THE DIMENSIONS OF CROWN PRIVILEGE IN COMMONWEALTH LAW: A COMPARATIVE STUDY

I. INTRODUCTION

A striking example of the function of law in modern society, of reconciling the conflict of individual, public and social interests,[1] is provided by the legal principles governing the exclusion of evidence on the ground of jeopardy to the State interest. The cardinal aspects of public policy which come into conflict in this area are (a) the public interest that harm should not be done to the nation or to the public service; and (b) the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced if justice is to be done.[2] The body of evidentiary law which has been evolved in this regard by the Anglo-American legal tradition is founded on a compromise between divergent objectives of social policy. The purpose of this article is to offer a critical analysis of the foundations on which the prevailing doctrines and attitudes in Commonwealth jurisdictions are based.

II. THE JURIDICAL CHARACTER OF THE DOCTRINE OF EXCLUSION

The branch of the law dealing with State interest as a basis of exclusion of evidence has no strict bearing on the concept of privilege.[3] The distinct character of the rules governing the former area is demonstrable in several ways: (i) the objection to reception of evidence, based on public policy, may be invoked by any person and, indeed, should be taken by the judge *ex mero motu,*[4] (ii) unlike a plea of privilege, the objection of State interest cannot be waived by the Crown or by any other person;[5] (iii) the rule of exclusion deriving from public policy encompasses primary and secondary evidence without discrimination;[6] (iv) the objection of State interest cannot be

[1] See generally, E. Ehrlich, *Fundamental Principles of the Sociology of Law* (translation by W.L. Moll), pp. 489-506; *cf.* R. Pound, "Sociology of Law and Sociological Jurisprudence" (1943-4) 5 University of Toronto Law Journal 1.

[2] S.L. Phipson, *The Law of Evidence* (12th edition, 1976), p. 231. para. 562.

[3] In *Conway* v. *Rimmer* [1968] A.C. 910 every member of the House of Lords, with the exception of Lord Morris, assailed the nomenclature of 'Crown privilege' and expressed a preference for the phrase 'public policy'. The term 'Crown privilege' has been described as "wrong" *(Rogers* v *Secretary of State for the Home Department* [1973] A.C. 388 at p. 400, *per* Lord Reid), "misleading" *(D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 at p. 190, *per* Lord Denning M.R.) and "not accurate, though sometimes convenient" *(Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388 at p. 406, *per* Lord Pearson).

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

[5] *Spong* v. *Spong* [1914] V.L.R. 77; *Rogers v. Secretary of State for the Home Department* [1973] A.C. 388.

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

rejected on the ground that the document in question came into existence in pursuance of some criminal or fraudulent purpose.[7]

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

III. The Scope of The Exclusionary Rule

The exclusionary rule, although generally invoked in respect of documents,[8] applies also to real[9] and oral[10] evidence. An English court has declared: "It cannot be laid down that all public documents … are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest that there must be a limit to the duty or power of compelling the production of papers which are connected with acts of State."[11]

The general rule of disclosure is sustained by two major considerations. The first is that "Each party enjoys as an incident of his right to a fair trial the right to present as part of his case all the relevant and material evidence which supports or tends to support that case."[12] The second consideration, closely allied to the first, is that "The withholding from parties of relevant and material documents, unless justified by the strongest considerations of public interest, is apt to undermine public confidence in the judicial process."[13] The New Zealand courts have emphasized that "It is vital for the court to be as fully informed as reasonably possible of the facts and issues."[14] "Indeed, in some cases, the only prospect the injured person has of recovering damages lies in his being able to obtain in court information from (an official) file."[15]

The High Court of Australia has envisaged the principle of non-disclosure as "embracing a group of 'exceptional bases' in which the public interest in the proper administration of justice has been outweighed by a superior public interest of a self-evident and overwhelming

[7] *R.* v. *Cox and Railton* (1885) 14 Q.B.D. 153; *O'Rourke* v. *Darbishire* [1920] A.C. 581.

[8] In its application to documents the principle based on State interest is not confined to documents in the possession of the Crown or to documents which the Crown has brought into existence. It extends to documents which are not in the custody of the Crown and which are brought into existence by another party if the documents contain confidential information supplied by the Crown, production of which would be harmful to the public interest; *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co. Ltd.* [1916] 1 K.B. 822.

[9] *Marconi's Wireless Telegraph Co., Ltd.* v. *Commonwealth (No. 2)* (1913) 16 C.L.R. at p. 185.

[10] *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624 at p. 643.

[11] *Beatson* v. *Skene* (1860) 5 H. & N. 838.

[12] *Australian National Airlines Commission* v. *The Commonwealth of Australia* (1975) 132 C.L.R. 554 at p. 593, *per* Mason J.: *Haseltine Research Inc.* v. *Zenith Radio Corporation* (1965) 7 F.L.R. 339.

[13] *Ibid. cf. Attorney-General* v. *Mulholland: Attorney-General* v. *Foster* [1963] 2 Q.B. 477.

[14] *Fiordland Venison Ltd.* v. *Minister of Agriculture and Fisheries* [1978] 2 N.Z.L.R. 341.

[15] *Hinton* v. *Campbell* [1953] N.Z.L.R. 573 at p. 575, *per* North J.

kind."[16] The basis of non-disclosure, according to one strand of judicial opinion, is that a confidential relationship exists and that production of the evidence is in breach of some ethical or social value involving the public interest.[17] The privilege against disclosure springs from a confidential communication, coupled with a paramount public interest in permitting the secrecy surrounding the communication or its contents to be maintained.[18] Although the categories of public interest are not closed[19] and the courts show "willingness to extend established principles by analogy and legitimate extrapolation";[20] extension of the principle of non-disclosure is effected with restraint and circumspection.[21]

Lord Denning has identified confidentiality as the essential basis of exclusion of evidence on the ground of public policy.[22] However, this does not represent the prevailing view of the relationship between confidentiality and public interest. Confidentiality, though not coeval with public interest, is a "significant element"[23] of the latter concept. Still, it is neither "a satisfactory basis for testing whether relevant evidence should be withheld"[24] nor "a separate head of immunity".[25] The view countenanced by modern authority is that "where the subject matter is clearly of public interest, the *additional* fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld".[26] This approach is predicated on the assumption that public interest requires to be "extrinsically established"[27] or accepted as a matter of inference.[28] The element of public interest is adequately demonstrable in the context of communications for the purpose of marriage conciliation.[29] The effect of the existing law is that, although confidentiality furnishes no independent justification for withholding evidence in the public interest, it may have

[16] *Australian National Airlines Commission* v. *The Commonwealth of Australia* (1975) 132 C.L.R. 554 at p. 593, *per* Mason J

[17] *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201 at p. 232, *per* Lord Edmund-Davies; *cf. R.* v. *Cheltenham Justices; Ex pane Secretary of State for Trade* [1977] 1 W.L.R. 95 at p. 100, *per* Lord Widgery C.J. See also *British Steel Corporation* v. *Granada Television Ltd.* [1980] 3 W.L.R. 818 at p. 826, *per* Lord Wilberforce, and at p. 836, *per* Viscount Dilhorne.

[18] *R. v. Snider* (1954) 109 C.C.C. 193.

[19] *In re D. (Infants)* (1970) 1 W.L.R. 559; *Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388.

[20] *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 2 W.L.R. 201 at p. 215, *per* Lord Hailsham of St. Marylebone.

[21] *McGuiness* v. *Attorney-General of Victoria* (1940) 63 C.L.R. 73 at p. 104, *per* Dixon J.

[22] "The true question is whether the court will compel a person to break a confidence" *(D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 at p. 190).

[23] *D.* v. *N.S.P.C.C.* [1978] A.C. 171 at p. 199, *per* Scarman L.J.

[24] *D.* v. *N.S.P.C.C.* [1978] A.C. 171 at p. 237, *per* Lord Simon of Glaisdale.

[25] *Id.*, at p. 230, *per* Lord Hailsham of St. Marylebone.

[26] *Id.*, at p. 246, *per* Lord Edmund-Davies.

[27] *Id.*, at p. 239, *per* Lord Simon of Glaisdale; *cf.* Lord *Diplock,* at p. 220. The existence of "any general privilege protecting communications given in confidence" has been denied *(Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388 at p. 408, *per* Lord Simon of Glaisdale).

[28] *Theodoropoulas* v. *Theodoropoulas* [1964] P. 311 at pp. 313-4.

[29] *McTaggart* v. *McTaggard* [1959] P. 94; *Mole* v. *Mole* [1951] P. 21; *Henley* v. *Henley* [1955] P. 202.

an important bearing on the latter issue, in so far as the range of factors by reference to which the divergent elements of public policy need to be evaluated, will generally include the confidentiality of documents or other evidence.[30]

The least controversial application of the principle of non-disclosure is in the sphere of national security which includes national defence and the conduct of foreign relations. When the defendants, acting under the direction of the Board of Admiralty, refused to produce a letter to their agent on the ground that it contained information concerning the Government's plans with regard to one of the Middle Eastern campaigns of the First World War, the objection of the defendants was upheld.[31] In the leading case of *Duncan* v. *Cammell Laird & Co. Ltd.*[32] the defendants to a claim for damages for negligence in relation to the construction of submarines successfully resisted, on a direction by the Board of Admiralty, the production of numerous documents in their possession in their capacity as government contractors. The design and structure of submarines, especially when the country was at war, was clearly a matter pertaining to national security.

Documents which have been suppressed on the ground of probable injury to State interest include communications between the governor of a colony and its legal or military officers as to the condition of the colony or the conduct of its agents,[33] communications between the governor of a colony and a Secretary of State[34] and communications between a Dominion High Commissioner and the Prime Minister of the Dominion.[35] Similarly, disclosure has been refused in respect of reports of military inquiries[36] and communications of the commander-in-chief of forces abroad with the Government[37] on the ground that national security relates, in a broad sense, to the defence of the nation and the maintenance of good diplomatic relations with foreign States.[38] However, disclosure has been ordered in respect of State pupil record cards.[39]

There is no doubt that the deliberations of Parliament, the proceedings of the Privy Council and State secrets fall within the purview of the exclusionary rule. Thus, the speeches and votes of Members of Parliament may not be divulged except by leave of the House.[40]

[30] The English Court of Appeal has recently adopted the approach that confidentiality, the need for candour and the desirability of cooperation are all factors to be weighed in the balance: *Neilson* v. *Laugharne* [1981] 2 W.L.R. 537 at p. 544, *per* Lord Denning M.R.
[31] *Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co., Ltd.* [1969] 1 K.B. 822 at p. 830.
[32] [1942] A.C. 624.
[33] *Wyatt* v. *Gore* (1816) Holt N.P. 299; *Cooke* v. *Maxwell* (1817) 2 Stark 183.
[34] *Wright* v. *Mills* (1890) 62 L.T. 558.
[35] *Isaacs* v. *Cook* [1925] 2 K.B. 391.
[36] *Home* v. *Bentinck* (1820) 2 Brod. & Bing. 130; *cf. St. George v. St. George* [1959] Q.W.N. 13.
[37] *Chatterton* v. *Secretary of State* [1895] 2 Q.B. 189.
[38] *R.* v. *Brixton Prison Governor: Ex parte Soblens* (1963) 2 Q.B. 243; but see *Spitzel* v. *Beck* (1890) 16 V.L.R. 661 at p. 663.
[39] *McLean* v. *Moore* (1969) 90 W.N. (Pt. 1) (NSW) 679.
[40] *Plunkett* v. *Cobbett* (1804) 5 Esp. 136; *Chubb* v. *Salomons* (1852) 3 C. & K. 75.

