Cabinet Secrecy in Democracy

M. C. Pramodan*

Industrialisation, urbanisation and the present communication technology have placed on the modern democratic institutions a burden of management of large volumes of information. The processes of society and functions of the government became more and more complex. New and new demands for services are sought for. Along with the greater role of government, there arose a problem of bringing the government to account for the excesses and deficiencies. To clarify the doubts on many occasions, documents with the governmental agencies are required. A need for government-held information is thus felt in the modern democracies. However, governments are not willing, for different reasons, to disclose the information required of them.

Cabinet decisions form the highest level executive decisions in a country. Any leakage of them may affect the entire nation because many of the decisions may be intended to be carried out in future, some relating to internal affairs, some relating to external affairs and yet some other relating to defence matters.

The Rationale of Cabinet Secrecy

The concept of cabinet secrecy owes its origin in the evolution of Parliament in Britain. By convention, a member of the cabinet takes an oath that he will keep secret all matters revealed to him. But it is pointed out that the oath of secrecy appears to be founded upon morals or conscience rather than

* LL.M. (Cochin); Lawyer, High Court of Kerala.
on law.\textsuperscript{1} Oaths do not provide a satisfactory justification for secrecy because oaths taken by persons in various fields do not execute any kind of privilege for them.\textsuperscript{2} Cabinet papers are also not protected from disclosure because they are confidential in nature. The question is whether the disclosure of the cabinet documents would be contrary to the public interest.

The secrecy of cabinet documents is attributed to the constitutional fiction that the cabinet exists solely to formulate advice for the sovereign in whose name all executive decisions are taken and that the advices to the Crown are secret.\textsuperscript{3} This fiction had its meaning in earlier days. But now it is the cabinet the real ruler and the 'Crown' is only a by-stander.

Protection of cabinet papers has sometimes been sought on the basis of convention of collective responsibility. All Ministers are expected to support publicly cabinet decisions regardless of their own personal view. The disclosure of cabinet documents indicating the particular views of individual Ministers, will tend to undermine this convention.\textsuperscript{4} The Ministers, it is feared, may not feel free to surrender their political, personal and departmental preferences to the achievement of a common view if they know that their stand or compromise would become public knowledge. However it is criticised that maintaining collective responsibility merely requires that members of the cabinet may tell the same story before the public. If there is no disagreement in fact, the disclosure of cabinet documents will cause no harm to the convention.\textsuperscript{5} Also the convention may not be breached by disclosure of the agenda or the ultimate decision of the cabinet.

\begin{enumerate}
\item Ibid.
\item Even cabinet minutes seldom record dissenting voices. A Minister who wants his dissent recorded must ask for it to be done. This is clearly regarded as exceptional and undesirable procedure. See Mackintosh, The British Cabinet, (3rd ed., 1977), p. 534.
\end{enumerate}
It is argued that the business of the government would be difficult if the inner workings of the government machinery being exposed to the gaze of those ready to criticise without adequate knowledge of the background of the cabinet decision. There are two strands to this thinking. First is that the Ministers may go back from taking hard decisions if they are made known to the political opponents. But this seems unlikely because secrecy merely postpones the inevitable unpopularity. The second is that the pressure groups will seek to intervene directly in the decision whenever they find that their interests are at stake. But it is a truth that in the actual operation of a government, few Ministers can avoid the importuning of lobbyists. Many departmental submissions to the cabinet are disguised briefs for various outside organizations. Thus all that secrecy may achieve is that only favoured groups will have the opportunity to acquire timely information.

An argument frequently relied on by the courts for cabinet secrecy is based on candour in cabinet discussions, that is, Ministers may be free to express alternatives in the policy formulation and decision making process in a private atmosphere in which candid and even blunt assessments may be made. Secrecy is thus said to be required for a full, free and open discussion in the cabinet meeting. If the cabinet discussions are made public, discussion may be made with an eye to the record and not to the problem in hand, detracting from the efficient running of a department. However, it is to be noted that the candour argument operates no more forcefully at cabinet level than in the lower reaches of the administration. It seems that secrecy has a merit in this regard so that Ministers may be able to

