DOCUMENTS ON "AFFAIRS OF STATE" AS EVIDENCE: BRINGING A LEGAL PORCUPINE INTO JUDICIAL CUSTODY

I. *INTRODUCTION*

Recently, the Federal Court of Malaysia had to deal with a 'legal porcupine'[1] which had already troubled courts in other jurisdictions[2] for quite some time. The legal porcupine in question is one of the so-called "governmental privileges"[3] which the law of evidence provides for on the basis of public policy. The privilege refers generally to a discretionary power conferred, either by statute or at common law, to a high-ranking government official to give or withhold permission to or from anyone who wishes or is required to produce documents, the disclosure of which would injure the public interest. It also extends

[1] S.A, de Smith, *Judicial Review of Administrative Action* (3rd ed., Stevens 1973), at p. 287. The line from which this phrase is taken is as follows: "We now take hold of a legal porcupine which bristles with difficulties as soon as it is touched."

[2] The jurisdictions which will be referred to in this article are those of India, Sri Lanka, Malaysia, Singapore and England.

[3] The use of the term is now quite contentious in the light of recent trends in the English law on the subject, though the usage appears more acceptable in the U.S. — see Cleary *et. al.*, *McCormick on Evidence,* Ch. 12 (2nd ed., West Publ. Co., 1972). In England, the term "Crown Privilege" was criticised by Viscount Simon L.C. in *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624, at pp. 641-2. It was said that privilege could be waived by the litigant protected by it, but that "the rule that the interest of the state must not be put in jeopardy by producing the documents which would injure it is a principle... quite unconnected with the interests or claims of the particular parties in litigation"— the Court would have to step in even if no objection was taken at all. If this is the basic difference between the so-called "Crown privilege" and the other types of privilege, the distinction appears to have been blurred in local law as the "head of department" is given the authority to give or withhold consent for disclosure as he sees fit. Recently, Lord Simon of Glaisdale, in *D.* v. *Nat. Soc. for the Prevention of Cruelty to Children* [1978] A.C. 171, at p. 233, placed the bases of all the so-called evidential privileges as "Public Policy. Then, speaking of the cases which are classified under the new term "Public Policy", the .learned Law Lord said: "There is no harm in categorising this sort of non-waivable exclusion under the heading of 'Public Policy' provided that it is recognised, first, that the exclusion of *any* relevant evidence is to be justified on grounds of public policy..., secondly, that dealing with it in this way merely signifies methodologically that it constitutes the residuum of classes of excluded evidence which cannot be dealt with appropriately under other headings (for example, hearsay, 'the best evidence rule', non-compellability or privilege), and thirdly, that the label 'Public Policy' here does not mean that the courts must necessarily wait on Parliament or must necessarily refrain from the normal common law process of applying an established rule to circumstances analogous to those in which the rule was established ...." (at p. 234F-H). The doctrine in England has been extended to cover claims for non-disclosure of material evidence made by nonrcentral Government bodies: see *R.* v. *Lewes Justices, Ex p. Sec. of State, Home Dept.* [1973] A.C. 388, and *D.* v. *N.S.P.C.C.* (*supra.*). In this article, the terms "State Privilege" or "Governmental Privilege" are used as they are distinct from the English doctrine (see *supra.)* and because of judicial ernployment of the terms. See also, *Burmah Oil Co.* v. *Bank of England* [1979] 1 W.L.R. 473, and *Science Research Council* v. *Nassé* [1978] 3 All E.R. 1196.

to oral evidence based on such documents.[4] Though the privilege is well established, its scope and mode of operation have been the main sources of difficulty, both at common law and in statutory form. In Malaysia and Singapore, it is codified in section 123 of the Evidence Act.[5] Sections 162[6] and 165[7] are also relevant in determining the scope and mode of operation of the privilege.

In *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor.*,[8] the Federal Court of Malaysia had to consider the applicability of these statutory provisions to a set of documents from a Committee of Enquiry set up, *inter alia,* to investigate the circumstances leading to the death of a patient in a Government hospital. Negligence on the part of some hospital officers was alleged by the plaintiffs representing the estate of the deceased. To support the claim, the plaintiffs sought the notes and findings of the Committee of Enquiry and was met with an objection by the defendants that the documents were privileged under section 123. The trial judge[9] considered the law on the privilege in some detail and rejected the claim. The defendants appealed to the Federal Court which similarly rejected the claim and dismissed the appeal.[10] Only one full judgment — that of Raja Azlan Shah FJ. (as he then was) — was delivered, the other two appeal judges concurring with him. An interesting feature of the judgment is in the copious citation of Com-

4 Section 123, Evidence Act (hereinafter referred to as "the Act"), Cap. 5, (Singapore Statutes, Rev. Ed. 1970). The Indian Evidence Act 1872 was the model Code for a number of countries including Malaysia, Singapore and Sri Lanka. The provisions of the Indian Act were re-enacted virtually unchanged in Malaysia and Singapore. Recently, major amendments were made to the Singapore code: *vide* Evidence (Amendment) Act, No. 11 of 1976, (Singapore Statutes, Rev. Ed. 1970, 1976 Supp.). For the English position on this point, see J.E.S. Simon (now, Lord Simon of Glaisdale), "Evidence Excluded by Considerations of State Interest" [1955] Camb. L.J. 62.

5 Cap. 5, (Singapore); Evidence Act (Rev. 1971), Laws of Malaysia, Cap. 56. The Malaysian provision differs slightly from its Singapore counterpart in that the ultimate control rests with the Minister (in the case of a department of the Federal Government) and with the Chief Minister (in the case of a department of a State Government). In Singapore, the ultimate control rests with the President in all cases.

6 Cap. 5 (Singapore); Cap. 56 (Malaysia). Section 162, in so far as it is relevant provides: "(1) 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 on by the court. (2) The court, if it sees fit, may inspect the document unless it refers to affairs of state, or take other evidence to enable it to determine on its admissibility."

7 *Ibid.* Section 165 is a general provision empowering the judge to ask questions and to order production of any document. The second proviso states: "Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse, party...." This section and its proviso is virtually ignored by the judges in their discussion on the privilege under section 123. *Quaere:* whether a judge could, under this provision, call for a document claimed to be privileged under section 123 for the purpose of inspection.

8 [1978] 2 M.L.J. 146. For a detailed discussion of the case, see, *post,* p. 119, (P.K. Jones).

9 Mohamed Zahir J.

10 [1978] 2 M.L.J. 146, at pp. 149-151.

monwealth and United States authorities[11] on some aspects of the privilege, particularly on the issue of the Court's power not to accept the Executive officer's word as final. Unfortunately, the utility of these cases was not made immediately obvious in the judgment, especially with regard to their applicability to the local provisions. The more relevant authorities— notably, the Indian Supreme Court decision of *State of Punjab* v. *Sodhi Sukhdev Singh*[12] and its standing after another Supreme Court decision *State of Uttar Pradesh* v. *Raj Narain*[13] (in which some rules inconsistent with those of the former case were enunciated)—were not well discussed. It would appear that the Federal Court was rather puzzled by the seemingly inconsistent attitudes that the Indian Supreme Court has towards the applicability of the common law in general and English law in particular. For instance, Raja Azlan Shah F.J. remarked that "Courts in India tend to rely on the wording of the Evidence Act rather than English law".[14] This was immediately followed by a paragraph on the *Sodhi Sukhdev*[15] decision, of which he said that "what makes these opinions [referring to the judgments in the case] interesting is that all the judges rely on English law and the common law. All of them seemed to regard the problem before them as if they were looking at an English problem in the abstract."[16] It is hard to discover what conclusion the Federal Court is drawing on this matter. In any event, a review of the present law seems to be warranted. The basic problems arising from the legislative enactments[17] must first be identified and the judicial res-

[11] Some of the major cases cited were *Conway* v. *Rimmer* [1968] 2 A.C. 910, *R.* v. *Lewes Justices, Ex p. Sec. of Slate, Home Dept.* [1973] A.C. 388, *U.S.* v. *Reynolds* (1953) 345 U.S. 1, *Robinson* v. *State of S. Australia (No. 2)* [1931] A.C. 704, *D.* v. *N.S.P.C.C.* [1978] A.C. 171, *State of Punjab v. Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493, *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865.

[12] A.I.R. 1961 S.C. 493.

[13] A.I.R. 1975 S.C. 865.

[14] [1978] 2 M.L.J. 146, at p; 150F.

[15] A.I.R. 1961 S.C. 493.

[16] [1978] 2 M.L.J. 146 at p. 105H-I. With respect to the learned Judge, this view could not be sustained especially in the case of the majority in *Sodhi Sukhdev Singh (supra.).* Gajendragadkar J. (for the majority): "… as we have repeatedly pointed out, our decision must ultimately rest on the relevant statutory provisions contained in the Indian Evidence Act" (p. 509, para. 35). See also, *ibid*., p. 507 (para. 31) and Subba Rao J., *ibid*., at p. 516 (para. 56). In Sri Lanka, Basnayake C.J., in a forthright fashion, declared: "Little assistance can be gained by a reference to English law…. In construing our Evidence Ordinance it would not be correct to approach it with preconceived notions of English law and treat section 123 as a statutory declaration of that system of law." *(D. Appuhamy* v. *T.B. lllangaratne* (1964) 66 N.L.J. 97, at pp. 104, 107).

[17] In Singapore, apart from the Act itself, provisions relevant to the privilege are found in the Government Proceedings Act, s. 34 (Cap. 21, Singapore Statutes, Rev. Ed., 1970) and in the Rules of the Supreme Court 1970 (see, *post* pp. 41-44). Malaysia has similar provisions in her Government Proceedings Act (F.M.S. Ord. 58 of 1956), s. 36 (as amended) and in her Rules of the Supreme Court 1957 (L.N. 321 as amended). These provisions concern civil actions to which the Government is a party. Sections 34 (of Singapore's Government Proceedings Act) and 36 (of Malaysia's Government Proceedings Act) generally subject the Government to discovery, produce documents for inspection and answer interrogatories. There is a proviso in both cases to the effect that rules of law which authorise or require the withholding of any document, or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest shall prevail. Plainly, sections 123 and 124 of the Act would qualify as such "rules of law".

In Malaysia, s. 36 of the Government Proceedings Act and R.S.C. Ord. 31, r. 30 contain additional provisions on the issue of "injury to the public interest". S. 36(3) provides:

ponses to them evaluated. It may also be appropriate to refer to alternative codifications for ways in which the problems arising from the privilege may be overcome.

II. *BASIC PROBLEMS: THE PRIVILEGE UNDER THE EVIDENCE ACT*[18]

1. *Indian and Sri Lankan authorities*

The major source of difficulty for the judges in relation to the privilege may be said to be the failure of the legislature to provide for an adequate number of rules (either in the Evidence Act or in the procedure enactments) to regulate the mode of claiming the privilege. Consequently, the judges have found it necessary to rely on the common law to fill this "gap". The extent of the gap, however, can only be ascertained by an examination of the express provisions in the Act[19] and in the civil and criminal procedure enactments.[20]

The key provisions in the Evidence Act concerning the privilege, sections 123 and 162, generally provide for the type of documents that are within the privilege,[21] the discretion on the part of the officer to give or withhold permission regarding production and the giving of evidence,[22] and the role (and limits) of a court to review the validity of any objection to production.[23] The type of documents falling within this privilege is described hi section 123 as "unpublished official records

> "Without prejudice to the proviso to the preceding subsection (1), any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed, if in the opinion of the persons hereinafter mentioned, it would be injurious to the public interest to disclose the existence thereof. Such persons are —
> (a) In respect of the Federal Government, a Minister;
> (b) In respect of the Government of a State, the Chief Minister of such State."

There is also a proviso to this subsection:

> "Provided that it shall not be deemed injurious to the public interest to disclose the existence of any such document by reason only of the fact that such disclosure would or might lead or tend to the success of the opposite party in the proceedings."

