Singapore Journal of Legal Studies
[1995] 558 – 596

HISTORY AND JUDICIAL THEORIES OF LEGAL PROFESSIONAL PRIVILEGE

This article is partly historical and partly theoretical. The first part traces the history of legal professional privilege as applied in the common law and chancery courts from the sixteenth to the middle of the nineteenth century. It shows that the manner in which the purpose and role of the privilege were conceptualized had an impact on the evolution of the rule. The many judicial theories identified in the historical account are assessed at the broader level in the second part. Of all the different justifications, the privilege, it is argued, is best seen as a principle of process fairness.

I. INTRODUCTION

A lawyer owes a duty to his client not to disclose communication made between them in the course and for the purpose of employment. This is not just a precept of professional ethics;[1] the duty is imposed as well by both the substantive law[2] and by the adjectival law of evidence.[3] The present concern is with the last. Related to the lawyer's evidential duty, which, one should add, the client has the power to enforce, is the client's evidential right not to disclose confidential communication with his lawyer.[4] All of these – the duty, the power and the right – make up what is known as "legal professional privilege".[5]

1 On which, see item no 26(a), Ch 1, *Practice Directions and Rulings* (1989). For a thought-provoking conspectus of ethical theories, see Andrew Phang, "Utility, Rights, and Relativity: A Preliminary Look at Lawyers in Hard Cases" (1993) 14 Sing LR 248.

2 *Eg*, the law of contract: *Taylor* v *Blacklow* (1836) 3 Bing (NC) 235.

3 S 128(1), Evidence Act (Cap 97, 1990 Rev Ed).

4 S 131, Evidence Act, *supra*, note 3. As will be seen, at common law, the client's right was recognised much later than the lawyer's duty.

5 Generally, see YL Tan, *The Law of Advocates and Solicitors in Singapore and Malaysia* (1991) Ch 7. The privilege has recently been extended to patent agents: ss 95 and 96, The Patents Act 1994, Cap 21/94. In this article, reference to "legal professional privilege" will not include the related privilege protecting communication between the lawyer or his client with a third party for the purpose of litigation ('litigation privilege'). The seed of the litigation privilege was sowed relatively late in *Lonsdale* v *Heaton* (1830) You 58, at 77-78 and arguably its germination into a settled and distinct rule did not come about until after the drafting of our model, the Indian Evidence Act. It is not surprising therefore that the litigation privilege is not specifically provided for in the Evidence Act.

This article searches for the historical and theoretical foundations of the privilege. Part II investigates the roots of the privilege in an attempt to uncover the thoughts that shaped its early development. The history will be traced up to the middle of the nineteenth century, by which time, all of the major arguments for and against it have been raised and debated. An attempt will be made to relate shifts in the perception of the privilege to its evolution.

Following that historical account, Part III will take stock of and describe the many judicial theories identified in the earlier part and evaluate them at the broader theoretical level. Of the many bases on which judges have sought to justify the privilege, it will be argued that the conception of the privilege as a principle of process fairness and a corollary of other procedural rights and safeguards is the most attractive.

II. Historical Development of the Privilege and of its Rationale

Although the privilege found expression even in Roman times,[6] Roman law had hardly any influence on the development of the privilege in England.[7] In English law, the genesis of the privilege can be traced to the reign of Elizabeth the First.[8] While the privilege must obviously have grown out of a setting in which a witness is compellable to give evidence, it did not first emerged from the common law courts. Testimonial compulsion and

6 *Dig lib* 22, *tit* 5, *l* 25. See also: Radin, "The Privilege of Confidential Communication Between Lawyer and Client" (1928) 16 Cal L Rev 487, at 487-489; Greenleaf, *A Treatise on the Law of Evidence* (5th ed, 1850), vol 1, at 302, fn 1; Ullman, "Medieval Principles of Evidence" (1946) 62 LQR 77, at 81-82.

7 English law of evidence developed on native lines: Holdsworth, *A History of English Law* (3rd ed, 1944), vol IX, at 187; *R* v *Hill* (1851) 2 Den 254, at 260. As Morrison pointed out in "Some Features of the Roman and the English Law of Evidence" (1959) 33 Tulane LR 577, at 585, the Roman law did not always clearly distinguish competence, compellability and privilege. That distinction is one that English law stresses. Unlike Roman law, legal professional privilege at common law and in equity was not directly related to any supposed lack of credibility of the witness: Radin, *supra*, note 6, especially at 489; Greenleaf, *supra*, note 6. However, *cf*: Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (3rd ed, 1781), at 283-285 (privilege apparently treated as falling under general rule of incompetence of persons interested in the cause); *Annesley* v *Earl of Anglesea* (1743) 17 How St Tr 1139, at 1234-1235 (solicitor-general argued, somewhat along the Roman line, that an attorney who was wicked enough to betray, by testifying to, the secrets of his client should not be believed); *Pearse* v *Pearse* (1846) 1 De G & Sm 12, at 25-26 (Knight Bruce VC referred to the civil law and advanced the view that the privilege is "not a peculiar but a general rule of jurisprudence").

8 The earliest records appear to be: *Lee* v *Markham* (1569), *Windsor* v *Umberville* (1574) in C Monro, *Acta Cancellaria* (1847), at 375 and 411 respectively, cited by Jones, *The Elizabethan Court of Chancery* (1967), at 319, fn 2 and p 320, fn 3 respectively.

duty were recognized by the Chancery about two centuries before the common law[9] and the earliest reports of privilege claims concerned attempted examination before that court of subpoenaed solicitors, attornies and counsels.[10] The lack of report of cases on the privilege until the later half of the sixteenth century does not exclude the possibility of its recognition in equity before then since the reporting of Chancery cases was not practised until 1557.[11] On the other hand, common law authorities on the privilege did not surface until the seventeenth century even though its tradition of reporting goes back to the Year Books of the middle ages.

A. *The Sixteenth and Seventeenth Centuries*

1. *Equity cases*

Since the sixteenth century, counsellors,[12] solicitors[13] and attorneys,[14] although regarded as competent witnesses, may plead for exemption from compulsory examination upon matters which came to their knowledge while acting in those capacities.[15] Unfortunately, the reports do not reveal any thought on the rationale.

Cases of the seventeenth century[16] premised the privilege on the need to protect the client's secrets. The protection was not absolute. Lord Nottingham wrote in his Manual of Chancery Practice, which was compiled while he was Lord Keeper of the Great Seal from 1673 to 1675:

9 Wigmore, *Evidence in Trials at Common Law* (McNaughton Rev, 1961), vol 8, at 67-68; Holdsworth, *supra*, note 7, at 184-185.

10 See the equity cases of the 16th and 17th centuries discussed below and, generally, Jones, *supra*, note 8, at 317-320.

11 Maitland, *Equity and the Forms of Action at Common Law – Two Courses of Lectures* (1929 reprint), at 8.

12 *Creed* v *Trap* (1578-79) Choyce Cases 121; *Dennis* v *Codrington* (1579-80) Cary 100.

13 *Berd* v *Lovelace* (1576-77) Cary 62; *Austen* v *Vesey* (1577) Cary 63; *Hartford* v *Lee* (1577-78) Cary 62; *Kelway* v *Kelway* (1579-80) Cary 89.

14 *Cf Havers* v *Randoll* (1581) Choyce Cases 148.

15 The privilege was limited to such matters in *Berd* v *Lovelace*, *supra*, note 13; *Creed* v *Trap*, *supra*, note 12; *Kelway* v *Kelway*, *supra*, note 13. (I do not have access to two other sixteenth century decisions, *Bluett* v *Lancaster* and *Rawlighe* v *Alye*, referred to by Jones, *supra*, note 8, at 319, fn 6 and p 320, fn 1 respectively.)

16 Apart from the cases to follow, see *Legard* v *Foot* (1673) Rep Temp Finch 82; *Stanhope* v *Nott* 2 Swans 221, fn 9; *Spencer* v *Luttrell* (1674) I Nottingham's Chancery Cases, no 150, also referred to in 2 Swans 221, fn 9. In an essay published in 1612, a year before he became Attorney-General, Francis Bacon, perhaps reflecting the sentiments of his time, gave great value to confidence. He wrote: "The greatest trust between man and man is the trust of giving counsel." (*The Essays or Counsels, Civil and Moral of Francis Bacon* (Reynolds ed, 1890), at 147.)

> Though councellors and solicitors being entrusted with the secrets of their clients have thereby a privilege not to be examined as witnesses..., yet this rule is to be understood with these two limitations; first, if the secret came to their knowledge otherwise than as councellors or solicitors; or secondly, if the matter entrusted to their secrecy be scandalous and unfit for them to be trusted in, as the suppression or concealment or razure of a deed or will. In these cases, they are to be examined.[17]

It is unclear why the client's secrets were considered worthy of protection. According to Wigmore, the initial reason has more to do with the respect for the lawyer's honour as a gentleman not to violate the confidence entrusted to him than with the interest of the client in not suffering such violation.[18] This 'honour' reasoning was not explicitly articulated in the cases. It was however implicit in the court's description of the privilege as that of the bar.[19] The reasoning may also be detected in *Atterbury* v *Hawkins* where a scrivener's claim for privilege was dismissed because he "is not a civil confessor as a lawyer is nor to be so treated, but rather a person suspected in law as apt to make unlawful concealments."[20] One may infer from this that only those of the higher strata of the legal community were excused from being compelled to disclose their clients' trust because they were thought (by reason perhaps of their higher social position) less likely to abuse the court's indulgence.[21]

Even at this early stage, judges were aware of the need to take into account the interest of the party seeking disclosure. In *Stanhope* v *Nott*, counsel was ordered to disclose to whom he had delivered his client's deeds on the reasoning that, otherwise, "deeds having been played into the hands of a counsel might be suppressed, and the party injured left without remedy."[22]

[17] *Lord Nottingham's "Manual of Chancery Practice" and "Prolegomena of Chancery and Equity*" (Yale ed, 1965) title V, section 23. On the first limitation, see *Bulstrod* v *Letchmere* (1676) 2 Freeman 6; on the second, see *Rothwell* v *King* (1675) I Nottingham's Chancery Cases, no 68, also referred to at 2 Swans 221, fn 9.

[18] *Supra*, note 9, at 543.

[19] *Bulstrod* v *Letchmere*, *supra*, note 17.

[20] (1678) 2 Chan Cas 242, II Nottingham's Chancery Cases, no 663. Emphasis added *Cf Harvey* v *Clayton*, (1675) referred to in 2 Swans 221, fn 7, where a scrivener's claim of privilege was upheld; this was approved by Lord Abinger in the later case of *Turquand* v *Knight* (1836) 2 M & W 98, at 100. See also *Vaillant* v *Dodemead* (1743) 2 Atk 524 (privilege claimed by a clerk in court.)

[21] *Cf* counsel's argument, raised in subsequent proceedings in the same case, that the *client* has an interest in having the confidence protected as an extension of his legal right: (1678) 2 Chan Cas 242.

[22] *Supra*, note 16, at 222. See also *Rothwell* v *King*, *supra*, note 16.

2. *Common law cases*

While the privilege already had a strong foothold in equity by the seventeenth century, records of the privilege in common law trials surfaced only in the middle of that century. As in equity, at common law, the privilege did not protect from disclosure knowledge which was not gained by the lawyer from his client in his professional capacity.[23] The few cases that upheld the privilege vaguely associated it with the moral obligation to keep secrets.[24] In a case towards the end of that century,[25] the policy was more explicitly stated but reported differently. An attorney was called as a witness and examined on an agreement that he had drafted and on the transactions carried out under the agreement. According to one report,[26] Holt CJ refused to admit the attorney as a witness "because... he was privately intrusted by both parties, to make the bargain, and to keep it secret. And ... a trustee shall not be a witness, in order to betray a trust." This "trust" rationale differed from that adopted by the Chancery as common law apparently predicated the privilege on the client's (instead of the lawyer's) interest; it was acknowledged, in an earlier case, that if the client be willing, the Court will compel the counsel to discover what he knows.[27]

According to a different report,[28] the decision was based on the policy reasoning that if the evidence of a client's secrets 'should be admitted, it would be a manifest hinderance to all society, commerce and conversation.' This succinct statement evinces an utilitarianism not yet evident in equity cases. Instead of explaining the privilege by reference to an abhorrence of the betrayal of trust, it was justified instead on the larger benefits (which were not amplified) that would accrue to society.[29]

[23] *Sparke* v *Middleton* (1664) 1 Keble 505; *Sir Richard Greenfields Case* (1642) March NR 82, at para 136; *Cuts* v *Pickering* (1673) 1 Ventris 197, 3 Chan Rep 66, Nelson 81.

[24] *Waldron and Ward* (1654) Style 450; *Cuts* v *Pickering*, *supra*, note 23.

