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RIGHT TO PRIVACY VS. FREEDOM OF EXPRESSION: STRIKING A DELICATE BALANCE IN THE DIGITAL AGE

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I.INTRODUCTION

It is an age in which a social media post by anyone can share intimate details about a person's life to thousands in a matter of seconds, making the conflict between the right to privacy and freedom of speech more significant than ever. With issues ranging from paparazzi to doxxing and even state spying, it is clear that the two basic rights, both of which are essential for human freedom and democracy, have a habit of butting heads in modern times. When an unconsented photograph is taken, when a private message leaks to the press, or when there is an exposé that pushes the boundaries of public interest, there is an important question that must be addressed: How does one protect an individual's sovereignty while not inhibiting the healthy discussion necessary for freedom?

The right to privacy was established in the late nineteenth century when technology such as instantaneous photography threatened a person's ability to remain private. According to Warren and Brandeis, however, the current legal principles are inadequate in safeguarding individuals against emotional and reputational damages arising out of an intrusion into their private affairs and unwarranted publicity.[1] Their proposal for greater recognition of the right to privacy as part of individual self-respect has come a long way and today covers informational privacy, decisional privacy, and privacy against interference both by the government and by individuals.

Freedom of speech and expression is the bedrock of democracy. Freedom of speech allows people the freedom to participate in discussions, search for truths, and checks governmental excesses. From a philosophical point of view, freedom of speech has its origin in the philosophy of harm put forward by John Stuart Mill and the philosophy of free exchange of ideas propounded by Oliver Wendell Holmes.[2] Freedom of speech allows people to speak out, criticize those in authority, and advance the cultures and polity.

These two rights are not in any contradiction. Indeed, privacy allows individuals the safe environment they need to think, identify themselves, and express. Otherwise, fear of being

[1] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).
[2] John Stuart Mill, *On Liberty* (1859); *Abrams v. United States*, 250 U.S. 616, 630 (1919).

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watched or seen can stifle opposition and prevent fulfilment of oneself. On the contrary, freedom of expression ensures protection of privacy by helping highlight any violations and fighting for better safeguards. When there is interference between an individual's freedom of expression and the other's privacy, the case should be resolved in a careful manner.

For instance, in India, this conflict has been legally settled with the help of a landmark judgement passed in July 2017. It was then that the country's Supreme Court established that privacy is a constitutionally-enshrined fundamental right that is inherently related to Article 21 and Article 19 freedoms. In fact, the court ruled in the case of *Justice K.S. Puttaswamy v. Union of India* that the privacy principle is important as it protects individuals' dignity, autonomy, and ability to exercise their rights.[3]

This paper will analyse the principles of privacy in the context of freedom of expression, key legislative acts, important cases, problems related to digital age, and balance between conflicting rights. In democratic countries, freedom of speech and privacy are important rights that should coexist and be strongly defended. Otherwise, there would be no real democracy in such societies.

II. CONCEPTUAL FOUNDATIONS

Freedom of speech has deeply philosophical foundations. The notion of John Stuart Mill's harm principle implies imposing limitations on speech only when such speech harms another individual directly because of the crucial role that the right of speech plays in reaching truth through debates. In the United States, Oliver Wendell Holmes proposed a marketplace approach that highlights the necessary consequences of conflicting ideas and even the offensive ones moving society forward.[4] Such concepts imply high levels of protection based on the idea of speech being vital for self-realization, democracy, and checking abuse of power.

At the same time, the concept of privacy concerns personal autonomy and respect. Warren and Brandeis indicated that with new technological advances, legal regulation needed to evolve and recognize the individual's right to inviolate personality.[5] Nowadays, this means treating privacy not only as control over personal data but also as intimacy and ability to choose freely without undue monitoring. Privacy creates a space where individuals can think and form relationships without early exposure to judgment.

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[3] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).
[4] John Stuart Mill, *On Liberty* (1859); *Abrams v. United States*, 250 U.S. 616, 630 (1919).
[5] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205 (1890).

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The reason for such contradiction lies in the necessity of sharing information about others whenever speaking. Nevertheless, research shows that privacy is the first step toward any real expression; since, without the room for personal reflection and experimentation, expression itself will become artificial, restricted, or even staged. The connection between privacy and freedom of expression can be compared to the two sides of one and the same coin, each one being dependent upon the other and complementing one another.[6]

It should be understood that there are consequences attached to this matter. Strong security of both types of rights increases democracy through the creation of an environment where people would feel confident enough to express themselves and experiment. The lack of balance between the two types of rights may harm the individual and society. In particular, when either too much surveillance takes place in the form of either corporate or governmental control, or, on the other hand, too much information sharing happens, both individuals and societies suffer.[7]

