III. The system for the preparation of the Official Report in the Swiss Parliament

Communication by Mr Hans-Peter GERSCHWILER (Switzerland), Deputy Secretary General of the Federal Assembly, National Council, at the Beijing Session (September 1996)

Mr Gerschwiler made the following communication to members of the Association:

"Since the Parliamentary Reform of 1989 the size of the Official Bulletin of the Swiss Federal Assembly has grown by one third. Nevertheless, the Bulletin is being produced twice as fast, with a slightly reduced number of staff, and is published not only in print but also via other media. Cost savings for personnel and printing will ensure that the full total of the investment of approximately one million Swiss Francs will have paid for itself within five or six years (owing to rapid technological advances, the amount required would now be substantially lower). At the root of this success story lies a new software application called Audiodisk.

What is Audiodisk?

Basically, Audiodisk is a digital sound recording system. It is used to produce a continuous digital record of the debates in both Chambers of the Swiss Federal Assembly. One PC operator present at the debate "cuts" the speeches into jobs lasting approximately five minutes each, adding further information (name of speaker, language, business item number, etc.).

The Audiodisk server is linked to the internal computer network. This permits all members on the staff of the Official Bulletin to immediately listen to individual segments of the recording, using earphones and from their own PCs, without wasting time handling tape recorders or cassettes. These segments are

continuously transcribed and edited in a regular text processing system (Winword).

However, Audiodisk is much more than a digital recording system. The digitally recorded sound is linked to a database, which allows a number of additional functions which do not exist in traditional, analog recording systems:

- Individual jobs, sorted by language, can be automatically and continuously routed to available transcribers and editors, without physical transfer of tapes, cassettes or hard copy.
- Continuous update on state work.
- If required, active coordination of work by supervisor, who can optimize distribution of tasks, alter priority of individual jobs, and intervene immediately should problems occur.
- Macros serve as interface with text processing system: data from Audiodisk database can be used for automatic selection and manipulation of Winword documents.
- Searches for specific speakers, business items, etc. for rapid execution of documentation tasks, and for statistical purposes.
- Fast access during revision to any segment of the recording to check completeness and accuracy of provisional transcripts.
- Any one of the PCs can carry out all available functions.

A Revolutionary System

The previous analog sound recording system required intense maintenance, and was failure-prone. In addition, transfer of tapes and hard copy from one workplace to the other was extremely time-consuming. Also, any kind of research required vast amounts of time—time which was no longer available once the reforms of the early nineties enabled Parliament to function more actively and more dynamically. The clear goal for the new sound recording system was, therefore, faster production of the Federal Bulletin—without taking on any new staff!

In contrast to pure negotiation minutes, the Official Bulletin of the Swiss Federal Assembly not only publishes the texts of the individual speeches but presents the full parliamentary proceedings for each business item. The new system was expected to increase the transparency of these proceedings. It was desired to be able to treat the recordings of the parliamentary decisions as well

as of the presidential comments on the proceedings separately from those of the actual speeches, in order to process them in accordance with the Bulletin's uniform structure and presentation.

The Official Bulletin must carry the latest information. Therefore, the execution of urgent tasks also needed to be simplified.

The Introduction of Audiodislc

The Audiodisk system was originally conceived as a purely military application. The functions required for its use in Parliament first needed to be defined in detail, and the software designed accordingly. Since this was a pioneering project without any comparable precedent, intense planning and development was required. This stage lasted approximately two years.

The Service of the Official Bulletin of the Swiss Federal Assembly have been using Audiodisk since 1993. The system rapidly proved to function well. Owing to its very user-friendly design, staff only require a short training-period. Initially, some serious problems presented themselves concerning the integration of this system into the existing internal computer network, which was already overtaxed. However, it was possible to go into full production after only a few weeks.

Efficient Work

All the goals have been fully reached:

- Since the supervisor can optimize processes during individual meetings, even long sessions of the Federal Assembly can be processed rapidly, and by a slightly reduced number of staff.
- Specialists continuously transcribe presidential statements and decisions taken by the Assembly into the official formulation. This structure can therefore immediately be accessed for the montage of the individual text segments.
- The Audiodisk database enables documentation tasks to be carried out without delay.
- The link between Audiodisk and Winword accelerates and simplifies the processing of text files. These files not only go into print but can also be published on the internal computer network, on the internet/WWW, and on

CD ROM. The complete text is available internally two to three days after each session.

The implementation of Audiodisk brought about numerous other steps of rationalization and automization within the Service, which was therefore able to streamline its output to suit the needs of the Members of Parliament as well as those of other professional users."

Mr OLLÉ-LAPRUNE congratulated Mr Gerschwiler on his extremely clear technical explanation presented on behalf of Mrs Anne-Marie HUBER, Secretary General of the Federal Assembly of Switzerland, on the new system for the preparation of the Official Report used in the Swiss Parliament. He was himself very interested by this question of modernisation of systems for the official reports of parliamentary debates, and said that the Association will perhaps at a later session have to deepen and extend the thoughts of Mr GERSCHWILER, particularly to compare the technical solutions arrived at in this matter by the diverse assemblies represented in the ASGP.

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Further information provided by Mr John CLERC (Switzerland), Deputy Secretary General off the Federal Assembly, Council off States, at the Seoul Session (April 1997)

Mr Jacques OLLÉ-LAPRUNE asked Mr John CLERC of the Federal Assembly of" Switzerland to introduce the presentation of the system for the Official Report in the Swiss Parliament. He recalled that Mr Hans-Peter GERSCHWILER had made a communication on this matter at the session in Beijing (September 1996). The Association had considered that this subject could be tackled again at future conferences.

Mr CLERC first introduced his two colleagues who were going to comment on the video presented on this theme: Mr Andreas SIDLER, responsible for the information service of the Swiss Parliament, and Mr François COMMENT, responsible for the department of the Official Report. Giving a brief historical survey, Mr CLERC explained that since the 1960s there was no longer any use

of shorthand writers in the parliamentary services of his country. There were significant intervals between parliamentary sittings. As a result, it had not been possible to develop a genuine tradition of shorthand writing. Mr CLERC said that this situation had obliged those responsible in the Parliament to think up a new system, the Audiodisk system. This was considered by many to be revolutionary; it had proved its usefulness and denied the received wisdom which gave the impression that the Swiss were not always at the forefront of progress.

Mr COMMENT explained that according to the Swiss Constitution parliamentary debates had to be public. Since 1891 they were in fact published. The Swiss Parliament sat for 52 days of the year, the debates taking up 500 hours per year. Today the Official Report was more than a simple transcription of the debates since it contained both the speeches, which comprised two thirds of its volume, and other texts which comprised the other third: written texts presented to members of parliament, proposed amendments, or the answers from Government to parliamentary questions.

Mr COMMENT noted that at present the system of the Official Report was rendered more effective by the use of a centralised computer-based system. However, a system which would allow the automatic transcription of debates did not as yet exist and could not therefore be used. The Audiodisk system relied on the following principle: the sound was registered digitally in the chamber and then cut into "jobs" of about five minutes each. These units were logged in the computer. An initial typing service provided the first transcription. Twenty persons in total were dedicated to this task. The work of producing the Official Report began immediately. After the first transcription, other staff, of a university level, were responsible for rereading the texts and listening again to the sound tracks. They could correct the text directly on a computer screen.

Mr COMMENT said that this work took place four times a year, for three weeks at a time. The majority of texts were written in German (75 % of the Official Report), the others being in French or, more rarely, Italian. In general, the service was able to retranscribe a speech in an hour and send the text back to the speaker in an even shorter time period. Parliamentarians were able to introduce some corrections to their speeches, but only stylistic improvements. All the speeches made were incorporated into the Official Report electronically. Speeches, like written documents, were published in a single volume, which made it easier for users to consult the Report.

Mr COMMENT stressed the fact that this process was simultaneous. One sitting lasted, as a general rule, from four to five hours. Several people were charged with the task of assembling the oral and written texts. At the end of the process, the texts of one sitting correspond to about one hundred pages. Mr COMMENT added that one hour after the speech the text was available on

Parliament's internal network, a facility largely used by journalists. He noted that the equivalent of four years of parliamentary sittings was on a CD-Rom, with the advantage of allowing a very rapid search for a specified text from a simple question. Thus, all the users of the Internet could have access to the complete text of a speech very quickly. The information in the CD-Rom was the equivalent of about 6,000 pages of the Official Record.

