Sri Lanka Journal of Social Sciences

Sociological Foundations of the Concept of 'State Interest' in Evidentiary Law

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1. The Sociological Approach to Jurisprudence

One of the major reasons for the decline of public confidence in legal institutions today is the tendency to regard law as a collection of technical rules, or worse, as a mere craft. An essential prerequisite to the understanding of legal rules and legal institutions in their proper perspective is the consideration of a legal system as an integrated whole. The law has to be viewed not as a shapeless mass of disjointed rules remote from life but as an institution which serves the ends of society. This purpose can be achieved adequately only by emphasizing factors of social policy as a crucial aspect of the administration of law. The inadequacy of conceptual analysis alone has been exposed by the sociological jurists whose work has influenced profoundly the avenues of development of modern jurisprudence.

Auguste Comte, who is regarded as the father of the discipline of "sociology", identified and analyzed four modes of social investigation—observation, experiment, comparison and the historical method. The application of these means of investigation to the study of law is typified by the work of the German jurist, Ihering, who expounded the theory relating to the jurisprudence of "interests".[1] His basic thesis was that there is an inevitable conflict between collective and individual interests in society and that the regulation of this conflict is one of the fundamental aims of the law. Ehrlich[2] pointed out that the material, as distinguished from the formal, source of law was discernible not in statutory provisions or in decided cases but in the activities of society. He declared that "The centre of legal gravity lies in society itself."[3] The most sophisticated

1. R. von Ihering, *Law as a Means to an End* (translation by I. Husik, *Modern Legal Philosophy*, series v).
2. E. Ehrlich, *Fundamental Principles of the Sociology of Law* (translation by W. L. Moll), pp. 489 – 506.
3. See the foreword to the work referred to at note 2, *supra*.

analysis of law, as an instrument for the reconciliation of competing interests, is that of Roscoe Pound.[4] Pound looked upon jurisprudence as a technology and consistently applied the analogy of engineering to social problems.

A striking example of the function of law in modern society, of reconciling the conflict of individual, public and social interests, is provided by the legal principles governing the exclusion of evidence on the ground of jeopardy to the State interest. The cardinal aspects of public policy which come into conflict in this area are: (a) the public interest that harm should not be done to the nation or to the public service; and (b) the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced if justice is to be done.[5] The body of evidentiary law which has been evolved in this area by the Anglo-American legal tradition is founded on a compromise between divergent objectives of social policy. The purpose of this article is to offer a critical analysis of the foundations on which these legal principles and attitudes are based, as an illustration of the sociological approach to contemporary jurisprudence.

2. The Juridical Character of the Doctrine of Exclusion of Evidence on the Ground of Protection of State Interest

The branch of the law dealing with State interest as a basis of exclusion of evidence has no bearing on the concept of privilege.[6] The distinct character of the rules governing the former area is demonstrable in several ways: (i) the objection to reception of evidence, based on public policy, may be invoked by any person and, indeed, should be taken by the judge *ex mero motu*;[7] (ii) unlike a plea of privilege, the objection of State interest cannot be waived by the Crown or by any other person;[8] (iii) the rule of exclusion deriving from public policy encompasses primary and secondary evidence without discrimination;[9] (iv) the objection of State

4. R. Pound, *The Scope and Purpose of Sociological Jurisprudence* (1910 - 11) 24 Harvard Law Review 591; (1911 - 12) 25 Harvard Law Review 140, 489; *A Survey of Social Interests* (1943 - 44) 57 Harvard Law Reviw 1; *Sociology of Law and Sociological Jurisprudence* (1943 - 44) 5 University of Toronto Law Journal 1.

5. S. L. Phipson, *The Law of Evidence* (12th Edition, 1976), p. 231, paragraph 562.

6. In *Conway* v. *Rimmer* (1968) A. C. 910 every member of the House of Lords, with the exception of Lord Morris, assailed the nomenclature of "Crown privilege" and expressed a preference for the phrase "public policy".

7. *Hennessy* v. *Wright* (1888) 21 Q. B. D. 509; *Chatterton* v. *Secretary of State* (1895) 2 Q. B. 189.

8. *Rogers* v. *Secretary of State for the Home Department* (1973) A. C. 388.

9. *Hughes* v. *Vargas* (1893) 9 T. L. R. 92; *Gain* v. *Gain* (1961) 1 W. L. R. 1469.

interest cannot be rejected on the ground that the document in question came into existence in pursuance of some criminal or fraudulent purpose.[10]

In view of these special features characterizing the relevant legal principles, they cannot be assimilated with the notion of privilege in evidentiary law and are better conceived of in the setting of broader considerations of public policy which control the admissibility of evidence in judicial proceedings.

3. The Scope of the Exclusionary Rule

The principle has been authoritatively formulated for English law that "Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld."[11] In a libel action arising from an altercation between two army officers, the production of correspondence between the plaintiff and the War Office and of minutes of a military inquiry was refused. Pollock, C.B., said: "It cannot be laid down that all public documents, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest that there must be a limit to the duty or power of compelling the production of papers which are connected with acts of State."[12]

The least controversial application of this principle is in the area of national security which includes national defence and the conduct of foreign relations. When 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 objection of the defendants was upheld.[13] In the leading case of, *Duncan v. Cammell Laird & Co., Ltd.*[14] the defendants to a claim for damages for negligence in relation to the construction of submarines successfully resisted, on a direction by the Board of Admiralty, the production of numerous documents in their possession in their capacity as government contractors. The design and structure of submarines, especially when the country was at war, was clearly a matter pertaining to national security.

10. *R. v. Cox and Railton* (1885) 14 Q.B.D. 153; *O'Rourke v Darbishire* (1920) A. C. 581
11. *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624 at p. 636
12. *Beat on* v. *Skene* (1860) 5 H. & N. 838
13. *Asiatic Petroleum Co., Ltd.* v *Anglo-Persian Oil Co., Ltd.* (1916) 1 K. B. 822 at p. 830.
14. (1942) A. C. 624.

Documents which have been suppressed on the ground of probable injury to State interest include communications between the governor of a colony and its legal or military officers as to the condition of the colony or the conduct of its agents,[15] communications between the governor of a colony and a Secretary of State[16] and communications between a Dominion High Commissioner and the Prime Minister of the Dominion.[17] Similarly, disclosure has been refused in respect of resports of military inquiries[18] and communications of the commander-in-chief of forces abroad with the Government[19] on the ground that national security relates, in a broad sense, to the defence of the nation and the maintenance of good diplomatic relations with foreign States.[20]

There is no doubt that the deliberations of Parliament, the proceedings of the Privy Council and State secrets fall within the purview of the exclusionary rule. Thus, the speeches and votes of Members of Parliament may not be divulged except by leave of the House.[21] The minutes of an examination of witnesses before the Lords of the Council are considered confidential.[22] An Officer of the Tower has been held entitled to refuse to disclose whether a plan of that building, which is produced, is accurate or not.[23]

In *Duncan* v. *Cammell Laird & Co., Ltd.*[24] where the plaintiff sought discovery of documents relating to the submarine *Thetis* including a contract for the hull and machinery together with plans and specifications, and the first Lord of the Admiralty stated that "it would be injurious to the public interest that any of the said documents should be disclosed to any person", there is little scope to impugn the correctness of the decision by the House of Lords that the documents should be excluded, since any of these documents might well have given valuable information to the skilled eye of an agent of a foreign power. However, Viscount Simon took the opportunity to deal with the whole question of the right of the Crown to prevent production of documents in litigation, whether the Crown was a party to the proceedings or not.

