into the witness box and his evidence was admitted on record, the Court was in error in ruling out his evidence as inadmissible when he came to pass judgment.[17]

Prosecutor as witness. A police officer or Advocate conducting a prosecution should never be sworn unless he is called as a witness and if so called he should be allowed to depose only to those facts which he knows and of which he is, in accordance with the provisions of the Qanun-e-Shahadat a competent witness.[18]

9. **Lunatic, incompetency of, as witness.** A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.[19] Where a witness is declared incapable of giving evidence owing to insanity it is the duty of the Court to record its finding that the witness is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. The fact that the witness had become incompetent to testify and so incapable of giving evidence must be proved strictly.[20]

10. Close relations, testimony of. Testimony in favour of a son or grandson, or in favour of father, or grandfather is not admissible because the Holy Prophet (PBUH) had so ordained.[1]

4. *Judges and Magistrates*. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(*c*) *A* is accused before the Court of Session of attempting to murder a police officer whilst on his trial before *B* a Session Judge. *B* must be examined as to what occurred.

Evidence Act, 1872. This Article is exact reproduction of section 121 of the Act.

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17. AIR 1914 All. 364=15 Cr.L.J. 429.
18. 6 CPLR (Cr.) 1.
19. 2003 Cr.L.J. 265 (FB).
20. AIR 1953 Madh-B. 262=1954 Cr.L.J. 6.

Synopsis

1. Privilege of Judge or Magistrate.
2. Evidence of what the Judge saw.
3. Judge giving evidence in case conducted by himself.
4. Judge personally interested in case.
5. Appellate Court may question Judge.
6. Value of statement of Judge.
7. Arbitrators, evidence of.

1. Privilege of Judge or Magistrate. The questions mentioned in Articles 4, 7 and 8 are not barred. A witness has simply the privilege of refusing to answer them and a Magistrate may warn a witness about his privilege. But he cannot disallow such questions.[2] As the privilege relates only to the witness, he can waive it. Where a Magistrate or a Judge waives such privilege or does not object to answer the question, it does not lie in the mouth of any person to assert the privilege.

2. Evidence of what the Judge saw. Judges are not exempted from being called as witnesses to depose upon matters which they saw when sitting as judges, unless they came to their knowledge by virtue of an investigation which they were making as judges.[3]

There is nothing in Criminal P.C. which disqualifies a Magistrate who holds a preliminary inquiry from trying the case himself. So he may be a witness as to other matters which occurred in his presence while so acting as a Magistrate.[4] Even the fact that a Subordinate Magistrate expressed his opinion in submitting a report in a case referred to him for local investigation under section 202, Criminal P.C. is no bar to his holding a trial on an order by the District Magistrate making over the case to him for that purpose. He will be a competent witness under Art. 4.[5]

3. Judge giving evidence in case conducted by himself. A Judge is a competent witness and can give evidence in a case being tried before himself even though he laid the complaint, acting as a public officer, provided that he has no personal or pecuniary interest in the subject of the charge. He is not precluded thereby from dealing judicially with the evidence, of which his own forms a part.[6] But if he does so he is bound to state to the prisoner or other person concerned or to make known to him so far as he can what are the facts which he himself observed to which he himself can bear testimony. Moreover the prisoner who is being tried by a Judge in this situation has a right, if he thinks it desirable, to cross-examine the Judge who under these circumstances and to this extent must be viewed as a witness and his evidence should be recorded.[7] This is so because a Judge, if he intends that the Court must act on a statement of his, must make the statement in the same manner as any

2. 12 Cr.L.J. 227 (Rang).
3. (70-71) 6 Mad. HCR (App.) 42.
4. 24 Cal. 167.
5. (1900) 4 Cal. W.N. 604 (DB).
6. (70) 4 Rang. L.R. (Cr.) 15 (DB).

other witness.[8] But without saying that it is illegal for a Magistrate to give evidence in the witness box in a case, with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such contingency can possibly be avoided.[9]

4. Judge personally interested in case. When investigations of the police preliminary to a trial are directed to a very considerable degree by a Magistrate, such Magistrate is personally interested in the case and is disqualified from trying it by the provisions of Criminal P.C. and he cannot be a competent witness to testify to matters which occurred in his presence while he was so acting.[10]

