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National Transparency Regimes: Rules or Principles? A Comparative Analysis of the United States and The Netherlands

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ABSTRACT

Technology development and democratization have been identified as the general drivers of the worldwide thrust in transparency. But what transparency regimes do these drivers generate in different countries? This mixed method study indicates that national regimes are different due to pre-existing institutional differences and critical junctures in the historical development of transparency regimes. Our analysis shows that the U.S. transparency regime can be characterized as a rules-based approach while a principles-based transparency regime prevails in the Netherlands. This article nuances the debate about the global character of transparency and highlights two different outcomes of the push for transparency.

KEYWORDS

Transparency regimes;
Freedom of Information;
Rules and Principles; United
States; Netherlands

Introduction

In the past decades national transparency regimes have increased worldwide (Erkkilä, 2010) and this movement has not yet come to a hold. The Open Government Partnership (2014), launched in 2011, is a global effort to promote transparency. Currently more than 60 countries are participating. Transparency—defined as the availability of information about an organization allowing external actors to monitor the internal workings or performance of that organization (Grimmelikhuijsen, 2012; Meijer, 2013)—is increasingly seen as a hallmark of good governance (Hood, 2006; Roberts, 2006). This idea has gained so much momentum that countries from Estonia to China are all implementing transparency regimes.

The general drivers of the current thrust of transparency initiatives are a call for democratization and accountability and the availability of new technologies. At the same time, these transparency initiatives need to have a “fit” with existing institutional structures and therefore one could expect that pre-existing institutional differences are mirrored in differences in transparency regimes (Meijer, 2013). This assumption, however, has not been explored since there are few comparative studies that systematically analyze differences between countries. Thus, despite the enthusiasm for and popularity of transparency, its local meaning and embedding in national histories are still obscure (Hood & Heald, 2006).

This paper aims to reconstruct how *transparency regimes* have evolved against the background of pre-existing institutions. Transparency regimes are the sum of all transparency arrangements of a country. These arrangements and policies arise from and reflect the political, social, and normative context (Mitchell, 2011). To explore differences in the construction of transparency regimes, we will study the development of transparency in two countries: the United States and The Netherlands as part of the European Union. In order to understand the historical development a comparative perspective can lead to asking very useful and sometimes new questions (Moore, 1993). The two countries have been frontrunners in the transparency movement and both have a long transparency tradition. At the same time, these countries are different in their political institutions with the United States as a majoritarian system and The Netherlands as a consociational democracy (Lijphart, 1977).

This paper will set out to answer the following questions:

- (1) To what extent are U.S. and Dutch transparency regimes—in terms of the legal frameworks and practices of civil servants—similar or different?
- (2) How can we explain these similarities or differences between these countries from a historical institutional perspective?

This comparative analysis contributes to our academic understanding by conceptualizing transparency regimes as national translations of global trends. Our paper shows that these regimes may either be based on rules, a more legalistic approach, or principles, a more normative approach.

Dimensions of transparency regimes

Transparency regime as a concept is defined in line with accountability regime (Bovens, Schillemans, & Hart, 2008), as the sum of all transparency arrangements of a country. This concept attempts to capture how institutions, actors, and ideas tend to coalesce into relatively long-term institutional patterns of interaction that combine to keep contents and processes more or less constant over time (Howlett, Ramesh, & Perl, 2009). Freedom of information legislation (FOI) is considered the backbone of transparency regimes (Grimmelikhuijsen, 2012; Roberts, 2006). However, transparency regimes are not just contained in rules. Arrangements and policies are also revealed through practices, symbols, and discourses (Schneider & Ingram, 1997). Together, they become institutionalized guiding government actions (Mellett, 2009). Based on the policy design literature (Howlett, 2011; Schneider & Ingram, 1997; Smith & Larimer, 2009) we distinguish four dimensions of a transparency regime: target populations, goals or problems to be solved, rules governing or constraining action, and rationales and assumptions. We will use these four elements to develop a precise understanding of transparency regimes.

First, the *target populations* are those persons whose actions are most likely to deliver goals (Schneider & Ingram, 1997). Transparency regimes provide citizens the opportunity to see what is going on inside the government. In addition, citizens need information to participate and voice their opinions (Meijer, Curtin, & Hillebrandt, 2012). Government agencies therefore need to provide and stimulate opportunities for feedback and participation. Second, *goals* are the basic aims and expectations a government has in deciding to pursue some course of action (Howlett, 2011). Goals can be stated in broad terms allowing professionals great leeway in interpretation or they can be more specific (Schneider & Ingram, 1997). Transparency can be seen as a goal in itself, in which transparency is seen as a basic human right (Birkenshaw, 2006; Florini, 2007; Scholtes, 2012) or as a means to an end with the aim of improving political institutions (Heald, 2006; Mitchell, 2011). The third dimension refers to *rules*. Rules can be complex and obfuscated and can require someone specially trained to interpret and

administer them properly (Schneider & Ingram, 1997). FOIs as the backbone of transparency, allow access to information. FOIs establish rules on where and how to file requests. Besides passive disclosure, increasingly FOIs also incorporate provisions of proactive disclosure. Thereby establishing a legal obligation on public authorities to “push out” information (Darbishire, 2010). Finally, *rationales* and assumptions, they are the underlying tenets of transparency regimes. Rationales are the explanations and justifications for the design itself, such as the choice of a target population, goals, or rules (Schneider & Ingram, 1997). Assumptions are the underlying logics that tie the other elements together (Schneider & Ingram, 1997).

Thus, transparency regimes can vary on each of these dimensions. Applying this conceptual framework, results in an overview of similarities and differences between regimes at one point in time. However in this study we are not only taking a “snapshot” view but we will focus on the origins and evolution of transparency regimes as well. Tracing earlier decisions through time and across cultures may provide an explanation of the possible variation in transparency regimes.

