

# THE RIGHT TO PRIVACY FROM LEGAL AND ETHICAL PERSPECTIVES

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## ABSTRACT

*The right to privacy is conceived from different point of views. This causes a state of ambiguity in the privacy concepts. The cultural difference among the societies has led to adopt different point of views towards the legal governing of privacy. Some scholars see that there is no need to adopt new regulations for this right whereas others argued that the privacy concept is an independent concept from other concepts so, new rules should be adopted specially in the era of new technology. The moral value of the right to privacy is taken into consideration as well. The aim of this paper is to highlight the challenge of having a consensus agreement on the meaning of the right to privacy and the legal and ethical dimensions of this right from different perspectives.*

**Keywords:** Right, Privacy, Ethical, Value, Challenge.

## INTRODUCTION

The meaning of privacy has been always a challenging issue for scholars since ancient times (such as: Aristotle, John Stuart Mill, John Locke, etc.). For instance, Aristotle has identified the concept of privacy by distinguishing between what is 'public' such as political issues and what is private such as domestic affairs (Ropolyi, 2013). Similarly, John Stuart Mill separated the sphere of government authority and the sphere of self-regulation (Riley, 1998). Again, in his Second Treatise on Government, John Locke distinguished between the public associated with the element of nature and the private domain associated with oneself, one's own body and property (Laslett, 1988). However, the privacy concept differs from generation to another (Mead, 1949; Tamás, 2002). The cultural variations have also its impacts on the meaning of 'privacy' concept where the privacy right has been treated in different ways according to the cultural factors in the society (Albakjaji et al., 2020). These variations in the privacy concept make it so difficult to have a consensus agreement on the right to privacy (Albakjaji & Adams, 2016). It has also become a bigger challenge during the age of technological advancement in areas of digital media and digital communication, such as the Internet and e-commerce. The technological development makes it so difficult or current regulations and statutes to address data confidentiality violations across the geographical boundaries of national states. The aim of this paper is to highlight the challenge of having a consensus agreement on the meaning of the right to privacy and the legal and ethical dimensions of this right from different perspectives.

The importance of this study is that no study spots light on the meaning of the right to privacy and the impacts of cultural variations on this right especially in the era of the technological development.

The next section will comb and review the related literature on the meaning of privacy. Section three will focus on the ethical value of the privacy right and the moral implications of this right in and the difference of views on the necessity for this right to be governed by a specific legal framework. Section four will discuss the privacy in relation to other concepts, Section five will be the conclusion which summarizes the research main findings and presents recommendations and suggestions.

## Definition of Privacy

The Oxford dictionary defined the word privacy as a state in which one is not observed or disturbed by other people, or the state of being free from public attention (Oxford Dictionary, 2015). However, the literature on privacy does not stick to a single definition: some scholars have associated it with the state of being free from public attention (Renaud & Galvez-Cruz, 2010), while others has included with it other rights such as: the right to freedom of thought and conscience, the right to be alone, the right to control one's own body, the right to protect one's own reputation, the right to a family life, the right to a sexuality of your own definition, or the right to be excluded from publicity (Neetling et al., 1996). For instance, Rachels (1975) associated the concept with personal integrity and dignity; and Klitou (2014) attributed the meaning of privacy to factors, such as people's individual personalities, experiences and their positions and roles in the society. Furthermore, some scholars have regarded privacy as a human need to develop other needs, such as health, education and social relationships (Moore, 2003). Legal scholars have also tried to define 'privacy' as the right to be left alone in an attempt to protect the right to privacy and the right to develop one's personality without any interference (Warren and Brandeis, 1890). Adopting this principle, the US courts tried to protect the right of a couple to be alone against the landlord behaviour that fitted a camera in their bedroom (Hamberger, 1964). However, Prosser (1960) tried to build modern privacy torts that address specific emotional, reputational and proprietary injuries; and his view has formed the basis of the current US privacy torts which cover the following areas:

1. Public disclosure of private facts;
2. Intrusion upon seclusion;
3. Appropriation of name or likeness;
4. False light.

Accordingly, Solove (2002) argued that the basis for the privacy tort law is the right to immunity or seclusion, which is the right of an individual to determine *"to what extent his thoughts, sentiments, and emotions shall be communicated to others"*.

