

ASSAILING THE TENABILITY OF SECTION 122 OF THE INDIAN EVIDENCE ACT: TRAVERSING THROUGH THE TROUBLED WATERS

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ABSTRACT

Section 122 of the Indian Evidence Act of 1872 provides for marital communication privilege intending to protect marital privacy and marriage as an institution. However, this provision has been facing significant criticisms for obstructing the truth-seeking nature of the judicial process. This article attempts to highlight that the objective that the provision seeks to achieve is flawed and haphazard in nature. It further discusses various prevailing infirmities that have crept into the provision and proposes to abrogate those lacunae. It also highlights concerns relating to the exceptions grafted into the provision and contends to add some more exceptions to it by borrowing them from foreign jurisdictions. It further criticizes the reasonings adopted in various cases by courts of the United Kingdom (“UK”), the United States of America (“USA”), and India to showcase a comparative analysis of the

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exercise of this provision in these states. At certain points, the authors also draw inspiration from foreign constituencies, which have evolved some welcoming developments and suggest its adoption in India. However, it should not be misconstrued that the authors demand a complete erasure of the privilege, but rather suggest limiting its impact on the information-seeking process of the judiciary. Therefore, to alleviate the present infirmities in the provision it is proposed that voluntary testimony of the witness spouse must be permitted. In other words, if a spouse is willing to become a witness and provide testimony voluntarily to the detriment of another spouse, then that should be permitted and accepted instead of restricting it. Further, some more exceptions are carved into the provision. These suggestions are the prime solutions which the authors propose to cure the existing defects in the provision. The authors also believe that adopting this mechanism could balance the competing interests of protecting marital privacy and the truth-seeking mechanism of the judiciary in an effective manner.

Keywords: *Marital Privilege, Truth-Seeking Nature, Flawed Objective, Prevailing Infirmities, Individual Privacy, Voluntary Testimony*

I. INTRODUCTION

Section 122 of the Indian Evidence Act, 1872¹ holds significant importance in the realm of marital communications privilege. It protects the communications made during marriage from one spouse to the other, which is treated as privileged communications between them. There are three parts of the section, the first part states that no married person shall be forced to disclose the communication made by the other person to whom the former is married.² The second part states that no married person shall be permitted to disclose such communications without the consent of his/her spouse or any representative in interest. The last part carves out an exception that such a privilege of non-disclosure without consent shall not be applicable in cases where one married person is prosecuted for a crime against the other.³ In this context, it is important to note that under Indian law, this privilege is of the spouse who made the communication to the other spouse. That is, the privilege is of the communicating spouse and, not the witness spouse.⁴ This provision originated from British colonial laws and was subsequently adopted in Britain as well. But the above three components mark a stark departure from the English common law privilege where only the witness spouse holds the privilege, it does not extend beyond the marriage and is applicable in civil cases only.⁵

The foundation of spousal privilege can be traced back to two medieval concepts, as highlighted in the case of *Trammel v. United States*.⁶ First, it stemmed from the idea that a married couple was seen as a single entity, particularly without an independent legal existence for women.

¹The Indian Evidence Act, 1872 (1 of 1872) s 122.

²Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.

³M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.

⁴*TJ Ponnien v MC Varghese* AIR 1967 Ker 228.

⁵Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.

⁶*Trammel v United States* (1980) 445 US 40.

Second, it was based on the notion that an individual cannot self-incriminate due to their interest in the legal proceedings.

Consequently, if one spouse's communication was deemed inadmissible, the other spouse's communication would also be barred. Furthermore, considering the limited rights of women during that era, they were regarded as the *property* of men. This perspective led to the logical argument that one's property, in this case, a spouse, should not be compelled to testify against the owner of that property.⁷

There are two distinct types of privileges that fall under the umbrella of marital communications privilege: *Testimonial Privilege* and *Spousal Confidence Privilege*.⁸ Testimonial Privilege relieves a witness, particularly a spouse, from the obligation to provide evidence against their spouse in legal proceedings. This privilege, rooted in older English laws, serves the purpose of fostering marital harmony and preventing discord within the relationship.⁹ On the other hand, Section 122 of the Evidence Act 1872 is associated with Spousal Confidence Privilege. This privilege primarily focuses on safeguarding the privacy of communication between spouses and prohibits a spouse from divulging such confidential communications during testimony.¹⁰ Its primary objective is to preserve marital harmony.

However, in recent times, the provision has come under scrutiny, with questions arising regarding its viability and potential shortcomings. Recently, in the case of *the State of Kerala v. Rasheed & Ors*,¹¹ the Kerala High Court questioned the legality of Section 122 of the Indian Evidence Act, 1872, which prohibits the admission of voluntary

⁷*RIT Foundation v The Union of India* (2022) MANU DE 1638.

⁸Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.

⁹US Legal Inc, 'Find a Legal Form in Minutes' (*Testimonial Privilege Law and Legal Definition* / USLegal, Inc.) <<https://definitions.uslegal.com/t/testimonial-privilege>>.

¹⁰James H Feldman and Carolyn Sievers Reed, 'Silences in the Storm: Testimonial Privileges in Matrimonial Disputes' (1987) 21(2) Family Law Quarterly 189.

