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# **RIGHT TO PRIVACY V. THE EVIDENCE LAW: AN ANALYSIS OF MARITAL PRIVILEGE AND PRIVACY RIGHTS IN NEHA V VIBHOR GARG**

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## **ABSTRACT**

In the realm of the legal system in India, evidence is an indispensable factor that decides the outcome of every legal dispute. The function of the Magistrate's court is to evaluate at the preliminary stage of a court case the sufficiency of the evidence provided in accordance with the law. An eminent case is Neha Garg v. Vibhor Garg, which raised the question of whether the essence of call recordings shall be admissible in marital cases. Although the Indian Evidence Act is the governing law, different High Courts have interpreted its provisions in various ways. However, the Supreme Court's decision in Neha Garg v. Vibhor Garg established a revolutionary rule allowing secret tape-recorded verbal exchanges between spouses to be considered in matrimonial cases.

This paper acts as a critique of the judgment of the apex Court, primarily on the footing of the principles of privacy under Article 21, set against the background of the limits of evidentiary jurisprudence in India. The tug of war lies between Section 122 of the Indian Evidence Act that bars the disclosure of the secrecy of spousal communication and Article 21 of the Indian Constitution that embodies the right to privacy, extending into the domestic spaces. By permitting the admissibility of secretly tape-recorded talks, the courts arguably dilute this crucial constitutional safeguard in the private space of the marriage. This article assesses the extent to which the Court's judgment potentially constricts the protective ambit of privacy and paves the way for such aggressive means of evidence-gathering in matrimonial cases.

**Keywords:** Admissibility, matrimonial, Article 21, section 122, Bhartiya Sakshya Adhiniyam.

## INTRODUCTION

Section 128 of the Bharatiya Sakshya Adhiniyam, 2023, practically retains the language and the very spirit of the British law contained in Section 122 of the Indian Evidence Act, 1872, to enunciate the doctrine of marital privilege. The provision stands on the basis that the marital relationship must be kept sacred, the spouse must be prevented from disclosing to any other person what has been communicated by the other spouse during their life together, except for proceedings where the parties are the spouses. This very construction has led to the present contours, which judicial pronouncements have given. Thus, the Supreme Court in *M.C. Verghese v. T.J. Ponnann*<sup>1</sup> held that the protection applies from the time of communication during marriage, regardless of the status of the marital relationship at the time of testifying. On the other hand, the court in *Ram Bharosey v. State of Uttar Pradesh*<sup>2</sup> laid down a vital distinction between communications that are protected and acts observed by a spouse that are not protected. The matter of evidentiary privilege is now to be viewed through the prism of Article 21 of the Constitution, which, after the broad interpretation in the case of *Justice K.S. Puttaswamy v. Union of India*<sup>3</sup>, has assigned the right to privacy to be one of the fundamental rights under the Constitution. The Supreme Court's ruling in *Neha v. Vibhor Garg*, marks a turning point in the conflict of these principles in their various spheres. The Court, by accepting the secretly recorded conversations between the spouses as admissible evidence, has done so by a mere tone of recalibration of the balance of power that protected marriage institutions and individual autonomy with a new set of privacy rights.

### Historical Genesis of Marital Privilege

Marital privilege is a complex and multifaceted doctrine within the law of evidence, composed of two distinct evidentiary rules. Firstly, the spousal testimonial privilege and secondly, the confidential marital communications privilege.<sup>4</sup> These privileges serve to prevent the compelled disclosure of spousal testimony in legal proceedings, but they differ significantly in their origins, scope, and underlying rationales.<sup>5</sup> Over time, both courts and legislatures have carved out numerous exceptions to the marital privileges, particularly for the testimonial

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<sup>1</sup> *M.C. Verghese v. T.J. Ponnann* (1970) 1 SCC 37.

<sup>2</sup> *Ram Bharosey v. State of Uttar Pradesh* (1954) 1 SCC 284.