6. Supra, n. 2 at p. 269.
7. Ibid.
8. From the Burmah Oil Co. case, [1980] A.C. 1090, it is clear that governments do seek advice from outside financial and industrial circles. It is more in accord with the realities of modern government.
9. Supra, n. 2 at p. 268.
take bold decisions neglecting the lobbyists and partymen. However this candour argument cannot be a justification for non-disclosure of the final decisions taken by the cabinet.\footnote{The government had exploited the blank cheque based on this ‘candour argument’ allowed by the courts in earlier cases at the expense of justice in individual cases. But later the English courts corrected themselves. See Conway v. Rimmer, [1968] A.C. 910. The Australian High Court also expressed its dissatisfaction with the candour argument. See Sankey v. Whitlam, 142 C.L.R. 1 (1978). In a recent New Zealand case, Brightwell v. Accident Compensation Corporation, [1985] 1 N.Z.L.R. 132, Mc Mullin, J., asserted that public confidence in the administration of government was likely to be increased by the realization that advice was given with knowledge of the risk of subsequent examination in the courts. See Supra, n. 5 at p. 171.}

The cabinet papers are generally treated as a class. The cabinet is the very centre of national affairs and at all times possesses information which are or must be kept secret. But it would not be appropriate to entitle the same degree of protection to all documents falling with the class of cabinet papers, because the extent of protection required depends on the particular subject matter or policy contained in each document. As a general rule, the greater the sensitivity and importance of the information sought, the higher the documents on the policy formulation scale, and the wider the context, the more reluctant should a court be to order production over the objection of the executive.\footnote{Supra, n. 5 at p. 172.}

The Period of Secrecy

Passage of time is an important criterion in deciding the secrecy of cabinet papers. Lord Reid in Conway v. Rimmer,\footnote{[1968] A.C. 910 at p. 952.} said that cabinet papers could be ordered to be disclosed when they become documents of ‘historical interest’ only. A slightly different view was taken in A. G. v. Jonathan Cape Ltd.\footnote{[1975] 3 All E.R. 484.} The
Court said that there must be a limit in time after which the confidential character of the information would lapse and the time-limit would depend on the particular case. This view seems to be more appropriate. It is to be noted however that in Jonathan, disclosure was held to be harmless after ten years. In Sankey v. Whitlam, the documents ordered to be disclosed were only between three and half to five years old. Thus the life of cabinet secrecy appears to be getting shorter even though it may be impossible to lay down a concrete rule for determining when secrecy would lapse. What is more important is the consequences of disclosure.

The point in time at which a litigant seeks disclosure of cabinet documents may constitute a balancing factor to be weighed by the courts. The possible prejudice to the implementation of the policies underlying the cabinet papers due to the premature disclosure is important in the balancing process. Disclosure of cabinet discussions at the developmental stage when there is keen public interest in the subject-matter may seriously impair the proper functioning of the executive. On the other hand, the risk of damage to the public interest is comparatively less when it is no longer of continuing policy significance.

Prior Disclosure

The public interest in the maintenance of cabinet secrecy will be very much reduced in weight if the documents have already been published. The necessity for secrecy then no longer operates. Once the papers become public and subject to public speculation and discussion, it is not easy to identify the particular quality of public interest which is said to reside in the

14. Id. at p. 495.
16. Supra, n. 5 at p. 175.
17. Id. at p. 166.
18. The Privy Council in Robinson’s case had also formed a similar view. See Robinson v. State of South Australia, [1931] A.C. 704 (P.C.) at p. 718.
non-production of such documents. Still one question arises whether the documents, which are improperly or illegally published may be taken in evidence in a suit or whether the government may be asked to produce such documents as evidence. It may not be the impropriety or illegality in the method in which the cabinet documents become open that matters but the attitude to be adopted by the courts towards such documents, that is, whether the court would have ordered disclosure of the documents after the balancing of the competing interests.

The court may inspect the original document before ordering disclosure to satisfy itself that what had been published was in fact the true copy. Where the prior disclosure has been limited to selective portions, it does not take away the privilege.

**What Constitutes Cabinet Documents?**

Courts always prefer to allow secrecy for the cabinet documents unless it is controverted beyond doubt. Thus it is necessary to know what documents may be called as cabinet documents having the privilege.