It is worth mentioning here, that there is no full consensus on any of the cited definitions of privacy between cultures and across time. The meaning seems to be changing as to include more attributes, such as: control of personal information that is collected over the Internet by

various social and e-commerce platforms. Also, the consequences of invading personal privacy are uncontrollable like those of olden times. The Internet space has made it very difficult for governments to control activities over their territories, within real-time temporalities (Albakjaji & Adams, 2016). Yet, there is a clear consensus about the importance of privacy as it protects individual interests, such as personal freedom and autonomy (Allen, 2011; Moore, 2010; Reiman 2004) as well as social interests (Solove, 2008). The social value of privacy can be recognised by Benn and Gaus (1983), who claim that privacy has impacted the social life since the concept of privacy regulates institutions, practices, activities and social and individual life generally. Again, Fried (1970) and Rachels (1975) have argued that privacy norms help regulate and develop social, family and professional relationships, and enhance the interaction on a variety of levels. This great value of privacy has been clearly identified by Solove (2008), who stated that a society without privacy is just like a suffocating society.

The word "*Right*" in Arabic language comes with many meanings, including: affirmation and necessity, and it also acquires its full meaning according to what is added to it, and in the term, it is a source of interest; the rights of the individual are his interests, or the means leading to the ends that are his rights. Muslim jurists have defined the truth in the past and present, and perhaps one of the oldest defined by Judge al-Marwazi al-Shafi'i, who died in the year 462 AH, and among the most comprehensive contemporary definitions of truth is a definition (Al-Alfi, 2018). The fact that the right is "*the competence of a person with a material or moral value that the Shariah establishes authority or assignment*", and all the definitions of Muslim jurists emphasize highlighting the element of exclusivity and authority, and assert that the source of the right is the Sharia.

It is noticeable that the right to privacy in Islamic jurisprudence, although it was not defined specifically among the old jurists, the reason for this is due to the chain of value system surrounding the private life of the individual, which the provisions of Islam were keen to emphasize before the idea of privacy in its contemporary legal sense, Such as the provisions for permission, the prohibition of espionage, the virtue of concealing over others, the benevolence of leaving what is not part of the human interest in the affairs of others, the prohibition of inflicting harm on others in all its forms, and other lofty values and good morals that prevent infringement on the lives of others of any colour, and all This is fixed by the explicit texts of the Qur'an and Sunnah.

### **The Ethical Value of the Privacy in Digital Era**

The value of privacy has even increased with the increasing use and efficiency of electronic data processing, especially what is called information privacy. Thus, according to Westin (1967) privacy may be defined as the claim of individuals, groups or institutions to determine when, how and to what extent information about them is communicated to others. In other words, privacy is your right to control what happens with personal information about you. In his surveyed studies of animals, Westin goes even further to confirm that the need to privacy is not only a human desire, but the animals need this right too.

The privacy literature has often emphasised the importance of recognizing the moral right to privacy; while the legal right is clearly stated and stipulated in constitutions or laws. Hence,

the problem is always how to determine the moral right. For instance, Schoeman (1985) stated that to know whether the privacy right and protection should be accorded to individuals formally, and explicitly, we should focus the attention on sensitivity to privacy interests when respect for them cannot feasibly be part of any clear and explicit institutional rules. So, the distinction between the moral right of privacy and the legal one depends on whether the interest of individuals in terms of privacy is very important to their lives and hence there is a moral right to privacy. So, understanding the person, his perception and his appreciation of the importance of interest may help determine whether there is a moral right or not.

Thus, the literature on privacy considered the moral importance of privacy as a moral and social virtue. In this regard, Debatin (2011) argued that privacy seems to be a quintessential individual concept and it is a social concept that belongs to the individual. In a similar line, Schoeman (1985) argued that privacy has a moral aspect since it is a need for maintaining the individual dignity. He relied on the idea that privacy is a human need for enabling individual to see him/her as a being with moral characters, value and worth, a point of view, searching for meaning in life. He also viewed privacy as a social need for enabling individual to develop his/her relationships in the society. This point of view relies on the conception of the individual as substantive, objective, and self-subsisting entity or the individual autonomy. However, Hongladarom (2016) criticized this view by arguing that self-subsisting concept means that the individual does not need other individuals for her/his very being, and consequently, that individual's moral value or dignity would not suffer. Hence, Hongladarom has argued that trust has an essential value, and that in the society where individuals trust each other, and the law is just, everything is known to everybody, the human dignity and moral value are maintained although privacy is neither available nor exist. He stressed that in the case of imbalance of power there is no dignity or moral worth - only in this case it is possible to say that privacy is very necessary for human dignity.