See, *post,* pp. 42-43, for a discussion of the effect of these additional provisions (as found in the R.S.C. 1957).

In criminal cases, judges no doubt are expected to be more vigilant in screening claims of privilege, but, in theory, the same provisions in the Act apply. In view of section 5 of the Criminal Procedure Code (Cap. 113, Singapore Statutes, Rev. Ed, 1970; F.M.S. Cap. 6), which provide for the reception of English law where the Code itself is silent on matters of criminal procedure, English case-law is probably relevant and applicable in the case of the privilege: *vide, Archbold on Pleading, Evidence & Practice in Criminal Cases* (39th ed., S. Mitchell, Sweet & Maxwell, 1976), para. 1315 and cases cited therein. See also, A. Wharam, Crown Privilege in Criminal Cases [1972] Crim. L.R. 675 and Whitmore, *op.cit.*, p. 682. KB. s. 57, Crim. Proc. Code (Cap. 113, Singapore Statutes, Rev. Ed. 1970), which provides for summons to; produce documents or things, is subject to the provisions of the Evidence Act: s. 57(3).

[18] See *supra.* fn. 4. Indian and Sri Lankan decisions are discussed first. The law in Malaysia and Singapore is discussed *post* p. 41 *et. seq.*

[19] Cap. 5 (Singapore); Cap. 56 (Laws of Malaysia 1971).

[20] See fn. 17, *supra.*

[21] S. 123 of the Act.

[22] *Ibid.*

[23] Section 162 of the Act.

relating to affairs of State"[24] and the judges have encountered difficulty here basically because of a lack of definition of this phrase by the legislature. The real difficulty is perceived to lie in the notoriously open-textured phrase "affairs of State"[25] more than in the phrase "unpublished official records".[26]

The question "What are affairs of State" has long been regarded as an issue of law (i.e. of statutory interpretation) and hence a matter for the judge.[27] It follows from this classification that an executive officer's opinion that a document does refer to "affairs of State" in a particular instance cannot be regarded as conclusive or, at least in theory, is a matter in which a court may feel competent to look into. Judges have, no doubt, taken advantage of this issue in using it as a means of controlling executive claims of privilege. But the authorities concerning this issue reveal a number of approaches.

The first approach may be called the "fixed meaning" approach. Some judges have attempted to fix the meaning of the phrase either by stipulating what it ought to mean (which is probably more honest) or by, what one may call, "reporting" its meaning — using the meaning at the time when the Act was first drafted.[28] To take the second type of this approach first, one can refer to the judgment of Basnayake C.J. in the Sri Lankan case of *M.A. Daniel Appuhamy v. J.B. lllangaratne & Ors.*[29] where he attempted to fix the meaning of the phrase by "reporting" its usage thus:

> "Our Evidence Ordinance was enacted in 1895 at a time when the activities of the State were confined to gubernatorial functions. Neither social welfare nor trade come within the ambit of the State's activities at that time, the expression 'affairs of State' must have been confined to matters relating to diplomacy and statecraft and the business of government. Words such as these in a statute should be given the meaning they held at the time the Statute was passed."[30]

By this approach, the learned judge confined the meaning of the term and excluded particularly activities of the State in the fields of trade and social welfare.[31] The other two appeal judges (Weerasooriya S.P.J.[32] and T.S. Fernando J.[33]) did not accept this definition which may be said to be at once too broad and too narrow. Too broad because riot every document written or otherwise made in the course of government business may be regarded as relating to "affairs of State". As Bhagwati J. in *Chamarbanghwalla* v. Parpia[34] so vividly

24 Section 123 of the Act.
25 *Ibid.*
26 As T.S. Fernando J. said, "Whether a document is an unpublished official record is easily ascertainable. Not so whether the record relates to affairs of State." *(M.D, Appuhamy v. T.B. Illangaratne & Ors.* (1964) 66 N.L.J. 97, 129).
27 *State of Punjab v. Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493, at p. 505, paras. 25-26; See also, Mohamed Zahir J., in *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor.* [1978] 2 M.L.J. 146, at p. 147B and E.
28 The first Draft of the Indian Evidence Act 1872 was by Sir James Fitzjames Stephen in 1870, See, *Sarkar on Evidence* (12th ed., Sarkar & Sons Ltd.) pp. 1-3.
29 (1964) 66 N.LJ. 97.
30 *Ibid* at p. 103.
31 *Ibid.*
32 *ibid.* at p. 116.
33 *Ibid.* at p. 127.
34 A.I.R. 1950 Bom. 230.

hypothesised, a wide reference to "government business" would "cover even orders for transfers of officers of government departments and the most unimportant matters of administrative detail."[35]

The definition may be regarded as too narrow because it is not unlikely that documents concerning the trading and social welfare activities of the State may require the protection afforded by the privilege although one may agree with the Privy Council's view (expressed in *Robinson* v. *State of South Australia (No.* 2)[36] that in times of peace, "such cases must be rare indeed."

Another attempt to inject some precision to the phrase has been to stipulate the meaning of it, having regard to the purpose of the privilege. A paradigmatic case is the judgment of the Full Bench delivered by Khosla J. in *Governor-General-in-Council* v. *H. Peer Mohd. Khuda Bux & Ors.*[37] The judge, after a review of English and other Commonwealth authorities[38] and acting on the premise (which, he argued, was supported by the authorities) that the phrase "cannot mean any and every matter in which the State is concerned",[39] declared that

> "... on the weight of authority both in England and in this country, I would define 'affairs of State' as matters of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations."[40]

The fact that the definition reflects the primary justification[41] for the existence of the privilege is certainly its chief merit. The definition is clearly "determined by a reference to the grounds on which privilege can be claimed."[42] In effect, the definition offers a judge an opportunity to consider the question whether disclosure of the document will be harmful to the public interest — a question which judges have sometimes maintained belongs more to the Executive.[43] It would appear that the definition has "married" two distinct questions[44]—

(i) whether the document in question relates to "affairs of State"

and

(ii) whether disclosure of such a document would be harmful to the public interest.

By the definition, the answer to the first question, *viz.* a matter for the judge — involves an enquiry (and an answer) to the second.

35 *Ibid.*
36 [1931] A.C. 704.
37 A.I.R. 1960 Punj. 228.
38 *Ibid*., at pp. 232-33.
39 *Ibid*., at p. 232 (para. 16).
40 *Ibid*., at p. 233 (para. 19).
41 *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865, p. 875, para. 41. See generally, VIII, Wigmore, *Evidence* (McNaughton Rev.), sections 2378, 2378a, 2379.
42 *Per* Bhagwati J. in *Chamarbanghwalla* v. *Parpia* AJ.R. 1950 Bom. 230.
43 *State of Punjab* v. *Sodhi Sukhdev Singh (supra.)* at p. 505, paras. 25-26. Cf. Subba Rao J., *ibid.,* at p. 529, para. 101.
44 *Sarkar on Evidence,* (*op.cit.*) at p. 1162.

Dicta to the effect that the head of department's decision to give or to withhold permission is final[45] is merely paying lip-service to the discretionary power conferred in section 123 and sound rather hollow indeed. In *Governor-General-in-Council* v. *H. Peer Mohd. & Ors.*[46] itself, Khosla J. held that

> "... once the Court comes to the conclusion that the document relates to affairs of State the decision of the head of department to give or withhold permission to its production must be accepted as final. On this point the Court cannot question the discretion of the head of department[47]

This show of judicial (and judicious) self-denial of jurisdiction to review executive decisions is, as noted above, more apparent than real. It is unlikely that a judge, after having decided that a document does refer to "affairs of State" in the same that harm to the public interests is apprehended would disagree with an executive decision to withhold permission for production. Of course, the judge may have been thinking of a situation where, after having found a document to relate to "affairs of State" (because its disclosure might injure public interests), he would not, and could not, interfere with the departmental head's decision to permit disclosure. Such cases, however, must be of rare occurrence.[48] Indeed, it has been suggested that such cases cannot occur at all.[49]

In the result, the definition has encountered serious opposition and is probably no longer valid in India after the Supreme Court decision of *State of Punjab* v. *Sodhi Sukhdev Singh*[50] where the definition was specifically disapproved.[51] The trial judge in that case had applied Khosla J.'s definition and made an inquiry into the consequences of disclosure.[52] The majority[53] in the Supreme Court held him to be in error in applying the definition for two reasons: first, "it is not a part of the Court's jurisdiction to decide whether the disclosure of the given document would lead to any injury to public interest...."[54] Second, the classes of injury specified by Khosla J. "cannot be treated as exhaustive."[55]

Whether the definition deserves recognition still is another matter. It would be difficult to deny the soundness of it on principle — based as it is on the grounds which justify its existence.[56] Its suitability would partly depend on whether the Court has jurisdiction to inspect documents for which privilege is claimed. For any serious attempt to evaluate the consequences of disclosure should, *ex necessitae,* be buttressed by a judicial power to inspect the document itself.[57] If the

45 *State of Punjab* v. *Sodhi Sukhdev Singh (supra.)* at p. 505, para. 26, and see, *post,* fn. 47.
46 A.I.R. 1960 Punj. 238.
47 *Ibid.,* at p. 236, para. 27.
48 *State of Uttar Pradesh* v. *Raj Narain (supra.)* p. 883, para. 70 (Mathew J.).
49 *Ibid.,* at p. 869, para. 14 (Ray C.J.). This probably goes too far.
50 *Supra.*
51 A.I.R. 1961 S.C. 493, at p 511, para. 41.
52 *Ibid.*
53 Gajendragadkar J., Sinha C.J., and Wanchoo J.
54 See fn. 51, *supra.*
55 See, *supra.,* fn. 51.
56 See, *supra.,* fn. 48.
57 See Kapur J. in *Sodhi Sukhdev Singh (supra.)* and also, D.H. Clark, "The Last Word on the Last Word" (1969) 32 M.L.R. 142, 146.

statute expressly forbids this, it throws into doubt the value of such a definition. Also, other approaches to the meaning of the phrase may be preferable if the power to inspect is not given.

As the majority in *Sodhi Sukhdev Singh*[58] disapproved of Khosla J.'s definition, their approach may perhaps be worth examining. Gajendragadkar J., delivering the majority judgment, regarded as significant the fact that the legislature had refrained from defining the term, so judges ought not to try to define the term as well.[59] He then said,

> "The question as to whether any particular document or a class of documents answers to description must be determined in each case on the relevant facts and circumstances adduced before the Court."[60]

This certainly amounts to giving the judges *carte blanche* on what they regard as proper criteria to apply in each case on the issue. There is always the risk here of inconsistency and disparity among the judges, especially if the lower courts and the higher courts both share the same power in identifying the proper reasons for recognising or refusing to recognise a document relating to "affairs of State". What is clear on the majority judgment is perhaps this: that in making this decision, the judge is not authorised to look into the consequences of disclosure.[61] Further, it is only documents relating to the State's commercial and social welfare activities which may be regarded as "borderline cases"[62] in which "difficulty arises."[63]

A more felicitous formulation may be obtained from Subba Rao J.'s judgment[64] in the same case. After identifying as documents "relating to affairs of State" such documents as "documents whose production would endanger the public interest",[65] and "documents pertaining to public security, defence and foreign relations,"[66] the judge stated that

> "(c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer."[67]

These rules, however, are all "subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases."[68]

Support for this formulation by the majority would not be forthcoming as the test of "injury to the public interest" is assimilated once again; but this time, in a more limited context. As far as

58 See, *supra.* fn. 51.
59 A.I.R. 1961 S.C. 493, at p. 511.
60 *Ibid.*
61 *Ibid.,* at p. 505, para. 26.
62 *Ibid.,* at p. 502, para. 16.
63 *Ibid.,* para. 17.
64 *Ibid.,* at p. 525, para. 87 *et. seq.*
65 *Ibid.,* para. 105 (at p. 532).
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*

"documents pertaining to public security, defence and foreign relations"[69] are concerned, it would appear that they are, *prima facie,* 'affairs of State' documents and, ordinarily, no enquiry into the dangers of disclosure needs be undertaken. The dangers of disclosure are said to be apparent from the nature of the documents themselves, and a judge must have the utmost consideration for the opinions of the departmental head on matters such as these.[70] However, in the other two categories, an inquiry into the possibilities of danger to the public interest has to be made. The separate category of "documents whose disclosure would endanger the public interest"[71] was not further elaborated but this may possibly refer to those high-level departmental policy documents not having to do with national security or diplomatic matters. The interesting category is that of documents relating to the State's trading and social welfare activities. A presumption of fact apparently applies, in the case of such documents, to the effect that they are not "affairs of State".[72] The presumption has to be rebutted, no doubt, by convincing proof that they should be regarded as such, and they will only be regarded to be so if they endanger the 'public interest'.[73]

This approach, no doubt, is more sophisticated than that of Khosla J.'s and has the additional quality of distinguishing the more important "public interests"[74] from the rest. Particularly is it useful in the case of State documents on trade and social welfare activities. The burden of proof rests with the department in such cases and the burden might be a "heavy" one[75]— certainly, it should be heavier than that imposed on the first Category which, one may accept, includes all those documents not within the second category but which otherwise deserve protection because they relate to sensitive policy matters.

