LAW OF PRIVILEGES AS AN ANTITHESIS TO GLOBAL DEMOCRATIC POLICIES: A COMPARATIVE STUDY

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The Law of Privileges has had a long journey in developing from the Crown Privilege in the era of British dominance to the subsequent concept of Public Interest Immunity, the same change reflecting in different nations in different forms; the United Stated of America calls it the 'executive privilege' where as the Indian Government has named it 'Governmental Privilege'. Further changes in nomenclature can be observed in other Commonwealth countries such as Canada and Australia. Though the jargon varies through the various countries, the concept remains very similar; varying slightly with the variance in forms of government. The most common privilege among these countries is that of withholding the disclosure of documents. It can be believed to an extent that the growing complexity of a modern state increases the secrecy in the Government, this in turn leads to administrative discrepancies. A democratic administration requires a delicate balance of secrecy. Through this research project, the transition of privilege from absolute discretion of the executive to a limited discretion that is subject to the confines of judicial review shall be examined. The impact of these privileges on the accountability and transparency of the Government shall be scrutinised.

A comparable position in many countries, mainly England, Australia and Canada, project to us that the law relating to state privilege is more or less the same but in the recent times the position is changing from rigidity to elasticity of its adoption, formal to liberal approach, the earlier position from control by executive to the discretion left to the judiciary. In the above mentioned situations there are two situations witnessed, injury to the public interest, the authority is with judiciary than executive.

ENGLAND

There have been several changes pertaining to this subject in the English law. They do not lay down any new principles, as the situation stands the same that is more of a rigid approach than an elastic approach. The House of Lords stressed the need to balance the public interest in non-disclosure against the public interest, in seeing that justice is done to the parties.[1] The claim for privilege has been justified in certain circumstances where report has been made from one public officer to another in the due course of the day. The report hence made must be considered as confidential, and if that is breached then there will not

[1] Norwich Pharmacol Co. Ltd. V. Commissioner of Customs & Excise, (1973) 2 ALL ER 943, (HL)

be any full and free reports being filed. An English academic writer Garner suggested in his book that[2] long ago it really did not stand up to close examination, because a civil servant should not be prepared to write a report that may be open to criticism or one that he does not wish to be examined in court. Here it is protecting the interest of the public by not allowing the public servant to write a report in an open forum, because as the matters are related to the state affairs, and a party files an affidavit against it and it is recorded in the open there might be high chances of risk to his person.

CATEGORIZATION OF DISCLOSURE

Cabinet minutes- In **Conway v. Rimmer**[3] the communications with the ambassador and some cases of communication between the heads of departments, it was it was concealed that no court would order the production of such documents.

Police information- this material is judicially recognized as a class of evidence which can be disclosed but it is purely based in the public policy, but an exception is laid for criminal cases.

Class content- in England, there are a class of contents for whom the production of the documents is to be withheld even it is required that it should be disclosed as it is necessary to protect the interest of such a class. And there is another class identifies on the grounds of national security is at stake.

In modern times, if any privilege is to be claimed in the interest of the state, or public policy there has been a test laid, relevant evidence must be excluded if its production would be contrary to the state interest. Another main aspect to be noted is that there is not distinction to be drawn when the crown is a party and in the proceedings between the private citizens and corporations. Up until the Second World War, it was established by the courts that the Crown's power to withhold the disclosure of documentary evidence was not an absolute privilege. This however took a turn for the worse in the case of **Duncan v. Cammell Laird and Co. Ltd.**[4] The House of Lords in the case held that once a Minister under the Crown Privilege claims privilege for any document in the name of Public Interest, it shall be considered final and conclusive. In the instant case, a Submarine made by the defendants sank during trials, killing 99 persons on board. One of the dependants of the killed brought about an action against the constructors on the ground of negligence in the construction of the submarine, and demanded the production of the blueprints of the design in order to prove the negligence. The first Lord of Admiralty claimed privilege on the ground that "the blue prints of the design were a military secret and its disclosure would jeopardize public interest."[5] The court allowed this claim, as conclusive and absolute. This decision leads to all kind of "class" claims which caused a serious obstruction in the

