MATRIMONIAL COMMUNICATIONS: WEDDED TO THE IRRATIONAL

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This note reviews the privileged status bestowed on matrimonial communication under section 122 of the Indian Evidence Act of 1872. It finds the rationale to be the protection of the institution of marriage. The analysis commences on the basis that there is a need to review this privilege today. The note traces the roots of the Indian legislation to its British predecessor. This historical approach facilitates the discovery of the intended scope and extent of protection. The note argues that section 122 transcends its rationale and hampers the course of justice by making relevant evidence inaccessible to courts for little gain, if at all, elsewhere. To remedy the situation, the note recommends a set of legal reforms to the Indian statute that would withdraw this privilege from certain areas.

I. INTRODUCTION

In common law of evidence, all logically relevant facts are admissible as evidence, except those, which have been specifically excluded.[1] One ground for specific

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[1] PHIPSON & ELLIOTT, MANUAL OF THE LAW OF EVIDENCE 10-11 (D.W. Elliott ed., 2001); CROSS & TAPPER ON EVIDENCE 55-57 (Colin Tapper ed., 1999).

exclusion is public interest.[2] Many areas fall within this broad term. One such area is matrimonial communications.[3] Matrimonial communications were considered privileged communications between spouses, which should not be revealed as evidence.[4] However, this rule has been watered down in England over the years as will be shown in the course of this article.

In India, section 122 of the Indian Evidence Act, 1872 incorporates this rule.[5] It prevents a person who has been, or is married, from disclosing any communication made to him or her during marriage by his or her spouse. Such disclosures can only be made upon the consent of the other spouse; in suits between the two spouses; or in cases of criminal prosecution of one spouse for a crime against the other. The rationale behind this provision is to protect matrimonial harmony. However, there is an attempt to preclude the application of the protection in situations where the marital harmony may have been ruptured such as in the three situations herein discussed.

The need to review section 122 arises from its potential to hamper the dispensation of justice by basing decisions on incomplete facts. As would be noted in the course of this article, pertinent issues relating to cases of child sexual abuse and other offences against relatives can never be properly addressed, unless evidence from spouses are provided. This note attempts to trace the history of section 122. It will first explore the English law origins of the section and follow it up with an examination of the substantial legislative changes to the earlier legal position in England. Thereafter the note will examine the rationale behind section 122, analyse its constituents and highlight its potential to impede the dispensation of justice. Emphasis will be placed on how the provision fails to justify the rationale. In the concluding section, a set of recommendations is to be proposed as a measure of legal reform.

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[2] PETER MURPHY, MURPHY ON EVIDENCE 354-355 (1997).

[3] *See* PHIPSON & ELLIOTT, *supra* note 1, at 147.

[4] *See* MURPHY, *supra* note 2, at 419-420.

[5] Indian Evidence Act, 1872, § 122:

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

II. History And Evolution

A. Common Law

According to Sir Edward Coke, the wife could not be produced as witness either for or against her husband. There were primarily two reasons for this. The wife was not competent to give evidence and her evidence was also otherwise inadmissible on grounds of public policy.[6] The rule of spousal incompetence was based on two canons of medieval jurisprudence read in conjunction. The first being that an accused was not permitted to testify on his own behalf because of his interest in the proceedings; and second being the legal fiction that the husband and wife were one entity.[7] Even otherwise her evidence would be inadmissible on the grounds of public policy because of the potential of such testimony to cause marital discord.

Under common law, there were four recognized rules of evidence regarding spousal privilege protecting matrimonial communications.[8] The rules were that firstly, neither the party nor his or her spouse was a competent witness for the party. Secondly, the party was not a compellable witness against himself. Thirdly, the spouse was not a competent witness against his or her spouse. Fourthly, marital communications were protected from disclosure.

However, the aforementioned common law rules of evidence were diluted by the judiciary in the last century. Greene, L.J., in *Shenton* v. *Tyler,*[9] denied the existence of the fourth rule that marital communications as such were protected from disclosure. He held that the protection to matrimonial communications was found only in section 3 of the Evidence Amendment Act, 1853,[10] which did not extend such protection to matrimonial communications once the marriage had ceased to exist. In this case, it had been argued that independent of the legislative changes made in the law, common law protection under the fourth rule still prevented marital communications from disclosure, even after marriage.

