

**AN ANALYSIS OF SPOUSAL COMPETENCE AND NON-
COMPELLABILITY IN TERMS OF SECTION 198 OF THE
CRIMINAL PROCEDURE ACT 51 OF 1977**

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For my darling Sophia

Never forget that I love you. Life is filled with hard times and good times. Learn from everything you can, inside you is a rainbow waiting to shine. Be the great woman I know you are destined to be.

Remember always, *“educating the mind without educating the heart is no education at all”*

ARISTOTLE

DECLARATION

I, Melissa Lazarus hereby declare that this research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university. Further, I declare that I have obtained the necessary authorisation and consent to carry out this research.

I declare that this Dissertation contains my own work except where specifically acknowledged.

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ABSTRACT

Marital privilege to be or not to be that is the question? The origins of marital privilege dictate that it has been founded on the biblical principles of the sacredness of the union between man and wife. So holy is this union that wives could not betray their husbands as they would be betraying the God ordained marital union. As a result, wives were not competent or compellable witnesses against their husbands. Over the years the privilege has been developed in English common law where wives were declared to be competent and later non-compellable subject to exception only when an accused spouse has been charged with an offence that falls within a specific category. South Africa has adopted marital privilege from the English common law and has since codified it through the enactment of Section 198 of the Criminal Procedure Act 51 of 1977. According to this section spouses cannot be compelled to testify against each other unless the crime for which the accused spouse is charged with appears in the categories listed in Section 195 of the Criminal Procedure Act. This study examines the particular sections that pertain to spousal non-compellability. In so doing it highlights the development of the privilege in English common law and South Africa. There are many criticisms that are levied against affording a privilege to a particular class of persons. The most prevailing argument is that the non-compellability exception given to spouses is unconstitutional because it violates the right to equality in terms of section 9 of the constitution. This study examines the merits of this argument and reaches the conclusion that spousal non-compellability fails to withstand the test against unfair discrimination on the basis of marital status. It is a provision which fails to acknowledge the ever changing needs of a modern society in which we no longer have a one dimensional view of what may constitute a marital relationship. To this end the privilege does not take into account same sex couples, co-habitants and those persons that cannot get married legally. While it may be necessary for spouses and same sex couples to confide in each other without having to be fearful that their communications could be subject to testimony in court, to allow the privilege to remain in existence in its current form is to perpetuate unfair discrimination and inequality within our constitutional democracy. This creates an undesirable situation and therefore demands action in the form of reforming the privilege rather than a total abolishment of the exception. This study seeks to put forth recommendations in this regard by examining the nature, genesis and evolution of spousal competence and non-compellability in South African law.

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CHAPTER ONE

BACKGROUND

1.1. Introduction

“Sprang from the canons of medieval jurisprudence: the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From that doctrine, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife”¹

Marital privilege or the non-compellability exception afforded to spouses as described in the abovementioned quotation finds expression within the ambit of South African common law and in section 198 of the Criminal Procedure Act (hereinafter referred to as the CPA).² According to the principles that underlie the privilege, a spouse, although a competent witness, is not compellable unless the crime falls within a specific category.³ Spouses therefore are the only category of witnesses who are afforded a privilege that permits them to refuse to disclose to the court evidence that is both admissible and highly relevant in criminal proceedings.

In line with the general principles of evidence as it relates to competence and compellability Cowen and Carter⁴ provide the following explanation:

“A competent witness is a person whom the law allows a party to ask, but not compel, to give evidence. A compellable witness is a person whom the law allows a party to compel to give evidence. There are certain questions that a witness may refuse to answer if he so wishes. He is said to be privileged in respect of those questions.”

¹ *Trammel v. United States* (1980) 445 U.S. 40, 44.

² Criminal Procedure Act 51 of 1977.

³ Ibid see section 195(1)(a)-(i) of the. Offences committed against the person of either of the spouses or of a child of either of them. Included are the offences of bigamy, incest and abduction, and certain offences in terms of the Child Care Act 74 of 1983, the Maintenance Act 99 of 1998 and the Sexual Offences Act 23 of 1957.

⁴ Cowen and Carter, *Essays on the law of Evidence*, (1956) 220.

In amplification of the above it is clear therefore that a competent witness is one who is deemed fit to adduce evidence.⁵ A compellable witness is one who may be forced to adduce evidence and privilege refers to a concession afforded to a witness to refuse to adduce evidence.⁶

While it may be argued that privilege is necessitated by the need to offer protection to certain categories of persons, a right or a public interest,⁷ the point of contention arises when the existence of such a privilege impacts negatively on the court's fact-finding in that it confers a benefit to a particular group of persons at the exclusion of others.⁸

The term 'marriage' as understood in the law of evidence includes customary marriages and marital unions.⁹ The primary objective of the privilege remains the protection of marital confidentiality in order to promote and preserve the marital relationship.¹⁰ As the quote in the beginning of this chapter suggests the privilege finds its roots deeply entrenched in medieval jurisprudence. Arguably it does not take into account factors such as the following: the current modern definitions of relationships which fall outside the confines of a legal marriage; public policy which demands that a court of law has access to all the relevant evidence to ensure that those who are guilty of a crime are convicted; and perhaps most importantly the constitutional right to equality.¹¹

The consequence has been that the justification of this archaic concept, once firmly embedded within criminal procedure, has in recent times become increasingly difficult to uphold. Some commentators argue that a continuance of the privilege would be a perpetuation of unfair discrimination.¹² These rights are enshrined in the Constitution and any "*law or conduct*" that is in violation should be disregarded.¹³ The crux of these arguments is that the privilege does

⁵ Lusty David, 'Is There A Common Law Privilege Against Spouse-Incrimination?' (2004), 27 *UNSWLJ* 1.

⁶ *Ibid.*

⁷ *Supra* note 4.

⁸ BC Naude, 'Spousal competence and compell-ability to testify: A reconsideration' (2004). *SACJ*.

⁹ Section 195(2) of the Act.

¹⁰ *Supra* note 8.

¹¹ Abdool Delano. 'Section 198 of the criminal Procedure Act: Marital privilege or unfair discrimination on the ground of marital status?' (2004). *De Rebus*.

¹² *Ibid.*

¹³ Constitution of the Republic of South Africa, 1996 Section 2.

not extend to couples who are co-habitants and life partners, and fails to consider relationships that do not conform to the conventional notion of a legal marriage.¹⁴ The counter argument is that a spouse also enjoys the right to privacy which will be undermined should the privilege be removed from South African law.¹⁵ The questions to be considered in light of these arguments are therefore whether the right to marital privilege outweighs the right to equality and whether the interest in protecting the marital union is more relevant than the interests of justice.

This dissertation seeks to initiate the debate as to whether this age-old privilege can continue to find relevance in the context of a post constitutional democracy. The research undertakes to analyse the intricacies of the legal principles that uphold the foundations of the privilege both in common law and in statute. In addition, the study will also explore three fundamental questions, the first why are spouses deserving of a higher degree of protection as compared to all other category of witnesses? The second, does public policy dictate that communications made during a marriage must remain inviolable and is it necessary to distinguish marital relationships from other unions for the purpose of compellability?

The debate surrounding marital privilege is not unique to South African law and yet surprisingly not even foreign jurisdictions have been able to provide a conclusive resolution regarding the viability of the privilege. Countries such as Australia have abolished the privilege from its legal system altogether by stating that the privilege did not form part of the common law and thus was not deserving of a place within Australian law.¹⁶ This may not be the ideal solution for South Africa as will be discussed under recommendations in chapter 5 of this study. In the 20th century, law commissions in South Africa¹⁷ much like the United Kingdom have made efforts to consider the relevance of the privilege however these commissions have not been decisive on any specific reform. Thus, the privilege remains unchanged causing this area of the law to remain an issue for future deliberation. In the face of mounting pressure to give force and effect to the rights embedded in the constitution there is a pressing need to examine the constitutionality of marital privilege. This cannot be done without instructive and comprehensive research on guiding authority and commentary in South Africa and abroad.

¹⁴ Supra note 8.

¹⁵ Ibid.

¹⁶ *Australian Crime Commission and Louise Stoddart*, b71 of 2010.

¹⁷ South African Law Commission, Issue Paper 26(Project 126) *Review of the Law of Evidence*, 2008.

1.2 A Brief Overview of the History of Marital Privilege.

Marital communications are protected within law. Evidence of this can be found first as opposed to any other evidence in section 3 of the Evidence Amendment Act of 1853.¹⁸ This section provided that:

*“No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”*¹⁹

Origins of this theory date back to the bible and continued through to medieval ecclesiastical law.²⁰ According to the prevailing views of the day in allegiance with the spiritual norms and customs, spouses were deemed to be a singular entity that were spiritually ordained.²¹ Husbands and wives were therefore regarded as one.²² This formed the basic premise of the common law and reinforced the patriarchal notion that underpinned the values of society, that a husband was the only legally recognised person in the marital union, and therefore the marital privilege would practically serve only to protect a husband who was charged with an offence.²³

In accordance with English common law an accused could not give evidence in support of his own case because he was presumed to have a vested interest in the proceeding.²⁴ The spiritual context within which a married couple was viewed guaranteed that a wife would be silent.²⁵ The very prospect that a wife may betray her husband and as a result thereof the future of the marriage may be compromised led to the understanding that the immunity given to spouses was in fact actually affording an accused spouse protection against self-incrimination.²⁶

¹⁸ Evidence Amendment Act of 1853, s3.

¹⁹ Ibid.

²⁰ Supra note 5.

²¹ GA Barton; *The competence and compellability of spouses to give evidence in criminal proceedings and the confidentiality of marital communications* (LLM thesis, UNISA, 1977).

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

It is this theory that formed the basis of marital privilege that persisted for centuries.²⁷ The theory started to erode as wives began to emerge with their own separate legal identity that allowed them rights in property and to enter into contractual relationships.²⁸ It then became apparent that the purpose of marital privilege was slowly departing from the protection of the husband as the accused spouse to a social interest in ensuring that the marital relationship was protected.²⁹ In as early as 1933 American courts regarded wives as competent witnesses in defence of their husbands but not against them.³⁰

In South Africa a spouse lacked competence and compellability in criminal proceedings for the defence or prosecution.³¹ The CPA³² was the first sign of reform with regard to spousal competence, in which spouses were deemed to be competent and compellable for the defence. Spouses were only declared to be competent and non-compellable for prosecution in 1988 when section 195 and section 196 of the CPA³³ were amended by subsection 6 and 7 of the Law of Evidence Amendment Act³⁴ resulting in spouses becoming competent witnesses although not compellable unless the crime in question falls within a specific category.³⁵

1.3. LEGAL FRAMEWORK IN SOUTH AFRICA

1.3.1 The Constitution of the Republic of South Africa³⁶

The most compelling reason for a reconsideration of marital privilege can be found in the Constitution.³⁷ In determining whether marital privilege violates the constitution one must give consideration to section 39(1) of the Constitution,³⁸ which states:

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Supra note 2.

³³ Ibid.

³⁴ Act 45 of 1988.

³⁵ Supra note 2 at section 195.

³⁶ Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

³⁷ Ibid.

³⁸ Ibid.

“When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b).....(c) may consider foreign law.”

To determine whether section 198 of the CPA³⁹ violates the right to equality, section 9 of the constitution⁴⁰ must be examined. The fact that the privilege only recognises relationships that are valid in law perpetuates unfair discrimination upon those that have sought to be in relationships that are not or cannot be valid in law.⁴¹ Marital status is a specified ground in section 9(3) of the constitution⁴² expounding that one may not be discriminated against on this basis.⁴³

In *Harksen v Lane*⁴⁴ the Constitutional Court set out the stages of an inquiry that needs to be undertaken to determine whether the right to equality has been violated. A discussion of this inquiry will be examined in greater detail in chapter 3 of this study.

In addition to protecting the right to equality, the Constitution⁴⁵ also recognises that spouses, like other category of witnesses are deserving of the right to privacy.⁴⁶ It may be argued that

³⁹ Supra note 2.

⁴⁰ Section 9 (the 'equality clause', as it is known) of the Bill of Rights states:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.”

“(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

“(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

“(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection.”

“(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

⁴¹ Supra note 8.

⁴² Supra note 36.

⁴³ Supra note 11.

⁴⁴ 1998 (1) SA 300 (CC).

⁴⁵ Supra note 36.

⁴⁶ Supra note 8.

such a right may be limited by section 36 of the Constitution.⁴⁷ However marital communications are regarded as privileged, section 14 (d) of the Constitution⁴⁸ provides that every person has a right against the infringement of his or her private communications.⁴⁹ Therefore the question that emanates is by affording married persons a separate privilege from testifying, are we saying that the right to privacy supercedes the right to equality? This will be discussed further in Chapter 3 of this dissertation.

1.3.2 The Criminal Procedure Act 51 of 1977

The current rules governing marital privilege in South Africa is contained in section 195 to section 199 of the CPA.⁵⁰ The provisions of section 196 (1) of the CPA⁵¹ renders the spouse a competent but non-compellable witness for the defence.⁵² According to section 198 of the CPA⁵³ a spouse may claim marital privilege and refuse to disclose any communication made during the subsistence of the marriage.⁵⁴ The exception can be found in a category of offences contained in section 195 of the CPA⁵⁵ in which a spouse becomes compellable in respect of any of the offences listed under this section. This privilege is not applicable to spouses in civil matters as they are regarded as both competent and compellable and may be called to testify on behalf of the accused spouse and against such spouse.⁵⁶

The holder of the privilege remains the testifying spouse and the accused spouse cannot prevent such communication from being disclosed.⁵⁷ This appears to be a diversion from the general principles attached to other privileges. The notable difference is that in all other privileges it is the person for whom the benefit exists that is the holder of the privilege stemming from the

⁴⁷ Supra note 11.

⁴⁸ Ibid.

⁴⁹ Supra note 8.

⁵⁰ Supra note 2.

⁵¹ Ibid.

⁵² Supra note 21.

⁵³ Supra note 2.

⁵⁴ Supra note 21.

⁵⁵ Supra note 2 at section 195.

⁵⁶ The Civil Proceedings Evidence Act 25 of 1965.

⁵⁷ Supra note 8.

fact that it is that person's communication that deserves some sort of protection.⁵⁸ By affording the testifying spouse, the right of holder of the privilege, there is no protection afforded to the accused spouse as he or she has no ability to control whether the communication is divulged and to what extent because no consent is required from the accused spouse.⁵⁹

Section 199 of the CPA⁶⁰ does provide that a testifying spouse may decline to respond to a question if the accused spouse would have not been compelled to answer that same question.⁶¹ But again the choice remains with the testifying spouse who may still decide to testify leaving the spouse who made the communication susceptible. Even a third person that hears or intercepts the communication cannot be prevented from disclosing it.⁶² This displays that the purpose of the privilege is not concerned with the protection of the spouse but rather the marital relationship.⁶³

As was alluded to in the previous paragraph if the main purpose of the privilege is the protection of the marital relationship and not the accused spouse than it is quite interesting that the privilege persists after divorce. The extension of the privilege after divorce is therefore illogical if the relationship has since been terminated, simply because any disclosure once the marital union has ended will not cause any harm to the marriage or threaten the way the ex-spouses continue to exchange confidences with each other.⁶⁴ The privilege only extends to communications made during the subsistence of the marriage and widows and widowers remain excluded.⁶⁵ It is submitted in agreement with the view advanced by Naude⁶⁶ that the privilege should only be afforded in terms of marital status at the time that the witness is required to testify and not at the time when the communication was made.⁶⁷

⁵⁸ Ibid

⁵⁹ Ibid.

