II. Roles of Government and Parliament/backbenchers in the introduction and passage of legislation

1. Introductory Note by Mr Silvio Benvenuto, July 1993

1. General Introduction

In the classic system of separation of powers within the state described in the 18th Century by Montesquieu, parliament represents the "legislative power", to which is opposed the executive power (as well as the judicial power). In this system, the legislative function, understood as the detailed elaboration of a general prescription, belongs above all to parliament. Conversely the tasks of government, that is the role of dealing with concrete and particular matters arising under the general body of the laws, belong to the executive arm.

All constitutional systems have evolved relative to the classic system, albeit with different features according to the different traditions, history and events in each country.

It is above all the very concept of a law which has changed relative to the past. In effect laws have increasingly lost their original characteristics of rarity and constancy (which has been described as "the majesty of the law"), as parliaments - the political instrument of the principle of sovereignty of the people in democratic systems - have tended to take on, in a more and more invasive manner, the function of control of the executive and to participate increasingly in the political orientation of the government.

In other ways, the role and influence of government in the task of framing primary legislation has weighed ever more heavily, according to the teachings of numerous philosophers of the last century (notably J. Stuart Mill). According to these authorities, the executive is shown to be more involved than the legislative in proposing laws, with Assemblies being more inclined to control and to approve the executive's proposals.

The most significant historical example of the determining role of government in the formulation of laws in parliament is the British *Cabinet Government* model, which has evolved to become *Prime Ministerial Government.*

Under this model, which anticipated the advent of what a well-known jurist, Mr George Burdeau, has called the *"démocraties qui gouvernent",* a law is not regarded as the expression of the general will but as the expression of the principles of the majority and the most important instrument of government.

More recently, in France, under the Constitution of 1958, the attempt has also been made to reserve to government, using various different legal instruments, control of the process of formulating the law.

Even if in general it can be said that, where it exists, the pre-eminence of government in the field of legislative activity rests above all else on acceptance of the principle of the political majority, numerous legal instruments and parliamentary procedures exist to give effect to this result.

Thus if the incidence and extent of the government's power in legislative matters among the different countries is to be compared, these instruments and procedures must first of all be identified.

Nevertheless, a purely theoretical exposition of the mechanisms would give a distorted picture unless their practical operation is also examined.

An example can illustrate the importance of taking into account practical application: under article 41(1) of the French Constitution the government can declare draft amendments by private members to be inadmissible as being outside the scope of the bill or as being contrary to powers reserved to the government. However, between 1981 and 1986 the government never invoked this article, so as not to deprive Members of their rights of amendment.

In general terms, and taking account of the different constitutional systems in different countries, it can be stated that the incidence of the role of government in the legislative function takes different forms according to circumstances (necessity, urgency, crisis, exceptional situations), according to the purpose of the legislation (budget, public expenditure, taxation), according to procedural stage (introduction, amendment), and according to the political relationship with parliament (deciding the Orders of the Day, the timing of stages of a bill, or requirements for its approval).

Other hypotheses arise, as will be discussed below, in which a government is accorded competence in primary legislation, even relative to parliament, and in which the government exercises a power of primary legislation delegated to it by the parliament.

But before examining these various cases in more detail, it is worth introducing further precision on the concept of legislation. The concept contains differences according to whether the so-called "civil law" countries are being considered (such being the Italian concept of legislation, a product of the romano-german system; this latter having undergone evolution in respect of public law, above all in France) or the so-called "common law" countries (such as those deriving from the English system).

In the civil law countries, as a result of the general principles and characteristic norms of the system, the executive possesses a normative power with respect to the execution of laws and, generally speaking, there is no need for an empowering law to regulate the situation in particular cases in this area.

In common law countries, in order to fulfill such functions, the executive has need of what is called "delegated legislation"; this is effected through "statutory instruments", which in their turn might take a variety of froms (rules, orders, regulations, licences, directions etc.).

The concept of delegated legislation in a civil law country such as Italy is quite different. Under the Italian Constitution (Article 76), under certain conditions and with certain limits, the Parliament can charge the government with fulfilling certain legislative functions. In such cases however, the acts performed by the government under its delegated powers have exactly the same force and status as laws approved directly by the Parliament: that is to say they are part of what can be defined as primary legislation.

Consequently, so as to avoid confusions of terminology and concepts between different countries with different legal systems, and to restrict the scope of this paper, which otherwise would be too wide, the paper, in considering the respective roles of government and parliament, will be limited to what can be defined as primary legislation.

2. The role off government in legislative action in cases off necessity, urgency or crisis

In many constitutional systems it is laid down that in cases of necessity, urgency or crisis the government has a special role in the adoption of primary-type legislation.

For example, under Article 77 of the Italian Constitution the government may, in extraordinary or urgent situations, adopt provisional measures which have the force of law. However, such measures must be confirmed into law by parliament within a period of 60 days from their promulgation, failing which

they become ineffective from their commencement. A similar rule exists in the Greek Constitution (Article 44). In the latter case however it is provided that where such a measure becomes ineffective there is no retrospective effect on events which have already taken place. Other Constitutions, while recognising a power for the government to issue urgent decrees, exclude certain types of matters from this power (for example Article 86 of the Constitution of Spain excludes matters relating to the basic institutions of the state and those relating to the rights and duties of citizens).

The German Constitution (Article 81) lays down that the government may declare a state of "legislative emergency", by virtue of which, if the lower chamber (Bundestag) twice rejects a government bill, or if it approves such a bill in so amended a form that it is unacceptable to the government, it is sufficient for its adoption for the bill to be approved by the upper house alone (Bundesrat).

The Greek Constitution (Article 76) lays down that a bill designated as "very urgent" by the government is put to the vote subject to only limited debate, and the government can demand that a bill which is particularly important or urgent be discussed at a set number of sittings less than three (with two supplementary sittings being allotted at the request of one tenth of Members).

Urgent procedures for the examination of bills at the request of the government are also provided for by, among others, the Constitutions of Portugal (Article 173) and Italy (Article 72, which leaves the relevant detailed provisions to be set out in the parliamentary rules/standing orders).

3. The role of government relative to the purposes of the legislation

Legislation in respect of public expenditure and the state budget is an area where the government in many countries plays a major, if not exclusive, role.

In the United Kingdom, bills or amendments which involve expenditure or a charge on the public must be accompanied by a "Queen's Recommendation", that is to say they must in practice have the agreement of the government.

In France, Article 40 of the Constitution provides, in more draconian fashion, that non-government bills or amendments are not in order if they involve a diminution in public receipts or the creation or increase of a charge on the public.

Article 113 of the German Constitution lays down that discussions in the two chambers on increases in the expenditure plans of the government in the federal budget, or which imply new expenditure, require the agreement of the government. The government can require the parliament to suspend its consideration but must report back to the Bundestag within six weeks giving its opinion on the matter. If the Bundestag insists on considering the bill, the government can demand a second consideration.

Under the terms of Article 17 of the Irish Constitution, an appropriation of public expenditure cannot be decided by a resolution of the Dáil (House of Representatives) or even by a bill without a recommendation in the form of a message from the Taoiseach (Prime Minister).

On the other hand, even in systems whose rules or practices give an exclusive or predominant role to government in expenditure or budgetary matters, there is often - to a greater or lesser extent according to the country and to the particular political circumstances - negotiation betwen the government and the political groups, both of the majority and the opposition.

In a recent article in the *Revue frangaise de finances publiques* (H. Message, "Can the power of parliament with respect to the budget be measured?") there is a detailed analysis of the amendments which Members of Parliament from the majority, but also those from the opposition, succeeded in making to the government's proposals in 1991,1992 and 1993.

This illustrates the point made earlier that it is important always to check how the legal provisions and procedures which accord powers to the government operate in practice, particularly in respect of legislative matters, and especially financial legislation.

Examination of practical experience sometimes leads to apparently paradoxical conclusions. In respect of budgetary legislation for example, the contest between government and parliament can give rise to similar situations even as between countries such as France, where the government has very precise legal and regulatory insruments at its disposal, and Italy, where by contrast everyone complains that parliamentarians have too much power and that as a result public expenditure can become ungovernable.

A study put in hand by the secretariat of the Italian Senate, specifically on this matter, has shown that in Italy, despite the very full and in fact almost unlimited powers of parliament in legislation relating to public expenditure, successive budget and finance laws of the 1990s have in essence followed the objectives that the government sought to achieve in respect of the level of expenditure and the amount of the deficit.

Leaving aside public sector finances, a particular case of interest relating to the predominace of government in legislation is shown by Article 37 of the French Constitution. This Article provides that parliament cannot legislate except in the areas specifically laid down by Article 34 of the Constitution. All other matters are reserved to the government, which legislates in this area by its own acts. To all intents and purposes these acts are laws properly so-called, and, at least in respect of wide areas under this power, it follows that it is the government which is the effective holder of primary legislative power. The legislative competence of the government is protected further either by the possibility memtioned above of declaring bills or amendments to be out of order or by the power which the Prime Minister also has under Article 61 of referring a bill to the Constitutional Council, before its promulgation, to rule on its constitutionality.

There are also, in many countries, particular regimes relating to the respective competence of government and parliament in respect of ratification of Treaties.

4. The role of government in respect off initiating legislation and of procedures for consideration of bills

Apart from the exception already discussed of particular kinds of matters, notably public finance and expenditure, it is generally the case that government and parliament have an equal status in respect of initiating legislation.

This is the theory, but in practice government bills in almost all countries are of greater political importance and have a higher chance than non-government bills of becoming law.

It would therefore be a first point of interest to establish the facts, for the different countries and for a specified period, as to the proportion of laws which begin as government bills and which begin as non-government bills.

It is important above all to determine whether there exist particular legal provisions or parliamentary procedures which put the government into a position of being able to dominate or influence legislative activity.

In Italy this question has for a long time occupied the attention of political interests and specialists of constitutional law and political science.

In effect in this country the powers of government to direct legislative activity are few and limited, which has led it to have recourse to the procedure

of emergency decrees more frequently than might properly be regarded as matters of urgency.

In other countries on the other hand the government has very effective powers and instruments at its disposal.

For example in France, under Article 48 of the Constitution, the government has priority over the order of business of parliament. In accordance with this provision, which infringes a customary principle of parliaments that they have the sovereign right to control their own order of business, the government may require parliament to consider its bills, and those non-government bills which it has accepted.