Historical institutional perspective on transparency regimes

Historically, transparency has been an area of democratization and administrative reform with differing national traditions and institutional trajectories (Erkkilä, 2012). The politics of decision-making interacts with the institutional framework and culture of a country to produce differences (John, 1998). Moore (1993) shows how variation in starting points, rules, institutions, and reactions result in different approaches to democracy. Differences in policy inheritance could be a possible explanation for current differences in transparency regimes. Yet regimes can also converge due to modernization and globalization (Erkkilä, 2010). So far the origins of institutions and the sources of change remain rather opaque (Pierson, 2000).

Institutions in this paper are “the rules and legacies associated with particular institutions or institutional arrangements” (Peters et al., 2005, p. 1286). Institutional differences result in different approaches to democracy (Lijphart, 1977). From a historical institutionalist perspective, institutions are considered as rather persistent elements of the historical landscape, as one of the central factors pushing historical developments along certain paths (Hall & Taylor, 1996). Pierson (2000) argues that institutions are often

designed to be change resistant. Initial institutional decisions can become self-reinforcing over time. These self-reinforcing processes make institutional configurations and their policies difficult to change since it encourages actors to focus on a certain alternatives and to continue movement down a particular path once initial steps are taken. Thus previous choices may be sticky and path dependent (Pierson, 2000).

In order to study the origins and evolution of transparency regimes, we will build on the following elements as part of historical institutionalism (Peters et al., 2005): (a) the selection of initial paths and the political choices made at policy initiation, (b) the role of political actors, next to bureaucrats and policy makers, (c) the evolution of policy, (d) institutions and ideas, for instance, the influence of political parties as conduits for the expression of ideas, (e) the structure of an agency in terms of linking outcomes with actors and with processes that produced the outcome, and lastly (f) change. Change occurs because periods of path dependent stability can be interrupted by critical junctures (Copoccia and Kelemen, 2007). Coppoccia and Kelemen (2007 p.348) define critical junctions as “relatively short periods of time during which there is a substantially heightened probability that agents’ choice will affect the outcome of interest.” Yet, next to more dramatic shifts, change can also occur incrementally which still implies change, evolution, and path dependency (Guy Peters et al., 2005).

Thus, analyzing historical institutional trajectories can provide insight into crucial moments of regime formation of transparency regimes against the background of pre-existing differences in political and administrative institutions, which can send countries along distinctive developmental paths, thereby developing different transparency regimes. Moreover it indicates that regimes continue to evolve in response to changing conditions in the environment, yet constrained by past trajectories that had already resulted in a variety of democratic and political institutions (Lijphart, 1977; Rutgers, 2001; Thelen, 1999).

Research methods

The study is based on a comparative mixed method design. The United States and The Netherlands were selected as cases because these countries both have a long history of transparency. The two countries differ however in their tradition of the concept of the state and democracy. Some scholars (Rutgers, 2001; Stillman, 1990) argue that the United States stems from a stateless tradition amounting to a rejection of unitary administrative models and of centralization of power.

The Netherlands stems from a stateness tradition, in which the state is considered the guardian of the general interest and the organizer of collective action. State and stateless refer to different ways of conceptualizing social reality (Rutgers, 2001). In addition, the United States has a majoritarian system while The Netherlands has a consociational democracy (Lijphart, 1977). These differences in institutional tradition may have caused each country to develop their transparency regime along different paths to embed them in democratic and administrative systems.

The *research strategy* consisted of two phases. First, the transparency regimes were compared by analyzing the legal frameworks and practices of civil servants. Data from a broader study was used encompassing an analysis of legal documents, an online survey, and in-depth interviews (Ruijter, 2013). The data was analyzed, guided by the dimensions identified in the conceptual framework; target populations, goals, rules, and rationales and assumptions.

For the *survey* a cross-sectional design was used. A modified version of Dillman’s (2007) tailored design method was used for the dissemination of the survey (Liu, Horsley, & Levenshush, 2010). A non-probability sample was drawn from a sampling frame. In order to obtain a sampling frame in the United States the Online Leadership Directories of the Federal Government was used in November 2012 to identify communication officials from federal agencies. This led to a sampling frame of 1393 people. 169 people responded, a response rate of 12%. In The Netherlands a database was created, by asking individual ministries to participate. All but one Ministry was willing to participate. The database consisted of 169 Dutch communication officials, 68 responded, a response rate of 37%. The *interviews* served to provide an in-depth understanding of the transparency regimes. 14 in-depth interviews with federal American open government and communication officials and 16 in-depth interviews with national Dutch open government and communication officials were carried out. Three interviews took place by phone the other 27 interviews face to face. The interviews were recorded, except for five interviews. In these five cases extensive notes were taken. Participants were identified, by using both a random and snowballing technique. In five American federal agencies both a government communicator and an open government official were interviewed. In the other agencies the Open Government (Deputy) Director was interviewed. In The Netherlands 7 different national agencies and 16 different respondents participated. Within two agencies the researcher spoke to both transparency/Open Data experts and communication officials. In the other agencies either

the transparency expert or a government communicator was interviewed. The questions for the survey and the interviews concerned respondents' perception of transparency in general, their involvement in transparency activity, the rules and regulations regarding transparency, and the organizational support they received.

