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# Transparency in European Union Governance: The Misdirection of Europe’s Legitimacy Enterprise?

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To Graeme, my long-suffering fiancé, yes we can get married now.

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**Abstract**

This thesis critically appraises the concept of transparency, using the European Union as a case study. The assumption of a positive effects relationship between transparency and legitimacy, notwithstanding the limited empirical evidence, is a pervasive feature of academic and popular literature on transparency, across a variety of subject domains. It has also dominated EU institutional discourses on access to documents, where it has been mooted as a tool for addressing some of the legitimacy problems attendant upon further political integration.

Using Grid-Group Cultural Theory, this thesis re-evaluates EU transparency policy through a distinctly ‘culturalist’ lens, exposing some of the hitherto unseen variables which interpose upon transparency’s putative legitimacy enhancing potential. Demonstrating that cultural biases exercise a determinative effect on different actors perceptions and expectations of transparency, it is shown how complex communicative and interpretative processes are influenced by deep-seated cultural heuristics (ways of thinking about and navigating the world around us) which can unseat transparency’s intended effects.

Further, it is argued that adopting a Grid-Group approach to transparency policy development offers a means of navigating the fuzzy world of actor preferences. By using a limited typology of four fundamental worldviews, it is possible to generate predictive narrative accounts of different groups of actors’ expectations of transparency, including how they choose to frame transparency problems and what their preferred policy solutions are. Using these narrative accounts we can pursue a more theoretically sustainable account of the relationship between transparency and legitimacy. In the EU context, it is asserted that this process could be used to broker policy reform by exposing some of the unintended consequences and policy pitfalls of pursuing a linear transparency agenda, thus reinvigorating the policy stalemate that has enveloped proposals to recast the existing Regulation 1049/2001 on access to documents.

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# 1) Transparency in European Union Governance: the Misdirection of Europe’s Legitimacy Enterprise?

“Transparency is not about restoring trust in institutions. Transparency is the politics of managing mistrust.”[[1]](#footnote-1)

### 1.1 Introduction

This thesis critically appraises the concept of transparency and its application both as a doctrine of governance and as a policy tool, using the European Union as a case study. In particular, it focuses upon how the institutions of the European Union have characterised transparency, how it has been shaped in the context of the Union’s political legitimacy, and the extent to which the centralised institutions’ dominant attitudes towards transparency are reflected in the self-evident plurality of public perceptions about the EU. In order to capture and explain some of that pluralism, Grid-Group Cultural Theory will be used as a theoretical basis for constructing a series of cultural narratives about EU transparency, based upon four fundamental cultural types, which the theory contends are present in enduring social and political orders of any size and scale.[[2]](#footnote-2) In turn these narratives will be used to reappraise whether transparency, as a constitutional norm of democratic governance within the EU, is capable of achieving some of the goals that have been made in its name. In particular, this thesis will formally question a number of the intuitive assumptions that have been explicitly and implicitly articulated about transparency’s ‘legitimacy enhancing potential’.

The thesis structure, its methodological approach and the core research questions are set out in detail at the end of this introductory chapter, followed by an outline chapter structure, to clarify the organisation of the argument. First however, it is apposite to introduce the political and legal context in which EU transparency operates, the nature of EU public law, and some of the key discourses on legitimacy in the EU political space.

### On Transparency, Legitimacy and the Continuing Viability of Political Union

“[T]he uncertain state of the European integration project at the close of the twentieth century raises questions about its very legitimacy.”[[3]](#footnote-3)

Some 16 years ago, Banchoff and Smith questioned the continuing viability of European Union integration. Despite repeated calls to bring the Union ‘closer to its citizens’, that analysis remains particularly prescient.[[4]](#footnote-4) Cognitive and emotional detachment from the Union has been compounded as the integration process has moved on, rendering the progress in European unification increasingly susceptible to the stresses attendant upon swings in public attitudes.[[5]](#footnote-5) Repeatedly, since the passage of the Treaty on European Union, significant moments in the process of constitutionalisation have been met with resistance from European publics.[[6]](#footnote-6) In addition, a growing body of empirical scholarship points to a weakening of public support for European integration,[[7]](#footnote-7) coupled with a reorienting of national level politics towards the protection of domestic interests, which focus on the communities of individuals and collective identities that exist at that level.[[8]](#footnote-8) In short, the European Union occupies a highly contested political space.

The source of public disaffection for European integration is often attributed to enduring legitimacy shortfalls produced by structural deficiencies in Europe’s institutional arrangements and constitutional order. On the one hand there is a problem with ‘recognition’[[9]](#footnote-9) (i.e. formally accepting the EU’s political legitimacy), insofar as a lack of affective loyalty towards the EU is a direct product of the Union’s failure to adequately define and articulate its spheres of activity and the exercise of its competences. There is perceived anger at the widespread lack of transparency in relation to decision-making and a belief that the transfer of sovereignty in sensitive areas threatens pre-existing communities and collective identities below the supranational level of governance. On the other hand there is concern about effective democratic ‘representation’. Deficiencies in the character and quality of representation at the European level are structural in nature. Partly, these deficiencies are testament to the institutions’ functionalist inheritance, though it has also been argued that there is widespread misunderstanding about the division of power between the institutions, and consequently the Union has been unduly criticised for not replicating domestic constitutional arrangements.[[10]](#footnote-10) Nevertheless, many Europeans feel that further measures need to be put into place to render the institutions directly democratically accountable to European citizens’, in order to reorient the law making process away from elite level interests.

If this combination of structural deficiencies and emotional detachment renders the Union particularly susceptible to the stresses attendant upon volatile economic and political climates, the Union’s recent history demonstrates that such stresses have been in no short supply.

The Eurozone debt crisis (2009-present) began to emerge merely weeks after the entry into force of the Treaty of Lisbon; it has since crystallised into the single most sustained economic and political challenge that European Union has ever had to face. A belated admission by Greece in 2009 that it had been underreporting levels of public debt was followed swiftly by revaluations of indebtedness in other member states; along with widespread panic in creditor states as changing market interest rates raised the spectre of default. Much of the intergovernmental reform effort that had navigated the difficult, yet ultimately successful passage of the Lisbon Treaty has since swiftly dissipated.[[11]](#footnote-11)

Protracted economic stagnation has decimated opportunities for growth and placed severe constraints on public service delivery across the continent. As citizens readily perceive of weaker opportunities for future prosperity, economic crisis has morphed into political crisis, reawakening debates about the purpose of European integration and the value of European institutions. Domestic Eurosceptic positions have both strengthened and mobilised, whilst new populist parties increasingly seek political entrenchment by campaigning for a repatriation of competences in the national political sphere.[[12]](#footnote-12) Furthermore, in the summer of 2015, concerns about seemingly intractable austerity cemented panic about the reception of displaced refugees, fleeing Syria, Libya and elsewhere. Propagated by a hostile media, capable of exacerbating deep-seated fears about insufficient wealth, jobs and resources to go round, the issues of economic migration and asylum became widely conflated, serving to stoke the fires of Eurosceptic arguments about securing domestic governance and dissipating sovereignty.[[13]](#footnote-13)

In this particularly stark environment, the continuing viability of political union is subjected to an enormous normative challenge: how does it sufficiently embody the standards required to create and maintain legitimate political order necessary for the good functioning of European Union, its institutions and their policy performance?[[14]](#footnote-14)

The dimensions of this normative challenge are significant. On the one hand, they relate to political contestation at the European level about how the Union exercises its competences in terms of its policy focuses and legislative output. On the other, there are very real concerns that the centrifugal tendencies produced by increased heterogeneity in a Union of 28 member states and half a billion people, compounds the lack of consensus about what the EU should look like, what its direction of travel is and the pace at which further integration ought to be pursued.[[15]](#footnote-15) How therefore might the Union successfully pursue legitimacy building?

### 1.3 Building Legitimacy: The Role of Transparency

Since the 1980s, public administration systems and political organisations the world-over have increasingly become preoccupied with transparency and its purportedly beneficial characteristics.[[16]](#footnote-16) It is readily identified as a palliative for a number of the ills of modern governance, not least corruption, inefficiency and the pressing question of regime legitimacy.[[17]](#footnote-17) This latter concern has been a dominant motivator in the European Union’s efforts to increase the transparency of its institutions and their activities, premised upon the belief that there is a direct correlation between increasing openness and the perceived legitimacy of political decision making.[[18]](#footnote-18)

Transparency first became a watchword of the European Union at the Lisbon European Council in 1992.[[19]](#footnote-19) The Treaty on European Union raised (or else renewed), in a number of member states, concerns about both the means and ends of European integration, the real value of the principle of subsidiarity, the safeguarding of domestic constitutional principles in the European public space and the overall democratic quality of the European project.[[20]](#footnote-20) In the context of the Union’s increased political salience, it became apparent that further legitimation could not be presupposed on the basis of implied consent and the permissive consensus.[[21]](#footnote-21) Transparency then could be used as a means of improving communication between political actors and citizens, providing Europe’s publics with the means of getting-to-know Europe, along with the means to understand how it operated and why, in the hope of filtering down the dialogic processes that had serviced constitutionalisation at the elite level. Similarly, Union elites could use transparency to tackle inadequacies relating to inputs. With information, citizens (or rather civil society groups) have the means to participate in the policy making process, to lobby and make their interests heard, bolstered by conscious efforts to constitutionalise consultation processes at the Union level.[[22]](#footnote-22)

Thus faced with a political climate in which democracy is at once viewed as the all-embracing symbol of legitimacy, and the most potent of legitimating devices,[[23]](#footnote-23) transparency came to be seen as a fundamentally important means of injecting structural capacity for both citizen participation and collective deliberation. The general tenor of that belief has since propagated the mainstreaming of transparency policy in a plethora of contexts within the Union, a democratising mission that maintains high levels of academic endorsement.

#### 1.3.1 A Preliminary Note on Terminology

Transparency is a concept that is difficult to define in terms of scope and purpose, at least partly because it is usually defined by reference to a metaphor.[[24]](#footnote-24) In the case of the EU, this problem is further compounded because, as will be discussed below and in *Part 1* of this thesis, the debate about transparency has not been especially focussed. At this juncture, it is necessary to distinguish three key terms, and their respective relationships: transparency, openness and access to information/documents. In much of the pre-1992 literature on transparency, the terms transparency and openness are assumed synonyms and used interchangeably. Nevertheless, there is an emerging consensus within the current literature that would suggest openness is broader than transparency and in turn transparency is broader than access to documents.[[25]](#footnote-25) This too would appear to be the current EU constitutional position, as set out in the Title II provisions of the TEU (arts. 9-12) and article 15 TFEU.

Openness then, might be defined as a broad constitutional principle of democratic polities which afford individuals effective opportunities for representation, participation and deliberation in the political space. In common law jurisdictions, openness is often termed ‘open government’, thus signifying that the business of government takes place in such a manner as to facilitate effective public oversight. It is a ‘mentality’ of government that permeates all spheres of democratic governance and public life. Information is at once accessible and visible, both in terms of decision-making and executive action. Access to documents is supplemented by other hard legal rules which secure open-meetings provisions (including direct participation), consultation rights and rights relating to administrative procedure, which are in turn bolstered by pro-active government policies of communication and publicity. Latterly, glimmers of what is being termed ‘second-wave open government’ extends the notion yet further to include co-production and co-innovation in government policy, where the traditional institutions of the state are increasingly reliant on sourcing their authority from a network of stakeholders, each exercising power, influence and counter-influence.[[26]](#footnote-26)

Conversely, transparency might be said to be a product or goal of openness. It can still refer to both the accessibility and visibility of information and it is often extended to include access to meetings and rule-making proceedings. It is very much concerned with the articulation of legal rules and procedural guarantees securing that accessibility and visibility, but it does not necessarily encapsulate the broader notion of visibility and access as a ‘mentality’ of democratic governance.

Access to documents is traditionally the paradigm legal method of increasing transparency within given governance systems. It provides a simple hard legal guarantee that all citizens are entitled to access and read documents held by public authorities, subject to a number of pre-determined exceptions – including such things as the safeguarding of national security and the protection of personal data. This thesis will address all three of these concepts in further detail, particularly in *Chapters 2 & 3*, which offer a detailed account of the history of transparency as an idea, and the evolution of transparency within the various institutional settings of the European Union.

#### 1.3.2 A Potted History of the EU Transparency Regime

The first formal transparency mechanism at the Union level was the internal ‘Joint Code on Access’, providing a right of access to documents of the Council and Commission, which came into effect on 1 January 1994.[[27]](#footnote-27) The code was later replaced by Regulation 1049/2001, following the passage of the Treaty of Amsterdam, which saw the incorporation of the phrase ‘as openly as possible’ into article 1 TEU. The Treaty of Amsterdam also formalised, under article 255 EC, the treaty requirement to introduce secondary legislation governing a right of access to European Parliament, Council and Commission documents. Furthermore, this right of access was enshrined in Article 42 of the Charter of Fundamental Rights.

Following the introduction of Regulation 1049/2001, the Commission published its White Paper on Governance[[28]](#footnote-28), an overarching review of European governance designed explicitly to facilitate new modes of governance within the Union, with a particular view to targeting growing concerns about the legitimacy of the Union’s extant framework of governance.[[29]](#footnote-29) Strategic areas of focus included openness and transparency, citizen participation and the promotion of accountability and effectiveness. These developments cemented the politicisation of openness and transparency, which remained high on the EU agenda throughout the early 2000s. The Commission-led *European Transparency Initiative*[[30]](#footnote-30) launched a public consultation on three themes, including the application of minimum standards for the consultation of civil society. Meanwhile the Council also finalised an *Overall Policy on Transparency*,[[31]](#footnote-31) designed to further open up its work by making all co-decision debates in the Council public.

In 2008 a proposal was introduced to recast the regulation on access, pursuant to a review of how the regulation had worked since 2001.[[32]](#footnote-32) This was followed swiftly by a breakdown in negotiations between the respective law making institutions. MEPs disagreed vehemently with both the Commission and the Council, both over the content of the proposals and the legislative mechanism by which a new regulation would be introduced. When the Parliament chose not to adopt a first reading position, the Commission later considered that it might introduce a further proposal, designed merely to align the regulation on access with revised treaty commitments on openness, pursuant to article 15(3) of the Treaty on the Functioning of the European Union.[[33]](#footnote-33) During a protracted period that was dubbed by some as an ‘institutional impasse’, the Council appeared to spend very little time discussing the draft proposals or the European Parliament’s opposition to the Commission’s draft proposals.[[34]](#footnote-34) Despite efforts by successive incoming Council Presidencies, the institutions have failed to collectively renegotiate a new regulation.

Nevertheless, this hiatus in legislative reform did not interfere with further codification of openness, transparency and access to documents at the constitutional level, within the Treaty of Lisbon. Article 1 TEU retains the construction employed in the Amsterdam Treaty, and declares that “…decisions are taken as openly as possible…” Furthermore, the Title II provisions on ‘democratic principles’ specifically address the right of European citizens to participate in the democratic life of the Union, by employing a dualistic construction of democratic legitimacy in articles 10 & 11 TEU. As such, the individual citizen is at once the source of his own right to consult with and be consulted by the European institutions, a right which flows directly from his/her European citizenship. In addition, he/she is a member of one of Europe’s ‘peoples’ whose civil society organisations can converse directly with the Union. Finally, Article 15 TFEU establishes a new legal base for the principle of access to documents that moves beyond the existing Article 255 by extending the tight of access to cover all EU institutions and not just the Council, Parliament and the Commission. This position more adequately reflects the reality that other institutions had either assumed rules on access or had otherwise had those rules thrust upon them. Detailed discussion on the EU transparency regime is provided in *Chapter 3*.

#### 1.3.3 On the Nature of European Public Law

There has been much written about the uniqueness of the EU as a transnational legal regime, possessed not only of ‘legislative’ powers, but also of a distinct operating logic (or logics) in respect of its decision making and legal reasoning.[[35]](#footnote-35) Transparency’s legal dimension within the European Union has been moulded in this context, a dynamic framework in which the public law of EU member states influences the developing law of the European Union and vice versa, through processes of challenge and conflict, convergence, harmonisation and legal transplant.[[36]](#footnote-36)

Indeed, for the EU, legal transplantation has been a significant source of legal change, and it is no secret that much of the early inspiration for an EU access to documents regime was borrowed from the constitutional traditions of Denmark and (following its accession in 1995) Sweden, where access to information and ‘extended openness’ form intrinsic elements of their domestic constitutional edifices.[[37]](#footnote-37) Nevertheless it is necessary to state that transparency in an EU context has enjoyed and endured a life of its own. The Danish and Swedish understandings of transparency are deeply culturally embedded, a complication that questions the efficacy with which legal concepts can be effectively transplanted from one regime to another. Inevitably there will be both normative and operational distortions as the host jurisdiction attempts to graft onto itself a workable understanding of the borrowed concept.

Such normative distortions, both in respect of how transparency and access to documents is understood, and what it might be used to achieve, is particularly evident in the EU case, since it didn’t so much take place in the process of developing an EU access to documents regime, but rather it preceded it. It is to be recalled from the preceding section that transparency became a watchword of the European institutions in the early 1990s, in response to concerns at the member state level about how European integration was progressing and Europe’s apparent proximity problem in the context of democratic deficit. From there the idea crystallised that increasing EU transparency could be a means of ameliorating a number of these legitimacy concerns. However, in the EU member states that have adopted open government policies, the right of public access is often concerned less with legitimacy and more with the scrutiny of government action and the accountability of its actors.

Whilst accountability and legitimacy are closely related, in the domestic constitutional sphere, established and well-understood representation processes reduce the probability of legitimacy deficits attendant upon proximity issues. In Sweden for instance, the Swedish Transparency Principle couples access to documents with the right of civil servants to disclose any information to the press, in order to allow ministries to hold executive agencies to account on policy implementation matters. This is because these agencies are not directly subordinated to the relevant ministry and consequently the legitimacy issue relates to the accountability ‘third-party’ delivery agencies, rather than to political institutions.[[38]](#footnote-38)

Further normative distortion, particularly in the early years of the transparency debate at the European level, has endured precisely because that debate has not been focussed. Rather, a number of institutional debates have been guided by a variety of institutional logics. Through the White Paper on Governance for instance, it can be observed that the Commission was consciously attempting to articulate a vision in which increased public participation in EU activity, could be actively fostered to mitigate input representation weaknesses.[[39]](#footnote-39) Conversely, the Council has been preoccupied with how it might increase publicity in terms of its decision-making processes, without haemorrhaging the efficiency of its diplomatic working method.[[40]](#footnote-40) Conversely, the Parliament has focussed explicitly on promoting public trust in its members, particularly in terms of members’ interactions with organised lobbying interests.[[41]](#footnote-41) These various transparency objectives would not necessarily be fully realised, if at all, by the adoption of a modified Scandinavian ‘Transparency Principle’, but still they formed part of the discourse concerned with justifying the introduction of a European level ‘access regime’ in the 1990s and beyond. This early plurality of beliefs in transparency appeared somehow to cement the notion that ‘transparency’ could function as the ‘push-button panacea’[[42]](#footnote-42) for virtually any systemic breakdown in the ensuing decade.

The result of this process of borrowing from member states legal traditions has been the emergence of a distinctive, and in some senses organic, product of the EU legal order.[[43]](#footnote-43) The procedural mechanisms through which access is granted in these different systems may be more or less similar, but the EU regime itself furnishes modified constitutional priorities. This thesis seeks to analyse the extent to which transparency is capable of successfully addressing those constitutional objectives and whether in fact that regime is suited to addressing those objectives.

This thesis argues that extant transparency policy and the existing access to documents regime are not capable of fully realising the political ambition of reducing the legitimacy problem inherent in the so-called proximity gap between Europeans and EU-institutional decision-making processes. Furthermore, insofar as the institutions have variously pursued legitimacy and/or trust-building objectives through transparency policy and access to documents, such objectives are predicated on a false assumption in which it is believed that increasing transparency through formal legal and political mechanisms, increases trust in the institutions and enhances the legitimacy of the Union’s democratic architecture, or indeed both. Part III of this thesis will re-examine the Union’s efforts to increase transparency through a distinctly ‘culturalist’ lens and argues that a cultural approach to policy making is required to account for the pluralism inherent in the institutions’ various analytical starting-points to transparency policy (which are arguably also present in citizens and civil society groups’ perspectives on EU policy-making). By considering such differences explicitly, it will be argued that it is possible to explore options for policy brokerage that permit the development of policy that is more sustainable, in the sense that it is acceptable to a broader range of stakeholders’ core beliefs about transparency and access to documents.

#### 1.3.4 Some Preliminary Remarks about EU Legitimacy

It has already been asserted that the transition to a distinctly ‘political’ EU reawakened concerns about the legitimacy of the EU qua polity. In a Union that has an increasingly citizen focussed agenda, legitimacy could no longer be articulated only in a formal legal or positivist sense, thus rendering redundant the language of primacy, competences and jurisdiction, which had been instrumental in the early crystallisation of the then European Community.[[44]](#footnote-44) Similarly, politicisation meant that Union institutions could no longer piggy back on the indirect legitimation afforded by national governments’ membership of the Council as co-legislator. Furthermore, perceived weaknesses in the European Parliament’s capacity to exercise its supervisory role over the other institutions, along with is diminished legislative role vis-à-vis the role played by national parliaments in domestic legislation, all conspired to suggest that in the terms set by western political systems, EU legitimacy is lacking, both normatively and socially.[[45]](#footnote-45)

The EU must concern itself with political legitimacy and not merely with the legality of its activities, precisely because it cannot lean on the shared values that populate national constitutions and feed a sense of national identity, a point the German Bundesverfassungsgericht (Federal Constitutional Court) has suggested places a formal limit on the attribution of competences to the EU.[[46]](#footnote-46) Shared values, encapsulates the notion of ‘traditional legitimacy’ as espoused by Weber in his work on legitimate rule.[[47]](#footnote-47) It suggests that legitimacy is conferred on a regime or political and legal order, through shared understanding of culture, custom, history and language. Within this shared cognitive space discourses can emerge about how the governed wish to be governed, through the medium of party political and parliamentary representation.[[48]](#footnote-48)

This apparent lack of ‘traditional legitimacy’ can be viewed as a challenge to the exercise of legislative and political power by the EU that simultaneously it might be considered to undermine the traditional legitimacy that national governments are privileged to enjoy.

Though Union institutions have arguably not sought to use transparency as a means of directly generating ‘shared values’ within the EU political space, they have attempted to use transparency remedially, as a means of reconstructing EU legitimacy through the medium of deliberation.[[49]](#footnote-49) The concept of ‘deliberative democracy’, seeks not to replace traditional mechanisms of direct and representative democracy, but rather to substitute for them by encouraging participation in a process of deliberation, either directly or through representative civil society groups.[[50]](#footnote-50) Transparency mechanisms are supposed to facilitate this deliberative democracy by providing access to the information that allows interested citizens to participate effectively. The process of argumentation and of contestation, whether it concerns macro or micro level policy matters, is believed to be an actual source of EU legitimacy.[[51]](#footnote-51) Deliberation can be further supported by supplementing access rights with consultation promises, an innovation set out by the Commission following the White Paper on Governance, and which is now contained in a code of conduct.[[52]](#footnote-52)

Legitimation through deliberation however, still presents a number of important issues for the Union, not least because it is not at all clear that it reduces the proximity problem between EU citizens and the institutions. Furthermore, it is also clear that it is structurally impossible for the deliberative process to make space for all EU citizens where an issue is particularly salient, raising the question, if not me then who, and why?

A final point to be made at this stage is concerned with the thorny issue of ‘Output Legitimacy’. Output Legitimacy differs from the various accounts presented above insofar as it is a non-majoritarian, non-democratic mode of political legitimation, concerned with government on behalf of the people, in their interests.[[53]](#footnote-53) Output legitimacy is measured on the basis of the effectiveness with which the EU delivers on the expectations of the people it governs, in terms of peace and economic prosperity and so on. The concept is invoked often to defend the imperfect democratic credentials of the European Union, particularly where the argument is being made that it is inappropriate to define the EU according to the same democratic standards that we define member state governments. Output legitimacy thus has some important implications for transparency. On the one hand it may question the investment made by Union institutions in promoting the accessibility and visibility of information. On the other, if the quality of outputs is the standard by which we determine EU legitimacy, then insofar as transparency might interfere with the efficiency of traditional institutional working methods and cultures, it could be said to contribute to the de-legitimation of the EU, (albeit counter-intuitively).

Further discussion is provided in *Chapter 4*, which examines a number of different accounts of legitimacy with a view to unpacking the relationship between legitimacy and democracy, (with democracy being the paradigm example of legitimate governance or rule in western political philosophy).

### 1.4 Transparency: Defining a Problem

The future direction of European Union transparency now stands at a crossroads. Over two decades, successive rounds of legislative and policy development have been successful in weaving the language of transparency into the treaties, thereby cementing its status as principle of constitutional importance. Indeed, transparency is now considered a core component of the Union’s constitutional edifice, and is an essential normative yardstick against which the propriety of executive action by the Union ought to be assessed.[[54]](#footnote-54) However, despite these strong moves towards constitutionalisation, the failure of the institutions to agree on a compromise recast proposal for the regulation on access indicates a certain revisionist trend within the centralised institutions. In particular the Council and Commission have variously aired concerns that transparency requirements not only clash with institutional operating logics, but they can also exert negative effects on administrative efficiency and the capacity to deliver institutional outputs.[[55]](#footnote-55) Equally, there is a feeling within these institutions that increasing transparency has not resulted in the legitimacy gains that were initially envisaged.[[56]](#footnote-56)

Evidence from the Union’s own Eurobarometer surveys correlates broadly with this latter sentiment. There is observable longitudinal decline, subject to intermediary fluctuations, in levels of trust in the EU as a whole, along with a decline in citizens’ belief that their voice counts in Europe.[[57]](#footnote-57) Furthermore, a growing body of critical scholarship highlights the potentially negative consequences of increasing transparency requirements, thus suggesting that European institutions may have been propelled by a strategically naïve view of the relationship between transparency and legitimacy.[[58]](#footnote-58) Such a view has hypothesised that the provision of transparency entails certain functional effects, insofar as the ‘mechanical’ provision of information is capable of communicating a uniform message amenable to singular interpretation, by a unitary and rational demos. Such a mechanical communication process, it is believed, will allow an authentically democratic and thereby legitimate Union to be readily perceived, producing a reflexively transparent polity.[[59]](#footnote-59)

Whilst there may be sound philosophical justification for believing that transparency can generate legitimacy, plausible risks include both frustration and disappointment effects, along with the disenfranchisement fostered by information overload, amongst other things.[[60]](#footnote-60) Correspondingly, empirical investigation into the relationship between transparency and legitimacy has provided inconclusive evidence that, in complex polities, there is a positive correlation between increasing transparency and increasing legitimacy. The link is clearly complex and highly context dependant, making the likely outcomes of transparency reform difficult to predict.[[61]](#footnote-61)

Furthermore, the extant transparency hypothesis appears to demonstrably oversimplify the nature of communicative and discursive processes in politics and governance, relying upon the belief that information can be communicated and interpreted objectively. Consequently, the importance of the question of information perception is consistently underemphasised. Variations in beliefs about transparency, the information that should be rendered transparent, when and why need to actively be accounted for, the challenge being to find a theory of transparency as component of European Union constitutional politics that is able to cope effectively with the self-evident phenomenon of pluralism. Bearing these concerns in mind, this thesis will consider the extent to which that pluralism might be accounted for by considering transparency as a public policy problem, for which variation in attitudes and approach are made central to the analysis of what transparency is, what it means and how it works.

### 1.5 The Research Questions

This thesis takes forward the growing body of critical scholarship on transparency, the revisionist trends that are visible within the centralised institutions in their approaches to and expectations of transparency, and the extant empirical evidence that points to a much more nuanced relationship between transparency and legitimacy than has previously been hypothesised. A primary research objective will be to evaluate the ways in which transparency and legitimacy do interact, considering how EU transparency policy in the last two decades has impacted upon perceptions of legitimacy within the Union, in the context of ongoing constitutional priorities to alleviate the perceived proximity gap. The function of this evaluation is to question the viability of institutional approaches to and beliefs about ‘legitimising effect’ and to question whether, how and to what extent institutional approaches to transparency have been strategically naïve.

In addition, this thesis will consider how we might more adequately posit the relationship between transparency and legitimacy, specifically in terms of how we might account for the complex nature of information perception, by placing the issue of pluralism (in terms of human attitudes and approaches to legal and political phenomena) at the centre of the transparency narrative constructed herein. The purpose of this exercise will be to consider how Union institutions might successfully reorient their efforts in the field of transparency policy, considering in particular the apparent policy development impasse and stalemate which has endured now for some seven years. Reflections will be made on the potential limitations and normative import of transparency policy in the life of the EU, considering in particular the specific difficulties that are presented by the requirement to pursue a policy design process that takes account of the various factors that inform individual’s different political starting points, their attitudes and beliefs about transparency and their attitudes towards the EU and its institutions. Such differences are apparent in microcosm in the various approaches that have been taken by the centralised institutions themselves. As a minimum, it will be argued that the policy design process needs to be able to effectively mediate the differences in institutional approach, considering also how and where these might be reflective of broader social and cultural attitudes prevalent amongst European publics. These research objectives are encapsulated in the following research question:

**‘To what extent have intuitively held assumptions about the relationship between transparency and legitimacy, in the context of European Union governance, been misplaced?’**

This research question will be answered by addressing the following two sub-research questions:

1. **How have the centralised institutions of the European Union (the European Parliament, the Commission and the Council) conceived of, developed and communicated the relationship between transparency and legitimacy?**
2. **How can we more adequately chart the interplay of factors affecting the relationship between transparency and legitimacy (and by definition other objects of democratic governance), for the purposes of improving the policy design process, in the context of European Union Governance?**

The central research question has two clear strands. On the one hand, *Part I* will explore and expose institutional understandings of both transparency and legitimacy, with a view to considering explicitly how those institutional approaches have driven policy development and execution. Subsequently, Parts II and III of the thesis are concerned with questioning the extent to which those understandings are unduly simplistic or misdirected and how such variations in approach relate (or not) to one another. In *Chapters 4 & 5,* ‘anatomies’ of transparency and legitimacy will be shaped that attempt to outline the limits of their respective conceptual grammars. Part III of the thesis both utilises and evaluates these conceptual grammars using the methodological approach developed within Grid-Group Cultural Theory, which, as briefly intimated in the opening paragraphs, presupposes a matrix of mutually contradictory fundamental attitudes, that guide individual approaches towards all aspects of social and political life.

Research sub-question one (the EU institutions’ approaches to transparency) will be answered by explicitly considering a selection of the policy documents and publications that have emerged at significant moments in the evolution of the Union’s transparency policy agenda since Maastricht. *Chapter 3* will explore, chronologically, the development of the institutions’ attitudes to transparency by reference to a number of historically significant theoretical justifications for transparency, as outlined in *Chapter 2*. Subsequently, research sub-question two (the factors affecting the relationship between transparency and legitimacy) will be explored in two distinct stages. In *Chapter 5* a dimensional analysis of transparency will be presented that considers what transparency can achieve as a tool of governance, based on a number of structural questions concerning purpose and audience. This analysis will be further refined in *Part III*, by reflecting further on the cultural factors that inform different actors’ perceptions of transparency’s value and role.

### 1.6 Methodological Approach

At the heart of this thesis is an issue of conceptual clarity: a fuzzy understanding of transparency and what it can do may well have resulted in polities distorting its potential and in its misapplication. One unassailable observation that has already been indirectly mentioned above is that the mainstreaming of transparency policy has produced various discrete policy measures that move in a number of different directions, the effects of which are aggravated or mitigated by numerous environmental characteristics. This thesis will make a distinct contribution both to tackling that conceptual fuzziness and to accounting for some of its potentially distortive effects in the policy design and implementation process,

In setting out the ‘anatomies’ of transparency and legitimacy in *Part II*, the chapters employ a dimensional analysis to model specifically how different transparency measures move, who is affected by them, who benefits and who loses? What type of transparency/legitimacy does this produce?[[62]](#footnote-62)

This ‘dimensionalising’ is further refined and evaluated in Part III.[[63]](#footnote-63) A significant problem with producing a conceptual grammar is: where does one start? Equally, when is it appropriate to stop? Furthermore, dimensional accounts only tell us part of the story, they outline how transparency and legitimacy might interact, but they do not tell us the circumstances in which they are likely to interact to produce particular outcomes, which are informed by actors’ beliefs and expectations. Grid-Group Cultural Theory is instructive here because it offers a limitative way of classifying the dimensions of transparency and legitimacy according to four fundamental worldviews: hierarchy, individualism, egalitarianism and fatalism.

By constructing narratives according to these various worldviews, it is possible to shape the analysis in the context of different actors attitudes to governance, by allowing the analyst to take account of value orientations and the impact of these different orientations on the interpretation of the European Union’s institutional approaches to transparency. The objective of this approach is to consider where elite level policy approaches may have overlooked considerations that are key determinants in others’ views of legitimate political action.[[64]](#footnote-64) In addition, where evolving institutional policy responses to transparency have promoted divergence in attitudes between the centralised EU institutions (as is evident in the fallout from the Commission’s proposal to recast Regulation 1049/2001 on access to documents) cultural theory offers the possibility for identifying culturally hybrid alternatives to promote stable policy reform and prevent intractable policy stagnation.[[65]](#footnote-65)

More importantly however, Grid-Group Cultural Theory, as will be explored in Part III, prioritises a particular heuristic for problem-solving that is both expansive and limitative. It is expansive, since it invokes a pluralistic approach to actors’ policy beliefs, yet limitative insofar as the matrix relies upon four diametrically opposing world-views. This analytic utility is a particularly valuable since it allows policy actors to harness Grid-Group’s predictive capacity in order to very quickly produce an encompassing typology of mutually contradictory views, significant pinch-points within the totality of competing viewpoints in a given political space. In *Chapter 6* a detailed methodological outline of Grid-Group Cultural Theory is offered, including its theoretical precepts, its applications and any potential methodological shortcomings.

### 1.7 Chapter Outline

A brief outline of the contents of each chapter is offered at this stage in order to assist the reader with the structure of the argument that follows. In **Part I** of this thesis, **Chapter 2** will examine ‘The Idea of Transparency’ by charting its historical development as a term and latterly as a concept of governance. Focussing on the period from the enlightenment to the present day, this chapter explores how transparency and its role in the modern democratic polity came into being. It reflects in particular on the ‘conceptual crowding’ that has taken place as transparency has been adopted as a policy focus in a proliferation of governance contexts. This historical evaluation contextualises the politico-historical and social circumstances in which the EU has approached the adoption and mainstreaming of ideas about transparency and access to documents, resulting in their progressive constitutionalisation.

In **Chapter 3**  the analysis will turn to consider how the politico-historical ideas presented in *Chapter 2* have been transplanted and fertilised within the European Union, reflecting on institutional working methodologies and cultures. *Chapter 3* will chart very closely the progressive constitutionalisation of transparency in the life of the Union, noting the periods of ‘transparency gain’ and ‘transparency inertia’ that have emerged as a result of successive reassessments of the political value of transparency and the institutional behavioural change that mainstreaming transparency demands.

In **Part II** attention will turn to the second sub-research question, where **Chapters 4** and **5** respectively will undertake an analysis of the instrumental value of transparency. *Chapter 4* will address directly the transparency-legitimacy relationship, analysing various typologies of democratic legitimacy in order to make some observations about transparency’s capacity to deliver on these ‘legitimacy indicators’. In turn, *Chapter 4* will also make some observations on the circumstances in which the logic of legislative transparency, as understood in terms of a legal right to access official documents, might in fact (counter-intuitively) serve to erode the basis on which it is assumed that the European Union enjoys a measure of democratic legitimacy.

Subsequently *Chapter 5* will build on the observations made in chapter 4 about the nature of transparency’s putative relationship with democratic legitimacy. In doing so, *Chapter 5* will expressly construct an ‘anatomy’ of transparency that considers explicitly how transparency moves about the political and legislative space, in terms of three specific structural questions about the thing that is being rendered transparent, how that transparency is to be achieved and the intended audience. The anatomy that is presented by responding to these important structural questions will evaluate the instrumental capacity of transparency to promote the ‘goods’ of authentically democratic governance, as understood in liberal democratic theory.

In the latter part (**Part III**) of this thesis, the EU’s longitudinal approach to transparency policy will be re-evaluated through a ‘culturalist’ theoretical lens. Using the anatomy developed in *Part II* the theoretical propositions advanced by Grid-Group Cultural Theory and its matrix of four worldviews will serve as the epistemological starting point for constructing a series of cultural narratives for the purposes of comparing and contrasting competing views about transparency, whilst also taking into account the cultural origins of those particular political belief systems. **Chapter 6** will offer a comprehensive introduction to the theory, along with a detailed methodological discussion on its potentially broad contribution to legislative and public policy debates in varied governance settings.

**Chapters 7** and **8** will utilise the Grid-Group methodology presented in *Chapter 6* to develop a cultural typology of transparency belief systems , in order to offer a cultural explanation for the observable differences in approach and the competing analytical starting points of the EU institutions. In *Chapter 7* The empirical evidence for constructing the typology will be harnessed by conducting a discourse analysis of a number of transparency policy documents, a number of which were initially explored in the politico-historical analysis presented in Chapter 3. These policy documents chart the evolving approach of the EU’s centralised institutions and document a number of the key constitutional turning points in the history of the EU’s transparency narrative, ever since the emergence of transparency as a constitutional agenda item at Maastrcht. The evidence that is harnessed from this discourse analysis will be used to structure a typology which characterises different institutional approaches in terms of the four cultural types (hierarchy, individualism, egalitarianism and fatalism) used in the Grid-Group matrix. This typology will serve as a ‘cultural baseline’, against which it will be possible to identify matters of difference and confluence, as between the institutions, and the various points at which these might occur.

In the final substantive chapter (**Chapter 8**) the typology developed in *Chapter 7* will be used to construct a series of cultural narratives that conceive of transparency as a ‘public policy problem’. In doing so, the narratives will consider how transparency, as a political, legislative and indeed constitutional phenomenon of the EU governance landscape requires effective structuring and management. The cultural narratives will provide a theoretical account of why different political actors choose to approach a policy problem in a particular way, the motivations for these particular policy responses and the policy solutions that they believe to be credible in a given context. *Chapter 8* will thus present an account of how it would be possible to pursue inter-institutional policy brokerage and reform, in order to stabilise future policy development and minimise the risk of encountering a further severe political impasse.

Finally, in the **Conclusion**, some reflections will be offered on the value of pursuing a culturalist analysis in EU policy-making, specifically in light of the specific complexities presented by pluralism and governance in crowded institutional environments. Some comments will also be offered on the opportunities to undertake further research in this area.

# 2. The Idea of Transparency

### 2.1 Transparency: What’s in a Name?

The words transparent and transparency are without doubt, popular terms in both national and international debates about organisational management, legitimacy and effective institutional accountability. By the turn of the 21st century, transparency had been invoked in innumerable reforming charters, mission statements and policy documents, achieving at its zenith an almost religious reverence[[66]](#footnote-66) as a ‘universal desideratum’ of good governance.[[67]](#footnote-67) Whether transparency is deserving of that epithet is a consideration that is central to this thesis, since it goes to the heart of the research question set out in *Chapter 1*, namely: to what extent have intuitively held assumptions about the relationship between transparency and legitimacy, in the context of European Union governance, been misplaced? It is asserted that transparency has been poorly defined, particularly in relation to its value as a concept of good governance, resulting in misunderstanding and an overestimation of its capacities, which have in turn produced weaknesses in both policy design and execution.

The purpose of this chapter is to map the origins of transparency *in abstracto*, focussing on the range of meanings that have been applied to the term and the different senses in which it has been invoked, in a number of different social and political contexts, throughout various periods of history. In particular, it will address the ideas that have been instrumental in the construction of transparency’s underlying rationale (*Section 2.2).* Subsequently, the focus will turnexamine some pre-twentieth century ideas about what transparency could achieve *(Section 2.3)*,before turning to a number of modern notions about transparency *(Section 2.4)*. This foundation will serve as a useful platform from which it will be possible to consider specifically how transparency has been employed by the European Union in *Chapter 3*, where the analysis will focus on how the EU’s application of transparency reflects its conceptual history, and also where its usage might reflect a novel understanding of the term and its determinants.

At this early stage, it is useful to have something that might approximate to a working definition, to what does transparency refer specifically when it is used in a governance context? It is to be recalled from *Chapter 1* that transparency ought to be distinguished from its bedfellows, openness and access to documents. There, it was asserted that transparency is concerned with the procedures and processes that seek to secure the accessibility and visibility of information, such as rules about open meetings and the publication of government information.

The word itself is derived from mediaeval Latin (*transparentia*), the ordinary meaning of which conveys the idea of perviousness to light. In this literal sense, the term transparency has been used in English since at least the late 16th century.[[68]](#footnote-68) It is this physical property of being transparent, of casting light upon something so that things might be readily perceived and understood, that has since been adopted in a governance context to define, albeit metaphorically, what transparency should do.[[69]](#footnote-69) Hence, transparency is about ‘lifting the veil of secrecy’.[[70]](#footnote-70)

Such definitions however, merely convey the idea that transparency is about making the business of government less closed and secretive. Crucially, they say nothing specifically about transparency’s scope and purpose, its logical limits and why it is necessary. *The Encyclopaedia of Democratic Thought* suggests something a little broader:

“Transparency is central to contemporary discussions of both democratic governance and public service reform, since open access to information and elimination of secrecy is taken to be a condition for the prevention of corruption and promoting public accountability…

“…[It] denotes governance according to fixed and published rules, on the basis of information and procedures that are accessible to the public, and (in some uses) within clearly demarcated fields of activity…” [[71]](#footnote-71)

Using this definition, it is possible to start to assemble an idea both of what transparency is about and what it is supposed to do. It is clearly a compound concept, within which government activity is meant to be predictable (i.e. governance according to fixed rules). Furthermore, there should be a publicly available account of that activity. A key justification for requiring both certainty and publicity in governance is to prevent corruption and promote the idea that public institutions are accountable to the people whose lives they influence.

The foregoing ideas are likely to be familiar, not least because they feature in conversations about democracy and the democratic character of national governments and international organisations alike. One particular conception of transparency’s role in the construction of democracy is addressed in *Section 2.2.4* below, as part of the range of ideas that has infused transparency underlying rationale. In addition, *Chapter 3* will consider explicitly how the EU has approached the relationship between transparency and its cognates, including trust and accountability, along with the role that each of these play within an overarching democracy umbrella.

Before that however, this chapter will now focus on unpacking transparency’s heritage, looking at how the range of ideas that we now attribute to it, initially emerged and crystallised. In doing so, attention will be paid to whether the ideas that have infused our modern understanding of transparency, coalesce into a sufficiently cohesive doctrine or principle. If they do not, is it possible to identify hidden contradictions, capable of diminishing the effectiveness of this seemingly irreproachable concept?

### The Rationale for Transparency: A Case of Conceptual Overcrowding?

The issue of tackling government secrecy has been alluded to already in the context of our working definition of transparency, as set out in *Section 2.1* above. Arguments against government secrecy very readily converge with arguments about the censorship of information and the freedom of expression of both the public and the press. One of the most notable early examples of an argument for providing these freedoms can be found in Milton’s *Aeropagitica:*

“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; who ever new Truth to put the worse, in a free and open encounter? Her confuting is the best and surest supressing. He who hears what praying there is for light and clearer knowledge to be sent down among us, would think of other matters to be constituted beyond the discipline of Geneva, framed and fabricked already to our hands. Yet when the new light which we beg for shines in upon us, there be who envy and oppose, if it come not first in at their casements.”[[72]](#footnote-72)

Though Milton here is pressing primarily for Parliament to provide the ‘liberty of unlicensed printing’, it is of note that he uses the metaphor of ‘light shining through’ to convey his message. Furthermore, the metaphor works on two levels. On the one hand, the light physically permits a person to see what is going on and therefore they are capable of readily interpreting the situation. On the other hand, the allusion to light conveys a sense of purity and truth, which Milton presses by exclaiming, “…who ever new Truth to put the worse, in a free and open encounter?” In other words, Parliament should not fear the liberty of the press, since the truth will out; in an age of free information, it will be possible to identify falsehood. Milton presses his case still further by contending that if the wise man exhorts us to exercise due diligence, then what use is it if another order enjoins that we can know “nothing but by statute?”[[73]](#footnote-73) In short, censorship prevents man from exercising his higher faculties and self-improvement.

The *Aeropagitica* alludes heavily to classical and biblical themes. Milton was, at least partly, motivated by a desire to convey the enlightened nature of Athenian justice, a city in which publication had not been licensed, along with the enduring quality of his argument, which had been influenced by Euripides amongst others:

“This is true liberty, when free-born men,

“Having to advise the public, may speak free…”[[74]](#footnote-74)

The notion that a good and just society is characterised by truthfulness and candour is an idea that is taken forward by Milton from the classical scholars and goes on to infuse much enlightenment thinking. Kant[[75]](#footnote-75), Rousseau[[76]](#footnote-76), Bentham[[77]](#footnote-77), Madison[[78]](#footnote-78) and Mill[[79]](#footnote-79) all have something to say about the desirability of truth and openness and how it might guard against opaqueness and evil, though their focuses differ slightly.

Madison diligently articulates the desirability of openness, arguing that popular government requires the free exchange of popular information, so that persons can be meaningful participants in the democratic process:

“A people who mean to be their own governors must arm themselves with the power that knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”[[80]](#footnote-80)

Here, he is clearly concerned with framing principles about the transmission of information in a broad constitutional sense, focussing a number of the preconditions necessary for effective democracy. This we might reasonably consider to be an objective that is broader or somehow beyond the scope of transparency itself, particularly in view of the distinction made between transparency and openness in *Chapter 1,* wherein it was asserted that transparency, ought perhaps to be distinguished from ‘openness’, understood as a mentality of government that encompasses a plethora of the core governance traits we would associate with democracy, including not just access to information, but participation, representation and so on. Nevertheless, what Madison demonstrates is a certain philosophical continuity from Milton and his forebears: freedom of speech must prevail over censorship if man is to be able to realise his place effectively within the political realm.

#### Transparency and Revolution

Madison’s call for transparency as an essential precondition for self-government is inextricably bound up with the revolutionary movements that occupied the second part of the eighteenth century on both sides of the Atlantic. It is possible here to identify the slow crystallisation of a norm that had political, juridical and moral implications, and which encompassed a requirement that post-revolutionary society become reflexively transparent.[[81]](#footnote-81) Indeed, one of the distinguishing features of the *ancien régime* was its incapacity to operate under any system of transparency, owing to the paradoxical fragility of absolute monarchy and the court’s susceptibility to factious interests, cabals and intrigues.[[82]](#footnote-82)

The rejection of secrecy permeated not only the political discourse of post-revolutionary reconstruction, but it became a subject that was debated in print, literature, the theatre and the church, as noted here by Foucault:

“A fear haunted the second half of the eighteenth century; it was of darkened space, where the veil of obscurity concealed in its entirety, the visibility of things, people and truths. One must dissolve the fragments of the night which obscure the light, ensure that there would no longer be darkened space within society, demolish the darkened chambers which sustain arbitrary government, the whims of the monarch, religious superstition, the plots of tyrants and of the clergy, the illusions of ignorance and other such epidemics.”[[83]](#footnote-83)

It is apparent that much revolutionary interest in the value of transparency was motivated by its capacity to expose the exercise of absolute power, allowing the people to question the motives of the secret state and demand, amongst other things, governance according to normatively inspired, rational law. But beyond exposing the machinations of the capricious state, how specifically might transparency furnish rational government, conducted in the interests of the people?

#### 2.2.2 Bentham on Publicity: Securities Against Misrule and Other Writings

In considering specifically how transparency might furnish rational government, Jeremy Bentham addressed at length the arguments for openness and the publication of information, in his writings on the principle of publicity. His contribution to the history of transparency discourse is particularly significant for the way in which he justifies publicity in terms of political accountability, justice and the rule of law.

It is to be noted at this juncture that Bentham used the word publicity rather than transparency, as did many of his contemporaries. Nevertheless, he appears to have been aware of the term transparency and of its meaning, and from his own writing it can be inferred that he assumed that the two terms carried similar connotations.[[84]](#footnote-84)

For Bentham, the principle of publicity was the very ‘soul of justice’.[[85]](#footnote-85) He reasoned that law is the primary mechanism through which a society can provide for its security, but that the administration of the law affords many opportunities for abuse by those who would seek to govern us. The objective then of publicity, is the maintenance of ‘official moral aptitude’.[[86]](#footnote-86) It is clear that he thinks of publicity as broad constitutional foundation for the construction of a just society. Governmental action of every conceivable sort should be subjected to almost limitless publicity. Not only should there be laws requiring openness and disclosure of government action, but the very physical fabric of the political realm ought to be constructed so as to prevent secrecy and intrigue. Bentham gave considerable thought to the structuring of quasi-formal institutions to oversee various branches of government, particularly the judiciary. His ‘quasi-jury’ would focus on the manner in which the judge conducted a civil or criminal trial and keep him under surveillance whilst he himself conducted the trial.[[87]](#footnote-87) Similarly, an unrestricted free press would facilitate the oversight of governmental action through the ‘Public Opinion Tribunal’, since public opinion, he thought, was more powerful than any other form of institutional scrutiny.[[88]](#footnote-88)

In *Securities Against Misrule*, the Public Opinion Tribunal is presented as being the only effective check on the exercise of official power:

“Those who desire to see any check whatsoever to the power of the government under which they live, or limit to their sufferings under it, must look for such check and limit to the power of the Public Opinion Tribunal…to this place of refuge or to none.”[[89]](#footnote-89)

Strictly speaking, the tribunal itself is hypothetical, composed of an informal coalition of indeterminate and ‘unassignable’ individuals. Nevertheless, in Bentham’s writing, the tribunal often assumed an official constitutional status, through which it operated a ‘supreme constitutive’ power, which would appear to reflect much revolutionary thought about the true source of constitutional power and popular sovereignty.[[90]](#footnote-90) Though on this latter point it must be conceded that Bentham was not entirely clear. In his other works, Bentham discusses law as being the product of the command of a sovereign, to wit the exercise of the sovereign will can never be illegal.[[91]](#footnote-91) As such, it is risky to suggest that Bentham was expounding a view of publicity in which it operates as a direct challenge to the exercise of sovereign power, much less as a constitutional principle that has the capacity to subjugate sovereign will.

Here, it must be recalled that Bentham was writing in eighteenth century England, his command theory of law reflected the constitutional settlement that had emerged following the restoration of the monarchy in 1660. The role for publicity within this system seems therefore to operate as a check on the unlimited law-making power of the sovereign, by mobilising public opinion. Crucially, though publicity remains a principle of constitutional importance, constitutionality and legality in Bentham’s command theory of law do not mirror one another.[[92]](#footnote-92)

Irrespective of how Bentham would reconcile his devices for promoting publicity with the source of legal authority, the fictive Public Opinion Tribunal is clearly afforded a preeminent role in *Securities Against Misrule*. The tribunal however relies upon an interested and informed public acting altruistically, if it is to be effective. On this point, Bentham was signally dubious, recognising that any number of self-interested motives could deter members of the public from performing their role appropriately. His response to this was to press the case for maximal transparency. He assumed that there needed to be ever greater access to available information in order to promote enlightenment, believing that information and education led to self-improvement.[[93]](#footnote-93)

Ultimately, though not all members of the public could be relied upon to take an active interest, the tribunal would nevertheless be incorruptible, since it would, for the most part, promote the greatest good for the greatest number. Furthermore, the idle interests of the aristocracy would be explicitly excluded in order to prioritise the democratising interests of the middle and entrepreneurial classes.[[94]](#footnote-94)

It is clear that the constitutional system envisaged by Bentham, in which the personal interests exercised by ruling elites, could be corrected by subjecting their motives to the widest possible publicity, has been significant in informing how we understand the relationship between transparency and accountability, (which will be further discussed in *Section 2.4* below.) A key component of his legacy is that this form of public scrutiny is unconditionally beneficial. This is an idea that has been adopted subsequently to press the case for ‘government by discussion’, which combines the arguments for holding government to account, with the Madisonian notion that democracy must facilitate meaningful participation.

#### 2.2.3 Transparency, Scrutiny and Discursive Democracy

In John Stuart Mill’s *Considerations on Representative Government*, the argument for publicity is explicitly extended to justify popular participation. The most advantageous form of popular government is that which offers the widest possible opportunities for participation in the exercise of public functions:

“…[B]y opening to all classes of private citizens, so far as is consistent with other equally important objects, the widest participation in the details of judicial and administrative business; as by jury trial, admission to municipal offices, and above all by the utmost possible publicity and liberty of discussion, whereby not merely a few individuals in succession, but the whole public, are made, to a certain extent, participants in the government, and sharers in the instruction and mental exercise derivable from it.”[[95]](#footnote-95)

Similarly, Bagehot has pressed the case for the free circulation of information since it is essential to the exercise of free choice. Bagehot’s econometric take on freedom of information sought to emphasise that once knowledge has been made public, it becomes a public good that cannot then be retaken by the private sphere. Once a subject is released for public discussion, “you can never withdraw it again; you can never again clothe it with mystery, or fence it by consecration; it remains forever open to free choice and exposed to profane deliberation.”[[96]](#footnote-96)

In these accounts, the Benthamite notion of subjecting government action to public opinion is still apparent, but it is subjugated to a broader democratising purpose. Controlling the flow of information that is available to the public stifles discussion, hobbles criticism and deprives people of their capacity to participate meaningfully in the political sphere. Whilst the oversight of government action and its endorsement or censure, which is the essence of accountability, is an aspect of democratic participation, that participatory right is itself not limited to holding government to account. More broadly, participating in the deliberation of issues common to the demos (or a significant part thereof), is the very nexus of a democratic ideal in which a community of free and equal citizens can take part in the organisation of public affairs.

The chief modern exponent of this expansive notion of transparency as democracy through deliberation, is Jürgen Habermas. In his *Discourse Theory of Law and Democracy,* Habermas contends that democracy intuitively entails the practice of free and reflective reasoning about issues common to the public, though which the exercise of coercive power is modified and mitigated.[[97]](#footnote-97) Though democracy itself does not guarantee restrictions on the exercise of sovereign power, when popular sovereignty is exercised through this deliberative framework, it establishes conditions favourable to the subordination of such power.[[98]](#footnote-98)

In expounding his theory of deliberative discourse, Habermas was predominantly concerned with how to interpret popular sovereignty in modern complex societies, using discourse theory to suggest that political power is derived from and ultimately vested in the communicative power of citizens.[[99]](#footnote-99) Habermas needed however to reconcile the source of power, rooted in popular sovereignty, with the very real exercise of administrative power and discretion. Administrative power must therefore be subject to the law through statutory authorisation, in order to prevent it from being tainted by the illegitimate interventions of social power, such as the strength of privileged interests to assert themselves.[[100]](#footnote-100) Habermas further contends that administrative power is only legitimate where it is bound to discursively generated communicative power. Communicative power can only develop if it is allowed to flourish in “undeformed public spheres”, through “structures of undamaged intersubjectivity found in non-distorted communication”.[[101]](#footnote-101)

In Habermas’ construction of democracy, it can be readily inferred that an ambitious form of transparency reigns.[[102]](#footnote-102) This is because the exercise of popular sovereignty requires free and unrestricted communication between persons and this is predicated on free and equal persons taking part in that discourse on an equal footing. For such free communication to take place, people within the public sphere must have ready access to information of all kinds, and it must be intelligible. Furthermore, the law must prevent the tainting of administrative power by exposing illegitimate interventions and the corruption wrought by privileged interests. As such, the law must guarantee that administrative power is exercised in the open, in order that the risk of corruption is minimised.

In Habermas’ ideally constituted public sphere, constant communication facilitates the transfer of information through the press, media and the cultural complex.[[103]](#footnote-103) As such, he is invoking the construction of a political constitution that guarantees freedom of information, freedom of expression and the absence of censorship. In one sense, he is thus fusing the various arguments for transparency that have been presented herein, from Milton’s request for unregulated printing onwards, in order to generate the enlightenment ideal of a reflexively transparent society. This is because the nature of communicative power is such that it can only operate in the absence of information asymmetry.

#### 2.2.4 Transparency: A Doctrine of Compound Essences

The foregoing brief elucidation of a number of the key components of transparency’s underlying rationale, reveals something of the extent to which transparency is a doctrine of compound essences. It might at once be about freedom of information, freedom of expression, the elimination of executive and administrative corruption, meaningful participation in democratic society and the exercise of popular sovereignty.

Without exception, the arguments presented seem to blur the distinction between openness, transparency and access to information, as presented in *Chapter 1*, primarily because no distinction is drawn between what transparency might normatively imply and how it subsequently functions in a procedural sense. The latter is also apparent in relation to arguments that invoke transparency as a tool to facilitate accountability, participation and democracy, but which do not actually define the role that transparency is playing, setting out its capacities, its limits and where it is clearly operating in tandem with other principles of governance.

Nevertheless, it would be analytically unjust to suggest that these blurred distinctions are actually the fault of any of the authors whose ideas have been presented here, since the discussion has been one primarily of transparency *avant la lettre.* Madison for instance was writing about ‘popular information’ in the context of openness, and at a broad level of generality. Equally, Bentham and Mill used the term publicity and invoked it in the widest possible sense. Though Bentham may have assumed that transparency and publicity embody very similar meanings, it is clearly possible to draw some distinction between the import of the two terms, which has implications for any contemporary definition of transparency. The working definition that was provided in *Section 1* above, for instance, states that transparency “denotes governance…on the basis of information and procedures that are accessible to the public…” On one reading, this suggests that the obligation presented by transparency merely presupposes access to, rather than the actual diffusion of information. Publicity, on the other hand, can be said to envisage the diffusion and free circulation of information.[[104]](#footnote-104)

What is apparent at this stage is that a great number of the ideas which we might now attribute to transparency, and which might be alluded to in our working definition of transparency, relate to a series of much older ideas in legal and political thought. The idea that there should be greater openness in terms of a liberal press is in fact pre-revolutionary, emerging prior to the development of democratic states in Europe as we would recognise them. Similarly, ideas about rational law and the scrutiny of government action, of transparency as accountability, can equally be traced back to Bentham and the French Revolutionary quest for the totally transparent state.

Nevertheless, though there is a certain philosophical continuity in the demands that have been set out by Milton, Madison & Bentham etc, those arguments appear to have in mind quite different objects and purposes. There is no single big transparency idea or goal.[[105]](#footnote-105) This begs important questions about the objects and purposes that contemporary transparency advocates have in mind when reviving and building upon these older ideas, since transparency’s attractiveness must inevitably be located in what we believe it can achieve, or else what it has been proven to achieve. Furthermore, a related and equally important question, is whether these objects and purposes are complementary or contradictory.

Before turning to the range of ideas that feature in contemporary transparency scholarship, how these relate to older ideas and whether they reflect similar or different objectives and purposes, it is appropriate to first briefly clarify the specific things that the pre-twentieth century scholars sought to achieve when making their pro-transparency arguments.

### Rethinking Some Early Modern Ideas About Transparency: The Goal(s) in Transparency’s Sights

Within the revolutionary concept of the reflexively transparent society, it is possible to discern a number of distinct, yet specific objectives, which collectively contributed to the overarching ideal. The first, which is readily discernible from the discussion on Bentham in *Section 2.2.3* above, is that the exposure of government activity to publicity and general scrutiny would reduce corruption and promote governance according to the rule of law. The specific goal is thus the promotion of accountability, through the meticulous recording of government action and its subsequent publication. This specific objective feeds off of a broader enlightenment preoccupation with subjecting the world around us to the scientific method, through which it would be possible to identify, quantify and understand all manner of things.[[106]](#footnote-106) To understand and quantify things signified also the ability to control them in the interests of state security. As such, though accountability was primarily directed towards government activity, it did not only reside there. Generalised surveillance and the engineering of public spaces could contribute to social harmony by promoting the accountability of all citizens, to one another and to the state.[[107]](#footnote-107)

A related objective of the transparent society was the promotion of legal certainty. Laws should be both rationally made, fixed and knowable. In expounding this goal, the revolutionary scholars were actually drawing upon one of the oldest ideas in legal discourse, which can be traced separately in Ancient Chinese and Classical Greek philosophy to at least the 4th century BC.[[108]](#footnote-108) The promotion of legal certainty was aimed specifically at curbing the excesses of arbitrarily exercised power by exacting as much fixity as possible from the published laws of the state. Where there was room for discretion, there was room for the illegitimate and capricious interests of rulers to behave arbitrarily. Rule based governance is a defining feature of modern liberal democracy that today enjoys broad recognition within many legal systems influenced by Western political thought. Not only should the rules that govern state’s relationship with its citizens be fixed and readily cognisable, but the organisation of executive political power within government should be subjected to constitutional rules that structure the exercise of different forms of power.

#### Early Modern Transparency In Practice: Sweden’s ‘Trychfrihetsförodningen’

Perhaps the only European example of pre-twentieth century state legislated transparency, is to be found in Sweden’s Freedom of the Press Act from 1766, which has since been revised and given constitutional status.[[109]](#footnote-109) Today, the Act outlines a transparency principle that is comprised of four elements: 1) public access to official documents; 2) public access to court hearings; 3) the right to attend meetings of parliamentary and municipal assemblies; 4) freedom of expression for civil servants.[[110]](#footnote-110) In terms of its objective, the Act pursues a hybrid goal in which the activities of the government are both predictable and knowable, the relationship between the state and the individual is clarified and the public can question the motives, outputs and outcomes of government policy. In doing so it draws upon both of the ‘objectives’ discussed above.

The Freedom of the Press Act is today an ingrained part not only of Sweden’s legal heritage, but of its cultural heritage also. Indeed it has been characterised as the Swedish ‘open government tradition’.[[111]](#footnote-111) Though the access rights themselves are seldom invoked by citizens, the notion that government can never take place off the record is considered to exercise an important indirect effect on the propriety of government action. Furthermore, the right of access itself is assumed to belong to the citizen, it is a fundamental right which incentivises the exercise of administrative power in the public interest. Finally, since civil servants are free to speak to the press on any matter, there is the ever-present possibility that unlawful and immoral conduct will still be brought to the public’s attention, even if they have no other means of knowing what took place.

In the later part of the twentieth century, access to information laws became one of the paradigm mechanisms through which governments could set about increasing the transparency of domestic legal and political orders. Access to information has also been one of the cornerstones of the EU’s transparency framework in practice, which will be considered in detail in *Chapter 3.* Not all of these information laws adopt the four elements of Sweden’s ‘transparency principle’, nor do they all pursue the specific objectives discussed here, though accountability can be said to be an objective of many of them.

The focus of this chapter will now turn to transparency’s reinvention in the latter part of the twentieth century. It will consider the extent to which transparency’s re-emergence draws upon these older ideas, concepts and principles, along with whether it is motivated by the same objectives.

### The Emergence of a Contemporary Transparency Movement

The preceding two sections of this chapter adopted an historical lens through which key ideas about transparency, its rationale, its doctrines and its objectives were examined. It demonstrated that arguments about the desirability of increasing transparency within society engendered a great deal of philosophical support, particularly during the revolutionary period in Europe. Indeed, ideas about transparency were in vogue, long before the term itself.

One of the things that is immediately apparent about transparency’s renaissance in the late twentieth century, is that it emerges predominantly in international organisational and institutional documents, indicating that the locus of attention has shifted somewhat. Whilst transparency between the state and the citizen is still important, attention is also being paid to the transparency of supranational organisations, the transparency of states between one another and the transparency of NGOs operating transnationally. This cognitive embedding of transparency promotion simultaneously at the sub- and supra- national levels is testament to its perceived centrality in an extensive range of policy domains. Further, it is symptomatic of the widely held belief that transparency is necessary in increasingly information-centric governance systems.

