

## ***Right to Privacy: A Comparative Perspective in Law & Shariah***

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### ***Abstract***

*Islam is the religion covering all the aspect of a human life whether they are related to physical needs or spiritual demands. In Islamic system, there is a sound criteria for rights. Among them, is the right to privacy and personal affairs from securing point of view Islam commands its followers to maintain the privacy as social responsibility, Especially the matters that deal with state affairs, it has been forbidden to disclose the secret of others and has been regarded a punishable sin.*

*The article deals with the right to privacy from Islamic and Sharia perspective.*

**Key Words:** *Physical, Spiritual, Security, Disclose*

### ***Meaning and Concept***

Privacy is derived from the word 'privatus', which stands for many things in different contexts, such as:

1. The right of an individual or group to seclude from others
2. A right to deprive one's self from something ;(from privo 'to deprive')
3. A right not to share in formations with others;
4. A right to hide the exposure of your body to others;
5. A right of personal modesty;
6. A right to prevent "intrusions into one's physical space or solitude"<sup>1</sup>.

A considerable number of jurists attempted to perceive Privacy. The views of some of these philosophers on the subject are as follows:

Alan Westin believing that the new technologies have altered the balance between privacy and disclosure and that the privacy rights may limit the government surveillance, for the purpose of protecting democratic processes, defines privacy as:

*"Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[It is] the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or in small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.[E]ach individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives. The individual does so in the face of pressures from the curiosity of others and from the processes of surveillance that every society sets in order to enforce its social norms<sup>2</sup>."*

Westin's definition mentions the following points or dimensions of privacy:

1. "Right of an individual ,group or organization 'when, how, and to what extent share in formations with others', and sometimes not to share with others;
2. Right of an individual to seclude 'from the general society through physical or psychological means, either in a state of solitude or in small-group intimacy or, when among larger groups, in a condition of anonymity or reserve';

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3. Right of an individual to hide or disclose in formations with others 'in light of the environmental conditions and social norms set by the society in which he lives'<sup>3</sup>

The important thing which Westin mentions in his definition is that in his view each individual is in continuous engagement of personal adjustment process to keep the balance between the desire for privacy and the desire for communication and disclosure of himself to others<sup>4</sup>.

Amitai Etzioni attempts to introduce a communitarian approach to privacy and thus suggests a 'shared moral culture'<sup>5</sup>, for establishing a social order.

Amitai Etzioni is of the view that privacy laws help in increasing the government surveillance. He treats privacy as one good, among many others and believes that the technological effects depend on community accountability and oversight<sup>6</sup>.

Etzioni (1999) defines privacy as:

*"The realm in which an actor (either a person or a group, such as a couple) can legitimately act without disclosure and accountability to others. Privacy thus is a societal license that exempts a category of acts (including thoughts and emotions) from communal, public, and governmental scrutiny<sup>7</sup>."*

In the above mentioned definition Etzioni has mentioned two rights of an individual under privacy, which are as follows:

Right of an individual not to disclose himself, without being accountable to the society.

Right of an individual to express his emotions and thoughts without passing from 'communal, public, and governmental scrutiny'.

Barry Schwartz (1968) sees privacy in a slightly different angle from Etzioni. While defining privacy his focus is on the individual behavior, personal practices and culture of the realm.

In his view privacy is:

*"A highly institutionalized form of withdrawal...[where] rules governing entrance into and exit from privacy are most clearly articulated on the level of the social establishment and are reflected in its physical structure and in proprieties concerning the uses of space, doors, windows, drawers, etc.<sup>8</sup>."*

David Flaherty is considered to be a specialist in Informational Privacy and Managing Privacy. He has developed data protection as an aspect of privacy, as in his view networked computer databases pose threats to privacy<sup>9</sup>.

Richard Posner and Lawrence Lessig are considered to be expert in the economic aspect of privacy and personal information.

Posner is of the view that concealing information may have a bad effect on the market efficiency. He is of the opinion that the concealment of any defect in the product is fraud. Believing this Posner criticizes Economic Privacy<sup>10</sup>.