5. Appellate Court may question Judge. Art.4 empowers an appellate Court to question the trial Judge on matters relating to the proceedings before him and the answers to such questions should certainly be taken into account when deciding the appeal.[11]

6. Value of statement of Judge. The statement of the Judge who presides at a trial, whether it be in a criminal or civil case, as to what has taken place at the trial is conclusive. The statement of the Judge is absolute verity and it ought to be taken precisely as a record and the Court should act on it in the same manner as on a record of the court which of itself imports absolute verity.[12]

7. Arbitrators, evidence of. Where a charge of dishonesty or partiality is made any relevant evidence which the arbitrator can give is properly admissible. It is however necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose.[13]

5. *Communications during marriage.* No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married: nor shall he be permitted to disclose any such communication, unless the person who made it, his representative-in-interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

Evidence Act, 1872. This Article is exact reproduction of section 112 of the Act.

Synopsis

1. Scope.
2. Evidence of spouses against each other--inadmissible.

8. 7 Suth W.R. (Civil) 190.
9. 19 Mad. 263+20 Cal. 857=2 Cal. 405 (DB).
10. 23 Cal. 328 (DB)+20 Cal. 857.
11. AIR 1953 All. 97 (DB).
12. 10 Bom. HCR 75.
13. AIR 1914 P.C. 105.

against their son is not an offence against the other spouse, though it may cause him grief and, it is not covered by this Article.[7]

6. *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.

Explanation. In this Article, "official records relating to the affairs of State" includes documents concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Provincial Government or any statutory body or corporation or company set up or controlled by such Government.

Evidence Act, 1872. Art.6 corresponds to section 123 of the Act re-produced below.

123. *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.

Synopsis

1. Scope.
2. Public interest and private interests.
3. Unpublished official records.
4. "Records relating to any affairs of State."
5. Commercial or contractual activities of State.
6. Police diaries and other papers.
7. Income-tax, sales tax returns, etc.
8. Head of Department to claim privilege.
9. Manner of claiming privilege.
10. Court to decide whether document relates to affairs of State.
11. Secondary evidence of privileged document.
12. Adverse inference against State from non-production.

1. Scope. Article 6 protects the discovery of documents referring to matters of State and it is based on the general rule that no person can be compelled to give evidence of State secrets including communications between public officers.[8] If a document forms part of an unpublished official record and relates to any affairs of the State, the same may be given in evidence, if the head of the department concerned grants permission for the purpose. Moreover the fact whether the document forms part of an unpublished record and it relates to any affairs of the State or not, can be ascertained by the Magistrate after going through the record.[9]

7. AIR 1914 Lah. 380 (DB).
8. AIR 1939 Bom. 237 (DB).
9. AIR 1965 Tri. 33.

The privilege conferred by the section is a narrow one to be exercised most sparingly.[10] The Court has to determine, when the witness is in the witness box, as to whether he is entitled to claim the privilege with respect to certain communications or whether the privilege cannot be claimed therefor. If privilege is properly claimed, no hostile inference under Article 129 can be made against him. If he claims privilege improperly the Court must compel him to answer the question that is put to him.[11] The following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State; (*a*) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (*b*) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State.[12] Therefore before deciding as to whether a person can rightly claim privilege under this Article two points arise for consideration by Court, *viz.*, whether the document from which the information is to be given is on a matter relating to affairs of the State and whether the disclosure would be against public interest.[13] If the answer to these questions is in affirmative the Court has to admit the claim of privilege otherwise not.[14]

Questions infringing privilege may be forbidden. The questions which a witness is not permitted by Arts. 6 and 9 to answer might properly be forbidden by the Court from being put at all. In this they differ from questions referred to under Arts. 4, 7 and 8. In these cases the witness is not compellable and may refuse to answer the questions without any adverse inference being drawn but the Court cannot forbid those questions. At the most it can enlighten the witness about his rights when it thinks he is ignorant of them.[15]

Malice does not destroy privilege. When *prima facie* a document is privileged, proof of malice will not take away that privilege.[16]

Civil Procedure Code, does not override provisions of this Article. Articles 6 and 158 being a special law, the general provision of law contained in sub-rule (2) of rule 19 of Order 11, Civil P.C. cannot abrogate the special law.[17]

