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Transparency and the TTIP negotiations

A critique of the common sense



A couple of months ago, Matthias Fekl, the French State Secretary of Trade, gave a talk at UC Berkeley in which he threatened to abort the TTIP negotiations due to its massive lack in transparency. The claim that transparency would foster trust and secure a better outcome of democratic processes is now very common. In the public debate, it is the most prominent critique aimed at the Transatlantic Trade and Investment Partnership (TTIP) as leaders of the

European Union and the United States negotiate the free trade agreement in secrecy. This raised distrust as to whether the leaders actually had the public interest (whatever it is) in mind, and transparency seems to be the solution that re-establishes trust and promotes democratic participation. However, research indicates that transparency has none of these effects - at least not directly. What can realistically be expected of transparency?

Transparency, now and then: Governing by distrust

Trust is today considered the gold standard of politics. It makes sense to relate transparency and trust in order to lobby for more transparent politics. Yet, in contrast to that, the claims for transparency usually rise when trust is damaged, when we at least want to be able to check if everything goes in the right direction: Trust is good, control is better. Accordingly, the British jurist Jeremy Bentham who developed political transparency around 1800 stressed over and over again: transparency »is a system of *distrust*«. [\[1\]](#)

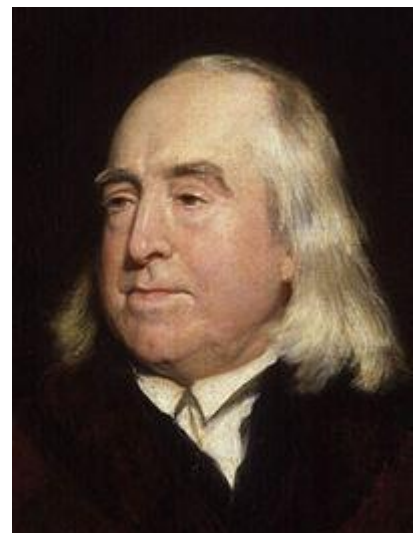
When we turn to Bentham's initial idea of transparency, his rationale seems compellingly timely. Corruption, he thought, is not a question of character but one of chance. People with power would always tend to maximize their own pleasures, dumping the cost on the public. Underpinning those impressions, Bentham developed a moral theory called utilitarianism. According to utilitarianism, every human being is steered by »two sovereign

masters, *pain* and *pleasure*«. ^[2] Consequently, human beings try to maximize their own pleasure (›self-interest principle‹). But legislation can also use their perception of pleasure and pain to steer the behavior. By incentives and sanctions, the happiness of one would, thus, be aligned with the happiness of the greatest number (›interest junction principle‹).

This utilitarian moral mechanics is implemented by transparency. Inspired by Newton's experiments with transparent prisms, Bentham thought, transparency offers a new method of ›obtaining power of mind over mind‹: ^[3] People whose behavior is exposed to the public would behave aptly in order to avoid sanctions by the public. Transparency, thus, becomes the guideline to set up a public sphere that is able to access and steer the supposedly corrupt behavior of officials and politicians.

Always a political practitioner, Bentham made concrete suggestion as how to achieve a transparent political system. First, political language must be made transparent by *formal rules*. They regulate how to formulate laws, how to speak in parliament and express a political position. Secondly, he demanded (and drafted) a glass architecture for assembly halls and ministerial offices. Thirdly, Bentham advocated a massive expansion of media-publicity. In addition to extensive newspaper reports, this included an encompassing duty of the state to register, document and publish political debates. Those formal procedures, Bentham thought, would filter the personal interests, producing a pure political discourse that is freed from metaphors and delusion and instead based on rational information. Thus grounded on purified information and structured by its own transparent rules, the public debate would produce a *rational universal judgement*. This rational judgement, finally, must be enforced by a transparent institutional system that reaches hierarchically from the people down to the local functionary, assigning specific tasks to every official while making him directly accountable and dismissible.

To sum up Bentham's strategy, the governance of transparency tries to steer the behavior of public officials because they cannot be trusted. Transparency thereby informs a set of practices that *rationalize the public sphere*: On the one hand, they enable and enforce the *public control* of the functionaries by *formalizing political language and action*. On the other hand, the (assumed) purification of politics would lead to more and more reliable information, improving the *content* of political judgement. After formalizing what is said and done according to the meta-principles of transparency, Bentham thought, the purified information would automatically effect a *neutral and rational judgement* that embodies the ›universal interest‹, the ›greatest happiness of the greatest number‹.



