Chapter 8
Justifying Privacy: The Indian Supreme Court's Comparative Analysis

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Abstract The opinion authored by Justice Chandrachud in K. S. Puttaswamy v. Union of India has extensively employed philosophical and comparative materials in justifying a fundamental right to privacy under the Constitution of India. Here, we examine some implications of the reliance on such materials. We first argue that the court relies on a strong liberty-based zonal view of privacy. However, its reliance on Aristotle's views is controversial, and reliance on JS Mill's views does not immediately yield a strong zonal argument. The opinion's aggregation of "intimacy-based", "expectation-based", and "other guarantees-based" justifications that are reflected in decisions in the USA also presents conceptual difficulties in understanding the composition of a private zone. We then point out that as in the USA and South Africa, liberty-based justifications in the opinion gradually gravitate towards autonomy-, personhood- and finally, dignity-based accounts. The opinion's theoretical explanation of the relationship between these concepts however makes their individual content elusive and warrants ironing out of some inconsistencies that emerge. Dignity-based views may not yield a zonal argument like the liberty-based views employed by the opinion earlier. We then indicate that dignity-based arguments for privacy do have to contend with certain differences with liberty-based views owing to their distinct historical evolution in law, and in light of the liberty-restraining potential of dignity.

8.1 Introduction

The right to privacy has received a high constitutional status across several constitutional democracies in the twenty-first century including the European Union, the USA, the UK, Canada and South Africa. Following the trend, the Supreme Court

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of India pronounced privacy to be a fundamental right of particular significance by proclaiming its inextricable link to the constitutional values of liberty and dignity. The court's decision has been celebrated in journalistic forums, and indeed this might be justified given the reaffirmation of the constitution's commitment to the values of liberty and dignity. The decision is a remarkable one at least on the sheer breadth of justifications employed by the separate opinions. Ranging from the philosophy of natural rights and Aristotle' distinction of the private and the public, to modern controversies over informational privacy and the importance of the "dark matter" of constitutional law, the decision abounds both in metaphors and in legal and philosophical materials. Undoubtedly it holds immense potential for legal academics to conduct critical or celebratory post mortems, or to speculate how the decision might affect other constitutional issues to be adjudicated by the court. Despite the breadth of the judgment, or perhaps due to it, the aims of this paper are modestly narrow in focussing on certain implications of the court's employing of philosophical and comparative materials. In comparative materials, we particularly focus on the USA and South Africa. In this, we analyse the opinion authored by Justice Chandrachud which also speaks for Chief Justice Khehar, and Justices Agrawal and Nazeer (hereafter "the Opinion"). It is in the Opinion that we find the most extensive use of philosophical and comparative materials in constitutional law across jurisdictions. We first argue that tracking the development of privacy law in the USA, the Opinion employs three distinctive reasons for zonal privacy: intimacy-based justifications, expectation-based justifications, and justifications based on other constitutional guarantees. Each of these justifications is however a distinct answer to the same question of what constitutes a private zone protected by the right to privacy. Indeed, they might not sit well together, even though courts in the USA, and the Opinion, have employed all three in justifying a right to privacy. We then point out that liberty-based zonal arguments on privacy inevitably employ personhood- and autonomy-based arguments in cases involving decisional autonomy, which take them closer to dignity-based justifications witnessed in South African and German cases. The Opinion has incorporated such justification in justifying privacy without recognising the tensions that might lie in the legal–historical connection of privacy to the values of liberty and dignity. To advance this argument, we first point out in Part I the nature of liberty-based arguments that the Opinion employs with the support of comparative and philosophical materials. We identify conceptual gaps that demand further explanation of what constitutes the private zone and why. In Part II, we reflect on how this compares to the dignity-based arguments in the Opinion. We argue that in linking dignity, liberty and privacy, the court employs some far-reaching theoretical assumptions that warrant further reflection on how they might be employed in adjudicating privacy cases. Towards the end, we briefly indicate that dignity and liberty reflect distinct traditions of thinking about privacy which may at times offer varying conclusions in privacy cases.

8.2 The Decision in *Puttuswamy* and Liberty-Based Justifications

The Constitution of India does not have an express provision for a right to privacy. Since the early years after independence, majority opinions of the court have held that there was no fundamental right to privacy under the Indian Constitution. In 1954, through a decision of a 8-judge bench, the court held that "When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction".[1] Subsequently in *Kharak Singh v. State of UP*,[2] a 6-judge bench confirmed the view that there was no fundamental right to privacy under the Indian Constitution. However, in his dissenting opinion, Subbarao J. held that even though privacy was not an enumerated fundamental right, "…the said right is an essential ingredient of personal liberty". Referring to the rapid technological developments being witnessed by societies, and the psychological effects of surveillance, he held that the right to personal liberty under Article 21 was "a right of the individual to be free from restrictions or encroachments on his person, whether (they) are directly imposed or indirectly brought about through calculated measures". For him, the idea of personal liberty included freedom from intrusions into an individual's "private life".[3] Subbarao J's opinion was based on an integrated reading of the fundamental rights, where any law infringing fundamental rights must meet the test of being "just, fair, and reasonable" apart from satisfying the express constitutional limitations on each right. More than a decade later in 1978, Subbarao J's view on this reading of interpreting the fundamental rights was upheld by the majority of a 7-judge bench of the court in *Maneka Gandhi v. Union of India*.[4] Though this case did not expressly rule on the status of a constitutional right to privacy in India, it's reliance on Justice Subbarao's dissent provided enough judicial uncertainty for a fresh bout regarding privacy in the court.