15. *Wyatt* v. *Gore* (1816) Holt N. P. 299; *Cooke* v. *Maxwell* (1817) 2 Stark 183.
16. *Hennessy* v. *Wright*, *supra*; *Wright* v. *Mills* (1890) 62 L. T. 558
17. *Isaacs* v *Cook* (1925) 2 K. B. 391
18. *Home* v. *Bentick* (1820) 2 Brod & Bing. 130
19. *Chatterton* v. *Secretary of State*, *supra*.
20. *R.* v. *Brixton Prison Governor, ex parte Soblens* (1963) 2 Q. B. 243
21. *Plunkett* v. *Cobbett* (1804) 5 Esp. 136; *Chubb* v. *Salomons* (1852) 3 C & K. 75
22. *R.* v. *Layer* (1722) 16 St. Tr. 93.
23. *R.* v. *Watson* (1817) 2 Stark. 116
24. See note 14, *supra*.

The exposition of the law in this case leaves no room for doubt that the test of incompatibility with the public interest is satisfied:

(a) by having regard to the contents of the particular document; or

(b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

The doctrine requiring virtually guaranteed secrecy for certain classes of documents has received a wide interpretation in the decided cases. Among documents which have been excluded on this ground by the English courts are confidential reports and plans submitted to the Board of Trade,[25] army medical sheets relating to a soldier,[26] reports as to a collision at sea by a naval captain to the Admiralty,[27] reports by the Inspector-General of Prisons to the Lord Lieutenant of Ireland,[28] police reports under the Irish Crimes Act,[29] documents setting out grounds on which a prisoner received the royal pardon,[30] reports by doctors and prison officers on the mental condition of a prisoner and concerning an assault on a fellow prisoner who claimed damages against the Home Office,[31] correspondence between an officer of Customs and the Board of Commissioners,[32] a communication by a justice of the peace to the Commissioners of the Great Seal or to another justice,[33] a report by an officer of Inland Revenue to his superiors,[34] documents brought into existence within the Customs and Excise Departments for the purpose of fixing an assessment for liability to purchase tax,[35] communications between the Commissioners of Customs and independent third parties for the same purpose,[36] confidential letters commenting on the character of employees at the Mint[37] and communications made by or to the Lord Chamberlain in his official capacity as to persons to be invited to court.[38]

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25. *Mercer* v. *Denne* (1904) 2 Ch. 534.
26. *Anthony* v. *Anthony* (1919) 35 T. L. R. 559
27. *The Bellerophon* (1874) 44 L. J. Adm. 5.
28. *M' Elveney* v. *Connellan* 17 I. C. L. R. 55.
29. *R.* v. *McCormack* Crimes Act Cas. 244; *Ashtown* v. *Waterford* (1908) 42 Ir. L. T. 77
30. *R.* v. *Cobbett* (1804) 2 St. Tr. (N. S.) 789
31. *Ellis* v. *Home Office* (1953) 2 Q. B. 135
32. *Anderson* v. *Hamilton* (1816) 2 Brod. & B. 156.
33. *Fitzgibbon* v. *Greer* (1858) Ir. R. 9 C. L. 294
34. *Hughes* v. *Vargas* (1893) 9 T. L. R. 92.
35. *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)* (1973) 3 W. L. R. 268
36. *ibid.*
37. *Latter* v. *Goolden* (C. A.) 18 November, 1894 cited in *Williams* v. *Star Co.* (1908) 24 T. L. R. 297
38. *West* v. *West* (1911) 27 T. L. R. 189.

On the other hand, documents the exclusion of which has not been necessitated by considerations of State interest are exemplified by letters by a private individual to the Postmaster-General, complaining of the conduct of a postal official,[39] official books indicating the appointment of a collector of property tax[40] and communications between the keeper of a lunatic asylum and the Commissioners in Lunacy.[41]

The high-water mark of the doctrine which requires the keeping of a class of documents secret, irrespective of their contents, is represented by the case of *Broome* v. *Broome*.[42] A wife petitioned for divorce on the ground of adultery. The husband was a regular soldier of non-commissioned rank. An issue in the case related to the circumstances in which the wife was received by the husband on her arrival at his station in Hong Kong. There had been at Hong Kong a representative of the Soldiers, Sailors and Air Force Families Association. Differences had arisen between the husband and wife, and her good offices were invoked. She had made written reports of the case to her head office. The wife issued a *subpoena ad testificandum* directed to the representative of the Association and a *subpoena duces tecum* addressed to the Secretary of State for War relating to documents concerning attempts to reconcile the spouses made by the S.S.A.F.A. The Minister resisted production of the documents. On the basis of the existing authorities[43] Sachs, J. ruled that the principle of exclusion of documents on the footing of State interest could be applied irrespective of where a document originates and in whose custody it is held.

On numerous occasions, however, the English courts have expressed misgivings about the extreme width of the exclusionary rule which is entrenched in the decided cases. *Odlum* v. *Stratton*[44] was an action for libel brought by a farmer against the chairman of a War Agricultural Committee. One of the issues related to the plaintiff's efficiency as a farmer. There were several contemporary records and reports made by the Committee and communications between the Committee and the Minister. The Ministry of Agriculture successfully objected to the production of all these documents, but Atkinson, J. considered that their disclosure would have

39. *Blake v. Pilford* (1832) 1 Moo & Rob. 198
40. *Lee* v. *Birrell* (1813) 1 M. & S. 482
41. *Hill* v. *Philp* (1852) 7 Exch. 232
42. (1955) 2 W. L. R. 401; cf. J. E. S. Simon, *Evidence Excluded by Consideration of State Interest* 1955 Cambridge Law Journal 62.
43. *Ankin* v. *L. N. E. Railway* (1930) 1 K. B. 527; *Moss* v. *Chesham U. D. C.* 16 January 1945.
44. July 21 – 29, 1949, quoted by J. E. S. Simon, *op. cit.*, at p. 73

been of the utmost assistance in arriving at the truth. In *Ellis* v. *Home Office*[45] a prisoner in gaol was seriously assaulted by a fellow prisoner. The plaintiff alleged that this was due to the negligence of servants of the Home Office who knew, or should have known, that the assailant was unsafe. The Crown claimed privilege for police reports and medical reports on the behaviour of the assailant before the assault. Devlin J., while dismissing the action, said: "I must express my uneasy feeling that justice may not have been done because the material before me was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done." These judicial observations express doubts whether the exclusion of evidence at the instance of the executive might not have an adverse effect on the administration of justice.

These reservations are justified by the result reached in several cases. For example, in a divorce action[46] the issue was whether the husband had contracted syphilis during military service. Both parties wanted production of his military records, but the court upheld the War Office view that the public interest was best served by not producing them.[47] A liquidator who had taken out a misfeasance summons against directors could not have the balance sheets of the company when they were in the hands of the Inland Revenue authorities.[48] The refusal of the Minister of Transport, in an action for damages against a railway company arising out of a railway accident, to let the plaintiff have access to a report on the accident sent by the defendants was upheld[49] although his predecessor, the President of the Board of Trade, had never withheld it from litigants.[50] The protests of the judge at the lack of assistance from the Local Government Board were unavailing in an action for nuisance caused by a smallpox hospital where the report of the inspector of the board was withheld.[51] This trend, which is reflected in some Australian decisions[52], provides justification for the comment that "It is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them."[53]

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45. (1953) 2 Q. B. 135
46. *Anthony* v. *Anthony* (1919) 35 T. L. R. 559
47. cf. *King* v. *King* (1944) Q. W. N. 25
48. *Re Joseph Hargreaves, Ltd.* (1900) 1 Ch. 347; see also *Honeychurch* v. *Honeychurch* (1943) S. A. S. R. 31.
49. *Ankin* v. *L. N. E. Railway* (1930) 1 K. B. 527.
50. *Woolley* v. *N. L. R.* (1869) L. R. 4 C. P. 602.
51. *Attorney-General* v. *Nottingham Corporation* (1904) 1 Ch. 673.
52. See, for example, *Seeney* v. *Seeney* (1945) Q. W. N. 20.
53. *Broome* v. *Broome* (1955) 1 All E. R. 201 at p. 207, *per* Sachs, J.

