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Secrecy and openness: individuals, enterprises and public administrations

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FOREWORD

The XVIIth Colloquy on European Law, devoted to the theme "Secrecy and Transparency - individuals, enterprises and public administrations", was organised by the Council of Europe in collaboration with the Faculty of Law of the University of Zaragoza. The Council of Europe, which brings together 21 European States, has as its objective the realisation of closer union between its members so as to safeguard and develop human rights and fundamental freedoms and to promote their economic and social progress. In this perspective, it serves as a framework for the finalisation of common policies as well as for the conclusion of international treaties. It has also adopted Recommendations addressed to the Governments of the member States.

For the successful accomplishment of its tasks, notably in the legal field, the Council of Europe carries out research work, studies, collects information and experience on the problems which arise in European society and on their evolution with a view to bringing to bear concerted responses and, if necessary, to embark upon action aimed at harmonising and coordinating national laws. In this context, and since 1969, the Council of Europe has organised Colloquies on European law which have very frequently given rise to proposals for concrete action by the organisation.

The Zaragoza Colloquy, which was took place from 21-23 October 1987, brought together some 70 participants with specialist knowledge of the theme of the Colloquy. The participants came from the member States of the Council of Europe as well as from Canada, Finland and the Holy See.

At the inaugural session, speeches were given by Mr. M. RAMIREZ, Dean of the Faculty of Law and Chairman of the Colloquy, Mr. V. CAMARENA BADIA, Rector of the University of Zaragoza, Mr. F. HONDIUS, Deputy Director of Legal Affairs of the Council of Europe, Mr. J.M. PAZ AGUERAS, Secretary General of the Ministry of Foreign Affairs and Mr. H. GOMEZ de las ROCES, President of the Region of Aragon.

During the three days of the Colloquy, the following themes were discussed:

- A functional approach to the legal rules governing secrecy and transparency;

Report presented by Mr. H. BURKERT (Federal Republic of Germany); Co-Rapporteur: Dr. G. GARCIA CANTERO, Professor of Civil Law at the University of Zaragoza.

- Critical perspectives on secrecy within public administration

Report presented by Mr. P. GERMER, Professor at the University of Aarhus (Denmark); Co-Rapporteur: Dr. J. BERMEJO VERA, Professor of Administrative Law at the University of Zaragoza.

- Commercial secrecy and information transparency;

Report presented by Mr. J. HUET, Professor at the University of Paris V - René Descartes (France); Co-Rapporteur: Dr. I. QUINTANA CARLO, Professor of Commercial Law at the University of Zaragoza.

- Protecting information disclosed in confidence - towards a harmonised approach to the legal rules governing professional secrecy;

Report presented by Mr. P. SIEGHART, barrister, Visiting Professor at King's College, University of London (United Kingdom); Co-Rapporteur: Dr. J. GIL CREMADES, Professor of Legal Philosophy at the University of Zaragoza.

Following the presentation of the reports and discussions, the general report was given by Mr. M. RAMIREZ.

The participants adopted a final Declaration in which they emphasised in particular that it would be extremely appropriate for the Council of Europe to comply with the wish expressed by the Parliamentary Assembly in Recommendation 1012 (1985) on the harmonisation of the rules on professional secrecy.

In addition, the participants believed that the work could be of even greater interest if it were to be undertaken in the context of a more general analysis of the common principles - based on respect for human rights and fundamental freedoms - and which would necessarily inspire the regulation of information circulation in the member States of the Council of Europe.

The results of the Colloquy have been communicated to the Committee of Ministers of the Council of Europe via their European Committee on Legal Co-operation (CDCJ). This volume contains the text of the speech given by Mr. F.W. HONDIUS at the inaugural session, the reports and notes submitted to the Colloquy as well as the final Declaration adopted at the end of the Colloquy by the participants, whose names are also listed herein.

SPEECH

by

Mr. Frits W. HONDIUS
Deputy Director of Legal Affairs
of the Council of Europe
representing the Secretary General of the Council of Europe

On the 1st of January of this year, the Council of Europe embarked on the implementation of its Third Medium-Term Plan. This Plan sets out the broad objectives to be achieved by co-operation between our 21 member States: safeguarding and development of human rights, reinforcement of social cohesion, defence of democratic society against destabilising factors such as terrorism and other forms of violence, fostering the cultural values of this Continent, including those which we share with Eastern Europe, meeting the challenge of the new technologies, improving the quality of our natural and man-made environment.

Secretary General Oreja has underlined that these objectives can only be realised if we use the full political potential of Europe. Moreover, achievement of these goals is not enough: "... those concerned need to be aware of such action and the results, and for this purpose an efficacious information policy will have to be worked out."

Information is a central theme pervading all sectors of the Council of Europe.

It is the subject of this Colloquy.

On several occasions, the Committee of Ministers has reaffirmed the member States' common and fundamental beliefs regarding information. Article 10 of the European Human Rights Convention is certainly the most comprehensive, definitive and binding statement of the freedom of expression and information which, to my knowledge, is the only human right with a specific rider: "regardless of frontiers".

Our member States have recognised that there are several reasons for amplifying this right beyond the strict bounds of the Convention. One reason is that the Convention is only a safety net against abuse. Protection against abuse is not enough. There should also be positive policies and laws enhancing and encouraging the fullest use of the freedom of information, taking into account the manifold ways in which information is collected, stored and communicated. This is why the Committee of Ministers proposed, and the member States adopted in 1981, a Data Protection Convention. This is also why the Committee of Ministers will adopt, in the near future, a Convention on transfrontier broadcasting.

I am sure that you agree with me that at this Colloquy, devoted to the conflicting claims for access to information and the protection of information received in confidence, we should remind ourselves of all existing texts which the Committee of Ministers or other bodies within the Council of Europe have issued, in addition to the Human Rights Convention. This Colloquy lasts only three days and we should not lose time by going once more over too familiar ground.

Let me remind you that the Council of Europe's standard-setting work with regard to information has developed in three stages.

During the first stage, several instruments - treaties and recommendations - have tackled information aspects of other problems. I could mention in this category, as a random example in the legal field, our very useful Convention on Information on Foreign Law (1968) or the Resolution on co-operation between European law libraries (1967).

A second stage opened about fifteen years ago when the Committee of Ministers began addressing the more fundamental question of the legal status of information as such. This interest in information issues was raised by two developments: on the one hand the revolution of information and communication technologies and on the other hand the debate between countries in the western world, the socialist countries and third world countries about the political meaning of information. I shall leave aside here the mass media issues, which have become so important that the Council of Europe has opened a new chapter on this subject in the present Medium-Term Plan.

With regard to information issues which interest us here and which we shall term, for brevity's sake, "administrative information", the Council of Europe has noted that in the modern State public authorities, as well as users in the private sector, are veritable storehouses of information, the handling of which deeply affects the lives of individuals and the community as a whole.

It was for this reason that the Committee of Ministers adopted in 1977 Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, in which it advocated a right of access to administrative information by any persons affected by an administrative act. Three years later, in Recommendation No. R (80) 2, Ministers re-emphasised the principle of individual access to information in connection with the exercise of discretionary powers by a public authority, a field where the individual is particularly vulnerable.

The Committee of Ministers went a step further in 1981 when it affirmed, in Recommendation No. R (81) 19, the basic right of access of every person to information held by public authorities irrespective of whether he or she can show a personal interest.

The third stage was reached on 29 April 1982 when the Committee of Ministers, at its 70th Session, solemnly adopted the Declaration on the Freedom of Expression and Information. This Declaration was very timely because it arrived at a moment when the western world was in disarray about attacks made in certain international fora against the freedom of information. The Declaration states, in positive terms, the fundamental beliefs and policies of our member States with regard to information. Information, and freedom of information, is essential for the harmonious development of every human being, every group, every nation and the international community. Ministers expressed inter alia their desire for "an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely, political, social, economic and cultural matters". This Declaration is important in particular because, in contrast to Conventions and Recommendations which the Council of Europe addresses to itself, this text has been addressed to the world at large.

The overall progress achieved in this field and the possibilities for reinforcing the right of access were reviewed in March 1985 at the European Ministerial Conference on Human Rights in Vienna. In their Resolution No. 2 the Ministers asked once more that attention be given "to access to information by the individual within the framework of an open information policy".

Later on during the same year, in November 1985, the question of access to information was again reviewed from the point of view of Article 10, at the 6th Colloquy on the European Human Rights Convention in Seville. One rapporteur, Lord McGregor, pointed out that in spite of the progress made in the field of access to official documents and the right of individuals to see and demand correction of their records, we still have a long way to go. Even in Sweden, which has more than two hundred years of tradition, the public still is not very well aware of its information rights. The difficulties are compounded by two factors: the staggering volume of information (in France in one year alone (1984) 327 laws, 1022 décrets d'application, 340 other décrets and some ten thousand circulars were adopted) and the lack of clarity, accuracy and simplicity of the information.

Freedom of access is a good thing provided we can find our way through the forest in spite of the trees.

At this junction let us direct our attention for some moments eastward and contemplate "glasnost", which is now rapidly earning a place in information vocabulary. It is of course too early to say whether or not it simply is a passing fancy or, as many Soviet émigrés state, a grand illusion. Whatever it is, it merits attention because it conveys something new. In our traditional approach to information, we emphasise the visual aspects: information is recorded on paper or in computer memories, and is accessed, read, printed out, published. Glasnost derives from ΓΟΛΟC , "voice"*, and could be roughly translated as "speaking up", "being outspoken". This applies to the citizens as much as to the administration.

Glasnost has sparked our imagination because of a fortuitous resemblance to "glass" in English and other Germanic languages, "glace" in French. "Glass" conjures up a metaphor: seeing through, transparency, sunshine. When watching a "Son et Lumière" play in the magnificent Cathedral of Strasbourg recently, light projected at night through the stained glass windows, I mused that the "glass" principle implies that you can look through a window in two directions: inside to outside or outside to inside. So it is with information, which can be looked at from the vantage point of the individual concerned or the information user. In French "glace" adds yet another facet: information stored should reflect, not distort, our truthful image.

But let me repeat, linguistically all this has little to do with what Mr. Gorbachev understands by glasnost. He recently gave an object lesson in glasnost by disappearing without explanation for several weeks from public view, retreating into the secrecy, or as our Spanish hosts so elegantly say "itimidad" of his private life.

This brings us to the second theme of this Colloquy, ie secrecy, confidentiality, privacy and intimacy. Let me observe, first of all, that secrecy, which often has negative connotations, is also a positive element in the system of values the Council of Europe stands for. I shall mention three examples relating to our Organisation's three basic principles: democracy, human rights and Rule of Law.

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* which, in turn, goes back to the Greek "glossa" (tongue).

In the field of democracy we believe in the principle of secret voting. In the human rights field, private life, inviolability of the home, secrecy of correspondence are protected as such. In the field of the Rule of Law, the secrecy of the deliberations of courts is respected in all member States.

One of the reasons why secrecy has attracted the attention of both the Parliamentary Assembly, which has addressed to the Committee of Ministers Recommendation 1012 (1985) on harmonisation of rules of professional secrecy, and of the Committee of Ministers itself is that with the emergence of modern techniques of information handling, information (including confidential information) tends more and more to lead an existence of its own, separate from the persons who collected the information. The classical example is the doctor. Formerly, when a patient went to see him, the family doctor would scribble a few lines on a card and lock it in his desk. No one else would have access to it. The doctor's bad handwriting discouraged anyone from trying to decipher it. Nowadays, the patient reports to a clinic. Even before he has seen any doctor the receptionist will enter his name into the computer. Doctors, nurses and laboratories add further data, which becomes from the outset what has been called a "deposited" or "shared secret". Medical specialisation, social security and computerised book-keeping oblige the medical practitioner to share his secrets, or parts thereof, with others, members or non-members of his profession.

Hence the need for "objective" rules of secrecy attached to the information, addressed to whoever comes in touch with it.

As for "subjective" rules attached to professionals who handle information given in confidence, it should be noted that in addition to the traditional threesome: doctor, lawyer, priest, there are many other professionals to whom we may have to confide our secrets in our private or work life. Members of one such profession are right here in this room: our interpreters. Remember photographs of President Reagan and Mr. Gorbachev having a "private conversation"? Between them there is always that third, indispensable professional, the interpreter.

Professional secrecy is the obligation on members of fiduciary professions to maintain a discreet silence with regard to confidential communications received by them in the course of duty. For people who turn for assistance to others better qualified than themselves, assurance that their confidentiality will not be betrayed is a necessary condition for such reccurse.

The Parliamentary Assembly has observed in its Recommendation 1012 that the legislation in Europe varies widely both with regard to the definition of the professions concerned, the nature of the safeguards and the machinery for securing compliance with secrecy rules. It has asked the Committee of Ministers to recommend minimum European standards for professional secrecy.

Before taking such a step, however, the Committee of Ministers is very interested to hear the opinion of experts.

This is why we are gathered here today at the University of Zaragoza, which I wish to thank on behalf of the Council of Europe for its hospitality and for its important intellectual contribution to this 17th Colloquy on European Law.

A FUNCTIONAL APPROACH TO THE LEGAL RULES GOVERNING SECRECY AND OPENNESS

Report presented by

Mr Herbert BURKERT,

Institute for Data Processing and Law
St. Augustin (Federal Republic of Germany)

1 Introduction

Going through a catalogue of the works of Marcel DUCHAMP you may come across the picture of an object which resembles a spare part of some old radio receiver. The object is called 'With a Secret Noise'. The artist described its creation as follows :

> "This Ready-made is a ball of twine between two squares of brass and before I finished it, Arensberg put something inside the ball of twine, and never told me what it was, (...). It was a sort of secret, and it makes a noise, so we call this Ready-made with a secret noise, and listen to it. I will never know whether it is a diamond or a coin". [2]

With this object, DUCHAMP has tried to transform an abstract notion, describing a relation between persons or between persons and objects, into something tangible, in this case even audible.

In a humbler and certainly less refined way, this essay, as an introduction to a colloquy on comparative law, is also an attempt at rendering its subject 'secrecy and openness' more tangible. It seeks to explore the common ground of the more detailed papers to follow, making some broad generalizations with the sole excuse to stimulate discussion. It attempts to examine some of the social phenomena of, as a recent Canadian report[3] has put it, 'the Open and the Shut', before we come to a more detailed analysis of how the various national legal orders reflect these phenomena. This approach is obliged to an understanding of comparative law qualified by LAMBERT [4] as to " dégager, dessous la diversité apparente des législations le fond commun des institutions et des conceptions qui y est latent."

Such an understanding of comparative law has to look for the *social* phenomena of secrecy and openness, their *functions* in society, before legal rules on these phenomena may then be seen and compared as specific attempts to distribute and control the distribution of information in society.

While such rules have, at least implicitly, always been part of the law, they have to be seen today in a different light: The activities, since at least

[2] DUCHAMP commenting on 'Ready-made, Easter 1916, New York', in SWEENEY, J.J.: A Conversation with Marcel Duchamp, reprinted in: SCHWARZ 1969, 462; cf. also: LASCAULT 1984, 130.

[3] HOUSE OF COMMONS CANADA 1987

[4] LAMBERT 1905,31

the seventies, of the Council of Europe [5] and of the OECD [6], as well as in a number of industrialized countries, to deal with the issues of access, free flow and privacy protection, lead to a new awareness of the problems of such distributions: They reflect the impact of information and communication technology on secrecy and openness.

With these remarks the structure of this essay on secrecy and openness has already presented itself: we shall at first provide a brief 'tour d'horizon' of the social phenomena of secrecy and implicitly of its mirror image openness, as both have been observed by various disciplines (2nd section). Having thus dealt with the "secrets of secrecy" we shall then try to identify the specific *role of law* in relation to secrecy and openness (3rd section). In a further step we shall ask "Why today?" and try to find out how information and communication technology is affecting these rules (4th section). We shall conclude (5th section) by tentatively introducing a third concept on which, basic to secrecy and openness, law making may have to focus: the concept of trust and its role in an environment where direct communication is increasingly being replaced by technically assisted and mediated communication.

In all these steps secrecy will receive, in tendency, more attention than openness. 'Secrecy' and 'openness' are seen here as conscious individual and organizational choices. As this essay is written at a time when it seems that the choice for secrecy is under stronger pressure to legitimize itself (partly as we shall duely see because of information technology), this essay reflects the spirit of the time by focussing more strongly on secrecy than on openness.

Methodologically this paper takes a *functional* approach: This implies that we shall not content ourselves with restating the apparent arguments for the legitimacy of either secrecy or transparency. Instead we try to go one step further and ask about the role which these concepts play in the way in which individuals and organizations seek to master their environments. This approach, however, should not be overestimated. It is an attempt at

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[5] Parliamentary Assembly of the Council of Europe, Recommendation 854 (1979) on Access by the Public to Government Records and Freedom of Information; Council of Europe, Committee of Ministers, Recommendation 81(19) on the Access to Information held by Public Authorities; European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 28 January 1981; Council of Europe, Parliamentary Assembly, Recommendation 1037 (1987) on Data Protection and Freedom of Information.

[6] Organization for Economic Co-operation and Development, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980; Report on the Laws of Access to Administrative Documents, Paris 1984.

comprehension rather than at explanation. [7] This paper should be seen as providing a framework (among other possible frameworks) in which the more detailed accounts on the various areas of secrecy during this colloquy might be placed. In all these efforts, however, being concerned with law one should recall:

> "Les subtilités du secret ne se laissent pas aisément mettre en équations et les juristes trouvent ici l'un de ces domaines où ils peuvent craindre que quelque scientifique que soit leur démarche le droit ne puisse se dire une science. C'est qu'il se trouve ici aux prises avec la pâte humaine la plus subtile, à la charnière entre la vie sociale, qu'il prétend régir, et l'intimité des consciences, qui lui échappe." [8]

2 The Secrets of Secrecy

2.1 Various Observations on Secrecy

To come closer to the ubiquitous phenomena of secrecy and openness let us examine the results of those who, from various viewpoints, have already made these phenomena the object of their attempts at understanding and let us look specifically at the social sciences and their way of perceiving secrecy and transparency. [9]

It seems to be an inherently human capacity in communication to decide on what to keep secret and what to disclose. This implies a definition of secrecy which sees it as a situation of deliberate concealment, as a state where something is 'set aside' (Latin: *secernere*). [10] This definition directs us to the findings of psychology and psychoanalysis:

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[7] It should not be concealed here that, in spite of the attraction of functional analysis to legal theory (cf. e.g. LUHMANN 1972) ,such approaches have met with severe criticism in the social sciences (cf. e.g. LUHMANN/HABERMAS 1971, MACIEJEWSKI 1973). The need for such an approach to secrecy, however, has already been stressed by TEFFT 1980a, 45f. and FERRARI 1981,61f.

[8] GOUILLOUD 1984, 205

[9] Perhaps one might even go one step further: Science and Arts and the Humanities (as FLORIOT/COMBALDIEU 1973,180 remarked with regard to history: " Et cependant, combien d'événements historiques n'ont étés connus que par la révélation de secrets!") may be regarded as activities to unveil the secrets of the world and our existence. But this goes beyond the scope of our definition of secrecy as a mode of human communication.

[10] With regard to definitions and etymology: BOK 1984,6; LÉVY 1976, 118; LE BOT 1984,2.

> "Control over secrecy provides a safety valve for individuals in the midst of communal life - some influence over transactions between the world of personal experience and the world shared with others. With no control over such exchanges, human beings would be unable to exercise choice about their lives." [11]

Although not identical with privacy [12], secrecy, as the possibility to choose, seems to be of fundamental importance to the mental well-being.

So important does this capacity seem to be that its lack, caused by external or internal reasons, is regarded as a psychological anomaly:

> "Les névroses classiques et leurs versions modernes peuvent être considérées (...) comme des incapacités psychosociales de ce qu'une personne a eu à maintenir à l'écart d'autres personnes et souvent aussi d'elle-même (...) certains désirs, pulsions, impulsions, mobiles, sentiments, pensées, comportements." [13]

This observation leads us two steps further. First, while this observation includes the secret unknown to its bearer, an element of secrecy which we have deliberately excluded by our definitions and which seems to be the main interest of psychoanalysis [14], it points to the fact that secrecy describes a *social* relationship. Second, it implies that not only its lack but also its excess may lead to anomalies.

This ambivalence [15] and the social dynamism displayed in these phenomena have attracted the attention of further disciplines. Ethnology, the discipline which is concerned with the understanding of societies different from ours, to arrive, through difference, at common denominators, has been among the most active to explore secrecy, perhaps because it has so heavily to rely on secrets being disclosed to ethnologists. [16] Their descriptions also recall how deeply secrecy has been connected to the sacred [17], the arcane. Taboos, secret oaths, secret initiation rites, secret knowledge create associations which are still with us in our more profane uses of the words 'secrecy' and 'secret'. These associations often connect the secret to the evil,

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[11] BOK 1984,20, summing up the findings of these disciplines.

[12] Defined by BOK 1984,10 as "the condition of of being protected from unwanted access by others".

[13] MARGOLIS 1976, 136/137

[14] GIRARD 1976

[15] BOUTANG 1971, 129f.

[16] ZEMPLINI 1984, 102f.

[17] BOK 1984, 6

a combination which, as we shall see later on, still veils the legitimation processes of secrecy. In our societies the old myths from our cultural heritage are still with us: Prometheus robbed the Gods of their secret on how to make fire. The Gods answered by donating another secret to the brother of Prometheus, Epimetheus, : Pandora's Box.

How strongly the crucial choice between secrecy and openness has always occupied the human mind is also shown by its being one of the main topoi of classical and not so classical literature. The secret may be secret love as in the Tristan motive or, more civilized, secret marriage, a famous element, as it seems, of 17th century Spanish drama. [18] Is there perhaps even a relationship, as a recent review in the Times Literary Supplement [19] seemed to insinuate, between the obsession of the English reading public with spy-novels and the Official Secrets Act? [20]

Sociologists have taken a more matter of fact approach: among the first and still the classical approach is the one by SIMMEL [21] who set out to rationalize these phenomena: "(...) secrecy is not in immediate interdependence with evil but evil with secrecy", because with our opportunity to choose most likely we shall choose to hide what our environment tends to look upon as negative. Yet, this associative environment of secrecy contains another element which will be of interest again when we look more closely into administrative secrecy: "Out of this secrecy which throws a shadow over all that is deep and significant, grows the logically fallacious, but typical, error, that everything secret is something essential and significant." [22]

But how is the very function of this multi-associative phenomenon seen by sociologists? Quite simply as a communication tool which serves purposes

[18] Cf. FRENZEL 1980, 463ff.

[19] Nicholas HILEY, Lifting the Lid, in : TLS May 22, 1987

[20] It would be challenging to generalize on this perhaps not totally serious assumption: Is there a correlation between the circulation of such literature (and movies) and the (however quantifiable - this is yet another subject for research) status of administrative secrecy in a given country?

[21] SIMMEL 1906

[22] SIMMEL 1906,465; cf. also LAUNAY 1966, quoting Sir Edward GREY: "Un ministre harcelé par les travaux administratifs d'un grand service public, doit être souvent étonné d'apprendre les plans soigneusement élaborés, les motifs profonds et secrets que ses critiques ou ses admirateurs lui attribuent. Les spectateurs, exempts de toute responsabilité, ont le temps d'inventer et ils attribuent aux ministres bien des choses que les ministres n'ont pas eu le temps d'inventer, quand bien même ils seraient assez intelligents pour le faire." Looking at some results of investigative journalism which lives so much from access laws one tends, however, to wonder at times whether Sir Edward's observation is not indeed, perhaps because of larger staff today, a bit outdated?

beyond mere communication: "Secrecy, however varied its manifestation, is simply a social resource (or adaptive strategy) used by individuals to attain certain ends in the course of social interaction."[23] From this perspective the deliberate choice to communicate information *as secrets* is an important element for the creation of social relations which go beyond one-to-one relations, because such communication presupposes the existence of a third party. "Le jeu du secret et le jeu du tiers inclus-exclu: aussi le nombre canonique des joueurs est-il de trois et la typologie du secret, celle d'un triangle mais dont un des sommets serait hors du champ où son schéma est tracé." [24] Secrets therefore have also to be seen as a solder of social relationships and as a constructive element for the generating processes of organizations. [25] The choice between secrecy and openness as communication modes co-determines identity vis-à-vis a not yet organized environment and within organizations.

Two qualities of secrecy and openness, on the individual as well as on the organizational level, deserve closer attention: the social dynamism which is inherent in the choice and its relationship to power.

2.2 The Dynamics of Secrecy

Each secret shared creates insiders and outsiders. The insider sees the secret both as a distinction and a burden. It creates the urge to make its inherent power felt to the outsider. The moment of greatest pleasure to be derived from this power transferred is the moment of revelation to the outsider. To the outsider on the other hand, if the secret is at least known as a secret, i.e. as a meta-information on some unknown information, the secret is both a neglection of a social relationship and a challenge, a challenge which urges the outsider to reveal the secret.

So secrecy contains not only constructive but also destructive elements. It invites to be revealed, it creates the urge to be discovered. In order to master its disruptive potentials additional mechanisms seem to be needed. One such mechanism is to recall the connections between secrecy and the arcane (as in oaths of secrecy). Such a mechanism, however, may by itself develop a new dynamics leading in turn to a deterioration of the social function of secrecy: Its ritual framework may evolve to an extent which renders the information to be protected to be almost of secondary importance.

[23] TEFFT 1980a, 35
[24] MARIN 1984, 64
[25] Cf. NEDELMANN 1985, 44f.

2.3 Secrecy and Power

Besides this dynamics it is obvious that we are faced with mechanisms of social power:

A social relationship is created in which influence is exerted and which itself contributes to exerting influence on the outside.

Secrecy, however, is only a specific way in which power may be created, maintained or transferred. [26] It is specific, because of this double and synchronized effect on the inside as well as on the outside of social groups: The creation of a communication mode 'secrecy' prescribes to the receiver of information the way in which the information to be communicated should be handled. Whoever sets this mode influences (and thus has power on) the future handling of this information. This demands submission on the part of the receiver. This submission is compensated by a connotative meaning: not only has the communication mode been set, but by setting the mode other elements of power have also been transmitted: there is an invitation 'to belong' to the sender and to share in all the other sender's resources of power.

'Secrecy' is thus a meta-information not only on how information is to be handled but that power is shared in a more general way between the communicators. The information, the secret, itself is then used to exert influence on the outside because the knowledge about it is limited. Not knowledge as such, to use a famous quotation, seems to be power, but exclusive knowledge. Because of this exclusivity those who have the secret can act according to their own time scale, they have the opportunity to act according to their own timing. They can wait till 'time is ripe', till the conditions have changed in the environment so that whatever they intend they have a better chance to put their intentions into reality. They can also use the element of surprise.

But this is a precarious advantage because it is time dependent. [27] Exclusivity may decay, but also the utility of the information may disappear because it may no longer be relevant. This, by the way, implies that secret information only provides power with regard to the outside, if it is not only secret but also relevant. So not only must the knowledge be exclusive to 'be'

[26] As a reviewer (Judith Williamson) remarked on several films (yet another cultural medium in which secrets play an important role) 'unveiling' state power (in the New Statesman's arts column of 29 May 1967): "Power is a difficult thing to visualize. Partly because it is not, in fact, a thing but an operation, a relationship; very hard to 'see', though certainly felt, its invisibility is easily confused with secrecy."

[27] Cf. SIEVERS 1974

power, it also must be relevant. Its internal power effects, however, seem not to be as dependent on relevance provided that the irrelevance does not reach a degree at which it destroys the symbolic meaning of trustful sharing.

2.4 The Functions of Secrecy

Differentiating these general observations according to the various levels of social power we arrive at the following assumptions with regard to the social functions of secrecy:

- For the individual, for the process of individualization itself, the possibility to choose between secrecy and openness in communicating with the outside seems to be an anthropological necessity. The way in which the individual masters these choices co-determines the individual's capacity to establish social relationships.
- To social groups secrecy provides
  - an internal binding force over their members, helping to maintain group coherence, and
  - an external defence mechanism against such outside influences, which seek to erode the cohesion of the organizational entity. It becomes a shield which allows to optimize, also for agressive purposes, internal decision making processes in order to gain at least time and to be able to profit from the element of surprise.
- There are strong internal and external forces which endanger the choice made between secrecy and openness. In reaction to these forces both the individual and the social group affected may be led to an excess or a lack of secrecy.
  - To the individual, a lack of secrecy may render individuality and personal identity impossible to achieve, whereas an excess of secrecy will cut off the individual from his social environment.
  - To organizations, a lack of secrecy makes them vulnerable to external forces which may endanger their very existence. Excess of secrecy may lead to a lack of readjustments to outside changes, may render control and communication impossible, may decrease their capacity to discern the outside environment, to make internal adjustments and may generally stifle internal decision making processes.

Because of its relation to social power and because of its inherent dynamism and its general ambivalence which continuously endanger its existence, secrecy and the alternate choice for openness need social stabilization. Where the arcane can no longer fulfil this task, a more rational instrument is called to duty: law.

3 The Role of Law

This leads us to the role of law which, in our understanding, seeks to stabilize social relations by formalization and institutionalization.

Formalization means establishing (usually written) rules and procedures for social conflicts, in this context over secrecy and openness, which not only help to decide such conflicts but make their outcome predictable in a way that a stable expectation with regard to the consequences of the use of secrecy and openness is created. Institutionalization, in this context, is the condensation of such rules and procedures in recognizable organizational units which are less time dependent and have assigned functions in the decision making or decision control relating to secrecy and transparency. [28]

It should be noted in parenthesis that these institutionalizations of secrecy are not to be confounded with more general institutionalization processes in which secrecy plays a part, e.g. the evolution of courts [29] :

Courts which were faced with counteracting forces tried to increase their power by acting in secret, particularly in an environment which was hostile to them, either because the prevailing social forces were following a different concept of law, or because law enforcement was too particularized or generally ineffective. Courts still try to defend their decision making processes against undue influences by conducting certain procedures in camera and by guarding their 'secret of deliberation'. [30] Even the very process of law making has remained secret for a long time and still very often is, at least in its initial phases.

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[28] In practice, such bodies may e.g. be involved in classification processes; they may mediate information demands between individuals and organizations or among organizations.

[29] Cf. SCHERER 1979, 5ff.

[30] The secret of deliberation seems to serve various purposes: It saves the court from outside pressure, in particular if its members are taken from the general public; it serves the participants from future retaliations (FLORIOT/COMBALDIEU 1973,176). It is a counter balance against the openness of the procedure as such. Even during the French Revolution one realized quickly after legislating the openness of the deliberation in 1791 what kind of disadvantages would follow. Thus the law was quickly changed (FLORIOT/COMBALDIEU 1973, 178); cf. also RAYNAUD 1974, 712f.

Returning to the specific functions of law with regard to secrecy and transparency we observe a wide choice of methods available to law to master the dynamism and to check on the power implications of secrecy. It can choose to encourage, strengthen or defend secrecy or openness, direction and intensity depending on the strength of the social forces to be assisted or resisted. The most intensive (not necessarily always the most effective) way is the use of penal law with regard to disclosure or concealment. The choice may also be influenced by providing or withholding legal remedies, while the actual choice whether action will be taken is left to the interested parties (e.g.certain mechanisms of civil law in the context of contract law). In the specific environment of administrative systems (which we shall examine more closely below: 3.3) a 'decision space' of discretion may be defined, or the exact procedures with regard to information exchanges may be prescribed. Furthermore, the approach to ensure adequate choices may be direct or indirect. As we shall see, when examining the functional changes of secrecy and transparency in the era of information and communication technology (below 4.) together with the functional changes law had undergone by then, indirect methods seem to gain a rising importance: the choice between secrecy and openness may e.g. be influenced by either providing or withholding gratifications.

Whatever means the law chooses, the prescription by law alleviates the burden of individual and case by case decision making. It provides, or at least seems to provide, individuals and organizations with clear options. But as we shall see, the complexity of the decisions to be taken, because of the inherent social dynamics of secrecy and openness, is leading to a differentiation process in law which in turn questions its ability to provide stable expectations. This seems to be mainly due to the strong context dependency of all matters relating to information handling. This context dependency will turn out to be one of the most difficult tasks for law: the closer to context law operates the less it can fulfil its task of *general* stabilization. To come closer to the various contexts and their impact we have chosen three areas of secrecy for a more or less summary inspection: professional, commercial and administrative secrecy.

The examination of these three areas should be regarded as providing additional comments to their more detailed expositions during the colloquy which will certainly add other perspectives.

3.1 Professional Secrecy

The first set of secrets which is of interest to us is professional secrecy. Here, all the dimension of secrecy are at play: the individual establishing a bond with the professional, the professionals establishing a bond among themselves, the exclusion of interested third parties may they be other interested individuals, organisations or state authorities, the dependency of the client, the power of the profession. The information handling rules governing these relationships have long been solely guaranteed by internal codes. The slow transformation from a morally oriented concept into formal legal rules (e.g. into penal law) is reflected e.g. in the motivation for section 378 of the French Penal Code:

> " Cette disposition est nouvelle dans nos lois, (...) il serait à désirer que la délicatesse la rendît inutile, mais combien ne voit-on pas de personnes dépositaires des secrets dus à leur état, sacrifier leur devoir à la causticité, se jouer des secrets les plus graves, alimenter la malignité par les révélations indécentes, des anectodes scandaleuses." [31]

Its legal recognition was in part a recognition of other social powers, the confessional secret e.g. a recognition of the power of the Church, i.e. in as far as this power was accepted. [32]

The formalization of the professional secret was not only an acceptance of the prevailing powers of the professionals (they were the group which helped to build the liberal state [33]), but there has also been a rational functional element in the recognition of professional secrecy. A rational approach to public health e.g. seemed to imply the need of a protected relationship between the patient and the doctor to create conditions for an optimal information flow. But because of the internal power relationship secrecy creates, as we have

[31] Quoted from FLORIOT/COMBALDIEU 1973,17.

[32] This was, however, not the case everywhere: In 1794 the 'Preussisches Allgemeines Landrecht', one of the large German codification efforts, regulated - Part II, Title IX, 80-82 -that the seal of the secret confession had to be broken if e.g. disadvantages for the state were to be feared. Cf. WIEBEL 1970, 79. This was one solution to the classical question created by this specific form of professional secrecy: What was the duty of the priest if the preparation of an assassination on the monarch was revealed to him? Cf. FLORIOT/COMBALDIEU 1973,14. In general it seems that as much as religious organizations refrained from intervening in 'public affairs' and concentrated on their tasks of the 'care for the souls' then the more easily they could obtain the privilege of professional secrecy. Cf. WIEBEL op. cit.

[33] Cf. GLEIZAL 1981, 97f.

seen, this relationship had not only to be protected against the outside, but also against disruption from the inside: the patient who revealed a secret to the doctor needed to be protected against the doctor as well. So regulation of professional secrecy is not only an attempt at securing the position of the professionals but also the position of the client. This multirelational function leads to sometimes complicated and not always homogeneous regulative techniques which again stress the differentiation problems of law in this field:

In an environment where for other reasons there is a legal demand on openness professional secrecy is protected against this demand: in criminal procedure, a procedure slowly opened to public scrutiny to avoid miscarriages of justice, a doctor *may* e.g. withhold information. But in an environment where there are no specific legal demands on openness but where there may be potent social forces driving at revelation the legal regulations *demand* secrecy. There is no exact symmetrical relationship between these two sets of regulations: Secrets are *allowed* to be kept where otherwise there would have to be openness but they *need not* be kept in such cases. On the other hand where there are no such rules on openness, secrets *have to* be kept, a rule usually enforced by provisions of criminal law backed by the threat of becoming professionally ostracized. This already implies a specific relationship between secrecy and openness, at least in the field of professional secrecy: Where there are legal rules of openness, usually wrought from secrecy (as with regard to the principal openness of court procedures, a gain from the revolutions of the 18th century), this openness is the rule and (professional) secrecy is (an accepted) exemption. This is already an indicator of the different social esteem openness has slowly gained during the historical development processes of our current societies and which will find our attention again (against the background of information and communication technology) in section 4 below.

Professional secrecy, as accepted as it may seem, has, however, never been uncontested as to its actual extensions. Several problems have arisen here:

Professional secrecy has its specific traps, notably how to define the borderline between the status as a member of the profession and a social status of a more general nature which has lead to the exchange of confidential information. e.g.: What if a doctor receives information as a friend of the family? [34] Professional secrecy also becomes a problem, in particular in

[34] FLORIOT/COMBALDIEU 1973,69ff.

court procedure, when a member of the profession has to act as an expert witness, often without the consent of the person examined. [35]

So, protecting the specific relationship between the 'professional' and the person relying on the professional, provided in the interest of social values, may collide with other rules which protect the same values by, however, using opposite means: openness. It is this conflict, that secrecy and openness set out to protect the same values, which we shall come across again and again. Such conflicts are very often unsolvable by strict legal rules, in the sense that whatever decision is taken, a value is compromized. Law in such cases may reflect the social understanding of which decision should be taken, and may thus serve to take some burden from the decision maker who is in this undecidable situation. But it can only remove some burden. Although unburdened from legal consequences the decision maker may still have to face the views of the peers of the profession, the disappointment (to put it mildly) of the client and confrontations with his own conscience. The situation is even more unfortunate because it may easily happen, in the piecemeal approach to legislation in our times, where 'grand' codifications seem very difficult to be achieved, that a lack of legal unity and comprehensiveness occurs. The decision maker may then be faced with contradictory legal demands. The least law can do in such cases is to leave the choice to the decision maker's own conscience. "En droit et en équité la loi doit laisser à chacun et dans chaque cas particulier le soin de prendre une décision dans le secret de sa conscience." [36] Here again the limits of stabilization by formalization through law become clearly visible. In view of these limits social systems seem to be able to develop alternative yet equifunctional mechanisms. In this case the decision making may be taken out of the rigid framework of law and transferred to internal group decision making processes (e.g. among the members of ethical committees), with law mainly prescribing (at most) such a transfer. Law withdraws to procedure to avoid dysfunctionality. [37]

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[35] FLORIOT/COMBALDIEU 1973,75. Other conflicts have eroded this area of secrecy as well. How can child abuse be dealt with effectively, if the doctor treating such cases is bound by secrecy (FLORIOT/COMBALDIEU 1973,91)? How can future criminal acts in other fields be prevented (FLORIOT/COMBALDIEU 1973,141)?