⁶⁰ Supra note 2 above.

⁶¹ See s 199 of the Act and s 12 of the Civil Proceedings Evidence Act 25 of 1965.

⁶² Supra note 8.

⁶³ Ibid.

⁶⁴ Supra note 8.

⁶⁵ Section 198(2) of the Act and s 10(2) of the Civil Proceedings Evidence Act 25 of 1965. The privilege applies even if the communication was not made in confidence, as long as it was made while the spouses were still married: SJ van Niekerk, SE van der Merwe and AJ van Wyk Privileges in die Bewysreg (1984) 192.

⁶⁶ Supra note 8.

⁶⁷ Ibid.

Marital privilege is intriguing and has piqued the writers' interest. It reflects a modern debate on whether society's interest in protecting the sanctity of marriage should outweigh its interest in ensuring that the court is able to arrive at a proper judgement by placing all the relevant facts before it, particularly testimony of spouses which may be highly relevant and yet would otherwise be protected by the privilege. The justification for the continued existence of the privilege remains that should a spouse be compelled to testify against the other spouse it would place undue stress and strain on the relationship and could ultimately lead to a breakdown of the marriage. It is argued however that this justification may not hold much weight against the effect and outcome of the privilege which essentially continues to perpetuate a violation of the constitution through unfair discrimination and inequality on the basis of marital status. These points of criticism coupled with the fact that the privilege places the importance of preserving a marital union over the interests of the court having all the evidence before it is certainly cause for further inspection into the law governing marital privilege.

1.4. CASE LAW

In a discussion of the common law position and legal framework on marital privilege it is important to undertake an analysis of some judicial precedents that have adopted and interpreted the principles of marital privilege in South African law.

There is yet to be a case before South African courts that challenge the constitutionality of marital privilege. A study of case law related to marriage privilege deals with the legal principles that enforce the privilege and has certainly resulted in development of the privilege. Some of these cases will be discussed briefly.

1.4.1 English Case law

Marital privilege has been considered in two primary cases in English courts that deal with spousal non-compellability, these were the cases of *Leach v The King*⁶⁸ and *Hoskyn v Metropolitan Police Commissioner*.⁶⁹ In the former case the court stated that the non-compellability of a spouse has existed since the foundations of the common law.

⁶⁸ 1912 AC 305.

⁶⁹ 1979 AC 474.

In *Hoskyn*,⁷⁰ the court rejected the notion that a spouse is compellable when he or she is a victim of inter domestic violence and held that it was a fundamental principle that spouses should not be compelled to testify against each other in criminal cases, even when they were fully competent to do so.

1.4.2 American Case Law

*Trammel v United States*⁷¹ is the seminal judgement on marital privilege by the Supreme Court in America. This case eliminated the right of the accused spouse, that allowed that spouse to prevent a witness spouse from giving evidence incriminating the accused spouse and confirmed that the witness spouse has a privilege to refuse to disclose such evidence.

1.4.3 South African Case Law

Prior to the enactment of the CPA⁷² the general principle that spouses were incompetent witnesses in criminal proceeding came under severe judicial criticism and scrutiny. This is clearly reflected in the cases of, *R v Jamba*⁷³ *S v Khanyapa*⁷⁴. In the case of *S v Mgcwabe*⁷⁵ the court held that,

“Section 195(1) of the CPA does not provide that a spouse shall not be compellable to give evidence only if this is necessary to preserve the marriage relationship. It affords such spouse an absolute right to make an election not to testify. If a spouse refuses to testify because that spouse does not wish to go to court, despite feeling nothing for his or her partner, this cannot have the effect of making such spouse a compellable witness for the prosecution. s195 (1) gives the spouse an absolute right to make an election not to testify; it does not provide that a spouse shall not be compellable to give evidence 'only if this is necessary to preserve the marriage relationship.’”⁷⁶

⁷⁰ Ibid.

⁷¹ 445 US 40 (1980).

⁷² Supra note 2.

⁷³ 1947 (4) SA 228 (C).

⁷⁴ 1979 (1) SA 824 (A) at 835D–F.

⁷⁵ 2015 (2) SACR 517 (ECG) Paragraph [12] at 522d.

⁷⁶ Ibid.

A marriage entered into for ulterior purposes does not ordinarily affect its validity for the purpose of section 195(1) of the CPA⁷⁷. In *S v Leepile & others*⁷⁸ a marriage entered into during an adjournment in proceedings under section 189 (1) of the CPA⁷⁹ was held to be valid for the purposes of section 195 (1)⁸⁰ even though the motive of the parties in entering into the marriage was to afford the witness a 'just excuse' for refusing to answer questions put to her in terms of section 189 (1) of the CPA⁸¹. It was held, further, in *S v Louw*⁸² that the fact that the accused intended to marry an essential state witness before the commencement of the trial, and that the witness would become non-compellable in terms of section 195 of the CPA,⁸³ was not a justifiable reason for refusing to grant the accused bail. The court further held that section 195 of the CPA⁸⁴ was possibly unconstitutional.⁸⁵

In *S v Vengetsamy*⁸⁶ a woman, married in accordance with Hindu rites, was regarded as a non-compellable witness for the prosecution against her husband on the ground that the marriage was a monogamous union. The court in *S v Johardien*⁸⁷ however, was of the view that the decision in *Vengetsamy*⁸⁸ was incorrect and did not follow it.

1.5. INTERNATIONAL COMPARATIVE AUTHORITY

A comparative study on the law in foreign jurisdictions as it relates to the non-compellability privilege afforded to spouses will provide greater insight into how the privilege could be considered in the future in South African law either through the reformation or the elimination of the privilege. The foreign jurisdiction that will be analysed is the United States of America.

⁷⁷ Supra note 2.

⁷⁸ (3) 1986 (2) SA 352 (W).

⁷⁹ Supra note 2.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² 2000 (2) SACR 714 (T).

⁸³ Supra note 2.

⁸⁴ Ibid.

⁸⁵ Supra note 82 at pg716 par F.

⁸⁶ 1972 (4) SA 351 (D).

⁸⁷ 1990 (1) SA 1026 (C).

⁸⁸ Supra note 86 above.

The United States of America much like South Africa recognises the existence of the non-compellability privilege afforded to spouses. The notable difference is that the United States of America affords much greater protection to marital communications.

The reasons for the posture adopted in America would prove useful to South African lawmakers in the determination of the future of the non-compellability exception of spouses in our law.

1.5.1 United States of America

While the United States of America have followed the same common law principle as both England and South Africa the former has chosen to adopt a slightly different approach to the privilege. The United States have codified marital privilege in the Federal Rules of Evidence, Rule 501.⁸⁹

The interpretation afforded by the courts in respect of the privilege is that the privilege shall be governed by common law unless it is provided for in the United States constitution, a Federal Statute or the rules of the Supreme Court.⁹⁰ This view is different in civil law where it is left to state law to govern the privilege.⁹¹

There are certainly features in American law that are efficacious in the regulation of marital privilege these are useful mechanisms in assessing the current legislation that are applicable to marital privilege in South Africa. A brief discussion of such tools will be discussed further in this dissertation.

1.6. AIM OF THE STUDY

The aim of this dissertation is to analyse marital privilege as set out in section 198 of the CPA⁹² in order to determine its constitutionality and find a mechanism for facilitating a principled and consistent exercise of the privilege in South African law for the future.

⁸⁹ Katherine O. Eldredt 'Every Spouse's Evidence': Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials, *The University of Chicago Law Review*.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Supra note 2.

1.7. RESEARCH OBJECTIVES AND RATIONALE OF THE STUDY

The specific objectives of the study are to:

- Discuss the history and application of marital privilege;
- Discuss the current SA legal framework and case law pertaining to marital privilege;
- Discuss the constitutionality of marital privilege.
- Comparatively analyse and examine marital privilege in the United States of America.
- Propose recommendations.

The rationale of this study is to determine if marital privilege afforded to spouses:

1. Is consistent with the right to equality?
2. Is deserving of protection in terms of the right to privacy?
3. Amounts to unfair discrimination based on marital status?

These remain central considerations that are fundamental in determining the constitutionality of marital privilege.

1.8. LITERATURE REVIEW

The main justification for the existence of marital privilege remains the protection of the institution of marriage founded on the belief that this union was the cornerstone of our society. Naude submits that the justification is baseless and that the effect of such a privilege leaves much to be desired.⁹³ He further advances the view that in the context of a modern society the privilege lacks constitutional muster in its failure to recognize other conventional relationships that may arise within the family component.⁹⁴

As Naude suggests the underlying consideration for the justification is that spouses must be able to communicate with each other freely and in total confidence without fear of interference or intervention from the law.⁹⁵ He further argues however that marital confidence is not dependent on the existence of a marital privilege and the fact that the spouse has knowledge of

⁹³ Supra note 8.

⁹⁴ Ibid.

⁹⁵ Ibid.

the existence of the marital privilege cannot be said to encourage him or her to take their spouse into greater confidence or on the other hand not take his or her spouse into confidence at all.⁹⁶

Heydon⁹⁷ supports Naudes⁹⁸ view and advances that most people are not aware of the rules applicable to marital privilege in the first place or that such a privilege is in existence at all thus any argument that the marital privilege promotes or protects trust in a marriage cannot be sustained.

Sopinka, Lederman and Bryant⁹⁹ point out that a marriage from its inception is formed out of a trust relationship and it is this that leads to open and transparent communication between the spouses not the fact that there is a marital privilege in existence for their protection. They further point out that the absence of a marital privilege is likely to have little or no effect on the way spouses confide in each other.¹⁰⁰ Thus, the justification of the existence of the privilege on the premise that it protects the trust relationship deserves more attention particularly as the confidence may still be breached at any time by the testifying spouse as he or she remains the holder of the right and there is no guarantee that he or she will invoke the protection of marital privilege.¹⁰¹

Perhaps the most important justification in respect of marital privilege remains the argument that spouses deserve such protection in terms of the right to privacy. Naude submits that the right to privacy pales in comparison to other constitutional rights that the marital privilege fails to consider.¹⁰² He further advances that when one analyses the inconsistent situation that arises because of the privilege the arguments in support of the spouses right to privacy remains unconvincing.¹⁰³

Naude¹⁰⁴ gives an example of such an anomalous situation by pointing out that a spouse who witnesses a murderous act by the other spouse may be forced to give evidence related to such but if that spouse does not witness the actual murder but is the recipient of an admission about

⁹⁶ Ibid.

⁹⁷ JD Heydon 'Legal Professional Privilege and Third Parties (1974) 37 *MLR* 601.

⁹⁸ Supra note 8.

⁹⁹ J Sopinka, SN Lederman and AW Bryant, *The Law of Evidence in Canada* (1992) 690.

¹⁰⁰ Ibid.

¹⁰¹ Supra note 8.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Supra note 8 at pg. 331.

the commission of the murder that spouse cannot be forced to testify. Despite pointing out the weaknesses in relying on the right to privacy to justify marital privilege, Naude¹⁰⁵ goes on to suggest as part of his recommendations that the court must not discard the right totally and that it should be taken into consideration when the court uses its discretion to determine whether there is a need for spousal testimony or not. Naude¹⁰⁶ states that policy considerations inform the marital privilege and questions whether marriages are deserving of the high valued status it has been afforded through such a privilege.

It is trite in our law that the holder of the marital privilege is the spouse to whom a communication is made. Many have argued that this principle governing the privilege is a deviation from the normal principles pertaining to other privileges without plausible reason. Naude points out the difference in that the holder of the privilege is the only person who can consent to the information being divulged and the holder is usually the person who will derive a benefit from the existence of such a privilege thus flowing from this it would normally be that person's interest which is protected by the privilege.¹⁰⁷

McNicol¹⁰⁸ holds the view as is highlighted by Naude¹⁰⁹ that one could follow either of the two former options, both authors agree that either the holder of the right should be the spouse making the communication and whose interest may be deserving of protection or that the holders of the privilege should be both spouses jointly and thus should one favour the latter option, the privilege would only be waived by mutual consent of both spouses. Unsurprisingly both McNicol¹¹⁰ and Naude¹¹¹ then conclude on this point by advancing that they do not favour the current position in our law that the holder of the marital privilege is only the spouse who is the receiver of the communication. Naude's¹¹² main contention in this regard is that it is illogical and falls out of the prevailing principles that govern other privileges in the law of evidence.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Supra note 8.

¹⁰⁸ SB McNicol Law of Privilege (1992).

¹⁰⁹ Supra note 8.

¹¹⁰ Supra note 108.

¹¹¹ Supra note 8.

¹¹² Ibid.

Mcnicol¹¹³ provides a basis for his stance by stating that the object of having a privilege in the first place is defeated in that it is meant to serve as a guard for the person who has made such communication, in marital privilege where the holder of the privilege is not the person who made such communication that spouse remains unprotected. The argument that the privilege exists to protect the marriage and not the spouse who made the communication therefore that spouse is not the holder of such right, does not hold much weight.¹¹⁴ It appears that should a spouse choose to waive the marital privilege and testify against the other spouse than the marriage is at a greater risk of destruction plagued by the feeling of betrayal and anger towards the spouse who testified against the other out of choice. It is suggested that it would serve to protect the marriage better if the holder of the right was in fact the spouse who made the communication as that spouse could choose to waive the privilege of his or her own accord thus not leaving the other spouse vulnerable to rejection should he or she decide to testify and further to that not wanting to testify at all due to fear of reprisal.

According to our law, marital privilege can also be invoked by divorced persons but is only applicable to communications made during the subsistence of the marriage.¹¹⁵ Naude argues that there is no reason why the privilege should be extended to persons that are no longer married.¹¹⁶ There is no longer the risk that the marriage relationship will be harmed. He states that the way spouses confide in each other during the marriage will not be affected in any way should they not be afforded the protection of the privilege once they divorce.¹¹⁷ Naude also makes an important point for consideration that the test that should be applied by our law to determine marital status, should be at the time that the evidence is given as opposed to the date that the communication was made.¹¹⁸

There are offences for which spouses are compelled to testify and may not be allowed to invoke the benefit of the privilege.¹¹⁹ Naude suggests that this list of specified offences that form part of a specific category is justified by the ‘removal of choice’ argument.¹²⁰

¹¹³ Supra note 108.

¹¹⁴ Ibid.

¹¹⁵ Supra note 8.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Supra note 8 at pg. 332.

¹²⁰ Ibid.

Zuckermann¹²¹ states that in allowing the prosecution the ability to compel a spouse to testify for certain offences it avoids the other spouse from exerting undue pressure and influence over the testifying spouse in order to avoid being found guilty and therefore maintains harmony within the marital home. The question as to whether this outcome is achieved is a further point for discussion.

