

SHOULD MATRIMONIAL COMMUNICATION BE GIVEN A SPECIAL STATUS UNDER THE INDIAN LAW OF EVIDENCE? A CRITICAL ANALYSIS

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INTRODUCTION

Evidentiary privileges, almost of all kinds, are mixed blessings. Privileges are created to protect "interests and relationships" deemed "of sufficient social importance." and they permit the exclusion, or "sacrifice," of potentially relevant, reliable, and credible evidence, often the kind of evidence that many would not call "incidental." Eminent evidence scholars including Jeremy Bentham, John Henry Wigmore, Charles Alan, Wright and Kenneth W. Graham, Jr., and Edward J. Imwinkelried have explored the rationales for evidentiary privileges, but they have done so largely by considering privileges as a unitary concept.¹

One of the major principles recognized by the law in the conduct of litigation is that of disclosure of evidence. The meaning of this expression is that parties shall reveal to each other and for the purpose of proceedings, any and all evidence, relevant to the issues in those proceedings, which is or has been in their possession, custody and power. The object of the principle is simply that all such relevant evidence in the case should be available to be inspected by all parties, and that the parties should be free to place before the Court any evidence which will assist it in determining the truth and in doing justice between the parties. The idea of inspection of evidence in the possession of another party is primarily of importance in the field of documentary and real evidence, and most of the battles in the field of public interest immunity and privilege have been fought in relation to such evidence. The principle of disclosure and its object of enabling the parties to place before the court all relevant and admissible evidence, applies to evidence in whatever form, and the rules of privilege in particular are of significance with respect to certain kinds of oral evidence.²

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¹ Eileen A. Scallen, Relational And Informational Privileges and the Case of the Mysterious Mediation Privilege, 38 Loy. L.A. L. Rev. 537, as taken from Westlaw.

² Peter Murphy, Murphy on EVIDENCE, 5th ed., 1997, p.n. 354.

One such kind of privilege enjoyed is in the communication made between spouses. Section 122 of the Evidence Act provides for such privilege and inhibits disclosure of marital confidence. Any communication between the husband and wife during the continuance of the marriage is privileged; hence wife as a plaintiff in a suit cannot be confronted with the same.

This paper intends to challenge the applicability and relevance of this doctrine in contemporary times. The Central Argument of this paper shall relate to the features of the doctrine and the exceptions which have carved out by the act. It will be the prerogative of the research paper to answer pertinent questions like:-

1. What has been the impact of this privilege in modern times where the institution of marriage has become weak and flimsy?
2. What is the scope of the doctrine in cases where the two spouses are contesting against each other in a civil/ criminal suit?
3. What is the position of common law on this issue and how does Indian Law differ from the same?
4. What is the nexus and importance of this privilege in light of the Protection of Women against Domestic Violence Act, 2005?

The Structure and flow of the paper

The paper has been dealt with in a heading wise manner. It is divided in Sections and sub sections. Each part has been separately dealt with. First the researcher has discussed the scope of the section along with the reasons behind its enactment. Then the researcher has gone on to understand the various ingredients covered under it and this has been done with the help of relevant case laws on the particular ingredient dealt with. Few landmark judgments on the issue have also been discussed in detail to provide for a holistic understanding of the issue. What the communication as privilege includes and what it excludes has also been stated. Finally at the end the section has been viewed in a critical light. Its necessity versus impediments it causes in making available important evidence at times. The researcher has also provided some views on the contemporary application of the age old section in some recent acts enacted and how its exception can still be justified according to it.

Limitations of the paper

A limitation in doing this paper has been availability of a few cases that have been decided under this section. Also there are varying opinions of the Courts on this privilege. Even in the last few years only a few cases have been found including the High Courts

along with the Supreme Court. No Supreme Court case has been found relating to Section 122 of the Indian Evidence Act in the last 4 years.

General Overview of the Privilege

It has been seen that husbands and wives are competent witnesses in all civil proceedings, and in criminal proceedings against an accused, his or her wife or husband is a competent witness, whether for or against. S. 120³ deals with competence or admissibility. But S.122⁴ affects compellability, and contains a rule of privilege protecting the disclosure of all communications, between persons married to one another, made during marriage, except in certain cases i.e. in litigation between themselves⁵.

