

# UNRAVELLING THE ROLE OF AUTONOMY AND CONSENT IN PRIVACY

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## Abstract

*It has been widely acknowledged that consent is central to the right to privacy. This has been recognised by the Supreme Court in Justice K.S. Puttaswamy v. Union of India (2017), as well as in the Personal Data Protection Bill, 2019 (currently pending in Parliament). While several studies have mentioned the difficulties of obtaining informed consent in today's world, there has been little discussion on the precise role of consent within a privacy rights analysis. We will attempt to explore this crucial and under-theorised issue through an analysis of the Court's recent constitutional jurisprudence. Underlying the recognition of the right to privacy have been the values of dignity, autonomy and liberty. We argue that the Court has recognised an autonomy-rich conception of dignity, which focuses upon an individual's continued capacity to make autonomous choices. This both enhances and limits the role of consent in privacy – while consent is an important factor to be considered by courts, it does not completely determine whether a person can effectively claim a right to privacy. We then situate this understanding of consent within the doctrinal tools adopted by the Court to adjudicate privacy claims – the reasonable expectations test and proportionality. We argue that consent plays a key role in both these tests. Consent is an important variable, but does not operate in an 'all-or-nothing' manner, and has to be balanced with other factors such as the autonomy of the individual, public interest and the rights of others. This has important implications for assertions of privacy in the future.*

*Keywords: Right to Privacy, Puttaswamy, Data Protection Bill, 2019, consent, dignity*

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## 1. Introduction

The decision of nine judges of the Supreme Court, in *Justice K.S. Puttaswamy v. Union of India*<sup>1</sup> (*Puttaswamy I*), declaring the right to privacy a fundamental right has justifiably been celebrated because of its unanimous recognition of the constitutional status of privacy in India.<sup>2</sup> The many opinions in *Puttaswamy I* espouse several high principles of constitutional law in the process of linking up the right to privacy with Article 21, as well as with Articles 14, 15, 19, 25 and other provisions of Part III. However, sources of uncertainty in the decision have made predicting the application of its principles to future decisions a tricky exercise. The reasons for this are several: the lack of a clear majority opinion,<sup>3</sup> the use of often conflicting theoretical foundations,<sup>4</sup> as well as the limited scope of the referral.<sup>5</sup>

Two years on, we have now had time to observe the application of the principles of this decision by the Supreme Court, in decisions such as *Navtej Singh Johar*<sup>6</sup>, *Joseph Shine*<sup>7</sup>, and *Justice K.S. Puttaswamy v. Union of India (Puttaswamy II)*<sup>8</sup>. *Puttaswamy II* is particularly significant because it deals with the validity of the Aadhaar;<sup>9</sup> and it was arguments against the Aadhaar scheme which occasioned the referral to the nine-judge bench in *Puttaswamy I*.

While *Puttaswamy II* has clarified a few matters with regard to how *Puttaswamy I* is to be applied, it has also thrown up a host of questions. We do not propose to examine all these questions in this paper; instead, we focus on the narrower issue of consent. Both *Puttaswamy I* and *II* repeatedly emphasise the centrality of consent to the right to privacy.<sup>10</sup> The precise role of consent, and its interaction with other principles is, however, uncertain.

<sup>1</sup> K.S. Puttaswamy v. Union of India, W.P. (Civil) 494/2012 (Supreme Court, 24/08/2017).

<sup>2</sup> See M. Kamil, *Puttaswamy: Jury still out on some privacy concerns?*, 1(2) Indian Law Review 190 (2017); see also, Pritam Baruah and Zaid Deva, *Justifying Privacy: The Indian Supreme Court's Comparative Analysis*, Indian Yearbook of Comparative Law (Forthcoming in 2018) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3223381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381), last seen on 08/07/2019; V Bhandari, A Kak, S Parsheera, F Rahman, *An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict*, 11 IndraStra Global 1, (2017) <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-54766-2> last seen on 08/07/2019; see also, AP Kumar, *The Puttaswamy Judgment: Exploring Privacy Within and Without*, 52(51) Economic and Political Weekly 34 (2017).

<sup>3</sup> The decision has a 'plurality' opinion rendered by Chandrachud, J and assented to by three other judges (JS Khehar, CJI, RK Agrawal, J and S Abdul Nazeer, J), falling one short of a clear majority of five. In addition, J Chelameswar, J, SA Bobde, J, RF Nariman, J, Abhay Manohar Sapre J, and Sanjay Kishan Kaul, J gave separate concurring opinions.

<sup>4</sup> Pritam Baruah and Zaid Deva, *Justifying Privacy: The Indian Supreme Court's Comparative Analysis*, Indian Yearbook of Comparative Law (Forthcoming in 2018) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3223381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381), last seen on 08/07/2019

<sup>5</sup> M. Kamil, *Puttaswamy: Jury still out on some privacy concerns?*, 1(2) Indian Law Review 190 (2017), at 202-03.

<sup>6</sup> *Navtej Singh Johar v. Union of India*, W.P. (Criminal) 76/2016 (Supreme Court, 06/09/2018).

<sup>7</sup> *Joseph Shine v. Union of India*, W.P. (Criminal) 194/2017 (Supreme Court, 27/09/2018).

<sup>8</sup> *K.S. Puttaswamy v. Union of India*, W.P. (Civil) 494/2012 (Supreme Court, 26/09/2018).

<sup>9</sup> Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

<sup>10</sup> See supra 1, at ¶ 171.

This is an important lacuna: if consent is indeed central to privacy, then understanding the role of consent in privacy becomes crucial.

In this paper, we chalk out a few of the major questions in this regard and propose a few preliminary solutions. The main purpose of our paper is to provoke a debate over the role of consent in a privacy rights analysis. We here will not be concerning ourselves with the separate (and important) question about whether consent can be meaningfully obtained in the context of many privacy claims. For instance, studies have shown that people do not really understand what they are consenting to when agreeing to privacy policies online.<sup>11</sup> Similarly, scholars have questioned whether the processes of metadata collection can ever meaningfully be consented to.<sup>12</sup>

We will, instead, explain the role of consent within privacy, when meaningfully given, with a full understanding of its consequences. This is important, as many studies of consent stop at questioning whether consent is real or illusory, without going into the larger question of what justificatory work consent performs in privacy rights claims. Further, even though the focus of our paper will be upon the right to privacy, much of our analysis with respect to, for instance, waiver of fundamental rights, can apply to other fundamental rights as well.

The structure of our paper will be as follows: Part 2 will explore the principles of liberty, autonomy and dignity, which were the foundations of the right to privacy as conceived in *Puttaswamy I*. We will demonstrate how *Puttaswamy I* and subsequent cases adopted what we term an ‘autonomy-rich’ conception of dignity, which can help us situate the role of consent. Part 3 will discuss the application of this conception to the question of waiver of rights, the right to be forgotten and the public interest. After Part 4 briefly discusses the doctrinal contours of privacy, Parts 5 and 6 will explore how consent can be situated within the reasonable expectations doctrine and proportionality analysis as adopted by the Court in *Puttaswamy I* and *II*. Our discussion will be concluded in Part 7, which re-asserts our central claim that consent is an important, but not completely determinative, value in privacy claims. Courts must take consent into account as a variable in the balancing process which also considers the overall autonomy of a person and the rights of others.

## 2. Philosophical Foundations of Consent in *Puttaswamy I*

This Part will focus on analysing the foundations of the fundamental right to privacy in *Puttaswamy I*. This will be done at four levels. First, we will discuss the justifications used in the various opinions for declaring privacy a fundamental right, as these will inform both the contours of privacy, as well as its limitations. Second, we will focus specifically on

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<sup>11</sup> V. Bhandari, A. Kak, S. Parsheera, F. Rahman, *An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict*, 11 *IndraStra Global* 1, (2017) available at <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-54766-2>, last seen on 08/07/2019.

<sup>12</sup> D. Solove, *Privacy Self Management and the Consent Dilemma*, 126 *Harvard Law Review* 1880, 1894-1900, (2013).

how these justifications in turn impact the role of consent. Third, we will look at a few cases which were decided post-*Puttaswamy I*, to clarify a few of the positions mentioned in the latter. Last, we will briefly explore how the majority opinion in *Puttaswamy II* misunderstood a few of these key principles underlying the opinions in *Puttaswamy I*.

## 2.1. *The Justifications for Privacy - Unravelling the Dignity-Liberty-Autonomy Triangle*

The right to privacy is not explicitly stated in the Constitution; this made it all the more important for the various judges in *Puttaswamy I* to link it up with other constitutional values. These other constitutional values, such as for instance, the right to life and personal liberty in Article 21, then became prisms through which privacy could be constructed. Similar links were drawn with other fundamental rights, such as the right to equality (Articles 14), right against discrimination (Article 15), freedom of religion (Article 25) and the various freedoms in Article 19.<sup>13</sup>

However, three concepts dominate the justifications given for the right to privacy across all the opinions: liberty, autonomy and dignity. We'll begin with the 'plurality' opinion authored by Chandrachud, J and subscribed to by three other judges. In the discussion over the 'essential nature of privacy', the opinion begins by observing the importance of privacy in protecting the autonomy of the individual. The ability to make choices was seen as the core of human personality.<sup>14</sup>

Therefore, in Chandrachud, J's formulation, privacy allows individuals to 'chart and pursue' the development of their personalities, which is in turn a postulate of dignity.<sup>15</sup> Similarly, privacy is linked to liberty by the observation that "it is in privacy that the individual can decide how liberty is best exercised".<sup>16</sup> Liberty, dignity and privacy,

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<sup>13</sup> The final 'Order of the Court', signed by all nine judges, signifies the multiple sources of the right to privacy when it states, "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and *as a part of the freedoms guaranteed by Part III of the Constitution.*" (emphasis ours). As an instance of more explicitly drawing from multiple sources, we can refer to Chandrachud J [See *Supra* 1, at ¶ 169 (Chandrachud, J)]: "The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right... Privacy is the ultimate expression of the sanctity of the individual. *It is a constitutional value which straddles across the spectrum of fundamental rights* and protects for the individual a zone of choice and self-determination." (emphasis ours) Similar linkages are drawn up by the other opinions in *Puttaswamy I* as well.

<sup>14</sup> *Supra* 1, at ¶ 168 (Chandrachud, J).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

therefore, all help preserve diversity in a plural culture. Similar statements on the links between liberty, autonomy and dignity can be found in the other opinions in this case.<sup>17</sup>

This does not mean that the concepts above are interchangeable, and neither are all subsumed with the notion of privacy. For instance, Chandrachud, J clearly observes that privacy is a subset of liberty, with the latter being the broader notion.<sup>18</sup> This understanding is reiterated by Nariman, J when he notes that privacy, even though based on liberty, is different from it. He illustrates this by observing how the First Amendment of the US Constitution has been used to protect privacy rights with respect to the possession of obscene material at one's home, while the same First Amendment will not protect obscenity in public spaces.<sup>19</sup>

We therefore largely agree with Kamil, when she observes, “[F]or the large part, the Supreme Court’s articulation of the rationale for privacy appears to be based on the notion of individual liberty operationalized through the ideas of autonomy and dignity.”<sup>20</sup> However, it becomes crucial to understand the precise nature of the relationship between these concepts. In case of a conflict between liberty and dignity, for instance, which one will prevail? European courts have shown a tendency to give precedence to dignity in such cases. The ‘dwarf-tossing’ case is a famous instance of this, where the mayor of a town banned ‘dwarf-tossing’ performances, a show in which a dwarf in protective gear is tossed around by customers in a bar. In an appeal by an affected dwarf, the French Conseil d’Etat held that the ban was justified because the show undermined human dignity. It upheld the power to ban the show, “even where protective measures are in place to ensure the safety of the person concerned and *this person lends himself willingly and for reward to this activity.*”<sup>21</sup> Similarly, the German Federal Administrative Court has upheld the prohibition of ‘peep-shows’, on the grounds of protecting the dignity of women who expose themselves to men for payment.<sup>22</sup>

This is important, because it is clear from the above that the consent of the person whose rights were involved was largely deemed irrelevant when it conflicted with dignity. Indeed, as Baruah and Deva point out, dignity can often manifest itself in a ‘liberty-restricting’ role.<sup>23</sup> One of the reasons often cited for the importance given to dignity by German courts is the position of dignity in the German Basic Law as the supreme value in

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<sup>17</sup> Supra 5, at 191-197

<sup>18</sup> Ibid, at 169 (Chandrachud, J).

<sup>19</sup> Ibid, at ¶¶ 49-50 (Nariman, J).

<sup>20</sup> Supra 5, at 197.

<sup>21</sup> Commune de Morsang-sur-Orge, CE, Ass., 27 Oct. 1995, N° 136727 (Administrative Court Assembly, France). [Translation available at <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1024>, last seen on 24/06/2019.] See generally Luís R. Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. Int’l & Comp. L. Rev. 331 (2012).

<sup>22</sup> Sittenwidrigkeit von Peep-Shows, BverfGE 64, 274, (Higher Administrative Court for Münster) at 279–280; as cited in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) The European Journal of International Law 655, at 705 (2008).