III. LEGAL REGIMES

Legal regimes around the world have followed a fairly similar, yet distinct path in dealing with the contradiction between the need for privacy and freedom of expression. The First Amendment in the United States Constitution is reflective of the belief in the almost absolute nature of the right to freedom of expression in America. In fact, the American focus in relation to privacy rights through common law is more pronounced when it comes to intrusion, publication, appropriation, and false light invasion of privacy. Privacy has been identified as a constitutional right in America only by oblique implication in the case of *Griswold v. Connecticut.*[8] Privacy was first recognized as a constitutional right in this landmark case of 1965. The courts have since found it pertinent in the issue of decisional autonomy by making use of the 'actual malice' doctrine that came out of *New York Times v. Sullivan*.[9]

In contrast, Article 8 and 10 of the European Convention on Human Rights address both privacy and freedom of expression. The ECtHR applies equal weightage to both cases and conducts a rigorous proportionality test. The GDPR creates yet another dimension of information privacy in Europe; however, Article 85 provides special provisions in the case of national law when data protection comes into conflict with freedom of the press, academia, and arts. This approach clearly signifies the evolution towards a dignified autonomy, along with freedom of expression.

In this regard, it must be noted that India has made some important strides in this direction in light of the nine judges' ruling in the case of *Justice K.S. Puttaswamy v. Union of India*. The

[6] Daniel J. Solove, *Conceptualizing Privacy*, 90 Calif. L. Rev. 1087, 1130 (2002).
[7] Neil M. Richards, *The Information Privacy Law Project*, 94 Geo. L.J. 1087 (2006).
[8] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[9] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

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court ruled unanimously on the matter of privacy as a fundamental right under Article 21 and the close association of Articles 21 and 19(1)(a). The doctrine of privacy includes bodily, informational, and decisional dimensions. These categories of privacy all emanate from the concept of human dignity. However, the right is not absolute in nature. The restriction should pass a tough proportionality test. It should have a legitimate purpose, have a rational connection to the purpose, be a measure of least infringement, and strike an appropriate balance between the infringement caused and the advantage gained in relation to the other interest.

Comparisons between these legal approaches show that it is not enough to declare one right paramount to the other; rather, what is required is the development of appropriate legal techniques, such as the proportionality test, the public interest defense, and contextual examination, to reconcile rights when conflict arises.

IV. ILLUSTRATIVE CASE STUDIES

There have been several landmark cases in the jurisprudence on the balance between freedom of expression and privacy. An example in this regard within the Indian legal context would be the case of *Justice K.S. Puttaswamy v. Union of India*.[10] The nine-judge constitutional bench of the Supreme Court, by way of its unanimous judgment, declared privacy to be a fundamental right, corrected the prior narrow conception of the same, and firmly anchored the same under Article 21 and Article 19. A number of precedents have been laid down in other countries as well in relation to the said issue.

As a pertinent illustration here would be the case of *Von Hannover v. Germany*. The European Court of Human Rights, in this case, opined that there was a reasonable expectation of privacy for Princess Caroline of Monaco against the paparazzi taking pictures of her.[11] This was because the photographs in question were not being used in connection with a debate of general public concern; consequently, press freedom of expression was hampered. The criteria set by the ECtHR in the case of *Axel Springer AG v. Germany*[12] for achieving balance between Articles 8 and 10 of the Convention include contribution to a public debate, the reputation of the person whose private life is involved, his past conduct, mode of obtaining information, accuracy, and nature of the sanction being imposed.[13]

[10] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).
[11] *Von Hannover v. Germany*, App. No. 59320/00, 2004-VI Eur. Ct. H.R. 293.
[12] *Axel Springer AG v. Germany* [GC], App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012).
[13] European Convention on Human Rights arts. 8, 10, Nov. 4, 1950, 213 U.N.T.S. 221.

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One crucial decision of English law in respect to the issues of privacy and publicity lies in the case of *Campbell v. Mirror Group Newspapers*.[14] In this landmark case, the House of Lords recognized misuse of private information as a tort, and held that publication of photographs, as well as publishing the information concerning Naomi Campbell's treatments for her addictions, violated her rights to privacy.

A crucial precedent in India on privacy versus publicity can be drawn from the case of *R. Rajagopal v. State of Tamil Nadu*. Also known as "Auto Shanker case," it would be significant to note that in this case, the Supreme Court of India found an individual's right to privacy in relation to his personal life without taking away the freedom of press on matters of public interest.[15]

Some more recent examples in the digital age have brought out new concerns. Issues such as those of revenge pornography, leaking information without permission, and the 'right to be forgotten' (acknowledged in India after the Puttaswamy case and in Europe through Google Spain) put the court's capacity to balance between permanently damaging the individual online and the importance of archives and freedom of expression to the test. One thing that emerges time and again from all these cases is that the court no longer relies on blanket laws. In their decisions, courts have adopted analytical mechanisms which help reduce the risk of damage to either right.[16]