[25] *Anonymus* (1694) LPR 556, referred to in Viner, *General Abridgment of Law and Equity* (2nd ed, 1792), vol XII, at 37-38; reported in (1694) 1 Ld Raym 733 and, in less detail, (1694) Skin 404.

[26] (1694) 1 Ld Raym 733.

[27] Dictum in *Lea* v *Wheatley* (1679), noted in *The Trial of the Duchess of Kingston Trial* (1776) 20 How St Tr 356, at 574. It may still be argued that this proposition does not detract from the theory that the privilege protects the lawyer's honour since where the client agrees to waive the privilege, there is no dishonour in the disclosure.

[28] (1694) LPR 556.

[29] The legal literature of this period, unfortunately, does not shed much light on the policy. It is written in Coke's *Commentary upon Littleton*, which first appeared in 1628: "[A] man ... cannot be challenged to be witnesse ... though the witnesse be ... *of counsell* ... to either partie ... but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact...." (*Co Lit 6 b.* Emphasis added.) This statement must be read as referring to the competence of witnesses; such was the interpretation of

B. *The Eighteenth Century*

1. *Equity cases*

By this century, the privilege had become "the known practice of all courts of law and equity."[30] The cases were not explicit on the rationale of the privilege. In equity, the view that the privilege belongs to and is thus waivable by the lawyer, although not universally held,[31] continued to have some force.[32]

An inherent tension[33] between the discovery process (which allows a party to compel his opponent to disclose his knowledge of material facts and to produce relevant documents) and the privilege (which protects against compulsion to disclose lawyer-client communication, despite its relevance to the dispute) was bound to surface and it did during this century, and, as we shall see, with greater conflict, in the next. In *Radcliffe* v *Fursman*,[34] the defendant raised a demurrer to a bill requiring him to set forth, inter alia, the case stated by him for the opinion of counsel and the opinion given by counsel thereon. What was significant was that the privilege was claimed against compulsion directed not at the lawyer but at the client. Lord Chancellor King overruled the demurrer as to setting forth the case stated for counsel's opinion but allowed it as to the counsel's opinion. On appeal to the House of Lords on the point that was overruled, one of the defendant's arguments was that the document was privileged. In particular, it was argued that the *client* must be entitled to claim privilege over his communication with his lawyer if the rule protecting the *lawyer* from being compelled to disclose professional communication is not to be eroded.[35] The plaintiff, on the other hand, argued that the matters sought to be discovered were relevant to the dispute and ought to be revealed in the interest of truth.

The House of Lords dismissed the appeal; no ground was reported. It may be that the privilege claim failed because of adherence to the honour or trust reasoning of the privilege. Since the person compelled to make the disclosure was not the lawyer but the client, questions of compromising

Viner (see *supra*, note 25, at 1, para A2 and at 37-38, para Ba). Then, as now, the lawyer is competent to testify in a cause involving his client; he is merely excused from testifying on matters protected by the privilege. See *eg*, *Wisden* v *Wisden* (1849) 6 Hare 549.

30 *Radcliffe* v *Fursman* (1730) II Brown 514, at 516-517.

31 See the argument in *Radcliffe* v *Fursman*, *supra*, note 30, at 517.

32 *Maddox* v *Maddox* (1747) 1 Ves Sen 61. According to Lord Chancellor Eldon in *Earl of Cholmondeley* v *Lord Clinton* (1815) 19 Ves Jun 261, at 267-8, Sir John Strange was of the same opinion in *The Bishop of Winchester* v *Bernard Fournier* (1752) 2 Ves Sen 446.

33 Noted by many judges, *eg*, Lord Langdale in *Flight* v *Robinson* (1844) 8 Beav 22, at 34-37.

34 *Supra*, note 30.

professional integrity and of the violation of trust reposed in the lawyer did not arise.[36] One may take issue with this interpretation since, by parity of reasoning, the client should be compellable to disclose counsel's opinion as well and the court at first instant had held that he was not. (Indeed, if he is, the lawyer's right not to disclose (without his client's consent) would be virtually meaningless as it can always be circumvented by extracting the privileged information from the client.) A better explanation of the decision is that the court had treated the client's right to personally assert the privilege as parasitic of the lawyer's right not to disclose privileged matters.[37] Arguably, the latter's right would be breached if the client were to be ordered to disclose his lawyer's opinion but not if he were to be ordered to disclose his own statement.

2. *Common law cases*

The development of the privilege at common law gained substantial momentum during this period. There were attempts at rationalisation that rested on a few decipherable lines of thoughts, the distinctions amongst which were not appreciated in the cases, which sometimes run them together.

i) *Trust and confidence*

According to the first, "[i]t is contrary to the Policy of the Law to permit any Person to betray a Secret with which the Law has intrusted him."[38] Given the recognition that the privilege serves to protect trust and confidence, it is not surprising that the privilege was denied where the evidence that was sought to be adduced from the lawyer was not of knowledge that the client had acquainted him confidentially so that its disclosure would not violate any trust reposed in him.[39] This rationale was prevalent in the cases and was frequently espoused in academic treatises of the eighteenth century.[40]

[35] *Ibid*, at 517.

[36] See generally, Morgan, foreword to the *Model Code of Evidence as Adopted and Promulgated by the American Law Institute* (1942), at 25 and "Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence" (1942-43) 10 U of Chicago LR 285, at 288.

[37] This treatment is more explicit in a case decided in the next century: *Manser* v *Dix* (1855) 1 K & J 451, at 460.

[38] Buller, *supra*, note 7, at 284, citing *Lindsay* v *Talbot* (1724) Oct Str 140. To similar effect are counsels' arguments in *Lord Say and Seal's case* (1712) 10 Mod 40, at 41 and *Cobden* v *Kendrick* (1791) 4 TR 431, at 432.

[39] *Lord Say and Seal's case*, note 38; *Doe* v *Andrew* (1778) 2 Cowp 845; *Duffin* v *Smith* (1792) Peake 146. See also Buller, *supra*, note 7, at 284-285 but *cf R* v *Watkinson* (1740) 2 Strange 1122.

However, it provided an inadequate foundation for the privilege inasmuch as it was inconsistent with the position that the common law had taken (as early as in 1776), outside the context of lawyer-client communication, that trust, confidentiality and professional honour are not legitimate excuses, in themselves, for hiding evidence from judicial purview.[41] In *Wilson* v *Rastall*,[42] the court was forced to address that inconsistency. An attorney was in possession of certain letters with the consent of *H*, an agent of the defendant. At the trial, the attorney was asked to produce the letters but he objected on the basis that, although he was not, at any material time, acting for *H*,[43] the letters had been communicated to him confidentially. The objection was upheld at first instance but dismissed on appeal. The appeal judges expressed sympathy for the argument that confidential conversations between friends should be protected[44] but, in their view, the authorities[45] did not allow a privilege to be founded on confidence alone. Since there was no attorney-client relationship between the attorney and *H*, the evidence was held to have been wrongly excluded and the rule nisi for a new trial was made absolute.

If the purpose of the privilege is to protect trust and confidence, it should cover all confidential communications. That, as the judges in *Wilson* v *Rastall* accepted, was not the case and their unhappiness over this is symptomatic of their inability to differentiate lawyers from other confidants. To overcome this, as we shall see, judges came to justify the privilege on the peculiarity of legal representation.

[40] We find, *eg*, Blackstone stating this to be the law of his time: "[N]o counsel, attorney, or other person, *intrusted* with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of *privacy*, as came to his knowlege by virtue of such *trust and confidence*: but he may be examined as to mere matters of fact ... which might have come to his knowledge without being *intrusted* in the cause." (*Commentaries on the Laws of England* (1768), Book III, at 370. Emphasis added.) Similarly, see Buller, note 38.

[41] This was established in the celebrated case of *The Trial of the Duchess of Kingston* (1776) 20 How St Tr 355, at 572-573: a surgeon was compelled to give evidence of matters communicated to him confidentially and professionally.

[42] (1792) 4 TR 753.

[43] Strangely, it is also mentioned, but without explanation, in the report (*eg*, *ibid*, at 754) that the confidence was reposed in the attorney "professionally".

[44] *Ibid*, *per* Lord Kenyon at 1286 and Buller J at 1287. Grose J, *ibid*, at 1288, agreed with both.

[45] They fell into two groups. The first established that there was no general privilege over confidential communication (*The Trial of the Duchess of Kingston*, *supra*, note 41; *The Trial of William Lord Russell* (1683) 9 How St Tr 577). The second established that a lawyer's knowledge gained from his client otherwise than in his professional capacity was not

ii) *Candour and safety*

Some alternative rationales appeared in the well documented state trial of *Craig* v *Earl of Anglesea*.[46] The plaintiff complained that the defendant had wrongfully ejected him from his farm. The defendant had inherited the land in issue from his deceased brother who was thought to have died without heirs. The plaintiff alleged that his lessor, a certain *JA*, was in fact the long lost son of the deceased brother and, as such, had a superior title to the land. To prove this, the plaintiff proposed to examine an attorney. The attorney had acted for the defendant on several occasions over a number of years.[47] The testimony of the attorney was sought on two matters. The first was that the defendant had told him, several times before the last retainer and apparently over a period when the attorney was not acting for him,[48] that he (the defendant) was prepared to surrender title to *JA* and live in France if *JA* would make annual payments to him.[49] The second matter occupied most of the attention of the bench and bar. The defendant, it seemed, had changed his mind after receiving news of *JA*'s indictment for murder. He allegedly told the attorney, after he was retained to prosecute the murder charge, that he did not care if it cost him £10,000 if he could get *JA* hanged for he should then be easy in his title and estate.[50]

The defendant objected to the reception of the attorney's testimony. The court agreed that the privilege belonged to the client in that, without his consent, an attorney may not give evidence of their secret communication.[51] The objection was nonetheless overruled unanimously by the bench. The reasons were mainly three: First, the defendant did not make the material conversations to the attorney in a professional capacity, but as a friend.[52] The second reason (which was related to the first) was that the communications were not necessary for the carrying on of any suit or prosecution

privileged (*eg, Vaillant* v *Dodemead*, *supra*, note 20).

46 (1743) 17 How St Tr 1139 esp at 1223-1254; the issue of privilege was addressed by a total of eleven counsels. This trial lasted fifteen days before the Court of Exchequer in Ireland. It is discussed at length by Hazard, "[A] Historical Perspective on the Attorney-Client Privilege" (1978) 66 Cal LR 1061, at 1073-1080 and Friedman, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds" (1986) 64 NCL Rev 443, at 446-450. This case is more popularly known as *Annesley* v *Earl of Anglesea*; that name, however, mis-identifies the plaintiff.

47 *Supra*, note 46, at 1226-1227.

48 *Ibid*, at 1228 and 1237; *cf* at 1227-1228.

49 *Ibid*, at 1224 and 1245.

50 *Ibid*, at 1224 and 1245.

51 Lord Chief Baron Bowes, *ibid*, at 1239 and Baron Mounteney, *ibid*, at 1242. See also the speech of the Solicitor-General, *ibid*, at 1235.

52 Lord Chief Baron Bowes, *ibid*, at 1239-40; Baron Dawson, *ibid*, at 1244. See also the

in which the attorney was retained.[53] Thirdly, a "wicked secret", in any event, should not be concealed.[54]

Although semblance of the early honour rationale still appeared in the arguments,[55] it was much derogated by the court's recognition that the privilege was that of the client. The privilege was seen as protecting his interest rather than protecting his lawyer's honour.[56] Neither was the Court prepared to ground the privilege simply on the sanctity of trust and confidence (although these values were often mentioned in the arguments and judgments)[57] for the fact that the defendant had confided in the attorney as an acquaintance (and not for the purpose of legal employment) was held insufficient to invoke the privilege. Instead, the privilege was related to the necessity of legal representation. As a counsel for the defendant argued, the privilege is required for effective legal assistance in that it encourages full and candid disclosure from the client.[58] Baron Mounteney expressed a similar view but his emphasis was on safety in legal consultation:

> [A]n increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ ... other persons who might transact that business for them .... [T]his necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it *safe* for clients to communicate to their attornies all proper instruction for carrying on those causes which they found themselves under a necessity of intrusting to their care.[59]

These two reasonings, the first that the privilege promotes candour and the second that the privilege ensures safety in legal recourse, dominated the cases to come. They were not carefully differentiated as both grew from the recognition that legal assistance is a necessity and the distinction

argument of Mr Harward, counsel, *ibid*, at 1233.

53 Baron Mounteney, *ibid*, at 1241 and 1242; Baron Dawson, *ibid*, at 1244. See also the arguments of: Serj. Tisdall, *ibid*, at 1229-1230; Mr Walsh, *ibid*, at 1230; Mr Harward, *ibid*, at 1232; the solicitor-general, *ibid*, at 1235.