Under Sec. 120, Evidence Act, the wife of an accused person is a competent witness. Under Sec. 122 the wife is not permitted to disclose any communication made by the husband during marriage unless the husband who made it consents. The prohibition is extended to all communications of whatever nature which pass between husband and wife.⁶

The provisions of the section can be summarized as⁷:-

- 1) The privilege extends to all communications made to a person *during marriage*, by any person to whom he or she has been married, but not to communications *before* marriage.
- 2) The communication need not be confidential. The rule applies to communications of *every nature*.

³ S. 120. Parties to civil suit, and their wives or husbands - Husband or wife of person under criminal trial - In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

⁴ S.122. Communications during marriage - No person who is or has been married, shall be compelled to disclose any communication 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 proceedings in which one married person is prosecuted for any crime committed against the other.

⁵ Sudipto Sarkar & V.R.Manohar, Sarkar on Law of Evidence, 15th ed., 1999, Vol.II, p.n. 1983.

⁶ *Ramchandra Shankershet Uravane v. Emperor*, A.I.R. 1933 Bom. 153 at p.157; See also Gopal S. Chaturvedi (Rev.) FIELD'S Commentary on Law of Evidence, Vol.5, 12th ed. 2006, p.n. 4589.

⁷ Gopal S. Chaturvedi (Rev.) FIELD'S Commentary on Law of Evidence, Vol.5, 12th ed. 2006, p.n. 4589.

- 3) The rule of privilege applies equally whether or not the witness or his or her spouse is a party to the proceeding. It extends to *all* cases, i.e. to cases between strangers as well as to suits or proceedings in which the husband or wife is a party.
- 4) The privilege extends to communications made to a spouse and not to those made by a spouse. But the privilege is conferred not on the witness (unless the witness happens to be the spouse who made the communication), but on the spouse who *made the communication*; the witness cannot therefore waive it at his or her will, nor can the court *permit* disclosure even if he or she is willing to do it.⁸ It is only the spouse who made the communication or his or her representative in interest who can consent to give up the privilege.
- 5) The prohibition continues after the death of one of the parties to the marriage or divorce.⁹ The obligation is to continue beyond the subsistence of marriage. The fact that a motion for divorce or for declaration of nullity of marriage has been made does not stop the obligation from continuing. The admissibility in evidence of the communication will be adjudged in the light of the status at that date.¹⁰ It has been held in England that as the privilege in the English section (s 3 of the Evidence Am Act 1853) in terms relates only to husbands and wives, it does not exist after the marriage has come to an end¹¹. The words "husband" and "wife" which are used in the English section do not appear in s.122. Moreover, when the section was framed the intention was to codify the then prevailing law in England which had been construed to apply to widows, widowers or divorced persons¹². Further it is probable that the words "husband" and "wife" were excluded from the Indian section with a view to make it clear that the privilege continues even after the death of one of the parties or divorce. The use of the words "representatives in interest" points to the same conclusion.

Principle of privilege

The prohibition under Sec. 122 of the Indian Evidence Act is based on the ground that the admission of such testimony is likely to disturb the peace of the family and weaken the feeling of mutual confidence. It rests on technicality that can be waived at will but

⁸ *Nawab Howladar v. R.*, 40 C 891, 804 *post*

⁹ *Nawab Howladar v. R.*, 40 C 891, 804 *post*,

¹⁰ *Verghese v. Ponnen*, A 1970 SC 1876.

¹¹ *Shenton v. Tyler*, *post*

¹² *Monroe v. Twistleton*; *O'Connor v. Majoribanks*; *Doker v. Hasler*, *post*

is founded on a principle of high import which no Court is entitled to relax. It is further not confined to cases where communication is of strictly confidential character. In fact, it extends to all communications of whatever nature, which pass between the husband and the wife unless the spouse making the communication consents to its disclosure¹³. Section 122 of the Evidence Act recognizes the age-old concept of marital confidence that all communications between spouses during the wedlock are sacrosanct. This section limits the rule enunciated in s.120.¹⁴

Nature and extent of privilege

The prohibition enacted by this 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. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or the wife is a party on the record¹⁵. It is however limited to such matters as have been communicated "during marriage", and consequently, if a man were to make the most confidential statement to a woman before he married her, and it were afterwards to become important in a civil suit to know what the statement was, the wife, on being called as a witness, and interrogated with respect to the communication, would, as it seems be bound to disclose what she knew of the matter¹⁶.

¹³ Col. S.J. Chaudhary v. State, 1984 (2) Crimes 487 at p.489 (Delhi); 1985 CrLJ 622 (Delhi). See also Gopal S. Chaturvedi (Rev.) FIELD'S Commentary on Law Of Evidence, Vol.5, 12th ed. 2006, p.n. 4589.

