

Comparative Analysis of Privileged Communication Under Bharatiya Sakshya Adhinayam: Balancing Confidentiality and Justice

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Abstract: *The concept of privileged communication occupies a central place in the law of evidence, ensuring that certain relationships built on trust particularly between legal professionals and their clients are protected from compelled disclosure. With the introduction of the Bharatiya Sakshya Adhinyam, 2023 (BSA), India has undertaken a significant reform of its evidentiary framework, replacing the colonial-era Indian Evidence Act, 1872. This research paper undertakes a comparative analysis of privileged communication under the BSA, examining its continuity and departures from earlier legal provisions. The paper explores the scope and extent of professional privilege, particularly advocate client communications, and analyses the statutory protections alongside recognized exceptions. While privilege fosters candour and effective legal representation, excessive protection may impede fact-finding and judicial transparency. The paper argues that the BSA attempts to strike a nuanced balance but leaves certain ambiguities, particularly in the context of evolving digital communications and cross-professional confidentiality. Ultimately, this study concludes that while the BSA reinforces the foundational principles of privileged communication, there remains a pressing need for clearer judicial interpretation and potential legislative refinement to address emerging challenges. The paper contributes to ongoing discourse by proposing a balanced approach that safeguards trust without undermining the broader objectives of justice*

Keywords: Privileged communication, confidentiality, justice, exceptions

1. INTRODUCTION

The law of evidence forms the backbone of any fair judicial system, governing what information may be presented before courts and under what conditions it may be admitted or excluded. Among its most significant doctrines is that of privileged communication, which protects certain confidential exchanges from disclosure in legal proceedings. Rooted in the need to preserve trust in professional relationships, particularly between advocates and their clients, this principle ensures that individuals can seek legal advice without fear that their disclosures may later be used against them.

In India, the framework governing privileged communications has undergone a substantial transformation with the enactment of the Bharatiya Sakshya Adhinyam, 2023 (BSA), which replaces the long-standing Indian Evidence Act, 1872. Privileged communication, however, is not absolute. The legal system must reconcile the need to protect confidential relationships with the overarching objective of uncovering truth and ensuring fair trials. Situations involving fraud, criminal intent, or overriding public interest often justify limitations on such privilege. Consequently, courts are frequently called upon to navigate this delicate balance, ensuring that privilege is neither misused as a shield for wrongdoing nor unduly curtailed in a manner that undermines legal representation.

This research paper seeks to undertake a comparative analysis of privileged communication under the BSA, examining its scope, limitations, and practical implications. By analysing statutory provisions, judicial interpretations, and



comparative perspectives from other jurisdictions, the study aims to evaluate whether the current legal framework successfully harmonizes the principles of confidentiality and justice in an evolving legal landscape.

OBJECTIVE OF THE STUDY:

- To analyse the scope of privileged communication under the Bharatiya Sakshya Adhinayam,2023
- To asses between the balance between confidentiality and justice
- To highlight the comparison with the Indian Evidence act, 1872.

RESEARCH QUESTIONS:

- Whether the Bharatiya Sakshya Adhinayam, regulates privileged communication?
- Whether it effectively balance confidentiality with the interests of justice?

METHODOLOGY:

The methodology used in this paper is a doctrinal, non-empirical method. It focuses on the letter of the law rather than the law in action. This paper is composed of a detailed analysis of legal rules in primary sources like statutes and regulations.

MEANING OF PRIVILEGED COMMUNICATION:

Privileged communication refers to specific types of confidential exchanges that the law protects from disclosure in judicial proceedings. Under legal rules of evidence, such communications cannot be compelled to be revealed in court, as they are safeguarded by recognized privileges. The primary objective of this protection is to promote trust, honesty, and openness in certain sensitive relationships, where individuals must feel secure in sharing information without fear of legal consequences.