The proliferation of the term becomes readily apparent in the 1980s and 1990s. Transparency becomes prevalent in discussions about the General Agreement on Tariffs and Trade, the creation of the European Union following the adoption of the Maastricht Treaty, and in debates about the influence of NGOs.[[112]](#footnote-112) Again, it is to be noted that Hood has demonstrated how doctrines of openness in international affairs and diplomacy can be traced at least to the peace process which followed the conclusion of World War I and armistice in 1918, and as such, they are not an entirely new concept in international relations terms, nor in International Relations theory.[[113]](#footnote-113) Indeed, insofar as doctrines of openness have been articulated as a means of pursuing or sustaining peace in international politics, it appears that their nexus coalesces about the epistemic and political assumptions that have defined the West’s post-Enlightenment historiography.[[114]](#footnote-114)

Notwithstanding the latter point, a signally important event in transparency’s renaissance is the creation of ‘Transparency International’, an NGO whose very raison d’être is the promotion of transparency as a means of combatting corruption, both in state institutions and in private corporations. The creation of Transparency International precipitated interest in the term transparency on the international stage; it also helped to define transparency’s import as a policy tool, both for interested parties and for the academic world.[[115]](#footnote-115)

#### Transparency International: Battling Corruption

Transparency International (TI) was formed in 1993, when Peter Eigen and nine allies signed the founding charter in The Hague, Netherlands.[[116]](#footnote-116) Eigen, who had previously worked for the World Bank, determined to found the TI in response to concern that corruption was directly undermining efforts to promote sustainable economic development in the world’s most deprived countries, whilst also hampering growth in developing economies. Concerned by the bank’s comparative inability to reduce this corruption in the nations to which it gave loans, TI sought to draw attention to the siphoning of funds away from infrastructure development, along with the apparent complicity of wealthier (and less internally corrupt) states. The organisation was thus formed specifically to examine the causes and consequences of corruption, to report on its findings and to advocate for policy change.[[117]](#footnote-117) Eigen and his partners settled on the term Transparency International, since the word came replete with a rich heritage in which coalesced ideas about openness.[[118]](#footnote-118)

TI enjoyed early success in campaigning against corruption by working with the Organisation of American States, particularly in promoting the idea that corruption could be exposed through transparency, and that this in turn promoted accountability and good-governance. Eigen et al were instrumental in driving home a vocabulary in which transparency became synonymous with good governance, which was subsequently adopted both by the World Bank and the OECD.[[119]](#footnote-119) These two organisations subsequently provided state guidance on open budgetary policy, freedom of information legislation and on how to involve citizens in the oversight of state owned businesses in order to promote accountability.[[120]](#footnote-120)

In addition to its work with other international organisations, TI began to develop its Corruption Perceptions Index, designed to produce a sort of league table of the world’s states, according to their performance against a number of different metrics, thus producing a comparative measure of perceptions of corruption within states.[[121]](#footnote-121) The Corruption Perceptions Index has gathered much media attention and its annual reports are now widely circulated in the mainstream media, though the index itself has attracted some criticism, particularly during its infancy, owing to allegations that there was, ironically, a lack of transparency in the process through which TI arrived at its results.[[122]](#footnote-122)

Whilst TI have devoted much energy to popularising transparency as a means of tackling corruption, they have consciously chosen to allow the term to symbolise a broad gamut of measures, including, but not limited to access to information, the pro-active provision of information to the public, open decision-making processes including access to meetings and regulation to provide additional accountability measures.[[123]](#footnote-123) Partly this connotes a desire to encourage transparency and transparent to be thought of primarily as adjectives, symbolising honesty, integrity and accountability. When the term is applied to a state or organisation, it acts as a shorthand and a benchmark of quality.

In thinking about how TI’s use of transparency bears relation to the working definition set out in *Section 2.1* along with the subsequent discussions on transparency’s rationale and its objectives, there are some obvious parallels to be drawn. Signally, TI have characterised transparency as a means of tackling corruption, which, as has already been discussed, was a preoccupation of Bentham’s writing on publicity and is reflected in much Revolutionary thought on the transparent state. In seeking to tackle that corruption, the object or goal has been to promote accountability (again an idea that is well trodden in the historical literature), though here it is to be noted that the accountability envisaged stretches beyond the actions of government and includes private actors, chiefly business stakeholders, where they deal with public money or indirectly benefit from international economic stimulus via the World Bank and other NGOs.

Though TI have chosen to be deliberately expansive about the actual measures that fall within the purview of the transparency umbrella, many of these would also equate directly with our working definition of transparency, since they are procedural in nature and seek to regulate the mechanics of information exchange between the state and its citizens.

Ultimately, TI has worked to establish a systematic agenda for the elimination of corruption, chiefly financial corruption and mismanagement, which they attribute to underlying faults in state and institutional governance systems. In doing so, they have promoted sustained interest in transparency and have helped to establish the term as part of the everyday lexicon of public officials, the media and academia. As scholars in different fields have in turn become aware of transparency, they too have interpreted transparency’s meaning and form to incorporate specific ideas about the nature of public-decision making, disclosure, participation and democracy, invoking old ideas in new contexts and expanding their role accordingly.

#### Some Academic Notions of Transparency: Ideas from International Relations, Public Policy and Administration Research

The proliferation of domains in which transparency now features as a central policy concern highlights how different groups of political actors choose to communicate their actions and is demonstrative of the centrality of the ideas of openness and publicity to inter-institutional political interaction. How different disciplines conceptualise the realisation of transparency in practice is used as an analytical axis through which positions are developed on a range of core theoretical problems within their respective fields. Considering how ideas about transparency have become embedded within the disciplines of International Relations, Public Policy and Administration is demonstrative of its contemporary dominance and also signifies how it manifests itself in different configurations, reflecting constellations of various older ideas, as set out in *Sections 2.2* and *2.3* above. Accordingly, it will be possible to identify some of the epistemological and ontological starting points for the particular configuration of ideas that underpins the evolution of the European Union’s approach to transparency, which will be considered in *Chapter 3.*  In turn, this will provide a firmer analytical ground from which to pursue a more critical analysis of the components of transparency and its relationship with legitimacy in *Chapters 4 & 5*.

##### ***2.4.2.1 International Relations***

In International Relations, transparency appears as a term used to describe the behaviour of states and supranational organisations, particularly within the Realist and Institutionalist schools.[[124]](#footnote-124) Here transparency is perceived as conveying trustworthiness on the part of actors in negotiating fields and as a means of circumventing the perpetual security dilemma, whereby transparency might be used as a means of overcoming concern about conflict to arrive at a more just international system in the absence of more firmly institutionalised global governance.[[125]](#footnote-125) As academic interest in transparency in International Relations research has grown throughout the 1990s and 2000s, scholarship has identified how third-party actors encourage increasing transparency as a state goal, particularly in non-democratic nations, where it is perceived that opening up governmental decision making processes to the public view will initiate transition towards democracy and citizen involvement in the governing of the state. This is in turn perceived to diminish the perception of risk of conflict as between states, since the informational attributes of democracy are instrumental to foreign policy behaviour since the perception of illegitimate threats will be opposed both by domestic oppositions and the broader international community.[[126]](#footnote-126)

Certain NGOs and TI are instrumental in promoting an agenda of transparency as democratic-security, which is viewed as having both internal and external dimensions. Opening up decision-making is supposed to coincide with increasing the quality and effectiveness of government management, not least because different branches of government are capable of seeing how one another are acting. Furthermore, governments (as rational actors) can look to promote peace and security through attracting inward investment and inter-state trade. These NGO’s seek also to broaden the transparency mission by focussing on ethics standards and encouraging states to implement ethical codes, in order to help sustain the emergence of good governance standards and securitise emergent transparency gains.[[127]](#footnote-127)

Very quickly it can be observed that within International Relations research, transparency was crystallised as a normative standard of behaviour and as a public value, in which openness towards the public, or at least a marked decrease in secretly conducted negotiations and management practice, combined with the sharing of information as between international actors in order to promote state accountability at the international level:

“Transparency comprises the legal, political and institutional structures that make information about the internal characteristics of a government and society available to actors both inside and outside the domestic political system. Transparency is increased by any mechanism that leads to the public disclosure of information, whether a free press, open government, hearings, or the existence of nongovernmental organisations with an incentive to release objective information about the government.[[128]](#footnote-128)

Coexisting with this definition, was the belief that transparency constituted something of an unarticulated demand for greater openness, a demand for the information that citizens required to be active participants in domestic self-governance. Transparency would thus remain incomplete if states merely increased access to information by legislative means or publication.[[129]](#footnote-129)

Interestingly, the very same literature that had championed transparency in international relations, also identified a drawback to transparency. The openness that results from increasing access to information, particularly where there is now the opportunity for direct media intrusion and the live reporting of events, can reduce the expediency of negotiations by making frank communication more difficult. Not only does information release increase the potential for interest groups to reorient negotiations, but existing democratic nations may be at a disadvantage in negotiations with non-democratic nations because of the apparent information imbalance. Furthermore, there are some information sources that states may wish to legitimately keep private, especially where malicious foreign interests could destabilise internal economic security, promote civil unrest and damage infrastructure.[[130]](#footnote-130)

The significance of transparency research in international relations lies in how it has begun to explicitly structure transparency as a complex and multifaceted value, which is not impervious to countervailing considerations about the desirability of secrecy. Nevertheless, transparency’s remit has also been further extended, no longer is it merely about preventing corruption, but societies should use transparency as a tool to build trust through disclosure. Underpinning this is a democratic notion which assumes that democracy requires active citizen participation in the business of governance, which can only happen where citizen groups are empowered to do so.

Once again it is apparent that much of the thinking that supports this view of transparency bears relationship with the older ideas discussed in *Sections 2.2 & 2.3*. Here, it is a Madisonian view seems to permeate the discussion, particularly in terms of participation and the development of the democratic state. A number of these ideas will be revisited in more detail in *Chapter 5*, in which is developed an anatomy of transparency designed to capture these complementary, competing and countervailing viewpoints about the purposes to which transparency can soundly be put, within any given democratic governance structure.

##### ***2.4.2.2 Public Policy***

The approach to transparency in public policy research has perhaps been a little more muted than in International Relations research. Here transparency is considered to be an attribute of public policy and a metric by which to measure the quality of policy design and delivery. If policy design is good, then that part of the policy which is concerned with implementation and the management of discretionary authority will incorporate effective accountability structures. It will also pro-actively advise citizens on the availability of services and expected service delivery standards.[[131]](#footnote-131)

A significant innovation in how transparency is viewed in public policy research relates to the measurement of policy effectiveness.[[132]](#footnote-132) Transparent public policies are considered to be effective when the public uses them to make personal choices about public service provision, typically in relation to education and healthcare, among other things. In this context, transparency becomes about submitting information to the public record in order to facilitate individual choice. Archon Fung, David Weil and Mary Graham have argued that the promise of transparency in public policy design and delivery extends to the emergence of improved outcomes in healthcare, public health and safety, education and product quality.[[133]](#footnote-133) It promotes inspection and monitoring regimes and the recording of institutional inputs, outputs and outcomes relevant to various metrics, in order to provide the public with reliable quality measures.[[134]](#footnote-134) Transparency is also used as a means of increasing quality within public institutions by introducing a form of league-table competition. Public service providers are encouraged to think no differently from private market providers and must furnish the public with information in order that they can make an informed choice.[[135]](#footnote-135)

Latterly, public policy research into transparency has focussed on how to define the role it is playing at different points in the policy implementation process. The starting point is that information availability alone can only ever have a limited impact on increasing transparency. Libich has identified five types of transparency that each exercise an effect on the overall success of policy outcomes: political transparency, economic transparency, procedural transparency, policy transparency and operational transparency.[[136]](#footnote-136)

Political transparency is concerned with articulating policy goals within a team, institution or sector to promote policy cohesion. Economic transparency relates to the banks and monetary policy institutions making their decision-making architecture publicly available in order to promote trustworthiness and contextual information about progress on policy goals. Procedural transparency concerns opening up the ‘black box’ inside which public bodies operational decisions and the exercise of discretionary power takes place. Similarly, policy transparency opens up that same ‘black box’, albeit within government, about how decisions are made, through recorded open voting, public meetings and access to the minutes. Finally, operational transparency relates to performance measurement in order to present a picture of whether an organisational or sector based policy decision has achieved its objectives.

Whilst in international relations research the scope of transparency was enhanced to include the idea of building trust through disclosure and promoting participation, public policy research has chosen to focus on how to actually structure the physical disclosure of information in order to promote trust, by centring on the information that citizens actually need to make decisions about service quality. Thus, citizens need information not only about policy objectives, but also about whether policy delivery processes have had any success in meeting those objectives, in order to be able to make effective evaluations and to take a strategic overview of the quality of governance at the national and sub-national levels.

The approach here bears a loose resemblance to ideas about the transparent state and some of the ideas presented by Habermas’ in his theory of deliberative democracy, where citizens are enabled to undertake unrestricted deliberations within the public sphere. Nevertheless, public policy transparency is both narrower and more focussed. It might also be said that the underlying purpose of increasing transparency in this arena has less to do with citizens themselves and more to do with enhancing the likelihood of policy successes. Thus transparency is an attribute of policy-making, to be manipulated explicitly to promote policy impact.[[137]](#footnote-137)

This latter idea of enhancing policy successes will be revisited in *Chapters 7 & 8*, in response to the idea that it is imperative, if transparency is to be successful in any given political context, that we have a theory of transparency capable of responding to a plethora of different actor’s perspectives about the means and ends of transparency as a legislative and policy tool.

##### ***2.4.2.3 Politics and Administration***

Transparency in politics and administration research draws heavily on ideas that are well rehearsed in International Relations theory and public policy about the visibility of decision-making. Here however, that visibility is explicitly about the relationship between elected officials and the voters they serve, in order to enhance both trust in the political process and the trustworthiness of the actors who play a part in it.[[138]](#footnote-138) Transparency is about access to government information, and specifically it is about the formal and legal rules governing a right of access. In addition, it is about citizen perceptions of the level of transparency that they enjoy. According to this interpretation, transparency can be measured in terms of citizens’ beliefs about the amount of secrecy that governments exercise and the secrecy for which they have made formal provision by legislative or other means.

Much like the construction of transparency that has been developed by public policy researchers, in administration research focuses on transparency as a means of improving government outcomes and as a mechanism for fostering public support for government activities. As such, there is much interest in how governments seek to promote operational transparency to engender this support.

In respect of the design of organisational transparency, Lodge and Stirton have constructed a transparency model that integrates four mechanisms: voice, representation, information and choice.[[139]](#footnote-139) This model integrates a range of ideas about visible decision-making and participation, in order to enhance citizen input and thus their cooperation with the implementation of policy choices that they feel have been designed with their needs in mind. Voice and representation relate to the process of policy selection, construction and deliberation, whilst information and choice are concerned with policy implementation and public service provision. Stirton and Lodge write in the context of the rise of the regulatory state and the transition from heavily centralised forms of public service provision, to a mixed-state in which some services are contracted out to private providers. It is argued that an increase in voice and representation can secure a public service ethos in privately managed public services, whose service delivery is monitored and managed through the provision of information and the exercise of public choice.

Public administration research on transparency is interesting insofar as it promotes transparency to counter government secrecy rather than corruption. In doing so it draws upon the notion that democracy necessitates a certain measure of transparency in order that citizens can effectively participate and in turn be effectively represented. It also serves to reinforce ideas of popular sovereignty and of citizens being at the heart of what governments do. Transparency is thus a measure of democratic quality, openness and secrecy stand at opposite ends of a spectrum. The positions that states occupy on the spectrum indicates how citizen oriented a government is and how responsive it is to the evolving needs of its population.

### Conclusion

This chapter has traced the range of concepts, doctrines and principles that have been attached to the idea of transparency throughout its long and varied history. It has highlighted how in contemporary discussions about transparency, in a range of different settings, ideas about what transparency is to be used for and what it can achieve invoke aspects any of the older philosophical doctrines on openness. Nevertheless, it has also highlighted that the contemporary discourse has manipulated the concept of transparency and expanded the import of its metaphor in order to adapt it to new challenges and new circumstances.

This conceptual crowding suggests at once both opportunities and challenges. The apparent malleability of transparency, both in theory and practice is clearly something that has contributed to its contemporary popularity, it might also be genuinely indicative of transparency’s potential contribution to governance and to policy design. On the other hand contemporary doctrines of transparency appear to have emerged within specific policy domains which might not be readily transferable. It has been noted that there is no single underlying objective or transparency idea, which would serve to unify the disparate range of policy mechanisms, procedural tools and organisational forms that operate under the banner of transparency. Though many of the ideas about transparency discussed here have taken a view on openness, there is still much to be debated about what specifically is to be opened up, how it is going to be done and who specifically that openness should benefit. In mastering these specific questions about scope, design and implementation, there is the potential for much conflict and confusion.

Further conceptual clarity needs to be sought in terms of the specific contribution that transparency is making to accountability and democracy and how these related concepts interact. As was discussed in *Section 2.2.5* on the relationship between the terms ‘transparency’ and ‘publicity’, the two terms may carry similar connotations, but they are not in fact the same thing. Does transparency incorporate accountability or merely facilitate it? Similarly, can transparency enhance democracy through information provision, or does it merely establish a pre-condition for democratic enhancement? The discussion on transparency in public policy above would suggest that there needs to be something more than mere information provision.

A final point to consider at this stage is whether institutions of government and governance can have a legitimate interest in eschewing the principle of transparency and indeed in doctrines that contradict the openness ideal. In *Section 2.4.2.3* on politics and administration, it was suggested that policy research in those areas had expanded the idea that transparency is supposed to counter corruption, to the idea that transparency works to root out secrecy. Nevertheless, it was also highlighted in that section and in the discussion on transparency in International Relations research that, that there might be circumstances in which secrecy is in the legitimate interests of relevant stakeholders, particularly where openness might allow illegitimate interests to control the decision making process, and in international negotiations where there is information asymmetry between states. One might add to these, citizens’ interests in securing the privacy of their own personal data and the state’s duty to secure this on their behalf.[[140]](#footnote-140) Concerns which may become exacerbated in the context of the mixed state that was discussed above.

*Chapter 3* will now turn to the analysis of the European Union’s adoption of the transparency idea and the construction of its own transparency framework. It will consider the extent to which the Union has reflected on and adopted extant conceptions of transparency, along with whether it has consciously chosen to modify those conceptions and use transparency for its own specific purposes. In doing so, attention will be paid to whether or not the EU has offered any definitional and conceptual clarity to transparency itself and to the goals that it would like transparency to achieve, demarcating how and where transparency interacts with other objects of public policy to achieve those goals. Furthermore, attention will be paid to how the Union has sought to overcome any apparent tensions between the way in which it wants to use transparency and other legitimate, yet contradictory ideas, such as secrecy.

# 3. Towards a Transparent EU: Openness and Secrecy in a Contested Political Space

Tying together the responses to various structural questions about transparency as a policy tool and as a component of modern governance, specifically in relation to its scope, design and implementation, relates directly to an underlying ontological concern about the goal(s) or objective(s) that the European Union is trying to achieve by further embedding transparency within its constitutional architecture, policy development and institutional working methods. In *Chapter 2* it wasdemonstrated that a complex epistemic historiography in European philosophy and political governance, which is deeply suffused within the contemporary debate and policy literatures across a range of governance disciplines.

This chapter is concerned directly with the first sub-research question: how have the centralised institutions of the European Union conceived of, developed and communicated the relationship between transparency and legitimacy? It will further explore some of the theoretical ideas introduced in *Chapter 2* and build upon that analysis by considering explicitly the specific goals or objectives that have been pursued in the name of transparency in the EU political and institutional context.

By examining specifically the ontological justifications that the Union’s institutions have variously supplied in pursuit of an emerging transparency agenda, it will be possible to consider the ways in which the Union’s transparency narrative has relied upon specific theoretical configurations which characterise transparency as a legitimacy enhancing tool and as a means of enhancing the proximity gap between the institutional architecture and the people of Europe. As with the preceding chapter, this chapter will examine in a broadly chronological format a number of the significant stages in the development of the Union’s loosely correlating transparency framework, demonstrating where it has been influenced successively by divergent institutional perspectives and the phenomenon of cross-fertilisation. It is to be recalled from *Chapter 1* that the EU’s legal order is one characterised by legal transplants, in which a constant process of mutual influence informs the evolving supranational order and its relationship with the legal orders of the member states. In this highly charged and somewhat febrile environment, surely the conceptual crowding that has characterised transparency’s historical emergence and development would likely continue as transparency took root in the EU institutional space?

On the latter point, the thorny issue of terminology raises its head once again. It will become apparent in the discussion that follows, that from the inception of the debate on European transparency, until at least the Commission’s White Paper on Governance[[141]](#footnote-141) (2001), transparency and access to documents are, for all practical purposes, regarded as synonymous by the institutions. Indeed, whenever increasing transparency or openness is discussed by the institutions, it tends to occur in the interinstitutional debate about whether the policy on access to documents is extensive enough and whether it is supported by an appropriate legislative and or constitutional footing. It is only after the White Paper that a broader and more nuanced approach is taken to transparency, led by the Commission’s focus on transparency as a mechanism for regulating lobbying interests and for managing the process of policy formation.[[142]](#footnote-142)

This chapter will proceed by briefly outlining the nature of the EU’s institutional working methodology, along with the specific events that are viewed as the catalysts of the Union’s transparency debate (*Section 3.1)*. Subsequently, the focus will turn to the various approaches taken by the institutions in the construction of a policy on transparency and access to documents, building upon the potted history offered in *Chapter 1.* *Section 3.2* will analyse the early evolution of the policy, which concludes with the adoption of Regulation 1049/2001 and the Commission’s White Paper on Governance. *Section 3.3* will then consider some more recent developments, such as the development of digital registers of documents, the use of the internet to operationalise transparency, and the failed attempt to Recast Regulation 1049/2001, which points to shifting fault lines in the interinstitutional approach to transparency. Finally *Section 3.4* will reflect on the evolution of the EU’s transparency landscape, considering how institutional assumptions about transparency’s effects have produced the current state of affairs.

### 3.1 Governing in the Shadows: The EU’s Working Methodology

Fluctuating power relationships within the EU’s centralised institutions have altered the Union’s working methodology significantly in the last two decades or so. The EU’s transparency journey commenced in the early 1990s, at a time when the ‘cloak of secrecy’ could be said to be an ‘essential part of the Council’s methodology’.[[143]](#footnote-143) Today, the European Parliament as an (almost) equal co-legislator has diminished the legislative stranglehold of the Council of Ministers, rendering the process of creating legislation much more open as a result, not least because the Council has yielded to the imposition open meetings provisions when it is acting in a legislative capacity.[[144]](#footnote-144)

Similarly, both the Council and the Commission have had to respond to political pressure from the Parliament and civil society groups in the field of access to documents, where there have been a number of legal challenges to the use of discretionary exceptions to access, in both legislative and administrative contexts. These challenges have, on many occasions, been supported by the powerful EU courts in Luxembourg, keen to inject their own view on the implications of greater transparency on the quality of EU democracy.[[145]](#footnote-145) In addition, by keeping transparency high on the political agenda, governments in the member states have responded by accepting (some enthusiastically and others reluctantly) the progressive constitutionalisation of the transparency idea in increasingly hard legal rules, as was indicated in *Chapter 1.*  Notably, the Title II provisions of the Treaty on European Union,[[146]](#footnote-146) along with Article 15 TFEU, now form the core transparency edifice of the treaty structure. They seek to promote active citizen participation (both directly and indirectly through civil society groups and national parliaments), effective representation, consultation and the scrutiny of Union action, along with reiterating extant guarantees on access to documents held by the institutions.[[147]](#footnote-147)

Nevertheless, whilst the working methodology of the Union’s centralised institutions has changed markedly over the last two decades, so has the political context in which they operate. In the introduction to *Chapter 1*, it was noted that the exercise of supranational power by the institutions engenders the very real exercise of sovereignty on behalf of half a billion European citizens and the 28 member states to which they belong. The Council for instance, negotiates directly with third countries on the conclusion of international agreements, whilst the Commission has increasing influence in hitherto exclusively domestic policy areas, particularly in relation to national budgets and monetary policy.[[148]](#footnote-148) This raises questions not only about whether the development of EU transparency policy has kept apace with the evolving scope of supranational power, but about whether it can, in any instance, provide the structural preconditions necessary for the democratic and legitimate exercise of that power.

Presently, the state of EU transparency policy stands at something of a crossroads. As the institutions adjust to, endorse or react against the impact of transparency on their working environments, the continuing presence of older ideas that support ‘diplomatic’ modes of working, and a legitimacy culture presupposed on ‘outputs’ have exacerbated interinstitutional tensions. In legislative and administrative policy contexts, the Commission and the Council have expressed concerns about the point at which transparency occurs to render their actions publicly visible, and whether in the preparatory stages of policy development, there ought to be a necessary measure of secrecy.[[149]](#footnote-149) For the Council in particular, there is concern that the process of consensus building through deliberation is unduly hampered by enhanced visibility and the scrutiny of subjective interests.[[150]](#footnote-150) Whilst all EU institutions recognise the need for a measure of secrecy to protect legitimate interests, including personal privacy and national security, there is still a great deal of disagreement about the point at which that secrecy ceases to be legitimate, and in turn the point at which transparency begins to serve the democratic interest.

#### 3.1.1 Challenging Institutional Secrecy: Transparency’s Catalysts

The uneasy passage of the Treaty of Maastricht is often cited as the primary catalyst for change. The treaty symbolised a new stage ‘in the process of creating an ever closer union…in which decisions are taken as closely as possible to the citizen…’[[151]](#footnote-151) Nevertheless, its rejection by the Danish electorate threw into stark relief concerns that were being voiced in a number of quarters about the design of the EU political system, its institutional structures and its rule-making procedures.[[152]](#footnote-152) In its existing form, the Union fell foul of many of the ideas bound up with Western European conceptions of modern democratic governance (particularly in relation to the structural decoupling of input representation from the Union’s policy making and legislative processes,[[153]](#footnote-153) which along with a culturally disparate demos, presented a growing proximity problem.[[154]](#footnote-154)) These concerns needed to be addressed if the Union was to continue to exercise of power in growing fields of competence.[[155]](#footnote-155)

Earlier attempts to alleviate some of the excesses of the institutions’ diplomatic working methodology (particularly that of the Council), by introducing direct elections to the European Parliament, in order that the latter institution might seek to hold the others more accountable, had not proven particularly successful.[[156]](#footnote-156) Information about both the legislative and executive activities of the Council and the Commission was released piecemeal, by Ministers and Commissioners speaking strictly off-the-record to trusted Brussels-based journalists.[[157]](#footnote-157)

Partly in a bid to assuage the concerns of the Danish electorate, who had been invited to vote again in a second referendum on the Maastricht Treaty, and partly in response to mounting external pressures from journalists amongst others, the Council and Commission promulgated a Joint Code on Access to Institutional Documents in late 1993.[[158]](#footnote-158) The Code was designed to implement Maastricht Treaty Declaration No. 17, in which transparency is allied directly with the concepts of institutional democracy and public confidence.[[159]](#footnote-159) It marks the first significant watershed in the Union’s transparency framework, and the beginning of an expedited process of constitutionalisation for its policy on access to documents.

Nonetheless, though the Code was promulgated swiftly, it did not signify an institutional denouement, in which EU governments and civil service elites suddenly came to believe that the legitimacy of their actions was contingent upon the extent to which they allowed themselves to be publicly scrutinised.[[160]](#footnote-160) Civil society groups (chiefly journalists and researchers) had to rely on the Joint Code to challenge institutional decisions before EU courts,[[161]](#footnote-161) thereby maintaining the pressure on the Council and Commission which shaped both the scope and the substance of the nascent right of access. Equally, a conscientious EU Ombudsman tackled the institutions on the quality of their interactions with the public,[[162]](#footnote-162) which pressed home the arguments being made in Council by a small clique of pro-transparency member states (notably Denmark, Sweden, the Netherlands and Finland).

A second watershed event occurred in 1999. The resignation en masse of the Santer Commission revealed just quite how toxic the pervasive culture of secrecy continued to be, along with how it had facilitated cronyism and corruption in the upper echelons of the Commission, which in turn engendered a reluctance to accept even the vaguest conception of ministerial responsibility.[[163]](#footnote-163) Following a report sent to the European Parliament by whistle-blower Paul van Buitenen, which alleged the existence of widespread malfeasance, along with the suggestion that there was a co-ordinated effort to hinder auditors’ investigations, the European Parliament debated a motion of censure.[[164]](#footnote-164) Though this was later defeated as a result of internal disagreement between party political factions (the allegations largely centred on two commissioners who both belonged to the Socialist grouping), there was support for the establishment of a Committee of Independent Experts. The committee determined that even though many Commissioners were not guilty of wrongdoing, the absence of any collective responsibility questioned the tenability of the Commission as a whole. The problem boiled down to a lack of transparency, resulting in a lack of accountability and hence the reluctance to accept political responsibility.[[165]](#footnote-165) This needed addressing urgently. Administrative and political culture was tainted at all levels. Transparency thus came to be regarded as intrinsically valuable insofar as it could facilitate good governance within the institutions.

The collapse of the Santer Commission pressed home the case for formalising EU transparency. Prior to the Treaty of Amsterdam, access to documents provisions had been drawn up by the institutions under the auspices of their own rules of procedure, rather than through secondary legislation.[[166]](#footnote-166) Since the treaty incorporated a new Article 255, requiring the institutions to bring forward a proposal for a Regulation on access, it would be possible for transparency to make the transition from voluntary administrative principle, moving towards becoming a fully-fledged general principle of European law in its own right.[[167]](#footnote-167)

### 3.2 The Rationale for Improving Access: Community, Closeness and Confidence

It is by responding to the increasing political salience of the Union in the lives of the European people, that its institutions began to articulate their own rationale for increasing transparency, specifically with a view to rectifying the perception that Union elites were increasingly distant and out of touch. Following the European Council’s Birmingham Declaration in 1992, entitled ‘A Community Close to its Citizens’,[[168]](#footnote-168) the Commission set out plans for improving public access to the institutions. This began with a comparative survey of access to documents legislation amongst the member states and some non-member countries. The Commission concluded:

‘Improved access to information will be a means of brining the public closer to the Community institutions and of stimulating a more informed and involved debate on Community Policy matters. It will also be a means of increasing the public’s confidence in the Community’.[[169]](#footnote-169)

This subsequently informed a Commission ‘Communication on Openness in the Community’[[170]](#footnote-170), which set in motion the arrangements for formalised access that became the Joint Code. The Commission seeks to establish a mission for transparency and openness, in which it can be used to manage public perceptions of the institutions and their work, providing suggestions in Annex 3 about how actors can work to improve ‘media relations’, ‘networking’ and ‘image’. The Commission’s overall objective is to:

‘[E]xplain its actions more clearly and provide adequate understanding about the Community’s work. In this case…to dialogue with and facilitate participation of the public in the most effective way. It therefore has initiated a set of measures aimed at increasing openness and transparency in its relations with the public…’[[171]](#footnote-171)

This report represented the Commission’s ‘completed’ response to the task that it had been given to implement Declaration No. 17 at Maastricht. It built upon two earlier Communications, in which the focus had been to harness the public opinion of citizens who followed Community affairs closely.[[172]](#footnote-172) As such the proposed measures were largely focussed on administrative reform to the Official Journal along with the creation of an ‘Interinstitutional Yearbook’, which would set out in detail the ‘organigramme’ of the institutions.

In these initial stages of transparency reform, it is evident that repeated assumptions are made about the nature of the relationship between transparency and legitimacy, since transparency strengthens democracy by positively disposing the public towards the activities of the Union. At this time however, transparency is being used specifically to mean access to information or access to documents only:

‘[T]he public’s right of access to information is considered to be a vital element in the proper functioning of a free society as it further extends democracy within the administrative process’.[[173]](#footnote-173)

Furthermore, from the perspective of the Commission, it does not have a duty to sell the legitimacy of the Union directly, but this is instead a job for the member states:

‘The Member States play a particularly important role in the Community, since it is they who enact Community policy. Given this importance, the Commission invited Member States to take further action to improve openness at the national level in the implementation of Community policies.’[[174]](#footnote-174)

It is evident that at this time, transparency was confined to being a passive administrative right, limited in scope. The Commission of course may have held legitimate concerns about the extent to which it was politically appropriate for it to communicate directly with European citizens and bypass the member states. It might also have had some concerns about whether it had the competence to ‘educate’ European citizens. Furthermore, a more proactive position would clearly have had both logistical and financial resource implications.

Nevertheless, there is something of a dichotomy here. If legitimacy is enhanced by selling the Union to its public, then how can that be achieved by merely granting access to dry (and often unintelligible) policy documents, via an internal rule of procedure that comparatively few ordinary citizens would have any knowledge of? Of course it is possible that the Commission believed it might facilitate the dissemination of information in the media through promoting access for interested citizens and civil society groups. This however signally discounts that possibility that the framing of that information by domestic media channels could exert an influence (positive or negative) on citizens’ perceptions.[[175]](#footnote-175) Consequently, it is contingent on harnessing the goodwill of domestic media channels to provide reporting that accurately and favourably represents EU institutional and policy positions. Perhaps naively, this seems to ignore the domestic political context within the member states, wherein domestic policy matters are prioritised at the at the expense of EU level issues. This is further compounded by the tendency of domestic institutions and political figures to exploit strained relations between the member state and the Union for domestic political gain. This can be to safeguard elected politicians’/political parties’ popularity at the expense of a ‘distant’ and ‘bureaucratic’ EU. Equally in member states with a vehemently Eurosceptic print media, such as the UK, anti-EU positions may be almost universally pursued, even where a policy matter is only tangentially connected to the Union and its spheres of competence or indeed where the reporting concerns non-EU institutions such as the European Court of Human Rights in Strasbourg.

#### 3.2.1 The Growing Influence of the European Parliament

Prior to the introduction of the Joint Code, it was the Commission who had taken the lead on the development of a centralised transparency policy. The Joint Code however had not been implemented without some controversy. The Netherlands, practically a lone voice in the Council at this time, had petitioned the Court of Justice, concerning the legality of introducing the Code via the Council’s and the Commission’s internal Rules of Procedure.[[176]](#footnote-176)

At this juncture, the European Parliament’s Committee on Institutional Affairs produced its own motions for a resolution on ‘Openness in the Community’ and for the ‘Transparency of Community Legislation’.[[177]](#footnote-177) The committee signals its support for the Commission’s move to increase access to documents, but then it goes somewhat further by arguing that this right should extend to the ‘preparatory or related proceedings of the authorities’ of the EU, and ‘in general, to all of the documents in their possession’.[[178]](#footnote-178) Arguably, the European Parliament is making the first formal call to expand the scope of the right to include information held and produced by the Comitology committees, by Coreper and many other ‘discrete’ administrative and executive ‘authorities’, in addition to the other centralised institutions not covered by the Code. Furthermore, it argues that transparency must extend to the entire legislative decision-making process,’ since ‘the various institutions cannot be said to be sufficiently open if the Community system as a whole remains impenetrable to the public.’[[179]](#footnote-179)

The explanatory statements that accompany these declarations detail an ambitious programme that would codify the entire Community decision-making process, along with proposals to actively communicate with the Union’s citizenry information about each of the Community institutions, how they exercise their authority and how they interrelate. The most far-reaching of the proposals, which builds upon a review of the classification of Community acts that was tabled at Maastricht, recommends the appointment of a high-level committee of jurists to catalogue the treaty articles according to whether they perform a constitutive or legislative function, in order that the Community system is more ‘understandable to the citizens of the Union’.[[180]](#footnote-180)

This early call for the extensive formal constitutionalisation of the treaty system in the context of an emerging policy framework on transparency and openness, demonstrates how the European Parliament was keen to articulate a vision in which transparency is firmly wedded to the democratic principle. Nevertheless, their focus is still primarily the constitutionalisation of the treaty system, which has more to do with it perceived penetrability than with fostering active interest and engagement in the Union itself. Hindsight also shows how later attempts at constitutionalisation through the Constitutional Treaty project prompted Europe’s citizens to question more vociferously than ever before the legitimacy of the Union, its operations and its institutions, particularly in terms of the reach of its powers.[[181]](#footnote-181)

Notwithstanding how meritorious such an exercise might be, it can be seen that the European Parliament is pushing the boundaries somewhat, by repeatedly articulating a strong and direct link between transparency and democracy, not only so that the institutions can benefit from increased public support, but so that the public can participate by holding those institutions to account:

‘The degree of openness of administration reflects the esteem in which parliamentary democracy is held by governments... It enables him to criticise, control and influence government channels either through his representatives in parliament or directly.

‘...It is a civil right that require of government bodies that they lay open the decision-making process to public inspection and that they explain the underlying motives and consequences of policy or policy proposals... Openness of government also reflects the extent to which government takes seriously the rule of law...

‘Parliament wants the Union to develop into a fully-fledged, democratically accountable system of law in which citizens are protected ...’[[182]](#footnote-182)

The links that the Parliament makes here to effective accountability structures, oriented outwards from the institutions towards the public, are likely to have been influenced strongly by the use of transparency measures to facilitate accountability in the national context. Not only did it have access to the Commission’s earlier comparative survey on national access to documents regimes, MEPs were also able to comment on domestic arrangements.

At this juncture, the European Parliament appears to see itself as democratically responsible for promoting transparency as a political necessity; it is not only an instrumental component of democracy, it is also intrinsically valuable. In late 1994, the European Parliament Delegation to the Interinstitutional Conference presented a draft set of recommendations on ‘Transparency and Democracy’.[[183]](#footnote-183) The recommendations represent some of the most expansive institutional statements on the importance of transparency for the continuing legitimacy of the European project, and signify how the Parliament had very quickly become the most forceful advocate for increasing transparency amongst the law making institutions:

‘Transparency is both an institutional concept and a conceptual component of the principle of democracy. A democratic process without transparency is unthinkable. **The legitimation of any authority, including that of the European Community, requires political events, including political objectives chosen, to be properly understood.** Political scrutiny in particular is impossible without detailed information of the subject matter to be scrutinized. A logical chain of requirements thus arises: **democracy – legitimation through participation and scrutiny – transparency.** The first presupposes the second and the second presupposes the third.’[[184]](#footnote-184) [**Emphasis added**]

After developing the theoretical relationship between transparency, legitimacy and democracy, the recommendations seek to establish transparency as a legal principle, suggesting that the obligations it contains arise from existing Union law:

‘1. ...Transparency is negotiable only up to a point. We cannot negotiate over transparency as such: the transparency principle is a legal principle arising from Union law.

‘2. The justification for this position is that the principle of democracy is an expression of existing Union law, since transparency, as was argued above, is a key element or conceptual component of the democracy principle. Any new interinstitutional agreement which seeks to reduce the transparency deficit should not be seen as embodying an understanding attitude on the part of the institutions of the Union but as the fulfilment of an obligation enshrined in the Treaty itself...

‘Democracy would remain a theory with no practical application if practical consequences were not drawn from the theory. This requires consistency. Without such consistency the credibility gap currently facing the Community institutions will widen. **Transparency is a crucial means for recovering the lost credibility’**[.][[185]](#footnote-185) [**Emphasis added**]

There is a clear crystallisation here of the belief that the logical result of providing access to information and increased accountability is the creation of a new avenue for citizen participation, which itself is capable of mitigating perceived deficiencies in existing mechanisms of democratic representation, arising from the unusual division of powers amongst the centralised institutions:

‘It is of the highest importance for the credibility of the European Union that its decision making process be as transparent as possible, especially in view of the difficulties of ensuring democratic control of this process, and of its remoteness from European citizens.’[[186]](#footnote-186)

In this sense, legitimacy is a product of increased transparency, though it remains unclear whether the Parliament believes that this legitimacy is produced only at the point that there are effective accountability mechanisms in place, to supplement the provision of information and allow citizens to influence the on-going political process. What is apparent is that the Parliament is convinced not only of transparency’s ability to sustain the status quo, but also of its ability to recover lost public credibility, i.e. to create legitimacy that has hitherto been absent. To press its case yet further, transparency is not only desirable, but it is mandated by existing Union law, both in terms of the constitutive principles on which the treaty system has been built, but also in relation to specific commitments to respect fundamental rights, the introduction of a European category of citizenship and through Article 191 of the EC treaty (now repealed) which stated that: ‘Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.’

#### 3.2.2 Setting Standards: The European Courts’ Consolidate Transparency Gains

Whilst the European Parliament had been keen to promote a vision for transparency in which it took on a legitimacy enhancing role, the Court of First Instance and the Court of Justice were keen also to consolidate transparency gains, forcing the institutions to live up to the obligations that they had imposed upon themselves.

In early 1995, the CFI delivered its judgment in *Carvel,*[[187]](#footnote-187) which had cast a spotlight on the continuing secrecy of the day-to-day deliberations of the Council. The Council had contended that its rules of procedure, which stated that deliberations would take place in secret, could be invoked to overcome the provisions of the Joint Code on Access. In the absence of any evidence that the Council had conducted a comparative assessment of these competing provisions, the CFI upheld Carvel’s appeal, granting him access to the minutes he had requested, which included material relating to the development of policy in the nascent Justice and Home Affairs Pillar. The court did not however go so far as to make any statement regarding the legal position of transparency within the Community system.

The judgment was significant not only for being the first challenge to the Council’s interpretation of the Joint Code, but also because it adopted a teleological method that would become characteristic to the subsequent case law on the interpretation of the Joint Code (and later on the interpretation of Regulation 1049/2001 on access to documents.) This method has sought time and again to situate both the Code and the Regulation in the context of its broader democratic purpose.[[188]](#footnote-188) In doing so, the Courts reiterated much of the reasoning of the European Parliament in stating that the purpose of providing access to documents was to provide for the public control of the political activities of the institutions, by providing a means of scrutiny.

Though the Courts were evidently keen to constitutionalise access to documents, they did not go so far as to argue that the Code in itself needed to be placed on a legislative footing. As might be recalled from the foregoing subsection, the Court of Justice dismissed an appeal from the *Netherlands*, which had argued that the adoption of the Code via internal rules of procedure affected the institutional balance of power and was an unsuitable mechanism for conferring rights on individuals.[[189]](#footnote-189) This was despite intervention from the European Parliament, who had argued that the principle of transparency was mandated by Union law and hence should have a legislative footing. The Court of Justice had to tread carefully, if it upset the balance of power by illegitimately crossing over into the legislative realm itself, then it risked fundamentally destabilising the fledgling transparency project. Constitutionalisation would have to be led by the law-making institutions; from there it could be moulded by the Courts, as litigants sought determinations on the fine detail of the provisions.

#### 3.2.3 Amsterdam and Beyond

The pressure exercised by the Courts and the European Parliament exerted an influence in the build-up to the Intergovernmental Conference in 1996, which had a remit to strengthen the democratic mandate of the Union, in anticipation of the prospect of further enlargement. Here the Netherlands and Denmark, who both have strong open government traditions, were keen to keep transparency high on the agenda.[[190]](#footnote-190)

In addition to pressure from the Court, there was concern that the Council had not really adapted its working practices in line with the spirit and purpose of the new right of access, to which the Council’s Secretariat-General responded quite defensively:

‘[B]efore the launch of this new official approach to openness and transparency, the flow of information on Community affairs in general, and on the Council’s discussions in particular, was already characterised by the existence of a multitude of sources that were particularly active in that area...

‘Rather than substantially increase the effective flow of information, the new approach has thus accentuated recognition that anyone must have the fullest possible access to information...

‘Additional measures to increase the transparency of the Council’s proceedings have come into being in the meantime.’[[191]](#footnote-191)

On any analysis, the Council has been consistently the least positively disposed institution to the theoretical arguments advanced in defence of transparency. Its intergovernmental origins and composition are naturally geared towards both diplomacy and diplomatic privilege.[[192]](#footnote-192) The Council has of course had to grapple with sustained increases in requests for access to its documents, whilst managing a plurality of interests that represent very different national government traditions on openness.[[193]](#footnote-193) In addition, the Council has had to manage perhaps the biggest institutional change, in the context of limited dedicated resources.

Nevertheless, concerns about how the Council was responding to a new pro-access culture propelled transparency yet again onto the constitutional stage, making it a hot topic of treaty reform at Amsterdam. The Treaty (signed 2 October 1997, ratified 1 May 1999) introduced a modification to Article 1, Title 1 TEU, inserting the words ‘as openly as possible’ to the construct ‘ever closer union’ in which decisions are taken as ‘closely as possible to the citizen’. This arguably was to herald a greater emphasis on transparency, and indicates that it was now being considered in constitutional terms as an organising principle, mediating information-driven power relationships between Union stakeholders. The other significant development was the introduction of Article 255 TEC (now Article 15 TFEU) which provided for the creation of a Regulation on access to documents covering the Council, the Commission and the European Parliament, to be adopted under the co-decision procedure. Each of the three institutions was required also to establish specific provisions regarding access to documents in its own rules of procedure.

#### 3.2.4 Auditing Developments: The White Paper on Governance

Following the ratification of the Treaty of Amsterdam, the Commission once again takes the helm. To begin with, it decides to audit its own progress in the field of openness and information.[[194]](#footnote-194) Much like the Council, the Commission is at this juncture keen to (almost defensively) reflect on how it has delivered on its earlier policy commitments. It does however consider also how it might formalise arrangements for a permanent dialogue with civil society and business groups, before shifting the focus specifically to how transparency might be operationalised through its press campaigns, the Europe Direct service and upgrades to the EUROPA server.

By 2000, the Commission seems also to have shifted in its view on transparency. Whilst it continued to endorse access to documents in principle, a number of its newer initiatives began to focus more explicitly on how increased transparency can facilitate the Commission’s management of its own operations, including mitigating the effects of organised lobbying. This shift in focus can be read in two contradictory lights. On the one hand, if the Commission is genuinely committed to facilitating citizen participation and inclusion in the policy development process, then it must also mitigate the more sinister effects of corporate and organised lobbying, which can be used to stifle individuals and civil society from exercising their voice. In addition, the Commission is responsible for ensuring that staff within the directorates general are assessing access requests according to the same criteria, and subject to the standards enumerated by EU courts. Conversely however, focussing efforts on increasing the transparency of other actors operating in the EU political space, rather than continuing the movement to ‘open up’ the institutions towards the public, arguably shifts the nexus of policy efforts away from directly combatting citizens’ disenfranchisement with the perceived distance of the institutions from their day-to-day lives.

The issue of enhancing affective loyalty towards the institutions was by 2000 an established theme, which is considered again at length in the preparatory work to the White Paper.[[195]](#footnote-195) There was clear sense of urgency attached to burning questions about how to build a sustainable European public space, which does not appear to have materialised after some eight years of concerted institutional interest in transparency:

‘...[C]itizenship of the Union is much more a legal than political reality... [C]itizens have little in the way of a European political consciousness and are not given much encouragement nor facility to engage in a consistent political dialogue with these institutions.’[[196]](#footnote-196)

‘[A] European democratic debate that would not be properly designed, conducted and finalised would inevitably result in a serious confidence crisis throughout the EU.’[[197]](#footnote-197)

Whilst the rhetoric is strong, in one important sense it does not add anything new to the debate. The Commission had been asserting since 1993 that transparency was welded to the democratic principle since it could ‘build confidence’ in the institutions and in European governance. The resulting White Paper[[198]](#footnote-198) condenses the extensive preparatory guidance into a five specific principles of ‘good-governance’, from which could be developed a series of proposals for change. The idea being that the document would be a high-level road map to secure the ‘future of Europe’. Interestingly, transparency does not feature, though openness does. All five principles are in fact transparency-oriented and there is the sense that the Commission has come to view transparency as an umbrella concept for openness, access to documents, participation and accountability; though this would inverts the relationship between transparency and openness, as set out in *Chapters 1 & 2,* where openness was taken to be the umbrella concept:

‘**Openness**. The institutions should work in a core open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions.

**‘Participation**...Improved participation is likely to create more confidence in the end result and in the institutions which deliver policies.

**‘Accountability**...Each of the institutions must explain and take responsibility for what it does in Europe.

**‘Effectiveness**.Policies must be effective and timely...

**‘Coherence**.Policies and action must be coherent and easily understood...

‘The Union is changing as well...its legitimacy today depends upon involvement and participation...’[[199]](#footnote-199)

#### 3.2.5 A Regulation on Access

The adoption of Regulation 1049/2001 on 30 May 2001 represents the culmination of a first legal-constitutionalist phase of transparency reform in the life of the European Union.[[200]](#footnote-200) At this juncture, transparency as access is fully embedded into the constitutional framework of the Union via Article 255 EC, though its actual impact on the institutional culture of the Commission, the Council and the Parliament, as has already been alluded to in the foregoing section, varies somewhat. During the passage of the Regulation, the Parliament had engaged combatively with the Commission, having garnered a strategic advantage following the resignation of the Santer Commission in 1999.[[201]](#footnote-201) In these compromised political circumstances, the Commission could not risk resisting calls for greater transparency, notwithstanding any genuine concerns it might have had about the impact of the Regulation on the effectiveness of its day-to-day work.[[202]](#footnote-202) The Council meanwhile, also seemed temporarily more amenable to increasing access, since Sweden had joined the Union in 1995, the Netherlands was no longer a lone voice in internal deliberations.

There were some notable procedural failings in the promulgation of the Regulation, particularly in relation to the apparent lack of consultation. This was criticised both by the European Ombudsman and the UK House of Lords, in a detailed and critical report.[[203]](#footnote-203) Member states with longstanding traditions of openness were concerned that the requirement to ‘not hamper the proper application of the regulation’ appeared to impose a requirement on national regimes to be no more liberal than their EU counterpart.[[204]](#footnote-204)

The Regulation is generally regarded as being successful in echoing prior commitments to greater transparency; the preamble declares that the purpose of the regulation is to give ‘the fullest possible effect to the right of public access,’ whilst the scope of the regulation covered delegated legislation also. There are however some significant limitations, since the Regulation itself only applied to documents held by the Council, Commission and European Parliament. Nevertheless, owing to pressure from the European Ombudsman, the other institutions, offices, bodies and agencies of the Union (with the exception of the EU Courts) adopt parallel provisions granting access to their documents.[[205]](#footnote-205) Article 15(3) TFEU has amended this position by explicitly including the bodies, offices and agencies of the Union within the right of access that it guarantees.

The most controversial aspect of the regulation has been the discretionary exceptions contained in Article 4. The Commission and the Council have both exhibited a certain reticence to the disclosure of information at an early stage in the legislative process and both have relied upon the exceptions, notably Article 4(3) the so-called ‘space to think’ exception, in order to prevent such early disclosure.

Once again the Court of Justice has been instrumental in unpacking, though its teleological method, the precise import of the Regulation. In sweeping aside concerns the institutions have about the ‘effectiveness of the internal decision making process’, the Court of Justice declared in *Turco* that increased openness ‘enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.’[[206]](#footnote-206)

More recently still, in the topical *Access Info. Europe[[207]](#footnote-207)* judgement, both the General Court and the Court of Justice reiterated this reasoning. The Council attempted to state once again that it harboured concerns about the effectiveness of its decision-making procedure. It suggested that early disclosure might prevent a free and frank discussion, and that it might also wed member state delegations to their previously disclosed positions, thereby preventing the achievement of consensus and as such destabilising the legislative process. The Court countered that by having access to this information, the public would be able to see precisely where and why member states had altered their negotiating positions and this could very well engender public support. Conversely, it is the censorship of this information that would prevent the public from understanding why a legislative proposal had progressed in the way it had, thus delegitimising the legislative process altogether.[[208]](#footnote-208)

### 3.3 Operationalising Transparency Gains: The Process Begins to Unravel?

In the period leading up to the adoption of Regulation 1049/2001, the broad institutional focus had coalesced around the how to adequately frame a legal right of access to documents, rather than on the process of disseminating information by ensuring that institutional documents painted an accurate picture of internal policy making. Equally, there had not been any concerted focus on the voluntary provision of information and the use of extra-legal mechanisms such as the internet, to close the proximity gap and generate affective loyalty.

As part of the Commission’s broadened approach to transparency which accompanied the White Paper of governance, a second operational phase of EU transparency has focussed on how to operationalise access to documents through the internet and the introduction of registers of documents held by the institutions. The Europa portal contains an enormous amount of information on the institutions, their powers and the process of policy formation. This increased use of the internet is regarded as instrumental in the process of proactively enhancing transparency, not only of the EU, but of governments worldwide, public bodies, NGOs and even private corporations.[[209]](#footnote-209) Internet transparency is designed to replicate the transparency of the institution by providing virtual access to its policy making processes. By uploading documents and providing access to data sets, the institution provides additional opportunities for the citizen to engage critically with what is going on, to piece together what is going on in the ‘black box’ and to register their consent or disapproval.

Conversely however, informational transparency through web based services can promote information overload.[[210]](#footnote-210) This can reduce overall levels of transparency as individuals are not always able to discriminate between the relative importance and reliability of competing sources. Equally, the type of scrutiny that this form of transparency encourages is labour intensive and thus could very well disengage all but the most determined citizen.

#### 3.3.1 An Electronic Documents Register

One important mechanism for capitalising on transparency gains has been to digitise the centralised institutions registers of documents, in order to facilitate speedier access and to reduce unnecessary requests for documents that are freely available in the public domain. The importance of this exercise lies in the cataloguing and codification of information that is often already freely available, but which citizens may nevertheless not know how to access. In addition, as the institutions have responded to external pressure to publish more about their internal processes, thereby requiring them to release documents at an earlier stage of legislative development, the Council’s and the Commission’s registers of documents now contain a great deal that might not be freely available elsewhere.[[211]](#footnote-211)

The Commission’s register actually consists of a number of different specialised registers, including a Comitology register, registers pertinent to the different directorates general and a register of expert groups.[[212]](#footnote-212) Following the launch of its Transparency Initiative in 2006, there is also now a register of lobbyists, in order to give a picture of the external actors attempting to influence the policy process.[[213]](#footnote-213) The main body of the Commission’s register contains details of the Commission’s legislative proposals, its autonomous acts, reports and the minutes of its meetings.

Despite this progress, the Commission has come under fire for failing to register all of the documents that it has produced or handled. In particular, there is concern that it is not possible to gain an accurate picture of the documents that the Commission either now holds or has at some time had access to, let alone actually access the content of these documents. Furthermore, both the Commission and the Council have been criticised for overzealous use of the EU Classified Information System (EUCI), which allows for access to documents to be restricted according to four different categories of classification.[[214]](#footnote-214)

On this latter point, it has once again fallen to the Court of Justice to exercise judicial oversight and force the Commission to comply with its obligations. In *Gottfried Heinrich,* the Commission was castigated over the technical implementation of a hitherto unpublished list of items that were to be banned from hand luggage pursuant to a review of airport security regulations. Notwithstanding the sensitive nature of the matter, the Court ruled that where rules requiring individuals to comply with specific measures had not been published, then they could entail no legal effects vis-à-vis the individuals envisaged as being bound by those rules.[[215]](#footnote-215) The import of the case is in fact that the failure to publish rules entailing individual obligations is an infringement of the rule of law, it nevertheless demonstrates how a continuing tendency towards secrecy, particularly in areas perceived as ‘sensitive’, can incline the institutions to not live up to the spirit of their transparency obligations.

A final point of note is that the Commission’s Register has been criticised for being less comprehensive than its counterpart in the Council, which after an initial slow start, is increasingly providing access to documents from a growing number of its sub-committees.[[216]](#footnote-216) In fact, the state of the Commission’s register has been the subject of a successful complaint to the Ombudsman for maladministration. He criticised the failure to keep an adequate register of documents, the failure to deliver on repeated commitments to further develop the registers and the failure to provide any indication of the scope of a new centralised system, initially intended for operation in 2010.[[217]](#footnote-217)

In no small part, the Commission’s reticence in terms of its register of documents appears to relate to its wish to prevent purely internal documents from being disclosed. It has attempted consistently to distinguish between documents that it considers to be part of the legislative process, and documents that it considers to be predominantly concerned with internal processes and operations, including briefings, reports of some meetings and anything containing an official’s personal opinion. At times the distinction is particularly difficult to make, but it is fundamental if the Commission wishes not to disclose a given document, since purely internal documents are excluded from the scope of Regulation 1049/2001.[[218]](#footnote-218)

#### 3.3.2 A New Regulation on Access to Documents?

A wholesale revision/recast of Regulation 1049/2001 has been on the cards since late 2005, which coincided with the Commission’s launch of the Transparency Initiative, the focus of which had been to develop a new register of lobbying interests (as was discussed in *Section 3.3.1* above.) As the existing Regulation had been in force for a number of years, the institutions were now in a position to review its application and amend it in light of the emerging body of case law on access.[[219]](#footnote-219)

A formal proposal was later introduced in 2008,[[220]](#footnote-220) which was quickly followed by a breakdown in negotiations between the law making institutions. Sticking points emerged not only over the type of process being used to implement a new regulation, but also over the Commission’s proposal to narrow the definition of a ‘document’, as part of a package of seemingly more restrictive proposals.[[221]](#footnote-221) Under this restricted definition, documents drawn up or otherwise received by the institutions would have to be formally registered before they are considered to be institutional documents falling within the purview of the regulation. The European Parliament perceived this as offering the Commission and the Council carte blanche to pick and choose what they wished to publish, effectively turning back the clock on access to documents to the culture that prevailed in the early 1990s.[[222]](#footnote-222) Whilst the Council appeared keen to consider the Commission’s proposal for a more restrictive regulation, particularly insofar as it might reduce the administrative burden of responding to access requests, the European Parliament set out their objections at length.[[223]](#footnote-223)

The entry into force of the Treaty of Lisbon provided renewed impetus to re-establish the stilted negotiations process, though they never particularly regained any momentum. In 2011, amidst calls for a recast of the regulation to satisfy the arguably more expansive Article 15 TFEU, the Commission introduced a ‘Lisbonised’ recast proposal to bring the existing regulation under its new legal base.[[224]](#footnote-224) This too however was quickly stilted. A new regulation is technically still under consideration, though the Council concluded late last year that it is unlikely there will be ‘a successful outcome of negotiations’.[[225]](#footnote-225)

Thus far, this interinstitutional deadlock has arguably promoted a degree of transparency policy stability, since in the absence of any institutional consensus on the way forward, the status quo has been maintained, at least at a regulatory level.[[226]](#footnote-226) A number of non-governmental bodies, including Statewatch, have argued that certain exceptions in the existing regulation, in particular the exception contained in Article 4(3) that relates to the internal decision making process, are incompatible with the provisions of Article 15 TFEU.[[227]](#footnote-227)

Nevertheless, the situation readily invites further academic deliberation, not only of the normative import of the new treaty provisions and their requirements, but also of what particular values transparency is supposed to foster within the EU institutional system. The battery of pro-transparency treaty provisions, including Article 1 TEU, Articles 9-12 TEU and Article 15 TFEU, all indicate a continued investment in the belief that transparency and openness facilitate participation and representation, in order to promote the ideal of a collective European political community that has democratic legitimacy. The interinstitutional discord however belies a certain retrogression, particularly on the part of the Council and the Commission. Whether this actually constitutes an institutional retreat from the pro-legitimacy mantra is uncertain. It may very well be indicative of the development of a more nuanced approach, one that takes into account the limits of the legitimacy enhancing potential of access to documents regimes. Equally, both Council and Commission now have two decades of experience of managing that access, along with the costs that it entails and the amount of value that is added, relative to the types of citizen requestor. In any event there is clearly a need to reconcile constitutional obligation with institutional culture, which there doesn’t currently appear to be any impetus for.

#### 3.3.3 Recent Developments: Old Habits Die Hard

Notwithstanding the now frustrated process of recasting Regulation 1049/2001, the post-Lisbon transparency landscape has been characterised by the re-emergence of old habits and even older arguments about the distortion of institutional decision-making processes.

#### 3.3.3.1 Using Classification to Prevent Listing on the Council’s Register

In a report issued in 2014 by the UK organisation Statewatch indicates that the Council is not listing, or otherwise failing to disclose the existence of documents it holds on its own transparency register.[[228]](#footnote-228) This has provoked quite a degree of consternation, the suggestion being that the Council is leaning heavily on the European Union Classified Information System (EUCI) to control external access to its documentary archive. Pro-transparency advocates are also concerned that the EUCI is by design anti-transparency, since at the lowest level of classification ‘Restricted’, the institution may classify any document which may be disadvantageous to the interests of the Union, a definition that appears designed for the purposes of limiting access to embarrassing rather than dangerous or particularly sensitive information.[[229]](#footnote-229)

As was explained very briefly in *Section 3.3.1* above, the EUCI is a fourfold classification system designed to ensure that the Union’s security, including its political, economic and commercial interests, is protected. The system was authorised by a Council Decision of 23 September 13 and it enjoins all Union bodies and agencies established under Title V, Chapter 2, TEU, in addition to Europol and Eurojust to apply in their internal rules of procedure, the basic principles and minimum standards set out in its Decision.[[230]](#footnote-230)

Whilst the Decision is supposed to operate without affecting the implementation of Article 15 TFEU, and the access to information requirements that it entails, the broad terms in which the guidance on the handling of EUCI information is cast, may well encourage institutions to exercise more caution than is strictly necessary.[[231]](#footnote-231) In addition, once information has been classified, only the originator is authorised to declassify the information.[[232]](#footnote-232) Finally, the Decision contains a provision for upscaling the security classification of aggregated EUCI.[[233]](#footnote-233)

The introduction of EUCI constitutes the third occasion on which Union elites have either tightened or attempted to tighten rules on the handling of classified information, since Maastricht. On the first occasion, in 1992, a proposal for a regulation was presented detailing security arrangements for classified information held pursuant to the treaties.[[234]](#footnote-234) This measure, and the negative publicity it attracted was arguably instrumental in the initial Danish rejection of the treaty. Subsequently, in a move dubbed the Solana ‘summertime coup’, the Council agreed via a written procedure that documents marked ‘Top Secret’, ‘Secret’ and ‘Confidential’ should be excluded from public access permanently, thereby modifying the earlier 1993 decision on access to documents (the Joint Code). At the time, civil society groups were dismayed both at the method chosen and the timing. On the issue of the chosen method, the written procedure required no formal vote, with the draft rules merely being faxed out to the COREPER delegates. In terms of timing, many felt it cynical that the measure was introduced at a time when the European Parliament wasn’t sitting. Given its stance on transparency, it almost certainly would not have endorsed the measure.[[235]](#footnote-235)

#### 3.3.3.2 The Council Seeks to Circumvent the Court of Justice

A much more significant development however is the Council’s response to the Court of Justice’s determination in the *Access Info. Europe* appeal.[[236]](#footnote-236) During the appeal, the Council had sought to defend its existing practice of refusing to disclose the identities of delegations when they make recommendations for legislative amendments as part of an ongoing legislative procedure. Significantly, the legislative procedure in question in this case, concerned the recasting of the regulation on access to documents. The Council made the argument that disclosing delegations’ identities could make them slaves to the lobbying of domestic interest groups and thus distort the effectiveness of the internal decision making process. The Court of Justice nevertheless deferred to its now established position that the spirit of the regulation and its legal base required the widest possible access.[[237]](#footnote-237) Being able to hold national delegations to account back home constitutes the very essence of democracy, a sentiment that had been rendered even more concretely in the Advocate General’s opinion.[[238]](#footnote-238)

Dissatisfied however, the Council has postponed making any changes to its internal decision-making procedure. A leaked document,[[239]](#footnote-239) later placed in free circulation on wobbing.eu and statewatch.org websites, reveals that the General Secretariat had asked Coreper to consider whether the Council should amend its practice to reveal the identities of delegations as a matter of course, or whether in fact the Council should adopt a new practice of not recording the identities of those delegations when they make their submissions. Though the latter position might conceivably be regarded as constituting formal compliance with the judgement since the Council cannot disclose information that it doesn’t hold, it seems to openly go against the spirit of the court’s ruling, restricting the *effet utile* of the principle of full legislative openness. Furthermore, it seems that such an administrative change, if implemented, could itself hamper the efficacy of the internal decision making process, since the Council would be unaware of which member state delegations had submitted particular proposals in future debates.

Prior to the unofficial leaking of the internal note, the wobbing.eu website had made an access request, for which it had been granted partial access, with the Council redacting that part where the Secretariat had asked Coreper to consider whether to stop recording the identities of delegations when they make their submissions. The Council’s reply to the wobbing.eu confirmatory application (appeal for full disclosure of the document, including the redacted parts) indicated that it felt Coreper should be allowed to take a decision on how to implement the judgement, “free from external pressures and influence”.[[240]](#footnote-240) It is interesting to note that the Council feels sufficiently emboldened to supply the same material reasoning in its confirmatory application refusal, as it had supplied earlier to the Court of Justice in its unsuccessful appeal. Nevertheless, only six member state delegations[[241]](#footnote-241) dissented from the Council’s collective position by advocating that full access to the requested document should be granted. Wobbing.eu later submitted questions to the EU Ombudsman, Emily O’Reilly, asking whether the negative response can be justified and whether the Council could be considered to be acting in “contempt of court”.[[242]](#footnote-242)

The transparency inertia being exhibited by the Council and (to a lesser extent) the Commission, has clearly resulted in a stagnation of further progressive policy reform within the Union. Though hitherto, that stagnation has resulted in a degree of ‘transparency stability’, the actions of the Council in response to the *Access Info Europe* affair are a matter for concern, insofar as they evidence the Council’s institutional commitment to policy retrogression. The future outlook appears increasingly discordant, in the absence of any institutional impetus to seek compromise on a new access to documents legislation, which would be the obvious springboard for the construction of a comprehensive post-Lisbon transparency settlement. Nevertheless, the current torpor could prove particularly useful in the long-term, since it affords the space for a return to first principles, permitting a re-questioning of what we would like transparency to achieve in a Union context. This of course requires an objective assessment of transparency’s capacities and shortcomings, devoid of the assumptions, presumptions and fears that have fuelled such opinions about transparency, on both sides of the divide. It may very well be that we have reached the high-water mark of transparency in a Union context, particularly from an access to documents perspective, but this needs to be informed by a sophisticated understanding of whether the current regime is providing optimal levels of transparency, not only in terms of the Union’s objectives and commitments, but also in terms of external perception.

