PROFESSIONAL COMMUNICATION AND CONFIDENTIAL COMMUNICATION

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<td>AIR</td>
<td>All India Reports</td>
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- Raj Narain v. Indira Gandhi, AIR 1974 All 324.
- Re An Attorney AIR 1925 Bom 1.
- Umbica Churn Sen v. Bengal Spinning and Weaving Co. ILR 22 Cal. 105.
CHAPTER – I

INTRODUCTION

Sections 126 to 129\(^2\) deal with the privilege that is attached to professional communication between the legal advisors and the client under the Indian Law. On the other hand privilege under common law is incorporated under two broad heads, Legal advice privilege which protects any communication between a lawyer and the client which have the purpose of seeking or giving legal advice and Litigation Privilege which protects any communication between a lawyer and third parties or between the client and third parties which are made for the purpose of existing or contemplated legal proceedings. The rational of the privileges are grounded in the principle of natural justice.

The term ‘privilege’ has a range of meanings. Sometimes it is used loosely to cover exclusionary rules like the one generally barring admissibility of compromise negotiations. A narrower use of the term, covering rules preserving a right to keep certain relevant information from one’s adversaries, would include the work product doctrine and the right against self incrimination.

Privileges give special treatment, i.e. a cloak of secrecy to a variety of confidential communications such as those made in the relationships of lawyer-client, husband-wife, or priest-penitent.

One of the most important grounds on which access to evidence can be refused is that the evidence in question is protected by legal professional privilege. This doctrine gives legal recognition to a person’s interest in maintaining the secrecy of confidential communication in connection with his legal affairs. The doctrine originated at common law and for most purposes its scope and limits are still determined by the common law.

Information which is conveyed in a privileged communication cannot be brought into trial and cannot be a subject for discovery even though the statement may be relevant to a disputed issue. In a lawyer-client context, for example, a client can refuse to answer a question like ‘what did you tell your lawyer?’ The client is also entitled to prevent the lawyer from

\(^2\) The Indian Evidence Act, 1872
revealing what the client said. Similarly, a letter written by a client to the lawyer will not be admissible.

However, only the actual statement made in confidential relationships are kept secret by privileges. Suppose that a client has said to his lawyer, ‘I knocked down a telephone pole while I was driving my red car.’ The client could not in this case be asked in the trial, ‘What did you tell your lawyer about the telephone pole and your car?’ However, the lawyer-client privilege would not block questions like, ‘Did you knock down the telephone pole?’ or ‘What color is your car?’ The privilege protects against revealing the statements that a person makes privately to his lawyer but it does not protect against revealing the information a client knows whether or not the client may have communicated that information in privileged conversation. The privilege prohibits questions that would call for answers like, ‘My client told me his car is red’ or ‘I told my lawyer that my car is red’. If information can be developed in ways that do not involve reliance on a communication made in a confidential relationship, privilege doctrines have no effect. They keep the fact that the information was discussed, but they do not make the information itself a secret.

Like the special relevance rules for character or subsequent remedial measures, privileges represent a social choice that particular goals should overcome the general premise that relevant evidence is admissible. The most widely accepted rationale for evidentiary privileges is a utilitarian analysis, that the communication are socially desirable, and that people would be less likely to make them if they were not privileged. In a lawyer-client case, the utilitarian argument would be that the society as a whole benefits when the frequency of people’s consultation with lawyers increase. Also, people who need advice about complicated transactions or other events might decline to seek it if they thought that the words they spoke to lawyers could be used against them sometime later at trials. Besides the utilitarian point of view, two other explanations are sometimes given. One is that privileges reflect a recognition that the state should not intrude in certain personal relationships. In contrast, another theory argues that rather than showing government’s sensitivity to privacy, privileges show government’s interest in corrupting the search for the truth to benefit powerful social groups such as lawyers.

Although there are many different privileges, they all involve certain basic issues. Did the communication take place within the relationship required for the privilege? Was it confidential?
Who is entitled to claim the privilege? Has the proponent of the privilege waived its benefit by acting in ways that has destroyed the confidentiality it is meant to provide? Does the communication involve a topic for which the protection of the privilege is removed to serve other social interests?

1.1 Research scheme

The research scheme undertaken by the researcher would comprise of doing a doctrinal study of the concept of Professional communication and Confidential Communication as a ground of privileged communication as laid down under section 126 to 129 of the Indian Evidence Act, 1872. The research question which the researcher would deal with in this project is ‘What are the laws specifically dealing with the aspect of ‘professional communications’ and ‘Confidential communication’ under the laws of India and England?’

1.2 Research Techniques for Data Collection

Research technique of analysis, critique, and review of the theories would be intended to be employed.