Second the historical trajectories were analyzed using *process tracing*. Process tracing is a method that attempts to trace the links between possible causes and observed outcomes. One form of process tracing is a detailed historical narrative. The narrative consists of a sequence of events some of which foreclose certain paths and steer the outcome in other directions, thereby identifying key decision points or branching points (George & Bennett, 2005). Official documents such as legislation, clarifications of legislation, white papers, evaluations, and Open Government plans in both countries were analyzed. These documents were analyzed guided by the concepts identified in the conceptual framework: (a) the selection of initial paths, (b) the role of political actors, (c) the evolution of policy, (d) institutions and ideas, (e) the structure of an agency, and (f) change.

Comparing transparency regimes

In this section the findings of the analysis of the transparency regimes are described. We thereby focus on the FOI and the practices of civil servants. The findings are presented in line with the dimensions: target population, goals, rules, and rationales and assumptions.

Legal frameworks

American freedom of information act (FOIA)

In terms of the dimension target population, the FOIA provides for any person presumptive access to unpublished, existing, and identifiable records of the agencies of the Federal executive branch without having to demonstrate a need or reason for such a request (Relyea, 2008). Acquiring knowledge is necessary for the empowerment of the people. In Congressional reports regarding the bill, Madison, who was the chairman of the committee which drafted the first amendment is quoted: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives (...)" (In: S. Rept. No 1219, 88th Cong., 2d Sess. S. 1666). A democratic society requires an informed, intelligent electorate (H. Rept. No. 1497, 89th Cong., 2d Sess, 1966).

The FOIA itself does not address a specific goal but the Congressional Report (Senate Report. No 1219, 88th Cong., 2d Sess, 1964) refers to a goal in more specific terms: "the bill (S. 166) to clarify and protect the right of the public to information." Or "the public's right to know the operations of its Government." Furthermore, the 1966 signing statement reads "democracy works best when the people have all the information that the security of the Nation permits" (Johnson, 1966). It is a means for citizens to know what their government is up to (Department of Justice, 2014). From the time the FOIA was enacted it has been a continual work in progress, with amendments by Congress every decade.

Concerning the dimension rules, the act (5 U.S.C § 552) is explicit. The FOIA addresses access to documents and the posting of documents on websites as well as the publication in the *Federal Register*. Under FOIA, agencies must disclose any information that is requested. An agency should respond to the requestor and let them know if their request is going to be met within 20 working days. The FOIA has nine exemptions. An administrative appeal is made directly to the agency. The final recourse is through the US federal court system. The FOIA gives direct instructions to agencies about an annual report with an elaborative description of the requests, denials, how long it took the agency to respond, etc., that needs to be submitted to the Attorney General of the United States. The FOIA addresses access to documents but it also requires agencies to make available certain categories of information without a request (FOIA (a) (2)), including final opinions and orders, specific policy statements and interpretations, certain administrative staff manuals, and frequently requested records (5 U.S.C. § 552). This is the underpinning for the Administration's requirement that agencies not rely solely on FOIA requests, but also engage in proactive disclosures (McDermott, 2010).

Finally, as far as the dimension rationales and assumptions are concerned, the FOIA is based on a document system characterized by directing and controlling. It is a more legalistic approach. After all, a system of documents requires that the requester knows which document it concerns and thus record-keeping by government agencies is essential (Daalder, 2005). It requires agencies to keep an index of their records. "This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen

simply because he had no way in which to discover it” (S. Rept. No 1219, 88th Cong., 2d Sess).

Dutch public access act

Regarding the dimension target population, under the Wet openbaarheid van bestuur (Wob), the Dutch Public Access Act (1991), any person can demand information related to an administrative matter if it is contained in documents held by the public authorities or companies carrying out work on behalf of a public authority. Proactively providing information is considered in the interest of democratic governance in general and in the interest of participation in particular (Stolk, 1985).

The goal formulated in broad terms in the first lines of the act states that it is in the interest of effective, democratic governance, to amend the rules concerning openness and public access to government information and to incorporate these rules in statute law wherever possible (Stolk, 1985; Wob, 1991). Openness and disclosure are perceived to be means to an end (Stolk, 1985).

Concerning the rules, the Wob requires that administrative bodies provide information on request. Once a request has been filed, the authority has 4 weeks to respond. Whereas the FOIA is a 19-page document, the Wob is described in 8 pages. The section about fees, exemptions, and conditions under which information can be deleted are much more detailed in the FOIA. The Wob has 11 exemptions. There is not a separate supervisory body for overseeing implementation of FOI under the law (Sandukhchyan, 2007). Appeals can be made to the administrative court, which reaches the final decision (E-Government Factsheet, 2010). The Wob makes an explicit distinction between passive and proactive information (Daalder, 2005). Regarding proactive disclosure the act states that an administrative authority shall provide, of its own accord, information on its policy, and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance (Wob, article 8). This information should be provided in a timely fashion (Memorie van Antwoord, 1976–1977; Wopereis, 1996), in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible (art. 8(2) Wob). The Wob also demands information to be up to date, accurate, and comparable (Wob, Section 2 (2)). As Schelhaas (1976) points out, standards such as “timely” leave room for subjectivity. Furthermore, the Wob does not specify classes of information that should be made public proactively. Contrary to passive dissemination, proactive dissemination is not based on an enforceable right. There is no legal recourse for citizens or any

interested party, but it is an instruction norm (Daalder, 2005).

As far as the underlying rationales and assumptions are concerned, the Wob addresses *information* as laid down in documents related to an administrative matter (Galjaard, 2002). The Wob can be characterized as an information system. An information system is based on mutual trust. In this system, requesters do not specifically have to know exactly which record it concerns. It is enough to relate to an administrative matter without having to mention a specific document (Daalder, 2005). In addition, for information providers the information system offers leeway and room for interpretation. In case of a conflict it can also be decided to disclose a summary instead of the whole text (Memorie van Toelichting, 1974–1975).

