LAW COMMISSION OF INDIA

EIGHTY - EIGHTH REPORT

ON

GOVERNMENTAL PRIVILEGE IN EVIDENCE: SECTIONS 123-124 AND 162, INDIAN EVIDENCE ACT, 1872 AND ARTICLES 74 AND 163 OF THE CONSTITUTION

7th January 1983

D. O. No. F. 2(4)/82-L. C. January 10, 1983.

My dear Minister,

I send herewith the Eighty-eighth Report of the Law Commission on Government Privilege from production of certain documents and disclosure of certain communications before the courts.

The subject was taken up for consideration at the request of the Government of India arising out of a communication from the learned Attorney General of India to consider the implications of a recent judgment of the Supreme Court in what is popularly known as Judges' Transfer Case.

The Commission wished to express its appreciation to Mr. P. M. Bakshi, Part-time Member of the Commission for the preparation of the Report. We also acknowledge with thanks the help given by Mr. V. V. Vaze, ex-Member-Secretary.

With regards,

Yours sincerely,
Sd/-
(K. K. MATHEW)

Shri Jagannath Kaushal,
Minister of Law, Justice &
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New Delhi-1.

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CHAPTER 1

INTRODUCTORY

The subject.

1.1. This Report deals with an important topic that lies at the frontiers of public law and adjective law—the question of State privilege. The subject was earlier known by the title of "Crown Privilege", but is currently discussed under the title "public interest privilege" or "Executive privilege". Claims of privilege under this head generally have constitutional dimensions and, for that reason, may be said to belong to the domain of public law. At the same time, the claim to such privilege is made in courts and, if successful, excludes certain species of material from being effectively admitted in evidence—thus operating in the adjective field. Because of this dual character of the privilege, a discussion of the subject borders on the realm of constitutional law as also on the realm of adjective law.

The reference.

1.2. The subject has been taken up by the Law Commission at the request of the Government of India, who, in turn, had been requested by the Attorney-General of India[1] to consider the implications of a recent judgment[2] of the Supreme Court and the need for defining certain matters connected with the privilege, arising out of the aforesaid judgment.

Public law in its procedural aspect.

1.3. Public law in its procedural aspect is of as much interest as its substantive law. Although the citizen may sue public bodies and the Government, it does not necessarily follow that the law and procedure applied by the courts to such suits will be the same as is applied in litigation between private citizens. Special procedural advantages and protections are enjoyed by the State. One of such protections operates in the field of evidence, and is in the nature of a privilege regarding the production of certain documents and disclosure of certain communications.

Privilege.

1.4. The term "privilege" as used in Evidence law means a freedom from compulsion to give evidence or to discover-up material, or a right to prevent or bar information from other sources during or in connection with litigation, but on grounds extrinsic to the goals of litigation.[3]

In the law of evidence, there are many situations where a party to litigation (or some other person) may claim a privilege and thereby resist the production of a document or the giving of oral evidence on a particular subject in court.

The State.

1.5. Most of these privileges are enjoyed by private persons. For example the law confers upon the individual the constitutional privilege of not incriminating himself, it also accords a privileged status to confidential communications between attorney and client; husband and wife and between certain other communicants in special private relationships.[4] But we are concerned here with a situation where the claim is by the State to withhold a document, or evidence, on the ground that the disclosure will be prejudicial to the public interest. This is the privilege dealt with in section 123, Evidence Act, which prohibits the giving of evidence derived from unpublished official records relating to affairs of State except with the permission of the head of the Department.

Section 123 and its predecessor.

1.6. It may be stated as a matter of interest that section 22 of the Evidence Act (2 of 1855) was as follows :—

"XXII. A witness shall not be forced to produce any document relating to affairs of State the production of which would be contrary to good policy".

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1. Attorney General's letter dated 1st February, 1982 to the Minister of Law, Justice and Company Affairs.
2. *S.P. Gupta* V. *Union of India*, A.I.R. 1982 S.C. 149.
3. Paul F. Rothstein, Evidence : State and Federal Rules (1981), page 407.
4. Graham C. Lilly, An Introduction to the Law of Evidence (1978), page 317.

Liability of the State.

1.7. From the point of view of public law, it is possible to view the matter as one concerning the liability of the State in the adjective sphere. Though the provision is contained in the Evidence Act, it is obvious that it has important repercussions in administrative law. We are referring to this aspect in order to put the matter in its proper perspective.

History and rationale.

1.8. In England, Crown privilege is usually dealt with as an aspect of the general law of State liability. In this connection, it may be noted that the Crown Proceedings Act, 1947, while making the Crown liable as a private citizen in many respects, took care to provide that its provisions should not affect this general law.

In one article, published a few years ago, the history of Crown privilege was thus dealt with[1]—

> "The source of the Crown's privilege in relation to production of documents in a suit between subject and subject (whether production is sought from a party or from some other) can, no doubt, be traced to the prerogative right to prevent the disclosure of State secrets, or even of preventing the escape of inconvenient intelligence regarding Court intrigue. As is pointed out in Pollock and Maitland's History of English Law (2nd ed., Vol. I, page 517), 'the king has power to shield those who do unlawful acts in his name, and can withdraw from the ordinary course of justice cases in which he has any concern. If the king disseises A and transfers the land to X, then X when he is sued will say that he cannot answer without the king, and the action will be stayed until the king orders that it shall proceed'. We find similar principles applied to the non-disclosure of documents in the seventeenth and eighteenth centuries."

> "But with the growth of democratic Government, the interest of the Crown in these matters developed into and became identified with public interest.

> "……In the early days of the nineteenth century, when principles of 'public policy' received broad and generous interpretation……we find the privilege of documents recognised on "the ground of public interest". At this date, public policy and the interest of the public were to all intents synonymous."

In the report of *Layor's case*,[2] the Attorney-General claimed that minutes of the Lords of the Council should not be produced; and Sir John Prate L.C.J. supported the claim, adding that "it would be for the disservice of the King to have these things disclosed".

Executive privilege—U.S.A.

1.9. In the United States, the corresponding privilege, known as "executive privilege", is definitely considered as an aspect of "sovereign immunity". Of course this American version of Crown privilege has never been at par with the British doctrine as known in some of the earlier cases, but we need not discuss that aspect of the matter at present.

English law—injury to public interest.

1.10. The general principle now formulated in England is that relevant evidence must be excluded if its reception would be contrary to the public interest. It is this general principle that seems to regulate the disclosure or non disclosure of communications in the conduct of official affairs. There is no separate rule for official communications in addition to that applicable for official papers. In particular, the Crown is not allowed to object to the giving of any oral evidence by a witness, even if he be a civil servant. The witness must attend, and objection must be limited to question relating to matters claimed to be covered by the doctrine of public policy[3]—whatever be the proper scope of that doctrine.

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1. "Documents Privileged in Public Interest" 39 Law Quarterly Rev. 476-477.

2. *Layer's case*, (1722) 16 How. St. Tr. page 224.

3. *Broome* V. *Broome*, (1955) 1 All E.R. 201, 204. For comment, see (1957) Cambridge Law Journal II.

The case of *Broome*[1] is an illustration: The wife in that case had sued the husband for dissolution of the marriage, on the ground of cruelty, alleging, *inter alia*, that when she joined the husband in Hong Kong (where the husband was posted as a sergeant in the army), the husband took her to a filthy apartment of a standard far below his means and failed to provide her with any assistance and kept her short of money. For proving this allegation, the wife caused a subpoena (for oral evidence and for producing certain documents) to be served on one Mrs. Allsop, who was, at the material time, the sole representative of the Soldiers' Families Association in Hong Kong. The Secretary of State for War, by a certificate, recorded the opinion that it was not in the public interest that "the document should be produced or the evidence of Mrs. Allsop given orally". We are, at the moment, concerned with the latter part of the certificate relating to oral evidence. Sachs, J. held that it was wrong on the part of the Minister to adopt a procedure which would prevent the witness from giving any evidence, whatsoever, of any sort. The form of the certificate was not such as to enable the court to ascertain what really was the nature of the evidence for which privilege was being claimed. On the merits also, he was not persuaded that, in the circumstances of the case, there was a legitimate justification for claiming the privilege. Evidence of Mrs. Allsop as to the way in which the wife was received at the Quay at Hong Kong and the sort of accommodation available and connected matters was relevant and of assistance to the court and in none of those matters was there any apparent cause for any intervention in the name of Crown privilege.

1.11. So far as could be gathered from the case law on the subject, there is, in England, no separate privilege of confidential communications made to public servants—at least according to the modern theory. The principle of injury to the public interest applies, and it would appear that whatever rule applies to written records, applies to oral communications. However, it is said[2] that the procedure which may be appropriately followed in respect of oral evidence may have to be worked out. No separate privilege in England.

Lord Simon, in *Rogers* V. *Secretary of State*,[3] observed as under :

> "I am not, for myself, convinced that there is any general privilege protecting communications given in confidence (see *Smith* v. *East India Co.*[4]. but *Cf. Alfred Cromption Amusement Machines Ltd.* v. C. *Comrs. of Customs and Excise*)[5]".

After adverting to the circumstances from which the law might itself infer confidentiality, Lord Simon observed :

> "But if this is a correct classification, it would suggest that the privilege (a true privilege being waivable) is that of the imparter of the information and not that of the recipient".

While Lord Simon was cautious enough not to make a categorical statement, the treatment of the subject in some of the recent works on evidence[6-7] seems to suggest that cases of confidential communications made for official purposes or not separately dealt with, but are subsumed under the general category of public interest.

In India, the privilege incorporated in section 123 of the Evidence Act was, perhaps, intended to incorporate a policy decision. It is not, however, very clear whether the farmers of the Evidence Act examined the English law in detail. The available records relating to that Act do not throw light on the subject.