¹¹*State of Kerala v Rasheed & Ors* (2022) SCC OnLine Ker 963.

testimony given by a spouse against the accused spouse, even when granted with complete volition of the spouse. In this case, the accused, suspecting some illicit relationship between his wife and the deceased, killed the deceased by first hitting his car with the deceased's bike and then stabbed him to death. The wife deposed that on the day before the murder of the deceased, there was a quarrel between her and the accused over some telephonic chats between the deceased and herself, following which the accused left the house in his car with which the accused hit the deceased's bike. This statement of the accused's wife was essential to establish the motive to kill, but due to the protection of Section 122 the above statement was held to be inadmissible. Further, no other evidence proving motive was satisfactorily presented for which the prosecution failed to establish the alleged motive. In this context, the Court opined that although there was clear evidence establishing the motive, due to the flawed arrangement of placing marital privacy over public interest by virtue of Section 122, the truth-seeking process got obstructed. Therefore, the Court expressed the need for an amendment to address this matter and called into question, the validity of the provision. The aforementioned case shed light on a significant issue that calls for rectifying a fundamental flaw inherent in the objective of Section 122.

This article delves into exploring the troubled waters surrounding Section 122, aiming to critically analyse its tenability and address the emerging concerns. By examining the inherent complexities and implications of this provision, the authors seek to shed light on the need for a comprehensive reevaluation of its application in the context of contemporary legal principles and societal norms. The second part of the article peruses the underlying legislative objective behind Section 122. The third part points out the flaw in such objective by highlighting how it obstructs the judicial truth-seeking process. The fourth part depicts the prevailing infirmities that crept into the marital privilege which includes sham marriages, considering legally married couples only, continuation of the privilege after the marriage ends and the

extension of the privilege when strangers are involved. The fifth part navigates through the insufficiency in the existing exceptions to the marital privilege and suggests some new exceptions to be added to it for assisting the truth-seeking process. The last part makes a case for permitting voluntary testimony of the witness spouse on the ground that the witness spouse has an individual privacy apart from marital privacy. The authors assert that exercising of such individual privacy rights should be allowed and hence, concomitantly, the witness spouse's voluntary testimony should be permitted.

II. PERUSING THE OBJECTIVE BEHIND SECTION 122

The objective behind framing this provision and preventing disclosure of communications without reservations between married persons is to protect the family peace, prevent domestic broils and maintain the mutual trust between married couples, which is considered most important to lead a harmonious married life.¹² In the United States, spousal privilege is supported by a two-fold objective: firstly, *utilitarian or instrumental rationale* under which privilege is essential to maintain the confidential relationship, and requires the communicating party to be aware of the privilege before revealing the confidences.¹³ Secondly, *humanistic rationale* argues for the privilege to promote autonomy and enable spouses to make independent life choices.¹⁴ In India, the framing of Section 122 hints that it adopts both the rationales of protecting the relationship and preserving marital autonomy.

¹²M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.

¹³Edward J Imwinkelried, 'State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States' (2003) 53 *New Mexico Law Review* 71, 72.

¹⁴*ibid.*

III. FLAWED OBJECTIVE

The rationale behind Section 122 appears untenable to uphold it in its current form owing to two major reasons, as highlighted below.

A. *Fails to satisfy the second part of Section 122*

This objective succeeds in justifying that a spouse cannot be compelled to disclose such communications as it can be inferred from the necessity to preserve the marital ties and compelling a spouse could shake that domestic confidence.¹⁵ However, it can in no way be contemplated to justify the second part where the spouse wants to disclose the communications willingly, but the law prevents it.¹⁶ The spouse who is willing to disclose has moved further and seems ready to risk the family peace.¹⁷ So, after that, it matters in the least, whether it actually gets disclosed or not, as the mutual distrust has already frayed between the spouses. Moreover, the reasoning for retaining family peace with non-compulsive disclosure is not logically applied since a disturbance in marriage due to such disclosure is not the most serious one amongst other reasons responsible for marital disturbances.¹⁸

B. *Obstacles in the delivery of justice*

Under this privilege, justice seems subservient to the consent of the accused as to whether the wrongdoer wants to get into trouble, which is generally negative.¹⁹ This spousal privilege frustrates the nature of

¹⁵Ho Hock Lai, 'Spousal Testimony on Marital Communication as Incriminating Evidence: *Lim Lye Hock v PP*' (1995) *Singapore Journal of Legal Studies* 236, 242.

¹⁶Ho Hock Lai, 'Spousal Testimony on Marital Communication as Incriminating Evidence: *Lim Lye Hock v PP*' (1995) *Singapore Journal of Legal Studies* 242-244.

¹⁷Gazal Preet Kaur, 'Does Section 122 of the Evidence Act need reform?' (*The Leaflet*, 3 February 2022) <<https://theleaflet.in/does-section-122-of-the-evidence-act-need-reform>> accessed 11 March 2023.

¹⁸John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8 (Wolter Kluwers 2010) 213.

¹⁹*ibid.*

evidence law as a truth-seeking process and hinders administration of justice more than safeguarding marital unity.²⁰ The crucial aim of this privilege, as considered to strengthen a marriage by increasing their confidential communication, is intrinsically flawed as there lies no causal link between them.²¹ It is because even if marital privileges get abolished, it will not prohibit the revelation of confidential information between spouses.²² It needs to be realised that people do not enter into a marriage because of the inducement of a guarantee of confidentiality, rather marriages and communications are motivated by trust and affection.²³ The Supreme Court of New Mexico resonating with the same view took a stern decision of abolishing the spousal communications privilege in the state.²⁴ The majority held that most married persons are generally unaware of the privilege.²⁵ Further, it is different from the attorney-client or doctor-patient privilege,²⁶ where the confidences are revealed with utmost awareness of the privilege that their information will not get revealed which is unfounded in marital privilege. Hence, if such privilege fails to have any impact on the regular married lives of spouses, then the balance should tilt towards *information seeking* in the judicial system instead of protecting some abstract harm to marital harmony.²⁷ It should be realised that when the social benefits of the truth-seeking process outweigh that of

²⁰Anne N Deprez, 'Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege' (1980) 56 Indiana Law Journal 121, 127.

