

CAUGHT OFF-GUARD: BALANCING THE HORIZONTALITY DISCORD BETWEEN PRIVACY AND PAPARAZZI PRESS RIGHTS

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Conflicts between privacy and freedom of expression usually arise when non-state actors like the paparazzi publish photographs of individuals, relying on the claim of public interest or that the individual, being a public figure, has forfeited their privacy interest. The legitimacy of such a claim must be decided by the courts by balancing the two fundamental rights of privacy and freedom of the press. Fundamental rights regulate the relationship between individuals and the State, whereas the conflict between these rights of privacy and paparazzi press pertains to non-state actors. The article delves into the horizontality question between the two fundamental rights, focusing on the ‘indirect horizontal effect’ as a solution, and further examines the balancing of privacy interests with public interests, proposing parameters that may be considered as part of the balancing test.

I. INTRODUCTION

Well, the paparazzi, they snapped a pic and it’s going to be out in the morning.

-Shay¹

More than a century ago, a legendary development² took place that has become even more relevant today. Samuel Warren and Louis Brandeis published a remarkable law review article on ‘Right to Privacy’ in 1890 in the Harvard Law Review that implored the courts to consider a right to protection of privacy.³ It

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¹ This line is from a Canadian television program “Instant Star” which was aired from 15 September 2004 to 26 June 2008 <<https://www.quotes.net/mquote/766212>> accessed 26 October 2023.

² A Etzioni, *The Limits of Privacy* (New York: Basic Books 1999).

³ Samuel Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4(5) Harv LR 193.

recognised that such protection stemmed from an individual's "involute personality" and that a person whose privacy stood violated could demand a remedy against invasion.⁴ They probably did not comprehend the full extent of their statement when they said, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'that is whispered in the closet shall be proclaimed from the house-tops'".⁵ Fast forward to current times, when social media has fuelled the love of photographs and videos, and the camera phone whisked out in an instant turns the humble photograph into an act of intrusion into a person's private life.

On one normal afternoon, Alia Bhatt, a famous Indian actress, found photographs of her personal moments splashed across social media. Calling it a serious intrusion of her privacy, she resented the journalists who had taken pictures of her and her daughter while she was inside her residence.⁶ The over-aggressive news gathering photojournalists run amok, and an innocent individual is "caught off-guard." This incident reminds one of Kaul's J. observation that "technology has made it possible to enter a citizen's house without knocking at his/her door, and this is equally possible both by the State and non-state actors".⁷ It is indeed unfortunate that public curiosity has exceeded all boundaries of propriety. An individual is not safe from prying eyes even inside his/her home. The target is the physical privacy of an innocent individual where the intruder invades privacy by watching, listening, or sensing the person against his wishes.⁸ Unfortunately, India does not have any specific legislation for the protection of personal privacy against the paparazzi.

The present discussion revolves around the competing interests of the right to privacy of an individual and the freedom of the press enjoyed by the paparazzi, given the fact that restrictions on freedom of the press are legitimate only if they are carefully tailored to serve a pressing social need.⁹ Conflicts between privacy and freedom of expression usually arise where non-state actors like the paparazzi publicise private matters, relying on the claim of public interest or that the individual being a public figure had forfeited privacy interest. The legitimacy of such

⁴ *ibid* 211.

⁵ *ibid* 195.

⁶ Komal RJ Panchal et al., 'Alia Bhatt Row: Intrusion of Privacy, Lack of Consent – Is India's Paparazzi Culture Going Too Far, Too Fast?' *Indian Express* (Mumbai, 23 February 2023) <<https://indianexpress.com/article/entertainment/bollywood/alia-bhatt-row-intrusion-of-privacy-lack-of-consent-and-absence-of-law-is-the-pap-culture-going-too-far-8460428/>>.

⁷ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1 ¶645 (*hereinafter* Puttaswamy).

⁸ N AMoreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) *Camb LJ* 350, 355.

⁹ Toby Mendel, 'The Right of the Public to Know and Freedom of Entertainment: Information Seen from the Consumer's Angle' (Paper for the Conference on Freedom of Expression and the Right to Privacy, 23 September 1999) 3 <<https://www.article19.org/data/files/pdfs/publications/freedom-of-information-foi-vs.-privacy.pdf>>.

a claim must be decided by the courts by balancing the two fundamental rights of privacy and freedom of the press. The other issue at hand is that fundamental rights regulate the relationship between individuals and the State (vertical effect), whereas the conflict between these two rights pertains to non-state actors (horizontal effect). This paper, in Part II, analyses the legal status of the fundamental rights of freedom of the press and the right to privacy under the Indian Constitution in the context of the publication of photographs by paparazzi as an invasion of privacy of an individual. Part III delves into the horizontality question between the two fundamental rights, focussing on the indirect horizontal effect as an appropriate solution. Part IV looks at the approach that can be adopted by the courts in India to balance privacy interests with public interests, proposing certain parameters that need to be considered as a part of the balancing test.

II. THE COMPETING INTERESTS OF PRIVACY AND EXPRESSION

The threat to privacy has grown manifold on account of two reasons: firstly, the decline in acceptable standards of civility and courteousness; it has become commonplace to take pictures of people without obtaining their consent, to record private moments of people for entertainment, to eavesdrop on private conversations, etc. Such non-observance of social norms of deference and demeanour results in injury to the personality. Second is the remarkable development of intrusive technology devices. With the advancement in technology, society today allows more and more intrusion into the private lives of people. In the coming years, the rise in new threats will ensure that privacy is harder to maintain, if not impossible.¹⁰ “The technological development today can enable not only the State but also big corporations and private entities to be the ‘big brother’”.¹¹ The new instruments of intrusion into the private sphere are a cause for serious concern.

In today’s world of smart gadgets, smartphones or even smart homes, our life is captured instantaneously on camera phones and is ‘proclaimed from the house-tops’ as it spreads like wildfire on social media. Do we have any remedy against such an invasion? More significantly, do we have a ‘right to be let alone’ in today’s technology-driven times that have blurred the boundaries between private and public spaces? Incidents of invasion of privacy are common and remain largely unaddressed. There is limited protection available against the unwanted publication of photographs by individuals.

¹⁰ Janna Anderson and Lee Raine, “Themes: The Most Harmful or Menacing Changes in Digital Life that are Likely by 2035” (Pew Research Center, 21 June 2023) <<https://www.pewresearch.org/internet/2023/06/21/themes-the-most-harmful-or-menacing-changes-in-digital-life-that-are-likely-by-2035/>> accessed 8 October 2023.

¹¹ Puttaswamy (n 7) ¶594 (SK Kaul J).