Mr SIDLER then gave a demonstration of the system of digital recording used for Audiodisk. He explained the way in which the work stations were organised among the typists, editors and supervisors, and showed on the screen the way in which the central system was managed so as to avoid all possible mishaps. He also mentioned several possible scenarios for the development of the system in the future and summarised the different stages of the process of producing the Official Report.

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The President congratulated the Swiss delegation on the stimulating and instructive nature of their presentation which had given the members of the Association a clear and precise understanding of the technical innovations used in the Swiss Parliament. He added that one of the merits of the ASGP had to be precisely that, enabling the exchange of professional experience, including technical areas. He then gave the floor to secretaries general who wished to contribute.

Mr HONTEBEYRIE (France) first thanked his Swiss colleagues for the quality of their presentation. He then explained that French parliamentarians often had a tendency to interrupt their colleagues who were speaking in the hemicycle, if only to express their satisfaction. They also applauded and this was recorded in the Official Journal which thus gave a sense of the interruptions to the speeches and the reactions which occurred in the Chamber. Mr HONTEBEYRIE asked to what extent the Swiss system was able to take account of reactions of approval or disapproval which might take place during debates.

Mr CLERC said that representatives of the department of the Official Report were always present in the Chamber. They, were the ones who recorded the moments of applause which could be retained and indicated from which political group these reactions came. These notes were then kept and integrated into the minutes of the debates. Similarly, if exclamations such as "Very good!"

or "Bravo" came from some group or other, they were recorded by the staff of the Official Report. Mr CLERC added, however, that the customs of Swiss politics were different from those of France, such interruptions being rare. He added that this facilitated the work of editing the Official Record.

Mr COMMENT, responsible for the Official Report, said that it was technically possible after the first transcription to have several elements appear in the text of a speech. He gave the example of bilingual or trilingual parliamentarians who began their speech in German, then continued in French and ended in Italian. After the speech itself, the technicians could recut the speech at the precise point of these language changes, so as to integrate all the parts, according to the language used, in what was called the "electronic queueing system".

Mr GALAL (Sudan) asked two questions: one concerned what took place when a sitting was held in secret; the other concerned the back-up system. Mr GALAL asked if the whole system could come to a halt in the case of a breakdown.

Mr CLERC pointed out that instances of secret sessions were very rare in the history of the Swiss Parliament. There was an example dating from 1944 when a sitting had permitted the taking of various confidential measures at the end of the Second World War. In 1990, another secret session had been held. It concerned the location of a sort of retreat in which the government could meet in time of war. In these two cases, only members of parliament were present, with the Secretary General, all others being excluded. The sound had naturally been turned off so that these discussions could not be recorded.

With regard to the second more technical question, which concerned breakdowns, Mr CLERC explained that there was a reserve which could cut in at any moment when a channel appeared jammed. He then turned to Mr SIDLER, who said that every precaution had been taken when the system was installed in Parliament. A double security had been provided. First, a microphone absolutely independent of the system of amplifiers had been installed in the Chamber and relayed directly to the central system, which meant that recording was always possible even if the sound system in the Chamber failed. Mr SIDLER noted that this had occurred on a few occasions since the system had been in service, that is over the last four years. He then mentioned the existence of a second form of security. All the debates were at the same time recorded not only on the digital electronic system, but also by a much more traditional system of magnetic recording which permitted the recording of a whole sitting of four or five hours. He said that the digital system had broken down on two occasions and that it had then been possible to incorporate without any difficulty the recordings on the magnetic tapes into the principal system and to continue to

work without interruption. In conclusion, he observed that access to debates held in secret was the object of particular security since it was necessary to introduce a "login", that is a password, to gain access to the system.

Mr FALL (Senegal) asked what were the reasons which led the Swiss Parliament to eliminate any system relying on shorthand writers.

Mr CLERC said that there were lengthy intervals between the sittings of the Swiss Parliament which explained why they had never had a genuine tradition of shorthand writing. He recalled that numerous parliaments in the world preferred to train their own staff themselves, offering them a secure job. He said that the Swiss Parliament had employed shorthand writers until the 1960s but these persons thus worked only part time, for the 52 days when the Federal Parliament sate. They thus had great difficulties in finding complementary employment, with the exception of a few contracts for international conferences held in Geneva or at the meetings of parliamentarians. This situation had led to a real shortage of shorthand writers which had become worrying at the beginning of the sixties when those responsible in Parliament at the time had desired in vain to recruit a team of shorthand writers. Mr CLERC concluded by saying that this lack of available shorthand writers had led the Swiss Parliament to have recourse to a system of sound recording on magnetic tape.

Mr COUDERC (France) asked what was the financial cost of the initial investment in material and software. He then asked what was the annual cost of the running of the system, and finally the cost per member of parliament, if that could be calculated.

Mr SIDLER said that the system had cost about 900,000 Swiss francs, with the network for sound distribution. He added that thanks to this system, the Swiss Parliament had also saved money. The services had also gained in the time taken to broadcast. Furthermore, the setting of the text now took place within the Department of the Official Report which meant a saving of about 100,000 to 150,000 Swiss francs in the costs of type-setting and printing each year for the publishing of the Official Report;

IV* Parliament and Official Secrets

Communication by Mr Manuel ALBA NAVARRO (Spain)

Complete text provided by Mr ALBA NAVARRO in preparation for his contribution in the plenary session.

I. Introduction

Because of the extent of its consequences and implications, the subject that we have chosen on which to reflect and debate begins with a demarcation of the same which, by limiting it, makes it able to be covered in a session of this type and distances it from what, in any other way, could become a profound but undoubtedly very obscure philosophical disquisition on publicising political decision and action as a basis for democratic political systems.

In effect, the existence of facts or matters which are only known in a limited way or even excluded from publicity, may be interpreted as a disturbance of the democratic order, above all if this exclusion from publicity is also legally protected by the corresponding regulations. This is due, basically, to the fact that a hypothesis exists, typical of the liberal theory of political representation, which still enjoys enormous power today and which is the fact that representation is not possible without publicity, while control of the representatives by the electors is not possible. J. Bentham defended publicity not only by basing himself on the function of control of parliamentary assemblies, but also by explaining that publicity both within Parliament and outside was the guarantee that reason would inspire political action. On the other hand, he attacked secrets saying that "a secret, the instrument of conspiracy, should never be the regular system of a government".[1]

The general opinion on contemporary doctrine is summarised in these words of Bentham: a secret can never be a general rule for action of a democratic Government. However, an unlimited formula for the principle of public-

[1] Jeremy Bentham. Public Access to Government held information. Stevens and Sons ltd., London 1987, page 2.

ity which leaves no place for the secret may threaten very important foundations of the democratic regime itself, weakening it to excess. Today there is no room for radical positions in favour of hidden information nor romantic attitudes in defence of publicity without conditions, the need for the co-existence of publicity and secrets has to be admitted.

Having established this premise, the basic debate will be centred on a definition of the limits of what can be kept secret and the conditions under which this situation has to be established, always maintaining that publicity is the general rule and secrecy the exception. However, it is normal to expect that this debate will develop from the point of view of a defence of publicity as an inherent element in certain basic individual or collective rights and, in particular the right to information. Nevertheless, this general way of considering the matter has a much wider dimension than the one that we are attempting to adopt now which is, on the other hand, considerably less frequent and which is limited to an examination of the role of the parliamentary institution with regard to the official secrets of the Executive.

This new way of looking at the matter is one of the reasons that has lead us to propose this question as a subject for debate together with other reasons which may perhaps be considered circumstantial or even personal: the approval of a draft Law on Official Secrets has recently been made public in Spain which has lead to heated controversy in the communications media. For me, then, and perhaps also for other colleagues, this is a major and immediate problem.

Once a demarcation of the object has been made, the limitation of the intention must also be made very clear which, where it corresponds to this type of intervention, is certainly not to give a detailed explanation of all the problems that Parliament may experience by virtue of the existence of official secrets and their possible solutions, but rather to act as an introducer, suggesting questions which may be suggested with respect to this subject and with regard to which the debate may be enriched, together with a knowledge of the way in which these questions have to be treated in other legal ordinances.