V. CONTEMPORARY CHALLENGES IN THE DIGITAL AGE

Privacy and Freedom of Expression are interconnected in a complex manner in the digital age. The issues associated with the connection of privacy and freedom of expression cannot be addressed through existing legal means because social media has raised many problems with privacy. Examples of these issues include doxxing, revenge porn, and cyberbullying campaign, among others, all of which show that social media is a threat to people's privacy and also spread information widely. After it is posted on the Internet, any information cannot be recovered because of the permanency and searchability of web information.[17]

The problem of threats to privacy is further aggravated by data-related business models used by technology companies in order to conduct businesses online. In such a case, companies believe they have a right to gather personal data in order to innovate and also help promote

[14] *Campbell v. Mirror Group Newspapers Ltd.*, [2004] UKHL 22.
[15] *R. Rajagopal v. State of T.N.*, (1994) 6 S.C.C. 632 (India).
[16] Daniel J. Solove, *The Future of Privacy*, 97 Calif. L. Rev. 1 (2009).
[17] Daniel J. Solove, *The Future of Privacy*, 97 Calif. L. Rev. 1 (2009).

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user-generated content in their own benefit. It is difficult to reconcile between privacy and freedom of expression given that freedom of expression rights can be invoked by companies.[18]

AI and deepfake technologies are new elements which have been introduced into the war game. The AI-driven videos or images may damage someone's reputation or invade their privacy in a way that lacks any evidentiary marks. At the same time, states are making use of surveillance technologies to secure their national or even governmental interests. Issues related to facial recognition, data localization, and interception are among the examples. The Indian case regarding the Aadhar project is indicative in this respect.[19] The 'right to be forgotten' emerges as another important issue which needs to be addressed. Although the courts in Europe and some in India recognize such right in certain cases, it is necessary to weigh such a right in light of the public's right to access information and the archival value of historical data. Younger generations exhibit a paradoxical attitude towards their personal information; despite being willing to disclose it on social media for connection, they feel worried about its exploitation.[20]

However, it becomes increasingly apparent from these issues that the magnitude, rapidity, and borderless character of digital expression require a more responsive approach. In light of this, traditional balancing approaches have to change in order to accommodate new realities such as algorithmic enhancement, transnational data flow, and individual empowerment.

VI. BALANCE MECHANISMS AND BEST PRACTICES

Addressing the conflict between the right to privacy and free speech needs an advanced system of balance than hierarchies. The application of the proportionality test, widely used in India and Europe, seems like the most effective approach. In accordance with the test, any curtailment on one of the rights must advance a legitimate objective, be rationally connected to that objective, be the least restrictive means for achieving it, and result in an overall net benefit when considering both the harm caused and advantages gained.[21]

Certain circumstances should be taken into account here. The nature of the information at stake, whether it concerns a private individual or not, the source of the information, the level of dissemination, and the value to the general interest, all those aspects need to be considered.

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[18] Shoshana Zuboff, The Age of Surveillance Capitalism (2019); *see also* Julie E. Cohen, *What Privacy Is For*, 126 Harv. L. Rev. 1904 (2013).
[19] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).
[20] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317 (May 13, 2014).
[21] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).

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Individuals should be more protected than public figures or celebrities whose personal lives are always of interest to the general audience.[22]

Public interest justification is essential. Any speech related to corruption, abuse of power, and issues of public health and safety is highly valued. Regulation of the media cannot happen solely in order to fulfill the two aspects, namely curiosity and economics. Self-regulation of the media is necessary in relation to the three main factors, i.e., the truth, least possible harm, and verification of sources.

The following are the suggestions that can be made regarding both of the rights from the point of view of the policymakers and the legislation such as data protection laws. For instance, the Digital Personal Data Protection Act, 2023, in India. An online forum should operate on the basis of notice and takedown policy with a guarantee that it would not be misused. There also should be an appeal process that does not turn out into censorship at all. In the meantime, courts also need to have their share of balancing the two principles. It is of utmost importance to introduce digital literacy programs that would help to defend the rights of privacy and freedom of speech at the same time.

Thus, one needs to understand that both rights, privacy and freedom of speech, are interdependent as privacy helps a person to think freely and freedom of speech to express himself.

VII. CONCLUSION

The conflict between privacy and freedom of expression reveals many deep-rooted philosophical issues revolving around individualism and growth of those who co-exist in an interconnected society. Moving from the early research by Warren and Brandeis through the historic case of Puttaswamy to current developments in international law, there has been an increasingly common understanding of the fact that these two rights have an interconnection rather than a paradoxical relationship.

Technological progress brings both greater capabilities in regard to speech and greater risks to privacy interests, requiring a balance between these two interests. Absolute dominance of one right over another entails the decline and deterioration of the latter: surveillance impairs freedom of speech and creativity; extreme disclosure undermines human dignity and security.

Within the framework of a fully developed constitutional state, it becomes crucial to promote people's right to oppose and preserve their privacy that allows for such opposition to exist. Through the use of proportionality, contextuality, and ethics, it will become possible to nurture freedom of expression while not forgetting the importance of preserving individuals' privacy and dignity.

[22] *Axel Springer AG v. Germany* [GC], App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012).