The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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RIGHT TO PRIVACY VS. FREEDOM OF EXPRESSION: FINDING THE CONSTITUTIONAL BALANCE

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Abstract

The relationship between the right to privacy and freedom of expression has become increasingly complex in the digital age, where personal information can be collected, disseminated, and preserved on an unprecedented scale. Both rights are essential to individual dignity, autonomy, and democratic participation, yet their exercise may give rise to competing constitutional interests. This article examines the constitutional framework governing this relationship in India, with particular reference to Article 21, Articles 19(1)(a) and 19(2) of the Constitution, and the landmark judgment in Justice K.S. Puttaswamy (Retd.) v. Union of India. It explores the challenges posed by digital surveillance, personal data processing, online publication, anonymity, encryption, and requests for the deletion or de-listing of information. The article also considers the relevance of the Digital Personal Data Protection Act, 2023, and ARTICLE 19's Global Principles on Protection of Freedom of Expression and Privacy in addressing these concerns. It argues that neither privacy nor freedom of expression should be treated as an absolute right and that their reconciliation requires a context-specific assessment of public interest, proportionality, necessity, and potential harm. Ultimately, an effective constitutional balance must protect individuals against unjustified intrusions while preserving legitimate journalism, public accountability, and democratic discourse.

Introduction

Privacy and freedom of expression clash on a regular basis. Privacy protects an individual's personal life, decisions, communications and information, whereas freedom of expression protects the right to speak, write, report, criticise, create or distribute information. The tension becomes particularly acute in a digital environment where a photograph, message or allegation can reach hundreds of millions of people within hours, and governments, companies and private actors have the ability to collect, store and analyse vast amounts of personal information. This is no longer a dispute between one person who wants to stay private and one person who wants to publish something about the other: it has implications for journalism, government openness, online platforms, surveillance, digital archives, social media and access to information. There may be a need to publish something

about a public figure, a need for anonymity to speak about something sensitive, a need to determine whether an old report should be searchable, or a need to specify how personal information can be lawfully processed.
The interaction between the two rights is more nuanced than a simple choice between privacy and expression. ARTICLE 19's Global Principles on Protection of Freedom of Expression and Privacy recognise this by describing them as rights that can be mutually reinforcing, while acknowledging that there may be circumstances in which the rights conflict. The key question is not which of the rights should win out in all circumstances, but what weight should be given to the competing interests when the exercise of one affects the other.[1]

Privacy as a Constitutional Right in India

For decades, the Indian Constitution did not expressly use the word "privacy." This changed fundamentally with Justice K.S. Puttaswamy (Retd.) v. Union of India, in which a unanimous nine-judge Bench recognised privacy as a constitutionally protected right. The Court associated privacy with life and personal liberty under Article 21 and with freedoms and dignity protected by Part III of the Constitution.[2]
What is remarkable about Puttaswamy is not merely that the Court recognised privacy, but that it explained what privacy protects: privacy was connected with individual autonomy, dignity, identity and the ability of a person to make intimate and personal choices. Privacy is not the same thing as secrecy: it is possible for a person to have nothing to do with secrecy and still have a legitimate constitutional interest in controlling access to, use of or disclosure of information about them.
At the same time that the Court recognised privacy as a constitutional right, it also refused to recognise it as an absolute right: an invasion of privacy would have to meet constitutional standards. The Court mentioned legality, legitimate State aim and proportionality as requirements for State action that intrudes on privacy.[3] This is particularly important in circumstances where the State seeks access to communications, location information, digital records or other personal information.
The digital environment makes this a more complex issue. Personal data can reveal a person's relationships, movements, preferences, professional activities, finances, opinions or other aspects of identity, and information that might not appear to be of any significance separately can become highly revealing when combined. The issue is not so much the disclosure of one secret, but the construction of a whole set of information about a person.
ARTICLE 19's Principles similarly view privacy as control over personal information and recognise rights such as access, correction, erasure, portability and objection to certain kinds of processing. These Principles are not Indian law, but they represent a useful approach to how privacy and expression interact in a digital environment.[4]

Freedom of Expression and Its Constitutional Protection

Article 19(1)(a) of the Constitution guarantees freedom of speech and expression, which takes on a special significance in terms of supporting journalism, political and social discourse, artistic activity, criticism, debate and exchange of information. A democratic society cannot function without the ability to criticise institutions and to discuss matters of public concern.