II. Previous question: the existence of special regulation on official secrets

In order to further examine the problem that opens up for Parliament when considering official secrets, a very diverse order may be adopted. A very classic scheme, proper to the legal sciences, is that of distinguishing between the

objective, subjective and formal elements, in such a way that, in the first place, we should consider what is understood by an official secret and which matters are limited to the secret or reserved classification in each national legislature. In the second place, who is empowered to include certain information in any of the legal protection categories and who may lift this protection and to whom must the knowledge of reserved material be reserved, whether different levels of protection exist which are differentiated by the number of people who may know the secret and if any means of control has been set up for the secrets which consists of giving a limited distribution to same, normally to a reduced group of parliamentarians. And, in third place, what formal requirements have to be complied with in order to consider certain material as secret, whether any special procedure exists, whether this procedure varies in terms of the level of protection granted, whether any consequences are anticipated in the case of non-compliance with the procedural rules, for what period of time the protection implied by the classification of material as reserved is anticipated, whether the material in question will automatically be made public once this period of time has come to an end or only if this is requested by someone who is interested in it, etc.

However, this scheme would be more suitable for a general study of official secrets which would be very illustrative when offering a compared panorama of the Government situation with respect to official secrets in different countries but would probably not be so useful for examining the role of Parliament which would, undoubtedly, be limited to having a section in the subjective elements.

Because of this, and following this leading thread of greater or lesser protagonism of Parliament at all times, we consider it more useful to use a purely chronological perspective which will accompany the official secret during its life from the time of its birth until it ceases to exist.

In accordance with this perspective, there exists a prior question which may surround our reflections and which precedes any other consideration in this respect. This is the existence or not of a special regulation on official secrets and whether this specific regulation is considered necessary or not.

According to my information, this regulation does exist in countries such as the United Kingdom, whose first law on the matter dates from 1889, this being substituted by the Official Secrets Act of 1911 and later the present Official Secrets Law of 1989; the Federal Republic of Germany, which has one of the most highly perfected official secrets legislations with an article in the Penal Code, the Law on personal security measures with regard to classified material, of 11th November 1987, and a Parliamentary Resolution for regulating access

of the House to classified material, which appears as an appendix to the Bundestag Regulations; Italy, whose regulations extend from the Royal Decree of 1 lth July 1941, the present application of which is under discussion, to the laws of 24th October 1977 and 7th August 1990; and Spain, where Law 9/1968, of 3rd April, regulating Official Secrets, modified by Law 48/1978, of 7th October, and the Resolution of the Presidency of the Congress of 2nd June 1992, on access by the Congress to official secrets, which substitutes another Presidency Resolution of 1986, are at present in force.

In other ordinances, although no specific regulations may exist on the matter, regulations which may be applied to same can be found as a part of a more general regulation; for example, when the limits on the right to information are established or when the exceptions to the citizens' right of access to administrative archives and registers are enumerated. This is the case in the United States (with the Freedom of Information Act, the Privacy Act and the so-called Sunshine Laws) and in France, with the law on citizens' access to documents in the possession of the Administration, of 17th July 1978.

In precise terms, the different treatments are a product of the very different concepts which may be held with respect to how a secret should be interpreted, which also causes the existence of a great diversity of names. For example, in France one speaks of "defence secrets"; while in Holland, Luxembourg and Belgium reference is made to "security secrets" and in Greece and Italy one alludes to "State Secrets" with a denomination that is materially more extensive (not only limited to matters of a military nature) which comes nearer to the Spanish "official secrets".

Whatever the case, a very interesting question arises from this point: should the non-existence of specific regulations on this type of secret lead to the conclusion that there does not exist any possibility of official secrets or, on the contrary, that, as these regulations do not exist, any material may be declared secret or reserved by the Executive when it considers this convenient for its own ends without special rules existing on the matter? Except for the distance between them, it is the same question that has been expressed in the classic constitutional doctrine with respect to those constitutional texts that do not require any special procedures for their own reform. Bryce did not hesitate to qualify these texts as "flexible", understanding that their reform was simpler than for so-called "rigid" texts. However, he did not consider that in many cases the reason for the lack of provision was to facilitate constitutional reform, but that, probably, it responded to a belief that this reform would not be necessary nor was there any reason why it would be possible. The hypothesis of the "unreformable" constitutions today is largely rejected and nobody has any doubts about the fact that if a constitutional text does not contain any special procedure

for its own modification it is merely because it can be reformed like any ordinary law.

The parallelism may be curious or inappropriate, but it can certainly be applied without effort to many other examples of Constitutional Law in which the absence of specific provisions may have different interpretations. However, what interests us at this moment is that this view provides us with a justification for the existence of legislation on official secrets: by having to admit the need for these secrets, their regulation can guarantee that the secret will be an exception and publicity the general rule. We understand that, because of this, the content of this legislation is always in the same direction: a limitation on the number of possible secrets by limiting the matters that can be classified as such and a blurring of the features which make up the secrets' profile by, at least, allowing them to be known by a small circle of people (frequently members of parliament) in order to ensure the existence of some kind of control over the Executive.

In any case, this prior question now places us before the first possibility of Parliament action, as a legislating body. It cannot be doubted that any regulation that may be imposed on official secrets would have to have the rank of a law since, as we have already said, this is a question that directly affects certain fundamental rights which are normally protected by the law reserve. It would therefore be in legislative procedure that Parliament would be able to show its opinion with respect to the particular content of this regulation and exert an influence on it. And, above all, it would be at this time when it could retain for itself a more or less relevant role in this question, a role which could be developed in any of the phases of the life of an official secret, although it would normally come into effect at a time after the declaration of such a secret, including some means of control which would tend to guarantee that the Executive would make good use of the powers attributed to it by the Law.

We should pay special attention to the possibilities offered to Parliament with regard to the regulatory ruling on such questions, as the freedom of the Houses would be much greater when drawing up their own internal rules than via their participation in the processing of a general law. Because of this, from the point of view of parliamentary autonomy, it would appear that the most suitable measure is to reserve the widest field possible with respect to the position of Parliament regarding official secrets, so that this can be regulated in the corresponding Regulations. In this respect, we can recall the aforementioned German case and also the Spanish one. In Spain, in spite of being pre-constitutional, the Law on Official Secrets is shown to fully respect the Houses when it states in Article 10.2 that: «The declaration on "classified material" will not affect the Congress or the Senate, which will always have access to any

information they may need in the manner determined by the respective Regulations and, where applicable, in secret sessions». The only development of this provision has occurred in Congress, since neither the Regulations of this House or of the Senate contain any provision with respect to access to official secrets, however, while the Upper House has not corrected this lack, it has been overcome in Congress with the Presidency Resolution of 1986, which was later substituted by that of the 2nd June 1992, in which the internal procedures to be followed for accessing classified material, the consequences in the case in non-fulfilment of the reserve duty, etc., were established.

One curious piece of data may be quoted which is that, the Resolution of 1986 having been opposed in the Spanish Constitutional Court, the latter rejected the appeal without studying the matter in depth because it considered that the procedural channel was not the correct one as the Presidency Resolutions are not acts against which appeal can be brought under protection, but "normative provisions, which can be included in parliamentary regulations and which, having even on occasions been dictated in a particular case, have been understood to be included in the House Regulations" (Sentence of the Constitutional Court 118/1988, of 20th June). In this way the Presidency Regulations are placed on the same level as the Regulations of the House for the effects of an appeal before the Constitutional Court.

III. Classification off material as being reserved: the birth off secrets

The above puts us in direct contact with one of the most interesting problems among all those that we would like to suggest and which arises at the very beginning of the question, that is to say, when the secret as such is born. This is the question of an examination to decide whether a possibility exists of attributing any function to Parliament at the time of declaring that certain matters should be considered as reserved or secret, whether this is granting it the capacity to decide this with regard to the matters being dealt with or merely assigning it a supervisory function with regard to Government decisions.