The British system operates to similar effect, with non-government bills (private members' bills) being proceeded with only on Fridays. The government programme is guaranteed by the legislative timetable put in hand by an authority specially charged with this role (the Leader of the House). There is of course consultation with the opposition (via the opposition whips), but this consultation is not such as to impede - at least in respect of matters of political importance - the determining and decisive role of the government.

Besides those just discussed, there are many other procedural instruments to assist the government in the realisation of its legislative programme.

In this connection can be mentioned the *vote bloqué* procedure in France where, under Article 44 of the Constitution, the government can insist on a single vote on all or part of a bill under discussion, as amended in accordance with government amendments only. Also to be considered are the mechanisms such as the "Guillotine" or "Allocation of Time Order" or such as the "Kangaroo" which provide respectively for the automatic submission to a vote of the government draft for the bill or for debate on the amendments to be cut short.

Furthermore, either by some normative provision or by constitutinal or parliamentary custom, there exists in many countries the opportunity for the government of forcing the parliament to adopt its legislative proposals by making them a question of confidence: that is to say that parliament, if it rejects the government's proposals, must take responsibility for the fall of the government.

5. The adoption by the government of primary legislative power delegated to it by parliament

As noted earlier, the Italian Constitution (under Article 76) allows parliament to delegate to government the power to issue acts of primary legislation.

The provision in question however lays down that the exercise of this legislative power "can only be delegated to government under principles and criteria laid down and only for a limited period and for defined purposes".

At the time of granting such a delegation the parliament tends to reserve to itself a certain control on the government's options in so far as it lays down that before issuing such acts the government must seek the opinion of the relevant permanent committees of the two chambers.

A general law governing the organisation of the Presidency of the Council of Ministers provides that such an opinion is obligatory for delegations exceeding two years in duration. The passing of such a delegated power does not prevent parliament, if it sees fit, from pasing its own legislative measures in the area of the delegated power.

By contrast the Spanish Constitution (Article 84) guarantees, for the period of the delegation, exclusivity in power in that area to the government; it follows that the government can claim any bills or amendments which conflict with a delegation currently in force to be out of order. Still in Spain, the terms of Article 81 and 82 of the Constitution provide that legislation in the area of matters which require an organic law of parliament cannot be the object of a delegation to government. An analogous provision exists in the Portuguese Constitution (Article 167).

Various different methods and procedures exist in other countries which provide for the delegation of legislative power from government to parliament.

2. **Topical** discussion: extract from the Minutes of the Canberra session, September 1993

The PRESIDENT noted that a topical discussion on the respective roles of government and parliament in the initiation of legislation had been proposed by Mr Benvenuto (Italy) at the New Delhi session (Spring 1993).

Mr BENVENUTO summarised the principal points of his introductory note. He underlined in particular that the role of parliament had evolved and that legislative activity was not an exclusive function of parliament but was shared between parliament and government: the government proposed laws and the parliament controlled the executive's proposals.

Mr ALBA (Spain) sought clarification of the English title in the introductory note since the English word "preparation" did not appear to him to correspond to the French term "création".

Mr BAHADUR (Nepal) concentrated on the examples of Asiatic countries. He explained that government Orders existed in such systems although with some differences. He sought further details on the position in Italy in respect of the validation of such Orders promulgated while parliament is not in session. He referred to the different forms of legislative initiative: Bills proposed by the Opposition, Bills proposed by the majority or by the Government and Bills proposed on a private initiative. Sometimes Bills proposed by members of the Opposition did not take account of laws already in force. In some cases the hurried conditions in which some Bills were prepared meant that there was room for improvement in parliamentary debate.

Mr BENVENUTO gave some details on the position in respect to Orders made in extraordinary or urgent circumstances in Italy. Such texts must be approved or converted into laws by the Parliament within sixty days. He noted that French terminology, as with Italian legislation, distinguished "proposition de loi" *(roughly translatable as "proposed law")* which referred to a Bill proposed by a Member of Parliament from "projet de loi" *(roughly translatable as "draft law")* which was proposed by the Government.

Dr. KABEL (Germany) noted the following points. Statistics showed that in Germany also the Executive played an important role in the legislative process since 54% of Bills tabled were of government origin (the figures being taken from the last legislature). The proportion for Bills passed into law was 63%. Nevertheless these figures should be treated with caution. In particular it was necessary to take into account that parliamentary principles did not lead to a total separation of government from parliament. It could be presumed that Bills tabled by the Government were supported by the parliamentary majority. The parliamentary groups in the majority were involved in various ways with the formulation of government Bills. Additionally, groups could table Bills which were, in practice, Government Bills so as to save time since the involvement of the Bundesrat in the legislative procedure only arose on Government Bills.

Dr. KABEL then made two clarifications concerning the German Constitution. A state of legislative urgency, declared by the President of the Republic, allowed a Bill to be adopted with the consent of the Bundesrat alone if the Bundestag rejected it or only agreed to it with amendment. This procedure could only be activated if the Chancellor had already lost a vote of confidence while the Bundestag had not been dissolved. The procedure was not directed towards military coups, revolution or disasters which threatened the normal functioning of the legislative bodies. It was concerned solely with serious government crises where the Legislative and the Executive were blocking each other and where there existed no possibility of formation of a new majority. Such a state of legislative urgency had never been declared in Germany.

As for Article 101 of the Constitution, which required the consent of the Government for proposals which would increase expenditure, or which might do so in future years, this procedure had only been activated once, in 1953. In cases where the Government commanded a majority the procedure was of no practical importance.

Sir Clifford BOULTON (United Kingdom) noted that the United Kingdom had a parliamentary system of government. This did not mean to imply government by Parliament, but by the Government in a parliamentary context. Legislation was principally at government initiative, but Members of Parliament were able to affect Bills, particularly during the preliminary consultation processes. Consideration of legislation relating to social questions was largely at the initiative of Members.

Additionally, the role of parliament was to control the administration of government partly through oversight of Ministerial orders. Delegated legislation, as opposed to primary legislation, was of major importance in quantitative terms and it was appropriate for parliament to exercise control over it. Finally, the right of amendment allowed Members of Parliament to modify government legislation.

Mr BENVENUTO noted that the role of government was equally significant in the British system. The existence of days reserved for examination of Private Members' Bills and the role of the Leader of the House in ensuring execution of the government's legislative programme, were also fundamental.

Mr PENERANDA (Spain) gave some clarifications on Article 84 of the Spanish Constitution which forbad parliament to pass laws in areas reserved to the Executive for a specified period so as to avoid possible conflicts.

Mr LANZ (Switzerland) stressed that popular rights in legislative matters influenced the respective role of parliament and government in this area. Fifty thousand citizens could demand abrogation of a law by referendum, a system which represented a threat to bills which had been passed and thus influenced the contents of Bills. Popular legislative initiative only concerned constitutional modifications but they could also set off the legislative process by their knock-on effects.

Finally, reflecting the federal character of Switzerland, Cantons had a right of initiative and were also concerned in the process of preparation of Bills. The distinction between creation and legislative initiative was difficult to apply in Switzerland.

Mr BENVENUTO noted that he wished to assess the relative importance of government and parliament in initiation of legislation.

Mr SOELAKSONO (Indonesia) gave some details relating to his country. Article 5 of the Constitution gave to the President of the Republic the power to table Bills. Additionally the President could issue the regulations necessary to apply laws. Finally Article 22 allowed the President to promulgate government regulations which must receive the approval of the House or be revoked. In financial matters the budget must be approved each year and if this was not done the preceding year's budget took effect. The Government also had the power to set the order of priorities of Bills submitted to the House.

Mr NDIAYE (Senegal) recalled that the Constitution of Senegal had been influenced by the French Constitution of 1958. There was a distinction between matters subject to regulation and matters which were within the domain of legislation. The Parliament could not take the initiative in areas in which it was not concerned. Furthermore in legislative matters the Government had the right of initiative for measures of a financial character and the system of Orders allowed the Government to engage in delegated legislation. Finally, as in all countries in Africa, the Opposition now played an important role, which implied a certain re-arrangement within the Constitution.

Mr ABUL HASHEM (Bangladesh) noted the importance of the distinction between primary and secondary legislation. In the first case Bills were prepared by the Government and submitted to parliament to be passed, while in the latter case the Government could issue measures by regulation. In situations of urgency the Government could issue Orders which had a legislative nature and were applicable for three months, their validity thereafter requiring confirmation by the Parliament.

The Parliament had a certain role to play in the initiation of legislation. Members of Parliament could table Bills. Most of them however did not get past the stage of examination in Committee. Some of them however could, nevertheless, be passed though the principal role remained with the Government which had the initiative in respect of most Bills.

Mr HADJIOANNOU (Cyprus) underlined that in respect of primary legislation all Bills must be submitted to the House in order to become law. The Government could not adopt provisional measures.

As for delegated legislation, this could not enter into force except after approval by the House or after a delay of sixty days. Generally the House requested a Minister to withdraw the draft and to re-table it so as to create a longer delay.

Mr WERUNGA (Kenya) stressed that legislative initiative belonged to Government and to individual Members of Parliament, both from the majority and from the Opposition. However Private Members' Bills could not have

expenditure implications; only government bills could. In 1993 out of two such Bills only one had been adopted by the Assembly. Any Bills adopted must receive the assent of the President because the Constitution provided that Parliament comprised the National Assembly and the President. Since the adoption of a multi-party system in 1992 the National Assembly had been able to override the President and to pass a Bill for a second time which had not received the approval of the President within fourteen days.

As for secondary legislation, there were a number of different kinds of cases. Some such measures were effective from their publication while others required approval by parliament.

Mrs. MOMPEI (Botswana) noted certain legislative features. Government Bills must be published within thirty days and those which affected national usages and customs must be referred to the House of Chiefs which could propose amendments before the Bill was sent to the National Assembly. Texts which had been passed must receive the approval of the President of the Republic before becoming law.