There are many other reasons that have been advanced as to need for the creation of a specific category of offences that have been excluded from the protection of the marital privilege. Naude presents the notion that the public interest would be better served by having a list of offences that must be prosecuted as opposed to advancing non-compellability of spouses in relation to all crimes as a blanket privilege that one can invoke in respect of any or all offences.¹²² Schwikkard and Van der Merwe remind us that the basis of the privilege since its inception has been the protection of a marriage but when one considers the offences contained in the list most of which are directly related to the spouse or their children this notion struggles to hold its weight.¹²³ Naude¹²⁴ submits that both the abovementioned arguments are deserving of merit but when one considers the exclusion of specified offences from the privilege one must also give due consideration to the challenges associated with it.

The most notable criticism appears to be in section 195 of the CPA¹²⁵ which fails to make provision for some serious and prevalent offences such as murder.¹²⁶ This is problematic in that a spouse of an accused spouse who has committed murder may not be compelled to testify against that spouse. Another area of concern, as Schwikkard and Van Der Merwe¹²⁷ highlight is in the interpretation of the wording 'offence against the person'. They point out that the courts have adopted a rather restrictive approach to the meaning of this phrase thereby confining it to the offences of assault and state that they doubt whether this is in accordance with the original intent of the legislators and further suggest that there remains no reason to not

¹²¹ Aas Zuckerman Principles of evidence (1989) 290.

¹²² Supra note 8.

¹²³ PJ Schwikkard and SE van der Merwe, Principles of Evidence 2ed (2002) 142.

¹²⁴ Supra note 8 at pg. 332.

¹²⁵ Supra note 2.

¹²⁶ Supra note 8.

¹²⁷ Supra note 123 para 10.6

include offences that cause injury to one's personality such as *crimen iniuria* under the ambit of this section.¹²⁸

The other criticism that is noteworthy is the obvious conundrum that may occur when a spouse is charged with an array of offences at the same time some of which are exempted as per the list and other offences that are not. This would result in the spouse being compelled to testify on some charges and not compellable on other charges. While Naude suggests that this situation could be dissolved by a separation of trials or with a withdrawal of the non-compellability charges he does point out that where the charges are formulated on the same evidence this may be unfeasible due to time and the costs involved as well as causing possible undue benefit to the prosecution.¹²⁹

The most important reason for an analysis of marital privilege and a revision of our laws in this regard can be found in the Constitution. As Naude¹³⁰ states by affording only persons that are "*party to a marriage that is recognized and valid in law and not beyond that*" protection from testifying against each other, the privilege implicates the right to equality. This issue needs to be examined in greater detail to determine whether the differentiation between different categories of partnerships and marriage for purposes of compellability is justified.

Naude states that one cannot take a restrictive approach to the concept of relationships in that it may only be worthy of protection if it is reduced to the legal standing of a marriage.¹³¹ He argues that the concept of family cannot be placed into a vacuum of what may constitute an acceptable family model.¹³² This goes far beyond the notion of a marriage but includes the values it is based on and the purposes attached to it.¹³³

In addition any constitutional enquiry involving marital privilege must bear reference to whether the privilege in light of the provisions of section 198 of the CPA¹³⁴ justifiably limits the right to equality.¹³⁵ Madala J pointed out in *Satchwell v President of the Republic*¹³⁶ that

¹²⁸ Ibid.

¹²⁹ Supra note 8 at pg. 333

¹³⁰ Ibid.

¹³¹ Supra note 8.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Supra note 2.

¹³⁵ Supra note 11.

¹³⁶ 1997 (4) SA 1 (CC) at para 41.

equality for all South Africans is a theme that runs rampant throughout the Constitution. The test for violation of the right to equality was set out in *Harksen v Lane*¹³⁷ and the approach adopted by the court in *Harksen*¹³⁸ was subsequently confirmed by many other cases.¹³⁹

Naude¹⁴⁰ argues that if one were to apply the two-stage inquiry as set out in the abovementioned case the results will yield that marital privilege as contained in the provisions of section 198 of the CPA¹⁴¹ is discriminatory in so far as it relates to marital status and sexual orientation. The latter two grounds are listed in section 9(3) of the constitution¹⁴² which means one may presume unfairness however one would still have to prove unfairness. Naude states that in doing so one has to conduct an analysis of what makes discrimination unfair.¹⁴³

In consideration of the above Naude¹⁴⁴ highlights that the provisions that give effect to marital privilege differentiates between married people and unmarried couples and by granting certain rights only to married people they discriminate against those that are unable to marry or choose not to. He further concludes that the basis of the privilege is the preservation of the marriage but by excluding people who have not entered into a marriage it is suggesting that such relationships are not worthy of recognition or respect and do not constitute a family.¹⁴⁵ Naude brings his argument in this regard to an end with a proposition that an extension of the privilege to persons who are in relationships but not married will in no way undermine the traditional institution of marriage stating explicitly that section 198 of the CPA¹⁴⁶ is “*irrational and unjustifiable*.”¹⁴⁷

¹³⁷ 1998 (1) SA 300 (CC).

¹³⁸ Ibid.

¹³⁹ Supra note 8 at pg. 339.

¹⁴⁰ Ibid.

¹⁴¹ Supra note 2.

¹⁴² Supra note 36.

¹⁴³ Supra note 8.

¹⁴⁴ Ibid.

¹⁴⁵ Supra note 8.

¹⁴⁶ Supra note 2.

¹⁴⁷ Supra note 8.

1. 9. RESEARCH METHODOLOGY

This dissertation will be a desktop review of the applicable legal material.

Some of the international instruments and legislation to be analyzed includes the following:

- The Constitution of South Africa, Act 106 of 1996.¹⁴⁸
- Criminal Procedure Act 51 of 1977.¹⁴⁹
- The Law of Evidence Amendment Act 45 of 1988.¹⁵⁰
- Civil Proceedings Evidence Act.¹⁵¹

The research will also make use of secondary sources to support the researchers and sources above. Secondary sources include Books, Journals, Peer-Reviewed Articles, Online Academic Research Papers and Critical and Evaluative works on the primary data.

The Internet will be used in the collection of information using search engines such as Google Scholar, Lexis Nexis, Act Online and Hein Online.

1.10 CHAPTER BREAKDOWN

Chapter One: Introduction

Chapter one of this research paper sets out the background for the study as well as provides an introduction on marital privilege. The chapter provides the research questions, aims and objectives, literature review and an explanation of the research type and methodology.

Chapter Two: The history and development of Marital Privilege

This chapter will provide an overview of the concept of marital privilege. It will trace the origins and development of marital privilege and the early stages of how the law in South Africa approached and developed marital privilege.\

¹⁴⁸ Supra note 36.

¹⁴⁹ Supra note 2.

¹⁵⁰ Supra note 18.

¹⁵¹ Supra note 56.

Chapter Three: Legislative framework and the constitutionality of section 198 of the CPA

This chapter will examine the constitutionality of the rules underpinning marital privilege. In so doing the chapter will include a critical analysis of the right to privacy as it relates to spousal communications and whether this right sufficiently justifies the continued existence of a marital privilege. The chapter will also focus on the right to equality and determine whether this right has been infringed by the provision of section 198 of the CPA¹⁵². Both rights will be weighed against each other to determine the constitutionality of marital privilege.

Chapter Four: Foreign legal systems

Marital privilege appears to have its origins in international legal systems it would therefore be of great interest to explore the key aspects of the privilege and the current principles that underpin the operation of the privilege in foreign jurisdictions. This chapter will consist of a comparative analysis of authorities on marital privilege from the legal systems of the United States of America in whose jurisdiction marital privilege remains solidified, much like South Africa. An analysis of these legal systems would be beneficial to South Africa as it would provide practicable solutions for possible reform.

Chapter Five: Conclusion and Recommendations

The final chapter of this study will draw conclusions from the research and make recommendations. The chapter would seek to highlight the importance of achieving a proportionate balance between the interests of justice, society, the individual and the constitution.¹⁵³

1.11 Conclusion

In conclusion there is certainly a compelling argument for lawmakers to review the current principles of marital privilege. The question still remains as to the development that is needed and the type of reform that should be undertaken. This necessitates the need for research to be conducted in this area of the law with a view of dissecting pertinent issues such as the purpose of section 198 of the CPA¹⁵⁴ in dealing with spousal testimony, the constitutional right of privacy and the right to equality with a view of proposing possible recommendations.

¹⁵² Supra note 2.

¹⁵³ Supra note 8.

¹⁵⁴ Supra note 2.

CHAPTER TWO

THE HISTORY AND DEVELOPMENT OF MARITAL PRIVILEGE

2.1 Introduction

While the exact origins of marital privilege may be debatable, the fundamental principles it encompasses are undoubtedly, deeply rooted in English common law.¹⁵⁵ Stemming from an ancient ideology that wives are not compelled to give evidence regarding their husband's criminal activities because they remain bound in terms of the marital relationship.¹⁵⁶

The common law underpins the rules that relate to spousal competence and non-compellability.¹⁵⁷ The privilege has retained its relevance through biblical and medieval ecclesiastical law and has evolved over the centuries from the time of Lord Coke in 1628 to its current form in the CPA¹⁵⁸. This chapter entails a discussion on the origins of the privilege and traces its development in South African law.

2.2 The origins of marital privilege

Marital privilege can be traced back to divine law.¹⁵⁹ The privilege is rooted within a biblical context stemming from the notion that a man and women once united in matrimony are regarded as one flesh.¹⁶⁰ Their unity and loyalty to each other remained of utmost importance because marriage was ordained by God and therefore no man should be allowed to put this asunder and certainly not through betraying the other.¹⁶¹ The above notion provides an explanation as to the need in common law for the special protection afforded to spouses to maintain the sanctity of the marriage because it was a relationship that was sacred in the eyes

¹⁵⁵ Supra note 5.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Supra note 2.

¹⁵⁹ Holy Bible, Genesis II 24; Matthew XIX 5–6; Mark X 8.

¹⁶⁰ Supra note 5.

¹⁶¹ Ibid.

of God. Remnants of this ideal forms the basis of the justification for spousal non-compellability even today.¹⁶²

The Bible also clearly defined the role of a wife which was to serve, obey and be submissive to their husbands in every respect.¹⁶³ This often-forced women into a difficult position where they were expected to remain within their defined roles as demanded in the Bible and preached by the church but faced a moral issue when they became aware that their husbands were involved in the commission of a crime.¹⁶⁴

2.3 *English common law*

In response to this dilemma the principle that wives were not bound to divulge information related to the crimes that their husbands may have committed developed within common law.¹⁶⁵

The common law rule went on to be further developed by King Ine of West Saxon¹⁶⁶ and King Canute¹⁶⁷ in a show of sympathy to wives whose husbands had committed crimes.¹⁶⁸ Both of these kings reinforced spousal non-compellability clearly to give credence to the relationship between husband and wife as defined in the bible which outlined that wives were to be obedient to their husbands and ensure harmony within the matrimonial home at all costs.¹⁶⁹

¹⁶²Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ “Code (c688–94) provided that [i]f a husband steals a beast and carries it into his house, and it is seized therein, he shall forfeit his share [of the household property] – his wife only being exempt, since she must obey her lord.

¹⁶⁷ code (c1020–34) as follows: *If anyone carries stolen goods home to his cottage and is detected, the law is that he (the owner) shall have what he has tracked. § 1. And unless the goods had been put under the wife’s lock and key, she shall be clear [of any charge of complicity]. 1a. But it is her duty to guard the keys of the following – her storeroom and her chest and her cupboard. If the goods have been put in any of these, she shall be held guilty. § 1b. But no wife can forbid her husband to deposit anything that he desires in his cottage.”*

¹⁶⁸ Supra note 5.

¹⁶⁹ Ibid.

There were four widely recognised common law rules that governed marital privilege at the time.¹⁷⁰ The first being that neither spouse was competent to testify on behalf of each other.¹⁷¹ Secondly that a spouse could not be compellable when it would result in self-incrimination, the third rule was that the spouse was incompetent when required to testify against the accused spouse and the final rule was that the communications subject to a marriage were protected from being disclosed.¹⁷²

The work of Michael Dalton titled 'The Countrey of Justice' in 1618¹⁷³ is said to be the first authority that formally set out a description of the English common law rules of marital privilege.

The rule described by Dalton¹⁷⁴ only afforded marital privilege to a wife and not a husband. In addition, it did not assert that wives were incompetent witnesses if they were called to testify in support of their husbands. Dalton did not state any limitations to a wife testifying in the defence of her husband and merely advanced that in respect of testifying against her husband she was not legally bound.¹⁷⁵ Dalton's treatise contributed to the early development of the rules governing spousal non-compellability and with its emergence it became clear that its foundations rested on a biblical premise that wives were to remain loyal to their husbands and not divulge the details of their criminal activities, thus entrenching the concept of spousal non-compellability but this did not mean that they were not competent witnesses.¹⁷⁶

In 1628 the position advanced by Dalton¹⁷⁷ was drastically reversed by Lord Coke¹⁷⁸ who remarked that wives were incompetent witnesses against their husbands irrespective of whether they testified in support of them or against them in the following statement:

¹⁷⁰ Ibid referred to *Shenton v Tyler* (1939) 1 E.R. 827.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Michael Dalton, *The Countrey Justice* (1618) 261-262.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Sir Edward Coke, 'a wife cannot be produced either against or for her husband', *The First Part of the Institutes of the Lawes of England* 6 b.

*“Note it hath been resolved, that a wife cannot be produced either for or against her husband, quia sunt duae animae in carne una, and it might be a cause of implacable discord and dissension between them, and a means of great inconvenience.”*¹⁷⁹

In these utterances he declared a rule contrary to the view advanced by Dalton.¹⁸⁰ Lord Coke¹⁸¹ failed to note Daltons¹⁸² view which preceded his rule and has been accredited with the creation of the rule of spousal incompetency in English common law.¹⁸³

The rule was quickly accepted by the courts and although initially only referred to wives, it was soon extended to husbands as well.¹⁸⁴ By the end of the 17th century it had become the catalyst for all matters involving spousal testimony.¹⁸⁵ This meant that in any proceedings that involved a husband and wife as a party to the action, neither of them were permitted to give evidence.¹⁸⁶

With all spouses being declared incompetent witnesses, the non-compellability of a spouse was no longer an issue for determination.¹⁸⁷ Although Lord Cokes¹⁸⁸ spousal incompetence rule drastically changed the position that was proposed by Dalton¹⁸⁹ it appeared that it did not eliminate it in its entirety.¹⁹⁰ Evidence of this can be found in the treatise of Hale in 1676¹⁹¹ where he references both Lord Coke¹⁹² in respect of spousal incompetency and Dalton¹⁹³ in respect of collateral cases.¹⁹⁴

¹⁷⁹ Ibid.

¹⁸⁰ Supra note 173.

¹⁸¹ Supra note 178.

¹⁸² Supra note 173.

¹⁸³ Supra note 5.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Supra note 5.

¹⁸⁸ Supra note 178.

¹⁸⁹ Supra note 173.

¹⁹⁰ Supra note 5.

¹⁹¹ Hale Sir Matthew, *History of the Pleas of the Crown* (c1676) vol 2, 279.

¹⁹² Supra 178.

¹⁹³ Supra 173.

¹⁹⁴ Supra note 5.