[2] Garner, Administrative Law (1967), page 252
[3] (1968) ALL ER 847
[4] HL 27 APR 1942
[5] *Ibid*

delivery of justice. There was a lot of criticism for the broad sweep of the privilege led to the statement in the House of Lords by Viscount Kilmuir LC, through the statement the indication that a privilege might be claimed not only on the grounds of public interest and injury of public tranquillity but also on the basis that the document belonged to a particular class of documents, which if disclosed would injure public interest and thus might prejudice freedom and candour of communication with and within public service. Furthermore, as a matter of policy, privilege would not for the future be claimed with respect to certain classes of documents. He further pointed out that the privilege was available with respect to oral communication on the same principles as in case of written communication.[6] In the case of **Conway v. Rimmer**[7], wherein the plaintiff sought to see the report that was filed against him in the claim that a police officer was maliciously prosecuted by his superior officer, the Home Secretary intervened with a claim of a "class" privilege. The House of Lords rejected his claim and allowed the disclosure of the report. They stated that "they would not allow any claims unless the public interest in secrecy clearly outweighs the public interest in doing justice to the litigant; and that was a matter that is to be determined by the court and not the executive." Lord Reid said that "'I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."[8]

Section 28[9] of the Crown Proceedings Act successfully affirms the traditional doctrine of Crown Privilege, and simultaneously subjects it to certain qualifications. Section 28 recognises the right of the crown to withhold documents if found to be injurious to public interest by the relevant minister. Thus, the crown was given legal power to override the rights of the litigants not only in cases of genuine necessity but in any cases where a

[6] Coonan v. Richardson; 1947 QWN 19
[7] Supra Footnote No. 5
[8] *Ibid*
[9] S. 28 :- Discovery
(1)Subject to and in accordance with rules of court :—
(a)in any civil proceedings in the High Court or [the county court] to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and
(b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories: Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
Any order of the court made under the powers conferred by paragraph (b) of this subsection shall direct by what officer of the Crown the interrogatories are to be answered.
(2)Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

governmental department thought it fit. However, a catch in this clause is that the claim of privilege is to be decided only by a judge and not by the executive.

The landmark decision of **Rogers v. Home Secretary**[10]replaced 'Crown Privilege' by the term 'Public Interest Immunity'. Lord Reid in this case opined "The ground put forward had been said to be crown privileges. I think that the expression is wrong and may be misleading. The real question is whether public interest requires the letter shall not be produce and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court all relevant evidence. A Minister of the crown is the most appropriate person to assert this public interest, and his evidence is always valuable."[11] Upon closely tracing the evolution of crown privilege it can be seen quite clearly that it has evolved more in the name of public interest rather than in the interest of the government. Further, it has been taken into account that the concept of 'public interest' is also broadened In the case of **Burma Oil Co. Ltd v. Bank of England**[12], Lord Wilberforce has stated with reference to the Coonan case "it does not profess to cover every case, nor has it frozen the law, but it does provide a solid basis for progress as regards the point now under discussion". All the future cases involving claim for privilege to withhold documents cannot be decided within the four corners of the ruling in Conway. As Lord Hailsham observed in **D. v. National Society for the Prevention of Cruelty to Children**[13] the categories of public interests are not closed. With the development of social condition and social legislation, new categories will vie with each other in getting precedence over the public interest in the administration of justice.[14]

AUSTRALIA

In recent times there have been two developments which took place in Australia. A well-known decision in the case of **Sankey V. Whitlam**[15] the High Court of Australia held that it is the responsibility of the court to decide whether the document should be produced protected from the disclosure in the public interest. In the name of proper justice, the court should take care of the balance between the disclosure in the name of public interest and in the protection of the public interest. Here the nature of public interest will vary from case to case as the protection to disclose or not will also vary. In this above case there were documents comprising of cabinet papers and communications between the ministers and senior officials. The writ of mandamus was filed before the High Court for the production of the documents. Then the court declared that all the documents are ought to be produced even with regards to the excepted papers. The court asked to produce all the document and