3. Report prepared by Mr Silvio Benvenuto, Deputy Secretary General of the Senate of Italy (adopted at the Madrid session, March 1995)

Preamble

In the classic description of the sharing of powers of the State in Europe in the 18th century by Montesquieu, the Parliament represented the "legislative power" to which was opposed (as well as the judicial power) the executive power. Under this analysis, the legislative function, understood as the laying down of general principles, belonged above all to Parliament. By contrast it was the role of the Executive to exercise the activity of Government, that is to say, management of specific, concrete issues within the general outlines fixed by legislation.

In all constitutional systems, this classic arrangement has gone through a process of evolution, with of course individual features and details which differ according to the traditions, history and particular events in each country.

It is first of all the very notion of a law itself which has changed relative to the past. In effect it has lost its original characteristics of rarity and stability

(what is called "the majesty of the law"). In a number of countries, the law is not the sole or the principal normative instrument regulating relations between citizens, either amongst each other or relative to public and private bodies which are charged with the functioning of the state and public administration. Furthermore, as the political instrument of the principle of the sovereignty of the people in democratic systems, Parliaments have tended to fulfil in a more and more incisive manner their function of control over the executive and increasingly to participate in the direction of Government policy. These functions are sometimes as important as the traditional legislative functions.

In other respects, the role and impact of Government in the exercise of the legislative function at the primary level has become more and more substantial, as described in the teachings of many commentators of the last century (notably John Stuart Mill). According to these commentators, the Executive is more likely than Parliament to propose laws, with Parliaments being more ready to control and to approve the proposals of the Executive.

The most significant historical example of the determinant role of the Government in the formation of laws in Parliament is given by the British system of *Cabinet Government.* Under this model, which was the first of what a well-known jurist, Mr George Burdeau, called the *"démocraties qui gouvernent",* a law is not considered to be the expression of the general will but the expression of the principles of the majority and as the principal instrument of Government.

More recently, in France, the 1958 Constitution also sought to give Government, by means of different legal and procedural instruments, mastery over the process of law-making.

This short general introduction indicates the interest raised in establishing what role the Government plays in different countries in respect of legislative activity.

The responses to the questionnaire approved at the Paris session offer a spread of situations very different from each other. Alongside countries where the classic sharing of powers is at least in theory respected and where, at least at the formal level, Parliament remains as the sole arbiter in legislative activity, there are other countries where the Government plays a major role, either through specific legal instruments laid down by the Constitution or parliamentary rules, or by political means, thanks to the *continuum* which subsists between the political majority in Parliament and the Government. The latter can, in effect, in certain cases either on its own initiative or by delegation from Parliament adopt directly measures similar to laws approved by Parliament; in other cases it can influence the path followed by a Bill, ensuring that bills it has proposed or which it supports are given priority in debating time or always

proceed to final approval. And other powers can, in practice, further assure the Government a dominant or pre-eminent position in the legislative process.

This Report takes into account replies, often very full and richly argued, sent in by the following countries: Algeria (National Consultative Council), Australia (Senate), Belgium (Senate, House of Representatives), Brazil (Federal Senate), Bulgaria, Canada (Senate, House of Commons), Cyprus (House of Representatives), Czech Republic (Chamber of Deputies), Denmark (Folketinget), Finland (Parliament), France (National Assembly, Senate), FYR of Macedonia (Assembly of the Republic), Germany (Bundesrat, Bundestag), Greece (Chamber of Deputies), Iceland (Althingi), India (Rajya Sabha), Israel (Knesset), Italy, Japan (House of Representatives, House of Councillors), Republic of Korea (National Assembly), Lithuania (Seimas), Niger (National Assembly), Norway (Stortinget), New Zealand (House of Representatives), Netherlands (First Chamber), Papua New Guinea, Philippines (House of Representatives, Senate), Poland (Senate), Portugal (Assembly of the Republic), Spain (Senate), Switzerland (Federal Assembly), Uganda (National Assembly), United Kingdom (House of Commons, House of Lords), Uruguay (Senate), USA (Senate), Zambia (National Assembly), Zimbabwe (Parliament).

Before describing in their various aspects the respective roles of Government and Parliament/backbenchers in legislative activity, it should be made clear that in all countries there is an institutional figure (King, President of the Republic, etc) who fulfils the functions of Head of State.

In most cases, the Head of State, following the English formula, reigns but does not govern. Consequently, in these countries some acts, still formally undertaken by the Head of State, in practice fall within the competence of the Government and it is in this way that they are dealt with in this report.

Furthermore, account has been taken of the fact that in some Presidential or semi-Presidential systems, the Head of State also exercises powers belonging within the Governmental sphere; in this context all reference to the Government includes reference to the Head of State.

The United States of America illustrates, as is well known, a different constitutional system. The US President, directly elected by the people, has wide ranging powers. In this system, which is based on a strict separation of powers, the closest term corresponding to "Government" in other constitutional systems is the "Administration". This term describes the President and the heads of the main organs of the executive ("Executive Branch"). The latter cannot at the same time be members of the Parliament. (In France and Switzerland also there is an incompatibility between membership of the Government and of Parliament.)

Government legislative power arising from authorisation or delegation by parliament to the government

The possibility of Government adopting measures similar to laws approved by Parliament following authorisation or delegation by Parliament does not exist in some countries where the principle of division of powers has been laid down in a rigid manner. Such countries are: Algeria, Bulgaria, Lithuania, Netherlands, Czech Republic, Uganda, Uruguay.

In other countries where delegation by Parliament to the Government is possible, it is important to distinguish cases where, by virtue of such delegation, the Government acquires the power to adopt measures having the same force as laws approved by Parliament. Clearly, this difference is important where there exists a hierarchy of legal sources, under which a normative act having the character of secondary legislation cannot amend an act of primary legislation such as laws directly adopted by Parliament.

The description of the system in force in respect of normative delegation from Parliament to Government given hereafter takes account, subject to the limits of the responses received to the questionnaire, of the distinction between primary legislation and secondary legislation. It must, however, be underlined that this distinction is not always clear in the various countries; consequently, some statements are inevitably somewhat general, since it is not possible within this report to examine more deeply the description of the constitutional systems in the different countries case by case.

Additionally, it should be noted that the notion of legislation contains some differences between the countries known as *civil law* countries (such as the Italian concept of legislation, issuing from the romano-germanic system; this system has undergone an evolution in respect of public law, above all in France) or countries known as *common law* countries (deriving from the English system).

In the *civil law* countries, the Executive draws the normative power necessary for the execution of laws from the norms of general nature in the system itself; and in principle it is not necessary to have a specific enabling law each time to regulate the different situations.

In the *common law* countries, to fulfil such a role the executive requires what is known as *delegated legislation;* this is done via *statutory instruments* which in their turn can comprise a variety of different instruments *(rules, orders, regulations, licences, directions* etc.).

The notion of delegated legislation in a civil law country such as Italy, for example, is totally different. Under the Italian constitution (article 76), under

certain conditions and within certain limits, the Parliament can delegate to Government the power of fulfilling the legislative function. In such a case, however, the measures issued by the Government under this delegated power have the same formal validity as laws directly approved by Parliament; that is to say, they form part of what can be defined as primary legislation.

In the light of these general considerations, amongst the countries where delegation from Parliament to Government is provided for of a kind which amounts to a legislative power at the primary level (that is to say, similar to laws approved by Parliament) are Belgium, Brazil, Italy, Niger, Norway, Poland, Portugal, Zambia and Zimbabwe.

In Italy, as mentioned earlier, it should be noted that the Parliament can only delegate to Government a power to adopt measures having the force of a law after it has laid down the principles and governing criteria and for a limited duration and for defined objects. The Parliament retains at all times the power to legislate within the delegated domain, and sometimes imposes on Government an obligation to consult parliamentary standing Committees or special Committees for an opinion before the adoption of the legislative measures which are the subject of the delegation accorded by the Parliament.

In Brazil, the constitution sets out certain matters which cannot be delegated (nationality, citizenship, individual political and electoral rights etc). The Parliament always retains the power to legislate in the domain which has been delegated, and control over delegated legislation is undertaken *a posteriori* by Parliament or by legal routes.

In Belgium, legislative delegation to Government is possible under "special powers laws". The law which confers the special powers on Government sets out in detail the matters covered by the delegation and the time limits within which the delegation may be exercised. In general, it is not possible to delegate to the Government (formally to the King) power to legislate on a matter which is within the domain of law, that it to say, matters that cannot be regulated except by a law approved by Parliament (for example, the norms governing the organisation of local communities). In general, an enabling law lays down that the delegated norms are subject to confirmation/ratification by Parliament. In principle, Parliament retains the power to legislate on matters delegated to the Government.

In the Republic of Korea, Parliament can only delegate to Government power to adopt legislative acts in the areas and under the conditions set down by the Constitution and by laws. Such measures adopted by the Government are subject to control by the Supreme Court and by the Constitutional Court. Parliament retains the right to legislate on delegated matters.

In Niger also delegation of legislative power is subject to limits and to control *a posteriori* by Parliament (ratification). The Parliament does not retain legislative power in delegated areas.

In Norway the delegation of legislative power is subject to limits which are not however very strict. By means of a Committee specially appointed for this purpose, Parliament can approve recommendations relating to measures adopted by the Government (the King in Council) but it cannot annul or amend such measures. Further control on Government is possible by means of questions and interpellations. Parliament maintains a reserve power to legislate directly on matters subject to delegation.

In Poland legislative delegation is subject to limits in nature and in time. Parliamentary control is political and *a posteriori.* Furthermore, the Parliament loses its power to legislate in matters in which it has conferred legislative delegated power to the Government. However, the Government possesses no legal instruments to protect its legislative power in delegated areas.

In the FYR of Macedonia delegation of legislative power is not provided for except in case of war or extraordinary circumstances. Certain matters relating to human rights and to fundamental civil rights cannot be subject to a delegation.

In Spain any delegation of legislative power, which must specify the objects and the time limits on the delegation, cannot include certain specific matters (for example, fundamental rights and public freedoms). The delegating law can set down additional controls without prejudice to other legal controls. The Parliament does not retain the power to legislate on matters which are subject to delegation to Government. Under article 84 of the Constitution, the Government can oppose any bill or proposed amendment which would be contrary to a valid and current delegation of legislative power.

In Zambia measures adopted by the Government pursuant to enabling laws must be submitted to Parliament within 28 days of their adoption, even though they may enter into force from the time of their adoption.