But the crucial issue which keeps cropping up in the above analysis on the meaning of the phrase "affairs of State" has been the competency of the Courts to enter into an evaluation of the consequences of disclosure. Local judges have to surmount two major problems in relation to the issue. The first relates to the question of statutory authority for such a purpose. The second — not a unique

69 *Ibid.*

70 Probably, judges would be quite willing to take judicial notice of the fact that such documents are, by their nature, sensitive and therefore not meant for disclosure.

71 See fn. 65, *supra.*

72 The formulation of Subba Rao J. with respect to such documents can be fitted nicely, it is submitted, into the language of presumptions. A presumption of fact, as Cross stresses (in *Evidence,* 4th ed. 1974, Butterworths, at p. 111), is a "frequently recurring example of circumstantial evidence". It is an inference "which *may* be drawn by the tribunal of fact", but it is not necessarily drawn in every case. There is, at least on this view, an evidential burden to rebut the presumption.

73 Subba Rao J., *supra.,* fn. 67, head (d).

74 That is to say, the documents relating to national defence and foreign affairs obviously would be within well-established and fairly determinate "public interests", namely, the security of the State and the fostering of good international relations (which may be seen as an aspect of state security). Apart from the other fundamental public interest, the administration of justice, the other "public interests" would have to be identified and the weight to be attached to be determined *ad hoc.* On the "ordering of public interests", see generally, J.R. Lucas, *Democracy and Participation,* (1975, Penguin Books), Ch. 6.

75 *Cf.,* Lord Reid, *Reg.* v. *Lewes Justices, Ex p. Sec. of State, Home Dept.* [1972] 3 W.L.R. at pp. 282-3.

problem for local judges only — has to do with the substantive arguments on the limits to judicial intervention in the identification and weighing of interests, and is discussed in the next section.

The issue of statutory authority for judicial intervention into the substance of claims of privilege rests on section 162 of the Act.[76] Under subsection (1) of the section, a power (coupled with a duty) is conferred on judges to decide on the "validity" of any objection made as to the production (and admissibility) of documents.[77] There seems to be a difference in judicial opinion as to the extent of this power, as the judgments in *Sodhi Sukhdev Singh*,[78] among others, will show. The majority, through Gajendragadkar J., read section 162(1) as conveying on the Court authority to "hold a preliminary enquiry into the character of the document"[79] but, at the same time, this does not entitle the Court to hold "an enquiry into the possible injury to public interest."[80] However, the majority seems to recognise a certain situation when judicial intervention into substance could be justified.[81] This occurs when departmental heads, in making claims of privilege, are affected by "extraneous and collateral purposes"[82] for such claims. There is a duty on the departmental heads concerned to "indicate briefly... the reason why it is apprehended that... disclosure would lead to injury to public interest."[83] The position adopted by the majority, it is submitted, may be stated as follows: If the appropriate departmental head properly identifies a likely injury to public interest in the event of disclosure, the court would not look into the merits of this decision. But if the departmental head acted on reasons other than those based on "injury to the public interest," the court could, and presumably would, overrule the objection to production and hold the objection "invalid". The majority indicated what they regard as "impermissible reasons": the fact that disclosure might 'defeat the defence raised by the state',[84] 'the apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the government',[85] or that it may provoke public criticism or censure in the Legislature'.[86] There is a distinction, in other words, between departmental interests and public interests.[87] But, barring the use of, or influence by, such reasons and provided a departmental head does not in any other way act capriciously, he has a fairly wide discretion in applying the test of "injury to the public interest." Occasionally, however, a court may be persuaded to look behind what is apparently a proper exercise of the discretionary power.[88]

76 The relevant parts of the section is reproduced at *supra.,* fn. 6.
77 Fn. 6, *supra.*
78 A.I.R. 1961 S.C. 493.
79 *Ibid.,* at p. 505, para. 25.
80 *Ibid.*
81 *Ibid.,* p. 504, para. 24.
82 *Ibid.*
83 *Ibid.*
84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 On the distinction, see Street, "State Secrets — A Comparative Study", (1951) 14 M.L.R. 121.
88 In *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor. (supra.),* the judgment of Mohamed Zahir J. illustrates an inquiry of this limited nature. *Cf.* the Federal Court's approach to the problem: see, *post,* pp. 42-43.

Subba Rao J.'s reading of section 162(1), in contrast to that of the majority's, can hardly be described as cautious, starting as he did from the premise that the subsection imposes "no limitation on the scope of the court's decision".[89] He ascribes to the court a power to "disallow the objection if it comes to the conclusion 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 override all other aspects of public interest."[90] On this view, a court will look into the assertion by the departmental head that disclosure would result in injury to the public interest, and if it disagrees with the officer, it can overrule the objection and order production: the difference between this view and that of the majority's clearly rests on this point.

By way of assessment of these views, it may first be said that the majority's view is plainly more consonant with the wide discretion conferred by section 123 although it is no less true that the courts have been unwilling to construe words such as "if he thinks fit" as investing the authority with absolute discretion.[91] On the matter of statutory interpretation, then, the majority's view is preferable. But other factors ought also to be taken into account in assessing the relative merits of these views. Important factors such as the type of public interests alleged to be involved, the status of the head of department making the objection, the available evidence before the Court are all relevant to a consideration of these views.[92]

To take the last-mentioned factor first, one can hardly deny that the greater the availability of evidence for the judge, the more justi-

89 A.I.R. 1961 S.C. 493, at p. 530, para. 101.

90 *Ibid.*

91 It is, no doubt, true that judges (especially in *Sodhi Sukhdev Singh)* claimed that section 123 confers an "absolute discretion" on the Minister or departmental head (if different). This term, as used by them, does not import all that is contained in the word "absolute", since the judges (with the exception, probably, of Kapur J.) contemplated situations when judicial review could be possible. To take an example of the loose usage — Subba Rao J., at p. 529, para. 101 said:

> "The words... 'as he thinks fit' confer an absolute discretion on the head of the department to give or withhold such permission .... One can visualize a situation when the officer in exercise of his absolute discretion refuses to give permission for the use of not only noxious documents but even of innocuous one. The only limitation on his power is his reason and experience."

Immediately after this explanation of the term, Subba Rao J. went on to say that if the officer refuses to give permission, "the party affected may take out necessary summons to the State Government to produce the document. The State Government may depute one of its officers to produce the document in court. Then only the occasion for raising the question of privilege arises and S. 162 governs the situation." It would appear that the learned judge felt that the officer would have "absolute discretion" so long as the party adversely affected by the refusal does not take out summons. This, surely, is hardly sufficient ground to label the officer's discretion as "absolute". The key question is: can the court review the exercise of the discretion when called on to do so?

92 S.A. de Smith (in *Judicial Review of Administrative Action, op. cit.*) remarks:

> "The scope of review may be conditioned by a variety of factors: the wording of the discretionary power, the subject-matter to which it is related, the character of the authority to which it is entrusted, the purpose for which it is conferred, the particular circumstances in which it has in fact been exercised, the materials available to the court and, in the last analysis, whether a court is of the opinion that judicial intervention would be in the public interest." (p. 249).

fication is there for him to review executive decisions. In the context of the privilege, there is no sense denying the evidential importance of the document itself and, on a matter of principle, if the judge is given the power to decide the issue whether a document refers to affairs of State or not, it would seem to follow that he should be allowed to inspect the document itself — if the best evidence is available, should it remain hidden from the eyes of the Court? This issue has caused great judicial perplexity — the House of Lords overruled itself[93] on the point, as did the Indian Supreme Court.[94]

As regards the Evidence Act, the relevant provision to consider is section 162(2) which states as follows:

> "The Court, if it sees fit, may inspect the document unless it refers to affairs of State or take other evidence to determine its admissibility."

Two issues arise out of this subsection: firstly, whether the provision precludes a judge from inspecting a document which is alleged to refer to "affairs of State" and secondly, whether, if so, a judge could take other evidence on the matter. These two questions may be discussed conveniently by classifying the possible positions a Court could take into three:

(1) Absolute prohibition on inspection and the taking of other evidence.

(2) No inspection but the taking of other evidence is permitted.

(3) Inspection of document permitted.

Position 1: A Court in deciding whether a document for which privilege under section 123 is claimed ought to be disclosed or not cannot inspect the document and may not take other evidence on the matter.

A persistent adherent to this view is Kapur J.,[95] who dissented from the majority in adopting this position in *Sodhi Sukhdev* Singh.[96]

Speaking of subsection (2), the judge held that because of the words "unless it refers to affairs of State", the Court is disentitled from inspecting it.[97] Further, he held that the Court could not take other evidence on the matter because "the words in the subsection '... or to take... its admissibility' on this plain language do not apply to production and consequently the taking of evidence must have reference to the admissibility of the document."[98] The learned judge

93 *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624 was finally departed from in *Conway* v. *Rimmer* [1968] A.C. 910 (though, see *Re Grosvenor Hotel (No. 2),* [1965] Ch, 1233; *Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57; *Wednesbury Corpn.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 261, where *Duncan's* case was distinguished).

94 *State of Punjab* v. *Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493 must be regarded as overruled on this point by the later decisions of the Supreme Court in *Amar Chand Butail* v. *Union of India & Ors.* A.I.R. 1964 S.C. 1658 and *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865.

95 The learned judge also articulated similar views in *Governor-General in Council* v. *H. Peer Mohd., Khuda Bux & Ors.,* A.I.R. 1950 E. Punj. 228.

96 A.I.R. 1961 S.C. 493, at pp. 513-525.

97 *Ibid.,* p. 515 (para. 54).

98 *Ibid.*

had relied on a distinction, clearly drawn in subsection (1) as well, between production and admissibility.[99] It would seem that on a literal construction, it would be difficult to fault Kapur J.'s reading of the section. However, on a matter of principle, the learned judge pointed out — rather uncritically, one may add — the consequences of taking such a strict construction of the subsection.