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1. *Broome* V. *Broome* (1955) 1 All F. R. 201.
2. *Broome* V. *Broome*, (1955) Probate 190, 198; (1955) 1 All E.R. 201 (Sachs J.).
3. *Rogers* V. *Secretary of State*, (1972) 2 All E.R. 1057, 1067 (H.L.).
4. *Smith* V. *East India Co.*, (1841) 1 Ph. at 54.
5. *Alfred Cromption Amusement Machines Ltd.* V. *Comrs. of Customs and Excise*, (1972) 2 All E.R. 353, 380; (1972) 2 W.I.R. 835, 859.
6. Cross on Evidence (1979), Chapter 12, Section 1, Pages 305-317.
7. Phipson, Manual of Evidence (1972), Page 94.

The significance of privilege.

1.12. In fact, such privileges raise several important issues of policy transcending mere technical issues. Privileged communications enjoy protection for a unique reason. The law of evidence generally seeks accuracy in fact finding by receiving relevant evidence thought to be reliable, while rejecting that which is thought to be insufficiently probative or trustworthy.[1] But privileged communications, which (by usual evidentiary standards) may be highly probative as well as trustworthy are excluded because their disclosure is inimical to a principle or relationship (predominately non-evidentiary in nature) that society deems worthy of preserving and fostering. Quite often, the evidence that could be derived from these protected sources would be admissible if judged by the usual standards of probative value and trustworthiness. Nevertheless, it is excluded for reasons of policy.

The cost of privilege.

1.13. The cost of evidentiary privilege is apparent, and it should not be borne with indifference. In the first place, the conferral of a privilege results in the suppression of probative evidence and makes the trier decide factual issues without benefit of the evidence. In this sense, an evidentiary privilege increases the probability that judicial disputes will be decided erroneously. Hence, in short, the question arises if the privilege is worth its price. The conferral of a privilege is grounded upon the assumption that its recognition significantly advances an interest relationship, or principle that society considers a prevailing value. Thus, a balancing is necessary.

Balancing of conflicting considerations.

1.14. It is to be noted that the breadth of the cloak of secrecy accorded by a privilege is often the amalgam of statutory language and judicial gloss, and of a tension between certain branches of public policy, on the one hand, and the need of the public and the court to be informed, on the other hand.

Scheme of discussion.

1.15. After making these general observations, we would like to indicate the scheme of discussion adopted in this Report. The rationale and general ambit of the privilege under discussion will be first dealt with. The authorities that can claim the privilege and the authorities that will decide the claim will next receive attention—the latter being of comparatively much greater importance. We shall then address ourselves to the material on which the claim to privilege may be asserted and the machinery and procedure for adjudication of the claim Besides the provisions of the law of evidence, a discussion of certain constitutional provisions relating to secrecy will also be required. A brief discussion of the position in certain other countries will be offered. The Report will conclude with recommendations for reform of the law.

Previous report

1.16. At this stage, it would be proper to mention that there is a comprehensive Report[2] of the Law Commission on the Indian Evidence Act, 1872. The Report was forwarded to Government[3] in May, 1977. The Report has, in an exhaustive and comprehensive manner, dealt with the entire Evidence Act, including, of course, the sections relevant to the present Report. Not only have we derived considerable assistance from the material presented in the Report, but also we are happy to say that we agree in substance with the approach shown in that Report.

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1. Graham C. Lilly, An Introduction to the Law of Evidence (1978), page 317.
2. Law Commission of India, 69th Report (Indian Evidence Act, 1872) (May, 1977).
3. One of us was a party to that Report also.

CHAPTER 2

PRESENT LAW IN INDIA

Scope of the present Report and earlier Report of the Law Commission.

2.1. The present law on the subject of State privilege—in so far as it relates to the production of evidence as such—is principally contained in sections 123, 124 and 162 of the Indian Evidence Act, 1872. The first two sections are, on an analysis, found to overlap each other. The last-mentioned section (section 162) is not confined to State privilege as such, but concerns itself with the procedure for determination of all questions of privilege, whether the privilege is claimed under the head of State privilege or under any other head.

In the main, these three sections of the Indian Evidence Act, 1872 are material to the topic under consideration. In fact, as already stated, that Act has itself been reported by the Law Commission in an exhaustive and comprehensive Report.[1] Certain provisions of the Constitution dealing as they do with the secrecy of certain material, will also receive attention.

Scope of the openness in Government.

2.2 It should be mentioned that this Report is not concerned with the general question of secrecy in Government and it is not therefore proposed in the Report to go into a detailed discussion of freedom of information, citizen's right to know and allied matters. Those matters—important as they are in any democratic society —focus on the relations between the Government and the citizen in general. It may also be mentioned that the Official Secrets Act is also outside this Report. That Act deals with a different aspect of Government secrecy—the communication of official secrets and the commission of certain other acts prejudicial to security which are regarded as constituting conduct fit for punishment by use of the weapon of criminal law. (Incidentally, this Act also has been reported on by the Law Commission).[2] The present Report deals rather with evidentiary privilege claimed on behalf of the State on the basis of certain considerations of high policy considerations—more appropriately called public interest.

Comparative developments.

2.3. Governmental privilege in litigation in regard to evidence has attracted considerable attention in recent times in so many countries, within as well as outside the Commonwealth. The developments have been somewhat rapid. Indeed, at some stage, they have been so rapid as to make it difficult to keep abreast of them. On some issues relevant to the privilege in question, the law elsewhere can still be said to be in a state of evolution. While the general direction in which the law is moving may be said to be fairly well established, new situations- not unexpectedly —go on arising, and furnish illustrations of an infinite variety of circumstances in relation to which the privilege comes to be claimed—successfully or otherwise.

It is not our intention to embark on an exhaustive survey as such of the position in numerous countries. But material that elucidates points that might otherwise remain obscure will be referred to wherever appropriate.

Indian law—sections 123 and 124, Evidence Act.

2.4. The Indian law on the subject is mainly concerned in three sections of the Evidence Act, Section 123 of that Act reads as under :—

> "123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit".[3]

Besides section 123, there is yet another section relevant to official matters, the disclosure whereof would be injurious to the public interest. Under section 124 of the Act, no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

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1. Law Commission of India, 69th Report (Indian Evidence Act, 1872), Chapters 65, 66, 93 (May, 1977).
2. Law Commission of India, 43rd Report (Officences against the National Security).
3. For rules as to discovery, see Order 11, Code of Civil Procedure, 1908.

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Sections 123—124 compared.

2.5. To some extent, sections 123 and 124 of the Evidence Act seem to overlap; at the same time, in certain respects, they differ from each other. They overlap, in so far as evidence which is derived from unpublished official records, *and which consists of communications made to a public officer in official confidence*, falls under both the sections. They differ, in so far as evidence derived from unpublished official records, *but not consisting of communications made to a public officer in official confidence*, falls only under section 124 and is outside section 123.

Section 123 is not confined to a public officer, while section 124 is so confined. On the other hand, section 123 is confined to a written record, while section 124 is not so confined. Overlapping can therefore arise on their present wording, as already mentioned above. We shall revert to this aspect when making our concrete recommendations.[1]

Overlapping between the two and its possible sequences.

2.6. In certain cases—say, inregard to oral official communications—it is enough to comply with section 124. Such cases do not present problems of magnitude. But the overlapping between the two sections (to which we have referred above) may create difficulties, where both the sections apply. In particular, while, under section 123 (as it now stands), it is for the head of the Department to give permission; under section 124, it is for the public servant to decide whether the public interest would suffer by the disclosure. It will be necessary to revert to this aspect later, since it is a matter of crucial importance and does not constitute a problem of interest merely from the point of view of legislative drafting or of textual analysis of the section.

Section 162.

2.7. Connected with the subject is the provision in section 162 of the same Act, under which a witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the Court, under the section. That section further provides that the Court, if it seems fit, may inspect the document, unless it (the document) refers to matters of State, or take other evidence, to enable the Court to determine on its admissibility. (The last paragraph of the section is not material for the present purpose).

Section 162 is not, of course, confined to documents for which a privilege is claimed under section 123. The section is the machinery section for the determination of *all claims to privilege* in respect of documents.

Recommendations made in Report on Evidence Act.

2.8. All these provisions of the Evidence Act received detailed discussion by the Law Commission in its Report on the Evidence Act. The recommendations made in that Report in so far as they concern sections 123, 124 and 162, may be summarised at this stage for convenience of reference.[2]

The recommendation relating to section 123 was to revise the section on the following lines :—

(1) No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, unless the officer at the head of the department concerned has given permission for giving such evidence. (This proposition was intended to state the position, to start with. It would operate primarily as between the witness and his superior. There was no change of substance).

(2) Such officer should not withhold such permission unless he is satisfied that the giving of such evidence would be injurious to the public interest. He should make an affidavit also in this regard. The Court may, if it thinks fit, call for a further affidavit from the head of the department. (This proposition was intended to amplify the section, by highlighting the test of "injury to the public interest"—a test discernible from the case law on the subject—and by codifying the procedure that had already been indicated judicially).

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1. See Chapter 11 *infra*.
2. Law Commission of India, 69th Report (Indian Evidence Act, 1872), Chapters 66, 66 and 93.

(3) Where such officer has withheld permission for the giving of such evidence, and the Court, after inspecting the unpublished official records concerned and after considering the affidavit, is of the opinion that the giving of such evidence would not be injurious to the public interest, the court should record its decision to that effect and thereupon the section will not apply to such evidence. [This proposition was intended to modify the existing section, in so far as the textual law was concerned. The change was an important one, as the decision as to injury to the public interest would be with the Court and not with the officer at the head of the Department].

2.9. Then, as regards section 124, the recommendation was to revise it as under :—

"124. (1) No public officer shall be compelled to disclose communications made to him in official confidence, other than communications contained in unpublished official records relating to any affairs of State, when the court considers that the public interests would suffer by the disclosure.

(2) Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that the public interests would suffer by its disclosure, the court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefor".

2.10. As to section 162, second paragraph, Evidence Act, the recommendation of the Commission was to delete the words "unless it refers to matters of State". The object was to remove any restriction on the power of the court to inspect a document claimed to be relating to "affairs of State" and therefore privileged on that account.