A. FREEDOM OF PRESS, PHOTOGRAPHY, AND PAPARAZZI

Freedom of the press is recognised as a fundamental freedom in India under Article 19(1)(a).¹² It is the very soul of democracy which furthers the public interest.¹³ In fact, free speech jurisprudence in India has developed to a higher extent as compared to privacy jurisprudence.¹⁴ Public interest in freedom of the press originates from “the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves”.¹⁵ “This right is required in any modern democracy without which there cannot be transfer of information or requisite discussion for a democratic society”.¹⁶ The European Court of Human Rights says,

*“Whilst the press must not overstep the bounds set, inter alia, in the interest of ‘the protection of the reputation and rights of others’, it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”*¹⁷

Photographs, in terms of impact, have a far greater communicative and informative bearing than verbal communication. Vicki Goldberg puts it pithily, “Photographs have a swifter and more succinct impact than words, an impact that is instantaneous, visceral, and intense”, and they share a power which plays “havoc with the human mind and heart”.¹⁸ Srivatsan believes that “photographic vision has a way of penetrating any discourse and powerfully reconstituting its logic and practice”.¹⁹ A photographer’s expression comes into full play only when they have the freedom of access to the subject and the location. Consequently, it is important to protect ‘photographic speech’, especially in an era driven by visual news media.

¹² *Romesh Thappar v State of Madras* 1950 SCC 436; *Brij Bhushan v State of Delhi* 1950 SCC 449; *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.

¹³ *Express Newspapers (P) Ltd v Union of India* 1958 SCC OnLine SC 23; AIR 1958 SC 578; *Sakal Papers (P) Ltd. v Union of India* 1961 SCC OnLine SC 124; AIR 1962 SC 305; and *Bennett Coleman & Co v Union of India* (1972) 2 SCC 788.

¹⁴ Shruti Bedi, ‘The Contestation Between Right to be Forgotten and Freedom of Expression: Constitutional Silences and Missed Opportunities’ (2021)6(1) *CompConst L & Admin LJ* 1, 22.

¹⁵ *Indian Express Newspapers (Bombay) (P) Ltd v Union of India* (1985) 1 SCC 641 ¶68 (*hereinafter* *Express Newspapers*).

¹⁶ *ibid* ¶154.

¹⁷ *Jersild v Denmark* (1995) 19 EHRR 1 ¶31.

¹⁸ Vicki Goldberg, *The Power of Photography: How Photographs Changed Our Lives* (Abbeville Press 1991) 7.

¹⁹ R Srivatsan, ‘Photography and Society: Icon Building in Action’ (March 1991) 26(11/12) *Eco & PolWkly* 771.

However, the insensitivity of the overzealous paparazzi in gathering news is well known. Driven by the earnings from celebrity news, it is not uncommon for them to jeopardise the safety of their subjects.²⁰ The tragic death of Princess Diana is an example of such insensitivity.²¹ Except for remedies under common law, the current legal remedies available in India afford little protection against acts of intrusive photography, videography, or unauthorised surveillance. The only statutory protection available is under the criminal law that makes voyeurism²² and stalking²³ a criminal offence. Those offences do not apply to newsgathering journalists/paparazzi or amateur photographers. The intention of the paparazzi is generally to capture photographs to provide information and entertainment to the people, which is economically beneficial. More than sexual harassment, a photo-journalist works to arrest the unguarded feelings of a person.²⁴ There are no governmental regulations in terms of spaces, time, manner, etc, on such photography. The only exception is a code of ethics for journalists/media, developed under the mandate of section 13(2)(b) of the Press Council Act titled 'Norms of Journalistic Conduct'. Under the code, the press is not supposed to invade an individual's privacy simply on account of "prurient or morbid curiosity".²⁵ The explanation to point 42 of the Guidelines states, "Things concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of *privacy* excepting where any of these impinges upon the public or public interest".²⁶ However, the violation of these guidelines does not attract any penalty. Therefore, for the excited newsgathering paparazzi interested in capturing the 'photograph of the month', it is an ethic that is easily dispensable.

Prosser states that fortification of newsworthy photographs "arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them".²⁷ A photojournalist has the right to gather information under the ambit of Article 19(1) (a), and to take pictures he needs to exercise the right to access the location of

²⁰ Zhendong Sun, 'Balancing Freedom of the Press and the Right to Privacy: Lessons for China' (A thesis submitted to McGill University in partial fulfilment of the requirements of the LLM degree, Mc Gill University, Montreal, 2006) 7 <<https://escholarship.mcgill.ca/downloads/p5547r677>> accessed 11 October 2023.

²¹ Mallika Soni, 'Princess Diana's Death: The Tragic Car Accident and Paparazzi Chase' *The Hindustan Times* (17 May 2023) <<https://www.hindustantimes.com/world-news/harry-meghan-car-chase-princess-dianas-death-the-tragic-car-accident-and-paparazzi-chase-101684335862963.html#:~:text=The%20car%20crash%20occurred%20as,Diana%20in%20her%20final%20moments.>>> accessed 11 October 2023.

²² Penal Code 1860, §354-C.

²³ Penal Code 1860, §354-D.

²⁴ Robert EMensel, "Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885-1915' (1991) 43(1) *Amer Quar* 24.

²⁵ Press Council of India, 'Norms of Journalistic Conduct' (2022) 38 <<https://www.presscouncil.nic.in/Norms.aspx>> accessed 20 October 2023.

²⁶ *ibid*.

²⁷ Nancy DZeronda, 'Street Shootings: Covert Photography and Public Privacy' (2019) 63(4) *Vand LR* 1131, 1139.

his subject.²⁸ However, such freedom is not absolute.²⁹ It does not shield journalists/media/paparazzi from the liability of intruding into the privacy of a person's home. The courts, in such cases, must perform the unsavoury role of balancing the right to privacy with the interest in free expression.

B. PRIVACY: A NEBULOUS 'RIGHT TO BE LET ALONE'

Privacy as a concept has defied understanding and classification. Being a subjective concept like 'liberty' and 'freedom,' it evades a precise definition.³⁰ Flaherty related privacy to "solitude, secrecy, and autonomy" but specified that it was "not synonymous with these terms".³¹ Consequently, to comprehend its contours, we attempt to observe the functions that it ostensibly serves.³² Privacy is vital to a person's autonomy,³³ to the feeling of control over one's life that is capable of being guarded against public intrusion.³⁴ It is the fundamental aspect of an individual's individuality, personhood³⁵ or dignity.³⁶ It seeks to determine the claim of individuals, groups, or institutions to regulate for themselves when, how, and to what extent information about them is communicated to others.³⁷ The common law right to privacy bestows on every person the control and determination over the extent of communication of his thoughts, sentiments, and emotions.³⁸ The individual retains control over the power to fix the limits of publicity of his private life.