The abovementioned decision was an embodiment of the perception in England that a blanket privilege in relation to matrimonial communications was antithetical to public interest. Since the marriage in question was over, there was no matrimonial harmony to be preserved by protecting such communications. Hence, the decision abandoned a rule, which sought to exclude evidence without serving any purpose.

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6 W.S. Holdsworth, *Notes*, 56 LAW Q. REV. 137, 138 (1940).

7 *See* MURPHY, *supra* note 2, at 420; J. KAPLAN & J.R. WALTZ, CASES AND MATERIALS ON EVIDENCE 559 (1984).

8 Shenton v. Tyler, [1939] 1 All E.R. 827, 831-832.

9 *Shenton, id.* at 832-840.

10 *Shenton, id.* at 833: "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."

However, the substantial changes in the law relating to spousal privilege were brought about through legislations.

B. Legislative Changes

The Evidence Act, 1843 codified the law of evidence in England. It preserved the incompetence of spouses as witnesses in matters in which the other spouse was a party. However, there was much dissatisfaction and criticism of the laws relating to the competence and compellability of spouses, as is reflected by *Wigmore on Evidence*.[11]

The Commission on Common Law submitted its report in 1853. The report sought to balance "the alarm and unhappiness" caused by the public disclosure of confidential communications between spouses with the disadvantage, which may arise from "the loss of light, which such disclosures may throw on the questions in dispute."[12] It stated that the alarm and unhappiness caused would be a far greater evil than the disadvantage caused by non-disclosure of such information.[13] This led to the Evidence Amendment Act, 1853, whereby spouses were made competent and compellable witnesses against each other, except in criminal cases and adultery,[14] but matrimonial communications specifically were made privileged.[15] The privilege was that of the spouse testifying, i.e., he or she could not be compelled to disclose matrimonial communications.

Subsequently, the Criminal Evidence Act of 1898 conferred competency, as a witness, on the spouse of the party charged in criminal proceedings and at the same time retained the privilege on matrimonial communications.[16] Hence, if a spouse wished to

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11 To quote WIGMORE, "... the fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas- pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself", *cited from* Wendy Harris, *Spousal Competence and Compellability in Criminal Trials in the 21st Century*, 3 QUEENSLAND U. OF TECH. L. & JUST. J. (2003), *available at* http://www.law.qut.edu.au/about/ljj/editions/v3n2/harris_full.jsp (last visited July 2, 2005) [hereinafter Harris].

12 COMMISSION ON COMMON LAW PROCEDURE, 2ND REPORT, at 13, *cited from* LAW COMMISSION OF INDIA, 69TH REPORT ON THE INDIAN EVIDENCE ACT 1872 ¶ 64.10 (1977).

13 SIR JOHN WOODROFFE & SYED AMIR ALI'S LAW OF EVIDENCE 3328 (Gopi Nath ed., 1996).

14 Evidence (Amendment) Act, 1853, § 1.

15 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."

16 Criminal Evidence Act, 1898, § 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

testify as to matrimonial communications against the other spouse, he or she would be free to do so, but he or she could not be compelled to testify by the prosecution, in case he or she was unwilling to do so.

The old rule relating to matrimonial communications was abolished by section 16(3)[17] of the Civil Evidence Act, 1968 in relation to civil proceedings. Hence, a spouse is now treated just as any other witness in civil cases. Section 80(9) of the Police and Criminal Evidence Act, 1984 abolished the old rule relating to matrimonial communications in relation to criminal proceedings.

The Police and Criminal Evidence Act, 1984 made a host of changes to the evidentiary law regarding matrimonial communications. According to section 80[18] of

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marriage, or a wife compellable to disclose any communications made to her by her husband during the marriage."

[17] Civil Evidence Act, 1968, § 16(3), reads: "Section 3 of the Evidence (Amendment) Act, 1853 (which provides that a husband and wife shall not be compellable to disclose any communications made to him or her by his or her spouse during marriage) shall cease to have effect, except in relation to criminal proceedings."