Many suggest that while Lord Cokes'¹⁹⁵ rule dominated legal theory at the time, the principles expounded by Dalton¹⁹⁶ to an extent operated alongside it particularly in those matters where the rule advanced by Lord Coke¹⁹⁷ did not pronounce on an issue and therefore was not applicable.¹⁹⁸ On these occasions the door was left open for the development and reform of spousal privilege within English law.¹⁹⁹

2.4 Statutory Development of Marital Privilege in English law

Although marital privilege was birthed through the common law, substantial changes that sought to formalise this area of law only occurred through the development of legislation.

In 1853 the common law was revised upon the recommendation of the Commissioners on Common Law Procedure.²⁰⁰ The main aim of the commission was to achieve a balance between the “*the alarm and unhappiness*” that would be caused by the disclosure of confidential marital communications to the public and the disadvantage that may occur as a result of such disclosures.²⁰¹ The recommendations of the commission led to the creation of the Evidence Amendment Act²⁰² which pronounced that husbands and wives were competent and compellable except in criminal matters or matters involving adultery.

Thus, it followed, that the spousal incompetency rule was abrogated, however confidential communication between spouses were to be regarded as privileged.

In 1898 the Criminal Evidence Act²⁰³ made spouses competent witnesses against the accused spouse in criminal proceedings while still allowing spouses to enjoy the protection of marital privilege. Thus, a spouse could testify against an accused spouse on behalf of the prosecution

¹⁹⁵ Supra note 178.

¹⁹⁶ Supra note 173.

¹⁹⁷ Supra note 178.

¹⁹⁸ Supra note 5.

¹⁹⁹ Examples include non-judicial contexts, pre-trial procedures for the disclosure of information and judicial proceedings in which the witness's spouse was not a party.

²⁰⁰ Commission on Common Law Procedure, 2nd report at 13.

²⁰¹ Cited in *Shenton v Tyler* [1939] 1 All E.R. 827 at p. 833 (per Sir Wilfred Greene M.R.).

²⁰² Evidence Amendment Act of 1853.

²⁰³ Section 4(1) of the Criminal Evidence Act of 1898.

should they elect to do so but that spouse could not be compelled to testify in terms of section 53 of the Youth Justice and Criminal Evidence Act.²⁰⁴

The Police and Criminal Evidence Act²⁰⁵ currently governs spousal privilege as contained in the provisions under section 80.²⁰⁶

²⁰⁴ Youth Justice and Criminal Evidence Act 1999.

²⁰⁵ Police and Criminal Evidence Act of 1984.

²⁰⁶“(2) *In any proceedings the spouse or civil partner of a person charged in the proceedings shall, subject to subsection (4) below, be compellable to give evidence on behalf of that person.*”

“(2A) *In any proceedings the spouse or civil partner of a person charged in the proceedings shall, subject to subsection (4) below, be compellable—to give evidence on behalf of any other person charged in the proceedings (a) but only in respect of any specified offence with which that other person is charged; or (b) to give evidence for the prosecution but only in respect of any specified offences with which any person is charged in the proceedings.*”

“(3) *In relation to the spouse or civil partner of a person charged in any proceedings, an offence is a specified offence for the purposes of subsection (2A) above if—*

(a) it involves an assault on, or injury or a threat of injury to, the spouse or civil partner or a person who was at the material time under the age of 16;

(b) it is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or

(c) it consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.”

“(4) *No person who is charged in any proceedings shall be compellable by virtue of subsection (2) or (2A) above to give evidence in the proceedings.*”

“(4A) *References in this section to a person charged in any proceedings do not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).*”

“(5) *In any proceedings a person who has been but is no longer married to the accused shall be compellable to give evidence as if that person and the accused had never been married.*”

“(5A) *In any proceedings a person who has been but is no longer the civil partner of the accused shall be compellable to give evidence as if that person and the accused had never been civil partners.*”

“(6) *Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.*”

“(7) *In subsection (3)(b) above ‘sexual-offence’ means an offence under the Protection of Children Act 1978 or Part 1 of the Sexual Offences Act 2003.*”

“(8) *Section 1(d) of the Criminal Evidence Act 1898.*”

According to the Police and Criminal Evidence Act²⁰⁷ spouses are competent and compellable witnesses against each other during the marriage and this persists even after divorce.²⁰⁸ That means that marital privilege does not extend to divorced persons as the status of such a witness is as if they were never married at all.²⁰⁹

The privilege is only applicable to persons who are legally married and therefore has attracted much criticism for excluding co-habitants and other long-term life partnerships from the ambit of the privileges' protection. This issue was brought before the court in *R v Pearce*²¹⁰ in which it was argued, that Article 8 of the European Convention on Human Rights²¹¹ which lists respect for family life, necessitated that co-habitants be treated the same as married persons, however the court did not accept this argument, choosing instead to restrict non-compellability to certain category of witnesses and highlighting the difficulty the court would experience if it were to distinguish a long term relationship for the purpose of compellability.²¹²

Section 80(2A) and (3) of The Police and Criminal Evidence Act²¹³ sets out exceptions to the spousal non-compellability rule, these include a specific category of offences as listed in section 80(3) (a)–(c),²¹⁴ some of which are cases involving sexual offences, and assault to either the spouse or a child under the age of 16 years including attempts or conspiracy to commit these offences.²¹⁵

The reason for the list of offences for which spouses are compelled to testify was a balancing act by parliament to ensure the protection of the marital relationship and try and address the needs of the public in ensuring crimes are prosecuted effectively.²¹⁶ It was also concerned with crimes associated with sexual abuse and domestic violence. It has been suggested that 'offences

²⁰⁷ Ibid.

²⁰⁸ Section 80(5).

²⁰⁹ Ibid.

²¹⁰ [2002] 1 Cr App R 39.

²¹¹ Article 8 of the European Convention on Human Rights, 1953.

²¹² Supra note 8.

²¹³ Supra note 205.

²¹⁴ Ibid.

²¹⁵ Harris Wendy 'Spousal Competence and Compellability in Criminal Trials in the 21st Century', Vol 3 No 2 (QUTLJJ) Accessed on the lr.law.qut.edu.au website on 11 October 2017.

²¹⁶ Ibid.

involving assault' are defined as more than a simple assault and could include robbery.²¹⁷ As far as the 16-year age provision goes it does create some anomalies, for example a spouse would be compelled to testify in relation to offences committed against a child under the age of 16 irrespective if that child is born out of the marriage or not however if the child is sixteen and above the spouse is a non-compellable witness.²¹⁸

2.5 The adoption of marital privilege in South Africa

The principles that govern marital privilege in both criminal and civil proceedings in South African law can be traced back to our British predecessors. For the purpose of this study focus will be placed on the development of marital privilege in criminal proceedings.

The Cape colony first introduced spousal non-compellability in South Africa through the formulation of Ordinance No 72 of 1830.²¹⁹ This merely confirmed the position as adopted in English law, that spouses were both incompetent and non-compellable witnesses.²²⁰

In 1886 this area of the law progressed through the enactment of section 6 of the Administration of Justice Act ²²¹by the Cape legislature which read as follows:

*"In any proceeding against any persons for any crime or offence, such person and the wife or husband, as the case may be, of such person may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case."*²²²

This time around the Cape legislature appeared to be ahead of their English counterparts who only passed a similar provision in 1898 in the form of the Criminal Evidence Act.²²³

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Section 14 provided: "And be it further enacted and declared, that no person shall, in any case be competent or admitted to give evidence for or against the husband or wife of such person, or to give evidence in any case in which the husband or wife of such person shall be tried for any crime or offence together with any other person."

²²⁰ Section 3 of the Evidence Amendment Act (1853)

²²¹ Act No 13 of 1886.

²²² Ibid.

²²³ Supra note 18.

In 1859, Natal followed the Cape colony in its adoption of marital privilege by enacting Law 17 of 1859 exactly as laid out in English law.²²⁴ The law was developed further in 1888 and spouses of accused were now regarded as competent but not compellable witnesses in criminal proceedings.²²⁵ Through this development it appeared that the right to invoke marital privilege was therefore given to the testifying spouse who could decide to divulge confidential marital communications or not.²²⁶ This was different to the position adopted by the Cape colony in which the holder of the right remained the spouse who had made the communication as it was the accused who had the right to determine if the spouse was fit to testify and thus the accused spouse had a choice whether to call the other spouse as a witness or not.²²⁷

The Orange Free State²²⁸ and Transvaal²²⁹ took a different approach than that of the Cape and Natal and went a step further to extend the privilege to a divorced person in relation to communications made during the marriage.²³⁰

The different approaches adopted by the colonies in South Africa would overtime become problematic and perhaps the lawmakers had reasonable foresight that this was an eventuality. Presumably to remedy this situation the Criminal Procedure and Evidence Act²³¹ came into operation on 1 January 1918. This piece of legislation sought to consolidate the different rules adopted by the colonies in respect of evidence and procedure.

Marital privilege was made provision for, in section 296 of the Criminal Procedure and Evidence Act.²³² Section 296 (1) was a modification of section 4 of the Cape Act.²³³ Section 296(2) was a re-enactment, with modifications, of section 19 of the old Law of Evidence Ordinance²³⁴. Section 296 was re-enacted as section 229 of the Criminal Procedure Act.²³⁵ This

²²⁴ Ibid.

²²⁵ S 1 Law 37 of 1888-Natal.

²²⁶ Supra note 21 at page 22.

²²⁷ S 6 Act No 13 of 1886 Cape.

²²⁸ Ordinance No 1 1 of 1 902.

²²⁹ Ordinance No 16 of 1 902.

²³⁰ Supra note 21 at page 23.

²³¹ Act No 31 of 1917.

²³² Ibid.

²³³ Act No 4 of 1861.

²³⁴ Ordinance 72 of 1830.

²³⁵ Act No 56 of 1955.

section was in turn re-enacted, with verbal modifications, as the current section 198 of the CPA.²³⁶

The provisions of these sections reinforced that a spouse may not be compelled to testify in so far as the evidence relates to marital communications made while the marriage relationship subsisted, and that marital privilege was extended to include divorced persons where the marriage no longer existed due to dissolution or annulment by a court competent to do so.²³⁷

The adoption of the CPA²³⁸ saw the inclusion of section 195 and section 198 of the CPA.²³⁹

Section 195 of the CPA²⁴⁰ provided as follows: *“the wife or husband of an accused shall not be competent to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with. . . .”*²⁴¹ The CPA in the form of section 195 made provision for a list of offences for which a spouse may be compellable and therefore was unable to rely on the protection of marital privilege.²⁴²

Spouses were only declared to be competent and non-compellable in 1988 when section 195 and section 196 of the CPA²⁴³ were amended by subsection 6 and 7 of the Law of Evidence Amendment Act²⁴⁴. Section 198 of the CPA²⁴⁵ provided as follows: *“No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”*²⁴⁶

The current position remains that a spouse is both competent and compellable to tender evidence on behalf of the accused spouse. However, when required to testify on behalf of the prosecution the testifying spouse is only compellable in the instance where the accused has

²³⁶ Supra note 2.

²³⁷ Supra note 21.

²³⁸ Ibid.

²³⁹ Supra note 2.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Supra note 8.

²⁴³ Supra note 2.

²⁴⁴ Act No.45 of 1988.

²⁴⁵ Supra note 2.

²⁴⁶ Ibid.

been charged with an offence that falls within a specific category listed under section 195 of the CPA.²⁴⁷

2.6 Conclusion

The origins of marital privilege reflect that it is a law that is premised on an outdated and primitive biblical notion that clearly is inconsistent with many principles of our law today particularly the right to equality. Despite the serious flaws evident within the privilege it has persistently remained intact through centuries of legal development and reform and even up until today enjoys more protection than those afforded to other categories of witnesses. The question remains as to whether marriage still deserves the privilege our law has guaranteed it, is it a concept that remains worthy of the pedestal that the law has placed it on?

South Africa has adopted the same principles as that of the English in entrenching marital privilege within our law.²⁴⁸ Thus, we have inherited the same criticism as our English counterparts that the privilege is outdated and excludes the modern definitions of relationships which in the current day is varied and far reaching. This chapter has revealed that marital privilege has moved away from a reflection of divine law from which it originated and instead is seen to reflect an antiquated notion that excludes the realities of the modern day. The law reform commissioners in England reaffirmed this when it recommended that the privilege in civil proceedings be abolished stating that “*it is unrealistic to suppose that candour of communication between husband and wife is influenced today by the statutory provisions.*”²⁴⁹ The discussion in the next chapter will be focused on the South African legal position in respect of marital privilege. It will examine the relationship between the current legislative framework and the constitution.

²⁴⁷ Supra note 21.

²⁴⁸ Supra note 21.

²⁴⁹ Law Reform Commission, Privilege in Civil Proceedings, Report No 16 (1967) 7.

CHAPTER THREE

LEGISLATIVE FRAMEWORK IN SOUTH AFRICA

3.1 Introduction

Any study of marital privilege necessitates an analysis of the legal framework out of which this privilege operates. In this chapter, a discussion will follow on the provisions of the CPA²⁵⁰ as they relate to marital privilege and its constitutionality. A brief study on how the courts have approached marital privilege in light of case law will also be undertaken.

It is imperative from the inception to analyse the differences between the compellability of a testifying spouse for the defence and on behalf of the prosecution. In respect of the defence, the spouse of an accused is competent and compellable.²⁵¹ In relation to a co-accused, the testifying spouse, is competent but non-compellable.²⁵² With regard to testifying on behalf of the prosecution the spouse of an accused is a competent witness but as a rule cannot be compelled to testify in this capacity unless the crime falls within a specific category as set out in section 195 of the CPA.²⁵³

3.2 Section 195 of the Criminal Procedure Act²⁵⁴

The spouse is therefore both competent and compellable only where the accused is charged with a crime falling within the categories as set out in the provisions of section 195 of the act listed below:

“(a) Any offence committed against the person of either of them or of a child of either of them.”

“(b) Any offence under Chapter 8 of the Child Care Act 1983 committed in respect of any child of either of them.”

“(c) Any contravention of any provision of s 31(1) of the Maintenance Act 1998, or of such provision as applied by any other law.”

²⁵⁰ Supra note 2.

²⁵¹ Du Toit, *Commentary on the Criminal Procedure Act*, 4th Ed, 2016, ch 22-p 456.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Supra note 2.

“(d) Bigamy.”

“(e) Incest as contemplated in s 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.”

“(f) Abduction.”

“(g) Any contravention of any provision of s 2, 8, 10, 11, 12, 12A, 17 or 20 of the Sexual Offences Act 1957.”

“(g A) any contravention of any provision of s 17 or 23 of Act 32 of 2007 as referred to in (e) above; “

“(h) Perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection.”

“(i) The statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in (h) above.”

The development of a category of offences that deem spouses compellable witnesses, is in terms of the ‘removal of choice’ argument.²⁵⁵ The rationale is that by forcing a spouse to testify, the likelihood that the accused would unduly pressurise the testifying spouse into not giving evidence, is reduced.²⁵⁶ Further it would prevent the testifying spouse from being put in a compromising position where that spouse would have to make the personal choice to testify against the accused, thereby creating a situation where that spouse could face reprisal creating a disharmonious situation in the home environment.²⁵⁷

It would appear that the main objective of marital privilege and particularly the creation of a category of offences in terms of section 195 of the CPA²⁵⁸ is that the marriage would remain protected.²⁵⁹ The fact that the spouse is compelled to testify in terms of these offences means that he or she would be less susceptible to harm from the accused because the testifying spouse is giving evidence because he or she is being forced to testify and not of their own volition.²⁶⁰ However, this argument does not hold much weight in that the offences that are covered by

²⁵⁵ Supra note 8 at pg. 332.

