

PRIVACY PROTECTION: A TALE OF TWO CULTURES*

by

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The paper provides a novel and critical analysis of privacy as an instrumental notion within social and cultural contexts. The argument suggests there is much utility in a novel multiple-perspective approach to the study of privacy in a socio-legal context. It questions our assumptions about privacy by looking to a differing privacy culture - that of the India. It examines the Indian perception of privacy based on India's cultural values and offers an explanation for why India's concept of privacy is beyond the often dominated public-private dichotomy and why it has implicitly or explicitly affected the agenda for privacy theory by placing some issues in the limelight while leaving others backstage. The importance of the argument is due to its critical assessment of the current European approach (from the EC, ECJ and ECHR) where privacy is regarded as an inalienable right with a concrete psychological foundation. I argue that privacy interests are far more extensive and deeper than the European definition which can at best capture only some of the issues which require elucidation when we litigate over privacy.

KEYWORDS

Privacy, Concept of privacy, Cultural values, Cultural context

1. INTRODUCTION

Privacy is not a Western value; forms of privacy are found in every culture throughout the world. The difference among cultures lies not in whether

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the need for privacy is present, but, rather, in the ways in which that need is met and the ways in which privacy is regulated. Privacy is culturally relative.¹ It is contingent upon factors such as the social, moral, and political values of the people living in a given domain.² This paper provides a critical analysis of privacy as an instrumental concept within social and cultural contexts.³ For the purposes of my argument I will look at only two cultural implementations of privacy: India and Europe (though the argument is of course global). The paper presents two underlying reasons for the existent differences in privacy concerns between India and Western countries. One is regulatory but based upon culture and the other is more “purely” cultural: these two elements provide the theme of this paper.

The conflict between privacy and overall social good has yet to be resolved to determine the scope of privacy within the law. Since the time of Westin,⁴ many scholars have analysed the importance of privacy as it affects relationship development overall,⁵ interpersonal relations,⁶ and trust,⁷ Until recently, theories of privacy have been dominated by the psychological and socio-psychological views of individuals and their preferences for privacy.⁸ More recently, theorists have examined the role of trust, with the goal of un-

¹ See J. H. Larson and N. Medora, “Privacy Preferences: A Cross-Cultural Comparison of Americans and Asian Indians” (1992) 22 (1) *International Journal of Sociology of the Family*, 55-66

² Samuel Huntington in his book *The Clash of Civilizations and the Remaking of World Order* argues that “most important distinctions among peoples are [no longer] ideological, political, or economic. They are cultural.” Huntington, S. P., *The Clash of Civilizations and the Remaking of World Order* (New York, NY: Simon and Schuster, 1996) 21

³ This paper insists that the relationship between privacy and culture should not be excluded or merely neglected as it has been done by many of the most highly-regarded and often cited philosophical and legal works on privacy. What I have attempted to show in this paper is that the culture of a society affects, in a significant way all aspects of that society, including its legal system.

⁴ A.F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967)

⁵ Social psychologist Altman viewed privacy as a dialectical process of boundary regulation by embodied subjects. See I. Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* (Monterey, CA: Brooks/Cole Publishing, 1975)

⁶ A significant amount of work has also been done by communication scholars. See J.P. Caughlin and S. Petronio, “Privacy in Families” in A. L. Vangelisti (ed), *Handbook of Family Communication* (Mahwah, NJ: Erlbaum, 2004) 379-412; See S. Petronio, *Balancing the Secrets of Private Disclosures*. (Mahwah, NJ: Lawrence Erlbaum, 2000). See also S. Petronio, *Boundaries of Privacy: Dialectics of Disclosure*. (Albany, NY: SUNY Press, 2002)

⁷ I. Altman, “Privacy Regulation: Culturally Universal or Culturally Specific?” (1977) 33(3) *Journal of Social Issues* 66

⁸ Westin notes that privacy preferences are shaped by new technologies; social climates and public attitudes; and shifting policies and laws. See A.F. Westin, “Social and Political Dimensions of Privacy” (2003) 59 *Journal of Social Issues*, 431-453 See also I. Altman, *The Environment and Social behavior: Privacy, Personal Space, Territory, Crowding* (Monterey, CA: Brooks/Cole Publishing, 1975); Newell analysed various approaches to the concept of privacy as found in the cross-disciplinary literature on privacy. See P. B Newell, “Perspectives on Privacy” (1994) 15 *Journal of Environmental Psychology*, 87-104

derstanding privacy as a dialectical process.⁹ However, considerable gaps remain in our understanding of the influence of privacy within social and cultural contexts and, in particular, the influence of privacy preferences on larger social structures.¹⁰ So far, relatively little attention has been paid to cross-cultural factors,¹¹ and the few studies that have addressed this topic have been inconclusive regarding the role of culture in privacy issues.¹² Understanding the social mechanisms involved in maintaining privacy may lead to a better understanding of privacy systems and their inner workings.¹³

Furthermore, rather than looking into the specific societal, political, and economic factors that have triggered the controversy, privacy researchers have made various assumptions about the meaning and extent of the right to privacy. Can a single definition of privacy possibly do justice to the cultural variations¹⁴ that exist? In fact, even in the West we are in the midst of significant privacy conflicts; it is not clear what is believed to be protected, what is actually protected, and what is not protected in terms of privacy.¹⁵ Deep cultural differences still exist among European countries concerning what should be private.¹⁶ ¹⁷ Altman has observed that although privacy is a universal process, cultures differ in terms of the behavioural mechanisms

⁹ J. L. Steel, "Interpersonal Correlates of Trust and Self-disclosure" (1991) 68 *Psychological Reports*, 1319-1320

¹⁰ See L. Kisselburgh, "The Social Structure of Privacy in Socio-technological Realms" (2009) Paper presented at the annual meeting of the International Communication Association (Marriott, Chicago, IL, May 20, 2009)

¹¹ See I. Altman, "Privacy Regulation: Culturally Universal or Culturally Specific?" (1977) 33(3) *Journal of Social Issues*, 66-84

¹² As Bennett and Raab remark, 'We have little systematic cross-national survey evidence about attitudes to privacy with which to investigate the nature and influence of wider cultural attributes.' See C. J. Bennett and C.D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Aldershot: Ashgate, 2003) 15

¹³ For a detailed discussion on sociological analysis of historical changes in levels and types of privacy, see E. Shils, *Center and Periphery: Essays in Macrosociology* (University of Chicago Press, Chicago / London 1975)

¹⁴ A desire for privacy varies from culture to culture according to a complex range of factors. See B. Moore, *Privacy Studies in Social and Cultural History* (Armonk NY: M.E. Sharpe, 1984)

¹⁵ Many feminists have objected to the privacy right, arguing that the concept is connected to male dominance. See M.C. Nussbaum "Is Privacy Bad for Women? What the Indian Constitutional Tradition Can Teach About Sex Equality" (2000) 25 *Boston Law Review*, 42-47

¹⁶ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 111, 105-136

¹⁷ Bygrave also argues that levels of privacy across nations and cultures, and across broad historical periods, are in constant flux. This variation can be attributed to differences in perceptions of the degree to which privacy is or will be threatened. See L. A. Bygrave, "Privacy Protection in a Global Context -- a Comparative Overview" (2010) 56 *Scandinavian Studies in Law*, 327; See also M. Tugendhat and I. Christie, (eds.) *The Law of Privacy and The Media* (OUP, 2002) Section 5.2

used to regulate desired levels of privacy.¹⁸ Protecting privacy requires unique regulatory mechanisms involving an ongoing, discursive and optimizing process.

This paper analyses why privacy is more than just a simplistic legal concept beyond the normative questions addressed by Western society. It suggests multiple approaches to the study of privacy in a socio-legal context. Further, it examines philosophical questions about the concept of privacy based on India's cultural values. An analysis of both Western and Indian positions uncovers parallels and similarities. There seems to be adequate common ground to allow for the building of a bridge between the two strands of thought. The paper also explains why India's concept of privacy often extends beyond the dominant public-private dichotomy, as well as why it has implicitly or explicitly affected the overall agenda for privacy theory by drawing some issues into the limelight while leaving others backstage.

The notion of privacy differs throughout the world because the cultures in which privacy takes root and inheres itself differ. Cultural relativism maintains that the content of rights enjoyed by a community is determined by culture,¹⁹ and local cultural traditions determine the existence and scope of rights enjoyed by individuals in a given society.