<sup>3</sup> *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017) 10 SCC 1

<sup>4</sup> marital privilege | Wex | US Law | LII / Legal Information Institute, accessed on September 11, 2025, [https://www.law.cornell.edu/wex/marital\\_privilege](https://www.law.cornell.edu/wex/marital_privilege)

<sup>5</sup> Federal Marital Privileges In A Criminal Context: The Need For Further Modification Since Trammel The, accessed on September 11, 2025, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2848&context=wlulr>

privilege.<sup>6</sup>The most common and long-standing exception applies particularly when one spouse accuses the other of a crime against him/her or their children, such as domestic violence, assault, or incest. This "necessity exception" has existed since the common law to prevent an injustice to the victim-spouse, on the presumption that a marriage where a crime is committed between spouses is "unworthy of protection".<sup>7</sup>

The principle of marital privilege embedded within Section 122 of the Indian Evidence Act, now codified as the Bharatiya Sakshya Adhiniyam, traces its origins to English common law jurisprudence.<sup>8</sup> The US Supreme Court's decision in *Hawkins v. United States* had re-entrenched a rule that both spouses held the testimonial privilege, giving the defendant, that is, the spouse, the power to prevent their partner from testifying against them. This rule was rooted in the belief that compelling a spouse to testify would be an "unforgivable act" that would destroy marital harmony, a policy deemed necessary for the benefit of both the family and society.<sup>9</sup>

The conceptual understanding of 'Spousal privilege' is rooted in two medieval common law concepts, as stated in *Trammel v. United States*, 'a person could not incriminate himself as he has an interest in the proceedings, and that the married couple was one, given the absence of an independent legal existence of a woman'.<sup>10</sup> The provision also rests on the traditional notion that marriage constitutes a sacred institution requiring protection from external interference, thereby necessitating absolute confidentiality between spouses.<sup>11</sup> The legislative intent behind this provision was to safeguard the sanctity of matrimonial relationships by creating an evidentiary shield around spousal communications.<sup>12</sup>

Section 122 of the Indian Evidence Act was initially framed to establish that no individual who is or has been married can be compelled to reveal any communication made to them by their spouse during the marriage. Furthermore, such a person is not permitted to disclose the communication without the consent of the spouse who made it or their legal representative,

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<sup>6</sup> *Supra 1*

<sup>7</sup> *Supra 2*

<sup>8</sup> Saumya Ranjan Dixit and Bhabesh Satapathy, 'Assailing the Tenability of Section 122 of the Indian Evidence Act: Traversing Through the Troubled Waters' (2024) 13(2) *NLIU L Rev* 155, 157.

<sup>9</sup> 5.31 Spousal Testimonial Privilege - Scholarly Commons, accessed on September 11, 2025, [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2647&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2647&context=faculty_publications)

<sup>10</sup> *Trammel v. United States*, 445 U.S. 40 (1980).

<sup>11</sup> *Nagaraj v State of Karnataka* (1996) Cr LJ 2901 (Kar).

<sup>12</sup> *SJ Choudhary v State* (1985) Cr LJ 622 (Del).

except in cases involving disputes directly between the spouses or criminal proceedings where one spouse is accused of an offence against the other.<sup>13</sup> The Bharatiya Sakshya Adhiniyam<sup>14</sup> substantially preserves this provision with only a few amendments, underlining the legislature's sustained dedication to safeguarding the confidentiality of marital communications.

The evolutionary jurisprudence of marital privilege in India has been significantly influenced by landmark judgements that have shaped its contours and limitations. In *M.C. Verghese v T.J. Ponnai*<sup>15</sup>, the Supreme Court laid down some principles regarding the scope and application of 122, namely that the privilege attaches at the time when the 'spousal communication' is made during the subsistence of the marriage, regardless of the marital status at the time when the evidence is sought to be adduced. It reinforced the temporal aspect of marital privilege, that is, communications made during marriage shall enjoy all protection even after termination of the matrimonial relationship.