The Bharatiya Sakshya Adhiniyam, 2023 acknowledges different forms of privileged communication, most notably those between advocates and their clients. In addition, the law may extend similar protection to marital communications and, in a broader sense, to interactions involving professionals such as doctors, religious advisors, or counsellors, depending on the legal framework. These privileges are essential to maintaining the confidentiality of information shared within such relationships, thereby encouraging full and frank disclosure. at the same time, the scope and application of privileged communication are not uniform and may differ depending on the jurisdiction and the nature of the relationship involved. The protection is not absolute and is subject to certain legal limitations and exceptions.

In essence, privileged communication refers to legally protected exchanges that cannot be disclosed or used as evidence in court without consent. However, for a communication to qualify as privileged, certain conditions must be satisfied:

- The relationship between the parties must be one that is legally recognized as confidential.
- The communication must take place in a private setting, intended only for the parties involved.

Thus, privileged communication serves as a crucial mechanism in balancing the need for confidentiality with the proper administration of justice.

Statutory Provision under, Indian Evidence Act,1872 & Bharatiya Sakshya Adhinayam,2023:

Aspect	Indian Evidence Act,1872	Bharatiya Sakshya Adhinayam 2023
Legal professional privilege	Section 126-129 deal with professional communications between advocate and client	Section 132 corresponding to section 126 repealed under evidence act.
Section 127	Extends privilege to interpreters, clerks, and servants of advocates	Continued under BSA with similar applicability
Section 128	Privilege not waived unless client calls advocate as witness	Same principle preserved under BSA
Section 129	Protects confidential communications of clients from compelled disclosure	Retained under BSA Marital Privilege



Section 123	Evidence derived from unpublished official records Similar protection retained in BSA Exceptions to Privilege Communications made in furtherance of illegal purpose not protected	Same exceptions preserved under BSA
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TYPES OF PRIVILEGED COMMUNICATION UNDER INDIAN LAW:

Communication during marriage:

Any communication that takes place between a husband and wife is protected as privileged communication. The communication between a wife and husband is not protected when the marriage is dissolved. This is not an absolute privilege. The communication between the husband and wife will be considered as evidence if it relates to a criminal act. The communication between the wife and husband is protected when it is confidential or sensitive. The communication is protected even if it is not sensitive or confidential. Where the husband was accused of murder, the wife was called in to give a testimony against the husband, the testimony can relate to the act and conduct of the accused (husband).

Exceptions to this rule include situations like acts distinct from the communication itself, the waiver of privileges, legal proceedings between the married individuals, communications made prior to or after the marriage's dissolution and evidence of communication provided by a third party, as established in legal precedents such as Appu Vs. State 1971 and Queen Empress Vs. Danoghue 1899.

In Ram Bharose Vs. State of UP 1954, the Court laid down that mere doing of an act in the presence of the spouse cannot be considered as communication between them. It is not like any domestic act will be considered as communication. Communication must be conveyed in some way; be it verbal, or non-verbal.

In the case of MC Verghese Vs. TJ Ponnann 1970, the respondent, TJ Ponnann, sent letters from Bombay to his wife, Rathi, who was residing with her parents in Trivandrum. These letters were claimed to contain defamatory remarks about Verghese, who was the petitioner and Rathi's father. Consequently, the father-in-law initiated a lawsuit based on the content of these letters, which were passed from the wife to her father. The Kerala High Court dismissed the admissibility of these letters as evidence, invoking this Section regarding communications during marriage.

The Supreme Court, upon appeal, established that although a spouse is typically prohibited from testifying about the content of certain communications, these communications can be validated by a third party (in this instance, the wife's father).

Affairs of the State:

No information can be disclosed from the unpublished official records which relate to state affairs. To do so, the permission of the relevant department head is necessary. A privilege is claimed on the documents and other communication by public officials relating to affairs of the state. The privilege should be claimed either by the minister, or his secretary, or by the head of the department. The usual method of claiming the privilege is by filing an affidavit. Where the non-disclosure of certain information has a greater adverse impact on the public interest than its revelation, such communication may not be protected by state privileges.