### 3.4 Conclusion: How Did we Get Here?

*Section 3.1* of this chapter set out some of the significant catalysts that have been instrumental in the creation of an EU transparency policy. These events signify that transparency, both in terms of institutional culture and as a means of securing good governance, is not a natural (and certainly not inevitable) end point for the European Union and its centralised institutions. In particular, for the Council and the Commission, who do not derive their authority directly from European publics, ingrained institutional cultures have made it difficult at times for these institutions to fully accept the implications of transparency on the internal policy process, even in a legislative setting, where the Union’s own primary law and constitutional order now requires openness.[[243]](#footnote-243) This dichotomy is often characterised in terms of the Union’s sui generis, supranational legal order. It is a polity that simultaneously occupies space within the domestic and international legal spheres, it thus shares characteristics with both and is invariably adjudged by the democratic standards common to each of them, resulting in some inconsistencies and incompatibilities.[[244]](#footnote-244)

Nevertheless, in response to the political catalysts that launched transparency onto the EU agenda, the centralised institutions have engaged (sometimes quite fruitfully) in a process of constructing a role and a rationale for that transparency, often investing quite heavily in their expectations of what they believe transparency can and will achieve in terms of EU legislation and policymaking. This chapter has demonstrated how the EU institutions, over a period of some 25 years, have engaged in the construction of an ontological rationale for transparency that, at many junctures, has presupposed its capacity to facilitate the legitimation of the EU order. Nevertheless, the transparency mechanisms involved have been informed directly by the Union’s own legal heritage and the inheritance that it can draw upon in respect of the member states’ own domestic approaches. Early policy development for instance, became catalysed in response to a comparative survey on member states access to documents legislation. In addition the member states in the Council that had longstanding access to documents frameworks (such as Sweden and the Netherlands) were keen to press home the desirability of legislating to provide a citizen’s right to access official documents, in accordance with their own understandings of political constitutionalism.

Since integration has worked most successfully at the formal legal level,[[245]](#footnote-245) the operationalisation of transparency policy from Maastricht until at least the White Paper on Governance became synonymous with access to documents rather than other, broader and more political openness measures. Despite this comparatively narrow focus on providing formal legal access, the institutions sought to publicly articulate an expansive transparency narrative, framed powerfully in terms of constitutional and democratic fundamentals. Thus the process of legal transplantation invoked a theoretical shift. As was explored in *Chapter 2,* access to government information in the nation state context has traditionally been shaped in terms of arguments about reducing corruption and promoting the accountability of public servants. For the Union however, arguments about promoting accountability, from the very inception of the EU transparency narrative in the early 1990s, became subsumed within a broader debate about the quality of democracy, participation and representation. The nexus of this debate coalesced about how it might be possible to secure the legitimacy of the EU qua polity, specifically in terms of articulating the relationship between the citizens and the institutions, with access to documents being perceived almost as a gateway to increased active participation (though the difficult logistical and process questions of whom, when and in what configurations, citizens would be able to directly engage, remained inexpertly answered.)

The specific focus on legitimacy represents a continuation of the transparency idea and is indicative of the progressive, purposive and increasingly information-centric approaches to governance that were discussed in a number of the modern policy literatures examined in *Section 2.3* of *Chapter 2*. It also highlights how the events that were to became catalysts for the development of EU transparency policy, forced the institutions to at least acknowledge the widespread perception that structural defects in the Union’s democratic edifice risked delegitimising the European project. If transparency facilitated legitimacy it thus signified both that these significant political and constitutional problems were potentially fixable.

The discussion in *Section 3.2* demonstrated the attractiveness of transparency as a solution to the Union’s legitimacy problems, highlighting how this particular policy position became mainstreamed in the rhetoric of the Commission and the European Parliament. In the case of the latter, particularly strong transparency-as-legitimacy arguments could also be used to broker advantage in fluctuating interinstitutional power relationships, since the Parliament was the only body that directly derived its legitimacy from Europe’s citizens, yet it has historically occupied a diminished law making role vis-à-vis the Council.

Notwithstanding the apparent logic of the transparency as legitimacy idea, the discussion in *Section 3.2,* and subsequently, has also considered how this may very well be based on naïve premises. Simply because citizens have access to information does not necessarily indicate that citizens will be more positively disposed to a policy initiative as a result. Indeed, knowing more about the justifications for a particular policy initiative may in fact diminish citizens’ perceptions of the institutions and of the Union as a whole; account must be made of the dialogic processes that affect the interpretation of information. It also seems that the Commission in particular has underestimated (or else did not consider) how seriously the member states would take their obligations to ‘communicate Europe’ to their citizens, nor did it envision the possibility that they might actively play on the Union’s apparent ‘illegitimacy’ to reap political advantage at home.

Since the introduction of the Regulation on Access (1049/2001) the focus has broadened beyond mere access to documents, though this remains a central focus of the policy. The Commission’s Transparency Initiative considered how transparency might continue to be operationalised, with a focus on improving the quality of citizen representation and participation, through the creation of a Transparency Register. In *Section 3.3* the value of this innovation was considered in two very different, competing lights. The operationalisation of transparency policy hasn’t appeared to bring with it the legitimacy gains that were initially envisaged.[[246]](#footnote-246) Notwithstanding some of the institutions shortcomings in terms of actually complying with obligations to maintain their own registers of documents, it is not apparent that the Union’s internet-mediated forms of transparency have contributed significantly to the task of communicating Europe beyond narrow range of specialist and interested individuals. Nor is it entirely clear that these mechanisms for operationalising transparency would ever actually be capable of reducing that proximity gap, since transparency gains in themselves only address the information access deficiency or ‘supply-side’ problem of the representation & participation complex that characterises this proximity problem.[[247]](#footnote-247) Furthermore, as greater access has begun to have a more significant impact on the day-to-day operations of the Commission and the Council, both have exhibited concerns about how this affects operational effectiveness. Ironically, both Commission and Council have even intimated that enforced openness can potentially reduce the operational legitimacy of the institutions insofar as they cannot achieve the outputs expected of them. The idea being that consensus is harder to achieve where negotiations take place in the open as member states might find it more difficult to retreat from previously articulated positions.

In amongst these concerns, the constitutionalisation of transparency has marched on apace. The relevant treaty provisions now themselves make transparency a structural component of good governance.[[248]](#footnote-248) This view continues to engender significant support from the European Courts, the Parliament and the Ombudsman. As the debacle over recasting Regulation 1049/2001 has shown, these institutions are not likely to retreat from the belief that transparency contributes directly to the democratic legitimacy of the Union, and they have displayed a willingness to continue to engage combatively in the face of any retreat from that position.

In exploring how the centralised institutions have publicly articulated their respective approaches to the constitutionalisation of transparency as an EU norm, this chapter has demonstrated how those approaches have been predicated on certain normative assumptions about transparency’s legitimacy building capacity. Further, it has considered the relevant constitutional and democratic determinants that have been instrumental in shaping this transparency as legitimacy approach, wherein transparency mechanisms have been fashioned as a means of mitigating the proximity gap.

The intuitive normative logic for pursuing such an approach is clearly appealing and has, in various contexts, (as was shown in *Chapter 2)* received much explicit endorsement. Nevertheless, the discussion herein has already articulated where perhaps assumptions made about transparency-as-access, ignores the range of potential outcomes that result from giving citizens direct access to additional government information. As intimated in *Chapter 1* it is apparent that the empirical relationship between transparency and legitimacy is more cloudy than it would first appear.

Looking forwards, *Chapter 4* will further explore and examine the integrity of some of those propositions. It will explore some of the structural components of legitimacy and examine the extent to which supposed interfaces between transparency and legitimacy are theoretically sustainable. Now it has been established how the EU has theorised the transparency-legitimacy relationship, it will be possible to more fully explore how we might chart the interrelationship between the two, with a view to explicitly considering why, where and how transparency might produce unintended consequences.

# 4. The Transparency-Legitimacy Relationship: A Question of Democratic Capability?

It has already been asserted in *Chapter 1*, that a phenomenon of cognitive and emotional detachment from the European project is observably rendering the process of integration susceptible to changes in the public mood.[[249]](#footnote-249) Questions about EU legitimacy go to the very heart of the debate about the Union’s ultimate ‘destination’, its direction of travel and the pace of change. Utilising transparency to foster an improved sense of community, closeness and confidence in Europe’s citizens, as was observed in *Section 3.2* of *Chapter 3*, has been articulated as an aspect of its underlying rationale in the European context, ever since its formal inception at Maastricht. The post-Maastricht expansion of Union activity has tested transparency’s capacity to foster the affective loyalty of heterogeneous publics, sporting a plurality of interests, in an evolving polity in which the delimitation of competences has become increasingly complex.[[250]](#footnote-250)

This chapter will explore the determinants of legitimacy in an EU context, examining how it has been characterised in terms of a number of academic accounts of the process of legitimacy construction within polities. It will also consider some of the features specific to EU constitutionalism and how they affect the process of building legitimacy in the European Union. In thinking specifically about how legitimacy has been characterised, it will be possible to reflect further on the first sub-research question, in respect of how and where the EU’s transparency architecture responds to or reinforces processes of legitimacy building in the EU. Further, it will also be possible to situate where the relevant limitations might be, including where processes of legitimation are divorced from, and potentially even undermined by, the EU institutional approach to transparency, contrary to expectations. Assumptions made about EU transparency mechanisms, question the theoretical sustainability of transparency-legitimacy relationship and thus present the case for positing alternative conceptions of how the relationship might be understood, predicated on a more comprehensive account of transparency’s capacities and limitations, and relative to an understanding of how processes of legitimation are readily engaged (sub-research question 2). The forthcoming discussion in this chapter will accordingly establish some of the groundwork for responding to that second sub-research question, which is the object of *Part III* of this thesis.

Processes of legitimation (political legitimacy) might be said to be concerned primarily with establishing the normative conditions necessary for stability of the constitutional order and for the promotion of good governance, in terms of the functioning of political institutions and their policy outputs.[[251]](#footnote-251) Much like transparency, legitimacy is a compound concept of multiple essences. The creation of a ‘legitimate’ European political space encompasses numerous objects that are readily attributed to a modern understanding of constitutionalism, not least democracy, accountability, effectiveness, fairness, trust, the rule of law and citizenship rights.[[252]](#footnote-252) In examining what a legitimate European space might, or indeed, should look like, this chapter will reappraise the argument that democratic governance presupposes the existence of specific forms of transparency, which serve to facilitate legitimacy by promoting participation and scrutiny (amongst other things), as was encountered in *Chapters 2 & 3*.

*Section 4.1* will consider forms of legitimacy and legitimation, as they are understood to operate both within nation-states and in the EU. This section will focus on elucidating how processes of legitimation are characterised, how legitimacy is defined and what legitimacy requires. Subsequently, *Section 4.2* will compare and contrast this understanding of legitimacy with an examination of the elements of the EU’s constitutional order that have at various times been accused of promoting legitimacy ‘crisis’. In particular, Section 4.2 will consider some of the widely discussed structural deficiencies present in the EU’s democratic architecture and in its institutional processes, which are associated with deficiencies in the quality of input legitimacy as posited in *Chapter 1*[[253]](#footnote-253) (i.e. legitimation understood as the representation of citizens’ interests and the direct participation of citizen groups.) In addition, attention will be paid to the oft cited no-demos thesis (i.e. the apparent lack of a ‘European collective identity’). The latter can be characterised variously as a product of those structural democratic inadequacies, or as representative of a much more deep-seated crisis in the process of European construction, in which European citizens simply do not recognise the EU as an appropriate forum for politics, when contrasted for instance with domestic political institutions.[[254]](#footnote-254)

Finally, *Section 4.3* will make some initial reflections how the transparency might be used to alleviate some of the legitimacy deficiencies identified in the preceding section. It will concentrate on the ideas about transparency that have been articulated by the EU’s centralised institutions, as set out in *Chapter 3*, considering in particular whether beliefs about transparency’s ability to mitigate the effects of those input deficiencies are justifiable in terms of the accounts of legitimation provided in *Section 4.1.* This latter section will inform the construction of an ‘anatomy of transparency’ (otherwise termed a ‘conceptual grammar’) in *Chapter 5*. This will focus specifically on the structural elements of transparency and how they respond to and are (or ought) to be shaped by variances in political context and audience.

#### 4.1 Forms of Legitimacy and the Mechanics of Legitimation

For contemporary political systems, and the EU is no exception, the participation of the people is a prerequisite element of constitutional construction and thus legitimacy is a fundamental concept.[[255]](#footnote-255) Many contemporary definitions of (democratic) legitimacy pertain to a measure of public support for institutions, policy outputs and/or politicians themselves.[[256]](#footnote-256) If people believe that existing political institutions are appropriate, in some measure effective and operate according to accepted standards of moral propriety (i.e. are not widely perceived as corrupt), then those institutions are imbued with legitimacy.[[257]](#footnote-257) Accordingly, legitimacy can be said to be concerned predominantly with the justifications for, and acceptance of, authority and the exercise of political power by certain actors, on behalf of a broader community of citizen stakeholders.[[258]](#footnote-258) Broadly speaking, this suggests that the ingredients of democratic legitimacy are: 1) an observable measure of consensus on political values; 2) broad acceptance of the constitutional and legal orders (which are of democratic character), and; 3) elected political representation, which is responsive to the needs of the people.[[259]](#footnote-259)

### *4.1.1 Defining Legitimacy: Descriptive, Normative and Fused Accounts*

In the foregoing paragraph, a ‘fused’ account of democratic legitimacy was presented, combining both normative and descriptive elements. On the one hand, legitimacy is normatively bound to certain standards of acceptability, in relation to the values prioritised by the political order and in the orientations of elected representatives. On the other, legitimacy is vested, in part, in the observation that rule by the political order (howsoever defined) is located in its regularity and in the generalised compliance of the citizenry.

It is possible to describe legitimacy in purely descriptive terms, such as in the Weberian three-fold classification of legitimate domination, (i.e. the traditional, charismatic and legal-rational modes of legitimacy), where the descriptive elements are prioritised.[[260]](#footnote-260) Citizens’ orientations towards rules and commands issued by those in authority provide evidence of legitimate domination; belief in legitimacy constitutes the mere subjective recognition of rule as legitimate, irrespective of the motivations underlying citizens’ generalised compliance.[[261]](#footnote-261) Accordingly, legitimacy bears no direct relationship with democracy insofar as it is possible to characterise autocratic rule as legitimate, by reference to either an historical or charismatic account of legitimation.

Nevertheless, even Weber acknowledged that citizen actors may orient their behaviour towards political institutions, because the population feel that they represent a commonly held normative ideal. In this latter instance, a political order which ‘enjoys the prestige of being considered binding’ is considered to be a ‘legitimate order’, thus demonstrating a blurring of the distinction between the empirically observable modes of ‘legitimation’ and the subjective, values-based quality of being considered legitimate.[[262]](#footnote-262)

Conversely, in a purely values-based or ‘normative’ account, legitimacy is tied directly to a benchmark of acceptability that provides justification for the exercise of political power and authority. Normative accounts of legitimacy provide an explanation for both why the exercise of political power by a particular form of government is permissible, and why there exists an obligation for citizens to comply with demands issued by government. It also holds that where the conditions for legitimacy are not being adhered to by political institutions who wield power, the exercise of that power may be considered unjustifiable or illegitimate, even where it is exercised in accordance with established legal and constitutional processes.[[263]](#footnote-263)

In a fused account (as described above), a polity can only be described as legitimate where the people both believe in its legitimacy (i.e. there is subjective recognition that certain political institutions wield power) and also because the exercise of that power can be reconciled in terms of their beliefs.[[264]](#footnote-264) In such a mixed definition, individual’s own expectations and value orientations are equally as important, if not potentially more so, than compliance with formal and constitutional provisions about the exercise of power (though it is to be noted that those value orientations may themselves prioritise compliance with formal processes). They reflect a continuity in political thought prevalent since the early modern period, in which thinkers like Locke and Rousseau articulated a vision in which legitimate rule is derived directly from the will of sovereign subjects as expressed through political institutions. Arguably then, a vision of legitimacy in which political institutions undertake to capture the preponderance of social expectations, has come to dominate thinking about what legitimacy entails.[[265]](#footnote-265)

### 4.1.2 Engendering Citizen Support: Legitimacy by Degrees

There is a risk, with all of the accounts of legitimacy offered above, of adopting a dichotomous view in which polities are labelled simply as legitimate or illegitimate. This belies a much more complex and variegated reality in which legitimacy comes by degrees, as suggested by Hertz: ‘Legitimacy runs the scale from complete acclaim to complete rejection…ranging all the way from support, consent, compliance through decline, erosion and loss.’[[266]](#footnote-266)

No political regime is ever going to be legitimate for 100% of the population 100% of the time, since it is impossible for political institutions to be truly representative of the plurality of interests and/or pursue political action in respect of their individual interests, all of the time. Similarly, in terms of the commands issued by political institutions, their policy outputs and decisions, there is always going to be a measurable element of subjective illegitimacy.[[267]](#footnote-267) Conversely however, very few political regimes throughout the world, irrespective of whether they are democratic or not, will be regarded as fundamentally illegitimate by the whole population.[[268]](#footnote-268)

Consequently, political regimes of all shapes and scales attempt to foster public support, (both attitudinal and behavioural) by ensuring that political institutions are sufficiently embedded in the broader socio-cultural environment. Such embedding takes place by promoting active relationships between institutions, citizens and civil society, supported by constitutional rules that regulate the social dialogue that takes place between political institutions and the publics they serve.[[269]](#footnote-269) Furthermore, those constitutional arrangements, at least in democratic regimes, provide certain rule of law guarantees specifically in respect of citizens’ rights of participation and representation within the democratic architecture.[[270]](#footnote-270)

Attempts to generate support within political regimes may be designed to promote the legitimacy of the system as a whole, or to generate support for specific policies.[[271]](#footnote-271) Similarly, legitimacy may be derived either from the things that a political regime achieves, (often termed substantive or output legitimacy) or for the manner in which policy decisions are taken and the resulting policies executed (often termed procedural or input/throughput legitimacy).[[272]](#footnote-272) Regime legitimacy thus implies a number of trade-offs. On the one hand efficiency and effectiveness are pitted against stability and predictability; on the other normative expectations can present challenges for political style and existing institutional cultures.[[273]](#footnote-273)

This latter issue of institutional culture is significant insofar as it can have a marked distortive effect on the impact of measures designed to generate political support. As institutions move to incorporate new procedural, legislative and even constitutional mechanisms, designed to improve visibility, accessibility and popular investment in the political sphere, the spirit and import of those measures is often distorted in order to minimise the risk to core aspects of the existing culture and working practices. Indeed, this process of promoting institutional manipulation begins during the legislative phase, where institutional actors will present competing priorities during negotiations, based on their own institutional world-views.[[274]](#footnote-274)

This phenomenon may well be particularly prevalent in the EU context, where the logics that governed institutional construction during earlier incarnations of the contemporary Union retain some influence within the institutions themselves, but which nevertheless no longer reflect broader realities in respect of the evolving EU polity. This issue was considered in *Chapter 3*, specifically in relation to the process of adopting a new Regulation on Access, but also more broadly in the context of institutional approaches to the inception of transparency rules and the shaping of the political agenda towards transparency.

The relationship between institutional cultures, conflicts of culture and how these reflect broader public attitudes is consequently significant in influencing the capacity of political institutions to effectively reflect the preponderance of social expectations, particularly where the institution is typically composed of either a narrower range of interests, or where other cultural perspectives are subsumed by a dominant view. This particular problem will be considered further in *Part III*, which will undertake an assessment of institutional approaches to transparency (i.e. how the institutions prioritise what should be made transparent, to whom and when).

#### 4.1.2.1 Legitimacy, Trust and Regime Effectiveness

Closely related to the issue of reflecting social expectations are considerations about how legitimacy interacts with the related concepts of public trust and ‘regime effectiveness’, the latter concerning expectations about what political institutions should deliver. Miller has characterised trust as follows:

‘Political trust can be thought of as a basic evolutive or affective orientation toward the government…[T]rust runs from high trust to high distrust or political cynicism. Cynicism thus refers to the degree of negative affect toward government and is a statement of the belief that the government is not…producing outputs in accord with individual expectations.’[[275]](#footnote-275)

As explored in the normative and descriptive accounts above, legitimacy can be characterised generically as being concerned with the features of a given political system as a whole and its permanence, whereas trust tends to refer more directly to the actors who occupy political power and to those who issue commands. This is potentially significant insofar as it is apposite to draw a distinction between regime legitimacy and the confidence citizens have in particular institutions and the actors therein. If the decline in confidence in certain political institutions signifies a potentially more significant loss of regime legitimacy, then fostering trust in actors and institutions may be an important means of attempting to shore up legitimacy deficits. On the other hand, if cynicism is limited to the perceived motivations of individual actors or the ineffectiveness of a given institution, then trust may be a poor indicator of underlying levels of legitimacy.[[276]](#footnote-276) In the case of the latter, even in situations where there is intense public dissatisfaction with officials, branches of government, and perhaps even governments as a whole, citizens still might not reject the system of governance and the constitutional arrangements for democracy within their respective nation-states.[[277]](#footnote-277)

Delineating between crises of trust and crises of legitimacy is particularly difficult, since both are symptomatically very similar, insofar as they result in public disaffection for political institutions. As such, the challenge for the regime is not to inadvertently erode underlying levels of legitimacy when it implements measures to counter a growth in dissatisfaction with particular institutions. Particular attention thus ought to be paid to identifying the sources of a perceived crisis of legitimacy. This issue is considered further in *Sections 4.2& 4.3* below.

In thinking about how legitimacy and trust interact with transparency, it might be recalled from *Chapter 2,* that assumptions about transparency’s ‘performativity’ relate to the belief that provision of information about what institutions do inside the ‘black box’ of governance can foster trust. This however presupposes that citizens are content with the explanation that they receive by way of transparency mechanisms; it is also contingent upon being able to readily understand what is going on, on the basis of the information provided by way of transparency. This raised important questions about the transparency mechanisms used and how they are situated in relation to the governance architecture, which will be explored in *Chapter 5.*

In addition to the significance of the relationship between legitimacy and trust, the relationship between legitimacy and effectiveness is often held to be of instrumental value in terms of longitudinal regime stability and the maintenance of underlying levels of legitimacy. If effectiveness is held to be the ability of a polity to satisfy the needs of its citizenry over time, then the assumption is that a reservoir of legitimacy will promote regime stability in the case of asymmetric shocks resulting in temporary decreases in effectiveness. Conversely, where there are low-levels of underlying legitimacy, sudden or marked decreases in regime effectiveness are much more likely to result in breakdown.[[278]](#footnote-278)

The importance of the legitimacy-effectiveness relationship is arguably heightened in the EU context, where it is often argued that the social and cultural conditions necessary for the emergence of strong underlying levels of legitimacy do not exist, making the polity much more reliant on its effectiveness, and thus much more susceptible to asymmetric and cyclical stresses.[[279]](#footnote-279) Typically, the institutional structure of the EU imperfectly reflects the common features of domestic institutional arrangements, making the Union’s constitutional context comparatively more difficult to navigate for the ordinary citizen. Moreover, the post-Maasticht expansion of the Union’s fields of activity adds further complexity to assessments of the EU’s regime effectiveness, not least owing to the difficulties in theoretically accounting for and explaining what the activities in these new fields looks like to citizens who do not have a direct point-of-reference and whom are perhaps physically distanced from where the activity is taking place. Furthermore, the proliferation of *de novo* bodies sitting outside/alongside the formal constitutional structure, renders the organogram of the institutions, and the system of checks and balances that the regulatory agencies are supposed to represent, virtually impenetrable.[[280]](#footnote-280) Indeed, on this latter point, it ought to be noted that the Commission, in the White Paper on Governance (2001), proposed increasing the number of regulatory agencies in order to ensure formal-legal compliance with EU regulation and hence regime effectiveness, perhaps ironically contributing to the problem it set out to solve.[[281]](#footnote-281)

As will be discussed in *Section 4.2* below, there is a debate in EU studies about the extent to which the Union ought to be expected to structured (either institutionally or procedurally) according to a domestic understanding of democratic constitutionalism, given the novel legislative and political space that the Union occupies. Nevertheless, comparisons between the two abound and can have a profound influence on assessments of legitimacy and regime effectiveness.

### 4.1.3 National and Supranational Legitimation

Hitherto the discussion has considered both forms of legitimacy and the mechanics of legitimation largely in the abstract. The paradigm frame of reference, as alluded to immediately above, has traditionally been the nation state, which is at least partly a result of the continuity of thought between early modern and contemporary philosophers. In the context of the EU however, it is increasingly recognised that a statist orientation poses some difficulties for an organisation in which there are overlapping sovereignties and in which national and supranational political institutions must co-exist.[[282]](#footnote-282) In a supranational context then, it is important to question whether the identifiable signs of citizens’ affective orientations towards political institutions are comparable with their equivalents in a nation-state context. Similarly, does effective political representation within supranational institutions take the same forms?

Wallace has argued that political identification with elites in national and supranational contexts tends to be different, particularly in terms of loyalty and affection.[[283]](#footnote-283) This reflects older research which suggests that citizen support at the supranational level is much more likely to be based on utilitarian calculations and pragmatism, as compared with the thick affective loyalty that operates within member states.[[284]](#footnote-284)

Despite this recognition that processes of legitimation might look different in an EU context, there is markedly little consensus about what the defining features of those processes would look like, along with some dispute about whether there is a problem at all, at the European level, with satisfying both the recognition and representation elements of legitimacy.[[285]](#footnote-285)

#### 4.1.3.1 Modelling Legitimacy in the Context of European Integration: Neo-functionalism, Intergovernmentalism & Federalism

From the earliest days of European integration until the passage of the Treaty on European Union (TEU) in the 1990s, the progressive construction of a supranational space with an emerging constitutional character, took place without any significant normative debate on the implications for democracy and legitimacy.[[286]](#footnote-286) The neo-functionalist explanation for integration attempted to explain that process as a predominantly elite level one, guided by logic of spillover in which legitimacy was derived or borrowed from the member states.[[287]](#footnote-287) The argument ran that political, economic and social leaders took decisions under a ‘permissive consensus’.[[288]](#footnote-288) That consensus presupposed deference towards political elites; it was assumed that power was being exercised on behalf of the collective interest and that such interests were tightly bound up in the orientations and the motivations of the institutions and actors themselves.[[289]](#footnote-289) The relative absence of the ‘European question’ from domestic political debates, presupposed an assumption that integration was generally beneficial, and particularly from the economic perspective.[[290]](#footnote-290)

The neo-functionalist account acknowledged, to a certain extent, the recognition element of legitimacy via the device of ‘permissive consensus’. Through this device, it could be said that notwithstanding citizens were one-step removed from the political process, they acknowledged and consented to European construction, which was exercised tacitly on their behalf by national elites. However, such an account is only satisfactory where Europe operates (or rather operated) at low level of political saliency vis-à-vis Europe’s citizens (i.e. where there was a low level of political expectation that EU processes and its spheres of activity would directly involve citizen deliberation or indeed visibly impact upon citizens’ lives). Nevertheless, for those groups within society for whom Europe was politically important, economic actors and politicians, it was argued that these groups readily accepted Europe as a venue for pursuing their political objectives.[[291]](#footnote-291) The key development of the neo-functionalist account is that it recognised the potential for a supranational organisation to be an important arena for politics, operating either in addition to or instead of the national political centre. Nevertheless, it also underestimated the pace of politicisation throughout the 1970s, 1980s and 1990s (and since), along with the need for representation that those political developments would require. Furthermore, neo-functionalism failed to take into account the challenge that politicisation would pose to extant modes of technocratic governance.[[292]](#footnote-292)

Other approaches to European integration, including liberal intergovernmentalism and federalism, have attempted to provide an account of the different dimensions of legitimacy and the requirements of recognition and representation in the context of their respective organising logics.

Liberal intergovernmentalism presupposes that the member states are key players in the integration process. The motivation to engage in regional integration is presupposed upon the belief that national preferences are constrained in the geo-political and macroeconomic contexts. Such national preferences are formulated in response to, and in the context of, the status quo created by existing intergovernmental agreements. Consequently, the member states engage in a process of inter-state bargaining on the basis of their understanding of likely outcomes in relation to their national preferences, in the absence of any international cooperation. The pooling of sovereignty is a tool designed explicitly to seek credible commitments to pursued preferred courses of action.[[293]](#footnote-293)

The liberal intergovernmentalist approach, whilst offering an account for why states ought ordinarily to be considered legitimate political actors, as opposed to EU citizens themselves for instance, nevertheless encounters a similar problem to the neo-functionalist account in the context of the increasing politicisation of the supranational institutions. As sovereignty is progressively pooled, these institutions have become independent arenas for politics, rather than merely the de facto safeguard against non-compliance in areas of international cooperation as between member states. This raises complex concerns about the erosion of national identity and the side-lining of national political preferences (including domestic political institutions). Accordingly, the loosening of the links between political preferences and the centralised institutions in Brussels is precipitated by cleavages in political outlook as between states, political parties, the institutions themselves and the publics they serve. The diminution in ‘recognition’ for the interstate politics taking place within the EU is characterised by a failing of the institutions (both domestic and centralised) to effectively engender the political preferences of publics,[[294]](#footnote-294) reinforcing the ‘new normal’ of a fused understanding of legitimacy.

Finally, federalism presupposes that the Union is governed by an organising logic that prioritises the coordination of government at the central European level, but in which domestic governance is not necessarily supplanted or subjugated to governance at the federal level.[[295]](#footnote-295) It has been argued that the legitimacy requirements of this kind of supranational entity entail emergence of a sufficiently ‘thick’ collective European identity, alongside the development of representative institutions that are directly accountable to Europe’s citizens and thus which respond to their expectations.[[296]](#footnote-296) The logic of federalism can be said to support, to a certain extent, the displacement of existing nation-states and their centrality in the political lives of European citizens, albeit within particular, constitutionally defined, policy domains. Conversely however, certain functional EU operating principles, including subsidiarity and proportionality, (and the operation of federal governance elsewhere in the world,) are indicative of the fact that the structure of the nation state itself will still be fundamentally important in the daily lives of citizens and in the delivery of expected public services. As such, federalists to not envisage the destruction of existing European nation states, but rather seek merely to replicate the stability and robustness of domestic political arrangements in the European space.[[297]](#footnote-297) By promoting the legitimacy of centralised action through clarifying the delimitation of competences and by shoring up the ‘representative’ quality of the centralised institutions, structural deficiencies in Europe’s democratic character can be reduced.

The viability of federalism as the logical conclusion of the EU’s current development trajectory is questionable, not least because there are concerns that cultural heterogeneity will prevent a thick collective identity from emerging. Nevertheless, it is a useful model for highlighting some of the range of concerns, voiced by actors in various quarters, about democratic deficit and the characteristics of legitimate institutions. [[298]](#footnote-298) It has been asserted that transparency (here and in *Chapter 3*) can facilitate the construction of collective identity by being conceived as a mechanism for promoting communication and discourse as well as promoting understanding of the EU’s *sui generis* processes. It bears repeating however that the logic underpinning this notion of transparency as a dialogic tool, risks presupposing a certain homogenic view, amongst different groups of political actors and the public, about the intrinsic value of the Union, its constitutional ‘justness’, its spheres of activity and its outputs.

#### 4.1.3.2 Tabulating the Principal Sources of Supranational Legitimacy

The approaches to European integration discussed immediately above identify a number of mechanisms through which it might be possible to generate supranational legitimacy, focussing on the twin elements of recognition and representation. These mechanisms rely on a legitimacy mix constituted of a variety of modes of legitimation employed collectively, but in differing amounts. Social scientists concerned with legitimacy problems in the EU context, tend to identify five principal types of legitimation:[[299]](#footnote-299)

1. Legality/Constitutionality

Legitimacy as legality is principally an indirect method of legitimation. Weiler for instance has noted the ‘formal’ constitutional legitimisation of the EU’s institutions through the treaty system.[[300]](#footnote-300) Legitimacy as legality is indirect insofar as it piggy-backs on underlying levels of domestic legitimacy, contending that legitimate national political institutions sanctioned the creation of the EU space through legal mechanisms. Where democratic member states have also engaged in sovereignty transfer to the EU, a de facto legitimate constitutional order is formed in which the community of member states is enabled to undertake coordinated action in order to better achieve shared objectives.[[301]](#footnote-301) If legitimacy is defined normatively as compliance with extant legal mechanisms, then the EU is only illegitimate insofar as it goes beyond its legally prescribed competences.

Legal legitimacy is often viewed as insufficient, in and of itself, to provide an adequate foundation of legitimacy for the EU, but it nevertheless it is also capable of facilitating other modes of legitimation, as was alluded to in *Section 4.1.2* above.[[302]](#footnote-302) The role of law as a facilitator of legitimation has been considered by Höreth, who concludes that the EU is a multidimensional and complex problem that requires a variety of methods of legitimation in different contexts, for which the medium of international law can help to structure the process.[[303]](#footnote-303)

1. Compliance

Legitimacy as compliance is related to legitimacy as legality. It measures legitimation in terms of member states’ and social actors’ compliance with the EU’s legal and political frameworks. This form of legitimacy also has analogues with Weber’s early 20th century typology, in which legitimacy could be found in citizens’ habitual acquiescence to the ordonnances of their rulers. Legitimacy as compliance is however criticised as a normative criterion for legitimation, since it might signify mere apathy.

It is apparent from the discussion in *Section 4.1* that contemporary understandings of democratic legitimacy suggest that legitimacy as compliance is an insufficient basis, of itself to conclude that the Union is in fact legitimate in the eyes of European publics. The seeming permanence of Euroscepticism is indicative of resistance and contestation, even if a measure of formal (i.e. legal) compliance remains.[[304]](#footnote-304) Legitimation thus relies upon the simultaneous satisfaction of descriptive and normative elements.

1. Effectiveness or Output Legitimacy

As discussed in *Section 4.1.2.1* above, legitimacy as effectiveness is a mode of legitimation that ties legitimacy directly to the success of a political regime in terms of its problem solving capacity.[[305]](#footnote-305) Output legitimacy is to be contrasted with input legitimacy in that it constitutes government for the people (i.e. government on their behalf) rather than government directly by the people. The latter is of course assumed to be the only truly legitimate form of governance in representative democracy.

A political regime may be measured either against the success it has had in delivering on political promises, or on the basis of its ability to fulfil citizens’ expectations, or indeed a mixture of both. This poses significant difficulties for regimes, which will need to manage the expectations of their electorates by diminishing the mismatch between their political aims and citizens’ demands. Here, both the framing of results and access to the data plays a significant role in influencing and managing perceptions of legitimacy. Measuring governance according to utilitarian calculations of governmental effectiveness has taken on a new significance in the recent history of the EU, where compromised economic growth has produced a downturn in relative standards of living.[[306]](#footnote-306) Prolonged stagnation has tested the very fabric of intra-European social solidarity, exacerbated by a climate in which there appears to be real winners and losers, at the member state level, in the battle to return the continent to growth and prosperity.[[307]](#footnote-307) This phenomenon is discussed further in *Section 4.2* below.

1. Representativeness (or input legitimacy)

Political representation in the form of directly elected representation is the cornerstone of democratic governance.[[308]](#footnote-308) Representativeness however, might refer more broadly to the avenues through which citizens are able to influence the political process through features such as consultation and access, either to actors directly or to information about how actors behave when working within political institutions. This method of legitimation is the one most attentive to fostering within the public a sense of audience identification with the political process, i.e. government by the people, rather than on their behalf.

The quality of input legitimacy poses persistent problems within the EU since direct representation is not a feature of some key EU institutions including the Commission and the Council of Ministers. Though the Council of Ministers, European Council and a number of the Committees enjoy a measure of indirect representative legitimacy, it is disputed whether this is capable of generating any affective loyalty towards the EU in the context of it occupying a position of increased social and political importance in the lives of the Union’s publics.[[309]](#footnote-309)

Linked to this latter issue, research on public opinion has highlighted that even the directly elected European Parliament is incapable of producing feelings of identity and belongingness, which is further exacerbated by the fact that treaty provisions on EU democracy make party political representation in the EP a constitutional requirement.[[310]](#footnote-310) Enduring difficulties with the quality of Europe’s representativeness has provided the institutional impetus to voice alternative mechanisms for fostering public support, and to alternatively characterise the nature of the EU polity as a multidimensional polyarchy or as an associative democracy.[[311]](#footnote-311) In these alternative conceptions, deliberation, consultation, interest-group representation, access to information and increasing the transparency of the political process are viewed as essential substitutes for the direct participation and representation that has been rendered absent. This raises significant questions about the mix of these alternative processes and their capability for performing as an effective substitute for direct representation, as has already been alluded to in the discussion on neo-functionalism, liberal intergovernmentalism and federalism above. This issue is directly addressed further in *Section 4.2* below.

1. Process legitimacy (or throughput/procedural legitimacy)

Throughput legitimacy is concerned with what takes place in the black-box between the construction of political institutions and the outputs that they produce.[[312]](#footnote-312) It might readily be seen as a composite part of input legitimacy insofar as it is concerned with the legitimation of political actors’ activities as they go about the business of producing policy. Throughput therefore is concerned with extending the influence of citizens’ beyond the mere election of representatives to governance institutions throughout the political process in order to ensure that government is conducted in the interests of the people.

Throughput also relates to legitimacy as legality in respect of the fact that the creation of law and policy can be regarded as legitimate where it is visibly created in accordance with established formal procedures, including compliance with constitutional expectations/guarantees in respect of transparency, proportionality, subsidiarity etc. Ultimately, throughput processes seek to regard individuals within a democracy as equal; they therefore have an equal interest in having their concerns equitably represented in governance processes.[[313]](#footnote-313)

#### 4.1.3.3 A Brief Note on the EU’s Approach to Legitimacy and Processes of Legitimation

Traditionally, Union authorities have tended to rely upon the first and third mechanisms for legitimation (legality and outputs/effectiveness). It has been assumed that the relative efficiency of the institutions in terms of their ability to distribute resources in an efficient, fair and relatively equitable manner has provided some support for pursuing integration on the basis of a ‘permissive consensus’, where direct representation has been side-lined. Successive rounds of treaty reform have also been perceived as a mechanism through which the institutions have relied on indirect and borrowed forms of legitimacy. Nevertheless, EU officials and elites have maintained that the EU is imbued with sufficient legitimacy, owing to the double democratic mandate of a directly elected European Parliament and Council representing members of directly elected national governments.[[314]](#footnote-314) Some academics accede to this view and have argued that the EU is imbued with sufficient legitimacy,[[315]](#footnote-315) even if it is predominantly borrowed from the domestic political sphere, and despite the fact that domestic political oversight of EU legislative and policy processes remains weak.[[316]](#footnote-316)

Whilst assessments that the EU enjoys some borrowed or indirect legitimacy are essentially valid, the argument that these constitute sufficient sources of legitimation for modern and complex EU in which decisions are taken about very sensitive issues of policy, often impacting directly on the security and the social and economic well-being of citizens in tangible ways.[[317]](#footnote-317) Presently, the only directly elected EU institution, the European Parliament, suffers from persistently low turn-outs in periodic elections.[[318]](#footnote-318) Though its legislative role has been progressively strengthened in successive rounds of treaty reform that have established co-decision as the ordinary legislative procedure, this presents its own legitimacy challenges insofar as the EP does not appear capable of sustaining a sense of collective involvement and participation amongst European publics, where majoritarian decision-making increasingly produces clear winners and losers. Furthermore, notwithstanding this progressive strengthening of the Parliament’s legislative role, the democratic quality of the whole process is clouded by a number of issues, including a lack of clarity about the particular interests represented by parliamentary groupings and the vicissitudes of interinstitutional deliberation at key stages in the legislative procedure.[[319]](#footnote-319)

Since the adoption of the Maastricht Treaty, there have been profound changes not only to the internal functioning of the EU, but also to its international legal position, characterised by an expansion of competence.[[320]](#footnote-320) Whilst some national authorities and civil society groups have demanded structural reform, along with more transparency and accountability from the institutions and the officials working in Brussels, for many ordinary citizens, political transformation in the EU occurred at a comparatively low level of visibility. Nevertheless, it has now become axiomatic that EU citizens need to be more readily included in EU matters and that the Union needs to constantly work towards generating its own sources of popular support.[[321]](#footnote-321)

Widespread recognition of this fact did prompt key EU institutions introduce strategies to improve the quality of input legitimacy as early as the late 1980s, the flagships of which have been measures to create EU citizenship and the White Paper on Governance initiatives to include civil society representation in policy making. Broadly speaking however, the academic appraisal of these initiatives has not been overwhelmingly positive, not least because the White Paper concluded (almost in ignorance of the proximity problem) that the EU is a fundamentally legitimate institution, predicated upon the maintenance of the rule of law and enjoying a ‘double-democratic’ through which citizens directly and indirectly participate in the political process.[[322]](#footnote-322) Accordingly, the White Paper is appraised as having undersold the Union’s legitimacy problems, by focussing predominantly on process driven solutions to pragmatic problems about the provision of information, including a need to improve communications about the Union, its structures and institutions.

This arguably reductivist approach, in prioritising the information dissemination dimension, signally fails to account for the ‘affective’ dimension of the problem, (i.e. the promotion of collective identification with and belief in the value of the EU and its capacity to address social needs at the supranational level.) Accordingly, it can be asserted that the Union sought to address problems of legitimacy by engaging in a process of problematizing the issues according to structures that existing institutional arrangements might be capable of tackling (or at least doing more to solve), an issue that will be reconsidered in *Chapter 8.* In doing so, priority has been accorded to the functional salience of the existing architecture, rather than on the deeper questions of identity, values and justifications which are bound up in the messy, complex and socially-oriented recognition element of legitimacy.

## 4.2 The EU Legitimacy Problem: Building Affective Orientations and Engagement

Using the concepts of recognition and representation as coined by Banchoff and Smith,[[323]](#footnote-323) the foregoing section discussed the mechanics of legitimation in both the national and the supranational context, before briefly elucidating some of the weaknesses that the EU experiences in forging its legitimacy and maintaining adequate legitimation. This section will look more intently at the causes and consequences of those legitimacy weaknesses, along with some of the reasons for their apparent persistence.

### *4.2.1 Seeking the Consent of the Governed: The No Demos Thesis*

A wealth of contemporary empirical examinations point to decreasing levels of citizen support for the EU, a trend that first emerged in the early 1990s and appears to be continuing today.[[324]](#footnote-324) This phenomenon has been characterised by Hooghe and Marks as the emergence of a ‘constraining dissensus’ in which certain European issues now attract the public’s attention in line with the increasing salience of integration and its goals.[[325]](#footnote-325) This reflects the political requirement to seek direct popular approval to endorse further integration at key constitutional moments through referenda, even in countries where referenda are traditionally very rare. Such referenda however can suffer from being highly politically charged and therefore reductionist/populist exercises, with citizens forced to make a choice about the entire future of the European project on the basis of a small number of issues identified as relevant to the national context.[[326]](#footnote-326) Thus increasing populism has exponentially increased the significance of older territorial identities, as citizens often do not have the time and resources to attentively dissect the likely consequences of further integration and so become swayed by appeals to identity.[[327]](#footnote-327) The effect of this phenomenon post-Maastricht has been to dichotomise allegiance to Europe with the protection of national interests, characterised by perceived risks to member state communities and existing socio-cultural ties.[[328]](#footnote-328)

In addition to declining popular support, further empirical research confirms that citizens’ support for European integration is tied loosely to cost/benefit calculations (often mediated through domestic party political assessments of the likely costs and benefits) and generalised expectations about economic growth.[[329]](#footnote-329) This point was briefly addressed in *Chapter 1* and in *Section 4.1.2.1* above. Over-reliance on characterising EU membership purely as a pragmatic endeavour, presents a particular risk for the European Union since legitimacy assessments made on the basis of utilitarian calculations can work to prevent the emergence of anything but a cursory collective sense of endeavour, and render the polity vulnerable to asymmetric stresses in the absence of an underlying legitimacy reserve.

#### 4.2.1.1 Can a Collective European Identity Ever Emerge?

Europe’s legitimacy challenge is to prevent further growth in the *proximity gap* that exists between European institutions, political elites and the general public. In order to do that, many assume that a shared sense of community and the emergence of a supplementary we identity is crucial, since this can promote regime legitimacy.[[330]](#footnote-330) Several researchers are also of the belief that fostering a sufficiently thick collective identity must take place before further legitimation by way of democratisation can occur.[[331]](#footnote-331) This is because, as was alluded to in *Section 4.1.3.3* above, subjecting more European level decision making to majority rule requires a measure of socio-cultural cohesion in order to avoid heteronomy. A shared community identity within the polity functions as a sort of pre-political precondition, through which citizens accept that a decision was taken as part of an act of self-determination, even though the outcomes of that process produce winners and losers when subjected to simple econometric analyses. By contrast, relying on legitimation through outputs, risks exacerbating heteronomy in a deeper and wider EU, since it compounds feelings of alienation and dissatisfaction among groups that do not readily perceive the benefits of majoritarian decision-making.

In this analytical context, there is disagreement about whether a shared sense of collective identity can emerge in the near or distant future and about the reasons why this might not occur.[[332]](#footnote-332) One widely held assumption is that there is no European demos because the polity lacks a community of communication, amongst the other cultural and social trappings that are meant to stabilise communities through collective recognition.[[333]](#footnote-333) This notion of a community of communication has not been lost on European institutions and indeed it is arguably one of the driving forces behind the push to increase the transparency of the European Union.

In the early 1990s, European Commission focussed its efforts in developing transparency policy on how it might improve avenues of communication between the institutions and civil society, as well as suggesting how member states could improve communication with the public about Europe, its structures, processes and areas of competence.[[334]](#footnote-334) Whilst the Commission’s rhetoric was strong, the resource implications of such a policy, particularly where the Commission was seeking the assistance of national authorities to communicate with their publics, do not appear to have been fully considered. Equally, there did not appear to be any fixed idea of the intended audience. Was this to be a semi-elite process in which the intended audience consisted largely of organised groups? Did it envision reaching out only to ‘informed’ and ‘interested’ citizens? Who did the Commission want national authorities to target? Each of these important procedural and structural questions appear to have been ineffectively dealt with by the Commission, accordingly it is only possible to speculate as to the institutions’ commitment tackling perceived legitimacy deficits through the creation of a community of communication.

Some nevertheless remain hopeful and have rejected the claim that there can never be a cohesive European demos as such, suggesting that there are already empirically observable signs of the emergence of trans-national/post-national community formation.[[335]](#footnote-335) Whilst others still, posit that such an identity may emerge in the future, pointing out the comparative youth of the European polity, and the centuries over which national identities have been formed in the ferment of Europe’s long reformation and subsequent revolutions.[[336]](#footnote-336)

Others still, advocate the strengthening of European democracy through further constitutional and structural reform, in order to foster collective feelings of support.[[337]](#footnote-337) This is to be contrasted directly with the view presented immediately above, where a first group of researchers were convinced that a pre-political collective identity is a prerequisite to pursuing further democratisation by way of institutional and constitutional change. Irrespective of how one views that relationship however, the belief that the development of a collective identity is the outcome of continuing efforts to democratise Europe’s institutional structure risks relying on the hypothesis that there is an inherent connection between the two processes that we have yet to see realised. Thus in the absence of any empirical evidence that demonstrates this relationship and points to whether it is conditional or causal, any further attempts to legitimise poses the risk of aggravating extant legitimacy shortfalls precisely because there is a weak underlying community of resilience.

A further problem presents itself in relation to this hypothesis, since both processes (democratisation and the development of collective support) must take place at the same time, producing a ‘dilemma of simultaneity’.[[338]](#footnote-338) On the one hand there is a strong argument to state that the European Union has already advanced to the point where it needs to seek citizens’ consent before further steps are taken which point in the direction of further harmonisation or unification. Conversely however, if pursuing further democracy does exacerbate existing tensions (as we have seen repeatedly in significant constitutional moments over the years), then conflicts both within and between member states could severely test Union solidarity, particularly where, as has been experienced over much of the last decade, the continent falls victim to supressed economic performance and significant pressures on its problem solving capacity.[[339]](#footnote-339)

### *4.2.2 Legitimising the European Public Space: Generating Citizen Representation and Participation*

It has already been asserted that although citizens have not traditionally been viewed as the primary constituency within the European political system, their role is now increasingly recognised as being central to the continuing success of integration. This is, to a greater or lesser extent, recognised by the Union itself, insofar as the treaty system now prioritises the principles of active participation and effective representation.[[340]](#footnote-340) Further, in *Section 4.1.3.1* above, it was noted that citizenship has been a central component of the effort to reorient Europe towards its people(s); a preoccupation with generating collective identity is evident in much of the literature examined in this chapter.

In practice however, though a number of high profile examples of the inclusion of civil society groups within the political process, including the debate over the ‘Charter of Fundamental Rights’ and ‘The Convention on the Future of Europe’,[[341]](#footnote-341) are evidence of a certain citizen focussed orientation, these events seem consistently to be marred by a comparatively weak civic consciousness in relation to EU issues. Persistently poor visibility of the EU political arena within the member states has hampered efforts to communicate that attempts were being made to incorporate their perspectives into the decision making process.

Furthermore, outwith significant constitutional events, institutional efforts to allow citizens to directly influence decision making have proven relatively inefficient, with some suggesting that this is the influence of elite level actors and European politicians, who perhaps perceive a threat to their own traditional roles as mediators of democracy at the European level. This latter observation is in fact another manifestation of the impact of institutional culture on the dominant working logics and modes of the Union, which was discussed briefly in *Section 4.1.2* above. In particular, it has been observed that the institutions have sought to implement top-down hierarchical measures to remedy structural inadequacies, resulting in a failure to deal appropriately with the ‘citizenship dimension’ at all.[[342]](#footnote-342)

#### 4.2.2.1 Civic Participation: A Dialogic Problem?

The role of collective identity in legitimising the European Union is chiefly viewed as a mechanism for integrating publics in order to facilitate communication. This is reflected in the deliberative democracy advanced by Habermas,[[343]](#footnote-343) which was discussed in *Chapter 2*, in the context of an expansive vision of transparency through which administrative power and discretion are mediated by a discursively generated communicative power. Within this vision, civil society is empowered to influence the decision-making process, providing citizens with a means to govern through consensus.

In the Habermasian ideal, this integrated public space envisages the entire community, thus facilitating a number of different voices. Presently however, it appears that any public sphere of civil society that does exist is somewhat disconnected; lobbying groups focus on specific issues and inter-group communication does not appear to be well developed outwith targeted campaigning. The need to generate an integrated communicative sphere that encompasses the entire community must overcome the absence of common historical and socio-cultural ties, in order to begin to collectively construct commonality and self-understanding, presupposed upon principles that can withstand cyclical economic stresses and which promote the values of the Union even in times of stagnation.

It is possible to posit that the existing institutional structure provides an anchor for the development of a community that transcends the nation state.[[344]](#footnote-344) The argument runs that the multi-level EU generates a variety of avenues of communication, not least through lobbying, campaigns and news-reports.[[345]](#footnote-345) Despite the fact that this does not all occur in some hypothetical integrated public sphere, on-going debate about the EU does take place in a number of independent but related spheres of communication. Nevertheless, these discrete and issue specific communicative challenges still present a democratic challenge, since the news reporting (formal and informal) that underpins these conversations, typically reaches a transnational community of elite groups, thus confirming the divide between elites and Europe’s publics.[[346]](#footnote-346)

This latter phenomenon has been alternatively characterised as a divide between different categories of European publics.[[347]](#footnote-347) Strong publics, such as representative assemblies are part of a European communicative sphere, exercising their voice (to a greater or lesser extent) on matters pertaining to Europe. Since they are, in the main, democratically elected, they are still publics in a technical sense. The European Parliament can be said to fulfil this role, as can national parliaments, to the extent that they are engaged and exercise oversight. In exercising that oversight, these publics are engaging in a form of deliberative democracy that has a strong normative force vis-à-vis our understanding of democracy, since they are dominated by representative actors rather than technocratic elites. Even this analysis however presents a picture of a somewhat segmented communicative sphere that does not overcome the elite-citizen divide. There is little evidence that these bodies can contribute to collective will formation, particularly in the case of national parliamentary assemblies, who are composed of party political actors that have preconceived ideas and agendas in relation to European integration. In addition, national political actors often have an interest in scapegoating Europe and contributing to communicative fragmentation where domestic political interests (and parliamentary careers) are at stake.

It is not impossible that more direct public engagement with the European issues that directly affect citizens lives, will generate a feeling amongst publics that the EU is a viable and legitimate arena for politics to take place, and of course a proportion of citizens in each of the member states already do consider Europe to be a legitimate political arena. Nonetheless, studies show a disconnect for instance, between the Commission’s presentation of political events and their eventual reporting in national media, with the two seeking to emphasise different aspects of the decision-making process.[[348]](#footnote-348) Merely increasing coverage of EU issues actually risks further de-legitimation, since legitimacy in the EU is so closely tied to assessments of its performance. As such instead of integrating publics, this produces the opposite effect. The result is a comparative lack of understating about even the very basic fundamentals of the EU political process, knowledge of which has to be a precondition of meaningful citizen engagement.

Finally, there is further evidence to suggest that even where there is reporting of issues that are distinctly European, the actors therein are labelled and defined according to the member states to which they belong, thus exacerbating the potential for national identities to prevent identity formation at the European level.[[349]](#footnote-349) Put simply, communication is simply not enough to generate an integrated European public space, rendering extant strategies to improve democratic legitimacy doomed to failure. A significant part of this problem appears to be that a dialogic or deliberative conception of democracy reduces the public sphere to a realm characterised by active public relations between the institutions and the publics they serve. Adequate and effective representation/participation is still contingent on those institutions responses to and actions upon its dialogues with the public. Equally, transparency measures, irrespective of whether they are formally constituted through access to information provisions, or from part of an institutional communications strategy, do not guarantee influence. Transparency is thus a tool for generating publicity, but it cannot be said to translate directly to enhanced legitimacy, since it does not adequately take account of pre-existing value positions and affective loyalty. Neither can it be said that knowledge about the Union and its performance outcomes in any given field is determinative in the relationship between transparency and perceived political legitimacy.[[350]](#footnote-350)

## 4.3 Europe’s Legitimacy Dilemma: What Role Transparency?

As the Union has grappled with establishing a logic that underpins supranational integration, in which it can accommodate existing political spaces and identity allegiances within the member states, it is apparent that it has been somewhat hamstrung by the demand to replicate the characteristics of democratic legitimacy that typify its member states. This is particularly problematic insofar as attempts to directly impose a statist interpretation of democratic legitimacy in the European public sphere are often viewed as a direct challenge to the communities inhabiting national political arenas. In addition, a statist conception of democratic legitimacy has repeatedly been assessed as unsuitable, since Europe’s centralised institutions do not correspond with their domestic counterparts in terms of their structure and roles, particularly in relation to the division of competences between executive and legislative power centres.

In addition to citizens potentially not recognising Europe as a democratic arena in which politics should take place, many have argued that cultural heterogeneity prevents the Union from establishing itself as a truly democratic polity, since it lacks the requisite socio-cultural foundations upon which citizens can build with one another a sense of bondedness. This dual problem of democratic legitimacy has been characterised as a dilemma of simultaneity; the Union must pursue a course of legitimation that tackles both problems simultaneously without knowing at the outset the relationship between the two, whether one contributes to the other and whether steps to remedy one might exacerbate the other.

In an attempt to circumnavigate this problem, the institutions, led by the Commission have championed efforts to increase communication and dialogue, within the purview of various policy efforts to increase Europe’s transparency towards its citizens. Indeed, increasing the transparency of Europe occupies a great-deal of the subtext of the debate about the formation of a collective identity and the creation of a public communicative sphere. As has been highlighted in *Chapter 3* and in *Section 4.2* above, communicative efforts have relied on encouraging the participation of civil society groups in various high-profile events. In addition, national political authorities have been encouraged to promote dialogue about Europe and increase the public’s consciousness by engaging more readily in debates about Europe. With an uncertain amount of success, the institutions have also sought to encourage media coverage of events, debates, and decision-making processes, in order to alleviate the proximity problem and establish a commonality of interests amongst European peoples divided by traditional national, ethnic and cultural identities.

A significant problem with these strategies however is that there have been little systematic thought given how to appropriately target those communicative efforts and transparency measures, nor is it apparent that a considered approach has been taken to whether different actors within a multi-level Europe will have competing priorities. For instance, in *Section 4.2.2.1* above, it was highlighted that nationalmedia outlets do not have the same priorities as the Commission when reporting on European issues. The same criticism has been made of the role of national political authorities and actors in communicating Europe.

Where communicative efforts have enjoyed a measure of success, it appears that they have only been successful in propagating the efforts of elite groups of motivated and integrated citizens, who are seeking to influence the decision-making process in fragmented ways, in relation to targeted and subject-specific matters of high political salience.

In addition to the need for a greater understanding of the relationship between collective identity, democratisation and legitimacy, the role of transparency remains uncertain. If transparency is being used predominantly to publicise the Union, then it is apparent that it will both enhance and detract from legitimacy in mixed and somewhat unpredictable ways, as was suggested in the discussion in *Chapter 2*. This questions the value of prioritising information-centric mechanisms of governance as a means of generating legitimacy, (though it does not necessarily detract from the normative case of pursuing a transparent EU, since there may well be other sound principles for promoting transparency, such as maintaining citizens’ rights to know).

Nevertheless, it is clear that providing and promoting transparency is only an aspect of the legitimacy complex, and that utilising information provision as a means of generating affective loyalty must be guided by a systematic approach, predicated on an assessment of what specifically the Union is seeking to render transparent, which mechanisms will it engage to pursue that transparency and who does it have in mind as the target audience? Furthermore, why specifically is certain information being made transparent and what purpose does it serve?

The issue of transparency’s target audience, in the context of these questions, is particularly problematic. A significant part of the problem with efforts to legitimise the Union has been that citizens are recognised to be culturally heterogeneous, yet the communicative methods engaged appear to have addressed Europe’s publics as a homogenous mass. Citizens’ demands both in terms of transparency and legitimacy are all but regarded as universal. In reality that cultural heterogeneity will reflect differences in approach to the idea of community itself, to the participatory role of any given community within the European Union, to the legitimacy standards that different communities expect of the Union, and to the types of transparency the Union is expected to provide. Only by comprehending the nature of the demographic mix and their varied expectations can the Union comprehensively address any attendant legitimacy crises. Furthermore, it is only by comprehending the varied expectations of Europe’s political and cultural communities that transparency can be used in a targeted manner to overcome problems of distance, exclusion and centrifugal desires to break-away. Outwith resolving these multi-faceted theoretical problems, there are very real practical difficulties to accessing and comprehending what those varied expectations are and how they might be encapsulated within the policy development process.

### 4.4 Conclusion

The object of this chapter has been to examine the determinants of democratic legitimacy in the EU context, reflecting in particular on the ‘legitimacy crises’ that have affected EU political development, and which turn on the notion of a deficiency in affective loyalty towards the EU qua polity. It has been demonstrated that EU legitimacy is itself situated within a complex in which the interaction between the recognition and representation elements have been variously characterised in different typologies that seek to prioritise both normative and descriptive elements of legitimacy, alongside the specific mechanisms through which it is understood that legitimacy can be achieved in the democratic context.

In the context of this thesis’ research questions, the findings of this chapter confirm the hypothesis presented in *Chapter 1* insofar as it was posited that the transparency-legitimacy relationship in the EU context had been predicated on a strategically naïve understanding of the interactions that take place between the two concepts. The analysis also provided some further reflections (in relation to the first sub-research question) on how the EU institutions, notably the Commission, has pursued a policy narrative through which transparency could be used as a mechanism for ‘thickening’ a putative collective identity between Europe’s publics, chiefly by means of promoting an understanding of the institutions’ themselves, their respective remits and the commitment of the Union to the rule-of-law, amongst other democratic fundamentals.

Importantly however, the analysis presented herein posits some important initial questions about how it might be possible to pursue a more theoretically sustainable account of the interplay between transparency and legitimacy, thinking specifically about where and when transparency might contribute to or sustain a given legitimacy measure. In this regard, it was noted that it is necessary to undertake a strategic approach to transparency that is attentive to the situational elements of how information is disseminated and the interpretative frame through which that information is analysed by the intended audience.

In *Chapter 5* the discussion will return again to transparency. In seeking to produce an anatomy of transparency, the analysis will tease out systematically how it is possible to might approach those important questions raised above, i.e. what are we making transparent, how are we doing so and why? The object of this exercise is to produce a ‘conceptual grammar’ transparency that explicitly posits the links between what is being made transparent and the context in which that transparency exercise is taking place, and which renders explicit what particular purposes that transparency will serve. Equally it is possible to determine, or at least reliably hypothesise where particular goals might well be undermined. It will thus subsequently be possible to begin to take a more considered approach to whether or not transparency endeavours are legitimacy enhancing or legitimacy defeating, given the conceptual overcrowding that both concepts have evidently been subjected to and which invite speculation on the basis of intuitive assumptions and false causalities.

The grammar proposed in *Chapter 5* will subsequently be refined in *Part III* of this thesis in the context of key questions about culture and the impact of culture on information perception. The impact of culture on institutional approaches to transparency and legitimacy has already been considered briefly at various points in this chapter, particularly in the context of institutional responses to transparency and legitimacy requirements. Nevertheless, culture has a fundamental impact also on the expectations that are invested in transparency, indeed it is the driving force behind the heterogeneous perspectives that are observable on any given social, political or legal issue. Considering explicitly how it might be methodologically possible to incorporate the phenomenon of cultural heterogeneity into discussions about transparency and thus take account of varied transparency demands, presents a significant opportunity to revisit EU policy approaches to transparency and design (or rather broker) policy solutions that are attentive to various shades of cultural expectation.

# 5. The Anatomy of Transparency: Its Scope, Dimensions, Varieties and Directions

This chapter will explore how more realistic views about transparency’s effects can be developed, and proceeds on the basis that a context dependent understanding of transparency’s effects should be an intrinsic aspect of policy design and delivery. Hitherto, this thesis has considered the EU institutions’ conceptual understanding of transparency, including the sources and influences of that understanding and how they have articulated and published a narrative in which transparency is allied to the process of democratic legitimation in the EU (understood in the context of the EU’s ‘legitimacy crisis’, namely the need to reduce the so-called proximity gap). The analysis that will be pursued in this chapter is oriented towards responding to the second research sub-question, as set out in *Chapter 1,* which asks: how can we more adequately chart the interplay of factors affecting the relationship between transparency and legitimacy (and by definition other objects of governance), for the purposes of improving the policy design process, in the context of EU Governance?

In order to answer that research question, *Chapter 4* concluded that a more strategic approach would need to be taken that explored transparency’s capacities relative to the structural and situational components of the contexts in which transparency is being introduced or increased. This must start with a systematic examination of the nature of transparency itself. Accordingly, this chapter will sketch out the components of a viable anatomy of transparency. That is to say it will re-evaluate transparency’s conceptual grammar, which was considered from a historical perspective in *Chapter 2*, specifically considering what transparency is capable of achieving in different political contexts and with different audiences in mind. In particular, the anatomy will explore number of assumptions that have been made about the contribution that transparency can make to on-going processes of democratisation and the pursuit of democratic goals, including its contribution to the creation of a collective European identity in an integrated public sphere.

Thinking specifically about the place of transparency in governance, this chapter will address three probative questions: 1) What information, processes or events should be made transparent and to what extent should their disclosure render them fully transparent? 2) How can we effectively and efficiently realise transparency? 3) To whom can and should that transparency be directed?