Opinions expressed during discussions at a Cabinet meeting are confidential[41] until such time as their disclosure would not undermine the doctrine of collective Cabinet responsibility.[42] The minutes of an examination of witnesses before the Lords of the Council have been accorded protection from disclosure.[43]

In *Duncan* v. *Cammell Laird & Co. Ltd.*[44] where the plaintiff sought discovery of documents relating to the submarine *Thetis* including a contract for the hull and machinery together with plans and specifications, and the First Lord of the Admiralty stated that "it would be injurious to the public interest that any of the said documents should be disclosed to any person", there is little scope to impugn the correctness of the decision by the House of Lords that the documents should be excluded. However, Viscount Simon took the opportunity to deal with the whole question of the right of the Crown to prevent production of documents in litigation, whether the Crown was a party to the proceedings or not.

The exposition of the law in this case leaves no room for doubt that the test of incompatibility with the public interest is satisfied: (a) by having regard to the contents of the particular document; or (b) by the fact that the document belongs to a class which, on the grounds of public interest, must generally as a class be withheld from production. However, the fact that a document is a member of a class of documents ordinarily protected from disclosure, the High Court of Australia has recently held, is not invariably determinative of the issue.[45]

The doctrine requiring virtually guaranteed secrecy for certain classes of documents has received a wide interpretation in the decided cases. Among documents which have been excluded on this ground by the British courts are confidential reports and plans submitted to the Board of Trade,[46] army medical sheets relating to a soldier,[47] reports as to a collision at sea by a naval captain to the Admiralty,[48] reports by the Inspector-General of Prisons to the Lord Lieutenant of Ireland,[49] police reports under the Irish Crimes Act,[50] documents setting out grounds on which a prisoner received the royal pardon[51] and reports by doctors and prison officers on the mental condition of a prisoner and concerning an assault on a fellow prisoner who claimed damages against the Home Office.[52] Other examples of this category of document are provided by correspondence between an officer of Customs and the Board of Commissioners,[53] a communication by a

[41] *Lanyon Pty. Ltd.* v. *Commonwealth of Australia* (1974) 3 A.L.R. 58 at p. 60, *per* Menzies J.
[42] *Attorney-General* v. *Jonathan Cape Ltd.; Attorney-General* v. *Times Newspapers Ltd.* [1976] Q.B. 752.
[43] *R. v. Layer* (1722) 16 St. Tr. 93.
[44] See note 10 *supra.*
[45] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505.
[46] *Mercer* v. *Denne* [1904] 2 Ch. 534.
[47] *Anthony* v. *Anthony* [1919] T.L.R. 559.
[48] *The Bellerophon* (1874) 44 LJ. Adm. 5.
[49] *M'Elveney* v. *Connellan* (1904) 17 I.C.L.R. 55.
[50] *Ashtown* v. *Waterford* (1908) 42 Ir.L.T. 77.
[51] *R.* v. *Cobbett* (1804) 2 St. Tr. (N S.) 789.
[52] *Ellis* v. *Home Office* [1953] 2 Q.B. 135.
[53] *Anderson* v. *Hamilton* (1816) 2 Brod. & Biz. 156.

justice of the peace to the Commissioners of the Great Seal or to another justice,[54] a report by an officer of Inland Revenue to his superiors,[55] documents brought into existence within the Customs and Excise Departments for the purpose of fixing an assessment for liability to purchase tax,[56] communications between the Commissioners of Customs and independent third parties for the same purpose,[57] confidential letters commenting on the character of employees at the Mint[58] and even communications made by or to the Lord Chamberlain in his official capacity as to persons to be invited to court.[59]

On the other hand, documents the exclusion of which, as a class, has not been necessitated by considerations of State interest are exemplified by letters by a private individual to the Postmaster-General complaining of the conduct of a postal official,[60] official books indicating the appointment of a collector of property tax[61] and communications between the keeper of a lunatic asylum and the Commissioners in Lunacy.[62] The effect of a recent Australian decision is that statements of persons who would or might be called as witnesses in a preliminary inquiry in committal proceedings before a magistrate are not, as a class, subject to Crown privilege.[63]

The high-water mark of the doctrine which requires the keeping of a class of documents secret, irrespective of their contents, is represented by the case of *Broome v. Broomed.*[64] *A* wife petitioned for divorce on the ground of adultery. The husband was a regular soldier of non-commissioned rank. An issue in the case related to the circumstances in which the wife was received by the husband on her arrival at his station in Hong Kong. There had been at Hong Kong a representative of the Soldiers, Sailors and Air Force Families Association, Differences had arisen between the husband and wife, and her good offices were invoked. She had made written reports of the case to her head office. The wife issued a *subpoena ad testificandum* directed to the representative of the Association and a *subpoena duces tecum* addressed to the Secretary of State for War relating to documents concerning attempts to reconcile the spouses made by the S.S.A.F.A. The Minister resisted production of the documents. On the basis of the existing authorities[65] Sachs J. ruled that the principle of exclusion of documents on the footing of State interest could be applied irrespective of where a document originates and in whose custody it is held.

54 *Fitzgibbon* v. *Greer* (1858) 9 I.C.L.R. 294.
55 *Hughes v. Vargas* (1893) 9 T.L.R. 92.
56 *Crompton (Alfred) Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)* [1973] 3 W.L.R. 268.
57 *Ibid.*
58 *Latter v. Goolden* (C.A.) 18 November 1894 cited in *Williams* v. *Star Co.* (1908) 24 T.L.R. 297.
59 *West* v. *West* (1911) 27 T.L.R. 189.
60 *Blake v. Pilford* (1832) 1 Moo. & Rob. 198.
61 *Lee* v. *Birrell* (1813) 1 M. & S. 482.
62 *Hill* v. *Philp* (1852) 7 Exch. 232.
63 *Attorney-General for New South Wales* v. *Findlay* (1976) 50 A.L.J.R. 637 at p. 638, *per* Barwick CJ.
64 [1955] 2 W.L.R. 401; *cf.* J.E.S. Simon, "Evidence Excluded by Consideration of State Interest" (1955) Cambridge Law Journal 62.
65 *Ankin* v. *L.N.E. Railway* [1930] 1 K.B. 527; *Moss* v. *Chesham U.D.C.* 16 January 1945.

On numerous occasions, however, English courts have expressed misgivings about the extreme width of the exclusionary rule which is entrenched in the decided cases. *Odium* v. *Stratton*[66] was an action for libel brought by a farmer against the chairman of a War Agricultural Committee. One of the issues related to the plaintiff's efficiency as a farmer. There were several contemporary records and reports made by the Committee and communications between the Committee and the Minister. The Ministry of Agriculture successfully objected to the production of all these documents, but Atkinson J. considered that their disclosure would have been of the utmost assistance in arriving at the truth. In *Ellis* v. *Home Office*[67] a prisoner in gaol was seriously assaulted by a fellow prisoner. The plaintiff alleged that this was due to the negligence of servants of the Home Office who knew, or should have known, that the assailant was unsafe. The Crown successfully claimed privilege for police reports and medical reports on the behaviour of the assailant before the assault. Devlin J., while dismissing the action, said: "I must express my uneasy feeling that justice may not have been done because the material before us was not complete and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done."[68] These judicial observations express doubts whether the exclusion of evidence at the instance of the executive might not have an adverse effect on the administration of justice.

These reservations are justified by the result reached in several cases. For example, in a divorce action[69] the issue was whether the husband had contracted syphilis during military service. Both parties wanted production of his military records, but the court upheld the War Office view that the public interest was best served by not producing them.[70] A liquidator who had taken out a misfeasance summons against directors could not have the balance sheets of the company when they were in the hands of the Inland Revenue authorities.[71] The refusal of the Minister of Transport, in an action for damages against a railway company arising out of a railway accident, to let the plaintiff have access to a report on the accident sent by the defendant was upheld,[72] although his predecessor, the President of the Board of Trade, had never withheld it from litigants.[73] The protests of the judge at the lack of assistance from the Local Government Board were unavailing in an action for nuisance said to have been caused by a smallpox hospital where the report of the inspector of the board was withheld.[74] This trend, which is reflected in some Australian decisions,[75] provides justification for the comment that "It is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them."[76]

66 July 21-19, 1949, quoted by J.E.S. Simon, *op.cit.*, at p. 73.
67 [1953] 2 Q.B. 135.
68 Quoted at p. 137 by Singleton L.J.
69 *Anthony* v. *Anthony* (1919) 35 T.L.R. 559.
70 *Cf. King* v. *King* [1944] Q.W.N. 25.
71 *Re Joseph Hargreaves Ltd.* [1900] 1 Ch. 347; see also *Honeychurch* v. *Honeychurch* [1943] S.A.S.R. 31.
72 *Ankin* v. *L.N.E. Railway* [1930] 1 K.B. 527.
73 *Woolley* v. *N.L. Railway* [1869] L.R. 4 C.P. 602.
74 *Attorney-General* v. *Nottingham Corporation* [1904] 1 Ch. 673.
75 See, for example, *Seeney* v. *Seeney* [1945] Q.W.N. 20.
76 *Brooms* v. *Broome* [1955] 1 All E.R. 201 at p. 207, *per* Sachs J.

The wide scope of the exclusionary doctrine, as applied to documents considered to belong to a sensitive class, is attributable to the formulation of the relevant principle by Viscount Simon in the *Cammell Laird* case: "The public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than upon the contents of the particular document itself."[77] Viscount Kilmuir L.C., in a statement in the House of Lords on the grounds which warrant invocation of Crown privilege, expressly distinguished between "contents" and "class" cases. Having set out the first ground that disclosure of the contents of the particular document would injure the public interest, he proceeded: "The second ground is that the document falls within a class which the public interest requires to be withheld from production."[78] The rationale underlying the second ground was stated to be that "Government decisions should be taken on the best advice and with the fullest information."[79]

A recent judgment of the High Court of Australia suggests that the distinction between "class" and "contents" situations ought not to be regarded as absolute. The comment was made that there was "no reason to extend the umbrella of non-disclosure or non-production to all documents concerned with policy making in government departments"[80] and that, within this area, "a distinction should be drawn between important matters of policy and those which are not".[81] The House of Lords has conceded that the dichotomy between "contents" and "class" cases is "not wholly satisfactory".[82]

Nonetheless, the distinction remains entrenched in English and Commonwealth law. Thus, according to the House of Lords, "a 'class' claim may legitimately be advanced even in respect of documents having *no* contents which it would prejudice the public interest to disclose";[83] nor is a "class" claim deprived of its identity because part of its contents has been divulged.[84] The classification of "class" and "contents" cases has been adopted authoritatively as "a good working, but not logically perfect, distinction".[85] The essential basis of "class" claims is *"pour encourager les autres"*.[86] This consideration, it has been recognised in Australia, has implications for the burden of proof: "Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden".[87]

The unsatisfactory condition of the law, as stated in the *Cammell Laird* case, is due primarily to the failure to take into account the