[18] Police and Criminal Evidence Act, 1984, § 80, reads:

> Section 80 - Competence and Compellability of Accused's Spouse.
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> (2) In any proceedings the wife or husband of a person charged in the proceedings shall, subject to subsection (4) below, be compellable to give evidence on behalf of that person.
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> (2A) In any proceedings the wife or husband of a person charged in the proceedings shall, subject to subsection (4) below, be compellable--
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> (a) to give evidence on behalf of any other person charged in the proceedings but only in respect of any specified offence with which that other person is charged; or
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> (b) to give evidence for the prosecution but only in respect of any specified offence with which any person is charged in the proceedings.
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> (3) In relation to the wife or husband of a person charged in any proceedings, an offence is a specified offence for the purposes of subsection (2A) above if--
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> (a) it involves an assault on, or injury or a threat of injury to, the wife or husband or a person who was at the material time under the age of 16;
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> (b) it is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or
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> (c) it consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.
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> (4) No person who is charged in any proceedings shall be compellable by virtue of subsection (2) or (2A) above to give evidence in the proceedings.
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> (4A) References in this section to a person charged in any proceedings do not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for

the enactment, a spouse is a competent witness against the other spouse, during the subsistence of their marriage and also after divorce. In the latter case, i.e., after divorce, the spouse is both a competent and compellable witness against the accused.[19] So the court can compel a former-spouse to appear as witness in proceedings in which the other former-spouse is charged, just like any other ordinary witness. This enactment clearly deviates from the earlier law where the matrimonial privilege applied.

However, the concern over matrimonial harmony has not completely disappeared. To preserve matrimonial harmony, the spouse cannot still be *compelled* to give testimony against the other spouse.[20] There are a few exceptions to this rule prohibiting compulsion, such as cases of assault or injury to the spouse giving testimony or of assault or injury to a person below the age of 16, or sexual offences or abetment or attempt or conspiracy to commit any of the these offences.[21]

The spouse of the accused may be compelled to give evidence *on behalf of* the spouse.[22] Earlier the law merely dealt with the exclusion of matrimonial communications as evidence. This provision foresees situations where the accused wants to call his or her spouse as witness, but the spouse refuses to testify in favour of the accused because of marital discord. Since the testimony of such spouse may prove useful to the court in determining the case before it, such spouse may be compelled to testify on behalf of the accused.

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any other reason).

(5) In any proceedings a person who has been but is no longer married to the accused shall be compellable to give evidence as if that person and the accused had never been married.

(6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.

(7) In subsection (3)(b) above "sexual-offence" means an offence under the Protection of Children Act 1978 or Part 1 of the Sexual Offences Act 2003.

(9) Section 1(d) of the Criminal Evidence Act 1898 (communications between husband and wife) and section 43(1) of the Matrimonial Causes Act 1965 (evidence as to marital intercourse) shall cease to have effect.

19 Police and Criminal Evidence Act, 1984, § 80(5). The same was applied in R. v. Cruttenden, [1991] 3 All E.R. 242, where the accused and the witness had divorced before the trial, so the evidence of the witness was held to be admissible.

20 Police and Criminal Evidence Act, 1984, § 80(3). The same was discussed in Woolgar, [1991] Crim. L.R. 545, *cited from* BLACKSTONE'S CRIMINAL PRACTICE 1981 (Peter Murphy ed., 2000) but not applied on facts since the husband and wife were merely indicted together but were not jointly charged.

21 Police and Criminal Evidence Act, 1984, § 80(3).

22 Police and Criminal Evidence Act, 1984, § 80(2).

The evidence may be related to matters, which occurred during marriage, as well.[23] Section 80 provides no exclusion to matters that occurred during marriage. This is different from the Indian position where the spouse may testify as to communications made before or after marriage by the other spouse, but not as to communications made during marriage. However, section 80 does preserve the right against self-incrimination of the spouse. If the two spouses are charged together, then there is no compellability.[24]

C. Section 122: Analysis

Section 122, as enacted in 1872, was a reflection of the then prevailing law in England, with certain changes. Firstly, section 122 extended the protection to matrimonial communications beyond marriage as well. Secondly, in England, the privilege of non-disclosure of matrimonial communications was that of the witness-spouse, while section 122 bestowed the privilege on the other spouse. The other spouse could prevent the witness-spouse from disclosing matrimonial communications. Thirdly, the Indian Evidence Act, 1872 made the spouse a competent witness in all proceedings involving the other spouse,[25] while in England, spouses were competent witnesses only in civil cases involving the other spouse. This kind of privilege is spousal privilege.

