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EVIDENTIAL PRIVILEGE: SACRIFICE IN THE SEARCH FOR TRUTH

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The decision of the *High Court in PP* v *Knight Glenn Jeyasingam* contains what is probably the most important discussion of the law of privilege in recent years. A plea negotiation privilege was brought into existence, without express statutory sanction, through the medium of "purposive interpretation". This article uses this decision as a springboard to discuss the two core issues in the law of privilege – the determination of whether a privilege should exist at all, and the task of marking the boundaries of an existing privilege. The meaning of "purposive interpretation" in the context of a clash between contending and incompatible social values –the integrity of the judicial fact-finding process and the value sought to be protected by the privilege– is explored.

I. FORENSIC ACCURACY AND EXTRINSIC POLICY

Much of the law of evidence is there to improve the quality of judicial fact-finding. Even rules which, on first impression, seem to exclude probative evidence, do so in order to raise the level of forensic accuracy – examples are the rule against hearsay, propensity evidence and opinion.[1] The rules of privilege are different. They bar courts and judges from considering admittedly probative, and potentially crucial, evidence in order to pursue extrinsic policies not directly related to accurate fact-finding.[2] This must be

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1 Probative value is thought to be outweighed by the possibility of prejudice – ascription of too much probative value than is deserved, or the inefficiency of wasting too much time over evidence which is likely to be of minimal probative value.

2 See the early discussion in Falknor, "Extrinsic Policies Affecting Admissibility" (1955/6) 10 Rutgers L Rev 574, and the masterly summary (and optical metaphor) of Lord Simon of Glaisdale in *D* v *NSPCC* [1978] AC 171, at 233:

> [T]here is a continuum of relevant evidence which may be excluded from forensic scrutiny. This extends from that excluded in the interest of the forensic process itself as an instrument of justice (for example, evidence of propensity to commit crime), through that excluded for … cognate interests (for example, legal professional privilege), through again that excluded in order to facilitate the avoidance of forensic contestation (for example, "without prejudice" communications), to evidence excluded because its adduction might imperil the security of that civil society which the administration of justice itself also subserves (for example, sources of police information or state secrets).

astounding to the uninitiated – what could possibly be more important than the accurate determination of facts, surely a condition of the right to a fair trial? Yet rules of privilege exist. Inherent in their existence is a moral-political determination that the relevant extrinsic value is more important than a fair trial, and an instrumental assumption that the exclusion of evidence would be effective in preserving that extrinsic value. Here, our problems begin. Is there any principled way to compare the value of a fair trial with an extrinsic value like, for example, the preservation of marital confidences? Difficult moral and philosophical questions have to be answered. Is there any satisfactory way of finding out if, and to what extent, the assurance of evidential privilege is effective in encouraging, for example, a client to be more forthcoming with his or her lawyer? Complex psychological phenomena must be explored. The astute reader will already see that any answer to the first (moral-political) question will be arbitrary, and that any answer to the second (instrumental question) will be highly speculative. The shape of our rules of privilege exemplify this, and consequently suffer from a lack of logical coherence. It would have been far easier if all the rules of privilege were abolished[3] – the moral determination being that nothing is worth jeopardising a fair trial. This has not been the position for any of the major common law jurisdictions.[4] However, the moment one privilege is recognised, there is no logically convincing way to resist the recognition of many others. Which moral or philosophical principle is it that says that lawyer-client confidentiality (which rises to the level of a privilege) is more important than doctor-patient confidentiality (which does not)? Yet to go to that other extreme and raise all of them to the status of a privilege would make serious, and probably unacceptable, inroads into the right to a fair trial. The line-drawing exercise here is fraught with illogical compromises more commonly seen in political, rather than judicial, decision-making.

Even after it has been decided that a particular privilege should exist, our problems do not end. The boundaries of the privilege, both scope and exception, must be marked out. This line-drawing exercise, like the one prior to it, is no simple matter. If there is statutory language, one could, of course, adhere to a philosophy of literalism. Or if the matter is governed by common law, precedent can be construed strictly. For reasons which are not

> The various classes of excluded relevant evidence may for ease of exposition be presented under different colours. But in reality they constitute a spectrum, refractions of the single light of public interest which may outshine that of the desirability that all relevant evidence should be adduced to a court of law.

[3] With perhaps a "clear and present danger" exception - that famous formulation of Holmes J for exceptions to the freedom of speech in *Schenck* v *United States* (1919) 249 US 47, and of course the normal rules of discovery in place.

[4] See Rule 73 of the Finalised Draft Text of Rules of Procedure and Evidence under the Rome Statute of the International Criminal Court, http://www.un.org/law/icc/statute/rules/english/1_add1e.doc, which essentially restates the familiar privileges.

entirely clear, this has not been very attractive to the judges. Instead, most have opted for "purposive" interpretation, attempting to give effect to the purpose or rationale of the privilege. Yet, the fact that the existence of a privilege has been recognised tells us nothing about *how far* the rule-maker, legislative or judicial, was willing to go. Should the privilege that exists between lawyer and client yield to the need for an accused person to show his innocence? The highest courts of Britain and Canada cannot agree,[5] and this is not surprising. A "purposive" approach, either in statutory interpretation or in common law development, has first to decide which purpose it is that is to be served – the preservation of confidences or the right to have all available evidence before the court. In the really troublesome cases, it is a zero-sum game – advancing one set of values will damage the other. In most borderline situations, the thorny issues of justification of the privilege return to haunt us. Categorical solutions or answers are simply not possible. This is the price that has to be paid for creating a privilege in the first place.

It might be thought that the ideal solution would be to confer a discretion on the courts to either exclude or admit evidence, depending on the particular facts of the case. This has been the preferred method for some privileges, for example, public interest immunity[6] and illegally obtained evidence.[7] The attraction is flexibility – the court can carefully calibrate the respective damage to the competing values.[8] Yet for other privileges, discretion has been frowned upon. The very possibility that a discretion might be exercised against the privilege, it is argued, may destroy the confidence which the privilege seeks to protect.[9] Yet, even for those thinking about the values protected by the privilege, a discretion is better than nothing. We face again the problem of how far the law is willing to go.

It would be folly, in a discussion of this nature, to even attempt a comprehensive exposition of all the evidential privileges. My chosen task is much more modest – it is to examine a highly personal selection of some aspects of the law of privileges in order to assess how courts have tackled the two primary problems of justification and scope of evidential privilege.

5 See discussion, *infra*.

6 See discussion, *infra*.

7 The exclusion of illegally or improperly obtained evidence is not normally thought of as a privilege, but whatever the categorisation might be, it is thematically related to the mechanics of deciding between accurate fact-finding and the pursuit of some other extrinsic social value. It not easy to figure out exactly what criterion the court decided on in *SM Summit Holdings Ltd* & Anor v *Public Prosecutor* [1997] 3 SLR 922, especially because it did not mention the earlier decision in *Cheng Swee Tiang* v *PP* [1964] 1 MLJ 291 which clearly opted for a balancing discretion - but that must be left for another day.