'Res judicata' on question of privilege. Where a plea of privilege has been unheld by one Bench of the High Court another Bench would not be justified in refusing to give effect to it, and in reopening the question.[18]

Writ of 'certiorari'. Where the application is for a writ of certiorari to bring up the proceedings terminating in an order removing the applicant from service, the

10. AIR 1931 P.C. 254+AIR 1933 Lah. 157 (Should not be claimed unnecessarily)+AIR 1951 Bom. 72 (DB).
11. PLD 1951 F.C. 15=1951 FCR 43=3 DLR 172.
12. AIR 1961 SC 493.
13. AIR 1954 Bhopal 9=1954 Cr.L.J. 602.
14. PLD 1969 Lah. 908=22 DLR W.P. 57=PLR 1969 (2) W.P. 298.
15. 12 Cr.L.J. 277 (Low Bur).
16. 27 Bom. 189.
17. 1957 Cr.L.J. 134 (Madh-B)+AIR 1960 Pat. 192.
18. PLD 1968 Lah. 667 (DB).

tendency of the Criminal Courts is to exclude the privilege in criminal trials where it directly tends to thwart an accused from defending himself in respect of the incriminating material that may be brought against him, or indirectly obstruct him from presenting evidence as may be intended to further a point that is going to be raised in defence of the charges. Unless the accused has a full opportunity to defend himself, the trial can only be a farce and would suffer from an inherent vice, that may vitiate the whole proceedings. Truth and justice are the twin pillars on which the infrastructure of this mighty Islamic State of Pakistan rests and justice in a criminal trial cannot be allowed to be sacrificed at the alter of a concept which can only erode the fair determination of a cause, instead of supporting it.[9]

Privilege not challenged by defence. Where privilege claimed by Home Secretary was not challenged by defence. The privilege was deemed to have been conceded.[10]

11. Secondary evidence of privileged document. If a document cannot on principles of public policy be read in evidence, the effect will be the same as if it is not in existence, and parole evidence cannot be given to prove its contents.[11] Therefore secondary evidence of document falling under the section cannot be given.[12] Where a complaint is based on some official communication, oral or in writing falling within the scope of Art.6 and there is no likelihood of proving the communication by primary or direct evidence, the Magistrate is justified in dismissing the complaint under section 203, Criminal P.C.[13] The Court has no power to order a person who has appeared on behalf of his department to act contrary to the directions of the Head of his Department and give evidence regarding any matter to which the document may relate.[14]

Copies of privileged documents. If the original of the document is privileged, that privilege cannot be got over by litigants surreptitiously getting hold of copies of the document and asking the Court to look at the secondary evidence of the documents.[15]

12. Adverse inference against State from non-production. If a witness is not to claim privilege with respect to a certain communication he must be compelled to answer the question put to him. If he unjustifiably refuses to answer he should be compelled to do so. The Court has to determine, when the witness is in the witness box, as to whether he is entitled to claim privilege with respect to certain communications or whether privilege cannot be claimed therefor. If privilege is properly claimed, no hostile inference under Art. 19, III(*b*) can be made against him.

9 PLD 1992 SC 492=PLJ 1992 SC 305=NLR 1992 SCJ 606.
10 PLD 1968 Lah. 667=PLR 1969 (1) W.P. 32 (DB).
11 AIR 1932 Cal. 468=33 Cr.L.J. 599 (DB)+AIR 1958 Cal. 440 (DB).
12 27 Bom. 189=11 Cr.L.J. 205 (DB) (Lah).
13 11 Cr.L.J. 205 (DB) (Lah).
14 AIR 1944 Lah. 434=ILR 1945 Lah. 219.
15 PLD 1969 Lah. 908=22 DLR W.P. 57 (DB)+AIR 1951 Bom. 72 (DB).

if he claims privilege improperly the Court must compel him to answer the question that is put to him.[16]

Documentary evidence not produced. Where privilege was claimed by a person not entitled to do so and consequently documents had not been produced before the Court and there was no indication also as to why the privilege was claimed or what affair of State was involved in the document, an adverse inference was drawn against the prosecution.[17] Where the file concerning the detention of the accused was sent to the Court but it was contended that only the Court was to see the file and it was not to be shown to the defence counsel. It was held that it is the duty of all the parties concerned to acquaint the Court with all the facts which are within their respective knowledge, and if the court arrives at the conclusion that any party is withholding or suppressing any evidence which it is not in law entitled to withhold, then it shall have to bear the consequences of doing so.[18]