The answers to those questions will be delimited, to a significant extent, by the governance ‘habitat’ in which transparency is to be introduced or augmented. In the EU context, that habitat will consist of multiple public institutions, private corporations, civil society groups and individual actors, all of which will experience differing degrees of exposure to established regulatory regimes, in response to the dynamic and fluid power relationships that they exercise with one another.

The multiplicity of stakeholder groups in modern polities (the abiding feature of the phenomenon of polycentricity[[351]](#footnote-351)) significantly expands the range of answers we can give to the what, how and who questions that underpin the design and implementation of transparency policy. The existing power relationships between these groups is perhaps the most important factor influencing the different varieties, forms and structure of regulatory instruments, along with how those actors are affected or impacted by the overall regulatory scheme.[[352]](#footnote-352) In addition, those relationships shape expectations of transparency based on an actor’s overall experience of the machinery of governance. In particular, actors’ positioning within that machinery fundamentally informs their perceptions and presumptions about the general desirability of transparency, or lack thereof. Normative perceptions about transparency’s intrinsic virtue, or relative value, are thus significant in responding to questions about how different transparency mechanisms are chosen, as was outlined in *Chapter 2*. In addition, they can significantly alter the balance of scales in assessments concerning the extent to which maximising transparency should be prioritised over competing constitutional and administrative values including effectiveness, fairness and privacy.

The objective of examining, and in some cases re-examining, these fundamental structural questions about the building blocks of transparency is to move beyond a cursory two-dimensional analysis of readily perceptible cost/benefit implications of living in a habitat characterised by more or less transparency. There necessarily has to be a certain *savoir-faire* about the directions in which transparency is enabled to move and the varieties of transparency that are used, along with how that influences power dynamics and reshapes the governance terrain.[[353]](#footnote-353) Different approaches are suited to different ecosystems, rendering it practically impossible to construct a ‘neutral’ or one-size-fits-all transparency corpus. [[354]](#footnote-354) The argument runs therefore that the EU needs to clarify how its transparency strategies, including, but not limited to, its access to documents regime and its communication policies, drive legitimation processes, once it has chosen to engage in information release. The assumption that information is received, understood and processed similarly by different actors, risks undermining the purposes underlying information release.

The analysis will now proceed in four stages. Section 1 is concerned with the scope of transparency, ironing out the preliminary issue of how transparency is normatively characterised (as a good, value, attribute etc.) and how that affects our approach to the central questions of what, how and to whom should we make the business of governance transparent. Sections 2, 3 and 4, will then address these three questions individually, considering in turn the dimensions, varieties and directions of transparency.

### 5.1 Scope: Normatively Sketching the Transparency Corpus

In previous chapters, transparency has been considered in terms of its development and influence, as a component of modern democratic governance, generally, and in the EU in particular. *Chapter 2* examined transparency’s pre and post-Enlightenment historiography, highlighting the intuitive process of value ascription that has contributed to its contemporary pervasiveness. That process of value ascription has relied, in large part, on a deceptively simple and uniquely positive performativity claim: transparency passively renders visible the previously unseen.[[355]](#footnote-355) This metaphorical ‘casting of light’ upon the formerly shadowed machinery of government, has been normatively promoted in both consequentialist and deontological approaches to the political constitution, though naturally on the basis of different presuppositions. Both nevertheless have invested in transparency’s collective property as a device that materially augments the moral quality of democracy.

#### 5.1.1 The Virtue/Value Debate: Consequentialist & Deontological Justifications for Transparency

The consequentialist case for transparency presupposes that opaqueness in government is likely to engender both corruption and regulatory capture. Secrecy in decision making encourages rent-seeking. As such, transparency’s performativity is inherently virtuous; its mere presence reduces corruption and asymmetric information flows. On this account, transparency is mandated insofar as it promotes the good (often termed welfare or utility), it is heavily informed by the Benthamite tradition, and is encapsulated in the famous canon: ‘the more strictly we are watched, the better we behave’.[[356]](#footnote-356) In addition, transparency’s ‘passivity’ is assumed to exert no specific transformative or deleterious effects on the existing governance terrain, i.e. introducing transparency will not affect other governance outputs or the power relationships that exist between the various branches of government and external stakeholders etc.[[357]](#footnote-357)

Alternatively, the progressive embedding of transparency within the lexicon of modern governance has also encouraged the proliferation of deontological or ‘value’ based claims about transparency’s capacity to enhance or facilitate participatory democracy, promote legitimacy and increase the effectiveness of administrative accountability.[[358]](#footnote-358) *Chapter 3* explored the inception of transparency and its subsequent embedding within the life of the EU, considering both legislative and policy based developments, along with some of the value based claims that have been made in its favour. They are rooted in longstanding concepts of procedural justice and in the notion of political equality amongst citizens which accompanied the rise of the republican (and latterly liberal) state.[[359]](#footnote-359) As such, they presuppose that transparency is instrumental in optimising the effectiveness of accountability/legitimacy etc., framing these concepts as normative principles of democratic governance.

Though perhaps not readily apparent, a fundamental difference here between deontological and consequentialist accounts is that the former do not assert transparency’s inherent virtue, since deontological ethics would assess the moral value of imposing transparency within a governance system by criteria different from the ‘state-of-affairs’ that such a choice would bring about.[[360]](#footnote-360) Consequentialists determine at the outset the state-of-affairs that they regard as being inherently virtuous or valuable. For example, it is desirable to maximise a state of affairs in which secrecy and corruption in government is minimised; the consequences are thus determinative of the moral virtuousness of introducing transparency.[[361]](#footnote-361) For deontologists however the rightness of transparency is based in the rights of citizens.[[362]](#footnote-362) Commonly it is asserted that the right at stake here is the right to meaningfully participate in democratic self-government. As such, the rightness of introducing or augmenting transparency relates directly to its conformity with a higher moral norm. Implementing or augmenting transparency might not in fact produce ‘good’ (in the sense that it contributes to utilitarian outcomes) but it is justified on the basis of it being the ‘right’ thing to do.

Belief that transparency is the morally right thing to do, and the belief that introducing transparency will consequentially produce a desirable state of affairs are not mutually incompatible. However, if one subscribes to a deontological obligation to introduce transparency, because citizens have a right to information, then irrespective of the state of affairs produced, transparency must be introduced. This correspondingly affects any consequentialist assessment of transparency’s capacity to produce ‘good’, such as to minimise corruption or enhance legitimacy, since the moral claim (or rather justification) for transparency is located elsewhere.

Nevertheless, even if increasing transparency is regarded as the morally right thing to do, the notion that this presupposes a normative principle of participation in democratic self-government remains somewhat normatively hazy. As has been highlighted, value based claims about the moral rightness of transparency have proliferated, and they are often justified on the basis of competing and inconsistent premises about the kinds of values that should validate legal choices. Core moral norms in deontological ethics are narrowly construed and the principle of participation in democratic self-government appears logically to be itself a right, stemming from an altogether different prior constitutive norm, perhaps of human equality or of human physiological and psychological integrity.[[363]](#footnote-363) Further, transparency is normatively defended not merely in terms of democratic participation, but also in respect of democratic representation, accountability and legitimacy etc. These embody overlapping deontological concerns, making it difficult to concretise the normative basis for transparency’s ‘rightness’.

Of course, if the Union pursues a purely consequentialist vision for transparency, in which it is being used merely as a tool to bring about a more legitimate Union, then there is not necessarily any need to concretise transparency’s rightness in normative terms. That however does not appear to be the view that has been propagated by some of the centralised institutions, including the European Parliament and the Court of Justice, who associate transparency directly with citizens’ capacity to achieve effective representation and democratic participation in the life of the Union, as was discussed in *Chapter 3.*

Alternatively, as was charted in *Chapter 2,* transparency’s meteoric rise accompanied the emergence of the republican state, which had been influenced by both Hobbesian[[364]](#footnote-364) and Rousseauian[[365]](#footnote-365) contract or covenant based ethical theories. Here the search for a core normative principle is sublimated by an appeal to public reasons in which morally right acts are hypothetically prescribed by a suitably constructed social contract, or rather, morally wrong acts are forbidden by such an appropriately enumerated contract.[[366]](#footnote-366) Modern contractualist ethics would divine that the moral content of transparency is in fact rooted in its justifiability; it is a value that is accepted in social, political and legal culture, and thus supported by the substruct of the hypothetical social contract.[[367]](#footnote-367)

It is a matter of some considerable debate whether contractualist theories of normative ethics are in any true sense deontological, rather they might be more appropriately considered meta-ethical.[[368]](#footnote-368) Certainly, contractualist ethics stands orthogonal to the agent and patient centred views of deontology.[[369]](#footnote-369) Nevertheless, this peculiarity of contractualist ethics might go some way to explaining the fact that an appeal to collective public morals might not necessarily yield to deontology and the moral rightness of transparency on the basis of some acceptable higher moral norm. It has been noted for instance that contractualist ethics might very well respond to epistemological accounts of moral notions, meaning that publics are free to consensually justify recourse to transparency on the basis of its utility (the state of affairs that it induces), or indeed on the basis of any other form of socially acceptable reasoning.[[370]](#footnote-370)

The foregoing analysis suggests that whilst transparency may be rightly considered a good, its value is contingent upon its relationship with other values that form part of any given constitutional system. As a result, the extent to which transparency might readily be considered an essential constitutional precondition of the Union’s constitutional system depends on the varying contexts in which these associated values operate. Moreover, the environment in which transparency operates is replete with opportunities for conflict. This directly impacts on the effectiveness of transparency mechanisms and renders it difficult to argue with any measure of precision that transparency is either a deontological obligation or indeed consequentially valuable, any or all of the time.

In Chapter 4 the relationship between transparency and legitimacy in the EU was examined in the context of Union efforts to use transparency to ameliorate perceived legitimacy deficits. On this view, Transparency’s justifiability is directly contingent upon its role in increasing legitimacy, which might be regarded as desirable, or as a morally absolute precondition of democratic governance. In Chapter 3, however, it was noted that some of the centralised institutions are now retreating from that view. Empirical evidence suggests that there is not a linear relationship between transparency and legitimacy – or at least not between legitimacy and transparency as it has been conceived of and implemented hitherto by the European Union.[[371]](#footnote-371)

The analysis in Chapter 4 highlighed that transparency and legitimacy could be potentially competitive values that will produce antagonistic effects. It established that there are limits to positive transparency and that assessments must be made that account for the overall additional benefit of more transparency, versus the implications in terms of direct and indirect costs and disadvantages towards other stakeholders in the overall regulatory scheme. This approach is prevalent in econometric analyses of transparency, which were outlined in Chapter 2.[[372]](#footnote-372)

By conceding that transparency is an aspect of governance that can induce both positive and negative effects, it might be necessary to qualify any consequentialist account of transparency’s inherent virtue, since the state-of-affairs that is produced, may very well not maximise the good. Deontological justifications are however a little more tricky, transparency may still be an obligation if it is either a right, or instrumental in the maintenance of another right, stemming from a core moral norm. Though identifying the specific right(s)and the interrelationships they embody is evidently complicated, as has already been discussed. On the contractualist account, it is hypothetically possible to seek to justify transparency on either basis, or indeed on some other basis altogether.

#### 5.1.2 Broadening the Basis for Justification: Accounting for Transparency’s Dis-utility

Performative evaluations of transparency[[373]](#footnote-373) now increasingly highlight the moral contradictions not necessarily apparent in a panoply of definitions heavily reliant on metaphor.[[374]](#footnote-374) By exposing potential paradoxes, as we have seen in Chapter 4 transparency is rendered neither as a virtue nor a value, but rather it is considered potentially valuable on the basis of a number of contextual factors surrounding the forms which it takes, the ends to which it is put and the correlative attributes with which it is associated, (accountability, for instance) as part of a governance system.

Sociological accounts of transparency have been particularly influential in bringing to the fore the potential dis-utility that can be a direct result of objectifying transparency’s impact. Some have highlighted the value of ‘ignorance’ in maintaining social order, suggesting that restricted information flows may contribute positively to social functioning and cohesion within societies.[[375]](#footnote-375) Others have gone further, suggesting that trust should be considered as a non-individualistic concept, rooted in inherited culture, undermining the assumption that transparency somehow virtuously increases the level of trust in governance systems.[[376]](#footnote-376) Finally a third view, which was briefly outlined in Chapter 2 contends that even where transparency can be said to contribute positively to promoting trustworthiness in public life, (i.e. by imposing periodic accounting or audit requirements on government and business) it merely provides a basis for judgement and (where necessary) sanctioning. Nevertheless, when that transparency does not operate synergistically with other regulatory mechanisms that provide for reproaching, penalising or dismissing those who are responsible for poor performance, the case for requiring transparency is generally weakened.[[377]](#footnote-377)

The preponderance of these viewpoints begs an important question. If transparency is only potentially valuable, then how might it best be categorised? There is a strong case for proposing that transparency might be most aptly characterised within this anatomy as an attribute of governance, perhaps even a mere ‘tool’ of administration. It has already been demonstrated that it is context-dependent and within a given context, transparency’s values have to be established, they cannot be assumed.[[378]](#footnote-378) In certain circumstances transparency will contribute to the achievement of other regulatory goals or objectives, which might themselves be categorised as virtues, values or mere attributes of a democratic polity. Insofar as it is valuable, its value may be assessed in relation to the achievement of these other objects, but that value may have to be discounted where unintended consequences occur.

Supporting this characterisation of transparency as an ‘attribute’, it has been suggested that the existing corpus of transparency legislation exemplifies how access to documents legislation[[379]](#footnote-379) is about the availability and accessibility of information, but that such legislation is silent on a number of the circumstances governing that accessibility. Chiefly, access to documents legislation is often neutral or passive on the question of who avails themselves of the available transparency and what the broader social and political costs of access are.[[380]](#footnote-380) Here, transparency’s passivity means something quite different from the neutral impact that consequentialists have suggested that transparency has on an administrative regime. In this context the legislation’s passivity reduces transparency to a negative value, (or rather a negative component of liberty)[[381]](#footnote-381) since the legislation serves only to establish the province within which citizens are capable of seeking transparency. Transparency is in fact achieved only at the point an individual chooses to exercise or satisfy the conditions that have been enumerated in the legislation and thus s/he gains access to the information they seek.[[382]](#footnote-382)

#### 5.1.3 What Does Transparency Actually Provide?

A fundamental paradox of the transparency metaphor is that the information contained in documents, reports and indexes is not a ‘window’ into the operations of an institution, but rather an ‘image’ of the institution (or an aspect thereof) is presented on the accessed document. Moreover, the image presented on the document is not only a mere representation, but it is inevitably an imperfect representation. This in and of itself is not necessarily fatal to the purposes of transparency, since the potentially valuable aspect of the transparency that this representation provides does not lie in its accuracy, but rather in its reliability.[[383]](#footnote-383)

Correspondingly, potentially valuable transparency may be sought in documents containing information that does not perfectly represent all of the features of an institution or process, credibility is found in the appropriateness of the content of the information itself. Here ‘appropriateness’ is a measure of what is required of the information source in order that it provides the necessary semblance of the institution under consideration. As has been suggested, semblance here is more important than resemblance, reliability trumps accuracy and in turn comprehensibility must trump reliability. Consequently, information as commodity is never, *stricto sensu*, more or less transparent, it can only be more or less accurate, more or less reliable, and ultimately more or less usable.[[384]](#footnote-384)

Usability raises yet further concerns about information, as the paradigm source of transparency, and the relationship of that source with the subject seeking it. Information items require human interpretation, which is a significant, perhaps even the decisive variable, in assessments concerning accuracy and reliability. In addition, the information itself has an author, who created a particular information item for a specific purpose, which itself has to be inferred through an act of human interpretation. The false objectification of information, i.e. the idea that it is merely a neutral representation of a given phenomenon, obscures this purpose and makes it more difficult for the information item to be effectively interpreted.[[385]](#footnote-385)

The risk here is that the fundamental objective of transparency is debased. Human motivations underpin the structures of all organisations and institutions, and of all the activities conducted therein, be they individually or collectively manifested. Furthermore, the notion of human perception, of filtering observations about the world through a personalised socio-cultural lens, is the most significant and inherently mutable characteristic of any assessment of how valuable transparency is in a given context. How to reconcile the variability inherent in human perception and the affect that this has on assessing transparency’s value, including how this might be accounted for in the policy design and implementation process will be the subject of *Part III* of this thesis.

Here it is sufficient to be concerned with the risk posed by the prevailing view of transparency as ‘neutral’ information and the paradox that this may in fact result in more obscurity. A simple hypothetical can be posed to illustrate this point. A government department might choose to tender a contract for the creation of new offices. As part of the bidding process it requires that all tenders disclose the last 3 years of company accounts. The purpose of this disclosure is very likely to be that the department concerned can make an assessment as to the trustworthiness of the building firm it is considering. The accounts will include turnover figures and basic details about projects undertaken in the past, thus enabling the department to make assessments about the size of building project that the firm is capable of undertaking. The accounts will also include details of outstanding payments to creditors and former clients of the firm for whom it now is effectively a creditor. This information allows the department to assess the risk of the firm concerned suddenly being faced with liquidation, or perhaps it might point to a defect in the firm’s previous building projects if there are a significant number former clients whose accounts are still to be settled.

Anyone who later views the records of the tender decision would not be able to glean the purpose for which that information was used merely by looking at it, since the information itself is merely a series of financial transactions. The purpose behind requesting that information was not an objective matter. Purpose subjectivity affects a significant amount of the information produced by any organisations, along with subsequent uses of that information by an organisation/other actors, regardless of whether it was produced internally or by a third party. That subjectivity is obscured by the temptation to view information as an objective ‘thing-like entity’, which exists independently of human agency.[[386]](#footnote-386)

#### 5.1.4 Producing Transparency: The Co-existence of Passive and Active Processes

In section 5.1.2 above, it was considered that one of the defining features of transparency as access to documents is its ‘passivity’, since access legislation merely establishes the province within which information/documents can be sought. In the case of the EU, Regulation 1049/2001 which was encountered in *Chapter 3,* provides access specifically to documents created or acquired by or transmitted to the centralised institutions, pursuant to their legislative/administrative activities.

Whilst the province of transparency may be appropriately characterised as negative, the documents that can be accessed are information products that have been created in the course of the centralised institutions undertaking their legislative and administrative activities. Some may have been expressly created for the purposes of communicating what those activities are, whilst the vast majority will have been created to facilitate institutional processes, outputs and outcomes. Irrespective of the purpose for which information has been created, it is apparent that it must have been ‘actively’ produced. It is the combination of these passive and active elements in tandem that co-ordinates the supply of and demand for information which constitutes modern transparency.[[387]](#footnote-387)

Given these factors, it is only logical to suggest that where there is not demand for information, the chances are it will not be produced. Demand is dictated by a number of factors, not least the legislative scheme establishing an access regime. In addition, the composition of stakeholder interests within a political community and how effectively they voice their demands will have an effect upon the ‘amount’ of accessible transparency there is to be had and its quality. The information that is produced should satisfy stakeholder requirements in respect of its accuracy and reliability, usability etc. These are difficult criteria to satisfy – the stakeholder *in abstracto* is an unknown quantity. His or her prior knowledge, their position relative to the institution under scrutiny and their relationship with other stakeholders and institutions will affect the act of human interpretation, and as such the resulting usability of that information.

Furthermore, issues of usability in the context of EU transparency have a particular pertinence, since EU rules on accessibility provide for access to internally produced or held documents that were not likely to have been created with the stakeholder in mind. Access is granted to internal documents, drawn up for use by the institution in the day-to-day management of the organisation, or pursuant to their policy objectives. As such, stakeholders must be content with entirely decontextualized material of limited use, the documents concerned might be incomplete, they might disclose decisions or conclusions but not the justifications for those reasons, and they might even have been redacted. The significance of this problem appears to lie in the fact that FOI regimes around the world tend to sidestep active processes of creating information for the purposes of increasing stakeholder transparency, by simply making provision for access to documents already being produced as part of the day-to-day running of a department or institution.

Conversely, even in situations where information has been produced specifically to cast light on the operations of an institution, accuracy, credibility and usability may still be compromised, owing to the problem presented by the phenomenon of rival and complementary information products.[[388]](#footnote-388) Rival information products compete with one another for a given stakeholder’s attention or trust; they may be produced by different information outlets, or different sectors of the same information outlet. In the case of government transparency, rival information products produced by other bodies may be created for purposes indirectly related to or antagonistic to the purpose of increasing transparency. This is a phenomenon that is particularly pertinent to the EU, where the possibility of conflict between supranational and national levels of government can result in diametrically opposing media coverage from different press outlets.

Complementary information products, as the name suggests, support and or supplement one another in the dissemination of information to stakeholders. This might typically be through promoting accessibility via a number of different channels and/or through harnessing developments in information and communications technology.[[389]](#footnote-389) Complementary products should promote accuracy and reliability also by reinforcing a common transparency message.

#### 5.1.5 Constructing Transparency: A Quest for Translucency?

Much of the forgoing discussion has sought to deconstruct transparency as a concept, thereby exposing its weaknesses in order to establish the limits of transparency’s scope. That discussion has focussed in particular on concerns about the value of the information that constitutes transparency, and how that in turn presents concerns about the reliability and usability of the information gains made possible by access to documents regimes. In normative terms, the risk of assuming that transparency is either inherently functionally valuable or otherwise morally justified as ‘right’ was questioned. The inevitable conclusion must be that transparency as information is perfectly capable of facilitating knowledge (which unlike information must be *ipso facto* usable), but its capacity to do so depends not only on the degree of available transparency, but also on a number of other factors.[[390]](#footnote-390)

Transparency is therefore a ‘variable’ attribute of governance. The factors that might intervene and affect its quality, correspond with the questions set out in the introduction to this chapter – what information, processes and events should we make transparent? How should that information be made transparent, not merely in terms of the overall regulatory scheme, but what additional contextual information needs to be communicated to make transparency sources usable? Finally, to whom should information be rendered transparent and in doing so, what contextual factors about the stakeholder groups concerned need to be taken into account?

Arguably a fourth (subsidiary) question also interposes here. Not only should we ask what information should be made transparent, but to what extent should it be made transparent? Transparency may indeed be variable, but degrees of transparency may themselves be valuable in different contexts. Whilst *section 5.1.1 above* considered the potential that transparency may detract from the value added by other desirable attributes of public policy, it must also be contended that there might be circumstances in which privacy and secrecy are legitimate concerns for an organisation, particularly where transparency intersects with personal privacy rights, commercial confidentiality, human safety etc.

Whilst in contemporary political discourse the terms ‘partial transparency’ and ‘translucency’ are not readily used, they may in fact quite accurately describe the condition of a governance habitat. Partial transparency is a feature of EU access to documents system,[[391]](#footnote-391) and many other FOI regimes,[[392]](#footnote-392) and it is clear that the substance of many court challenges can turn on fine assessments of the extent to which documents and parts thereof are subject to disclosure (and the level of scrutiny that the disclosing authority must apply in making that decision), either because a legally mandated exception to disclosure potentially prevails over parts of the requested information, or for some other presumption which has been applied by the defending authority.[[393]](#footnote-393)

It is clear in these circumstances that the result is not full transparency. Equally there is not full opacity either and certainly there is more transparency than there was prior to disclosure. The quest for transparency might thus be more aptly described as a quest for translucency, through which it is possible to access more information and know more about a system, decision or process than was previously known, but which nevertheless cannot be rendered totally transparent.

The next section will move on to consider the first of the three composite factors of our transparency variable, asking the question, ‘what’ information should be made transparent? In framing the question alternately, one might ask what are the ‘dimensions’ of our transparency anatomy and how does that inform what we could or should disclose?

#### 5.2 Dimensions: What Should we Disclose and to What Extent?

Preliminary considerations aside, we can now focus on the things that we seek to glean from transparency. The dimensions of transparency might also be considered to be transparency’s aims or goals. How those aims/goals are characterised depends very much on the elements of the transparency principle that we would seek to prioritise within a particular governance setting, in other words, what characteristics of a regime do we view as being important or essential, and how are we going to use transparency to ensure that?

Traditionally, the preeminent value of good-governance has been ‘accountability’, in the sense that increasing the transparency of an organisation or institution towards another institution, group or body of people, allows the latter to hold the former to account.[[394]](#footnote-394) This view emerges out of consequentialist thinking on transparency, as discussed in *section 5.1.1* above. The shortcomings of such a position have been discussed extensively elsewhere,[[395]](#footnote-395) and also in the discussion in earlier chapters. In addition, a preoccupation within the academic literature of contextualising transparency and accountability as almost indistinguishable concepts has resulted in accountability being designated as a governance tool that can require the provision of information for its own sake, rather than it being a mechanism that deals with the holding to account (i.e. sanctioning or censure) that might follow the disclosure of information under transparency provisions.[[396]](#footnote-396)

In view of those documented shortcomings and confusions, instead of identifying accountability as one of the dimensions of transparency, accountability will be considered here as a sub-principle of transparency’s value as a *regulatory* instrument.[[397]](#footnote-397) In addition, two further dimensions of transparency will be discussed, transparency as a principle of *good or sound administration* and transparency as *efficiency*, which feature heavily in some of the theoretical assessments of the sources of EU legitimation, which were discussed in *Chapter 4*.

Naturally, the dimensions of transparency manifest themselves differently at different levels of governance. For instance, transparency as regulation looks very different (certainly more abstract) at the constitutional level from how it appears in concrete settings involving the administration and the individual. In addition, it needs to be highlighted that the dimensions of transparency are also covalent, insofar as concrete forms of transparency regulation may simultaneously serve more than one of transparency’s supposed dimensions.[[398]](#footnote-398) Bearing this in mind, other typologies and taxonomies of transparency may very well characterise the dimensions quite differently.

#### 5.2.1 Transparency as Regulation

In an Op-Ed piece for the Wall Street Journal, the American media executive L. Gordon-Crovitz declared that transparency ‘is more powerful than regulation’.[[399]](#footnote-399) That statement embodies the adage that ‘knowledge is power’,[[400]](#footnote-400) suggesting that transparency within an organisation or institution, supplies information to others that can be used to exert control, power or influence over the aforementioned transparent institution. This idea of being able to exert control, power or influence bears many close analogues to the discussion that has taken place in public policy scholarship, which, as detailed in *Chapter 2*, has asserted that transparency can be used to facilitate the evaluation of public policy design and delivery and as a means through which the public can hold emanations of the state to account. In a regulatory setting, this dimension of transparency manifests itself most commonly as compulsory disclosure.[[401]](#footnote-401) That disclosure comes in many forms and affects many public and private institutions. It typically involves disclosing budgetary positions/expenditure and financial performance, though other common examples include state schools disclosing examination results and hospitals reporting on waiting times and morbidity rates.[[402]](#footnote-402)

In reality however, the notion that transparency is in fact ‘more powerful than regulation’, is something of a misnomer. Requiring institutions and organisations to make their activities open to other organisations, pressure groups and the public at large is itself a form of regulation rather than being something other than or additional to regulation.[[403]](#footnote-403) Indeed, the question of whether it is a more successful form of regulation is surely dependant on the issues of who we make information available to and in what forms. Beyond that, there is a further issue of whether those to whom we make information available are actually motivated to exercise regulatory oversight.

Nevertheless, once it is recognised that transparency can be used as a form of control, the question of precisely what information should be disclosed must be equally as fundamental as the foregoing concern about whether anyone will actually exercise that control. The common examples have already been provided – examination results, waiting times, number of successful operations, morbidity rates, train services running on time etc. This statistical information usually pertains to outcomes or outputs; it measures the success of an institution at service delivery. Or at least, it does so partly. Disclosing outcomes allows one to make cursory assessments about the quality of service delivery in the instant case, but it would perhaps be hasty to use this information alone as the basis for a comparative assessment, which often is exactly the type of assessment that interest groups and stakeholders are invited to make. Moreover, surely a comparative assessment of service providers is a fundamental element of using transparency as a control mechanism?

In order to be able to undertake worthwhile comparative assessments of hospitals for instance, one would have to be appraised of not only surgery success rates, but also whether different hospitals had received equivalent funding, whether they had allocated their budgets similarly, whether they had access to equivalent professional expertise, the demographics (and health characteristics) of the population that each hospital serves and the geographical area over which this all takes place. Surely this additional, contextual information, is a prerequisite of using transparency to make a qualitative evaluation? Nevertheless, the sheer number of variables for which we would require relevant information raises a number of related concerns. The first of these concerns, which has already been briefly considered in *section 5.1.3*, relates to the phenomenon of partial transparency, whether the disclosure was appropriate in the circumstances and whether a reasonable and meaningful evaluation can be made notwithstanding the ‘incompleteness’ of the disclosure. The second concern invites us to consider the increase in organisational costs as a result additional disclosure, against efficiency gains or the increase in accuracy provided by the availability of more information on a wider range of metrics. Finally, would providing additional information for the sake of completeness, accuracy or reliability, actually promote usability - is further disclosure appropriate in all the circumstances? [[404]](#footnote-404)

At this point, the question of ‘what information should we release’ intersects with the question of how it might be released, an issue that will be considered further in Section 5.3. Nevertheless, it remains pertinent to ask, once it has been established that transparency can be used as a mechanism of regulatory control, how suitable existing or future information release would be for the exercise of that control, and further to this, what foreseeable good will come of it?

#### 5.2.1.1 Transparency as the regulation of government.

In democratic terms, the importance of transparency is purportedly its capacity to allow citizens to regulate the organs of (central) government in particular, rather than emanations of the state and other public service providers in general. The control that can be exerted as a result of this type of transparency might readily be described as ‘democracy in action’.

There are two distinct elements to the concept of transparency as the regulation of government. On the one hand transparency is supposed to prevent governmental misbehaviour by preventing those in power from speaking with ‘two-tongues’ in order to hide their corrupt actions or shield their real motivations. This is classic Benthamite transparency, resting on the suspicion that behind closed doors those with power are up to no good. In the alternative, transparency in this guise is also heavily associated with academic debate about the characteristics of participatory and representative democracy and the conditions in which democracy must operate for it to be considered legitimate.

These two distinct elements draw heavily on the different arguments presented by consequentialist and deontological accounts of transparency – of whether we institute transparency to promote good decision making or whether we institute transparency because public decision making is a valuable end in itself.

On the one hand, is democracy not about the right of the public to assert their own version of what is right, irrespective of whether it is wise? On the other, do we risk debasing government by facilitating some form of mob populism and what foreseeable ill might come of this?[[405]](#footnote-405) Invariably public decision making is an important aspect of democracy; it may even be argued that it is an inviolable aspect of democracy that is not diminished merely because occasionally the public get things wrong. Nevertheless, government is not merely inputs driven – governmental institutions derive their legitimacy from the interplay of input, process and output factors, as was discussed in *Chapter 4.* Where those outputs or outcomes are diminished because increased transparency has forced government to appeal to the lowest common denominator, government may be delegitimised to a greater extent than it would be by restricting transparency and accordingly limiting popular rights to public decision making. [[406]](#footnote-406)

Treading this fine-line necessarily has significant implications in terms of what information to disclose and what not to disclose, and perhaps also when that information should be disclosed. More importantly perhaps, who should make that decision? The EU regulation on access (1049/2001) attempts to navigate some of these difficulties by providing that the institutions can refuse disclosure of documents where that disclosure would ‘seriously undermine the decision making process’.[[407]](#footnote-407) This however is the most heavily criticised provision of the regulation.[[408]](#footnote-408) In addition, where that provision was relied upon by the Council in *Access Info. Europe,* to justify only partial release of the requested document, the Court of Justice found that the ‘sensitive nature’ of the provisions contained in the requested document, was not sufficient evidence to indicate that the Council’s decision-making process would be ‘seriously undermined’.[[409]](#footnote-409)

Both the criticism that has been levied at the exception to disclosure where it would ‘seriously undermine the decision making process’, and the decision of the Court of Justice to very strictly interpret the scope of that exception, seemingly speak to a belief that inconsiderate, bad or corrupt public decision-making is more likely to occur than a situation in which populism prevents public officials from taking wise, considered and often hard decisions that might be facilitated behind closed doors, or otherwise at arms’ length. There are of course situations in which such a belief might be conceivably justified. It is also to be noted that transparency itself can work to sustain that belief where supposedly bad decisions have been disclosed and they remain within the public psyche. The risk of course is that this manner of thinking about transparency can become obsessively concerned with transparency maximisation, rather than optimisation, with transparency gains failing to satisfy the appetites of the public.

#### 5.2.2 Transparency as Good Administration

Transparency as good administration tends to be associated with the publication of procedures and processes outlining an individual’s relations with public authorities, in order to secure fairness in public decision making. Arguably, not only is the focus slightly different here, but so are the methods by which that transparency is secured. Hitherto, this chapter has been almost exclusively concerned with transparency as access to documents in order to secure governmental openness and public participation. Administrative transparency is however concerned with a broader range of regulatory mechanisms and discrete rights that may be owed to individuals where they are affected by public decision-making.[[410]](#footnote-410)

In the EU, Article 41(2) of the Charter of Fundamental Rights recognises the right of access to a person’s file as part of the principle of good administration. This might be viewed as a sort of individual manifestation of access to documents more generally.[[411]](#footnote-411) Transparency here is designed to ensure fairness and it emerges from quite a different legal tradition to that which precedes access to government information. In effect it is a derivative of the right to a defence, which has been appropriated as an aspect of good administration in the Charter of Fundamental Rights. The right to a defence is itself bound within longstanding evidentiary traditions of the criminal law, namely that a defendant knows the offences with which he has been charged, that his indictment has been laid according to fixed, pre-existing laws and that the evidence to be used against him at trial has been disclosed (see *Chapter 2*).

Stemming from this evidentiary tradition, transparency displays a strong relationship with legal certainty, which in administrative terms extends to having clear procedures in order to prevent harm or future conflict. Typically, procedural rules should establish whether a party has the right to be heard or make a written submission prior to a decision of a public authority in which he is individually or directly affected. In addition, those rules should establish relevant time limits for making applications/submissions and for receiving responses, what the obligations of the public authority are and whether their discretionary authority binds them to actually taking a decision, or indeed whether they might be forced to reconsider a prior decision. Ultimately, policy rules and administrative procedures, should serve to make the actions of the administration predictable, militating against the possibility that the exercise of discretion becomes capricious or arbitrary.[[412]](#footnote-412)

Under EU law, the transparency requirements imposing upon legal certainty take on additional significance in respect of directives, where national authorities have a duty to transpose the obligation contained in the directive into national law. In case law coming before the Court of Justice, the classic formula of “clear, precise and unconditional” has given over to constructions in which transparency features as a separate requirement: provisions of directives must be implemented with ‘precision, clarity and transparency’.[[413]](#footnote-413) Alternatively, the Court has held that directives must be able to create a situation which is ‘precise, clear and transparent to enable individuals to ascertain their rights…’,[[414]](#footnote-414) illustrating how EU transparency requirements in respect of sound administration can permeate the domestic law of the member states also.

Further examples of where the European Commission in particular has determined to provide for a significant degree of transparency and certainty in the execution of its policy choices can be found in the fields of state aid and public procurement. Here the Commission has relied upon a number of soft law instruments in order to provide interpretative guidance for treaty provisions that cover these fields.[[415]](#footnote-415) It is clear that in providing guidance about how and when the Commission will exercise its discretionary authority, the transparency of administrative decision making is increased and decisions that are taken appear less arbitrary. In addition, where such soft law guidance has been provided, the Court of Justice has indicated that the Commission has auto-limited its discretionary authority. Should it choose to depart from this soft-law guidance, then it might be held to have breached the principles of equal-treatment or legitimate expectations for instance.[[416]](#footnote-416)

In the field of public procurement, the principle of equal treatment between tenderers for public contracts is said to imply an obligation of transparency for the purposes of ensuring both equality of opportunity (i.e. the prevention of indirect discrimination) and for the purposes of facilitating control or compliance with the principle of equal treatment. In both senses the implied principle of transparency is being used to regulate, allowing both Commission and stakeholder oversight of the exercise of private contracts for the purchase of public goods. Though transparency must be present in order to exercise control and ensure the application of equal treatment, it remains separate from and not bound-up with that principle. Such a conclusion must follow from the fact that transparency facilitates review of whether the obligations inherent in the principle of equal treatment have been complied with. Furthermore, the visibility should be afforded to all parties, i.e. tendering authorities and those submitting tenders.[[417]](#footnote-417) Following on from the discussion on the relationship between transparency and accountability *in section 5.2* above, this situation appears to involve a number of distinct administrative principles working in concert to ensure sound administration. Transparency provides for access to sufficient information in order to determine whether the non-discretionary principle of equal treatment has been applied when deciding which tender to select. The principle of equal-treatment is the legal requirement to consider all tenders under criteria of equality of opportunity and non-discrimination. Finally the principle of accountability provides for the exercise of control, the application of a sanction or remedy, in the event that the principle of equal treatment has been breached.

The question of what information this dimension of transparency requires authorities to disclose is in many cases fairly easy to settle. The normative content of the principle of legal certainty, which underpins the design of many provisions used to promote ‘good administration’, has an established pedigree and is fairly uncontentious. Fairness demands that the administration tells the individual about decisions that might affect him or her and in taking that decision they cannot act on a whim. Moreover, where transparency requires the prior notification of procedural rules or the communication of an individual decision, such requirements do not involve significant material costs, nor do they place an onerous administrative burden on the authority concerned. Nevertheless, some difficulties may arise in respect of qualitative transparency duties, such as the duty to give reasons, where it must be established on a case-by –case basis what constitutes sufficient, appropriate or credible reasoning in the circumstances.

It is clear that transparency plays something of a substantive role in the delivery of good administration, since it is essential to the functioning of the principle of legal certainty, and perhaps also to the principles of equal-treatment/non-discrimination. In that sense, transparency is a non-discretionary attribute of governance, though its value is relative to these other principles. In addition, transparency may not be capable of ensuring good or effective administration of its own, as was noted in the example on public procurement offered above.

#### 5.2.3 Transparency as Efficiency

Transparency as efficiency presupposes that the open availability of information will both guarantee and facilitate this market efficiency, working towards a virtuous circle in which increasing transparency enables the identification of truth, consequently producing more knowledge and greater openness. Such arguments are analogous to those made in free speech theory[[418]](#footnote-418) and by the open-source community.[[419]](#footnote-419) Notwithstanding the distinctions that have already been made between information and knowledge (see *section 5.1.3*), proponents of transparency as efficiency believe that the provision of information inclines towards knowledge, even if it cannot guarantee it, and thus transparency is at the very least highly desirable, if not absolutely essential.

The natural position for transparency as efficiency advocates is to demand as much transparency as possible, information leads to truth, but when and where this truth will materialise cannot be pre-empted, so as much information as possible must be available all of the time. Denying disclosure could produce situations in which there is imperfect information and informational asymmetry, which could have damaging effects on the performance of financial, commodities and products markets, on policy formulation and execution in government departments, eventually drilling right down to the individual decisions taken by public bodies in the management and administration of public service provision.

The rationale behind this position is distinctly managerial; social engineering is desirable insofar as it allows society to be rationally administered by benevolent authorities who are possessed of perfect information.[[420]](#footnote-420) This rationale however is also a weakness, because it does not justify the free exchange of information all of the time, if authorities are truly acting benevolently.

Institutional behaviour changes in response to access to new information as those working within institutions can manage social systems better if they know what is going on. That act of ‘knowing’ involves gleaning information from all the available indicators that capture the essence of or are otherwise regarded as a reliable representation of the phenomenon at hand.[[421]](#footnote-421)

Such empirical claims about transparency may nevertheless be overblown. If information inclines towards truth and truth to knowledge, then there would never be widespread belief in falsehood, despite widespread dissemination of relevant and factual information. Intuitionism would prove an almost infallible source of reason. Believing that empirical information inclines towards truth, and in turn truth to knowledge, relies upon the possibility that it is always possible to infer the unarticulated assumptions which have informed the construction of any given information item.

Moreover, the efficiency of total transparency belies both the material costs of information production and the adaptive behaviours that transparency can induce. *Sections 5.1.4 and 5.2.2* above, have already identified not only the substantive and material costs that accompany information production, but also the risks of subjecting institutional processes and policy-making to populism. In order to counter these risks institutions may adopt intuitively defensive positions that evade or erode the capacity of information disclosure to precipitate enquiry and scrutiny. Typically, less information might be produced in the sense that less is physically recorded. This is behaviour that is not only limited to public bodies, since even in financial markets, herd-like behaviour (the conformity with expectations) may be adopted as a stratagem to prevent probing scrutiny of organisational working practices. This raises significant questions about the net effectiveness of maximising transparency in the name of efficiency.

Nevertheless, whilst there are evident flaws in the assumptions made by advocates of transparency as efficiency, making it necessary to question the correlation between openness, truth and knowledge, it is abundantly clear that the open-sourcing of information is much more likely to produce knowledge than its opposite. Clearly, whilst maximal transparency might be undesirable, something akin to maximal translucency might be optimal. The notion of optimal transparency contends that there is an optimum level of transparency, above which, the costs associated with information production, mob-populism and adaptive behaviours, outweighs the benefits of further increasing transparency.[[422]](#footnote-422) Below the optimal level, increasing transparency reaps more benefits than costs. The inherent difficulty however lies in identifying when optimum transparency has been reached. Do we benchmark transparency optimisation against the outputs or outcomes of public bodies, looking for the point at which institutions become less effective because of the costs associated with their transparency requirements? How might it be possible to prove such a link between these two phenomena? Surely any benchmarking process would involve further increasing transparency and hence compound the problem?

### 5.3 Varieties: How Can We Effectively and Efficiently Realise Transparency?

The foregoing section focussed upon the things that we might want to get out of transparency by considering the different aims and objectives that transparency advocates commonly seek to promote, in order to explore what information should be disclosed and to what extent. Here the focus turns to how that information should be disclosed in order to sustain those objectives.

The construction of (government) transparency turns on relations within government institutions on the one hand and between government and external stakeholders on the other. Government institutions are fundamental players in the formation of the different ‘varieties’ of transparency, in response to the governance habitat and the pressures (i.e. the supply and demand) for a particular type of transparency.[[423]](#footnote-423) These decisions are influenced by perceived cost and benefit considerations, both normative and pragmatic which combine to generate push and pull factors in the generation of transparency practices.

It is tempting to regard the cause of any lack of effectiveness in government transparency as solely a result of power inequalities that within government allow hierarchically superior institutional actors to overrule their subordinates, and which also allow government to ignore or side-line demands from external actors. Certainly power relationships are an important factor in determining the effectiveness of transparency policy, but the social and political construction of transparency presents additional concerns relating to form and sense, in other words the structure and appropriateness of transparency mechanisms in practice. Furthermore, the transformative influence of transparency in practice alters the dynamics over time of polycentric institutional and external stakeholder relationships, making those questions of structure and appropriateness ever-present concerns.

Within this chapter, we have already contemplated some of the effects of polycentricity and how the phenomenon of multiple actors and multiple powerbases typical of modern polities, works to broaden appropriate responses to the questions central to the composition of an anatomy of transparency (see introduction). Polycentricity implies also that the varieties of transparency employed within a polity will never in fact be perfected, but rather competing interests will contrive to produce a state of perpetual flux.[[424]](#footnote-424) It is instructive therefore to perhaps analyse ‘varieties’ of transparency in terms of the relational bonds that it reinforces and perhaps undermines between the different types of actors we have already considered.[[425]](#footnote-425)

In Institutional Relations terms, the actors who are party to a transparency relationship may readily be characterised as the object and subject of that relationship, since the latter can use the transfer of information to ‘monitor’ the former.[[426]](#footnote-426) The nature of the relationship itself may be examined according to a number of characteristics, including the nature and frequency of interactions and the relative power of the two actors within a given system or setting. These factors influence the effectiveness of the ‘monitoring’ that can be conducted by the subject, but nevertheless are subsidiary to the formal rules and processes governing the information transfer. It is to be recalled here that the relationship is constructed around a process of information exchange and as such the object of the relationship will be the actor who must provide information about themselves, but the object of the transparency remains the information itself. The monitoring is being conducted on the basis of a ‘representation of reality’ and it too may be analysed in terms of its accuracy, credibility and appropriateness, see *section 5.1.3* above. Furthermore, that information is a socio-cultural construction of reality, in the respect that an act of human interpretation was decisive in determining both the form and structure of the information item. When it is transferred to the subject actor of the transparency relationship, it will be evaluated by reference to the receiving actor’s own socio-cultural construction of reality and its value is affected accordingly.

In addition to these qualitative factors affecting the analysis of varieties of transparency, the scale at which the analysis takes place is significant. In the example used above, a single actor was made object of the institutional relationship and another, the subject. Clearly transparency practices can be analysed at the level of specific relations between discrete actors, but that analysis can also consider the overall efficacy of sets of relations within a system, or indeed between systems.

#### 5.3.1 Varieties of Transparency: Addressing the Intricacies of Transparency Modelling

Thus far we have highlighted that a number of institutional, sociological and cultural variables influence the value contribution of a particular type of transparency in action. How those variables are managed requires both an understanding of the system topography along with how different actors’ expectations are shaped by that topography. When examining transparency’s dimensions, in *section 5.2,* we considered what transparency was used for, in order to consider what advocates might want or demand. Here those considerations need to be taken somewhat further, considering how actors will react to the changed topography that is created as a result of new forms of transparency as they are introduced. Invariably there will always be an element of uncertainty, but how actors are likely to react can be predicted to a certain degree by understanding the extant power relationship and the cultural bias that influences their perspective. This will be the focus of the discussion in *Chapter 6.*

Mediating the reaction to transparency involves, significantly, navigating institutional resistance to transparency and the risks associated with the reconfiguration of power stemming from information exchange.[[427]](#footnote-427) It also needs to navigate demands for more transparency where the motive is solely to destabilise existing power relationships.

In addition to strategic concerns there are logistical complexities relating to the capacity of institutions to create transparency. Institutions may be unequipped to synthesise and disseminate information from multiple sources in order to optimise transparency. This can be either a result of costs and material resources constraints, but also a result of intellectual constraints.[[428]](#footnote-428) Where intellectual constraints prevent the effective implementation of good variants of transparency, the problem can be further compounded by the phenomenon of cognitive dissonance between the actors creating and the actors receiving information.

Even when strategic and logistical constraints have been overcome to a certain extent, the provision of transparency itself has logistical implications insofar as the availability and accessibility of information is ‘agenda setting’. Demands for more and better information about phenomena for which there is already information available, are much more likely to occur than demands for information about things for which little is known, as exemplified by Rumsfeld’s infamous ‘known unknowns’ and ‘unknown unknowns’. It is the belief in ‘known unknowns’ which guides the demand for more transparency, stemming from a frame of reference that suggests the known quantity of a given phenomenon is either incomplete or inaccurate.[[429]](#footnote-429)

### 5.3.2 Varieties of Transparency in Practice

Varieties of transparency may be defined either in terms of what they specifically allow/provide access to, or in terms of how their process characteristics generate implications for the systems and habitats in which transparency regimes operate. Quite simply, a law or regulation providing access to certain classes of government document is a ‘variety’ of transparency. Equally, a law or regulation that requires that meetings of administrative bodies be conducted in public is another ‘variety’ of transparency. However, if varieties of transparency are considered in terms of what they specifically demand of the environments in which they operate, we might more fruitfully consider how those varieties respond to the strategic and logistical intricacies discussed in the foregoing section.

#### 5.3.2.1 Process Transparency

In a previous section entitled ‘transparency as regulation’, (*section 5.2.1*)an example was provided in which it was considered what information would be needed to make an effective comparative assessment of hospitals on the basis of league tables of results. Here similar concerns are raised in terms of whether transparency is effectively framed in mechanisms that only publish information about outputs? Is it enough to know how many successful hip operations a hospital has conducted, or do you also need to know the processes that have been undertaken by the hospital to arrive at that figure? Certainly a degree of context can be added by providing information about inputs, the material and social resources provided to facilitate the hospital undertaking these operations, but do we not also need information about the hospital rule-book? How does it keep a track of and account for the money that it has been allocated? What is the pre-theatre etiquette? How are staffing levels arranged? What about the medical assessments themselves, how much is left up to the individual practitioner’s discretion?

Information about processes puts flesh on the bones of statistical accounts of events/outputs, and it can contribute to providing credibility in the long-term for shorthand and league-table transparency measurements.[[430]](#footnote-430) Nevertheless, providing such process transparency is often much more difficult than merely providing access to simple statistical data. Opening up institutional processes risks both the politicisation of institutional operations and the creation of an oppressive culture, promoting disaffection and defensiveness. Similarly, by making operational aspects of internal processes more transparent, there is a risk of generating conflict between competing considerations of openness and privacy. Hospitals treat individual patients and their personal information is rightly regarded as private, though it might of course still be highly relevant.

Despite these potential rights conflicts, process transparency is achievable. As a minimum, organisations should be required to publish their internal rule-books, and be ordinarily bound by their own published standards. Equally, the application of those rules in individual cases should take place in a standardised way. Where extraneous circumstances mean that a process must take place differently from the norm, then that must be accompanied by published procedures for reviewing the decision and/or a statement of reasons provided. Providing process transparency resonates very strongly with the notion of transparency as ‘good administration’, in particular with the principles of achieving legal certainty and fairness. It is clear also that process transparency has analogues in practices designed to promote accountability, legitimacy, the rule of law and democracy, suggesting that such practices may be introduced for a multiplicity of purposes. More accurately, it might be said that a given practice forms a continuum, promoting transparency at a certain point in time, and facilitating accountability in another, the publication must of course precede any accountability process.

#### 5.3.2.2 Surveillance Transparency

Surveillance transparency concerns the requirement to make disclosure in real-time.[[431]](#footnote-431) The mechanisms used to ensure this constant disclosure vary. At one extreme, the processes of an organisation and the people within it may be subject to permanent CCTV recording, though less onerous mechanisms include on-the-spot inspection, notified inspection and demands to produce certain records or information. Strong surveillance transparency offers the possibility of being able to capture both events and organisational processes as auditors are offered some measure of insight into what goes on ‘on the factory floor’, so to speak. Nevertheless, surveillance transparency is heavily criticised, not only because it presents complications in respect of rights to privacy, but also because it is suggested that it can induce defensive behaviour and reduce both effectiveness and efficiency.

The effectiveness argument suggests that if transparency consists of permanent organisational surveillance, the focus of the organisation itself can never be entirely devoted to its productive activities. Administrative attention must be devoted to ensuring the accuracy of transparency registers, and statistical data about productivity and resource consumption etc. Efficiency arguments on the other hand are made on the basis of the belief that constant surveillance can induce proceduralism and thereby disincentivise productivity.[[432]](#footnote-432) Not only are additional time and material resources devoted to the additional transparency burden, but the sentiment that this induces in institutional actors, by forcing them to be constantly subjected to the public gaze, is likely not to be conducive to encouraging investment and ownership of institutional actors in their tasks.

The alternative to providing continuous transparency is to provide periodic transparency windows, usually through reporting and surveillance cycles. The institutionalisation of the reporting and surveillance cycle is a core feature of macro-economic policy co-ordination across the EU, an area of policy that straddles the supranational/intergovernmental divide. Through the European Semester, the Commission undertakes a detailed analysis of member state submissions on budgetary, macroeconomic and structural reforms, and provides country specific recommendations for the following year.[[433]](#footnote-433) In reporting-cycle transparency, a picture of the relevant institution is only required at specific point in time and organisations are required prepare an account of their activities for stakeholder verification. Classically, this type of transparency is a feature of listed companies, who must prepare an audited report of their accounts. The advantages to this method of securing transparency are that obviously there is a recognised transparency window in which institutional actors are aware that they must present their account, once that window has closed, attention can then be re-focused on the productive activities of the institution. Such transparency might also be compatible with the release of time confidential information, which is particularly important for financial institutions, who stage the release of financial information to prevent fraud and promote trust in financial markets.

Reporting-cycle transparency is now a core feature of the governmental management of information, though early release and ‘leaks’ appear also as embedded aspects of this type of information governance strategy, where unilateral control over information release can allow government to exercise some control over the ‘spin’ put on policy announcements. This however weakens the value of time-confidentiality arguments, particularly about information in the government domain, and correspondingly increases the weight of arguments in favour of continuous transparency, in order to prevent the institutional manipulation of information for governments’ own purposes.[[434]](#footnote-434) Further, the ‘leaking’ and spinning of information release in order to manage its potentially negative impact is antithetical to the idea that transparency exists to promote trust in government and the legitimacy of governance institutions. Indeed, concern about the ‘selective’ release of information is embodied in the organisation Wikileaks, which specialises in the analysis and publication of large datasets of restricted official materials which have been sourced in defiance of legal mechanisms preventing that information from disclosure.[[435]](#footnote-435) Though Wikileaks’ motivation is not an objection to reporting-cycle transparency per se, it rejects, in toto, the idea that government information should ever remain secret, since this furnishes possibilities for corruption.

In order to prevent the subversion of transparency’s objectives, reporting-cycle transparency needs to be effectively regulated, thus preventing institution from manipulating information release, either through leaking or through delaying publication of time-sensitive information until some of the heat has been extracted from a scandal. The most significant risk here is that in the absence of other regulatory mechanisms, information may never reach the public domain, either because it is buried in the footnotes, decontextualized or camouflaged by the reporting ‘style’, or because it is simply excluded from reporting. Reporting requirements might therefore have to be supplemented with regulation about formatting and requirements to provide sufficient background material for the information disclosed to be comprehensible. Regulation might need to provide for reports to be reviewed and for reporting to be supplemented with institutional auditing. It might even be appropriate to invoke the criminal law in order to disincentivise the misrepresentation and manipulation of information disclosure.

Transparency as access to documents appears to embody elements of both continuous and reporting-cycle transparency, along with their respective risks and shortcomings. In principle transparency is continuously available, since requests for documents can be made at any time. However there is, in many instances, a significant delay between the request and the production of the information, which can be further extended where documents are initially refused, or the institution concerned requests that the applicant clarifies their access request. In addition to this, only partial access to the requested documents may be granted. Where applicants are searching ‘blind’, important contextual material may be contained in other documents. Equally, access legislation does not specifically prescribe the information that must be recorded in institutional documents, and so only a partial picture of processes, events and outcomes may be available, even when full access is granted, as has already been asserted in *Chapter 3*.

### 5.4 Directions: To Whom Can and Should We Disclose Information?

This final section considers who should be in receipt of the information gains presented by increased transparency. Outwardly this might seem like something of an odd question. Governmental transparency should be directed towards the individual citizen, since she or he is a participant in democracy and needs to be furnished with the tools to participate effectively. As we have already considered in some detail however, modern societies are a complex mix of stakeholders with different information needs. In addition, transparency may be used by these different actors to furnish or facilitate the achievement of other administrative and constitutional principles allied to democracy. The transparency mix therefore concerns much more than mere ‘transparency inwards’, i.e. the opening up of governmental institutions to the public gaze.

When considering how transparency can move, i.e. the types of institutions, activities and persons whose actions can be made more transparent, along with the different audiences that such transparency movements serve, it is apt to consider transparency on a 2 x 2 dimensional matrix, through which transparency can move upwards, downwards, inwards and outwards.[[436]](#footnote-436)

Inwards

Outwards

Upwards

Downwards

Hypothetical symmetrical or optimal transparency point.

#### 5.4.1 Transparency Inwards

Transparency can move ‘inwards’ towards the centre point, signifying that individuals outside of an organisation are enabled to observe what is going on within. Characteristically, this type of transparency would be provided through access to documents, though other stronger and weaker methods may be sanctioned, including mandatory disclosure. Transparency inwards can be mediated through the provision of recordings, preparatory notes and internal correspondence, including emails, thereby providing a fuller picture of what is going on within the institution, including deliberative and decision-making processes, in addition to resolutions and outcomes. Explanatory memoranda and statutory guidance are now common features of policy implementation, both domestically[[437]](#footnote-437) and within the EU[[438]](#footnote-438), though governments remain reticent about opening up decision-making much beyond this and access regimes may specifically delimit the extent to which decision-making is left effectively on show. As was highlighted in *section 5.3.2.2* above, public and private institutions do have some legitimate concerns about the interface between transparency and personal privacy, its effect on productivity and the efficacy of decision-making, particularly where the threat of publicity can be said to stifle frankness.[[439]](#footnote-439)

The desirability of this type of transparency and its ‘intensity’ will be determined significantly by how one understands democracy to work, along with the role of participation and representation within that particular model of democracy. Notwithstanding the possibility that more anxious scrutiny may prevent corruption, it may in fact be counter-intuitive in relatively high-trust societies to establish probing transparency regimes, which can have the effect of reducing existing levels of trust by exposing unseemly or unexpected practices that have remained hidden hitherto.[[440]](#footnote-440) Equally, in high-trust societies the active exercise of democracy may be limited to participation in periodic elections, authorising a mandate to govern for a set period of time. Outwith those election windows, actors within governance institutions are required to police their own behaviour, with internal systems of checks and balances being responsible for warding off corruption and double-dealing.

Even in societies where levels of trust might not be particularly high, or where trust has been shaken by the exposure of corruption, the established constitutional settlement might promote inertia or fatalism, rather than pressure for more probing transparency. In the UK for instance, despite widespread publication of the MPs expenses scandal, only minor substantive changes have been made to the existing system of self-governance through the Select Committee system,[[441]](#footnote-441) notwithstanding the creation of the Independent Parliamentary Standards Authority (IPSA). It can be observed also in other areas that opportunities for direct participation in governance are limited, and the role of referenda in the UK constitutional settlement continues to be the subject of some debate.[[442]](#footnote-442) Furthermore, though consultation on government policy is a long-standing feature of policy development in the UK, the sample-sizing, content, format and the duration of consultations, is controlled exclusively by the managing department.

Transparency inwards is also relevant to social control, either in terms of the exercise of control over public institutions, or indeed in terms of public institutions’ lawful control of private lives. In terms of the social control of public institutions, the interface between transparency and accountability is not clear cut. Nevertheless, as was explored in *section 5.2* above, some form of disclosure is in effect a pre-requisite to any significant accountability mechanism being put into place, even if the disclosure itself is no guarantee of accountability. For law enforcement agencies, warrant systems provide the means by which transparency is enforced in order to exercise control over the public. In this sense, these public officials peer inwardly into the private lives and homes of individuals suspected of contravening rules of social order.

#### 5.4.2 Transparency Outwards

The corollary of transparency inwards is transparency outwards from the centre. This type of transparency allows institutional actors to survey the governance habitat and its topography. In corporate and commercial terms, actors are examining what is going on outside of the organisation in order to respond to changes in the behaviour of competitors, peers and product/service users.

This surveying of habitat is fundamental to the organisation being fit for purpose, quite simply, without outwards transparency no regulatory institution would be able to perform well, since there could only ever be ideological and not empirically informed decision and policy making. If it is a commercial enterprise, it needs to ensure that it remains competitive; if it is a public institution performing a public service it needs to ensure that it is effectively maintaining service delivery and providing appropriate and effective regulation.

Transparency outwards relates to transparency inwards, particularly where public institutions are concerned, insofar as that institution’s policy-making and regulation will respond to what it can empirically observe going outwards. In addition, information sought through inwards transparency may be complemented or completed by information gleaned from external organisations. As such, without outwards transparency, the information available from inwards transparency may be sparse, incomplete or otherwise incomprehensible. Only the processes of that public institution will be able to be observed, and even then the underlying motivations for such processes may not be apparent.

Since public bodies often have regulatory power, it is often comparatively easy for them to impose and enforce outwards transparency through census and other information gathering exercises. Again, both outwards and inwards transparency may meet, where the public body concerned seeks to monitor the impact of business and commerce or indeed private individuals on the market, along with the wider economic and regulatory environments. Nevertheless, outwards transparency is not concerned as such with surveying the internal events and transformation processes of these businesses and institutions, but rather how their outputs impact upon the wider governance habitat.

#### 5.4.3 Transparency Upwards

This form of transparency moves along the Y axis, from the centre point upwards and characterises a classic master-servant type relationship. As such, it presupposes that the master can observe all the actions of his servant, monitoring his conduct, behaviour and the results that he achieves.

Transparency upwards is fundamental to the smooth internal operations of an organisation, since line managers must be able to direct operations from above, responding to the availability of information from below. In this setting, as with outwards transparency, it is often not easy to delineate transparency from accountability and control processes, where the transparency exists specifically to facilitate regulation and management of subordinate individuals or institutions.

Transparency upwards may most commonly be associated with internal surveillance, where employees are required to account for their time, may be recorded and are subjected to periodic assessment. This can be more or less invasive and usually bears some inverse correspondence with the seniority of individuals working within the organisation.

Effective internal management of operations may again contribute to the quality and comprehensiveness of the information available through inwards transparency, since upwards transparency is designed to promote process compliance and the effective recording of transactions and interactions between people within the organisation. This information, recorded in the form of agendas and minutes of meetings, formal negotiating positions and resolutions, in fact often serves something of a dual purpose; In the first instance, the institution concerned uses it to facilitate business operations, subsequently making it available (or at least partly available) to broader stakeholder interests. This can promote efficiency, since any given organisation is not recording and reporting separately for itself and for its outside interests. Nevertheless, it can also result in poor or incomprehensible information being provided to those outside interests, since they might not understand the institutional shorthand that has often been constructed around longstanding internal reporting and recording (see the discussion on information comprehensibility at *Section 5.1.3* above). In addition, it is often only decisions and not the reasoning behind those decisions that is recorded, drastically reducing the quality of information dissemination, which becomes ever more decontextualized, the further it is removed from the institution.

#### 5.4.4 Transparency Downwards

The final direction on the grid in which transparency might move is downwards along the Y axis, from the centre point. Transparency downwards is associated with democratic accountability and the capacity of the institutional subordinate to see and monitor what his hierarchical superiors are doing.

In public institutional and business settings, downwards transparency may be absent, or comparatively poorly developed, when set against upwards transparency. Businesses and institutions, with the exception of co-operative societies and mutual organisations, need not formally be democratic. In addition, downwards transparency may not be fundamental or even desirable, in the context of day-to-day business operations. Nevertheless, some downwards transparency mechanisms can be observed, notably through trades union and employee forum representation on executive committees and through the release of performance reports to employees etc.

Downwards transparency can assist with encouraging employees and institutional subordinates to understand the rationale behind institutional decisions, which otherwise might not be apparent, and which therefore might make institutional choices appear illegitimate. In broader democratic terms, it allows the subordinate to enquire as to whether power is being exercised responsibly and in response to a broadly construed understanding of need.

As might be already apparent, the directions in which transparency can move are interrelated, in so far as the presence of one type can facilitate another, either because the mechanisms for information collection are the same, or simply because an alternate type of transparency ensures information ‘collection’ in the first-place, where there otherwise would not be the institutional will to do so. Transparency inwards and downwards represent most strongly the ways in which transparency can be used to promote democracy and accountability, whilst transparency upwards and outwards present elite forms of transparency, used by privileged groups to manage and regulate others.

The transparency mix presents the possibility that there can be symmetrical transparency in situations where appropriate, credible and comprehensible information is available in all four directions. Where one or other direction is lacking, then the transparency mix can be said to be asymmetrical. Given the interrelationship between the different directions, asymmetrical transparency might compound the failure of transparency in the remaining direction(s), especially where they rely on the same sources of information.

### 5.5 Conclusion

This chapter has undertaken a structural assessment of transparency’s potential contribution to governance, with a view to pursuing a more strategic assessment of transparency’s relative costs and benefits. In doing so, the analysis has considered how transparency’s potential contribution is impacted by both the governance habitat; assessment of its relative value is further complicated by the phenomenon of polycentricity. In turn, this chapter addressed how perceptions of transparency are influenced by normative and deontological judgements about transparency’s necessity; in the case of the latter, it is not always readily apparent, in democratic terms, where the ethical justification for transparency sits. The persistence of assumptions about transparency’s performativity and its transformative effects, as has been addressed in this Chapter and in *Chapter’s 2, 3 and 4* often cloud the picture, leading to the conclusion that transparency is serving a multiplicity of purposes simultaneously.

In response to the key questions of what, how and to whom it has been demonstrated that the purportedly beneficial and predictable effects of introducing transparency rely on complicated administrative, political and communicative processes. Government information is frequently suffused with many meanings and none, it is decontextualized and it is often not produced with disclosure in mind. Furthermore, when considering transparency’s ‘paradigm’ method (i.e. access to documents), the inherent passivity of the process means that transparency is not achieved until it is sought, and the process of seeking is fraught with complications attendant upon how ‘incomplete’ the information requested, and its subsequent full or partial disclosure, actually is. Even, when assessing transparency’s contribution to a specific goal (i.e. in relation to regulation, effective administration etc.) it has been demonstrated that assessments of the relative costs and benefits of increasing transparency can turn on factors that are not intrinsic to the act of providing more transparency.