Further, in *Ram Bharosey v State of Uttar Pradesh*<sup>16</sup> which refined the understanding of marital privilege by distinguishing between communications and acts witnessed by a spouse. The apex court's decision observed that while Section 122 protects verbal communications made by one spouse to another, it does not conceal the acts or conduct witnessed by the spouse. This distinction has proved crucial in subsequent judgements, as it delineates the precise boundaries of marital privilege.

### **Constitutional Evolution of Privacy Rights under Article 21**

The evolution of privacy rights under Article 21 of the Indian Constitution represents an exceptional process in interpretation of constitution and judicial process. Article 21, which states that "no person shall be deprived of his life or personal liberty except according to procedure established by law,"<sup>17</sup> It was initially construed in a rather narrow fashion by the courts. Initially, the protection was limited, and over the years, it has slowly but has developed into a strong and wide constitutional guarantee that has been influenced by the progress made in the legal system over the years through judicial rulings.

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<sup>13</sup> Indian Evidence Act 1872, s 122.

<sup>14</sup> Bharatiya Sakshya Adhiniyam, 2023 (Act No. 47 of 2023).

<sup>15</sup> Supra 1

<sup>16</sup> Supra 2

<sup>17</sup> Constitution of India 1950, art 21.

The foundation of the right to privacy within the Constitution can be traced to the eminent case of *Kharak Singh v. State of Uttar Pradesh*<sup>18</sup>. The Supreme Court, in its ruling, did not go so far as to acknowledge privacy as a fundamental right in the most direct way but rather indicated that the “personal liberty” phrase in Article 21 includes not only the freedoms expressly enumerated in Article 19 but also a wider range. So, even though the Court pointed out this aspect, it chose to be careful and, thus, did not resolve the issue of the formal recognition of privacy as a right protected by the Constitution at that time.

In case of *Gobind v. State of Madhya Pradesh*<sup>19</sup> While analyzing the issues, the court underwent a major shift in its viewpoint regarding the matter of privacy, eventually categorizing it as an implicit dimension of the right to live one's life as one pleases, which is guaranteed by Article 21. The Court's decision introduced the "compelling state interest" test, borrowing and effectively applying it from American constitutional law. It declared that any government intrusion into a person's privacy has to be both necessary for an important state interest and proportionate to the legitimate aim sought by the government. This judgment was a turning point in the history of Indian privacy law, and it created a system for weighing the individual privacy rights against the state's interests.

The right to privacy did not just get a constitutional guarantee; it also got a stronger recognition by the Supreme Court in the case of *K.S. Puttaswamy (Retd.) v. Union of India*, where a nine-judge bench delivered a unanimous judgment that privacy is a dimension of the greater circle of ‘right to life and personal liberty’ under Article 21.<sup>20</sup> The Court firmed its previous decisions and overruled the decisions in *M.P. Sharma v. Satish Chandra* and *Kharak Singh v. State of Uttar Pradesh*, wherein privacy was not accepted as a fundamental right. The *K.S. Puttaswamy* verdict declared that privacy is nothing less than the very core of human dignity and individual freedom; however, it is also subject to reasonable limitations through law.

The *Puttaswamy* ruling caused a further expansion of the right to privacy's scope so that it is not only a protection against the government but also includes the protection of personal dignity and autonomy in such close and intimate relationships as marriage. This large definition unavoidably affects the practice of the marital privilege under Section 122, where the personal

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<sup>18</sup> *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

<sup>19</sup> *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148

<sup>20</sup> *Supra* 3

rights are opposed to the evidence or institution.

## **The Intersection: Marital Privilege and Privacy Rights**

The interaction between marital privilege under Section 122 and the constitutional right to privacy under Article 21 has been a learned and complicated debate in Indian law. Even though both provisions aim at different ends, preventing disclosure of personal affairs and protecting the privacy of the individual, their actual operation in the courts often results in a variety of interpretations and sometimes opposed verdicts.

