



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

**VOLUME II, ISSUE III
JULY - SEPTEMBER, 2021**

<https://journal.lexresearchhub.com>

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Publications**

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SPOUSAL PRIVILEGE UNDER THE INDIAN EVIDENCE ACT

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ABSTRACT

Privileged communication means communication between two people who are in a relationship which is protected and the details of such communication cannot be disclosed. If it is disclosed then the information becomes inadmissible in the court of law. The rationale behind the provision is protecting the sanctity and institution of marriage. However, the author argues that the rationale behind the law is old and futile and obstructs the course of justice as it makes important evidence not admissible in the court of law. The paper sets forth various aspects relating to this issue such as child sexual abuse and other crimes which can never be adjudicated properly if evidence from spouses is not made admissible. Recent developments and judgments have also been discussed and reviewed in light of this law. The paper also discusses a comparative analysis of the laws of California. The author has recommended a set of legal reforms to remedy the situation caused by the historical approach of this law.

Keywords - *Privileged communication, Obstruction of Justice, Inadmissible, Institution of marriage.*

1. INTRODUCTION

This paper discusses the status of privilege e-communication between spouses under section 122 of the Indian Evidence Act, 1872. The rationale behind the provision is protecting the sanctity and institution of marriage. However, there is a need to review the law as it stands today because of various reasons discussed in the paper. The historical approach of this law expedites the discovery of the extent and scope of protection. There searcher further argues that the rationale behind the law is old and futile and obstructs the course of justice as it makes important evidence not admissible in a court of law. The researcher recommends a set of reforms to make the law a little less rigid. Privileged communication means communication between two people who are in a relationship which is protected and the details of such communication cannot be disclosed. If it is disclosed then the information becomes inadmissible in the court of law. The rationale behind the provision is the protection of such relationships. The Indian Evidence Act lays down three forms of privileged communications. They are (a) spousal privilege, (b) professional privilege and (c) state communication.

This paper focuses on the communication disclosed in a spousal relationship and its different aspects. Matrimonial communications have been watered down in the UK over the years. In India, section 122 entails the provision of this rule¹. It prevents a person who is married or has been married from disclosing any communication made to him or her during the subsistence of marriage. The disclosure can only be made when the other spouse gives consent in suits between them or in cases of criminal prosecution from the crime of one spouse against the other.

The purpose and need to review this provision arise from the fact that it has the potential to cause harm to the process of administration of Justice. The paper discusses various aspects relating to this issue such as child sexual abuse and other crimes which can never be adjudicated properly if evidence from spouses is not admissible. The paper also tries to trace the history of this provision and the rationale with which it was introduced. It also examines legislative changes to earlier positions in England. The paper also discusses a comparative study with the laws of California with respect to spousal communication. The author also tries to examine the rationale behind this provision and analyses its elements and its potential to harm the administration of Justice.

The paper tries to emphasize the fact that the provision has failed to justify the rationale behind the provision. There cent development sand judgments have also been reviewed in the light of this law. The researcher has provided some recommendations with respect to the same at the end of the paper.

2. RESEARCH METHODOLOGY

2.1 RESEARCH OBJECTIVES

- To identify the nature, rationale and elements of spousal communication privilege.
- To understand the history and origin of spousal testimonial privilege.
- To study the infirmities in the current provision with respect to spousal privilege.
- To identify recent developments made in India and other countries in relation to spousal privilege.
- To do a comparative analysis with the jurisprudence of California.

¹Indian Evidence Act, 1872, § 122.

2.2 RESEARCH QUESTIONS

- Whether spousal communication privilege should continue to exist?
- Whether spousal privilege should exist beyond marriage?
- Whether the presence of a third person during conversation removes the veil of confidence?
- What are the exceptions to the present provision in India?
- Should spousal privilege protect spouses in heinous crimes even if it's not abrogated?

2.3 METHOD OF DATA COLLECTION

The researcher conducted secondary research for reaching relevant findings to the questions intended to be answered through the paper. The researcher utilised the descriptive method using the quantitative approach in gathering information in sync with research objectives.