Why is the Indian approach to privacy, which is dominated by its own cultural norms, of value to Western thinking about the subject? For me, the debate is about avoiding a culturally biased approach²⁰ and, at the same time, restraining from the imposition of Western norms²¹ of privacy and individuality on the rest of the world, including India, since it is often difficult, if not impossible, to understand other societies based upon Western

¹⁸ I. Altman, "Privacy Regulation: Culturally Universal or Culturally Specific?" (1977) 33(3) *Journal of Social Issues*, 66

¹⁹ F. R. Teson, "International Human Rights and Relativism" (1985) 25 *Virginia Journal of International Law*, 869, 870

²⁰ For example, Hofstede found that many American politicians have difficulty recognising that their type of capitalism is culturally unsuitable for more collectivist societies and can have strongly disruptive effects on these societies. I make a similar argument in the context of privacy in this paper. G. Hofstede, *Culture's Consequences, International Differences in Work-Related Values* (Beverly Hills: Sage Publications, 1980) 389; See also G. Hofstede, "The Cultural Relativity of Organisational Practices and Theories" (1983) 14 (2) *Journal of International Business Studies*, 89, 75-89

²¹ Snyder has argued that anthropologists, like some sociologists of law, reject Western jurisprudence as the only source of analytic concepts or, more importantly, as guidelines for research. F.G. Snyder, "Anthropology, Dispute Processes and Law: A Critical Introduction" (1981) 8 (2) *British Journal of Law and Society*, 141, 141-180

conceptions of law.²² More specifically, I argue along the lines of Pospisil's approach that one's understanding of legal phenomena can be enhanced at a general level: not in a natural law cultural vacuum, but in a conceptual space that necessarily partakes of the specific cultural examples that feed it.²³ Legal constructs will manifest themselves in accord with the unique cultural traditions in which they are embedded.²⁴ Here I simply want to stress that cultural differences across nations not only permit but require significant allowances for cross-cultural variations in privacy regulation.

Newell argues that differences in methods of privacy regulation can lead to problems when relocating from one culture to another.²⁵ In the West, an individual is recognised as the true unit of being and the organic building block of society. In contrast, Indian culture has been built around collectives, where the individual is always part of the whole in relation to which his or her existence is defined. An individual is never considered an entity unto oneself in India.²⁶ This provides an argument in support of the adaptation of privacy preferences which are beneficial to communities rather than individuals.²⁷ Hence, I argue that culture should simultaneously assert an exception and create opposition to a certain type of privacy rights. The basic lesson is that rights advocates cannot get too far ahead of the values of the majority of the people. In general, laws that are not in accord with the values of a particular society will be difficult to enforce.

The literature introduced in the next section explores the critical role that context plays in the structuring of privacy expectations and interests, as asserted by privacy theorists. Following that, I argue for the need to study privacy and privacy preferences in the context of Indian culture. In this sec-

²² P. Bohannan, *Justice and Judgment Among the Tiv* (OUP, 1968); See L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971); See also L. Pospisil, "Modern and Traditional Administration of Justice in New Guinea" (1981) 19 *Journal of Legal Pluralism*, 93

²³ L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971)

²⁴ L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971)

²⁵ P. B Newell, "Cross-Cultural Comparison of Privacy Definitions and Functions: A Systems Approach" (1998) 18 *Journal of Environmental Psychology*, 357, 357-371

²⁶ For a criticism of the Western character of the concept of human rights from an Indian point of view, see: R. Panikkar, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes*, 75-102

²⁷ Similarly, traditional Thai values and culture are not conducive to the assimilation of the concepts of privacy rights, as Thai culture is based on collectivism. For a provocative exploration of Thai perspectives on privacy, see P. Ramasoota, "Privacy: A Philosophical Sketch and a Search for a Thai Perception" (2001) 4(2) *Manusya: Journal of Humanities*, 98, 89-107

tion, I also analyse a number of Indian cases that highlight the many cultural differences which exist, including those that are readily apparent as well as those that are so subtle they are often overlooked. In reality, simply because the same terminology may be used by different cultures does not mean that this terminology is being used or understood in the same context. Hence, in the fourth section, I take a closer look at the current regulatory framework in India, and particularly at the Indian Constitution, and explore whether the meaning of privacy in India has changed and, if so, to what degree. The potential consequences of such change in India are also explored.

Finally, I conclude by arguing for a differentiated understanding of Western and Indian perceptions of privacy and for anchoring the debate about privacy regulation in India firmly in the cultural experiences of its people. Such an undertaking calls for an interrogation of the relationships between form and substance of the law within a socio-legal context in India. Evidence suggests that compensatory social mechanisms are present in India that allow for the regulation of privacy when such formal regulation is not present in the Indian constitution. These time-honoured social mechanisms have proven capable of providing necessary privacy protections. Instead of following a strict regulatory approach, historically, India has taken a prescriptive approach to the right to privacy through a wholly unique blend of constitutional law, social norms, conventions, and sanctions that are worthy of closer examination.

2. PRIVACY IN CONTEXT: THE CONCEPT

People employ “context”²⁸ in their thinking about privacy.²⁹ The definitions of privacy vary significantly in different fields, ranging from a right or entitlement in law³⁰, to a state of boundary regulation, limited access or isolation in philosophy³¹ and psychology³², to control in social sciences³³ and in-

²⁸ See H. Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2010); See H. Nissenbaum, “Privacy as Contextual Integrity” (2004) 79 (1) *Washington Law Review*, 101-158 ; D. Solove, *Understanding Privacy* (Harvard University Press, 2008); See also J. E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven CT: Yale University Press, 2012); See A.D. Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania State University Press, 2010)

²⁹ I have deliberately relied upon sources from the 1960’s through 1980’s as most of the seminal scholarship in the field was produced during this period. This period is also important as the paper focus on the cultural distinctions in privacy development and deals with the philosophical and anthropological foundations of privacy.

³⁰ S. Warren and L.D. Brandeis, “The right to privacy” (1890) 4 *Harvard Law Review*, 193–220

formation systems³⁴. Numerous works in diverse fields have immensely improved our understanding of privacy at the individual, organizational, and societal levels; however, despite many attempts,³⁵ it is still unclear if different types of privacy have distinct experiential correlates or should be treated separately.³⁶

In principle every individual should have the same claim to privacy. Thus, from a socio-psychological perspective one individual's exercise of privacy must submit to the equal claim of every other individual. However, in reality this approach entails some loss of privacy for everyone or highlights uneven power relations³⁷, so the question becomes who enjoys what privacy and how. Moore applies a social evolutionary approach and argues that personal privacy cannot prevail because society's concerns outweigh those of individuals.³⁸ Privacy is often seen as in tension with the needs of wider society, as it may substantially reduce the opportunity to engage in collective action.³⁹ Therefore, it seems reasonable to suppose that, as with other social values, some variations in the nature of privacy and some inequality in the distribution of privacy do exist.⁴⁰

Two main problems have hindered the establishment of a unifying framework for the study of privacy. First, the majority of attempts to define

³¹ F.Schoeman, "Privacy and intimate information" in F. Schoeman (ed.), *Philosophical dimensions of privacy: An Anthology* (CUP, 1984) 403-417, See A. Westin, "The Origins of Modern Claims to Privacy", in F. Schoeman (ed.), *Philosophical dimensions of privacy: An Anthology* (CUP, 1984) 56-74

³² Altman incorporates both social and environmental psychology in understanding the nature of privacy. See I. Altman, *The environment and social behaviour* (Monterey, CA: Brooks/Cole, 1975) See also S.T. Margulis, "Privacy as a social issue and behavioural concept" (2003) 59 (2) *Journal of Social Issues*, 243-262

³³ Westin provides a link between secrecy and privacy. See A. Westin, *Privacy and freedom* (New York: Atheneum, 1967)

³⁴ L. Palen and P. Dourish, "Unpacking 'privacy' for a networked world" in *Proceedings of the SIGCHI conference on Human factors in computing systems*, (ACM, 2003) 129-136

³⁵ W.A. Parent, "Privacy, Morality and the Law" (1983) 12 *Philosophy & Public Affairs*, 269 and see also F.Schoeman, (1984) "Privacy and intimate information" in F. Schoeman (ed.), *Philosophical dimensions of privacy* (CUP, 1984) 403-417

³⁶ R.Taylor and G. Ferguson, "Solitude and Intimacy: Linking territoriality and Privacy" (1980) 4(4) *Journal of Nonverbal Behavior*, 227-239

³⁷ V. J. Derlega, and A.L. Chaikin, "Privacy and self-disclosure in social relationships" (1977) 33 *Journal of Social Issues*, 102-115

³⁸ B. Moore, *Privacy Studies in Social and Cultural History* (Armonk NY: M.E. Sharpe, 1984) 274

³⁹ It can also be argued that privacy rights can have detrimental effect on societal needs. See R. A. Posner, "The Right to Privacy" (1978) 12 *Georgia Law Review*, 393-422 (Posner criticised privacy rights from an economic perspective) Etzioni critically argued against privacy rights from a communitarian perspective. See also A. Etzioni, *The Limits of Privacy* (Basic Books, New York, 1999)