[77] [1942] A.C. 624 at p. 635.
[78] Statement to the House of Lords on 6th June 1956.
[79] *Ibid.*
[80] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 573, *per* Mason J.
[81] *Ibid.*
[82] *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700 at p. 723, *per* Lord Keith of Kinkel.
[83] *Id*., at p. 717, *per* Lord Edmund-Davies.
[84] *Id*., at p. 706, *per* Lord Wilberforce.
[85] *Id*., at p. 732, *per* Lord Scarman.
[86] *Lonrho Ltd.* v. *Shell Petroleum Ltd.* [1980] 1 W.L.R. 627 at p. 638, *per* Lord Diplock.
[87] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 545, *per* Stephen J.

different ramifications of the concept of "public interest" in this area. Viscount Simon relied heavily on the *dictum* of Lord Parker of Waddington that "Those who are responsible for the national security must be the sole judge of what the national security requires."[88] Viscount Simon's substitution of the phrase "national interest" for "national security" suggests that he regarded the two phrases as synonymous. It is clear, however, that "national interest" is a significantly wider concept than "national security", in that it covers not only the safety of the country but other types of interest, including commercial interests. The distinction between these concepts has been recognised in judicial pronouncements of impeccable authority.[89]

It has been aptly observed by a New South Wales court that "There are no absolutes in this field".[90] "In each case it is a matter of weighing the detriment supposed to flow from production against the prejudice to the administration of justice which may result from a refusal to order production."[91] However, the metaphor of balancing is not altogether appropriate. "Here the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective — to dispose fairly of the case — can be achieved without doing so, and only in a last resort to order discovery. This is a more complex process than merely using the scales; it is an exercise in judicial judgment."[92]

It is inevitable that the role of the judiciary in this regard should entail a predominant element of policy and creativity, "as the range of issues which engage the attention of the executive government is infinite and as the manner in which those issues are considered varies from case to case".[93] It is a striking feature of the development of the law that extension of State activity in the spheres of business and commerce has presaged liberal invocation of Crown privilege.[94] This phenomenon, in due course, encouraged a spirit of judicial circumspection which finds expression in the recent comment by the Supreme Court of New Zealand: "The activities of the State were not withering but expanding, and it therefore could no longer hold its very special position in the courts."[95]

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

88 *The Zamora* [1916] 2 A.C. 77 at p. 107.

89 See *Chandler* v. *Director of Public Prosecutions* [1962] 3 W.L.R. 694.

90 *Ex pane Attorney-General; Re Cook* (1967) 86 W.N. (Pt. 2) (N.S.W.) 222 at p. 239, *per* Holmes, J.A.; *cf. Attorney-General v. dough* [1963] 1 Q.B. 773 at p. 788, *per* Lord Parker C.J.; *Isbey* v. *New Zealand Broadcasting Corporation (No. 2)* [1975] 2 N.Z.L.R. 237 at p. 238, *per* Cooke J.

91 *Australian National Airlines Commission v. The Commonwealth of Australia* (1975) 132 C.L.R. 554 at p. 592, *per* Mason J.

92 *Science Research Council* v. *Nasse: Leyland Cars (B.L. Cars Ltd.)* v. *Vyas* [1979] 3 W.L.R. 762 at p. 771, *per* Lord Wilberforce.

93 *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 574, *per* Mason J.

94 See, for example, *Wadeer* v. *East India Co.* (1856) 44 E.R. 360 at p. 363.

95 *Arataki Honey Ltd.* v. *Minister of Agriculture and Fisheries* [1979] 2 N.Z.L.R. 311 at p. 316, *per* Jeffries J.

that the considerations which apply in contexts where national defence and good diplomatic relations are thought to be imperilled, can be distinguished convincingly from those relevant to situations where evidence is sought to be excluded on the basis that its reception is injurious to some other element of the public interest. For example, it can scarcely be suggested that comparable considerations come into play in a case where publication of the design of a submarine is claimed to endanger the public safety[96] and in a case where reception of the medical sheets of a soldier[97] or of evidence relating to attempts at reconciling a soldier with his estranged wife[98] is objected to on the ground of transgression of the public interest.

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

There are many cases where the nature of the injury which would or might be done to the nation or to the public service is of so grave a character that no other interest, public or private, including the interest in the administration of justice on the basis of uninhibited access to relevant evidence, can be allowed to prevail over it. With regard to such cases it is a proper approach that production or discovery of the document in question would put the interest of the State in jeopardy. However, there are many other cases where the possible injury to the public service is less significant in character or in degree. In these contexts it is altogether appropriate to evaluate closely the public interests involved.[99] Consequently, it is not a valid principle that the smallest probability of injury to the public service must invariably outweigh the gravest impediment to the administration of justice.

Indeed, contemporary judicial trends in Australia and in England call for satisfaction of stricter tests than those emerging from the traditional law, before relevant evidence may justifiably be excluded on grounds of public policy. There did exist a *cursus curiae* which favoured State papers (a category of documents encompassing Cabinet minutes, dispatches from ambassadors and minutes of discussions

[96] *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624.
[97] *Anthony* v. *Anthony* (1919) 35 T.L.R. 559.
[98] *Broome* v. *Broome* [1955] 1 All E.R. 201.
[99] *Cf. Conway* v. *Rimmer* [1968] A.C. 910. *Cf.* the treatment of "national security" and "other national interests" by J.A. Gobbo, D. Byrne and J.D. Heydon, *Cross on Evidence* (2nd Australian edition, 1979) pp. 293-294, and by D.L. Mathieson, *Cross on Evidence* (3rd New Zealand edition, 1979), pp. 286-287.

involving ministers) being accorded absolute protection.[1] But current judicial attitudes in Australia are hostile to the recognition of State papers as a homogeneous class governed by an indiscriminate principle of total immunity from disclosure. The High Court of Australia is committed to the empirical approach that "The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from production, no matter what they individually contain".[2] The gist of this approach is that Cabinet decisions and papers, far from requiring the application of special principles, "stand fairly and squarely within the area of (the general) rule".[3] The House of Lords, rejecting the contention that a claim for immunity from production in respect of documents of this category is conclusive,[4] has asserted "the residual power to inspect and to order disclosure":[5] "Something must turn on the nature of the subject matter, the persons who dealt with it and the manner in which they did so".[6]

The unequivocal purport of prevailing Australian law is that recourse should be had to the 'balancing' process throughout the range of State documents, irrespective of the level at which the decisions or consultations they embody have been taken or held. The foundation of the law is "a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case".[7] The criteria by reference to which the court accords priority to one of the competing elements of the public interest in this specific context are those derived from the general body of law pertaining to Crown privilege: "In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice."[8]

The present condition of Australian and English jurisprudence, then, cannot be reconciled with a 'two-tier' theory of Crown privilege which requires the application of disparate principles to documents relating to decisions and deliberations in the higher and in the inferior echelons of government, respectively. Still, the especial sensitivity and vulnerability of the former class of documents may well render appropriate differences of emphasis in the application of substantially uniform legal principles. Notwithstanding the assertion by the High Court of Australia that the protection conferred even on this category of documents "does not endure for ever",[9] it is not difficult to conceive of circumstances in which it is desirable that the protection given

1 *R.* v. *Turnbull* [1958] Tas. S.R. 80; *Re Grosvenor Hotel, London (No 2)* [1965] Ch. 1210 at pp. 1247, 1255; *Conway* v. *Rimmer* [1968] A.C. 388 pp. 952, 973, 979, 987 and 993; *Rogers* v. *Home Secretary* [1973] A.C. 388 at p. 412; *Lanyon Pty. Ltd.* v. *Commonwealth* (1974) 3 A.L.R. 58 at p. 60 (subject, however, to a qualification envisaging "very special circumstances", *per* Menzies J.); *Australian National Airlines Commission* v. *Commonwealth* (1975) 132 C.L.R. 582 at p. 591; *Bany-King* v. *Minister of Defence* [1979] 2 All E.R. 80.
2 *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 528, *per* Gibbs A.C.J.
3 *Id.*, at p. 571, *per* Mason J.
4 *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700.
5 *Id.*, at p. 733, *per* Lord Scarman.
6 *Id.*, at p. 725, *per* Lord Keith of Kinkel.
7 *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 546, *per* Stephen J.
8 *Id.*, at pp. 529-30, *per* Gibbs A.C.J.
9 *Id.*, at p. 529, *per* Gibbs A.C.J.

should "continue to operate beyond the time span of a particular episode".[10] Extended protection, in point of time, is defensible in cases where "to reveal what advice was *then* sought and given and the mechanism for seeking and considering such advice might well make the process of government more difficult now."[11] However, the fundamental consideration, stressed by the High Court of Australia[12] as well as by the House of Lords,[13] is that in this area, no less than in others, "A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim."[14]

The unwarranted extension of the scope of the exclusionary rule in contexts which do not impinge on national security is to be imputed, in the main, to the facile assumption that, the contrast in these cases necessarily being between the interest of the individual litigant and the interest of the community as a whole, the latter interest is entitled to precedence. This approach is reflected in the assertion that "The public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."[15] A similar attitude finds expression in the comment that "The public interest must be considered paramount to the individual interest of a suitor in a court of justice."[16]

The fallacy inherent in this approach lies in the identification of the interest in the proper administration of justice as an individual interest. "If the private interest is an interest in securing an adequate remedy for a tort whether committed by a civil servant or otherwise, then it is also the public interest that justice should be administered so that the innocent are compensated for the wrongs done to them by their fellows."[17] It is apparent, then, that the supposed dichotomy between the individual interest and the public interest in this context is misconceived. The integrity of political institutions and the exposure of organs of government to public scrutiny indisputably transcend the range of individual interests and form an integral aspect of the public interest.

Although it is incontrovertible that there is a public interest in the general security and in public safety which is of an overriding

[10] *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700 at p. 707, *per* Lord Wilberforce.
[11] *Ibid.*
[12] See note 14, *infra.*
[13] "The immunity is a rule of law; its scope is a question of law; and its applicability to the facts of a particular case is for the court, not the minister, to determine": *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700 at p. 732, *per* Lord Scarman. *Cf. Lonrho Ltd.* v. *Shell Petroleum Ltd.* [1980] 1 W.L.R. 627 at p. 638, *per* Lord Diplock.
[14] *Sankey v. Whitlam* (1978) 21 A.L.R. 505 at p. 542, *per* Stephen J.
[15] *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624 at p. 643, *per* Viscount Simon.
[16] *Beatson* v. *Skene* (1860) 5 H. & N. 853.
[17] H. Street, "State Secrets: A Comparative Study" (1951) 14 Modern Law Review 121 at pp. 130-131.

character,[18] this interest must be contained within its legitimate ambit. The relegation of a crucial facet of the public interest — that pertaining to availability of the entirely of the relevant evidence to the courts as a foundation for achieving justice between individuals and between the individual and the State — has resulted in an imbalance in the weight assigned to the diverse elements of public policy. It is submitted that some of the deficiencies which have marred the evolution of the case law of England can be supplied by the formulation of distinct rules catering to different branches of the public interest.

IV. Responsibility For Determining The Issue of Public Interest

In the *Cammel Laird* case [19] the House of Lords laid down the proposition that an objection validly taken to production on the ground that it would be detrimental to the public interest is conclusive. Accordingly, it was stated that the court should not require to see the documents for the purpose of judging whether disclosure would in fact harm the public interest.

