

1 CMET (2014) 59

Click-Me Not: The Never-Ending Affair of Shutterbugs and Celebrities

by

Aastha Mehta and Himaja Bhatt*


INTRODUCTION

Tabloids all over the world and gossip columns have shown every feature of a celebrity's life, and this trend has over the years caught up in India like wildfire. Right to privacy, in the context of media peeping into the lives of celebrities and public figures has been a controversial debate, with the two extremes being: one which supports the intrusion on the ground of celebrities consenting to it along with stardom and they reciprocally getting publicity and the other being those who would want to keep the press on the sidelines and let them not get away with the tactics of getting news about private lives of public figures. Case laws have proved to be an important literature, and the two countries namely USA and France, which are going to be discussed next, have generated a plethora of it majorly due to it being a hub for celebrities, but partly there being certain laws in place for such intrusions.

JURISPRUDENCE IN USA

The American Constitution has no express mention of the right to privacy, however such a right has been read into the Constitution, with many judgments turning into landmark ones.¹ The most oft quoted judgment is Justice Brandeis dissent in *Olmstead v. United States*², which has been reproduced herein

"The makers of our Constitution understood the need to secure conditions favourable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality -- the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men. The principle underlying the Fourth and Fifth

 Page: 60

Amendments is protection against invasions of the sanctities of a man's home and privacies of life. This is recognition of the significance of man's spiritual nature, his feelings, and his intellect".³

Incidentally, Justice Brandeis along with Justice Warren had for the first time written about the news gathering techniques of media, resulting in infringement of privacy in one of their articles in Harvard Law Review.⁴

In this section, the authors addresses three major themes - one being how the press cannot be controlled completely, the reason being that the public wants to know more about the lives of their favourite stars, and second being the defence which the media often takes has been many a times recognized by courts that is the defence of "news-worthiness". Lastly, the concept of "Faustian bargain", as the media puts it, is a kind of *quid pro quo*.

Beginning with the first analysis, celebrities and public figures are often seen in the outside world as glamorous and beautiful, which increases the amount of interest people have in them and their lives. People want to know more about them and it's for this precise reason the media is required to cover the lives of such sought after celebrities to enhance their viewership or readership. In support of the view that

celebrities have given up their right to complete privacy from the eyes of media, the Court of Appeal of California has, in the case of *Clint Eastwood v. Superior Court of Los Angeles County*⁵ citing another case of *Carlisle v. Fawcett Publications, Inc.*⁶ held as follows "there is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors ... may legitimately be mentioned and discussed in print ... A celebrity has relinquished a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs or character".⁷

It further held that the affairs of Eastwood, which showed him in a love triangle by a weekly magazine *National Enquirer* was held by the court to be a genuine matter of public concern and would preclude any liability. However the Court balanced out the situation by stating that press cannot go to the extent of totally abrogating the right to privacy. Another important case law which indicates complete seclusion for celebrities is not



Page: 61

possible is the case of *Gallella v. Onassis*⁸. This case was concerned with the obtrusive and unwarranted coverage being given to Jacqueline Kennedy Onassis, widow of former President of USA, JF Kennedy and her children by a reported named Ron Gallella. The court herein stated that taking of pictures could not be prevented. However, certain acts which the photographer committed, i.e. following them on private boating etc. can be prevented and gave an injunction not to approach the ms Onassis from 25 feet and her children from 30 feet.

The current position pertaining to right to privacy is found in Second Restatement of Torts⁹ in the form of "Intrusion upon Seclusion" which reads as follows "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if intrusion would be highly offensive to a reasonable person."¹⁰ However, this requires physical intrusion and publication of any image taken by way of such intrusion which is true for all states in US, making it mostly like trespass. Second problem with the tort remedy is what would amount to offensive for a reasonable person is always subject to debate and a pure question of subjectivity. However there have been cases where the right of privacy was vehemently protected by the judiciary, showing that the press does not get an unfettered license to do as it wishes at the cost of someone's sensibilities being hurt. These include *Virgil v. Time*¹¹ where the courts have made an boundary for what cannot be covered by press by saying as follows "the fact that they engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure." One of such case is *Tribune Review Publishing Co. v. Thomas*¹² wherein also the court with strict strictures stated that news which satisfies curiosity, is not protected under Fourteenth Amendments. Some authors also champion the cause of celebrities in their writings some of which include Jennifer Scharf¹³ and Jamie Nordhaus¹⁴ to name a few, who maintain the stand that private moments are required even in the life of celebrities which should be respected and that they are not objects for people to see.