<sup>23</sup> Supra 4, at 18-19.

the objective order of values.<sup>24</sup> However, as McCrudden points out, dignity has often been used in a rights-constraining role in other countries as well.<sup>25</sup> McCrudden, in his analysis of dignity, notes that there can be two approaches to dignity: a choice-based autonomy approach, and a communitarian approach.<sup>26</sup> A choice-based autonomy approach focuses upon the decisions made by an individual. A communitarian approach, on the other hand, focuses on a person as a social being, and the concept of dignity is constructed on that basis. As observed by the German Constitutional Court: “[H]uman dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual.”<sup>27</sup> He notes that this underlies the decisions of the Courts in the dwarf-tossing and peep-show cases. Inbuilt into this idea of dignity is the notion that dignity is dependent upon communitarian standards of what is dignified or ‘human’.<sup>28</sup>

The question which arises in our context is: what role does *Puttaswamy I* conceive for dignity? This is a challenging task since, even though dignity is universally mentioned in the various opinions, several statements, often contradictory, are made with respect to its functional relationship with liberty and autonomy.<sup>29</sup> Chandrachud, J seems to ascribe dignity the status of the foundational value and the ‘core’ which unites the fundamental rights. Privacy, in this context, is valuable because it assures dignity to the individual.<sup>30</sup>

Interestingly, Chandrachud, J quotes Aharon Barak<sup>31</sup>, where he observes the ‘central normative role’ of dignity<sup>32</sup> in uniting ‘human rights into one whole’.<sup>33</sup> This understanding of dignity has been used by the Supreme Court of Israel in rights-constraining ways, as can be seen in the case of *Station Film Co. v. Public Council for Film Censorship*, where the Supreme Court of Israel upheld the deletion of scenes from a film on the grounds of protection of dignity.<sup>34</sup> However, this discussion has to be mediated with what Chandrachud, J says about the concept of dignity itself. He notes that dignity has both intrinsic and

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<sup>24</sup> For instance, Article 1(1) of the Basic Law provides, “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Article 1(2) states, “The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.”

<sup>25</sup> C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) *The European Journal of International Law* 655, at 702 (2008).

<sup>26</sup> *Ibid.*, at 699.

<sup>27</sup> *Ibid.*, at 705.

<sup>28</sup> However, we will argue later that the judges in *Puttaswamy I* and subsequent cases have adopted an autonomy-rich approach to dignity. The autonomy-rich approach gives greater emphasis to the choices of individuals. However, it is still not the case that *any* choice is determinative of the issue. Choices can be limited in certain circumstances, as will be explained later. (*See* Parts 2.3 and 3.2 of this article)

<sup>29</sup> *See supra* 4, *Supra* 25, for more.

<sup>30</sup> *Supra* 1, at ¶ 107 (Chandrachud, J).

<sup>31</sup> A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (CUP 2015) as cited in *supra* 1 at ¶ 105 (Chandrachud, J).

<sup>32</sup> *Supra* 1 at ¶ 105 (Chandrachud, J).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Station Film Co. v. Public Council for Film Censorship*, (1994) 50 PD (5) 661 (Supreme Court of Israel); *Supra* 25, at 702.

instrumental value.<sup>35</sup> From an instrumental point of view, “dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other.”<sup>36</sup>

The implication which seems to flow from this is that dignity is a liberty-affirming concept rather than a liberty-restricting one. Indeed, in many situations, protection of dignity can easily be envisaged as converging with an increase in liberty. For instance, in *Navtej Singh Johar v Union of India*<sup>37</sup>, Misra, J observes that Section 377 denudes persons of dignity because it impinges upon their ‘right to choose without fear’ in the context of sexual relationships.<sup>38</sup> However, there is again little clarity in the above quotation from Chandrachud, J, as to what would happen in case of a conflict between dignity and liberty.

There is a possible key to the resolution of this conflict in Chandrachud, J’s discussion of the concept of ‘inalienability’ in the context of privacy being a ‘natural’ right. In fact, all the judges (with the notable exception of Chelameswar, J), accord privacy the status of a ‘natural right’.<sup>39</sup> Most, in turn, also refer to these rights being ‘inalienable’.<sup>40</sup> For instance, Chandrachud, J observes that “[p]rivacy is a concomitant of the right of the individual to exercise control over his or her personality”, which in turn finds its origin in the idea of certain rights being ‘natural’ to human beings.<sup>41</sup> He then states, “Natural rights are inalienable because they are inseparable from the human personality.”<sup>42</sup> However, inalienability and autonomy can pull in opposite directions, and this is acknowledged by him:

The concept of natural inalienable rights secures autonomy to human beings. But the autonomy is not absolute, for the simple reason that, the concept of inalienable rights postulates that there are some rights which no human being may alienate. While natural rights protect the right of the individual to choose and preserve liberty, yet the autonomy of the individual is not absolute or total. As a theoretical construct, it would otherwise be strictly possible to hire another person to kill oneself or to sell oneself into slavery or servitude.

He further quotes Ster and Jones in observing that such acts, though ostensibly autonomous, ‘pretend to an autonomy that does not exist’, being exercises in ‘false autonomy’.<sup>43</sup> This is just an instance of the age-old debate about the limitations of autonomy.

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<sup>35</sup> Intrinsic value is the value ascribed to dignity as an interest in itself. Instrumental value is the value ascribed to dignity in furthering other interests. See *Supra* 1, at ¶ 169 (Chandrachud, J).

<sup>36</sup> *Supra* 1, at ¶ 169 (Chandrachud, J).

<sup>37</sup> *Supra* 6.

<sup>38</sup> *Ibid*, at ¶¶ 132, 138 (Misra, J).

<sup>39</sup> See, for instance, *supra* 1 at ¶ 12 (Bobde, J) and ¶ 56 (Nariman, J).

<sup>40</sup> *Supra* 1, at ¶ 40 (Chandrachud, J); at ¶ 92-94 (Nariman, J); at ¶ 25 (Sapre, J); at ¶ 12, 31, 47 (Bobde, J); at ¶ 20 (Chelameswar, J). It is clear that a majority of the judges not only recognised privacy as a fundamental right, but also characterised it as ‘inalienable’.

<sup>41</sup> *Ibid*, at ¶ 40 (Chandrachud, J).

<sup>42</sup> *Ibid*.

<sup>43</sup> C. A. Ster & G. M. Jones, *The Coherence of Natural Inalienable Rights*, 76(4) UMKC Law Review 939, 971-972 (2007- 08); *Supra* 1, at ¶ 45 (Chandrachud, J).

Immanuel Kant, for instance, has often been seen to be among the originators of the modern concept of dignity in his conception of persons as ends-in-themselves. In his formulation of the categorical imperative, however, Kant mentions instances of duties towards oneself, such as the duty to not take your own life.<sup>44</sup> The duty to not treat others as means to an end also extends to oneself; so we can clearly see the linkages between this and the idea of ‘false autonomy’ i.e. autonomy does not contemplate the ability to make absolutely any choice.

In making these linkages with natural law theories, Chandrachud, J cites *Golaknath v. State of Punjab*<sup>45</sup>, where Subba Rao, CJ speaks of the fundamental rights as ‘transcendental’, ‘primordial’ and ‘natural’ within his larger argument that fundamental rights cannot be amended by Parliament.<sup>46</sup> Chandrachud, J concludes from this that fundamental rights “are primordial rights which have traditionally been regarded as natural rights.”<sup>47</sup> He then goes on to cite a few of the judges in *Kesavananda Bharati*<sup>48</sup>, such as Sikri, CJ who also accorded fundamental rights the status of natural rights. However, this understanding of natural rights is of doubtful provenance, as (a) *Golaknath* was overruled by *Kesavananda Bharati*, and (b) *Kesavananda Bharati* is ambivalent about natural rights theories. Khanna, J’s opinion in *Kesavananda*, regarded by many as the controlling opinion because it straddles a middle path, explicitly disregards a reliance on natural rights theories, even in the formulation of the basic structure.<sup>49</sup>

Be that as it may, *Puttaswamy I* does effectively hold (by eight judges) that fundamental rights are natural rights, and thereby imports much of the uncertainty of natural law theories. For our purpose, it is sufficient to observe the impact this has on consent, and the possible liberty-restraining potential of both the reliance on dignity, and its corresponding link to natural law theories.

## 2.2. *Consent in Puttaswamy I*

Having looked at the theoretical foundations of the right to privacy in the preceding sub-part, our focus here is on how this is used in the judgment to specifically deal with the issue of consent. Consent finds mention especially in the parts of the opinions which deal with informational self-determination. Chandrachud, J, for example, observes, “Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality

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<sup>44</sup> I. Kant, *Practical Philosophy*, 73-74 (Cambridge edn., 1996).

<sup>45</sup> *Golaknath v. State of Punjab*, (1967) 2 SCR 762.

<sup>46</sup> *Ibid*, at ¶¶ 17-19 (Rao, J).

<sup>47</sup> *Supra* 1, at ¶ 108 (Chandrachud, J).

<sup>48</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>49</sup> *Ibid*, at ¶ 1467 (Khanna, J): “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.”

of consent.”<sup>50</sup> He also takes note of the Report of the Group of Experts on Privacy (under the erstwhile Planning Commission), which laid out nine privacy principles, where consent is mentioned at several places: in the collection of data, purpose limitations, the ability to access and correct data, and in the disclosure of information.<sup>51</sup> These principles are largely reiterated by Kaul, J.<sup>52</sup>

A similar emphasis on consent can be found in other judgments. Bobde, J conceives of the right to privacy as involving the right to choose and specify.<sup>53</sup> The right to choose necessarily involves the choice about whether to disclose information, whereas the right to specify encapsulates the right to decide who gets access to the information.

Bhatia observes that we need to look at the emphasis on consent in *Puttaswamy I* and read it together with the clear rejection of the ‘third-party doctrine’.<sup>54</sup> In doing so, he observes that, from the perspective of privacy, ‘consent is not a one-time waiver of your right to control your personal information, but must extend to each and every distinct and specific *use* of that information, *even after* you have consented to the State collecting it from you.’<sup>55</sup>

We largely agree with his statement about the holding in *Puttaswamy I*, but would modify it to the extent that it needs to account for a fuller understanding of the right to be forgotten, which we will deal with in Part 3 of this article. It is also important to observe that, though the judgments do commendably focus on consent, there is little focus upon its limitations in the context of the theoretical foundations of privacy laid out in the preceding parts of their judgments. This still leaves open the question about those cases where consent can conflict with dignity or autonomy: what if a person wants to delete information which they have put up on Facebook 10 years ago, because it is embarrassing or affects their job prospects?<sup>56</sup> On the same thread, what if a person has handed over biometric details to the State when enrolling for Aadhaar, but now wants that biometric information to be deleted?

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<sup>50</sup> Supra 1, at ¶ 177 (Chandrachud, J).

<sup>51</sup> Ibid, at ¶ 184 (Chandrachud, J).

<sup>52</sup> Ibid, at ¶ 70 (Kaul, J).

<sup>53</sup> Ibid, at ¶¶ 43-44 (Bobde, J).

<sup>54</sup> The ‘third-party’ doctrine is a doctrine evolved by the US Supreme Court which holds that, once a person discloses information to a third party, they have effectively lost their privacy rights to such information. This was categorically rejected by the Supreme Court of India in *District Registrar and Collector, Hyderabad v. Canara Bank*, (2005) 1 SCC 495. The majority in *Puttaswamy* agrees with the Canara Bank decision, as can be seen in Chandrachud, J and Nariman, J’s opinions. This shall be discussed in greater detail in later sections. (*See* Part 5 of this article).

<sup>55</sup> G. Bhatia, *The Supreme Court’s Right to Privacy Judgment – IV: Privacy, Informational Self-Determination, and the Idea of Consent*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2017/08/30/the-supreme-courts-right-to-privacy-judgment-iv-privacy-informational-self-determination-and-the-idea-of-consent/>, last seen on 08/07/2019 (emphasis in original).

<sup>56</sup> An additional question which can be asked in such a situation is: *who* would be the duty-bearer to ensure deletion of the information in such an instance - the State or a private agency such as Facebook? We will not enter into the question of horizontal applicability of the right in this article, but suffice it to say that these arguments can potentially also be used to construct liability under tort law. Alternatively, arguments could be made for horizontal application of certain fundamental rights based on the public nature of such

### 2.3. *Post-Puttaswamy I aids to construction*

Several cases following *Puttaswamy I* relied upon various aspects of the judgment. Here, we will be looking at three judgements to help decipher the position of the Court on the issue of the limits of consent: *Common Cause v Union of India*<sup>57</sup> (*'Common Cause'*), *Navtej Singh Johar v Union of India*<sup>58</sup> (*'Navtej Johar'*) and *Puttaswamy II*<sup>59</sup>.

In *Common Cause*, the issues were the constitutional validity of passive euthanasia and living wills. Euthanasia is perhaps amongst the most contentious arenas with respect to the limits of consent, as can be seen from the Kantian duty against suicide.<sup>60</sup> A five-judge bench of the Supreme Court upheld the validity of passive euthanasia for terminally ill or PVT (persistent vegetative state) patients, while passing directions regarding a mechanism to ensure safeguards in the process.<sup>61</sup> The Court also upheld the usage of 'living wills', whereby a person can specify, in advance, refusal of treatment in case they later are not in a position to do so.<sup>62</sup> A question that might legitimately be asked here is whether allowing a person to die would be a violation of dignity? Can consent in this case override dignity?

This question is dealt with in an interesting manner by the Court. Misra, J, writing for himself and Khanwilkar, J, notes that dignity must necessarily take into account the circumstances of the patient. A patient in a terminally ill or PVT state "has no other choice but to suffer an avoidable protracted treatment."<sup>63</sup> This in turn affects the patient's "right to live with dignity and face death with dignity, which is a preserved concept of *bodily autonomy* and right to privacy."<sup>64</sup> In a similar vein, Chandrachud, J observes that terminal illness signifies a loss of control over one's faculties. This makes control over 'essential decisions about how an individual should be treated at the end of life' fundamental to their autonomy and dignity.<sup>65</sup>

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social networking websites. (See *Zee Telefilms v. Union of India*, (2005) 4 SCC 649.) *Puttaswamy I* did not conclusively answer this question, but a few of judges did recommend data protection laws.