Privacy stems from the zone of freedom or, in a basic sense, the 'right to be let alone'.³⁹ In India, the law around privacy was slow to develop. The

²⁸ Andrew D Morton, 'Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation' (1999) 147(6) U Penn LR 1435, 1447.

²⁹ Reasonable restrictions can be imposed on the grounds of security; sovereignty and integrity of India; friendly relations with foreign countries; public order; decency or morality; defamation; contempt of court under art19(2) of the Indian Constitution.

³⁰ Mclean Deckle, *Privacy and Its Invasion* (Bloomsbury Publishing 1995) 3.

³¹ David H Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* (University of North Carolina Press 1989) 8.

³² Samuel D Warren & Louis D Brandeis, 'Privacy, Photography, and the Press' (1997—1998) 111(4) Harv LR 1086, 1087.

³³ Louis Henkin, 'Privacy and Autonomy' (1974) 74 Colum LR 1410, 1425; Daniel R Ortiz, 'Privacy, Autonomy, and Consent' (1989) 12 Harv J L & PubPol'y91, 92-97.

³⁴ Stephen Goode, *The Right to Privacy* (Franklin Watts 1983) 6.

³⁵ See J Braxton Craven, Jr, 'Personhood: The Right to be Let Alone' (1976) Duke LJ 699, 702-03.

³⁶ See Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 NYU LR 962, 970-71.

³⁷ Alan F Westin, *Privacy and Freedom* (Athenum 1967) 7.

³⁸ Warren & Brandeis (n 3).

³⁹ Divij Joshi, 'Privacy Theory 101: Warren and Brandeis's 'The Right to Privacy' - Law, Affect and the 'Right to be Let Alone'' (*Centre for Law & Policy Research*, 25 September 2020) <<https://clpr.org.in/blog/privacy-theory-101-warren-and-brandeis-law-affect-and-the-right-to-be-let-alone/>> accessed 30 September 2023.

Constitution of India does not contain any express provision for the right to privacy. The Supreme Court of India in *R. Rajagopal v. State of T.N.*⁴⁰ (*hereinafter* Rajagopal) had recognised that privacy as a right had two aspects. One is the more general law of privacy, the unlawful invasion of which attracts the tort action for damages. Second is the constitutional recognition afforded to the right to privacy that protects privacy against unlawful governmental invasion.⁴¹ Relying upon Rajagopal, the Delhi High Court in 2001 in *Khushwant Singh v. Maneka Gandhi*,⁴² (*hereinafter* Khushwant Singh) held that privacy disputes between two individuals were a tort claim and not a constitutional claim.⁴³ It was only in 2017 that the Indian Supreme Court in *K.S. Puttaswamy v. Union of India*⁴⁴ (*hereinafter* Puttaswamy) finally held the right to privacy as a fundamental right under Article 21, even though it was long recognised as a “common law right” applicable between private parties.⁴⁵ Perfect privacy is obviously impossible, but certain spheres of an individual’s private life need protection. Puttaswamy redefined the privacy landscape in India when it held that “the privacy of the home must protect the family, marriage, procreation and sexual orientation”.⁴⁶

Judicial decisions favouring privacy believe that the right is determined by the customs and the sensibilities of an ordinary or reasonable man,⁴⁷ and any behaviour which mentally disturbs an individual with ordinary feelings would give rise to a cause of action.⁴⁸ The exercise of the right to privacy does not entail the isolation of an individual but is a feature that enhances the variety of relationships.⁴⁹ There may be times when the interest of the press to publish information outweighs the privacy interest of the individual.

Conflict arises between photographers and their unwilling subjects when the act of photography captures the unguarded feelings or physical state of a person in their private sphere. The press claims the right to photograph anyone and to publish it as they please. The individual, on the other hand, feels violated and exposed upon being photographed without permission, especially when such photographs are splashed across newspapers, magazines, or online sites.⁵⁰

⁴⁰ *R. Rajagopal v State of T.N.* (1994) 6 SCC 632.

⁴¹ *ibid* ¶9.

⁴² *Khushwant Singh v Maneka Gandhi* 2001 SCC Online Del 1030.

⁴³ *ibid* ¶62.

⁴⁴ Puttaswamy (n 7).

⁴⁵ *ibid* ¶169- 170, 180-181.

⁴⁶ *ibid* ¶645.

⁴⁷ *Indu Jain v Forbes Incorporated* 2007 SCC OnLine Del 1424 ¶97 (*hereinafter* Indu Jain).

⁴⁸ Robert A Steinberg, ‘Defamation, Privacy and the First Amendment.1976’ 1976(5) Duke LJ 1016, 1023.

⁴⁹ Ferdinand David Schoeman, *Privacy and Social Freedom* (Cambridge University Press, 1992) 21.

⁵⁰ Mensel (n 24) 30-31.

III. THE HORIZONTALITY SPECTRUM OF PRIVACY AND FREEDOM OF PRESS

Even though the Puttaswamy court held privacy to be a fundamental right, it did not go into the aspect of horizontal application of the right. Probably because it was not the mandate of the court. However, as discussed, the right to privacy often comes in conflict with freedom of the press, especially in cases where the paparazzi overstep the private boundary and invade a person's privacy. Since the issue of horizontal application of fundamental rights is ambiguous and developing, the courts have been unable to work under a clear framework on this aspect.

The right to privacy as it stands today is both a common law right and a fundamental right.⁵¹ The difference between the two classes of the same right (nature and content being the same) is that common law rights are applied horizontally between two private individuals, and fundamental rights are available against the State. Further, for violation of a common law right, action lies in an "ordinary court of law".⁵² Action for violation of fundamental rights lies before a constitutional court. Though Puttaswamy did not examine the question of horizontal application of the right to privacy, S.K. Kaul J. understood that privacy was a limitation not only on the exercise of State power but also on non-state actors.⁵³ He said,

*"Privacy is one of the most important rights to be protected both against State and non-state actors and be recognised as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case."*⁵⁴

Photographs taken without consent by the paparazzi (non-state actor) constitute a violation of the right to privacy of a private individual (non-state actor). Consequently, limiting the vertical application of constitutional rights is insufficient. Also, to perimeter such invasion of privacy, to recourse to common law is regressive. The Indian judiciary has tried to apply fundamental rights horizontally, albeit with a certain lack of clarity.⁵⁵

⁵¹ Bobde J in the Puttaswamycase opined that it was "possible for an interest to simultaneously be recognised as a common law right and a fundamental right." *Puttaswamy* (n 7) ¶397.