> "If the Court cannot inspect the documents, if no secondary evidence can be given as to its contents and if the necessary materials and the circumstances which would indicate the injury to the public interests... cannot be before the Court it cannot be in a position to decide whether the document relates to affairs of State or not and the logical conclusion would be that the Court is debarred from overruling the discretion of the head of the department concerned, because the Court cannot say whether the disclosure or non-disclosure would be detrimental or not."[1]

Such an abdication of judicial power was regarded as intolerable by the other judges.[2] It may also be said that one need not accept the strict construction approach as pointed out by Kapur J., for even on statutory interpretation grounds, it seems absurd that the legislature would take away a power conferred by one subsection[3] immediately in the next,[4] This point probably was uppermost in Gajendragadkar J.'s mind when he remarked that "the jurisdiction conferred on the Court... by the first clause is not illusory or nominal."[5]

Position 2: A Court, in deciding whether a document for which privilege under section 123 is claimed ought to be disclosed or not cannot inspect the document nor take secondary evidence of its contents, but may take collateral evidence on the matter.

This view was taken by the majority (which included Subba Rao J.)[6] in *Sodhi Sukhdev Singh*[7] and also by the majority[8] in the Sri Lankan case of *M. Daniel Appuhamy*[9] The main issue concerning this view has been to justify the taking of other evidence and to specify what sort of evidence may be tendered. Subba Rao J. puts the legislative justification for taking this position thus:

> "The more reasonable construction... is to give a wider meaning to the word 'admissibility' so as to comprehend both production as well as admissibility, for the question of admissibility arises only after the document is produced and a party seeks to get it in evidence."[10]

Gajendragadkar J. rejected an argument that section 162(2) contains two discrete limbs and that the power to take other evidence relates solely to admissibility, not production.[11] Calling such a construction "ingenious", the learned judge held that to read the clause in this

99 *Ibid.,* see also, section 162(1) of the Act, *supra,* fn. 6.
1 *Ibid.,* p. 515, para. 56.
2 Kapur J. appears to stand alone on this issue.
3 Section 162(1), *supra,* fn. 6.
4 Section 162(2), *supra.,* fn. 6.
5 A.I.R. 1961 S.C. 493, at p. 504, para. 22.
6 Gajendragadkar J. delivered judgment on behalf of three others (see fn. 53, *supra.)* while Subba Rao J. delivered his own judgment.
7 A.I.R. 1961 S.C. 493.
8 Weerasooriya S.P.J. and T.S. Fernando J. followed the majority view in *Sodhi Sukhdev Singh (supra.).*
9 (1964) 66 N.L.J. 97.
10 A.I.R. 1961 S.C. 493, at p. 528, para. 96.
11 *Ibid.,* at p. 503, para. 22.

manner is to "break up the clause artificially which is plainly not justified by the rules of grammar".[12]

What collateral evidence the Court may take on the matter clearly does not include secondary evidence of the contents for "if the document cannot be inspected its contents cannot indirectly be proved."[13] The majority did not give much guidance as to what "collateral evidence" may include except that secondary evidence of the document's contents is not within the term. Gajendragadkar J., however, in considering the argument made by counsel for the State of Punjab that the person making the affidavit can be summoned to face cross-examination only to test his credibility, remarked that there is no reason for limiting the cross-examination in this manner.[14] He continued:

> "It would be open to the opponent to put such relevant and permissible questions as he may think of to help the Court in determining whether the document belongs to the privileged class or not."[15]

Although the range of "relevant and permissible questions" remains vague — perhaps advisedly so — such questions as may tend to establish a capricious exercise of the discretion,[16] or *a fortiori* a failure to exercise the discretion at all[17] should be allowed. Questions tending to show that exercise of the discretion was prompted by irrelevant or improper considerations may also be permitted.[18] Finally, it may be suggested that questions directed to show that the "wrong" public interests had been taken into account[19] should also be within the permitted range. What is not permitted are questions tendered for the purpose of impugning the head of department's appraisal of the possible dangers to the public interest.[20]

This second position certainly presents a far more attractive interpretation of section 162 though, it is submitted, not without strain on the language of the section.[21] The judicial power is not so "illusory or nominal"[22] as the first position would have made it,[23] nor, on the other hand, is it so extensive as to require judges to "make delicate value-judgments on matters outside the normal bounds of judicial

12 *Ibid.*
13 *Ibid.*
14 *Ibid.,* p. 505, para. 24.
15 *Ibid.*
16 At *ibid.,* p. 504, para. 23, the majority provided for detailed rules as to how an affidavit should be made and what it should contain. This was necessary, in the majority's view, to ensure that "extraneous and collateral purposes" are not taken into account. Clearly, taking into account irrelevant or improper purposes, or worse, failure to exercise the discretion would be situations which the judge would be expected to step in. It is also legitimate to infer that a capricious exercise of the power will attract judicial review.
17 See, *supra.,* fn. 16.
18 See, *supra,* fn. 16.
19 See, among others, *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865; *B.A. Rao & Ors. v. Sapuran Kaur & Anor.* [1978] 2 M.L.J. 146.
20 *State of Punjab* v. *Sodhi Sukhdev Singh (supra.).*
21 Section 162(2), on the second limb, "or take other evidence to.. .determine its *admissibility*."
22 A.I.R. 1961 S.C. 493, at p. 504, para. 22.
23 See, *supra.,* p. 35.

involvement."[24] But, on a matter of principle, it does suffer the inherent vice of precluding the judge from examining the very thing that he has the duty to decide on. Not only does it offend the "best evidence" rule,[25] but further, it requires the judge, more or less, to rely on circumstantial evidence principally from a probably biased party[26]— *i.e.* the head of department even though the direct evidence is available (and, presumably, in court as section 162(1) requires the witness summoned to bring the document to court).[27]

Further, the reasons normally tendered by proponents of the view that there should be no inspection by the judge are now regarded as rather unconvincing. One reason arose out of the ruling in *Dunoan* v. *Cammell, Laird & Co. Ltd.*[28] that a Minister's certificate or affidavit regarding the danger to public interest is conclusive.[29] This being so, inspection of the documents was not only impermissible, it was plainly unnecessary. Once the ruling on the conclusiveness of the Minister's word was challenged — as in *Conway* v, *Rimmer*[30]— the reason for the prohibition also becomes highly questionable. The second reason put forward by Viscount Simon L.C. in *Duncan* v. *Cammell Laird & Co. Ltd.*[31] was that "where the Crown is a party to the litigation, this would amount to communicating with one party to the conclusion of the other, and it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other."[32] This reason was specifically rejected by all the Law Lords[33] in *Conway* v. *Rimmer.*[34]

24 Clark, "The Last Word on the Last Word" (1969) 32 M.L.R. 142.

25 Generally, Cross, *Evidence* (4th ed., 1974, Butterworths) Ch. 1, Sect. 4. The rule, of course, admits of numerous exceptions, but the application of it here is simply to indicate that in deciding on the production of a document, it is, to say the least, illogical in not being allowed to examine the very thing which is in question, especially if this is a "contents" claim. The prohibition is more defensible in the case of "class" claims, although see Lord Morris in *Conway* v. *Rimmer* [1968] A.C. 910, at p. 971C-D, where he could "see no difference in principle between the consideration of what have been called the contents cases and the class cases." See also, Lord Hodson, *ibid*., at p. 979D and compare the speeches of Lords Pearce and Hodson where the distinction between the two types of claim seems to have been recognised. Lord Reid probably would have agreed with Lords Pearce and Hodson.

26 There is little doubt that this is one consideration which argues for judicial review. Lord Reid in *Conway* v. *Rimmer* [1968] A.C. 910, at p. 950G-951A articulates the argument best:

> "But in this field it is more than ever necessary that in a doubtful case the alleged public interest in concealment should be balanced against the public interest that the administration of justice should not be frustrated. *If the Minister, who has no duty to balance these conflicting interests,* says no more than in his opinion the public interest requires concealment, and if that is to be accepted as conclusive in this field as well as with regard to documents in his possession, it seems to me not only that very serious injustice may be done to the parties, but also that the due administration of justice may be gravely impaired for quite inadequate reasons." (italics mine).

27 Fn. 6, *supra*., p. 25.

28 [1942] A.C. 624.

29 *Ibid*., esp. at pp. 638-642.

30 [1968] A.C. 910.

31 [1942] A.C. 624.

32 *Ibid*., at pp. 640-641.

33 Lord Reid, in *Conway* v. *Rimmer* [1968] A.C. 910, at 953B-C; Lord Morris, *ibid*., at p. 964D; Lord Hodson, *ibid*., at p. 979B; Lord Pearce, *ibid*., at p. 981G; Lord Upjohn, *ibid*., at p. 995F-996B.

34 [1968] A.C. 910.

Lord Reid could not see how reading a document not prepared for the judge can be regarded as "communicating with" the judge.[35]

The second position, then, is an in-between approach to the perennial problem of balancing the factor of competence of a judge in matters public and political with that of the risk of administrative abuse, whether deliberate or otherwise, of discretionary powers. There can be hardly any dispute that once it is conceded a judge should not regard the word of the appropriate executive officer as conclusive an examination of the document in question becomes a necessity, especially when the public interests involved are not clear, or some ulterior motive for the claims of privilege is suspected. The fetter, self-imposed, was too much for the Indian Supreme Court to accept and in a *volte-face,* made remarkable by the poor justification of it, held that judicial inspection of the documents is permissible.[36-37] This is best discussed in position (3) following.

Position 3: A Court, in deciding whether a document for which privilege under section 123 is claimed ought to be disclosed or not, may inspect the document in question.

Two Indian Supreme Court decisions may be cited as authority for this position: *Amur Chand Butail* v. *Union of India & Ors.*[38] and *State of Uttar Pradesh* v. *Raj Narain.*[39] The fate of *Sodhi Sukhdev Singh* [40] appears uncertain on the issue of inspection after these two cases. No doubt these two cases brought Indian law back into the mainstream of the common law on this matter, but whereas in *Conway v. Rimmer*[41] the House of Lords took pains to rationalise the departure from *Duncan* v. *Cammell, Laird & Co. Ltd.*,[42] the Indian Supreme Court in the two cases achieved the *volte-face* almost unnoticed.

No reasons were given nor authorities cited in *Amar Chand Butail*[43] for the Court's decision to order production of the documents for inspection by the Court. It was odd, too, that no 'other evidence' was taken first on the issue of the nature of the document although the Minister's 'statement' was rejected as an 'affidavit'. The failure to discuss *Sodhi Sukhdev Singh*[44] on the issue of inspection was even made more glaring by the fact that Gajendragadkar C.J. who delivered the unanimous judgment of the Court also gave the majority judgment in *Sodhi Sukhdev Singh.*[45]

35 *Ibid.*, at p. 953C.

36-37 *Amar Chand Butail* v. *Union of India & Ors.* A.I.R. 1964 S.C. 1658; *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865.

38 *Supra.*

39 *Supra.*

40 A.I.R. 1961 S.C. 493. In *Raj Narain (supra.),* the Supreme Court purported to discuss *Sodhi Sukhdev Singh,* but what happened to the case in *toto* is, by no means, clear.

41 [1968] A.C. 910.

42 [1942] A.C. 624.

43 A.I.R. 1964 S.C. 1658.

44 A.I.R. 1961 S.C. 493.

45 *ibid.* The fact that *Sodhi Sukhdev Singh* was decided in 1961 and *Amar Chand Butail* in 1964 — a space of three years — made it all the more incredible that the earlier case was not mentioned at all in the later case.