[1] ARTICLE 19, The Global Principles on Protection of Freedom of Expression and Privacy (2017).
[2] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[3] Id.; see also K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.
[4] ARTICLE 19, supra note 1.

The right to free expression is not absolute: Article 19(2) makes it clear that the State may impose reasonable restrictions on the exercise of the right on certain grounds, including the sovereignty and integrity of India, security of the State, public order, decency or morality, contempt of court, defamation and incitement to an offence. It means that the constitutional issue is not whether reasonable restrictions may be imposed, but whether a particular restriction is consistent with the constitutional framework.[5]

This becomes particularly difficult when speech includes personal information. A person may claim that the publication of an article or photograph invades their privacy, while the publisher may claim that the information is of public interest or relevance. Neither should be able to settle the dispute on its own: what matters is the nature of the information, the purpose for which it was published, the status of the person concerned, the extent of public interest, the method of obtaining the information, and the potential harm that may be caused by publication.

What distinguishes public interest from mere public curiosity is that the former usually involves information relevant to matters of legitimate concern to society, such as accountability, corruption, public administration, public health or the exercise of public power, whereas the latter often takes the form of information that is newsworthy because a lot of people are interested in it at the time. ARTICLE 19's Principles adopt a similar approach, suggesting that any restrictions should be based on law and have a legitimate purpose, while interference should be necessary and proportionate. They also recognise that laws on privacy can create problems if they are applied in such a way that they prevent legitimate criticism, expose wrongdoing or suppress information that legitimately contributes to public debate.[6]

When Does Privacy Give Way to Public Interest?

One of the most difficult areas is where private information is connected, directly or indirectly, with a matter of public concern. This is information about a public figure's assets, conflicts of interest, professional conduct or exercise of public power, which may have a stronger connection with public interest than information about the same person's private life or relationships.

This does not mean that public figures automatically lose their constitutional right to privacy: having a public office may increase the level of scrutiny attached to a person, but it does not mean that every aspect of their private life becomes a legitimate subject of publication. What needs to be considered is whether the information has a genuine connection with the public issue being discussed.

ARTICLE 19's Principles are useful here because they identify a number of factors that may be relevant to the publication of personal information, namely whether the publication contributes to public debate, the notoriety or vulnerability of the person affected by the publication, the nature and sensitivity of the information published, the conduct of the person and the source of the information. They also distinguish between public figures and private individuals, recognising that the former normally attract greater public scrutiny, especially if they exercise a public function.[7]

The same principles can apply to court records and official information. Open justice has its own value, but unrestricted disclosure of court records may put victims, children, witnesses or vulnerable persons at risk. ARTICLE 19 therefore views open justice and privacy as issues that need to be considered together, rather than as absolutes: one single rule does not apply to both.[8]

[5] INDIA CONST. art. 19, cls. 1(a), 2.
[6] ARTICLE 19, supra note 1.
[7] Id.
[8] Id.

This is the better approach because the same information may have different significance in different circumstances: the address of a person may be irrelevant to public debate in one set of circumstances, but highly relevant to the protection of a public official or the investigation of wrongdoing in another. The constitutional balance therefore depends on the context and purpose, as well as likely consequences.

The Right to Privacy in the Digital Age

Technology has complicated the relationship between privacy and expression because information is no longer confined to the time and place of its original publication. A photograph, an old news report, a comment or a court record can remain searchable long after the original publication has lost relevance.

This can affect the impact of a private statement or the ability of a person to control what happens to information about them long after it was originally shared. A statement that reached a limited audience may now be available to anyone who searches a person's name. Information that was once difficult to find can be copied, indexed, republished or combined with other information. Disclosure may have lasting effects even if the original publication no longer commands attention.