Constitutional provisions.

2.11. The survey of the Indian law has so far concentrated on the provisions in the Evidence Act. Besides these, there are important provisions in articles 74 and 163 of the Constitution, to which it will be necessary to make a reference[1] for the purpose of considering certain needed amendment. These provisions protect the secrecy of advice given by the Cabinet.

Succeeding Chatpers of the Report.

2.12. The succeeding Chapters of this Report will deal with several points arising out of the above provisions—statutory as well as constitutional—in the light of the materials referred to above.

1. Chapter 9, *infra*.

CHAPTER 3

THE GENERAL AMBIT OF THE PRIVILEGE : "AFFAIRS OF STATE"

Sections 123—Affairs of State.

3.1. At this stage, it may be convenient to deal in brief with the ambit of the privilege conferred by section 123 of the Indian Evidence Act, 1872— an exercise which will show concretely how the abstractions that appear in the law have been applied in practice. The expression "affairs of the State" which occurs in the section is not used in other legislation in force in India. But it is used frequently in text books and academic literature. The principal object of the use of the expression is to indicate the distinction between matters of concern to the State, and matters of private interest.[1] This of course, is not the only ingredient of the privilege, since it is further required that the matters in respect of which privilege is claimed must be of such a nature that their disclosure would be prejudicial to the public interest. The principle on which the protection is given is that where a conflict arises between public and private interest, private interest must yield to the public interest.

Routine documents.

3.2. Every communication from an officer of the State to another officer is not necessarily one relating to "affairs of State". The privilege could not arise, for example, in respect of a posting register kept by the Customs Preventive Service, the entry in question being merely a note of the time when particular preventive officers were ordered to be at their stations.[2]

Security of the State.

3.3. The expression "affairs of State" may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper security of the State. Reports relating to an individual with a view to taking action under the Preventive Detention Act is a matter relating to affairs of State.[3]

Ministerial advice.

3.4. The expression "affairs of State" would also cover advice given by a Minister. Thus, in a Rajasthan case[4], the plaintiff brought an action for the recovery of Rs. 1,19,000 against the State of Rajasthan, on account of a refund of a part of the excise duty paid on the stocks of matches produced by the plaintiff for consumption in the State territory. This was in pursuance of an agreement with the State Government. There was a document which embodied the minutes of the discussion and indicated the advice given by the Minister. The State claimed privilege in respect of this document under section 123. The claim of privilege was upheld by the trial court, as well as by the High Court. The High Court held that the document which embodied the minutes of discussion and which indicated the advice given by the Minister was certainly protected under section 123, and the Court could not compel the State to produce it.

On the other hand, documents and letters relating to a contract with the Government for the supply of goods do not relate to affairs of State.[5]

Obscurity as to income-tax papers.

3.5. These simple situations may not present much difficulty. But the obscurity of the expression "affairs of State" is illustrated by the decisions that were rendered with reference to other matters. Income-tax returns made to income-tax officers and assessment orders may be cited as an example. Before the enactment of specific statutory provision on the subject, it was held that returns submitted to the income-tax officer, and statments before him or orders made by him, did not refer to "affairs of State" (section 123), nor were they made in official confidence (section 124), and the officer concerned was bound to produce them, if summoned to do so.[6-7] It was after these judicial decisions that section 54 of the Income-tax Act, 1922, was enacted. Section 54 of the Income-tax Act, 1922 (now section 137 of the Income-tax Act, 1961) to state only the gist thereof enacted that statements made or returns, accounts or documents produced for evidence before Income-tax

1. *State of Punjab* V. *Sodhi Sukhdev Sindh*, A.I.R. 1961 S.C. 493, and also *Lady Dinbai* V. *Dominion of India*, A.I.R. 1951 Bom. 72.
2. *Rukumali* V. *R.*, 22 C.W.N. 1951.
3. *Choudhury* V. *Changkakati*, A.I.R. 1960 Assam 210.
4. *Kotah Match Factory, Kotah* V. *State of* Rajasthan, A.I.R. 1970 Raj. 118.
5. *G. G. in Council* V. *Peer Md.* A.I.R. 1950 Punj. 228.
6. *Venkatachella* V. *Sampatu Chettiar*, (1909) I.L.R. 32, 62; 19 Mad. L.J. 263.
7. *Jadabaram* V. *Bulloram*, (1899) I.L.R. 26 Cal. 281.

authorities shall be treated as confidential and disclosure thereof by any public servant was prohibited, and no official shall be required to produce any such document or to give evidence in respect thereof.

Departmental inquiries.

3.6 The difficulty of deciding whether a matter is or is not an "affair of State" is also illustrated by the case-law relating to statements made by witnesses in the cases of a departmental enquiry into the conduct of a public officer. The question arises when, after the departmental enquiry, the guilty public servants are prosecuted—usually for the offence of accepting illegal gratification. It was held by the Calcutta High Court[1] that such statements were not privileged under sections 123 to 125, and the accused was entitled to cross-examine the witnesses under section 153 with reference to the statements made by the witness at the departmental enquiry. The same view was taken by the Nagpur High Court.[2] On the other hand, statments by witnesses in a secret and confidential investigation by the C. I. D. for ascertaining whether there is a *prima facie* case for a departmental enquiry against the public servant were held to be privileged by the Lahore and Orissa High Courts.[3-4]

In a Punjab case,[5] the respondent Surjit Singh had filed a suit against the State of Punjab for a declaration that his retirement from service before he reached the age of superannuation was illegal and was violative of various provisions of the Constitution of India. He requested the trial court to direct the department to produce in Court the character Rolls and confidential reports maintained in the department, in respect of himself and some other inspectors who were junior to him but were retained in service. The State claimed privilege under section 123, on the ground that the documents were unpublished official records relating to "affairs of State". The trial court disallowed the privilege, holding that these documents did not relate to "affairs of State." The matter came up before the High Court in revision. The High Court allowed the petition filed by the State, and held that the character roll and confidential reports maintained for the purpose of providing an appraisal of the merit of State Servants by their superiors from time to time were in the nature of confidential communications from one officer to another, and were meant to serve as part of the material designed to maintain the efficiency of the public servants. The High Court further held that those documents would relate to "affairs of State". It dissented from two earlier cases to the contrary.[6] Thus, conflicting views exist within the same High Court.

Imprecision.

3.7. In a Punjab case, Khosla J. attempted to evolve a definition of the expression "affairs of State",[7] and this definition was relied on in the same High Court in a later case.[8] However, in appeal before the Supreme Court in the later case,[9] the definition was not treated as exhaustive. Thus, the expression "affairs of State" is in practice, found to be somewhat imprecise.

Injury to public interest.

3.8. In fact, it is the concept of injury to the public interest that is in furture likely to be paramount in India, as in other countries.

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1. *Harbans* V. *R.*, 16 C.W.N. 431.
2. *Ibrahim* V. *Secretary of State*, A.I.R. 1936 Nag. 25.
3. *Nazir* V. *R.*, A.I.R. 1944 Lah. 424.
4. *James Bashi* V. *Collector of Ganjam*, A.I.R. 1959 Orissa 152.
5. *State of Punjab* V. *Surjit Singh*, A.I.R. 1975 P & H 11.
6. (a) *Union of India* V. *Raj Kumar*, A.I.R. 1967 Punj. 387.
   (b) *Niranjan Dass* V. *State of Punjab*, A.I.R. 1968 Punj. 255.
7. *G.G.-in-Council* V. *Peer Mohd.*, A.I.R. 1960 Punj. 228, 233 (Khosla, J.).
8. *Sodni Sukhdev Singh* V. *The State*, A.I.R. 1961 Punj. 407.
9. *State of Punjab* V. *Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 43, (1961) 2 S.C.R. 37.

CHAPTER 4

THE AUTHORITY WHO CAN CLAIM THE PRIVILEGE

The head of the Department

4.1 The authority that can *claim* the privilege is specified in section 123 of the Indian Evidence Act as the Head of the Department. It is not our intention to go into the niceties of the precise meaning of this expression with reference to the administrative set up of Government. What we would like to emphasise is that, in conformity with our recommendation,[1] the claim made by the Head of Department should not be final or binding on the Court. The Head of the Department can place all materials before the Court that are relevant for acquainting the court with the nature of the do ument and for persuading it about the validity of the claim. The final decision as to whether, having regard to the circumstances of the case, the claim is justified, will be with the court. The court will (as at present) have power to take oral evidence for the purpose. However, primarily it will be on an examination in chambers (of the document) that the court will arrive at the decision.

4.2. Another important question relates to the authority which will *decide* the claim of privilege. This will be discussed in the next Chapter.[2]

1. Chapters 5, 6 and 7 *infra*.
2. Chapter 5, *infra*.

CHAPTER 5

THE AUTHORITY WHICH DECIDES THE QUESTION OF PRIVILEGE

Indian and English law.

5.1. The question which authority will determine the existence or otherwise of Government privilege in relation to a particular document is one on which we find, considerable disparity between the Indian statutory law on the one hand and the English law on the other. If we are to take literally what is stated in section 123 of the Indian Evidence Act, it is for the head of the department concerned to determine whether or not the document should be disclosed. In England, on the other hand, where an objection on the score of "Crown privilege" is made as to the production of a document, it is for the court to decide whether the objection should be upheld.[1] To a large extent, this disparity between Indian law and English law has been reduced by judicial decisions in India.[2]

Need to vest power in the court.

5.2. In our view, the statute itself should make it clear that power to decide the question of privilege vests in the court. The foundation for the privilege is injury to the public interest.[3] There are two aspects of the puplic interest—the puplic interest in the maintenance of secrecy of certain material, and the public interest in the production of all factual material that is relavent to a matter in issue in litigation. The two may often be in conflict. The balancing of the considerations that so come into conflict is a delicate task which should, both in the interests of justice and in the efficient performance of the task of such balancing, be left to the judiciary, rather than to any other agency. Courts are, by training as well as by their orientation properly equipped to deal with such questions. As Salmon, L. J. (as he then was) said, writing extra-judicially[4]—

> "This is constitutional question of the first importance and it can be settled only in the courts....There is no, indeed, no country in which the common law holds sway whose courts have failed to recognise they have such a power—to be exercised, no doubt, rarely and in the last resort, but nevertheless to be exercised when necessary."