⁴⁰ C.J. Bennett and C.D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Aldershot: Ashgate, 2003) 35

privacy are inadequate; they focus either too specifically or too broadly on a particular topic. The result is a narrow conception of privacy that is not generalisable or a definition so vague as to be methodologically useless. Second, the work on privacy tends to be value-driven.⁴¹ Authors, whether speaking in privacy's defence or advocating its reduction, begin their work with strong biases and predetermined goals, and their approach naturally affects their questions, data, findings, and conclusions.⁴² Along these same lines, referring to the gap between sociological approaches to law, Leith argues that there is an inherent contradiction in sociological terms when we contextualise the legal right of privacy as an individualistic concept of the 'right to be left alone'⁴³ and as a stand-alone fundamental right, rather than part of a social process.⁴⁴ A theory of self and society is an essential requirement of any coherent and critical legal understanding of the nature of privacy. That is, if we are to begin to develop a socio-legal theory of privacy, we need a socio-legal framework to balance privacy rights with other competing – and frequently more important – rights.⁴⁵

However, one of the reasons for difficulties in discussing questions of privacy in the socio-legal context has been the lack of an adequate method which would be acceptable to most social scientists for interpretation or understanding. Social patterns and values today are too diverse, decentralized, and purposefully different to provide a foundation for general rules of discourse at the level of specificity required for the protection of privacy. Hence, the socio-legal argument about privacy is surrounded by dichotomies, for instance, 'individual vs. community, autonomy vs. heteronomy, and identity vs. difference'.⁴⁶ Consequently, in the analysis of privacy in a socio-legal context, one tendency is to theorise "the legal" by drawing on crit-

⁴¹ See A.D. Moore, *Privacy Rights: Moral and Legal Foundations* (Pennsylvania State University Press, 2010); see also A.D. Moore, "Values, Objectivity, and Relationalism" (2004) 38 *The Journal of Value Inquiry*, 75-90; A.D. Moore, "Privacy: Its Meaning and Value." (2003) 40 *American Philosophical Quarterly*, 215-227

⁴² D.V.S. Kasper, "The Evolution (Or Devolution) of Privacy" (2005) 20 (1) *Sociological Forum*, 69-92

⁴³ In the U.K., the Younger Committee understood privacy as "seclusion" but privacy does not have to be seclusion or isolation.

⁴⁴ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 105, 105-136

⁴⁵ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 106, 105- 136

⁴⁶ R. Capurro, "Privacy: An Intercultural Perspective" (2005) 7(1) *Ethics and Information Technology*, 37-47

ical theories and at the same time treating “the social” as if it were not problematic.

There are several sceptical and critical accounts of privacy;⁴⁷ however, developing a legal concept of privacy depends upon the approach one wishes to adopt. For example, considerable differences exist between the European and the US approach to privacy.⁴⁸ In legal-philosophical discourse, there are divergent uses of privacy. Philosophical debates concerning definitions are deeply affected by the development of privacy protection in the law, regardless of whether a right to privacy exists, and the extent to which such a right, if it does exist, is restricted. Archetypal privacy theories propose that one of privacy's main functions is to help maintain an individual's self-identity by creating personal boundaries.⁴⁹ Although conceptual and everyday definitions vary, a major emphasis is also put on the limited-access view of privacy. The limited-access view proposes that privacy represents control over unwanted access or, alternatively, regulation of, limitations on, or exemption from scrutiny, surveillance⁵⁰, or unwanted access.⁵¹ This limited-access view is consistent with the concept of privacy in the US⁵² and it has been legally recognised and protected there for more than a century.⁵³ Gavison suggested that privacy should be defined as ‘a limitation of others’ access to an individual,’ in which ‘access’ consists of a complex combination of three elements - secrecy, anonymity, and solitude.⁵⁴

⁴⁷ See J. Thomson, “The Right to Privacy” (1975) 4 *Philosophy and Public Affairs*, 295-314 See also R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990) See R. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981) See C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989)

⁴⁸ In the US the Privacy Act of 1974 5 U.S.C. § 552a has a much narrower focus than that of Europe. The development of ‘Safe Harbor’ agreements shows the difference in expectations between the two systems.

⁴⁹ See I. Altman, *The Environment and Social Behaviour* (Monterey, CA: Brooks/Cole, 1975) see also A. Westin, *Privacy and Freedom* (New York: Atheneum Press, 1970)

⁵⁰ Nissenbaum argues in favour of a degree of protection of privacy in the public sphere. H. Nissenbaum, “Protecting Privacy in an Information Age: The Problem of Privacy in Public” (1998) 17 *Law and Philosophy*, 559-596; see N. Moreham, “Privacy in Public Places” (2006) 65(3) *Cambridge Law Journal*, 617-618; see also E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places”, (2000) 50 (3) *University of Toronto Law Journal*, 305-346; C. Slobogin, “Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity” (2002) 72 (1) *Mississippi Law Journal*, 213-299; S. A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham, Ont.: Butterworths, 2005) 34-35; see also M. Zimmer, “But the data is already public: on the ethics of research in Facebook”, (2010) 12 (4) *Ethics & Information Technology*, 313-325;

⁵¹ S.T. Margulis, “Privacy as a social issue and behavioural concept” (2003) 59 (2) *Journal of Social Issues*, 243-262

⁵² *Griswold v. Connecticut* 381 US 479, 85 S. Ct 1678, 14 L.Ed 2nd 510 (1965)

⁵³ D. Meeler, “Is Information All We Need to Protect?” (2008) 1(1) *The Monist*, 151-169

⁵⁴ R. Gavison, “Privacy and the Limits of Law” (1980) 89 *Yale Law Journal*, 421, 428

Thus, the concept of privacy is best understood as a concern for limited accessibility, and at the core of privacy protection is control of that which indeed “enters” someone’s private space. Many analyses of privacy pertain to partly overlapping concepts such as “freedom” and “liberty”. Privacy can also mean “autonomy” in the sense of choice and control.⁵⁵ Feldman characterises privacy as freedom of choice.⁵⁶

Altman differentiates between the desired and achieved levels of privacy and notes that one’s desired privacy depends on the success of interpersonal boundary-control processes which are dialectic in nature.⁵⁷ He proposed that there is an ‘optimal degree of desired access of the self to the others at any moment in time’⁵⁸ by which a person asserts control over how much he or she is open to various others. This desire for control over the social contact is associated with one’s culture and may vary over time and on many occasions will be influenced by a particular set of circumstances or a particular setting.⁵⁹ But what does this control mean? In the psychological literature, the illusion of control is defined as a cognitive bias by which one is convinced that he can influence an event with his behaviour, while rationally it is clear that he has no power to affect the outcome,⁶⁰ which means a distinction can also be made between “actual” privacy and “perceived” privacy.

In contrast with the literature referred to above, which defines privacy in terms of control, Wacks argued that the protection afforded by the law of privacy should be limited to information, which in his words, ‘relates to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict its collection, use, or circulation’.⁶¹ According to this hypothesis, a right to privacy would be recognized by law; it would extend only over a limited, conventionally designated, area of information,⁶² ‘symbolic of the whole institu-

⁵⁵ B. Rossler, *The Value of Privacy* (Cambridge: Polity, 2005)

⁵⁶ D. Feldman, “Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47 *Current Legal Problems*, 41

⁵⁷ I. Altman, “Privacy regulation: Culturally universal or culturally specific?” (1977) 33(3) *Journal of Social Issues*, 66-84

⁵⁸ I. Altman, *The environment and social behaviour* (Monterey, CA: Brooks/Cole, 1975) 11

⁵⁹ D. M. Pedersen, “Psychological Functions of Privacy” (1997) 17(2) *Journal of Environmental Psychology*, 147-156

⁶⁰ E.J. Langer, “The Illusion of Control” (1975) 32(2) *Journal of Personality and Social Psychology*, 311-328

⁶¹ R. Wacks, *Personal Information - Privacy and the Law* (Oxford: Clarendon Press, 1993) 26

⁶² H. Nissenbaum, “Protecting Privacy in an Information Age: The Problem of Privacy in Public” (1998) 17 *Law and Philosophy*, 559-596

tion of privacy'.⁶³ However, no single type of information is considered personal in all situations. Wacks pointed out that although focusing attention on an individual or intruding upon his solitude is inherently objectionable in its own right, our concern for the individual's privacy in these circumstances is strongest when the person is engaging in activities that we would normally consider private.⁶⁴ Hence, it can be argued that access to personal information⁶⁵ is necessary but not sufficient condition for it to be defined as falling within the scope of privacy. The presumption that the personal control of information is the ultimate goal to be achieved is ideological rather than theoretical.⁶⁶ What is further required is that the information must be of an intimate and sensitive nature,⁶⁷ such as information about a person's sexual proclivities, but content may differ considerably from society to society and depends upon the society's culture. Whatever may be the nature of this information, there is no denying that this high level of concern about information privacy is the reason for the creation of new privacy legislation in several countries. However, historically, protection of information has been prominent but not exhaustive in the development of privacy law.