Again, Parent (1983) conceived privacy as a moral value, not as a legal right, making a distinction between undocumented personal information and documented personal information, emphasising the condition of keeping undocumented information out of the reach of others. He argued that the undocumented information may become documented one once others possess this undocumented value. He justifies possessing or acquiring the undocumented information by others if this information belongs to the public records such as newspapers or courts records. So, in this case there is no privacy invasion, but rather he views this invasion as abridgment of autonomy, trespass, or harassment regardless of how many times the information has been published or released.

The ethical value of privacy was also based on three applicable ethical norms, as explained by Britz (1996)-Truth, Freedom and Human rights. Truth as an ethical norm serves for the factual correctness of information, guiding the information professional regarding the accurate and factually correct handling of private information. Also, truth is an expression of ethical virtues such as openness, honesty, and trustworthiness. Freedom is more associated with the individual's freedom of choice and the freedom from intrusion. The norm of human right to privacy entails that as long as there is a juridical acknowledgment and protection of person right to privacy, this right should combine the right to protection from unlawful interference from others in one's private life.

With the increasing importance of privacy, the concept has shifted its focus to access, which may include either physical access or personal information or attention (Bok, 1982). In this regard, privacy has become associated with limited accessibility to others; and this has included the ability to make important decision without interference from others, but the protection of individual autonomous choice from governmental interference is not included in this view (Allen, 1987). Then, for other theorists (Altman, 1975; Boritz, 2011), the right to privacy has been associated with the selective control of access to the self. Hence, privacy may be conceived as capability to determine what one wants to reveal and how accessible one wants to be (Bellotti, 1997; Boritz, 2011). In this regard, an individual has a perfect privacy when others are completely inaccessible to that individual, and this can be achieved through independent but interrelated ways: through secrecy, anonymity and solitude (Gavison, 1980).

In identifying privacy in terms of control over access, theorists have advocated that this may include control over access to information, bodies and places as well (Moore, 2003) or the control over information, access to oneself either physically or mentally and the control over one's ability to make important decision (DeCew, 1997; Schoeman, 1985). According to this view, there is a moral value of privacy that stems from being a shield to protect the individual against scrutiny, prejudice, pressure, exploitation and judgements of others. So, by enabling individuals to have freedom and independence, the importance of privacy is clearly manifested. This could be regarded as a human right that enables the individual to influence, or handle data about themselves-as pointed out by Schoeman (1985).

However, limiting the privacy concept to the individual right to have a control over the information related to oneself, identity, family or personal life may involve some difficulties. Schoeman (1985) argued that although it does not seem to beg any moral questions, it does seem particularly vulnerable to a number of counter examples:

*"We can easily imagine a person living in a State of a complete privacy with strict privacy laws and regulations, but lacking control over who has access to information about him. For instance, a man shipwrecked on a deserted island or lost in a dense forest has, unfortunately, lost control over who has access to his information, but we would not want to say that he has no privacy. Indeed, ironically, his problem is that he has too much privacy. To take another example, a person who chose to exercise his discretionary control over information about himself by divulging everything cannot be said to have lost control, although he surely cannot be said to have any privacy."*

Also, conceiving privacy as a state or condition of limited access to a person is not without flaws too. According to Schoeman (1985), the characterizations of this definition leave open the question of whether privacy is a desirable state, and how valuable it is in relation to other things. He mentioned that this view will create a mix between the privacy concept and other concepts such as an individual rightful sphere of autonomy. Examples may include the case of autonomy over abortion, birth control, and the gender of one's sexual partner, as well as some issues concerning freedom of conscience. He stated that these issues are at least arguably privacy matters, but some researchers confirmed that these matters are related to other rights such as an individual rightful sphere of autonomy.