Lord Justice Salmon described the power as "vital to the true administration of justice".

Defect in the present section.

5.3. When the matter is viewed in this perspective, it will be perceived that it is a major defect in section 123 of the Evidence Act, that it does not give prominence to the essence of the privilege, namely, the injury to the public interest. According to the modern understanding of the basic objective and rationale of the privilege, it is not enough that the documents relate to "matters of State". The matters must be such that their disclosure would be injurious to the public interest. As early as 1931, the Privy Council stated the position thus in a case very often cited—

> "The principle of the rule is the concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires."[5-6]

Supreme Court judgement.

5.4. The case law on the subject has been reviewed by Ray, C. J.[7] who observed: "In the ultimate analysis the contents of the documents are so described that it

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1. *Conway* V. *Rimmer*, (1968) 1 All E.R. 874 (H.L.). See particularly the speech of Lord Morris of Borth-Y-guest.
2. See the case law on section 162, Evidence Act.
   [Also paragraph 7.8, *infra*].
3. *Cf. State of U. P.* V. *Raj Narain*, A.I.R. 1975 S.C. 865.
4. Lord Justice Salmon, "Bench : The Last Bulwark of Individual Liberty" (1967) reprinted in (1967) 69 Bom. L. R. (Journal) 123.
5. *Robinson* V. *State of South Australia*, A.I.R. 1931 P.C. 704, 719.
6. *Cf. Sankey* V. *Whitlam*, (1978) 21 A.L.R. 505 (High Court of Australia).
7. *State of U.P.* V. *Raj Narain*, A.I.R. 1975 S.C. 865, 875, 876, para 41.

could be seen at once that in public interest the documents are to be withheld." Most of the commonwealth decisions[1] on the subject emphasise the aspect of balancing— an aspect recently re-emphasised in America also.[2] The touchstone by which the doctrine of Crown privilege operates, was felicitously expressed by Lord Radcliffe in the Scottish appeal.[3] His Lordship said: "The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between parties is not to be available to the party engaged in a suit with the Crown. The interests of Government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that *impartial* justice should be done in the courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the court would be better qualified than the minister to measure the importance of such principles in application to the particular case that is before it."

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1. (a) *Rogers* V. *Home Secy.*, (1973) A.C. 388, 406, 412.
   (b) *Konia* V. *Morley*, (1976) 1 N.Z.L.R. 455.
   (c) *Glasgow Corp.* V. *Central Land Board*, (1956) S.C. 1, 18, 19 (H.L.).
   (d) *Re Grosvenor Hotel London No.* 2, (1965) Ch. 1218, 1246.
2. *U.S.* V. *Nixon*, (1974) 418 U.S. 683.
3. *Glasgow Corp.* V. *Central Land Board*, (1956) S.C. 1, 18, 19 (H.L.).

CHAPTER 6

THE MATERIALS FOR CLAIMING AND DECIDING THE PRIVILEGE

Materials.

6.1. The materials on which a claim to the privilege under discussion may be based generally comprise—

(a) affidavits filed in the first instance,

(b) further affidavits, when required by the court,

(c) the document in original (where produced),

(d) oral evidence (to the extent permissible).

The first two raise no problems, as (a) the parties may be expected to file such affidavits as they may be advised,[1] and (b) the Court should continue to have the necessary power to direct them to file affidavits.[2] As to the third aspect (the original document), we are recommending that it should be produced for inspection in every case.[3]

As regards the last aspect—oral evidence—the Court certainly has the power to call for it, even now. If—as is our recommendation—the law should insist that the document (in respect of which privilege is claimed) should be produced for inspection by the Court *in camera*,[4] occasions for oral evidence will be reduced to a very large extent.

Position regarding production.

6.2 In regard to production, section 123 speaks of the permission of the head of the department. It was held[5] by a majority judgment of the Supreme Court in 1961 that the Court is competent, and indeed bound, to hold a preliminary inquiry and determine the validity of an objection to the production of the document, when privilege is claimed under section 123. This necessarily involves an inquiry into the question whether the evidence relates to "affairs of State" or not.

The head of the Department claiming privilege under section 123 must apply his mind. In *Amarchand* v. *Union of India* (a)[6] judgement of the Supreme Court of India referred to by the Court of Appeal in the English case of *Conway* v. *Rimmer*[7] this aspect became important. In that case, the Supreme Court rejected the claim for privilege on the ground that the statement of the Home Minister did not show that he had seriously applied his mind to the contents of the document, or that he had examined the question whether their disclosure would injure the public interest. The Supreme Court observed as follows :—

> "In view of the fact that section 123 confers wide powers on the head of the department, the heads of departments should act with scrupulous care in exercising their right under section 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Consideration which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure must always be distinguished from considerations of expendiency".

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1. *State of U.P.* V. *Raj Narain*, A.I.R. 1975 S.C. 865.
2. *State of U.P.* V. *Raj Narain*, A.I.R. 1975 S.C. 865.
3. Chapter 7, *infra*.
4. Chapter 7, *infra*.
5. *State of Punjab* V. *Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; (1961) 2 S.C.R. 372.
6. *Amarchand* V. *Union of India*, A.I.R. 1964 S.C. 1958, 1961 (not reported in the S.C.R.).
7. *Conway* V. *Rimmer* (in the Court of Appeal).

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Practice in India as to affidavits.

6.3. It is well-known that the practice in India is for the head of the department to make an affidavit, setting out the objection on behalf of the State and relevant factors. The present practice was thus described by the Supreme Court in another case[1]—

> "It is now the well-settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a Minister to affirm an affidavit. That will arise in the course of the enquiry by the Court as to whether the documents should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production, the matter ends there. If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibility contemplated in section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in *Sukhdev Singh's case*.
>
> This Court has said that where no affidavit was filed, an affidavit could be directed to be filed later on. The *Grosvenor Hotel, London Group of cases*, (1963) 2 All E. R. 426; (1964) 1 All E. R. 92; (1964) 2 All E. R. 674 and (1964) 3 All E. R.354 (*supra*) in England shows that if an affidavit is defective, an opportunity can be given to file a better affidavit. It is for the Court to decide whether the affidavit is clear in regard to objection about the nature of documents. The Court can direct further affidavit in that behalf. If the Court is satisfied with the affidavits, the Court will refuse disclosure. If the Court in spite of the affidavit wishes to inspect the document, the Court may do so."

Andhra Case.

6.4. It was agrued in an Andhra case[2] that the notes and minutes made on the files were within the privileged class and were exempt from production. The privilege claimed by the Additional Chief Secretary could not be questioned in view of section 123. It was held that there was nothing in the affidavit to "suggest that the notes made, relate to expression of an opinion in the determination and execution of public policies", a test suggested in *Sukhdev Singh's case*.[3]

1. *State of U.P.* V. *Raj Narain*, A.I.R. 1975 S.C. 865, 876, para 42.
2. *R. Ramanna* V. *Govt. of A.P.*, A.I.R. 1971 A.P. 196.
3. *Sukhdev Singh's case* A.I.R. 1961 S.C. 493, 502.

CHAPTER 7

MACHINERY FOR DETERMINATION OF THE PRIVILEGE

Section 162 analysed.

7.1. It is now possible to examine section 162 in the light of the above points. Section 162 comprises four matters:—

(a) the duty of a person who is summoned to produce a document, to bring it into court;

(b) the power of the court to decide objections to its production (in evidence) or admissibility;

(c) the procedure to be followed for the purpose of exercising the power referred to at (b) above; and

(d) the translation of the document.

(a) Production.

7.2. As regards the first topic (duty to produce), it should be noted that there is a distinction between bringing the document in court and its production in evidence. When a person is summoned to "produce" a document—the expression "production" is also used in the two procedural Codes—that person must bring it into court. This simple and elementary provision really gives rise to the important implication that even if a person has an objection to handing over the document for use *in evidence*, he must bring it into court. The physical production of the document is obligatory. Whether the objection to its legal production is on the ground that the document has no relevance to the suit or proceeding or whether it is on the ground that the document, though relevant, is inadmissible by virtue of a statutory bar, it is not for the person summoned to determine that objection for himself. Only the Court will decide the objection to "production" in this sense. Production in the physical sense is mandatory on the person called upon to do so by the Court.

Inspection by the court and production of the document for inspection.

7.3 The question really should not have presented any serious difficulty. Once it is established that the claim to privilege must be decided *by the court*, the logical course should have been to allow the court to examine all the materials. The document itself would, of course, be the best evidence and (if in existence) the best evidence ought to be before the court. The matter has been unnecessarily complicated by section 162 of the Evidence Act, which seems to exclude from inspection by the court a document relating to "matters of State". The anomalous position was discussed at length by the Law Commission in its Report on the Evidence Act, and we would like to record here that we whole-heartedly agree with the approach adopted in that Report and the recommendation made by the Commission for amendment of the law. Since that Report was written, developments in other countries have re-inforced the desirability of inspection by the Court of the document claimed to be privileged. Of course, the inspection must be in chambers—as was emphasised by the Law Commission in specific terms. Subject to this safeguard—which, in this case, is of paramount importance—the court must have power to inspect the document. To this, there should be no exception and on this reasoning section 162, Evidence Act, will certainly require amendment.

Documents not in possession or power.