²¹Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.

²²Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 136.

²³Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 137.

²⁴*State v Gutierrez* (2021) NMSC 008 [82].

²⁵*ibid.*

²⁶*ibid.*

²⁷David Medine, 'The Adverse Testimony Privilege: Time to Dispose of a 'Sentimental Relic' (1988) 67 Oregon Law Review 519, 548.

marital privilege, then the former should be considered as a dominant factor.²⁸

However, it should not be misconstrued that the authors are claiming a complete abrogation of Section 122. The abrogation of the marital privilege in toto could cause more injustice to a spouse and may not further the interests of justice in seeking information.²⁹ Here, it needs to be clarified that the marital privilege includes both testimonial privilege and spousal confidence privilege and the authors do not propose to completely abrogate both of them. Instead, it is proposed that the testimonial privilege must be retained but the spousal confidence privilege, where the spouse is prohibited from disclosing information irrespective of the spouse's voluntariness, is proposed to be abrogated.

It is because the pivotal pedestal on which the testimonial privilege stands is that of marital privacy and autonomy. Neither society should tinker with it, nor the State or judicial system should interfere more in that restricted zone. The unit of family also enjoys autonomy in a free society as it is seen as an extension of the personal autonomy of individual spouses in the unit, which preserves the unit's decisional autonomy and choice-making.³⁰ It is this crucible of privacy which sustains marital privilege and precludes its elimination. Hence, the authors contend that the marital communications privilege should be available in every sphere of marriage, but its intensity and extent must be lowered in certain circumstances.³¹ There needs to be wide

²⁸ibid.

²⁹Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 731.

³⁰Edward J Imwinkelried, 'State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States' (2003) 53 New Mexico Law Review 71, 93.

³¹Bentham, *Rationale of Judicial Evidence* (5th edn, Wolter Kluwer 1827) 332, 339-345.

availability without making any unintelligible differentia but with certain reforms in it which are highlighted in the following sections.

IV. PREVAILING INFIRMITIES IN THE PRIVILEGE

The foremost reform proposed is to remedy the prevailing infirmities that plague this privilege and hampers both the autonomy of the spouses and the information-seeking mechanism.

A. *Sham marriages*

Earlier, there have been instances where the accused married the witness before the witness could give her testimony to avail the protection of this privilege, and unfortunately, this has been warranted by the courts. In different cases like *State v. Chrismore*³² and *Pedley v. Wellesley*,³³ the courts held that the time when the relationship of marriage begins is immaterial and the exclusion of testimony prevails even though the accused married the witness after she was made a part of the trial. But to tackle such instances, courts in the US developed a *sham marriage* exception under which the spousal immunity privilege is not extended to *premarital acts*.³⁴ However, the authors opine that this exception does not act as a bulwark in modern times where people marry to get immigrant visas or citizenship in developed foreign countries. In *United States v. Fomichev*,³⁵ a person got married to a US lady to obtain US citizenship in return for his paying the rent where both stay. But upon such revelation of the ill motive by his wife, they faced charges of sham marriage. The Ninth Circuit held that this exception does not apply to marital communications privilege, but instead applies only to *spousal immunity privilege*.³⁶ It held that “*marriages that are for entered into for practical reasons may ripen*

³²*State v Chrismore* 223 Iowa 957.

³³*Pedley v Wellesley* 3 Car. & P. 558.

³⁴*United States v Clark* 712 F.2d 299 (7th Cir. 1983).

³⁵*United States v Fomichev* 899 F.3d 766 (9th Cir. 2018).

³⁶*ibid.*

into loving relationships” and that “*the applicability of the sham marriage exception requires a limited inquiry into whether parties married for the purpose of invoking the testimonial privilege.*”³⁷ So, if couples are legally married without any intrinsic purpose of misusing the privilege, then they are protected by the spousal communications privilege.³⁸ This line of reasoning, when seen with the growing number of cases in India involving people entering into marriages for getting immigration visas (especially in the US),³⁹ it appears that the privilege provides for an an easy escape route.⁴⁰ Thus, this decision emphasizes that marriages entered into for practical reasons, such as obtaining immigration benefits, may still be protected by the spousal communications privilege if it is genuine. However, this legal nuance raises concerns, echoing Jeremy Bentham’s observation that spousal privilege can create inconsistencies in justice, granting individuals a license to commit wrongdoing with spousal protection.⁴¹ The prevalence of sham marriages for immigration purposes, particularly in the US, underscores the potential exploitation of this privilege as an escape route in various cross-border legal proceedings.

B. Concerned only with legally married couples

Furthermore, this objective appears flawed due to another reason that it is only applicable to legally wedded couples and not otherwise.⁴² Its

³⁷ibid.

³⁸Stephen A Saltzburg, ‘Sham Marriage and Privilege’ (2019) 33 Criminal Justice 51, 52-53.

³⁹PTI, ‘Indian pleads guilty to marriage and visa fraud’ *The Times of India* (Delhi, 15 March 2019) <<https://timesofindia.indiatimes.com/nri/indian-pleads-guilty-to-marriage-and-visa-fraud/articleshow/68429342.cms>> accessed 31 August 2023.