Section 122's marital privilege concept was traditionally viewed as a means of preserving the institution of marriage at the expense of the privacy rights of the spouses. It was to the betterment of married people's communication that the privilege was given. But now, with the issuance of privacy as a basic right by the Constitution of India, the new aspect of this situation arises, and the courts are forced to weigh the parties' private rights against the public right of marriage to the extent of non-divorce, that is, the larger interest of the marital institution's continuity.

The primary issue lies in the use of secretly recorded phone recordings of conversations between husbands and wives in court, it poses a difficult intersection of rights coming from Article 21 of the Constitution of India, the Indian Evidence Act, and the Family Court Act. A harmonious interpretation of these three Acts must be made to ensure that the dispensing of justice is not hindered. The situation gets particularly complicated when one party seeks to admit as evidence the private communications that have been secretly recorded without the other person's knowledge in the setting of marriage disputes.

### **NEHA V VIBHOR GARG, A PARADIGMATIC CASE STUDY**

The Neha v Vibhor Garg case is an example of how marital privilege and confidentiality rights collide into conflict, demonstrating a complicated situation that courts had to try through the trial of the merits of the two legal principles and then decide. The primary issue, as presented by the parties, started as divorce proceedings in which the husband wanted to use the recordings of his wife's telephonic conversations done secretly and without her knowledge as evidence of her cruelty in the divorce case under Section 13 of the Hindu Marriage Act, 1955. The wife objected to the use of these electronic conversations for various reasons, primarily, the

infringement of her privacy rights under Article 21 and the protection that marital communications have under Section 122. The Punjab and Haryana High Court ruled that recording voice conversations without consent is a clear breach of the right to privacy.

Justices B.V. Nagarathna and Satish Chandra Sharma, in the Supreme Court judgement of *Vibhor Garg v. Neha*, overturned the High Court's ruling and held that secretly recorded conversations between spouses can be admissible as evidence in divorce proceedings, and it does not violate the right to privacy. The Court clarified that the purpose of Section 122 of the Evidence Act is to protect spousal communications to preserve the institution of marriage, rather than to guarantee individual privacy. The Court also clarified that the privilege under Section 122 does not apply to instances where the spouses themselves are suing or are being sued by each other. For the opinion of the Court, offenses such as cruelty might require a vigorous scrutiny of private communications between spouses, where modern technical evidence, such as audio or video recordings of phone calls, is likely to be important in establishing the truth. Notably, the Court contrasted a spouse personally testifying about secret communications that Section 122 expressly prevents from a recording of such communications being admissible as a document of evidence. The Court clarified that a tape recorder itself acts like a disinterested witness and thereby brings such voice recordings outside the scope of marital privilege.

The judgment of the Supreme Court in *Vibhor Garg v. Neha* will play a major role in the perception of spousal privilege and marital privacy in the future. It holds that such privacy between spouses that does exist is never absolute and may be suspended when the necessity for a fair settlement or fair trial in the matrimonial cases is imminent. It therefore follows that the last bastion of absolute marital privacy has now been diluted significantly.

## **THE PERSISTING QUESTION OF PRIVACY IN VIBHOR v. NEHA GARG**

The Supreme Court's ruling in *Vibhor Garg v. Neha* has brought a measure of clarity to the long-standing debate over the admissibility of secretly recorded spousal conversations as evidence. In this decision, the right to privacy clashed with two statutory regimes, the Evidence Act and the Family Courts Act. While the different statutes raise distinct questions, their cumulative effect appears to weaken a protection under the Constitution. Also, the Family

Courts Act is fundamentally designed to promote conciliation, encouraging couples to resolve marital conflicts amicably and cooperatively. Allowing the use of covertly recorded conversations without the consent of either spouse, runs counter to the core objective, undermining the ‘conciliation’ spirit of the Act and eroding the mutual trust that it seeks to uphold.<sup>21</sup>

In reality, the battle between the matrimonial privilege and the privacy right guaranteed by the Constitution is one of the most debated issues in Indian legal jurisprudence. The decision in the Vibhor Garg case, from a constitutional perspective, actually reduces privacy in marital relations to such an extent that, at times, the safeguarding of the marriage institution might conceal the individual's right to privacy. Nevertheless, the law should not be intact; it should consider significant values like human dignity, interpersonal relationships, and emotional pain avoidance.