In 2017, through its decision in *K. S. Puttaswamy v. Union of India*[5] the court finally settled the matter by reading in a fundamental right to privacy into Article 21 of the constitution which provides for the right to life and liberty. The question about privacy had resurfaced with the Government of India's proposal of the *Aadhaar* scheme, which sought to create a biometric and demographic database of Indian citizens to issue a unique identity number for each citizen. Broadly the promise of the scheme was to ensure "…efficient, transparent, and targeted delivery of subsidies, benefits and services" by the Government of India in its quest for the elusive ideal of good governance. The legal form of the proposal was the AADHAAR (TARGETED

[1] M. P. Sharma v. Satish Chandra, (1954) SCR 1077.

[2] Kharak Singh v. State of UP, (1964) 1 SCR 332.

[3] Subbarao J, Ibid., at Para 28.

[4] (1978) 1 SCC 248.

[5] (2017) 10 SCC 1.

DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016, ('the Act') the constitutional validity of which was challenged by several individuals and organisations. One of the chief challenges to the Act was that it violated a fundamental right to privacy of Indian citizens. While hearing the petitions challenging the Act, the court referred the question of the existence of a right to privacy to a 9-judge bench owing to the chequered judicial history of the right. All the separate opinions held that there was a right to privacy under the Constitution of India, even if the focus of their justifications varied in character. Justice Chandrachud's opinion was the longest, and it distinctively relied on a zonal concept of privacy where a right to privacy is justified by the existence of a distinctive private zone that the state, and even other individuals, may not intrude.

8.2.1 Zonal Privacy: Liberty Justifications

One of the key controversies over privacy has been in articulating what constitutes or marks out the private zone of the individual where she is free from intrusions. This of course is a challenge that only zonal views of privacy must surmount. Indeed any concept of privacy does employ at least the language of a private zone. Whether it is decisional privacy, control-based justifications for privacy, or personhood- or dignity-based accounts, the idea of a private zone features in each, albeit in different capacities. For example, personhood- or dignity-based accounts might involve a zonal argument to argue that only if a person is left alone in some aspects of their life, they can develop their personality, and that would be treating them as ends in themselves. In recognising the individual's right to self-determine their personalities by rejecting claims of control by others, a zone would slowly emerge, where others may not decide for the individual. In contrast, the available justifications of zonal accounts witnessed in the Opinion are united by the ontological belief that there does exist a private zone that ought not to be interfered with. The existence of the zone is the reason for non-interference. Given this assertion, it is their burden to articulate what constitutes the zone.

Typically, three reasons attempt at defining such a zone. First is the nature of certain activities as being so intimate or personal that others have no reasonable interest in interfering with an individual's decisions regarding them. Intimate sexual relationships including sexual orientation, and sexual practices such as sadomasochism, or JS Mill's example of experimenting with life by getting oneself drunk in private, are some classic examples of such decisions. This justification for privacy is justifiable on Mill's harm principle anchored in self-regarding actions, or HLA Hart's softer view that those activities that do not affect others and that society can tolerate should be immune from the gaze of the law.[6] Fundamentally such justifications are liberty-based ones.

[6] *See* Hart 1963.

Secondly, the expectation of individuals to be let alone in certain aspects of their lives appears to many as being an indication of where they must be left alone.[7] This category might include a range of activities that might be considered as within the legitimate expectation of an individual to be left alone. Though this view is also a liberty-based one, it is weaker than the first view, in that the legitimacy of an expectation is always subject to it being reasonable.

Third is the view that other guarantees/rights define the private zone of individuals. In this sense, it is other protected rights that would provide content to the inviolable private zone of the individual. Such a view is particularly susceptible to privacy-sceptical critics who argue that privacy by itself is a cluster of rights where none of those rights are justified by the idea of privacy.[8] Rather each of the other rights has its own interest that warrants protection. Privacy is an empty concept on such a view.

In the Opinion, Justice Chandrachud unambiguously embraces a zonal idea of privacy and calls it "an inviolable core"[9] where each human being is entitled to be left alone. His commitment to the zonal view is clear since he relies on a public–private distinction by employing Aristotle's distinction between "polis" and "oikos", which he thinks "provides a basis for restricting governmental authority to activities falling within the public realm".[10] A tangential comment on the invoking of Aristotle's distinction might be of interest here. Justice Chandrachud does not refer to Aristotle's work, but to secondary literature that employs Aristotle.[11] This counter-intuitively turns out to be an exercise in judicial wisdom, as closely engaging with Aristotle's distinction would have required the court to justify his views on the similarities and differences between property, slave and women, which for Aristotle were a part of the household or private realm. What united the three was their purpose of satisfying the needs of man which were in the realm of the household as opposed to the polis.[12] Indeed, the public–private distinction is controversial as much of modern law is a slow incursion into the realms traditionally considered to be private, in order to protect the rights of oppressed sections of societies such as women and children. Invoking a full-blown Aristotelian distinction would have sat even more uneasily with Justice Chandrachud's listing of feminist criticisms of privacy in later parts of the Opinion.[13] On closer inspection, accepting some feminist criticisms of privacy would warrant abandoning the Aristotelian distinction, which unlike later liberty-based articulations of the private zone is based on the nature of the private realm that is constituted by the needs of man and the nature of property, slaves and women.

To return to the question of the private zone, we contend that it is the liberty-based views that the Opinion embraces, which has a significant bearing on the comparative

[7] Olmstead v. United States, 277 U.S. 438 (1928).

[8] Thomson 1975. For replies, see Rachels 1975, Scanlon 1975.

[9] Chandrachud J, *supra* note 5 at Para 2.

[10] Chandrachud J, *supra* note 5 at Para 29.

[11] James 2013.

[12] **ARISTOTLE, POLITICA, BOOK I,** in McKeon 2001. See Chaps. 3–13 for a discussion of the household, which is the description of the private sphere.