Obviously the aforementioned possibility always exists but it is also clear that what is possible is not always what is the most convenient. In the first case, that of Parliament being able to decide, for itself and without any contact with the Government which matters should be considered secret we consider to have very serious obstacles. The first of these is that this possibility goes against the logic of the notion of an official secret. This logic implies that the producer of the reserved information should decide whether this reserved information

should continue to be reserved or whether, on the other hand, it may be made public. That is to say, it seems reasonable that only the Executive may decide to keep certain information that it possesses and which it has generated itself, secret, among other reasons because if it communicates this information to another instance in order to take some decision in this respect, it would be difficult to consider it as a secret in the strict sense of the word. In another direction, it also appears difficult to harmonize some of the classic parliamentary functions such as the representation of interests and the formation of public opinion with the function of declaring secrets: it would probably become very complicated for the parliamentary representatives to explain to their electors that it would be better to be unaware of certain matters. We could perhaps affirm that, in the case of any means of this kind being established, it is more than probable that the Houses would not make use of it, because of the unpopularity that a decision of this kind would cause.

A different case would be that of arbitrating on any type of parliamentary control over decisions previously taken by the Executive. The extent to which a control of this kind could decrease governmental power is debatable and what is true is that in Comparative Law there are no examples of such initial control over the classification of material: in countries such as France, the United States and the United Kingdom there are no specific regulations on the holder of classification powers, but this is due to the fact that this power is understood as being unquestionably assigned to the Executive. In other countries, such as Italy and Spain, this power is precisely assigned to particular bodies within the Executive. In the latter case, the Law on Official Secrets, in accordance with its 1978 form, establishes that the classification of material within the secret or reserved categories will be the exclusive right within their spheres of the Council of Ministers and the Council of the Heads of Staff (Article 4) it being expressly established that this power may not be transferred or delegated (Article 5).

Whatever the case, this point may be concluded by recognising that the end sought by the existence of a prior control could have a similar efficiency to that of Parliament exercising a later control on the declaration of material as reserved, since it may be confirmed at any time whether the Government acted correctly or not by making this declaration

IV. Keeping material secret and parliamentary control

Once material has been declared secret, the first thing that draws one's attention, in the majority of the legislations, is the existence of different reserve

categories which, in general, correspond to different levels of protection. In colloquial language, this diversity may appear paradoxical, since there are no levels in the normal sense of the term "secret", one matter cannot be more secret than another, it is either a secret or it is not. However, we know that this is not the meaning of the expression "official secret" which, from the outset, is something known by a group of people, although these may be few in proportion, and which has to be protected above all from general distribution to the public and the communications media, but the particular knowledge of which by certain people, who have the duty not to spread it, does not affect its nature of being secret. Because of this, for example, it may be known in a parliamentary instance and continue to be secret.

It is true that this gradation is very frequent and the classifications existing are very varied, although the criteria employed for preparing these always tends to hinge on the idea of the seriousness of the harm which may be produced in the case of the secret being revealed, and because of this, have different levels of protection. To give only a few examples, of major to minor protection: in Germany there is a distinction between top secret, secret, confidential information and information exclusively for internal use; while in Spain classified material may have the categories of secret or reserved according to the level of protection required (Article 3 of the Law on Official Secrets). On the other hand, in other cases, classification occurs according to the matter on which the secrets occur, as happens in the United Kingdom, where the areas of interest to be protected are distinguished:

a) Security and Intelligence

b) Defence

c) International Relations

d) Matters relating to the execution of laws.

In this case, however, the classifications are mixed for the effects of protecting secrets where their revelation is typified as a crime, with the criteria of whether it causes serious harm to public interest or not.

What could be more interesting for us at this time is to consider whether a classification of official secrets of this type could affect the essence of parliamentary control over same. Of course, it is understood that there is only room for one negative response to the pretention that any of the categories should be excluded from this control, as this would be the equivalent of denying the same parliamentary control over official secrets. Another and different question is whether this control could be exercised in a different manner according to one or another type of reserved material. This would appear to be appropriate, if it is

the Houses that establish these different internal procedures, as happened in the Congress Presidency Resolution of 1992 in Spain. This regulation decrees knowledge on the part of one Member of each Parliamentary Group of those represented in the House, having been elected for the entire legislature by the plenary session and by a majority of 3/5, if the material whose knowledge is claimed has been classified in the secret category, and knowledge on the part of the Spokesmen for the Parliamentary Groups or the representatives of these in Commission, when the initiative for the request has come from here, where the classified material falls in the reserved category. Lastly, it lays down that, exceptionally, the Government may make a request to the Board of Spokesmen of the House that the information on particular material which has been declared secret should be facilitated exclusively to the President of the House or of the Commission, when the request has been made by the latter, in all cases corresponding to the final resolution of the Board of Spokesmen of the Congress.

This solution seems to us to respect parliamentary autonomy, but what, on the other hand, does not appear to be adequate is that the difference in treatment, according to the different reserve categories, should be imposed by an extra-parliamentarian rule, among other reasons because it would leave the decision on the parliamentary procedure to follow in the hands of the Government (which would decide on the categories of all material).

Along a similar line, it must be considered that in a two house Parliament, the power to organise the control procedure on official secrets corresponds separately to each House, although whether this type of control can be reserved only for one of the Houses is a different question.

In effect, it may be imagined that, in accordance with the features which define the two house model existing in a particular parliamentary regime, the power to control the Executive in matters of official secrets only corresponds to one of the two Houses or that, on the contrary, if we have a "perfect" or "balanced" system of bicameralism, this power is attributed to both Houses equally. A division in the functions can even be established, attributing the control of certain categories to one of the Houses, which will have the inevitable consequence of establishing a hierarchical organisation between the two, since knowledge of the material belonging to the more heavily protected categories will be understood as the most relevant function.

A problem which is intimately connected with these questions was established in Spain with the Law regulating the use and control of credits intended for reserved expenses, Law 11/1995, of 1 lth May, which in Article 7 states that these credits will be subject to the control of the Congress, via a parliamentary

Commission composed of the President of the House and those Members who, in accordance with parliamentary regulations, have access to official secrets. With this, the Senate is excluded from the control of credits destined for reserved expenses when this House is not excluded from the control of official secrets in general by the Law which, on the contrary, beforehand expressly anticipated that it would have access to any information claimed in the manner determined by the Regulations, as we have already mentioned. All this caused considerable discussion during the processing of the Law in the Senate, in spite of the fact that it was finally approved with the form that we have quoted.

Another of the questions which arises during the life of the official secret is that of the sanctions that are anticipated for those who infringe the duty regarding the reserve and make protected information public. The range of possibilities is very wide and the examples in Comparative Law, which are very varied, starts with a penal sanction in the case of the revelation of secrets being typified as a crime, and ends with a simple administrative or disciplinary sanction in the case of the subject having the obligation to guard the secret being a civil servant.

With regard to where our interests lie at the present time, the problem has to be centred basically on the sanctions which may be imposed on those members of parliament who fail to comply with their duty regarding the reserve and who infringe the rules on official secrets. Once more, as there is a lack of concrete provisions in this respect, it seems that the most appropriate are the Regulations or related internal rules, which should establish this type of provision, since Parliamentary regulatory autonomy demands that this should regulate the disciplinary regime of the members of parliament. However, a reservation should exist that the revelation of secrets has to be typified by the Penal Code as a crime, as in this case there would be no case for establishing a privileged regime for the members of parliament and senators, even though other procedural privileges recognised in the majority of the ordinances: special code of laws, the need for obtaining the rogatory letters concession, etc. ... may be applicable when judging this conduct.

One difficult case, but one which is possible in practice, is that which would occur, if a member of parliament obtained knowledge of reserved material through channels other than those legally anticipated. Would he be obliged to keep the secret or, on the contrary, should he report the person who provided him with the information? Probably there is only one casuistic solution which, undoubtedly, would always have to take into account all the extremes surrounding the case and particularly the specific content of the secret in question.

For the rest, the possibility of imagining complicated cases are infinite and, as in any other branch of the Law, we would never be able to design extensive

regulations which would completely eliminate all occasions for setting out problems. In this respect, reference may be made to the Ponting case, which occurred in the United Kingdom. On the basis of the now abolished Article 2 of the Law of 1911, Clive Ponting, a civil servant, was accused of providing a member of parliament with documents relating to a Government attempt to hide information on the sinking of an Argentinian vessel during the Falklands War from the Special Commission on Foreign Affairs of the House of Commons. Finally, Ponting was absolved, because it was understood that the "national interest" exception was applicable to the case, since although secrets had been revealed, this was not done to an unlawful person but to a member of Parliament.