Consent is also more complicated in an online environment: people may give information for a specific purpose but not intend it to be reused for unrelated purposes. ARTICLE 19 therefore emphasises lawful and fair processing, transparency and safeguards around personal data, recognising that the fact that information has entered the digital world does not necessarily justify every subsequent use of the information.[9]

India's Digital Personal Data Protection Act, 2023, reflects this evolving legal landscape. Its stated purpose is to regulate the processing of digital personal data, recognising both an individual's interest in protecting personal data and the need to process data for lawful purposes. It also contains provisions relating to access to information, correction and erasure, grievance redressal and exemptions. The Act has been brought into force through a phased commencement notification, with different provisions taking effect on different dates.[10]

The Act therefore introduces another layer of complexity in the privacy-expression debate. Data protection laws can help to protect individuals against unjustified processing, but such laws also need to be considered alongside legitimate publishing, journalism, research or access to information. This is why ARTICLE 19 recommends meaningful exemptions or limitations for journalistic, literary, academic and artistic purposes and for information that must remain available for historical or public-interest reasons.[11]

Anonymity, Encryption and the Chilling Effect

The privacy-expression relationship is also relevant to the protection of anonymous communication. Anonymity can enable people to express controversial opinions, report wrongdoing, seek help or share sensitive information, knowing that they are not immediately identifiable. For a vulnerable person, it can make the difference between engaging in public debate and keeping quiet.

[9] Id.
[10] Digital Personal Data Protection Act, No. 22 of 2023 (India).
[11] ARTICLE 19, supra note 1.

Anonymity can also be abused, but the existence of risks does not justify blanket bans. ARTICLE 19's Principles discourage blanket real-name requirements and recognise that anonymity can be helpful to meaningful expression.[12]

Encryption is another area in which protection of one right can support the other. Secure communications protect private conversations, but they also protect journalists, whistleblowers, lawyers and ordinary citizens who need confidential communication. ARTICLE 19 specifically refers to encryption in relation to both privacy and freedom of expression, showing how rules that increase access to information cannot operate in isolation from the need for people to be able to communicate freely.[13]

Surveillance, Data Collection and the Chilling Effect

Privacy versus expression is not limited to disputes over publication. If people believe that their communications, searches, movements or relationships are being constantly monitored, they may change their behaviour, for example by avoiding certain topics or people. This is commonly referred to as a chilling effect.

The problem is not merely the reading of the contents of a message, but also that metadata and communication records can reveal patterns of contact, the time of communication and the development of relationships. ARTICLE 19 therefore treats indiscriminate or untargeted collection, storage or analysis of communications and communications data as a serious interference with privacy.[14]

Indian constitutional law provides an important framework for examining such intrusions. Under Puttaswamy, the existence of a legitimate objective does not end the inquiry, but the means adopted to achieve the objective must also have a rational connection to it and be proportionate. The later Aadhaar judgment elaborated proportionality as involving a legitimate goal, suitability or rational connection, necessity and balancing between the importance of the objective and the extent of rights infringement.[15]

This is relevant to the issue of privacy restrictions, which can have consequences that extend beyond the individual whose data is collected. If surveillance causes people to refrain from speaking publicly or to protect themselves by silence or by avoiding communications with journalists or civil society, the effect is felt in freedom of expression as well.

Publication, Deletion, De-listing and Permanent Digital Records

Requests for erasure of information or "de-listing" from the internet present another difficult issue. Individuals may argue that information is outdated, inaccurate, irrelevant or disproportionately harmful, while deletion or de-listing can interfere with journalism, historical records, accountability or the ability of the public to understand past events.

It is important to distinguish between deletion and de-listing: while deletion removes the content from a specific source, de-listing usually involves making something less discoverable by a particular search engine. A de-listed item may still exist at its original location. The distinction is relevant because reducing discoverability is different from erasing history.

