THE CHANGING ELEMENT OF PRIVILEGE UNDER SECTION 123 OF THE INDIAN EVIDENCE ACT, 1872

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CHAPTER 1

An Introduction to Indian Evidence Act.

It is significant for the working of any Democracy that general public knows about the undertakings of the State. This is combined with a conviction that nothing ought to be kept covered up the extent that matters identifying with open issues are concerned. In the meantime, it is additionally critical for the working of State machinery that specific delicate information is kept circumspect from general public spaces. Such information can be, for instance, exceedingly characteristic for the security of the State that its disclosure may put public interest in jeopardy. This can be established into the saying of 'Salus populi est suprema lex' which implies regard for public welfare is the highest law and hence validating the non-disclosure of certain information for the greater public good. Such privileges can be traced in almost all of the modern legal systems of the world. This research paper highlights the expanding eclipse of privilege accorded to the government in the interest of greater transparency and accountability. It also states the statutory interpretation of the privilege law and its significant improvement in India and furthermore examines the eclipse of privilege law with the Right to Information Act, 2005 as a measure for greater accountability and disclosure.

This awareness about the State enables the public to make informed choices which are extremely vital for the dynamics and mannerism of a democracy.[1] However, such informed choices can only be made if the people not only have the freedom but also the right to know

[1] Benett Coleman vs Union of India, AIR 1973 SC 106.

about the public affairs of the State. It hence casts a duty on the legislature to account for greater transparency and in fact, few scholars have gone ahead to argue that the politicians should not be administered an oath of secrecy, but an oath of transparency.[2]

The Indian Evidence Act alongside the Constitution of India likewise perceives this right of privilege. Such benefits can be followed in the majority of the advanced lawful frameworks of the world. It has been named as 'Crown or Prerogative benefit' in the common law of United Kingdom and as 'Executive Privilege' in the United States of America. The 'privilege' under Section 123 of the Indian Evidence Act is claimed frequently by the Government to authorize them not to produce its unpublished records in courts. As per this section a witness cannot be permitted to give any evidence which is derived from unpublished records relating to any affairs of state without permission of the officer at the head of department concerned. But, what were the reasons behind the recent change in the Interpretation of Section 123 of this Act? The scope of article is applicable only up to the Indian legislations and does not include scope of legislations of other countries which acts as the limitation.

CHAPTER 2

The Change of Interpretation to Section 123 of Evidence Act.

In the Indian setting, Section 123 of the Evidence Act concedes the public policy privilege with regards to the undertakings of the State. It is imperative to detail to bare text of the section before abiding further. Section 123 provides-

Evidence as to affairs of State - *No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.*[3]

[2] V. Nageshwar Rao, KVSS Janardhanacharyulu, 'Legal Foundations of Right to Information: An overview' 1(3) IUP Journal of Governance and Public Policy 7, 10 (2006).
[3] Section 123, Indian Evidence Act 1872.

An exposed scrutiny of the section uncovers two essential qualities of the information that can be hidden from open disclosure under this section. One, the information ought to be as unpublished authority records and two, the information ought identify with the issues of the State. Concerning the unpublished document, what is imperative is that the records are unpublished as well as be an expectation with respect to the State to keep it far from open investigation. Hence, the term unpublished can be interpreted to mean 'unpublicized.'[4]

While there has not been much level headed discussion about the understanding of unpublished authority records, the word 'affairs of state' has turned into a question in a number of judicial case laws. A non specific perusing of the word affairs of the state can be comprehended to signify 'matters of the state' in order to incorporate everything without exception remotely related to the State. This obviously could not have been the intention of the legislature.[5]

The earliest interpretation of the word affairs of the state emphasized on a wider reading of the term to include all State secrets such as State papers and communication between the governmental departments and its officials with regards to which privilege can be granted to the State with respect to guardian of public interest.[6] This view was watered down in the *Tukaram*[7] case wherein only those matters whose disclosure would- (i) prejudicial to public interest (ii) relating to security of state (iii) diplomatic ties with the government and (iv) efficient working of administration could be included in the ambit of affairs of the State.

