

RIGHT TO PRIVACY IN INDIA: EXISTENCE, SCOPE & CHALLENGES



MARIYAM KAMIL
EXETER COLLEGE

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ABSTRACT

This thesis examines the constitutional right to privacy in India. It focusses on five main themes: (i) the theoretical conception of privacy that has been expounded by the Indian Supreme Court; (ii) the Supreme Court's reasoning in support of reading privacy — an unenumerated right — into the Indian Constitution; (iii) the classification of privacy into sub-rights or clusters of rights; (iv) whether privacy is guaranteed against the State, or private persons, or both; and (v) the standard(s) of judicial review that apply to privacy cases in India.

The thesis makes five key claims.

First, the modern privacy jurisprudence in India makes it clear that the constitutional right to privacy is underpinned by two values: autonomy and dignity. In recognising these values as the conceptual foundation for privacy, the Indian Supreme Court has evolved a conception of privacy that places individual personality at the centre of analysis. However, the Court's reasoning does leave some uncertainty as to the relative weight that Indian Courts should place upon the values of autonomy and dignity in future cases.

Second, the reasons offered by the Supreme Court in support of reading privacy into the Indian Constitution give rise to two consequences: (i) there is a doctrinal tension between the Court's reasoning and its previous jurisprudence on the notion of 'concomitant rights'; (ii) the Court proceeded on the (incorrect) basis that the status of privacy as a 'natural right' is determinative, or relevant, to its status as a fundamental right under the Constitution.

Third, the constitutional right to privacy in India consists of three variants: physical (or spatial) privacy, informational privacy and decisional privacy. Although these variants often

overlap, each of them has a distinct sphere of operation. Moreover, the Court needs to ask different questions depending on the variant of privacy that it is considering.

Fourth, there is support for the indirect horizontal application of the constitutional right to privacy in India. However, the direct horizontal application of the right is at a crossroads. It is likely that the Supreme Court will be called on to make a choice in the coming years. Two options are open to the Court. The first is to adopt a model of direct horizontal application. The alternative option is to recognise that different entities exhibit varying degrees of ‘publicness’. Which among these options will commend itself to the Supreme Court remains to be seen.

Fifth, in general, the Supreme Court of India has employed four different standards of review in its rights adjudication: (i) reasonableness; (ii) *Wednesbury* unreasonableness; (iii) strict scrutiny; and (iv) proportionality. The standard of review that applies to the Court’s privacy adjudication is proportionality. Having examined the nature of proportionality review in India, in 2018, the Supreme Court adopted what I refer to as the ‘hybrid model’ of proportionality. The thesis argues that the hybrid model is excessively complex to the extent of being obscure. Notably, rather than attempting to apply this test correctly, subsequent Indian cases have largely ignored the hybrid model.

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INTRODUCTION

The invasion of privacy is of no consequence because privacy is not a fundamental right and has no meaning under Article 21.¹

- Attorney General for India,
August 2015.

The Constitution of India does not expressly guarantee the right to privacy. The Constituent Assembly Debates do not shed much light on the constitutional protection of this right either. Nonetheless, for at least two decades before this statement, Courts in India had been enforcing privacy as a constitutional guarantee. When viewed against that background, the Attorney General's claim is a bold one.

A. BACKGROUND

In making the submission quoted above, the Attorney General may have been assisted by the circuitous history of the right to privacy in India. The right has evolved almost entirely through judicial decisions. It is fair to say that the Indian Supreme Court's decisions, sprawling over nearly 70 years, have lacked consistency. The Supreme Court rejected the status of privacy as a constitutional guarantee in 1954 and 1962.² Nearly a decade later, it recognised the right within narrow confines.³ Finally, in 1975, the Court affirmed the existence of the constitutional right to

¹ Nikhil Pahwa "Violation of privacy doesn't mean anything because privacy is not a guaranteed right" – *GoI Medianama* (New Delhi, 6 August 2015) <<http://www.medianama.com/2015/08/223-privacy-india-aadhaar/>> accessed 17 May 2022.

² *MP Sharma v Satish Chandra* AIR 1954 SC 300; *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

³ *RM Malkani v State of Maharashtra* AIR 1973 SC 157 [31].

privacy. It did so tentatively first⁴ and then more definitively,⁵ albeit that the 1954 and 1962 decisions rejecting the right were never formally overruled.

Notably, the Attorney General's submission was made in the context of the constitutional validity of the 'Aadhaar Card Scheme', India's biometric identification program. With over 1.2 billion enrollees, it is the largest of its kind in the world. On the one hand, the scheme has been hailed as the vehicle for India's 'invisible millions... to emerge from the darkness to which they have been relegated'.⁶ On the other, it has been criticised as fundamentally destabilising the balance of power between the citizen and the State.⁷ In either case, the key point for the present purposes is that the constitutional permissibility of the Aadhaar Card Scheme was a momentous social and political issue.

The Supreme Court's consideration of that issue has had profound consequences for the development of the constitutional right to privacy in India. For instance, it led to the existence of the constitutional right to privacy in India being re-adjudicated, in 2017, by an enlarged panel of nine judges of the Supreme Court,⁸ only the tenth in the history of independent India. The nine judges emphatically, and unanimously, declared that the right to privacy was protected by the Constitution of India.⁹ The judges also extensively re-examined the nature and scope of the Indian

⁴ *Govind v State of Madhya Pradesh* AIR 1975 SC 1378 [22], [28].

⁵ *R Rajagopal v State of Tamil Nadu* AIR 1995 SC 264 [26]; *District Registrar & Collector, Hyderabad v Canara Bank* AIR 2005 SC 186 [40].

⁶ Nandan Nilekani and Viral Shah, *Rebooting India* (Allen Lane 2016) 5.

⁷ Ursula Rao and Vijayanka Nair, 'Aadhaar: Governing with Biometrics' (2019) 42 *Journal of South Asian Studies* 469, 476.

⁸ Referral order in *Justice KS Puttaswamy v Union of India (Puttaswamy Referral)* AIR 2015 SC 3081.

⁹ *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1.

right to privacy. A year later, a panel of five judges of the Supreme Court was called upon to apply the principles laid down by the nine-judge bench.¹⁰ In doing so, the Court substantially upheld the constitutional validity of the Aadhar Card Scheme.

These two decisions, which are referred to in this thesis as *Puttaswamy I* (the nine-judge bench decision) and *Puttaswamy II* (the five-judge bench decision), marked the beginning of an era of modern privacy jurisprudence in India. More generally, they are perhaps the most significant constitutional decisions by the Supreme Court in recent Indian history. This is reflected in the wide range of issues that the judgments touched upon. As explained elsewhere in this thesis, they include the development of proportionality review in India, the constitutional permissibility of the criminalisation of homosexuality and the overruling of the much-criticised emergency era decision in *ADM Jabalpur*.¹¹ Their significance is also reflected in the currency that these decisions have obtained in privacy adjudication in jurisdictions outside India.¹²

The adjudication in *Puttaswamy I* had yet another important consequence: the Indian Government's constitution of the BN Srikrishna Committee to deliberate on evolving a data protection framework in India. The committee submitted its report in July 2018, recommending the enactment of data protection legislation. This resulted in numerous draft statutes being prepared. They include the draft Data Protection Bill 2018, the Personal Data Protection Bill 2019,

¹⁰ *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

¹¹ *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521. In this case, the Supreme Court accepted that the government could suspend the right to habeas corpus during an emergency.

¹² See, for example, *Nubian Rights Forum v The Hon Attorney-General* [2020] eKLR [125] (High Court of Kenya); *Robinson v Attorney General of Jamaica* [2019] JMFC Full 04 [87] ff (Supreme Court of Jamaica).

the Data Protection Bill 2021 and the Digital Personal Data Protection Bill 2022. As at the time of submitting this thesis, none of these have been enacted into law.

Against that backdrop, an examination of the constitutional right to privacy in India — and its existence, scope and challenges — seems topical. That is the task that this thesis undertakes.

B. RESEARCH QUESTIONS AND KEY CLAIMS

This thesis seeks to answer the following research questions:

- (a) What is the theoretical conception of privacy that has been expounded by the Indian Supreme Court?
- (b) What consequences follow from the justifications offered by the Supreme Court for reading privacy into Article 21 of the Indian Constitution? In particular, is that reasoning consistent with the Court's approach to concomitant rights? Moreover, was the Supreme Court right to rely on the status of privacy as a 'natural right' in support of that conclusion?
- (c) Can the constitutional right to privacy in India be meaningfully classified into sub-categories or variants?
- (d) Against whom is the constitutional right to privacy owed? In particular, can the right be enforced against private persons?
- (e) What model of proportionality has the Indian Supreme Court used in its privacy adjudication? How well does it work?

In response to these questions, the thesis makes the following key claims:

- (a) According to the theoretical conception of privacy adopted by the Supreme Court, the right is underpinned by two values: autonomy and dignity. However, the Supreme Court's reasoning leaves scope for uncertainty as to the relative weight that Indian Courts should place upon these values.¹³
- (b) The thesis does not consider, in detail, whether the Supreme Court was right to read privacy into Article 21. That exercise raises issues that go beyond this thesis such as the general legitimacy of judicial recognition of non-enumerated rights. Nevertheless, the thesis highlights two consequences that arise from the Supreme Court's interpretive methodology:
- (i) some of the Court's reasoning in recognising privacy as a constitutional guarantee is seemingly inconsistent with its previous jurisprudence on the notion of 'concomitant rights';
 - (ii) the Supreme Court was wrong in treating the status of privacy as a 'natural right' in justifying its recognition as a fundamental right.
- (c) The constitutional right to privacy in India can be meaningfully sub-categorised into three variants: physical privacy, informational privacy and decisional privacy. These categories may often overlap. Nonetheless, the categorisation is significant because the Court needs to ask different questions depending on the variant of privacy that it is being asked to consider. The proposed categories were first set out in the MPhil thesis in 2015. The MPhil thesis was cited in oral and written argument in *Puttaswamy I*, where the Supreme Court adopted the three-fold classification proposed here.¹⁴

¹³ These claims were made in a case-note published as Mariyam Kamil, 'Puttaswamy: Jury still out on some privacy concerns?' (2017) 1 Indian Law Review 190.

¹⁴ The M Phil thesis was also cited with approval by Chelameswar J in *Puttaswamy I* (n 9) [222].

- (d) As a general rule, the constitutional right to privacy is owed against the State. There is some support in the Indian caselaw for the indirect horizontal application of the constitutional right to privacy. Beyond this, there are two alternative options that seem open to the Indian Courts: the first is to recognise direct horizontal application and the second is to adopt what I call the ‘publicness thesis’.¹⁵
- (e) Although this has not been expressly articulated in Indian public law jurisprudence, the Supreme Court has employed four standards of review in fundamental rights cases: rationality, reasonableness, strict scrutiny and proportionality. The Supreme Court has now adopted proportionality as the standard that applies in privacy cases.¹⁶ The thesis argues that the version of proportionality adopted by the Indian Supreme Court is best understood as a ‘hybrid’ model. This model adopts the German proportionality test as its starting point. It then modifies that approach based on the academic work of Professors Bilchitz and von Bernstorff. The thesis argues that the ‘hybrid’ model is unworkable in India as it is too complex to the point of being obscure.

C. METHODOLOGY

This thesis employs a largely doctrinal methodology. As explained in more detail in chapters 1 and 2, the Constituent Assembly Debates offer very little guidance in relation to the right to privacy

¹⁵ These claims were made in a paper presented at the third biennial Public Law Conference at the University of Melbourne in July 2018.

¹⁶ I have commented on the Supreme Court’s adoption of proportionality in ‘The Aadhaar Judgment and the Constitution – II: On proportionality’ (*Indian Constitutional Law and Philosophy Blog*, 30 September 2018) <<https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/>> accessed 19 February 2023.

in India. With some notable exceptions, the constitutional right to privacy in India has also not been the subject of extensive academic examination. The primary source material for any consideration of the nature and scope of the right to privacy in India is, therefore, the cases. Accordingly, the thesis has had to rely on the Indian caselaw as its starting point for examining the issues addressed here. In doing so, the thesis has primarily focused on cases decided by the Indian Supreme Court.¹⁷ It will be apparent to a reader of the thesis that the right to privacy has received considerable judicial attention from the Supreme Court of India in recent years.

As stated above, the thesis adopts a primarily doctrinal methodology. Theoretical aspects of privacy have been considered to the extent that these have informed the Indian Courts' approach to privacy. For example, chapter 2 sets out the academic literature that examines the justification(s) for the right to privacy. This forms the basis for the claim that the right to privacy in India is best justified by reference to the twin values of autonomy and dignity. Another theoretical aspect of the thesis is its consideration of the taxonomy of privacy in India. Chapter 3 considers various proposals in the academic literature as to how the right to privacy may be sub-classified. Based on that material, the thesis proposes a three-fold classification for the Indian right to privacy. Yet another theoretical aspect of the thesis is its treatment of the horizontal application of the constitutional right to privacy in India. The caselaw does not offer a conclusive answer here. Accordingly, it is suggested that the preferable method for the further development of the right to privacy by the courts is to adopt what I call the 'publicness thesis'.

The thesis does not directly seek to employ a comparative approach. However, the Supreme Court of India has relied on insights from other jurisdictions in several privacy cases. Therefore,

¹⁷ Where relevant, some High Court cases have also been considered.

it has been necessary to consider those jurisdictions, in particular, to critique the Supreme Court's reliance on such material. For example, while examining the standard(s) of review by reference to which privacy cases are adjudicated, it is explained that the prevalent standard is now proportionality. In that context, the thesis considers the nature of proportionality review in Germany and Canada. This is primarily because those are the jurisdictions to which the Supreme Court has looked in developing its own model of proportionality. Similarly, in chapter 4, it is pointed out that whether, and to what extent, the right to privacy in India applies horizontally has been substantially influenced by the ECHR jurisprudence. It will become apparent to a reader of the thesis that there has been an interesting shift in the Indian Courts' approach to comparative material in recent years. In the early years of privacy adjudication, the Supreme Court relied heavily on American jurisprudence. In more recent years, the trend has been to examine more closely the approach to privacy under the ECHR. This shift is considered in more detail in the Conclusion.

D. STRUCTURE

The thesis consists of six chapters.

Chapter 1 outlines the chronological evolution of the constitutional right to privacy in India. It analyses the key privacy cases in India and suggests that they fall into four categories: (i) early recognition of the right to privacy (1950 – 1975); (ii) evolution of the right to privacy (1976 – 1995); (iii) the recognition of privacy as a full-fledged constitutional right in India (1996 – 2014); and (iv) the modern jurisprudence (2015 – 2022).

Chapter 2 attempts to answer three foundational questions relating to the right to privacy in India: what are the values underlying privacy in India? What provisions of the Indian Constitution

protect this right? Chapter 2 explains that the right to privacy in India is underpinned by two core values: autonomy and dignity. It also addresses two consequences that arise from the Supreme Court's reasoning in reading privacy into the Constitution: one relates to the doctrine of 'concomitant rights' and the other concerns the nature of privacy as a 'natural right'.

Chapter 3 examines the taxonomy of the right to privacy in India. The key enquiry here is whether the right to privacy can be meaningfully classified into sub-categories. It is argued that the answer is in the affirmative. Chapter 3 argues that the Indian right to privacy consists of three distinct variants: physical privacy, informational privacy and decisional privacy.

Chapter 4 examines whether the right to privacy in India applies horizontally. It is argued that there is some support in Indian cases for the indirect horizontal application of privacy. The chapter also suggests that, in India, the horizontal application of the constitutional right to privacy is at a crossroads. Two options seem open. The first is to recognise the direct horizontal application of privacy. The second is a more nuanced approach that suggests that different entities exhibit varying degrees of 'publicness'. This is referred to as the 'publicness thesis'.

Chapters 5 and 6 concern the standard(s) of judicial review. **Chapter 5** introduces the debate by outlining four different standards of review that the Indian Supreme Court has adopted in its constitutional rights adjudication. They are: (i) reasonableness; (ii) *Wednesbury* unreasonableness; (iii) strict scrutiny; and (iv) proportionality. Based on this background, **chapter 6** undertakes the task of analysing the standard of review that applies to privacy adjudication in India. The modern privacy jurisprudence in India adopts proportionality as the applicable standard. However, a number of questions remain unanswered. What is the content of proportionality in

India? What are the consequences of adopting this model of proportionality? In particular, it is workable? Chapter 5 attempts to answer these questions.

CHAPTER 1

EVOLUTION OF THE RIGHT TO PRIVACY IN INDIA

This chapter examines the evolution of the constitutional right to privacy in India through the caselaw. The discussion in this chapter focusses primarily on decisions of the Indian Supreme Court. In some instances, however, some notable judgments of various High Courts are also considered.

The purpose of this chapter is to provide the reader with important background material that informs the analysis in the chapters that follow. The subsequent chapters of the thesis will demonstrate that this material has played a key role in shaping the present status of the constitutional right to privacy in India. Moreover, later chapters of the thesis will also draw upon the material presented here to examine specific aspects of the constitutional right to privacy.

This chapter proceeds as follows. **Section A** provides an overview of the enforcement of constitutionally guaranteed fundamental rights in India. It also briefly considers the relevant Constituent Assembly Debates that concern the right to privacy. The remainder of the chapter provides a temporal overview of the Indian caselaw on privacy. The relevant decisions span nearly 70 years. They are considered in four eras: early recognition of the right to privacy (1950 – 1975) (**section B**); evolution of the right to privacy (1976 – 1995) (**section C**); privacy as a full-fledged right (1996 – 2014) (**section D**) and the modern jurisprudence (2015 – 2022) (**section E**).

A. OVERVIEW

Part III of the Constitution of India, entitled ‘fundamental rights’, is the Indian Bill of Rights. It protects the right to life, liberty, equality, and freedom of speech and expression, among other

rights. As a general rule, fundamental rights are enforceable against the State.¹ However, there are at least three known exceptions to this rule: right against discrimination in respect of access to certain public places,² right against untouchability,³ and the right against exploitation.⁴ These rights are enforceable against private persons too. The circumstances in which the right to privacy is enforceable in this way are examined further in chapter 4 of this thesis.

‘State’ for the purposes of Part III includes the Central and State Executives and Legislatures, and ‘all local or other authorities within the territory of India or under the control of the Government of India’.⁵ Over the last several decades, the Indian judiciary has evolved a set of principles to determine whether an entity is ‘State’. In broad terms, that determination hinges on the extent of Government *control* over an entity, and the nature and extent of its public *functions*.⁶

Article 13 of the Indian Constitution prohibits the ‘State’ from making laws that are contrary to Part III. Laws made in contravention are declared void to the extent of their inconsistency.⁷ For these purposes, ‘law’ refers not only to legislations, but includes ordinances, orders, bye-laws and

¹ *PD Shamdasani v Central Bank of India* AIR 1952 SC 59; *Vidya Verma v Shiv Narain Verma* AIR 1956 SC 108.

² Constitution of India 1950, art 15(2). Unless stated otherwise, in this thesis, ‘Article’ refers to Articles of the Constitution of India.

³ Constitution of India 1950, art 17.

⁴ Constitution of India 1950, art 23 and art 24.

⁵ Constitution of India 1950, art 12 states: ‘In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India’. The question of whether Courts fall within the definition of Article 12 is considered further in ch 4: see section C(2) of ch 4 of this thesis.

⁶ Arvind P Datar, *Commentary on the Constitution of India* (vol 1, 2nd edn, LexisNexis Butterworths Wadhwa 2007) 38.

⁷ Constitution of India 1950, art 13.

rules, among other instrument. Thus, Article 13 empowers Indian courts to strike down both primary and secondary legislation if, and insofar as, they are inconsistent with Part III of the Constitution.

The Constitution mandates that there shall be a Supreme Court of India (the highest appellate Court of the country)⁸ and a High Court for each state.⁹ The right to petition the Supreme Court for enforcement of fundamental rights is provided by Article 32.¹⁰ Article 32 confers a fundamental right on a person to directly move the Supreme Court without going through an appellate hierarchy.

One of the recurring themes in the Indian Supreme Court's Part III jurisprudence is the influence of India's international obligations on the interpretation of fundamental rights. Although India is a dualist legal system,¹¹ the Supreme Court has confirmed that India's international commitments are relevant to Part III interpretation. So far as is possible, Part III rights will be interpreted in consistence with India's international obligations.¹²

It is against this background that the constitutional right to privacy in India must be considered. The right to privacy is not an enumerated right under the Indian Constitution. Although it was discussed in the Constituent Assembly Debates, that discussion focused on two narrow

⁸ Constitution of India 1950, art 124.

⁹ Constitution of India 1950, art 214.

¹⁰ Constitution of India 1950, art 32 (remedies for enforcement of fundamental rights).

¹¹ *Jolly George Varghese v Bank of Cochin* AIR 1980 SC 470 [10].

¹² *People's Union of Civil Liberties (PUCL) v Union of India* AIR 1997 SC 568 [23].

aspects of the right to privacy: secrecy of correspondence, and protection from unreasonable searches and seizures.¹³

As to the former, on 17 March 1947, Mr KM Munshi proposed the addition of a constitutional provision protecting, among other matters, ‘the right to the secrecy of his correspondence... the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or public authority’.¹⁴ The latter was reflected in the memorandum submitted by Dr Ambedkar on 24 March 1947, which suggested protection of ‘[t]he right of the people to be secure in their persons, houses, persons and effects against unreasonable searches and seizures...’.¹⁵ Both these aspects of privacy were reflected in the draft report of the sub-committee on fundamental rights dated 3 April 1947.¹⁶

Ultimately, neither of these matters were addressed by way of specific constitutional provisions. It appears that this was the result, primarily, of a note submitted by Sir Alladi Krishnaswamy Iyer on 10 April 1947. As to the secrecy of correspondence he argued that, ‘it need not find a place in chapter on fundamental rights and it had better left to the protection afforded by the ordinary law of the land contained in various enactments’.¹⁷ As for the idea of a specific provision against unreasonable searches and seizures, he expressed the concern that ‘the effect of the clause... will be to abrogate some of the provisions of the Criminal Procedure Code and to

¹³ See generally, B Shiva Rao, *The Framing of India’s Constitution* (vol 2, NM Tripathi 1966–68) 75ff.

¹⁴ *ibid* 75. See also, *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1 [144].

¹⁵ Rao (n 13) 87; *Puttaswamy I* (n 14) [145].

¹⁶ Rao (n 13) 139; *Puttaswamy I* (n 14) [146]. Clause 9(d) protected secrecy of correspondence and clause 10 guaranteed protection from unreasonable searches and seizures.

¹⁷ Rao (n 13) 158–59; *Puttaswamy I* (n 14) [147].

leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable'.¹⁸

It follows that the Constituent Assembly Debates do not provide any significant insights on the scope of the constitutional right to privacy in India. For that analysis, we must turn to the cases. As mentioned above, in the sections that follow, the cases are examined as falling into four eras.

B. EARLY RECOGNITION OF THE RIGHT TO PRIVACY (1950 – 1975)

The first Indian case to discuss privacy — *MP Sharma*¹⁹ — was decided just four years after the Constitution came into force. In that case, the Supreme Court, while examining the constitutional validity of search and seizures, declined to recognise a constitutional right to privacy. The Court upheld the constitutional validity of the impugned search and seizures. The Court explained that:²⁰

When the Constitution makers have thought fit not to... [recognise] a fundamental right to privacy... we have no justification to import it, into a totally different fundamental right.

Importantly, privacy was not argued as a facet of Article 21 in *MP Sharma*.²¹ As we will shortly see, however, privacy came to be recognised as implicit in the guarantee of life and liberty under (inter alia) Article 21.²²

¹⁸ *ibid.*

¹⁹ *MP Sharma v Satish Chandra* AIR 1954 SC 300.

²⁰ *ibid* [24].

²¹ Constitution of India 1950, art 21 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

²² *Govind v State of Madhya Pradesh* AIR 1975 SC 1378.

It was in 1962, in *Kharak Singh*,²³ that privacy was first argued as an aspect of Article 21. This case concerned the constitutional validity of the Uttar Pradesh State police regulations, which permitted surveillance and maintenance of personal records of suspects. Surveillance included the power to carry out secret picketing of suspects' houses, domiciliary visits at night, and periodical enquiries into their movement. It was argued that this was contrary to the freedom of movement (Article 19(1)(d))²⁴ and personal liberty (Article 21).

The Court, by a 4:2 majority, upheld the regulations except the provision concerning domiciliary visits. The Court reasoned that *secret* picketing cannot violate the petitioner's freedom of movement; the petitioner is unaware of it.²⁵ The regulation permitting domiciliary visits was struck down as contrary to personal liberty under Article 21 on the basis that the rights guaranteed by Article 21 can only be restricted by 'law'. The impugned police regulations did not have legislative backing.

The regulations concerning periodical enquiries into the suspect's movements and lifestyle were upheld. On whether they violated the petitioner's privacy, the Court reiterated that 'privacy is not a guaranteed right under our Constitution'.²⁶ The reasoning of the Court was based on the fact that the Indian Constitution does not contain a provision analogous to the American Fourth Amendment.²⁷

²³ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

²⁴ Constitution of India 1950, art 19(1)(d) 'All citizens shall have the right (d) to move freely throughout the territory of India'.

²⁵ *Kharak Singh* (n 23) [10].

²⁶ *ibid* [17].

²⁷ *ibid* [18]–[19]. The Fourth Amendment guarantees the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

In my view, this line of reasoning does not withstand scrutiny. Unlike Article 8 of the ECHR, the US Constitution (much like the Indian Constitution) does not contain an express guarantee of privacy. However, as the US Supreme Court has confirmed, the right to privacy also stems out of ‘liberty’ under the Fourteenth Amendment.²⁸ Article 21, the Indian analogue of the Fourteenth amendment,²⁹ guarantees that ‘[n]o person shall be deprived of his life or personal liberty except according to procedure established by law’.³⁰ Even in the absence of a provision analogous to the Fourth Amendment, therefore, it is unclear why privacy was not considered as part of ‘personal liberty’ under Article 21 of the Indian Constitution.

Indeed, it is striking that in deciding the validity of domiciliary visits, the Court relied on some comparative material on the meaning of ‘liberty’. This included, in particular, the US Supreme Court’s decision in *Wolf*.³¹ There, the US Court, in a passage cited with approval in *Kharak Singh*, read privacy as stemming from liberty:³²

The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause... Accordingly, we have no hesitation in saying that were a State

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized’.

²⁸ *Roe v Wade* 410 US 113 (1973).

²⁹ *Kharak Singh* (n 23) [13] (Ayyangar J). The Fourteenth Amendment provides that ‘[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws’.

³⁰ Constitution of India 1950, art 21.

³¹ *Wolf v Colorado* 338 US 25 (1949).

³² *ibid* 28 (emphasis added).

affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

In view of this reasoning, it is remarkable that the majority did not consider a similar possibility under Article 21. Interestingly, Rao J's dissenting opinion interpreted the right to 'personal liberty' as subsuming a guarantee of privacy. He said,³³

the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.

After *Kharak Singh*, there was a decade-long hiatus before privacy came up before the Supreme Court again. In *Malkani*,³⁴ the Court considered the constitutional validity of investigatory phone-tapping. In response to a privacy plea, the Court remarked,³⁵

The telephonic conversation of an innocent citizen will be protected by Courts against... interference... The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.

Here, the Court seems willing to protect the privacy of an *innocent* citizen. However, it was unwilling to extend such protection to the accused appellant, presumably on the basis that he may subsequently be found guilty. In *Malkani*, the Court appears to have gone one step further than *Kharak Singh* by acknowledging a constitutional right to privacy, though available only to

³³ *Kharak Singh* (n 23) [28] (Rao J) (emphasis added).

³⁴ *RM Malkani v State of Maharashtra* AIR 1973 SC 157.

³⁵ *ibid* [31] (emphasis added).

innocent citizens. In spite of this, a year later in *Pooran Mal*³⁶ (another search and seizure case), the Supreme Court reiterated that a right to privacy did not exist under the Indian Constitution.³⁷

1975 marked a turning point for privacy in India. The Supreme Court, in *Govind*,³⁸ was examining another surveillance case. The facts were materially identical to *Kharak Singh*. The validity of Madhya Pradesh State police regulations was now in question. As in *Kharak Singh*, it was argued that domiciliary visits offended Articles 19(1)(d) and 21.

However, there was a significant distinction between *Kharak Singh* and *Govind*. While the police regulations in *Kharak Singh* were administrative, the regulations in *Govind* had legislative backing. This distinction is important because *Govind* went on to uphold the validity of these regulations as reasonable restrictions on the freedom of movement and personal liberty.

Although the Court's discussion of privacy was in the hypothetical, it — for the first time — rooted the right to privacy within liberty:³⁹

even assuming, that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

³⁶ *Pooran Mal v Director of Inspector (Investigation)* AIR 1974 SC 348.

³⁷ *ibid* [24].

³⁸ *Govind* (n 22).

³⁹ *ibid* [28].

The three-judge bench in *Govind* was bound by the six-judge bench's decision in *Kharak Singh*.⁴⁰ Perhaps this is why the Court stopped short of expressly stating that Article 21 guaranteed privacy. It merely proceeded on the 'assumption' that this right exists. Had the police regulations not had the force of law, the Court may have been forced to take a clearer stance.

Nonetheless, what the *Govind* bench did do within its conjectural discussion of privacy, was to consider its meaning and scope. It said that privacy 'relates to and overlaps with... liberty'.⁴¹ The *Govind* bench also relied on American jurisprudence, which had considerably evolved since *Kharak Singh*. By now, the seminal decision in *Roe*⁴² had affirmed privacy as part of the Fourteenth Amendment.⁴³ The Court in *Govind* also relied on the statement in *Griswold*⁴⁴ that 'specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees'.⁴⁵ Based on this reasoning, *Govind* suggested that the right to privacy is a penumbral emanation of other expressly guaranteed rights, including the right to personal liberty.⁴⁶

Additionally, *Govind* also adopted 'compelling state interest' as the touchstone for restrictions on the right to privacy.⁴⁷ This is a notable development because 'compelling state

⁴⁰ Sandeep Challa, 'The Fundamental Right to Privacy: A Case-by-Case Development sans Stare Decisis' (2007) 1 The Indian Journal of Constitutional Law 224; Durga Das Basu, *Commentary on the Constitution of India* (vol 3, 8th edn, LexisNexis Butterworths Wadhwa 2008) 3149.

⁴¹ *Govind* (n 22) [23].

⁴² *Roe v Wade* (n 28).

⁴³ *ibid* 147–64.

⁴⁴ *Griswold v Connecticut* 381 US 479 (1965).

⁴⁵ *ibid* 484 (Douglas J).

⁴⁶ *Govind* (n 22) [28].

⁴⁷ *ibid* [33] (emphasis added).

interest’ is a more stringent standard of judicial scrutiny than ‘reasonableness’⁴⁸ — the test regularly used for Article 21 infractions.⁴⁹ It is interesting that the Court in *Govind* tested privacy infringements against this higher standard, despite being hesitant to explicitly recognise privacy as a fundamental right. This aspect of the Court’s reasoning is considered further in Chapter 5 of this thesis.

Notwithstanding its uncertainties, however, *Govind* came to be looked upon by subsequent cases as the first affirmation of the right to privacy in India.⁵⁰

C. EVOLUTION OF THE RIGHT TO PRIVACY (1976 – 1995)

In 1982, *Malak Singh*⁵¹ continued the *Govind* trend by analysing privacy as an emanation of rights rooted in personal liberty and freedom of movement. Here, the Supreme Court was examining another surveillance case. The vires of the impugned police rules were not challenged. Rather, the argument was that a person’s name should not be included in the surveillance register without a hearing. Although the petitioner did not urge this point, the Court stated,⁵²

surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21... and the freedom of movement guaranteed by Art. 19(1)(d). That cannot be permitted.

⁴⁸ *Ashok Kumar Thakur v Union of India & Ors* (2008) 6 SCC 1 [536]; Tarunabh Khaitan, ‘Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement’ (2008) 50 *Journal of the Indian Law Institute* 177, 179–80.

⁴⁹ *Maneka Gandhi v Union of India* AIR 1978 SC 597. The standards of review applicable to privacy infractions are considered in chapters 4 and 5 of this thesis.

⁵⁰ See for example, *R Rajagopal v State of Tamil Nadu* AIR 1995 SC 264 [9].

⁵¹ *Malak Singh v State of Punjab and Haryana* AIR 1982 SC 760.

⁵² *ibid* [6].

The Court concluded that a person could not have a cause for complaint as long as such interference was in accordance with law and was for the prevention of disorder and crime. The Court however cautioned against excessive surveillance.⁵³

In the meantime, a 1983 decision of the Andhra Pradesh High Court considered a novel privacy issue. In *Sareetha*⁵⁴ the Court examined the constitutional validity of restitution of conjugal rights under the Hindu Marriage Act.⁵⁵ The husband was seeking an order for restitution of conjugal rights, which the wife challenged as violative of Articles 14,⁵⁶ 19 and 21.

The Court concluded that sexual cohabitation was an inseparable part of restitution of conjugal rights. It noted that the impugned law not only⁵⁷

transfer[s] the choice to have or not to have marital intercourse to the state from the concerned individual... [it also] surrender[s] the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the state.

Thus, according to the Court, the decisional autonomy of the wife was alienated in respect of inherently personal matters such as her choice not to cohabit with her husband, her choice not to have marital intercourse and her choice not to bear children.

⁵³ *ibid* [9].

⁵⁴ *T Sareetha v Venkata Subbaiah* AIR 1983 AP 356 (HC).

⁵⁵ Hindu Marriage Act 1955, s 9. Section 9 provides that: 'When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly'.

⁵⁶ Constitution of India 1950, art 14: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

⁵⁷ *Sareetha* (n 54) [17].

Relying on *Govind*, the Court held that privacy can only be subordinated to a ‘superior state interest’. In this case, ‘there are no overwhelming state interests to justify the subordination of the [wife’s] valuable right to privacy’.⁵⁸ Thus, the impugned provision was held to violate Article 21.

This decision was ahead of its time in many ways. For instance, it was the first Indian decision to recognise decisional autonomy as an aspect of privacy. Until then, privacy had only been understood as an encroachment into an individual’s personal space. The decision also came at a time when the constitutional right to privacy was only beginning to develop.

This is perhaps why the Supreme Court overruled *Sareetha* within a year. In *Saroj Rani*,⁵⁹ the Supreme Court disagreed with the High Court’s reasoning in *Sareetha* and preferred a contrary decision of the Delhi High Court.⁶⁰ In that case, section 9 of the Hindu Marriage Act, 1955 had been found to be compatible with Article 21. The *Saroj Rani* bench interpreting the Delhi High Court decision, held that:⁶¹

The remedy of restitution aimed at cohabitation and consortium and not merely at sexual intercourse... the restitution decree did not enforce sexual intercourse. Thus, it was a fallacy to hold that the restitution of conjugal rights constituted “the starkest form of governmental invasion” of “marital privacy”.

The Court also noted that there were ‘sufficient safeguards in Section 9 to prevent it from being a tyranny’.⁶² The law permitting restitution of conjugal rights was considered to serve a

⁵⁸ *ibid* [29].

⁵⁹ *Saroj Rani v Sudarshan Kumar Chadha* AIR 1984 SC 1562.

⁶⁰ *Harvinder Kaur v Harmander Singh Choudhry* AIR 1984 Del 66 (HC).

⁶¹ *Saroj Rani* (n 59) [12].

⁶² *ibid* [15].

social purpose i.e., prevention of failing marriages. Thus, the impugned section was held constitutionally valid.⁶³

After nearly ten years, the evolution of privacy took another interesting turn in *Rajagopal*.⁶⁴ The petitioners in this case were the editors and publishers of a magazine. The State of Tamil Nadu was the respondent. The case concerned the publication of a prisoner's autobiography by the petitioner magazine. The autobiography allegedly depicted an illicit nexus between the prisoner and various government officials. The prison authorities, and the State of Tamil Nadu, claimed that the autobiography was not written by the prisoner, and that its publication would constitute blackmail. The petitioner publishing house sought judicial affirmation of its right to publish the autobiography. The prison authorities and the State objected, purporting to act on the prisoner's behalf.

Two preliminary points merit attention. First, although not specifically argued, the Court considered the implications of the publication on the prisoner's privacy. Secondly, whether the prisoner himself had written the autobiography was disputed. The Court proceeded on the assumption that, 'the... prisoner has neither written his autobiography nor... authorized the Petitioners to publish the same'.⁶⁵

Based on this assumption, the right in question was the prisoner's privacy. The relevant issue was whether the publication of an (unauthorised) autobiography would constitute an infringement of the prisoner's privacy by the publishing house. The Court framed the issue in the following

⁶³ *ibid* [17].

⁶⁴ *Rajagopal* (n 50).

⁶⁵ *ibid* [7].

way: '[w]hether the freedom of press... entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances'?⁶⁶

So construed, this is a claim between two private bodies, namely the prisoner and the publishing house. There is no violation of the right to privacy by the State here, raising the question whether Article 21 is violated at all.⁶⁷ The Court, at the outset, appeared to agree with this reasoning.⁶⁸

[Privacy] has two aspects... (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects... against unlawful governmental invasion.

Given this, it is clear that the publication would only be an infraction of the first aspect of privacy i.e. a tort. Surprisingly, however, the Court then undertook a detailed analysis of the constitutional right to privacy. It said:⁶⁹

The right to privacy is implicit in the right to life and liberty guaranteed... by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent... If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.

⁶⁶ *ibid* [8].

⁶⁷ Article 21 is apposite for infringements by the State: *Shamdasani* (n 1); *Vidya* (n 1).

⁶⁸ *Rajagopal* (n 50) [9].

⁶⁹ *ibid* [28].

This decision, as we will shortly see, became the first in a line of cases to wrongly read privacy infractions by private bodies into Article 21.⁷⁰

D. PRIVACY AS A FULL-FLEDGED RIGHT (1996 – 2014)

During this phase, under the broad canopy of privacy, Indian Courts started to examine a wide variety of cases.

For instance, in 1996, in *PUCL*,⁷¹ the vires of section 5(2) of the Indian Telegraph Act 1885, which permitted telephone-tapping in certain circumstances, was questioned. It was argued that telephone-tapping invaded an individual's freedom of speech and privacy under Articles 19(1)(a)⁷² and 21 respectively. To be permissible, it would have to be a 'reasonable restriction' with adequate procedural safeguards.

Section 5(2) permitted interception of telegraph messages from any person on the occurrence of a 'public emergency', or in the interest of 'public safety' and if 'necessary or expedient... in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing... an offence'.⁷³

The Court upheld the impugned section. It pointed out that the section laid down the conditions under which messages may be intercepted. However, section 5(2) lacked the necessary

⁷⁰ For a similar reasoning see, Gautam Bhatia, 'State Surveillance and the Right to Privacy in India: A Constitutional Biography' (2014) 26 National Law School of India Review 127, 139; Bhairav Acharya, 'The Four Parts of Privacy in India' (2015) 50 (22) Economic and Political Weekly 32, 37.

⁷¹ *PUCL* (n 12).

⁷² Constitution of India 1950, art 19(1)(a): 'All citizens shall have the right (a) to freedom of speech and expression'.

⁷³ *PUCL* (n 12) [28].

procedural backing to ensure that the exercise of that power is just, fair and reasonable.⁷⁴ The Court also said that it ought to be left to the central government to make rules ensuring procedural safeguards. But until that was done, the Court provided interim safeguards.⁷⁵

Notably, *PUCL* was also the first case to consider India's international obligations relating to privacy. Article 17 of the ICCPR⁷⁶ (to which India is a signatory) states that no one shall be subject to unlawful or arbitrary interference with his privacy, family, home or correspondence. The Court also noted Article 12 of the UDHR⁷⁷ which is in similar terms. These international law obligations, the Court said, are incorporated into domestic law.⁷⁸ This is a theme that I return to in Chapter 2, while considering the Supreme Court's reasoning in reading privacy as a right implicit in Part III of the Indian Constitution.

Another important decision is the 1998 ruling in *Mr X*.⁷⁹ This case concerned the disclosure by a hospital of a patient's HIV status to his relatives, leading to the breakdown of his impending

⁷⁴ *ibid* [31].

⁷⁵ The Court's safeguards concerned persons authorised to issue an order allowing telephone-tapping, the time-period for which such an order would have effect, and the mandatory maintenance of a record of intercepted communications, among others: *ibid* [35].

⁷⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17.

⁷⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 12: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

⁷⁸ *PUCL* (n 12) [23].

⁷⁹ *Mr X v Hospital Z* AIR 1999 SC 495. See also, the judgment in the Review Petition reported as *Mr X v Hospital Z* AIR 2003 SC 664.

marriage. The patient contended that this violated his right to privacy. It was argued that the breach rendered the hospital liable for damages.

On privacy, interestingly, the Court referred to Article 8 of the ECHR⁸⁰ (to which India is *not* a party) to conclude that,⁸¹

the right of privacy is not... absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

The Court proceeded by weighing two competing rights against each other: the right to life of the patient's fiancé (including her right to lead a healthy life) and the patient's right to privacy. It was said that 'the RIGHT which would advance the public morality or public interest' should be given precedence.⁸² With little reasoning in support, the Court concluded that the fiancé's right to life must prevail over the patient's right to privacy.

Interestingly, just as in *Rajagopal*, both litigants here were private entities. Furthermore, the plea of the patient appears to have been a claim for tortious damages. Consequently, the Court's methodology of analysing this issue under Article 21 is puzzling.

*Sharda*⁸³ was another case where both parties were private entities. A husband was seeking divorce based on his wife's unsoundness of mind. To prove this, he sought her compulsory medical examination. The lower Court granted this application. The wife argued that compelling her to

⁸⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8 (right to respect for private and family life).

⁸¹ *Mr X* (1999) (n 79) [25].

⁸² *ibid* [43].

⁸³ *Sharda v Dharampal* AIR 2003 SC 3450.

undergo a medical examination would breach her Article 21 rights. After examining a range of Indian, American, Canadian and English cases on privacy, the Court defined privacy as ‘the state of being free from intrusion or disturbance in one’s private life or affairs’.⁸⁴ It further held that:⁸⁵

Mental health treatment involves disclosure of one’s most private feelings... To allow these private communications to be publicly disclosed abrogates... an individual’s... privacy... However... [privacy] is not absolute and may only be recognized if the benefit to society outweigh the costs of keeping the information private.

Based on this balancing reasoning, the Court examined the competing interests. On the one hand the husband had a right to seek divorce based on the unsoundness of his spouse’s mind. On the other, compulsory medical examination would infringe the wife’s right to privacy. Reconciling these claims, the Court ordered the wife to undergo a medical test. This was considered a justified limitation on her privacy, as a contrary conclusion would render ‘unsoundness of mind’ as a ground for divorce nugatory.

Three key points merit attention at this stage. First, *Sharda* involved two private parties. However, it is arguable that since the order to undergo a medical test was from the Court (arguably, ‘State’ under Article 12⁸⁶), Article 21 is attracted. Secondly, and more importantly, it instantiates a line of cases (*Mr X* is another example) where the scope of the petitioner’s privacy depended on balancing it against another competing right: the right to health of the fiancé in *Mr X* and the husband’s right of divorce in *Sharda*. Thirdly, in addition to the cases considered above, the Supreme Court has provided (albeit limited) support for a more restricted version of the horizontal

⁸⁴ *ibid* [76].

⁸⁵ *ibid*.

⁸⁶ See for instance, Krishnaprasad KV, ‘Judicial Accountability and Fundamental Rights – I’ (*Indian Constitutional Law and Philosophy Blog*, 29 December 2013) <<https://indconlawphil.wordpress.com/2013/12/29/judicial-accountability-and-fundamental-rights-i/>> accessed 18 March 2021.

application of privacy, namely indirect horizontality. In broad terms, this involves reading the broad language of a statute (even if it applies between privacy persons) as being informed by constitutionally guaranteed rights. This trend, along with the cases that support it, is examined further in Chapter 4 of this thesis.

2005 marked another turning point for privacy in India. A two-judge bench in *Canara Bank*⁸⁷ considered the constitutional validity of a state amendment to the Indian Stamp Act 1899. Section 73 of that Act permitted inspection of documents in the custody of public officers by authorised persons, if such inspection would lead to securing stamp duty or to the discovery of stamp duty fraud. The State of Andhra Pradesh, by way of an amendment, replaced ‘public officers’ with ‘any person’.⁸⁸ This meant that any person who was found in possession of documents falling within the purview of section 73, was liable to subject such documents to inspection. This particularly affected banks that held documents on behalf of customers. The petitioner bank challenged the state amendment. The High Court found it invalid. The State then came up in appeal before the Supreme Court.

The bank argued that the impugned legislation infringed the privacy of its customers. Many private agreements were held by banks as security. The impugned legislation rendered them susceptible to scrutiny. This, it was argued, conflicted with the banks’ duty of customer confidentiality.

⁸⁷ *District Registrar & Collector, Hyderabad v Canara Bank* AIR 2005 SC 186.

⁸⁸ The Indian Stamp (Andhra Pradesh Amendment) Act 1986, s 6.

The core privacy question in *Canara Bank* was whether the documents in the bank's possession continued to retain their private character. In answering this question, the Court referred to *Miller*.⁸⁹ In *Miller*, the US Court had held that once a document reaches a third party it loses Fourth Amendment protection. However, *Canara Bank* chose to depart from *Miller*. Based on academic criticisms of that judgment, the Court concluded that the right to privacy concerned 'persons and not places':⁹⁰

the documents or copies of documents of the customer which are in Bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a Bank.

Canara Bank was followed by two search and seizure cases in quick succession. *Metrani*,⁹¹ the first among them, concerned a search under the Income Tax Act 1961. On privacy the Court noted that search and seizure provisions under the Act were a 'serious invasion into the privacy of a citizen'⁹² and ought 'to be construed strictly'.⁹³ In 2007, in *Nisar*,⁹⁴ the Court considered sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act 1985, which permitted search and seizure in private and public places respectively. The Court justified this legislative distinction based on the need to protect the suspect's privacy. It held, 'even if a statute confers such power

⁸⁹ *United States v Miller* 425 US 435 (1976).

⁹⁰ *Canara Bank* (n 87) [54].

⁹¹ *PR Metrani v Commissioner of Income Tax, Bangalore* AIR 2007 SC 386.

⁹² *ibid* [14].

⁹³ *ibid*.

⁹⁴ *Directorate of Revenue v Mohammed Nisar Holia* (2008) 2 SCC 370.

upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones'.⁹⁵

A 2007 decision of the Andhra Pradesh High Court also merits discussion. This was also a case between two private individuals where the Court invoked Article 21. *Rayala*⁹⁶ was a matrimonial dispute where the husband had secretly recorded his wife's telephone conversations. He sought to use them as evidence in his divorce petition. Bilal J — it is submitted, wrongly — placed reliance on *Malkani* and *PUCL*, both Article 21 cases, to discern the limits of telephone-tapping. He concluded that 'the husband does not derive any power... to record a telephonic conversation of his wife without her knowledge'.⁹⁷ Although that may have been the right result, Bilal J was wrong in his reasoning. This is because it is difficult to see how the private claim between the husband and the wife in this case engaged Article 21 at all. Such a claim is quite unlike the cases of *Malkani* and *PUCL* upon which he relied, both of which concerned State restrictions on an individual's right to privacy.

In 2007, the Supreme Court considered the freedom of employment. *Anuj Garg*⁹⁸ examined the constitutional validity of section 30 of the Punjab Excise Act 1914. The impugned provision prohibited the employment of women, and men under the age of 25, in premises where liquor or intoxicating drugs were sold. The decision recognised autonomy in employment as an interest protected by privacy.

⁹⁵ *ibid* [14].

⁹⁶ *Rayala Bhuvaneswari v Nagaphanender Rayala* AIR 2008 AP 98 (HC).

⁹⁷ *ibid* [6].

⁹⁸ *Anuj Garg v Hotel Association of India* AIR 2008 SC 663.

The Court examined the competing interests of a women's autonomy to choose her profession, and that of the State to protect the security of women. The Court said, '[p]rivacy rights prescribe autonomy to choose [a] profession whereas *security concerns* texture methodology of delivery of this assurance'.⁹⁹

The impugned legislation was categorised as providing for 'protective discrimination'. The Court asserted that this category of legislations should be subjected to 'strict scrutiny'. Justifiably, it turned to the 'compelling state interest' test.¹⁰⁰ While it is true that the Court was not referring to 'compelling state interest' as the relevant test for privacy claims alone, privacy was one of the rights under consideration.

The application of strict scrutiny in *Anuj Garg* has attracted considerable academic attention.¹⁰¹ Additionally, *Anuj Garg* also provides support for understanding privacy as a guarantee against restrictions on decisional autonomy. Finally, it throws open the question whether the standard of 'strict scrutiny' is apposite for privacy infractions. Admittedly, it is arguable that it was the 'protective' nature of the impugned legislation in *Anuj Garg* that attracted strict scrutiny. Whether this is the case remains to be examined.

*Hinsa Sangh*¹⁰² also advances the decisional autonomy reasoning. There, the Court was examining the constitutionality of a municipal resolution for the temporary closure of

⁹⁹ *ibid* [34] (emphasis added).

¹⁰⁰ *ibid* [45].

¹⁰¹ Khaitan (n 48); Malavika Prasad, 'The Doctrine of Strict Scrutiny and Cross-constitutional Borrowing: Reading *Subhash Chandra v. Delhi Subordinate Services Selection Board* 2009 (11) SCALE 278' (2010) 4 *Indian Journal of Constitutional Law* 115.

¹⁰² *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat* AIR 2008 SC 1892.

slaughterhouses to mark respect for a Jain festival. The Court observed, '[w]hat one eats is one's personal affair and... part of his right to privacy... included in Article 21'.¹⁰³ Although the restriction was justified as being reasonable, this dictum implies that what an individual chooses to eat is part of his decisional choice, and hence protected by privacy.

In 2008, another telephone-tapping case came before the Supreme Court. In *Bharat Shah*¹⁰⁴ the constitutional validity of the Maharashtra Control of Organised Crime Act 1999 was challenged. It was argued that the interception of communication under the Act violated privacy. The Court's reasoning hinged on two factors: the legitimacy of the reason for restricting privacy and the adequacy of procedural safeguards. It said:¹⁰⁵

the said law authorizes the interception of... communication only... to prevent the commission of an organised crime or... to collect the evidence to the commission of such... crime. The procedures authorizing such interception are also provided therein with enough procedural safeguards... the contention of the respondents that [the impugned provisions] are violative of the Article 21... cannot... be accepted.

This analysis closely mirrors the reasoning in *PUCL*. In that case, section 5(2) of the Telegraph Act was considered to be a justified privacy infraction because it only authorised telephone-tapping under defined circumstances.

¹⁰³ *ibid* [22].

¹⁰⁴ *State of Maharashtra v Bharat Shanti Lal Shah* (2008) 13 SCC 5.

¹⁰⁵ *ibid* [45].

Decisional autonomy came up again in *Suchita Srivastava*.¹⁰⁶ This case arose from a peculiar factual matrix. A mentally ‘retarded’¹⁰⁷ woman had conceived as the consequence of an alleged rape, in the course of her confinement in a welfare institution. Despite her illness, she expressed a desire to bear the child. The High Court ruled that it was in her best interests to undergo an abortion. The Supreme Court disagreed.

Importantly, the Supreme Court placed considerable reliance on the personal ‘choice’ of the woman. It said, ‘[h]er reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act’.¹⁰⁸ The Court then traced this choice to personal liberty under Article 21. The Court explained,¹⁰⁹

There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’... It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected.

The Court determined that the State must respect the choice of a mentally ‘retarded’ woman who was capable of taking decisions concerning the termination of her pregnancy. Obtaining her consent before such abortion was also an essential requirement under the applicable statutory scheme. The Court noted that it was not in the ‘best interests’ of the woman to terminate the

¹⁰⁶ *Suchita Srivastava v Chandigarh Administration* AIR 2010 SC 235.

¹⁰⁷ This is a problematic term. Nevertheless, it is used here since the Supreme Court expressly distinguished between ‘mentally retarded’ and ‘mentally ill’ persons. The Court held that persons falling in the latter category could not exercise their decisional autonomy to make abortion decisions under the applicable statute.

¹⁰⁸ *Suchita Srivastava* (n 106) [10].

¹⁰⁹ *ibid* [11] (emphasis added).

pregnancy, inter alia, because she had completed 19 weeks of her pregnancy; an abortion at this stage could pose a health risk to her.

This decision discussed privacy, dignity and bodily integrity as together protecting a woman's reproductive choices. This is in keeping with the judicial trend that traces an individual's autonomy in making personal choices to privacy.

Subsequently, the Supreme Court had occasion to consider privacy in the context of section 377 of the Indian Penal Code, the provision that penalises homosexual conduct. The constitutional validity of this section was challenged before the Delhi High Court under Articles 14, 15, 19 and 21 in *NAZ Foundation*.¹¹⁰ It was argued that it violated, inter alia, the right to privacy. The Delhi High Court declared the section unconstitutional insofar as it criminalised consensual private sexual acts of adults. However, the Supreme Court subsequently overruled this decision in *Suresh Koushal*.¹¹¹ For our purposes, it is important to examine both the High Court and the Supreme Court decisions.

Before the Delhi High Court, the petitioners argued that section 377 infringed 'the right of privacy, both zonal and decisional'.¹¹² It was also suggested that privacy could only be abridged in furtherance of a 'compelling state interest', which was absent in this case. The Government defended the impugned section on the basis of the compelling interest in protecting public safety, health and public morality.

¹¹⁰ *NAZ Foundation v Government of NCT* 2010 Cri LJ 94 (Del HC).

¹¹¹ *Suresh Kumar Koushal v NAZ Foundation* AIR 2014 SC 563.

¹¹² *NAZ Foundation* (n 110) [24].

After examining a large body of case-law on privacy, the Court stated that ‘the right to privacy thus has been held to protect a “private space in which man may become and remain himself”. The ability to do so is exercised in accordance with individual autonomy’.¹¹³ In this passage, the Court appears to read privacy as protecting the private sphere of an individual. It extends this definition by noting that for an individual to be himself in his private zone, he ought to be able to exercise his autonomy. The Court elaborated on this in a subsequent passage:¹¹⁴

The sphere of privacy allows persons to develop human relations without interference... from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill... legitimate goals. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21.

The Court concluded that the impugned section infringed a person’s dignity and privacy. By criminalising acts on the basis of the sexual identity associated with them, section 377 infringed Article 21.

On the question of ‘compelling state interest’, the Court concluded that homosexuality was not a disease, and that the argument based on public health did not withstand scrutiny. Considering public morality, the Court distinguished public morality from constitutional morality. The former, it was held, did not constitute a ‘compelling state interest’.¹¹⁵

¹¹³ *ibid* [40].

¹¹⁴ *ibid* [48].

¹¹⁵ *ibid* [75].

On appeal, the Supreme Court (in *Suresh Koushal*) surprisingly, and with very little reasoning, concluded that,¹¹⁶

In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377... violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

The Court affords no other reason in response to the contention that the impugned legislation violated privacy. Unfortunately, therefore, the Supreme Court's ruling offers no guidance on the right to privacy. Since then, the Supreme Court has departed from its earlier view holding that the criminalisation of homosexuality is contrary to the Indian Constitution. That decision is considered in section D below.

Another important decision is the 2010 ruling in *Selvi*.¹¹⁷ The Court was examining the constitutional validity of involuntary administration of techniques such as narcoanalysis, polygraph examination and brain-mapping. The conflicting interests here were the interest in improving investigation efforts in criminal cases on the one hand, and the preservation of an individual's liberties on the other. The question was whether these techniques infringed the test-subject's privacy.

The Court concluded that compulsory administration of the impugned techniques ran against the right to privacy. In reaching this conclusion, the Court said:¹¹⁸

¹¹⁶ *Suresh Koushal* (n 111) [52].

¹¹⁷ *Selvi v State of Karnataka* AIR 2010 SC 1974.

¹¹⁸ *ibid* [191] (emphasis added).

A distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the 'right to privacy' we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

This reasoning is interesting, not least because this was the first time an Indian Court carved out a conceptual distinction between physical and mental privacy infractions. This passage also hints at the idea that mental infractions leading to a breach of privacy will be scrutinised by reference to a higher threshold as compared to physical infringements.

Notably, the Court also discussed decisional autonomy as an aspect of privacy. An individual's choice to give evidence is part of decisional autonomy; no one else should interfere with this choice. It was held,¹¹⁹

We must recognize the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice... there should be no scope for any other individual to interfere with such autonomy.

Therefore... subjecting a person to the impugned techniques in an involuntary manner violates... privacy.

The Court's distinction between physical and mental infractions leads to some intriguing questions. Why did *Sharda* not consider privacy as a guarantee against mental infractions? At first blush, compulsory psychiatric examination and mandatory administration of investigatory techniques seem indistinguishable. In my view, the *Selvi* Court's attempt to overcome this hurdle faces some serious difficulties.

¹¹⁹ *ibid* [192] and [193].

For example, in its discussion of *Sharda*, the *Selvi* Court admitted that ‘a medical test for ascertaining the mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses’.¹²⁰ Yet, in its examination of privacy, the Court distinguished *Sharda* on the basis that ‘the [*Sharda*] Court did not touch on the distinction between testimonial acts and physical evidence, simply because Article 20(3) is not applicable to a proceeding of a civil nature’.¹²¹ Further, the Court concluded that the *Sharda* situation did not amount to a testimonial act but merely constituted physical evidence. With respect, this is contradictory to the Court’s earlier assertion.

The *Selvi* Court also reaffirmed ‘compelling public interest’ as the test for justifying privacy infractions. The Government argued that the impugned techniques were justifiable as they served a ‘compelling public interest in eliciting information that could help in preventing criminal activities’.¹²² The Court shied away from answering this question, reasoning that it was up to the legislature to balance public safety and personal liberty.

The *Selvi* decision impacted the right to privacy in three important ways. First, it distinguished between physical and mental infractions of privacy, and implied that mental infractions should be held to a higher threshold. Second, it appears to have expanded the scope of privacy beyond a spatial right to include decisional autonomy. Third, it affirmed ‘compelling public interest’ as the test for mental privacy infractions.