Claim allowed by Court. Once the claim for privilege in respect of a document is allowed, no adverse inference should be drawn against the party from its non-production whether the privilege was claimed by the party himself or by a third party.[19] It follows that when unpublished official records relating to affairs of the State are necessary for the defence of the accused but being privileged the court does not order their production, the accused cannot claim that an adverse inference should be drawn against the prosecution and he should be acquitted on that ground.[20]

7. *Official communications.* No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Explanation. In this Article, "communication" includes communications concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Provincial Government or any statutory body or corporation or company set up or controlled by such Government.

Evidence Act, 1872. This Article corresponds to section 124 of the Evidence Act reproduced below.

124. *Official communications.* No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Synopsis

1. Scope.
2. Public officer.
3. Communication made in official capacity.

16 PLD 1951 F.C. 15=1951 FCR 43=3 DLR 172.
17 AIR 1945 Lah. 293=47 Cr.L.J. 277.
18 PLD 1954 Pesh. 20 (DB).
19 PLD 1969 Lah. 985 (DB)+PLD 1988 Lah. 728 (DB)+AIR 1914-Cal. 396 (SB).
20 AIR 1961 Punj. 215.

not the communication was made to the witness that it is for official confidence and thereafter to inform the witness that it is for him to decide whether he will disclose the matter, and that he cannot be compelled to disclose it if in his opinion, such a disclosure would injure the public interest.[3]

7. Who may claim privilege. A claim of privilege is usually made by the officer to whom a communication is made, but where a communication is made to a particular officer but he forwards it to another officer for further action, the communication should be held to have been addressed to the latter officer for the purpose of, and an affidavit from that officer to the effect that public interest would suffer by its disclosure should be taken as sufficient to support a claim of privilege.[4]

8. Failure to claim privilege--effect. Art.7 is applicable only when a public officer who is asked to produce communications or official documents claims privilege on the ground that public interests would suffer if such documents were disclosed.[5] Where the official concerned has not directly claimed any protection under Art.7 nor is the Court informed that the disclosure of the documents called for, would affect public interest, no foundation is laid for claiming the privilege in question.[6] Therefore where copies of documents had been filed in the lower Court apparently without any objection that they are privileged documents under Art.7 which should not be admitted in evidence, it cannot be claimed subsequently that they are communications made in official confidence.[7]

8. *Information as to commission of offences.* No Magistrate or Police-officer shall be compelled to say where he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation. In this Article; "Revenue-officer" means any officer employed in or about the business of any branch of the public revenue.

Evidence Act, 1872. This Article is a reproduction of section 125 of the Act.

Synopsis

1. Scope.
2. Non-disclosure of source by police.
3. Privilege of prosecution witnesses.
4. Duty of Court.

1. Scope. It is absolutely essential for the welfare of the State that the names of spies, decoys or informers should not be divulged; for otherwise, be it from fear, or shame, or the dislike of being mixed up in inquiries of this nature, few men would

3. PLR 1959 (1) W.P. 1 (SC).
4. AIR 1963 Orissa 111.
5. PLD 1954 Bal. 1=6 DLR W.P. (Bal) 162.
6. AIR 1960 Mys. 186.
7. AIR 1923 Mad. 332.

choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that a great many crimes would pass unpunished.[8] Therefore, under Art. 8, prosecution is not bound to disclose the source of information as to the commission of the offence.[9]

Statement of disclosed informant. Art.8 rests upon public policy. It protects the name of a spy or secret informant, but not the nature of the information. And it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.[10]

Gambling. The rule embodies in Art. 8 is clearly applicable to gambling cases. A mere suggestion that the complaint would show that the house raided was not the one referred to in the complaint was held not sufficient to justify any departure from that rule and the Magistrate was held perfectly right in refusing to order the production of the complaint.[11] It is not improper for a police officer to refuse to produce a complaint which is demanded for ascertaining an informer's name; such refusal is privileged under this Article.[12]