In *Raj Narain's*[46] case, the Court paid more attention to the discrepancy existing on this issue between *Sodhi Sukhdev Singh*[47] and *Amar Chand Butail.*[48] It was obvious that the latter case was preferred. Ray C.J. remarked that *Amar Chand Butail*[49] was an unanimous decision recognising the power of inspection. Rather later on in his judgment, he pointed out that the concurring judges in *Sodhi Sukhdev Singh*[50] also supported the majority in the view that there should be no inspection. No further comment was made by the Chief Justice, but it may perhaps be suggested that he therefore thought he had two conflicting cases of the same stature to choose from, and that he was entitled to choose *Amar Chand Butail*.[51] Another factor which seems to have weighed heavily with him was that the Indian and English decisions he referred to "establish that the foundation of the law behind sections 123 and 162... is the same as in English law."[52] Whether by this he meant to imply that Indian law should be brought in line with English law can only be guessed at for he conveniently ignored section 162(2). Mathew J. also misunderstood the majority decision in *Sodhi Sukhdev Singh*.[53] He thought that it was held in that case that an enquiry under section 162 involves enquiring into the consequences of disclosure and he could not understand how this could be done without inspecting the document concerned.[54] He therefore concluded that the Court could examine the document and could override the departmental head concerned if it comes to the conclusion that disclosure would not be harmful to the public interests.[55] Mathew J.'s argument seems to be one of necessity — that is, the power of inspection is necessary to the exercise of the power under section 162(1). While such a view appears implied in Mathew J.'s judgment, Basnayake C.J. in *D. Appuhamy*[56] was not so vague. The Chief Justice declared in no uncertain terms that "section 162(2) ... has no application to section 123" and that for the purpose of exercising its power under section 162(1), "the Court is untrammelled by section 162(2)... and may inspect the document."[57] He justified this view thus:

> "It is an established canon of interpretation. .. that when a power is conferred by statute all powers necessary for the effective exercise of that power are conferred by implication. Section 123 must therefore be regarded as conferring those implied powers; because the Court cannot effectively exercise its far-reaching powers without them."[58]

It is difficult to see how section 123 which specifically confers a wide discretion on the departmental heads could be regarded as conferring

46 A.I.R. 1975 S.C. 865.
47 A.I.R. 1961 S.C. 493.
48 A.I.R. 1964 S.C. 1658.
49 A.I.R. 1964 S.C. 1658.
50 A.I.R. 1961 S.C. 498; Subba Rao J. and Kapur J. were the judges involved.
51 A.I.R. 1964 S.C. 1658.
52 A.I.R. 1975 S.C. 865, at p. 875, para. 41.
53 A.I.R. 1961 S.C. 493.
54 A.I.R. 1975 S.C. 865, at p. 883. The misunderstanding lies in the fact that the majority in *Sodhi Sukhdev Singh (supra.)* never decided that a court could look into the consequences of disclosure in its preliminary enquiry authorised under section 162(1) of the Act.
55 *Ibid*., at p. 886.
56 (1964) 66 N.L.J. 97.
57 *Ibid*., at p. 102.
58 *Ibid.*

overriding powers to judges especially the power to inspect those documents for which the privilege is claimed. T.S. Fernando J. in the same case[59] and another Court in the earlier decision of *Keerthiratne* v. *Gunawardere*[60] certainly thought that section 162(2) prohibits the inspection of documents alleged to refer to 'affairs of State'. Basnayake C.J. appears to be in the minority on this point.

It is evident, from the analysis of the authorities above, that it is not possible to read into the relevant sections a power to inspect without straining the language to an intolerable extent. The merits of having such a power is, of course, another matter but in the light of section 162(2), the approach adopted by the Indian Supreme Court in *Sodhi Sukhdev Singh*[61] appears by far the most attractive.

(2) *The Law in Malaysia and Singapore*

These basic problems which have been faced by Indian and Sri Lankan courts have hardly tested the Malaysian and Singapore judges. In Malaysia, Yong J. in *Gurbachan Singh* v. *P.P.*[62] glossed over the problem of privilege with indecent haste, holding that "the court can inspect the document in question to ascertain whether … its production in Court would be injurious to the public interest."[63] No reference was made to section 123 or section 162 and only one English case[64] was mentioned in the context. This case could hardly be regarded as strong authority. In *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor.,*[65] the judgment of Mohamed Zahir J.[66] bears interesting comparison to the judgment of the Federal Court.[67] Mohamed Zahir J. held that

(i) It is for the Court to decide whether a document relates to affairs of State or not, and if it did, then the head of department must decide on the risks of disclosure.[68]

(ii) There is a difference in approach between English law and local law in that section 162(2) prohibits examination of the document, but that the Court could take other evidence on the matter.[69]

(iii) In taking other evidence, the type of further information that may be sought consists of the apprehended injury to the public interests and the nature of the "affairs of State" involved.[70]

59 (1964) 66 N.L.J. 97.
60 (1956) 58 N.L.J. 62.
61 A.I.R. 1961 S.C. 493.
62 [1966] 2 M.L.J. 125.
63 *Ibid.,* at p. 127. He restricted this power to "cases where the Minister's claim for privilege was over a class of documents." The document in question was a "Police Enquiry Paper".
64 *Re Grosvenor Hotel, London (No. 2)* [1964] 3 W.L.R. 992.
65 [1978] 2 M.L.J. 146.
66 *Ibid.*
67 *Ibid.,* at p. 149.
68 *Ibid.,* at p. 147B.
69 *Ibid.,* at p. 147F.
70 *Ibid.,* at p. 148D.

The learned judge did not find it necessary to take "other evidence" as he found the affidavit from the Minister sufficient.[71] He held that the documents do not relate to "affairs of State" and ordered disclosure.[72]

The Federal Court dismissed the appeal but in the process declared that the Court has power to call for and inspect the documents in question.[73] "It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that 'affairs of State' is involved."[74] Oddly enough, Raja Azlan Shah F.J. approved of Mohamed Zahir J.'s dictum on the taking of other evidence.[75] The Federal Court, however, must be taken to have overruled Mohammed Zahir J.'s holding that the Court could not inspect the documents in question. In civil cases, it may be possible to pray in aid — although this was not done in the case — R.S.C., Ord. 31, r. 19A(2)[76] which empowers the Court to inspect the document for the purpose of deciding on the validity of the claim of privilege. It must be noted, however, that a similar rule in India was construed to be subject to section 162(2).[77] Insofar as this point is concerned, Singapore's Rules of the Supreme Court are clearer in that the power of the Court to inspect[78] is subject to "any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest."[79] There is no such limitation in the Malaysian rules where the government is a party. However, R.S.C. Ord. 31 r. 30 (of the Malaysian rules)[80] and R.S.C. Ord. 73, r. 10(2) (of Singapore's Rules)[81] provides a saving clause for a Minister subject to an order of disclosure. If, in the opinion of the Prime Minister or Chief Minister (in Malaysia) as the case may be, or that of a Minister (in Singapore), disclosure of any document would be injurious to the public interest, the order of disclosure shall be construed as not having application to it.[82] But in the Malaysian rules, a proviso is attached to Ord. 31, r. 30 as follows:

> "Provided that it shall not be deemed injurious to the public interest to disclose the existence of any such document by reason only of the fact that such disclosure would or might lead or tend to the success of the opposite party in the proceedings.[83]

This proviso may be construed so as to give a Court the authority to enquire into the primary purpose for an objection to production. Whether this would necessitate the Court itself going into the issue of balancing competing interests must largely depend on the circumstances of the case. It can be said that the approach of the trial judge

71 *Ibid.,* at p. 148G.
72 *Ibid.,* at p. 149C.
73 *Ibid.,* at p. 150E. This point was *obiter.*
74 *Ibid.,* at p. 150G.
75 *Ibid.,* at p. 150I.
76 Rules of the Supreme Court 1957, L.N. 321 (as amended).
77 See *State of Punjab* v. *Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493. *Cf.,* on this point, the Privy Council decision in *Robinson* v. *State of S. Australia (No. 2)* [1931] A.C. 704.
78 R.S.C. Ord. 24, r. 13(2).
79 R.S.C. Ord. 24, r. 15.
80 Rules of the Supreme Court 1957, L.N. 321 (as amended).
81 Rules of the Supreme Court 1970.
82 R.S.C. Ord. 73, r. 10(2).
83 Rules of the Supreme Court, 1957, L.N. 321 (as amended).

in *B.A. Rao's* case,[84] illustrates the exercise of this jurisdiction. The balancing of competing interests by the judge may be necessary if only to assure himself that the Minister in charge was motivated by the proper considerations. Since the power to decide whether disclosure of a document is or is not injurious to public interest rests with the Prime Minister[85] or Chief Minister[86] under the rules, it is perhaps safe to say that occasions on which the Court has to be drawn into weighing interests in this context will be rare.

Whether the judgments in *B.A. Rao*[87] indicate a greater power to enquire into and balance conflicting public interests is another issue. Mohamed Zahir J. merely confined himself to the issue of finding out what injury is apprehended and what "affairs of State" are involved.[88] Even then, he was rather hesitant: "It is not easy to state with certain degree of confidence what injury to the public is apprehended. It is all a matter of speculation. . . ."[89] Raja Azlan Shah F.J. in the Federal Court was far from hesitant. He declared that the Court understands better than all others the process of balancing competing considerations[90] and that the Court has the overriding power to decide on the issue of disclosure ultimately.[91] Whether *B.A. Rao*[92] will be followed in Singapore is a matter of conjecture. But it is submitted that the Federal Court has sacrificed integrity in statutory interpretation for compliance to, perhaps, a more principled approach which has become law in most Commonwealth countries.[93] Mohamed Zahir J.'s approach,[94] together with that of the majority in *Sodhi Sukhdev Singh,*[95] is, it is submitted, preferable. It pays heed to the statutory provisions especially section 162(2) whilst retaining a judicial power to intervene in circumstances where it can be shown that an abuse of administrative power had taken place. It may also be mentioned that Subba Rao J.'s formulation of working rules[96] for injecting content into the phrase "affairs of State" is by far a better model than the others[97] previously discussed.

84 [1978] 2 M.L.J. 146.

85 R.S.C. Ord. 31, r. 30 (Malaysian Rules of the Supreme Court 1957), and see fn. 17, *supra,* p. 26, for a similar provision in the Malaysian Government Proceedings Act, F.M.S. Ord. 38 of 1956.

86 *Ibid.*

87 [1978] 2 M.L.J. 146.

88 *Ibid.,* at p. 147-8.

89 *Ibid.,* at 148F.

90 *Ibid.,* at p. 150E. The learned judge is in good company here. See, for instance, Lord Morris in *Conway* v. *Rimmer* [1968] A.C. 910, at p. 956G, and at p. 972A where he said: "But where there is more than one aspect of the public interest to be considered, it seems to me that a court, in reference to the litigation pending before it, will be in the best position to decide where the weight of public interest predominates. I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due."

91 *Ibid.*

92 [1978] 2 M.L.J. 146.

88 See the review of authorities by Raja Azlan Shah F.J. in the instant case.

94 *Ibid.,* at pp. 146-148.

95 A.I.R. 1961 S.C. 493.

96 See, *supra.,* fn. 6, p. 25.

97 See, *supra.,* p. 31 *et. seq.*

It only remains to discuss the possibility of reform to the provisions. This can only be done by first answering the difficult question of whether, on principle, a court should enter into the merits of a claim that disclosure of a document would lead to injury to the public interest.[98]

III. *IDENTIFYING AND WEIGHING PUBLIC INTERESTS: LIMITS TO JUDICIAL INTERVENTION*

A general conclusion which can be drawn from a review of the authorities on the privilege is that the general trend is towards a firmer awareness of the need for judicial review even in matters which may involve social or political issues. As a learned American judge recently said, "The Courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative."[99] The standard arguments for judicial review of administrative action are well-canvassed elsewhere.[1] In the context of the privilege, the necessity of it may be demonstrated by citing C.K. Allen's description of the types of abuse of power which do occur:

> " 'abuse of power' does not consist only in gross, unscrupulous excess of it, but also in gradual and often well-meaning extension, in a timorous rather than an aggressive spirit."[2]

It may also be said that the grounds for review in administrative law such as mistake or *mala fides* on the part of the officer, or acting on wrong or irrelevant considerations are probably quite inadequate here. A learned judge regarded as "mainly in the region of hypothetical cases"[3] allegations that the officer has made a mistake or was *mala fides.* The crucial line between "departmental interests" and "public interests" can be wonderfully thin. Sachs J. in *Broome* v. *Broome*[4] illustrated how easy it is to slide from the one to the other:

> "One cannot help noting that the steps which would extend the heads of public interest from 'maintaining the morale of the forces', to 'maintaining general public morale' and thence to maintaining the faith of the public in specific institutions serving it are neither very large nor unduly illogical."[5]

The need for a judicial power to monitor (and, of course, if necessary, to override) executive reasons for claims of privilege becomes clearer if it is realised that such reasons must not only be that injury to the public interests are apprehended by the officer to result from disclosure but that such reasons must count sufficiently heavily to outweigh another "fundamental"[6] public interest, namely, the administration of justice which requires that relevant and cogent evidence should be made available to a party to facilitate his assertion of his legal rights. This "balancing test" was finally fully emphasised in

98 *See, infra.*

99 H.J. Friendly, "The Courts And Social Policy: Substance and Procedure" 33 Univ. of Miami L. Rev. 21 (1978).

1 *Vide,* S.A. de Smith, *Judicial Review of Administrative Action, op. cit.,* Part One; H.W.R. Wade, *Administrative Law,* 4th ed., 1977, O.U.P., Pt. I.

