SOS RULE OF LAW: UNLOCKING THE RIGHT TO KNOW

TUESDAY, NOVEMBER 29, 2016

15:00 – 18:30

SALA KOCH
PALAZZO MADAMA
PIAZZA MADAMA, 11- ROME

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INFORMATIONAL BOOKLET

This document presents a summary of the MRes Dissertation in Political Science by Laura Harth at the University of Exeter with an ESRC South West Doctoral Training Centre (UK) scholarship and the contributions made by the Nonviolent Radical Party Transnational and Transparty and the Global Committee for the Rule of Law Marco Pannella, in collaboration with the partners for this Conference.

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WELCOME ADDRESS

Pietro Grasso, *President of the Senate of the Italian Republic*

SPEAKERS

Giulio Terzi di Sant'Agata, *Ambassador, President of the Global Committee for the Rule of Law – Marco Pannella, former Minister for Foreign Affairs of Italy*
Franco Frattini, *President of SIOI, former Minister for Foreign Affairs of Italy*
Najima Thay Thay Rhozali, *former Secretary of State for Literacy and non-formal Education of Morocco*
Sid Ahmed Ghozali, *former Prime Minister of Algeria*
Bakhtiar Amin, *former Minister for Human Rights of Iraq*
Natalino Ronzitti, *Emeritus Professor of International Law, LUISS University, IAI Member*
Maurizio Turco, *Nonviolent Radical Party transnational transparty*
Matteo Angioli, *Secretary General, Global Committee for the Rule of Law - Marco Pannella*
Laura Harth, Ph.D. *researcher, University of Exeter*

THE MEETING WILL BE CHAIRED BY

M. Cherif Bassiouni, *Emeritus Professor of Law, DePaul University College of Law; Honorary President, International Institute of Higher Studies in Criminal Sciences; Honorary President, International Association of Penal Law*

Speaker Biographies

Matteo Angioli (born October 18, 1979 in Pistoia, Italy) is Secretary General of the Global Committee for the Rule of Law "Marco Pannella." He started to participate in the activities of the Nonviolent Radical Party in 1995 when the Radicals were collecting signatures to call 20 national referendums. From 2002 to 2009, he was parliamentary assistant to Marco Pannella at the European Parliament in Brussels and Strasbourg. From 2009 to 2012 he worked with former Vice President of the Italian Senate, Emma Bonino. Since 2011 he is member of the General Council of the Nonviolent Radical Party.

Bakhtiar Amin (born in 1959 in Kirkuk, Iraq) is the former Minister of Human Rights in the interim government in Iraq from June 2004 to May 2005. He has 20 years of experience in the field of international human rights and humanitarian work. He participated in numerous fact finding missions in Iraq, Iran, Turkey, Syria, Kurdistan, Lebanon, Afghanistan, Pakistan and India.

Prof M. Cherif Bassiouni (born in 1937 in Cairo, Egypt) is Emeritus Professor of Law at DePaul University where he taught from 1964 to 2009. He was a founding member of the International Human Rights Law Institute at DePaul University which was established in 1990. He served as President from 1990 to 2008 and then President Emeritus. In 1972, he was one of the founders of the International Institute of Higher Studies in Criminal Sciences (ISISC) located in Siracusa, Italy, where he served as General-Secretary from 1972 to 1974, Dean from 1974 to 1988 and then as President to date. He also served as the Secretary General of the International Association of Penal Law from 1974 to 1989 and as President for three five-year terms from 1989 to 2004 when he was elected Honorary President. Since 1975, Professor Bassiouni has been appointed to 22 United Nations positions, including the following: Chair and then member of the Commission of Inquiry for Libya (2011-12), Independent Expert on Human Rights for Afghanistan (2004-06), Independent Expert on the Rights to Restitution, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000). Between 1973 and 2003, Professor Bassiouni served as a consultant to the U.S. Department

of State and Department of Justice on different projects. He received nine honorary degrees from six countries and has been awarded eleven medals from seven countries. Among the many distinctions and awards he has received are: the Nomination for the Nobel Peace Prize (1999), American Society of International Law Goler T. Butcher Medal (2014), The Stockholm Human Rights Award (2013).

Franco Frattini (born March 14, 1957 in Rome, Italy) is the President of the Italian Society for International Organization – SIOI. He has been Minister for Civil Service and Coordination of Information and Security Services from 2001 to 2002; Vice President of the European Commission and Commissioner for Justice, Freedom and Security from 2004 to 2008 and Minister of Foreign Affairs from 2008 to 2011.

Sid Ahmed Ghozali (born March 31, 1937 in Maghnia, Algeria) was Prime Minister of Algeria from 1991 to 1992. Between 1977 and 1994, he covered various institutional roles: he was Minister of Energy and Industry, Ambassador to Belgium, Finance Minister, Foreign Minister, Prime Minister, and Ambassador to France.

Pietro Grasso (born January 1, 1945 in Licata, Italy) is the President of the Italian Senate. His appointment in 2013 followed an illustrious career in the judiciary. In 1969, he entered the judiciary as district judge in Barrafranca/Enna. In 1972, he moved to Palermo and investigated cases regarding crimes against public administration and organized crime. In 1985 he was appointed associate judge in the first maxi-trial against Sicilian Mafia, Cosa Nostra. He also led the investigation into the murder of Piersanti Mattarella, President of Sicily, in 1980. In 1989 he was appointed as consultant to the Parliamentary Inquiry Commission on Mafia and Organized Crime. In 1992 he joined the central commission for the implementation of the special witnesses' and justice collaborators' protection program. In 1999, as Chief Prosecutor in Palermo, he coordinated the investigations into the murder of judges Giovanni Falcone and Paolo Borsellino, both killed in 1992, and into the Mafia bombing campaigns of 1993. He led the the Prosecutor Office of Palermo until 2005 when he was appointed National Public Prosecutor of the Direzione Nazionale Antimafia – DNA. As National Anti-Mafia Prosecutor, he gave momentum to the most important

investigations against domestic and foreign organized crime. On January 8, 2013 he resigned from the judiciary and was elected Senator of the Republic for the Democratic Party. On March 16, 2013 he was elected President of the Senate.

Francesca Graziani (born in Italy) is Professor of *International Law* at the Second University of Naples. She also teaches international and EU law in various post-graduate schools, including at the Italian Society for International Organization – SIOI in Rome. Since 1997 she is juridical expert to the Italian Ministry of Foreign Affairs, Diplomatic Contentious Affairs and Treaties.

Laura Harth (born November 26, 1985 in Bruges, Belgium) is a doctoral researcher at the University of Exeter, UK. Her PhD is funded by the South West Doctoral Training Centre (Economic and Social Research Council, UK). She completed her Master in International and European Law at the University of Ghent, Belgium, the European Master's Degree in Human Rights and Democratisation at the University of Padua, Italy, and an MRes in Political Sciences at Exeter University.

Louis Michel (born September 2, 1947 in Tienen, Belgium) was Belgium's Minister of Foreign Affairs from 1999 to 2004. He served as European Commissioner for Development and Humanitarian Aid from 2004 to 2009. Since 2009, he has been a Member of the European Parliament.

Natalino Ronzitti (born October 9, 1949 in Portoferraio, Italy) is Emeritus Professor of International Law at LUISS University in Rome and an advisory expert for IAI (Institute of International Affairs). He has been a visiting Fellow and Scholar in Residence at numerous foreign universities, including in the United Kingdom and the United States. He was "Professeur invité" at the University of Paris II, and has often been a guest professor at the Alexandria University in Egypt. He has participated in conferences at numerous foreign universities and institutes, and given a course at the Hague Academy of International Law. He has been an advisor to the Ministries of Foreign Affairs and of Defence, and a legal advisor to the Italian Mission to the Conference on Disarmament in

Geneva. He is a "Member" of the Institut de droit international.