In the case of State of UP Vs. Raj Narain 1975, Mr. Raj Narain filed an election petition alleging the misappropriation of public funds by a political party for the re-election of the Prime Minister of India. The petitioner requested the Government of U.P. to produce the Blue Book, containing guidelines for the safety of the Prime Minister during travels. The Allahabad High Court ruled that the Blue Book did not meet the criteria of Section 123 of the Indian Evidence Act and ordered its production, asserting that failure to produce the document would jeopardize public interest. The judgment favoured Mr. Raj Narain. Subsequently, the Uttar Pradesh State Government appealed this decision to the Supreme Court. The question concerning the classification of the Blue Book record under Section 123



of the Indian Evidence Act, 1872, which pertains to unpublished government records and whether the non-disclosure of this document impacts public interest, was addressed in the Supreme Court of India.

The Supreme Court opined that Section 123 of the Indian Evidence Act, primarily aims to prevent harm to public interest. The judges asserted that any document capable of influencing public policy and future developments should be accessible to the court.

The court's decision highlighted that when the potential public interest affected by non-disclosure outweighs that affected by disclosure, the Court has the right to demand the production of such documents. The Supreme Court upheld the Allahabad High Court's decision and emphasized that it is within the judiciary's purview to determine if a document serves the public interest.

Official communications:

When any communication takes place in the official confidence, the public officer is not compelled to share the same. When a court requires the disclosure of service records of a public official suspected of wrongdoing, the state cannot claim such privileges.

Information as to commission of offences:

No revenue officer or magistrate can be compelled to share any information, which is about the commission of crime.

Professional communications:

Advocate are prohibited from disclosing any information shared with them by a client. Privileged communication between a legal advisor and client shall not be compelled to be disclosed in court. The relationship between a Advocate and client is considered a professional relationship and the communication during this time is privileged. Such communication should have taken place during the course of employment. The communication can only be disclosed when the client gives an express consent for the same. A legal professional is also prohibited from sharing any information contained in any documents. There are two exemptions made under this provision. The communication can be disclosed;

If the intention is of committing an activity which is illegal.

> If a fraud or crime is committed. This should have occurred in the course of employment.

The privilege is not waived until the client calls their legal representative to testify. This will entail that the client has agreed to disclose the details of a privileged communication. This provision also applies to interpreters, clerks and employees of advocates.

In addition to the above categories, the framework of privileged communication under the Bharatiya Sakshya Adhinyam, 2023 reflects a broader attempt to harmonize individual rights with institutional interests. While privileges such as spousal, official, and professional communications are recognized to preserve trust and confidentiality, their application is carefully conditioned to prevent obstruction of justice. The law adopts a functional approach, where the relevance, purpose, and context of the communication determine its admissibility. Courts are therefore empowered to scrutinize claims of privilege and ensure that such protections are not invoked arbitrarily. This balanced approach reinforces the principle that privilege is an exception to the general rule of disclosure and must be applied in a manner that upholds both fairness in trial and the integrity of protected relationships.

BALANCING CONFIDENTIALITY & JUSTICE:

The doctrine of privileged communication reflects a fundamental tension within the law of evidence: the need to preserve confidentiality in certain relationships versus the imperative of ensuring justice through full disclosure of relevant facts. Under the Bharatiya Sakshya Adhinyam, 2023 (BSA), this balance continues to be a central concern, as the statute retains the core principles of privilege while attempting to align them with the evolving demands of the justice system.



Confidentiality, particularly in the context of advocate–client relationships, is essential for the proper functioning of the legal system. Clients must be able to communicate openly with their legal advisors without fear that their disclosures will later be used against them. This protection encourages candour, enabling advocates to provide accurate legal advice and effective representation. The BSA, much like the earlier Indian Evidence Act, 1872, safeguards such communications by prohibiting their disclosure without the client’s consent, thereby reinforcing trust in the legal profession.