The other theme being the concept of "news worthiness", which can be termed as the litmus test for what is worth publishing and what is not, acting like a meter where the balance of rights should tilt. It is often called the



Kapella's test since it was developed in *Kapellas v. Kofman*¹⁵. It has three tests which would indicate whether privacy has been infringed or not given herein:

- 1) the social value of the information published,
- 2) the depth of the article's intrusion into private affairs and
- 3) the extent to which the subject voluntarily acceded to a position of public notoriety.¹⁶

In my opinion, all these standards would not give a blanket freedom to press, nor does it guarantee protection to celebrities, as all these depend largely on the circumstances and facts under which the alleged intrusion took place. These standards make the outcome of litigation uncertain, giving out no definite rule. It has been stated very aptly, "until society's inevitable appetite for lurid and personal information is curbed, media will continue to treat such information as newsworthy striving to satisfy the cravings of public".¹⁷

One more interesting aspect in the academic opinion, which distinguished between descriptive and normative meaning of newsworthiness, stressing on the fact that if there is a descriptive newsworthiness, tort of privacy would also be engulfed and anything which the publisher considers to arouse interest in the event will be allowed publication.¹⁸ However, newsworthiness needs to be defined more compactly, wherein one knows how much is considered tolerable by public personalities. Adding to what newsworthy means, court has stated that "Whether an item is newsworthy depends solely on "the content of the article" not the publisher's 'motive to increase circulation'"¹⁹ This leads us to the third concept of *Faustian bargain*, which is linked to what celebrities gain out of the article published.

Sometimes, articles being published do not always damage the reputation of the celebrity in question. Celebrities are on such a platform because they are in the public with the media covering their every public appearance and interview. Wouldn't unwarranted publicity also keep celebrities in the news and in peoples' minds, indirectly increasing curiosity in them, and resulting into professional benefits also? Isn't it also a professional hazard like the ones accompanying many other professions? It would be too much to ask from the press not to print any information, which might create interest



among people, but then again it should be a self-imposed restriction on journalists what would be permissible.

EUROPEAN JURISPRUDENCE

1. France

Despite the fact that France has always set an example of strict privacy laws, an example that has been followed by Britain and other European countries; it's ex-president had been termed as "*un president publicities*"²⁰ by Jean Hauser in *The French Review of Civil Rights*. This comment had attracted criticism from a lot of journals and newspapers around the world, including *The Guardian* which called the first citizen's passion for publicity as "creating a whole new world for the country's laws on privacy".²¹ Nicolas Sarkozy added a new dimension to the presidency-press relations by voluntarily revealing personal information about his affair with Italian model Carla

Bruni. The most surprising aspect is, however that the ex-President and both his wives alleged that their right to privacy has been infringed by the media several times.²²

The Constitution has no direct mention of the right to privacy but *Déclaration des droits de l'homme et du citoyen, 1789* (Declaration of rights of men and citizens), which forms a part of the constitutional law states that liberty consists of being able to do all that does not harm others.²³ Furthermore, France has ratified the European Convention of Human Rights and Fundamental Liberties²⁴ which affirms that every person has the right to respect of his private and family life, of his domicile and his correspondence.²⁵ The first clear and explicit law relating to privacy was passed on July 17, 1990 which introduced an article in the *Code civil* of France: "Everyone has a right to respect of their private life. Judges can, without prejudice to the compensation for damage suffered, prescribe all measures that are necessary and proper to stop or remove any prevalent obstruction in the private life of citizens. In cases of urgency, interim measures can be taken by the court."²⁶ The Penal code severely punishes publications of recordings and images.



What is droit au respect de la vie privée?

Article 9 of the *code civil* confers this right on all citizens, without however defining it. The jurisprudence doesn't define it precisely either, but it draws some contours and a plethora of case-laws suggests that it effectively means "the right to liberty of carrying on one's individual existence with minimal degree of external invasions". Some protected elements include name, image, voice, intimacy, honour, reputation, state of health, emotional relations, religious beliefs, familial bonds, and in more general terms all that is potential of revealing intimate information about one's life. However, the governing law is totally based on precedents and hence is subjective. Information relating to revenue and property has been held to be non-private. The rule evolved by the courts is that all information which is not necessary for public knowledge should not be revealed.

Civil Action

Article 9 of the code allows judges to award compensation and all other appropriate remedies including interim measures. Thus, a victim of privacy intrusion can obtain a decree from the court for seizure, sequestration (depending on the gravity of intrusion) besides damages and publication of the order in press.

Penal Implications

In addition to civil action, Article 226-1 of the *code pénal* (penal code) allows criminal proceedings to be initiated in two cases:

Capture, recording or transmission, without consent of the author, a conversation held in privacy and intended to be confidential

Capture or transmission, without consent of the subject, the image of a person in a private building.

An underlying assumption made in such cases is that where the capture or recording was effectuated visibly and in knowledge of interested parties without any opposition, the parties have consented to such capture, recording or transmission thereof. When an action falling under Article 226-1 is committed by the press, in writing or audio-visual media, the director of such publication or transmission is made liable.²⁷ Violation of right to privacy can attract one year of imprisonment and a fine of 300 francs.