Courts may not confer privilege to a file merely due to the presence of a particular document. A cabinet document does not give advantage of privilege to the whole file in which it is contained. Also a document is not privileged because there is a chance that it will come before the cabinet. Submissions by individual Minister to the cabinet, discussion papers circulated among the members of the cabinet and briefs prepared by departments for Ministers to use in cabinet or cabinet committees may be treated as cabinet documents to be protected from disclosure. In *Lanyon Property Ltd. v. The Commonwealth*; disclosure of minutes of the cabinet and its committees were sought by the plaintiff in order to prove its claims of compensation for the land acquired by the government. But allowing the claim of privilege, Menzies, J. observed:

21. *Id.* at p. 653. (emphasis supplied).
"... the governmental process directed to obtaining a cabinet decision upon a matter of policy and cabinet's decision upon that matter should not, in the public interest, be disclosed by the production of cabinet papers including what I would describe as papers which have been brought into existence within the governmental organization for the purpose of preparing a submission to cabinet. Such papers belong to a class of documents, that ought not to be examined by the court, except, it may be, in very special circumstances”.

This opinion provides ample freedom for the executive where all sorts of documents could be concealed by simply including them in cabinet submissions. Though the Court insisted that the documents must be created with the cabinet in mind, possibility of abuse is more. A similar approach was also taken in Conway v. Rimmer\textsuperscript{22} in which the Court was prepared to extend the privilege to all high level documents concerning policy making\textsuperscript{23} This approach is also not appropriate. The mere fact that cabinet looks at a document cannot be a sufficient criterion to confer cabinet status leading to privilege.

Generally the detailed work leading to cabinet decisions will be mostly done by the cabinet committees. In the committees, takes place the real debate. The matters decided in the cabinet committees are not usually reopened in the cabinet. Thus there is nothing wrong in conferring the status of cabinet papers to those of the cabinet committees for the purpose of conferring the privilege, though the cabinet committees include members other than Ministers.

The cabinet is the centre where the most important executive decisions in a nation are taken. The privilege for cabinet papers may be allowed for such decisions taken in the cabinet. In Conway v. Rimmer, both Lord Pearce\textsuperscript{24} and Lord Upjohn\textsuperscript{25}

\textsuperscript{22} [1968] A.C. 910.
\textsuperscript{23} Id. at p. 952, \textit{per} Lord Reid.
\textsuperscript{24} Id. at p. 987.
\textsuperscript{25} Id. at p. 993.
were ready to bestow the same immunity to other high level documents also. Lord Reid extended the immunity even further to documents which were concerned with policy making even when prepared by quite junior officials. 26

Many important decisions do not reach the cabinet at all but are taken by individual Ministers without reference to their colleagues and in certain cases, the Ministers may delegate the authority to the permanent head of the department. 27 The importance of such a decision is never below that of a cabinet decision. Documents referring to the views of the Minister or the permanent head may be protected whether the cabinet is made aware of those views or not. 28 The explanation for bringing such documents within the ambit of immunity is that it is necessary to prop up the convention of individual ministerial responsibility and also that the convention whereby civil servants remain anonymous and have their failures and successes attributed to the Ministers. The anonymity is seen as a quid pro quo for the disinterested political advice. 29 But if it is possible to disclose the document or its contents without giving the identity of the official, it may be done.

Now an enquiry is made into the judicial attitude towards the problem of cabinet secrecy in different nations.

The Position in England

As already mentioned above, the important state documents relating to high level policy decisions especially cabinet papers are assured to be immune from production. The Duncan's case 30 established that documents could well remain secret unless the government allowed disclosure. In Re Grosvenor Hotel Ltd. (No. 2) 31 which had shown unhappiness with Duncan's

26. Id. at p. 952.
27. Supra, n. 2 at p. 272.
28. Id. at p. 273.
29. Ibid.
31. [1965] 1 Ch. 1219 at p. 1246.
rule, however decided that a court should never order production of cabinet papers because executive was considered to be a judge as to whether such papers should be disclosed. In *Conway v. Rimmer*, the Court was in favour of taking away the executive's discretion, but was reluctant to apply the same principle in the case of cabinet papers. A ministerial claim to non-disclosure of cabinet papers was held to remain judicially unreviewable despite the contents of the documents sought and their importance to the party seeking production. Accordingly, Lord Reid said:

"I do not doubt that there are classes of documents which ought not to be disclosed whatever their contents may be. Virtually everyone agrees that cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest".