[10] [1991] 2 All ER 319
[11]Burmah Oil Co. Ltd v. Bank of England; (1979) 3 All E.R. 700; applied the principle of 'public interest immunity' and it was held after inspection , the concerned Government documents were privileged.
[12]*Ibid*
[13] [1977] 1 All E.R. 589
[14] V.G. James; Government Privilege to Withhold Documents; Journal of Indian Law Institute
[15] (1978) ALR 505 (High Court of Australia)

that not document is to be withheld with the officials- not vent the cabinet papers. Stephen J. in this case stated that "the judge made law relating to Crown Privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded. On the contrary its essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case."

Legislative impact in Australia

1. **Evidence Amendment Act, 1982** - The very first development from the judicial side is the Evidence Amendment Act, 1982 passed for the Australia Northern Territory. This act allows the Attorney General to claim the privilege of not disclosing certain documents in the name of public policy and injury to interest of the public. Even after many criticisms by the opposition on this move the House of Lords in the same case as above mentioned appreciated by saying that it is a brave move towards a broader approach.
2. **New South Wales Amendment**- New South Wales government also made an amendment to the evidence act by section 61(1) - if any disclosure of the communication in any legal proceedings described in the certificate is not in consonance of the public interest, then it shall not be disclosed.

CANADA

Canada has a liberal legislation in this aspect. Canadian courts have followed the English case law of **Conway v. Rimmer**[16] with regards to the subject of the state interest, but at times they follow a different type of approach. In most of the cases where there is no relation of with the question of national security, international relations or cabinet confidence, the claim for privilege will be read and understood with that of the state interest.

Section 41 of the Federal Courts Act, 1970 this act adopts a quite different approach to such matters. Section 41(1) states that subject to any provision of any other act in existence when a minister of the Crown certifies any court of the affidavit that there is a threat to the public interest and it is not to be disclosed, the discretion is left to the judiciary to examine the documents and decide if it is appropriate to publish or not subject to the restriction and other conditions laid down. Section 41(2) of the act says that if the documents speak about the threat to the national security, international relations and defence or the provincial relations, then the court shall right away refuse the document from being published. [17]

[16] [1968] AC 910

[17] Carey v. Ontario, [1986] 2 SCR 637 – In the instant case, the production of documents was allowed and claims of privilege were quashed by the Supreme Court of Canada R. v. Liepert, [1997] 1 SCR 281

UNITED STATES OF AMERICA

The landmark case in the US from where the concept of 'executive privilege' evolved is **United States v. Reynolds**[18], wherein the state claimed privilege over the Air Force's accident investigation report. The suit was initiated by the widows of the 3 civilian observers who were killed in a military airplane crash, under Federal Torts Claims Act, 1946. The plaintiffs claimed for the report of the crash investigation which was claimed under privilege by the state. The courts rejected the view that the claim of executive privilege was conclusive and binding on the court, it acknowledged the existence of state secrets that could not be disclosed to the public. However, it also put forth a view asserting judicial control on the decision as to whether the document that is believed to be privileged actually falls under the privilege.

In case of other official information that does not involve state secrets, Rule 228 of Model Code of Evidence Rules lays down that the disclosure of such information must be made and an alternative for the government is one to the case.[19]

The U.S courts staunchly refused to accept executive privilege as conclusive, this is reaffirmed in the case of **New York Times v. U.S**[20] also known as the '**Pentagon Papers Case**'. An injunction was demanded against the New York Times and Washington Post prohibiting the publishing of what was regarded as classified materials[21] by the State. The government contended that such disclosure would inhibit national security and defence. The court in this case held that the injunction cannot be granted merely on the claim that the document is privileged. There were two broad common formulations drafted by the judges, firstly that the Constitution bars any restraint upon newspaper publication, regardless of the nature of the material published[22]; secondly, such damage to the nation from publication is to be determined by the executive function and the courts should defer to the executive determination. 'The potential conflict between the judiciary and the executive, which is believed to be the root of the issue of 'privilege' was vividly illustrated in the controversial case of **U.S. v. Nixon**[23] (Watergate Tapes Case).