Finally, I would like to leave two questions which are very closely related with the above and which have caused some public debate among the communications media recently in this country. The first of these is the suggestion of a possible conflict among the powers which could arise in the case of one or more parliamentarians who have knowledge of an official secret being called to declare by a judicial body which is hearing a penal process for the committing of a crime. Which carries the most weight, duty regarding the reserve or collaboration with the law? And from another point of view, should official secrets also be kept when in court or should the courts be able to receive information on them where necessary for fulfilling their functions? The first proposition may, on appearance, bring about a certain rejection with regard to what should, however, bear careful reflection. Are professional secrets and the clause on conscience accepted in almost all procedural ordinances as exceptions when having to declare before the courts?

Whatever the case, it is understood that the previous case can only arise when the committing of a crime is deduced from the information of which the secret is composed and this information is then strictly necessary for the culmination of the judicial process. But then we find ourselves faced with the second question that I wanted to put forward: What happens if, by virtue of the information provided as an official secret, Parliament, or the parliamentarians authorized for this, become aware of the committing of a crime? Is it their duty to inform the Fiscal Ministry or even public opinion? Or, on the contrary, does duty regarding reserve, as a special duty, possess greater force than the generic duty of respecting the legal ordinance and ensuring that it is complied with? Whatever the answer chosen, we always consider the improbability of this case. It is not easy, in effect, for whoever facilitates the reserved information, the Government, to recognise that it or some of its agents committed a crime when informing Parliament of this. And, if the author is someone who cannot be linked with the Government itself, it is likewise very strange that the Government should wish to protect him.

With regard to the case put forward in Spain, we can say that the solution given by the instructing judge to the Board of Spokesmen for the Congress consisted of denying the advisory nature of Parliament when having to resolve this type of problem. The Board understood that it is the judge whose task it is to interpret and apply the law and left the parliamentarians free to be called to declare and to act according to the dictates of their consciences.

V. Declassificalion off reserved material

Lastly, we would like to make some observations with respect to the final phase of the life of official secrets, that is to say, the time when the reserved material is declassified and ceases to be secret.

The essential question in this point is: What is the role corresponding to Parliament in this decision?

As a general norm, de-classification of official secrets corresponds to the same authorities that committed them to being classified as secret. And in this sense there are several specific provisions, for example, in the Italian and Spanish legislation. Therefore, it is normally the Executive which has the power to take this decision and there is a certain logic in this. However, it would not be foolish to defend a system in which the possibility is permitted of Parliament, with the requirements that it deems opportune, deciding on the de-classification of that material, which in its opinion and in accordance with the law, no longer merits being considered secret. This possibility would give full meaning to parliamentary control over official secrets since, in any other way, it would be lacking an essential element: in the case of this being requested, Parliament would be limited to knowing those matters that the Government considers to be secret (and which may be the least relevant in the opinion of the Houses), but, if it observes an incorrect use by the Government of the powers granted to it by law, Parliament cannot compel it to de-classify material on which it considers that the establishment of a reserve is inappropriate.

In this respect, it must not be forgotten that this possibility is conceded to some judicial bodies in some ordinances, as happens in the United States, where the correct classification of reserved material can be evaluated by the judges in each case and the Executive may be contradicted. This occurred in the case of the MacNamara Report, in which the High Court authorized the publication of classified information on the Vietnam War, because it considered that to prohibit the spread of information based on the first exception in the Freedom of Information Act (that which refers to national defence and

foreign policy), the Government has to allege and prove that this inevitably originated an event which would place the security and defence of the State in jeopardy.

The question of time is also involved with the de-classification of official secrets. Once a period of time has passed and due to the fact that interest has been lost in the information or that a revelation would not then imply any harm to public interest, these official secrets are no longer worth being protected. This time may be indefinite and understood to have ended when the aforementioned extremes have been checked or a particular period of time may be previously fixed. For example, in Portugal, once 25 years have passed, reserved notes of the Ministry of Foreign Affairs are automatically published. In Spain the draft Law on Official Secrets anticipated the automatic loss of the condition of secrecy after a period of 50 years, a period of time which has been considered excessive in some sectors that have criticized the text.

We could consider the convenience of granting Parliament the powers to decide when a sufficient period of time has passed for the revelation of reserved information not to cause any harm to public interest, since it is true to say that this period can vary greatly according to the case and Parliament should, in any case, be characterized by being in contact with the present situation of the society that it represents.

In the same way and as a final question, we could ask if it would be suitable or useful to attribute some function to Parliament when having to decide on the effects of de-classifying secrets. There is no doubt that it would be possible to grant this type of power to Parliament, as a body whose task is to control the Executive in matters of Official Secrets. But, in precise terms, in this as in all the other questions put forward, the reply would be given by the attitude adopted with regard to the parliamentary institution and the interest that it shows in a reinforcement of this in the heart of the group of constitutional bodies.

Proceedings at the plenary session in Beijing (September 1996)

Mr ALBA NAVARRO reminded the conference that Jeremy Bentham had defended openness and publicity not only by citing the function of control belonging to parliamentary assemblies but also by explaining that publicity both within Parliament and outside was the guarantee that reason would inspire political action. Bentham attacked secrets saying that "a secret, the instrument of conspiracy, should never be the regular system of government". Mr Alba

Navarro summarised contemporary doctrine by stating that a secret could never be a general rule for the action of a democratic government. However, an unlimited formula for the principle of publicity which left no place for the secret might threaten very important foundations of the democratic regime itself, weakening it to excess.

Thus any debate would centre on the definition of the limits to secrecy, always with the assumption that publicity was the general rule and secrecy the exception. Mr Alba Navarro wished to consider a specific aspect of the question, namely the role of Parliament with regard to the official secrets of the Executive. It was a major issue in Spain because the recent approval of a draft Law on Official Secrets had led to heated controversy in the media.

The United Kingdom, Germany, Italy and Spain were among the countries which had in place specific regulations on official secrets. In other jurisdictions the limits on the right to information might be established as part of a more general regulation. Examples were the United States, where such restrictions were included within the Freedom of Information and Privacy Acts, and France. The differences in treatment reflected differences in the view of the status and range of secrets. Likewise different regimes had different names for such classified material. In some instances it was limited to "defence" or "security" secrets, in others more broadly to "State" or "official" secrets.

It was worth asking whether the absence of such regulations meant that official secrets did not exist. In fact the opposite was more likely to be the case. The lack of such regulations probably meant that it was easier to have secrets. By having legislation, and thus admitting the need for secrets, their regulation could guarantee that the secret would be an exception and publicity the general rule. Legislation limited the number of possible secrets and often allowed the secrets to be known by a small circle of people (frequently Members of Parliament) to ensure some kind of control over the Executive. The process of legislation was thus a vital opportunity for Parliament to reserve to itself certain rights and control. In the Law on Official Secrets in Spain the Congress and the Senate retained the right of access to information, if necessary in secret sessions. A 1992 Presidency/Speaker Resolution governed the internal procedures to be followed for accessing classified material.

The logic of official secrets was that it was for the Executive to decide whether to keep certain information secret. Was there a possibility of Parliament having a function in deciding whether certain matters should be secret? It seemed inappropriate to such parliamentary functions as the representation of interests and the formation of public opinion. It would be difficult for Members to tell their constituents that they had better be unaware of certain matters. In the

countries examined there was either an assumption that it was for the Executive to classify material as secret or this function was specifically assigned to a particular body within the Executive.

In the majority of legislations there were different categories of secret corresponding to different levels of protection. The criteria for such classification tended to be the seriousness of harm resulting from their release, the laws of Germany and Spain being examples. The United Kingdom, on the other hand, classified according to the area of interest to be protected. The question arose as to whether such classifications affected the nature of parliamentary control. In Spain access to classified information for parliamentary representatives differed according to whether the material was "secret" or "reserved". It was important that there be some parliamentary control over classified material. It did not, however, seem appropriate that the nature of the parliamentary control should be determined by an extra-parliamentary classification of the material. In bi-cameral parliaments the issue of the respective rights of each House to control was also important.

Different countries imposed different sanctions on those who infringed the duty to preserve the secrecy of classified material. With regard to Members of Parliament it was necessary that any discipline be according to the internal and autonomous rules of the House. The issue was more difficult if the Member had gained access to the classified material through some means other than a legitimate channel. What then were his obligations to secrecy? It was probably impossible to stipulate one clear answer. Each case would have to be considered in its context. Further complex problems were the duty to secrecy of a parliamentarian conflicting with the possible duty to testify on the relevant matter before a court of law, and the question of what action to take should a crime become apparent to a Member through his access to classified material.