⁵² *ibid* ¶397.

⁵³ *ibid* ¶¶592-93.

⁵⁴ *ibid* ¶646.

⁵⁵ Gautam Bhatia, 'Horizontality Under the Indian Constitution: A Schema' (*Ind Con L & Phil* 24 May 2015) <<https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/>> accessed 23 October 2023.

Under the scheme of the Constitution of India, there are provisions where the horizontal application of certain fundamental rights is accepted, such as prohibition against discrimination (Art. 15(2)), abolition of untouchability (Art. 17), prohibition against human trafficking and forced labour (Art. 23); and prohibition against child labour (Art. 24). This validates the proposition that horizontal application of fundamental rights is not out rightly unacceptable and that it is within the scheme of the Constitution itself. In fact, the Indian Constitution is revolutionary in that sense since it pioneers such recognition.⁵⁶

This question of horizontal application of fundamental rights, particularly Articles 19 and 21, seems to have been recently accepted to a certain extent by the Supreme Court of India in *Kaushal Kishor v. State of U.P.* (hereinafter *Kishor*).⁵⁷ The court relied on Vivian Bose's statement nudge to ignore the "pettifogging of the law"⁵⁸ and its previous decisions⁵⁹ held (per majority 4:1) that "A fundamental right under Articles 19/21 can be enforced even against persons other than the State or its instrumentalities".⁶⁰ Despite the criticism of the judgment,⁶¹ is undoubtedly progressive and provides a case for the application of constitutional rights against non-state actors. Both Articles 19 and 21 are vulnerable to violation by private entities.⁶² In today's technological era, when Artificial Intelligence is taking the world by storm, the fundamental rights of individuals are beleaguered by the power of big private players in the public sphere. The *Kishor* court was aware of such a situation when it opined, "Today, the infringement of the right to privacy is mostly by private players, and if fundamental rights cannot be enforced against non-State actors, this right will go for a toss." The dissenting judgment of Nagarathna J. differs from the majority as she believes that the fundamental rights under Articles 19 and 21 may not be justiciable against non-state actors before constitutional courts except in cases where those rights have been recognised through statutes.⁶³

⁵⁶ David Bilchitz & Surya Deva, 'The Horizontal Application of Fundamental Rights in India: "Kishor" (Baby) Steps in the Right Direction' (*IACL-AIDC Blog* 25 April 2023) <<https://blog-iacl-aide.org/2023-posts/2023/4/25/the-horizontal-application-of-fundamental-rights-in-india-kishor-baby-steps-in-the-right-direction>> accessed 23 October 2023.

⁵⁷ *Kaushal Kishor v State of U.P.* (2023) 4 SCC 1.

⁵⁸ *S. Krishnan v State of Madras* 1951 SCC 499 ¶ 63.

⁵⁹ *LDA v M.K. Gupta* (1994) 1 SCC 243; *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490; *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388; *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42; *Vishaka v State of Rajasthan* (1997) 6 SCC 241; *Githa Hariharan v RBI* (1999) 2 SCC 228; *Jeeja Ghosh v Union of India* (2016) 7 SCC 761.

⁶⁰ *Kishor* (n 57) ¶ 83.

⁶¹ See Gautam Bhatia, 'Kaushal Kishor, Horizontal Rights, and Free Speech: Glaring Conceptual Errors' (*Ind Con L & Phil* 27 January 2023) <<https://indconlawphil.wordpress.com/2023/01/27/kaushal-kishor-horizontal-rights-and-free-speech-glaring-conceptual-errors/>> accessed 24 October 2023.

⁶² Bilchitz & Deva (n 56).

⁶³ *Kishor* (n 57) ¶ 276.

The Supreme Court of India is one of the most progressive courts, and its jurisprudence is extremely rich and sensitive to the needs and rights of its people. It is, therefore, not strange for the majority in *Kishor* to believe that “The purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights”.⁶⁴ Bilchitz and Deva support such a proposition as they see *Kishor* directing the advancement of common law via fundamental rights and the obligations of non-state actors flowing from Articles 19 and 21.⁶⁵ The question opened by *Kishor* can be developed further by using the ‘indirect horizontal effect’. Although constitutional rights apply directly only to the State, some degree of indirect application can be permitted to non-state actors.⁶⁶ Bhatia explains the concept of indirect horizontality as “an approach where private *law* is subjected to constitutional scrutiny and is interpreted or modified accordingly”.⁶⁷

The Canadian Supreme Court has adopted indirect horizontality under the 1982 Charter of Fundamental Rights and Freedoms.⁶⁸ This approach distinguishes between ‘constitutional rights’ and ‘constitutional values’ wherein constitutional rights are applied vertically against governmental action, but at the same time permits horizontal application to non-state actors through the inherent power of the courts to develop the common law in line with the constitutional values contained in the Charter.⁶⁹ The Supreme Court of Canada referred to it in the *Dolphin Delivery case*,⁷⁰

*“Where ... private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative.”*⁷¹

⁶⁴ *ibid* ¶81.6. The majority judgment quoted Dr AS Anand’s J observation in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 ¶34.

⁶⁵ Bilchitz & Deva (n 56).

⁶⁶ Sujith Nair, ‘Horizontal Application of Fundamental Rights: Benign or Misconceived?’ (2023) 7(2) CALJ 76.

⁶⁷ Bhatia (n 61).

⁶⁸ See generally Andrew S Butler, ‘Constitutional Rights in Private Litigation: A Critique and Comparative Analysis’ (1993) 22 Anglo-Am LR 1; Murray Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ (1998) Public L 423.

⁶⁹ Stephen Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 Mich LR 387, 398.

⁷⁰ *Retail, Wholesale & DeptStore Union v Dolphin Delivery Ltd.* 1986 SCC OnLine Can SC 69 (1986) 2 SCR 573.

⁷¹ *ibid* 605.