Jeremy Bentham (1748 – 1832)

The timeliness of Bentham's governance strategy, however, is not entirely accidental. Today's call for transparency rose out of the crises in the 1970s that became known as the beginning of a second or reflexive modernity. Inspired by economic rational choice theories, New Public Management (NPM) offered a political response to those crises. Like Bentham, it diagnosed the state and its officials to be inefficient and unreliable. As a remedy NPM proposed formal performance measurements and constant observation.^[4] Transparency, again, promised to make politics more accountable and more efficient.

The (dys)function of distrust and transparency

The linkage of distrust and transparency irritates today's common sense in at least two ways: On the one hand, despite the contemporary focus on trust, the public debate again and again calls for an instrument that is based on distrust: Who calls for transparency is not willing to trust blindly on the reasoning and action of officials. Rather, s/he suspects that they will behave contrary to the public interest. On the other hand, it challenges the comfy belief that trust is *always* the right choice. Contrary to that, Bentham considered distrust not a ›bad‹ thing for democracy but a valuable ›good‹. He even stated that »every good political institution is founded upon this base«. ^[5]

Yet, the tendency to moralize trust and distrust as good or bad blocks the necessary discussion of their (political) function. Both, trust and distrust, are approaches to reduce the overwhelming complexity that follows out of contingency.^[6] As in Bentham's case, these contingencies are often perceived as insecurity. For instance, the uncertainty as to whether an official will fulfill his duty aptly translated into the fear that corruption will threaten the property of the people.

Transparency was Bentham's strategy to respond to this situation as well as it was one of NPM's major responses to the crises of the 1970s. It enforces distrust by inspection and formalization in order to regain control. This idea to rely on formal institutions instead of personal virtue, is crucial for a liberal democracy, and it is inscribed in its every-day practices, such as the freedom of press and information or the parliamentary rules of procedure.

Distrust, however, has an inherent problem: It re-enforces itself because the information on which one allows to trust narrows with every step. As there are no final criteria to guarantee that an information is reliable, the ›distruster‹ must focus on negative expectations: s/he is always in search for betrayal. But when the trusted information narrow down, there is no ground on which to decide how to act - and the capacity to act stumbles. As distrust increases, the system gets paralyzed.

Calling for transparency can, therefore, be dangerous if one mistakes it for an instrument of trust. Such an assumption as it is prevalent in the debate about TTIP ignores that

transparency fosters distrust. But when distrust rises, it could lead up to a point where people are not able to trust on any democratic processes any longer. Transparency, thus, needs a counterbalance to stop the spiral of distrust. Only in such a balanced setting, transparency might help to enhance legitimacy.

How transparency leads to non-transparency and expert participation

The TTIP debate is also a good example for a second concern that has to be addressed when we talk about transparency. On the one hand, in contemporary claims as well as in Bentham's discussion, transparency aims to reduce the insecurities of opaque political actions. On the other hand, to make political action visible and accountable, the applied practices ultimately produce more and more information. As transparency aims to reduce complexity through a system of visibility, it paradoxically produces new complexities. In consequence, the single information is hidden again: Instead of locking it in a secret corner, it is now the needle in the haystack.

In a different context, this phenomenon is known as information overload.^[7] In politics, the European Parliament provides a good illustration. It publishes a mass of data, such as livestreams and protocols of parliamentary sittings, a »newshub« that aggregates information of members of parliaments, political groups and the parliamentary offices, and it offers a lobby register. Nonetheless, the European Parliament is often considered to work opaquely. Although still in hope that pure information would avoid this paradox, Bentham already noted the problem: »as the mass increases, the transparency diminishes«.^[8]

Producing more and more information, thus, creates a new complexity that cannot be handled by a single citizen. Rather than fostering the participation of the citizens, new actors step into the political process. Those actors build special competencies of inspection and evaluation for a specific topic in order to deal with the new informational complexity. To handle the informational complexity, those organizations develop a complex inner structure that is not transparent in itself. Transparency, hence, fosters the participation of certain specialized non-governmental organizations. It sets the stage for expert participation, not for citizen's participation.