2. Britain

In Britain, because of the absence of a written constitution, there is no formal guarantee of right to privacy or right to freedom of expression of the press. Even the Bill of Rights²⁸ which safeguards the fundamental liberties of citizens fails to mention the right to privacy. The European Convention on Human Rights and Fundamental Liberties²⁹ was ratified back in 1951 but it is still not integrated in the national law. The government thus proposed a Human Rights Bill³⁰ for integrating the convention in 1997. The Bill is currently under the scanner of the House of Lords.

In the absence of a general recognition of the right to private life, tribunals of law punish certain press intrusions and awards damages in cases of civil responsibility. However, there are specific laws against harassment³¹, defamation, malicious falsehood.

Examples

a) *Malicious Falsehood*: In 1990, a curious case of malicious falsehood occurred when television writer Gordon Kaye was hospitalised. A journalist and a photographer went to the hospital, clicked pictures and published them in *Sunday Sport* along with a false interview with the writer. The tribunal conducting the trial held it to be a case of malicious falsehood because it had published false information without the consent of Kaye. Moreover, it was done with an intention to stop the writer from selling the story of his accident to other journals, which constitutes malice. The court ruled in this case that there can be no compensation for trespass, defamation or disclosure of secrets, but action can be based solely on malicious falsehood.

b) *Disclosure of Secrets*: In 1993, certain pictures of the princess of Wales in sportswear were captured without the knowledge of the princess by the owner of gymnastic club and later sold to a group of press leading to widespread diffusion of the information.³² The action on the grounds of 'disclosure of secret' was allowed in this case owing to the existence of a contract of *extreme confidentiality* between the princess and the club owner. However, the jurisprudence admits for an action on these grounds even in the absence of a formal agreement of confidentiality. Thus, when a person had confided in a friend the information of his homosexual relations with a third person and the information was later

found in *Mail on Sunday*, court granted redressal against disclosure of secret information and both the friend and the newspaper were held liable.

The only elements required for an action in secret disclosure are existence of a special relationship imposing discretion, and a degree of intimacy or secrecy required by the nature of information.

AUTO-REGULATION OF THE MEDIA

A. Audio-Visual

In England, there exists a *Broadcasting Standards Commission* (BSC) which deals with unjustified intrusions into the private lives by modes of radio diffusion or television. Since 1997, BSC exists as a result of the fusion of two organizations — the

Broadcasting Standards Council and the Broadcasting Complaints Commission and the members of BSC are nominated by the minister of audio-visual department. BSC was assigned with the task of laying down a *Code of Good Conduct* which is in force since January 1, 1998. This Code provides guidelines for dealing with privacy invasions and is based on the notion that privacy is a relative concept and lives of certain individuals are naturally more exposed to the public owing to their position and profession. It permits the intrusion as long as public necessity so demands but does not sanction measures by the media which are disproportionate to the information sought. The BSC publishes its decisions in a monthly bulletin and can also compel the audio-visual channels that are party to the dispute to transmit the decision. The complaints to BSC can be filed by any interested party within a time-period of 3 months or 6 weeks in case of television and radio respectively.

B. Written Press

After the 2nd World War, a Press Council was created as a part of the work initiated by the Royal Commission for the betterment of press. Just like the BSC, the Press Council was entrusted with the work to lay down a Code of Conduct and censoring undesirable journalistic practices. However, its partisan composition and lack of power created a vacuum in the regulation of written press. Thus, it was replaced by the *Press Complaints Commission* (PCC) in 1990. A salient feature of the Code for written press is that conviction of photographers is limited only to pictures taken on private property, in hotel rooms, or parts of hospitals where patients are treated or housed while all places exterior to the private property including waiting rooms of hotels and hospitals are excluded from the ambit.



According to the Code for journalists, the following information is deemed to be of public necessity-

- 1) Detection or highlighting of a crime or serious offense
- 2) Protection of public health and safety
- 3) Preventing the public from being misled by the words or actions of an individual or an organization

This is a very inclusive provision since it allows the press to, for instance, publish that the children of a certain politician attends a certain school, as voters have the right to know whether their leaders act upon their words.

However, the functioning of PCC is not free of criticism. The Council has no power to impose fines and its recommendations are of a non-binding nature. Thus, in a vast majority of cases, the newspapers get away with publishing a correction in the next edition.

In 1995, Buckingham Palace lodged a complaint against an article published in *Business Age* which ranked the treasury of the queen as the richest in the country following a comment that there was no clear distinction between the personal assets and the treasury. The PCC did not award any compensation for injury to reputation of the royal family, but merely directed the press to verify the information and publish an explanation.

Several experts have remarked that the PCC is an organ created by the industry (press), dominated by the industry and functioning in a manner favourable to the industry. Thus, there is a need to replace the Council by a tribunal responsible for punishing breaching of professional ethics and having the power to impose fines and

financial compensation.