¹²⁰ *ibid* [177].

¹²¹ *ibid* [190].

¹²² *ibid* [215].

There is one other case on disclosure of information to third parties, which echoes a similar reasoning as *Canara Bank. Jethmalani*¹²³ was a case concerning unaccounted personal funds held in foreign banks. The Government of India had secured a list of Indians who held accounts in Liechtenstein banks. The petitioner-social activists sought this information under the Right to Information Act 2005. However, the Government argued that such disclosure would violate the account-holders' privacy.

Upholding the right to privacy of these individuals, the Court said, 'it is important that human beings be allowed domains of freedom that are free of public scrutiny'.¹²⁴ At its crux, this case required the balancing of two competing interests, namely the constitutional right of the petitioners to move the Supreme Court on the one hand and the respondents' fundamental right to privacy on the other. Balancing these interests, the Court stated that it could not pass an inquisitorial order whereby certain citizens' right to privacy was being breached by other citizens.

Interestingly, the Court also seemed to affirm the existence of a positive obligation on the State to protect privacy. The Court said,¹²⁵

The notion of fundamental rights, such as a right to privacy... is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

¹²³ *Ram Jethmalani v Union of India* (2011) 8 SCC 1.

¹²⁴ *ibid* [73].

¹²⁵ *ibid*.

Regardless of whether the State may legitimately access such information, the Court felt that its disclosure to the public would give rise to a separate cause for complaint:¹²⁶

Whether the State itself can access details of citizens bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public... either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals.

In 2014, the two-judge bench of the Supreme Court in *NALSA*¹²⁷ recognised the constitutional and human rights of trans-genders. Radhakrishnan J highlighted the relevant provisions of UDHR and ICCPR that provided for equality, dignity and privacy of all persons. He also referred to the Yogyakarta Principles, a set of norms developed by human rights experts in a meeting held at Yogyakarta, Indonesia. These principles called for the application of international human rights standards to the LGBT community.

While the Court clarified that it was dealing only with the rights of transgenders (and not those of the homosexual community),¹²⁸ it reproduced some of the relevant Yogyakarta Principles. On the right to privacy, they read,¹²⁹

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

¹²⁶ *ibid* [77].

¹²⁷ *National Legal Services Authority (NALSA) v Union of India* AIR 2014 SC 1863.

¹²⁸ *ibid* [107] (Sikri J).

¹²⁹ *ibid* [22].

Noticeably, the Yogyakarta Principles protect privacy in a spatial and decisional sense. Although these Principles are not binding, Radhakrishnan J concluded that they must be recognised as part of the constitutional guarantee of fundamental rights.¹³⁰

Interestingly, Radhakrishnan J recognised privacy and autonomy as two separate rights. He traced both these rights to Articles 19(1)(a) and 21, which confer freedom of speech and expression and right to life and personal liberty respectively.¹³¹ This is an interesting illustration of the notion that privacy is a ‘penumbral right’ i.e. a right emanating from several constitutional provisions. The notion of privacy as a penumbral right is examined further in Chapter 2 of this thesis.

E. THE MODERN JURISPRUDENCE (2015 – 2022)

An account of the modern privacy jurisprudence in India must begin with the Supreme Court’s decision in *Justice KS Puttaswamy v Union of India* (referred to in this thesis as ‘*Puttaswamy I*’) on 24 August 2017.¹³²

As explained in the Introduction, the dispute here arose out of the ‘Aadhaar Card Scheme’, a scheme run by the Indian Government for the collection of demographic and biometric data. This scheme was challenged on the basis that it violated privacy.¹³³ Interestingly, instead of justifying the scheme as a reasonable restriction, the Government ‘doubted’ the very existence of a constitutional right to privacy in India. The Attorney General submitted that *MP Sharma* and

¹³⁰ *ibid* [53].

¹³¹ *ibid* [66]–[69].

¹³² *Puttaswamy I* (n 14).

¹³³ See the referral order in *Justice KS Puttaswamy v Union of India (Puttaswamy Referral)* AIR 2015 SC 3081.

Kharak Singh had not been overruled.¹³⁴ As explained above, those decisions had declined to recognise privacy as a constitutional right. The subsequent decisions recognising the right were decisions of lower bench strengths. This, it was argued, has ‘resulted in a jurisprudentially impermissible divergence of judicial opinions’.¹³⁵ In response, the petitioners contended that,¹³⁶

in all the countries where Anglo-Saxon jurisprudence is followed, ‘privacy’ is recognised as an important aspect of the liberty of human beings... it is too late in the day for the Union of India to argue that the Constitution... does not recognise privacy.

The Court’s initial inclination seems to have been against the Government’s stance. It said that,¹³⁷

[i]f the observations made in *MP Sharma* and *Kharak Singh* are... read literally and accepted as the law... the fundamental rights guaranteed under the Constitution... and... right to liberty under Article 21 would be denuded of vigour and vitality.

Nevertheless, the Court felt that the Government’s contention raised significant constitutional questions. Consequently, in order to ensure ‘institutional integrity and judicial discipline’ it chose to refer the matter to a larger bench.¹³⁸ Accordingly, the issue of whether the Constitution of India recognised privacy as a fundamental right came up before a nine-judge bench of the Supreme Court.

On 24 August 2017, the nine-judge bench unanimously and decisively upheld the existence of the constitutional right to privacy in India.¹³⁹ The MPhil thesis, which was submitted before the

¹³⁴ *ibid* [3]. For a similar argument made before the referral, see Challa (n 40).

¹³⁵ *Puttaswamy Referral* (n 133) [3].

¹³⁶ *ibid* [11].

¹³⁷ *ibid* [12].

¹³⁸ *ibid*.

¹³⁹ *Puttaswamy I* (n 14). Six separate opinions were handed down and the judgment sprawled over 500 paragraphs.

referral was decided, had argued that the referral provides ‘an opportunity for the Supreme Court to clear up conceptual muddles abounding the right to privacy in India’.¹⁴⁰ The extent to which the Supreme Court has been successful in doing so will feature as a recurring theme in the remainder of this thesis. For the present purposes, it suffices to note that all nine judges upheld privacy as a fundamental constitutional right. Nonetheless, the judges did not speak with one voice as to the scope and structure of that right. The judgment consisted of six separate opinions. They were authored by Chandrachud J, Chelameswar J, Bobde J, Nariman J, Sapre J and Kaul J. In view of the wide range of topics that are addressed in the judgments and the myriad sources of material considered therein, this chapter will not attempt to summarise each of them. Instead, subsequent chapters of this thesis will return to these opinions in order to understand the guidance they provide on topics such as the meaning of privacy (Chapter 2), the classification of privacy into sub-variants (Chapter 3), the horizontal application of privacy (Chapter 4) and the standard(s) of judicial review applicable to privacy cases (Chapters 5 and 6).

Following *Puttaswamy I*, a bench of five judges of the Supreme Court was constituted to adjudicate the constitutional validity of the Aadhaar scheme.¹⁴¹ The task for this bench was to apply the principles laid down in *Puttaswamy I* to the Aadhaar scheme. The decision was pronounced on 26 September 2018. By a 4:1 majority, the Court upheld most aspects of the

¹⁴⁰ Mariyam Kamil, ‘The Structure of The Right to Privacy in India’ (MPhil thesis, University of Oxford 2015) ch I.

¹⁴¹ While the matter was pending consideration of this bench, a related issue came up for consideration before the Supreme Court in *Binoy Viswam v Union of India* AIR 2017 SC 2967. The legislative provision under challenge in that case was section 139AA of the Income Tax Act 1961, which had the consequence of linking Aadhaar numbers to income tax records. Since the constitutional challenge to the Aadhaar Scheme was pending consideration before a different bench, the Court declined to enter into an analysis of the right to privacy: see, in particular, [71], [124] and [127(i)]. Nevertheless, the Court provided some guidance regarding proportionality: see [63]ff. That issue is considered in chapter 5 of this thesis.

scheme. The five-judge 2018 decision, also *Justice KS Puttaswamy v Union of India*,¹⁴² will be referred to as '*Puttaswamy II*'. The judgment in *Puttaswamy II* consisted of three separate opinions. Sikri J speaking on behalf of himself, Misra CJ and Khanwilkar J, upheld the Aadhaar scheme subject to one exception. The exception was section 57 of the Aadhaar Act, which enabled the use of information collected under Aadhaar for 'establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect'.¹⁴³ The majority held that, insofar as this provision enabled private corporations or individuals to seek authentication based on the Aadhaar data, it was unconstitutional. Bhushan J wrote a separate opinion concurring with the majority, and Chandrachud J dissented. As above, this chapter will not attempt to summarise the judgments in *Puttaswamy II*. They are analysed thematically in subsequent chapters.¹⁴⁴

The days immediately following the judgment in *Puttaswamy II* were eventful ones for the right to privacy. The very next day, a constitution bench of the Supreme Court decided another privacy case: *Joseph Shine v Union of India*.¹⁴⁵ In broad terms, the question for the Court was

¹⁴² *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

¹⁴³ The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, s 57: 'Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect'. S 57 has since been omitted by the Aadhaar and Other Laws (Amendment) Act 2019.

¹⁴⁴ In the meantime, Chandrachud J returned to the issue of privacy in *Shafin Jahan v Asokan KM* AIR 2018 SC 1933. He said the following at [75]: 'The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith'.

¹⁴⁵ *Joseph Shine v Union of India* AIR 2018 SC 4898.

whether the criminalisation of ‘adultery’ was permissible under the Indian Constitution. Under challenge was section 497 of the Indian Penal Code, which provided that:¹⁴⁶

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

The Court unanimously struck down this provision as being unconstitutional, inter alia, on the basis that it violated the constitutional right to privacy. The most noteworthy aspect of the judgments handed down by the Supreme Court is the Court’s recognition of the relationship between privacy and dignity. This is particularly apparent from the judgments of Dipak Misra CJI and Chandrachud J. For the present purposes, the key passage from Dipak Misra CJI’s judgment is the following:¹⁴⁷

Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim.... We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two.

In a similar vein, Chandrachud J considered that the impugned provision was impermissible since it was contrary to ‘the spirit of the rights-based jurisprudence of this Court, which seeks to

¹⁴⁶ Indian Penal Code 1860, s 497.

¹⁴⁷ *Joseph Shine* (n 145) [49] (Dipak Misra CJI) (emphasis added).

protect the dignity of the individual and her “intimate personal choices””.¹⁴⁸ He went on to explain that:¹⁴⁹

In criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy.

Although it was certainly open to the Court to strike down section 497 as a breach of the right to equality under Article 15 of the Indian Constitution (indeed, that is the reasoning that Nariman J adopted¹⁵⁰), it is notable that the Court invoked ‘dignity’ — and the right to privacy — as the bases for its decision.

Two days after the decision in *Puttaswamy II*, the Supreme Court handed down its judgment in *Indian Young Lawyers Association*.¹⁵¹ The question for the Court in that case was whether certain customary restrictions imposed by the *Sabarimala* temple on the entry of women between 10 and 50 years were in breach of the Indian Constitution. The Court held that the restrictions were impermissible. In doing so, Chandrachud J recognised that the menstrual status of a women, which is an aspect of her personhood, was protected by the right to privacy.¹⁵² He explained that:¹⁵³

Women have a right to control their own bodies. The menstrual status of a woman is an attribute of her privacy and person. Women have a constitutional entitlement that their biological processes must be free from social and religious practices, which

¹⁴⁸ *ibid* [141] (Chandrachud J).

¹⁴⁹ *ibid* [145].

¹⁵⁰ *ibid* [73]–[86] (Nariman J).

¹⁵¹ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

¹⁵² *ibid* [258] (Chandrachud J).

¹⁵³ *ibid*.

enforce segregation and exclusion. These practices result in humiliation and a violation of dignity.

As explained in section C above, in *Suresh Koushal*,¹⁵⁴ the Supreme Court overruled the decision of the Delhi High Court in *NAZ Foundation*.¹⁵⁵ The consequence was that section 377 of the Indian Penal Code was constitutionally valid. In *Puttaswamy I*, the Supreme Court had taken the step of expressly stating that the reasoning in *Suresh Koushal* was flawed.¹⁵⁶ However, the Court stopped short of overruling *Suresh Koushal* since it was pending consideration before another bench of the Supreme Court. Following the decision in *Puttaswamy I*, the constitutional validity of section 377 came up again, by way of a curative petition,¹⁵⁷ before five judges of the Supreme Court in *Navtej Singh Johar*.¹⁵⁸ The judges unanimously overruled *Suresh Koushal*. Four separate opinions authored by Misra CJI (on behalf of himself and Khanwilkar J), Nariman J, Chandrachud J and Indu Malhotra J were handed down.

There is a surprising degree of convergence in the judge's reasoning insofar as privacy is concerned. In broad terms, each of the judges recognised that rights of sexual minorities were protected by privacy. Accordingly, they each held that criminalisation of homosexuality constituted a breach of decisional privacy or, in other words, the privacy of choice.¹⁵⁹ For instance, Dipak Misra CJI said, '[a]s sexual orientation is an essential and innate facet of privacy, the right

¹⁵⁴ *Suresh Koushal* (n 111).

¹⁵⁵ *NAZ Foundation* (n 110).

¹⁵⁶ *Puttaswamy I* (n 14) [126]–[128] (Chandrachud J).

¹⁵⁷ For an understanding of curative petitions in India, see generally, *Rupa Ashok Hurra v Ashok Hurra* [2002] 4 SCC 388.

¹⁵⁸ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321.

¹⁵⁹ This aspect of the right to privacy is examined in more detail in section C(2)(iii) of chapter 3 of this thesis.

to privacy takes within its sweep the right of every individual including that of the LGBT [community] to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution'.¹⁶⁰ Similarly, Nariman J explained that 'the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21'.¹⁶¹ He considered the criminalisation of homosexual conduct to be inconsistent with that guarantee. Chandrachud J went one step further. He noted that *Puttaswamy I* had recognised the right to sexual orientation as an intrinsic part of the right to privacy.¹⁶² Based on that premise, he reasoned that he would recognise 'sexual privacy' as an aspect of Article 21.¹⁶³ His conception of 'sexual privacy' included, at the very least, 'the right to a self-determined sexual orientation'.¹⁶⁴ Criminalisation of homosexuality was plainly inconsistent with this right. Finally, Indu Malhotra J also held that section 377 of the Indian Penal Code was inconsistent with decisional privacy. She explained that,¹⁶⁵

The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.

¹⁶⁰ *Navtej Singh Johar* (n 158) [229] (Dipak Misra CJ).

¹⁶¹ *ibid* [333] (Nariman J).

¹⁶² *ibid* [406] (Chandrachud J).

¹⁶³ *ibid* [411] (Chandrachud J).

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid* [524.2] (Indu Malhotra J).

Accordingly, she also concluded that section 377 ‘takes away the decisional autonomy of the LGBT persons to make choices consistent with their sexual orientation’.¹⁶⁶ As a result, she too concurred with the majority in holding section 377 to be constitutionally invalid.¹⁶⁷

Privacy then came up before a five-judge bench of the Supreme Court in *Subhash Chandra Agarwal*.¹⁶⁸ This time the issue arose in the context of appeals from certain requests filed by the petitioner under the Right to Information Act 2005 (the ‘RTI Act’). The requests sought: (a) correspondence of a former Chief Justice of India in relation to the allegation that a lawyer had approached him to influence his judicial decisions; (b) correspondence between constitutional authorities relating to the appointment of several judges of the Supreme Court; and (c) information relating to the declaration of assets made by judges of the Supreme Court. Each of the requests were rejected by the Central Public Information Officer of the Supreme Court.

Strictly, the issue before the Court in *Subhash Chandra Agarwal* concerned the correct interpretation of relevant provisions of the RTI Act and, in particular, section 8(1)(j) and the proviso to section 11 of the Act.¹⁶⁹ Nevertheless, the Supreme Court considered that the

¹⁶⁶ *ibid.*

¹⁶⁷ The right to privacy was also examined in two subsequent decisions of this period, namely *Indian Hotel and Restaurant Association v State of Maharashtra* AIR 2019 SC 589 and *Gopalkrishnan v State of Kerala* AIR 2020 SC 1.

¹⁶⁸ *Central Public Information Officer v Subhash Chandra Agarwal* (2020) 5 SCC 481.

¹⁶⁹ Right to Information Act 2005, s 8(1)(j) grants an exemption from disclosure of information if:

‘information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information’.

Similarly, the proviso to s 11 states that ‘except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party’.

constitutional right to privacy was engaged.¹⁷⁰ In doing so, the Court recognised the scope for indirect horizontal application of the right to privacy.¹⁷¹ I return to this aspect of the judgment in chapter 4. In addition, the Court provided guidance on three aspects of the constitutional protection of privacy. First, Sanjiv Khanna J identified the provisions of the Constitution upon which the right to privacy was traced. In a passage that merits reproduction, he said:¹⁷²

It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy over personal choices. While physical privacy enjoys constitutional recognition in Article 19(1)(d) and (e) read with Article 21, personal informational privacy is relatable to Article 21 and right to privacy of choice is enshrined in Articles 19(1)(a) to (c), 20(3), 21 and 25 of the Constitution.

The constitutional bases for privacy are examined further in chapter 2 of this thesis.

Second, the judges were of the unanimous opinion that the balancing exercise required by section 8(1)(j) and the proviso to section 11 of the RTI Act reflected the requirement of proportionality. As NV Ramana J put it succinctly, the 'contextual balancing' required by these provisions 'involves [the] proportionality test'.¹⁷³ In particular, he explained that balancing exercise should take into account a number of factors such as: (a) nature and content of the information; (b) consequences of non-disclosure; (c) dangers and benefits to public; (d) type of confidential obligation; (e) beliefs of the confidant; reasonable suspicion; (f) party to whom information is disclosed; (g) manner in which information acquired; (h) public and private

¹⁷⁰ See *Subhash Chandra Agarwal* (n 168) [206], [216] and [223] (Chandrachud J).

¹⁷¹ This was reinforced by the Supreme Court in *X v Government of NCT of Delhi* AIR 2022 SC 4917.

¹⁷² *Subhash Chandra Agarwal* (n 168) [41] (Sanjiv Khanna J).

¹⁷³ *ibid* [131] (NV Ramana J). See also, *ibid* [42] (Sanjiv Khanna J) and [224] (Chandrachud J).

interests; and (i) freedom of expression and proportionality. What the test of proportionality involves is examined further in chapters 5 and 6 of the thesis.

Third, NV Ramana J provided helpful guidance as to the factors that the Court should take into account in determining whether the petitioner was entitled to a reasonable expectation of privacy. He provided a non-exhaustive list of 10 factors, namely: (a) the nature of information; (b) impact on private life; (c) improper conduct; (d) criminality; (e) place where the activity occurred or the information was found; (f) attributes of claimants such as being a public figure, a minor etc and their reputation; (g) absence of consent; (h) circumstances and purposes for which the information came into the hands of the publishers; (i) effect on the claimant; and (j) intrusion's nature and purpose.¹⁷⁴

In sum, this chapter demonstrated that a proper understanding of the constitutional right to privacy in India requires a close study of caselaw spanning nearly 70 years. As explained above, the relevant cases fall into four temporal categories. It will be apparent to the reader that, although the cases provide guidance on a number of privacy issues, they leave open a number of difficult questions. For example, what, precisely, does the right to privacy mean in India? What are the interests/values that justify it? Can the right to privacy be meaningfully classified in sub-categories? If so, are these categories conceptually distinct? What is the standard of review that Indian Courts apply to privacy infractions? The remainder of this thesis will return to the cases analysed in this chapter with a view to providing the answers to some of these questions.

¹⁷⁴ *ibid* [127] (NV Ramana J).

CHAPTER 2

CONCEPTION OF THE RIGHT TO PRIVACY IN INDIA

Defining the concept of ‘privacy’ is a notoriously difficult task. The term ‘privacy’ has often been referred to as ‘protean’,¹ ‘a chameleon-like word’,² ‘an embarrassment of meanings’³ and ‘talismanic’.⁴ Courts and commentators have been unable to reach consensus as to a single, acceptable definition of the term. This has resulted in a conceptual muddle. The lack of agreement about its definition is only one aspect of the academic controversies surrounding the right to privacy.

Against that background, this chapter seeks to answer the following research questions: First, what are the justifications offered by the Supreme Court for reading privacy into the Indian Constitution? Is the Court’s reasoning consistent with its approach to concomitant rights? Was the Supreme Court right to offer the status of privacy as a ‘natural right’ in support of that conclusion? Second, what is the theoretical conception of privacy that has been expounded by the Indian Supreme Court?

In answering these questions, this chapter proceeds as follows. **Section A** considers the Supreme Court’s recognition of privacy as a fundamental right in India. **Section B** addresses the conception of the right to privacy in India focussing, primarily, on the approach adopted by the

¹ Tom Gerety, ‘Redefining Privacy’ (1977) 12 Harvard Civil Rights-Civil Liberties Law Review 233, 234.

² Lillian BeVier, ‘Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection’ (1995) 4 William & Mary Bill of Rights Journal 455, 458.

³ Kim Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press 1988) 184–85.

⁴ Ken Gormley, ‘One Hundred Years of Privacy’ [1992] Wisconsin Law Review 1335, 1337.

Supreme Court in two (relatively) recent decisions where the right to privacy was comprehensively re-examined: *Puttaswamy v Union of India*⁵ (*Puttaswamy I*) and *Puttaswamy v Union of India*⁶ (*Puttaswamy II*).

A. RECOGNITION OF PRIVACY AS A FUNDAMENTAL RIGHT IN INDIA

This section of the thesis considers why the Supreme Court in *Puttaswamy I* and *Puttaswamy II* recognised privacy as a fundamental right under the Indian Constitution. The Court's reasoning is analysed in sub-section (1). That reasoning is then critiqued in sub-section (2).

1. The Court's Reasons for Recognising Privacy as a Fundamental Right

Despite the multiplicity of the separate opinions that were handed down in *Puttaswamy I* and *Puttaswamy II*, there is a remarkable degree of convergence in the reasons offered by the judges for why privacy must be recognised as a fundamental right under the Indian Constitution. Their reasoning may be analysed in five stages.

First, as explained in chapter 1 of this thesis, privacy is not an enumerated right under the Indian Constitution. As such, in order to determine whether the Indian Constitution impliedly guarantees a right to privacy, the Court had to adopt an understanding of the proper approach towards interpreting the Indian Constitution. Notably, there was little disagreement among the judges as to the correct approach towards constitutional interpretation. Some judges did not

⁵ *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1.

⁶ *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

address this issue expressly whereas some did. Nevertheless, most judges appear to have implicitly followed the same approach.

The most detailed exposition of this issue is found by the judgment of Chelameswar J in *Puttaswamy I*. In broad terms, he was critical of a purely textual approach towards constitutional interpretation. For instance, he rejected as ‘too primitive’ the idea that ‘whatever is not found in the text of the Constitution cannot become a part of the Constitution’.⁷ Instead, he went on to defend a ‘living constitutionalist approach’. He considered that, despite the criticisms levelled against that approach, it was preferable to a purely textual analysis. He clarified, however, that his approach did not permit judges to ignore constitutional text. Instead, according to him, his approach offered the right balance between deference to the Constitutional text and the ability of the judges to evolve the Constitution to suit the emerging cultural, social and political ethos of a liberal republic.⁸

Chandrachud J expressly agreed with Chelameswar J on this issue. He rejected the idea that the Constitution should be ‘constrict[ed]’ by an ‘originalist interpretation’.⁹ According to him, understanding and applying the Constitution as a living instrument was the better course. Indeed, he considered that this approach was ‘necessary to ensure [the Constitution’s] continued relevance’.¹⁰ Similarly, Sapre J went so far as to say that ‘the doctrine of originalism... has no

⁷ *Puttaswamy I* (n 5) [208].

⁸ *ibid* [203] (fn 278).

⁹ *ibid* [151].

¹⁰ *ibid*.

place’ in India.¹¹ More interestingly, Kaul J considered that the original intent of the Constitution drafters was that the Constitution would be an organic document.¹²

The **second** theme that emerges from the judges’ reasoning is their conception of privacy as a natural right. A representative example of this reasoning may be found in the following passage from Chandrachud J’s judgment in *Puttaswamy I*:¹³

[Privacy] finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights.

In substance, this reasoning suggests that the right to privacy is not *conferred* by the Constitution. Rather, privacy is a pre-existing, natural and inalienable right. Its existence is, at best, confirmed by the other rights guaranteed by Part III of the Constitution. The fact that the Constitution does not expressly enumerate the right to privacy, therefore, does not mean that such a right is not guaranteed by the Constitution. It follows that the unenumerated status of the right to privacy in the Indian context is not a reason for declining to recognise such a right.

Third, in justifying the existence of the Constitutional right to privacy in India, most judges relied on a line of reasoning that suggests that privacy is necessary for the exercise of other rights guaranteed by Part III of the Constitution. It must follow, they said, that privacy was also guaranteed by the Constitution. Were it otherwise, many of the other rights guaranteed by Part III would be devoid of their value or practical utility. Passages reflecting this reasoning are found in

¹¹ *ibid* [349].

¹² *ibid* [452].

¹³ *ibid* [40]. See also, *ibid* [248] (Bobde J), [375](i) (Nariman J); *Puttaswamy II* (n 6) [105] (Dipak Misra CJI, Sikri J and Khanwilkar J).

the judgment of Chandrachud J in *Puttaswamy I*. He considered that privacy was a ‘concomitant of the right of the individual to exercise control over his or her personality’.¹⁴ In other words, privacy was a necessary requirement for an individual to exercise their personality. Chandrachud J added, ‘privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution’.¹⁵

Bobde J expressed himself even more clearly on this point. As he put it succinctly, ‘privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III’.¹⁶ He went on to clarify that he considered privacy to be ‘a right or condition, logically presupposed by rights expressly recorded in the constitutional text’.¹⁷ This view is also reflected in the majority opinion in *Puttaswamy II*. In that case, the majority judges observed that ‘privacy is intrinsic to freedom, liberty and dignity’¹⁸ and ‘indispensable to dignity and liberty’.¹⁹

Fourth, at least one of the judges in *Puttaswamy I* considered that the recognition of the right to privacy in India was required by India’s commitments under international law. Chandrachud J explained that, in the absence of domestic law to the contrary, domestic law in India had to be construed in the light of international law. Accordingly, the meaning of constitutional principles in India had to be ‘illuminated by the content of international conventions

¹⁴ *Puttaswamy I* (n 5) [40].

¹⁵ *ibid* [113].

¹⁶ *ibid* [270].

¹⁷ *ibid* [271].

¹⁸ *Puttaswamy II* (n 6) [81](iii) (Dipak Misra CJI, Sikri J and Khanwilkar J)

¹⁹ *ibid* [474] (Chandrachud J).

to which India is a party'.²⁰ He pointed out that recognition of privacy as a fundamental right in India was required by India's commitments under international law. In particular, he relied on Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, both of which protect the right to privacy.²¹

The MPhil dissertation upon which this thesis is based had made a similar argument (at a stage when *Puttaswamy I* had not been decided). In that thesis, it was argued that, in the absence of provisions suggesting the contrary, the Indian Constitution had to be construed in the light of international law. In particular, the meaning of rights to life and liberty under Article 21 had to be construed in the light of India's international obligations. India is duty-bound under international law to protect the right to privacy of its citizens. It must follow that, in the absence of contrary indications (of which there are none in the Indian context), privacy had to be read into Article 21 of the Indian Constitution.

Fifth, what are the provisions of the Indian Constitution that protect the right to privacy? In other words, what are constitutional sources of the right?

An obvious answer is that the right emanates from the protection of the right to life and liberty under Article 21 of the Constitution. That is clearly correct. Indeed, in *Puttaswamy I*, Chelameswar J went so far as to say that 'the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak'.²² In saying so, Chelameswar J was not suggesting that privacy in the Indian context was exclusively confined to Article 21. Rather, the preferable

²⁰ *Puttaswamy I* (n 5) [91].

²¹ *ibid* [129], [130] and [133].

²² *ibid* [235].

reading of his reasoning is that, although there may be peripheral emanations of the right to privacy under the Indian Constitution, they should be read alongside (and not without reference to) Article 21. For example, a peripheral right to privacy arising under one of the other provisions of the Indian Constitution may be justified by reading Article 21 along with another provision of Part III. The fact that the Court recognised peripheral sources of the right to privacy other than Article 21 is apparent from its final Order. The Order states that:²³

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as part of the freedoms guaranteed by Part III of the Constitution.

The conception of privacy as a peripheral right that emerges from other provisions of the Indian Constitution was also recognised by Chandrachud J,²⁴ Bobde J²⁵ and Nariman J²⁶ in *Puttaswamy I*. This was confirmed by the majority judges in *Puttaswamy II*.²⁷

This peripheral conception raises a further question: what are the other provisions of the Indian Constitution that protect the right to privacy? A relatively clear answer is provided by the judgments in *Puttaswamy I*. With the benefit of these judgments, it is possible to say that privacy is protected by the following guarantees in Part III of the Constitution:

- (a) Article 21, which protects the right to life and liberty (addressed above).

²³ *ibid* [504](iii) (emphasis added).

²⁴ *ibid* [169].

²⁵ *ibid* [264], [267]–[270].

²⁶ *ibid* [364], [369] and [377].

²⁷ *Puttaswamy II* (n 6) [87].

- (b) Article 14,²⁸ which guarantees the right to equality. Although this is not a separate guarantee of the right to privacy, it allows a petitioner to challenge a restriction of their right to privacy on the basis that, for example, such a restriction is arbitrary and unreasonable.
- (c) Article 19,²⁹ which guarantees the following six rights. The right to: (i) freedom of speech and expression; (ii) assemble peaceably and without arms; (iii) form associations and unions or cooperative societies; (iv) move freely throughout the territory of India; (v) reside and settle in any part of the territory of India; and (vi) practise any profession, or to carry on any occupation, trade or business.
- (d) Article 20(3),³⁰ which provides the right against self-incrimination.³¹
- (e) Article 25,³² which guarantees ‘freedom of conscience and the right freely to profess, practice and propagate religion’ subject to public order, morality and health.
- (f) Article 26,³³ which guarantees to every religious denomination the right to: (i) establish and maintain institutions for religious and charitable purposes; (ii) manage their own

²⁸ *Puttaswamy I* (n 5) [369] (Nariman J).

²⁹ *ibid* [267] (Bobde J), [369] (Nariman J).

³⁰ *ibid* [279] (Bobde J).

³¹ Constitution of India 1950, art 20(3) provides that ‘[n]o person accused of any offence shall be compelled to be a witness against himself’.

³² *Puttaswamy I* (n 5) [268] (Bobde J).

³³ *ibid*.

affairs in matters of religion; (iii) own and acquire movable and immovable property;
(iv) administer such property in accordance with law.

(g) Article 28,³⁴ which provides a negative freedom from religious instructions in educational institutions wholly maintained out of State funds.

(h) Article 29,³⁵ which provides to any section of Indian citizens, the right to conserve their distinct language, script or culture.

2. Critique of the Court's Reasons for Recognising Privacy as a Fundamental Right

This section offers a critique of the Supreme Court's treatment of the constitutional right to privacy in India in *Puttaswamy I* and *Puttaswamy II*. It focusses on two aspects of the Court's reasoning: (i) the Court's implicit adoption of a theory of concomitant rights; and (ii) the Court's characterisation of privacy as a natural right.

i. Concomitant Rights

As explained above, many judges in *Puttaswamy I* and *Puttaswamy II* justified the recognition of a Constitutional right to privacy in India by suggesting that privacy was a necessary pre-condition for the exercise of other fundamental rights guaranteed by Part III of the Constitution. For instance, Chandrachud J said that privacy 'is a concomitant of the right of the individual to exercise control over his or her personality'.³⁶ Similarly, Bobde J explained that 'privacy is the necessary condition

³⁴ *ibid.*

³⁵ *ibid* [269] (Bobde J).

³⁶ *ibid* [40].

precedent to the enjoyment of any of the guarantees in Part III'.³⁷ *Puttaswamy I* was decided by a bench of nine judges. Chandrachud J was speaking for himself and three other judges and Bobde J for himself. Therefore, it is apparent that this reasoning has the support of the majority in *Puttaswamy I*.

In my view, by adopting this line of reasoning, the judges were implicitly adopting a theory of concomitant rights. The theory of concomitant rights is the idea that if the Constitution guarantees a right 'X', it must implicitly be taken to have guaranteed another right 'Y', if Y is necessary for the exercise of X, or X would be rendered meaningless without Y.³⁸ Although the judges in *Puttaswamy I* relied on this line of reasoning to justify the recognition of the constitutional right to privacy in India, they did not address an important doctrinal hurdle standing in the way of this reasoning: the fact that the Indian Supreme Court has had a difficult, and often inconsistent, attitude towards the recognition of concomitant rights.

The recognition of concomitant rights has been expressly rejected by the Indian Supreme Court on multiple occasions. The decision in *All India Bank Employees' Association v National Industrial Tribunal* is one example.³⁹ That case arose from a demand by some bank employees for increased wages. While the demand was being adjudicated by the National Industrial Tribunal, an amendment was made to the Banking Companies Act 1949. The amendment prevented the National Industrial Tribunal from demanding the disclosure of certain commercial information from the Banks. The petitioners argued that the amendment violated their rights under Article

³⁷ *ibid* [34].

³⁸ Uday Raj Rai, *Fundamental Rights and their Enforcement* (PH Learning 2011) 155.

³⁹ *All India Bank Employees' Association v National Industrial Tribunal* AIR 1962 SC 171.

19(1)(c) of the Constitution, which guarantees the right to form trade unions. They argued that this right would be rendered redundant if it did not extend to the protection of employees' interests in disputes with their employers.

A five-judge bench of the Supreme Court rejected this contention. In doing so, they also expressly rejected the notion of concomitant rights. The judges said:⁴⁰

It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.

The rejection of the theory of concomitant rights was confirmed, 16 years later, in *Maneka Gandhi v Union of India*.⁴¹ In that case, speaking for the majority, Bhagwati J said:⁴²

We cannot... accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right.

It is fair to say, however, that the Supreme Court's attitude towards concomitant rights has not been entirely consistent over the years. Thus, as Reddy and Dhavan point out, in the context of the freedom of the press, the Supreme Court has protected aspects of a right on the basis that, without it, another right under Part III would be rendered non-existent or meaningless.⁴³ On this

⁴⁰ *ibid* [22] (BP Sinha CJ and Sarkar, Mudholkar, Rajagopala Ayyangar, Das JJ).

⁴¹ *Maneka Gandhi v Union of India* AIR 1978 SC 597.

⁴² *ibid* [84].

⁴³ BP Jeewan Reddy and Rajeev Dhavan, 'The Jurisprudence of Human Rights' in David Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (vol 34, International Studies in Human Rights, Brill 1994) 204–05.

basis, the freedom of the press has been held to be a concomitant aspect of the freedom of speech and expression.⁴⁴ Similarly, restrictions on the number of pages that a newspaper could publish, and price control on the sale of newspapers, have been held to be violative of the freedom of speech and expression.⁴⁵ Moreover, restrictions imposed on journalists' rights to access a prison have also been held to be violative of the right to freedom of speech and expression.⁴⁶

In *Puttaswamy I*, the Supreme Court failed to grapple with the doctrinal difficulties posed by its earlier inconsistent decisions as to concomitant rights. Nonetheless, in my view, the Court was justified in recognising a constitutional right to privacy on the basis (*inter alia*) that, without it, many other rights under Part III would be rendered redundant. With respect, the error lies in the earlier decisions such as *All India Bank Employees' Association* which purported, wholesale, to reject the theory of concomitant rights. This was neither necessary nor correct as a matter of principle.

As Rai points out, Article 30(1) of the Constitution confers on minorities the right to establish educational institutions. That right would be devoid of its meaning if the Government were to enact legislation denying recognition to such institutions. If such legislation were challenged as being violative of Article 30(1), the answer must surely be that the legislation is unconstitutional. Were it otherwise, Article 30(1) would amount to nothing more than an empty guarantee.⁴⁷ The difficulty with the petitioners' contention in *All India Bank Employees' Association* is that there is

⁴⁴ *The Printers (Mysore) Ltd v Assistant Commercial Tax Officer* (1994) 2 SCC 434.

⁴⁵ *Sakal Papers Pvt Ltd v Union of India* AIR 1962 SC 305.

⁴⁶ *Prabha Dutt v Union of India* AIR 1982 SC 6.

⁴⁷ Rai (n 38) 155–56.

only a tenuous connection between the interests of the National Industrial Tribunal having before it all the relevant evidence and the right under Article 19(1)(c) to form trade unions. The contention that Article 19(1)(c) necessarily required a concomitant right relating to such evidence is therefore without merit. However, this ought not to have motivated the Supreme Court to reject the doctrine of concomitant rights in its entirety. As Reddy and Dhavan observe, ‘the concomitant rights doctrine is a brake on extravagant claims masquerading as human rights’.⁴⁸

As a matter of principle, in my view, the correct analysis should be whether an enumerated right under Part III requires the recognition of other concomitant rights ought to depend on how closely related the two rights are and whether the non-recognition of the concomitant right would render an express guarantee under Part III redundant or meaningless. Therefore, if, as the Supreme Court held, the non-recognition of the right to privacy would render other rights under Part III redundant, the Court was correct to recognise privacy as a fundamental right on this basis. The doctrine of concomitant rights does not pose a hurdle in the way of that reasoning.

ii. *Natural Right*

As explained above, in justifying the recognition of the fundamental right to privacy in India, many judges relied on the characterisation of privacy as a ‘natural right’. For instance, Chandrachud J said that the genesis of privacy was ‘natural rights [which are] inalienable because they are inseparable from the human personality’.⁴⁹ Similarly, Bobde J expressed the view that ‘[p]rivacy...

⁴⁸ Reddy and Dhavan (n 43) 205.

⁴⁹ *Puttaswamy I* (n 5) [40].

eminently qualifies as an inalienable natural right...'.⁵⁰ Nariman J agreed with this analysis.⁵¹ It is apparent, therefore, that there is majority support in *Puttaswamy I* for the characterisation of privacy as a natural right.

In my view, with respect, characterising privacy as a natural right adds nothing to the analysis of whether it is a fundamental right under the Indian Constitution.⁵² The recognition of privacy as a fundamental right must be justified — and indeed was justified by the Court in *Puttaswamy I* — on other grounds. The natural rights analysis was, therefore, unnecessary to answer the question whether privacy must be considered to be a fundamental right in India.

The notion of a 'natural right' is based on natural law theory, which suggests that individuals possess certain rights by virtue of their human nature rather than on account of prevailing laws or customs.⁵³ The idea is ultimately based on the work of Locke who contended that prior to the political state there existed a state of nature in which human beings possessed the rights to 'life, liberty and estate'.⁵⁴

Even if privacy is a natural right in some sense, does it follow that it is a fundamental right under the Indian Constitution? The better view is that it does not. The clearest evidence of this is

⁵⁰ *ibid* [248].

⁵¹ *ibid* [375](i).

⁵² For a general criticism of the Indian Supreme Court's reliance on the notion of natural rights, see Tarunabh Khaitan, 'Against Natural Rights—Why the Supreme Court should NOT declare the right to intimacy as a natural right' (*Indian Constitutional Law and Philosophy Blog*, 17 July 2018): <https://indconlawphil.wordpress.com/2018/07/17/guest-post-against-natural-rights-why-the-supreme-court-should-not-declare-the-right-to-intimacy-as-a-natural-right/> (accessed 20 March 2022).

⁵³ Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul, *Natural Rights Liberalism from Locke to Nozick* (CUP 2010) vii.

⁵⁴ *ibid*.

provided by the treatment of the right to property under the Indian Constitution. The right to property is widely regarded as a natural right.⁵⁵ Yet, it is not a fundamental right under the Indian Constitution. Although property was once recognised as a fundamental right, it was removed from the fundamental rights chapter of the Constitution by the Constitution (Forty-fourth Amendment) Act 1978. If recognition as a natural right were a good reason, in and of itself, for treating a right as part of Part III of the Indian Constitution, then the right to property ought to be regarded as a fundamental right. That, however, is not the law in India.

There are also significant doctrinal difficulties with the Court's reasoning in *Puttaswamy I* that characterisation of a right as a natural right contributes to its status as a fundamental right. That view was expressly rejected by many judges in *Kesavananda Bharati v State of Kerala*.⁵⁶ For instance, Palekar J pointed out that several rights expressly guaranteed by Part III were not natural rights. He gave as examples the abolition of untouchability (Article 17), the abolition of titles (Article 18), protection against double jeopardy (Article 20.2), the protection of children against employment in factories (Article 24) and the freedom from religious instruction in state-funded educational institutions (Article 28).⁵⁷ Similarly, Beg J expressly refused to use 'any natural law theory' as an aid to the construction of the Constitution.⁵⁸ Ray J also confirmed that 'our

⁵⁵ *ibid.*

⁵⁶ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. Admittedly, Sikri CJ adopted a different view: see *ibid* [305]–[309]. See also, *Basheshar Nath v Commissioner of Income Tax* AIR 1959 SC 149 [101] (Das J) for the view that the natural law characterisation is unhelpful.

⁵⁷ *Kesavananda Bharati* (n 56) [1287].

⁵⁸ *ibid* [1859].

Constitution does not adopt the theory that fundamental rights are natural rights...'.⁵⁹ The most detailed consideration of this topic was by Khanna J who said the following:⁶⁰

Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the state. It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of Constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the Constitutional or statutory provisions.

Regrettably, the Court in *Puttaswamy I* did not address the earlier cases that had held that characterisation as a natural right was not a good reason, in itself, for recognising a right as a fundamental right under the Indian Constitution.

B. THE CONCEPTION OF PRIVACY IN INDIA

Section A of this chapter examined the Supreme Court's reasons for recognising privacy as a fundamental right under the Indian Constitution. This section considers what privacy means in India. In particular, what are the values underpinning that right? It begins with a literature review in sub-section (1). Against that background, sub-section (2) examines the conception of privacy in India.

⁵⁹ *ibid* [945].

⁶⁰ *ibid* [1467].

1. Literature Review

This section is a literature review. This review does not attempt to take a position on the competing theoretical accounts of the right to privacy. It is offered by way of background only. However, the inclusion of such a section may assist the reader because, in *Puttaswamy I*, the Supreme Court referred to and drew upon many of the academic works that are cited in the literature review here. For example, the values of autonomy and dignity that the Court adopted were drawn from the academic literature.

The literature review that follows consists of three sub-sections. Sub-section (i) outlines some of the prominent criticisms levelled against the existence of privacy as an independent right. Sub-section (ii) examines the literature that attempts to identify the values underlying the right to privacy. Sub-section (iii) considers the meaning of privacy and the various conceptions of that notion that are advanced in the literature. It will be apparent to the reader that the literature review examines the literature criticising, and defending, privacy before turning to its justifications and underlying values. The reason for this approach is that it is a fundamental question whether privacy should be recognised as a right, or a separate right, at all. If the answer is yes, the next question that arises is what the values underlying that right are.

i. *Criticisms of Privacy*

The core critics of privacy are reductionists. They espouse the view that privacy is reducible to other rights. They argue that privacy does not protect any unique value and, therefore, that it should not be recognised as a separate legal right. Reductionists are not the only critics of privacy. The right has also come under attack from feminists, economists, and legal commentators.

It will be suggested below that the challenges to privacy may be understood as consisting of three propositions:⁶¹ (a) the non-distinctiveness thesis, which suggests that privacy is reducible to other claims or rights.; (b) the non-coherence thesis, which is the view that the right to privacy is not a conceptually coherent category; (c) the denial thesis, which argues that the right of privacy, or at the very last significant aspects of it, do not merit protection.

Most traditional reductionist accounts are based on ***the non-distinctiveness thesis***. Davis's work in 1959, one of the earliest reductionist accounts of privacy, is an example.⁶² According to him, privacy is an ideological interest derived from the protection of other rights, much like the 'pursuit of happiness' or 'freedom from fear'.⁶³ These other rights offer freedom from 1) infliction of mental suffering, and 2) expropriation of personality or some property interest.⁶⁴ He finds no value in gathering together a number of diverse tort causes of action such as defamation, trespass, mental suffering or emotional distress, under the umbrella label of privacy. Instead, he argues that we must be explicit about the fundamental bases in each case.⁶⁵

Another example of the non-distinctiveness thesis is offered by Thomson.⁶⁶ To her, privacy is not a distinct legal interest. It intersects almost completely with the rights over person and property. Based on this 'simplifying hypothesis' she argues that privacy infractions are really a

⁶¹ Loosely based on Ferdinand Schoeman, 'Privacy: Philosophical Dimensions of the Literature' in Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984) 5ff.

⁶² Frederick Davis, 'What do We Mean by "Right to Privacy"?' (1959) 4 South Dakota Law Review 1.

⁶³ *ibid* 19.

⁶⁴ *ibid* 22–23.

⁶⁵ *ibid* 24.

⁶⁶ Judith Jarvis Thomson, 'The Right to Privacy' in Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984).

violation of the right not to be looked at, the right not to be listened to, or the right not to be harmed. All of these are rights over the person. She also argues that ownership rights include negative rights that others shall not look at your possessions, others shall not tear or damage your possessions etc.

The non-distinctiveness thesis has been convincingly criticised by many commentators. Scanlon, for one, finds Thomson's account 'unsatisfactory'.⁶⁷ He objects to Thomson's conception of privacy as consisting of various rights, namely, the right not to be looked at, the right not to be listened to, the right not to have my objects looked at and so on. He argues that there are no such general rights to begin with. A person may well have an *interest* in not being looked at or listened to. However, it is inaccurate to characterise these general interests as rights.

Inness is another commentator who disassembles Thomson's skepticism. The focus of Inness's attack is on Thomson's contention that many privacy claims may be reduced to and understood as violations of the right to property. Inness shows that privacy rights are not restricted to proprietary rights. Consider a lover who publishes love letters that were sent to him without the author's consent. This may result in a breach of privacy. However, it is not explicable as a breach of the right to property. The author of the letter had no right to property in the letters once they had been sent.⁶⁸ This shows that privacy and ownership operate differently.⁶⁹ A breach of the right to property is neither a necessary nor sufficient condition for a violation of privacy.

⁶⁷ Thomas Scanlon, 'Thomson on Privacy' (1975) 4 *Philosophy and Public Affairs* 315, 315.

⁶⁸ Julie C Inness, *Privacy, Intimacy, and Isolation* (OUP 1992) 33.

⁶⁹ *ibid* 34.

The *non-coherence thesis* suggests that privacy is not a coherent legal category. Davis's early work illustrates the non-coherence thesis. Consider this passage for example:⁷⁰

Greater clarification in the law can be achieved... if the fundamental basis for recovery were made explicit in each case. If it is mental suffering or emotional distress, let us say so. If it is the expropriation of one's personality, or the property interest therein, let us admit that circumstances can support a recovery here as well... But to gather together a number of diverse and explicit tort causes of action under general social concepts without further articulation is to undermine the administration of justice by blurring the lines between deserving and undeserving cases.

Davis seems to suggest that the principles underlying privacy cases vary from emotional distress or mental suffering to personality rights and property rights. Thus, there is no coherent conceptual unity that brings these diverse principles together.⁷¹

Another, albeit limited, version of the non-coherence thesis is adopted by authors who adopt the position that decisional privacy is conceptually distinct from its other variants. Lindgren, for instance, suggests that 'decisional autonomy' must be disassociated from the right to privacy more generally. According to her, cases about abortion and reproductive rights do not raise issues of privacy at all. Instead, these cases must be viewed purely from the lens of personal autonomy.

Lindgren avers that the existing taxonomy of privacy classifies it into three broad categories: privacy of physical space or 'spatial' privacy, control over the flow of personal information or 'informational' privacy, and 'decisional autonomy'.⁷² Lindgren argues that 'decisional autonomy' is conceptually distinct from spatial and informational privacy, which are interrelated because they

⁷⁰ Davis, 'What do We Mean by "Right to Privacy"?' (n 62) 24.

⁷¹ See also BeVier (n 2) 458.

⁷² Yvonne Lindgren, 'Personal Autonomy: Towards a New Taxonomy for Privacy Law' (2009–10) 31 Women's Rights Law Reporter 447, 451.

are essentially oriented to protect the traditional privacy notions of ‘accessibility and concealment’.⁷³ She reasons that the purpose of decisional autonomy is to protect a very different interest, namely, the ‘choice about the way one chooses to live his or her life’.⁷⁴

This criticism of the unity of privacy is answered by DeCew. He argues that, despite the seeming differences, there is a common conceptual thread that unites decisional privacy with other manifestations of privacy. All three variants of privacy⁷⁵ protect against conceptually analogous dangers namely ‘scrutiny, embarrassment, judgment ridicule... pressure to conform, prejudice, emotional distress... losses in self-esteem...’.⁷⁶ Compare for instance, informational privacy and decisional privacy. Restrictions on individual freedom—the danger that privacy protection is oriented to protect—arise both from the threat of an information leak as well as from the individual’s inability to control her own decision-making. The latter imposes a direct restriction, whereas the former has a chilling effect on individual freedom.⁷⁷ As DeCew puts it,⁷⁸

[T]he desire to protect a sanctuary for ourselves... without the threat of scrutiny, embarrassment, judgment, and the deleterious consequences they might bring, is a major underlying reason for providing *both* information control and control over decision making.

⁷³ *ibid* 469.

⁷⁴ *ibid* 486.

⁷⁵ DeCew calls them informational, expressive and accessibility privacy: see generally, Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press 1997).

⁷⁶ *ibid* 63–64.

⁷⁷ *ibid* 64.

⁷⁸ *ibid* (emphasis in original).

The **denial thesis** states that privacy, or at least some aspects of it, is unjustifiable or unreasonably broad. Two main shades of opinion will be examined under this head: (i) the economic criticism of privacy; and (ii) the feminist critique.⁷⁹

a) The Economic Critique

The leading economic critique of privacy comes from Richard Posner.⁸⁰ Posner argues that privacy consists of various clusters of rights. His first cluster is ‘secrecy’ i.e., the notion of privacy as ‘the withholding or concealment of information, particularly personal information’.⁸¹ To Posner, there is no value in protecting the right to conceal facts or information about oneself. Concealment is often driven by a motive to mislead, to misrepresent or manipulate other’s opinion of oneself. According to him, this prompts people to pry. In Posner’s words,⁸²

[W]hen an actual or potential relationship, whether business or personal, creates opportunities to profit (monetarily or not) from possessing information about someone else. This is what motivates the demand for personal information.

Therefore, Posner suggests that this demand for personal information is a means of ‘self-protection’⁸³ i.e., an individual should be allowed to protect himself or herself from a

⁷⁹ A third strand of criticism is offered by Bork: Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Sinclair-Stevenson 1990). Since this largely relates to whether the US Supreme Court was right to read a general right to privacy into the US Constitution, it is not examined here in detail.

⁸⁰ See generally, Richard A Posner, ‘The Right of Privacy’ (1977–78) 12 *Georgia Law Review* 393; Richard A Posner, ‘Privacy, Secrecy, and Reputation’ (1979) 28 *Buffalo Law Review* 1; Richard A Posner, ‘The Uncertain Protection of Privacy by the Supreme Court’ [1979] *The Supreme Court Review* 173; Richard A Posner, ‘Introduction - The Law and Economics of Privacy’ (1980) 9 *Journal of Legal Studies* 621; Richard A Posner, ‘The Economics of Review’ (1981) 71 *American Economic Review* 405; Richard A Posner, *The Economics of Justice* (Harvard University Press 1981).

⁸¹ Posner, *The Economics of Justice* (n 80) 231.

⁸² *ibid* 232.

⁸³ *ibid* 235, 238.

disadvantageous transaction, whether it is a social transaction such as marriage, or indeed, a business transaction such as employment.

However, Posner makes two concessions on this point. First, he argues that the producers of ‘innovative ideas’ should have the right of exclusive possession of their information⁸⁴ when the information is ‘a product of a significant investment’.⁸⁵ The second concession relates to ‘private communications’.⁸⁶ He justifies the protection of private communication on the basis that it is necessary to avoid communications becoming more formal and less effective.

Posner’s second notion of privacy is ‘seclusion’. Seclusion is the interest that a person has in being left alone.⁸⁷ Posner also calls this notion of privacy ‘physical privacy’.⁸⁸ To him, it is a precondition of other valuable notions such as innovation and private conversations. Although he finds a value in protecting a person’s physical privacy, he observes that it is merely a ‘[w]estern cultural artifact’.⁸⁹

Having identified the two clusters of secrecy and seclusion, Posner criticises privacy advocates for conflating these concepts. To him, they protect distinct interests, namely the interest

⁸⁴ *ibid* 242.

⁸⁵ *ibid* 244.

⁸⁶ *ibid* 403.

⁸⁷ *ibid* 272.

⁸⁸ *ibid* 275.

⁸⁹ *ibid* 268.

in concealing information in the case of the former, and the interest in being left alone in the case of the latter.⁹⁰

Posner then turns to his third cluster of privacy i.e., ‘autonomy’. This is the idea that privacy protects persons from governmental intrusion. He begins by pointing out that no such right is guaranteed by the US Constitution. ‘There are just particular rights to be free from specific forms of invasion of privacy’.⁹¹ He considers that the US Supreme Court was incorrect in broadening the right to privacy beyond secrecy and seclusion to a ‘general right... to be free from governmental interference’.⁹² He concludes that unless ‘privacy’ is synonymous with ‘freedom’, such a right cannot be read into the Constitution.⁹³ As he puts it, ‘[w]e already have perfectly good words—liberty and autonomy and freedom—to describe the interest in being allowed to do what one wants without interference. We should not define privacy to mean the same thing and thereby obscure its other meanings’.⁹⁴

Bloustein offers a searching critique of Postern’s economic analysis.⁹⁵ A key aspect of Bloustein’s criticism of Posner is that he makes social judgments under the guise of economic analysis. Consider for instance, Posner’s argument that, except in some specified circumstances,

⁹⁰ *ibid* 273–74.

⁹¹ *ibid* 315.

⁹² *ibid*.

⁹³ *ibid*.

⁹⁴ *ibid* 274–75.

⁹⁵ Edward J Bloustein, ‘Privacy Is Dear at Any Price: A Response to Professor Posner’s Economic Theory’ (1977–78) 12 *Georgia Law Review* 429.

there is no reason to protect a privacy interest in concealing information.⁹⁶ Among the many facets of this issue is the following enquiry: will protecting a privacy interest in these circumstances encourage investment in socially valuable information? Surely, whether an investment in information is socially valuable is a social judgment, not an economic one.⁹⁷ Therefore, it appears that Posner stretches his economics analysis beyond the realms of its legitimate reach.

b) The Feminist Critique

The key objection raised by feminists against privacy is that it operates as a shield for discrimination against women.⁹⁸ This is one aspect of the feminist critique of the liberal legal state. Feminists argue that societal inequalities have allowed the male point of view to be adopted as the law. The perceived legitimacy of law makes male dominance both invisible and acceptable.⁹⁹ While an exposition of the feminist analysis of politics and state¹⁰⁰ is beyond the scope of this thesis, one of the feminist critiques of privacy—by MacKinnon—is briefly discussed here.

MacKinnon's central reason for rejecting privacy hinges on the public-private distinction. According to her, 'inequality is socially pervasive' in both public and private spheres.¹⁰¹ It would

⁹⁶ See text to n 81 and n 82 above.

⁹⁷ Bloustein, 'Privacy Is Dear at Any Price' (n 97) 441. For another criticism of Posner's account of privacy, see Ruth Gavison, 'Privacy and the Limits of Law' (1979–80) 89 Yale Law Journal 421, 453–54.

⁹⁸ For example, see generally: Catharine A MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989); Nadine Taub and Elizabeth M Schneider, 'Women's Subordination and the Role of Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (3rd edn, Basic Books 1998).

⁹⁹ MacKinnon (n 98) 237.

¹⁰⁰ For a literature overview of the feminist analysis of politics, see generally: Jean Bethke Elshtain, *Public Man, Private Woman* (Princeton University Press 1981) ch 5.

¹⁰¹ MacKinnon (n 98) 191.

be a mistake to assume that the private space is politically neutral from a gender perspective. Privacy law wrongly assumes ‘that women are equal to men’ in the private space.¹⁰² Instead of protecting women’s autonomy, as it often claims to do, privacy therefore perpetuates breaches of women’s right to choice.¹⁰³ In this way, privacy ends up alienating women, from each other, and from the public discourse. In effect, privacy functions as the right of *men* to be left alone.

One aspect of the right to privacy seemingly challenges MacKinnon’s positive case. That is the operation of privacy to protect women’s autonomy in the context of abortion. MacKinnon meets this objection in the following way: although couched in terms of women’s autonomy, the right to abortion operates in two different ways: it enables men ‘to control the reproductive consequences of intercourse’ and it ‘enhances the availability of intercourse’.¹⁰⁴ In order to be gender neutral, the right to privacy would need to grant women, a right to have sex with men on the same terms as men have sex with women. However, under the conditions of pre-existing gender inequality, all that the right of abortion achieves is to ‘remove the one real consequence men could not easily ignore’ i.e., childbirth.¹⁰⁵ The attitude of privacy to abortion is in this sense symptomatic of a larger failure: it glosses over the reality that in conditions of social inequality, substantive equality requires ‘intervention, not abdication’.¹⁰⁶

¹⁰² *ibid* 193.

¹⁰³ *ibid*.

¹⁰⁴ *ibid* 188.

¹⁰⁵ *ibid* 190.

¹⁰⁶ *ibid* 191.