(i) Nature of Privilege: There are two kinds of spousal privileges:[26] 'testimonial privilege', which bars all adverse spousal testimony and 'spousal confidences privilege', which bars testimony as to matrimonial communications made during marriage. Testimonial privilege is broader in the sense that it bars all testimony by one spouse against the other, including testimony of the acts of the spouse, which the witness-spouse saw,[27] while spousal confidences privilege excludes only the testimony relating to private communications between spouses when they were married. However, in another sense, testimonial privilege is narrower as it applies only if the spouses are married at the time when the testimony is sought to be given, while spousal confidences privilege usually protects the matrimonial communications forever.[28] Section 122 deals with spousal confidences privilege. The old English law where a spouse could not be produced as witness against the other spouse represented testimonial privilege.

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[23] BLACKSTONE'S CRIMINAL PRACTICE 1979 (Peter Murphy ed., 2000).

[24] Police and Criminal Evidence Act, 1984, § 80(4).

[25] Indian Evidence Act, 1872, § 120.

[26] C. MULLER & L.C. KIRKPATRICK, EVIDENCE UNDER THE RULES 939 (2000).

[27] Such evidence was held admissible in India, where § 122 embodies spousal confidence privilege, in Ram Bharosey v. State, A.I.R. 1954 S.C. 704; Bhalchandra Namdeo Shinde v. State of Maharashtra, 2003 (2) Mh.L.J. 580.

[28] *See* MULLER & KIRKPATRICK, *supra* note 26, at 939.

(ii) Rationale of section 122: Certain relevant evidence is made inadmissible because of public policy. Chapter IX of the Indian Evidence Act, 1872 deals with witnesses. As per section 120 of the Act, a spouse would be a competent witness in criminal as well as civil proceedings involving the other spouse. However, this may create strife between the husband and the wife, if one spouse testifies against the other or reveals certain confidential, sensitive information revealed to him or her by the spouse. Such testimony would have a powerful tendency to destroy the peace of families and weaken or destroy the mutual happiness on which the marriage subsists.[29]

This creates a clash between two conflicting public interests - the public interest that administration of justice should not be frustrated by withholding relevant evidence and the public interest of preserving harmony in the family between the husband and the wife. The interest of preserving domestic peace and conjugal confidence between the spouses has been given overriding effect.[30] Hence, section 122 of the Indian Evidence Act, 1872 makes matrimonial communications inadmissible as evidence in order to preserve the harmony in marriage between the husband and the wife.

(iii) Elements of Section 122: Section 122 protects matrimonial communications from disclosure by either spouse. However, if a person happens to overhear communications by a spouse, he may testify as to the contents of the communication.[31] If another person comes in possession of such communications between spouses, such as through a letter, this provision does not prevent him from disclosing such communication.[32] It is the individual and not the communication, which is protected by the provision.[33] There is no bar to proving such communication in court, by means other than using spouses' testimony. It is only communications, which are inadmissible, not acts which one spouse sees another commit.[34]

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29 Ramchandra v. Emperor, A.I.R. 1933 Bom. 153; S.J. Choudhary v. State, 1984 (2) Crimes 487.

30 C.D. FIELD'S LAW OF EVIDENCE 4536 (B. Malik et al. eds., 1990).

31 Appu v. State, A.I.R. 1971 Mad. 194, 196. Here the husband's confession to his wife, in the presence of others, was allowed to be proved by the evidence of the others present, who overheard the confession.

32 M.C. Verghese v. T.J. Ponnon, (1969) 1 S.C.C. 37, 41, where letters written by the respondent to his wife to be produced as evidence by the appellant, who had come in possession of the letters. It followed the case of Rumping v. DPP, [1962] 3 All E.R. 256, where a letter written by the accused to his wife, which amounted to a confession of the murder with which he was charged, was handed over to the police by a person entrusted to post it. The letter was considered admissible as evidence; Queen Empress v. Donoghue, 1899 I.L.R. 22 Mag. 1, *cited from* FIELD, *supra* note 30, at 4537, where a letter written by the husband to his wife was seized during a search of their house. It was held admissible.

33 *Appu*, A.I.R. 1971 Mad. 194.