<sup>57</sup> *Common Cause v. Union of India*, W.P. (Civil) 215/2005 (Supreme Court, 09/03/2018).

<sup>58</sup> *Supra* 6.

<sup>59</sup> *Supra* 8.

<sup>60</sup> *Supra* 44.

<sup>61</sup> *Supra* 57.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*, at ¶ 160 (Misra, J).

<sup>64</sup> *Ibid*, at ¶ 160 (Misra, J) (emphasis ours).

<sup>65</sup> *Ibid*, at ¶ 82 (Chandrachud, J): "Dignity in death has a sense of realism that permeates the right to life. It has a basic connect with the autonomy of the individual and the right to self-determination. Loss of control over the body and the mind are portents of the deprivation of liberty. As the end of life approaches, a loss of control over human faculties denudes life of its meaning. Terminal illness hastens the loss of faculties. Control over essential decisions about how an individual should be treated at the end of life is hence an essential attribute of the right to life... In matters as fundamental as death and the process of dying, each individual is entitled to a reasonable expectation of the protection of his or her autonomy by a legal order founded on the rule of law. A constitutional expectation of providing dignity in death is protected by Article 21 and is enforceable against the state."

What is essential to note here is the conception of dignity in terms of autonomy, and the ability to make real choices. This choice is permitted because of the lack of any real autonomy in the patient in case she continues to lose control over her faculties. This does not follow the German ‘communitarian’ model of dignity, as observed by McCrudden. Misra, J re-emphasizes this, when he observes that neither ‘social morality’ nor ‘medical ethics’ will have a role to play here, given that dignity requires that the autonomy of the individual in this matter be preserved.<sup>66</sup> The ‘medical ethics’ referred to included, for instance, the Hippocratic Oath administered to doctors, which gives emphasis to the preservation of life.

*Navtej Johar* augments this departure from the ‘communitarian’ model of dignity with its focus on ‘constitutional morality’. When, for instance, Chandrachud J notes that the Supreme Court cannot rely on ‘popular public morality’ when rendering its decisions, but instead has to be guided by ‘constitutional morality’, he affirms a choice-based autonomy approach to dignity.<sup>67</sup> ‘Constitutional morality’ in turn reflects the broad principles underlying the Constitution, such as liberty, equality and fraternity.<sup>68</sup> *Navtej Johar* also affirms the crucial role of autonomy in the determination of a zone of privacy.<sup>69</sup>

Another important take-away from *Common Cause* is the combination of subjective and objective factors in the determination of whether passive euthanasia should be permitted in a particular case. This is implicit in the directions given by the court regarding the procedure to be followed to allow passive euthanasia, which takes into account both the patient’s wishes, as well as doctors’ opinions as to the condition of the patient.<sup>70</sup> This is directly noted by Chandrachud, J when he observes that “[w]hat an individual would decide as an autonomous entity is a matter of *subjective* perception. What is in the best interest of the patient is an *objective* standard.”<sup>71</sup> He later clearly states that what is required is a ‘balance’ between these two standards.<sup>72</sup> The individual must have the right to determine whether or not to accept medical intervention, but this has to be coupled with an objective determination by experts about the condition of the patient (as to whether she is terminally ill or in a permanent vegetative state).<sup>73</sup> This objective prong ties up with the earlier observations regarding the lack of real choices available to the patient.

So how does this fit in with the *Puttaswamy I* discussion on the limitations of autonomy and the inalienability of rights? *Common Cause* and *Navtej Singh* give us what we term an ‘autonomy-rich’ notion of dignity, which is divorced from communitarian notions which position dignity in an often-antagonistic position to autonomy. However, even a choice-based autonomy account does limit consent: it would not, for instance, permit

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<sup>66</sup> Supra 6, at ¶ 170 (Misra, J).

<sup>67</sup> Supra 6, at ¶ 144 (Chandrachud, J).

<sup>68</sup> Ibid.

<sup>69</sup> This also reaffirms a departure from a privacy approach which is focused on ‘spaces’ to a privacy approach which focuses upon the ‘person’. See supra 6, at ¶ 60-62 (Chandrachud, J).

<sup>70</sup> Supra 57 at ¶ 191 (Misra, J).

<sup>71</sup> Supra 57, at ¶ 118 (Chandrachud J).

<sup>72</sup> Ibid, at ¶ 120 (Chandrachud J).

<sup>73</sup> Ibid.

those choices which *reduce autonomy* in the future. For example, an individual cannot sell herself into slavery, as observed by Chandrachud, J in *Puttaswamy I*. The idea is simple: the choice-based autonomy approach respects individual choices because this shows respect for the autonomy of an individual, which in turn ensures a dignified life. It cannot allow those choices which effectively deprive an individual of the status of an autonomous agent, thereby limiting her dignity. A dignified life, being tied to an autonomous life, *resists anything which would render the ability to make decisions in the future limited*. This has implications for the examples we gave above, in the context of privacy: even though a person might consent to the collection of her data, this does not mean that she has foregone all interests in that data. The requirements of an autonomy-respecting notion of dignity would require that all consensual usage of data cannot be unconditional. It has to take into account the ability of the data in question to affect the ability of the individual to make choices in the future. Consent, hence, is a retractable and ongoing process to the extent that an individual's interests in the data persists. This has links to the idea of the right to be forgotten, which we will deal with in the next Part.

#### 2.4. *Puttaswamy II's (mis)applications of consent and autonomy*

Before parting, it is important to observe a few discordant notes in the majority opinion of *Puttaswamy II*, which was tasked with determining the constitutional validity of Aadhaar. A particularly concerning aspect of the decision was the way in which it dealt with consent, and the use of dignity. The majority opinion, authored by Sikri, J, attempted a new 'formulation' of dignity which is based on 'public good', which he called the 'community approach'.<sup>74</sup> He contrasted this with a choice-based autonomy approach to dignity, terming it as the 'individualistic approach'.<sup>75</sup> This alternative approach to dignity is then used as a counter to the individualistic approach to justify a balancing act which allows for the sacrificing of certain privacy rights:

It is the balancing of *two facets of dignity of the same individual*. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and *in the process some aspect of autonomy is sacrificed*, the balancing of the two becomes an important task which is to be achieved by the Courts.<sup>76</sup>

This raises several questions. The first is a clear departure from the autonomy-rich view of dignity in *Puttaswamy I* and *Common Cause*. Nowhere in the above is the question asked: what is the consent of the individual to this bartering away of rights? A choice-based autonomy model would, as we have seen before, have put the individual's choices center

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<sup>74</sup> Supra 8 at page 537-38 (Sikri, J).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid, at page 539-40 (Sikri, J). (emphasis ours)

stage. However, here it would seem as though the Court is making the choice for the individual herself. We suspect that the majority opinion realizes that it cannot base such a balancing exercise upon the autonomy approach, and hence, moved towards a community approach.<sup>77</sup> It could then avoid answering uncomfortable questions about the lack of real choices in the functioning of the Aadhaar scheme. Second, and in keeping with the model of autonomy we have discussed above, Chandrachud J in his dissent points out that it was not established by the State that the ‘two rights are mutually exclusive.’<sup>78</sup> The right to lead a dignified life in terms of access to welfare schemes can only be seen as entailing a ‘sacrifice’ of privacy when it could be proved that no alternatives are available, and the burden lies upon the State to prove this.<sup>79</sup> This, again, fits in with the choice-based autonomy model of dignity we have discussed, which naturally does not fit in with decisions which lead to a *reduction* in the overall autonomy of a person.

This approach of Sikri, J is tied into the way in which he generally deals with the ‘voluntariness’ of the Aadhaar scheme. The judgement is replete with referrals to the fact that Aadhaar is ‘voluntary’.<sup>80</sup> However, in a pointed question as to whether people (above the age of 18) have a right to ‘opt out’ or ‘revoke’ consent to Aadhaar, the UIDAI clarifies that there is no such option.<sup>81</sup> Consent to part with biometric information is then essentially, a one-time act. This can be contrasted with the way in which the majority opinion deals with children. While observing that children are incapable of giving consent, it notes that parents can give consent on their behalf.<sup>82</sup> Importantly, however, children are given the right to opt out of the scheme when they attain the age of majority.<sup>83</sup> In this context, it is a bit curious that this right to opt out is not given to adults who may similarly wish to exit the scheme.<sup>84</sup> Chandrachud, J, in contrast, observes that all persons must have the ability to opt-out, as ownership of data ‘must at all times vest in the individual whose data is collected.’<sup>85</sup>

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<sup>77</sup> The majority opinion does also offer an alternative argument of ‘public interest’ to justify the privacy infringements. But it is important to observe that even the ‘public interest’ is repeatedly framed in the language of the right to dignity of other people to receive welfare benefits (*See Supra* 8 at page 548-549 (Sikri, J) for instance). It would be interesting to think about the reasons behind the move converting the ‘public interest’ into a matter of ‘rights’. Our suspicion is that it is a device to lend a greater weightage to the ‘public interest’ in the proportionality analysis.

<sup>78</sup> *Supra* 8, at ¶ 254 (Chandrachud, J).

<sup>79</sup> *Ibid.*

<sup>80</sup> See, for instance, *Supra* 8, at ¶¶ 373, 323.

<sup>81</sup> *Supra* 8, at page 66 (Sikri, J).

<sup>82</sup> *Supra* 8 at ¶ 327 (Sikri, J); Sikri, J further emphasises the ‘incapacity’ rationale through a review of Indian legislative policy on juveniles in India which indicates protection towards children: “Thus, when a child is not competent to contract; not in a position to consent; barred from transferring property; prohibited from taking employment; and not allowed to open/operate bank accounts and, as a consequence, not in a position to negotiate her rights, thirsting [sic] upon compulsory requirement of holding Aadhaar would be an inviable inroad into their fundamental rights under Article 21.” [*Supra* 8 at ¶ 327 (Sikri, J)] It is also worth mentioning that the thrust is upon the ‘compulsoriness’ of the requirement further indicating an ‘autonomy-rich’ approach.

<sup>83</sup> *Supra* 8, at ¶ 332 (Sikri, J).

<sup>84</sup> See part 6 for an attempt to decode this from the perspective of proportionality.

<sup>85</sup> *Supra* 8, at ¶ 152 (Chandrachud, J).

Though the majority opinion on this issue suffers from several other shortcomings,<sup>86</sup> what is particularly concerning is the introduction of an uncertain counter-formulation of dignity, which departs from the autonomy-rich conception of dignity in *Puttaswamy I*, *Common Cause* and *Navtej Johar*. Similarly, the inability to opt-out of the Aadhaar scheme for adults rests uneasily with an understanding of privacy which emphasises the individual's continuing interests in information voluntarily parted with, clearly established by the larger nine-judge bench decision in *Puttaswamy I*. In the next part, we will demonstrate how an autonomy-rich conception of dignity helps us understand other important privacy-related concepts such as the doctrine of waiver and the right to be forgotten.

### 3. Waiver of Fundamental Rights and the Right to be Forgotten

A possible source of confusion over the role of consent in fundamental rights claims is the controversial doctrine of waiver. In this Part we will, first, analyse the principles which underlie the doctrine of waiver and clarify a few common misconceptions about the doctrine. Second, we will demonstrate that the doctrine, if properly understood, underlines our autonomy-rich conception of dignity. In the process, we will show how this helps us understand important issues such as the continuing privacy interests that a person has in their information, and the right to be forgotten.

#### 3.1. *The Doctrine of Waiver*

Another lens through which we can understand *Puttaswamy I*'s formulation of privacy and the limitations of consent is through the controversial doctrine of 'waiver' of fundamental rights. The doctrine of waiver was also discussed in *Puttaswamy I* to a certain extent, but we will begin to explore this doctrine through the landmark *Basheshar Nath*<sup>87</sup> case.

In the *Basheshar Nath* case, the appellant challenged the validity of a settlement he made with taxation authorities under the Taxation on Income (Investigation Commission) Act, 1947 (the 'Investigation Act'). The appellant had agreed to pay certain arrears to the taxation authorities under this settlement. Subsequently, parts of the Investigation Act were declared as violative of Article 14 (and hence invalid) in other cases.<sup>88</sup> The appellant raised a claim that the settlement he entered into was invalid because the underlying provision had been declared unconstitutional. The Attorney General rebutted this, by claiming that, by entering into the settlement, the appellant had 'waived' or given up his Article 14 claim in the matter.

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<sup>86</sup> In particular the characterisation of various schemes as 'rights' in the case of children, and hence their not being subject to verification by Aadhaar. Many of these schemes are seen as 'benefits' in the case of adults, even though the Court holds them to be a part of the right to dignity. See *Supra* 8, at page 390-91, 563-64, and 548-49 (Sikri, J).

<sup>87</sup> *Basheshar Nath v. Commissioner for Income Tax*, 1959 Supp (1) SCC 528.

<sup>88</sup> *Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri*, [1954] 26 ITR 1 (SC).

In dealing with this claim, the Court dealt with the question: can the fundamental right of the appellant here be waived? The five-judge bench rendered four different opinions, holding in favour of the appellant. Das CJ (on behalf of himself and Kapur, J) confined the discussion on waiver to Article 14 specifically, observing that it was unnecessary for their purposes to consider whether other fundamental rights could be waived.<sup>89</sup> Looking at the text of Article 14<sup>90</sup>, they observed that it is not framed as a ‘right’, but is rather a *command* to the State to ensure equality. Therefore, it would not be permissible for the State to argue that a person has *chosen* to be treated unequally.<sup>91</sup> This is, they note, a ‘matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do.’<sup>92</sup> This obligation of the State remains irrespective of the conduct of any person.