54 Lord Chief Baron Bowes, *ibid*, at 1240; Baron Mounteney, *ibid*, at 1243. See the arguments of Serj. Marshall, *ibid*, at 1226; Serj. Tisdall, *ibid*, at 1229; Mr Harward, *ibid*, at 1232.

55 For example, that of Mr Daly, counsel for the defendant, *ibid*, at 1224.

56 As a counsel for the defendant so caustically remarked: "...it is absolutely necessary to extend this privilege to the client, and not restrict it entirely to the solicitor, especially as there may be some of that profession, who cannot be supposed to be actuated by such principles of honour and virtue, as an office of so great confidence requires; I mean the person now produced to be a witness for the plaintiff." (*Ibid*, at 1224.)

57 *Ibid*, at 1232, 1236-1237, 1239-1240 and 1244.

58 *Ibid*, at 1237.

between means and end was not kept firmly in mind. Safety in legal consultation could be conceptualised both as a means to induce the client's confidence as well as an objective in itself.

iii) *Alter-ego*

In *Craig* v *Earl of Anglesea* can be found yet another attempt at rationalisation of the privilege, one that is rooted in the idea that the lawyer is, so to speak, his client's alter-ego. On this theory, the privilege is a reflection of the unification of their legal personalities: evidence cannot be obtained from the client indirectly through his lawyer; it must be remembered that until the middle of the next century, the parties themselves could not give evidence at a common law trial.[60] The alter-ego theory is not precisely propounded but traces of it can be found (mixed with other rationales) in both the arguments[61] and the judgments.[62] It offers, in the final analysis, the 'safety' explanation. At bottom, the idea is that the client's legal position should not be prejudiced by the engagement (necessitated by the complexities of the law) of legal assistance.[63] The alter-ego theory is however different from the promotion of candour argument: While the latter posits that the privilege is indispensable in facilitating legal rep-

[59] *Supra*, note 46, at 1241. Emphasis added.

[60] See Odgers "Changes in Procedure and in the Law of Evidence", Chapter VII in *A Century of Law Reform* (1901), at 234-235, on the gradual erosion of this rule.

[61] *Supra*, note 46, at 1225: "This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room, and therefore if you cannot ask me, you cannot ask that man; for every thing said to him, is as if I had said it to myself, and he is not to answer it"; at 1225-1226: "In pleading, it is, 'ponit in loco suo attornatum', the attorney is as himself. And it is contrary to the rules of natural justice and equity, that any man should betray himself. I apprehend it is not material whether this be a turpis causa or not; as this man was employed by [the defendant], he can be asked no other questions than [the defendant] himself.... [The attorney] is in the place of the client, and as he entrusts him with secrets, he is not to disclose them without his leave..."; and at 1230: "[T]he attorney stands in the place of his client, who cannot be examined as witness against himself."

[62] The Lord Chief Baron Bowes said, *ibid*, at 1239: "[T]he policy of the law in protecting secrets disclosed by the client to his attorney [is] in favour of his client, and principally for his service, and ... the attorney is *in loco* of the client, and therefore his trustee." Similarly, Baron Mounteney in discussing the justification for the privilege made brief reference (*ibid*, at 1241) to the fact that the attorney is *ponere in loco suo* of his client.

[63] Implicit in counsel's argument, *ibid*, at 1224 (client should not, by the necessity of employing a lawyer, lose the benefit of "retaining secrets unrevealed") and p 1225 (the client's right not to disclose incriminating title should not be violated by allowing his attorney to be

resentation, the unspoken basis of the former is that the privilege reflects, in itself, a principle of process fairness.

Legal writers of this era, like judges of their time, did not distinguish the various rationales and often treated them as complimentary of each other. A conflation of ideas can be found in this passage in that leading treatise on evidence law of the eighteenth century, Chief Baron Gilbert's *The Law of Evidence*:[64]

> A Man retained as Attorney, Counsel, or Solicitor can't give Evidence of any thing imparted after the Retainer, for after the Retainer they are considered as the same Person with their clients [*the 'alter-ego' theory*], and are trusted with their Secrets, which without a Breach of Trust cannot be revealed [*the 'protection of confidence and trust' rationale*], and without such sort of Confidence there cou'd be no Trust or Dependence on any Man, or no transacting of Affairs by the Ministry or Mediation of another, and therefore the Law in this case maintains such sort of Confidence inviolable [*the 'utilitarian' argument*].

C. *The Nineteenth Century*

This was an exciting era in the development of the privilege. What disparities there were between the privilege at common law and in equity came to an end in the early part of this century.[65]

1. *Equity cases*

Unlike the common law judges who had, since the last century, ventured to explore a greater diversity of policies, most equity judges continued, up to the early nineteenth century, to adhere to the idea that the purpose of the privilege is to protect the lawyer from coerced betrayal of his client's

questioned on the same).

64 At p 98 of the edition published posthumously in Dublin in 1754, quoted in "Developments in the Law – Privileged Communications" (1985) 98 Harv LR 1450, at 1456, in fn 17. A similar quotation, but of the 1756 London edition, appears in Wigmore, note 9, at 543, in fn 3. The words within brackets in the quotation set out in the text are added.

65 By 1833, Lord Chancellor Brougham was able to state with confidence: "The rules of evidence are the same on both sides of the Hall; the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same." (*Greenough* v *Gaskell* (1833) 1 My & K 98, at 115.) Hence, the later fusion of law and equity under the Judicature Acts of 1873 and 1875 did

trust.[66] Arguably, this explains the continued reluctance of the Chancery to allow the client a truly independent claim of the privilege when he is compelled to give discovery:[67] the direct beneficiary of a rule that is perceived as protecting a person from being forced to violate the trust of another is the confidant. While chancery judges came to abandon the view that the privilege belongs to the lawyer, their recognition that it belongs to the client only meant, thus far, a recognition that the lawyer may not, without his client's consent, divulge professional confidence.[68]

In the nineteenth century, equity judges began searching for alternative justifications for the privilege. The supplant of the trust rationale was perhaps inevitable given that, by the beginning of the nineteenth century, it was established in equity that a party cannot resist disclosure simply on the ground of confidentiality.[69] The move away from the trust rationale accompanied the expansion, in at least two important areas, of the scope of the privilege in equity. First, the client became entitled, after much dissent, to claim the privilege when he is compelled to disclose his communication to his lawyer. Secondly, the reach of the privilege when claimed by the lawyer and, later, by the client, was extended to communications made without contemplation of litigation.

Radcliffe v *Fursman*, it will be recalled, decided that a party may be compelled to produce a case stated for the opinion of counsel even though he may not be compelled to produce counsel's opinion rendered thereon.[70] The inconsistency was noted by a number of judges.[71] As counsel in *Nias* v *Northern & Eastern Railway Co* said, "if opinions of counsel are entitled to protection, which has never been disputed, it seems impossible that such protection can be effectual without also withholding the statements on

not have much of an impact on the privilege.

66 *Wright* v *Mayer* (1801) 6 Ves Jun 280; *Richards* v *Jackson* (1812) 18 Ves Jun 472; *Wayte* v *Surman* (1823) 2 LJ (OS) Ch 28; *Parkhurst* v *Lowten* (1819) 2 Swans 194, at 201, 216; *Knight* v *Marquess of Waterford* (1835) 2 Y & C Ex 22, at 40-41. *Cf* the "alter-ego" argument advanced by the defendant in *Spenceley* v *Schulenburgh* (1806) 7 East 357.

67 *Preston* v *Carr* (1826) 1 Y & J 175; *Greenlaw* v *King* (1838) 1 Beav 137, at 144; *Wright* v *Mayer* (1801) 6 Ves Jun 280, at 281 (dictum); *Parry* v *Watkins* (1831) LJ (OS) Ch 63 (see argument of Mr Wakefield).

68 *Parkhurst* v *Lowten*, *supra*, note 66, at 208, 216; *Wisden* v *Wisden* (1849) 6 Hare 549. The court will insist that the duty be upheld: *Beer* v *Ward* (1821) Jac 77, at 80, 82.

69 *Taylor* v *Milner* (1805) 11 Ves Jun 41, at 43. Similarly, in later cases: *Greenlaw* v *King*, *supra*, note 67, at 145; *Hopkinson* v *Lord Burghley* (1867) 2 Ch App 447. As we have seen, common law had reached the same position much earlier: *supra*, note 41.

70 *Supra*, note 34. See also: *Richards* v *Jackson*, *supra*, note 66; *Preston* v *Carr*, *supra*, note 67; *Lord Walsingham* v *Goodricke* (1843) 3 Hare 122; *Glyn* v *Caulfeild* (1851) 3 Mac & G 463, at 474; *Bluck* v *Galsworthy* (1860) 2 Giff 453.

71 Such as the Lord Chief Baron in *Knight* v *Marquess of Waterford* (1835) 2 Y & C Ex 22, at 31 and Lord Brougham in *Meath* v *Winchester* (1835-1836) 4 Clark & Finnelly 445,

which the opinions are given."[72] Not surprisingly, *Radcliffe* proved unpopular amongst most of the equity judges in the nineteenth century. When it was followed, it was mostly amid reservations[73] and it was not followed in some cases although the distinctions on the facts were tenuous.[74]

The matter fell for re-examination by Lord Chancellor Brougham in 1833 in *Bolton* v *Corporation of Liverpool*.[75] This was an action for the recovery of town dues. The plaintiff filed a chancery bill against the defendants for the discovery of, *inter alia*, cases stated by the defendants to counsels for their opinion which allegedly contained statements which were against their right to the dues. Of the cases, two were stated long before the proceedings were contemplated; the rest were stated in the progress of the cause or in anticipation of it. In the court below,[76] the Vice-Chancellor had ordered discovery of the two cases and denied discovery of the rest. On appeal, the court apparently had only to consider the position of the cases that were stated in contemplation of the action and pending the proceedings.[77] It was held that those cases need not be produced. One ground was that they were privileged.[78] On the policy front, the Lord Chancellor justified the privilege not on the traditional basis of protecting confidence but on

at 472.

72 (1838) 2 Keen 76, at 78.

73 *Richards* v *Jackson*, *supra*, note 66; *Preston* v *Carr*, *supra*, note 67, at 179 (*per* Garrow B) but see the concession of the plaintiff's counsel at 177. In *Lord Walsingham* v *Goodricke*, *supra*, note 70, at 127, the court observed that *Radcliffe* "has been disapproved by almost every Judge under whose notice it has been extended." Some judges, however, took the matter as settled: *Newton* v *Beresford* (1831) You 377; *Glegg* v *Legh* (1819) 4 Madd 192, at 206.

74 *Vent* v *Pacey* (1830) 4 Russ 193 (letter written with a view to taking opinion of counsel on a matter in dispute held privileged from production by the client without addressing the plaintiff's argument that it was impossible to distinguish such a letter from a case stated for counsel's opinion). Similarly, see: *Hughes* v *Biddulph* (1827) 4 Russ 190, especially counsel's argument at 191. *Cf Garland* v *Scott* (1830) 3 Sim 396; *Holmes* v *Baddeley* (1844) 1 Ph 476, at 483.

75 (1833) 1 My & K 88.

76 (1831) 3 Sim 466.

77 (1883) 1 My & K 88, at 93. *Cf Holmes* v *Baddeley*, *supra*, note 74, at 482 where Lord Chancellor Lyndhurst pointed out that, in fact, the cases and opinions ordered to be produced in *Bolton* were not stated in the answer to have been prepared and taken in contemplation of litigation.

78 Another ground for the decision was that to order the production of the cases would violate the rule (then in force) that a party can withhold, from discovery, evidence which supports only his case (*supra*, note 75, at 94). A number of later cases tried to narrow the decision to this ground: *eg*, *Llewellyn* v *Badeley* (1842) 1 Hare 527, at 533; *Combe & Ors* v *City of London* (1840) 4 Y & C Ex 139, at 159, *cf* on appeal, (1842) 1 Y & CCC 631, at 650; *Knight* v *Marquess of Waterford* (1835) 2 Y & C Ex 22, at 42. On the principle that a party cannot discover evidence that relates only to his adversary's case, see *Bligh* v *Berson* (1819)

the necessity of legal consultation. The two related ideas flowing from this – first, that the privilege secures the client's rights by prohibiting the lawyer from revealing their confidential communication to the prejudice of the client, and second, that it induces candour from the client and thus facilitates the conduct of legal proceedings – are contained, but not kept apart, in the judgment of Lord Brougham.[79] On the technical front, *Bolton* would appear to be inconsistent with the outcome in *Radcliffe* but it was distinguished on the basis that in *Radcliffe*, the cases were stated for the advice of counsel not with any litigation in mind whereas in *Bolton*, on the facts assumed in the appeal, the cases were stated in contemplation of or pending the proceedings.[80] The fact that the Lord Chancellor failed to explain the significance of the distinction, despite the plaintiff's counsel having argued that it was immaterial,[81] gives the impression that it was only a convenient and technical way of outflanking *Radcliffe*.[82] This impression is augmented by the explicit rejection of that distinction by the Lord Chancellor himself in the very same year albeit in a context different from that in *Radcliffe*.