Lord Hodson thought that cabinet documents as a class required absolute protection from disclosure from their very character. Lord Pearce who extended the privilege further said that production would never be ordered of fairly wide classes of documents at a high level such as cabinet correspondences. The varying opinions in *Conway v. Rimmer* were finally crystallised in *Rogers v. Secretary of State for Home Department* in which Lord Salmon cited cabinet minutes falling within classes of documents which for years have been recognised by law as entitled in the public interest to be immune from disclosure and even a certificate from a Minister to that effect was not at all necessary. Later in *Attorney General v. Jonathan Cape Ltd.* the Court held that the cabinet proceedings and papers were secret and could not be publicly disclosed until they had passed into history.

33. *Id.* at p. 952.
34. *Id.* at p. 973.
35. *Id.* at p. 987.
37. [1975] 3 All E.R. 484.
In England, in 1979, came another important decision regarding the cabinet secrecy. In *Burmah Oil Co. Ltd. v. Bank of England*, the House of Lords applied the balancing principles laid down in *Conway’s case* to high level governmental policy formulation. In this case, production of communications between Ministers and minutes and briefs for Ministers and memoranda of meetings attended by Ministers etc., were sought. It was resisted on the ground that such documents formed a class of documents relating to the formulating of high level governmental policy and that their non-disclosure was necessary for the proper functioning of the public service. This was rejected by the House of Lords. Although none of the documents were ‘cabinet papers’, the decision contained a lot of dicta concerning cabinet secrecy. The majority of the Law Lords accepted with varying degrees of enthusiasm that no classes of documents, not even cabinet papers are excluded entirely from the balancing exercise. Later in *Air Canada v. Secretary of State for Trade*, the House of Lords held that communications between, to and from Ministers, minutes and briefs for Ministers, memoranda of meetings attended by Ministers etc., did not enjoy the protection of cabinet minutes. In this case, the increase in landing charges introduced by the British Airport Authority was challenged by the plaintiff company, claiming that the increase was excessive and discriminatory. In order to prove the claims, the company sought production of documents including communication at a high level relating to policy formulations. Allowing the protection, Lord Scarman observed:

“... if it is a class claim in which the objection on the face of the certificate is a strong one as in this case where the documents are minutes and memoranda passing at a high level between ministers and their advisers and concerned with the formulation of policy, the court will pay great regard to the Minister’s view (or that of the senior official who has signed the certificate). It will not inspect

---

40. Id. at p. 924.
unless there is a likelihood that the documents will be necessary for disposing fairly of the case or saving costs”.

It was asserted that cabinet documents did not have complete immunity but were entitled to a high a degree of protection against disclosure. One of the instances where the immunity loses is when a serious misconduct is alleged against a Minister. In this case the plaintiff company was unable to show that the contested documents were likely to assist its case.

**Australia**

The position in Australia was also similar. Although in the *Marconi’s case* it was held that the courts had power to examine documents to determine whether an executive claim to immunity was justified, the courts in Australia were unable to shrug off the effects of *Duncan’s* decision. Thus cabinet papers as a class continued to be exempt from production. In 1974, a slightly different opinion was expressed by Menzies, J., in *Lanyon Property Ltd. v. The Commonwealth*. Upholding a claim for immunity for cabinet documents, he said that in special circumstances, the cabinet documents may be ordered for production.