3. Germany

The first few articles of the German Constitution provide the fundamental rights of individuals. The Constitution states that the dignity of a person is intangible, and every public authority is under an obligation to respect and protect it.³³ Further, it states that everyone has the right to free development of personality, as long as it does not result in restriction on any other individual's right, constitutional order or morality.³⁴ At the same time, the right to expression and diffusion of one's opinion and information is also granted.³⁵ The very next clause imposes limitations on the exercise of right to expression including the respect for right to personal honour of any



Page: 68

citizen and ensures that this right is not abused or used to the detriment of another.³⁶

These constitutional provisions were integrated into civil jurisprudence to form an idea of right to personal life infringement of which attracted compensation to the other party. Further, the penal code also protects citizens against certain special intrusions like making public an intimate conversation or secret correspondence.

The constitutional court of Germany has ruled in a series of decisions that, in cases of conflict between the right to expression of the press and right to privacy of an individual, the contradicting interests have to be estimated and appreciated in a manner relative to each other. There is no general rule regarding over-riding effect of one right *vis-à-vis* other. But the tribunals have evolved certain principles, for example, the communication of personal details is not sanctioned by law unless there is a legitimate interest justifying the same. Affirming the jurisprudential position, the Code of Ethics of the German Council of Press³⁷ states that the press must respect the right to privacy and intimacy of a human being. In cases where the private life of a person affects public interest, it can be evoked in the media ensuring that no other rights of the person are affected by such publication.

The penal code has a separate chapter to deal with intrusions into privacy and intimacy of an individual which can be punished with fine or an imprisonment not exceeding 3 years.³⁸

4. Italy

The Italian Republic guarantees its citizens all inviolable rights in the capacity of individuals as well as social groups.³⁹ The liberty and secrecy of correspondence and all other forms of communication⁴⁰, as well as the liberty of expression of the press⁴¹ are also protected. The civil law does not make any explicit reference to "private life" or an equivalent idea. The civil code merely guarantees the right to image while the penal code punishes "illicit interference in private life", a very abstract term not followed by any specific acts. Legislation passed in 1996⁴² deals with just journalistic intrusions without consent of interested parties and invites the National Council of Journalists to elaborate a code of ethics for regulating publication of diffusion of information relating to health or sexual lives of public figures.



Page: 69

An important test developed by the judiciary of Italy is that of *inviolability*. While the

legal texts don't recognize any rights besides the right to image, the jurisprudence affirms the inviolability of a particular right and the decision of granting protection to the right is made on the touchstone of the inviolability test.

The Right to Image

The Civil Code recognizes the right against 'abuse of image'⁴³ and protects all exhibition or publication of images that are detrimental to the dignity or reputation of a person except in cases where it is granted by law. Copyright legislations protect unwarranted publication of portraits, reproduction or commercialization thereof without consent of the person⁴⁴ save in cases where reproduction of the image is justified by the notoriety or overriding public interest.⁴⁵

Other Rights

In 1963, the Court of Cassation of Italy affirmed the inviolable right to self-determination, based on Article 2 of the Constitution. According to the Court, this right is violated when private news is made public without any explicit or implicit consent or overriding public interest. The right to protection of private life was expressly proclaimed for the first time by the Court in 1975. On the other hand, the Constitutional Court has also adopted the position of ordinary courts and stated that the inviolable right to private life must include, within its ambit the right to dignity, honour, responsibility, discretion and reputation.

However, in cases of conflict between protection of right to privacy and liberty of press which is also safeguarded by the Constitution, the jurisprudence refuses to give a generalised edge to one right over the other and favours case-by-case perusal. It is seen that the jurisprudence is reluctant to limit the manifestation of liberty of expression of journalists, not just in the diffusion of factual information, but also their opinions and comments. The authors feel that this is vital for creating a democratic environment, the liberty of expression of reporters and journalists cannot be compromised unless absolutely required by virtue of its being outbalanced by a citizen's right to privacy. In other words, the Italian jurisprudence sanctions the disclosure of news, even if it is prejudicial to the reputation of a celebrity, so long as the information is true and its diffusion corresponds to some social utility.




INDIAN POSITION: CONFLICT BETWEEN ARTICLE 19(1)(A), 19(1)(G) AND ARTICLE 21

"I give the fight up: let there be an end, a privacy, an obscure nook for me. I want to be forgotten even by God"

Robert Browning.

The word "celebrity" owes its origin to the Latin term "celebritatem" which means "the condition of being famous". The official definition of the term celebrity may be stated as "a person, who has a prominent profile and commands some degree of public fascination and influence in day-to-day media".⁴⁶ The definition itself is indicative that being in the limelight is a part of the job description. And yet, so many celebrities make a fuss about their personal lives being made public by the media. We see a perennial conflict between two fundamental rights wherein it is often forgotten that celebrities are celebrities by virtue of the media. Unlike some countries which have legislations that strike a balance between the freedom of press and right to privacy⁴⁷, India noticeably lacks one. This section depicts the dynamics of paparazzi and celebrity journalism in India.

