conclusions about the application of insights about transparency in modern architecture to transparency in government information.

In *The associations of judicial and administrative transparency*, Robert Vaughn explores these associations by considering the role that transparency plays in limiting discretion in administration and in the judiciary. From this perspective, judicial and administrative transparency share a common goal and confront the failures of transparency to limit that discretion. Vaughn describes how theories justifying the exercise of discretion in administration developed by administrative law scholars illuminate justifications for judicial discretion. Each of these theories treats transparency differently. By encouraging the reader to consider how theories justifying discretion in administration may apply to discretion in the judiciary, Vaughn invites the reader to judge the manner in which administrative transparency is associated with judicial transparency.

Transparency in the judiciary relied upon “classic versions” of judicial transparency in federal civil litigation closely tied to public trials and a uniform appellate process. The foundation for these classic versions has crumbled with the disappearance of the civil trial and the alterations in appellate procedures. With the judiciary, the loss of these classic versions has decreased judicial transparency and increased judicial discretion. Current issues regarding judicial transparency illustrate the similarity of views regarding secrecy that draw on the justification for administrative secrecy including expertise, experience and professionalism.

The associations between judicial and administrative transparency explain the limitation on judicial review of administrative discretion. In particular, the associations between justifications for administrative and judicial secrecy affect judicial interpretation of open-government laws,

such as freedom-of-information provisions and whistleblower-protection statutes.

Likewise, administrative secrecy encourages judicial secrecy. Vaughn explores examples such as the exemption in the federal Freedom of Information Act for properly classified documents, judicial expansion of the state-secrets privilege and the use of a secret court to approve national-security wiretapping and data interception.

PART II: CULTURAL AND NATIONAL PERSPECTIVES ON TRANSPARENCY

The experience with transparency in different countries at different times illustrates how national and cultural traits influence debates about transparency and the effectiveness of transparency laws. In this regard, the five chapters in this part provide different contexts for understanding transparency.

John Head's chapter, *Opposing legal transparency in dynastic China: the pervasive logic of Confucianist views of legal opacity*, focuses on legal transparency, that is, how much knowledge about legal rules (and punishments) should be public. Head describes a conflict between Legalists and Confucianists on this point. From the Confucian perspective of a good society, one based on rituals and clans, transparency of legal rules undermined rather than supported such a society. Knowledge of legal rules and punishments encouraged calculation and evasion, reducing the influence and control of the emperor and high officials. Moreover, such knowledge weakened the hierarchy on which society rested. Knowledge of legal rules could lead to uniform application of these rules regardless of status. In these ways, transparency of legal rules was seen as inconsistent with organizing principles of Chinese society. Given other societal values, transparency can have unintended and perhaps perverse consequences.

In *Transparency and the Shi'i clerical elite*, Haider Ala Hamoudi suggests how religious institutions can affect transparency. Hamoudi examines not religious doctrine but the character and interests of religious institutions. In this case, the Shi'i schools of religious scholars, whose pronouncements on Islamic doctrine receive deference from religious adherents. The example of the Shi'i clerical scholars in Iraq suggests that the interests of those institutions in maintaining their contemporary relevance can encourage them to undertake good government standards as a basis for such relevance. He gives examples of how the leading clerics in Iraq acquire public support and admiration for the advocacy of transparency reforms regarding the operations of the interim government and the

procedures to be used for the election of transitional bodies. Although he recognizes the limitations placed on these clerical elite, he suggests that their institutional interests may support transparency reforms in the Iraqi government. If so, these clerics might portend a role for Shi'i institutions in supporting broader transparency initiatives.

In *Transparency under dispute: public relations, bureaucracy and democracy in Mexico*, Irma Eréndira Sandoval argues that transparency reforms in new democracies must demonstrate that transparency makes government more effective and accountable than previous authoritarian systems. Mexico has among the strongest access-to-information laws in the world but she describes how transparency remains a politically contested concept. It is not clear to many Mexicans that transparency has produced a more effective or accountable government.

In her view, one reason for the failures of model transparency laws in Mexico has been the predominance of bureaucratic and public-relations approaches to information-access laws. Under the bureaucratic approach, government officials see transparency as a technocratic device to improve government administration. Under the public-relations approach, transparency becomes a way of emphasizing the accomplishments of the government and of assuring the public of its good faith and commitment to democracy. However, neither of these approaches is sufficient to resist the attempts of the political establishment to weaken these laws in their application. These actions discourage reform and reduce public confidence in the value of transparency laws.

Sandoval believes that transparency laws in Mexico must be seen as an expansion of democracy and citizen participation. Unless state officials accept this view of transparency, the most enlightened of modern right-to-know provisions are likely to fail. Her chapter highlights the political and social support required to implement even the most modern transparency laws.

In *When transparency meets politics: the case of Mexico's electoral ballots*, John Mill Ackerman also focuses on the Mexican Freedom of Information Law, but his interest is how interpretation of the law has restricted its application and threatens the viability of the law. He considers the interpretation of the Freedom of Information Law by the Federal Electoral Institute, the Federal Electoral Tribunal, and Mexico's Supreme Court regarding citizen access to the ballots in Mexico's contested 2006 Presidential Election.