7.4. Even as regards physical production (in the sense explained above), difficult questions could sometimes arise, where a witness who is summoned to produce a document raises the objection that the document is not in his power. In this context, the crucial words are—"Possession or power". Where the witness is exclusively in control of the document and some one else claims control over it, no difficulty could arise by reason of the first part of section 162. But difficulty may arise when the witness is in joint possession with somebody else, who is not before the court. In such a case, in deciding whether the witness ought to be compelled to "produce" the document, normally the court will act on what is considered to be just in the circumstances. This aspect came up for consideration in a Bombay case.[1] On a review of English cases, it was observed that this matter would depend on whether the defendant, physically speaking, could produce this document and, legally speaking, ought to produce it, there being no other person having an interest distinct from the defendant.

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1. *Haji Jaharia Kassim* V. *Haji Casim*, (1876) I.L.R. 1 Bom. 496, 499.

But one having the actual custody of documents may be compelled to produce them even though the document is owned by others.

Under the first part of section 161, then, the document must be brought into court. The production of the document in evidence will, under the second part be excused where the document is privileged from disclosure.

(b) Decision of objection.

7.5 It is expressly laid down in the second part of the section that only the court can decide the validity of the object. There is, however, a disharmony between section 123 and section 162. Section 123, in the last part, gives power to the head of the Department to give or withhold permission "as he thinks fit". But section 162 gives the power to the Court. It is necessary to remove this disharmony—which can be achieved by deleting the offending part of section 123.

(c) Machinery.

7.6. For implementing the second part of section 162 (adjudication upon the issue of privilege), some machinery is obvioulsy needed. This is the third part of section 162. It compresses, in effect, two different topics. :

(i) inspection of the document—the court is given this power, unless the document relates to "matters of State",

(ii) taking of other evidence by the court to enable it to decide the objection.

Anomaly.

7.7. In so far as section 123 excludes the court's power to inspect documents relating to "matters of State", it presents a provision that is anomalous as well as productive of serious disharmony,—not to speak of injustice. It is anomalous, because the inspection of a document would ordinarily be the best method of judging its nature and essential character. To deprive the court of this indispensable machinery is to render its role futile. Other evidence cannot be a substitute for the original. The provision is also out of harmony with that part of section 162 which assumes that the court shall decide the question of privilege. Finally, the provision could be productive of injustice, because, on rather insufficient evidence, a useful document may come to be excluded. It is this aspect that requires urgent attention. The only satisfactory way is to remove the exception. As Lord Morris said.[1]

> "Whenever objection is made to the production of a relevant document, it is for the court to decide whether to uphold the objection....the power of the court must also include a power to examine the documents privately."

Supreme Court case.

7.8. In this connection, reference may be made to the observations in *State of U. P.* V. *Raj Narain*,[2] which were as follows:—

> "As it was held in that case,[3] that the Court has no power to inspect the document, it is difficult to see how the Court can find, without conducting an enquiry as regards the possible effect of the disclosure of the documents upon public interest, that a document is one relating to affairs of State as, ex-hypothesis, a document can relate to affairs of State only if its disclosure will injure public interest. It might be that there are certain classes of documents which are per se noxious in the sense that, without, conducting an enquiry, it might be possible to say that by virtue of their character their disclosure would be injurious to public interest. But there are other documents which do not belong to the noxious class and yet their disclosure would be injurious to public interest. The enquiry to be conducted under section 162—is an enquiry into the validity of the objection that the document is an unpublished official record relating to affairs of State and therefore permission to give evidence derived from it is declined. The objection would be that the document relates to secret affairs of State and its disclosure cannot be permitted, for, why should the officer at the head of the department raise an objection to the production of a document if he is prepared to permit its disclosure even though it relates to secret affairs of State? Section 162 visualizes an enquiry into that objection and empowers the court to take evidence for deciding whether the

1. *Conway* V. *Rimmer*, (1964) 1 All E.R. 874, 880 (H.L.).
2. *State of U.P.* V. *Raj Narain*, A.I.R. 1975 S.C. 882, 883, para 69 (per Mathew, J.).
3. *State of Punjab* V. *Sodhi Sukhdev Singh*, A.I.R. 1961 Punj. 493, 567, para 94.

objection is valid. The court therefore has to consider two things; whether the documents relate to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in section 123 'as he thinks fit' confer an 'absolute discretion', on the head of the department to give or withold such permission. As I said, it is only if the officer refuses to permit the disclosure of a document that any question can arise in a court and then section 162 of the Evidence Act will govern the situation. An overriding power in express terms is conferred on the court under section 162 to decide finally on the validity of the objection. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of section 162 of the Evidence Act, there is no limitation on the scope of the court's decision though in the second part the mode of inquiry is hedged in by conditions. It is therefore clear that even though the head of the department has refused to grant permission, it is open to the court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public interest and the expression "as he thinks fit" in the latter part of section 123 need not deter the Court from deciding the question afresh, as section 162 authorises the court to determine the validity of the objection finally (see the concurring judgment of Subba Rao, J. in *Sukhdev Singh's case*").

It may be noted that, at present, inspection of a document which relates to "matters of State" is prohibited by section 162. In *Amar Chand's case*,[1] the appellant called upon the respondents, the Union and the State to produce certain documents. The respondents claimed privilege. The Supreme Court saw the documents and was satisfied that the claim for privilege was not justified. The case illustrates how inspection may become necessary to determine whether the claim to privilege is justified.

We may also refer to an Andhra case[2] on the same point.

7.9. The last part of section 162 (translation) creates no problem. (d) Translation.

1. *Amar Chand* V. *Union of India*, A.I.R. 1964 S.C. 1958.
2. *R. Ramanna* V. *Govt. of A.P.*, A.I.R. 1971 A.P. 196.

CHAPTER 8

THE PROCEDURAL CODES

Right of appeal—need for.

8.1. An important question relating to procedure that deserves to be considered may now be mentioned. Where a document is claimed to be privileged under section 123 and the Court determines the question one way or the other, the question naturally arises whether there should be a right of appeal against a ruling so determining the question, and if so, in what cases, and to which forum. In considering that issue, a distinction can be made between a ruling upholding the privilege so claimed and a ruling denying it, in the particular case. A ruling upholding the privilege can be challenged in appeal on final determination in the case, whether it be a decree or other final order in a civil case and a judgment of conviction or acquittal or other final order in a criminal case. A separate right of appeal is not required, and the absence of such a right would not seriously prejudice the interests of the private litigant, whose request for admission in evidence of the particular document is rejected by upholding the privilege. But the case of a denial of the privilege stands on a different footing. The document would then straightaway go into evidence. If, ultimately, on appeal, the document is held to be privileged, an anomalous situation might arise. The harm that the privilege is intended to prevent (injury to the public interest) would then have been already done. Any ruling of the Appellate Court (even if it upholds the privilege) would then have only an academic value, so far as that particular litigation is concerned. In view of this, an immediate and separate right of appeal to the appropriate forum would appear to be necessary in the interests of justice. Such a course, we think, should be adopted whether the proceedings are civil or criminal in nature.

Forum of appeal.

8.2. Next, as regards the forum, we are of the opinion that irrespective of the status of the trial court or of the nature of the proceedings, the appeal against the order denying the claim of privilage should be to the High Court.

Two reasons have weighed with us in coming to this conclusion. First, the question is of such a nature that the procedural law should enable the matter to be decided by the highest court in the State without delay. Secondly, a straight appeal to the High Court would cut short the intermediate stages and enable the rendering of a prompt decision. Usually, controversies involving such claim are of a sensitive character and it is desirable that the resolution of such controverses within the legal framework is not unduly prolonged. We would, therefore, recommend that both the Codes of procedure—Civil and Criminal—should be amended by inserting a suitable provision on the subject, incorporating the points discussed above.

Lord Reid's views as to appeal.

8.3. It may be mentioned that the suggestion for giving a right of appeal to the Government was made by Lord Reid in *Conway's case*[1].

> "It is important, however, that the Minister should have a right to appeal before the document is produced. The matter was not fully investigated in the argument before Your Lordships, but it does appear that in one way or another there can be an appeal if the document is in the custody of a servant of the Crown or of a person who is willing to co-operate with the Minister. There may be difficulty if it is in the hands of a person who wishes to produce it. That difficulty, however, could occur today, if a witness wishes to give some evidence which the Minister unsuccessfully urges the Court to prevent from being given. It may be that this is a matter which "deserves further investigation by the Crown authorities".

Wigmore's view.

8.4. After examining the scope of the privilege in the light of logic and policy, Wigmore concludes as follows[2] —

> "(1) Any *executive* or *administrative* regulation purporting in general terms to authorise refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void.

1. *Conway* V. *Rimmer*, (1968.) 1 All E.R. 874. For later stages, see (1968) 2 All E.R. 304.
2. Wig. S. 379. cited in Sarkar, Evidence (1971), page 1165.

(2) Any *statute* declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in a court of justice.

(3) The *procedure* in such cases should be : A letter of request from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document ; followed (in case of refusal) by a reply from the Departmental head stating the circumstances deemmed to justify the refusal ; and then a ruling by the Court, this ruling to be appealable and determinate of the privilege".

Suggested provision.

8.5. In the light of the above, it will be necessary to insert a suitable provision in both the Codes at the appropriate place, somewhat on the following lines :—

"*Any person aggrieved by the decision of any court subordinate to the High Court rejecting a claim for privilege made under section* 123 *or section* 124 *of the Indian Evidence Act*, 1872 *shall have a right of appeal to the High Court against such decision and such appeal may be filed notwithstanding the fact that the proceeding in which the decision was pronounced by the Court is still pending.*"

CHAPTER 9

CONSTITUTIONAL PROVISIONS

Article 74—Advice given by Ministers to the President.

9.1. We have so far considered the position under the Evidence Act. There is an important constitutional provision to which reference should now be made. Article 74 of the Constitution reads as under :—

"74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice :

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such re-consideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court."

Similar provision is contained in article 163 of the Constitution in regard to States.

Need for protection regarding materials constituting the reasons.

9.2. Article 74, while preserving the confidentiality of the advice tendered by Ministers, makes no specific provision in relation to the connected matters, that is to say, papers preceding the advice and forming the materials that constitute the reasons for the advice. On this point a clarification becomes necessary in view of the discussion contained in a recent decision of the Supreme Court.[1]

Supreme court case.

