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COMMITTEE ON CULTURE, SCIENCE, EDUCATION AND MEDIA

Media freedom, public trust and the people's right to know

Rapporteur: Mr Roberto RAMPI, Italy, Socialists, Democrats and Greens Group

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Introduction

I wish to endorse wholeheartedly the report by Helen Darbishire and the past, present and (thinking of the resolution tabled by Senator Rampi) future work the Committee on this topic. Today, our democracies suffer from the pandemic, but more profoundly from luck of trust in legislation, diffuse scepticism towards 'reason' and 'evidence' and attacks on the legitimacy of parliamentary assemblies to hold the government to account. The right to know is a vision of another future for democracy and governance. If we do not act with initiatives like the one on the table today, the world will not remain as it is. It will get worse. Standing still is not an option.

My reflections are grounded in ten years of research on the instruments that open up the decision-making process to a range of stakeholders. These instruments have the potential to deliver the right to know across the whole policy process, from formulation to decision-making and implementation. My research is about the conditions under which this potential is fulfilled. It has been and is currently funded by the European Research Council. The ERC awarded me two advanced four-year grants, one on Analysis of Learning in Regulatory Governance and another, more recent, on Procedural Tools for Effective Governance. I gratefully acknowledge the support of the ERC as well as Senator Rampi, his staff (Matteo Angioli in particular), my ERC project colleagues (above all: Claire Dunlop, Jonathan Kamkhaji, Gaia Taffoni and Claudius Wagemann) and the world-class research and teaching environment provided by the School of Transnational Governance.

Appraisal

This is a foundational report in the sense that it sets robust foundations for the political activity of the Committee on Culture, Science, Education and Media and more broadly for all advocacy and political organizations engaged with the right to know. I am not aware of any

other study or report that provides equally robust foundations. Helen Darbishire has delivered a milestone, covering an immense territory in an agile and synthetic document. I also wish to thank her for having discussed her preliminary ideas with me and other colleagues and friends who are supporting Senator Roberto Rampi.

I wish to draw your attention to three important features of the report.

[1] The Definition of the right know. For the first time in political history, the Committee has the opportunity to work with a concept, that, if endorsed by the Committee with a resolution, will provide the benchmark for future political work in international organizations and beyond (think of Courts, political parties, governments, advocacy organizations). The right to know is defined as

*a citizen's civil and political right to be actively informed of all aspects regarding the administration of all public goods during the entire political process, in order to allow for the full and democratic participation in public debate regarding such goods and hold public goods administrators accountable according to the standards of human rights and the Rule of La*w.

This definition is taken directly from the Global Committee for the Rule of Law "Marco Pannella". In this way, the report acknowledges years of conceptual and political activity of the GCRL and the early intuitions of the legendary Marco Pannella, active on the right to know since the days of the Iraq War in 2003. The GCRL sees its efforts endorsed in a report for the Council of Europe. I hasten to add that the definition is fundamental because it covers the whole political process and focuses on accountability of public bodies and administrators. In a similar vein, Senator Rampi's memo dated 19 June 2020 rightly observes that this definition has an immediate connection with policy instruments. He argues that the definition:

> is a foundation to strengthen the effectiveness of policy instruments such as consultation, citizens assemblies, data protection tools, freedom of information acts, impact assessment of proposed policies, ex-post legislative evaluation and the Ombudsman, and (when these instruments are not effective) to enhance citizens' protection by a general right that can be enforced by the courts.

[2] The second element of strength is the list of practical recommendations made in the report, commencing with the invitation to the member states of the Council of Europe to ratify the Tromsø convention. The report points towards practical, operative initiatives that this Assembly should take.

[3] Third comes the synoptic treatment of access to information in a variety of contexts and in relation to a full set of actors. The report is also forward-looking in reasoning about how to govern access to information in the 'age of the machines', GDPR, digital rights and algorithmic governance. This synoptic treatment provides the Committee and the Council of Europe with a detailed map of where to look at and where to go. No territory is missed. This is the territory we need to navigate to democratise our ailing democracies.

Suggestions

What next, then? Foundations are indispensable to building work. Detailed maps are for those who want to explore, travel and reach destinations. The report and Senator Rampi's work in this Committee are a call for action. What building works are most necessary and feasible? Here we should consider the difference between right of information and right to know. The former is contained in but does not constitute the latter. The equation, so to speak is 'information + something else = right to know". What is the 'something else'? I offer two suggestions.

First, rights travel better across the policy process if encapsulated in policy instruments and institutions that can be adopted by government, supervised by parliaments and oversight bodies, protected by special commissioners and 'champions' and finally reviewed in Court. If you wish, following Vivien Schmidt, one can talk of accountability in three phases: input, throughput and output.

Second, if we put a dynamic lens on the policy process and observe it from inception to implementation, we can easily identify the patterns and see what these right-to-know instruments and institutions are.

[1] Consider the input dimension or phase first. When public decisions emerge at the stage of policy formulation, stakeholders and the general public have the right to be notified and the right to comment on the basis of meaningful and sufficiently detailed elements of the proposal. This is the policy instrument of consultation, or, as known in the North-American experience, notice and comment. Today we are facing an uncertain future and for this reason consultation must also apply to foresight. I see foresight as the nexus between present decisions and the future. The presence of consultation in foresight tools is more important than ever. Parliamentary assemblies are the natural fora to push governments and regulators to avoid making consultation a tick-the-box exercise based on dull questionnaire based on tweaking the status quo. The agenda is to push consultation towards the wider notion of participation, connecting right to know to the right to participation – a point that is splendidly captured in the report we discuss today.