Documents and objects. The Article contemplates only the prohibition of the source from whom the Magistrate or the Police Officer got information as to the commission of an offence and not as to the custody of any documents or other material objects, that might have been seized in the course of investigation and that might be tendered in evidence to prove the commission of the offence.[13] But when a document is in fact privileged no adverse inference can be drawn from its non-production. This rule applies as regards the party claiming the privilege. A *fortoiri* where privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege.[14]

2. Non-disclosure of source by police. Art. 8 entitles a police officer to refus to disclose the source of his information as to the commission of any offence whil public policy demands that no adverse inference be drawn against the prosecution fo withholding an informer from the witness box.[15] But that does not mean that a polic officer cannot disclose the name of an informant. There is no reason why a investigating police officer should not indicate the source of his information c which he takes action and arrests the accused. It is sometimes of assistance to t Court to know what the source is.[16]

3. Privilege of prosecution witnesses. In criminal prosecutions, witnesses prosecution are privileged from disclosing the channel through which they receiv

8. AIR 1959 All. 727=1959 Cr.L.J. 1274+AIR 1960 Pat. 582.
9. 1998 P. Cr. L.J. 1821 (DB) (FSC).
10. AIR 1914 Sind 45=16 Cr.L.J. 447 (DB).
11. AIR 1914 Sind 45=16 Cr.L.J. 447 (DB).
12. AIR 1917 Sind 43=18 Cr.L.J. 70 (DB) (Case under Bombay Prevention of Gambling Act, S.
13. AIR 1954 Mad. 1023=1954 Cr. L. J. 1624.
14. AIR 1914 Cal. 396 (SB).
15. PLD 1969 Dacca 339=21 DLR 503 (DB)+AIR 1959 All. 727.
16. AIR 1941 Oudh 130=42 Cr. L.J. 165 (DB).

or communicated information. But the privilege does not extend beyond the right to keep back the names of their informants. Thus a detective cannot refuse on ground of public policy to answer a question as to where he was secreted.[17]

4. Duty of Court. Though this section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule, show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the Judge, apart from objection taken, to exclude the evidence.[18]

9. *Professional communications*. No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this Article shall protect from disclosure--

(1) any such communication made in furtherance of any illegal purpose; or

(2) any fact observed by any advocate, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client.

Explanation. The obligation stated in this Article continues after the employment has ceased.

Illustrations

(*a*) *A*, a client says to *B*, an advocate "I wish to obtain possession of property by the use of forged deed on which I request you to sue".

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*b*) *A*, being charged with embezzlement, retains *B*, an advocate, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A's* account book charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

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17 AIR 1916 Cal. 188=16 Cr. L.J. 497 (DB).
18 AIR 1914 Cal. 396 (SB).

This being committed since the commencement of the proceedings it is not protected from disclosure.

Evidence Act, 1872. This Article is a reproduction of section 126 of the Evidence Act with exception of illustration (a) of the Act, which has been deleted.

Synopsis

1. Scope and object.
2. Privileged communications.
3. Unprivileged communications.
4. Extent of privilege.
5. Facts observed by Counsel during his employment.
6. Explanation.
7. Waiver.

1. Scope and object. The protection granted by this section is absolutely necessary for the administration of justice because if the privilege did not exist a man would not cousult any skilled person or would only dare to tell his counsel half his case. It is absolutely necessary that a man in order to have assistance of professional man to defend his case, should be able to place unrestricted and unbounded confidence in the professional person and that the communication he so makes to him should be kept secret. The section has been enacted for the protection of the client and not of the lawyer. The latter is therefore bound to claim privilege unless it is waived by his client expressly under Art. 9 or impliedly under Art. 11.[19]

Art. 9 makes all communications between professional advisers, and their clients confidential; and it is only with the clients express consent, that such a person may disclose any communication made to him in the course and for the purpose of his employment. The proviso to this section rightly provides, however, that the protection of the section will not extend to any communications made in furtherance of an illegal purpose, or to any fact showing that a crime or fraud has been committed since the commencement of the employment. It is remarkable that the obligation laid down in this Article continues even after the employment has ceased.[20] The Article prohibits disclosure by an advocate of the advice given by another advocate also.[1]