Giulio Terzi di Sant'Agata (born June 9, 1946 in Bergamo, Italy) served as Minister of Foreign Affairs in the Italian Government from November 2011 to March 2013. He was Ambassador of Italy to Israel from 2002 to 2004, and to the United States from 2009 to 2011. Previously, he served as Permanent Representative of Italy to the United Nations in New York from 2008 to 2009, where he also headed the Italian Delegation to the United Nations Security Council. Currently he is the President of the Global Committee for the Rule of Law "Marco Pannella."

Dr Najima Thay Thay Rhozali (born in 1960 in Zellidja Boubeker, Morocco), was appointed Secretary of State of Education and Youth charged with Alphabetization and Non-Formal Education in 2002. She is specialized in the study of the oral traditions of southern Morocco and, since 2005, she teaches cultural marketing at the University of Kenitra (Morocco).

Maurizio Turco (born April 18, 1960 in Taranto, Italy) is the Treasurer of the Nonviolent Radical Party transnational transparty (NRPTT) since 2005. From 1999 to 2004 he was Member of the European Parliament and President of the Radical MEPs of the Lista Bonino. He was Member of the Italian Parliament from 2006 to 2013.

Introduction

Over the course of the past two decades, we have witnessed a growing disregard for international human rights standards and the Rule of Law in both domestic and international policies, not at least in so-called "established democracies". The discretionary power of Nation States has strengthened at the expense of the Rule of Law and the universality of fundamental rights as codified in the international covenants. At the same time, new technological developments in communication have allowed for greater transparency and reporting on these issues, inciting entire populations into rebellion, though so far without many positive results for the Rule of Law. Moreover, the same communication strategies are frequently used to disinform the public, which does not always possess the necessary tools to distinguish facts from fiction and is disenfranchised by the lack of information available to judge the actions of their Governments and hold them to account.

The Nonviolent Radical Party transnational and transparty initiated its current campaign for the reaffirmation of the Rule of Law and the affirmation of a human right to know in 2003, after an attempt to avert the war in Iraq through the exile of Saddam Hussein and the establishment of an interim government under the auspices of the United Nations in Iraq was defeated by the swift actions of President Bush and Prime Minister Blair. The publication of the Report on the War in Iraq by the Chilcot Inquiry has confirmed that the decision to go into war was based on disputable grounds, and that the facts presented to the people and to the British Parliament were at least tainted by a certain predisposition to go to war in Iraq.

The global scenario has not calmed down since then: social tensions and political instability are growing. Populist voices are strenghtened all over the world, with results that go from previously unimagined voting results to the abolishment of previously conquered human rights to terrorism and civil war. While this grim scenario may rationally be met with a very negative outlook, we believe an alternative outlook is possible. The current scenario may present a unique chance to turn a rather relaxed government approach to the

affirmation of human rights worldwide, and especially in their international policies, into a firm commitment to the advancement of the Rule of Law on a global scale. We also believe the affirmation of the human right to know what and how governments decide in name of their citizens is essential to such an endeavour.

A. The right to know – Concept Definition

1. Background

The first express reference to the "right to know" was made in 1953 by Harold Cross in *The People's Right to Know*[1]. Over the years, the idea of the right to know in more or less concrete terms has gained increased academic attention, albeit with differing results in innovation. The latter appears directly correlated to the political climate. In this sense, we note that in the 1980s and '90s, academic and public debate on the issue was merely focused on the re-visitation of previous endeavours. This is no coincidence: "*History may well remember the era that spanned the collapse of the Soviet Union and the collapse of the World Trade Centre as the Decade of Openness. Social movements around the world seized on the demise of communism and the decay of dictatorships to demand more open, democratic, responsive governments. And those governments did respond."*[2] Alternately, the 1950s and '60s saw a series of scandals and war efforts (from Watergate to the Vietnam War) that mobilized the civil and academic society, spurring the conceptualization of the right to know. 9/11 was a turning point that spurred similar outcries and debate. *"In the aftermath of September 11, as control of information emerged as a crucial weapon in the war against terror, troubling signs emerged that governments might be shutting the door on the Decade of Openness."*[3]

Similarly, a long series of events and policies following the war in Iraq led to global public outcries. The list is long but a very brief and non-exhaustive overview would include: the use of armed drones for extra-judicial killing, the extra-judicial treatment of prisoners (Guantanamo and CIA transportation), Snowden's revelations of NSA programmes and the following revelation of similar programmes abroad, and the increased recourse to the *state of emergency* in democratic countries.

All cases, while very distinct in nature, have three commonalities: (1) they have a

[1] Cross, Harold L. (1953), *The People's Right to Know*, New York: Columbia University Press.
[2] Blanton, T. (2002), "The World's Right to Know", in *Foreign Policy,* No. 131, p. 50.
[3] Idem, p. 50.

detrimental effect on the universal enjoyment of human rights, (2) their effects spread beyond one single nation state, and (3) they are covered by a veil of secrecy.

Commonalities (1) and (2) have a direct detrimental impact on the *Rule of Law*, as defined by Patricia O'Brien, Permanent Representative for the Republic of Ireland to the United Nations in Geneva, during the round-table discussion "SOS Rule of Law" held at the Palais des Nations, home to the United Nations Human Rights Council, on May 13, 2016. Participants to the round-table convened by the NRPTT and Ambassador Maurizio Serra, Permanent Representative for Italy to the United Nations (UN) in Geneva, included the Permanent Representatives of the Republic of Ireland, Morocco, Mexico and Canada.

Ambassador O'Brien, former Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, defined[4] the Rule of Law according to the 67th United Nations General Assembly Declaration of September 24, 2012: "*The United Nations defines the Rule of Law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards .*"

International and regional instruments and monitoring bodies refer to the principles of legitimacy, legality, transparency, proportionality, necessity and accountability as fundamental pre-requisites for the respect of human rights, democracy and the Rule of Law: *inter alia*, the United Nations Convention Against Corruption (chap. II art. 5 para. 1), the Human Rights Council Resolution A/HCR/28/L24, the 133rd Inter-Parliamentary Union Assembly resolution *Democracy in the digital era and the threat to privacy and individual freedoms*, the African Union Commission *Agenda 2063*, the European Parliament resolution of 8 September 2015.

[4] Full audio-visual registration of the Round-Table Conference is available at: http://www.radioradicale.it/scheda/474911/sos-stato-di-diritto.

While the principles of legality, proportionality and necessity have been invoked by multiple national and international courts with regard to some of the policies enlisted in paragraph one of this section, the third commonality in those policies – the veil of secrecy – has been addressed significantly less by such and other public instances, while it has been the main preoccupation for many civil society organizations. It very clearly undermines the principles of transparency and accountability, fundamental prerequisites to the Rule of Law, against the *reason of state.*

In this light, an additional combination of commonalities must be evoked: the veil of secrecy (3) appears to have an endemic and transnational effect (2). It is in this analytic framework that the NRPTT defined the need for the universal recognition of the human right to know as an essential prerequisite to the universal application of the Rule of Law as defined and the thus implied full enjoyment of human rights.

Based on the above rationale, the NRPTT has come up with two definitions for the right to know. The first one comes in the form of the appeal written by Professor Aldo Masullo and inspired by the definitional attributes of Professor Enrico Giovannini. The second definition is a legal definition, fruit of the joint effort of the NRPTT, the Global Committee for the Rule of Law (GCRL), Professor Francesca Graziani for the Societa Italiana per le Organizzazioni Internazionali (SIOI), Professor Natalino Ronzitti for the Istituto per gli Affari Internazionali (IAI), and Professor Claudio Radaelli from Exeter University, and follows in section B of this document.

A succinct version of the essential attributes of the Appeal's definition reads as follows:

(1) If democracy is the power of the people, and if one is powerless because one cannot decide properly if one does not know, it is evident that the people, that all citizens, have the right to know.

(2) The struggle for an earnest intellectual formation open to all and the reinforcement of the tools of information dissemination is a preliminary condition for the affirmation of the right to know.