Privacy is hardly a one-dimensional construct. Burgoon et al. distinguished four dimensions of privacy as 'the ability to control and limit physical, interactional, psychological and informational access to the self or one's group'.⁶⁸ Solove attempted to conceptualize privacy under six general headings: '(1) the right to be let alone—Samuel Warren and Louis Brandeis's famous formulation for the right to privacy; (2) limited access to the self—the ability to shield oneself from unwanted access by others; (3) secrecy—the concealment of certain matters from others; (4) control over personal information—the ability to exercise control over information about oneself; (5) personhood—the protection of one's personality, individuality, and dignity;

⁶³ C. Fried, "Privacy" (1968) 77 *The Yale Law Journal*, 493

⁶⁴ R. Wacks, *Personal Information - Privacy and the Law* (Oxford: Clarendon Press, 1993) 26

⁶⁵ Personal information includes information about gender, income, name, address and/or information about personal activities, proclivities, interests.

⁶⁶ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 112, 105-136

⁶⁷ The House of Lords used this sense of privacy in *Campbell v. Mirror Group Newspapers Ltd.*, upholding Naomi Campbell's right to keep the information out of the public eye. Privacy in this sense may be a condition for the exercise of autonomy.

⁶⁸ J.K. Burgoon, R. Parrott, B.A. LePoire, D.L. Kelley, J.B. Walther, and D. Perry, "Maintaining and restoring privacy through communication in different types of relationship" (1989) 6 *Journal of Social and Personal Relationships*, 132, 131-158

and (6) intimacy—control over, or limited access to, one’s intimate relationships or aspects of life’.⁶⁹

While these elements are independent of each other, they are also related, and a bit of reflection suggests difficulty with all of them. These normative views may well be disconnected from a culture and do not take into consideration a society’s boundaries on the ‘right to privacy’. It is apparent that privacy’s status as a right is precarious, depending on the caprice of the courts and social conventions. Thus, it is not surprising that, as Solove concludes, even after more than a century of American lawyers wrangling over the definition of privacy, that ‘with a few exceptions, the discourse conceptualizes privacy in terms of necessary and sufficient conditions’. In other words, most American theorists attempt to conceptualize privacy by isolating one or more of its common essential or core characteristics. He argues that privacy is better understood by drawing from Ludwig Wittgenstein’s notion of family resemblances. As Wittgenstein suggested, certain concepts might not have a single common characteristic; rather, they draw from a common pool of similar elements.⁷⁰

In contrast, the EU, based on the argument that safeguarding privacy must be a legal imperative, has taken a strong initiative toward a top-down approach regarding privacy.⁷¹ The “regulation model” proffered by the EU holds that standardised privacy protection regulations (eventually on a global scale) are necessary. In other words, in Europe, privacy is regarded as an inalienable right because it is so important to “dignity” and one’s sense of autonomy. Leith proposed that the current European legal framing of the debate sets explains privacy as a reified concept that combines individual psychological needs and individual (fundamental) rights⁷². In this framing, he observes, the social nature is ignored.⁷³ As an inalienable right, like human or civil rights, privacy in European societies is provided to the individual as a sphere of freedom and autonomy.⁷⁴ However, privacy in-

⁶⁹ D.J. Solove, “Conceptualizing Privacy”(2002) 90 *California Law Review*,1092

⁷⁰ D.J. Solove, “Conceptualizing Privacy”(2002) 90 *California Law Review*,1091

⁷¹ Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’.

⁷² See *National Panasonic (UK) Ltd v EC Commission* Case 136/79 [1980] ECR 2033

⁷³ P. Leith, “The Socio-Legal Context of Privacy” (2006) 2(2) *International Journal of Law in Context*, 106, 105-136

⁷⁴ To be protected against ‘arbitrary interferences’ by public authorities See *Ollson v. Sweden*, (1988) ECHR (Ser. A130), Para. 61. See also *Amman v. Switzerland*, [2000-II] ECHR, Para. 50.

terests are both more extensive and deeper than the EU's definition allows.⁷⁵ That definition can at best capture much of the legal extension of the concept of privacy, but not the nature of socio-cultural notions of privacy.

Much of the rhetoric does not accurately show the actual effect of the legal framing of privacy, but it can have a powerful effect upon legislator, judge, and litigant. This "individualistic" approach is problematic: it leads us to attempt the development of a pathological society in which social benefit is forever playing second fiddle to individual desire, and it further leads to legal reasoning which must – to accord with the rhetoric of the legislature – involve complex legal fictions.⁷⁶ However, even though the EU has attempted to provide a uniform conception of privacy, European law recognises privacy haphazardly because privacy is widely perceived to be "a good thing". The literature has generally argued that we are under increasing surveillance or have lost privacy; researchers have contended that we must work toward protecting privacy rather than creating detailed solutions for each element within the indefinable notion of privacy. Leith suggested that rhetorical solutions are not effective because the rhetoric surrounding privacy rights developed from a biased position that failed to consider the evidence regarding social communication.⁷⁷ Hence, perhaps not surprisingly, communication theorists like Kisselburgh, in an effort to expand understanding about how privacy is enacted in social contexts,⁷⁸ advocated in favour of reconceptualising the framework for examining privacy within the context of the meta-theoretical traditions of communication theory as postulated by Craig,⁷⁹ and these theorists have suggested multiple and multi-theoretical approaches to the study of privacy.⁸⁰

The fundamental question is whether privacy is actually important. Ing-ham states that 'man, we are repeatedly told is a social animal, and yet he

⁷⁵ The European Court of Human Rights has delivered several decisions to specify the content and the extent of the right to privacy. See further F. Bignami, "Privacy and Law Enforcement in the European Union: The Data Retention Directive" (2007) 8 (1) *Chicago Journal of International Law*, 233-255

⁷⁶ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 106

⁷⁷ See P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 105-136

⁷⁸ L. Kisselburgh, *The social structure and construction of privacy in socio-technological realms*. (Purdue University, West Lafayette, IN, 2008)

⁷⁹ R.T. Craig, "Communication theory as a field" (1999) 9(2) *Communication Theory*, 119-161

⁸⁰ L. Kisselburgh, *The social structure and construction of privacy in socio-technological realms*. (Purdue University, West Lafayette, IN, 2008)

constantly seeks to achieve a state of privacy'.⁸¹ Perhaps the best way to fully answer this question would be to offer a social theory of privacy and a more detached empirical study, which is beyond the scope of this article. However, it is obvious that privacy is to some extent important to everyone. Indeed, despite definitional difficulties, privacy provides what Lyon and Zureik call a 'mobilizing concept to express real social anxieties and fears'.⁸² The variable nature of the meaning of privacy, as with any component of nonmaterial culture, makes it difficult to arrive at an exact definition.⁸³ It is quite possible that in the digital age privacy as the conscious and controlled protection of personal information cannot be sustained. Then again, it is precisely at this point that it also appears that privacy does not carry just a simple black or white definition. Even if we develop a clearer concept of privacy, it will not dictate how privacy should be balanced against other individual rights and public concerns. One may have an important interest in privacy that for legal or social reasons cannot be protected. Leith said that 'those who approach the notion of privacy with technical understanding and a reasonably critical attitude toward the assumptions which underlie the rhetoric of privacy can be struck by the mismatch between perception of what is happening in the world and what is actually happening in the new information processing industries'.⁸⁴ Only a small percentage of society is concerned with perceptions of the damaging effects of technology and these perceptions are frequently associated with highly moral and ideological judgments. Meanwhile, most people pay virtually no attention.⁸⁵

In my view, taken together, these observations suggest that the demarcation between individuals and society is not fixed and may change over time; there is no fixed realm of the private. Something that today seems like a violation of privacy tomorrow can be considered normal. This relative feature of privacy is well known but not often emphasised. Hence, the individual structural axis of legal studies is inadequate to understand the ramifications of continued dominance of society for development of law, the role of cul-

⁸¹ R. Ingham, (1978) "Privacy and psychology" in J. B. Young (ed.), *Privacy* (Chichester, UK: Wiley, 1978) 45, 35–59

⁸² D. Lyon and E. Zureik, *Computers, Surveillance, and Privacy* (Minneapolis: University of Minnesota Press, 1996) 16

⁸³ D.V.S Kasper, "The Evolution (Or Devolution) of Privacy" (2005) 20 (1) *Sociological Forum*, 69-92

⁸⁴ P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 119, 105-136

⁸⁵ See P. Leith, "The Socio-Legal Context of Privacy" (2006) 2(2) *International Journal of Law in Context*, 106, 105-136

ture in the constitution of different types of societies, and relations between people within societies. Long and Quek argued that the EU's approach to regulation has little relationship to the privacy concerns of European people;⁸⁶ rather, it highlights the international differences in regulation of privacy. This does not imply that a legal concept of privacy should be disregarded; instead, the concept of privacy must take into consideration the cultural context.