Returning briefly to the research questions, the objective of this chapter has been to explore how we might pursue a more theoretically sustainable account of transparency’s potential contribution to governance, exploring the interplay of factors affecting the relationship between transparency, legitimacy and other objects of democratic governance, for the purposes of pursuing better policy design and delivery in an EU context (research sub-question 2). Correspondingly, this chapter has explored how and where disclosure of information may have a mixed impact on the pursuit of legitimation and other goals, by demonstrating how the purity of that transparency is affected by the vicissitudes inherent in the governance of complex polities. Nevertheless, by exploring transparency’s conceptual grammar, charting its dimensions, varieties and directions, it is possible to produce hypotheses about the benefits and risks associated with information disclosure whilst also making more reliable assessments of the types and amounts of transparency that are needed to pursue particular goals.

Nevertheless, in addition to broad questions about transparency’s desirability from both deontological and utilitarian (consequentialist) perspectives at the meta-policy level, the complex communicative process which takes place between the introduction of transparency and the emergence of any supposedly desirable state of affairs is heavily contingent on both political actors and, more broadly, the public’s own perceptions of transparency. Whilst such individually held views will themselves be influenced by the nature of the dominant political discourse, those perceptions are heavily influenced by complex socio-cultural factors and biases, and can have a determinative effect on whether transparency is assessed as being good, bad or indifferent to the pursuit of a given goal. Furthermore, those individually held perspectives are determinative in the approach to the bigger policy questions about transparency’s normative import.

In *Part III* of this thesis, the analysis will explore how it is possible to consider the range of perceptions about transparency and expectations thereof, with a view to building these into the design and delivery of transparency policy in the EU context. In particular, the consideration will be given to how it is possible to account for the spectrum of relevant stakeholder interests, including institutional actors and EU citizens, who collectively inform the expectations that are invested in transparency. It is to be recalled that at the heart of this thesis is a debate about the extent to which transparency can be used to mitigate the effects of the so-called proximity gap and the attendant legitimacy deficits that espouses. It will be argued that by pursuing a distinctly culturalist approach, it is possible to design a theoretically mature approach to transparency and its relationship with legitimacy. Further, by exploring expectations that are invested in transparency, it may be possible to chart a course for the future direction of transparency policy in the EU that brokers policy development, based on an understanding of how deep-seated those expectations are and the extent to which mutually acceptable policy solutions can be pursued.

# 6. Conducting Policy Analysis in a Contested Political Space: An Introduction to Grid-Group Cultural Theory

This final part of the thesis is concerned with how it is possible to adequately account for the complex processes that encompass the provision of transparency, particularly those political, socio-cultural and communicative processes that can affect transparency’s performativity vis-à-vis its stated policy aims. The anatomy of transparency that was presented in *Chapter 5* considered and evaluated some of the effects that transparency purportedly produces. In addition, that analysis determined that not only can transparency produce unanticipated effects and work to defeat stated policy objectives, not least increased legitimacy, but the effects themselves can be relatively unpredictable. Nevertheless, analysing transparency’s instrumental value on the basis of its contribution to other ‘goods’ of democratic governance is an essential element of effective policy design and delivery, if undermining the achievement of those goods is to be at all avoided. Such a task however requires both an understanding both of how instrumental assumptions are formed in the first place, along with a means of assessing how competing accounts might be prioritised in any given governance setting.

The goal of *Part III* of this thesis is to consider how a transparency policy framework might be fashioned within the EU, in such a manner as it is capable of responding intelligently to the pluralism that is the Union’s defining political feature. As such, the subject of the inquiry is how institutional political actors and others, as stakeholders in the EU project, come to acquire the preferences or expectations that they have invested in it. How are those beliefs and expectations sustained, and what happens when and if they change? Those expectations which have variously been invested in transparency in the EU context, as intimated, sit at the very heart of assessments about whether transparency policy has successfully contributed to generating legitimacy in the EU by means of tackling the proximity gap, or indeed whether it has contributed to the emergence of any other anticipated and desirable state of affairs. By seeking to account for those competing sets of expectations, it is possible to open up the complex dialectic that informs how information is interpreted and understood when it is released, and thus it is possible to suggest how different actors will evaluate the extant policy approach in relation to its stated policy aims. Furthermore, it is possible to predict how alternative approaches might be perceived by different actors and how it might be possible to navigate the observable policy conflict and stagnation that is seemingly now perennial feature of the EU’s transparency approach, as was explored in *Chapter 3.*

For policy analysis, capturing and modelling the diversity inherent in actor approaches and expectations means that culture matters.[[443]](#footnote-443) A distinct culturalist approach will be used throughout *Chapters 6, 7 & 8*, to reframe and refine the conclusions drawn in preceding chapters: *Grid-Group Cultural Theory*.[[444]](#footnote-444) Section 1 establishes some preliminary justifications for the suitability of the Grid-Group methodology as a mechanism of accounting for actor perceptions about transparency. Subsequently, section 2 will set out in detail the central claims of the theory and its typology, as well as providing a short account of its intellectual pedigree. Section 3 moves on to examine how the theory can be applied in the context of examining EU transparency and how the typology that it supplies can be constructed, making reference to a number of relevant examples from existing literature in a number of social science fields. Finally, section 4 will acknowledge some of the theoretical implications of using Grid-Group in social sciences research, along with any relevant methodological limitations.

### 6.1 Why Grid-Group? Some Preliminary Justifications

Cultural analysis has a rich pedigree not only in the humanities, but also within anthropology and political science. Culturalist approaches can be divided between attitudinal and inclusive methods. In the former, culture is defined as the mental product of individuals’ attitudes. This takes the form of the aggregated meanings, values, labels and norms that people readily attach to various phenomena. In attitudinal approaches to culture, it is often assumed that there is a high degree of congruence between policy processes and political cultures. Where there are differences in culture, these are bridged by imposing a unifying governance culture.[[445]](#footnote-445)

The inclusive method is more comprehensive. It takes a social-constructivist approach in which culture is a mechanism for making sense of the world by means of classification, order and division. Constructivism emphasises the meanings that have been assigned to material objects and observable phenomena and emphasises the importance of these meanings over the mere empirical existence of the thing itself in question.[[446]](#footnote-446) This notion is particularly important to transparency scholarship in terms of how constructivism presupposes that the communicative and interpretative elements of transparency, which arguably governance institutions have less control over, may potentially be more significant than the actual process of disclosing information as supposed ‘objective fact’. Further, it relates directly to ideas about transparency that have developed in the context of International Relations theory, which were discussed in *Chapter 2*.

In addition to assuming that culture is a mechanism for making sense of the world by means of classification, order and division, the inclusive method views culture as being affected by social institutions that are part of everyday life for groups of individuals. These social institutions produce a variety of different cultural contexts that exercise opposing effects upon the thoughts, predispositions and actions of individuals. Within the inclusive approach there is a division between those who consider the study of culture to require a fine-grained, immersive and ethnographic approach, and those who believe that culture is a dependant variable in the study and understanding of underlying socio-economic and technological epiphenomena.[[447]](#footnote-447) Both of these attitudes present some significant risks and limitations, whilst the former is particularly labour intensive, the latter can often lead to the conclusion that culture is mere false consciousness, in need of a reality check.

Grid-Group successfully navigates these two pitfalls, because its ideal-type structure captures a form of ‘workable pluralism’, which prevents the analysis from assuming a universal or near-universal culture ever exists. In addition the constructivist relationship that Grid-group assumes between individuals’ cultural biases and the groups/neo-institutional contexts in which those biases are formed, guards against the assumption that culture is mere false consciousness.[[448]](#footnote-448)

#### 6.1.1 The Grid-Group Approach

Grid-Group is an approach that has progressively gathered support within the social sciences, as both a typology and a full explanatory theory.[[449]](#footnote-449) It emerged in cultural anthropology[[450]](#footnote-450) as a mechanism for explaining relationships between cultures, thus offering a parsimonious (i.e. shorthand) explanatory account of how humans come to hold a limited number of answers to some fundamental social questions. Those questions concern how the world works, how human beings choose to define themselves and how they might hold others accountable in their interpersonal relations.[[451]](#footnote-451) The theory posits that how a person conceives of answering these particular questions, and many others, is a product of where they find themselves in respect of two fundamental dimensions of sociality: grid and group. On the one hand, the grid dimension is concerned with an individual’s amenability/susceptibility to regulation, otherwise known as external or institutional prescription. On the other, group refers directly to the sense of affiliation or bondedness that a person feels to a given social group.

Adherents of the theory claim that it plugs a significant and hitherto insurmountable gap in the social sciences, since it appears to reconcile the controversy between methodological individualism and methodological collectivism.[[452]](#footnote-452) In doing so, it shows how distinctive and repeated patterns of social relations are formed in relation to the two dimensions of grid and group.[[453]](#footnote-453) These patterns of social relations generate preferences in response to shared values and beliefs, otherwise known as cultural biases. Emphasis is placed on cultural coherence and social viability. The patterns of social relations and their corresponding cultural biases are exemplified within the Grid-Group typology by a limited number of cultural types or ways of life. Neither the patterns of social relations, nor the cultural biases are accorded causal priority, since both are mutually sustaining.[[454]](#footnote-454)

Though Grid-Group, at least in its early guises, developed at arms-length from mainstream political science research, it has been suggested that it is a ‘neo-institutional’ theory, since it shares with the New Institutionalism movement a belief that both institutional arrangements and social processes matter in sustaining ways of life, as was briefly alluded to in the foregoing introduction to this section.[[455]](#footnote-455) This is not an uncontroversial view. Prior to the advent of the New Institutionalism movement in political science, the interest in developing empirical models of public attitudes and belief systems had been muted by Converse’s study on mass attitudes. He had concluded that people do not derive true attitudinal positions towards specific issues through deduction from some overall ideological schemata.[[456]](#footnote-456) Rather, individuals respond essentially randomly when faced with specific questions about political orientations and public policy, the implication being that individuals are unconstrained by any prior ideological disposition, when interpreting information in concrete cases. Furthermore, Converse asserted that the absence of preformed attitudes and preferences can extend beyond mere surveys of their political beliefs and policy orientations to active and participatory political events including elections.[[457]](#footnote-457)

Since the publication of Converse’s work, a number of scholars have disputed many aspects of his central thesis, not least by questioning the idea that individuals make unconstrained judgements about new political and social events.[[458]](#footnote-458) They point to the widespread use of the ‘liberal-conservative’ continuum for recording mass attitudes to specific political issues, which, despite its limitations, presupposes some relationship between current and past events.[[459]](#footnote-459) Scholars have also contested the idea that individuals may form discrete preferences and policy positions, unconstrained by any overarching belief matrix, since life is too complex and abstract for individuals to be able to cognitively structure the world in the absence of any guiding schemata.[[460]](#footnote-460) As such, though academics have encountered difficulties in empirically measuring public attitudes, this may be a product either of measurement problems, or of the potentially latent nature of some ideological schemata.[[461]](#footnote-461)

Though scholars in different fields continue to make fine distinctions between the terms schemata, attitudes, images, ideologies, system beliefs and cultural biases, all share a generic belief that some generalised cognitive predispositions are instrumental in shaping individual responses to political issues and circumstances arising out of social encounters. Grid-Group, as is perhaps evident, is no different. As a cultural theory it asserts that these cognitive predispositions are indices of culture. Its typology evinces a particular overarching cognitive scheme that may lie behind and structure the relationships between various core beliefs; beliefs which shape views about oneself, one’s place in the world and one’s relationship with others.[[462]](#footnote-462)

In doing so, Grid-Group presents at least two distinct methodological advantages over other less dynamic classifications of public belief systems. On the one hand, it eradicates the problem of ‘latency’. Since the Grid-Group typology commences with a number of premises about how social and institutional relationships and core beliefs, shape attitudes towards (and responses to) all kinds of individual human experiences, it is not necessary to inductively reason backwards from a concrete public attitudes in order to seek to identify a latent cognitive and ideological scheme.

In addition, the typology offers much more analytic variety than the traditional liberal-conservative continuum, yet that variety is still constrained by a limited number of world views. On the continuum, persons may be grouped together as either liberal or conservative on the basis of their overall responses to survey questions, since it is incapable of distinguishing between different types of liberal/conservative, (economic or social for instance) who may have fundamentally different opinions about what should be done in a given situation.[[463]](#footnote-463) By measuring interpersonal human relationships across two dimensions, rather than one, Grid-Group accounts for the possibility that similar attitudinal responses may emerge where persons are guided by a cultural bias that is the product of a pairwise combination of two or perhaps three of the worldviews advocated by the theory.

This latter methodological advantage is particularly relevant to the analysis of perceptions about transparency and transparency policy. It has already been suggested in *Chapter 5* that the inevitably polycentricity of modern polities complicates the range of appropriate responses to the questions of what constitutes transparency and how might it be successfully delivered within any given setting. Selecting from amongst that range of appropriate responses when engaged in the business of policy design, i.e. choosing to use transparency for a particular political purpose, requires policy makers to be alive to the different values that are perceived to underpin the instrumental value of transparency itself. After all, it is these underpinning values which will be central to public assessments of whether the application of transparency has achieved the political purposes to which it was put. By being aware of the ways in which actors perceive the world, and how this imports particular value perspectives into their assessments of institutional and policy successes, policy makers might successfully mediate between competing public preferences and expectations, to promote policy sustainability.[[464]](#footnote-464)

### 6.2 What is Grid-Group Cultural Theory? An Analysis of the Theory’s Central Claims and Intellectual Pedigree

Modern Grid-Group Cultural Theory occupies two distinct forms in addition to a number of intermediary variations. This is partly a result of the diversity of social sciences in which Grid-Group has found a home, though it is also a product of how scholars have responded to and subsequently modified a number of the theory’s central premises. At one end of the spectrum, the Grid-Group typology constitutes merely a typology of four extreme cultural types. At the other, Grid-Group Cultural Theory is regarded as a complete explanatory theory of sociocultural viability that can be used to explain how people confer meaning on human interaction and experience.[[465]](#footnote-465)

#### 6.2.1 Understanding the Typology

The typology itself is premised upon four distinct worldviews (cosmological types), which are linked to four extreme models of social organisation. If the grid and group dimensions are used in place of the X and Y axes on a graph, these four worldviews sit at the extreme corners of the graph, thus producing the grid-group typology.[[466]](#footnote-466)

To recap, the two dimensions are: 1) Grid, the willing deference to the imposition of regulation; and 2) Group, the general boundary or bondedness of a community of individuals. Individuals themselves can be expected to move, or otherwise be forced to move, across the diagram according to choice or circumstances. The four worldviews have been given various named at different times, but will be referred to here as: fatalist, hierarchist, individualist and egalitarian.

Increasing Grid

|  |  |
| --- | --- |
| Fatalist | Hierarchist |
| Individualist | Egalitarian |

Increasing Group

*Figure 1: The cultural map: two dimensions, four types* (adapted from M. Douglas, *Cultural Bias* (1982) London, Routledge & Keegan Paul)

Since the publication of the typology in (roughly) this form, by Mary Douglas, it has been refined in many subsequent essays and publications. It has already been noted above (section 6.1) that the theory has garnered interest from scholars in numerous academic fields, including the political and environmental sciences, international relations theory, regulation and diplomacy.[[467]](#footnote-467) Significantly, Aaron Wildavsky progressively championed the use of Grid-Group in the political sciences,[[468]](#footnote-468) which in turn paved the way for a comprehensive explanatory form of Grid-Group Cultural Theoryby Thompson et al.[[469]](#footnote-469)

#### 6.2.2 Claims and Conditions: Grid-Group’s Central Precepts

Both as a typology and as a theory, Grid-Group presupposes a number of important claims. The primary claim is that the theory is irreducibly cultural in character; regardless of the topic under investigation and the mode of investigation, culture is important. Preferences and personal justifications based on those preferences are the guiding force of social relations: everything that a human being does or wants is grounded in culture. This is a view that was briefly considered in *Chapter 4*, where it was asserted that beliefs about legitimacy correspond with personally held views about the world, which must be supported by both institutional allegiances and social experience.

A secondary claim assumes that it is possible to identify and distinguish between a limited number of cultural types, through the creation of a typology of culture. The typology includes the scope to map various combinations of patterns of social relations and patterns of cultural biases, often termed *cosmologies*. These combinations or patterns are identified as sub-cultures, ways of life, or rationalities. They are sustainable when social relations and cultural biases shared between people within a culture or sub-culture, reinforce one another[[470]](#footnote-470)

This claim rests upon the belief that the viable modes of human interaction can be identified by making assessments on the basis of the two (grid and group) dimensions. By restricting the formation of attitudes to these two dimensions, the theory is empirically workable, but it can still readily identify that movement away from one worldview does not represent movement towards an equal-opposite worldview, as is the case in one-dimensional accounts of public attitudes (such as the liberal-conservative continuum.)[[471]](#footnote-471)

The final claim is that the application of the typology is universal. The idea behind this somewhat grand claim is that the dimensions underpinning the cultural types represent the fundamental nature of the social being. The theory presupposes that the vast majority of personal perceptions, values and normative modes of behaviour are derived from or constructed in the mechanisms that we employ for organising social relations. The organisation of our social relations in particular ways is revealed by the preferences that we have towards the two dimensions, i.e. the relative strength of the bondedness that we feel towards the group(s) to which we belong, and the impact of regulation on our lives, including our perceptions of whether that regulation is imposed legitimately. Institutions of social construction therefore, in one very important sense, do the thinking for us.[[472]](#footnote-472)

In the comprehensive explanatory version of the theory posited by Thompson et al, the claims are slightly modified and presented as three theoretical conditions. The *first condition* is that viability of all ways of life is constrained by the need for congruence between social relations and cultural biases. Social relations continue to be defined as patterns of interpersonal relations, whilst cultural biases continue to reflect shared values and beliefs; the two must support one another and a viable combination of the two is referred to as a way of life. The *second condition* is termed the ‘impossibility theorem’, in which there can only ever be five ways of life, or rather only five forms of life meet the first viability or compatibility condition. To fatalist, hierarchist, individualist and egalitarian, Thompson et al add ‘autonomy’ or hermitude.[[473]](#footnote-473) This makes the theory dynamic insofar as it is possible to encounter social change in a number of different directions.

Change occurs because the five ways of life, though individual viable are subjected to the rigours of the real world. Though human perception is fundamentally culturally biased, that does not necessarily mean human beings can always procure the circumstances that they would wish for. Surprise, or a discrepancy between expected and actual events, is what dislodges individuals from their way of life. Change will occur whenever successive events intervene in such a way as to prevent a way of life from producing a state of affairs that reflect the expectations that it has generated, thereby prompting individuals to look elsewhere for a better offer.

Simultaneously, Thompson and the ‘hard’ cultural theorists maintain that the ways of life are in competition for adherents, and thus are dependent upon one another as potential sources of membership. Each of the ways of life needs its rivals, both to define itself against and to compensate for its own deficiencies. If egalitarians for instance were to eliminate hierarchists or individualists, the lack of opposing targets would remove the need for them to promote strong group bondedness and thus their way of life would be undermined. This is the *third condition* (or ‘requisite variety condition’) it is possible that there might be a greater number of ways of life, but there cannot be fewer.

Of course it is to be recalled that the theory is a dynamic one and as such every way of life may not be represented equally within a single country, company or polity at any given time. The requisite variety condition requires merely that all ways of life are present to a greater or lesser extent. Furthermore, there can be no ‘static equilibrium’ between the ways of life in any given society; they are all in a perpetual state of flux. This perpetual dynamic imbalance is supposed to account for both observable differences between societal regimes and the change within regimes over time.

The foregoing claims present a heady and attractive mix for scholars in a variety of social science disciplines. Using the typology, grid-group analysts can deduce preferences and attitudes, behaviours and likely responses to behaviours regarding all kinds of topics for each of the ideal types (i.e. the four types posited in the cultural map). It is for these reasons that the theory has attracted the interest of a plethora of social scientists. If the theory in fact lives up to its claims, then it offers something of a powerful predictive (though not deterministic) mapping tool that could be adapted to a number of areas of policy development, particularly in analysing the utility of different forms of law and regulation, their reception within various social and political groups and the extent to which it is likely to be perceived as useful, or legitimate, or indeed fit for purpose.

#### 6.2.3 A Note on the Grid and Group Dimensions

How one chooses to define the dimensions has important methodological consequences. Douglas herself defines the dimensions as ‘polythetic scales’.[[474]](#footnote-474) If the dimensions are in fact polythetic then they should be viewed as sharing a number of characteristics, which individually may not all be present in each observable case.[[475]](#footnote-475)

For the Grid dimension, Douglas specifies four specific constituent elements: insulation, control, autonomy and competition.[[476]](#footnote-476) It is to be recalled that the Grid represents the extent to which an individual is circumscribed by regulation; the more binding and extensive the regulation, the less an individual’s passage through life is open to negotiation within social and political communities. Conversely, as one moves down the Grid dimension, the more s/he is expected to independently negotiate the nature of their relationships with others.

For the Group dimension, the relevant constituent elements have been identified as frequency of group interaction, scope of group activities and the definable group boundary.[[477]](#footnote-477) For Group, the higher the level of group bondedness, the greater an individual’s incorporation, ultimately signifying the loss of individual choice to group decision. As one continues to move along the group dimension, the tighter the controls become over group admission and the higher the boundaries become separating those within from those outside of the group.

The dimensions both serve to identify specific modes of social control – which is the focal point of the theory. Individual choice may be circumscribed either within social groups or by the imposition of rules accompanying their position within a socio-political hierarchy. It is taken as given that individuals seek to manipulate and are in turn manipulated by others. Changing social circumstances reflect changes in those who are newly entitled to or otherwise disbarred from exercising power over others.

Though the dimensions themselves are almost exclusively referred to as Grid and Group, Wildavsky has suggested that the theory actually presents two fundamental existential questions: 1) who am I? and 2) how should I behave?[[478]](#footnote-478) Whilst some authors have chosen to focus specifically on their topics of investigation by selecting predicates relevant to their field, others have chosen to ignore the dimensions altogether (or at least explicitly) and focus on the presentation of the resulting types. Though this practice has been reproached as being cultural theory without Grid and Group, it is common in qualitative examinations. Furthermore, since the cultural types are directly informed by their relationship to the grid and group dimensions, the dimensions are always (at least indirectly) relevant.

#### 6.2.4 The Worldviews

Placing the grid and group dimensions as the axes on a graph, produces four distinct types of social relations: 1) hierarchy, symbolising strong grid, strong group; 2) fatalism, symbolising strong grid, weak group; 3) individualism, symbolising weak grid, weak group; and 4) egalitarianism, symbolising weak grid, strong group. If one manages to avoid entering into coercive relationships then a fifth category of hermit culture can be said to exist, which is a feature of the ‘hard’ explanatory form of Grid-Group as developed by Thompson et al.[[479]](#footnote-479) This fifth form is not directly discussed here, since it is not included in classic formulations of the typology – it is also disputed as a distinctly ‘non-social’ category of social life.

Each bias is based on the notion of a stable form of social environment that would collapse in the absence of its specific cultural foundations. The theory does not seek to be reductive in the sense that it asserts there are only these four forms of social organisation exist, but rather it seeks to present only four within the two dimensions, since seeking to present a thousand different varieties would not adequately represent the various forms of social organisation that can be identified in various experimental settings the world over. Since the theory acknowledges the potential for there to be a potentially infinite number of mixed forms of socialisation; these are assumed to be ‘transitional’.[[480]](#footnote-480)

The labels used for the four worldviews have been subjected to some discussion and debate, chiefly concerning whether they in fact evince some form of bias. Here the terms *hierarchist, fatalist, individualist* and *egalitarian,* will be because they are all familiar and readily understandable terms across disciplinary boundaries, notwithstanding any pejorative overtones.

#### 6.2.4.1 Summarising the Worldviews

The characteristics of the four worldviews may be summarised as follows:

1. Hierarchist – the hierarchist culture supports tradition and order. Individuals within a hierarchist culture are subject to both controls from other members within the group and the demands of job roles, circumstances which flow from strong feelings of group affiliation and a positive responsiveness to the imposition of regulation. In this worldview human beings are unequal creatures, endowed with different capacities and shortcomings, which are mitigated through institutional guidance, coordination and direction. This form of organisation is good for solving problems of co-ordination and it has a developed system of managing internal conflict by positioning people differently within the hierarchy.[[481]](#footnote-481)
2. Individualist – the individualistic social context holds no regard for tradition, it is a competitive form of social organisation in which dominant positions are vied for on merit (manipulation?) alone. The environment is characterised by a low tolerance for both group incorporation and external prescription. The social environment is organised largely by self-regulation between voluntary, perpetually changing, contract based networks of persons, assumed to have broadly equal natural talents. Success in life is directly related to how these talents are successfully harnessed and the social environment can not compensate for lack of enterprise.[[482]](#footnote-482)

Douglas has noted that these two forms of social organisation correspond broadly with the Weberian distinction between bureaucracies and markets.[[483]](#footnote-483) They also represent forms of social environment that some have highlighted as being the only stable variations of social organisation.[[484]](#footnote-484) Furthermore, some theorists have contended the proposition that two or more the worldviews may operate as ‘dominant’ or ‘majoritarian’ cultures within a given society. In this circumstance, the relevant cultures operate collectively, to the exclusion of other cultural types. An alliance between hierarchy and individualism has been termed the ‘establishment culture’, a form of social organisation observable both in the USA and Britain.[[485]](#footnote-485) Pairwise combinations of cultures and how they might impact upon governance will be discussed further below.

1. Egalitarianism – the egalitarian community operates a closed social system with elaborate social rules designed to keep all members equal. This form of social organisation is characterised by strong feelings of group bondedness and weak perceptions of the imposition of regulation. Human beings are perceived to be broadly equal both in their capacities and as such there is little internal role differentiation. This makes internal relationships between members ambiguous and renders conflict difficult to control. In this form of organisation, it is the social system that is perceived to be flawed and not individual human beings, all other cultural types distort natural social harmony. Egalitarian communities work best as small, highly bonded communities in which collective decisions are taken through discussions designed to achieve consensus. Leaders are not exalted and individual ambition is thwarted.[[486]](#footnote-486)
2. Fatalism – the fatalist is fundamentally controlled from without. He perceives a capricious social environment and as such seeks to avoid group alignment, eschewing the manipulation of others. In addition, s/he seeks to exert little influence over the lives of fellow human beings. The environment is thus characterised by weak feelings of group affiliation, but strong feelings of the imposition of regulation. This recognising that the social organisation within which the fatalist lives (albeit at the periphery) exerts significant controls over his/her life predisposes him/her to social avoidance. At the extreme, predisposition to fatalism is not really a form of social organisation at all. As people voluntarily or forcibly enter this position, it becomes much less possible to predict what is likely to happen and the fatalists tend towards a self-defeating culture of fatalism.[[487]](#footnote-487)

#### 6.2.5 A Brief Note on Alliances: How the Cultural Types Might be Observed in Political Settings

As aforementioned, the theory assumes that each of the four types of cultural bias is present within any community of persons, and that the biases exist in a state of competition with one another. That being said, the adherents of each particular culture can (at least figuratively) be counted and will reveal the relative mix of cultures at work within any organisation, enterprise or state. In section 6.2.4.1 above, it was mentioned that is possible for additive mixes of cultural types to combine and generate regimes.[[488]](#footnote-488)

If any two of the cultural types exist within a given society, then it is possible to witness the emergence of one of six specific regime types. Hierarchy and egalitarianism combined is said to produce *social democracy.* The strong group affiliation in both of these types prioritises a strong belief in equality before the law and in representation/participation within the political constitution. Enclavist tendencies are tempered by the imposition of regulation, as established authority structures allow qualified persons to undertake group representation. Authority structures also provide mechanisms through which it is possible to mediate group conflicts.[[489]](#footnote-489)

Egalitarianism and Individualism can combine to yield a form of exceptualism, promoting unsubstantiated beliefs in the capacities of individuals within the group, and therefore the group as a whole. Individualism and fatalism can combine to produce authoritarianism, whilst fatalism and hierarchy can combine to form totalitarianism. In both instances, fatalistic unwillingness to challenge either authority structures, charismatic leaders of the egotistical whim of strong-willed individuals can lead to a loss of individual control over participation in the social environment.

The final two regimes represent the diagonal pairings of hierarchy and individualism & fatalism and egalitarianism. As aforementioned, hierarchy and individualism combine to form what has been termed as ‘establishment’ or the ‘positive sloped diagonal’. It has been said to represent the political context both in the USA and in Great Britain, insofar as individualists have sought positions of power within the established hierarchies of the state in order to promote movement down grid in respect of regulation of the market. Conversely, the ‘negative sloped diagonal’ or fatalism combined with egalitarianism might most readily be associated with communal regimes living in the midst of a larger hierarchical social order, which asserts an effect on the community’s access to natural and social resources.[[490]](#footnote-490)

In political regimes that employ cultural alliances, the regime itself serves as the overall political context.[[491]](#footnote-491) Two or more cultures interact so as to pursue shared goals, for the purposes of self-preservation. It is to be recalled that cultural survival of each of the cultural types requires the survival of the others. Individualists for instance need hierarchists to guarantee that acquired material resources are protected, in order that they may continue to pursue their speculative behaviour.

### 6.3 Constructing a Typology: a Grid-Group Account of Transparency

The overview that has been provided in the preceding sections is, by its very nature, cast in particularly broad terms. The particular analytical starting point of Grid-Group is comprehensive, reaching far and wide to distil the very essence of how human beings come to structure their social relations with one another in the context of their beliefs about the social world. Those relations and beliefs are mutually instructive and mutually reinforcing, they generate normative and attitudinal expectations and provide an interpretative frame through which action in social and political spaces is understood, and subsequently either supported or resisted, on the basis of its reconcilability with dominant beliefs and attitudes. Nevertheless, it is possible to harness the precepts of Grid-Group and apply them to the concept of transparency as it operates in the EU political space, using the classifications to generate narratives about how transparency policy ought to be designed and implemented and the purposes which that transparency might legitimately serve.

### 6.3.1 Using Grid-Group to Refine the Extant Analysis

It is to be recalled from *Section 6.1* that one distinct advantage of the Grid-Group method is that it provides a greater level of complexity and accuracy to the study of public attitudes and belief systems as compared with other typologies of socio-cultural and political organisation. In terms of this thesis and its inquiry into the sustainability of extant EU narratives about the relationship between transparency and legitimacy, the greater complexity offered by this two dimensional model provides an opportunity to capture something of the broad range of perceptions that feed into institutional, public and civic society assessments of transparency’s role and the values it serves. This feature is particularly important, not least because of the polycentric nature of the European Union as has been asserted repeatedly throughout this thesis.

In addition however, this feature of Grid-Group offers the potential to refine the conceptually crowded anatomies of transparency and legitimacy that were offered in *Part II*. The historical justification for some of this conceptual crowding was explored in *Chapter 2* and it was further acknowledged in *Chapter 3* how the sui generis process of European construction, characterised by transplants and cross-fertilisation has compounded this. In analytical terms however, the conceptual crowding that is attendant upon examinations of transparency and legitimacy is to some extent are the product of ‘conceptual ad hocracy’, through which typologies are formed based predominantly on empirical observation or inductive reasoning, which can result in uneven and lopsided categorisations of overlapping ideas. The effects of this conceptual ad hocracy can be alleviated through the dynamic and relational nature of the Grid-Group typology. As such, within each of the cultural biases constructed, it is possible to explore the extent to which competing conceptions of transparency and legitimacy relate to one another and how the dominant interpretative frame within each of these biases produces particular conclusions about the introduction of transparency measures within the political space.

Furthermore, the methodological utility offered by Grid-Group is that its typology is universal and exhaustive. The literature addressed in the preceding sections of this chapter is testament to the sheer variety of social sciences topics to which a Grid-Group methodology has been applied. Though it is acknowledged that the statistical and empirical testability of the theory (particularly in terms of the selection of the predicates to measure the two dimensions) is not as extensive as it could be, there is an emerging consensus that Grid-Group’s methodological reliability is at least as good as other available methods of assessment.[[492]](#footnote-492)

The exhaustive nature of the theory is both a distinct advantage and a shortcoming. In *Chapters 4 and 5* respectively, the analysis considered how difficult it is to pursue or distil a core ‘canonical’ meaning for transparency or legitimacy. Indeed, the search for a conceptual grammar of the two concepts is complicated specifically because the terms have been so readily categorised in overlapping, complementary and contradictory senses in concrete settings. Such categorisations are used in turn to label the instrumental applications of transparency and its assumed relationship with legitimacy, thus producing the potentially lopsided classifications in the preceding paragraphs. In part, that lop-sidedness is often a result of failing to know where it is appropriate to begin dimensionalising a concept, and where one might justifiably stop. Here Grid-Group’s exhaustive typology is useful in restricting the number of different conceptual dimensions that feed into the construction of that grammar.

### 6.3.2 Using Grid-Group to Inform Policy Design and Development

In turn, the limited number of concrete conceptual viewpoints produced by Grid-Group can easily be applied in the analysis of policy development and design; the cultural types, or biases generate lots of information about how transparency is to be understood within each of the distinct operating logics that prevail. Each of the biases can thus be understood as producing an approach about ‘how to do something’, based on how adherents of that particular bias perceive the social world around them. By pursuing a given bias’ ‘how to do it logic’, it can thus be discerned where particular transparency approaches will be perceived as legitimate in the sense that they conform with a dominant modes of thinking and belief, i.e. it is possible to make judgements about the acceptability of a given transparency mechanism, legislative or regulatory instrument for a particular constituency of actors who can be said to broadly hold a hierarchist or egalitarian viewpoint for instance. It ought to be recalled here that the theory does not imply that any given cultural bias will exist in a pure form within a given political/social organisation, though one or more forms may be discernible and indeed be dominant. In observing a messy social reality, elements of each bias will necessarily be present and the dominant mode of social organisation may in fact invoke a pairwise or indeed tripartite combination of the four fundamental cultural types.

The central research question of this thesis targets assumptions made about the relationship between transparency and legitimacy in the design and implementation of European Union transparency policy. In the introduction to this thesis and subsequently, a hypothesis has been posited in which it the inception of the EU transparency regime at Maastricht had proceeded with the emergence of an assumed ‘symbiotic’ relationship between transparency and legitimacy, which, for a time at least, came to be the dominant understanding of transparency’s contribution to democratic governance. This fails to fully take account of the potential for transparency mechanisms to produce unintended consequences and effects that are orthogonal to or which even undermine legitimacy enhancement. As the analysis in *Chapter 5* demonstrated, this may be directly attributable to simple claims about transparency’s performativity overshadowing the complex communicative and interpretative processes which intercede between the introduction of transparency measures and assessments of their acceptability and relative success.

At least part of the reason for failing to fully appreciate the complexity of transparency’s relationship with legitimacy is that the Union and its centralised institutions have failed to appreciate the account for the range of public perceptions that are instructive in assessments of transparency measures, their acceptability and how they are reconciled with expectations about how the polity pursues its policy development. Accordingly, the viability of institutionally held assumptions about the legitimising potential of transparency may prove unsustainable in the light of the political expectations of the European demos. More pressingly however, the apparent failure to secure ‘enhanced’ legitimacy and to reduce the proximity gap has resulted in a reappraisal of the value of transparency and access to documents legislation in particular. The diminished appetite of the Council and the Commission to pursue revised secondary legislation in line with the progressive constitutionalisation that has occurred at the treaty level has produced policy stalemate, as discussed in *Chapter 3*. Nevertheless, strong commitments to transparency’s legitimacy enhancing potential are still supported by the dominant narratives within the European Parliament and the Court of Justice. Understanding the socio-cultural preconditions that inform belief systems within the respective institutions could prove instructive in pursuing meaningful policy reform in the immediate to median terms. It could also be influential in pursuing transparency policy design that is cognisant of public attitudes and expectations.

In using the Grid-Group typology in the remaining two chapters of this thesis, the starting point will be to reconsider how the centralised institutions policy positions relate to the forms of social organisation evinced by the cultural types. In order to do so, a textual discourse analysis will be undertaken in *Chapter 7* of much of the source material that informed *Chapter* 3. This exercise will make it possible to plot the core belief systems of the centralised institutions and consider how those belief systems map onto an institutional value structure that presupposes particular ideas about transparency, including how it ought to operate and what should be rendered transparent by transparency’s processes. Briefly, some further methodological considerations relevant to using Grid-Group in socio-legal and political research projects are dealt with below.

### 6.4 Some Further Methodological Considerations

The methodological value of Grid-Group analysis is its capacity to address problems inherent in understanding and explaining, comparing and contrasting different cultures, or aspects thereof. By extension, the theory can be adopted as part of the methodological framework of inquiry in a variety of social science disciplines, since it provides a system for ordering varied and disparate responses to social phenomena. As such one can use, ‘the model to better understand and explain how constructed contextual “meanings are generated, caught and transformed”.[[493]](#footnote-493) Further, the grid-group matrix can be used to classify contexts and to:

‘…[D]raw **specific observations about individuals, their value and belief dimensions, and behavioural and symbolic variables manifested in specific environments**. One of the model’s most beneficial aspects is its holistic, comprehensive nature. It is designed to take account of the total social environment and individual member relationships among each other and their context.’ [emphasis added].[[494]](#footnote-494)

#### 6.4.1 Using Grid-Group to Predict and Generalise

Grid-group is supposed to provide for a reasonable degree of predictability in the analysis of causal relationships between culture, behaviour and thought.[[495]](#footnote-495) It is however not supposed to be deterministic or linear in its approach to those causes. The dimensions of grid and group are designed to engender something of a symbiotic relationship. The dimensions can thus be considered as mutually supportive, both of one another and of the concepts of culture, behaviour and values. In addition, the fabric of the dimensions is supposed to account for free-will, choice and subjectivity, which would prevent a wholly predictive and deterministic analysis to be drawn from the application of the theory to a given phenomenon – i.e. just because a person or institution or cultural subset has been given a ‘hierarchist’ label, doesn’t indicate that they will evince specifically hierarchical behaviours in other observable circumstances and situations.[[496]](#footnote-496)

The theory, as was alluded to in subsection 6.2.1, has been applied in a variety of disciplines where one of the objects of investigation has been to unpack social arrangements.[[497]](#footnote-497) However, even in the field of anthropology, the intellectual home of the theory, not all social scientists can agree on the value of the grid-group matrix in the conduct of social science research.[[498]](#footnote-498) Nevertheless, there is some consensus that employing the theory provides one with a stratagem for coping with the problems of ‘purpose’ and ‘generalisation’ in academic research. The idea here is that the theory allows one to engage in something of a predictive enterprise by using the matrix to make specific reasonable generalisations about the variety of cultural responses that people might offer to a range of different phenomena.[[499]](#footnote-499)

Using the typology however for the purposes of prediction and generalisation however does carry some risk. It has already been suggested that the matrix is not designed to produce deterministic responses to questions about causal relationships and the dimensions are supposed to represent ‘polythetic’ scales. In addition, it should be recalled that all forms of qualitative inquiry are value-bound. The primary instrument is the human researcher, who filters the data collection through his own worldview, subjects the data to his own values and perspectives and inevitably the theoretical frame that he has adopted. Both consciously and unconsciously the researcher carries biases that construct a reality based around his own research experiences. The value in the generalizability of the matrix therefore is subject to the researchers coding of the data under analysis. How the researcher constructs his/her predicates either for the dimensions, the world views or both, directly impacts the quality of the generalizable outcomes that may be extracted.[[500]](#footnote-500)

This latter consideration is particularly important where, as here, the matrix is being used in the first instance to make theoretical generalisations about institutional and in turn public perceptions of transparency as an attribute of governance, in particular thinking about how these various perceptions reconcile transparency with legitimacy, either in deontological or instrumental/consequentialist terms, or perhaps even both. The premise here is to unpack the socio-cultural investment in these two concepts and how different actors consider those understandings to inform expectations about the EU’s governance architecture and its policy priorities. In searching for their respective conceptual ‘grammars’, the data analysis and narrative construction that takes place in *Chapters 7 & 8* aims to examine where and when (if at all) that socio-cultural investment perceives both transparency and legitimacy to either exist for, or contribute to the achievement of, the same purposes/objectives.

#### 6.4.2 Further Implications of Incorporating Grid-Group into Research Projects

In the social sciences there is some debate as to how and when a theoretical framework is to be incorporated into a research project, whilst research methods must to a certain extent be determined at the outset, theory pure may be chosen *a priori* or *a posteriori*. A key consideration here is whether the framework chosen is being used informatively or determinatively – the theoretical framework should guide the analysis, not determine the outcome. As such, it may be advisable to ‘choose’ a theoretical framework towards the conclusion of an investigation,[[501]](#footnote-501) though data sourcing and analysis are integrative and dynamic processes – the collecting and sorting takes place at the same time, and so theoretical considerations may force themselves upon research design earlier in the process.

In addition to choosing when to incorporate a theoretical framework, with Grid-Group one needs to realistically consider whether it is being used as a classificatory scheme or as a full explanatory theory. Earlier, this chapter outlined the significant claims of the theory. These are: 1) culture matters; 2) a limited number of cultural types can be identified and distinguished; and 3) that the application of the typology is universal. Subsequently, subsection 6.2.2 outlined the three conditions that must be accepted if using Grid-Group as a full explanatory theory: 1) the viability condition; 2) the impossibility theorem; and 3) the requisite variety condition.

Using Cultural Theory as a theoretical framework in its full explanatory forms requires subscribing to these propositions, along with the claim that change can be accounted for as a result of surprise. If the social forms are defined by their difference, then adherents will be predisposed to a certain resistance to change. Nevertheless, change occurs. This must therefore be a result of surprise events inducing change within a community, institution or members thereof.

Adherence to the full explanatory form of Cultural Theory enhances the possibility that the framework will have a determinative effect on the analysis of research data. The ‘polythetic’ nature of the dimensions can result in manipulation, insofar as observable phenomena can be said to resemble one or other of the social forms, when in fact there is evidence to suggest that the impossibility theorem may inaccurately represent the stable forms of social organisation.

Finally, whether using cultural theory as either a classificatory scheme or an explanatory theory, the vocabulary of Grid-group can provide both shorthand and detailed descriptions of the research environment or aspects thereof. The language of Cultural theory, of its dimensions and its worldviews reflect meaningful propositions about the social environment, thus unpacking dense descriptions and adding new layers of relatable meaning.[[502]](#footnote-502)

### 6.5 Conclusion

This chapter has explored the advantages and methodological implications of using the Grid-Group methodology of cultural types to explore and account for various institutional and public perspectives on transparency. An exploration of the theory, its associated typology demonstrated its analytic utility in terms of its generalizability, the exhaustive nature of the matrix and the capacity to generate predictions about social phenomena, reasoning from the fixed social realities presented within each of the cultural types. This chapter has also proposed how the Grid-Group matrix will be used in the remaining chapters of this thesis to refine the extant analyses undertaken in *Part II* of this thesis, commencing with a discourse analysis in *Chapter 7*, through which core beliefs about transparency will be elicited, compared and contrasted.

The object of the remaining chapters of this thesis is to harness the predictive capacity of the thesis to highlight socio-cultural preferences in relation to transparency, in order to promote a more theoretically mature account of its capacities and shortcomings that is alive to the complex communicative and interpretative processes which inform those perceptions. It will be argued that this predictive capacity can be used in policy design and development in a number of different ways. On the one hand, the typology that will be produced provides a shorthand account of the spectrum of perceptions present within the social space and so can be used to predict how specific policy tools and solutions will be interpreted by different stakeholders. On the other, by comparing and contrasting the different expectations invested in transparency, it is possible to undertake policy brokerage as between different groups of actors with competing perceptions, so as to produce policy solutions that are reconcilable with a broader range of actors core policy beliefs.

# 7. Constructing a Cultural Theory of EU Transparency Policy: A Discourse Analysis of Policy Belief Systems

The remaining two chapters of this thesis will develop a cultural theory of EU transparency policy, modelled on the typology presented by Grid-Group Cultural Theory, as set out in *Chapter 6*. The focus of this chapter is to consider how fundamental beliefs about the world (i.e. the values that are embedded in the institutional ways of life outlined in the Grid-Group matrix) have implications in terms of policy discourses and in the development of policy belief systems. Specifically, this chapter will consider how cultural biases fundamentally influence the attitudinal approaches to transparency that lie at the heart of individuals’ and institutions’ core policy beliefs.

Important questions about unarticulated assumptions and false causalities in the context of the transparency-legitimacy relationship have been the object of this thesis; it was posited in *Chapter 1* that the persistence of questions about the legitimacy of the EU political order fundamentally challenges the legitimacy-enhancing logic that transparency appears to have acquired as the ‘push-button panacea’ for crises of virtually any description.[[503]](#footnote-503) As this issue has been progressively unpacked, this strategically naïve relationship has been repeatedly attributed to difficulties attendant upon the polysemic nature of interpretation, problems of communication and the deep-seated predispositions of citizens and elites.

It will be argued in this chapter that ‘core policy belief systems’ establish the positional negotiating spheres of institutional actors operating within the European Union’s constitutional space, and as such, an understanding of what those positional strategies are, can assist us in identifying when and where there is the potential for policy conflict and stagnation as between different constituencies of political actor.[[504]](#footnote-504) It was noted, both in the introduction and in *Chapter 3,* that policy stagnation is currently hampering further legislative evolution of EU transparency policy. Crucially, this has significantly affected the secondary level implementing legislation (i.e. the introduction of a recast regulation on access to documents) that serves to structure and implement the Union’s core policy position(s) on transparency, as established by (amongst other things) relevant treaty provisions. Furthermore, *Chapters 4 & 5* explored extensively how there can be significant arenas of conflict as between the transparency and legitimacy policy domains, when the context in which information is shared and the mechanisms used to share that information are poorly understood.

In the sections that follow, the process of undertaking a discourse analysis of institutional policy documents and selected discourse fragments will be discussed. As discussed briefly in *Chapter 6,* a discourse analysis of institutional policy documents makes it possible to elicit relevant policy positions and consider how they relate to the social forms (cultural biases) which are central to the Grid-Group typology. From this it is possible to analyse how those policy positions flow from holding a particular view of the world which is reinforced by existing institutional structures. *Section 1* details relevant methodological considerations, along with the limitations of this method of textual analysis. Broadly speaking, discourse analysis in a socio-legal/political context, involves close textual and broader contextual analysis of the selected documents, in order to elicit key or repeated themes and particular normative/ethical allegiances. In *Section 2* the discourse fragments will be used to compare and contrast how they provide evidence of differences in the respective policy belief systems of the institutions, thus demonstrating potential avenues of policy conflict and stagnation. In *Section 3,* the discourse analysis will be subject to an initial tabulation, using the Grid-Group matrix to establish a cultural baseline from which it might be possible to identify the dominant or preeminent policy approaches of each of the centralised institutions. The analysis will consider also how these approaches might be reflected amongst the broader public. The imposition of this explicitly ‘culturalist’ lens is designed to identify the opportunities that might exist for culturally hybrid policy alternatives (i.e. mixed approaches that satisfy broader constituencies of political actors). It is contended that by reinterpreting extant policy outputs, future policy development efforts can exploit opportunities to facilitate discursive policy brokerage, in order to explicitly promote better policy solutions.

In the final chapter*,* the typology of EU transparency policy belief systems produced in *Section 3*, below, will be used as a starting point for developing a ‘reflective cultural analysis’ of transparency. The analytical focus will shift slightly, insofar as the aim will be to produce an overarching set of ‘transparency narratives’ that use the language of policy problems and problem structuring to consider how the policy development process can be refined by anticipating side-effects and promoting opportunities to learn from previous sticking points. Whilst a better understanding of policy problems does not necessarily, of itself, produce ready-made solutions, the policy maker and legislator is at least capable of avoiding the weaknesses and unarticulated assumptions that are inherent in their own belief systems, along with the risks attendant upon circular arguments, invalid conclusions and false causalities. At the very least, understanding how policy implementation will be interpreted (and thereby evaluated) by different groups of stakeholders, should disabuse actors of the notion that there can ever be a linear relationship between transparency and legitimacy.

### 7.1 Conducting a Discourse Analysis of EU Transparency Policy

Ascertaining actors’ policy core and deep-core belief systems can be undertaken by using the grid-group matrix to structure a discourse analysis in which significant policy statements about transparency made by the institutions are coded according to specific categories.[[505]](#footnote-505) Discourse analysis is a useful methodological tool for exploring the political meanings that inform written and spoken text, since it allows the researcher to code for particular themes, meanings, constructions and contextual elements across a range of texts from a variety of sources and time periods.[[506]](#footnote-506)

In constructing a cultural theory of European transparency policy, a discourse analysis provides the relevant data through which it is possible to construct a typology of the core belief systems that exist and map how and where they differ and overlap. The primary contribution of Grid Group here is to set out something akin to an analytical compass; its four core-value systems allow the analyst to find his bearings amongst the various ideals espoused in the public policy statements of different groups of actors.[[507]](#footnote-507)

It is helpful juncture to think briefly about the policy development process in abstract. If policy development is viewed essentially as a competition between different groupings of actors who advocate specific beliefs about the value of certain policy processes, then it is important to consider and attempt to tabulate underlying beliefs of those groups of actors work to provide a sort of overarching heuristic in their approach to policy development. The resulting belief system that is held by an actor or coalition of actors provides a framework through which they approach problem structuring, policy development, the implementation and the prioritisation of policy goals. Thinking about transparency specifically as the solution to a public policy problem, namely the EU’s ‘proximity problem’ (i.e. the perceived ‘gap’ between the public and the institutions) will be considered in more detail in *Chapter 8*. For now however, it is useful to consider how beliefs about policy issues are layered.[[508]](#footnote-508)

At the heart of a policy belief system can be said to be a deep core of fundamental axioms that define a worldview for the individual and his/her place within society and the wider world. The grid-group matrix, as explored in *Chapter 6,* contextualises and limits the plurality amongst worldviews by identifying four omnipresent value systems – hierarchy, which seeks predominantly to conserve the existing state of affairs; individualism, which seeks to promote competition for wealth and resources as between individuals in society; egalitarianism, which is enclavist in nature and promotes a stringently egalitarian position, and; fatalism which encompasses passive and isolated individuals who are subject to the imposition of social regulation, but whom are otherwise socially excluded. Deep-core belief systems, as was argued in *Chapter 6* affect all aspects of actors’ approaches to social and political life. As such, they produce causal perceptions about how positional strategies should be pursued in order to reaffirm those deep core beliefs within a given policy setting. This second layer of beliefs might be termed policy/positional-core beliefs; they stem directly from the interpretative frame that is imposed by deep-core of actors’ world-views and serve to create a reflexive framework in which actors’ beliefs about the social and political worlds around them are readily identifiable in the activities taking place within those worlds.[[509]](#footnote-509) Finally, secondary beliefs about how to implement policy decisions and achieve the policy’s core objectives complete the picture. It is assumed within this layered approach that for the sake for forming successful coalitions, actors must be prepared to compromise on certain positional objectives. With that in mind, they will present the least resistance to secondary beliefs about how to implement policy objectives and the most resistance to challenges to their deep-core belief systems. In that sense, actors might be said to be instrumentally, if not objectively, rational, i.e. they pursue venues that are provided by constitutional and governances structures through which they can efficiently exert maximal influence in order to safeguard and propagate their deep-core belief systems.[[510]](#footnote-510)

### *7.1.1 Methodological Approach: Document Selection*

The methodological starting point for text-based qualitative discourse analysis is to identify relevant source material and establish the social and historical context in which that material was produced.[[511]](#footnote-511) In this instance, the source material is principally published policy documents of the centralised institutions (the Council, Commission and European Parliament) including some interinstitutional documents and some internal documents that have been subject to European Union classification, but subsequently released or leaked (principally via the site statewatch.org). Very many of these have already been considered briefly in the historical analysis that was undertaken in *Chapter 3* and a full list is provided in the bibliography. The time-period over which documents were selected for coding covers documents produced and published between 1992 and the present day. This corresponds roughly with the time-period over which transparency has been a prominent policy issue, subject to EU legislation and progressive constitutionalisation.

In addition to documents produced by the legislative institutions, selected judgments of the Court of Justice have been analysed, for completeness. Though the court is not a legislative institution, it has played a significant role in the evolving policy positions of the centralised legislative institutions (acting variously as protagonists and antagonists in relevant cases) as it has interpreted the legislation that has given effect to EU transparency policy and established the outer reaches of that existing legislation. Furthermore, institutional reactions to the Court’s adjudication have played a role in shaping the interinstitutional approach to policy brokerage, particularly where there has been a desire to limit the practical effects of the Court’s judgments, as was noted in *Chapter 3*.[[512]](#footnote-512)

To a certain extent, the source identification is arbitrary. Obvious limitations include the availability of resources, particularly in the context of documents that have been classified and subsequently declassified or leaked. Where documents are only available on an ad hoc or fragmented basis, significant pieces of the puzzle might be missing and this increases the possibility of misreading deep-core beliefs and policy core beliefs which are not always expressly articulated, but must be inferred from the broader context of the documents under analysis. Further, limits upon the researcher’s time and resources mean that it is not possible to code all documents produced by large-scale institutions, particularly over extended time-periods.

### *7.1.2 Contextualisation: Production Methods & Audience*

Ordinarily, when documents are selected for discourse analysis, the preliminary investigation would include a background check of the production processes relevant to the selected documents, including the institutional and personal background of the producer of the source material. In this instance the documents are being published anonymously on behalf of the institution and represent a collective policy position (NB in respect of that institution only, not as between Union’s centralised institutions). Nevertheless, other contextual questions relating to intended audience remain relevant. With institutional policy documents the primary target audience is often other policy actors, either within the institution itself or in other institutions. Further, where documents have been classified and leaked, they were clearly intended for an internal audience and not for wider public readership.

Somewhat ironically, given the subject matter being analysed, the institutions are aware that Regulation 1049/2001 alters the context in which internal documents are produced. Indeed this very point has been discussed in *Chapter 5*, which dealt with the anatomy of transparency, and which discussed the principles that might affect how and when information is to be disclosed. As a result, save for where a document is covered by a mandatory exemption, there is always the potential for future disclosure; even where parts of the document are exempt from disclosure, the remainder shall be disclosed if requested.[[513]](#footnote-513)

Even where institutional documents are being prepared predominantly for an internal audience, in an institutional landscape as broad as that covered by the EU’s principal legislative institutions, the internal audience itself is particularly varied. In the Council for instance, its intergovernmental structure presupposes a culture in which the relative privacy allows actors to be much more equivocal and receptive to the consensus building that has been characterised as preeminent in the shaping of politics in the post-Maastricht period, albeit less so in the more discrete arena of policy making.[[514]](#footnote-514) In the hard glare of the public gaze however, Member State delegations are much more likely to adopt a hard positional negotiating tone.[[515]](#footnote-515) The coder must therefore be aware that considerations about the intended audience are likely to influence how documents are constructed and the extent to which they reflect genuine core-beliefs about policy. As was mentioned in *Section 7.1* above, actors may choose to be instrumentally rational and present false positions in order to secure collective bargaining gains.

### *7.1.3 Coding*

The coding process involves assigning attributes to specific units of analysis, such as paragraphs, sentences or words; it is in essence a tagging process. Here, that tagging is looking to identify policy beliefs about transparency and the inferences that can readily be drawn about institutional conceptions of the wider world (these are known as discourse strands).[[516]](#footnote-516) To do so, it is necessary to establish coding categories, based initially on a theoretical outline of subject matter and the research questions.

By following this process, a few key themes are immediately apparent, including publicity, accountability, truth, openness, freedom, trust, democracy etc. These are themes that are reflected in the analysis of secondary literature that was undertaken in *Chapter 2* and have suffused the concept of transparency throughout its long and varied history. To briefly recall, it was noted in *Section 2.2* for instance, that the belief that transparency might guard against government censorship and secrecy, has been repeatedly articulated as a central tenet of its rationale since the early modern period. It was further discussed how the notion of a good and just society in which there is free access to information and government is honest and candid, as described by Milton in the *Aeropagitica*, was taken forward by a number of enlightenment thinkers and revolutionaries.[[517]](#footnote-517) These thinkers, chief amongst them Bentham, Rousseau and Kant, further contended that the publicity of information would allow the people to hold government to account; as transparency is operationalized, so democracy might be securitised.

The discussion in *Chapter 2* went on to demonstrate how variations of these key ideas and themes have continuously formed the philosophical and theoretical backdrop to thinking about transparency, reappearing in the *Discursive Theory of Law and Democracy* put forward by Habermas, and in a variety of modern academic political discourses.[[518]](#footnote-518)

By reviewing the secondary literature that has already been analysed and selecting a number of initial coding categories, it is possible to analyse a sample of the ‘primary texts’ and examine whether these contain any of these themes. Equally, some categories may be too broad and so they may have to be broken down into sub-categories.

Following a review of the secondary literature outlined in *Chapter 2* the following three coding categories were selected: 1) Accountability (& prevention of corruption), 2) Regime Legitimation, and 3) Trust. These categories were selected initially on the basis of the frequency with which these themes occur and recur throughout all of the secondary literature surveyed and across all the relevant time-periods. Accountability is a dominant feature in the literature of Bentham that was surveyed in *section 2.2.3* and in that section it was demonstrated how Bentham’s *Securities Against Misrule[[519]](#footnote-519)* has been the theoretical inspiration for much of the literature that has followed, including in the contemporary work of Heald[[520]](#footnote-520), Hood[[521]](#footnote-521), Birkinshaw[[522]](#footnote-522) & O’Neill.[[523]](#footnote-523)

The relationship between transparency and legitimacy and the extent to which it has potentially been misconstrued is a central object of this thesis and its research questions. As such, identifying when, how and with what frequency the institutions’ own publications associate transparency with legitimacy is an important element in determining what their overarching policy approach is, and how that approach influences the policy strategies that are prioritised and advocated by each of the institutions surveyed. Such an exercise can also facilitate assessment of whether the institutional approaches to transparency and legitimacy reflect the plurality of public perceptions about these concepts, by considering the extent to which dominant institutional attitudes occupy the four corners of the cultural matrix.

Trust is a theme that underpins assessments of democratic quality and is relevant to both accountability and regime legitimation, as was explored in *Chapter 4.* In respect of the former, accountability demands are predicated upon levels of underlying trust and thus demands for increasing transparency are directly related to perceptions about trust.[[524]](#footnote-524) The secondary literature highlights how more transparency can be seen to both increase and decrease perceptions of trust, allied to the phenomenon of whether citizens ‘like what they see’. Correspondingly this impacts upon regime legitimation. In both high and low trust settings, transparency can be perceived as a means of promoting and or maintaining regime legitimacy. However, as was discussed in *Chapter 4*, there is the potential for transparency to be inversely correlated with legitimacy, where that transparency reveals undesirable and unanticipated facets of governance. How the institutions perceive underlying levels of trust should therefore impact upon their approaches to transparency in respect of promoting accountability and regime legitimation.

### *7.1.4 Coding Methodology: Theoretical Considerations & Limitations*

A basic coding method was adopted for this study, in which sections of the texts were highlighted in different colours corresponding to the core themes. The significant limitation of this method how one might adequately represent instances where multiple coding categories are potentially represented by a single statement within the text. In these cases, it is appropriate to break down the highlighted text into phrases or even words that correspond with the selected discourse strand, though this can then make it difficult to establish how the discourse works within the larger body of highlighted text, it might also obscure how the different discourse strands overlap, rather than highlighting the inherent intertextual nature of the coding themes.

Nevertheless, despite these limitations, a simple coding process in which sections of text are highlighted is suitable for present purposes. This is because the different coding themes or discourse strands are in effect subsidiary to the institutional values that they represent. Since the objective here is to produce a tabulation of the influences on institutional policy approaches to transparency, the purpose of the research is concerned with what, cumulatively, the coded statements within a given document tell us about the dominant policy approach of the author(s) of that text. For example, in a Joint Communication from the Commission in 1993, entitled “Increased transparency in the work of the Commission”, “An open and structured dialogue between the Commission and special interest groups”, the Commission sets out that its overall objective is to:

‘[E]xplain its actions more clearly and provide adequate understanding about the Community’s work. In this case…to dialogue with and facilitate participation of the public in the most effective way. It therefore has initiated a set of measures aimed at increasing openness and transparency in its relations with the public…’[[525]](#footnote-525)

The statement highlighted in green has been coded as relating to the theme ‘accountability’, since it is concerned with the Commission explaining its actions and providing an account of the work it does to the public. Conversely, the statement highlighted in blue has been coded as relating to the theme ‘regime legitimation’ since it is concerned with facilitating effective public participation. Nevertheless, these statements might both be reasonably coded as relating to trust. However, as indicated immediately above, the object of the coding exercise is to highlight passages of text within the selected documents that reveal something about institutional policy belief systems and their approach to policy development, this will be particularly relevant to the tabulation that is produced in *Section 7.3* below. Consequently, it is important both to read around the coded text and to gather context from whole passages in addition to simple statements and highlighted phrases. By looking at the whole of the excerpt provided above, it can be seen that the passage refers more than once to the public and to facilitating relations with the public, with a view in the first instance to providing ‘adequate understanding’ and, in turn, to promote ‘effective participation’. As such the dominant message of the statement is that the Commission is looking to enhance legitimacy, whilst increasing accountability and promoting trust are instrumental in achieving that enhanced legitimacy.

### *7.1.5 Contextual Analysis: Structural Features , Problem Definition Strategies & Secondary Beliefs*

As has been outlined in *Section 7.1.4* immediately above, the coding exercise should accompany a macro examination of the features of each text, considering how each of the coded discourse fragments feed into broader arguments. This exercise relies significantly on the longitudinal analysis already presented in *Chapter 3.* The key is to identify how the context informs the argument and what specific references the texts themselves make explicit or otherwise allude to.

Exploring intertextuality helps to paint a picture of the longer term attitudinal approach taken by the institutions and whether it has altered over time in response to the changing political landscape.[[526]](#footnote-526) It is important of course to recall from *Section 7.1* above that belief systems are layered. In this respect, the institutions may have altered their secondary layer instrumental beliefs about the transparency policy approach, without fundamentally reordering their primary level beliefs about transparency itself, which flow from actors’ deep-core worldviews.

As was outlined in *Chapter 6,* Grid-group Cultural Theory provides an account of cultural change in which actors may move within the matrix (in extreme circumstances from one worldview to another) if repeated exposure to events in the social and political worlds challenges and or disproves beliefs that form part of their respective cultural biases. In the first instance, challenge in real-world settings is likely to affect the second-layer instrumental beliefs about how policy goals are to be implemented and achieved. When one method is proven over time not to be as effective as anticipated, alternative means of attempting to achieve the same goals may be pursued, since this involves the least disruption to core and deep-core belief systems that fundamentally structure actors’ worldviews. It is only where instrumental beliefs about policy approaches repeatedly prove unfruitful that policy-core and subsequently deep-core beliefs about particular issues and the wider social and political worlds become affected. This can result in movements in a range of directions across the matrix and can ultimately result in adherents of one of the core worldviews becoming adherents of another.

Finally, it is important to consider how the text presents policy scenarios and the actions stemming from them as self-evident or urgent etc. Again, the clues may be evident from the texts themselves and whether they indicate what ‘could’, ‘should’ or ‘must’ be done. Furthermore, to what extent do the texts present information as fact, and how are these factualities supported by evidence within the documents. A particularly strong feature of policy discourses is the extent to which they seek to naturalise certain interpretations or policy approaches by presenting them as a common sense deduction of circumstances.

### 7.2 Sample Discourse Fragments: How the Centralised Institutions have Constructed Policy Approaches

Using the methodology outlined in section 7.1 above, this subsection will discuss some sample discourse fragments that were considered as part of the discourse analysis, in order to demonstrate not only the application of the method described, but also show how inferences were drawn about the broader contextual features of the documents in relation to the narrative space that they occupy and the policy approaches that they prioritise.