N.H. Bhagwati, J and K Subba Rao, J delivered separate concurring opinions, and held that *no* fundamental right can be waived. NH Bhagwati, J observed that Article 13(2)<sup>93</sup>, which declares laws in contravention of the fundamental rights as void, does not contain any exception for waiver of fundamental rights.<sup>94</sup> Similarly, the text of the fundamental rights themselves specify the conditions under which they can be restricted, and none of them mention waiver.<sup>95</sup> He observed that the distinction in US case law between rights which are enacted for the benefit of the individual (which can be waived), and rights which are enacted in public interest (which cannot be waived) should not apply to India, because ours is ‘a nascent democracy’ with a different social, economic, educational and political situation from the US.<sup>96</sup>

This idea is further exemplified by K Subba Rao, J, who observed that we have to take into account the power imbalances which exist between the State and the citizen, who can easily be made to give up her rights by the State ‘by fear of force or hope of preferment’.<sup>97</sup> In a particularly trenchant tone, he stated:

A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms.

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<sup>89</sup> Supra 85, at ¶¶ 14-15 (Das, CJ).

<sup>90</sup> Art. 14, the Constitution of India, ‘*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*’ (emphasis ours)

<sup>91</sup> Supra 87, at ¶¶ 14-15 (Das, CJ).

<sup>92</sup> Ibid.

<sup>93</sup> Art. 13, the Constitution of India, ‘The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.’

<sup>94</sup> Supra 87, at ¶¶ 8-9 (Bhagwati, J).

<sup>95</sup> Ibid, at ¶ 10 (Bhagwati, J).

<sup>96</sup> Ibid, at ¶¶ 55-56 (Das, J); See ¶¶ 92, 103 (Justice SK Das in a separate opinion largely follows the distinction in US case law between rights which are for the benefit of the individual and rights which are for public interest).

<sup>97</sup> Ibid, at ¶ 67 (Rao, J).

In such circumstances, *it is the duty of this Court to protect their rights against themselves.*<sup>98</sup>

This undoubtedly has strong paternalist undertones, but we need to appreciate it in the context of the duties of the State in a country where, as Ambedkar observes, democracy is only ‘top-dressing on an Indian soil, which is essentially undemocratic.’<sup>99</sup> He makes this observation in the context of discussing the absence of ‘constitutional morality’<sup>100</sup> in Indian society. He approvingly quotes the historian Grote who thought constitutional morality an ‘indispensable condition’ for a free government.<sup>101</sup> While these observations were made by Ambedkar in the context of explaining the extremely detailed nature of the Indian Constitution, if this is coupled with the larger constitutional goal of ‘social revolution’<sup>102</sup>, one can envisage a strongly interventionist rights framework. Ambedkar repeatedly emphasized that merely giving political rights would not be enough to emancipate; in the absence of State intervention, such rights might never be exercised meaningfully.<sup>103</sup>

It is difficult to cull out a clear binding ratio from *Bheshar Nath* because of the many opinions. At the very least, it is certain that Article 14 cannot be waived, as that is held by four judges. *Olga Tellis*<sup>104</sup>, however, clearly disagrees with the US case law distinction between those fundamental rights which are for private and those which are for public benefit. The Court observes that *all* fundamental rights are enacted for the larger public interest, and no individual “can barter away the freedoms conferred upon him by the Constitution.”<sup>105</sup> *Olga Tellis*’ formulation extends to all fundamental rights, and not just Article 14. The reasoning given by the Court is closely aligned with K Subba Rao, J in

<sup>98</sup> Ibid, at ¶ 74 (Rao, J). (emphasis ours)

<sup>99</sup> Speech by B.R. Ambedkar, *Constituent Assembly Debates*, Constituent Assembly (4/11/1948), available at [http://cadindia.clpr.org.in/constitution\\_assembly\\_debates/volume/7/1948-11-04](http://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-11-04), last accessed on 15/7/19.

<sup>100</sup> Ambedkar, in his speech, quotes with approval the conceptualization of constitutional morality given by the historian Grote, who notes that constitutional morality means ‘a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.’ Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, ch 2 (1st ed., 1972).

<sup>103</sup> In his essay on ‘Slaves and Untouchables’, for instance, he wrote: ‘In untouchability there is no escape... A deprivation of a man’s freedom by an open and direct way is a preferable form of enslavement. It makes the slave conscious of his enslavement and to become conscious of slavery is the first and most important step in the battle for freedom. But if a man is deprived of his liberty indirectly he has no consciousness of his enslavement. Untouchability is an indirect form of slavery. *To tell an Untouchable ‘you are free, you are a citizen, you have all the rights of a citizen’, and to tighten the rope in such a way as to leave him no opportunity to realise the ideal is a cruel deception.* It is enslavement without making the Untouchables conscious of their enslavement. It is slavery though it is untouchability. It is real though it is indirect. It is enduring because it is unconscious. Of the two orders, untouchability is beyond doubt the worse.’ (emphasis ours) Kamala Visweswaran, *Un/common Cultures: Racism and the Rearticulation of Cultural Difference*, 156-57, (Duke University Press, 2010).

<sup>104</sup> *Olga Tellis v. Bombay Municipal Corporation and Ors.*, AIR 1986 SC 180.

<sup>105</sup> Ibid, at ¶ 28 (Y.V. Chandrachud, J).

*Bashesar Nath*, i.e. that this is in order to safeguard the individual against the powerful State.<sup>106</sup>

Another reason as to why the public interest might weigh against waiver of fundamental right is because of what is called the ‘precedential’ effect of the case in affecting the rights of third parties.<sup>107</sup> This is exemplified by the ECtHR in the *Pretty v UK*<sup>108</sup> case, which dealt with the permissibility of active euthanasia. Upholding the law which prohibited this, the Court observed that even though the conditions of terminally ill patients will vary, what matters is the ‘vulnerability of the class’ of patients for whose protection the law existed. It was the rights of these vulnerable patients which would weigh against the decision of the patient to end her life.<sup>109</sup>

However, this does not mean that a person must always *exercise* their rights irrespective of their wishes.<sup>110</sup> For instance, having the freedom of speech does not imply that I have to necessarily write an opinion piece on an important political issue everyday; I can choose to not speak at all, while reserving the *right* to speak when I want to. What would be invalid, for instance, is my entering into a contract with the State whereby I am prohibited from speaking on a particular issue (when, of course, it is not covered by any of the reasonable restrictions in Article 19(2)). Kulgod, for instance, argues that we inherently accept waiver of fundamental rights because we allow for persons to plead guilty or to accept a plea bargain during a criminal trial, and hence waive our Article 21 rights to a full trial.<sup>111</sup> However, this can be dealt with in a simple way: the right under Article 21 prohibits the deprivation of one’s liberty except in accordance with a just, fair and reasonable procedure.<sup>112</sup> When a person enters a guilty plea in conditions free from coercion, and in compliance with fair procedures, there is no waiver of this right, as the conditions of Article 21 have been met.

<sup>106</sup> Ibid, at ¶ 29. (Y.V. Chandrachud, J) “Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits.” Of course, there is a minor difference between estoppel and waiver, but that is not material for our purposes, as the Court itself says that the two concepts are ‘closely connected’.

<sup>107</sup> Sébastien Van Drooghenbroeck, *Does the Theory of Waiver of Fundamental Rights Offer Solutions to Settle Their Conflicts?*, 69, in *When Human Rights Clash at the European Court of Human Rights Conflict or Harmony?* (Stijn Smet and Eva Brems, 1st ed., 2017).

<sup>108</sup> *Pretty v. United Kingdom*, App. no 2346/02, 29 April 2002.

<sup>109</sup> Ibid, at 70. “The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question.”

<sup>110</sup> This difference between non-exercise of a right and *waiver* is emphasised by K Subba Rao J in *Bashesar Nath*, *Supra* 87, at ¶ 67.

<sup>111</sup> Sachin Kulgod, *Waiver of Constitutional and Fundamental Rights-- A Constitutional Discretion, Not An American Doctrine*, 1 SCC Journal 19, 34 (2011).

<sup>112</sup> We are reading in the requirements in the *Maneka Gandhi* case here. See *Maneka Gandhi v. Union of India*, 1978 1 SCC 248 at ¶¶ 4-7.

We agree, however, that a possibly better way to frame the inability to waive a right would be that “it will not be open to the State or to a defendant or respondent to contend that a person is not entitled to enforce his fundamental right because he has waived it.”<sup>113</sup> Otherwise, as Datar correctly points out, this would lead to an anomalous situation wherein a person, whose fundamental rights have been violated, would be forced to approach a Court to challenge it even if they did not want to do so.

### 3.2. *Balancing privacy rights and the right to be forgotten*

This distinction between waiver and non-exercise can help clarify how, rather than being paternalistic, the inability to waive fundamental rights *enhances* autonomy.<sup>114</sup> It also syncs in with *Puttaswamy I*'s discussion about the ‘inalienability’ of fundamental rights.<sup>115</sup> Interestingly, the doctrine of waiver was sought to be used by counsel for the respondents to argue that privacy should not be recognised as a fundamental right.<sup>116</sup> The fact that it cannot be waived, it was argued, implies that the government cannot under any circumstances get any information from a citizen. This was correctly rebuffed by Nariman J, who observes that the question of waiver is completely separate from the question of justifiable limitations on a fundamental right.<sup>117</sup> When the State imposes a reasonable restriction on a right following constitutional limitations, there is no question of a waiver.

In answering this question, however, Nariman, J gives an example of a person who posts information on a public space such as Facebook. He claims that a person cannot claim a privacy right in that information after such a disclosure.<sup>118</sup> With respect, we feel that this might not be the correct approach to the issue. First, since the doctrine of waiver as enunciated in *Basheshar Nath* and reaffirmed in *Olga Tellis*, was not overruled in any of the opinions in *Puttaswamy I*, it is questionable whether Nariman, J meant that the person here has ‘waived’ their rights. Second, as observed by Kaul, J in his opinion, people continue to have privacy interests in information which concerns themselves even after such information is made public.<sup>119</sup> This idea of continuing interests in information even after disclosure is also reaffirmed by the idea of purpose limitations and the requirement of

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<sup>113</sup> Arvind Datar, *Can a Fundamental Right be waived?: Legal Notes by Arvind Datar*, Bar & Bench, available at <https://barandbench.com/can-fundamental-right-waived-arvind-datar/>, last seen on 08/07/2018.

<sup>114</sup> A related (but different) concept in this regard is the doctrine of ‘unconstitutional conditions’, which forbids ‘any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.’ [*Ahmedabad St Xavier’s College Society v State of Gujarat*, 1974 1 SCC 717, at ¶ 158 (Mathew, J)]. The doctrine of waiver is, however, broader since it includes situations where a person has voluntarily given up her rights, even if it is not a condition for the grant of a privilege by the state.

<sup>115</sup> Interestingly, none of the judges in *Basheshar Nath* who said that FRs cannot be waived relied upon any natural rights theory. Natural rights were mentioned only once, by Justice SK Das, largely in order to note that it does not apply. *Supra* 87, at ¶ 56 (SK Das, J).

<sup>116</sup> *Supra* 1, at ¶ 60 (Nariman, J).

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, at ¶ 60 (Nariman, J).

<sup>119</sup> *Ibid.*, at ¶ 65 (Kaul, J).

deletion of data when it has served its purpose.<sup>120</sup> The reason for this is that the right to privacy is valuable partly because it enables us to control information which pertains to ourselves, which forms a part of our person. This is implicit in the recognition of informational privacy by all the judges in *Puttaswamy I*.

However, once the information is made public, then, even though a person continues to have a privacy right in such information, this has to be balanced with the rights of other citizens to freedom of speech and expression. This is because, as explained by Robert Post, this information now becomes a part of the ‘public sphere’<sup>121</sup>, which is essential to the healthy functioning of democracies. As an example, a politician ‘X’ decides to post, on Facebook, a personal picture of him having dinner with a friend ‘Y’ at a restaurant. Five years later, it is found that ‘Y’ has links to a spy agency of a foreign government. People use the Facebook photograph in order to allege links between ‘X’, ‘Y’ and the foreign government. In this situation, the public interest would demand that the privacy rights of ‘X’ be overridden, and that the picture is not mandatorily deleted. On the other hand, one can imagine several situations in which there would be no public interest in the information in question, and the individual in question can assert continuing rights in it.

There is little doubt that balancing the public interest and the privacy rights of individuals in such cases is a delicate matter. However, this exercise is already done in several places for the right to privacy. For instance, Section 8(1)(j) of the Right to Information Act, which allows for the non-disclosure of information which would cause ‘an unwarranted invasion of the privacy of the individual’ explicitly authorizes a balancing of this privacy with the public interest.<sup>122</sup> The Supreme Court too has implicitly endorsed such a balancing of privacy with the public interest in *Rajagopal*<sup>123</sup>, known as the ‘Autoshankar’ case. In this case, while observing that the right to privacy is implicit in Article 21, exceptions were carved out for public records and for public officials with respect to the discharge of official functions.<sup>124</sup> We leave aside, for the purposes of this paper, the separate

<sup>120</sup> Ibid, at ¶ 184 (Chandrachud, J).