[13] *See* Chandrachud J, *supra* note 5 at Para 140(d).

materials that the court employs. Despite the reference to various concepts such as "human personality", "autonomy", "choices" and "control", Justice Chandrachud anchors them all in the concept of autonomy that he thinks is associated over matters which can be kept private. In his own words:

> Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is *manifested in the ability to make decisions on matters intimate to human life*. The autonomy of the individual is associated *over matters which can be kept private*.[14]

Notice that the private zone referred to here is founded on the concept of autonomy which in turn is related to the ability to make choices. The ability to make these choices is extended only to certain matters which are united by the idea of their being "intimate to human life" that qualifies them to be kept private. Undoubtedly, the idea is that it is the nature of some activities as intimate that admits them to the private zone. What makes some acts to be considered as intimate and others not? This question would haunt any account of privacy that relies on the nature of certain aspects of human life as private. The Opinion certainly cannot rely on the Aristotelian distinction, since the focus of the Opinion is not on the nature of a man's household. Rather the focus is on the ideas of the intimate or the personal. We have pointed out above the centrality of the idea of something being intimate. In addition, the Opinion also takes the idea of something being "personal" as being central to privacy:

> Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated.[15]

These words do identify the desirable consequence of heterogeneous personalities (within certain limitations perhaps) developing in a society that protects privacy. That consequence is however possible because of the solitude a person enjoys in certain personal spheres of an individual's life. As was the case with the idea of intimacy, what would indeed strike deep roots for such a belief is some articulation of what makes anything personal. Though one might think that it is unfair to saddle a court's opinion with such a burden, it is precisely the conventional work of courts to design tests that would help adjudicate between what deserves legal protection and what does not. In the case of privacy, the need for a test would be especially pressing given the fierce demands of the law and society on the one hand to control an individual's affairs, and the crying demand of the individual to be let alone, on the other. It is the limits of such demands that warrant reflection and decision. Indeed, the philosophical literature that the court refers to precisely dwells on how to ascertain such limits. If there is to be a zone, then there must be some recognisable boundaries or limits that identify it.

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[14] Chandrachud J, *supra* note 5 at Para 168 (emphasis supplied).

[15] Ibid.

A viable interpretation of the Opinion's reliance on the idea of a private zone might hinge on its reference to JS Mill's views on liberty.[16] Mill's view relies on certain basic liberties as being fundamental to human existence, e.g. the liberties of conscience and expression, of tastes, pursuits and life plan, and liberties of association. Liberties however were tempered by exceptions that include the harm principle and some enforceable duties that benefit an individual and contribute to the public good. Mill's views on liberty therefore do not immediately transform into an intimacy-based privacy argument. What might bring the Opinion close to Mill's account is the reliance on the second and third justification for a private zone pointed out above: that it is the expectation of individuals on the one hand, and other constitutional guarantees on another, that carve out a private zone. The Opinion indeed speaks of both in the same breath when it states that "Privacy at a subjective level is a reflection of those areas where an individual desires to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone".[17] Mill's view might lend weight to the idea that other constitutional guarantees justify a private realm, even though Mill himself does not speak of a private zone. We think this to be the case since if other constitutional guarantees track Mill's basic liberties, then an argument of the following form emerges: other constitutional guarantees (fundamental rights protecting liberties in the present case) articulate liberty interests protected by rights which the state and other individuals may not intrude. These liberties would have a dual function. First, they are the gatekeepers of privacy. If a citizen wishes to plead privacy violation, then she must prove that one of her other liberties is at stake. This immediately implies the second function: that the right to privacy will always be interpreted through the lens of some other liberty right. If this view were to be accepted, then it is unclear as to what else is left for privacy if other liberties protected by the constitution do the work for defining a non-violable zone. This zonal view of privacy therefore falls prey to Judith Jarvis Thomson's scepticism that it is other rights that justify a right to privacy and privacy by itself does no substantive justificatory work.[18]

Our argument here does not lead to the conclusion that privacy has no content or independent contribution of its own. Rather the intent is to demonstrate that the Opinion's reliance on arguments that reflect a liberty-based zonal view of privacy has unclear justificatory moorings. Indeed, liberty-based arguments by courts in other jurisdictions inevitably begin to rely on other concepts such as personhood and autonomy to justify privacy.[19] Similarly in the case of the Opinion, Justice Chandrachud relies on a relation drawn between privacy and dignity to articulate the relationship between privacy and liberty. Relying on the conclusion that "privacy protects liberty" and that "privacy protection gains for us the freedom to define

[16] **John Stuart Mill, On Liberty and Other Essays** (Stefan Collini ed., 1989) (1859) Chs. III and IV.

[17] Chandrachud J, *supra* note 5 at Para 169.

[18] See Thomson, *supra* note 8.

[19] See below the discussion of the cases in the USA.

ourselves and our relations to others",[20] Justice Chandrachud states that "…liberty is a broader notion, privacy is essential for protecting liberty. Recognizing a constitutional right to privacy is a reaffirmation of the individual interest in making certain decisions crucial to one's personality and being".[21] The emphasis on the idea of liberty being instrumental in developing one's personhood is unmistakable here. Privacy in turn is essential for protecting the exercise of liberty. The Opinion qualifies this conclusion by stating that "Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space".[22] This starkly contrasts with the following observation: "Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised".[23] Despite the contrasting nature of the statements, it might reasonably be constructed that privacy is fundamental to liberty protection since only in privacy or seclusion or solitude does one exercise the freedom of reflecting over how one ought to exercise their liberties. Of course, the sceptic will point out that this is just another way of articulating the freedom of thought and conscience, and that privacy, seclusion or solitude may facilitate this for some while not for others. For example, some individuals reflect well in public places such as libraries, cafes or in public transport, while others might prefer the seclusion of a private study. Any intrusion of their liberty to think by mandating them to think particular thoughts or not, notwithstanding the absurdity of such orders, would be a plain violation of their freedom of thought and conscience as much as it might be a violation of privacy. Privacy questions would become pertinent if say someone were surreptitiously mapping their brains to know what they were thinking without doing anything to hinder their thinking. A sceptic might yet argue that even that would be more of a property argument, in that they were *your* thoughts and you could exclude others from knowing them, than a privacy argument that might do the work here. In the alternative, it might be the potential threat of the misuse of that information, such as (mis)representing us to others that hampers our social relations, which is relevant for prohibiting brain mapping. Privacy would only be a gloss on such liberty concerns and thus may not be fundamental to liberty as the Opinion would have us believe.[24] Be that as it may, the Opinion does contemplate the value of privacy in enabling other liberties as one way of articulating its value. The other way is to say that some liberties, perhaps those that are related to intimate relationships such as sexual relations, or other matters that are intimate in terms of thought, such as writing a novel, can only be exercised in private. Though the privacy sceptic might have responses to this conclusion too, our aim here is not to adjudicate between

[20] Privacy, *Stanford Encyclopedia of Philosophy* (2002), available at https://plato.stanford.edu/entries/privacy/.