Before independence, there was no statutory or constitutional guarantee of liberty of expression of the press or right to privacy of an individual. However, the Privy Council ruled that some degree of 'common law freedom' was allowed to the press if claimed.⁴⁸ After the enactment of the Constitution, it is guaranteed as a fundamental right, as recognition of the universally guaranteed freedom of speech and expression. In India, every citizen has the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴⁹ Judiciary has affirmed this position by stating that it furthers the creation of an informed citizenry and hence the concept of democracy.⁵⁰ The right guaranteed under Article 19(1)(a) implicitly includes freedom of press and are restricted only by the limitations mentioned in Article 19(2). The constitutional viewpoint of freedom of press was explained by Venkataramiah, J. of the Supreme Court of India in *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*⁵¹ The apex court has realized that the press plays the role of public educator making social and political intercourse possible on a large scale. It functions like the fourth pillar


 Page: 71

of democracy, advancing public interest by publishing facts and opinions which are often not palatable to Governments and other authorities. The press is granted wide freedoms which the executive cannot restrict merely by using 19(2) as a justification unless in cases of reasonable restrictions⁵² for which no general standard exists and has to be determined on a case-by-case basis.⁵³

While the restrictions on free speech must be reasonable, there are no restrictions of reasonableness on an individual's exercise of rights. George Orwell said, "If liberty means anything at all, it means the right to tell people what they do not want to hear."⁵⁴ Societal standards of acceptability play an important part role in deciding the reasonableness of any restriction. The right to speech and expression must always be balanced with other rights, including the right to privacy and cannot exist in vacuum.⁵⁵

The polemic becomes more controversial when the individual whose right to privacy is in question is a celebrity. When asked about the leaking of Shahid Kapur-Kareena Kapoor's kiss clip in an interview, Amitabh Bachchan said "If you allow yourself to be photographed, that's no fault of the media". It is the paparazzi that has turned into a boon for mediocre Bollywood stars, obliging a large number of them to hold photo shoots at their whims and fancies. This allows the paparazzi to exercise its freedom of expression in a way that outbalances the celebrities' right to privacy because the celebrities and the press enjoy such a relationship. The paparazzi advent is ever-growing and haunting celebrities. Unlike earlier times, when contemplating love affairs of celebrities was all that media did, recent exposures on television and internet showing celebrities in embarrassing situations threaten the right to privacy of celebrities.⁵⁶

On the other hand, journalists are not content with the level of intrusion, some even claim that the paparazzi culture does not exist in India at all.⁵⁷ Rahul Bhatia, a celebrity journalists, says, "*Photographers say that inadequate payment and, more importantly, little demand for revealing candid photographs make it unremunerative to be a paparazzi. And so the very definition of the paparazzo's role has been altered to fit in with the harsh*

 Page: 72

*Indian reality.*⁵⁸ Besides the problem of budget and insufficiency of risk-taking journalists, Indian celebrities step out of their homes as celebrities and don't let the media catch glimpses of their personal lives. Aakar Patel, former editor of *Mid-Day* and working with *Tehelka* admits having tried creation of a paparazzo culture which turned out to be a failed attempt.

With the growing shutterbug culture in the country, the lack of specific legislations is strongly felt. The scanty number of case-laws on celebrity rights adds to the trouble. For instance, our judiciary is yet to recognize the right of publicity and the right to name or image as distinct legal rights.⁵⁹ The current set up of intellectual property rights can be used to prevent privacy intrusions until a codified law on celebrity and publicity rights is developed.⁶⁰ A recent trend of trademarking names and sound tracks to prevent reproduction and duplication without consent is increasingly seen. Annoyed by unwarranted duplication and non-consensual commercialization of their names/voices/books, celebrities like Kajol, Amitabh Bachchan and Sanjeev Kapoor have taken resort to trademarks. By applying the rationale under Section 2(1)(zb) of the Indian Trademarks Act, 1999, celebrity names have over the years acquired secondary meaning and also carry goodwill, and are capable of distinguishing the goods and services of one person from those of others.⁶¹ A number of other common law causes of action like registration of domain name⁶², passing off and copyright protection can also be availed.

SUGGESTION AND GUIDELINES EVOLVED THROUGH FOREIGN CASE LAWS AND INDIAN SCENARIO

Our country has a buzzing and ever growing industry of entertainment, which makes anyone ponder why is there a no proper legislation to protect the privacy of celebrities and public figures. Indian journalism has always had a tendency of sensational journalism, which is why celebrity gossip has shot up giving rise to tabloid culture. This section gives us a view as to why India needs a legislation so that the press does not go overboard and privacy of public figures is completely compromised.