I will now consider one response to the feminist critique of privacy, which is by Allen. Allen offers a half-way house. She accepts that the private sphere has often facilitated subjugation and harassment of women.¹⁰⁷ However, she suggests that the solution does not lie in abolishing the right to privacy. Instead, what is required is an egalitarian conception of privacy. As Allen puts it, ‘the lines between public and private should be renegotiated and redrawn as necessary to further dignity, safety, and equality’.¹⁰⁸

Allen also suggests that a number of aspects of privacy are unaffected by the feminist critique. While the feminists are rightfully suspicious of what the private sphere has signified for women in the past, it would be a mistake to discount what privacy rights might offer women in the future. In her words, ‘there is little doubt that women seeking greater control over their lives already have begun to benefit from heightened social respect for appropriate forms of physical, informational, proprietary, and decisional privacy’.¹⁰⁹

ii. *The Values Served by Privacy*

The previous section suggested that the literature that challenges the existence of privacy as a separate right may be understood through three propositions: the non-distinctiveness thesis, the non-coherence thesis and the denial thesis. As a logical corollary, accounts that justify privacy—the ‘coherentist accounts’—must reject all three propositions. The coherentist literature is now reviewed. For ease of reference, they will be classified in accordance with the values that they

¹⁰⁷ Anita L Allen, ‘Coercing Privacy’ (1998–99) 40 William and Mary Law Review 723, 742. See also, Jean Bethke Elshtain, *Democracy on Trial* (Basic Books 1995) 50.

¹⁰⁸ *ibid* 750.

¹⁰⁹ *ibid*.

identify as underlying the right to privacy. Broadly, these justifications fall under the following five heads: (1) privacy and protection from societal pressure; (2) privacy and personhood; (3) privacy and dignity; (4) privacy and inter-personal relations; and (5) privacy and autonomy.

a) Privacy and Protection from Societal Pressure

Schoeman's work is an example of this type of justification. Schoeman identifies two categories of social norms that structure privacy: norms that control and norms that liberate.¹¹⁰ The former affords an individual, a sphere where others' access is restricted. However, the individual's behaviour in that private sphere is 'rigidly defined by social norms'.¹¹¹ Consequently, there is little discretion within the private sphere.¹¹² In contrast, the latter category of privacy norms offer a private domain of wide individual discretion. A distinctive feature of this class of norms is their ability to facilitate individual self-expression.¹¹³

Schoeman's account of privacy primarily concerns the second set of norms. These norms, he argues, are justified by a principle analogous to the constitutional principles against legal coercion. He says,¹¹⁴

[P]rivate norms serve the same function vis-à-vis social coercion that constitutional principles serve vis-à-vis legal coercion, protecting individual from the overreaching control of others.

¹¹⁰ Ferdinand David Schoeman, *Privacy and Social Freedom* (CUP 1992) 16. See also, Jeffery L Johnson, 'Constitutional Privacy' (1994) 13 *Law and Philosophy* 161, 187.

¹¹¹ Schoeman (n 110) 15.

¹¹² *ibid.*

¹¹³ *ibid* 18.

¹¹⁴ *ibid* 22.

Why must one be wary of control by others, one may wonder. The response lies in the dichotomy between social control and self-expression. In Schoeman's words,¹¹⁵

Culture and traditions have *authority* for people, and this authority means that individuals are not, and do not see themselves as, entirely free to pick and choose among cultural norms what is worth embodying in their own lives.

Therefore, in certain circumstances, it is important to shield individuals from social pressure. This is especially so when they pose an impediment for individuals' ability to 'explore and express in their own private life'.¹¹⁶ On Schoeman's account, the right to privacy performs an important social function: when social or cultural norms constitute impediments to an individual's right to self-expression, it 'insulates people from inappropriate manifestations of social pressures'.¹¹⁷

b) Privacy and Personhood

Many coherentist accounts also justify privacy on the basis of the idea of 'personhood' or 'inviolable personality'.

Reiman's thesis is a good illustration of this. Reiman's account shares a common thread with Schoeman's theses. All three base their positive case for privacy on the necessity for guaranteeing individuals' freedom from social control. However, Reiman goes further to conceive privacy as a necessary element of 'personhood'. To him, privacy 'protects the individual's interest in

¹¹⁵ *ibid* 92 (emphasis in original).

¹¹⁶ *ibid* 106.

¹¹⁷ *ibid* 136.

becoming, being, and remaining a person'.¹¹⁸ To Reiman 'privacy is a social ritual by means of which an individual's moral title to his existence is conferred'.¹¹⁹ Let us now unpack this assertion.

A starting point is to recognise that, despite the variety of means through which a group may influence an individual, ultimately, it must recognise that 'his existence is his own'.¹²⁰ More precisely, persons must be afforded a moral right to shape their own destiny. This is a pre-condition of meaningful personhood.

A right to one's own personhood in this sense subsumes two ingredients. First, it guarantees the right to do with my body as I wish. Secondly, and more relevantly, it also includes 'the right to control when and by whom my body is experienced'.¹²¹ The second element guarantees an individual, a right to 'cognitive appropriation'¹²² i.e., an entitlement 'to determine when and by whom his concrete reality is experienced'.¹²³ The latter protection plays an important enabling role in societal relations. As Reiman puts it, 'it enables me to make the commitment that underlies caring as my commitment uniquely conveyed by my thoughts and witnessed by my actions'.¹²⁴

¹¹⁸ Jeffrey Reiman, 'Privacy, Intimacy, and Personhood' (1976) 6 *Philosophy and Public Affairs* 26, 44. See also, Jean L Cohen, 'Redescribing Privacy: Identity, Difference, and the Abortion Controversy' (1992–93) 3 *Columbia Journal of Gender and Law* 43, 100.

¹¹⁹ Reiman (n 118) 39.

¹²⁰ *ibid.*

¹²¹ *ibid* 42.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid* 44.

c) Privacy and Dignity

A substantial body of scholarly literature justifies privacy by reference to the notion of dignity. Consider, for instance, Bloustein.

Bloustein relies on the work of Dean Prosser.¹²⁵ Prosser classified the tort of privacy into: i) ‘Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs’, ii) ‘Public disclosure of embarrassing private facts about the plaintiff’, iii) ‘Publicity which places the plaintiff in a false light in the public eye’, and iv) ‘Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness’.¹²⁶ Although Prosser himself did not adopt a dignity-based understanding of privacy, a careful examination of his four categories of privacy, Bloustein argues, does buttress the view that each of them is, at its core, premised on individual dignity.

Consider for instance, the intrusion cases. These are cases where illegal or unreasonable means have been used to discover something about the plaintiff’s private life. In one decided case for example, the defendant was an unwanted spectator to the plaintiff giving birth to her child.¹²⁷ Now, what exactly is the claimant’s complaint? Bloustein argues that it is premised on a ‘desire to enhance her individuality and human dignity’.¹²⁸ The crux of the complaint is not based on the

¹²⁵ See generally, William Prosser, ‘Privacy’ (1960) 48 California Law Review 383.

¹²⁶ *ibid* 389.

¹²⁷ *De May v Roberts* 46 Mich 160, 9 NW 146 (1881).

¹²⁸ Edward J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 New York University Law Review 962, 973. See also, Anita Allen, *Unpopular Privacy: What Must We Hide?* (OUP 2011) 15.

complainant's mental trauma. Instead, it is based on the indignity that she had to suffer. Thus, to Bloustein, 'the gist of the wrong in the intrusion cases is... a blow to human dignity'.¹²⁹

The public disclosure cases are explicable in the same way. Consider a case where a newspaper publishes the picture of a new-born deformed child.¹³⁰ The complaint surely is not that the child's or its parents' reputation has been compromised. Rather, it is that the parents 'are rather mortified and insulted that the world should be witness to their private tragedy'.¹³¹

The same goes for 'use of name or likeness', Prosser's third category. Here, the complaint relates to the commercialisation of an aspect of the complainant's personality. In truth therefore, these cases are analogous to the public disclosure cases. As Bloustein puts it,¹³²

The only difference between these cases and the public disclosure cases is the fact that the sense of personal affront and indignity is provoked by the association of name or likeness with a commercial product rather than by publicity concerning intimacies of personal life.

Finally, a similar account can be provided of the 'false light' cases. These are instances where the defendant publicly and falsely attributes to the claimant, some opinion or utterance. Here, it is 'the slur on [complainant's] reputation' that constitutes a violation of her individual integrity. In sum, this takes Bloustein to the position that most instances of infringement of privacy are identifiable as instances of breach of individual personality, particularly through an affront to dignity.

¹²⁹ Bloustein 'Privacy as an Aspect of Human Dignity' (n 128) 974.

¹³⁰ *Bazemore v Savannah Hosp* 171 Ga 257, 155 SE 194 (1930).

¹³¹ Bloustein, 'Privacy as an Aspect of Human Dignity' (n 128) 979.

¹³² *ibid* 987.

d) Privacy and Inter-personal Relations

Another set of accounts of the right to privacy justify that notion on the basis of the need to protect inter-personal relations. On Fried's account, for instance, privacy is an important pre-condition for a number of aspects that we value in human inter-personal relations.

Important among them is intimacy. Fried suggests that our right to exercise a degree of control over our personal information is an important pre-condition for our ability to maintain different degrees of intimacy.¹³³ An equally important aspect of inter-personal relations that privacy guarantees is mutual self-respect. As Fried argues, 'the rights of privacy are among the basic entitlements which men must respect in each other; and mutual respect is the minimal precondition for love and friendship'.¹³⁴ Finally, privacy provides the context for a number of significant relationships. We would hardly be human if we had to do without friendship, love and trust. An atmosphere of expectation of privacy, is a necessary pre-condition for maintaining those relationships.

Thus, on Fried's account, privacy is a necessary pre-condition for a number of important inter-personal attributes. In his words,¹³⁵

[P]rivacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.

¹³³ Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Harvard University Press 1970) 142. See also, Adam D Moore, 'Privacy: Its Meaning and Value' (2003) 40 *American Philosophical Quarterly* 215, 220.

¹³⁴ Fried (n 133).

¹³⁵ *ibid* 140.

e) Privacy and Autonomy

Rössler offers an autonomy-based account of the right to privacy. Rössler's central argument works its way through two important concepts on its way to privacy. They are freedom and autonomy.

In liberal philosophy, freedom of the individual is an important value. It is seen as offering citizens the possibility for living their life in accordance with their own ideas of individual good.¹³⁶ Freedom by itself is, Rössler argues, indeterminate. In her words:¹³⁷

[W]e would not really describe persons as free if they made their choices 'only' freely, arbitrarily, without reason, acting as though in the pure freedom of the 'chooser', without at the same time also being determined or grounded by a certain attitude towards themselves and towards their possible options.

Consequently, we expect people to be not just free, but autonomous. A life lived autonomously, Rössler argues, is more valuable than a merely free life.¹³⁸

But how does this relate to privacy? On Rössler's account, the recognition of a right to privacy is based on individual freedom and autonomy.¹³⁹ Indeed, Rössler goes so far as to assert that 'the true realization of freedom, that is a life led autonomously, is only possible in conditions where privacy is protected'.¹⁴⁰ There is then a functional reason to value privacy. This consists in

¹³⁶ Beate Rössler, *The Value of Privacy* (Rupert DV Glasgow tr, Polity Press 2005) 43.

¹³⁷ *ibid* 49.

¹³⁸ *ibid* 50.

¹³⁹ *ibid* 66.

¹⁴⁰ *ibid* 72.

the fact that private spaces (both physical and metaphorical) are spheres where individuals can exercise their right to live their life autonomously.¹⁴¹ In sum, as Rössler puts it,¹⁴²

The concept of privacy demarcates for the individual realism or dimensions that he needs in order to be able to enjoy the individual freedom exacted and legally safeguarded in modern societies.

iii. *Understanding Privacy*

This section focusses on understanding what privacy is. A number of different conceptions of privacy have been offered in the academic literature. Categorising these conceptions is a difficult task. This is primarily because many of them overlap in more than one respect. Two methods of classification are suggested here, while recognising that many of these categories are not mutually exclusive.

Broadly, as Inness argues, definitions of privacy may be classified as based either on the notion of ‘control’ or, on the idea of ‘separation’. Control-based definitions understand privacy as based on the individuals’ freedom to control aspects of their own self. Separation based definitions, on the other hand, conceive of two separate spheres namely the public and the private.¹⁴³

Five particular conceptions of privacy will now be considered: (a) access-based conceptions; (b) autonomy-based conceptions; (c) information-based conceptions; (d) intimacy-based conceptions; and (e) hybrid conceptions.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ See Inness (n 68) 42ff and ch 4.

a) Access-based Conceptions

According to some commentators, privacy is primarily concerned with ‘access’. A state of privacy is one that restricts access to an individual in certain respects. In keeping with the analysis offered above, an access-based conception may be control-based or separation-based. An example of each is considered below.

Allen offers a ‘restricted-access definition’ of privacy. Her conception relies on ‘separation’ rather than ‘control’.¹⁴⁴ Allen’s understanding of privacy characterises it as a restriction on access to individuals, their mental states and on information about them.

Allen’s definition merits reproduction in full. In her words,¹⁴⁵

Personal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others. To say that a person possesses or enjoys privacy is to say that, in some respect and to some extent, the person (or the person’s mental state, or information about the person) is beyond the range of others’ five senses and any devices that can enhance, reveal, trace, or record human conduct, thought, belief or emotion.

If privacy is defined as a state of inaccessibility, then as a logical corollary, accessibility is a condition of its breach. Access in this sense may be direct (perception through senses) or indirect (through surveillance devices).¹⁴⁶

¹⁴⁴ In fact, Allen expressly rejects a control-based account of privacy: see Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman and Littlefield 1988) 11.

¹⁴⁵ *ibid* 15.

¹⁴⁶ *ibid*.

A control-based definition of privacy that relies on ‘access’ is offered by Rössler. Rössler proposes a definition of privacy that is based primarily on access and control. But two preliminary points about Rössler’s account are in order before we proceed to consider her definition itself.

First, Rössler identifies three aspects to which the right to privacy may apply:¹⁴⁷ (a) to modes of action and conduct – often identified as decisional privacy (b) to knowledge – sometimes referred to as informational privacy, and (c) to spaces – called physical or local privacy.

Secondly, Rössler proposes the following definition:¹⁴⁸

Something counts as private if one can oneself control the access to this “something”. Conversely, the protection of privacy means protection against unwanted access by other people.

The terms ‘control’ and ‘access’ in this definition have a direct, physical meaning as well as a metaphorical meaning. In the metaphorical sense, they refer to one’s ability to control who has access to knowledge about me, although such knowledge is not physically stored in a specific location.¹⁴⁹

¹⁴⁷ *ibid* 6.

¹⁴⁸ *ibid* 8.

¹⁴⁹ For another control based ‘access’ definition of privacy, see Adam Moore, ‘Defining Privacy’ (2008) 39 *Journal of Social Philosophy* 411, 414.

b) Autonomy-based Conceptions

Gerety offers an autonomy-based conception for privacy.¹⁵⁰ There are two aspects of his analysis that are of particular relevance to this chapter. The first is his rejection of the dignity-based definitions. Secondly, and more importantly, we will consider his preferred analysis.

Gerety rejects dignity as the appropriate hook on which to hang a conception of privacy. He is particularly critical of Bloustein's work.¹⁵¹ He re-examines Bloustein's analysis of the four categories identified by Prosser. In each of those categories, he argues, the dignity analysis is either under-inclusive or over-inclusive. Consider for instance, the appropriation cases. Broadly, they consist of three elements: a) the wrongful or fraudulent taking b) of another's identity c) for one's own advantage.¹⁵² When understood as an aspect of personal dignity, Gerety argues, 'this right includes too much and must fall of its own weight'.¹⁵³ He continues,¹⁵⁴

We never control many of the uses to which our names, likenesses, and even histories are put, nor can we hope to. These aspects of our identities, in particular, face outward and are in some sense in the public domain.

Gerety's preferred analysis relies on the twin notions of 'autonomy' and 'intimacy'. He identifies control over one's own body as the most basic form of autonomy.¹⁵⁵ This also makes body, the preliminary reference point for control over one's personal identity. But here, an

¹⁵⁰ Gerety (n 1).

¹⁵¹ See text to n 125 to n 132 above.

¹⁵² Gerety (n 1) 253.

¹⁵³ *ibid* 254.

¹⁵⁴ *ibid*.

¹⁵⁵ *ibid* 266.

understanding of privacy that is based solely on autonomy suffers from the same danger that the dignity-based conception does; it is too broad.

Hence, Gerety relies on the notion of intimacy. An autonomy-based conception of privacy must, he argues, be cut down by ‘intimacy’. It is a violation of one’s intimacy *and* autonomy that attracts privacy protection. In defence of this claim, Gerety relies on the intuitively appealing notion that one must be required to share one’s intimacy with others only in so far as one chooses to do so.

Pulling these two lines of reasoning together, Gerety offers the following proposition:¹⁵⁶

Invasions of privacy take place whenever we are deprived of control over such intimacies of our bodies and minds as to offend what are ultimately shared standards of autonomy.

c) Information-based Conception

A number of commentators have defined privacy as premised on our interest in controlling information about ourselves. Consider Fried’s account for example. Fried suggests that we intuitively associate privacy with secrecy. At a deeper level, Fried argues,¹⁵⁷

[P]rivacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.

¹⁵⁶ *ibid* 268.

¹⁵⁷ Fried (n 133) 140 (emphasis added). See also, WA Parent, ‘Privacy, Morality, and the Law’ (1983) 12 *Philosophy and Public Affairs* 269, 269.

In adopting this conception, Fried falls within the category of commentators who rely on control rather than separation to define privacy. On his account, privacy is about ‘control over knowledge about oneself’.¹⁵⁸

d) Intimacy-based Conception

Inness adopts a conception of privacy that is based on the notion of intimacy. She proceeds in the following steps. Her definition is control-based. She starts from the premise that one has privacy in so far as one can control certain aspects of her life.¹⁵⁹ That, however, raises the question, in respect of what aspects is a right to privacy recognised? Inness identifies three dimensions in particular: information-based, access-based and decision-based accounts of privacy. However, to Inness, this separation does not, by itself, answer all our questions. We still need an account of the *content* of privacy. What information does privacy protection attach to? When does privacy protection impose restrictions on access? What decisions are protected by privacy?

According to Inness, the answer to these questions is found in the notion of intimacy. Intimacy is the criterion on the basis of which privacy protection is afforded to spaces, information and decisions.¹⁶⁰ Thus, privacy is best identified as a state where one has control over one’s own intimacy.

¹⁵⁸ Fried (n 133) 141.

¹⁵⁹ Inness (n 68) 57.

¹⁶⁰ *ibid.*

A further question remains unanswered. What is intimacy? What actions, decisions or spaces are intimate? In responding to this enquiry Inness argues that whether something is intimate depends on the motivation that underlies it. In her words,¹⁶¹

When an agent characterizes an act or activity as intimate, she is claiming that it draws its meaning and value from her love, liking, or care. Intimate decisions concern such matters and, thus, involve a choice on the agent's part about how to... embody her love, liking, or care.

e) Hybrid Conceptions

In contrast to the conceptions considered above, some commentators define privacy by combining a number of different criteria. They offer no overarching definition for the general right of privacy. Gavison offers a good illustration of this trend.

Gavison's definition is access-based. On Gavison's account, privacy is a limitation of others' access to an individual.¹⁶² From this starting point, Gavison proceeds to identify three components of privacy. Privacy, she argues, consists of secrecy, anonymity and solitude. Each category is justified by a different notion of privacy. Let us now examine each of these categories.

Secrecy protects an individual from others' access in relation to information. Thus, this form of privacy is related to 'the amount of information known about an individual'.¹⁶³ This is perhaps the most common form of privacy infringement.

¹⁶¹ *ibid* 75–76.

¹⁶² Gavison (n 97) 428.

¹⁶³ *ibid* 429.

The second component of privacy is anonymity. This concerns the attention paid to an individual. The potential for privacy infringement occurs regardless of whether the attention is conscious or inadvertent.¹⁶⁴ Although secrecy and anonymity often overlap, there are areas where they operate independently. For example, anonymity may be infringed without a breach of secrecy. This occurs when undue attention is paid to an individual leading to a breach of her privacy although no new information is uncovered as a consequence of the attention. Gavison offers an illustration. Consider a case where the President decides to walk the streets incognito. What would be the effect of shouting ‘Here is the President’? As Gavison says, ‘no further information is given, but none is necessary’.¹⁶⁵

The third aspect of privacy infringement is solitude. This concerns the loss of privacy through undue physical access to an individual. Such physical access may be direct (through proximity, for example) or indirect (through phone tapping, for instance).

This section surveyed the academic literature on privacy. Two points in particular were considered: the justification for a separate right to privacy and the appropriate conception of the idea of privacy. With that background, the next section examines the conception of the right to privacy in India.

2. The Conception of Privacy in India

As mentioned earlier in this chapter, the existence, nature and scope of the Constitutional right to privacy in India were comprehensively re-examined in two (relatively) recent decisions of Indian

¹⁶⁴ *ibid* 432.

¹⁶⁵ *ibid*.

Supreme Court: *Puttaswamy I* and *Puttaswamy II*. This section examines the Court's consideration of the values underlying the constitutional right to privacy in India. The section that follows critically analyses the reasoning of the Court.

i. *What are the Values Underlying the Right to Privacy in India?*

This section will examine the conception of the right to privacy in India. In particular, it will address the values underlying the right to privacy in India. As Chandrachud J observed at the beginning of his speech in *Puttaswamy I*,¹⁶⁶

The basic question whether privacy is a right protected under our Constitution requires an understanding of what privacy means. For it is when we understand what interests or entitlements privacy safeguards, that we can determine whether the Constitution protects privacy.

Part of the exercise in this section will be to place the Supreme Court's treatment of privacy in the broader context of the academic literature that was examined in sub-section (1) of this section.

Consider, for example, the 'reductionist' literature. As explained earlier in this chapter, reductionists argue that privacy is reducible to other allied rights such as rights over the person and the right to property. Therefore, they argue that privacy does not have its own unique value. Chandrachud J expressly considered many reductionist accounts of the right to privacy. For example, among others, he referred to the work of Posner, Thomson and MacKinnon, which were examined earlier in this chapter. Chandrachud J responded to this literature in his judgment in *Puttaswamy I*. Rejecting the suggestion that privacy is reducible to the right to liberty, he said,¹⁶⁷

¹⁶⁶ *Puttaswamy I* (n 5) [7] (Chandrachud J).

¹⁶⁷ *ibid* [140](c).

The powerful counter argument to these criticisms is that while individuals possess multiple liberties under the Constitution, read in isolation, many of them are not related to the kinds of concerns that emerge in privacy issues. In this view, liberty is a concept which is broader than privacy and issues or claims relating to privacy are a sub-set of claims to liberty.

According to him, therefore, the claim that privacy is a category of liberty is not inconsistent with recognising its separate meaning and existence.

It was pointed out earlier in this chapter that another vantage point from which privacy has come under attack is that of feminism. It was explained that some feminists have challenged privacy — and indeed, the broader notion of a public-private divide — on the basis that they operate as a shield for discrimination against women. Chandrachud J considered this critique too including, in particular, the work of MacKinnon. However, he disagrees with MacKinnon that privacy should not be recognised as a separate right. Instead, his view was that it is possible to take ‘the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty’.¹⁶⁸

For the present purposes, the key question is: what are the interest(s) that justify the existence of the right to privacy in India? In examining that question, Chandrachud J (in particular) considered the various competing explanations for the right to privacy. He examined the role of privacy in protecting individual personality, autonomy and dignity.¹⁶⁹ He did not expressly cite any academic literature in support of these conceptions of privacy. However, the reader will recall that the literature that examines these conceptions of privacy was examined in section B(1)(ii)(b), (c) and (e) above.

¹⁶⁸ *ibid* [140](d).

¹⁶⁹ *ibid* [168].

On this question of the value(s) underlying privacy, there is a clear thread that runs through the Court's reasoning: individual liberty. One may also take the further step of noting that, according to the judges, the fundamental right to privacy protects individual liberty by guaranteeing protection to individual dignity and autonomy.

Consider Chandrachud J's judgment first. He clearly affirmed a dignitarian conception of the right to privacy. He said,¹⁷⁰

The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion.

But why does dignity merit protection? Chandrachud J's response to that question is based both on the 'intrinsic' and 'instrumental' reasons for protecting dignity.¹⁷¹ As an inherent entitlement and a constitutionally protected interest, dignity carries an intrinsic value. The inseparability of dignity and freedom also mean that there are important instrumental reasons for guaranteeing dignity.¹⁷²

Chandrachud J offered a second prong for his analysis, namely individual autonomy. He pointed out that there was a crucial relationship between privacy and individual autonomy. In his words, 'privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life'.¹⁷³

¹⁷⁰ *ibid* [113].

¹⁷¹ *ibid* [169].

¹⁷² *ibid*.

¹⁷³ *ibid* [113].

Interestingly, Chandrachud J also noted that there was an underlying relationship between the notions of liberty, dignity and autonomy. As to this, he said,¹⁷⁴

Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.

In sum, according to Chandrachud J, autonomy and dignity are intertwined ideas. The broad concept of liberty includes within its sweep, autonomy and dignity, both of which together inform the justification for the right to privacy in India.

Bobde J also provided a clear exposition of the interests that privacy protects in *Puttaswamy*. According to him, the two values with which privacy is most intimately connected are ‘innate dignity and autonomy of man’.¹⁷⁵ His justification of privacy, therefore, aligns closely with that of Chandrachud J. However, Bobde J went one step further. He suggested that privacy was such an innate part of the fundamental rights chapter of the Indian Constitution that other freedoms cannot be realised without privacy. Consider this passage for example:¹⁷⁶

Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of ‘personal liberty’ and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.

Therefore, according to Bobde J, privacy is not only an end in itself, but also a means to achieving something else; in this case, the exercise of other fundamental freedoms. Consider, for example, Bobde J’s elucidation of how privacy acts as an enabler of the right to freedom of speech

¹⁷⁴ *ibid* [188](A).

¹⁷⁵ *ibid* [248] (Bobde J).

¹⁷⁶ *ibid* [261].

and expression. To him, a condition of relative privacy is a pre-condition for the effective exercise of the right to freedom of speech and expression, as is the case with most other rights guaranteed by Article 19. Bobde J said,¹⁷⁷

Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with. A peaceful assembly requires the exclusion of elements who may not be peaceful or who may have a different agenda. The freedom to associate must necessarily be the freedom to associate with those of one's choice and those with common objectives.

He pursued the same line of reasoning in relation to dignity. He said:¹⁷⁸

It is difficult to see how dignity – whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights – can be assured to the individual without privacy.

Here, again, privacy was justified as a means to achieve dignity.

We can now turn to Nariman J's judgment. It is best understood as consisting of two complementary strands of reasoning. On the one hand, his analysis mirrors that of Chandrachud J and Bobde J. He relied on the twin notions of dignity and liberty to make a case for the right to privacy. As he put it, 'it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual'.¹⁷⁹

However, there is another strand of reasoning that runs through Nariman J's analysis. One finds this, for example, in his identification of the 'three aspects' of privacy in India: 'privacy that

¹⁷⁷ *ibid* [267].

¹⁷⁸ *ibid* [266].

¹⁷⁹ *ibid* [331] (Nariman J).

involves the person’, ‘informational privacy’ and ‘the privacy of choice’.¹⁸⁰ Notably, far from confining himself to identifying these different variants of privacy, Nariman J made an attempt at identifying the interests that underlie each category. To him, privacy of choice is based on ‘an individual’s autonomy’;¹⁸¹ privacy of the person relates to ‘rights relatable to [one’s] physical body’ and informational privacy guarantees ‘control over the dissemination of material that is personal to him’.¹⁸² In this respect, Nariman J’s reasoning is representative of a body of privacy literature that relies on the classification of privacy as the basis for its justification.¹⁸³ The classification of privacy is considered in more detail in chapter 3 of this thesis.

Sapre J’s judgment resonates with some of Bobde J’s reasoning. Sapre J considered that dignity was inconceivable without privacy. He discussed privacy as an inherent right which is inseparable from the human being. He said,¹⁸⁴

In my considered opinion, “*right to privacy of any individual*” is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last [*sic*].

¹⁸⁰ *ibid* [364].

¹⁸¹ *ibid*.

¹⁸² *ibid*.

¹⁸³ Daniel Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477. However, the argument that different categories of privacy protect different interests is best explained by Bostwick in the context of his privacy of repose, sanctuary and intimate decision: see, Gary Bostwick, ‘A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision’ (1976) 64 *California Law Review* 1447.

¹⁸⁴ *Puttaswamy I* (n 5) [402] (Sapre J) (emphasis in original).

It is difficult to read much more into Sapre J's conception of the right to privacy. It may be possible to understand his justification as rooted within dignity, but this is a stretched interpretation.

Consider, for example, this passage:¹⁸⁵

I, therefore, do not find any difficulty in tracing the “*right to privacy*” emanating from the two expressions of the Preamble namely, “*liberty of thought, expression, belief, faith and worship*” and “*Fraternity assuring the dignity of the individual*”.

Now, consider the judgment of Chelameswar J. He noted that for the purposes of this reference, the Court is only concerned with answering the question whether a fundamental right to privacy exists at all. ‘Definitional uncertainty’ is, he said, no reason to refrain from recognising the right. However, a significant insight offered by Chelameswar J’s judgment is his characterisation of fundamental rights as generally constructed on a foundation of ‘liberty’. In his words,¹⁸⁶

I am of the opinion that a better view of the whole scheme of the chapter on fundamental rights is to look at each one of the guaranteed fundamental rights not as a series of isolated points, but as a rational continuum of the legal concept of liberty i.e. freedom from all substantial, arbitrary encroachments and purposeless restraints sought to be made by the State.

He reiterated this point in the context of privacy. He said:¹⁸⁷

The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

Finally, we turn to Kaul J’s reasoning. There are two interesting aspects about Kaul J’s opinion. On the one hand, he aligned himself with the other judgments considered above. For

¹⁸⁵ *ibid* [411].

¹⁸⁶ *ibid* [221] (Chelameswar J).

¹⁸⁷ *ibid* [231].

example, he said that '[p]rivacy... is nothing but a form of dignity, which itself is a subset of liberty'.¹⁸⁸ He also said, '[t]he privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity'.¹⁸⁹ This seems unexceptional.

Interestingly, however, Kaul J also pursued a parallel line of reasoning that offered a systemic rationale for the right to privacy. Tracing the value of privacy to the maintenance of a democratic system, he said,¹⁹⁰

Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision making processes and shaping behaviour. It can be used as a tool to exercise control over us like the 'big brother' State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

Reiterating the instrumental value that privacy plays in maintaining a free democracy, he said that¹⁹¹ '[t]he hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation'.

It appears therefore, that in addition to affirming an individualistic rationale for the right to privacy, Kaul J also adopted a systemic justification for privacy. That polity-based justification is based on the need to maintain a free democracy.

¹⁸⁸ *ibid* [497] (Kaul J) (emphasis added).

¹⁸⁹ *ibid*.

¹⁹⁰ *ibid* [438].

¹⁹¹ *ibid* [472].

In conclusion, this section demonstrated that, for the large part, the Supreme Court's articulation of the rationale for privacy is based on the notion of individual liberty operationalised through the ideas of autonomy and dignity. Although Kaul J substantially agreed with this view, he offered an additional, systemic, justification for privacy. The systemic justification is based on why privacy is necessary for sustaining a free democracy.

ii. *Critique of the Supreme Court's Reasoning on Values Underlying Privacy*

One respect in which the judgments in *Puttaswamy I* and *Puttaswamy II* may be said to be unsatisfactory relates to their treatment of the relationship between the values underlying the constitutional right to privacy in India.

As explained above, there was broad agreement between the judges that privacy in India is justified by the values of autonomy and dignity. That proposition, however, leaves several questions unanswered. For example, a key question concerns the relationship between the values of dignity and autonomy. The Supreme Court's reasoning does not offer a clear answer as to what the nature of that relationship is. Are some aspects of the right to privacy based on dignity whereas others are based on liberty? Or are all privacy claims necessarily based on both these values? In either case, what is the relative weight that the Court will place on each of these values in adjudicating privacy claims?

Chandrachud J addressed the relationship between the values of liberty and dignity in the following passage in his judgment:¹⁹²

¹⁹² *ibid* [188](A) (Chandrachud J).

Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.

There is a recognition in this passage that liberty (or autonomy) and dignity are closely related values. Indeed, Chandrachud J goes so far as to say that liberty is ‘inseparable’ from a dignified human existence. Yet, the relative emphasis that one places on the values of liberty and dignity has the potential to alter the nature and scope of the right to privacy in India. As an example of this, consider Chelameswar J’s analysis of the right to privacy in *Puttaswamy I*.

Chelameswar J justified the right to privacy under the Indian Constitution almost entirely by reference to the protection of liberty under the Indian Constitution.¹⁹³ This led him to conclude that privacy was ‘part of liberty within the meaning of that expression in Article 21’.¹⁹⁴ Indeed, as mentioned above, he went so far as to say that ‘the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak’.¹⁹⁵

The analysis of Bobde J provides an interesting contrast. Unlike the reasoning of Chelameswar J, Bobde J provided a wider justification for the right to privacy, relying on both liberty and dignity.¹⁹⁶ This led him to trace the right to privacy to the entirety of Part III of the

¹⁹³ *ibid* [227] and [231].

¹⁹⁴ *ibid* [231].

¹⁹⁵ *ibid* [235].

¹⁹⁶ *ibid* [260], [261] and [266].

Constitution. He invoked no less than six different provisions of the Constitution as supporting the right.¹⁹⁷

The contrast between the analyses of Chelameswar J and Bobde J shows that the choice between the values of autonomy and dignity has significant doctrinal implications for the constitutional right to privacy in India. Yet, the relationship between these values and the relative weight that one must place on them remains largely unclear.

Yet another element of complexity arises from the reasoning of Kaul J. As explained above, he offered (among others) a systemic justification for the right to privacy. He considered that the right to privacy was justified on the basis that it was necessary for a free democracy. This reasoning raises yet further questions. In particular, what is the relationship between the systemic justification and the justifications based on individual liberty (i.e., autonomy and dignity)? Are there cases in which these categories come into conflict with each other? If so, how is such a conflict to be resolved? The answers to these questions remain to be evolved in the Indian privacy context.

In conclusion, the aim of this chapter was to examine the conception of the constitutional right to privacy in India. It focussed on two main questions: What are the consequences of the Court's reasoning in support of reading in privacy as a fundamental right under the Indian Constitution? What are the values underlying privacy in India? As to the first of those questions, it was argued that the Court's reasoning in relation to the doctrine of concomitant rights and its characterisation of privacy as a natural right are open to criticism. As to the second question, the Supreme Court has recognised that privacy in India is justified by the values of autonomy and

¹⁹⁷ *ibid* [264], [267]–[270].

dignity. However, the relationship between the values and the relative weight that Indian Courts will place upon them remain unclear.

CHAPTER 3

THREE CONCEPTIONS OF PRIVACY

This chapter examines whether the constitutional right to privacy in India can be meaningfully sub-classified. The MPhil thesis had argued that the constitutional right to privacy in India consists of three notions: physical privacy, informational privacy and decisional privacy. This classification was accepted by the Supreme Court in *Puttaswamy I*, where the MPhil thesis was cited with approval.¹ The reader will find that, much like the rest of this thesis, the decision in *Puttaswamy I* is an important landmark for the issues examined in this chapter. The adoption of a clear taxonomy for the right to privacy has provided much-needed clarity on what was otherwise a confusing facet of privacy in India.

This chapter will proceed in three sections. **Section A** will briefly consider the debate surrounding the unification theory of privacy i.e., whether there is a unitary conception of privacy or whether there are different conceptions of the right. It will be argued that the right consists of multiple categories in India. **Section B** will undertake a review of the academic literature on the taxonomy of privacy. The purpose of this literature review is to demonstrate that previous attempts to classify the right to privacy have followed one of five different methodologies. This insight is an important first step in deciding the best taxonomy for the constitutional right to privacy in India. **Section C** will apply the output from these two sections to the Indian context and identify a classification best suited for the constitutional right to privacy in India. As mentioned above, I will argue that in India, there are at least three distinct,

¹ An earlier version of this chapter (which was submitted as part of the MPhil thesis) was cited in oral argument and in the judgment in *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1.

albeit interrelated, conceptions of privacy. The categorisation is important because one needs to ask very different questions based on the category of privacy infraction that has occurred.

A. THE UNIFICATION DEBATE IN PRIVACY

A number of authors ascribe to the view that ‘privacy’ is a unitary concept. They oppose the idea that privacy is a ‘cluster of rights’.² This argument generally relies on the proposition that privacy protects a single value such as ‘dignity’,³ ‘inviolable personality’,⁴ ‘autonomy’,⁵ ‘anti-totalitarianism’,⁶ ‘personhood’,⁷ or ‘[regulation of] information’.⁸

By contrast, some authors argue that privacy is not a unitary concept but comprises of various ‘clusters’,⁹ ‘zones’,¹⁰ ‘rights’,¹¹ ‘categories’,¹² ‘species’¹³ or ‘disparate interests’.¹⁴ To

² Jerry Kang, ‘Information Privacy in Cyberspace Transactions’ (1998) 50 Stanford Law Review 1193, 1202.

³ Edward Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 New York University Law Review 962, 1000–07.

⁴ Samuel Warren and Louis Brandeis (1890) 4 Harvard Law Review 193, 205.

⁵ Louis Henkin, ‘Privacy and Autonomy’ (1974) 74 Columbia Law Review 1410, 1425; Joel Feinberg, ‘Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?’ (1983) 58 Notre Dame Law Review 445; Daniel Ortiz, ‘Privacy, Autonomy, and Consent’ (1989) 12 Harvard Journal of Law and Public Policy 91.

⁶ Jed Rubenfeld, ‘The Right of Privacy’ (1989) 102 Harvard Law Review 737.

⁷ See Roscoe Pound, ‘Interests in Personality’ (1915) 28 Harvard Law Review 343; Jeffrey Reiman, ‘Privacy, Intimacy, and Personhood’ (1976) 6 Philosophy and Public Affairs 26.

⁸ See Alan Westin, *Privacy and Freedom* (1st edn, Atheneum 1967) 7–13; Arthur Miller, *Assault on Privacy: Computers, Data Banks, and Dossiers* (University of Michigan Press 1971) 25.

⁹ Kang (n 2) 1202.

¹⁰ Gary Bostwick, ‘A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision’ (1976) 64 California Law Review 1447, 1451.

¹¹ Erwin Chemerinsky, ‘Rediscovering Brandeis’s Right to Privacy’ (2007) 45 Brandeis Law Journal 643, 645.

¹² Anita Allen, *Unpopular Privacy: What Must We Hide?* (OUP 2011) 5.

¹³ Ken Gormley, ‘One Hundred Years of Privacy’ [1992] Wisconsin Law Review 1335, 1339ff.

¹⁴ Lillian BeVier, ‘Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection’ (1995) 4 William & Mary Bill of Rights Journal 455, 458.

these scholars, privacy is an umbrella right that reflects distinct conceptions or categories. Many authors have also suggested taxonomies reflecting these conceptions. These categorisations are particularly popular in American privacy jurisprudence.

Despite the existence of some credible arguments for a unitary conception of privacy, in my view, the constitutional right to privacy in India is best conceptualised as consisting of different sub-categories for a number of reasons. First, Indian privacy jurisprudence, especially in its early years, was deeply inspired by American caselaw. It was explained in the previous chapter that, although privacy is not an enumerated right under the Indian Constitution, Indian Courts, like their American counterparts, have read privacy as emanating from the underlying values dignity and autonomy. Indian Courts also relied heavily on American decisions during the initial development of Indian privacy jurisprudence. It is relevant, therefore, that a large share of the American academic literature ascribes to the view that there are different notions of privacy.

Second, even before *Puttaswamy I* was decided, on at least two occasions Indian courts had hinted at the existence of different conceptions of privacy. *Sareetha* and *Selvi* are examples of this trend. In *Sareetha* the Court suggested that privacy is ‘not [a] unitary concept but is multidimensional’.¹⁵ In *Selvi*, the Supreme Court noted that ‘[i]n conceptualising the “right to privacy” we must highlight the distinction between privacy in a physical sense and the privacy of one’s mental processes’.¹⁶ This recognition paved the way for the recognition of a well-developed taxonomy for the right to privacy in India (as to which, see immediately below).

¹⁵ *T Sareetha v Venkata Subbaiah* AIR 1983 AP 356 (HC) [24].

¹⁶ *Selvi v State of Karnataka* AIR 2010 SC 1974 [191].

Third, the existence of different categories of privacy was expressly recognised by the Supreme Court in *Puttaswamy I*. In doing so, the Court relied on, among other sources, the arguments advanced in a previous version of this chapter. It is important to recognise that, as explained below, Indian courts had been grappling with the different conceptions of privacy long before the decision in *Puttaswamy I*. Therefore, the effect of that judgment was only to recognise what was already implicit in the Indian privacy jurisprudence.

B. TAXONOMIES OF PRIVACY — A LITERATURE REVIEW

This section considers the academic literature on the classification of the right to privacy. Subsections 1 to 5 below demonstrate that academic attempts to classify the right to privacy have followed one of five different methodologies. Section 6 below argues that of these five methodologies, the fourth is best suited to the constitutional right to privacy in India.

One of the first attempts at developing a taxonomy for privacy was by Prosser in 1960. Prosser classified the tort of privacy into: i) ‘Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs’, ii) ‘Public disclosure of embarrassing private facts about the plaintiff’, iii) ‘Publicity which places the plaintiff in a false light in the public eye’, and iv) ‘Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness’.¹⁷ Since Prosser’s classification is confined to tort law, it is of limited assistance to this thesis.

In what follows, this section will consider authors who have attempted to classify the constitutional right to privacy. In my view, taxonomies of privacy fall into five categories:

- (1) Classifications based on *privacy harms* or *activities* that cause infringements;

¹⁷ William Prosser, ‘Privacy’ (1960) 48 California Law Review 383, 389.

- (2) Classifications based on the ‘interests’ that privacy protects or on its justifications;
- (3) Classifications based on the source from which aspects of the right to privacy derive authority;
- (4) Classifications based on the nature of the right; and
- (5) Classifications that combine one or more aspects of the above categories.

After examining the relevant literature, this thesis will conclude that classifications based on category (4) are best suited to the Indian context. Consequently, the model that this thesis proposes for India. As mentioned above, the taxonomy that the Supreme Court of India has now adopted closely mirrors this category.

1. Classifications Based on Privacy Harms or Harmful Activities

Many authors have classified privacy infringements on the basis of the *harm* caused or the harmful *activity* involved. The most popular among them is Solove.¹⁸

Solove’s taxonomy is based on the ‘*activities* which cause privacy problems’. He argues that ‘privacy violations involve a variety of types of harmful or problematic activities’.¹⁹ To him, there is no ‘common denominator that links’ all privacy violations.²⁰ Solove’s taxonomy divides activities that constitute privacy infringements into: i) ‘information collection’, ii) ‘information processing’, iii) ‘information dissemination’ and iv) ‘invasion’.

¹⁸ For another taxonomy that falls into the same category, see Debbie Kasper, ‘The Evolution (or Devolution) of Privacy’ (2005) 20 Sociological Forum 69, 76.

¹⁹ Daniel Solove, ‘A Taxonomy of Privacy’ (2006) 154 University of Pennsylvania Law Review 477, 480.

²⁰ *ibid* 558.

‘Information collection’ is simply the collection of information from individuals. This category is further sub-divided into ‘surveillance’ and ‘interrogation’. ‘Surveillance’ is the watching, recording or listening of an individual’s activities, whereas ‘interrogation’ is the probing and questioning of an individual for information.

‘Information processing’ is the using, storing, maintaining, combining, manipulating or searching of the data collected. This is sub-categorised into: a) ‘aggregation’ (combining different pieces of data of an individual); b) ‘identification’ (linking obtained information to a particular individual); c) ‘insecurity’ (careless protection of collected data); d) ‘secondary use’ (unauthorisedly using collected data for a purpose other than what it was collected for); and e) ‘exclusion’ (preventing an individual from knowing about information others have about him).

The third category, ‘information dissemination’, is the transfer of personal data to others. Here the data moves further away from the individual from whom it was collected, and passes from those who collected it, to third parties. This group is sub-categorised into: a) ‘breach of confidentiality’, where a promise to keep information confidential is breached; b) ‘disclosure’, where information is revealed about a person, and this changes the way others perceive him; c) ‘exposure’, where a person’s ‘nudity, grief, or bodily functions’ are revealed; d) ‘increased accessibility’, where there is an increase in the accessibility to information; e) ‘blackmail’, where there is a threat to disclose personal data about a person; f) ‘appropriation’, where a person’s identity is misused; and g) ‘distortion’, where false and incorrect information is spread about a person.

Although widely cited, Solove’s account is not bereft of flaws. One of its significant weaknesses is its US-centric nature. Solove’s account purports to provide a theoretically sound and universally applicable account of the right to privacy. However, his work is almost entirely based on US caselaw. As Doris puts it, Solove’s ‘great faith in the universality of his...

framework' is an 'overreach'.²¹ Of course, this does not necessarily mean that Solove's account is incompatible with Indian law. But it does suggest that one must be circumspect in transplanting it wholesale to India.

A second challenge is raised by the work of Rautenbach. Rautenbach applies Solove to South Africa. The South African Constitution protects decisional autonomy as a right separate from privacy. Therefore, Solove's classification, which is inclusive of decisional autonomy, is too broad for South Africa.²² A further objection to Solove's classification arises from his failure to define 'personal matters'. This is relevant for Solove's fourth category i.e. 'invasion', in particular, the sub-category 'decisional interference'. Without a clear definition of what constitutes 'personal decisions', the scope of this class remains indeterminate.²³ Moreover, it is unclear whether, in classifying the right to privacy, one must focus on the nature of the invasive actions or on the complainant's ability to control them. Solove prefers the former whereas Rautenbach, the latter. Solove provides no persuasive reasons for his view.

A final set of challenges is posed by Bartow. Bartow's objection to Solove's work is its failure to focus sufficiently on the ways in which privacy violations affect people's lives i.e., the reasons why privacy harms must be curbed. In her words,²⁴

most commentators agree that compromising a person's privacy will chill certain behaviours and change others, but a powerful list of the reasons why this is a negative phenomenon that the law should... prevent is not a significant attribute of Solove's taxonomy.

²¹ Martin Doris, 'Publication Review: Understanding Privacy' (2010) 14 *Edinburgh Law Review* 543, 545.

²² IM Rautenbach, 'Privacy Taxonomies' [2009] *Journal of South African Law* 548, 551.

²³ *ibid.*

²⁴ Ann Bartow, 'A Feeling of Unease About Privacy' (2006) 155 *University of Pennsylvania Law Review* 52, 52 (emphasis added).

Finally, Bartow also suggests that Solove's taxonomy is unnecessarily rigid. For example, while discussing 'information processing', Solove asserts that information is first aggregated from multiple sources and the subject of such information is then identified. But why must that be the case? It is equally plausible that the identification of the subject precedes the aggregation of information. Examples of this phenomenon are routinely found in surveillance cases. Thus, to Bartow, Solove's work imposes a degree of rigidity regarding the factual patterns that lead to a privacy breach.²⁵

In sum therefore, despite its initial attractions, there are many reasons why one must be circumspect about adapting Solove's taxonomy to India.

2. Classifications Based on Privacy Interests or Justifications

There is a considerable body of academic literature that argues that different sub-areas within the right to privacy protect different 'interests' or 'justifications'.²⁶ It is Bostwick's taxonomy that takes the centre-stage under this category.

Bostwick groups 'privacy' into three classes based on their primary facts. But Bostwick goes beyond a mere factual classification; to him, each of these classes protect a different 'interest'. The standard of legal protection afforded in each of these classes is also different.²⁷ Bostwick's three zones of privacy are examined immediately below.

²⁵ *ibid* 57.

²⁶ See BeVier (n 14) 458.

²⁷ *ibid* 1450.

i. *Privacy of Repose*

Repose is the ‘right to be let alone’ in its most basic sense; the ‘freedom from anything that disturbs or excites’.²⁸ The interest that repose protects is an individual’s peace. Therefore, repose can be infringed by the mere existence or by the passive activity of another person. Due to this, repose conflicts with other freedoms such as freedom of speech and assembly. When a balancing act is undertaken, these freedoms generally prevail over repose.

In the American context, Bostwick concludes that repose is not constitutionally protected. This is mainly because repose infringements often arise between private parties. He adds however, that when the State is involved in the bothersome activity, Courts have been more sensitive to the individual’s right of repose.

ii. *Privacy of Sanctuary*

Bostwick explains privacy of sanctuary as:²⁹

prohibiting *other persons* from seeing, hearing, and knowing. It is expressed... in the fourth amendment, which protects the right of the people to be secure not only against unreasonable searches, but also against unreasonable seizures.

The interest that sanctuary protects is the liberty of an individual to ensure that some things are kept private. Sanctuary is different from repose: repose prohibits or blocks interference with an individual’s personal zone whereas sanctuary ensures that certain information is kept within the zone.

The test for interferences of sanctuary by private parties, Bostwick argues, is similar to the test for repose. In both cases, it is necessary to balance conflicting rights. While the privacy

²⁸ *ibid* 1451.

²⁹ *ibid* 1456.

of sanctuary here will not have the constitutional backing of the Fourth Amendment, the invasion by the private party may often be supported by constitutional protections (e.g. freedom of press). By contrast, when sanctuary is invaded by the State, it is governed by the Fourth Amendment.

iii. *Privacy of Intimate Decision*

This category protects the freedom of individuals to act autonomously, and is explained as,³⁰

an area within which... fundamental decisions must be allowed to operate without the injection of disruptive factors by the state. This privacy is less “freedom from” and more “freedom to”.

Bostwick uses American cases such as *Griswold*,³¹ *Roe*,³² *Quinlan*³³ and *Ravin*³⁴ to point out that in addition to the right to procreation and abortion, the zone also protects a number of other intimate decisions. These decisions concern cohabitation, child-rearing, bodily integrity and sexual activities of consenting adults in private, among others.

Bostwick concludes that the zone of intimate decision is not protected by a single provision of the US Constitution, but by a number of them. He also asserts that, as this zone is constitutionally protected, it does not require statutory reinforcement. The test to determine whether the zone of intimate decision has been invaded is two-fold: is the decision ‘intimate’? If yes, then, is there a ‘compelling state interest’ that justifies interference with that decision?

³⁰ *ibid* 1466.

³¹ *Griswold v Connecticut* 381 US 479 (1965).

³² *Roe v Wade* 410 US 113 (1973).

³³ *In re Quinlan* 70 NJ 10, 355 A2d 647 (1976).

³⁴ *Ravin v State* 537 P2d 494 (Alas 1975).

3. Classifications Based on the Source of Law

The key commentator here is Gormley.³⁵ Although the development of Gormley's species of legal privacy is underpinned by the history of the right to privacy in the US, his categories are of some comparative relevance. They are examined immediately below.

i. *'Tort privacy'*

Gormley's first category is the tort law notion of privacy, which embodies the 'right to be let alone'. Gormley ascribes to the view that originally, the privacy tort related to the control of information. Therefore, his first category is best understood as the 'right to be let alone, with respect to the acquisition and dissemination of information'.³⁶

ii. *'Fourth Amendment privacy'*

Gormley defines this category as the 'right to be let alone, with respect to governmental searches and seizures'.³⁷ This is protected by the Fourth Amendment. This category is intended to preserve what some authors call the 'sanctuary' of an individual from the government, so that he can carry out his activities without unjustified interference.

iii. *'First Amendment privacy'*

This is the 'right to be let alone, when one individual's freedom of speech threatens... another citizen's liberty of thought and repose'.³⁸ Gormley notes that there are two distinct kinds of cases in this category that are often conflated — cases where 'free *speech*' and privacy

³⁵ Gormley (n 13) 1339.

³⁶ *ibid* 1357.

³⁷ *ibid* 1374.

³⁸ *ibid* 1434.

intersect; and where ‘free *press*’ and privacy interact. Gormley argues that the ‘free speech’ sub-category has constitutional backing in part, and is therefore, quasi-constitutional. The ‘free press’ sub-category however, only has tortious backing.

Referring to ‘free speech’ cases, he notes that the First Amendment has come to be recognised as consisting of two distinct, countervailing freedoms — ‘the... freedom to speak and express views... without governmental interference’ and ‘the freedom... to think and engage in private thoughts, free from... outside speech’.³⁹ However, in cases where these freedoms clash on purely private conduct, this specie is forced to draw from sources within and outside the Constitution. This explains the ‘quasi-constitutional’ tag.

iv. ‘*Fundamental-decision privacy*’

This is the ‘right to be let alone, with respect to fundamental... decisions concerning the individual’s own person’.⁴⁰ This category is now rooted almost directly in the due process clause. The value underlying this specie is ‘autonomy’. This form of autonomy gives the individual the freedom to perform acts, undergo experiences, and take basic life decisions without external interference.

v. ‘*State-constitutional privacy*’

Gormley’s final specie is ‘the right to be let alone, with respect to a variety of private and governmental intrusions generally overlapping with species number one through number four above, yet often extending greater protections to the citizen by virtue of independent state

³⁹ *ibid* 1381.

⁴⁰ *ibid* 1420.

constitutional provisions’.⁴¹ This specie is similar to the ones discussed above, but is given fortification under state documents.

The attraction of Gormley’s account is its relatively stable and straightforward nature. However, many scholars also consider this to be one of its weaknesses. Solove, for instance, dismisses Gormley’s account on the basis that it lacks a systematic or sound conceptual basis, and is instead based on different sources of the privacy right.

4. Classifications Based on the Nature of Individual Rights

This heading captures the academic literature that argues that privacy is an aggregation of distinct rights. According to Allen, for instance, in everyday parlance invasions of privacy can be divided into certain ‘easily illustrated categories’.⁴²

“Physical” privacy... is disturbed when a person’s efforts to seclude or conceal himself or herself are frustrated; “informational” privacy is disturbed when data, facts, or conversations that a person wishes to secret or anonymize are... acquired or disclosed... “locational” privacy is a hybrid: the privacy of information about a person’s physical — that is, geographical — whereabouts. ...we can also speak of “decisional,” “proprietary,” “associational,” and “intellectual” privacy.⁴³

Kang’s work is another example of an attempt to classify privacy as consisting of individual rights. He takes the view that the guarantee of ‘privacy’ can be grouped into three, functionally interconnected ‘clusters’. His first cluster concerns ‘physical space’ i.e. the extent to which a person’s ‘territorial solitude’ is protected from undesirable ‘objects or signals’.⁴⁴

⁴¹ *ibid* 1434.

⁴² Allen, *Unpopular Privacy* (n 12). For other examples of academic literature that fall into this category, see Chemerinsky (n 11) 644; Stefano Scoglio, *Transforming Privacy: A Transpersonal Philosophy of Rights* (Praeger 1998) 1–2.

⁴³ *ibid*. See also, Anita Allen, ‘Genetic Privacy: Emerging Concepts and Values’ in Mark Rothstein (ed), *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (Yale University Press 1997) 33.

⁴⁴ Kang (n 2) 1202.

This is protected by the Fourth Amendment. The second cluster concerns ‘choice’ i.e. a person’s ‘freedom to make self-defining choices without state interference’.⁴⁵ Kang’s third and final cluster is ‘information privacy’. This is concerned with the control and flow of personal information, more specifically the control over ‘processing — i.e., the acquisition, disclosure, and use — of personal information’.⁴⁶

One objection to Kang’s categories is their breadth. To Solove, this ‘limits their usefulness’.⁴⁷ As noted previously, Solove’s own account is a very detailed taxonomy, broken down into sixteen sub-categories. This, he reasons, makes them practically more useful.

Following a line of reasoning quite similar to Kang’s, DeCew identifies three types of privacy claims — ‘informational privacy’, ‘accessibility privacy’ and ‘expressive privacy’.⁴⁸ ‘Informational privacy’ is the reasonable expectation of individuals, that information about them will not be available publicly. ‘Informational privacy’ is protected by both tort law as well as the Fourth Amendment.

‘Accessibility privacy’ encompasses two kinds of cases. First, where acquisition of information involves gaining access to the *individual*. This overlaps with ‘informational privacy’. Second, where information is irrelevant, yet physical access is at stake, through proximity and observations. DeCew further elaborates that accessibility privacy includes protection of socially prescribed private behaviour (such as sexual and bathroom activities), as

⁴⁵ *ibid* 1203.

⁴⁶ *ibid*. A classification almost identical to Kang, although from a definitional perspective, has been made by Rössler. Although Rössler’s definition relies on the notion of ‘access’, normatively he conceives privacy as consisting of ‘decisional’, ‘informational’ and ‘local’ variants: see, Beate Rössler, *The Value of Privacy* (Rupert DV Glasgow tr, Polity 2005) 9.

⁴⁷ Solove (n 19) 482.

⁴⁸ Judith DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press 1997).

well as ‘physical closeness or surveillance in public or private spaces’.⁴⁹ This category includes acts that cause fear of excessive scrutiny.

Finally, the category of ‘expressive privacy’ protects self-expression and self-identity through speech or activity. Expressive privacy protects an individual’s right to take decisions that concern his or her personhood, without interference from the government or other individuals. DeCew’s broader and inclusive understanding of expressive privacy includes not only ‘fundamental’ decisions concerning, for example, intimate relationships and reproductive choices, but also decisions or activities that relate to an individual’s religious or political commitments. These choices contribute towards the development of his self-identity.

As noted above, both Kang and DeCew pursue similar lines of thinking. Consequently, DeCew’s account suffers from the same flaws as Kang’s. Indeed, Solove thinks that DeCew’s account has limited usability since her categories are broadly defined.

Finally, Siegel’s account of privacy has its grounding in a deficiency in the other accounts. He picks out in particular, the ‘information control’ and the ‘autonomy-based’ schools of thought. Focussing on either information or on the autonomy of the complainant, to Siegel fails to capture the whole picture.⁵⁰

Siegel’s account of privacy categorises privacy claims into three classes: ‘control over stimulus input’, ‘control over stimulus output’ and ‘control over self-regarding conduct’. All three categories cut across constitutional and tortious privacy.

⁴⁹ *ibid* 76.

⁵⁰ Paul Siegel, ‘Privacy: Control over Stimulus Input, Stimulus Output, and Self-regarding Conduct’ (1984) 33 *Buffalo Law Review* 35, 36.

