How to improve board diversity without resorting to quotas and 'tokenism'

Financial Post

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/media_mentions

Recommended Citation

"How to improve board diversity without resorting to quotas and 'tokenism'." Financial Post (06 October 2014): https://digitalcommons.osgoode.yorku.ca/media_mentions/623

This Media Mention is brought to you for free and open access by the News and Public Relations at Osgoode Digital Commons. It has been accepted for inclusion in Media Mentions by an authorized administrator of Osgoode Digital Commons.
Proposition: Secrecy is a necessary condition for good governance

Craig Scott (against): Granted, for some purposes, and for a certain period of time in relation to each purpose, some government institutions are more likely to govern well if there is confidentiality of certain types of information. However, we could just as well consider an alternative proposition, for which I would presumably have been asked to be on the ‘Yes’ side, and you on the ‘No’ side: Transparency is a necessary condition for good governance. The point is that, for good governance, both secrecy and transparency are necessary and, as such, any one of the above propositions is false if it can be read as if it excludes the necessity of the other. It seems to me, therefore, that consideration of the relationship between secrecy and governance requires nuance and equilibrium.

We ought to consider the relative importance of each value (secrecy or transparency) and of its opposite, and the corresponding relative priority accorded to one value over the other when making policy or legal rules about who can access what information when. The test of whether secrecy is a necessary condition has to be contextualized—according to the kind of institution, the kind of issue area at play, the kind of information in question, and indeed the nature and extent of the harms caused or feared were the information to be released. Everything boils down to the truth of a different general claim: secrecy is not generally necessary, but rather necessary only when that necessity can be demonstrated in a specific governing context. In the demonstration exercise just mentioned, transparency has the upper hand. In other words, for a variety of reasons, transparency should be the baseline presumption of modern democratic governance, and the burden should lie with those who would substitute secrecy as the governing norm.

1 The present paper is one in a series of in-print “Nez-à-Nez” (nose to nose) debates organized by Global Brief, a world affairs magazine for each issue of the magazine. The print magazine comes out quarterly while the website (www.globalbrief.ca) has constantly updated content, including by a stable of 16 “geo-bloggers” blogging in eight different languages (English, Arabic, Chinese, Spanish, French, German, Russian and Turkish). The present version appears on the website at: http://globalbrief.ca/blog/2011/02/18/%E2%80%9Csecrecy-is-a-necessary-condition-for-good-governance%E2%80%9D/. A substantially identical version of the present debate will appear, differently formatted and with final edits, in the print edition.

2 Craig Scott is Professor of Law, Osgoode Hall Law School, and Director of the Nathanson Centre on Transnational Human Rights, Crime and Security (York University, Toronto).

Daniel P. Fata is Vice-President at the Cohen Group in Washington, DC. He served as the US Deputy Assistant Secretary of Defense for Europe and NATO Policy from 2005 to 2008.
We should probably either use the term ‘good governance’ (in the debating proposition) in its broadest possible sense to mean ‘governing well’ or, alternatively, stipulate that the accretion of principles (rule of law and eradication of corruption, among others) associated with ‘good governance’ discourse can be extended to the realm of international or global affairs.

In respect of the Wikileaks saga that, along with the recent upheaval in the Arab Middle East, was surely a key driver of our debating proposition, three sets of questions are of great interest – and in each case, it seems that Wikileaks-generated answers will be a good thing – both in moral terms and also for international governance (at least in the medium-term): What actors were involved in the June 2009 coup d’état in Honduras, and what was each actor’s precise role? What were the lines of command from, and extent of knowledge of, senior military and government officials in Sri Lanka in respect of the methods of warfare used – despite civilian presence – on the battlefield in the last months of the war between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan state in 2009? Finally, what were, and remain, the known conditions within Afghanistan detention and interrogation facilities to which the Canadian government has been transferring prisoners taken in theatre since 2006, and is there any evidence from US sources that Canada was knowingly sending prisoners to face a substantial risk of torture partly in order to be able to benefit from intelligence extracted from these prisoners by Afghanistan authorities?

For every one of these three questions, the getting-at-the-truth-of-the-matter is being actively undermined by mixtures of obfuscation, legalistic manoeuvring, outright lying and general dissembling by the governments in question. This is a bad thing for governance, as secrecy policy, law and practice, in each of these cases, together facilitate a lack of accountability.