[21] Chandrachud J, *supra* note 5 at Para 140(c).

[22] *Supra* note 17.

[23] *Supra* note 14.

[24] The sceptic would of course be contested by those who argue that privacy is valuable because it protects our control over information about us which is material to how we want to represent ourselves in our social relationships. See Thomson, *supra note* 8; Marmor 2015.

the sceptic and enthusiast. Rather what we do want to point out is that the Opinion's reliance on liberty argument particularly stems from its reliance on judicial decisions in the USA, which too started with a strong liberty argument and slowly accorded centrality to personhood and autonomy arguments that may as well be viewed through a dignity lens. In what follows, we argue that the liberty-oriented view is peculiar to the US context and might have some rough edges for a dignity-based argument that other jurisdictions such as South Africa and Germany have relied on.

After an extensive reference to judicial decisions in the USA, the Opinion seems to employ the developments in that jurisdiction for three purposes.[25] First, even if it is not an enumerated right, privacy can still be protected as a fundamental right under the Indian Constitution just as it has been accorded the status of a right under various amendments under the US Constitution.[26] Second, it borrows the idea that privacy attaches to persons and not places, which is marked in the USA in the drastic shift of privacy doctrine from the traditional "trespass doctrine".[27] And third, despite balancing the right to privacy of citizens with the interest of the state in maintaining law and order, the courts in the USA have steadily increased privacy protection to protect aspects of a person's "private life" from interference by the state.[28] It therefore seems that the court employs the US decisions to justify its commitment to a zonal conception of privacy shaped by the three justifications that we identified above. In our opinion, liberty-based arguments give a peculiar character to the zonal, or what the Opinion calls the "spatial" concept of privacy, which inevitably invites reliance on personhood-based views of privacy that depart from the three justifications that we have identified in this section.

8.2.2 Liberty Arguments in the USA

The USA has a well-established right to privacy encompassing informational privacy, decisional autonomy, personhood, intimacy and secrecy/confidentiality.[29] Much like India, it does not have an express constitutional provision which provides for a right to privacy. The right has been read into the first, third, fourth, fifth and the ninth Amendments. The present US doctrine on privacy recognises its debt to Warren and Brandeis' article in the Harvard Law Review that argued for a common law right of privacy to mean an "inviolate personality" which also embraced within itself the "right to be let alone".[30] They however did not argue for a constitutional right to privacy. Rather they likened the breach of privacy to tortious liability having a horizontal application.

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[25] See Part K of the opinion for a survey of US judicial decisions.

[26] Chandrachud J, *supra* note 5 at Para 134(ii).

[27] Ibid.

[28] Ibid.

[29] Wacks 2010.

[30] Warren and Brandeis 1890.

Initially, courts were hesitant to adopt the reasoning of Warren and Brandies, and it was only in 1928 in *Olmstead v. United States*,[31] that Justice Brandies, in a strongly worded dissent, reiterated the "right to be let alone" as the most comprehensive of rights provided for by the constitution:

> The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men.

Justice Brandies here links privacy to conditions for the pursuit of happiness which also justifies other rights such as those to beliefs, thoughts, and emotions. Even if reductionist, his view grants privacy the same justification as is available to other rights of citizens. Though Justice Brandeis' reliance on the pursuit of happiness is an outlier today in terms of the substantive justification for privacy, the rooting of privacy in the same justificatory terrain as other rights has become an accepted way of thinking about privacy. In Justice Chandrachud's words, "The central theme is that privacy is an intrinsic part of life, personal liberty and of the freedoms guaranteed by Part III which entitles it to protection as a core of constitutional doctrine".[32] In one sense, privacy on this view is an essential part of freedoms available to individuals.[33]

The conclusion of Justice Brandeis's dissent became the law in the USA when in *Katz v. United States*[34] the court overruled *Olmstead* and adopted the reasoning of Brandies. This case is considered a landmark, marking a shift in privacy jurisprudence, by holding that the Fourth Amendment protected zones where people had a reasonable expectation of privacy. This was a departure from existing doctrine on the Fourth Amendment which focussed on a property-based reading of the Amendment.[35] In *Katz* the court held that "The Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all".[36]

While the court did not completely depart from the reasoning in *Olmstead* in this regard, by relying on the idea of a protected zone shaped by the expectations of people, it made privacy protection in the USA essentially a "liberty protection", i.e. protection of the personal space from government.[37] That privacy is essentially a liberty protection can be discerned from several other decisions that the Opin-

[31] 277 U.S. 438 (1928).

[32] Chandrachud J, *supra* note 5 at Para 158.

[33] Post 2001.

[34] 389 U.S. 347 (1967).

[35] Bhatia 2014.

[36] *Supra* note 34 at 2B.

[37] Levin and Nicholson 2005 (For the identical conclusion that privacy protection in the USA is a liberty protection).

ion highlights.[38] Most such decisions have employed either an intimacy-based or expectation-based zonal argument.