The rejection occurred in *Greenough* v *Gaskell*.[83] Drawers of a promissory note alleged that they were induced by the defendant, a solicitor, to make the note to cover the debt of his client, *D*. A dispute arose over whether documents in the defendant's possession, which were either written or received by him in his capacity as solicitor of *D*, were privileged from discovery. The claim of privilege was rejected at first instant but allowed on appeal. The Lord Chancellor pointed out that *Greenough* was unlike *Bolton* and *Radcliffe* in that it was not concerned with the extent to which the client may be called upon to produce his communication to his pro-

7 Price 205; *Lyell* v *Kennedy* (1883) 8 App Cas 217, at 225.

79 His Lordship said (*supra*, note 75, at 94-5): "If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in Courts of Justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers. But without such communication no person can safely come into Court, either to obtain redress or to defend himself." See also: *Reid* v *Langlois* (1849) 1 Mac & G 627, at 638.

80 On this requirement, see: *Garland* v *Scott* (1830) 3 Sim 396; *Vent* v *Pacey*, *supra*, note 74; and *Hughes* v *Biddulp*, *supra*, note 74.

81 *Supra*, note 75, at 481.

82 Further evidence of this may be found in the views expressed by Lord Brougham, sitting on special request in the House of Lords in the case of *Meath* v *Winchester*, *supra*, note 71, at 511, 533. See also the argument of counsel for the defendant in *Knight* v *Marquess of Waterford*, *supra*, note 78, at 38.

83 (1833) 1 My & K 98: this judgment was delivered before the same judge gave reserved judgment (but after he had heard the arguments) in *Bolton*.

fessional adviser[84] but with the ambit of the privilege that a solicitor, who is himself the defendant, may claim against discovery. As such, the Court was free from the shackles of *Radcliffe* and did not have to make any artificial distinction. His Lordship held that a lawyer may claim privilege over lawyer-client communication even if it was made while legal proceedings were neither pending nor in contemplation. That view was well received in subsequent cases.[85] It was premised on a conception of the privilege similar to that propounded in *Bolton*.[86] However, in one respect, his Lordship took the policy argument further:

> If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could *safely* adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.[87]

The privilege protects access to legal assistance not only in litigation but also in matters that do not have any more connection with litigation than every transaction may by possibility become the subject of judicial enquiry. In other words, the privilege was widened to help individuals stay within the law.

Given the similarity in policies,[88] and that the reasons given in *Greenough* against requiring contemplation of litigation applied equally where the *client* is asked to discover his communication to his lawyer, it was illogical for the scope of the privilege not to be co-extensive.[89] Hence, a number of judges in later cases felt that the principle established in *Bolton* should be extended to allow the *client* to claim privilege over communication made

84 *Ibid*, at 100-101.

85 Such as *Herring* v *Clobery* (1842) 1 Ph 91; *Lord Walsingham* v *Goodricke*, *supra*, note 70, at 124.

86 See Lord Brougham's judgment, *supra*, note 83, at 103.

87 *Ibid*, note 83, at 102. Emphasis added.

88 That their justifications might differ was, in fact, advocated by a counsel in *Craig* v *Earl of Anglesea*, *supra*, note 46, at 1236-1237.

89 See the view of Vice-Chancellor Sir James Wigram, in *Lord Walsingham* v *Goodricke*, *supra*, note 70, at 126. *Cf Greenough* itself, *supra*, note 83, at 100-101 and in *Meath* v *Winchester*, *supra*, note 71, at 471-472.

90 In *Pearse* v *Pearse*, *supra*, note 7, at 26, the Vice-Chancellor confessed that he was "at a loss to perceive any substantial difference in point of reason, or principle, or convenience, between the liability of the client and that of his counsel or solicitor to disclose the client's communications made in confidence professionally to either." See also: *Lord Walsingham* v *Goodricke*, *supra*, note 70; *Thompson* v *Falk* (1852) 1 Drewry 21, especially at 26; *Manser* v *Dix*, *supra*, note 37; *Knight* v *Marquess of Waterford*, *supra,* note 78, at 38; *Bellwood*

to his lawyer even if it was not made in contemplation of litigation.[90]

On the other hand, there were conservative judges who were against the extension and who advocated that *Bolton* should be narrowly applied. Their main contention was that the privilege contradicts the very purpose of discovery which is to allow a party to "sift the conscience"[91] of his adversary, to get to the truth by extracting from the adversary 'all relevant facts within [his] knowledge..., and ... all the documents by which those facts may be manifested.'[92] Lord Langdale, the then Master of the Rolls, was a prominent member of the conservative camp who, it seems, took every opportunity he had to state his objections. In a number of judgments,[93] his Lordship espoused a view very similar to that which Bentham was advocating at around this time in his *Rationale of Judicial Evidence*.[94] Bentham's objection to legal professional privilege is well known. To him, the correct ascertainment of facts is a requisite for rectitude of decision. The privilege obfuscates the truth about past events as it allows a party to hide information relating to those events from the court.[95] Since the innocent has nothing to hide, the privilege can only serve the guilty. No harm would arise if the absence of the privilege leads to the client being guarded in his communication with his lawyer. If the client has done no wrong, he needs no incentive for candour. The only use of the privilege then is to hide the wrongdoings of the client.[96]

Bentham's views on the privilege attracted a number of contemporary critics and supporters. Étienne Dumont so said of Bentham's attack: "Admit this opinion of Mr Bentham...and the accused have no longer counsel; they

v *Wetherell* (1835) 1 Y & C Ex 211, at 219 and 4 Y & C Ex 563.

91 *Nias* v *Northern and Eastern Railway Co* (1838) 2 Keen 76 at 79.

92 *Flight* v *Robinson*, *supra*, note 33, at 33-34. See also: *Storey* v *Lord John George Lennox* (1836) 1 My & Cr 525, at 536.

93 *Nias* v *Northern and Eastern Railway Co*, *supra*, note 91, at 80; *Greenlaw* v *King*, *supra*, note 67, at 143-144; *Flight* v *Robinson*, *supra*, note 33, at 35, 36.

94 Work on the treatise was done between 1802-1812 but came to be published only in 1827, under the editorship of John Stuart Mill. Although Bentham and Lord Brougham held opposite views on the privilege (and on other matters beside), they were on good terms: H A Holland, "Jeremy Bentham" (1948) 10 CLJ 3 at 22.

95 See generally, Bentham, *Rationale of Judicial Evidence*, at 474-476 and *An Introductory View of the Rationale of Evidence*, at 99-100, both of the Bowring edition (William Tait: Edinburgh, 1843).

96 "But if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be,) the consequence will be, that no such confidence will be reposed. Not reposed? – Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray....": *Rationale of Judicial Evidence*, note 95, at 473. Edmund Morgan made a similar argument about a century later: "Some Observations Concerning a Model Code of Evidence" (1940)

are surrounded by agents of justice and the police, against whom they ought to be so much the more upon their guard....They are so many spies and informers placed round the accused. This is to suppress the defence entirely."[97] To this, John Stuart Mill, who was the original English editor of *Rationale of Judicial Evidence*, pointedly replied: 'Call this man ... an informer or not, as you please; but if you call him an informer, remember to add, that the act which constitutes him one, is a meritorious act.'[98] Another contemporary critic was Thomas Denman. His argument is noted by later commentators especially for its non-utilitarian element[99] which comes across forcefully in these famous words, written before he became Chief Justice: "...Human beings are never to be run down, like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity...."[100] This provoked a spirited reply from Mill, the gist of which was that the ultimate aim of a trial ought not to be that the parties should have fair play; it should have a higher objective in the discovery of truth.[101]

Bentham's objections to the privilege did not carry the day. Denman's view found judicial support; Vice Chancellor Knight Bruce said, in an often quoted passage in *Pearse* v *Pearse*:[102]

> Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

89 U Pa L Rev 145, at 152.

97 Note to p 247 of Bentham's *A Treatise of Judicial Evidence* as edited by Dumont (1825 English translation), quoted in W Twining, *Theories of Evidence: Bentham & Wigmore* (London: Weidenfeld & Nicolson, 1985) at 103. Dumont was a close friend of Bentham and was largely responsible for making the latter's writings available in France.

98 *The Works of Jeremy Bentham* (Bowring ed, 1843) vol VII, at 478; the reference to the editor thereat is to the original editor: see vol VI, at 203.

99 Although one must add, as has rightly been pointed out by Professor Twining, that Denman actually combined both utilitarian and non-utilitarian elements in his argument: *supra*, note 97, at 104.

100 (1824) 40 Edinburgh Review 169, at 186.

101 Mill derided those who, viewing the question with "fox-hunting eyes", regarded "a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is ... that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance." *Rationale of Judicial Evidence*, note 95, at 477.

This argument is more complex than those seen in *Bolton* and *Greenough*. The ultimate objective of the privilege is not simply to encourage and protect legal consultation and to promote candour in the client. The privilege reflects the court's concern with the fundamental question of fair play and the maintenance of the dignity in the litigation process.

Lord Langdale's dissent had as little influence as Bentham's views. Whatever reservations there were about extending the privilege, it came to be accepted by the courts.[103] Not very long after the appeal in *Bolton* was dismissed, the majority of cases decided that contemplation of litigation was not a necessary condition of the client's claim of privilege.[104] Lord Langdale publicly conceded defeat, albeit reluctantly.[105]

2. *Common law cases*

The majority of the common law cases adopted a rule-based approach to decision-making. Policy discussions were rare. While the privilege was usually seen as protecting the confidence which the client had entrusted to his lawyer professionally,[106] the reason for that protection was, in most cases, not made explicit. In cases where it was, old ideas were restated, namely, that the privilege is necessary for effectual legal assistance;[107] that it is desirable to accord 'safety' in legal consultation;[108] that it reflects the lawyer's role as an alter-ego of his client; that the client's trust is sacred

[102] *Supra*, note 7, at 28-29.

[103] In 1850, Lord Cranworth urged a pragmatic approach in *Balguy* v *Broadhurst* 1 Sim (NS) 111, at 112: "Judges have differed in their opinions as to the general policy of the rule as to privileged communications. Some of them have thought that there ought to be no such rule. Others have been of a contrary opinion, and have said that even truth may be purchased too dearly. The rule, however, is now established and acted on: and whatever may be thought of it, I am sure that it is most inconvenient to have a rule laid down and the Courts struggling to avoid it."

[104] *Clagett* v *Phillips* (1842) 2 Y & CCC 82; *Reece* v *Trye* (1846) 9 Beav 316; *Calley* v *Richards* (1854) 10 Beav 401; *Manser* v *Dix*, *supra*, note 37; *MacFarlan* v *Rolt* (1871) LR 14 Eq 580; *Minet* v *Morgan* (1873) LR 8 Ch App 361; *Wilson* v *Northampton and Banbury Junction Railway Co* (1872) LR 14 Eq 477. *Cf Beadon* v *King* (1849) 17 Sim 34; *Hawkins* v *Gathercole* (1850-1851) 1 Sim (NS) 150; *Bluck* v *Galsworthy* (1860) 2 Giff 453.

[105] In *Carpmael* v *Powis* (1845) 15 LJ Ch 275, at 276 and *Reece* v *Tyre*, note 104, at 319.

[106] See for *eg*, *Robson* v *Kemp* (1803) 5 Esp 52; *Shore* v *Bedford* (1843) 5 Man & G 271; *Forshaw* v *Lewis* (1855) 10 Ex 712, at 715-716; *Brown* v *Forster* (1857) 1 H & N 737.

[107] *Earl of Falmouth* v *Moss* (1822) 11 Price 455, at 470; reporter's note (a)1 to *Broad* v *Pitts* (1828) M & M 233, at 235; *Cleave* v *Jones* (1852) 7 Ex 421, at 426.

[108] *Meath* v *Winchester*, *supra*, note 71, at 509, 512.