It would be pertinent to note that the tension between Article 21 and Article 19 is difficult to be balanced. A similar issue was found in one of

the cases, wherein Article 8 of European Convention on Human Rights, which protects the right to privacy and Article 10 which talks about freedom of expression were sought to be weighed against each other. Lord Woolf CJ, also conceded that the problem in making these two rights compatible in following words: *"There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account"*.⁶³

This very case laid down the guidelines for courts to follow for issuing injunction as to publication of private details of celebrities, in this case, the affairs of married footballer. For Indian courts it can act as a tailor made manual to understand which right should precede when. One of the most important point held herein is, that courts have to consider that if injunction for such publication is not granted, it would take away the only remedy of the claimant and also the fact whether the defendant's right

to expression is being hampered to a great extent.⁶⁴ The judgment goes on to cite other catena of judgments in order to establish that even Section 12 of the Human Rights Act, 1998, require that right to freedom of expression has to be justified, and the claimant has to show that there is some private interest to be protected. Looking at it from an Indian perspective, it would be highly advisable to follow the test which was laid down in *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*⁶⁵ in order to ascertain what needs to be out of media scrutiny. The relevant paragraph is reproduced herein,

"An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or



Page: 74


conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private".

A v. B & C is also one of the cases wherein the British court itself admitted that public figures by their very nature cannot expect complete privacy. Authors by quoting the below paragraph of the judgment reiterate the view that public figures will always attract public attention, however for the purpose of adjudication, there is one way in which it can be ascertained whether or not the published information could have actually interested the readers or not.

*In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.*⁶⁶

If such small points are considered in future by Indian judiciary as and when cases come with respect to intrusion, it would act as a literature for courts to decide the ever-going conflict between articles of the Indian Constitution. Moving to a new aspect, freedom of press is something which is a cherished right in our society. Complete denial to press, for covering celebrities, is too harsh a step. In India, we have the **Press Council of India Act, 1978**, which in Section 13(2)(a) and 13(2)(d) and (e) provide us the complete solution. 13(2)(a) makes the council responsible for independence of news agencies whereas 13(2)(d) and (e) also give a collateral duty to the Council to instil sense of responsibility and high standards of professionalism in journalism. This gives us a base to construct the balance which is required to ensure no one's rights, nor the celebrities, nor is the media prejudiced and obliterated completely. However, there is one glaring loophole, often misused by the media to pry into the secrets of the private lives of celebrities. Section 14 which is power to censure, reads as follows in subsection 1:

"Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or

 Page: 75

news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct, the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may: provided that the Council may not take cognizance if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.⁶⁷

The word which leaves room for interpretation is the word "public taste". The public gets interested by such sensational headlines about celebrities, which make it easy for newspapers to publish as desired. Public taste is a concept which can be easily deciphered and bifurcated into category of people as, willing or unwilling. Their willingness to see more of celebrity stories will in turn lead to more stalking by media, and their lack of interest will lead into a decline of coverage of private moments of celebrities by media. Study of American culture, which is constantly being adopted by Indian culture shows that corporate pressure are also forces more news organizations to have entertainment oriented reporting, to satisfy the craving of people to know more about the lives of celebrities.⁶⁸ Though every situation, in case a complaint comes to council is to be judged on the facts and situation of each case, but yet to moderate between the two diagonally opposites, some clear guidelines need to be given, so that no right is said to have been in the hands of a handful of people.

However, there are other equally arguable points to show that gathering news about private lives of celebrities isn't a really a violation as compared to violation of right of privacy for an ordinary citizen. Authors also prescribe to the view. One of the most appealing views being that public figures by their occupation are inherently public, and they have waived their right to privacy.⁶⁹ In Indian the current position can be found in Press Council of India's Norms on Journalistic Conduct⁷⁰ which in Rule 7 talks about **Privacy of public figures**. The fact that same standards of privacy does not apply to public figures is seen from the rules itself which has a

 Page: 76

separate rule namely Rule 6 which address the issue of right to privacy of ordinary citizens. Rule 7 in no unambiguous manner also lays down that public figures are going to be subject to scrutiny by press which is shown in the following manner *"The public person who functions under public gaze as an emissary/representative of the public cannot expect to be afforded the same degree of privacy as a private person. His acts and conduct as are of public interest ('public interest' being distinct and separate from 'of interest to public') even if conducted in private may be brought to public knowledge through the medium of the press. The press has however, a corresponding duty to ensure that the information about such acts and conduct of public interest of the public person is obtained through fair means, is properly verified and then reported accurately.*

The same rule prohibits the use of surveillance devices. In India, problems which generally occur in the west, pertaining to coverage and intrusion by media into lives of celebrity children also is taken care of when Rule 7(iii) points out that **"family of public figures is not journalistic material, more so in case of minors"**, which shows that the Indian law is well-equipped, though codifying it would ensure further safeguards. One commendable thing about these rules is that it makes very detailed provisions, and one of the rules, which the authors would want to state as general blanket rule is shown in Rule 17(viii) which states as follows "The Indian reader is much more mature and able to appreciate good journalism and in the long run, the attempts to copy the west by promoting the 'so-called popular permissiveness' may defeat the very aim of the paper to boost circulation."