2.4 SCOPE OF THE STUDY

The study is focused only concerning spousal privilege under the Evidence Act. The study focuses on the elements, rationale and problems faced under this provision to answer the research question. The paper has not covered other privileges and is only limited to matrimonial privileges.

2.5 LIMITATIONS

The method of data collection is secondary and no primary data were collected and analysed due to paucity of time.

2.6 CHAPTALISATION

The paper is divided into 5 chapters. The first chapter deals with the history and origin of spousal privilege. The second chapter deals with its position under Indian Law. The third chapter deals

with limitations and problems associated with the current legal position and the fourth part cover a comparative study.

3. REVIEW OF LITERATURE

Tanmay Amar (2005)² analysed matrimonial communications under the Indian Evidence Act. The paper reviewed the history, rationale and infirmities under the provision. The author has argued that section 122 hampers the administration of justice. The author has provided a set of recommendations that would help in remedying the current position.

Eric Mills Holmes (1968)³ wrote about the evidentiary value of privileged communication between spouses. The author discovered the scope and review of privilege and who can waive it. It dealt with the issue of third-party witnesses and issues faced by courts in determining guiltiness because of the existing privilege.

Lisa Yurwit Bergstrom (2011)⁴ analysed spousal privilege for couples. The article identified circumstances and forums in which spouses can assert evidentiary privilege. It examined its purpose and provided a background for the same. It determined the availability of the same for same-sex couples. It also looked at state and federal defences present under marriage acts and explored their impact on evidentiary privileges.

Sanjay Vashishtha (2017)⁵ did a critical study on the abrogation of spousal privilege in Canada. The motive behind abrogating was laid down. The scope of spousal communication in Canada pre and post-2015 was analysed. Its criminological implication was also touched upon. The researcher however highlighted how abrogation might lead to secret trial and victimisation of the accused.

Naomi Goodno (2010)⁶ the first half of the article discussed the legal history of marital privilege and the exceptions to it in cases of child abuse cases. The second part of the article sets forth some recommendations and the researcher has also proposed legislation. It also talks about state legislatures and federal courts have created exceptions to marital communications privilege.

²Student Bar Review, National Law School of India University, Bangalore, 2005.

³North Carolina Law Review, Vol. 46, No.3.

⁴University of Maryland Law Journal of Race, Religion, Gender and class, Vol. 11.

⁵International Journal of Criminology and Sociological Theory, Vol. 10, No. 1, July 2017, 1-19.

⁶Kansas Law Review, 2010.

Namit Halakhandi (2018)⁷ analysed various case laws concerning privileged communication. The article touched upon the history concerning the USA. The researcher analysed section 122 in depth. It also touched upon privilege in live-in relationships as well.

Anushka (2019)⁸ analysed privileged communication under the Indian Evidence Act. It touched upon spousal communication and its origin. The rules of interpretation that the courts have followed were also discussed and the exceptions when the rule will not apply.

Mikah Thompson (2006)⁹ analysed marital communication privilege and its applicability to electronic mail. The article addresses whether marital communication is needed considering the rationale behind it. It also looks at whether marital privilege extends to electronic communication. It also addresses whether courts should reconsider its use in today's world.

Sagnik Chatterjee (2010)¹⁰ analysed privileged communication under the Indian Evidence Act. It analysed all three privileges. Concerning spousal privilege, it analysed certain case laws and followed that there should be restrictions concerning the application.

4. HISTORY AND ORIGIN

The rule preventing a spouse from testifying or disclosing information has ancient origins. According to the U.S. Supreme court, spousal testimony has arisen from two tenets of medieval Jurisprudence. Firstly, the accused is prevented from testifying against himself because of interest in the proceeding and secondly, the concept that the wife and husband are one entity and so the wife is not competent to give evidence on the grounds of public policy.¹¹

There were four rules of evidence under common law about spousal privilege for protecting matrimonial communication.¹² The rules were, firstly, neither the spouse nor the party was a competent witness. Secondly, the party cannot be a compellable witness against himself. Thirdly,

⁷Blog in ipleaders.

⁸Published in LawTimesJournal.

⁹Santa Clara Law Review, Vol. 58, p. 275, 2006.

¹⁰Article published in Lex peeps.