1.3 Research Methodology

The researcher has followed the doctrinal method of research throughout the project and the MLA system of formatting has been adopted by him.

1.4 Scheme of Chapterisation

The first chapter would comprise to giving a general introduction to the project. It would also state the research scheme, the research technique, the research methodology and the scheme of chapterisation which would be followed in the project. The second chapter would highlight the scope of the sections under consideration. Chapter three would highlight the Indian statutory and case laws in specific as related to the concept. The fourth chapter would analyze the English common law for the specific provision. It would also provide a comparative analysis in brief between the two types of privileges prevalent under the law. Lastly, chapter five would conclude the project.

1.5 Footnoting Style to be adopted

National Law University standard style of footnoting will be followed throughout the project.
CHAPTER – II

SCOPE OF THE SECTIONS

Under Section 126, no barrister, attorney, pleader of vakil can be compelled to disclose any communication made to him in the course of his employment, unless the client consents for that disclosure.

When a barrister, attorney, pleader, or vakil is the party interrogated as a witness, he is not only privileged and protected from disclosing, but even if willing, he is not permitted to disclose, unless with his client’s express consent.

The principle on which communications to a solicitor, etc are privileged is that, otherwise, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid to be thrown into litigation. Section 126 is designed to abort the attempt to intrude into the privacy of the close preserve of the fund of information conveyed by the client closeted in confidence.

On the other hand Section 129 lays down that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness in which case he may be compelled to disclose any such communication as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

It is highly desirable that communication with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to. Advice would have to be given on maimed and distorted statements, and useless litigation would thus be promoted in numberless cases. Lastly, a compulsory disclosure of confidential communication is so opposed to the popular conscience on that point that it would lead to frequent falsehoods as to what had really taken place. The rule of protection in this section is one which should be construed in a sense most favorable in bringing professional knowledge to bear effectively on the facts, out of

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3 Indian Evidence Act
4 Raj Narain v. Indira Gandhi, AIR 1974 All 324.
5 Munchershaw Bezonji v. New Dhurumsey Spinning and Weaving Company, ILR 4 Bom. 576 at p. 582.
which legal rights and obligations arise. The disclosures made under this section, should not be enforced in any cases, except where they are plainly necessary.

This section applies where the client is interrogated and whether he be a party to the suit or not. It adopts the principle contended for in Taylor on Evidence, but with this qualification that if a party becomes a witness of his own accord, he shall, if the court requires it, be made to disclose everything necessary to the true comprehension of his testimony, where it was held that a case laid down by the plaintiff before the counsel was privileged not only as against the court, but as against the opposite-party.

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7 Ibid at p. 581.
CHAPTER – III

INDIAN LAW RELATING TO THE PROVISION

In the Halsbury Laws of Evidence it is observed that ‘Confidential communications passing between a client and his legal adviser and made for the purpose of obtaining or giving legal advice are in general, privileged from disclosure. The privilege is available in respect of the oral testimony of witnesses, and the principles which determine whether a communication is or is not privileged are the same for both oral and written communications. The privilege is that of the client and may be waived by him.

As already posited Sections 126 and 127 apply when the legal advisers or his clerk, etc are interrogated as a witness. The professional advisor of a third party or a stranger is privileged; or rather his client is, as well as the professional adviser of a party to the suit. Section 129 applies when the client himself is interrogated and whether such client be a party to the case or not; and by the terms of this latter section, it is only communications which have passed between a person and his legal professional adviser that that are privileged. The rule is established for the protection not of the legal advisers but of the client and the privilege, therefore, may only be waived by the latter, it is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser. Further, a compulsory disclosure of confidential communications is so opposed to the popular conscience that it would lead to frequent falsehoods as to what had really taken place.

The rule of law’ as pointed out by Lord Sankey “….is the condition of liberty. Amid the cross-currents and shifting sands of public life, the law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the law courts, at any rate, he can get justice.”

However, the provisos to S. 126 prevent the privilege conferred from becoming the shield of crime or illegality. The rule does not apply to all that which passed between a client and his legal advisor, but only to what passes between them in professional confidence, and the

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contriving of crime or illegality is no part of the professional occupation of a legal adviser; and it can as little be said that it is part of his duty to advise his client as to the means of evading the law.

This section does not forbid the disclosure of a fact disclosed. The immunity from disclosure which can be claimed by a client in respect of a communication made to his lawyer is not absolute but limited in its scope. Section 126 prescribes the limits of the two provisos. The use of the word ‘shall’ in S. 126 indicates that the prohibition is of mandatory character. Also the privilege embodied in S. 126 is not liable to melt down on the principle of waiver of acquiescence. Section 126 is intended for the protection of the client and not of the lawyer. Unless the client waives the privilege, the counsel cannot be compelled to give evidence against him so long as the case does not fall within the exception clause.