3. PRIVACY IN CULTURAL CONTEXT

Culture encompasses the values and meanings produced in a given society by various phenomena and experiences.⁸⁷ What does privacy mean for people in the cultural context? Privacy responds to the societal culture; it reflects deeper values and assumptions held in the larger culture.⁸⁸ India's influential cultural distinctiveness and cultural values are known to affect its population's attitudes toward privacy and these characteristics are identified marginally with its regulatory approach. Although it is apparent that 'levels of privacy across nations and cultures, and across broad historical periods, are in constant flux,'⁸⁹ the definitions of privacy are culturally and historically biased towards the West and thus may not apply to other socio-cultural contexts.

While I do not condemn the Western perception of privacy, I argue that the existence of multiple cultures and philosophies prompts questions regarding the appropriateness of hegemonic relations and the privileging of one culture over another. The question is whether privacy is deemed inherently valuable by all people or whether its value is relative to cultural differences. Ethical relativism holds that morality is relative to the norms of one's culture⁹⁰ and that the perception of whether an action is right or wrong differs according to the moral norms of the society in which it is practiced⁹¹. In reality, there is diversity within cultures, and there are certainly many dif-

⁸⁶ W.J. Long and M.P. Quek, "Personal data privacy protection in an age of globalization: The US-EU Safe Harbor compromise" (2002) 9 (3) *Journal of European Public Policy*, 325-344

⁸⁷ A practice of the culture into which an individual is born is responsible for creation of "informational, material, and social— structures we know and how we come to know it." See J. E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven CT: Yale University Press, 2012)

⁸⁸ V. W. Kupritz, "The Dynamics of Privacy Regulation: A Conceptual Model for HRD and Organizations" (2000) 38 (1) *Journal of Industrial Teacher Education*, 29-59

⁸⁹ L. A. Bygrave, "Privacy Protection in a Global Context- A Comparative Overview" (2010) 56 *Scandinavian Studies in Law*, 327

⁹⁰ M. Velasquez, C. Andre, T. Shanks, and M.J. Meyer, "Ethical Relativism" (1992) 5(2) *Issues in Ethics*, 2-5

ferences of opinion about the importance of privacy, what the issues are, and how they should be addressed. Patterns of privacy, as evidenced by anthropological research differ significantly from society to society⁹² and it is affected by the context of perception. At the broader level of conceptualisation there has been little disagreement about privacy, and almost all cultures appear to value privacy,⁹³ even if those cultures differ in their ways of seeking and obtaining privacy. Thus, we cannot apply a universal code of laws across the world given our differences in cultures and beliefs.⁹⁴

Utilizing the definition of culture as something that has varied visible aspects and deeper learned aspects that are unchangeable, one finds that although history itself is littered with examples of 'uninvited cultural invasion and overthrow'⁹⁵, cultural values have not simply been reshaped to conform to the values and preferences of the victor. I argue that the invasion of culture causes a particular type of "privacy mistrust" that can be understood in the larger context of "civilisation scepticism".⁹⁶ Hence, the relatively homogenous perspective of the Western democracies fails to appreciate the diversity in a nation like India which has a distinctive, influential cultural heritage that springs from its own unique background and determines the ways in which its citizens express and understand the same concept.

The term "culture" has also been applied in historical and sociological literature to denote a wide array of referents, including the "social whole", as well as the "basic values, practices and beliefs" of a social group⁹⁷. What makes Indian culture special is the concept of autonomous, non-distinctive individuals living outside of society. When it comes to 'man-in-society', Indian views are not unique; indeed, their views are prototypical and lucid

⁹¹ M. Velasquez, C. Andre, T. Shanks, and M.J. Meyer, "Ethical Relativism" (1992) 5(2) *Issues in Ethics*, 2-5

⁹² J. M. Roberts and T. Gregor, "Privacy: A Cultural View" in R. J. Pennock and J. W. Chapman (eds.) *Privacy* (New York: Atherton Press, 1971) 199-225

⁹³ S. H. Schwartz and W. Bilsky, "Towards a psychological structure of human values" (1990) 53 *Journal of Personality and Social Psychology*, 550-562

⁹⁴ In other words, according to cultural relativist view "there is an irreducible diversity among cultures because each culture is a unique whole with parts so intertwined that none of them can be understood or evaluated without reference to the other parts and to the cultural whole, the so-called pattern of culture". S. Lawson, "Democracy and the problem of cultural relativism: normative issues for international politics" (1998) 12 (2) *Global Society: Journal of Interdisciplinary International Relations*, 251-271

⁹⁵ T. Haywood, *Info-rich info-poor: access and exchange in the global information society* (London: Bowker-Saur, 1995) 131

⁹⁶ Author's own emphasis

⁹⁷ See J.B. Thompson, *Ideology and Modern Culture*, (Polity Press, 1990) 124-127

expressions of a widespread mode of social thought⁹⁸, but they do diverge considerably from the “natural man” tradition of Western social thought⁹⁹. The Western “autonomous individual” imagines the incredible, that he lives within an inviolate protected region (the extended boundaries of the self) where he is ‘free to choose’¹⁰⁰; for him, the meaning of privacy and respect for privacy concerns this “individuality”,¹⁰¹ it is largely about achieving individual goals of self-realization,¹⁰² an integral feature of what Bennett and Raab term as the privacy paradigm¹⁰³. Indeed, this respect for autonomy and individuality is essential to the basic moral and legal norms in the West.¹⁰⁴ This is in contrast to an alternate understanding of the holistic culture of India¹⁰⁵, which seems to embrace a socio-centric conception of the relationship of individual to society (‘the individual is embedded in a web of social relations’¹⁰⁶ to which his or her existence is defined). These relational selves focus more on communication and other practices intended to foster a sense of community. According to Hofstede¹⁰⁷, India is a collectivist soci-

⁹⁸ See D. W. Murray, “What is the Western Concept of the Self? on Forgetting David Hume” (1993) 21 (1) *Ethos*, 3-23

⁹⁹ R. Shweder, and E. Bourne, “Does the Concept of the Person Vary Cross-Culturally?” in R. Shweder and R. LeVine (eds.), *Culture Theory: Essays on Mind, Self, and Emotion* (CUP, 1984) 158-199

¹⁰⁰ According to Miller, the Western conceptions of morality are organized around concepts such as individual rights and care. J. Miller, “Cultural Diversity in the Morality of Caring: Individually-Oriented Versus Duty-Based Interpersonal Moral Codes.” (1994) 28 (1) *Cross-Cultural Research*, 3-39; See also R. Shweder, and E. Bourne, “Does the Concept of the Person Vary Cross-Culturally?” in R. Shweder and R. LeVine (eds.) *Culture Theory: Essays on Mind, Self, and Emotion* (CUP, 1984) 182, 158-199

¹⁰¹ In contemporary Western societies, conceptions of the self-derived from liberal political theory play an important role in constructing our socially situated notions of both selfhood and privacy. J. E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven CT: Yale University Press, 2012)

¹⁰² A. F. Westin, *Privacy and freedom* (New York: Atheneum, 1967) 39. Privacy and privacy rights tend to focus on benefits for individuals. These benefits are about securing individuality, autonomy, dignity, emotional release, and self-evaluation. See also L. A. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits*, (Kluwer Law International, The Hague / London / New York, 2002) 133-134

¹⁰³ C.J. Bennett and C.D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Aldershot: Ashgate, 2003)

¹⁰⁴ R. Capurro, “Privacy: An Intercultural Perspective” (2005) 7 (1) *Ethics and Information Technology*, 37-47

¹⁰⁵ Indian philosophy accentuates on social duty, of ‘Indian values’ and consciousness. See A. Bharati, “The Self in Hindu Thought and Action.” in G. Marsella, A.J. DeVos, and F.L.K. Hsu (eds.), *Culture and Self* (New York: Tavistock, 1985); T. Chand, “The Individual in the Legal and Political Thought and Institutions of India” in C.A. Moore (ed.), *The Indian Mind: Essentials of Indian Philosophy and Culture*, (Honolulu: East-West Center Press/University of Hawaii Press, 1967)

¹⁰⁶ Indian social and moral philosophy binds selves to social relations. See B. Parekh, “Private and Public Spheres in India” (2009) 12 *Critical Review of International Social and Political Philosophy*, 317, 313-328

ety with a lower Individualism Index (IDV)¹⁰⁸ and a higher Power Distance Index (PDI)¹⁰⁹ compared to the UK or US, which are individualist societies with higher IDV in which an individual's importance is at least equal to, if not greater than, the importance of the collectivity.¹¹⁰ Hofstede has shown that individuals in collectivist societies have more faith in other people than those in individualist societies¹¹¹. They thereby de-emphasize the self and thus individual privacy¹¹² as an isolate, in favour of greater interaction and interconnectivity with others and for harmony and well-being of the community.¹¹³ This dual direction of privacy based on reciprocal relationships and the differences in perceptions of the degree to which privacy is threatened explains why the Indian conception of privacy, essentially derived from a collectivist mentality, differs from its Western equivalents based on a more individualistic culture.