Differences in the practices of communication officials in the two countries

Next to the established law, we also analyzed the practices of transparency arrangements. The survey results showed that 32.8% of the American communication officials are regularly involved in disclosures in response to FOIA-requests, compared to 17.5% in The Netherlands. In both countries communication officials mainly contribute to making information available proactively; 87.7% in the United States and 63.1% in The Netherlands. All interviewees were involved in transparency initiatives.

Regarding the *target population*, about half of both American (50%) and Dutch communication officials (48%) interact most with the general public. They also interact with the media, not for profit and for profit organizations. 86% of the Americans and 79.2% of the Dutch communication officials take into account the different needs of their stakeholders when providing information. Although we see some slight differences between the countries, an independent samples t-test did not show significant differences. In line with the survey in both countries interviewees stressed the importance of feedback and participation the American interviewees often referred to transparency from the perspective of citizens, that *people* can tell what is going on inside the government. A slightly different discourse compared to the Dutch who emphasized that *the government* should show what it is doing, should be able to explain what it stands for and should explain why certain choices are made.

In terms of *goals*, the results of the survey showed that Dutch communication officials mainly indicated

that government transparency can contribute to enhancing trust in government and second in improving the relationship between citizens and government, whereas American communication officials indicated that transparency can contribute most to both trust and accountability (see Table 1).

In general, American communication officials knew more about the formal rules, which suggest that they have a stronger focus on legal requirements (see Table 2).

Respondents in both countries considered both passive (US 93.4% and NLS 98.1%) and proactive disclosure (US 92.6%, NLS 93%) to be (very) important aspects of government transparency. However, when asked which of the two is more important for enhancing government transparency, the majority of the Americans indicated both proactive and passive (53.3%), but 37.2% indicated proactive disclosure to be more important and only 9.5% indicated that making information available after a specific request is

more important. By contrast, the Dutch indicated that proactive transparency is most important (45.6%). However, 43.9% indicates that both proactive and passive are most important and 10.5% making information available after a specific request.

In terms of the last dimension, rationales, and assumptions, Americans when discussing aspects of Open Government, spontaneously referred to the FOIA but also other laws and regulations such as the Administrative Procedures Act, the Sunshine Act, The Privacy Act, Federal Advisory Committees, and the Paperwork Reduction Act. Furthermore, they described the choice for Open Government in general as incremental, no monumental change or something that has always existed.

Well I mean I think it [Open Government] springs from a tradition that you know that probably arises out of earlier programs like FOIA and you know sunshine laws that really speaks to the degree to which a government agency or department should try and share with the public as much information as it can. (Interviewee 6 US)

So even when we had these discussions about you know [Open Government], we try to not only focus on the Open Government initiative per se. We tried to look at all the tangent pieces and how they roll up into this concept called openness. So we spend a lot of time going back to a lot of laws and regulations and executive orders that have been out there for years. (Interviewee 2c US)

By contrast, the Dutch referred directly or indirectly to a changing society and technology that influenced the choice of government toward more openness. They indicate that transparency falls within a general trend of diminishing government authority and a government who has to earn trust from citizens. Two respondents referred in this context to an increasing horizontalization within society, a network society. This network society entails mutual trust and proactively and openly showing what you do as an agency.

There is the horizontalization movement that implies that you have to show how you deal with things (...) So I think it is mainly because of these kinds of movements that we are becoming more proactive. In the horizontalization movement we would like to be seen as a partner, with mutual trust. (Interviewee 7 NL)

Others referred to the Wob, reports by advisory Committees or public opinion reports. As one respondent summarized, pressure for disclosing information comes:

(...) from parliament, society and is supported by a little regulation. (Interviewee 3 NL)

A summary of the results can be found in Table 3.

Table 1. Contribution of Transparency.

Government transparency can contribute most to (more than one answer is possible)	US	NLS
Enhancing government accountability	62%	32%
Enhancing trust in government	65%	70%
Enhancing democracy	28%	19%
Reducing corruption	23%	7%
Improving the relationship between citizens and government	49%	39%
Enhancing government efficiency and effectiveness	29%	26%

Note. Respondents were allowed to select the three most important contributions that is why the total is more than 100%.

Table 2. Results Knowledge of Formal Rules.

	Survey Questions	True	False	Don't know
United States	Open government and transparency initiatives require disclosing information without waiting for a specific request	71.8%	13.5%	14.7%
	The freedom of information act mandates disclosing certain information without waiting for a specific request	32.7%	29.9%	37.2%
	There is regulation that requires government documents to be written in a for stakeholders understandable way	82.8%	6.4%	10.2%
Netherlands	The Wob mandates disclosing information without waiting for a specific request	45.6%	31.1%	19.3%
	The Wob mandates government agencies to disclose information in an understandable manner	45.6%	35.1%	19.3%
	The Wob mandates that government agencies disclose information at their own initiative regarding policy, preparation, and implementation	31.9%	43.9%	24.6%

Note. Right answer to all questions is "true."

Table 3. Summary Differences in Transparency Regimes in the United States and The Netherlands.

Regime Dimensions	United States	The Netherlands
<i>Target population</i>	Importance of knowledgeable electorate vital for democracy	Participation and public information, no difference in practice however
<i>Goals</i>	Right to information. Practitioners emphasize accountability and trust	Effective and democratic governance. Practitioners emphasize trust
<i>Rules</i>	FOIA explicit, more detailed and exhaustive, US practitioners score higher on knowledge of rules	Wob implicit in general but explicit distinction between passive and active information
<i>Rationales and assumptions</i>	Document system, fear for too much secrecy of big government American practitioners emphasize an incremental change toward more openness, based on legacy of rules and regulations	Wob information based, more room for subjectivity Dutch practitioners refer to context, changes in society

Analysis of differences: Rules and principles

How can we label the differences found above? In other academic fields (Black, 2008; Burgemeestre, Hulstijn, & Tan, 2009) rules-based and principles-based approaches have been identified as underlying theoretical tenets for policy regimes. In the field of corporate governance (Sama & Shoaf, 2005) and compliance (Burgemeestre et al., 2009) these approaches have been used as a framework to analyze the differences between the United States and the EU in which they conclude that the U.S. approach can be characterized as more rules-based whereas the EU approach as more principles-based. In this section we analyze whether this framework is useful for transparency regimes as well.

