

The Right to Privacy under International Law and Islamic Law: A Comparative Legal Analysis

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Abstract

Right to privacy is a fundamental human right enjoyed by actual and legal persons. It helps in establishing their dignity. If compromised, privacy can result in exposure of data that was not supposed to come into public knowledge. This paper claims that Islam has always emphasized on the maintenance of privacy of data and declared the privacy of an individual to be sanctified. Specifically, importance of privacy in the Qur'an and Sunnah has been explained. International law too endorses the preservation and protection of the right to privacy. This paper is an effort to comprehend a compact legal analysis of International Law and Islamic law with respect to right to privacy in order to present a comparative legal analysis. For a case study data privacy and cyber security is discussed for more understanding of the phenomenon of the privacy in different international instruments. Moreover, there are instances where right to privacy appears to be in conflict with security. The author has analyzed balancing the public security and private privacy and has stated a number of principles for this purpose. The aim is to explain the manner in which balance can be achieved between privacy and security by the application of the stated principles.

Key words: *Privacy, Security, Balancing Security and Privacy, Principles of Balancing Privacy*

1. Introduction

The world has become a global village and it has become difficult to draw a line between what is supposed to be disclosed and what should remain outside the public knowledge and information. This highlights the need and vitality of

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the right to privacy of natural and legal persons. It is not an easy task to protect privacy and enjoy the right without protection granted by law. In this situation International law and Islamic law both protect the right to privacy of individuals so that their data remains in safe hands and their integrity remains intact.

In this paper, the right to privacy and its importance is analyzed, then the right to privacy in international legal regime and finally the parameters of the right to privacy under Islamic law are discussed.

2. The Right to Privacy

We need to highlight at the outset that there is no universally accepted definition of privacy. However, some scholars have attempted to do so. Privacy is taken as a concept of negative freedom i.e. ‘being let alone and not to be interfered with’. Not interfering with someone’s personal affairs is considered to be respecting the privacy of that individual.

Louis Brandeis defined privacy in 1890 as “the most fundamental of all rights cherished by free people” and “the right to be let alone”. Brandeis considers privacy to be the basis for the enjoyment of all rights which are enjoyed by people in a society. It is also considered as their right to be in a private space.

Privacy has also been described to refer to “an area of a man’s life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade.” Under this definition privacy is considered to be that areas of an individual’s life which a prudent man would not think to violate

Privacy is a fundamental, constitutional and human right and has been described as an essential element of an individual’s life. Privacy is a condition or state of being free from public attention to interfere with one’s acts or decisions. It lets an individual to enjoy private life and does not attract attention with his personal affairs.

Interference into the privacy of someone has been termed precisely as nuisance. Suzzanne considers interfering with someone's privacy is nuisance which is a crime.

Privacy is an individualistic, instrumental and liberal value, necessary for securing happiness. Moreover it is taken as a necessary element if someone wants to live a free life from interference or secure happiness.

From the above definitions and elaborations, it appears that privacy is a term which is open to interpretation and has been taken in different senses by different authors. It is because of its importance that it is kept at the rank of fundamental rights and is guaranteed by granting through the constitutions of different states and Pakistan is also one of them.

3. Significance of Privacy for an Individual

Protection of privacy is considered an important human right, which is necessary for the protection of liberty and democratic institutions. William Pfaff says, "The defining characteristic of totalitarianism is its assault on privacy. The individual in a totalitarian state is deprived of privacy in order to destroy his or her liberty."

It can be inferred from the discussion above that privacy is an important and essential part of an individuals' life because it helps them maintain their autonomy, integrity, self-esteem and individuality by creating a sense of confidence in an individual. The person knows that his rights are protected under the law.

Privacy is also important because of its functional benefits. For example, anonymity and pseudonymity helps an individual protect his privacy and maintain his identity. Anonymity can be maintained by being anonymous while pseudonymity can be maintained by using fictitious names which becomes their identity.