²⁵⁶ AAS Zuckermann Principles of Evidence (1989) 290.

²⁵⁷ Supra note 8 at pg. 332.

²⁵⁸ Supra note 2.

²⁵⁹ Supra note 8.

²⁶⁰ Ibid.

section 195 of the CPA could in any event lead to the destruction of the marriage whether she is compelled to testify or not as most of the offences affect the marriage directly or indirectly as it may relate to the spouse or their children.²⁶¹ Thus, it is submitted that the existence of a category of offences bears no specific relevance.²⁶² Therefore, it is argued that there remains no reason why the spouse should not be subjected to the same rules as any other competent witness and be compellable for all matters not just those subject to the categories as per section 195 of the CPA.²⁶³

The second reason for the creation of a category of compellable offences is that it would serve the public interest not to allow the accused to escape liability on the basis of spousal non-compellability.²⁶⁴ It would certainly be difficult to justify why certain crimes were not being prosecuted on the basis of non-compellability of spouses therefore it would appear that in an attempt to alleviate public outcry the legislators decided that for certain offences spouses would be made compellable. In ensuring that there are certain crimes that will not be subject to spousal non-compellability it creates the impression that the interests of justice are being served.²⁶⁵ In theory this may appear to be the case but in practice it is highly debatable.

The inclusion of a list of offences that are exempted from spousal non-compellability appears to have been a meagre attempt to reform marital privilege in South Africa. While noteworthy, the problems associated with such a list is deserving of consideration.

The New Zealand Law Commission²⁶⁶ paid particular attention to the difficulties encountered with such a list and the operation of the spousal non-compellability privilege in its law and as a result thereof sought to abrogate the privilege in its entirety from the common law through the release of a Draft Evidence Code.²⁶⁷ Although the Draft Evidence Code²⁶⁸ is yet to be adopted by parliament the New Zealand Law Commission's²⁶⁹ comment in relation to a list of

²⁶¹ Ibid.

²⁶² PJ Schwikkard and SE van der Merwe *Principles of Evidence* 2ed (2002) 398.

²⁶³ Supra note 8.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ The New Zealand Law Commission, *Evidence*, Report No 55 (1999) 78.

²⁶⁷ Draft Evidence Code s 61(4)(b) 1999.

²⁶⁸ Ibid.

²⁶⁹ The New Zealand Law Commission *Evidence Law: Privilege* Preliminary Paper No 23 (1994)103.

category of offences for which spouses are compellable witnesses is noteworthy, it stated the following:

*“ . . . These lists of specified offences require decisions by law-makers on competing public interests that are too broad, and too reliant on intuition rather than information on actual costs. The evolution of such lists in other jurisdictions has also shown that over time arbitrary distinctions develop. They create the potential for complex procedural problems at trials which involve several charges, not all of which involve listed offences. These problems are exacerbated if there is more than one accused.”*²⁷⁰

Section 195 of the CPA²⁷¹ is no exception to the above and appears to be plagued with its own set of problems. Firstly, the list fails to incorporate many serious offences such as murder.²⁷² The list appears to place importance on familial relationships over other persons, thus a spouse can be compelled to testify about the abuse or assault of their own child but not about the abuse or assault of somebody else’s child.

An additional problem is that our courts have restrictively interpreted the term ‘offence against the person’,²⁷³ which generally is taken to mean the crime of assault.²⁷⁴ The question remains as to whether this may be in line with the original purpose of the legislature. Du Toit²⁷⁵ suggests there appears to be no reason why this provision should not include other crimes, particularly those that infringe personality rights such as *crimen injuria*. This certainly exposes the interpretational difficulties encountered with section 195.

The term ‘spouse’ under section 195 includes divorced persons provided that the testifying spouse is required to give evidence pertaining to events during the subsistence of the marriage. This was decided in the case of *S v Taylor*²⁷⁶ when the court stated that the words “wife or husband” contained in section 195 and section 196 of the CPA,²⁷⁷ include divorced persons when required to give evidence regarding events during the marriage.²⁷⁸

²⁷⁰ Ibid.

²⁷¹ Supra note 2.

²⁷² Supra note 8.

²⁷³ Section 195(1)(a).

²⁷⁴ Supra note 252.

²⁷⁵ Ibid.

²⁷⁶ 1991 (2) SACR 69 (C).

²⁷⁷ Supra note 2.

²⁷⁸ Supra note 8.

The rationale behind extending the non-compellability privilege to include former spouses is, that should divorced persons not be included, than it would be mean that the principle of incompetence in respect of former spouses would be applicable.²⁷⁹ This would create an untenable situation which would clearly not have been in line with the legislative purpose. Thus, the inclusion of former spouses in the interpretation of section 195 of the CPA²⁸⁰ appears to be in accordance with the purpose of the legislature and according to Du toit²⁸¹ an appropriate decision.²⁸² It would not be logical to have spouses compellable in terms of section 195 of the CPA²⁸³ and former spouses non-compellable when marital privilege in terms of section 198 of the CPA²⁸⁴ is afforded to both current and former spouses of an accused.²⁸⁵

A further problem encountered is when an accused is faced with numerous charges and a testifying spouse is a compellable witness for some and not all of these charges.²⁸⁶ It has been proposed that the situation could be alleviated by trying the compellable offences separately from the non-compellable offences.²⁸⁷ This however may not be practical where the material facts in dispute are inter related to the other offences as well as when one considers the costs and time delays that may occur in the separation of these trials due to non-compellability.²⁸⁸

3.3 Section 198 of the Criminal Procedure Act²⁸⁹

In South Africa spousal non-compellability as it relates to criminal proceedings is given effect to in section 198 of the CPA²⁹⁰. The section provides as follows:

²⁷⁹ Supra note 8.

²⁸⁰ Supra note 2.

²⁸¹ Supra note 51.

²⁸² Ibid.

²⁸³ Supra note 2.

²⁸⁴ Ibid.

²⁸⁵ Supra note 8.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Supra note 2.

²⁹⁰ Act No.51 of 1977.

*“No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”*²⁹¹

3.3.1 *The holder of the privilege*

According to section 198 of the CPA,²⁹² the accused spouse cannot claim spousal non-compellability. Thus, it is the spouse to whom the communication is made who is left with the decision to testify or not which does not require the approval of the accused spouse as it is the testifying spouse that is the holder of the privilege.²⁹³ This is in stark contrast to the principles that govern other privileges in South African law.²⁹⁴

The two most distinguishable features are that in all other privileges, it is the accused person that is the holder of the privilege and therefore must give consent in order for the privilege to be waived.²⁹⁵ An example of this can be found in legal professional privilege where the accused is the person that can decide to invoke or waive the privilege.²⁹⁶ The second feature flows from the first in that, the holder is the person who will benefit from the existence of the privilege and thus it is communications made by the holder that is sought to be protected.²⁹⁷

The question then arises, is the spouse to whom the communication is made, the rightful holder of marital privilege?

In *Rumping v DPP*²⁹⁸ Lord Reid notes:

“It is a mystery to me why it was decided to give this privilege to the spouse who is a witness: it means that if that spouse wishes to protect the other he or she will disclose what helps the other spouse but use this privilege to conceal communications if they would be injurious, but on the other hand a spouse

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Supra note 8.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ *Rumping v DPP* [1962] 3 All ER 256.

*who has become unfriendly to the other spouse will use this privilege to disclose communications if they are injurious to the other spouse but conceal them if they are helpful.*²⁹⁹

If one is to adopt the general approach with regard to all other privileges than one could argue that the rightful holder of the privilege should be the accused spouse as he or she is the person who has made the communication and as a result he or she can be the only person that may consent to the disclosure of such communication.³⁰⁰ However, another suitable alternative, is that both the testifying spouse and accused spouse be made the joint holders of the privilege, due to the fact that the communications are subject to a marital contract therefore both share the right to waive the privilege.³⁰¹

Both these arguments are compelling as it is clear that affording the testifying spouse the privilege at the exclusion of the accused is not in accordance with all other privileges. It is certainly illogical to ignore the accused spouse, as the one who is deserving of the protection of the privilege and give all power to the testifying spouse as the holder of the right. There always remains the risk that there may be an abuse of such power as pointed out in *Rumping v DPP*.³⁰² Particularly in instances where the relationship has soured, and the testifying spouse seeks revenge against the accused spouse. The accused who has made the confidential communication therefore remains unprotected.³⁰³ In all other privileges it is the person who made the communication that is protected, and the privilege therefore operates to that person's benefit.³⁰⁴

3.3.2 Former spouses/divorced persons

Marital privilege extends to former spouses, it can therefore, be invoked after the dissolution of the marriage although it is only applicable to communications disclosed while the marital relationship was in existence.³⁰⁵ Section 198 (2) of the CPA³⁰⁶ provides that the privilege does

²⁹⁹ Ibid at 259 par E.

³⁰⁰ Supra note 8.

³⁰¹ Ibid.

³⁰² Supra note 298.

³⁰³ Supra note 8.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Supra note 2.

not apply to widows and to those former spouses whose marriage was dissolved extrajudicially.³⁰⁷ The main justification for the privilege has always been the protection of the marriage and yet the privilege extends where the marriage is no longer in existence. There is no valid reason as to why it may be necessary for the privilege to be extended to former spouses as the marital harmony is no longer at risk and there is no conjugal relationship that may be harmed should a former spouse be compelled to testify.³⁰⁸ The fact that divorced persons are included under the ambit of protection in terms of marital privilege is therefore illogical and baseless. The ideal approach would be to determine marital status when the spouse is required to give evidence and not when the communications were made.³⁰⁹ This would then be in line with the justification advanced for the development of marital privilege which is to protect the marital relationship and guard against the destruction of the marriage. There is no marital relationship to protect once the marriage is dissolved thus it is unfathomable why the law would still allow the privilege to persist upon the termination of the marriage.

3.3.3 *Third parties*

Any other person that hears the confidential communications between spouses can testify against the accused spouse and cannot be forced or prevented from doing so.³¹⁰ Although some have argued that this may be a contravention of the right to privacy³¹¹ it is widely accepted that it is in the interest of society that such communications be heard by the courts.³¹² It is submitted that it would cast the net too wide if third persons who overheard the confidential communication between spouses were afforded a privilege against testifying and would make it difficult for legislators to draw the line, thus third persons should be treated as any other category of witnesses.³¹³ This appears more logical and in line with the justification of the privilege which is to protect the marriage and not the accused spouse.

³⁰⁷ Zeffert, Paizes and Skeen, *The South African Law of Evidence*, 2003 at pg 621.

³⁰⁸ *Ibid.*

³⁰⁹ *Supra* note 8.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Supra* note 1 at 50

³¹³ *Supra* note 8.

3.4 The constitutionality of marital privilege

Over the years the constitutionality of marital privilege has become questionable.³¹⁴ Spouses under South African law are defined as “a party to a marriage that is recognised as valid in law and not beyond that”.³¹⁵ Section 198 bestows a privilege on a husband or wife, thereby affording protection only to persons that are in a marital relationship that is recognised by law. The privilege does not make provision for persons that are in permanent life partnerships and co-habitants whether heterosexual or same sex, and also excludes those persons who choose not to marry or are prevented from doing so legally.³¹⁶

A pertinent argument raised is that even such persons are deserving of protection in respect of the confidential communications they share.³¹⁷ Is it necessary to distinguish between a marriage and other types of relationships for the purpose of compellability? It is submitted that the answer to this question is no. It has been argued that the concept of marriage is just one type of partnership and that marriage is beyond the control of an individual.³¹⁸

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*³¹⁹ the following was noted:

*“Courts may say, in response to heterosexual cohabitants, that they chose not to marry and cannot ask for assistance from the courts once they exercised this choice. One response to this is that “choice” must be understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people, especially poor women.”*³²⁰

Many calls have been heeded to extend the definition of spouses to include life partners this has resulted in numerous cases and statutes in South Africa giving recognition to partners by broadening the definition of relationships to include partners and not only spouses.³²¹ Marital

³¹⁴ In *S v Louw* supra at 726b Van der Westhuizen J notes that s 195 of the Act might be unconstitutional.

³¹⁵ *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at 7B; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

³¹⁶ Supra note 8.

³¹⁷ Ibid.

³¹⁸ JD Payne and MA Payne, *Canadian Family Law, Marriage* (2001).

³¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

³²⁰ Ibid at para 36.

³²¹ Supra note 8.

privilege differentiates between married persons and those who are not married and as a result finds itself at odds with the Constitution.³²²

3.4.1 *The right to equality*

The right to equality is of paramount importance to our democracy and is therefore one of the foundational rights within the Constitution. In *Satchwell v President of the Republic*³²³, Madala J refers to *President of the Republic of South Africa*³²⁴, where Goldstone J noted the following:

*“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or her.”*³²⁵

Forming part of this constitutional vision is the recognition that all South Africans form part of a diverse society which is made up of different relationships that do not always fit the mould of a conventional marriage. It is the equality of all South Africans that contribute to this diversity that the Constitution seeks to protect.

Section 9 (the ‘equality clause’, as it is known) states the following:

“(1) everyone is equal before the law and has the right to equal protection and benefit of the law.”

‘(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

“(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

“(4) No person may unfairly discriminate directly or indirectly against anyone on one or

³²² Ibid.

³²³ Supra note 136.

³²⁴ 1997 (4) SA 1 (CC).

³²⁵ Ibid at para 41.

more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

“(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”³²⁶

Naude³²⁷ highlights that the test for a violation of the equality clause is set out in *Harksen v Lane NO and others*³²⁸ and is as follows.³²⁹

1. “Does the relevant provision differentiate between people or categories of people?”
‘If it does, does the differentiation bear a rational connection to a legitimate government purpose’? If it does not, then there is a violation of section 9(1). Even if there is such a connection, it might still amount to discrimination in terms of section 9(3) or (4).³³⁰
2. “Does the differentiation amount to unfair discrimination?”
3. “This requires a two-stage enquiry:
 - (i) First, does the differentiation amount to ‘discrimination’? If the discrimination is on a specific ground, then it will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”³³¹
 - (ii) “If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specific ground, then unfairness will be presumed. If it has been on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in a similar situation. If this stage of the inquiry finds the differentiation not to be unfair, there will be no violation of subsections (3) and (4).”³³²
4. “The second stage is to determine if the provision can be justified under the limitation clause.”³³³

³²⁶ Supra note 36.

³²⁷ Supra note 8 at pg.339.

³²⁸ Supra note 44.