(3) The third element obliges those powers possessing information, which is essential to popular decisions, to provide that information.

As is evident from the NRPTT Appeal, the concept of the right to know to be proposed must necessarily respond to a series of objectives, which will be briefly discussed in the following section.

2. Objectives

2.1 Public Right to Know

A distinction must necessarily be made between a private right to know as already sanctioned by the Council of Europe's Convention on Human Rights and Biomedicine[5] with regard to a patient's right (not) to be informed on their individual health status, and a *public* right to know, where citizens may invoke a claim merely on the basis of their being a citizen, a part of a community, and therefore not on the basis of a specifically demonstrable and direct interest.

On the basis of international human rights standards, governmental institutions can be considered as a kind of *board of trustees* of all *public goods* of which the citizens are the beneficiaries. In this context, *"citizens have a collective right to demand that the state account for its management of the trust's assets. This is a collective right because, although it may not be justified by one person's interest in this information, it can be justified by the interests of all citizens in knowing how the state is managing their common trust assets. In other words, citizens have interests as members of a group (beneficiaries of a trust) in information (a public good), and they have a right to know – a right to demand an accounting- because it serves their interest as beneficiaries. The scope of an accounting in trust law is quite broad, including "all items of information in which the beneficiary has a legitimate concern, […] also including a duty to provide the information necessary to assess whether and how the state is carrying out its fiduciary obligations."*[6]

[5] Article 10 on the Right to Privacy and to Information of the 1997 Council of Europe's Convention on Human Rights and Biomedicine.
[6] Roesler, S.M. (2012), "The Nature of the Environmental Right to Know", in *Ecology Law Quarterly,* Vol.39, p. 1030-1031.

It then follows naturally that such a definition of a public right to know will encompass all public goods entrusted to the government: the justice system, central banking, tax collection, the environment, foreign relations, public security, and so on.

Defining a public right to know in such terms not only encapsulates it in a clear context, it also leads us to two important indications. The first is that a conception of the public right to know as applicable to the administration of all public goods immediately avoids the question as to who has an obligation to respond to the claim to know. Whether it is one of the classical three powers in the state, a specifically designed government agency, or a private contractor hired by the state, as long as they have been entrusted with the administration of a public good, they will have to account for their administration on behalf of the public.

Secondly, defining the public right to know as a right applicable to the administration of public goods provides an important indicator as to its classification in a grander scheme. The few examples of public goods listed above all correspond to one or more human rights codified in international instruments. All people have a recognized right to clean water; they have a right to live which imposes a positive duty on governments to protect them; they have clearly stated rights in the administration of justice; and so on. The ensemble of these rights and their protection mechanisms, as we have seen before, fall under the larger scope of the Rule of Law on both a national and international level. On this basis, the public right to know may be viewed as a *derivative* right; a civil and political tool to enable and protect the enjoyment of other rights. This corresponds indeed to the intention of the NRPTT campaigners, who view the public right to know as a *preventive* rather than a *reparatory* measure for the protection of human rights and the Rule of Law.

2.2 Democracy

On the basic tenet of the above described *trust system of public goods*, the public right to know hinges on the following additional rationale: the principle of self-government in a democratic society. The core idea of democracy, based on the trust system, is that public goods are governed *by* the people *for* the people, as opposed to (supposedly) *for* but *not by* the people in other regimes. Therefore, democracy not only postulates voluntary assent as

the foundation for government[7], it also gives direct *voice* to the people in how their public goods should be administered. The term *voice* has been quite literally translated in the rights to freedom of speech and press freedom as a *"necessary corollary of the […] system of self-government"*[8] allowing for direct citizen participation.

As many authors note[9], this principle necessarily imply a public's right to know: *"Our democratic society derives its power from the people, and must allow public access to all matters relating to the public's business. Only in this manner can the public participate in government, respond intelligently to its demands, and the right to comment on public men and public matters, -so vital to the proper functioning of self-government by free men-, be exercised."*[10] *"Public business is the public's business. The people have the right to know. […] Without that the citizens of a democracy have but changed their kings."*[11]

Following these statements, we can find two underlying principles for the public right to know from which additional attributes of the concept can be discerned: *public discourse* and *democratic accountability*. While certain accountability instruments may be found also in other regimes, the combination of both terms will be present only in democracies and has important consequences for the limits that can be imposed on the people's right to know, as well as its efficiency.

When confined to a mechanism of accountability, so-called reasons of state (e.g. efficiency of debate in international negotiations, decisions to go to war, and so on) may be more easily and frequently invoked to protect certain information with the veil of secrecy. This is a tendency returning time and time again in history, and which has made a forceful comeback in the new millennium. When the attribute of public discourse as the basic tenet

[7] Yankwich, L.R. (1956), "Legal Implications, and Barriers to, the Right to Know", in *Marquette Law Review,* Vol. 40 No. 3, p. 4.
[8] Hayes, M.J. (1987), "What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information since Richmond Newspapers", in *Virginia Law Review,* Vol. 73 No. 6, p. 1113.
[9] See in particular Meiklejohn, A. (1948), *Free Speech and its Relation to Self-Government,* New York: Harper Bros.
[10] Yankwich, L.R. (1956), "Legal Implications, and Barriers to, the Right to Know", in *Marquette Law Review,* Vol. 40 No. 3, p. 33.
[11] Cross, H. (1953) in Fenster, M. (2011), "The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State", *University of Pittsburgh Law Review,* Vol. 73, pp. 461-462.

for democracy is brought into the debate however, such reasons of state will hold only if the interest they seek to protect by keeping it secret weighs more in the balancing scale than the tenet of public discourse.

A sensible public right to know must necessarily include both attributes in order to be an effective tool for democratic participation. Where the public discourse attribute will enable democratic participation in the political process, the accountability attribute will function as a control mechanism for the execution of the decisions taken.

2.3 Public Discourse

Freedom of press and of opinion are among the prime indicators for a healthy and functioning democracy. *Public discourse* shapes the decisions a society takes and can be traced back to John Stuart Mill's metaphor of a free society as a *marketplace of ideas. "In this view, valuable ideas are strengthened and refined when subject to opposition and public scrutiny. Even false or damaging ideas enjoy protection because they are best corrected or discredited through competition with other ideas. […], for Mill, the true evil of censorship lies in deciding the truth for others by not allowing the full range of views and opinions to be heard."* [12] Moreover, *public discourse* not only shapes ideas, it is also a means of conveying them and therefore participating in self-government. *"For many democratic theorists, participation by individual citizens is, in fact, a necessary, or fundamental, component of democratic self-governance. Indeed, meaningful participation is essential to republican strains of democratic theory, in which citizens participate in dialogue in order to identify and further the common good. This participatory view of self-government is reflected in Supreme Court opinions, federal statutes, and numerous international human rights documents."*[13]

Both the marketplace metaphor and the participation requisite form strong rationales for the right to know and provide us with important indications as to its attributes and

[12] Roesler, S.M. (2012), "The Nature of the Environmental Right to Know", in *Ecology Law Quarterly,* Vol.39, p. 1001.
[13] Roesler, S.M. (2012), "The Nature of the Environmental Right to Know", in *Ecology Law Quarterly,* Vol.39, p. 1015.

classification. First of all, it is clear that if *"voters govern the nation, it is vital that they have access to information on the matters they decide. Restricting information would prevent voters from understanding the issues before them, and would lead to "ill-considered, ill-balanced" results, threatening the welfare of the nation."*[14] Or in the words of James Madison, Chairman of the Commission that drafted the First Amendment to the American Constitution in 1806: *"Self-government is possible only to the extent that the leaders of the state are agents responsive to the will of the people. If the public opinion which directs conduct of governmental affairs is to have any validity; if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided. A thorough knowledge of official deportment is essential to protect the electorate from inadvertently condoning the mistakes of those in power. The importance of freedom of information to a nation which professes self-government lies in the fact that without one the other cannot truly exist."*[15]

Even more so than on the basis of the described *trust system*, self-government in which citizens participate through the freedom of expression presupposes that such public discourse is based on an informed public opinion. Such a public discourse criteria widened the scope foreseen by accountability measures, as – contrary to Hennings' statement[16] - it does not merely ask *what* a current government is doing in the name of their people, but it may also ask *why*, *who*, and – very importantly – what *differing opinions*, *alternative options,* or even *themes* are out there?