However, it was stated in a case that the privilege contained in S. 126 of the Indian Evidence Act, 1872 is not an absolute privilege but only a conditional one. The lawyer is entitled to and is obliged also, to speak to the said communication if his client expressly consents to do so. The words in S. 126 ‘unless with his client’s express consent for the disclosure of any communication made by him to his lawyer.

Also, where the counsel for an accused recorded the statement of the witnesses recorded by the court in extenso to prepare himself for an effective cross-examination of the witness, and those notes contained instructions given by the client, the instructions given by the client being privileged under S. 126, the counsel for the accused could not be compelled to show notes to the court.

Now, with respect to S. 129, the case of Bustros v. White is regarded as the leading case upon the subject of discovery under the new practice and has been followed in India in the case

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9 Re An Attorney AIR 1925 Bom 1.
16 L.R. 1 Q.B. Div 423.
of Wallace v. Jefferson.\textsuperscript{17} In this case it was observed, ‘In Bustros v. White\textsuperscript{18} it was decided a court of appeal consisting of eight judges that a judge has no discretion as to refusing to allow the production of documents in possession of a party to the suit relating to the matter in question, provided the documents are not privileged. Section 130 of the Civil Procedure Code would appear to have been copied from the above rule, and therefore it is advisable to adopt the English ruling as to its construction. As the defendant’s affidavit admitted that the documents in question related to the matter in dispute, the only question which had to be determined was whether they were privileged. They consisted of two or three telegrams or letters, all of which passed between the plaintiff in London and his agent in Bombay. It was said that they were confidential communication between principals and their agents. But the mere circumstances that communications are confidential does not render them privileged as laid down in the case of Anderson v. Bank of British Columbia.

Also in the case of Umbica Churn Sen v. Bengal Spinning and Weaving Co.\textsuperscript{19}, it was held that where a party refers to a document in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up those facts by way of answer to plaintiff’s claim, he cannot afterwards attempt to make the case that the document are confidential and intended merely for his legal advisers or for the purpose only of evidence in the case.

\textsuperscript{17} 2 Bom. 453.
\textsuperscript{18} L.R. 1 Q.B. Div 423. p. 34.
\textsuperscript{19} ILR 22 Cal. 105.
CHAPTER – IV

ENGLISH LAW RELATING TO THE PROVISION

Under the common law one of the most important grounds on which access to evidence can be refused is that the evidence in question is protected by legal professional privilege. This doctrine gives legal recognition to a person’s interest in maintaining the secrecy of confidential communications in connection with his legal affairs. The doctrine for most purposes, its scope and limits are determined by the common law, however the Parliament had given the privilege statutory expression for certain purposes. Under S. 10(1) of the Police and Criminal Evidence Act, 1984 (PACE) states that “items subject to legal privilege means,

a. Communications between a professional legal advisor and his client or any person representing his client made in connection with the giving of legal advice to the client;
b. Communications between a professional legal advisor and his client or any person representing his client or between such an advisor or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; and
c. Items enclosed with or referred to in communications and made-
   i. In connection with the giving of legal advice, or
   ii. In connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them”

This section gives effect to two forms of privilege under common law. One form protects communication between a client and a lawyer made in connection with a purpose of the client obtaining or receiving legal advice from the lawyer. This is sometimes referred to as lawyer-client privilege, or legal advice privilege to distinguish it from the other form of legal professional privilege known as litigation privilege. Litigation privilege protects communications between a client or the client’s lawyer, and a third party made for the dominant purpose of the
client obtaining or receiving advice or information in connection with litigation that is in existence or is contemplated as a definitive prospect.

Under both forms the privileges is that of the client, not the lawyer or the third party. The privilege gives the client a right to refuse to disclose a privileged communication, a right to refuse to give evidence about it and a right that a lawyer (or the third party) shall not be compelled to disclose or give evidence about it without the client’s consent. The lawyer owes a corresponding duty to the client not to disclose a privileged communication without the client’s consent. Such consent can be freely given or withheld. If the client does disclose or give evidence about a privileged communication, or consents to the lawyer (or a third party) doing so, would waive the privilege.

**LEGAL ADVICE PRIVILEGE**

With respect to the first type of privilege under common law, this type of privilege has been recognized for centuries. According to Wigmore, the earliest reference appear in the late sixteenth century when cases were reported holding that solicitors and counsel were exempt from examination touching the matter on which they were acting for the client. However, in this early period the court regarded the privilege as that of the lawyer and not the client. The modern form of the privilege was settled in the nineteenth century as the courts of equity refined their process of pre-trial discovery. A series of leading cases established two propositions that are crucial for an accurate identification of the modern rationales for the privilege. The first one being that the privilege is that of the client rather than lawyer, while the second one being that privilege attaches to confidential communication in connection with a purpose of legal advice irrespective of whether litigation is in existence or contemplated.