In a separate class of cases dealing with questions of abortion, contraception and sexual orientation, the decisions in the USA have significantly moved from pure liberty-based ones to those that emphasise personhood and autonomy. Perhaps the reason for such a change was the subject matter of the cases. They involved questions of decisional autonomy, which in turn led such justifications close to dignity-based ones seen in South African and Canadian cases.

8.3 Towards Personhood

Griswold v. Connecticut[39] marked a significant shift in the understanding of privacy by US courts. The case involved a question related to decisional autonomy. The constitutionality of a Connecticut law, that made the use of any drug or medicinal article for the purpose of preventing conception illegal, was challenged on grounds of violation of the Fourteenth Amendment. In holding the law to be unconstitutional, the court held that the "guarantees in the bill of rights had penumbras which emanated from those guarantees which give them life and substance, and such guarantees created zones of privacy".[40] This is a distinctive move since the court now articulates the private zone through the third justification that we identified: that it is other guarantees that shape the private zone. The court articulated a right to privacy by relating it to other rights such as right to association, the Fifth Amendment in its self-incrimination clause, and the Fourth Amendment. The justification received an even stronger holist colour in Justice Goldberg's concurring opinion: "right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live". Though it is unclear as to the precise manner in which other constitutional guarantees or the totality of the constitutional scheme shape a right to privacy, this approach of the court does gain support from sophisticated philosophical lineage traceable to Ludwig Wittgenstein's idea of family resemblances.[41] On such interpretations, the varied use of privacy justifications can be understood in a pluralistic rather than an essentialist way, where other constitutional guarantees provide a glimpse into what qualifies as a privacy protection without any one of them capturing

[38] United States v. Jones 565 U.S. 400 (2012) (For an argument based on intimacy); Kyllo v. United States 53 U.S. 27 (2001) (for an intimacy-based argument); Carey 2q2v. Population Services International 431 U.S. 678 (1977) (for an intimacy-based choice argument); Florida v. Jardines 569 U.S. 1 (2013) (for reliance on the idea of an expectation); the dissents in Minnesota v. Olson 495 U.S. 91 (1990) (for an expectation-based argument); Smith v. Maryland 442 U.S. 735 (1979) (expectation-based argument); State v. Miller 425 U.S. 435 (1976) (expectation-based argument).

[39] 381 U.S. 479 (1965).

[40] Ibid., at 10.

[41] *See* Henry 2011 (for an argument of how the varied use of dignity by US courts can be understood not in terms of an essential meaning of dignity through a pluralistic approach typified by Wittgenstein's idea of family resemblances).

privacy in its entirety. The trend of reading privacy in this distinctive manner continued in the courts reasoning through several cases pertaining to decisional autonomy, perhaps finding an ultimate expression in *Lawrence v. Texas*. A few significant cases are worth mentioning in tracing the development of this trend.

In *Roe v. Wade*[42] the US Supreme Court continued with the reasoning in *Griswold* in invalidating a Texas law imposing criminal liability upon persons choosing to abort pregnancies. The court found such a measure violative of the Due Process Clause of the Fourteenth Amendment and held that the right to privacy, though not absolute or unqualified, includes within it the right to decide on abortion. The court relates privacy with liberty, looking at the right to privacy as essentially a liberty protection with Stewart J holding the abortion law as directly violating personal liberty protected by the Due Process Clause:

> The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.[43]

Despite the emphasis on liberty as the central value in justifying a right to privacy, in *Lawrence v. Texas*[44] while invalidating the Texas sodomy law, the court shifts its justificatory focus to personhood:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence … Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[45]
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> …[A]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[46]

These observations in *Lawrence* provide a bridge, though on some views alone, between liberty justifications for privacy and dignity-based ones. Indeed in India, the privacy–autonomy–personhood–dignity connection was relied on by the Delhi High Court in its persuasive decision in the *Naz Foundation* case.[47] What sets Justice Chandrachud's opinion apart, and several of the other opinions in the *Puttaswamy* decision, is the inclusion of liberty in the web of values along with autonomy, personhood and dignity. Though on holist views of how values are to be interpreted in law this might appear to be a good strategy, the peculiar historical roots of liberty and dignity with regard to privacy may not make this an easy task. Though the idea of personhood is a common concept shared by both liberty- and dignity-based justifications for privacy, the legal–historical roots of the two are distinct. In what

[42] 410 U.S. 113 (1973).

[43] Ibid., at 152.

[44] 539 U.S. 558 (2003).

[45] Ibid., at 1.

[46] *Supra* note 44 at 13.

[47] For a discussion of the nature of this connection in the decision, see Baruah 2009.

follows, we first lay out the nature of the dignity argument found in the opinion under analysis and compare it with decisions in South Africa and Germany which employ a dignity-based approach to privacy. We then point out some differences between the liberty- and dignity-based views to demonstrate that combining the two may require ironing out several creases on how privacy should be understood.

8.4 Liberty and Dignity in Puttaswamy

The elusive content, but widespread application, of dignity has propelled extensive legal and philosophical scholarship in recent years.[48] The standard scholarly view about dignity in adjudication appears to be that judicial decisions have done little to provide it with any content.[49] The problem has not been diagnosed to either judges or the judicial process. Rather, on several influential views, dignity is inherently an indeterminate concept and thus has been variously characterised as an essentially contested concept,[50] a placeholder,[51] an interpretive concept,[52] or a concept whose content should only be understood through a Wittgensteinian lens of meaning.[53] Given this background of accepted indeterminacy about dignity, staking any strong claim to dignity is bound to invite critical scrutiny.[54]

Despite the problem of indeterminacy, dignity has been extensively employed by Indian courts in constitutional adjudication, but much as elsewhere, the content that can be gleaned from such decisions is particularly thin.[55] Despite dignity only finding mention in the Preamble, the Fundamental Duties and the Directive principles, courts have extensively employed it in fundamental rights cases mostly as a source for unenumerated rights and as a justification for existing rights.[56]

Compared to other decisions that employ dignity, the Opinion's substantive engagement with dignity is promising and refreshing. Justice Chandrachud locates dignity in the constitution by stating that it "finds expression in the preamble and is reflected in Article 14, 19 and 21".[57] The reasons motivating this conclusion are well-established in Indian Constitutional Law on three counts at least. First, ever

[48] *See* Baruah 2014.