Daniel P. Fata (for): As a former US executive branch policy-maker, I am familiar with, and in many cases relied on, ‘secrecy’ – or ‘protection of classified information,’ as it were – in order to understand and debate relevant issues, and ultimately to make policy recommendations to my superiors on issues of national security. The functioning of government oftentimes requires ‘secrecy’ and reduced or limited transparency in order to allow for the proper development of policy options and the implementation of policy decisions. Many governments adhere to this same essential premise – at almost all levels. (There may indeed be a few models of local or state-level government that posit complete transparency.)

The question is not whether the public has a need to know, but rather whether the public has a need to know right now? The world is evidently filled with data that is easily accessible via the Internet. Much of this data is repetitious, unsubstantiated and, in the end, useless for purposes of robust policy-making. However, there is enough information out there that is valuable and does provide a glimpse into the workings of government. One of the major problems with Wikileaks is that much of the information does not paint the entire picture of the issue or decision-making considerations and
processes at play. In most cases, Wikileaks provides slide frames from a pictorial series. Some frames are clearly more complete than others. But what Wikileaks does not reveal is how the information captured in the classified documents was subsequently discussed, debated, discounted, considered and, ultimately, employed for action – or, indeed, non-action. What the world sees, therefore, is ‘sausage-making’ at only its ingredient-mixing stage. I am not so convinced that the public wants to know all of the inner workings of government policy-making at every step of the way. And evidently, if the public had a vote or say on every government issue at all stages of relevant policy development or decision-making, nothing would ever be accomplished.

Under US law, any citizen, journalist or entity can file a Freedom of Information Act (FOIA) petition to request classified US government documents. The executive branch can deny the request on national security and a few other grounds. Nonetheless, there remains a legal and proper provision for Americans to make their government more transparent. What has happened over the past few decades is that, knowing that internal memos and documents can be subject to FOIA petitions, more conversations within government take place without written records, and in person.

The Wikileaks release will likely reinforce already bad, system-wide tendencies to not put information down on paper – thus, paradoxically, increasing ‘secrecy.’ This is not to mention the risk to the well-being of US federal government employees, servicemen and women and taxpayers whose names were revealed in the Wikileaks documents.

CS: You mention the rationale with the widest consensus for secrecy – namely the risk to individuals. We might think of Zimbabwean Prime Minister Morgan Tsvangirai – now facing a treason investigation after Wikileaks conveniently dropped in President Mugabe’s lap a cable that suggests that Tsvangirai had privately told US officials that sanctions against Zimbabwe should continue. I find especially interesting your point that timing is key; that is, that there is a danger in not seeing the proverbial policy ‘sausage’ for its ingredients when information comes out in bits and pieces – and that the greater the chances of premature transparency, the greater the incentives for oral communications to replace written records.

Timing, in the form of delayed release of information, is the central mechanism used in democracies to justify extensive secrecy – by virtue of laws that sequester documents deemed sensitive in archives until specified time periods have passed. Transparency is vindicated – but only in the fullness of time; that is, when the archives eventually open. For example, today we discover (as reported recently by Haaretz) that the UK ambassador to Israel reported to London in 1980 that Israel, in his view, would use nuclear weapons in any generalized war with Arab states, rather than accept to lose the war. One cannot help but ask: had this information emerged into the public domain 30 or even 20 or 15 years ago, what exactly would have been the harm to the world in having access to a high-level, informed view that Israel had nuclear weapons (contrary to Israel’s ongoing refusal to formally confirm such possession) and apparently countenanced this specific scenario for their use? We would be better off if nuclear realities in the Middle East were – at the time the UK government was receiving this
information – readily on the table, and not under the table. We are also all better off now that it is known, via Wikileaks cables, that at least some leaders of Arab Middle Eastern countries actively want Israel to attack Iran to forestall Iran’s development of a nuclear weapon. Indeed, we are a better informed global public for the combination of delayed archival release by most states and the current Wikileaks information. Even as mere ingredients for the metaphorical sausage you mention, both information types and sources have some potential to generate greater focus of more minds, stimulate productive debate and engage a wider pool of intellectual resources feeding into solution-seeking.

Of course, the biggest problem with time-based trade-offs for extensive secrecy is the absence of clear exceptions for documents that may be evidence of legal wrongdoing: for instance, the said coup in Honduras, recent war crimes in Sri Lanka, or detainee transfer to risk of torture by Canada in Afghanistan. All of these cases dealt not only with matters of political controversy or morality, but also with questions of fundamental legality. Granted, Wikileaks releasing a river of information so that streams of wrongdoing can be detected – or possibly be detected – is a rather blunt instrument for purposes of detecting legal wrongdoing. Still, we need leaking as a transparency practice, and we need effective institutionalized mechanisms for encouraging such leaking – or at least for protecting those brave enough to do it.