Visual media is also one way in which privacy of celebrities takes a toll, when news channels show celebrity affairs and their other private details. Therefore there is a Cable Television Network Act, 1995, as well as rules, and specific rule 6(d) and 6(i) state the following respectively "6(d):*No program should be carried by the cable service which contains material that is obscene, defamatory, or deliberately false.* 6(e) *No program should be carried in the cable service which criticizes, maligns, or slanders any individual in person or certain groups, segments of social, public, and moral life of the country*".⁷¹ This also shows us the level of awareness; however such rules and provisions are seldom invoked for the benefit of celebrities especially in India. In addition, we have self-regulatory body called Broadcast Complaint Commission, with its own redressal mechanism, in order to ensure no content is aired which is harmful to public.⁷² So, considering a situation if any private moments of any public figure is aired



on entertainment channels, even if it might be of interest to majority, even if a single citizen gets offended, or for that matter the celebrity itself can approach this forum, making the news channel liable to remove the offending content from the show. In order to maintain the level of neutrality, there are four non-broadcasting members out of total 13, which include one eminent media critic/expert, so that news agencies don't receive leverage over the complaints. The BCC can also take *suo motu* cognizance of any content which might offend highly any person, or is of such nature which is not advisable for viewership.

This shows how different forums see to it no one is harmed by media channels, however there is minimal literature as to whether agencies who monitor the careers of celebrities resort to it, in case certain unwarranted pictures, or writing comes into public domain, which might be harmful for the celebrities.

CONCLUSION

The authors conclude stating that developed countries have more jurisprudence and literature on privacy rights of celebrities and it is ever growing. When it comes to the right of media to give cover and broadcast, celebrities face a professional hazard. The media should be allowed to exercise their right, however some restrictions are necessary, which are generally taken care of by courts. India though, does not have a legislation and only different forums where celebrities can complain, a statute can act as a more proper safeguard for celebrities, and along with that it can also outline the limits wherein media can exercise their rights, making sure both the parties receive balanced rights.

* 3rd Year, B.A. LL.B (Hons.) and B.Sc. LL.B (Hons.), Gujarat National Law University, Gandhinagar.

¹ *Griswold v. Connecticut*, [1965] 381 US 479, 484; *Lawrence v. Texas*, [2003] 539 US 558.

² [1928] 277 US 438.

³ [1928] 277 US 438.

⁴ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' [1890] 4 Harv L Rev 193, 195.

⁵ [1983] 149 Cal App 3d 409 : 10 Media L Rep 1073.

⁶ [1962] 201 Cal App 2d 733, 746.

⁷ *ibid* 747.

⁸ [1963] 353 F Supp 196 (SDNY1972).

⁹ Restatement (Second) of torts 1977, s 652.

¹⁰ Restatement (Second) of torts 1877, s 652B.

¹¹ [1975] 527 F2d 1122, 1131 (9th Circ).

¹² [1958] 254 F2d 883, 886 (3rd Circ).

¹³ Jeniffer Scharf, 'Shooting for the stars: A call for federal legislation to protect celebrities right to privacy' [2005] Buffalo Intellectual Property Law Journal 164, 169.

¹⁴ Jamie E Nordhaus, 'Celebrities Rights to Privacy: How far should Papparazi be allowed to go?' [1999] The Rev of Litigation 286, 289.

¹⁵ [1969] 459 P2d 912 Cal.

¹⁶ *ibid* 922.

¹⁷ Hillary E Ware, 'Note, 'Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for 'Outed remedies' [1997] 32 Harv CR CLL Rev 449, 465.

¹⁸ Comments, 'The Right to Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness' [1963] Univ Chic L Rev 722.

¹⁹ *Jamie Messenger v. Gruner + Jahr Printing & pub*, [2000] 208 F3d 122.

²⁰ J Hauser, 'Electronic Journal of Comparative Law' [2008] EJCL 283.

²¹ M Berlins, 'Publicity-mad Sarkozy leads fight for privacy' [2008] The Guardian.

²² *Nicola S v. Le Matin*, TGI Thonon Les Bains, 22 September 2006; *Ciganer-Albeniz v. Cremisi, Société Flammarion and Bitton*, TGI Paris, 11 January 2008, JCP 2008, Act 66; *N Sarkozy v. StéRyanair and C BruniTedeschi v. StéRyanair*, TGI Paris, 5 February 2008, JCP 2008, Act 117.

²³ Déclaration des droits de l'homme et du citoyen, art 4.

²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms 1953.

²⁵ *ibid* art 8.

²⁶ *ibid* art 9.

²⁷ La Loi sur la liberté de la presse 1881, art 42; La Loi sur la communication audiovisuelle 1982 art 93-3.

²⁸ Bill of Rights 1689.

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms 1953.

³⁰ Human Rights Act, 1998.