4. Right to Privacy and International Law

The core principle of privacy in modern law may be found in the Universal Declaration of Human Rights 1948 (UDHR). Article 12 of the UDHR asserts the enforcement of privacy right and prohibits arbitrary interference with the privacy of individual. An individual's privacy includes his personal, family, home and information about his correspondence. Article 17 of International Covenant on Civil and Political Rights 1977 (ICCPR) states that;

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and everyone has the right to the protection of law against such interference or attacks.”

ICCPR also emphasizes on declaring meddling with someone's privacy as illegal and he shall enjoy protection of law if his privacy is under attack as it is deemed to be an indirect attack on his dignity and reputation as the dignity of an individual is attached to maintenance of his privacy. Moreover no one's privacy can be violated by anybody without due process of law.

Moreover, Article 14 of the United Nations Convention on Migrant Workers 1990; Article 16 of the United Nations Convention on the Rights of the Child 1989; Article 10 of the African Charter on the Rights and Welfare of the Child; Article 11 of the American Convention on Human Rights; Article 4 of the African Union Principles on Freedom of Expression; Article 5 of the American Declaration of the Rights and Duties of Man; Article 21 of the Arab Charter on Human Rights; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms recognize and protect privacy as a fundamental and human right.

5. Moral and Religious Perspective of the Right to Privacy

Islam has advocated and guaranteed the protection of the rights of human

beings. From its point of view, human rights are rights enjoyed by individuals merely on the ground of their humanity.

Islam believes in 10 basic fundamental human rights. These include right to life; right to live in dignity; right to justice; right to equal protection of law; right to choice; right of free expression; right to privacy; right of property; right to basic necessities of life; and the right to Revolt.

The Islamic jurists and scholars have advocated the cause of justice and freedom for all humans irrespective of their religion, color, sex, language or other factors for discrimination keeping in view the fact that Allah Almighty in His capacity as the Lawgiver is the basic source of human rights.

Since He has conferred these rights on the human beings, no country, individual or institution has the power to withdraw the rights that are granted by Allah Almighty. All Muslim rulers must accept, recognize and take steps to ensure the enforcement these rights. Muslim jurists regarded human rights as the integral part of their faith. Every citizen of a Muslim state has a right to a decent living. Life is a divine gift and its sanctity must be observed and preserved at all costs.

6. The Right to Privacy in the Qur'an

The right to privacy, freedom, dignity and equality are guaranteed in Islam. The right to privacy includes, the right of individual to be left alone to live his/her private life; the right to be free from governmental surveillance and intrusion; the right not to have an individual's private affairs made public without their permission; protection of persons and the places where they live, from seizures and searches; protection of knowledge and thoughts from compulsory self-incrimination; and government is not entitled to regulate the intimate behavior of individual which gives him right to maintain his secrecy of personal information and keep the things confidential which he does not wish to disclose.

The Qur'an has made it clear that a person's privacy is not public property and nobody is allowed to intervene without permission. Even the government has no right to interfere in one's privacy unless they have sufficient evidence of commission of a crime. The Qur'an states that:

“O you, who believe, do not enter houses other than your own, until you have asked permission and saluted those in them: that is best for you, in order that you may heed what is seemly. If you find no one in the house enter not until permission is given to you; if you are asked to go back, go back: that makes for greater purity for yourselves: and Allah knows well all that you do”.

Right to privacy is sacred, inviolable and unalienable right in Islam. Privacy has been valued by Islam and can be asked as a matter of right. Privacy of an individual is sacred and its violation is prohibited unless compelling reason is there to do so. Nobody can deprive of his privacy without due process of law, which indicates that right to privacy is not absolute in Islam.

On another instance, the Qur'an states that: “Enter houses through the proper doors”. It is important to note that the Qur'an has encouraged entering the homes through the proper passages so that everyone does not only has knowledge about the entrance into the house, they can exercise their authority to deny permission of entry to those that they do not want to welcome.