In Zimbabwe also, precise time limits are laid down for the adoption by Government of measures which have been delegated to it. The Parliament does not retain a power to legislate on delegated matters.

In Papua New Guinea also there is provision for a form of secondary legislation adopted by the Government which must be submitted to Parliament for approval. Parliament retains the right to legislate in the same area.

In Portugal delegation of legislative power to the Government cannot be exercised for matters expressly reserved for legislative action by Parliament.

The delegation must set out the purpose, the nature, the extent and the duration of the authorisation. The delegation comes to an end automatically in the case of the resignation of the Government, dissolution of the Assembly at the end of a legislature, or, in all cases, one year after the delegation has been conferred if it relates to fiscal matters. Ten Members can ask Parliament to decide not to ratify a measure adopted by the Government. While awaiting such a decision the measure itself can be suspended by Parliament; Parliament retains in all cases the right to legislate on matters delegated to Government.

In the Republic of Cyprus the Government must submit to the approval of Parliament by-laws arising from a delegation.

In the USA both the President, whose powers under the Constitution are limited, and the Government (Executive Branch) derive most of their powers under an authorisation or delegation by Parliament. In the individual measures *(Statutes)* under which the different departments are established, the Congress can lay down conditions, limits and obligations. Besides giving powers to the President, the Congress lays down general criteria, in flexible terms, so as to ensure Executive action. Since 1932, the Congress has used a special legislative instrument (the Legislative Veto) to control the activity of the Executive. Before making individual decisions under the delegated authority, officials of the Executive Branch must obtain the approval of Congress for a measure other than a law (approval by one House, by both Houses, or by a Committee or Sub-Committee). Although declared unconstitutional in 1983 by the Supreme Court, in a case referred to it, this procedure continues to be followed in practice. The measures adopted by the Executive, in respect of regulations and decisions made under the delegated power, have the force of law; on the other hand, Congress can continue to pass its own laws in the same field. Congress also has a power of preventative control over the delegated legislation (not only in the ways already indicated, but equally by requiring the opinion or approval of the relevant Committees) as well as further control through the power to pass laws limiting or restricting the *Statutes.* Other forms of control are exercised by other parliamentary methods (hearings, committees of inquiry, informal contact, etc.).

In other countries, delegation of legislative power from Parliament to Government concerns secondary normative activities or, as they are called in civil law countries, regulatory norms, in the sense that the norms or regulations in the measures adopted by the Government are subordinate to laws approved by Parliament and cannot amend such laws.

In Australia delegated legislation must be laid before both Houses of Parliament, which can, within certain deadlines, reject the measures adopted by the Government.

In Canada the limits of delegated legislation are fixed by the enabling legislation which establishes the delegated power. Delegated legislation has a secondary character and cannot amend laws approved directly by Parliament. Parliament can specify that the adoption of delegated legislation shall be subject to its approval and always retains the power to legislate directly on the matter delegated to Government. A Joint Committee of both Houses of Parliament has a scrutiny role over delegated legislation. However, the proliferation of such legislation is such that it is impossible for the Committee to examine them all.

In Denmark as well delegation concerns administrative powers (secondary legislation). A Committee of Parliament examines the measures before the Government adopts them.

In the Philippines several laws provide for the possibility of Parliament delegating to the Government (or rather the President/Government) the power to adopt measures to govern the implementation of laws passed by Parliament and which by consequence are not exactly comparable to the laws themselves. Clearly, given the nature of the norms delegated to the Government, the Parliament retains at all times the power to legislate directly on the same matter.

It is the same in India where it is clearly laid down that measures adopted by the Government following a delegation of legislative power do not have the same force as laws approved by Parliament and that they cannot amend or replace such laws. In conferring the delegation the Parliament can lay down limits and governing criteria. A special Committee called the Committee on Subordinate Legislation has been established in the two Houses of the Indian Parliament. The Parliament retains at all times the power to legislate within the field delegated to Government.

In Iceland, although Article 2 of the Constitution solemnly provides that legislative activity is a matter for Parliament and the President, Parliament can delegate to the Executive a power to adopt secondary legislative instruments (regulations etc.); such instruments always have a lower status than the laws (statutes) to which they are subject. In conferring such power, Parliament can set down limits on such matters as the substance of the instrument, or the time for which it can remain in force, etc., but it cannot actually control the measures and it is the Government which adopts them; the Government is under no obligation to submit them to Parliament. If the adoption of such a measure causes controversy, the party involved can bring the matter before the courts, but he may also - when certain conditions are fulfilled - have access to the Parliamentary Ombudsman (PO) and lodge a complaint. If the PO comes to the conclusion that the measure (for instance administrative rules issued by a Ministry) lacks legal basis or is ambiguous the usual procedure is to notify the

presidium of the Parliament as well as the Ministry in question. The presidium forwards the matter to the respective parliamentary committee for consideration. The PO may also on his own initiative draw attention to ambiguities in the law, which will in the same way be forwarded to the aforementioned parliamentary committee. Parliament retains the power to legislate in matters delegated to Government, although this is unlikely to happen in practice.

Also in Japan legislative power cannot be totally delegated by statute to the administration because such delegation may usurp the legislative power which belongs exclusively to Parliament (the National Diet). An individual statute may delegate to the Executive Branch (Cabinet) of the Government the power to lay down and enforce its own measures, generically termed "cabinet orders", so long as their purport appears to be in conformity with the authorising law. The effects of the orders are inferior to statutes enacted by Parliament. Parliament retains the right to legislate in the same area.

The possibility of delegation of legislative power exists in Niger. The Parliament exercises a control *a posteriori* in that delegated measures adopted by Government must be ratified. For delegated matters, the Parliament retains the power to legislate directly.

In Germany delegation by Parliament to the Government, provided for under article 80 of the Constitution, is subject to a series of limits and conditions. The measures adopted by the Government cannot be considered as laws in a formal sense and they are subject, within a hierarchy of legal sources, to laws approved by Parliament. Clearly, within the areas of delegation Parliament retains the power to legislate directly.

In the United Kingdom Parliament can delegate to Government the power to adopt secondary legislation such as Rules, Regulations, Byelaws or other Statutory Instruments which are not at the same level as a statute passed by Parliament. Parliament can fix precise limits to the Government's power to adopt delegated measures and retains the power to legislate directly in such areas. The House of Lords has recently appointed a Committee to scrutinise the extent to which it is proper for the Government to ask Parliament to delegate powers to the executive. The more important such measures are submitted to Parliament for approval; Parliament generally decides on the measure as a whole, with no power to pass any amendments, save in the most exceptional cases. Sometimes approval precedes and sometimes it follows adoption of the measures by the Government.

An analogous situation exists in Israel and New Zealand, where it is also laid down that for certain matters adoption of measures by Government requires the confirmation or ratification of Parliament.

A particular case where the power delegated by Parliament to Government can give rise to primary legislation (that is to say, laws similar to those approved by Parliament) or to secondary legislation is France, where, under the terms of article 38 of the Constitution, the Government can, in order to enact its programme, request from Parliament authority to adopt, within a specified time, measures which are normally within the domain of law. The enabling Act must fix in detail the measures to be adopted and the timescales in which the Government must adopt them and in which the Government must place the ratification bills before Parliament. Until such ratification takes place, the measures adopted by the Government have regulatory (secondary legislation) status. If Parliament, having had the measures submitted to it for ratification, does not come to a decision the measures retain their regulatory status. If Parliament refuses ratification the measures become null and void. If Parliament ratifies the measures adopted by the Government they then acquire full legislative validity. Where Parliament delegates to Government a power to legislate in a particular way it does not retain the power to legislate itself in that area. The Government, in accordance with article 41 of the Constitution, may oppose as irreceivable bills or amendments put forward by Members of Parliament which would be contrary to the delegation accorded to it. The Constitutional Council adjudicates in case of disagreement.

In Switzerland the Government can have delegated to it by the Parliament power to adopt ordinances known as *"dépendantes"* following definition of their objects and guiding principles. In theory, the Parliament can require that the ordinance that the Government proposes to adopt shall be submitted to it first for approval. However this procedure is rare.

legislative powers off government in situations off emergency or necessity

Overall, many constitutions or general laws lay down that in situations of necessity or emergency the Government can adopt legislative measures, which are normally then required to be submitted to Parliament for definitive ratification. Of course, it goes without saying that even where such a power exists in some countries its exercise in recent decades has been rare.

In a limited number of countries, adoption by the Government in cases of necessity or emergency measures having the same force as laws is within the general competence of Government, and requires no formal act of declaration of a state of necessity or emergency. Among these countries is Italy, whose constitution (article 77) stipulates that the Government in extraordinary situa-

tions of necessity or emergency can adopt on its own responsibility provisional measures having force of law; these must be laid immediately before both Houses for them to be approved and become null and void from the beginning if Parliament does not approve them within 60 days. Such a situation, which was foreseen in the Constitution as being an extraordinary one, has occurred very frequently in recent years for a series of constitutional and political reasons; to such an extent that emergency Government legislation in due course has become the principal form of legislative activity. During the last legislature, which lasted only two years, the Government presented no fewer than 495 "laws by decree" (of which 235 were new and 260 were repeats of previous such laws which had not been converted into normal laws within the timescale laid down by the Constitution). The number of "laws by decrees" ratified by Parliament, and thus acquiring definitively the status of law, was 118.

The move in Italy from a system of proportional representation to a majority electoral system, and through this move to more stable and homogeneous Governments, should restore to this procedure its exceptional character.

Among the countries which do not provide for the possibility of Government adopting directly measures similar to laws approved by Parliament are Australia, Bulgaria, Lithuania, Poland, the Czech Republic and Uganda.

In Belgium also, there is no constitutional procedure for this. However, in economic matters, a law of 1989 allows the Government, for the purpose of preserving the country's competitiveness, to adopt a series of measures once the Parliament has adopted a motion declaring that the competitiveness of the country is threatened. In Belgium also, even though the constitution did not provide for it, on the occasion of the two World Wars 1914-1918 and 1940-44 the Government, seeing the impossibility of Parliament reconvening, adopted directly measures of a legislative nature.

An explicit declaration of a state of emergency is required in Canada (Emergency Act). The Government measures are provisional and can be overturned by Parliament.