[36] FLORIOT/COMBALDIEU 1973,149

[37] The dysfunctions can already be observed: The revival of the ethical discussion of information handling, cf. e.g. BURKERT 1986, can be understood as a distrust in the integrative function of law. With regard to this general tendency of withdrawal: ELY 1980.

With the increase of social complexity and organization other problems are facing professional secrecy. Socio-economic changes have e.g. led to an internal expansion of the traditional professions. The provision of health services e.g. (but also of advisory services coming close to legal services as e.g. in social work) can no longer be managed solely by individuals but has become the task of larger 'services'. [38] Not all of the personnel of such services is totally bound by the traditions of the profession. This poses a double threat to the function of secrecy: if the legal protection of secrecy relies on conditions formulated too restrictively, large parts of the personnel (and their clients) may be left without protection. But they may also feel to be less bound by the internal professionally enforced traditions of secrecy.

Furthermore there is a tendency to extend rules of secrecy to new areas. 'New' professions where the protection of the confidential relationship is of equal importance as in the 'old' professions (very crucial e.g. for the media) demand the protection of their secrets.[39]

These changes in the functions of the professions have to be 'revisited' in the environment of the new technologies and of the amalgamation between some of the professional services and the administrative system. We shall take up the thread in section 4 below.

3.2 Commercial Secrecy

Whereas law protects professional communication processes because of the social importance attributed to such communications, the same task, at first glance, seems to prevail with regard to commercial secrets. Production processes in a competitive and therefore in tendency hostile environment rely on group cohesion, in particular when these groups increase with the complication of production processes: the relationship between those who plan and those who create, between those who develop and those who exploit, etc. have to be stabilized . There are also social and not only individual interests at stake. If progress should continue, it must be ensured that those who contribute can profit.

But it is this orientation towards property which at a second glance makes the role of law not so much a protection of information relations but

[38] With regard to the problems arising in hospitals : FLORIOT/COMBALDIEU 1973,69ff.

[39] Some even argue that such enlargements have almost become a question of style; they have become status symbols of the new professions (cf. e.g. FLORIOT/COMBALDIEU 1973,24).

of information contents. Indeed this relation to property is one of the main sources of legitimacy for commercial secrets. [40]

Not the secondary beneficial effects of a communication relationship seem to be at stake (as it had been between the doctor and the patient for the sake of public health) but rather the value of a mental or physical object which is to be guarded (an idea, a formula, a process, a construction, a machine).

Apart from the argument for trade secrets "concerned with the Lockean view of property" [41], there are two moral legitimations brought forward: One connects commercial secrets closely to the role of personal secrecy which we have described above when revealing the secrets of secrecy (above 2.). This notion, however, is difficult to extend to collective autonomy. As the INSTITUTE OF LAW RESEARCH expressed it " (...) such a claim might be legitimate for an individual, but is it true for Coca Cola?" [42] The other moral argument is based on business ethics, re-introduces the relationship concept and certainly plays its role in attempts to legally protect commercial secrecy with the use of contract law or equity oriented concepts of confidentiality.

More forceful arguments, because they operate absolutely and not just within specific relationships, focus on the economic implications of the protection of secrecy. This functional assessment of commercial secrecy goes back to the period of mercantilism. Especially, however, during industrialization trade and commercial secrets received legal protection by law's most expressive tool : criminal law. Interestingly enough this development was not uncontested. At least the liberal state recognized the importance of what later was to be called the free flow of economic information for its inherent concept of self regulating markets and free competition.[43] If inventors of products or processes and traders were allowed to keep their secrets indiscriminately, technological and economic development would be hampered and no optimal prices could be reached in the market. The problem therefore was to arrive at an adequate balance which would still make it worthwhile to develop new products and processes but would also keep the general economic development in mind. This was the rationale of patent law and related legislation. But this could also be observed in the restrictive approach to the protection of trade secrets which, if at all protected,

[40] Cf. with regard to the following INSTITUTE OF LAW RESEARCH 1986, 105 ff.

[41] INSTITUTE OF LAW RESEARCH 1986, 105

[42] INSTITUTE OF LAW RESEARCH 1986, 108. Incidently this remark reminds us very much of the data protection debate in relation to the protection of legal persons.

[43] Cf. OEHLER 1981; DI RUZZA 1981, 129f.

were at least in the beginning mainly protected against foreigners. This restrictiveness can still be seen in notions of trade secrets of today, when it is demanded that an effort by the entrepreneur to keep the secret has to be shown.

The real challenges, however, are posed to the functionality of protecting commercial secrets by law and criminal law in particular, when the social climate favours communication. We shall reexamine these impacts when looking at the role of law in the age of communication and information technology (see below 4.2).

3.3 Administrative Secrecy

The area where the notion of secrecy survived the longest, received the earliest and the most persistent legal protection is administrative secrecy, although apparently in some countries there must have been some rather lenient practices, recalling De Tocqueville's remark in 'On Democracy in America': "I have in my papers original documents which I have received as answers to some of my questions", this being a very early example of access to administrative documents.

The functional importance of secrecy in organizations performing political and public functions, the way we define administrative secrecy here, cannot be grasped sufficiently, if one does not realize its inherent utility. It is too limited a perspective if one relates secrecy in the public process directly to an inherent malevolent intention of organizations to cover up. (We recall here SIMMEL's remark on secrecy and the evil.) If this were the case secrecy could very easily be discredited in total and would have had far more difficulties even only to be accepted as an occasional exemption to desired public transparence.

Secrecy regulations in relation to administrative functions work as an enormous facilitator for the decision making process. Recalling our observations on the general functions of secrecy for organizations we might state with regard to the secrecy of administrative decision making processes:

- Secrecy creates, by its social dimension (see above 2.), a group of common coherent understanding even if only the understanding that one shares "a pledge to secrecy". This group feeling is not to be underestimated since it contributes considerably to a 'team spirit', especially if such a group is working in a hostile environment.

- Secrecy, with regard to such groups, facilitates discussion processes by

de-formalizing such processes. What is meant with this observation may briefly be illustrated by everyday experience from group discussions: In such discussions, in particular in the context of planning, one often uses the 'brainstorming' technique. This technique is a formal de-formalization of discussion allowing for a given period of time all inputs without any internal or external censorship. None of the participants has to filter his own discussion input any longer: informal reasoning, associative comments, emotional contributions are allowed, broadening the scope of material which then can be used for the decision making process. This enlargement, however, is only possible, if the participants are freed from the danger to be confronted with inconsistencies to previous positions taken, from loyalties they are supposed to uphold, and from future responsibilities.

In such a context secrecy may even lead to an improvement of the quality of the decisions reached since the range from which information and arguments are taken has been enlarged.

- Secrecy of the decision making process of administrative and political bodies has a symbolic value. The pressure on the political and administrative system to bring order into the world of disorder, to create a coherent and sufficiently stable framework for orientation is, even in democratic systems, not to be underestimated. To answer this need the symbol of consensus among the guiding but also of their apparent neutrality [44] has to be maintained. It is a symbol because, as we have just seen, apart from the general difficulties to arrive at consensus, the use of secrecy is a shield behind which dissent is invited for the sake of productivity. In order to allow for this dissent in an environment which requires external consensus, symbolic consensus has to be created with the help of secrecy. [45]

- Secrecy allows administrative systems to influence their environment according to their *own* timing. [46] The administrative system gains a competitive advantage with regard to other systems seeking to influence the environment as well. The administrative system can use the element of surprise or choose to wait for an opportunity when the

[44] Cf. COUËTOUX 1981, 35

[45] It may be noted here already that there seems to be a relation between administrative openness and the capacity of a society to live with (visible) dissent.

[46] Cf. SIEVERS 1974, 56f.

environment is particularly receptive to the decision to be taken. Thus the probability of successful influence increases.

These functional advantages relate to the secrecy of the *decision making process*. As we shall see in the course of the colloquy such functions are e.g. reflected in regulations applying to cabinet documents, economic and monetary decisions, internal drafts, advice to ministers, decisions on government tenders etc.

These functions lose their normative power once the decision has been reached and made public. Consequently, as we shall see later in the colloquy in more detail, some legislators on administrative secrecy demand that the decision making process is revealed once the decision has been made public. Other regulations on the other hand still value the symbolic importance of consent (in view of the necessity that such bodies will have to continue to make decisions) and postpone openness to history, regulating access in their archive laws.

But there are not only decision making related functions of administrative secrecy. Administrative systems have also to rely on the existence of input channels and on the quality of information entering these channels. Such channels are very often difficult to establish because those giving information may fear negative reactions from their environments. When such information channels are established by law, very often secrecy has to be offered at the same time as an insurance against such risks. Information requirements in the context of environmental or consumer protection would be endangered, in a generally competitive environment, without such assurance. In such a context the administration is very often seen only as a 'trustee' of information still 'owned' (a concept which we are familiar with from our comments on commercial secrecy) by the information provider.

The protection of information channels is particularly important with regard to the relations between the individual citizen and public administration. The protection of personal secrecy becomes a condition for the transfer of personal information. Tax secrecy, statistical secrecy (with the additional safeguard of anonymity), the protection of the 'informer' in the context of law enforcement are examples of ensuring information flow with the help of administrative secrecy.

We have, however, not yet answered the question of the role of law in this context. First of all, with the increasing rationalization of administrative processes, any action by public administration, including its information handling processes, has to be formalized by legal regulations. Secondly, ac-

cording to general pressures on secrecy, described in section 2 above, administrative secrecy has to be stabilized by formal rules and institutionalization.

However, when the formally 'self-evident' becomes formalized and institutionalized, self-evidence is not only strengthened, but also, according to the inherent paradoxon of this process, weakened:

Once you move from the obvious to the formally stated you have to admit that the obvious is not as obvious as it seemed. In order to legitimize you have to give reasons. Reasons are, again at least in the democratic systems of our time, open to discourse. Administrative secrecy, at least till recently, has been relatively robust, in most countries, to such debates.

It is, however, apparent that the functionality of administrative secrecy as described above has inherent contradictions resulting from the social dynamics of secrecy. Every functionality carries with it the source of its dysfunctionality:

In decision making processes, protected by secrecy, group coherence may break up, if dissent is continuously covered under the veil of secrecy. Decision making under secrecy may become deformalized to an extend where it is totally deformed. The symbolic value of consent may turn into a 'myth' to be ridiculed. The competitive advantage provided by secrecy may be used beyond the limits of powers granted. The amount of information, available for decision making, may decrease and its quality deteriorate, if, because of secrecy, decisions become unpredictable. Outside control may become impossible. The latter effect which, at a first glance, may give the administration more maneuvering space, may also reduce its own opportunities because its own dependence on the quality and accuracy of information provided by 'interested parties' increases (an effect to be observed e.g. in environmental protection). Finally, its time dependence makes secrecy a tool of relative value: "La trahison c'est une question du temps" (Talleyrand).

These inherent possibilities of dysfunction again increase the need for legal regulations which seek to formalize the unstable balance between the functionality and dysfunctionality of secrecy.

It is against the background of the empirical evidence of the dysfunction of administrative secrecy [47] that concepts are encouraged which entitle in particular the individual to openness of the administration, at least as far as the individual is directly concerned, since secrecy in this context is mainly perceived as a defense mechanism which legitimately should only be used by the less powerful. Because of the inherent and fundamental value perceived

[47] Cf. TEFFT 1980a, 67

to rest in the possibility of choice between openness and secrecy, the individual is entitled to personal secrecy, to administrative secrecy whenever this personal secrecy might be compromized by the administration and to public openness whenever (or even before ever) administrative secrecy becomes dysfunctional to the individual (as citizen).

Consequently all administrative systems, again in democratic environments, under the fundamental challenges of accountability and under the basic assumptions of 'borrowed' public power, are bound by regulative systems, of various appearances, which seek to balance secrecy and openness. In most systems, in particular the symbolic value of consensus, still has a forming impact. This impact, however, is deteriorating, none the least under the influence of information and communication technology which makes the general public more conscious of the various ways of information handling and the inherent difficulties of decision making. The effects of this process will be subject to a more specific analysis below (4.3).

3.4 Summary

The inherent dynamics and the power implications of secrecy and openness put special burdens on law seeking to formalize and stabilize social choices in general. A wide variety of techniques is used to capture the dialectical tension between secrecy and openness. Looking closer at the techniques in specific contexts three types of legal concepts may be perceived [48] :

- In professional secrecy it is the *relationship* concept which prevails, protecting a communication relationship the existence of which is deemed to be beneficiary for society as a whole.
- With regard to commercial secrets it is the *property* approach which still prevails; an information object is protected against further exchanges.
- Finally in administrative secrecy , we find both approaches and yet a third as far as the sphere of the administrative secret expands into the sphere of the personal secret: the *entitlement* approach which is also predominant in the human rights discussion of secrecy and openness.

Because of this context dependency, and the power relations at stake, law has to become highly differentiated to master the different contexts, the

[48] Cf. INSTITUTE OF LAW RESEARCH 1986, 137ff.

multi-relations involved (e.g. client:profession:state; exclusive economic incentives:competitive market economy; functions and dysfunction of public administrative concealment). This complexity may in turn lead to a general dysfunction of law in this field: if legal regulations on openness and secrecy become too differentiated and too casuistic, the predictability function of law suffers. It can no longer bring order, it only describes disorder. This approaching dysfunction of law caused by its refinement is a generally observed process not only in the area of information handling. It is the result of a general paradoxon of the structuring function of law: while structures seek to reduce complexity they become an additional part of the existing complexity. This process has also to be seen in the context of the changes of the economic and social environment. Its effects on the regulations on secrecy and openness in the era of information and communication technology will now be examined.

4 Regulating in the Age of Information and Communication Technology

The interest of law in secrecy presupposes a certain degree of problematization. If social forces to keep secrets were strong enough and generally accepted the influence of law would be unnecessary. Legal regulations on secrecy are therefore an indicator , because of the connection between secrecy and power, of the problematization of power, of social power conflicts in a society.

Altough the questions of secrecy and openness have always been of interest to the law, there has now obviously been a revitalisation of this issue. In the period between 1977 to 1987 almost all OECD countries have either passed or at least drafted legislation relating to the extent in which individual secrets have to be dealt with by public administration and (at least in some countries) by private parties as well. In the same period some countries have either drafted or passed or changed current legislation relating to the accessibility of public secrets. All these regulatory activities have one thing in common: to react to the impact of information and communication technology.

The technological impact on the holding and distributing of information affects all three areas of secrecy and openness which are under our examination.

4.1 Professional Secrecy

We have already pointed to the fact that with regard to professional secrecy the picture of the individual professional is no longer valid but that the individual client is more and more faced with organizations which provide these professional services. [49] It is with the organization rather than with an individual professional that the client has to establish a relationship of trust. Medical services e.g. are provided by 'staff' working in the context of the division of medical labour. This division demands the sharing of information. Sharing needs organization for the distribution of information. The demands of organizing information, of course, invite the use of information and communication technology, in particular because medical treatment has not only to be medically but also economically efficient. So while law, as we have shown above (3.1), is taking care of the organizational enlargement of the profession, though not without problems, by gradually extending the rules of professional secrecy, it also has to take care of the qualitative technological enhancement of information handling within the profession and between the profession and its environment (which of course also applies to those unfortunate members of the profession who still practice individually). These problems are aggravated by the fact that a large number of these services regarded to be provided by individual independent professionals are now provided not only by organizations but by organizations which belong totally or at least partly to state bodies so that the members of such organizations are not only faced with obligations to their (ever enlarging) profession but to public authorities as well. In addition such organizations face other responsibilities than those providing merely individual oriented professional services. As state (or semi-state) organizations they are linked to considerations of public policy , they are faced with public scrutiny, they have to live with the constraints and responsibilities of public spending. As the provision of such services in such environments becomes a task of administrative services, the areas of professional secrecy and administrative secrecy (and openness) begin to overlap, if not to merge. As public health policies and professional health services begin to merge, information flows between these areas begin to increase, with the help of information technology, at greater ease, speed, quantity and complexity.

Law has, of course, tried to face these changes and reacted to public alertness. Data protection discussion in France, e.g., was largely caused by plans for a project connecting public health policies with professional

[49] Cf. SIMITIS 1985

medical services. Special data protection legislation in the field of public health and social security data (as e.g. in Germany) is a reaction to maintain the functional effects of traditional professional secrecy in an environment of automated state provided professional services. [50]

Such legislation, however, cannot solve a more fundamental problem, the problem of the increasing demand for personal data for such services. This demand is a result of political demands on the public sector to administer resources economically and at the same time to divide these resources according to the principle of distributive justice.

It should be noted here, even if only in parenthesis, that the strongest tension for professional (in particular for medical) secrecy is created by the amalgamation of political demands and professional traditions. It is not so much this amalgamation as such, however, which has always been present (the co-operation in a profession itself is in part a reaction to such demands from the political system), but it is the mode in which this amalgamation is exercised: the law makers faced with budget considerations and the distribution of professional services react with a more astute application of the principle of distributive justice which in consequence leads to an increase in control on whether this principle has correctly been observed. That such an approach is possible at all, in spite of the demands it puts on administrative resources, is also a result of the opportunities information and communication technology provides [51]: The better one intends to distribute these professional services within the given constraints the more one has to to know about those who are going to receive them in order to find out whether they really deserve them. So these political demands (which will not be criticised here since they are of a more general nature) are the source for the 'hunger' for personal data and lead to a potential threat to personal secrecy in the context of professional services and therefore to a threat to professional secrecy in general. The individual seems to have no other choice: personal secrecy has to be relinquished in order to obtain these services.

So information technology, and this is our assumption based on these observations, reverses a trend: While in the liberal state individual secrecy in connection with professional services received legal protection in the course

[50] Cf. e.g. COUNCIL OF EUROPE, Regulations for automated medical data banks, recommendation No. R (81) 1 adopted by the Committee of Ministers of the Council of Europe on 23 January 1981; Protection of personal data used for social security purposes, recommendation R (86)1, adopted by the Committee of Ministers of the Council of Europe on 23 January 1986.

[51] RULE et al. 1980, 153ff.

of the great codifcation processes as professional secrecy (promoted by the professions because they, too, profited from this elevation of status by the vesting of the right to secrecy) this trend, at least factually, seems to be reversed in the post-industrial society: With the opportunities provided by information and communication technology, the individual now exchanges individual secrecy for professional services provided by or at least financed with the help of public or semi-public institutions: To the degree in which the professions no longer mainly rely in their own support on privately provided fees but on (usually collectively agreed) 'rates' the traditional professional secrecy is being gradually substituted by administrative secrecy. [52] So the development pattern of professional secrecy merges with the developments of administrative secrecy. It is under that section (4.3) that we will pick up this development again.

4.2 Commercial Secrets

The effect of information and communication technology works on the concept of commercial secrets in a different and at the same time almost subversive way: while commercial secrets still receive attention by the legislators in an atmosphere of international competitiveness and are transported, in this era of new mercantilism, almost into the sphere of state secrets again (the secrets of the laser replacing the secrets of the porcellaine) its very core is deteriorating under the conceptual changes induced by information and communication technology. Two of the influences at work here shall briefly be mentioned: *intangibility* and *universality*.

- Information technology reduces all material forms of information representation to electromagnetic signals. Whatever the differences in representation they are now reduced to series of bipolar signals. Whatever has been corporal, at least as a sheet of paper, becomes intangible and differences between the copy and the original, already heavily under attack by the copying techniques for paper and analog audio-video signals, disappear.

  So any traditional property oriented approach, changing already with notions like copyright and patent, becomes even more difficult to maintain. Or rather, other sources used to legitimize the protection of intangibles become more important. The protection of such intangibles

[52] Cf. also COUNCIL OF EUROPE, Parliamentary Assembly, Recommendation 1012(1985), in particular No. 4.

can no longer derive their legitimacy from the aura of property, as a natural right, but is to be regarded as the outcome of a conscious political choice under economic considerations. At the same time, however, it becomes more difficult to control this political choice effectively because of the evasiveness of the medium [53].

- In addition against the background of the international market for goods and services the essentially *universal* character of the technology becomes evident: Information technology somewhere in the world, one is attempted to say, because of communication technology, is information technology everywhere in the world. The effective protection of commercial secrets is no longer, as it has been observed clearly by the Council of Europe [54], a matter merely of national legislation. Unfortunately, at the current state of affairs, this is putting the secrecy protection schemes of the new mercantilism into a dilemma: for international and thus effective legislation international consensus has to be sought and this would mean the sacrifice of at least some of the mercantilistic elements. Where this is perceived as being too tedious and too lengthy or simply unwanted, one is easily attempted to apply less consensus oriented mechanisms like extraterritoriality or reciprocity 'offered' to more vulnerable partners on the markets. But these tactics are closely linked to one's own economic dominance and such dominance has been realized as being transient, never total and always limited in duration.

Furthermore, the concept of the commercial secret is under attack from developments not exclusively linked to information technology but to technology in general: As the risks of technological applications are more sharply observed and debated generally, the pressure to control technology in its commercial uses increases. The sphere of the property oriented concepts of secrecy come under pressure to be opened in the name of the public interest. The pressure for openness is not (yet) directly targeted at the 'owners' of these secrets but rather at the middleman: public administration. In administrative law, as we shall see, the presssure increases to share such secrets, first, of course, within the administration, second there is pressure on the administration to share them with the public. - This mechanism has its side effects as we shall see below 4.3 - The closeness of the commercial

[53] Cf. in detail MOEHRENSCHLAGER 1986

[54] Consultative Assembly of the Council of Europe, Resolution 571 (1974) on the protection of manufacturing and commercial secrets.

secret to the state secret, at first glance an increase in protection, may at a second glance thus turn into a threat of revelation, at least as far as the administrative secret is weakening.

4.3 Administrative Secrecy

Experiences with the vulnerability of democratic systems in the face of totalitarianism led to an emphasis on openness in government as an important element for stability. After 1945, in varying degrees and by using different approaches, more countries followed the classical Swedish example and took steps to achieve more openness in their administrative and political systems. Administrative secrecy as a 'self-evident' necessity had to compete with openness for legitimacy. The latest of these legislative attempts to change the rule/exemption relationship between openness and secrecy has been the French access law (which aimed at a general improvement of the relationship between the governing and the governed). It is called the latest law here, although there has been more recent access legislation, e.g. in Canada, New Zealand and Australia, because it seems to be the last in which the administration has still been seen as operating in a traditional paper environment. Incidently enacted at almost the same time as the French data protection law it was passed , revealingly, without awareness of the mutual implications of both legislations.

Data protection legislation as such was a signal that in public opinion the trend towards more public openness as expressed in the early access legislation had by then been reversed by the technological developments of information handling. Even if some observers had seen in this trend rather an 'intimization of the public sphere' , i.e. a trend in which persons and events in the public sector are reduced to the categories and values of private life , where gossip takes the place of public debate , personal interest stories reign over political issues , in short , where intimacy exerts its tyranny[55], it had at least become increasingly established that the secrecy of the public sector and the publicity of private life needed legitimization and not the secrecy of private life and the publicity of the public sector. But the amount of personal data increased and the sphere of private secrecy seemed to decrease. Information processing became less transparent: the transparent ('glass') citizen was confronted with the intransparent administration:

These developments thus criticized had, of course, not solely been caused by information and communication technology. Rather, as we have shown

[55] SENNETT 1986

it for commercial and professional secrecy there was a mutual relationship between the changes in the econonic and social environment and in the role of public functions. The exact nature of these relationships is still subject to sociological and economic debate. With information technology as with all other systemic technologies it is said that we are not dealing with a technology and its impact on an environment but with an environment almost 'breeding' a technology; the technology then has to be regarded as a cultural artefact and as such as the expression of cultural (and political) values.[56]

Without going further into this question it is necessary, however, to recall that during the functional changes of the public sector the sphere between the individual (citizen) and the state has gradually been thinned out with regard to sanctuaries of secrets shared among individuals. This happened not because there was no (legal) protection of these spheres but because the state took over functions performed in these spheres. It is the state now, as we have said, with whom e.g. professional secrets are increasingly being shared because it is the state which provides the professional services or distributes financial resources.

In public debate it seemed as if finally the story of Gyges' ring[57] had become reality: the state can see us, we can no longer see the state. This judgement on the inherent dangers of the new technologies against the background of the enlarged spectrum of public functions contributed to the rise of the data protection issue. This is not the place to spread out the development of data protection in detail; this has already been the subject of other Council of Europe occasions.[58]

This observation, together with experienced difficulties in applying traditional access legislations in the new less paper oriented environment lead to a revival of access legislation. During this revival it also became obvious that

[56] We should remember that , while the negative utopia proved itself a powerful driving force behind data protection, we should not underestimate the political vigour behind this technology. We have to see it embedded in an environment in which already before the advent of information technology social phenomena have been seen to be empirically accessible and manageable, where mental processes have become open to rationalization just as physical processes , where the concept of distributive social justice has been used and where an increasing need for security has demanded early detection of deviances. These attitudes have helped to adopt the technology. What the technology finally achieved was to turn possibilities into opportunities: what had been perceived as possible could now be realized.

[57] Cf. Platon ,Politeia 359d-360b; cf. SEIF 1986.

[58] Cf. COUNCIL OF EUROPE 1985

data protection and access to government legislation had to be coordinated. Integrated approaches appeared. So today it almost seems as if the trend has changed again and administrative openness is regaining momentum.

One could leave the debate at that, observing once again that balances are sought between secrecy and openness, but it seems necessary to point to a number of current or possible future trends in administrative secrecy which may become problematic for the functioning of legal regulations on openness and secrecy.

There is at first the technological development itself. There is uneasiness with traditional protective approaches in data protection legislation, oriented to the large stand alone system, in the face of smaller more powerful processors, new storing and communication devices, concepts of artificial intelligence, distributed systems and relational data bases. How can the sphere of private secrecy survive in such an environment? On the other hand, the technology and even more important the increasing familiarity with the technology open up new dimensions of public transparence. As an example Swedish legislation may be cited which demands that in the design of future administrative information systems direct access by the citizen via terminal should be considered.

It can also be observed that the legitimacy of public secrecy in the core areas is basically untarnished. These legitimations of secrecy seem so closely knitted to the functionality of administrative systems (see above 3.3) that this is unlikely to change. Although some observers maintain that the evidence of the counterproductive effects of administrative secrecy seem to dominate. [59] What seems to change gradually, however, is the 'burden of proof': In a communication conscious society it is the refusal of communication which needs additional legitimation efforts. In the legitimation debate it is expressed more and more clearly that information distribution relates to power [60] and that the opportunities to choose between openness and secrecy are a power resource. The choices taken reflect the power structure of a society. If we adopt the concept of the law state as a morphological program for the democratic state, law , in regulating secrecy and openness has to achieve a careful balance in the distribution of this resource : Law has to give secrecy to the less powerful as a defense mechanism ; and where it is given to the powerful it is only 'leased' to use it against the supposedly even more powerful or in defense of the less powerful. Where it is 'leased' it is inherent that the lease must be controlled and may be revoked. Techni-

[59] TEFFT 1980a, 67

[60] Cf. e.g. BULL 1979, 1181 f.

cally this means that each opportunity for secrecy must be controlled and counterbalanced.

This debate on the power implications of information and communication is slowly extending to public administration. There, it seems, it is 'rationalized' during two long term processes which may have their repercussions on secrecy and openness:

Arguments for the choices between secrecy and openness may less be formulated with mere reference to general 'self-evident' principles but may rather contain reasoning in the framework of information resource management. In the course of this process it will be easier to lead a rational discourse on the arguments to be provided. This increase of discourse may lead to an increasing pressure on what may be called material definitions of secrecy[61] in favour of more procedural oriented definitions of secrets, as they are already to be found e.g. in the North American context. [62] It is in such procedures then that the choices between secrecy and openness may reasonably be deliberated with less danger that secrecy becomes a fetich. This emphasis on procedure, more generally to be observed in legal and constitutional theory [63], will also lead to a greater importance of mediating institutions and court procedure with regard to secrecy and openness.

Information consciousness in public administration, however, also seems to lead to an increasing consciousness of the economic value of information. This consciousness is, of course, also due to the developments of the information economy as such in which the administrative system has to operate. The actual reactions may differ from country to country mainly depending on the belief which is held with regard to the role of the state in such an environment.

There are, however, already indications that future changes to public transparency may come from economic considerations. There is an increasing pressure on public administrative bodies to provide information services in a broader sense regardless of the existence of access legislation. There is equal pressure that administrations should use their financial resources as sparingly as possible. Caught between these pressures some agencies have developed new strategies. Some seek to reduce legal access to information which is formatted in the traditional way (paper files), trying to market the

[61] E.g. A secret is information which because of its essence, its possible harm etc. has necessarily to be kept secret. Cf. AHRENS 1966, 7.

[62] E.g. A secret is information which in the course of a clearly defined procedure has been classified as such.Cf. AHRENS 1966, 10,23.

[63] Cf. e.g. ELY 1980, 14f.

more upgraded formats (tapes, on-line access) by themselves.

Others make a barter with professional information providers, taking their resources to upgrade their internal information handling procedures, offering in exchange monopoly like economic exploitation rights. Three examples shall be given here to clarify this assumption:

It seems obvious that the legislator, when creating the access opportunities of the openness laws, was looking at public sector information mainly from the angle of the citizen/administration relationship and was not taking into account the 'double value' of information, both as a texture of the democratic society *and* as a marketable good.

In a case, where using the US Freedom of Information Act, a company had requested the computer tapes of a medical literature data base provided by the National Library of Medicine (NLM) which usually sells such tapes on the market, the 9th Circuit Court went to considerable efforts to affirm the access refusal of the administration. The Circuit Court ruled that the tapes were not records within the meaning of the Freedom of Information Act, because:

> "to read these terms in the broad manner suggested by appellant would result in the obliteration of that portion of the National Library of Medicine Act (...) which gives the Secretary and the Board of regents wide discretion in setting charges for use of library material. The Supreme Court, however, has held that the FOIA must be read in a manner consistent with previously existing statutes, insofar as such reading is compatible with the Act's purposes (...)." [64]

This decision has been strongly criticized. The COMMITTEE ON GOVERNMENT OPERATIONS summed up the criticism[65]

> " None of the nine FOIA exemptions covers the Medlars data base, and the court relied on the unusual determination that the Medlars tapes were not agency records within the meaning of the FOIA and that the tapes were therefore unavailable through an FOIA request. This holding (...) is clearly incorrect. The Medlars tapes contain information compiled by a government agency under specific statutory authority and with the use of

[64] SDC Development Corporation v. Mathews, 542 F.2d 1118 (1976)
[65] COMMITTEE ON GOVERNMENT OPERATIONS 1986, 33

> appropriated funds. When the tapes are sold to users, the revenues are turned over to the Treasury as miscellaneous receipts. Under these circumstances, it is impossible to support the conclusion that the records are not agency records. It is apparent that the court found the tapes not to be agency records in order to support the result that it felt was justified on grounds that are not specifically recognized by the FOIA. The court was concerned that the release of the tapes under the FOIA would substantially hamper the operations of the NLM. "

The implications of such an economically oriented approach are even more drastically illustrated by another case on the US state level:

The New York State legislature has enacted a law [66] which prohibits the sale of the information collected by the Legal Retrieval Service, a computerized data base established by the Bill Drafting Commission of the New York State Legislature containing legislative information, if such information is to be sold to competing entities.[67]

In the third example the Patent and Trademark Office (PTO) wanted to develop a trademark database. It made an agreement with three private companies to convert these documents into machine-readable format and to share the data base with the PTO.[68] The PTO agreed -as a barter- to limit public access to the computerized tapes as far as possible. Access to the database was only permitted in the reading room and the depository libraries. Other access requests were only answered by giving out files in paper format. The PTO felt that it thus struck an adequate balance between the right of access and its need to ensure exclusivity for its private sector partners.[69] The PTO even restricted the search techniques to be used in the reading rooms to those comparable when going through a paper file.

It is not our intention to evaluate these not yet clearly distinct developments. But it seems apparent that in the age of information and communication technology even more attention will have to be paid not only to formal openness rights but also to the opportunities of effective uses of this openness.

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[66] New York Laws chapter 257 (1984)

[67] COMMITTEE ON GOVERNMENT OPERATIONS 1986,7f; this law is currently challenged whether it is constitutional.

[68] In detail: General Accounting Office, Patent and Trademark Office Needs to Better Manage Automation of its Trademark Operations, IMTEC-85-8, 1985.

[69] Cf. COMMITTEE ON GOVERNMENT OPERATIONS 1986, 48ff. The PTO is currently reviewing its policies.

Even if we do not go as far as the school of the economics of law, where a right goes to the highest bidder and where you compensate where you cannot regulate, we must be aware that there are also the economics of secrecy and openness. This is not totally a new insight. Patent law, as we have explained above in 4.2, is in fact nothing else but the shrewd protection of a secret taking into account its economic impact : to exploit it economically in the most fruitful way for the economy, it is made public; to use it you have to pay for the licence; to secure these payments you have to pay patent registration fees. In our more general concept of secrecy and openness regulations as a means to steer information flows the recent economization in particular of public sector information deserves stronger attention today: even while access laws are on the progress, this economization may create new obstacles. While cost aspects of access to government information have often been used as an argument against such legislation , such legislation , if passed , usually secures access at the nominal costs of reproduction and search efforts with various possibilities to obtain a fee waiver. However, with the development of information markets the economic value of public sector information is gradually realized by the public and the private sector.

One contributing cause to this development is certainly the extensive use of access legislation for economic competitive purposes: as we have shown what once was regarded as a commercial secret has in tendency become an administrative secret in a move to increase public accountability of private enterprises. Being now administrative secrets they cannot avoid becoming the target of access demands directed to the public sector. There usually is an exemption clause of some kind in these access laws relating to commercial secrets the criteria used by the public administration are not necessarily the same which would have been used by the private enterprise. There are, in some laws, procedural means which involve these enterprises in the decision on release. But this involvement is no guarantee that the administration will follow the reasoning of the enterprise. Altough there usually is an additional safeguard providing the enterprise with the opportunity to bring the case to court, the court as well has to weigh public interests against the interests of the enterprise. Since a competing company may directly or indirectly invoke this public interest access laws may be and in some countries are used as tools for investigative information strategies in a competitive market.

In the course of these trends more effective barriers to openness may be created than the legal barriers of secrecy because they will have immediate effects. If you cannot pay for the information, you cannot obtain it. Or, even if you get the information, it may be in a format or of a quantity which

will make it difficult to process it effectively. Again this is not a historically singular development. Openness and secrecy could always be bought without such a buy being necessarily always illegal. But in the history of democratic societies at least the buying of public sector information was increasingly scrutinized morally and legally because of the value of such information for the basic foundations of the democratic concept. Access laws, seen from this perspective, also had the function to democratize participation in the political and cultural decision making processes, to contribute to equal opportunities for access by those who are not part of specific social networks already created by privileges of birth, rank, status or wealth. Yet the application of free contract doctrines may very well give new legitimacy to old privileges. If we accept the extension of economic principles to public sector information, and there are legitimate arguments which favour this development, we must be aware that we shall, at least, have to look for compensating economic and/or legal mechanism to avoid that the 'information society' turns into a counterproductive set of 'closed user groups' of democracy.

Finally in the context of comparative law, the inherent trend of 'universalism' observed already in the regulation of commercial secrets must be restated. With the closer and more and more institutionalized co-operation among public administrations the need for harmonization is obvious. Information and communication technology reach their full potentials only if geographical limitations can be overcome. The international economy and the international information economy in particular both need and are enhanced by this technology. But at the same time they tend to make pure national regulations obsolete or at least demand that national regulations take into account international effects : the 'global stock market', the 'global information market', the international division of labour and the international distribution of goods and services demand from national legislators an awareness of the international implications of their laws. With regard to openness and secrecy this implies that administrative openness in one country tends to become administrative openness almost everywhere.

4.4 Summary

The extensive use of information and communication technology coincides, not totally by chance, with functional changes in the administrative system. The public sector extending its services into areas formerly under the sole care of professions absorbs part of these functions or at least influences

them by the allocation of financial resources. In the course of this process the sphere of the *professional secret* formerly created and established under the influence of the professional groups during the evolution of the Liberal State moves into the sphere of public secrecy slowly eroding the 'sanctuary' which had existed between the individual citizen and the state.

Commercial secrecy is also on its way to becoming administrative secrecy. This is partly due to the (re-)increasing competitiveness between states which leads to new forms of mercantilism. Partly this move is a result of a pressure mediated through the political system from a public consisting of consumers and employees. This pressure is put on private companies in order to hold them accountable for hazards their production processes or products may create. Since in a competitive market economy it is difficult to exercise this pressure separately on the various enterprises a general regulative environment is created in which these companies have to transfer information to the public sector where it is under control by public interest considerations. The main effect of information and communication technology in this field, however, is on the source of legitimacy of the commercial secret: The technology renders concepts derived from tangible and exclusive property generally questionable and makes them the object of more economically oriented distribution policies.