This section "rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families to promote domestic broils, and to weaken, if not destroy, that feeling of mutual confidence which is the most endearing solace of married life", HARDWICKE LCJ, in *Barker v. Dixie*, Lee Cast Hardwicke, 264; See also Y.V. Chandrachud, V.R. Manohar, Ratanlal & Dhirajlal's, "The Law of Evidence", 21st ed., 2004, p.n. 689. Wadhwa & Company. Nagpur.

¹⁴ Gopi Nath (Rev. and Ed.), Sir John Woodrooffe & Syed Amir Ali's, Law of Evidence", Vol. 4, 16th ed., 1996, p.n. 3328.

In England the Commission on Common Law Procedure in its second report, submitted in 1853 observed as under:

"So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss light which such revelations might throw on the questions in dispute ...hence all communications between them should beheld privileged."

Pringle v. Pringle pg, 281, 288, See also

¹⁵ Sudipto Sarkar & V.R.Manohar, SARKAR'S LAW OF EVIDENCE, 15th ed., 1999, Vol.II, p.n. 1985.

¹⁶ Tay s 909 A

The protection would not extend to facts coming to knowledge during the marriage, but from extraneous sources¹⁷. The privilege applies only to those who profess to maintain towards each other the legal relation of husband and wife.

For the application of Section 122, it is not necessary that wife or husband should be a party to the case or proceeding. In any case, irrespective of the persons who are the parties to it, any communication made by a wife to her husband or by a husband to his wife is prevented from being proved in a court of law¹⁸.

Overheard Statements

The privilege extends to all communications between husband and wife while they are alone or in the presence of children of tender years and also to communications which have been overheard by others. But under the English and American rule third persons are allowed to give evidence of communications between married persons made in their presence or overheard by them¹⁹.

Markby says that the protection conferred in India is greater than the English law, because in India the witness is not permitted to disclose the communication, so that the person making it, as well as the witness to whom it is made, is protected. In England the witness only is protected²⁰. The law does not however appear to be otherwise in India and there is no reason why communications made in the presence or overheard by third persons should be protected from disclosure by those persons.²¹

Any communication

The section speaks of 'any communication' and so the privilege extends to all communications of whatever nature passing between married persons and is not confined to communication of a confidential character. The words 'any communication' are wide enough to embrace communications of every nature including ordinary conversations relating to business affairs which are not of a private or confidential character.²²

¹⁷ English v. Cropper; 8 Bush 292.

¹⁸ Batuk Lal's, LAW OF EVIDENCE, 5th ed., 2004, p.n.1424.

¹⁹ R v. Simmons, 6 C & P 540; State Bank v. Hutchinson, 62 Kan 9 (Am); See also Sudipto Sarkar & V.R. Manohar, SARKAR'S LAW OF EVIDENCE, Vol.2, 15th ed., 1999, p.n. 1986.

²⁰ At least so it appears from STEPHEN in his DIGEST Art 110 (Markby p 93).

²¹ Sudipto Sarkar & V.R. Manohar, SARKAR'S LAW OF EVIDENCE, Vol.2, 15th ed., 1999, p.n. 1986.

²² H.K. Saharay (rev.), M. Monir, LAW OF EVIDENCE, 14th ed. 2006, Vol.2, p.n. 2070.

As a general rule, the privilege includes letters from one spouse to another²³. But threatening letters by a husband to his wife while they are living apart in contemplation for a suit for divorce are not confidential communications²⁴. And to commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence, nor is it a communication made by the husband to the wife²⁵.

'Communication' not 'acts'

The protection extends only to communications, ie utterances and not acts. The confidence, it may be argued, which the husband and wife desires, and the freedom from apprehension which the privilege is designed to secure, must be supposed to be equally desirable for conducts as for utterances. The difficulty with this though is that it proves too much. On the one hand, the privilege does not apply to domestic conduct as such, and on the other hand it is equally true that any particular act or conduct may in fact become the subject of a special confidence in the wife alone, i.e. may become communication to her²⁶.

While his domestic acts are not ordinarily to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication. It is clear that the mere doing of an act by the husband in front of the wife is not communication of it by him, for it is done for the sake of doing and not for the sake of disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge²⁷.