¹¹W.S. Holdsworth, Notes, 56 LAW Q. REV. 137, 138 (1940), See, Trammel v. United States (1980) 445 U.S. 40, 44; See also, People v. Sinohui (2002) 28 Cal.4th 205.

¹²Shenton v. Tyler, (1939) 1 All E.R 827, 831-832.

a spouse cannot be a competent witness against the other spouse; fourthly, marital communication is protected information and so cannot be disclosed.

However, the rules of evidence were diluted by the judiciary in *Shenton v. Tyler*¹³. Where the existence of the fourth rule was denied. It was held that the protection is only found in section 3 of the Evidence Amendment Act¹⁴. The section did not extend protection to matrimonial communication once the marriage comes to an end. It was argued from the opposite side that independent of the changes made in the legislature, the common law still protects marital communications from disclosure even after it comes to an end.

The decision was realization of the perception that a blanket privilege in cases of matrimonial communication is contrary to the public interest. If the marriage is over then there is no need to protect the matrimonial harmony. Hence, the judgement abandoned the rule which provided blanket protection to exclude evidence without serving any kind of purpose.

Several jurisdictions recognize some form of spousal privilege but it has always been subject to intense criticism. The idea behind these privileges is unsupported presumptions and is very antiquated.¹⁵

Legislative Changes

The law of evidence in England is codified under The Evidence Act, 1843. It entailed the incompetence of spouses as a witness when the other spouse was a party to the case. There was much criticism and dissatisfaction. The Law Commission in its report sought to balance the unhappiness and alarm caused by public disclosure of the communication.¹⁶ This report led to an amendment in the Evidence Act wherein spouses were made a compellable and competent witness against each other except in adultery and criminal cases¹⁷, but matrimonial communications were

¹³ Shenton, id at 832-840.

¹⁴ Shenton, id. at 833: "No husband shall be compellable to disclose any communicator made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

¹⁵ People v. Sinohui (2002) 28 Cal. 4th 205.

¹⁶ Commission on common law procedure, 2- REPORT, at 13, cited from Law Commission of India, 69T REPORT ON THE INDIAN EVIDENCE Act 1872 1 64.10 (1977).

¹⁷ Evidence (Amendment) Act, 1853, S 1.

particularly made privileged.¹⁸ The privilege was that the spouse who is testifying cannot be compelled to disclose such communication.

Subsequently, a spouse of the party was conferred competence as a witness by the Criminal Evidence Act, 1898. The privilege of matrimonial communication was retained at the same time.¹⁹ Hence, if the spouse wants to give a testimony against the other spouse, they are free to do so but they cannot be compelled to testify if they are not willing to do so. The earlier rule about the same was abolished by Civil Evidence Act²⁰. Thus, a spouse can serve as a witness in civil proceedings as well. The police and Criminal Evidence Act, 1984, made some changes regarding spousal communication as well.²¹

However, it can be seen that the concern over matrimonial communication is not completely done away with. The spouse cannot still be forced to give testimony against the other. A few exceptions in this regard are cases such as assault or injury to the person giving testimony or injury to someone below the age of 16, or sexual crimes or abetment or conspiracy to commit such offences.²² The provision now foresees cases where the accused wishes to call his or her spouse as a witness but the other spouse does not want to do so. Now, since the testimony can prove useful then the court in such cases can compel the spouse to testify on behalf of the other spouse who is accused.

5. THE INDIAN POSITION UNDER SECTION 122 OF THE EVIDENCE ACT.

In India, Marriage is seen as a social institution and thus it is sacred. Section 122 of the Evidence Act is a reflection of prevailing law in England. Section 122 of the Evidence Act protects communication beyond marriage as well. Under this, the accused spouse can prevent the witness spouse from testifying by disclosing information. Thirdly, the act made the spouse a competent

¹⁸ Evidence (Amendment Act), 1853, § 3, which read as: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

¹⁹ Criminal Evidence Act, 1898, S 1 (d), which read as: "Nothing in this Act shall make a husband compellable to disclose any communications made to him by his wife during the marriage, or a wife compellable to disclose any communications made to her by her husband during the marriage."

²⁰ Civil Evidence Act, 1968, § 16(3).