The sphere of *administrative secrecy* had come under pressure by the political assessment of experiences with totalitarianism. Adaption processes towards more openness, however, were slowed down by the use of information and communication technology and the move of professional and commercial secrecy into the sphere of public administration as described above. As a counter move against this development first data protection laws, then modernized access laws and finally integrative legislative approaches tried to reinforce a proper balance between openness and secrecy and an efficient control of this balance. In the meanwhile, however, administrative information has become an economic factor subject to market and marketing considerations. How the information interests of the general public are best being served against the background of such developments remains to be seen, in particular as the basic possibility to steer context dependent information distribution processes by law in its traditional form has to be questioned in view of the complexity and diversity of this task.

5 Beyond Secrecy and Openness: the Importance of Trust in the Information Age

The proper balance between openness and secrecy seems thus threatened from various interrelated factors. This is not the place to examine the general impact of information and communication technology on the future of democracies. [70] From our observations on the functions of secrecy and openness for individuals, organizations and the political system, one aspect evolved to be of crucial importance, even if this aspect has not yet found the attention it seems to deserve: the choice between openness and secrecy seems to be determined by that yet little explored phenomenon 'trust'. [71]

Openness seems to prevail wherever there is trust and as far as there is trust. The borderline between secrecy and openness is also the borderline between distrust and trust. It is not our intention to examine the phenomenon of trust to the same degree as we did with secrecy and openness. Yet, a few remarks seem necessary because, in our view, if the social conditions for secrecy and openness are changing under the impact of information and communication technology then we must also pay attention to the effects on the roots of the choice between transparency and secrecy. It will be one of the main functional obligations of law to re-establish trust in an environment where direct communication is increasingly substituted and mediated by information and communication technology. This is not an easy task. Some tentative remarks have to suffice.

The relationship between openness, secrecy and trust is complicated by the fact that they are mutually dependent. In order to be able to trust there must be a minimum of openness. Only where I can trust can there be openness. In order that this mutual relationship can develop there must be an advance in either openness or trust. Trust thus involves risk taking. Our individual and social experiences in direct communication usually enable us, based on a multitude of conscious and subconscious signals, to judge the risks of trust with a reasonable probability of success as long as we can communicate directly. Information and communication technology, at least at its current state, have a tendency to reduce the 'band width' of signals available to us for such signals.

In such a technologically advanced environment there are a number of conditions which, if provided, make trust still possible: First of all, the

[70] Cf. already: COUNCIL OF EUROPE 1985; cf. also BURKERT 1985.

[71] Some general observations on trust in: SCHOTTLAENDER 1957, DEUTSCH 1958.

medium must be reliable. This implies that the medium must be understood with regard to its limitations and extensions. [72] Also, with regard to the contents communicated and the communication partners involved, the risks of sanctions for openly communicated messages may be reduced. If there is negative response there may be safeguards that this response is not directly attributed to the sender (anonymity). Even if there is negative response directly attributed, the sanctions may still be limited. All these are future tasks of law making in the information and communication society which would approach the problem of secrecy and openness not only at the level of information distribution but at the cause of the various patterns of distribution. [73]

In the crucial relationship between the citizen and the administrative system this may imply yet a further need for openness: The administrative system may more strongly be under pressure to provide an advance in openness even in times of increasing vulnerability in order to contribute to trust in the present technological environment to overcome emotional reservations. [74]

It should be noted here, however, that there are also new opportunities: there are applications possible which, and here we meet a final paradoxon, may contribute to create trust:

There are e.g. technical developments which increase public secrecy and yet allow trust: Asymmetric public key encryption techniques transferred on chips are capable of providing users of public networks with a powerful tool to keep their communications authentic, secure and identical, with the opportunity to communicate under pseudonyms, which may be revealed only under specific conditions, thus strengthening individual secrecy and still enabling secure social communication.[75]

Finally, the use of information and communication technology in organizations, prescribed under the demands of efficiency may exercise a generally

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[72] One might wonder, however, whether e.g. the implications of the use of the telephone are already generally understood.

[73] The broadness of this task, if the relation between democracy and the encouraged use of information and communication technology is to be taken seriously has already been expressed by RODOTA 1985,20 : "The real problem is therefore to establish a framework of fundamental principles which can be referred to in a changing situation; not the survival, more or less precarious, of the old institutional framework. In the Information Age, it is necessary to re-write the table of values so as to guarantee the real expansion of what one means by the words liberty and democracy."

[74] Cf. STASSEN 1974,615

[75] For more details cf. BURKERT 1986a

wholesome effect on the information handling practice of public administrations in particular: the effective use of this technology under the restrictive conditions of cost effectiveness presupposes a careful analysis of information flows, information demands, decision making processes, distribution and marketing strategies. [76]

In the long run all organizations, including public organizations whether they already operate in an access oriented environment or not, will have to undergo this exercise. It is to be hoped that in the course of this exercise attitudes towards openness and secrecy will be demystified and sublime principles will be broken down to every day rules. It is on this level now that sociologists, information scientists and legal researchers will have to co-operate, a co-operation for which, however, also resources from funding institutions will be needed. [77]

Perhaps on this level the effective use of information and communication technology and the fundamental values of democracies, so often juxtaposed in public debate, may finally, if not be reconciled, at least be shown as not to be in opposition as often as one had supposed. With regard to law, however, this may mean that we shall have to live with a higher complexity of procedures and rules. But if there is the advantage of information and communication technology to cope with higher complexity, why not use it also for this purpose?

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[76] An interesting but not uncontested example for such an approach in consideration of the legal environment is the US Office of Management and Budget's Circular A-130; cf. in detail BURKERT 1987, 144ff.

[77] Cf. LASSERRE et al. 1987, 232.

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A FUNCTIONAL APPROACH TO THE LEGAL RULES GOVERNING SECRECY AND OPENNESS

Co-report presented by

Mr. Gabriel GARCIA CANTERO
Professor of Civil Law and
Director of the Department of Private Law,
Faculty of Law of the University of Zaragoza

I. INTRODUCTION

In his report on the "Functional approach to the legal rules governing secrecy and transparency", the Rapporteur had the excellent idea of putting forward a framework which could be used as a means of opening the discussions. In this framework, the Rapporteur emphasised the anthropological, sociological and psychological aspects of the issues involved, and at the same time took on board the field of psychoanalysis. Nor did he ignore making reference to the Spanish literature of the Golden Age. He underlined both the static and dynamic aspects of secrecy as well as the relationship between secrecy and power. At that juncture, he reached the conclusion that the possibility of choosing between secrecy and communication constitutes an anthropological need while, in regard to groups, secrecy makes it possible to maintain their internal cohesion vis à vis external hostile factors since it provides them with a sort of self-defence mechanism. At a certain moment in history, the law intervenes to stabilise the social relations which affect secrecy and communication. At the same time, the law institutionalises these relationships. I would emphasise some ideas which emerge from his vast treatment of the subject: the affirmation that modern technology must be considered as an artifice or a cultural product and, accordingly, as an expression of cultural as well as political values; the new dimensions concerned by medical secrecy given the enormous increase in people involved in health care; the fact that administrative information, by reason of its quality as well as quantity, has become a commercial commodity subject to market rules; finally, the concern provoked by the need to know how the sphere of intimate life can survive in the context of modern communication technologies.

I envisage my task as Co-Rapporteur to this Colloquy as not being simply confined to demonstrating the differences and similarities which exist between the Rapporteur's views and my own, but rather to complete the discussions by providing you with some information on aspects of Spanish law.

As a lawyer trained in the civilian tradition, I ask myself the same question as Professor Kaiser (1): "Why must the secrecy of private life be protected?". Allow me to provide you with his reply, inspite of the length of the quotation designed to refine his thinking: "Everyone's life contains two different parts. One part is turned towards the outside world. That is the part involving social relationships and public activities. This part may be the subject of research and disclosure by third parties since it is public. The other part is focussed on the individual himself, on the members of his family, on his friends. This part must not be the subject of investigation or disclosure, because investigations and disclosures offend the sensitivity and intimacy of private and family life." Professor Kaiser continues by stating that there is a link between the secrecy of private life and freedom. A private life which is the subject of investigation and disclosure is not, in reality, free. When public authorities get to know about certain aspects of private life such as political or religious opinions, citizens may legitimately fear unjust discrimination. The great developments in data processing give rise to very serious apprehension in regard to the secrecy of private life. Given that data processing is capable of making available to the State and to private enterprises a certain amount of appreciably important information on individuals, the latter's natural "opacity" is replaced by a "transparency" of the secrecy which is essential for personal and family life.

II. SECRECY AND TRANSPARENCY IN THE SPANISH CONSTITUTION OF 1978

2. Taking a broad view of Spanish law in relation to secrecy and transparency, it is necessary for me to refer to our Constitution of 1978 which, on this issue, contains a very detailed regulation of the rights and duties of the individual in Chapter I. Chapter I begins with a general declaration in Article 10.1 which reads as follows: "The dignity of the individual, his inviolable and inherent rights, the free development of his personality, respect for the law and the rights of others are the basis of political order and social peace." The Constitution has been drawn up thanks to the consensus among all the political parties which are represented in Parliament and their unanimous wish to situate the future political cohabitation of the Spanish people in the respect for human rights is apparent. Furthermore, since the Spanish Constitution was the last to be promulgated in the Western world, we have been able to benefit from the experience of other countries, as well as from the undoubted strengthening factor provided by international Pacts and Declarations on rights and freedoms and to which reference is made in Article 10.2: "The norms relating to fundamental freedoms and rights which are recognised by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and in accordance with the international treaties and agreements on similar issues which have been ratified by Spain." It is for all these reasons that I think that Spanish law will be reasonably receptive to the suggestions and recommendations of the Council of Europe - more so since some of the questions which will be discussed in this forum are mentioned in the Constitution itself, although they have not yet been completely regulated.

A. Intimacy and secrecy of private life

Article 16, which regulates ideological and religious freedom, states in sub-paragraph 2 that "no-one shall be obliged to disclose his ideology, religion or beliefs". There is no doubt that ideological and religious freedom have been so reinforced, more so since the right to intimate life includes both the convictions and beliefs of the individual. However, the main reference to the right to intimate life is found in Article 18, sub-paragraph 1 of which places on the same level personal and family intimacy with Article 10 of the Universal Declaration of 1948, Article 8 of the Convention of 1950 and Article 17 of the International Pact on Civil and Political Rights: "The right to honour, to personal and family intimacy and to one's own image is guaranteed."

Legal writing (doctrine) usually considers in a positive way both the formulation and implementation of this precept, and emphasises that it is a general statement having very many different applications throughout the text of the Constitution (2). Besides what I have already mentioned in regard to the secrecy surrounding ideological and religious convictions, the following factors should also be mentioned:

- inviolability of the home (Article 18.2)

- the secrecy of communications and, in particular, postal, telegraphic and telephone communications (Article 18.3)

- the conscience clause and professional secrecy in the exercise of freedom of information, in regard to which a reservation is made (Article 20.1d)

- the freedom of self-incrimination (Article 24.2, first sentence)

- the provision of a reservation to regulate cases where, for reasons of kinship or professional secrecy, an individual will not be obliged to give information on matters thought to constitute criminal offences (Article 24.2, second sentence)

Quite a few of these constitutional precepts are further developed in the penal code and in the laws governing procedure. It is interesting to note, at this juncture, Organic Law 1/1982 of 5 May which regulates the civil protection of the right to honour, personal and family intimacy and one's own image.

Article 2 of this law provides a protective framework and the basic concept of illegitimate intrusion:

> "1. The civil protection of intimate life shall be defined by laws and social customs in relation to the sphere which each person, whether for himself or for his family, protects by virtue of his own actions.
>
> 2. Where the law expressly authorises or where the holder of the right has expressly consented, any act thereby taking place will not be considered as an illegitimate intrusion into the protected sphere.

3. The consent referred to in the preceding paragraph may be revoked at any time, but compensation shall be paid, as the case may be, for damage and prejudice sustained, including loss of justified expectation."

Case law has been able to clarify somewhat the nature of the aforegoing concept relating to the notion of personal intimacy (3).

Articles 7 and 8 present a positive and a negative aspect of what constitutes illegitimate intrusion:

Article 7

"The following shall be considered as illegitimate intrusions into the sphere of protection defined by Article 2 of this law:

1. The installation in any place whatsoever of listening apparatus, cameras, viewing devices or any other means which make it possible to record or reproduce the intimate life of individuals.

2. The use of listening apparatus, viewing devices or any other means which make it possible to acquire knowledge of the intimate life of individuals or of their statements or private letters which are not intended for those making use of the abovementioned means, as well as their recording or reproduction.

3. The disclosure of facts concerning the private life of an individual as well as the disclosure or publication of the content of letters, diaries or other personal written material of an intimate nature.

4. The disclosure of personal information on a person or family which are within the knowledge of the person disclosing by reason of his professional or official duties.

5. The recording, reproduction or disclosure by means of photographs, films or any other such method, of the image of an individual in places or at times or other occasions where he expects privacy, with the exception of the cases laid down in Article 8.2.

6. The use of the name, voice or image of an individual for reasons of publicity, commercialisation or similar activity.

7. The disclosure of statements or facts concerning an individual which defame or discredit him."

Article 8

"1. In principle, the following shall not be considered as giving rise to illegitimate intrusions: acts authorised or decided by a competent authority in accordance with the law; overriding interests of historical, scientific or cultural nature.

2. In particular, the right to one's own image shall not prevent:

a) The recording, reproduction or publication by whatever means of the image when it involves persons discharging a public activity or who are in public life or when the image has been captured in the course of a public demonstration or in places which are accessible to the public.

b) The use of the caricature of these persons in accordance with social custom.

c) Pictorial information relating to a particular fact or public event when the image of the person in question is an accessory part thereof.

The exceptions provided for in sub-paragraphs (a) and (b) shall not apply to authorities or persons fulfilling functions which, because of their nature, require anonymity for their exercise."

B. Information and disclosure

Besides the right to intimacy and secrecy, the other aspect of the discussion concentrates on the right to information and disclosure, a right which is fundamental in any democratic society. The Spanish Constitution gives explicit recognition to this right in Article 20 (4):

"1. The Constitution recognises and protects the right:

a) to express and make freely known thoughts, ideas and opinions whether spoken, written or expressed in any other manner;

(....)

d) to communicate or receive freely truthful information regardless of the means by which the information is made known.

2. The exercise of these rights shall not be restricted by any sort of prior censure.

(...)

4. These freedoms are limited by the respect for the rights recognised in Chapter 1, by the principles of law which develop it and, in particular, by the right to honour, intimate life, one's own image and the protection of childhood and youth."

It is interesting to recall in the context of Article 20 that if the right to information and communication is proclaimed, it nonetheless remains subordinate to the right to intimate life (given the lack of precision, both intimate personal life as well as family life should be read). This subordination also appears in other constitutional precepts.

As with Article 35 of the Portuguese Constitution of 1976, Article 18.4 provides: "The law shall limit the use of data processing so as to guarantee honour and personal and family intimacy for the citizen, and the full exercise of his rights".

If we leave aside Chapter 1 and look at Chapter 4 which deals with "the Government and the Administration" an interesting legal reservation may be found which has a direct link with the subject of our discussions: "The law shall regulate .... (b) access by the citizen to archives and administrative files, except for cases involving the security and the defence of the state, the investigation of offences and the intimate life of the individual". The positioning of this norm has a bearing on constitutional protection since it does not dispense with the protection granted by Article 53. It does not prevent the effective nature of the rights set out in Section 1, Chapter 1 of the Constitution. It relates to the intimate life of the individual in so far as it places a limitation on the possibility of access to administrative files, and this may also be seen as referring also to the intimacy of family life.

The legislative body has not developed the constitutional text regarding data processing and access by the citizen to archives and administrative files, but it seems clear that neither of these texts may violate personal and family intimacy (5).

III. SECRECY AND TRANSPARENCY IN THE CIVIL CODE

Provisions relating to secrecy and transparency may also be found in the civil code. However, it is not possible to locate in the civil code general definitions given that the civil code belongs to the family of XIXth century codes which customarily do not include among their articles the theory of personality rights. Rather, the civil code contains isolated precepts, incomplete norms and allusions or references which find their real importance against the background of the constitutional text in force. The majority of the norms refer to the right of the individual and the family, but other provisions are found in other sectors of the civil code

Secret marriages or marriages of convenience have not only constituted a major and dramatic factor in the literature of the XVIIIth century but also have given rise to a legal institution which is still in force and maintained even after the reforms of 1981 in Article 64 of the civil code (6). They represent, beyond a shadow of a doubt, an unusual way of giving recognition to secrecy through the law. The state in fact found it useful that the celebration of marriages should be entered in a register so as to ensure publicity for the union. There may now be a departure from this rule at the request of the marriage partners so that the marriage can be entered in a special register of a secret nature.

In spite of the reform of 1981 the filiation regime continues to be influenced by secrecy as well as the private nature of procreation. Following sexual relations, whether within or outside the institution of marriage, the Intimsphere is created which, coupled with the scientific difficulty in fixing the exact moment of conception (one of nature's reputed mysteries), led Roman lawyers to establish the famous presumption of paternity (pater is est quae juxtae nuptiae demonstrant). In addition, right up to the time of the most recent reforms, the system in force in the majority of European countries prohibited for various reasons any investigation into paternity or maternity for the centuries to come. The 1978

Constitution also recalls the new approaches in providing in Article 39.2 that "the law shall allow investigation into paternity". New Article 127 of the civil code as developed provides that "in judgements relating to affiliation, investigation into paternity or maternity shall be permissible by any sort of proof including biological evidence". Nevertheless, like an echo from the old system, sub-paragraph 2 lays down a proviso: "The judge shall not declare admissible the request if the beginning of the evidence relating to the facts on which the request is based is not presented conjointly" (As if there were habitual evidence of sexual relations!) (7).

In accordance with Article 122 of the civil code, when voluntary recognition of non-matrimonial affiliation is made separately by one of the parents, he may not give the name of the other partner unless the other partner's name is well known.

The determination of incestuous affiliation has, in Article 125, a rather hesitant regulatory approach since such affiliation is in principle determined in relation to one of the parents it can only be established with reference to the other (except for cases of judicial authorisation where the discovery of the true origin presents advantages for the minor).

Article 959 regulates the hypothetical situation where the secrecy surrounding pregnancy must be published, namely when the nasciturus concerns a posthumous child whose succession rights prejudice third parties.

Although it is now being revised, Article 175, sub-paragraph 2, must also be mentioned at this juncture since it establishes the secrecy of registration of the origin of an adopted child: "The register on civil status shall not publish, as from the moment of adoption, any information whatscever which reveals the origin of the adopted person, nor the latter's status as such."

As regards the family financial situation, certain provisions dispense with the duty to render accounts to certain persons (parents, guardians, etc). This is most probably done for reasons of trust, but it also has as a consequence the creation of "opacity" in the economic management of these persons.

The 1981 reform has abolished the paternal usufruct on the property of a non-emancipated child. The new Article 165 provides that henceforth "the fruits of his property shall always belong to the non-emancipated child as well as everything which he acquires by reason of his work or industry". However, there is an exception allowing the parents to direct the fruits of the patrimony of the minor living with them to pay off family expenses and dispensing them from the obligation to account for the sums so employed.

Although the law of 1983 has substituted the system of guardianship exercised by an authority to that of family guardianship, it has nevertheless kept in Article 275 the traditional role of the guardian, namely the receipt of all benefits or advantages in exchange for food. This supposes that by way of compensation for the obligation to satisfy all the needs of his ward, the guardian appropriates all the fruits of the ward's patrimony and without having to account annually for the management.

The 1981 reform has introduced in the regime governing acquisitions - a legal economic regime in the field of common law - a provision which is inspired by the principles of transparency and publicity in the management both of personal property as well as common property. Article 1383 of the civil code provides that "spouses must inform each other of the situation and profit on all economic activity in which they engage". Following the disappearance of the primary position of the husband in the management of common affairs, the legislature, mindful of the need for transparency, was desirous to create this obligation of reciprocal information. Non-respect for the aforementioned obligation (which is in total contradiction to secrecy), if done repeatedly and earnestly, allows the spouse denied his or her rights to seek the dissolution of the union (Article 1393, 4°).

In regard to the law governing succession, the legal regime governing the holograph type of will (the classic example of secrecy) must be mentioned. When drafting their last will and testament, Spaniards may opt either for a will drawn up before a notary or, for a private will involving no intervention on the part of a public authority or witnesses, given that some people of a particularly cautious nature prefer to keep their will as secret as possible. However, such people must be concerned about the conservation and publication of the will after their death so that it can take effect. One of the procedures used involves handing over the will to a particularly trustworthy person who is made the depository of the secretly expressed wish of the testator. Article 690 of the law lays down strict rules in this regard. Ten days after he knows of the death of the testator, the depository of the will is under a legal obligation to hand it over to the tribunal. He is liable to pay compensation for any damage suffered as a result of delay (after five years the will becomes null and void).

Evidence furnished by witnesses is regulated by Article 1247-5 which declares that "anyone who by reason of his profession or status is obliged to keep secret facts relating to his profession or status" is declared legally incapable of testifying.

I do not claim to have made an exhaustive study of the subject. The concepts of secrecy and transparency may be found elsewhere in other legal norms (on the publication of laws: Article 91 C.E. and 2.1 C.C.; on the hidden nature or secret held and capable of being disclosed: Article 614 C.C.; on the probative value of private papers or secrets kept by a person: Article 1228 C.C.; on the hidden or secret nature of defects of the res vendita engaging the vendor's liability: Article 1484 C.C.).

The ideas expressed are sufficient to allow one to state that Spanish civil law is by no means unconcerned by the preoccupations discussed in this Colloquy.

N O T E S

(1) KAISER, La protection de la vie privée. Protection du secret de la vie privée (Paris, Aix-en-Provence, 1984), p. 11 ss.

(2) Vide FARINAS MATONI, El derecho a la intimidad (Madrid 1983), p. 257.

(3) The Supreme Court declared, on 28 October 1986 in the case involving the televising of the death of the toreador Paquirri, "the protection of one's personality must be understood with the utmost relativity, that any manifestation of automatism must be eliminated" and that "the sphere of personal intimacy is to be determined in a decisive manner through the ideas which are widely accepted in society and by the concept that everyone, in accordance with his own actions, shall maintain and determine by his various modes of behaviour".

(4) In a work published several years ago, El derecho a la intimidad (Oviedo 1970), p. 7, IGLESIAS CUBRIA considered the right to communication with our fellow men as an innate right.

(5) See the ordonnance of the Minister of Finance of 30 July 1982 concerning the limitation of access to information contained in fiscal data bases.

(6) In regard to marital secrecy, see GARCIA CANTERO Comentarios Albaladejo, II, 2nd Ed. (Madrid 1982), p. 166 ss.

(7) Note that legislative recognition of new techniques of in vitro procreation shall as a consequence give rise to the disappearance of the secret of the procreational act, since by definition third parties intervene in the procedure.

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ADMINISTRATIVE SECRECY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Report presented by

Professor Peter GERMER,
University of Aarhus (Denmark)

I. The principle of democratic openness

In his celebrated essay on secrecy the German sociologist Georg Simmel recalled that openness in government affairs was a rather recent phenomenon. As late as the seventeenth and eighteenth centuries governments kept anxiously silent about the amounts of state depts and the tax situation, but in the nineteenth century publicity invaded the affairs of state, and by now politics and administration have lost their secrecy and inaccessibility to an extent which the bureaucrats of the nineteenth century would have found impossible, and governments officially publish facts without whose secrecy no regime seemed possible in earlier times. According to Simmel, the answer to the question of how far this development may be considered expedient depends on social value axioms, but in democratic societies openness should prevail, because every democracy holds publicity to be an intrinsically desirable situation, on the fundamental premise that everybody should know the events and circumstances that concern him, since this is the condition without which he cannot contribute to decisions affecting him.(See Kurt H. Wolff, ed., The Sociology of Georg Simmel, 1950, pp. 336-337.)

The high principles of democratic openness have been recognized by the Council of Europe on many occasions. On the 29th of April 1982 the Committee of Ministers adopted a declaration on the freedom of expression and information, stating that this freedom is a fundamental element of the principles of genuine democracy, the rule of law and respect for human rights. It should be noted that the declaration of the Committee of Ministers referred to Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention on Human Rights without any distinction, although the wording of the two provisions is not exactly the same.

Article 19 of the Universal Declaration of Human Rights reads as follows:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Article 10 of the European Convention on Human Rights provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The language of Article 19 of the Universal Declaration of Human Rights is reflected in Article 19 of the International Covenant on Civil an Political Rights which provides as follows:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order, or of public health or morals."

For the purpose of this paper the most intriguing difference between the three texts is that the right to seek information is expressly recognized by the provisions of Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil an Political Rights, while no such right is mentioned in the European Convention on Human Rights. All three texts expressly guarantee the right to receive and impart information, but the right to seek information seems precarious under Article 10 of the European Convention on Human Rights.

It has been argued by Giorgio Malinverni and other legal experts that although a textual interpretation based on preparatory work might lead to the conclusion that the right to seek information is not covered by Article 10 of the European Convention on Human Rights, the aim and effectiveness of Article 10 may be invoked in support of the view that the right to seek information is implied by that provision. (See Giorgio Malinverni, Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights, Human Rights Law Journal, vol. 4, 1983, pp. 443-460, at p. 449 with further references) Professor Malinverni points out that the case-law of the European Commission of Human Rights and the European Court of Human Rights show an encouraging trend in this respect. The Commission has stated that it cannot be ruled out that the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for his own position. In the Sunday Times case the Court emphasized that Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed, and the Court held that the families of the numerous thalidomide victims had a fundamen-

tal interest in knowing all the facts of the case and could not be denied such information. (See, ibid., at p. 450, with references to X v. Federal Republic of Germany, Application No. 8383/78, 17 Decisions and Reports 227-229, and Eur. Court H.R., The Sunday Times judgment of 26 April 1979, at paragraph 66).

II. The case law of the European Commission of Human Rights

Recent case law of the European Commission of Human Rights shows that, in principle, it cannot be excluded that the right to receive information, under Article 10 of the European Convention on Human Rights, in certain circumstances includes a right of access to information which is not generally accessible, but up to now there has not been much direct action in this field. That does not necessarily mean that the Commission shows especial restraint in cases concerning secrecy, but as long as it has not put its foot down the Commission may rightfully be suspected of not taking openness seriously.

In X v. Ireland, (Application No. 8878/80), the Commission rejected the applicant's complaints as manifestly ill-founded. The applicant, who was a consultant biologist residing in County Cork, Ireland, had stated that the object of his application was to close an asbestos dump near his home and to uphold his claim that the planning conditions and provisions for monitoring in relation to the dump were insufficient to protect the public. In March 1977 planning permission had been granted to a State authority for industrial development to use a site four miles from the applicant's home for the disposal of asbestos waste coming from a factory which manufactured brake disc pads. The applicant appealed against the grant of planning permission to a planning board, with the outcome that permission was granted for the use of the site as an asbestos dump, subject to eighteen conditions intended to reduce or eliminate the escape of asbestos dust or fibres and to keep constant checks on the pollution of the atmosphere and the surrounding area. In November 1977 the applicant instituted proceedings at the High Court, and in the course of the hearing the applicant was provided with access to documents in the possession of the County Council concerning the results of monitoring tests which had been carried out by an independent agency in compliance with the planning conditions. The High Court noted that there existed abundant evidence on which the planning board could properly grant permission subject to the conditions which had been imposed. An appeal to the Supreme Court was rejected in 1979.

Before the European Commission of Human Rights the applicant made complaints under Article 10, claiming inter alia that his right to receive information was infringed in that his request for the publication of monitoring results had been denied by the authorities. The Commission noted that although the right to receive information, under Article 10, is primarily intended to guarantee access to general sources of information it cannot be excluded that in certain circumstances it includes a right to access to documents which are not generally accessible. However, the Commission was not of the opinion that Article 10 imposes an obligation on State authorities to publish such information as opposed to facilitating access to them. The Commission noted, moreover, that the applicant had been granted access to monitoring data in the course of the hearing before the High Court and that there was no indication from the case file that further access to data in the possession of the County Council had been denied him. Against this background the Commission declared the application inadmissible.

In Behrendt v. Federal Republic of Germany, (Application No. 9296/81), the applicant, who as an assistant in the law faculty of the university of Munich had been the first female candidate for habilitation, complained that events in the faculty in connection with her habilitation procedure

amounted to a violation of Article 3 and Article 8 of the European Convention on Human Rights, referring inter alia to insulting debates held by the faculty without giving her a chance to be heard, and the imposition of professional secrecy in this respect. The European Commission of Human Rights observed that the question of the faculty's professional secrecy did not raise any issues under Articles 3 or 8 of the Convention, but should be considered under Article 10 of the Convention. The Commission stated that if it be assumed that the right to receive information, under Article 10, extends to sources of information which are not generally accessible but which are of particular importance to the person concerned, it must be noted that Article 10 (2) expressly authorises the non-disclosure of information received in confidence, provided that this is lawful and necessary in a democratic society. Furthermore, the Commission noted that the applicant's right to receive the information relevant for the proceedings instituted by her before German courts had in fact been recognised, and in particular the statements relating to her character and reputation had actually been disclosed. In these circumstances the Commission considered that the applicant's complaint was manifestly ill-founded.

In Wallen v. Sweden, (Application No. 10877/84), the applicant invoked Article 3 of the European Convention on Human Rights. The applicant stated that in 1982 a letter concerning her was sent to a mental hospital in Stockholm by a lawyer, who represented a Swedish artist. Subsequently a psychiatrist from the hospital telephoned the applicant and asked her to meet him for a conversation. The applicant appeared at the hospital and was informed that a letter including a report from the lawyer had been submitted to the hospital. The applicant requested permission to read the report but that was refused. The doctor in question informed the applicant that he intended to commence forced medication on her and if she refused such medication she would immediately be involuntarily committed to the mental hospital. The applicant stated that she had no choice but to surrender to the power of the doctor, and she then immediately got an injection. She was ordered to return each fortnight for medication.

Before the European Commission of Human Rights the applicant complained that she had been subjected to torture by way of forced medication, and she submitted that the treatment was inhuman and degrading, stating that she considered it to be a punishment for having called upon the artist in question who was her idol. This part of the applicant's complaints was rejected pursuant to Article 27 (3) of the Convention for failure to exhaust domestic remedies.

The applicant also alleged a violation of the Convention in that she had not been allowed to see the report on herself, which she had wanted to read in order to find out what she had been blamed for. The Commission noted that the applicant had not invoked any specific article in this respect apart from Article 3 of the Convention, which the Commission considered not to be relevant. However, the Commission on its own examined Article 8 and Article 10 of the Convention.

As to Article 8 the Commission observed that the refusal of the authorities to disclose to the applicant a letter which concerned her could in the circumstances be regarded as an interference with her right under Article 8 (1) to respect for her private life, but it must be recalled that the refusal was due to the fact that the authorities considered that the disclosure of the letter could entail a danger for the person who had written the letter, or that someone close to that person could be subjected to violence or other serious interference. Referring to Article 8 (2) the Commission observed that the decision to refuse to disclose the letter was "in accordance with the law", as it was taken pursuant to the Swedish Secrecy

Act, and the Commission stated that the decision was "necessary in a democratic society ... for the protection of the rights and freedoms of others" namely those persons who could be in danger if the letter was disclosed.

As to Article 10 the Commission observed that it could be left open whether the provision concerning the freedom to receive and impart information can be interpreted as guaranteeing a right to receive information which the authority holding the information does not wish to impart. Even assuming that the refusal to disclose the letter to the applicant could be regarded as a restriction on her freedoms under Article 10 (1), such a restriction would be justified under the terms of Article 10 (2) as being "prescribed by law", and "necessary in a democratic society for the protection of the rights of others".

On the basis of these observations the Commission reached the conclusion that the refusal to disclose the letter to the applicant did not constitute a violation of the Convention, and the application was rejected as manifestly ill-founded in this respect.

In Gaskin v. United Kingdom, (Application No. 10454/83), the applicant, who was born in 1959, complained about refusal of a local authority to give him access to the file relating to his period spent in care. In December 1959 the applicant was taken into the care of Liverpool City Council following the death of his mother, and he remained in the care of the local authority until he attained his majority in 1977. During the major part of this period the applicant was boarded out with various foster parents, and under the terms of the regulations concerning boarding-out of children the local authority was under a duty to keep certain confidential records concerning the applicant and his care. The applicant contended that during his period spent in care he was ill-treated, and he argued that access to the case-file was necessary to him in order to attempt to cope with the psychological problems which he claimed to suffer as a result of the time spent in care. Before the European Commission of Human Rights the applicant complained inter alia that the local authority's continuing refusal to grant him access to the case-file constituted a violation of article 8 and Article 10 of the European Convention on Human Rights.

The Commission noted that a file relating to the applicant's treatment in care did indeed exist. The file contained information compiled from a variety of sources and was intended to provide the local authority with a complete record of the applicant's development during his childhood such as might normally be in the memory of a child's parents. As the applicant's period of care had ended in 1977, the case-file was no longer of any use to the local authorities, but its relevance to the applicant had not ceased, since the file might provide the applicant's principal source of information about his past and formative years. In these circumstances the applicant's complaint of his continued lack of access to the case-file could not be considered to be incompatible ratione materiae with either Article 8 or Article 10 of the Convention. The Commission found that this complaint raised difficult questions of fact and law as to the interpretation and application of Articles 8 and 10 which could only be resolved by an examination of the merits. Consequently, the complaints concerning violation of Articles 8 and 10 could not be considered manifestly ill-founded. No other grounds for inadmissibility having been established, the Commission in its decision of 23 January 1986 on admissibility declared the applicant's complaint of his continued lack of access to the case-file admissible. As of August 1987 the case is still pending.

In X v. United Kingdom, (Application No. 11516/85), the applicant complained inter alia that the refusal of the Scottish authorities to provide him with a copy of the pathologist's post-mortem report of his murdered wife was a breach of Article 10 of the Convention. The circumstances surrounding the murder were unclear. On 31 March 1984 at around midnight the applicant's wife was murdered in a block of flats and was dragged out of the building and into the road. Earlier in the evening the applicant's wife had been met by her subsequent assailant, D, and his uncle and aunt in a bar. They all went together to the flat and D's uncle and aunt left about an hour before midnight, the arrangement being that the applicant's wife and D would follow them later to another bar. When charged with the murder, D decided to plead guilty, thereby avoiding a full public trial, and consequently many of the details of what happened to the applicant's wife were not revealed as they would normally have been under cross-questioning in court.

The European Commission of Human Rights observed that the post-mortem report is a technical medical document which is the property of the Crown and is not normally released to the public, but nevertheless the applicant wished to receive a copy of the report, contending that Article 10 of the Convention conferred upon him a right to require the production to him of such a document. In this regard the Commission recalled the previous occasions on which it had considered what sorts of information are covered by the freedom to receive information referred to in Article 10. However, the Commission did not find it necessary to decide the extent of the right conferred upon the applicant by Article 10 (1) as regards the post-mortem report, since it was clear that he had in fact substantially received the information which he claimed was denied to him. Certain details of the circumstances of his wife's death were provided to his solicitors by the Procurator Fiscal at a meeting on 9 August 1984 following a request by them for a copy of the full report. In response to a further request to the Lord Advocate at the Crown Office on behalf of the applicant for a copy of the report, the Lord Advocate confirmed that it was not the practice in any case to provide the victim's family with a copy of the post-mortem report, but the Lord Advocate confirmed that the Procurator Fiscal would be happy to discuss any other outstanding matters on which information was sought with the applicant's solicitors. Further information was provided at a meeting between the applicant's representative and the Procurator Fiscal on 4 March 1985 when the applicant's solicitors put certain further specific questions to the Procurator Fiscal concerning the injuries suffered by the applicant's wife, details of the circstances of her death and the behaviour of the other individuals involved prior to the murder. The Procurator Fiscal provided full written answers to all these questions, although he maintained his refusal of access to the post-mortem report itself. Moreover, the Procurator Fiscal confirmed that the applicant might seek answers to any further questions concerning the circumstances of his wife's death in the same way if any question remained outstanding.

The European Commission of Human Rights stated that the Convention could not in these circumstances be interpreted to guarantee a right to receive information in a particular form, and the applicant had no right to receive a copy of the post-mortem report itself since he had in any event received, or could receive if he formulated a suitable request, the substantive information sought by means of the written answers to his questions. The applicant had not indicated what further information he required and had not received. On the basis of these observations the Commission found that there had been no interference with the applicant's access to information and that his complaints in this respect were manifestly ill-founded within the meaning of Article 27 (3) of the Convention.

In Leigh, Guardian Newspapers & Observer Newspapers v. United Kingdom, (Application No. 10039/82), the question of secrecy was intermingled with far-reaching questions concerning freedom of information and freedom of speech and press. The application related to proceedings which were taken by the Home Office against Harriet Harman for contempt of court. Harriet Harman, acting in her capacity as solicitor for the National Council for Civil Liberties, had represented a prisoner in a civil action against the Home Office for false imprisonment. The action concerned the prisoner's detention in a special unit for disruptive prisoners which had been set up at Wakefield Prison. In the course of these proceedings the prisoner successfully sought court orders for discovery of certain documents by the Home Office. The documents were disclosed on the basis of an implied undertaking to the court and an express undertaking by Harriet Harman to the Home Office that the documents were confidential and were not to be used for collateral or ulterior purposes apart from the trial of the action. In the course of the action, counsel for each side read aloud material parts of some 800 of the documents which had been arranged in two exhibit bundles. After the bundles had been read out in open court David Leigh, a journalist by profession, asked for sight of them and was allowed to inspect them in Harriet Harman's office, but he did not see the complete set of documents consisting of 17 bundles which the Home Office had produced and which had not been read out in court. In April 1980 David Leigh wrote a feature article for The Guardian based on the information he had gathered from the documents, critically examining the role of the Home Office in the setting up of the special units at Wakefield Prison.

