

# Legal professional privilege; Jurisdiction of the courts; Law, science, and equality before the law

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## Legal professional privilege

A special set of rules controls the confidentiality of communications between lawyers and their clients. It is a very important part of the legal system.

In an episode of *The Simpsons*, Marge is walking past a law centre when she sees the delinquent lawyer Lionel Hutz in a side street suspiciously rooting through papers and rubbish in a garbage dumpster. Hutz looks up, panicked, and says to her, pointing at the container, "I'll have you know the contents of that dumpster are private! You stick your nose in, you'll be violating attorney-dumpster confidentiality." While that precise concept is unknown to the law, the principle of confidentiality deserves attention.

The recent scandal of secretly recorded conversations between the lawyer Simon Creighton and his client (*The Times* 5th February, 2008) raises the question: why do we have the principle of "professional privilege" that protects the lawyer-client relationship?

In essence, the privilege means that communications between a lawyer and client are confidential, and can only be revealed to a law court or the police at the option of the client. The same protection of confidentiality does not extend to doctor-patient, priest-penitent, or accountant-client relationships so it is easier for the legal system to information from those professional communications.

The word "privilege" comes from the Latin (*privilegium*) for "private law", a law applying to an individual or small group. Under general law, what citizens say to each other can be used in evidence in law courts. A "private law" though applies to lawyers, and gives lawyer-client communications a specially guarded confidentiality.

The justification is simple and compelling. You don't want to live in anarchy, you want to live in a society of laws and rules. As there are thousands of laws, you don't want to have to become an expert yourself on them all, anymore than you want to learn medicine just so you can be your own doctor. You want experts on the laws: lawyers. So, a society should encourage citizens to go to its lawyers for advice whenever they are in difficulties. To ensure the lawyer-client relationship works well, there must be complete trust, and, in order for that to happen, the client must feel assured that client-lawyer communications are completely private and confidential.

It isn't a question of "if a client has done nothing wrong, they've got nothing to worry about if their chats with their lawyer are recorded". To be full and frank with lawyers in criminal, family, civil, and commercial cases, many clients have to mention secret, embarrassing or compromising things that are incidental to their main stories. However, more good is served by those things remaining confidential, and the law taking its proper course guided by lawyers, than if clients were deterred from telling the big truths to lawyers for fear of the incidental compromising facts being open to be made public.

The rule of privilege is long established. In *Greenough v Gaskell* (1833) 39 Eng Rep 618, Lord Chancellor Brougham said

(at 621) that the rule was important to uphold "the interests of justice". He said if the rule did not exist, people would be mistrustful of consulting legal experts, and so would end up worsening their own positions with do-it-yourself law. He said "every one would be thrown upon his own legal resources".

More recently, in 2003, the Privy Council (the highest appeal court for many commonwealth countries) ruled that lawyer-client privilege is fundamental to the operation of justice and should not be overridden unless the law has specifically said so in a particular circumstance: *B v Auckland District Law Society* [2003] UKPC 38. The privilege is also protected under European law: Case 155/79 *AM&S Europe Ltd v EC Commission* [1983] QB 878, and European human rights law: *Campbell v UK* (1992) 15 EHRR 137

The privilege against disclosure does not, however, cover all communications. In a case in 1884, an English appeal confirmed that if a client asks a lawyer for information in order to be guided on how to commit a crime, the lawyer can testify about that despite the client's protests: *R v Cox and Railton* (1884) 14 QBD 153

Henry Muster, who had d been libeled in *The Brightonian*, was awarded damages. But the publisher of the paper, Richard Railton, conspired with a business partner to make a property transaction in order to avoid paying the damages. Railton had asked his solicitor some questions in preparation to do something unlawful. Informed, for example, that he wasn't allowed to sell property to his own business partner, Railton asked the solicitor "Does anyone know about the partnership except for you?" After the scam was exposed, the solicitor was called as a prosecution witness and Railton and his partner were convicted.