### *7.2.1 The Commission*

It may be recalled from *Chapter 3* that in the initial ‘post-Maastricht’ phase of European transparency policy (1993 onwards) the Commission was particularly active in outlining the rationale for providing access to documents that had been made a policy commitment during the passage of the treaty. On 5 May 1993, the Commission published a communication on ‘Public Access to the Institutions’ Documents’. The document itself was an evidence-based comparative survey of access to documents in the member states and some non-member countries, considering in particular the types of documents that may be accessed, relevant exceptions and the legislative basis for providing access. The broad conclusion drawn by the document is that there was a case for further developing access to documents at the Community level and in doing so the Commission presented the following rationale:

‘Improved access to information will be a means of brining the public closer to the Community institutions and or stimulating a more informed and involved debate on Community Policy matters. It will also be a means of increasing the public’s confidence in the Community’.[[527]](#footnote-527)

The statement highlighted in blue has been tagged as a discourse strand relating to regime legitimation, since its objective is to involve the public more directly in institutional decision making. In seeking to do just that, the Commission’s objective is to stimulate a more involved debate about policy matters, which speaks to increased accountability (the section highlighted in green), whilst a corresponding objective is to increase public confidence (which has been highlighted in purple). The rhetoric used is repeated consistently in documents produced during this period, both by the Commission and other institutional actors, including the European Council.[[528]](#footnote-528) The coding themes of accountability, regime legitimation and trust are often referred to indirectly and are loosely tied together as being a collection of objects that are achieved when measures are taken to increase transparency and openness. Consciously however, transparency and access to documents are referred to interchangeably and no effort is made to distinguish how one relates to the other.

In subsequent documents, the Commission alters the emphasis slightly in focussing more expressly on the idea of using transparency to enhance support for the European Union, by emphasising the trust/legitimacy aspects. In its ‘Communication on Openness in the Community’[[529]](#footnote-529) the Commission established the theoretical underpinning behind giving formalised access to documents, and which set out in Annex 2 the basic principles that would subsequently feed into the Joint Code on Access, and later the Regulation 1049/2001 on Access to Documents. In Annex 3, the Commission goes on to detail how openness and transparency relate to the public and thus how the institutions’ may work to improve ‘media relations’, ‘networking’ and ‘image’. The Commission set out its understanding of the broader political context thus:

‘The Commission is aware that the process of European integration and in particular the implementation of the Treaty on European Union and progress towards Community enlargement can only progress successfully with the support of Europe’s citizens...

The report represented the Commission’s ‘completed’ response to the task it had been given at Maastricht, which specifically required it to investigate and present measures designed to improve public access. It built upon the conclusions of an earlier joint communication on ‘Increased transparency in the work of the Commission’ and ‘An open and structured dialogue between the Commission and special interest groups’.[[530]](#footnote-530) These earlier documents were ‘specifically addressed to those members of the public who followed Community affairs closely’[[531]](#footnote-531), and the resulting measures were largely focussed on administrative reform.

In this initial phase of transparency development (characterised in this thesis as the period between the passage of the Maastricht Treaty in 1992 and the inception of the Regulation on Access in 2001), both the thinking about transparency and the policy commitments that flow from these communications are fairly abstract. Very little policy thinking seems to have been given to mapping out the type of transparency that would be created, who this was most likely to affect (both internally and externally) and how this render the institutions more accessible as a result.

Nevertheless, the Commission did explicitly addresses its policy reform in the context of citizens who watch ‘community affairs closely’, suggesting that transparency policy was more about shoring up a nascent critical mass of public support and trust. Despite this, Annex 3[[532]](#footnote-532) to the Communication on Openness in the Community does contain measures designed to improve ‘media relations’ and ‘training and image’, presumably in an effort to seek to foster broader engagement, though this again is limited to exploiting existing channels of engagement, direct contact with citizens is eschewed in favour of harnessing the media as interlocutor. This latter point relates directly to the analysis undertaken in *Chapter 4,* where it was concluded that the institutions had given insufficient thought to how transparency tools might be applied to generate a thick sense of collective identity, whilst nevertheless prioritising transparency (rhetorically at least) as a mechanism of doing just that.

Accordingly, despite the apparently abstract and high-level way in which transparency is addressed in this early period, some policy core beliefs about transparency enhancing regime legitimacy are repeated consistently throughout the documents surveyed. This mantle is taken forward by the European Parliament, which seeks both to widen the import of transparency and strengthen the other centralised institutions policy commitments.

### *7.2.2 The European Parliament*

For the European Parliament, transparency was swiftly adopted as a key conceptual driver for democratic improvement in the Union:

‘The degree of openness of administration reflects the esteem in which parliamentary democracy is held by governments... It enables him to criticise, control and influence government channels either through his representatives in parliament or directly.

‘...It is a civil right that require of government bodies that they lay open the decision-making process to public inspection and that they explain the underlying motives and consequences of policy or policy proposals... Openness of government also reflects the extent to which government takes seriously the rule of law...

‘Parliament wants the Union to develop into a fully-fledged, democratically accountable system of law in which citizens are protected ...’[[533]](#footnote-533)

There are strong explicit links made here to the presence of effective accountability structures, oriented outwards from the institutions towards the public. The Parliament is likely to have taken its lead in this respect from the comparative survey on national access to documents regimes that the Commission had conducted in 1993. In the national context, using transparency measures to facilitate the accountability of executive decision-making, in respect of the effect of those decisions on the public, was a growing trend.

As thinking about openness becomes embedded in the political mind set of the EP, the concept is broadened out, seemingly to serve both deontological and consequentialist objectives. Nevertheless, at this point in the institutional thinking about transparency and openness, questions of legitimacy and its relationship with transparency remain less explicitly formulated.

On 22 November 1994, the Secretariat of the European Parliament Delegation to the Interinstitutional Conference, submitted to it a set of draft recommendations on “Transparency and Democracy”[[534]](#footnote-534). Within, the introductory remarks on the ‘Institutional Importance of Transparency’ indicate that transparency in the language of the institutions has come “to have a quite specific meaning. In this sphere, transparency is taken to mean the extent to which a process or the reasons behind a political decision are open to scrutiny.”[[535]](#footnote-535) Further to this, the recommendations posit questions about the directions in which transparency should move. Does parliament require transparency as a supervisory body? What about the press? To what extent should we inform the people most affected by a Union legislative or policy decision? How should the European public be informed more generally?

Immediately after, the hitherto implicit relationship between transparency, legitimacy and the resulting impact on democracy is unpacked and the now established association between transparency and accountability in the EU context becomes enmeshed with legitimation:

“Transparency is both an institutional concept and a conceptual component of the principle of democracy. A democratic process without transparency is unthinkable. The legitimation of any authority, including that of the European Community, requires political events, including political objectives chosen, to be properly understood. Political scrutiny in particular is impossible without detailed information of the subject matter to be scrutinized. A logical chain of requirements thus arises: democracy – legitimation through participation and scrutiny – transparency. The first presupposes the second and the second presupposes the third.”[[536]](#footnote-536)

After developing the theoretical relationship between transparency, legitimacy and democracy, the recommendations seek to establish transparency as a legal principle, suggesting that the obligations it contains arise from existing Union law:

“1. ...Transparency is negotiable only up to a point. We cannot negotiate over transparency as such: the transparency principle is a legal principle arising from Union law.

‘2. The justification for this position is that the principle of democracy is an expression of existing Union law, since transparency, as was argued above, is a key element or conceptual component of the democracy principle. Any new interinstitutional agreement which seeks to reduce the transparency deficit should not be seen as embodying an understanding attitude on the part of the institutions of the Union but as the fulfilment of an obligation enshrined in the Treaty itself...

‘Democracy would remain a theory with no practical application if practical consequences were not drawn from the theory. This requires consistency. Without such consistency the credibility gap currently facing the Community institutions will widen. Transparency is a crucial means for recovering the lost credibility,”[[537]](#footnote-537)

These statements represent the active crystallisation of a policy-core belief about the value of transparency that the European Parliament subsequently sought to propagate amongst the other centralised institutions. The practical implications of access and the increased accountability that it would bring, would develop an avenue for citizen participation in the life of the Union, that could ameliorate any perceived deficiencies in Community mechanisms for democratic representation, arising from the unusual division of powers amongst the institutions. It is, by now, a familiar argument, predicated on a familiar logic:

“It is of the highest importance for the credibility of the European Union that its decision making process be as transparent as possible, especially in view of the difficulties of ensuring democratic control of this process, and of its remoteness from European citizens.”[[538]](#footnote-538)

In that sense, legitimacy is an inherent product of the application of transparency, though the EP fails to adequately state here that within its theoretical construct, the capacity or effectiveness of that inherent transparency is directly contingent upon the effectiveness of accountability mechanisms designed and implemented to support transparency.

Perhaps most telling is the sentiment that ‘[t]ransparency is a crucial means for recovering the lost credibility’, implying a belief that transparency is capable not only of sustaining pre-existing forms of legitimacy, but also of replacing or substituting for lost public credibility, i.e. creating legitimacy where it has been lost or is otherwise hitherto absent. The EP builds upon the earlier Commission statements about the value of openness in governance, and indicates that its practical suggestions for policy development in the field of communication are not only desirable, but necessitated by existing Union law. In doing so, it attaches transparency requirements to the principle of democracy as enumerated in the preamble to the Union Treaty, Union commitments to respect the fundamental rights, the introduction of Union citizenship, and Article 191 of the EC Treaty (repealed) which stated: ‘Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.’

A strong feature of the European Parliament’s transparency discourse, as compared with that of the Commission, is the way in which it seeks to sustain and defend its policy core beliefs by consistent references to the treaties, thus situating its interpretation of transparency firmly within the Union’s familiar constitutional framework. The Parliament is also keen to communicate its secondary level beliefs about how transparency is to be implemented. Later developments have borne out that the Parliament was keen (and remains so) to use this strong policy core position to establish a defined positional negotiation strategy on the implementation of policy reform and the delivery of key policy commitments, which, as is by now well-rehearsed, has clashed strongly with the policy core positions of the Commission and the Council.

***7.2.3 The Court of Justice***

The Court of Justice has had most impact in delimiting the scope of the provisions of the existing Regulation on access. Analysis of its case law emphasises, fairly consistently, an approach that prioritises openness, from which seems to emerge a pro-constitutional and democratic perspective on the value of the principle of access to documents. Indeed the preamble to Regulation 1049/2001 states that ‘openness enables citizens to participate more closely in decision-making processes and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.’ Accordingly, the court has taken principled positions on the institutional requirement to conduct a thorough and individual examination of requested documents, and on the assessment of foreseeable harm. Nevertheless, it has graduated its approach according to the categories of document requested in the proceedings before it, placing limits on the outer reaches of this general presumption of openness in the context of administrative and judicial documents.

#### In the context of legislative documents, much can be gleaned from the landmark (pre-Lisbon) ruling in Turco:

#### “[I]t is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible…in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system…

#### The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.”[[539]](#footnote-539)

It is evident that a dominant theme of the approach of the court is the assumption that transparency is an inherent aspect of regime legitimation, albeit that legitimation is framed in the context of democratic rights. Accordingly it might be assumed that the value of transparency is assumed to be located in its capacity to allow individuals to exercise their rights, and thus it is indirectly, rather than directly, instrumental in regime legitimation. Nevertheless, the court has further sought to clarify its position by clarifying that in principle, Regulation 1049/2001 requires disclosure even of the opinions of the Council’s legal service where they relate to a legislative process, with exceptions limited to situations In which they are particularly sensitive of where the opinion is much broader than the legislative process in question.

The Court reiterated its high-tariff approach in *Access info. Europe,* clarifying that full access can only be circumscribed where there is a foreseeable risk that protected interests (i.e. interests protected by the exceptions in Article 4) would be undermined. Of particular interest has been the ‘space-to-think’ exception contained in Article 4(3), since it hypothetically presents a fairly low-bar against which early-stage proposals are rendered exempt from disclosure. Nevertheless, in the legislative context the Court determined that where documents contain legislative proposals for amendment (as submitted by council delegations), “are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive…by reference to any criterion whatsoever.”[[540]](#footnote-540)

Notwithstanding this strong position, it is apparent that the Court of Justice and the General Court do not always take a consistent approach, with the latter limiting the scope of the general principle of openness in legislative matters, by reference to the Commission’s power of initiative:

“[I]t is important to protect that power for initiative from any influences exerted by public or private interests which would attempt, outside of organised consultation, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution.”[[541]](#footnote-541)

It is notable that the here, even where the General Court is limiting the right of access, it characterises its position by reference to the principle of regime legitimation, insofar as it alludes to the possibility of lobbying interests compelling the Commission to pursue a particular position or otherwise influence/destabilise the ordinary course of the legislative process. Specifically, the case concerned the disclosure of impact assessments produced in the course of the Commission adopting a legislative procedure. Nevertheless, the decision potentially seriously circumscribes the established position on openness in respect of the Commission, by undertaking to formally distinguish between ‘legislative initiative’ and the ‘legislative procedure’.

Irrespective of the fact that the court has consistently erred on the side of openness, it has taken a thorough and tempered approach that elicits fine distinctions between legislative, administrative and judicial matters, with apparently different standards of openness applying to each. In the *MyTravel* case the Court indicated that: “administrative activity…does not require as extensive an access to documents as that concerning the legislative activity of a union institutions.”[[542]](#footnote-542)

Pursuant to the MyTravel decision, the Court has controversially allowed the institutions, notably the Commission, to refuse the disclosure of administrative documents, on the basis of general presumptions, albeit within certain limits, and noting that this restricts the fundamental principle of transparency as laid out in the treaties. The excerpt below shows that the court continues to be preoccupied with the condition of ‘regime legitimacy’ in attempting to define and justify how different institutional approaches to access and disclosure are permitted to obtrude on the general principle of openness:

“[T]he possibility of relying on general presumptions…is no insignificant matter. The effect of such presumptions is not only that they restrict the fundamental principle of transparency laid out in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, but also that they limit in practice access to the documents in question. Accordingly, the use of such presumptions must be founded on reasonable and convincing grounds.”[[543]](#footnote-543)

The area in which the court has been notably most restrictive is in relation to judicial proceedings. Here the court has confirmed its position that judicial activities are excluded from the scope of the right of access to documents, though this exception is subject to a temporal limitation:

“[T]he exclusion of judicial activities from the scope of the right of access…is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it, take place in an atmosphere of total serenity. (para. 76)

“[A] general presumption that disclosure of the pleadings…would undermine the protection of those proceedings…while those proceedings remain pending.” (para 92)[[544]](#footnote-544)

This decision has been roundly criticised as being an exercise in institutional politics, through which the Court has sought fit to extricate itself from transparency standards that it seeks to impose upon the other institutions.[[545]](#footnote-545) Nevertheless the decision may be read in terms of the Court being legitimately preoccupied with the ‘trust’ that parties invest in the proceedings and their conduct, free from external influences and interests. Though it is perhaps telling that the substance of the court’s argument appears to shift from ‘regime legitimation’ to ‘trust’. Nevertheless the court does seek to place a temporal limitation on the existence of a general presumption here, noting that there are no longer grounds for presuming that disclosure of the proceedings would affect he activities of the Court, once those proceedings have been closed by a decision of the Court.

### 7.3 Institutional Values and their Implications for Policy Approaches: A Tabulation of Findings

From these discourse analysis (coding and contextual analysis) exercises it is possible to establish a typology of core belief systems about transparency and its role as a feature of the EU’s governance landscape, based on the four world-views of the grid-group matrix.[[546]](#footnote-546) The tabulation attempts to structure the findings of that analysis by considering not only core belief systems, but also beliefs about transparency policy values, along with instrumental beliefs about the introduction and impact of transparency regimes, in the hope of arriving at a fuller picture of the attitudes underpinned by these biases.[[547]](#footnote-547) The tabulation is based on a cross-referencing of the discourse fragments against the value systems that underpin each of the world-views, thus producing a picture of what beliefs about transparency look like in each of those cultural frames.

*Figure 1* below, sets out the results of the initial tabulation.[[548]](#footnote-548) The discourses demonstrate how a problem might be defined, the core values and strategies that are reflected in this definition (and in turn the deep-core values that the ‘adherent’ is seeking to maintain), along with instrumental beliefs about how these policy objectives are to be achieved and the preferred instruments (legislative, non-legislative etc.)

The ‘policy core values’ used in the table reflect the coding categories selected in *Section 7.1.1.3* above. The ‘problem definitions’ and ‘preferred policy instruments/techniques’ identified are taken from the discussion in *Section 7.1* above and are designed to elucidate the layered nature of policy belief systems. Distinguishing between deep-core, policy core and secondary level beliefs is relevant not only to the discussion on viable hybrid policy solutions, that will be considered in *Section 7.3* below, but it is also relevant to the discussion on problem definition strategies that will be discussed in *Chapter 8*; it is important to have a picture of where, and in respect of which particular aspects of policy design and implementation, actors may be prepared to compromise.

As anticipated, it is clear from the table that there is much more fundamental disagreement about the policy core beliefs than there is about policy implementation strategies. Questions about regulation and costs for instance can be viewed as questions of scale, with the object of negotiations being to establish an acceptable compromise between those more and less disposed to different implementation approaches.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Policy Core Belief** | **Hierarchist** | **Individualist** | **Egalitarian** | **Fatalist** |
| Accountability | Promotes upscale accountability with oversight by hierarchical superiors, preference for vertical relationships and large-scale implementation. Emphasis on formal processes and procedures. | Emphasis on efficient task performance and not on vertical hierarchies. Indifference to scale of implementation, opposition to formalised processes where they have efficiency costs. | Strong horizontal networks of accountability. All are equally entitled to access available information. Preference for smaller scale accountability structures & total internal openness towards the group (outer limits of which are tightly defined by circumstance). | Resignation to belief that the system is fundamentally corrupt. Individual powerless to demand accountability. (Systems may combine fatalist and hierarchist approaches, introducing accountability through contrived randomness’ or lottery). |
| Regime Legitimation | Historically justified on basis of embedded processes. Limited opportunities for additional sources of input legitimacy i.e. representation. | Justified on basis of regime effectiveness & ability to pursue own goals without interference from governance and regulatory regimes, | Promotes equality of access to the available information. Promotion of participation rights & citizen peer-review of ‘public servants’. | Regime illegitimate & capricious, individual powerless. Opportunities, such as they might arise, to be exploited. |
| Trust | Typically high levels of underlying trust. Promotes perception that regime is ‘effective in the circumstances’. | Typically high levels of mutual suspicion. Focus on outputs rather than fairness. | Typically high levels of trust within the group boundary, mutual suspicion of those lying outwith. Focus on articulating a ‘collective voice’ position. | Mistrust of both systems and other individuals. Desire to evince all interaction with the regime/ participation with others. |
| **Problem Definition** | Promoting structure: how to increase transparency of government activity whilst maintaining the sanctity of hierarchical information streams by reducing effectiveness or increasing costs. | Insufficient capacity to analyse available information. Loss of time and opportunities where provision of information impacts adversely on effectiveness. | Erosion of the civic political space.. Lack of direct public accountability. Ineffective input and process participation mechanisms. | All others’ contrive to keep any and all valuable information a secret. |
| **Preferred Policy Instruments/ Techniques** | Regulation, clearly defined rights. Scope of those rights yields to the will of the administration. Broadly construed exceptions. | Focus on ‘market’ to define the parameters of information rights. Large-scale regulation perceived as unnecessary and costly. | Regulation to reflect inner convictions and personal moral attitudes, focus on civic and social responsibility. | Would prefer to absent oneself from strictures of social organisation in this context. |
| Costs | Public acceptance of some access costs to mitigate impact upon tight administrative budgets. | Disregard, provide compensation for access costs where they are unavoidable, charge where they are optional. | Minimisation of direct cost impacts to facilitate equality of access. | Regulatory regime imposes cost on seeking access to information. |
| Policy Implementation, preferred approach | Prefers technological fixes, promotes benefits of ICT, the internet and social media as mechanisms of engagement. | Love of technological fixes for administrative problems, esp. where efficiency is increased and costs minimised. | Preference for low-tech and small-scale solutions, need to provide access on a personalised and ‘lowest common denominator basis’. Normative adherence to equality within the enclave prioritised over labour-intensivity of solution. | No preference for any particular approach to defining technologies to promote specific solutions. |

Fig. 1 A Cultural Typology of Transparency Belief Systems

By using the cultural baseline provided in Table 1, it is possible to begin to construct a more detailed picture of institutional attitudes towards transparency, by considering how the discourse analysis evidences differences in institutional approaches and priorities. Figure 2 provides a tabulation of Cultural biases prevalent with the EU Institutions’ publications on transparency.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Institution** | **Policy Objective: Accountability** | **Policy Objective:**  **Legitimation** | **Policy Objective:**  **Trust** | **Problem Definition** | **External Costs** | **Preferred policy Instruments** | **Technology Preference** |
| Commission | H, I | I | H | H | H | H, I | H, I |
| Council of Ministers | H, I | I | H | H | H | H, I | H, I |
| European Parliament | H, I, E | H, E | E | E | H, I , E | H, E | H, I |
| Court of Justice | I, E | E, H | E | E | I, E | H, E | H, I, E |

Figure 2: Cultural Biases in EU Institutions attitudes to Transparency

It is to be noted that the ‘fatalist’ policy frame is not present in *Figure 2* since the fatalist cultural bias is not an active form of social organisation, though, as indicated in *Chapter 6*, institutions may pursue what might be interpreted as a ‘fatalist’ logic in respect of their ‘preferred policy instruments’ (albeit in pursuance of other, non-fatalist policy objectives). For example, the fatalist might interpret exceptions to access as fundamentally random or capricious in their operation. Fatalism will be considered more explicitly in *Section 3.4* below, where the relationship between institutional and mass public cultural biases is explored.

This secondary tabulation highlights not only relevant differences and similarities in the institutions’ core approaches, and the cultural baseline from which those approaches are likely to be drawn, but it can be used to identify the stages at which divergent approaches emerge and consequently the points in the policy development and implementation process at which there is likely to be conflict. Conversely, where the analysis suggests that the institution has adopted a mixed or hybrid policy approach; this can be used as a starting point to examine where affinities might potentially exist, as between the institutions, resulting in improved policy success rates.

In *Figure 2* above, it can be seen that whilst there is apparent interinstitutional disagreement about how the EU’s transparency problem is defined, (with the Commission and the Council undertaking a predominantly hierarchist approach, whilst the Parliament and Court of Justice have adopted a predominantly egalitarian approach) there are stronger underlying levels of agreement about the policy instruments that should be used and whether there should be a ‘technological’ fix (where hierarchist hybrid approaches prevail across the institutions.) This would suggest that policymakers should focus on policy development strategies and negotiations that seek to minimise the perception of significant differences between groups of actors about the normative investment in transparency, since there seems to be more agreement about ‘ends’. It may further represent the cultural context in which transparency has taken root in the EU, insofar as the cross-fertilisation of policy mechanisms and legislative instruments, borrowed from the Member States, has been instrumental in shaping the policy fix that has been pursued. Nevertheless, it must be conceded that the apparent agreement between institutions about the instruments that should underpin EU transparency, belies somewhat the varied scope and effect to which those instruments can be put. Agreement on the need for legislative intervention is quite different from agreement on the terms of that legislative intervention, as current events will attest.[[549]](#footnote-549)

Furthermore, the attitudes captured in Figure 2 reflect the institutions’ public commitments to transparency/access to documents. These traceable policy commitments are of course only a part of the story and they are likely to be complemented by analyses of the ‘invisible’ commitments that the institutions would not want to publicly acknowledge. To the extent that there is an unknown and potentially unquantifiable gap between actual and projected cultural allegiances, it is impossible to suggest what the resulting impact is on policy success. Nevertheless, given that the biases themselves collectively represent a complete ‘political space’ it is possible to assert that unidentified biases are already captured by the typology, even if they are not explicitly identified. The task remains to make judgements about the reliability of observable policy commitments in terms of institutions’ true allegiances, which can be discerned, to a certain extent, by the evolving ‘public’ position over time.

Building upon the comparative assessment of institutional approaches to transparency (both attitudinal and instrumental) it is subsequently possible to extrapolate how the potential affinities and avenues of conflict map onto the bigger picture of citizen approaches and attitudes to transparency. Whilst some of the cleavages that play out here are also likely to be relevant to the citizen actor’s analysis and understanding of the policy context, the institutions must also be alive to policy-core positions that are underrepresented or perhaps not represented at all, as highlighted in figure 2. By utilising the information that is captured in *Figure 1*, the institutions are able to make reasoned predictions about citizen’s attitudinal responses by harnessing the predictive capacity of Grid-Group theory to generate preferences about political issues from competing perspectives. This latter aspect, should also be a core element of policy brokerage, since policy success or failure (particularly where the policy objectives relate to aspects of constitutional or democratic character) is not vested in actions of the institutions alone.

### 7.4 A note on the Relationship between Institutional Values and Public Attitudes

As has already been asserted, the variety of institutional interests and values represented in the foregoing tabulation should also, to a greater or lesser extent, capture values espoused by a European publics. Nevertheless, evidencing cultural variety within and between populations, in a manner that is both statistically significant and thereby reasonably reliable, presents obvious logistical problems. In the case of a population as large and diverse as that of the EU, the complexities of scale become almost insurmountable.

Extant surveying methods, such as the Eurobarometer surveys which were briefly referred to in *Chapter 1*,are useful insofar as they evidence longitudinal trends in overall levels of trust in the institutions, which can substitute as a proxy measure for generalised perceptions about democratic legitimacy. Beyond this however, they cannot provide any qualitative measure of attitudinal positions and the underlying biases which may inform them. Nevertheless, it is possible to draw out how cultural biases might be situated within the Grid-Group matrix by reflecting on how European publics have behaved in response to significant constitutional events and turning points in the EU integration journey.

It has already been noted in *Chapter 3* that moves to introduce transparency catalysed in the wake of events surrounding the passage of the Treaty on European Union, including the Danish referendum rejecting its ratification. Similarly, in national referenda France and Denmark rejected the Constitutional Treaty and voters in Ireland initially voted to reject the ratification of the TEU and TFEU. Both individually and collectively, these referenda signal the prevalence of fatalism in public attitudes about processes of integration. Citizen actors are bound by the regulation and prescription that is imposed by institutional elites in Brussels, yet citizens do not share a ‘thick’ collective affinity with their counterparts in other states. Further, it is possible to observe how these tensions have played out and been exacerbated in the aftermath of the financial crisis as smaller, indebted states are subjected to the seemingly hegemonic power and interests of a dominant institutional austerity.

The most prescient example of mass-perceived fatalism can be found in the decision of the United Kingdom to leave the European Union, following a referendum held in 2016. Domestically, the referendum exposed significant differences as between the attitudes of those living in different regions of the UK, and also between dense urban populations and more sparsely populated rural areas. Though many major cities, Scotland and Northern Ireland voted to remain, the overall result was nevertheless a vote to leave. In a bitter and divisive campaign issues of transparency and legitimacy were brought to the fore. The dominant narrative of leave campaigners revolved around immigration, the costs of EU membership, and the desire to ‘take back control’ in areas of pooled sovereignty.

Both camps were accused of presenting misinformation, with a particularly egregious claim from the leave campaign, suggesting that £50 million a day was spent on EU membership which could be invested in the National Health Service, a figure that would conveniently cover projected funding shortfalls. Conversely, the remain camp were accused of scaremongering in relation speculation about the post-‘Brexit’ trading relationship with the EU. Confrontations came to a head, when the then UK Justice Minister, Michael Gove, chose to publicly exploit this fatalist sentiment announcing that “people in this country have had enough of experts”.[[550]](#footnote-550)

Despite the obvious limitations of relying on landmark political events as evidence of mass public attitudes; they are instructive insofar as they highlight how fatalism is potentially a very significant bias when exploring the interface between dominant opinions in institutional elites and dominant opinions amongst groups of citizens. Accordingly, this particular cleavage of attitudes needs to be fully considered as part of any policy brokerage process that has the aim of promoting workable compromise as between all significant stakeholders.

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The evidence elucidated here will be reinterpreted in *Chapter 8,* with a view to producing aframe-reflective analysis of transparency as a policy problem for the purposes of eliciting an overarching cultural narrative of policy approaches. The explicit aim will be to use the tabulation as an overarching heuristic of the institutions’ approaches to policy development, in order to inform suggestions about future courses of action in the Union’s transparency policy arena. This serves 2 distinct yet related purposes. On the one hand, the very real emergence of transparency policy stagnation suggests that the institutions are unsure how to proceed in a world where core policy-beliefs about transparency’s instrumental value are not reflected on the ground. On the other, it has been argued in this thesis that insufficient attention has been paid to public perceptions about transparency, to how they vary and to who is likely to hold a particular perspective. *Chapter 8* will begin to answer some of those questions by explicitly invoking cultural narratives as a tool for the policy design and development process.

# 8. A Cultural Theory of Transparency in the European Union: Problem Framing, Values and Policy Belief Systems

In this final chapter, the aim is to utilise the typologies presented in *Chapter 7* to develop a ‘frame-reflective’ Cultural Theory[[551]](#footnote-551) of transparency policy belief systems, utilising the insights generated to inform suggestions about the future direction of transparency policy in the EU. The typologies presented in *Sections 7.2 and 7.3* explored how cultural biases are fundamental to attitudinal approaches towards transparency which structure individuals’ policy belief systems. By demonstrating that the centralised European Union institutions have made differential assumptions on the ‘facts’, *Chapter 7* offered a cultural explanation for institutional practice, past and present, in relation to transparency and the goals pursued in its name.[[552]](#footnote-552)

This chapter will build upon that analysis by considering the extent to which institutional policy orientations are reconcilable with the perceptions of other groups of actors, and thereby with the publics they serve. In doing so it will consider how the differences in institutional approach identified in *Chapter 7* have influenced the institutions’ problem definition strategies. The objective here remains allied to responding to the question of how we can more adequately chart the interplay of factors affecting the relationship between transparency and legitimacy (and by definition, other objects of democratic governance), specifically in the context of the interpretative and communicative processes which underpin the value assumptions made about transparency. To do so, four narratives will be constructed, based on the four cultural types presented in *Chapter 6* – individualism, fatalism, hierarchy and egalitarianism. The idea is to test whether the adherent of a particular worldview will consistently contextualise policy problems and identify possible solutions in accordance with that worldview, whilst also considering the extent to which this is predictable.

It is to be recalled that the grid-group matrix, which is the cornerstone of cultural theory, specifically identifies the most pronounced differences in policy actors’ approaches to policy problems. By focussing on these distinct contrasts, it is anticipated that the narratives presented will capture something of the inherent complexity of cultural pluralism. It was argued in *Chapter 6* that Grid-Group Cultural Theory offers a mechanism for both structuring and simplifying some of that inherent complexity, since within the extreme positions presented, there is scope for a potentially infinite variety of mixed approaches to exist. Indeed, if any attempt at looking at policy problems and their solutions is to be useful, then that variety needs to be meaningfully simplified and constrained.

In proposing a cultural theory of European Union transparency and considering the conclusions that might subsequently be inferred, the idea is not to simply suggest that any one of (or a combination of) the institutions has pursued a particular cultural bias, whilst a homogenous public mass subscribe to another. Rather, the goal is to explore the interplay between the values that can be said to have been prioritised by the institutions in their transparency endeavours, and how those values are reflected in the spectrum of biases held by a deeply heterogeneous and diverse set of European publics. The theory demonstrates how some of the conceptual and contextual complexity that was encountered in Parts I and II of this thesis, emerges from a much more expansive range of culturally context dependent rationalities than are traditionally posited in other institutional accounts of political and legislative action, where the individual actor may be variously entirely ‘rational’ or entirely ‘path-dependent’. In essence, the ultimate question might be framed as: how is the intermediation between different views or perspectives on transparency organised within the European Union?

The chapter will proceed as follows. In *Section 1*, Grid-group Cultural Theory will be used to structure some of the ideas that have been presented in preceding chapters about transparency and its contribution to governance. Drawing particularly upon some the normative and ethical debates about the value of transparency that were first introduced in *Chapter 2*, and examined further in *Chapter 5*, it will consider how particular cultural biases structure problems, and the solutions to those problems in particular ways. The four narratives that will be generated to shape the enquiry will consider how the particular frames that those biases impose upon problem structuring influence policy belief systems, exclude certain facts and rely on certain information processing strategies that prioritise particular methods or types of problem resolution. The value of this exercise from a governance perspective is that it highlights the gap that exists between different baseline policy belief systems, and identifies the discourses that are prevalent within a particular policy domain.

Subsequently, *Section 2* of this chapter will focus on how incomplete frames for structuring policy problems and the public policy solution strategies they produce, may have resulted in unanticipated consequences, side-effects and missed opportunities for the Union’s transparency policy strategy, bearing in mind the invisible sources of power and influence that have shaped transparency policy throughout its history, and which have impacted on the Union’s legislative endeavours. It will be argued that opportunities for learning can be readily gleaned if policy makers, legislators and analysts deliberately consider how problems might be cognitively structured by different stakeholder interests. Further, by pro-actively justifying policy choices it might be possible to reconcile different policy approaches by bridging certain cultural differences, and/or destabilising “irrational” cultural viewpoints that are not supported or otherwise undermined by repeated exposure to a different set of social facts.

## 8.1 Using Grid-Group Cultural Theory to Structure and Reframe Policy Problems (and their Solutions?)

The Grid-Group typology is a convenient starting point for the analysing transparency as a policy problem, since it allows the analyst to identify a number of different context-specific ways in which a problem might be defined. Further, Grid-Group also demonstrates very clearly where different problem-definition strategies are likely to come into conflict with one another resulting in policy deadlock.[[553]](#footnote-553)

In *Chapter 5* we considered how different conceptions of transparency make different kinds of information demands, depending upon the parameters that have been established within which the policy operates. As such, the direction in which transparency moves (up or down) an organisational chain and whether it is looking inwards or outwards, along with the intended audience, have a decisive impact on the types of information demand that are made. Cultural Theory advocates that those information demands are not only shaped in terms of factors relevant to their immediate context, but that the biases of actors are instrumental in shaping systems and processes. Ultimately, those biases are instrumental in in determining what transparency looks like within those specific contexts.

### *8.1.1 Transparency as a Policy Problem*

In order to understand how grid-group can be used to devise governance strategies that deal with complex social and political problems, it is important to understand how those problems occur. Thinking about transparency as a public policy problem is a useful mechanism through which to explore the different dynamics at play, since it exposes the effects of underlying biases and assumptions that feed into how the problem has been defined and thereby the solutions that should be pursued.

To define transparency as a policy problem is to suggest that policy actors perceive a gap between current political conditions and a desired normative ideal or empirical state of affairs. Problems become politicised where there is an expectation that public bodies and/or governments are responsible for tackling them. In devising policy strategies for dealing with problems, political actors and the public can agree or disagree on each of the three constituent elements of problem framing aforementioned, i.e. they can dispute the nature of current state of affairs, the desired circumstances to be achieved, and the significance of the gap lying in between. [[554]](#footnote-554) The factors affecting these potential sources of disagreement include the potential knowledge gaps that exist between different constituencies and groups of stakeholders, beliefs about the degree of certainty with which knowledge is held, levels of intra- and inter- group consensus about the desired standards to be achieved, whether there is in fact a gap between our current circumstances and normative expectations, and the extent to which this is a ‘public policy problem’ to be tackled by government.[[555]](#footnote-555)

The contribution that Cultural Theory makes, is to tackle some of the complexity created in problem framing by offering a means of predicting some of the recurrent orientations of actors who identify with a particular way of life and hold a corresponding cultural bias. Subsequently, that predictive capacity can be harnessed to suggest patterns in how adherents of a particular bias will respond to the ways in which problems are framed by the other types.[[556]](#footnote-556)

In essence the European Union’s attempts to promote transparency can be understood as an example of a policy problem, one in which ideas about both how to tackle perceptions of diminished legitimacy and why such a state of affairs existed became conflated, the answer to both being invested in the idea of transparency. *Chapter 3* explored how the centralised institutions’ responded to claims that the Union’s democratic quality was weakened by a perceived ‘proximity problem’ in which the public felt distanced from rule-making authorities. In order to tackle this, the institutions sought to introduce transparency via legislative means. Institutional secrecy, diplomatic working methods, legislative processes that compared unfavourably with their national counterparts and scandal, all had their part to play in propelling the political narrative towards increasing transparency. Actors sought to promote confidence in the Union’s political architecture by providing information to reduce the ‘gap’ between the public and the institutions.[[557]](#footnote-557) Thinking long-term, they also wanted this information provision to promote a sense of community by providing citizens’ with the means to find out about what the Union does and why, and to enjoy some involvement in the Union’s activities.

### *8.1.2 Promoting Transparency: Four Management Strategies (for Dealing with the Proximity Problem?)*

The manner in which Union institutions sought to address this proximity problem can be identified as a structured policy approach in which there was a degree of inter-institutional consensus about the nature of the problem and the proposed solution,[[558]](#footnote-558) even if there remained some disagreement about the significance of the problem and/or the extent to which there should be an attempt to maximise transparency. The institutions could readily agree that European publics did feel distanced from the centralised authorities in Brussels. Furthermore, there was some consensus that the problem could be addressed, in the first instance at least, by adopting strategies to increase transparency and thereby expose something more of the inner workings of the institutions. In addition, there was some consensus that the problem should be tackled using formal ‘legal’ means.[[559]](#footnote-559)

Structured problems are characterised by high degrees of certain knowledge and correspondingly high degrees of consensus about the ends that should be achieved. Dealing with these problems is considered to be part and parcel of the role of the administration. By contrast, moderately structured problems exist where there is either consent about the ends to be achieved, or consensus about the nature of existing knowledge, but there remains significant disagreement about the corresponding element i.e. although we may know a great deal about the problem, there is very little agreement about how it should be tackled, and vice versa. Finally, there are problems where both the pre-existing knowledge base and the desired ends or goals are hotly contested. This category of problems is fundamentally unstructured.[[560]](#footnote-560)

The EU’s own proximity problem for the reasons outlined immediately above, may consequently be characterised as structured, since it has been demonstrated that there is a high degree of certain knowledge about what the problem is (i.e. distance between the rulers and the ruled) and correspondingly high degrees of consent (amongst the institutions at least) about how the problem should be tackled. Nevertheless, as has been demonstrated in *Chapters 3 & 4* the effectiveness and efficiency of the EU’s legislative strategies to increase transparency, have been challenged repeatedly by the persistence of the proximity problem. As the empirical evidence has grown and the academic analysis of transparency has become more sophisticated, increasingly the view is taken that more transparency will not cure the EU’s democratic ills. Consequently, there is also a strong case for arguing that that the Union’s proximity problem is a moderately structured problem, since there is a high degree of consent about the nature of the problem, but increasing uncertainty about whether transparency (and specifically legislative transparency) will ever lead us to a definitive solution.

#### 8.1.2.1 The Hierarchist Bias: Structuring Policy Problems & Maintaining the Status Quo?

To understand the value that can be gleaned from bringing grid-group cultural theory to bear on the EU’s approach to problem definition and solving, it is important to consider how EU policy makers and other actors would respond to the different problem types set out above. How do those different actors travel between means and ends and to what extent is this determined not by the nature of the problem itself, but by preconceived ideas and holding a certain view of the world?

The policy maker working in a complex bureaucracy is exposed to a series of institutionally mediated social relationships that are strongly hierarchical.[[561]](#footnote-561) To understand how the EU approaches problem solving, there is much literature that views the organisation as a complex bureaucracy; [[562]](#footnote-562) actors within the centralised institutions observe specific written and unwritten rules in their dealings with one another, particularly in the interinstitutional context. Indeed, even when politics is taking place ‘off the record’ and certain formal protocols are dispensed with, interaction is designed to promote the stability of overarching organisational paradigms.[[563]](#footnote-563)

Thompson and Wildavsky[[564]](#footnote-564) have described the bias towards hierarchical decision making as paradigm protection. Hierarchies seek to sustain themselves by prioritising the existing, widely accepted theories and methods of doing things, such as a belief in science (and the scientific method(s)), technology (and the unquestioned benefit of technological advancement) and religion (and the divine basis of universal moral truths). These all reinforce the status quo by justifying existing power bases and familiar governance structures.[[565]](#footnote-565) Consequently, public policy problem solving commences from having an ordered knowledge base, predicated upon a scientific methodology and capable of addressing the complexity that is produced within the governance hierarchy. The approach to problem solving is also functional and analytic; since there is a supposedly agreed upon starting point and a generalised belief that finding solutions should be left to expert actors.

The rationale underpinning a hierarchist system seeks to discretely compartmentalise the intellectual capacities of actors in organisational frameworks, it does this in a manner akin to Fordism, dividing by professions and specialisms. By recognising and accounting for the intellectual limits of individual actors, hierarchs are developed that form complex bureaucratic structures, within which the individual is only responsible for addressing a part of the problem, according to the tools and methodological premises of the organisation as a whole. According to this logic, problems are capable of being packaged, labelled and divided in such a way that they are capable of being tackled by the institutional sub-units that have been tasked with finding solutions. In essence the problem is repackaged so that if fits neatly onto the framework of the existing hierarchy, as far as possible. This is to prevent the hierarchy from being weakened by making structural changes that expose inconsistencies and depart from the premises supported by the protected paradigms.

For a hierarchist policy maker, a problem can be said to be composed of 3 related elements. The first is that the problem must be capable of being structured, as discussed immediately above. This means that the problem must be capable of being broken down into self-contained sub-problem components. Equally it must be capable of being reassembled. Secondly, it must be assumed that government can tackle the problem and add value. This involves assuming that government is able to identify both the desired state of affairs to be achieved, along with the constraints that may prevent government from achieving the desired future state. Finally, government must be able to distinguish both between the importance and desirability of policy alternatives, along with the urgency of the different policy dimensions, thus implying that some problem parts are not worth solving.[[566]](#footnote-566)

In thinking about how these particular problem definition strategies might have influenced the structuring of European Union transparency policy, it is possible to identify that both actual and perceived deficiencies in the EU’s democratic architecture (in particular in relation to accountability, participation and legitimacy) were capable of being repackaged as being predominantly ‘transparency problems’, since institutional hierarchies were capable of readily identifying a solution for which there was a growing consensus amongst institutional elites in the Commission, Council and the Parliament: ‘access to documents’.

In fact, pursuing access to documents legislation can be said to be politically convenient for a number of reasons. Firstly, there was an established roadmap in the Swedish and Dutch examples that demonstrated how the operational aspects of providing documents to the public could be accommodated.[[567]](#footnote-567) In addition, there were structured, bureaucratic and technological solutions to the problem, i.e. formal requests for access, coupled with the active provision of information via new information and communications technology.[[568]](#footnote-568) By conceiving of broad problems of democratic accountability in this way, they could be conveniently repackaged as problems that could be tackled discretely by the institutions acting independently, who conveniently retained a great deal of administrative control into the bargain, not only in relation to the documents they would release, but also at earlier stages of the information production process. Things might be selectively committed to paper, classified under a competing legal regime and hence not subject to disclosure, or else only partly subject to disclosure.[[569]](#footnote-569)

Furthermore, transparency as solution was predicated upon sound rational and methodologically rigorous thinking from the political sciences, with a longstanding intellectual pedigree dating back to at least the enlightenment.[[570]](#footnote-570) Finally, the transparency solution introduced, readily distinguished between the parts of the problem that could and should be solved and those that were more distant, difficult and potentially unsolvable. The right of access allowed citizens to request documents held by the institutions. This would surely attract motivated and interested citizens, and members of elite groups (the media, lawyers and academics) who were better placed to reach diffuse publics than the centralised institutions themselves.

It can be argued the dimensions of hierarchist problem solving lead to an inversion of the standard logic that observable problems should determine the direction of solution-focussed strategies.[[571]](#footnote-571) By contrast, what counts as a problem for the hierarchist depends very much on the solutions identified, elaborated and capable of implementation.[[572]](#footnote-572) If this is indeed the case, by conceiving of these fundamental deficiencies in EU democracy as problems of ‘information provision’, it may be possible to detect an institutional tendency to ‘put the cart before the horse’. If providing access to documents is politically convenient, readily achievable and confirms pre-existing beliefs about what democracy requires of European institutions in their service of the public, then the solution implemented also reinforces and stabilises dominant behavioural approaches within those institutions.

The hierarchist policy frame will deal with all problems as being structured, in the absence of overwhelming evidence to the contrary. In particular, hierarchists find any dispute about values, problem solving strategies and the existing knowledge base in relation to the observable world difficult to navigate. Often, it is easier to simply ignore rival interpretation of the available evidence and simply try to impose pre-determined values, or else ignore those parts of the problem where there is fundamental disagreement about what the problem specifically relates to and how it ought to be defined. In the initial, post-Maastricht phase of EU transparency, there appeared to be much more interinstitutional consensus than dissensus about the values being pursued. Though certain institutional operating logics were more secret than others, notably in the Council of Ministers, the framing of the solution allowed those institutions to adopt a Joint Code in which their respective value positions could be maintained by allowing the institutions a measure of control over the interpretation of the code itself and the exceptions contained therein.[[573]](#footnote-573) Furthermore, managing access could be fundamentally controlled as documents registers have not been centralised.

As *Chapter 3* charted, transparency policy subsequently became subject to a programme of progressive constitutionalisation, through which the right of access was famed more prominently in higher norms of EU law. On the one hand this may be interpreted as representing a continuing consensus amongst the institutions about the need to take a structured approach to alleviating the so-called proximity problem. Nevertheless, despite the introduction of Regulation 1049/2001 and continuing institutional interest in transparency through the White Paper on Governance and the European Transparency Initiative, concerns about the perceived distance of the centralised EU architecture from the people have never really dissipated. As *Chapters 2 and 5* have suggested, there may be a number of reasons for this, not least that increasing transparency begets a desire for yet more transparency, whilst also increasing transparency may correspondingly result in the growth of adverse consequences. As was highlighted in *Chapters 5 & 6* , where increased publicity demonstrates a ‘reality’ that does not readily chime with our social and political preferences, then the disconnect between our cultural view of the world and the empirical circumstances in which we find ourselves can promote increased dissatisfaction and disaffection.

Observing that the hierarchist policy frame treats all problems as structured, in the absence of overwhelming evidence to the contrary, and noting that the hierarchist approach to problem structuring often will often invert the standard logic of pursuing solutions to identified problems, the more recent phenomenon of policy stagnation seems to emerge directly from the emergence of diverging interinstitutional approaches to transparency as a ‘problem-solving’ policy instrument and the ends that it might achieve.

Much like where there is disagreement about means, hierarchists will only reluctantly address problems where there is disagreement about the ends to be achieved, since means and ends are part of the same problem structuring continuum. Unstructured or fuzzy problems are by definition not problems for the hierarchist, since disagreement about the underlying knowledge base can be used to undermine the notion that there exists a problem to be addressed by public institutions.

#### 8.1.2.2 A Capricious EU? The Fatalist Bias

In the Grid-Group typology, fatalists experience themselves as fundamental outcasts, subjected to the capricious exercise of external authority. Fatalists may be perceived politically as members of an underclass, living a life of exclusion on the edge of society. It is common for the fatalist bias to be excluded from analyses of policymaking, since it is not an active cultural bias in which adherents subscribe to particularised and stable views of the world around them.[[574]](#footnote-574)

The fatalist perceives life as an unavoidable lottery in which unforeseeable changes in environmental circumstances can occur at any time. This can lead to the perception that the institutional environment is anarchic, punctuated by ambiguous decision-making arenas in which institutional relationships with the wider social and political world are fundamentally unpredictable. Alternatively however, it is possible to perceive of the institutional environment as a highly stratified and ordered, in which public institutions are tightly rule-bound organisations, but the rules and or the conditions under which they apply might change sporadically.[[575]](#footnote-575) In democratic terms, fatalists often perceive the governance environment, whether rule-bound and stratified or fundamentally unpredictable, as an arena in which they can have no hope of influencing outcomes. Consequently, they do not see their own interests reflected in the political priorities of governing elites and are convinced of the fundamental illegitimacy of both governance institutions and their actors, in toto.[[576]](#footnote-576)

Whilst EU institutional authorities are not likely to readily associate their policymaking with this worldview and its associated cultural bias, it is possible that those availing themselves of the right of access to documents, perceive that access is more fuzzy than structured, since disclosure is not guaranteed. Activists have long contended that the broad scope of the exceptions to access contained in the Joint Code and later in Regulation 1049/2001 on Access to Documents, allow the institutions to refuse access at will.[[577]](#footnote-577) In particular, the exception contained in Article 4(3) of the later regulation has caused much consternation, and is dubbed the ‘space to think’ exception.[[578]](#footnote-578) Though the provision has been subject to determination by the Court of Justice, the court itself makes a distinction between disclosure in legislative and administrative matters, not guaranteeing a presumption of access in the latter.[[579]](#footnote-579) Furthermore, the Council is recorded as having mooted unilateral internal reform to its recording and reporting processes, in order to circumvent rules on access.[[580]](#footnote-580)

Such tactical moves in which the institutions respond to conditions imposed upon them by the wider political environment, can be characterised as strategies of ‘avoidance’ in which they gamble on the success of risky moves in order to minimise institutional damage and to promote the stability of existing working cultures.[[581]](#footnote-581) By granting a passive right of access to documents, the institutions can be shown to be undertaking risk on the expectation that the polity is not forced to become more transparent than initially envisaged or desired. Document requests provide narrow snapshots of the work taking place in discrete areas, thus it would take a significant number of coordinated requests to generate sufficient disclosure to give a generalised picture of the organisation and the scope of its work.

Nevertheless, as already indicated, policymaking professionals are unlikely to admit to defining problems and solutions in terms of the fatalist cultural bias, since it endorses a view of the world in which all problems are fundamentally unstructured. However, when evaluating policy success and failure, it is of note that the fatalist actor may perceive that the system is unstructured and capricious, even where policymakers have adopted a structured policy approach that makes use of standard legislative tools.

This latter point is significant in the context of individual public and group assessments of government policy-making and the governance architecture. The susceptibility of policy implementation and its supporting legislation to the charge that it operates capriciously or otherwise fails to take account of fundamental stakeholder interests can be determinative in assessments of policy legitimacy. In the context of rules granting access to documents, fatalists may well point to the discretionary rules covering exceptions to access, noting also that the rules themselves can only be changed by the very institutional actors who enjoy the privilege of that discretion. Consequently, what is perceived by institutional actors as an ordered and structured transparency environment may be perceived by all or some actors who exist outside of the established governance architecture as a lottery, in which access may be denied on a whim.

#### 8.1.2.3 The Egalitarian Bias: The Dominance of Normativism

The enclavist chooses to cultivate relationships only with like-minded people, minimising interference and critique from outside the enclave. The world outside is perceived as a hostile threat to the groupthink that dominates within the enclave, and it has been noted how this particular bias can pervade the upper echelons of hierarchist organisations, particularly where there is marked homogeneity amongst its members.[[582]](#footnote-582)

In situations in which organisational actors perceive external threats, risks to existing practices or a hostile public, it is likely that the symptoms of groupthink may occur and become progressively institutionalised by instilling a common belief system in most organisational members. The worldview may be described as a form of ‘communicative rationality’ in which negotiation, persuasion and propaganda are the chief means of securing consent amongst equally valuable group members.[[583]](#footnote-583) It is value rational, precisely because the search for normative standards and appropriate solutions is the predominant issue in problem-solving efforts. Insurmountable value conflicts are assumed to exist between those within the enclave and those outside of it, with the proposed solution being that those external to the group should give up their values and adopt the enclavist viewpoint accordingly.

The value dimension in enclavist policymaking often engenders a strong focus on the perceived differences between groups within a society/polity and the inherent unfairness of unequal treatment. Value conflict is thus often shaped in relation to broad democratic issues like distributive justice, equality and fairness; furthermore that conflict is often presented as a normative binary.

By framing problems in terms of their fairness, conflicts about solutions can very quickly become subsumed within broader debates about trust in public institutions and the legitimacy of action. Poor information search, focus on a single option for reform and an underestimation of the associated risks are regarded as typical defects of egalitarian policymaking.[[584]](#footnote-584) In particular, since the focus of problem-solving is on values and normative standards, there is a tendency to let ends justify means, irrespective of the effectiveness and efficiency of the avenues chosen.[[585]](#footnote-585)

It is possible to identify egalitarian value bias in the movement to introduce EU transparency and specifically access to documents. In the aftermath of Maastricht, the the Swedish and Danish lobby grew in strength and importance, articulating strongly that transparency was an inherent part of a democratic constitutional system; the policy position that these northern European countries presented in Brussels tended to prioritise the normative worth of transparency as self-evidently valuable.[[586]](#footnote-586) Opposition to introducing access to documents could thus be characterised as ethically or morally wrong. By focussing the argument on normative ideals, little emphasis was placed on the effectiveness of introducing access to documents as a mechanism for improving the democratic quality of the EU as a polity. Equally, concerns about the impact on internal working arrangements and enforced institutional change were easily dismissed.

Throughout the 1990s, strong value positions on transparency were adopted more broadly within the centralised institutions, following the lead taken by the European Parliament.[[587]](#footnote-587) Nevertheless, within the Council there were lingering doubts about the efficacy of increased transparency, particularly in terms of the foreseeable policymaking impacts. These have been most explicitly articulated in its litigation before the Court of Justice, where it is concerned chiefly about the risk of being held to a policy position as a result of the increased publicity that accompanies transparency.[[588]](#footnote-588) Most recently, the Council, along with the Commission, has demurred on proposals for new access to documents legislation. Chiefly it is concerned that without additional restrictions on what can be accessed (in terms of what is defined as a ‘document’) the potential operational risks are too great.[[589]](#footnote-589)

This opposition to the normative position held by the European Parliament appears to have strengthened their resolve, rather than colour their beliefs about the ethical contribution of transparency.[[590]](#footnote-590) Responding to such trenchant policy positions is an acute policy problem. Identifying common solutions is particularly difficult, because it is almost exclusively normative commitments that have structured the policy position in the first place. In addition, the egalitarian bias is naturally inclined to defend the fatalist as the victim of an ethically weak institutional system.[[591]](#footnote-591)

That the European Union’s transparency policy ‘stagnation’ is, at least in part, the product of a normative dispute about the value of transparency qua component of democratic governance, indicates that the problem has become intractable. In *Chapter 7* it was discussed how cultural biases entail layered beliefs about policy problems. Policy core beliefs represent fundamental assumptions about political concepts and states of affairs that are materially less negotiable than secondary beliefs about how those concepts/states of affairs should be embedded within society. This suggests that there is perhaps a need for the Commission and Council to think strategically about how they can successfully deliver transparency policy reform in such a way that it is operationally feasible, whilst protecting the Parliament’s assumptions about the value and contribution of transparency, (which are, at least in part, reflected in policy rhetoric used by the Court of Justice, and other groups of political stakeholders.)

#### 8.1.2.4 Prioritising Efficiency over Ethical Considerations: The Individualist Bias

The individualist rationality is functional and strategic. Adherents seek to freely negotiate the boundaries of their relationships with others and choose to navigate the social and political worlds through networks. The individualist is constantly on the lookout for usable information in order to maximise his utility and satisfy his expectations. Equally, he will seek to strategically exploit his relationships with others in order to achieve these functional aims.

Bearing the traits of this particular bias in mind, the individualist pursues a problem definition strategy that prioritises pragmatic opportunities for improvement in which the decisive factor is an assessment of the available means. The only options worth considering are those that are achievable in terms of the available organisational, technical and financial resources. Resultantly, the task of the individualist policy analyst is to point out the unachievable on the basis of observable real-world constraints.

In order to do that, current environmental conditions are taken as an evaluative base and fundamental starting point. In this respect, extant institutional working cultures are instructive in the assessment of acceptable policy solutions that might accompany increasing transparency. Preferences are formulated in terms of the available options for incremental change and as such goal formation is eschewed in favour of an implicit belief that continuous incremental change accompanies constantly shifting policy preferences. Accordingly, those changing policy preferences may, in some instances advocate no further policy action or otherwise constraining the current policy trajectory. This allows the individualist to exploit his networks, by identifying policy constraints, threats and shared interests, even in relation to sometime opponents.

Individualist policymaking biases can be identified in the changing policy positions of certain of the centralised institutions, chiefly in the Council of Ministers. In responding to the evolving political environment, institutional officials have been able to evaluate the impact on providing access to documents over time. In doing so they have been able to reconsider the impact that increasing transparency has had on the normative objective of achieving further democratic legitimacy. In concluding that access to documents legislation has had only a negligible impact (or rather had not produced the desired impacts), it is possible to re-order institutional priorities and resist further transparency on the basis that the available evidence suggests that the desired objectives are not achievable.

The individualist’s focus on resource constraints and on incremental change that is responsive to the changing environment can be highly antagonistic to the egalitarian, who focuses policy solutions on achieving value-based goals. The individualist has little time for the abstract and feels that better answers are sought by pursing more empirical evidence.

### 8.1.3 Transparency as Problem and Solution: A Cultural Account of the EU Transparency Regime

By bringing Grid-Group Cultural Theory to bear on EU transparency, in particular on the access to documents regime, it can be seen that there are linear matches between cultural biases and the manner in which transparency is defined both as a problem and as a solution. This exercise has also demonstrated how each of the cultural biases are likely to respond to some of the others, identifying where there might be potential hybrid ‘affinities’, or alternatively ‘cleavages’, precipitated by adopting a certain policy-making approach.

In a mixed institutional environment like the EU, it is virtually impossible for politicians and legislators of one particular cultural hue to hold a monopoly on any domain. As such, identifying likely affinities and cleavages is key to producing policy and in turn legislation that is supported by plausible arguments, that speak to the widest possible audience. Indeed, knowledge about how the different cultural types are likely to respond to different arguments about what constitutes a public policy problem and how we should address it, is fundamental to developing a best practice approach to legislative intervention.

Hood has demonstrated that Grid-Group Cultural Theory is capable of describing and analysing mixes and hybrid cultural positions, which is something that will be examined further in the next section. In terms of addressing the fundamental policy questions of what could or should be done and how, cultural theory goes some way to explaining what to expect in terms of how different actors characterise problems, indicating also where there will be likely conflict and which policy hybrids are potentially workable. In the remaining section of this chapter, the emphasis will shift from how different institutional cultures make differential use of the facts, to an examination of the particular value systems that have been prioritised by the institutions in their approach to transparency policy and the resulting hybrids that have prevailed.

## 8.2 Stabilising Policy Reform and Promoting Future Policy Development

The central claim here is that the Grid-Group typology offers a finite, yet sufficiently variegated set of alternatives for mapping and monitoring differences in the belief systems of actors working in governance settings. The constrained relativism of the typology provides four distinct cultural focal points that make it possible to capture the prevalence and relative strength of the biases in the context of multiple stakeholder interests.[[592]](#footnote-592) The idea is that from an analytic perspective, it is possible to glean much more information about people’s belief systems than dividing on the basis of political allegiance (left versus right), or indeed making any dichotomous distinction between any two critical approaches (such as Marxism, materialism and postmodernism.) Ultimately, the goal is to construct the political space in which the debates about when to act, how to act, why to act and what for, are hashed out. Cultural theory should also indicate whom is likely to answer those questions in a particular way and why they find their answers credible.[[593]](#footnote-593)

That space functions within the meta-narratives that are provided by the four cultural biases encountered in *Chapter 6*, and outlined in *Section 8.1* above in the context of problem-framing. Debate is thus focussed on the argumentative hold that each of these biases can exert not only upon their own active and passive adherents, but also on those who typically subscribe to alternative biases.

In her study of operational policy dynamics, Van Baren[[594]](#footnote-594) identified that where the hierarchist policy frame is the dominant one, its adherents attempted to identify a fixed solution and then seek to close the debate that accompanied the decision-making process. This pattern reflects much of the dynamics of hierarchist problem-framing, in which a solution often precedes the ‘problem’ and the unstructured parts of the problem are dismissed or else diminished. The active work of the hierarchists to exclude or marginalise the influence of those actors who viewed the problem through a different cultural bias, prevented those other actors from airing their concerns and resultantly they formed antagonistic coalitions that destabilised the policy implementation process. Van Baren identified that the coalitions often displayed strong egalitarian biases, taking forceful normative positions against the proposed hierarchist solutions. As a result, there emerged policy deadlock, until such time as brokers could be appointed to break the deadlock. It was found that brokers were successful where they espoused a policy belief system that incorporated both hierarchist and egalitarian biases.

The contribution of Van Baren’s comparative analysis is that it demonstrates how, by focussing on the biases and the potential for them to combine, it is possible to establish a method for identifying potential zones of compromise and areas in which actors’ policy belies might converge, in order to precipitate productive dialogue.[[595]](#footnote-595)

Reflecting upon these insights in the context of EU transparency policy, it might be demonstrated that current policy deadlock over the implementation of a new Regulation on access to documents has been precipitated by the dominance of a hierarchist and individualist policy frames in which the Council of Ministers and the Commission are keen to structure the outer-limits of the right of access and thus pre-determine the extent of their obligations.[[596]](#footnote-596) In response to the impact of transparency policy over time in relation to the proximity gap and its persistence, these institutional elites have latterly modified their respective policy positions to re-order their policy priorities and consequently the perceived risk to administrative efficiency of increasing transparency continues to be pressed as an important consideration in further legislative reform.

Conversely, the European Parliament, which has consistently committed itself to advocating for maximal transparency, has trenchantly stuck to its normative value position that greater transparency is the intrinsically just thing to do. Its own cultural policy frame is accordingly influenced heavily by the enclavist (alternatively termed egalitarian) bias, though which it has championed a commitment to greater openness and easier access.

Policy deadlock has resulted because both parties have assumed red-lines in respect of their policy belief systems. In the case of the Council of Ministers, its red-lines relate to ‘ends’ and the scope of a revised legislative instrument itself. The European Parliament however refuses to negotiate on the values underpinning its policy position and consequently does not believe these are safeguarded in the legislation proposed. Trilogue meetings between the European Parliament, Council and Commission are also reported to have failed.[[597]](#footnote-597) This is potentially a result of the fact that the Commission’s own policy position appears to be very closely aligned to that of the Council (it provided the text of the draft regulation), making it an ineffective broker as between these opposing policy positions.

The potential value of understanding the mix of cultural biases in a given policy arena is that it might clearly facilitate successful policy reform. By identifying the prevalence of imbalances between the cultural biases within a policy arena, it is possible to identify whether dominant institutional practices are stifling reform because of peculiarities in the administrative and institutional infrastructure.[[598]](#footnote-598) These particularities can influence the diffusion of particular biases or else promote antagonism because the institutions themselves are not responsive to shifting allegiances in the broader social and political worlds.

The Council’s refusal to acknowledge the value positions of the strong egalitarian lobby in the EU might be a case in point here. Not only does the European Parliament take a view that more transparency is intrinsically good, this view has alternatively been endorsed by the Court of Justice, various coalitions of member states and any number of citizen-interest lobbying groups.[[599]](#footnote-599) However, the Council’s own modes of working and institutional structure, including its reliance on diplomatic communications channels and mutually assured secrecy,[[600]](#footnote-600) require it to prioritise a hierarchical and structured approach to transparency reform, in line with its core stakeholder expectations.

Finally, in addition to highlighting which policy positions are influencing, and potentially hijacking the debate, assessing the cultural mix of key policy arguments can be used to measure the democratic quality of a debate in terms of excluded voices. One would expect that the fatalist perspective is likely to be overlooked. This however is risky, as has been highlighted above. It has been demonstrated that it is possible for fatalists to perceive capriciousness in others’ structured and policy approaches, particularly heirarchist approaches. Since bureaucratic institutions are likely to adopt a hierarchist policy bias in any number of policy areas, there is a risk that a corresponding growth in fatalism will precipitate apathy and political disengagement, whilst encouraging egalitarians to oppose policy reform precisely because it ‘victimises’ the fatalists.[[601]](#footnote-601) Very quickly impasses develop and policy management becomes crisis management. This may provide policy stability for a time, but is also likely to result in sudden policy shocks once latent policy positions reach critical mass. Such a fate, some have observed, is likely to befall the EU in relation to the future of its access to documents regime.

By way of tabulating the foregoing analysis, *Figure 3* considers three different possible transparency belief systems and their cultural influences. The belief systems emerge out of the public policy debate on transparency and are affected chiefly by the dominance of particular cultural biases in the arguments made within that policy arena. Further belief systems are possible, and these emerge out of dyads and triads, of biases operating in combination with one another.