In June 1980 the Home Office sought an order to punish Harriet Harman for contempt of court, and on 27 November 1980 the court of first instance found in favour of the Home Office. An appeal to the Court of Appeal was dismissed on 6 February 1981, and a further appeal to the House of Lords was dismissed on 11 February 1982. The majority of the House of Lords found that the implied obligation not to use the documents for any ulterior purpose continued despite the fact that they had been read out in open court.

In the proceedings before the European Commission of Human Rights David Leigh stated that he considered Harriet Harman's actions in allowing him to inspect the exhibited bundles to be normal practice, and he explained that in his thirteen years as a journalist he had frequently attended both criminal and civil trials and commonly asked the parties for documents which had been put in evidence in the course of a public hearing. These requests had invariably been met whether the case was a civil or a criminal one, and whether or not the documents in question originated from the party whom he approached. Guardian Newspapers and Observer Newspapers stated that their principal interest was in the evidence presented in the course of the case concerning false imprisonment and the ray of light which it shed on policy-making within a notoriously secretive area of Government activity. It was known that control units had been in existence since 1974 and had been closed by the Home Secretary in October 1975, but until the evidence in the case which served as basis for David Leigh's feature article in April 1980 it was not known how the decision to set up the units had been made, how the original concept had changed, or what steps had been taken by the Home Office to forestall public criticism.

The applicants complained inter alia that the decision of the House of Lords in Harman v. Home Office had interfered with their right to receive and impart information as guaranteed by Article 10 (1) of the European Convention on Human Rights. David Leigh stated that he had been unable to write further stories on the control units and that The Guardian and The Observer had been unable to publish such articles. All three applicants claimed that their sources of information had been adversely affected because recipients of discovered documents would now be unwilling to permit inspection of such documents, even if the documents had been read out in court. The applicants added that the risk of proceedings being taken against them for contempt of court had a chilling effect upon their right to freedom of expression.

The European Commission of Human Rights observed that The Guardian and The Observer had remained free to publish articles concerning the control units and that no effort had been made to restrain such publication. The Commission considered that the complaint brought by these two applicants was, in essence, an actio popularis and that, therefore, they could not be regarded as victims within the meaning of Article 25 (1) of the Convention. As to David Leigh the Commission considered that he could not claim to be a victim either, and it noted in this regard that he had been able to publish his article concerning the control units with complete freedom. No attempt had been made to bring proceedings against him for abetting contempt of court, and he remained free to publish further articles without interference. The fact that as a result of the House of Lords decision in Harman v. Home Office he was unable to gain further access to the discovered documents on which he based his feature article in April 1980 did not make him a victim within the meaning of Article 25 (1) of the Convention, since in the Commission's view such a restriction must be seen as an indirect consequence of the decision of the House of Lords and one which affected every interested journalist in the United Kingdom. On the basis of these considerations the Commission held that the application must be rejected as incompatible ratione personae with the provisions of the Convention within the meaning of Article 27 (2).

In X v. Federal Republic of Germany, (Application No. 11556/85), the applicant, a German lawyer born in 1899, complained inter alia that the German authorities had refused to grant him access to the criminal register in respect of van der Lubbe who was convicted and sentenced to death in 1933 by a German court for having set fire to the Reichstag. The applicant had attempted to rehabilitate van der Lubbe by reopening the criminal proceedings, but his requests had been rejected, and he had been informed by the General Public Prosecutor that he could not be told the reasons why the entry into the criminal register of van der Lubbe had been deleted. The European Commission of Human Rights noted - without negations - that a claim to seek and receive certain information from the authorities could, as such, fall within the scope of Article 10 of the Convention. However, the Commission found that in the circumstances of the case in point, the authorities' refusal to disclose to the applicant the reasons why another person's entry into the criminal register had been deleted did not disclose any appearance of a violation of the rights set out in Article 10. This part of the application was rejected as manifestly ill-founded, and the application was declared inadmissible.

III. The case of the dangerous Museum Official

The recent judgment of the European Court of Human Rights in the Leander case shows that secrecy within public administration is a precarious issue under the European Convention on Human Rights. (See Eur. Court H.R., Leander case, judgment of 26 March 1987, Series A No. 116). The facts of the case were to some extent in dispute between the applicant, Torsten Leander, and his adversary, the Swedish Government, but the main issues were clear.

The applicant, a carpenter by profession, was born in 1951. On 20 August 1979 he began to work as a temporary replacement in a post of museum technician at the Naval Museum at Karlskrona. The museum is adjacent to Karlskrona Naval Base which is a restricted military security zone. Before the European Court of Human Rights the applicant maintained that the intention was that he should work for ten months in this post while its ordinary holder was on leave, and he alleged that on 3 September 1979 he was told to leave his work pending the outcome of a personnel control on him which had to be carried out under the Swedish Personnel Control Ordinance of 1969. According to the applicant this control had been requested on 9 August 1979. The Swedish Government submitted that the applicant had only been employed from 20 August to 31 August 1931, as evidenced by a notice to that effect issued by the Director of the Museum on 27 August 1979. The Government furthermore contended that in employing Torsten Leander the Director had committed two mistakes. Firstly, it was against the regulations to employ a person before a personnel control had been undertaken, and secondly, the post had not been properly advertised. The necessary steps for filling the vacancy were taken on 30 August 1979, and the post was opened for application until 28 September 1979, but having been informed by the Director that he would not be eligible because the outcome of the personnel control had been unfavourable, Torsten Leander did not apply.

The further events offer points of resemblance with Catch 22. Following the advice of the Security Chief of the Naval Base, Leander wrote to the Commander-in-Chief of the Navy requesting to be informed of the reasons why he could not be employed at the Naval Museum. In his reply of 3 October 1979 the Commander-in-Chief of the Navy explained that the Museum possessed several storage rooms and historical objects which were located within the area for which the Chief of the Naval Base was responsible, and the person holding the post at the museum must be free to circulate within restricted areas. The Chief of the Naval Base had requested a personnel control, because the rules concerning access to the restricted areas must apply to the personnel at the Museum. The Commander-in-Chief of the Navy stated that the outcome of the personnel control had been unfavourable, but he indicated that Leander would be eligible for the post if his duties at the Museum did not nessecitate his having access to the naval installations at the Naval Base. On 22 October 1979 Leander complained to the Swedish Government asking to be declared eligible for the temporary employment at the Museum, and requesting information on the reasons for the unfavourable outcome of the personnel control. The Government requested the opinion of the Supreme Commander of the Armed Forces, who in turn consulted the Commander-in-Chief of the Navy. In his reply to the Government the Supreme Commander of the Armed Forces stated that

the employment of Leander in August 1979 did not involve any access to the Naval Base, and the Commander-in-Chief of the Navy had stated that he did not oppose such employment, but the Director of the Naval Museum had affirmed the requirement that Leander should have access to the Naval Base. The Supreme Commander of the Armed Forces agreed with the Commander-in-Chief of the Navy that Leander might be employed by the Naval Museum provided that the holder of the appointment should not have access to the Naval Base. The opinion of the Supreme Commander of the Armed Forces was accompanied by a secret annex, containing information on Leander which had been released by the National Police Board. This annex was never communicated to Leander and was not included in the material submitted to the European Court of Human Rights.

In a letter of 5 February 1980 Leander raised new grievances before the Government complaining that the National Police Board had refused to communicate to him the security information concerning him. In support of his complaint Leander referred to a provision of the Personnel Control Ordinance according to which the person concerned should be given opportunity to submit observations on the security information if special reasons gave cause for this. By decision of 14 May 1980 the Government rejected the whole of Leander's complaint, stating that the question whether a person was eligible for a certain position could only be examined in the context of a complaint about the appointment to the post, and Leander had lodged no appeal with the Government in respect of appointment. Furthermore, the Government stated that in the case of Leander there were no such special circumstances as mentioned in the Personnel Control Ordinance which could give Leander the right to be acquainted with the information about him released by the National Police Board to the Supreme Commander of the Armed Forces.

In the course of the proceedings before the European Commission of Human Rights and the European Court of Human Rights Leander gave detailed information on his personal background. He had not belonged to any political party since 1976, but earlier he had been a member of the Swedish Communist Party, and he had also been a member of an association which published a radical review. During his military service in 1971-72 he had been active in the soldiers' union, and he had been a delegate at a soldiers' union conference in 1972, which he maintained had been infiltrated by the security police. He had been active in the Swedish Building Workers' Association and he had travelled a couple of times in Eastern Europe. However, he asserted that according to concordant statements by responsible officials none of these circumstances had been the cause of the unfavourable outcome of the personnel control.

Before the European Commission of Human Rights Leander complained that the Swedish authorities kept information on him which was not disclosed to him, and he alleged that his rights under Articles 8 and 10 of the Convention had been violated. He also complained that he had had no effective remedy before a national authority in Sweden and that accordingly Article 13 of the Convention had been violated. The Commission concluded by a unanimous vote that there had been no breach of Article 8 and 10 of the Convention. As to the alleged violation of Article 13 of the Convention the Government argued that Swedish law offered sufficient rem-

edies for the purposes of Article 13, namely
- a formal application for the post, and an appeal to the Government;
- a request to the National Police Board for access to the secret police-register on the basis of the Swedish Freedom of the Press Act, and an appeal to the administrative courts;
- a complaint to the Chancellor of Justice;
- a complaint to the Parliamentary Ombudsman.

Having examined whether any of these four remedies taken separately could satisfy the requirement of being an effective remedy within the meaning of Article 13, the European Commission of Human Rights found that none of them was acceptable. However, by a vote of seven against five the Commission reached the conclusion that the case disclosed no breach of article 13. The majority of the Commission found that although there was no single remedy which could have provided Leander with a proper Article 13 remedy, the four remedies, taken in the aggregate, met the requirements of Article 13. Thus, the majority of the Commission constructed the extraordinary equation

$$0 + 0 + 0 + 0 = 1$$

The Court, like the Commission, reached the conclusion that there had been no breach of Article 8 of the Convention, since the safeguards contained in the Swedish personnel control system met the requirements of Article 8 (2). In view of the wide margin of appreciation available to it, the Government was entitled to consider that the interests of national security prevailed over the individual interests of Leander, and therefore the interference to which Leander was subjected could not be said to have been disproportionate to the legitimate aim pursued.

As to the alleged violation of Article 10 of the Convention the Court concluded that there had been no interference with Leander's freedom to express opinions. Neither had there been any interference with his freedom to receive information. The Court stated that Article 10 does not, in circumstances such as those of the Leander case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual. However, the Court observed that the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Taken literally, this observation could mean that the Court would not have reached the same conclusion as the Commission in Leigh, Guardian Newspapers & Observer Newspapers v. United Kingdom, since Harriet Harman was willing to allow David Leigh to inspect the exhibited bundles further.

As to the alleged violation of Article 13 the Court held, by four votes to three, that there had been no breach of the Convention. The majority of the Court found that the aggregate of the remedies satisfied the conditions of Article 13 in the particular circumstances of the case, and the question was thus decided on narrow grounds.

IV. The chilling effect

In cases concerning secrecy within public administration the European Commission of Human Rights has constantly paid lip-service to the principle of democratic openness, but it seems relevant to ask the question which the Americans have been asking in various contexts since the 1984 TV commercial for Wendy's hamburgers: "Where's the beef?" In respect of

most of the cases it is difficult for outsiders to make a critical assessment of the decisions of the European Commission of Human Rights, because, for good reasons, not all the facts are known. However, a little wondering may be appropriate.

Considering the case of Wallen v. Sweden, (Application No. 10877/84), one may wonder if it is normal procedure that a lawyer representing an artist who has been bothered by one of his fans writes directly to a mental hospital, whereupon a psychiatrist from the hospital summons the fan for a conversation at the hospital and threatens to have her involuntarily committed. In the course of the proceedings before the European Commission of Human Rights Mona Wallen had submitted a medical certificate of 11 June 1984 according to which she was mentally normal, and although people who can prove that they are not insane are always met with suspicion, one may wonder if there was any real danger involved in disclosing to her the letter which had interfered with her right to respect for her private life.

One may also wonder why in X v. United Kingdom, (Application No. 11516/85), the applicant was not allowed to see the post-mortem report. He could ask all the questions he wanted, but he could not see the report itself. It is like a used car dealer covering his list with his hand. If there is no hocus-pocus why can't the customer see the list? The problem is that you do not know what questions to ask if you don't have access to the secret information. In the Leander case it was impossible to find out why the outcome of the personnel control was unfavourable. Leander could ask if it was due to his earlier membership of the Swedish Communist Party, if it was because he had been active in organizing soldiers and workers, or if it was because he had travelled in Eastern Europe. The answer to all these questions was no. What other questions could he ask? The person searching for secret information is groping in the dark.

In some cases the reports of the European Commission of Human Rights provide sufficient grounds for a critical assessment. In Leigh, Guardian Newspapers & Observer Newspapers v. United Kingdom, (Application No. 10039/82), the Commission, in primitive language, gave the following explanation:

> "The Convention does not institute for individuals a kind of actio popularis merely because they consider that a particular legal provision is in conflict with a provision of the Convention."

Apart from the semantic absurdity of the sentence, the observation was not relevant to the case in point. The Commission stated that it did "not consider that the concept of 'victim' in Article 25 (1) may be interpreted so broadly, in the present context, as to encompass every newspaper or journalist in the United Kingdom who might conceivably be affected by the decision of the House of Lords", but that was not the issue, as the applicants claimed that they were all directly affected by the decision of the House of Lords. The Guardian had already published an article on the role of the Home Office in the setting up of the special units at Wakefield Prison, and both newspapers had shown a special interest in publishing further articles on this subject. It is therefore difficult to understand how the Commission could state that the complaint brought by the two newspapers was "in essence, an actio popularis". In relation to the the complaint brought by David Leigh the Commission made the irrelevant observation that the restriction resulting from the decision of the House

of Lords affected every interested journalist in the United Kingdom. David Leigh had written an article based on the information which he had gathered from the exhibited bundles of documents, and he had a special incentive to write further articles on the basis of the information contained in the documents. His situation was not the same as that of all other interested journalists in the United Kingdom. If Woodward and Bernstein had been stopped after their first article on Watergate, all other interested journalists in the United States would probably also have been affected, but that would not have justified the interference, and nobody would have talked about actio popularis if the Washington Post had instituted court proceedings.

David Leigh and the two newspapers argued that the decision of the House of Lords had a chilling effect. This kind of argument plays an important role in American constitutional law. (See, e.g., Note: The Chilling Effect in Constitutional Law, Columbia Law Review, vol. 69, 1969, pp. 808-842.) The European Commission of Human Rights disregarded the chilling effect, emphasizing that David Leigh was able to publish his article on the basis of the information he had received from Harriet Harman and that no proceedings were actually taken against him. However, these observations did not dispose of the applicants' claim that they were victims because the restrictions on their freedom to receive the information in the exhibited bundles deprived them of the ability to write and publish the type of detailed critical review of the programme which they desired to produce. It cannot be denied that the decision of the House of Lords had a chilling effect in this respect. It does not require much knowledge of journalism to realize that the writing process is seriously hampered if a journalist who has published one article on a controversial subject is cut off from verifying the information needed for further articles on the same subject.

The Leander case also has a chilling effect. Young people may be scared of being associated with radical political movements. They may think that if they join a radical political party, participate in labour organizing activities, or travel in Eastern Europe, they run the risk of not being eligible for certain posts in the civil service. There may be other reasons for their ineligibility, but they will never be able to find out what those other reasons are. They may exhaust domestic remedies, realizing that there is always a catch, and there is no help from the European Commission of Human Rights and the European Court of Human Rights. An adequate description of the chilling effect in relation to denial of benefits or positions was given in 1969 by Thomas I. Emerson in his comprehensive treatise on freedom of expression:

> "The effect on freedom of expression from withholding benefits or positions is apparent. To some extent the impact is direct, as when a person deliberately foregoes some form of expression in order to be eligible for a benefit or position. More frequently the impact is indirect. Numerous other persons seek to avoid future trouble by steering clear of controversial opinions or associations. These repercussions extend particularly to young persons, studying for or just entering a career. The more extensive the restrictions and the longer they remain in operation the more pervasive becomes the dampening effect. Over a period of time the whole ethos of political life may be drastically altered.
>
> There are, moreover, certain features of this kind of restriction which accentuate the impact upon the system of free expression.

In the first place the regulations are, even more clearly than in most controls of expression, a form of preventive law. No harm has yet been done. The scheme is to avoid injury by weeding out in advance those persons who might possibly cause the injury some time in the future. Such restrictions almost inevitably suffer from overbreadth, in design and in application. In order to avoid the bad risks they tend to eliminate many of the good risks.

Secondly, the restrictions are usually framed as administrative regulations rather than criminal offences. Hence the safeguards of a criminal proceeding are lacking. Rules relating to the burden of proof, the admission of evidence, the necessity of a judicial tribunal, are all relaxed or abandoned. It is possible, moreover, to initiate a proceeding or disqualify an applicant on a showing substantially less than is required to commence a criminal prosecution. The administrative system may, therefore, be a much tighter, more pervading form of restriction.

Finally, the system of restriction is normally one of low visibility. Decisions are frequently informal, made without public hearing, and indeed without publicity. Official findings of fact and reasons are usually not given. Such procedures are particularly likely when the person affected is an applicant rather than an incumbent. Thus an air of mystery and uncertainty permeates the process. The imagined impact of the restriction may be the most repressive feature of all." (Thomas I. Emerson, The System of Freedom of Expression, 1970, pp. 162-163.)

There is no reason to believe that professor Emerson had prophetic gifts and could foresee what would happen in Sweden some ten years later. Rather, the reason why his observations seem particularly relevant could be that they are universally valid.

V. In search of principled decisions

A comparative study of statutory provisions concerning administrative secrecy shows that there are many ways of preventing public disclosure. (See, e.g., Civil Service Department, Disclosure of Official Information: A Report on Overseas Practice, H.M.S.O, 1979.) At one extreme there is the Swedish Secrecy Act, containing many detailed provisions, which means that it is always possible to find a clause that may vouch for secrecy. At the other extreme are short secrecy clauses establishing broad categories which invariably suffer from vagueness and overbreadth. In some countries it is the extent of secrecy which is the greatest secret of all, as several commentators on administrative secrecy have observed. (See, e.g., James Michael, The Politics of Secrecy, 1982, p. 9.) In recent years pressures have existed in many democratic countries for increased knowledge of the processes of government, but statutory measures introducing freedom of information often contain provisions consistent with the continued practice of official secrecy. (See, e.g., David Clark, Open Government: The French Experience, Political Quarterly, vol. 57, 1986, pp. 278-294, at p. 285.)

In view of the many ways in which the member States may prevent public disclosure there is a need for protection under the European Convention on Human Rights. However, if the member States are given a wide margin of appreciation the protection becomes illusory. The European Commission of Hu-

man Rights and the European Court of Human Rights have resorted to a balancing test, but in these matters a balancing test is no test at all.

The need for a standard in matters of openness versus secrecy was stressed by Melville B. Nimmer in an article commenting on the Pentagon Papers trial, which agitated the public mind in America at the beginning of the seventies. Professor Nimmer rejected the absolutist position of free speech which would protect any disclosure of any secret, and he also rejected the other polar position which would contend that any time a government official causes the stamp of "secret" to be placed on a document, all enquiry is ended. On the analogy of other free speech problems he stated that there must be narrow, objective and definite standards to guide the determination of government secrecy. Regarding communicative activities with the intent to achieve a public disclosure to the people, as distinguished from a private disclosure to an agent of a foreign nation, it seemed proper to conclude that such activities might be the subject of criminal punishment only if a serious injury to the state could be proven to be both likely and imminent as a result of such public disclosure; publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling state security. Prevention of public disclosure would also be acceptable in cases where such disclosure would place a person in immediate jeopardy. Professor Nimmer admitted that some injury would result from the standards which he had suggested, but he thought that the harm would be more than counterbalanced by the speech values enhanced. Along with some minimal injury to national interests, speech immunity would carry with it a healthy criticism of government officials whose activities could not otherwise be held up to public light. (See, Melville B. Nimmer, National Security v. Free Speech: The Issues Left Undecided in the Ellsberg Case, Stanford Law Review, vol. 26, 1974, pp. 311-333.)

It may take a generation or two, but eventually the European Commission of Human Rights and the European Court of Human Rights will have to perform the task of making principled decisions in cases concerning administrative secrecy. In the meantime lawyers who care about democratic openness could make valuable contributions trying to establish the right criteria for delimiting administrative secrecy. This is a difficult matter, and it seems that so far nobody has thought it through.

SECRECY WITHIN PUBLIC ADMINISTRATIONS - THE BASIC PRINCIPLES OF SPANISH LEGAL REGULATION

Co-report presented by
Dr. J. BERMEJO VERA
Professor of Administrative Law
Faculty of Law University of Zaragoza

The principle of transparency in official matters and issues is, as has been stated over and over again, synonymous with contemporary democratic regimes. From the socio-political point of view, almost no-one would deny the very strong links which exist between the principle of publicity for decisions taken by governments (the publicity principle being understood in the most widely accepted sense) and the very foundations of democracy. Democracy is a form of government which excludes, as a matter of principle, the concealment and secrecy of measures and decisions taken to promote the general interest to which democratic government accords a priority.

This is "an understood value" which can only exceptionally be abandoned and then only for particularly well-founded reasons. It is customary to regard the secret nature of decision-making and, a fortiori, the decisions taken as something which belongs to byegone ages where the notions of "raison d'Etat" and "Arcana regni" prevailed. The latter two notions are totally incompatible with the democratic principle which inspires and informs the activities of public powers.

Accordingly, in this perspective modern societies and their public opinion frequently react favourably to any open breach in the inconvenient substitution of the predominance of the democratic transparency principle to the principle of administrative secrecy. Once it is admitted that administrative secrecy clauses - this being understood as a reasonable exception to the publicity principle - are employed in specified and justified situations, public opinion customarily perceives, and with a certain relief, the various circumstances in which the application of a secrecy claim will not succeed entirely in diminishing the transparency obligation.

Limiting myself to only one example which is perhaps very important and which received a great deal of coverage at the time, allow me to recall a judgment of the British courts. At the beginning of 1985 a civil servant working in the Ministry of Defence Mr. Clive Ponting, was accused of having communicated information which was protected by a "secrecy clause" to the Labour MP Mr. Tam Dalyell. The civil servant admitted full responsibility for the "leak" of documents (containing secrets it would seem) to a member of the UK Parliament and which concerned the strange case of the Belgrano, the Argentinian ship, at the time of the celebrated Falklands War. You may perhaps recall that the Belgrano was sunk during a British expedition to the Falklands. According to the information released by the media at the time, the sinking of the Belgrano took place while certain countries were trying to activate and force peace negotiations. The result was, if we take the view of the media, that the ship sank at the same time as the possibilities (or maybe it is better to say definite possibilities) of reaching a peaceful solution. Loss of life on both sides was thereby produced. However, this could have been avoided.

At an abstract level, building on the basis of this affair, and ignoring personal opinions or ill-founded prejudices, it should be remembered that the polemic so opened up juxtaposed the absolving of the civil servant who had revealed the official secret and the precise scope and limits of official secrets. In other words, and as shown moreover in the course of the Paliamentary debates in which Mr. Heseltine, the British Defence Minister, insisted on the official secrecy dimensions of the affair, the civil servant was found not guilty since the so-called disclosure had not been made to an "unauthorised" person but to a Member of Parliament. The latter factor is particularly important in the regulation of official secrecy in Spain. Accordingly it can be seen that in the case in question abusive interpretation of official secrecy has been annulled as a principle.

However, it should be immediately stated that this realistic and exemplary hypothesis concerning the competence of a modern society to confront a non-democratic form of power does not constitute, from a strictly legal point of view, the habitual practice. In the first place, and as the Rapporteur, Professor Germer, has clearly put it, and with reference to James Michael: "In some countries, it is the extent of secrecy which is the secret of all". And in the second place, since the law in force recognises, and in conjunction with unlimited claims to transparency in Government business, justified restrictions which are intended precisely to protect the general interest. These limits must be the subject of detailed analysis and must be very carefully considered each time an unconditional formulation of the publicity principle - and the consequences thereof, namely the elimination of administrative secrecy - possibly threatens the extremely important foundations of the democratic regime (the fundamental rights of citizens, even those of the State).

There is an extremely delicate balance in issue which neither romantic attitudes arguing in favour of the defence of publicity or unconditional transparency nor, at the other end of the scale, the entrenched positions in favour of the secrecy of official information or its prior screening before circulation to the public at large, are sufficient to bring about. Allow me to give you an anecdote in the form of a quote which, generally speaking, hits the mark and reads as follows: "If you want something to have the greatest possible publicity, call it a secret or say that its circulation is restricted." By that we mean that the impenetrability of official secrets may, on numerous occasions, yield to the imagination which contributes to distorting the matters and issues which are claimed to be safeguarded by this system. Perhaps that is why the challenge of our times and of our lawyers is not simply "to make significant contributions which attempt to establish strict criteria in favour of the delimitation of administrative secrecy" as Professor Germer has indicated to us, but also, and on a wider scale, to ask ourselves whether or not it is appropriate to maintain secrecy for the activities of public powers. It must be said at any rate that the latter affirmation cannot simply be understood in the context of the legal regulations and behaviour of an isolated country. As long as there is prolonged international imbalance - and it seems that this state of affairs will continue for a long time - each State will regard with suspicion the judgments of those which defend the elimination of "secret activity" - of administrative secrecy - without considering that such secrecy very frequently exists for non-specified reasons, including of course the "security and defence" of the State, but for a sort of undetermined vagueness corresponding to the plurality of States opposing each other or which are in a permanent state of opposition.

Accordingly, and perhaps to insist on the legal perspective which I have previously put forward, it may be worthwhile to examine the normative texts in Spain which refer to administrative secrecy. At the same time it is also worthwhile underlining the precepts around which revolve the justifications for secrecy in the affairs of public administration rather than stressing the theoretical bases and formulae for such justifications. The following discussion will argue in favour of democratic transparency as the rule.

Right up to the promulgation of the 1978 Spanish Constitution which hailed a new orientation in our democratic regime, it was possible to state that the littera legis advocated the principle of transparency in administrative affairs. It must be recalled in this regard, and bearing in mind the work of Enrique Gomes-Reino (El principio de publicidad de la accion del Estado y la tecnica de los secretos oficiales, Revista Espanola de Derecho Adminstrativo, n° 8, 1976) as well as Article 7 of the Press Law of 18 March 1966, that Article 1 of the law of 5 April 1968 entitled "The law on official secrets" - which was modified by the law of 7 October 1978 - introduced the right to obtain information on the acts of the Government, the administration and public bodies, a right which was limited by Article 7 of the Press Law to "periodic publications and press agencies". On the other hand, Article 1 of the law on official secrets did not proceed on the basis of establishing a right in favour of the citizen, but rather on the basis of subjecting "the organs of the State when conducting their affairs to the principle of publicity in accordance with the norms regulating the action of ...".

In addition to these principles which, and as Gomes-Reino has shown, do not easily withstand rigorous criticism since their practical application cannot easily be compared and contrasted, a reference should be made to an earlier law. The law on administrative procedure of 17 July 1958 claimed to rationalise the system for elaborating administrative decisions. It had introduced general clauses for "the written nature" of the acts (Article 41), for the "publication" of acts directed at plural interests (Article 46), for "obligatory reasoning" in certain cases (Article 43) and especially for "a right to information" in regard to all administrative files (Articles 62 et. seq.) and for a "right to a prior hearing" (Article 91).

In brief, there was an important array of precepts intended to break the traditional rule of administrative secrecy although they were mediated by methods of interpretation which were rooted in a byegone era. Suffice it to point out for the time being (since such norms are still in force) that the right to information is circumscribed in regard to third parties and very rigorously restricted in accordance with Article 23 of the law of 17 July 1958 and its accompanying judicial interpretation, and only concerns the "state of development" of files or "particular features" thereof.

Reference should also be made to the precepts establishing the duty of civil servants working in public administrations to "maintain absolute secrecy in regard to anything concerning matters which come to their knowledge in the framework of their functions" (Article 80 of the law on civil servants of 7 February 1964) as well as to "statistical secrecy" (Articles 11 of the law on statistics of 31 December 1956 and 82 et. seq. of the regulation of 2 February 1948). Both principles co-existed, obviously for completely different purposes in the Spanish legal provisions. In one or the other hypotheses it was in no way claimed to protect possible restrictions

on the administrative transparency rule, but the absence of a harmonised regulation of the provisions could very well (and it did) provide false justifications for the inoperability of the basic law in practice. A vague barrier exists between the information obligation and a civil servant's duty of secrecy, the violation of which gives rise to serious disciplinary measures or even criminal sanctions (Article 367 of the Penal Code regards rather ambiguously the violation of secrecy as an offence) - something which one might extend to the very ambiguous regulation of statistical secrecy. As I was saying, this vague frontier could very well contribute to clearly restrictive interpretations of the principle of publicity for administrative acts.

Generally, the meaning of the 1978 Spanish Constitution is very positive as regards the problem being analysed, and in many respects. In the first place, since the Constitution's dogmatic points of view constitute a series of revisions of the principles which held dominance previously. The "principles and values" which the constitutional text gathers together and protects are totally incompatible with restrictive interpretations on transparency and publicity for governmental action. In addition, the concrete provisions of the Constitution articulate these principles and values in an operational manner or, to put it another way, with direct effectiveness. It has introduced substantive rules and specific bodies which are intended to make the abovementioned principles effective and the values and precepts concrete. (For example the Defender of the People, who was set up by virtue of Article 54 of the Constitution and regulated by the organic law of 6 April 1981 and who may not be refused documents, including documents classified as secret unless the Council of Ministers has expressly agreed in accordance with the provisions of Article 22 of the law of 6 April 1981.) Finally, the normative provisions which extend the adopted texts have contributed or are about to contribute, to the reintegration of the previous system and have established new techniques which offer better perspectives for the protection of the principle of transparency in administrative acts and the downgrading of secrecy. Nevertheless, and as we have already had occasion to remark, there still exist provisions of a byegone era which may partially cast a shadow on the optimistic vision which I have just sketched.

As an exhaustive treatment of this subject is not possible in these few pages, it must be pointed out that the constitutional text of 1978 contains precepts which, although occupying the same normative level, are uneven in their functioning. The catalogue of fundamental rights and freedoms is particularly worthy of mention. The recognition and protection of free expression and the right to information figures among these rights (Article 20). The latter Article even if it does not directly guarantee the individual right of the citizen vis à vis administrative secrecy has nevertheless become an indispensable functioning of the transparency principle by means of techniques of social communication. In fact it is these techniques of social communication - in contrast to the system already mentioned in the Press Law of 1966 - which assume importance at the time of requiring, including by protective methods of a jurisdictional nature, effectiveness for the transparency of administrative acts. It seems clear that the fundamental right to communicate and freely receive information would be seriously threatened were the media to be denied the real possibility of exercising it.

Above all, our constitutional text accepts unconditionally European and international interpretation of these rights and freedoms in accordance with the formula set out in Article 10.2 (a quite significant Article) and which reads as follows:

> "The norms relating to the fundamental rights and freedoms recognised in the Constitution shall be interpreted in accordance with their Universal Declaration on Human Rights and with international treaties and agreements on similar issues which Spain has ratified."

All this means that any step taken before a European or international jurisdiction involving pronouncement on the tension between transparency and administrative secrecy can only contribute positively to the effectiveness of these important rights to the detriment of silence and concealment. (Some of the recent decisions of the European Court and Commission of Human Rights referred to by Professor Peter Germer, the Rapporteur, may constitute an example of this.)

In regard to the administration of justice, the provisions contained in Article 24.2 may be mentioned (the right to a public hearing within a reasonable time). These provisions are completed by Article 120 ("litigation must be public unless exceptions are provided by law or procedure"). The two texts guarantee with the exception of statements on the rules of secrecy surrounding judicial inquiries (Articles 301 etc of the Criminal Procedure Law of 14 September 1982), that jurisdictional actions carried out in secret are proscribed and contribute to making more transparent the very important task entrusted to the judicial power. (A very important ruling of the Spanish Constitutional Court of 31 January 1985 OJ of 5 March nevertheless decided that the secrecy of judicial inquiry may not eliminate the fundamental freedom and the right to receive information.)

The provision contained in Article 105 of the Constitution is much more important both at the individual level as well as in the context of the guarantee for persons directly affected (however its significance is certainly less great in a social and political perspective). Article 105 reads:

> "The Law shall regulate:
>
> a) the right of the citizen to be heard directly or through organisations and associations recognised by Law when administrative provisions are being elaborated which concern him;
>
> b) access by the citizen to archives and administrative files except in cases concerning the security and defence of the State, investigation into criminal offences and the intimate life of others;
>
> c) the procedure which administrative acts must follow and which will ensure the party concerned the right to be heard."

It is true that this provision has three aspects: a) as a guarantee of fact that citizens will be heard and, accordingly, may publicly know the files during the elaboration of administrative provisions affecting them; b) as a guarantee in regard to the system for making administrative decisions and accordingly vis à vis the secret nature of the procedure as a result of allowing the interested party to be heard; c) as a configuration of a subjective right of access to archives and administrative decisions granted to "citizens".

Some important conclusions can be drawn from this constitutional principle which has been critically analysed by, among others, Alvarez Rico in "Documentacion Administrativa", n° 183, 1979, pages 103-133. Although it is true that the precautions contained in the Article reduce its direct effect when faced with secrecy tactics, there is undoubtedly therein an excellent leverage, in accordance with the fundamental right of information and the freedom of expression, to oblige a change of attitude in the vision of oft-opposed administrative secrecy.

The first jurisprudential interpretation of this principle has not really been felicitous. The Spanish Supreme Court, in a decision of 16 October 1979, relying on the literal wording of the opening part of Article 105 of the Constitution ("the Law shall regulate: ...") reached the negative conclusion to the effect that:

> "... without ignoring the superior rank which the constitutional principles occupy within the normative hierarchy, nevertheless when they are declaratory of fundamental principles and the constitutional norm itself expressly states that "a Law shall regulate" access of the citizen to archives and administrative files, it is without doubt the intention of the legislator that complementary principles which develop and limit the principle of access are necessary for its application..."

To illustrate its thesis the court had recourse to an even less felicitous legal comparison:

> "... as with, for example, the freedom to circulate in the whole of the national territory, the highway code imposes limits on this freedom but is not in contradiction with it. On the contrary, it avoids absurd consequences and makes it possible for freedom of movement to become a reality ...".

The court concluded, in accordance with its thesis, by stating:

> "... It is for this reason that as long as the law has not been promulgated (that is to say the law which will develop the publicity principle contained in Article 105), it is clear that the structure or scope which must be given to the publicity principle must be as laid down in the Administrative Procedure Law of 1958...".

Professor Sainz Moreno, commenting on this decision (Spanish Journal of Administrative Law, n° 24 1980, pages 119 et. seq.) put forward several weighty arguments against this reasoning. He stated: a) that Article 105 is not limited to formulating a fundamental principle, since it has a well-defined normative content as much positive ("access of the citizen to archives and administrative

files") as negative ("except in cases concerning the security and defence of the State, investigations into criminal offences and the intimate life of others"); b) that regulation by the legislator is not an essential condition for the exercise of a right since such regulation "does not make it possible" but develops it and regulates it so that its exercise may be ordained. As long as there is no regulation, administrations must operate case by case taking the law as a model for their conduct; c) that the content of the principle is quite compatible with the Law on Procedure of 1958 referred to previously since the rights of "interested parties" - a more restrictive and demanding concept - are different from the documentary information in the dossiers which affect them, and the rights of "citizens" - an undoubtedly larger concept - in general to have access to archives and administrative files.

This is a progressive interpretation of the principle under scrutiny. In my opinion, it is juridically more correct without however overlooking the dangers of subjective interpretation which such a method could have for administrations long used to other tactics. (For the rest, it seems that our constitutional court has taken a neutral stance in the only case where it was obliged to resolve a problem concerning a hearing for citizens - sub-paragraph (a) of Article 105 of the Constitution - by refusing to identify between the nature of the "interested party" or "the party in the procedure" and the functional participation envisaged in that principle. Although the question was raised rather maladroitly and the constitutional court argued along obiter dicta lines, it is nonetheless certain that the decision is not in line with the interpretation favoured by Professor Sainz Moreno in regard to sub-paragraph (b) of Article 105. The decision is dated 8 May 1985 and published in the OJ on 5 June.)