[109] *Earl of Falmouth* v *Moss*, *supra*, note 107, at 470, *per* Baron Garrow: "The client is called upon to make his professional adviser, as it were, himself; and therefore such persons ought to be, and have been, held to be protected from answering questions which may tend to

and ought to be protected.[109]

At common law, there was absent the level of debates and arguments seen in contemporaneous equity cases. One reason could be that the common law judges were not confronted with any need for great expansion of the privilege. They had yet to face the issue, encountered by the Chancery, of whether to extend the privilege to the client because a party, during this time, could not be called to give evidence at a common law trial. Furthermore, the common law was contented to follow the path paved by the chancery judges. For example, there were some common law cases decided prior to *Greenough* which had held that the privilege did not apply if the lawyer-client communication was made when a suit was neither pending nor contemplated.[110] However, after *Greenough* was decided, common law judges simply followed it and the requirement was dropped with minimum fuss.[111] This is not to suggest that the common law looked to equity out of intellectual laziness; it was, at least in part, for the pragmatic reason of achieving consistency between the two branches.[112]

D. *Summary of the Historical Account*

It seems to have been the initial theory (which does not seem as historically prominent as some writers describe it to be)[113] that the privilege protects professional honour. The theory quickly gave way to the view, prevalent up to the seventeenth century, in the case of common law, and the eighteenth century, in the case of equity, that the privilege serves to protect the client's trust. Later, the privilege came to be seen as a necessary incident of the lawyer-client relationship. This idea underlay a number of different theories. The first appeared now and then in the cases at various times: the lawyer is considered as his client's alter-ego; the opponent is to extract what he can from the client himself and must not force information out of him through

disturb the sacred trust reposed in them."

[110] *Wadsworth* v *Hamshaw* (1819) 2 Brod & B 5 note (a); *Williams* v *Mundie* (1824) Ry & Mood 34, 1 Car & P 158; *Broad* v *Pitts*, *supra*, note 107; *Clarke* v *Clarke* (1830) 1 M & Rob 3; *Bramwell* v *Lucas* (1824) 2 B & C 745.

[111] *Mynn* v *Joliffe* (1834) 1 M & Rob 327; *Doe* v *Harris* (1833) 5 Car & P 592; *Turquand* v *Knight* (1836) 2 M & W 98.

[112] That reasoning was displayed in *Meath* v *Winchester*, *supra*, note 71, at 472; *Earl of Falmouth* v *Moss*, *supra*, note 107, at 461, 471; *Beer* v *Ward*, *supra*, note 67, at 79-80. *Cf Bustros* v *White* (1876) 1 QBD 423, at 425.

[113] As authority for this theory, Wigmore (*supra*, note 9, at 543, para 2290) is invariably cited: *eg*, Holdsworth, *supra*, note 7, at 202; "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement" (1977) 91 Harv L Rev 464, 465; Morgan, "Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence", *supra*, note 36, at 288, and "Some Observations Concerning a Model Code of Evidence" (1940) 89 U of Pa

his lawyer. Related to this is an important theory that grounded the privilege on the 'safety' principle: that a client's right should not be prejudiced by seeking, as he must, legal assistance.

The utilitarian rationalisation noticeably appeared at common law in the eighteenth century and dominated both common law and equity in the century after. Under that theory, the privilege is thought to be desirable not for what it does but for the consequences of its operation. It departs from the idea that allowing non-disclosure is intrinsically good. Instead, it seeks justification in the alleged utility of not allowing compulsion of disclosure. Utility is said to flow from the promotion of candour in the client's communication to the lawyer; the result is better legal advice and/or representation. On this view, the privilege does not protect confidential communication already made as an end in itself but is a means of promoting candid communication. It is not directly concerned with the protection of any value personal to the claimant; rather, it is seen as the price to be paid for the public good arising from the effective administration of justice. This utilitarian argument cuts two ways and, as we have seen, leading utilitarian arguments in the opposite direction early in the nineteenth century was Bentham. In defence against that attack, some jurists, as we saw, presented the privilege as a principle of process fairness.

III. Evaluation of the Judicial Theories

An attempt will now be made to evaluate, on a conceptual plane, each school of thought. Of the many judicial justifications, it will be argued that the one that makes most sense is that which conceives the privilege as a corollary of other procedural rights and safeguards. Justification cannot proceed unless it is clear what needs justification. Therefore, to that we must first turn.

A. *Objections to the Privilege*

According to the discovery of truth model of adjudication, the central aim of the trial process is the ascertainment of the facts relevant to the dispute. That ascertainment is necessary to secure the proper execution of substantive law. The goal, to use Benthamite language, is rectitude of decision.[114] Alternatively, it may said that we ought to aspire towards accuracy in

LR 145, at 152.

[114] Bentham's theory of adjudication is well discussed by Gerald J Postema, *Bentham and the Common Law Tradition*, (1986), especially at chapter 10, and by Twining, *supra*, note 97,

fact-finding because we should be mindful of the risk of incurring what Dworkin[115] has called the 'moral harm' that a wrong decision will cause.

Those, like Bentham, who dislike the privilege say that it frustrates the ascertainment of truth because it allows a party to hide relevant information from those who sit to determine the facts.[116] Since the innocent has nothing to hide, the privilege can only serve the wrong-doer. Fairness in adjudication is called into question.[117] The party who is denied access to privileged information or documents may rightly feel aggrieved that the court should deliberately thwart his effort to prove his case. This creates a measure of disillusionment with the legal process as a whole and may affect the acceptability of the verdict.[118]

Bentham overstated his case.[119] This can be argued even within the framework of the adjudication model just set out. First, he wrongly assumed that the client is able to tell what facts are legally incriminating. However, the legal relevance of facts is itself a matter on which the client requires legal advice. Without the privilege, the client may withhold information which he thinks are inculpatory when they are in law exculpatory. By encouraging the client to tell all he knows, the privilege, it can be argued, serves the innocent as well; it facilitates, rather than hinder, the search for truth inasmuch as the court is presented with a defense which would not have been raised had the client not been encouraged by the privilege to

at chapter 2.

115 "Policy, Principle and Procedure" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981), at 193.

116 See generally Bentham, *Rationale of Judicial Evidence*, *supra*, note 95, at 474-476 and *An Introductory View of the Rationale of Evidence*, note 95, at 99-100; Morgan, foreword to the *Model Code of Evidence as Adopted and Promulgated by the American Law Institute* (1942), at 7 and 26-28; Frankel in "The Search for Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031, *Partisan Justice* (1980), and "The Search for Truth Continued: More Disclosure, Less Privilege" (1982) 54 U Colorado L Rev 51. In some continental systems, the thinking seems to go the other way; the privilege is seen "as consistent with the goal of accurate fact-finding because they help to avoid perjury....": Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Court Today" (1956) 31 Tulane LR 101 at 109-110.

117 See Sixteenth Report of the UK Law Reform Committee, *Privilege in Civil Proceedings*, Cmnd 3472 (1967), at 3, para 1.

118 On the concept of "acceptability of verdicts", see C Neeson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" (1985) 98 Harv LR 1357. A similar thesis is expounded by Ian Dennis (but under the different name of "legitimacy of verdict") in "Reconstructing the Law of Criminal Evidence" [1989] CLP 21, at 35-44.

119 D Luban, *Lawyers and Justice – An Ethical Study* (1988), at 190-191; K Kipnis, *Legal Ethics* (1986), at 74-77; Kaplow & Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability" (1989) 102 Harv LR 567 at 605-6. *Cf* B Landesman, "Confidentiality and the Lawyer-Client Relationship" in *The Good Lawyer*

disclose the facts supporting it. Second, clients do not approach lawyers only after the event; in many cases, they consult lawyers to assure themselves of the legality of what they plan to do. We can assume that most clients would refrain from doing an act if they are told that it is unlawful. The privilege, as we saw, applies even to communications made without contemplation of litigation. By encouraging candour in before-the-event consultations, the privilege, one may say, helps to keep individuals *within* the law. Thus, it is not true that the privilege is useful only to the guilty – those who are already *outside* the law.

In any event, it is utopian to expect a trial to produce perfect procedural justice.[120] Judges in favour of the privilege hardly ever deny that it deters truth-finding. They sought, however, to outweigh that criticism with other values and policies.[121] Before examining those values and policies, the starting premiss deserves some attention: to what extent is the privilege inimical to the court's determination of the truth? If we are prepared to accept the utilitarian argument that the privilege promotes candour in the client, we would also have to accept that, without the privilege, the client would not be candid. *Ex hypothesi*, the privilege does not affect the quantity of evidence that would ultimately come before the court: with the privilege, the lawyer cannot testify as to what his client has told him, whereas without the privilege, the lawyer can testify but would have little to reveal since the assumption is that his client would be guarded in communicating with him.[122] In the final analysis, compelling the disclosure of the client's communication would make the court no wiser than if the privilege exists. The criticism that the privilege obstructs the search for truth is largely

(Luban ed, 1984) Ch 8, at 205-206.

120 As John Rawls notes in *A Theory of Justice* (1972) at 85: "The trial procedure is framed to search for and to establish the truth.... But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose consistent with the other ends of the law."

121 Wigmore classified the privilege as the type of evidential rule which "rest on no purpose of improving the search for truth but on the willingness to yield to requirements of *extrinsic policy*." Wigmore, *supra*, note 9, at 3, section 2175. The issue that the privilege raises is, as Galligan puts it ("More Scepticism About Scepticism" (1988) 8 OJLS 249, at 255), "external" to proof; the value which the privilege upholds is independent of rectitude of outcome. *Cf* the view of Professor Dennis, *supra,* note 118, at 38.

122 See: Callan and David, "Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System" (1976) 29 Rutgers LR 333, at 395; Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists" (1980) 66 Va LR 597, at 610-611; Alschuler, "The Preservation of a Client's Confidence: One Value Among Many or a Categorical Imperative?" (1981) 52 U Colorado LR 349, at 350; Kipnis, *Legal Ethics*, *supra*, note 119, at 76-77; Bundy and Elhauge, "Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation" (1991) 79

predicated on the belief that the client, even in the absence of the privilege, will be just as frank with his lawyer. This belief creates an antinomy with the theory that the privilege is needed as an incentive for candour.

An adversarial trial is not a scientific process of separating falsehoods from truths in the manner of sifting black from white.[123] It is, in reality, a process in which a litigant, through his lawyer, will try, as best he can and in evidently partisan fashion, to persuade the fact-finder of his factual allegations and/or to dissuade them of his opponent's factual allegations. The task of the fact-finder is to decide, based on the conflicting evidence placed before him, whether he is sufficiently persuaded either way to the degree set by the law. The persuasion/dissuasion exercise is regulated by rules. Some, but not all, of these rules are concerned with accuracy of fact-finding; others ensure the acceptability or legitimacy of the outcome of the trial and the privilege is one of them. Its scope is narrow. Consider its role: the privilege does not excuse a client in a civil case and an accused who chooses to testify from being compelled to disclose what he *knows*, even if he has communicated his knowledge to his lawyer;[124] what he may not be compelled to disclose is restricted to *communication* passing between him and his lawyer professionally. The reach of the privilege at common law and in equity does not extend to matters other than communication, or to pre-existing communication between the client and a third party.[125] On the lawyer's part, his duty not to disclose communication with his client does not give him a right to misrepresent facts.[126] Although the point is controversial, the better view is that the privilege is not a rule of inadmissibility: it, of itself, does not *exclude* evidence of (as opposed to entitling a party to *resist compulsion* to disclose) privileged communication.[127] In

Cal LR 315, at 403.

[123] On the pursuit of truth and the trial process, see: Frank, *Courts on Trial* (1973), especially chapter 6 ("The 'Fight' Theory versus the 'Truth' Theory"); MacCallum, *Legislative Intent and other Essays on Law, Politics, and Morality* (Singer and Martin eds, 1993) chapter 13 ("Justice and Adversary Proceedings"); Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 ABA Rep, Part I, 395, reprinted in *Landmarks of Law* (Henson ed, 1960); Nicolson, "Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse" (1994) 57 MLR 726; Damaska, "Presentation of Evidence and Fact Finding Precision" (1975) 123 U Pa L Rev 1083.

[124] *Chant* v *Brown* (1849) 7 Hare 79, at 86; *Manser* v *Dix*, *supra*, note 37, at 454-455.

[125] Cross and Tapper, *Cross on Evidence* (7th ed, 1990), at 436-7, 441-2; Julius Stone, *Evidence, Its History and Policies*, revised by WAN Wells (1991), at 579-580. Also: HL Ho, "Legal Professional Privilege and Garnishee Proceedings" [1992] SJLS 144, at 149-158.

[126] See, for *eg*, *Jones v Godrich* (Probate Court) (1844) 5 Moore 17, especially at 46.

[127] See generally, A Zuckerman, "Legal Professional Privilege and the Ascertainment of Truth" [1990] MLR 381; A Newbold, "Inadvertent Disclosure in Civil Proceedings" (1991) 107 LQR 99; Howard, Crane and Hochberg, *Phipson on Evidence* (14th ed, 1990), paras 20-05 to 20-10, at 495-499; *Cross on Evidence*, *supra*, note 125, at 443-445. Also: HL Ho,

gist, therefore, what the privilege does is merely to place some restrictions on the litigant's manner of presenting his case and his means of persuading/dissuading the fact-finder.