However, even within the British Isles,[20] this view has not been followed consistently. A different approach has been adopted for Scots law, in respect of which Viscount Simon said: "We have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so."[21] Although there are decisions by the Scottish courts[22] which are in line with the *Cammell Laird* ruling, the contrary view is supported by the balance of judicial authority in Scotland.[23]

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

The Canadian courts, despite some prevarication,[24] have asserted that the certificate by the executive is subject to judicial scrutiny.[25]

[18] R. Pound, "A Survey of Social Interests" (1943) 57 Harvard Law Review 1 at p. 17; *cf. Dufresne Construction Co. Ltd.* v. *R.* [1935] Ex. 77 at p. 85, *per* Angers J.

[19] See note 32 at p. 278, *supra.*

[20] *Re Grosvenor Hotel (No. 2)* [1965] Ch. 1233; *Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57; *Wednesbury Corporation* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 261.

[21] *Glasgow Corporation* v. *Central Land Board* [1956] S.C. (H.L.) 1 at p. 11.

[22] *Earle* v. *Vass* (1822) 1 Shaw's App. 229; *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* [1909] S.C. 335.

[23] See *Henderson* v. *M'Gown* [1916] S.C. 821 and the cases cited in the judgment.

[24] *Green* v. *Livermore* [1939] O.W.N. 429; *Murray v. Murray* (1947) 3 D.L.R. 236; *Weber* v. *Pawlik* (1952) 2 D.L.R. 750.

[25] *Lengyel* v. *Swanson and Calgary Power Co. Ltd.* (1947) 2 W.W.R. 648; *Pocock* v. *Pocock* [1950] O.R. 734; *Re Geldart's Dairies, Ltd.* (1950) 3 D.L.R. 141; *R.* v. *Snider* (1953) 2 D.L.R. 9. But see note 75 at p. 294, *infra.*

In Australia the view has been expressed that "A ministerial objection taken in proper form is conclusive",[26] but this does not represent the consensus of judicial opinion in Australia. In the leading case of *Robinson* v. *South Australia State*[27] the State Government had assumed the function of acquiring and marketing all wheat grown in the State and distributing the proceeds to the growers. An action was brought alleging negligence in carrying out this function. The Privy Council remitted the case to the Supreme Court of South Australia with the direction that "It is a proper one for the exercise by that court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified."[28] A similar conclusion has been reached in other Australian decisions. Where a police officer who had given evidence before a magistrate on a charge of illegal betting declined on the direction of his superiors to produce vouchers directly relating to his evidence, and where an affidavit from the Chief Secretary of Victoria was tendered to the Magistrate in which the Minister objected to the production of the document, the Supreme Court of Victoria endorsed the reasoning in *Robinson's* case.[29] The courts of Queensland have taken the same view.[30] It has been declared to be "the simple duty of the court"[31] to protect the privilege where it exists.

In New Zealand, despite the contrary view taken in some decisions,[32] the established trend is inimical to investing the certificate by the executive with conclusive effect.[33] The courts of New Zealand, it has been asserted unequivocally, possess the power to disallow a ministerial objection to the production of documents in respect of which Crown privilege is claimed if they think it right to do so.[34] This has been received by writers in New Zealand as "a definite and welcome advance in the law."[35] In several cases[36] a claim of Crown privilege was upheld only after independent judicial investigation. Nevertheless, a more qualified approach does emerge from some New Zealand decisions. Thus, it has been said that the judge may inspect the document "in any doubtful case"[37] or "when the Minister's certificate is not sufficiently informative to enable him to say that the privilege applies."[38] Judicial scrutiny has been thought to be excluded

[26] *Nash* v. *Commissioner for Railways* (1863) 80 W.N. (Part 1) (N.S.W.) 460 at p. 464, Herron A.C.J. and McClemens and Brereton JJ.; *cf. Foran* v. *Derrick* (1892) 18 V.L.R. 408; *Ex pane Falstein, Re Maker* (1948) 49 S.R. (N.S.W.) 133.
[27] [1931] A.C. 704.
[28] At p. 723.
[29] *Bruce* v. *Waldron* [1963] V.R. 1; *Cowan v. Stanhill Estates Pty. Ltd.* [1966] V.R. 604.
[30] *Queensland Pine Co.* v. *Commonwealth of Australia* [1920] St. R. Qd. 121.
[31] *Commonwealth* v. *Kreglinger & Fernau Ltd.; Commonwealth v. Bardsley* (1926) 37 C.L.R. 393 at pp. 422, 430, *per* Isaacs and Starke JJ.; *cf. Lloyd* v. *Wallach* (1915) 20 C.L.R. 299; *Parker* v. *Parker* (1935) 52 W.N. (N.S.W.) 217; *Kleimeyer* v. *Clay* [1965] Q.W.N. 26.
[32] *Carroll* v. *Osburn* [1952] N.Z.L.R. 763 at p. 765, *per* Northcroft J.; *cf. Hinton* v. *Campbell* [1953] N.Z.L.R. 573, *per* North J.
[33] *Gisborne Fire Board* v. *Lunken* [1936] N.Z.L.R. 894.
[34] *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 894.
[35] See R.B. Cooke in (1962) *New Zealand Law Journal* 534 at p. 538.
[36] *Coe and Simmonds* v. *Simmonds (No. 2)* (1911) 30 N.Z.L.R. 488; *Transport Ministry* v. *Alexander* [1978] 1 N.Z.L.R. 306.
[37] *Meates* v. *Attorney-General* (unreported, 18th February, 1976), *per* Beattie J.
[38] *Elston* v. *State Services Commission* (unreported, 28th June 1977), *per* Richardson J.

in circumstances where the Minister's reasons where not within the purview of judicial experience.[39] The Court of Appeal of New Zealand has conceded that there are some classes of cases where the Minister's statement should be treated as decisive.[40]

From the standpoint of the doctrine of *stare decisis,* the question has arisen whether the opinion of the Privy Council in *Robinson v. South Australia State* has been deprived of authority by the subsequent decision of the House of Lords in the *Cammell Laird* case. Further difficulty has been caused by the ruling of the High Court of Australia that it would follow decisions of the House of Lords even if this course involves overruling its own decision.[41] There is some authority that a decision of the Privy Council ceases to be binding in colonial and dominion courts when it has been expressly rejected as erroneous by the House of Lords.[42] However, substantial support for the contrary view may also be found.[43] In principle, the Australian courts have expressed an emphatic preference for the latter strand of authority.[44]

Judicial attitudes in the Commonwealth probably influenced the decision in *Conway* v. *Rimmer*[45] where the House of Lords unanimously distinguished the *Cammell Laird* case. This was an action for malicious prosecution brought by a former police probationer who had been charged with, and acquitted of, theft, against his former superintendent who had caused the charge to be brought. Contrary to the wishes of both parties, the Home Secretary objected to the production of the five reports mentioned in the defendant's list of documents. Four of these reports related to the plaintiff's conduct as a probationer, and the other was made to the Chief Constable for transmission to the Director of Public Prosecutions in connection with the charge of theft. The House of Lords ordered production of the documents for inspection by them and, after inspection,[46] they ordered production to the plaintiff.

[39] *Pollock v. Pollock and Grey* [1970] N.Z.L.R. 771 at p. 772, *per* Moller J.; *cf. Tipene* v. *Apperley* [1977] **1 N.Z.L.R.** 100 at p. 105, *per* Beattie J.

[40] *Konia* v. *Morley* [1976] 1 N.Z.L.R. 455 at p. 461, *per* McCarthy P.

[41] *Piro* v. *Foster & Co. Ltd.* (1943) 68 C.L.R. 313.

[42] *Will* v. *Bank of Montreal* (1931) 3 D.L.R. 526 at pp. 536-537; *Carroll* v. *Osburn* [1952] N.Z.L.R. 763.

[43] *Gannon* v. *White* (1886) 12 V.L.R. 589 at p. 595; *Re Lobb* v. *Nixon* (1926) 2 D.L.R. 819; *Houston v. Stone* (1943) 43 S.R. (N.S.W.) 118 at p. 123; *Christie* v. *Ford* (1957) 2 F.L.R. 202.

[44] *Bruce* v. *Waldron* [1963] V.R. 1 at p. 8, *per* Lowe, Smith and Gowans, JJ. Since *Parker v. R.* (1963) 111 C.L.R. 610 the Australian High Court has chosen to follow its own decisions rather than those of the House of Lords.

[45] [1968] 1 All E.R. 874; *cf. Homestake Mining Co.* v. *Texasgulf Potash Co.* (1977) 76 D.L.R. (3d) 521 at p. 528.

[46] As to the propriety of private inspection, the High Court of Australia has declared: "Once a court has decided, notwithstanding the opposition of a Minister, that on balance the document should probably be produced, it will sometimes be desirable, or indeed essential, to examine the document before making an order for production" *(Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at pp. 531-2, *per* Gibbs A.C.J.). The caution enjoined upon a court in relation to this step is underscored in the comment by Lord Wilberforce: "As to principle, I cannot think that it is desirable that the court should assume the task of inspection except in rare instances where a strong positive case is made out, certainly not on a bare unsupported assertion by the party seeking production that something to help him may be found, or on some unsupported, viz. speculative, hunch of its own" *(Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700 at p. 711). Private inspection by a court is legitimate

The *ratio decidendi* underlying the separate opinions of the five Law Lords is contained in the statement by Lord Morris: "Whenever an objection is made to the production of a relevant document, it is for the court to decide whether or not to uphold the objection. The power of the court must include a power to examine documents privately, there being no difference in principle between contents cases and class cases."[47] This decision, by releasing the English courts from the thraldom of "the Simon dragnet doctrine",[48] has "brought back into legal custody a dangerous executive power."[49] The decision in *Conway* v. *Rimmer has* been applied unreservedly by Commonwealth courts.[50]

The crucial issue is whether it is the executive or the judiciary which should bear the responsibility for determining the question of public interest. Various considerations have been urged in support of the conclusion, reached in the *Cammell Laird* case, that this function falls within the purview of the executive. Firstly, it has been contended that a judge could only consider this matter in public and that argument in open court as to the admissibility of the document would vitiate the very objectives which are sought to be attained by exclusion of the evidence. Nevertheless, prior to the *Cammell Laird* decision, no impropriety was thought to attach to examination of documents in the judge's chambers.[51] Secondly, it has been said that if the judge sees documents without their being shown to the parties, this would amount, when the Crown is a party, to communicating with one party to the exclusion of the other. This objection is devoid of merit. "Where a document has not been prepared for the information of the judge, it seems to be a misuse of language to say that the judge 'communicates with' the holder of the document by reading it."[52] Thirdly, the argument has been used that, where "policy" is concerned, "it is for Ministers and not for the courts to judge and the Ministers must discharge their responsibilities under the control of Parliament."[53] The danger here is that the word "policy" will be used as a blanket justifying the executive claim to a monopoly of discretionary decisions by reliance on the constitutional canon of political responsibility.[54]

In terms of an assessment of conflicting policy objectives, it is evident that acceptance of the certificate by the executive as conclusive

where the court feels that "it cannot properly decide on which side the balance falls without privately inspecting the documents" *(Burmah Oil Co. Ltd.* v. *Bank of England, supra,* at p. 726, *per* Lord Keith of Kinkel), Private inspection by the court should not be undertaken "lightly or ill-advisedly" *(Gaskin* v. *Liverpool City Council* [1980] 1 W.L.R. 1549 at p. 1555, *per* Megaw L.J.) in any circumstances, and only "very rarely" in 'class' cases *(Neilson v.Laugharne* [1981] 2 W.L.R. 537 at p. 545, *per* Lord Denning M.R.).