The wide scope of the exclusionary doctrine, as applied to documents considered to belong to a sensitive class, is attributable to the formulation of the relevant principle by Viscount Simon in the *Cammell Laird* case: "The public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than upon the contents of the particular document itself."[54] Viscount Kilmuir, L.C., in a statement in the House of Lords on the grounds which justify invocation of Crown privilege, expressly distinguished between the "contents" cases and the "class" cases. Having set out the first ground that disclosure of the contents of the particular document would injure the public interest, he proceeded: "The second ground is that the document falls within a class which the public interest requires to be withheld from production, and Lord Simon particularized this head of public interest as the proper functioning of the public service".[55] The rationale underlying the second ground was stated to be that "Government decisions should be taken on the best advice and with the fullest information."[56]

The unsatisfactory condition of the law, as stated in the *Cammell Laird* case, is due primarily to the failure to take into account the different ramifications of the concept of "public interest" in this area. Viscount Simon relied heavily on the dictum of Lord Parker of Waddington that "Those who are responsible for the national security must be the sole judges of what the national security requires."[57] Viscount Simon's substitution of the phrase "national interest" for "national security" suggests that he regarded the two phrases as synonymous. It is clear, however, that "national interest" is a significantly wider concept than "national security", in that it covers not only the safety of the country but other types of interest, including commercial interests. The distinction between these concepts has been recognized in judicial pronouncements of impeccable authority.[58]

Evaluation of the public interest cannot be governed in all contexts by a uniform and immutable principle. The complexity of the concept and the diversity of the situations in which it becomes relevant as a possible basis for the exclusion of evidence render an inflexible approach of minimal

54. (1942) A. C. 624 at p. 635
55. Statement to the House of Lords on 6 June 1956
56. *ibid.*
57. *The Zamora* (1916) 2 A. C. 77 at p. 107
58. See *Chandler* v. *Director of Public Prosecutions* (1962) 3 W. L. R. 694

value. Broadly, the proposition is maintainable that the considerations which apply in contexts where national defence and good diplomatic relations are thought to be imperilled, can be distinguished entirely from those relevant to situations where evidence is sought to be excluded on the basis that its reception is injurious to some other element of the public interest. For example, it can scarcely be suggested that comparable considerations come into play in a case where publication of the design of a submarine is claimed to endanger the public safety[59] since such publication would enable an enemy agent to become aware that the submarine was equipped with tubes which could fire backwards, and in a case where reception of the medical sheets of a soldier[60] or of evidence relating to attempts at reconciling a soldier with his estranged wife[61] is objected to on the ground of transgression of the public interest.

Gradations and refinements must necessarily be recognized in relation to the component elements of the concept of public interest. An essential feature of the concept is that it comprises several facets, the relative importance of which cannot be determined in the abstract but depends on the nature of the interest which is alleged to be threatened and the extent to which jeopardy to that interest is evident in a given case. The public interest in the due administration of justice is no less vital than the public interest in the protection of the State by the non-disclosure of potentially hazardous information. The subordination of the former interest to the latter needs to be justified by compelling considerations. The central problem in these circumstances is to balance competing interests and to decide which interest should be accorded priority in the light of the exigencies of a particular situation.

There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, including the interest in the administration of justice on the basis of uninhibited access to relevant evidence, can be allowed to prevail over it. With regard to such cases it is a proper approach that production or discovery of the document in question would put the interest of the State in jeopardy. However, there are many other cases where the possible injury to the public service is less significant in character and in degree. In these contexts it is altogether appropriate to balance the public interests involved.[62] Consequently, it is not a valid

59. *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624
60. *Anthony* v. *Anthony* (1919) 35 T. L. R. 559.
61. *Broome* v. *Broome* (1955) 1 All E. R. 201.
62. cf. *Conway* v. *Rimmer* (1968) A. C. 910

principle that the smallest probability of injury to the public service must invariably outweigh the gravest impediment to the administration of justice.

The unwarranted extension of the scope of the exclusionary rule in contexts which do not impinge on national security is to be imputed, in the main, to the facile assumption that, the antipathy in these cases necessarily being between the interest of the individual litigant and the interest of the community as a whole, the latter interest is entitled to precedence. This approach is reflected in the assertion that "The public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."[63] A similar attitude finds expression in the comment that "The public interest must be considered paramount to the individual interest of a suitor in a court of justice."[64]

The fallacy inherent in this approach lies in the identification of the interest in the proper administration of justice as an individual interest. "If the private interest is an interest in securing an adequate remedy for a tort whether committed by a civil servant or otherwise, then it is also the public interest that justice should be administered so that the innocent are compensated for the wrongs done to them by their fellows."[65] It is apparent, then, that the supposed dichotomy between the individual interest and the public interest in this context is misconceived. The integrity of political institutions and the exposure of organs of government to public scrutiny indisputably transcend the range of individual interests and form an integral aspect of the public interest.

Although it is incontrovertible that there is a public interest in the general security and in public safety which is of an overriding character,[66] this interest must be contained within its legitimate ambit. The relegation of a crucial facet of the public interest – that pertaining to availability of the entirety of the relevant evidence to the courts as a foundation for achieving justice between individuals and between the individual and the State – has resulted in an imbalance in the weightage assigned to the different elements

63. *Duncan* v. *Cammell Laird* & Co. (1942) A. C. 624 at p. 643, *per* Viscount Simon
64. *Beatson* v. *Skene* (1860) 5 H. & N. 853, *per* Pollock. C. B.
65. H. Street, *State Secrets: A Comparative Study* (1951) 14 Modern Law Review 121 at pp. 130 – 131
66. R. Pound, *A Survey of Social Interests* (1943) 57 Harvard Law Review at p. 17; cf. *Dusfresne Construction Co., Ltd.* v. R. (1935 Ex. 77 at p. 85 *per* Angers, J.

of public policy in this area of the law. It is submitted that some of the deficiencies which have characterized the evolution of the case law of England can be supplied by the formulation of distinct rules catering to different branches of the public interest.

4. Responsibility for Determining the Issue of Public Interest

In the *Cammell Laird* case[67] the House of Lords laid down the proposition that an objection validly taken to production on the ground that it would be detrimental to the public interest is conclusive. Accordingly, it was stated that the court should not require to see the documents for the purpose of itself judging whether disclosure would in fact harm the public interest.

However, even within the British Isles,[68] this view has not been followed consistently. A different approach has been adopted in Scotland. In *Glasgow Corporation* v. *Central Land Board*[69] Viscount Simonds observed: "In the course of the present appeal we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so."[70] Although there are decisions by the Scottish courts[71] which are in line with the *Cammell Laird* ruling, the contrary view is supported by a preponderance of judicial authority in Scotland.[72]

The *Cammell Laird* ruling on this point has not found favour in most Commonwealth jurisdictions.