2 C.K. Allen, *Law and Orders,* (3rd ed., Stevens & Sons, 1965), p. 332.

3 *Per* Lord Somervell in *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736, at p 770.

4 [1955] p. 190.

5 *Ibid.*

6 Lord Simon of Glaisdale, *D.* v. *N.S.P.C.C.* [1978] A.C. 171, at p. 231A.

Conway v. *Rimmer*.[7] Before that, judges were sometimes mistaken as to its operation. For instance, Pollock C.B. in *Beatson* v. *Skene*[8] thought that the interests to be weighed were of different types — on the one hand, the general public interest and on the other, "the individual interest of a suitor in a court of justice".[9] As Roscoe Pound was wont to remark, "… if the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide."[10] He advocated the view that

> "When we are seeking to adjust conflicting and overlapping claims and demands in some new aspect or new situation, it is important to subsume the individual interests under social interests and to weigh them as such."[11]

Thus, what ought to be in the balance is not so much "public interests" v. "individual interests", but that of conflicting public interests. Of course, although the public interest of the administration of justice is rightly regarded as a "fundamental" one, "it is not an exclusive interest."[12] It is in fact, "an aspect (a crucially important one) of a broader public interest in the maintenance of social peace and order."[13]

Though the balancing test is now well-established in the law relating to the privilege, its application is made difficult and uncertain because of some theoretical problems. The first, and key problem, undoubtedly centres on the meaning of the term "public interest" — a term not unknown in the Act but undefined. The term is better known, of course, in political argument,[14] being a frequent justificatory argument for the implementation of unpopular measures, such as, say, "Energy-saving is in the public interest". The term has a dangerously conclusive aura about it when used — it may be said to have a "conclusive" aura, because of a premise that whatever is done in the public interest must be "right", and the onus is on those who dispute it to prove it "wrong": that usually can be done only by showing that it is "not in the public interest" to do it. The premise is in most cases unquestioned. What is or what is not within the "public interest", however, is something which "reasonable men may reasonably disagree" about.[15] Thus "every interpretation of it is open to dispute… and the ruler's interpretation may be as partial as those who oppose him."[16] It can be taken for granted that the ruler can never be proved entirely wrong except in rare cases, for "it is in the nature of the case that some member of the community will be gratified or benefited by the course of action adopted and others will not."[17]

7 [1968] A.C. 910.
8 (1860) 5 H. & N. 838.
9 *Ibid.,* at p. 854.
10 R. Pound, "A Survey of Social Interests" 57 Harv. L. Rev. 1, at p. 2 (1943).
11 *Ibid.,* at p. 3.
12 *D.* v. *N.S.P.C.C.* [1978] A.C. 171, at p.231A.
13 *Ibid.*
14 See generally, J.R. Lucas, *The Principles of Politics,* (1966, Oxford University Press), s. 48; and the same author in *Democracy & Participation, op.cit.,* Ch. 6.
15 J.R. Lucas, *The Principles of Politics, op.cit.,* at p. 208.
16 J.R. Lucas, *Democracy & Participation, op. cit.,* p. 97.
17 *Ibid.* See also, B. Barry, "The Public Interest" in Ch. VI, *Political Philosophy* (ed., A. Quinton, 1967, O.U.P.).

Even jurists have not found the term an easy one to handle. Roscoe Pound's definition of a "public interest",[18] and his category of such interests has been criticised: "The whole category of public interests, indeed, wears an anomalous air in relation to the rest of Pound's scheme."[19] What, in fact, his notion of "public interests" boils down to is, apparently, "security of the political institutions".[20]

Professor Cross declares that " 'state interest' is an ominously vague expression and it is necessary to turn to decided cases in order to ascertain the extent to which this objection to the reception of relevant evidence has been taken."[21] He then classifies these instances as (1) National Security, (2) Other National Interests and (3) Police Matters.[22] Though categories (1) and (3) appear well established, category (2) is subject to, and has been subjected to, extension. The suggestion by Professor Cross that "there must be some connection between the claim to exclusion and the central government before it will be recognised by the courts"[23] has been rendered doubtful in *Rogers* v. *Sec. of State for Home Affairs*[24] and was clearly rejected in *D.* v. *N.S.P.C.C.*[25] Thus, it would be a foolish exercise indeed to inject certainty into the term. Far better, perhaps, to restrict the occasions when the balancing test may have to be used.

Quite apart from the intractable problem of the scope of the term "public interest", other theoretical problems have arisen. For instance, how is one to attach weight to the "interests" in question? Even if this can be done, are the interests intra-commensurable?

18 The definition can be found in Pound's "A Survey of Social Interests" *(supra.)* at p. 2: "Public interests are claims or demands or desires involved in life in a politically organised society and asserted in title of that organization". He explains *(ibid.)* that "they are commonly treated as the claims of a politically organised society thought of as an entity". This view appears hardly distinguishable from his identification of one "social interest" labelled as the "security of social institutions" (*ibid.,* p. 3). The distinction between "public interests" and "social interests" does not apply to the discussion on the privilege at all, and theoretical problems about Pound's classification and scheme of interests will not be dealt with here. See generally, Stone, *Social Dimensions of Law and Justice* (1966, Stevens & Sons Ltd.), Chs. 4-6 for a detailed critique of the Poundian scheme.

19 Stone, *op, cit.*. at p. 171.

20 *Ibid.,* and see Pound, "A Survey of Social Interests) pp. 20-25 (*supra.*). The "security of political institutions" is but one aspect of Pound's social interest in the "security of social institutions" (the other institutions being the domestic, religious and economic ones), The scheme has to be looked at as a whole if any assistance is to be obtained from it in discussing the law on the privilege. For instance, Pound identified other important social interests which could easily figure in any "balancing test": *e.g.,* interest in general security, interest in the general morals, interest in conservation of social resources etc. Where jurisprudential writings may be expected to be especially helpful, such as in the establishment of a scientific test for the weighing of interests, practicable solutions are sadly lacking. Pound himself was rather brief on this aspect: III *Jurisprudence* (1959, West Publishing Co.), Ch. 15, Sec. 100. He was moved to comment as to this — "But however common and natural it is for philosophers and jurists to seek such a method, we have come to think today that the quest is futile." (*ibid.,* p. 330) All he could propose was to take all the interests relevant to a particular case into account "in an adjustment that gives effect to the totality as far as possible." (p. 331).

21 Cross, *Evidence (supra),* p. 266.

22 *Ibid.,* pp. 266-270.

23 *Ibid.,* p. 269.

24 *Reg.* v. *Lewes Justices, Ex p. Sec. of State, Home Dept.* [1973] A.C. 388.

25 [1978] A.C. 171.

That is, can the weights be balanced against each other in some scientific fashion? Again, can there be consistency in its application? Scarman L.J.'s answer to this last question seems to be "No", for he said that "if the whole thing is left to the judicial balancing operation we will be back to the length of the Chancellor's foot."[26] As regards the first two questions, it may perhaps be said that the weight of an interest must depend on the circumstances of each case — no interest having a constant weight at any time. Thus, in times of war or national instability, the public interest of general security should be weightier than it would be in times of peace. Even in the case of the administration of justice, its weight may vary according as to whether a party has a reasonably good or a doubtful claim. Such intricate problems have even made a normally cautious academic cry out: "there was no obvious reason why judicial wisdom and experience should be surer guides to the public interest on these matters than the judgments formed by the Executive."[27] He lamented the unpredictability of judicial policy as contrasted with Executive policy which, in his view, "was at least regulated by intelligible principles."[28] In particular, the learned author thought that recent decisions had unduly played down the element of confidentiality as a basis of claim for non-disclosure.[29]

Whatever misgivings there may be about the "balancing test", it is now well-established beyond question and the only useful question which may be discussed here is: What are the limits, self-imposed by the judges, in the use of the "balancing test"?

Firstly, there is undoubtedly a judicial attitude that circumspection is required in considering claims of the privilege. Due regard must be given to the Executive's views.[30] In fact, Lord Reid in *Canway* v. *Rimmer*[31] went so far as to say that cases in which it would be proper to question Ministerial views on such matters must be "very rare" indeed.[32] The learned judge was prepared to accept that a Minister is the best judge "where public or political consequences of disclosure are apprehended."[33] Similar sentiments by the other Law Lords may also be found.[34] Recently, Lord Simon of Glaisdale indicated that "decisions which may affect the national balance of payments or the public safety are best left to be made by the collective wisdom of Parliament on the advice of the Executive... briefed by officials who have investigated over a wide field the repercussions of the decision."[35] Lords Reid[36] and Upjohn[37] also indicated some types of documents which are, without more, regarded as highly sensitive and hence not

26 *Ibid.,* at p. 184H, *arguendo.*
27 S.A. de Smith, *Constitutional and Administrative Law,* p. 611 (3rd ed., Penguin Books, 1977).
28 *Ibid.*
29 *Ibid.,* and see, *post,* fn. 46, p.
30 See, Scarman L.J. in *D.* \ *N.S.P.C.C.* [1978] A.C. 171, at p. 197B.
31 [1968] A.C. 910.
32 *Ibid.,* at p. 943G.
33 *Ibid.,* at p. 945F.
34 *Ibid.,* at p. 957A (Lord Morris), 984C (Lord Pearce).
35 [1978] A.C. 171, at p. 235A.
36 *Conway* v. *Rimmer* [1968] A.C. 910, at p. 952D-G.
37 *Ibid.,* at p. 993E-G.

subject to disclosure, whatever their contents may be. Such documents include Cabinet Papers, Foreign Office dispatches, military communications, high policy Departmental Papers. Lord Reid hinted at a distinction between such documents and "routine documents",[38] although both he and Lord Upjohn denied the possibility of an exhaustive definition as regards such documents.[39] In the case of "routine documents", the balancing test ought to be applied in order to discover whether they are really "necessary for the proper functioning of the public service."[40]

Secondly, the judicial enquiry into the soundness of a claim is, of course, largely conditioned by the statement of the Executive as to what public interests are involved and how disclosure would prejudice those interests. This statement of the officer concerned is accorded primary attention — so much so that if a judge is dissatisfied with it, he may order a further statement from the officer.[41] Thus, a judge would apply the balancing test normally on the public interests identified by the officer. Very rarely, if ever, is it necessary to look beyond the Executive's statement.

