

Scope of Privileges and Issues in some Common Law Systems- India

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Rationale of Privilege

- Right to a client to obtain legal advice in confidence
- To encourage full and frank communication between attorneys and their clients

The Indian Evidence Act 1872

- Section 126 –
 - No Barrister, Attorney, Pleader or Vakil
 - Shall be permitted to disclose communications made by his client or advice given by him.
 - In the course of his employment
 - Except if there is an illegal purpose or showing a crime or fraud after commencement of his employment

Section 129 of Indian Evidence Act:

- No one shall be compelled to disclose to a Court any confidential communication
- Between him and his legal professional adviser.
- Except when he offers himself as a witness, to the extent necessary to explain evidence given.
- This protection applies to the client, and not the legal professional adviser

Other Provisions

- Code of Civil Procedure, 1908: Pleader includes an advocate, vakil or attorney of High Court
- Bar Council of India Rules: Part VI, Chapter II, Section II, Rule 17:
 - ‘An advocate Shall not breach Section 126 of the Indian Evidence Act (Breach entails punishment)

Weaknesses of Indian Law

- Section 126: Does not include patent agent, while Section 129 the expression 'legal professional adviser' may not include a patent agent, and the provision restricts privilege to the client only.
- *Wilden Pump Engineering Co. v. Fusfield*: Patent agent not regarded as a variety of lawyer, and held to be out of the common law privilege under English law – Civil Evidence Act S 15 and Patents Act S 104
- *Dormeuil Trademark*: Privilege does not extend to trade mark agents

Weaknesses Continued

- Communications between clients-third parties and lawyer-third parties, such as technical experts and expert witnesses:
 - Not privileged if the communication came into existence for the purpose of obtaining advice from the lawyer (legal advice privilege)
 - Privileged if the communications occur subsequent to the decision to commence litigation (litigation privilege)
 - Indian law likely to adopt this distinction based on English common law.

Weaknesses Continued

- Foreign law privilege
 - Under English law of privilege, communications between clients and their foreign lawyers, or with their foreign clients, will be protected based on *lex fori* (*Re: Duncan*).
 - The new recognition is that privilege is not merely a right to refuse material at trial, but a fundamental right – hence different principles might apply today.
 - Difficult conflict of law issues arise.
 - The position in India is unclear, although the use of ‘barrister’ [General Clauses Act Section 3 (4)] may provide a clue.

Weakness Continued

- In-house Counsel – under Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules:
 - Advocate cannot be a full-salaried employee
- In-house counsel in *Municipal Corporation v. Vijay Metal Works*, Section 126 and 129 of the Evidence Act provided same protection on his legal advice as a barrister or attorney. Although, in the *Akzo Nobel* judgment, the ECJ appears to have taken a contrary view.

Conclusion

- Certain categories of intellectual property advisers are not covered
- Third parties not covered
- Communications between clients and foreign advisers are not clearly protected
- The scope of 'client' not clear in the context of corporations
- Privilege should cover Technical and legal matters