⁴⁰H Glenister, ‘Partner Visa for Indian Man Suspected of Being in a Sham Marriage’ (*William Gerard Legal*, 17 August 2021) <<https://www.wglegal.com.au/notable-cases/partner-visa-application-for-indian-man-suspected-of-being-in-a-sham-marriage>>.

⁴¹Bentham, *Rationale of Judicial Evidence* (5th edn, Wolter Kluwer 1827) 332, 339-345.

⁴²Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.

application is restricted to paramours as well.⁴³ It is a prudent contemplation that if the aim is to protect family peace, then there is no ground to disregard the family peace of a couple who have been staying together irrespective of the fact that whether their marriage is valid or not. It simply disregards the harmony that gets dispensed between couples who are innocent about the validity of their marriage and have not stayed together for a long time leading to a legal presumption⁴⁴ that their marriage is valid. This shows the partiality that the objective accelerates in the time where there is a growing jurisprudence on accepting *live-in relationships* as equivalent to marriage by persons legally qualified to marry, upon fulfilling conditions of cohabiting for a significant time and holding themselves as spouses before society.⁴⁵ Further, considering the efforts in extending certain marital rights to them,⁴⁶ this privilege should be extended to them as well. In foreign jurisdictions, more radical views are expressed by scholars who argue for extending the marital communications privilege to unmarried cohabitants as well, owing to the policy objective which underpins the privilege, as that objective is not vitiated upon accommodating the unmarried cohabitants.⁴⁷ Views are also presented to recognise the privilege for same-sex partners as well, based on the *humanistic rationale* which upholds their privacy, autonomy, and their choice is equivalently precious as a couple in a heterosexual marriage.⁴⁸

⁴³*Shankar v State of Tamil Nadu* (1994) SCC (4) 478.

⁴⁴Amit Anand Choudhury, 'Couple living together will be presumed married, Supreme Court rules' *The Times of India* (Delhi, 13 April 2015) <<https://timesofindia.indiatimes.com/india/couple-living-together-will-be-presumed-married-supreme-court-rules/articleshow/46901198.cms>> accessed 11 March 2023.

⁴⁵*D Veluswamy v D Patchaiammal* (2010) 10 SCC 469.

⁴⁶*Indra Sarma v VKV Sarma* (2013) 15 SCC 755.

⁴⁷Julia Cardozo, 'Let My Love Open the Door: The Case for Extending Marital Privileges to Unmarried Cohabitants' (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 375.

⁴⁸Elizabeth Kimberly (Kyhm) Penfil, 'In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?' (2005) 88(4) *Marquette Law Review* 815, 841.

C. Continuity of the protection after the nullity of the marriage

It was held in the case of *T.J. Ponnen v. M.C. Varghese*⁴⁹ that there is a difference between English law and Indian law regarding Section 122 as this protection of communication continues even after the death of the maker of the communication. In English law, the privilege lies with the recipient of the communications and not the maker thereof so the recipient can waive the privilege and disclose the communication.⁵⁰ Further, it does not extend after death under the English law, but under Section 122, the privilege lies with the maker of the communication and “*a prohibition against the recipient which cannot be contravened by the recipient even after the maker’s death.*”⁵¹ There is no thinkable reason for extending the privilege even after the death of the maker.

This was further reiterated by the Supreme Court in *M.C. Verghese v. T.J. Ponnan & Anr*⁵² that the spouse will be barred from furnishing evidence even after the nullity of the marriage. Such a continuity of privilege, even after the nullity of marriage, can cause greater injustice to the victim. It can be inferred from the case of *SJ Chaudhury v. State*⁵³ where a widow married the accused but, due to some disturbance, left the accused and married another man. Thereafter, she also got divorced from the accused. However, the accused killed the other man in a blast, and the woman was examined, where she revealed some of the communications made to her by the accused. But those disclosures were not admitted by the court as they were made before the divorce was granted to them.⁵⁴ This clearly shows the precarious condition of the woman who can neither return to her former husband as she deemed him to be the killer, nor disclose the communications to punish him.

⁴⁹*TJ Ponnen v MC Varghese* AIR 1967 Ker 228.

⁵⁰*ibid* para 17.

⁵¹*ibid*.

⁵²*MC Verghese v TJ Ponnan & Anr* (1970) AIR 1876.

⁵³*SJ Chaudhury v State* (1984) SCC OnLine Del 185.

⁵⁴*ibid*.

This shows a complete failure of the objective to protect peace and harmony in marriage after it has ended.

It is also unfortunate that a widow cannot be a representative in interest for her, and if there is no one to give consent to her, then she can neither be compelled nor permitted to disclose the communications made to her during his lifetime.⁵⁵ Unfortunately, this privilege has been granted high accord and made difficult to tamper with as has been held in various cases that “*the prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax.*”⁵⁶

This set of precedence is not acceptable because of two sets of reasons: firstly, if the objective is to maintain family harmony, then it is in no way fulfilled as one of the spouses is already dead. It cannot be contemplated how family peace could get disturbed if the spouse is dead, which clearly shows an unacceptable extension of the flawed objective.⁵⁷ Secondly, it appears that the privilege of a dead spouse is being upheld to prohibit the other spouse from disclosing the communications between them which is unacceptable. It is because the privilege lies in the fact that the person can or cannot give consent to such disclosure. However, irrespective of the consent of the representative in interest, the dead spouse can never grant or deny consent, therefore his/her privilege ends at death. However, it is still absurdly made to continue, and its cost is to be borne not only by the other spouse but also by the society and the victim as well.

⁵⁵*Nawab Howladar v Emperor* (1913) ILR 40 Cal 891.