³²⁹ Ibid at par 54.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

In terms of the first stage of the enquiry it is submitted that the provisions of section 198 of the CPA³³⁴ makes a distinction between married persons and unmarried persons.³³⁵ It is argued however that such a differentiation is justified as a rational government objective and as a result thereof is not necessarily a violation of section 9(1) of the constitution.³³⁶

On application of the second stage of enquiry the differentiation on the basis of marital status is unfair discrimination.³³⁷ Further, the fact that marital status is included as a specified ground in terms of section 9 (3) of the constitution³³⁸ means that unfairness is presumed and a prima facie violation of section 9(3) has indeed occurred.³³⁹ However discrimination is not automatically deemed to be unfair.³⁴⁰ In *Harksen v Lane*³⁴¹ the court stated that in deciding this issue , the impact that such discrimination on the victim must be considered by taking into account a number of factors which should be assessed objectively in respect of its cumulative effect.

*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*³⁴² dealt with unfair discrimination based on marital status, in this case, the constitutional court held that the provisions of the Aliens Control Act³⁴³ which granted spouses of South African citizens a right to an immigration permit amounted to unfair discrimination on the basis of marital status. The provisions of the Aliens Control Act,³⁴⁴ much like section 198 of the CPA³⁴⁵ differentiated between married persons and those that were not married in that it granted a benefit to spouses that was not available to unmarried category of persons which included life partners and co-habitants.³⁴⁶

³³⁴ Supra note 2.

³³⁵ Supra note 8.

³³⁶ Ibid.

³³⁷ Ibid at pg.339.

³³⁸ Supra note 36.

³³⁹ Supra note 8.

³⁴⁰ Ibid.

³⁴¹ Supra note 44.

³⁴² Supra note 319.

³⁴³ Act No.96 of 1991.

³⁴⁴ Ibid.

³⁴⁵ Supra note 2.

³⁴⁶ Supra note 8 at pg. 341.

The Constitutional Court also highlighted that the manner in which the protection of the traditional marital regime is carried out must not unjustifiably limit the constitutional rights of life partners in same sex relationships.³⁴⁷ There appears to be no rational connection between the justification for the existence of marital privilege which is to ensure the marital relationship is protected and the exclusion of life partners from the privilege provided for in terms of section 198 of the CPA.³⁴⁸

The third and final stage of the enquiry deals with whether section 198 of the CPA³⁴⁹ is a justifiable limitation in terms of section 36 of the constitution.³⁵⁰ If the limitation cannot be justified than the provisions of section 198 should be declared unconstitutional.³⁵¹

Section 36³⁵² highlights certain criteria which tests the constitutional justification of a right. A right is justifiably limited when it is said to be “*reasonable and justifiable in an open and democratic society based on equality, freedom and human dignity.*”³⁵³ In this regard section 36(1) (b) and subsection (1)(d)³⁵⁴ provides a guiding threshold in the form of a test that measures whether there is a reasonable and justifiable balance of competing rights.³⁵⁵ These sections operate to (1) determine whether there is a legitimate purpose in restricting a practice and (2) determine whether a connection exists between the limiting measure and what it purports to achieve.³⁵⁶ It would appear therefore that section 198 is not a justifiable limitation of the right to equality.

*The Constitutional Court (CC) in Ex Parte Chairperson of the Constitutional Assembly: In re Certificate of the Constitution of the Republic of South Africa*³⁵⁷ emphasised the point that the right to marry was not a constitutionally protected right unlike the right to equality.³⁵⁸ Thus the

³⁴⁷ Supra note 136.

³⁴⁸ Supra note 2.

³⁴⁹ Supra note 2.

³⁵⁰ Supra note 31.

³⁵¹ Supra note 8.

³⁵² Supra note 31.

³⁵³ J Burchell, *Principles of Criminal Law*, 4 ed (2013) (See Fn 61) 320

³⁵⁴ Supra note 31.

³⁵⁵ Supra note 8.

³⁵⁶ Ibid.

³⁵⁷ 1996 (4) SA 744 (CC) at 806.

³⁵⁸ Supra note 8.

importance attached to the right to equality would be much higher than that of marriage. The slightest suggestion that they were equal in any measure would be preposterous.

It, therefore, follows that, when comparing the right to equality to that of the exclusive right to marital privilege, section 9 of the Constitution³⁵⁹ clearly dictates that a spousal communication privilege is unconstitutional.³⁶⁰

3.5 The right to privacy

The right to privacy is another argument advanced in justification for the existence and preservation of marital privilege. While it is argued that the right to privacy should not be disregarded in its entirety it certainly is not compelling enough against the right to equality as highlighted above. Noteworthy is the argument advanced by Naude³⁶¹ that to afford an exclusive consideration of the right to privacy in respect of spousal privilege will create an anomalous situation.³⁶² This is best illustrated through a practical example:

A, the spouse of Y witnesses a murder of a child and will be compelled to testify as to the murder. The situation would be different if A did not witness the crime but Y admitted to A that he had murdered a child, as a recipient of such information A would not be forced to testify against Y.³⁶³

It is submitted in support of the view favoured by Naude³⁶⁴ that there is no distinction between communications where a crime has already been perpetrated and communications about the planning of a crime.³⁶⁵ In both these instances a spouse should be compellable.³⁶⁶

³⁵⁹ Supra note 31.

³⁶⁰ Supra note 8 at pg.342.

³⁶¹Supra note 8 at pg. 349.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid

³⁶⁵ Ibid.

³⁶⁶ Ibid.

3.6 *An interpretation of spousal non-compellability by the courts of South Africa*

South African courts have dealt with a limited amount of cases that relate to spousal competence and non-compellability. A brief discussion of a few of these cases in respect of the principles they have expounded will follow.

In *S v Leepile and Others*³⁶⁷ the court held that the exact time when events occurred is irrelevant, therefore it does not matter that at the time of the incident in question the testifying spouse was not married to the accused. In this case the court also found that a marriage entered into during an adjournment in proceedings under section 189 (1) of the CPA³⁶⁸ was held to be valid for the purposes of section 195 (1) of the CPA³⁶⁹ even though the motive of the parties in entering into the marriage was to afford the witness a 'just excuse' for refusing to answer questions put to her in terms of section 189 (1) of the CPA³⁷⁰.

The court in *R v Algar*³⁷¹ held that former spouses were competent but not compellable to testify about events which took place during the marriage. Where the marriage has terminated or been annulled the reason therefore is not relevant unless the marriage was declared void ab initio, in which event no marriage existed at the time of the occurrence of the events.³⁷²

In the case of *S v Mgcwabe*³⁷³ the court looked at whether the fact that the marriage relationship had been severely damaged negated the immunity afforded to a testifying spouse and the court answered that it did not.³⁷⁴

The court stated that section 195(1) gives the spouse “*An absolute right to make an election not to testify*”; *it does not provide that a spouse shall not be compellable to give evidence 'only if this is necessary to preserve the marriage relationship.'*”³⁷⁵

³⁶⁷ Supra note 78 at 332.

³⁶⁸ Supra note 2.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ 1963 (2) QB 799.

³⁷² Ibid.

³⁷³ Supra note 75.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

In *S v Louw*³⁷⁶ the court found that the fact that the accused intended to marry an essential state witness before the commencement of the trial, and that as a result thereof the witness would become non-compellable in terms of section 195 of the CPA³⁷⁷, was not a justifiable reason for refusing to grant the accused bail.

In *S v Vengetsamy*³⁷⁸ a woman, married in accordance with Hindu rites, was regarded as a non-compellable against her husband on the ground that the marriage was a monogamous union and constituted a valid marriage even though it was customary in nature. The court in *S v Johardien*³⁷⁹ however, was of the view that the decision in *Vengetsamy*³⁸⁰ was incorrect and did not follow it. The position has since changed with the adoption of subsection (2) of Act 18 of 1996.

3.7 Conclusion

The points of criticism discussed above highlight the need for the revision of the laws that dictate the principles of spousal non-compellability. It is however in the Constitution³⁸¹ that we find the most compelling need for reformation.

South Africa is a country that prides itself in its Constitution.³⁸² It remains the highest law in the land and as a result all other laws and conduct are subject to constitutional scrutiny in order to be validated. Deeply embedded in the Constitution³⁸³ is the fundamental right to equality and section 198 of the CPA³⁸⁴ appears to be in violation of that right.

The purpose of section 198 of the CPA³⁸⁵ is based on policy considerations that have resulted in the elevation of the institution of marriage at the exclusion of all other relationships to a position that it may no longer deserve. An examination of marital privilege in relation to the

³⁷⁶ Supra note 38.

³⁷⁷ Supra note 2.

³⁷⁸ Supra note 86.

³⁷⁹ 1990 (1) SA 1026 (C).

³⁸⁰ Supra note 86.

³⁸¹ Supra note 31.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Supra note 2.

³⁸⁵ Supra note 2.

equality provisions in the constitution³⁸⁶ reveal that it is a concept in our law that fails to pass constitutional muster. It is highly unlikely that the manner in which spouses confide in each other would change if marital privilege did not exist.³⁸⁷

The provisions discriminate on the basis of marital status and can no longer be sustained in this post constitutional era. Amidst the right to equality is the test in terms of section 36 of the constitution³⁸⁸, which sets out the test to determine whether there is a justification for limiting the right to equality. The need to afford spouses a privilege to not testify against an accused spouse over other persons in other relationships which for all intents and purposes amounts to a marital relationship is not a justifiable limitation of the right to equality. While it may be argued that marital privilege remains an important part of our criminal justice system the question that must be asked is at what expense? It is a privilege that is certainly not absolute as it is an obstruction to the truth-seeking process. The dilatory tactics adopted by the legislators in not giving the problems associated with the privilege adequate attention, has resulted in an abandonment of its obligation to uphold the right to equality. While the future of marital privilege remains to be seen, if the constitution is to be taken seriously it is a matter that must be given immediate consideration.

A movement towards legal reform in respect of marital privilege will require an examination of developments in foreign jurisdictions as there is little authority on the subject in South Africa. The next chapter undertakes a review of the position in American law and the evolution of spousal non-compellability within its jurisdiction.

³⁸⁶ Supra note 31.

³⁸⁷ Supra note 99.

³⁸⁸ Ibid.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF LEGAL DEVELOPMENTS IN THE UNITED STATES OF AMERICA

4.1 Introduction

Perhaps the quandary that has arisen regarding spousal non-compellability in South African law can best be resolved with a comparative analysis of international law. Our jurisprudence is simply replete with references to international law materials. Thus, it is important to consider the identification and interpretation of marital privilege in foreign jurisdictions. In this chapter the evolution of marital privilege in the United States of America will be discussed.

4.2. Historical development

The first traces of marital privilege in American courts can be found in the case of *Stein v. Bowman*³⁸⁹ in 1839. This marked the introduction of the privilege into federal common law.³⁹⁰ Although as the discussion in chapter one revealed the origins of the privilege date back to medieval times. In American law there were divergent views adopted by both the courts and the legislators in respect of the rule in English common law that spouses were not compellable witnesses for the defence.³⁹¹ According to Wigmore³⁹² who advances the majority American view on marital privilege, while there is a distinct principle that exists in which it is recognised that spouses should not testify against each other it has never been elevated to a separate rule related to spousal non-compellability.³⁹³ This was primarily due to the fact that the evidence of a spouse against an accused spouse would be inadmissible as spouses were not allowed to testify against each other in any event.³⁹⁴ The general principle therefore that spouses were

³⁸⁹ 38 U.S. 209, 223 (1839).

³⁹⁰ JB Routh, Digital pillow talk? Waiving marital privilege at work in *United states v. Hamilton, South Carolina Law Review* vol. 64.

³⁹¹ Ibid.

³⁹² J Wigmore, *Evidence*, 3rd Ed (1940) at pg. 2223.

³⁹³ Supra note 21.

³⁹⁴ Reasons advanced by Barton in note 21 that there was no reason for a separate rule were as follows,

disqualified as witnesses against each other remained intact up until the 19th century.³⁹⁵ It was only abolished in federal courts in 1933 in the case of *Funk v United States*³⁹⁶ when spouses became eligible to testify on behalf of an accused spouse.³⁹⁷ In as much as the court in *Funk* eliminated the rule against spousal competence it maintained that an accused spouse would be able to prevent the other spouse from testifying adversely against him or her.³⁹⁸ This decision saw the general rule of spousal incompetence evolve into the adverse spousal testimony privilege, significantly distinct from spousal disqualification.³⁹⁹

The justification for the privilege being the protection of the marital relationship faced harsh criticism as many commentators viewed this as a benign purpose.⁴⁰⁰ Wigmore termed the privilege “*the merest anachronism in legal theory and an indefensible obstruction to truth in practice.*”⁴⁰¹ This view was supported by the Committee on Improvements in the Law of Evidence of the American Bar association⁴⁰² which sought the abolishment of such a privilege. In 1942 in light of the criticism levied against the privilege, the American law institute in its Model Code of Evidence⁴⁰³ in support of the continued existence of a privilege to protect marital communications, stated that there was no need for the right afforded to an accused spouse to be able to exclude adverse testimony from the other spouse.⁴⁰⁴ This move was closely

(1) “ In most instances where it was desired to make one spouse reveal the communications of the other, such evidence would be against the party-spouse and the evidence would already have been excluded on that ground.”

(2) “Similarly where the party-spouse desired that the communications be revealed on his behalf, then the evidence was excluded on the basis that spouses may not testify for each other.”

(3) “The only instance where evidence of marital communications might not have been excluded in this way was where the spouse was not a party but an indifferent person whose communications to his wife were nevertheless material to the cause.”

³⁹⁵ Supra note 21.

³⁹⁶ 290 U.S 371(1933).

³⁹⁷ Younger et al, *Principles of Evidence*, 3rd Ed, 1997.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ J Wigmore, *Evidence*, 2228 at 221.

⁴⁰² American Bar Association Reports 594-595(1938).

⁴⁰³ American Law Institute, *Model Code of Evidence*, Rule 215(1942).

⁴⁰⁴ Supra note at 397 pg.833.

followed by the Uniform rules of Evidence in 1953⁴⁰⁵ which limited the scope of the privilege to communications made in confidence only.⁴⁰⁶

In Hawkins v United States,⁴⁰⁷ the future of the privilege in federal courts was considered but the court chose to leave the rule intact and interestingly rejected the governments' suggestions of reforming the privilege by making the testifying spouse the holder of the right thereby abrogating control from the accused spouse.⁴⁰⁸ This position has been adopted in terms of South African Law. The court in *Hawkins v United States*⁴⁰⁹ appeared to be reluctant to undertake any serious modification of the rule against adverse spousal testimony and as a result, the privilege remained intact, spouses could therefore not testify against each other unless they both consented.⁴¹⁰ The only exceptions noted are cases in which one spouse commits a crime against the other and in recent times has included crimes against children of either spouse and the property of a spouse.⁴¹¹ The court did however remark that its judgement was not intended to, 'foreclose whatever changes in the rule may eventually be dictated by reason and experience.'⁴¹²

In retrospect it would seem that the court in *Hawkins v United States*⁴¹³ was prophetic in its foresight that reform in this area of the law may be necessitated by reason and experience. This was to come to fruition in the form of the Federal Rules of Evidence 501⁴¹⁴ which gave the courts the power to develop privilege regarding evidence in federal criminal trials.⁴¹⁵ This was to be substituted⁴¹⁶ by a separate set of rules drafted by the Judicial Conference Advisory Committee⁴¹⁶ which contained a total of nine privilege including a husband and wife privilege.⁴¹⁷ The result would have been a codification of the Hawkins rule and an elimination

⁴⁰⁵ Drafted by the National Conference of Commissioners on Uniform state laws, 1953.