These last points enable us to state that the public right to know must necessarily apply to the entire political process at all times, and not merely to the current decision-making process. While not confined to this example, this makes sense especially when one

[14] Hayes, M.J. (1987), "What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information since Richmond Newspapers", in *Virginia Law Review,* Vol. 73 No. 6*,* p. 1113.
[15] Yankwich, L.R. (1956), "Legal Implications, and Barriers to, the Right to Know", in *Marquette Law Review,* Vol. 40 No. 3, p. 33.
[16] Hennings, T.C.Jr. (1959), "Constitutional Law: The People's Right To Know", in *American Bar Association Journal,* Vol. 45 No. 7, p. 668: *"Freedom of information about governmental affairs is an inherent and necessary part of our political system. Ours is a system of self-government – and self-government can work effectively only where the people have full access to information about what their Government is doing."*

considers the electoral process, a key participating moment in the people's self-government. It makes common sense to state that a citizen must be able to arrive at an informed opinion regarding the various electoral candidates in the field. However, a true marketplace of ideas in which public discourse can grow must necessarily allow for as many opinions and themes as are out there, not merely those dealt with by the current government and opposition candidates. Not so much because one has a right to be heard, but because the public has a right to an informed opinion.

Moreover, where accountability mechanisms such as freedom of information may prove essential tools in controlling a bureaucracy or government, the limit the possibility of citizens who may intervene only *after* decisions have been taken and target the consequences rather than the causes of an action, thereby effectively limiting democratic participation. The public discourse requisite on the other hand will focus exactly on those mechanisms – such as notification of the intention to legislate - that enable an informed public debate *during* and even *before* policy decisions are taken and executed, augmenting also the legitimacy of decisions taken or changing their course by enabling the continuous participation of citizens in the administration of public goods.

While freedom of press is an essential attribute to the right to know, it cannot be confined to such. A U.S. Supreme Court opinion stated: *"Only as the press serves the public's right to know assiduously is freedom of the press important."*[17] As Beth laments, too often the media selects what the public will or will not read, hear or see on the basis of its very own judgment of what the public wants. *"What results, finally, is an information-gathering and –editing elite which has selected itself as the body to decide."*[18] This is not to imply that the media does so only in a malevolent manner. Most often decisions are dictated by shareholders and commercial terms, as lamented by journalists themselves. However, as *"the primary purpose of press rights to gather and publish information is to promote informed political and personal decision making through a mechanism of public*

[17] Yankwich, L.R. (1956), "Legal Implications, and Barriers to, the Right to Know", in *Marquette Law Review,* Vol. 40 No. 3, p. 33.
[18] Beth, L.P. (1983), "The Public's Right to Know: The Supreme Court as Pandora?", in *Michigan Law Review,* Vol. 81 No. 4, p. 886.

discourse[19] *"*, the government, as trustee of the public good, has an obligation to step in and ensure the existence of the marketplace of ideas.

Such a positive obligation on the part of the government may translate in policy instruments such as the *equal time doctrine and fairness doctrines*[20]. The point to be made is that the freedom of press is subservient to the public right to know (and freedom of expression). *"Whereas media organizations and individual journalists may have additional motives, the primary social role of the press, grounded in the people's right to know, is found in the media's contribution to public discourse."*[21]

2.4 Accountability

On the basis of self-government (and the trust system of public goods), citizens are entitled to all information regarding the *what, why* and *how* of policy decisions in all fields as an essential key to meaningful participation. At the same time, they hold the right of control over the execution of decisions taken: *"So we are back to the problem of responsibility. For democracy implies responsibility of one to the other and of those who govern to the community."*[22] *"Since, under our theory of government, sovereignty resides in the people, it logically and necessarily follows that the people have a right to know what the Government –which they themselves have established- is doing, and that government officials properly may interfere with the free exercise of that right only to the extent the people themselves consent."*[23]

On the basis of the above, the principle of governmental accountability should assure complete *transparency* of the administration of public goods. The direct link between

[19] Gauthier, C.G. (1999), "Right to Know, Press Freedom, Public Discourse", in *Journal of Mass Media Ethics,* Vol. 14 No. 4, p. 198
[20] Foreign Policy Association (1973), "The Mass Media and Foreign Policy: What Limits on the Public's Right to Know?, in *Great Decisions,* p. 19.
[21] Gauthier, C.G. (1999), "Right to Know, Press Freedom, Public Discourse", in *Journal of Mass Media Ethics,* Vol. 14 No. 4, pp. 201-202.
[22] Yankwich, L.R. (1956), "Legal Implications, and Barriers to, the Right to Know", in *Marquette Law Review,* Vol. 40 No. 3, p. 4.
[23] Hennings, T.C.Jr. (1959), "Constitutional Law: The People's Right To Know", in *American Bar Association Journal,* Vol. 45 No. 7, p. 669.

transparency and accountability has been the object of ample academic and governmental debate. In the words of Curtin: *"Transparency refers to the 'constant availability of information'. As such, it does not amount to accountability but it represents an indispensable element for an effective system of accountability. Whereas 'accountability is an obligation to give account or explain and justify one's actions… transparency is the degree to which information on such actions is available".*[24]

With regard to the European Union, Settembri defines transparency as "*the right of citizens (actor) to access to information (content) in order to enable their effective participation and, in doing so, strengthen the European institutions and hold them accountable (function)"*[25]. In this definition, we can again witness the subservient role of transparency to both effective participation and accountability.

In his definition, Settembri activates the principle of transparency through the instrument of access of information. He adds two more dimensions to this initial definition: access to the thinking behind the decision and a presumption of the opening of the decision-making process to non-governmental participation.[26]

Access to information (what) and access to the thinking behind the decision (why), as well as access to the *operational* steps undertaken[27] (how), can here all be defined as transparent accountability mechanisms pertaining to the public right to know ("transparency instruments"). Furthermore, it is worth noting that informational transparency instruments have also been coined as *efficient control mechanisms: "Information remedies have recently been touted as powerful supplements or alternatives to direct command-and-control regulation"*[28]*,* or in the terms of Damonte, Dunlop and Radaelli, as powerful *fire*

[24] Curtin, D. (2009) *Executive power of the European Union: Law, practices, and the living constitution*. New York: Oxford University Press, pp. 244-245.
[25] Settembri, P. (2005) "Transparency and the EU legislator: "Let he who is without sin cast the First stone"*", in *JCMS: Journal of Common Market Studies*, Vol. 43 No. 3, pp. 640-641.
[26] Settembri, P. (2005) "Transparency and the EU legislator: "Let he who is without sin cast the First stone"*", in *JCMS: Journal of Common Market Studies*, Vol. 43 No. 3, pp. 640-641.
[27] Yin, G.K. (2014), "Reforming (and saving) the IRS by respecting the public's right to know", in *Virginia Law Review,* Vol. 100 No. 6*,* pp. 1151-1152.
[28] Konar, S., Cohen, M.A. (1997), "Information as regulation: The effect of community right to know laws on toxic emissions", in *Journal of Environmental Economics and Management,* Vol. 32 No. 1*,* p. 109.

alarms as opposed to in-agency *police control*[29], which is of particular importance with regard to the Rule of Law and human rights.
They demonstrate how the strength of transparency instruments does not lie in their individual qualities, but rather in their combination, as in an *ecology* of instruments[30], in which each instrument may seek to illuminate another aspect of public policy making.