[49] *See* McCrudden 2008.

[50] Ibid. *See* Waldron (2013). Gallie 1955.

[51] *Supra* note 49 at 722.

[52] Dworkin 2010.

[53] *Supra* note 41 at 177.

[54] McCrudden, *supra* note 49 (for a discussion on the varied use of dignity); Rao 2008, Feldman 2000 (providing an analysis of the many ways in which dignity has been used in English law, yet expressing scepticism about its use); O'Mahony 2012, White 2012, Pinker 2008, Bagaric and Allan 2006, Macklin 2003, Brownsword 2003.

[55] Pritam Baruah, *Human Dignity in Indian Constitutional Adjudication* (unpublished manuscript) (on file with authors).

[56] Ibid.

[57] Chandrachud J, *supra* note 5 at Para 96.

since the decision in *Francis Coraille Mullin*, the right to life as a right to life with dignity has become an established doctrine in India.[58] Second, the dignity–fraternity relationship is an invaluable contribution of the Indian Constitution's provision of non-discrimination.[59] Third, since *Maneka Gandhi's* acceptance of Justice Subbarao's dissent in *Kartar Singh*, Articles 14, 19 and 21 are understood as unified in terms of any restriction of these rights having to satisfy the test of being "fair, just and reasonable". Though the third reason here does not immediately warrant the conclusion that the content of the concepts of equality, freedom, and dignity is identical, it does recognise their mutual dependence and the great constitutional weight they carry.

There is much to be reflected upon about the precise nature of how dignity might be understood in light of its textual presence in the Indian Constitution, and how it conceptually relates to the values of equality, life and liberty. However, for the present purposes, we will restrict ourselves to its relationship to liberty, privacy and autonomy in the manner that they feature in the Opinion. Indeed as Mariyam Kamil points out, the opinions in *Puttaswamy* hold that "the fundamental right to privacy protects individual liberty by guaranteeing protection to individual dignity and autonomy".[60]

The Opinion accords dignity the highest constitutional status as a constitutional value underlying the fundamental rights: "Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence".[61] Privacy, on a literal reading, is accorded an even higher status as it is the core of human dignity:

> Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.[62]

The unusually high status accorded to privacy also shines through in the following extract from the Opinion:

> Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. 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.[63]

A literal meaning of these statements indicates that privacy is the core of all fundamental rights as it is the core of human dignity, and indeed even human dignity can only exist if one has privacy. The broad nature of these statements is theoretically

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[58](1981) 1 SCC 608.

[59]Baxi 2014).

[60]Kamil 2017.

[61]Chandrachud J, *supra* note 5 at Para 107.

[62]Chandrachud J, *supra* note 5 at Para 3(E) [Conclusion]. Indeed such a link between dignity and privacy was proposed in some of the earliest scholarly debates on privacy. See Bloustein 1964.

[63]Chandrachud J, *supra* note 5 at Para 169.

intriguing, and the uninhibited speculation of the relationship between them makes their usefulness in constitutional adjudication elusive. For one, dignity can perhaps exist even without privacy, especially when the undignified acts at issue were of a public nature. For example unfairly discriminating on the basis of caste or gender is to subject the discriminated to indignity, and such indignity may be in the form of public humiliation. Recent objection to *Dalit* grooms riding horses is an attempt at humiliating their community by publicly denying their equality as human beings.[64] In indignities such as these, both the attempted humiliation and its contestation are public in nature. The statement under scrutiny here would avoid misinterpretation if the Opinion of course meant that every violation of privacy led to subjecting an individual to indignity, rather than the other way round.

It is also difficult to imagine that privacy would easily straddle across all fundamental rights, as several choices protected by fundamental rights get their value only in being public in nature. For example, my right to freedom of speech and expression is valuable more in public expression than in perhaps speaking in private to someone, or to myself.[65] The Opinion might have of course intended to mean that some aspects of some fundamental rights are related to privacy. Perhaps the right to form one's own thoughts in private, which would encompass every choice an individual makes, is the best candidate for a reason that straddles across all fundamental rights. However, it is debatable as to whether all decisions are made in private, and indeed it is intriguing to think of a person, say in Bentham's Panoptican, who cannot form any thoughts because she is under surveillance. The possibility of the existence of these counterfactuals might be reason enough to be cautious in the manner of theorising moral values. It is not our intention here to deny the importance of theorisation in adjudication.[66] Rather the suggestion is to be cautious in making theoretical speculations which are potentially far-reaching.

Another example of the potential dangers of unanchored theorisation appears in the statement that "the right to privacy is an element of human dignity" and that "the sanctity of privacy lies in its functional relationship with dignity".[67] When compared to the statement in the Opinion that privacy is the core of human dignity, the nature of the relationship between the two values becomes confusing. One might point out that privacy is perhaps the core element of human dignity, and the relationship between the core of dignity and its other elements is a functional one. But that conclusion requires explanation, which is not immediately forthcoming in the Opinion, despite the following explanation:

> Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the

[64] See *Upper Caste Men Attack Dalit Groom for Riding Horse in Rajasthan*, (**The Wire**, April 30, 2018), https://thewire.in/caste/upper-caste-men-attack-dalit-groom-for-riding-horse-in-rajasthan.

[65] See Raz 1991 (for an argument for why the right is a public good).

[66] In fact, one of the authors here holds the view that the courts must provide the best reasons available to them in any decision. See Pritam Baruah, *supra* note 48, Part III.

[67] Chandrachud J, *supra* note 5 at Para 113.