It was normally for the Executive to de-classify material. It would, however, be possible to have a system in which Parliament might have such a role. It should be remembered that in the United States the court could judge whether the Executive had acted correctly in the classification of material and, if it deemed it appropriate, de-classify the material. Most secrets became less sensitive with the passage of time. There were provisions in certain countries' legislation for reserved material to be published after a number of years. It should be considered whether to grant Parliament powers to decide whether sufficient time had elapsed for material to be made public, and, indeed; to judge on the effects of de-classifying secrets. Parliament should, after all, be an institution attuned to the situation in society at large. It should, in conclusion, be remembered that the discussion of official secrets only made sense in the

context of an open society. In a closed society the problems discussed would simply not exist.

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The PRESIDENT thanked Mr Alba Navarro for introducing a debate on a subject of great interest and importance. The question of official secrets went to the heart of the relationship between the Executive and the Legislature.

Mr NYS (Belgium) congratulated Mr Alba Navarro on his paper. The question of classified material in Government was at that moment very topical in Belgium. There had been pressure last session for an inquiry into the murder of two Belgians in Egypt. The Government was against the request of a Senate Committee for the release of certain reports relating both to national defence and paratroopers which could have an effect on the military situation in other countries. It was a very confidential file. The Senate therefore decided to form an ad hoc committee consisting of two well known magistrates and two senators who would have access to all documents, the access being under very strict controls to avoid any of the documents' contents being released elsewhere. The ad hoc committee would then report to the Plenary Committee on External Affairs. There was no precedent for the approach.

Sir Michael WHEELER-BOOTH (United Kingdom) noted that this was a subject which raised difficulties for all. The traditional view in the United Kingdom was that Parliament was a public body and that therefore evidence was taken in public (although Committees did deliberate in private). If evidence was given in private there was always the danger of leaks and the information could not be used in the report. The Defence Committee did take evidence in private which was not published. Similarly the European Committees in both Houses were told things not suitable for publication. But there was very rarely a need for secret evidence.

There had in the United Kingdom recently been a problem of secrecy relating to the use by Ministers of affidavits to prevent certain information on arms sent to Iraq being presented to a Court. An inquiry had criticised the Ministers' practice. Freedom of Information legislation elsewhere, as in the United States, risked defining not only what should be made public but also what should be kept secret.

Dr KABEL (Germany) congratulated Mr Alba Navarro on his paper and said that there should be another opportunity to discuss it. The question came up

in Germany from time to time. There was some inherent contradiction in considering how to preserve the secrets of a public body. It was possible to form small committees to maintain parliamentary control but only where the Government could trust the membership not to make classified information public. There was, for instance, a Committee in the German Parliament on the secret service. There was an obvious danger to the activities of the secret service should its work be made public. The system worked well. There was, however, always the danger that a Member might decide to make something public for political reasons.

Mr BENVENUTO (Italy) said that the question of secrecy was a very difficult one in Italy. It should be noted that in considering the relationship between Government and Parliament it was sometimes Parliament which had the secrets. Committees could decide that evidence received was classified.

The PRESIDENT again thanked Mr Alba Navarro for his contribution on a very topical subject. It might on some later occasion be a suitable subject for a questionnaire.

V* Mechanisms for the direct participation of citizens in the parliamentary system of Peru

Communication by Mr José CEVASCO PIEDRA (Peru), Seoul Session (April 1997)

Mr CEVASCO PIEDRA explained that the Congress of Peru was constitutionally a unicameral parliament. This was one of the measures adopted in Peru in order to modernise the country and its bureaucracy. The parliamentary services were not competent to make political decisions. That was for the elected representatives. The parliamentary officials had to ensure that the institution was efficient within the framework established by Parliament and the Constitution. Efficiency had always been a goal of the parliamentary administration but the concept was perhaps inadequate now for the global village established by thè modern communications revolution. Communication was a vital aspect of the small virtual world in which we now lived. The Legislature had to meet the challenge of this new technology. Parliament consisted not only of members but also of the staff. If the enactment of laws was the main task of members of parliament, the staff had to supply members with the material necessary to achieve their aims. Members' offices already had such provisions as data processing, video and radio. Sessions of the Congress were broadcast via cable. It was decided, however, that such innovations were not enough. Modern technology had also to be used to engage the citizen and society. Society was now more demanding of its politicians. There was a concern for transparency in political decision-making. Citizens were no longer passive but wanted full participation in the life of the country. Technology could be used to encourage such greater participation.

Parliament had an e-mail address so that citizens could communicate readily with their representatives and a page on the network to announce the current business of Congress. A 'Virtual Parliament' had also been created. The legislative power was one of the pillars of democracy. The legitimacy of the institution was, therefore, fundamental if democracy was to flourish. That legitimacy depended on the extent of its acceptance by society. Parliament had to be both legal and legitimate. There had been a tendency for citizens to call the

function of parliament into question. Parliaments were also becoming more difficult to manage as the old two-party politics was replaced by a more multi-party system. Technology could help counteract the problems arising from a multi-party system and allow the institution to be more alert and react more quickly to popular opinion. The Virtual Parliament helped parliamentarians to get closer to Peruvian society.

The Virtual Parliament was a computerised network to which citizens could gain access via the Internet. Requests, opinions and suggestions could be presented. This would strengthen the political basis of Peru, creating a permanent link between the citizens and Parliament. Opinions could be sought on bills. Congress could receive requests directly for action or legislation. There were public dialogue groups in which topics of interest were suggested, with Congress as a sort of electronic mediator. The office managing the Virtual Parliament made Parliament aware of any issues which tended to reappear. The agenda of Congress was available and citizens could make known their comments and suggestions on bills. They were then handed on to the relevant parliamentarians before the debate and vote. There was also a well developed student programme, involving visits, clubs and competitions.

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Mr ALBA NAVARRO thanked Mr CEVASCO for his fascinating account. He was sure that there would be questions.

Mr OWUSU-ANSAH (Ghana) said that his parliament had a similar goal to that of Peru but was reaching the people not through technology but through visits. They were constrained by a lack of funding from investing in technology. There was a tendency after an election for the population to shut up and be uninterested in Parliament. Moreover parliamentarians did not often visit the constituencies through lack of funds. The political leaders decided, therefore, to take parliament to the people. After every sessional year (there were four sessions in each parliamentary term) a venue was chosen by the leadership and parliamentarians assembled there. The meeting was advertised and between 3000 to 4000 persons would attend to ask questions of their political leadership. There was also an annual report from the Speaker on the activities of Parliament and that formed the basis for some of the questioning. Questions were asked and answered, and suggestions made. It was, however, difficult to reach the villages with political information. Not many could afford radios and televisions. At the

moment these meetings took place at the national level but it was to be extended to the regional and district level.

There were organised attempts to get students, trade unions and other professional bodies to visit parliament. There remained, however, a problem of funding which could usefully be addressed by the donor agencies.

Mr BECANE (France) said that he found the communication very interesting. He wanted to know whether citizens had to put their name down to be participants in the Virtual Parliament. If so, how many persons had subscribed?

Mr CEVASCO PIEDRA said that the Virtual Parliament was inaugurated on 17 December 1996. When he left for Seoul there were 861 subscribers, both individuals and institutions. There were 49 items for the public discussion groups where citizens engaged freely in debate. Ten opinions had been submitted on the basis of these debates to Parliament. 189 draft bills had been published on the Internet to get the opinions of citizens. 123 committee bills had also been published on the Internet. There were about 200 secondary school students in the 'friends club'. They were, in all its activity, thinking not just of today's parliament but tomorrow's.

Mr FARACHIO (Uruguay) said that the points raised were very interesting. Uruguay had experienced some problems in integrating parliament into a modern society. Parliament had to meet the demands of the modem world without getting carried away by new technology. Perhaps a system aiming at an easy dialogue with the people could lead to the disappearance of Parliament altogether and technology taking over. Technology was necessary to make parliament known, encourage visits and dialogue. What justified parliament, however, was the voting of elected representatives.

Mr VIVAS TAFUR (Colombia) asked how one could ensure that this extension of democracy and political dialogue was included within the normal life of parliament.