Lawrence Lessig suggests for control of personal information, concerning the business affairs. In his view online privacy breaches can be regulated through code and law<sup>11</sup>.

In Lessig's view the communal conception of privacy is difficult to maintain. He is of the opinion that Economic approaches and idea of protection of privacy can be strengthened by making the people realize to conceive the privacy right as a property right. He suggests that the people be enabled to control information about themselves<sup>12</sup>.

At present attempts are being made to make social values of societies as an integral part of privacy and thus to reframe privacy as a fundamental right of the

people. Priscilla Regan and Leslie Regan Shade have played leading and important role in this regard.

Priscilla Regan is of the opinion that the concepts of privacy of individuals have failed philosophically and in policy and thus she propounds and supports:

*“A social value of privacy with three dimensions; ‘shared perceptions, public values, and collective components’”.*

Priscilla Regan is of the view that:

*“Shared ideas about privacy allow freedom of conscience and diversity in thought. Public values guarantee democratic participation, including freedoms of speech and association, and limits government power. Collective elements describe privacy as collective good that cannot be divided. Regan’s goal is to strengthen privacy claims in policy making; ‘if we did recognize the collective or public good value of privacy, as well as the common and public value of privacy, those advocating privacy protections would have a stronger basis upon which to argue for its protection.’<sup>13</sup>”*

Leslie Regan Shade argues that:

*“The human right to privacy is necessary for meaningful democratic participation, and ensures human dignity and autonomy. Privacy depends on norms for how information is distributed, and if this is appropriate. Violations of privacy depend on context. Shade believes that privacy must be approached from a people-centered perspective and not through the marketplace<sup>14</sup>.”*

### **Incorporation of Right to Privacy**

Most of the international and regional organizations of Human rights and states of the world have incorporated the concept of privacy in their respective instruments and constitutions, by declaring it as a right of individuals against the invasion of their privacy by the other individuals, governments and corporations etc.

At present almost all countries have laws on privacy, covering all of its dimensions and aspects. However the laws of privacy of the individuals may be conflicting with the idea of ‘Freedom of Expression and Liberty’ which may require public disclosure of information that would otherwise be considered private in other cultures, civilizations and state laws pertaining to right of freedom of expression and liberty.

The Human Right to Privacy has precedent in the United Nations Declaration of Human Rights:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers<sup>15</sup>.”*

The Universal Declaration of Human Rights further states as:

*“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks<sup>16</sup>.”*

The European Convention on Human Rights guarantees the right to respect “for private and family life, one’s home and correspondence”<sup>17</sup>.

The European Court of Human Rights in Strasbourg has developed a large body of jurisprudence defining this fundamental right to privacy. It speaks as:

*“Everyone has the right to respect for his private and family life, his home and his correspondence<sup>18</sup>.”*

And

*“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others<sup>19</sup>.”*

The above mentioned Article of the ECHR clearly provides a right to someone's personal privacy and of his family life. However, some restrictions may also be imposed on this right of privacy for the sake of public safety, national security, for the protection of the rights and freedoms of others, for the protection of health or morals, for the prevention of disorder or crime or for the economic well-being of a country etc.

It is pertinent to mention here that European Court while recognizing and providing protection to the right of privacy of an individual has given a broad interpretation to the Article.

The European Union requires all member states to legislate in order to ensure that citizens have a right to privacy<sup>20</sup>.

Some of the important cases decided by the European Court on the Issue are as follows:

1. In the case entitled Golder v. United Kingdom<sup>21</sup> a prisoner sought permission from the Home Office to take the help of a solicitor in order to institute Libel proceedings against an officer of the prison, which was refused by it. When the case was brought before the Court it observed that:

*"Everyone is entitled to a fair hearing, as requiring a right of access to a solicitor...the right of access constitutes an element which is inherent in the right stated by Article 6<sup>22</sup>."*

In the case of Modinos v. Cyprus (1993)<sup>23</sup> the European Court while giving its verdict on the question raised before it gave a very liberal interpretation to the Act by considering the homosexuality lying with the ambit of the Article under the right to privacy.