The time has now come to state that neither fundamental rights as is the case for information and free expression already mentioned and those of a subjective nature of a less dogmatic nature, nor those deriving from Article 105 are unlimited in scope for, logically speaking, they must cohabit with other rights no less fundamental and in regard to which there is every possibility of a collision. I offer this view because the Constitution itself, and quite rightly so, has established limits to the freedom of information which forms public opinion and constitutes an institutional guaranteed principle of democracy. As the Spanish constitutional court recalled, the limits are: "respect for the rights recognised in Chapter 1, in the precepts contained in the laws which develop it and in particular through the right to honour, intimate life, one's own image and the protection of adolescence and childhood" (Article 20.4). Similarly there exists an exception to the right of citizens to have access to archives and administrative files. The content of the exception, it is true, is vague but it does not appear to exclude totally this right. As regards the exception in question, Article 105 (b) of the Constitution states that "except in cases concerning the security and defence of the State, the investigation of criminal offences and the intimate life of others". It is precisely for reasons which are scarcely defined that it seems possible to interpret the exception just mentioned in the sense of an absolute bar on the exercise of the right of access to archives and administrative files. However, this right constitutes a very important guarantee for a true application of transparency within administrations.

The adaptation of these principles and precepts as well as their exceptions to the norms in force is usually done literally. A convincing and operational development envisaging a real and definitive prohibition on administrative secrecy still remains to be formulated. These remarks are without prejudice to what I will highlight at a later stage in my conclusions.

The principles contained in the regulatory law on Spanish historical patrimony are remarkable. Article 49 of the law defines the scope of the term "document" as follows - "any form of expression in natural or conventional language, as well as any other graphic expression or sound or image brought into being by whatever type of medium including computerised media" - as well as what is to be understood as forming part of documentary patrimony - "documents of whatever era, created, conserved or assembled in the exercise of its functions by whatever type of body or organisation of a public nature, in which the State or other public companies have a majority share in the capital, and by private or legal persons managing and running public services" - and attributes consultation rights in a very generous manner.

Article 57 states in fact that consultation is free and unrestricted, "unless it affects matters which have been classified as official secrets in accordance with the law and which should not be made publicly known by express provision contained in the law, or the diffusion of the content of which could entail risks for the security and defence of the State or the investigation of criminal offences". Even in these cases it is possible to seek express authorisation for consultation (Article 57 (b)). Such authorisation may be granted even in the case of secret or restricted documents by the authority which so declares them. However, this right of access is not admissible in regard to "documents containing personal information of a police, procedural, clinical or other nature capable of affecting the security of persons, their honour, the intimacy of their personal or family life, or their own image". In these cases the express consent of interested parties or the efflux of 25 years from the date of the issue of the document is required. I should also state that even if sub-paragraph 2 of this very important principle relates to the laying down of the conditions for consolidation or for obtaining of copies to the regulations, this can in no way be interpreted as an indefinite delay for the application of this very important step towards full democratic transparency.

The provisions of the new legislation on local authorities which was approved in April 1985 must also be noted. The Article in the law relating to the bases of the local regimes requires that the meetings of plenary bodies of local corporations be held in public except where an absolute majority decides in favour of maintaining secrecy of discussions and votes on certain issues capable of affecting the fundamental rights of citizens as defined in Article 18.1 of the Constitution. It also provides that "all citizens have the right to obtain copies and substantiating certificates of local agreements and their previous history, as well as to consult archives and files in accordance with the arrangements defined in the implementing texts of Article 105 (b) of the Constitution". This very important principle adds: "refusal or limitation of this right in all cases concerning the security and defence of the State, the investigation of criminal offences or the intimate life of individuals, must be verified by a reasoned resolution".

However, the rights to information and access to files and archives which the regulation on organisation, functioning and the legal regime (Royal Decree of 28 November 1986) grants to citizens, are even more important. The texts which develop Article 18.1 (e) of the aforementioned law contain a significant number of norms for the application of these rights (Articles 180, 207 and more particularly Articles 226 et. seq.). These texts constitute, and without prejudice to excessive criticism which may be made, the most important step towards absolute supremacy of the principle of publicity for administrative action.

As stated previously provisions capable of putting in question these centrifugal movements towards the hard core of administrative secrecy coexist with these more advanced provisions. If this type of circles of freedom constantly plague this hard core, it is by no means less certain that other waves - often justifiable (although not so often justified) - act as factors which protect this secrecy zone which, for a good number of citizens, continues to be a vital constancy. The law on official secrets, by virtue of which certain agreements concluded within the Assembly of the Faculty of Law were declared secret (see, Gomez-Reino, page 131), starts from the principle that "public matters which interest us all may and must be known by all" (here I am citing the explanatory reasoning) but also from the assertion that "the necessity for imposing limitations is undeniable when prejudice affecting the public interest, the security of the State or the interests of the national collectivity may follow from publicity" (loc. cit.). The law assigns to the Government and to the senior administrative staff, in a sort of dichotomy between civil power and military power which is no longer admissible - the competence to declare a matter, an act, a document, etc secret or restricted in accordance with the degree or level of protection required. (In the recent conventions on the protection of classified information signed on 15 and 17 June 1986 by Spain, Italy and Norway the categories "confidential" and "limited diffusion" have been added.) The legislature itself may also classify any issue as "secret" (Article 1.2 of the law, but only of course in cases where such practice would not contradict the superior principles and values to which we have alluded). Individuals having knowledge of these particular issues must keep an absolute silence and if they come into the hands of the media, they must be warned of the proceeding qualification (Article 9) since "they shall not be communicated, made known or published nor their content used outside the limits laid down by the law" (Article 13). In conclusion, it must be stated, and is a very positive factor, that the law on official secrets requires - or at least recommends - that qualifying a matter as secret or restricted should not prejudice "the exact accomplishment of procedures for hearings, allegations, notifications for interested parties" - that is to say minimum individual gurantees of a procedural nature - although at the same time sanctions are laid down for cases of "infringement of secrecy by interested parties" (Article 14).

To conclude this reference, I would add that although the law has excluded the Spanish Parliament (the two chambers) from these restrictions, it is only through a recent Resolution of 18 December 1986 that the procedure for access by the Chamber of Deputies to classified issues has been regulated (published in the Official Journal of the "Cortes Generales" of 19 December 1986 n° 14, Series E, pages 467-468).

From another point of view, and of course for totally different purposes, there remains the clause concerning statistical secrecy which consists of a prohibition on making known or publishing official information if they are identified or could be associated with a certain individual entity. From a reading of the Spanish Legal Ordinance (in the opinion of Adoracion De Miguel, in his work "Derecho a la informacion frente al derecho a la intimidad" (The right to information when confronted with the right to intimate life), published by the National Institute for Statistics, Madrid, 1983, pages 193 et. seq.), it could be said that statistical secrecy takes priority over the right to information, a situation which is manifestly in contrast to the situation existing in the United States where statisticians complain about the continuous excess of confidentiality.

The Law on Statistics of Catalonia of 9 July 1987 provides an even more recent example of this situation. Articles 25, 26, 30 and 31, in particular, make it possible to be certain that although very important, the "strategies of secrecy" have not yet been abandoned in public administrations.

Although other data and judgmental elements could be brought to bear here, such as the problematic survival of the undefined obligation of civil servants' secrecy which continues right up to the members of the personnel assemblies and the delegates of the personnel "for everything concerning issues which the administration expressly declares as being of a reserved nature even after the expiry of the mandate " (Article 10 of the law of 12 May 1987, O.J. of 17 June on the working conditions and participation of civil servants in the public administration). What sort of restricted matters could be involved here, beyond those which the official secrets law allows to be so qualified? Is this a revival of secrecy or an open gate to the genesis of new strategies for administrative secrecy? It is not easy to reply to these questions without bearing in mind the data which has been previously synthesised.

Commenting on a famous decision of the French Conseil d'Etat - the Affaire sieurs Rousselot and others; reg. n° 77.710, of 1972 - Mssrs. Labetoulle and Cabanes stated that "public collectivities erect two sorts of barriers for the citizen: the silence of their officials and the secrecy of their files..." and they plead for an unreserved change. On the same date, certain media (for example the daily newspaper Ya of 21 March 1972) revealed that since 1945 in the United States - the paradise it would seem for free access to files, dossiers and documents - "about 1 billion documents have been declared secret by the North American Government". So, one finds as regards permissive laws, and this is a strange contrast, perhaps too many secret documents while with restrictive laws the number is much less. Once again, that makes one think of the adequacy of all possible efforts aimed at remodelling strategies and conduct. It is well understood that it is only by joint or collective action on the part of the different States - and this forum might be a magnificent occasion which should not be lost - which can facilitate the desired change. Of course, and given what has already been stated, one can only recognise that the Spanish legal rules are going in this direction.

COMMERCIAL SECRECY AND INFORMATION TRANSPARENCY

Report presented by

Mr. Jérôme HUET
Professor at the University of Paris V

INTRODUCTION

The traditional importance of commercial secrecy and its legislative implications, the recent appearance of concern for transparency and its current development

For a long time business secrecy has been seen to be a basic token of the proper functioning of any society in which there is industrial and commercial activity. Everyone is entitled to protect his manufacturing processes and sales techniques and third parties are forbidden to procure them by fraudulent means. Manufacturing secrets are protected in almost all countries (in France, their disclosure by the manager, a clerk or a worker of the enterprise is penalised under Article 418 of the Penal Code; a comparable provision, with an apparently wider scope, can be found in Article 204 of the German Penal Code, applicable to any employee, worker or apprentice who has disclosed a commercial or industrial secret, and in Switzerland in Article 162 of the Penal Code in connection with the violation of manufacturing of commercial secrets which are designated in English and American law vary broadly as trade secrets).

The State itself, whose prosperity is largely dependent on the development of these activities, is not indifferent to this requirement. Thus in France, the Penal Code covers crimes and offences against public welfare and describes as guilty of an act of treason anyone who "delivers to a foreign power or its agents, in whatever form and by whatever means, an item of information, object, document or process which should be kept secret in the interests of national defence" (Article 72), and as guilty of a crime or offence against private persons "any manager, clerk, or factory worker who has communicated or attempted to communicate to foreigners or French nationals residing in foreign countries secrets of the factory in which he is employed" (Article 418, para. 1), to an even greater extent than "if these secrets have been communicated to French nationals residing in France" (Article 418, para. 3). And because it is in the nature of the information, which forms part of the secret, that it is transmitted through people and not only through documents, the code also indicts "anyone who, with a view to causing harm to French industry, has caused managers, clerks or workers of an undertaking to depart to foreign countries" (Article 417).

More recently, moreover, in the context of the international application of the so-called anti-trust laws, several countries have adopted measures forbidding their enterprises to communicate information of an economic nature, in the course of a procedure instigated by a foreign public entity, under pain of penal sanctions. Thus in France, a law dated 16 July 1980 "forbids any individual of French nationality or residing habitually on French territory and any manager, representative, official or agent of a legal entity having its registered office or establishment there from communicating ... to foreign public authorities any documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which is likely to cause harm to the sovereignty, security, and vital economic interests of France or to public order ..." (on this text, which modifies a law of 26 July 1968 concerning maritime trade, and on its "counter-legislation" nature designed to temper extra-territorial implementation of the American law, see B Audit, La loi française et les conflits de souveraineté, Revue de jurisprudence commerciale, numéro spécial, 1984).

It is true that commercial secrecy, which is generally speaking understood as covering all the know-how accumulated by an enterprise in the industrial field and in customer research and the knowledge of the means required to preserve it, is directly justified, very naturally, on the basis of de facto imperatives and de jure reasoning. It is in fact essential for everyone to be able to use his own intellectual resources in order to maintain or improve his position on the market: the components of competition postulate the use of secrecy. And at the same time, in law, this accumulation of own intellectual resources appears as an extension of the material property of the entrepreneur to the operating methods initiated by him. Both economically and legally, therefore, the validity of business secrecy appears to be beyond dispute.

However, for a number of years now, in fact since the beginning of the post-industrial era, a concern for transparency in the activities of economic operators has become increasingly apparent. In contrast to individuals, whose private lives are increasingly threatened by the potential for annoyance and disclosure afforded by the new techniques of recording, reproduction and communication, and whose privacy the law has sought to protect to a greater extent (see in France, Article 9 of the Civil Code on privacy, and Articles 368 et seq of the Penal Code penalising certain forms of use of visual or sound recording apparatus), also enable them to retain a desirable degree of anonymity (see in France, the Laws of 1982 and 1985 on audio-visual communications, guaranteeing freedom of access to programmes and anonymity in the choice of users), commercial activities must now be brought out into the open: much information, in particular of an accounting nature, has to made available to the public by all enterprises.

Similar developments are taking place, in various countries, in the administrations. And it is well known that administrative secrecy, although a more recent phenomenon, is decreasing in line with commercial secrecy. However, the reason for the change is not the same in both cases. In administrative matters, the dominant concept is doubtless that every citizen forms part of the body of the State: he is to some extent entitled to have access to the information in the latter's possession because in a way it belongs to him. Such is the true meaning of the laws governing access to administrative documents, the right to which is not subject to proof of any special interest or any grievance on the part of the person availing himself of such facility (see, in France, the law of 17 July 1978 establishing, in Article 1, "the right of any person to information ... in regard to the freedom of access to administrative documents of

a non-nominative nature"; in this connection, and on many other points, see "La transparence administrative", by B Lasserre, N Lenoir and B Stirn, 1987, p 106). Certainly, this affords some protection for citizens against arbitrary decisions by the authorities, but the requirement, which incidentally has been satisfied by other means and for a longer period of time, cannot alone justify the mechanisms introduced. In the main, what such legislation provides is greater participation for citizens in public life, rather than better protection.

In commercial matters, other considerations are at the origin of the weakening of the prerogatives traditionally linked to secrecy. These are of several kinds. The most important lies perhaps in the very imperatives of competition, which at first seemed to justify quite naturally the right to secrecy. The free play of competition requires that certain information, enabling economic operators to make an objective comparison of the conditions under which suppliers of goods or services operate, shall be made available to everyone. Hence the obligation, laid down for instance in the French ordinance of 1 December 1986 (which on this point largely resumes previous law) for "any producer, wholesaler or importer" to "communicate to any retailer who so requests his price list and conditions of sale", which must include "the conditions for settlement and, if applicable, any rebates or discounts" (ordinance on the freedom of prices and competition, Article 33, which is also contained in a section headed "transparency and restrictive practices"; on this text, see inter alia, Decocq and Pedamon, Jurisclasseur commercial, numéro spécial 1 bis, 1987). This is only one example, and much other information must nowadays be made available to the public in economic life. And this information militates in favour of various kinds of entity, whether it be another enterprise operating in the same sector, a final consumer wishing to obtain the best possible conditions for a purchase or a saver wanting to invest capital ...

A further reason for less commercial secrecy there again limits the scope of an argument which apparently militates in its favour and is derived from the right of ownership: the operation of the enterprise is a function not only of the acquisition of material goods, but also of the labour provided by the employees. Also, the ownership of the enterprise itself, since the advent of joint stock companies, is shared between many investors: the shareholders or other associates are therefore participants in the undertaking. These two categories of people are therefore entitled, and increasingly restrictive provisions ensure that this is so, to obtain information in regard to the activities of the undertaking.

A third consideration, finally, is the interest of the local authority: the latter should be able to obtain various information for purposes of taxation, trade and industry guidelines, good relations with foreign countries ... Hence the fact that commercial secrecy cannot be relied on in dealing with certain administrations, and the need for enterprises to declare to the authorities a number of the operations they are carrying out.

In this situation, midway between the right to business secrecy and the obligation for the enterprises to demonstrate transparency, one may well wonder what influence is likely to be exerted by the development of the new techniques of informatics and communications. In one sense, it would seem to be a good thing that the phenomenon should help to strengthen the trend towards the circulation of information that already exists: telematics, in particular, can only improve access to the commercial information which is already available, but in ways which do not always facilitate the consultation of that information. Although there is no legal change, the relevant factors are on the increase. And the development of data banks, on prices for instance, is likely to give full impetus to this trend.

This does not however mean that in law certain changes have not occurred or are not about to occur. Access to nominal data stored in a computer, which several countries have authorised in order to protect private persons against the computer processing of information concerning them, and which has been given international scope by a Convention of the Council of Europe dated 28 January 1981, undoubtedly opens up a breach of commercial secrecy: it has not perhaps been sufficienty emphasised that private persons now have the right to contact the enterprise in order to ascertain whether the card indexes contain information concerning them (particularly the card indexes of customers or prospects), and more particularly to have the data concerning them modified if necessary. This is an intrusion into processing demanding commercial secrecy, since the data relating to the various interlocuters of the enterprise constitute a source of value to it, to the extent that their misappropriation for the benefit of third parties is generally subject to penalties (in France, through the offence of breach of trust, if the act is attributable for instance to an employee).

Moreover, in the case of the use of lists of customers which are liable to be used for mail-shots or made available for that purpose, the French union for direct advertising has laid down that the persons involved may ask to have their names deleted, so that they do not receive advertising through the mail (compare the Recommendation of the Council of Europe of 25 October 1985 concerning the protection of personal data used for the purposes of direct marketing. Article 3.1 of which suggests that "the data subject has been informed directly or by some other appropriate means at the time of the collection or at some later stage of the possibility of transmitting the data to third parties and unless he has objected"). Certainly these are only case by case "spot" derogations from commercial secrecy, but they are indicative of a certain concern for transparency.

In another context, it is to be feared that the increasing use of computers to process data constituting commercial secrets, linked to the transmission potential afforded by telecommunications, may accentuate vulnerability of enterprises, which are increasingly exposed to piracy. One of the major considerations involved in the development of these new techniques today, which is of direct interest to undertakings for the protection of their intellectual capital, is therefore the prevention of computer fraud.

Conversely, it is of note that the industries involved in the new information technologies prosper under the secrecy which surrounds the innovations they develop and the systems they market. Whereas traditionally, inventions covered by a patent must, in return for an operating monopoly granted to the author, be communicated to the public in order to encourage progress, software, since it is protected in most countries by copyright, is not subject to this constraint. Moreover, most of the technical know-how deployed by the manufacturers of data processing systems is merely kept secret so that competitors cannot reassemble the elements and offer compatible equipment. This situation also gave rise to a particularly significant case involving the Commission of the European Communities and IBM in December 1980, following complaints made from 1977 on by various undertakings in the computer sector: the procedure for infringement of the rules of competition was set aside in view of several commitments made by IBM in August 1984, including one to communicate well in advance information relating to the interfaces of certain of its systems (System 370 and interconnection with the systems networks architecture) so as to enable competing manufacturers of compatible equipment to connect hardware and software of their design to these systems (see for instance in this connection Les Echos, 3 August 1984, "La CEE oblige IBM à dévoiler ses petits secrets à ses concurrents").

It is therefore difficult to determine at the present time the respective proportions of secrecy and transparency in commercial activity, particularly as there is at first sight no precise legal definition of either.

PART ONE

Legal definition of the concepts of secrecy and transparency through their varied applications

Although secrecy and transparency can be described in vague and general terms, it is less easy to give a precise legal definition of them in view of their very varied and modulated applications.

Initially, one would be tempted to say that a secret is information which a person is justified in keeping to himself, whereas transparency involves an obligation to communicate information to others; but it can be seen that these definitions are already inadequate, since on the one hand, when a person is entitled to keep information to himself, the question remains as to whether it can be communicated to a third party whilst at the same time retaining its secrecy, and on the other hand, since information tends to be transparent it is still necessary to determine who may have access to it, unless it is to be available to everyone.

a. Legal approach to the concept of secrecy in commercial matters

It is apprently easier in the first place to seek to define secrecy, since the concept already has legal applications. In fact, however, this concept is often used in a sense different to that which it has in commercial matters. It is generally the secret entrusted of necessity to others which the law seeks to protect by requiring the recipient not to disclose it: this is the case in the matter of professional secrecy, particularly in medical matters (in France the rule is set by Article 378 of the Penal Code, which expressly specifies not only doctors but also any other recipient of secrets, for instance notaries or bankers: in connection with this professional secrecy, see Vouin et Rassat, Droit pénal spécial, 1983, No. 247 et seq). The legal rule is here expressed through an obligation, which is generally subject to penalties, and it is aimed at activities conducted by persons who are frequently the recipients of confidential information.

Quite different in principle is the approach required in the case of business secrecy. Here secrecy is seen particularly as a right for the holder of the information: the rule is expressed in terms of prerogative and not obligation. The idea is that the enterprise, notwithstanding the transparency which is increasingly required of it, is justified in refusing to communicate information which forms part of its intellectual capital, its strategy or its methods. It can even be said that in this field the right to secrecy is the principle, the need to inform others and therefore to communicate or disclose information which is relevant only when covered by a rule.

It is only contingently that the secret in itself takes the form of an obligation on those who take part in the activities of the enterprise or with whom the enterprise is in contact, for instance employees attending meetings of the Board of Directors who are bound by confidentiality (see Guyon, Droit des affaires, 1986, Nos. 324 and 335), or auditors bound by professional secrecy. Generally speaking, moreover, if this obligation exists it is because such persons have access, by force of circumstances, to secret material, and not so much because the secret material is entrusted to them.

Much of the information that any enterprise is entitled to keep to itself is moreover solely shared by the managers or the technical teams. And the rules designed to protect manufacturing secrets, by forbidding staff to disclose them, tend to stengthen this prime prerogative. It only has to be specified that in order to be classified as secret, the information in question must be known only to a limited number of persons, and that the enterprise wishes to preserve it as such.

However, it must be possible to communicate information involving business secrecy, because it is of appreciable economic value. Such communication will of course be selective, destined for certain specific interlocutors and often subject to a charge. But the important thing is that it should not thereby lose the de facto protection imparted by secrecy. It can be achieved by contract law. For instance, clauses can be inserted in conventions on the communication of know-how or in licences for the operation of address indexes, obliging the co-contracting party to keep the information supplied confidential and not to communicate it to third parties. The result is some protection for the original holder of the secret, but with some limitations in the case where a third party, who is therefore not bound by any contractual obligation, finds himself in possession of the information in question: no action can be taken against him.

This is why in many cases there may be a preference for the de facto protection afforded by secrecy, a legal protection of information of value to the enterprise through patent rights or copyright when this is possible.

In the final analysis, business secrecy covers a number of items of information which are accessible as such to a limited number of persons and which the enterprise on the one hand is entitled to keep to itself, whilst at the same time being protected partly against certain unauthorised disclosures, and on the other hand may communicate to such co-contracting parties as it wishes to have the knowledge, subject to the latter keeping it secret as well.

b. Legal approach to the concept of transparency in commercial matters

Transparency, on the other hand, is not the subject of any legal application as such, and it is therefore even more difficult to define. It is only through various mechanisms that the need for it emerges. There may be others, but two main legal techniques are used for this purpose: the right of access and the obligation to give publicity. But whatever process is used, the main aspect is an obligation on the holder of the information to make it available to others.

The right of access is a minor and "spot" method of transparency: it enables a person, under defined conditions, to consult information access to which he might otherwise be refused. This is illustrated inter alia in relations with the administration, and that should have some effect on enterprises in the public sector, and in regard to the nominative data mentioned above. Transparency applies here from person to person, between the person who must respect the right of access and the person who avails himself of it; but the effects stop there, and for instance in the case of administrative documents, the law lays down that the applicant may not divulge the information given to him in order to derive commercial benefit from it (Article 10 of the above-mentioned Law of 17 July 1978: "the exercise of the right of communication ... does not include, for its beneficiaries or for third parties, the possibility of reproducing, disseminating or using for commercial purposes the documents communicated").

Legal publicity is the preferential method of expression of transparency, and in fact the most emphatic (on existing rules in commercial matters and the difficuly of "reconciling the right to information with the right to discretion", see Guyon, Droit des affaires, 1986, No. 920 et seq). Its object is to make information available to everyone, under given conditions which give everybody the opportunity of easy access. This is the mechanism which has been used for a long time by the authorities before making their decisions or standards mandatory, and it is important to note that institutions having the characteristics of independent administrative authorities, which are currently being developed, are obliged to publish their recommendations or opinions, together with an annual report in general, and this helps to encourage the transparency of information of public origin.

Publicity obligations are also applicable to private persons, at least when they carry out economic activities: in France, this applies to the accounts and balance sheets of commercial companies, which must be lodged for this purpose with the registrar of the commercial tribunal during the month in which they are approved, and then annexed to the register of trade and companies (Article 293 of the Decree of 23 March 1967 on commercial companies has provided for this in general terms since 1968 for joint stock companies, and a Decree of 17 February 1986 requires the registrar to inform the public by means of a notice published in the Official Bulletin of civil and commercial announcements; this obligation was extended to limited companies by a Decree of 30 July 1986; on these provisions, see Guyon, op cit, No. 925, who nevertheless considers that "the financial publicity field is still fairly small"). Moroever, these requirements to publish are reinforced when the enterprise makes a public call for funds (Articles 294 et seq of the Decree of 23 March 1967 quoted above, which do not call for lodgement but for actual publication of these accounts); also in this respect, the Commission for Stock Exchange Operations may bring to the notice of the public any comments or information it considers appropriate concerning them.

Between these two procedures, there is a whole range of other possibilities with variations and modulations which reflect varying degrees of concern for transparency.

The declaration requirement which applies in France for instance to associations, press bodies or telematic services, is similar to the publication requirement insofar as anyone may obtain the information. But a declaration may have to be addressed only to certain persons, generally public authorities: this is the case for relations with the French Ministry of Industry, and more particularly to the Institut national de la propriété industrielle, in respect of transfers of technology abroad, contracts for which must be lodged (the requirement is in fact vindicated in the area of exchange control, since funds can only be recovered from abroad if this requirement has been met). Again in the field of international trade, pursuant to rules applicable in France and in most of the industrialised countries, there are requirements, as regards the high technologies and particularly for computer products, for export licences, the issue of which is subject to the production of appropriate information regarding the goods concerned prior to their dispatch from France (and certain exports require special authorisation from COCOM, which consists of representatives from more than 15 Western countries and Japan). In these cases, however, the data are only made available to the recipient of the declaration.

Another procedure for transparency, wider in scope, may be found in the requirement to hold certain information at the disposal of others. This usually concerns co-contracting parties of the enterprise, as in the case of the "retailers" specified in the French Ordinance of 1986 on prices, who are entitled to receive price lists and conditions of sale from the suppliers (ordinance quoted). But there may be a requirement vis-à-vis the public in general, and the measure often tends to protect consumers: thus a Decree of 24 July 1984, implementing the last banking law adopted in France, declares that "credit establishments shall be responsible for bringing to the notice of their customers and the public the general banking conditions governing the operations they carry out" (this refers to banks and financial establishments as a whole and the requirement doubtless explains why the latter now show on the statements they issue to their customers the valuation days applicable to the various operations recorded in the accounts).

Moreover, it is communication in various forms that is required of enterprises in regard to the various types of information destined for those privileged interlocutors, ie the employees, who contribute to their expansion by means of their work, and the shareholders, who participate in the capital. It would be interesting these days to make an accurate comparison of the types of information to which either of these two categories may have access. It would no doubt transpire that the employees are more entitled than the shareholders to be kept informed of the activities of the enterprise (in this connection see G Virassamy, Secret des affaires et droit à l'information, to be published), but what is clear is that in this case the beneficiaries of the transparency constitute a category of persons who are entitled to receive at the same time, and by the same procedures, the information they require to enable them to carry out their work in the enterprise.

Finally the transparency required of the enterprise is often achieved by the exercise of powers of investigation or enquiry which are the prerogative inter alia of the administrative or economic authorities. This is the case in particular pursuant to the French Ordinance of 1 December 1986 on the freedom of prices and competition, which reorganises the procedure applicable in the matter of trusts or amalgamations before the new Council for Competition and also provides for interested parties the option of submitting to the latter "any planned amalgamation or any amalgamation likely to prejudice competition, inter alia by the creation or consolidation of a dominant position" (ordinance quoted, Article 38).

These various applications which can be associated with the notion of transparency indicate that the latter is expressed legally by an obligation to communicate information given to its holder, which can operate in various ways which reflect, on the one hand, the diversity of its recipients, who may be named persons, the public in general, categories of persons to be protected or public administrations, and on the other hand, the multiplicity of the objects pursued by the legislator in imposing such communication. More than business secrecy in itself therefore, the transparency required of undertakings is difficult to describe as a whole, since the concerns which trigger the various mechanisms used involve the satisfaction of a very large number of objectives which may have little relation to each other.

It is nevertheless possible, on the basis of these legal definitions, to determine the main functions which are assured in commercial matters by the existence of a right to secrecy and the requirement to provide a certain transparency, and also, no doubt, to conclude that these functions are still inadequately assured.

PART TWO

Secrecy: instrument for the protection of the intellectual patrimony of the enterprise and its commercial strategy

What constitutes commercial secrecy has been recently defined by the Institute of Law Research and Reform of Edmonton, in a report by a federal and provincial working party submitted to the Attorney General of Alberta and addressed also to the assistant Attorneys General of the other Canadian territories (Les secrets commerciaux, Alberta, 1986, Canada, French version, pages 2 et seq), as "identifiable commercial and technical information held secret with a view to economic benefit": in fact, the authors observe, the enterprise deploys certain, often considerable, resources in order to obtain an advantage over a competitor in the manufacture or marketing of products or services. The report refers to four main categories of secrets: those linked to the composition of a product, the technological data of a process or a manufacturing technique, strategic commercial information on markets or lists of customers, and specialist compilations of information which are not known as such to the public. It also deplores the fact that notwithstanding their increased importance in modern economics, these secrets are ill-protected and are not covered by a separate set of specific rules. In fact, and this is valid in many other countries, they are generally covered by the application of rules with a general scope derived from contract law, the law of civil liability or penalties such as that for breach of trust. Also, as the authors emphasise, these mechanisms are difficult to implement in the absence of pre-existing relations between the undertaking concerned and those who should be required to observe the secrecy, so that they provide no answer to the hypothesis in which a third party acquires in good faith information which has been misappropriated, nor does it seem possible to apply them to the case of industrial espionage (at least in Canada, see the above report page 6).

A similar finding, to the effect that legislation on industrial espionage is in general insufficient and inadequate in relation to current needs, was reached by the Assembly of the Council of Europe, in its Resolution No. 571 of 3 July 1974 relating to the protection of manufacturing and commercial secrets, in which a secret is described as "any manufacturing or commercial information which is of value to a firm or private person in their non-public possession, with the exception of information already protected". This resolution emphasises the generally inadequate nature of legislation on industrial espionage and proposes inter alia, in a model law, the application of penalties for any "act committed for the purpose of unlawful investigation, appropriation, communication or utilisation of a secret, by a person not authorised to do so by the person entitled to such secret" (Article 3).

Thus defined, the subject of the secrecy proves to be close to what is usually described in French doctrine as "savoir faire", or "know-how". This covers "knowledge for which a person, wishing to save money and time, is ready to pay a certain price", or, more precisely: "technical knowledge which can be transmitted and is not immediately accessible to the public" (Mousseron, Répertoire commercial Dalloz, V° Savoir faire, 1977, Nos. 4 and 5). And it is well known that nowadays, not only because of the cost of patents, but also probably in order to avoid making public information on their processes or methods, enterprises often prefer to protect the techniques they use by secrecy, under the heading of know-how.

Consideration of know-how is also linked in a way to the question of the protection of information as such. This is currently the subject of much discussion in France and also in other countries, and its solution involves two kinds of reasoning: the first is that, since information is not material, it is difficult to accept that classic offences like theft can be applied to its misappropriation (see inter alia M-P Lucas de Leyssac, Une information seule est-t-elle susceptible de vol ou d'une autre atteinte juridique aux biens? Recueil Dalloz 1985, Chronique p. 43, in which the author appears to favour the application of the rules of theft; contra, J Deveze, Le vol de "biens informatiques", Semaine juridique, 1985. I. 3210, "Les secrets commerciaux", report quoted p. 8: "to the question, can information be the subject of theft?, traditional English, American and Canadian law replies in the negative"; see also P Catala, The "ownership" of information, Mélanges Raynaud, 1985, p. 97 et seq), the second resulting from the fact that there are special rules for the protection of certain types of information which fulfil certain specific conditions, particularly patents and copyright, so that it is hardly logical to accept concurrently a general principle of appropriation of information of any kind.

The difficulty of protecting know-how or information is even more acute in France in that there is no express legal recognition of commercial secrecy (in the same connection, see Crémieux, Le secret des affaires, "L'information en droit privé", travaux de la conférence d'agrégation, L.G.D.J., 1978, p. 457 et seq, No. 1) and its violation is subject to penalties only in respect of the manufacturing processes referred to in Article 418 of the Penal Code.

These definitions and comparisons tend to lead to the conclusion that in any case there is little similarity between the need for enterprises to benefit from legal protection in respect of various information from which they derive part of their economic strength and the need to safeguard the privacy of individuals, as set out in the European Convention on Human Rights, Article 8, which states that "everyone has the right to respect for his private and family life, his home and his correspondence" (see also, in the sense that there can be no assimilation of business secrecy to the secrecy of private life, Crémieux, Le secret des affaires, "L'information en droit privé", travaux de la conférence d'agrégation, L.G.D.J., 1978, p. 457 et seq, No. 3). Although comparable problems may arise for both categories of persons, for example in regard to the intrusion of third parties on private premises (in France, for instance, case law assimilates the act of entering a factory without permission to violation of domicile), the secrecy of correspondence by mail or telecommunications, or the rectification of erroneous information (French courts, on the basis of the common law of liability, give legal entities the right to obtain such rectifications in the case of an error in a data bank, even although the law on data processing and freedoms makes provision for such a right only for individuals), it is difficult to talk of the "privacy" of an enterprise.

One of the first concerns expressed in regard to commercial or business secrecy is a certain literary property of the enterprise which is representative of economic wealth through the progressive accumulation of technical data, organisation methods or market knowledge. More precisely, it would appear that there are two types of such secrets: in addition to knowledge acquired through research or experience, which cannot always be appropriated pursuant to a system of ownership such as patent or copyright, there is what might be called the commercial strategy of the enterprise. This covers all the decisions taken or projects in hand in regard to the choice of products, contractual relations with sub-contractors, canvassing of categories of customer, methods of publicity ... This second type of information, which definitely cannot be protected by any system of literary property, is no less important than the first, and the question is indeed whether the enterprise has sufficient means to keep to itself this information which helps it to justify its economic position, and the disclosure of which may cause it considerable harm.

Moreover, the observance of business secrecy does not raise the same difficulties for both categories of information. In the case of intellectual knowledge, the major imperative today is to further consideration of the possible appropriation of information which does not come under patent or copyright, and therefore to proceed to a critical analysis of the conditions of application and the current effectiveness of these two main modes of literary property. This question has arisen in the case of software, or computer programmes: the solution adopted in most countries, including France, has been to extend copyright to this new type of creation, and so to proceed by a sort of extrapolation to one of the existing property systems. But the question remains in the case of many other groups of information or elements of knowledge, the development and use of which are favoured by informatics. A very ordinary example of this is the lists of customers or other card indexes of addresses, which are very widely used today and are themselves increasingly traded.

Such knowledge is doubtless already the subject of some protection, particularly through the application of penalties. Prevention of violation of manufacturing secrets by an employee of the enterprise and in certain countries apparently also violation of commercial secrets in general (see the provisions mentioned in the introduction), will help in this connection. In France, the offence of breach of trust, which is applicable to the various categories of persons bound to the enterprise by a contract, whether it be a work contract, a contract of hire, a contract of agency or mandate (Article 408 of the Penal Code), has been applied to misappropriations of customer card indexes, which were considered by the judges as being assimilable to an item of merchandise because of their economic value. And a recent decision has even penalised as theft a reproduction made by an employee of plans of plant manufactured by an undertaking, regardless of whether or not the models were covered by patent (Chambre criminelle de la Cour de Cassation, 29 April 1986, Bulletin criminel No. 148). It is also possible, in the case of misappropriation, to seek compensation through civil reparation on the basis of liability or unjust enrichment, and decisions rendered in France show that such penalties have a certain value, particularly where misappropriation takes place during talks conducted with a view to the conclusion of a contract between two enterprises.

However, the protection of the intellectual capital of the enterprise certainly remains fragile. Although it is probably too soon to hope that a legal theory of information, defining general rules regarding its appropriation, may make it possible to devise appropriate solutions (in the sense that "the reluctance to make information directly subject to legal rules is probably perfectly justified", see: Legal problems arising from the transfrontier flows of data, OECD 22 June 1981, report prepared by MM Bing, Forsberg and Nygaard), indirect methods of safeguarding can nevertheless be envisaged.

In particular, the penalisation of computer fraud would be a useful instrument in the campaign against industrial and commercial espionage. A bill recently received a first reading in the National Assembly in France, the current wording of which provides in particular for a penalty of imprisonment for two months to one year for "anyone who has had fraudulent access, directly or indirectly, to an automatic data processing system". The charge is therefore likely to apply to anyone who has misappropriated information contained in the memory of a computer, and it is independent of any ownership which may have been established in connection with such information (the text is to be shortly submitted to the Senate, see J Huet, "En France, le projet de loi sur la fraude informatique ...", Revue de droit de l'informatique, 1986, No. 3).

At the same time, and more specifically, it would be useful to return to the proposals of the Council of Europe - and this would be an opportunity for France to fill an unquestionable gap - concerning the protection of manufacturing and trade secrets: the broad definition of what is covered by secrecy as "any manufacturing or commercial information of value to the undertaking" appears suitable (although it is conjectural whether it covers all aspects of commercial secrecy, see below), and there is also justification for the penalising of any person "not duly authorised" who obtains such information for purposes of communication or use.

Moreover, the recommendation mentioned has the value of emphasising the importance of misappropriation of secrets by former employees of the enterprise. This is in fact a more redoutable source of misappropriation than that which is consequent upon the laying off of staff (see in connection with informatics, the report by Y Serra, "La protection du patrimoine intellectuel de l'entreprise: obligation de non-concurrence et autres clauses contractuelles", in the fourth meeting on informatics law in Nanterre, Informatique et relations de travail, Economica, 1986, p. 165 et seq). The model law assimilates the use of the secret by an unauthorised person to its use by an employee or former employee of the holder of the secret (Article 4). This latter point should probably be examined in more detail, since the recommendation does not appear to deal with the case of communication to a third party by a former employee of the enterprise.