DF: There absolutely should be transparency in democratic government. This is essential to maintaining freedoms and rights, and for ensuring that no one individual is above the law. Accountability matters; and transparency is necessary for accountability. In no way am I suggesting that legal wrongdoing should be hidden from the public, covered up or otherwise obfuscated until a statute of limitations has expired. Citizens of a country do indeed have a right to know how their government functions. As mentioned, however, citizens do not necessarily have a need to know ‘right now’ or in ‘real-time’ about all of the inner workings of government – including and perhaps especially at the highest levels of domestic governance, diplomatic statecraft and national security. Too much information is not necessarily a good thing – particularly if it incomplete and cannot be judged in context.

In the case of the US, its legislative systems work generally well, and always in the recognition that Congress takes very seriously its responsibilities for conducting oversight of the executive branch of government. Every day that Congress is in session, numerous oversight hearings are held in both the House and the Senate. Most are public hearings, and most have executive branch witnesses testify. Members of Congress and their staff are very well versed on the issues of the day, and are very probing. When issues are too sensitive to be discussed in a public setting, the hearing goes into ‘closed’ or ‘executive’ session, such that comments and discussion can be made in confidence. Quite frequently, closed sessions result in Members of Congress – often the chairman of a committee – sending a letter to a Cabinet secretary requesting additional information on an issue discussed during a hearing or, on occasion, asking for the Cabinet secretary to testify in person before the committee to personally explain an issue.
The fact that this dialogue occurs, and that mechanisms exist for the executive branch to be held accountable to Congress – that is, to the elected representatives of the American people – suggests that enough people – and indeed the most appropriate people – are ‘in the loop,’ and are monitoring and questioning the functions of the executive branch of government. These people are also crying foul when something appears to be awry. The number of Congressional hearings that took place in the lead-up to, and then during, the recent Iraq War was astounding. Issues like interrogations, Abu Ghraib, and whether Saddam Hussein did or did not have nuclear weapons, were all on the table for the world to see – and in most of their ugliness. Some of the information was reported or released in real-time, while some was hidden from public view for a few months or years; but brought to the surface this information was, and by various means. (Iran-Contra is another important example of questionable activities undertaken by the executive branch being exposed to the public, and then fully investigated and addressed by the legislative branch; while not in real-time, at least shortly after the activities in question took place.)

It should be noted that an absolute minority of individuals volunteer to actively protect the democratic way of life, democratic liberties and economic livelihoods. In doing their jobs, these volunteers – soldiers, diplomats, policemen, aid workers – put their lives on the line, and expect to be protected to the maximum possible degree. In other words, there is a general duty to protect them as they do their jobs in the service of the general citizenry. I am therefore not sure that information as sensitive as the names of funders of terrorist finance networks, the locations of war criminals in hiding, and the ways in which military forces are being blown up by enemy roadside bombs needs to be revealed and shared with the general public in real-time – and perhaps particularly so because of the speed with which such information travels the globe and can get into the hands of foes.

CS: Does excessive transparency, as you suggest, seriously undermine good governance by driving written records out of government communications? Your example suggests that even robust freedom of information legislation has had the effect of driving some government communications into oral or perhaps other informal avenues – so as to preclude a paper trail susceptible to freedom of information petitions. I presume that it is already the case that much of the most secretive traffic within government does not actually go through even ‘Secret – No Foreigners’ embassy cable traffic – largely due to a longstanding concern with leaks (if only because of the huge distribution lists that one sees even on Secret cables). I wonder whether there is not some serious ‘good governance’ onus on governments and officials to create encrypted communication and record-keeping systems (such as the ones that bypass regular diplomatic traffic) for that which is truly believed to merit full secrecy.