In Cyprus in the event of war or a situation threatening the survival of the Republic the Government can proclaim a state of emergency; this must immediately be submitted to the House of Representatives for approval or rejection. Proclamation of a state of emergency ends and its provisions expire after two months have elapsed following ratification by the House of Representatives unless the latter, at the request of the Government, extends it. The effects of the measures adopted are provisional. Where it is rejected by the House, the proclamation of the state of emergency is without legal effect.

In the Philippines it is provided that legislative powers are conferred on the President by Parliament in the event of a national emergency or war. The powers can only be exercised during the state of emergency and are subject to restrictions laid down by Congress. The powers automatically cease on the next adjournment of Congress unless Parliament itself repeals them earlier. The President must make a report to Parliament within ten days following the adoption of such measures and he must submit a monthly report.

In Finland, on the basis of two laws relating to emergency and necessity (Martial Law and Law on Territorial Defence), measures adopted by the Government must be submitted immediately to Parliament which can abrogate them. Over the last five years, no measure of this type has been adopted by the Government.

In Israel under emergency legislation adopted in 1948 the measures adopted by the Government do not need approval of Parliament; the Parliament retains however a power of limiting or annulling such emergency measures by a law. Over the last five years, there has been recourse to such measures 11 times.

In the FYR of Macedonia measures adopted by the Government have temporary validity and remain in force for the extent of the state of war or emergency. No such measure has been passed over the last five years.

In Uruguay, the Constitution provides that, in situations of emergency or internal disorder or attack from abroad, the Executive may adopt immediate security measures. These may include restriction or suspension of individuals' rights. The measures must be communicated to Parliament (General Assembly) meeting within 24 hours of their adoption. The General Assembly may validate the measures by a simple majority. Such measures cannot be assimilated into the law and, in any case, none have been adopted over the last five years.

In Zambia adoption of emergency measures by the Government requires a prior declaration of a state of emergency, which must however be confirmed by the Parliament within seven days.

In Zimbabwe emergency measures adopted by the Government are definitive and are not submitted to Parliament for ratification.

In other countries the Government does not require a prior and formal declaration of urgency or necessity in order to adopt emergency legislative measures comparable to laws.

In Denmark, for example, the power is set out in article 23 of the constitution but it is limited to absolutely exceptional circumstances such as war, and in fact it has not been used at all in recent years.

In Brazil the Government can adopt provisional legislative measures similar to ordinary laws which remain in force for 30 days during which time Parliament is obliged to consider them. The Parliament can approve the relevant measure in its entirety or amend it. After 30 days the measure can be reintroduced. Between October 1988 and May 1994 the Government has had a recourse to such emergency decrees on 506 occasions, of which 215 were repeats of previous decrees.

In France article 16 of the constitution lays down that in totally exceptional emergency situations the President of the Republic can adopt measures of a legislative character after having consulted the Prime Minister, the Presidents of both Houses and the Constitutional Council. These measures are in principle fully valid but they must be in response to a specific emergency and they can only be adopted within a limited period set down by article 16 of the Constitution. They do not require ratification by Parliament. This constitutional provision has been applied in France on only one occasion, in 1961, in connection with the crisis in Algeria.

In Greece the constitution provides for only two exceptional cases: extremely urgent and unforeseen need, or a state of siege or immediate threat to national security. The measures adopted by the President on proposal of the Government must be submitted to Parliament for ratification; Parliament must accept or reject them in their entirety. Over the last five years, recourse has been had to emergency measures on four occasions.

In India, in accordance with article 133 of the constitution, at any time when the two Houses of Parliament are not in session the President can adopt ordinances which have the same force and the same effects as a law of Parliament. Such measures have a provisional character and must be submitted to both Houses. They expire six weeks after the reassembly of Parliament or earlier if the measures are rejected by both Houses of Parliament and they can, at any time, be repealed by the President who issued them. In the course of the last five years about 85 such emergency ordinances have been adopted.

In Iceland, under article 28 of the Constitution, the Executive (formally, the President, but in practice the Government) can adopt provisional legislative measures while Parliament is not in session. Such measures, which must be in accordance with the Constitution, must be submitted to Parliament as soon as possible. If Parliament does not approve them, or fails to give its assent within six weeks of reconvening, the measures cease to have effect. As there is no Constitutional Court in Iceland, any possible unconstitutionality in such measures must be raised before the ordinary courts; in some rare such cases, these courts have declared measures to be unconstitutional. Note must also be taken

of the practical effect of a 1991 amendment to the Consitution following which, formally, Parliament sits throughout the year, so that the Government's freedom to adopt emergency legislative measures - while not actually abolished - has become much more restrained; this no doubt explains the fact that while there were 4 such measures adopted by the Government in 1988 and in 1990, there was only one in each of 1992,1993, and 1994.

In the Republic of Korea urgent measures in serious and exceptional circumstances are adopted by the President of the Republic; when circumstances require it he can proclaim martial law. The measures must be submitted for ratification to Parliament and become ineffective if this ratification is not given. Over the last five years, emergency measures have been adopted in relation to finance and the economy.

In Norway also a prior declaration of emergency is not necessary for the Government to adopt emergency measures. The Parliament must be informed as soon as possible and has a power to annul the measures. The adoption of emergency measures by the Government are totally exceptional occurrences and no such measures have been adopted over the last five years.

In Papua New Guinea, the Government can only adopt legislative measures after a formal declaration of a state of emergency; such measures are provisional in effect and can only be adopted during the period of the emergency; Parliament is informed and comes to a view on the measures. The Constitution provides for the establishment of an emergency parliamentary Committee.

Specific laws also regulate the adoption of legislative measures by the Government in emergency situations in New Zealand. The measures are fully valid. However, no emergency measures at central government level have been adopted over the last five years.

In the Netherlands the Government can adopt legislative measures in the event of war or catastrophes. Such measures are definitive in character, but in fact none have been adopted over the course of the last five years.

In Switzerland the Government can issue decrees known as "indépendantes", drawing this right to legislate directly from the Constitution. There is no requirement for a formal declaration of emergency for the Government to adopt emergency measures. Such measures were adopted in 1990 and 1992 in respect of the wars in Iraq and Yugoslavia.

In Spain, under the terms of article 86 of the constitution, in the event of extraordinary and urgent necessity the Government can adopt temporary legislative measures; such measures cannot however go so far as to affect the structure of the fundamental institutions of the State, or the rights, duties and

liberties recognised under Part I of the Constitution, or the powers of the Regions, or the general electoral law. The measures must be submitted to Parliament and voted by Parliament in their entirety within 30 days. For the discussion and the vote on the measures a special procedure is laid down. Between 1989 and 1993 the Government used this emergency legislative procedure 48 times.

In Portugal the Government can legislate by means of normative measures having force of law in situations of urgency and necessity defined in accordance with the law. The competence of the Government in this area does not extend to areas restricting or limiting the personal rights established under the Constitution. The declaration of a state of siege or emergency which also involves the adoption of extraordinary legislative measures is not within the competence of the Government but within that of the President of the Republic.

A particular and individual system exists in Germany. Article 81 of the Constitution lays down that in particular circumstances, where the House which is directly elected by the people (Bundestag) has rejected a bill which the Government has declared to be urgent, a state of legislative emergency can be proclaimed. After such a proclamation, the bill is returned to Parliament to be voted on once again. If the Bundestag rejects the bill once more, or does not approve it, approval by the other House (Bundesrat) alone is sufficient for the bill to be law. However, this procedure has never been put into effect.

A particular situation exists in Algeria where the constitution does not provide expressly for a power for Government to adopt acts similar to laws. However, following the establishment in January 1992 of a state of emergency, the Government adopted 26 "laws by decree". Such measures are fully valid and no procedures of ratification by Parliament have been provided for.

In the United Kingdom, the Government in principle cannot adopt legislative matters without the authority of Parliament. However, wide-rangeing measures were deemed to be necessary during the Second World War. In September 1939 Parliament convened and approved emergency measures on three occasions. In addition, a special law (Emergency Powers Act 1920) provides for the adoption by Government of measures (Regulations) conferring on Ministers or other persons powers in relation to matters essential to public safety or the life of the community. Such measures must be submitted immediately to Parliament and expire after seven days if they are not approved by Parliament. The duration of such measures is in any case limited to 30 days. The state of emergency is declared by the Crown by a message to Parliament. However, the Government has adopted no emergency legislative measures over the last five years.

In the USA, in times of emergency, the President can use constitutional powers given to him as Commander in Chief, or formally declare a state of emergency under the National Emergencies Act. Although the President's powers deriving directly from the constitution are not subject to a time limit, a formal declaration of a state of emergency remains in force for one year unless the President or Congress set a shorter term. A declaration of a state of emergency can be extended by the President if, 90 days before the automatic time limit of one year, he sends a formal communication to the Federal Register and notifies Congress. In general, the effects of presidential emergency measures are provisional. Their prolongation after the end of the crisis can give rise to hostility in public opinion and counter measures in Congress and in the federal courts which can annul the relevant measures. The Congress can reject or limit the powers that the President seeks to adopt on the basis of a state of emergency, but it is not required to validate the declaration. The Directors of departments of the Executive can be summoned to Congress to account for the powers and actions adopted by the President. The President of the USA has formally declared a national state of emergency seven times since 1989. In four cases, this was to freeze assets or ban trade with certain foreign countries, in two cases to do with arms proliferation and in one case it concerned export controls.

The powers of government relating to legislative initiative and to procedure in the legislative process

In countries such as the United Kingdom where the Prime Minister is also the leader of the parliamentary majority, and especially when the system is generally a two-party one, the Government has no need of special instruments to assist it in presenting its legislative programme and getting it passed and thus to have a predominant role in legislative activity. This does not however prevent the Government, even in such countries, sometimes having its task rendered easier by the use of certain special procedures available under specific written rules or by custom. Thus, for example, in the case of the United Kingdom, amendments relating to finance (which, furthermore, may only be introduced in the House of Commons and not in the House of Lords) must be approved by the Government.