Allowing client-lawyer privilege does not, as is sometimes said, amount to allowing criminals to thrive. A lawyer cannot assist in the commission of a crime or say to a court anything he knows is untrue – those are very serious offences. Moreover, it is a lawyer's positive duty to disclose information that he knows or suspects relates to particular crimes such as terrorism (under the Terrorism Act 2000) or money laundering (under the Proceeds of Crime Act 2002). Sometimes, of course, that puts lawyers in a difficult position. The barrister Rayner Goddard (who became Lord Chief Justice in 1946) asked his first client, during their initial cell interview at the Old Bailey: "Now, my man, what is your story?" The client replied "Well, that's rather up to you, guv'nor."

It might be that the privilege rule means that lawyers get to hear some immoral or shocking non-criminal things about the lives of some clients, and that those remain secret. That, though, is a small price to pay for a population knowing that the state does not have its eye and an ear in the very offices where citizens go when they need help.

## Jurisdiction of the courts – the strange case of the president, the plotters, the failed coup, and the abandoned judgment

One key issue for the English legal system is the extent of its jurisdiction – what sort of cases its courts can adjudicate upon.

Many rules and principles are relevant in considering whether a case that one party might want to be heard in the courts can in fact be judged in them.

This issue was recently looked at in a case before the House of Lords. In the end no final answer to the dispute was given, but the law can be helpfully explained in the context of the unusual case.

This is a case in which a foreign president tried to sue the people who plotted his downfall but was told by the English Court of Appeal, in effect, "you cannot bring your action here because that would be playing international politics in a law court". In law, the phrase is that this dispute was "not justiciable" in the English courts.

TEODORO OBIANG NGUEMA MBASOGO, THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA, AND THE REPUBLIC OF EQUATORIAL GUINEA

V.

LOGO LIMITED A company incorporated in the British Virgin Islands, and others

HL 2008, CA [2006] EWCA Civ 1370

Part of the appeal was to do with complex aspects of the law of tort (e.g. what are the necessary ingredients of the tort of conspiracy?) but the bigger legal issue concerned the circumstances in which a foreign head of state can sue in the UK with the purpose of protecting his power in his sovereign state.

In a nutshell, in 2006 in this case the Court of Appeal ruled that although a foreign head of state can use the English courts for some civil actions, e.g. in the way an individual citizen can in order to get money owed to him, a head of state cannot sue if the sort of action he is bringing is really a *political* action.

In 2005 the African State of Equatorial Guinea had a population of only 521,000, but it was (and is) rich in oil and gas. Its capital, Malabo, is situated on the island of Bioko, off the coast of Cameroon, about 160 km from the mainland coast of Equatorial Guinea.

The President of the Republic of Equatorial Guinea enjoys international recognition as head of state and the United Kingdom has full and reciprocal diplomatic relations with the country of which he is head.

The appeal arose from an alleged conspiracy by the defendants to overthrow the government by means of a private coup, to seize control of the state and its valuable assets, to kill or injure the president and to install Severo Moto (who is an Equato-Guinean living in Spain), as the new President.

The claimants (the government and the president) alleged that the president was caused "great apprehension and fear", particularly for his own and his family's safety. He believed that both he and his family were likely to be injured or killed in the course of the attack. They further alleged that the life of the head of a foreign friendly state had been at stake with billions of pounds of assets placed in jeopardy. A case of international terrorism against Equatorial Guinea, a friendly state, had been master-minded and financed, they said, within the jurisdiction of the English courts. In those circumstances it was the proper function of the law, the claimant said, to ensure that such wrongs were remedied.

One of the key questions was: are the tort claims justiciable or should the court decline to entertain them because they amount to an exercise of sovereign power by Equatorial Guinea within the jurisdiction of the English courts?

The underlying theme of the defendants' position was that in reality, the claim was nothing more than an exercise of sovereign authority by Equatorial Guinea in the courts of England and Wales because, in essence, it was a claim for losses sustained in the exercise of the power of a sovereign state to protect itself from revolution. The claimants responded that this

misrepresented the true nature of their claims. Properly understood, they said, these were entirely conventional claims for compensation for pecuniary loss suffered as a result of the defendants' tortious actions.