8 For example, a discretionary approach can distinguish between an accused who needs the evidence in order to run a credible defence to a serious criminal charge, and a plaintiff who seeks the evidence to pursue a minor civil claim.

9 There are of course privileges which protect values other than confidence.

II. THE BIRTH OF A PRIVILEGE

In the fascinating decision of the Singapore High Court in *PP* v *Knight Glenn Jeyasingam*[10] (hereafter, *Knight*), we witnessed a rare event – the creation of a privilege. This is all the more interesting in the context of what seems to be a comprehensive statutory regime – the Evidence Act. It was held that statements made by the accused in the course of plea negotiations (which failed) were privileged and operated to prevent the Public Prosecutor from using them to impeach his credit at his subsequent trial. In the absence of an express statutory mandate, the court had, essentially, to answer two questions. First, does the court have the power to create privileges judicially; and secondly, if it does, should it create a plea negotiation privilege?

A. *A Judicial Power to Create a Privilege*

The extent to which a court may take liberties with the Evidence Act depends on the attitude one has towards section 2(2) of the Evidence Act.[11] The technical question is whether the criminal plea negotiation privilege is "inconsistent" with section 23, a civil compromise or "without prejudice" negotiation privilege. It is not difficult to demonstrate the extreme manipulability of the test of inconsistency. If one wished, as the court in *Knight* did, to show consistency, that can be done by showing that the policy of encouraging consensual disposal of cases (which underlies the civil privilege in section 23) is consistent (and hence cannot be inconsistent) with a similar policy for criminal proceedings (together with the corresponding privilege). If, however, the court had been disinclined to entertain the criminal privilege, it could have, with equal force, argued that, as provisions of the Evidence Act which do not mention anything, apply to both civil and criminal proceedings, provisions which do expressly limit their operation to civil cases (as does section 23) must rule out any extension to criminal proceedings. The true criterion does not appear to be

[10] [1999] 2 SLR 499.

[11] Cap 97, 1997 Rev Ed. It reads:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

The implication is that common law (rules of evidence not contained in any written law) not inconsistent with the Act are not repealed, and therefore continue in force. It has never been satisfactorily explained why the Evidence Act, which was drafted as a comprehensive Code, came to be enacted together with this common law "wild-card".

inconsistency, but desirability.[12] It is a legislative power in the guise of a legal test.[13] This is a role which many judges are not very comfortable with – section 2(2) has, until very recently, been studiously avoided.[14] It is not within the scope of this discussion to launch into a full-scale analysis of section 2(2). *Knight* effectively makes the question of the creation of evidential privileges (not mentioned in the statutes) one of common law.[15] Nor was the court restricting itself to the familiar English common law, where plea negotiation privilege does not exist.[16] How is the court to discharge this gate-keeping function – whether to admit or reject a supplicant privilege? The possibilities for the kind of analogical extension employed in *Knight* are almost endless. If plea negotiation privilege can grow out of the civil negotiation privilege in section 23, then the door is open (theoretically, at least) for a doctor-patient or priest-penitent privilege to spring from lawyer-client privilege under section 128 – confidentiality is equally important to all these professional services, all of which cannot be said to be less important than legal services.[17] Nor would it be out of the

[12] See, for other examples, the use of s 2(2) to "import" common law developments subsequent to the drafting of the Evidence Act in *Tan Meng Jee* v *PP* [1996] 2 SLR 422 (similar fact evidence); and in *Soon Peck Wah* v *Woon Che Chye* [1998] 1 SLR 234 (hearsay exceptions). In the absence of binding precedent, it is hard to believe that the courts, in deciding whether or not to "import" common law were concerned only with consistency and not primarily with desirability.

[13] Unless, of course, a provision of the Act expressly (or by necessary implication) forbids it.

[14] See, for example, *Cheng Swee Tiang*, *supra*, note 7, where s 2(2) ought to have been, but was not, discussed. See also the unarticulated importation of "litigation privilege", *infra*.

[15] A distinction ought to drawn between "common law" (of Singapore) and common law of England – no attempt has been made in any s 2(2) case to inquire what the common law of Singapore was when the Evidence Act came into force more than a hundred years ago (which was probably English common law). Instead the inquiry seems to have been for the court to ask itself what the common law of Singapore ought to be now. *Knight* demonstrates that the court will not restrict itself to the *English* common law. This "pro-active" approach is to be contrasted with the much more conservative stance of the past: see, for example, in the context of the assumed non-existence of a physician-patient privilege in *PP* v *Haji Kassim* [1971] 2 MLJ 115 ("the Evidence Ordinance provides a complete code on the subject"); Karthigesu, "Medical and Legal Privilege [1976] 1 MLJ xi ("What is true of England is also true of Singapore"). Medical privilege does not exist under the English common law, nor is it mentioned in the Evidence Act.

[16] The court in *Knight* recognises this, but plays it down by saying that there is "minimal discussion" of the privilege in the English cases, *supra*, note 10, at 509. The court does not say where this "minimal discussion" is to be found.

[17] Attempts have been made to distinguish legal professional privilege by saying that there is a more intimate connection between the proper working of the lawyer-client relationship and the administration of justice, than there is with respect to the work of other professionals – see H L Ho, "History and Judicial Theories of Legal Professional Privilege" [1995] SJLS 558 . This really begs the question – why is it more important to protect the administration of justice (by encouraging candour and thus good advice) by giving special protection to lawyer-client confidentiality, than it is to protect other social

question to draw an analogy between the marital communication privilege under section 124 and a privilege protecting other intimate relationships, for example, parent-child, non-marital life-partners. Nor would it be stretching logic to urge a favourable comparison between the police informer privilege (sections 126 and 127) and a new privilege which protects journalists from disclosing the identity of their informers.[18]

Curiously, the assumption of judicial power to create privileges puts our courts in very much the same position as the United States federal courts under the Federal Rules of Evidence. A comprehensive list of privileges in the original draft was abandoned in favour of "common law" development "in the light of reason and experience".[19] Indeed various "novel" privileges have been pressed upon the courts – sometimes with success, sometimes with failure, but often with no really convincing reason why they succeed or fail. In *Jaffee* v *Redmond*,[20] the Supreme Court created a "psychotherapist

values like proper medical treatment? Also, this theory of close connection to the administration of justice cannot explain the existence of other privileges like the marital communications privilege or public interest privilege. Indeed the lack of proximity to the administration of justice has not prevented the widespread statutory recognition of physician-patient privilege in state law in the United States (see Strong, *Ed*, *McCormick on Evidence*, 4th Ed, 1992, chap 11). Perhaps a more promising way of re-casting the proximity argument is to say that rules which impinge directly on the legal process are within the competence of judges to decide – so when courts create legal professional privilege, they have in mind only the cost to the integrity of the fact-finding process (of not having the privilege leading to lack of candour and resulting in bad legal representation, and of having the privilege and sacrificing some relevant evidence). There is arguably no attempt to pit one set of social values against another. But this again does not explain the judicial creation of , for example, marital privileges. From this perspective, creation of the plea bargaining practice is interesting. If the system responds to the overload of full trials by taking "short cuts" and conducting trials at undue haste, then it is indeed a comparison of detriment to the fact-finding process. But if the system simply delays proceedings, we leave the realm of accurate fact-finding and are comparing the integrity of the fact-finding process with the cost of trial delay (which need have nothing to do with accurate fact-finding).