²¹ Police and Criminal Evidence Act, 1984, S.80(9).

²² Police and Criminal Evidence Act, 1984, S 80(3).

witness in all proceedings²³ while the England rule makes the spouse a competent witness only in cases of civil nature. This kind of privilege is known as spousal privilege.

Nature of privilege

There are two kinds of privilege concerning spousal privilege and they are ‘testimonial privilege’ and ‘spousal confidences privilege’. The former one bars all testimony and the latter one bars testimony of information made during the marriage. Testimonial privilege is broader as it bars all testimony by one partner against the other, which includes even the acts of the spouse which was seen by the witness.²⁴ The other one excludes only the testimony concerning private information between the spouses when they were together and married. Section 122 entails spousal confidence privilege. The old English law represented testimonial privilege.

Elements of Section 122

Section 122 only protects matrimonial communication from the disclosure of it by other spouse but if the spouse or a person overhears such communication, then he may testify the information disclosed in the communication. In *M.C. Verghese v. T.J. Ponnnon*²⁵, some letters were written by the husband to his wife and there to be produced as evidence by the appellant as he came in possession of those was held to be admissible. The communication is not protected but the individual is protected by the law.²⁶ People other than the spouse can prove such information in a court of law. It was further held that the admissibility should be judged concerning the status of parties at the time of making communication and not at the time when the evidence is being presented in the court.

In *Balchandra Namdeo Shinde v. The state of Maharashtra*²⁷, it was held by the court that literal rule of interpretation should be used while interpreting the provision and broad interpretation should not be used.

Exceptions of Matrimonial Communication

²³Indian Evidence Act, 1872, § 120.

²⁴Ram Bharosey v. State, A.I.R. 1954 S.C. 704; Bhalchandra Namdeo Shinde v. State of Maharashtra, (2003) 2 Mh.L.J. 580.

²⁵(1969) 1 S.C.C. 37, 41.

²⁶ Appu, A.I.R 1971 Mad. 194.

²⁷(2003) 2 Mh.L.J. 580.

There are three exceptions when communication between spouses can be held admissible. The first one is when a partner who made the communication is consenting to make such disclosure. Now, such communication will not be disclosed if the partner is dead or there is no representative-in-interest because then it becomes impossible to obtain consent. Consent cannot be implied. It has to be express for it to be made admissible.²⁸

The second and third exceptions is concerning situations where the institution or harmony has already been fallen apart. It is because no purpose would be served by excluding such disclosures if there is no marriage anymore. If evidence given to the court is serving the purpose and helps resolve the question of law then it will be taken into consideration.

The second exception comes when two partners are fighting against each other in the suit. Here the term 'suit' refers to all legal proceedings between the partners. It is assumed that when a spouse is suing the other one the institution of marriage has already been destroyed. The third exception is concerning the prosecution of one spouse for a crime against the other one. Even prosecution for bigamy falls under the stated exception. Some authors suggest that even adultery should fall under this exception.²⁹ It is so because there is a presumption of marriage harmony getting lost if a spouse has committed crime against another.

6. PROBLEMS ASSOCIATED WITH SECTION 122 OF EVIDENCE ACT

The rationale behind the section

Some evidence is made inadmissible because of public policy. Under section 120 of the act, a spouse is listed as a competent witness involving the other spouse. However, this can create clashes between husband and wife if one partner reveals confidential information against another. Therefore, such testimony tends to destroy peace and destroy mutual happiness between the spouses. This rationale creates a clash between two interests that is the public interest of the

²⁸Nawab Howaldar v. Emperor, (1999) 15 Cri. L.J. 303.

²⁹ RATANLAL & DHIRAJLAL's THE LAW OF EVIDENCE 1176 (Y.V. Chandrachud & A. Kuppuswami eds., 2002).

administration of justice and the public interest of preserving harmony. However, the interest of preserving mutual happiness and peace between spouses has been given an overriding effect.³⁰ Hence, matrimonial communication is not admissible for protecting harmony in a marriage between two people.