The Canadian courts have vigorously asserted that the certificate by the executive is subject to judicial scrutiny.[73]

In *Robinson* v. *South Australia State*[74] the State Government had assumed the function of acquiring and marketing all wheat grown in the State and distributing the proceeds to the growers. An action was brought alleging

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67. See note 63, *supra.*
68. See *Re Grosvenor Hotel* (No. 2) (1965) Ch. 1233; *Merricks* v. *Nott – Bower* (1965) 1 Q. B. 57; *Wednesbury Corporation* v. *Minister of Housing and Local Government* (1965) 1 W. L. R. 261.
69. (1956) S. C. (H. L.) 1.
70. At p. 11
71. *Earle* v. *Vass* (1822) 1 Shaw's App. 229; *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (1909) S. C. 335.
72. See *Henderson* v. M' Gown (1916) S. C. 821 and the cases cited in the judgment.
73. *Re Geldart's Dairies Ltd.* (1950) 3 D. L. R. 141 at p. 144; *R.* v. *Snider* (1953) 2 D. L. R 9; *contra*: *Weber* v. *Pawlik* (1952) 2 D. L. R. 750
74. (1931) A. C. 704

negligence in carrying out this function. The Privy Council remitted the case to the Supreme Court of South Australia with a direction that "it is a proper one for the exercise by that court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified."[75]

A similar conclusion has been reached in other Australian decisions. Where a police officer who had given evidence before a Magistrate on a charge of illegal betting declined on the direction of his superiors to produce vouchers directly relating to his evidence, and where an affidavit from the Chief Secretary of Victoria was tendered to the Magistrate in which the Minister objected to the production of the document, the Supreme Court of Victoria endorsed the reasoning in *Robinson's* case.[76] The courts of Queensland have taken the same view.[77] Some difficulty was caused by the ruling of the High Court of Australia that it would follow decisions of the House of Lords even to the extent of overruling its own decisions.[78] It is clear, however, that the Australian courts have shown little enthusiasm in following the decision of the House of Lords in the *Cammell Laird* case.

The Court of Appeal in New Zealand[79] has adopted the ruling in *Robinson* v. *South Australia State* in preference to that in the *Cammell Laird* case.

The balance of authority in the United States of America is in conflict with *Cammell Laird.* The American Supreme Court has declared: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[80] Where the Treasury refused to produce the correspondence relating to a suit for breach of contract and relied on an opinion of the Attorney-General that the certificate of the head of the department was conclusive, production of the correspondence was ordered.[81] In keeping with American authority[82] the objection predicated on State interest, *per se,* will not absolve a department from disclosing information within its knowledge.[82] Although the cases cannot be reconciled entirely,[83]

75. At p. 723
76. *Bruce* v. *Waldron* (1963) V. R. 3
77. *Queensland Pine Co.* v. *Commonwealth of Australia* (1920) St. R. Qd. 121
78. *Piro* v. *Foster & Co. Ltd.* (1943) 68 C. L. R. 313
79. *Corbett* v. *Social Security Commission* (1962) N. Z. L. R. 878.
80. *United States* v. *Reynolds* (1952) 345 U. S. 1 at pp. 9 – 10 *per* Vinson C. J.
81. *Robinson* v. *United States* (1915) 50 Ct. Cl. 159
82. *Fleming* v. *Bernardi* (1941) 1 F. R. D. 624
83. *United States* v. *General Motors Corporation* (1942) 2 F. R. D. 528; *Walling* v. *Comet Carriers Inc* (1944) 3 F. R. D. 442; *Bowles* v. *Ackerman* (1945) 4 F. R. D. 260

they support the proposition that the Government can properly be compelled to produce files if their relevance is manifest and if no other privilege militates against production.

The Appellate Division in South Africa has declined to treat the Minister's certificate as conclusive.[84]

Judicial attitudes in the Commonweath and in the United States probably influenced the decision in *Conway* v. *Rimmer*[85] where the House of Lords unanimously distinguished the *Cammell Laird* case. This was an action for malicious prosecution brought by a former police probationer who had been charged with, and acquitted of, theft, against his former superintendent who had caused the charge to be brought. Contrary to the wishes of both parties, the Home Secretary objected to the production of the five reports mentioned in the defendant's list of documents. Four of these reports related to the plaintiff's conduct as a probationer, and the other was made to the Chief Constable for transmission to the Director of Public Prosecutions in connection with the charge of theft. The House of Lords ordered production of the documents for inspection by them and, after inspection, they ordered production to the plaintiff.

The *ratio decidendi* underlying the separate opinions of the five Law Lords is contained in the statement by Lord Morris: "Whenever an objection is made to the production of a relevant document, it is for the court to decide whether or not to uphold the objection. The power of the court must include a power to examine documents privately, there being no difference in principle between contents cases and class cases."[86] This decision, by releasing the English courts from the thraldom of "the Simon dragnet doctrine",[87] has "brought back into legal custody a dangerous executive power".[88] The decision in *Conway* v. *Rimmer* has been applied unreservedly by Commonwealth courts.[89]

The crucial issue is whether it is the executive or the judiciary which should bear the responsibility for determining the question of public interest. Various considerations have been urged in support of the conclusion, reached in the *Cammell Laird* case, that this function falls within

84. *Van der Linde* v. *Calitz* (1967) (2) S. A. 239
85. (1968) 1 All E. R. 874.
86. At p. 900.
87. C. K. Allen in (1964) 80 Law Quarterly Review at p. 159.
88. H. W. R. Wade in (1968) 84 Law Quarterly Review at p. 173.
89. *Pollock* v. *Pollock and Grey* (1970) N. Z. L. R. 771, *McFarlane* v. *Sharp* (1972) N. Z. L. R. 64.

the purview of the executive. Firstly, it has been contended that a judge could only consider this matter in public, and that argument in open court as to the admissibility of the document would vitiate the very objectives which are sought to be attained by exclusion of the evidence. Nevertheless, prior to the *Cammell Laird* decision, no impropriety was thought to attach to examination of documents in the judge's chambers.[90] Secondly, it has been said that if the judge sees documents without their being shown to the parties, this would amount, when the Crown is a party, to communicating with one party to the exclusion of the other. This objection is devoid of merit. "Where a document has not been prepared for the information of the judge, it seems to be a misuse of language to say that the judge 'communicates with' the holder of the document by reading it."[91] Thirdly, the argument has been used that, where "policy" is concerned, "it is for Ministers and not for the courts to judge and the Ministers must discharge their responsibilities under the control of Parliament."[92] The danger here is that the word "policy" will be used as a blanket justifying the executive claim to a monopoly of discretionary decisions by reliance on the constitutional canon of political responsibility.[93]

In terms of an assessment of conflicting policy objectives, it is evident that acceptance of the certificate by the executive as conclusive is fraught with considerable danger to the freedom of the individual, especially in the light of rules of practice which are currently entrenched. Although the rule was originally formulated that the decision to object should be taken by the Minister who is the political head of the department and that he should himself have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced,[94] greater latitude has been conceded to the executive recently. Thus, it has been considered sufficient if the affidavit is made "by anyone else of sufficient authority and responsibility to be entrusted with the task."[95] The effect of this principle is to confer on the

90. *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* (1916) 1 K. B. 822, *per* Scrutton, J.; *Spigelman* v. *Hocken* (1933) 50 T. L. R. 87, *per* Macnaghten, J.

91. *Conway* v. *Rimmer*, *supra*, for Lord Reid.

92. See the speech by the Attorney - General during the second reading of the Crown Proceedings Bill, 1947, in the House of Commons, Hansard, volume 439, No. 135, column 1691.

93. H. Street, *State Secrets: A Comparative Study* (1951) 14 Modern Law Review 121 at p. 133

94. See *Duncan* v. *Cammell Laird & Co.*, *supra*

95. *Crompton (Alfred) Amusement Machines, Ltd.* v. *Customs and Excise Commissioners* (No. 2) (1972) 2 Q. B. 102 at p. 113, *per* Lord Denning, M. R.; cf. *Ronnfeldt* v. *Phillips* (1918) 34 T. L. R. 556

executive a measure of discretion, the magnitude of which cannot but result in erosion of interests which represent vital component elements of public policy in this area.