‘Control over stimulus input’ captures cases where the law protects an individual’s right to keep away certain kinds of external stimuli. Such ‘stimuli’ may or may not have linguistic expression. Protection against unreasonable searches and seizures is an example of this class. This protection is unavailable if the complainant has ‘assumed the risk’ of the external stimuli. Hence, claims in this category will rarely be successful if the offending conduct happened in a public place.⁵¹

‘Control over stimulus output’ is the flip side of the ‘control over stimulus input’ category. Here, an individual’s right to exercise *control* over certain types of external stimuli is protected. One’s right to *not* speak under certain circumstances is an example. Siegel views the right against self-incrimination as a corollary of this category.⁵²

‘Control over self-regarding conduct’ is Siegel’s final category. This is Siegel’s proposed replacement for decisional autonomy. An evaluation of whether there has been an infringement of privacy under this category is determined by asking:⁵³

(a) Was the conduct that is abridged ‘fundamental enough’?

(b) Is there a ‘compelling state interest’ that justifies the infringement?

The precise reason for the shift from ‘autonomy’ to ‘self-regarding conduct’ is based on the latter formulation’s ability to better reconcile US caselaw. Consider, for example, *Roe*. On one view, the reason why Justice Blackmun considered ‘abortion’ to be a fundamental decision is based on the ‘distress reasoning’ i.e. the distress that a woman who is forced to carry an unwanted child, bears. To Siegel, this analysis does not withstand scrutiny. This is because in

⁵¹ *ibid* 50–51.

⁵² *ibid* 56–63.

⁵³ *ibid* 63–66.

general public law jurisprudence in the US, the possibility of ‘distress’ is not by itself sufficient to qualify liberties as ‘fundamental’.⁵⁴

Why then is a woman’s right to choose whether or not to abort ‘fundamental’? To Siegel, the answer is that it constitutes ‘self-regarding conduct’ i.e. conduct that does not engage anyone else’s interest. In *Roe*, Justice Blackmun considered sexual morality as purely self-regarding. However, the State has a countervailing interest in protecting the woman’s health, and in protecting the foetus. This explains why the Court in *Roe* balanced the woman’s right to abortion against these countervailing concerns.⁵⁵

5. Hybrid Classifications

Some classifications of privacy combine more than one attribute of privacy. One example is Lindgren’s work. She disassociates ‘decisional autonomy’ from privacy and re-casts it as a separate right, namely, the right to personal autonomy. According to her, cases concerning abortion and reproductive rights do not raise privacy concerns. Instead, they are personal autonomy cases.

Lindgren argues that the existing taxonomy of privacy classifies it into three broad categories — ‘spatial’ privacy, ‘informational’ privacy, and ‘decisional autonomy’.⁵⁶ Lindgren suggests that ‘decisional autonomy’ is conceptually distinct from ‘spatial’ and ‘informational’ privacy. The latter two protect traditional privacy notions such as ‘accessibility and

⁵⁴ *ibid* 73–75.

⁵⁵ *ibid* 75.

⁵⁶ Yvonne Lindgren, ‘Personal Autonomy: Towards a New Taxonomy for Privacy Law’ (2009–10) 31 *Women’s Rights Law Reporter* 447, 451.

concealment’.⁵⁷ They are also functionally connected because generally, when one is safeguarded, the other is protected too.⁵⁸

However, to her, ‘decisional autonomy’ protects a different interest, namely, the ‘choice about the way one chooses to live his or her life’.⁵⁹ Lindgren points to many advantages that arise from disassociating ‘decisional autonomy’ from general privacy. For one, ‘decisional autonomy’ will no longer be constrained by the limits of privacy law.⁶⁰

Why is Lindgren’s classification ‘hybrid’? By disassociating ‘decisional autonomy’ from general privacy, she suggests that these rights derive their legitimacy from different sources of law. In this respect, this classification is based on the *source* of the right. With this exception however, her classification is, in every other respect based on the *nature* of the right.

The suggestion that the right to ‘decisional autonomy’ has little to do with the right to privacy is a radical one. While Lindgren’s views are attractive, American privacy jurisprudence on ‘decisional autonomy’ is far too intertwined with the due process clause, for it to now be disassociated. Consequently, Lindgren’s arguments remain impractical.

⁵⁷ *ibid* 469.

⁵⁸ *ibid*.

⁵⁹ *ibid* 486.

⁶⁰ For a similar argument in the Indian context, see, Martha Nussbaum, ‘Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique’ in Zoya Hasan, Eswaran Sridharan and R Sudarshan (eds), *India’s Living Constitution: Ideas, Practices, Controversies* (Anthem 2005) 272–74.

6. Classifying Privacy — An Evaluation for India

The previous five sections identified five different methods of classifying privacy. From those models, this section attempts to identify the model that is best suited for the constitutional right to privacy in India.

Before turning to consider each of these methodologies in more detail, it may be instructive to consider what purpose or purposes, these taxonomies service. If, for example, each of them serves a different purpose, that might be an important factor to take into account in deciding which is best suited to the constitutional right to privacy in India.

In my view, each of the taxonomies considered above is seeking to achieve the same purpose, or relatively similar purposes. That is, they are suggesting the best way to understand privacy and its sub-parts. As explained in chapter 2, privacy is an abstract notion. It is not self-defining. The taxonomies discussed in the previous section are seeking to advance a clearer understanding of that concept. They do so, in particular, by considering whether privacy can be split up into sub-parts and, if so, whether the sub-parts can be meaningfully defined. This exercise might contribute to a better understanding of the concept of privacy as a whole.

In view of this, it seems to me that the purpose or purposes served by a particular taxonomy is not a basis on which one could decide whether they are suitable for adoption in India. Instead, it is necessary to consider each of these methodologies on their own terms. I turn to that task immediately below.

The first model, which classifies privacy based on the harmful *activity* is not viable in India. In my view, this model (including Solove's classification) is not suited to India for two reasons. First, this category is excessively oriented around the privacy of 'information'. The harmful activities are concerned with information 'collection', 'processing' and

‘dissemination’. These categories are then further sub-categorised into components that are also concerned with the privacy of information. There is no support in the Indian privacy caselaw for splitting ‘informational privacy’ into further subcategories or sub-sub-categories. Unsurprisingly, therefore, many of the sub-categories proposed by this model have never been used in India.⁶¹ The flipside of this weakness of the first model is that, as a consequence of its excessive focus on information, ‘physical’ and ‘decisional’ privacy are neglected and cast into the same basket of ‘invasion’.⁶²

Secondly, while Solove criticises other classifications for their breadth, the problem with his own theory is that the boundaries between his groups are too narrow. In reality, the boundary between the different categories is not likely to be as well-defined as Solove appears to contemplate. For instance, within ‘informational privacy’, information extraction and information processing are better understood as two different ways in which the same variant of privacy is infringed rather than as two conceptually distinct sub-categories.

The second model, which classifies privacy based on the *interests* it protects, is centered around the work of Bostwick. While this is one of the most sophisticated accounts of privacy, it has its deficiencies too. For example, Bostwick’s conception of ‘repose’ is too sensitive. According to Bostwick, a person’s mere presence in another’s zone of repose can infringe this aspect of privacy. It seems unlikely that any Constitution would protect an interest of this nature. It follows that repose an interest that is too sensitive to warrant constitutional protection. For all practical purposes, therefore, the category of ‘repose’ is therefore of limited utility in classifying the constitutional right to privacy. Furthermore, in my view, the category of

⁶¹ Apar Gupta, ‘Balancing Online Privacy in India’ (2010) 6 Indian Journal of Law and Technology 43, 51.

⁶² In some cases, such as Solove’s work, this might be the result of an attempt to explain both the tortious and constitutional right to privacy. For the present purposes, it is the constitutional right to privacy alone that matters.

‘sanctuary’ is too narrowly defined. It only includes cases where something leaves the complainant’s zone of privacy. But one can think of several examples where there is an infringement of one’s spatial privacy, yet nothing tangible is extracted out of that zone. It would appear that Bostwick’s category of ‘sanctuary’ does not extend to these cases. Yet, it is difficult to understand why the constitutional right to privacy should exclude such cases.

The third model classifies privacy based on the *source* from which the right is derived. Such categorisation is apt for American privacy, which has found protection under several sources. As explained in chapter 2 above, privacy is protected by multiple provisions of the Indian Constitution. Nevertheless, it remains true that more than one conception of privacy is protected within the umbrella of the same fundamental right. For example, as explained in chapter 2 of the thesis, multiple conceptions of the right are protected by the same provision of the Constitution (namely Article 21). Indeed, one might say that Article 21 is the anchor for the constitutional right to privacy in India. A taxonomy that is based solely on the constitutional source of the right to privacy is therefore unsuited to India. In any event, it is not clear what analytical purpose would be served by this method of categorisation.

The **fourth category** classifies privacy based on the *nature* of its constituent rights. Most proponents of this model categorise privacy as consisting of ‘physical’, ‘informational’ and ‘decisional’ variants. In my view, this is the model that is most suited to the Indian context. Insofar as there was any support in Indian case-law pre-*Puttaswamy I* for a taxonomy of privacy, it appeared to be based on the nature of its component rights.⁶³ As explained later in this chapter, *Puttaswamy I* has now expressly adopted a classification based on the nature of

⁶³ See for example *Sareetha* (n 15) [24]; and *Selvi* (n 16) [191].

right. Further, it will also be explained below that much of the Indian privacy caselaw is explicable by reference to this taxonomy.

The biggest criticism levelled against this model is that it is too broad.⁶⁴ While this criticism is not unfounded, privacy infractions are rarely clear-cut. More often than not, there are overlaps between categories. Having multiple, watered-down categories, although helpful in narrowing the scope of the right, is far removed from how privacy infractions practically work. Further, the fourth category does not necessarily preclude further categorisation, at least in India. The fact that such sub-categories may exist does not take away from the validity of this model.

The **fifth model** classifies privacy based on a combination of one or more of the other four categories. Lindgren is its main proponent.⁶⁵ While she agrees with the fourth category on other counts, according to her, ‘decisional autonomy’ is better understood as the right to personal autonomy, and not privacy. Indian Courts however have not made this distinction. Courts in India have recognised ‘decisional’ privacy as an aspect of the right to privacy.⁶⁶ Moreover, as explained in chapter 2, the Supreme Court of India has now expressly recognised that the constitutional right to privacy in India is unpinned by the values of autonomy and dignity. In doing so, the Court recognised that these values form the basis of decisional privacy as well as the other variants of privacy. There is nothing in the Court’s reasoning that suggests that decisional privacy is so distinct from the other variants of privacy such that its analysis of the underlying values is inapplicable to decisional privacy.

⁶⁴ Solove (n 19) 482.

⁶⁵ See text to n 56 above.

⁶⁶ See sections D and E of ch 1 of this thesis.

As explained above, in my view, the fourth method of classification identified above is best suited to the constitutional right to privacy in India. The next section will apply that model to the Indian context.

C. A TAXONOMY OF PRIVACY FOR INDIA

Indian Courts have discussed privacy in a wide range of contexts such as surveillance, telephone-tapping, flow of information, abortion, rights of transgenders, homosexuality and narco-analysis. In my view, it is difficult to escape the conclusion that these cases concern different conceptions of privacy, not privacy in a unitary sense. However, the delineation of privacy into these conceptions had not been expressly recognised, or formally conceptualised, in India for six decades. It was only in 2017, in *Puttaswamy I*, that the Supreme Court of India expressly recognised that the constitutional right to privacy consisted of different categories. This section considers the taxonomy of the constitutional right to privacy in India.

Sub-section 6 of section B above argued that, of the available taxonomies, a classification based on the nature of the right is the most workable in India. Consequently, the model that I propose is based on the categorisation of privacy into ‘physical’, ‘informational’ and ‘decisional’ privacy. This section further analyses that classification in three stages. Sub-section 1 examines the literature on the classification of the constitutional right to privacy in India. Sub-section 2 sets out the taxonomy that I propose. Sub-section 3 addresses the recognition of this model by the Supreme Court of India.

1. Taxonomy of Privacy in India — Literature Review

The most detailed classification of the right to privacy in India is by Chandrachud. He recognises multiple ‘zones’ of privacy, namely ‘surveillance’, ‘search and seizure’, ‘disclosure of intimate details’, ‘public-eye’ and ‘marriage’. While Chandrachud’s classification is

nuanced, with respect, it does little more than compartmentalise Indian cases based on their *factual* background. Whilst this is a useful backward-looking exercise, it provides no guidance on how Courts should test similarly placed cases in the future. It also leaves a number of questions unanswered. For instance, what is the conceptual distinction between ‘surveillance’ and ‘search and seizure’? If there is such a distinction, what is the basis for it? Why does ‘disclosure of intimate details’ fall under a separate category from ‘surveillance’?

Nonetheless, Chandrachud’s account must be lauded for its contributions to Indian privacy jurisprudence. For instance, his was the first account to recognise the concept of ‘decisional’ privacy in India. Chandrachud argues that despite the judicial non-recognition of what he calls the ‘substantive’⁶⁷ right to privacy in India,⁶⁸ this right already exists under the Indian Constitution. He traces this right to Article 25⁶⁹ (the freedom of conscience and religion) and Article 19 (among others, the freedom of thought and expression). To Chandrachud, these constitutional guarantees protect an individual’s fundamental choices. As explained below, the Supreme Court of India has now recognised that this aspect of privacy concerns an individual’s privacy decisions.

His is also the first account that implicitly recognised the three notions of privacy in India. In Chandrachud’s words,⁷⁰

⁶⁷ Abhinav Chandrachud, ‘The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution’ (2006) 3 Supreme Court Cases (Journal) 31, 33 refers to Rubenfeld to draw an understanding of ‘substantive’ privacy. To Rubenfeld, substantive privacy was ‘the right to privacy that concerns us attaches to the rightholder’s own actions. It is not informational but substantive, immunizing certain conduct - such as using contraceptives, marrying someone of a different color, or aborting a pregnancy - from state proscription or penalty’. See, Rubenfeld (n 6) 740.

⁶⁸ Abhinav Chandrachud (n 67) 33.

⁶⁹ Constitution of India 1950, art 25 (Freedom of conscience and free profession, practice and propagation of religion).

⁷⁰ Abhinav Chandrachud (n 67) 50.

[Privacy] embodies a freedom from unwarranted, arbitrary and unnecessary surveillance, search and seizure. It signifies the power to decide what kind of personal information may be disclosed, and the choice of whom the disclosure may be made to. It is a safeguard of the exercise of choice in matters fundamental to our existence.

These three sentences seem to correspond closely to ‘physical’, ‘informational’ and ‘decisional’ privacy. While Chandrachud stops short of categorising Indian privacy in this fashion, he certainly comes close to recognising the three different notions.

Gupta’s work also merits consideration at this stage. Although his work focusses on online privacy, he tests Prosser’s and Solove’s classifications against Indian caselaw. This leads him to conclude that India has recognised only certain aspects of their taxonomies. He argues for instance, that ‘information processing’ has found no recognition in India so far.⁷¹

An important limitation of Gupta’s account is its restriction to online privacy. For our purposes, this is a significant limitation. Furthermore, Gupta’s uncritical choice of Solove’s taxonomy over all others is also questionable. Finally, even assuming that Solove is to be applied in the Indian context, Gupta’s conclusions only hold good for online privacy. For example, he does not consider ‘decisional privacy’ at all. As demonstrated below, Indian Courts have now recognised considered this aspect of privacy.

A book on Indian privacy law, by Taneja and Kumar,⁷² also considers four ‘aspects’ of privacy: a) ‘bodily privacy’, which concerns ‘physical protection of person’.⁷³ It includes search and seizure, narco-analysis and clandestine photography; b) ‘privacy of the home and family life’ protects matters within the ‘four walls of a man’s home’ and ‘autonomy in matters

⁷¹ Gupta (n 61) 50.

⁷² Rishika Taneja and Sidhant Kumar, *Privacy Law: Principles, Injunctions and Compensation* (Eastern Book Company 2014).

⁷³ *ibid* 4.

of the family’.⁷⁴ These include infractions of reproductive autonomy, sexual relations, personal beliefs and choices, and intrusive journalism; c) ‘communication privacy’ protects telephonic and online communication; and d) ‘information privacy’ primarily concerns data — it includes transmitting data about financial details, health records, etc. in everyday transactions, as well as creation of ‘public databases’. While this categorisation is novel in the Indian context, it does not withstand scrutiny for four reasons.

First, ‘privacy of home and family life’ is not a conceptually coherent category. For instance, what happens if information regarding the family life of an individual is extracted by tapping his home telephone? Is it an infraction within this category or an infraction of ‘communication’ or ‘information’ privacy (i.e., their categories c and d)? On Taneja’s and Kumar’s account, the answer is unclear.

Secondly, it is difficult to distinguish between ‘communication’ and ‘information’ privacy. Infractions of both categories of privacy would involve the transmission of information to unauthorised recipients. These categories collapse into each other, or at least overlap significantly.

Thirdly, it is incorrect to categorise narco-analysis as involving only a ‘bodily’ privacy infraction. Indeed, in *Selvi*, the Supreme Court expressly distinguished between ‘mental’ and ‘physical’ infractions of privacy⁷⁵ and considered narco-analysis as falling in the former category. The Supreme Court was plainly right to do so. Indeed, one may think that one of the fundamental objections to involuntary narco-analysis is that it allows the interrogator unrestricted, and uncontrolled, access to the subject’s mind.

⁷⁴ *ibid.*

⁷⁵ *Selvi* (n 16) [191].

Lastly, and most importantly, the categorisation proposed by Taneja and Kumar does not account for ‘decisional privacy’, unless the relevant decision concerns ‘family life’. This is difficult to justify. There is no good reason why other fundamental personal decisions ought not to be protected by the constitutional right to privacy. Taneja and Kumar also do not mention overlaps between their categories, although it seems implicit in their analysis that such overlaps do exist.

Finally, an excellent, albeit brief, article by Acharya warrants consideration.⁷⁶ On many issues this chapter concurs with Acharya. He examines the literature on the meaning of ‘privacy’ and concludes that three distinct meanings emerge — ‘spatial control’, ‘decisional autonomy’ and ‘informational control’. Analysing the Indian debate surrounding privacy, he argues that privacy claims can be discussed in *four* parts.

The first is ‘privacy and press freedom’, which revolves around the conflict between the *tort* of privacy and the right to know. His second category is ‘privacy from state surveillance’. This includes surveillance of property and communication. The third privacy claim is in ‘relation to decisional autonomy’ and protects an individual’s ‘fundamental choices’.⁷⁷ Acharya argues that the Delhi High Court decision in *NAZ* is the sole decision to ‘enforce decisional autonomy flowing from a right to privacy’.⁷⁸ To him, ‘[t]hese and other failures suggest Indian privacy law has not matured to protect individual sovereignty’.⁷⁹ His final category is ‘information privacy’ which protects ‘personal information’. ‘Personal

⁷⁶ Bhairav Acharya, ‘The Four Parts of Privacy in India’ (2015) 50 (22) *Economic and Political Weekly* 32.

⁷⁷ *ibid* 35.

⁷⁸ *ibid* 35–36. As explained in section D of ch 1, the decision of the Delhi High Court was overruled by the Supreme Court, and that Supreme Court decision was itself later reversed (section E of ch 1).

⁷⁹ *ibid* 36.

information’ is ‘that which can cause the identification of a person, whether used directly or in conjunction with other information’.⁸⁰

This thesis proposes a comparable, albeit not identical, threefold classification for the *constitutional* right to privacy in India. Acharya, however, adheres to a fourfold classification which also accounts for private law infractions of the right. However, certain crucial points of distinction merit attention. First, Acharya’s second category — ‘privacy from state surveillance’ — includes surveillance of ‘communication’ as well as ‘property’. In my view, surveillance of communication, at least, overlaps with ‘information privacy’ wherein ‘personal information’ is often extracted as part of surveillance. This thesis will argue that surveillance of ‘person’ is better categorised as ‘physical privacy’, while surveillance of ‘communication’ is better understood as ‘informational privacy’. Secondly, ‘decisional autonomy’ in India is better developed than the Acharya argues. While it was certainly in its nascent stages at the time when Acharya’s work was published, even then, multiple cases had discussed the ‘decisional’ aspect of privacy.⁸¹ As explained below, this has now been put beyond doubt, including by the Supreme Court in *Puttaswamy I*.

As mentioned above, on many issues, this thesis agrees with Acharya. For instance, he points to the lack of conceptual clarity. In his words, ‘privacy case law has failed to achieve theoretical clarity, and as a result a jumble of contending concepts confuses the law instead of substantiating it’.⁸² The attempt in this thesis is to remedy that and to make sense of the Indian caselaw as it stands.

⁸⁰ *ibid.*

⁸¹ See sections D and E in ch 1 of this thesis.

⁸² Acharya (n 76) 37.

2. A Model for the Taxonomy of Privacy in India

Having examined some attempts to classify privacy in India, I now turn to the model that this thesis proposes for India. The model propounded by this thesis argues that the constitutional right to privacy in India is best understood as consisting of three aspects: (a) ‘physical’ or ‘spatial’ privacy (b) ‘informational’ privacy and (c) ‘decisional’ privacy or privacy of ‘choice’. I will attempt to delineate the conceptual limits of each of these categories in the three sub-sections that follow.

i. *Physical Privacy*

Some authors understand ‘physical privacy’ as privacy that attaches to property.⁸³ Some others explain it as a ‘physical space’ or area of ‘territorial solitude’ which is protected from interference by undesirable ‘objects or signals’.⁸⁴ For the purposes of my model, ‘physical privacy’ refers to privacy of certain private zones or spaces of individuals. Importantly, ‘physical privacy’ is not restricted to tangible invasions. It also extends to intangible infringements. An example.

Example 1: A and B (a local authority) own neighbouring properties. B fixes a powerful lamp in its property. The lamp points at A’s bedroom window. A complains that the blinding light infringes his physical privacy. Is his claim tenable?

While the intrusion itself is intangible, the blinding light has entered A’s personal zone. Consequently, unless reasonably justified, B infringes A’s physical privacy.

⁸³ Scoglio (n 42) 1.

⁸⁴ Kang (n 2) 1202.

‘Physical privacy’ derives from the notion of affording everyone ‘a sphere where [one] should be let alone’.⁸⁵ Indian Courts have held that privacy protects the ‘personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing’.⁸⁶ This definition points (at the very least) towards protection of the *physical* home, family, marriage, motherhood and child-rearing of an individual. Whether this definition also includes *decisions* concerning these matters will be examined shortly.

An important question remains to be answered. Does the protection of spatial privacy extend only to private places? As a matter of principle, the answer is that physical privacy extends to public places too. This is supported by the Supreme Court’s ruling in *Nisar*.⁸⁷ There, the Court upheld a statute that imposed stricter conditions for search and seizure in private places than public spaces. It noted that ‘even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones’.⁸⁸ In doing so, the Court was affirming a statutory standard. Nonetheless, the Court’s reasoning confirms the idea that a person’s physical zone of privacy remains intact even in public spaces.

However, it appears that stricter safeguards must be afforded to ‘physical privacy’ in private places than in public places. This is explicable on the basis that what is considered ‘reasonable’ in public places is different from private places. Siegel explains this by reference to an individual’s ‘assumption of risk’.⁸⁹ An individual assumes the risk of confronting certain

⁸⁵ *Govind v State of Madhya Pradesh* AIR 1975 SC 1378 [21].

⁸⁶ *ibid* [24].

⁸⁷ *Directorate of Revenue v Mohammed Nisar Holia* (2008) 2 SCC 370.

⁸⁸ *ibid* [14].

⁸⁹ Siegel (n 50) 53.

activities when in public. The ‘reasonable expectation of privacy’ test, derived from the US caselaw, is a useful way of reconciling the differing standards of privacy protection in public and private spaces. Indeed, it is sensible to suggest that one’s ‘expectation of privacy’ differs depending on whether the alleged infringing activity takes place in a private or public space.

ii. *Informational Privacy*

‘Informational privacy’ protects against breaches of privacy resulting from the dissemination of personal information. It allows an individual to control their personal information from being disseminated to unauthorised recipients. It permits a person to control not just *what* information is disclosed, but also to *whom* such disclosure is made.⁹⁰

‘Informational privacy’ can be infringed in one or more of three ways — first, when the information is *extracted*; second, when information is *disclosed* to an unauthorised recipient; and third, when information is *used* for an unauthorised purpose. Compare these examples:

Example 2.1 A, a police officer, enters B’s premises without legal authorisation, and seizes B’s personal documents. A has violated B’s ‘informational privacy’ by *extracting* B’s personal information.

Example 2.2 In the above example, if A had conducted the search and seizure legally, there wouldn’t be an infraction of ‘informational privacy’ by extraction. If A however, then proceeds to publicly *disclose* the information obtained, without reasonable cause or B’s authorisation, that would infringe B’s ‘informational privacy’.

Example 2.3 A couple are seen kissing on a government-installed CCTV security camera. The officer in charge of surveillance (a state functionary) uploads this video on an adult website. In this example, although the surveillance itself may be justified by legitimate and reasonable security concerns, the *misuse* of the information activates the couple’s ‘informational’ right to privacy.

In conceptualising ‘informational privacy’, it is also important to understand the kind of information that is protected. Is *all* information that an individual has control over, protected?

⁹⁰ See Abhinav Chandrachud (n 67) 39.

As a general rule, the answer is in the negative. Most authors qualify ‘informational privacy’ as protecting ‘personal’ or ‘private’ information. But what is ‘personal’ or ‘private’? Academic literature offers some helpful explanations here. Allen understands it as information ‘that a person wishes to secret or anonymize’.⁹¹ Chandrachud explains it as ‘that aspect of their lives... over which no member of the public can have a legitimate claim’.⁹² Similarly, according to Kang, information may be ‘personal’ in three ways: by authorship, where the individual has created or prepared the information; by a descriptive relation, where the information describes the person in some way other than authorship, e.g. DNA profiles, fingerprints etc; and through instrumental mapping i.e. an instrument such as a security number that details a relation to the individual. This is generally used for instrumental identification.

Since privacy belongs to ‘persons and not places’, Indian Courts have held that ‘informational privacy’ applies even against third parties.⁹³ This is so even if a person has parted with such information to a second person, in confidence. Consider an example.

Example 3: A discloses private information to his insurance company B. X, an instrumentality of the State, unlawfully obtains such information from B, without A’s consent. Despite A having parted with the information to B, the information continues to retain its private nature. A claim is available against X for breach of ‘informational privacy’.

In this example, the breach occurs when X *extracts* the information from B. If in the above example, X had obtained the information lawfully from B, but decided to publish it without just cause, the breach of ‘informational privacy’ would be triggered by the *disclosure*.

⁹¹ Allen, *Unpopular Privacy* (n 12) 5.

⁹² Abhinav Chandrachud (n 67) 39.

⁹³ *District Registrar & Collector, Hyderabad v Canara Bank* AIR 2005 SC 186 [54].

iii. *Decisional Privacy*

As Chandrachud points out, US Courts have recognised at least two ‘aspects’ of privacy — ‘[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions’.⁹⁴ This sub-section is concerned with privacy in the second sense, namely ‘decisional privacy’.

Indian Courts, unlike their American counterparts, had not explicitly delineated ‘decisional privacy’ until *Puttaswamy I*. Yet, on multiple instances even before 2017, they had grappled with this notion. Examples of such cases include those concerned with an individual’s choice of profession,⁹⁵ the complainant’s dietary choices,⁹⁶ a woman’s reproductive choices,⁹⁷ a person’s autonomy to choose relationships,⁹⁸ his choice to exercise a right to silence,⁹⁹ the petitioner’s choice of gender,¹⁰⁰ and a wife’s right not to cohabit with her spouse.¹⁰¹ At a high level, therefore, ‘decisional privacy’ in India protects an individual’s choices from state interference.

However, this notion of ‘decisional privacy’ is cast too generally. Can it be that every one of an individual’s choices is constitutionally protected? The answer must be in the negative. To overcome this hurdle, most privacy commentators qualify ‘decisional privacy’ as

⁹⁴ *Whalen v Roe* 429 US 589, 599–600 (1977) (Stevens J) (emphasis added).

⁹⁵ *Anuj Garg v Hotel Association of India* AIR 2008 SC 663.

⁹⁶ *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat* AIR 2008 SC 1892.

⁹⁷ *Suchita Srivastava v Chandigarh Administration* AIR 2010 SC 235.

⁹⁸ *NAZ Foundation v Government of NCT* 2010 Cri LJ 94 (Del HC).

⁹⁹ *Selvi* (n 16).

¹⁰⁰ *National Legal Services Authority (NALSA) v Union of India* AIR 2014 SC 1863.

¹⁰¹ *Sareetha* (n 15).

protecting those choices or decisions that are ‘private’,¹⁰² ‘personal’¹⁰³ or ‘fundamental’.¹⁰⁴ However, some Indian ‘decisional privacy’ cases are difficult to reconcile with this qualification. For instance, is an individual’s freedom to choose a profession or food ‘personal’ or ‘fundamental’ in the relevant sense? The answer requires a more nuanced understanding of ‘choice’.

Within the Indian privacy model, to understand the range of ‘choices’ that fall within the ambit of privacy, Siegel’s account is helpful. Siegel relies on the notion of ‘self-regarding conduct’ i.e., ‘conduct which affects no one’s interests but those of the participants themselves’.¹⁰⁵ However, I propose two modifications to this analysis. The first among them is to re-characterise the relevant conduct as ‘self-regarding *choice*’ or ‘self-regarding *decisions*’. So understood, ‘decisional privacy’ is concerned with decisions of an individual that are primarily concerned with his own intimate interests rather than the interests of others. Second, there will inevitably be cases in which another person’s legitimate interests are engaged by one person’s decisions. In such cases, the complainant’s right to choose will need to be weighed against such interests. The more a decision is concerned with the complainant’s own interests rather than another person’s legitimate interest, the more likely that it will be protected by the right to decisional privacy. This reasoning explains the protection afforded to a person’s choice of food or profession. As long as that choice does not affect another person’s

¹⁰² See, Solove (n 19) 491, 555ff; Scoglio (n 42) 1. The Indian Supreme Court decision in *Selvi* also uses the term ‘private choice’. See *Selvi* (n 16) [192].

¹⁰³ Allen, ‘Genetic Privacy: Emerging Concepts and Values’ (n 43) 33; Chemerinsky (n 11) 646.

¹⁰⁴ Bostwick (n 10) 1466; Gormley (n 13).

¹⁰⁵ Siegel (n 50) 37. He borrows the concept of ‘self-regarding’ conduct from John Stuart Mill. See, John Stuart Mill, *On Liberty* (Alburey Castell ed, AHM Publishing Corporation 1947) 13.

legitimate interests, it will be protected. In so far as it does, his choice will need to be weighed against that other legitimate interest.

iv. *Overlaps*

Thus far, the attempt in this chapter was to conceptually delineate three categories of privacy. However, these categories often overlap. They do so when the same infringing act engages two or even all of the three categories. This section highlights these intersections.

a) Overlap Between Physical and Informational Privacy

The infraction of ‘physical privacy’ may involve some ‘personal information’ being compromised. For this reason, it may even be argued that physical privacy and informational privacy must be considered as a single category. However, this amalgamation is incorrect for two reasons. First, since they are conceptually distinct, in order to adjudge whether there has been a violation under either category, one needs to ask very different questions. Secondly, despite there being occasional overlaps, there are instances where one is violated, without attracting the other.

Consider these examples.

Example 4.1. A and B (a local authority) own neighbouring properties. B fixes a powerful lamp in its property. The lamp happens to point at A’s bedroom window.

Here, A’s ‘physical privacy’ is violated. Since no information of A was extracted, there was no violation of ‘informational privacy’.

Example 4.2. A impounds some confidential ‘personal’ documentation with his bank B. X, an instrumentality of the State, unlawfully gains access to these documents.

Here, X has not come into contact with A, yet X has unauthorisedly extracted personal information about A. A's 'informational privacy' was violated by X, but not his 'physical privacy'.

Example 4.3. A's house is unreasonably searched by police officer B. B retrieves some documents which contain information that is personal to A.

Here, B has infringed A's 'physical privacy' and 'informational privacy'.

The examples above justify the need to maintain a distinction between the two categories despite their overlap.

b) Overlap between Physical and Decisional Privacy

Overlaps between 'physical' and 'decisional' privacy are also conceivable. Criminalisation of homosexuality is an example. By criminalising homosexual conduct, two individuals are not only denied a physical zone, free from state interference. Equally, they are also denied the right to make a 'self-regarding choice' as to their sexual preferences. Thus, criminalising homosexuality simultaneously violates 'physical' and 'decisional' privacy.

c) Overlap between Informational and Decisional Privacy

Assume that the government passes legislation making it mandatory for all citizens publicly to disclose their sexual orientation. In respect of all citizens who do not consent to making this declaration, the government's unreasonable infraction is a breach of their 'informational' privacy. Since the aggrieved citizens are also entitled to a choice to remain silent in respect of their private affairs, the legislation also breaches their 'decisional' privacy.

d) Overlap between Physical, Informational and Decisional Privacy

Mental intrusion is an example of an overlap between all the three categories. Some authors argue that ‘mental privacy’ is better considered as a separate category by itself.¹⁰⁶ The preferable view is that mental intrusion is better understood as an overlap between all three categories. Consider for example, involuntary administration of narco-analysis. This violates all three spheres of privacy: i) ‘physical privacy’ is violated because the person’s private zone is directly infringed; ii) ‘informational privacy’ is violated because information that is personal to the test-subject is extracted from him without his consent, and iii) ‘decisional privacy’ is violated because his choice to remain silent about certain information is disrespected.

3. Recognition of the Threefold Categorisation in India

The MPhil thesis had proposed the threefold classification of the constitutional right to privacy in India that was set out immediately above. The model proposed in the MPhil thesis consisted of physical privacy, informational privacy and decisional privacy. That model was adopted by the Supreme Court in *Puttaswamy I* and is now the law in India. In adopting this taxonomy of the right to privacy in India, Chelameswar J expressly cited with approval the MPhil thesis as providing a detailed account of the taxonomy of the constitutional right to privacy in India.¹⁰⁷

There are two main aspects of the judicial adoption of this model in India that merit close attention.

First, there was near unanimity among the judges in *Puttaswamy I* that the constitutional right to privacy in India is not a unitary notion. Rather, they considered that it consists of

¹⁰⁶ Scoglio (n 42) 2; Westin (n 8) 32.

¹⁰⁷ *Puttaswamy I* (n 1) [222] (fn 309).

conceptually distinct sub-categories. Thus, Chandrachud J explained that privacy had ‘*distinct connotations*’.¹⁰⁸ In doing so, he referred to several different ‘*types of privacy*’.¹⁰⁹ Similarly, Chelameswar J did not consider it necessary to provide an exhaustive account of the different types of privacy that are recognised by the Indian Constitution.¹¹⁰ Nonetheless, he referred with approval to the extensive academic and judicial literature on the taxonomy of privacy.¹¹¹ Nariman J also subscribed to the notion that privacy could meaningfully be sub-categorised into various clusters of rights.¹¹² He hinted at the idea (which was examined in chapter 2 of this thesis) that the protection of privacy could be traced to different provisions of the Indian Constitution.¹¹³ Sapre J was clearer on this point. He said:¹¹⁴

I also hold that the “*right to privacy*” has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

Kaul J agreed that the ‘right to privacy may have different aspects’.¹¹⁵

Second, the Court in *Puttaswamy I* also addressed a more difficult question: what is the correct taxonomy for the constitutional right to privacy in India? What sub-categories could the right to privacy be meaningfully sub-categorised into? On this issue, the judges did not speak with one voice. However, they did frame their discussion of this issue by reference to

¹⁰⁸ *ibid* [141].

¹⁰⁹ *ibid* [142].

¹¹⁰ *ibid* [227].

¹¹¹ *ibid* [222]–[227].

¹¹² *ibid* [360]–[364].

¹¹³ *ibid* [364].

¹¹⁴ *ibid* [413].

¹¹⁵ *ibid* [430].

the academic literature that was discussed in section B above. For example, Chelameswar J seemed attracted to Bostwick's classification of privacy into 'repose', 'sanctuary' and 'intimate decision'.¹¹⁶ Kaul J, on the other hand, referred to Prosser's four-fold classification of privacy.¹¹⁷ Chandrachud J also referred to the taxonomies proposed by Westin, Clarke and Allen.¹¹⁸ The reader will recall that this literature was examined in section B above.

Nonetheless, there is clear majority in *Puttaswamy I* for the proposition that the constitutional right to privacy in India is best categorised into three variants, namely physical privacy, informational privacy and decisional privacy. Such majority is constituted by Chandrachud J (who spoke on behalf of himself and three other judges) and Nariman J (speaking for himself).

Chandrachud J referred to various attempts in the academic literature to classify the right to privacy. For instance, he referred to the works of Westin, Clarke and Allen. However, he ultimately came down in favour of the view that '[p]rivacy has distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control'.¹¹⁹ Although Chandrachud J used the terminology of 'spatial control' he expressly clarified that, by this, he was referring to 'the creation of private spaces'.¹²⁰ In other words, his conception of 'spatial privacy' is identical to the concept of 'physical privacy' that is referred to in this thesis. Similarly, Nariman J expressly stated that privacy in India consisted of at least three aspects:¹²¹

¹¹⁶ *ibid* [227].

¹¹⁷ *ibid* [479].

¹¹⁸ *ibid* [141].

¹¹⁹ *ibid* [141].

¹²⁰ *ibid*.

¹²¹ *ibid* [364].

Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;

Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

If there was any doubt that there is majority support in *Puttaswamy I* for the three-fold classification of privacy into its physical, informational and decisional variants, such doubt is removed by the subsequent caselaw. Two such decisions merit consideration.

The first among them is the decision of five judges of the Supreme Court in *Puttaswamy II*.¹²² In his dissenting judgment in that case, Chandrachud J interpreted *Puttaswamy I* as affirming the three-fold categorisation. At [27] of his judgment, he said (referring to *Puttaswamy I*) that '[p]rivacy has been held to have distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control'. The second relevant decision is *Central Public Information Officer v Subhash Chandra Agarwal*.¹²³ In that case, Sanjiv Khanna J affirmed the three-fold classification. In doing so, he said the following:¹²⁴

It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy over personal choices.

Thus, the modern caselaw in India has adopted the threefold classification of privacy that was proposed in the MPhil thesis. As a result, the current law in India is that the constitutional

¹²² *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

¹²³ *Central Public Information Officer v Subhash Chandra Agarwal* (2020) 5 SCC 481.

¹²⁴ *ibid* [41].

right to privacy consists of three sub-categories: physical privacy, informational privacy and decisional privacy.

To conclude, this chapter has demonstrated that useful insights may be derived by categorising the Indian privacy jurisprudence into three distinct streams. The scope of the right to privacy is distinct within each of these spheres. Moreover, different questions need to be asked depending on the specific variant of privacy that is under consideration. For instance, physical privacy raises the question of whether the complainant had a reasonable expectation of privacy. Information privacy requires the Court to consider whether the complainant had consented to the disclosure/use of private information. In contrast, the critical question in most decisional privacy cases is whether the relevant decision is sufficiently fundamental or private so as to merit constitutional protection. Most privacy cases in India may be categorised into one or more of the three variants of privacy that were discussed in this chapter. Table 1 (immediately below) classifies the key Indian cases into one of these three categories, or as cases where the categories overlap.

TABLE 1: CLASSIFICATION OF PRIVACY CASES IN INDIA

PHYSICAL	INFORMATIONAL	DECISIONAL	OVERLAPS
1. <i>Kharak Singh v State of UP</i> AIR 1963 SC 1295 (surveillance)	1. <i>RM Malkani v State of Maharashtra</i> AIR 1973 SC 157 (telephone tapping)	1. <i>T Sareetha v Venkata Subbaiah</i> AIR 1983 AP 356 (HC) (restitution of conjugal rights)	1. <i>PR Metrani v Commissioner of Income Tax, Bangalore</i> AIR 2007 SC 386 (search and seizure and collection of information) (physical and informational)
2. <i>Govind v State of Madhya Pradesh</i> AIR 1975 SC 1378 (surveillance)	2. <i>People's Union of Civil Liberties (PUCL) v Union of India</i> AIR 1997 SC 568 (telephone tapping)	2. <i>Saroj Rani v Sudarshan Kumar Chadha</i> AIR 1984 SC 1562 (restitution of conjugal rights)	2. <i>Selvi v State of Karnataka</i> AIR 2010 SC 1974 (constitutional validity of involuntary narcoanalysis) (physical and decisional)
3. <i>Malak Singh v State of Punjab and Haryana</i> AIR 1982 SC 760 (surveillance)	3. <i>State of Maharashtra v Bharat Shanti Lal Shah</i> (2008) 13 SCC 5 (telephone tapping)	3. <i>Anuj Garg v Hotel Association of India</i> AIR 2008 SC 663 (prohibition on employment of women or young adults in certain premises)	3. <i>Sharda v Dharampal</i> AIR 2003 SC 3450 (compulsory psychiatric examination) (physical and decisional)
4. <i>Directorate of Revenue v Mohammed Nisar Holia</i> (2008) 2 SCC 370 (search and seizure)	4. <i>District Registrar & Collector, Hyderabad v Canara Bank</i> AIR 2005 SC 186 (inspection of documents held by private entities such as banks)	4. <i>Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat</i> AIR 2008 SC 1892 (ban on slaughter houses on certain days)	4. <i>National Legal Services Authority (NALSA) v Union of India</i> AIR 2014 SC 1863 (rights of transgenders) (physical and decisional)
5. <i>PR Metrani v Commissioner of Income Tax, Bangalore</i> AIR 2007 SC 386 (search and seizure)	5. <i>Ram Jethmalani v Union of India</i> (2011) 8 SCC 1 (disclosure of information relating to	5. <i>Suchita Srivastava v Chandigarh Administration</i> AIR 2010 SC 235 (abortion by a mentally challenged woman)	5. <i>Navtej Singh Johar v Union of India</i> AIR 2018 SC 4321 (criminalisation of homosexuality) (physical and decisional)
6. <i>Indian Young Lawyers Association v State of Kerala</i> (2019) 11 SCC			

1 (women's right to enter the Sabarimala temple) 7. <i>Indian Hotel and Restaurant Association v State of Maharashtra</i> AIR 2019 SC 589 (surveillance in certain bars and other places of public entertainment)	foreign bank accounts held by Indian citizens) 6. <i>Puttaswamy v Union of India</i> (2019) 1 SCC 1 (constitutional validity of the Aadhar Card Scheme) 7. <i>Gopalkrishnan v State of Kerala</i> AIR 2020 SC 1 (accused persons' right to access victim's private information)	6. <i>Joseph Shine v Union of India</i> AIR 2018 SC 4898 (criminalisation of adultery)	
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CHAPTER 4

HORIZONTAL APPLICATION OF PRIVACY

Chapter 2 of the thesis examined the conception of privacy in India. In particular, it considered the Supreme Court's reasoning in reading privacy into the Indian Constitution. It also considered the values underlying the right to privacy in India. Chapter 3 argued that the right to privacy in India consists of three variants: physical, informational and decisional privacy. This chapter examines another fundamental question that concerns the right: whom is privacy guaranteed against? It is solely against the State? Or does it also bind private actors? If so, to what extent and in what circumstances does it bind private actors?

In India, this issue has garnered much judicial attention over the last decade. In August 2017, in *Puttaswamy I*,¹ a bench consisting of nine judges of the Supreme Court re-adjudicated the contours of the constitutional right to privacy in India. Although this is being hailed as one of the most significant judgments in the country's history, the Supreme Court's view on horizontality is, unfortunately, divided. As a result, there is considerable ambiguity as to whether, and to what extent, privacy operates horizontally in India. It appears that, as a general rule, Indian Courts have refrained from applying fundamental rights horizontally.² However, on many occasions, the

¹ *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1.

² *PD Shamdasani v Central Bank of India* AIR 1952 SC 59; *Vidya Verma v Shiv Narain Verma* AIR 1956 SC 108.

Supreme Court has blurred the conceptual distinction between the private law infringement of privacy and the constitutional law infraction.³

This chapter will suggest that the horizontal application of the constitutional right to privacy in India is at a crossroads. When the Supreme Court of India is called on to consider this issue, in my view, there are two principal options that are open to the Court. The first among them is the wholesale adoption of direct horizontal application of privacy. The second, and more nuanced option is, what I will call ‘the public-ness thesis’.

The chapter proceeds as follows. **Section A** will consider what it means for a constitutional right to apply horizontally. This section will also consider the various modes of horizontality. **Section B** will consider the Indian cases on horizontal application, specifically, in the context of Article 21 of the Constitution. **Section C** will examine the caselaw of the Supreme Court of India on the horizontal application of the right to privacy. **Section D** will outline the two options open to the Supreme Court. Finally, **section E** will offer some concluding observations.

A. HORIZONTALITY: MEANING AND TAXONOMY

The purpose of this section is to set the scene. What does horizontality mean? Are there different degrees of horizontality? Can the horizontal application of constitutional rights be considered under meaningful sub-categories? Those are the prefatory questions that will be examined here. In this section, and in the chapter generally, I will use the terms ‘duty-bearer’ and ‘right-holder’ to refer to the participants in a constitutional claim. It will become evident from what follows that it

³ See *R Rajagopal v State of Tamil Nadu* AIR 1995 SC 254, *Mr X v Hospital Z* AIR 1999 SC 495, and *Rayala Bhuvaneswari v Nagaphanender Rayala* AIR 2008 AP 98 (HC). These cases are considered in more detail at section C(1) below.

is the nature of the ‘duty bearer’ that determines whether the application of a constitutional right is horizontal or vertical. Importantly, it will also become evident from what is said below that it is only in this limited sense that the horizontal application of a constitutional norm is linked to its ‘scope’. Otherwise, the horizontal or vertical application of a constitutional right is an issue that is distinct from the content of the relevant right.

On the basis of the ‘nature of the duty-bearer’, there are two fundamental ways of developing a taxonomy of horizontal application: (a) duty bearers are state actors only and (b) both state actors and private entities/individuals may be duty bearers.⁴

In the literature, the first possibility is commonly referred to as ‘vertical application’. A purely vertical approach to the application of a constitutional norm would suggest that ‘individual rights bind - impose constitutional duties on - only the government and not private actors’.⁵ The commonly offered justification for the vertical approach lies in the well-known, albeit contested, idea of the public-private divide.⁶ Thus, the liberal values of liberty, autonomy, and privacy of individuals are sometimes offered in defence of the purely vertical approach. Limiting the scope of operation of a constitutional norm to the public sphere would enhance the autonomy of persons to operate in their free private spaces; or so it is argued.⁷

⁴ See generally, Stephen Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 Michigan Law Review 387.

⁵ *ibid* 394.

⁶ This point and what it means for horizontality is pursued in more detail at section D below.

⁷ Gardbaum (n 4) 394.

Now consider the opposite position: direct horizontality. On this approach, constitutional norms ‘impose constitutional duties on private actors as well as on government [i.e. State]’.⁸ Direct horizontality is often justified by a critique of the conventional liberal idea that the duty-bearers of constitutional rights ought to be the State alone.⁹ In the context of some rights, or indeed in certain circumstances, proponents of direct horizontality argue, constitutional norms ought to operate so as to hold non-state private parties accountable. This possibility was mooted by Rai in the early 1990s in the Indian context. He said,¹⁰

one thing is definite that the rapidly growing might of the private industrial sector needs to be subjected to the responsibility of observing constitutional norms contained in the chapter of fundamental rights... the only solution lies in this that India must take note of the reality that the might of the private corporate sector is comparable to that of public authorities and it must be put under the constitutional discipline of fundamental rights.

In my view, whether Rai’s proposal is achieved by espousing a broad definition of ‘State’ or by adopting direct application of fundamental rights against certain non-state entities is a matter of form rather than substance. Either possibility admits that, in certain circumstances, certain non-state actors ought to be bound by the same constitutional constraints that States operate under. This is the crux of the argument in favour of direct horizontal application.

Between the two opposite ends of the spectrum that were examined above — the vertical approach and direct horizontality — there are a number of other possibilities.¹¹ Two among these,

⁸ *ibid* 395.

⁹ *ibid*.

¹⁰ Uday Raj Rai, ‘Reach of Fundamental Rights’ (1994) 36 *Journal of the Indian Law Institute* 291, 301

¹¹ See Alison L Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (CUP 2011) ch 2, p 18ff; Ian Leigh, ‘Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?’ (1999) 48 *International and Comparative Law Quarterly* 57.

in particular, are relevant for the present purposes: (a) indirect horizontality and (b) positive obligations of the State. They will now be considered.

In broad terms, indirect horizontality refers to a judicial methodology by which constitutional rights may, without creating enforceable rights and obligations on their own, influence the development of other laws whether statutory or otherwise.¹² A common example of this may be found in the UK Human Rights Act 1998. Section 6(1) of the Act provides that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right’. Section 6(3) confirms that courts and tribunals fall within the purview of ‘public authorities’. It follows that Courts are bound to apply Convention standards even in their adjudication of purely private disputes. Phillipson and Williams capture this notion succinctly in the following passage:¹³

The courts themselves *are* public authorities however, and therefore are bound to comply with the Convention – even, seemingly, when developing the common law in disputes between private parties. Thus the HRA appears to envisage some, albeit indirect, role for Convention rights in common law litigation between private parties.

To be clear, the nomination of courts or tribunals as the duty-bearers of a constitutional norm is only one of the many techniques for achieving indirect horizontal effect. It is, by no means, the only one.

Interestingly, within the rubric of indirect horizontality, the literature offers the possibility of ‘weak’ and ‘strong’ variants.¹⁴ The strong version imposes an obligation on courts to ensure

¹² Young (n 11) 20.

¹³ Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 *Modern Law Review* 878, 880 (emphasis in original).

¹⁴ Gavin Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: a Bang or a Whimper?’ (1999) 62 *Modern Law Review* 824, 830.

that all law is interpreted consistently with Constitutional/Convention rights.¹⁵ The weak variant, in contrast, only demands that courts pay due regard to the values underlying the Constitutional/Convention norms in their adjudication, both of public or private disputes. As Young puts it,¹⁶

Strong indirect horizontal effect refers to a model of indirect horizontal effect that places an *obligation* upon the court to interpret the common law so as to ensure its compatibility with Convention rights. Weak indirect horizontal effect refers to the duty of the court to ensure that the common law develops in line with the *values incorporated by Convention rights*.

Finally, consider the interface between the horizontal application of constitutional rights and positive obligations of the State. It is not rare to come across obligations that require the State to protect private entities or individuals against infractions of their constitutional rights. The duty bearers in the context of these positive obligations are the States themselves. However, crucially, the State's positive obligations may manifest in something akin to the horizontal application of constitutional norms. For instance, as is typically the case in relation to positive State obligations, assume that a constitutional claim is brought against the State on account of its failure to protect a petitioner from the breach of the petitioner's rights by a private entity. In this context, the bearer of the relevant duty is the State itself, not the non-state entity. However, the enforcement of the

¹⁵ Murray Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] Public Law 423, 435.

¹⁶ Young (n 11) 39 (emphasis in original). The literature also considers the idea of remedial or procedural horizontal application. Consider the following passage from Young (n 11) 19 for example:

Remedial or procedural horizontality focuses on the discretionary powers of the court to issue court orders or to grant remedies in private law actions. Ensuring that court orders and remedies are not contrary to Convention rights could indirectly impose an obligation to respect Convention rights on private parties: for example, if the court were to grant an injunction preventing an individual from acting in a manner that would breach the Convention rights of others.

positive obligation against the State has an indirect impact on the private entity. It is for this reason that Young argues that¹⁷

an action brought against the state for failure to uphold its positive obligations under the Convention results in the indirect imposition of an obligation upon a private individual to respect the Convention rights of others.

It is also for this reason that the method of imposing positive obligations on the State has sometimes been called ‘intermediate horizontality’.¹⁸ Thus, positive obligations are, strictly speaking, conceptually distinguishable from the horizontal application of constitutional rights. However, positive obligations of the state are capable of producing consequences that are akin to horizontality.

B. HORIZONTALITY OF CONSTITUTIONAL RIGHTS IN INDIA

The previous section highlighted some issues relating to terminology. In this section, I will consider the Indian Courts’ general approach to the types of horizontality outlined above.

It was explained in chapter 2 that Article 21 is the primary source of the constitutional right to privacy in India. The words of Article 21¹⁹ do not express a position on its vertical or horizontal application. However, as a general rule, Indian courts appear to have adopted the view that Article 21 rights are only enforceable against the State. Consider for example, the 1952 decision of the Supreme Court in *PD Shamdasani v Central Bank of India*.²⁰ The dispute in that case arose in the

¹⁷ *ibid* 27.

¹⁸ *ibid*. See also, Phillipson and Williams (n 13) 884.

¹⁹ Constitution of India 1950, art 21 ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’.

²⁰ *Shamdasani* (n 2).

context of the Respondent bank's sale of the Petitioner's shares in exercise of the bank's *lein*. In that context, and although this is strictly obiter, Sastri CJ said,²¹

There is no express reference to the State in article 21. But could it be suggested on that account that that article was intended to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion.

This view was reiterated by the Supreme Court in *Vidya Verma v Shiv Narain Verma*.²² That case arose, more squarely, in the context of Article 21. It concerned a habeas corpus petition by a husband to release his wife from the custody of her father. In that context, Vivian Bose J affirmed the reasoning of Sastri CJ in *Shamdasani*. The reasoning of the Courts in *Shamdasani* and *Vidya Verma* have been subject to academic criticism.²³ However, neither case has been expressly overruled. Therefore, it appears that, as a general rule, the Indian Supreme Court's position is that Article 21 is principally vertical in its operation.

Despite this general rule, on a few occasions the Supreme Court has alluded to the direct horizontal application of the rights guaranteed by Article 21. Consider, for instance, *Consumer Education and Research Centre v Union of India & Others*.²⁴ In that case, the Supreme Court was called upon to consider occupational health hazards faced by workmen in the asbestos industry in India. The Petitioner organisation wished to fill up a lacuna in subordinate legislation within the asbestos industry by seeking remedial measures which directed the asbestos industry to maintain

²¹ *ibid* [5].

²² *Vidya Verma* (n 2).

²³ Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C Raj Kumar and K Chockalingam (eds), *Human Rights, Justice, and Constitutional Empowerment* (2nd edn, OUP 2007) 55–57.

²⁴ *Consumer Education and Research Centre v Union of India & Others* (1995) 3 SCC 42.

certain safeguards. The Court granted the petition. In doing so, it appeared to be willing to invoke Article 21 to protect the health of workmen, regardless of whether their employer was a private entity. Ramaswamy J said,²⁵

The State, be Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right, to life. Denial thereof denudes the workman the finer facets of life violating Article 21.

The Supreme Court's celebrated decision in *Vishaka v State of Rajasthan*²⁶ is another notable example. That case arose in the context of an incident of the gang rape of a social worker in a village in Rajasthan. However, the Court considered the wider issue of sexual harassment at the workplace. In that context, Verma CJ said,²⁷

Each such incident results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of the rights under Articles 14 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) "to practice any profession or to carry out any occupation, trade or business". Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women.

In addition to the cases concerning the purely vertical approach and direct horizontal application, the Supreme Court has also considered the possibility of indirect horizontal application. Consider, for example, *Zoroastrian Cooperative Housing Society v District Registrar*.²⁸ The central contention in that case was that the meaning of the phrase 'public policy'

²⁵ *ibid* [26].

²⁶ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

²⁷ *ibid* [3].

²⁸ *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632.

in section 4 of the Cooperative Societies Act must be construed in light of the constitutional right to equality.²⁹ That argument was rejected. The Court concluded that,³⁰

The concept of public policy in the context of the Cooperative Societies Act has to be looked for under the four corners of that Act... .

There is, however, an important clarification to be made about this case. This was not a case that considered the horizontal application of Article 21. The argument there was that the right to equality guaranteed by Article 14 of the Indian Constitution ought to be given indirect horizontal application. As explained below, the Court appears to have adopted a different approach in relation to the indirect horizontal application of the right to privacy under Article 21 of the Constitution.

The final category, positive obligations of the State, has also found representation in the Indian caselaw. Although there are numerous instances of this, a recent example is the nine-judge bench privacy decision of the Supreme Court in *Puttaswamy I*.³¹ It will be recalled that, in this case, the Court was called upon to re-adjudicate the very existence of the right to privacy in India. In that context, Chandrachud J provided a useful and succinct restatement of the law on positive obligations:³²

Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. The Constitutional right is placed at a pedestal which embodies both a negative and a positive freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy.

²⁹ Constitution of India 1950, art 14 ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India’.

³⁰ *Zoroastrian Cooperative Housing Society* (n 28) [13].

³¹ *Puttaswamy I* (n 1).

³² *ibid* [158].

In summary, the caselaw in India supports four main propositions. First, as a general rule, Article 21 rights apply vertically. Second, in certain limited circumstances, Article 21 has also been applied in a directly horizontal fashion. Third, the Indian Supreme Court has also considered the possibility of indirect horizontal application (although it was rejected in the context of Article 14). Finally, there is ample support for positive obligations of the State to protect individuals' rights under Article 21.

C. HORIZONTAL APPLICATION OF THE RIGHT TO PRIVACY IN INDIA

Where do Indian cases stand on horizontal application of the constitutional right to privacy? That is the question that this section considers. Unfortunately, the Supreme Court's jurisprudence on the horizontal application of the right to privacy in India has been, with respect, chaotic. A temporal overview of Indian privacy caselaw reveals four interesting conclusions for horizontality.

First, vertical application remains the more dominant category. As demonstrated by chapter 1, an overwhelming majority of the Indian privacy jurisprudence consists of cases where the duty-bearer is the State.

Second, there are at least two Indian privacy cases that discuss a positive obligation on the State to protect the right. The first, a 2011 decision of the Supreme Court (*Ram Jethmalani*),³³ was considered in detail in chapter 1.³⁴ There, the dispute concerned unaccounted personal funds held in foreign banks. The Government of India had secured a list of Indians who held accounts in Liechtenstein banks. The petitioners were social activists who sought this information under the

³³ *Ram Jethmalani v Union of India* (2011) 8 SCC 1.

³⁴ Text to n 123 in section D of ch 1 of this thesis.