A similar position is also followed in Germany, where constitutional rights have a ‘radiating effect’ on private law.⁷² “Constitutional rights have an indirect horizontal effect because they influence, but do not directly govern or control, private law disputes between individuals.”⁷³

In India in 2019, the Bombay High Court in *Shree Krishna Education Society v. State of Maharashtra*⁷⁴ dealt with the petitioner-schools’ obligation to comply with the reservation norm before it could claim any grant-in-aid. Though it was not a case of horizontal application of fundamental rights, the court observed, “Under the doctrine known as “indirect horizontal effect”, courts charged with construing and developing non-constitutional law must consider constitutional values and constitutional courts will oversee them to determine whether they have been sufficiently respectful of those values.”⁷⁵

Therefore, the best course of action in case of a fundamental rights dispute between non-state actors is to apply the ‘indirect horizontal effect’, which is achieved via the impact of constitutional rights on the private law that individuals invoke in civil disputes. This impact on private law can take place either in a direct form, where constitutional rights apply to it fully, or it can be applied indirectly, wherein courts take into account constitutional values while interpreting and applying the provisions.⁷⁶ Hopefully, the future development of jurisprudence on horizontal application will concretise the accountability of non-state actors for violation of fundamental rights, ensuring effective remedies for the victim. In an era of diminishing privacy, it becomes even more critical to protect a person’s fundamental right to privacy against the anesthetised newsgathering paparazzi through constitutional courts’ adjudication. Since both freedom of expression and the right to privacy can be applied horizontally, what would take precedence over the other needs to be determined. Accordingly, an exercise in balancing interests needs to be conducted.

IV. BALANCING THE TWO INTERESTS

Both the right to privacy and freedom of the press are essential rights in a democratic country like India. When a person’s photograph is published and an action is brought against it, the courts must determine whether such publication amounts to an invasion of privacy. The conflict arises if the newsgathering

⁷² Hunt (n 68) 432. In the landmark case of *Luth* [7 BVerfGE 198 (1958)], the Federal Constitutional Court held that Eric Luth’s right to free speech protected his political expression in organising a boycott of a film by Veit Harlan (a Nazi-era film director), even though Harlan’s economic interests were protected by private law.

⁷³ See Gardbaum (n 69) 401; Kenneth M. Lewan, ‘The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany’ (1968) 17 Int & Comp LQ 571, 599.

⁷⁴ *Shree Krishna Education Society v State of Maharashtra* 2019 SCC OnLine Bom 767.

⁷⁵ *ibid* 59.

⁷⁶ Gardbaum (n 69) 404.

paparazzi oversteps boundaries in an unrestrained manner or if privacy is used as a “tool by the rich and powerful to clamp down on legitimate criticism about them”.⁷⁷ The right to privacy must be balanced against the right to freedom of the press of the paparazzi in such matters.

Post Puttaswamy, the concept of privacy has suddenly received increased interest from various high courts.⁷⁸ These courts have restricted speech for violation of privacy without the employment of any balancing test. In *Swami Ramdev v. Juggernaut*,⁷⁹ the Delhi High Court ordered the publisher to remove the contentious content from the book about the petitioner as it violated his right to privacy without conducting a balancing test. The Madras High Court in *Kanimozhi Karunanidhi v. Thiru P. Varadarajan*⁸⁰ pushed freedom of expression under the carpet by stating that right to privacy enjoyed a “preeminent position” after Puttaswamy.⁸¹

However, conferring a ‘preeminent position’ to privacy will lead to a ‘chilling effect’ on freedom of the press. Given that surveillance and censorship have become the norm of the day, the information and data about the private lives of people available to the government are unparalleled. The usage of new technologies like Artificial Intelligence (AI), facial recognition technology (FRT), etc, along with social media use and pervasive computing, allows authorities to censor, track, and control populations.⁸² If an individual does not have control over what information is being shared about them or how the information is being used, it has a chilling effect on their freedom of expression, leading to self-censorship. A person is said to be deterred if they are deterred from speaking or expressing themselves out of fear of legal threat of harm.⁸³ To assess the extent of restriction required to protect an individual’s right to privacy, we need to take account of the potential for harm that will result from the disclosure of the information.⁸⁴ The Second Press Commission, which was to examine the legal and constitutional safeguards for the protection of the right to privacy, acknowledged the need for the protection of this right.⁸⁵ The Commission believed that the proper balancing between the two rights was crucial because if privacy claims became the basis of legal action, it would lead to the press being made vulnerable to malicious

⁷⁷ Vishal Rakhecha, ‘Privacy, the Shield that Protects or the Sword that Strikes Freedom of Speech?’ (2021) 5(1) Ind LR 62, 76.

⁷⁸ *ibid* 63.

⁷⁹ *Swami Ramdev v Juggernaut* 2018 SCC OnLine SC 740.

⁸⁰ *Kanimozhi Karunanidhi v Thiru P. Varadarajan* 2018 SCC OnLine Mad 1637.

⁸¹ *ibid* ¶41.

⁸² Jonathon W Penney, ‘Understanding Chilling Effects’ (2022) 106 Min LR 1451, 1452-1453.

⁸³ Frederick Schauer, ‘Fear, Risk, and the First Amendment: Unravelling the “Chilling Effect”’ (1978) 58 B U LR 685, 689.

⁸⁴ Indu Jain (n 47) ¶145.

⁸⁵ Government of India, ‘Report Second Press Commission, Vol. II, Appendices-I—XII’ (1982) 1–2 <<https://indianculture.gov.in/reports-proceedings/report-second-press-commission-vol-ii-appendices-i-xii>> accessed 26 October 2023.

litigation. No right can be given presumptive authority. The courts have to ensure that the delicate act of balancing is carried out in a fair and just manner. The Supreme Court has also stressed the obligation of this fine act of balancing in *Sahara India Real Estate Corpn Ltd v. SEBI*⁸⁶ (hereinafter Sahara),

*“Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values.”*⁸⁷

Speaking of such balancing between freedom of the press and the right to privacy, Gita Mittal J. stated that freedom of speech and expression under Article 19(1)(a) “should not be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered”.⁸⁸

The European Court applies a three-part test to balance privacy as a restriction on freedom of expression.⁸⁹ The restriction imposed must be “necessary in a democratic society” serving a pressing social need, the reasons justifying it are relevant and sufficient, and finally, it should be proportionate to the legitimate aim pursued.⁹⁰ A similar solution to balancing the two fundamental rights has been propounded by the five-judge bench decision of the Supreme Court in the Sahara case.⁹¹ The courts could first examine whether the application of one fundamental right is a “real and substantial risk” to the efficacious operation of the other; second, whether any “reasonable” or less intrusive alternative can negate the existing risk, i.e. the necessity of a balancing measure (necessity test); and lastly whether the benefit of the balancing measures outweighs the damage to the application of the right/freedom sought to be limited (proportionality test).⁹² Accordingly, the paparazzi should be banned from publishing a photograph when such ban is necessary to prevent a serious risk of invasion of privacy (necessity test) and where the constructive effect of the ban outweighs the harmful effect on the interest of the public to right to information (proportionality test).