Brief facts of the case were that under the fear of the violation of Section 171 of the Criminal Code of Cyprus a case was initiated by a gay rights activist, Alexandros Modinos, who was involved in sexual relationship with another male adult.

It was held by the Court that the said the existence of the Section of the Criminal Code is directly affecting the private life of the applicant and thus is an interference with his right privacy.

In the case entitled Gillan and Quinton v United Kingdom<sup>24</sup> it was Held by the Court that the powers granted to UK Police under the Terrorism Act 2000 of 'stop and search' without reasonable suspicion were in violation of the right to privacy of a person. It was observed by the Court that the powers granted to the Police under sections 44 and 45 of the said Act were:

*"Neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse" and thus are in "violation of Article 8 of the Convention"<sup>25</sup>.*

As per Anglo-American traditions, recognized by most of the states of USA, it is not lawful to reveal the private facts of a person if he does not like that the in formations concerning his private life to be made public, unless the person in question is a public figure<sup>26</sup>.

In US law the appropriation of a person's identity; his name, image, or some other aspect of his private life is considered an offense. Besides this to intercept the private communications of a person is also unlawful, unless the doer has some privilege or consent has been taken from the victim<sup>27</sup>.

The US Constitution has not recognized privacy by not incorporating it; however the US Judiciary has endeavored much to overcome this legislative deficiency, by recognizing the right to privacy through a considerable number of its

decisions. The Supreme Court of USA in some of its recent decisions have given recognition to the privacy right, by broadly interpreting the right to liberty guaranteed by the 14<sup>th</sup> Amendments to the Constitution. Some of the decisions in this regard are worth mentioning:

In a case entitled *Katz v. United States*, the Supreme Court approved Informational Privacy by giving protections to some types of electronic communications. In the said case the appellant, named Katz was convicted on the ground of transmitting illegal gambling wagers from Los Angeles to Miami and Boston. His conversations were recorded by FBI, secretly, by placing a listening device outside the phone booth. The Supreme Court of USA by reversing the decisions of the lower court decided that the recording of conversations of the appellant was in violation of 4<sup>th</sup> Amendment of the Constitution of USA and privacy rights.

The majority of the judges, in the said case were of the opinion that:

*"It is not relevant to consider either the place of the appellant was public or private" but "whether his conversation could reasonably be considered a private one"<sup>28</sup>.*

In the case entitled *Stanley vs. Georgia* the Supreme Court unanimously overturned all the earlier decisions, by invalidating all state laws which were prohibiting the possession of obscene material on the grounds of the 1st and 14th Amendments of the Constitution.<sup>29</sup> It was decided by the Court that:

*"An individual right to possess and view pornography in his own home is protected under the right of privacy."*

Justice Marshall remarked in this case as:

*"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's mind"<sup>30</sup>.*

In the case entitled *Ravin vs. state* the Alaska Supreme Court held that the right of a citizen to possess and use small quantities of marijuana at his home has the Constitution's privacy protection. While concluding the case the Court ruled that:

*"We conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied"<sup>31</sup>.*

- 1) In the case of *Cruzan v. Director, Missouri Department of Health* the concept of privacy was widened by including in it the:

*"Right to refuse medical treatment under the 'Due Process Clause' and its implied right to privacy"<sup>32</sup>.*

- 2) In one of the landmark cases entitled *Griswold v. Connecticut* (1965), the Supreme Court of USA while recognizing the right of privacy, at least for the married couples, invalidated the law on the use of contraceptives by married couples on the ground that it violates the "right to marital privacy".<sup>33</sup>

The decision was based on the 4<sup>th</sup>, 5<sup>th</sup>, and 9<sup>th</sup> Amendments of the Constitution. The 4<sup>th</sup> Amendment provides protection from searches and seizures of private homes, without a warrant based on probable cause, the 5<sup>th</sup> Amendment gives

guarantee of due process of law; whereas the 9th Amendment gives assurance that rights not specified in the Constitution are "retained by the people".