34 *Ram Bharosey*, A.I.R. 1954 S.C. 704, where the wife's testimony as to seeing the husband come from the scene of crime and hide the murder weapon, was admissible, since the testimony related to acts which the wife saw the husband commit and not to communications made by the husband.

The bar to admissibility attaches at the time that the communication is made. Hence, its admissibility will be judged in light of the status of the parties at the time of making the communication and not in light of the status, at the time when the evidence is sought to be given in court.[35]

There are three exceptions when such matrimonial communications are admissible as evidence. Firstly, when the spouse who made the communication or his representative-in-interest consents to such disclosure. If the spouse is dead and there is no representative- in- interest, then such communication becomes totally inadmissible, because no consent may be obtained for such disclosure.[36] Such consent cannot be implied from circumstances, it has to be express.

The second and third exceptions relate to situations where the harmony in the marriage has already disintegrated. Since no purpose would be served by excluding matrimonial communications anymore, these exceptions have been carved out to make all relevant evidence available to the court and serve the ends of justice. The second exception arises when the two spouses are involved in a suit against each other. It is submitted that the term "suit" is obviously used in a generic sense here. It must refer to all legal proceedings between the spouses.[37] It is presumed that when a spouse sues the other, the harmony between them has been destroyed. The third exception arises when one spouse is being prosecuted for a crime committed against the other. Prosecution for bigamy would also fall within this exception.[38] Some authors are also of the view that adultery would be covered under this exception.[39] Again there is a presumption made that if a spouse has committed a crime against the other spouse, marital harmony is lost.

(iv) Infirmities in Section 122: There are several infirmities, which the provision suffers from. Firstly, its rationale does not justify prevention of voluntary testimony. The rationale behind section 122 is preservation of harmony between the husband and the wife. This rationale is satisfied when the compelled testimony of a spouse is

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35 *M.C. Verghese*, (1969) 1 S.C.C. 37.

36 Nawab Howaldar v. Emperor, 15 Cri. L.J. 303 *cited from* PRINCIPLES AND DIGEST OF THE LAW OF EVIDENCE 1304 (D. Nandan ed., 1999). In this case one of the several accused died before trial commenced. The communication made to the wife before dying, which implicated the other accused, was held to be inadmissible.

37 LAW COMMISSION OF INDIA, 185TH REPORT ON THE INDIAN EVIDENCE ACT 1872 (2002) recommends that a new § 122 be inserted where the exception uses the term 'proceedings between married persons', instead of 'suit'. But no explanation is provided for this particular change in nomenclature, presumably because the Law Commission regarded the term 'suit' in the present § 122 as referring to all legal proceedings and merely sought to clarify it in the new provision proposed.

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

39 *Id.*

made inadmissible, but not when the voluntary testimony is also made inadmissible. If a spouse is compelled to testify against the other spouse or compelled to disclose some sensitive communication from the other spouse, then it may lead to sour relations between the spouses. One spouse may feel cheated or betrayed even if such testimony were compelled. However, if such testimony were voluntary, then it shows that the relations between the husband and wife have already reached a stage where the harmony between them has been ruptured. Preventing the disclosure of such communications would serve no sensible purpose. It would only hamper the administration of justice. The rationale behind section 122 fails in cases of voluntary disclosure of matrimonial communications.

Secondly, even the rationale does not justify the prohibition beyond marriage. Once the marriage ceases to exist there is no question of any matrimonial harmony being preserved. Thus, section 122 serves no purpose and in fact hinders justice in such cases. The argument that fear of future disclosure may create mistrust in marriage at present, is far-fetched and ill grounded.[40] It would be irrational to presume that before making a communication to one's spouse, one would take comfort from the existence of section 122 that the communication would never be revealed in court even if they went in for a divorce. And then reassured, one proceeded to make the communication with greater ease. It will also be unreasonable to further presume that if section 122 were not there, one's communications to one's spouse would be shadowed by the fear that in case they were subsequently estranged, the other spouse would reveal the communications in court. And hence the removal of such protection beyond marriage would cause marital discord because of lack of free communication. Further, as shown earlier, English law, for more than a century, has provided such privilege only during the subsistence of the marriage. While it is possible that a person may be hesitant to confess a crime to his or her spouse considering the repercussions, it is unlikely that such long-term repercussions will enter his or her consideration, before communicating to the spouse. Further, the hesitation will arise only if the spouse has committed some grave offence and not in the normal course of events.