<sup>121</sup> Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right To Be Forgotten, and the Construction of the Public Sphere*, 67 *Duke Law Journal*, 981, 1051-1052 (2018) (“The public sphere is a field of intersubjective communicative action; it would collapse if individuals could at will withdraw from circulation information “relating to” themselves because they have the right to ‘control’ such personal data. The public sphere in a democracy also serves the political purpose of self-governance. Those who control the circulation of personal data in the public sphere control the creation of public opinion.”)

<sup>122</sup> S. 8(1)(j), The Right to Information Act, 2005, states:

“8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, ...  
(j) 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*:  
Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.” (emphasis ours)

<sup>123</sup> R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

<sup>124</sup> Ibid, at ¶ 26 (Reddy, J). It has been argued that *Rajagopal* in fact deals more with a tortious claim rather than an assertion of a fundamental right against the State. See Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 26 *National Law School of India Review* 127,

but important question as to how do we evaluate what counts as a ‘public interest’ and the importance it can be given when balancing against the right to privacy in particular cases.<sup>125</sup>

Linked to the idea of a continuing privacy interest in personal information, is the ‘right to be forgotten’, which is referred to by Kaul, J in *Puttaswamy I*.<sup>126</sup> The right to be forgotten can be described as the right to individuals to ‘determine the development of their lives in an *autonomous* way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past.’<sup>127</sup> The concept is clearly based in the autonomy of persons, and can be understood as a part of the right of individuals to change and re-invent themselves, unshackled by mistakes made in the past.<sup>128</sup> This assumes all the more importance in the digital age, where the Internet becomes a permanent record of a person’s acts, leading to permanent stigmatization.<sup>129</sup>

Rustad and Kulevska, while arguing for a right to be forgotten, have also observed that this has to be balanced with other rights such as freedom of expression.<sup>130</sup> To determine whether an individual can claim this right, they evolve a complex balancing process which involves taking into account the nature of the information, whether the person is a public figure, and the public right to know.<sup>131</sup> This is what has largely been encapsulated in Section 20 of the Personal Data Protection Bill, 2019, which is currently pending before Parliament.<sup>132</sup> This provision, which gives a right to an individual to ‘restrict or prevent the

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138-139 (2014). This can be a way in which we can apply the right to privacy in our Facebook examples, for instance.

<sup>125</sup> For instance, it is questionable whether pervasive profiling of individuals can be justified on the grounds of small gains in economic efficiency. Of particular concern in this regard is the recent Economic Survey of India’s push for greater data collection across multiple spheres. See Economic Survey 2018-19 Volume, *Chapter 4: Data “Of the People, By the People, For the People”* available at [https://www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/echap04\\_vol1.pdf](https://www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/echap04_vol1.pdf) last seen on 10/07/2019.

<sup>126</sup> *Supra* 1, at ¶¶ 62-69 (Kaul, J).

<sup>127</sup> Alessandro Mantelero, *The EU Proposal for a General Data Protection Regulation and the Roots of the “Right To Be Forgotten”*, 29(3) *Computer Law & Security Review* 229, 229–235 (2013); Michael L. Rustad, Sanna Kulevska, *Reconceptualising the Right to be Forgotten to Enable Transatlantic Data Flow*, 28(2) *Harvard Journal of Law & Technology* 349, 353, (2015). (emphasis ours)

<sup>128</sup> *Supra* 1, at ¶¶ 66-69 (Kaul, J).

<sup>129</sup> Michael L. Rustad, Sanna Kulevska, *Reconceptualising the Right to be Forgotten to Enable Transatlantic Data Flow*, 28(2) *Harvard Journal of Law & Technology* 349, 352, (2015). This can also be linked to the ‘right to repent’. See *Supra* 107, at 71-72.

<sup>130</sup> *Ibid.*, at 354.

<sup>131</sup> *Ibid.*

<sup>132</sup> S. 20, Personal Data Protection Bill, 2019 (pending), states:

20. Right To Be Forgotten

- (1) The data principal shall have the right to restrict or prevent the continuing disclosure of his personal data by a data fiduciary where such disclosure—
- (a) has served the purpose for which it was collected or is no longer necessary for the purpose;
  - (b) was made with the consent of the data principal under section 11 and such consent has since been withdrawn; or
  - (c) was made contrary to the provisions of this Act or any other law for the time being in force.
- (2) The rights under sub-section (1) may be enforced only on an order of the Adjudicating Officer made on an application filed by the data principal, in such form and manner as may be prescribed, on any of the grounds specified under clauses (a), (b) or clause (c) of that sub-section:

continuing disclosure of his personal data by a data fiduciary' under certain circumstances, mandates that this right be balanced with *inter alia* 'the relevance of the personal data to the public' and the 'role of the data principal in public life.'<sup>133</sup> Importantly, the right to be forgotten applies even where the initial use of the data was authorised by the individual, underlining the idea that a person continues to possess interests in her data, even if she has consented to its use for a particular purpose.

In conclusion, it is clear, from the discussion on waiver of fundamental rights in this Part of the article as well as the previous Part's discussion on inalienability and autonomy, that consent, while important in determining the scope of privacy, is not completely determinative of the question as to whether a person can successfully make a privacy claim. As Van Drooghenbroeck observes in the context of the position of consent in ECtHR law, consent impacts the scope of rights, but it does not completely neutralize the conflict.<sup>134</sup> Consent and waiver do not operate in an 'all-or-nothing' manner, and become only one of the arguments in the balancing exercise to be undertaken by Courts.<sup>135</sup>

We have conceptualized the limitations on consent and waiver as an operationalization of the principle of preservation of the autonomy of individuals through the prism of dignity. Recognizing consent is, of course, an important part of recognizing a person's autonomy, and Courts must take it into account. However, where consent might lead to an irreversible reduction of the autonomy of individuals, courts will have to weigh consent against other factors such as the autonomy of the person, the rights of others and the public interest. The consent of the person should be given a high weightage when balancing it with the other interests we have specified.

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Provided that no order shall be made under this sub-section unless it is shown by the data principal that his right or interest in preventing or restricting the continued disclosure of his personal data overrides the right to freedom of speech and expression and the right to information of any other citizen.

- (3) The Adjudicating Officer shall, while making an order under sub-section (2), having regard to—
- (a) the sensitivity of the personal data;
  - (b) the scale of disclosure and the degree of accessibility sought to be restricted or prevented;
  - (c) the role of the data principal in public life;
  - (d) the relevance of the personal data to the public; and
  - (e) the nature of the disclosure and of the activities of the data fiduciary, particularly whether the data fiduciary systematically facilitates access to personal data and whether the activities shall be significantly impeded if disclosures of the relevant nature were to be restricted or prevented.
- (4) Where any person finds that personal data, the disclosure of which has been restricted or prevented by an order of the Adjudicating Officer under sub-section (2), does not satisfy the conditions referred to in that sub-section, he may apply for the review of that order to the Adjudicating Officer in such manner as may be prescribed, and the Adjudicating Officer shall review his order.
- (5) Any person aggrieved by an order made under this section by the Adjudicating Officer may prefer an appeal to the Appellate Tribunal.”

<sup>133</sup> Ibid.

<sup>134</sup> Supra 107, at 71.

<sup>135</sup> Ibid.

#### 4. The Doctrinal Contours of the Right of Privacy

We will now use our analysis in Parts 2 and 3 of this article to explore certain doctrinal formulations related to the right to privacy. Doctrines such as the ‘reasonable expectations test’ and ‘proportionality’ have been introduced and used in *Puttaswamy I* and *II* in order to determine the scope of privacy claims. We will situate consent within these doctrines, in an attempt to bring together the principles underlying these judgements and their doctrinal formulations.

*Puttaswamy I* held unanimously that the right to privacy is a constitutionally guaranteed fundamental right. However, the Court did not answer several allied questions about its content. For instance, the key question as to the scope of the right to privacy is largely unanswered, although the question seems inevitable in any assessment of a privacy claim: ‘What is covered by the right to privacy?’ Perhaps the lack of an answer has good justification. Some judges in *Puttaswamy I* acknowledge the difficulty (if not impossibility) inherent in establishing coherent contours to the right and thus consciously refuse to adopt a clear doctrine, instead endorsing a ‘case by case’ determination - presumably anchored on the considerations of dignity and liberty.<sup>136</sup> Chelameshwar, J, for instance, offers a broad definition in terms of ‘repose’, ‘sanctuary’ and ‘intimate decision’ - acknowledging, yet not addressing, the ‘definitional concerns’ in relation to the right of privacy.<sup>137</sup> In a similar vein is Nariman, J’s discussion of the three aspects of privacy being physical, informational and decisional privacy.<sup>138</sup> It is important to note here that despite the various conceptualisations of the right, all judges ground these in the values of liberty, autonomy and dignity, and our claims about the role of consent equally apply across all aspects of privacy.<sup>139</sup>

By contrast, Chandrachud, J’s lead judgment (representing four judges of the nine) invokes the ‘reasonable expectations test’ (hereinafter ‘RET’) to define a valid privacy claim. This formulation of RET involves the dual components of (i) the subjective *willingness* to be protected by privacy and (ii) objective *recognition* of privacy - defined by ‘constitutional values’.<sup>140</sup> The precise contours of the test shall be discussed in Part 5 of this article.

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<sup>136</sup> The ‘case to case basis’ approach is either expressly adopted (or hinted to) by Justice Chelameshwar, Justice Bobde, Justice Sapre and Justice Nariman. See *Supra* 1 at ¶ 36 (Chelameshwar, J); ¶ 36 (Sapre, J): ‘Similarly, 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.’, ¶ 40 (Bobde, J), and ¶ 46 (Nariman, J). The judges consciously kept the definitional contours of the right vague in the interest of its breadth.

<sup>137</sup> A key argument made by the state in *Puttaswamy I* was to challenge the constitutional status of the right to privacy was to point to the definitional concerns in the formulation of the right. Thus, the Attorney General had argued that the right itself is vague, the right being recognized would provide unhindered judicial scrutiny. Judges Chelameshwar and Nariman specifically reject this argument suggesting that the definitional concerns of privacy do not take away from its constitutional status. See *Supra* 1, at ¶ 19 (Bobde, J) and ¶ 36 (Chemeswar, J).

<sup>138</sup> *Supra* 1, at ¶ 81 (Nariman, J).

<sup>139</sup> See part 2.1 and part 3.2 of this article. Since the interests in individual autonomy, liberty and dignity underlie all aspects of privacy, we see no reason to limit the applications of our analysis to only certain aspects of privacy.

<sup>140</sup> *Supra* 1 at ¶ 169 (Chandrachud, J).

As to valid limitations to the right to privacy, Chandrachud, J and Kaul, J invoke the ‘proportionality’ review to adjudge permissible infringements of privacy.<sup>141</sup> The proportionality review as adopted by Chandrachud, J includes the prongs of (i) legality - there exists a law backing the infringement, (ii) legitimacy - the law is in pursuance of a legitimate state aim and (iii) balancing - the legitimate aim is proportional to the infringement of privacy in question.<sup>142</sup>

*Puttaswamy II* largely follows *Puttaswamy I* in adopting RET (to define a privacy claim) and proportionality (to limit it). The nuances of the court’s approach in *Puttaswamy II* shall be discussed through the anchor of ‘autonomy’ and ‘consent’ in the succeeding sections, building upon our discussion in Parts 2 and 3.

## 5. Finding consent within the doctrinal contours of privacy: Consent and reasonable expectations

In *Puttaswamy I*, traces of consent, choice and autonomy seem to be inherently operationalised within Chandrachud, J’s formulation of RET.<sup>143</sup> Chandrachud, J uses RET to define the contours of the right to privacy<sup>144</sup> - with dual stages of enquiry: (i) subjective

<sup>141</sup> Chandrachud, J and Kaul, J form a majority endorsement of the proportionality review. Kaul, J adds to the three components offered by Chandrachud, J: the fourth component of ‘procedural safeguards’. Considering that Chandrachud, J alone does not make the majority opinion, Bhatia observes that the standard of review as accepted by the court in *Puttaswamy I* would include the four components of legality, legitimacy, balancing and procedural safeguards. See Gautam Bhatia, *The Supreme Court’s Right to Privacy Judgment – VI: Limitations*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2017/09/01/the-supreme-courts-right-to-privacy-judgment-vi-limitations/> last seen on 08/07/2019. However, it has to be noted that Sikri, J does not consider ‘procedural safeguards’ as a separate doctrinal prong of proportionality within his formulation of the test in *Puttaswamy II*. See also V Bhandari, A Kak, S Parsheera and F Rahman, supra 11. For an interesting discussion on the use of proportionality in *Puttaswamy I* and *II*, see generally Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?* 3(2) University of Oxford Human Rights Hub Journal 55 (2020).

<sup>142</sup> There have also been questions as to what was the standard of review adopted within the balancing stage, with both ‘compelling interest’ and ‘reasonableness’ being referred to across the opinions. See M Kamil, *The Aadhaar Judgment and the Constitution – II: On proportionality (Guest Post)*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/> last seen on 08/07/2019.

<sup>143</sup> And perhaps Kaul, J’s approach, which checks solely for an autonomous decision to opt for privacy: “all that needs to be considered is if such an intent to choose and specify exists, whether directly in its manifestation in the rights bearer’s actions, or otherwise.” Supra 1, at ¶ 43 (Kaul, J).