Given the rationale, there are various infirmities, which the law suffers from. The provision reduces the scope of admissibility which can be important to the case. It also does not justify the prevention of voluntary testimony. The rationale is not satisfied when the spouse wants to voluntarily testify against the spouse. A partner may feel betrayed or cheated if the information is disclosed forcefully. However, if the same is voluntary then it proves that the relationship between the spouses has already been disrupted. Preventing the disclosure will do no good. It will hamper the administration of justice and so the rationale behind the section fails in such cases.

The provision does not justify the prohibition beyond marriage. Once the marriage ceases to exist, then there is no question of protecting that marriage. The fear of future disclosure that might create mistrust in marriage is ill-grounded. It is not a rationale to presume that if section 122 is not there then a spouse will not communicate in fear to the other partner that if they were to be separated in the future then the spouse might reveal the information in the court. And so, removal of such protection after marriage will cause discord because of lack of communication. Under English law, the law provides for privilege only during the subsistence of marriage. It is a possibility that a spouse may be hesitant considering the repercussions but it is irrational to consider long-term effects. The hesitation will only arise if the spouse has committed an offense which not normal.

The rationale does not justify the cases of grave offences such as child sexual abuse. These cases are heinous and they are committed to private so nature remains unknown to outsiders. A spouse may likely make communication regarding this to the spouse. If such communications are made inadmissible then grave injustice will be caused to the child. After knowing about the commission of such crime, no spouse would want to live with their partner anymore. It has been held in many cases that medical evidence is not conclusive and support of direct evidence is needed. DNA tests will not be helpful in such a case because a parent and a child are not strangers. Therefore, evidence of another spouse is important in abusive parent cases.

³⁰ CD. FIEL's LAW OF EVIDENCE 4536 (B. Malik et al. eds., 1990)

In *Fatima v. Emperor*³¹, the child was killed by the mother. The father's evidence was held inadmissible under section 122. In such a case, anyways the relationship between the father and the mother would have been disrupted. Even in such cases, evidence will be inadmissible which would cause injustice and the rationale behind the provision will also not be satisfied.

If a spouse is involved in harming a family member and confides the information with his or her spouse, even then such information will be protected. This again does not justify the rationale behind the provision because the sanctity will be disrupted the minute such information is disclosed. If a spouse has committed rape on a family member, then his wife would not want to live with him anyway. Protecting such information will not yield any results.³²

As per the law, the spouse cannot be forced to testify communication by the other spouse. If a spouse wants to introduce evidence in the court and wants the other spouse to testify and the spouse refuses to testify then he or she cannot be forced to make such a testimony. By doing so, no public interest is saved. If the person who is charged cannot set aside protection under section 1223 then there is a miscarriage of justice and the rationale is also defeated.

The rationale is defeated in cases of grave offences such as rape, murder and sexual abuse. The provision is causing great hindrances to other people such as a relative or child or anyone else trying to get justice in the court of law.

7. RECENT JUDGEMENTS AND DEVELOPMENTS

The Rajasthan High court in *Preeti Jain v. Kunal Jain*³³, while deciding a writ petition filed by a wife challenging the admissibility of an electronic record in the form of pinhole camera held that section 65B is not applicable in such cases and that privilege under section 122 of Evidence Act is not applicable in Family court cases. The judge observed that under Section 14 of the Family Court Act, the court may receive any report or evidence which it is opinion may facilitate effective

³¹A.LR. 1914 Lah. 380

³²Nagraj v. State of Karnataka, (1996) Cri. L.J. 2901.

³³(2016) SCC OnLine Raj 2838.

adjudication irrespective of whether or not it is admissible or relevant under the Indian Evidence Act, 1872.

The section makes it clear that issues of relevancy and admissibility do not apply to cases before the family court. It is at the discretion of the court to receive or not to receive evidence placed before the court. The bench also observed that “the privilege concerning matrimonial communication under section 122 will not attract as section 14 eclipses that provision. Section 14 is a special law against general law which is section 122.

The New Mexico Supreme court on August 30, 2019, abolished the spousal communication privilege. In *State v. Gutierrez*³⁴, the court held that the privilege is a reminder of a very different society than the one in which we are living today. It shouldn't be retained and therefore should be abolished. The court also cited various law review articles which criticized this privilege from a feminist perspective. The court suggested that this privilege supports the idea of male domination because it is usually invoked by husbands.