Production of document by counsel under compulsion. The power of the Court to make an order under sub-section (1) of section 94, Cr.P.C. is not limited by the provisions of Art. 9 but the discretion under sub-section (1) of section 94, Cr.P.C. is a judicial discretion and it should not ordinarily be exercised in such a way as to conflict with the privilege against disclosure conferred by Art. 9.[2]

Doctor. The section gives protection to an advocate with regard to communications made to him in the course of his employment as such by a client. There is no protection afforded by the Act to a doctor as such.[3]

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19. AIR 1954 Mad. 741=1954 Cr.L.J. 1239.
20. 1993 CLC 747 (DB)+AIR 1954 Raj. 241=1954 Cr.L.J. 1591.
1. AIR 1925 Bom. 1 (FB).
2. AIR 1940 Bom. 361+AIR 1962 Guj. 290.
3. AIR 1933 All. 56.

record with the express consent of the client. Art. 9 was not applicable to the case and a counsel may be examined in Court about the contents of the document or matters connected with it.[17]

The consent of the client must be express. A failure on the part of a client to claim privilege when he is under cross-examination does not amount to "express consent" given by him to his legal adviser to disclose a communication which is otherwise privileged under the section.[18]

Counsel engaged by two parties. A legal practitioner engaged by two parties cannot make disclosures in proceedings between a third party and one client without consent of both clients, though as between them there can be no secrecy.[19]

10. *Article 9 to apply to interpreters, etc.* The provisions of Article 9 shall apply to interpreters, and the clerks or servants of Advocate.

Evidence Act, 1872. This Article is a reproduction of S. 127 of the Act.

1. Scope. Article 10 extends to a communication made to a pleader's clerk the same confidential character which attaches to be communicated by client to the pleader direct under Article 9.[20]

11. *Privilege not waived by volunteering evidence.* If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Art. 9 and, if any party to a suit or proceeding calls any such Advocate as a witness, he shall be deemed to have consented to such disclosure only if he questions such Advocate on matters which, but for such question, he would not be at liberty to disclose.

Evidence Act, 1872. This Article is a reproduction of section 128 of the Act.

12. *Confidential communications with legal advisers.* No one shall be compelled to disclose to the Court, tribunal or other authority exercising judicial or *quasi*-judicial powers or jurisdiction any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

16. AIR 1963 All. 157+16 Cal. W.N. 742 (DB) (If given evidence inadmissible).
17. PLD 1963 SC 51=1963 (1) PSCR 356=15 DLR SC 9.
18. AIR 1933 Sind 47=34 Cr.L.J. 562 (DB).
19. AIR 1925 Bom. 1 (FB).
20. 26 Cal. 53 (DB).

Evidence Act, 1872. Corresponding section of the Act reads as follows.

129. *Confidential communications with legal advisers.* No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Synopsis

1. Scope.
2. Statements made to legal advisers.
3. Communications between person other than clients and counsel.
4. Person appearing as his own witness.

1. Scope. The rule of protection contained in the sections seems to be one which should be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise and disclosures made under Art. 12 should not be enforced in any case except where they are plainly necessary. Communications with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to. Moreover a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point that it would lead to frequent falsehoods as to what had really taken place.[1]

Tribunal or other judicial authority. Protection granted by Evidence Act to confidential communications between counsel and his client from disclosure in Court has been extended by Qanun-e-Shahadat Order to tribunals and other authorities exercising judicial or *quasi*-judicial powers. In this respect the Order has enlarged the scope of the provision in the Evidence Act, 1872.

2. Statements made to legal advisers. Statements laid by a client before his counsel for the purpose of obtaining legal advice are privileged.[2] Notes of evidence of a party's witness obtained by his counsel for preparing his brief are privileged. The opposite party cannot claim production of such notes.[3] Similarly statements of witnesses recorded for special purpose of being shown to a legal adviser to see whether there is a good case to go to Court are privileged under Art. 12.[4]

3. Communications between persons other than clients and counsel. The documents for which privilege can be claimed would be those only which are in the nature of communications between lay clients and their professional legal advisers. No privilege can attach in law to the statement made by a party's servant with reference to the subject-matter of the suit to the master.[5] Similarly confidential

1. 4 Bom. 576.
2. 4 Bom. 576.
3. AIR 1916 P.C. 157.
4. AIR 1918 Nag. 77.
5. AIR 1927 Bom. 367.