The Puttaswamy judgment conclusively established that privacy is a component of human liberty and dignity. This wide-ranging constitutional vision finds itself set against the narrower track followed in recent judgments, and it argues for a more subtle legal framework, a framework that strikes a judicial balance between the social integrity of marriage and the individual's own entitlement to the protection of his or her privacy, personal and informational.

The Overlapping rights and statutory provisions cease to exist, but the primary contention is that Section 122 of the Evidence and Section 14 of the Family Court Act should not override the constitutional value of privacy under Article 21. The Apex court in *People's Union for Civil Liberties v. Union of India* identified Telephone is a part of modern man's life and the right to hold a telephonic conversation in the privacy of one's domestic surroundings without interference can certainly be claimed as “right to privacy”, such conversions are often intimate and confidential and hence telephone tapping infracts the Article 21 of the constitution.<sup>22</sup> The Right to privacy may arise out of a specific relationship, which may be commercial, matrimonial, or even political. It incorporates the idea of non-public disclosure of true private facts, which may invade the right to privacy; this prefers the individuality of a being at all

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<sup>21</sup> from legalism to empathy: the transformative journey of family courts in India. By Jheel Bagaria <https://articles.manupatra.com/article-details/FROM-LEGALISM-TO-EMPATHY-THE-TRANSFORMATIVE-JOURNEY-OF-FAMILY-COURTS-IN-INDIA>

<sup>22</sup> *People's Union for Civil Liberties v. Union of India* (1997) 1 SCC 301

times.<sup>23</sup>

A clear stance was taken by the Andhra Pradesh High Court that the act of recording a conversation without the knowledge of the wife is illegal and amounts to infringement of the right to privacy, and even if the recordings in question are true, they are not admissible in evidence.<sup>24</sup> The Punjab and Haryana High Court, in its major finding, stated that technological equipment like mobile phones should not be readily allowed to be used as an instrument of torture and oppression against a wife in a matrimonial dispute, where the law itself is made for resolving the dispute and conciliation between the parties. The court should strike a balance between justice and injustice and discretion in decision-making.<sup>25</sup> A married woman has her own individualistic identity, which includes the valuable right to privacy; the nine-judge bench established privacy as an intrinsic part of the right to life and personal liberty, essential for human dignity and autonomy.<sup>26</sup> This is not extinguished upon entering a marriage. Intimacy and trust are the core aspects of a marital relationship, which do not dissolve the individual identity afforded to a married woman.<sup>27</sup> Couples speak many things with each other; if every word is weighed and brought up in court for judicial scrutiny, it would create a vacuum for couples filing divorces, and hence kill the object of matrimonial law. The Courts should not participate in approving mischief and invite the invasion of privacy rights.<sup>28</sup>

The conversation between husband and wife happens in the daily routine. In recognizing such recordings in the absence of consent, the Court may well encourage creeping mistrust among spouse parties, to the detriment of Section 122, which intends to promote spousal harmony. The production of electronic evidence in court, specifically the call recordings, must be decided considering the 'relevancy' of the evidence, the atmosphere, and the circumstances prevailing in the family at that moment.<sup>29</sup> Section 122, which grants privilege to spousal communications, is designed to protect marital confidence, to support the right to fair trial, not to provide a license for violation of privacy. A trial cannot be considered "fair" if it relies on evidence obtained by violating a fundamental right; the right to a fair trial must extend to protecting the constitutional