A rules-based approach is the “cookbook approach”; it tells a person what to do or how to behave. This approach is more explicit, detailed, and prescriptive (Table 4). It tends to be fear driven, focuses on detection, and on compliance with a specific set of procedural requirements (Arjoon, 2006; Burgemeestre et al., 2009). A principles-based approach does not tell a

person what to do but how to decide what needs doing (Alexander & Jemakowicz, 2006). Norms are formulated as guidelines and the exact implementation is left to the subject of the norm (Burgemeestre et al., 2009). A principles-based approach is more implicit and emphasizes “doing the right thing” by appropriate means (Arjoon, 2006). Finally, a rules-based approach is more commonly found in societies favoring bureaucracies while a principles-based approach is more commonly found in societies characterized by strong and operative social controls (Sama & Shoaf, 2005).

First of all, in terms of the target population we found no real difference. In both countries anyone can obtain government information. There is however a slight difference in discourse. The FOIA emphasizes the power of knowledge in fear of a big government, whereas the Wob stresses participation of citizens in light of democratic governance. These results indicate a more fear driven rules-based approach (Arjoon, 2006; Burgemeestre et al., 2009) in the United States. Second, in a rules-based approach, rules are typically procedural and detailed; specifying how, i.e., by what actions an objective should be achieved. By contrast, principles are declarative, specifying what situation is required. How this should be achieved is left to the discretion of the implementer (Burgemeestre et al., 2009). Third, *goals* in the United States can be characterized as procedural—right to information—and declarative in The Netherlands—effective and democratic governance. Moreover the FOIA is more detailed and consists of more pages than the Dutch Wob. Fourth, related to *rules*, the American FOIA is based on a record system, is explicit and mandates forms of transparency. The Dutch Wob, based on an information system is more implicit and leaves room for interpretation. Applying rules requires knowledge of the rules itself (Burgemeestre et al., 2009). We found that American communication officials had more knowledge of the formal rules than Dutch government officials. Applying principles also requires knowledge of the context and all other relevant principles (Burgemeestre et al., 2009). Dutch communication

Table 4. Framework for Analyzing the Differences in Transparency Regimes.

Rationales and Assumptions	Rules-Based	Principles-Based
<i>Target population</i>	Emphasizes enforceability	Emphasizes communication
<i>Goals</i>	Procedural (how)	Declarative (what)
<i>Rules</i>	Follows the letter of the law Knowledge of rules needed All or nothing (strict) More explicit, detailed, and prescriptive Complies with a specific set of procedural requirements Focus on detection Mandatory Tends to consider issues in black and white Societies favoring bureaucracies	Follows the spirit of the law Knowledge of context and all other principles needed Allow for exceptions More implicit, broad Emphasizes doing the right thing. Focus on prevention Discretionary Considers issues in “gray” areas Societies favoring social control Tends to be values driven
<i>Rationales and assumptions</i>	Tends to be fear driven	

Adapted by Arjoon (2006) and Burgemeestre et al. (2009).

officials referred less to rules but more to contextual factors such as societal changes as a vehicle for more openness. Forth, the regulatory relationship in a rules-based approach is characterized by directing and controlling (Black, 2008). The *rationale in the United States* seems more focused on directing and controlling by rules with amendments of the FOIA every decade, several related laws and a focus on accountability. The principles-based approach is characterized by an institutional context of mutual trust in which regulators communicate their goals and expectations (Black, 2008bb). This seems more in line with the rationale of the Dutch approach, where communication officials emphasize the importance of mutual trust (see Table 4).

On the basis of these findings we can now answer our first research question: To what extent are US and Dutch transparency regimes—in terms of the legal frameworks and practices of civil servants—similar or different? We found that there are differences between the two transparency regimes both in terms of the legal frameworks and practices of civil servants. The United States can be characterized as having a more rules-based regime and The Netherlands as having a principles-based regime. Yet not all characteristics of the two approaches can be traced to our findings: e.g., the fact that a principles-based approach is more commonly found in societies with strong social operative controls. Therefore we will delve further into the two transparency regimes by analyzing the historical trajectories.

Historical trajectories of transparency regimes

This section focuses on how we can understand the differences between the two regimes by analyzing the events leading up to the transparency regimes guided by historical institutionalist elements: the selection of initial paths, the role of political actors and civil servants, the evolution of policy, the importance of institutions, the structure of agency and change.

Origins and evolution in the United States

Characterizing the complex history of a nation is highly complicated and misses out on important nuances. Nevertheless, important work has been done by various historical-institutionalist scholars on the differences between the United States and Europe. According to Rutgers (2001, p. 230), in the Anglo-American stateless tradition government rather than state is the core concept. Government by the people and serving the community is regarded as essential in this tradition to fight oppression and support the fight of man against the

system. An active law of the judiciary is stressed (Rutgers, 2001). The Constitution of 1787 is based on the separation doctrine (Rutgers, 2000). U.S. Federalism allocates governmental powers between the federal and state government. The relative absence of coordination and control is largely intentional. The constitutional framers feared the control of the central government over the states (Peters, 2010). “The United States was born in a war that rejected the organizational qualities of the state as they had been evolving in Europe over the eighteenth century” (Skowronek, 1982, p. 20). Analyzing the initial paths, it is the fear of a big powerful government that can be seen as one of the developments that set the stage for the development of the American transparency regime and over time, and possibly due to litigation (Howard, 1987), this fear has resulted in an emphasis on rules to curtail and regulate the power of government.