What then are the influences of cultural specificity on privacy? It has been shown that cultural values affect the development and maintenance of

¹⁰⁷ See G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (Sage Publications, 2001) 79

www.cyborlink.com/besite/hofstede.htm

¹⁰⁸ The Individualism Index (IDV) measures the extent to which a society tends to emphasise individual rights versus collective goals. See G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations*, (Sage Publications, 2001) 79

www.cyborlink.com/besite/hofstede.htm

¹⁰⁹ Power distance is defined as how a culture approaches and accepts inequality in status (i.e., prestige, wealth and power). See further G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations*, (Sage Publications, 2001)

www.cyborlink.com/besite/hofstede.htm

¹¹⁰ In the Western societies the notion of "self" is relational to "individualism", on the contrary in India the individual is considered to be just one part of the society. For a detailed analyses of Western conceptions of self; See F. Johnson, "The Western Concept of Self" in G. Marsella, A.J. DeVos, and F.L.K. Hsu(eds.), *Culture and Self* (New York: Tavistock, 1985); R. N. Bellah, et al., *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985); A. De Tocqueville, *Democracy in America* (New York: Signet, 2001)

¹¹¹ See G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations*, (Sage Publications, 2001)

www.cyborlink.com/besite/hofstede.htm

¹¹² In these circumstances, individual rights and expectations vary with social conventions. Although people do expect privacy regarding the self, they also recognize that social good is often equal to or greater than the individual's need for personal privacy. See Court on its motion *v Union of India*, 139 (2007) D.L.T. 244 (India) where prohibition was imposed on black films put on the windscreens of cars by owners for privacy as well as to shield them from the sun, on the ground that this was being used by criminals to perpetrate offences, often rape and molestation in moving vehicles.

¹¹³ Similar social thinking is also found in Africa; "Ubuntu", best described as a community-based mindset in which the welfare of the group is greater than the welfare of a single individual in the group. See N.M. Kwamwangamalu and M. Nkonko, "Ubuntu in South Africa: a Sociolinguistic Perspective to a Pan-African Concept" (1999) 13(2) *Critical Arts Journal*, 24-42

social institutions, including political and legislative bodies¹¹⁴. Western societies came to view privacy as an important value that gave rise to a privacy interest or right recognized by law or social convention¹¹⁵ that is regulatory in nature. Although it is in the interest of Indian society to preserve both the individual rights aspects of privacy and the social value of privacy, privacy is still dominated by the moral concept of subjectivity¹¹⁶ – in which privacy is not permanent but dependent on situations, relationships, and dispositional preferences. For example, while it is not common practice in the UK for general practitioners (GPs) to discuss patient information of the wife with her husband, such discussion is quite common in India, where GPs regularly discuss such issues with the husband or other members of the family. Does this reduced control necessarily imply reduced privacy? On the contrary, this practice conforms to a consistent set of rules as developed within the Indian society that the level of privacy should not interfere with an individual's ability to feel emotionally safe and secure through social linkage. I believe it also means that "being private" in traditional Indian concept includes sharing with "family" and within the "familial space" and evidence suggests that the desire to demarcate one's life from others in the family is nearly non-existent but it is separate from the outside world as the privacy "of the family" is greatly valued.¹¹⁷ Consequently, a whole series of protocols ranging from body language, spoken and written communications, cultural values and norms have been established to ensure that this distinction is well respected.¹¹⁸

Are any aspects of life inherently private and not just conventionally so? Ironically, there is a shared framework for understanding privacy.¹¹⁹ As discussed in the previous section, one of the interests most commonly associated with the term privacy is the interest in controlling access to and dis-

¹¹⁴ See G. Hofstede, *Cultures and Organizations: Software of the mind* (McGraw-Hill: Berkshire, 1991)

¹¹⁵ A. F. Westin, "Social and Political Dimensions of Privacy" (2003) 59 *Journal of Social Issues*, 431

¹¹⁶ This is opposite to a classic Western view of subject and identity as something permanent and even substantial. R. Capurro, "Privacy: An Intercultural Perspective" (2005) 7(1) *Ethics and Information Technology*, 37-47

¹¹⁷ B. Parekh, "Private and Public Spheres in India" (2009) 12 *Critical Review of International Social and Political Philosophy*, 313-328

¹¹⁸ H. Irwin, *Communicating with Asia: Understanding People and Customs* (Malaysia: Allen & Unwin, 1996)

¹¹⁹ Importantly, although different cultures have different conventions about personal space and territory, as I have discussed later on in this section people in every culture use personal space and territory to manage interpersonal boundaries. See I. Altman, "Privacy Regulation: Culturally Universal or Culturally Specific?" (1977) 33(3) *Journal of Social Issues*, 66-84

semination of information about oneself; hence, not surprisingly, in India and throughout the world people recognise that certain types of information about oneself are privileged. However, if a limit on the dissemination of information is too rigidly applied it will result in arbitrariness. In India, people's perception of privacy is also influenced by how people relate to, communicate and share each other's professional, familial and personal information.

It is useful to couch this discussion of privacy on court decisions, especially decisions of the Indian High Courts and the Supreme Court, as the Court's thinking on this issue can be seen as mirroring widely held views. Indeed, in *T. Sareetha v T. Venkata Subbaiah*¹²⁰, it was held that what is undeniable about any conception of privacy is its reference to the "human body" and control over personal identity. A number of court decisions further reflect the importance of privacy as a social issue and as a "social phenomenon". In *Garesilal v Rasul Fathima*¹²¹, the Court found that Indian women have always been protected from intrusion into the privacy of their homes. The home is the archetypal private space and it is seen as a tangible expression of the intangible culture. Privacy inside the house is a right of every woman, and cognitively much more so for a woman who has inhibitions by custom or religious notions that cause her to seclude herself, including secluding herself in public places through observation of "purdah" (veil)¹²².

In *Basai v Hasan Raza Khan*¹²³, the Court recognised "purdah" as the basis of this right and held that it entitled the owner of one property to compel the owner of another to modify the design or architecture of his property so that the woman residing in the dominant tenements could be kept in "purdah". According to the Court, the right is based on "natural modesty or human morality". The Court, however, also held that the customary right to privacy can be claimed only with respect to apartments which are generally occupied and used by females; it does not extend to apartments ordinarily used by males. This conforms to the basis of the customary right of privacy being the purdah system, which was confined to the protection of

¹²⁰ AIR 1983 AP 356

¹²¹ AIR 1977 ALL. 118

¹²² "Purdah" literally means "curtain". It is the practice of preventing women from being seen by men. This takes two forms: physical segregation of the sexes and the requirement for women to cover their bodies and conceal their form. Purdah exists in various forms in the Islamic world and among Hindu women in some parts of India.

¹²³ AIR 1963 ALL. 143

“purdahnasin” women and those parts of a house which are ordinarily occupied by females. Once established, it not only extends to women who are in the habit of observing “purdah”, but also to women of all races. However, it is equally true that the right of privacy cannot be extended to an oppressive extent.

A variety of social, economic and technological changes in India have, over the years, seemed to widen the arena within which the presumption of a right to privacy ought to operate. Also, over this period, the area within which private activities can take place has been extended beyond the home. In *Shri Bhagwan Rambaudwji v Babu Purshottamdas*¹²⁴, the Court ruled that ‘it would have to be decided in each case whether the right of privacy violated is substantial or material or whether the right of privacy claimed by a plaintiff is to an oppressive extent’. In the recent case of the Naz Foundation, the Delhi High Court held that the right to privacy has been held to protect a ‘private space in which man may become and remain himself’.¹²⁵ The judges predicated their application of the right to privacy in this case with a discussion of the concept of “dignity” and its presence in the Indian Constitution. The court observed: ‘at its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of dignity are the autonomy of the private will and a person's freedom of choice and action’¹²⁶. Naz Foundation articulates a unique non-spatial and portable understanding of privacy that extends beyond “place” into “person”. It is patently clear that the Indian culture of privacy is dominated by such factors as rights of the family, observation of the “purdah” and the belief that intrusion affects the modesty, dignity or decency of the person.

Interestingly, similar findings regarding people’s perception of privacy were reported in two surveys published by the School of Computer Science of Carnegie Mellon University¹²⁷. Both surveys were quite revealing in the sense that they vividly underlined the great gap that separates the Western

¹²⁴ Second Appeal No. 101 of 1959 Decided on 25/11/1960

¹²⁵ *Naz Foundation v Government of NCT of Delhi* WP(C) No.7455/2001 (2 July 2009). In the ‘Naz Foundation Case’, the Delhi High Court decided to strike down provisions criminalising homosexual sexual conduct on grounds of invasion of privacy.