[18] That the answers are not a foregone conclusion is demonstrated by the amount of discussion in the literature concerning these and other analogous potential privileges. See, for example, *R* v *Gruenke* [1991] 3 SCR 263 (priest-penitent privilege); Alexander and Bush, "Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege" (1997) 23 Journal of Legislation 215.

[19] Rule 501, United States Federal Rules of Evidence, http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/fre/query=[jump!3A!27acrule501!27]/doc/{@583}?. See the critique in Note, "Making Sense of the Rules of Privilege Under the Structural (Il)Logic of the Federal Rules of Evidence" (1992) 105 Harv L Rev 1339.

[20] (1996) 518 US 1. There has been much comment. See, for example, Imwinkelried, "The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffee* v *Redmond*" (1998) 49 Hastings L J 969, who says, at 989:

privilege", justifying it in very much the same way as lawyer-client privilege normally is – confidentiality is essential to psychotherapy, and mental well-being is a value more important than the accurate determination of legal liability. Yet who does not sympathise with the sentiments of Justice Scalia in dissent? The alleged privilege was attacked on two fronts. On the assertion that a privilege is necessary for the work of a psychotherapist and to mental health, Justice Scalia said:[21]

> For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders – none of whom was awarded a privilege against testifying in court.

As to the proposition that the work of a psychotherapist is more important than the administration of justice, the Judge declared:[22]

> But I see no reason why she [the accused] should be enabled both not to admit it in a criminal court …, and to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else. And even less reason why she should be enabled to deny her guilt …while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify. It seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences.

The objections of Justice Scalia are, in my view, unanswerable – but neither are they answerable in the context of the well established lawyer-client privilege. If we follow the logic of the lawyer-client privilege, then there is no reason why it should not apply to a host of other professional services and relationships – that we cannot do without drying up significant sources of evidence. If however, we deny recognition to these new privileges, there is no basis upon which we can preserve even the lawyer-

> The importance of the Jaffee decision transcends the psychotherapy privilege. The conventional wisdom is that the traditional instrumental rationale for privilege doctrine is strongest in this setting. If the rationale fails here – as it appears to – *the failure calls into question the propriety of relying on the rationale in many other settings*, including … medical privilege, the spousal privilege, the corporate attorney-client privilege, and the clergy privilege.

[21] *Ibid*, p 22.

[22] *Ibid*, p 23.

client privilege.[23] The creation of privileges is not a labour of logic, but a result of political compromises. Compare this with the earlier Supreme Court decision in *University of Pennsylvania* v *EEOC*[24] where an alleged academic peer review privilege was denied recognition. Justice Blackmun was generous enough to concede that "universities and colleges play significant roles in American society", and to assume that "confidentiality is important to the proper functioning of the peer review process".[25] However, in the final analysis, all this was unable to outweigh the social value in the administration of justice – in the particular context of this case, the facilitation of anti-discrimination proceedings. Can there any basis on which we can decide that the work of psychotherapist is more important than the work of academic institutions?

Those who think that the assumption of the judicial power to create privileges is a good thing will applaud what the Singapore court did in *Knight*. There are certainly grounds for thinking like that. Historically, evidential privileges were judicially created.[26] Practically, evidential privilege is probably not the kind of thing which will normally be high on the priority list of a legislature. However, imagine yourself in the position of a judge who has to make the sort of decisions inherent in such a creative power. If a privilege is thought necessary to protect the lawyer-client and marital relationship, what will you do when physicians, psychotherapist, counsellors and parents and cohabiting couples (who choose not to get married) come knocking on the door? We have simply no convincing basis, either in the study of psychology or in homespun wisdom to draw a distinction. Even if the effectiveness argument is settled, how will you compare the social value of the work of lawyers with the work of other professions, or the value of the marital relationship with others of similar intimacy? If you choose some but not others, it will not be easy to ward of allegations of bias. If this unsettles you, as it does me, then the question is

[23] I have alluded to the "proximity" to the administration of justice argument, *supra*, note 17. Non-instrumental reasons have been offered, for example, the idea that it is fundamental human right of some kind, either as a corollary of a right to a fair trial, or as a right to privacy. See Auburn, *Legal Professional Privilege: Law and Theory*, 2000, chap 2. The problem is we still have to decide why these "rights" are more important that the "right" of a litigant to use all available probative evidence. In Singapore, it probably goes without saying, it is not easy to imagine the acceptance of this, or any right, on the basis of non-instrumental reasons alone.

[24] (1990) 493 US 182. Aspiring academics go through a "peer review" process in order to obtain tenure – tenured faculty make submissions either in support of or against the granting of tenure to aspirants.

[25] *Ibid*, p 193.

[26] Perhaps the oldest privileges, legal professional privilege and the marital privileges, were originally judge-made. See *McCormick On Evidence*, *supra*, note 17, p 281:

> The earliest recognised privileges were judicially created, the origin of both the husband-wife and attorney-client privileges being traceable to the received common law.

whether the Singapore court in *Knight* had a choice? I believe it did. It could have said that, notwithstanding the activism of the early common law, the detailed list of privileges in the Evidence Act is exhaustive and any further additions or subtractions ought to be made as a legislative decision. The courts are not strangers to policy considerations, but a point is reached where decisions are so starkly political that judges are in danger of biting off more than they can chew. I have never been an advocate of literalism in statutory interpretation, but where to advance the cause of a social value (through evidential privilege) must mean a potentially serious undermining of the administration of justice, a "purposive" or "facilitative" approach is incurably problematic. It is meaningless without answering the question of which purpose it is that is to be served or facilitated – the administration of justice or the countervailing social value. Legislatures do this all the time – a simple example is budget allocation where a more or less fixed sum of money is to be divided between the different governmental functions. Legislators have to decide between, say, an extra submarine for defence, or paying the education service more for better teachers. Judges (as judges) are probably out of their depth.

B. *The Decision to Create a Plea Negotiation Privilege*

The assumption of a power to create a privilege does not of course mean that the court has to recognise the supplicant privilege. *Knight* should be examined at a another level – if we accept that the court has a discretion, ought it to have been exercised in favour of a plea negotiation privilege? The court in *Knight* came down resoundingly on the side of creating the privilege, notwithstanding the potential probative value of the evidence the privilege might shield:[27]

> [I]t is clear that *a broad policy objective of consensual case disposal* must be recognised …[To deny such a privilege] would so stifle the conduct of plea negotiations as to *completely obviate* its practice. The protection [of plea negotiations] is therefore not only important, but *necessary*, to preserve the harmonious prosecution of our criminal laws.