The tabulation demonstrates that any potential future policy brokerage on revised access to documents legislation in the EU, must focus on promoting mutually acceptable solutions to the policy approach framed within that legislation. As was discussed in *Chapter 7*, there is limited scope for influencing the deep core beliefs that inform actor positions on transparency, but there is potential to pursue negotiation on the ‘policy core’ beliefs in relation to the terms of the legislative instrument itself and pursuing forms of wording that do not undermine deep core beliefs.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Belief System 1** | **Belief System 2** | **Belief System 3** |
|  | More transparency? Yes, on the condition that it does not impact on institutional effectiveness and is subjected to an accepted regulatory design process. | More transparency? Absolutely, it is a prerequisite of democratic quality and promotes accountability. | More transparency? No, not unless there is empirical evidence of the ‘value’ it adds, along with its necessity. |
| **Style of Thinking and Acting** | Hierarchical and moderately individualistic. | Egalitarian and moderately hierarchical. | Strongly individualistic, moderately fatalistic. |
| **Policy Approach** | Stabilises existing institutional structures. Prioritises the ‘value’ in information. | Prioritises core democratic values, subjugates the intra-institutional preferences to those values. | Questions normative assumptions, promotes less regulation. |
| **Planning and Implementation** | Decisive, structured with agreement about legislative instruments. | Decisive, broadly construed legislative provisions with few constraints and exceptions. | Not decisive, limited intervention. |

Figure 3 – Tabulating possible policy belief systems about transparency

## 8.3 Conclusion

This chapter has explored the contribution that cultural theory can make to policy analysis in the context of EU transparency policy. It focussed on how it is possible to reflect on dominant frames of thought, problem definition strategies and on the predispositions of different groups in relation to their value positions and preferred strategies for intervention.

Cultural theory harnesses the pluralism that is often perceived as an insurmountable problem when looking to evaluate policy failure, and constrains it within its typology of four cultural biases. By looking at interactions between these four biases it is possible to increase the complexity a little by proposing hybrids of two or more of the worldviews sitting in uneasy alliance with one another. Thinking about how these reflect the institutional approaches of the EU’s centralised institutions in relation to its access to documents regime offers a potential account of why policy reform has not been forthcoming and highlights where there are cleavages between the institutions that may be the site of future problems. Finally, in showing where there are potential affinities, between cultural viewpoints, it is possible to identify how future policy reform might be taken forwards.

More broadly, the cultural accounts presented herein arguably represent the various perceptions held not just by institutional actors but also by other stakeholders in the European project. As such, constructing a series of cultural narratives for transparency demonstrates the evaluative criteria against which those different constituencies of actors might choose to evaluate policy developments (and indeed the failure to pursue or achieve planned policy developments). In turn, the narratives highlight that if transparency is to engender legitimacy, the manner in which it is introduced and the ways in which it operates must coincide with particular pre-political modes of thought and belief which themselves provide relevant evaluative criteria. Though it is advocated here that an understanding of competing cultural frames of reference can be useful in promoting policy reform that is mutually acceptable to a greater number of actors, it has also been conclusively demonstrated that it is risky to pursue policy goals from a culturally hegemonic starting point.

# 9. Conclusion: Understanding Transparency’s Effects, the Value of Adopting a ‘Culturalist’ Lens

The assumption of a positive ‘effects’ relationship between the existence of transparency in EU political decision-making and democratic legitimacy, is at best, empirically flawed. Despite the longstanding and respectable pedigree that this assumption has in both academic and popular literature, it is apparent that this hypothesis leaves far too much out of the equation. Though there may very well be a strong normative case for continuing to pursue the objective of increasing legislative and administrative transparency within the EU, its justifiability ought not to be predicated wholly or mainly on it enhancing the quality and character of the EU’s legitimacy; the evidence is scant, and in some instances it is also contradictory.

The question of why transparency does not appear to, as anticipated, result in increasing democratic legitimacy is likely to be located in the parts of the equation that are typically glossed over, namely the different socio-cultural starting points of different groups of actors and stakeholders. These directly influence perceptions of the quality of democratic legitimacy, particularly in relation to a given group of actors’ prior levels of knowledge and baseline levels of trust. More determinatively however, those stating points structure the interpretative frame that structures the assessment of informational transparency and its contribution to legitimacy. There clearly is a complex communicative process in which the intended meaning, and the meaning that is gleaned from informational transparency, can become disassociated. The way in which cultural biases produce this dissociation is by shaping the shorthand heuristics (ways of thinking, interpreting and understanding the world) that allow us to navigate informationally complex spaces. A by-product of these heuristics is that they colour our judgement of the social and political environments around us. A culturalist account of EU transparency exposes some of those dominant biases and presents a limitative account of their likely composition in the EU political environment.

The object of this thesis has been to increase our understanding of transparency’s effects in the EU context by exploring how and where EU actors have invested in the common assumption that transparency begets legitimacy, which is itself part of a pervasive and dominant culturally informed view. In particular this thesis has appraised certain assumptions made about transparency’s instrumental value in the context of the so-called “proximity gap” and the political contestation that has accompanied processes of political integration and the pooling of sovereignty. These have been attributed to a failure to engage citizens’ affective loyalty towards the EU qua polity; attachment to the Union is consequently contingent upon the prevalence of attitudes within the public mood, which is exacerbated by a low baseline of collective cultural identity and the phenomenon of cultural heterogeneity. In Grid-Group terms, this latter phenomenon is characterised in terms of the distribution of more or less bonded groups of citizens’ and civil society groups across the physical and ideological spaces that constitute the European Union. Their shared affective identity competes with the attempted imposition homogeneous cultural norms in an EU-wide context. Equally, regulation in a localised context can also serve to delegitimise the imposition of supranational regulation and the harmonisation of regimes.

The decision of the United Kingdom to leave the European Union, following a referendum in June 2016 on its continuing membership, demonstrates just how deep seated and intractable political contestation within the EU actually is. The result signals the rejection by a member state of the very idea of further European integration, in toto. Disassembling and understanding the complex and varied factors that influenced the result will invariably take some time, though clearly concerns about legitimacy and indeed transparency have played their part. The dimensions of the debate that preceded the UK’s referendum exemplify the persistent challenges presented by propagating an intra-continental investment in a common endeavour, particularly in the face of observable constitutional and structural deficits for ensuring that political recognition and representation at the EU level accord with public demands and expectations. Further, extant accounts of EU legitimacy which focus variously on the input or output sides of the equation, ignore the fact that perceptions of legitimacy are based on the observable sum total of the polity’s structures, processes and outcomes, the interpretation of which is subject to the vicissitudes of culturally informed political preferences.

By considering the longitudinal developments in transparency and access to documents over a period of almost 25 years, this thesis has demonstrated how the centralised institutions have variously invested in transparency’s performativity and how that view has matured over time. There remains a strong normative commitment to transparency in the dominant positions asserted by the European Parliament and in the judgments of the Court of Justice, though these perhaps conflate accounts of transparency’s moral justifiability with its purported instrumental contribution to democratic legitimacy; the sheer pervasiveness of the ‘transparency as legitimacy’ mantra may indeed operate as a substitute for a normative justification that is in reality located elsewhere.

In the face of repeated evidence that transparency’s effects on EU legitimacy are not necessarily linear, the Council and Commission have observably retreated from this hitherto common view, reasserting traditionally privileged methods of working. This has created interinstitutional tensions and is seemingly antithetical to transparency’s constitutional status in the Treaties as a cornerstone of EU democratic principles. At a secondary legislative level, the most obvious effect of this interinstitutional tension has been the policy stagnation that has prevented the introduction of a revised Regulation on access to documents. In that vein, this thesis’ research and sub-research questions sought to examine not only whether assumptions about transparency’s relationship with legitimacy are misplaced, but also how we might pursue a more sustainable and multifaceted understanding of the interrelationship between those two concepts, using Grid-Group Cultural Theory. In particular, it was explored how the typology of biases presented by the theory could be used to structure narratives from which it would be possible to extrapolate accounts of actor preferences in relation to their problem-framing strategies and preferred policy ‘solutions’. Using this information it would then be possible to pursue policy brokerage by focussing on available common ground, in order to heal the rift between transparency’s constitutional status and its regulatory application in EU secondary legislation.

More broadly, it has also been demonstrated how this principle of exposing how and where individuals make differential assumptions based on similar facts (i.e. what is going on in the communicative black box) can be applied simultaneously at different political levels. Grid-Group can therefore assist with the processes of policy design and implementation by generating narrative accounts of different constituencies of actor preferences, based upon our understanding of how different groups understand their social and political worlds. Such accounts can be used to highlight how a heterogeneous public understands and expects transparency to operate within the Union. It may very well also guard against placing messianic levels of expectation in the capacity of regulatory mechanisms to structurally reconfigure citizen’s affective relationships with the Union.

#### 9. 1 The Contribution Made by Undertaking a Culturalist Analysis

The central contribution of this thesis has been to reconceive the scope, dimensions and potential instrumental contribution of transparency in the European Union, by specifically invoking an analytic mechanism that accounts for the impact of culture on beliefs about transparency and thereby on perceptions of EU legitimacy. Commencing from the assumption that democratic legitimacy is, significantly, a question of harnessing an affective disposition towards a regime (which is achieved though majoritarian cognisance of, and support for, observable input, throughput and output processes), endorsement of the EU is effectively subjugated to prior, deep-seated, political preferences. Consequently, the analytical framework through which we assess transparency’s effects must be capable of reflecting the possible (and perhaps likely) variations in approach, and the distinct analytical starting-points of, public opinion. At the very least, understanding institutional cultures and operating logics is a fundamental precursor to brokering effective and workable policy development that is endorsed by the relevant political actors, and which is thus invested with at least a chance of success.

The notion of preferences in relation to law and social policy being shaped by political allegiances is neither new nor particularly controversial, but traditional assessments of those political allegiances are often both limitative and linear (based on a left/right or liberal-conservative continuum). Further, they often offer a very limited account of how those allegiances came into being and in many instances rely on a ‘rational actor’ heuristic in which preferences are dominated by assessments of the impact of a decision on individual circumstances. The contribution of a cultural approach here is to offer an explanation for why rationality itself is not an objective concept, but rather it is culturally located. It further contests the notion that preferences are formed predominantly out of self-interest calculations; equally, it does not attribute communitarian or altruistic preferences to the belief that social and cultural institutions have minds of their own that serve to displace individuals’ cognition.

*Part III* of this thesis worked through a ‘culturalist’ analytical approach to the ‘problem of transparency’, in order to bottom-out the sources of our underlying preconceptions about its intrinsic and or instrumental value, in terms of its potential contribution to legitimacy and democratic governance. The Grid-Group Cultural Theory analytic framework, as outlined in *Chapter 6*, is predicated upon the principle that there are a limited number of viable forms (four or five, depending upon the version of the theory adopted) of socio-political cooperation present within communities of any size and scale. Adherents of each of the four principle ‘ways of life’ structure their ways of thinking and modes of being in a manner that is congruent with the overarching view of the social and natural worlds. Their behaviour in turn serves to reinforce their modes of thinking, making their ways of thinking and modes of being mutually reinforcing. The analytic utility of the framework is that it provides for a more variegated set of responses to any question of social and political thought, particularly in relation to preference formation, whilst still distilling a limited number of viable responses to such questions.

It is possible to conceive of the cultural narratives that were constructed using the Grid-Group framework (as set out in *Chapter 8*) as distinct logics about how to promote effective transparency from a particular governance vantage point.[[602]](#footnote-602) Indeed, the three ‘active’ cultural types, hierarchy, individualism and egalitarianism have been observed as mapping (more or less accurately) onto widely recognised models of administrative governance: hierarchy, market and community, respectively.[[603]](#footnote-603) Nevertheless, as this thesis has asserted, and as Cultural Theory cautions against, pursuing exclusively (or indeed predominantly) any one of these narratives will always leave policy solutions susceptible to competition from competing ‘logics’, vying for room within the political space. More practically, prioritising a particular governance logic to the exclusion of others, as has been demonstrated, will potentially alienate core constituencies of stakeholders and could eventually procure a critical mass of disapproval for the policy position that has been pursued.

Though Fatalism is harder to place in respect of extant ideas about governance, it ought not to be overlooked, especially in this particular policy context. The dominant narratives have interwoven transparency with trust, accountability and participation; here the fatalist account potentially offers some very powerful insight on behalf of constituencies of citizens and communities of actors whom feel disempowered and disenfranchised (a concern which increasingly dominates discussions about the relationship between citizens and their governments throughout the developed world.) Accordingly it is important to bear in mind the possibility for both apathy and even active mistrust towards both the ways in which transparency has been conceived, understood and applied in the Union, and towards transparency’s ‘products’, i.e. the things that become known, particularly in terms of the things government’s try to actively communicate. In respect of the latter, it was noted in *Chapter 5* and elsewhere, that the proliferation of information raises a variety of questions about our capacity as individuals to interpret that information, we find lots of data hard to process, can’t evaluate effectively (and speedily) the sources we ought to trust, and we are incapable of determining whether our decisions are based on accurate and contemporary information. Faced with such adversity, *Chapter 6* demonstrated the role of cultural biases in filtering out excess information, processing what is left in such a way as fundamentally reinforces our existing worldviews and institutional paradigms.

It is to be recalled that the narratives constructed in *Chapter 8* are merely distilled representations of a much messier social reality. Their real value is in allowing us to compare and contrast various notions of what a ‘good’ solution to the transparency problem might look like. Consequently, those narratives ought properly to be thought of as normative accounts of the transparency problem itself, rather than descriptive representations of how communities of individuals actually respond to the transparency phenomenon; though in the real world of political decision-making, normative goals and descriptive realities are delicately nuanced and interwoven. The narratives can of course be used to broadly characterise the Union’s transparency approach; indeed the typology developed in *Chapter 7* is structured according to a discourse analysis designed to elucidate observable institutional policy approaches, which were subsequently evaluated in the context of the Grid-Group matrix and assigned to one or other of the ideal-type worldviews. In doing so, the typology demonstrated that it is comparatively easy to identify elements of these normative accounts at play within the day-to-day realpolitik of the EU institutions. Nevertheless, the fundamental contribution of these accounts is to be found in using them to identify how a particular legislative and policy approach to transparency might be designed, the political stakeholders for whom a given transparency approach is acceptable, and crucially, to identify and explain why such an approach is acceptable to those stakeholders (i.e. the narratives identify “the qualities of a decision process that provide arguments for the acceptability of its decisions”).[[604]](#footnote-604)

Conversely, understanding not only what is justifiable, but how and why certain approaches are not justifiable in the context of a given cultural narrative, along with how that narrative responds to the approaches prioritised by each of the others, is arguably invaluable when navigating the EU’s hybrid institutional environment. The final section of *Chapter 8* offered an account of some of the value systems that have been prioritised in the centralised institutions’ approach to recasting the regulation on access to documents. It highlighted that the apparent dominance of a hierarchist cultural frame had, as has been observed in other settings, effectively marginalised the “minority” view of other actors by relying on structural inequalities in the design of the EU’s legislative process.

The current policy context presents an ideal opportunity for future learning; whilst the status quo might be the least ‘offensive’ option for each of the institutions, since there is no legislative disruption to the existing state of affairs, it is perverse insofar as neither the Council, the Commission nor the Parliament have succeeded in promoting a policy frame that is logically reconcilable with their evolved policy-core positions on transparency. The current position does not amply reflect the constitutional evolution of transparency within the treaty system, nor have the Council and Commission been able to effectively delimit the outer reaches of their transparency obligations in such a manner as is consonant with their institutional working methods. (Though they perhaps reluctantly accept the de facto limits established by the existing state of affairs.) Seemingly, effective policy management will require both: a compromise solution that is not indifferent to the intrinsic value some actors place in transparency, but which is also instrumentally reasonable in respect of the burden that it places collectively on the centralised institutions to facilitate access. More broadly, it invites questions about the continuing role of established access to documents regimes as the paradigm method for promoting transparency, particularly in the context of the increasingly diffuse sources of access that are crystallising in the age of ‘wikileaks’ and the changing face of newsprint media reporting.

#### 9.2 Further Developing a Culturalist Analysis

The culturalist analytical vantage-point presented within this thesis has presented a distinct contribution to the evaluation of transparency within the life of the European Union, by considering expressly not only how institutional elites have behaved, but why they might choose to act in the ways they have done.

This thesis has harnessed Grid-Group Cultural Theory’s predictive capacity to provide insight into the broader policy preferences of European publics and consider how those different publics might respond to action taking place within the policy design and delivery process. There is scope for further iterative testing of the validity of the narratives presented herein (*Chapter 8)*, which were used to characterise EU institutional approaches to transparency. Not least, such further iterative testing of the narratives would serve to refine the narratives from other researchers perspectives and so increase their reliability. In doing so, other source material might well be identified and analysed. Equally, other research methods might be employed, including the use of survey and interview techniques to compare and contrast first-hand accounts of institutional actors with the findings of the textual analysis presented in *Chapter 7*.

There is also scope for further substantive testing of the narratives in relation to public attitudes. Theorising about attitudes, beliefs and preferences in an EU context will always succumb to practical shortcomings, owing to its sheer size and scale and the potential for graduated variations in beliefs amongst a population of 0.5 billion people. Invariably then, any typology of attitudes and/or belief systems will be reductive. Nevertheless, the reliability of the narratives would benefit from testing by surveying ordinary members of the public.

Notwithstanding these potential shortcomings, this thesis has demonstrated the clear potential of Grid-Group Cultural Theory to synthesise and tabulate pluralistic approaches to complex political and legal phenomena. Its distinct analytical advantages suggest that it has application not only in the field of EU transparency, but in research projects that traverse the EU’s fluid constitutional context. Equally, the model offers much to the EU institutional actor, particularly as a tool for verifying the acceptability of new legislative action and policy reform, since it can elucidate much about how other political actors and heterogeneous publics are likely to receive it.

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9. Recognition and representation are terms coined by Banchoff and Smith to refer to citizens’ identification with a political regime and to the democratic character of political institutions respectively. Thus they characterise the two principal elements of legitimation that are seen as the cornerstones of modern democratic legitimacy. See Banchoff and Smith, n.1, 6; there is a more detailed discussion on legitimacy methods and the mechanics of legitimation in *Chapter 4*. [↑](#footnote-ref-9)
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42. P. Birkinshaw, ‘EU Transparency and Access to Documents’ in P. Birkinshaw and M. Varney (eds.) *The EU Legal Order After Lisbon* (2010, Netherlands, Wolters-Kluwer) [↑](#footnote-ref-42)
43. In the debate about how to characterise the nature of European Public Law and the nature of the interactions that take place between domestic and EU legal systems, Bell has argued that ‘cross-fertilisation’ is a more appropriate term than legal transplant, it is : ‘an external stimulus promot[ing] an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.’ J. Bell, ‘Mechanisms for Cross-Fertilisation of Administrative Law in Europe’ in J. Beatson and T. Tridimas, *New Directions in European Public Law* (1998, London, Hart Publishing) 147 [↑](#footnote-ref-43)
44. J. Murkens, ‘“We Want our Identity Back” – The Revival of national Sovereignty in the German Federal Constitutional Court’s Decision on the Lisbon Treaty’ [2010] *Public Law*, 530. Though here it is to be noted that the German Bundesverfassungsgericht casts doubt on the European Union’s capacity to articulate its legitimacy in a positivist or constitutionalist sense, but it does so by articulating just such a constitutionalist argument, framed in the language of national sovereignty. [↑](#footnote-ref-44)
45. G. de Búrca, ‘The Quest for Legitimacy in the European Union’ [1996] *Modern Law Review* 59, 349: “…legitimacy has both a social aspect, in terms of being rooted in popular consent, and a normative aspect, in terms of the underlying values on which such consent is based.” [↑](#footnote-ref-45)
46. Murkens, n. 44, 531 [↑](#footnote-ref-46)
47. M. Spencer, ‘Weber on Legitimate Norms and Authority’ [1970] *British Journal of Sociology*, 21, 123 [↑](#footnote-ref-47)
48. BVerfG, 2 BvE 2/08, June 30 2009, 249 [↑](#footnote-ref-48)
49. Harlow, n. 23, 11 [↑](#footnote-ref-49)
50. M. Jachtenuchs, ‘Theoretical Perspectives on European Governance’ (1995) *European Law Journal*, 113, 127 [↑](#footnote-ref-50)
51. C. Sternberg, *The Struggle for EU Legitimacy: Public Contestation 1950-2005,* (2008 London, Palgrave Macmillan) [↑](#footnote-ref-51)
52. C. Harlow and R. Rawlings, ‘National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence?’ (2010) *Italian Journal of Administrative Law,* 215-258 [↑](#footnote-ref-52)
53. F. Scharpf, *Governing in Europe, Effective and Democratic*? (1999, Oxford, Oxford University Press) [↑](#footnote-ref-53)
54. D. Curtin et al, ‘Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda’ [2013] ELJ, 19, 1 [↑](#footnote-ref-54)
55. I. Harden, ‘The Revision of Regulation 1049/2001 on Public Access to Documents’ [2009] EPL 15, 239 [↑](#footnote-ref-55)
56. D. Curtin et al, n. 54 [↑](#footnote-ref-56)
57. Standard Eurobarometer 79, Spring 2013, accessible at <http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_first_en.pdf>, accessed 12/11/14 [↑](#footnote-ref-57)
58. Notable amongst transparency’s critics is Onora O’Neill, who delivered the 2002 BBC Radio 4 Reith Lectures, entitled ‘A Question of Trust’, accessible at <http://www.bbc.co.uk/ratio4/reith2002/>, accessed 15/03/16. See also, O. O’Neill, ‘Transparency and the Ethics of Communication’ in C. Hood and D. Heald (eds.) *Transparency: The Key to Better Governance?* (2006, Oxford, OUP); A. Etzioni, ‘Is Transparency the Best Disinfectant’ [2010] *Journal of Political Philosophy* 18, 389; J. De Fine Licht, ‘Do We Really Want to Know? The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy’ [2011] *Scandinavian Political Studies*, 34, 183. Further sources are discussed in detail in Chapter 5, ‘Constructing an Anatomy of Transparency’. [↑](#footnote-ref-58)
59. M. Fenster, ‘Transparency in search of a theory’ [2015] *European Journal of Social Theory* 18(2), 151 [↑](#footnote-ref-59)
60. J. de fine licht, n. 1, 127 [↑](#footnote-ref-60)
61. Ibid. In small-scale and vignette experiments, there is some evidence to suggest a correlation between increasing transparency and increased legitimacy, though it was also held that this could not be extrapolated more generally to suggest that such a positive correlation actually exists, or is applicable in complex organisational structures. See also, A. Meijer & S. Grimmelikuijsen, ‘The Effects of Transparency on the Perceived Trustworthiness of a Government Organisation: Evidence from an Online Experiment’ [2011] *Journal of Public Administration Research & Theory*, 22 [↑](#footnote-ref-61)
62. Dimensional analysis involves distinguishing different types of transparency according to form or function, i.e. adjectivising it. See D. Heald, ‘Varieties of Transparency’,in C. Hood and D. Heald (eds.) *Transparency: The Key to Better Governance?*, n. 58, 25 et seq. [↑](#footnote-ref-62)
63. Grid-Group Cultural Theory was first described by Mary Douglas in *Natural Symbols* (1970, London, Barrie & Rockliff) and was subsequently refined in a number of her works, leading to the publication in 1987 of *How Institutions Think* (1986, London, Routledge). Grid-Group has been used extensively in cultural anthropology and sociology and one can also find examples in which it is being used in politics and political theory. Indeed a brief exposition is made by C. Hood, in the article *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?* [2010]Western European Politics’, 35(5), 989, concerning the interrelationship between accountability and transparency as a concept of governance. For a further account of Grid-Group, see J. Spickard, *A Guide to Mary Douglas’s Three Versions of Grid/Group Theory* [1989] *Sociological Analysis*, 50(2), 151 [↑](#footnote-ref-63)
64. R. Hoppe, ‘Cultures of Policy Problems’ [2002] *Journal of Comparative Policy Analysis: Research and Practice* 4, 305 [↑](#footnote-ref-64)
65. C. Hood, *The Art of the State* (1998, Oxford, Clarendon Press) [↑](#footnote-ref-65)
66. C. Hood ‘Transparency in Historical Perspective’ in C. Hood and D. Heald (eds) *Transparency: The Key to Better Governance?* (2006, Oxford, OUP) 3 [↑](#footnote-ref-66)
67. P. Birkinshaw ‘Transparency and Access to Documents’ in P. Birkinshaw and M. Varney (eds) *The EU Legal Order After Lisbon* (2010, Netherlands, Kluwer) 229 [↑](#footnote-ref-67)
68. A short definition of the noun is provided by Oxford dictionaries online, <http://www.oxforddictionaries.com/definition/english/transparency>, accessed 01/02/16 [↑](#footnote-ref-68)
69. D. Curtin ‘Executive Power of the European Union’ (2009, Oxford, OUP) 204 [↑](#footnote-ref-69)
70. Davis ‘Access to and Transmission of Information: Position of the Media’ in V. Deckmyn & I. Thompson, *Openness and Transparency in the European Union* (2002, Maastricht, EIPA) 121 [↑](#footnote-ref-70)
71. C. Hood ‘Transparency’ in P. Clarke & J. Foweraker (eds) *Enyclopaedia of Democratic Thought* (2006, London, Routledge) 700 [↑](#footnote-ref-71)
72. Pdf accessible online at: <http://www.gutenberg.org/files/608/608-h/608-h.htm>, accessed 01/02/16 [↑](#footnote-ref-72)
73. Ibid. [↑](#footnote-ref-73)
74. Euripides, Hicetid. Ibid. [↑](#footnote-ref-74)
75. I. Kant, ‘Toward perpetual Peace’ in Immanuel Kant, *Practical Philosophy* trans and ed M. Gregor, ([1795] 1996, Cambridge, CUP); O. O’Neill ‘Transparency and the Ethics of Communication’, in C. Hood and D. Heald (eds) *Transparency: The Key to Better Government?* (OUP 2006) 75, 82 [↑](#footnote-ref-75)
76. JJ. Rousseau, ‘Du Contrat Social ou Principes du Droit Politique’ (1963, Paris: Union Générale d’Editions); JJ Rousseau, ‘The Government of Poland’, tr Willmoore Kendall (1985, Indianapolis: Hackett Publishing) 72 [↑](#footnote-ref-76)
77. G. Postema, ‘The Soul of Justice’, in X. Zhai and M. Quinn (eds) *Bentham’s Theory of Law and Public Opinion* (2014, Cambridge, CUP) 40 et seq. [↑](#footnote-ref-77)
78. Letter from James Madison to W.T. Barry, August 4 1822, in *The Writings of James Madison*, G. Hunt ed, accessible online <http://oll.libertyfund.org/titles/1933>, accessed 01/02/16 [↑](#footnote-ref-78)
79. J. S. Mill ‘On Liberty’ (2005, New York, Cosimo) [↑](#footnote-ref-79)
80. James Madison, n.13 [↑](#footnote-ref-80)
81. M. Richir ‘Révolution et transparence sociale’, preface in J. G. Fichte, *Considérations sur la Révolution Française* ((1793) 1974, Paris: Payout), 10: “…la pensée ‘révolutionnaire’ qui est animée de la croyance en une transarence de la société elle-même”. [↑](#footnote-ref-81)
82. S. Baume, ‘La transparence dans la conduite des affaires publiques. Origines et sens d'une exigence.’ (2011) *Raison Publique* 1 [↑](#footnote-ref-82)
83. M. Foucault ‘L’oeil du pouvoir’ in *Dits et écrits II, 1776-1988* (2001, Paris, Gallimard), 197: “Une peur a hanté la seconde moitié du XVIIIe siècle : c’est l’espace sombre, l’écran d’obscurité qui fait obstacle à l’entière visibilité des choses, des gens, des vérités. Dissoudre les fragments de nuit qui s’opposent à la lumière, faire qu’il n’y ait plus d’espace sombre dans la société, démolir ces chambres noires où se fomentent l’arbitraire politique, les caprices du monarque, les superstitions religieuses, les complots des tyrans et des prêtres, les illusions de l’ignorance, les épidémies.” Author’s translation. [↑](#footnote-ref-83)
84. In offering a definition of ‘opakeness’, Bentham suggests the following: “Opakeness. Want of transparency, disturbance given [to] the transparency of the whole business…for the secret and successful operation of sinister interest.” J. Bentham ‘First Principles Preparatory to Constitutional Code’ in P. Schofield ed, *The Collected Works of Jeremy Bentham* (1989, Oxford, OUP) 102 [↑](#footnote-ref-84)
85. Postema, n. 12, 40 [↑](#footnote-ref-85)
86. Ibid, 46 [↑](#footnote-ref-86)
87. Schofield, n. 19 [↑](#footnote-ref-87)
88. Ibid. [↑](#footnote-ref-88)
89. J. Bentham ‘Securities Against Misrule’, in P. Schofield (ed) The Collected Works of Jeremy Bentham (1991, Oxford, OUP), quoted in Xiaobo Zhai and Michel Quinn, ibid. [↑](#footnote-ref-89)
90. Postema, n. 12, 47 [↑](#footnote-ref-90)
91. J. Bentham, ‘Of The Limits of the Penal Branch of Jurisprudence’ in P. Schofield (ed) The Collected Works of Jeremy Bentham (2010, Oxford, OUP) 38 et seq. [↑](#footnote-ref-91)
92. Ibid, 38 [↑](#footnote-ref-92)
93. Postema, n. 12, 49 [↑](#footnote-ref-93)
94. Ibid, 50 [↑](#footnote-ref-94)
95. J. S. Mill ‘Considerations on Representative Government’ ((1861) 2008, Rockville MD, Serenity Publishers), 47 [↑](#footnote-ref-95)
96. W. Bagehot, ‘Physics and Politics’ ((1972) 2007, New York, Cosimo) 104 [↑](#footnote-ref-96)
97. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans W/ Rehg ((1992) 1996 Cambridge MA, MIT Press) 7 [↑](#footnote-ref-97)
98. J. Cohen ‘Reflections on Habermas on Democracy’ [1999] *Ratio Juris* (12)4, 385, 386 [↑](#footnote-ref-98)
99. J. Flynn ‘Communicative Power in Habermas’s Theory of Democracy’ European Journal of Political Theory 3(4), 433, 434 [↑](#footnote-ref-99)
100. Ibid, 435; Habermas, n. 32,150 [↑](#footnote-ref-100)
101. Habermas, n.32, 148 [↑](#footnote-ref-101)
102. T. Heysse ‘Freedom, Transparency and the Public Sphere. A Philosophical Analysis’ (1998) *The Public*, 5, 14 [↑](#footnote-ref-102)
103. Ibid, 13 [↑](#footnote-ref-103)
104. D. Naurin has analysed the relevant distinctions that ought to be drawn between transparency and publicity, concluding that transparency presupposes the conditions through which persons can potentially gain access to information, whereas publicity concerns information that has actually been diffused. Transparency is thus a necessary condition through which publicity can take place, but it is not a guarantee of publicity, which requires also an interested media, and which is limited by rational human disinterest in a great deal of what goes on in the world around us, along with cognitive limits on the amount of information we can process; D. Naurin ‘Transparency, Publicity, Accountability – The Missing Links’, [2006] Swiss Political Science Review 12(3), 91 [↑](#footnote-ref-104)
105. C. Hood, n.1, 19 [↑](#footnote-ref-105)
106. C. Hood, n.1, 8 [↑](#footnote-ref-106)
107. Ibid. [↑](#footnote-ref-107)
108. Ibid, p.5 [↑](#footnote-ref-108)
109. C. Grønbech-Jensen, ‘The Scandinavian Tradition of Open Government and the European Union: Problems of Compatibility? (1998) *Journal of European Public Policy* 5(1), 185, 188 [↑](#footnote-ref-109)
110. Ibid. [↑](#footnote-ref-110)
111. Ibid. [↑](#footnote-ref-111)
112. For examples relevant to each category, see J. Lodge ‘Transparency and Democratic Legitimacy’ [1994] JCMS 32(3), 343; A. Qureshi ‘The New GATT Policy Review Mechanism: An Exercise in Transparency or ‘Enforcement’?’ [1990] *Journal of World Trade* 24, 147; B. Holzner & L. Holzner *Transparency in Global Change: The Vanguard of the Open Society* (2006, Pittsburgh, Pittsburgh University Press,) [↑](#footnote-ref-112)
113. Hood, n. 1, 11 [↑](#footnote-ref-113)
114. M .Foucault *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977.* (1980, New York, Pantheon Books) 153 [↑](#footnote-ref-114)
115. C. Ball ‘What is Transparency?’ [2009] *Public Integrity* 11(4), 293, 295 [↑](#footnote-ref-115)
116. The 10 founding members were: Laurence Cockroft, Peter Conze, Peter Eigen, Fritz Heimann, Michael Herschman, Kamal Hossain, Gerry Parfitt, Jeremy Pope, Roy Stacy and Frank Vogl. The Founding Charter was formally recorded in the Register of Association of Berlin Charlottenburg, Germany, 15 June 1993. Further details on the founding of Transparency International can be found online: <https://www.transparency.org/whoweare/history/>, accessed 12/05/2016 [↑](#footnote-ref-116)
117. Holzner & Holzner, n.47, 188 [↑](#footnote-ref-117)
118. P. Eigen ‘The Web of Corruption’ trans Johann Diderich (2003, New York, Campus Verlag) 38 [↑](#footnote-ref-118)
119. See, respectively: N. Woods ‘Making the IMF and the World Bank More Accountable’ [2001] International Affairs 77(1), 83; A. Roberts *Blacked Out: Government Secrecy in the Information Age* (2006, New York: Columbia University Press) [↑](#footnote-ref-119)
120. C. Ball, n. 50, 296 [↑](#footnote-ref-120)
121. Ibid. [↑](#footnote-ref-121)
122. Ibid. [↑](#footnote-ref-122)
123. D. Stone, *Policy Pradox: The Art of Political Decision Making* (2002, New York: Norton) 305 [↑](#footnote-ref-123)
124. I. van Bael ‘Bureaucracy Versus Democracy in the EC: Community Legislation is Being Shaped by Faceless Technocrats’ [1989] *International Financial Law Review* 8, 12; D. McCarthy and M. Fluck ‘The concept of transparency in International Relations: Towards a critical approach’ [2016] European Journal of International Relations, 1, 3 [↑](#footnote-ref-124)
125. F. Kratochwil and J. Ruggie ‘International Organisation: A State of the Art or an Art of the State’ [1986] International Organisation 40(4), 753; D. Clarke and W. Reed ‘The Strategic Sources of Foreign Policy Substitution’ [2005] American Journal of Political Science 49(3), 609; K. Booth and NJ Wheeler *The Security Dilemma: Fear Co-operation and Trust in World Politics*  (2007 Basingstoke, Palgrave Macmillan). [↑](#footnote-ref-125)
126. J. Ritter ‘Know Thine Enemy: Information and Democratic Foreign Policy’ in B. Finel and K. Lord eds. *Power and Conflict in the Age of Transparency* (2000, New York, Palgrave) 83 [↑](#footnote-ref-126)
127. T. Cooper and D. Yoder ‘Public Management Ethics Standards in a Transnational World’ [2002] Public Integrity 4(4), 333 [↑](#footnote-ref-127)
128. B. Finel and K. Lord ‘The Surprising Logic of Transparency’ [1999] International Studies Quarterly 43(2), 315, 316 [↑](#footnote-ref-128)
129. R. Mitchell ‘Sources of Transparency: Information Systems in International Regimes’ [1998] International Studies Quarterly 48(3), 425 [↑](#footnote-ref-129)
130. Finel and Lord, n.63 [↑](#footnote-ref-130)
131. N. Finkelstein (ed) ‘Transparency in Public Policy: Great Britain and the United States’ (2000, New York: St Martin’s Press) 1 [↑](#footnote-ref-131)
132. S. Woolf ‘The Transparency of Health Policy Decisions’ in Neal Finkelstein (ed) *Transparency and Public Policy: Great Britain and the United States* (2000, New York: St Martin’s Press) 10 [↑](#footnote-ref-132)
133. A. Fung et al, *Full Disclosure: The Perils and Promise of Transparency* (2007 Cambridge, Cambridge University Press) Fung et al note however that the ‘peril’ of transparency relates to how political dynamics produce gerrymandered forms of transparency, where exceptions to the general principle of disclosure for vested interests, prevent individuals from making genuinely informed choices. [↑](#footnote-ref-133)
134. Ibid. [↑](#footnote-ref-134)
135. C. Ball, n. 50, 300 [↑](#footnote-ref-135)
136. J. Libich ‘Should Monetary Policy be Transparent’ [2006] Policy 22(1), 28 [↑](#footnote-ref-136)
137. C. Ball, n. 50, 301 [↑](#footnote-ref-137)
138. Roberts, n. 54 [↑](#footnote-ref-138)
139. M. Lodge and L. Stirton ‘Transparency Mechanisms: Building Publicness into Public Services’ [2001] *Journal of Law and Society* 28, 471 The 4 dimensional matrix developed by Lodge and Stirton is indirectly predicated on the Grid-Group matrix, as developed by Mary Douglas and others, as introduced in *Section 1.1* of *Chapter 1*. This thesis makes the case for a ‘culturalist’ analysis of transparency, predicated on the core concepts of Douglas’ Grid-Group matrix. A detailed description is provided in *Chapter 6*. [↑](#footnote-ref-139)
140. R. Hazell ‘Balancing Privacy and Freedom of Information: Policy options in the United Kingdom’ in MacDonald and Terrill (eds) *Open Government, Freedom of Information and Privacy* (1998, Basingstoke: MacMillan) 67 [↑](#footnote-ref-140)
141. Commission, ‘European Governance – A White Paper’, COM(2001) 428 final, OJ C 287, 12.10.2001 [↑](#footnote-ref-141)
142. Commission, ‘Communication from the Commission of 21 March 2007 – Follow up to the Green Paper ‘European Transparency Initiative’’ COM(2007) 127 final [↑](#footnote-ref-142)
143. M. Westflake, *The Council of the European Union* (1995, London, Catermill,) 145 [↑](#footnote-ref-143)
144. Artice 15(2) TFEU [↑](#footnote-ref-144)
145. For an overview of the case law on Regulation 1049/2001 on Access to EU Documents during its first decade, see S. Peers, ‘Case Law Summary EU Access to Documents Regulation’ (2010) Statewatch.org, accessible at: <http://www.statewatch.org/analyses/no-116-eu-case-law-summary-access-regulation.pdf>, accessed 25/02/16; see also D. Adamski, ‘How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited’, [2009] Common Market Law Review 46, 521 [↑](#footnote-ref-145)
146. For an analysis of the provisions and their content, see A. von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organisations’ [2012] European Journal of International Law 23(2), 315; see also A. Alemmano, ‘Unpacking the Principle of Openness in EU law: Transparency, Participation and Democracy’, (2014) EL Rev 39 [↑](#footnote-ref-146)
147. Alemmano, ibid. [↑](#footnote-ref-147)
148. D. Curtin, ‘Judging EU Secrecy’ [2012] Amsterdam Law School Legal Studies Research Paper No. 103, 4, accessible at <file:///C:/Users/Stephen/Downloads/SSRN-id2184249.pdf>, accessed 25/02/16 [↑](#footnote-ref-148)
149. Ibid. [↑](#footnote-ref-149)
150. S. Lea and P. J. Cardwell, ‘Transparency Requirements in the Course of a Legislative Procedure: *Council v Access Info. Europe* [2015] European Public Law 21(1), 61 [↑](#footnote-ref-150)
151. Treaty on European Union, preamble. [↑](#footnote-ref-151)
152. Danish disquiet was apparently motivated by negative press coverage of an unanticipated Commission proposal for a regulation ‘on the security measures applicable to classified information produced or transmitted in connection with the European Economic Community or Euratom activities,’ Commission (1992) 56 final (92/C 72/16). The regulation proposed a three-tier classificatory system for documents held by or produced by the institutions and it contained two sets of security measures on the classification of all forms of information where disclosure could be detrimental to the essential interests of the European Communities or the member states. Furthermore, a rudimentary clearance system was proposed for institutional staff, with no right of appeal against the removal of clearance. The measure was subsequently criticised vehemently by the Legal Affairs Committee of the European Parliament, which added fuel to the press furore. The measure was quietly withdrawn at the Edinburgh European Council meeting in 1992, though it marks the first in a series of attempts to introduce a formal EU classification scheme, as will be highlighted later. [↑](#footnote-ref-152)
153. J. Lodge, ‘Transparency and Democratic Legitimacy’ [1994] JCMS 32(3), 343 [↑](#footnote-ref-153)
154. European Parliament, ‘Policy Department B. Structural and Cohesion Policies. Communicating Europe to Its Citizens: State of Affairs and Prospects’ (2014), accessible at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/529080/IPOL_STU%282014%29529080_EN.pdf>, accessed 25/02/14 [↑](#footnote-ref-154)
155. S. Peers, ‘From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union’, in V. Deckmyn (ed) *Increasing Transparency in the European Union?* (2002 Maastricht, EIPA) 7 [↑](#footnote-ref-155)
156. T. Bunyan, ‘Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information’ (2002) Statewatch.org, available at: <http://www.statewatch.org/secret/freeinfo/intro.htm>, accessed 25/02/2015 [↑](#footnote-ref-156)
157. D. Curtin, ‘Transparent Executive Power’ in *Executive Power of the European Union: Law, Practices and the Living Constitution’* (2009, Oxford: OUP) 205 [↑](#footnote-ref-157)
158. OJEC C1993 166/4 [↑](#footnote-ref-158)
159. ‘[T]ransparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration’. [↑](#footnote-ref-159)
160. Bunyan, n. 3 [↑](#footnote-ref-160)
161. Case T-194/94 Carvel and Guardian Newspapers v Council [1995] ECRII-2765; Case T-174/95 Svenska Journalistfo’rbundet v Council [1998] ECR II-2289; [↑](#footnote-ref-161)
162. Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/FIJH), accessible at: <http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/378/html.bookmark>, accessed 25/02/16. The Ombudsman concluded that the failure to adopt and to make easily available to the public, rules governing public access to documents could constitute an instance of maladministration. In doing so the Ombudsman reiterated the Court of Justice in Case C-58/94 *Netherlands v Council* [1996] ECR-I 2169: “So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration”. [↑](#footnote-ref-162)
163. Nils Ringe, ‘The Santer Commission Resignation Crisis: Government-Opposition Dynamics in Executive-Legislative Relations of the EU’ (2003) University of Pittsburgh, accessible at <http://aei.pitt.edu/2919/1/156.pdf>, accessed 25/02/16 [↑](#footnote-ref-163)
164. A. Topan, ‘The Resignation of the Santer Commission: The Impact of ‘Trust’ and ‘Reputation’, (2002) EIoP 6(14), accessible at: <http://eiop.or.at/eiop/pdf/2002-014.pdf>, accessed 25/02/16 [↑](#footnote-ref-164)
165. Curtin, n. 4, 206 [↑](#footnote-ref-165)
166. See n. 18 [↑](#footnote-ref-166)
167. Prior to this, it was assumed that access rights emerged out of other general principles of European law, including the principle of legal certainty and the principle of non-discrimination, see S. Prechal and M. de Leeuw, ‘Is the Right of Public Access to Documents a General Principle of Law?’ in U. Bernitz, J. Nergelius, C. Cardner and X. Groussot (eds) *General Principles of EC Law in a Process of Development* (2008, New York, Kluwer) [↑](#footnote-ref-167)
168. Council (1992) DOC/92/6 ‘European Council, Birmingham 16 October 1992 Presidency Conclusions’ [↑](#footnote-ref-168)
169. Commission (1993) 93/C 156/05, COM (1993) 191 final [↑](#footnote-ref-169)
170. COM (1993) 258 final [↑](#footnote-ref-170)
171. Ibid, p. 5 [↑](#footnote-ref-171)
172. Commission, ‘Joint Communication: “Increased transparency in the work of the Commission” and “An open and structured dialogue between the Commission and special interest groups”’, O.J. C 63, 5/3/1993 [↑](#footnote-ref-172)
173. Commission, ‘Public Access to the Institutions’ Documents’, COM (1993) 191 final. [↑](#footnote-ref-173)
174. Ibid, p. 5 [↑](#footnote-ref-174)
175. J. de fine Licht, *‘Do We Really Want to Know? The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy’* [2011] Scandinavian Political Studies 34(3), 183, 191 [↑](#footnote-ref-175)
176. Case C-58/94 *Netherlands v Council,* n. 16. The Netherlands sought to annul decisions 93/730/EC and 93/731/EC as well as Article 22 of Council Decision 6/12/93 on its own internal rules of procedure (OJ L304 of 10/12/93). The Dutch government contended that the creation of a public right of access to documents by modification of the internal codes of procedure of the institutions was not permitted and that the right should have a formal legislative footing. The appeal was dismissed; see paragraphs 34-38. [↑](#footnote-ref-176)
177. Available at [www.oostlander.net/rapporten/940321e.html](http://www.oostlander.net/rapporten/940321e.html) [↑](#footnote-ref-177)
178. Ibid, p.4 [↑](#footnote-ref-178)
179. Ibid, p.5 [↑](#footnote-ref-179)
180. Ibid, p. 6 [↑](#footnote-ref-180)
181. F. Laursen (ed) ‘The Rise and Fall of the EU’s Constitutional Treaty’ (Leiden, Nijhoff 2008); note in particular the contributions in part II on national perspectives. [↑](#footnote-ref-181)
182. European Parliament (1994) ‘Opinion of the Committee on Culture, Youth, Education and the Media for the Committee on Institutional Affairs’, appended to the ‘Motion for a Resolution on Openness in the Community’, n. 30 [↑](#footnote-ref-182)
183. DOC\_EN\DV\260\260723, available at: <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=WSLLLk0SsQS31tNpbTQkkXj7nTw1VRRdG0MlW3wsVJsQSs6ny8pt!-346607269?docId=134333&cardId=134333> , accessed 01/03/16 [↑](#footnote-ref-183)
184. Ibid, p. 3 [↑](#footnote-ref-184)
185. Ibid, p. 3-4 [↑](#footnote-ref-185)
186. Ibid, p. 5 [↑](#footnote-ref-186)
187. See n. 21 [↑](#footnote-ref-187)
188. See for example, S. Lea & P. J. Cardwell, n. 7; D. Curtin, ‘Betwixt and Between: Democracy and Transparency in the Governance of the EU’ in J A Winter et al (eds) *Reforming the Treaty on European Union* (The Hague: Kluwer, 1996) 95 [↑](#footnote-ref-188)
189. See n. 22 and n. 28 [↑](#footnote-ref-189)
190. A detailed summary of the submissions made by the Netherlands and Denmark is presented in the European Parliament’s 1996 White Paper on the 1996 Intergovernmental Conference, available at: <http://www.europarl.europa.eu/igc1996/pos-da_en.htm> [↑](#footnote-ref-190)
191. Council Secretariat-General, ‘Public Access to Council Documents’ [1996] , accessible at <http://www.consilium.europa.eu/uedocs/cmsUpload/register7.pdf> [↑](#footnote-ref-191)
192. David Stasavage, ‘Does Transparency Make a Difference? The Example of the European Council of Ministers’, in Cristopher Hood and David Heald (eds) *Transparency: The Key to Better Governance?* (OUP, 2006) 165 [↑](#footnote-ref-192)
193. Curtin, n.17, 228 [↑](#footnote-ref-193)
194. Commission (1999?) ‘Commission initiatives in the field of openness and information’, available at ec.europa.eu/transparency/access\_documents/docs/proj\_com\_en.pdf; it would appear that the document does not list an official series classification, or its registration in the official journal, though it remains publically available through the Europa website. The document also does not contain a date of publication, though from the range of internal references, it cannot have been published before 20 January 1999. [↑](#footnote-ref-194)
195. Commission (2002) ‘European Governance: Preparatory work for the White Paper’, Luxembourg, Office for Official Publications of the European Communities. The preparatory work seems to have been published sometime after the White Paper, in response to public pressure to get a full picture of the policy development process that it went through during its gestation. [↑](#footnote-ref-195)
196. Ibid, p. 13 [↑](#footnote-ref-196)
197. Commission (2002) ‘European Governance: Preparatory work for the White Paper’, Luxembourg, Office for Official Publications of the European Communities. The preparatory work seems to have been published sometime after the White Paper, in response to public pressure to get a full picture of the policy development process that it went through during its gestation. [↑](#footnote-ref-197)
198. Commission (2001) ‘European Governance: A White Paper’, Luxembourg, Office for Official Publication of the European Communities, available at <http://ec.europa.eu/governance/white_paper/en.pdf> [↑](#footnote-ref-198)
199. Ibid, pp. 10-11 [↑](#footnote-ref-199)
200. Curtin, n. 17, 213 [↑](#footnote-ref-200)
201. See Section 3.1.1 above. [↑](#footnote-ref-201)
202. Ian Harden, ‘The Revision of Regulation 1049/2001’, (2009) European Public Law 15, 239 [↑](#footnote-ref-202)
203. Accessible at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/108/10804.htm>, accessed 25/02/15 [↑](#footnote-ref-203)
204. Harden, n. 61 [↑](#footnote-ref-204)
205. Draft Recommendation by the Ombudsman to the European Institutions, bodies and agencies in the own initiative enquiry OI/1/98/OV, accessible at: [www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/507/html.bookmark](http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/507/html.bookmark), accessed 25/02/15 [↑](#footnote-ref-205)
206. Joined Cases C-39/05P and C-52/05 P *Turco v Council of Ministers*, para. 45 [↑](#footnote-ref-206)
207. Case C-280/11P *Council of the European Union v. Access Info. Europe,* ECLI:EU:C:2013:671 [↑](#footnote-ref-207)
208. Stephen Lea & Paul James Cardwell, n.10 [↑](#footnote-ref-208)
209. EW Welch and CC Hinnant, ‘Internet use, transparency and interactivity effects on trust in government,’ (2003) Proceedings of the 36th Hawaii International Conference on System Sciences, accessible at www2.computer.org/portal/web/csdl/doi/10.1109/HICSS.2003.1174323 [↑](#footnote-ref-209)
210. E Amatzoni, ‘Is Transparency the Best Disinfectant?’ [2009] [↑](#footnote-ref-210)
211. Dierdre Curtin, ‘Digital Government in the European Union: Freedom of Information trumped by “internal Security” in Alistair Roberts (ed) *National Security and Open Government: Striking the Right Balance* (New York, 2003) 99 [↑](#footnote-ref-211)
212. <http://ec.europa.eu/transparency/regcomitology/faq_en.htm>. This is in addition to the introduction of a web-based repository to the register which enables direct access to a certain number of documents and an online pro forma for the request of documents not already freely available, pursuant to Regulation 1049/2001, Article 11 [↑](#footnote-ref-212)
213. <https://webgate.ec.europa.eu/transparency/regrin/wecome.do?locale=en> [↑](#footnote-ref-213)
214. The EUCI is discussed further below in *Section 3.3.3* on ‘Recent Developments’. [↑](#footnote-ref-214)
215. Case C-345/06 *Gottfried Heinrich,* judgement of the Court (Grand Chamber), 10 March 2009, para. 63. In this matter the European Parliament also intervened, suing the Commission before the Court of Justice for its failure to publish the new aviation security standards; Case C-474/07 *European Parliament v Commission.* Following the subsequent publication of Regulation (EC) No. 828/2008, the case was officially withdrawn. [↑](#footnote-ref-215)
216. Curtin, n.17, 224 & 229 [↑](#footnote-ref-216)
217. Decision of the European Ombudsman closing the inquiry into Complaint 3208/2006/GG against the Commission, 18 December 2008, accessible at [www.ombudsman.europa.eu/cases/decision.face/en/3728/html.bookmark](http://www.ombudsman.europa.eu/cases/decision.face/en/3728/html.bookmark), accessed 24/02/15 [↑](#footnote-ref-217)
218. Commission, ‘Discussion Paper on Public Access to Commission Documents’, 23 April 1999, SG.C.2/VJ/CD D (99) 83, accessible at [www.statewatch.org/2consw.htm](http://www.statewatch.org/2consw.htm), accessed 24/02/15 [↑](#footnote-ref-218)
219. Commission, ‘Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament Council and Commission documents’, COM(2008) 229 final. [↑](#footnote-ref-219)
220. Ibid. [↑](#footnote-ref-220)
221. Ian Harden, n. 61, 239 [↑](#footnote-ref-221)
222. Ibid. [↑](#footnote-ref-222)
223. European Parliament, ‘Report on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)’ A7-9999/2011. A significant factor in the ensuing stalemate was objections raised by the Council Secretariat to the extensive redrafting proposals submitted by the European Parliament, which the Secretariat claimed went beyond the rules of procedure established for ‘recasting’ a regulation. The recast is a specific mechanism which restricts the Parliament to responding only to the legislative modifications submitted in the recast proposal, see Patrick Birkinshaw & Mike Varney, ‘Government and Information. The Law Relating to Access, Disclosure and their Regulation’ (Haywards Heath: Bloomsbury Professional, 2011) 306 et seq. [↑](#footnote-ref-223)
224. European Commisison, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission Documents’, COM(2011) yyy final. [↑](#footnote-ref-224)
225. Council of the European Union, ‘Proposal for a Regulation of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission documents – State of Play*’* (Interinstitutional Note 15698, 2013). [↑](#footnote-ref-225)
226. Further discussion on this point is offered in Maarten Hillebrandt et al, ‘Transparency in the Council of Ministers: An Institutional Analysis’ (2014) European Law Journal 20(1), 14 [↑](#footnote-ref-226)
227. Tony Bunyan ‘Proposed Commission changes to Regulation on access to documents fail to meet Lisbon Treaty Commitments’ (2011) Statewatch.org, <http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>, accessed 18/05/2014 [↑](#footnote-ref-227)
228. Tony Bunyan ‘Constructing the secret EU State: “Restricted” and “Limite” documents hidden from view by the Council” (Statewatch.org, April 2014) <http://statewatch.org/analyses/no-240-restricted-documents.pdf>, accessed 22/02/14 [↑](#footnote-ref-228)
229. Ibid. [↑](#footnote-ref-229)
230. Council Decision of 23 September 2013, on the security rues for protecting EU classified information (2013/488/EU) [↑](#footnote-ref-230)
231. Ibid, Article 10 [↑](#footnote-ref-231)
232. Ibid, Article 3 [↑](#footnote-ref-232)
233. Ibid, Article 4 [↑](#footnote-ref-233)
234. See n. 12 [↑](#footnote-ref-234)
235. See the Statewatch News Bulletin, ‘EU: Solana Coup: access to documents rules re-written to meet NATO demands,’ accessible at: [www.statewatch.org/.../sw10n34.pdf](http://www.statewatch.org/.../sw10n34.pdf), accessed 28/02/15 [↑](#footnote-ref-235)
236. Case C-280/11P *Council of the European Union v. Access Info Europe*, 17 October 2013, nyr [↑](#footnote-ref-236)
237. Ibid, para 40 [↑](#footnote-ref-237)
238. Case C-280/11 P *Council of the European Union v. Access Info Europe,* 17 October 2013, nyr, Opinion of AG Cruz Villalón, para 71 [↑](#footnote-ref-238)
239. General Secretariat of the Council of the European Union, *Public access to documents* (Internal Note 17177, LIMITE, 2013) <http://www.wobbing.eu/sites/default/files/document%20leaked.pdf> accessed 03/05/2014 [↑](#footnote-ref-239)
240. Staffan Dahllöf, ‘Secrecy rules despite Court judgement’(wobbing.eu, 26 March 2014) <http://www.wobbing.eu/news/secrecy-rules-despite-court-judgement> accessed 04/05/2014; Working Party on Information Council of the European Union, ‘Public access to documents – Confirmatory application No 04/c/01/14’(I/A Item Note 6102, Limite, 2014) <http://www.wobbing.eu/sites/default/files/rejection%20of%20access.pdf> accessed 04/05/2014 [↑](#footnote-ref-240)
241. Those delegations were, somewhat predictably, Denmark, Estonia, The Netherlands, Slovenia, Finland and Sweden. [↑](#footnote-ref-241)
242. Dahllöf n. 34 [↑](#footnote-ref-242)
243. Arts 9-12 TEU and Art 15 TFEU, see *Section 3.1* above [↑](#footnote-ref-243)
244. David Beetham and Christopher Lord, *Legitimacy and the European Union* (London, Longman 1998) 73 [↑](#footnote-ref-244)
245. Patrick Birkinshaw, *European Public Law* (Cambridge, Butterworths 2003) ch 1 [↑](#footnote-ref-245)
246. For further detail on this point, see Hillebrandt et al, n.85. For a general discussion on the relationship between transparency and legitimacy, see Onora O’Neill ‘Transparency and the Ethics of Communication’ in Christopher Hood and David Heald (eds) *Transparency: The Key to Better Governance,* n.51; Dierdre Curtin & Albert Meijer ‘Does Transparency Strengthen Legitimacy’ [2006] Information Polity 14. Further discussion on this issue will be the focus of Chapter 4. [↑](#footnote-ref-246)
247. A Etzioni ‘Is transparency the best disinfectant?’ [2010] Journal of Political Philosophy 18(4), 389. This point will be further addressed in Chapter 4. [↑](#footnote-ref-247)
248. Article 15 TFEU; see *Section 3.1* above; Alemanno, n.6 [↑](#footnote-ref-248)
249. V. Kaina & I. Karolewski, ‘EU Governance and European Identity’ [2009] Living Reviews in European Governance 4(2) 5, accessible online at <http://www.livingreviews.org/lreg-2009-2>, accessed 20/04/16 [↑](#footnote-ref-249)
250. On the expansion of Union activities, see C. Bickerton, D. Hodson & U. Puetter, ‘The New-Intergovernmentalism: European Integration in the Post-Maastricht Era’ [2015] *JCMS* 53(4),703 [↑](#footnote-ref-250)
251. S Saurugger, *Theoretical Approaches to European Integration* (2014, Basingstoke, Palgrave Macmillan) 185 [↑](#footnote-ref-251)
252. Ibid. [↑](#footnote-ref-252)
253. EU legitimacy is often described in terms of normative criteria relating to ‘inputs’ and ‘outputs’. Input legitimacy relates directly to the EU’s responsiveness to its citizenry and their political concerns as a result of their participation in the machinery of governance. Output legitimacy on the other hand is concerned predominantly political regime effectiveness and the quality of the policy outputs that the EU delivers on behalf of its people. The characterisation of EU legitimacy in these terms attributed to Fritz Scharpf, *Demokratietheorie zwischen Utopie unt Anpassung* (1970, Konstanz, Universitätsverlag). See also, F. Scharpf, *Governing in Europe: Effective and Democratic?* (1999, New York, Oxford University Press). Further discussion on this distinction is offered in *Section 4.1.3.2* below [↑](#footnote-ref-253)
254. T. Banchoff & M. Smith, ‘Introduction: Conceptualising Legitimacy in a Contested Polity*’* in T. Banchoff and M. Smith eds. *Legitimacy and the European Union: The Contested Polity* (1999, London, Routledge) 1 [↑](#footnote-ref-254)
255. M. Dogan, ‘Conceptions of Legitimacy’ in M Hawkesworth & M Kogan (eds) *Encyclopaedia of Government and Politics: 1. Political Science* (London, Routledge, 1992) 116 [↑](#footnote-ref-255)
256. As Schaar famously stated in *Legitimacy in the Modern State:* “The new definitions all dissolve legitimacy into belief or opinion. If a people hold the belief that existing institutions are “appropriate” or “morally proper”, then those institutions are legitimate. That’s all there is to it.” J. Schaar, *Legitimacy in the Modern State* (New Brunswick NJ, Transaction Publishers, 1981) 20. See also C. Lord, ‘Legitimacy, Democracy and the EU: When Abstract Questions Become Practice Policy Problems’, Policy Paper 03/00 [2000] ESRC Programme ‘One Europe or Several?’, accessible online <http://www.mcrit.com/scenarios/visionsofeurope/documents/one%20Europe%20or%20Several/C%20Lord.pdf>, accessed 28/03/15 [↑](#footnote-ref-256)
257. Dogan, n. 7, ibid. [↑](#footnote-ref-257)
258. G. de Burca, ‘The Quest for Legitimacy in the European Union’, *Modern Law Review* [1996] 59(3), 349 [↑](#footnote-ref-258)
259. P. Merkl, ‘Comparing legitimacy and values amongst advanced countries’ in M. Dogan (ed) *Comparing pluralist democracies: Strains on Legitimacy* (1988, Boulder CO, Westview Press) 21 [↑](#footnote-ref-259)
260. M. Weber, *Economy and Society: An Outline of Interpretative Sociology* vol. 1(1978, Berkeley CA, University of California Press) 213 [↑](#footnote-ref-260)
261. Ibid. [↑](#footnote-ref-261)
262. Ibid. 31 [↑](#footnote-ref-262)
263. An expansive account of normative political legitimacy in democratic theory is offered by John Rawls in *Political Liberalism* (New York, Columbia University Press, 1993) [↑](#footnote-ref-263)
264. D Beetham, *The Legitimation of Power* (Atlantic Highlands NJ, Humanities Press, 1993) 11. See also, W. Connolly, *Legitimacy and the State* (New York, New York University Press, 1984); J. Habermas *Communication and the Evolution of Society,* trans by Thomas McCarthy (Boston, Beacon Press 1979) [↑](#footnote-ref-264)
265. R. Dahl, *Democracy and its Critics* (New Haven CT, Yale University Press, 1989) [↑](#footnote-ref-265)
266. J Hertz, ‘Legitimacy, can we retrieve it?’ in *Comparative Politics* [1978]10(3), 317, 320 [↑](#footnote-ref-266)
267. J. Linz, ‘Legitimacy of democracy and the socioeconomic system, in M. Dogan (ed) *Comparing Pluralist Democracies: Strains on Legitimacy*, n. 11, 66 [↑](#footnote-ref-267)
268. Ibid. [↑](#footnote-ref-268)
269. S Andreev, ‘The EU ‘Crisis of Legitimacy’ Revisited: Concepts, Causes and Possible Consequences for European Politics and Citizens’, *Political Perspectives* [2007] 7(2), accessible online <http://www.politicalperspectives.org.uk/wp-content/uploads/2010/08/EPRU-2007-S1-07.pdf>, accessed 28/03/15 [↑](#footnote-ref-269)
270. G O’Donnell et al, *The Quality of Democracy: Theory and Applications* (Notre Dame IN, Notre Dame University Press, 2004) [↑](#footnote-ref-270)
271. D. Easton, *A System Analysis of Political Life* (New York, Wiley, 1965) 311 et seq. [↑](#footnote-ref-271)
272. See *Section 4.1.3.2* below for more on these categories. See also, Scharpf, n. 5 [↑](#footnote-ref-272)
273. L. Diamond and S Lipset, ‘Legitimacy’ in S. Lipset (ed) *The Encyclopedia of Democracy. Vo. 3: L-R* (London, Routledge, 1995) [↑](#footnote-ref-273)
274. M. Hillebrandt, D. Curtin, A. Meijer, ‘Transparency in the EU Council of Ministers: An Institutional Analysis’, *European Law Journal* (2014) 20(1), 1 [↑](#footnote-ref-274)
275. A. Miller, ‘Political issues and trust in government 1964-1970’ in *American Political Science Review* [1974] 68(3), 952 [↑](#footnote-ref-275)
276. Lipset and Schneider have argued that ‘People lose faith in leaders much more easily than they lose confidence in the system. All the indicators that we have examined show that the public has been growing increasingly critical of the performance of major institutions. There has been no significant decline in the legitimacy ascribed to the underlying political and economic systems. S. Lipset and W. Schneider, ‘*The Confidence Gap, Business, Labour and Government in the Public Mind* (Baltimore, Johns Hopkins University Press 1983) 378 [↑](#footnote-ref-276)
277. Ibid, 384 [↑](#footnote-ref-277)
278. S. Lipset, ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’, in *The American Political Science Review* [1959] 53(1), 69 [↑](#footnote-ref-278)
279. V. Kaina and I. Karolewski, ‘EU Governance and European Identity’ in *Living Reviews in European Governance* (2009) 4(2), accessible at <http://www.livingreviews.org/lreg-2009-2> (accessed 28/03/15). [↑](#footnote-ref-279)
280. Bickerton et al, n. 2, 705 [↑](#footnote-ref-280)
281. Infra, n. 66, p. 23 [↑](#footnote-ref-281)
282. Banchoff and Smith, n. 6, 4 [↑](#footnote-ref-282)
283. H. Wallace, ‘Deepening and Widening: Problems of Legitimacy for the EC’ in S. Garcia (ed) *European Identity and the Search for Legitimacy* (London, Pinter, 1993) 99 [↑](#footnote-ref-283)
284. S. Panebianco, ‘European Citizenship and European Identity: From the Treaty of Maastricht to Public Opinion Attitudes’ in *Jean Monnet Working Papers In Comparative and International Politics* (1996) 3/96, accessible online <http://homepages.wmich.edu/~plambert/comp/lipset.pdf> (accessed 28/03/15) [↑](#footnote-ref-284)
285. As discussed in *Section 4.1.1* above, ‘recognition’ refers to the phenomenon of citizens’ recognising political institutions as legitimate, whilst ‘representation’ refers to those mechanisms through which political institutions reflect the beliefs of their publics. The terms were coined in an EU context by Banchoff and Smith,