47 At p. 900.

48 C.K. Allen in (1964) 80 Law Quarterly Review at p. 159.

49 H.W.R. Wade in (1968) 84 Law Quarterly Review at p. 173.

50 See, for example, *McFarlane* v. *Sharp* [1972] N.Z.L.R. 64.

51 *Asiatic Petroleum Co. Ltd.* v. *Hocken* (1933) 50 T.L.R. 87; *Spigelmann* v. *Hocken* (1933) 50 T.L.R. 87.

52 *Conway* v. *Rimmer, supra, per* Lord Reid.

53 See the speech by the Attorney-General during the second reading of the Crown Proceedings Bill, 1947, in the House of Commons (Hansard, volume 439, No. 135, column 1691); for a comparable statement by a New South Wales court, see *Ex parte Attorney-General: Re Cook* (1967) 86 W.M. (Pt. 2) (N.S.W.) 222 at p. 240, *per* Holmes J.A.

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

is fraught with considerable danger to the freedom of the individual, especially in the light of rules of practice which are currently entrenched. Although the rule was originally formulated in England[55] and in New Zealand [56] that the decision to object should be taken by the Minister who is the political head of the department and that he should himself have seen and considered the contents of the documents and formed the view that on grounds of public interest they ought not to be produced, greater latitude has been conceded to the executive recently. Thus, it has been considered sufficient if the affidavit is made "by anyone else of sufficient authority and responsibility to be entrusted with the task."[57] The position in Australia is that "There is no rule that the objection must *be* taken by the responsible Minister …, but where it is thought desirable, the Court may require proof that the responsible Minister has given the matter his personal attention and has formed the opinion that production would be injurious to the public interest."[58] The effect of the English approach, modified to some extent in Australia, is to confer on the executive a measure of discretion, the magnitude of which cannot but result in erosion of interests which represent vital component elements of public policy in this area.

The acceptable method of arriving at equilibrium between conflicting aspects of the public interest is to allocate final responsibility to the judiciary, subject to perceptively defined qualifications. Except in cases where detriment to national defence or to the conduct of diplomatic relations is alleged,[59] the interest of the State in non-disclosure should be viewed as one aspect of the public interest the totality of which requires to be assessed comprehensively by the courts in a given factual context. The validity of this approach is reinforced by the consideration that the view of the executive may frequently be taken from a narrow departmental angle and could, therefore, quite easily assume an insular quality.

It is a satisfying solution that the courts should hold the balance between the public interest, as perceived by a Minister, in withholding documents or other evidence and the public interest in ensuring the proper administration of justice. This does not entail the attachment of trifling weight to the view of the executive. The view has been taken in England that, although the Minister's affidavit is not con-

[55] *Duncan* v. *Commell Laird & Co. Ltd., supra.*

[56] *Hiroa Mariu* v. *Hutt Timber and Hardware Co. Ltd.* [1950] N.Z.L.R. 458.

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

[58] *Hubbard* v. *Hubbard* [1948] V.L.R. 480 at pp. 481-2, *per* Gavan Duffy J. The Australian High Court has stressed that "An affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed, so as to enable the court to evaluate the competing interests" *(Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 572, *per* Mason J.). In the *Burmah Oil Co.* case, *supra,* the House of Lords adverted to the circumstance that "The Minister has read and applied his mind to each of the documents,... the Minister has not merely repeated a mechanical formula…. The certificate is specific and motivated" (at p. 704, *per* Lord Wilberforce).

[59] *Konia* v. *Morley* [1976] 1 N.Z.L.R. 455 at p. 461, *per* McCarthy P.

elusive, the court will rely on it greatly.[60] In the United States it has been expressly recognised that the opinion of the departmental head will carry great weight.[61] In New Zealand the judicial power to disallow a plea of Crown privilege has been characterised as a power to be held in reserve and not to be exercised lightly.[62] In Australia this power is resorted to "sparingly and in rare cases"[63] and only if "some real ground"[64] for overruling the ministerial objection is demonstrable.

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

The sections of the Evidence Ordinance of Sri Lanka[65] which provide for the exclusion of evidence under the head of "Affairs of State and Allied Matters", place the relevant principles in three distinct groups:

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

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

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

This mode of formulating the applicable law serves the purpose of emphasizing the operation of two distinct principles. So far as section 123 is concerned, the statement or document must be necessarily excluded if the objection, properly phrased, is taken by the appropriate authority. The court has no jurisdiction to inquire into the sufficiency of the grounds alleged. But the position is otherwise under section 124. When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the court has jurisdiction, under section 124 read with section 162(2),

[60] *Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388. English courts have consistently held that the judge should normally accept the affidavit claiming immunity: *Westminster Airways Ltd.* v. *Kuwait Oil Co. Ltd.* [1950] 2 All E.R. 596. The English judicial attitude is typified by the observation of Lord Wilberforce in the *Burmah Oil Co.* case, *supra,* that the court, in rejecting the view of the executive, should have "something positive or identifiable to put into the scales" (at p. 711). A realistic appraisal of the conflicting considerations must necessarily take into account that "judicial review is not a *bonum in se,* it is part, and a valuable one, of democratic government in which other responsibilities coexist" *(ibid).*

[61] *Pollen* v. *Ford Instrument Co.* (1939) 26 F. Supp. 583.

[62] *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878.

[63] *Ex parte Brown: Re Tunstall* (1966) 67 S.R. (N.S.W.) 1 at p. 12.

[64] *Ex parte Attorney-General: Re Cook* (1967) 86 W.N. (Pt. 2) (N.S.W.) 222 at p. 239.

[65] No. 14 of 1895.

to inspect the document and to admit it in evidence if it is of opinion (a) that the communication was not made in official confidence, or (b) that the public interest would not suffer by the disclosure of the communication.[66] The second question can arise for determination only after the court accepts that the communication was made in official confidence, but the issue as to prejudice to the public interest is one which the court is entitled to decide for itself.

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

In the setting of the principle embodied in section 123, then, judicial control of executive discretion is rigidly circumscribed. This residual control, however, has been exercised effectively by the courts of Sri Lanka. The question has been considered whether registers prepared under the Waste Lands Ordinance relate to "affairs of State".[67] It has been held that the record of a speech made in public by a candidate for election or his agent is not an unpublished official record relating to "affairs of State".[68] The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book has been considered not to alter the character of the document.[69]

The concept of "affairs of State" has been significantly curtailed by the view reflected in Sri Lankan[70] and Indian[71] decisions that "affairs of State" cannot be construed as being synonymous with "State or Government business" and that the phrase denotes exclusively matters relating to diplomacy, statecraft and public administration. In regard to police reports of speeches made at election meetings, there is a *cursus curiae* in Sri Lanka that these reports do not concern "affairs of State" and may be validly produced.[72]

As for section 124 which deals with "communications made in official confidence", it has been held that this expression includes not merely interdepartmental correspondence but also correspondence by members of the public with government officials.[73]

The fundamental contrast offered by English law is that, within the framework of that system, matters provided for by sections 123 and 124 of the Evidence Ordinance of Sri Lanka and the Evidence Act of India are enveloped within the scope of a single principle. Thus, the rule has been formulated for English law that "witnesses may not be asked, and will not be allowed to state, facts or to produce documents, the disclosure of which would be prejudicial to the public

66 See the case cited at note 73, *infra.*
67 *Dias* v. *Special Officer* (1928) 30 N.L.R. 129.
68 *Daniel Appuhamy* v. *Illangaratne* (1964) 66 N.L.R, 97.
69 *Ibid.*
70 *Ibid.*
71 *Dinbai* v. *Dominion of India* [1950] A.I.R. East Punjab 228.
72 See, for example, *Illangaratne* v. *de Silva* (1948) 49 N.L.R. 169 at p. 175; *Don Philip* v. *Illangaratne* (1949) 51 N.L.R. 561 at p. 562.
73 *Keerlhiratne* v. *Gunawardene* (1956) 58 N.L.R. 62.

service; and this exclusion is not confined to official communications or documents but extends to all others likely to prejudice the public interest."[74]

The expedient of stratification of the different elements of public policy — which is a feature of the Asian systems modelled on the Indian Evidence Act — bears comparison with the approach of the American Law Institute to the compilation of the Model Code of Evidence.[75] A distinction is drawn there between "secrets of State" and "official information". The former is defined as "information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations". "Official information" means "information not open or theretofore disclosed to the public relating to internal affairs of a State of the United States acquired by a public official in the course of his duty".[76] Unless the head of a department consents to its disclosure, a secret of State must not be disclosed, and a judge is bound to prevent its disclosure on the ground of lack of departmental consent even if both parties are willing.[77] "Information" is not to be disclosed if the judge finds that it is "official information" and, in addition, if its disclosure "will be harmful to the interests of the government of which the witness is an officer in its governmental capacity". The distinction between "secrets of State" and "official information" is supportable on the basis that it permits judicial surveillance over executive discretion in varying degrees, depending on the context in which the problem arises.

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

V. TECHNIQUES FOR RESTRICTING THE SCOPE OF THE EXCLUSIONARY DOCTRINE

A major impetus towards restricting the dimensions of the exclusionary rule is provided by the realization that "A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence turns will furnish to bureaucratic officials

[74] S.L. Phipson, *Law of Evidence* (9th edition), p. 196.

[75] Philadelphia, 1942, Rules 227 and 228. It is of interest to note that the Federal Court Act of Canada (S.C. 1970-71, c. 1) distinguishes between documents certified by a Minister to belong to a class or to contain information which "on grounds of public interest specified in the affidavit should be withheld from production and discovery to the parties" [Section 41(1)] and documents or their contents which, according to a Minister's certificate, "would be injurious to international relations, national defence or security or to federal—provincial relations or would disclose a confidence of the Queen's Privy Council for Canada" [section 41(2)]. The latter class, but not the former, is debarred conclusively from examination by the Court: see *Landreville* v. *R. (No. 1)* (1977) 1 F.C. 419; *Attorney-General of Quebec* v. *Attorney-General of Canada* (1978) 87 D.L.R. (3d) 667; *Re Human Rights Commission and Solicitor-General of Canada* (1978) 93 D.L.R. (3d) 562.

[76] *Ibid.*

[77] H. Street, *op.cit.*, p. 134.

too ample opportunities for abusing the privilege".[78] In pursuit of the objective of demarcating the confines of the exclusionary rule based on State interest, judicial initiative has involved the employment of several techniques:

(i) It used to be thought that proof of a direct connection between the claim to exclusion and the central government was a necessary requirement for non-disclosure of evidence. Where, for instance, the validity of a notice requisitioning a house was in issue, the English courts showed no reluctance in rejecting the corporation's claim to exclude their interdepartmental communications in the public interest.[79] Despite the existence in England, as in many other countries, of large public bodies such as British Railways and the National Coal Board, the efficient functioning of which has an immediate bearing on the public interest, the Attorney-General stated in his submissions to the House of Lords in *Conway* v. *Rimmer*[80] that Crown privilege was not, and could not be, invoked to prevent disclosure of similar documents made by them or their servants, even if it were maintained that this was required for the proper and efficient functioning of that public service.