Would turning away the plea negotiation privilege "completely obviate" the practice of plea negotiations? It is not entirely unreasonable to make that supposition – conceivably, accused persons or their lawyers are more likely to be more forthcoming if they had the assurance that statements made in the course of plea negotiations cannot be subsequently used against them should the negotiations fail. It is, however, quite a leap of logic to conclude from this that if the privilege did not exist, the practice of plea negotiations would collapse completely. The most telling point is that no one in

[27] *Supra*, note 10, at 516.

Singapore thought such a privilege existed until *Knight* decided that it did.[28] It is most unlikely that the accused in *Knight* (or his solicitors) laboured under the belief that such a privilege existed to any degree of certainty when he made his representations to the Attorney-General. Yet plea negotiations have presumably been going on since the British established the modern system of criminal justice in Singapore well over 100 years ago. There is every reason to believe that the accused person, if he or she were so inclined, will make representations whether or not the privilege existed. The hope that the prosecuting authority might act on the representation and either withdraw or lessen the charges is normally a compelling one. Few, if any, would stop to think about the issue of privilege, should negotiations fail.

Even if we can accept that some of those who might have otherwise made representations will be deterred by the absence of privilege, can we say that it is "not only important, but *necessary* to preserve the harmonious prosecution of our criminal laws"? The foundation of plea negotiation privilege in North America has always been the spectre of the wheels of justice grinding to a halt if accused persons, who might otherwise have negotiated a plea, claimed trial.[29] The assumption is, of course, that a great deal of plea negotiations go on. Statistics produced by the Deputy Public Prosecutor in *Knight* for Singapore were, however, quite to the contrary – only 2.3% of persons charged in 1997 made any kind of representations. If the privilege did not exist, the criminal justice system will certainly not grind to a halt – there will simply be, perhaps, a few more trials. It would have been very curious if the Public Prosecutor had opposed something which was so clearly "necessary" for the administration of justice.[30]

The court drew upon two broadly analogous principles to buttress its recognition of the plea negotiation privilege: the "without prejudice" rule for civil cases under section 23,[31] and the judicial practice of using a plea of guilt as mitigation in sentencing (the "one-third rule"). Of the analogy

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[28] The standard works, for example, Chin, *Evidence* (1988), display no awareness at all of such a possibility – it would have been foolhardy, before the decision of *Knight*, for any lawyer to assume or to advise his client that a kind of plea negotiation privilege existed in Singapore.

[29] Few have argued that plea bargaining is good in itself (apart from cost savings). Indeed, it cannot be denied that the cost saving of plea bargaining comes with a moral price.

[30] It is not that the Public Prosecutor can never be wrong – but one would have thought that the prosecutorial authority will be first to feel the strain if the number of full trials go beyond the capacity of the resources that are now available.

[31] It reads:

> In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

between plea negotiations in criminal cases and settlement negotiations in civil matters, the court said:[32]

> [I]t is clear that the purpose for which s23 was enacted applies *with equal force* to the administration of the criminal justice system.

Does the policy of encouraging consensual case settlement for civil cases apply "with equal force". Even on its own terms, *Knight* demonstrates that the "force" is not equal – for while the court was willing to recognise a privilege in criminal proceedings, it was not willing to give it the same scope or reach as the civil privilege under section 23. The court was at pains to point out that the criminal privilege was restricted only to "plea negotiations" and does not amount to a full fledged "without prejudice" privilege, which prevails in civil cases.[33] The court does not explain why, and I defer discussion of it for the moment.[34] There is a fundamental difference between civil and criminal cases. Civil cases are *private* disputes in which society has everything to gain and nothing to lose by consensual settlement between the parties – if the aggrieved party is willing to accept a reduce sum in exchange for the cost and trouble of a full scale trial, that really is his or her choice. In criminal proceedings, "consensual settlement" is fraught with difficulty.[35] The criminal law has a very public dimension – the moral condemnation of the offender *commensurate with fault* – and this is not something that should bargained with. If there is sufficient evidence to prosecute for an offence, then barring any mitigating circumstances that might trigger a legitimate exercise of prosecutorial discretion,[36] then the accused ought to be charged accordingly. It is not easy to make a morally justifiable case for allowing the accused to bargain with the prosecution for a lesser charge in exchange for sparing the prosecutor[37] from working for the conviction. It is not the place for an extended argument for the justifiability of plea bargaining –[38] my purpose is to show that there is a

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[32] *Supra*, note 10, at 519.

[33] *Ibid*.

[34] See discussion, *infra*.

[35] I find it difficult to improve on the classic critique in Ferguson and Roberts, "Plea Bargaining: Directions for Canadian Reform" [1974] Canadian Bar Review 497. The Law Reform Commission of Canada originally adopted the views in this article, but subsequently changed its mind, *Plea Discussions and Agreements* (1989), not because it had changed its views about the morality of plea bargaining, but because it thought that it was a necessary evil.

[36] In which case, the charge should be reduced accordingly, without bargaining.

[37] And, of course, the court.

[38] The literature is legion. See, for example, Guidorizzi, "Should We Really 'Ban' Plea Bargaining?" (1998) 47 Emory Law Journal 753 (against); Lynch, "Our Administrative System of Criminal Justice" (1998) 66 Fordham L Rev 2117 (for). The upshot is simply that if we can live without it, we should.

very good reason for us to be encouraging of settlement in civil cases, but to be suspicious of it for criminal proceedings.

There is a slightly stronger analogy with the sentencing practice of rewarding the accused who pleads guilty with a one-third discount.[39] The reason for the "one third discount" is to encourage the accused to plead guilty (and hence avoid the cost of a full trial) in exchange for leniency.[40] Again, this is not the place to discuss in detail the merits of such a practice. Suffice it to say that there is very respectable opinion that this unjustifiably deters the innocent accused from claiming his or her right to a trial.[41] Be that as it may, the court in *Knight* seemed to be of the view that we cannot have the guilty plea discount without the plea negotiation privilege. This must proceed from a misunderstanding of some kind. While both share the ultimate aim in cost-saving through trial avoidance, the encouragement of guilty pleas does not necessarily include the encouragement of plea *negotiations*. The reason is that many, if not most, accused persons plead guilty, and plead guilty without negotiating. Presumably, some are doing so to avail themselves of the sentence discount. It is really quite coherent to say that, since there is enough of an incentive to plea guilty (without encouraging plea negotiations *via* an evidential privilege), we do not need the help of a plea negotiation privilege. If the privilege comes without a cost, then there is no reason not to have it – but in the context of a plea negotiation privilege, there is a cost. As with all privileges, the integrity of the fact-finding process is always potentially placed in jeopardy by any rule which shields probative evidence from the court. Additionally, where the activity encouraged by the privilege is morally ambiguous (to say the least), there is a moral cost as well.