Ackerman ably describes the scope and coverage of the Freedom of Information Law and demonstrates that that Law should have permitted citizen access to the ballots. He carefully examines each of the administrative and judicial opinions denying such access to show how they misinter-

preted or ignored important provisions of the law. These interpretations expose a political manipulation of the transparency provisions and show how that manipulation has weakened government commitment to apply the standards contained within these provisions.

Ackerman also describes how these interpretations threaten the future of the transparency provisions. Administrative and judicial opinions, he believes, have created a number of exceptions to disclosure not found in these access provisions. These exceptions portend future evasion of the standards of transparency established by Mexico's ground-breaking law.

In *The role of the courts in China's progress towards transparency*, Liu Wenjing discusses how the courts in China have addressed freedom of information requests. In doing so she identifies the challenges confronting the courts, but she still believes that the courts have expanded the scope of government transparency. Wenjing explains the Open-Government Information laws that, ideally, lead to transparency and describes the structure of national, regional and local laws and regulations that influence the decisions of the courts. She summarizes the organization and procedures of the courts and suggests how these aspects of the Chinese judiciary have affected the application of open-government provisions.

By examining a number of cases, Wenjing identifies the difficulties for the courts, including standing, the standards of review and burdens of proof, conflicts between differing laws that may cover the same documents, and the role of state secrecy.

PART III: LEGAL APPROACHES TO TRANSPARENCY

The chapters in this part consider the legal techniques for securing transparency. These techniques also disclose the contexts that give rise to transparency provisions. These legal techniques address different problems and emphasize different views of transparency. For example, freedom of information and whistleblower laws similarly seek the disclosure of information held by the government. Whistleblower laws, however, are more likely to cover the private sector as well. Recent whistleblower laws in the US, the UK and Japan responded to public health and safety disasters resulting not only from poor government regulation but also from negligence and misconduct in industry. On the other hand, only a few freedom of information laws permit their use against private persons. The South African provision stands nearly alone for its application to non-governmental entities.

Public financial disclosure provisions concern a small subset of government-held information – that information which helps to evaluate conflicts of interest by covered governmental employees. Not surprisingly,

these laws are closely tied to anti-corruption efforts. Public participation in rulemaking addresses one type of administrative activity and does not apply to information regarding the conduct of administrative officials in other circumstances.

These examples show that transparency laws respond to different problems, cover different types of information, concern different governmental processes, and raise different policy debates. All of these techniques can be seen as transparency provisions but the examination of them not only casts light on each of them but also exposes different aspects of transparency. Thus, a variety of laws implement the concept of transparency. The most common of these include freedom of information laws, whistleblower protection, public involvement in agency rulemaking, and public financial disclosure. These types of transparency laws are now found throughout the world.

Since 1990, freedom of information laws have been enacted in over 80 countries and strengthened in countries that previously had enacted such laws. Particularly in Eastern Europe and in states formerly part of the Soviet Union, states have enacted extensive open-government laws. Other countries with longstanding reputations for bureaucratic secrecy, such as the UK and Japan, have passed freedom of information and information disclosure laws.

In *The history of government transparency*, Dan Metcalfe traces the history of freedom of information to a 1766 Swedish law, a law that preceded by centuries all other freedom of information laws. Metcalfe describes how political exigencies led to the passage of US federal Freedom of Information Act and documents the recent passage of these laws in other countries. He discusses how more recent laws contain innovations that have encouraged changes in long-standing laws such as the one in the US.

The last two decades have also witnessed a new generation of global whistleblower laws. Apart from the US, almost no other national laws were enacted before 1990. The adoption of such laws has now accelerated and nearly four times the number of these statutes were passed in the 2000s than in the 1990s. The UK and Japan have also passed whistleblower provisions. Outside the North American countries, the largest number of whistleblower laws is found in Europe, followed by Asia, Australia and New Zealand, Africa, the Middle East, and South America. Many whistleblower laws cover both government and industry.

In *The long and winding road to transparency in the UK*, Shonali Routray describes the passage of freedom of information and whistleblower laws in the UK. In that description, she explores the influences that led to the passage of these laws in a country with a reputation for bureaucratic secrecy. She suggests the type of challenges that have confronted advocates for the enactment of such laws and for their effective enforcement. She speculates as to the future of these laws in the UK.

Public disclosure of assets, liability, gifts, and other financial information forms one of the more common types of anti-corruption provisions. For decades, the federal government and state governments within the US have required public disclosures by public officials and employees. Anti-corruption conventions, such the Inter-American Convention against Corruption, require financial disclosure by certain public officials.

In *Faux transparency: ethics, privacy, and the demise of the STOCK Act's massive online disclosure of employees' finances*, Kathleen Clark and Cheryl Embree present the negative consequences of some of these provisions. They discuss how differences in political accountability in legislatures and in administration can lead to laws that are improperly broad in their coverage of administrative officials. They also suggest that benefits of some disclosure laws do not justify the invasions of privacy created by them.