The court was of the view that abolition of privilege is important to combat coercion by defendant spouses to their wives. They agree with the view of radical feminists that spousal privilege is not important to protect marital privacy. It was stated that privilege has outlived its life.

In *United States v. Acker*, it was held that marital privilege only applies to persons who are legally married. But today, both English and Indian courts have conferred numerous rights to people who are in Live-in-relationship. It is predicted by many authors that because of this nature the courts may extend the spousal privilege to live-in couples as well.

The prosecutors in Alaska and California are creating ways to convict an abuser without relying on the testimony of victims which is a daunting task because most of such things happen privately inside the walls of the house.³⁵ Some states have adopted a no-drop policy. Under this, prosecutors view intimate violence as violence against the state and seek to establish the government's interest rather than the victim's wishes. These new approaches that the prosecutors are using show the

³⁴(2019) 471 P.3d 1260.

³⁵ Louise Ellison, Prosecuting Domestic Violence without Victim Participation, 65 MOD. L. REV. 834, 834, 840-41 (2002)

need for alternative methods of proof because victims refuse to testify under the spousal privilege provision.

In Canada, matrimonial communication privilege was abrogated in 2015 in absence of any parliamentary debate. The purpose behind this abrogation was to ensure that courts can use the testimony of the spouses as evidence earlier, the spouses were competent only in certain offences.

8. SPOUSAL PRIVILEGE IN THE USA

The position concerning spousal privilege in the USA and India is very different. Spousal privilege in the USA is differentiated into two types of privileges namely the “spousal testimonial privilege and marital communication privilege”. Under spousal testimony privilege, a spouse can refuse to give testimony and can also deny becoming a witness.³⁶ Under Marital communication privilege, a spouse can prevent the other spouse from disclosing or a spouse can deny giving details of communication that occurred while the subsistence of marriage.³⁷ In some cases, spousal testimony privilege may not apply, but marital privilege may remain intact. Then, testimony will be allowed from the non-party spouse mostly about the observations or actions of another spouse which were not communicated but the communicated acts are still outside the purview.

In California, all privileges are statutory.³⁸ It is so because they prevent the admission of important and relevant evidence and so the approach followed is that they should be narrowly construed. The legislature has provided exceptions to spousal testimony privilege and it identifies some categories of proceedings where it might not apply.³⁹ It sets forth waiver as an exception to the privilege. This exception is a reason why spouses usually don’t contend with privilege.

Section 973(B) provides a waiver in cases where the case provides a benefit on the spouse who is not a party to the case. Under this section, it is stated that there is no privilege in a civil proceeding which brought by a spouse for the immediate benefit of his spouse or both of them. There is an argument that a large exposure of a tort lawsuit against a married defendant is one such example

³⁶Evid. Code, §§ 970, 971.

³⁷ Evid. Code, § 980.

³⁸ See Evid. Code § 911(a).

³⁹ Evid. Code, § 972.

where the spouse's defence confers an immediate benefit on the non-party spouse. Secondly, acts of a spouse will not come under confidential communications. Acts of a spouse conveying ideas and thought are not considered privileged communication. The privilege comes with some limits too. Firstly, privilege will apply only in cases where communication was intended to be confidential.⁴⁰

9. CONCLUSION, FINDINGS AND SUGGESTIONS

The public policy concerning the administration of justice is conflicting with the rationale behind the marital privileges which was aimed to preserve families. The intention of the legislature while enacting the provision was to protect the sanctity of marriage but there are various instances which prove to be futile when it comes to extending this privilege in those situations. Such instances are when the couple is separated or one of a spouse has committed some grave crime which is anyways going to disrupt the mutual peace between the partners. Courts provide blanket protection to spouses and do not conduct any factual inquiries about the nature of the relationship. If the testimony privilege is extended to unmarried couples, it is going to create a lot of havoc because there is no effective solution when it comes to cases of grave nature. The victims will see this extra hurdle in their journey to justice.

Members of one's family have the same status and position as that of strangers while overhearing the conversation between spouses. Therefore, if disclosure of communication is done in the presence of family members, then or if it's overheard by a member then the veil of confidence gets removed and the communication no longer is privileged.