In this sense a non-exhaustive, but essential list of properties of transparency instruments can be proposed: (1) ideally, all information is proactively made available by the administrator of the public good in question; (2) where not, information request procedures are short, cheap, and appeal against an averse response is available through an independent institution; (3) the information obtained is intelligible[31]; (4) exceptions are narrowly defined by law[32] and must withstand a balancing test against the interest of public discourse[33]; (5) an updated index of all available and all withheld information is open for consultation[34]; (6) an independent control body oversees that the former properties are complied with; (7) the definition of exceptions is subject to public debate and review[35].

While such properties indicate a considerable positive obligation for administrators of public goods, it is clear that other instruments may help them alleviate the direct burden. For example, novel concepts such as *open government* which use *"dynamic new tools and interfaces that make the information dramatically more useful to citizens"*[36]*,* but also old ones such as the media, provide reasonable tools for the diffusion of information and their

[29] Damonte, A., Dunlop, C.A., Radaelli, C.M. (2014), "Controlling bureaucracies with fire alarms: policy instruments and cross-country patterns", in *Journal of European Public Policy*, Vol. 21 No. 9*,* pp. 1330–1349.
[30] Schmidt, V. A. (2012) "Democracy and legitimacy in the European Union revisited: Input, output and "Throughput"", in *Political Studies*, Vol. 61 No. 1.
[31] Fenster, M. (2015), "Transparency in search of a theory", in *European Journal of Social Theory,* Vol. 18 No. 2, pp. 154-159.
[32] Halperin, M.H., Hoffman, D.N. (1976), "Secrecy and the Right to Know", in *Law and Contemporary Problems*, Vol. 40 No. 3, Presidential Power: Part 2, p. 133.
[33] Hayes, M.J. (1987), "What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information since Richmond Newspapers", in *Virginia Law Review,* Vol. 73 No. 6*,* p. 1122.
[34] Halperin, M.H., Hoffman, D.N. (1976), "Secrecy and the Right to Know", in *Law and Contemporary Problems*, Vol. 40 No. 3, Presidential Power: Part 2, p. 145.
[35] Idem.
[36] Yu, H., Robinson, D.G. (2012), "The New Ambiguity of 'Open Government'", in 59 *UCLA Law Review Discourse,* Vol. 178, p. 180.

intelligibility. However, the administrator must ensure that such alternatives are in place and safeguard their quality when not performing the duty directly. This idea is most clearly present in the legal definition provided by the campaigners, as well as in the amply available literature on transparency and accountability.

3. Concept Definition

On the basis of the above, the proposed concept definition for the *public right to know* is: (a) the citizen's civil and political right (b) to be actively informed of all aspects regarding the administration of all public goods (c) during the entire political process, in order to allow (d) for the full and democratic participation in public discourse regarding such goods and (e) hold public goods administrators accountable according to the standards of human rights and the Rule of Law.

Theoretically the public right to know is enabled through an ecology of public discourse, transparency and human rights instruments (e.g. freedom of expression and press) in a family resemblance structure, responding to at least one or a combination of the following properties:

(1) Timing in the political process: before, during, or after the policy making process;
(2) Limitations to the right to know are themselves subject to the right to know, first and foremost through public discourse ("second-order secrecy") and are subject to continuous public review;
(3) Instruments provide information on the administration of public goods in all fields as to: who, what, why, how, and alternative options or topics for public debate;
(4) Instruments enable the intelligibility of the provided information to the public;
(5) The information is easily accessible to all, and an index of all available and withheld information is open for consultation.

B. Legal Definition

1. Background

Where the International Criminal Court and the human right to truth are paramount to the effective persecution of perpetrators of grave crimes against humanity and reparation for the victims and their families, the right to know should act as a preventive measure to such incidents by allowing for the effective accountability of public authorities, encompassing all branches of the State (executive, legislative and judicial), other public or governmental bodies at all levels of Government (national, regional or local) including independent regulatory and security agencies, as well as public and private institutions which carry out public functions.

Much of the rationale supporting the right to know is partly recognised within the United Nations framework, albeit in a fragmented and dispersed form. Furthermore, the increasing internationalisation of secondary secrecy rules through the originator principle as highlighted by a number of prominent studies underlines the need for a global debate on the use of such rules and the right to know. The principles of public accountability, evidence-based decisions, access to information, freedom of expression, access to internet and considerations on the laws governing State secrecy clauses constitute its pillars.

The 2013 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion (A/68/362) expressly states that the right to access information is one of the central components of the right to freedom of opinion and expression, as established by the Universal Declaration of Human Rights (art. 19), the International Covenant on Civil and Political Rights (art. 19 (2)) and regional human rights treaties (A/68/362), and that "obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights. Core requirements for democratic governance, such as transparency, the accountability of public authorities or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information."

The same concern is also evident in other recent reports of other UN human rights bodies, such as the 2013 Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (A/69/397), and the 2014 Report of the Office of the United Nations High Commissioner for Human Rights on "The right to privacy in the digital age" (A/HRC/27/37), which call for greater and effective public accessibility, transparency and oversight of governmental policies, laws and practices in order to assess their coherence with international human rights law and to ensure accountability.

International and regional instruments and monitoring bodies refer to the principles of legitimacy, legality, transparency, proportionality, necessity and accountability as fundamental pre-requisites for the respect of human rights, democracy and the Rule of Law: *inter alia*, the United Nations Convention Against Corruption (chap. II art. 5 para. 1), the Human Rights Council Resolution A/HCR/28/L24, the 133rd Inter-Parliamentary Union Assembly resolution *Democracy in the digital era and the threat to privacy and individual freedoms*, the African Union Commision *Agenda 2063*, the European Parliament resolution of 8 September 2015.

Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information even expressly refers to the *right to knowledge*: "*Making public all generally available documents held by the public sector – concerning not only the political process but also the legal and administrative process – is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy. This objective is applicable to institutions at every level, be is local, national or international."*

Openness and transparency is increasingly becoming a central value for government efforts around the world. In 2011, an international platform called Open Government Partnership was created to improve the quality of public services via Open Data to become more transparent, accountable and responsive to citizens. The Open Government Partnership formally launched on September 20, 2011, when the eight founding governments (Brazil,

Indonesia, Mexico, Norway, the Philippines, South Africa, the United Kingdom and the United States) endorsed the Open Government Declaration.[37]

Moreover, by recognizing the supreme value of the human dimension, the right to know will become a fundamental means to ensure the full expression of the inherent dignity of all human beings, and the full enjoyment of their equal and inalienable rights, in accordance with the new UN Sustainable Development Goals (SDGs).

As the world embarks on the challenging project to meet the new SDGs, data become essential in order to monitor progress, hold Governments accountable and foster sustainable development. New technologies are leading to an exponential increase in the volume and types of data available but there are huge and growing inequalities in access to data and information, and in the ability to use it. In its report *A World That Counts,* the UN Secretary General's Independent Expert Advisory Group on a Data Revolution for Sustainable Development (IEAG) calls for openness and transparency underling that "more diverse, integrated, timely and trustworthy information can lead to better decision-making" and more empowered people, which in turn can lead to "better policies, better decisions and greater participation and accountability, leading to better outcomes for people and the planet."

To make these mechanisms of accountability work, States must adopt and implement a series of policy instruments and procedures. The nature of ecosystem of the right to know is embodied in instruments affecting all stages of the decision-making process: input, throughput, output. Specific policy instruments include, *inter alia*: public notice of proposed regulation and Government action; time-frames for regulatory action, minimum standards and procedures for open consultation; affirmative information provisions; impact assessment of proposed legislation; freedom of information acts; ombudsman review of agency decisions; protection of whistleblowers in the public sector; limitation of discretion in the use of State secrecy clauses; legal liability of agency to persons adversely affected by wrong decisions; judicial review of rule-making; *ex-post* legislative and regulatory

[37] Available at: http://www.opengovpartnership.org/about/open-government-declaration.

evaluation.