In countries where the Government is the result of a coalition of several parties, on the other hand, or where, for political or other reasons, no one particular force can procure the enactment of its legislative programme, normative instruments limiting the powers of Members of Parliament have an importance. However, even where such powers (which are sometimes very strong),

are available to a Government, it is clearly not always the case that the Government can avail itself fully of their provisions. Thus it can happen that despite these powers the Government, because of a particular political situation, is obliged to come to an agreement with the Opposition. Amongst the instruments which the Government can have available to enforce its legislative programme there must also be considered the motion of confidence. In effect, to make Parliament responsible for provoking a Government crisis by rejecting a motion of confidence, which the Government itself in certain countries can link to the acceptance or rejection of a bill under debate, can be a means of forcing Parliament's hand, especially where there exists no strong political and homogeneous majority.

However, to understand fully to what extent the Government may effectively be the master of legislative activity, it is necessary to examine in depth, country by country, not only the provisions of the constitution and the parliamentary or other rules but also the actual functioning of the political system. Hence alongside the description of the normative and regulatory instruments which the Government has in the various countries to enable it to play a dominant role in legislative activity, an attempt has been made to identify other key points capable of having a significant effect. For example, the fact that laws which are passed result entirely or largely from the legislative initiative of the Government' rather than from non-governmental/parliamentary initiative[2] can be important. Of course, such information must be interpreted with a certain caution. Thus even where all laws which are passed arise from government initiative it can happen that the government bills have undergone fundamental modifications as a result of amendments presented by other Members of Parliament. So much so that where such amendments are approved against the wish of Government or where they result from confrontation and negotiation between the majority and the opposition, then government control of legislation cannot be classed as determinant.

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[1] *Translation note: "Projets de loi d'initiative gouvernementale"* and *"propositions de hi d'initiative parlementaire"* have been translated as "government(al) bills" (or "bills arising from government initiative") and "non-government/parliamentary bills" (or "bills arising from non-governmental/parliamentary initiative") respectively.

[2] The questionnaire sought factual information on the number of Government bills and of non-Government/parliamentary bills, together with the percentage in each case which became law, over the last five years. In the replies that were received not all were in reference to this period. The figures given in this report thus refer sometimes to, longer periods and sometimes to shorter periods.

Another observation of a general nature is worth making. Particularly in countries where there are rigid constitutions, that is to say constitutions which cannot be amended by ordinary laws except by a particular procedure, Parliament can come up against some limits to legislative activity in the sense that non-government bills or amendments which are contrary to these values or to the principles of the constitution can be declared to be out of order. These limits apply to legislative activity in general, independently of whether the bills are of government initiative or from other Members of Parliament. Clearly in such a case there is no difference of role between the Government and Parliament. It is the same for all rules governing the procedure for passage of laws and which are equally applicable in the same way to both government and non-government bills. For example, in general, it is a fairly widely shared principle that amendments cannot be proposed which are outside the scope of the bill which is scheduled for discussion.

Equally it cannot be considered as a manifestation of a particular role for the Government that almost everywhere legislative initiative for the ratification of international treaties or for the approval of the state budget is reserved to the Government. All the evidence suggests that this reservation of legislative initiative to the Government has a totally logical and natural explanation in the fact that it relates to matters for which the preparatory activity can only have been taken by the Government.

By contrast it is a different situation, and one which impacts on the respective roles of Government and Parliament, where it is laid down that certain expressly identified matters cannot be governed by laws passed by Parliament but are reserved for regulation by the Government (what is called the "government regulatory domain"). A system in such precise terms as this is only to be seen in France, in an original and interesting form in article 34 of the Constitution; this sets out, in principle restrictively, the area which is the exclusive domain of law/statute, leaving anything which is not in the list to the regulatory power of Government. This gives Parliament a very constrained area of activity. In practice, Parliament has intervened more and more often in the regulatory domain by passing bills without opposition from the Government.

An analogous but more circumscribed limit to the legislative power of Parliament can be found, as described in the preceding section devoted to delegation of legislative power, in countries where the Parliament itself cannot legislate on a matter which has been the object of a delegation of legislative power to the Government, at least for the duration of the delegated power.

That having been said, and noting that in general in bicameral systems one of the two Houses possesses more limited legislative powers, there follows a review of the situation in the various countries. This begins with those where

the Government, while enjoying a decisive and fundamental role in legislative activity, thanks to the political majority which supports it, does not possess particular normative and procedural instruments.

This is the case in Australia, where the formal powers of the Government and legislative activity are limited even though in fact the role of the Government is determinant. The Government can table a motion of censure on the basis of a bill but it normally has no need to do so. 78% of bills are government bills and 22% are non-government/parliamentary bills. Almost 90% of government bills become law while the percentage of non-government/parliamentary bills which succeed is very low. In some years this percentage is zero.

In Belgium also the Government does not have formal powers and debate on government bills and non-government/parliamentary bills is subject to the same procedure. The Government can make the process a question of confidence, but following the constitutional reforms entering into force after the next legislative elections, only a "constructive" motion of confidence will be possible; that is to say, the Government will not be able to resign, and the House would not be able to withdraw its confidence, unless a successor is designated. Non-government/ parliamentary bills are twice as numerous as government bills; however, for the period under consideration, out of 480 government bills 433 succeeded while out of 1,089 non-government bills only 88 became law.

In Bulgaria the Government has no special powers in legislative procedure. However, the President of the Republic has the power to suspend laws. In the course of the last three years around 38% of bills were government bills.

In the Czech Republic the Government has no particular powers relating to the procedure for debate and passage of a bill. It can make the approval or rejection of a bill a matter of confidence but it must declare this intention at the moment the legislative process for debate on the bill begins. Government bills are nearly 65% of the total, the rest being non-governmental/parliamentary bills. About 85% of government bills become law and the same percentage is reported for non-government bills.

In Cyprus, with the exception of bills relating to ratification of international treaties, the Government has no particular powers in the legislative process. In respect of legislative initiative the Government predominates (77.33% against 22.67%). The percentage of government bills which became law is 85.1%; by contrast the figure for non-government/parliamentary bills is 14.9%. The President of the Republic has the right to veto laws relating to international affairs, defence or security. He can also send back a law approved by the House of Representatives for second consideration.

In Denmark the Government has no particular powers. In theory the Government has a right of veto on non-government bills approved by Parliament. In practice it has never had recourse to this in the current century. 78% of bills are government bills as against 22% for non-government/parliamentary bills. Some 87% of government bills become law while for non-government/parliamentary bills the percentage is 17%.

In Finland, the Government has no formal powers. There is a right of veto over laws passed, but this power has been exercised only rarely. Government bills represent 99% of the total. They almost always become law while non-government bills succeed only rarely.

In Germany, apart from the emergency legislative procedure discussed in the previous section, the Government has no particular formal powers in the legislative process and there is no right of veto. The Prime Minister (Federal Chancellor) can in the directly elected House (Bundestag) link a confidence motion with a vote on a bill. In such a case the confidence motion and the bill are voted on together. Given that the motion of confidence requires the support of the majority of Members while the Bill requires only a simple majority, it can happen that the bill is approved by simple majority while the confidence motion is rejected. In Germany, for the period under consideration, there were 612 non-government/parliamentary bills as against 663 government bills. The percentage of laws passed were around 69% for government bills and 31% for non-government bills.

In Iceland, the Government has no formal means of blocking or directing legislative activity. The Government can nevertheless gain control over the legislative process through its supporting majority.

In theory, parliamentary rules provide for means of limiting excessive debate on bills, but in practice it has not been necessary to use them for several decades. In addition, the Government can make approval of all or part of a bill a question of confidence, and this has happened on occasion. Over the last 5 years (1989-94) 988 bills were tabled of which around 63% were government bills. Of 620 government bills, 395 became law (about 63%), while of 368 non-governmental/backbench bills only 59 (about 16%) passed into law.

In Israel the Government can present a confidence motion linked to the approval or rejection of a bill, but it has no formal powers in the legislative process. Bills introduced on the initiative of the Government numbered 213 (of which 207 became law) as against 3,162 non-government/parliamentary bills (of which 287 became law).

In Japan the Government has no particular powers relating to the procedure for debate on a bill or its passage. But the administration can significantly affect

legislative activity by dissolving the House of Representatives. Introduction of bills on governmental initiative is far more common than introduction on parliamentary initiative (in the past five years 70% of bills were proposed by government and 30% by parliament). On average, over 90% of bills proposed by the government become law, while the percentage of parliamentary bills becoming law is about 15-20%.

In Norway the Government, while it has political control over legislative activity, has no particular procedural powers except for a right to table a motion of confidence on the rejection or approval of a bill being discussed. In accordance with the written constitution the King has a temporary veto over laws adopted by Parliament. Furthermore, if a law has been approved without amendment in two sessions of Parliament, held after two consecutive elections, separated from each other by at least two consecutive sessions of Parliament, the law can enter into force without royal assent. If royal assent has not been given to a bill before Parliament ends each annual session this has the same effect as a refusal of assent. However, refusal of assent is in fact very rare and has only happened in a case of error in the law or a change of circumstances arising amongst the parliamentary majority. Around 90% of bills are at government initiative. Most of them become law while it is rare that non-government/ Parliamentary bills succeed.

In Poland also, in principle, legislative procedure gives no particular formal powers to the Government. Legislative initiative is mostly non-governmental (around 70%) relative to governmental (around 27%). Laws which are passed result more or less in the same percentage from Government initiative and non-government/parliamentary initiative (around 48%).

In Lithuania the Government has no particular power in the legislative procedure. No motion of confidence procedure is laid down. Legislative initiative rests above all with Government.

In the FYR of Macedonia the Government has the power to table a vote of confidence if the Parliament does not accept a bill or part of a bill which has been tabled. The Government has no particular powers but in practice it influences the legislative activity and most bills are at government initiative.

In Portugal also the Government has no particular formal powers in the legislative process. Legislative initiative rests mostly with Members of Parliament (80% as against 20% for government initiative). Around 62% of government bills become law while for non-governmental/parliamentary bills the percentage is around 26%.

In Algeria the Government can have a substantial influence over the legislative activity; it can use a number of instruments to this effect in particu-

lar: it can, under article 114 of the constitution, oppose non-government bills. This article declares to be out of order all bills which would increase a charge on the public or reduce public resources. It can require priority for the discussion of government bills in fixing the agenda of the Assembly. It can also demand a vote without debate on a matter included in the Orders of the Day. Furthermore, individual Members cannot propose amendments to bills approving conventions or treaties. There is no provision for motions of confidence linked to a bill. Government bills represent around 88% while non-government/parliamentary bills represent 12%. Around 85% of the former succeed.