communications between the principal and his agent relating to matters in a suit are not privileged. They must be confidential communications with a professional adviser to render them privileged.[6]

Communications between a witness and his legal adviser are not privileged but the Court should not ordinarily question the witness on what passed between the two. Where the Court permitted a witness to consult her counsel regarding the advisability of producing a document before the Court. The consultation lasted about fifteen minutes and after that the document was brought on the record. The Judge thereupon called both the client and the counsel to the witness box and examined them regarding their conversation. It was held that the Judge did not appear to have acted beyond the scope of his powers in examining the lady and her counsel to find out what had passed between them before they decided to produce the document in question. The proceedings may have been unusual, but there was nothing unjudicial about it, for the possibility of a witness being advised as to the evidence he is to give, and the nature of such advice, if any, are matters of great importance to a Court in evaluating evidence led before it.[7]

4. Person appearing as his own witness. If a party becomes a witness of his own accord, he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony.[8]

13. *Production of title-deed of witness, not a party.* No witness who is not a party to a suit shall be compelled to produce his title deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Evidence Act, 1872. This Article is exact reproduction of section 130 of the Act.

1. Scope. A witness cannot be compelled to produce his title deeds even though he may have them with him in the Court. No proceedings under sections 175 and 204, P.P.C. can be maintained against him for disobedience of the order to produce them,[9] but if he does not produce them the party summoning him may use certified copy as secondary evidence. Failure to pay process-fee for the issue of a warrant for production of the original document does not deprive him of his right to use a certified copy as secondary evidence.[10]

6. 2 Bom. 453 (DB).
7. PLD 1963 SC 51=1963 (1) PSCR 356=15 DLR (SC) 9.
8. 4 Bom. 576.
9. 12 Cr.L.J. 450 (Cal.).
10. 15 Cr.L.J. 7 (DB).

possession, could refuse produce documents in his possession, which any other person entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Evidence Act, 1872. This Article is exact reproduction of section 131 of the Act.

15. *Witness not excused from answering on ground that answer will criminate.* A witness shall not be excused from answering any question as to any matter relevant to the matter-in-issue in any suit or in any civil or criminal proceedings, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso. Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Evidence Act, 1872. This Article is exact reproduction of section 132 of the Act.

Synopsis

1. Scope.
2. Privilege of witness.
3. Defamatory answers given by witness.
4. Prosecution for perjury by witness.
5. Taking thumb impression.
6. "Shall be compelled to give."
7. Court witness.

1. Scope. The protection offered by proviso to Art. 15 does not cover any and every answer given by a witness during the course of his trial.[11] A witness has no privilege beyond the immunity conferred by Art. 15 but even if he has any, that privilege cannot be claimed and allowed before he takes his stand, and before the question, whether incriminatory or otherwise, is considered by the Court in the light of surrounding circumstances. It has to be remembered that the privilege is in the nature of a prohibition against involuntary subjection to questions. The emphasis is on compulsory disclosure of guilt by an accused in a criminal matter and the right does not extend to a proceeding which does not involve punishment for the commission of a crime.[12]

11. AIR 1929 Mad. 236=30 Cr.L.J. 613.
12. AIR 1962 Punj. 101.

Irrelevant questions. The Article does not deal with all criminatory questions which may be addressed to a witness, but only with questions relevant to the matter-in-issue. It may be implied from the limitation in the Article that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant.[13]

Questions must be asked during trial. Art. 15 would relate only to witness and would apply to examination of witness in Court or on commission. Such witness could not refuse to answer question relating to any matter which was relevant to any fact in issue in suit.[14] The Article, obviously applies only to questions asked in the course of trial. Where a Magistrate believing that the complainant had given false evidence in the course of the trial, had his thumb impression taken out of Court for the purpose of identifying him in a further prosecution under S. 193, Penal Code. It was held that Art. 15 had no application as the thumb impression was not taken during the trial; in fact it was taken with view to the possibility of a subsequent trial.[15]

Article 15 does not apply to a statement made by a person during an investigation under S. 161, Cr.P.C. An investigation under Ch. 14, Cr.P.C. may be proceeding but is certainly no suit or a civil or criminal proceeding. So defamatory statements made by a person in answer to interrogatories during investigation under S. 161 are not protected under Article 15.[16]