As a core element of the Rule of Law, the right to know thus aims to improve governance and public accountability, central to the full application of the Rule of Law and the prevention of human rights violations, and to strengthen participatory democracy by taking decisions as openly and as closely as possible to citizens and with full disclosure of the evidence behind the decisions.

Furthermore, the express recognition of the right to know as a fundamental human right would not only bring coherence, comprehensibility and predictability to this still scattered picture, by building a comprehensive legal and policy framework, but would allow for a profound and global process of reviewing State secrecy governance in an ever-more interconnected world. The convenors of this Conference therefore propose the following Draft Resolution on the right to know for discussion.

2. Draft Resolution

Guided by the purposes and principles of the Charter of the United Nations;

- *Reaffirming* the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and other relevant international human rights instruments;

- *Recalling* para. 3 of Article 19 of the ICCPR, expressly recognizing that restrictions to "freedom to seek, receive and impart information shall be such as are provided by law and are necessary";

- *Taking also into account* the UN Human Rights Committee General Comment N. 34 of 21 July 2011 on Article 19 of the ICCPR;

- *Recalling* Human Rights Council Resolution 19/36 of 23 March 2012 on human rights, democracy and the Rule of Law and Human Rights Council Resolution 28/14 of 23 March 2015 on the promotion and protection of all human rights;

- *Considering* the 2013 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion (A/68/362), which expressly states that "obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights";

- *Affirming* the active role of regional Organizations in ensuring the Rule of Law and political accountability;

- *Underlining* the important role of non-governmental organizations in monitoring and promoting democratic oversight;

– *Stressing* that human rights, democracy and the Rule of Law are interdependent and mutually reinforcing;

– *Bearing in mind* that challenges to democracy, the Rule of Law and human rights arise in all societies;

– *Worried* that the prolonged use of the state of emergency may hamper fundamental human rights;

– *Affirming* the principle of accountability of public authorities as central to the full application of the Rule of Law and the prevention of human rights violations;

– *Asserting* that the right to know is a core element of the Rule of Law, improving governance and public accountability, and strengthening participatory democracy by taking decisions as openly and as closely as possible to the citizen;

1. *Urges* States to recognize the right to know as a fundamental human right;

2. *Points out* that the right to know includes the right to be properly informed, the right to receive information, and the right to access information held by public authorities;

3. *Recalls* that "public authorities" encompass all branches of the State (executive, legislative and judicial), other public or governmental bodies at all levels of government (national, regional or local) including bodies funded, owned or controlled by the State, as well as public and private institutions which carry out public functions;

4. *Stresses* that "information" includes all records held by a public authority, regardless of the physical form in which the information is stored, its source or the date of production;

5. *Urges* States to respect and ensure respect for the right to know through comprehensive national legislation based on the principle of maximum openness;

6. *Encourages* States to enact the necessary procedures and instruments in order to ensure prompt, easy, effective and practical access to information held by public authorities at all stages of the relevant decision-making process;

7. *Recommends* to this end the adoption and implementation of rules securing the rights of citizens to access information and to challenge adverse government decisions and wrongdoing, identifying the obligations of the government and regulators to give reasons and collect, publish and diffuse information, and limiting discretion on transparency, access and information;

8. *Requests* States to adopt a series of policy instruments and procedures such as administrative procedure acts and giving reasons requirements. Specific policy instruments include, inter alia: public notice of proposed regulation and government action; time-frames, minimum standards and procedures for open consultation; affirmative information provisions; impact assessment of proposed legislation; freedom of information acts; equal timing and fairness guarantees in media; ombudsman review of agency decisions; protection of whistleblowers in the public sector; limitation of discretion in the use of state secrecy clauses; legal liability of agency to persons adversely affected by wrong decisions; judicial review of rulemaking; ex post legislative evaluation. The instruments allow for the full and informed participation of citizens in a democratic Rule of Law;

9. *Invites* States to ensure that the exercise of the right to request access to information should not require individuals to demonstrate any legal or specific interest in the information;

10. *Identifies* limitations to the right to know only in very exceptional circumstances provided by law and in compliance with international human rights. Such

limitations should be clearly and narrowly defined, limited in time, compatible with international legal instruments, compliant to the principles of necessity and proportionality, and subject to independent domestic review;

11. *Calls upon* States and the relevant international and regional Organizations to verify compliance by establishing specific mechanisms in order to disseminate, monitor and implement the right to know, at the national and international level by, inter alia, identifying best practices and experience to create guidelines on promoting the right to know;

12. *Invites* States to support Non-governmental Organizations and civil society in their actions to promote the right to know;

13. *Encourages* UN Special Rapporteurs, working groups and other mechanisms of the Human Rights Council to take the issue of the right to know into account, as appropriate, in their mandate;

14. *Requests* the Office of the High Commissioner for Human Rights, in consultation with States and relevant international Organizations, to organize a panel discussion, during the … Session of the Human Rights Council on common challenges facing States in their effort to secure the Rule of Law and the right to know;

15. *Requests* the Office of the High Commissioner for Human Rights to address the issue of the right to know in his annual Report;

16. *Decides* to remain actively seized of the matter.

C. Critiques and benefits

1. Differentiating

The proposed concept definition for the right to know allows to differentiate it from underlying instruments such as transparency mechanisms. While these are essential tools in the enactment of the right to know, its scope cannot be confined to any one of them. The objectives set out at the beginning of this document point to the need for an *ecology* of instruments pertaining to the right to know that may increase citizen's awareness and effective participation in the administration of public goods through public discourse and accountability mechanisms.

Where transparency mechanisms find their operational equivalent in policy instruments such as, among others, Freedom of Information laws (FOIA), regulatory impact assessments, publicly-accessible debates and voting records, protection of whistle-blowers, we cannot not agree with Fenster who states that "*The FOIA enacted a version of a "right to know"*[38]. FOIA represents an instrument of public accountability pertaining to the public right to know. Other accountability mechanisms, such as the possibility of judicial action against a corrupt government official, complete the spectrum of democratic accountability measures but do not – although they may build on it- pertain to the public right to know.

Furthermore, transparency mechanisms often pertain solely to the policy process, and not the entire political process. Though not in absolute terms, they tend to be limited to the phase *after* the decision-making, and require intensive attention and tools to maintain such attention, as noted by several NGOs and civil representatives. We deem it therefore essential to insert the public discourse argument as a core element of the right to know, allowing citizens to participate actively in all phases of the political process and debate, including agenda-setting.

[38] Fenster, M. (2011), "The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State", *University of Pittsburgh Law Review,* Vol. 73, p. 465.

As we hypothesize, an ecology of instruments enabling the interests listed in the objectives above, should have a larger positive impact on the overall enjoyment of human rights and the Rule of Law. Unfortunately, collecting and compiling adequate data to test the impact of the defined concept against any of the four objectives it wishes to contribute to, would require a significantly large research project.

However, it may be possible to consider smaller studies, using a bathtub model[39] in which the single or combined impact of instruments of the public right to know on indicators of one of the four objectives is tested. Testing on such micro-levels may be a strong indicator for impact at the macro-levels, with the hypothesis that an *ecology* of instruments pertaining to the public right to know (e.g. with the defined properties) will result in a larger positive impact. In any case, the collection of data in a manner coherent with the defined concepts will be of the utmost importance. In fact, a small exercise with readily available data from the World Bank in both its Worldwide Governance Indicators and Mechanisms of Public Accountability demonstrate the increased positive impact of a comprehensive right to know concept instead of individual measures such as Freedom of Information Acts on the defined objectives. Such an exercise therefore demonstrates the necessary differentiation between individual transparency instruments as adopted in recent years and a comprehensive concept of the right to know.[40]

2. Financial

Imposing a positive obligation on the government of the breadth we have proposed may lead to the conclusion of a disproportionate financial burden. However, such a claim is increasingly difficult to sustain. Many governments have already adopted one or a series of both transparency and public discourse mechanisms and studies such as the 2015 European Commission publication *"Creating Value through Open Data"*[41] even demonstrate how a "data value chain friendly policy environment" creates significant direct

[39] Maggetti, M., Gilardi, F., Radaelli, C. M. (2013), *Designing Research in the Social Sciences*, London: Sage Publications, pp. 37-39.
[40] Harth, L. (2016), MRes Dissertation *"Unlocking the Right to Know"*, Exeter University, pp. 46-55.
[41] European Commission (2015), *Creating Value through Open Data*, available at: https://www.europeandataportal.eu/sites/default/files/edp_creating_value_through_open_data_0.pdf.

and indirect benefits in terms of monetised benefits, job creation and cost savings. It can therefore be argued that, especially at a time when digitalisation is close to becoming an automated process, the proactive publication of documents and information regarding the policy process does not only present benefits in terms of the public's knowledge, but even in direct economic terms.