Knight might have been on firmer footing if the argument had been that, even with the sentence discount policy in place, there are still too many people claiming trials – so we need, it may be argued, the plea negotiation privilege to increase the rate of guilty pleas following representations to the Attorney-General. Unfortunately, this is foreclosed by the by the very high

[39] For recent affirmations of the practice, see *Tay Beng Guan Albert* v *PP* [2000] 3 SLR 785, and *Lim Hock Hin Kelvin* v PP [1998] 1 SLR 801.

[40] The earlier theory that a plea of guilt indicates remorse seems to have disappeared from modern discussions.

[41] For example, Ashworth, *The Criminal Process*, (1994), chap 9, who describes, at 282-3, the practice as a "structural incentive" to "innocent defendants to 'cut their losses'". Worse, because the discount is not a foregone conclusion and may be refused in a variety of circumstances (for example, where "public interest" requires, *Sim Gek Yong* v *PP* [1995] 1 SLR 537, or where the accused is deemed to have been "caught red-handed", *PP* v *Tay Beng Guan Albert* [2000] 3 SLR 785), which cannot be predicted with certainty, the practice has the potential to deceive the accused into believing that he or she is getting something in exchange for a guilty plea.

existing rate of guilty pleas.[42] The Deputy Public Prosecutor, in opposing the creation of such a privilege, obviously was not of the view that the absence of the privilege was in any way detrimental to the "harmonious prosecution of our criminal laws". He could, of course, have been wrong (and the court right) – but it appears impossible to force such a privilege down the throat of an unwilling prosecutor anyway. In *United States* v *Mezzanatto*,[43] the Supreme Court held that the plea negotiation privilege (under the Federal Rules of Evidence) is waivable, and that it was so waived when the prosecuting authority made it clear to the accused that any negotiation had to proceed on the basis that the privilege had been waived. In other words, the Attorney-General in Singapore is at liberty to make a general policy, announced to all concerned, that all representations are to be made on condition that the plea negotiation privilege is waived. The Supreme Court may have been wrong – but can it be that the plea negotiation privilege is the only one that the beneficiary cannot be allowed to waive?

Even if we accept the vagaries that normally surround the job of privilege creation, the decision in *Knight* to recognise the plea negotiation privilege is highly problematic in the context of a criminal justice system in which plea negotiations do not play a particularly important part in efficiency gains through the avoidance of trials.

II. The Boundaries of a Privilege

The other thing which ought to weigh in the minds of those who are inclined to create a privilege is the vexed question of what the exact scope or boundary of the privilege should be. Given the highly political nature of the creation of privileges in the first place, one should not be surprised that difficult boundary issues share this heritage. The logic of a privilege will inevitably incline towards expansiveness and bright-line rules – it is better to err on the side of over-protection rather than under-protection of the relevant social value. Rules, which guarantee protection, are preferred over discretion, which holds out the possibility of non-protection. On the other hand the logic of preserving the integrity of the fact-finding process dictates a more grudging attitude – we are already adversely affecting the integrity of the legal system by recognising the privilege, let us not make matters worse by extending it beyond the core privilege situations. This way of looking at privileges is also receptive to the carving-out of exceptions to the

[42] The Public Prosecutor has revealed that there was a 92% plead guilty rate (not including departmental summonses) in the Subordinate Courts which handle the vast majority of all criminal cases: Chan Sek Keong, "Rethinking the Criminal Justice System of Singapore for the 21st Century" in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (2000).

[43] (1995) 513 US 196.

privilege, and to the use of discretion to over-ride the privilege. The logic of one approach is implacably opposed to the logic of the other, and there is seldom any rational way of deciding which should prevail in a particular "border dispute". The initial decision to create a privilege does not tell us how far it is to go. Consistency amongst the different privileges cannot be expected. Again, no comprehensive attempt to look at all the boundary issues of all the privileges will be made. What follows is a selective discussion of a few of them intended to illustrate the dynamics involved in the exercise.

A. *Plea Negotiation Privilege: Bargains and Police Statements*

Although *Knight* is primarily a decision concerning the creation of a privilege, it was immediately faced with a number of border disputes. One example was whether the new-found plea negotiation privilege covers representations made by the accused intended to persuade the prosecuting authority to withdraw all charges. This is a deviation from the core plea negotiation situation – the accused offering to plead guilty *in exchange* for the prosecution preferring a lesser charge. The court ruled in favour of expansiveness:[44]

> [I]t cannot be said that an accused who seeks a withdrawal of charges will not, *in the final analysis*, agree to surrendering (sic) a lesser plea. In this way, a person who makes representations for the withdrawal of charges against him is clearly involved in a process of plea negotiations with the prosecution.

Consistent with the logic of the privilege, withdrawal representations might lead to plea negotiations on a lesser charge, so they should also be privileged. On the other hand, if one had the integrity of the fact-finding process in mind, one can quite reasonably say that, while statements made in the course of actual plea negotiations should be protected, statements which may or may not lead to plea negotiations should not – for the gain there is much more speculative than in the core situation. To have protected the communication of an accused person (asking for the withdrawal of charges) who never intended to plead guilty to any lesser charge would have been a sacrifice for nothing.

Contrast this with the other boundary ruling found in *Knight* – that the plea negotiation privilege does not amount to a criminal version of the "without prejudice" privilege for civil cases:[45]

[44] *Supra*, note 10, at 507.

[45] *Supra*, note 10, at 521-2.

> The extension of the "without prejudice" rule [in criminal proceedings] is *limited to representations made in plea negotiations.* No such privilege disturbs the existing common law and statutory provisions concerning admissibility of statements as admissions under the Evidence Act or statements such as those secured pursuant to s 122 of the Criminal Procedure Code.

As for "admissibility of statements as admissions under the Evidence Act", there can be no doubt that a privilege does indeed "disturb" the existing regime – for without the privilege, admissions made by the accused in plea negotiations or otherwise would be admissible.[46] More to the point is the potential clash between the privilege and admissions made by the accused in the course of police interrogation.[47] United States jurisprudence on the line between admissible police statements and privileged plea negotiation statements is very vexed. One can see why – the bargaining can, quite conceivably, start during police interrogation. Plea negotiations can very well begin in the course of police interrogation. If one were looking only at the logic of the privilege, then the limitation of the privilege to post-interrogation negotiation makes no sense. It can only be explained by what was perceived by the court to be the over-riding need for use of police statements at the trial, should the accused claim it.