The lives property and privacy of all citizens in an Islamic state are considered sacred, whether or not the person is Muslim. The Qur'an has laid down the injunctions: “Do not spy or backbite each other” and “Do not enter any houses unless you are sure of their occupant's consent”. These verses clearly establish the importance of privacy in Islam. They denote that the privacy should be maintained and privacy of other persons should also be respected as intervention and violation in the privacy of any human is against their dignity and self-respect. Interference in someone's privacy against their will cannot be justified at any cost.

7.The Right to Privacy and Sunnah

There are also authentic records of instances that have occurred during the life of the Prophet (Peace be on Him) as well as instructions issued by him that set a guiding framework with reference to ensuring the privacy of individuals in their homes.

“It is reported that a man came to see the Prophet Muhammad (Peace be on Him) and sought permission for entry while standing just in front of the door. The Prophet (Peace be on Him) said to him; ‘Stand aside’: The purpose of the Commandment for seeking permission is to prevent casting of looks inside the house”.

The importance of respect to the right of privacy in Islam can be understood from the fact that the Prophet (Peace be on Him) has clearly forbade His followers to enter even their own houses suddenly and without a prior indication or notice of their entry.

The reason was to make sure that the dwellers of the house become aware of the arrival of the person so that the person who comes from outside may not see and counter their female family members in a condition, in which he does not like them to be seen by someone.

The procedure for entering another person’s residence is also evident from the Prophet Muhammad’s (Peace be on Him) personal life. “The practice of the Prophet, peace and blessings be on him, was that whenever he went to see somebody, he would stand aside, to the right or the left of the door, and seek permission as it was not then usual to hang curtains on the doors.”

Moreover, Peeping into someone’s house is strictly prohibited in Islam to the extent that the Prophet (Peace be on Him) said that if a man finds another person secretly peering into his house, and he puts out his eye or eyes as punishment, he will not be liable to prosecution.

8. Islam and Privacy of Data

Islam has placed similar sanctity on the privacy of data. There are also references to ensuring the data privacy of an individual and, more specifically, correspondence in the teachings of the Prophet (Peace be on Him). “According to Abdullah bin Abbas, the Prophet said: ‘Whoever glances through the letter of his brother without his permission, glances into fire’”.

Therefore peeping into the personal documents and reading their private letters, messages, emails etc. without their permission is clearly forbidden in Islam. This contention is further strengthened by the following report:

“Sahl b. Sa’id reported that a person peeped through the hole of the door of Allah’s Messenger (Peace Be on Him), and at that time Allah’s Messenger (Peace Be on Him) had with him a scratching instrument with which he had been scratching his head. When Allah’s Messenger (Peace be on Him) saw him, he said: ‘If I were to know that you had been peeping through the door, I would have thrust that into your eyes’ and ‘Permission is needed as a protection against glance’”.

It is inferred from these reports that intrusion into someone’s private life, property, house, communications and messages, cannot be justified in any case even if that is by the government on any ground whatsoever. The government currently violate privacy of individuals on the ground that it is necessary for it to know the details of a potential dangerous person.

The basis of this theory is the fear of governments, who having suspicion over some of their citizens and the on the basis of their suspicion they may trace calls, ma also keep a check on their activities and so on. Prophet (Peace be on Him) says that: “When a ruler seeks to make imputations against the people, he corrupts them.”

Intervention in private lives of the people by governments and public officials

promotes agitation amongst people. Due to constant yet unnecessary watch on common person, people would not be able to use their right to freedom of expression and conscious. Even slipping of tongue could cause serious problems to their lives and families. It would cause a mutual distrust and suspicion amongst people. Ultimately, the intrusion, which is unnatural and unjustified, promotes rebellion, as they resort to resistance in implementation of orders of government.

“Narrated Mu’awiya: I heard the Messenger of Allah (Peace be on Him) say: “if you search for the faults of the people, you will corrupt them, or will nearly corrupt them. Abu Darda’ said: These are the words, which Mu’awiya heard personally from the Messenger of Allah (Peace be on Him) and Allah benefited him by them.”