The acceptable method of arriving at equilibrium between conflicting aspects of the public interest is to allocate final responsibility to the judiciary, subject to closely defined qualifications. Except in cases where detriment to the national defence or to the conduct of diplomatic relations is alleged, the interest of the State in non-disclosure is to be viewed as one aspect of the public interest the totality of which requires to be comprehensively assessed, in the setting of the facts of the particular case, by the courts. The validity of this approach is reinforced by the consideration that the view of the executive may frequently be taken from a narrow departmental angle and could, therefore, quite easily assume an insular quality.

Consequently, it is a satisfying solution that the courts should hold the balance between the public interest, as expressed by a Minister, to withhold documents or other evidence, and the public interest in ensuring the proper administration of justice. This does not involve the attachment of trifling weight to the view of the executive. The view has been taken in England that, although the Minister's affidavit is not conclusive, the court will rely on it greatly.[96] In the United States it has been expressly recognized that the opinion of the departmental head will carry great weight.[97] The prevailing rule is that careful consideration must be given to the Minister's view in every case, and "if the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Minister's view must prevail."[98] Notwithstanding that the "contents" cases and the "class" cases are not distinguishable by reference to any general principle, it is in the highest degree improbable that if a Minister certifies that disclosure of a particular document would be contrary to the public interest, any court would be inclined to go behind the certificate.[99]

The differences between the ramifications of the concept of "public interest", in their practical application, indicate the desirability of spelling out distinct criteria facilitating a solution which derives from the balancing of competing interests in divergent contexts. In this respect, the structural framework of codified Asian systems founded on the Indian Evidence Act, 1872, is seen to be of intrinsic value.

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96. *Rogers* v. *Secretary of State for the Home Department* (1973) A. C. 388
97. *Pollen* v. *Ford Instrument Co.* (1939) 26 F. Supp. 583
98. *Conway* v. *Rimmer, supra, per* Lord Reid
99. R. Cross, *Evidence* (4th edition, 1974), p. 272

The sections of the Evidence Ordinance of Sri Lanka[100] which provide for the exclusion of evidence under the head of "Affairs of State and Allied Matters", place the relevant principles in three distinct groups:

(i) There is an absolute prohibition (section 123) against the production of unpublished official records relating to "affairs of State", except with the permission of the appropriate executive authority;

(ii) A public officer has the right to withhold from evidence communications made in official confidence when he considers that the public interest would suffer by the disclosure (section 124);

(iii) Certain "law enforcement officers" have the right to withhold the source of information as to the commission of offences (section 125).

This mode of formulating the applicable law serves the purpose of emphasizing the operation of two distinct principles. So far as section 123 is concerned, the statement or document must be necessarily excluded if the objection, properly phrased, is taken by the appropriate authority. The court has no jurisdiction to inquire into the sufficiency of the grounds alleged. But the position is otherwise under section 124. When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the court has jurisdiction, under section 124 read with section 162 (2), to inspect the document and to admit it in evidence if it is of opinion (a) that the communication was not made in official confidence, or (b) that the public interest would not suffer by the disclosure of the communication.[100a] The second question can arise for determination only after the court accepts that the communication was made in official confidence, but the issue as to prejudice to the public interest is one which the court is entitled to decide for itself.

It would seem that section 123 envisages a limitation of the court's inquiry to the question whether the record pertains to "affairs of State". Once this question is answered in the affirmative, a certificate from the appropriate authority deprives the court of its right of inspection.

In the setting of the principle embodied in section 123, then, judicial control of executive discretion is rigidly circumscribed. This residual control, however, has been exercised effectively by the courts of Sri Lanka. The

100. No. 14 of 1895. 100a See the case cited at note 107, *Infra*.

question has been considered whether registers prepared under the Waste Lands Ordinance relate to "affairs of State".[101] It has been held that the record of a speech made in public by a candidate for election or his agent is not an unpublished official record relating to "affairs of State".[102] The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book has been considered not to alter the character of the document.[103]

The concept of "affairs of State" has been significantly curtailed by the view reflected in Sri Lankan[104] and Indian[105] decisions that "affairs of State" cannot be construed as being synonymous with "State or Government business" and that the phrase denotes exclusively matters relating to diplomacy, statecraft and public administration. In regard to police reports of speeches made at election meetings, there is a *cursus curiae* in Sri Lanka that these reports do not concern "affairs of State" and may be validly produced.[106]

As for section 124 which deals with "communications made in official confidence", it has been held that this expression includes not merely inter-official correspondence but also correspondence by members of the public with government officials.[107]

The fundamental contrast offered by English law is that, within the framework of that system, matters provided for by sections 123 and 124 of the Evidence Ordinance of Sri Lanka are enveloped within the scope of a single principle. Thus, the rule has been formulated for English law that "Witnesses may not be asked, and will not be allowed to state, facts or to produce documents, the disclosure of which would be prejudicial to the public service; and this exclusion is not confined to official communications or documents but extends to all others likely to prejudice the public interest."[108]

The expedient of stratification of the different elements of public policy—which is a feature of the Asian systems modelled on the Indian Evidence Act—bears comparison with the approach of the American Law Institute to the compilation of the Model Code of Evidence.[109] A distinction

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101. *Dias* v. *Special Officer* (1928) 30. N. L. R. 129
102. *Daniel Appuhamy* v. *Illangaratne* (1964) 66 N. L. R. 97
103. *ibid*
104. *ibid*
105. *Dinbai* v. *Dominion of India* (1950) A. I. R. East Punjab 228
106. See, for example, *Illangaratne* v. *de Silva* (1948) 49 N. L. R. 169 at p. 173; *Don Philip* v. *Illangaratne* (1949) 51 N. L. R. 561 at p. 562
107. *Keerthiratne* v. *Gunawardene* (1956) 58 N. L. R. 62
108. S. L. Phipson, *Law of Evidence* (9th edition), p. 196
109. Philadelphia, 1942, Rules 227 and 228.

is drawn there between "secrets of State" and "official information". The former is defined as "information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations". "Official information" means "information not open or theretofore disclosed to the public relating to internal affairs of a State or of the United States acquired by a public official in the course of his duty".[110] Unless either the judge finds that it is not a "secret of State" or the head of a department consents to its disclosure, a secret of State must not be disclosed, and a judge is empowered to prevent its disclosure even if both parties are willing.[111] "information" is not to be disclosed if the judge finds that it is "official information" and also if its disclosure "will be harmful to the interests of the government of which the witness is an officer in its governmental capacity". The distinction between "secrets of State" and "official information" is supportable on the basis that it permits judicial surveillance over executive discretion in varying degrees, depending on the context in which the problem arises.

The cardinal merit of the approach typified by the Indian Evidence Act and the American Model Code of Evidence, as contrasted with the structural framework of English law, is that an amorphous head of public policy governed by a uniform principle of exclusion of evidence has been valuably replaced by a combination of rules which are conducive in greater degree to differences of approach and emphasis being accommodated in dissimilar factual contexts.

5. Techniques for Restricting the Scope of the Exclusionary Doctrine

A major impetus towards restricting the dimensions of the exclusionary rule is provided by the realization that "A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence turns will furnish to bureaucratic officials too ample opportunities for abusing the privilege".[112] In pursuit of the objective of demarcating the confines of the exclusionary rule based on State interest, judicial initiative has extended to the employment of several techniques:

(a) A necessary condition of exclusion of evidence is that there must be some connection between the claim to exclusion and the central Government.[113] Where, for instance, the validity of a notice requisitioning

110. *ibid.*
111. H. Street, *op. cit.*, p. 134
112. J. H. Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition, 1940), Volume 8, p. 799.
113. R. Cross, *Evidence* (4rd edition, 1974), p. 269

a house was in issue, the English courts showed no reluctance in rejecting the corporation's claim to exclude their interdepartmental communications in the public interest.[114] Although there are now in England, as in many other countries, large public bodies such as British Railways and the National Coal Board, the efficient functioning of which has an immediate bearing on the public interest, the Attorney-General conceded in his submissions to the House of Lords in *Conway* v. *Rimmer*[115] that Crown privilege was not and could not be invoked to prevent disclosure of similar documents made by them or their servants, even if it were said that this was required for the proper and efficient functioning of that public service. In view of the rapid proliferation of public corporations and comparable institutions today, particularly in Asian and African countries which are in the process of developing a mixed economy, this limitation on the scope of the rule of exclusion is of practical importance.