Thirdly, as the Privy Council in *Robinson* v. *State of S. Australia* (*No.* 2)[42] held, the exercise of the judicial power must "be carefully guarded so as not to occasion to the State the mischief which the privilege, if it exists, is designed to guard against".[43] Thus, to take an example, suppose A, a farmer, wishes to challenge the government on its intention to build an atomic power station near his farmlands. To substantiate his claim that the station may give off waste materials which will damage the health of his livestock, he seeks production of a report on the estimated pollution risks. Could a judge seriously go into the issue of whether disclosure of that report would be more damaging to the public interest than non-disclosure if he makes no mention about the risks of pollution and the types of waste that may be produced? He would probably prefer the Minister's assessment in such a case.

Fourthly, it is fairly well established which reasons will not be regarded as valid to support a claim for non-disclosure.[44] Apart from those mentioned above, it was made clear recently, in several House of Lords decisions,[45] that the fact that the document is marked "confidential" or that confidentiality is required to promote candid reports in the public service are not good reasons *per se,* although they may be relevant to an overall assessment.[46]

38 *Ibid.,* at p. 952G.
39 *Ibid.,* at p.952F (Lord Reid), p. 993F (Lord Upjohn).
40 *Ibid.,* at p. 952G.
41 *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor.* [1978] 2 M.L.J. 148.
42 [1931] A.C. 704.
43 *Ibid.,* at p. 716.
44 *Supra.,* p.
45 *Conway* v. *Rimmer* [1968] A.C. 910; *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs & Excise Comrs. (No. 2)* [1974] A.C. 405; *Norwich Pharmacal. Co.* v. *Customs & Excise Comrs.* [1974] A.C. 133; *R.* v. *Sec. of State, Home Dept.* [1973] A.C. 388; *D.* v. *N.S.P.C.C.* [1978] A.C. 171.
46 Authorities from the U.S. are far more enamoured towards the "candour" argument: see, *e.g. Kaiser Aluminium & Chemical Corpn.* v. *U.S.* 141 Ct. Cl. 38, 157 F. Supp. 939 (1958); *Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F. 2d. 600 (5th Cir. 1966); *Ackerly* v. *Ley* 420 F. 2d. 1336 (D.C. Cir. 1969). See also, S.A. de Smith, *Constitutional & Administrative Law,* (3rd ed., 1977, Penguin Books) at pp. 611-613.

Fifthly, Lord Reid in *Conway* v. *Rimmer*[47] evinced an opinion that a Minister should have a right of appeal before production can be ordered.[48] Strictly speaking, this point does not render the balancing test more certain. But if there is such a right, it would be reasonable to expect that the judge in the lower court will be concerned to articulate his reasons for his decision properly. At least, it may be a check to unorthodox approaches to the balancing process.

Sixthly, there is the general argument that the training of judges is such that they, almost to a man, would have the same methodology of reasoning and application of evaluative tests, even in matters of public policy.[49] One may, perhaps, cite as an example of this, the judicial predilection in *D.* v. *N.S.P.C.C.*[50] for the use of the "analogy" to develop common-law doctrine. Thus, according to Lord Hailsham:

> "... the general tradition of the development of doctrine.., proceeds through evolution by extension or analogy of recognised principles and reported precedents. Bold statements of general principles based on a review of the total field are more appropriate to legislation by Parliament which has at its command techniques of enquiry, sources of information and a worldly-wise experience, far less restricted from those available to the courts in the course of contested litigation ...."[51]

Thus, although the Legislature may have a greater claim to legitimacy in matters of public policy — in this, the Executive stands together with the Legislature — the exercise of judicial discretion, in view of the above factors, would not be as unpredictable as has been suggested.

It is, however, true that uncertainty to a degree must arise when applying a balancing test of public interests, for it is necessary to have a fair idea of the priority of interests before the balancing can be done. As to which interest should have precedence over another, opinions may quite understandably differ. In *D.* v. *N.S.P.C.C.*,[52] six of the judges involved in the case (the five Law Lords and Lord Denning M.R.) decided for disclosure and three other judges decided against.[53] One of the main grounds against disclosure was that the Society may cease to function if their informers' names were revealed or may be required from them.[54] The protection of the informer was justified even though, in the result, "the non-disclosure would serve to protect a malicious or reckless as well as a bona fide informant."[55] In contrast to this view, Scarman L.J. put the argument for the other side strongly:

> "Nevertheless it has to be accepted that some may be deterred from giving information to the society, if Crown privilege cannot be claimed. This is a loss which is damaging to the public interest. But the damage has to be considered in a wider context even than the welfare of children. What sort of society is the law to reflect?"[56]

47 [1968] A.C. 910.
48 *Ibid.,* at p.953D.
49 See, K. Llewellyn, *The Common Law Tradition — Deciding Appeals* (Little, Brown, 1960), at p. 19 *et. seq.,* for a detailed identification and analysis of "steadying factors" in judicial decision which make for better "reckonability".
50 [1978] A.C. 171.
51 *Ibid.,* at p. 225H.
52 [1978] A.C. 171.
53 Scarman L.J., Sir John Pennycuick, and Master Jacob.
54 [1978] A.C. 171 at pp.
55 *Ibid.,* at p. 222C.
56 *Ibid.,* at p. 199G.

Having posed this question, he continued:

> "If it be an open society, then men must be prepared to face the consequences of giving information to bodies such as the N.S.P.C.C.... If it be a society in which as a general rule informers may invoke the public interest to protect their anonymity, the law may be found to encourage a Star Chamber world wholly alien to the English tradition."[57]

It is evident that Scarman L.J. perceived the public interests concerned here to be wider in scope than his fellow judges and who can say that he is wrong to do so? Plainly, the certainty that one may expect from such delicate value-judgments is, at most, a reasoned account of the judge's sense of priorities either explicitly or implicitly contained in his judgment. Scarman **L.J.**'s judgment is instructive from another aspect: it is that in the "balancing test", there is no fixed rule as to how many factors one may take into account.[58] Thus, although his fellow judges preferred to keep the "public interest" analysis fairly close to the work of the N.S.P.C.C., Scarman L.J. preferred to identify a wider public interest, namely, the "Open Society" and he seems to suggest that the price of protecting the informer is not worth the cost to an open society, where men are not afraid to stand up for what they have done. On the other hand, Lord Denning M.R., for instance, was worried that "gross injustice may be done to the informant if he or she is to be the object of resentment by the mother, or harassed by an action for libel or slander...."[59] For this and other reasons, Lord Denning M.R. came down "decisively" for non-disclosure.[60] Thus, in policy decisions, certainty cannot perhaps be expected. What can be expected is that a judge will render a reasoned account for his decision which, of course, he will hope would assuage the feelings of injustice of the party adversely affected by his decision.

In relation to the uncertainty of policy decision-making, it may, perhaps, be pertinent to point to a thesis by Professor R. Dworkin that when a judge applies policies, there is no reason why that decision should bind future judges or, for that matter, the judge in the instant case need not feel himself bound by past precedents based on policy.[61] He explains his view thus:

> "... if judges based their decisions on arguments of policy they would be free to say that some policy might be adequately served by serving it in the case at bar... (but) neither earlier decisions nor hypothetical decisions need be understood as serving the same policy."[62]

To illustrate this point, the public interest of general security is paramount in times of war or instability, hence, the government deserves the full backing of the law — *Duncan* v. *Cammell, Laird & Co.*[63] In times of peace, the public interest in the individual life becomes significant again and this must be protected from the excesses of

57 *Ibid.,* at pp. 199H-200A.
58 See, J.R. Lucas, *The Principles of Politics (op. cit.)* ss. 48 and 55.
59 [1978] A.C. 171, at p. 192E.
60 *Ibid.,* at p. 192F.
61 R.M. Dworkin, "Hard Cases", in *Taking Rights Seriously* (1977, Duckworth), Ch. 4.
62 *Ibid.,* at p. 88. *Contra,* arguments of principle which "can supply a justification for a particular decision... only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances."
63 [1942] A.C. 624.

governmental power — *Conway* v. *Rimmer.*[64] There is no reason why *Duncan* v. *Cammell, Laird & Co. Ltd.,*[65] as a matter of policy, should bind *Conway* v. *Rimmer,*[66] just as it would have been wrong for the judges in *Duncan* v. *Cammell, Laird & Co. Ltd.*[67] to have regarded themselves bound by *Robinson* v. *State of S. Australia (No.* 2).[68] Perhaps, the solution lies in judicial recognition of the weak pull of precedents when claims of the privilege are being considered.

It may be said, then, that there is some truth in the uncertainty, hence unpredictability, in the application of the balancing test. But it is also clear that the judges must retain this power to review, if only to deter over-zealous, let alone unscrupulous, civil servants. The test, however, should be used only when the judge is dissatisfied with the case presented by the departmental head. If the balancing test is applied, it may be desirable for the judge to indicate the interests on each side of the balance, as did Lord Denning M.R. in *D.* v. *N.S.P.C.C.*[69]

IV. *ALTERNATIVE CODIFICATIONS OF THE PRIVILEGE: AIDS TO RE-FORMULATION*

The unsatisfactory features of the law relating to the privilege have been discussed above. In the main, three of these features recur and dominate: (1) the lack of a sufficiently precise definition for the phrase "affairs of state";[70] (2) the uncertainties inherent in the judicial "balancing test", in spite of the limits to the power of the judges to review Executive claims;[71] (3) the legislative failure to provide for clear rules as to how claims of privilege ought to be put forward and how a judge should examine such claims — in particular, is there a power to inspect the evidence for which privilege is claimed?[72] It will be seen that these unsatisfactory elements have been tackled by draftsmen from the U.S. and Canada and their proposals will now be looked at.

There is no particularly compelling reason why the term "affairs of State" should be retained and defined. A better approach, perhaps, is to distinguish the different types of documents on the basis of their propensity to threaten the well-established public interest of "national security" and "foreign relations". In the proposed Federal Rules of

64 [1968] A.C. 910.
65 [1942] A.C. 624.
66 [1968] A.C. 910.
67 [1942] A.C. 624.
68 [1931] A.C. 704.
69 [1978] A.C. 171.
70 *B.A. Rao & Ors.* v. *Sapuran Kaur & Anor.* [1978] 2 M.L.J. 146; *Gurbachan Singh* v. *P.P.* [1966] 2 M.L.J. 125; *Amar Chand Butail* v. *Union of India & Ors.* A.I.R. 1964 S.C. 1658; *State of Uttar Pradesh* v. *Raj Narain* A.I.R. 1975 S.C. 865, and see *supra.,* pp. 28-32.
71 See *supra.,* pp. 44-51.
72 *State of Punjab* v. *Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493 at p. 504, para. 23 for a statement of the judge-made rules of procedure (Gagendragadkar J.). See also, cases mentioned in fn. 70, *supra.*

Evidence,[73] Standard 509(a)(l) and (2), a distinction is made between "secret of state" and "official information", the first term being restricted to governmental secrets which relate to the national defence or international relations, while "official information" forms a larger category, but, what is more important, it is subject to clear and precise conditions. The conditions[74] are firstly, that they must be shown to be information within the custody or control of a government department or its agent. Secondly, the burden is on him who asserts the privilege to show that disclosure of such information would be contrary to the public interest. Thirdly, the information must fall within any of the following categories:

(a) intragovernmental opinions or recommendations which arise from policy discussions;

(b) investigation files compiled for law-enforcement purposes;

(c) information exempted from disclosure under the Freedom of Information Act, 5 U.S.C. Ch. 552.

The distinction between "state secrets" and "official information" is an instructive one: indeed, had it not been for the judicial development of the term "affairs of State", it could have been possible to preserve a similar distinction in sections 123 and 124 of the Act.[75] The distinction is undoubtedly useful as it resolves the question of priorities on most governmental documents — any document which does not concern national defence or international relations are subject to the stricter conditions imposed in Standard 509(a)(2).