9.3. In the Supreme Court decision referred to above, the question at issue (so far as is relevant for the present report) was the ambit of the protection against disclosure under article 74(2) of the Constitution. It was held that while the reasons which had weighed with the Council of Ministers would certainly form part of the advice, the material on which the reasoning is based and the advice is given cannot be said to form part of the advice. On this basis, the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government in that particular case was held to be outside the exclusionary rule enacted in article 74(2) of the Constitution. In arriving at this conclusion, one of the judgments adopts the analogy of a judgment given by a court of law. The relevant passage reads as under :—

"The point we are making may be illustrated by taking the analogy of a judgment given by a Court of law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the judgment ? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgement. Similarly, the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accodingly be held to be outside the exclusionary rule enacted in clause (2) of article 74."

Another view possible.

9.4 We have given anxious consideration to the reasoning and the conclusion in the judgement of the Supreme Court referred to above. However, with respect, it appears to us that it is possible to take a different view in the matter. It is evidence that supplies the reasons or grounds for the conclusions on various questions of fact at issue. It is *because of the evidence* that factual conclusions on matters at issue are reached. To put it differently, in litigation, evidence constitutes the

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1. *S.P. Gupta* V. *Union of India*, A.I.R. 1982 S.C. 149 (February issue) ; (1981) Suppl. S.C.C. 87, 246 to 266, paras 59-74.

factnal grounds or reasons for the decision. Similarly, in regard to the advice tendered by Ministers to the President, the materials that support the Ministerial advice represent the factual grounds or reasons for the advice. We therefore consider it proper to regard the materials forming the basis of the advice as part of the grounds or reasons for the advice.

Material for reconsideration of the advice.

9.5. The matter could be viewed from a pragmatic angle also. Under article 74(1), proviso of the Constitution,[1] the President has the right to require the Ministers to reconsider the advice tendered by them. Now, the President can discharge this constitutional responsibility only if he has before him the materials that had weighed with the Ministers in tendering their advice. It is only on the basis of these materials that he can satisfy himself about the propriety of the advice tendered and of the extent to which the advice is warranted by the materials. What "reasons" seeks to express is the mental process of those who give the advice. This mental process does not operate in a vacuum ; it operates in a particular setting, from which it ought not to be separated. It is common practice that the background information and documents which are operative in the minds of those whose business it is to advise on high matters of State are referred to (though not set out in detail in so many words) in their advice. It is impossible to view the advice in isolation from such materials, relevant to and referred to in the advice, thereby constituting the very foundation of the advice.

Need for amendment.

9.6. When the matter is viewed in this light, it becomes desirable to remove the doubts created in this respect by the Supreme Court judgment.[2] The implications of article 74(2) of the Constitution should, in our opinion, be articulated more expressly and clearly than has been done at present. Such an amendment becomes necessary in order to re-state the position more clearly in the interest of harmonious working of the Constitution and in the interest of a faithful implementation of the constitutional policy as we understand it.

Materials referred to in the advice tendered by Members.

9.7 At the same time, we are not unaware that in regard to any head of evidentiary privilege, there are dangers in framing the relevant provision too widely. The interest of the litigants, on the one hand, and the interest of society in the maintenance of a certain constitutional policy, on the other hand, are both important. The operative rules on the subject should seek to strike a happy balance between the two. We think that such a balance could be maintained and considerable vagueness and unintended width of the privilege could be guarded against, by providing that materials to be privileged under article 74(2) of the Constitution as constituting the reasons must have been referred to in the advice mentioned in that article.

Recommendations as to articles 74 and 163 of the Constitution.

9.8. This postulates an amendment of the relevant constitutional provisions. It may be difficult to give a precise draft, but the following is a very rough suggestion for an Explanation to be added to article 74 of the Constitution to carry out the above object :—

> *"Explanation.—Materials that constitute the grounds or reasons for the advice tendered by the Ministers to the President shall, for the purposes of this article, be deemed to be part of such advice, where such materials are referred to in such advice."*

A similar Explanation (with necessary adaptation) should be added to article 163 of the Constitution, which is an analogous provision relating to the advice tendered by Ministers to the Governor.

We recommend that the Constitution be amended on the lines indicated above.

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1. Para 9.1, *supra*.
2. Para 9.3, *supra*.

CHAPTER 10

BRIEF COMPARATIVE SURVEY

I. General observations.

General trends witnessed in England and other countries.

10.1. A study of the comparable position in many other countries, particularly England, Australia, Canada and the United States, shows that by and large the law on the subject of State privilege is moving from rigidity to elasticity, from a formal approach to a liberal one and from the earlier position of control by the executive to the later position of the discretion being left increasingly to the judiciary. No doubt, extreme cases and unprecedented situations might provoke an extreme re-action in this or that direction. In general, as stated above, two broad developments are witnessed; in the first place, the paramount test now recognised is that of injury to the public interest; in the second place, it is also now recognised that the ultimate authority to determine the availability of privilege in a particular case is the judiciary, and not the executive. This trend is illustrated in England by the leading decision in *Conway* V. *Rimmer* ; in Australia by the leading decision *in Sankey* V. *Whitlam* ; in Canada by the relevant case law : and in New Zeland also by the relevant case law. Some areas in Australia and (in regard to the Federal Court) Canada have adopted a different approach—but these might be regarded as aberrations.

England.

10.2. The position in England definitely bears out the general trend mentioned above.

II. English Law.

The process of evolution.

10.3. The English cases on the subject of Crown privilege (now known as 'State interest' or 'public interest') have undergone a long process of evolution.[1] The case law upto *Conway* V. *Rimmer*[2] was reviewed, in detail, in the Report of the Law Commission on the Evidence Act.[3]

Some subsequent cases were also noted in the Report on the Evidence Act.[4]

Thereafter, several cases have arisen on the subject. They do not lay down any new principle, but seem to show that the general trend is towards less of a rigid approach and more of an elastic one.

In some of the cases, the claim of privilege was upheld.[5-6] In one of the cases, the claim was over-ruled and discovery of documents ordered. The House of Lords stressed the need to balance the public interest in non-disclosure against the 'public interest', in seeing that justice is done to the parties.[7]

10.4. The decision of the House of Lords in *Norwich Pharmacal Ltd.* V. *Customs and Excise Commissioners*[8] is of a particular interest. The appellants were owners and licensees of a patent; information concerning imports published by the Commissioners showed that some importations must have been made by persons infringing the patent. The appellants sought an order that the Commissioner should disclose the name of the importers of the goods which were the subject of the patent. Though of the opinion that the Commissioners had rightly refused to make a disclosure without an order of the court, the House of Lords made the

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1. *Cf.* Cross, Evidence (1979), pages 306, 307.
2. *Conway* V. *Rimmer*, (1968) 1 All E.R. 874 (H.L.).
3. Law Commission of India, 69th Report (Evidence Act).
4. For a brief survey, see D.C.M. Yardley, "Executive Privilege" (1974) New Law Journal 794,796
5. *R. V. Lewes J. J. ex-Parte Home Secretary*, (1972) W.L.R. 279 (H.L.).
6. *Alfred Crompton Amusement Machines Ltd.*, (1973) All E.R. 169 (H.L.).
7. *Norwich Pharmacal Co. Ltd.* V. *Commissioners of Customs & Excise*, (1973) 2 All E.R. 943. (H.L.).
8. *Norwich Pharmacal Co. Ltd.* V. *Customs & Excise Commissioner*, (1973) 2 All E.R. 943 (H.L.

order. The most relevant consideration was that the persons whose names were to be disclosed were almost certainly wrongdoers.[1] Other relevant considerations were said to be the relations between the wrongdoers and the Commissioner, whether the information could be obtained from another source, and whether giving it would involve the Commissioners in trouble which could not be compensated by an order for costs.[2]

10.5. Lord Edmund Davies's observations in another case are also pertinent. "The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is whether it is clearly demonstrated that in the particular case the public interest would nevertheless be better served by excluding evidence despite its relevance. If, on balance, the matter is left in doubt, disclosure should be ordered"[3].

10.6. The principle as emerging from various judicial decisions in England has been stated thus in the leading English book on Evidence[4] :— **The priniciple**

> "Relevant evidence must be excluded on the ground of public policy when it concerns certain matters of public interest considered to be more important than the full disclosure of facts to the court and when it relates to miscellaneous matters connected with litigation".

10.7. The rule specifically relating to public interest has been simply stated as follows[5] :—

> "Relevant evidence must be excluded if its reception would be contrary to State interest, but 'State interest' is an ominously vague expression and it is necessary to turn to the decided cases in order to ascertain the extent to which this objection to the reception of relevant evidence has been taken".

Some illustrative cases may be mentioned.

10.8. Discussion of English law in the text books generally appears under various categories, national security, public service and the like. In one of the cases[6] involving national security, the defendants, acting under the direction of the Board of Admiralty, refused to produce a letter to their agent on the ground that it contained information concerning the Government's plans with regard to one of the Middle Eastern campaigns of the First World War. The information had, of course, been given to the defendants by the Board of Admiralty under the seal of strictest secrecy, but as Swinfen-Eldy, L. J. observed :— **National security.**

> "The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production : the general public interest is paramount to the interests of the suitor".

Where the security of the State is involved, the claim of privilege (if substantiated by adequate material) may be more readily upheld[7].