Furthermore, current Freedom of Information provisions, where available, may prove more cost- and labour intensive than the proactive distribution of available information. As the European Ombudsman noted in a letter to President of the European Commission Juncker in November 2015 with regard to the publication of Ad Hoc Ethical Committee opinions[42], under current regulations, institutions are often required to render documents available after a request has been made to the person requesting such information. Such requests may be multiple and require examination on each instance. As the Ombudsman notes, since such requests are likely to arrive according to the Commission's own evaluation, publishing them proactively may simply eliminate additional direct and indirect labour-costs.

Such an approach can again be found in the aforementioned document *Creating Value through Open Data: "Open Data bridges the gap between government and citizens in terms of information. Freedom of Information laws allow access by the general public to certain types of data held by national governments. Open Data can be seen as an important part in strengthening citizen right, as it will make it much easier to obtain access to the information you want when it is already available online for free. As a result of the release of more data, grassroots initiatives such as TheyWorkForYou in the UK14 – which tracks the activities and initiatives of members of UK's Parliaments and assemblies – and the equivalent at US level GovTrackUs 15 – which tracks the bills and activities of US Congress members – emerged. These initiatives contributed to bringing further transparency to the democratic process."*

[42] Available at: www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61417/html.bookmark.

Moreover, as noted by Damonte, Dunlop and Radaelli[43], fire alarms mechanisms enabled by transparency measures prove to have a larger cost-effective impact on the control of bureaucracies and alleviate the need for effective internal control mechanisms.

Lastly, as the Report *A World That Counts,* prepared by the UN Secretary General's Independent Expert Advisory Group on a Data Revolution for Sustainable Development (IEAG), shows, "*more diverse, integrated, timely and trustworthy information can lead to better* – and thus more efficient - *decision-making*". This is again reflected in conclusions of the European Commission document *Creating Value through Open Data: "Public administration is by far the sector that will gain the most from opening up data, with a value of 22bn EUR in 2020. This confirms that the public sector is the first re-user of its own data. […] Better decision making is one of the main benefits of Open Data sharing, also known as "data-driven decision making."*

3. Secrecy

The convenors of this conference do not propose the complete abolition of state secrecy mechanisms and measures, as sufficient, proportionate and legitimate reasons may exist to make use of such instruments. However, on the basis of the public discourse objective and the risk of an endemic use of state secrecy instruments as pointed out above, we propose the following for discussion.

As stated in previous sections, the public discourse argument may prove a very strong tool in the secrecy versus transparency balancing act, more so than the single appeal on accountability grounds. Halperin presents concrete examples of such a balancing exercise with specific regard to one of the most guarded policy areas: foreign and military relations.

On the basis of his argument, we may state for example that the concrete technical composure of a new weapon may be kept confidential, as its disclosure might have harmful

[43] Damonte, A., Dunlop, C.A., Radaelli, C.M. (2014), "Controlling bureaucracies with fire alarms: policy instruments and cross-country patterns", in *Journal of European Public Policy*, Vol. 21 No. 9, pp. 1330–1349.

consequences for other human rights, with the right to life in primis. However, the development, existence and possible use of such weapons *should* be part of public debate, as they pertain to one of the most essential political decisions a government may take with public means.[44] In this sense, it hardly makes any sense to keep programmes such as the United States' armed drone programme used for extrajudicial killings a secret from the public at home, when the consequences cannot in any reasonable manner be hidden, at least not in a democratic society which enjoys freedom of press. While precise targets and timing may be kept confidential prior to the execution, no reasonable security reasons can be invoked to keep such a programme hidden other than the aim to avoid public debate at home. A similar point in case may be made with regard to negotiations in international relations. Where initial goals and intention to start negotiations should be disclosed to public to allow for debate, for reasons of efficiency it may be reasonable not to disclose all information such as the lowest possible bargaining point. However, when significant decisions are taken during negotiations – such as Tony Blair's "*I will be with you, no matter what"* -, these should be immediately entrusted to the public debate as they may shape it in a very diverse manner.[45] In this sense the tenet of public discourse is a stronger component in the necessary balancing acts between objective security reasons and the people's right to know than accountability mechanisms.

Furthermore, in her critique of secrecy in the European Union, Deirdre Curtin warns for a process of *regulation creep*, where the growing cooperation between States and national or inter-governmental institutions has led to the adoption of confidentiality standards in line with those of the "highest bidder" as to obtain information from another source, the same minimum level of confidentiality must be guaranteed. Curtin therefore does not as much target the issue of so-called *first-order secrecy*, that is the kind of documents classified and the procedure leading to their classification, but the lack of *second-order secrecy*, which regards the manner in which the rules on secrecy are being established rather than the use of the instrument itself. She laments the unilateral executive control

[44] In the sense of Halperin, M.H., Hoffman, D.N. (1976), "Secrecy and the Right to Know", in *Law and Contemporary Problems*, Vol. 40 No. 3, Presidential Power: Part 2, p. 134-137.
[45] Halperin, M.H., Hoffman, D.N. (1976), "Secrecy and the Right to Know", in *Law and Contemporary Problems*, Vol. 40 No. 3, Presidential Power: Part 2, p. 135.

over sensitive information (both classified and unclassified but controlled) due to the manner in which the rules on confidential documents have been established: "*Underpinning the web of rules and arrangements is something approaching a culture of secrecy. A culture of secrecy has two main tools that cause secrecy to multiply quasi-automatically: the principle of derivative classification (limits the right of access to any persons who are cleared to see documents in the respective classification categories, leading to a common drift to classify the entirety of the document containing a small sensitive 'secret') and the principle of originator control (information may not be downgraded, released or declassified without the consent of the originating Government or executive entity"*.[46]

While such principles may reflect a logical approach to the treatment of sensitive documents, Curtin appears right in noting how such a *culture*, when not based on consistent and open debate between the public and representatives in the first place and between institutions in the second place, may lead to an executive-driven approach to secrecy, which ramifications inevitably trickle down into all aspects and levels of a global governing structure. The point made by Curtin on *regulation creep* instead of *second order secrecy* strengthens the claim of campaigners that such a debate must be held necessarily at the United Nations level.