Indian Right to Information Act 2005. However, the Government argued that such disclosure would violate the account-holders' privacy. Upholding the right to privacy of these individuals, the Court said,³⁵

The notion of fundamental rights, such as a right to privacy... is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

The second is the 2017 nine-judge bench decision in *Puttaswamy I*. This case was also examined in some detail above.³⁶

The third and fourth conclusions concern direct horizontal application and indirect horizontal application respectively. They are considered in turn below.

1. Direct Horizontal Application

Direct horizontal application concerns cases where the constitutional right to privacy has been held to be enforceable against private individuals. There are at least three examples of this in the Indian case law. The 1995 decision of the Indian Supreme Court in *Rajagopal*,³⁷ the 1999 decision in *Mr X v Hospital Z*³⁸ and the 2008 decision of the Andhra Pradesh High Court in *Rayala*.³⁹ These decisions are problematic because from the reasoning of the respective Courts, it is unclear how the first dominant category and the second exception category can be reconciled with each other

³⁵ *Ram Jethmalani* (n 33) [73].

³⁶ See text to n 31 above.

³⁷ *Rajagopal* (n 3).

³⁸ *Mr X* (n 3).

³⁹ *Rayala* (n 3).

on any conceptual basis. The background facts and reasoning of the Courts in each of these decisions were considered in previous chapters.⁴⁰ As explained in chapter 1, *Rajagopal*, *Mr X* and *Rayala* were all cases in which the respondent was a private entity, and not the State. Despite this, the respective Courts analysed the claim by reference to Article 21 of the Indian Constitution.

Accordingly, the question of horizontality in Indian privacy jurisprudence remains challenging. There is support in the case law in India for both vertical and horizontal application of the right to privacy. However, it remains unclear in what circumstances and upon what criteria the right will apply horizontally.

This confusion is further evident from the recent decision of nine-judges in *Puttaswamy I*. In that case, the judges did not speak with one voice on the extent of horizontal application of the right to privacy in India. There were six separate opinions handed down. Chandrachud J, speaking on behalf of himself and three other judges, referred to privacy against ‘non-state actors’. However, he did so narrowly, and in the context of a discussion about data protection. Even there, he ultimately chose to leave this difficult question to the legislature. He said,⁴¹

The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection.

Chelameswar J, in comparison, adopted a more measured approach. He noted that although claims for protecting privacy interests can arise against State as well as non-State entities, it is

⁴⁰ See text to n 64 (*Rajagopal*), n 79 (*Mr X*) and n 96 (*Rayala*) in ch 1 of this thesis.

⁴¹ *Puttaswamy I* (n 1) [190].

plausible that these claims arise from different interests and consequently, demand different methods of protection.⁴² Further, he said,⁴³

Cases arose in various jurisdictions in the context of privacy interests based on (i) Common Law; (ii) statutory recognition; and (iii) constitutionally protected claims of the right of privacy.

However, on balance, he took the view that whether and the extent to which privacy protection avails against non-State entities must remain beyond the scope of the reference to the Supreme Court.

Then, there are two judgments that adopt radically opposing positions on this issue. First, Bobde J's judgment. He offers a clear analysis on horizontality. Firmly rejecting horizontal application of the fundamental right to privacy, he highlighted the distinction between the common law right to privacy and the fundamental right. But he also indicated that the 'nature and content' of the right remained the same in both forms.⁴⁴ It is only 'the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed' that are distinct.⁴⁵ This claim is interesting, but untested. This is especially so since there is limited guidance to be had from the precedents as to what the content of the 'common law right' is. In any case, Bobde J's position on this issue appears to be tolerably clear. In his words,⁴⁶

Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie.

⁴² *ibid* [223].

⁴³ *ibid*.

⁴⁴ *ibid* [253].

⁴⁵ *ibid*.

⁴⁶ *ibid*.

Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

At the other end of the spectrum is Kaul J's concurring opinion. In a discussion on privacy and technology, he began in much the same way as Chandrachud J. He stated that recognising and enforcing privacy against non-State actors requires intervention by the legislature.⁴⁷ He then went on to explain the importance of having regulations over data collection including against the State and non-State actors.

His final analysis, however, seems to come down in favour of direct horizontal application of privacy. He said,⁴⁸

The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

This paragraph is interesting for two reasons. First, it affirms the direct horizontal application of privacy. Second, and more remarkably, in this passage, Kaul J appears to expand the role of non-State infringement of privacy not just to the 'inner sphere' of a person, but also to his 'autonomous life choices'. Clearly therefore, Kaul J's conception of horizontal application of the fundamental right to privacy extends beyond the realm of technology and data protection. Importantly, Kaul J also categorically noted that it is the fundamental right (i.e. the Constitutional guarantee of privacy) which offers protection against interference by State and non-State actors. This makes it difficult to explain away this passage as relating to the common law right of privacy. In sum, Kaul J clearly affirmed horizontal application of the constitutional right to privacy.

⁴⁷ *ibid* [431].

⁴⁸ *ibid* [496].

To conclude on this point, among the judgments in *Puttaswamy I*, Kaul J and Bobde J appear to occupy two ends of the spectrum. Chandrachud J and Chelameswar J in contrast offered limited observations on this point. Unfortunately, as a consequence, the implications of the Supreme Court's decision on the horizontal application of the constitutional right to privacy remain unclear.

Regrettably, the caselaw following *Puttaswamy I* has not added any clarity to the position of law. For instance, none of the judges in *Puttaswamy II* discussed the horizontal application of privacy. The only insight one gains from the judgments in *Puttaswamy II* on this point is Chandrachud J's stray observation that '[t]he right to informational privacy is not only vertical (asserted and protected against state actors) but horizontal as well'.⁴⁹ It is difficult to read much into this comment, save to observe that it only serves to compound the confusion as to this aspect of the right to privacy. The horizontal application of privacy does not appear to have been discussed in any of the subsequent cases decided after *Puttaswamy II* either.

2. Indirect Horizontal Application

It was explained above that, in *Zoroastrian Cooperative Housing Society*, the Supreme Court rejected the submission that the phrase 'public policy' in section 4 of the Cooperative Societies Act must be construed in the light of the constitutional right to equality. By doing do, the Court adopted an approach that seems contrary to the notion of indirect horizontal application. However, the Court appears to have rowed back from this attitude in its later decisions, in particular, in the context of its modern privacy jurisprudence.

⁴⁹ *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1 [32].

For example, the issue of indirect horizontal application came up before the Supreme Court in *Subhash Chandra Agarwal*.⁵⁰ The relevant background was set out in chapter 1. In very brief summary, the dispute arose from a petition under the Right to Information Act 2005 (the ‘RTI Act’) regarding certain correspondence with, and the declaration of assets by, judges of the Supreme Court. As explained in chapter 1, this was ultimately a question of construction of the RTI Act. However, the Supreme Court recognised that, as part of that exercise, the Court had to take into account the constitutional rights underlying the statutory scheme of the RTI Act. Thus, Khanna J said that the ‘RTI Act captures this interplay of the competing rights’.⁵¹ Similarly, Ramana J and Chandrachud J also recognised that the issue before the Court ultimately involved the interplay between the petitioner’s right to information and the judges’ right to privacy.⁵²

All three judges recognised that the scheme of the RTI Act required the Court to balance these competing rights against each other.⁵³ As to how that balancing exercise was to be carried out, the Court substantially adopted the approach that English Courts undertake to the balancing of rights under Articles 8 and 10 of the ECHR. Thus, Ramana J said, ‘the right to information and right to privacy are at an equal footing. There is no requirement to take an a priori view that one right trumps other’.⁵⁴ He also held that the balancing of competing fundamental rights was to be carried out in accordance with the ‘proportionality test’.⁵⁵

⁵⁰ *Central Public Information Officer v Subhash Chandra Agarwal* (2020) 5 SCC 481.

⁵¹ *ibid* [36].

⁵² *ibid* [92] (Ramana J), [206], [216] (Chandrachud J).

⁵³ *ibid* [223] (Chandrachud J).

⁵⁴ *ibid* [130].

⁵⁵ *ibid* [131].

Similarly, in *Gopalkrishnan v State of Kerala*,⁵⁶ the question for the Court was whether a person accused in a criminal trial had the right to access a memory card/pen-drive that was appended to the police report and which the prosecution proposed to rely on as evidence against the accused. That depended, in turn, on whether the memory card/pen-drive was a ‘document’ within the meaning of section 3 of the Indian Evidence Act 1872 and section 29 of the Indian Penal Code 1860.⁵⁷ Although, strictly, this was a question of statutory construction, the Court recognised that there were conflicting constitutional rights at play.

On the one hand, the accused had a right to fair trial under Article 21 of the Constitution. On the other, the victim — whose information was contained in the memory card/pen-drive — had a right to privacy in respect of such information under Article 21. The Court held that it was ‘imperative to adopt an approach which would balance both the rights’.⁵⁸ Accordingly, it was held that the accused was entitled to reassure himself of the credibility and genuineness of the evidence that the prosecution relied on against him while affording the maximum protection possible to the right to privacy of the victim.

Ultimately, the question of how such balance is to be struck was left to trial courts. The Court held that the trial court may issue ‘suitable directions to balance the interests of both sides’.⁵⁹

⁵⁶ *Gopalkrishnan v State of Kerala* AIR 2020 SC 1.

⁵⁷ *ibid* [2].

⁵⁸ *ibid* [39], [42].

⁵⁹ *ibid* [44].

However, the Court suggested that, for example, the accused (or his lawyer) may be permitted to inspect the contents of the memory card/pen-drive, if necessary, along his lawyer and IT expert.⁶⁰

Similarly, the issue of indirect horizontal application came up squarely in *X v NCT of Delhi*.⁶¹ That case arose out of a petition by X who was 22 weeks pregnant. She sought the Court's permission to terminate her pregnancy lawfully. The basis upon which she sought such permission was that 'her partner had refused to marry her at the last stage' and that she was wary of the 'social stigma and harassment pertaining to unmarried single parents, especially women'.⁶²

The circumstances in which a pregnancy could be terminated lawfully after 20 weeks in India is governed by the Medical Termination of Pregnancy Act 1971 (the 'MTP Act') and the rules made thereunder. The relevant provision, section 3(2), only permitted termination of pregnancies where the continuance of the pregnancy involved a risk to the life of the mother or where there was a substantial risk that the child would suffer from serious physical or mental abnormality. Strictly, the petitioner did not fall under either of these categories. Nonetheless, the Court permitted her to carry out an abortion.⁶³ The Court did so on the basis that unmarried women ought to have the right to access safe and legal abortions between 20 and 24 weeks 'if they face a change in their material circumstances'.⁶⁴ The relevant change in this case was X's partner's refusal to marry her.

⁶⁰ *ibid* [43].

⁶¹ *X v Government of NCT of Delhi* AIR 2022 SC 4917.

⁶² *ibid* [3].

⁶³ See the terms of the Court's interim order: *ibid* [22].

⁶⁴ *ibid* [118], [121].

The Court justified that conclusion, inter alia, on the basis that the MTP Act and its rules must be construed in the light of the ‘constitutional values’.⁶⁵ Among other constitutional sources, the Court relied in particular on a women’s right to reproductive autonomy. This, it was held, was a part of the bodily autonomy and decisional autonomy of a pregnant woman,⁶⁶ both of which are integral aspects of her right to privacy.⁶⁷ The Court also explained that depriving a pregnant woman of the right to make intimate choices over her body would also be an affront to her dignity.⁶⁸ It was said that the ‘right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity’.⁶⁹

The cases examined above suggest a shift in the judicial trend in relation to indirect horizontal application. This approach stands in marked contrast to the approach that the Court adopted in *Zoroastrian Cooperative Housing Society*. In that case, the Supreme Court considered that the meaning of a statutory term was to be found ‘under the four corners of that Act’. By contrast, in its modern privacy jurisprudence, the Supreme Court has shown its willingness — where appropriate — to construe statutory enactments in the light of relevant constitutional values. Each of the three modern decisions examined above illustrate this trend. These cases also exemplify the Court’s approach to cases where fundamental rights come into conflict with each other. In such cases, the Court has been prepared to balance those rights against each other,

⁶⁵ *ibid* [95]–[134].

⁶⁶ *ibid* [98]–[99].

⁶⁷ *ibid* [105].

⁶⁸ *ibid* [109]–[110].

⁶⁹ *ibid* [116].

adopting an approach that seems to mirror the English Court's approach to the balancing of Articles 8 and 10 of the ECHR.

The Indian Supreme Court's approach to indirect horizontal application also appears to stand in contrast to the justification for that approach offered by the English Courts. As Hunt explains, the application of Convention rights to English legislation — even when the legislation applies between private parties — is predicted on the status of English Courts as 'public authorities' under the Human Rights Act 1998. Hunt also points out that, by contrast, clause 7 of the Interim South African Constitution refers to the legislative and executive organs of the State, but not the 'judiciary'. He argues that this has resulted in horizontal effect *not* being imported into South African constitutional law.⁷⁰

In this respect, the Indian Constitution is closer to the South African Constitution than the Human Rights Act. Article 12 of the Indian Constitution provides that 'the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India'. Notably, and much like the Interim South African Constitution that Hunt refers to, Article 12 does not expressly refer to the judiciary. Whether this means that Courts fall within the purview of the 'State' under Article 12 has generated a large body of caselaw in India.⁷¹ Nonetheless, this question ultimately remains unresolved in India.

⁷⁰ Hunt (n 15) 438 (emphasis added).

⁷¹ *Ujjam Bai v State of Uttar Pradesh* AIR 1962 SC 1621; *Mirajkar v State of Maharashtra* AIR 1967 SC 1; *Triveniben v State of Gujarat* AIR 1989 SC 1335; *AR Antulay v RS Nayak* (1992) 1 SCC 225; *Rupa Ashok Hurra v Ashok Hurra* [2002] 4 SCC 388.

For the present purposes, the key point is that — unlike the approach that Hunt adverts to — the indirect horizontal application of fundamental rights in India does not appear to be underpinned by the status of Indian Courts as ‘the State’ under the Indian Constitution. None of the cases that were examined above refer to this issue. Nor do they say that the application of constitutional values as part of statutory interpretation is conditional on the judiciary being considered as part of the ‘State’ under Article 12.

D. THE WAY FORWARD: HORIZONTALITY AT A CROSSROADS

The previous sections demonstrated three general trends in the caselaw of the Indian Supreme Court on horizontality. First, the modern cases on the constitutional right to privacy show the adoption of indirect horizontal application. Second, the decisions of the Supreme Court in the 1950s had, as a general rule, espoused a purely vertical approach to the operation of fundamental rights. This was especially so in the context of Article 21 of the Indian Constitution. Notably, Article 21 is the key constitutional provision into which the right to privacy has now been read in.⁷² Third, and subsequently, the Court has rowed back from the stringency of this general vertical approach. Thus, through a number of its more recent decisions, the Court has now affirmed the possibility of direct horizontal application of constitutional rights. As a result of this dichotomy, the caselaw on the horizontal application of the constitutional right to privacy in India is currently in a state of flux. Consequently, whether and to what extent the constitutional right to privacy applies horizontally in India remains unclear. This was examined in some detail in section C above.

⁷² See for instance, *Puttaswamy I* (n 1) [235] (Chelameswar J).

It is likely that the Indian Supreme Court will be called on to take a position on this issue in the near future. In the meantime, this section will suggest that the horizontal application of the right to privacy in India is at a crossroads. There are two possible approaches that are open to the Court. The first is what I will call the ‘publicness thesis’. The publicness thesis suggests that private actors may, based on their functions or status, demonstrate a level of public character. Their public character may justify bringing them within the bounds of the constitutional guarantee of rights. The second, alternative approach, is to adopt wholesale the direct horizontal application of the constitutional right to privacy in India. The second possibility i.e. direct horizontality is well-known. For that reason, the publicness thesis will now be considered in some detail.

1. The Publicness Thesis

In section A, it was suggested that the purely vertical approach is often justified by the need to preserve the negative freedoms of individuals. Imposing constitutional duties on individuals acting within their private spheres would, it is argued, negatively impact their freedom. However, this argument presumes a conceptually defensible bright-line divide between the public and private spheres. That dichotomy, however, has come under considerable scrutiny. It is not necessary to rehearse all of the criticisms in detail here. By way of example, the feminist critique was examined in some detail in chapter 2. In very brief summary, the feminist critique argues that privacy operates as a shield for discrimination against women. Thus, as MacKinnon argues, privacy law

assumes ‘that women are equal to men’ in the private sphere⁷³. By doing so, rather than protecting the autonomy of women, privacy perpetuates a breach of women’s right to choose.⁷⁴

The feminist account of the right to privacy has been convincingly criticised by other commentators, including Allen and Elshtain. This was considered in chapter 2. The feminist critique of privacy was also expressly considered and criticised by the Indian Supreme Court in *Puttaswamy I*. Chandrachud J explained that, instead of rejecting privacy altogether, the ‘challenge... is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women...’.⁷⁵ Accordingly, in my view, the feminist account does not provide a good reason why the right to privacy must not be recognised at all.

Nonetheless, the feminist critique suggests that there are good reasons why the public-private divide may not be best understood as a binary notion. Stated differently, the public (or indeed private) character of entities and individuals may be better understood as lying on a spectrum. To be clear, this analysis would not be a complete answer to the feminist critique. In particular, the contention that the private sphere operates as a shield for discrimination against women is not negated by recognising that ‘private-ness’ or ‘public-ness’ are notions that lie on a spectrum. However, recognising the absence of a bright line between the ‘private’ and the ‘public’ offers a more accurate, and nuanced, approach.

⁷³ Catharine A MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) 193. See also, Nadine Taub and Elizabeth M Schneider, ‘Women’s Subordination and the Role of Law’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (3rd edn, Basic Books 1998).

⁷⁴ Mackinnon (n 73).

⁷⁵ *Puttaswamy I* (n 1) [140] (Chandrachud J).

There is some support for this view in the judicial and academic literature. By way of example, consider the decision of the House of Lords in *Charter v Race Relations Board*.⁷⁶ That case concerned the interpretation of the phrase ‘provision to the public or a section of the public’ in the Race Relations Act 1978. In that context, Lord Simon said,⁷⁷

We all have, we hope, a spark of unique personality. But every one of us plays a number of roles in life. We are children, husbands or wives, mothers or fathers, members of some association, passengers in a bus, cinemagoers, workers with varying status in industry or commerce or profession, adherents of a religious denomination, parliamentary or local government electors, nationals of a state, together with countless other personae in the course of a lifetime - many in the course of a day - some, indeed. Simultaneously. Certain of these roles lie in the public domain; others in the private or domestic. When the draftsman used the words “provision to the public or a section of the public” he was contemplating, I think, provision to persons aggregated in one or other of their public roles.

The idea that the public nature of an entity is a matter of degree is also reflected in the literature on anti-discrimination law. Khaitan, for instance, has argued that,⁷⁸

Instead of a sharp line dividing public and private bodies, it is better to appreciate that most persons lie somewhere on a spectrum, depending on the specific function they are performing at the relevant time: the state, perhaps when acting as a legislator, sits at the extreme end of public-ness, while an adult all by herself lost in her thoughts lies at the extreme private end of this spectrum.

Thus, in the context of anti-discrimination law, the public character of an entity is considered as a factor that militates in favour of bringing an entity within the scope of anti-discrimination regulation. In that sense, Khaitan’s reasoning bears close analogous relevance for the horizontal

⁷⁶ *Charter v Race Relations Board* [1973] 1 All ER 512.

⁷⁷ *ibid* 527.

⁷⁸ Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 203.

operation of constitutional rights. In both cases, the crux of the issue concerns the circumstances in which a non-state entity must, legitimately, be brought within the scope of public regulation.

As shown in section A above, one of the main objections against direct horizontality is the concern that it would impermissibly restrict negative freedoms of private individuals and entities. In contexts where non-state actors demonstrate varying degrees of ‘publicness’, however, much of the force of this objection is lost. Indeed, the closer an entity lies to the ‘public’ end of the spectrum, the stronger the case is for insisting that it must act in compliance with constitutional standards.

The previous discussion raises a critical question: how must the publicness or otherwise of a non-state entity be judged? The Indian caselaw offers very little guidance on this issue. All that can be done on the current state of the Indian jurisprudence, therefore, is to offer some tentative criteria. Non-exhaustively, three indicia are proposed here (two of which are borrowed from the work on Khaitan, albeit in the different context of anti-discrimination law).

The first among them ought to be relatively straightforward; it is **functionality**. If it is accepted that non-state entities occupy various positions along a spectrum of publicness, then it must be relatively uncontroversial that the function they exercise is, at least, one among the features that determine whether and the extent to which they demonstrate public character.⁷⁹ Unsurprisingly, in the modern state, private actors perform functions that are as vital to human flourishing as the State does. To allow a private entity to escape constitutional regulation in the exercise of its public functions would, therefore, be to permit a triumph of form over substance. Thus, for example, the functionality criterion suggests that a private hospital in the performance

⁷⁹ *ibid.*

of life-saving emergency services demonstrates more public character than an individual acting in the context of their personal social relationships.

Although there is no direct support for this criterion in the Indian caselaw, it is indirectly supported by the Indian cases on the meaning of ‘State’ under Article 12 of the Indian Constitution. Indian Courts have held that the ‘function’ exercised by a body is a highly relevant factor in deciding whether it must be subject to Part III of the Constitution. In that context, the Supreme Court has held that ‘[i]f a given function is of such public importance and so closely related to governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action’.⁸⁰

The second criterion concerns **status**. This criterion caters for the power differentials that may exist between entities or individuals that interact with each other in the private sphere. When there are considerable power differentials in private relations, there is a good reason to bring in public regulation. As Khaitan argues, ‘relationships that are characterized by a significant power dynamic are a matter of public concern’.⁸¹ He offers the example of employers. The unequal power relationship between an employer and employee suggests that, at least in some circumstances, there is good reason for public regulation to step in. This criterion has not been expressly recognised in Indian case law. Nevertheless, in my view, it is at least a useful indicative marker of circumstances in which a private entity ought to be subject to public regulation.

⁸⁰ *Sukhdev Singh v Bhagat Ram* AIR 1975 SC 1331 [98].

⁸¹ *ibid* 205.

A third and final marker is **pervasiveness**. The question here is how pervasive the impugned conduct is. If, for example, a particular form of social prejudice is pervasive, and therefore results in the denial of opportunities to particular social groups, there is a stronger case for regulation through public law norms.

The markers suggested above are also capable of explaining the few instances in which the Indian Supreme Court has found in favour of direct horizontal application. Consider, for instance, *Vishaka* again. As explained above, in that case, the Supreme Court was considering the issue of sexual harassment of women at the workplace. In that context, Verma CJ said,⁸²

Each such incident results in violation of the fundamental rights of Gender Equality and the Right to Life and Liberty. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) to practice any profession or to carry out any occupation, trade or business. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women.

Notably, the Court's directions in *Vishaka* were not confined to State as the employer. However, in *Vishaka*, both the criteria of pervasiveness and status were established. In particular, the Court specifically observed the pervasive nature of sexual harassment at workplace as a social issue.⁸³ The issue also arose in the context of sexual harassment in the context of an employer-employee relationship.

The decision in *Consumer Education and Research Centre v Union of India*⁸⁴ is also susceptible to a similar explanation. In that case, the issue before the Court was the safety of

⁸² *Vishaka* (n 26) [3].

⁸³ *ibid* [2].

⁸⁴ *Consumer Education and Research Centre* (n 24).

employees in asbestos industries at their workplace, particularly, from pollution. In that context, Ramaswamy J said,⁸⁵

in an appropriate case, the court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful; to prevent pollution of workplace; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by the Court under Article 32 and Article 142 of the Constitution.

The indicative criteria proposed here also suggest that at least some of the cases that apply the right to privacy horizontally may require reconsideration. *Rayala*, for instance, was a purely private dispute between a husband and wife. It is difficult to see why the constitutional right to privacy is engaged in that context. Similarly, the crux of the dispute in *Rajagopal* concerned the publication of an unauthorised autobiography. Here, again, there was no indication that the Respondent had a public status.

As suggested earlier, when the issue of horizontal application of the right to privacy comes up before the Supreme Court, the Court will have three principal options before it. One is to hold that the right to privacy applies purely vertically. The second is to adopt, wholesale, direct horizontality. The third option is to adopt the publicness thesis outlined above. The first option seems unlikely, in my view. This is especially so since it would require the Supreme Court to overrule the cases in which the right to privacy has been applied in a horizontal manner thus far. It would also sit uneasily with the Court's approach to indirect horizontal application, as explained above.

⁸⁵ *ibid* [30].

As for the choice between direct horizontality and the publicness thesis, in my view, the publicness thesis offers a flexible and principled approach to holding private entities accountable by reference to constitutional norms. When compared to direct horizontality, it has the advantage that it is less of a blunt instrument. As explained above, the publicness thesis is also a good description of the previous cases that have inclined towards offering some recognition to horizontal application. This, of course, does not preclude the Supreme Court from now adopting the view that the right to privacy will, henceforth be horizontally applicable. As mentioned above, there is a hint of this trend in Chandrachud J's reasoning in *Puttaswamy II*. Whether the Court will be tempted to take that course remains to be seen.

E. CONCLUSION

This chapter considered the horizontal application of the constitutional right to privacy in India. It was shown that the modern privacy cases in India provide clear support for indirect horizontal application of the constitutional right to privacy. By contrast, there remains significant ambiguity as to whether, and the extent to which, the right to privacy operates in a directly horizontal fashion. The fact that the nine judges in *Puttaswamy I* expressed three diametrically opposite views on this issue is unfortunate but revealing.

It was suggested that the direct horizontal application of privacy in India is at a crossroads. The Supreme Court will inevitably be called on to make a choice. Three among the options open to the Court were highlighted above: maintaining a purely vertical approach, a wholesale adoption of direct horizontality and the more restrained, albeit more flexible, 'public-ness thesis'. Which among these will commend itself to the Supreme Court remains to be seen. However, for the reasons provided above, in my view, there are good reasons in favour of adopting the publicness

thesis. If and when adopted, the criteria for judging ‘publicness’ will need to evolve on a case-by-case basis.

CHAPTER 5

STANDARDS OF REVIEW

What is the standard of judicial review that applies to privacy cases in India? This question does not permit an easy answer. This is especially so since the caselaw of the Supreme Court is ambiguous and seemingly inconsistent on a number of critical issues. The attempt in **chapters 5** and **6** of the thesis is to resolve some of these ambiguities and lay out a clear roadmap.

Chapter 5 attempts to state the positive law with some clarity. It will examine the Indian Supreme Court's jurisprudence to understand the different standards of judicial review that have been applied by the Court in its fundamental rights adjudication. It will be seen that the Supreme Court has grappled with four different standards. They are: (a) rationality (**section A**); (b) reasonableness (**section B**); (c) strict scrutiny (**section C**) and (d) proportionality (**section D**). Each of them will be considered in turn in this chapter. **Section E** will consider the application of these standards to privacy cases before the modern proportionality approach was adopted by the Supreme Court in *Puttaswamy I* and *Puttaswamy II*.

Chapter 6 will focus on the modern approach to proportionality that has been applied in the privacy cases in India. A key aspect of this analysis is the Supreme Court's recent pronouncement on proportionality in *Puttaswamy II*.¹ The thesis does not attempt to take a position on the general transnational debate about the merits and demerits of proportionality. Rather, the focus of chapter 6 will be on critiquing the modern application of proportionality to privacy cases in India. In particular, it will consider whether the Supreme Court was justified in adopting, what I will call, a

¹ *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

hybrid version of proportionality. It will also consider the consequences that follow from that choice for future cases.

A. RATIONALITY

Rationality review has typically been applied in administrative law cases in India.² Although rationality review is not directly applicable to cases involving the constitutional right to privacy, it is important to outline its scope and application so as to separate it out clearly from other applicable standards of review.

As a preliminary point, it is crucial to distinguish rationality review from reasonableness review. Although the terms have sometimes been used synonymously,³ they are two different thresholds. As demonstrated in more detail below, there is a crucial distinction between the application of these two standards: reasonableness review applies when the Court is acting as a ‘primary reviewer’ i.e. the Court is deciding, for itself, whether the State infringed a fundamental right. In contrast, rationality review applies in cases where the Court’s task is that of a ‘secondary reviewer’ i.e. the Court is asked to decide whether the impugned decision falls within the parameters of the law.⁴ While exercising the task of ‘secondary review’, the Court does not substitute its judgment in place of that of the body whose decision is under review. It simply asks whether the relevant power was exercised within the applicable boundaries.

² *Tata Cellular v Union of India* (1994) 6 SCC 651 [94]; *Union of India v Ganayutham* (1997) 7 SCC 463 [28](4)(a). See also Abhinav Chandrachud, ‘Wednesbury Reformulated: Proportionality and the Supreme Court of India’ (2013) 13 OUC LJ 191; Lee Marsons, ‘Bifurcation, unification and calibration: a comparison of Indian and English approaches to proportionality’ (2018) 2 Indian Law Review 26.

³ See *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [88] (Aiyar J).

⁴ *Ganayutham* (n 2) [28](4)(a).

Rationality review in India equates to the well-known *Wednesbury* standard of unreasonableness.⁵ This was first propounded by Lord Greene MR in *Wednesbury Corporation*.⁶ Four decades later, judicial attention returned to the *Wednesbury* standard in England in *Council of Civil Service Unions*.⁷ In that case, Lord Diplock held that administrative action was open to judicial review on three grounds: (a) illegality (b) irrationality (i.e. *Wednesbury* unreasonableness) and (c) procedural impropriety.⁸ In relation to the second ground, Lord Diplock said:⁹

“*Wednesbury* unreasonableness”... applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

The dicta of Lord Green MR and Lord Diplock have had a profound impact on the Indian understanding of rationality review. In the Indian cases, the three grounds of review outlined by Lord Diplock have come to be referred to as the ‘CCSU principles’.¹⁰ For example, in 1996, a three-judge bench of the India Supreme Court in *Tata Cellular*¹¹ provided a useful summary of the content of ‘rationality review’. This analysis was largely inspired by the CCSU principles. In *Tata Cellular*, the Supreme Court noted that:¹²

⁵ *ibid* [12]. See also, *Tata Cellular* (n 2) [94]. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁷ *Council of Civil Service Unions v Minister for the Civil Service (CCSU)* [1985] AC 374 (HL).

⁸ *ibid* 410–11 (Lord Diplock).

⁹ *ibid*.

¹⁰ *Ganayutham* (n 2) [28](2), [28](4)(a).

¹¹ *Tata Cellular* (n 2).

¹² *ibid* [94]. See also *Ganayutham* (n 2) [28](2) and [28](4)(a).

it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken... shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness,

(iii) Procedural impropriety.

In the meantime, the English law on judicial review developed further. The test laid down by Lord Greene and Lord Diplock came under scrutiny and was subsequently overhauled.¹³ Further, the meaning of irrationality in the context of human rights came up for consideration before the English Court of Appeal in *Ex p Smith*.¹⁴ Eventually, the principle of proportionality was recognised in English administrative law.¹⁵ During this period, some English decisions tended

¹³ Lord Cooke suggested that the test is better understood as 'whether the decision in question was one which a reasonable authority could reach': *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418 (HL) 452 (Lord Cooke). The Indian Supreme Court was apathetic towards this pronouncement in *Om Kumar v Union of India* (2001) 2 SCC 386 [49] and [50]. See also, Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 277.

¹⁴ *R v Ministry of Defence, Ex p Smith* [1996] QB 517 (CA).

¹⁵ *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [51] (Lord Slynn). Although Lord Diplock in *CCSU* discussed the possibility of proportionality as an independent ground of review (*CCSU* (n 7) 410), and Lord Roskill and Lord Bridge similarly speculated such future development (*R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 (HL) 749 (Lord Bridge), 750 (Lord Roskill)), it was Lord Slynn's pronouncement in *Alconbury* that is considered the most determinate.

to adopt the view that rationality and proportionality are one and the same.¹⁶ As explained in more detail below, in the academic literature this has come to be referred to as the unification thesis.¹⁷

That trend does not appear to have garnered support in India. The Indian Courts have followed the English decisions in *Brind* and *Smith* where the Courts maintained a distinction between the judicial functions of primary review and secondary review.¹⁸ These cases suggested that Courts would exercise secondary review, based on *Wednesbury* principles, in cases that were not concerned with rights under the Convention.¹⁹ Based on these decisions, Indian Courts rejected the idea that rationality and proportionality are identical standards.²⁰ As the Supreme Court explained in *Om Kumar*:²¹

It must be said that the House of Lords [in *Chief Constable of Sussex*] has deviated both from proportionality and *Wednesbury*. This deviation, in our view, is likely to lead to considerable vagueness in the administrative law which has just now been crystallising. It is difficult for us to understand how the primary role of the Courts in cases involving fundamental freedoms and the secondary role of Courts in other cases not involving such rights and where *Wednesbury* rule is to be applied, can be equated.

In our opinion, the principles laid down in *Brind* and *Exp. Smith*... to which we have made reference earlier are more clear-cut and must be adhered to.

¹⁶ See *Chief Constable of Sussex* (n 13) 439 (Lord Slynn); *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [116] (Lord Reed); *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [273] (Lord Kerr). For the opposite view i.e. rationality and proportionality are separate concepts, see *R v Secretary of State for Justice, Ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 [27] (Lord Steyn). For a commentary on this debate see Marsons (n 2).

¹⁷ See Marsons (n 2) 27. As Marsons explains, Varuhas has referred to this debate as ‘unification’: Jason Varuhas, ‘Against Unification’ in Mark Elliott and Hanna Wilberg (eds), *The Scope and Intensity of Substantive Review* (Hart Publishing 2015) 92.

¹⁸ *Brind* (n 15) 749 (Lord Bridge); *Ex p Smith* (n 14) 564 (Henry LJ).

¹⁹ *Brind* (n 15) 748–49 (Lord Bridge); *Ex p Smith* (n 14) 554–56 (Lord Bingham MR).

²⁰ *Om Kumar* (n 13) [51].

²¹ *ibid* [50], [51] (emphasis added).

Thus, the view adopted in *Om Kumar* was that the *Wednesbury* standard applies to cases of secondary review whereas proportionality review applies to cases of primary review. Despite this clear delineation, however, in some subsequent decisions the Supreme Court seemed to support the unification trend. In 2008, in *Hazarilal* for instance, the Court noted that the ‘*Wednesbury* principle of unreasonableness has been replaced by the doctrine of proportionality’.²²

However, this appears to have been no more than an aberration. Indeed, this reasoning was rejected in 2010 by the two-judge bench decision in *Shyam Kumar*.²³ Referring to the *Hazarilal* decision, the bench concluded that ‘the *Wednesbury* principle of unreasonableness as such has not been replaced by the doctrine of proportionality though that test is being applied more and more when violation of human rights is alleged’.²⁴

The present position of Indian law on the application of rationality appears, therefore, to adopt the distinction between rationality and proportionality. Rationality applies when the Court is acting as a secondary reviewer whereas the proportionality standard is relevant to cases of primary review.²⁵

²² *State of Madhya Pradesh and Ors v Hazarilal* (2008) 3 SCC 273 [12].

²³ *Chairman, All India Railway Board v Shyam Kumar* (2010) 6 SCC 614.

²⁴ *ibid* [28], [29] (emphasis in original).

²⁵ Although this thesis does not delve into this issue in any detail, it is recognised that there are conceptual difficulties with separating out the application of proportionality and rationality by reference to the distinction between primary and secondary review. For that view, see Paul Craig, ‘The Nature of Reasonableness Review’ (2013) 66 CLP 131, 141–42. For the argument that proportionality should be confined to cases where public law ‘rights’ are engaged see Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ (2008) New Zealand Law Review 423, 477 and, for a response, see Craig, ‘Proportionality, Rationality and Review’ (n 13). The intermediate position—that proportionality is itself capable of subsuming the distinction between rights and non-rights cases—is adopted by Schauer: see Frederick Schauer, ‘Proportionality and the Question of Weight’ in Grant Huscroft and Bradley W Miller (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 175.

B. REASONABLENESS REVIEW

The test of reasonableness permeates the fundamental rights chapter of the Indian Constitution.²⁶ Many provisions of Part III of the Constitution require this standard to be met before an infringing act can be held valid. Indeed, some cases have gone so far as to say that even those provisions of the Constitution that do not expressly use the word ‘reasonable restrictions’, impliedly, require this test to be met.²⁷

The starting point for understanding the standard of ‘reasonableness’ as it applies under the Indian Constitution is a trinity of provisions in Part III: Articles 14,²⁸ 19²⁹ and 21.³⁰ Article 14 protects the right to equality, Article 19 lists out six fundamental freedoms (including the right to freedom of speech and expression, the right to peaceful assembly and the right to free movement throughout India) and Article 21 guarantees the right to life and personal liberty. Most privacy cases are also tested against the touchstone of Articles 19 and 21.³¹ Although there are subtle differences between the standard of judicial scrutiny that apply to the three provisions, ‘reasonableness’ is a common thread that runs through them. Before making more progress on the

²⁶ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722 [17].

²⁷ *Acharya Narendra Prasadji v State of Gujarat* AIR 1974 SC 2098.

²⁸ Constitution of India 1950, art 14 ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India’.

²⁹ Constitution of India 1950, art 19(1) ‘All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and ... (g) to practise any profession, or to carry on any occupation, trade or business’.

³⁰ Constitution of India 1950, art 21 ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’. Articles 14, 19 and 21 have been described as the ‘golden triangle’ of the Indian Constitution: *Minerva Mills v Union of India* (1980) 3 SCC 625 [79].

³¹ See generally, ch 1 of this thesis.

application of reasonableness review to each of these three guarantees, it is necessary to set out the context in which that enquiry arises under each of them.

A challenge under Article 14 may arise in two ways: (a) discrimination challenge: this arises when a State act is challenged on the basis that it impermissibly discriminates between persons. In response, the State must show that the classification it adopted was based on an ‘intelligible differentia’ which had a ‘rational nexus’ to the object sought to be achieved;³² (b) arbitrariness challenge: here, a State act is impugned on the basis that it is ‘arbitrary’. To justify it, the State must demonstrate that the State act was not unfair, unjust or arbitrary.³³ In contrast, Article 19 freedoms are limited by ‘reasonable restrictions’ with specified objectives under sub-clauses 19(2) to 19(6). Similarly, the rights guaranteed by Article 21 may only be constrained by ‘just, fair and reasonable’ law.³⁴

Thus, although the meaning of reasonableness remains the same across Part III of the Indian Constitution, the mechanics of its application vary depending on the particular provision that applies. What, then, is the meaning of ‘reasonableness review’ under Part III of the Indian Constitution? Despite the pervasiveness of the test, there remains some ambiguity as to the exact meaning of ‘reasonableness review’ in India.

As a starting point, one may examine the Constituent Assembly Debates to understand the framers’ intent in relation to the meaning of ‘reasonableness’. Narayan and Sindhu have

³² *Sarkar* (n 3) [58]. The test has been reiterated several times by the Supreme Court including in *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [175], [233], [522.2].

³³ *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3 [85], [86].

³⁴ *Maneka Gandhi v Union of India* (1978) 1 SCC 248. Also reiterated several times in *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1 including at [183], [236], [281].

undertaken an extensive historical analysis of judicial review in India.³⁵ They point out that, in the Constituent Assembly, it was Pandit Thakur Das Bhargava who first suggested inclusion of the word ‘reasonable’ before the word ‘restrictions’ in Article 19.³⁶ This proposal commanded universal acceptance in the Constituent Assembly. The following passage from Bhargava’s speech merits reproduction:³⁷

If you put the word ‘reasonable’ there, the court will have to see whether a particular Act is in the interests of the public and secondly whether the restrictions imposed by the legislatures are reasonable, proper and necessary in the circumstances of the case. The courts shall have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts which will have the final say.

As Narayan and Sindhu argue, the ‘reasonableness’ threshold was taken by other members of the Constituent Assembly as one which favours the protection of fundamental rights.³⁸ Professor Saxena, for example, said that ‘the amendment of Mr. Bhargava... gives me hope that this article in its final form will be a real charter of our liberty’.³⁹ Similarly, Krishnamachari hoped that

³⁵ Vikram Aditya Narayan and Jahnvi Sindhu, ‘A historical argument for proportionality under the Indian Constitution’ (2018) 2 Indian Law Review 51.

³⁶ *ibid* 76. Permissible restrictions to Article 19(1) are provided in Articles 19(2) to (6) of the Constitution of India 1950. For example, Article 19(2) provides: ‘Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence’.

³⁷ Constituent Assembly of India Deb 1 December 1948, vol VII
<<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html>> accessed 15 October 2019. The Article being discussed was ultimately what became Article 19.

³⁸ Narayan and Sindhu (n 35) 76–77.

³⁹ Constituent Assembly of India Deb 2 December 1948, vol VII
<<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html>> accessed 15 October 2019.

inclusion of the word ‘reasonable’ would ensure that the Constitution provided ‘a fairly reasonable enumeration of our rights and a fairly conservative abridgment of those rights’.⁴⁰

Two consequences follow from Bhargava’s understanding of the concept of ‘reasonableness’. First, the Courts would be required to determine whether an infringing act is in the public interest. Second, the Courts would need to ascertain whether the restrictions on the right are ‘reasonable’, ‘proper’ and ‘necessary’. According to Narayan and Sindhu, Bhargava appears to have used these three words synonymously.⁴¹ If that is indeed the case, the only insight that the Constituent Assembly Debates offer as to the meaning of ‘reasonableness review’ is that the word ‘reasonable’ was inserted into Part III to curtail the circumstances in which fundamental rights may be permissibly restricted. For further guidance, we need to turn to the caselaw.

One of the first cases to consider ‘reasonableness of restrictions’ was a five judge-bench decision of the Supreme Court in 1950.⁴² In that case, it was argued that an externment order⁴³ violated the petitioner’s right to freedom of movement under Article 19(1)(d). The Court, by a 3:2 majority, upheld the externment order. In doing so, it discussed the meaning of reasonableness. The then Attorney General had argued that the Court could only enquire whether the *restrictions*

⁴⁰ *ibid.*

⁴¹ Narayan and Sindhu (n 35) 76.

⁴² *NB Khare v State of Delhi* AIR 1950 SC 211.

⁴³ The order required the Petitioner ‘not to remain in the Delhi District, and immediately to remove himself from the Delhi District and not to return to the District’: *ibid* [2].

on the right were reasonable, and not whether the law itself was reasonable.⁴⁴ Kania CJ, on behalf of himself and two other judges, rejected this argument. He said that:⁴⁵

The law providing reasonable restrictions on the exercise of the right... may contain substantive provisions as well as procedural provisions. While the reasonableness... has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law.

According to Kania CJ, therefore, in order to satisfy ‘reasonableness review’ the impugned State act had to be procedurally as well as substantively reasonable.⁴⁶

A more instructive discussion of the meaning of ‘reasonableness’ was provided by the Supreme Court, a year later, in *Chintaman Rao*.⁴⁷ In that case, the Court said:⁴⁸

The phrase “reasonable restriction” connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word “reasonable” implies intelligent care and deliberation, that is, the choice of a course which reason dictates.

Another significant case dealing with ‘reasonableness’ came a year later. This was the five-judge bench decision of the Supreme Court in *VG Row*.⁴⁹ Here, the Court was examining the constitutional validity of an amendment to a statute and a government order which had declared

⁴⁴ *ibid* [23].

⁴⁵ *ibid* [4].

⁴⁶ See also, MP Singh, ‘The Constitutional Principle of Reasonableness’ (1987) 3 Supreme Court Cases Journal 31, 33.

⁴⁷ *Chintaman Rao v State of Madhya Pradesh* AIR 1951 SC 118.

⁴⁸ *ibid* [8].

⁴⁹ *State of Madras v VG Row* AIR 1952 SC 196.

the ‘People’s Education Society’ an unlawful association. The General Secretary of the society alleged that this was violative of their right to form unions or associations under Article 19(1)(c).

The Supreme Court declared the impugned legislation unconstitutional. In doing so, it explained the meaning of the phrase ‘reasonable restriction’ in Article 19(4). Inter alia, the Court said that in applying the reasonableness threshold, it would consider the nature of the right alleged to have been infringed, the purpose of the restrictions imposed by the State, the extent and urgency of the evil sought to be remedied by the State’s action, the disproportion (if any) of the imposition and the prevailing social conditions at the time.⁵⁰

Some authors⁵¹ have argued that these criteria are strikingly similar to those employed in the context of proportionality (which is discussed in more detail in section D of this chapter). In my view, however, the Court does not seem to have gone so far as to adopt the proportionality standard. Although the judgment did use the words ‘disproportion of the imposition on the right contrasted with the importance of the purpose’,⁵² it is doubtful whether this goes so far as to transplant, wholesale, the standard of proportionality to India. Had the Court intended to do so, it would have provided some guidance as to what ‘proportionality’ meant in this context. In any event, whether the judgment in *VG Row* in fact adopted the proportionality standard is of limited

⁵⁰ *ibid* [16].

⁵¹ Gautam Bhatia, ‘Modern Dental College vs State of MP: The Supreme Court’s Foray into Proportionality and Public Goods’ (*Indian Constitutional Law and Philosophy Blog*, 2 May 2016) <<https://indconlawphil.wordpress.com/2016/05/07/modern-dental-college-vs-state-of-mp-the-supreme-courts-foray-into-proportionality-and-public-goods/>> accessed 15 October 2019; Puneet Dinesh, ‘Proportionality, Punishment and Judicial Review: A Response to Jeydev C.S.’ (*Indian Constitutional Law and Philosophy Blog*, 12 July 2017) <<https://indconlawphil.wordpress.com/2017/07/12/proportionality-punishment-and-judicial-review-a-response-to-jeydev-c-s/>> accessed 15 October 2019.

⁵² *VG Row* (n 49) [16].

relevance. This is because a number of subsequent cases have interpreted *VG Row* as having done so.⁵³

For the present purposes, however, the decision in *VG Row* is significant because the Supreme Court emphasised that validity of restrictions imposed on one right will not serve as a precedent in the context of another right. The Court clarified that this was so ‘even when the constitutional criterion is the same, namely, reasonableness’.⁵⁴ Thus, reasonableness does not mean the same in the context of all the provisions of the Constitution.⁵⁵ As will shortly be seen, however, in 1978 in *Maneka Gandhi*,⁵⁶ the Supreme Court changed its view on this point. After that decision, ‘reasonableness’ came to carry a similar meaning across most Articles of the Indian Constitution.

The decision in *Maneka Gandhi* was a watershed moment in the Indian Supreme Court’s Part III jurisprudence.⁵⁷ In that case, a seven-judge bench was called upon to examine the constitutionality of an administrative order that had resulted in the petitioner’s passport being impounded. The petitioner challenged the order as being violative of Articles 14, 19 and 21. The Court upheld the petitioner’s rights and, in doing so, handed down five separate, concurring opinions.

⁵³ See *Om Kumar* (n 13) [27]; *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 [58]; *Puttaswamy II* (n 1) [647] (Chandrachud J). See also text to n 191 below.

⁵⁴ *VG Row* (n 49) [19].

⁵⁵ *ibid.*

⁵⁶ *Maneka Gandhi* (n 34). See also *Kavalappara Kottarathil and Kochunni v States of Madras and Kerala* 1960 KLJ 1077 (SC) [41].

⁵⁷ The key significance of the decision is that, in the context of Article 21 of the Indian Constitution, it marked a move from procedural due process to the requirement of substantive due process.

In *Maneka Gandhi*, Bhagwati J considered the nature of ‘reasonableness review’ under Part III. He said,⁵⁸

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Bhagwati J’s reasoning in this passage—adopting the view that ‘law’, in order to comply with Article 21, must be ‘just and fair’ and reasonable—commenced a new era in the Supreme Court’s constitutional adjudication. That proposition has now become firmly entrenched in the Indian Supreme Court’s jurisprudence. As Chandrachud J recently reiterated in *Puttaswamy I*, it is now trite law that ‘[t]he ambit of “the procedure established by law” has been interpreted to mean that the procedure must be fair, just and reasonable’.⁵⁹

Turning to post-*Maneka Gandhi* developments, the 1998 decision of the Supreme Court in *MRF*⁶⁰ offers an illustration of the application of the reasonableness standard. In that case, the Court summarised the applicable legal principles in the following way:⁶¹

...

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and

⁵⁸ *Maneka Gandhi* (n 34) [56] (Bhagwati J).

⁵⁹ *Puttaswamy I* (n 34) [149] (Chandrachud J).

⁶⁰ *MRF Ltd v Inspector Kerala Government* (1998) 8 SCC 227.

⁶¹ *ibid* [14] (emphasis added).

the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Clause(6) of Article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind.

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

Against that backdrop, I will now examine some of the privacy decisions which have considered the application of the reasonableness standard. The privacy case law suggests that the reasonableness analysis must proceed in three stages. The first pre-requisite is that the infringing act must have the authority of ‘law’ (i.e. law enacted by Parliament).⁶² If the impugned State action which intrudes on a Part III guarantee is not backed by ‘law’ in this sense, it is invalid. There is no need to look any further.

If this hurdle is overcome, two further enquiries follow: 1) Is the State pursuing a legitimate state aim or objective? I will call this the ‘objective review’; 2) Is the State using reasonable means to achieve this State objective? That is to ask, is there a rational nexus between the means used and the objective sought to be achieved and is the State going further than necessary to achieve the objective? I will call the second enquiry the ‘means review’.

*Malak Singh*⁶³ illustrates the application of these tests. This was a surveillance case. Applying the ‘reasonableness’ test, the Court noted that the regulations permitting surveillance

⁶² See *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 [5].

⁶³ *Malak Singh v State of Punjab and Haryana* AIR 1982 SC 760.

were intended to facilitate the prevention of crime. Evidently, this is a legitimate state interest. The Court held that, as long as such a legitimate interest is served, the privacy infraction will be justified.⁶⁴ Notably, the Court also examined whether the mode of surveillance employed went further than what was reasonably necessary to achieve this objective. ‘Discreet surveillance of suspects, habitual and potential offenders’, the Court said, ‘may be necessary and so the maintenance of history sheet and surveillance register may be necessary too, for the purpose of prevention of crime’.⁶⁵ However, the Court cautioned against excessive surveillance:⁶⁶

Surveillance of persons... for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the Court’s protection.

Overall, on both the methodology of surveillance as well as the state interest underlying it, the Court’s analysis in *Malak Singh* conforms to the reasonableness threshold understood as consisting of two separate enquiries: objective review and means review.

Now, consider *Metrani*.⁶⁷ Here, the Court was concerned with search and seizures conducted under the Income Tax Act 1961. The Court held that search and seizure was intended to prevent the ‘evasion of tax’ and ‘realization of taxes, penalties’.⁶⁸ This is a reasonable state interest. In addition, the Court also considered whether the infraction went further than necessary, for

⁶⁴ *ibid* [6].

⁶⁵ *ibid* [7].

⁶⁶ *ibid* [9].

⁶⁷ *PR Metrani v Commissioner of Income Tax, Bangalore* AIR 2007 SC 386.

⁶⁸ *ibid* [15].

example, by extending for a prolonged period of time.⁶⁹ That latter enquiry is best explained as an example of ‘means review’.

The kind of judicial reasoning that is embodied in the decisions in *Malak Singh* and *Metrani* i.e., of pursuing, albeit impliedly, the twin enquiries of objective review and means review has been consistently followed in the privacy case law of the Supreme Court. Further examples of this trend may also be seen in the other privacy cases decided by the Supreme Court which include *Bharat Shah*,⁷⁰ *Canara Bank*⁷¹ and *Jethmalani*.⁷²

The clearest exposition of reasonableness review in the privacy context is the decision in *Canara Bank*. The relevant background was considered in chapter 1. In brief summary, the case was concerned with the validity of a state amendment to the Stamp Act. The amendment permitted ‘any person authorised in writing by the Collector’⁷³ to inspect private documents in the possession of other individuals or private entities (such as banks).

The Court first considered the state interest underlying the impugned amendment. The State had sought to justify the state amendment on the basis of ‘reasonableness’. It was argued that the amendment was passed with the intention of ‘safeguarding the revenue of the State and striking at the evil of stamp duty evasion’.⁷⁴ The Court also specifically noted that legislative intrusions of

⁶⁹ *ibid.*

⁷⁰ *State of Maharashtra v Bharat Shanti Lal Shah* (2008) 13 SCC 5 [34], [44].

⁷¹ *District Registrar and Collector, Hyderabad v Canara Bank* AIR 2005 SC 186 [34], [59].

⁷² *Ram Jethmalani v Union of India* (2011) 8 SCC 1 [73], [77].

⁷³ *Canara Bank* (n 71) [16] (emphasis added).

⁷⁴ *ibid* [9].

this nature ‘must be tested on the touchstone of reasonableness’.⁷⁵ On the facts of this case, the Court was satisfied that the amendment was reasonable.

The Court further applied the ‘reasonable nexus’ threshold for analysing the methodology employed to achieve the stated objective. The Court insisted on a ‘reasonable nexus between stringency of the provision and the purpose sought to be achieved’.⁷⁶ Applying this standard to the facts, the Court found the state amendment to be invalid for two reasons. First, as an aspect of ‘reasonableness’, searches under the impugned amendment must be permitted only in cases where there exists a ‘reasonable cause’ for the Court to believe that there is potential stamp duty evasion. The power of search under the impugned amendment was not so confined. Secondly, the Court found constitutionally impermissible, the broad scope afforded to persons who are entitled to carry out searches. On this aspect, the amendment provided no safeguards. This was found to be non-compliant with ‘reasonableness’.⁷⁷

Unbridled power available to be exercised by any person whom the Collector may think proper to authorize without laying down any guidelines... and without recording the availability of grounds which would give rise to the belief, on the existence where of only, the power may be exercised deprives the provision of the quality of reasonableness.

In sum, the Indian case law on the application of reasonableness review is based on the following principles: (a) the requirement of ‘reasonableness’ is one of the common threads that run through Articles 14, 19 and 21 of the Constitution; and (b) usually, and particularly in the privacy context, reasonableness review involves asking the three questions: (i) does the State act

⁷⁵ *ibid* [34].

⁷⁶ *ibid* [59].

⁷⁷ *ibid* (emphasis added).

have the backing of law? (ii) is the State pursuing a legitimate State aim? (objective review); (iii) did the means pursued by the State have a rational nexus with the objective sought to be achieved and was it excessive? (means review).

C. STRICT SCRUTINY

In many cases, Indian Courts have employed a standard of scrutiny that is more rigorous than the conventional reasonableness analysis.⁷⁸ Although different terms have been used to describe this heightened standard of review,⁷⁹ I will refer to it as ‘strict scrutiny’. Strict scrutiny is a two-pronged test⁸⁰ that asks: 1) whether the State is pursuing a ‘compelling’ State aim; and 2) if so, whether the State is pursuing the least intrusive means of achieving that objective.

‘Strict scrutiny’ has a long pedigree in global constitutional jurisprudence. It appears to have originated in America⁸¹ from where Indian Courts borrowed it.⁸² In the context of privacy, it was

⁷⁸ See *Govind v State of Madhya Pradesh* AIR 1975 SC 1378 [33]; *Anuj Garg v Hotel Association of India* AIR 2008 SC 663 [45]; *Ashok Kumar Thakur v Union of India and Ors* (2008) 6 SCC 1 [536]. See also, Tarunabh Khaitan, ‘Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement’ (2008) 50 *Journal of the Indian Law Institute* 177, 179–80.

⁷⁹ *T Sareetha v Venkata Subbaiah* AIR 1983 AP 356 (HC): uses the terminology of ‘superior’ or ‘overwhelming’ state interest; *Puttaswamy II* (n 1) [480]: Chandrachud J uses the term ‘strict constitutional scrutiny’ to describe his three-fold test which includes a proportionality analysis. His test is discussed in more detail in the next section (see section D below). In *Om Kumar* (n 13) [37] the Court uses ‘strict scrutiny’ and ‘proportionality’ synonymously.

⁸⁰ See Richard H Fallon Jr, ‘Strict Judicial Scrutiny’ (2007) 54 *UCLA Law Review* 1267; Gautam Bhatia, ‘State Surveillance and the Right to Privacy in India: A Constitutional Biography’ (2014) 26 *National Law School of India Review* 127, 135. See also, *Miller v Johnson* 515 US 900 (1995) 920; *Johnson v California* 543 US 499 (2005) 505. The Supreme Court of India has also now acknowledged that ‘strict scrutiny’ is a two-pronged test which includes ‘compelling state interest’ and ‘narrow-tailoring’. See for example, *Ashok Kumar Thakur* (n 78) [179], [536]; *Puttaswamy I* (n 34) [236] (Chelameswar J).

⁸¹ Fallon (n 80) 1273ff. Hints of the test can be seen in many 1960s decisions of the United States. See *McLaughlin v Florida* 379 US 184 (1964) 196; *Griswold v Connecticut* 381 US 479 (1965) 497 (Goldberg J) and *Roe v Wade* 410 US 113 (1973) 154, 155.

⁸² One of the first Indian decisions to refer to ‘compelling state interest’ was *Govind* (n 78). There the Court drew heavily from American cases on privacy including *Griswold* and *Roe*: *ibid* [17], [19]. See also, *Ashok Kumar Thakur* (n 78) [536]; *Puttaswamy I* (n 34) [236] (Chelameswar J); Khaitan (n 78) 179; Bhatia, ‘State Surveillance and the

first considered, in 1975, in *Govind*.⁸³ Interestingly, though, in *Govind*, the Court only referred to the first part of this test: ‘compelling state interest’.⁸⁴ Unsurprisingly, in *Govind*, the Indian Supreme Court’s reasoning relied heavily on American jurisprudence. In particular the Court relied on the decisions in *Griswold*⁸⁵ and *Roe*.⁸⁶ In a notable passage in *Govind*, Mathew J said the following:⁸⁷

Depending on the character and antecedents, of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy... the right to privacy... must be subject to restriction on the basis of compelling public interest.