The scales are tilted unfairly against the privilege when the issue is framed as whether we should obstruct the search for truth. We ought to be asking instead: is it fair or acceptable to allow a party to persuade/dissuade the fact-finder by the expediency of getting his opponent to reveal his communication to his lawyer or by using the lawyer as a source of proof against his client? Is it legitimate to require him to persuade/dissuade by other means? The law answers the first question 'no' and the second question 'yes'. We now move on to consider why.

B. *Justifications for the Privilege*

1. *Privilege and morality*

The privilege is sometimes justified as a rule that is intrinsically good. There are many conceptions of the good which is said to be embodied in the privilege. The initial sentiment appeared to be that lawyers, being honourable men, should not suffer the indignity of being forced to betray their clients' confidence. The lawyer's loyalty[128] to his client must be respected. The emphasis in the cases soon changed; the privilege protects the client's secrets. The protection arises out of the desire to grant individuals control over personal information and out of the regard for the relationship of trust in which secrets are shared.[129]

The various values just identified are indeed recognised and upheld by the law. Authorities have existed since long ago that an injunction may be obtained to prevent the breach of confidence, in particular, to forbid a former solicitor from switching loyalty to the adversary in the same

"Admissibility, Privilege and the Expunging of Evidence" [1994] SAcLJ 146.

[128] See generally, Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale LJ 1060; Patterson, "Legal Ethics and the Lawyer's Duty of Loyalty" (1980) 29 Emory LJ 909; Fletcher, *Loyalty – An Essay on the Morality of Relationships* (1993), 22-24, 80-81. The lawyer has a general duty to remain loyal to his client since the thirteen century: Brand, *The Origins of the English Legal Profession* (1992), at 123-125, 129, 130. *Cf Doe* v *Andrew* (1778) 2 Cowp 845, at 845-846.

[129] See S Bok, *Secrets – Moral and Ethical Aspects* (1983) at 120-121. See also: Krattten "Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach" (1976) 64 Geo LJ 613, at 647-657; "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement", *supra*, note 113, at 483-484; Wacks, *Personal Information – Privacy and the Law* (1993), at 184-187; Feldman, *Civil Liberties and Human Rights in England and Wales* (1993), Chpt 10.

[130] See, *eg*, *Cholmondeley* v *Clinton*, *supra*, note 32; *Robinson* v *Mullet* (1817) 4 Price 353;

dispute;[130] that a lawyer who has breached his client's trust by disclosing confidential information to a third party may be liable in damages to the client;[131] or his name may even be struck off the roll.[132] However, those instances concern a lawyer's contractual, equitable, ethical/professional obligations to preserve his client's confidence; they do not involve the question of whether the court should compel the client or his lawyer to breach that confidence.[133] The disclosure of confidential communication looses much of its immorality when it is done, not voluntarily, but under the compulsion of the law. In a sense, legal compulsion 'legitimises' the disclosure,[134] which is after all 'in a Court of justice, for the furtherance of justice.'[135] In any event, the law is prepared to compel a lawyer to disclose information even when it would have been immoral for him to volunteer the disclosure of the same.[136]

With regard to the regulation of the bilateral relationship between the confider and his confidant, where the only victim of the breach of confidence is the confider, there is no great conceptual difficulty in enforcing, as the law and professional ethics do, moral values like trust and confidence. However, in the context of legal professional privilege, there is an added dimension. We must take into account the interests of the adversary. The law should respect the lawyer's honour, or his client's confidence but to what extent should that override, in a civil context, the legal rights of the opponent, the enforcement of which may require a compromise of those values (to the extent that the disclosure of the professional communication

Bricheno v *Thorp* (1821) Jac 299, 303; *Beer* v *Ward*, *supra*, note 68; *Davies* v *Clough* (1837) 8 Sim 262. See also Brand, *supra*, note 128. For a modern English authority, see: *Re a firm of solicitors* [1995] 3 All ER 482.

131 *Taylor* v *Blacklow* (1836) 3 Bing (NC) 235. Vaughan J said, *ibid*, at 249, that when a lawyer reveals his client's confidence to a third party, "[t]here can be no doubt [he] has been guilty of a gross breach of a great moral duty; and the law is never better employed than in enforcing the observance of moral duties."

132 *Earl of Cholmondeley* v *Lord Clinton*, *supra*, note 32, at 268.

133 In *Taylor* v *Blacklow*, *supra*, note 131, at 247, Tindal CJ made it clear that the liability of the attorney to his client for revealing confidential information to a third party did not depend on whether the information was privileged. The distinction between ordering a solicitor not to communicate his client's secrets to an individual and ordering him not to communicate the same by way of giving evidence in court was similarly noted in *Beer* v *Ward*, *supra*, note 68. See, on the distinction between the privilege and the solicitor's duty of confidence: F Curry, *Breach of Confidence* (1984), at 155-156.

134 *Cf In The Trial of the Duchess of Kingston*, (1776) 20 How St Tr 356, at 573, *per* Lord Mansfield: "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour ... but to give that information in a Court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

135 *Hopkinson* v *Lord Burghley* (1867) 2 Ch App 447, at 448-449.

between the client and his lawyer, in violation of those values, is required by the opponent for the purposes of proof)? The credibility of the legal system must also be taken into account. It is reduced if evidentiary rules are seen to thwart the vindication of legal rights. In a criminal context, the morality of protecting confidence has to contend with the perceived immorality of concealing a client's confession of a crime. The sanctity of an individual's trust has to be balanced against the good to society in the conviction and punishment of the guilty.[137]

The court has to undertake a balancing exercise and there is no ambiguity in the outcome: a person cannot simply claim the trust and confidence of another to excuse himself from testifying. However, the court is prepared to let the balance tilt the other way where the trust and confidence exist in the context of a legal professional relationship.[138] This leads to an obvious point which was made in an 1851 case:

> It is evident that the rule which protects from disclosure confidential communications between solicitor and client does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases in which at least equal confidence is reposed....[139]

Since trust and confidence are not unique to the lawyer-client relationship, to insist that the privilege is based on the protection of such values is unprincipled and provokes professional jealousy. It will lend credence to the criticism of self-interest: that the privilege was created by lawyers to promote and protect the business of the legal profession.[140] This

[136] As excellently illustrated in *Moore* v *Terrell* (1833) 4 B & Ad 870.

[137] The conflict of moral personal obligation and moral public duty is most acute where the client consults his attorney in furtherance of a crime or fraud. On this conflict, see Gardner, *supra*, note 129; Friedman, *supra*, note 46.

[138] Levinson goes to the extent of saying (in "Testimonial Privileges and The Preferences of Friendship" [1984] Duke LJ 631, at 647) that "far from being evidence of a general commitment to the values of trust and privacy, the present system of testimonial privileges is a symbol much more of our cultural over-commitment to the values of professionalism."

[139] *Russell* v *Jackson* 9 Hare 392. See also *Earl of Falmouth* v *Moss*, *supra*, note 112, at 470-471.

[140] See: "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement", *supra*, note 113, at 469-470, fn 23; Frankel, "The Search for Truth Continued: More Disclosure, Less Privilege", *supra*, note 116, at 62; "Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence" (1992) 105 Harvard LR 1339, at 1344, fn 29, citing Eric D. Green & Charles R Nesson, *Problems, Cases, and Materials on Evidence* (1983), at 526.

[141] See *eg*, *Greenough* v *Gaskell*, *supra*, note 83, at 103; note (a) 1 to *Broad* v *Pitts* (1828)

is an allegation that the courts have been fast to deny[141] (although in an ancient case, the Court used this as a startling pretext for the privilege).[142] More fundamentally, the trust rationale does not fully explain why the client should (now) be entitled to claim privilege over his communication with his lawyer; as was suggested, this rationale was, on one view, actually a hindrance to the extension of the privilege to the client during the eighteenth century. It is not confidence per se that is protected but confidence as a necessary requisite for what Lord Brougham has called 'the security of men's rights in Courts of Justice.'[143] How the privilege secures legal rights would be explored under the last heading of this part.

2. *Privilege as a necessary incident of the lawyer-client relationship*

Another way that judges have justified the privilege was to treat it as an inherent feature of the dynamics of the lawyer-client relationship. The cases reveal two approaches. The first concentrates on the *external* dynamics and is embodied in the alter-ego theory: *as against others*, the lawyer stands for the client. This, in a sense, is a more definable derivative of a much more general argument which one may call "the system justification". Of that, a little will now be said before outlining the second approach.

Instead of justifying the privilege on particular values or specific policy objectives, modern judges sometimes offer the adversarial system of adjudication as a direct excuse.[144] The privilege is said to be consistent with the tradition of allowing each party a degree of secrecy in their preparation for the litigation battle.[145] Whatever force this theory might have in relation to the privilege regarding third party communications and trial preparations,[146] it has little validity when applied to legal professional privilege. In the first place, it is under-inclusive: the privilege covers as well communications made outside the context of litigation. In any event,

M & M 233, at 235.

142 In *Harvey* v *Clayton* (1675), noted in 2 Swans 222, a scrivener was excused from revealing his client's trust because "it may be a ruin to [him] in his trade, to discover it; for no man hereafter, will employ him."

143 *Bolton* v *Corporation of Liverpool*, *supra*, note 75, at 95.

144 See: *D* v *NSPCC* [1978] AC 171, at 231-2 and *Waugh* v *British Railways Board* [1980] AC 521, at 535-6 but *cf* at 531.

145 See Geoffrey C Hazard Jr, *Ethics In The Practice of Law* (1978) chapter 9; Morgan "Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence" 10 (1942-3) U of Chicago LR 285, at 286.

146 The assumption is that a person motivated by self-interest would be more diligent than an impartial investigator in gathering evidence, preparing and advancing his case and in finding the weaknesses of his adversary's. That self-interest is promoted, so the argument goes,

the privilege is not a characteristic of the adversarial culture for it can be found as well in most continental legal systems.[147] More generally, to say that the privilege is a reflection of how our system of adjudication works is inconclusive for the privilege then is only as defensible as the adversarial system is. Whether the adversarial system is defensible is itself a large and controversial area,[148] into which it is not proposed to tread.

The focus of the second approach is in the *internal* dynamics, the manner in which the client should relate to the lawyer for the purpose of facilitating legal assistance and representation. The crux of that theory is the belief that the privilege promotes candour in the client.

i) *The alter-ego theory*

To rest the privilege on the ground that the consequence of legal representation is a fusion of the legal identities of the lawyer and his client and to argue from there that the opponent is to extract what he can from the client himself and must not force information from him through his lawyer,[149] is to offer a technical explanation by reference to a legal myth; at that level, it is patently unsatisfactory.

One needs to venture behind this legalistic facade. The policy has much to do with the ideals and ideology of legal representation. It has been said,

if we do not require them to share the fruits of their labour.

147 See *AM & S Europe Ltd* v *EC Commission* [1982] 2 CMLR 264.

148 As David Luban has noted, when it comes to justifying the adversarial system, the discussion often ends where it ought to begin: "The Adversarial Excuse" in *The Good Lawyer – Lawyers' Roles and Lawyers' Ethics* (Luban ed, 1984) essay 4.

149 *Cf* Simon, "The ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 29 Wisconsin LR 30, at 42: "The rule that the lawyer cannot reveal a confidence of the client without the client's consent is ... a reflection of the fact that the lawyer is, in effect, an extension of the client's will. Since he cannot consult his own ends or his own notions of social norms, the lawyer has no basis other than the interests of his client for deciding whether or not to reveal confidences." See also: *United States* v *Judson* 322 F 2d 460, at 467 (9th Cir 1963); "The Attorney-Client Privilege in Class Actions: Fashioning An Exception to Promote Adequacy of Representation" (1984) 97 Harv LR 947, at 948-949. To similar effect is the argument of Andrew Paizes, "Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege" (1989) 109 S Afr LJ 109, at 120-121: "[T]his identity of lawyer and client provides the moral foundation for an absolute privilege.... If we regard them as constituting one conceptual unit then, ex hypothesi, no 'communication', as such, has been made."