## Privacy in Relation to Other Concepts

The concept of privacy is overlapped with other similar concepts such as the confidentiality, liberty, and autonomy. This overlap causes a state of ambiguity in the concept of privacy where some scholars have argued that we do not need to apply a specific legal framework to govern the privacy right. So, the traditional rules that are applied to these concepts could be applicable to privacy right as well.

It is quite important to distinguish between the concept of privacy and the concept of confidentiality. According to Kauffman et al. (2011), the core of confidentiality concentrates on protecting transactional or sensitive information of a firm from unauthorized disclosure by adopting a controlling system to control the access to the information that is stored in the company's information systems. In contrast, information privacy centres on the idea of the necessity of protecting the personal information that the businesses acquire from the individuals. Thus, the confidentiality focuses on the idea of using privacy enhancing technology to protect the business data, whereas, the focus of information privacy is on enabling individuals to control the ways by which firms use their personal information, and store it in the company systems (Culnan & Williams, 2009). In general, the privacy concept ranged from regarding it as a claim or entitlement, or even the right of an individual to control own personal information to considering it as a state or condition of limited access to a person (Schoeman, 1985). However, despite there is no consensus on the uniformity of the privacy concept, there remains the question of the characterization of the right to privacy.

The Islamic concept of the right to "*privacy*" combines the meaning of "*confidentiality*", since everything that belongs to the individual is part of his personal property that others have no right to disclose, with the "*moral value*" in taking into account the privacy of others and ensuring that they are not intruded or penetrated. And this concept would move to a more assertive measure if the matter moved to harm or offend others in any way. Physically or morally, then that transgression becomes a crime punishable by law, and that punishment is estimated to the extent of the harm suffered by others.

The literature has also associated the concept of privacy with the concept of liberty which refers to free will as contrasted with constraint. In politics, liberty means that all the community members are entitled to the social and political freedom. This concept is deeply rooted in the earliest times; for instance, the Roman Emperor Marcus Aurelius (121–180 AD) wrote that a kingly government should respect the freedom of all the governed and he defined a polity as the entity that enacts laws for all, and ensure that all people have equal rights and equal freedom of speech. According to Thomas Hobbes liberty is the freedom of doing what the individual likes to do. He stated that a free man is he that in those things which by his strength and wit he is able to do is not hindered to do what he hath the will to do. However, the philosopher John Locke (Laslett, 1988) argued that conceiving the liberty as an absolute discretion or what the individual likes is a rejected perspective. He argued that freedom should be restrained or tied by laws that are established on consent in the commonwealth and enacted by a law-making authority that the common wills confer this power to it. According to his theory, only in the nature state people are free from any law or any law-making power, but they are only subject to the law of nature of their rule. But in political society, freedom of people under government is to be under no

restriction apart from standing rules to live by that are common to everyone in the society and made by the law-making power established in it. Persons have a right or liberty to (1) follow their own will in all things that the law has not prohibited and (2) not to be subject to the inconstant, uncertain, unknown, and arbitrary wills of others.

In fact, John Stuart Mill was the first philosopher who distinguished between liberty as the freedom to act and liberty as the absence of coercion (Hooks, 2008). In his work on liberty, he classified liberty into two opposite concepts: positive liberty and negative liberty. The former one confers the individual freedom to exercise his civil right, while the latter confers the individual freedom from tyranny and the arbitrary exercise of authority (Schermer, 2007).

According to these views, it is worth mentioning that liberty is the framework that combines the civil, political and social rights such as the freedom of speech, freedom of assembly and the right to privacy which are altogether fundamental rights to humans and are necessary for flourishing the free and democratic societies. The liberty and privacy are interrelated concepts where the protection of liberty will ensure that the right to privacy will be taken into consideration as well. Klitou (2014) Argued that privacy is not necessarily an end, but rather a means to an end. Instead, the end is greater liberty. So, privacy is an important value for enabling other basic entitlements (Holtzman, 2006; Gavison, 1980). For instance, Fulda (1996) confirmed the importance of privacy for free and democratic society, explaining stated that:

*"It is no accident that totalitarian systems in which there is no freedom whatsoever also tolerate no privacy... For Big Brother to act, he must know, and state surveillance with spies everywhere was a staple of the now-fallen totalitarian regimes".*

So, in these societies, privacy becomes a vital importance in its presence, and its absence has catastrophic affects (Westin, 1967; Klitou, 2014).