The statement of the wife that she saw the accused (her husband) on the early hours of the day of the murder while it was still dark coming down the roof of his house, that he went to the bhusa kothri and came out again and took a bath and wore the same clothes, is not inadmissible as it has reference to his acts and conduct and not to any communications made to the wife.²⁸

²³ *Apkins v. Com*, 148 Ky 662.

²⁴ *Mc Namara v. M*, 99 Neb 9.

²⁵ *S v. Young*, (NJ), 117 Atl 713. See also Sudipto Sarkar & V.R. Manohar, *SARKAR'S LAW OF EVIDENCE*, Vol.2, 15th ed., 1999, p.n. 1986.

²⁶ For example the Husband bringing home a package of valuables, and calling it his wife's attention, "Note that I place this in the fourth desk drawer", in effect communicates to her not only the words but also the act of placing the package. See also Sudipto Sarkar & V.R. Manohar, *SARKAR'S LAW OF EVIDENCE*, Vol.2, 15th ed., 1999, p.n. 1987.

²⁷ *Wig s 2337*.

²⁸ *Ram Bharosey v. S*, A 1954 SC 704; 1954 CrLJ 1755.

Communication Can be Proved By Other Means

Under Section 122 of Evidence Act, a wife cannot be compelled to disclose any communication made to her. Communications between husband and wife during coverture is privileged and its disclosure cannot be enforced. The law does not protect the communications as such, but only excludes the spouse from being a witness to prove it. A communication between a husband and his wife is not protected if it can be proved without their assistance: it is the individuals and not the communications who are protected.²⁹

In a case of Kerala High Court, the husband wrote a letter to his wife residing at her parent's house. The letter contained defamatory matters against the father of the wife. The father got the letters and filed a complaint for defamation against the husband and he filed those letters. It was held that the letters were not relevant and it was observed that if such evidence is allowed the section will be rendered illusory and what the wife is not permitted to do herself and she can do through a relation of her to the prejudice of her husband.³⁰

The Supreme Court over-ruled the decision of the Kerala High Court and held Section 122 of the Evidence Act only prevents disclosure in giving evidence in court of the communication made by the husband to the wife. If the wife appears in the witness box to give evidence about the communications made to her in the letters sent by her husband, prima facie the communications may not be permitted to be deposed to or disclosed unless the husband consents. That does not, however, mean that no other evidence which is not barred under Section 122 of Evidence Act or other provisions of the Act cannot be given.³¹

Similarly in another case *Rumping*, the mate of a Dutch ship was tried for murder committed on board the ship. Rumping had written a letter to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrives at the port outside England. The member of the crew handed over the envelope to the Captain of the ship who handed it over to the police. The letter was produced at the trial and it was held to be admissible.³²

²⁹ David Hay (Gen. Ed.), HALSBURY'S LAWS OF INDIA, Vol. 15: Estoppel and Waiver Evidence, 2000, 145.204, p.n. 402. See also *Appu alias Ayyangar v. Padayachi v. State* AIR 1971 Mad 615.

³⁰ *T.J. Ponnen v. M.C. Verghese*, AIR 1967 Ker 228.

³¹ *M.C. Verghese v. T.J. Ponnen*, AIR 1970 SC 1876.

³² *Rumping v. Director of Public Prosecution*, (1962) 3 All ER 256.

Exception to Rule of S. 122: Crime Committed Against Another

There is one exception to the general rule. When there is a Civil suit between the husband and the wife the communication between them can be proved by them. Again in a criminal proceeding if a wife is prosecuted for an offence committed by her against her husband or if the husband is prosecuted for an offence committed by him against his wife, the other spouse will be allowed to disclose any communication made by him or his partner. But offence must be one against the other³³.

- I. The prohibition does not exist between in any suit between married persons, eg under s.52 Divorce Act and other litigation between them.³⁴
- II. It does not also apply in proceedings in which one married person is prosecuted for any crime against another, viz offences against person, assault, bodily injury, wrongful confinement or any other form of offence eg theft by one of the spouse against the other.³⁵

English and Indian Law: The Comparison

In civil cases in England the privilege was contained in section 3 of the Evidence Amendment Act, 1853³⁶ which provided that: "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". In Taylor (s910), Halsbury³⁷ and other English books it was assumed that the privilege also existed at common law before the Act of 1853, and that relying upon certain cases³⁸ that even after the marriage is severed by death or divorce. After an exhaustive survey of the nature and extent of the privilege, it was held that the old common law rule that communication between husband and wife were not admissible in evidence concerned solely with the competency (i.e. admissibility) and not compellability (i.e. privilege) and that the privilege is the creation of the statute of 1853.³⁹

³³ S.K. Sarkar & Ejaz Ahmed, *Law of Evidence*, 6th ed., Vol.II, 2006, p.n.2109.