Even if we accept the existence of a plea negotiation privilege in some form or other, we can still disagree over where the boundaries should be –[48] this, in turn, is determined by what is often a subjective and speculative evaluation of the cost and benefit to both the integrity of legal process and the countervailing value promoted by the privilege. Sometimes the logic of the privilege wins, sometimes the need for the use of the evidence prevails. The result is often, and perhaps unavoidably, unpredictable.

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[46] S 21 of the Evidence Act makes admissions "relevant" (or in modern language, admissible) "against the party who makes them".

[47] There are essentially two kinds of police statements – those recorded under s122(6) of the Criminal Procedure Code, and those recorded under s121 of the Code. Simply, the 122(6) statement is that which is recorded after the caution in that provision is given to the accused, and 121 statements are any statements taken either before or after the 122(6) statement has been recorded. It is odd that the dicta mentions only the "s122" (presumably s 122(6) statements) – could it be that the privilege does not cover 122(6) statements, but might apply to s121 statements?

[48] There is much learning from the United States: see Leonard, *Selected Rules of Limited Admissibility: Regulation of Evidence to Promote Extrinsic Policies and Values* (1996), at 158-89. A difficult issue has been whether impeachment of credit (as opposed to use as substantive evidence) is prevented by the privilege – the federal and various state rules do not agree. The facts in *Knight* actually raised this issue, but the Court merely assumed, without argument, that the privilege does prevent impeachment use.

B. *Legal Professional Privilege: Innocence at Stake and Litigation Privilege*

It is interesting to see what courts do when the stakes are high. Does legal professional privilege (the privilege that protects communications between lawyer and client) operate to prevent disclosure or admissibility of evidence which might be crucial to vindicate someone accused of a criminal offence? The courts in Singapore have yet to be faced with such a dilemma. What will they do when the question does come before our courts? The House of Lords has declared, in *R* v *Derby Magistrates' Court*, *Ex parte B*,[49] that the privilege must prevail, even when the client was no longer in any danger of being charged for the crime. This surprisingly absolutist position was, of course, entirely understandable if we are looking at the logic of the privilege – "once any exception to the general rule is allowed, the client's confidence is necessarily lost".[50] One might quarrel with the speculation that confidence is "necessarily lost",[51] but it cannot be denied that the logic of the privilege applies with the same force, whether or not some other person needs to use it for whatever reason. The Supreme Court of Canada took the contrary position in *R* v *McClure*.[52] The privilege is not absolute and must yield, in the appropriate circumstances, where the innocence of the accused is at stake. The Canadians are willing to sacrifice some lawyer-client confidence in order to prevent a wrongful conviction; the British are not. Nor is the House of Lords consistent in its aversion towards the carving of exceptions to legal professional privilege. Communications made with the purpose of furthering a crime or fraud is a well established exception.[53] Where the criminal or fraudulent purpose is that of the client, the exception is not problematic – the law does not want to foster confidence between lawyer and client where the client is seeking legal advice in order to perpetrate a crime or fraud. However, in *R* v *Central Criminal Court, Ex parte Francis, Francis*,[54] the House of Lords extended this exception to a situation where a third party and not the client possessed the criminal purpose. This does present a problem – for when I communicate with my lawyer, how can I be sure that some time in the future, some criminal

[49] [1996] AC 487. Earlier decisions of lower courts in favour of the privilege were overruled.

[50] The words of Lord Taylor CJ, *ibid*, p 508.

[51] For it can be argued that a privilege which yields to an "innocence at stake" exception, especially if it is coupled with a rider that the client must not be in danger of being charged for the crime, is better than no privilege at all, and might be just enough to encourage an acceptable degree of candour.

[52] [2001] 1 SCR 445. The Canadians have also recognised a "public safety" exception: *Smith* v *Jones* [1999] 1 SCR 455.

[53] The Evidence Act makes an express exception of "communication made in furtherance of any illegal purpose": s 128(1)(a).

[54] [1989] AC 346.

purpose of a third party (unknown to me now) will operate to lift the privilege. Confidence is "necessarily lost", if we can believe the reasoning in the *Derby Magistrates' Court* case. What indeed is the message of the two House of Lords decisions – that, in some circumstances, the privilege must yield to the need for successful criminal prosecution,[55] but it should never be subordinated to the need for a successful defence to a criminal charge?

What is a Singapore court to do with these issues – the innocence at stake exception, and the application of the crime-fraud exception to the criminal or fraudulent intentions of a third party? The Evidence Act does not contain an innocence exception – but, as we have seen from *Knight*, this does not mean that it does not exist. The Act does contain an "illegal purpose" exception,[56] but does not specifically say whose criminal or fraudulent purpose it must be. The court which eventually has to deal with these questions is not to be envied – it is not easy to see how they can be resolved in any principled fashion.[57] There seems to be no way out of a crude horse-trading exercise.

One issue which does seem to have been impliedly decided is the existence in Singapore of "litigation privilege", the privilege which protects communication (normally an expert report of some kind) between the client (or the lawyer on his or her behalf) and a third party, made for the dominant purpose of litigation. There is, of course, no mention of such a privilege in the Evidence Act.[58] In *Brink's Inc* v *Singapore Airlines Ltd*,[59] the Court of Appeal merely assumed, without argument, that such a privilege existed.

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[55] The prosecution was trying to get at a third party drug money launderer.

[56] Nor does the third party issue exhaust the potential problems of this exception. For example, the Evidence Act does not contain a definition of "illegal" – it could mean criminal only, or it could mean also, following s 43 of the Penal Code, Cap 224 (1985 Rev Ed), intention to breach a civil obligation. If it does indeed extend to civil wrongs, there does not seem to be any restriction to "fraudulent" purposes.

[57] The Singapore courts will not be alone. The United States Supreme Court's latest foray into attorney-client privilege in *Swidler & Berlin* v *US* (1998) 524 US 399 yielded the ruling that the privilege survives the death of the client, on this ground (at 407):

> While fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it *vanishes altogether*.

It is not easy to understand why the privilege is to be protected to this extreme extent, or how this can be reconciled with the accepted differentiation between communication and "fact" – if the client knew that facts observed by the lawyer in the process of communications between them may be disclosed (for example, handwriting), the client may well fear this and not communicate with the lawyer at all, let alone be less than frank with the lawyer.

[58] Which is understandable in that the Act was drafted before such a privilege crystallised at common law.

[59] [1998] 2 SLR 657. The Court decided the point "[a]pplying the approach taken in *Waugh* v *British Railways Board* [1980] AC 521".