In addition to the choice of test that the courts deem necessary to employ, they must consider the broader implications of their decision on freedom of

⁸⁶ *Sahara India Real Estate Corpn Ltd v SEBI* (2012) 10 SCC 603. In this case the conflict was between freedom of expression and right to fair trial.

⁸⁷ *ibid* ¶25.

⁸⁸ Indu Jain (n 47) ¶197.

⁸⁹ *Lingens v Austria* 8 EHRR 103 ¶35(8 July 1986).

⁹⁰ *Sunday Times v United Kingdom* 2 EHRR 245 ¶62(26 April 1979).

⁹¹ Sahara (n 86) ¶42.

⁹² See Bedi (n 14) 23. Also see Anubhav Khamroi, ‘Constitutional Silences, Balancing of Rights, and the Concept of a “Neutralising Device”’ (*Ind Con L & Phil* 9 November 2019) <<https://indconlawphil.wordpress.com/2019/11/09/guest-post-constitutional-silences-balancing-of-rights-and-the-concept-of-a-neutralising-device/>> accessed 27 October 2023.

expression.⁹³ It therefore follows that if a person is aggrieved by the publication of his photograph, he may bring an action for violation of his right to privacy before a constitutional court. In such cases, the courts will conduct the balancing test (as discussed above) between the two fundamental rights, taking into account certain vital values like public interest, whether the person is a public figure, whether it occurs in a public place, or whether it is a matter of public record.

A. PUBLIC INTEREST

Matters of public interest arise out of the right of the people to know what is happening in the world and the freedom of the press to inform them. The privilege of informing the public is not limited simply to the dissemination of news but extends to education, entertainment, amusement, etc.⁹⁴ There exists a legitimate public curiosity about the lives of celebrities and public figures, which is fed by the media's daily dose of petty gossip on their lifestyles, eating habits, clothes etc. Public interest as a defence against invasion of privacy has existed for a long time.⁹⁵

However, 'public interest' is synonymous with 'newsworthiness' and is a vague and ambiguous term. In fact, Judge Aldous has remarked, "The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know ... the media have a private interest of their own in publishing what appeals to the public and may increase their circulation".⁹⁶ It was defined in *Russel v. Wheeler*⁹⁷ as

*"Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity or as the interests of the particular localities, which may be affected by the matters in question."*⁹⁸

Public interest primarily refers to information that is of essential importance to the public, and its scope is wider than information that is merely of interest to the public. Interestingly, the Delhi High Court in *Khushwant Singh* went against this thought when it stated that public interest does not mean "what is good for the public" but "what is of interest to the public".⁹⁹ This was a mistaken interpretation as many times the public is interested in some information which is simply entertaining, or they derive some pleasure in knowing, but there is 'no public

⁹³ Mendel (n 9) 7.

⁹⁴ William L Prosser, 'Privacy' (1960) 48(3) Cal LR 383, 413.

⁹⁵ Warren & Brandeis (n 3).

⁹⁶ *British Steel Corporation v Granada Television Ltd* (1984) AC 1096, 1168 (1980) 3 WLR 774.

⁹⁷ *Russel v Wheeler* 165 Colo 296 (1968).

⁹⁸ See DC Jain, 'The Phantom of "Public Interest"' (1986) 3 SCC (J) 30.

⁹⁹ *Khushwant Singh* (n 42) ¶75.

interest' in knowing.¹⁰⁰ However, subsequently the High Court rectified its interpretation in the *Indu Jain v. Forbes Incorporated*¹⁰¹ (*hereinafter* Indu Jain), by holding that "Public or general interest in the matter published has to be more than mere idle curiosity".¹⁰²

In a recent case of 2022 before the Delhi High Court, *Ruba Ahmed v. Hansal Mehta*¹⁰³, the plaintiffs had filed for an injunction against the release of the movie "Faraaz" on the ground that it depicted their daughters in a bad light in the Terrorist Attack of 1 July 2016. It was contended that the right to privacy of the two daughters, who were victims in the terror attack that had taken place in Bangladesh, was violated. The court conclusively held that if a person unknowingly became "an actor in the occurrence of the general or public interest" (a terror attack being such a matter of public interest), the publication could not be categorised as "an evasion of his right to privacy".¹⁰⁴ Additionally, the court held that the "right to privacy is essentially a right in *personam* and is not inheritable by the mothers/legal heirs of the deceased persons".¹⁰⁵

B. PUBLIC FIGURES

Privacy is a zone where an individual can make decisions in their normal life without being exposed to public judgment or expectation. Such freedom is not, however, extended to public figures who have the ability to influence the lives of people in society. Consequently, it is generally accepted that "public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons".¹⁰⁶ Media is allowed a certain degree of intrusion in these cases.

A public figure is a person who, through his accomplishments or voluntary efforts, has placed himself in the public eye. He is an individual "who has assumed roles of special prominence in the affairs of a society" wherein the public has a legitimate interest in his doings.¹⁰⁷ These figures may include a variety of celebrities like actors, sports personalities, social media influencers, entertainers, etc. Prosser lists three reasons for such loss of privacy.¹⁰⁸ Firstly, these figures have sought publicity and consented to it, and therefore cannot complain of it.

¹⁰⁰ David Archard, 'Privacy, the Public Interest and a Prurient Public' in Matthew Kieran (ed) *Media Ethics* (London: Routledge, 1998) 90.

¹⁰¹ Indu Jain (n 47).

¹⁰² *ibid* ¶218.

¹⁰³ *Ruba Ahmed v Hansal Mehta* (2022) 6 HCC (Del) 225.

¹⁰⁴ *ibid* ¶58.

¹⁰⁵ *ibid* ¶63.

¹⁰⁶ *Carlisle v Fawcett Publications, Inc.* 201 Cal App 2d 733, 746-47 (Cal Ct App 1962).

¹⁰⁷ Legal Information Institute, 'Public Figure' Cornell Law School <https://www.law.cornell.edu/wex/public_figure> accessed 24 October 2023.

¹⁰⁸ Prosser (n 94) 411.

Secondly, their personalities and their affairs are already in the public eye and can no longer be regarded as their own private business. Thirdly, the press has a constitutional privilege to inform the public about those who have become legitimate matters of public interest.