     (n. 6) and framed the characterisation of Europe’s ‘legitimacy problem’, as discussed in *Chapter 1.*  [↑](#footnote-ref-285)
286. Saurugger, n.3, 196 [↑](#footnote-ref-286)
287. E. Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950-1957* (Stanford, Stanford University Press, 1958) [↑](#footnote-ref-287)
288. N. Lindberg and S. Scheingold, *Europe’s Would-be Polity* (Englewood Cliffs NJ, Prentice-Hall, 1970) [↑](#footnote-ref-288)
289. Ibid, [↑](#footnote-ref-289)
290. Saurugger, n. 3, 196. Note however that this argument has been subject to revised analysis, the permissive consensus, it is contended has succumbed to a loosening of the ties between ‘interests and organisations’, promoting increased scepticism about the validity of institutional interests and their investment in the process of European construction, see J. Hayward, ed. *The Crisis of Representation in Europe* (1995, London, Frank Cass); C. Hay *Why We Hate politics* (2007, Cambridge, Polity Press). [↑](#footnote-ref-290)
291. Banchoff and Smith, n.6, 6 [↑](#footnote-ref-291)
292. Lindberg & Scheingold, n. 37, 269 [↑](#footnote-ref-292)
293. A. Moravcsik, ‘Liberal Intergovernmentalism: A Rejoinder’ [1995] JCMS 33(4) 611, 612; P. Taylor, *The European Union in the 1990s* (1996, Oxford, OUP) [↑](#footnote-ref-293)
294. R. Rohrschneider and S. Whitefield, *The Strain of Representation: How Parties Represent Diverse Voices in Western and Eastern Europe* (2012, Oxford, OUP); Hayward, n. 41; Hay, n. 41 [↑](#footnote-ref-294)
295. See for instance, A. Duff *Federal Union Now* (2010, The Federal Trust) accessible online, <http://www.federalists.eu/fileadmin/files_uef/Other/Federal_Union_Now_book_by_Andrew_Duff.pdf>, accessed 20/04/16; A. Duff *Post-National Democracy and the Reform of the European Parliament* (2011, Notre Europe) accessible at <http://ftp.infoeuropa.eurocid.pt/database/000046001-000047000/000046890.pdf>, accessed 20/04/16; A. Duff ‘On Dealing with Euroscepticism’ [2013] *JCMS* 51(1), 140 [↑](#footnote-ref-295)
296. H. Wallace, n. 32, 101 [↑](#footnote-ref-296)
297. Duff ‘Federal Union Now’, n. 46, 3 [↑](#footnote-ref-297)
298. Banchoff and Smith, n. 6, 6 [↑](#footnote-ref-298)
299. See for instance: F. Scharpf, ‘Interdependence and Democratic Legitimation’, *Max Planck Institute Working Paper* 98(2) accessible online: <http://www.mpifg.de/pu/workpap/wp98-2/wp98-2.html> (accessed 28/03/14); C. Lord and P. Magnette, ‘E Pluribus Unum? Creative Disagreement about Legitimacy in the EU’ *JCMS* 42(1), 193; A. Føllesdal, ‘EU Legitimacy and Normative Political Theory’ in M. Cini and A.K. Bourne (eds) *Palgrave Advances in EU Studies* (Basingstoke, Palgrave Macmillan, 2006) 151 et seq.; B. Kohler-Koch and B. Rittberger, *Debating the Democratic Legitimacy of the European Union* (Plymouth, Rowman & Littlefield, 2007) [↑](#footnote-ref-299)
300. J. Weiler, ‘After Maastricht: Community Legitimacy in Post-1992 Europe’, in W. Adams (ed) *Singular Europe, Economy and Polity of the European Community after 1992* (Michigan, University of Michigan Press, 1993) 19 [↑](#footnote-ref-300)
301. J. Weiler, ‘The Transformation of Europe’, in *Yale Law Journal* 100, 2403 [↑](#footnote-ref-301)
302. D. Obradovic, ‘Policy Legitimacy and the European Union’ *JCMS* 34(2), 191, 197 [↑](#footnote-ref-302)
303. M. Höreth, ‘The Trilemma of Legitimacy – Multilevel Governance in the EU and the Problem of Democracy”, *ZEI Discussion Papers* (1998) C(11), accessible online: <http://aei.pitt.edu/340/1/dp_c11_hoereth.pdf>, (accessed 28/03/15) [↑](#footnote-ref-303)
304. J. Lacroix and R. Coman (eds) *Les resistances à l’Europe: Cultures Nationales, ideologies et strategies d’acteurs* (Brussels, Editions de l’Université de Bruxelles, 2007). [↑](#footnote-ref-304)
305. F. Scharpf, *Governing in Europe: Effective and Democratic?* (1999, Oxford, OUP) [↑](#footnote-ref-305)
306. D. Braun & M. Tausendpfund, ‘The Impact of the Euro Crisis on Citizens Support for the European Union’ [2014] Journal of European Integration 36(3) 231 [↑](#footnote-ref-306)
307. Kaina and Karolewski, n. 31 [↑](#footnote-ref-307)
308. M. Gallagher, M. Laver and P. Mair, *Representative Government in Modern Europe* (London, McGraw-Hill, 2011 5th rev ed) [↑](#footnote-ref-308)
309. Saurugger, n. 3, 200 [↑](#footnote-ref-309)
310. P. Mair & J. Thomassen, ‘Political Representation and Government in the European Union’ in *Journal of European Public Policy* 17(1), 20 [↑](#footnote-ref-310)
311. B. Kohler-Koch, ‘Framing: The Bottleneck of Constructing Legitimate Institutions’, *Journal of European Public Policy* [2000]7(4), 513 [↑](#footnote-ref-311)
312. V. Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput’, *KFG Working Paper 2*1/2010, accessible online: <http://edocs.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUDOCS_derivate_000000001433/WP_21_November_Schmidt.pdf>, (accessed 28/03/15) [↑](#footnote-ref-312)
313. J. Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism’, in *Journal of Philosophy* 92, 109 [↑](#footnote-ref-313)
314. European Commission, ‘European Governance: a White Paper’, COM (2001) 428 final, 7: “The Union…has a double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States”. See also, Article 10 TEU. [↑](#footnote-ref-314)
315. A. Moravcsik, ‘In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union’, *JCMS* 40(4), 603; C. Crombez, ‘The Democratic Deficit of the European Union. Much Ado about Nothing?’, *European Union Politics* (2003) 4(1), 101 [↑](#footnote-ref-315)
316. D. Curtin, ‘Challenging Executive Dominance in European Democracy’ *Modern Law Review* [2014] 77(1), 1. Professor Curtin notes how national parliaments are disadvantaged by executive dominance over the control and release of information, whilst the European Parliament has compounded this by succumbing to internal rules on the distribution of information in order to gain a seat at closed legislative trilogue meetings. [↑](#footnote-ref-316)
317. Ibid, 3 [↑](#footnote-ref-317)
318. See for instance: <http://www.europarl.europa.eu/elections2014-results/en/turnout.html>, accessed 20/04/16 [↑](#footnote-ref-318)
319. A. Cygan *Accountability, Parliamentarism and Transparency in the EU* (2013, Northampton, Edward Elgar) 105 [↑](#footnote-ref-319)
320. There is lively academic debate about how post-Maastricht developments ought appropriately to be characterised, see Bickerton, n. 2; F. Schimmelfennig, ‘What’s the News in ‘New Intergovernmentalism’? A Critique of Bickerton, Hodson and Puetter’ [2015] *JCMS* 53(4) 723 [↑](#footnote-ref-320)
321. F. Schimmelfennig, ‘Legitimate Rule in the European Union. The Academic Debate’, *Tübingen University Working Papers in International Politics and Peace Studies* (1996) n. 27 [↑](#footnote-ref-321)
322. E. Eriksen, ‘Democratic or Technocratic Governance’, *Harvard Law School* *Jean Monnet Working Papers* (2001) No. 6; M. Höreth, ‘The European Commission’s White Paper on Governance: A Tool-Kit for Closing the Legitimacy Gap of EU Policy-Making” *ZEI Discussion Papers* (2001) C(94) [↑](#footnote-ref-322)
323. n. 6 [↑](#footnote-ref-323)
324. Hix, n.1; Hooge & Marks, n. 1; Taylor, n.1; Kaina & Karolewski, n.31; F. Deutsch, ‘Legitimacy and Identity in the European Union: empirical findings from the old member states’ in P. Karolewski & V. Kaina (eds.) *European Identity: Theoretical Perspectives and Empirical Insights*  (Berlin, LIT Verlag, 2006), 149 - 178 [↑](#footnote-ref-324)
325. See n.1 [↑](#footnote-ref-325)
326. V. Schmidt *Democracy in Europe: The EU and National Polities* (2006, Oxford, OUP) Within, Schmidt contents that a de facto distinction is to be drawn between politics and policy-making, with member states increasingly wary of engaging in the latter in a pan-European context, unless it can be demonstrated that pan-European action directly supports national interests. [↑](#footnote-ref-326)
327. L. Hooghe and G. Marks, ‘Europe’s Blues: Theoretical Soul-Searching after the Rejection of the European Constitution”. *PS: Political Science & Politics* (2006) 39(2) 247, 428 [↑](#footnote-ref-327)
328. Hooghe & Marks, n. 1 [↑](#footnote-ref-328)
329. C. Eichenberg and R. Dalton, ‘Post-Maastricht Blues: The Transformation of Citizen Support for European Integration, 1973-2004’, *Acta Politica* (2007) 42(2-3) 128; L. McLaren, ‘Explaining Mass-Level Euroscepticism: Identity, Interests and Institutional Distrust’, *Acta Politica* (2007) 42(2-3) 233 [↑](#footnote-ref-329)
330. T. Risse, ‘European Institutions and Identity Change: What Have We Learned?’ in R. Herrmann et al (eds.) *Transnational Identities: Becoming European in the EU* (Plymouth, Rowman & Littlefield, 2009) 247; L. McLaren, *Identity, Interests and Attitudes to European Integration* (Houndmills, Palgrave Macmillan, 2006) [↑](#footnote-ref-330)
331. R. Dahrendorf, ‘The Challenge for Democracy’, *Journal of Democracy* (2003) 14(4) 101; F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, OUP, 1999) [↑](#footnote-ref-331)
332. U. Haltern, ‘A Comment on Von Bogdandy’ in B. Kohler-Koch and B. Rittberger, n. 45, 45 et seq.; [↑](#footnote-ref-332)
333. M. Greven and L. Pauly, ‘Democracy Beyond the State?’ (Oxford, Rowman and Littlefield, 2000) [↑](#footnote-ref-333)
334. See for instance: Commission, ‘Joint Communication: “Increased transparency in the work of the Commission” and “An open and structured dialogue between the Commission and special interest groups”’, O.J. C 63, 5/3/1993; Commisison ‘Public Access to the Institutions’ Documents’ COM (1993) 191 final; Commission ‘European Governance: A White Paper’ (2001), Luxembourg, accessible at [http://ec.europa.eu/governance/white paper/en.pdf](http://ec.europa.eu/governance/white%20paper/en.pdf), accessed 20/04/16 [↑](#footnote-ref-334)
335. M. Bruter, *Citizens of Europe? The Emergence of a Mass European Identity* (Houndmills, Palgrave Macmillan, 2005); Deutsch, n. 65 [↑](#footnote-ref-335)
336. M. Kohli, ‘The Battlegrounds of European Identity’ *European Societies (*2000) 2(2) 113 [↑](#footnote-ref-336)
337. E. Eriksen and E. Fossum, ‘Europe in Search of Legitimacy: Strategies of Legitimation Assessed’, *International Political Science Review,* (2004)25(4) 401; A. Føllesdal and S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ *JCMS* (2006) 44(3) 533 [↑](#footnote-ref-337)
338. Karolewski and Kaina, n. 31, 8 [↑](#footnote-ref-338)
339. J. Jimeno, ‘The Long lasting consequences of the European crisis’ [2015] *European Central Bank, Working Paper Series*, No. 1832, accessible online: <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1832.en.pdf>, accessed 20/04/16 [↑](#footnote-ref-339)
340. Treaty on European Union, Title II Provisions on Democratic Principles. [↑](#footnote-ref-340)
341. S. Andreev, n. 21, 12 [↑](#footnote-ref-341)
342. Eriksen, n. 73 [↑](#footnote-ref-342)
343. Habermas, n.16; Habermas, n. 57 [↑](#footnote-ref-343)
344. P. Schlesinger, ‘“Europeanness” – a New Cultural Battlefield?’ in J. Hutchinson & A. Smith (eds), *Nationalism: Critical Concepts in Political Science* (London, Routledge, 2000) 1862; P. Schlesinger, ‘Changing Spaces of Political Communication: The Case of the European Union’, *Political Communication* (1999) 16(3), 263 [↑](#footnote-ref-344)
345. Schlesinger (1999), n. 78 [↑](#footnote-ref-345)
346. Ibid. [↑](#footnote-ref-346)
347. E. Eriksen & J. Fossum, ‘Democracy Through Strong Publics in the European Union?’ *JCMS* (2002) 40(3) 401 [↑](#footnote-ref-347)
348. P. Bijsmans & C. Altides, ‘Bridging the Gap between EU Politics and Citizens? The European Commission, National Media and EU Affairs in the Public Sphere’ *Journal of European Integration* (2007) 29(3) 323 [↑](#footnote-ref-348)
349. J. Downey & K. Thomas, ‘Is There a European Public Sphere? The Berlusconi-Schulz Case’ *European Journal of Communication* (2006) 21(2) 165 [↑](#footnote-ref-349)
350. S. Grimmelikhuijsen, ‘Linking transparency, knowledge and citizen trust in government’ *International Review of Administrative Sciences* (2012) 78(1) 50 [↑](#footnote-ref-350)
351. The implications of polycentricity for the modern regulatory state has been examined at length by Martin Lodge and Lindsay Stirton, see M. Lodge & L. Stirton ‘Accountability in the Regulatory State’ in Baldwin, Cave & Lodge (eds.) *The Oxford Handbook of Regulation* (Oxford, OUP, 2010) [↑](#footnote-ref-351)
352. Black, *‘*Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’, *Current Legal Problems* (2001) 54, 103 [↑](#footnote-ref-352)
353. David Heald has suggested that there needs to be some additional ‘sophistication’ about the varieties of transparency that the state employs and consciousness about the directions in which that transparency moves. D. Heald, ‘Transparency as an Instrumental Value’*,* in C. Hood & D. Heald (eds.) *Transparency: The Key to Better Governance?* (Oxford, OUP, 2006) 59 [↑](#footnote-ref-353)
354. C. Hood, *‘Explaining Economic Policy Reversals* (Buckingham, Open University Press, 2004) Hood wrote how particular policies, and to this we might add particular incarnations of transparency, might be fitted to a particular social ‘ecosystem’ in a given space and time. [↑](#footnote-ref-354)
355. Roberts, ‘No one is perfect: The limits of transparency and an ethic for ‘intelligent’ accountability’*,* in *Accounting, Organisations and Society* (2009) 34, 957, 958 [↑](#footnote-ref-355)
356. J. Bentham, *Farming defended, Writings on the Poor Laws*, vol. 1, Michael Quinn (ed) ( Oxford, Oxford University Press, 2001) 276, 277. This canon has had a number of other incarnations, of which Justice Brandeis’ sunlight metaphor is perhaps the most famous. All encapsulate something of the idea that transparency virtuously induces a state of affairs in which there is less administrative corruption. [↑](#footnote-ref-356)
357. The assumption that transparency exerts no transformative effects on systems of government has been widely refuted, as will be discussed later in this section. Nevertheless, the presentation of transparency as an unalloyed good still predominates a great deal of the rhetoric defending the introduction of more transparency. Indeed, the first memorandum signed by President Barack Obama after assuming the presidency asserted that the good thing about transparency was that it promoted ‘accountability’ for public officials, see *Transparency and Open Government* (*Memorandum for the Heads of Executive Departments and Agencies).* Jan 21 2009, accessible at <http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/>, accessed 05/04/15 [↑](#footnote-ref-357)
358. See for instance J. Lodge, ‘Transparency and Democratic Legitimacy’, *JCMS* (2003) 32(3) 343 [↑](#footnote-ref-358)
359. See Chapter 2. [↑](#footnote-ref-359)
360. A clear and concise introduction can be found in the Stanford Encyclopaedia of Philosophy, see Larry & Moore, ‘Deontological Ethics’, in Edward N. Zalta (ed.), ‘The Stanford Encyclopaedia of Philosophy’ (2012) accessible at <http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/>, accessed 05/04/2015 [↑](#footnote-ref-360)
361. The variant of consequentialism being discussed here is often termed the “utilitarianism of rights”. In classical utilitarianism, the ‘good’ is identified with hedonism, and is calculated as an aggregate of each person’s share of the good. Here doing, or refraining from doing, a certain kind of act is regarded itself as an inherently valuable state of affairs that is constitutive of the good. In this specific case, transparency may be regarded as a duty to be kept as part of the good to be maximised. See for instance, R. Nozick, *Anarchy, State and Utopia* (New York, Basic Books, 1974) [↑](#footnote-ref-361)
362. This view of deontological ethics is often termed ‘patient’ or ‘victim’ centred, to be distinguished from ‘agent’ centred views where we are regarded as each having a collective of permissions and obligations that give us ‘agent-relative’ reasons for action, see Schleffer, *The Rejection of Consequentialism (*Oxford, OUP, 1982) Patient centred deontology posits a core right, often the right not to have one’s body, labour or talent exploited without your prior consent. From this core right we derive discrete rights, such as the right not to be killed or tortured. Core moral norms are limited in patient centred deontological ethics, they cannot extend to producing the ‘good’ where it would require intruding on the reciprocal rights guaranteed by that core moral norm(s). Simply, the correlative rights stemming from the core norm are regarded as absolute insofar as they achieve/uphold the core normative standard(s). These notions are expressed by both right and left leaning libertarians, see for instance Mack, *‘In Defense of the Jurisdiction Theory of Rights’,* *Journal of Ethics* (2000) 4, 71; Steiner, *An Essay on Rights (*Oxford, Blackwell, 1994) [↑](#footnote-ref-362)
363. Ibid. [↑](#footnote-ref-363)
364. T. Hobbes, *Leviathan, (*Oxford, OUP, 1996)  [↑](#footnote-ref-364)
365. JJ. Rousseau, *The Social Contract,* M. Cranston ed.(London, Penguin, 1968) [↑](#footnote-ref-365)
366. J. Rawls, *A Theory of Justice (*Cambridge Mass., Harvard University Press, 1978) [↑](#footnote-ref-366)
367. M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy (* Cambridge, Cambridge University Press*,* 2003) [↑](#footnote-ref-367)
368. Larry & Moore, n.10 [↑](#footnote-ref-368)
369. Ibid. [↑](#footnote-ref-369)
370. This view is gleaned from the observation that in the Rawlsian account of the social contract, there is no obvious substantive reason why parties to the contract, in the original position, would be compelled to choose a form of political constitution based on a deontological ethic. Harsanyi notes for instance that utilitarianism may very well be the chosen organising principle, Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality: A Critique of John Rawls’s Theory, (*Berkeley: Centre for Research in Management Science, 1978) whilst Kymlicka also riffs off of this position, suggesting that it may even be conceivable that those in the original position would engage in gaming behaviour, chancing their arm at an unequally high distribution of social and material resources, W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, OUP, 2002) 53 et seq. [↑](#footnote-ref-370)
371. Specifically, in relation to studies examining the effects of the institutions transparency strategies to improve communication and foster collective identity, see *Chapter 4.*  [↑](#footnote-ref-371)
372. See D. Heald, ‘Fiscal Transparency: Concepts, Measurement and UK Practice’, in *Public Administration*, (2003) 81(4), 723 [↑](#footnote-ref-372)
373. The corporate governance transparency debate has been influential in developing not only the Anglo-American and EU understanding of what specifically transparency signifies, but it has also been instrumental in proffering a heavily analytical method of evaluating transparency that highlights its direct and indirect costs, forcing a departure from a priori and intuitive claims about transparency’s virtue. Particularly significant here is the notion of the difference between maximal and optimal transparency, see Heald, ibid; Hermalin & Weisbach, ‘Transparency and Corporate Governance’*,* NBER Working Paper (2007) No. 12875, accessible at: <http://www.nber.org/papers/w12875.pdf?new_window=1>, accessed 06/04/15 [↑](#footnote-ref-373)
374. Tsoukas, ‘The Tyranny of Light: the temptations and paradoxes of the information society’, *Futures* (2007) 29(9) 827, 838 [↑](#footnote-ref-374)
375. C. Hood, ‘Transparency*’,*  in Clarke & Foweraker (eds.) ‘Encyclopaedia of Democratic Thought’ (London, Routledge, 2001) 701, 704 [↑](#footnote-ref-375)
376. See for instance F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity (*New York, Free Press, 1995) Within, Fukuyama presents a view of trust that would suggest it is a product of a reservoir of social capital, something that high-trust societies enjoy and which more cynical or untrustworthy societies don’t. [↑](#footnote-ref-376)
377. O. O’Neill, ‘Transparency and the Ethics of Communication’ in D. Heald & C. Hood (eds.) ‘*Transparency: The Key to Better Governance?*, n. 1 [↑](#footnote-ref-377)
378. See, Bannister & Connolly, ‘A Critical Review of Openness in e-government’*,* *Policy and Internet* (2011) 3(1) 1, 5. Within, drawing upon reflections made by Heald (D. Heald, ‘*Transparency as an Instrumental Value’,* in C. Hood & D. Heald (eds.), n.1 ), a distinction is made between transparency on the one hand and fairness or equality on the other. The weight of analysis would recommend caution when seeking to elevate the status of transparency. [↑](#footnote-ref-378)
379. Here the focus remains on transparency as access to documents, since access or FOIA legislation is the paradigmatic case of administrative transparency. In the next section of this chapter, which addresses transparency’s dimensions, a broader view of what constitutes transparency in government will be examined. [↑](#footnote-ref-379)
380. F. Schauer,’ Transparency in Three Dimensions’*,* in *University of Illinois Law Review* (2011) 4, 1339 . In the EU and the US for instance, both Regulation 1049/2001 and the Freedom of Information Act 1986, 5 U.S.C § 552 (2006), permit that all persons, including ‘aliens’ (though this is discretionary in the case of the former) may seek access to a document as defined by the legislation. Further, that access is circumscribed only by any exceptions to the general principle of access, though admittedly exceptions may be broadly enumerated. The existing legislation may also be characterised as neutral on the question of what information should be rendered transparent and in what format should access be given. UK legislation does make provision for ‘publication schemes’, providing some guidance as to what should be pro-actively published. See the UK Freedom of Information Act 2000 c. 36, s.19. The EU regulation however relies solely on a general right of access, providing documents in their original format, or parts thereof, subject to application of one of the exceptions and/or the principles enumerated by the Court of Justice. [↑](#footnote-ref-380)
381. On the distinction between positive and negative values see Alexander, *Constitutionalism*, in Golding and Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory,* (Oxford, Blackwell, 2005) 249,255. Such a distinction was first enumerated by Isiah Berlin in his essay *Two Concepts of Liberty.* Within, Berlin defines negative liberty according to the following question: ‘What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be without interference by other persons?’ Conversely, the positive sense of liberty is to be defined according to the question ‘What, or who, is the source of control or interference that can determine someone to do or be, this rather than that?’ Berlin (1969) *Two Concepts of Liberty*, in Berlin, ‘Four Essays on Liberty’, Oxford, OUP, [↑](#footnote-ref-381)
382. Alemanno & Stefan, ‘Openness at the Court of Justice of the European Union: Toppling a Taboo’*, CMLRev* (2014) 51(1), x [↑](#footnote-ref-382)
383. Menéndez-Viso (2009) *Black and White Transparency: Contradictions of a Moral Metaphor,* in Ethics for Information Technology, 11, pp. 155-162, at p. 158 [↑](#footnote-ref-383)
384. Ibid. [↑](#footnote-ref-384)
385. Tsoukas (1997) supra, n. 24, at p. 830 [↑](#footnote-ref-385)
386. Reddy, n. 34. [↑](#footnote-ref-386)
387. Menéndez-Viso, n. 33, 158 [↑](#footnote-ref-387)
388. Ibid. [↑](#footnote-ref-388)
389. Ibid. [↑](#footnote-ref-389)
390. Schauer (2011) Supra n. 30 at p. 1345 et seq. [↑](#footnote-ref-390)
391. Article 4 of Regulation 1049/2001 [↑](#footnote-ref-391)
392. US Department of Justice (2010) *Freedom of Information Act Reference Guide,* accessible online, <http://www.justice.gov.oip/referenceguide.htm>, accessed 28/12/13 [↑](#footnote-ref-392)
393. See for example the discussion in Joined Cases C-514/11 P & C-605/11 P *LPN and Finland v Commisison* EU:C:2013:738, para. 72 et seq. [↑](#footnote-ref-393)
394. Schauer, n. 11, at p. 1346 [↑](#footnote-ref-394)
395. See for instance, C. Hood ‘Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?*’,* in *West European Politics* (2007) 33(5), 989 [↑](#footnote-ref-395)
396. See for instance, Lodge and Stirton, n.2. Section 1 of this chapter highlighted that transparency ought properly to be considered as an instrumental value, rather than as an inherent virtue or governance, at least partly because it could not, of itself ensure that accountability would follow from the provision of information. It therefore only seems logical that accountability cannot flow from the absence of transparency – merely because accountability requires transparency does not necessarily indicate that it subsumes it. [↑](#footnote-ref-396)
397. This term is preferred by Schauer, supra n. 30, though he also distinguishes between ‘transparency as democracy’ and ‘transparency as regulation’. Here it is argued that transparency is an attribute of governance and as such it should be considered as a species of regulation (or regulatory tool). Transparency as democracy is subsumed within the heading ‘transparency as regulation’, since it is effectively the use of transparency to regulate government activity. A distinction is drawn however between transparency in a constitutional and an administrative setting, and transparency as a principle of ‘good or sound administration’ is considered under a separate heading. [↑](#footnote-ref-397)
398. Prechal & de Leeuw, ‘Dimensions of Transparency: The Building Blocks for a New Legal Principle?’*,* in *Review of European Administrative Law* (2007) 51, 52 [↑](#footnote-ref-398)
399. Gordon Crovitz, Op-Ed., *Transparency is More Powerful than Regulation,* in ‘Wall St. Journal’, March 30, 2009, accessible online <http://online.wsj.com/news/articles/SB123837223623167841>, accessed 28/12/13 [↑](#footnote-ref-399)
400. ‘Knowledge is power’ is the most common translation of the Latin aphorism “*scientia potentia est*”, which is widely attributed to Sir Francis Bacon. Nevertheless, the phrase in that form does not appear in any of Bacon’s Latin or English writings. The phrase first appears in the form ‘*scientia potentia est*’ in Thomas Hobbes’ Leviathan, first published in 1651. [↑](#footnote-ref-400)
401. P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal (*Cambridge, CUP, 2011 4th ed.) [↑](#footnote-ref-401)
402. Heald, n. 3 [↑](#footnote-ref-402)
403. Schauer, supra n. 30, at p. 1348 [↑](#footnote-ref-403)
404. For further discussion on these issues, see M. Fenster ‘The Opacity of Transparency’*,* in ‘*Iowa Law Review*, (2006) 91, 888. 937 et seq. [↑](#footnote-ref-404)
405. Nelson, *On Justifying Democracy, (*London, Routledge and Kegan Paul, 2009) [↑](#footnote-ref-405)
406. Ibid. [↑](#footnote-ref-406)
407. Article 4(3). [↑](#footnote-ref-407)
408. See for instance the ‘Observatory on Access to Documents’ of the website [www.statewatch.org](http://www.statewatch.org), which calls the provision the institutional ‘space-to- think’ clause. [↑](#footnote-ref-408)
409. Case C-280/11P *Council v Access info. Europe* ECLI:EU:C:2013:671 [↑](#footnote-ref-409)
410. Prechal & de Leeuw, n.51, 51 [↑](#footnote-ref-410)
411. ibid [↑](#footnote-ref-411)
412. Ibid, at p. 54. See also the Advocate General’s opinion in Case C-110/03 *Belgium v Commission* [2005] ECR-2802, para. 36 et seq. “[B]oth the principle of transparency and legal certainty must be respected by the legislature as sources of Community law and failure to do so would, under Article 230 EC, constitute an infringement…”. [↑](#footnote-ref-412)
413. Case C-417/99 *Commission v Spain* [2001] ECR I-6015, para 40. [↑](#footnote-ref-413)
414. Case C-177/04 *Commission v France* [2006] ECR I-2461, para 48. [↑](#footnote-ref-414)
415. European Commission, *State Aid Manual of Procedures*, Luxembourg, Office of Publications of the European Union, (2013) accessible online <http://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf>, accessed 04/04/15 [↑](#footnote-ref-415)
416. Joined Cases C-189/02 P, C-202/02 P, C-205/02 P and C-213/02 P *Dansk Rørindustri A/S and Others v. Commission* [2005] ECR-I-5425 [↑](#footnote-ref-416)
417. Case C-26/03 *Stadt Halle* [2005] ECR I-1 [↑](#footnote-ref-417)
418. Marshall, ‘In defence of the Search for Truth as a First AmendmentJustification’, *Georgia Law Review*, (1995) 30(1), 1 [↑](#footnote-ref-418)
419. See for instance the mission statement of the open source initiative, <http://www.opensource.org>, accessed 01/05/2016 [↑](#footnote-ref-419)
420. This concept of a rationally administered society embodies the Foucauldian notion of ‘governmentality’, defined by Foucault as: “1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, and its principle form of knowledge political economy, and as its essential technical means apparatuses of security.

     “2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline etc.) of this type of power which may be termed government, resulting, on the one hand, in formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of savoirs.

     “3. The process, or rather the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes ‘governmentalized’.” Foucault ‘Governmentality’*,* trans. Rosi Baridotti & revised by Colin Gordon*,* in Burchell et al. (eds.) *The Foucault Effect: Studies in Governmentality* (Chicago, University of Chicago Press, 1991) 87 [↑](#footnote-ref-420)
421. Power (1997) *The Audit Society,* in Hopwood & Miller (eds.) ‘Accounting as Social and Institutional Practice’, Cambridge, Cambridge University Press, pp. 299-316 [↑](#footnote-ref-421)
422. Walsh, ‘Optimal Economic Transparency’*,* in *International Journal of Central Banking*, (2007) 3(1), 5 [↑](#footnote-ref-422)
423. C. Hood, ‘Beyond Exchanging First Principles?*’* in C. Hood & D. Heald (eds.), n.1, 212 [↑](#footnote-ref-423)
424. see Lodge & Stirton (2011) supra, n.1 [↑](#footnote-ref-424)
425. Ezzamel, ‘Corporate Governance & Financial Control’, in Ezammel & Heathfield (eds.) *Perspectives on Financial Control: Essays in Memory of Kenneth Hilton* (London, Chapman & Hall, 1992) 3 [↑](#footnote-ref-425)
426. M. Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue & as a Mechanism’*, West European Politics*, (2010) 33(5), 946 [↑](#footnote-ref-426)
427. Stone (1997) *Policy Paradox: The Art of Political Decision Making,* New York, Norton & Co; Heinemann et al (2009) *Managing Strategic Complexity in Coordination Games,* in ‘Review of Economic Studies’, 76, pp. 181-221 [↑](#footnote-ref-427)
428. Roberts, ‘Wikileaks: The Illusion of Transparency’*,* in ‘International Review of Administrative Sciences’, (2012) 78(1), 116 [↑](#footnote-ref-428)
429. Ibid. [↑](#footnote-ref-429)
430. Hood, *Varieties of Transparency,* in Hood & Heald (eds.), n. 1, 25 [↑](#footnote-ref-430)
431. Ibid. [↑](#footnote-ref-431)
432. O. O’Neill, *A Question of Trust,* The 2002 Reith Lectures, BBC Radio 4, accessible at <http://www.bbc.co.uk/programmes/p00ghvd8>, accessed 06/04/15 [↑](#footnote-ref-432)
433. See <http://ec.europa.eu/europe2020/making-it-happen/index_en.htm>, accesses 06/06/16 [↑](#footnote-ref-433)
434. Cabinet Office, *Government Response to the Tenth Report of Session 2008-09 from The Public Administration Select Committee: Leaks and Whistleblowing in Whitehall (2010)* Cmnd 7863, London, HMSO, accessible online[*https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/228774/7863.pdf*](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228774/7863.pdf)*, accessed 05/04/15* [↑](#footnote-ref-434)
435. See M. Fenster ‘Disclosure’s Effects: Wikileaks and Transparency’ in *Iowa Law Review* (2012) 97, 753, 755. Though revised since, a former declaration on Wikileaks *About* page stated: “Publishing [leaked material] improves transparency, and this transparency creates a better society for all people. Better scrutiny leads to reduced corruption and stronger democracies in all society’s institutions, including government, corporations and other organisations. A healthy, virbrant and inquisitive journalistic media plays a vital role in achieving these goals.” Thus, the very raison d’être of Wikileaks might be said to embrace an all too familiar understanding of transparency’s transformative promise. [↑](#footnote-ref-435)
436. David Heald has noted how transparency might be characterised in each of these situations in *Transparency as an Instrumental Value*, n. 1 [↑](#footnote-ref-436)
437. For further detail, see The Cabinet Office Guide to Making Legidlation, July 2015: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf>, accessed 06/07/2016 [↑](#footnote-ref-437)
438. See the Commission’s Better Regulation guidelines on the production of explanatory memoranda: <http://ec.europa.eu/smart-regulation/guidelines/tool_34_en.htm>, accessed 06/07/2016 [↑](#footnote-ref-438)
439. For a précis of the privacy v disclosure arguments in this context see, P. Leino ‘Just a Little Sunshine in the Rain@ The 2010 case law of the European Court of Justice on Access to Documents’ (2011) *CML Rev*, 48, 1215 [↑](#footnote-ref-439)
440. O’Neill (2002) *A Question of Trust,* supra n. 85 [↑](#footnote-ref-440)
441. For detail on MPs pay and expenses, see <http://www.parliament.uk/about/mps-and-lords/members/pay-mps/>, accessed 05/04/15 [↑](#footnote-ref-441)
442. The UK-wide referendum on the UK’s continuing membership of the European Union is only the third UK-wide referendum to be held since 1973. With the exception of a referendum on proposed changes to the UK voting system in 2011, the only other UK-wide referendum was held in 1975 and asked whether the UK should remain members of the then Economic Communities, see <http://www.parliament.uk/education/about-your-parliament/general-elections/referendums/>, accessed 06/06/16. The fallout from the referendum on the UK’s membership on the EU continues to be felt; its formal constitutional status in legal terms is ‘advisory’, though in political terms the result has been held to be decisive. How this impacts on the government’s proposals for withdrawal from the EU, the role of parliament and the formal Article 50 trigger is now the subject of legal challenge, see <https://www.theguardian.com/law/2016/jul/03/parliament-must-decide-whether-or-not-to-leave-the-eu-say-lawyers>, accessed 05/07/2016; T. T. Arvind, R. Kirkham and L. Stirton, ‘Article 50 and the European Union Act 2011: Why Parliamentary Consent is Still Necessary’ U.K. Const. L. Blog (1st Jul 2016) available at [http://ukconstitutionallaw.org](https://ukconstitutionallaw.org/), accessed 06/07/2016 [↑](#footnote-ref-442)
443. R. Hoppe, ‘Applied Cultural Theory: Tool for Policy Analysis’ in F. Fischer et al (eds.) *Handbook of Public Policy Analysis* (2007London, CRC Press) 289 [↑](#footnote-ref-443)
444. The remaining part of this thesis refers variously to Grid-Group Cultural Theory; Grid-Group; Cultural Theory; GGCT. Unless otherwise stated, each is a reference to Grid Group Cultural Theory as developed by Mary Douglas and refined specifically for use in political analysis by Aaron Wildavsky, Michael Thompson and Richard Ellis, see sections 6.1.1 and 6.2 infra. [↑](#footnote-ref-444)
445. G. Grendstad and P. Selle, ‘The Formation and Transformation of Preferences. Cultural Theory and Postmaterialism Compared.’ In M. Thompson et al, *Cultural Theory as Political Science* (1999, Routledge, London), 43 [↑](#footnote-ref-445)
446. A. Wendt, *Social Theory of International Politics* (2000, Cambridge, CUP) [↑](#footnote-ref-446)
447. Hoppe, n. 1, 290 [↑](#footnote-ref-447)
448. Ibid. [↑](#footnote-ref-448)
449. See for instance, M. Schwartz & M. Thompson, *Divided We Stand: Re-defining Politics, Technology and Social Change* (Philadelphia, Philadelphia University Press, 1990); R. Ellis, *American Political Cultures* (New York, OUP, 1993); D. Coyle & R. Ellis, *Politics, Culture & Policy* (Boulder CO, Westview Press, 1994) [↑](#footnote-ref-449)
450. Further detail is provided in section 6.2 [↑](#footnote-ref-450)
451. Aaron Wildavsky ‘Why self-interest means less outside of a social context: cultural contributions to a theory of rational choices’ [1994] Journal of Theoretical Politics 6, 131 [↑](#footnote-ref-451)
452. Gunnar Grendstad & Per Selle ‘Cultural Theory and the New Institutionalism’ [1995] *Journal of Theoretical Politics* 7, 5 [↑](#footnote-ref-452)
453. Richard Coughlin & Charles Lockhart, ‘Grid-Group Theory and Political Ideology: a consideration of their relative strengths and weaknesses for explaining the structure of mass belief systems’ [1998] *Journal of Theoretical Politics* 10, 33, 36 [↑](#footnote-ref-453)
454. M. Thompson et al, *Cultural Theory* (Boulder CO, Westview Press, 1990) 1 [↑](#footnote-ref-454)
455. Grendstad & Selle, n. 3, 6; W. Powell and P. DiMaggio (eds.), *The New Institutionalism in Organisational Analysis* (Chicago, Chicago University Press, 1993) 3 [↑](#footnote-ref-455)
456. P. Converse, ‘The Nature of Belief Systems in Mass Publics’, in David Apter (ed.) *Ideology and Discontent* (New York, Free Press, 1964) 206 [↑](#footnote-ref-456)
457. Ibid. [↑](#footnote-ref-457)
458. Coughlin & Lockhart, n. 5, 34; D. Green ‘On the Dimensionality of Public Sentiment Towards Parties and Ideological Groups’ [1988] *American Journal of Political Science* 32, 758 [↑](#footnote-ref-458)
459. Ibid. [↑](#footnote-ref-459)
460. R. Lane, *Political Ideology* (New York, Free Press, 1992); P. Connover & S. Feldman, ‘Schema Theory in Political Psychology’ [1991] *American Political Science Review* 85, 1364 [↑](#footnote-ref-460)
461. D. Kinder, ‘Diversity and Complexity in American Public Opinion’, in Ada Finifter (ed.) *Political Science: The State of The Discipline,* (Washington DC, American Political Science Association) 389 [↑](#footnote-ref-461)
462. Thompson et al, n.6 [↑](#footnote-ref-462)
463. R. Klatch, *Women of the New Right* (Philadelphia, Temple University Press, 1987) [↑](#footnote-ref-463)
464. Martin Lodge & Lindsay Stirton, ‘Accountability in the Regulatory State’ in Robert Baldwin et al (eds.) *The Oxford Handbook of Regulation,* (Oxford, OUP, 2010) 350, 360 [↑](#footnote-ref-464)
465. V. Mamadouh, ‘Grid-group cultural theory: an introduction*’* [2009] *Geojournal* 47, 395, 396 [↑](#footnote-ref-465)
466. Ibid. [↑](#footnote-ref-466)
467. See n. 1; J. Gross & S. Rayner *Measuring Culture: A paradigm for the analysis of social organisation*  (New York, Columbia University Press, 1987); R. Ellis & M. Thompson, *Culture Matters: Essays in Honour of Aaron Wildavsky* (Boulder CO, Westview Press, 1997); M. Thompson et al, *Cultural Theory as Political Science,* (London, Routledge & Keegan Paul, 1999) [↑](#footnote-ref-467)
468. A. Wildavsky, ‘The Three Cultures: Explaining Anomalies in the American Welfare State’ [1982] *The Public Interest* 69, 45; A. Wildavsky, ‘The Logic of Public Sector Growth’, in Jan-Erik Lane (ed.) *State and Market. The Politics of the Public and the Private,* (London, Sage, 1985) 231; A. Wildavsky, ‘Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation’, [1987] *American Political Science Review 81*, 1; A. Wildavsky, ‘What Other Theory Would Be Expected to Answer Such Profound Questions? A Reply to Per Selle’s Critique of Cultural Theory’ [1991] *Scandinavian Political Studies* 14, 355 [↑](#footnote-ref-468)
469. Thompson et al, n.6 [↑](#footnote-ref-469)
470. A. Wildavsky, ‘Democracy as a Coalition of Cultures’ [1994] *Society* 31, 80 [↑](#footnote-ref-470)
471. Douglas, *Cultural Bias,* n.18 [↑](#footnote-ref-471)
472. M. Douglas, *How Institutions Think,* n. 18 [↑](#footnote-ref-472)
473. It is questioned whether this fifth form is really a way of life at all, since the hermit deliberately withdraws from the coercive social involvement that characterises the ways of life of the other four forms. If the hermit therefore is truly emancipated from the two elementary dimensions of sociality, in what way must his cultural biases be sustained by his social relations? Nevertheless, the autonomy presented by the hermit’s way of life can be said to reflect the pre-political existence of a state of nature, a theoretically viable form of existence, absent of sociality. The analysis that will take place in the remaining parts of this thesis is restricted to the four traditional forms. [↑](#footnote-ref-473)
474. Douglas, *Cultural Bias, n.18* [↑](#footnote-ref-474)
475. R. Needham, ‘Polythetic Classification: Convergence and Consequences’ [1975] MAN New Series 10, 349 [↑](#footnote-ref-475)
476. Douglas, *Cultural Bias, n.18*  [↑](#footnote-ref-476)
477. Mars, ibid. [↑](#footnote-ref-477)
478. Wildavsky, *Choosing Preferences by Constructing Institutions,* n. 29 [↑](#footnote-ref-478)
479. See also, M. Thompson, ‘The Problem at the Centre: An Autonomous Cosmology’, in Mary Douglas (ed.) *Essays in the Sociology of Perception,* n. 18,33 et seq; M. Thompson & A. Wildavsky ‘A policy distinction: from economic and cultural homogeneity to cultural heterogeneity in the classification of poor people’ [1986] *Policy Sciences* 19, 163. In *Cultural Bias*, Mary Douglas acknowledges that the autonomous individual may well exist, but not as part of the cultural map. [↑](#footnote-ref-479)
480. Douglas, n. 38, 411 [↑](#footnote-ref-480)
481. Coughlin & Lockhart, n.5, 37 [↑](#footnote-ref-481)
482. Ibid. [↑](#footnote-ref-482)
483. Douglas, n. 38, 411 [↑](#footnote-ref-483)
484. C. Lindblom, *Politics and Markets: The World’s Political-Economic Systems* (New York, Basic, 1977) [↑](#footnote-ref-484)
485. Grendstad & Per Selle, n.4, 13. Additional comment on regimes and alliances between the cultural types is offered below. [↑](#footnote-ref-485)
486. Coughlin & Lockhart, n5, 37 [↑](#footnote-ref-486)
487. Ibid. [↑](#footnote-ref-487)
488. Grendstad & Selle, n. 4, 13 [↑](#footnote-ref-488)
489. Thompson et al, n. 7 [↑](#footnote-ref-489)
490. David Ostrander, ‘One and Two Dimensional Models of the Distribution of Beliefs’ in Mary Douglas, *Essays in the Sociology of Perception*, n. 18, 14 [↑](#footnote-ref-490)
491. Gunnar Grendstad has attempted an empirical analysis of some extant variations of regimes and alliances, see *Egalitarianism and Environmentalism: Explorations in the Cultural Context of Green Values* (1993) Norsk senter for forskning i ledelse, organisasjon og styring [↑](#footnote-ref-491)
492. Grendstad & Selle, n. 4; Christopher Hood, ‘Control over Bureaucracy: Cultural Theory and Institutional Variety’ [1996] Journal of Public Policy 15, 207; D. Douglas Caulkins, ‘Is Mary Douglas’s Grid-Group Analysis Useful for Cross Cultural Research?’ [1999] Cross-Cultural Research 33, 108 [↑](#footnote-ref-492)
493. Edward Harris, ‘Toward a grid and group interpretation of school culture’[1995] Journal of School Leadership 5, 619, quoting Mary Douglas (1982) *In the active voice*, n.18, 189 [↑](#footnote-ref-493)
494. Ibid. [↑](#footnote-ref-494)
495. Anfara & Mertz, *Theoretical Frameworks in Qualitative Research, (*2006 London, Sage Publications), 140 [↑](#footnote-ref-495)
496. Mary Douglas, *In the Active Voice,* n.18 [↑](#footnote-ref-496)
497. R. Ellis, n.1; Steve. Rayner, *Disagreeing about risk: The institutional cultures of risk management and planning for future generations,* in S. Hadden (ed.) ‘Risk analysis, institutions and public policy’ (1981) Port Washington NY, Associated faculty press; Martin Lodge et al, ‘Dodgy kebabs everywhere?: variety of worldviews and regulatory change’*,* [2010] Public Administration 88, 247 [↑](#footnote-ref-497)
498. Vincent Anfara & Norma Mertz, n. 53 [↑](#footnote-ref-498)
499. Harry Wolcott, *The Art of Fieldwork* (1995)London, AltaMira Press*,* 170, 189 [↑](#footnote-ref-499)
500. Anfara & Mertz, n. 53 [↑](#footnote-ref-500)
501. Indeed, this is the advice offered by Wolcott, n. 57 [↑](#footnote-ref-501)
502. Anfara & Mertz, n. 53, 149 [↑](#footnote-ref-502)
503. P. Birkinshaw, ‘EU Transparency and Access to Documents’ in P. Birkinshaw & M. Varney, eds. *The EU Legal Order after Lisbon* (2010, Netherlands, Wolters Kluwer) [↑](#footnote-ref-503)
504. E. Roe *Taking Complexity Seriously: Policy analysis, triangulation and sustainable development* (1998, Boston, Kluwer); A. Wildavsky, ‘Choosing Preferences By Constructing Institutions: A Cultural Theory of Preference Formation’ 1987] *The American Political Science Review,* 81(1), 3 [↑](#footnote-ref-504)
505. P. Sabatier and H. Jenkins-Smith *Policy Change and Learning: An Advocacy Coalition Approach* (1993 Boulder, Westview Press) [↑](#footnote-ref-505)
506. P. Chilton, *Analyzing Political Discourse – Theory and Practice* (2004, London, Arnold); N. Fairclough *Critical Discourse Analysis: The Critical Study of Language* (1995, London, Pearson); M. McLuhan, *Understanding Media* (2001, New York, Routledge Classics). [↑](#footnote-ref-506)
507. R. Hoppe ‘Applied Cultural Theory: Tool for Policy Analysts’ in F. Fischer et al, eds. *Handbook of Public Policy Analysis* (2007, New York, Taylor Francis) 293; Wildavsky, n. 2 [↑](#footnote-ref-507)
508. A number of texts on cultural theory and political science discuss the concept of layered policy belief systems, consisting of ‘deep-core’, ‘policy-core’ and ‘secondary’ level layers of belief, each having implications for an actors’ predisposition to compromise. See: M. Zafonte & P. Sabatier (1998) ‘Shared Beliefs and Imposed Interdependencies as Determinants of Ally Networks in Overlapping Subsystems’ [1998] *Journal of Theoretical Politics* 10(4) 473; R. Hoppe ‘Cultures of Policy Problems’ [2002] *Journal of Comparative Policy Analysis: Research and Practice* 4, 305; Sabatier & Jenkins-Smith, n. 3 [↑](#footnote-ref-508)
509. Sabatier and Zafonte, n. 6 [↑](#footnote-ref-509)
510. R. Hoppe & J. Grin. ‘Traffic Problems go through the technology assessment machine: a cultural comparison’ in N. Vig & H. Paschen eds. *Parliaments and Technology: The Development of Technology Assessment in Europe* (2000, Albany, State University of New York Press) 273, 312 [↑](#footnote-ref-510)
511. Chilton, n. 4 [↑](#footnote-ref-511)
512. For an illustrative example of the kinds of institutional policy brokerage that has taken place in response to decisions of the Court of Justice, see S. Lea & P. Cardwell ‘Transparency Requirements in the Course of a Legislative Procedure: *Council v Access Info Europe*’ [2015] European Public Law 21(1), 61 [↑](#footnote-ref-512)
513. Joined Cases C-39/05 P and C-52/05 P *Sewden & Turco v Council* [↑](#footnote-ref-513)
514. V. Schmidt *Democracy in Europe: The EU and National Polities* (2006, Oxford, OUP) [↑](#footnote-ref-514)
515. C. Reh et al ‘The Informal Politics of Legislation: Explaining Secluded Decision Making in the European Union’ [2013] *Comparative Politics Studies* 46(9), 1112; O. Costa ‘Que Peut Le Parlement Européen?’ [2014] *Pouvoirs* 149, 79, 82 et seq. [↑](#footnote-ref-515)
516. The labels adopted here are drawn largely from Chilton, n.4. [↑](#footnote-ref-516)
517. Pdf accessible online at: [www.guttenberg.org/files/608/608-h/608-h.htm](http://www.guttenberg.org/files/608/608-h/608-h.htm), accessed 01/02/16 [↑](#footnote-ref-517)
518. J. Habermas, ‘Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy trans w. Rehg (1992(1996) Cambridge, MIT Press). For a précis and critical commentary of the theory, see H. Baxter *Habermas: The Discourse Theory of Law and Democracy* (2011, Stanford, Stanford University Press); M .Deflem ‘The Legal Theory of Jürgen Habermas’ in R. Banakar & M. Travers, eds. *Law and Social Theory* (2013 2nd ed. Oxford, Hart Publishing) [↑](#footnote-ref-518)
519. J. Bentham ‘Securities Against Misrule’ in P. Schofield, ed. *The Collected Works of Jeremy Bentham* (1991, Oxford, OUP. [↑](#footnote-ref-519)
520. D. Heald ‘Fiscal Transparency: Concepts, Measurement and UK Practice’ [2003*] Public Administration* 81(4), 723; D. Heald ‘Why is transparency about public expenditure so elusive?’ [2012] *International Review of Administrative Sciences* 78(1), 30 [↑](#footnote-ref-520)
521. C. Hood ‘Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple? [2010] *West European Politics* 33(5), 989; C. Hood ‘What Happens When Transparency Meets Blame-Avoidance?’ [2007] Public Management Review 9(2), 191 [↑](#footnote-ref-521)
522. P. Birkinshaw ‘Valuing Transparency in the Government and the Media’ in N. Bowles, J. Hamilton and D. Levy, eds. *Transparency in Politics and the Media: Accountability and Open Government* (2013, Oxford, I.B. Tauris); P. Birkinshaw *Freedom of Information: The Law, The Practice and the Ideal* (2010 4th ed. Cambridge, CUP) [↑](#footnote-ref-522)
523. O. O’Neill *A Question of Trust: The BBC Reith Lectures 2002* (2002, Cambridge, CUP) [↑](#footnote-ref-523)
524. Ibid. [↑](#footnote-ref-524)
525. COM 1993 (258) Final. [↑](#footnote-ref-525)
526. J. Wilson, ‘Political Discourse’ in D. Schriffin, D. Tannen & H. Hamilton, eds. *Handbook of Discourse Analysis*, (2001, Oxford, Blackwells) 398 [↑](#footnote-ref-526)
527. Commission (1993) 93/C 156/05, COM (1993) 191 final. [↑](#footnote-ref-527)
528. Council (1992) DOC/92/6 ‘European Council, Birmingham 16 October 1992 Presidency Conclusions’, not in particular the following statements, ‘As a community of democracies, we can only move forward with the support of our citizens,’ para 2 & ‘we reaffirm that decisions must be taken as closely as possible to the citizen,’ para 4;Council (1002) SN 456/92 ‘European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency’, para 7. [↑](#footnote-ref-528)
529. COM (1993) 258 final [↑](#footnote-ref-529)
530. O.J. C 63, 5/3/1993 [↑](#footnote-ref-530)
531. See n. 10, p. 8 [↑](#footnote-ref-531)
532. See n. 13, pp. 14-17 [↑](#footnote-ref-532)
533. European Parliament (1994) ‘Opinion of the Committee on Culture, Youth, Education and the Media for the Committee on Institutional Affairs’, appended to the ‘Motion for a Resolution on Openness in the Community’, see n. 23, pp.16-21 [↑](#footnote-ref-533)
534. DOC\_EN\DV\260\260723, available at: <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=WSLLLk0SsQS31tNpbTQkkXj7nTw1VRRdG0MlW3wsVJsQSs6ny8pt!-346607269?docId=134333&cardId=134333> [↑](#footnote-ref-534)
535. Ibid, p. 2 [↑](#footnote-ref-535)
536. Ibid, p. 3 [↑](#footnote-ref-536)
537. Ibid, pp. 3-4 [↑](#footnote-ref-537)
538. Ibid, p. 5 [↑](#footnote-ref-538)
539. Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizo Turco v Council,* para. 45 [↑](#footnote-ref-539)
540. *C-280/11 P Council v Access info. Europe, para 63.* [↑](#footnote-ref-540)
541. Case T-424/14 & T-425/14 *ClientEarth v. the Commission,* para. 95 [↑](#footnote-ref-541)
542. Case C-506/08 P *Sweden v the Commission,* para. 87 [↑](#footnote-ref-542)
543. Case T-306/12 *Spirlea v Commission,* para 52. [↑](#footnote-ref-543)
544. Joined Cases C-514/07 P and C-532/07 P Association de la Presse Internationale ASBL (API). [↑](#footnote-ref-544)
545. A, Alemanno & O. Stefan ‘Openness at the Court of Justice of the European Union: Toppling a Taboo’ *CMLRev* (2014) 51, 97 [↑](#footnote-ref-545)
546. Sabatier & Jenkins Smith, n. 3 [↑](#footnote-ref-546)
547. Collins, H. & Evans, R. ‘The Third Wave of Science Studies: Studies of Expertise and Experience’ in *Social Studies of Science (2002)* 32(2) 235 [↑](#footnote-ref-547)
548. See also, R. Hoppe and J. Grin. n. 8 [↑](#footnote-ref-548)
549. [↑](#footnote-ref-549)
550. H. Mance, *Britain has had enough of experts, says Gove* (03 June 2016) accessible online: <http://www.ft.com/cms/s/0/3be49734-29cb-11e6-83e4-abc22d5d108c.html#axzz4L0u2WPFh>, accessed 08/06/16 [↑](#footnote-ref-550)
551. Within this chapter, the phrases ‘Cultural Theory’ and ‘Grid-Group Cultural Theory’ are used interchangeably, both are referring exclusively to Grid-Group Cultural-Theory. [↑](#footnote-ref-551)
552. M. Thompson & A. Wildavsky, “A Cultural Theory of Information Bias in Organisations” in *Journal of Management Studies* (1986)23(3), 273 [↑](#footnote-ref-552)
553. R. Hoppe ‘Cultures of Policy Problems’ in *Journal of Comparative Policy Analysis: Research and Practice* (2002) 4, 305 [↑](#footnote-ref-553)
554. R. Hoppe, ‘Applied Cultural Theory’ in F. Fischer, G. J. Miller & M. Sidney (eds.) *Handbook of Public Policy Analysis: Theory, Politics and Methods* (2006, London, Taylor Francis) 289, 299 [↑](#footnote-ref-554)
555. M. Douglas & A. Wildavsky, *Risk and Culture* (1982, Berkeley, University of California Press) [↑](#footnote-ref-555)
556. C. Hood, *The Art of The State: Culture: Rhetoric and Public Management* (1998, Oxford, OUP) 25 [↑](#footnote-ref-556)
557. See Chapter 3, section 3.2. [↑](#footnote-ref-557)
558. See section 3.2 of Chapter 2, which discusses at length the rationale and rhetoric espoused by the Council, European Parliament, Court of Justice & Commission in justifying the move towards increasing transparency. [↑](#footnote-ref-558)
559. See P. Birkinshaw, *European Public Law* (2003, London, Butterworths) where it is argued in chapter 1 that European integration has been most successful at a formal legal level, confirming that the default institutional position has often been to provide solutions through legislative means (either for the purposes of harmonisation or for providing de minimis legal standards.) [↑](#footnote-ref-559)
560. R. Hoppe, n.3 [↑](#footnote-ref-560)
561. Thompson et al; Mamadouh [↑](#footnote-ref-561)
562. J. Richardson & S. Mazey (eds.) *European Union: Power and Policy Making* (2015 4th ed, London, Routledge); A. Wille, *The Normalisation of the European Commission*: *Politics and Bureaucracy in the EU Executive* (2013, Oxford, OUP); [↑](#footnote-ref-562)
563. Curtin etc. [↑](#footnote-ref-563)
564. M. Thompson & A. Wildavsky, “A Cultural Theory of Information Bias in Organisations” in *Journal of Management Studies* (1986)23(3), 273 [↑](#footnote-ref-564)
565. Some assume science and religion to be mutually exclusive, since scientific enquiry is supposed to represent a method that is rigorous and analytical, and based upon empirical observation of circumstances. Religion conversely, is predicated on faith in the divine. Nevertheless, Rastogi has posited that the only basis on which intrinsic moral values may be postulated, and in which all human beings can be said to be harmoniously related, is in their mutual identification with the Divine. Furthermore, this framework relationship is “rational in an absolute and universal sense.” As such, it facilitates lasting solutions to the malfunctioning of social systems. P. Rastogi, *Policy Analysis and Problem Solving for Social Systems. Toward Understanding, Monitoring and Managing Complex Real World Problems* (1992, New Delhi, Sage) [↑](#footnote-ref-565)
566. D. Dery *Problem Definition in Policy Analysis* (1984, Lawrence KS, University of Kansas Press) 21 et seq. [↑](#footnote-ref-566)
567. See *Chapter 3* [↑](#footnote-ref-567)
568. Achieving transparency has long been associated with technological advances in the delivery of public services, particularly through ICT and widespread internet access, see J. Elia, ‘Transparency Rights, Technology and Trust in *Ethics and Information Technology* (2009) 11(2), 145; K . Hacker & J. van Dijk (eds.) *Digital Democracy: Issues of Theory and Practice* (2000, Sage, London) [↑](#footnote-ref-568)
569. See Chapter 3, section 3 [↑](#footnote-ref-569)
570. For an overview, see *Chapter 2*, section 1 [↑](#footnote-ref-570)
571. Hoppe, n. 3, 316 [↑](#footnote-ref-571)
572. H. Rittel & M. Webber, “Dilemmas in a General Theory of Planning”, in *Policy Sciences* (1973) 4, 155 [↑](#footnote-ref-572)
573. See for instance, D. Curtin, ‘Transparent Executive Power’ in *Executive Power in the European Union* (2009, Oxford, OUP) 207 et seq. which details the institutional culture of the Council of Ministers in the context of the EU’s legal and political architecture. [↑](#footnote-ref-573)
574. Thompson & Wildavsky, n. 11, 280 [↑](#footnote-ref-574)
575. Christopher Hood has noted how ‘lottery based’ systems of social regulation can be identified within bureaucracies as a logic of ‘how to do’ government, as was briefly discussed in *Chapter 6*. See C. Hood *The Art of the State: Culture, Rhetoric and Public Management* (1998 Oxford, OUP); C. Hood ‘Control over Bureaucracy: Cultural Theory and Institutional Variety’, *Journal of Public Policy* (1995) 15(3), 207. [↑](#footnote-ref-575)
576. Arguably, fatalistic attitudes towards the Union and its institutions were instructive in many of the pro-Brexit arguments influencing the UK’s referendum in June 2016 on continuing membership of the European Union. Concerns about the comparative lack of influence on the direction of policy and the diminution of sovereignty are well-rehearsed in accounts of the UK’s traditionally uneasy relationship with the Union, particularly in relation to social and political integration, see for instance: J. Medrano, *Framing Europe: Attitudes to European Integration in Germany, Spain and the United Kingdom* (2003, Princeton, Princeton University Press). [↑](#footnote-ref-576)
577. See for instance case T-233/09 *Access Info. Europe v Council* [↑](#footnote-ref-577)
578. Extensive analysis is provided by Professor Steve Peers in the Statewatch.org observatory on EU access to documents, [*http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm*](http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm) [↑](#footnote-ref-578)
579. *Commission v Techische Glaswerke Ilmenau, para 6O: ‘Moreover it is important to note that, in contrast with cases where the Community institutions act in the capacity of a legislature, in which wider access to documents should be authorised…documents relating to procedures for reviewing State aid… fall within the framework for administrative functions specifically allocated to the said institutions…”* [↑](#footnote-ref-579)
580. See chapter 3, part 3 for discussion and analysis. [↑](#footnote-ref-580)
581. Y. Dror, *Policymaking under Adversity* (1986, New Brunswick: NJ, Transaction Books)10 [↑](#footnote-ref-581)
582. I. Janis *Groupthink. Psychological Studies of Policy Decisions and Fiascoes* (1982 2nd ed, Boston: MA, Houghton Mifflin) [↑](#footnote-ref-582)
583. Hoppe, n.3 316 [↑](#footnote-ref-583)
584. Janis, n. 26, 243 [↑](#footnote-ref-584)
585. Hoppe, n.3, 317 [↑](#footnote-ref-585)
586. See D. Curtin, ‘Transparent Executive Power’ in D. Curtin *Executive Power of the European Union: Law, Practices and the Living Constitution* (2009, Oxford, OUP) [↑](#footnote-ref-586)
587. For an example of the value position of the European Parliament, see : European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast*), (2011), A7-9999/2011. [↑](#footnote-ref-587)
588. Joined Cases C 39/05 & C 52/05 P *Sweedn & Turco V Council* ECLI:EU:C:2008:374 [↑](#footnote-ref-588)
589. Council, *Public access to documents*, (2013, Internal Note 17177, LIMITE) accessible online: <http://www.wobbing.eu/sites/default/files/document%20leaked.pdf> accessed 03/05/2016 [↑](#footnote-ref-589)
590. See European Parliament, *Policy Department B. Structural and Cohesion Policies. Communicating Europe to Its Citizens: State of Affairs and Prospects* (2014), accessible online: <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/529080/IPOL_STU%282014%29529080_EN.pdf>, accessed 25/02/16 [↑](#footnote-ref-590)
591. Hoppe, etc. [↑](#footnote-ref-591)
592. B. Swedlow, ‘Toward Cultural Analysis in Policy Analysis: Picking Up where Aaron Wildavsky left off’ in *Journal of Comparative Policy Analysis: Research and Practice* (2002)4, 267 [↑](#footnote-ref-592)
593. M. Thompson, ‘Don’t let it put you off from dinner: First steps towards ethical policies shaped by cultural considerations’ in *Journal of Comparative Policy Analysis* (2002) 4, 347 [↑](#footnote-ref-593)
594. Van Baren (2001) [↑](#footnote-ref-594)
595. Ibid. [↑](#footnote-ref-595)
596. Chapter 3, section 3.3; statewatch.org [↑](#footnote-ref-596)
597. Council reports that there is ‘unlikely to be a successful outcome of negotiations’. [↑](#footnote-ref-597)
598. A. Peterse & R. Hoppe, *Handling Frozen Fire. Political Culture and Risk Management.* (1993, Boulder, Westview Press) 252 [↑](#footnote-ref-598)
599. See for instance, P. Leino ‘Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents’ (2011) *CML Rev*, 48, 1215. See also the websites of [www.AccessinfoEurope.org](http://www.AccessinfoEurope.org) and [www.wobbing.eu](http://www.wobbing.eu). [↑](#footnote-ref-599)
600. Curtin, n. 19 [↑](#footnote-ref-600)
601. Hoppe, n. 3 [↑](#footnote-ref-601)
602. C. Hood *The Art of the State: Culture Rhetoric and Public Management* (1998, Oxford, OUP) 8 [↑](#footnote-ref-602)
603. J. Mashaw ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in M. Dowdle (ed) *Public Accountability* (2006, Cambridge, CUP). [↑](#footnote-ref-603)
604. J. Mashaw *Bureaucratic Justice: Managing Social Security Disability Claims* (1983, New Haven Yale University Press) 24 [↑](#footnote-ref-604)