¹²⁶ *Naz Foundation v Government of NCT of Delhi* WP(C) No.7455/2001 (2 July 2009) Para 26

¹²⁷ See P. Kumaraguru and L. Cranor, “Privacy in India: Attitudes and Awareness”, in Proceedings of the Workshop on Privacy Enhancing Technologies (Dubrovnik, Croatia: PET, 2005)

perception of privacy and the predominating perception in India. The survey found that personal autonomy is not much valued in Indian society¹²⁸ and unlike some of the public opinion surveys in the West¹²⁹, evidence from these surveys showed less cynicism over existing level of privacy. But the survey did not show that privacy is “less valued” in Indian culture; it is seen more as part of a “societal value” rather than an “individual value”. It confirms that Indians are more concerned with a different dimension of privacy and ascribe value to protecting the concerns that fall within that dimension; it is not seen as an “intrinsic good” but as an “instrumental good”. From this perspective, I argue that we must reject information acquisition and publication as solely determinative of privacy invasions. If we do so, and acknowledge that privacy concerns encompass not only information but also activity and physical access, then we have good reason to consider whether the realm of the private can properly be taken to include the sort of privacy interests protected in constitutional law as well as those associated with tort law. It further reemphasises that privacy is a highly subjective value. Public policy and law can only establish rules, principles and procedures if and when required or demanded (e.g., if there are concerns about information privacy, governments can become more involved as individuals are more likely to call for stronger privacy laws); it is also up to individuals to assert their own privacy interests and claims.

It seems to me that the question of privacy should be considered from an Indian perspective within these arguments and experiences. What results from this discussion, I contend, is not a choice of one over the other, but rather a dualism. To me, a more effective argument for cultural relativity of privacy conceptions would be structured differently. Any reasonably developed culture has a basic understanding of privacy based on a ‘minimal conception’¹³⁰. It is important to note here that this minimal conception is shared by all cultures. What is required is multiple matching between these

¹²⁸ With regard to cultural prescriptions and privacy, Kumaraguru and Cranor (2005) refer to the lack of an explicit privacy concern. See P. Kumaraguru and L. Cranor, “Privacy in India: Attitudes and Awareness”, in Proceedings of the Workshop on Privacy Enhancing Technologies (Dubrovnik, Croatia: PET, 2005)

¹²⁹ See L. A. Bygrave, *Data Protection Law: Approaching its Rationale, Logic and Limits*, (Kluwer Law International, The Hague / London / New York, 2002) 138–143 See also C.J. Bennett and C.D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (Aldershot: Ashgate, 2003) 56-65

¹³⁰ M. Mizutani, J. Dorsey, and J.H. Moor, “The Internet and Japanese Conception of Privacy,” (2004) 6(2) *Ethics and Information Technology*, 121-128

variations in cultural forms and their respective privacy conceptions¹³¹. Hence, the policies need not be common but neither should they be singular. Rather, they should be a conjunction of contexts, requiring the norms of each context to be respected.

4. PRIVACY: REGULATORY ENVIRONMENT IN INDIA

Regulating mechanisms operate in different combinations as a social system. Every legal system has a core comprised of the system's underlying principle: the general, constitutional and administrative norms that apply to any legal event in the given society. Such a core naturally includes the teachings of the constitution of the legal system as well as the basic principles and values underlying the various legal areas. The differences in political systems and legislations in various countries can be interpreted as consequences of societal value differences and the degree to which members of a society look to the government to remedy social issues.¹³²

In the US and, until recently, Canada and Australia, privacy regulation has tended to be targeted or sector specific and to be aimed mainly at the public sector. This sectoral or voluntary approach contrasts with the omnibus approach in both the public and private sectors used by the EU. Unlike in the EU, the right to privacy in India is scattered across various legal fields. As a customary right, it is treated as an easement forming part of statutory law and as a part of the constitutional right to life and liberty; it is considered to be the illustration of prerogative development of human rights and basic freedoms.

Despite pressure from internal and external fronts, India has traditionally showed a general unwillingness to adopt specific privacy laws.¹³³ There is a significant and positive relationship between concerns about privacy and the level of government involvement in the regulation of privacy.¹³⁴ The analysis made earlier in the paper emphasises that India's history has not

¹³¹ The different cultures will receive and interpret information differently regardless of universal concepts which all people share. The same information will not produce the same understanding.

¹³² S.J. Milberg, H.J. Smith, S.J. Burke, "Information Privacy: Corporate Management and National Regulation" (2000) 11 (1) *Organization Science*, 35-57

¹³³ Particularly I am critical of Prof Greenleaf's rather broad and stereotypical suggestion that India's legislative framework is 'inadequate to protect rights of individuals as much as it promises to do'. See G. Greenleaf "Promises and illusions of data protection in Indian law" (2011) 1 (1) *International Data Privacy Law*, 47-69

¹³⁴ See S.J. Milberg, H.J. Smith, S.J. Burke, "Information Privacy: Corporate Management and National Regulation" (2000) 11 (1) *Organization Science*, 35-57

been plagued by privacy abuses as Parekh argues because of the respect for privacy of the family and those breaking the norm are looked down upon and even ostracised.¹³⁵ I am also inclined to argue here that India's recent general reluctance to legislate for privacy protection may be deeply rooted in its colonial past.¹³⁶

A country's "legal origin" significantly affects the evolution of its legal rules. Due to the greater constitutional independence of their judiciary, "common law" legal institutions are thought both to exhibit a greater degree of adaptability than "civil law" systems through their greater reliance on "bottom up" rule-making by the judiciary, as opposed to "top-down" codifications, and to be less susceptible to corrosion by politicians and bureaucrats.¹³⁷ Although India is described as a common law country, having inherited a common law legal system from the British, many of its laws were in fact codified during the British rule, and those laws were driven by an agenda of distrust that resulted in an array of rules and regulations that were almost impossible to uphold and at times oppressive in nature. In the post-independent India, these laws were then overlaid with further legislation when the government implemented a socialist reform agenda encompassing all areas of commercial activity, which resulted in an obstructive bureaucracy and relentless overregulation. The other consequence was the existence of the law as an ideology without connection to the institutions in society that flesh out the law. Hence, the system India inherited from the colonial rulers suffers from three defects - delay, cost, and great uncertainty in the final outcome of any litigation. The system is a maze of complex procedures together with a multiplicity of laws. In the wake of this pattern, businesses in the private sector had to wait for months or years for a response to their requests for government approvals of entrepreneurial projects and many times they waited in vain.¹³⁸ This repressive environment caused an understandable fear of government regulation.¹³⁹ It was not until the 1990s that this overly-stifling quagmire of excessive government control started to

¹³⁵ B. Parekh, "Private and Public Spheres in India" (2009) 12 *Critical Review of International Social and Political Philosophy*, 313-328

¹³⁶ India has recently implemented new regulations aimed at data security issues related to private sector uses of data but these rules are not intended neither designed to act as set of privacy rules (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules, 2011 Under Section 43A of the Information Technology Act, 2000).

¹³⁷ J. Armour and P. Lele, *Law, Finance, and Politics: The Case of India*, (ECGI, 2008) Law Working Paper N^o.107/2008, www.ecgi.org/wp

¹³⁸ G. Das, *India Unbound* (Anchor Books, 2002) 216-218

get dismantled, and since then there have been rapid and far-reaching law reforms.¹⁴⁰ Furthermore, the nature of coalition politics in India, coupled with a very activist judicial review, means that passing legislation is a slow and erratic process, and consequently the scepticism about legislation protecting privacy is comprehensible.¹⁴¹ This has also provoked questions of whether and to what extent the current constitution protects privacy in India. In the next section I take a closer look at the current Indian Constitutional framework and whether the meaning of privacy in India has changed and, if so, to what degree and with what consequence.

4.1 CONSTITUTIONAL PRIVACY RIGHTS

The institutional underpinnings of 'privacy' presuppose certain law–state–society relations. But there is a substantial debate regarding whether or not a 'right to privacy' exists under the Indian Constitution. However, I argue that we should be asking an altogether different question: if we were to deny that people have right to privacy, what would be the impact of this denial on the values that the Indian Constitution was designed to protect? The Indian Constitution does not expressly recognise the right to privacy but there exists a belief that the Constitution contains certain rights other than those expressly mentioned in its content. To establish the presence of such a right it must be shown that the right in question is an integral part of the enumerated right upon which its existence depends. The rationale behind this formulation is simply that the enumerated right would be meaningless without providing for certain other rights by implication. While Indian courts may not have explicitly analysed privacy as a concept involving both individual and collective components, the importance of the social

¹³⁹ In India, there is no sunset provision for statutes which are not in force. Unnecessary statutes remain on the statute books unless they are repealed. Some of these dysfunctional legislations have been repealed on the basis of the reports of the Law Commission which have been accepted by the Government. But many of such statutes including some of the British Statutes are still cluttering the statute books.