[2] Always at the stage of policy formulation, the government and public bodies such as independent regulatory authorities must produce evidence of the likely effects of the decision or, better, alternative options under consideration. This instrument is known as (regulatory) impact assessment.

The impact assessment instrument is grounded on the right of all citizens, affected stakeholders and above all Members of Parliament to know the evidence that leads a government to introduce a new rule or policy. This right has a mirror image in the obligation to give reasons before making a public decision – an obligation enshrined in the US Administrative Procedure Act since 1946. It is this obligation and the right that follows that has allowed Courts to develop what exactly is or should be the nature of the 'evidence' and 'reasons'. We have seen the political importance of impact assessment in the Brexit process, when Westminster shamed the May government to inform the MPs on whether there were impact assessments of how Brexit would have impacted on key sectors of the British economy. More recently, Conservative MPs have criticised their own Prime Minister Johnson

in November 2020 for having introduced a lockdown in England without a full impact assessment covering both the public health effects and the economic implications. Advocacy organizations and research institutes have criticised the European Commission for withdrawing proposals without publishing an impact assessment justifying the decision to withdraw. The governance architecture of the Eurozone has emerged in a kind of 'impact-assessment-free' zone.

This policy instrument (impact assessment) provides parliamentary assemblies with resources to hold the government to account for the absence of impact assessment, as well as for the poor quality of these assessments. More broadly, it has potential for the right to know of all groups that are affected by a public decision, such as a regulation.

One final world on this policy instrument. It is distinctively different from the explanatory memorandum because it has analytical quality. A good impact assessment includes estimates on the effects on the economy, jobs, gender and the environment in a single template, allowing MPs and the general public to see how the government makes choices across trade-offs and risks. Fundamental is the transparency of the impact assessments and studies on which decisions affecting our lives are taken, as shown by the transparency reviews carried out by Sense about Science. Parliaments should push harder on the provision of these transparency reviews and look hard, with healthy scepticism, at the trade-offs and balancing acts in the pandemic and recovery plans.

And indeed, the future is now. All member states of the Council of Europe are engaged with recovery and innovation, in a context of public health emergency that is still worrying. We need to know how governments are making their balancing acts between different types of risks and objectives, between data protection and data for the protection of the public – between sustainability and immediate economic concerns. Gender is key to the recovery and the new model of growth we ought to embrace. Impact assessment is an important lens (not the only one of course) we and our representatives have to observe, know and when necessary criticize and hold national leaders and institutions like the European Commission to account for these balancing acts.

[3] The Ombudsman allows access to a wide range of citizens, independently of their economic and cultural capital, to a form of quasi-litigation. The members of the Committee do not need me to explain how this institution works. The Ombudsman tackles issues in terms of substance rather than in terms of legal form. This office can create reputational damages to the public administrations that are not aligned with standards of good practice. In our context, the fundamental nexus is between Ombudsman and parliamentary assemblies -- in fact we distinguish parliamentary Ombudsman officers from sectoral ones.

[4] Senator Rampi's June 2020 memorandum mentions ex-post regulatory and legislative evaluation. This is an instrument that allows MPs and their representatives to hold the government to account on the basis of whether laws and regulations are still fit for purpose. In our phase of paradigmatic change, it's important to know whether laws and regulations are fit for future, support ambitions plans for a digital world where citizens are in control of their data, and allow socially-responsible innovations. Consultation is a technique that is often used in legislative evaluation – we see this instruments interwoven to another.

Research shows that few governments are latched on this regulatory and legislative evaluation agenda. But some parliamentary assemblies already show that we should not wait for governments to initiate evaluations of the legislative stock. MPs can push the government on the presence or absence of evaluations, their timing, the questions asked in evaluations, the level of publicity and publication, and finally what the government wants to do with the results of the evaluation.

[5] I do not want to carry on with a list of instruments and procedures to avoid the impression of providing a handbook of policy instrumentation. But parliamentary assemblies should pay attention to who when and for whom oversight (of the above-mentioned instruments) is exercised. Institutions are indispensable to exercise oversight on how the instruments are deployed and their effects. (Regulatory) Oversight bodies in charge of consultation, impact assessment, evaluation and so on should not be governmental tools to fine-tuning the status quo. Parliamentary assemblies should demand and obtain the independence of these bodies from the political line of the government of the day. This dimension of the right to know is about knowing whether the instruments are used appropriately and for what aims. Good things (like meaningful consultation) do not just happen because they are good. They have to be protected by institutions.

To conclude, I offer two observations. Please do not think about the instruments and institutions as shopping list. Our research shows that what matters is their interaction, how they work together. We talk about the mechanisms that link some properties of the right to know across the instruments, not about building a house of cards of regulatory and legislative requirements. When the ecology of instruments and institutions triggers the correct mechanisms of the right to know, there are positive effects on final governance outcomes – we just published a study on the causal relation between consultation and corruption and I would be delighted to brief the committee on the implications of these ecological thinking.

Finally, and this is my second observation, the right to know we consider today at the hearing can be strengthened by recent developments in the United Nations. The UN published on 30 April an important General Comment on the Right to Science, which enhances some of the properties of the right we consider in this Committee and the background report. The right to science as defined in the General Comment is not (just) the right of the scientists, it is the right of all citizens. It has right-to-know dimensions because citizens have the right to know why research and authorization on this or that substance is carried out, how and when. We have seen faster authorization processes for vaccines. The right to science suggests that citizens are entitled to know in a context of spreading anxiety and depression why faster research protocols and authorization for medical use of psychedelics are not in sight, as lamented by medical doctors in the UK such as Ben Sessa and Robin Carth-Harris.

Thank you for considering my thoughts. Me and my staff are enthusiastically available to support the Committee in its work. For now, I shall stop and listen to your questions.