⁴⁰⁶ Supra note 397 pg.835.

⁴⁰⁷ 358, U.S 74(1958).

⁴⁰⁸ Supra note 397 at pg.834.

⁴⁰⁹ Supra note 407.

⁴¹⁰ Supra note 397 at pg.834.

⁴¹¹ Ibid.

⁴¹² Supra note 401.

⁴¹³ Ibid.

⁴¹⁴ Federal rules of Evidence 501.

⁴¹⁵ Supra note 397.

⁴¹⁶ Judicial Conference Advisory Committee on rules of evidence.

⁴¹⁷ Supra note 397 at pg. 834.

of the marital privilege. However congress rejected this proposal on the basis that it favoured a flexible approach to marital privilege in allowing courts to determine the rules case by case.

Through the years and since Hawkins, support for the privilege has dwindled.⁴¹⁸ Of the thirty one jurisdictions in which the privilege initially operated there are only 24 states that continue to advocate the need for the privilege.⁴¹⁹ The privilege has been criticised in that it sweeps too broadly and much like South Africa lacks consistency in the wider scope of other privileges.

4.3 Current position

Marital privilege in American law is currently governed covered by the Federal rules of evidence and may differ from state to state depending on statutes.⁴²⁰ In American law spouses are exempted from testifying in respect of certain communications.⁴²¹ The basis for the privilege is the same as in South African law, which is the recognition that a marriage is sacred and therefore should be protected.

The two types of marital privilege recognised by the Supreme court of appeal is testimonial privilege and marital communications privilege.⁴²² According to testimonial privilege, a spouse cannot be compelled to give evidence against an accused spouse in criminal proceedings and it is the witness spouse that is the holder of the privilege.⁴²³ The marital communication privilege relates to acts and words communicated between spouses that are privileged.⁴²⁴ It provides that “*communications between spouses, privately made, are generally assumed to have been intended to be confidential and hence they are privileged...*”⁴²⁵ Through these words it advances the notion that if a communication between husband and wife is made in private with the intention that it remain confidential than the assumption is that such communication would be privileged.⁴²⁶

⁴¹⁸ Ibid at pg.835.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

4.4 Defining Principles of Marital Privilege

There are four principle elements of marital privilege in American law, the first that there must be a communication made, second that there must be the existence of a valid marriage, thirdly the communication must have been confidential and forth, the privilege must not have been waived.⁴²⁷ Marital privilege in American law is applicable to all proceedings irrespective of whether the spouse who made the communication is a party to the proceedings or not.⁴²⁸ This was the view taken by the court in *Dalton v People*,⁴²⁹ in this American case the convicted spouse was found guilty of stealing a car with another accused. She then wrote a letter to her husband while incarcerated. Even though the other spouse had no interest in the proceedings because his spouse was already convicted the court prevented the convicted spouse from revealing the contents of the letter in the accused defence.⁴³⁰

The privilege exists even upon the dissolution of the marriage and its protections extends after death.⁴³¹ Wigmore⁴³² suggests and rightly so that the privilege should be limited in this regard particularly in cases where one spouse wants to utilise the privilege for his or her own defence or material interest in the absence of the deceased spouse.⁴³³

Marital communications as defined in American law relate only to those communications made during the subsistence of the marriage. This is founded on the premise that the privilege exists in law to protect a marital relationship and nothing less. Wigmore⁴³⁴ infers that communications between spouses that are separated are covered under marital communications as the marriage remains legally valid. However, in the Model Code of Evidence⁴³⁵ enacted in 1942 'spouses' excludes husband and wives that are separated. Barton⁴³⁶ argues that it is illogical to exclude spouses who are separated from the protection of the privilege.⁴³⁷ In South

⁴²⁷ Supra note 390 at pg.1150.

⁴²⁸ Supra note 397.

⁴²⁹ 189 Pac 37(1920).

⁴³⁰ Supra note 397.

⁴³¹ Supra note 21.

⁴³² Supra note 401.

⁴³³ Supra note 21.

⁴³⁴ Supra note 401.

⁴³⁵ Model Code of Evidence 1942.

⁴³⁶ Supra note 21.

⁴³⁷ Ibid.

Africa the privilege covers spouses that are separated, this can be inferred from the provisions of section 198(1) and (2) of the CPA⁴³⁸ which make reference to ‘husbands’ and ‘wives’ and the fact that in our law the privilege includes former spouses.

4.5 Pre-marital communications

Pre-marital communication is not regarded as privileged. However, in American law there appears to be differing views in lower federal courts whether the privilege covers communications made while spouses were married but only communicated afterwards.⁴³⁹ A practical example would be where A writes a letter to B during their marriage but directs that such letter only be opened upon the death of A.⁴⁴⁰ Is that communication deserving of protection under marital privilege when the marriage relationship has been terminated? This question was answered in the case of *New York Life Ins Co v Ross*⁴⁴¹ where the court held that such communication is covered by marital privilege, the fact that it was only communicated after the marriage did not affect the fact that such communication was made during the subsistence of the marriage.⁴⁴² It therefore appears that the applicable test would be to examine the intention of the communicating spouse at the time when the communication was made. The question therefore is, was it intended to be a communication during the marriage but delivered after death or one that was to be regarded as a post marital communication? The latter of course as laid out in the case of *Mullin-Johnson Co v Penn Mutual Life Ins Co*⁴⁴³ would not be deserving of protection under marital privilege.⁴⁴⁴

Even though premarital communications are generally excluded from marital privilege it is presumed that where such communication would require one spouse to testify against the other than such testimony would be regarded as adverse and excluded.⁴⁴⁵ If, however the marriage is no longer in existence than the court would admit such evidence.⁴⁴⁶ In instances where the

⁴³⁸ Supra note 2.

⁴³⁹ Supra note 21.

⁴⁴⁰ Ibid.

⁴⁴¹ 30 F 2d 80.

⁴⁴² Supra note 21 at pg.27.

⁴⁴³ (1933 DC Cal) 2 F Supp 203.

⁴⁴⁴ Supra note 21 at pg.26.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

communication was made before marriage but intended to be delivered after marriage it is regarded as marital communication.⁴⁴⁷

This is perhaps best illustrated through a practical example used by Barton⁴⁴⁸, A writes a letter to his future bride B but indicates that the letter is only to be opened after they are married. Clearly the intention of A being the communicating spouse is that the communication be delivered after the marriage.⁴⁴⁹ Thus, it is logical that such communication should be protected in terms of marital privilege.

4.6 Confidential communications

In addition to the requirement that the communications must be made during the marriage, American law also requires that the communication be confidential.⁴⁵⁰ This is in stark contrast to South African and English law where the privilege protects ‘any communication’. In support of the confidential requirement, Wigmore⁴⁵¹ pointed out that the purpose of marital privilege is to, “to ensure subjectively the unrestrained privacy of communication is not intended to be a private one the privilege has no application to it.”⁴⁵²

As compared to the position adopted by South Africa and the English who have been reluctant to make a distinction between confidential communications and general communications, the Americans have boldly limited the privilege to only include confidential communications between spouses. Barton⁴⁵³ advances that there is no logical basis for the requirement that every single communication made between husband and wife should be excluded by virtue of marital privilege.⁴⁵⁴ There is merit in this argument. He cites Wigmore⁴⁵⁵ in this regard and points out the impracticality of such a blanket provision particularly in matters where spouses are business

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid.

⁴⁵¹ Supra note 401 s2336.

⁴⁵² Supra note 21.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Supra note 401.

partners and required to prove contracts this may be an impossible task if “any communication” between them would be privileged.⁴⁵⁶

The primary difficulty with this distinction is the arduous task of determining whether a communication is confidential or not. Barton,⁴⁵⁷ alluding to the difficulties encountered by the English courts in this regard, suggests that the test that should be applied to determine admissibility of a confidential communication should be objective.⁴⁵⁸ The suggestion put forth by Wigmore⁴⁵⁹ appears to be more appealing, he maintains that the starting point should be a presumption that all communications made during a marriage are confidential unless it can be proven otherwise.

Thus, the presumption favours confidentiality and once again highlights the efforts of American legislators to protect the interests of the communicating spouse.⁴⁶⁰ It is in this very principle that we find American law antithetical to South African and English law. In South Africa and England there is no protection that is provided to the spouse who made the communication as it is the spouse to whom the communication is made, that remains the holder of the privilege.

4.7 Third party

Another noteworthy comparison is where a third party overhears the exchange of confidential communications between spouses. Is the communication still privileged now that the third party is involved? The case of *Wolfe v United States*⁴⁶¹ is deserving of discussion in this regard. The facts briefly are that a spouse had read out a letter to his stenographer for typing addressed to his wife. The evidence that was being sought by the prosecution was the contents of such letter through the notes of the stenographer. The court relied on the common law in reaching its decision stating that competency in federal trials were dictated by common law and not statute. Barton⁴⁶² suggests that this judgment indicates the divergent views that Americans take

⁴⁵⁶ Supra note 21.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Supra note 401.

⁴⁶⁰ Supra note 21.

⁴⁶¹ 291 U.S. 7, 14 (1934).

⁴⁶² Supra note 21.

of English common law.⁴⁶³ The court stated the immunity granted by marital privilege is vital to the preservation of the marriage and as such outweighs any negative effects on the administration of justice.⁴⁶⁴ The court did not decide the issue on whether the communication was confidential or not but focused on the confidential communications when a third party is privy to such communication. The court reached the decision that the communication was not privileged as the spouses could have communicated with each other freely and easily without the help of the stenographer if they had wanted the communication to remain confidential.⁴⁶⁵ The court held the following,

‘The privilege suppresses relevant testimony and could be allowed only when it is plain that marital confidence can otherwise not reasonably be preserved. Nothing in this case can suggest any such necessity.’⁴⁶⁶

According to Wigmore the confidentiality is negated when a third person is in close proximity and as a result thereof may hear such communication between spouses and where there is the intention of the communicating spouse to share such communication with a third party.⁴⁶⁷ In both these instances it appears that there is some knowledge on the part of the spouse divulging the communication that by doing so there is the likelihood that a third party would hear such communication.⁴⁶⁸ This is perhaps the rationale that the court used in the *Wolfe v United States*⁴⁶⁹ case. The communication therefore would be admissible evidence by the spouse who made it.

Barton⁴⁷⁰ states that this defies the main justification of marital privilege as it is now dependent on the presence of a third party and not on the intention of the communicating spouse that the privilege remains confidential.⁴⁷¹ Ultimately in instances where the communication made is confidential and a spouse may be prevented from disclosing such information there is nothing that stops a third party from divulging such communications whether the communicating

⁴⁶³ Ibid.

⁴⁶⁴ Supra note 461.

⁴⁶⁵ Ibid at par 14, headnotes 3 and 4.

⁴⁶⁶ Ibid at par 17.

⁴⁶⁷ Supra note 21.

⁴⁶⁸ Ibid.

⁴⁶⁹ Supra note 401.

⁴⁷⁰ Supra note 21.

⁴⁷¹ Ibid.

spouse was aware of the presence of the third party or not. Therein lies a point of criticism, in that American law seeks to protect the confidentiality of the communication, thereby advocating the interests of the communicating spouse by preventing the testifying spouse from disclosing such communications and yet in respect of third parties, the communicating spouse is largely unprotected and powerless should a third party choose to disclose the confidential communication he or she has overheard. As pointed out in the case of *State v Freeman*⁴⁷² this approach is rather illogical.⁴⁷³

A further point of criticism is that, this principle encourages people invading the privacy of spouses, by deliberately listening in on their communications, but Barton⁴⁷⁴ reminds us that the purpose of the privilege remains the protection of the marital relationship and not to ensure one spouse avoids criminal liability by preventing the other spouse from incriminating him or her.⁴⁷⁵

What happens when the spouse to whom the communication is made deliberately divulges that confidential communication to a third party with the knowledge that while he or she may be prevented from testifying the same does not apply to the third party? As Barton⁴⁷⁶ highlights this may not apply to verbal communication as it is tantamount to hearsay and therefore would be inadmissible.⁴⁷⁷ However, it is a more likely a possibility through written evidence. Barton⁴⁷⁸ states that where a third party seeks to introduce evidence in a written form given to that third party by the spouse to whom the communication is made, then it should be decided upon as if it were that spouse testifying.⁴⁷⁹ Therefore, should the spouse who made such communication object than that evidence should be rendered inadmissible.⁴⁸⁰

The courts decisions in this regard has varied. If the third party is in possession of such communication without any indication that there was some dubious conduct on the part of the

⁴⁷² (1929)197 NC 37,148 SE 450. The court stated that it is illogical to effect through a third party what the privilege intends to prevent in the first place which is disclosure by the testifying spouse.

⁴⁷³ Supra note 21.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

spouse to whom the communication was made than it would follow the general principle that a third party cannot be prevented from disclosing such confidential communication.⁴⁸¹ It follows therefore that should a spouse lose such confidential written communication through theft, robbery etc than such communication is not protected by marital privilege should the third party who is in possession of such lost or stolen communication choose to disclose same.⁴⁸² This advocates the justification of the privilege to protect the marital relationship which is not at risk should confidential communication be revealed by a third party as opposed to a spouse simply because the third party has no vested interest in the marriage.

4.8 Other forms of communication

The American courts have not been consistent in respect of its approach to communications by way of letters.⁴⁸³ In some cases, this evidence has been excluded while other cases have considered the letters to be admissible due to the provision in statute that refers to confidential communications and not written communications.⁴⁸⁴

The above discussion focused on the confidentiality requirement in American law and while this is imperative in understanding the principles underpinning marital privilege, consideration must also be given to, what constitutes ‘communication’. The main question to be answered is whether marital privilege only covers communication that is oral or written or does it also include observations made by one spouse about the conduct or physical appearance of the other spouse. Under South African law it can be presumed that it would include all communication by the term ‘any communication’ however there has been no explicit pronouncement on this aspect by our courts.

Barton⁴⁸⁵ suggests that if one recognises that spoken or written word is not the only means of communication and that other forms of communication such as gestures exist than by virtue of this recognition it does not make sense for the privilege to be limited to only verbal expressions as a form of communication.⁴⁸⁶ While this may be a logical argument therein lies the difficulty

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

which even Barton⁴⁸⁷ recognises that is, if the privilege is taken to include all forms of communication then when and how does one draw the line? Barton⁴⁸⁸ suggests this may be done through one of two ways, the first by limiting the privilege to confidential communications only where the communicating spouse would have intended such communication to remain in confidence.⁴⁸⁹

The second option is much like the current South African position, which is to include ‘any communication’ derived during the subsistence of the marriage.⁴⁹⁰ The American courts have adopted a restrictive approach, paying allegiance to the foundational principles of the privilege, they have maintained that, it is communications that would be to the detriment of the marriage that would always be excluded.⁴⁹¹ There has been no uniform ruling by the courts regarding whether the physical appearance observed by one spouse in respect of the other can be regarded as communication that is privileged.⁴⁹² Federal rules indicate that communication covers utterances and not acts.⁴⁹³

In a more recent American case, that is perhaps closer to home, that of *State of North Carolina v. Lesiba Simon Motsaoka*⁴⁹⁴ the North Carolina appeal court found that tears shared between spouses were not protected by marital privilege. It was a case which brought the question of what constitutes confidential communication in terms of marital privilege into the spotlight. The accused was a South African citizen who was charged with rape committed in North Carolina. It is alleged that he committed the rape in 2003 but was only convicted in 2015. A sketch revealing his identikit was circulated in the local newspapers as investigators tried to find the suspect.⁴⁹⁵ His wife alleges that one day when they were driving in the car, the accused was reading the newspaper and when he saw the sketch of himself as a rape suspect in the paper he started to cry, and she saw a teardrop fall.⁴⁹⁶ The accused was extradited from South Africa

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ No. COA15-304, October 20, 2015.