¹⁴⁰ See J. Bhagwati, *India in Transition* (Oxford: Clarendon Press, 1993) See also A. Panagariya, "India in the 1980s and 1990s: A Triumph of Reforms" (IMF, Working Paper WP/04/03, 2004)

¹⁴¹ At the time of writing this article, there are reports about India's Legislative Department Working on Draft of so-called "*Privacy Bill 2011*". As the author understands the draft is at a preliminary stage and details of the Bill are yet to be finalized. It would be unwise to be dogmatic about this Bill as there have been no further public developments in relation to the draft since April 2011 and this is not the first time attempts have been made to draft such a Bill (see *The Personal Data Protection Bill 2006*, introduced in Parliament on 8 December 2006. Bill No. XCI of 2006). It is highly unlikely that the Bill will be presented in the current parliament.

value of privacy has been implicitly recognised by the Supreme Court of India in certain cases.¹⁴²

The Supreme Court of India in *Kharak Singh v State of Uttar Pradesh* accepted in 1964 that a right of privacy¹⁴³ is implicit in the Constitution under Article 21, which states, 'no person shall be deprived of his life or personal liberty except according to procedure established by law.'¹⁴⁴ The Court equated "personal liberty" with "privacy", and observed that: 'the concept of liberty in Article 21 was comprehensive enough to include privacy and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy'.¹⁴⁵ On the basis of this provision, the Supreme Court subsequently held that 'those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law.'¹⁴⁶ More recently, in *Menka Gandhi v Union of India*¹⁴⁷ the phrase "procedure established by law" has been held to have a meaning similar to "due process of law" in the US Constitution and with the phrase 'in accordance with law' in the ECHR. It would not be enough to say that a violation of privacy would be justified by law; it must further be shown that the law under which the violation has taken place is just, fair and reasonable.

In *People's Union for Civil Liberties v. Union of India*¹⁴⁸ the Supreme Court held that 'right to life and personal liberty includes the right to privacy and right to privacy includes telephone conversation in the privacy at home or office and thus telephone tapping violates Art. 21.' In *R. Rajagopal v. State of Tamil Nadu*,¹⁴⁹ it was held that the constitutional recognition is given to the right to privacy which protects personal privacy against unlaw-

¹⁴² The protection of privacy by the Indian courts has developed primarily from this constitutional basis, rather than by Indian courts developing a tort of invasion of privacy (as in the USA or New Zealand), or by extension of the law of breach of confidence (as in the UK).

¹⁴³ 1 SCR 332 (1964)

¹⁴⁴ Art 21 of the Constitution of India

¹⁴⁵ *Kharak Singh v State of UP*, 1 SCR 332 (1964) The Court was greatly influenced by two US cases: *Munn v. Illinois* 94 US 113 and *Wolfe v. Colorado* 338 US 25

¹⁴⁶ See *Gobind v State of M.P.* (1975) 2 SCC 148, See *State v Charulata Joshi*(1999) 4 SCC 65 In *M. P. Sharma v Satish Chandra*, District Magistrate, Delhi AIR 1954 SC 300 the court held that, Power of search and seizure does not violate the right to privacy because it is in the interest of the State.

¹⁴⁷ AIR 1978 SC 597

¹⁴⁸ AIR 1997 SC 568

¹⁴⁹ AIR 1995 SC 264

ful governmental invasion, but in *Indu Jain v. Forbes Incorporated*¹⁵⁰ it was held that the enforcement of the right to privacy under the Indian constitutional scheme can only be made against state instrumentalities and not against private persons. At the time of the writing of the Indian Constitution, the house was seen as the central locus of intimate activities, and hence as the place where intervention of the government needed strongest justification. Indian courts have interpreted the right to privacy as the right to freedom from intrusions by the state. However, the most significant recent development related to privacy issues is the decision of the High Court of Delhi in the *Naz Foundation Case*.¹⁵¹ The *Naz* decision extended the view by implying that it also protects the 'autonomy of the private will and a person's freedom of choice and action and it protects the core identity and dignity of the individual'¹⁵² as cited earlier. But the notion of individuality in India is far more complex and multi-faceted, and to focus on only one level of behaviour would miss the point that one is dealing with a complex system of needs, wants, and behavioural styles. The perception of privacy as a fundamental right changes depending on those concerned and the context in which this right is being exercised. It is not viewed as an "absolute right",¹⁵³ but it is recognised as a right of "special significance"¹⁵⁴ and it also recognises society's interest in preserving privacy apart from a particular individual's interest.

5. CONCLUSION

As this article was being written it seems that new technology¹⁵⁵ is apparently threatening the very concept of privacy. Perhaps what was understood may be thought of as the correct way the phenomenon ought to be understood. India is not a society without privacy – but it has a different perception of privacy from that to which we have become accustomed in

¹⁵⁰ IA 12993/2006 in CS(OS) 2172/2006 (High Court of Delhi)

¹⁵¹ *Naz Foundation v Government of NCT of Delhi* WP(C) No.7455/2001 (2 July 2009) The Court found that s377 of the Indian Penal Code, 1860 breached the right of privacy and rejected the claim that this invasion of privacy was justified within the exception to Article 21. It found that the State cannot invade the privacy of citizens based solely on considerations of 'public morals'.

¹⁵² *Naz Foundation Case* para 46-48 of the Judgement

¹⁵³ Certainly, the Indian Courts did not recognise any natural right to privacy. See *C Krishna Murthy v U Rajlingam* (1980) AIR Andhra Pradesh 69, Para 8

¹⁵⁴ In the case of *State of Maharashtra v Madhulkar Narain* it was held that the 'right to privacy' is available even to a woman of easy virtue.

¹⁵⁵ Twitter and instant messaging in the words of Lord Neuberger are "totally out of control" and society should consider other ways to bring Twitter and other websites under control.

the West. India's attitude toward privacy is more of "respect", for rather than as a right; its focus is more on where privacy concerns "physical space" and "personal liberty" threatened primarily by the State rather than "informational privacy". It is more about practical rules based on "social morality", "virtues" and "righteous" conduct. This attitude is compatible with the social and cultural structure of the country where a high level of privacy is seen to have a detrimental effect on the trusting relationships and social interaction with others.

I set out to answer the question of how to reconcile traditional Indian values and concerns about privacy with the so-called Western ones. In this process, the article has highlighted the need to understand the ontological distinctiveness of Indian culture, social structure, and moral aspirations. It has argued for a differentiated understanding of Western and Indian perception of privacy and for anchoring the debate about privacy firmly in the cultural experiences of India. Such an undertaking calls for interrogation of the relationships between form and substance of the law in socio-legal context in India. Evidence suggests that in India compensatory social mechanisms are present, which allow for the regulation of privacy and where it is not present the Indian constitution is capable of providing the protection. Instead of following a strict regulative approach, India takes a prescriptive approach to the right to privacy through a peculiar blend of constitutional law, social norms, conventions, and sanctions. Privacy is understood through a process of "optimization". To move to the heart of the matter, is there a need for reforming the law and/or is it a question of re-educating the people, reforming the culture? "Socio-cultural" issues unique to countries must be considered and appreciated in their own right. We must acknowledge the existence of two different cultures of privacy based on different intuitive sensibilities.

One can accurately infer that regulatory preferences are in some measure a reactive function; that is, when societal expectations regarding privacy management are perceived to be unmet, a legislative reaction is likely to follow. But the precise form of that reaction, and the expected policies for privacy, cannot be specified in a culture-free context. What will or will not meet "societal expectations" is highly contingent on a society itself, and different societies will exhibit varying levels of concern about privacy, both in general and in their assessment of specific practices. The goal is to synthesize these different areas of knowledge in favour a balancing framework

based on a realistic set of standards. The result will be legal pluralism that indirectly accounts for the co-existence of multiple experiences of the law in society without structural and systemic ramifications for Indian society within the wider international law. The implications of this view are significant. Perhaps most basic is the assumed fact of human diversity.

Finally, the regulation of privacy cannot be focused just on legislation and in any event will soon prove too complex. Perhaps the debate should not be between means and ends-based interpretations of privacy law, as this way of thinking has several untoward consequences. Leith suggests that privacy is under-theorised and argues in favour of developing a socio-legal privacy theory.¹⁵⁶ It is argued that instead of having an independent existence of the right to privacy as a statutory right, it is more logical to refer to privacy as an interest, which can be invaded for “public good”. I propose that this interest be imagined as part of a “collective good” which is important for furtherance of the “public good”, thus leaving it open to us to adopt a broader concept of privacy and how extensively it ought to be protected. What does exist is the attribution of human action to the private or to the public sphere, which itself is subject to change. There is nothing inherent in human nature that makes privacy valuable for all humans. The reasonable-person standard originated from the necessity that life in an organised society mandated a certain average of conduct, saying that a sacrifice of individual peculiarities going beyond a certain point is necessary for the general welfare. It is not a binary choice between two extreme positions, between black and white, but it does allow for more nuanced solutions.

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¹⁵⁶ P. Leith, “The Socio-Legal Context of Privacy” (2006) 2(2) *International Journal of Law in Context*, 105-136

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