Recent judicial decisions have crucially expanded the scope of the exclusionary rule in this regard. The identity of an informant who had communicated in confidence with an organization dedicated to the welfare of children — an objective of paramount concern to the State — has been held to fall within the purview of the rule of non-disclosure.[81] It was aptly pointed out that a link with the central government formed no part of the rationale underlying exclusion: "The police,[82] the local authoirty[83] and the society[84] stand on the same footing. The public interest is identical in relation to each. The guarantee of confidentiality has the same and not different values in relation to each."[85] Information supplied to a statutory gaming board may be likewise protected. The crucial question was said to be whether "the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties."[86] In Australian law, too, a nexus with the central government is not indispensable, the exclusionary doctrine founded on public policy not being confined to "strict and static classes".[87]

The effect of Australian and English judicial opinion that the Crown or the State, for this purpose, embraces "the whole organization of the body politic for supreme civil rule and government — the whole

[78] J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition, 1940), volume 8, p. 799.
[79] *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349 at p. 379.
[80] *Supra.*
[81] *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171.
[82] *Conway* v. *Rimmer, supra.*
[83] *In re Infants* [1970] 1 W.L.R. 599.
[84] *D.* v. *National Society for the Prevention of Cruelty to Children, supra.*
[85] *Id.*, at p. 230, *per* Lord Hailsham of St. Marylebone.
[86] *Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388 at p. 401, *per* Lord Reid: *cf.* Lord Morris of Borth-y-Gest, at p. 405; Lord Simon of Glaisdale, at p. 408.
[87] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 543, *per* Stephen J.

political organization which is the basis of civil government,"[88] is sustained by compelling considerations of policy involving the variety and complexity of the functions of the modern State. The recurrent transfer of functions among central, local and statutory organs of government, which is a regular feature of public administration today, constitutes a factor of particular relevance.[89] The sole intrinsic significance of some connection with departments or officials of the central government, perhaps, is that their involvement "in practice may affect the cogency of the argument against disclosure",[90]

In view of the rapid proliferation of public corporations and comparable institutions in recent times, especially in Asian and African countries which are in the process of evolving a mixed economy, this development of the law signifies a beneficial response to changes in political structures and in social and economic circumstances.

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

In the *Cammell Laird* case Viscount Simon entertained no doubt that a distinction could not be made for this purpose between oral and documentary evidence: "The same principle must apply to the exclusion of oral evidence, which, if given, would jeopardise the interests of the community."[91] Nevertheless, in *Broome* v. *Broome*[92] the rule of exclusion applicable to documentary evidence was held not to inhibit the reception of oral testimony, except possibly secondary oral evidence of excluded documents. However, this aspect of the decision in *Broome* v. *Broome* should be considered *per incuriam,* since no reference was made to previous judicial authority to the contrary.[93] The need to recognise a distinction between documentary evidence and oral evidence in this context was felt by Sachs J., because, at the time *Broome's* case was decided, the *Cammell Laird* ruling was fully operative and the English courts considered the endeavour worthwhile to repudiate, in regard to oral evidence, a fetter which had been compulsorily imposed as to the reception of documentary evidence in a manner which stultified balanced value-judgments on the part of courts as the basis for reconciling conflicting elements of public policy. The usefulness of this distinction has been eliminated by the decision of the House of Lords in *Conway* v. *Rimmer* which resuscitates the doctrine of judicial control of the admissibility of evidence in these cases. The principle is settled today that, where documentary evidence is excluded on the ground of repugnance to the State interest, oral

[88] *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 at pp. 235-6, *per* Lord Simon of Glaisdale. This English Court of Appeal has recently reasserted that it is necessary for the proper functioning of the child care service that the confidentiality of documents should be preserved: *Gaskin* v. *Liverpool City Council* [1980] 1 W.L.R. 1549 at p. 1554, *per* Megaw L.J.

[89] *Ibid.*

[90] *Id.*, at p. 245, *per* Lord Edmund-Davies.

[91] [1942] A.C. 624 at p. 643.

[92] *Supra.*

[93] *R.* v. *William Cobbett* (1831) 2 St. Tr. (N.S.) 789, *per* Lord Tenterden; *R.* v. *Baynes* [1909] 1 K.B. 285 was convincingly distinguished on the facts.

evidence of any kind — whether it relates to the excluded documents or to other matters — is equally barred.

No distinction is defensible from the standpoint of policy between types of secondary evidence — namely, secondary evidence of documents the production of which is incompatible with the public interest and oral testimony of other facts the proof of which is precluded on the identical footing. It is anomalous in principle to recognise a rule which, while excluding evidence of the former, acquiesces in reception of proof of the latter. The invalidity of the distinction is demonstrable in the light of the consideration that it is generally not the document the disclosure of which harms the public interest but the facts stated therein.[94]

In regard to secondary oral evidence of documents there is unassailable authority that, if the original document falls within a class of document which is excluded by public policy, a copy is equally excluded.[95] Moreover, if copies of documents are excluded from evidence on the ground of public policy, there is no justification, either in principle or on authority, for the application of a different rule to oral testimony in respect of their contents. The law takes no cognizance of degrees of secondary evidence. Accordingly, once secondary evidence of a document is admissible, a party is entitled to adduce any type of secondary evidence,[96] including oral testimony and circumstantial or presumptive evidence.[97] In conformity with this principle it has been held that, where the original document was excluded on a certificate that its production would be prejudicial to discipline and to the interest of the Inland Revenue, the evidence of clerks in the office who had seen the report was necessarily excluded.[98] This attitude finds consistent support in the case law.[99]

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

(iii) In his argument addressed to the House of Lords in *Conway* v. *Rimmer* the Attorney-General made the surprising concession that, even in accordance with the principle enunciated in the *Cammell Laird* case, the courts possessed power to override an objection by the executive (i) taken in bad faith, or (ii) actuated by an irrelevant consideration, or (iii) founded on a false factual premise.[1] As the

94 J.E.S. Simon, *op.cit.*, *p.* 69.
95 *Ankin* v. *L.N.E. Railway* [1930] 1 K.B. 527; *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624; *Moss* v. *Chesham U.D.C.* January 16, 1945, before Lynskey J. See J.E.S. Simon, *op. cit.*, p. 68.
96 *Brown* v. *Woodman* (1834) 6 C. & P. 206, *Doe* v. *Ross* (1840) 7 M. & W. 102; *Hall* v. *Hall* (1841) 3 M. & Gr. 242.
97 *R.* v. *Fordingbridge* (1858) 27 L.J.M.C. 290.
98 *Hughes* v. *Vargas* (1893) 9 T.L.R. 551.
99 *Chatterton* v. *Secretary of State for India* [1895] 2 Q.B. 189 at p. 195; *Moss* v. *Chesham U.D.C.* January 16, 1945 before Lynskey J.; see, for Australian law, *Coonan* v. *Richardson* [1947] Q.W.N. 19; *R.* v. *Bryant (No. 2)* [1956] Q.S.R. 570; *Blundell* v. *Guerin* [1968] S.A.S.R. 39; *cf.*, for Canadian law, *Clemens* v. *Crown Trust Co.* (1952) 3 D.L.R. 508.
1 (1968) 1 All E.R. 874 at p. 891.

decided cases suggest,[2] these grounds, considered cumulatively, will result in a significant erosion of the conclusive effect which the certificate by the executive had been declared to possess. The comment has been aptly made that the attractiveness of these heads of review for the courts consists of their virtually untrammelled flexibility in determining, in relation to any given power of an administrative body, the matters that are and are not to be taken into account and thereby in facilitating an oblique assessment of the reasonableness of the decision under review.[3] The plenitude of this discretion available to the courts, according to the argument of the Attorney-General, would have whittled down substantially the impregnable position of the executive in matters involving State interest, in terms of the *Cammell Laird* doctrine. However, the usefulness of these formulas as modes of revivifying the postulate of judicial control is reduced by the practical reversal of the *Cammell Laird* opinion, in so far as it purported to expound the general law relating to the topic, by the unanimous conclusion of the House of Lords in *Conway* v. *Rimmer.*

(iv) A drastic method of precluding expansion of the scope of the exclusionary doctrine has been suggested in some decided cases. In *Broome* v. *Broome* Sachs J. wondered whether the development of Crown privilege on the ground of public interest "might not now be regarded by the courts in the same light as development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency in each of these matters being for the courts not to develop fresh heads but to leave them to the legislature."[4] A similar approach to the problem seems to have commended itself to Lord Upjohn in *Conway* v. *Rimmer.*[5]

On this point identical reasoning is not contained in the speeches of the five Law Lords in *Conway* v. *Rimmer.* If the view of Lord Upjohn were to prevail, *Conway* v. *Rimmer* would supersede the *Cammell Laird* doctrine not only to the extent of abrogating the principle of unqualified executive responsibility but in the further sense that, outside the traditional classifications such as national defence, the conduct of foreign policy and "high level interdepartmental communications",[6] other classes of documents would be held intrinsically incapable of exclusion because of the predominant public interest in their adduction as relevant evidence. But the pendulum has not swung so far in the opposite direction. Lords Reid, Hodson and Morris seem by implication to have rejected Lord Upjohn's approach.

The principle suggested by the tenor of the speeches of the majority is that classification of documents *in limine* is not supportable and that an empirical assessment of the competing elements of public policy, against the background of the particular case, cannot be

[2] See *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87; *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736; *Auten* v. *Rayne* [1958] 1 W.L.R. 1300.

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

[4] [1955] 2 W.L.R. 401 at p. 408.

[5] [1968] 1 All E.R. 874 at p. 915.

[6] At p. 910.

dispensed with. Despite the support which the innovative suggestion by Lord Upjohn has received from writers,[7] it is submitted that the adoption of this proposal will deprive the law of essential malleability and resilience and that the recognition of closed categories impedes unjustifiably the development of new heads of public policy in response to changing requirements and conditions.

VI. Factors Conditioning the Exercise of Judicial Discretion

In the absence of an *a priori* classification which governs absolutely the reception or non-disclosure of evidence, the discretion of the court is the operative criterion. Naturally, the result of the exercise of discretion in peripheral areas cannot be predicted, but a tentative identification of the *indicia* relating to the exercise of judicial discretion in this area may be usefully attempted.