<sup>144</sup> See Gautam Bhatia, *The Aadhaar Judgment and the Constitution – I: Doctrinal Inconsistencies and a Constitutionalism of Convenience*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience>, last seen on 08/07/2019. However, it must be noted that other judges of the court do not (at least explicitly) endorse this formulation nor do they explicitly invoke the ‘reasonable expectations test’; in particular, Bobde, J specifically refuses to admit the doctrine on grounds that it was “not necessary for the purpose of this case to deal with the particular instances of privacy claims”. Additionally, an explicit critique to (and rejection of) the doctrine

willingness, and (ii) objective acceptance on the basis of ‘constitutional values’.<sup>145</sup> The subjective stage of RET inevitably involves a scrutiny of the individual’s autonomous choices, while the objective stage functions to limit it. To answer the precise role of consent within RET, it is best to first identify the role of consent within RET as used in the United States.

The role of consent is seen evidently through the application of the American third party doctrine (hereinafter ‘TPD’). TPD (largely accepted as a subset of RET) postulates that an individual loses her privacy claim against the state if she consents to sharing the information with a third party. For instance, therefore, if an individual shares personal data to a service provider, she shall be deemed to have forgone her privacy claim over the data, against the State - which may access the information. This is, of course, open to misuse and clearly minimises individual autonomy over data. However, the doctrine’s rationale may help posit a role for consent within RET.

### 5.1. *The American Third Party Doctrine and Puttaswamy I*

RET was first admitted by US Courts in *Katz v. United States*<sup>146</sup> - abandoning the ‘spatial’ model of inquiry as established *Olmstead v. United States*.<sup>147</sup> The erstwhile rule in *Olmstead* suggested that the Fourth Amendment protection of privacy only extended to ‘constitutionally protected areas’.<sup>148</sup> The two-staged test adopted by Harlan, J (constituting the subjective willingness to be protected by privacy and objective societal acceptance)<sup>149</sup> in *Katz* was eventually recognised as the ‘reasonable expectations test’.<sup>150</sup>

Later, American courts (primarily through *United States v. Miller*<sup>151</sup> and *Smith v. Maryland*<sup>152</sup>) developed the TPD. In *Miller*, the court held that an individual did not possess a legitimate privacy claim over bank records voluntarily revealed to a third party, on the

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is found in the Nariman, J’s judgment which specifically rejects the doctrine. *See* Supra 1, at ¶ 40 (Bobde, J); *See* also supra 1, at ¶ 59 (Nariman, J).

<sup>145</sup> Supra 1, at ¶ 169 (Chandrachud, J)

<sup>146</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>147</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>148</sup> *Ibid*, at page 465-466. Here, the court interpreted the fourth amendment narrowly in terms of “actual physical invasion(s)”. *See* Richard Thompson, *The Fourth Amendment Third-Party Doctrine*, Congressional Research Service, 5 available at <https://fas.org/sgp/crs/misc/R43586.pdf> last visited on 08/07/2019.

<sup>149</sup> Supra 146, at page 361 (Stewart, J). “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.””

<sup>150</sup> *Ibid*, at page 351 (Stewart, J). The case in *Katz* concerned the admissibility of recordings of the accused’s telephonic conversations in a phonebooth. The conversations were recorded by investigating authorities from *outside* of the phonebooth. This was significant as the prosecutor (following *Olmstead’s* spatial formulation) argued that the accused had no constitutional protection in the space that lay outside the booth and thus lacked a privacy claim. The court rejected this argument holding that (i) the fourth amendment protected people and not places and (ii) that even “an area accessible to the public may be constitutionally protected”.

<sup>151</sup> *United States v. Miller*, 425 U.S. 435 (1976).

<sup>152</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

grounds that (i) the bank deposits are not confidential communications, thus lacking a societal acceptance of the privacy claim, and (ii) the information was voluntarily disbursed.<sup>153</sup>

A clearer expression of the role of voluntariness in TPD is found in *Smith v. Maryland* where the court rejected a privacy claim over telephone records using TPD - given that the accused had provided the information to the telephone company voluntarily, he did not have a privacy claim over it. The Court here goes on to justify the rationale of TPD within the second (objective) stage of RET: there was no societal acceptance of the privacy claim, since the accused had ‘voluntarily’ assumed the risk of the information being given to the police.<sup>154</sup>

From the formation of the doctrine in *Smith*, it seems that TPD is hinged on the second stage of RET, i.e. societal acceptance (or alternatively societal assumption of risk). In this context it must be remembered that the second stage of the RET as formulated by Chandrachud, J in *Puttaswamy I* is not a consideration of societal acceptance, but a consideration of constitutional delineation.<sup>155</sup>

In the recent decision of *Carpenter v. United States*<sup>156</sup> the American Supreme Court reconsidered TPD. The case concerned the constitutionality of a law which allowed the state to compel mobile service providers to provide Cell-Site Location Information (CLSI), i.e. time-stamped information about an individual’s location, provided that there were reasonable grounds to show that the information may be relevant to an ongoing criminal investigation.

The majority opinion of Roberts, J clarifies the application of TPD in two ways: First, the court acknowledges that the doctrine is not to be invoked blindly without taking into account the nature of information being solicited.<sup>157</sup> Roberts, J holds that CLSI gave the State an opportunity to intricately survey individuals; given these ‘concerns’, there exists a reasonable expectation for such information to be protected (curiously, for Roberts, J similar concerns would not apply to records of bank transactions and records of numbers dialed).<sup>158</sup> Second, Roberts, J holds that a mere disbursal of information to a third party need not necessarily amount to a voluntary assumption of risk - particularly not for information gathered from cell-phones, given that cell phones are “a pervasive and insistent part of daily life”.<sup>159</sup>

## 5.2. *Third Party Doctrine in India*

<sup>153</sup> See *Ibid*, at page 442 (McReynolds, J).

<sup>154</sup> *Ibid*, at page 735 (Blackmun, J).

<sup>155</sup> See *supra* 144 for more.

<sup>156</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>157</sup> *Ibid*, at page 2221 (Roberts, J).

<sup>158</sup> *Ibid*, at page 2217 (Roberts, J); Roberts, J notes that the information provides the state access to “an intimate window into a person’s life” as the information reveals “familial, political, professional, religious, and sexual associations.”

<sup>159</sup> *Ibid*, at page 2221 (Roberts, J).

The majority opinion in *Carpenter* presumably restricts the application of TPD to (i) disbursal of ‘non-serious’ information, and (ii) instances where disbursal to a third party would imply the ‘voluntary assumption of risk’. The attempt here is to hide the potential flaws of TPD - although, the cracks remain visible: Why can’t a State-possessed record of numbers dialed by an individual be used to survey an individual (per facts in *Smith*)? Why should the disbursal of bank record transactions imply a ‘voluntary’ assumption of risk that the information may be disbursed to the state (per facts in *Miller*)? Can the disbursal of information to a third party *ever* imply a ‘voluntary’ forgoing of all privacy claims altogether?

TPD is rightly criticized for its severe consequences. The doctrine offers lax restrictions on the state’s ability to survey and gather private data considering, particularly, that a significant amount of sensitive personal information today is provided ‘voluntarily’ to internet service providers (We share our search history with Google, information related to our purchases with Amazon, etc.). More importantly, the approach minimizes individual autonomy and consent since the disbursal of information to a third party is seen as a forfeit of privacy interests altogether.<sup>160</sup> TPD was unequivocally rejected by the Court in the pre-*Puttaswamy* case of *District Registrar & Collector v. Canara Bank*.<sup>161</sup> However, it remains to be seen whether it would be tenable in light of the discussion on RET in *Puttaswamy I*. Nariman, J in *Puttaswamy I* also expressly rejects TPD, and in fact refuses to incorporate RET fearing that it would be “intrinsically linked” to TPD.<sup>162</sup>

It must be noted here that the objective stage of the American RET (which is the doctrinal hinge of TPD) has *not* been entirely incorporated by the Indian Supreme Court. Chandrachud, J in *Puttaswamy I* does not incorporate a ‘societal’ standard for the objective stage of RET (as in the US) but instead contemplates a ‘constitutionally’ defined standard wherein privacy, on the objective plane, is defined by ‘constitutional values’<sup>163</sup>. This formulation implies the adoption of an objective harm-based standard i.e. ultimately, the subjective willingness to define a particular privacy claim shall stand *unless* the privacy claim has the potential to ‘harm’ constitutional values, such as another person’s rights.<sup>164</sup> This approach, we feel, is most apt in allowing for a progressive standard while also addressing the problems of RET discussed by Nariman, J.

An approach similar to this harm-based approach can be seen in the recent decision of the Canadian Supreme Court in *R v Jarvis*<sup>165</sup>, especially in the concurring opinion of

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<sup>160</sup> See Part 3 of this article.

<sup>161</sup> *District Registrar & Collector v. Canara Bank*, (2005) 1 SCC 496; *also see* *Supra* 1, at ¶ 47 (Nariman, J).

<sup>162</sup> *Supra* 1 at ¶ 59 (Nariman, J).

<sup>163</sup> *Supra* 1, at ¶ 169 (Chandrachud, J).

<sup>164</sup> An implication of this is found in Chandrachud, J’s formulation of RET where he alludes to the objective prong of the test as being defined in terms of harm to the rights of third parties. *See* *Supra* 1 at ¶ 169 (Chandrachud, J); “[T]he exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces.”

<sup>165</sup> *R v. Jarvis*, [2019] 1 SCR 488 (Supreme Court of Canada).

Rowe, J. In *Jarvis*, the majority adopted a ‘context-based’ enquiry into determining RET which implies that the Court would take into account a variety of factors (not limited to the publicity of information or its societal acceptance), to determine the validity of the privacy claim.<sup>166</sup> Rowe, J, utilised a value-laden approach to determining reasonable expectations - similar to Chandrachud, J in *Puttaswamy I* - to establish that the information’s availability in the public domain was not determinative as to the absence of a valid privacy claim.<sup>167</sup> Other precedents from foreign jurisdictions also hint at a ‘harm’-based metric to define the breadth of privacy - these may also shed some light on how the ‘harm-based’ standard may be adopted in India in forthcoming cases.<sup>168</sup>

Ultimately, the scope of review in the RET stage should be relatively thin. As long as a non-trivial privacy-related harm is discernible from the petitioner’s claim, the Court should (ideally) find a privacy infringement. The Court should then proceed to determining whether the infringement of privacy is justified due to other interests, at the proportionality stage.<sup>169</sup> The Court should set a flexible threshold at the RET stage of inquiry, rather than having strict definitional standards (which are injudicious considering the vagueness of the concept as a whole).<sup>170</sup> Such an approach is consistent with most of privacy jurisprudence in Europe and India which advocates for broad and non-exhaustive definitional contours for privacy.<sup>171</sup>

Therefore, our reformulation of RET (from *Puttaswamy I*) would place individual autonomy at the doctrinal core. We suggest that the determinant of defining a legitimate

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<sup>166</sup> Ibid, at ¶ 63-68 (Wagner, CJ).

<sup>167</sup> Ibid, at ¶¶ 135-136 (Rowe, J). Although the approach here does not specifically invoke a ‘harm’-based inquiry, the approach hinted by Justice Rowe is similar to RET as contemplated by Chandrachud, J. See Gautam Bhatia, *Notes from a Foreign Field: The Canadian Supreme Court on the “Reasonable Expectation of Privacy”*, Indian Constitutional Law and Philosophy, available at <https://indconlawphil.wordpress.com/2019/03/01/notes-from-a-foreign-field-the-canadian-supreme-court-on-the-reasonable-expectation-of-privacy/> last seen on 07/07/2020 for an analytical comparison of *R v. Jarvis* and *Puttaswamy I*.

<sup>168</sup> The nature of ‘harm’ in this context has been significantly broadened by some courts, as they have suggested that the storage and permanent recording of information (due to the potential harm in such storage) can give rise to a reasonable expectation of privacy, despite a user’s initial consent to share the data. See *PG&JH v. United Kingdom*, App. no. 44787/98, at ¶ 57; “Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method.” The ‘harm’, therefore, need not be immediate, but even proximate and impending harm which might flow from the disclosure shall be considered in determining RET.

<sup>169</sup> We discuss proportionality in Part 6 of this article.

<sup>170</sup> Samuel Beswick, *Perustration in the Pathless Woods: Hamed v R*, 17 Auckland University Law Review, 291, 297-298 (2011).

<sup>171</sup> See *Niemietz v. Germany*, App. no. 13710/88, at ¶ 29 and *Costello-Roberts v. the United Kingdom*, App. no. 13134/87, at ¶ 36. Also see *Supra 1*, ¶ 46 (Nariman J). Many judges in *Puttaswamy I* explicitly acknowledge the ambiguity in the definition of privacy and favour an open-texture in its definition to catalyse an expansive reading of the right in subsequent cases, as has been discussed in Part 4 of this article.

privacy claim would be an individual's autonomous choice to be protected by privacy (subjective component of RET). The restriction on this autonomous choice (objective component) would *not* be 'societal' recognition of the autonomous claim, but an objective harm principle i.e. only if the privacy claim impacts other constitutional values would the claim be rejected.<sup>172</sup>

### 5.3. *Puttaswamy II and the Third Party Doctrine*

There are certain discordant notes to our aforementioned formulation in Sikri, J's opinion in *Puttaswamy II*. Bhatia points out two irregularities: First, Sikri, J's formulation in certain instances extracts the American formulation of RET (which scrutinizes societal recognition instead of the constitutional harm principle)— a standard which Chandrachud, J in *Puttaswamy I* avoids and Nariman, J unequivocally rejects<sup>173</sup>. Second, Sikri, J suggests that biometric and demographic information does not raise any reasonable expectation of privacy given that “[t]hey are taken for passports, visa and registration by the State and also used in mobile phones, laptops, lockers etc. for private use.”<sup>174</sup> This seems uncomfortably close to the TPD rationale: an individual divulging information to third-parties shall be deemed to have forfeited her privacy claim over the information altogether.