In the same way, more consideration should be given to the use which might be made of information covered by secrecy by a third person having obtained knowledge of it by legitimate means (for example having acquired it from an apparently genuine holder). The model law assimilates this case to that of use by a former employee. It is also true that it is one of the most glaring weaknesses of protection through secrecy that it is powerless against persons with whom the enterprise has had no prior relations, who might be assumed to have an obligation to respect this secrecy. However, it appears difficult to penalise in this way a genuine third party, and to do so outside rules governing the appropriation of the information in question which might make this law demurrable for everyone. In the absence of such literary property, it has to be accepted that, like tangible property in respect of which possession is title, even if it has been acquired from a person holding it illegally, information can be validly transmitted to whoever receives it under conditions in which he is justified in believing that his interlocutor was entitled to dispose of it.

This is one reason which leads me to think, in the case of this first category of information, the secrecy of which can be assured by protection and which constitutes the literary capital of the enterprise, that there would be every interest, in order to give it better protection, in reconsidering the mechanisms of literary property so as to encourage their development on new bases. There is no reason to doubt that it would be possible today to accept the appropriation of card indexes of addresses, statistical data banks or basic know-how, and to penalise their misappropriation by third parties or their unauthorised use by rules approximating to counterfeiting, without requiring that the information in question should have any originality of expression or should satisfy any condition of novelty. It would seem sufficient, in order to ensure protection and contingent penalisation, to find that a person had appropriated an economic asset at the expense of others in order to avoid making the requisite investment.

In the same context, it may also be thought that it is probably better from the economic point of view to ensure the protection of knowledge by rules of appropriation, which do not preclude its dissemination, rather than through secrecy alone, which can only be effective if the information is kept out of reach of third parties (in the sense that "if information is also rarely offered on a market against payment, the reason is that it is generally developed in select confidential circles where, in the absence of adequate protection of literary property, its retention is considered as the best guarantee against piracy", see: "Les flux transfrontières de données: vers une économie internationale de l'information?, by

A Madec, Problèmes politiques et sociaux, No. 406, janvier 1981, La documentation française, p. 8, in which the author also emphasises "the importance of detailed international study of the right to information" and the fact that "the implementation of national information policies will certainly move back the commercial frontier of the market and the legal frontier of secrecy": and see also: "les flux transfrontières de données: vers une économie internationale de l'information?", by A Madec, followed by "Essai sur le statut juridique des informations" by P Leclercq, Informatisation et société No. 12, 1982, La documentation française).

This question does not arise in connection with the second category of information subject to business secrecy, which has to do with the commercial strategy of the enterprise. Since this is a matter of decisions relating to products, relations with contracting parties, canvassing or publicity, no literary property can be considered, and the mechanisms of common law are also of little practical use in the case of acts counter to the interests of the enterprise: in French law, for instance, breach of trust cannot be invoked in the absence of misappropriation of an item of property for the benefit of others, and it will be difficult to use the rules of unjust enrichment. Only civil liability might offer some means of defence.

Nevertheless, violations of such commercial secrets are to be feared, and industrial espionage may have very pernicious consequences in this connection. The idea of protecting them by a specific charge penalising the violation of secrecy by those who may have access to it therefore appears to be the only effective measure. It is not however certain that the model law contained in the resolution of the Council of Europe of 3 July 1974 will be able to guarantee such a result since it specifies as being covered by secrecy "information ... of value to the undertaking" (above Resolution, Article 1) and it is difficult to consider decisions or projects of a commercial nature as having an economic value which can be assessed, as opposed to knowledge acquired or studies carried out by the undertaking. It would therefore be useful to improve the wording on this point so as to ensure a better interpretation of this aspect of business secrecy.

A final difficulty, which affects both the intellectual capital of the enterprise and its commercial strategy, is to draw the line between the secret which merits protection and the transparency to which economic operators must be subject. The question may arise even in regard to the techniques or know-how developed by the enterprise. The case involving the Commission of the European Communities and IBM (mentioned in the introduction) illustrates this well: in order to stop proceedings, this company agreed to supply to its competitors information on the interfaces of the systems developed by it, thus revealing technical data concerning its own products. The increasing complexity of certain industries, the sub-division of equipment production in a single sector, or the overlapping of techniques used in complementary sectors of activity, as can be seen for instance in informatics and telecommunications, may make this type of information communication increasingly necessary in the future.

The line between secrecy and transparency is certainly more difficult to determine in the case of strategy of the enterprise since this notion may cover all kinds of relations with third parties and some of these links must, for the purpose of maintaining competition, be subject to surveillance by the public authorities so as to ensure that they do not constitute trusts forbidden by the law.

PART THREE

Transparency: essential element in the regulation of competition and the protection of general interests

Business secrecy and the need to reinforce its protection, to satisfy the legitimate interests of enterprises, must be reconciled with a certain degree of transparency in commercial activity which corresponds to pressing social and economic needs. It is pointless to list in detail the information requirements which benefit the employees or shareholders of an enterprise, its co-contracting parties or the public in general, or indeed to list the hypotheses in which the administration must or may receive information concerning its activity: they are innumerable. They demonstrate that economic life, and particularly its accounting and financial aspects, is or should be conducted increasingly in the open (see in this connection Saint-Alary, Le secret des affaires en droit français, travaux de l'association Henri Capitant, Le secret et le droit, 1974, p. 263 et seq, Virassamy, Secret des affaires et droit à l'information, to be published).

In regard to the internal operation of the enterprise and therefore relations with those who work in it or invest in it, the need for the circulation of information now appears to be manifest (even though difficulties of detail may appear: see for example recently, in regard to the introduction of new technology in the undertaking, the difficulty of determining what should be communicated to the works council, H-J Legrand, "Les enjeux de l'expertise technologique", report to the fourth meetings on the law of informatics in Nanterre, Informatique et relations de travail, Economica 1986, p. 51 et seq). In this context, moreover, transparency only operates within the enterprise, since in principle the information communicated does not usually leave it, as a requirement of secrecy is imposed on its recipients. Nevertheless it is true, particularly as regards the shareholders, that there may be a danger of commercial secrets becoming known to competitors of the enterprise.

When information has to be communicated to the public authorities, on the other hand, it is clearly transmitted outside and the notion of transparency takes on another dimension. The actual object is to satisfy interests higher than those of the enterprise or its members, and often to maintain the free play of competition, but here again, the members of the administrations receiving the information required are bound to secrecy pursuant to the rules imposed on them by their statute or special provision. It may however be that there is in certain situations a risk of the disclosure to third parties of information which should remain confidential. This is the case in France regarding the facts which may be brought to the notice of the Council for Competition when various enterprises are likely to be "interests" (Article 21 of the Ordinance of 1 December 1986 on the freedom of prices and competition, mentioned above) and when, the procedure being subject to a full hearing (Article 18) and having to respect the rights of the defence, these various persons may consult the file and be notified of the report, accompanied, if necessary, by the documents on which it is based (Article 21). The difficulty under the pressure of previous law has already been emphasised (see notwithstanding the somewhat imprecise nature of the paper: Forgoux, Droits de la défense et droit au secret des affaires dans les procédures en matière de concurrence, Gazette du Palais, 1979. 2 Doctrine, p. 482). Provision has now therefore been

made for the Chairman of the Council to "refuse the communication of documents jeopardising business secrecy" (Article 23); but the text adds: "Except when communication or consultation of these documents is required for the procedure or the exercise of the right of the parties", which seems to restrict singularly the scope of the exception; see also, regarding the application of the trust law in relations with the European Communities and in the matter of the publication of the decisions taken in the matter, Saint-Alary, quoted above, p. 275), whilst resuming the principle previously raised whereby the parties are liable to the penalties in Article 378 of the Penal Code covering professional secrecy in the case of disclosure of the information of which they obtained knowledge during this procedure (Article 24).

It is incidentally not rare in France for the legislator, when he places upon enterprises in a profession a declaration requirement concerning certain aspects of their production, or gives the administration the right to inform the public of facts concerning their activities, to adopt measures to preserve any secrets that may be involved. Thus the Law of 12 July 1977 on the monitoring of chemical products, which now calls for a declaration to be made to the administration prior to manufacture for commercial purposes or to the import of chemical substances, and states that producers or importers must communicate to it any information indicative of new dangers regarding these substances, lays down that "the administrative authorities shall hold secret information relating to the exploitation and manufacture of the substances and preparations, and shall ensure publicity in an appropriate form for any information of a toxicological nature obtained during examination of the files" (Article 6, Recueil Dalloz, legislation p. 316; this text also provides that persons having access to these files or information shall be bound by professional secrecy under the terms of Article 378 of the Penal Code).

Apart from this type of difficulty, the main stake in commercial transparency is probably now information for the public in general, and it would seem that this could be considerably improved. The comment is valid not only for relations between professionals and for economic or financial information on enterprises. It can also be made in regard to relations with consumers. Recent progress has certainly been considerable, and in France various measures have been taken to provide better information on the products and services offered by the professionals. In regard to credit, for instance, provisions for the protection of consumers oblige suppliers to give details of the actual total rate charged. For several years now, the banks have also included in their statements to their customers the valuation days relevant to the various operations carried out. But much other information of a technical or commercial nature on the characteristics and quality of products or services could be made available to distributors and especially consumers. At the same time, with the aid of the comparative and statistical processing potential afforded by computers, this information could be set out in a form which would facilitate comparisons between suppliers, permitting the variety of services offered to be assessed. It would thus be possible for instance, in the case of the most commonly used consumer goods, to initiate a concept of global cost indicating, on the basis of the price initially invoiced to the purchaser, the total anticipated cost to him of using the item for a certain number of years. In terms of statistics established by the producer, this would include not only the initial investment but also the repair and maintenance costs required to keep the item in good condition during the period in question. This indication could be mandatory for the vendor in certain sectors and for certain products, and optional in others.

It would thus appear that, although secrecy in economic relations is a necessity and its protection should be strengthened, it must leave room for wide transparency in commercial information, the demand for which may increase considerably.

COMMERCIAL SECRECY AND TRANSPARENCY OF INFORMATION

Co-report presented by

Mr. Ignacio QUINTANA CARLO
Professeur at the University of Zaragoza

In accordance with the organisational arrangements envisaged for this Colloquy, I see my role as Co-rapporteur as being limited to making a few observations on the report presented by Professor HUET and, accordingly, to help stimulate the discussions. However, and like the other Professors from the Zaragoza Law Faculty who have intervened during the Colloquy, I believe that, parallel to my role as "initiator" or "provocateur" of the discussions which the report of Professor Huet will certainly occasion, it would also be extremely interesting to devote some time to showing how the theme of commercial secrecy and transparency in the area of information is regulated in Spanish law.

I. Professor Huet's report, highly informative and full of suggestions as it is, takes a broader perspective than is normally adopted when this subject is being discussed. I think that Professor Huet has shown, indeed with maximum clarity, how the binomial secrecy/transparency is seen as a phenomenon comprising opposing forces within the framework of the life of an enterprise (a term which not only includes commercial activity but also industrial activity, even the activity engaged in by certain professionals). The secrecy/transparency dichotomy is located in a situation of permanent dialectical tension. This phenomenon is even more difficult to analyse systematically since, on the one hand, the very concepts of secrecy and transparency have not yet been worked out definitively and, on the other hand, the aforementioned forces characterising the relationship between the two concepts is influenced quite significantly by legal policy reasons.

Within this rather vaguely defined framework, mention must be made of how enterprises see the concept of secrecy. It is conceived not exclusively in terms of an obligation incumbent on persons participating in the activity of an enterprise (other manifestations of this type are found elsewhere, for example in Article 499 of the Penal Code in regard to the disclosure of secrets; in Article 65.2 of the Workers' Statute concerning professional secrecy of the members of the board of an enterprise; and in Article 12 of the Royal Decree of 25 January 1984 (Official Journal of 16 February 1984)) and imposing on everyone who knows of the preparation of a share offer for public acquisition an obligation to maintain secrecy right up until the moment when this is made public. It is also to be seen in terms of a right attaching to the owner of the information - a right which Professor Huet has clearly emphasised is based on the interest (which may be economically evaluated) which every enterprise has in refusing to communicate information which forms part of its intellectual capital (for example "the know-how"), strategy or methods (cf. Article 65 of the Spanish law on limited companies) and which authorises the Chairman of the Board to refuse the disclosure of information requested by a shareholder when this might prejudice social interests.

Since Professor Huet has, for obvious reasons, placed great emphasis on French law, I would like to make some additional brief observations on the evolution of secrecy and transparency in the business world of the European Economic Community (it may be noted that at the present time emphasis is placed more on transparency than on secrecy). My analysis is essentially concentrated on three areas: company law, the law governing the securities market (a new systematic category halfway between the law governing limited companies and the law governing stocks and shares) and consumer law.

As regards company law, it is today a permanent feature in all countries with a market economy that information relating to companies has ceased to be one of the rights of the shareholder (a right of an instrumental nature which allows him to exercise all those rights conferred on him by law: voting rights, the right to dividends, a right to refute contracts and agreements concluded by the company, etc). It has transformed itself into a veritable obligation incumbent on the company (known as "disclosure philosophy" or "information philosophy"). The measures adopted up to now by the Commission of the European Economic Community in the area of stocks and shares and which are designed to bring about the greatest possible degree of transparency in companies which have or intend to have their shares quoted on the different stock exchanges provide ample testimony of this: Commission Recommendation (77/534/EEC) of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities (Official Journal no. L 212 of 20/8/77); Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (Official Journal no. L 066 of 16/3/79); Council Directive of 17 March 1980 (80/390 EEC coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (Official Journal no. L 100 of 27/4/80) and, in particular, Council Directive of 15 February 1982 (82/121/EEC) on information to be published on a regular basis by companies the shares of which have been admitted to official stock exchange listing (Official Journal no. L 048 of 20/2/82). These measures should be completed by other instruments such as the proposal for a directive submitted by the Commission to the Council of Ministers on 29 April 1976 for the coordination of laws, regulations and administrative provisions regarding collective investment undertakings for transferable securities (Official Journal no. C 171 of 26/7/76) and the proposal for a Council Directive coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered for subscription or sale to the public (document no. C 226 of 31 August 1982), as modified by the proposal submitted to the Council on 19 June 1982 (document no. C 26 of 31 August 1982). As may be seen, there is a whole range of norms fundamentally governed by the idea that the public investor must have information which is legal, correct, clear, sufficient and published in good time so as to enable him to invest his savings in shares which can be regarded as trustworthy to the greatest possible extent regardless of whether he does so from the point of view of profit, maintenance of the liquidity or investment security.

As regards the law governing the stock market which is intimately linked to what we have just discussed, the EEC Commission has also paid particular attention to the phenomenon characterised by dealings in transferable securities which are carried out by what may be called "insiders". Since such individuals occupy positions within a company they are likely to have "privileged" information or, to put it another way, information capable of affecting the share quotations which a company owns in the market. Commission Recommendation (77/534 EEC) of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities laid down that individuals normally operating in the stock market are obliged to behave fairly in accordance with the code's objective even if to do so would deprive them in certain cases of short-term gains. In addition to the code, the Commission is working on other instruments such as the proposed directive which it submitted to the Council on 23 December 1985. This instrument envisages the publication of information before the acquisition or transfer of a significant part of the capital of a company which is quoted on the stock exchange (document Com (85) 791 final). The publication must contain a certain amount of information on the individuals who are capable of influencing, sometimes decisively and to a considerable extent, the direction which a company is taking. The investors may thus have a more precise idea of the life of the company in question. A preliminary draft directive was also prepared in 1974 on acquisition of shares offered to the public (document XI/65/74). However, this preliminary draft instrument, which deals specifically with dealings carried out by insiders, has been shelved. In conclusion, since 1983 the Commission has created a working party charged with studying whether or not it is useful for the EEC to adopt measures in this area and, if so, to determine the different measures to be adopted. (Reply of Mr. Tugendhat for the Commission to a question raised by Mr. Wedekind, document no. C 257, 26/9/83, p. 25.) Given the silence of the White Paper (Com (85) 310 final - June 1985) on the realisation of the internal market in regard to insider trading (no Community action is envisaged therein), there is nothing today to allow one to presume that the Commission will embark on short-term action in this field.

Finally, as regards consumer law - beyond the importance which the right to information has as an essential consumer right - there exists a draft article on electronic funds transfer (EFT) and the protection of consumers who use means of payment geared to this technology (document XI/213/86, rev. 2), as well as a draft recommendation of the Commission establishing a European code of conduct in the area of electronic payments (document III/2357/86, rev. 2 of 25 November 1986). The two drafts, which follow the rules adopted by the Council of Europe both in the Data Protection Convention and in Recommendation 1037 (1986) on data protection and the freedom of information, contain norms defining the sort of information which may be stored, the length of time for which it may be stored, and, in particular, the purposes for which it may be stored. The latter point is of major importance given that the information stored by credit card issuing bodies may be used not only for purposes of electronic funds transfer but also for other purposes such as the selection of clients and, indeed, even its sale to third parties (this issue assumes particular importance, for example, in cases where banking institutions act as holding companies for shops, insurance companies, tour operators, etc, which use the information stored to enable them to select new clients). The solution reached in the draft Community provisions has been inspired by what is called the "principle of purpose specification" as highlighted in Article 5 of the Council of Europe Convention.

II. As regards Spanish law, it is clear in the light of the characteristics of the phenomenon under discussion that it cannot be said that there exists norms regulating secrecy and transparency for the life of enterprises. As with other legal rules the only thing which may be done in this field is to examine the commercial juridical instruments in their entirety and observe the guiding principles in regard to secrecy and transparency in the life of enterprises.

When embarking upon examination of this whole area, the first problem which confronts the analyser is the determination of the very concept of commercial secrecy which constitutes a generic category (Oberbegriff) encapsulating all those secrets which are characterised by the fact that they revolve around the economic organisation which we call enterprise or business (see J.A. GOMEZ SEGADE, El secreto industrial ("know-how"), Concepto y proteccion, Madrid, 1974, pages 41 and ss.). It is possible to distinguish three types of commercial secret, even within the framework of this generic category: secrets which refer to the technico-industrial sector of the enterprise (manufacturing processes, repairs or assembly, manual techniques for the realisation of a product); secrets which are of concern to the purely commercial sector of the enterprise (lists of clients, suppliers, price calculations, etc); and secrets relating to other aspects of the internal organisation of the enterprise as well as its relations, knowledge of which would be of value to competitors, but which does not constitute property per se (relations with the personnel of the enterprise, the financial situation of the enterprise, plans for the conclusion of contracts, etc). It is undoubtedly the case that only the first two types of secret are of real interest for our work (industrial secrets and commercial secrets). Nevertheless, this does not mean that the third category of secret referred to should not be protected, possibly by having recourse to the law on unfair competition. Commercial and industrial secrets, and here it is interesting to stress that an important part of Spanish doctrine treats industrial secrecy and "know-how" as identical concepts, are essentially protected by two types of norms: on the one hand penal provisions regulating the breach of secrets, and on the other hand, the law on unfair competition.

As regards norms of a penal nature, the relevant provisions are essentially found in Articles 499, 192 bis and 497 bis of the Penal Code (the latter two provisions were introduced by the Organic Law of 15 October 1984 which modified this legal framework). These norms lay down penal sanctions for the disclosure of secrets in a way which causes prejudice to the owner by the foreman, an employee or workman of a factory or other industrial establishment (Article 499) and, moreover, in regard to the illegal installation of telephone taps or the use of technical devices for listening, communicating, storing or reproducing sound carried out by individuals (Article 497 bis) as well as by public authorities, their servants or agents without the necessary legal authorisation (Article 192 bis).

The norms regulating unfair competition are essentially contained in Articles 131 et. seq. of the Law on Industrial Property of 1902, Article 3 (d) of the Law on the suppression of restrictive trade practices of 20 July 1963 and Article 10 bis of the Convention of the Union of Paris on the protection of industrial property of 20 March 1883, the text of which was revised in Stockholm on 14 July 1967 and the direct application of which for Spanish law divides our best legal commentators. The fact that these norms do not contain a general prohibitive clause on anti-competitive behaviour presents a very grave disadvantage in Spain.

Special reference must be accorded to the theme of banking secrecy which constitutes in all probability one of the most frequently cited circumstances involving secrecy in the life of an enterprise. However, it is very important to point out that banking secrecy involves a secret, the conservation or disclosure of which does not affect the banking institution but rather the privacy of the client who has deposited his funds in a particular bank.

This obligation to ensure secrecy only figures indirectly in Spanish legislation and, to be more precise, in the provisions of a public nature which provide for the investigating powers of public authorities or their servants (Article 41 of the law of 14 November 1977 as developed by the Ministerial ruling of 14 January 1978, Article 111 of the general law on taxes as modified subsequently on 26 April 1985, the first additional clause to law 14/1985 of 29 May on the tax regime for certain financiers, and Article 6 of the Royal Legislative Decree of 28 June 1986 (1.298/1986) adapting Spanish norms to the legal regulations of the EEC). The reference in Article 23 of the Statute of the Spanish Bank to banking secrecy does not make it possible (contrary to the opinion of certain commentators and to the decision of the Supreme Court of 28 November 1928) to apply the concept to other banks.

Moreover, this theme has been the subject of recent judicial rulings, both by the ordinary courts (the decision of the administrative contentious chamber of the Audiencia Nacional on 18 June 1983 and the decision of the Third Chamber of the Supreme Court of 29 July 1983) and by the constitutional court in a decision of 26 November 1984 (110/1984) in a Constitutional appeal ("Amparo") 575/1983 involving tax investigation. In this case it was considered improbable that banking institutions had an obligation to inform the tax authorities given the abstract nature of the annotations (deposits and withdrawals) carried out on a current account.

Running parallel to these provisions protecting commercial secrecy and taking up the issue of transparency, one begins to observe that for some years now Spanish law has tended to reinforce transparency within enterprises. Without claiming to present an exhaustive treatment of this issue, some examples of this tendency can nevertheless be cited:

In the context of information relating to companies, one can quite clearly see how in the course of the last few years the legislator has moved from conceiving of information in terms of a shareholder's right to viewing it as a veritable obligation imposed on a company vis à vis the market. In the same order of ideas, since the publication of the Commercial Stock Exchange Regulations, adopted by the Decree of 30 June 1967, an obligation has been imposed by Article 47 on "companies and legal persons which have admitted securities to the official stock exchange listing to send each year to the governing body of the stock exchange reports, balances, profit and loss accounts and the results of this exercise". A series of norms (Decree of 10 July 1978) has so far been published which exclusively concern information which must provided by companies intending to place on the market fixed rate shares (Royal Decree no. 1847 of 5 September 1980 which extends the information obligation to the issue of variable rate shares and the Ministerial rulings of 17 November 1981, 26 February 1982, 24 May 1983 and 17 July 1984, which develop and complete the preceding provisions). These norms have gradually harmonised our law in this area with that in other neighbouring countries, as well as with the content of the relevant Community Directives which will be referred to at a later stage.

In the second place, and in regard to auditing, it is extremely significant that the preamble to the preliminary draft law now being elaborated intended to introduce into Spanish law the Community Directives in this area and, primarily, the eighth Directive of the Council of Ministers (84/253/EEC), begins by stating that "transparency in economic/accounting information of an enterprise is a factor which is coterminus with the economic system of the market envisaged in Article 38 of the Constitution".

Similarly, in the context of the law governing the stock exchange, the preliminary draft law to reform this market introduces into our stock exchange system a national Stock Market Commission which is very similar to the Italian and French institutions and, like them, has been inspired by the North American Securities Exchange Commission. These bodies are entrusted with the development, supervision and inspection of the stock market, as well as of the activities of anyone involved in the stock market. The law provides that the primary function which the Commission must carry out relates to "ensuring stock market transparency, the correct formation of prices on the stock market and the protection of investors, as well as promoting, ensuring and, if necessary, publishing information which is of interest to investors". To do this, the Commission may order share issuers, operators and other companies dealing in the stock market to immediately make known to the public facts or information which are capable of affecting dealings or, if this is not done, to do it itself (see Article 5 of the preliminary draft law).

However, as regards industrial law the tendencies which are appearing - not only in Spanish law but also in European patent law - show clearly the emergence of a greater protection for industrial secrets, which are taken to be any knowledge or technical rule which is kept secret although not protected by an exclusivity right. This protection is seen not only in the way in which the breach of industrial secrecy is defined in terms of a specific example of unfair competition but also in the way in which it envisages the reality of "know-how" as a patrimonial value of the enterprise which must be protected even by negative means (essentially by avoiding industrial espionage). In this line of ideas, reference can be made not only to the Munich Convention on European Patents but also to the very recent Spanish law on patents of 20 March 1986, in which the protection of "manufacturing or business secrets" of the Head of an enterprise appears to accept the placing of a limitation on the investigatory powers of the judicial authorities. This seems to emerge from both Article 61 (the extension of the protective framework of the patent from the processing stage to the product directly obtained) as well as from Article 130.4 (which relates to the verification of facts as one of the limits to the powers of the judge).

Finally, as regards consumer law the general law for the defence of consumers of 19 July 1984 follows very closely the preliminary programme of the EEC aimed at creating a policy for protecting and informing consumers (Resolution of the Commission of 14 April 1975, document no. C 92 of 25/4/75, pages 16 et. seq.). The law establishes as one of the "fundamental rights" of consumers and users "correct information on the different products or services and education and disclosure so as to facilitate awareness and knowledge of their appropriate use, consumption or enjoyment." Thus information appears to be a duty imposed on the Heads of enterprises. To be effective and sufficient, presentation/labelling of a product does not suffice per se. The consumer must also be informed about the content. Accordingly, one of the criteria for evaluating a defective

product is the way in which it is presented (cf. Article 6 of EEC Directive on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products (document no. L 210 of 7/8/85) and Article 3 of the aforementioned general law for the defence of the consumer which provides that the consumer or user must be given prior knowledge by appropriate means of risks which may occur as a result of foreseeable use of goods or services. As regards banking services, no-one would doubt the importance for clients of banking institutions of information on "charge days" or on the total amount of financial charges incurred in credit agreements, the latter type of information constituting one of the reasons which led the EEC to promulgate Council Directive 87/102/EEC of 22 December 1986 on the approximation of the laws, regulations and administrative provisions of the member States concerning consumer credit (Official Journal no. L 042 of 12/2/87, pages 48 et. seq.).

III. Even if the drawing of conclusions in this area is an extremely hazardous exercise given the acknowledged lack of precision of the very concepts of secrecy and transparency and the influence which political notions specific to each of our countries and to our epoch have on legal norms (the American and British phenomenon known as "deregulation" obviates the need for me to discuss this point further), I dare to go beyond the conclusions reached by Professor Huet. In doing so, I risk being seen as audacious. I would like to point out that vis à vis what is happening within the framework of administration, privacy rights and commerce, the tendency seems to be orientated clearly towards transparency. However, there exist two significant exceptions subject to different reasons:

- the protection of industrial secrets (know-how) which are guarded as if authentic inventions were involved (this said, non-patented);

- the protection of the secrecy of data held by companies on their clients. It is not protection of the company which is sought by databank protection but rather of the data subject. This sort of protection is based on the legal provisions regulating the right to privacy.

All this appears logical if account is taken of the fact that transparency is imperatively required for the protection of all the interests which are capable of being affected in the life of enterprises:

a) The market which in its entirety must be transparent, or, to put it another way, to provide all information which economic operators require to enable them to develop in the market.

b) The competitors, in so far as secrecy is not intended to protect the intellectual patrimony of the Head of the enterprise (for example the know-how).

c) The consumers, who must be given all kinds of information which enables them to chose between the different products and services which are made available in the market.

d) The public administration, in particular the tax authorities, so as to enable it to apply its tax policy in the most favourable conditions.

e) The national economy itself.

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PROTECTING INFORMATION DISCLOSED IN CONFIDENCE - TOWARDS A HARMONISED APPROACH TO THE LEGAL RULES GOVERNING PROFESSIONAL SECRECY

Report presented by

Mr. Paul SIEGHART,
Barrister, Visiting Professor at King's College, University of London

> "Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets."
>
> -- the Hippocratic Oath

INTRODUCTION

1. This report is one of several prepared for the Council of Europe's XVIIth Colloquy on European Law in Zaragoza, Spain, the theme of which is "Secrecy and openness -- individuals, enterprises and public administrations". The theme was chosen in the light of the decision by the Committee of Ministers to follow up the Parliamentary Assembly's Recommendation 1012 (1985) on harmonisation of the rules on professional secrecy, which reads as follows:

> The Assembly,
>
> 1. Considering that the right of respect for private life, guaranteed in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, is of utmost importance to a democratic society;
>
> 2. Aware that technical progress and scientific evolution not only contribute to the progress and welfare of mankind, but also provide the means to threaten fundamental rights such as the right to respect for private life, of which the right to respect of professional secrecy forms a part;
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> 3. Considering that the protection of professional secrecy is an essential part of the right to respect for private life;
>
> 4. Considering that certain developments in society such as data banks and increased bureaucracy may conflict with professional secrecy;
>
> 5. Considering that domestic legislation on the subject differs widely in the Council of Europe member states;
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> 6. Convinced that a harmonisation of the rules existing becomes more and more urgent in the light of technical progress, international integration and growing mobility of people;
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> 7. Welcoming the Resolution on professional secrecy, adopted by the European Parliament on 13 April 1984,
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> 8. Recommends that the Committee of Ministers prepare a recommendation to governments of Council of Europe member states setting forth minimum standards for the protection of professional secrecy, based in particular on the following principle:
>
> > "Any person having knowledge of a secret, by reason of his particular status or office or of his profession or skills, that the affected party, expressly or by implication, wishes to be kept secret is covered by the obligation of professional secrecy.

> Exceptions to this obligation must be provided for by law or ordered by a regular court, and be in accordance with Article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

2. It was thought appropriate to discuss this subject in the wider context of the law governing secrecy and openness generally, and of its impact on individuals, enterprises and public administrations. For this reason the Colloquy will receive other reports -- on a functional approach to the legal rules governing secrecy and openness, on secrecy within public administration, and on commercial secrecy and information transparency.

COMPETING VALUES, AND THEIR SOCIAL OBJECTIVES

3. Before one can begin to formulate even minimum standards for the protection of professional secrecy, one must identify the competing values involved, and consider the rights, obligations, and freedoms which flow from them. The two main values here are the right to privacy cited in the Parliamentary Recommendation and guaranteed by Article 8 of the European Convention, and the right to receive and impart information guaranteed by Article 10. Article 8 provides as follows:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. As against this, Article 10 provides that:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

5. Articles 1 and 13 of the Convention impose obligations on the member States of the Council of Europe to ensure the protection of both these rights, and where they appear to conflict with each other the task of the member States is then to try by some means to adjust that conflict. It is precisely for this purpose that each of the Articles has its second paragraph, which allows the core right that the Article guarantees to be restricted by national laws, for

the benefit both of the specific public interests which it enumerates and of the private rights of others.

6. Legal protection for professional secrecy is *prima facie* a restriction on freedom of expression, and in particular on the freedom "to receive and impart information and ideas without interference by public authority".[1] Likewise, if there were no such protection, there would in many cases be insufficient safeguards for the right to respect for private and family life, as well as for the exercise of some of the other Convention rights and freedoms. The primary task of national rules on professional secrecy must therefore be to reconcile the underlying social objectives served by the values reflected in these Articles, imposing only those rules which are necessary, in a democratic society, to secure the maximum protection for all the rights concerned. One must therefore next examine what these social objectives are.

7. The social objectives served by Article 10 have been well described by the European Court of Human Rights.[2] Freedom of expression and information constitutes one of the essential conditions for the maintenance of the kind of free, open, and plural society which lies at the heart of the democratic European tradition. It ensures a free press, and the free flow of information both between citizens, and between them and their public authorities, which enables the citizens to make informed political choices, and the authorities to perform the tasks assigned to them in the interests of the citizens. The free circulation of information assists the making of decisions about public policy, and the continual scrutiny of powerful institutions, public and private, helps to prevent corruption and to encourage efficiency.

8. The underlying social objective of the right to respect for private life guaranteed by Article 8 may be said to be one aspect of the respect for the inherent dignity of human individuals which enables them to maintain the independent autonomy and integrity, and the defence against powerful and potentially oppressive institutions, which is essential for the development and exercise of their varied faculties, unique to each of them, and which in its turn is another necessary condition for the maintenance of a free, open, plural, and democratic society. The most comprehensive national jurisprudence on this aspect of the matter is to be found in the Federal Republic of Germany, in the context of the "right to personality" protected by the Federal Basic Law.

9. In this connection, some of the rights protected by other Articles of the Convention may also be involved in the field of professional secrecy. The right to a fair trial guaranteed by Article 6 may be strongly argued to require a right to confidential communication with a lawyer of one's choice.[3] A right

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[1] One national court has said that an absolute duty of secrecy imposed on the medical profession is an interference with freedom of expression that must be justified on one of the grounds in Article 10.2: Decision of 16 October 1972, VfGH Austria (JB 1972, 196).

[2] See, for example, the *Handyside* case (Eur. Court H.R., Series A, no. 24), and the *Sunday Times* case (Eur. Court H.R., Series A, no. 30).

[3] As illustrated by Application No. 9300/81, *Can v. Austria*, which involved the supervision of all discussions between an accused and his defence counsel because of a possible danger of collusion. It was declared admissible by the European Commission of Human Rights on 14 December 1983. The Commission found that the restriction on private conversations was excessive, and a breach of Article 6.3(c), and approved a friendly settlement including revision of the criminal code. For the Commission's

to confidential communication with a spiritual adviser may be argued to be a necessary element of "the right to freedom of thought, conscience and religion" guaranteed by Article 9, particularly the "freedom, either alone or in community with others, to manifest his religion or belief, in worship, teaching, practice or observance". The right to peaceful enjoyment of one's possessions under the First Protocol may require some rights to confidentiality about one's financial affairs. Economic, social, and cultural rights such as the rights to health and education will necessarily entail some other rights to confidentiality. It can even be (and has often been) argued that the right to freedom of expression itself should include a right for journalists not to be forced to reveal their sources of information.

10. In short, the underlying social objective of both freedom of expression and professional secrecy is essentially the same: that is, the maintenance of a democratic and plural society in which individuals are free to develop their potential, to make their choices, and to maintain their autonomy and integrity. In seeking to achieve this, both openness and secrecy have their different parts to play in different contexts.

11. Given the unqualified support of the Parliamentary Recommendation for the protection of professional secrets, the case for secrecy in this particular context need not be further argued here. Suffice it to recall that individuals frequently require the help and co-operation of professionals when they need to make important choices, and more especially when they are faced with threats to their autonomy or integrity, either from natural causes such as sickness, or from powerful elements or institutions within their society which are hostile to their interests. In order to obtain this help, they must often impart personal secrets to those professionals in confidence, and they will not be able to do this freely unless they can expect their confidences to be respected. Accordingly, unless national laws adequately protect such confidences, the underlying social objective will be imperilled.

12. This is therefore the primary task to be achieved by the national laws of the member States in the field of professional secrecy. At present, however, these laws[4] still diverge widely in respect of:

(1) the professions concerned;
(2) what secrets are protected;
(3) for whose benefit they are protected;
(4) by what means they are protected;
(5) what exceptions there are to the protection.

If there are to be even minimum standards for such laws, there needs to be some common policy about at least some of these aspects of professional secrecy. For that purpose, it may be helpful now to examine those elements of the practice of professions which particularly affect the imparting of secrets.

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reasoning, see paras. 5 and 6 of the Annex to this report.

[4] A brief summary of them is attached as an Annex to this report.

ELEMENTS OF PROFESSIONAL SECRECY

13. There are two necessary parties to every professional secret: the professional who receives it, and the person to whom it relates (who is usually, but not always, the person who imparts it). In the terminology of data protection these correspond to the "data user" and the "data subject"; in this report they will henceforth be referred to as the "professional" and the "subject" respectively. (When we come, finally, to consider the element of "exceptions", we shall need to introduce additional parties in the shape of the institutions which assert claims to breaches of the obligation of secrecy.)

14. As well as two necessary parties, professional secrecy also involves at least one other essential element: an item of information which is to be regarded as secret. In an earlier report to the Council of Europe on this subject,[5] the present author suggested separate definitions for such a secret, and for the relationships in connection with which it is communicated. Such a relationship, it was proposed, could be described as:

> a relationship requiring trust and confidence by reason of the special qualifications and skills of one of the parties ("the practitioner") and the special needs of the other ("the subject"),

and a professional secret could be defined as:

> information imparted by the subject to the practitioner, or otherwise received by the practitioner in relation to the subject, in the course of the practitioner's practice, and which the subject, expressly or by implication, wishes to be kept secret.

The final (and much more concise) formulation of both these elements in the Draft Recommendation[6] adopted by the Legal Affairs Committee in May 1985 was:

> Any person having knowledge of a secret, by reason of his particular status or office or of his profession or skills, that the affected party, expressly or by implication, wishes to be kept secret is covered by the obligation of professional secrecy

and this was the wording adopted by the Parliamentary Assembly in its Recommendation 1012 (1985).

15. We therefore now have four elements to discuss in more detail: "secrets", "professionals", "affected parties" (which, for brevity, we shall continue to call "subjects"), and the "obligation of secrecy". Finally, there is the fifth element of "exceptions" to that obligation, to which the Recommendation also refers.