⁵⁶*ibid.*

⁵⁷John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8 (Wolter Kluwers 2010) 213.

D. Includes cases involving strangers solely

It is also repugnant to note that the privilege under Section 122 extends to all cases where the witness is a party to the action of a stranger⁵⁸ and includes cases where strangers' interests are solely involved.⁵⁹ This means that one spouse is not even free to disclose communications and needs the consent of the other spouse where the interests of a stranger are solely concerned. It seems to be nowhere related to achieving the objective of having privileged communications. This drawback is also found in foreign jurisdictions where under two circumstances involving strangers only, the privilege was upheld. Firstly, when a spouse's testimony implicating a third party creates a possibility of indirect implications for another spouse.⁶⁰ Secondly, when a spouse's testimony favouring a third party (a co-defendant of another spouse) could create an adverse inference against another spouse.⁶¹ These justifications appear fallacious because giving testimony against any stranger which may indirectly put the other spouse in trouble is unlikely to disturb marital harmony. The authors believe that marital harmony gets severely perturbed when a spouse directly provides testimony against the other, but any indirect harm to the spouse through testimony against a stranger is less likely to disturb family peace.⁶² Still this rule is elongated which could potentially be misused towards a miscarriage of justice and frustrate the truth-seeking process.

⁵⁸*O'Connor v Majoribanks* 4 M & G 435.

⁵⁹Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.

⁶⁰David Medine, 'The Adverse Testimony Privilege: Time to Dispose of a 'Sentimental Relic' (1988) 67 Oregon Law Review 519, 540.

⁶¹*ibid.*

⁶²*ibid.*

V. PERUSING SOME PERTINENT CONCERNS: NEED TO ADD MORE EXCEPTIONS TO THE PRIVILEGE

Section 122 contains three exceptions:⁶³ Firstly, when there is the consent of the other spouse (the communicating spouse) or his representative in interest. Secondly, where there is a suit between married persons. Thirdly, when one married person is prosecuted for committing any crime against another. Apart from these exceptions, there is another non-textual exception to the privilege, which is the ‘third-party exception.’⁶⁴ Under this exception, this privilege does not extend to prevent a third party from disclosing and proving the communications made between the spouses. The reasoning behind such an exception is that the privilege applies only to such information that is confidential (generally, in marriage, all communications are considered confidential) but when that is revealed to any third party, the confidentiality gets destroyed and warrants no such protection under the privilege.⁶⁵ This can be inferred from the case where a prisoner wrote a letter to his wife that was later found during the search of her house by police and was held admissible in court.⁶⁶ This was further extended to include cases where a third person overheard the communications made between the spouses and that was held

⁶³The Indian Evidence Act 1872 (1 of 1872) s 122.

⁶⁴KK Pappa, ‘Evidence-Privileged Communications-The Marital Communications Privilege Does Not Preclude a Third Party from Testifying as to the Contents of a Written Interspousal Communication and the Priest is the Sole Holder of the Priest-Penitent Privilege and Can Waive That Privilege without the Consent of the Penitent. -State v. Szemple, 135 NJ. 406, 640 A.2d 817 (1994)’ (1995) 25 Seton Hall Law Review 1591.

⁶⁵KK Pappa, ‘Evidence-Privileged Communications-The Marital Communications Privilege Does Not Preclude a Third Party from Testifying as to the Contents of a Written Interspousal Communication and the Priest is the Sole Holder of the Priest-Penitent Privilege and Can Waive That Privilege without the Consent of the Penitent. -State v. Szemple, 135 NJ. 406, 640 A.2d 817 (1994)’ (1995) 25 Seton Hall Law Review 1626-27.

⁶⁶*QE v Donaghue* 22 M 1.

admissible.⁶⁷ In the case of *Appu v. State*,⁶⁸ a third person was allowed to give evidence of the confession which he overheard between the spouses. This shows any disclosure of communication made by the spouses out of the court can be proved without applying any such privilege.⁶⁹ However, the current scenario is witnessing a growing number of grave and heinous crimes involving different tactics and misusing loopholes in the legal system. So, we contend to expand the exceptions in the following situations.

A. To protect the near and dear ones

The issue with these exceptions is that it has been interpreted in a very narrow and strict manner to include only the other married person and no one else. In one such case, a woman killed her daughter and made some incriminating statements about it to her husband, but the husband was not permitted to disclose it as the crime was not towards him rather toward their daughter.⁷⁰ In another case, it was reiterated that an offence *against* a person excludes even the son of the offender and the other spouse cannot disclose it irrespective of the grief caused to that spouse.⁷¹ Also, in an Indian case of *Nagaraj v. State of Karnataka*,⁷² the accused was levelled with charges of raping and killing his wife's sister and after committing the offence, he revealed it to his wife. But his wife was not permitted to give testimony of the fact and the information communicated.⁷³ This reasoning is flawed in the view of the authors because once a spouse commits any such crime against a near and dear one of the other spouse, there are less to no chances of having a peaceful marital life.

⁶⁷M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.

⁶⁸*Appu v State* AIR 1971 Mad 194.

⁶⁹*Daniel Youth v King* (1945) ALJ 269.

⁷⁰*Jhasanan v R* 81 IC 271.

⁷¹*Fatima v Emperor* (1914) PLR 216.

⁷²*Nagaraj v State of Karnataka* (1995) SCC OnLine Kar 360.