The notion of transparency in the United States can be traced back to the Founding Fathers (Popova-Nowak, 2011). The Founding Fathers believed in the open official publishing of government information and the necessity of providing information access to citizens as a precondition for the existence of a democratic society that requires citizen’s active engagement in the dialogue on social and political issues (Jaeger, 2005). “The idea of public information was a radical concept at the time of the American Revolution” (Quinn, 2003, p283). The Declaration of Independence (1776) specifically notes the separation of public records and legislative bodies as one of the reasons for the revolution.

A key political actor, in the early twentieth century was Woodrow Wilson. As Birchall (2011) points out, his presidential campaign focused on a call for the governmental and financial reform contained in the “New Freedom.” These early ideas concerning transparency were later reflected in the Federal Register Act of 1936 (Birchall, 2011). All public regulations began to be published and made accessible with the first publication of the Federal Register. Roosevelt turned to administrative management as a means of empowering (Arnold, 1995). Under Roosevelt, power shifted from Congress to a growing bureaucracy. This change from a modest role in national affairs by the central government before the 1930s to a powerful federal bureaucracy generated a need for steps to regulate and legitimize bureaucratic power (Roberts, 2006). Next to the Federal Register Act, Congress adopted in 1946 the Administrative Procedure Act (APA), the progenitor of the FOIA (Roberts, 2006). Section 3 of the APA had been interpreted as giving agencies unlimited discretion to withhold records under the vague standards or lack of standards. Therefore the new bill, the FOIA, had to

be more specific and set up workable standards (S. Rept. No 1219, 88th Cong., 2d Sess. S. 1666).

However, Congress debated the merits of freedom of legislation for more than a decade before it passed. This should be understood within the context of the early 1960s when protest movements encouraged greater “power to the people” (Roberts, 2006). The Senate Passage stressed the importance of access to documents and the fear for a big government: “at no time in our history has this been truer than today, when the very vastness of our Government and its myriad of agencies make it so difficult for the electorate to obtain that popular information” (In: S. Rept. No 1219, 88th Cong., 2d Sess. S. 1666). As Senator Moss, chairman of the Special subcommittee on Government Information said: “Government secrecy tends to grow as Government itself grows” (Cong. Rec. 13007, 1966). In addition, the importance of the empowerment of the people was emphasized. It was pointed out that if the forces of secrecy gain, the forces of freedom lose (Cong. Rec. 13007, 1966). The system of the U.S. government is based on the participation of the governed and it is therefore considered essential that the people are equipped to fulfill the role of responsible citizenship (Cong. Rec. 13007, 1966). These events, eventually led to the passage of FOIA on 4 July 1966.

The FOIA replaced the “need to know” standard by a “right to know.” The government now had to justify the need for secrecy (McDermott, 2010). The bill also provides for judicial review of the refusal of access and the withholding of information (Cong. Rec. 13007, 1966). In the subsequent years, Congress enacted other open government laws, such as the Federal Advisory Committee Act (FACA) and the government in the Sunshine Act of 1976. Furthermore, Congress moved to strengthen FOIA. The amendments of 1974 sought to overcome deficiencies of the FOIA as disclosed by hearings held in 1972 by the Foreign Operations and Government Information Subcommittee. Strengthening Congressional oversight in the administration of the Act is one of the amendments (H.R. 12471, 1974). Remarkably, these laws were enacted and amended during critical junctures in which Americans had lost faith in their government due to a series of illegal actions by the executive branch followed by attempts to cover them up. Throughout the Cold War the security establishments successfully resisted demands for increased openness. Yet, Americans learned of the secret escalation of the war in Vietnam and of the executive abuse of power known as “Watergate.” Legislation was intended to improve the performance of the executive branch by opening up agency decision-making, which would increase accountability, reduce corruption, and abuse of power (Frost, 2003).

The 1990s were characterized by a new attitude of openness, where sensitive projects that had been hidden in the name of national security were laid open for public scrutiny (Roberts, 2006). Under the Clinton Administration the previous Attorney General Janet Reno sent out a memorandum that warned FOIA officers: “the Justice Department would no longer defend an agency’s withholding of information merely because there was a substantial legal basis for doing so” (Sassen, 2006, p183). In 1996 the Electronic Freedom of Information Act Amendments were incorporated (H.R. 3902) with the purpose to foster democracy and improve public access of agency records. This decade of openness came to an abrupt end with a critical juncture: the terror attacks of 11 September 2001. New worries about terrorist attacks led to an expansion of secrecy as government agencies reconsidered the wisdom of disclosing information that once had been made routinely available (Roberts, 2006). Legislation in response to the 9/11 attacks greatly restricted the act’s scope. The Bush Administration-Ashcroft Memorandum (2001) encouraged presumptive non-disclosure.

The most recent amendment was by the 2007 Open Government Act, which was designed to aid FOIA requesters, improve agency FOIA performance and foster greater disclosure (Metcalf, 2009). President Obama signed two executive orders when he came into office. The Memorandum on Transparency and Open Government is calling for a transparent, participatory, and collaborative government (White House 21 January 2009). The Memorandum on the Freedom of Information Act states that FOIA encourages accountability through transparency and it directs federal agencies to take affirmative steps to make information public without waiting for specific requests. “In the face of doubt, openness prevails” (White House, 2009b). These memoranda were followed by the Open Government Directive issued on 8 December 2009 and the initiation of the Open Government Partnership in 2011.