> individual and the right of every person to make essential choices which affect the course of life.[68]

In the first statement about privacy, the relationship is clear in that privacy would allow for a person to lead a dignified life by preventing certain indignities brought about by unwanted intrusions. In privacy cases brought before law courts, the precise question is to determine whether some intrusions are unwarranted. Whether a reliance on dignity would clarify such matters, and how it might do so, still remains an open question. But what the statement indicates is that privacy is in the service of dignity where dignity is the core value that deserves protection and privacy is instrumental in doing so. As pointed out earlier in our reference to non-discrimination, dignity can be violated in ways that have not much to do with privacy. Privacy in those cases cannot share a functional relationship with dignity, and neither can it therefore be the core of dignity conceptually without further explanation of the content of both concepts.

In the second statement about autonomy, again it is unclear as to why one should conclude that essential choices in life are private in nature. Some choices such as keeping information about some of my relationships and habits out of the public eye might be related to privacy. However, many other decisions such as the decisions on what I should eat or wear, where I want to live or study, or what employment choices I think I must have are essential choices that are surely public in nature. Indeed on one of the most influential views on autonomy in the twentieth and twenty-first centuries, autonomy is a state of being where an individual has an environment where she is free to choose between some valuable options in life. In this sense, autonomy can exist without privacy, unless privacy connotes the very idea of being free to make a choice.[69] If that were indeed the case, then privacy and autonomy would be synonymous. If privacy however is related to some personal choice, say about control of information about oneself, then it would be consistent to say that privacy recognises autonomy. It does so by recognising that certain choices are private in nature, while not all are. Autonomy as a value, in contrast, captures the larger idea of the ability to make choices between valuable options. Such a conceptualisation of privacy and autonomy would have reserved a legible and distinct space for both concepts, even though the two were mutually related.

The broad manner in which privacy has been articulated in relation to dignity is not peculiar to the Opinion. In other jurisdictions such as South Africa and Germany, similar trends can be noticed despite the textual differences in the respective constitutions.[70] What lies strikingly in common with the Opinion under analysis is the centrality to the idea of personhood, sometimes referred to as "human personality"

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[68] Ibid.

[69] *See* Raz 1988.

[70] In Germany Article 13 specifically refers to the "inviolability of home", while the South African Constitution expressly provides for the right to privacy in Section 14: "Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

or "identity", which links the ideas of privacy, liberty and dignity. In the words of Justice Chandrachud:

> Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself.[71]

The structure of this argument resonates in the following observation made by the Federal Court in Germany in the *Microcensus* case:

> The state may take no measure, not even by law, that violates the dignity of the person beyond the limits specified by Article 2([1]) … [which] guarantees to each citizen an inviolable sphere of privacy beyond the reach of public authority. The state… must leave the individual with an inner space for the purpose of the free and responsible development of his personality. Within this space the individual is his own master.[72]

On a similar vein the Constitutional Court of South Africa in *Bernstein v. Bester and Others*[73] too proposes a similar justification but employs the concept of identity:

> The scope of privacy has been closely related to the concept of identity and… [that] the right… [is] based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.

Indeed, in all three jurisdictions privacy, liberty and dignity are accepted to be closely connected as constitutional values. The South African justifications are closer to the justifications in the Opinion, since they also employ the dignity argument along with a clear zonal argument. In *Bernstein*, the court refers to the idea of an "inner sanctum", which is later expanded in the case of *Investigating Directorate: Serious Economic Offences & Ors. v. Hyundai Motor Distributors Ltd. & Ors*.[74] Here, the court observed that the right to privacy was not just restricted to the "intimate core" but went much beyond with people when they were in their offices, cars or on mobile telephones. People retain a right to be left alone by the state unless certain conditions were satisfied. Though the *Investigating Directorate* case is known for the distinction it drew between privacy rights of natural persons and that of a juristic persons, one of the justifications it provided did emphasise on the idea of the inner sanctum: that privacy became more intense as matters gravitated towards the intimate personal sphere of the life of human beings and became less intense as one moved away from that core. For the court "This understanding of the right (to privacy) flows, as was said in *Bernstein*, from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings".[75]

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[71] Chandrachud J, *supra* note 5 at Para 168.

[72] *Microcensus* 27 BVerfGE 1 (1969).

[73] 1996 (2) SA 751 (CC).

[74] 2001 (1) SA 545 (CC).

[75] Ibid., at 18.

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,[76] the court went on to incorporate a much wider idea of autonomy into privacy which suggests the existence of constitutional positive obligations on the state to ensure conditions of autonomy. In this case, criminalisation of the act of sodomy was invalidated by the High Court which ruled that it was inconsistent with the constitution. The Constitutional Court while upholding the High Court decision held that the "inter-relationship between privacy, liberty and dignity" articulated what it means to be a human being. The harm caused by the provision in question affected the ability of an individual to achieve "self-identification and self-fulfilment" which struck at the very foundations of expressing one's humanity. The court went on to say that "just as liberty must be viewed not merely 'negatively or selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity' so must privacy be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place".[77]

The reliance by the South African Court on the ideas of identity, self-determination, self-fulfilment or personal self-realisation are echoed in Justice Chandrachud's opinion. Autonomy is the state of being that makes it possible for an individual to achieve any of these desirable states, even if an individual may not choose to do so. Autonomy therefore conceivably shares a close relationship with privacy. Though this conclusion might need further fleshing out, the language in which the Opinion and the South African cases cited above capture the valuable ends that privacy may help attain, brings them closer to an argument from dignity. On a Kantian view of dignity, one might argue that the capacity of human beings to reason and give a law unto them is a fact that ought to be respected by the state and other individuals. This requires the state to leave a person alone to self-determine how they ought to lead their lives. It also puts an obligation on others to not treat individuals merely as a means to an end. Privacy then is a means for protecting human dignity in some circumstances. Though this broad principle sounds convincing, the precise question brought before courts is when intrusion is justified or not. In answering such questions, having a fundamental right to privacy would surely tip the balance in favour of privacy, but the justification provided for privacy might turn out to be material in actual cases.