⁷³*ibid.*

Ironically, while defending marital privilege under Section 122, the sentiments of the spouses are taken into consideration as that is essential to maintain family peace.⁷⁴ However, when offence is committed against their own dearest children by one of the spouses, then the sentiment of the other spouse is not even considered. This is quite contradictory to the objective and only makes a travesty of justice. In such a scenario, the privilege, on one hand, fails to save the family peace and, on the other, allows a person to roam free without any punishment.

However, in the United States, an exception to the privilege is carved out when any crime is committed by one spouse on the children of either or both spouses. It can be seen in *United States v. Allery*,⁷⁵ where the wife was permitted to testify against her husband, who was accused of rape of her daughter. The same exception was upheld in *Reaves v. State*,⁷⁶ where a lady was charged with the murder of her minor step-daughter, and in *Commonwealth v. Hunter*,⁷⁷ where the defendant's wife was charged for causing brain injury to her minor stepson. In the common law regime as well, the exception to the privilege is more strict as the spouses can be compelled to give evidence for some specified crimes committed against the other spouse or their children.⁷⁸ Section 80(3) of the Police and Criminal Evidence Act 1984 of the United Kingdom specifies the offences of assault, injury, or sexual offence committed against the spouse or civil partner or a person below the age of 16 at that material time of commission under which the offender's spouse can be compelled to give testimony against the offender.⁷⁹

⁷⁴Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.

⁷⁵*United States v Allery* 526 F2d 1362, 1367 (8th Cir 1975).

⁷⁶*Reaves v State* 292 Ga. 582, 740 S.E.2d 141 (Ga. 2013).

⁷⁷*Commonwealth v Hunter* 60 A.3d 156, 159 (Pa. Super. Ct. 2013).

⁷⁸David Lusty, 'Is there a Common Law Privilege Against Spouse Incrimination?' (2004) 27 UNSW Law Journal 1, 23-24.

⁷⁹The Police and Criminal Evidence Act 1984, s 80.

Therefore, taking inspiration from the US and UK, India should carve out such an exception in a broad manner.

It is proposed that the exception should include the offences against human body committed against the immediate blood relations of the spouse, that is, immediate lineal ascendant and descendant including the adopted children of the spouse and siblings. This would be wide enough to cover the relations of father, mother, brother, sister and children. If the spouse has no such family or stays away from it for a long period of time voluntarily, then the lawful guardian of the spouse can be considered under this exception. It is to be noted that under this exception, the witness spouse can be compelled to provide testimony so a distinction is created between familial relations and other acquaintances, distant relatives, etc. of the spouse. Further, the condition of immediate blood relations is framed based on the closeness of the relationship of a person.

B. When both spouses are involved in crimes

George Rankin, the then Chief Justice of Bengal, from 1926 to 1934, had aptly pointed out that the requirement of consent of another spouse under Section 122 could be dilemmatic in the case of a joint trial of both spouses.⁸⁰ A curious situation may arise where it might be pertinent for one spouse's defence to disclose some evidence against another that may not be in the other spouse's interest to consent.⁸¹ This situation raises the question of whether the marital communication privilege acts as a barrier in preventing the spouses from disclosure or not. In the US, such situations fall under a "*joint participants exception*," where the courts took a radical view and completely disallowed the application of the privilege to the spouses involved in

⁸⁰Sir George Claus Rankin, *Background To Indian Law* (Cambridge University Press 1946) 132.

⁸¹*ibid.*

the crime.⁸² The justifications used by the courts are: firstly, once married people are engaged in crime, their marriage is no longer harmonious. So, it does not satisfy the underlying purpose of the privilege.⁸³ Secondly, after they commit a crime, their marriage loses rehabilitative potential and cannot be accepted as a harmonious marriage by the society hence, the marriage is not worth protecting.⁸⁴ However, these reasonings have been challenged on the grounds that there is no link between the commission of crime and enjoyment of marital harmony by the spouses and also there is a possibility that the offending spouses re-integrate into society without completely losing their rehabilitative potential.⁸⁵ So, instead of completely abrogating the privilege, a modified version of it needs to be accommodated. Such a version was given in the case of *United States v. Trammel*,⁸⁶ where the Court, instead of complete abrogation, vested the privilege exclusively in the witness-spouse and held that “*the witness may be neither compelled to testify nor foreclosed from testifying.*”⁸⁷ Thus, the Court balanced the competing interests of information-seeking and marital privilege. The effect of this judgment is not only restricted to *joint participant exception* but applies to all forms of marital privilege disputes where the privilege now lies in the witness spouse only and not the other defendant spouse.⁸⁸ However, some scholars also opined supporting the sustenance of ‘joint participant exception’ in certain situations⁸⁹ such as: firstly, where spouses participate in crime and witness-spouse refuse to testify. Secondly, where courts find there is

⁸²Amy G Bermingham, ‘Partners in Crime: The Joint Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony’ (1985) 53 *Fordham Law Review* 1019, 1026-1030.

⁸³*ibid.*

⁸⁴*ibid.*

⁸⁵*ibid.*

⁸⁶*United States v Trammel* 583 F.2d 1166, 1170-71 (10th Cir. 1978).

⁸⁷*ibid.*

⁸⁸*ibid.*

⁸⁹JE Jones, ‘Federal Marital Privileges in Criminal Context: The Need For Further Modification Since Trammel’ (1986) 43 *Washington & Lee Law Review* 197, 218.

no such marital harmony to protect, then the compulsion of this exception can better serve the purpose in ascertaining the truth. The reasoning is that ascertainment of truth is more crucial than preserving a marriage already torn by the offending spouses.⁹⁰

In this scenario, it is proposed that when both the spouses are actively engaged in committing crimes together, then the marital privilege should be abrogated completely. It is because, in this case, marriage serves an evil purpose of protecting both of them from facing punishment. So, compelling the spouses to testify against one another should be permitted so their offences cannot be hidden under the garb of marriage.