"This presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. . . To ensure that justice is done, it is imperative to

[18] 97 L Ed 727: 345 US I (1952)
[19] IP Massey, Administrative Law (9th ed.)
[20] 403 US 713 (1971)
[21] Classified Study; History of US Decision- Making Process on Vietnam Policy
[22] Except under special circumstances wherein it poses a direct and immediate damage to the nation.
[23] 418 US 618 (1974)

the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defence"[24]

In the United States, the source of the power to withhold disclosure of documents is statutory. It is the 'House Keeping' statute which provides that department heads may prescribe regulations for "the custody, use and preservation of the records, papers and property appertaining to the Department."[25] Thus, it is clear that the precedents regarding claiming executive privilege in the U.S.A is very well defined, the judiciary has set up the scope and limitations for when the privilege can be claimed.

INDIA

In India, the government holds the privilege of withholding documents from the courts. The same is claimed on the basis of Section 123 of the Evidence Act 1872, which lays down the provision that, no one shall be permitted to give any evidence derived from unpublished official records relating to the affairs of the state except with the permission of the head of the concerned department. The concerned department shall give or withhold the permission as he deems fit. Further, Section 124 extends this privilege to confidential official information. This privilege if claimed is not conclusive; meaning the courts can do nothing but accept the same. The same is provided in Section 162 of the Evidence Act 1872 which provides that when a witness is required to produce a document, he must bring it to the court and then may raise an objection to its production and admissibility.

In **State of Punjab v. Sodhi Sukhdev Singh**[26], the court had the opportunity of discussing the extent of government privilege to withhold documents where twin claims of governmental confidentiality and individual justice compete for recognition. For the documents whose contents fall within 'state affairs', the claim of privilege is not conclusive and the court is required to enquire into the nature of the document in the light of relevant facts and circumstances. However, the court held that in order to determine the claim of privilege, the court cannot inspect the document and the administration shall be the only and sole judge of public interest involved in the disclosure of the same.

The decision of the Supreme Court in **ADM, Jabalpur v. Shivakant Shukla**[27], may be considered as the landmark because of the special setting in which the case was decided. Ray, CJ observed Section 16-A (9) of the Maintenance of Internal Security Act 1971. This section provides for the provision that the grounds of detention are to be treated as confidential and are deemed to refer to matters of State and to be against public policy to disclose. It enacts provisions analogous to a conclusive proof of presumption. Such a

[24] *Ibid*
[25] 5 U.S.C., S. 22. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.
[26] 1961 AIR 493
[27] AIR 1976 SC 1207

provision is a genuine rule of evidence. This is in reference and in nature of the explanation of Sections 123 and 162 of the Evidence Act 1872. Therefore, when the detaining authority is bound by Section 16-A (9) and is absolutely forbidding from disclosure of material, then no question can arise for adverse inference against the authority. The court then cannot insist on the production of the file or hold the case of the detenu stands unrebutted by reason of such non-disclosure. To hold otherwise would be to induce reckless averments of mala fides to force the production of the file that may be forbidding by law. It is difficult to see how the State can deny the production of the documents and their use as evidence before the court where the documents relate to the issue of the case. Thereby all facts relevant to the case must be brought before the court and irrelevant facts be shut out.

To check if undue advantage is taken of the provision of Section 123 of the Evidence Act 1872 and in order to protect and guard against the possible misuse of the privilege, the court also framed certain norms:

- The claim of privilege should be in the form of an affidavit which must be signed by the Minister concerned or the Secretary of the department.
- The affidavit must indicate within permissible limits the reasons why the disclosure would result in public injury, and that the document in question has been carefully read and considered and the authority is fully convinced that its disclosure would injure public interest.
- If the affidavit is found unsatisfactory, the court may summon the authority for cross examination.

Working on the formulations, the Court in **Amar Chand Butail v. Union of India**[28] disallowed the privilege where there was evidence to show that the authority did not practically apply its mind to the question of injury to the interests of public which would be caused by the disclosure of the document.