Later in 1975, *Australian National Airlines Commission v. Commonwealth*, the High Court treated cabinet papers as a class which should be kept secret in the public interest. However in 1978 in *Sankey v. Whitlam*, four out of the five judges held that cabinet papers were not entitled to absolute protection and that court had power to inspect such documents with

41. *Id.* at p. 915, *per* Lord Fraser.
44. *Id.* at p. 652.
45. 132 C.L.R. 582 (1975) at p. 591.
46. 142 C.L.R. 1 (1978).
47. Gibbs A.C. J., Stephen, Mason and Aickin JJ. held the same view. Jacobs J. did not express any opinion on the issue.
a view to balancing the competing interests. In this case it was alleged that the Prime Minister along with a Minister, Treasurer and the Attorney General had conspired to borrow from overseas sources a sum in contravention of the Financial Agreement 1927, and hence necessitated disclosure of the high level Loan Council documents. The High Court of Australia rejected the class claim especially in a criminal case.

New Zealand

In New Zealand, the courts were much influenced by the dicta of Duncan’s case and cabinet documents were protected as a class. However in 1981, in Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No. 2), the Court after considering Sankey’s case and Burmah Oil case decided that the cabinet papers and the like should not be entitled to absolute protection from production. Following the Environmental Defence Society’s case in 1984 in Fletcher Timber Ltd. v. Attorney General it was ordered for production of communications between Ministers and Prime Minister and memoranda of Cabinet Committees. The Court rejected immunity claimed on the basis of class. A Minister’s certificate was held not to become the substitute for informed judicial decision.

Canada

In Canada, the recent authority in this area is Re Carey and the Queen. In this case, the Supreme Court held that

48. In this case, Gibbs J. said: “The fundamental principle is that documents may be withheld from disclosure only if, and to the extent that the public interest renders it necessary. The principles in my opinion must also apply to State papers. It is impossible to accept that the public interest requires that all State papers should be kept secret for ever, or until they are only of historical significance”. 142 C.L.R. 1 (1978) at pp. 41-42.
52. Unreported, but cited in id. at p. 163.
although the Canadian provincial common law did not confer an absolute immunity upon cabinet papers, courts must nevertheless proceed with caution in having them produced. The Court was thus careful enough to note the high importance of the cabinet documents and only in strong cases of public interest they may be ordered to be produced.

India

Unlike the United Kingdom, in India, the Constitution provides for the protection of cabinet documents from disclosure. Articles 74 and 163 of the Constitution provide for the protection in the cases of Central cabinet and State cabinet documents respectively by prohibiting inquiries into the advice tendered by the cabinet. Further, Article 361 of the Constitution indirectly protects the cabinet documents by saying that the President or the Governor shall not be answerable to any court for the exercise or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

Notwithstanding the protection provided under the constitutional scheme, the courts have protected the cabinet documents treating them as “affairs of State” under Section 123 of the Evidence Act. In State of Punjab v. Sodhi Sukhdev Singh, the respondent, a District and Sessions Judge who was removed from service made a representation to the Council of Ministers. The Council of Ministers after considering the ad-

53. Article 74 (2) of the Indian Constitution reads as follows: “The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court”. Article 163 (3) reads: “The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court”.

54. Section 123 of the Evidence Act reads as follows: “Evidence as to affairs of State — No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit”.

vice of the Public Service Commission ordered that the respondent may be placed in some suitable post. However the respondent filed a suit seeking a declaration to the effect that the removal from the service was illegal, void and inoperative. The trial court in the course of proceedings ordered for production of certain documents including the cabinet minutes regarding the representation made by the respondent and the report made by the Public Service Commission. The State claimed privilege for these documents under Section 123, Evidence Act regarding the documents as relating to 'affairs of State'. The Court held that documents which embodied the minutes of the meetings of the cabinet and documents which indicated the advice that is given by the cabinet to the Governor were protected under Section 123 of the Evidence Act.

The Court also agreed that such documents were protected under Article 163 (3) of the Constitution. According to the Court, such documents belonged to a class of documents the disclosure of which would considerably affect the public interest. The protection under Section 123 was later followed in the Orient Paper Mills case. The Calcutta High Court said that the privilege under Section 123 for non-production could be sought for a decision of a cabinet relating to the 'affairs of State', as it adversely affects the integrity of the cabinet in determination and execution of public policies.