C. Excluding privilege in grave offences

Applying spousal privilege in cases involving heinous crimes may impede the administration of justice and hinder the truth-seeking process. The purpose of criminal proceedings is to determine the guilt or innocence of the accused and to protect the rights and safety of the victims. Therefore, allowing spousal privilege in cases of grave offences could create a potential loophole where one spouse (who could be a potential witness) is shielded from testifying against the other, thereby obstructing the pursuit of justice. In many grave offences involving crimes against children or acts of terrorism, the interests of society and the victims often outweigh the privileges afforded to marital relationships. Such cases require a comprehensive investigation and gathering of evidence to ensure justice is served and the community's safety is upheld. However, allowing spousal privilege in such cases where one of the spouses is accused of serious offenses like POCSO, UAPA, terrorism, or other grave crimes can open avenues for potential abuse or collusion between spouses.

⁹⁰ibid.

Accused individuals may even use their marital relationship to manipulate or coerce their partners into remaining silent or providing false alibis, further obstructing the truth-seeking process and potentially allowing guilty parties to evade punishment. It may be viewed as affording undue protection to accused individuals in cases involving heinous offenses, which can undermine public confidence in the justice system and erode the principle of equal treatment before the law. Furthermore, in the case of *Mr. Vilas Raghunath Kurhade v. The State of Maharashtra*,⁹¹ judges of the Bombay High Court rightly appreciated the views that the detrimental effects of Section 122 would be more specific towards special penal statutes like the POTA Act, 2002, POCSO Act, NDPS Act, and MCOC Act, etc. While maintaining the confidentiality of spousal relations is important, a single blanket ban on any communication related to such heinous crimes may not be suitable for the demands of modern times in ensuring justice is served.⁹² Therefore, the authors contend that there should be an exception developed in cases involving such grave offences to place societal interests on a higher pedestal.

Here, it is proposed that grave offences should include those offences that hamper national and state security like terrorism, rioting, offences against the State, etc, and additionally, those offences which provide very high punishment without any *mens rea* requirement such as rape of both major and minor. The reason behind framing such a category is that the law provides stringent punishment even in absence of *mens rea*, which shows that these offences are graver than others. Hence, in such offences where strict liability is attached with punishment of life imprisonment, marital privilege should be completely abrogated and a spouse should be able to be compelled to testify against the other.

⁹¹*Mr Vilas Raghunath Kurhade v The State of Maharashtra* MANU/MH/0198/2011.

⁹²*ibid.*

VI. PRIVACY OF MARITAL UNITY VIS-À-VIS INDIVIDUAL PRIVACY

The restriction on a spouse to not disclose marital communications “*unless the person who made it, or his representative-in-interest, consents*”⁹³ casts a strange conflict between marital autonomy and individual privacy. This is specifically a concern where the individual is willing to give a testimony but is not permitted to do so, and such testimony is made inadmissible. While it is argued that once a spouse is willing to testify, then marital harmony no longer exists, so the privilege need not be extended to the spouses,⁹⁴ the contention appears more convincing from the individual privacy perspective as the former reasoning fails to empirically substantiate that the marriage failed owing to the spouse’s willingness to testify. It appears that by getting married, one renounces one’s ability of individual decision-making regarding liberty of expression and is even compelled to put down one’s dignity by being subservient to another. It sounds similar to upholding the antiquated notion of treating husband and wife as a single entity instead of separate individuals.⁹⁵

In the landmark *Puttaswamy* case⁹⁶ D.Y. Chandrachud, J. (later CJI) observed that “*Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised.*” He also stated, “*Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.*”⁹⁷ In these statements, there are two crucial aspects requiring sincere attention: firstly, privacy is of an individual and not

⁹³The Indian Evidence Act, 1872 (1 of 1972) s 122.

⁹⁴John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8 (Wolter Kluwers 2010) 213.

⁹⁵Wendy Harris, ‘Spousal Competence and Compellability in Criminal Trials in the 21st Century’ (2003) 3 QUTLJ 1, 2.

⁹⁶*Justice KS Puttaswamy (Retd.) & Anr v Union of India & Ors* (2017) 10 SCC 1.

⁹⁷*ibid.*

of any group so the spouses enjoy individual privacy independent of each other and the common marital privacy. Secondly, privacy forms the foundation for exercising their liberties, which shows that the liberty to express and the manner of expression of one's opinion and views emanates from the zone of privacy.

This can also be inferred from the case of *People's Union for Civil Liberties (PUCL) v. Union of India* (SC, 1997),⁹⁸ where it was held that the personal liberty of a person under Article 21 of the Indian Constitution⁹⁹ entails freedom from any reservation or encroachment on his person whether they are brought directly or indirectly on his liberty. This shows that every spouse enjoys a certain degree of decisional autonomy which is not lost or compromised to a great extent upon entering into marriage.¹⁰⁰ It is this decisional autonomy that formed the foundation of decriminalizing adultery in the *Joseph Shine* case.¹⁰¹ Thus, it should not be sacrificed before any other group privacy, but rather balanced with the common marital privacy.¹⁰²

Similar views were expressed by scholars while opposing the Federal Wiretap Act in the US, which was interpreted by courts to create a *wiretap exception* allowing a spouse to trap private communications of

⁹⁸*People's Union for Civil Liberties (PUCL) v Union of India* (2007) 12 SCC 135.