Mr CEVASCO PIEDRA said that the work of parliamentary officials was one of management only. The Internet allowed both the supply of information about parliament and the receiving of views from ordinary citizens. It was not the job of officials, however, to ensure that members of parliament took account of their views.

Mr HAHN (Israel) said that in Israel Channel 33 broadcast live from Parliament continuously every day. There was also the 'Education for Democracy' programme which was a joint enterprise between the Israeli parliament and the Ministry of Education. Each day school classes visited and watched sessions.

Mr CEVASCO PIEDRA said that as an example of the ignorance of parliament which had to be remedied, 80 per cent of citizens in Peru thought that Congress worked only on Thursday, when the plenary met. The Virtual Parliament was established to help those citizens who were unable to talk to parliamentarians directly. Thought was also being given as to how to involve and interest students. If parliaments did not try to get their democracy known, then parliaments themselves would disappear.

VI. The Belgian system of immunities for ministers and members of parliament

Communication from Mr Robert MYTTENAERE (Belgium), Seoul Session (April 1997).

Mr MYTTENAERE explained that two changes had taken place to the Belgian system of immunities. These changes related in the first place to a modification to the procedure for the lifting of immunity for members of parliament, and then to the procedure for the prosecution of ministers. He said that the constitutional changes were in particular due to increasing influence of the media and press which had a growing tendency to seize on matters involving the lifting of immunity. He said that Belgium had a latin political culture and tradition.

Previously, Article 59 of the Constitution read as follows:

"During the duration of a session Members of either of the two Chambers may only be arrested or prosecuted in penal matters with the authorization of the Chamber of which he is a member, except in cases of flagrante delicto."

The general principle was therefore that a member of parliament could not be prosecuted and arrested unless with the proper authorization of the Chamber of which he was a member. Parliamentary immunity did not apply in cases of *flagrante delicto* (that is, at the moment when the crime was committed or immediately afterwards), and for prosecutions entered into outside the period of the parliamentary session. It was necessary to note that this last exception was no longer applicable in practice since Parliament sat throughout the year. Moreover, the relevant Chamber was always able to demand the suspension of the prosecutions of members of parliament. This would mean that the member of parliament did not find himself outside the law but that the officials of the public prosecutor's office could not begin anything without the explicit intervention of the Chamber. From time to time a committee within the Assembly would examine, for instance, motoring offences.

Mr MYTTENAERE said that lately the least offence committed by a member of parliament was the object of an excessive media coverage and gave

the public the impression that the member of parliament had already been found guilty. Furthermore, even members of parliament who had wished that their immunity did not apply themselves could not demand the lifting of the immunity.

The text of Article 59 of the Constitution was henceforth redrafted as follows:

"Except in cases offlagrante delicto, no member of either chamber can, during the session, in penal matters, be sent or summoned before a court or tribunal, nor arrested, unless with the authorization of the Chamber to which he belongs.

Except in cases offlagrante delicto, measures requiring the intervention of a magistrate may only be ordered during the session against a member of either Chamber, in a penal matter, by the first president of the Court of Appeal on a request from the competent magistrate. This decision is communicated to the President/Speaker of the relevant Chamber.

Any search or seizure made by virtue of the preceding paragraph can only take place in the presence of the President/Speaker of the relevant Chamber or of a member designated by him.

During the session, only officers of the Public Prosecutor and competent agents can initiate criminal proceedings against a member of either Chamber.

The relevant member of either Chamber can, at every stage of the investigation, ask during the session and in relation to the penal matter that the Chamber of which, he is a member suspend the prosecution.

The relevant Chamber must decide to this effect by a two thirds majority of votes cast.

The detention of a member of either chamber or his prosecution before a court or tribunal is suspended for the session if the Chamber of which he is a member so requires."

With regard to the situation for ministers, Mr MYTTENAERE explained that since 1831 ministers could not be prosecuted except by the Chamber of Representatives. Only the Court of Cassation was able to judge them. Article 103 of the Belgian Constitution made clear that the Chamber of Representatives had the right to accuse ministers and bring them before the Court of

Cassation. Mr MYTTENAERE mentioned an example dating from 1865, when a minister had challenged a member of parliament to a duel and had been brought to court, on the decision of the Chamber, since duelling had been forbidden. He said that during recent years the Chamber had had to examine an increasing number of dossiers in which the name of a minister appeared. In December 1996 a Deputy Prime Minister having been implicated, the Chamber passed temporary and partial enabling legislation for Article 103 of the Constitution (Law of 17 December 1996) which applied to federal ministers. This law established the following principles:

- The preliminary investigation had to be undertaken by the Court of Cassation without the Chamber of Representatives having to intervene;
- The procedure for the inquiry and investigation had to be as close as possible to ordinary law. That was why the law provided that the powers of the Public Prosecutor and the examining magistrate were exercised respectively by the Attorney General to the Court of Cassation and by the judge of appeal designated for this purpose by the first President of the Court.
- Finally, the law regulated the procedure which had to be followed once the preliminary investigation had been concluded and in a case where the Chamber of Representatives would be involved according to Article 103 of the Constitution.

Mr MYTTENAERE said that the law of December 1996 thus meant the Chamber did not have to be directly involved before the slightest preliminary investigation had taken place, thus avoiding the excitement of public opinion by an exaggerated media coverage.

He also said that in parallel with the law of 17 December 1996 the Chamber had adopted in execution of Article 125 of the Constitution a draft partial and temporary law in relation to regional and local ministers. This draft legislation contained similar provisions to those adopted for federal ministers.

In conclusion, Mr MYTTENAERE explained that with regard to ministerial duties it seemed that there was an increasing attempt to protect the individual rather than the function.

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Mr ALBA NAVARRO congratulated Mr MYTTENAERE for the clarity and the precise and detailed character of his communication.

Mr VIVAS TAFUR (Colombia) said that the loss of parliamentary immunity was an important subject in his country. He said that fifteen members of parliament had lost their immunity in recent years and that there was in Colombia a supreme court charged exclusively with consideration of questions on the lifting of immunity.

Mr MYTTENAERE said that in the Belgian system the Court of Cassation as such had nothing to do with the lifting of parliamentary immunity. The jurisprudence was actually founded on the old system in which every act of judicial power had to be subject to the Chamber. From now on, the legal authorities would have to come to the Chamber with a well prepared dossier and could not intervene unless there was a presumption of guilt. In the old system nothing could be undertaken without the authorisation of the Chamber. The Chamber agreed to the lifting of immunity unless the incriminating facts appeared to be matters of minor importance. In addition, actions having a political aspect could not lead to the lifting of immunity. For example, at the time of the visit of Brezhnev to Belgium a member of parliament had tried to rush towards the Soviet leader. When the dossier had been sent to the Chamber, it had considered that immunity should not be lifted since the action of the member of parliament had been political: this member of parliament had wished to demonstrate, no doubt in a rough manner, his disagreement with the doctrine and ideas of communism.

Mr MYTTENAERE added that in the old system there had been on average three or four dossiers per year on the lifting of immunity which had been frequently requested on questions of traffic violation or other relatively minor matters. When the immunity had been lifted, this procedure had not hindered the member of parliament in the exercise of his mandate.

Mr DAVIES (United Kingdom) observed that the change which had occurred in Belgium seemed to move in the direction of a greater protection for the individual who found himself as a member of parliament. He noted that this same development had taken place in Great Britain. A law henceforth allowed members of parliament to renounce what were called their "privileges" to allow the courts to consider their case. He explained that this had caused widespread concern in the Commonwealth. He asked why Parliament in Belgium was involved in criminal cases. This was not the case in the United Kingdom.

Mr MYTTENAERE explained that in Belgium in any penal question the decision was taken by the Chamber. He noted that Belgium had had taken account of the effects of the French Orleanist legislation, which was marked by a lack of trust between the Legislative and Executive powers. In 1830 the Belgian constituent assembly was in fact very aware of what was happening in France at that time. The judicial officials were appointed by the King.

Mr MAVOUNGOU (Congo) congratulated the speaker for his presentation and said he was troubled by the parallel which seemed to have been made in the communication between parliamentary immunity and a sort of ministerial immunity. He said that in the one parliamentary system he was familiar with the minister was controlled by Parliament. He asked about the designation of this ministerial "immunity". Should one speak of a "government" or "ministerial" immunity?