In tracing the evolution of privacy law in USA and Europe, James Whitman has pointed out how the European lineage of a dignity-based evolution of privacy law leaves lesser space for arguing other liberties such as the freedom of press, or the freedom of expression.[78] Whitman's analysis portrays dignity as a status-based conception that had much to do with the honour and status of nobilities in Europe rather than with the Kantian conception of the equal dignity of all human beings.[79] The

[76] 1999 (1) SA 6 (CC).

[77] Ibid., at Para 116, quoting, Brennan 1988, quoting Cardozo 1928.

[78] Whitman 2004.

[79] For a discussion of such views and whether they are continuous with Kantian views, see Whitman 2003 at 243 (arguing that there is such a continuity); for a contrasting view, see Neuman 2003.

status-based conception has increasingly gained traction in understanding dignity in human rights law. On some such conceptions, dignity in human rights law accords a high rank and status to all individuals, which was only available to people of particular rank and status earlier.[80] In constitutional law, the status-based conception understood as one based on the honour of individuals has perhaps come closer to a Kantian conception of dignity based on autonomy. Despite such a gradual shift, the status-based account appears to be employed with equal comfort in liberty-limiting roles. Germany perhaps throws up the best examples of this where German courts have held that the right to freedom of speech and expression must be balanced against the harm done to the dignity of a person, whether living or dead. In the *Mephisto* case, the court clearly stated that even if the German Constitution had an express right to artistic freedom in Article 5 (3)[1], such a right was limited by the objective order of values in the constitution where dignity was the absolute value. The court held that artistic freedom had to be mindful of the dignity of an individual as an autonomous being, which was the supreme value in the order of values under the German Constitution.[81] A similar view was expressed in the *Ersa* case,[82] and earlier in the *Microcensus* case the court had held that individual liberty in Germany is but one component of the overarching principle of respect for human dignity.[83] Despite dignity being absolute, restricted forms of surveillance,[84] and life imprisonment subject to satisfying of certain obligations by the state, are constitutionally permissible in Germany. Indeed, the idea of having dignity and liberty within a community often witnesses dignity in a liberty-restricting role in Germany, as was seen in the *Mephisto* and *Ersa* cases.[85]

The German textual context is surely different from India's with there being a clear order of values in Germany where dignity is the supreme value. However, the language of full development of personality, and the centrality of the autonomous individual are common to understanding dignity and privacy in both jurisdictions. What is different in the German context is that Germany has strong data protection laws, and also strong constitutional protection for the honour/personality/reputation of individuals in a community. Though the latter might be due to the particular experience of fascism in Germany,[86] the tradition of dignity as protecting honour predates that experience.[87] This tradition brings forth the liberty-restricting potential of dignity when it comes to protecting the reputation of persons from say the freedom

[80] Waldron and Dan-Cohen 2012; see also Valentini 2017 (for a relational account).

[81] Kommers 1997.

[82] ERSA Case C-347/03 [2005] ECR I-3785.

[83] McAllister 2004.

[84] Uzun v. Germany, App no 35623/05, IHRL 1838 (ECHR 2010).

[85] See also McCrudden, *supra* note 49 at 704–705. (for the view that dignity has often been another hurdle to cross for litigants in establishing rights violation).

[86] See Whitman, *On Nazi "Honour", supra* note 79. Also see, Riley 2010.

[87] See Whitman, *supra* note 78.

of the press.[88] The anchoring of such honour-based notions of dignity in the law can surely be traced to the idea of the right of an individual to develop their personality by exercising their agency. An honour or status-based view of dignity in this sense can be connected to a Kantian conception. Nonetheless, examples such as Wackenheim' case[89] do demonstrate that dignity-based views have liberty-restricting dimensions. Such views might prove to be material in privacy cases when privacy is contested by freedom of speech and expression.

8.5 Conclusion

We have argued here that the opinion authored by Justice Chandrachud in the *Puttaswamy* judgment presents broad and rich justifications for the existence of a right to privacy. Two features of the Opinion stand testament to its breadth. First, that by employing comparative materials, primarily from the USA, the Opinion has incorporated all the existing justifications for zonal privacy which we have characterised as intimacy-based, expectation-based, and other guarantees-based. This does leave ample room for reflection as to how any of these would figure in subsequent privacy cases that may come up before courts in India. We have argued that a strong zonal argument may have its own devils to fight in terms of articulating the nature of the zone and the place it leaves for sensibly thinking about the other liberties under the constitution being valued in their own right. The three zonal justifications might indeed mutually compete at times. Secondly, reflecting the development of privacy jurisprudence in South Africa, the Opinion also employs what may be termed the holy trinity of liberal constitutionalism as a justification for privacy: a liberty-dignity-autonomy justification. Such a holist justification might serve as a claim to the coherence of constitutional values. But holism sometimes comes with the cost of making the individual content of any of these values elusive, including clarity in the relationships they share. We have indicated the danger of this cost by arguing that the relationship between the three may be more fine-grained than sometimes assumed. The cost is also latently reflected in the academic literature on dignity in terms of status-based and self-worth concepts. Though the two may overlap in several ways and may ultimately be understood to be complementary, the status-based views of dignity, particularly those displayed by laws protecting the honour/personality of individuals, do present a liberty-restraining feature. Ironing out these creases might not immediately be the task of courts, but authoritatively pronouncing all constitutional values to be broadly related may leave much to be clarified about how privacy adds value in addition to the liberties guaranteed by other fundamental rights.

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[88] Whitman, *supra* note 78 (for how European countries including Germany have restrained the press from disseminating information that did not appear to exhibit an expectation of privacy when the information was made available to others).

[89] *Manuel Wackenheim v. France* Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002) (report of the UN Human Rights Committee).

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