In Canada in principle the procedure for debate on government bills and for non-government/parliamentary bills is the same. But different deadlines apply to government bills and the Government has a right to propose closure motions. The Parliamentary Rules (Standing Orders) allow the Government to decide which bills shall have priority. Bills which increase a charge or reduce public resources must be supported by the Government; the Government can also table a motion of confidence related to a bill under debate. During the period under consideration there were 238 government bills and 420 non-government bills. 200 of the former succeeded while only 24 of the latter became law.

The Government benefits from no special procedure in the Philippines in relation to legislative activity but there is a Presidential power of veto and a power to certify the necessity of the immediate enactment of a bill to meet a public emergency or necessity. Certified bills are almost always passed. Given the Presidential form of Government, a large majority of bills are at non-government/parliamentary initiative (over 99%).

In Greece under article 77 of the constitution any bill designated as very urgent by the Government is put to the vote after a limited debate. The debate and vote take place in a single sitting which must not exceed 10 hours. Additionally, the Government can require that any bill which is particularly important or urgent must be debated in a limited number of sittings. The relevant Minister decides on the receivability of amendments tabled after the expiration of the deadline laid down. There is no provision for motions of confidence on a bill. Almost all legislative initiatives stem from Government (during the period under consideration there were only two non-government bills).

In France the power of legislative initiative is reserved by the Constitution to the Government in a specific number of areas: finance bills, *lois de plan* and *lois de programme.* In order to give effect to its legislative programme, the Government has at its disposal a number of procedural instruments. First of all it has the power to control the orders of the day (Article 48 of the Constitution).

Additionally, during the course of debate it can prevent discussion of amendments which have not been previously examined in Committee (Article 42), amendments which propose an increase in charges on the public or a reduction in public revenue (Article 40), amendments which do not fall within the domain of law/statute or which run contrary to a power which has been delegated (Article 41). The Government can also - as can Deputies themselves - oppose discussion of amendments which go beyond the scope of the debate, or can request that the order in which provisions are discussed and voted on should be changed (that is to say, that certain provisions should be examined later than the place at which they would normally be called). But above all the Government alone, under the Constitution, has the power to declare a bill to be a matter of urgency, which allows it to require the convening of a Joint Committee - with a view to final approval of a bill - after it has been considered only once in each House. Government can also require each House to come to a decision on the whole or part of a bill under discussion, amended in accordance with any amendments tabled or accepted by it, in a single vote. Finally, in the National Assembly, the Prime Minister can engage the responsibilty of the Government on the vote on a bill. Examination of the bill is interrupted the moment this procedure is engaged. Unless a censure motion is voted, the bill is deemed adopted. Use of this prerogative - which can be combined with the power to call for a single vote - has been relatively frequent, particularly since 1981: the Government has engaged its responsiblity on a bill on 59 occasions between 1981 and 1984, while no censure motion has been adopted in that time.

Non-government/parliamentary bills clearly predominate relative to government bills (in a ratio of approximately 1:10). However, while around 89% of government bills succeed (420 out of 463) it is only rarely that non-government/parliamentary bills succeed in becoming law (43 out of around 3,000).

In the Republic of Korea, although there is a presidential form of government, a close coordination takes place through what is called "government - party policy consultation". An overwhelming majority of bills passed by the National Assembly are draft bills proposed by the government after a prior consultation with the ruling majority party. Nearly 54% of bills are government bills as against 46% for non-government/parliamentary bills. The latter are almost all proposed by members of the opposition parties and no more than 30% pass into law. Furthermore because, as has been stated, it is a presidential regime with the President directly elected by the people, no provision is made for basing a motion of censure on the passage of a bill.

In India the programme of parliamentary work is directed by the Government even though the distribution of time between the different types of business under discussion, including government bills, is set down by a parlia-

mentary committee set up for this purpose. The President of India can demand a fresh examination of a law passed by Parliament but after it has been approved a second time the law must be promulgated. No provision is made for a motion of confidence to be tabled by the Government on a bill. 24.9% of bills are government bills, while most (75.1%) are of non-government/parliamentary initiative. However, during the period under consideration, no non-government bill became law while 75% of those tabled by the Government became law.

In Niger the Government has the advantage of a number of legal instruments to enact its legislative programme, notably in respect of fixing the Orders of the Day, the procedures and deadlines for debates, and the power to declare inadmissible amendments relating to financial matters. There is also the possibility of tabling a motion of confidence on a bill.

In New Zealand the Government has control over legislative activity, above all through the parliamentary majority which supports it. The Government decides on the priorities of its bills in the Orders of the Day, but it does not decide the order in which business is debated. The Government has no power to block or to terminate debate but amendments which involve a charge on the public or a diminution of revenue must be supported by the Government. Nearly 90% of bills are government bills as against 10% stemming from non-government/parliamentary initiative. Successful bills are largely government bills while non-government bills generally fail.

In the Netherlands no specific procedures exist for the consideration of government bills. However the Government has the power to influence the methods and deadlines for the debate and the admissibility of amendments from non-government sources; it can also table a motion of confidence on a bill although this power is not frequently exercised. Legislative initiative is almost entirely governmental (nearly 99% against 1 % for non-government/ parliamentary initiatives). As a result those which pass into law are also almost entirely government bills.

In Spain the principal instrument in favour of the Government is that laid down in article 134 of the Constitution. Under the terms of this article, any non-government bill or amendment which involves an increase in charges on the public or a reduction in revenue requires the prior approval of the Government. The Government cannot fix the Orders of the Day or the organisation of Parliamentary debates, but it can request that priority be given to its proposals or that its proposals be included in the Orders of the Day. No provision is made for the Government to table a motion of confidence on a bill. Government bills represent 76.2% of all bills as against 23.7% for non-government/parliamentary bills. Around 82.5% of the former pass into law whereas the rate for the latter is around 14.21%.

In the United States the President and the members of the Government (Executive Branch) cannot be members of Congress, as already mentioned above; also, speaking formally, they have no power of legislative initiative. In practice, the President can recommend to Congress the adoption of legislative measures, although formal tabling of bills rests with the members of Congress, often the party leader or another leading person in the President's party. The majority of bills are at parliamentary initiative; on the other hand a higher percentage of bills which can be considered as Governmental bills succeed. Technically speaking, there are no special procedural powers for the passage of bills in favour of the President or members of the Government. But the President can veto a bill passed by Congress and this veto can only be overridden by a second vote with a two thirds majority in each House. If Congress cannot act in this way because the annual session has finished, the veto becomes absolute (known as the "pocket veto"). Under this procedure, the veto must apply to the whole measure and not to parts of it only. As for debate on bills, the only limits imposed on Members' power of amendment are those agreed by Congress itself.

In Switzerland the influence of the Government is limited once a bill has been tabled in Parliament. It is Parliament which fixes the Orders of the Day and regulates the organisation of debate. Furthermore, the Swiss system not being of a governmental-parliamentary type, the Government has no power to table a motion of confidence on a bill under debate. About 70% of bills submitted to Parliament are government bills. Almost all government bills (nearly 98%) succeed in becoming law, albeit rarely unchanged as a result of amendments - often significant - proposed by individual members or Committees. The number of non-government/parliamentary bills which pass is much lower.

In Uganda the Government, although it has no particular procedural instruments available to it, completely controls legislative activity; in fact legislative activity is entirely Governmental and around 80% of bills presented by the Government pass into law.

In Uruguay some matters are reserved to the legislative initiative of the Executive (as, for example, creation of public sector employment, grants, retirement pensions, etc.). The Government has no special powers in legislative procedure except to declare a governmental bill to be urgent; if such a bill is not debated within 45 days in each House, it becomes law in the version proposed by the Government. The Executive has a power of total or partial veto on bills passed by Parliament. This power is frequently used. There were 471 government bills in the period under discussion, and 617 non-governmental/parliamentary bills. 373 bills passed into law of which 107 were governmental bills and 266 were non-governmental/parliamentary bills.

An analogous situation arises in Zambia, where the Presidential power of veto also exists. Legislative activity there is entirely Governmental and over the period under consideration all government bills have passed into law.

In Zimbabwe the Government has a power to influence the methods and deadlines involved in parliamentary debate; it can also decide on the admissibility of amendments. No provision is made for the Government to table a motion of confidence on a bill. Over the last five years all bills were government bills and all passed into law.

In Brazil the President of the Republic can request that government bills are discussed within a maximum delay of 45 days in each House. From a strictly legal point of view the Government has no other powers, but in fact it can influence the setting of the Orders of the Day even though this is the prerogative of the President/Speaker of each House. The President of the Republic has a power of full or partial veto. In the latter case the veto can only be imposed on an entire provision and not on a single word or few words within an article. Members cannot propose amendments which would have the effect of increasing a public charge in bills relating to administration and finance. In finance bills the number of amendments is limited to 50 for each Member of Parliament. Given the Presidential constitutional system, no provision is made for the tabling of a motion of confidence on a bill. Over the last five years, around 80% of government bills became law while the proportion for non-government bills scarcely exceeded 1%.

Reference has already been made at the beginning of this section to the United Kingdom, where the Government see its legislative programme enacted through the majority which upholds it. Apart from the constraints on Members in respect of tabling financial amendments, there are no other particular procedural instruments in favour of the Government. The House of Lords does not normally make amendments relating to finance, while in the House of Commons amendments which would increase expenditure must be approved by the Government. In terms of powers, it is for the House to decide on the priority to be accorded to subjects under debate and on the admissibility of amendments. The Crown has a formal right of veto but this has not been exercised since 1707-1708 and no provision is made for the possibility of sending back to Parliament for a further examination a bill already passed. The Government can indicate that it will regard its continuance in office as dependent on the acceptance or rejection of a bill. But this procedure cannot be considered as a formal vote of confidence. Between 1988 and 1993 a total of 831 bills had been tabled in the Commons (either directly or arriving from the House of Lords) of which 215 were government bills. 205 government bills became law while those from non-government sources (backbenchers) numbered 69. In the House of Lords, 65%

of bills tabled were government bills of which 97% passed into law. 35% were non-government bills of which 22% passed into law.