(b) The question arises whether the distinction between documentary evidence and oral testimony may properly be exploited as a means of enhancing the manoeuvrability available to the courts in circumstances where the rules applicable to one of these categories of evidence are thought to be characterized by excessive rigidity.

In the *Cammell Laird* case Viscount Simon entertained no doubt that a distinction could not be made for this purpose between oral and documentary evidence: "The same principle must apply to the exclusion of oral evidence which, if given, would jeopardize the interests of the community."[116] Nevertheless, in *Broome* v. *Broome*[117] the rule of exclusion applicable to documentary evidence was held not to inhibit the reception of oral testimony, except possibly, secondary oral evidence of excluded documents. However, this aspect of the decision in *Broome* v. *Broome* should be considered *per incuriam*, since no reference was made to previous judicial authority to the contrary.[118] The need to recognize a distinction between documentary evidence and oral evidence in this context was felt by Sachs, J., because, at the time *Broome's* case was decided, the *Cammell Laird* ruling was fully operative and the English courts considered the endeavour worthwhile to repudiate, in regard to oral evidence, a fetter which had been compulsorily imposed as to the reception of documentary evidence in a manner which stultified balanced value – judgments on the part of the

114. *Blackpool Corporation* v. *Locker* (1948) 1 K. B. 349 at p. 379
115. *Supra*
116. (1942) A. C. 624 at p. 643
117. *Supra*
118. R. v. *William Cobbett* (1831) 2 St. Tr. (N. S.) 789, *per* Lord Tenterden. However, the case of R. v *Baynes* (1909) 1 K. B. 285 was convincingly distinguished on the facts.

courts as the basis of reconciling conflicting elements of public policy. The usefulness of this distinction has been eliminated by the decision of the House of Lords in *Conway* v. *Rimmer* which resuscitates the doctrine of judicial control of the admissibility of evidence in these cases. The principle is settled today that, where documentary evidence is excluded on the ground of repugnance to the State interest, oral evidence of any kind — whether it relates to the excluded documents or to other matters — is equally barred.

No distinction is defensible from the standpoint of policy between types of secondary evidence — namely, secondary oral evidence of documents the production of which is incompatible with the public interest and oral testimony of other facts the proof of which is precluded on the identical footing. It is anomalous in principle to recognize a rule which, while excluding evidence of the former, acquiesces in reception of proof of the latter. The invalidity of the distinction is demonstrable in the light of the consideration that it is generally not the document the disclosure of which harms the public interest but the facts stated therein.[119]

In regard to secondary oral evidence of documents there is unassailable authority that, if the original document falls within a class of document which is excluded by public policy, a copy is equally excluded.[120] Moreover, if copies of documents are excluded from evidence on the ground of public policy, there is no justification, either in principle or on authority, for the application of a different rule to oral testimony in respect of their contents. The law takes no cognizance of degrees of secondary evidence. Accordingly, once secondary evidence of a document is admissible, a party is entitled to adduce any type of secondary evidence,[121] including oral testimony and circumstantial or presumptive evidence.[122] In conformity with this principle it has been held that, where the original document was excluded on a certificate that its production would be prejudicial to discipline and to the interest of the Inland Revenue, the evidence of clerks in the office who had seen the report was excluded.[123] This attitude finds consistent support in the case law.[124]

119. J. E. S. Simon, *op. cit.*, p. 69

120. *Ankin* v. *L. N. E. Railway* (1930) 1 K. B. 527; *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624; *Moss* v. *Chesham U. D. C.* January 16, 1945, before Lynskey, J. See J. E. S. Simon, *op. cit.* p. 68

121. *Brown* v. *Woodman* (1834) 6 C & P. 206, *Doe* v. *Ross* (1840) 7 M. & W. 102; *Hall* v. *Ball* (1841) 3 M. & Gr. 242

122. R. v. *Fordingbridge* (1858) 27 L. J. M. C. 290

123. *Hughes* v. *Vargas* (1893) 9 T. L. R. 551

124. *Chatterton* v. *Secretary of State for India* (1895) 2 Q. B. 189 at p. 195; *Moss* v. *Chesham U. D. C.* January 16, 1945, before Lynskey, J.

The condition of the present law is characterized by internal consistency and symmetry, in that formal distinctions – whether between documentary evidence and oral evidence or between types of secondary evidence – do not detract from the applicability of a uniform approach.

(c) In his argument addressed to the House of Lords in *Conway* v. *Rimmer* the Attorney-General made the surprising concession that, even in accordance with the principle enunciated in the *Cammell Laird* case, the courts possessed power to override an objection by the executive (i) taken in bad faith, or (ii) actuated by an irrelevant consideration, or (iii) founded on a false factual premise.[125] As the decided cases suggest,[126] these grounds, considered cumulatively, will result in a significant erosion of the conclusive effect which the certificate by the executive had been declared to possess. The comment has been aptly made that the attractiveness of these heads of review for the courts consists of their virtually untrammelled discretion to pronounce, in relation to any given power of an administrative body, the matters that are and are not to be taken into account and thereby in essence to pass upon the reasonableness of the decision under review.[127] The plenitude of this discretion available to the courts, according to the argument of the Attorney-General, would have whittled down substantially the impregnable position of the executive in matters involving State interest, in terms of the *Cammell Laird* doctrine. However, the usefulness of these formulae as a mode of revivifying the postulate of judicial control is reduced by the practical reversal of the *Cammell Laird* opinion, in so far as it purported to expound the general law relating to the topic, by the unanimous conclusion of the House of Lords in *Conway* v. *Rimmer*.

(d) A drastic method of precluding expansion of the scope of the exclusionary doctrine has been suggested in some decided cases. In *Broome* v. *Broome* Sachs, J. wondered whether the development of Crown privilege on the grounds of public interest "might not now be regarded by the courts in the same light as development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency in each of these matters

125. (1968) 1 All E. R. 874 at p. 891.

126. See *Franklin* v. *Minister of Town and Country Planning* (1948) A. C. 87; *Smith* v. *East Elloe R. D.* C. (1956) A. C. 736; *Auren* v. *Rayne* (1958) 1 W. L. R. 1300.

127. D. H. Clark, *The Last Word on the Last Word* (1969) 32 Modern Law Review 142 at p. 151; cf. *Roberts* v. *Hopwood* (1925) A. C. 578; *Prescott* v. *Birmingham Corporation* (1955) Ch. 210; *Taylor* v. *Munrow* (1960) 1 W. L. R. 151

being for the courts not to develop fresh heads but to leave them to the legislature."[128] A similar approach to the problem seems to have commended itself to Lord Upjohn in *Conway* v. *Rimmer*.[129]

On this point identical reasoning is not contained in the speeches of the five Law Lords in *Conway* v. *Rimmer*. If the view of Lord Upjohn were to prevail, *Conway* v. *Rimmer* would supersede the *Cammell Laird* doctrine not only to the extent of abrogating the principle of unqualified executive responsibility but in the further sense that, outside the traditional classifications such as national defence, the conduct of foreign policy and "high level inter-departmental communications",[130] other classes of documents would be held intrinsically incapable of exclusion because of the predominant public interest in their adduction as relevant evidence. But the pendulum has not swung so far in the opposite direction. Lords Reid, Hodson and Morris seem by implication to have rejected Lord Upjohn's approach.