⁴⁹⁵ [K Heath](#), Save your tears crying is not protected communication, Campbell law observer, Posted on November 9, 2015. Accessed on 8 August 2017.

⁴⁹⁶ Ibid.

in 2012 and during the trial he raised the objection to his wife testifying as to evidence that he teared during the car ride, on the basis that this evidence was subject to marital privilege because it constituted confidential communication between him and his wife.⁴⁹⁷ The court disagreed with this argument and the accused spouses' testimony was admitted into evidence.

In reaching its decision the court took into account case law and statute in North Carolina, the court found that the accused tears did not constitute a confidential spousal communication.⁴⁹⁸ The court stated that there was no conversation and therefore the accused could not have confided in his spouse, through the act of crying which was regarded as a reaction and not a definitive gesture in this case.⁴⁹⁹ The court did not pronounce on whether crying was a form of communication or not it merely stated that in this case the crying was not meant as a communication to the spouse due to it being a reaction by the accused to seeing a sketch of him in the newspaper.⁵⁰⁰ Which begs the question as to whether crying could be regarded as a form of communication where it is shown that through crying, a spouse intended to communicate confidentially with the other spouse and it was more than just a reaction.

4.9 *Limitations of marital privilege*

In the American jurisdiction, marital privilege is not absolute and therefore does not exist without exception.⁵⁰¹ This normally arises in situations where the accused spouse is charged with an offence against the other spouse or their children.⁵⁰² The exception in South African law can be found in a list of offences contained section 195 of the CPA⁵⁰³ and in American law it is catered for under the American Code of Evidence under 216⁵⁰⁴ which states the following,

*"Rule 216. Marital Privilege: Limitations"*⁵⁰⁵

"Neither of the spouses has a privilege under Rule 215 in

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Supra note 21 at pg. 42.

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Supra note 2.

⁵⁰⁴ American Code of Evidence as promulgated by the American Law Institute 1942.

⁵⁰⁵ Ibid.

- “(a) An action by one of them for annulment of marriage or for divorce or separation from the other, or for damages for the alienation of the affections of the other, or for criminal conversation with the other, or*
- (b) An action for damages for injury done by one of them to the person or property of the other, including an action for wrongful death of the other, or*
- (c) A criminal action in which one of them is charged with*
- (i) A crime against the person or property of the other or of a child of either, or*
- (ii) A crime against the person or property of a third person committed in the course of committing a crime against the other, or*
- (iii) Bigamy or adultery, or*
- (iv) Desertion of the other or of a child of either, or*
- (d) A criminal action in which the accused offers evidence of a communication between him and his spouse.”*

The category of offences contained under American law is much broader than South Africa this is apparent from the provisions of Section C (ii) which extends protection to third parties and their property during the course of the attack on the spouse.⁵⁰⁶ This would be revolutionary if implemented in South African law considering the prevalence of violent attacks in a domestic scenario, as protection would go beyond merely a spouse and a child but also the extended family unit. A witness spouse should be compelled to divulge such information especially where a third party was violated by the accused spouse in an attempt to attack the testifying spouse.

4.10 Conclusion

The above discussion is by no means an extensive analysis of American law in respect of marital privilege as this would be a mammoth task and if one is truly to do justice would certainly be worthy of a study on its own. Though superficial it does seek to highlight elements in American law that are useful mechanisms in comparison to the statutory provisions related to marital privilege in South African law. Both jurisdictions have recognised the need to afford

⁵⁰⁶ Supra note 21.

marital communications a privilege to ensure the protection of a marital relationship and are at one with each other in this respect.⁵⁰⁷

Divergence however rears its ugly head when it comes to the location of the privilege. In American law it is the spouse who makes the communication that is protected and in South African law the privilege is afforded to the spouse to whom the communication is made. It is submitted in support of Barton's view that the holder of the privilege in South African law is misplaced.⁵⁰⁸ The spouse who made the communication has no control over what evidence the testifying spouse may divulge. The spouse who has made the communication has taken the other spouse into their confidence, that spouse should therefore have the power to prevent the confidentiality from being breached.⁵⁰⁹ It creates an anomalous situation as pointed out by Barton⁵¹⁰ where the spouse who has not relied on the marital confidence at all but simply receives the communication is entitled to breach it.⁵¹¹

The other notable difference between American and South African law as indicated in the preceding paragraphs is that South African legislation affords the privilege to 'any communication' as opposed to American law in which only 'confidential communications are protected.'⁵¹² Even in states where the American legislation makes reference to 'any communication' the court has taken a restrictive approach applying it only to communications made in confidence.⁵¹³

It cannot be disputed that American and South African law are at one with each other in respect of the policy justification for the existence of the privilege. In American law this justification will never change, as society upholds the protection of marital communications as sacrosanct. Although this remains the current position in South Africa, the future remains questionable. There are some notable divergences in the principles governing the operation of the privilege in these two countries. It is submitted that it is in the divergent roots of American law that South Africa can detect prominent and valuable resources that serve as starting points to

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

investigate the amendment of the current laws pertaining to marital privilege bringing it into alignment with the constitution.

CHAPTER FIVE

CONCLUSION

5.1 Introduction

“... The fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas-pronouncement wholly reconcilable with each other, with the facts of life, and with the rule itself.”

The mixed views that marital privilege has garnered over the years is best described by Wigmore⁵¹⁴ in the quotation above. As this study reaches a conclusion it is quite clear that marital privilege is an ancient monolith that South Africa has inherited from our colonial history and has to be reformed in order to find its place in a post constitutional dispensation. This position is justified with the argument that the privilege exceeds its rationale, hampers the administration of justice by denying courts access to relevant information and is at odds with the right to equality in terms of the constitution. Of course those in support of the privilege rely on the argument that marriage is sacrosanct and therefore deserving of protection in order to preserve the marital harmony. This therefore necessitates a robust approach to reform marital privilege in order to achieve an equitable balance between ensuring the privilege is constitutionally sound and that people in unions are still able to confide in each other.

The study of foreign jurisdictions reveal that the privilege has its roots firmly entrenched within the law. The English legal regime is regarded as the primary source from which South Africa has derived its application of marital privilege.⁵¹⁵ Both the English and American legal systems have through the years produced extensive development in this area of the law.⁵¹⁶ These countries have endorsed marital privilege through the common law and legislation.⁵¹⁷ While countries such as Australia have indicated that the privilege does not exist in the common law, countries such as Hong Kong in recent years have recognised the importance of such a privilege

⁵¹⁴ Supra note 401.

⁵¹⁵ Supra note 21.

⁵¹⁶ Supra note 5.

⁵¹⁷ Ibid.

in the law of evidence and as a consequence thereof enacted provisions enforcing marital privilege within its legal system.⁵¹⁸

This however, cannot detract lawmakers from the fact that in South Africa there has been a social and politic evolution which necessitates the development of the common-law by interpreting the rules governing marital privilege more contextually, contemporarily and constitutionally. South African legislators cannot absolve themselves from this responsibility.

However, this does not mean that South Africa should effect a complete abrogation of marital privilege, this is certainly not the ultimate solution. There are compelling arguments that suggest that such a privilege is of paramount importance in the preservation of a marital relationship.⁵¹⁹

Case law and academic commentaries reveal that this contentious area of law is embedded within our criminal justice system. Historical developments and comparative authorities referred to in this study suggest there are valid grounds for the reformation of marital privilege.

In order to remedy the current constitutional dilemma marital privilege presents, it would require recommendations that would reform statute in order to align the privilege with constitutional norms and standards.

It is submitted that the preceding chapters have provided the basis for the reconsideration of the rules governing marital privilege.

5.2 Recommendations

Naude⁵²⁰ suggests three viable options, the first that marital privilege should be abolished while still allowing the witness spouse the decision on whether to testify or not, the exception would be where the accused spouse has been charged with an offence contained in Section 195.⁵²¹ This is an option that leaves the current position unchanged and therefore does not add much weight to the discussion on reforming the privilege.

⁵¹⁸ www.hkreform.gov.hk.

⁵¹⁹ Supra note 21.

⁵²⁰ Supra note 8.

⁵²¹ Ibid.

In order to stay relevant to the modern context, the privilege should be extended to include other categories of relationships that do not conform to the conventional notion of a marriage.⁵²² These of course would include co-habitants as well as couples that have chosen not to enter into a marriage or cannot legally enter into a marriage. The difficulty in implementing such an extension arises with the task of defining such relationships.⁵²³ This would be arduous in that courts would have to define relationships that function as a marriage.⁵²⁴ This would force the court to go through a factual enquiry in order to assess the relationship.⁵²⁵ This would be based on questions such as the length of the relationship, whether the couple are living together or not, their financial dependence on each other.⁵²⁶ In addition the prosecution would face the laborious task of facing confrontation by countless couples who do not want to give evidence until the court has pronounced on whether their relationship is afforded protection by the privilege.⁵²⁷ This would certainly place an enormous strain on the South African judicial system. It would also undermine criminal proceedings which as Naude points out may not be the arena for the evaluation of relationships to ascertain their functionality as a marriage.⁵²⁸ Despite these points of criticism it is submitted that in order to remedy the inequality that currently exists through the operation of the privilege however difficult it may be for the courts to adapt this approach it is not impossible and will be required for the proper administration of justice.

The second option is to render spouses the same as all other category of witnesses and in addition, as Naude suggests allow the court the discretion to pardon spouses when it is not in the public interest that they be compelled to testify.⁵²⁹ This is the most flexible approach. It seeks to balance the interests of justice with the interests of society.⁵³⁰ The law has always allowed witnesses a concession not to testify where that witness has a just excuse.⁵³¹ This is specifically provided for in section 189 of the Criminal Procedure Act which recognises that

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid.

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Ibid.

in certain situations it is undesirable to force a witness to give evidence.⁵³² The court defined ‘just excuse in *Attorney-General, Transvaal v Kader*⁵³³ as more than a lawful excuse stating that each case had to be assessed on its merits taking into account section 189. Essentially it appears to require a balancing act between the public interest in having access to all relevant evidence and the disadvantage suffered by the witness forced to testify.⁵³⁴

What would constitute a ‘just excuse’ for a spouse who does not wish to testify? Naude⁵³⁵ puts forth the following considerations that a court must take into account when making this determination,

- “1. *The probable probative value of the evidence;*
2. *The seriousness of the offence;*
3. *The disruption of any continuing relationship;*
4. *The harshness of compelling the person to testify;*
5. *The availability of other evidence on the same matters and the reliability of such evidence;*
6. *The likelihood that harm would be caused to the testifying spouse;*
7. *whether, in giving the evidence, the spouse would have to disclose matter that was received in confidence from the accused; and*
8. *Whether the application for exemption is made freely and independent of a threat or improper influence.”*⁵³⁶

This option does indeed appear enticing but is not without blemishes; the first is that by allowing the spouse to rely on the ‘just excuse’ not to testify one could create the impression that it is the spouse that has the discretion and not the court.⁵³⁷ In order to dispel this fear the court would have to adopt a strict approach in its application of discretion.⁵³⁸ The other criticism lends itself to the fact that the prosecution would be faced with much uncertainty as the prosecutor would not know beforehand whether the spouse would be compellable or not

⁵³² Ibid.

⁵³³ 1991(4) SA 727(A).

⁵³⁴ Supra note 8.

⁵³⁵ Ibid.

⁵³⁶ Ibid

⁵³⁷ Ibid.

⁵³⁸ Ibid.

this would affect the timeous and proper preparation of the case by the prosecutor.⁵³⁹ Although commendable this option still does not remedy the gap that exists whereby section 198 still excludes other forms of relationships thereby advancing inequality and this option does not take cognisance of this factor.

The last option is to remove marital privilege from South African law completely thereby forcing spouses to be competent and compellable with no room for exception.⁵⁴⁰ This would remedy the situation where the privilege appears to be operating in conflict with the Constitution but would not do much for the protection of communications between couples.

It would create equality amongst all categories of relationships and witnesses. However, it begs the question as to whether this may be the best solution. Naude argues this is an inflexible approach and is not desirable when one analyses the controversial nature of spousal testimony in the first place, in an area of the law where it is difficult to adopt a hard and fast approach.⁵⁴¹ The writer is in support of this view the defects in the law surrounding marital privilege cannot be cured through a rigid approach. This would be difficult to enforce without opposition from different sectors of society and could raise many issues in a diverse country such as South Africa where there are a wide array of societal norms and standards.

When one compares the right to equality with the right to marry it is discernible that section 9 of the Constitution dictates that marital privilege is unconstitutional. In light of this if credence is to be given to our Constitution than marital privilege must be reformed without delay.⁵⁴² It is submitted that this can only be achieved through an amendment of section 198 of the CPA⁵⁴³ and not a total abandonment of the privilege. It is humbly recommended that in order to remedy the problems discussed in this study section 198 should be replaced with a provision that reads as follows:

No person who is deemed to be in a ‘marital relationship’ or any other union for which they may be regarded as being in such relationship for all intents and purposes as determined by the court, is a compellable witness against the other in that same relationship, in respect of any

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Supra note 2.

confidential communications made to him or her during the subsistence of the relationship unless,

- The person who made such communication consents.
- The marriage has not been terminated.
- The communication is intended to be confidential.
- The court deems that it is in the interests of justice that such witness testifies.

This provision confers the privilege upon the accused spouse. It makes concession for other forms of relationships by bestowing upon the courts a discretion to determine whether a relationship meets all the elements of a marital relationship. Each case to be determined on its own merits. The provision also limits the privilege to confidential communication only and removes the privilege upon termination of the marriage as there is no marital relationship that remains at risk. In so doing the recommended provision may be able to achieve a more accurate balance between safeguarding the marital relationship, giving effect to the truth-seeking process and ensuring that the constitution is not violated.

5.3 Conclusion

Within our constitutional dispensation it is becoming increasingly difficult to justify the existence of an outdated illogical privilege that is currently in violation of the supreme law of our land. The privilege in its current form is a contradiction; on the one hand it purports to protect the marital relationship and yet on the other extends the privilege to divorced and separated persons where the marriage has been terminated. It at times detracts from the ends of justice by perpetuating inequality on the basis of marital status. If the Constitution is to be taken seriously than South African lawmakers must effect an amendment of the current provisions governing marital privilege. While the future of marital privilege in South African law maybe shrouded in uncertainty there is one thing we know for sure and that is as put by The South African law reform commission⁵⁴⁴ *'The constitutional right of equality before the law requires a re-consideration of marital privilege.'*⁵⁴⁵

⁵⁴⁴ Supra note 13.

⁵⁴⁵ Ibid.

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