[12] Id.
[13] Id.
[14] Id.
[15] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1; see also Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

ARTICLE 19's Principles therefore consider such requests with caution, distinguishing between content created by the person requesting removal and content published by third parties, and recommending that de-listing requests be evaluated using factors such as whether the information is personal and whether there was a reasonable expectation of privacy, whether it is accurate or outdated, whether the person is a public figure, and whether the information contributes to public interest.[16]

This recognises the potential harm of digital permanence, while also recognising that the internet has become a valuable repository of public information. A right to delete anything that is inconvenient or embarrassing could undermine legitimate reporting or historical records, and a right to treat everything as permanently available could render privacy protection meaningless.

The ARTICLE 19 Principles therefore favour a case-specific assessment and independent review, recognising that such decisions can affect not only requestors but also journalists, researchers, publishers or members of the public.[17]

Data Protection and Freedom of Information

The conflict is particularly acute where personal information is held by public authorities. Transparency and privacy can be at odds with each other: government records may contain personal information, but they can also reveal how public resources are used, how institutions work or whether public officials are being held accountable. ARTICLE 19's Principles propose a maximum-disclosure approach to information held by public bodies, subject to limited exceptions and harm and public-interest considerations. They also recognise that official records may need protections where disclosure would reveal highly sensitive information, particularly information concerning health, children, victims of violence or other vulnerable persons.[18]

In other words, neither privacy nor transparency should operate as mechanical rules: anonymisation can sometimes be a solution, allowing information relevant to public accountability to be available while protecting unnecessary identifying details, but there are also cases where the identity is relevant to understanding the public issue. The distinction therefore depends on what information is necessary for the legitimate public purpose and what additional disclosure merely increases private harm.

Finding the Constitutional Balance

Some discussions present privacy and expression as enemies, but the relationship is more nuanced. Privacy creates the space in which individuals can think, communicate, establish relationships and form opinions without constant surveillance, whereas expression enables individuals to participate in society, criticise authority, exchange information and develop their identities.

The erosion of either can affect the conditions necessary for the other, which means that the constitutional balance needs to start with the nature of the interference: is the State restricting expression, is a private actor publishing intimate information, is a platform processing personal data, is a search engine making old information permanently discoverable, is surveillance collecting information without sufficiently specific justification? Different problems may require different solutions.

[16] ARTICLE 19, supra note 1.
[17] Id.
[18] Id.

Proportionality is a useful method in this context because it prevents either of the rights from being treated as absolute: a restriction needs to have a lawful basis and legitimate objective, have a rational connection to it and avoid unnecessary interference with other rights if a less restrictive effective alternative is available. The final balancing test needs to consider the actual impact on the various rights affected.[19]

The digital environment also makes procedural safeguards important: people affected by the removal or disclosure of content may need remedies, and courts or independent bodies may need to be able to review decisions in cases where they involve public-interest reporting or fundamental privacy issues. Transparency is equally important in relation to large-scale decisions about access to information by platforms or authorities.

Conclusion

Privacy and freedom of expression are not a zero-sum game: they are both connected to dignity, liberty, autonomy and democratic participation. Their conflict becomes visible particularly when personal information is published, when surveillance affects communications, when data is retained or processed or when old information is made permanently discoverable.

Puttaswamy provides Indian constitutional law with an important foundation by recognising privacy as a fundamental right while acknowledging that rights may be subject to justified limitations. Article 19(1)(a) and Article 19(2), meanwhile, establish the constitutional importance of expression while recognising certain grounds for reasonable restriction. Taken together, these provisions require courts to go beyond simple claims of "privacy" or "free speech" and to consider the actual nature, purpose and impact of the interference.

The challenge in the digital age is therefore not to determine which of the rights is more important in principle, but to develop rules that protect individuals against unjustified intrusion without enabling privacy claims to become a blanket method of suppressing legitimate reporting, criticism or access to information. At the same time, freedom of expression should not be used to justify indiscriminate exposure of personal information.

A fair balance will require consideration of context, proportionality, public interest and procedural safeguards. As information becomes easier to collect, replicate and preserve, law needs to continue to protect the individual's ability to live privately while preserving the democratic space for speech, journalism, accountability and public debate.

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[19] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.