"Secrets"

16. The Parliamentary Recommendation does not attempt any limitation on the *content* of a "secret", and this is surely wise. As has been previously pointed

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[5] *The feasibility of harmonising the rules on professional secrecy in Council of Europe member States*, (1981) AS/Jur (33) 1.

[6] Doc. 5419.

out,[7] secrets depend as much on their context as on their content, and there are wide variations both within and between different member States of the Council of Europe as to the matters which different individuals are known to wish to keep secret. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data singles out information about racial origin, political opinions, religious or other beliefs, health, sexual life, and criminal convictions as being especially sensitive,[8] but there are a number of other aspects -- and, in particular, legal and financial ones -- of people's affairs which many individuals in many countries regard as "private". Since it is now well established that the categories of "secrets" defy objective definition, the subjective solution of "what the subject wishes to be kept secret" seems unavoidable.

17. Most of the working papers preceding the Parliamentary Recommendation include in their discussion of "secrets" both information provided *by* the subject, and information *about* the subject. This is of course essential in the field of health care, where much of the confidential information about a subject will come from examinations or tests carried out on him or her, the results of which will initially only be known to the professional, and not to the subject. It is also congruent with the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, and consistent with one working definition of "data privacy" as "the individual's claim to control the circulation of information about himself."[9] One should, however, note that the focus of modern data protection is on the content and circulation of the personal data: the approach, very roughly, is *in rem*. By contrast, the focus of the traditional doctrine of professional secrecy is more *in personam*, on the personal obligation of a professional to maintain the confidentiality of information which he or she acquires about the subject by virtue of their relationship.

18. This distinction has important implications for the measures by which professional secrets are protected. If the protection is to extend to information of a particular type, then it may well be aimed also at people who have no relationship with the subject at all; for example, the obligation of secrecy would extend to someone who had no professional relationship with the subject, but had obtained the information as the result of an initial breach of an obligation of secrecy owed by someone who had. This certainly seems desirable in principle.

19. However, if the protection is to be determined by reference to the relationship of the information -- rather than the recipient of the secret -- to the subject, then it could in an extreme case extend even to information collected by, say, a journalist or a public official (assuming, for this purpose, that he or she is a "professional") from old, but still publicly available, records. Such information might qualify as "secret" by reason of two factors: its unavailability without a substantial research effort, and the wish of the data subject that it should be kept secret. In some respects, this effect may be thought desirable: if, for example, some incident of someone's troubled adolescence had at the time been reported in a small local newspaper, it is not immediately obvious why it should be resuscitated many years later after the subject had moved far away, and was now a long-standing and rightly respected member of a quite different community. On the other hand, it might be thought desirable to devise some boundaries for this part of the field: it is not very

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[7] AS/Jur (33) 1, paras. 50-52.

[8] Article 6.

[9] *Report of the Committee on Data Protection.*

obviously connected with "professional" secrecy as this concept is commonly understood.

"Professionals"

20. Any precise definition of "professionals" is difficult enough in a single country, and virtually impossible if one has to contemplate no fewer that 21 different countries. One method might be to list every group which is designated by law in any of these countries as having special obligations or privileges in respect of information obtained in the course of their duties. But this has at least two major disadvantages to which the Legal Affairs Committee has drawn attention.[10] One is that many of these groups have no exact, or even approximate, equivalents in other countries. The other is the likelihood that any such list would soon be overtaken by events in the form of new "professions" with plausible claims for protection of their subjects' secrecy.

21. At the same time, it must be said that the formulation adopted by the Parliamentary Recommendation is remarkably wide. To define a professional as someone who acquires a secret "by reason of his particular status or office or of his professional skills" would include not only the commonly recognised professions but also a wide variety of other trades or occupations which, though they may require the exercise of some skills, involve no special relationship, whether of trust or otherwise, with their subjects, as well as the holders of offices which may not require the exercise of any skills at all, or of any professional qualifications, or of any relationship, special or other.

22. This formulation may therefore need some further refinement before it can be used for the purpose of an international standard. It has been argued elsewhere[11] that the concept of a profession entails at least the notion of a special obligation not to put the interests of the practitioner before those of the subject, and that this is the principal factor which distinguishes a profession from any other trade or occupation, regardless of the level of skills or qualifications which are required for its performance. Other factors might be found in the degree of vulnerability exhibited by the subject and the correlative degree of power exercised by the practitioner; or in the degree of trust, and the consequent fiduciary nature of the practitioner's obligations, which the relationship entails.

23. Presumably, it is intended that bankers, accountants, and other financial advisers should be included in the definition. However, it is not immediately clear whether it is also intended to cover journalists who claim, with some justification, that they would not be able to perform their function of keeping the public informed about matters of general concern if they could be compelled to disclose the sources of their information. On the one hand, it is usually the case that secrets are confided to journalists because of their status or office, and perhaps also their skills, as journalists; on the other hand, journalists themselves generally prefer not to claim special legal privileges in virtue of their occupation. In any case, secrets are usually confided to journalists precisely in order that they *should* be given wide publicity, and any protection of a journalist's sources might therefore be said to serve the

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[10] Doc. 5419, para. 23.

[11] P. Sieghart, "Professional ethics - for whose benefit ?", *Journal of the Society of Occupational Medicine*, (1982) 32, 4; *Journal of Medical Ethics*, (1982) 8, No. 1; "Professions as the Conscience of Society", *Journal of Medical Ethics*, (1985) 11, No. 3.

primary end of freedom of expression under Article 10, rather than of respect for private life under Article 8.

"Affected parties"

24. The preparatory reports for the Parliamentary Recommendation seem to have assumed that both the professional "person" having knowledge of a secret and the "affected party" are natural persons only; at least the question of whether they should include legal persons does not seem to have been discussed. In the field of data protection, the protracted arguments about whether protection should be given to information about legal persons are familiar, and only a minority of countries now provide such protection. The principal argument in favour of limiting data protection to natural persons is that the right to privacy is a human right, and that the rights protected by commercial confidentiality are founded on values of an essentially different kind.

25. But the interests served by professional secrecy may, in at least one respect, lead to a different approach. Taking the easier question first, an obligation of professional secrecy should obviously bind a legal entity such as a corporate enterprise carrying on the profession of lawyers or medical practitioners. This could conceivably present some problems in its application to different national rules on the forms of enterprise allowed to carry out professional activities. It might also present an initial problem in determining which officers and employees of the enterprise would be bound. If it were limited to those who actually received the secrets, the protection might well be inadequate. But if the obligation was primarily derived from the nature of the information, it could presumably be imposed without too much difficulty not only on the enterprise itself, but also on any of its officers or employees -- and indeed on other persons -- who had obtained access to it, with or without authority, but with knowledge of its nature as a professional secret.[12]

26. The more difficult question is whether a legal person should have rights as an "affected party". If professional secrecy is seen purely as a human right, then it would seem that it should be enforceable only by natural persons, as data protection rights are in most countries. But if it is also regarded as having some separate functional role, such as ensuring fairness in litigation involving companies, it could be argued that legal persons also have some claim to it, at all events so far as legal advice is concerned. On balance, it may be preferable to exclude legal persons from the definition of an "affected party" for the purposes of the Parliamentary Recommendation, but separate harmonisation of national rules on the confidentiality of legal advice to legal persons may then still be needed. Perhaps this should be done in the context of "commercial secrecy and information transparency" rather than of professional secrecy.

The "obligation of secrecy"

27. One matter should be made clear from the outset: the purpose of professional secrecy is solely to protect the interests of the subject, and the claim to professional secrecy can therefore only be asserted or waived by that person. (If the subject is not competent or available to assert or waive the right, then this can only be done by some "proxy" who represents his or her interests.) Professionals may of course have their own rights to confidentia-

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[12] This would also seem to be a way of overcoming the third difficulty about the definition of "professionals" raised by the Legal Affairs Committee: see Doc. 5419 para. 23.

lity or privacy, but these cannot be asserted to protect a subject's secrets: a claim not to reveal such secrets can only rest on an obligation owed to the subject, and not on any right vested in the professional.[13] (In particular, the professional's obligation of confidentiality to the subject cannot legitimately be used to justify the withholding *from* the subject of information obtained *about* the subject. There may well be other reasons for withholding such information, but they cannot be based on the professional's obligation of confidentiality.)

28. Since the interest in maintaining professional secrecy is that of the subject, it follows that the subject can allow, and even require, the professional to disclose such information. However, such decisions must be made freely, and there are several well-known circumstances where they may be influenced by economic pressures -- e.g. the disclosure of information, usually medical, in order to obtain employment or insurance.

29. All rules of professional secrecy assume that someone who is a professional obtains information about a subject which is not generally known, and that the professional is under a general obligation (usually imposed by law) not to disclose it. The rules then go on to define the circumstances in which the professional may be *free* to disclose the information, and the circumstances in which he or she may be *compelled* to disclose it. These circumstances generally relate to the nature of the information, the persons to whom it is to be disclosed, the purpose of the disclosure, the consequences of disclosure or non-disclosure -- and who may enforce such consequences, both in terms of initiating proceedings (to enforce professional secrecy or to require its breach) and of deciding them. The obligation of secrecy should therefore take two forms: a general prohibition of voluntary disclosure, and protection from compulsory disclosure. The first requires a rule to be enforced by sanctions, the second an immunity from the sanctions that would normally be imposed.

30. These rules can encompass both formal legal rules and the ethical (or deontological) standards of particular professions. But they should have two characteristics: sufficiently severe sanctions to deter their breach, and the standing of the subject to institute proceedings for the imposition of these sanctions. In many, if not most, European countries the obligations of professional secrecy are enforced by the criminal law. Criminal penalties may well be more effective than civil ones in enforcing professional secrecy, particularly if civil remedies are limited to compensation for financial harm. But the criminal law may not always be adequate if the decision to institute proceedings rests exclusively with a public official, and the right of the subject is limited to one of complaining to that official. If it were feasible, it would be preferable to have a combination of remedies, with the subject able to initiate proceedings to enforce professional secrecy, but with public officials having the power to initiate proceedings on behalf of subjects who are unable to do so.

31. It seems that in most Council of Europe countries the claim to immunity from compulsory disclosure is asserted in the first instance by the professional. This may be satisfactory if all professionals take their obligations seriously, but it seems to overlook the fundamental fact that professional secrecy exists only for the benefit of the subject. As has been previously suggested,[14] consideration should perhaps be given to some sort of notification

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[13] In any case, there are strong arguments for saying that professionals should not generally claim rights on their own behalf, but only on behalf of those whom they serve: see AS/Jur (33) 1, para. 55.

[14] AS/Jur (33) 1, paras. 70-73.

to the subject before a decision is made to breach professional secrecy under compulsion. This is obviously not feasible where the need to breach professional secrecy is founded on the requirement for the prevention of crime or the protection of national security. But when professional secrecy is to be breached for the benefit of some of the other public interests listed in Article 8(2), as the Parliamentary Recommendation proposes, a system of prior notification may not only be possible, but also desirable. There may, for example, well be cases where the subject is willing to waive the claim to professional secrecy. Although prior notification systems could risk becoming bureaucratic and time-consuming, there could well be a compensating benefit in those cases where the consent of the subject would relieve the professional of the obligation (and possible penalty) of asserting professional secrecy, and so remove the need for a protracted and expensive adjudication of the issue. The problem of reconciling competing privacy interests by such notification is well known in data protection: the most elaborate procedure is to be found in the Canadian Access to Information and Privacy Acts.

"Exceptions"

32. In the great majority of cases, the interests of the professional and the subject in the preservation of secrecy will coincide. Difficulties only begin when other interests are asserted to override the obligation of secrecy. Two questions then arise: the first is whether the professional's own interest in disclosure (assuming there is one) justifies him or her in breaching the obligation; the second is whether someone else's interest justifies compelling the professional to breach it. In the first case a professional may breach the obligation and escape whatever penalty would normally apply to enforce it; in the second the professional must breach the obligation or be punished. Sometimes, the two cases may overlap; for example, a physician may both wish to report a contagious disease, and be compelled by law to do so.

33. There are several categories of public authority which claim to have interests that would justify breaches of the obligation of professional secrecy:

(1) Courts of law, in order to ascertain the truth about issues before them;[15]

(2) Law enforcement agencies, to prevent or detect crime, or to safeguard national security;

(3) Fiscal authorities, to reduce tax evasion;

(4) Social security authorities, to detect fraudulent claims;

(5) Public safety authorities, such as those that license motor vehicles, aircraft, factories, etc., and their operators;

(6) Public health authorities, in order to reduce the incidence of occupational diseases, and to prevent the spread of communicable ones.

34. In addition, there are institutions more generally found in the private sector which claim such an interest:

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[15] According to the Legal Affairs Committee, this seems to be the area where the laws of the member States of the Council of Europe differ most widely: see Doc. 5419, paras. 15-18.

(1) Insurance companies, in order to assess the risks they underwrite;

(2) Employers, to improve personnel selection;

(3) Research institutions, to advance the pursuit of knowledge;

(4) The press, to reveal wrong-doing.

35. The Parliamentary Recommendation recognises that the interests protected by professional secrecy are not supreme, and advises that:

> exceptions to this obligation must be provided for by law or ordered by a regular court,[16] and be in accordance with Article 8.2 of the European Convention on Human Rights and Fundamental Freedoms.

36. Under that Article, such exceptions would of course have to be:

> in accordance with the law and ... necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Moreover, they would have to conform with the criteria now clearly laid down for all such exceptions by the European Court of Human Rights:[17] the State imposing the restrictions would have to show that they were required to meet a "pressing social need", pursued a legitimate aim, were proportionate to that aim, and were made for relevant and sufficient reasons.

37. But simply using the terminology of Article 8.2 would not only result in no advance on what is already required, as a minimum, by the Convention and the Court, but might be seen in some countries as an invitation for greater intrusions into professional secrecy than there presently are. Here, there is room for considerable elaboration. Clearly, some professional secrets are likely to deserve more protection than others: for example, a breach of secrecy about some routine financial advice might be justified in the limited circumstances of disclosure under court order for the detection of someone's serious crime, but not for general circulation in the absence of such an order. Besides, it is not obvious that all the public interests listed in Article 8.2 should have the same weight in allowing, let alone requiring, breaches of professional secrecy. In particular, the interest of "economic well-being" seems dangerously elastic, particularly as it could be applied to encouraging (or perhaps even requiring) breaches of legal and financial professional secrecy in a very wide variety of circumstances.

38. As previously suggested,[18] it would be preferable, even if perhaps more time-consuming, to seek general agreement on the "best current practice" justifying exceptions to the obligation of professional secrecy. The consultations with international professional associations already begun by the Legal Affairs

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[16] It is not immediately obvious how a regular court could make such an order unless it had a power to do so which had previously been "provided for by law".

[17] In the *Handyside* case (Eur. Court H.R., Series A, no. 24) and the *Sunday Times* case (Eur. Court H.R., Series A, no. 30).

[18] AS/Jur (33) 1, paras. 67-68.

Committee[19] might usefully be continued, as these associations have considerable interest in the harmonisation of standards on professional secrecy.

39. A particular example of "best current practice" may serve as an illustration of current trends in the protection of professional secrecy in Europe, and as a suitable conclusion to this report. As has previously been explained,[20] the laws of the United Kingdom on medical confidentiality have for several decades been somewhat anomalous. These anomalies were brought into sharp focus during the parliamentary proceedings leading to the enactment of the British Data Protection Act of 1984. Following several years of complex negotiations between government departments and representatives of most of the health professions (medical and dental practitioners, nurses, midwives, health visitors, clinical psychologists, social workers, and more than a dozen "professions supplementary to medicine" such as physiotherapists, occupational therapists, dieticians, radiographers, laboratory technicians, orthoptists, chiropodists, etc.), the rules of confidentiality relating to personal health information are now about to be codified in legally binding form.

40. In broad outline, these Codes will provide that personal health information (that is, information about the physical or mental health of identifiable individuals) which has been acquired by or on behalf of health professionals may only be lawfully disclosed, without the consent of the subject, for the following purposes:

(1) the provision of health care to that subject;

(2) certain essential purposes associated with health care, namely:

(a) informing a close relative of the subject's state of health, where this is in the subject's interests and the subject is not known to object;

(b) to enable someone (e.g. a social worker) to perform their responsibilities for the well-being of the subject;

(3) to prevent serious injury or damage to the health of another person;

(4) to prevent a serious risk to public health;

(5) for health care training;

(6) for health research, provided that the subject does not object, that the research has been approved by a properly constituted ethical research committee, that no damage or distress will be caused to the subject, and that the results of the research will not be made available in a form which identifies the subject;

(7) for the proper performance of certain management functions in the health field (e.g. the investigation of complaints, disciplinary proceedings, medical audit, etc.);

(8) where the disclosure is required (and not merely permitted) by law;

(9) where the disclosure has been ordered by a court, or by some other authority with legal powers to require it;

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[19] See Doc. 5419, p. 2, footnote 1.

[20] AS/Jur (33) 1, para. 27.

(10) where the disclosure is necessary for the prevention, detection or prosecution of a crime so serious that the public interest must prevail over the right to confidentiality;

(11) Where the disclosure is necessary to safeguard national security.

41. For almost all these cases, the Codes will require that the individual decision about disclosure must be taken only by the qualified health professional responsible, at the time of the proposed disclosure, for the particular aspect of the subject's care; that in all cases there should be well-established safeguards to ensure that the information will not be used for any other purpose than that for which it is disclosed; and that proper records will be kept, and suitable statistics published, of all disclosures made under compulsion of law, or to law enforcement agencies. The Codes will further require all public authorities forming part of the National Health Service to instal proper procedures for their implementation in consultation with representatives of all the relevant health professions, to adopt these procedures at meetings open to the public, to keep them under regular review, to bring them to the attention of all their employees and outside contractors, and to enforce them if necessary by disciplinary measures.

ANNEX

Existing laws protecting professional secrecy[1]

International law

1. Although there are many specific national provisions protecting professional secrecy, there are few explicit guarantees of professional secrecy in international human rights instruments.

2. Much of the existing international law on the right to a fair trial arguably entails a right of confidential communication with counsel, but express formulations of such a right are rare. Only the International Covenant on Civil and Political Rights[2] and the American Convention on Human Rights[3] expressly provide for this right (and then only in criminal trials), and of the two only the American Convention provides that the right is one to communicate "freely and privately."

3. Although the European Convention does not specifically provide such a right,[4] Rule 93 of the Council of Europe's Standard Minimum Rules for the Treatment of Prisoners[5] does:

> ... an untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose ... Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.

4. Similarly, Article 3.2(c) of the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights provides that, for the purposes of Convention proceedings, a detained person shall have the right "to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts."

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[1] The author would like to acknowledge his indebtedness to Mr. James Michael, senior lecturer in law at the Polytechnic of Central London, for his help in the preparation of this Annex.

[2] Article 14.3(b).

[3] Article 8.2(d).

[4] At the Council of Europe's Rome Colloquy in November 1975, Dr. Rudolf Machacek and the present author proposed the adoption of an Additional Protocol to make such a right explicit. That initiative was followed up a year later in the *Report on the Protection of Human Rights in Europe* (the Sieglerschmidt Report, Doc. 3852, p. 3, para. 4(c) and p. 30, para. 2), but since then no further progress appears to have been made on this front within the Council of Europe. The matter is, however, now under active consideration at the United Nations: see ECOSOC Resolution 1986/10, section XII, para. 1.(g).

[5] Resolution (73) 5 of the Committee of Ministers.

5. In *Bonzi v. Switzerland*,[6] the European Commission on Human Rights found that the right of an accused person to communicate with counsel of his choice could be inferred from Article 6.3(b) and (c) of the European Convention as a necessary condition of preparing his defence, although in *Schertenleib v. Switzerland*[7] the Commission said that the right to communicate with counsel might be subject to some restrictions. In *Can v. Austria*[8] the Commission concluded unanimously that the refusal to allow an accused unsupervised personal contacts with his lawyer was a violation of Article 6(3)(c). The Commission explained why a right to such contacts was important to the right to a fair trial:

> Several of these [pre-trial] functions are interfered with or made impossible if the defence counsel can communicate with his client only in the presence of a court official. The accused will find it difficult to express himself freely *vis-à-vis* his lawyer on the basic facts underlying the criminal charges because he must fear that his statements might be used, or might be forwarded for use against him, by the court officer who is listening. Under these circumstances it is e.g. difficult to discuss with the accused the question whether or not it is advisable in his case to make use of the right of silence, or to advise him to make a confession. The defence counsel will find it difficult to discuss the defence in general. Apart from these matters directly related to the defence, the accused may also find it difficult to raise complaints regarding his detention as he may fear reprisals if he expresses them in the presence of a court official. In this respect, it is not relevant whether such fears are justified.[9]

6. In 1985 the Commission approved a friendly settlement, commenting that:

> ... the respondent Government has undertaken to submit to the legislative assemblies a draft of new rules on the supervision in question and, when so doing, to take into account the unanimous opinion which the Commission expressed in its report. In addition, the Government has now already communicated the contents of the report to all the Austrian courts and to the prosecution authorities, thereby indicating the approach which the Government will propose should be adopted in the reform.

7. In *Campbell and Fell v. United Kingdom*[10] the European Court of Human Rights held that Article 6.1 was violated by the refusal to allow a prisoner to consult his solicitor about civil proceedings out of the hearing of a prison officer. (The Court had previously ruled that restrictions on prisoners' correspondence with persons other than a relative or friend violated Article 8.[11]) Although Fell's case does not fit the model of penitent and confessor, it is at least significant that the prohibition of correspondence by the prisoner, a Catholic priest, with two nuns, Sister Power and Sister Benedict, was found to

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[6] App. No. 7854/77; DR 12, p. 85.

[7] App. No. 8339/78; DR 17, p. 180.

[8] App. No. 9300/81; Commission's report of 12 July 1984, para. 56.

[9] Para. 56.

[10] App. Nos. 7819/77, 7878/77; Eur. Court H.R., Series A, no. 80.

[11] *Silver v. United Kingdom* Eur. Court H.R., Series A, no. 61, para. 99.

violate Article 8. If Article 8 protects the right of an imprisoned clergyman to communicate with other members of religious orders, albeit not in confidence, perhaps a right to confidential communication with a spiritual adviser may hereafter come to be developed.

National laws

8. It would be impossible, within the compass of this paper, to present either a complete or an accurate account of the laws relating to professional secrecy in all the 21 member States of the Council of Europe. Not all these countries provide for such secrecy by statute (in the United Kingdom and Ireland it arises from the judge-made laws of contract, breach of confidence, and evidence), and the distinction between the entitlement and the obligation to keep professional secrets is not always obvious. The Legal Affairs Committee of the Parliamentary Assembly[12] found two general statutory approaches: giving a general definition (such as "those to whom professional secrets are confided") with some examples (Greece, Luxembourg, France, Italy, Belgium, the Netherlands), or listing a small number of professions exhaustively (Switzerland, Denmark, Federal Republic of Germany, Sweden, Austria, Norway, Spain). Even when the law does not entitle a particular profession to remain silent, the practice may be to respect professional secrecy. For example, although English law does not clearly recognise the privilege of a priest to refuse to disclose confessional secrets,[13] there is no reported case in which a priest has in fact been ordered to testify on such matters. Again, many professions include secrecy as a part of their own professional standards, which may not necessarily have the force of law.

9. The two professions which most commonly have obligations and privileges of secrecy are law and medicine. Lawyers in most Council of Europe countries are both obliged to keep the secrets of clients, and entitled to refuse to disclose such secrets when giving evidence.[14] In the United Kingdom and Ireland this rule is subject to the qualification that an advocate must not knowingly assist a client in misleading the court, nor take part in a criminal conspiracy with the client. The Federal Republic of Germany provides a privilege against disclosing professional secrets confided to lawyers (and some other professions) by Article 53 of the Code of Penal Procedure. Denmark limits the privilege to defence advocates in criminal cases. In France the privilege is also generally observed.[15] Correspondence between lawyers is subject to an obligation of professional secrecy in France, Italy, Belgium, Luxembourg, and the Netherlands.

10. The obligation of professional secrecy for medical practitioners is as old as the oath attributed to Hippocrates (b. 460 BC) and still recited by many such practitioners on qualification:

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[12] Doc. 5419, para. 12.

[13] See *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675 at 681, per Jessel, MR.

[14] The laws on legal professional secrecy within the European Community are described in D.A.O. Edward, QC, *The Professional Secret, Confidentiality, and Legal Professional Privilege in the Nine Member States of the European Community*, Commission Consultative des Barreaux de la Communauté Européenne; and in F. D'Angelosante, *Projet de rapport ... sur le secret professionnel*, European Parliament, PE 89.134.

[15] PE 89.134, p. 10.

> Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

Most countries impose an obligation of secrecy on medical practitioners, and many allow them a privilege against revealing secrets when testifying. This is generally so in Greece, the Netherlands, Norway, Spain, Luxembourg, France, Italy, Sweden, Austria, Switzerland, and the Federal Republic of Germany, but not in the United Kingdom.[16] Such obligations and privileges are subject to two general exceptions: medical practitioners are often required by law to report information about particular kinds of crime, and they are also often required to report certain specified diseases.

11. Attempting a more detailed account of professional secrecy in so many different countries must be done with caution. Apart from problems of secondary sources and translation, some countries provide for exceptions to secrecy in detail and others by general principles only; in some countries the obligation is more a matter of professional ethics (or deontology) than of law; and assumptions about what is to be kept secret from whom may be so fundamental as to be rarely expressed. Subject to these qualifications and to any recent changes in national laws, the following is a summary of the main national provisions for professional secrecy in member States of the Council of Europe.[17]

12. Austria. The obligation not to disclose medical secrets is a part of the criminal code, and is subject to exceptions for disclosures to public health authorities, and for purposes of life insurance and social insurance. A medical practitioner has a general duty of professional secrecy, and he or she has a privilege to refuse to testify in civil proceedings, but not in criminal ones. On the other hand, there is a positive duty to breach professional secrecy and notify the authorities in the case of tuberculosis and certain other epidemic diseases such as cholera. Medical practitioners employed by public or private enterprises have a similar duty to inform employers about the medical condition of employees, in so far as it affects the employee's working capacity. Medical practitioners generally must inform law enforcement agencies of any suspected maltreatment of incapacitated persons or children under 14, as well as any suspected criminal injury or death. Beyond these relatively limited exceptions there are general principles that medical practitioners may disclose information when authorised by patients or their guardians, for reasons of public health or justice, when required to do so by law, to the social security administration regarding insurance claims, and to military authorities regarding fitness for military service. Medical practitioners are under an obligation to inform patients about the contents of medical reports on their state of health, but are not obliged to provide copies of such reports. Patients have a right to copies of reports of particular examinations, such as X-ray examinations. There is a privilege not to testify in court for priests, lawyers, notaries, and administrators of trust companies, unless their testimony is indispensible.

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[16] In *The Duchess of Kingston's Trial*, Lord Mansfield held that while a doctor might be honour-bound not to reveal his patient's secrets, he had no privilege to withhold such information from a court: (1776) 20 State Trials 573.

[17] The principal sources consulted in the preparation of this summary are CJ/SP-ME (82) 1 and the addenda thereto, PE 89.134, and a document entitled *Les sanctions de la violation du secret professionnel: une brève comparaison de la législation de certains Etats membres du Conseil de l'Europe*.

13. **Belgium.** The obligation of professional secrecy is imposed by the criminal code on physicians, surgeons, medical officers, pharmacists, midwives, and "other professions". From the caselaw, these other professions include judges, lawyers, notaries, and priests. A breach of this obligation is both a crime and a civil delict. These professionals may refuse to testify to an investigating magistrate, but only if the privilege is confirmed by a higher judge. There is no equivalent privilege in civil proceedings.

14. **Cyprus.** The Medical Etiquette Regulations 1972 establish a general obligation of secrecy for medical practitioners, but there is no privilege against compulsory disclosure in legal proceedings.

15. **Denmark.** Danish law on this subject appears to be fairly elaborate. There is a fundamental obligation of secrecy which is enforced by criminal penalties, subject to particular statutory obligations to disclose information, and to a general justification for breach of secrecy in order to protect third parties such as the relatives of a patient. The particular statutory obligations include obligations to make disclosures to public authorities about, for example, contagious diseases, venereal diseases, suspected harm inflicted by professional work, congenital malformations, death certificates, persons who are dangerous to others, serious crime, maltreatment of children, and side-effects of vaccinations. Priests, medical practitioners, and lawyers have a general privilege against breaching professional confidentiality when testifying. This can be removed with the consent of the subject, and can be overridden by a court order (but not against the defence lawyer in a criminal case).[18]

16. **France.** The obligation of confidentiality is imposed by the criminal code on physicians, surgeons, pharmacists, and midwives. A general obligation of professional secrecy has been applied by case-law to lawyers, police inspectors, bailiffs, and accountants. There are exceptions which justify breaching professional secrecy to disclose information about births and deaths, contagious and venereal diseases, accidents at work, for certificates of mental illness, and when necessary for medical treatment. In the case of lawyers, not even the agreement of the client is enough to allow or to force a lawyer to reveal a secret. This is subject to two exceptions: a court may order a lawyer to answer if the question is precise and bears on matters which are not covered by the terms of professional confidentiality, even if the lawyer invokes the privilege; and a secret may be revealed if it is for the legal defence of the person who confided it.[19]

17. **Germany.** The duty of professional confidentiality which is imposed on lawyers, notaries, and lawyers' assistants continues after the death of the client, when it may be enforced by the next of kin. Professionals also have a privilege against being forced to testify, but may be released from this privilege by the consent of the client. There is no professional privilege if the professional is suspected of complicity in crime.[20]

18. **Greece.** The legal duty of medical secrecy is enforced by criminal penalties. This is subject to two general exceptions. The first is for disclosures to public authorities as required by law, such as births, deaths, infectious disease, or crime. The second is for breaches of professional secrecy in fulfilment of a higher duty, or protection of a substantial public or private

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[18] PE 89.134, p. 10.

[19] PE 89.134, p. 15.

[20] PE 89.134, p. 13.

interest. Greek law on the privilege of medical practitioners seems to be relatively strict: Article 212 of the Code of Criminal Procedure provides that during criminal investigations a medical practitioner shall not be examined on matters of medical secrecy, and that any such examination is a nullity. Unusually, it seems that this is not merely a privilege against testifying, but an absolute obligation from which the medical practitioner cannot even be released by the consent of the patient. Article 261 establishes a privilege of medical practitioners to withhold documents concerning medical secrecy.

19. Ireland. Irish law and practice on medical secrecy is very similar to that of the United Kingdom (see below, para. 29). There is no general statutory obligation of medical secrecy, although there probably is such an obligation arising out of the laws of contract and breach of confidence. There is no privilege to refuse to disclose medical secrets in legal proceedings.

20. Italy. The criminal code imposes an obligation of professional secrecy in general terms, without specifying professions. It is an offence to breach professional secrecy without just cause, but no sanctions are imposed unless the breach causes prejudicial results. A 1953 statute provides a privilege against disclosing professional secrets in testimony for priests, lawyers, notaries, and medical professionals. But there is a power to compel testimony by such professionals if the claim to privilege is not well-founded.[21]

21. Luxembourg. As in most civil law countries, the obligation of medical secrecy is imposed by the Penal Code (Article 458). This is subject to the usual exception when disclosure of certain information to public authorities is required by law. In legal proceedings it seems that a medical practitioner may disclose medical secrets, but cannot be forced to do so if he or she claims a privilege not to.

22. The Netherlands. Dutch law on medical secrecy is a particular application of the general provision in the criminal code establishing criminal penalties for breaching secrecy related to an "office or profession", with prosecution based on a complaint from the person to whom the duty of secrecy is owed. Medical practitioners are also subject to professional disciplinary proceedings. Disclosure of medical secrets may be justified by the consent of the patient, emergency, law, or the order of a public official. There is no privilege against disclosure in legal proceedings.

23. Norway. A 1980 Act imposes a duty of professional secrecy on medical practitioners, but it is not clear what penalties there are for breaches of this. Disclosure is justified by the patient's consent, to disclose serious crime, maltreatment of children, disclosure of information to employers under relevant regulations, or for research if anonymity is guaranteed. There is a particular provision allowing medical practitioners to disclose information after a patient's death if there are "important reasons". It is not clear whether there is any privilege against testifying. There is a specific right of patients' access to their medical records. If this is refused on the ground that it would be against the interests of the patient or his family, access must be given to a representative nominated by the patient, usually a medical practitioner or a lawyer.

24. Portugal. Portuguese law imposes a duty of secrecy on medical practitioners which may be breached when authorised by law, if the patient consents, or "when absolutely necessary to uphold the dignity, rights and moral interests of both the medical practitioner and his patient." But medical practitioners are required to consult the President of the Medical Council before disclosing pro-

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[21] PE 89.134, p. 12.

fessional secrets. There is a general duty not to disclose medical secrets when testifying, and medical documents may be seized only if they are indispensable to a criminal investigation.

25. **Sweden.** Swedish law, like Danish, is rather complicated, with two particular characteristics. The first is that most, but not all, health care is provided by medical and other health practitioners who are civil servants; the second is that Swedish government documents are generally available as of right to any citizen. It does not follow, however, that medical records on individuals are available to the general public: one of the exceptions to the general right of public access is for the protection of personal privacy, and this means that individuals have a legal right of access to medical records about themselves, but not about others. This right may be restricted to avoid harm to the patient or to others. The exemption from the obligation to disclose records to the general public is reinforced by the criminal law against disclosing information orally. Medical civil servants are required not to disclose medical information by the Secrecy Act, which is enforced by criminal penalties. Similar provisions apply to medical practitioners and other medical personnel in the private sector.

26. **Switzerland.** Medical secrecy is imposed on medical practitioners and medical ancillaries by Article 321 of the Penal Code, which establishes criminal penalties for breaches of secrecy by professionals, including lawyers, pharmacists, and clergymen. Disclosures can be made with a patient's consent or by the professional's supervisory authority, such as the Health Council. More detailed exceptions are provided in cantonal laws. These usually require reporting of communicable diseases and declarations of births and deaths. Cantonal laws apparently vary in requiring medical practitioners to report criminal offences. The same appears to be the case for requirements on medical practitioners to breach confidentiality in testifying. There are also stringent laws about banking secrecy.

27. **Spain.** Unusually for a civil law country, Spain does not enforce medical secrecy by its criminal code (unless the practitioners are civil servants). The Royal Decree which provides for medical secrecy does not include sanctions for violations. The Code of Medical Ethics includes an obligation of secrecy on medical practitioners and their ancillaries, with exceptions for the ill-treatment of children, evidence to the Medical Association, or disclosures required by statute. These include notification of crimes, infectious diseases, and disclosures to employers, social security authorities, and Road Traffic Directorates in connection with driving licence applications. There is no privilege for medical practitioners in legal proceedings, although there is one for lawyers and priests.

28. **Turkey.** Turkish medical practitioners are bound to professional secrecy by the criminal code, but are also bound to disclose serious crimes, and infectious and venereal diseases, to the public authorities. There is a privilege against disclosing medical secrets in both civil and criminal proceedings, and it can only be waived by the patient. Patients have a right to an extract from their medical records.

29. **United Kingdom.** As in Ireland, there is no general statutory obligation of medical secrecy,[22] although there is an obligation of confidentiality under the (judge-made) laws of contract and breach of confidence. There is, however, a statutory obligation to observe medical ethics in the Medical Act 1978, and

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[22] However, plans are now well advanced for the codification, in legally binding form, of the rules of confidentiality relating to personal health information: see paras. 39-41 above of the main part of this report.

an obligation of professional confidentiality is a part of medical ethics (or deontology). There are no criminal penalties for unethical conduct, but a medical practitioner may be suspended or disqualified by the General Medical Council. As in other countries, there are many particular statutes which require a medical practitioner to inform public authorities about particular conditions such as certain infectious diseases, food poisoning, lead and other industrial poisoning, drug addiction, abortions, causes of death, or matters related to road traffic offences. Medical practitioners may breach confidentiality to disclose information to a patient's family, to appropriate authorities in cases of suspected crime or child abuse, or to researchers when the identity of a patient is not revealed. There may be a contractual duty for a medical practitioner employed by insurers or employers to disclose information about applicants for insurance or employees. It has been established since 1776[23] that medical practitioners have no privilege in legal proceedings, although in practice they are not often required to testify against their wishes.

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[23] *Duchess of Kingston's Trial*; 20 State Trials 573.

METHODOLOGICAL APPROACH TO THE LEGAL RULES GOVERNING PROFESSIONAL SECRECY

Co-report presented by

Mr. Juan José GIL CREMADES
Professor at the Faculty of Law,
University of Zaragoza (Spain)

Introduction

1. As Co-Rapporteur to Mr. Paul SIEGHART, I am of the opinion that it may be extremely useful, for the purpose of trying to get a better grasp of what his report is getting at, to alter the perspective in which the theme of "professional secrecy" is being discussed: the determination of some possible homogenous lines for "professional secrecy", as so decided by the Committee of Ministers, by following Recommendation 1012 (1985) of the Parliamentary Assembly of the Council of Europe. Mr. Sieghart has given us certain precise and concrete conceptual clarifications and, although he has shown in another context an interest in the theoretical dimensions of "professional secrecy" and similar themes (1), he is today addressing himself more to the legislator than to the law professor even if, and as we shall see later, he takes for granted in his approach that certain estimations as well as certain legal techniques are implied. My perspective is precisely methodological: to locate in the legal framework - both domestic and European - the legal dimensions of "professional secrecy". Once this methodological question is resolved, it will perhaps be easier to perfect the legislative technique for "professional secrecy".