Although we empathize with Bhatia's concerns, we feel that Sikri, J's opinion does not necessarily bind us to a regressive standard. Therefore, we add certain qualifications: First, it is unclear whether Sikri, J has unequivocally adopted the American standard for RET. Throughout the judgment, he offers different reformulations for RET - including the 'constitutional values' laden approach adopted by Chandrachud, J in *Puttaswamy I*.<sup>175</sup> More importantly, Sikri, J's final comment on RET is a list of considerations which must be taken into account when assessing a valid privacy claim, which include 'triviality', 'injury', 'nature' of information stored and extent of prior disclosure of information as considerations.<sup>176</sup> These considerations attempt to measure the degree of 'harm' which may be caused from the privacy infringement in question. This indicates that the test is closer to Chandrachud, J's formulation of RET test than the American test, despite its inconsistent use by Sikri, J.

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<sup>172</sup> A sound invocation of the 'objective harm principle' in relation to the second stage of RET is found in *Joseph Shine v. Union of India*, concerning the validity of section 497 of the IPC criminalising adultery. The court (albeit obliquely) looked into the matter from the lens of matrimonial privacy. Although the court held S. 497 as unconstitutional, it categorically upheld the state's 'intrusive' legislative efforts to regulate certain matrimonial (harmful) offences like domestic violence and dowry. Chandrachud, J (writing for himself) legitimised the reformatory efforts of the legislature (through the dowry prohibition act or the DV act, etc.) on the ground that the laws “protect[ed] the fundamental rights of every woman to live with dignity” noting further that the offence of adultery “did not fit that paradigm”. Thus, to explain our formulation of the second stage of RET; in a situation of domestic violence or physical abuse, any claim to privacy by the accused would fail, given the objective 'harm' on the woman. See *Supra* 7, at ¶ 61 (Chandrachud, J).

<sup>173</sup> *Supra* 55. Also see Part 5.2 of this article.

<sup>174</sup> *Supra* 8, at ¶ 252 (Sikri, J); also see *supra* 144.

<sup>175</sup> *Supra* 8, at ¶ 287 (Sikri, J). See also *supra* 8 at ¶ 289 (Sikri, J).

<sup>176</sup> *Ibid*, at ¶ 292 (Sikri, J).

Secondly, although there are indications that Sikri, J does not endorse the existence of ‘reasonable expectations’ over demographic and biometric information, Sikri, J eventually acknowledges a valid privacy claim over the information stored and collected with the government:

No doubt, the information which is gathered by the UIDAI (whether biometric or demographic) is parted with by the individuals to other agencies/body corporates etc. in many other kinds of transactions as well, as pointed out by the respondents. *However, the matter is to be looked into from the angle that this information is collected and stored by the State or instrumentality of the State.* Therefore, it becomes important to find out as to whether it meets the test of proportionality, and satisfies the condition that the measure must not have disproportionate impact on the right-holder (balancing stage).<sup>177</sup>

The rationale here is that *despite* the information being previously shared with other agencies, the factum of such sharing *will not amount to a waiver* of privacy claims over the information altogether. This appears to be a rejection of TPD. Instead, Sikri, J focuses on the information being “collected and stored by the State or instrumentality of the State”<sup>178</sup>. This may imply that information being ‘stored’ by the state would raise a heightened privacy claim due to the possible ‘harm’ which may be caused by the disbursement of information.<sup>179</sup> Alternatively, it could be suggested that privacy interests are heightened because it is the ‘state’ or its instrumentalities collecting and storing the information.<sup>180</sup> Nevertheless, the focus remains on the calculus of ‘harm’ and not ‘societal’ acceptance, thus steering clear of TPD.

Therefore, we feel that it is best to broadly read some of the ambiguities in Sikri, J’s opinion in consonance with the doctrinal positions of *Puttaswamy I*, in the manner we have proposed here, while discarding those parts which are contrary to the nine-judge decision. It is this proposed doctrinal interpretation, which is in conformance with the principles in *Puttaswamy I*, which should guide future applications of RET.

## 6. Consent and Proportionality

<sup>177</sup> Supra 8, at ¶ 284 (Sikri, J). (emphasis ours)

<sup>178</sup> Ibid.

<sup>179</sup> It is also essential to note in this context that the Sikri, J offers a specific direction to limit the amount of time for which authentication transaction data was retained at the CDR Erstwhile regulations provided that the data would be retained for 5 years which was reduced to 6 months by the judgment. *See* Ibid, at ¶ 205 and ¶ 447 (Sikri, J).

<sup>180</sup> It was argued by the Petitioners that individuals have a ‘higher expectation of privacy from the State’ given the existence of concentrated and centralised State power. *See* Ibid, at ¶ 241 (Sikri, J).

The role of consent within proportionality is more difficult to judge given that the ‘balancing act’ is significantly fact-sensitive in nature and the stage of review, as such, does not subsume any common metric of considerations.<sup>181</sup> Given the open texture in the balancing stage of review, different judges and courts use unique approaches to find the correct balance.<sup>182</sup> Therefore, in this Part, we will offer a broad overview of the doctrinal content of proportionality and examine the contrasting approaches of the judges in conducting proportionality, specifically discussing the role of consent within the approach.

### 6.1. *The Content of Proportionality*

Chandrachud, J in *Puttaswamy I* invokes the proportionality test to identify legitimate infringements of privacy: the three stages of the test include : (i) *legality*-existence of law, (ii) *legitimacy*- existence of a legitimate state aim to justify the infringement and (iii) *balancing* - balancing the infringement against the legitimate aim identified.<sup>183</sup> Sikri, J in *Puttaswamy II* adds to this, the components of ‘suitability’ (whether the means adopted by the state is suitable for the ends it seeks to meet); and ‘necessity’ (that the state must adopt the least restrictive alternative to meet its desired ends).<sup>184</sup> Sikri, J does not, however, contemplate significant scrutiny within these two stages and the key focus remains on ‘balancing’.<sup>185</sup>

The nature and content of the balancing stage remains notably elusive. To shed some light on this stage of review, Alexy offers the ‘weight formula’. Alexy suggests that the ‘balance’ contemplated is essentially a weighted average of (i) the relative abstract weights of opposing principles, (ii) the relative intensity of interference with or possible advancement of each opposing principle; and (iii) the reliability of assumptions relied upon to arrive at the relative intensity of interference or advancement.<sup>186</sup> Alexy’s weight formula is provided: (*I* denotes intensity, *W* denotes abstract weight and *R* denotes reliability)

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

Within this formulation, autonomy (broadly) and consent (narrowly) have significant value. In continuance of what we have said in Parts 2 and 3 of this article, ‘consent’ here

<sup>181</sup> Stavros Tsakyrakis, *Proportionality: An assault on human rights?* 7 International Journal of Constitutional Law, 468, 471-472 (2009)

<sup>182</sup> See Aparna Chandra, *Supra* 141 at 57-58, 84-86.

<sup>183</sup> Importantly, the only other judge invoking proportionality was Kaul, J who incorporated the additional prong of “procedural guarantees” within the test. *See* footnote number 141 above.

<sup>184</sup> *Supra* 8, at ¶ 267 (Sikri, J).

<sup>185</sup> Sikri, J adopts a nuanced version of the German test over the Canadian test which offers significantly less scrutiny for necessity. *See Supra* 142 for more.

<sup>186</sup> Robert Alexy, *Constitutional Rights and Proportionality*, 22 Journal for Constitutional Theory and Philosophy of Law 51, 55 (2014).

will become a factor which has to be taken into account in assigning relative ‘abstract weights’ to opposing principles.<sup>187</sup> In addition to this, the variable of consent and autonomy shall be significant in the court’s calculation of the relative ‘intensity’ of the privacy infringement in question. Within this calculation, (i) the degree of consent involved in the disbursal of information, and (ii) the potential ‘harm’ on individual autonomy (or the rights of others and the public interest<sup>188</sup>) through the disbursal will have to be taken into account.

An objection might be raised to this particular formulation of the role of consent in proportionality. As we have discussed in the previous part, RET accounts for the consent of the individual in question in the subjective willingness component of the test. The invocation of consent at the balancing stage might then be seen as a repetitive counting of the same factor in the privacy analysis. This objection is, however, misplaced. RET operates as a *threshold* requirement in order to determine whether a person can legitimately claim privacy (whether the right to privacy has been ‘engaged’ or ‘infringed’), whereas proportionality deals with whether privacy can be restricted in a particular situation by competing interests, after finding that privacy has been engaged.<sup>189</sup> However, there are legitimate concerns about whether RET, as conceptualised in *Puttaswamy I* and *II*, ends up being redundant in light of a rigorous proportionality analysis. First, the RET as conceptualised by the Supreme Court involves balancing between subjective willingness and objective constitutional values at the threshold stage of determining whether a person can claim a privacy interest. It is questionable whether this balancing should be done at this stage, when balancing is an essential part of the proportionality test, which follows RET. Second, as Barendt argues, this threshold balancing in RET leads to the ‘double counting’ of several factors.<sup>190</sup> Barendt, in fact argues that this is one of the many reasons as to why RET as a whole is an incoherent and redundant concept.<sup>191</sup> As we have discussed above, however, neither *Puttaswamy I* or *II* adopt the US model of RET, but the majority in *Puttaswamy II* clearly adopts a modified form of the test. It might be possible to argue that even this modified form of RET is redundant when proportionality is being used, but that is outside the scope of this paper. A possible way of reconciling these concerns is to adopt a broad harm-based approach to determining whether RET is satisfied, as we have discussed in the previous Part.<sup>192</sup>

None of the judges in *Puttaswamy I* or *Puttaswamy II* invoke Alexy explicitly. However, Alexy’s weight formula offers a good framework to analyse how the judges conducted the ‘delicate task’<sup>193</sup> of balancing. *Puttaswamy I* did not specifically deal with a

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<sup>187</sup> The question as to the balance between the relative ‘abstract weights’ of dignity and autonomy for instance can be formulated through a ‘liberty-affirming’ concept of dignity as opposed to a ‘liberty-restricting’ one. In this context the *relative* weight of opposing principles would depend upon the degree of importance which is accorded to autonomy, consent and the public interest within the formulation. See part 2 of this article.

<sup>188</sup> See part 2 of this article.

<sup>189</sup> *Supra* 142. [Kamil]

<sup>190</sup> Eric Barendt, ‘A reasonable expectation of privacy’: a coherent or redundant concept?, 96, 109 in *Comparative Defamation and Privacy Law* (Andrew Kenyon, 1st ed., 2016).

<sup>191</sup> *Ibid.*, at 114.

<sup>192</sup> See Part 5.2 of this article.

<sup>193</sup> *Supra* 8, at ¶ 189 (Sikri, J).

privacy claim and therefore the question as to the nuances of the proportionality test become moot. However, it becomes important to see how *Puttaswamy II* expressly invokes consent in relation to the doctrine.

## 6.2. *Autonomy and Voluntariness to Determine Relative Intensity of Privacy Infringements*

An interesting part of the *Puttaswamy II* judgment, which helps unravel the role of consent in the proportionality analysis, is the Court's approach towards Section 57 of the Act.<sup>194</sup> This provision of the Act allowed for the use of Aadhaar for establishing the identity of a person 'for any purpose', by both the State or 'any body corporate or person', pursuant to any law, or any contract. The Court upheld that part of Section 57 which dealt with the use of the number by the State pursuant to any law, subject to such a law being proportionate.<sup>195</sup> However, it struck down that part of Section 57 which allowed the use of Aadhaar by private parties pursuant to any contract. It did so for two reasons: (a) that such a contract is not a 'law', and hence the 'legality' requirement of proportionality is not met, and (b) that this would 'enable commercial exploitation of an individual [sic] biometric and demographic information by the [sic] private entities.'<sup>196</sup>

The argument about 'commercial exploitation' is particularly relevant from our perspective. This is because it is clear that the Court suggests that the use of Aadhaar by private parties is unconstitutional *even if it is used voluntarily*. Otherwise, there would be no need to strike down the part linked to the use of it through contracts, as contracts are voluntary by definition.<sup>197</sup> In addition, this argument is independent of the legality requirement i.e. it would not be valid for private parties to use Aadhaar even if this was specifically backed by law.<sup>198</sup> Sikri, J does not mention any reasons for this beyond 'commercial exploitation'.

<sup>194</sup> S. 57, The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, states:

"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."

<sup>195</sup> Supra 8, at page 560 (Sikri, J).

<sup>196</sup> Ibid.

<sup>197</sup> Prasanna S, *Why Aadhaar can't be used as authentication by private companies*, Medianama.com, 27 Sept 2018, Available at: <https://www.medianama.com/2018/09/223-section-57-why-aadhaar-cant-be-used-as-authentication-by-private-companies/> last seen on 2/07/2019. See also Vrinda Bhandari and Rahul Narayan, *In Striking Down Section 57, SC Has Curtailed the Function Creep and Financial Future of Aadhaar*, The Wire, 28 Sept 2018, Available at: <https://thewire.in/law/in-striking-down-section-57-sc-has-curtailed-the-function-creep-and-financial-future-of-aadhaar>, last seen on 02/07/2019. However, the recent Aadhaar and Other Laws (Amendment) Act, 2019, has amended section 4 of the Act to allow voluntary use of Aadhaar as proof of identity even by private entities (although it is subject to several procedural protections). We, nevertheless, assert that *Puttaswamy II* clearly holds that voluntary use of Aadhaar for authentication by private parties is prohibited.

<sup>198</sup> Ibid.