In the case of *S.J. Choudhary* v. *State*,[41] this protection was taken to the extreme. The accused in this case was married to the witness in question and subsequently separated, after which she (the witness) cohabited with another man, whom she had befriended during the subsistence of her marriage. The accused killed this man, but part of the testimony of the witness, which related to communications between her and the accused, and the jealousy shown by the accused with respect to the deceased, were excluded from evidence, as those communications were made before the decree of divorce was granted. The case is a striking example of how application of the section 122 prohibition beyond marriage can lead to absurd situations. So, while protection of such communications is justified during the subsistence of the marriage, such protection beyond marriage is undesirable.

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40 *See* Harris, *supra* note 11.

41 1984 (2) Crimes 487.

Thirdly, cases of child sexual abuse also bring this protection into sharp focus. Cases of child sexual abuse are heinous and by their very nature often remain unknown to people outside one's immediate family. Hence, it is very likely that one spouse may make communication to the other spouse regarding the same. If a child is sexually abused, naturally it is the parents to whom the child will complain and who will be the most enraged. When a parent abuses his or her child, the child it can be assumed would complain to the other parent, and such parent will obviously, before taking matters to the police, confront the other parent to check if such complaint is true. If the communications made by the abusive-parent to his spouse is made inadmissible, then it will be hard to prove such abuse based on the child's testimony alone. Medical evidence will not always be available or be conclusive and the testimony of the child may not be very reliable. Hence, in such cases the evidence of the other spouse becomes imperative to bring the abusive-parent to justice.

In a case relating to harm caused (not of sexual nature though) to one's child, in *Fatima* v. *Emperor*,[42] the mother killed the child. However, the father's evidence, which would have helped convict her, was held to be inadmissible under section 122. When one spouse in a couple harms the child, it usually disrupts the family. However, evidence related to such offence, in the form of matrimonial communications, adduced by the other spouse will be inadmissible. Again this would detract from the ends of justice and also not satisfy the rationale behind the provision.

Fourthly, when some close relative is involved the privilege may yet be problematic. Similar to the above case, if a spouse harms a close relative or friend of the other, say the other's father or mother, this has a strong possibility of causing disharmony in the family. However, the other spouse will be prevented from testifying against the accused-spouse, if the testimony was based on matrimonial communications. This is another way in which the provisions in its present form can detract from the ends of justice and not serve the rationale with which it was enacted.

In the case of *Nagaraj* v. *State of Karnataka*,[43] the accused was charged with raping and murdering his wife's sister. After committing the crimes, the accused had told his wife about them. However, the testimony of the wife with respect to this communication was held to be inadmissible. All matrimonial harmony between the accused and his wife had been dissolved the moment he told her that he had raped and murdered her sister and she came forward readily to testify against him. Yet such communications made to her were excluded from evidence. This shows how section 122 can yield incongruous results.

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[42] A.I.R. 1914 Lah. 380.

[43] 1996 Cri. L.J. 2901.

Again, in the case of *Jwala Sahai* v. *The Crown*,[44] the wife was prevented from adducing evidence as to matrimonial communications, which could have helped convict her husband of her sister's murder. In such a case, the husband had already torn the relation of marriage apart by killing his sister-in-law, this provision only served to protect him unjustifiably and the rationale was again not satisfied.

Fifthly, the spouse is not compellable to testify as to matrimonial communications by the other spouse. As per the present law, a spouse cannot be compelled to testify as to matrimonial communications by the other spouse. A spouse is naturally expected to be privy to more information about his or her spouse than other persons, by virtue of living together and being involved in the close relationship of marriage. For some reason, such as the estrangement of a couple, a spouse may refuse to testify to matrimonial communications made, which the accused/defendant spouse wants to introduce in evidence to buttress his or her defence.[45] No public interest is served by allowing the spouse to avail of the section 122 protection in this case. In fact, if the person charged cannot set aside such section 122 protection sought by his or her spouse, then the ends of justice may be defeated for lack of evidence.