The principle suggested by the tenor of the speeches of the majority is that classification of documents *in limine* is not supportable and that an empirical assessment of the competing elements of public policy, against the background of the particular case, cannot be dispensed with. Despite the support which the innovative suggestion by Lord Upjohn has received from writers,[131] it is submitted that the adoption of this proposal will deprive the law of essential malleability and resilience and that the recognition of closed categories impedes unjustifiably the development of new heads of public policy in response to changing requirements and circumstances.

6. Factors Conditioning the Exercise of Judicial Discretion

In the absence of an *a priori* classification which governs absolutely the reception or non-disclosure of evidence, the discretion of the court is the operative criterion. Naturally, the result of the exercise of discretion in peripheral areas cannot be predicted, but a tentative identification of the *indicia* relating to the exercise of judicial discretion in this area may be usefully attempted. The basic criterion is whether suppression of a class of documents is "necessary for the proper functioning of the public service."[132]

128· (1955) 2 W. L. R. 401 at p. 408.

129· (1968) 1 All E. R. 874 at p. 915.

130· At p. 910.

131· D. H. Clark, *op. cit.*

132· *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624 at p 642, *per* Lord Simon

(i) It is clear that the public interest requiring the non-disclosure of information which might be useful to those who organize or participate in criminal activities is generally entitled to priority over the counterveiling principle that all evidence relevant to the cause subject to adjudication should be available to the court. Consistently with this attitude, the identity of informers has usually been protected from disclosure.[133] In an action for penalties under the Excise Acts, an English court has refused to allow a witness for the Crown to answer the question whether he gave the information which led to the institution of proceedings.[134] The view has been taken that an Assistant Director of Public Prosecutions cannot be required to produce a letter which he had written to the Director[135] and that a conversation between a private solicitor and the Director of Public Prosecutions is privileged.[136] The stability of this principle has received emphasis: "This rule of public policy is not a matter of discretion; it is a rule of law and, as such, should be applied by the judge at the trial."[137] Although in a case of murder tried in the middle of the last century, Cockburn, C. J. allowed a police officer to disclose the names of the persons who had given him the information which led to the discovery of a phial containing poison,[138] this attitude is at variance with a paramount objective of public policy: "If the police were bound to answer that sort of question, the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is."[139]

This principle has been extended, with manifest justification, to ensure the protection of persons who supply valuable information to a Gaming Board. In *Rogers* v. *Secretary of State for the Home Department*[140] a company of which Rogers was a director sought the Gaming Board's consent to the grant of licences in respect of bingo halls to be managed by Rogers. The Board was obliged to take into account Rogers' character. They made inquiries of the Sussex Police, and in reply the Assistant Chief Constable of Sussex wrote a letter to the Board, which later refused the consent sought. Rogers began proceedings for criminal libel regarding the contents of the letter. The Home Secretary claimed

133. *R.* v. *Hardy* (1794) 24 St. Tr. 199 at p. 208, per Eyre, C. J.
134. *Attorney-General* v. *Briant* (1846) 15 M. & W. 169
135. *R.* v. *Benson* (1900) 151 C. C. C. Sess. Pap. 705.
136. *R.* v. *Carpenter* (1911) 156 C. C. C. Sess. Pap. 298
137. *Marks* v. *Beyfus* (1890) 25 Q. B. D. 494 at p. 498, *per* Lord Esher, M. R.
138. *R.* v. *Richardson* (1863) 3 F. & F. 692.
139. Lord MacDermott, *Protection from Power under English Law*, Hamlyn Lectures for 1957, pp. 103 – 104
140. (1973) A. C. 388.

privilege in respect of the letter and a copy. The House of Lords upheld the claims. Lord Reid placed emphasis on the consideration that the Board required the fullest information it could obtain in order to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming establishment and that many would refuse to speak unless assured of absolute secrecy.

(ii) It probably makes a difference whether the party who claims to be prejudiced by non-disclosure incurs the risk, in the proceedings in question, of forfeiting a right at that time vested in him, or whether the proceedings have as their object the conferment on him of a privilege which he did not enjoy previously. Thus, in *Rogers* v. *Secretary of State for the Home Department*, the House of Lords took into account that the documents which were eventually excluded came into existence only because the applicant was asking for a privilege and was submitting his character and reputation to scrutiny, and that the documents were not used to deprive him of any legal right.

(iii) The culpability or lack of blameworthiness of the party who is adversely affected by exclusion of the evidence is a material consideration.

In *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners*[141] the appellants were owners and licencees of a patent for a chemical called furazolidone. The patent was being infringed by illegal imports of the substance. The appellants instituted proceedings against the Commissioners to obtain the names and addresses of the importers. The Commissioners made a claim for privilege in an affidavit. This claim was rejected by the House of Lords. The primary ground on which the Chairman of the Commissioners sought to resist disclosure was that the good relations and mutual confidence which usually existed between the officers of the Customs and traders would be seriously impaired if it became known that any information of a confidential nature obtained from traders under statutory powers might have to be disclosed by the Commissioners otherwise than under the provisions of a statute enabling them to disclose it. One of the reasons emerging from the speeches in the House of Lords for the rejection of the claim by the Commissioners was that apprehension of this kind would be entertained only by dishonest traders[142].

This case may be contrasted with *Alfred Crompton Amusements Machines Ltd.* v. *Customs and Excise Commissioners*[143]. An issue arose between the company and the Commissioners as to the correct assessment for purchase

141. (1973) 2 All. E. R. 943.
142. See, in particular, *per* Lord Cross of Chelsea
143. (1973) 2 All E. R. 1169

tax on certain machines made by the company. The Commissioners claimed privilege for certain documents containing information supplied by third parties. The House of Lords upheld the claim. Distinguishing the *Norwich Pharmacal* case, Lord Cross of Chelsea remarked: "There it was probable that all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all. Here, on the other hand, one can well see that the third parties who have supplied this information to the Commissioners because of the existence of their statutory powers would very much resent its disclosure by the Commissioners to the appellants."[144].

(iv) The degree of likelihood or improbability of the harm which is envisaged as a consequence of reception of the evidence is a relevant factor. In the *Norwich Pharmacal* case one of the objections to disclosure was that traders who did not wish to have their names disclosed might be tempted to concoct false documents and thereby hamper the work of the Customs. Lord Reid pointed out that this required at least a conspiracy between the foreign consignor and the importer, and that such a contingency was in the highest degree improbable.

(v) The circumstance that an objection in a case is not primarily to prevent production but to sanction abstraction of documents which had already been lodged by one of the parties in proceedings before the court diminishes the merit of the objection. In *Whitehall* v. *Whitehall*[145] the letter which the Minister sought to suppress had already been produced in process. The claim by the executive was disallowed.

(vi) The purpose for which disclosure of the document or reception of the oral testimony is objected to, is pertinent to exercise of the court's discretion. In *Conway* v. *Rimmer* Lord Reid said: "Even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a civil case··· not to protect the document – its contents are already public property—but to protect the writer from civil liability, should he be sued for libel or other tort"[146]. Lord Reid, while expressing disapproval of this principle, did not assail its validity. It is submitted, however, that an ulterior purpose not relevant to furtherance of the public interest in question should militate decisively against acceptance of the claim by the executive.