Origins and evolution in The Netherlands

Contrasting the United States with Continental Europe, Rutgers (2001) indicates that Europe stems from a state-ness legacy. In the state-ness tradition the state is a considered to be a necessary institution to guarantee human well-being. The general interest acquires an objective status. It possesses public authority and to that purpose, undertakes collective action. By means of law, the state regulates social interaction and at the same time limits its intrusion into the life of the individual (Rutgers, 2001, p. 227). Looking at the initial paths, Meijer (2015) observes that in the eighteenth century

The Netherlands had developed into a form of elitist government with little citizen involvement. This changed in the 1750s when the ideas of the Enlightenment influenced political debates and resulted in forms of active citizen involvement and transparency of meetings, decisions, and information (De Bruin, 1996). The Dutch revolutionary movement was part of a worldwide process of change with the American and French Revolution as key occurrences. With French support, the Dutch “patriots” seized power at the end of the eighteenth century and they enacted a constitution that turned The Netherlands into a unitary state with democratic representation (Meijer, 2015). The Dutch style of politics, government and governance are characterized by deliberation, cooperation, compromise, and consensus (Kennedy, 2000; Kickert, 2008; Lijphart, 1999).

Before the adoption of the Wob, transparency was mainly based on legal traditions rather than detailed legislative regulation (Sandukhchyan, 2007). The fundament of proactive and reactive openness can be found in article 110 of the Dutch constitution (Daalder, 2005), but before the Second World War openness was mainly seen in terms of providing government information to parliament. Only after the Second World War the discussion started when government information should be given to *citizens* (Daalder, 2005). Prime Minister Schemerhorn at the time therefore installed the Van Heuven Goedhart committee (Wagenaar, 1997). Their report states that government should be extremely reticent in supplying information and the committee warned the government not to influence the will of citizens and to refrain from propaganda (Hajema, 2001).

In the 1950s pillarization, strong ties still existed between the political parties, newspapers, and affiliated networks. One of the main rules of the game of the pillarized political system was secrecy. Journalists were repeatedly denied access to ministries because they were suspected of publicizing “secret” information. Similar to the United States, during the sixties, the demand for more openness can be attributed to a new generation of young journalists, the development of television and of a social and political democratic movement (Wagenaar, 1997). Government became more complex and the question arose how information streams between government and society should be handled (Memorie van Toelichting, 1974–1975). The trigger for a critical juncture was an incident in 1967 regarding an independent public relations officer, Ben Korsten who sold government policy as propaganda for a minister instead of independently explaining government policy (Schelhaas, 1979; Wagenaar, 1997; Wopereis, 1996). Consequently, in 1970 a second state committee, the Biesheuvel Committee, was set up. The

central question was to what degree and in what way government information needed to be available for citizens (Biesheuvel, 1970). Analyzing the structure of the Committee it can be observed that lawmakers were largely absent. This was likely in line with the primary task of the committee: to reconsider the task of government information. Establishing the right to information by law was considered secondary (Daalder, 2005).

The Biesheuvel Committee defined openness as a mentality of government to provide and receive information from society. The norm of “everything is secret, except for what the administration makes public” should be replaced by “everything is public except for what needs to be kept a secret.” Whereas the Van Heuven Goedhart Committee advised the government to be reticent, the Biesheuvel committee thought the government should pursue an active information policy. This obligation was to be laid down in a Public Access Law. Proactive and passive disclosure were considered to complement each other (Wopereis, 1996). Increasing democratization was to be realized by improving communication between government and citizens (Biesheuvel, 1970). The report was received with political resistance and it took another decade before the Act on Public Access to Information came into effect (Wagenaar, 1997). The Act was passed in 1978 and was finally implemented in 1980. Taking into account the structure of agency it should be addressed that civil servants tasked with the implementation of the Wob initially operated within the department of communication or public information of the Ministry (Regeling ter uitvoering van de Wob, BZK, 1980). Furthermore, the initial Act contained a provision that the Act should be evaluated within three years. Based on the evaluation (Evaluatie commissie Wob, 1983), the 1978 Act (Wob, 1978) was replaced by the Public Access Act (Wob) in 1991, yet no significant changes were made compared to the 1978 act (Daalder, 2005).

Influenced by the rise of information technology in 2000 another State Committee was established (Wallage, 2001). The Committee Wallage recommended the proactive dissemination of government information as much as possible, preferable online in order to improve communication between the government and its citizens. The prevailing norm of citizen’s “right to information” should be replaced by the “right to communication” (Wallage, 2001).

Analyzing differences in historical trajectories

Both transparency regimes can be traced back to the eighteenth century. The implementation of FOI in both countries has its roots in the worldwide movement for

more democracy in the 1960s. Yet there are also substantial differences. This comparative analysis highlights that in the United States fear and suspicion of the expansion of the federal executive branch was the key to the development of FOIA in the 1960s. The increasing power of the bureaucracy was the initial critical juncture. Political actors pushed for more openness. A communication crisis in the early 1970s was the critical juncture in The Netherlands and this resulted in an emphasis on the need for openness as a mentality and secondary in the Public Access Act. The Dutch system only faced minor amendments whereas the American system faced substantial revisions as a result of illegal actions and 9/11. This means that both the long-term historical process in both countries and the specific critical junctures account for differences in transparency regimes. The relative weight of the critical junctures could not be assessed in this explorative study.

Based on these findings we can now answer the second research question. The differences between the transparency regimes can be explained on the basis of the institutional analysis of historical trajectories. We found that in terms of the first dimension *target groups*, both legal frameworks allow anyone to obtain government information. Yet, the conception of civil society is quite different. In the American situation, civil society came to be seen as one of the checks and balances on government abuse whereas in the Dutch context, building upon the tradition of pillarization, civil society was seen as a group of actors to work with, e.g., to communicate with.