10.9. Many national interests other than that of national security have been protected by the rule under consideration.[8] One of the cases may be cited.[9] Internal communications between the Customs and Excise Commissioners and their staff and communications of the Commissioners with third parties, all of which were brought into existence to enable the Commissioners to fulfill their statutory obligation of forming an opinion concerning the basis on which purchase tax should be payable by the company, were held to be proper subjects of a claim to withhold them from production in the public interest. **Other national interest.**

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1. The only innocent importers would have been re-importers.
2. On the last two cases, see a note by C.F. Tapper, 37 M.L.R. 92.
3. *D. V. N. S. P. C. C.* (1978) A.C. 171, 174, 246; (1977) 1 All E.R. 589.
4. Cross, Evidence (1979), page 304.
5. Cross, Evidence (1979), page 306.
6. *Asiatic Petroleum Co. Ltd.* V. *Anglo-Persian Oil Co. Ltd.*, (1916) 1 K.B. 822, 830.
7. *Cf. Duncan* V. *Cammel Laird & Co. Ltd.*, (1942) 1 All E.R. 857.
8. Cross, Evidence (1979), page 307.
9. *Alfred Crompton Amusement Machines* V. *Customs Commr.*, (1973) 2 All E.R. 1169.

Communications in public service.

10.10. The claim of privilege has been occasionally sought to be justified in circumstances where a report has been made from one public servant to another in course of his duty. The argument here is, that the report should be treated as confidential if it was prepared in conditions under which the officials making it expected it to be so treated. If confidentiality is destroyed, then the civil servant would not (it is stated) be prepared to write full and frank reports. The category can be conveniently labelled as a claim arising under the head of "public service". It would, however, appear that at the present day the privilege under this head is not recognised in England separately. The agrument that a confidential report will not be made frankly (if there is a probability of public scrutiny) has been criticised more than once by English academic writers.[1] Garner suggested[2] long ago that it really does not stand up to close examination, because "a civil servant should not be prepared to write a report that may be open to criticism or one that he does not wish to be examined in court (save on state security grounds)".

The House of Lords, dealing with the argument that the candour of communication between civil servants might be prejudiced if a privilege is not recognised, observed in *Conway's case*[3] as under :—

> "It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied to their other fellow subjects".

Residual categories.

10.11. There are other residual circumstances in which privilege is claimed. This is the residual category under "public interest". It seems, that in England this category is defined by reference to specific heads, such as, the prevention of specific crimes and the maintaining of the morale of the armed forces of the Crown. However, even these specific heads have not escaped criticism, judicially[4] and otherwise[5] According to Cross[6]—

> "It is difficult to believe that all the cases mentioned (by him) under the head of other national interests would be followed today".

Cross cites the following observations of Lord Hailsham of St. Marylebone[7] :—

> "The categories of public interest are not closed, and must alter from time to time, whether by restriction or extention, as social conditions and social legislation develop".

Cabinet minutes.

10.12. As to Cabinet minutes, communications with ambassadors and some cases of communications between heads of departments, it was conceded in the speeches in *Conway* V. *Rimmer*[8] that no court would order the production of such documents.

Police information.

10.13. Sources of police information are a judicially recognised class of evidence, excluded on the ground of public policy unless their production is required to establish innocence in a criminal trial[9].

Criminal cases.

10.14. As to criminal cases, in England, it is stated not to be the practice to claim privilege on the ground of State interest[10].

Public interest—suggestion for categorisation.

10.15. Suggestions have appeared in England that legislative action should be taken to particularise the species of public interest which should be taken into account[11]. But no such restrictive legislation seems to have been enacted so far in England.

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1. For example, Ingris Bell in (1957) Public Law.
2. Garner, Administrative Law (1967), page 252—a view repeated in later edition.
3. *Conway* V. *Rimmer*, (1968) 1 All E.R. 874, 919, 967 (H.L.).
4. *Regrossnor Hobe* (*No.* 1) (1963) 3 All E.R. 426, on appeal (1964) 1 All E.R. 92.
5. Articles in (a) 79 L.Q.R. 37, 153, 487.
   (b) 80 L.Q.R. 24, 158.
   (c) (1963) Public Law 405.
6. Cross, Evidence (1979), page 309.
7. *D.* V. *N. S. P. C. C.*, (1978) A.C. 71, 230.
8. *Conway* V. *Rimmer*, (1968) All E.R. 910, 971.
9. *Rogers* V. *Secretary of State for the Home Department*, (1972) 2 All E.R. 1057.
10. Cross, Evidence (1979), page 310.
11. Clark, "The Last Word on the Last Word" (1969), 32 Modern Law Rev. 142, 148.

Class-content distinction.

10.16. According to some of the earlier English cases, the production of a document may be withheld in public interest either on account of its contents or else because it belongs to a class which, on grounds of public policy must, as a class, be withheld from production. The latter ground of production is usually raised when some ground other than the national security is at stake.[1]

However, the trend in modern times, so far as the privilege claimed on the ground of affairs of State or public interest is concerned, is to apply one uniform test, the governing consideration being the simple (though abstract) one of injury to public interest. Relevant evidence must be excluded if the reception would be contrary to State interest[2].

Categorisation not favoured in England.

10.17. There is probably no category of documents such that courts will never order a document failing within it to be disclosed.[3-4]

It may be that, in practice, the fact that the document relates to a particular subject may induce the court to accord to that document a higher sanctity than to other documents of a more routine character. In this way, the nature of the document may be one of the relevant considerations in coming to a conclusion as to how far it deserves protection on the ground of injury to the public interest. But the formulation of the rule in abstract terms is not affected by this aspect, though it may be useful in spelling out, in more concrete and visible form, that which is indicated in abstract terms by a general rule. If one were to prepare a digest of reported cases, such a classification would perhaps be convenient as furnishing a label under which to arrange the discussion. Beyond that, classes may not necessarily furnish a basis for devising legal categories.

Procedural aspects.

10.18. As to procedural aspects, in *Conway* V. *Rimmer*[5], it was specifically and positively laid down that whenever an objection is made to the production of a relevant document, it is for the court to decide whether to uphold the objection. It was also held that the inherent power of the court must include a power to ask for a clarification or amplification of an objection to production, though the court will be careful not to impose (at that stage) a requirement which could only be met by divulging the very matters to which the objection related. Further, the power of the court must also include a power to examine documents privately though that power should in practice be sparingly exercised. Finally, as Lord Morris of Borth-y-gest observed : "I see no difference in principle between the consideration which should govern what have been called the contents cases and the class cases."[6]

Arranging of parties not material.

10.19. No distinction is made in England between cases in which Crown is a party and those in which the proceedings are between private citizens or corporations[7].

III. Austraila and Canada

Australia and Canada.

10.20. In Australia, two important developments have taken place recently. The well known decision of the High Court of Australia in *Sankey* V. *Whitlam*[8] specifically holds that it is the responsibility of the court to decide whether a document should be protected from disclosure in the public interest. The court must balance the public interest in non-disclosure against the public interest in proper justice. The nature of the public interest involved will vary from case to case, so that the protection afforded to documents of a class concerned with high levels of Government cannot be absolute, nor enjoyed for ever. According to the above

1. Cross on Evidence (1979), page 307.
2. Cross on Evidence (1979), page 306.
3. Lord Fraser in *Science Research Council* V. *Nasse*, (1979) 3 W.L.R. 784.
4. See also para 10.18, *infra*.
5. *Conway* V. *Rimmer*, (1968) A.C. 919, 971 (Lord Morris of Borth-y-gest).
6. *Cf.* para 10.16, *supra*.
7. Cross, Evidence (1979), page 389.
8. *Sankey* V. *Whitlam*, (1978) A.L.R. 505, 535-546 (High Court of Australia).

ruling, the fact that a document belongs to a class of documents that would ordinarily be regarded as protected from disclosure in the public interest is not necessarily determinative of the issue. Factors other than the document's membership of the class might be relevant to the balancing of the public interest.

10.21. The case mentioned above was a private prosecution brought against the former Prime Minister and two members of the Labour Ministry in Australia, alleging a conspiracy arising out of the so-called "Loans Affair". The documents summoned included documents [1] comprising cabinet papers and communications between Ministers and senior officials of the Government in relation to matters of Government policy. Some of the documents had already been published in *The Bulletin* magazine and also in a book; some had even been tabled in Parliament in the course of a debate on the "Loans affair". The magistrate before whom privilege was claimed upheld the claim of privilege by the Commissioners for all the documents summoned in respect of which the privilege had been claimed. The matter came up before the High Court on the informant seeking a writ of mandamus and declaration for production of the documents originally summoned. The High Court declared that (with one exception) all the documents ought to be produced. As regards the excepted document, a part of the said document was also to be made available. It was clearly laid down by the High Court that there was no particular class of documents exempt,—not even cabinet papers. The nub of the decision is to be found in the statement of Stephen, J.[2]—

> "The judge-made law relating to Crown privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded. On the contrary its essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case".

Legislative reaction in Australia.

10.22. This is the first development in Australia on the judicial side. But this is countered by the second noteworthy development in Australia, being a legislative reaction to the above decision in *Sankey* V. *Whitlam*. An example of this is the Evidence Amendment Act, 1982 passed for the Australian Northern Territory. This Act allows the Attorney-General to make a claim of privilege, if he considers that in the public interest certain documents or communications should not be released. If such a claim is made the court cannot admit those documents or communications in evidence. The Act covers relates to documents involving Ministers, Cabinet or the Executive Council, and communications between Federal and State Ministers.

The above legislation was vehemently criticised by the opposition, in the course of discussion of the Bill in the legislature[3].

10.23. Incidentally, it may be of interest to mention that the Australian judgment in *Sankey* V. *Whitlam* has been cited in a decision of the House of Lords,[4] apparently expressing agreement with its broad approach.

New South Wales Amendment.

10.24. It appears that as a reaction to the decision in *Sankey* V. *Whitlam*, the New South Wales State Government also amended the Evidence Act to provide in section 61(1) as under :—

> "61. (1) When the Attorney General certifies in writing that in his opinion—
>
> (a) any communication described in the certificate or any communication relating to a matter so described, is a government communication and is confidential; and
>
> (b) the disclosure of the communication in any legal proceedings described in the certificate is not in the public interest, the communication shall not be disclosed in or in relation to those legal proceedings or be admissible in evidence in those legal proceedings".