That such a privilege must exist is not at all clear. Although it is normally discussed as an extension of legal professional privilege, the rationale for it is quite distinct.[60] Litigation privilege in no way protects confidential communication between lawyer and client – its target is not even communication between lawyer and client. The most common reason advanced for the privilege is the preservation of the adversarial nature of our litigation process. The strength of that rationale depends then on how dearly we cherish the "adversarialness" of our system of justice, for there is much that is not very adversarial about both our criminal justice system, which grants extensive powers to the police to extract admissible confessions from the accused; and our civil justice system, which countenances broad discovery rights.[61] Again, the task of creation of the privilege is but the tip of the iceberg. Border disputes loom large – is litigation privilege to be governed by the "dominant purpose" test, the "sole purpose" test or some other criterion? The Court of Appeal simply assumed that the dominant purpose test applied.[62] Again the choice we opt for really hinges on how solicitous we want to be of the privilege – the dominant purpose test is more generous to the privilege than is the sole purpose test. The question of exceptions arise – the House of Lords in *In re L (A Minor)*[63] has decided that litigation privilege does not extend to judicial proceedings

[60] A possible way of associating the two privileges is to re-invent legal professional privilege as a pre-condition of the adversarial system (and not as encouragement of candour), but this has not been done by the courts of the major common law jurisdictions. Practically, the switching of rationales does not help us unravel either the existence or the boundary issues - we must first decide how important the adversarial system is, and the extent to which it should be adversarial. Needless to say, these questions do not yield ready answers.

[61] It is now accepted that procedural systems cannot be neatly packed into "adversarial" and "inquisitorial" boxes – elements of both exist to varying degrees. The question is no longer whether we should be adversarial or inquisitorial, but whether we should increase or decrease either element.

[62] The other leading contender, the "sole purpose" test, was the Australian common law position (*Grant* v *Downs* (1976) 135 CLR 674) until statute intervened in 1995 to impose the English "dominant purpose" test (*Waugh*, *supra*, note 59) to the curial context (and presumably not to pre-trial proceedings) – the High Court has since changed the common law test to "dominant purpose" to harmonise the situation (*Esso Australia Resources Ltd* v *The Commissioner of Taxation* [1999] HCA 67) over this protest of Australia's leading scholar on the law of privilege (McNicol, Note, (1999) 21 Sydney L Rev 656, at 666:

> In a climate today where the privilege is often used by corporate litigants and where the privilege has been extended even further than its original definition, judicial law makers should be cautious in expanding the doctrine again.

[63] [1997] AC 16. It was a close call with three judges in the majority and two in the minority. Lord Nicholls of Birkenhead, dissenting, did not buy the "investigative" – adversarial distinction, arguing that if procedural fairness requires a litigation privilege in normal proceedings, it should also require the privilege in child proceedings. This is classic "logic of the privilege" reasoning. Lord Jauncey of Tullichettle, for the majority, clearly had in mind the potential damage to the accuracy of fact-finding – here impinging directly on the "welfare of the child".

which are more "investigative" than adversarial – on the facts of the case "care proceedings" against a mother suspected of child abuse. If we do decide to adopt this decision for our own, it is not clear at all which proceedings should be considered "investigative" and which "adversarial".

The most serious practical questions in the realm of legal professional privilege has to do with whether we ought to take on board changes and refinements to the common law privilege in other jurisdictions which are not in entire accord with the provisions of the Evidence Act.[64] We could, of course, have adopted what is primarily a literal approach – only the privileges found in the Act apply, and only to the extent specified in the Act. This would mean that we simply refuse to recognise the existence of a litigation privilege. It also means that we do not have an "innocence at stake" exception. We learn from *Knight* that this is not what the court wants to do – but if we walk the "purposive" path, everything not expressly (or, presumably, by necessary implication) forbidden is up for grabs. My point is simply that in the context of the difficult issues of evidential privilege, a literal approach is not any less purposive – it merely serves the other contending purpose.

C. *"Without Prejudice" Privilege: Third Parties*

Examples could be multiplied of the many developments in the common law post-dating the drafting of the Evidence Act jockeying for entry. One could point to the "without prejudice" privilege under section 23, which we have encountered before. The House of Lords, in *Rush & Thompkins Ltd* v *Greater London Council*,[65] held that the privilege extended to all litigation connected with the same subject matter, whether between the same or different parties. The reason is that if I knew that statements which I make in the course of settlement negotiations with one party might be used against me by another party, I will not be free to speak and negotiations would be "chilled". If one takes the cue from the plea negotiation privilege in the United States Federal Rules of Evidence,[66] then the privilege ought to protect the use of statements against the person who made the statement or the other party to the negotiation. In *Lim Tjoen Kong* v *A-B Chew Investments Pte Ltd*,[67] the Court of Appeal thought it unnecessary to decide whether the English decision applies in Singapore, but ventured the view

[64] See the writings of Pinsler in "Aspects of Legal Professional Privilege: A Reconsideration of the Evidence Act" [1987]1 MLJ ciii; "Legal Professional Privilege: A Consideration of Recent Common Law Development" (1992) 4 SAcLJ 10.

[65] [1989] AC 1280. See Pinsler, "Communications in the Course of Settlement Negotiations and the Rule of Privilege" [1992] 1 MLJ xxv, who is uneasy that s 23 does not provide for any exception.

[66] *Supra*, note 19.

[67] [1991] 3 MLJ 4.

that a "literal reading" of section 23 "suggested that the privilege … is confined to the parties to the action". There is certainly some basis for saying that such is a possible meaning of section 23, which is based on express or implied agreement that the statements not be used as evidence – agreements between two parties should not normally bind a third party. We do not yet know whether the (English) common law development will prevail over the "literal interpretation".

D. *Public Interest Privilege: Executive Fiat or Judicial Balancing*

The last privilege I shall look at is unusual in that the prevailing (English) common law does not rely on a bright-line rule, but on an discretionary *ad hoc* balancing exercise to mediate potential border disputes. The well known decision of *Conway* v *Rimmer*[68] decided that, save for situations of the highest gravity, when the government alleges that disclosure of evidence will be prejudicial to the public interest, the court must balance against each other the potential harm of disclosure and the potential harm of depriving a litigant of probative evidence. It is interesting to contrast this with the resolute refusal of the House of Lords to indulge in any sort of case-by-case balancing in the context of legal professional privilege.[69] Will not official communication be disastrously chilled by the mere prospect that it might be disclosed, albeit after an exercise of judicial discretion?[70] Why is it that in public interest privilege, but not in legal professional privilege, that confidence can be sacrificed to some extent in order to aid a litigant? It cannot be that the confidence protected by legal professional privilege is somehow more important than those protected potentially by public interest privilege. Nor should the psychological responses of parties to the risk of a breach of confidence be different (in general) in the two contexts.

What is Singapore's position on public interest privilege? A "literal" interpretation of the Evidence Act provisions, sections 125 and 126, does seem to sound like the position abandoned by the English common law –[71] that the executive government has complete discretion to allow or disallow the production of "unpublished official records relating to affairs of State", or the use of "communications made … in official confidence". The executive government's *ipse dixit* is conclusive, absent bad faith. The decisions that do touch upon the provisions have held to this literal

[68] [1968] AC 910.

[69] See discussion above.

[70] There are, of course, situations where the mere revelation of official information would be against public interest, quite apart from any question of candour.