Clark and Embree stress that if such disclosure laws are to assure accountability and a role for citizens in evaluating the content of conflict of interest laws and their application, additional information regarding the duties and activities of public employees must also be available. They also assert that, for many employees, internal financial disclosure is preferable.

The federal government in the US has required public participation in agency rulemaking since 1946. Such public involvement can now be found in other countries. These requirements have begun to consider electronic access and participation by citizens and an increased citizen role in rule making. The federal government in the US is an important model for a transparent rulemaking process.

In *Transparency in policymaking — the (mostly) laudable example of the U.S. rulemaking system*, Jeffrey Lubbers examines this US model. He traces its history and describes its development. He pays some attention to electronic rulemaking and to greater citizen access to documents and information supporting an agency's proposed rules. He identifies weaknesses in US practice and speculates about likely developments in this field. Lubbers concludes that while rulemaking in the US has clearly reached "maturity, sophistication, level of participation and importance" that many countries hope to achieve, there is some concern that it also may have become "too difficult," "over proceduralized," or "ossified."

PART IV: GLOBAL GOVERNANCE AND TRANSPARENCY

A number of international institutions, many of whom are not subject to any body of national law, have incorporated transparency provisions. Of longer standing are those standards that impose transparency requirements

on those dealing with these institutions, such as contractors and recipients of aid. Beginning around the turn of the twenty-first century, the United Nations, the World Bank, and the regional development banks, such as the African Development Bank, have issued regulations protecting whistleblowers within these organizations. Since the mid 1990s, multilateral institutions have also faced increasing pressure to become more transparent themselves and allow for some form of participation by civil society groups.

Starting in the mid 1990s, multilateral financial institutions like the World Bank and the International Monetary Fund started to address corruption, an issue that was viewed formerly as being outside of the mandate of the World Bank as it was deemed to be interfering in the internal political affairs of the membership. Gradually, the anti-corruption mandate morphed into the promotion of good governance by those institutions and one of the criteria of “good governance” was the promotion of transparency and adoption of anti-corruption strategies.

In *Transparency at the World Bank*, Dan Metcalfe describes the World Bank’s recent “Access to Information” policy that permits persons to request documents and records of the World Bank and provides a two-tiered appeals process when the World Bank declines to disclose the requested documents.

Metcalfe traces the background leading to the issuance of the World Bank’s policy, examines the content of the policy, and describes the appeals process created by that policy. Metcalfe’s analysis then raises questions about the scope and effectiveness of the policy and suggests changes or clarifications that the Bank should make.

In *The emerging norm of transparency in international environmental governance*, David Hunter asserts that, since the early 1970s, the right of access to environmental information “has been the core of environmental protection efforts.” In convincing detail, Hunter explains important connections between transparency and environmental law. In particular, he states that the right of access to environmental information derived from human rights and emphasized a rights-based approach to transparency. Undoubtedly, international environmental law stands as the preeminent example of a field in which domestic and international institutions have created a global network of laws, treaties, conventions, and practices that provide access to documents and records regarding the protection of the environment. In many ways, access to information relevant to environmental protection created the space for other transparency laws.

Hunter explains how the Aarhus International Convention and the practices of international organizations concerning access have influenced international environmental law. He also believes that the negotiation

process in international treaties led to the acceptance of transparency in a number of international conventions. International practices and standards also drew on requirements for environmental impact assessments and environmental right to know laws, laws that require private companies to make public information about discharges of certain chemicals into the environment.

In the final chapter, *Transparency in international economic relations and the role of the WTO*, Padideh Ala'i and Matthew D'Orsi, describe the evolution of transparency obligations within the multilateral trading system. Beginning as obligations that were ancillary and subsidiary to the substantive provisions of market access and non-discrimination under the General Agreement on Tariffs and Trade (GATT 1947), transparency obligations became central and substantive obligations under the World Trade Organization (WTO). The transparency obligations of the WTO have had a profound impact on the internal governance of Member States in three key ways. First, transparency has facilitated trade disputes by identifying measures whose application and administration are inconsistent with the provisions of the covered agreements. Second, transparency has promoted the power of the central governments within Member States over local and provincial governments. Last, transparency requires uniformity in administration of measures within and among states to the extent possible. In conclusion, Ala'i and D'Orsi ask: Does transparency, in the context of the WTO, have any goal broader than that of protecting and promoting the interests of private traders? Does increased litigation, increasing centralization and increasing uniformity promoted in the name of transparency also contribute to broader goals of good governance or development?

Finally, in the chapter entitled "Concluding reflections", we reflect on lessons learned from the diverse approaches to transparency contained in these chapters. We hope that by reflecting on the current dominant approach to the concept of transparency and identifying the contradictions and limitations contained therein, this volume can help those who seek to promote rule of law and democracy in the name of transparency achieve, to the extent possible, the intended goals and aspirations and avoid its potential negative implications.