150 It might seem strange that lawyers should take pride in denying their moral autonomy. But the sentiment runs strong and has been voiced by many eminent persons, such as: Lord Brougham (see the part of a famous speech he made as counsel in the trial of Queen Caroline, quoted by Allen in "*R* v *Dean*" (1941) 225 LQR 84, at 104); Dr Samuel Johnson (see *Boswell's Life of Johnson* (Hill & Powell eds, 1950), Vol 5, at 26); Lord Macmillan (see *Law and Other Things* (1938), at 181); Lord Brampton (see his interview with the *Strand Magazine*

and many have done it with much professional pride,[150] that the first duty of a lawyer is to uphold the client's interests, without pre-judging him, and to do for the client all that he could do for himself if he had the knowledge and expertise of a lawyer. Could the privilege then be justified as a part of the tradition of legal representation which demands that the lawyer rigorously adopts his client's interests as his own? While there is certainly overlap between legal professional privilege and a lawyer's professional ethics, it would be circuitous (and, indeed, false)[151] to simply justify one on the basis of the other. However, although not identical, they are related.[152] Given that, can it nonetheless be said that the core values on which legal professionalism is based are similarly strong enough to support the privilege?

A glimpse of the answer comes from contrasting legal representation in a democracy with that in totalitarian states. In Cuba, for example, law professors at the University of Havana have declared that 'the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him.'[153] Similarly, in communist China, the view was (and perhaps is) that "the people's lawyer should put his duty to the state above his duty to the defendant. Indeed, it is the duty of the attorney to persuade the accused to confess his guilt, and, if he refuses to do so, to

in 1899, quoted in Allen, *ibid*, at 105); Baron Bramwell (*Johnson* v *Emerson* (1871) LR 6 Exch 329, at 367). See also: Megarry, *Lawyer and Litigant in England* (1962), at 52-53; Earl of Birkenhead, *Law Life and Letters*, vol one (1927), at 239. *Cf* the more "moderate" view of the Lord Chief Justice, Sir Alexander Cockburn, expressed in 1864 (quoted by Rogers, "The Ethics of Advocacy" (1899) LIX LQR 259, at 271).

[151] As K Kipnis says, that an act is legal does not entail that it is ethical: *Legal Ethics*, *supra*, note 119, at 66.

[152] See *Cholmondeley* v *Clinton* (1815) 19 Ves Jun 262; *Turquand* v *Knight* (1836) 2 M & W 98, at 101; *Re Cutts, an Attorney, ex parte Ibbetson* (1867) 16 LT 715, at 716. *Cf Little* v *Kingswood Collieries Co* (1882) 20 Ch D 733, at 735, 742.

[153] Statement made in a 1968 interview with Jesse Berman: "The Cuban Popular Tribunals" (1969) 69 Colum L Rev 1317, at 1341. Not surprisingly, at the trial before the tribunals, the accused often chose not to exercise his right to counsel. (*Ibid*, at 1345.) A similar statement was made by a Bulgarian lawyer: "In a Socialist state there is no division of duty between the judge, prosecutor and defense counsel ... the defense must assist the prosecutor to find the objective truth in a case." (J Kaplan *Criminal Justice* (1973), at 264-265 cited in M Freedman "Judge Frankel's Search for Truth" (1975) U Pa L Rev 1060, at 1063.) Under Nazism, lawyers were apparently authorised to reveal client's confidences: D Luban, *Lawyers and Justice – An Ethical Study*, *supra*, note 119, at 182. And in the former Soviet Union, it was said "that the first requirement which must be met by the defense counsel is that in presenting evidence in favour of a defendant he must proceed...not from the interests of his client but from the interests of the building up of socialism, from the interests of [the] state." (V Gsovski and K Grzybowski, *Law and Courts in the Soviet Union and Eastern Europe* (1959) vol 1, at 561.) But *cf* Damaska, *The Faces of Justice*

denounce him and reveal his secrets. The role of the defense attorney is, first of all, to...safeguard the socialist legal system and consolidate the proletarian dictatorship."[154]

The totalitarian lawyer is not our conception of a lawyer but of a spy and an informer; far from being a champion of private rights, he is an auxiliary agent of the state.[155] The deprivation of the alliance of a lawyer is illiberal; it does not give sufficient respect to the dignity of the individual.[156] In a free society, the individual is accorded a degree of autonomy. His private domain is protected from State intrusion by procedural rights and safeguards. To mark out and defend his autonomy, the individual needs a lawyer to enter his private domain for the purpose of assisting him in that task. However, that entry will itself constitute an intrusion unless we treat the lawyer as his client's extended self, his alter-ego, rather than as a component of the state machinery. What this requires, as Bruce Landesman puts it, is that the lawyer should not stand as an external moral agent with regard to the information revealed by his client; that ultimately, the information should not be used except as the latter chooses.[157]

The concern is not so much with substance as with process; not so much with the protection of substantive rights as the process in which rights, liabilities and guilt are determined. Consider how a counsel for the defendant in *Craig* v *Earl of Anglesea* formulated the alter-ego argument: "the attorney appearing for the party is, since the statute of Merton,[158] considered as the party himself. If then the attorney and party are considered one person, why shall the one be offered to be examined in this cause,

and State Authority (1986), at 175, fn 52.

[154] This quote is taken from a 1962 article by Leng Shao Chuan. "The Lawyer in Communist China" (1962) 4 J of Int Comm of Jurists 33. The position today appears not much different. Only last year, we were told that in China, "lawyers had been sometimes expelled from the law courts or arrested for a 'cover up' because they had pleaded "not guilty" for the defendant." ("Chinese Lawyers: The Search for Identity" *China News Analysis* 1 January 1994 No 1501) But the wind of change is blowing and some have urged for a recognition of legal professional privilege: *Law Magazine* March 1993, at 41 (in Chinese).

[155] V Gsovski and K Grzybowski, *Law and Courts in the Soviet Union and Eastern Europe*, *supra*, note 153, at 564.

[156] Louisell argues, *supra*, note 116, at 110: "there are things even more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations." In the words of Roscoe Pound (in a letter quoted in Gardner, "The Crime or Fraud Exception to the Attorney-Client Privilege" (1961) 47 ABAJ 708, at 713), underlying the privilege is the basic principle of "human dignity and inviolate personality."

[157] B Landesman, "Confidentiality and the Lawyer-Client Relationship" in *The Good Lawyer*, *supra*, note 119, at 198.

[158] 20 Hen III c 10: "every Freeman, which oweth Suit to ... the Court of his Lord, may freely make his Attorney to do those suits for him."

when the other cannot?"[159] The gist of the argument was that to disallow the privilege would erode the procedural rule prohibiting a party from giving evidence and from being questioned.[160] The privilege is not premised on any one procedural rule as such but on the general idea that legal representation should not deprive the client of a process of trial that is in accordance with the procedure as laid down by the law. The alter-ego argument is ultimately urging for the existence of the privilege to uphold (other) procedural rights and safeguards. We are once again led to the theory which will be pursued under the last heading.

ii) *The utilitarian argument – privilege as an incentive for candour*

This is the dominant judicial theory of the privilege; it seems also to be the one accepted by most modern writers.[161] However, the justification of the privilege in the utility of disallowing compulsion of disclosure does not stand scrutiny at the theoretical and the practical/empirical levels. Neither does it explain the current state of the law. At the theoretical level, the antinomy between the premiss of this rationale and that of the objection to the privilege as an obstruction to truth-finding has already been noted. There is also the other theoretical flaw, as mentioned before, which Bentham exposed. Bentham's criticisms (although, as was argued, are unconvincing for other reasons) cannot be dismissed by conceding that bad consequences that might flow from the *act* of non-disclosure but insisting at the same time the overall utility in applying the *rule*.[162] This is because the potential bad consequences that Bentham highlighted are in every case to which the rule applies: rule and act utilitarianisms ultimately merge.

The utilitarian argument is also unsatisfactory because underlying it are

[159] *Supra*, note 46, at 1226. See also, *supra*, note 61.

[160] See: Morgan's foreword to the *Model Code of Evidence as Adopted and Promulgated by the American Law Institute*, *supra*, note 116, at 24-25; Zacharias "Rethinking Confidentiality" (1989) 74 Iowa LR 351, at fn 55.

[161] Including Wigmore, *supra*, note 9, at 527, section 2285. His version of the utilitarian argument is criticised in "Functional Overlap Between The Law and Other Professionals: Its Implications for Privileged Communications Doctrine" (1962) 71 Yale LJ 1226 at 1230-1; McHale, *Medical Confidentiality And Legal Privilege* (1993), at 42-48; "Making Sense of Rules of Privilege Under the Structural (Il)logic of The Federal Rules of Evidence", *supra*, note 140, at 1344; Levinson, *supra*, note 138, at 642-3. There is supposedly a preference today for the utilitarian justifications over "rights-based" justifications: "Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison" (1995) 108 Harv LR 1697.

[162] As Saltzburg, *supra*, note 122, at 600, in fn 9, seems to have done. On whether there is a distinction between "act" and "rule" utilitarianism, see: JJC Smart, "Extreme and Restricted Utilitarianism" in *Theories of Ethics* (P Foot ed, 1967), at 171; McHale, *Medical Confidentiality and Legal Privilege*, *supra*, note 161, at 39-41.

too many assumptions which are not validated by empirical evidence.[163] How is it possible to assess and balance the harm and the good that non-compellability of disclosure would incur? Furthermore, the good outcome depends on a number of conjectures such as: that the client is aware of the privilege (and its scope) either before he meets his lawyer or is informed of it before he set out the facts to him;[164] that the client would be less candid if he is not aware of the privilege, and conversely, the privilege encourages him to be frank;[165] that full revelation of facts contributes to sounder advice and more effective representation.

The last is fundamental to this theory. However, what is meant by 'sounder advice and more effective representation' is far from self-explanatory. Submerged are a host of ethical and ideological issues which fail to surface in the discovery of truth model of adjudication. It may be accepted that the absence of the privilege will increase the risk of the client withholding facts which support his case because, due to ignorance or otherwise, he thought that they were against him. The more complete a picture the lawyer has of the strength and weaknesses of his client's case, the better is his position to advise and represent: he knows what he is up against. But what exactly does this import? As we have noted, within ethical limits, the lawyer's role is to represent a client based on the facts as alleged by the client rather than on some "objective truth". For if the lawyer is concerned with the latter, he has to judge the veracity of his client's story (as opposed to whether it will stand up in court) and this is not part of his role. If the lawyer is generally not concerned with the "objective truth" as such, then, in a sense, it matters not to him whether his client was truthful or not.[166] The reference

[163] The paucity and inconclusiveness of studies done is noted in "Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison", *supra*, note 161, at 1700. Ironically, legal professional privilege is itself a hindrance to studies on the lawyer-client relationship: Danet, Hoffman and Kermish, "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure", (1980) 14 Law & Soc Rev 905.

[164] This is doubted by some: Frankel, *supra*, note 116, at 59; "Developments in the Law – Privileged Communications", *supra*, note 64, at 1474. The result of a 1961 survey reported in the Yale Law Journal shows a lack of (American) public awareness of the privilege: "Functional Overlap Between The Law and Other Professionals: Its Implications for Privileged Communications Doctrine", *supra*, note 161, especially at 1236. It is unclear if the same can be said today.

[165] Louisell, *supra*, note 116, at 112, considered this to be "sheer speculation". See also "Developments in the Law – Privileged Communications", *supra*, note 64, at 1474. Surveys conducted in America referred to by Zacharias, *supra*, note 160, Part II, are inconclusive. Saltzburg more optimistically suggests that it is not unreasonable to assume that some communication would be repressed if there is no privilege: "Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach", 12 Hof L Rev 279 (1984), cited in *McCormick On Evidence* (Strong *et al* eds, 1992, 4th ed) vol 1, at 315, in fn 7.

[166] For he would have to remember the words of Lord Halsbury (written in a private letter quoted by Rogers, *supra*, note 150, at 271): "not abstract truth, but what is proved by legal

to the effectiveness of legal advice and representation relates not to the *truthfulness* of the information as revealed by the client but to the degree to which the information that was withheld would have been *useful* or *adverse* to his case.[167] The lawyer is better able to represent or advise his client to the extent that he has at his disposal all pertinent information by which to best advance or protect his client's interests. The privilege stems from the fear that the client's legal rights might be prejudiced by his reservation. Again, we find that in the final analysis, the privilege is concerned with the protection of legal rights.

The utilitarian argument, taken at its face value, is not in tandem with the form of the privilege. It does not adequately explain why the privilege can sometimes be raised by a stranger to the lawyer-client relationship.[168] Neither does it provide a convincing basis for protecting communication *from* the lawyer *to* the client which, historically, courts have been more willing to do than the protection of communication going the other way.[169] (It is unconvincing to explain this by attributing to the privilege the aim as well of encouraging the lawyer to be more candid in his advice.)[170] The utilitarian argument also fails to explain the common law and equity restriction of the privilege to the legal profession; a frank relationship is necessary for the workings of other professions and yet, at common law and in equity, the privilege does not extend to them.[171]

3. *Priviledge as a corollary of procedural rights and safeguards*

We now come to the theory that appeared from time to time in the cases and which other theories, in the final analysis, seem also to lead to: the

evidence to be true is what courts of justice deal with."