Having said this, I really do see the force of your point that it is possibly quite destructive of good governance if officials are afraid to be frank; that is, if such frankness may subject them to public attention, and possibly also vilification – even without there being anything resembling wrongdoing. I also recognize that it would be too bloody-minded to
reply to this concern by saying that (a) officials have a duty not to make arguments or
take decisions in private that they are not prepared to have defended in public; and (b)
officials have a corresponding professional duty to use written communications and
record systems precisely for there to be accountability. In this regard, it is instructive
how Lord Chancellor Straw decided in 2009 to veto the release of documents on UK
Cabinet decision-making around the decision to go to war against Iraq in 2003 – even
though UK legislation appears to have a presumption that Cabinet documents are
disclosable. Here is one passage in Straw’s reasoning:

“Serious and controversial decisions must be taken with free, frank – even blunt –
deliberation between colleagues. Dialogue must be fearless. Ministers must have the
confidence to challenge each other in private. They must ensure that decisions have
been properly thought through, sounding out all possibilities before committing
themselves to a course of action. They must not feel inhibited from advancing opinions
that may be unpopular or controversial. They must not be deflected from expressing
dissent by the fear that they may be held personally to account for views that are later
cast aside. Discussions of this nature will not, however, take place without a private
space in which thoughts can be voiced without fear of reprisal, or publicity. Cabinet
provides this space. If there cannot be frank discussion of the most important matters of
Government policy at Cabinet, it may not occur at all. Cabinet decision-making could
increasingly be driven into more informal channels, with attendant dangers of lack of
rigour, lack of proper accountability, and lack of proper recording of decisions.”

Straw argues that this reasoning is especially pertinent “when the issues at hand are of
the greatest sensitivity” in order to make the case, as UK legislation requires, that his
veto in the Iraq-war-decision context is exceptional. On its face, his reasoning would
seem to apply generally – even if the tenor of the UK legislation is that Cabinet
confidentiality should generally give way to the public interest in knowing about the
reasons for momentous decisions and decision-making processes. What this quotation
reveals is something of a clash between the transparency-leaning policy in the UK
legislation and the secrecy-leaning rationale of an executive actor. This is a good
defence of what I understand to be your own position.

Would you be willing to develop your own thinking on the danger of certain kinds of
transparency driving decision-making to informal channels and – as you nicely put it –
ironically creating a new problem of unaccountable (by virtue of being undocumented)
secrecy? Would you acknowledge that there is a point at which the argument about the
danger of informality degenerates into a threat from government to engage in bad
governance practices (face-to-face communications and unrecorded decisions) as a
way to fend off efforts to hold up government decision-making to the tests of rationality
and basic morality that only transparency can provide?

DF: I acknowledge that too much informality may lead to bad governance practices and
bad decision-making. The more that government officials feel less secure about the
confidentiality of things put on paper during the policy deliberation process, the less
likely it is that reasoned policy can and will be developed. Such insecurity will certainly
result in smaller and smaller groups being part of policy deciding-making processes, and will often keep in the dark those who are tasked with carrying out the policy on the ground or in practice. This, in turn, means that policy execution has great potential to be mishandled – either because there are few written details on what influenced the final policy decision, or because there are differences of opinion among executive agencies on what the policy decision in question actually means for particular agencies. This complicates the oversight role of the legislative branch, due to the degree of ambiguity about the original intent of the specific policy decision. And, finally, as mentioned in an earlier intervention, this insecurity puts those who have to execute the policy on the ground at great risk – in every conceivable sense of the word.

It seems clear, post-Wikileaks, that US diplomats will likely be more reluctant to put sensitive information in cables from their posts overseas about the internal dynamics and personalities of host countries for fear that such information will be leaked and revealed. This will have a detrimental effect on policy-making because the ‘context’ in a foreign government’s behaviour will not be well communicated to policy-makers. Sure, such information can be conveyed in person or via teleconference, but then only a small group of high-level policy-makers will be privy to it, and the desk officers and action officers – who are the day-to-day experts on a particular country – will likely be left in the dark.

Wikileaks will also, in turn, make foreign interlocutors less likely to share information with US diplomats for fear that what they say in confidence may end up in a leaked cable. This will doubtless deny US diplomats and government officials the ability to properly understand what is going on within a country.

We might conclude by noting that, in the case of the US, the Founding Fathers created a country of representative democracy – not direct democracy – in order that the requisite expertise be applied to the development of policies in the best interests of the American people. The Founding Fathers, while also believing in transparency and respect for the rule of the law, expected the American people to cede some direct control to the experts or ‘representatives.’ Experts need their tools in order to do their job. These tools tend to come in the form of confidential information that eventually transforms into confidential deliberations, and ultimately into confidential decision-making processes – but with public announcements and public oversight.

We ought to recognize that good public policy takes time to develop and to execute, and is never the sole domain or responsibility of just one party or actor. We ought to, most certainly, strengthen legislative oversight functions as a first step to improving transparency in government. But let us not overreact and demand too much transparency in the functioning of our executive branches. As the saying goes: be careful what you ask for; you just may get it.