However, it is also true that simply because an individual is a public figure, he does not lose control over his private life. There have been several cases in the US and UK where public figures/celebrities have successfully brought action against the paparazzi for invasion of privacy.¹⁰⁹ In the matter of *A v. B Plc*,¹¹⁰ a case under the European Convention for Protection of Human Rights and Fundamental Freedoms 1950, the court noticed that although a public figure was entitled to respect his privacy, on account of his public position, his actions would be open to closer scrutiny by the media. A newsworthy piece could include matters of public policy or those concerning the accomplishments and daily lives of public figures. However, if public curiosity takes on offensive connotations of sensational prying into private lives, it will not be categorised as public interest.¹¹¹

Even in India, the Delhi High Court dealt with a matter pertaining to this issue. In *Phoolan Devi v. Shekhar Kapoor*,¹¹² (hereinafter Phoolan Devi) the plaintiff had claimed an injunction against the release of the movie *Bandit Queen*, a movie based on her life, being violative of her right to privacy. She contended that she was not a 'public figure' as she was a bandit responsible for dacoity and murder. The court distinguished between the yardstick to be applied to a public figure for defamation or "libel" and for the purpose of "right to privacy action."¹¹³ For the latter, a public figure is "one who has arrived at a position where public attention is focussed upon him or her as a person".¹¹⁴ The court held her to be a 'public figure' since she had "thrust herself in the arena of publicity".¹¹⁵ However, the film was restrained from exhibition as it contained scenes pertaining to her personal life where she was gang raped and paraded nude, which adversely affected her privacy.¹¹⁶ The standard for measuring the privacy to which a public figure is entitled is different from that of an ordinary individual.

¹⁰⁹ Cherylann Mollan and Meryl Sebastian, 'Bollywood's Complex Relationship with Paparazzi' *BBC News* (17 March 2023) <<https://www.bbc.com/news/world-asia-india-64974628>> accessed 24 October 2023.

¹¹⁰ *A v B Plc* (2003) QB 195 : (2002) 3 WLR 542 : (2002) 2 All ER 545.

¹¹¹ *Bret Michaels v Internet Entertainment Group Inc* 5 F Supp 2d 823 (CD Cal 1998).

¹¹² *Phoolan Devi v Shekhar Kapoor* 1994 SCC OnLine Del 788.

¹¹³ *ibid* ¶32.

¹¹⁴ *ibid*.

¹¹⁵ *ibid* ¶33

¹¹⁶ *ibid* ¶46.

C. PUBLIC PLACE

Generally, protection for privacy is not available in public places.¹¹⁷ The accepted notion is that photographing someone in a public place does not invoke any liability.¹¹⁸ Bhagwati J. had once remarked that the fundamental right to speech and expression under the Indian Constitution was based on the First Amendment to the American Constitution.¹¹⁹ Undoubtedly, the American jurisprudence on this issue is far more developed. In the case of *Daily Times Democrat v. Graham*¹²⁰, a case decided by the Alabama Supreme Court, the plaintiff had sued the newspaper for the publication of a picture of her at a county fair. The photograph was taken when the wind blew her skirt upwards. Here, though the photograph was taken in public, the court held that,¹²¹ under certain circumstances, even pictures taken in public places would constitute an invasion of privacy. A reasonable person does not waive off all his rights while appearing in public. If the photographer is motivated by voyeurism, revenge or, harassment, or even mere curiosity, the subject of the photograph acquires a countervailing interest in the protection of privacy.¹²²

While a person naturally surrenders a great extent of privacy when venturing to a public place, it does not follow that they forfeit all legitimate expectations of privacy.¹²³ As far as the law in India is concerned, Puttaswamy has held that “privacy is not lost or surrendered merely because the individual is in a public place”.¹²⁴ It is recognised that the concept of privacy is attached to the person as a “facet of the dignity of the human beingx”.¹²⁵ It was clarified that solitude was not necessary to invoke privacy.¹²⁶ For instance, the act of taking a person aside in a public place to have a conversation is a signal of the exercise of privacy. It depends on the express or implied exercise of the right by an individual regardless of the place. Such implication is to be deduced from the conduct of the parties and the surrounding circumstances.

The Delhi High Court in *Indu Jain* relied on the observation made by Lord Hoffman in *Campbell v. MGN Ltd*¹²⁷ that:

¹¹⁷ Andrew Jay McClurg, ‘Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places’ (1995) 73(3) North Carol LR 989, 991-992.

¹¹⁸ Elizabeth Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50(3) U Toro LJ 305, 310-311.

¹¹⁹ *Express Newspapers (P) Ltd v Union of India* 1958 SCC OnLine SC 23 : 1959 SCR 12.

¹²⁰ *Daily Times Democrat v Graham* 162 So 2d 474 (Ala 1964).

¹²¹ *ibid* 478.

¹²² Simpson (n 118).

¹²³ Andrew J McClurg, ‘Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places’ (1995) 73 NC LR 989, 1086.

¹²⁴ *ibid* ¶323.

¹²⁵ *ibid*.

¹²⁶ *ibid* ¶403.

¹²⁷ *Campbell v MGN Ltd* (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) 2 All ER 995.

*“Being photographed in a public street is taken to be one of the ordinary incidents of living in a free community, the real issue was whether publicising the content of the photograph would be offensive; the balance in such a case has to be arrived at between the public right to information and whether it would justify dissemination or publication or photograph taken covertly and without authorisation.”*¹²⁸

In a Canadian case, *Les Éditions Vice-Versa Inc v. Gilbert Duclos*¹²⁹ a photographer took an artistic photo of a 17-year-old girl sitting on the steps of a building without her consent. The publication of the photograph made the girl sue the magazine for invasion of privacy, where the court had to balance the right to privacy and freedom of expression. The court held that the freedom “must be balanced against the reasonable expectation of privacy of the person whose image is reproduced and, generally, against the severity of the infringement of the parties’ right”.¹³⁰ Here, the girl was entitled to a reasonable expectation of privacy on a street where the photographer could easily have taken the consent of the girl.

D. PUBLIC RECORD

Media is generally allowed to publish information, which is a matter of public record. The Supreme Court of India in *Rajagopal* allowed the petitioner, a magazine, to publish the life story of a prisoner without his consent until the point that it was a part of public record. Any publication is unobjectionable if it is “based upon public records including court records”.¹³¹ If a subject becomes a matter of public record, the press and media acquire a legitimate right to comment on it, and the right to privacy no longer subsists.¹³²

One of the reasons for the court order restraining the exhibition of the movie *Bandit Queen* in *Phoolan Devi* case was that certain scenes based on her private life, where she was raped etc., were not a matter of public record as she had nowhere admitted to the occurrence of such events. The Delhi High Court in *Khushwant Singh* has clarified that “newspapers, periodicals, magazines are not public records”.¹³³ Just because a matter has been previously reported or has been given publicity does not make it a public record.

Therefore, the balancing act of the court will depend on certain factors/values: whether the photograph pertains to the person’s private or public life, whether there is public interest involved in the publication of the photograph,

¹²⁸ Indu Jain (n 47) ¶145.