However, the administration of justice requires that courts have access to all relevant evidence necessary to determine the truth. An absolute protection of confidentiality could obstruct this objective by excluding crucial information from judicial scrutiny. Recognizing this, the BSA incorporates well-established exceptions to privileged communication. Communications made in furtherance of an illegal purpose, or those relating to facts observed by a legal professional indicating the commission of a crime or fraud, are not protected. These exceptions prevent the misuse of privilege as a shield for unlawful activities and ensure that the legal system does not inadvertently facilitate injustice.

The challenge, therefore, lies in striking an appropriate balance. On one hand, weakening privilege may discourage individuals from seeking legal advice or from being fully transparent with their advocates, thereby undermining the quality of legal representation. On the other hand, overly broad protection may hinder the discovery of truth and impede fair adjudication. The BSA attempts to navigate this delicate balance by maintaining privilege as a rule while carving out specific, narrowly tailored exceptions.

Judicial interpretation plays a crucial role in maintaining this equilibrium. Courts are often required to determine whether a particular communication falls within the scope of privilege or within its exceptions. In doing so, they must carefully assess the purpose and context of the communication, ensuring that the protection of confidentiality does not extend to situations where it would defeat the ends of justice. This interpretative function is particularly significant in complex cases involving overlapping interests of privacy, public interest, and legal accountability. In the contemporary context, the balance between confidentiality and justice has become more complex due to the rise of digital communication. Emails, instant messaging platforms, and cloud-based data storage have expanded the scope of potentially privileged information while also increasing the risk of unauthorized disclosure and misuse. The BSA, while modern in its drafting, leaves certain ambiguities regarding the treatment of such digital communications, thereby placing greater responsibility on courts to interpret and apply existing principles to new technological realities.

CHALLENGES IN MODERN CONTEXT;

The doctrine of privileged communication, while firmly established in traditional evidence law, faces significant challenges in the contemporary legal landscape. Under the Bharatiya Sakshya Adhinyam, 2023, the core principles of confidentiality and professional privilege are preserved, yet rapid technological and societal changes have complicated their application. These developments raise important questions about the adequacy of existing legal frameworks in addressing modern realities.

One of the foremost challenges is the rise of digital communication. Today, interactions between clients and professionals frequently occur through emails, messaging applications, and virtual platforms. Unlike traditional face-to-face or written communications, digital exchanges are more susceptible to interception, unauthorized access, and data breaches. The ease with which such information can be stored, copied, and transmitted increases the risk of inadvertent disclosure of privileged material. Although the BSA modernizes evidentiary rules, it does not explicitly address all complexities associated with digital confidentiality, thereby creating interpretational uncertainties.

Another significant issue is the expanding scope of data storage and surveillance. With the increasing reliance on cloud-based systems and electronic record-keeping, privileged communications may be stored across multiple jurisdictions and platforms. This raises concerns regarding data protection, jurisdictional conflicts, and access by third parties, including government authorities. The intersection between evidentiary privilege and emerging data protection norms further complicates the legal landscape, requiring a careful reconciliation of competing interests.



The risk of misuse of privilege also presents a critical challenge. While privilege is intended to protect genuine confidentiality, it may be exploited to conceal wrongdoing or obstruct justice. For instance, individuals may attempt to classify communications as privileged to avoid disclosure of incriminating information. Although exceptions exist—particularly for communications made in furtherance of illegal or fraudulent purposes—the practical application of these exceptions often depends on judicial discretion, which may lead to inconsistency.

Additionally, there is a growing concern regarding the lack of clarity in extending privilege to other professions. While advocate–client privilege is well established, the extent to which similar protections apply to communications involving doctors, counsellors, or other professionals remains uncertain in Indian law. This ambiguity can lead to unequal protection of confidential relationships and may discourage individuals from fully disclosing sensitive information in non-legal contexts.