Privacy of an individual should be esteemed since violation of the privacy of an individual would lead to revealing his secrets, which after going into the hands of enemies could lead to serious consequences.

9. Cyber Security and Data Privacy- A Case Study

For better understanding of the relation between cyber security and data privacy is discussed. The convention for the protection of individuals with regard to Automatic Processing of Personal Data was drawn up by the Governmental Experts for the Council of Europe on 28 January, 1981 in Strasbourg. The aim of the document was to achieve the unity between the council members and regulate the flow of personal data. Furthermore it protected the rights, fundamental freedoms and right to privacy in particular with regard to automatic processing of personal data.

The UN Guidelines for the Regulation of Computerized Personal Data Files (1990) embark Fair Information Practices and suggest the adoption of national guidelines for the safeguard of personal privacy. The principles of Fair Information Practices can be derogated from only for the purpose of protection

of rights and basic freedoms of the individual(s) concerned or provision of humanitarian assistance.”

Discussions conducted at the UNESCO forum in 1998 and a Report of the Experts Meeting on Cyber Law was issued for the exploration of ethical and legal dimensions of cyberspace and identifying a set of core principles for the promotion of democracy and citizen empowerment was helpful in giving specific recommendations for UNESCO. By consensus of the experts the report proposed a set of principles to be promoted by UNESCO. Moreover it recommends a number of activities to be undertaken by UNESCO to facilitate the establishment of legal and ethical framework for the domain of cyber space. This specific task helped to consider protection of privacy and human rights in the digital age. It is necessary to review the facts known about the protection of privacy, threats to privacy, for the analysis of the situation, when the future of privacy protection is unfamiliar.

The competing views of government, private sector and citizen organizations must be considered for further advancements. Furthermore, a review was made on fundamental concerns presented by the citizens and representatives of the organizations occupied with issues of human rights and outline a plan for future action.

10. Balancing Public Security and Privacy

The principle of rule of law is the norm in balancing public security and the right to privacy because this area of law is still in evolutionary stages and basic principles of law regulate this area as they regulate other areas of law. It is also observed that in case of clash between public security and the right to privacy of an individual, public security shall be given preference as asserted by Aquilana, who is a legal expert and Professor in University of Plymouth UK, in her paper because betterment of public at large is the primary goal of a state and the state takes every step to maintain it. A number of principles are used to balance the right to privacy and public security which can also be found in hard

and soft law instruments. These principles include:

a) *Lesser Technological Privacy Intrusive Principle*

According to this principle, in case there is an alternative method by means of which privacy is infringed minimally while the intended purpose is achieved; that method shall be adopted.

b) *Principle of Favoring Moderate Intrusiveness*

Privacy intrusive technology should be used in a moderate manner, as unjustified and excessive use of such technology could cause serious threats to the right to privacy.

c) *Principle of Effectiveness*

Privacy intrusive methods should be effective to the extent that it helps in achieving the intended goal of public security.

d) *Principle of Accountability*

Working of the law enforcement agencies and personnel that carry out privacy invasions should be subject to accountability. The activities carried out by such agencies are subject to being challenged in courts of law or any other independent and impartial body so that the ends of justice could be met.

e) *Principle of Transparency*

Under this principle, the data gathered about an individual should only be communicated to the concerned authority and only on whose demand the data was collected. It should be ensured that the data is not shared with others who are not concerned with the same. Whereabouts of the person collecting and responsibly for keeping record of data, procedures for redress should be available to the aggrieved individuals. The aggrieved person must appreciate the forum to whom he will put his concerns and questions regarding retention of data related to him.

f) *Principle of Directly Proportional Incremental Authority to the Privacy Intrusiveness of the Technology Used*

The more intrusive the technology used is, the more approvals should be required from high ranking officials and officers of law enforcement agencies, ministers or judges. The purpose of these approvals is to ensure that the authority granted cannot be misused.