Although the judgment in *Govind* did not expressly refer to the second requirement of narrow tailoring, some authors⁸⁸ have argued that the Supreme Court also impliedly adopted this requirement. In particular, Bhatia reads the following passage from *Govind* as an example of the affirmation of narrow-tailoring:⁸⁹

[The impugned regulation], in our view, empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show a determination, to lead a life of crime... Mere convictions in criminal cases where nothing gravely imperil[ing] safety of society cannot be regarded as warranting surveillance under this Regulation. Similarly, domiciliary visits and picketing by the

Right to Privacy in India’ (n 80) 135; Raag Yadava, ‘Taking Rights Seriously – The Supreme Court on Strict Scrutiny’ (2010) 22 National Law School of India Review 147, 154.

⁸³ *Govind* (n 78).

⁸⁴ *ibid* [33].

⁸⁵ *Griswold* (n 81).

⁸⁶ *Roe* (n 81).

⁸⁷ *Govind* (n 78) [31] (emphasis added).

⁸⁸ Bhatia, ‘State Surveillance and the Right to Privacy in India’ (n 80) 136.

⁸⁹ *Govind* (n 78) [34] (emphasis added).

police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer.

Bhatia argues that the regulation itself made no reference to ‘gravity of the crime’.⁹⁰ The Court was able to uphold the constitutional validity of the regulation by narrowly tailoring the statute so that the State’s objective was achieved in a manner that minimally infringes the right.

There is another passage in *Govind* that connotes the narrow-tailoring reasoning more clearly:⁹¹

[D]rastic inroads directly into privacy... will be made if Regulations 855 and 856 were to be read widely. The relevant Articles of the Constitution... compel us therefore to narrow down the scope for play of the two Regulations. We proceed to give direction and restriction to the application of the said regulations with the caveat that if any action were taken beyond the boundaries so set, the citizen will be entitled to attack such action as unconstitutional and void.

Here, the Court is clearly saying that unless the impugned regulations are narrowed down, they would make inroads into the right to privacy which would render them unconstitutional.

Sareetha,⁹² a 1983 High Court decision that considered the constitutional validity of restitution of conjugal rights under the Hindu Marriage Act, also merits attention. In that case, the husband was seeking an order for restitution of conjugal rights, which the wife challenged as violative of her right to privacy. Relying on *Govind*, the Court held that privacy could only be subordinated to a ‘superior state interest’. The Court concluded that ‘there are no overwhelming

⁹⁰ Bhatia, ‘State Surveillance and the Right to Privacy in India’ (n 80) 136.

⁹¹ *Govind* (n 78) [30].

⁹² *Sareetha* (n 79). *Sareetha* was overruled within a year in *Saroj Rani v Sudarshan Kumar Chadha* AIR 1984 SC 1562.

state interests to justify the subordination of the [wife's] valuable right to privacy'.⁹³ The Court went further to consider whether the impugned legislation went further than necessary to achieve its objective. In that context, it was held that the 'remedy of restitution of conjugal rights is not only excessive but is also inappropriate'.⁹⁴ Here, there is no mention of the requirement of narrow tailoring.

Strict scrutiny was then considered by the Supreme Court in the context of a string of affirmative action cases.⁹⁵ Interestingly, in *Saurabh Chaudri*,⁹⁶ an affirmative action case decided in 2003, the Supreme Court rejected the application of the strict scrutiny test in India.⁹⁷

The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America... cannot be applied in this case. Such a test is not applied in Indian Courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.

In this passage, the Court appears to be suggesting that in *some* instances the Court may be willing to apply the heightened test. It concluded, however, that it was not applicable to the facts before it.

⁹³ *Sareetha* (n 79) [29].

⁹⁴ *ibid* [30].

⁹⁵ For example, in *Indra Sawhney v Union of India* AIR 1993 SC 477, the strict scrutiny standard was adopted by Thommen J, although it did not garner the support of the majority in that case.

⁹⁶ *Saurabh Chaudri v Union of India* (2003) 11 SCC 146.

⁹⁷ *ibid* [36] (Khare CJ) (emphasis added).

It was in 2007, in *Anuj Garg*,⁹⁸ that the Court applied the strict scrutiny standard to the facts. In that case, a provision prohibiting the employment of ‘any woman’ or ‘any man under the age of 25 years’ in premises where liquor or any other intoxicating drugs were consumed by the public was challenged. The petitioners argued that this violated Articles 14, 15 and 19(1)(g).⁹⁹ The Court upheld this contention. The Court considered strict scrutiny as the applicable standard of judicial review. This was justified on the basis that the impugned legislation provided for ‘protective discrimination’.¹⁰⁰ The Court observed that this category of legislations should be subjected to ‘strict scrutiny’. Unsurprisingly, therefore, it turned to the more rigorous ‘compelling state interest’ test. Sinha J said:¹⁰¹

It is to be borne in mind that legislations with pronounced ‘protective discrimination’ aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects... Personal freedom is a fundamental tenet which can not be compromised in the name of expediency until unless there is a *compelling state purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases.

However, the reasoning in *Anuj Garg* is not bereft of flaws. In a subsequent paragraph the Court made reference to the ECHR ‘doctrine of proportionality’.¹⁰² In my view, this had the effect

⁹⁸ *Anuj Garg* (n 78).

⁹⁹ Constitution of India 1950, art 19(1)(g) ‘All citizens shall have the right (g) to practise any profession, or to carry on any occupation, trade or business’.

¹⁰⁰ *Anuj Garg* (n 78) [44].

¹⁰¹ *ibid* [44], [45] (emphasis in original).

¹⁰² *ibid* [47].

of conflating the standards of strict scrutiny and proportionality without satisfactorily applying either.¹⁰³ Consider this paragraph:¹⁰⁴

The test to review such a Protective Discrimination statute would entail a two-pronged scrutiny:

(a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle,

(b) the same should be proportionate in measure.

It does appear, however, that the Court's understanding of proportionality here was inadequate.¹⁰⁵

The Court only peripherally alluded to aspects of proportionality when it stated that '[t]he Court's task is to determine whether the measures furthered by the State... are proportionate to... well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al',¹⁰⁶ and then that 'there should be a reasonable relationship of proportionality between the means used and the aim pursued'.¹⁰⁷ Despite this dichotomy, many authors consider *Anuj Garg* as authority for the application of strict scrutiny to protective discrimination cases in India.¹⁰⁸

¹⁰³ A similar view is espoused in Mahendra P Singh, 'Decriminalisation of Homosexuality and the Constitution' (2009) 2 NUJS Law Review 361, 376 and Moiz Tundawala, 'Invocation of Strict Scrutiny in India: Why the Opposition?' (2010) 3 NUJS Law Review 465, 473.

¹⁰⁴ *Anuj Garg* (n 78) [48].

¹⁰⁵ Proportionality is considered in the following section (section D) of this chapter.

¹⁰⁶ *Anuj Garg* (n 78) [49].

¹⁰⁷ *ibid.*

¹⁰⁸ See Khaitan (n 78) 179; Malavika Prasad, 'The Doctrine of Strict Scrutiny and Cross-constitutional Borrowing: Reading *Subhash Chandra v. Delhi Subordinate Services Selection Board* 2009 (11) SCALE 278' (2010) 4 Indian Journal of Constitutional Law 115, 115.

Ashok Kumar Thakur,¹⁰⁹ another affirmative action case, rowed back from the reasoning in *Anuj Garg* a few months after that decision. In *Ashok Kumar Thakur*, the Supreme Court rejected the application of the strict scrutiny doctrine in India. Balakrishnan CJ said,¹¹⁰

The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of ‘suspect legislation’ and we have been following the doctrine that every legislation passed by the Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same.

Although the Court rejected the application of this standard, helpfully, it clearly explained the components of this test. At paras [179] and [183], Balakrishnan CJ said:¹¹¹

Thus, the first limb of the strict scrutiny test that elucidates the ‘compelling institutional interest’ is focused on the objectives that affirmative action programmes are designed to achieve. The second limb, that of ‘narrow tailoring’, focuses on the details of specific affirmative action programmes and on the specific people it aims to benefit.

Furthermore, for any affirmative action programme to survive the strict standard of judicial scrutiny, the Courts want ‘compelling evidence’, that proves without any doubt that the affirmative action program is narrowly tailored and serves only the most compelling of interests. Thus, the bar for the State or institution that practices affirmative action programmes based of suspect classifications has been effectively raised. Therefore, in cases where a compelling interest is found, race-based methods may be used only after all other methods have been considered and found deficient, and that too only to that limited extent which is required to remedy a discrimination that has been identified, and only when it has been shown that the identified beneficiaries have suffered previously in the past, and lastly, only if all undue burdens that may impinge upon the rights of other non-beneficiaries are avoided.

¹⁰⁹ *Ashok Kumar Thakur* (n 78).

¹¹⁰ *ibid* [184] (Balakrishnan CJ).

¹¹¹ *ibid* [179], [183] (emphasis added).

This passage offers two important insights: i) strict scrutiny is a more rigorous standard of review; ii) at least as a general rule, in this passage, the Supreme Court appears to be rejecting the application of strict scrutiny in India. Indeed, following *Ashok Kumar Thakur*, many commentators espoused the view that strict scrutiny was not applicable in India at all.¹¹²

Clearly, there is a dichotomy in the Supreme Court's decisions on strict scrutiny that have been considered thus far. On the one hand, there are privacy decisions such as *Govind* and *Anuj Garg* (the latter concerned privacy as well as protective discrimination) which appear to apply this standard. On the other hand, there is a consistent line of affirmative action decisions that have rejected the application of the strict scrutiny doctrine to India.¹¹³

Khaitan offers a plausible solution to this conundrum. He argues, convincingly in my view, that the *Ashok Kumar Thakur* line of cases confined their rejection of the strict scrutiny standard to affirmative action cases alone.¹¹⁴ The test has not been rejected in its entirety in India. Interpreted in this way, *Anuj Garg* and *Ashok Kumar Thakur* are reconcilable. On this basis, other privacy cases such as *Govind* and *Sareetha*, which had been applying at least one of the two components of the test, are also easy to account for. Khaitan's thesis is relevant because it was adopted in subsequent decisions of the Court.¹¹⁵ The current state of the law in India is, therefore, that 'strict scrutiny' is inapplicable to affirmative action cases. But it continues to be of relevance

¹¹² MP Singh, 'Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure' (2008) 1 NUJS Law Review 193, 194; Singh, 'Decriminalisation of Homosexuality and the Constitution' (n 103) 376–77. See also, Tundawala (n 103); *Subhash Chandra v Delhi Subordinate Services Selection Board* (2009) 15 SCC 458 [43].

¹¹³ See *Saurabh Chaudri* (n 96) [36]; *Ashok Kumar Thakur* (n 78) [184].

¹¹⁴ Khaitan (n 78) 205–07.

¹¹⁵ *NAZ Foundation v Government of NCT* 2010 Cri LJ 94 (Del HC) [111]. See also, *Subhash Chandra* (n 112) [43].

to other categories of cases, including in particular privacy cases. As to what these other categories are, the Supreme Court provided substantial guidance in its 2009 decision in *Subhash Chandra*.¹¹⁶

In that decision, the Court said:¹¹⁷

We are of the opinion that in respect of the following categories of cases, the said test may be applied:

1. Where a statute or an action is patently unreasonable or arbitrary...
2. Where a statute is contrary to the constitutional scheme...
3. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.
4. Where a statute or execution action causes reverse discrimination.
5. Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example Clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof.
6. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right.
7. Where a statute is 'Expropriatory' or 'Confiscatory' in nature.
8. Where a statute prima facie seeks to interfere with sovereignty and integrity of India.

However, by no means, the list is exhaustive or may be held to be applicable in all situations.

Although a clarification of the categories of cases to which strict scrutiny applies would have been welcome, the Court's statement of the categories raises more questions than it answers.¹¹⁸ As to the first category, when is a statute 'patently unreasonable or arbitrary'? If a statute is so patently arbitrary, it is likely to infringe constitutional safeguards regardless of the standard of review

¹¹⁶ *Subhash Chandra* (n 112).

¹¹⁷ *ibid* [43].

¹¹⁸ For a critique of the decision in *Subhash Chandra* see, Prasad (n 108).

applied. What, then, does strict scrutiny add? Second, it is unclear what the phrase ‘statute is contrary to the constitutional scheme’ means. In most cases where a legislation is considered to infringe a Part III guarantee, is it not necessarily contrary to the constitutional scheme? Third, it is far from clear why strict scrutiny must apply to statutes to which the presumption of constitutionality does not apply. It is easy to understand why the presumption is reversed in that category. However, should those statutes also be held to a higher standard of scrutiny? The Court did not provide a convincing answer to this question. Fourth, the Court considered that strict scrutiny was the standard of judicial review applicable when a statute or executive action causes ‘reverse discrimination’. However, as explained above, the preferable view (which has also been adopted by the Supreme Court) is that strict scrutiny is inapplicable to cases where affirmative action measures are under challenge.

Returning now to the privacy context, despite the debate regarding its application to the sphere of protective discrimination, there had been near-consistent support for the application of strict scrutiny until the modern advent of proportionality in India. For example, in 2010, *Suchita Srivastava*¹¹⁹ considered the choice of a mentally unstable woman not to undergo an abortion. The Court said, ‘in the case of pregnant women there is also a “compelling state interest” in protecting the life of the prospective child’.¹²⁰ Further support for the relevance of strict scrutiny in the privacy context may be found in the 2010 Delhi High Court’s decision in *NAZ*¹²¹ which considered the constitutional validity of a penal provision that criminalised homosexuality. The petitioner argued that there was no ‘compelling state interest’ justifying the penal provision. The Union of

¹¹⁹ *Suchita Srivastava v Chandigarh Administration* AIR 2010 SC 235.

¹²⁰ *ibid* [11].

¹²¹ *NAZ Foundation* (n 115).

India conceded that the ‘right to privacy is not absolute and can be restricted for compelling state interest’.¹²² Thus, the relevance of a ‘compelling state interest’ was common ground between the parties.

In so far as the impugned provision punished non-consensual sexual acts, or sexual acts involving minors, the Court upheld its validity. This was based on the reasoning that curbing these activities serves a ‘compelling state interest’ i.e. the public purpose in bringing under legal regulation ‘the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex’.¹²³

The Supreme Court offered further support for ‘strict scrutiny’ in its 2010 decision in *Selvi*,¹²⁴ which considered whether the involuntary administration of narcoanalysis, polygraph examination and brain-mapping infringed (inter alia) privacy. Here again the Court unequivocally affirmed the ‘compelling state interest’ test. This is especially relevant because, in relation to many of the rights in question, the Court adopted ‘reasonableness’ as the applicable standard. Discussing an infringement of ‘liberty’ as protected by Article 21 for example, the Court framed the relevant issue as:¹²⁵

Whether the involuntary administration of the impugned techniques is a reasonable restriction on ‘personal liberty’ as understood in the context of Article 21 of the Constitution?

¹²² *ibid* [24].

¹²³ *ibid* [79].

¹²⁴ *Selvi v State of Karnataka* AIR 2010 SC 1974.

¹²⁵ *ibid* [7] (emphasis added).

In testing whether the impugned techniques violate privacy, however, the Court said:¹²⁶

Hence, such intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's 'right to privacy' and 'compelling public interest' has frequently occupied judicial attention.

Although the State's objective of 'preventing crimes' and 'expediting investigations' was recognised as a 'compelling public interest', this by itself proved insufficient to justify the impugned techniques. This conclusion appears to have been motivated by the fact that 'the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation'.¹²⁷ Although, in this passage, the Court did not go so far as to affirm the test of narrow-tailoring, arguably, it came close. It did suggest that the State's infraction of privacy will be justified only if the sole efficacious manner in which the state interest can be achieved is through that infraction. That must be the reason why the fact that there are other ways of achieving an expeditious investigation proved fatal to the constitutional validity of the impugned techniques.

Finally, consider the Supreme Court's nine-judge bench decision in *Puttaswamy I* in 2017.¹²⁸ It may be recalled that the Court was asked to adjudicate whether a fundamental right to privacy existed at all in India. Although all nine judges were of the unanimous view that the privacy was a fundamental right, the judges did not speak with one voice on all themes relating to privacy, including the standard of judicial review applicable to privacy cases in India.

Although the majority view arguably supports proportionality review as the standard of judicial review applicable to privacy cases in India (this point is considered at length in the next

¹²⁶ *ibid* [182] (emphasis added).

¹²⁷ *ibid* [152].

¹²⁸ *Puttaswamy I* (n 34).

chapter),¹²⁹ I am concerned here with three opinions that offer some support for applying strict scrutiny as the standard of review (albeit that these speeches do not comprise the majority view in *Puttaswamy I*).

The first is Chelameswar J's judgment. On the applicable standard of review, he observed as follows:¹³⁰

Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply.

Chelameswar J therefore adopted a variable standard of review. Further, he also noted that which among these two alternatives was applicable must depend on the 'context of concrete cases'.¹³¹ Clearly, however, to him, 'compelling state interest' and 'reasonableness' were the two available alternatives.

The second judgment that is of relevance is that of Bobde J. He noted:¹³²

In any event, the state can always legislate a reasonable restriction to protect and effectuate a compelling state interest, like it may while restricting any other fundamental right.

¹²⁹ See section A(1) of ch 6 of this thesis.

¹³⁰ *Puttaswamy I* (n 34) [236] (Chelameswar J).

¹³¹ *ibid*.

¹³² *ibid* [274] (Bobde J) (emphasis added).

With respect, Bobde J here appears to be conflating the concepts of reasonableness review and compelling state interest. Regrettably, Sapre J further compounded this confusion by stating as follows:¹³³

In view of foregoing discussion... ‘*right to privacy*’ is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

What Sapre J meant by ‘social, moral and compelling public interest’ is unclear.

What, then, does the Supreme Court’s jurisprudence tell us about the application of strict scrutiny in India? The answer may be summarised in three propositions. First, strict scrutiny is a more rigorous standard of review than reasonableness. Second, it is not applicable to affirmative action cases in India. It does seem, however, that it applies to several other categories of cases such as those identified by the Court in *Subhash Chandra* (save for the Court’s reference to ‘reverse discrimination’). Until recently, this included privacy cases (the recent change in trend is examined in the next chapter). Third, the difference between reasonableness review and strict scrutiny is primarily one of intensity. The degree of intensity of the ‘objective review’ and ‘means review’ changes, but the enquiries are similar. So, in strict scrutiny, within the ‘objective review’ the Court asks: is the State pursuing a *compelling* State interest (not merely a legitimate state interest)? Similarly, under ‘means review’, the Court will determine whether this is the *least intrusive* manner of achieving the State’s compelling objective (not simply whether the State used reasonable means to achieve its aim).

¹³³ *ibid* [412] (Sapre J) (emphasis in original).

D. PROPORTIONALITY

Proportionality has come to mean different things in different jurisdictions.¹³⁴ These differences, and some of the other prominent debates that abound proportionality will now be discussed.¹³⁵

In broad terms, proportionality consists of four enquiries: (a) Is the State pursuing a legitimate purpose? (legitimate purpose stage); (b) Is there a rational nexus between that purpose and the infringing act? (rational nexus or suitability stage); (c) Can another, less intrusive measure be used to achieve the State purpose? (necessity stage) and (d) Is the infringement of the right too great in comparison to the public purpose that is sought to be achieved (balancing stage or proportionality *stricto sensu*).¹³⁶

At a high level, the Supreme Court of India has adopted a very similar notion of the test of proportionality. For example, in *Binoy Viswam*¹³⁷ and *Bhasin*,¹³⁸ the Court held that the limitation of a constitutional right would be permissible in the following circumstances:

- (i) it is designated for a proper purpose;

¹³⁴ For example, the German proportionality test and the Canadian *Oakes* test are often contrasted: see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 University of Toronto Law Journal 383. These tests are discussed in more detail in section D(2) below of this chapter.

¹³⁵ See also section D(1) below of this chapter.

¹³⁶ See *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20] (770–71) (Lord Sumption), [74] (790–91) (Lord Reed); Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft and Bradley W Miller (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 313.

¹³⁷ *Binoy Viswam v Union of India* AIR 2017 SC 2967 [60] (borrowing the test from Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Doron Kalir tr, CUP 2012)). Although, notably, the Court omitted the fourth limb of proportionality while restating the test in [63].

¹³⁸ *Bhasin v Union of India* AIR 2020 SC 1308 [60] (again, citing with approval Barak, *Proportionality: Constitutional Rights and Their Limitation* (n 137)).

- (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
- (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
- (iv) there needs to be a proper relationship... between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

The first three among these enquiries are largely factual in nature and involve a means-end analysis.¹³⁹ The balancing exercise, in contrast, is an entirely value-laden process. It requires the Court to weigh two values against each other. In general terms, the question is whether ‘a statute’s benefit to one right or public good is proportionate to its detriment to another right or public good’.¹⁴⁰ As Lord Sumption put it, the ultimate question is whether ‘a fair balance has been struck between the rights of the individual and the interests of the community’.¹⁴¹ In India, Chandrachud J has explained the fourth limb of the proportionality in very similar terms: ‘[t]he requirement of proportionality is satisfied when the nature and extent of the abridgement of the right is proportionate to the legitimate aim being pursued by the State’.¹⁴² Moreover, as Khaitan explains,¹⁴³

On the one hand, the court should ask itself how important is the right in question and how seriously will the impugned measure restrict it. On the other hand, the importance of the state interest in question needs to be examined, along with asking how effectively and to what degree this interest will be achieved by the impugned measure.

¹³⁹ See Grimm (n 134) 393; Jochen von Bernstorff, ‘Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 72;

¹⁴⁰ Juliette G Duara, *Gender Justice and Proportionality in India: Comparative Perspectives* (Routledge 2017) ch 4.

¹⁴¹ *Bank Mellat* (n 136) [20].

¹⁴² *Central Public Information Officer v Subhash Chandra Agarwal* (2020) 5 SCC 481 [220].

¹⁴³ Khaitan (n 78) 184–85.

So, if an important right is only slightly restricted towards achieving an important state interest that is substantially furthered, on balance, the impugned measure should be permissible.

As a standard of review, therefore, ‘proportionality’ is qualitatively different from strict scrutiny and reasonableness review. It varies not only in intensity but also in structure and content. The first two limbs of proportionality align closely with the ‘objective review’ and ‘means review’ of the traditional reasonableness analysis. The third limb resembles the narrow-tailoring limb of strict scrutiny. However, as explained above, it is the fourth limb that is unique to proportionality. It requires the Court to make a value judgment; the Court must balance the importance of the *State interest* on the one hand, with the importance of the *right* or the extent of its intrusion, on the other. For instance, the Court may ask, is the public benefit that will ensue from pursuing the State interest greater than the extent of infringement of the right? Therefore, a State interest could be legitimate (first limb), rationally connected to its objective (second limb) and narrowly tailored (third limb), yet fail the balancing component of proportionality.

As to the scope and content of proportionality, academic commentators do not speak with one voice. However, an elaborate foray into the debates about the doctrine of proportionality is beyond the scope of this thesis. In particular, this thesis does not engage with the transnational debate about the benefits (or otherwise) of using proportionality as a standard of judicial review. Instead, this section will briefly acquaint the reader with some background to the doctrine of proportionality before turning to its application in India.

The remainder of this section proceeds in four stages. Sub-section (1) briefly considers the history and background of proportionality review. Sub-section (2) outlines two prominent models of proportionality: the German model and the Canadian model. Sub-section (3) considers some criticisms of proportionality. Finally, sub-section (4) addresses the historical application of

proportionality by the Indian Courts before the modern privacy cases (*Puttaswamy I* and *Puttaswamy II*) had been decided.

1. History

The origin of proportionality can be traced back to Germany in late nineteenth century.¹⁴⁴ From its German roots, proportionality spread to ‘post-Communist states in Central and Eastern Europe, and into Israel’.¹⁴⁵ It has now become a part of many Commonwealth jurisdictions including Canada, South Africa, New Zealand, the United Kingdom, among others.¹⁴⁶ In the words of Sweet and Mathews, ‘[b]y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA [i.e. proportionality analysis]’.¹⁴⁷ The United States is commonly understood to follow a tiered standard of judicial scrutiny (featuring minimal scrutiny, intermediate scrutiny and strict scrutiny) in place of proportionality review.¹⁴⁸

¹⁴⁴ See Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008–09) 47 *Columbia Journal of Transnational Law* 72; Paul Yowell, ‘Proportionality in United States Constitutional Law’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 102; Grimm (n 134) 385. For the view that the principle of proportionality can be traced back to an Aristotelian concept of justice, see Eric Engle, ‘The History of the General Principle of Proportionality: An Overview’ (2012) 10 *Dartmouth Law Journal* 1. For an account which traces the genesis of proportionality in UK law to the 16th century, see Paul Craig, ‘Proportionality and Judicial Review: A UK Historical Perspective’ in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) ch 9.

¹⁴⁵ Sweet and Mathews (n 144) 74.

¹⁴⁶ See generally, *ibid.* See also, Bernhard Schlink, ‘Proportionality in Constitutional Law: Why Everywhere But Here?’ 2012 (22) *Duke Journal of Comparative and International Law* 291, 296.

¹⁴⁷ Sweet and Mathews (n 144) 74.

¹⁴⁸ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (4th edn, Wolters Kluwer 2011) 687–95; Neils Petersen, ‘How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law’ (2013) 14 *German Law Journal* 1387, 1405–08. For the opposite view see Yowell (n 144); Schlink (n 146); Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 *Yale Law Journal* 3094. Many authors argue against the amalgamation of American balancing and European proportionality: see Moshe Cohen-Eliya and Iddo Porat, ‘American Balancing and German Proportionality: The

What is the proportionality test and when does it operate in constitutional law? Most authors opine that the test is deployed to ascertain whether a measure that impinges a right is justified.¹⁴⁹ Usually, that enquiry proceeds in two parts. First, the Courts must establish whether a fundamental right is engaged at all. If it is, the second enquiry then asks whether the interference with the right is justified.¹⁵⁰ Proportionality is engaged at the second stage. However, Möller argues that the first enquiry is starting to become more and more redundant, and the focus now firmly remains on the proportionality enquiry. As he explains:¹⁵¹

The first stage has become less and less important in practice, largely as a consequence of rights inflation, ie the phenomenon that more and more interests are protected as rights. Thus, almost every policy which imposes a burden on a person will also interfere with one of his or her rights. It is therefore no surprise that proportionality, as the core doctrinal tool employed at the second stage, has taken on such a prominent role in rights adjudication.

2. Two Models

There are two common versions of proportionality review: the German model and the Canadian model. The key distinction between these models is not in the structure of the test, but in how it is applied.

Historical Origins' (2010) 8 International Journal of Constitutional Law 263; Moshe Cohen-Eliya and Iddo Porat, 'The Hidden Foreign Law Debate in *Heller*: Proportionality Approach in American Constitutional Law' (2009) 46 San Diego Law Review 367.

¹⁴⁹ See Yowell (n 144) 88; Francisco J Urbina, 'Is it Really That Easy?: A Critique of Proportionality and "Balancing as Reasoning"' (2014) 27 Canadian Journal of Law and Jurisprudence 167, 167.

¹⁵⁰ Urbina (n 149) 167; Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31.

¹⁵¹ Möller, 'Constructing the Proportionality Test' (n 150) 31.

As Grimm points out,¹⁵² the Canadian proportionality test was first propounded in the famous *Oakes*¹⁵³ decision in 1986. The relevant passage from the judgment of Dickson CJ merits reproduction in full:¹⁵⁴

To establish that a limit is reasonable and demonstrably justified... two central criteria must be satisfied. **First**, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.

...

Second, once a sufficiently significant objective is recognized, then the party... must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form of proportionality test’... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. **First**, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. **Second**, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question... **Third**, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.

Since Dickson CJ split the enquiry in two parts i.e. i) is the objective of sufficient importance and ii) the three-part proportionality test, some jurists understand the Canadian test as a two-part enquiry,¹⁵⁵ while some others treat it as a three-part proportionality test. The three-part

¹⁵² See generally, Grimm (n 134).

¹⁵³ *R v Oakes* (1986) 1 SCR 103.

¹⁵⁴ *ibid* [69], [70] (Dickson CJ) (emphasis added).

¹⁵⁵ A reference to the two-step approach is made by Réaume. See, Denise Réaume, ‘Limitations on Constitutional Rights: The Logic of Proportionality’ (2009) Oxford Legal Research Paper Series No 26/2009, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463853> accessed 15 October 2019. See also, the majority judgment in *RJR Macdonald Inc v Canada (AG)* (1995) 3 SCR 199 (McLachlin J).

proportionality enquiry is said to subsume the three stages of ‘suitability’ (or ‘rational connection’), ‘minimal impairment’ and ‘balancing’.¹⁵⁶

The other variant of proportionality, the German version, is usually understood as a four-part enquiry which consists of the following questions:¹⁵⁷

- i) is the measure that is infringing the right serving a legitimate aim? (legitimate goal or objective stage);
- ii) is there a rational connection between the objective and the infringing act i.e. are the means suitable to achieve the objective? (rational nexus or suitability stage);
- iii) can another, less intrusive yet equally effective measure be used to achieve the objective? (necessity stage);
- iv) is the infringement of the right too great in comparison to the objective sought to be achieved i.e. does the measure have a disproportionate impact on the right-holder? (balancing stage). This is often called proportionality in the narrow sense or proportionality *stricto sensu*.¹⁵⁸

In my view, whether proportionality is understood as a two-party enquiry or a four-party enquiry (or indeed a three-party enquiry) is a terminological rather than substantive issue. As Möller explains,¹⁵⁹

Scholars writing on proportionality... are inconsistent as to whether the first stage of the test (legitimate goal) is a part of the test or a preliminary step. Accordingly, some scholars speak of a three-stage, others of a four-stage test; and what some refer to as,

¹⁵⁶ See David Bilchitz, ‘Necessity and Proportionality: Towards a Balanced Approach?’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 41–42; David M Beatty, *The Ultimate Rule of Law* (OUP 2004) 163.

¹⁵⁷ See generally, Grimm (n 134). See also, Möller, ‘Constructing the Proportionality Test’ (n 150) 33; Endicott (n 136) 313. Many authors treat the Canadian test as a four-pronged test too. See for example, Sweet and Mathews (n 144) 31; Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 71–72.

¹⁵⁸ See Aharon Barak, ‘Proportionality and Principled Balancing’ (2010) 4 *Law and Ethics of Human Rights* 1, 6.

¹⁵⁹ Möller, ‘Constructing the Proportionality Test’ (n 150) 33.

for example, the ‘second’ stage of the test is called the ‘third’ stage by others. It is important to keep this in mind to avoid confusion.

Returning to the German and Canadian models, commentators have argued that both these formulations of the proportionality test are similar in essence and are trying to reach substantially similar results.¹⁶⁰ However, predictably, there are subtle differences in the manner in which these tests have been applied by the German and Canadian Courts. Those differences have been explored in great detail in the academic literature, in particular, by Grimm.¹⁶¹ This chapter will not attempt to set them out in detail save to point out that the differences are perhaps the starkest in relation to the fourth balancing stage of the enquiry.

In Grimm’s words, at this stage, ‘the German Court argues at length, whereas the Canadian Court mostly presents a “résumé of previous analysis”’.¹⁶² The balancing exercise undertaken by the German model at this stage departs from its means-end analysis and moves towards a value-laden process. Grimm notes that perhaps ‘[t]he outside observer gets the impression that the Canadian Supreme Court avoids the third [balancing] step out of fear that a court might make policy decisions at this stage rather than legal decisions’.¹⁶³ However, ‘in practice, the [Canadian] Court’s dealing with the second [minimal impairment] step looks much more value laden than that

¹⁶⁰ See Grimm (n 134) 384.

¹⁶¹ *ibid* 387ff. Furthermore, Grimm also points here that the first few stages of both models require a means-end comparison, whereas the last (balancing) stage is a cost-benefit analysis which requires the balancing of the fundamental right infringed with the measure in whose interest the right is limited.

¹⁶² *ibid* 393.

¹⁶³ *ibid* 394.

of the German Court'.¹⁶⁴ The distinction between the German and Canadian versions of proportionality was also recently pointed out by the Supreme Court of India in *Bhasin*.¹⁶⁵

3. Criticisms of Proportionality

The German version is the more popular variant of proportionality.¹⁶⁶ However, the German model is not bereft of flaws. In particular, the balancing stage of the test is the one that is most often criticised. Authors have argued that the balancing done by the Courts is carried out in an impressionistic, ad hoc and unprincipled manner.¹⁶⁷ It is a policy-laden process which requires the Court to exercise value-judgments which can sometimes lead 'the Court to leave the legal realm and turn to political considerations'.¹⁶⁸ The Court is often sitting in review of legislative choices.¹⁶⁹ Finally, the balancing limb of proportionality is often also criticised for weighing incommensurable considerations against each other.¹⁷⁰

Nevertheless, many scholars have defended the balancing stage of proportionality against these criticisms. For instance, Grimm argues that,¹⁷¹

¹⁶⁴ *ibid* 395.

¹⁶⁵ *Bhasin* (n 138) [58].

¹⁶⁶ See generally, Möller, 'Constructing the Proportionality Test' (n 150).

¹⁶⁷ Möller engages with the impressionistic and unprincipled nature of balancing: Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 727; Möller, 'Constructing the Proportionality Test' (n 150) 32. See also, von Bernstorff (n 139).

¹⁶⁸ Grimm (n 134) 395.

¹⁶⁹ von Bernstorff (n 139) 68.

¹⁷⁰ This issue is explained succinctly in Endicott (n 136) 315–19.

¹⁷¹ Grimm (n 134) 395–96.

without the third [balancing] step the proportionality test, properly understood, would be unable to fulfil its purpose, namely, to give full effect to fundamental rights. This is so because the impact of an infringement of a fundamental right can be fully assessed only in the third step. The two previous steps can only reveal the failure of a law to reach its objective; they cannot evaluate the relative weight of the objective of the law, on the one hand, and the fundamental right, on the other, in the context of the legislation under review.

The literature on the criticisms of proportionality is voluminous. It is unnecessary for this chapter to engage with that material in any detail. By way of example, though, Möller enunciates a few other difficulties with proportionality:¹⁷²

There exists a number of problematic issues with regard to this (or other forms of) proportionality inquiry. One, widely neglected, question is about the legitimate goal stage: what does it mean to speak of the goal of a policy, and what does it mean to require a goal to be legitimate? With regard to the suitability and necessity stages, some of the open issues are how to deal with empirical uncertainty: should this lead to wide-ranging deference to the elected branches? At the balancing stage, we have to ask the question of what it means to say that a right is ‘balanced’ against a competing right or public interest.

Although these considerations are not the topic of this thesis, they provide important background against which proportionality review in India may be analysed.

4. The Application of Proportionality in India Before *Puttaswamy I* and *Puttaswamy II*

The advent of the modern approach to proportionality in India commenced with the decisions in *Puttaswamy I* and *Puttaswamy II*. Those decisions are examined in chapter 6. Before turning to those decisions, the remainder of this chapter undertakes two tasks: (i) it examines (in this section) the historical application of proportionality in India. It will be demonstrated below that such application of proportionality was largely confined to non-privacy cases; and (ii) it considers (in section E below) the standard of review that applied to privacy cases before *Puttaswamy I* and

¹⁷² Möller, ‘Constructing the Proportionality Test’ (n 150) 33–34.

Puttaswamy II. It will be shown that, before *Puttaswamy I* and *Puttaswamy II*, the applicable standard of review in privacy cases depended on the kind of privacy that was under consideration.

The focus in this section is on the application of proportionality in India before *Puttaswamy I* and *Puttaswamy II*. In particular, it asks, what did proportionality mean in India before these modern cases were decided?

I start this inquiry from the Constituent Assembly Debates. As highlighted in section B above, members of the Constituent Assembly used expressions such as ‘proper’ and ‘necessary’ to connote justifiable restrictions on fundamental rights.¹⁷³ On one view, therefore, there are hints of proportionality in the Constituent Assembly Debates. Indeed, Narayan and Sindhu argue that, of all the prevailing standards of judicial review in India, proportionality is the one that best reflects the framers’ intent.¹⁷⁴

In the context of proportionality, there is also an important debate about whether it is a *distinct* standard from other tests such as reasonableness, rationality and strict scrutiny. In the academic literature, this debate is often framed using the terminology of bifurcation and unification.¹⁷⁵ Unification argues that proportionality and another standard of judicial review (for example, reasonableness) are, in substance, one and the same.¹⁷⁶ In contrast, bifurcation theories seek to distinguish proportionality from other standards of judicial review.¹⁷⁷ By way of example,

¹⁷³ See text to n 37 above.

¹⁷⁴ Narayan and Sindhu (n 35) 85.

¹⁷⁵ See Marsons (n 2) 26–27.

¹⁷⁶ Varuhas uses the term ‘unification’ to refer to the position of theorists who argue that proportionality and common law of judicial review (i.e. *Wednesbury*) should be unified: Varuhas (n 17). See also, Marsons (n 2).

¹⁷⁷ Marsons (n 2) 26.

there is support, both among commentators and in the case-law, for unifying ‘rationality review’ and ‘proportionality review’ in the context of *administrative* law on the one hand,¹⁷⁸ and for unifying ‘reasonableness review’ and ‘proportionality review’ in the context of *constitutional* law on the other.¹⁷⁹ The debate about rationality review was considered in section A above. In this section, the focus will be on the interplay between reasonableness review and proportionality review.

To understand this debate, the Supreme Court’s decision in *VG Row*¹⁸⁰ in 1952 is crucial. As mentioned above, many commentators consider *VG Row* to be the first case which sowed the seeds for proportionality review in India.¹⁸¹ In that case, Sastri CJ said:¹⁸²

the test of reasonableness, where ever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the **disproportion** of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

As highlighted above, some authors have argued that the language of ‘disproportion’ in this passage is a shorthand for proportionality. In fact, many subsequent decisions have also adopted

¹⁷⁸ See Abhinav Chandrachud (n 2); *State of UP v Sheo Shanker Lal Srivastava* (2006) 3 SCC 276 [19]; *Indian Airlines Ltd v Prabha Kanan* (2006) 11 SCC 67 [22]; *Hazarilal* (n 22) [12].

¹⁷⁹ See David M Beatty, *The Ultimate Rule of Law* (OUP 2004) 163; Bhatia, ‘Modern Dental College vs State of MP’ (n 51); Dinesh (n 51); *Modern Dental College* (n 53) [58]; *Puttaswamy II* (n 1) [647] (Chandrachud J).

¹⁸⁰ *VG Row* (n 49).

¹⁸¹ Beatty (n 179) 163; Bhatia, ‘Modern Dental College vs State of MP’ (n 51); Dinesh (n 51).

¹⁸² *VG Row* (n 49) [16] (emphasis added).

this view.¹⁸³ The view taken in this thesis, however, is that this places more weight on the word ‘disproportion’ than it can reasonably bear.

After the decision in *VG Row*, the next significant development in relation to proportionality in India came 45 years later in *Ganayutham*.¹⁸⁴ This is not to say, however, that the Supreme Court never discussed proportionality during all these years. Abhinav Chandrachud identifies a number of instances when the Court discussed ‘proportionality’, especially in many public sector employment cases.¹⁸⁵ However, he concludes that although the term ‘proportionality’ is used in all these cases, it was really the *Wednesbury* unreasonableness test that is ‘masquerading as proportionality’.¹⁸⁶ Although this argument is interesting, it has been overtaken by subsequent developments. It will be demonstrated that the Supreme Court, over the period of the last two decades especially, has developed a more nuanced understanding of proportionality review. Thus, the modern conception of proportionality in India is, indisputably, distinct from *Wednesbury* unreasonableness.

In *Ganayutham*, a two-judge bench of the Supreme Court considered whether it was within the scope of the decision-making authority of an Inquiry Officer to withhold the gratuity of a government employee. Notably, here, the Court was called upon to play the role of a secondary reviewer, not one of primary reviewer. It follows, as discussed above, that the applicable standard

¹⁸³ See *Om Kumar* (n 13) [27]; *Modern Dental College* (n 53) [58]; *Puttaswamy II* (n 1) [647] (Chandrachud J).

¹⁸⁴ *Ganayutham* (n 2).

¹⁸⁵ See generally, Abhinav Chandrachud (n 2).

¹⁸⁶ *ibid* 207.

should have been rationality. However, undertaking a brief discussion of the doctrine of proportionality in the context of English law, the Court summarised the position as follows:¹⁸⁷

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on *Wednesbury* and CCSU principles...

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of ‘proportionality’ and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.

Thus, the Court left open the question whether proportionality would apply to cases of primary review. It is also interesting that the Court alluded to the notion that it could have a primary role to play only in the context of fundamental freedoms under Articles 19 or 21, but did not mention Article 14 in this context. That is an issue that I return to below.¹⁸⁸

Perhaps the most significant development in relation to the doctrine of proportionality in India came in the year 2000 when a two-judge bench delivered the judgment in *Om Kumar*.¹⁸⁹ On that occasion the Court was called upon to consider the quantum of punishment handed down to certain officials of the Delhi Development Authority by an administrator. Although in its eventual decision the Court was unequivocal in concluding that this was an instance of secondary review (where *Wednesbury* principles would apply),¹⁹⁰ it undertook a detailed discussion regarding

¹⁸⁷ *Ganayutham* (n 2) [28](4)(a) and (b) (emphasis added).

¹⁸⁸ See text to n 198 below.

¹⁸⁹ *Om Kumar* (n 13).

¹⁹⁰ *ibid* [72].

proportionality review and its interface with rationality review. On proportionality, the Court said:¹⁹¹

The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of ‘proportionality’ to legislative action since 1950, as stated in detail below.

There are two main takeaways from the above paragraph: i) proportionality review applies to legislative as well as administrative actions; ii) the passage from *VG Row* that was referred to earlier is interpreted as having affirmed proportionality.

In a subsequent passage, the Court then expanded on the understanding of proportionality review as follows:¹⁹²

By ‘proportionality’, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority ‘maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve’. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court.

Here the Court suggested that the proportionality test comprised of at least the following two elements: i) is the State using the least restrictive means to achieve its purpose? ii) is there a proper balance between the rights or liberties on the one hand and the purpose sought to be achieved on the other? These are the third (necessity) and fourth (balancing) limbs of the proportionality test.

¹⁹¹ *ibid* [27] (emphasis added).

¹⁹² *ibid* [28] (emphasis added).

This was one of the first cases that espoused a clear understanding of these limbs of proportionality in India.

The Court then went on to discuss proportionality in the context of the fundamental rights chapter of the Indian Constitution. In relation to Article 19, the Court said,¹⁹³

[w]hile dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution... this Court had... to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices... ‘Reasonable restrictions’ under Article 19(2) to (6) could be imposed on these freedoms only by legislation and Courts had occasion throughout to consider the proportionality of the restrictions.

Then, the Court returned to the decision in *VG Row* and discussed the application of proportionality to Articles 21 and 14.¹⁹⁴ The Court went so far as to state that ‘the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of “proportionality” has never been doubted in India. This is called “primary” review by the Courts of the validity of legislation which offended fundamental freedoms’.¹⁹⁵

On the application of proportionality review to administrative actions, the Court held:¹⁹⁶

Administrative action in India affecting fundamental freedoms has always been tested on the anvil of ‘proportionality’ in the last fifty years even though it has not been expressly stated that the principle that is applied is the ‘proportionality’ principle... There are hundreds of such cases dealt with by our Courts. In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the Courts as a primary reviewing authority and not on

¹⁹³ *ibid* [30].

¹⁹⁴ *ibid* [30]–[32].

¹⁹⁵ *ibid* [35].

¹⁹⁶ *ibid* [54].

the basis of *Wednesbury* principles. It may be that the Courts did not call this proportionality but it really was.

With respect, this formulation seems unpersuasive. It is unconvincing to suggest that Indian Courts, thus far, had been applying proportionality without expressly saying so. It may be closer to the truth to admit that the Courts were only beginning to develop a clearer understanding of the doctrine at this stage and that they were learning from foreign jurisprudence. In fact, authors like Chintan Chandrachud have argued that, in several instances, although the Indian Supreme Court has used the term ‘proportionality’ review, it has applied only some components of the test instead of each of the four components.¹⁹⁷

The Court in *Om Kumar* made another interesting observation about an arbitrariness challenge to administrative action under Article 14:¹⁹⁸

[W]hen administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as ‘arbitrary’ under Article 14, the principle of secondary review based on *Wednesbury* principles applies.

This is a crucial insight because it clears up the Article 14 conundrum that was left unanswered in *Ganayutham*.

The decision in *Om Kumar* had a significant impact. In the years that followed this decision, it was cited with approval in numerous authorities.¹⁹⁹ Indeed, some decisions, taking guidance

¹⁹⁷ See generally, Chintan Chandrachud, ‘Proportionality, Judicial Reasoning and the Indian Supreme Court’ (2017) 1 *Anti-Discrimination Law Review* 87.

¹⁹⁸ *Om Kumar* (n 13) [68].

¹⁹⁹ See *Teri Oat Estates v Union Territory, Chandigarh* (2004) 2 SCC 130 [45], [49]–[50]; *Gohil Vishvaraj Hanubhai v State of Gujarat* (2017) 13 SCC 621 [26]; *Puttaswamy II* (n 1) [650] (Chandrachud J), [1056] (Bhushan J).

from English cases such as *Huang*²⁰⁰ and *Daly*²⁰¹ went so far as to suggest that the ‘Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality’.²⁰² These gave teeth to the argument that, in substance, rationality and proportionality had been unified.

However, a two-judge bench decision in 2010 clarified the position. In *Shyam Kumar*²⁰³ the Court adjudicated the constitutional validity of an order issued by the Railway Board to conduct a re-examination for recruitment due to certain malpractices that occurred during the first test. The Court found no infirmity with the Board’s decision. However, it made an attempt to distinguish between the *Wednesbury* test and proportionality review:²⁰⁴

Wednesbury principle of unreasonableness as such has not been replaced by the doctrine of *proportionality* though that test is being applied more and more when violation of human rights is alleged.

The Court then made an attempt to distinguish between the two tests, pointing out that proportionality is a more precise and fastidious test.²⁰⁵ It also conceded that, ‘there has been an

²⁰⁰ *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105, [2005] 3 WLR 488 [44]: ‘may be apt to require the adjudicator to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merits judgment, which is yet more than *Daly* requires on a judicial review where the court has to decide a proportionality issue’. Sinha J in *Sheo Shanker* relied on *Huang* to conclude that *Wednesbury* principles were giving way to proportionality (*Sheo Shanker* (n 178) [19]).

²⁰¹ *Daly* (n 16) [28]: Lord Steyn states that, ‘[i]t is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review’. Indian judges have interpreted Lord Steyn’s speech as indicative that proportionality is more intensive than the *Wednesbury* standard, and also as a first step towards proportionality review which the Court eventually adopted in *Huang*. See, *Sheo Shanker* (n 178) [19] (Sinha J).

²⁰² *Hazarilal* (n 22) [12]. See also, *Indian Airlines* (n 178) [22]; *Sheo Shanker* (n 178) [19].

²⁰³ *Shyam Kumar* (n 23).

²⁰⁴ *ibid* [29] (emphasis in original).

²⁰⁵ *ibid* [30].

overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula'.²⁰⁶

However, the Court's own understanding of proportionality, here, was rather simplistic. It noted the following:²⁰⁷

Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review ha[ve] to examine whether [the] decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent [the] court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken.

It appears from this passage that the Court did not have the four-prong test in mind. In this passage, the Court seems to be discussing proportionality in the abstract. Moreover, it leaves open the question: between what components must the equilibrium be achieved? The Court went on to make the following observation:²⁰⁸

Courts have to develop an infeasible and principled approach to *proportionality*. Till that is done there will always be an overlapping between the traditional grounds of review and the principle of *proportionality* and the cases would continue to be decided in the same manner whichever principle is adopted. *Proportionality* as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker.

It was finally in 2016, in *Modern Dental College*,²⁰⁹ that the Supreme Court first adopted a principled approach to proportionality. Here, a five-judge bench was called upon to adjudicate the

²⁰⁶ *ibid.*

²⁰⁷ *ibid* [31] (emphasis in original).

²⁰⁸ *ibid* [33] (emphasis in original).

²⁰⁹ *Modern Dental College* (n 53).

constitutional validity of a Common Entrance Test by the State government of Madhya Pradesh for admission to private medical and dental colleges. The private colleges argued that this violated their autonomy and right to carry on occupation under Article 19(1)(g) of the Indian Constitution. The Court rejected this contention on the ground that profiteering is not a protected goal for ‘noble’ professions such as medicine.²¹⁰ As Bhatia articulates it, ‘a better way of understanding the issue (although the Court doesn’t put it this way) is that the prevention of profiteering is a weighty reason in support of the reasonableness of the restrictions placed upon the Article 19(1)(g) right’.²¹¹

More importantly for the present purposes, the Court undertook a discussion of proportionality in the context of reasonable restrictions. In particular, it said the following:²¹²

while examining as to whether the impugned provisions of the statute and Rules amount to reasonable restrictions... the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as ‘*Doctrine of Proportionality*’. Jurisprudentially, ‘*proportionality*’ can be defined as the set of Rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible.

This passage is important for two reasons. First, it seems to suggest that, to determine whether the impugned provisions are reasonable restrictions, the doctrine of proportionality ought to be

²¹⁰ *ibid* [30].

²¹¹ Bhatia, ‘Modern Dental College vs State of MP’ (n 51).

²¹² *Modern Dental College* (n 53) [53] (emphasis in original).

applied. In effect, this equates reasonableness with proportionality.²¹³ Second, it provides support for the application of the fourth limb of proportionality—the balancing limb—in India.²¹⁴

This is an important development because it appears that, by this stage, Indian Courts began to have a firm grasp of the doctrine of proportionality. *Modern Dental College* is also one of the first cases that discussed proportionality in the context of constitutional adjudication. Indeed, it exhibited a sophisticated understanding of the doctrine.

Connecting proportionality review to reasonableness review more emphatically, the Court in *Modern Dental College* also held,²¹⁵

We may unhesitatingly remark that this Doctrine of Proportionality, explained hereinabove... is enshrined in Article 19 itself... While defining as to what constitutes a reasonable restriction, this Court in plethora of judgments has held that the expression ‘*reasonable restriction*’ seeks to strike a balance between the freedom guaranteed by... Article 19 and the social control permitted by any of the Clauses (2) to (6). It is held that the expression ‘*reasonable*’ connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object.

As Bhatia explains, what the Court in *Modern Dental College* failed to do was apply the proportionality test to the facts before it.²¹⁶ It understood the test accurately, but in its application of the test the bench merely stated that, ‘[t]he extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to

²¹³ Bhatia, ‘*Modern Dental College vs State of MP*’ (n 51).

²¹⁴ The Court also went on to cite a passage from Chief Justice Aharon Barak which unmistakably elucidates its understanding of proportionality review: see *Modern Dental College* (n 53) [53] (emphasis in original) citing Barak, *Proportionality: Constitutional Rights and Their Limitation* (n 137) 3.

²¹⁵ *Modern Dental College* (n 53) [58] (emphasis in original).

²¹⁶ Bhatia, ‘*Modern Dental College vs State of MP*’ (n 51).

“restrictions” on the right of the Appellants to carry on their “occupation”, are clearly “reasonable” and satisfied the test of proportionality’.²¹⁷

Thus far, this section has focused on the application of proportionality in India generally, without focusing exclusively on the privacy cases. The purpose of this exercise has been to outline, in general terms, the application of the test of proportionality in India before *Puttaswamy I* and *Puttaswamy II* were decided. It is striking to note that, before these modern decisions, proportionality had rarely been applied to privacy cases in India. The modern Indian approach to the application of proportionality in privacy cases is considered in chapter 6.

E. JUDICIAL REVIEW IN PRIVACY CASES BEFORE *PUTTASWAMY I* AND *II*

Before examining the modern privacy cases on proportionality in India it is necessary to consider, briefly, the historic caselaw on the topic. This is the task that this section will undertake. It will demonstrate that, before the application of proportionality to privacy cases in India, Indian Courts oscillated between two different standards of review in its privacy adjudication: the traditional reasonableness threshold and the more rigorous strict scrutiny test. In particular, the cases suggest that physical and informational privacy cases were judged by reference to reasonableness. By contrast, as a general rule, decisional privacy cases were tested by reference to the higher threshold of strict scrutiny. Inevitably, there were cases where physical, informational and decisional privacy overlapped. In those cases, the Courts appear to have applied the higher of the two standards.

²¹⁷ *Modern Dental College* (n 53) [61] (emphasis in original).

1. Physical Privacy Cases

Consider the Supreme Court's decision in *Govind*.²¹⁸ The relevant background was explained in chapter 1 and earlier in this chapter.²¹⁹ Part of the difficulty with this case is its ambiguous reasoning. Although this was a 'physical privacy' case, the Court adopted the 'compelling state interest' standard.²²⁰ However, one must be circumspect about taking *Govind* as authority for that proposition. For one, it does not distinguish clearly, the 'compelling state interest' standard from the 'reasonableness' test. Consider the following passage:²²¹

There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior... the question would be whether a state interest is of such paramount importance as would justify an infringement of the right.

This passage affirms the higher 'compelling state interest' standard. However, the Court appears to be inconsistent in its stance. This is clear from the fact that, in subsequent passages, the Court reverted to the 'reasonableness' threshold:²²²

Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual... shall be free from official interference except where a reasonable basis for intrusion exists.

²¹⁸ *Govind* (n 78).

²¹⁹ See text to n 83 above and text to n 38 in ch 1 of this thesis.

²²⁰ *Govind* (n 78) [22], [33].

²²¹ *ibid* [22] (emphasis added).

²²² *ibid* [25] (emphasis added).

Indeed, *Govind* made a laudable contribution in introducing the ‘compelling state interest’ standard to privacy jurisprudence in India. It is submitted however, that the decision in *Govind* is internally inconsistent.

In *Govind*, the Court also considered the method used by the State to achieve its objective. Here again, *Govind* demonstrates inconsistency. In this respect too, the Court oscillates between the higher ‘narrow-tailoring’ threshold and the lower ‘reasonableness’ standard. On the one hand, the said that was necessary ‘to narrow down the scope for play of the two Regulations’.²²³ On the other, in some other parts of its reasoning, the Court affirmed reasonableness.²²⁴ In sum, the Court in *Govind* muddled two differing thresholds. Thus, it does not offer a clear view as to whether the applicable standard is reasonableness or strict scrutiny.

*Malak Singh*²²⁵ was another physical privacy case. As explained in section B above, in respect of both the underlying state interest as well as on the methodology of surveillance involved, the Court adopted the reasonableness test in that case.²²⁶

*Nisar*²²⁷ was another physical privacy case. It concerned a search and seizure under the Narcotic Drugs and Psychotropic Substances Act 1985. This legislation prohibits the use of dangerous drugs: a reasonable and legitimate aim. However, it was the executive act of carrying out a search and seizure that was challenged. Therefore, the Court characterised the objective

²²³ *ibid* [30] (emphasis added).

²²⁴ *ibid* [34] (emphasis added).

²²⁵ *Malak Singh* (n 63).

²²⁶ *ibid* [6], [9].

²²⁷ *Directorate of Revenue v Mohammed Nisar Holia* (2008) 2 SCC 370.

behind the impugned action as ‘enforcement of law’. It said, ‘[a]n interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to’.²²⁸ However, the Court noted some procedural irregularities in the search and seizure. On this basis, it said:²²⁹

An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones.

Finally, consider *Metrani*.²³⁰ As explained above, the Court here was concerned with search and seizures conducted under the Income Tax Act 1961. *Metrani* is perhaps better understood as an overlap case. This is because the complaint there did not stop with invasion of physical space. It also concerned information collection by the authorities. The Court held that the state interests involved were reasonable.²³¹ Notably, the Court did not require that the state interest be ‘compelling’. There is also some support in *Metrani* for the view that the infraction should not be unnecessary, nor extend for a prolonged period of time. This is similar to asking whether the state action uses a methodology ‘comparable’ to the state interest sought to be achieved. Consider this passage for instance:²³²

Section 132... provides that the money, bullion or the books of account... should not be retained unnecessarily and that the provisional assessment made... for the purpose of retention of the books is passed within a specified time in accordance with law.

²²⁸ *ibid* [14].

²²⁹ *ibid* (emphasis added).

²³⁰ *Metrani* (n 67).

²³¹ *ibid* [15].

²³² *ibid* (emphasis added).

The cases considered above suggest that, historically, Indian courts tested physical privacy infractions by reference to the conventional reasonableness analysis.

2. Informational Privacy Cases

The Indian Supreme Court has dealt with informational privacy in three well-known cases where investigatory telephone-tapping was challenged. These cases generally involve the unauthorised *extraction* of personal information. As shown below, these cases employed the standard of reasonableness.

*Malkani*²³³ was the first among these cases. The impugned executive act in *Malkani* was meant to prevent corruption and to uphold public order. This is a ‘reasonable’ state interest. Consequently, the act was held valid. Notably, the Court did not insist that the executive action must serve a ‘compelling’ state objective.

PUCL was another telephone-tapping case.²³⁴ The court held that interception of telephonic communications was only permissible in limited circumstances such as the ‘occurrence of a public emergency’ or ‘in the interest of public safety’.²³⁵ Importantly, the judgment makes no mention of ‘compelling state interest’. The standard consistently employed is that of reasonableness.

Consider now, a third telephone-tapping case: *Bharat Shah*.²³⁶ In this case provisions of the Maharashtra Control of Organised Crime Act 1999, which permitted interception of telephonic

²³³ *RM Malkani v State of Maharashtra* AIR 1973 SC 157.

²³⁴ *People’s Union of Civil Liberties (PUCL) v Union of India* AIR 1997 SC 568.

²³⁵ *ibid* [28].

²³⁶ *Bharat Shah* (n 70).

communication, were challenged. The reasoning of the Court was two-fold. The first aspect of the analysis concerned the legitimacy of the reason for restricting the right, and the second, the adequacy of procedural safeguards.

The Court noted that interception is justified ‘only if it is intended to prevent the commission of an organised crime or... to collect the evidence to the commission of such an organized crime’.²³⁷ The legitimacy of such interceptions was justified under the Act as ‘an indispensable aid to law enforcement and the administration of justice’.²³⁸ This is in line with the ‘reasonableness’ standard.