The Law Commission in its various reports has emphasized on the importance of public interest in granting privilege for disclosure. In its 69th report, it was emphasized that only such matter which could be prejudicial to public interest and not any private interest could be saved under this clause.[8] The doctrine of class claims was also rejected by the Law Commission in its 185th report and the courts were guided to be the final arbiters with respect to determination of public interest.[9]

[4] M.C. Sarkar, S.C. Sarkar, Sarkar's Law of Evidence 2987 (LexisNexis Butterworths, 2013).
[5] Rambhotla vs State of Andhra Pradesh, AIR 1971 AP 196.
[6] WM Best, The Principles of Law of Evidence 498 (12ed., 2009).
[7] Tukaram vs King Emperor, 1946
[8] Ministry of Law and Justice, Law Commission of India, 69th Report.
[9] Ministry of Law and Justice, Law Commission of India, 185th Report.

Evolution and Development of Law -

Phase I:

The judicial pendulum of Section 123 has witnessed a complete turn-around in the direction of greater transparency and public disclosure. The first significant decision in India regarding privilege of public documents was *Punjab v. S.S. Singh*[10] which involved a combined reading of Section 123 and Section 162 of the Indian Evidence Act. The government for this situation asserted benefit as for information identifying with the minutes of meeting between the Council of Minister and the State Public Service Commission for the reestablishment of a legal officer. The courts amid this period received the 'Hands-off' approach, holding that the Court can't hold an enquiry into the assessment of open intrigue which may emerge from the revelation of archives and the sole referee for this assessment is the specialist which has the guardianship of the records.

The court accentuated on the way that the courts could just hold a preparatory enquiry as for the question if the records identified with the undertakings of the State. The court in this case also introduced the doctrine of 'class' doctrine, which meant that a class of documents could be restrained from production simply not because of the information present in them but because of them being classified so.[11] It hence gave wide amplitude of power to the government to hide information that is did not want to be disclosed. The court continued to adopt this approach in the case of *Rambhotla Ramanna v. State of Andhra Pradesh* imposing an absolute prohibition on the scrutiny of a document relating to the affairs of the State by the judiciary.[12]

Phase II:

The shift from the Hands-off approach first came in the *Amar Chand* case[13] where the court not only ruled that the government should show a proper application of mind in evaluation of public interest but also denied the grant of privilege for the first time. The Kerala High Court went a step further to grant the judiciary the right to inspect a document before allowing the claim of privilege. Further adding impetus to this line of reasoning, Justice Mathew in *Raj*

[10] State of Punjab vs Sodhi Sukhdev Singh, AIR 1961 SC 493.
[11] Dr. V Nageswara Rao, The Indian Evidence Act 1st ed., 2012).
[12] Rambhotla Ramanna vs State of Andhra Pradesh, AIR 1971 AP 196.
[13] Amar Chand Butail vs Union of India, AIR 1964 SC 1658.

Narain specifically provided the court with the power to inspect the documents to evaluate the impact on public interest.[14]

The final jolt to the privilege claims came in the much acclaimed case of *SP Gupta vs Union of India* case.[15] The court in this case specifically overruled the earlier position in *Sukhdev* and brought the legal provision with respect to privilege close to the English position. The more current position is likewise impact by the requirement for more noteworthy straightforwardness and a move towards great administration. Likewise, this was the season of advancement of the Indian legal after the dark days of Emergency which had made the general population lose its confidence in the legal. The court talking through Justice Bhagwati examined long the significance of appropriate to know and ideal to free discourse and expression in the working of the majority rule government. The court likewise communicated worry over the teaching of 'class cases' holding it to be against the fundamental idea of open Government.

Phase III:

It is important over here to mention the suggestions made by the 88th Law Commission record with respect to the appeal power to the High Court against the order of the Lower court denying privilege to affairs of State.[16] However, this proposition suffered from the anomaly of inevitable revelation, which would have meant that if the Magistrate refuses privilege, the document would have flowed into public domain causing inevitable loss to public interest. Recognizing this, the 185th Law Commission proposed that the mechanism of reference to the High Court as soon as the matter for privilege was raised in the Lower courts.[17]

Numerous researchers have pointed blemishes in the proposed suggestion of the Law Commission with this respect. One, the ability to decide acceptability of records under Section 162 is presented on the 'all Judges and Magistrates' incorporated into Section 3 of the Evidence Act. Thus, there is no doubt of barring the lower judiciary from the extent of Section 162. Second, a probability of clashing perspective focuses between different High Courts may

[14] State of U. P. vs Raj Narain, AIR 1975 SC 885.
[15] S.P. Gupta vs Union of India, (1981) Supp. SCC 87.
[16] Ministry of Law and Justice, Law Commission of India, 85th Report, 13 (1980).
[17] Ministry of Law and Justice, Law Commission of India, 185th Report, 103 (1977).

likewise emerge. This would have the inevitable result of a document being barred from evidence by one High Court and the same being permitted by another High Court.[18]

The question of Section 123 also came up in the recent case of *Harish Chandra Rawat vs State of Uttrakhand*,[19] where in the imposition of President Rule in the state of Uttrakhand was challenged by the erstwhile UPA government of the state. The court held that the demonstration of documents in the modern world is the foundation of democracy which is required for the incorporation of citizens during the inclusion of citizens in the process of administration and governance.