¹²⁹ *Les Éditions Vice-Versa Inc v Gilbert Duclos* 1998 SCC OnLine Can SC 30 : (1998) 1 SCR 591.

¹³⁰ *ibid.*

¹³¹ Indu Jain (n 47) ¶57.

¹³² *ibid.*

¹³³ *Khushwant Singh* (n 43) ¶38.

whether the person is a public figure, celebrity, or a person of eminence; whether the photograph is captured in a public place, where the person had consented to it or was there a reasonable expectation of privacy; or whether the photograph is a matter of public record.¹³⁴

Shilpa Shetty's case is an important step forward in developing jurisprudence on the conflict between privacy and freedom of the press. A renowned actress and public figure, Shilpa Shetty, had sued several newspapers, media platforms and channels, including Facebook, Instagram, Twitter, YouTube, etc., for uploading defamatory videos/content against her and her family.¹³⁵ Gautam S. Patel J. of the Bombay High Court, while ordering the taking down of the posts, observed,

*"The considerations in a defamation action, and the wide protection to freedom of speech and freedom of press, must be balanced against the right to privacy. The latter is now recognised as a constitutionally protected right. Exceptions to the right to free speech may need to be narrowly tailored. But no court can fail to recognise the constitutional underpinnings of the right to privacy. No court can say that because a person is a public figure of some sort, therefore that person must be deemed to have forever sacrificed her or his right to privacy."*¹³⁶

At the same time, the High Court refused to pass a blanket restraining order since it would have a chilling effect on freedom of speech.¹³⁷

The concept of 'zone of privacy' as developed in the Puttaswamy case establishes a reasonable expectation of privacy that is afforded to every individual. Celebrities may not enjoy the same expectation of privacy, but being a public figure does not obliterate the expectation completely. Undoubtedly, the purpose of freedom of the press is to "advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments".¹³⁸ However, such public interest must be established. In the present case, the court objected to reports regarding Shetty's parenting but, at the same time, did not prevent the publication of reports pertaining to criminal investigations

¹³⁴ See Pankhuri Agarwal, 'Right to Privacy in India: Remedies Against Unauthorised Publication of Photographs' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3370248> accessed 21 October 2023.

¹³⁵ Vidya, 'Shilpa Shetty Moves Bombay HC to Restrain Social Media from Publishing Defamatory Content Against Her' *India Today* (29 July 2021) <<https://www.indiatoday.in/law/story/shilpa-shetty-moves-bombay-hc-to-restrain-media-from-publishing-defamatory-content-against-her-1834397-2021-07-29>> accessed 24 October 2023.

¹³⁶ *Shilpa Shetty Kundra v Clapping Hands (P) Ltd* 2021 SCC OnLine Bom 14145 ¶15.

¹³⁷ *ibid.*

¹³⁸ Express Newspapers (n 15) ¶32.

against her husband.¹³⁹ Right to privacy may give way to freedom of the press in case there is a higher interest of the public served, if the information about a person's private sphere is newsworthy, or if it pertains to a public figure.

The paparazzi are generally more interested in publishing about a person's private life when either the person is known publicly or where the activities involved pertain to immoral or deviant behaviour. The state of California in the U.S.A. passed an "anti-paparazzi" legislation in 1999 that banned invasion of privacy. It limited such ban to situations where the invasion is offensive to a reasonable person and where the person has a reasonable expectation of privacy.¹⁴⁰ Conclusively, the publication of photographs that are a matter of public interest should be allowed, for example, if it pertains to an illegal activity or if a public figure is involved whose success depends on public opinion to a great extent. On the other hand, if an individual has a reasonable expectation of privacy based on location or other circumstances or if the publication of material is offensive to a reasonable man, in such case, privacy should be protected. In balancing these interests, the courts should prescribe a remedy which is least intrusive and most effective in tackling abuse by paparazzi.

V. CONCLUSION

The general tendency of courts is to impose positive obligations on the State to protect an individual's privacy if the claim is in the context of vertical rights.¹⁴¹ Where, however, the claim is of breach of privacy by a non-state actor, the courts are inclined to demonstrate a predilection for favouring freedom of expression. Restricting the availability of fundamental rights against the State ensures that the public-private distinction is maintained. It is time to move beyond that, especially in cases of privacy violation, which is breached more frequently by private players like the paparazzi as opposed to the State. Supporting this argument, the article has attempted to clarify a complex area of constitutional law that has previously dealt with judicial caution and trepidation.

The courts in India have tackled the more vexing question pertaining to privacy as a fundamental right and have risen to the occasion where Parliament has feared to tread. It is time to move forward as the horizontal effect question requires urgent consideration. The approach adopted by the courts of applying horizontality nervously on a case-to-case basis leads to incomplete protection. To

¹³⁹ Jahnvi Sindhu, 'Times Face-Off: Should an Individual's Right to Privacy Prevail Over Press Freedom?' *The Times of India* (13 August 2021) <<https://timesofindia.indiatimes.com/india/times-face-off-should-an-individuals-right-to-privacy-prevail-over-press-freedom/articleshow/85291186.cms>> accessed 24 October 2023.

¹⁴⁰ Richard J Curry, Jr, 'Diana's Law, Celebrity and the Paparazzi: The Continuing Search for a Solution' (2000) 18(4) *J Comp Info L* 945.

¹⁴¹ Puttaswamy (n 7); *PUCI v Union of India* (1997) 1 SCC 301; *Kush Kalra v Union of India* (2021) 2 SCC 481; *Ramlila Maidan Incident, In Re* (2012) 5 SCC 1.

ensure the full protection of fundamental rights, it is imperative to give recognition to the horizontal effect. It is time for the courts to embolden themselves further and openly engage with the task at hand. It is time to recast the debate and revise the traditional vertical effect of constitutional rights. Such restrictive interpretation permits the non-state actor to do what is unconstitutional for the government to do. The interests of an individual can be afforded protection under the indirect horizontal effect, an interpretive task that requires the urgent attention of the Indian judiciary.

Cases of photographic invasion of privacy elucidate that there is no clarity on acceptable or unacceptable intrusions. As offensive uses of photographic technology rise and impend the elementary precepts of human dignity, reviewing the existing law on invasion of privacy is expedient. The balancing act requires the deftness of a trapeze artist, where the courts cannot work on a presumptive interpretation. The question to be examined is whether the public's right to information justifies the propagation of the photograph taken without authorisation. The interpretive calling of the courts to appraise the intensity of offensiveness of the invasion must be consistent with societal notions of dignity.