As regards procedural protections, unlike *PUCL*, in *Bharat Shah* the legislation already prescribed procedural safeguards. The Court’s decision provides some support for the view that these procedural safeguards were ‘reasonable’:²³⁹

[The right to privacy] can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable.

As explained in chapter 3, ‘informational privacy’ also affords protection against third party recipients of information. Two Supreme Court decisions affirm this view. The first case is the Supreme Court’s decision in *Canara Bank*.²⁴⁰ As explained in detail above, that case was

²³⁷ *ibid* [34].

²³⁸ *ibid* [7].

²³⁹ *ibid* [44].

²⁴⁰ *Canara Bank* (n 71).

concerned with the validity of a state amendment to the Stamp Act. In determining that issue, the Court applied the conventional reasonableness analysis.

The same is true of *Jethmalani*.²⁴¹ Here again, the privacy complaint turned on unauthorised information being dissipated to third parties. This case concerned the disclosure by the Indian Government of information regarding Liechtenstein bank accounts held by Indian citizens. The Court noted that there may be two circumstances when such disclosure may satisfy this threshold. First, when the information is intended to help the petitioners conduct their case.²⁴² The second justification concerns the right of the citizens to hold the government to account. Some support for this can be found in the following lines — ‘citizens, inter-alia, are ever vigilant about the functioning of the State in order to protect the constitutional project’.²⁴³ Both justifications appear to be ‘reasonable’.

The Court then considered whether the net of disclosure had been cast more widely than was reasonably necessary. It was held that only information belonging to certain class of persons should be disclosed. For instance, disclosure of information relating to persons against whom there are pending proceedings was considered permissible. In contrast, ‘[t]he revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy’.²⁴⁴ This evidently dovetails with the ‘reasonable nexus’ standard.

²⁴¹ *Jethmalani* (n 72).

²⁴² *ibid* [66].

²⁴³ *ibid* [73].

²⁴⁴ *ibid* [77].

In sum, the ‘informational privacy’ cases examined above may be seen to fall under two heads: cases where the complaint concerned investigatory telephone-tapping and cases that concerned disclosure to third parties. In both categories, Courts had consistently adopted reasonableness as the standard for judicial review.

3. Decisional Privacy Cases

This section will show that pre-*Puttaswamy I* and *Puttaswamy II*, when Indian Courts had occasion to consider decisional privacy, they applied the higher standard of strict scrutiny to such cases.

One of the earliest decisions to consider ‘decisional privacy’ was *Sareetha*.²⁴⁵ In that case, the constitutional validity of a section that permitted a spouse to seek an order for restitution of conjugal rights was challenged. In broad terms, the Court provided answers to three questions: was the decision in question fundamental enough to warrant protection? Did the impugned legislation advance a legitimate state interest? Was the intrusion complained of excessive in comparison to the objective sought to be achieved?

On the first question, the Court held that a woman’s choice regarding a matter that ‘so intimately concerns her body and which is so vital for her life’²⁴⁶ is ‘personal’. What is more relevant for the present purposes is the Court’s analysis of whether the impugned provision advanced a legitimate state interest. As to this, the Court relied on the ‘compelling state interest’ standard. The Court concluded that:²⁴⁷

²⁴⁵ *Sareetha* (n 79).

²⁴⁶ *ibid* [19].

²⁴⁷ *ibid* [29].

It is therefore legitimate to conclude that there are no overwhelming state interests that would justify the sacrificing of the individual's precious constitutional right to privacy.

It is likely that the objective underlying this provision could have been found to be lacking even under the 'reasonableness' threshold. Therefore, it is significant that the Court chose to rely on the higher standard of 'overwhelming state interest'. This appears to be an affirmation of the notion that a higher standard of scrutiny is apposite for 'decisional privacy'.

Regrettably, the progressive judgment in *Sareetha* was overruled in *Saroj Rani*.²⁴⁸ There, the impugned section was considered as serving a 'social purpose' — as an 'aid to the prevention of break-up of marriage'.²⁴⁹ This was considered a legitimate state interest. Contrary to the view in *Sareetha* that the impugned section was 'excessive', the Supreme Court held that '[t]here are sufficient safeguards in Section 9 to prevent it from being a tyranny'.²⁵⁰ After the unfortunate decision in *Saroj Rani*, the Indian Supreme Court only had occasion to consider 'decisional privacy' 25 years later, in *Anuj Garg*.²⁵¹ As explained above, in that case, the Court applied the strict scrutiny standard to decide whether a prohibition of employment of women (and men under 25 years) minors in premises selling liquor was constitutional.

Another important 'decisional privacy' case is the Supreme Court's decision in *Suchita Srivastava*.²⁵² This case concerned the choice of a mentally disabled woman to not undergo an abortion. On an application by the State administration, the High Court had directed the

²⁴⁸ *Saroj Rani* (n 92).

²⁴⁹ *ibid* [17].

²⁵⁰ *ibid* [15].

²⁵¹ *Anuj Garg* (n 78).

²⁵² *Suchita Srivastava* (n 119).

termination of her pregnancy. However, reversing this order, the Supreme Court reasoned that the woman's willingness, despite her circumstances, to bear the child must be respected:²⁵³

Her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter.

Clearly, apprehensions regarding her pregnancy are not unreasonable. She may not be able to assume all the responsibilities of motherhood, given her mental state. This can prove detrimental to the child. Further, she was an orphan with no financial stability or support. The Supreme Court however considered all these concerns insufficient to infringe her *choice*. Evidently, the Court was looking for a stronger justification.

Additional support for this can be found in subsequent passages of the decision where it was noted that in India, abortion is permissible only if specific statutory conditions are satisfied. Citing the legislative intent of having a qualified right to abortion, the Court said,²⁵⁴

There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty'... under Article 21... The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices.

Thus far, the reasoning in *Suchita Srivastava* indicates that the Court was looking for a justification beyond 'reasonableness'. The Court finally gave teeth to the higher 'compelling state interest' threshold when it noted that 'in the case of pregnant women there is also a "compelling state interest" in protecting the life of the prospective child'.²⁵⁵ This suggests that, infringing a woman's

²⁵³ *ibid* [10].

²⁵⁴ *ibid* [11].

²⁵⁵ *ibid*.

reproductive choice would only be permissible if there was a countervailing ‘compelling state interest’.

4. Notable Overlaps

This section considers some historical cases that have considered overlaps between physical, informational and decisional privacy. In these cases, Courts have usually applied the higher among the applicable standards of review. The Supreme Court’s decision in *Selvi*²⁵⁶ is a classic example.

In *Selvi*, the question before the Supreme Court was whether involuntary administration of narco-analysis, polygraph and brain mapping infringed, inter alia, the right to privacy. The Court held that these tests were constitutionally impermissible. The Court’s reasoning in reaching that conclusion gives rise to three points.

First, the Court recognised a conceptual separation between physical and mental infractions of privacy.²⁵⁷ This is notable because mental intrusions, such as those occasioned by the impugned techniques, are a combination of a breach of ‘physical’, ‘informational’ and ‘decisional’ privacy.

Second, the Court’s recognised that mental infractions of privacy must be held to a higher standard of review.²⁵⁸

While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses.

²⁵⁶ *Selvi* (n 124).

²⁵⁷ *ibid* [191].

²⁵⁸ *ibid*.

The latter, it was held, is protected by ‘the privacy of one’s mental processes’.²⁵⁹ Since mental infractions combine a breach of physical, informational and decisional privacy, the higher among the applicable standards is determinative.

Third, as explained above, the Court adopted the ‘compelling state interest’ test. The Court identified ‘the need to prevent crimes and expedite investigations or to protect public health or morality’ as examples of ‘compelling state interests’.²⁶⁰

Similarly, *Sharda*²⁶¹ raises an important question of overlap. The dispute arose from the application of a husband to subject his wife to compulsory psychiatric examination. This was intended to provide evidence in support of the husband’s application for divorce. The wife argued that a compulsory medical examination would infringe her privacy. At first blush, *Sharda* seems indistinguishable from *Selvi*. Prima facie, it involved an infringement of ‘physical’ (any compulsory medical examination infringes an individuals’ private space), ‘informational’ (a psychiatric examination involves the extraction of personal information) and ‘decisional’ (it is arguable that one has the right to decide whether one must be subject to a medical examination or not) privacy.

On closer examination however, the seeming breach of ‘decisional privacy’ disappears. As was argued in chapter 3, ‘decisional privacy’ protects ‘self-regarding choices’. The choice of the wife in *Sharda* was not purely self-regarding. In *Sharda*, the only means available for the husband to prove his divorce claim was the wife’s medical examination. Consequently, the wife’s decision

²⁵⁹ *ibid.*

²⁶⁰ *ibid.*

²⁶¹ *Sharda v Dharampal* AIR 2003 SC 3450.

not to subject herself to such examination would directly put at stake, her husband's right to divorce. In other words, the wife's decision in question is not purely 'self-regarding'. There is some support for this reasoning in the judgment:²⁶²

If [wife] avoids such medical examination on the ground that it violates his/her right to privacy... then it may... render the very grounds on which divorce is permissible nugatory... where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has to reconcile these competing interests by balancing the interests involved.

If this analysis is accepted, it leads to the conclusion that *Sharda* should not be treated as a 'decisional privacy' case. The case concerns 'informational' and 'physical' privacy alone. This may be why the Court did not look for a 'compelling state interest'. It sufficed that the husband had a countervailing statutory right. That provides a 'reasonable ground' on which to restrict the wife's Article 21 rights.²⁶³

To conclude this section, the exercise undertaken here was to examine the caselaw before the application of proportionality to the privacy cases in India. As mentioned above, the cases show that the Supreme Court adopted two different standards of review: reasonableness and strict scrutiny. As a general rule, reasonableness appears to have been applied to cases of physical and informational privacy whereas strict scrutiny has been applied to decisional privacy cases.

F. CONCLUSION

It was shown in this chapter that the Indian Supreme Court has grappled with four different standards of judicial review: a) rationality review; b) reasonableness review; c) strict scrutiny; and

²⁶² *ibid* [81].

²⁶³ *ibid*.

d) proportionality. The Court has struggled to provide a clear conceptual delineation between these standards, often conflating them, both in terminology and content. For instance, the Court has sometimes used ‘reasonableness review’ and ‘rationality’ synonymously.²⁶⁴ It has also equated ‘strict scrutiny’ and ‘proportionality’,²⁶⁵ and sometimes even used incoherent language such as ‘Wednesbury principle of proportionality’.²⁶⁶

The attempt in this chapter was to clarify some of this confusion and provide a clear map of the standards of judicial review that apply in India. The content of these standards was elaborated in the sections above and is illustrated in figure 1 (see below).

The following are my conclusions as to the application of the relevant standards of review:

1. In **administrative law** cases, i.e. where judicial review is performed other than by reference to a breach of Part III rights,²⁶⁷ there are two different applicable standards: ‘rationality review’ or ‘proportionality review’.²⁶⁸ (Rationality review here is synonymous with the *Wednesbury* standard of unreasonableness.²⁶⁹)

²⁶⁴ *Sarkar* (n 3) [88] (Aiyar J).

²⁶⁵ *Om Kumar* (n 13) [37]; *Puttaswamy II* (n 1) [480] (Chandrachud J).

²⁶⁶ *Harshad Shantilal Mehta v Custodian and Ors* (1998) 5 SCC 1 [36].

²⁶⁷ Save for arbitrariness under Article 14, as to which see text to n 273 below.

²⁶⁸ *Om Kumar* (n 13) [25]; *Ganayutham* (n 2) [28](4)(a)(b).

²⁶⁹ *Tata Cellular* (n 2) [94]; *Ganayutham* (n 2) [28](2), [28](4)(a). See also, text to n 5 in section A above.

- a. The case law in India suggests that rationality and proportionality are two different standards.²⁷⁰
 - b. Proportionality applies when the Court is performing the function of a primary reviewer²⁷¹ i.e. the Court is itself deciding whether a fundamental right has been infringed.
 - c. Rationality review applies when the Court is sitting in secondary review²⁷² (i.e. the Court is adjudicating whether a decision made by a primary decision-maker is within legal parameters).
 - d. The only exception to this rule is when an administrative action is challenged as being ‘arbitrary’ under Article 14 of the Indian Constitution.²⁷³ Although a fundamental right is engaged in such cases, the *Wednesbury* test will apply.²⁷⁴
2. In **constitutional law** cases (i.e., when a fundamental right is engaged), the Court is involved in primary review. The Supreme Court has applied at least three different standards of review on such occasions: i) ‘reasonableness review’, ii) ‘compelling state interest’ or ‘strict scrutiny’, and iii) ‘proportionality review’.

²⁷⁰ *Om Kumar* (n 13) [50], [51].

²⁷¹ *Ganayutham* (n 2) [28](4)(b); *Om Kumar* (n 13) [50], [51].

²⁷² *Ganayutham* (n 2) [28](4)(a); *Om Kumar* (n 13) [50], [51].

²⁷³ *Om Kumar* (n 13) [67], [68], [71].

²⁷⁴ *ibid.*

- a. Strict scrutiny is employed in certain categories of cases such as those involving ‘expropriatory’ or ‘confiscatory’ statutes, statutes which seek to interfere with the sovereignty and integrity of India or those which are against the constitutional scheme.²⁷⁵ However, many of these categories are broad brush and their application is not easy to discern. The preferable view is that strict scrutiny does not apply to affirmative action cases in India.²⁷⁶
- b. There is now strong support for the view that reasonableness review equates to proportionality.²⁷⁷
- c. It follows that proportionality is now the standard of review that permeates much of the Part III jurisprudence in India.

Figures 1 and 2 below illustrate the content and application of the four standards of review in India.

3. The **privacy cases** that were decided before *Puttaswamy I* and *Puttaswamy II* oscillated between two different standards of review. Physical and informational privacy cases were judged by reference to the conventional reasonableness analysis. By contrast, decisional privacy cases appeared to be tested by reference to the more stringent ‘strict scrutiny’ standard.

²⁷⁵ *Subhash Chandra* (n 112) [43].

²⁷⁶ *Saurabh Chaudri* (n 96) [36]; *Ashok Kumar Thakur* (n 78) [184].

²⁷⁷ *Modern Dental College* (n 53) [58]; *Puttaswamy II* (n 1) [647] (Chandrachud J). See also, *Beatty* (n 179) 163; *Bhatia*, ‘*Modern Dental College vs State of MP*’ (n 51).

Rationality Review	• Illegality • Irrationality i.e. <i>Wednesbury</i> unreasonableness • Procedural Impropriety
Reasonableness Review	• Is the State pursuing a legitimate objective? • Is the State using reasonable means to achieve its objective? • Is the State going further than necessary to achieve this objective?
Strict Scrutiny	• Is the State pursuing a 'compelling' State aim? • Is the State pursuing the least intrusive means of achieving that objective?
Proportionality	• Is the State pursuing a legitimate objective? • Is there a rational nexus between that purpose and the infringing act? • Can another, less intrusive measure be used to achieve the State purpose? • Is the infringement of the right too great in comparison to the public purpose sought to be achieved?

Figure 1: The content of the four standards of judicial review in India.

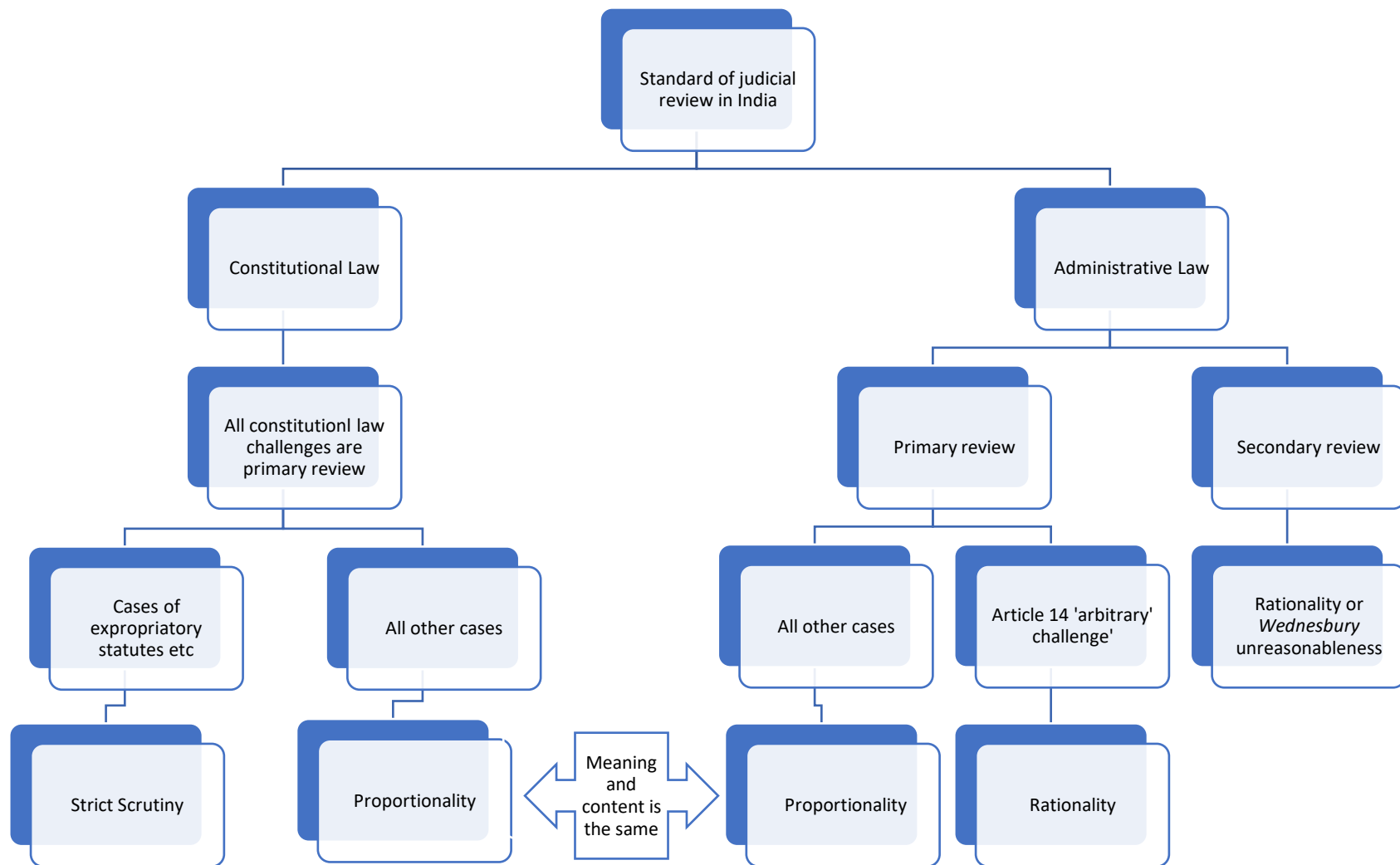


Figure 2: A map to illustrate the standards of judicial review currently applicable in India.

CHAPTER 6

THE MODERN APPROACH TO PROPORTIONALITY IN PRIVACY CASES IN INDIA

The previous chapter demonstrated the standards of judicial review that the Indian Supreme Court has employed thus far. It also attempted to examine the content and scope of those standards. It was also shown that, before the modern caselaw, privacy cases in India were tested by reference to reasonableness (physical and informational privacy) and strict scrutiny (decisional privacy). The aim in this chapter is to analyse the advent of proportionality as the predominant standard for judicial review in privacy cases.

The chapter consists of two sections. **Section A** will examine the adoption of proportionality by the Indian Supreme Court. It will demonstrate that the Supreme Court has adopted a hybrid definition of proportionality. **Section B** will critique the Supreme Court's adoption of proportionality and comment on what this means for future privacy cases.

A. THE MODERN JURISPRUDENCE ON PROPORTIONALITY AND PRIVACY

The modern Indian jurisprudence on the standards of judicial review in privacy cases consists of *Puttaswamy I* and *Puttaswamy II*. In broad terms, the impact of these decisions was to unify the standard of review that applies to privacy cases in India. These decisions confirm that the applicable standard is proportionality. In order to understand the status of the current law, therefore, it is necessary to examine these two decisions in some detail.

1. The Approach to Judicial Review in *Puttaswamy I*

In *Puttaswamy I*, the Supreme Court of India provided guidance on a number of aspects relating to the constitutional right to privacy in India. However, rather unsatisfactorily, it did not clearly decide whether ‘proportionality’ is the applicable standard of review for privacy infractions.

Puttaswamy I was decided by nine judges of the Indian Supreme Court. Among those, three judges (Bobde J, Chelameswar J and Sapre J) favoured ‘compelling state interest’ as the standard of review.¹ Indeed, they made no mention of proportionality review in their analysis. That leaves the judgments of Chandrachud J (speaking for himself and Khehar J, Agrawal J and Abdul Nazeer J), Kaul J and Nariman J.

Let us start with Kaul J’s analysis. He adopted the view that the standard of review for privacy violations is ‘proportionality’. Referring specifically to EU regulations,² he appears to have adopted this standard in its entirety:³

Test: Principle of Proportionality and Legitimacy

The concerns expressed on... the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

- (i) The action must be sanctioned by law;
- (ii) The proposed action must be necessary in a democratic society for a legitimate aim;
- (iii) The extent of such interference must be proportionate to the need for such interference;
- (iv) There must be procedural guarantees against abuse of such interference.

¹ This was examined in section C of ch 5 of this thesis: see text to n 130 of ch 5 of this thesis.

² *Puttaswamy I* (2017) 10 SCC 1 [492] (Kaul J).

³ *ibid* [490] (emphasis in original).

Here Kaul J appears to be referring to three out of the four limbs of the proportionality test: legitimate objective, necessity and balancing. Although he makes no reference to the rational nexus limb, he has certainly captured the essence of the test in this passage.

Now let us consider how Chandrachud J's judgment fits into this scheme. If Chandrachud J agreed with Kaul J on this point, then there is majority support for proportionality. Indeed, in one passage, Chandrachud J does appear to adopt this stance. At [180] he said,⁴

Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law.

I will refer to this as *Proposition 1*. Read in isolation, *Proposition 1* appears to be an affirmation of the balancing component of proportionality. However, let us now read *Proposition 1* in context. At [180], Chandrachud J held:⁵

[T]he state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement... The *first* requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21... *Second*, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action... The *third* requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law.

In the sentence immediately preceding *Proposition 1*, Chandrachud J spoke of the need for proportionality between the *object* sought to be achieved by the law and the *means* adopted to achieve the object. However, this is not the sense in which balancing is employed by proportionality. Instead, it concerns proportionality between the extent of infringement of a

⁴ *ibid* [180] (Chandrachud J).

⁵ *ibid* (emphasis added).

right and the countervailing public benefit that will accrue from such infringement. Furthermore, the idea that the means adopted by the State must go no further than what is necessary to achieve the object sought to be achieved, is an inherent component of reasonableness review. In *Proposition 1* therefore, was Chandrachud J merely referring to the need for proportionality between means and ends? The answer here remains unclear.

Unfortunately, the confusion is compounded by Chandrachud J's summary of his conclusions. There, he said:⁶

An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

In this passage, Chandrachud J employed the term proportionality to denote nothing more than a 'rational nexus' between the State's objects and means employed to achieve them. Surely, a State act that lacks a rational nexus between objects and means is bound to fail reasonableness review. Thus, it is unclear what the proportionality analysis here is contributing to the conventional reasonableness review.

We must now turn to Nariman J's judgment in *Puttaswamy I*. 'When it comes to restrictions on [privacy]', he said, 'the drill of various Articles to which the right relates must be scrupulously followed'.⁷ Consider, for example, a privacy claim that is centrally based on Article 21 but raises in a penumbral fashion, the right to freedom of speech and expression guaranteed by Article 19(1)(a). According to Nariman J, the Article 21 standard as well as the threshold laid down under Article 19(2) will have to be met by the impugned State action.

⁶ *ibid* [188](H).

⁷ *ibid* [369] (Nariman J).

These thresholds apply cumulatively. This, however, does not tell us the standard by reference to which such alleged infractions ought to be judged. As to this, Nariman J said:⁸

Every State intrusion into privacy interests... would be subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.

It is unclear what Nariman J meant by the ‘balancing test’ in this passage. One reading is that he was referring to the test of proportionality. Another, equally plausible, reading is that he was simply referring to the need to balance competing rights when they are in conflict.

Ultimately, therefore, *Puttaswamy I* did not offer a clear answer as to whether proportionality is the standard of judicial review that applies to all privacy cases in India. Such clarity was brought about by *Puttaswamy II*, to which we now turn.

2. The Approach to Judicial Review in *Puttaswamy II*

The key authority in India that considers the application of proportionality to privacy cases is now the decision in *Puttaswamy II*.⁹ The facts and background relating to *Puttaswamy II* are discussed elsewhere in this thesis.¹⁰ For the present purposes, the focus will be on the Court’s determination of the standard of judicial review and its application to the Aadhaar scheme.

i. The Dissent

Although Chandrachud J dissented, his speech provides a useful starting point, not least because he was the only member of the nine-judge bench in *Puttaswamy I* who also was part of the bench in *Puttaswamy II*. In considering Chandrachud J’s dissenting judgment, I will

⁸ *ibid* [337] (Nariman J).

⁹ *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

¹⁰ See text to n 6 in the Introduction of this thesis and text to n 132 and n 141 in ch 1 of this thesis.

examine, in particular, his formulation and application of proportionality review to understand whether the ambiguity created by his understanding of the test in *Puttaswamy I* was clarified in *Puttaswamy II*.

Chandrachud J pointed out that the Court had to balance two competing interests: human rights on the one hand and, what he refers to as ‘welfare furthering technology’ on the other.¹¹ The question for the Court was, as he put it, ‘how should the balance be struck between these competing interests?’¹²

Further, Chandrachud J noted that, ‘[a]s far as citizen-state relations are concerned, the Constitution was framed to balance the rights of the individual against legitimate State interests’.¹³ This is a clear nod in favour of the fourth limb of proportionality. Turning to the nine-judge bench decision in *Puttaswamy I*, he said, ‘[t]he decision lays down the test of proportionality to evaluate the constitutional validity of restrictions on the right to privacy’.¹⁴

This is a useful indicator that proportionality was the intended test in *Puttaswamy I* and that it is the standard against which privacy challenges—such as the Aadhaar challenge—are to be decided. It is important, however, to consider Chandrachud J’s understanding of the proportionality test. This is especially so since, apart from the balancing test, we see no mention of the other limbs of proportionality review yet.

¹¹ *Puttaswamy II* (n 9) [460] (Chandrachud J).

¹² *ibid*.

¹³ *ibid* [462].

¹⁴ *ibid* [465].

Chandrachud J proceeded to reiterate the test laid down by him in *Puttaswamy I*, which as mentioned above, lacked clarity in relation to the content of the proportionality standard. He said:¹⁵

Privacy, being an intrinsic component of the right to life and personal liberty, it was held that the limitations which operate on those rights, under Article 21, would operate on the right to privacy. Any restriction on the right to privacy would therefore be subjected to strict constitutional scrutiny... These three-fold requirements emerge from the procedural and content-based mandate of Article 21. The first requirement is the enactment of a valid law, which justifies an encroachment on privacy. The second requirement of a legitimate State aim ensures that the law enacted to restrict privacy is constitutionally reasonable and does not suffer from manifest arbitrariness. The third requirement of proportionality ensures that the nature and quality of the encroachment on the right to privacy is not disproportionate to the purpose of the law. Proportionality requires the State to justify that the means which are adopted by the legislature would encroach upon the right to privacy only to the minimum degree necessary to achieve its legitimate interest.

Curiously, this passage suggests that Chandrachud J does not think of proportionality as a four-pronged test. To him, the first requirement is that an infringing act must have the validity of law. This is indisputable.¹⁶ The second requirement, according to Chandrachud J, is that there must be a legitimate State aim. Here he appears to be alluding to the first limb of proportionality i.e. the legitimate goal limb. The third requirement of his test is that the encroachment on the right should be proportionate to the purpose of the law. Although he uses the language of ‘proportionality’, it appears that this is a reference to the third limb i.e. the necessity limb. Chandrachud J made this clear when he said that the State was required to ensure that the right is encroached to the minimum degree necessary to achieve its objective. This is a clear iteration of the necessity limb of proportionality review.

¹⁵ *ibid* [480] (Chandrachud J) (emphasis added).

¹⁶ See, *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 [15].

Chandrachud J, therefore, appears to have conflated the third and fourth limbs of proportionality review.¹⁷ The conflation of the various limbs of proportionality review into one enquiry is more evident in the following passage from Chandrachud J's judgment:¹⁸

The third principle (iii above) adopts the test of proportionality to ensure a rational nexus between the objects and the means adopted to achieve them. The essential role of the test of proportionality is to enable the court to determine whether a legislative measure is disproportionate in its interference with the fundamental right. In determining this, the court will have regard to whether a less intrusive measure could have been adopted consistent with the object of the law and whether the impact of the encroachment on a fundamental right is disproportionate to the benefit which is likely to ensue.

Chandrachud J then returned to the task of explaining proportionality further. He hailed proportionality as the 'best practice' judicial standard of review, as the 'centrepiece of jurisprudence' across Europe and many common law jurisdictions, and as a doctrine which has now been raised to the rank of a 'fundamental constitutional principle'.¹⁹ He then went on to refer to a number of Indian and foreign cases on proportionality review (including cases from the UK, Germany, ECtHR, France and CJEU, among others).²⁰ He then provided a summary of what he called the fundamental precepts of proportionality review. These were as follows:²¹

1. A law interfering with fundamental rights must be in pursuance of a legitimate state aim;
2. The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved;

¹⁷ This is not uncharacteristic. Some authors have argued along similar lines: see Paul Yowell, 'Proportionality in United States Constitutional Law' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 88.

¹⁸ *Puttaswamy II* (n 9) [652] (Chandrachud J).

¹⁹ *ibid* [645].

²⁰ *ibid* [653]ff.

²¹ *ibid* [666].

3. The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim;
4. Restrictions must not only serve a legitimate purposes; they must also be necessary to protect them; and
5. The State must provide sufficient safeguards relating to the storing and protection of centrally stored data. In order to prevent arbitrary or abusive interference with privacy, the State must guarantee that the collection and use of personal information is based on the consent of the individual; that it is authorised by law and that sufficient safeguards exist to ensure that the data is only used for the purpose specified at the time of collection. Ownership of the data must at all times vest in the individual whose data is collected. The individual must have a right of access to the data collected and the discretion to opt out.

Here, again, Chandrachud J captured the first (legitimate purpose), second (rational nexus) and third (necessity) limbs of proportionality review. However, he did not refer to the fourth (balancing) limb. It appears from Chandrachud J's formulation that he does refer to the four stages of proportionality independently at various stages of his judgment. However, yet again, the stage-by-stage analysis that proportionality review entails is never laid out in unequivocal terms.

Putting to one side the ambiguity in his formulation of the proportionality test, it is crucial to see how Chandrachud J applied the four limbs of proportionality to test the validity of the Aadhaar project. Applying the first limb of proportionality review i.e. is the State pursuing a legitimate interest, and the second requirement of his three-fold test, he said the following:²²

The Statement of Objects and Reasons [of the Aadhaar Act] indicates that the enactment is designed to ensure 'the **effective, secure and accurate** delivery of benefits, subsidies and services from the Consolidated Fund of India to targeted beneficiaries'.

...

There is a state interest in ensuring that the welfare benefits which the state provides reach those for whom they are intended.

²² *ibid* [625] and [626] (emphasis in original).

According to this analysis, the first limb of proportionality review was therefore met. The State was indeed pursuing a legitimate interest. However, Chandrachud J eventually went on to observe that the Aadhaar Act had exceeded the objective that it was meant to achieve. He noted:²³

The aim was to curb leakages and to increase transparent and efficient ‘targeted delivery of subsidies, benefits and services’. However, the Act in the present form has surpassed a tailored objective and has sought to administer every facet of the citizen-state engagement through mandatory biometric-enabled Aadhaar linking.

Thus, according to Chandrachud J’s analysis, the Aadhaar Act failed the second (rational nexus) limb of proportionality. In particular, he referred to section 57 of the Aadhaar Act which allows the use of an individual’s identification information not just by the State, but also by private entities and persons for establishing the identity of an individual ‘for any purpose’.²⁴ Section 57, he held, failed the test laid down in *Puttaswamy I*; it went well beyond the objective sought to be achieved by the State:²⁵

Section 57 of the Aadhaar Act allows the use of an Aadhaar number for establishing the identity of an individual ‘for any purpose’ by the state, private entities and persons. Allowing private entities to use Aadhaar numbers will lead to commercial exploitation of an individual’s personal data without his/her consent and could lead to individual profiling. The contention is that Section 57 fails to meet the requirements set out in the *Puttaswamy* judgment.

...

Section 57 indicates that the legislature has travelled far beyond its stated object of ensuring targeted delivery of social welfare benefits.

²³ *ibid* [670].

²⁴ The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, s 57: ‘Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for *any* purpose, whether by the State or *any* body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect: Provided that the use of Aadhaar number under this section shall be subject to the procedure and obligations under section 8 and Chapter VI’ (emphasis added). Since the *Puttaswamy II* decision, section 57 has been omitted through amendment.

²⁵ *Puttaswamy II* (n 9) [688], [691] (Chandrachud J).

Then, applying the third limb of proportionality, i.e. the necessity limb, Chandrachud J observed as follows:²⁶

The State has been unable to respond to the contention of the petitioners that it has failed to consider that there were much less rights-invasive measures that could have furthered its goals. The burden of proof on the State was to demonstrate that the right to food and other entitlements provided through the Aadhaar scheme could not have been secured without violating the fundamental rights of privacy and dignity.

This is important because, according to Chandrachud J, various aspects of the Aadhaar scheme failed not only the second limb but also the necessity limb of proportionality review. Could the State have adopted an alternative, less-intrusive, but equally effective, measure to achieve its objective? In response to this question, Chandrachud J concluded that the State had altogether failed to look at other less-invasive alternatives.

Let us now turn to the fourth stage of proportionality. On the balancing limb, Chandrachud J had to undertake two tasks: i) balance the extent of intrusion into the fundamental right with the competing state interest; and ii) balance two competing rights against each other. On the latter issue, he reached the following conclusion:²⁷

An invasion of privacy has to be proportional to and carefully tailored for achieving a legitimate aim... While analysing the architecture of Aadhaar, this Court has demonstrated how the purported safeguards in the Aadhaar architecture are inadequate to protect the integrity of personal data, the right of informational self-determination and above all rights attributable to the privacy-dignity-autonomy trilogy... The Aadhaar scheme causes an unwarranted intrusion into fundamental freedoms guaranteed under the Indian Constitution since the respondents have failed to demonstrate that these measures satisfy the test of necessity and proportionality.

And then at [787],²⁸

²⁶ *ibid* [702].

²⁷ *ibid* [703].

²⁸ *ibid* [787](14)(n).

One right cannot be taken away at the behest of the other. The State has failed to satisfy this Court that the targeted delivery of subsidies which animate the right to life entails a necessary sacrifice of the right to individual autonomy, data protection and dignity when both these rights are protected by the Constitution.

Thus, according to Chandrachud J's analysis, the Aadhaar scheme satisfied the first limb of proportionality, but failed the second and third limbs. He elaborated this further at [732], where he noted:²⁹

Ends do not justify means, at least as a matter of constitutional principle. For the means to be valid, they must be carefully tailored to achieve a legitimate state aim and should not be either disproportionate or excessive in their encroachment on individual liberties.

In view of his conclusions on the first three limbs of proportionality, Chandrachud J did not (and did not need to) undertake a detailed analysis applying the fourth limb of the proportionality enquiry to the facts.

ii. *The Concurrence*

It is also worth briefly examining Bhushan J's speech. Although, he concurred with the majority in upholding the constitutionality of the Aadhaar scheme, his view diverged from that of the majority in some respects.

Bhushan J began his judgment by referring to the reasonable expectation of privacy doctrine. He said that '[i]t is well settled that breach of privacy right can be claimed only when claimant on the facts of the particular case and circumstances have "reasonable expectation of privacy"'.³⁰ The Aadhaar scheme collected demographic as well as biometric data. As far as

²⁹ *ibid* [732].

³⁰ *ibid* [905] (Bhushan J).

demographic data was concerned, Bhushan J found that there was no reasonable expectation of privacy:³¹

[A]n individual in interaction with society or while interacting with his close relatives naturally gives and reveals his several information e.g. his name, age, date of birth, residential address, etc. We are of the opinion that in giving of those information there is no reasonable expectation of privacy. Thus, we conclude that demographic information required to be given in the process of enrolment does not violate any right of privacy.

It appears, therefore, that his analysis is confined to biometric data. In that respect, Bhushan J's analysis in this passage appears to suggest that there is no relevant intrusion of privacy that the State must answer to at all.

In my view, Bhushan J was right to apply the 'reasonable expectation of privacy' test as a preliminary hurdle that the petitioner had to clear. This is an important aspect of his judgment because, as I will explain in more detail below, that is not the way in which the majority judges applied the 'reasonable expectation' test.³²

Bhushan J also alluded to Chandrachud J's three-fold test: 'all restraints on privacy, i.e. whether a person has reasonable expectation of privacy, must fulfil three requirements before a restraint can be held to be justified'.³³ The first requirement of Chandrachud J's test requires the existence of a law. Answering this in the affirmative, Bhushan J held as follows:³⁴

Admittedly, Aadhaar Act is a Parliamentary law, hence the existence of law is satisfied. Mere existence of law may not be sufficient unless the law is fair and reasonable.

...

³¹ *ibid* [908].

³² See text to n 76 below.

³³ *Puttaswamy II* (n 9) [923].

³⁴ *ibid* [924], [925].

The Law, i.e., Aadhaar Act, which has been brought to provide for unique identity for delivery of subsidies, benefits or services was a dire necessity, which decision was arrived at after several reports and studies. Aadhaar Act was, thus, enacted for a legitimate State aim and fulfills the criteria of a law being fair and reasonable.

The above passages illustrate that, in Bhushan J's analysis, the Aadhaar Act had the force of law and was also pursuing a legitimate State aim. Thus, the Act satisfied the first and second requirements of Chandrachud J's test.

Bhushan J took the third requirement of Chandrachud J's test to mean proportionality review. This is clear from the fact that, while discussing *Puttaswamy I*, he said, 'atleast five out of nine Judges require[d] the proportionality test to be applied'.³⁵

Although he referred to the composite term 'proportionality test', in fact, Bhushan J appeared to be referring to the second and fourth limbs of proportionality review. Thus, on whether the Aadhaar scheme passed these tests, Bhushan J said:³⁶

The Statutory scheme, which has been brought in place has a reasonable relation to the object which the legislation seeks to achieve and the legislation does not exceed the object. The object of Aadhaar Act as noticed above was to provide for unique identity for purposes of delivery of benefits, subsidies and services to the eligible beneficiaries and to ward of misappropriation of benefits and subsidies, ward of deprivation of eligible beneficiaries.

In this passage, Bhushan J held that the Aadhaar Act passed the first two limbs of proportionality review. The Act was pursuing a legitimate State aim, and there was a reasonable nexus between the means and the State objective.

Then, Bhushan J took an interesting view as to the necessity limb of proportionality. Bhushan J first relied on a decision of the European Court of Justice for the proposition that 'proportionality merely involves an assessment that the measures taken was not more than

³⁵ *ibid* [1154].

³⁶ *ibid* [930].

necessary’.³⁷ He then turned to the 2017 UK Supreme Court decision in *AB v Her Majesty’s Advocate*.³⁸ Relying on that authority, he said, ‘it is not for the Court to identify the alternative measures, which may be least intrusive’.³⁹ Bhushan J also made a reference to the Indian Supreme Court’s decisions in *Modern Dental College*⁴⁰ and *Puttaswamy I*.⁴¹ Although these two judgments had mentioned the ‘least intrusive test’, Bhushan J was of the view that this test was not reflected ‘in the ratio of the above two judgments’.⁴² Ultimately, he went on to reject the necessity limb altogether. He said:⁴³

[T]here are several reasons due to which least intrusive test cannot be insisted. For applying the least intrusive test, the Court has to enter comparative analysis of all methods of identification available, which need to be examined with their details and compared. Court has to arrive at finding as to which mode of identity is a least intrusive. We are of the view that comparison of several modes of identity and to come to a decision, which is least intrusive is a matter, which may be better left to the experts to examine.

Bhushan J did not, and perhaps did not need to, engage with the balancing limb of proportionality in any detail.⁴⁴ Overall, he concluded that (with the exception of section 57 of

³⁷ *ibid* [930] quoting from: Joined cases C-293 and 594/12 *Digital Rights Ireland Ltd v Minister for Communications* [2014] ECR I – 238, para 46 which states that, ‘according to the settled case law of the court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives’.

³⁸ *AB v Her Majesty’s Advocate* [2017] UKSC 25, 2017 SLT 401 [37], [39].

³⁹ *Puttaswamy II* (n 9) [931] (Bhushan J).

⁴⁰ *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353. This decision is considered in more detail in section D(4) of the previous chapter (see text to n 209 of ch 5 of this thesis).

⁴¹ *Puttaswamy I* (n 2).

⁴² *Puttaswamy II* (n 9) [1110] (Bhushan J).

⁴³ *ibid* [1067].

⁴⁴ Except for some stray comments about the measures being ‘reasonable’ and ‘proportionate’: see *ibid* [1107].

the Aadhaar Act), the rest of the scheme passed Chandrachud J's threefold test, including proportionality review.⁴⁵

iii. *The Majority's Understanding of 'Proportionality'*

Ultimately, it is the standard of review adopted by the majority judges that now forms the law in India. That judgment will now be considered.

The majority judgment in the Aadhaar case (delivered by Sikri J on behalf of himself, Misra CJ and Khanwilkar J), adopted 'proportionality' as the standard of judicial review for privacy infractions.⁴⁶ Interestingly, though, the majority adopted what I will call a 'hybrid' version of this test. As explained in more detail below, the Court's approach to proportionality was 'hybrid' in two senses: (i) it adopted the German version of proportionality as its starting point; and (ii) the Court refined the German test by combining academic contributions of Professors Bilchitz and von Bernstorff.

The majority judges began their consideration of proportionality by recognising that 'some differences about the approach on the application of proportionality doctrine' exist.⁴⁷ For instance, the Judges pointed out the differences between the tests adopted by the German Constitutional Court and the Canadian Supreme Court. They explained the German test as follows:⁴⁸

According to this test, a measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the

⁴⁵ *ibid* [1173](2), (11).

⁴⁶ *ibid* [117]ff (Sikri J).

⁴⁷ *ibid* [119].

⁴⁸ *ibid* [120].

measure must not have a disproportionate impact on the right-holder (balancing stage).

The majority judges then contrasted the German approach with the Canadian *Oakes*⁴⁹ test:⁵⁰

In contrast, Canadian Supreme Court... has held that the objective must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’; there must be a rational connection between measure and objective; the means must ‘impair “as little as possible” the right or freedom in question’; and finally, ‘there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”’.

The Court pointed out that there were two main differences between the German approach and the Canadian one. First, the Canadian test required the State aim to be of ‘sufficient importance’.⁵¹ It is not sufficient for the State aim to be ‘legitimate’. Second, the German test insists that there must exist no other ‘less restrictive but equally effective alternative’.⁵² In contrast, the Canadian formulation only requires the State to impair the right ‘as little as possible’.⁵³

The majority then turned to the task of deciding which among these formulations was best suited for India. It pointed to two main criticisms levelled against the German test. First, all the moral work in the German test is done at the balancing stage, rendering the first three limbs of the test predominantly otiose.⁵⁴ Second, ‘the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what

⁴⁹ *R v Oakes* (1986) 1 SCR 103.

⁵⁰ *Puttaswamy II* (n 9) [122] (Sikri J).

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid* [123].

ought to be the proper domain of the democratic legislature'.⁵⁵ These criticisms are not new to proportionality review.

Interestingly, the Court found the answer to one of these criticisms in the work of David Bilchitz.⁵⁶ According to Bilchitz, the first concern (i.e. that the balancing stage of proportionality doing all the work rendering other limbs useless) may be addressed by focusing on the necessity stage (third limb) instead of the balancing stage (fourth limb).⁵⁷ Accordingly, he recommends supplementing the necessity stage of the enquiry in the following way:⁵⁸

First, a range of possible alternatives to the measure employed by the Government must be identified. **Secondly**, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a 'real and substantial manner'. **Thirdly**, the impact of the respective measures on the right at stake must be determined. **Finally**, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict means ends assessment favoured by... the German version of the proportionality test; it will also require a form of balancing to be carried out at the necessity stage.

In relation to the second criticism levelled against the German test (i.e. that the fourth balancing stage is carried out in an impressionistic fashion, unguided by principle) the majority held that this could be overcome by using established 'bright-line rules':⁵⁹

Insofar as second problem in German test is concerned, it can be taken care of by avoiding 'ad-hoc balancing' and instead proceeding on some 'bright-line rules' i.e. by doing the act of balancing on the basis of some established rule or by creating a sound rule.

⁵⁵ *ibid.*

⁵⁶ David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

⁵⁷ *ibid* 42, 61–62.

⁵⁸ *Puttaswamy II* (n 9) [123] (Sikri J) citing from Bilchitz (n 56) 51 (emphasis added).

⁵⁹ *Puttaswamy II* (n 9) [124] (Sikri J) (emphasis added).

This is an interesting claim. But what are these bright-line rules? The Court did not elaborate. In order to answer that question, we must investigate the origin of the Court's conception of 'bright-line rules'. It appears that the majority borrowed this notion from Jochen von Bernstorff.⁶⁰ In his work, von Bernstorff criticises 'ad hoc balancing' and suggests, in language strikingly similar to that employed by the Supreme Court, that it ought to be replaced by 'bright-line rules'.⁶¹

The majority decision in *Puttaswamy II* has been commonly interpreted as adopting the Bilchitz model to India. However, what the Court did, in reality, was to amalgamate two distinct models, creating a rather complex, hybrid, model of proportionality for India. Although it cited and engaged with Bilchitz's work, the Court entirely failed to acknowledge von Bernstorff's contribution to the literature on proportionality. Regrettably, this has compounded the confusion.

That the Court was, in fact, referring to von Bernstorff's model for the balancing limb of proportionality is abundantly clear from the following passage of the judgment:⁶²

There is a great debate as to which out of the aforesaid two approaches is a better approach. Some jurists are of the view that the proper application of the German test leads to a practice of constitutional review with two connected problems: first, as pointed out above, usually almost all the moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of rights issues in a meaningful way. Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what ought to be

⁶⁰ Jochen von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014). Regrettably, the majority does not cite him.

⁶¹ *ibid* 67, 85.

⁶² *Puttaswamy II* (n 9) [123] (Sikri J).

the proper domain of the democratic legislature. These concerns can, however, be addressed.

This passage is a near-verbatim reproduction of Möller's overview⁶³ of part 2 of the book '*Reasoning Rights: Comparative Judicial Engagement*' to which both Bilchitz and von Bernstorff contributed articles developing their own models. The relevant passage by Möller merits reproduction, and it reads as follows:⁶⁴

However, there are indeed problems with this version of the proportionality test, which are identified and for which solutions are proposed by Bilchitz and von Bernstorff. The proper application of the German test leads to a practice of constitutional review with two connected problems: first, as pointed out above, usually almost all the moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of rights issues in a meaningful way. Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what ought to be the proper domain of the democratic legislature. The first concern is addressed by Bilchitz, the second by von Bernstorff; both propose remedies for the weaknesses they identify.

Interestingly, the Court went on to consider Bilchitz's arguments in detail.⁶⁵ Although von Bernstorff did not find mention in the judgment, the Court's judgment adopts his approach of employing 'bright-line rules' to replace 'ad hoc balancing' at the final stage of the proportionality analysis.⁶⁶ Both the Bilchitz and von Bernstorff models are discussed in more detail in a following section.⁶⁷ However, it is relevant to note at this stage that the Court has

⁶³ Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

⁶⁴ *ibid* 35.

⁶⁵ *Puttaswamy II* (n 9) [123] (Sikri J).

⁶⁶ *ibid* [124].

⁶⁷ See section B(2)(i) below of this chapter.

adopted a combination of both these models. I will refer to this as the ‘hybrid’ version of proportionality review.

In sum, the Court adopted the German version of proportionality as the framework for Indian privacy cases. It then modified that test in two ways. First, it supplemented the third limb of proportionality by employing Professor Bilchitz’s analysis. Second, in relation to the fourth limb, the Court held that the need for ad hoc balancing could be obviated by developing, as Professor von Bernstorff recommends, certain bright lines rules. The Court referred to this as the ‘nuanced’ proportionality test, an amalgam of the German and Canadian tests.⁶⁸

The next section will attempt to understand the Court’s application of its own test to the facts before it.

iv. *The Majority’s Application of Proportionality*

The majority judges laid down a version of proportionality that requires the Court to consider the following four enquiries:

1. Is the State pursuing a legitimate (not necessarily compelling) aim?
2. Are the means used to achieving this aim reasonable or suitable?
3. Is there a less intrusive way to achieve the State objective? This enquiry includes:
 - a. *Identifying* alternatives to the measure adopted by the State.
 - b. Asking how *effective* each of these alternative measures are i.e. do they achieve the State objective in a ‘real and substantial manner’?

⁶⁸ *Puttaswamy II* (n 9) [126], [446](t) (Sikri J).

- c. What is the *impact* of each of these measures on the infringed right?
 - d. Is there a preferable alternative? This involves undertaking a ‘balancing exercise’.
4. Balancing the State objective on the one hand with the importance of the right and the extent of intrusion on the right on the other.
- a. This balancing is done by following bright-line rules which are either established or need to be evolved.

Let us now examine the majority’s application of its own test, particularly with reference to the highly contested third and fourth limbs of proportionality. On the first limb of proportionality i.e. whether the State is pursuing a legitimate objective, the Court found that it was:⁶⁹

Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised section of the society for whom such welfare schemes have been formulated.

...

[T]he aim of the Act is to ensure that these benefits actually reach the populace for whom they are meant. This is naturally a legitimate State aim.

The majority judges then proceeded to analyse the Aadhaar scheme based on the second limb of proportionality i.e. is there a rational nexus between the means used to achieve the State objective? Here, again, the Court reasoned that there was a rational connection between the means (i.e. the Aadhaar enrolment scheme and its authentication) and the State objective (i.e. providing welfare benefits):⁷⁰

⁶⁹ *ibid* [263], [266].

⁷⁰ *ibid* [278].

At this point of time, we are discussing the issue as to whether the limitation on the rights of the individuals is rationally connected to the fulfillment of the purpose contained in the Aadhaar Act... Section 7, which provides for necessity of authentication for receipt of certain subsidies, benefits and services has a definite purpose and this authentication is to achieve the objectives for which Aadhaar Act is enacted, namely, to ensure that such subsidies, benefits and services reach only the intended beneficiaries.

These two limbs of proportionality are largely uncontroversial. It is the Court's application of the third and fourth limbs that creates difficulty. On the third limb of proportionality—the necessity limb—although the majority endorsed Bilchitz's thesis as discussed above, it entirely failed to engage with that analysis. All that the majority had to say on the third limb was this:⁷¹

Insofar as third component is concerned, most of it stands answered while in the discussion that has ensued in respect of component No. 1 and 2. The manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, even the petitioners could not suggest any such method.

This reasoning is, with respect, unfortunate. There is no consideration at all of potential alternatives to the Aadhaar scheme. The Court avoided this enquiry on the basis that the petitioners had suggested no such alternates. It has been pointed out by Bhatia that this is factually incorrect.⁷² Indeed, Bhushan J referred to some alternate measures identified by the petitioners in his concurring judgment.⁷³ Furthermore, and perhaps unsurprisingly given its conclusion that there were no alternatives, the majority did not discuss the *effectiveness* of

⁷¹ *ibid* [280] (emphasis added).

⁷² Gautam Bhatia, 'The Aadhaar Judgment and the Constitution: Doctrinal Inconsistencies and a Constitutionalism of Convenience' (*Indian Constitutional Law and Philosophy Blog*, 28 September 2018) <<https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/>> accessed 15 November 2019.

⁷³ *Puttaswamy II* (n 9) [930] (Bhushan J) states: 'One of the submissions of the Petitioner[s] to contend that proportionality test is not fulfilled in the present case is; State did not adopt an alternative and more suitable and least intrusive method of identification, i.e., smart card or other similar devices'.

alternate measures. There is also no assessment of the *impact* of Aadhaar and other alternate measures on the right to privacy. Importantly, and as a logical corollary, the Court did not conduct any *balancing* exercise as part of the necessity analysis.

The Court had to clarify, through its own four-part enquiry, how it concluded that Aadhaar was the only scheme with no available alternatives to achieve the State purpose. This analysis was certainly not done in the first and second components of the test discussed above. Significantly, it was important for the Court to engage with this analysis because the strongest challenge to the Aadhaar scheme would have come from the third and fourth limbs of proportionality as these are more rigorous in nature than the first two prongs.

The Court's examination of the fourth limb of proportionality is also intriguing. Interestingly, at this stage the majority introduced a two-part enquiry into its exercise:⁷⁴

- i. Whether, 'legitimate state interest' ensures 'reasonable tailoring'?... Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy...
- ii. There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand.

The first enquiry, although it is not articulated clearly, is best understood as the conventional balancing analysis that forms part of proportionality review. It requires the Court to balance against each other the importance of the state objective and the extent of intrusion into the right. The second enquiry, in contrast, balances two fundamental rights against each another. I will consider the majority's approach to each of these enquiries in turn.

⁷⁴ *ibid* [285] (Sikri J).

On the first among these enquiries, instead of balancing the importance of the State purpose against the extent of intrusion into privacy, the Court engaged in a detailed evaluation of the ‘reasonable expectation of privacy’ test. Borrowing heavily from the English Court of Appeal’s decision in *R (Wood) v Commissioner*,⁷⁵ the Court said,⁷⁶

Therefore, when a claim of privacy seeks inclusion in Article 21... the Court needs to apply the reasonable expectation of privacy test. It should, *inter alia*, see:

- 1) What is the context in which a privacy claim is set up?
- 2) Does the claim relate to private or family life, or a confidential relationship?
- 3) Is the claim a serious one or is it trivial?
- 4) Is the disclosure likely to result in any serious or significant injury and the nature and extent of disclosure?
- 5) Is disclosure relate[d] to personal and sensitive information of an identified person?
- 6) Does disclosure relate to information already disclosed publicly? If so, its implication?

With respect, the Court’s application of the ‘reasonable expectation of privacy’ test was misconceived. In order to substantiate that proposition, it is important to understand what ‘reasonable expectation of privacy’ really is. It is a test laid down in a 1967 decision of the United States Supreme Court: *Katz v United States*.⁷⁷ This test was generally applied to American Fourth Amendment unreasonable search and seizure claims.⁷⁸ The test has a subjective component and an objective component. The subjective component asks whether

⁷⁵ See generally, *R (on the application of Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123.

⁷⁶ *Puttaswamy II* (n 9) [292] (Sikri J).

⁷⁷ *Katz v United States* 389 US 347, 361 (1967) (Harlan J).

⁷⁸ See Gary Bostwick, ‘A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision’ (1976) 64 California Law Review 1447, 1466ff; Erwin Chemerinsky, ‘Rediscovering Brandeis’s Right to Privacy’ (2007) 45 Brandeis Law Journal 643, 646ff; Ken Gormley, ‘One Hundred Years of Privacy’ [1992] Wisconsin Law Review 1335, 1391.

the person whose right is violated actually expected privacy in such a situation? If the answer is in the affirmative, the Court then considers whether, objectively, the society would find the expectation of privacy unreasonable?⁷⁹

The Court's use of the 'reasonable expectation of privacy' test is open to at least two objections. First, the reasonable expectation of privacy test has been discredited in the land of its origin.⁸⁰ Further, its application to Indian privacy cases is also disputed. For instance, Nariman J expressly rejected it in *Puttaswamy I*.⁸¹

Second, the purpose of the reasonable expectation of privacy test is to determine whether the infringement occurred in a sphere where the petitioner has a valid claim to privacy. It relates to a stage anterior to proportionality review. If the petitioner had no reasonable expectation of privacy, then there is no breach of the right to privacy to begin with. There is simply no need to engage in the exercise of balancing competing interests. Indeed, that is one of the conclusions that Bhushan J reached in his concurring judgment.⁸²

Curiously, the Court had adopted this understanding of the 'reasonable expectation of privacy' test in an earlier part of its reasoning. It said:⁸³

Before we proceed to analyse the respective submissions, it has also to be kept in mind that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21.

⁷⁹ See Bostwick (n 78) 1480–81.

⁸⁰ See Orin S Kerr, 'Four Models of Fourth Amendment Protection' (2007) 60 Stanford Law Review 503, 504–05.

⁸¹ *Puttaswamy I* (n 2) [342] (Nariman J).

⁸² *Puttaswamy II* (n 9) [905] (Bhushan J) stated: 'It is well settled that breach of privacy right can be claimed only when claimant on the facts of the particular case and circumstances have "reasonable expectation of privacy"'.

⁸³ *ibid* [260] (Sikri J).

Thus, if the petitioner has no reasonable expectation of privacy, she is outside the protective scope of Article 21. It is puzzling, therefore, that while undertaking a balancing exercise under the fourth limb of proportionality, the Court decided to use the ‘reasonable expectation of privacy’ test. With respect, this is conceptually indefensible.

On the second aspect of the balancing enquiry, the Court attempted to balance the right to privacy on the one hand, and the rights to food, livelihood and social welfare benefits on the other. On this point, the Court found that the invasion on the right to privacy was minimal. The majority reasoned in the following terms:⁸⁴

In the aforesaid backdrop, this Court is called upon to find out whether Aadhaar Act strikes a fair balance between the two rights... To reiterate some of the important features, it is to be borne in mind that the State is using Aadhaar as an enabler for providing deserving section of the society their right to food, right to livelihood, right to receive pension and other social assistance benefits like scholarships etc. thereby bringing their right to life to fruition. This necessity of Aadhaar has arisen in order to ensure that such benefits are given to only genuine beneficiaries. The Act aims at efficient, transparent and targeted delivery of subsidies, benefits and services. In the process, it wants to achieve the objective of checking the corrupt practices at various levels of distribution system which deprive genuine persons from receiving these benefits... As against the above larger public interest, the invasion into the privacy rights of these beneficiaries is minimal.