(i) It is clear that the public interest requiring the non-disclosure of information which might be useful to those who organise or participate in criminal activities is generally entitled to priority over the countervailing principle that all evidence relevant to the cause subject to adjudication should be available to the court. Consistently with this attitude, the identity of informers has usually been protected from disclosure.[8] In an action for penalties under the Excise Acts, an English court has refused to allow a witness for the Crown to answer the question whether he gave the information which led to the institution of proceedings.[9] The view has been taken that an Assistant Director of Public Prosecutions cannot be required to produce a letter which he had written to the Director[10] and that a conversation between a private solicitor and the Director of Public Prosecutions is privileged.[11] The stability of this principle has received emphasis: "This rule of public policy is not a matter of discretion: It is a rule of law and, as such, should be applied by the judge at the trial."[12] Although in a case of murder tried in the middle of the last century, Cockburn C.J. allowed a police officer to disclose the names of persons who had given him the information which led to the discovery of a phial containing poison,[13] this attitude is at variance with a paramount objective of public policy: "If the police were bound to answer that sort of question, the ultimate and undoubted effect would be to discourage information and to make the protection of the public very much more difficult than it is."[14]

This principle has been extended, with manifest justification, to ensure the protection of persons who supply valuable information to a gaming board. In *Rogers* v. *Secretary of State for the Home Department*[15] a company of which Rogers was a director sought the

[7] D.H. Clark, *op. cit.*
[8] *R.* v. *Hardy* (1794) 24 St. Tr. 199 at p. 208, *per* Eyre C.J.
[9] *Attorney-General* v. *Briant* (1846) 15 M. & W. 169.
[10] *R.* v. *Benson* (1900) 151 C.C.C. Sess. Pap. 705.
[11] *R.* v. *Carpenter* (1911) 156 C.C.C. Sess. Pap. 298.
[12] *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 at p. 498, *per* Lord Esher M.R.
[13] *R.* v. *Richardson* (1863) 3 F. & F. 692.
[14] Lord MacDermott, *Protection from Power under English Law,* Hamlyn Lectures for 1957, pp. 103-104.
[15] [1973] A.C. 388.

gaming board's consent to the grant of licences in respect of bingo halls to be managed by Rogers. The board was obliged to take into account Rogers' character. They made inquiries of the Sussex police, and in reply, the Assistant Chief Constable of Sussex wrote a letter to the board, which later refused the consent sought. Rogers began proceedings for criminal libel regarding the contents of the letter. The Home Secretary claimed privilege in respect of the letter and a copy. The House of Lords upheld the claim. Lord Reid placed emphasis on the consideration that the board required the fullest information it could obtain in order to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming establishment and that many would refuse to speak unless assured of absolute secrecy.

(ii) The probative value of the evidence, the reception of which is resisted on the footing of public policy, may affect the attitude of the court. The predilection of English courts during the last century that the rule of inclusion "embraces not only documents directly relevant but also documents which may well lead to a relevant train of enquiry",[16] has given way gradually to a more rigorous approach. The disposition of judges today is to exclude evidence "of merely vestigial importance"[17] which is likely to have adverse repercussions on State interest. The principle has been formulated that "unless its evidentiary value is clear and cogent, the balancing exercise may well lead to the conclusion that the public interest would best be served by upholding the objection to disclosure."[18]

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

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

In *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners*[19] the appellants were owners and licensees of a patent for a chemical called furazolidone. The patent was being infringed by illegal imports of the substance. The appellants instituted proceedings against the Commissioners to obtain the names and addresses of the importers. The Commissioners made a claim for privilege in an affidavit. This claim was rejected by the House of Lords. The primary ground on

[16] *Compagnie Financiere Commerciale du Pacifique* v. *Peruvian Guano Co.* (1882) 11 Q.B.D. 55.
[17] *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All **E.R.** 700 at p. 718 *per* Lord Edmund-Davies.
[18] *Id.*, at p. 721, *per* Lord Edmund-Davies.
[19] [1973] 1 All E.R. 943.

which the Chairman of the Commissioners sought to resist disclosure was that the good relations and mutual confidence which usually existed between the officers of the Customs and traders would be seriously impaired if it became known that any information of a confidential nature obtained from traders under statutory powers might have to be disclosed by the Commissioners otherwise than under the provisions of a statute enabling them to disclose it. One of the reasons emerging from the speeches in the House of Lords for the rejection of the claim by the Commissioners was that apprehensions of this kind would be entertained only by dishonest traders.[20]

This case may be contrasted with *Alfred Crompton Amusements Machines Ltd.* v. *Customs and Excise Commissioners*.[21] An issue arose between the company and the Commissioners as to the correct assessment for purchase tax on certain machines made by the company. The Commissioners claimed privilege for certain documents containing information supplied by third parties. The House of Lords upheld the claim. Distinguishing the *Norwich Pharmacal* case, Lord Cross of Chelsea remarked: "There it was probable that all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all. Here, on the other hand, one can well see that the third parties who have supplied this information to the Commissioners because of the existence of their statutory powers would very much resent its disclosure by the Commissioners to the appellants."[22] A New Zealand judge has commented: "There is, in my view, a clear distinction between a member of the public volunteering information and fearing reprisal and the statement of an apprehended receiver who confessed his guilt."[23]

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

(vi) The circumstance that the objection in a case is not primarily to prevent production but to secure suppression of documents which had already been lodged by one of the parties in proceedings before the court diminishes the merit of the objection. Where the letter which the Minister sought to suppress had been produced in process previously, Crown privilege was rejected by a Scottish court.[24] Similarly, the executive's claim was unsuccessful in an Australian case where the police prosecutor had elicited evidence in respect of which Crown privilege was claimed subsequently,[25] and in New Zealand in

[20] See, in particular, *per* Lord Cross of Chelsea.
[21] [1973] 2 All E.R. 1169.
[22] At p. 1185.
[23] *Tipene* v. *Apperley* [1977] 1 N.Z.L.R. 100 at p. 107, *per* Beattie J.
[24] *Whitehall* v. *Whitehall* [1957] S.C. at p. 39, *per* Lord Clyde.
[25] *Ex parte Brown; Re Tunstall* (1966) 67 **S.R.** (N.S.W.) 1; *cf. Lake George Mines Ltd.* v. *Gibbs, Bright & Co.* (1903) 3 S.R. (N.S.W.) 440; *Celebrity Pictures Pty. Ltd.* v. *Turnbull* (1929) 46 W.N. (N.S.W.) 121; *cf. Sankey* v. *Whitlam, supra,* at p. 531, *per* Gibbs A.C.J.

circumstances where the statements in question had been shown to the accused.[26]

(vii) The purpose for which disclosure of the document or reception of the oral testimony is objected to, is pertinent to exercise of the court's discretion. In *Conway* v. *Rimmer* Lord Reid said: "Even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a civil case... not to protect the document — its contents are already public property — but to protect the writer from civil liability, should he be sued for libel or other tort."[27] Lord Reid, while expressing disapproval of this course, did not assail its validity. It is submitted, however, that an ulterior purpose should militate decisively against acceptance of the claim by the executive.

Where production of documents was sought in the context of criminal proceedings involving charges that Ministers of the Crown had conspired together, under colour of their office, to accomplish unlawful objectives, the High Court of Australia was of opinion that disclosure was favoured by a preponderant equity. The court showed sensitivity to the consideration that "to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices".[28]

The English courts, on the whole, have felt less difficulty in upholding a plea of Crown privilege in relation to documents which were sought to be used merely to impugn the credibility of a witness than in circumstances where the documents constituted substantive evidence which would ordinarily have been admissible.[29]

(viii) It has been asserted that "Government servants are reluctant to put their observations into writing if they are likely to be produced in a court of law."[30] But the argument based on candour lacks cogency. Lord Hodson has trenchantly commented that "It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied to their other fellow subjects."[31] Lord Pearce has gone so far as to suggest that a police officer, for instance, far from being deterred from candour by the thought that a judge

[26] *R.* v. *Church* [1974] 2 N.Z.L.R. 116.

[27] [1968] 1 All E.R. 874 at p. 882.

[28] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 540, *per* Stephen J.

[29] *R.* v. *Cheltenham Justices: Ex parte Secretary of State for Trade* [1977] 1 W.L.R. 95 at p. 99, *per* Lord Widgery C.J.; *Attorney-General* v. *Briant* (1846) 15 L.J. Ex. 265.

[30] Sir Thomas Inskip, "Proceedings by and against the Crown" (1930) 4 Cambridge Law Journal 1 at p. 10; *cf. Sayers* v. *Perrin* [1965] Qd. R. 221. The argument based on candour has appealed to Canadian courts: see *M.N.R.* v. *Die Plast Co. Ltd.* (1952) 2 D.L.R. 808 at p. 815; *Reese* v. *R.* (1955) 3 D.L.R. 691 at p. 701; *Re Lew Fun Choue, re Low Sui Jim* (1955) 112 C.C.C. 264 at p. 267; *Croft and Croft* v. *Munnings and the Director, the Veterans' Land Act* [1957] O.R. 211 at p. 216; *Gronlund* v. *Hansen* (1968) 64 W.W.R. 74.

[31] *Conway* v. *Rimmer* [1968] A.C. 910 at p. 967. The Australian courts have declined to recognise a rule of public policy which requires that all official communications between Ministers of the Crown and senior civil servants should be protected from disclosure: *R.* v. *Turnbull* [1958] Tas. S.R. 80.

might read his notes, "would rather be put on his mettle to make sure that his observations were sound and accurate, and be stimulated by the thought that he might prove to be the one impartial recorder on whom justice between the parties might ultimately turn."[32] Evidence of conversations between departmental officers and persons concerned in the adoption of a child has been admitted in New Zealand, notwithstanding the risk that candour might be discouraged.[33]

Juxtaposed with emphatic judicial disapproval in England of the argument based on candour as "grotesque"[34] and refutation of its premise by the suggestion that access to fuller information is "likely to lead not to captious or ill-informed criticism but to criticism calculated to improve the nature of the working (of government)",[35] there exists an opposing strand of opinion that "If, as a ground, (candour) may at one time have been exaggerated, it has now received an excessive dose of cold water"[36] and that there certainly are contexts in which disclosure "could well deter frank and full expression in similar cases in the future".[37] In similar vein the High Court of Australia has characterised the argument predicated on candour and confidentiality as "not altogether unreal".[38]

The sharp conflict of judicial attitudes on this point is the product of fundamentally dissimilar values and assumptions which pervade the reasoning of different judges — a cleavage of opinion entirely natural in this area of the law. It would seem that the desirability of frankness in official communications is a relevant, but not decisive, consideration which calls for assessment in relation to other factors.

(ix) Among the relevant *indicia* is the degree of detachment and objectivity shown to exist on the part of the person resisting disclosure. "Since not only justice itself but also the appearance of justice is of considerable importance, the balancing exercise is bound to be affected to some degree where the party objecting to discovery is not a wholly detached observer of events in which he was in no way involved."[39] In the *Burmah Oil Co.* case the appellant sought discovery in respect of ten documents with a view to establishing that the price at which a compulsory sale to the Bank of England was effected, represented a substantial undervalue of its stock and that the bargain was manifestly inequitable. Lord Edmund-Davies, dealing with the plea of Crown privilege invoked by the Bank at the behest of the government, observed: "It cannot realistically be thought that the government is wholly devoid of interest in the outcome of these proceedings. On the contrary, it has a very real and lively interest, for were (the appellant) to succeed it could only be on the basis that the Bank behaved unconscionably, and the evidence indicates that the

[32] *Conway* v. *Rimmer* [1968] A.C. 910 at p. 985.
[33] *Pollock* v. *Pollock and Grey* [1970] N.Z.L.R. 771 at p. 773, *per* Moller J.: contrast the reasoning of the South Australian court in *Lock* v. *Lock* [1966] S.A.S.R. 246.
[34] *Burmah Oil Co. Ltd.* v. *Bank of England* [1979] 3 All E.R. 700 at p. 724, *per* Lord Keith of Kinkel.
[35] *Id.*, at p. 725, *per* Lord Keith of Kinkel.
[36] *Id.*, at p. 707, *per* Lord Wilberforce.
[37] *Ibid.*
[38] *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 527, *per* Gibbs A.C.J.
[39] *Burmah Oil Co. Ltd.* v. *Bank of England, supra,* at p. 720.