4. Public trust

In his assessment of transparency in the European Union, Settembri highlights the function of transparency in strengthening the European institutions. The latter is very much linked to democratic theory, based on the voluntary assent of citizens, which implies they recognize decisions taken as legitimate. Schmidt defines *legitimacy* as *"the extent to which input politics, throughput processes and output policies are acceptable to and accepted by the citizenry, such that citizens believe that these are morally authoritative and they therefore voluntarily comply with government acts even when these go against their own interests and desires"*[47]. Legitimacy implies citizen's trust in the governing system, a

[46] Curtin, D. (2014) "Overseeing secrets in the EU: A democratic perspective", in *JCMS: Journal of Common Market Studies*, Vol. 52 No. 3, p. 8.
[47] Schmidt, V. A. (2012) "Democracy and legitimacy in the European Union revisited: Input, output and

condition better served by transparency than secrecy as the 1997 U.S. Congressional Report of the Commission on Protecting and Reducing Government Secrecy (the "Moynihan Commission") clearly highlighted on the basis of an analysis into forty years of secrecy in the United States Government.[48]

The European Commission expressly recognizes the role of openness for legitimacy purposes in Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents: *"Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights."*

The same point in case was made by Yin with regard to the criticism directed against the IRS in the United States by the Treasury Inspector General for Tax Administration, who indicated that the IRS had used inappropriate criteria in deciding which EO applications deserved heightened scrutiny. Yin notes that the refusal by Lois Lerner, the IRS Director concerned, to testify on the issue *"likely fixed the public's impression of the episode […] as to exactly what the IRS did"*. As a consequence, *"Loss of public respect for the agency and tax system may hurt tax compliance, diminish interest in service in the IRS, and result in continuing budget cuts for the organization whose principal mission provides the lifeblood for the country."*[49]

Moreover, the increased use of new technologies in communication has created an alternative market of ideas, information and disinformation. The latter may present a considerable problem to political institutions when citizens do not possess the necessary tools to distinguish it from correct information, and undermine their legitimacy in

"Throughput"", in *Political Studies*, Vol. 61 No. 1, pp. 9-10.

[48] Strickland, L.S. (2005), "The information gulag: rethinking openness in times of national danger", in *Government Information Quarterly,* Vol. 22, p. 554.

[49] Yin, G.K. (2014), "Reforming (and saving) the IRS by respecting the public's right to know", *Virginia Law Review Vol. 100 No. 6,* p. 1116.

significant ways. Rather than aiming at the complete control of communication means between citizens, governmental institutions may draw considerable benefit in terms of credibility and public trust by consistently providing and distributing correct information through both transparency and public discourse measures.

Government transparency thus plays a fundamental role in a democracy and may function as a guarantee for government and institutional stability. A long series of recent scandals rocking the democratic establishment and launching populist anti-establishment movements like shooting stars in many Western countries may further endorse this point.

5. Government regimes

In accepting the administration of public goods as a trust system under the Rule of Law, one could argue that such a conception is not confined to the traditional democratic administration. While their actions do not account for such a claim, over the past decades even the majority of authoritarian regimes claim to act in the best interest of their people and their country.[50] Therefore, although it is far more probable to think of the public right to know in a democracy, can it be conceived solely in such a system?

If we define *accountability* in the trust system as *"an obligation to give account or explain and justify one's actions"*[51], we can see how the socio-economic spur of international organizations, have led to the gradual implementation of accountability and efficiency measures also in currently non-democratic environments. An explanatory reason for this development may be found in the choices made at the outset of the United Nations and the drafting of the international human rights covenants. While these form the backbone of the Rule of Law, no explicit choice for any kind of government regime was made. This is obviously based on historic reasons, as after World War II, the majority of participating states in the drafting process did not subscribe to a democratic regime. Gradually, various offices in the United Nations have moved towards an interpretation in which democracy is

[50] Rogge, O.J. (1972), "National Issues: The Right to Know", in *The American Scholar,* Vol. 41 No. 4, p. 644.
[51] Curtin, D. (2009) *Executive power of the European Union: Law, practices, and the living constitution*. New York: Oxford University Press, pp.244-245.

an essential part of the Rule of Law, but the development approach based on socio-economic rights rather than civil and political rights has proven more fruitful in promoting accountability standards as requested by donors (international organizations or other nation states) instead of citizens.

In fact, in the recent adoption of the Sustainable Development Goals (SDGs) on September 25, 2015, the signatory states set 17 goals to *end poverty, protect the planet and ensure prosperity for all*. Each goal has specific targets to be achieved over the course of the next 15 years. Goal 16 is "*dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels*".[52]

Three of the specific targets for goal 16 are:

- Develop effective, accountable and transparent institutions at all levels;

- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements;

- Substantially reduce corruption and bribery in all their forms.

Again, in none of the SDGs an explicit regime choice is made. This entails that accountability is presumed to be conceivable in any government system through the adoption of a series of policy instruments including public access to information. While this subscribes the trust theory and classification under the Rule of Law, it would appear we cannot confine the public right to know to a democratic system. However, two important remarks can be made:

(1) The adoption of mechanisms of accountability in such systems has mostly been spurred by international organizations and third states and not as a natural endowment to the citizens in exchange for their trust.

[52] United Nations (2015), *Sustainable Development Goals – 'Goal 16: Promote just, peaceful and inclusive societies'*, last consulted on 21/07/2016: at http://www.un.org/sustainabledevelopment/peace-justice/.

(2) As pointed out before, the *transparency* measures adopted do but subscribe to a part of the public right to know, rather than its entirety. This is mainly due to the fact that the adopted measures are aimed at increasing efficiency and fuel the economy, as a means to enhance socio-economic standards. As Blanton puts it: *"Today, as a consequence of globalization, the very concept of freedom of information is expanding from the purely moral stance of an indictment of secrecy to include a more value-neutral meaning – as another form of market regulation, of more efficient administration of government, and as a contributor to economic growth and the development of information industries."*[53]

However, the accountability measures adopted in this view do not *directly* enhance civil and political rights and can therefore but represent a part of a public right to know, which, from a human rights perspective, must necessarily cater to the entire panoply of human rights and the Rule of Law. Moreover, when limiting measures to the function of control, civic participation in the decision-making process remains limited and therefore undemocratic. Nonetheless, the described socio-economic spur departs from an increasingly shared belief that socio-economic development leads to democratization and the enjoyment of all civil and political rights.

[53] Blanton, T. (2002), "The World's Right to Know", in *Foreign Policy,* No. 131, p. 53.

Campaign Guidelines 2017

1. Amplify support base

Between the first Conference held in February 2014 at the European Parliament and the European Commission, and the November 29, 2016, Conference at the Italian Senate, the number of organizations and influential personalities in support of the campaign has steadily grown.

Today's Conference results should serve as a springboard to further strengthen this support base, focusing on the involvement of internationally relevant organizations that may provide concrete intellectual and/or financial support to the campaign.

To this end we aim to translate today's Conference outcome in as many languages as possible to enhance direct contact with the concerned organizations. The diffusion of the campaign's objectives on our website and social media networks should further reinforce such efforts, also among the general public.

2. United Nations

While amplifying the support base, the campaign should continue its initiative at the United Nations for the strengthening of the Rule of Law through the formal recognition of the right to know.

To this end, today's Conference outcome should reinforce the proposal made to the Italian Government to bring yet another new human right to the UN floor and to work together with the NRPTT and the Global Committee for the Rule of Law – Marco Pannella for the enlargement and strengthening of the number of countries interested in the issue. A first step in this direction was taken on May 13 of this year in Geneva, at the round-table organized by the NRPTT in cooperation with the Permanent Representation of the Italian Republic, represented by Ambassador Maurizio Serra. The Representatives of Ireland,

Morocco, Canada and Mexico took active part in the debate.

The study presented today on the right to know should serve the ground the question in more concrete terms, and allows for specific debate on the issue with "friendly" countries.

3. Create a Scientific Committee

To allow for the continuous deepening of the issue and to adequately respond to questions posed by the countries and organizations involved, we propose the creation of a scientific committee, made up of jurists, political scientists and others. The purpose of the scientific committee is to accompany the campaign for the right to know in all its phases. We will invite those scientists that have already supported the campaign and those who show interest to collaborate in the future to become part of this committee. The scientific committee will be coordinated by the Committee for the Rule of Law – Marco Pannella.

4. Financial support

Currently the organizations supporting the campaign for the strengthening of the Rule of Law, and in particular the NRPTT and the GCRL, enjoy little financial independence. This greatly affects its current activities, especially in terms of human resources.

Based on the outcome of today's conference, we propose therefore to ask for financial support to public and private organizations for the dissemination of information related to the campaign and to proceed with activities at the United Nations. It is within the responsibility of the organizations involved to coordinate such efforts.