CHAPTER 3

The Right to Information Act & Privilege.

The Right to Information is an important piece of legislation which has provided a vital instrument in the hands of the public to seek more transparency and accountability of public officials.[20] In this area an endeavour will be made to investigate the utilization of RTI Act to the privilege appreciated under the Evidence Act. The Right to Information is a special law and will prevail over a more generic law.

This directly means that if the executive determines the non-disclosure of certain information under Section 123 and Section 124 of the Evidence Act for derogating public interest, such information can only be revealed if the Right to Information also makes an exception to that effect. In simpler terms, in the case of a conflict between the provisions of the RTI Act and the Evidence Act, whereby the RTI mandates disclosure of certain information, privilege cannot be claimed with respect to the same.[21]

The dissenting opinion of Justice Subbarao and the majority in *SP Gupta* has now found a legal backing in the form of RTI Act. This is visible from the 2016 president *rule* case in Uttrakhand.

[18] Supra 26, at 573; V.R. Manohar, Ratanlal and Dhirajlal: The Law of Evidence 548 (LexisNexis Butterworth, 2011).
[19] Chandra Singh Rawat vs Union Of India, Writ Petition (M/S) No. 795 of 2016.
[20] Nathubhai Bhat, Accountability of Judiciary to Bar and Society at Large.
[21] R.S. Pathak, Administration of Justice and Public Accountability.

The court mentioned the importance of public disclosure for the working of an open democratic society and the trend for more disclosure was emphasized by the court.

RTI Act has revolutionarily changed the purported law of privilege where the Government used to hold data as mystery as matter of standard and uncovered particularly. Since RTI Act 2005, the rule is disclosure and special case is withholding it. RTI has abrogated the Official Secrets Act, 1923 and every single other enactment which repudiate or strife the RTI Act. The arrangements of benefit in Indian Evidence Act need to offer route to the revelation now according to Section 22 of Right to Information Act, 2005. On the off chance that the archives relate to issues of state, they can't be withheld by state as special records under Evidence Act, however needs to unveil under RTI Act, subject just to Section 8 and 9. The privilege against disclosure under Evidence Act is hence eclipsed by Right to Information Act.[22]

CHAPTER 4

Conclusion.

Section 123 of the Indian Evidence Act grants evidentiary privilege to documents relating to the issues of the State. This law is pervasive in all the present day legitimate systems of the nation. The "privilege" law is represented by the rule that specific information can't be liable to open revelation, since doing so would put public interest in jeopardy. Thus, information should be shielded from pubic for open intrigue.

The Law in England has been derived from the 'Crown Privilege.' In the underlying stage, the court ceased from going into the benefits of the information for which benefit was guaranteed, consequently adopting the 'Hands-Free approach.' This has been subsequently watered down to allow judicial review of the privilege claims in the interest of greater transparency and accountability. The convention of 'class cases' has additionally been dismisses by the court in the later choices. The Crown Privilege has been supplanted by 'Public Interest Immunity.'

[22] Prof. Madabhushi Sridhar, Privilege against ‘disclosure’ is eclipsed by RTI.

The author opines the courts in India have taken after a comparable direction to give path for more noteworthy straightforwardness in broad daylight issues led by the State. In the underlying stage, the court declined to go into the benefits of the privilege claims as is noticeable from the Sukhdev Singh case. This view has from that point forward diluted. Taking after the points of reference in SP Gupta and the 2016 President Rule case, the Indian courts have introduced judicial review of privilege claims and paved the way for greater transparency. The last jolt to the privilege claims has been given by the RTI Act. The RTI has overshadowed the Evidence Act, the Official Secrets Act 1923 and different enactments which were in disagreement to the RTI Law. The arrangement for privilege in the Evidence Law has to give way to Section 22 of the RTI demonstration which commands revelation and just in constrained cases, can the information be withheld. It should be comprehended that while accountability is imperative for democracy, certain data ought not to be presented in public domain, since doing as such would endanger the interest of the State and the Pubic.