Mr MYTTENAERE explained that in the Belgian system the protection of ministers did not amount to a genuine protection but was what one called a privilege of jurisdiction. In 1830 it had been considered that the minister could not be judged by inferior legal tribunals which he might have appointed himself. For whatever act, whether minor or not, whether it related to the exercise of the ministerial function or was of a private nature a minister could only be judged by a superior tribunal from which there was no appeal. The Chamber, sole representative of the people, had the right to decide to prosecute. The Chamber could thus judge if the minister had actually committed any offence and then decide if necessary whether or not to submit the dossier to the Court of Cassation. In sending on the dossier, the Chamber would make clear if in its opinion the minister had actually committed an offence. Mr MYTTENAERE said that it was important not to confuse two different systems: the parliamentary immunity which protected the work of the member of parliament and that of the minister to whom the privilege was accorded of not being judged by those whom he had himself appointed or supervised.

Mr FARACHIO (Uruguay) said that he had understood that formerly it was the Chamber which was the "master" of immunity but that now it was the members of parliament who had the individual right to lift their own immunity. He asked what were the necessary criteria for such a lifting of immunity.

Mr MYTTENAERE said that the member of parliament did not previously have control over his own immunity nor did he now. He summed up the situation in a few words: the member of parliament had nothing to say in the matter. The difference between the old and the new system was the following: in the old system the judicial power could not do anything without the agreement of the Chamber; whereas now it could do everything other than arrest a member of parliament and bring him before a court, without the agreement of the Chamber. The Chamber was still involved in the process and it was still the Chamber which had the duty of deciding whether or not the immunity of a member of parliament should be lifted. In the preceding system the Chamber was involved at the beginning of the process whereas now it was involved when the judicial power had already fully investigated the dossier.

Mr HONTEBEYRIE (France) thought that the question of immunity was both interesting and complex and said that he wished to refer to the situation in France. He considered that the situation on the matter of immunity was not very different in Belgium and Great Britain. With regard to France, the system of parliamentary immunity was two hundred years old since it was the very first revolutionary assemblies which had established it. At that time, the concern was to prevent the royal power putting pressure on members of parliament, imprisoning or prosecuting them so that they could not physically participate in the work of the Assemblée, with the aim of getting passed some proposal which was favoured by the King. The lifting of parliamentary immunity had thus permitted changes to the composition of the Assemblée. The members of the Assemblée had thus sought not only to protect the parliamentary function but also themselves collectively.

He said that in recent years France had seen developments comparable to those of Belgium and Great Britain. Previously, requests for the lifting of parliamentary immunity had been quite exceptional. They had recently become more frequent and now occurred in a world much more affected by the media than was the case in the 19th century. For some reason or other, a member of parliament would be prosecuted and it was necessary for the Assemblée to reach a decision in public debate. The press withheld only the name of the member and tended to present him as guilty even before the courts had come to a decision. This situation was contrary to the essential principle of the presumption of innocence. The press discussed cases of the lifting of immunity but omitted to explain, in some of them, that the members in question had not in the end been convicted.

It was to combat this situation that the French Constitution had been changed on two points in 1995. In the first place, and paradoxically, parliamentary immunity had been reduced so as to limit cases where the chambers had to make a decision. For crimes and offences the permission of Parliament had previously been necessary before beginning a prosecution. From now on the Constitution stated that there was no longer any need for such permission before prosecution. The extent of parliamentary immunity had thus been restricted. In the second place, the procedure itself had been modified. Mr HONTEBEYRIE explained that previously the lifting of parliamentary immunity gave rise to a debate in public session which could be very disagreeable both for the member of parliament and for all his colleagues. The constitutional assembly had chosen to go down another path to other parliaments, being concerned to protect the individual more than the function. It was now in fact the Bureau of the Assemblee which made a decision behind closed doors on the lifting of parliamentary immunity. There was therefore no longer a public debate. Members of

parliament, observers and the press only knew that the Bureau had met at a certain time and had decided to lift or not lift the parliamentary immunity of the member in question.

Mr HONTEBERYIE said a few words concerning the situation of ministers with regard to the courts. He explained that in France ministers traditionally could not be judged other than by their peers, either in the Assemblée Nationale or in the Senate. He explained that since 1958 (the beginning of the Fifth Republic) the members of the Government were not either deputies or senators. The old system was maintained however until 1995, the date of the constitutional changes, which had altered the conditions under which ministers could be prosecuted. Instead of being indicted by the two chambers, by an identical vote of the Assemblée Nationale and the Senate, and being judged by a Court composed only of members of parliament, they were henceforth judged by a Court composed of members of parliament, but also of three judges from the highest French courts of law. It was moreover one of the three judges who presided at this Court of Justice of the Republic. He added that the indictment was made through a body, the Committee of Petitions, which could be approached by any citizen believing that a minister had committed an offence in the exercise of its functions. If the Committee considered it justified, it sent the dossier to the Court of Justice.

Mr HONTEBEYRIE concluded by saying that this question had been posed in similar terms in many countries but each country had attempted to resolve the problem according to its own legal culture.

Mr YOO Soo Jeong (Republic of Korea) asked about the legal effect of the indictment in Belgium of ministers by the Chamber of Deputies. He then explained the Korean system in which Parliament had the right to indict a minister, the President, the members of the Council of State, the judges of the Constitutional Court. In cases of indictment by the National Assembly, the decision came back to the Constitutional Court. If he was judged guilty, the minister could then be dismissed from office. He could even be sentenced, that is be subject to legal action.

Mr MYTTENAERE explained that the Belgian system was the same, both in its old and new versions. He said that the Chamber which decided to indict a minister assumed on that occasion the role of the indicting Chamber. In every legal system there was in effect a court charged with deciding initially if a person should be sent before a court of law. In the Belgian system, it was the Chamber which fulfilled this role. It was then for the Court of Cassation take a decision, from which no appeal was possible. Mr MYTTENAERE observed that this procedure posed a problem for it meant that the minister did not have

the right to appeal from the first decision whereas every citizen had this right, a fundamental principle of every democratic regime. This principle required that every citizen judged by a court had the possibility of submitting his case to a higher court.

Mr MYTTENAERE said that this principle was in the European Convention of Human Rights and more generally in Article 6 of the United Nations Convention on political rights which came into force in 1976. He pointed out that a minister had recently been sentenced in Belgium to a penalty contained within the penal code. This sentence had been accompanied by a lifting of his political and civil rights. The Court of Cassation did not have the right to dismiss him as a minister for in Belgium ministers were appointed by the King and could only be removed by him. Mr MYTTENAERE said that it was evident, however, that a minister sentenced to a serious enough punishment had to offer his resignation. If he did not do so, the King himself required his removal. He concluded that the Court of Cassation could only apply penalties provided for in the penal code. Thus, if there was a political sanction which followed the ruling of the Court of Cassation, the Court was not directly responsible for it.

Mr CORREA (Venezuela) asked about the situation of the incriminated member of parliament. He asked if he could be reelected and stand immediately for parliament at the next election.

Mr MYTTENAERE explained that the lifting of immunity had only one effect, that of allowing justice to be done. If the member of parliament was convicted to a sentence exceeding two months imprisonment, he lost his political rights and could not stand in subsequent elections. Mr MYTTENAERE noted that there was a controversy on this issue in Belgium. The problem was to know if the member of parliament sentenced to more than two months imprisonment had to resign or not. Most lawyers thought that such a member should resign but others thought not. Mr MYTTENAERE said that up until now this situation had not yet occurred. He added that the Belgian Constitution provided that in order to be elected a candidate had to fulfil four conditions at the time of election, one of which was having at one's disposal one's political and civil rights. The Constitution, however, said that the candidate had to have at his disposal these political rights on the day of the election. Some persons, albeit a minority, thought therefore that this situation only held for the day of the election itself. This seemed a somewhat strange interpretation of the Constitution. Mr MYTTENARE concluded that no one could participate in elections if his criminal record contained a sentence of more than two months spent in prison.

ASSOCIATION OF SECRETARIES GENERAL OF PARLIAMENTS

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Constitutional **and** Parliamentary Information

Published by the Association of Secretaries General of Parliaments, under the auspices of the Inter-Parliamentary Union, is issued twice a year in both English and French.

Swiss francs

One number. . . . . 25 F
One year (2 numbers). . . . . 40 F

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