³⁴ Sudipto Sarkar & V.R.Manohar, *Sarkar's Law of Evidence*, 15th ed., 1999, Vol.II, p.n. 1989.

³⁵ *Ibid.*

³⁶ 16 & 17 Vic c 83.

³⁷ *Hailsham Ed Vol 13 p 728 and note*

³⁸ *O'Connor v. Majoribank; Doker v. Hasler and Monroe v. Twistleton 1802 Peake Add Cas 219, 221.*

³⁹ Sudipto Sarkar & V.R.Manohar, *Sarkar's Law of Evidence*, 15th ed., 1999, Vol.II, p.n. 1984; See also J. E. Macy, *Conversations between Husband and Wife Relating to Property or Business as within Rule Excluding Private Communications between them*, 4 A.L.R.2d 835

At common law there never was a separate principle or rule that communication between husband and wife are inadmissible in evidence on grounds of public policy; accordingly, unless the spouse is a witness and claims witness privilege communications between husband and wife are admissible.⁴⁰ It was further held that the privilege does not continue after the marriage has come to an end, i.e. it does not apply to widow, widowers or divorced persons⁴¹.

The privilege has now been completely abolished in civil cases by the Civil Evidence Act 1968 [s 16(3)]. Some further changes have been made by the Police and Criminal Evidence Act, 1984 under which it has been held that a former wife is competent to give evidence against her ex-husband of events that occurred during their marriage and before this Act came into force. The words 'any proceedings' were taken to mean any proceedings that took place after the section came into effect, even if the events were anterior to that date⁴².

Even apart from this wife has always been regarded as a competent witness though not compellable and, therefore, she can of her own volition give evidence in which case she will be treated as an ordinary witness and cannot refuse to answer questions on the ground of her non-compellability.⁴³

The main points of difference between the English and Indian Laws in criminal cases are:-

1. In England the privilege does not apply to widows, widowers, or divorced persons as in India.
2. There the privilege is conferred upon the witness alone, with the result that the other spouse has no right to object to the disclosure of the communications. Here it is the privilege of the spouse who made the communication and there can be no disclosure unless he or she, or his or her representative in interest gives consent.

⁴⁰ *Rumping v. DPP* 1962, 2 All ER 256 HL

⁴¹ *Shenton v. Tyler* 1939 1 All ER 827. See also Y.V. Chandrachud & Alladi Kuppuswami, Ratanlal & Dhirajlal, *The Law of Evidence*, 20th enlarged ed., 2002. p.n. 1175.

⁴² *R v. Crutlenden* (1991) 2 WLR 921; *R v. Mathias*, 1989 Crim LR 64 SouthWalk Crown Ct. See also S.K. Sarkar & Ejaz Ahmed, *Law of Evidence*, 6th ed., Vol.II, 2006, p.n.2107.

⁴³ Gopal S. Chaturvedi (Rev.) *Field's Commentary on Law of Evidence*, Vol.5, 12th ed. 2006, p.n. 4589

Conclusion: Special Reference to Protection of Women Against Domestic Violence Act, 2005

The privilege is not absolute. Because its effect is to deny evidence at trial, courts generally interpret it narrowly. And it is not confined to cases where the communication sought to be given out in evidence is of a strictly confidential character, but the prohibition is extended to all communications of whatever nature which pass between husband and wife⁴⁴. Section 122 provides against disclosure of a 'communication' and not against disclosure of effect of said communication.⁴⁵

The privilege thus not being absolute the exception to section 122 clearly states that the privilege cannot be claimed in certain situations, such as where one spouse is subject to prosecution for crimes committed against the other or against the children of the couple. This can be said to be in furtherance of upholding the principle of public interest and maintaining the sanctity of social institutions in the society. The idea behind such a concept is that state would intervene in the bedrooms of its citizens if it believes that privacy is being replaced by abuse and exploitation⁴⁶. A similar objective can be observed to the enactment of the Protection of Women Against Domestic Violence Act, 2005 which aims to provide quick relief to all those women who endure physical abuse. Legally also it would give them their due and rights. To some extent it will put an end to the atrocities the woman, wife suffers at the hands of a violent man. It will safeguard and benefit marriages and relationships from violent domestic abuse.⁴⁷

The new act contains five chapters and 37 sections with an objective to expand the definition of domestic violence, wide enough to encompass every possibility as it covers all forms of physical, sexual, verbal, emotional and economic abuse that can harm, cause injury to, endanger the health, safety, life, limb or well-being, either mental or

⁴⁴ *Nawab Howladar v. Emperor* "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."