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1. Dennis Pearce, "Of Ministers, Referies and Informers—Evidence Inadmissible in the Public Interest" (1980), 54 Aust. L.J. 127, 128.
2. *Sankey* V. *Whitlam*, (1978) 54 A.L.J.R. 11, 31 (High Court of Australia).
3. Evidence Amendment Act, 1982 for the Australian Northern Territory. See (July 1982) 8 Commonwealth Legal Bulletin 890.
4. *Burmah Oil* V. *Bank of England*, (1979) 3 W.L.R. 722, 760 (Lord Scarman).

Canada.

10.25. In Canada, the rule (apart from a specific statute, to be presently mentioned)[1] as laid down by the case law[2] seems to be a liberal one. Most Canadian courts have followed the English decision in *Conway* V. *Rimmer* in regard to the subject of State interest, although occasionally a different approach is visible. From a survey of the judicial decisions in Canada, it would appear that at least in cases where there is no question of national security or international relations or cabinet confidence, the claim of privilege on the basis of State interest will be reviewable by the courts in Canada[3-4].

Legislative reactions in Canada—Federal Court Act.

10.26. However, there is one specific statutory provision—section 41 of the Federal Court Act, 1970 (an Act dealing primarily with the structure, jurisdiction and procedure of the new Federal Court of Canada)—which adopts a somewhat, different line of approach. The section reads as under[5] :—

> "41. (1) Subject to the provisions of any other Act and to sub-section (2) when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production of discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court."

IV. U. S. A.

Position in U.S.A—The decision of 1953.

10.27. The case law on Governmental privilege in the U.S.A. has not been so rich and profuse as in Commonwealth jurisdictions. But at least two judicial decisions are noteworthy. The first is *U. S.* V. *Reynolds*,[6] which established the proposition that it is the judiciary that decides whether the privilege claimed on a particular occasion is justified or not.

The decision of 1974.

10.28. The trend is confirmed by the famous case of *United States* V. *Nixon*,[7] which suggests that the privilege in the areas of "State" secrets and "official information" is qualified and gives way upon a judicial assessment that there are more important interests to be served by disclosure in a particular case. To some extent, the decision in *United States* V. *Nixon* may be regarded as going further in the direction of liberality than the earlier decision in *U.S.* V. *Reynolds*[8], inasmuch as judicial weighing of the conflicting considerations is now given a place of pride.

Draft Federal Rules.

10.29. Literature on the above decision is abundant. The entire bunch of papers involved in the litigation has been brought out conveniently in one publication[9]. Soon after the judgment, there appeared several articles, of which it is enough to mention two which (taken together) cover almost all aspects of the decision [10-11].

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1. Paragraph 10.26 *infra*.
2. See cases cited in Stanley Schiff, Evidence in the Litigation Process 1978, Vol. 2, page 1069.
3. Barshnell, "Crown Privilege" (1973) 51 Canadian Bar Rev. 551.
4. Note, "Executive Privilege" (1975) 33 Univ. of Toronto Faculty Law Rev. 181.
5. Section 41, Federal Court Act, 1970 (Canada).
6. *U.S.* V. *Reynolds*, (1954) 345 U.S. 1.
7. *U.S.* V. *Nixon*, (1974) 418 U.S. 683.
8. *U. S.* V. *Reynolds*, (1954) 345 U.S. 1.
9. Leon Freedman (Ed.), *U.S.* V. *Nixon* : President before the Supreme Court (1974).
10. Symposium, *U.S.* V. *Nixon*, (1974) 22 UCLA Law Rev. 1-140.
11. Paul A. Freunds, "On Presidential Privilege" (1974) 88 Harvard Law Rev. 13.

Obscurity of position.

10.30. No doubt, some of the *obiter dicta* in the judgment in *U. S.* V. *Nixon* (observations relating to national security etc.) create the impression that the Court would go back upon its liberal approach earlier shown in *U.S.* V. *Reynolds*. However, that itself is a matter of some controversy.

Perhaps because of the obscurity of the position arising from the paucity of case law, one eminent writer on American constitutional law[1] has stressed the need for laying down some definite rules.

Draft Federal Rules of Evidence.

10.31. Before the decision in *U.S.* V. *Nixon* was pronounced, there had been formulated in 1972, the draft federal rules of evidence[2], and it is desirable to quote the relevant provision as proposed therein, so as to show the thinking even at that time. This is how the rule as to governmental privilege was formulated in those rules—

> "The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of State or official information as defined in this rule."

"Secrets of State" and "Official information".

10.32. In the same formulation, the documents were divided into two categories, namely secrets of State and official information, respectively. A "Secret of State" is a governmental secret relating to the national defence or the international relations of the United States. "Official information" is information within the custody or control of a department or agency of the Government, the disclosure of which is shown to be contrary to the public interest. Although the category of secrets of State (danger to national defence or international relations) separately mentioned in this formulation was probably derived from the decision in *U.S.* V. *Reynolds*, it should be mentioned that under that decision the judge must in every case determine whether the circumstances are appropriate for the claim of the privilege. Further (as already mentioned above), the later decision in *U. S.* V. *Nixon* shows a more liberal approach. That decision held that the interest of accused Watergate conspirators in marshalling evidence in their defence outwieghed the President's claim of privilege. Although the decision in *U. S.* V. *Nixon* related to protection claimed in high level communications in the executive department and did not relate, as such, to national defence, it would appear that the courts in United States would not now leave the question of privilege entirely to the discretion of the executive.

Practice in U.S.A.

10.33. As regards the actual procedure to be followed, the formulation proposed in the U.S. draft Federal Rules is of interest as showing the general approach. Rule 509 (c) of those rules[3] proposed as under :—

> "(c) **Procedure.**—The privilege for secrets of State may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of State, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require".

Secrecy in Government and U.S. Developments.

10.34. It may also be mentioned that the general approach to "secrecy in Government" has been affected by the passage of the Freedom of Information Act, although that Act does not directly deal with evidentiary privilege.

The subject of cabinet papers as such does not seem to have received much specific discussion in the United States.

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1. Philip Kurland, in Los Angeles Times (22 June, 1975) referred to by Pritchett, American Constitution (1977), page 250, fn. 19.
2. Rule 509, Federal Rules of Evidence (1972) (proposed).
3. Rules 509(c), Federal Rules of Evidence (proposed).

CHAPTER 11

RECOMMENDATIONS

As a result of the discussion contained in the preceding Chapters, certain changes in the present law will be required. These changes concern (a) the Indian Evidence Act, 1872, (b) the two procedural Codes, and (c) the Constitution.

(a) So far as concerns the Indian Evidence Act, 1772, the recommendations relate to sections 123, 124 and 162.

(i) Section 123 should be revised as under :—

"123. (1) Subject to the provisions of this section, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, unless the officer at the head of the department concerned has given permission for giving such evidence.

(2) Such officer shall not withhold such permission, unless he is satisfied that the giving of such evidence would be injurious to the public interest; and where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefor:

"Provided that where the Court is of opinion that the affidavit so made does not state the facts or the reasons fully, the Court may require such officer or, in appropriate cases, the Minister concerned with the subject, to make a further affidavit on the subject.

(3) Where such officer has withheld permission for the giving of such evidence, the court, after considering the affidavit or further affidavit, and if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally,—

(a) shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued;

(b) shall inspect the records in chambers; and

(c) shall determine the question whether the giving of such evidence would or would not be injurious to the public interest, recording its reasons therefor.

(4) Where, under sub-section (3), the court decides that the giving of such evidence would not be injurious to the public interest, the provisions of sub-section (1) shall not apply to such evidence".

(ii) Section 124 of the Evidence Act should be revised as under :—

"124. (1) No public officer shall be compelled to disclose communications made to him in official confidence, when the court considers that the public interests would suffer by the disclosure.

(2) Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that the public interests would suffer by its disclosure, the court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefor.

(3) *Nothing in this section applies to communications contained in unpublished official records relating to any affairs of State, which shall be dealt with under section* 123.[1]"

1. As to newly proposed section 124 (3), see para 2.5 *supra*.

(iii) In section 162, second paragraph, evidence Act, the words "unless it refers to matters of State" shall be deleted.

(b) As regards the two procedural Codes, the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973—it will be necessary to insert in both the Codes at the appropriate place a provision somewhat on the following lines[1]:—

"Any person aggrieved by the decision of any court subordinate to the High Court rejecting a claim for privilege made under section 123 or section 124 of the Indian Evidence Act, 1872 shall have a right of appeal to the High Court against such decision, and such appeal may be filed notwithstanding the fact that the proceeding in which the decision was pronounced by the court is still pending."

(c) As regards the Consititution, articles 74 and 163 will need amendment, on the lines recommended in the relevant Chapter of this Report[2].

K.K. MATHEW . . . . . *Chairman*
NASIRULLAH BEG . . . . . *Member*
J.P. CHATURVEDI . . . . . *Member*
P.M. BAKSHI . . . . . *Member (Part-time)*
M.B. RAO . . . . . *Member-Secretary.*

Dated : 7th January, 1983.

1. *Cf.* Chapter 8, *supra.*
2. Paragraph 9.8, *supra.*

GIPN—S3—450, LAD/ND/83—28-9-84—625.

ERRATA

Sl, No.	*Page*	*Para*	*Line*	*For*	*Read*
1.	3	1.11	11	v. *C. Comrs.*	v. *Comrs.*
2.	3	Footnote 1	1	All F. R. 201	All E. R. 201
3.	3	Footnote 7	1	Phips on	Phipson
4.	9	Footnote 8	1	Sodni	Sodhi
5.	10	4.1	8	do ument	document
6.	11	5.2	3	puplic	public
7.	11	5.2	3	puplic	public
8.	11	5.2	5	relavent	relevant
9.	18	8.2	3	privilage	privilege
10.	18	8.2	9	controverses	controversies
11.	21	9.4	Top line	factnal	factual
12.	22	Footnote 8	1	*Commissioner*	*Commissioners*
13.	29	Sub-Para (a) of 1st Para	1	1772	1872

GIPN—Sec. 3—450 L.A. D. (N.D.)/83—2-5-86—625.