The extent of the protection under Articles 163 (3) and 74 (2) seems to be absolute. A fulfledged protection was allowed by the Supreme Court in Sukhdev Singh's case. However, later the Patna High Court doubted the extent of the protection. In one case, the decision of the Council of Ministers relating to the appointment of the Chief Secretary to the Government was sought to be produced. When protection under Arti-

56. Id. at p. 512.
57. Id. at pp. 501-02.
59. Id. at p. 124.
cle 163 (3) was claimed, the High Court held that the file containing the advice by the cabinet to the Governor was not entirely privileged, and only those portions which indicated the advice were eligible for the protection. The courts thus can look into those unprotected portions of the file.

The decision in Sukhdev Singh's case indicated that the protection of the cabinet documents was absolute by way of treating such documents as a 'class' and also under Article 163 (3) of the Constitution. Later the Supreme Court, in the Judge's Transfer case, held that protection under Article 74 (2) would be available only to the advice tendered by the Council of Ministers and not to other materials upon which the cabinet decided. Accordingly the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material upon which the decision of the Central Government based, was held to be outside the protection of Article 74 of the Constitution.

The decision in Judge's Transfer case does not seem proper. First of all, it is difficult to isolate the actual 'advice' from the cabinet decision because it invariably includes the supporting materials also. Secondly, if the materials upon which a cabinet based its decisions, are disclosed, it will be easy to infer the advice given by the cabinet. Such a possibility definitely takes away the protection conferred under Article 74 itself.

However in Doypack Systems case, the Supreme Court slightly differed from the view taken in Judge's Transfer case. In Doypack Systems case, the appellant sought the disclosure of opinion on proposals of the Textile Ministry in the form of cabinet notes for the approval of the cabinet in the matter of promulgation of an ordinance and for framing of an Act. Protecting such documents under Article 74 (2) of the Constitution, the Supreme Court said:

63. Id. at p. 798. per Sabyasachi Mukharji, J.
"It is well to remember that it is duty of this court to prevent disclosure where Article 74 (2) is applicable. We are convinced that the notings of the officials which lead to the cabinet note leading to the cabinet decision formed part of the advice tendered to the President as the Act was preceded by an ordinance promulgated by the President".

Referring to Judge’s Transfer case, Sabyasachi Mukharji, J., further said:

"Cabinet papers are ... protected from disclosure not by reason of their contents but because of the class to which they belong. It appears to us that cabinet papers also include a paper brought into existence for the purpose of preparing submission to the cabinet ....".

The interpretation given by the Supreme Court in Judges Transfer case that only the 'advice part' of the cabinet documents could be protected under the constitutional provisions could help only to a certain extent because what is actually required to know from the point of a citizen's right to know is the actual advice and the Minister behind it. However the Supreme Court in Doypack Systems case shut out any possibilities of disclosure. Thus the trend in India is for protection of cabinet documents irrespective of the contents or circumstances. While trend in other countries, as shown above, is for lesser protection for such documents, the Supreme Court of India travels in a different direction.

Need for Disclosure of Cabinet Documents

The central idea in conferring privilege status to cabinet documents is that disclosure of them would be against public interest, i.e., disclosure would impede the proper functioning of the cabinet by taking away the necessary candour required for

such a high level body. This is only one facet of the problem. On the other side, we see that bodies which function in secrecy may easily be influenced by corruption, bribery and high-handedness. In a country like India, where the above virtues are common from top to bottom of the administration, an absolute protection to the cabinet documents does not seem justified. Openness at the top level may provide a better image to the administration and suspicions on such high level bodies may be cleared. Again the responsibility of such bodies for its decisions, whether political or otherwise, may be democratically fixed. This does not mean that all kinds of cabinet documents may be made open. The general policy may be openness and secrecy an exception. Whenever the cabinet desires secrecy to its decision, it may give reasons for them. Any citizen who requires information may be given standing to challenge the secrecy. The court, after an in camera inspection and hearing both parties, may decide finally on the harm to the public interest on disclosure. The disclosure would definitely hook the persons who are responsible for wrong decisions. This will also help the administration to be careful enough not to make irresponsible decisions.