[71] *Duncan* v *Cammel, Liard Co Ltd* [1942] AC 624.

interpretation –[72] *Re Siah Mooi Guat*,[73] and more recently, *Chan Hiang Leng Colin* v *PP*[74] and *Zainal bin Kuning* v *Chan Sin Mian Michael*.[75] Unfortunately, the common law position[76] does not appear to have been pressed upon the courts. It will be interesting to see if, like in *Knight* and *Brink's*, the current common law will be taken on board, or if it will be rejected as being "inconsistent" with the Evidence Act. My earlier analysis leads to the prediction that the courts will choose the regime which it thinks desirable. It is beyond the scope of this discussion to go into the constitutional issues of the appropriate division of power between the executive and the judiciary, so a few introductory remarks will have to suffice. First, while the executive is possibly in a position to determine the harm that would be caused by disclosure, it cannot have sufficient appreciation of the harm that will be caused by preventing a litigant from discovering and using the disputed evidence. Secondly, harm to the public can come in vastly varying degrees – the Evidence Act does not tell the executive the threshold of harm that will trigger the executive discretion to withhold the evidence. The temptation to "play it safe" will be strong. Thirdly, the issue is tied up with the general attitude of the judiciary towards the exercise of official discretion – in that respect, the law, even in Singapore, appears to have changed in favour of judicial review.[77] However, that must be seen in the light of the prevailing political culture of high deference to the decisions of the executive –[78] yet even political culture is not static, much depends on when the matter comes before the court.

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[72] This is to be contrasted with the Malaysian desire to reform the law in favour of the current common law position: *B A Rao* v *Sapuran Kaur* [1978] 2 MLJ 146. See Chin, "Documents on Affairs of State as Evidence" [1979] Mal L Rev 24.

[73] [1988] SLR 766. The High Court held that "it is for the minister, and not the court, to decide whether it is in the public interest that the information should be disclosed".

[74] [1994] 3 SLR 662. There is language in this case that the court might be willing, in the appropriate case, to carry out a balancing exercise: "I was not convinced … that the public interest dictated that such documents be produced before this court. The importance of preserving the confidentiality of state papers need not be stressed". If that is correct, it is not clear why the court thought it inappropriate to balance the competing considerations in this case.

[75] [1996] 3 SLR 121. The holding of the Court of Appeal here is nuanced: it applied only to s 126 (following an Indian text, a Straits Settlement case and a Malaysian decision), and left s 125 open. It is difficult to see why, on principle, the two sections should be differently construed.

[76] Or the Malaysian case of *B A Rao*, *supra*, note 72.

[77] *Chng Suan Tze* v *Minister of Home Affairs* [1989] 1 MLJ 69 (no such thing as an unreviewable power); but see *Chan Hiang Leng Colin* v *Minister for Information and the Arts* [1996] 1 SLR 609 (unreviewable in the context of "national security"). There is at least the possibility that where "national security" is not deemed to be in question, the normal regime of reviewability will prevail.

[78] This is not the place to dwell on the question of whether, and to what extent, this is desirable.

III. ATTITUDE AND THE LAW OF PRIVILEGE

Difficult issues of privilege have come before our courts before. Occasionally, the factual circumstances allow the court to side-step the question – as we have seen in *Lim Tjoen Kong* where the court found it unnecessary to decide if the "without prejudice" rule applies against third party use.[79] Somewhat less satisfactorily, the courts have simply assumed that the (English) common law applies in Singapore, without any attempt to justify its existence. We have seen how the court in *Brink's Inc* merely used the English rules on litigation privilege.[80] A contrary trend is seen in the public interest cases where a literal interpretation of the Evidence Act provisions was simply declared to be the law, without any attempt to deal with momentous developments in the English common law following *Conway* v *Rimmer*.[81] Occasionally too, the court has been able to deal with the case at hand without needing to tackle deeper issues of coherence. *Lim Lye Hock* v *PP*[82] dealt with the issue of whether the abolition of one of the two marital privileges (the spousal incrimination privilege)[83] had any effect on the other marital privilege (the marital communication privilege).[84] As the two privileges are legally distinct, the court was quite right to hold that legislation to do away with one cannot possibly affect the other as well. Yet a deeper question of coherence lurks beneath - both privileges are, at a higher level of abstraction, intended to give special protection to the institution of marriage –[85] the marital communication privilege by encouraging candour in marital communication, and the spousal incrimination privilege in preventing spouses from being place in a position of adversity against each other. How is one to regard the marital communication privilege now that the other privilege has gone? Courts have no choice over the existence or non-existence of a privilege decreed by statute, but they have to determine the boundaries of the privilege that remains. Should the courts defend the remaining marital communication privilege with extra zeal (now that the other one is gone), or read it restrictively, taking the cue from legislature that marriages are either not in need of, or are undeserving of special treatment?

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79 *Supra*, note 67.

80 Supra, note 59.

81 See discussion above.

82 [1995] 1 SLR 238.

83 S 134(5), Evidence Act.

84 S 124, Evidence Act.

85 Debate rages on in the United States: see, for example, Frost, "Updating the Marital Privileges: A Witness Centered Rationale" (1999) 14 Wisconsin Women's LJ 1; Regan, "Spousal Privilege and the Meanings of Marriage" (1995) 81 Vanderbilt L Rev 2045. State law has a variety of postures – some with both privileges intact, others with one or the other, normally the marital communication privilege.

We see the court in an "activist mode" in *Knight*, where a literal reading of the Evidence Act, which would have ruled out a plea negotiation privilege, was rejected.[86] There is much to applaud in the manner in which the court dealt with the issue (however we may feel about the result). It is heartening to see the court grappling with the legal issue of how such a privilege might fit with the Evidence Act, and with whether, as a matter of policy, such a privilege should exist. It is also interesting to note that the court was inspired, not by the English common law, but by common law of other countries, and even by a United States statutory provision. It only remains to sound a word of caution. In the world of statutory interpretation the battle between the old "literal interpretation" and the new "purposive approach" has been fought and won.[87] The deposed "literal interpretation" has connotations of backwardness, illogicality and mindless rigidity, while the reigning "purposive approach" carries with it progressiveness and logical fluidity. It is easy, as I fear the court in *Knight* may have been, to be caught up with using the purposive approach to advance the logic of the privilege. If it applies to civil cases, then why not criminal proceedings? However, the "purposive approach" in the context of the law of privilege is a dangerous game – what may be purposive towards the rationale of the privilege is antithesis to the integrity of the judicial fact-finding process. Literalism, under these circumstances, need not be mindless rigidity, but a recognition that the purposive approach has no meaning unless we can decide which purpose is to be served. Clipping the wings of a privilege is not necessarily a bad thing – the accuracy of the fact-finding process is enhanced. The sacrifice of one is the salvation of the other.

[86] See discussion above.

[87] S 9A(1), Interpretation Act, Cap 1 (1999 Rev Ed) reads:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.