⁴⁵ *Emperor v. Ramchandra Shankarshet Uravane*

⁴⁶ *Fatima v. Emperor* AIR1914 Lah.380; Mrs. Fatima was convicted of murder of her stepson. The session court had admitted the evidence of her confession to her husband on the ground that the alleged murder was Abdullah's (her husband) son and therefore an offence was committed against him.

⁴⁷ According to the United Nations Development Programme, nearly 70 per cent married women in the age group of 15 to 49 years in India face "rape, beating and verbal abuse". Under the new Act, the men booked under the law would face a minimum one-year jail term or a fine of Rs 20,000 (ch - V section 31). However, he could be booked under different sections of CrPC for different acts of violence: 18 Chapter - 2 section 3 of Protection of Women Against Domestic Violence Act, 2005. See also <http://www.legalserviceindia.com/article/196-Privilege-In-Matrimonial-Communication-And-The-Abuse-Of-Its-Sanctity.html> [Last accessed on Aug 25th at 10:30 PM].

physical of the aggrieved person⁴⁸. And finally bring it within the purview of a hardcore offence. Primarily meant to provide protection to the wife or female live-in partner from violence at the hands of the husband or male live-in partner or his relatives, chapter - V S. 32 (2) goes even further and says that “under the sole testimony of the aggrieved person, the court may conclude that an offence has been committed by the accused.”⁴⁹

The Indian Evidence Act which applies to both civil and criminal law finds its application to the Domestic Violence Act also and since it discusses about a matrimonial offence, the protection of privilege under section 122 would not be applicable in such cases of matrimonial offences against the husband.

So it can be seen that though section 122 of the Indian Evidence Act protects a spouse from disclosing the communication between them in public and making use of it as evidence in a court of law. It also provides an exception, which bars such privilege in cases where the spouse himself/herself is perpetrator of crime against the other spouse. The adjective nature of the Evidence Act makes it important enough to find its application in the newly legislated Domestic Violence Act, 2005 with an aim to cover every kind of domestic violence within its purview. Such an increased application maintains the effectively of decades old legislation and makes it competent enough to be still relevant in the present and contemporary context thus justifying the need for the section and the need for its exception.

Another aspect of this section can be seen with respect to its attack on the privilege. The father of the modern attack on spousal testimonial privilege appears to have been Jeremy Bentham, who harshly criticized various rules of exclusion, particularly the exclusion of the testimony of spouses for and against each other. Bentham, and other critics argued either that the privilege did not, in fact, promote marital harmony or that promotion of marital harmony was not, under the circumstances, worth the cost of forgoing the spouse’s evidence⁵⁰. The common attack on the instrumental rationale was that some marriages are beyond saving. The modern attack on the policy basis for the disqualification relies heavily on the idea that some broken marriages are not worth protecting, at least not at the cost of foregoing valuable evidence⁵¹.

⁴⁸ Chapter – 2 section 3 of Protection of Women Against Domestic Violence Act, 2005.

⁴⁹<http://www.legalserviceindia.com/article/I96-Privilege-In-Matrimonial-Communication-And-The-Abuse-Of-Its-Sanctity.html> [Last accessed on Aug 25th at 10:30 PM].

⁵⁰ 7 Jeremy Bentham, Rationale of Judicial Evidence, reprinted in 7 The Works of Jeremy Bentham 483 (John Bowring ed., Russell & Russell 1962) (1843). See also Louis W. Hensler, The Trammel Court’s Hasty Rejection of Jerry Maguire’s view of Marriage, 23 Ga. St. U. L. Rev. 325.

⁵¹ Louis W. Hensler, The Trammel Court’s Hasty Rejection of Jerry Maguire’s View of Marriage, 23 Ga. St. U. L. Rev. 325.

So it has to be critically viewed in that light to see whether the sanctity of marriage as the age old principle behind this section should regain the importance attached to it or, in the light of recent developments and changing societal situations of short lived marriages and divorce proceedings becoming a common sight the section should become more flexible in its scope so as to not compromise the evidentiary value behind it on the basis of such sanctity by providing it as a privilege.