⁹⁹The Constitution of India, 1950 art 21.

¹⁰⁰Gautam Bhatia, 'A Question of Consent: The Delhi High Court's Split Verdict on the Marital Rape Exception' (*Indian Constitutional Law and Philosophy*, 11 May 2022) <<https://indconlawphil.wordpress.com/2022/05/11/a-question-of-consent-the-delhi-high-courts-split-verdict-on-the-marital-rape-exception>> accessed 28 August 2023.

¹⁰¹*Joseph Shine v Union of India* (2019) 3 SCC 39.

¹⁰²Gautam Bhatia, 'Guest Post: Decisional Autonomy and Group Privacy – on the Karnataka High Court's Hijab Judgment' (*Indian Constitutional Law and Philosophy*, 22 March 2022) <<https://indconlawphil.wordpress.com/2022/03/22/guest-post-decisional-autonomy-and-group-privacy-on-the-karnataka-high-courts-hijab-judgment>> accessed 28 August 2023.

another and use it in contentious court proceedings.¹⁰³ These views advocate for a transition from *marital unity* to *marital individualism* which not only eliminates the condemned *single entity* concept but also aims at creating equality between husband and wife.¹⁰⁴ It cannot be denied that with marriage, the spouses forego some level of seclusion and not doing so can create significant trouble in marriage. However, still, individual zones of privacy and decision-making must be secured.¹⁰⁵

Similarly, in India, there is a serious conflict regarding the acceptability of videos or calls of a spouse secretly recorded by another as evidence in contentious court proceedings. The Rajasthan High Court held that the marital privilege will not get attracted in such cases before the Family Court as Section 14 of the Family Court Act eclipses the marital privilege under Section 122 in proceedings before it.¹⁰⁶ On the other hand, the Punjab & Haryana High Court held that although Family Court is not bound by rules of evidence to dismiss the admissibility of such evidence, but this infringes the right to privacy of a spouse, so acceptance of such evidence by the Family Court was unjustified.¹⁰⁷ This conflict needs a permanent settlement by the Apex Court in favour of preserving individual privacy at the cost of marital unity.

¹⁰³Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1095.

¹⁰⁴Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1119-20.

¹⁰⁵Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1118-19.

¹⁰⁶*Preeti Jain v Kunal Jain* (2016) SCC OnLine Raj 2838.

¹⁰⁷*Neha v Vibhor Garg* (2021) SCC OnLine P&H 4571.

VII. RECOMMENDATIONS AND CONCLUSION

From the above analysis, it appears that Section 122 fails to properly balance the twin objectives of preserving marital privacy and assisting in the truth-seeking process. The authors also recommended some suggestions for extending the exceptions which can be summarised as: firstly, to protect the near and dear ones, marital privilege should be completely abrogated for bodily offences against immediate blood relations like father, mother, siblings and children including adopted ones. Secondly, when both spouses are involved in the crime, then compelling the spouse to testify against the other should be permitted. Thirdly, the privilege should be completely extinguished for offences hampering national security and such offences on which law imposes strict liability with punishment extending till life imprisonment or more. But what about other offences which do not fall under these exceptions? Should Section 122 be available against those offences in full-fledged manner or apply partially?

Answering these queries, we propose a reform as discussed in the previous part that the requirement of *consent* of the communicating spouse or the defendant spouse needs to be eliminated. The marital communications privilege instead of availing to the defendant-spouse must be exclusively granted to the witness-spouse. This serves the purpose of protecting marital harmony very well by making it contingent on the witness spouse. It is because if the witness-spouse is willing to protect her marriage, then there is complete liberty to not disclose anything, otherwise the spouse can act according to her moral consciousness and reveal the information. This kind of reform can also be found in jurisdictions of Missouri, the District of Columbia, Georgia, Louisiana, Massachusetts, and Alabama, where the witness spouses are given the privilege of such voluntary testimony.¹⁰⁸

¹⁰⁸Malinda L Seymore, 'Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence' (1996) 90 Northwestern University Law Review 1032, 1059.

However, this reform is not free from obstacles and can turn extremely pernicious in the hands of government officials. As happened in the above-discussed case of *Trammel*,¹⁰⁹ where the wife was promised leniency for giving testimony against her husband. It hints that the state can intervene and provide either incentive or punishment to the witness spouse to let go of her privilege.¹¹⁰ Similarly, in *Hawkins v. United States*,¹¹¹ such a reform was asked for, but the court declined considering that the state could apparently secure voluntary testimony even from an unwilling witness spouse through various ways.¹¹² There are ample chances that if the privilege is shifted from defendant spouse to the witness-spouse then the government can certainly exercise coercion on the unwilling witnesses and could compel them to disclose confidential information.¹¹³ Similarly, even prosecutors can induce witness spouses to testify against the defendant spouses which could further damage their marital lives.¹¹⁴ Therefore, although this reform appears appealing, but choosing this will put an extra burden on courts to ensure that the testimony by the witness spouse was truly voluntary without any intervention or coercion. But by exercising such scrutiny, this reform can perfectly balance the competing interests of seeking crucial information to prevent society from getting battered with crimes and preserve marital privacy through the marital communications privilege. Hence, lastly, the authors assert that this reform must be adopted by the Indian legislature to quell the prevailing infirmities in marital privilege.

¹⁰⁹*United States v Trammel* 583 F.2d 1166, 1170-71 (10th Cir. 1978).

¹¹⁰Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 733.

¹¹¹*Hawkins v United States* (1958) 358 US 74.

¹¹²Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725.

¹¹³Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 734-37.

¹¹⁴Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 737-38.