A relatively unusual system is that in Italy. Here a highly multi-party system with a strongly proportional electoral law existed until the last elections (1994), putting the Government in a very uncomfortable position with regard to realisation of its legislative programme. This led the Government to make substantial use of urgent decrees as explained in a previous section, and to be looking at all times for a compromise, not only with the Opposition but even among the parties which were maintaining it in power. During the last legislature, which lasted only two years, 4,268 non-government/parliamentary bills were tabled and 835 government bills. 241 government bills became law, and 225 non-government/parliamentary bills. The new electoral law, reflecting a majority system, should favour the role of Government so as to eliminate or reduce the peculiar position of Italy in matters of legislative activity.

III. Jurisdictional power of the Legislative: impeachment in the Argentine Republic

1. Introductory Note by Dr Edgardo Piuzzi, Secretary General of the Senate of Argentina, September 1993

Everybody agrees that accountability of high public officials forms part of the Republican system of government. If we analyse the etymological origin of the word "REPUBLIC" it derives from the latin terms "RES" and "PUBLICA", in other words "a thing of everybody or a thing pertaining to the public". In this first example we notice that, being something that corresponds to the community, its management or at least interest in its destiny belongs to the community.

Under the National Constitution, the Argentine Republic has adopted the democratic republican system of government. Democracy is here understood not only as a way of government but also as a way of living, based on freedom, equality, dialogue, ideological pluralism, acceptance of differences: it is in essence a way of life.

While the republican system imposes an ethical pattern of behaviour, each person is clearly responsible for his own acts or omissions that might occur by reason of their improper behaviour. Such responsibility belongs to everybody and to each member of the society, and even more to high public officials.

Lack of morality, vice, corruption, or deceit constitute the antithesis of correct conduct in the republic and the germ of destruction of the system. In order to correct these deviations the National Constitution has established a suitable mechanism to protect "the republican virtue" which Montesquieu referred to as the "political trial [impeachment]".

The political trial is a procedure aimed at establishing the degree of responsibility that certain high public officials have in respect of the acts committed in the exercise of their functions and whose aim is to bring them to account for their position and to prevent them, in this way, from remaining in post up to the end of their term of office. In recognition of the importance of the political trial as a means of protection and support of the republican institutions, the provisions of the Argentine Constitution itself establishes its terms, conditions and effects.

Section 45 of our Magna Carta grants to the House of Representatives the power of bringing an accusation before the Senate against the President, Vice-President, Ministers and members of the Supreme Court and other lower National courts, to bring them to account for wrongful performance or criminal offences committed during their term of office, including common crimes.

Once the complaint has been made by the House of Representatives, the Senate judges the accused high public officials, in public trial. The sentence must receive a two-thirds majority of the votes cast in order to be accepted.

It is important to highlight that we are not talking about powers granted to the National Congress, but of powers granted to each of the Houses, as something pertaining to its competence, each of them having a separate special function: one accuses and the other judges.

Some commentators, trying to describe the factors taken into account, point out that the House which can be considered as "young" and representative of the people is the most appropriate to instigate the charge. The other House, which is more peaceful and less numerous and therefore less passionate, is the most appropriate to judge, with serenity, the charges made against public officials.

In my opinion, the roles of accusing and judging granted to the Houses of Congress come from the principle of division of powers, as a balance and counterbalance system. Power is held back by power, or is restrained in the heart of its own power by the organic and functional separation of powers which is established.

This control function belonging to both Houses constitutes a Tribunal of Political Justice, as a sole body having jurisdictional functions, created by the Argentine Constitution and regulating its functioning in such a way as to reestablish the constitutional order damaged by the wrongful behaviour of high officers.

Many authors suggest that it would be better to grant this political control function to a special body, placed beyond the scope of these three powers, which would offer greater independence and freedom to judge impartially.

However, the fact of having granted these functions to both Houses coincides with the republican principle of the division of powers. My experience as Parliamentary Secretary of the Senate, by virtue of which I have to act as Secretary of the Tribunal, has shown me that these powers are assumed with absolute responsibility, capacity and independence in my country, thereby ensuring the desired control.

According to our National Constitution the process of political trial operates with respect to officials high in the hierarchy of the Executive and Judicia-

ry, because it is the republic itself, in the form of its most distinguished magistrates, which acts as judge in such a case. Stability in their term of office therefore must be resolved with the greatest solemnities and guarantees, in order to prevent a greater harm to the nation.

To dismiss a President, a Minister, or a Judge from office, and even more to impose political sanctions on them, such as prohibition from occupying other posts of honour, is an act of great importance and therefore the constitution grants the process the maximum guarantees in order to protect the interest of the republic. The political trial is a process that should guarantee the inviolability of defence and of other elements of the process.

Therefore, although the Constitution has established general rules of proceeding, each of the Houses of the Congress has introduced into its regulations certain practices and procedures related to the process, laying down its essential features: publicity, equality, expedition, contiguity, oracy and opposition are typical features which allow the community to know the facts alleged, and allow the accused person to have a guarantee of a fair trial and for a due sentence to be passed.

The sentence passed by the Senate in public session has the effect of dismissing the accused person from office and rendering him ineligible to occupy any post of honour or confidence and, even more, bars him from receiving a salary from the nation. The condemned person would furthermore be subject to an accusation, a judgement and a punishment according to law before the ordinary courts. He would answer therefore under the civil and penal code for the acts or omissions that caused his dismissal.

According to one of our top constitutional experts, Dr. Joaquin V. Gonzalez, "the purpose of the political trial is not the punishment of the guilty person, but the protection of public interests against the offence or abuse of power. The actions of public officials may not be included within the penal code, and may also not constitute crimes or offences but may damage the public interests or dishonour the country". The only solution may be the Political Trial, as a mechanism established to repair the offence and restore morality to officials' acts.

The democratic system is based on that moral behaviour, allowing a climate of peace and respect within the state and, within this harmony with dissent, everyone may lead their own life, the few may govern the majority, and the majority may obey the few.

Therefore, and as corollary of this work, I take as gospel truth the words written by Julián Barraquero: "People do not prosper and are not free when they have good laws, but when they practice them with loyalty, love and respect."

2. Topical Discussion: extract from the Minutes off the Paris session, March 1994

Mr PIUZZI outlined some of the theoretical background to the principle of Impeachment, indicating that in Argentina the Constitution allocated different powers to each House with the lower House having the role of deciding to initiate an impeachment with the upper House acting as the Judges. This reflected the checks and balances involved in a Constitution under which power was shared. Impeachment was part of the protection for the public against the abuse of power by those in authority. The system for impeachment allowed holders of high office to be called to account for their conduct in office in areas where, although their action may not actually be unlawful, it was sufficiently undesirable to make them unfit for office.

Mr NDIAYE (President) (Senegal) asked whether the two Houses in fulfilling their tasks under the impeachment process called upon assistance from outside experts and whether Members of Parliament were capable of being impeached. Mr PIUZZI replied in respect of the first point that each House had a Committee charged with examining the issues involved and both Committees had lawyers amongst their regular advisers. These were not outside experts as such, although the Committee could call on such help if it wished. In respect of the second point, he indicated that Members of Parliament were not subject to the impeachment process since the Constitution limited it to the President, Vice-President, Ministers and senior Judges.

Mr DAVIES (United Kingdom) indicated that impeachment had been abolished in the British Parliament in the 18th Century. He asked whether the decisions taken on impeachment by the Parliament were, in practice, taken on political grounds and whether Government supporters voted in favour of Government Ministers. If the political system was functioning properly then a Minister who had lost the confidence of Parliament should anyway have to resign without a need for impeachment. He wondered how far politicians were able to judge matters which might in practice be moral issues. He also asked how often the procedure in practice had been used. Mr PIUZZI replied in respect of the first point that the Senate came to its decision on the basis of the evidence it had taken though, of course, there was a political aspect as well as a legal one. In respect of the more general points he agreed that there was an overlap with the political responsibility of Members to Parliament but felt that the Senate was not incapable of coming to a judgement on matters relating to morality. The procedure had been used on five occasions since 1983.

Mr MOUFONDA (Congo) said that in his country the system was different. For an impeachment, a High Court of Justice was created, the Members of

which were elected by the Supreme Court and by the Parliament. He sought clarification of the source of the sentence which was handed down in respect of an impeachment, noting that in many countries the sentence was a matter for the Court rather than for the Parliament. Mr PIUZZI in his reply indicated that there was no appeal from the judgement of the Senate. Once an impeachment had been decided on by the Senate the office holder lost his immunity and could then be tried by a Court.

Mr EYZAGUIRRE (Chile) asked whether regional Governors and Administrators and military personnel could be impeached, what special majority was required in the lower House to pursue an impeachment and what was the outcome of an impeachment. Mr PIUZZI replied that impeachment only operated at the national level so that regional Governors were not subject to the process. Members of the Armed Forces were not subject to the system either. A two-thirds majority was required in the lower House for an impeachment to be referred to the Senate. On a judgement in favour of impeachment by the Senate, the sanctions could involve not merely the loss of office but a bar on holding any similar jobs in the future.

Mr CASTIGLIA (Italy) asked about the relationship between the impeachment process and any civil court proceedings and sanctions. Mr PIUZZI replied that any civil trial was an entirely separate process and that any evidence brought in the impeachment proceedings could be brought up again in a civil case. However, the civil trial could only begin when the impeachment process had been completed since it was only from this point that immunity was lifted.

Mr VIVAS (Colombia) asked why so many hurdles, with special majorities, had to be overcome if the impeachment process was intended merely to deal with offences by holders of high office. Mr PIUZZI indicated that in respect of most conduct by public officials it was difficult to prosecute them, except in cases of *flagrante delicto.* The impeachment process was designed to cover areas not covered by the normal judicial processes since it was designed to address the extent to which their behaviour might make them inappropriate for public office. He noted that the special majorities required in the two Houses applied only to the final decision: the majorities for the procedural steps taken beforehand was only that of a simple majority.

Mr ALBA (Spain) indicated that in his country Parliament did not have a power of impeachment but that, nevertheless, Parliament could affect the process. He also raised the issue of parliamentary immunity. Mr PIUZZI replied that while Members enjoying parliamentary immunity may not be subject to the impeachment process, they could nevertheless, be stripped by their House of these privileges.