Bank was acting throughout in accordance with government instructions".[40] This circumstance warrants exceptionally close judicial scrutiny of the basis on which the claim to privilege is asserted.

(x) Although any party to an action is entitled to resist disclosure on the ground of Crown privilege,[41] the fact that the State, having considered the question specifically, declines to support the plea, will ordinarily carry some weight with a court. Where the plea of Crown privilege was taken by a former Prime Minister, the High Court of Australia remarked: "The court must be strongly influenced by the circumstance that the Commonwealth, having examined the documents and having considered the public interest, has made no objection to production."[42]

(xi) Lord Cross of Chelsea has suggested: "In a case where the contentions for and against disclosure appear to be fairly evenly balanced, the court should uphold a claim for privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill effects of nondisclosure."[43] The validity of this approach is controversial. The opposite view that, in cases of doubt, the public interest in the due administration of justice should prevail, has commended itself to courts in Commonwealth jurisdictions[44] and may be supported in principle.

VII. Special Considerations Applicable to Criminal Proceedings

The principle has been recognised generally that the interest of the State in the exclusion of documents or other evidence of a confidential or sensitive nature must give way to the overriding need to provide a defendant in criminal proceedings with every opportunity of vindicating his innocence.[45] Viscount Kilmuir L.C., in his statement to the House of Lords on the scope of Crown privilege, said: "If medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed".[46]

In at least one reported case[47] disclosure of the name of an informant has been ordered. But the principle is not entirely free from doubt in view of a *cursus curiae* which has resisted the divulging

40 *Ibid.*

41 *Pavey* v. *Furrie* (1979) 106 D.L.R. (3d) 425.

42 *Sankey* v. *Whitlam, supra* at p. 575, *per* Mason J.

43 *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners* [1973] 2 All E.R. 1169 at p. 1185.

44 See, for instance, *Elston* v. *State Services Commission* 28th June, 1977, *per* Richardson J. (New Zealand).

45 *Cf. Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388 at p. 407, *per* Lord Simon of Glaisdale: see for Australian law, *R.* v. *Salter* (1938) 34 Tas. L.R. 16.

46 Statement in the House of Lords on 6 June 1956. For recognition of this principle in Australia, see *Ex parte Ross: Re Pvm* (1953) 70 W.N. (N.S.W.) 174; *R.* v. *Crajanin* [1965] Qd. R. 324 at p. 330. For Canadian law, *cf. R.* v. *Blain* (1960) 31 W.W.R. 693.

47 *R.* v. *Richardson* (1863) 3 F. & F. 693; *cf. Webb* v. *Catchlove* (1886) 3 T.L.R. 159.

of information advantageous to the defence.[48] For Canadian law the view has been taken that, where evidence contained in a tax return is pertinent as evidence on a criminal charge, the magistrate before whom the charge is tried, is a person legally entitled to the information.[49] The Australian courts have pointed out that "It is a cogent consideration that, unless some means is available of obtaining access to documents such as witnesses' statements, a defendant, in a preliminary examination before a magistrate, may be quite unable to establish vital discrepancies where they do in fact occur."[50] This consideration, which is underscored in a strong line of authorities,[51] has culminated in the marked reluctance of the prosecution in England to claim exclusion of evidence on the ground of State interest in criminal proceedings.[52] An analogous principle has found favour in Australia where, however, the courts have been emphatic in their characterisation of this as a rule of practice rather than as the recognition of a right vested in the accused.[53]

The priority accorded to the interest of the defendant in criminal proceedings is embedded in the rule that, if the evidence of a Crown witness is contradictory of a previous statement made by him, the prosecution should make the statement available to counsel for the defence as a basis for cross-examination.[54]

In the United States of America the special protection conferred on a person accused of crime has been made to rest on a theory of implied waiver. The American courts have held that, if the government is instituting criminal proceedings, the accused is entitled to production of the government files and documents.[55] It is considered repugnant to rudimentary concepts of equity and fair dealing that the accused should be denied access to material which the government has used in preparing its case.[56] Learned Hand J., has observed: "While we must accept it is lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal proceeding founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate."[57]

In terms of a strictly conceptual analysis the dichotomy between the application of the exclusionary rule in civil and in criminal pro-

[48] *R.* v. *Watson* (1817) 32 St. Tr. 1: *R.* v. *Cobbett* (1831) 2 St. Tr. (N.S.) 789; *R.* v. *O'Connor* (1846) 4 St. Tr. (N.S.) 935; *Attorney-General* v. *Briant* (1846) 15 L.J. Ex. 265.

[49] *Ship* v. *R.* (1945) 95 Can. C.C. 143.

[50] *Maddison* v. *Goldrick* [1976] 1 N.S.W.L.R. 651 at p. 666, *per* Samuels J.A.

[51] *R.* v. *Clark* (1930) 32 Cr. App. Rep. 58; *Mahadeo* v. *R.* [1936] 2 All E.R. 813; *R.* v. *Hall* (1958) 43 Cr. App. Rep. 29; *R.* v. *Xinaris* (1955) 43 Cr. App. Rep. 30(n).

[52] *Rogers* v. *Secretary of State for the Home Department, supra; cf. Marks* v. *Beyfus* (1890) 25 Q.B.D. 494.

[53] *R.* v. *Charlton* [1972] V.R. 758; *Attorney-General for New South Wales* v. *Findlay* (1976) 50 A.L.J.R. 637.

[54] *R.* v. *Clarke* (1930) 22 Cr. App. Rep. 58; *cf. Dallison* v. *Caffery* [1965] 1 Q.B. 348.

[55] *U.S.* v. *Krulewitch* (1944) 145 F. 2nd 76.

[56] *U.S.* v. *Beekman* (1946) 155 F. 2nd 580 at p. 584.

[57] *U.S.* v. *Andolschek* (1944) 142 F. 2nd 503.

ceedings has been considered awkward.[58] Lord Reid has commented on the supposed illogicality of the prevailing law: "We have the curious result that 'freedom and candour of communication' is supposed not to be inhibited by knowledge of the writer that his report may be disclosed in a criminal case, but would still be supposed to be inhibited if he thought that his report might be disclosed in a civil case."[59]

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

VIII. PROCEDURAL ASPECTS

Objection to disclosure may be taken on oath either orally or by affidavit.[60] The State is entitled to be represented by counsel in regard to the claim for privilege.[61]

The procedure in cases where documentary evidence is objected to is quite settled. The affidavit in support of the claim for exclusion should set out with sufficient particularity the nature and identity of the documents which it is desired to withhold, and the grounds on which a claim to do so is based.[62] Where the claim for privilege is not made in the proper manner, the judge is entitled to exercise his own discretion.[63]

A more complex procedure may be required when oral evidence is sought to be excluded on the ground that its reception is injurious to State interest. Sachs J., confronted with this difficulty in *Broome* v. *Broome,*[64] said: "Any certificate in a 'blanket form' which stopped a witness going into the witness box seems contrary in principle to those portions of the decided cases which enjoin Ministers, before giving a certificate as regards documents, to examine each in turn in the light of the issues arising in the case." The force of this argument is evident. The inevitable result of conceding the claim asserted by the Crown in *Broome's* case would be to give the Crown power to prevent certain classes of witnesses, for example, civil servants, from having to give evidence in court.[65]

At the same time it cannot be denied that oral testimony may be no less detrimental to State interest than documentary evidence in

58 A.L. Goodhart, "The Authority of Duncan v. Cammell Laird & Co." (1963) 79 Law Quarterly Review 153 at p. 159.
59 *Conway* v. *Rimmer, supra.*
60 *Re Hargreaves* [1900] 1 Ch. 347.
61 *Wilkinson* v. *Wilkinson* (1901) 1 S.R. (N.S.W.) Eq. 285; *Constable* v. *Constable and Johnson* [1964] S.A.S.R. 68.
62 *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners, supra.*
63 *Spigelman* v. *Hocken* (1933) 150 L.T. 256.
64 *Supra.*
65 J.E.S. Simon, *op.cit.*, pp. 71-72.

some contexts. What is called for, then, is a procedure which, although capable of application to oral evidence, furnishes the court with adequate opportunity to disallow arbitrary or capricious claims by the executive.

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

IX. CONCLUSION

Three basic approaches may be formulated to the allocation of responsibility for the exclusion of evidence on the ground of injury to the State interest: (i) The decision of the executive should entail complete immunity from judicial review, (ii) The executive's view, although entitled to due consideration, does not relieve the courts of responsibility for the ultimate decision, (iii) The relevant principle should enable imputation of responsibility, variously, to the executive and to the judiciary, depending on the specific area of governmental policy involved. The theoretical premise of proposition (i), that the considerations pertaining to the applicability of Crown privilege are alien to judicial aptitude and experience and fall properly within the purview of the executive branch of government, is unconvincing. The basis of this argument is strengthened by confining it, in the manner suggested by proposition (iii), to limited sectors of consultation and decision making within the administrative process, in respect of which special protection is thought to be required by exceptional sensitivity.

In conceptual terms a bifurcation of responsibility controlled by criteria which envisage degrees of vulnerability of the State interest, is neither anomalous nor unique. Yet societal and political *mores* which mould prevailing attitudes to government — strikingly mirrored, in fact, in the emergent spirit of intrepidity characteristic of judicial decisions during the last decade — include, as a central element, vigorous hostility to opaque or inscrutable functioning of the machinery of government. In consequence, the entrenchment of unqualified executive discretion even in restricted circumstances by use of the expedient of division of responsibility lacks support in judicial decisions, despite its adoption by the legislatures of Canada[66] and New South Wales.[67] A compelling factor which militates against the dual approach, linked with distinctions between strata of governmental activity, is the difficulty of classifying *a priori* the categories of matters governed by the respective principles. The reference in the Canadian formulation, for instance, to "documents … injurious … to federal-provincial relations"[68]

[66] Federal Court Act, S.C. 1970-71, c. 1, sections 41(1) and (2).
[67] Evidence (Amendment) Act, No. 40 of 1977, sections 60(1) and 61(1).
[68] See note 75 at p. 294, *supra.*

allows scope for, perhaps, unduly wide operation of an absolute exclusionary doctrine over an amorphous range of matters.

The courts have been consistently responsive to legitimate claims to confidentiality proffered by the executive, but the assignment of final responsibility to the judiciary has not been the precursor of limitations on the ambit of Crown privilege. On the contrary, the significantly expanding frontiers of the rale of non-disclosure are exemplified by the recent reversal of a trend which confined Crown privilege to organs of the central government, distinguished from local authorities and statutory boards. It is submitted that an active judicial role in determining the merits of claims to Crown privilege is supportable from the standpoint of contemporary policy and that the tests emerging from the decided cases — which lend themselves to further development by means of the case law technique — provide a firm foundation for the exercise of judicial discretion.

G.L. PEIRIS*

* LL.B. (Ceylon), D.Phil. (Oxford), Ph.D. (Sri Lanka), Professor of Law and Dean of the Faculty of Law in the University of Colombo, Sri Lanka; Visiting Fellow of All Souls College, Oxford, 1980-81.