Much of the claimants' argument hinged on a case from 1861 called *Emperor of Austria v Day and Kossuth* (1861) 3 De G F & J 217. In that case, the defendants had printed banknotes in London. Louis Kossuth intended to introduce the notes into Hungary after he had overthrown the Emperor of Austria by revolution.

The Emperor obtained an injunction restraining the defendants from continuing to manufacture the notes. The injunction was upheld on appeal. One of the defences advanced was that the injunction should be refused because the proceedings were brought to protect the Emperor's political power and prerogatives. Lord Campbell, the Lord Chancellor, said (p. 238) that "if the suit were instituted merely to support his political power and prerogatives" he would have denied the Emperor the right to maintain the suit. But that was not seen to be the purpose, and the claim was allowed.

### Conclusion:

In the case of Mbasogo and Equatorial New Guinea, the president lost his case in the Court of Appeal in October 2006. The critical question was whether in bringing a claim, the claimant was doing an act which was of a "sovereign character" or which was "done by virtue of sovereign authority"; and whether the claim involved the exercise or assertion of a sovereign right. If so, then the court would not determine or enforce the claim.

On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it.

In the event, however, the House of Lords did not decide this case. It collapsed in an unprecedented fashion when the House of Lords refused to continue hearing the matter (*The Times*, 7th February, 2008). The Lords learnt that Simon Mann, a British former SAS officer accused of instigating the plot, was being held at a notorious prison in Equatorial Guinea and was being prevented by the government of Equatorial New Guinea from meeting with either his lawyers or British consular representatives.

Equatorial Guinea's stance so was so unconscionable to the nine law lords hearing the damages claim that they abruptly adjourned the proceedings indefinitely. They described the situation as "highly regrettable".

### Law, science, and equality

The legal system does not operate in a social vacuum. It must, continuously, interplay with the politics, science, economy, and moral world of which it is a part.

A good example of how legal issues are bound up with social and scientific matters came recently in a debate about whether cousin-marriage should be allowed.

In February, 2008, a government minister spoke of his worry about birth defects among children of first-cousin marriages in Britain's Asian community. He ignited a fierce debate. Phil Woolas said health workers were aware such marriages were creating increased risk of genetic problems. Mr Woolas said cultural sensitivities made the issue of birth defects difficult to address. Some members of the Asian community strongly opposed his views. Mr Woolas said:

"The issue we need to debate is first cousin marriages, whereby a lot of arranged marriages are with first cousins, and that produces lots of genetic problems in terms of disability [in children]."

Mr Woolas, who was supported by other MPs, stressed the marriages, which are legal in the UK, were a cultural, not a religious, issue and confined mainly to families originating in rural Pakistan.

His comments were supported by Ann Cryer MP who raised the issue two years ago after research showed British Pakistanis were 13 times more likely to have children with recessive disorders than the general population. Mrs Cryer, told *The Sunday Times* (10th February, 2008) "This is to do with a medieval culture where you keep wealth within the family."

Research for BBC2's Newsnight in November 2005 showed British Pakistanis accounted for 3.4% of all births but have 30 per cent of all British children with "recessive disorders".

[http://www.bbc.co.uk/pressoffice/pressreleases/stories/2005/11\\_november/16/newsnight.shtml](http://www.bbc.co.uk/pressoffice/pressreleases/stories/2005/11_november/16/newsnight.shtml)

It is a principle of modern English jurisprudence that all are equal under the law. Any English law about marriage or divorce cannot apply only to one section of the community. One key point not explored in the debate was that as cousin-marriages are legal in the UK, any opposition to them going on in *one* part of the community would have to be extended to an opposition to *all* parts of the community. The practice of cousin marriage might be much more common in one sub-culture than another but the law is concerned only with a single rule. If change were desired then, the only plausible legal option would be to bar all cousin-marriage.

Why is cousin marriage permitted by the law? In fact, most people wrongly think they are *not* allowed to marry the son or daughter of their parents' brothers and sisters. The current law on whom you can marry is based on this reasoning. Marriages between people sharing blood, such as siblings, have been banned for "consanguinity" for many centuries, although modern genetic science is not precise about where to draw the line to avoid undesirable inbreeding.