Remarkably, we see no reference whatsoever to any ‘bright-line rules’ here in keeping with its hybrid test outlined above. Thus, although the Court rejected ad hoc balancing as part of its reasoning on proportionality generally, that does not seem to have had any implications for the Court’s application of that test to the facts. The Court appears content with a version of ad hoc balancing that does not rely on any stated bright-line rules.

There are three main takeaways from the judgment in *Puttaswamy II* on the standard of review applicable to privacy claims. First, the standard of judicial review applicable to privacy

⁸⁴ *ibid* [298], [307]–[308] (Sikri J).

cases in India is now, unambiguously, proportionality. Second, the majority created its own version of proportionality for Indian privacy jurisprudence. Strikingly, this includes a balancing exercise under the third, necessity, limb and a suggestion that Courts must develop bright-line rules as part of the fourth balancing limb. Yet, it remains unclear what the content of the balancing exercise in India is. The content of any bright-line rules to be applied also remains ambiguous. Finally, the Court's application of the proportionality standard to the Aadhaar card scheme is defective in at least two main respects: it failed to engage meaningfully with the less intrusive alternatives and it, wrongly, in my view, conflated the fourth limb of proportionality review with the 'reasonable expectation of privacy' test.

A number of more recent decisions of the Supreme Court have put it beyond serious doubt that, in the context of the judicial review of privacy cases, proportionality is now the standard applicable in India. Indeed, that was the view that Indu Malhotra J adopted in *Johar*⁸⁵ (which was decided before *Puttaswamy II*), where she said that '[a]ny restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality'. This view was reiterated by Chandrachud J in *Subhash Chandra Agarwal*, which was decided in 2020. In that case, he said, '[t]he right to privacy and its numerous facets may be permissibly restricted where the abridgement is provided by law, pursues a legitimate State objective and complies with the principle of proportionality'.⁸⁶ A more interesting aspect of the post-*Puttaswamy II* caselaw is the extent to which they have applied the hybrid version of proportionality that was laid down by the Supreme Court in that case. That issue is considered in section B(3) below.

⁸⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [16.2].

⁸⁶ *Central Public Information Officer v Subhash Chandra Agarwal* (2020) 5 SCC 481 [223].

B. CRITIQUE OF THE ADOPTION OF HYBRID PROPORTIONALITY IN INDIA

The previous section of this chapter showed that the Supreme Court adopted a hybrid version of proportionality in *Puttaswamy II*. It also examined the Court's application of that test to the facts before it. This part of the chapter is normative. It will consider whether the Supreme Court was justified in adopting this hybrid definition of proportionality to India. The consequences of this hybrid test for future privacy cases will also be discussed. Sub-section 1 analyses the Indian Supreme Court's decision to adopt proportionality as the standard for privacy adjudication. Sub-section 2 focusses on the Court's adoption of a 'hybrid' model of proportionality, combining the academic models proposed by Bilchitz and von Bernstorff. Sub-section 3 comments on what this choice means for future privacy cases in India.

1. Adoption of Proportionality to Privacy Cases in India

This thesis does not attempt to engage with the general academic debate as to the justifications for proportionality as a standard of review. That debate merits a doctoral thesis of its own. For the present purposes, it suffices to say that the adoption of proportionality in India as the standard for review in privacy cases marks a significant improvement from the pre-existing position.

It was shown in section E of chapter 5 that, before the modern caselaw, the standard of review applicable to privacy cases depended on the nature of privacy that was in issue. Thus, physical and informational privacy cases were held to the lower standard of reasonableness whereas decisional privacy cases were judged by reference to the higher strict scrutiny test. One might search, in vain, in the cases for a justification for this distinction. The Courts had rarely articulated this distinction in the cases, albeit that it was almost always applied in practice. Indeed, in my view, there is no reason of principle why decisional privacy cases ought to be held to a higher standard than breaches of physical or informational privacy. It was

explained in chapter 2 that all three variants of privacy are capable of arising from the same provision of the Indian Constitution (e.g., Article 21). There is no necessary correlation between the nature of the privacy infraction and the gravity of infringement either. Infringements of physical or informational privacy are capable of being as intrusive as violations of decisional privacy. Why, then, should violations of physical or informational privacy be capable of easier justification than infringements of decisional privacy? No answer has been provided in judicial or academic writing. In my view, there is no convincing answer.

Privacy infractions vary in gravity. So do the nature of the justifications offered by the State for such infractions. Proportionality is a flexible tool that allows the Court to take into account these variations. For example, Chandra has pointed out that proportionality may vary in its application depending on ‘how intensely a court scrutinises rights infringing measures’.⁸⁷ She explains:⁸⁸

There are two aspects to the court’s scrutiny: (1) the *substantive standards*, that is, the four component sub-tests that the rights infringing measure has to satisfy; and (2) the *evidential standards*, comprising the burden of proof, standard of proof, and the quality of evidence that have to be fulfilled to prove that the substantive standards have been met or violated... The higher the intensity of review, the heavier is the justificatory burden on the State to satisfy the court that a rights-infringing measure is proportional.

One aspect of such flexibility is baked into the fourth limb of proportionality. It requires the Court to consider whether the extent to which privacy is infringed is too great in comparison to the public purpose that is sought to be achieved by the State. This affords the Court flexibility to take into account, on the one hand, the extent to which privacy is infringed and, on the other,

⁸⁷ Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (2020) 3 University of Oxford Human Rights Hub Journal 55, 58.

⁸⁸ *ibid.*

the nature of the justification offered by the State. In this respect, it appears to me that proportionality is a more flexible standard of review than strict scrutiny.

2. The Supreme Court's Adoption of the Bilchitz and von Bernstorff Models

As explained above, in *Puttaswamy II*, the Court adopted a 'hybrid' version of proportionality. The version of proportionality adopted by the Court was 'hybrid' in two senses: (i) the Court adopted the German version of proportionality as its starting point; and (ii) the Court refined the German test by combining academic contributions of Professors Bilchitz and von Bernstorff. This section examines this aspect of the Court's reasoning. As a starting point, it is necessary to examine the Bilchitz and von Bernstorff models in some detail. The adoption of those models by the Indian Supreme Court was considered briefly in section A(2)(iii) above. These models will now be examined in more detail immediately below.

i. *The Bilchitz and von Bernstorff Models: What Are They?*

Bilchitz's thesis focuses on the necessity component of proportionality. He proposes a more detailed enquiry at the necessity stage constituting of four sub-components.⁸⁹ The basis for his thesis lies in what he calls the 'strict interpretation of necessity'.⁹⁰ The analytical justification for this strict interpretation can be further traced back to Robert Alexy's work.⁹¹ According to Alexy, constitutional rights are better construed as 'principles' rather than 'rules'.⁹² Principles, unlike rules, are norms which 'require that something be realized to the greatest extent possible

⁸⁹ Bilchitz (n 56) 51.

⁹⁰ *ibid* 43.

⁹¹ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002).

⁹² *ibid* 47.

given the legal and factual possibilities'.⁹³ Alexy refers to this as the 'optimization requirements' of rights⁹⁴ i.e. a right must be realised to the fullest extent legally and factually possible.⁹⁵ Put simply, a State act that restricts a right should be strictly necessary to achieve its purpose such that the right is realised to the greatest extent possible. As Bilchitz explains it,⁹⁶

any degree of intrusion into Principle 1 (a right) may only be allowable to the extent necessary to realise another vital competing Principle 2 (an important social objective). If another means is available that equally realises Principle 2, and has a lesser impact on Principle 1, then Principle 1 is not being optimised to the greatest extent possible compatible with the realisation of Principle 2.

Alexy's theory of rights, particularly in the context of proportionality, has been considered by many authors.⁹⁷ Yet, his work is often commended for being one of the first attempts to conceptualise proportionality.⁹⁸ Bilchitz's own criticism of Alexy's optimisation argument is that the language of optimisation is tenable in some areas, for instance, in economics where quantification is possible. In contrast, it is rather more difficult to reduce principles and values that are qualitative in nature in much the same way.⁹⁹

Bilchitz highlights two problems that may result from the 'strict interpretation of necessity'. First, if interpreted too rigidly, strict necessity will set unrealistic goals for the State

⁹³ *ibid.*

⁹⁴ *ibid* 67–68.

⁹⁵ Möller, 'Constructing the Proportionality Test' (n 63) 31.

⁹⁶ Bilchitz (n 56) 44.

⁹⁷ See Kai Möller, 'Balancing and the structure of constitutional rights' (2007) 5 *International Journal of Constitutional Law* 453.

⁹⁸ See Möller, 'Constructing the Proportionality Test' (n 63) 32.

⁹⁹ Bilchitz (n 56) 44.

to achieve. In turn, it will have the effect of rendering most limitations unconstitutional.¹⁰⁰ Second, there is the opposite danger: interpreting the strict necessity test too liberally would render it too weak and, hence, ineffective.¹⁰¹

Interpreted strictly, necessity places a heavy burden on the State to justify its measures. In Bilchitz's words, if this standard is applied rigorously, 'judges would be required to consider all possible alternatives that could realise the government objective and be less restrictive of the right. The identification of any alternative that was even slightly less restrictive and equally effective would be sufficient to defeat a legislative measure'.¹⁰² This, he argues, is problematic because even measures which could be normatively justified, in objective (and not comparative) terms, would not be considered to be constitutionally permissible. It could also eventually lead to problems with separation of powers and legitimacy since 'Courts would be required to strike down any law that did not meet this strict test and to substitute their judgement concerning which measure is 'least restrictive' for that of the legislature'.¹⁰³ The Canadian Supreme Court's minimal impairment test is an example. When applied strictly, it significantly narrows down the measures that can pass constitutional muster.

Courts have tried to circumvent the intensity of this test in various ways. For example, the German Constitutional Court has adopted a highly deferential approach towards other branches.¹⁰⁴ As a general rule, the German Court has adopted the view that '[i]n forming a judgment as to whether the chosen means is suitable and necessary for achieving the desired

¹⁰⁰ *ibid.*

¹⁰¹ *ibid* 49–51.

¹⁰² *ibid* 44.

¹⁰³ *ibid* 45.

¹⁰⁴ *ibid* 48.

goals the legislator has a certain degree of discretion'.¹⁰⁵ This deferential approach, Bilchitz argues, runs into the opposite danger: it risks eroding the protection offered to fundamental rights.¹⁰⁶

As outlined above, Bilchitz proposes a revised and moderate interpretation of the necessity test to address these concerns.¹⁰⁷ As explained in section A above, his test contains four sub-components:

1. Possibility: a range of possible, feasible alternatives to the government measures must be identified; the Courts must be explicit about the criteria of feasibility.¹⁰⁸
2. Instrumentality: of the identified alternatives, only those measures must be retained which realise the government objective in a 'real and substantial manner'.¹⁰⁹ The phrase 'real and substantial manner' is borrowed from the Canadian Supreme Court and does not require the alternate measure to realise the objective to exactly the same degree as the proposed measure.¹¹⁰
3. Impact: the degree of impact of each of the alternate measures on the right is then ascertained. This requires the recognition of approximate impact.¹¹¹

¹⁰⁵ *ibid* 47–48 citing the *Cannabis* decision: BVerfG 9 March 1994, 90 BVerfGE 145 [173].

¹⁰⁶ *ibid* 48.

¹⁰⁷ *ibid* 51.

¹⁰⁸ *ibid* 51, 61.

¹⁰⁹ *ibid* 61.

¹¹⁰ *Alberta v Hutterian Brethren of Wilson Company* 2009 SCC 38 [55]; Bilchitz (n 56) 55.

¹¹¹ Bilchitz (n 56) 61.

4. Comparativity: an overall comparison must be made between the government measure and the alternate measures to adjudge which measure is least restrictive of the right.¹¹² As Bilchitz puts it, this component determines, ‘whether the government measure is the least restrictive means of the feasible alternatives under consideration. This involves evaluating whether an alternative exists that realises the objective in a real and substantial manner whilst having a lesser impact on the right’.¹¹³

According to Bilchitz, his moderate interpretation of necessity ensures that the Courts are not engaging with an amorphous, and unreasonably high, standard. Instead, they are encouraged to follow a ‘process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights’.¹¹⁴

Bilchitz’s model supports the Canadian approach to proportionality where greater emphasis is placed on the first and second stages of proportionality review than the final balancing stage. This leaves Bilchitz open to an obvious criticism: that he conflates the necessity limb of proportionality with the balancing limb.¹¹⁵ Indeed, this argument has been made against the Canadian version of proportionality more generally too. Grimm, for example, has advanced this argument.¹¹⁶

¹¹² *ibid.*

¹¹³ *ibid* 56.

¹¹⁴ *ibid* 61.

¹¹⁵ Bilchitz himself recognises this concern: *ibid* 58.

¹¹⁶ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 395: ‘Yet, in practice, the [Canadian] Court’s dealing with the second step looks much more value laden than that of the German Court... It is revealing that sometimes the Court uses the

In my view, however, Bilchitz is able to offer a convincing response. He concedes that necessity is ‘not simply a value-neutral or factual enquiry’; it involves a value judgment.¹¹⁷ He then argues that there is a difference between the balancing exercise at the necessity stage and the balancing analysis at the last balancing stage. The former is narrower in its scope. At the necessity stage, the question for the Court is whether the incremental benefit derived from one of the alternatives justifies the incremental increase in the extent of intrusion of a right. As Bilchitz puts it, ‘this can involve the court in balancing a reduced effectiveness (in realising the government’s objective) in an alternative measure against a lesser impact upon fundamental rights’.¹¹⁸

The balancing enquiry at the fourth stage is, however, a wider exercise. It follows that even if the Court were to conclude that a government measure satisfies the first three stages of proportionality, including necessity, the Court still needs to stand back from the details and ask whether, overall, the benefits of the measure outweigh the intrusion into the right.¹¹⁹

As highlighted earlier, the second component of the hybrid model adopted by the Supreme Court is derived from the work of von Bernstorff.¹²⁰ His model concerns the final balancing stage of the proportionality analysis or what is also referred to as proportionality *stricto sensu*. At this stage, the Court is asked to balance or ‘weigh’ the importance of the public

expression that, in view of a given danger, a law “does not unduly restrict” a guarantee, a kind of language that is typical of the balancing process reserved for the third step in Germany’.

¹¹⁷ Bilchitz (n 56) 58.

¹¹⁸ *ibid* 60.

¹¹⁹ *ibid*. However, even this explanation has come under criticism. Yowell, for one, remains sceptical of Bilchitz’s explanation. He argues that although Bilchitz makes the claim that the balancing at the necessity stage is more restrained and narrower than balancing at the final stage, the only example he is able to provide is that of a hypothetical law which has ‘an artificially narrow aim that is constructed in such a way that the possibility of considering less restrictive alternatives is excluded from the outset’. Yowell also takes exception to Bilchitz’s reasoning for defining the aim in terms of the means: see Yowell (n 17) 94.

¹²⁰ von Bernstorff (n 60).

interest against the extent of intrusion on the right. This component of proportionality, as outlined in a previous section, tends to be contentious.¹²¹ It has come under strong criticism from many scholars including on the basis that it requires judges to balance incommensurate interests against one another. Von Bernstorff calls this ‘ad hoc balancing’ i.e. ‘the practice of resolving conflicts between a right and a competing right or interest by weighing the interests involved on a *case-by-case basis* at the final stage of the proportionality test’.¹²²

Von Bernstorff points out the divisiveness among the commentators who consider the balancing limb.¹²³ However, he argues that scholars who support or criticise the balancing limb all agree that it is a necessary requirement for proportionality to operate.¹²⁴ Von Bernstorff argues that although ad hoc balancing is theoretically premised on Alexy’s work, this has not saved it from widespread scholarly criticism.¹²⁵ Scholars have attacked ad hoc balancing for ‘stifling collective self-determination’,¹²⁶ producing ‘a highly politicised form of adjudication’,¹²⁷ failing ‘to protect minimum human rights guarantees in a reliable fashion’,¹²⁸

¹²¹ See text to n 167 in section D(3) of ch 5 of this thesis.

¹²² This is Möller’s interpretation of von Bernstorff’s ad hoc balancing: Möller, ‘Constructing the Proportionality Test’ (n 63) 37. See also, von Bernstorff (n 60) 64.

¹²³ von Bernstorff (n 60) 64.

¹²⁴ *ibid.*

¹²⁵ *ibid* 65.

¹²⁶ *ibid* citing Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht Eine kritische Bilanz nach 60 Jahren Bundesverfassungsgericht* (Suhrkamp 2011).

¹²⁷ von Bernstorff (n 60) 65 citing Steven Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’ (2003) 23 OJLS 405; Oren Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 Yale Journal of International Law 437, 438ff; Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 MLR 671, 673.

¹²⁸ von Bernstorff (n 60) 65 citing Gross (n 127) 437ff; McHarg (n 127) 673.

‘weighing prima facie incommensurable interests [that] cannot be rationalised’,¹²⁹ among other reasons.

To overcome the ad hoc nature of the balancing limb of proportionality, von Bernstorff proposes what he calls ‘bright-line rules’.¹³⁰ Before turning to the meaning and content of these rules and his thesis, it is important to identify the basis for his model. Von Bernstorff’s model is inspired by a formalist approach to balancing (which values certainty) rather than a functionalist one.¹³¹ He is also inspired by a Kantian conception of rights¹³² ‘as *legal* rules with an anti-utilitarian *telos*’, rather than Alexy’s conceptualisation of rights as principles.¹³³

Turning to von Bernstorff’s model, he proposes a proportionality analysis without ad hoc balancing. He argues for what he calls a culture of judicial commitment in favour of bright-line rules particularly when it comes to an intensive infringement of human rights.¹³⁴ He explains these bright-line rules further as follows:¹³⁵

Such bright-line rules can be judicially constructed by reference to the ‘essence’, ‘substance’ or ‘core’ of a particular right *ex negativo* for specific groups of case scenarios, or by other generalisable tests.

Von Bernstorff then compares two models of proportionality. The first model is based on a means and end comparison. It examines the suitability of the legislation and whether it is

¹²⁹ von Bernstorff (n 60) 65 citing Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 89; Lorenzo Zucca, *Constitutional Dilemmas: Conflict of Fundamental Legal Rights in Europe and the USA* (OUP 2007) 85.

¹³⁰ von Bernstorff (n 60) 67, 73–75.

¹³¹ *ibid* 66.

¹³² Immanuel Kant, ‘Grundlegung zur Metaphysik der Sitten’ in Wilhelm Weischedel (ed), *Werkausgabe and Immanuel Kant*, vol 7 (19th edn, Suhrkamp Verlag 2000).

¹³³ von Bernstorff (n 60) 66–67.

¹³⁴ *ibid* 67.

¹³⁵ *ibid*.

the least intrusive means of achieving an objective.¹³⁶ The second model goes a step further to weigh the ‘seriousness of the infringement against the importance and urgency of the factors that justify it’ i.e. the ad hoc balancing stage.¹³⁷ The Canadian Supreme Court and the UN Human Rights Committee both apply the first model whereas the German Constitutional Court and the European Court of Human Rights apply the second model.¹³⁸

Von Bernstorff argues that Courts that adhere to the first model tend to be more categorical or rule-oriented while those which adhere to the second model tend to have more ad hoc balancing elements.¹³⁹ He states that categorical reasoning and ad hoc balancing are opposite ends of a spectrum, and that Courts can be placed on a sliding scale depending on their judicial reasoning.¹⁴⁰

According to von Bernstorff, in most cases, ad hoc balancing is either unnecessary to the end analyses or it has a detrimental effect on ‘the realisation of individual and collective self-determination’.¹⁴¹ To von Bernstorff, the solution to this problem lies in the establishment and usage of bright-line rules. One may well ask, what are these bright-line rules? Von Bernstorff answers as follows:¹⁴²

I defended the necessity of an intensified use of judicially established bright-line rules for specific groups of cases where particularly intensive interferences are at stake. Such judicially established limitations can be created by specific tests (intervention- thresholds) or definitional balancing, or appear in forms of explicit judicial references to the ‘core’, ‘substance’ or ‘essence’ of a particular right. But

¹³⁶ *ibid* 72.

¹³⁷ *ibid*.

¹³⁸ *ibid* 73–74.

¹³⁹ *ibid* 73.

¹⁴⁰ *ibid* 74–75.

¹⁴¹ *ibid* 83.

¹⁴² *ibid*.

how can the ‘essence’ or ‘core’ of a particular right be legally determined under conditions of postmodern societal contingency?... it will be very difficult to identify a universally shared quasi-ontological notion of minimum guarantees under particular human rights entitlements. But this should not hinder judges in concretising minimum standards *ex negativo* in view of particularly intensive infringements through judicial review. The judicially constructed ‘essence’ of the ‘core’ of a particular right is a creative interpretative act for specific scenarios, which indeed cannot rely on an uncontested objective theory of values.

Although the prospect of replacing ad hoc balancing with bright-line rules is attractive, there are a number of difficulties with von Bernstorff’s proposal. First, von Bernstorff’s model depends on the Court being able to identify what he calls the ‘essence’ or ‘core’ of a right. However, he does not offer any guidance on how the Court should go about this process. In particular, there is the danger that the process of identifying the ‘core’ or ‘essence’ will inevitably involve some form of balancing – the very exercise that von Bernstorff’s model is designed to obviate. Second, the idea of the ‘protected core’ of a right is relatively well-known in the ECtHr jurisprudence.¹⁴³ It is unclear what, if anything, von Bernstorff’s thesis adds to that analysis. Third, and in any event, von Bernstorff is conspicuously silent about the cases that do not engage the ‘core’ or ‘essence’ of a right. In those cases, even on von Bernstorff’s model, it appears that some form of balancing is unavoidable. Even if von Bernstorff’s thesis were to be judicially adopted in its entirety, therefore, it would not do away with the need for ad hoc balancing in toto.

As we have seen in the previous section, India has adopted a hybrid version of proportionality which espouses both Bilchitz’s and von Bernstorff’s models i.e. the Bilchitz model for the necessity limb and the von Bernstorff model for the balancing limb. The next section will consider how these models interact with each other and what the consequences of the hybrid model are for privacy cases in India.

¹⁴³ Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP 2018) ch 7.

ii. *How do the Bilchitz and von Bernstorff Models Interact with Each Other?*

With that background, we can now consider how the Bilchitz and von Bernstorff models interact with each other. Are these contradictory models or do they complement each other? If they are indeed inconsistent with each other, was the Indian Supreme Court wrong to combine them to create a hybrid version?

At first blush, it does appear that these models are in conflict. There are two apparent points of difference. First, Bilchitz's necessity model has an element of balancing subsumed within its fourth sub-component of necessity (comparativity).¹⁴⁴ Von Bernstorff, on the other hand, takes issue with any form of ad hoc balancing. He suggests that ad hoc balancing should be replaced by bright-line rules that are predictable and transparent.¹⁴⁵ Second, at a deeper level, there is also a theoretical inconsistency between the two models. Bilchitz bases his model on Alexy's conceptualisation of proportionality which recognises rights as 'principles' rather than 'rules'.¹⁴⁶ Von Bernstorff, in contrast, rejects this conceptualisation.¹⁴⁷ He adopts a more formalistic and Kantian approach to rights and argues that rights are better understood as 'rules'.¹⁴⁸ He prefers a proportionality analysis that is more 'legal' and less value-laden.

I will examine both of these points in turn. The first point about the apparent conflict of balancing is addressed by Bilchitz. He argues that it is difficult to discard balancing from the

¹⁴⁴ Bilchitz (n 56) 56–60.

¹⁴⁵ von Bernstorff (n 60) 84–86.

¹⁴⁶ Bilchitz (n 56) 43.

¹⁴⁷ von Bernstorff (n 60) 65–66.

¹⁴⁸ *ibid* 66–67.

proportionality enquiry altogether because an element of balancing is already a part of the necessity limb of proportionality review. In his words:¹⁴⁹

[T]he implications of my argument in this chapter are that adopting von Bernstorff's 'bright-line' rules will not eliminate some form of balancing from the alternative he suggests since a degree of balancing is included within the necessity enquiry itself, which von Bernstorff does not wish to dispense with. It is thus much harder to eliminate balancing from the proportionality enquiry than may have been thought.

Does this imply that these models are in opposition with each other? Bilchitz suggests that they are not. This is because, according to his model, it is possible to distinguish balancing at the necessity limb from balancing at the fourth stage of proportionality. As Bilchitz puts it,¹⁵⁰

I do not believe my argument completely destroys von Bernstorff's attempt to introduce more categorical reasoning into the proportionality enquiry. The reason for this is that it remains possible to distinguish the balancing that takes place within necessity from the balancing at the third stage of the enquiry.

He reiterates that the balancing at the necessity stage is a limited enquiry. However, he also clarifies that if this limited balancing at the necessity stage is dispensed with, proportionality will lose its 'essential character'.¹⁵¹ One would think that as a logical corollary, balancing at the next stage would also be an essential aspect of proportionality review. Bilchitz does not offer a detailed analysis of this point. His analysis remains rather tentative. He appears to be open to the notion that balancing at the final stage could be refined to address many of the concerns raised at that stage of the enquiry. However, it is unclear whether Bilchitz would adopt von Bernstorff's model in the fourth stage. In his words:¹⁵²

The broad discretion involved in such value judgements at the third stage of the enquiry as well as the utilitarian cost-benefit calculus in particular cases with

¹⁴⁹ Bilchitz (n 56) 59.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid* 60.

¹⁵² *ibid.*

limited principled guidelines appears to be what rightly worry theorists such as von Bernstorff. Whether it is possible or desirable to remove the broader normative evaluation required by the third stage when considering the limitation of rights is a matter I cannot take further here. What I have sought to demonstrate, however, is that a more limited form of balancing cannot be eliminated from the necessity enquiry. This more restrained form of balancing can be distinguished from that which is traditionally undertaken at the third stage of the proportionality enquiry, thus leaving room for alternatives to the third stage such as those proposed by von Bernstorff.

On Bilchitz's account, therefore, it remains unresolved whether these models can co-exist. However, he is willing to concede that some general rules which would apply in specific cases would be preferred over unstructured reasoning.¹⁵³ Von Bernstorff, for his part, acknowledges Bilchitz's model but does not engage extensively with it. He simply recognises that Bilchitz distinguishes the balancing at the necessity limb with balancing at the final stage.¹⁵⁴ To von Bernstorff, his thesis is concerned with the ad hoc nature of the balancing at the final stage.

With respect, it is hard to see how an element of ad hoc balancing can be avoided at the necessity limb of Bilchitz's model. Even if the balancing is limited, the same concerns that attach themselves to balancing at the final stage must also hold true for any balancing that happens at the necessity stage.

Now consider the second concern. There certainly appear to be different theoretical underpinnings for the two models. Although this may not be of direct, practical relevance to its application in India, Bilchitz's and von Bernstorff's models are based on two competing ideals as explained above.¹⁵⁵ Nonetheless, as Möller points out, they both aim to achieve

¹⁵³ *ibid* 59 fn 72.

¹⁵⁴ von Bernstorff (n 60) 83.

¹⁵⁵ See text to n 146 above.

similar goals.¹⁵⁶ Unlike the mainstream scholarship in this area—where authors are either criticising the doctrine of proportionality or defending it—Bilchitz and von Bernstorff are both attempting to refine the proportionality test so that they can identify a version of it which best advances the objectives of proportionality.¹⁵⁷ As Möller puts it,¹⁵⁸

Thus, their interest is not in the history of ideas but in *morality*: in order to take rights seriously, how should we construct the proportionality test, and what can we learn from the different conceptions on offer?

Whether this theoretical dichotomy will have any implications for the application of proportionality in India, and what such implications will be, remain to be seen. In the Indian context, the consequences of this inconsistency are not yet apparent and will, in all likelihood, need to be worked out in the context of the caselaw as it develops in years to come. At this stage, however, three points may be made about the Court's adoption of Bilchitz's and von Bernstorff's models.

The first among them relates to the majority's uncritical adoption of Bilchitz's model of proportionality. It has been argued by Bhatia that this choice is questionable.¹⁵⁹ Bilchitz's model has not yet found currency in his home jurisdiction (South Africa) or, for that matter, anywhere else in the world. Although this by itself is inconclusive, it does raise questions about its judicial adoption in India.

Second, some aspects of the Bilchitz thesis are themselves open to objection. For example, according to Bilchitz (and the majority) the third limb of proportionality requires a comparison of different measures all of which achieve the State objective 'in a real and

¹⁵⁶ Möller, 'Constructing the Proportionality Test' (n 63) 32–33.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid* 33 (emphasis in original).

¹⁵⁹ Bhatia (n 72).

substantial manner’.¹⁶⁰ Having identified a range of measures that can fairly and substantially achieve the State aim, why is it that, among those objectives, the State is not required to adopt the least intrusive option? There may be a defensible answer to this enquiry, but the majority of the Supreme Court does not engage with it at all.

A third point relates to the majority’s adoption of von Bernstorff’s bright-line rules. This, again, is a controversial claim. What are these bright-line rules in the Indian context? The majority offers no guidance on this. This concern is exacerbated by the fact that, unlike von Bernstorff, the majority show no inclination of doing away with ad hoc balancing. On the contrary, on multiple occasions within the judgment when reference is made to this limb of proportionality, they reiterate that the fourth limb requires the Court to weigh against each other the importance of the public purpose pursued by the State against the intrusion it causes into individual rights.¹⁶¹

3. Practical Implications of the Hybrid Model for Future Privacy Cases

What are the consequences of the new hybrid version of proportionality for fundamental rights in India? In particular, what are the consequences for privacy cases?

As explained above, Bilchitz’s model separately distinguishes between balancing at the necessity limb and balancing at the final stage of proportionality review. While balancing at the necessity stage compares the incremental benefit of various State measures (all of which fairly and substantially achieve the State objective) against the extent to which they intrude a particular right, balancing at the final limb is a wider exercise. The Court is asked to take a step

¹⁶⁰ Bilchitz (n 56) 61.

¹⁶¹ *Puttaswamy II* (n 9) [281]ff (Sikri J).

back to ask whether the extent of intrusion of the right is commensurate with the value of objective it seeks to achieve. This difference is an extremely subtle one.

It should be obvious from the preceding paragraph that applying Bilchitz's and von Bernstorff's models (and therefore the hybrid model outlined by the Court) correctly is not an easy task. Indeed, there is a danger here that the hybrid test may be complex to the extent of being obscure. There are difficulties with adopting such a test in a jurisdiction like India where proportionality review is still in the nascent stages of development. Unlike Germany, Canada or the EU, all of which have had decades of experience applying the proportionality standard, Indian Courts are relatively inexperienced at applying this test.¹⁶² One may wonder, therefore, whether the hybrid test—which is both extremely nuanced and difficult to apply to concrete facts—was a sensible choice in the Indian context.

The difficulties that follow from the hybrid model are evident from the reasoning in *Puttaswamy II* itself. At [123] and [124], the Court constructed an extremely nuanced hybrid model of proportionality. However, when it came to the application of this model to the facts before it, with respect, the Court was not up to the task. As has been demonstrated in section A of this chapter, not only did the Court not ask what the bright line rules were, it also failed to carry out the four-pronged inquisitorial exercise at the necessity limb.¹⁶³ Instead, it offered the rather bland (and incorrect) assertion that the petitioners had not identified any alternatives and therefore the Court was not required to consider any.

If further evidence were necessary for the pragmatic difficulties of applying the hybrid model in India, one only needs to look at the post-*Puttaswamy II* caselaw. None of the

¹⁶² This was demonstrated in the previous chapter. See section D(4) of ch 5 of this thesis.

¹⁶³ See text to n 71 and n 84 above.

subsequent cases over the last three years have even applied the hybrid test. Insofar as they have referred to proportionality review, these cases appear to have reverted back to the pre-*Puttaswamy II* position, often relying on the proportionality test from Chandrachud J's speech in *Puttaswamy I*.¹⁶⁴ The judicial trend in the post *Puttaswamy II* caselaw is exemplified by two recent decisions of the Supreme Court.

The first among them is *Bhasin*.¹⁶⁵ The background leading up to that decision was the following. Historically, Article 370 of the Indian Constitution made special provision for the State of Jammu and Kashmir. In particular, it provided that certain provisions of the Constitution were inapplicable to the State. On 5 August 2019, a Constitutional Order was issued by the President of India extending all provisions of the Constitution of India to the State. On the same day, fearing repercussions, restrictions on movement and public gatherings were imposed in the State. This had the effect of imposing severe restrictions on the movement of journalists in the State and, in some cases, newspapers could not be published in the State as a result. The petitioners challenged the Constitutional Order on the basis that it constituted a breach of the right to freedom of speech and expression. In this context, a three-judge bench of the Supreme Court applied the test of proportionality. In doing so, the judges expressly referred to the distinction between the German and Canadian variants of proportionality. The Court also considered the work of Bilchitz in refining the German test and pointed out that the Bilchitz model had been adopted by the Court in *Puttaswamy II*. Regrettably, however, the Court in *Bhasin* did not understand or apply the hybrid test correctly. This is apparent from the

¹⁶⁴ Some examples include *Subhash Chandra Agarwal* (n 86) [42], [131]; *Vinit Kumar v Central Bureau of Investigation* (2019) MANU Mh 2931 (Bom HC) [11], [19]; *Raju Sebastian v Union of India* (2019) 4 KHC 615 [12], [13].

¹⁶⁵ *Bhasin v Union of India* AIR 2020 SC 1308.

Court's summary of what proportionality review in India entails.¹⁶⁶ The Court explained that proportionality entailed three steps: (i) the identification of a legitimate State aim; (ii) asking whether there exists an alternative, less restrictive, mechanism that can achieve the State goal; and (iii) the requirement that the State act should be 'supported by sufficient material and should be amenable to judicial review'.¹⁶⁷ To state the obvious, this is not the hybrid test that the Supreme Court had laid down in *Puttaswamy II*. Perhaps, more importantly, it does not even appear to feature the balancing component of proportionality. This is striking because the Court had referred to the balancing test in an earlier passage of the same judgment.¹⁶⁸

The second example is *Internet and Mobile Association of India*.¹⁶⁹ In that case, the petitioners challenged the validity of a Statement issued by the Reserve Bank of India (RBI) on 5 April 2018 which, effectively, imposed a ban on the trading of virtual currencies in India. Among other grounds, the RBI Statement was challenged on the basis that it violated Article 19(1)(g) of the Indian Constitution. The Court accepted that the Statement imposed restrictions on that right. Accordingly, it was required to apply the principle of proportionality. Strikingly, the Court made no reference to the decision in *Puttaswamy II* or the hybrid test. Instead, it referred in detail to the decision of the UK Supreme Court in *Bank Mellat*.¹⁷⁰ The four limbs of proportionality as articulated by the UK Supreme Court in *Bank Mellat* were stated above. By reference to those requirements, the Court concluded that the RBI Statement was unconstitutional. That conclusion was justified on the rather straightforward basis that the RBI

¹⁶⁶ *ibid* [70].

¹⁶⁷ *ibid*.

¹⁶⁸ *ibid* [60].

¹⁶⁹ *Internet and Mobile Association of India v Reserve Bank of India* (2020) 10 SCC 274.

¹⁷⁰ *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700.

had not considered less intrusive measures.¹⁷¹ The Court's conclusion may well be, and is in my view, correct. What is striking, however, is the complete absence of any reference to the analysis and discussion of the meaning of proportionality in *Puttaswamy II*.

In sum, the decision in *Puttaswamy II* suggests that the standard that applies to privacy cases in India is the hybrid version of proportionality incorporating the Bilchitz and von Bernstorff models. In the absence of good reasons to the contrary (and it is not immediately apparent that there are any) this should also be the standard that applies to Part III jurisprudence more generally. This is especially so since, as explained above, the Court has also applied proportionality to non-privacy cases. However, more crucially, the status of the hybrid test laid down in *Puttaswamy II* remains unclear. In particular, whether the hybrid version of proportionality will flourish in India or will quietly be jettisoned remains to be seen. If the early indications offered by the post-*Puttaswamy II* caselaw are anything to go by, one must remain sceptical about the continued vitality of the hybrid test. As explained above, none of the post-*Puttaswamy II* cases have properly understood, or applied, that test.

¹⁷¹ *Internet and Mobile Association of India* (n 169) [6.164], [6.173].

CONCLUSION

The aim of this thesis was to study the existence, structure and scope of the constitutional right to privacy in India. It set out to answer five research questions. The questions and the key claims that the thesis makes in response to them are set out in the Introduction. The methodology employed by the thesis was also set out in the Introduction.

This section offers some concluding observations. It proceeds in two parts. **Section A** sets out the key claims made in this thesis. **Section B** identifies some broader themes that emerge from the issues examined in the thesis.

A. KEY CLAIMS

This section provides an overview of the key claims made in the thesis.

The thesis began, in **chapter 1**, by providing an outline of the key privacy cases decided by the Indian Courts since India attained its independence in 1947. It was suggested that a proper understanding of the constitutional right to privacy in India requires a close study of this extensive caselaw. It was shown that the cases were best analysed as falling into four temporal categories: (i) early recognition of the right to privacy (1950 – 1975); (ii) evolution of the right to privacy (1976 – 1995); (iii) the recognition of privacy as a full-fledged constitutional right in India (1996 – 2014); and (iv) the modern jurisprudence (2015 – 2022). A watershed moment in the history of the right to privacy in India occurred in 2017. In 2017, a nine-judge bench of the Supreme Court of India — only the tenth in the country’s history — decided *Puttaswamy I*.¹ By the time *Puttaswamy I* was decided, Indian Courts had been recognising and enforcing the constitutional right to privacy for several decades. Despite this,

¹ *Justice KS Puttaswamy v Union of India (Puttaswamy I)* (2017) 10 SCC 1.

in its submissions before the Supreme Court, the Union of India decided to challenge the very existence of such a right. This is what led to the constitution of an enlarged panel. The Indian Supreme Court used this opportunity emphatically, and unanimously, to declare the status of the right to privacy as a constitutional guarantee in India. Indeed, the decision of the Supreme Court in *Puttaswamy I*, and the subsequent application of those principles a year later by the five-judge bench in *Puttaswamy II*,² constitute a modern restatement of the law of privacy in India. However, despite the extensive judicial consideration of the right to privacy in recent times, the caselaw leaves several questions unanswered. Those questions were examined in the remainder of the thesis.

This task began in **chapter 2**, which examined some foundational aspects of the constitutional right to privacy in India. Chapter 2 focussed on two main questions: what is the theoretical conception of privacy that has been expounded by the Indian Supreme Court? What consequences follow from the justifications offered by the Supreme Court for reading privacy into the Indian Constitution?

As to the first of those questions, the Supreme Court in *Puttaswamy I* placed considerable emphasis on understanding the values underlying privacy. By way of example, Chandrachud J observed:³

The basic question whether privacy is a right protected under our Constitution requires an understanding of what privacy means. For it is when we understand what interests or entitlements privacy safeguards, that we can determine whether the Constitution protects privacy.

The Court's examination of the values underlying privacy led to the Court evolving a conception of privacy that places individual personality at the centre of analysis. Based on this

² *Justice KS Puttaswamy v Union of India (Puttaswamy II)* (2019) 1 SCC 1.

³ *Puttaswamy I* (n 1) [7].

foundation, the Court went on to emphasise that the right to privacy in India is best justified by reference to the twin values of autonomy and dignity. Whilst this clarification is welcome, the Court's analysis does little to clarify the relationship between the values and the relative weight that Indian Courts should place upon each of them in future cases.

As to the second question, it was argued that some aspects of the Court's reasoning for reading privacy into the Indian Constitution are open to criticism. For instance, in justifying its decision to read a right to privacy into the Constitution, the Court relied on the proposition that privacy is a necessary precondition for the exercise of other rights guaranteed by Part III of the Indian Constitution. In taking this course, the Court did not deal with the doctrinal difficulty posed by its previous attitude towards the 'doctrine of concomitant rights'.⁴ Another aspect of the Court's reasoning that is open to criticism is its characterisation of privacy as a 'natural right'. It is unclear how this assists in deciding whether privacy is a fundamental right in India. This is particularly so since many natural rights (e.g., the right to property) are not protected by Part III of the Indian Constitution. Equally, many rights guaranteed by Part III (e.g., the right against untouchability) are not natural rights. Ultimately, therefore, whether a right is protected by Part III and whether a right is a natural right are distinct enquiries.

In answering the first and second questions considered above, the Court also addressed an ancillary third question: what are the sources of the right to privacy under the Indian Constitution? To this, the Court offered a straightforward answer. There appears to be majority support in *Puttaswamy I* for the view that the primary repository of the right to privacy is Article 21 of the Constitution. However, there are a number of other provisions of the

⁴ The doctrine of concomitant rights is the idea that a constitutional guarantee of a right does not necessarily imply that all preconditions for the exercise of such right are also constitutionally protected: see section A(2)(i) of ch 2 of this thesis.

Constitution that protect the right to privacy in a penumbral fashion. They include Articles 14, 19, 20(3), 25, 26, 28 and 29 of the Constitution.

Chapter 3 of the thesis addressed the taxonomy of the right to privacy in India. In particular, it sought to answer the question whether the right to privacy can be meaningfully classified into sub-categories? This chapter began by considering the debate in the academic literature as to whether privacy is a unitary notion or whether it consists of various clusters of rights. It was suggested that there was scope for meaningfully classifying the Indian right to privacy into various sub-categories. Indeed, there is also support in the Indian caselaw for such categorisation. The thesis considered various proposals in the academic literature as to how the right to privacy could be sub-classified. Based on this material, the thesis suggested that useful insights may be derived by categorising the Indian privacy jurisprudence into three distinct variants: physical privacy, informational privacy and decisional privacy.

The scope of the right to privacy is distinct within each of these clusters, and different questions need to be asked depending on the specific variant of privacy that is under consideration. For instance, physical privacy raises the question of whether the complainant had a reasonable expectation of privacy. Informational privacy requires the Court to consider whether the complainant had consented to the disclosure/use of private information. In contrast, the critical question in most decisional privacy cases is whether the relevant decision is sufficiently fundamental or private so as to merit constitutional protection.

As explained in the Introduction, this classification of the right to privacy was first proposed in the MPhil thesis, which was submitted before *Puttaswamy I* had been decided. The MPhil thesis was cited to the Court in *Puttaswamy I* in oral argument. The Court adopted the three-fold classification proposed in the thesis, which is now the law in India. In particular,

Chelameswar J cited the taxonomy of the constitutional right to privacy in India, proposed in the MPhil thesis, with approval.⁵

Chapter 4 of the thesis examined the horizontal application of the right to privacy in India. This chapter attempted to answer the following questions: Against whom is the constitutional right to privacy owed? In particular, can the right be enforced against private persons? It was suggested that the modern privacy cases had recognised the indirect horizontal application of the right to privacy. Save in this respect, the horizontal application of privacy is at a crossroads in India. It is likely that the Supreme Court will be called on to make a choice in the coming years. Two main options seem open to the Court. The first among them is to adopt a model of direct horizontal application. An alternative choice is based on what I refer to as the ‘public-ness thesis’. Publicness thesis is the idea that private actors may, based on their functions or status, demonstrate a level of public character. The public or private nature of an entity is not always a binary choice. Many entities lie on a spectrum of publicness. Depending on how ‘public’ such an entity is, there may be good reasons for bringing such entities within the bounds of the constitutional guarantee of rights.

The publicness thesis raises a further question: how should the publicness of a non-state entity be judged? The identification of some criteria for publicness is a necessary requirement for the publicness thesis to operate. However, the Indian caselaw offers very little guidance as to what constitutes ‘publicness’. It was suggested in chapter 6, tentatively and non-exhaustively, that three indicative criteria may provide helpful guidance in determining publicness. They are: (a) functionality (i.e., to what extent is the function exercised by the non-state entity public in character?); (b) status (i.e., is there a power differential in the relationship between two private actors?); and (c) pervasiveness (i.e., how pervasive is the impugned

⁵ *Puttaswamy I* (n 1) [222] (fn 309).

conduct?). Depending on whether, and to what extent they fulfil these criteria, there may be good reasons why certain private actors ought to be considered duty-bound to comply with constitutional protections such as the right to privacy.

Finally, **chapters 5 and 6** of the thesis considered the standard(s) of judicial review applicable to privacy cases in India. The key questions that are sought to be answered in these chapters are: What model of proportionality has the Indian Supreme Court used in its privacy adjudication? How well does it work?

In answering these questions, **chapter 5** first introduced the area by pointing out that the Supreme Court had employed four different standards of review in its rights adjudication: (i) reasonableness; (ii) *Wednesbury* unreasonableness; (iii) strict scrutiny; and (iv) proportionality. Regrettably, the Supreme Court has not always been clear about the content of these standards. Neither has the Court employed a clear or consistent delineation between the standards. This has led to conceptual confusion. The task undertaken in chapter 5 was primarily to outline what each of these four standards are, to explain how they differ from each other and to set out in what categories of cases each of the four standards would apply. The reader may recall that the outcome of this exercise was summarised in Figures 1 and 2, which appear at the end of chapter 5. Chapter 5 also demonstrated that, before *Puttaswamy II* was decided, the Supreme Court's privacy adjudication involved the application of two different standards of review: reasonableness and strict scrutiny. The trend in the cases appears to show that reasonableness was applied to cases of physical and informational privacy whereas strict scrutiny was applied to decisional privacy violations.

Based on the background provided in chapter 5, **chapter 6** undertook the more challenging task of analysing the standard of review that applies to privacy adjudication in India. At a basic level, the answer to this enquiry is relatively straightforward. After the

decision in *Puttaswamy II*, it is tolerably clear that the applicable standard is proportionality. However, a number of questions remain unanswered. Was the Supreme Court in *Puttaswamy II* right in adopting proportionality as the applicable standard? What is the content of the Indian proportionality test? What does this mean for future privacy cases in India? Chapter 6 attempted to shed some light on these questions.

As mentioned above, before *Puttaswamy I* and *II*, Indian Courts applied different standards of review depending on the nature of privacy that was under consideration. It was argued in chapter 6 that this is difficult to justify as a matter of principle. Accordingly, the Court's adoption of proportionality as the unitary standard of review in privacy cases is an improvement from the pre-existing position. Proportionality also offers the Court a flexible tool that is capable of taking into account the extent of the intrusion as well as the weight of the justification offered by the State. It does so without tying the Court down, necessarily, to deciding cases by reference to the variant of privacy that is in issue. This is desirable because there is no necessary correlation between the variant of privacy that is violated and the gravity of such intrusion.

What does 'proportionality' mean in India? Chapter 6 showed that the content of proportionality review remained unclear even after the decision in *Puttaswamy I*. But a lot of clarity was brought about by *Puttaswamy II*. In *Puttaswamy II*, the Supreme Court adopted what I refer to as a hybrid version of proportionality. The hybrid model uses the German version of proportionality as a starting point. This is then supplemented by the academic models proposed by Professors Bilchitz and von Bernstorff.

There is much to be said about whether these models are compatible with each other. There are also questions to be raised about the Supreme Court's uncritical elevation of these academic models to the law in India. A more fruitful enquiry, however, is what the hybrid

model means for future privacy adjudication in India. It was suggested in chapter 6 that the hybrid model is excessively complex to the extent of being obscure. The correct application of that model is a challenging task. This is evidenced by the fact that the application of this model by the Court in *Puttaswamy II* leaves much to be desired. This is also demonstrated by the privacy cases decided after *Puttaswamy II*. Rather than attempting to apply it correctly, these cases have simply ignored the hybrid model that was laid down in *Puttaswamy II*.

B. BROADER THEMES

Section A of this concluding section provided an overview of the key claims made by the thesis. This section outlines some broader themes that emerge from the issues considered in the thesis. Four such themes are examined in turn below. They are: (1) the Indian judiciary's approach to comparative material; (2) evolution of the conception of privacy in India; (3) a disjunct between the Indian Courts' statements of principle and their application; and (4) legislative protection of the constitutional right to privacy in India.

1. Indian Judiciary's Approach to Comparative Material

As mentioned above, the first theme is the Indian judiciary's approach to comparative material. In its privacy adjudication, the Indian Supreme Court has always been willing to look outside India for valuable insights. However, an examination of the privacy cases decided over the last 70 years or so suggests a shift in emphasis. The trend in the early cases was to borrow from the American jurisprudence on privacy. The decision in *Govind*,⁶ which was examined in various chapters of the thesis, illustrates this trend. As explained in chapter 1, by the time the dispute

⁶ *Govind v State of Madhya Pradesh* AIR 1975 SC 1378.

in *Govind* came up before the Supreme Court of India, *Roe*⁷ and *Griswold*⁸ had been decided in America. The Supreme Court in *Govind* borrowed liberally from both these decisions. For instance, the idea that the right to privacy might function as a penumbral emanation of other expressly guaranteed rights was borrowed from *Griswold*.⁹ The suggestion that ‘compelling state interest’ might function as the touchstone for judging restrictions on the right to privacy¹⁰ also came from America.

The cases decided in the more recent years suggests a shift in emphasis. As a general rule, it appears that — although the Court continues to refer to American caselaw — it now places far more weight on the ECHR jurisprudence. There are three areas where the shift in emphasis is especially apparent: horizontality, balancing of competing rights and standards of review.

As to horizontality, this trend is evidenced by *Puttaswamy I*. Kaul J was the most vocal supporter of direct horizontality in that case. He stated, unambiguously, that privacy ‘protects the inner sphere of the individual from interference from both State, and non-State actors’.¹¹ This analysis was substantially influenced by the position under the ECHR.

As to the balancing of competing rights, it was explained in chapter 4 that the recent Indian cases have adopted a methodology that closely aligns with the way in which English Courts resolve the conflict between privacy and other competing rights. This approach assumes that neither has precedence over the other and that the conflict is to be resolved by reference to

⁷ *Roe v Wade* 410 US 113 (1973).

⁸ *Griswold v Connecticut* 381 US 479 (1965).

⁹ *Govind* (n 6) [28].

¹⁰ *ibid* [33].

¹¹ *Puttaswamy I* (n 1) [496].

the test of proportionality. The approach adopted by the Indian Courts appear to be based on the ‘ultimate balancing’ test,¹² although that terminology has not been employed in India.

As to standards of review, in adopting proportionality as the standard of review for privacy infractions, the judges in *Puttaswamy II* borrowed heavily from European jurisprudence. For instance, Chandrachud J referred to cases from the UK, Germany, ECtHR, France and CJEU¹³ while justifying proportionality as the ‘best practice’ standard for judicial review. The same trend may be observed in the judgment of Bhushan J, who also relied on the jurisprudence of the CJEU.¹⁴ Similarly, at least as a starting point, the majority judges in *Puttaswamy II* preferred the German model of proportionality to the Canadian version.¹⁵

The reasons for this shift in emphasis are harder to discern. It may be that the Indian Courts consider the privacy jurisprudence under the ECHR to be more well-developed as compared to the law in America. Or it may be that the submissions before the Court in recent years have focused on the European jurisprudence. The answer remains unclear. It is safe to say, however, that the shift in emphasis has had, and is likely to have, a considerable impact on the Court’s approach to its privacy adjudication.

2. Evolution of the Conception of Privacy in India

There has been a gradual evolution in the kind of privacy cases that have come up before Indian Courts. This, in turn, has resulted in a shift in the Indian Courts’ conception of the right to privacy.

¹² *In Re S* [2004] UKHL 47, [2005] 1 AC 593 [17].

¹³ *Puttaswamy II* (n 2) [653]ff.

¹⁴ *ibid* [930].

¹⁵ *ibid* [119].

As explained in chapter 1, most of the very early privacy cases that came before the Supreme Court were concerned with unlawful searches and seizures. In other words, they related to privacy in the physical or spatial sense. *MP Sharma* (1954),¹⁶ *Kharak Singh* (1962),¹⁷ *Govind* (1975)¹⁸ and *Malak Singh* (1982)¹⁹ are all examples of this. Each of them arose from a challenge to an unlawful search or seizure by the police. There then followed an intermediate phase when the Supreme Court had occasion to consider breaches of informational privacy. *Rajagopal* (1995),²⁰ which concerned the unauthorised publication of an autobiography, is an example of this intermediary phase. So is *PUCL* (1997),²¹ where the vires of section 5(2) of the Indian Telegraph Act were challenged. It is in the more recent caselaw that the Supreme Court had occasion to consider breaches of decisional privacy. *Suchita Srivastava* (2010),²² which concerned the reproductive choices of a mentally disabled woman, *Naz* (2010),²³ *Koushal* (2014)²⁴ and *Johar* (2018),²⁵ all of which concerned the criminalisation of homosexuality and *Selvi* (2010),²⁶ which examined the constitutional permissibility of involuntary narcoanalysis, are examples of the modern trend.

¹⁶ *MP Sharma v Satish Chandra* AIR 1954 SC 300.

¹⁷ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

¹⁸ *Govind* (n 6).

¹⁹ *Malak Singh v State of Punjab and Haryana* AIR 1982 SC 760.

²⁰ *R Rajagopal v State of Tamil Nadu* AIR 1995 SC 264.

²¹ *People's Union of Civil Liberties (PUCL) v Union of India* AIR 1997 SC 568.

²² *Suchita Srivastava v Chandigarh Administration* AIR 2010 SC 235.

²³ *NAZ Foundation v Government of NCT* 2010 Cri LJ 94 (Del HC).

²⁴ *Suresh Kumar Koushal v NAZ Foundation* AIR 2014 SC 563.

²⁵ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321.

²⁶ *Selvi v State of Karnataka* AIR 2010 SC 1974.

This gradual evolution in the nature of the cases to come before it also appears to have reflected in the Court's conception of privacy. For example, the early cases invariably approached the right to privacy as rooted in personal liberty and freedom of movement.²⁷ At this phase in its development, privacy was almost entirely conceptualised as a right that was based on liberty or autonomy. In more recent years, the prominence of the decisional aspect of the right appears to have prompted the Court to move away from this conception. For instance, the judgments in *Puttaswamy I* emphasise autonomy and dignity in equal measure as justifications for the right to privacy. Indeed, it was pointed out in chapter 2 that the relative weight to be attached to these values remains unclear. This is a paradigm shift from the way in which Indian Courts' analysed privacy claims in the early years after independence.

3. Disjunct between Statements of Principle and their Application

The third broad theme that emerges from the issues analysed in this thesis is a disjunct between the Indian Supreme Court's statement of the principles and its application of those principles to the facts before it. There are several examples of this trend among the cases examined in this thesis. It will suffice to focus on two of them for the present purposes.

The first among them is the decision in *Puttaswamy II*. It was explained in chapter 6 that, in *Puttaswamy II*, the Supreme Court affirmed a nuanced, complex and hybrid version of proportionality for India. Yet when it came to the application of that test to the facts before it, the Court was not up to the task. As explained in chapter 6, the Court's application of the third and fourth limbs of proportionality are indefensible. Under the third limb, the court did not consider potential alternative measures at all. Rather, it was content to proceed on the (incorrect) basis that the petitioners had not identified any such alternative measures. The Court

²⁷ See for example, *Govind* (n 6) [39]; *Malak Singh* (n 19).

also did not undertake any assessment of the *impact* of the impugned State act on the right to privacy. As a corollary, the Court did not conduct the balancing exercise either.

A second example of the same trend is the decision of the Supreme Court in 2016 in *Modern Dental College*.²⁸ As explained in chapter 5, this was one of the first decisions in which the Supreme Court adopted a principled approach to proportionality. The Court's statement of the principles of proportionality suggests that, by this time, it had developed a firm and nuanced understanding of proportionality. However, when it came to applying that test to the facts before it, the Court failed. The Court did not apply the structured four-stage proportionality test in a step-by-step fashion. Rather, its reasoning was confined to the observation that, '[t]he extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to "*restrictions*" on the right of the Appellants to carry on their "*occupation*", are clearly "*reasonable*" and satisfied the test of proportionality'.²⁹ Here, again, there appears to be a wide gulf between the Court's commendable statement of the relevant principles and its less-than-satisfactory application of those principles to the facts before it.

4. Legislative Protection of the Constitutional Right to Privacy

In India, there are some statutes that were enacted to protect constitutional safeguards. The Right to Information Act 2005, which enforces the citizens' constitutional right to information and accountability, is an example of such a statute. As mentioned in the Introduction, the Personal Data Protection Bill 2022 had the potential to become another example. If enacted, it

²⁸ *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

²⁹ *ibid* [61].

will function as a statute that protects and operationalises the right to privacy under the Indian Constitution.

As explained in the thesis, in *Puttaswamy I*, the Supreme Court of India declared that privacy is a fundamental right under the Indian Constitution. As mentioned in the Introduction, this resulted in the constitution of the BN Srikrishna Committee to evolve a data protection framework for India. The committee recommended the enactment of a data protection legislation. This has resulted in several different draft legislations being prepared. The latest version is the Digital Personal Data Protection Bill 2022. At the time of writing, however, this has not been enacted into law. This thesis does not therefore examine the legislative proposals in any detail. However, from the perspective of the constitutional right to privacy, two brief observations may be made.

First, even a cursory reading of the draft legislations suggest that they are substantially inspired by the EU General Data Protection Regulation (GDPR).³⁰ Although these draft legislations were not the creation of the judiciary, they are yet further examples of the trend highlighted above: the trend in the recent Indian privacy jurisprudence of borrowing from Europe in preference to America.

Second, if enacted into law, the Indian data protection legislation is likely to become the first port of call for remedying a large category of infringements of informational privacy. These are infringements that relate to ‘personal data’ as defined in clause 2(13) of the 2022 Bill. It would not be surprising if litigants preferred the certainty offered by the written words of a statute as compared to uncertainties surrounding the scope of the constitutional right to informational privacy in India. This is likely to lead to substantial litigation in India relating to

³⁰ Regulation (EU) 2016/679.

infringements of its data protection regime. In turn, this will pave the way for the development of a substantial body of Indian data protection law (including caselaw). It seems likely, therefore, that the future development of the constitutional right to informational privacy in India will be inextricably linked with India's data protection framework. Indeed, one may go so far as to say that the evolution of this aspect of the constitutional right to privacy is likely to be led by developments in data protection rather than through constitutional interpretation.

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