**Conclusion**

Generally the courts give undue weight to the interests of secrecy and less weight to the hardship caused to the litigants. It seems that even in the case of cabinet papers, public policy requires that the public interest immunity may not be widely construed. The courts may consider the relevance, cogency and materiality of the document sought for disclosure. As seen in *Sankey v. Whitlam*, the character of the proceedings made it very likely that for the prosecution to be successful, its evidence must include the cabinet papers sought by Mr. Sankey. Concerning the importance of documents to the litigation in question, the court may also consider the likelihood and expediency of proof being made by means other than their disclosure.63

The courts may be more willing to order disclosure of cabinet documents in a criminal case if it is to support the defence

of an accused. For the proof of guilt, the courts may order disclosure of cabinet documents. However, in cases other than criminal cases, the court may not be that such enthusiastic as they are deciding criminal cases.

The very purpose of cabinet secrecy is to promote its proper and efficient functioning and not to facilitate improper conduct. When there is a strong allegation of unlawful interference with one's statutory rights, courts may order for an in-camera inspection of documents.

There is no system of government so perfect that it is immune from the deseases of politically motivated crimes. In this respect it is not fair to exclude cabinet documents as a whole from disclosure as evidence especially when the charge is the grossly improper functioning of the Government. The interest of the community in such cases is so great that it may not be impeded by a mere rule of evidence. Also it is not proper to leave the decision to admit or exclude to those who are themselves charged with misconduct. A desire to cover up the unauthorised acts, whether the origin of them is the higher level authorities or subordinates, is quite natural. The unauthorised acts complained of may constitute a criminal offence and may have some element of moral culpability. Even in cases of unauthorised acts, which are tortious in nature, possibilities of disclosure may be looked into.

Cabinet secrets may not be made upon simply on the basis of an allegation. While it is unreasonable to insist that a party discharges initial onus without the aid of the documents, it is also equally unreasonable to disclose the inner workings of the Government to the public merely on the basis of suspicion.

67. In Williams v. Home Office, [1981] 1 All E.R. 1151, the Court ordered inspection and production of high level papers in order to resolve the issue whether a prisoner's limited statutory right of personal freedom or liberty had been breached by a particular Home Office policy.
68. Supra, n. 2 at p. 275.
Fishing expeditions by the political opponents may be reckoned with in this respect. The need for the evidence to the suit may be shown beyond any doubt. A prior inspection by the court is the via media.

In the cabinet, apart from the highly important matters, there will be discussions on matters of minor importance such as construction of new roads, closure of factories, grant or withdrawal of subsidies etc. Such low level decisions do not deserve any immunity. But when the decision is commercial in form but political in substance, like the purchase of shares as seen in *Burmah Oil Co.* case, disclosure of the documents may be discouraged. Sometimes it is the very existence of the high level decision the court has to depend. Where a statute provides that a particular decision can only be taken by a specified person or body, the court may receive evidence as to whether and by whom what decision is in fact taken whenever its validity is challenged. A claim of privilege in the name of cabinet secrecy in such cases does not seem appropriate.

It can be seen that in all common law countries, the new trend is in favour of disclosure, though not so liberal. It is submitted that the cabinet documents may be allowed privilege provided sufficient reasons bearing on harmful consequences are shown. However before making it open, the courts may go through the documents in camera. The burden of proof no doubt is on the individual who seeks disclosure. Merely because a certain period of time has elapsed, the cabinet documents need not be disclosed. The criterion may be the adverse consequences relating to the public interest. The court is the better forum, in the present set up, to decide such issues.

In a democratic set up, secrecy in cabinet records is against the fundamental principle of accountability of the elected representatives. The people's representatives may have the moral courage and integrity to withstand their opinions before the public. Secrecy in this respect seems to be a hide-out for political cor-

---

ruption. However, considering the peculiar Indian situations where communal riots, terrorist activities, linguistic clashes, and inter-state and central-state disputes are quite common, it seems that secrecy in cabinet records in certain situations may help the responsible Ministers to express fearlessly and to take positive decisions which on disclosure may make them unpopular among certain groups of people. Also, bold compromises agreed to by a Minister for the nation's good, if made open, may make him unpopular among the group from where he comes. The general policy on cabinet documents shall be disclosure and on deserving instances, cabinet documents may be allowed to be kept undisclosed. The harmful consequences on the functioning of the Government may be the appropriate test. The Indian constitutional provisions thus requires an amendment to that effect.