A marriage between people who are too closely related is not valid. The law speaks of the "prohibited degrees of relationship" and two types of closeness can be measured. Consanguinity concerns people descended from the same stock or a common ancestor. Affinity concerns people related through marriage or civil partnership.

Historically, the law was that you could not marry anyone within a certain number of degrees of proximity. The number of degrees at which marriage became permissible changed from seven degrees at one time to four degrees today. Now, marriages involving people related in the first three degrees are invalid but marriages in the fourth degree are okay.

How are degrees of relationship measured in the English legal system? The scheme is influenced by the Roman model which worked like this. Going down the generations like grandmother, mother, daughter, people are always one degree apart.

In general, if you want to know whether a relative is too close to marry, you count the spaces between each of you and your nearest common ancestor, then add together the two numbers. So, a brother and sister are *two degrees* apart because each is one degree from their common parent, so added together that's two degrees.

Marriage between people related in the *third degree* or less, is prohibited. So you cannot marry your mother's sister or brother, because you are related in the third degree to them. The common ancestor is your grandmother, from whom you are two degrees away, and your aunt or uncle is one away – three degrees altogether.

First cousins are related in the *fourth degree*. Your common ancestor will be your grandmother. You have two degrees separating you from her, and so will your cousin (like your mother's sibling's child). Added together, there are therefore four degrees of separation. So you can marry your first cousin.

The prohibited degrees were defined by Innocent III in 1215,

recognised in an Act of Henry VIII in 1536, (see Pollock and Maitland, *History of English Law*, 2nd ed., 1898, Vol II, Chp VII) and are now in the Marriage Act 1949.

Specifically, the Marriage Act lists the invalid relationships and says a man cannot marry: his mother, adoptive mother...daughter, adoptive daughter...father's mother, mother's mother, son's daughter, and so forth. A woman cannot marry: her father, adoptive father...son, adoptive son or former adoptive son, father's father, and several others.

The principle that marriages of close non-blood relatives are unlawful was modified in Scotland by the Family Law (Scotland) Act 2005. It says that a person can now marry their mother-in-law or father-in-law where death or divorce has ended the original marriage.

The old principle was based on biblical lines, such as that in Leviticus 20:14 which says that if a "man takes his wife and her mother" all three shall be burnt alive. A law that would perhaps have given Dustin Hoffman second thoughts in *The Graduate*.

There was no particular science behind the old lists of prohibited degrees of affinity. According to one classic legal history, they were simply the "idle ingenuities" of men who liked drawing up tables and "doggerel hexameters" (worthless rhythmic lines) (Pollock and Maitland, *op. cit.* p. 389).

Why did Scotland want to make special provision for a man to marry his mother-in-law or daughter-in-law, and a woman to marry her father-in-law or son-in-law, if death or divorce has ended the original relationship? The answer is that the Scottish Parliament took the view that "family law must be updated to ensure that it reflects the needs of all our people". Cupid can behave in curious ways, so diverse passions are legally permitted. Most things, in fact, except romantic love in the third degree.

Some people have sought to contribute to the debate by recounting their personal experience. For example a caller to BBC Asian Network radio (11th February, 2008) said that despite cousin-marriage in his extended family there was no evidence of genetic disorder; while, on the other side of the debate, a politician told of a baby living in an oxygen tent because of a disorder. Such argumentation, however, is very unhelpful. The law is made to address general phenomena. If drink driving is, on the whole, likely to make people have accidents, a policy against drink driving would not be invalidated by someone who said he personally had driven many times without an accident. Similarly, if eating fruit and vegetables is generally healthy, the diet would not be invalidated by one or several individuals who had eaten plenty of those foods all their life but then suffered from a serious illness. What can be said in the cousin-marriage debate is that if medical science can show that marriage in the fourth degree, like cousin marriage, poses a significant risk of recessive disorder, it should be made unlawful across British society.

In the English legal system, some parts of law are legislative and quite modern (Marriage Act 1949) but use precepts that are old and anachronistic and are arguably not founded upon modern science (marriage in the fourth degree being legal). However, even in a multicultural and multi-ethnic society, the rule of law must mean that any given rule should be applicable to all people. The tacit motto of the English legal system is: under one law a diverse people.