Chandrachud, J's opinion is a bit clearer and can be used to decode the reasoning of the majority opinion. He mentions two reasons as to why this part of Section 57 is unconstitutional: (a) that it traverses beyond the legitimate state aim of targeted delivery of social welfare benefits, and (b) that it allows for commercial exploitation of citizens' data, which would lead to profiling.<sup>199</sup> This means that this impacts the proportionality analysis for right to privacy at *two levels*: (a) at the initial stage of a legitimate state aim, which cannot extend to commercial use of data, and (b) at the balancing stage, because this would lead to pervasive profiling. He observes that extending the use of Aadhaar to private parties would lead to the creation of a comprehensive profile of citizens which would extend to 'every facet of human life'.<sup>200</sup> But why is profiling dangerous? This is explained by Chandrachud as follows:

Profiling can impact individuals and their behaviour. Since data collection records the preferences of an individual based on the entities which requested for proof of identity, any such pattern in itself is crucial data that could be used to predict the emergence of future choices and preferences of individuals. These preferences could also be used to influence the decision making of the electorate in choosing candidates for electoral offices. Such a practice would be unhealthy for the working of a democracy, *where a citizen is deprived of free choice*.<sup>201</sup>

This is a clear exposition of our central argument about the role of consent. First, it is clear that Chandrachud, J declares Section 57 to be unconstitutional even if individuals voluntarily give their Aadhaar details. Second, the reason for this is the continued autonomy of the individual; the profile of an individual can be used to deprive her of 'free choice' in the future. So, even though consent is important to determine infringements of privacy, it can be overridden by other factors, including the autonomy of the very individual concerned.

In addition to this, the degree of consent involved in the method of disbursement of information can also be used to measure the degree of intensity of the infringement. In this context, it is important to note that both judges give significant weight to the degree of 'voluntariness' of the Aadhaar scheme. Sikri, J establishes the voluntariness of the scheme on the basis of Section 3 of the Act which 'entitles' an individual to an Aadhaar number.<sup>202</sup> The suggested 'voluntariness' of the scheme implies that the intensity of the infringement of privacy is reduced due to individual's consensual disbursement of information. This is most explicit in Sikri, J's discussion in relation to the compulsory linking of Aadhaar to SIM Cards, where he notes that such mandatory linking "impinges upon the voluntary nature of the Aadhaar scheme".<sup>203</sup> However, this does not mean that Sikri, J holds consent to be a

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<sup>199</sup> Supra 8, at ¶ 243. (Chandrachud, J)

<sup>200</sup> Ibid, at ¶ 244.

<sup>201</sup> Ibid, at ¶ 245. (emphasis ours)

<sup>202</sup> Ibid.

<sup>203</sup> Ibid, at ¶ 442 (Sikri, J).

‘one-time’ waiver of all privacy interest. Instead, consent is a consideration which tips the balance in favour of constitutionality.<sup>204</sup>

Chandrachud, J also considers the voluntariness of the Aadhaar scheme to be an important consideration although he questions the voluntariness of the scheme.<sup>205</sup> The nature and degree of the voluntariness of the Aadhaar scheme can be debated (as there is a clear difference of opinion here) - although we do not seek to address that question. The pertinent fact remains, nevertheless, that the degree of consent remains a significant consideration in measuring the intensity of infringement for *both* the judges.

### 6.3. *Voluntariness and Balancing*

The problematic invocations of consent by Sikri, J in relation to children have already been noted.<sup>206</sup> Sikri, J holds that children being ‘incapable’ of consenting, any legislative attempts at ‘foisting’ such consent shall be ‘disproportionate’.<sup>207</sup> Sikri, J furthers this rationale to allude to a heightened privacy claim for children: since children lack capacity to consent, they have a heightened privacy claim over their information.<sup>208</sup> However, there is little analysis by the Court on the question of the ‘meaningful consent’<sup>209</sup> of data subjects when it came to upholding Section 7 of the Act. Nevertheless, the focus on the ‘incapacity’-based rationale indicates the silent yet critical weight Sikri, J accords to the consideration of ‘consent’: given that children lack the capacity to consent, the balancing exercise finds the scheme disproportionate.

The judges also use consent in context of their discussion on the savings clause in section 59 of the Aadhaar Act (which legitimized all data collected under the Aadhaar scheme between 2009 and 2016 when the law was enacted). Given that the ‘legality’ requirement of proportionality was not satisfied during this period, the petitioners argued that the infringements prior to 2016 were clearly disproportionate. In addition to this, it was argued that the lack of any procedural safeguards prior to the commencement of the act implied that any information shared prior to 2016 was not backed by the ‘informed consent’ of individuals. Chandrachud, J echoes these concerns in his minority opinion as he holds the savings clause invalid given that “the informed consent of those individuals, whose Aadhaar numbers were generated in that period cannot be retrospectively legislated by an assumption of law.”<sup>210</sup>

Sikri, J, on the other hand, upholds section 59 and, thereby, the privacy infringements prior to 2016. He holds that the requirement of ‘legality’ is satisfied since Section 59 ‘deems’

<sup>204</sup> See supra 8 at ¶ 446 (Sikri, J), conclusion (j): “the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. *Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality.*”

<sup>205</sup> Ibid, at ¶ 11 (Chandrachud, J).

<sup>206</sup> See Part 3 of this article.

<sup>207</sup> Supra 8, at ¶ 327 (Sikri, J).

<sup>208</sup> Murray v. Big Pictures (UK) Ltd., 109(2008) 3 WLR 1360 as cited in Supra 8, at ¶ 331 (Sikri, J).

<sup>209</sup> See supra 8, at ¶ 253 (Sikri, J) for petitioner arguments based on ‘illusory consent’.

<sup>210</sup> Supra 8, at ¶ 304 (Chandrachud, J).

the existence of law prior to 2016.<sup>211</sup> He further notes that in any case “the problem can be solved by eliciting ‘consent’ of all those persons who were enrolled prior to the passing of the Act.”<sup>212</sup> This can be seen either as (i) an observation that the ‘legality’ requirement can be excused with prospective consent or (ii) as bolstering the existent ‘deemed’ consent elicited prior to 2016. The position in (i) is clearly incorrect given that legality is an independent requirement in the proportionality analysis, and a restriction that is not backed by a law will be invalid despite satisfying the other prongs of the test.<sup>213</sup> However, position (ii) also raises legitimate concerns as to whether infringements of fundamental rights can be retrospectively consented to. In any case, the rationale of the majority is significantly autonomy-restricting even in ‘deeming’ of consent; which is sharply contrasted by Chandrachud, J’s approach, which we discuss below.

Additionally, although Sikri, J does not invoke TPD to deny the petitioners’ claim, he considers the factum of private information being available ‘in public domain’ as being relevant in balancing.<sup>214</sup> This largely follows our discussion in Part 3 about waiver of fundamental rights and the right to be forgotten. As we stated there, when information is in the public domain, the interests of the public must be taken into account and balanced against the individual’s subsisting privacy rights in the information. However, whether the possession of Aadhaar information by the State actually contributes to the public interest is another question, which is outside the scope of this article.<sup>215</sup>

Chandrachud, J’s dissenting opinion in *Puttaswamy II* places individual autonomy at the centre of proportionality.<sup>216</sup> As we have observed previously, Chandrachud J links purpose-limitations in the handling of data, with the continuing ability of an individual to exercise control over information pertaining to her.<sup>217</sup> He furthers this rationale to condemn third-party access to Aadhaar data: an individual’s data must be within her ‘control’ and therefore unauthorized ‘secondary’ linking of data (by a third party) would ‘erode the personal control over the information’.<sup>218</sup> This, of course, supplements his observations on ‘commercial exploitation’ as have been discussed earlier.<sup>219</sup> The purpose-limitation rationale is also used to strike down Section 7 of the Act.<sup>220</sup> Given that the scope of Aadhaar is undefined (and resultantly infinitely broad), it is impossible to for an individual to meaningfully consent to prospective uses of her biometric data.<sup>221</sup>

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<sup>211</sup> Ibid, at ¶ 371-372 (Sikri, J).

<sup>212</sup> Ibid, at ¶ 373 (Sikri, J).

<sup>213</sup> This has been recognised long before the adoption of the proportionality standard. In *Kharak Singh*, for instance, the Supreme Court clearly held that only a ‘law’ could justify infringements of Articles 19 and 21, and that this requirement is independent of the reasonableness of the restriction. See *Kharak Singh v State of UP*, (1964) 1 SCR 332, at ¶¶ 5 and 6 (N Rajagopala Ayyangar, J).

<sup>214</sup> Ibid, at ¶ 284 (Sikri, J).

<sup>215</sup> See *Supra* 144, for instance.

<sup>216</sup> See *Ibid* at ¶ 240 (Chandrachud, J).

<sup>217</sup> Ibid, at 218 (Chandrachud, J). See part 2.2 of this article.

<sup>218</sup> Ibid, at ¶ 231

<sup>219</sup> See part 6.2 of this article.

<sup>220</sup> *Supra* 8, at ¶ 248 (Chandrachud, J).

<sup>221</sup> *Supra* 8, at ¶ 246 (Chandrachud, J.), “The scope of Section 7 is very wide. It leaves the door open for the government to route more benefits, subsidies and services through the Consolidated Fund of India and expand the scope of Aadhaar.”

Summarising the approaches of Chandrachud, J and Sikri, J, we feel that Chandrachud, J's approach to balancing offers a markedly 'autonomy-rich' formulation of the right of privacy. Sikri, J's opinion departs from this autonomy-rich conception, clearly affirmed by the nine-judge decision in *Puttaswamy I* and subsequent cases<sup>222</sup>, at several instances. Chandrachud, J foregrounds his measurement of the intensity of privacy infringements on the considerations of autonomy and consent. This reaffirms our discussion about an autonomy-rich approach to privacy, where individuals continue to possess privacy rights in information which pertains to them, and is in greater consonance with the decision in *Puttaswamy I*.

## 7. Conclusion

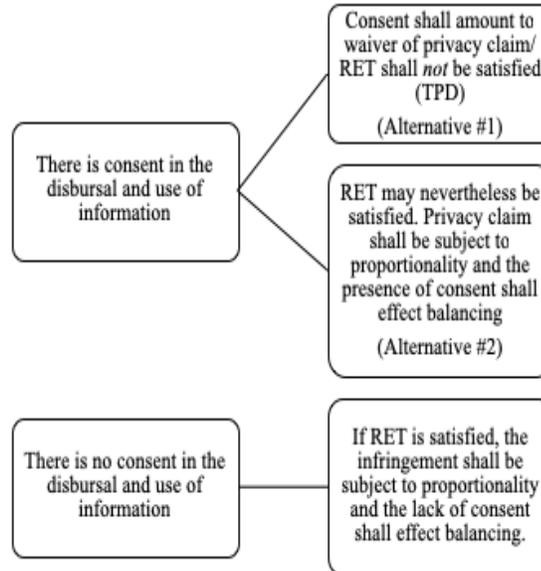
This article has explored various aspects about the role of consent in the right to privacy. *Puttaswamy I* builds upon a foundation rich with references to dignity, autonomy and liberty. Reading *Puttaswamy I* along with cases which have followed, we have conceptualised an autonomy-rich formulation of dignity, which focuses upon an individual's continued capacity to exercise autonomous choices. We have then situated consent within this matrix, as a key variable which signifies the importance of individual choice. However, preserving an autonomy-rich formulation of dignity can, in certain situations, require us to balance consent against other factors such as the continuing autonomy of the individual concerned. In this sense, the balancing exercise is a combination of subjective (consent) and objective (autonomy) factors, both of which have to be taken into account by a Court.

This conception of the role of consent also helps us explain the otherwise tricky issue of 'waiver' of fundamental rights. As we have shown in our analysis, consent in the disclosure of information does not lead to a complete abandonment of a person's privacy interests in that information, as is required by an autonomy-rich formulation of dignity. Consent does, however, alter the landscape within which privacy rights can be claimed. Once the information is in the public sphere, other rights, such as freedom of speech will have to be balanced against the person's continuing privacy rights. This also helps us understand the scope of the right to be forgotten.

We have analysed the implications of these principles upon the doctrinal tests used in *Puttaswamy I* and *II*, to determine the validity of privacy infringements. The alternative approaches to the role of consent (both within RET and proportionality) can be summarized through the diagram below:

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<sup>222</sup> See Part 2.3 of this article.



In relation to RET, Alternative #2 is the correct approach, which maximizes autonomy. We do not endorse Alternative #1, which limits consent to a ‘one-time’ act. Reinforcing this, we have also shown how *Puttaswamy I* unambiguously rejects the American third-party doctrine. The Court adopts a standard which takes into account subjective and objective factors which emphasises constitutional values based on dignity.

*Puttaswamy I* and *II* cement the role of a proportionality analysis in determining the validity of privacy infringements. We have situated consent within this analysis, in a manner which takes into account the doctrinal formulations of the Court. Consent is taken into account as a factor which affects the balancing stage during the proportionality analysis, rather than as an ‘all-or-nothing’ variable. The weight and intensity ascribed to consent will vary depending on the facts of a particular case, and will be balanced against such factors as the autonomy of the individual, the rights of others and the public interest.

We only attempt to lay down the foundations and define the broad contours of the functioning of consent. Several important issues remain to be addressed. For instance: how are Courts to evaluate ‘objective’ constitutional values and construct the image of an autonomy-rich individual without unduly affecting a person’s actual choices? What is the exact weight to be given to consent in the proportionality analysis? Which public interests can weigh against a person’s privacy interests? These questions need to be answered as well, and this article is only the first step in unravelling the tricky issue of consent.