[167] Uviller, "The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea" (1975) 123 U Pa LR 1067, at 1072-1073: "Few lawyers believe their clients tell them the unvarnished truth about the case (privilege or no), and few lawyers insist that they do so. The version of the facts requested and obtained is the defendant's 'story'. It may or may not be true, but the prime concerns of the lawyer are only two: first, is the story convincing, and second, does it meet adequately well the more damaging aspects of the prosecution account".

[168] See note 185 *infra*.

[169] On this point, *McCormick On Evidence*, *supra*, note 165, section 89, at 326, turns history on its head.

[170] *Cf Walsham* v *Stainton* (1863) 2 H & N 1, especially at 5-6; *Wilson* v *Northampton and Banbury Junction Railway Co* (1872) LR 14 Eq 477, at 483.

[171] *Cf R* v *Griffin* (1853) 6 Cox CC 219.

[172] *Cf* "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement", *supra*, note 113, at 480-482; Rosenfeld "The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations" (1982) 33 Hastings LJ 495, at 502-

privilege is explicable as a principle of process fairness.[172] The rule of law (however that phrase may be understood) confers on an individual legal rights. These legal rights may be substantive. (A substantive right is difficult to define with any degree of precision and no clarification would be, nor need be, attempted here.) Distinguishable generally from substantive legal rights are procedural legal rights. Substantive rights must be established under a process that is in compliance with the procedure (by which are included the adjectival rules of evidence) prescribed by the law.[173] The privilege is one of the rules of evidence that regulate how litigants are to persuade/dissuade the fact-finders of the factual allegations on which substantive rights operate. The privilege, as a juridical concept, contains five propositions.[174] They are:

1. A third party has *no right* to compel a client to disclose privileged communication.
2. Insofar as privileged communication is concerned, the client is *relieved from* the general *duty* of disclosure. (For example, should he testify, he is relieved from the duty of a witness to answer all relevant questions if the question put to him is on privileged communication.)
3. The lawyer owes a *duty* to the client *not* to disclose privileged communication if his client has not waived the privilege.
4. The client, who has not waived his privilege, has a *right* (or *power*) to stop the lawyer from disclosing privileged communication.
5. A third party has *no right* to compel a lawyer to disclose privileged communication if the client has not waived the privilege. (He may, however, have such a *right* (or *power*) if the client has waived the privilege.)

These five propositions share a common ground. The common ground is a principle of fairness which gives process value to the privilege.[175] The complexity of the law, as the courts have recognised from an early time, is such that the layman cannot independently decipher his legal rights,

506.

[173] *Cf* the amorphous doctrine of "due process of law" explored by Kadish, "Methodology and Criteria in Due Process Adjudication – A Survey and Criticism" (1976) 66 Yale LJ 319.

[174] On "right", "duty", and "privilege", see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1964 reprint), at 36-50. *Cf* Alan R White, *Rights* (1984), Chapter 11.

[175] See generally, R Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process

substantive or procedural. He needs the assistance of a lawyer both in and outside of litigation. Access to legal advice and representation is a corollary of an individual's legal rights; indeed, it is itself a procedural right, resting on a moral foundation.[176] Legal professional privilege is, however, not merely a manifestation or extension of the right to counsel. That a client should have access to legal advice and representation does not in and of itself tell us why communication in the course of seeking out legal help should not be disclosed against the client's wish;[177] it is insufficient by itself to explain any of the five propositions listed above. It seems just as pointless to say that the legal professional privilege is based on the privilege against self-incrimination. Legal professional privilege does not protect communication merely on the ground that its disclosure might prove injurious to the client.[178] Furthermore, the privilege against self-incrimination alone does not explain why the *lawyer* should be affected in the manner stated in propositions three, four and five above. As with the case of the right to counsel, a higher level of explanation is required.

The theoretical justification for the privilege is better conceived as grounded in this principle of process fairness, the seed of which can be found in the idea, which appeared frequently in the cases, of safety in legal consultation: *given the necessity of access to legal assistance and representation to the upholding of a person's legal rights, the seeking of such access must not thereby deprive that person of (other) procedural rights and safeguards to which he is entitled and consequently prejudice the judicial determination of his substantive rights*.[179] This proposition must hold true so long as there exist the underlying procedural rights and safeguards and so long as substantive rights are to be taken seriously.

The principle of fairness that is argued for is one that urges against 'irony' and is not simply against being 'legally prejudiced'. The latter is too wide as it would apply whenever a layman has to divulge confidential information to a person who provides services which are essential and which the layman cannot perform for himself or another. For example, one could argue that the layman cannot independently diagnose his medical condition and that

Values'" (1974) 60 Cornell LR 1.

176 As Fried argues in Correspondence, (1977) 86 Yale LJ 584 at 586.

177 See Saltzburg, *supra*, note 122, at 603, footnote 13. *Cf* Simon, *supra*, note 149, at 42.

178 As pointed out by Lord Jessel MR in *Bustros* v *White*, *supra*, note 112, at 427. See also *Parkhurst* v *Lowten* (1819) 2 Swans 194, at 216-217; *Doe* v *Andrew* (1778) 2 Cowp 845, at 845-486. *Cf* Holdsworth, *supra*, note 7, at 202; Hazard, *supra*, note 46, at 1062; "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement", *supra*, note 113, at 485-486.

179 *Cf*: D Luban, *Lawyers and Justice – An Ethical Study*, *supra*, note 119, at 192-7; Rogers, *supra*, note 150, at 261; Callan and David, *supra*, note 122, at 377. See also: *United States* v *Kasmir* (1974) 499 F 2d 444, at 451; *United States* v *Judson* (1963) 322 F 2d 460, at

he needs a doctor for that purpose. His seeking of medical attention may put him in a worse off position insofar as his legal position is concerned in that the doctor may be compelled to disclose confidential information to the detriment of his patient's legal case. However, his medical care is not compromised by that disclosure. (And, it should be noted, the argument advanced is not concerned with the effect of compulsory disclosure on patients' candour in the generality of cases.) There is no 'irony' that we see with respect to seeking legal representation; a patient is not denied the very thing which he sought in the way a lawyer's client would be if there is no privilege. The 'irony' is inherent in the meaning of legal representation. In its substantive sense of 'acting for' as opposed to its descriptive sense of 'standing for', representation involves, in the words of Pitkin, "acting in the interest of the represented, in a manner responsive to them."[180] If we compel a lawyer to disclose privileged information *against* his client's legal interests, interests to which he, as a legal representative, ought to be responsive, we are in fact denying the client "representation", the very thing he was seeking.

Take, for instance, the extreme case where the client confesses to his lawyer that he has committed a murder. It is not for the lawyer, without his client's consent, to proclaim his guilt to the Court. If the prosecution does not have sufficient evidence, then he ought to insist on an acquittal. His client is entitled to that procedural right and, as his lawyer, he has to insist on it on his client's behalf.[181] Otherwise, irony results: the client needs to consult a lawyer because he is ignorant of the law but doing so gets him a conviction that he may not have gotten but for seeking legal help. The privilege does not, contrary to what critics like Bentham have claimed, controvert the proposition that the guilty should be convicted. The privilege does not protect guilt; rather, it protects the client's entitlement to procedural rights and safeguards which would be insidiously violated if the lawyer or his client is compelled to disclose privileged commu-

466.

[180] *The Concept of Representation* (1967), at 209.

[181] This is recognised across common law jurisdictions. Authorities can be found in Australia (*Tuckier* v *The King* (1934) 52 CLR 335, at 346-347); India (*The King-Emperor* v *Barendra Kumar Ghose* (1923) 28 CWN 170, at 181-185); and in the United States (*Johns* v *Smyth* (1959) 176 F Supp 949, especially at 953; *United States ex rel. Wilcox* v *Johnson* (1977) 555 F 2d 115, especially at 122). See also the circumstances surrounding the representation of the accused in *R* v *Courvoisier* (1841) 9 Car & P 362, as related by Mellinkoff in *The Conscience of a Lawyer* (1973) especially Chapter VIII. Generally, see Pannick, *Advocates* (1992), at 157-159.

[182] As Fuller argues, "The Adversary System", in *Talks on American Law* (1972), at 40, the reason why we allow a lawyer to undertake the defense of a guilty person "is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by

nication.[182] Such procedural rights and safeguards in the example given would include the privilege against self-incrimination; the right of silence; the right to insist that the prosecution makes out a case to answer, or, putting it more generally, that it proves its case.[183]

By focusing on the protection of legal rights in justifying the privilege, we can explain why, at common law and in equity, it is restricted to the *legal* profession and, more specifically, to communication that is related to *legal* enquiries.[184] It also explains why the privilege is not entirely personal to the client but is, in many ways, associated with the legal right at stake in the dispute before the court. For example, the privilege enures for the benefit of the successor in title of the original holder of the legal right in issue and, generally, it cannot be raised against a person who shares an interest in the legal right in dispute.[185] The privilege, it has been said, follows the legal interest.[186] The rights-based theory also explains the notion 'once privileged, always privileged' which grew from the fear that lawyer-client communication might be used to prejudice the client's rights in subsequent proceedings.[187] Since the privilege, as argued, is a direct corollary of existing procedural rights, to attempt to extend the protection to a right which the client does not have must logically fail. Hence, it has been held that if a client has no right to withhold a pre-existing document, he and his lawyer does not acquire that right by the client's act of handing that document to his lawyer for the purpose of legal consultation.[188] Similarly, the privilege is inoperative in certain cases where the client's interest is no longer at stake.[189]

which society visits its condemnation on an erring member." Denman had argued similarly in (1824) 40 Edinburgh Review 169, at 186, quoted in Twining, *Theories of Evidence: Bentham and Wigmore*, *supra*, note 97, at 103. Ian Dennis uses a variant of this argument in justifying the privilege against self-incrimination: "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination" [1995] CLJ 342.

[183] *Eg*, in *Gardner* v *Irvin* (1878) 4 LR 4 Ex Div 49, at 53, the claim of privilege was partly upheld in order to avoid "[causing] the defendants to furnish evidence against themselves."

[184] According to the Sixteenth Report, *supra,* note 117, "(w)hat distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, *ie*, in the ultimate resort by litigation in the courts or in some administrative tribunal."

[185] *Cross on Evidence*, *supra*, note 125, at 435-6; *Phipson on Evidence*, *supra*, note 127, at paras 20-17 (joint retainer), 20-28, 29 (joint interest), 20-35 (duration of privilege); Stone, *supra*, note 125, at 575. See also: *Lee* v *South West Thames RHA* [1985] 1 WLR 845.

[186] *Russell* v *Jackson* (1851) 9 Hare 387, at 393.

[187] *Bullock and Co* v *Corrie and Co* (1878) 47 LJQB 352, at 353; *Holmes* v *Baddeley* (1844) 1 Ph 476, at 483.

[188] *Eg*: *R* v *Justice of the Peace for Peterborough, ex p Hicks* [1977] 1 WLR 1371.

[189] *Eg*, if the client has pleaded guilty, there is no justification for imposing the privilege against a co-accused who desires access to privileged information for the purposes of establishing

IV. Conclusion

The history of legal professional privilege has been moulded by a plethora of policies and conceptions of adjudicatory justice. While it is true that ideas of the past may not be suited to conditions of the present, an abstract theory constructed from those ideas, if they are sound, should be able to transcend time. On assessing the different schools of thought on their (ahistorical) merits, one – the rights-based theory – stands out. Under that theory, legal professional privilege is justifiable as a principle of process fairness. That principle of process fairness has three major predicates:

i) Access to legal assistance, be it advice or representation, is necessary for the realisation and enforcement of legal rights.

ii) A client should not, by virtue of seeking (as he must) legal assistance, be ironically deprived of the procedural rights and safeguards to which he is legally entitled.

iii) This will happen in the absence of any of the five legal rules, stated above, which are contained in the doctrine of legal professional privilege.

Our faith in the privilege is therefore only as strong as our respect for, and our willingness to take seriously, the procedural rights and safeguards which it protects. Hence, the justifiability of the privilege should ultimately turn on the existence and strength of those procedural rights and safeguards.[190]

Ho Hock Lai*

his defence: *R* v *Ataou* [1988] 2 All ER 321.

[190] An implication is this: given that those rights and safeguards figure less strongly in civil than in criminal cases, the privilege should arguably be stronger in criminal than in civil cases. See D Luban, *Lawyers and Justice – An Ethical Study*, *supra*, note 119, at 202-5.

* LLB (NUS); BCL (Oxon); Advocate & Solicitor (Singapore); Lecturer, Faculty of Law, National University of Singapore. I thank Liu Hern Kuan for reading an early draft and Li Mei Qin for alerting me to the recent Chinese literature cited in footnote 154.