Second, regarding the *goals*, the goal of FOIA is procedural; referring to a right to information, while the goal of the Wob is declarative; referring to effective and democratic governance. Our analysis of the initial paths showed that the FOIA was “created to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed” (McDermott (2010)). In The Netherlands, transparency is embedded in the public communication realm with an initial focus on proactive disclosure. Openness started in 1970 due to a critical juncture, a communication crisis, and was considered a mentality: it referred to a positive attitude of the government to provide neutral information to society.

Third, in terms of *rules*, the FOIA was found to be more prescriptive, explicit, and exhaustive than the Wob. Analyzing the policy evolution showed that the FOIA has been a continual work in progress in which political actors played a key role. Policy shifts can be observed from one presidential administration to the next and major amendments by Congress every decade as a result of both critical junctures and incremental

Table 5. Summary of Historical Trajectories.

Elements	US	NLS
<i>Initial paths</i>	Stateless tradition Discourse emphasizes the availability of information, access to information, and empowerment	Stateness tradition Link with communication discourse, openness as a mentality
<i>Actors</i>	Political actors, fear for a growing executive, importance of knowledgeable governed	Political actors/Prime minister, stakeholders/committees
<i>Evolution of policy</i>	Next to FOIA other regulations, several amendments to FOIA over time	Small changes in Public Access Act
<i>Importance of</i>	<i>institutions, ideas</i>	Amendments with change in administration
No major	amendments, influence of depillarization	
<i>Structure of agency Change</i>	Winning political actors become agents for change Critical junctures: increased power of bureaucracy, illegal actions, and September 11	Formation of committees Critical juncture: communication crisis

change. Due to historic skepticism about power of government, regulators sought refuge in rules. By contrast, in The Netherlands we find less rules and regulations. The Wob emerged from a broad consensus that government communication should be fair and open. Moreover, the Wob was not altered significantly and has hardly been the subject of political debate.

Fourth, the *underlying rationales and assumptions* are discussed. The American FOIA is based on a document system whereas the Dutch Wob is based on an information system. These systems reflect respectively that decisions can be made based on legalistic approaches characterized by directing and controlling (rules-based) or more normative approaches characterized by value-based argumentation techniques (principles-based). Sama and Shoaf (2005) point out that rules-based approaches are more commonly found in societies favoring bureaucracies, whereas a principles-based approach is more commonly found in societies characterized by strong and operative social controls. Analyzing the initial paths, the United States stems from a stateless tradition, in which government rather than state is the core concept (Rutgers, 2001), whereas, The Netherlands stems from a stateness tradition within which the state provides the context in which the interactions take place (See Table 5).

National transparency regime as “translation” of a global trend

This article highlights that there are clearly similarities in the worldwide push for more transparency but, nationally, this push is “translated” (Lendvai & Stubbs, 2007) into a transparency regime that fits the local institutional context and conditions, thereby expanding the analysis of Erkkilä (2012) and Meijer (2015). Pre-existing

institutional differences are mirrored in differences in transparency regimes; initial paths and critical junctures shape transparency regimes. In this comparative mixed method study the differences between the American and Dutch transparency regimes were characterized as rules-based and principles-based. The analysis shows that transparency regimes can be constructed based on legalistic approaches or more normative approaches. These approaches are in line with a society's earlier history and pre-existing institutions. Our analysis suggests that a stateless tradition favors a rules-based transparency arrangement whereas a stateness tradition seems to be in line with a principles-based arrangement. Although the difference in the notion of state is acknowledged by several scholars (Rutgers, 2001), Novak (2008) nuances this notion by demystifying the American state and outlining a model of state development against the argument of "statelessness." He thereby refers to the rule of law. "One of the distinctive attributes of the American governance is the central place of law in state formation and policy development" (Novak, 2008 p.767). This brings us to the question whether the historically litigiousness of US society (Howard, 1987) also influences the development of the transparency regime and its rules-oriented approach. An aspect that needs further exploration.

The drawback as we have seen in the case of the United States of a rules-based approach is the continual growth of rules to cover new situations or to help decide what to do when rules conflict. Moreover it might lead to an attempt to look for loopholes as ways for obeying to the rules while still doing things that the rules were intended to prevent (Stewart, 1996). Principles-based approaches may be too broad to interpret a micro level for the individual decision-maker (Sama & Shoaf, 2005). A rules-based approach can be seen as a necessary condition for effective government and a principles-based approach as a sufficient condition (Arjoon, 2006). Countries that are developing transparency regimes or are enhancing their transparency arrangements should be aware of these differences and develop a mix that fits their context. After all, the imposition of rules in a norm-based society could meet resistance, while the expectation that principles will adequately control (organizational) behavior could meet skepticism in rule-bound societies (Sama & Shoaf, 2005).

Not all characteristics of the American and Dutch transparency policies fit exactly within the framework of a rules-based or principles-based approach. Although Dworkin (1978) argued there is a strict logical distinction between rules and principles, more recently scholars (Alexander & Jermakowicz, 2006; Verheij et al., 1998) argue that the differences between rules and principles are merely a matter of degree. Regulatory systems

contain a mixture of rules and principles. The main challenge therefore is to strike a country-specific optimal balance between a rules and principles-based approach for transparency regimes. Currently, a bill to amend the Wob is taken into consideration by Dutch parliament. This new Wob is more explicit and exhaustive than the 1991 Wob. At the same time the Open Government directive in the United States speaks of the principle of transparency. On a continuum of rules and principles the United States and The Netherlands might be moving closer together in the future.

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