However, there are a number of situations in which a claim of lawyer-client privilege will or may fail, despite the fact that the claim relates to a communication between a lawyer and client. The first situation is where the communication is in furtherance of a crime or fraud on the part of the client. In this case it is more accurate to say not that the privilege is lost, but that it

20 Minet v. Morgan (1873) 8 Ch. App. 361.
21 Greenough v. Gaskell (1833) 1 Myl & K 98.
never arises in the first place. In the second situation privilege does not arise but the client subsequently waives the privilege. In the third situation the client has not waived the privilege but the third party has nonetheless acquired possession of the original or a copy of a privileged document, or is otherwise in a position to give evidence of a privileged communication. Finally, it is considered to what extent, if at all, a court may order disclosure of privileged communication in order to protect an interest that the court regards as having a higher priority.

**LITIGATION PRIVILEGE**

With respect to the type of privilege, litigation privilege protects material coming into existence for the purpose of litigation to which the client is a party. Clearly, this may include material that would in any event be covered by legal advice privilege, such as the client’s correspondence with his solicitor about the conduct of litigation. Litigation privilege like legal advice privilege also covers confidential work done by the client’s legal advisors on behalf of the client, such as legal research, counsel’s notes, and draft opinions and so on. However, litigation privilege is wider than legal advice privilege in one major respect. It extends privilege to confidential communications by the client or the lawyer with third parties for the dominant purpose of acquiring advice or information in connection with the litigation. Such communications typically include witness statements, proofs of evidence, expert reports and so.

Further, the rules relating to communications in furtherance of crime or fraud, waiver and secondary evidence are the same as for legal advice privilege.
CHAPTER – V

SECTION 126 OF THE INDIAN EVIDENCE ACT, 1872 AND ITS RELATION WITH SECTION 91 OF THE CODE OF CRIMINAL PROSECUTION, 1973

Section 91 (1) of the CrPc 1973 provides that whenever any court considers that the production of any document is necessary or desirable for the purpose of any inquiry, trial or other proceeding under the CrPc such court may summon the person in whose possession or power such documents is believed to be, and require him to attend and produce it. The discretion conferred by the section on the court is an absolute one, the only condition for its exercise being that, in the opinion of the court, the production of the document is necessary or desirable for the purposes of the inquiry, trial or other proceedings before the court.

Nothing in that section affects ss. 123 and 124 of Evidence Act. The provisions of this section cannot, however, be relied upon to negative the existence of the power of the court to make an order under S. 91(1) of the CrPc.

The Court in an appropriate case can order under S. 91, which would override the provisions of S. 126. It cannot be urged that an order under S. 91(1) is illegal merely because it violates the privilege conferred by this section. It is true that, in making an order under S. 91(1), the court exercises a judicial discretion, and ordinarily it would not, in the exercise of its discretion, make an order which violates the privilege conferred by S. 126. But it cannot be urged that no order can be made under S. 91(1), which infringes the privilege of professional communication embodied in S. 126.

It seems that the power of the court to make an order under S. 91(1) is not limited by the provisions of S. 126, but the discretion under S. 91(1) is a judicial discretion and it should not ordinarily be exercised in such a way as to conflict with the privilege against disclosure conferred by S. 126.24

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However, it is laid down that S. 91(3) of the CrPc exempts the documents which are protected under S. 123 and 124 but not under S. 126. Therefore in criminal cases the protection under S. 126 afforded to communications by client to lawyer cannot be availed of against an order to produce the document; the document must be produced, and the under section 162, it will be for the court after inspection of the documents if it deems fit, to consider and decide any objections regarding its production and admissibility.\(^{25}\)

\(^{25}\) Gangaram v. Habibullah, 58 A 364.
CHAPTER – VI

CONCLUSION

Hence, to conclude, as already laid down that in general S. 126-129 deal with the law relating to professional communications between clients and legal advisors or their clerks. A lawyer in under a moral obligation to respect the confidence reposed in him and not disclose communications which have been made to him in professional confidence i.e. in the course and for the purpose of his employment, by or on behalf of his clients, or to state the course of conditions of documents with which he has become acquainted in the course of his professional employment, without the consent of his client. This section gives legal sanction to this obligation. The question of privilege arises only when either the advocate or his client are asked to disclose the professional communication made between them. When the communication is in the form of writing and is made known to others, there is no ‘confidentiality’ for either the client or the advocate claiming privilege.

The foundation of this rule, as posited is not difficult to discover. It is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interest of justice which cannot be upheld, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. If deprived of all professional assistance, a man would not venture to consult a skillful person, or would only dare to tell his counselor half his case truthfully.
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