g) *Principle of Proportionality*

Whenever privacy is infringed in the name of public security, the infringement should be proportional to the alleged threat and the benefits derived from opting the desired technique.

h) *Principle of Fairness, Specific Purpose, Informed Consent and Legality*

This principle is based on Article 8 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). The principle asserts that data must be processed fairly only for the specific purpose(s) for which it was accessed, collected and processed. The fair processing of the data must be done with the consent of the person concerned with the data. The principle of legality states that the law enforcement agencies and officers must abide by the rule of law at all times and no act must be carried outside the jurisdiction of law.

i) *Principle of Finality and Purpose Limitation*

This principle proclaims that the data gathered regarding an individual should only be used for the purpose for which it was collected and not any other purpose. This is an essential principle to ensure privacy of the data.

j) *Principle of Accuracy*

United Nations General Assembly Guidelines for the Regulation of Computerized Personal Data Files Adopted by General Assembly Resolution 45/95 of 14 December 1990 for the principle of accuracy states that officials

responsible for collecting and keeping the data are entrusted with a duty to ascertain that the data recorded is complete, accurate and without errors or omissions and up to date.

k) *Principle of Non-retention of Data beyond a Certain Time Frame*

This principle asserts that the data should only be retained for the duration that is prescribed by law. When the data is no more of use to the concerned authorities for the purpose it was initially obtained, it should be deleted and removed.

l) *Principle of Right of Access and Rectification*

The person about whom the data has been collected by the agencies must have access to such data so that he could check the contents of the data. Article 8 of the EU Charter of Fundamental Human Rights also support this principle.

m) *Security Safeguards Principle*

The OECD Guidelines Concerning the Privacy of Personal Records 2011 asserts that personal data should be secured reasonably and access to data should be password-limited. The software managing all this should also restrict hackers and unauthorized individuals from accessing, modifying and tampering with the data.

n) *Principle of Technological Neutrality*

This principle signifies that such technologies should not be resorted to or used which compromises the privacy of individuals. To strengthen the principle further, it requires that standardized laws should be applied on all kinds of technology used.

o) *Principle of Anonymity, Pseudonymity, Unlinkability and Unobservability*

Under the principle of anonymity, the internet user uses the service without revealing the identity. For instance like people use internet social websites

without revealing their identity. It was a more common practice in the last decade. The principle of pseudonymity states that the internet user uses the service without unveiling the identity but is still answerable for it. For example the person can choose to remain anonymous and is still answerable for his acts. The principle of unlinkability provides that the user is unable to determine whether the same user caused certain specific operations in the system or not. Under this principle it is difficult to identify the person who has made changes in the system and it is difficult to link the act with the person who committed it. Lastly, the principle of unobservability states that the user may use a service without others being able to observe that the service is being used. For instance the agencies are able to carry out their routine task without being observed and surveilled.

11. Conclusion

It can be concluded from the preceding discussion that the right to privacy has been expressly stipulated both in Islamic law and International law. Efforts should be made by the governments and individuals to ensure that the right to privacy is maintained and enjoyed by individuals in its true spirit.

Awareness should be created and raised amongst masses so that they are conscious of their right to privacy and are enabled to take measures for protection of their right. For this purpose, seminars and awareness sessions may be conducted in educational institutions, schools, clubs, particular events, and other gatherings to highlight the worth of this right and the manner in which it could be protected.

Legislators should make laws that strengthens the right the privacy and protect the masses from undue infringement of their right by the state authorities. These laws should spell out the need for peeping into personal data and the parameters for doing so as well as the application of the principles for balancing security and privacy.

Government should set budget and frame policies to tackle the issue related

to the preservation of the right to privacy. Facilitation centers can also be established at grass root level for the purpose of solving issues faced by the common public. People would be able to get rapid relief on the complaints in addition to simple registration of complaints because infringement of privacy can be of serious nature and needs fast action for relief.

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