It is found that section 122 is outdated in the present scenario. It has a broader connotation attached to it. The rationale behind it preserving the marriage of spouses does not justify the need to get justice from other people. Administration of justice should always be the priority of any state. The author finds this provision to be an obstacle in that process because it makes relevant evidence inadmissible in the court of law for protecting the marriage between two people which anyways is

⁴⁰People v. Bogle (1995) 41 CA 4th 770 (suicide note of a spouse found by other spouse in trash is not confidential information); "People v. Gomez (1982) 134 CA3d 874."

going to break if the accused is proved guilty. No self-respecting spouse will live with his partner after knowing that he has committed rape or child sexual abuse. The marriage breaks on that point itself and the judiciary's little measure of protection that will cause no benefit to the society at large.

The author finds that this section should not exist in the present time because of its objective which is not relevant when it comes to putting someone behind the bar for grave offences. There is an exception in other countries wherein a spouse can testify in some offences. However, there is no such provision in India. If the marriage between two people has entered an area where a partner wants to share testimony voluntarily then it should be left to them and section 122 should not come to play.

There are other provisions like restitution of conjugal rights where the courts try to save the marriage. However, there is a lack of understanding that India as a nation is developing and even live-in relationships have been recognized and so only in cases of maintenance or other discords the court should interfere. Marriage is a union of two people who are major and competent to understand the nature of their actions. The goal should not be limited to the extent of protecting their relationship but should be on putting an offender behind the bars. Preservation of harmony between two people will never justify voluntary testimony.

The author finds that there is no need to extend the privilege beyond marriage. The legislature intended to protect the harmony and mutual happiness of two people. However, that is over when the marriage gets over. There can be more exceptions to this provision if not complete abrogation.

Countries like Canada have taken a bold step and some other legislatures have done that too. Indian Evidence act is an old law and it needs to be amended considering today's scenario and needs. If there is no specific provision or exceptions then it is going to operate as blanket protection. In California, this law is narrowly construed because complete protection cannot be given.

Some of the recommendations are as follows:

- (a) There should be an amendment in the law that if a spouse wants to voluntarily give evidence then they should be allowed to.

- (b) The protection should not be extended beyond marriage because it does not support the rationale of the provision.
- (c) If there are cases of grave nature then in such cases witness testimony should be allowed like in other countries.
- (d) If the accused spouse wants the other spouse to give evidence, then he should be allowed to do so. It will help in getting important evidence required to judge the case.
- (e) These exceptions should come into play because complete blanket protection will always be misused and hamper the administration of justice.

10. BIBLIOGRAPHY

- Eric M. Holmes, Evidence, Privileged Communications Between Husband and Wife, (Mar. 30, 2020, 9:00), <http://scholarship.law.unc.edu/nclr/vol46/iss3/10>.
- Tanmay Amar, Matrimonial Communications: Wedded to the Irrational, (Mar. 25, 2020, 1:00), <https://nlsir.com/wp-content/uploads/2020/07/Tanmay-Amar.pdf>.
- Lisa Yurwit Bergstrom, Spousal Privilege for couples, (Mar. 30, 2020, 3:00), <http://digitalcommons.law.umaryland.edu/rrgc/vol11/iss2/3>.
- Namit Halakhandi, Privileged Communication between husband and wife under section 122 of the Indian Evidence Act, (Apr. 2, 2020, 4:00), <https://blog.iplayers.in/privilege-communication-between-husband-and-wife/>.
- Anushka, Privileged Communication, (Apr. 2, 2020, 10:00), <https://lawtimesjournal.in/privileged-communication/>.
- Sanjay Vashishtha, A critical study on the abrogation of spousal privileged communication in Canada and its implication in criminology, (Apr. 10, 2020, 9:00).
- Mikah Thompson, Applicability of communication privilege to electronic mail, (Apr. 8, 2020, 10:00), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=991135.
- Sagnik Chatterjee, Privileged Communication under the evidence act, (Apr. 11, 2020, 4:00), <https://lexpeeps.in/privileged-communication-under-the-indian-evidence-act/>.
- Indian Evidence Act, 1872