Three comments may be made about this definition: Firstly, the definition of a "state secret" appears inadequate. In particular, it should have included Cabinet papers. It is pertinent to note that in the proposed Evidence Code of Canada,[76] where the dichotomy between "state secret" and "official information" is retained, the term "state secret" includes "matters of confidence of the Queen's Privy Council for Canada."[77] Secondly, as regards "official information", the test

73 The U.S. Federal Rules of Evidence are, by far, the most comprehensive and well-thought out Code drafted in recent years. The original draft, published in 1969, underwent several revisions before being promulgated by the Supreme Court in 1972. Further revisions were made in Congress and some of the rules approved by the Supreme Court were dropped. Weinstein and Berger points out, however, that the omitted rules have been "adopted by the highest court after very considerable professional debate" and "must be considered... at least reflective of considerable reason and experience." (*Weinstein's Evidence*, Vol. I, Preface, p.xi 1978, Matthew Bender). It was then suggested that the rules omitted by Congress but approved by the Supreme Court should be called "Standards". The proposed rule on governmental privilege, rule 509, was such a rule — it will be referred to in the text as Standard 509.

74 Standard 509(a)(2).

75 S. 124 of the Act covers communications made to a public officer in "official confidence". The public officer cannot be compelled to give evidence if he considers that the public interest would suffer by the disclosure. This may be contrasted with the wording of s. 123 of the Act which makes no mention of "public interest" had it not been imputed by the judges in their interpretations of the section. See cases cited fn. 70, *supra.,* at p.

76 The Canadian Code was modelled closely after the U.S. Federal Rules and prepared by the Law Commission of Canada after extensive consultation. It was introduced into the Federal Parliament as Bill C-423, but it is not known whether it has been passed at the time of writing.

77 Bill C-423, Clause 43(l)(b).

of "contrary to the public interest" is probably not as preferable as "injury to the public interest" (the term accepted at present), because the cognates of the word "contrary" could conceivably include simply "perceived unfavourable effects, however slight" and this may be a lighter burden to discharge than when the government is asked to show "injury to the public interest". Thirdly, if the balancing test is meant to be incorporated by this provision, it must be said that this is by no means clear. In the hearings on the proposed rules before the Judiciary Committee,[78] there was some puzzlement at a suggestion that the balancing test is incorporated in the phrase, "contrary to the public interest".[79] If this is true, it is expecting the phrase to do too much. Again, the proposed Canadian Code is seen to have a preferable formulation: it is provided in clause 43(2) that "The Crown... has a privilege... against disclosure of any official information ... unless the public interest in preserving the confidentiality of the information is outweighed by the public interest in the proper administration of justice".[80] It is clear, on this formulation, that the "balancing test" is incorporated. The test is to be used only in cases where "official information" is involved — certainly, it is intended to be limited in use as the government will have to show that disclosure is not in the public interest; the judicial role, presumably, will be limited by deciding whether the government has made out a case or not, *i.e.,* whether their balancing of the various interests is fair and equitable or some other such test.

The general provision for the privilege is as follows:

> S. 509 "(b) General rule of privilege — 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."

The government obviously has the burden[81] to show that if the required evidence is tended, there is a reasonable likelihood that either a state secret or official information will be disclosed. It is difficult to see what is added into the import of the section by the words "... of

78 Hearings on the Proposed Rules before Special Subcom. of Federal Criminal Laws, Comm. of the Judiciary, House of Representatives, 93d. Con., 1st Sess. on Proposed Rules of Evidence, Ser. No. 2, p. 531 (1973); note, especially, remarks of Rep. Holtzman.

79 Standard 509(a)(2).

80 Bill C-423, Canada.

81 It is not clear whether the government has a burden of proof or merely an evidential burden on the issue. The word "showing" may not be the same as "proving", but it is submitted that the burden here is probably the legal burden *(i.e.* the burden of proof) as an "evidential burden" may be discharged without "proving" or "showing" anything — see, *Jayasena* v. *R.* [1970] A.C. 618. It must also be remembered that the consequences of non-disclosure may be drastic, especially if the documents are central to the case of the party requiring them. Where they are of such a character, it is "a compelling reason for their production — one only to be overborne by the gravest considerations of State policy or security." *(Robinson* v. *State of S. Australia (No. 2)* [1931] A.C. 704, at p. 716.) On Burden of Proof, see Cross, *Evidence,* Chs. IV, V (4 ed., 1974, Butterworths). See *also, post,* p. (P.K. Jones).

danger".[82] They appear unnecessary, unless it is intended that the government will need to show that there is a reasonable danger that would result from disclosure — which is not what the section seems to mean. Given the assumption made in the case of state secrets that there will be danger in their disclosure, and the second assumption that there will also be danger if the evidence is really "official information" — as the second condition in section 509(a)(2) requires a showing of "contrary to public interest" — the two words appear to be otiose.

By far the most interesting part of the U.S. Rules is its formulation of the 'Procedure' provision which is stated as follows:

> S. 509 "(c) Procedures — The privilege for secret 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."

It is obvious that a distinction between "secret of state" and "official information" is maintained on procedural grounds as well. The main procedural differences are represented in tabular form as follows:

Issue	*Secret of State*	*Official Information*
1. Who may claim the privilege?	Chief Officer of the Government Agency or Department.	Any attorney representing the government.
2. In what form may the claim be made?	Written or otherwise	Written or otherwise
3. Where will the claims be heard?	Hearing May be (i) In Chambers (ii) *In camera.*	Hearing May be (i) In Chambers (ii) *In camera.*
4. May counsel for the party requiring disclosure inspect the claim and "showing" and be heard?	Yes. But Judge can, on motion by the government, conduct "showing" *in camera.*	Yes.
5. May the judge inspect the actual evidence for which privilege is claimed?	No provision on this.	Yes, *in camera.*

The fact that only an attorney need be responsible for a claim of privilege concerning "official information" is worth noting. There

[82] Standard 509(a)(2). Consider the meaning of the following statements:
S. 1: "It is reasonably likely that a 'secret of state' or 'official information' will be disclosed."
S. 2: "There is a reasonable danger that a 'secret of state' or 'official information will be disclosed."
The statements, it is submitted, mean the same thing.

is no doubt that this will save time, expense and work, especially for the chief officer of the department. But it is not difficult to agree with Scarman L.J. that a chief officer's opinion is still immensely helpful even though it is no longer regarded as conclusive.[83] The learned judge remarked: "An unguided judicial discretion is less likely to reach the right conclusion than one which has the advantage of the opinion of the responsible Minister having been made known to the Court."[84] However, it seems that on the basis of the rule as formulated above, a judge may still request an opinion from the chief officer in reliance on the clause to the effect that "the judge may take any protective measure which the interests of the government and the furtherance of justice may require".[85]

The role of the judge is reasonably well indicated in the rule. The fact that there is a difference in the status of the person authorised to claim the privilege — the chief officer for "secret of state" as compared to any attorney for "official information" — indicates a greater role for the judge in claims made in the latter category. The judicial power in such a case is buttressed with a power to inspect the evidence although this is to be done *in camera.*[86] In contrast, the judicial role is much reduced when "secrets of state" are involved. Two factors, in particular, support this conclusion: firstly, there is no test of "public interest" at all, and secondly, perhaps more importantly, the rules are silent as to the power to inspect. It is pertinent to note here that the "claim and the showing" which may be made wholly or partly in written form is to be distinguished from the actual document itself. Since the rules provide for a power to inspect in the case of "official information" it must be assumed that the omission in the case of state secrets was deliberate: *expressum facit cessare tacitum.* Unfortunately, the draftsman-Reporter to the Rules Committee was not all that clear.[87] What was intended, apparently, was a codification of the *U.S.* v. *Reynolds* [88] rule. The opinion of the Court as delivered by Vinson C.J. was ambiguous on the point.[89] It is submitted that on the formulation, the power to inspect in the case of state secrets clearly does not exist.

A word of criticism about the Procedure provision may be made in the fact that it is not clear at all as to how detailed a "claim and

83 *D.* v. *N.S.P.C.C.* [1978] A.C. 171.
84 *Ibid.,* at p. 197B.
85 Standard 509(c).
86 *Ibid.*
87 See, *supra.,* fn. 78, p.
88 345 U.S. 1. On the decision and the general law on the privilege, see *McCormick on Evidence,* (2nd ed., 1972, West Publishing), Ch. 12.
89 The relevant passage seems to be the following:
"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, *and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers* .... In each case, the showing of necessity which is made will determine how far the court should probe in satisfying that the occasion for invoking the privilege is appropriate." (345 U.S. 1, at p. 10) (Italics mine).

showing" must be, especially in the case of "official information." The English rules judicially enunciated to the effect that the Minister ought to indicate, as far as possible, the apprehended injury to the public interest, the fact that the Minister had carefully read and considered each document for which privilege is claimed, and the fact that the Minister must declare on oath that he has done all these things and that in his opinion, it would be harmful to disclose such documents[90] appear to be a more satisfactory approach.

In Canada, the proposed Code goes further in two ways to control the quality and confidentiality of the hearings on claims of privilege. In the case of "state secrets", the judge may, or must if so requested by a party or the Crown, stay the proceedings and refer the claim to the Chief Justice who will then appoint a judge of the Supreme Court to investigate the claim.[91] This provision certainly meets with Lord Reid's desire that the Crown should have a right to appeal before disclosure if it thought that the trial judge was really unaware of the ramifications of disclosure.[92] The Canadian provisions also contain a rule to the effect that disclosure of the actual evidence may be made in chambers and out of the hearing of all except the claimant and "whosoever the claimant wishes to have present."[93] There is doubt whether this provision extends to "state secrets" because the phrase used is "disclose the *information*"[94] which suggests that only the category of "official information" is envisaged. Finally, a sub-clause provides for judicial discretion to subject the disclosure of information "to such restrictions or conditions as he deems appropriate."[95] Such a provision has the merit of flexibility, though the practice of different judges may vary and render procedure uncertain in this respect.

In conclusion, it is suggested that the privilege should be limited — as in the case of the U.S. Rules — to the central organs of government. If the Legislature wishes to extend the privilege, it would be preferable to extend it *ad hoc,* by providing for them specifically in statutes,[96]

90 See, *Conway* v. *Rimmer* [1968] A.C. 910. For the Indian Rules, see, *supra.,* fn. 72, p.

91 Bill C-423, Cl. 43(3).

92 *Conway* v. *Rimmer* [1968] A.C. 910 at p.

93 Bill C-423, Cl. 43(4).

94 *Ibid.*

95 *Ibid.,* Cl. 43(5).

96 See, for instance, protection of informer provisions in the following Singapore statutes, all to be found in the Rev. Ed. 1970: s. 16, Betting Act (Cap. 95); s. 18, Common Gaming Houses Act (Cap. 96); s. 14, Kidnapping Act (Cap. 101); s. 34, Prevention of Corruption Act (Cap. 104). A typical provision of this nature is reproduced:

> (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
>
> (2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
>
> (3) If on a trial for any offence under this Act the court, after full enquiry into the case, is of the opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be

rather than adopting the common law extensions as found in *Rogers* v. *Sec. of State for the Home Dept.*[97] and as in *D.* v. *N.S.P.C.C.*[98] The dichotomy between "state secret" and "official information" should be utilised as discussed above. The procedural rules as laid down in the U.S. Standard 509(c) seems attractive if included within it are rules specifying the requirements for a formal claim as approved by the Law Lords in *Conway* v. *Rimmer.*[99] It is of interest to note, also, that the Federal Rules provide for the effects of a claim depending on whether it succeeds or not. Standard 509(e) provides that if a claim of privilege succeeds and another party is deprived of material evidence, "the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." Such a clause appears useful, though without a proper statement as to when, if ever, any of these steps ought to be taken, it seems to be giving the judges a power which they may prefer to do without.

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false or did not believe to be true, or if in any other proceeding the court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the original informer, the court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

97 [1973] A.C. 388.

98 [1978] A.C. 171.

99 [1968] A.C. 910.

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