Concerning privacy and negative liberty, Schermer (2007) argued that Warren and Brandis-in their interpretation of the right to privacy as the right to be left alone - have emphasised the importance of adopting a legal framework for protecting it. Based on this view, the right to be left alone is regarded as the concept of negative liberty. If no one knows what I do, when I do it, and with whom I do it, no one can possibly interfere with my privacy (Fulda, 1996). So, the interference with the inviolate personality will undermine the privacy of this personality. For instance, the government is exerting undue interference through its tax system which has frightening effects on privacy due to the vast reams of information returned annually by citizens to the government (Fulda, 1996).

However, Schermer (2007) has argued that there is no violation of the right to privacy if the interference does not affect the private sphere, or in other words, not every violation to the liberty will constitute a violation of privacy. He stated that:

*"If, for instance, I am physically constrained by a person from leaving or entering a certain area, my freedom is diminished while my (informational) privacy is not. When I am denied the freedom of religion or the right to protest, my liberty is diminished while my privacy is not. This means that certain important elements of negative liberty that do not have a 'private component', such as free speech and freedom of information, find little or no protection in the right to (informational) privacy and are possibly neglected" (Schermer (2007: 122).*

This view is based on the idea that the right to privacy relies on the distinction between private and public spheres, and if the violation of freedom affects the public, the right to privacy is not protected.

On the other hand, privacy could also be associated with positive liberty, especially when privacy is conceived as the instrument that enables the individual to take an autonomous decision, giving him/her the right to exercise their choices (election), and their attitudes (freedom of speech), and where this individual is not able to exercise these rights without entitling a degree of anonymity. In this regard, Schermer (2007) affirms that privacy protects positive liberty, using the Panopticon (a model prison that was designed by the Utilitarian philosopher Jeremy Bentham) as a good example on how a man without his privacy cannot exercise his rights or make any decision or choice, he is thus enslaved. Hence, the relationship between liberty and privacy has been asserted as complementary by Klitou (2014), stating that:

*“A threat to privacy, therefore, is also a significant threat to liberty, since privacy and liberty indeed go hand in hand and a threat to privacy and liberty is a direct threat on democracy”.*

## CONCLUSION

As mentioned above, the idea of linking the privacy and autonomy and trust was robustly contested by Hongladarom (2016), who claimed that in the close-knit society, individuals know very well small details about each other, and trust each other as well. So, in this society trust becomes as the corner stone for developing the society even though there is no privacy and it becomes not necessary for autonomy to function. Once the individual has the ability to make decision from his own will, he has the autonomy even though his details are known by others. Yet, he confirmed the relationship between privacy and accountability, pointing out that:

*“The need for privacy protection then becomes almost universal. Furthermore, if one is not accountable for what one does, then there would be no means to sanction anyone’s behavior, including snooping and violating others’ private personal space. So if there is no accountability, it is very likely that there is no privacy either”*

Thus, this view advocates that the best way to understand concepts of privacy, autonomy, trust and accountability is to conceive them as distinct concepts rather than define them as they are related to each other.

Privacy concept does not seem to have a uniform definition and is not accorded a straightforward legal treatment. This challenge has been accelerated with the introduction of new media and communication technology, such as: the internet, search engines, e-commerce platforms and social media networks. For instance, the internet has made it very easy for online entities to conduct various cyber activities that may pose problems and threats to the costumer privacy. Based on this it is worth mentioning that the traditional legal systems are not able to govern the right to privacy. They were right to involve the right to privacy with other concepts, but this could be in the past not in the era of the new technology. Technological and digital advancements are happening at a much faster pace than relevant legislative and regulative initiatives. Even the boldest attempts to regulate the cyber space will be doomed especially in the



face of the irony that the internet was created as a stateless connection. This is a call for legislators to adopt new rules to the right to privacy to meet the social change. The ethical and moral values of the right privacy should be the point of departure for the future governing of this right.

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