Divorce cases. Where there are special and distinct provisions as those contained in Ss. 51 and 52 of the Divorce Act which in all other respects are in full force, Article 15 cannot be treated and repealing them.[17]

2. Privilege of witness. A witness enjoys absolute privilege as the ultimate object of dispensing justice may rest on his testimony which in all probability must convey truth relating to the inquiry. Placing any fetters on witness may detain him from deposing truth or at least all that he knows about the point in issue and the same might misdirect the course of justice. Even alternate case of giving qualified privilege to witness's statement had to be confined to his deposition.[18]

Statement against co-accused. Article 15 affords sufficient protection to an accused to give evidence against his co-accused if compelled to do so and therefore he cannot be excused from appearing in the witness box.[19] An accused who had been jointly charged with another but whose case has been separated before the trial commenced, so that he could be examined as witness in the case of the other accused, cannot be denied the benefit of the proviso to Article 15. He is as much a witness as any other, because he is not an accused person in that case within the meaning of S.342, Criminal Procedure Code. When an oath could be administered to such a

13. 3 Mad. 271 (FB).
14. PLD 1997 Kar. 41=PLJ 1997 Kar. 263=1997 Law Notes (Kar) 37.
15. 39 Cal. 348=13 Cr.L.J. 173 (DB).
16. AIR 1960 All. 623.
17. 4 All. 49.
18. PLD 1993 Lah. 509.
19. AIR 1924 Lah. 247=24 Cr.L.J. 633.

person, naturally the incidents of Art. 15 will also attach themselves to such a person as witness.[20] In other words an accomplice, if compelled to answer incriminating questions by the Court, cannot be prosecuted for those answers and can claim protection under Art. 15 though he may be prosecuted on the strength of any other evidence available.[1]

Witness made accused after his evidence. Where oath is administered to prosecution witnesses and their evidence is taken and they are subsequently made accused persons in the case, there is no violation of the terms of section 342, Criminal P.C., as, when the oath was administered to them, they were not accused, and their evidence was admissible. Having been subsequently made accused persons, their evidence cannot, of course, be used against them.[2] The reason for this protection is that it is repugnant to all principles of criminal law as administered in this country to compel a person to give evidence in the very matter in which he is an accused or is liable to be made an accused person, and then to base the charge on such evidence, and at the trial of the accused to use such evidence 'given on oath' as a statement tending to prove the guilt of the accused.[3]

Person appearing as his own witness. Parties, as a mark of a fairplay, are expected to appear as their own witnesses so that opposite party has opportunity to cross-examine them. If parties do not like to enter into witness-box for evidence they cannot be forced for that purpose and a party not appearing for Examination-in-Chief as his own witness, would not be under obligation to tender himself for cross-examination by opposite party.[4] If a person volunteers to be his own witness, he can only claim such rights as fall within the ambit of the proviso to Art. 15. Such answers as a witness is compelled to give cannot be proved against him in any criminal proceeding, but they may not save him from a prosecution for perjury.[5]

Person questioned during investigation. A person who is interrogated under section 161, Cr.P.C. by a police officer making an investigation is not a witness. The word "witness" used in Art. 15 does not refer to any interrogatee examined by a police officer under section 161, Cr.P.C.; it refers only to a person who enters the witness-box and is sworn as a witness.[6]

3. Defamatory answers given by witness. Witness enjoys absolute privilege as the ultimate object of dispensing justice may rest on his testimony which in all probability must convey truth relating to the inquiry. Placing any fetters on witness may detain him from deposing truth or at least all that he knows about the point in issue and the same might misdirect the course of justice. Even alternate case of giving qualified privilege to witness's statement has to be confined to his deposition.

20. AIR 1957 Mad. 727=ILR 1957 Mad. 715=1957 Cr.L.J. 1287.
1. AIR 1935 Bom. 186=36 Cr.L.J. 937 (DB).
2. AIR 1947 Pat. 284=25 Pat. 539 (DB).
3. AIR 1926 Bom. 144=27 Cr.L.J. 433.
4. PLD 1990 Pesh. 100 (DB).
5. AIR 1962 Punj. 101 (Director of company appearing as his own witness in proceedings under section 185, Companies Act--Rights are those of witness).
6. AIR 1960 All. 623.