Finally, policy considerations should dictate different treatment in cases of rape. In cases of rape and other sexual violence directed at other people outside the family, as a matter of policy, the spouse should be allowed to give evidence. This has two possible justifications. Firstly, the matrimonial harmony in such circumstances usually breaks down beyond repair and there remains no social need to protect it and secondly, the public interest involved in prosecuting such cases of sexual violence is much higher than maintaining ties of courtesy.

III. RECOMMENDATIONS

To remedy the above-mentioned problems, it is suggested that section 122 of the Indian Evidence Act, 1872 be replaced by a new provision, which should read as follows:

> No person who is or has been married shall be compelled to disclose any communications made to him/her during marriage by his/her spouse, unless:
> (a) required by the other spouse to do so
> (b) the case involves a sexual offence
> (c) the marriage in question does not subsist anymore.

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[44] 32 PR 1914 Cr. 108, *cited from* V. KRISHNAMACHARI, LAW OF EVIDENCE 341 (1991).

[45] Such communications may be testified to by the accused/defendant spouse, but being an interested party, his evidence will carry less weight and may require corroboration. The Supreme Court has held in Siya Ram Rai v. State of Bihar, (1973) 3 S.C.C. 241, that the courts should, as a rule of prudence, look for corroboration of the testimony given by a interested witness, before relying upon it.

> Explanation: The term 'spouse' includes former spouse for the purposes of this section.

The effect of this provision would be to do away with spousal privilege of the accused-spouse and vest the same with the witness-spouse, to a limited extent. Spouses are allowed to testify against each other by virtue of section 120. However, the witness spouse will have the discretion to refuse to testify as to matrimonial communications. If there still exists harmony in the marriage, then the witness-spouse would have the option to preserve it by not testifying. However, if the harmony is already lost, this rule will help bring to light material facts from matrimonial communications.

This privilege of the witness-spouse will be subject to the three above-mentioned exceptions where the witness-spouse can no longer exercise the privilege and refuse to testify as to matrimonial communications. This will bring the Indian law in substantial conformity with the English law, since the effect of section 80 of Police and Criminal Evidence Act, 1984 is similar. This provision will allow a spouse to set aside the privilege, which his or her spouse may seek, to avoid testifying as to their matrimonial communications. This will address situations where a spouse, though privy to information favourable to the accused-spouse, is unwilling to testify as to the information because of a subsequent separation. The accused-spouse's own statements with respect to matrimonial communication will need corroboration as he is an interested party.[46] So he or she will need corroboration from the other spouse. This clause will cover such situations. Further, the provision will discard the exception in cases involving sexual offences, again in keeping with English law. Furthermore, the privilege will be removed once the marriage comes to an end, since the need to preserve matrimonial harmony would cease to exist.

IV. Conclusion

Section 122 of the Indian Evidence Act, 1872 remains an anachronism in the present day. Its expansive wording has never justified the simple rationale of preserving matrimonial harmony. It transcends much beyond its rationale and hampers the course of justice by making relevant evidence inaccessible to courts for little gain, if at all.

Preservation of matrimonial harmony never justified the prohibition of voluntary testimony as to matrimonial communications by one spouse against the other. If the marriage had reached a stage where a spouse would voluntarily give evidence against the other spouse, then it showed that there was no matrimonial harmony left to preserve and section 122 only served to hinder justice. Moreover, there are many instances, in which an action of a spouse can destroy matrimonial harmony and in

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[46] *Siya Ram Rai*, (1973) 3 S.C.C. 241.

which the other spouse is likely to be the key witness and yet is prohibited from giving evidence. Further, there is no justification for extending the privilege beyond the subsistence of marriage.

To amend the above-mentioned flaws, it is proposed that section 122 of the Indian Evidence Act, 1872 be replaced by a new provision, as specified in the previous section. It should provide that a person shall not be compelled to disclose matrimonial communications made to him or her by his or her spouse, except in three specific situations – where the other spouse requires that such communications be disclosed in court; where the case involves a sexual offence; and where the marriage in question does not subsist anymore.

Section 120 of the Indian Evidence Act, 1872 would, in the absence any specific prohibition, operate to make a spouse a competent witness against the other spouse. Once this provision comes into effect, voluntary testimony by a spouse, as to matrimonial communications will be allowed. Hence, the spousal privilege will be transferred to the witness-spouse and in the cases afore-mentioned, such privilege will be discarded. This should strike a better balance between reaching the ends of justice and preventing marital discord.