2. When people speak today about "professional secrecy", they do so in a context which is different from that characterising the classic liberalism of the 19th century. This was an age when professions were also "liberal" and this presupposed a particular relationship with the general interest today which was different from that which one normally perceives. Furthermore, new technologies have rendered information of such importance in modern society that "secrecy" or "privacy" as liberal values have become relativised. The consequential danger is a diminishing of the framework of individual and social group freedoms. At the present time there exists a growing awareness on the part of individuals and groups of the socio-political consequences of the progress in computer science. It is for this reason that we begin to ask ourselves, when we speak about rights of self-determination in the context of information with regard to automatic personal data processing, whether or not we are confronting a third generation of rights and freedoms which succeed the first generation (individual rights and classic constitutionalism) as well as the second generation (social rights of constitutionalism as from 1920) and which constitute a response to the phenomenon which some would refer to as "the pollution of liberties" - or, in other words, the downgrading of fundamental rights vis à vis certain uses of technology. More precisely, the methodological horizon in which I will deal with the issue of "professional secrecy" will be provided by the location of "professional secrecy" in the context of the opposition between individual freedoms and social rights.

3. Mindful of the need to ensure clarity for my exposé, I intend to take the following approach:

a. the study of "professional secrecy" within the legal category of "personality rights" in continental law, specifically a "civil law" study, with reference to the protection afforded by "penal law" and a consequential strengthening of the ethical regulation of the secret held by professional bodies;

b. the integration of "professional secrecy" into the requirements of "privacy" which, since it is contained in the constitutional text, counts among the guarantees specific to "public law";

c. the abandonment of the opposition between "public" and "private" as a result of a new configuration of "privacy" and which furnishes elements which are valid for regulation, expurged of the notion of "professional secrecy".

"Professional secrecy" and "personality rights"

4. Initially legal science established a relationship between "professional secrecy" and a category of civil law, and thus private law, which was referred to as "personality rights". The public protection of such a secret is not perceived since the circumstances concern a horizontal relationship between an individual and a professional. The ultimate binding ratio is, of course, provided by penal law which is compatible with an ambiguous corrective power possessed by professional bodies.

The difficulties encountered by European Civil Law at the time of the construction of a legal category of "personality rights" are today recognised. These difficulties were due in particular to the claim to render compatible civil law and the law exclusively regulating property rights. The requirements of the individual, such as in regard to his honour, image or professional secrecy which prima facie did not have a patrimonial content, led to an expansion of the content of private law. To enable us to relativise the apparent "novelty" of the phenomenon which we are witnessing today, the "new" techniques of modern life also provide a reason for the phenomenon (2). Once again, the legal categories are holistic. They have, in their origin and application, a practical purpose for regulating a constantly evolving social life.

The private law character of the regulation of professional secrecy as an aspect of the protection of the private life of the individual continues to be maintained (3). It is still true that breach of professional secrecy gives rise to a breach of the intimate sphere of the individual. But what is first and foremost affected is the trust placed in the professional. In addition, the differences between "private life" and "professional secrecy" have had to be established (4): a) respect for privacy guarantees the legal protection of the individual; the obligation of professional secrecy takes on a legal form for reasons of social interest so that members of society can place their trust in professionals and communicate information to them which is necessary for the exercise of their functions; b) privacy protection applies across the board, while professional secrecy is applicable only in regard to a particular professional; c) the object of professional secrecy relates not to

what the client wishes to maintain secret but to what he must reveal to the professional, while respect for privacy is broader in scope; d) a violation of privacy takes place as a result of the intervention by a third party in the intimate sphere of the victim without the latter being able to prevent it, while the violation of professional secrecy requires that the professional knows of the secret which the victim has personally and confidentially entrusted to him. In addition, a distinction has been made between what the professional knows as a result of the exercise of his functions and what he knows when exercising them. However, the latter is not indissociable from the former. The secrecy obligation only concerns the former. The disclosure of facts of which knowledge has been gained in a fortuitous manner may constitute a failing in a moral duty.

Summing up, therefore, linking "professional secrecy" to "personality rights" is today insufficient, given the social interest of the legally protected matter.

All this appears evident when regard is had to the evolution which "the secret" has undergone in the consideration which professional bodies have given to it: beyond its proclamation as an ethical element of the profession what is of more importance today, even when attempts are being made to regulate it, is its possible breach by State intereference. Accordingly, Article 41 of Royal Decree 2090/1982 of 24 July approving the General Statute of the Bar, states:

> "1. The lawyer has the duty and the right to maintain professional secrecy.
>
> Professional secrecy constitutes for the lawyer the duty and the right not to disclose any fact nor make known any document concerning his client which has been brought to his knowledge by the latter in the exercise of his functions.
>
> 2. Should the head of a body or his statutory substitute be alerted by the judicial authority or, as the case may be, by the competent governmental authority as to the existence of a recording device in the professional offices of a lawyer, he should go to the offices and help in procedures which may be carried out while ensuring protection of professional secrecy" (6).

A similar concern, not so much in regard to the breach of a secret by a professional but rather in regard to the obligatory demand for information being made by the State to the professional, is found in the Code of Medical Ethics adopted by the General Assembly of the Spanish Collegial Medical Organisation in April 1978 and sanctioned officially by the Ministry of Health and Social Security on 23 April 1979.

The overriding of the private interest in the issue is evidenced by three factors:

a) control by the State of professional titles and the conditions for their exercise;

b) without discontinuing to protect the relationship between "professional" and "client", the regulation of professional secrecy has increasingly as a priority issue the control of the request for information by the public administration - penal, health, fiscal, police... - when such information has been given to the professional in confidence, without excluding non-obligatory requests for information made by private bodies, banks, enterprises etc. Awareness is even more significant in regard to what is termed "journalistic secrecy" (7);

c) the body of professions covered by legal policy aimed at appropriate regulation of "secrecy" is increasingly expanding. Traditionally, doctors and lawyers have constituted the two classic liberal professions. In the context of a social welfare State, the liberal nature of the medical profession has almost disappeared while, at the same time, State interference in the exercise of the medical profession has increased. To a lesser extent, the lawyer has undergone a parallel transformation. He has become more and more dependent on the State in the exercise of his functions. This evolution can, for example, be observed in the notion of compulsory legal aid which is financed by the State. In addition, since the last century, the journalistic profession has really come to the fore, with a concomitant increasing requirement for the maintenance of professional secrecy. Today - given State intervention in the economy - the need for professional secrecy to also apply to the banking profession has been reinforced. On the other hand, a progressive secularisation has displaced to a certain extent, although it is still maintained, the "professional secret" of the priest.

In any case, it does not seem to be appropriate to provide a numerus clausus of professions which may be concerned by professional secrecy. There are an increasing number of professional titles and the criteria for the award of such titles are, in addition, changing. This is one reason why a casuistic approach to this subject should not be adopted.

"Professional secrecy" within the system of fundamental rights

5. It is well known that the North American judges Samuel D. Warren and Louis D. Brandreis are accredited with the technical definition of privacy as the right to be left alone - security against any invasion of the sacred precincts of private and domestic life (8). Subsequently, Brandreis formulated the opinion that the founding fathers of the American Constitution had implicitly taken account of such a right and that individual security should be considered as a requirement of the 4th Amendment vis à vis unwarranted interference by the Government in the private sphere of the individual (9). As has been pointed out, the new concept of intimate life had, from the beginning, an ambivalent meaning: to withold from public authorities personal and economic information so as to escape tax investigations (a conservative interpretation) or to react vis à vis State use of personal information for discriminatory purposes (a progressive interpretation).

However, in any case, recognition of the earlier rights to personality as fundamental public liberties has been a decisive step forward for specifying their legal nature from a new perspective. The notion of "human dignity" provides a common theoretical context for legitimating a right to intimate life as recognised for example by the Italian Constitution (Articles 2, 3, 13) or the Basic Law of the Federal Republic of Germany (Article 1 and 2) or the Spanish Constitution of 1978 (Article 10). As regards the Spanish Constitution, Article 1.3 of the Organic Law for the civil protection of the right to honour, individual and family intimacy and one's own image, of 5 May 1982 proclaims that this right is inalienable, imprescriptible and may not be renounced. From this time onwards, given the insertion of such rights into the constitutional texts, two consequences of a legal nature are brought about:

a) Personality is not dealt with from an individualistic point of view but from the standpoint of solidarity or life in society or, as it has been said, from the point of view of "social function".

b) The legal notion of privacy, of intimate life, is more a principle than a rule. As opposed to the discipline of a non-constitutional text, it is something which is not capable of literal and rigid interpretation which would prevent any intervention in the case of new manifestations of the right which were not accounted for at the time of adoption of the constitutional norm. All this involves the recognition of the important role to be assigned to the constitutional judge since he has been entrusted with the task of making these principles of modern day relevance.

In any case, the former protection of private relations in the area of personality rights does not disappear as such, since the thesis of "Drittwirkung der Grundrechte" elaborated by doctrine and German jurisprudence and recognised in Article 9 of the Spanish Constitution which proclaims "the citizen and public authorities are subject to the Constitution and to all other legal ordinances", remains in full force.

6. In this new context of the right to intimate life, the question must be asked as to the role to be played today by professional secrecy. From the doctrinal point of view, while recognising the ambiguous nature of the term "the right to intimate life", there are very many different formulations as to its content.

a) In German doctrine, distinction has been made between the Intimsphäre (a sphere relating to that which is secret and which is breached when someone gains knowledge of facts which should have remained unknown or, in the case of professional secrecy, should not have been disclosed), the Privatsphäre (which withdraws individual and family life from publicity) and the Individualsphäre (the right to name, image, honour, etc) (11).

b) An Italian author would include professional secrecy in the reserved zone (riservatezza) which, along with solitude, intimacy and anonymity would constitute the right which we are currently discussing (12).

c) North American jurisprudence has also included within privacy "confidential information", namely the guarantee that confidential communications between spouses, between the patient and his doctor, between the lawyer and his client, between the priest and the penitent, will not be divulged (13).

d) Spanish doctrine relating to the right to intimate life has paid scant attention to "professional secrecy" (14).

7. In the Spanish Constitution, the different circumstances envisaged in Article 18 are not structured under one general heading as the right to intimate life or privacy. And the same is true of the Organic Law on civil protection of the right to honour, individual and family intimacy and one's own image of 5 May 1982. Article 7 of the Organic Law lists the different situations which are to be protected and considers among the illegitimate intrusions: "The disclosure of private information relating to an individual or a family by a person having had official or personal knowledge of such information in the course of his professional activity" (Article 4). From the Explanatory Memorandum to the Law it may be understood that what is being referred to is one of the hypotheses which "may occur in real life and coincide with those foreseen in protective legislation existing in other countries for social and technological development equal or greater than ours". It is certain that in conjunction with this reference (non-exclusive it is true) to "professional secrecy", reference is being made to telephone tapping and other more classical situations having a bearing on intimate life, image and honour. All these are subject to the same legal protection and, as such, are treated identically.

For the rest, the Spanish legislator adopts a technique which seems particularly adapted to the issue and which consists in providing, as a limitative criterium for the scope of the different circumstances the definition contained in the law. It is also appropriate to have recourse to "social customs". In this regard, the Organic Law of 5 May 1982 states:

> "Civil protection of honour, intimate life and image will be defined by the laws and social customs having regard to the area for which each person, by his own acts, ensures protection either for himself or his family."

There is no question that the subject matter of the regulation is so greatly influenced by dominant social values and by the appreciations of individuals affected that a casuistic approach would run the risk of being influenced by value judgments prevailing at the time of adoption of legislation. In addition, it could not confront new situations and circumstances which the dominant social morality considers to be legally the subject of protection. However, to concede to social customs a normative value, the scope of which must be determined by the courts, introduces fairly strong degrees of legal insecurity. There is all the more reason to be wary of such an approach since it is difficult to specify the scope of the dominant social morality in a pluralistic society which has an ideologically fragmented body of judges.

For this reason it would be desirable for the different situations and circumstances to be clearly fixed by law and constitute a numerus clausus. In addition, the judge should have recourse to social customs only as a criterium of interpretation so as to fix concretely the limits within which one or other of the legally determined circumstances applies. In this sense, and beyond the "principles" laid down in the Spanish Constitution or in the Organic Law, it can be seen that Spain lacks a specific law on professional secrecy.

8. The reference to computer science in the rights concerning privacy in public constitutional law as something affecting professional secrecy is of particular importance. Constitutional guarantees are laid down which protect citizens against technological aggression in their private life and which are compatible with the fact that in modern day society access to information constitutes a new form of freedom. Professional secrecy today assumes new dimensions in the context of this opposition between "data providers" and "databank users".

Article 18.4 of the Spanish Constitution specifically refers, in contrast to its most precise precedent - Article 35 of the Portuguese Constitution - to the fact that the law will limit the use of data processing so as to guarantee privacy and full exercise of citizens' rights. In the absence of such a law which would develop the constitutional precept, it is to be supposed that professional secrecy will also be the subject of attention in the areas which have already been envisaged in comparative law. There is more to this than the simple use and communication of personal information by public administrations. There is, for example, issues involving the protection of clients against credit companies making unjustified use of information contained in their databanks (15). The Federal German Law of 1977 on Data Protection, being of a general character, not only protects data stored in public files but also the storage of personal data carried out by private sector companies.

In the absence of specific laws regulating these issues in the majority of European countries, although in many of them legislation is being prepared or is under consideration, I would like to make one observation on the legislative technique which, in my opinion, reflects the decision of the Committee of Ministers to regulate professional secrecy in a global manner. The regulation of professional secrecy should not be carried out as an additional hypothesis to the laws dealing with this problem and other aspects of legal guarantees for private life. Nor should it be regulated as one more hypothesis within a general law on "data protection". Otherwise, we are going to find ourselves faced with an inappropriate legislative confusion.

The "professional secret" in the tension between individual freedoms and social rights

9. Summarising the process which we have described, we could say that the right to intimate life - of which professional secrecy is one aspect - has been transformed from a privilege into a constitutional value which almost invariably retains its individualistic nature. Such an individualistic feature is in opposition to so-called "social rights", the legal nature of which is problematic but which are none the less inserted into constitutional texts as "guideline principles" which delimit the framework within which individual public freedoms may be exercised. That is why the obligation to maintain the professional secret, even if professional secrecy is formulated in a general manner, immediately requires determination of the exceptions to the general obligation. The exceptions do not normally affect the relationship between the professional and the individual. Rather they relate to the confrontation between professional and individual interests on the one hand, and the social interest on the other. One example of this is the doctor. Regulation of professional secrecy in so far as it affects doctors must reconcile individual interests

(personal health), professional interests and social interests (public health). It is for this reason that Mr. Paul Sieghart's report devotes such a great deal of attention to "the exceptions". The issue is of even greater interest in modern society that, and has been rightly said, the traditional political guarantee of habeas corpus seems to have been overtaken today by the guarantee of habeas data.

Today when public regulation is called for in regard to something which is private, such as professional secrecy, one almost accepts as inevitable the impossible reprivatisation and the necessary reinforcement of the "nationalisation" of the private. I believe that dealing with this issue in the light of the old legal opposition between "public/private" will provide us with some indications on the most appropriate regulation for secrecy. It is certain that axiological considerations figure here. The member States of the Council of Europe are not immune to this, even if it is not with ideological radicalism claiming to eliminate one of the two branches of the opposition (17). However, unless one accepts a functional explanation of rights and freedoms in complex societies, using the systems theory approach (18), a particular political option or a particular choice of legal goods to be protected cannot escape our attention. I will only give some brief indications:

a) The differentiation between public law and private law reflects the situation of a social group where a differentiation has been made between those belonging to the collectivity and those belonging to its various members or autonomous minor groups. This dichotomy signifies in turn that an additional parallel is established between a society composed of unequals (a distinction between those governing and those governed) and a society of equals. The birth of the liberal political economy introduced a nuance into this dichotomy - the political society (composed of unequals) and the economic society (composed of members who are formally equal in the market place, although unequal by reason of the division of labour). From the legal point of view, we find here a duality of legal techniques regulating the relations in one or other contexts - law in the public sector and contract in the private sector (19).

b) If we pass from concepts to values, we find ourselves faced with an alternative: either we opt for the primacy of the private over the public or, on the contrary, the public over the private. In the history of European law, private law is antecedent in its configuration and methodology to public law and political liberalism which resisted any State interference in property rights has made this tradition its own and has elaborated "rights of personality" in regard to private life. On the other hand, the primacy of public law signifies an increase in State intervention to regulate coercively the conduct of individuals and groups. Thus the State will regulate professional qualifications and the exercise of professions. This leads to the superimposition of State regulation (the reflection of the breach of trust in penal law, procedural law or in special laws, and the feeling that simple reprobation of a professional by his controlling body is insufficient) over the contractual relationship governing professionals and their clients (the professional/client relationship now also invested with mutual trust). The vertical organisation of society overrides horizontal organisation. This is a process which socialism has given rise to and which characterises advanced industrial societies. That

which is private has accordingly been "nationalised". However, in these societies the opposite procedure, which could be termed "the privatisation of the public" is also taking place at the same time. This is shown by such significant factors as the relations between employers' organisations and the State in macroeconomic structuring or the relationships between political parties when government coalitions are being organised.

In the same order of ideas, and given the present day evolution of the relations between public and private, it seems to me that any regulation of professional secrecy must be done so on the basis of consultation and collaboration with the professional bodies until consensus can be achieved on the content of such regulation.

c) The distinction between public and private must also be understood in relation to the distinction which exists between public and secret. As already known, the modern or liberal State contrasts with the State at the time of the Ancien Régime and counters what is "secret" (arcana imperii) by the principle of "publicity" and does so almost as a moral justification. As Kant has shown, the "transcendental formula of public law" could be stated in the following terms: "All actions relating to the right of other persons are injust if the norm cannot be reconciled with publicity" (20). Accordingly, the power of the Ancien Régime was an invisible power while in a democratic Republic decision making procedure is public. As a consequence, when distinguishing between "bourgeois" and "citizen", it is the latter who will lay claim to the secret nature of his private life, family life or economic, cultural and religious life.

There again the evolution is not linear. Given the degree of complexity acquired by modern society, public administrations require that certain facts and decisions remain hidden and justify the requirement on the basis of rationality. Visible power struggles constantly with invisible power. Parallel to this, we are witnessing the opposite procedure which attempts to make public that which is private - the modern State knows more about its citizens than the State of byegone ages and does so thanks in large measure to the assistance of new technologies. Thus, professional secrecy undergoes progressive restrictions which increasingly serve to highlight it.

10. In a society like ours which is based on information technology, information is power which means that partial information - like information obtained in the relationship between the professional and his client - tends to be organised both by the State as well as by other bodies possessing information supports. Inequalities thus become information inequalities.

The social and democratic State has need of information to conduct economic planning, fiscal policy, social prevention and the repression of crime. All thus justifies limitations being made on professional secrecy which can no longer be an absolute. However, this carries with it risks, not least for professional secrecy. Perhaps we should pass from a limitative vision, which is solely concerned with avoiding breaches of the secret, to a more expansive vision as has already been proposed for other spheres of intimate life (21): professional secrecy would be encapsulated in a "right of the person to control information concerning him".

Moreover, it is also necessary to overcome an excessively horizontal vision in the relationship between the professional and the client. The liberal professional has been replaced to a great extent by impersonal but powerful professional offices, hospitals, financial companies, etc. In other words, by agencies which are in turn invested with informational power which may not be as easily controlled today by the client as in the past. In addition, these professional agencies may be more receptive to State control - a control which in many cases will not be transparent for the citizen.

Finally, it is not only the individual who is concerned by the protection offered by professional secrecy. Legal persons - associations, organisations, trade unions, etc - are also interested. We do not believe that only the individual should be invested with the character of "concerned party". However, this is not antinomic to the consideration of professional secrecy as a "human right", namely a right which must be strictly interpreted and of sole concern to individuals. In a social State, groups and associations must also benefit from the guarantees.

11. Having made these observations of a general nature, I would like to conclude this co-report by suggesting, and going beyond what has been indicated in the report, certain proposals de lege ferenda in regard to professional secrecy:

a) The law should define and classify databanks run by professionals. It should determine their operational requirements and storage needs. It is surprising to observe that at the present time ownership and use of a motor car are regulated with greater care than ownership and use of databanks. It would be appropriate to ask if a preliminary registration requirement should be called for, or whether a declaratory procedure suffices.

b) Individuals as well as groups must know of the existence of databanks of a professional nature, and they must be guaranteed the right to control them so that they can:

1) access the data concerning them;

2) correct and delete data which are inaccurate and, if necessary, have a "right to be forgotten" (the destruction of data once a certain time limit has passed).

c) The circumstances authorised by law for the communication of information, including communication which goes against the interests of data subjects, must only be done in exceptional cases. I am aware that I am using here an indeterminate clause which must be invested with a material content. I believe that it is impossible to use a legislative technique which avoids the use of such clauses when exceptions to the principle of the maintenance of the secret must be defined. Clauses such as "protection of the security of the State" or "public health", or "the monetary interests of the State" contain a premeditated ambiguity which can only be compensated by the inclusion of guarantees in the very body of the law. Such guarantees will be discussed at a later stage.

The ambiguity also affects the use by the administration of information which may be in the hands of professionals and which may be of a personal nature, and which is to be communicated for "statistical and scientific research purposes". Although seemingly inoffensive in nature, such a transmission is problematic as shown by the decision of the Federal Constitutional Court of 15 December 1983 which declared unconstitutional the Census Law (Volkszählunggesetz) of 4 March 1982.

Given that it is not always possible to reach a consensus in the conflicts between individual and general interests, it is necessary to leave to the courts the task of creating case law which will "balance the interests" (Interessenabwägung) in conflict (22).

d) It is necessary to establish guarantees protecting the exercise of the freedom of information but which are compatible with the respect for private life. The instruments containing such guarantees may be varied and in accordance with existing systems of guarantees. The control bodies may be: 1) courts; 2) an administrative Commissioner under the control of Parliament and even nominated by Parliament directly or on proposal of the Government (Datenschutzbeauftragter in Germany); 3) a Commission in the form of an independent administrative authority (as in France); 4) in certain circumstances, the Constitutional Court; 5) the revision of penal and procedural legislation which takes account of the new context in which professional secrecy is today situated.

To sum up, I would like to recall that professional secrecy must be understood today in a broad manner, that is to say as the guarantee given to individuals, groups and institutions which allows them to decide personally when and under what circumstances information directly concerning them may be communicated to third parties.

NOTES

1. P. SIEGHART, Privacy and Computers, Latimer, London 1976.

2. Cf. B. EDELMAN, Le droit saisi par la photographie, Maspéro, Paris 1974 (Ed. esp. Tecnos, 1980).

3. Cf. R. NERSON, La protection de la vie privée en droit positif français, "Revue Internationale de droit comparé", October-December 1971, pp. 737-764.

4. A resume of this is contained in E. NOVOA, Derecho a la vida privada y libertad de informacion, series XXI, Mexico, 1981, 2nd edition, pp. 75 ss.

5. Cf. F. BRICOLA, in "Il diritto alla riservatezza e la sue tutela penale", Giuffrè, Milan, 1970, pp. 71 ss.

6. B.O.E. of 2 December 1982.

7. Cf. L.M. FARINAS, El derecho a la intimidad, trivium, Madrid, 1983, pp. 75 ss.

8. S.D. WARREN/L.D. BRANDREIS, The right to privacy, Harvard Law Review, December 1890, pp. 193 ss.

9. L.D. BRANDREIS, Dissenting Opinion, in the case Olmstaed v. United States (1928), in J.H.F. SHATTUCK (ed.), Rights of Privacy, National Textbook Co., New York, 1977, p. 11. Such right of privacy has not been recognised by British jurisprudence according to STEIN/J. SHAND, Legal Values in Western Society, Edinburgh University Press, 1978, chap. VIII.

10. As regards this distinction, R. DWORKIN, Taking Rights Seriously, Duckworth, London, 1977 (Spanish translation 1984).

11. H. HUBMANN, Das Persönlichkeitsrecht, Böhlau, Cologne, 2nd Ed., 1967, pp. 268 ss. For a summary of the doctrine, we refer to A.E PEREZ LUNO, Derechos humanos, Estado de Derecho y Constitucion. Tecnos, Madrid, 1984, pp. 327 ss.

12. V. FROSINI, Il diritto nella società tecnologica, Guiffrè, Milan, 1981, pp. 279 ss.

13. Paul A. FREUND, Privacy: One Concept of Many, in J.R. PENNOCK/J.W. CHAPMAN, Privacy, Lieber and Atherton, New York, 1971, pp. 197 ss.

14. Cf. L.M. FARINAS, op. cit. pp. 327 ss....who comments on the reports of RUIZ GIMENEZ (1969), IGLESIAS (1970), BATTLE (1972), NOVOA (1979), OLIVEROS (1980), PEREZ LUNO (1984).

15. Which the Fair Credit Act (1970) has done in the US. On this issue, as well as others, of comparative law, cf. A.E PEREZ LUNO, op. cit., pp. 349 ss.

16. S. SIMITIS, (ed.), Kommentaar zum Bundesdatenschutzgesetz, Nomos, Baden Baden, 1978.

17. Resolution 2450 of the General Assembly of the UN of 19 Dec. 1968 asked the Secretary General to prepare a report on the respect for personal privacy and the integrity and sovereignty of nations vis à vis the progress in storage and other techniques. The Secretary General published it on 19 December 1973 (document E/CN 4/1116, submitted at the 29th Session of the Human Rights Commission. In the report, the opinion of the USSR was reproduced in the following terms: "In the opinion of the competent Soviet bodies, the consequences flowing from scientific and technical progress in the specific sphere of human rights are far from being the most important aspect of human rights protection in an age of scientific and technical progress. The most important task is the protection of political, economic and social rights such as the right to work, to leisure, to education, etc". (apud. E. NOVOA, op. cit., pp. 136 ss.).

18. Cf. N. LUHMANN, Rechtssoziologie, Rohwolt, Reinbeck, 1972, pp. 281 ss.

19. On this theme, cf. N. BOBBIO; Estado, Gobierno, Sociedad, Plaza y Janés, Barcelona, 1987, pp. 11 ss.

20. Metaphysische Anfangsgründer der Rechtslehre, WW (CASSIRER), Bd. VII pp. 148 ss.

21. Cf. A.F. WESTIN, Privacy and Freedom, Atheneum, New York, 1967.

22. The social consensus as the "ideal situation" has been theorised by J. HABERMAS, Theorie des Kommunikativen Handelns, 3rd Ed., vol. I, Suhrkamp, Frankfurt a.M., 1985, pp. 155 ss. The "balance of interests" is brought about by means of arguments, so controlling the rationality of the balance: cf. R. ALEXY, Theorie der Grundrechte, Nomos, Baden Baden, 1985.

FINAL STATEMENT

The XVIIth Colloquy on European Law, which was held at the University of Zaragoza (Spain) from 21 to 23 October 1987, under the chairmanship of Professor M. RAMIREZ, Dean of the Faculty of Law, was devoted to the theme "Secrecy and Openness: Individuals, Enterprises and Public Administrations". The Colloquy brought together participants from the member States of the Council of Europe as well as from Canada, Finland and the Holy See. Several distinguished personalities from the host country also attended the Colloquy.

In the course of the three days of discussions reports were presented on the following themes:

1. "Introductory report - a functional approach to the legal rules governing secrecy and openness". Rapporteur: Mr. H. BURKERT/Co-rapporteur: Dr. G. GARCIA CANTERO;

2. "Critical perspectives on secrecy within public administration". Rapporteur: Mr. P. GERMER/Co-rapporteur: Dr. J. BERMEJO VERA;

3. "Commercial secrecy and information transparency". Rapporteur: Mr. J. HUET/Co-rapporteur: Dr. I. QUINTANO CARLO;

4. "Protecting information disclosed in confidence: Towards a harmonised approach to the legal rules governing professional secrecy". Rapporteur: Mr. P. SIEGHART/Co-rapporteur: Dr. J.J. GIL CREMADES.

Each presentation was followed by a broad exchange of information and views. The views were expressed by speakers in a personal capacity.

Having regard to the fundamental nature of many of the questions raised in the course of the discussions, such as balancing the interests of the individual and of society with regard to information, the role of law and legislation relating to transparency and secrecy, and having regard also to the highly interesting practical examples furnished during the meeting on the implications of these questions for the daily political life of the countries represented, the participants were in general agreement that the work of the Colloquy should be brought to the attention of policy makers at the international and national levels who are at present confronted with the need to provide answers to such questions.

Moreover, the participants were aware that certain of these questions are at present pending before the Committee of Ministers of the Council of Europe or before various ministerial conferences of specialised ministers and committees of experts within the framework of the Council of Europe. For this reason, the participants were in agreement to ask the Committee of Ministers to take particular note of the work of the Colloquy and to bring this work to the attention of the various bodies referred to above.

As regards future intergovernmental work of the Council of Europe, it was felt that it would be extremely valuable if the Organisation would agree to the wish expressed by the Parliamentary Assembly to examine, clarify and formulate common European principles relating to professional secrecy. Furthermore, the participants considered that this work would benefit greatly if it were undertaken against the background of a more general examination of the common principles (based upon respect for human rights and fundamental freedoms) which should inspire the regulation of information flows in Council of Europe member countries.

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS

PERSONS PRESENT FOR THE INAUGURAL SESSION/PERSONNES PRESENTES POUR LA SEANCE INAUGURALE

Mr. Manuel RAMIREZ, Dean of the Faculty of Law.
Mr. Vicente CAMARENA BADIA, Rector of the University.
Mr. Frits HONDIUS, Deputy Director of Legal Affairs, Council of Europe.
Mr. José Manuel PAZ AGUERAS, Technical Secretary General of the Foreign Office representing the Minister.
Mr. Hipólito GOMEZ de las ROCES, President of the Region of Aragon.

Presence of senior local, provincial and regional authorities.

EXECUTIVE CHAIRMAN/PRESIDENT EXECUTIF

Monsieur le Professeur Manuel RAMIREZ, Doyen de la Faculté de Droit, Cité Universitaire, ESP - SARAGOSSE 59 009.

CHAIRMEN OF THE WORKING SESSIONS/PRESIDENTS DES SEANCES DE TRAVAIL

Dr. D.J. BERMEJO
Dr. D.G. GARCIA CANTERO
Dr. D.E. GOMEZ-REINO
Dr. D.I. QUINTANA

GENERAL RAPPORTEUR/RAPPORTEUR GENERAL

Monsieur le Professeur Manuel RAMIREZ, Doyen de la Faculté de Droit, Cité Universitaire, ESP - SARAGOSSE 59 009.

RAPPORTEURS

Mr. Herbert BURKERT, GMD, forschungsstelle für Informationswirtschaft, Schönhauser Str. 64, D - 5000 KÖLN 51.

Professor Peter GERMER, Institut for offentlig ret, Aarhus Universiteit, DK - 8000 AARHUS.

Monsieur le Professeur Jérôme HUET, 40, rue de Bretagne, F - 75003 PARIS. (apoligised/excusé)

Professor Paul SIEGHART, 6 Gray's Inn Square, GB - LONDON WC1R 5IZ.

CO-RAPPORTEURS

Dr. Gabriel GARCIA CANTERO, Professor, Faculty of Law, University of Zaragoza, ESP - ZARAGOZA 50 009.

Dr. José BERMEJO VERA, Professor, Faculty of Law, University of Zaragoza, ESP - ZARAGOZA 50 009.

Dr. Iquacio QUINTANA CARLO, Professor, Faculty of Law, University of Zaragoza, ESP - ZARAGOZA 50 009.

Dr. Juan José GIL CREMADES, Professor, Faculty of Law, University of Zaragoza, ESP - ZARAGOZA 50 009.

AUSTRIA/AUTRICHE

Dr. Martin KOEHLER, Bundeskanzleramt, Verfassungsdienst, Ballhausplatz 2, A - 1014 WIEN.

BELGIUM/BELGIQUE

M. Stanislas HAMERLINCK, Secrétaire d'Administration, Ministère de la Justice, 3 place Poelaert, B - 1000 BRUXELLES.

CYPRUS/CHYPRE

Mr. George STAVRINAKIS, Legal Commissioner, c/o Ministry of Foreign Affairs, CY - NICOSIA.

DENMARK/DANEMARK

Mr. Peer LORENZEN, High Court Judge, Vestre Landsret, Gråbrødre Kirkestraede, DK - 8800 VIBORG.

FRANCE

M. Ronny ABRAHAM, Conseiller du Tribunal Administratif, Professeur à l'Institut d'Etudes Politiques de Paris, 27 rue Saint-Guillaume, F - 75007 PARIS.

FED. REP. OF GERMANY/REP. FED. D'ALLEMAGNE

Dr. Wolfgang BIRKE, Ministerialrat, Bundesjustizministerium, Heinemannstrasse 6, D - 5300 BONN 2.

GREECE/GRECE

M. V. SKOURIS, Professeur de Droit Public à l'Université de Thessalonique, Nikolaou Manou 18, GR - 54643 THESSALONIKI.

ICELAND/ISLANDE

Not represented/non représenté

IRELAND/IRLANDE

Not represented/non représenté

ITALY/ITALIE

Apologised/excusé

LIECHTENSTEIN

Not represented/non représenté

LUXEMBOURG

M. Marc MATHEKOWITSCH, Conseiller de Gouvernement au Ministère de la Justice, 16 Boulevard Royal, LUXEMBOURG.

MALTA/MALTE

Mr. V. BORG COSTANZI, Judge of the Superior Court of Malta, "Michaela", St. George's Beach, St. George's Bay, MALTA.

NETHERLANDS/PAYS BAS

Mr. C.R. NIESSEN, Chief of the Constitutional and Legislative Affairs Policy Division, Ministry of the Interior, PO Box 20011, NL - 2500 EH THE HAGUE.

Mr. P.L.G. VAN VELZEN, Legal Adviser in freedom of information affairs, Ministry of Foreign Affairs, Room 4D11, Bezuidenhoutseweg 67, NL - 2500 EH THE HAGUE.

NORWAY/NORVEGE

Mr. Sam E. HARRIS, Special Legal Adviser, Ministry of Justice, Department of Legislation, Pb 8005, Dep, N - 0030 OSLO 1.

PORTUGAL

Mme. Maria do Ceu ATAYADE TAVARES, Chef du Bureau droit européen, Ministère de la Justice, P - LISBONNE.

M. Reinaldo COSTO FRAGOSA, Licenciado en Financas, Assessor do Provedor de Justica, Avenida 5 de outubro 38, P - 1000 LISBOA.

M. Carlos J. SOARES DE BRITO, Licenciado im Direito-Assessor, Assessor do Provedor de Justica, Avenida 5 de outubro 1094, P - LISBOA CODEX.

SPAIN/ESPAGNE

Mr. José Manuel PAZ AGUERAS, Technical Secretary General of the Foreign Office representing the Minister.

SWEDEN/SUEDE

Mr. Göran REGNER, Assistant Under-Secretary, Ministry of Justice, S - 10333 STOCKHOLM.

SWITZERLAND/SUISSE

M. Amadeo PEREZ, Juriste, Service de la protection des données, Office fédéral de la Justice, Département fédéral de Justice et Police, CH - 3003 BERNE.

TURKEY/TURQUIE

Dr. Metin KIRATLI, Vice-President of the University of Ankara, Professor of Administrative Law, University of Ankara, TR - ANKARA.

UNITED KINGDOM/ROYAUME UNI

Not represented/non représenté

OBSERVERS/OBSERVATEURS

CANADA

Mr. Mark ZAZULAK, Acting Director, Information Law and Privacy Section, Department of Justice, OTTAWA, CANADA K1A 0H8.

FINLAND/FINLANDE

Mr. Pekka NURMI, Director of Legislation, Ministry of Justice, PL1, SF - 00131 HELSINKI.

HOLY SEE/SAINT SIEGE

Le Révérend Père Gonzalo HIGUERA UDIAS, Docteur en Théologie, Licencié en Philosophie en Droit Civil, Maldonado 1, ESP - 28000 MADRID.

YUGOSLAVIA/YOUGOSLAVIE

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LIST OF COLLOQUIES ON EUROPEAN LAW OF THE COUNCIL OF EUROPE

Colloquies held up to present:

1.	London, 1969	"Redress for non-material damage"
2.	Aarhus, 1971	"International mutual assistance in administrative matters"
3.	Würzburg, 1972	"The responsibility of the employer for the acts of his employees"
4.	Vienna, 1974	"Legal representation and custody of minors"
5.	Lyon, 1975	"Civil liability of physicians"
6.	Leiden, 1976	"Legal services for deprived persons, particularly in urban areas"
7.	Bari, 1977	"Forms of public participation in the preparation of legislative and administrative acts"
8.	Neuchâtel, 1978	"Standard terms in contracts"
9.	Madrid, 1979	"The liability of the State and regional and local authorities for damage caused by their agents or administrative services"
10.	Liège, 1980	"Scientific research and the law"
11.	Messina, 1981	"Legal problems concerning unmarried couples"
12.	Fribourg, 1982	"Principles and methods of preparing legal rules"
13.	Delphi, 1983	"International legal protection of cultural property"
14.	Lisbon, 1984	"Beyond 1984: The law and information technology in tomorrow's society"
15.	Bordeaux, 1985	"Judicial power and public liability for judicial acts"
16.	Lund, 1986	"The law of asylum and refugees - Present tendencies and future perspectives"
17.	Zaragoza, 1987	"Secrecy and Openness - Individuals, enterprises and public administrations"