³¹ Protection from Harassment Act, 1997.

³² 'LA Protection de la Vie Privée Face Aux Médias' (Senat) <http://www.senat.fr/lc/lc33/lc33_mono.html> accessed 27 June 2014.

- ³³ German Constitution, art 1(1).
- ³⁴ *ibid* art 2(1).
- ³⁵ *ibid* art 5(1).
- ³⁶ *ibid* art 5(2).
- ³⁷ German Press Code, s 8.
- ³⁸ German Constitution, arts 201, 202.
- ³⁹ Italian Constitution, art 2.
- ⁴⁰ *ibid* art 15.
- ⁴¹ *ibid* art 21.
- ⁴² Italian Data Protection Act, 1996.
- ⁴³ Italian Constitution, art 10.
- ⁴⁴ Law for the Protection of Copyright and Neighbouring Rights 1941, art 96.
- ⁴⁵ *ibid* art 97.
- ⁴⁶ Vaibhavi Pandey, 'India: Being Famous: A Boon Or A Bane?' (*Mondaq*, 2014) <<http://www.mondaq.com/india/x/284960/advertising+marketing+branding/beinG+FamoUS+a+boon+or+a+bane>> accessed 28 June 2014.
- ⁴⁷ Celebrity Rights Act, California 1985; Civil Code, France.
- ⁴⁸ *Channing Arnold v. King Emperor*, (1914) AIR 116, 117 (PC).
- ⁴⁹ Dr M Tiwari, 'Freedom of press in India: Constitutional Perspectives' [2006] PL, 7.
- ⁵⁰ *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294 : (2002) AIR 2112 (SC).
- ⁵¹ (1985) 1 SCC 641.
- ⁵² *Sakal Papers (P) Ltd. v. Union of India*, (1962) AIR 305 (SC).
- ⁵³ *Dwarkadas Shrinivas v. Sholapur Spinning & Weaving Co Ltd.*, (1954) SCR 674.
- ⁵⁴ George Orwell, 'The Freedom of the Press' (George Orwell, 1972) <http://www.orwell.ru/library/novels/Animal_Farm/english/efp_go> accessed 29 June 2014.
- ⁵⁵ Anahita Mathai, 'Media Freedom and Article 19' (*Observer Research Foundation*) <http://www.observerindia.com/cms/sites/orfonline/modules/issuebrief/attachments/issue53_1365505705338.pdf> accessed 29 June 2014.
- ⁵⁶ 'Paparazzi Culture in Bollywood' (*Indianetzone Films*) <http://entertainment.indianetzone.com/films/1/paparazzi_culture_in_bollywood.htm> accessed 29 June 2014.
- ⁵⁷ Rahul Bhatia, 'Why India has no Paparazzi' (*OPEN*) <<http://www.openthemagazine.com/article/nation/why-india-has-no-paparazzi>> accessed 29 June 2014.
- ⁵⁸ *ibid*.
- ⁵⁹ *ICC Development (International) Ltd v. Arvee Enterprises*, [2003] 26 PTC 245 Del.
- ⁶⁰ Amrithesh Mishra, 'Living off fame: protecting a celebrity's name in India' (*World Intellectual Property Review*) <<http://www.worldipreview.com/article/living-off-fame-protecting-a-celebrity-s-name-in-india>> accessed 29 June 2014.
- ⁶¹ *ibid*.
- ⁶² *Tata Sons Ltd v. Ramadasoft*, Case D 2000-1713, dated 8-2-2001 (WIPO), *DM Entertainment v. Rajesh Jhaveri*, Case 1147/2001, dated 10-10-2001 (Del).
- ⁶³ *A v. B & C*, [2002] EWCA Civ 337.

⁶⁴ ibid 11.

⁶⁵ (2001) HCA 63, para 42.

⁶⁶ J Hauser, 'Electronic Journal of Comparative Law' [2008] EJCL, para 11.

⁶⁷ Press Council of India Act, 1978.

⁶⁸ Jacqueline Sharkey, 'The Diana Aftermath' [1997] AM Journalism Rev 18, 22.

⁶⁹ D Scott Gurney, 'Note, Celebrities and First Amendment: Broader protection against unauthorized publication of photographs' [1985] 61 Ind LJ 697, 709.

⁷⁰ Press Council Of India, 'Norms on Journalistic Conduct' (*Press Council of India*, 2010) <<http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf>> accessed 25 June 2014.

⁷¹ 'Cable Television Network (Regulation) Rules, 1994' <<http://admis.hp.nic.in/himpol/Citizen/LawLib/C033.HTM>> accessed 25 June 2014.

⁷² 'Broadcasting Content Complaints Redressal Mechanism' (*IBF*, 1995) <<http://www.ibfindia.com/sites/default/files/pdf/Broadcasting%20Content%20Complaints%20Redressal%20Mechanism.pdf>> accessed 25 June 2014.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.