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<sup>23</sup> Mr 'X' v. Hospital Z', (1998) 8 SCC 296

<sup>24</sup> Rayala M. Bhuvaneshwari v. Nagaphanender Rayala, 2007 SCC OnLine AP 892

<sup>25</sup> Deepinder Singh Mann v. Ranjit Kaur, 2014 SCC OnLine P&H 4826

<sup>26</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>27</sup> Barać, I. *et al.* (2023). Gender Competent Family Law. In: Vujadinović, D., Fröhlich, M., Giegerich, T. (eds) Gender-Competent Legal Education. Springer Textbooks in Law. Springer, Cham. [https://doi.org/10.1007/978-3-031-14360-1\\_16](https://doi.org/10.1007/978-3-031-14360-1_16)

<sup>28</sup> *Supra* 17

<sup>29</sup> Tripat Deep Singh v. Paviter Kaur, 2018 SCC OnLine P&H 7671

rights of both parties.<sup>30</sup>

The act of secretly recording itself is a primary constitutional wrong, and therefore, the court should distinguish ‘secret electronic recordings’ from the other types used in exercising the right to a fair trial.

### **WHAT OUGHT TO BE DONE?**

An ever-evolving juncture between marital privilege and privacy rights must stay in the eye of the public, the judiciary, and the legislature. Firstly, lawmakers should provide a more valuable stance on what constitutes marital privilege in the electronic realm. Section 122, in its present form, does little to respond to the challenges posed by modern technology, ranging from electronic communication and social media to hidden recording devices and covert surveillance. There is a pressing need for legislators to formulate specific rules governing electronic evidence, while at the same time preserving the existing safeguards that protect marital communications.<sup>31</sup>

Secondly, courts may attempt to create functional tests that take a balancing of institutional objectives and individual liberties seriously, constructed to the specificities of the matters. The imposition of marital privilege or of privacy safeguards in a rigid way, without sensitivity to circumstance, threatens injustice because every marital case is different. Ultimately, the legal protections for susceptible spouses need to be because the scenario of marital privilege becoming a barrier to justice or a vehicle through which further harm might occur has arisen. Reforms to the law are necessary to modernize and harmonize these protections.

### **CONCLUSION**

Article 21 of the Indian Constitution and Section 122 of the Bharatiya Sakshya Adhiniyam are in a complicated tussle, but the legal luminaries have not stopped questioning the privacy rights connected with marriage. The ruling of *Neha v. Vibhor Garg* is a fine example, wherein the

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<sup>30</sup> Privacy vs. Evidence: Supreme Court allows secretly recorded spousal conversations as admissible evidence in matrimonial disputes...  
<https://www.scconline.com/blog/post/2025/07/15/secretly-recorded-spousal-conversations-admissible-evidence-supreme-court/>

<sup>31</sup> The principle of harmonious construction requires courts to interpret different legal provisions in a way that allows them to operate together without conflict. In this context, it involves balancing the rights and duties under the Constitution of India 1950, art 21; Indian Evidence Act 1872, s 122; and Family Courts Act 1984, s 14.

difficult balancing act of recognizing individual rights and the constitutional morals controlling marriage has been prioritized. In fact, the judgment by the Supreme Court regarding the admission of confidential tape recordings of married couples has highlighted the need for legal changes in line with the contemporary challenges in marriage disputes. The entanglement between the notions of marital privilege and privacy is indeed intensifying, and thus, the triad of cooperation among courts, lawmakers, and academic practitioners must continue.

The further question arises whether Indian law will be subjected to further sophisticated and equitable changes, which would preserve the sacredness of marriage or focus on individual freedom and privacy. One of the main challenges in the development of the law is to protect the right to marry and the privacy of communication so that these concepts can be adapted to new situations while dignity and welfare are still protected regarding the most vulnerable ones.