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144. At p. 1185
145. 1957 S. C. 30 especially at p. 39, *per* Lord Clyde.
146. (1968) 1 All E. R. 874 at p. 882

(vii) It has been asserted that "Government servants are reluctant to put their observations into writing if they are likely to be produced in a court of law"[147]. But the argument based on candour lacks cogency. Lord Hodson has trenchantly commented that "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."[148]. Lord Pearce has gone so far as to suggest that a police officer, for instance, far from being deterred from candour by the thought that a judge might read his notes, "would rather be put on his mettle to make sure that his observations were sound and accurate, and be stimulated by the thought that he might prove to be the one impartial recorder on whom justice between the parties might ultimately turn"[149]. The desirability of frankness in official communications is a relevant, but not decisive, consideration which has to be assessed in relation to other factors.

(viii) Although confidentiality is neither a ground of privilege nor a justification for withholding evidence in the public interest, it may have an important bearing on the latter issue[150]. The range of factors by reference to which the competing elements of public policy have to be evaluated, will generally include the confidentiality of documents or other evidence.

(ix) Lord Cross of Chelsea has suggested: "In a case where the contentions for and against disclosure appear to be fairly evenly balanced, the court should uphold a claim for privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill effects of nondisclosure"[151]. The validity of this approach is controversial. The opposite view that, in cases of doubt, the public interest in the due administration of justice should prevail, may be urged with equal force.

7. Special Considerations Applicable to Criminal Proceedings

The principle has been recognized generally that the interest of the State in the exclusion of documents or other evidence of a confidential or sensitive nature must give way to the overriding need to provide a defendant

147. Sir Thomas Inskip, *Proceedings by and against the Crown*, (1930) 4 Cambridge Law Journal 1 at p. 10

148. *Conway* v. *Rimmer* (1968) A. C. 910 at p. 967

149. *Conway* v. *Rimmer* (1968) A. C. 910 at p. 985

150. R. Cross, *Evidence* (4th edition, 1974), p. 273

151. *Alfred Crompton Amusement Machines, Ltd.* v. *Customs and Excise Commissioners* (1973) 2 All E. R. 1169 at p. 1185.

in criminal proceedings with every opportunity of vindicating his innocence[152]. Viscount Kilmuir, L. C., in his statement to the House of Lords on the scope of Crown privilege, said: "If medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed"[153].

In at least one reported case[154] disclosure of the name of an informant has been ordered. But the principle is not entirely free from doubt in view of a *cursus curiae* which has resisted the divulging of information advantageous to the defence[155]. For Canadian law the view has been taken that, where evidence contained in a tax return is pertinent as evidence on a criminal charge, the Magistrate before whom the charge is tried, is a person legally entitled to the information[156].

The priority accorded to the interest of the defendant in criminal proceedings finds expression in the rule that, if the evidence of a Crown witness is contradictory of a statement made by him, the prosecution should make the statement available to counsel for the defence as a basis for cross-examination.[157]

In the United States of America the special protection conferred on a person accused of crime has been made to rest on a theory of implied waiver. The American courts have held that, if the Government is instituting criminal proceedings, the accused is entitled to production of the Government files and documents.[158] It is considered repugnant to rudimentary concepts of equity and fair dealing that the accused should be denied access to material which the Government has used in preparing its case.[159] Learned Hand, J., has observed: "While we must accept it is lawful for a department of the Government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal proceeding founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate."[160]

152. cf. *Rogers* v. *Secretary of State for the Home Department* (1973) A. C. 388 at p. 407, *per* Lord Simon of Glaisdale
153. Statement in the House of Lords on 6 June 1956.
154. R. v. *Richardson* (1863) 3 F. & F. 693; cf *Webb* v. *Catchlove* (1886) 3 T. L. R. 159
155. R. v. *Watson* (1817) 32 St. Tr. 1; R. v. *Cobbett* (1831) 2 St. Tr. (N. S.) 789; R. v. O'Connor (1846) 4 St. Tr. (N. S.) 935; *Attorney-General* v. *Briant* (1846) 15 L. J. Ex. 265.
156. *Ship* v. R. (1945) 95 Can. C. C. 143
157. R. v. *Clarke* (1930) 22 Cr. App. Rep. 58; R. v. *Hall* (1958) 43 Cr. App. Rep. 29; cf. *Dallison* v. *Caffery* (1965) 1 Q. B. 348
158. U. S. v. *Krulewitch* (1944) 145 F. 2nd 76.
159. U. S. v. *Beekman* (1946) 155 F. 2nd 580 at p. 584
160. U. S. v. *Andolschek* (1944) 142 F. 2nd 503

In terms of a strictly conceptual analysis the dichotomy between the application of the exclusionary rule in civil and in criminal proceedings has been considered awkward.[161] Lord Reid has commented on the supposed illogicality of the prevailing law: "We have the curious result that 'freedom and candour of communication' is supposed not to be inhibited by knowledge of the writer that his report may be disclosed in a criminal case, but would still be supposed to be inhibited if he thought that his report might be disclosed in a civil case."[162]

It is submitted, however, that the dichotomy is supportable from the standpoint of policy. "Freedom and candour of communication" is a relevant element of the public interest which may be worthy of protection in competition with such other aspects of the public interest as are of comparable importance, but it must yield to paramount considerations of public policy to which the object of candour in official communications can appropriately be regarded as subordinate. This heightens the significance of a relative assessment, *ad hoc*, of the competing interests involved in a particular case.

8. Procedural Aspects

Objection to disclosure may be taken on oath either orally or by affidavit.[163]

The procedure in cases where documentary evidence is objected to, is quite settled. The affidavit in support of the claim for exclusion should set out with sufficient particularity the nature and identity of the documents which it is desired to withhold, and the grounds on which a claim to do so is based.[164] Where the claim for privilege is not made in the proper manner, the judge is entitled to exercise his own discretion.[165]

A more complex procedure may be required when oral evidence is sought to be excluded on the ground that its reception is injurious to State interest. Sachs, J., confronted with this difficulty in *Broome* v. *Broome*,[166] said: "Any certificate in a 'blanket form' which stopped a witness going into the witness box seems contrary in principle to those portions of the decided cases which enjoin Ministers, before giving a certificate as regards

161. A. L. Goodhart, *The Authority of Duncan* v. *Cammell Laird & Co.* (1963) 79 Law Quarterly Review 153 at p. 159.
162. *Conway* v. *Rimmer, supra.*
163. *Re Hargreaves* (1900) 1 Ch. 347
164. *Alfred Crompton Amusement Machines, Ltd.* v. *Customs and Excise Commissioners, supra.*
165. *Spigelman* v. *Hocken* (1933) 150 L. T. 256
166. *Supra*

documents, to examine each in turn in the light of the issues arising in the case." The force of this argument is obvious. The inevitable result of conceding the claim asserted by the Crown in *Broome*'s case would be to give the Crown power to prevent certain classes of witnesses, for example, civil servants, from having to give evidence in court.[167]

At the same time it cannot be denied that oral testimony may be no less detrimental to State interest than documentary evidence in some contexts. What is called for, then, is a procedure which, although capable of application to oral evidence, furnishes the court with adequate opportunity to disallow arbitrary or capricious claims by the executive.

The outline of a procedure consistent with these objectives emerges inferentially from the judgment in *Broome* v. *Broome*. In the first place, it is essential that the Minister's affidavit should delineate the precise scope of the evidence to which objection is taken. Moreover, the court would derive assistance from a statement by the Minister as to the way in which the offensive evidence injures the public interest. Secondly, emphasis has been placed on the need to secure the attendance in court of counsel on behalf of the Minister to listen to the questions and to object to them, if necessary. By these means the court should be able to ensure that the ambit of the exclusionary rule is restricted as narrowly as is consistent with protection of the State interest.

167. J. E. S. Simon, *op. cit*,. pp. 71 – 72