The globalization of legal services further adds complexity. Cross-border communications between clients and legal professionals may be subject to differing rules of privilege in different jurisdictions. This creates challenges in determining which legal standards apply and whether privilege will be recognized or enforced in international proceedings

CONCLUSION:

The doctrine of privileged communication remains a vital component of evidence law, safeguarding the confidentiality of sensitive relationships while supporting the effective functioning of the legal system. Under the Bharatiya Sakshya Adhinyam, 2023, the fundamental principles governing privileged communication have been preserved, ensuring continuity with the earlier Indian Evidence Act, 1872 while adopting a more modern and structured legislative approach.

This research has demonstrated that privileged communication serves a dual purpose: it promotes trust and openness in professional and personal relationships, and at the same time, it operates as a controlled exception within the broader objective of justice. The comparative analysis reveals that while the BSA largely retains the substantive framework of the earlier law, it continues to rely significantly on judicial interpretation to define the scope and limits of privilege. The presence of well-recognized exceptions—particularly in cases involving illegality, fraud, and public interest—ensures that privilege is not misused as a tool to obstruct justice.

However, the study also highlights certain challenges, especially in the context of digital communication, evolving professional relationships, and the absence of explicit clarity in some areas of application. These issues underline the need for a more nuanced and adaptive approach in interpreting and applying the law. The role of the judiciary becomes crucial in maintaining the delicate balance between confidentiality and transparency, ensuring that neither is disproportionately compromised.

In conclusion, the Bharatiya Sakshya Adhinyam, 2023 successfully upholds the core values of privileged communication while attempting to align with contemporary legal needs. Nevertheless, continued judicial refinement and potential legislative clarification are essential to address emerging complexities. A balanced and context-sensitive application of privilege will ultimately ensure that the twin objectives of protecting confidentiality and achieving justice are effectively harmonized.

SUGGESTIONS:

1. Clarification of Digital Privilege Framework- The Bharatiya Sakshya Adhinyam, 2023 should be supplemented with explicit provisions addressing digital communications such as emails, messaging platforms, and cloud-based data. Clear guidelines on storage, transmission, and admissibility of such communications will reduce ambiguity and ensure consistent judicial application.
2. Expansion of Privilege to Other Professional Relationships- The law should consider extending structured privilege protection to other professions such as doctors, psychologists, and counsellors. Unlike the well-defined advocate–client



privilege, these relationships currently lack uniform recognition, which may discourage individuals from fully disclosing sensitive information.

3. Codification of Exceptions with Greater Precision- While exceptions such as fraud and illegal purpose exist, their scope should be more clearly defined within the statute. This would minimize misuse and provide better guidance to courts in determining when privilege should be overridden in the interest of justice.

4. Judicial Guidelines for Consistent Interpretation- The development of standardized judicial guidelines or principles for interpreting privileged communication would promote uniformity across courts. This is particularly important in complex cases where confidentiality and public interest intersect.

5. Integration with Data Protection Laws- There should be a stronger alignment between evidentiary privilege and emerging data protection frameworks, such as the Digital Personal Data Protection Act, 2023. This integration would ensure comprehensive protection of sensitive information in both legal and technological

6. Awareness and Training for Legal Professionals- Advocates and legal practitioners should be trained on the evolving scope of privileged communication, especially in relation to digital evidence and cross-border data issues. This will enhance compliance and prevent unintentional breaches of confidentiality.

7. Strengthening Safeguards Against Misuse of Privilege- Mechanisms should be introduced to prevent the abuse of privilege as a shield for unlawful activities. Courts should be empowered with clearer standards to identify and address such misuse without undermining genuine confidentiality.

8. Periodic Legislative Review- Given the rapidly changing technological and legal landscape, periodic review and amendment of the Bharatiya Sakshya Adhiniyam, 2023 is essential. This will ensure that the law remains relevant, effective, and capable of addressing emerging challenges in privileged communication.

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