In **State v. Midland Rubber & Produce Co**.[29], the Kerala High Court went a step forward and reserved to itself the right to inspect the document before allowing the claim of privilege. The court then came to the conclusion after inspecting the document that no public interest would suffer from its disclosure. The other High Courts have followed the same line of reasoning, since then, in deciding upon the claims of privilege. Such trends in the judicial behaviour and system in this area of high social visibility is always welcome.

"The foundation of the law behind Ss. 123 and 162 of the Evidence Act is the same as the English Law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence is to be withheld is to be weighed against the public interest in administration of justice that courts should have fullest possible access to all relevant materials. When public interest outweighs the latter, the

[28] AIR 1964 SC 1658
[29]AIR 1971 Ker 228

evidence cannot be admitted. The court will *proporiomotu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safe-guarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. In the ultimate analysis the contents of the documents are do described that it could be seen at once that in the public interest the documents are to be withheld."

It has been illustrated in the abovementioned case in a precise manner as to what exactly is India's stand on the concept of 'Governmental Privileges'.

CONCLUSION

The intention of the research was to analyse the scope of 'privilege' in various countries and also to bring about a study of various legislations around the world with respect to the aspect of privilege. Further emphasis has been given to check on how it impacts the transparency and accountability of the government has been made.

The first part of the paper takes a global approach. It compares the privilege system in India, Australia, Canada, and England. This part enunciates how vital the concept of 'crown privilege' was to lay down a cornerstone for establishing the concept of privilege in executive among other commonwealth countries. Through this, it clarifies as to whether this global phenomenon is standard in all nations. We have found that, though they are all derived from the same concept, every country has made certain changes to suit itself.

Contrary to the concept in U.K, it is observed that the Indian Judiciary never gave the executive the opportunity to contend public interest. It is believed by the judiciary themselves and also by the Law Commission of India that there is none better than judiciary to determine the existence of public interest. On further analysis it is observed that the concept of claiming privileges and immunities extend to areas of tort law and contracts in case of the government, however since the scope of this study is limited to 'legal proceedings' only those aspects of privilege have been dealt with.

Once the concept of privilege in Indian law has been discussed, the study moved on to taking a closer look at what is a privilege in India. Through this, the intricacies of how 'privilege' has been construed by Indian law are taken into account. In this study it was observed that the concept of privilege is spread across various areas of law, most prominently constitution and evidence. In both cases privilege has been considered applicable only in cases of public interest.

The question however is who the right authority is to determine the issue of public interest? Is it the judiciary who is adept at dealing with that question from prior experience, or is it the executive who are aware of the repercussions that disclosure of the document could have?

The Indian judiciary has shown itself to be capable by upholding "right to know", and allowing disclosure in certain cases. The claim of privilege will be examined by the judiciary and not the document itself, if the authority claiming the privilege has doubts of impact of disclosure then the judiciary shall ensure confidentiality in its decisions regarding the same. Thus, the question of determining privilege has been dealt with in the light of ensuring transparency and accountability.

Further research has bought into light the intricacies of the legal procedures in the claiming of privileges in U.K, U.S.A and India. What is to be noted here is that, in the previous section that analysed global perspective did so only in the light of the law regarding privileges, this part however, goes into the legal proceedings that ensue when such privileges are claimed. In this research it has been observed that the law regarding privileges is more rigid in U.S.A as compared to U.K and India. In the U.S.A, the privilege is purely statutory and not very interpretive in nature, thus ensuring that the roles of executive and judiciary engraved in the constitution are followed. In U.K and India on the other hand, the judiciary plays a very interpretative role that ensures in sufficient separation of power and predominance to the underlying concept of democracy. Moreover, the U.S.A has passed the Freedom of Information Act which gives every citizen a legally enforceable right of access to government files and documents generally. The government cannot refuse information unless it falls under an exception stated in the Act. Though India has the Right to Information Act, the existence of the Official Secrets Act is counterproductive to the intention. Thus, in a way it can be concluded that the Indian and English Laws of Governmental Privileges during legal proceedings are diametrically opposite to the U.S Law.