For TTIP, the phenomenon of expert participation can be observed as well. When Cecilia Malmström became the European Commissioner for Trade in 2014, she answered the calls for transparency. Among others, she published an encompassing set of documents^[9] that contains the European positions in detail and an explanation in plain language. However, the legal scholar Fernanda Nicola, a specialist for extra-legal influences on law, especially on free trade agreements, found out that transparent information is often used by companies and interest groups to foster their positions. She warns that »transparency claims make the negotiation seem more democratic when in fact they enable interest groups across the Atlantic to capture the front end of the process«.^[10]

Transparency vs. the public sphere: Clarifications and Alternatives

Turning back to a closed door politics in which the state takes care of the universal interest is, however, not the solution for a democratic society. Transparency can, in fact, tackle democratic deficits. But those deficits are not a lack of trust and citizen's participation. The democratic deficits transparency can actually tackle are those associated with a liberal understanding of democracy.

Transparency might help to steer and control representatives by formalizing the legitimate corridor of their actions. Especially in the TTIP negotiations, this could be a powerful tool to enforce that the outcome will not exceed unnegotiable European standards - regarding economic products (such as pharmaceuticals) and political processes (such as public jurisdiction). In this respect, the monitoring by non-governmental organizations like Transparency International is crucial in order to balance the influence of other issue groups and to spot issues in the complex data of negotiations that should be debated publicly.

The public debate, however, should not rely on transparency claims. Publicity - as I tried to show - is not the same as transparency. Rather, transparency is a very specific strategy to organize the public sphere by rationalizing and formalizing behavior. This approach hopes to produce a rational, universal judgement. However, as it favors specific expert actors and their actions, it excludes other actors and their perspectives. Thus, the promises of neutrality and security offered by transparency are in vain.

Republican authors (such as Hannah Arendt) as well as liberal pluralists (such as Chantal Mouffe) have therefore argued that laws and institutions should help to multiply public rooms for debates instead of selecting one legitimate way to participate.^[11] Town hall meetings, deliberative mapping, participatory budgeting but also art performances and protests are examples for those public rooms. As they offer more opportunities and divergent modes to participate, they bring back the plurality of societal interests into political decision making.

The face-to-face encounters in those rooms offer two other advantages: First, they hold the potential to build trust. Interactions provide an opportunity to gain a solid experience of and familiarity with the beliefs and actions of the counterpart.^[12] They are an occasion (not a guarantee) to learn that the counterpart has a reasonable perspective on the goals of a common society, even if s/he holds beliefs in contradiction to my own. In turn, and second, they demonstrate that one's own perspective is not universal either. In fact, there is no such thing as a neutral judgement but only a collective and always temporary political decision about how we want to live.

In the TTIP affairs, the massive call for transparency has obscured the need for such a substantive debate. The pluralist-republican approach, however, requires the motivation to invest time and effort in the public debate. It requires a sense for the common affairs. The massive protests against certain regulations of the TTIP negotiations demonstrated the

potential for civil commitment. Rather than to content oneself with the call for transparency, this potential for complicated, multifaceted and detail-loving controversies about policies should be activated more often.

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[1] Bentham: [Essay on Political Tactics, p. 314](#). Recent empirical studies, too, are highly skeptical of the transparency-trust relationship, for instance Grimmelikhuijsen et al.: [The Effect of Transparency on Trust in Government](#).

[2] Those are the famous words at the beginning of Bentham's [An Introduction to the Principles of Morals and Legislation](#).

[3] Bentham: [Panopticon, p. 39](#). I discuss the genealogy of transparency, especially the link to physics, in length in my book [Die Ordnung der Transparenz](#).

[4] Tom Christensen and Per Lægread provide a useful introduction in [The Ashgate Research Companion to New Public Management](#), pp. 1-16. Among others, Christopher Hood stressed the parallels to Jeremy Bentham in his account of New Public Management in the [International Encyclopedia of the Social & Behavioral Sciences, pp. 12553-12556](#).

[5] Bentham: [Essay on Political Tactics, p. 314](#).

[6] This is discussed in Niklas Luhmann's book [Vertrauen](#). On pages 93-100, he also describes the autocatalytic dilemma of distrust, which I refer to in the next paragraph.

[7] For an exemplary overview, including a discussion of the effects, see Edmunds/Morris: [The problem of information overload in business organisations](#).

[8] Bentham: [Rationale of Judicial Evidence Part 2, p. 29](#).

[9] They are published online on the website of the [European Commission](#).

[10] Fernanda Nicola: [The Paradox of Transparency](#).

[11] For an extensive account see Vincent Rzepka/Grit Straßenberger: [Für einen konfliktiven Liberalismus](#). For the mentioned examples also see Mark Bevir's [A Theory of Governance, pp. 187-205](#).

[12] This was demonstrated in several works of symbolic interactionism as well as adapted and modified by Niklas Luhmann. For a brief overview see Linda R. Weber: [Self at the Heart of Trust](#).

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