- 3) In another important case of *Eisenstadt v. Baird*, the Supreme Court of United States expanded the scope of sexual privacy rights to unmarried persons. The Court while deciding the case accepted it a right of unmarried persons to possess contraception on the same basis as that of married couples on the plea of Equal Protection Clause of the Constitution.<sup>34</sup>

The constitution of Pakistan has given recognition to the privacy rights of the individuals, by linking it to the dignity of person. The relevant Article of the Constitution speaks on the issue as under:

*"The dignity of man, subject to law, the privacy of home, shall be inviolable"*<sup>35</sup>.

What appears to us from the bare reading of the above mentioned Article is that the Constitution of Pakistan treats the 'right to dignity' and of 'privacy', both as the fundamental rights of the individuals.

In addition to incorporation of the right to privacy by the Constitution, the Pakistani Judiciary has played an important role in enhancing and endorsing the right to privacy of the individuals. Some of the decisions of the higher judiciary, in this regard are worth mentioning.

In the case entitled *Chamber of Commerce and Industry, Quetta Baluchistan vs. Director-General Quetta Development Authority*, it is held by the Baluchistan High Court that:

*"Whilst privacy of the home was specifically recognized as a Fundamental Right (Art.14), people in public spaces were also entitled to limited personal space and privacy given the exigencies of the situation and to the extent that same could be ensured"*<sup>36</sup>

And

*"Fundamental Right of dignity (Art.14) would be violated when the users of the Park were holed in within the pit of the Park Fundamental Right of dignity"*<sup>37</sup>

In the same case it was further observed by the learned High Court of Baluchistan that:

*"Couples, families or for that matter any person would be deterred from venturing into the Park if every movement of theirs could be monitored, they, in circumstances effectively would be discriminated against, in respect of access to a public place which was yet another Fundamental Right infringed"*<sup>38</sup>.

In another case of Baluchistan High Court entitled *Ghulam Hussain vs. Additional Sessions Judge, Dera Allah Yar*, the learned Court while acquitting the Accused from the charges observed that?

*"Article 14 of the Constitution had also, guaranteed the fundamental right of privacy of home. Almighty Allah has himself bestowed such right upon human beings, which has been specifically mentioned in the Holy Quran and in the teachings of Prophet Muhammad (SAW)"*<sup>39</sup>.

Keeping in view the facts of the above mentioned case it was held by the Court that the raid on the house of the accused was conducted in violation of the mandatory provisions of section 8 of the Baluchistan Prevention of Gambling Ordinance, 1978. The "privacy of home could be violated only in certain exceptional circumstances and to do so strict compliance of the applicable law had to be made"<sup>40</sup>.

In the case entitled *Shariq Saeed v Mansoor Ali Khan* it is held by the *Sind High Court, Karachi* that:

*"While exercising right of freedom of speech and expression, one has to keep in his mind that he has also a corresponding responsibility and duty to ensure that his*

*freedom of expression and speech may not transgress limits of freedom beyond the boundaries of Art.14 of the Constitution.”*

Thus,

*“While allowing freedom of speech and expression as a fundamental right, it is also provided under Art.14 of the Constitution, that dignity of man, subject to law, the privacy of home are inviolable<sup>41</sup>.”*

In the case entitled Muhammad Siddique Vs. the State it was held by the Court that entering into the house of the accused, without warrant is a clear violation of right to privacy of a person protected by the Constitution of Pakistan as well as against the injunctions of Islam. It speaks as:

*“Islam attaches much importance to the sanctity and maintenance of privacy of the house and nobody is allowed to violate the privacy of the house irrespective of the business done being in the house.”*

Thus,

*“The provisions of the Art.14 which provides sanctity and privacy to a private house were also violated<sup>42</sup>.”*

In the case of Ahmad Nawaz Vs. the State it was held by the Karachi High Court, Sindh, that:

*“Article 14 guarantees to all citizens of Pakistan that their dignity, subject to law, their privacy of home was inviolable<sup>43</sup>.”*

### **Implications**

Privacy law is the area concerning the protection of privacy of the individuals. However, there is no universally accepted privacy law among all the nations and states. In spite of the endeavors made by the world community the overwhelming majority of world population is still deprived of privacy rights of a person and his family.

Though the idea of privacy has been incorporated by all the international and regional instruments of Human rights and states of the world in their respective instruments and constitutions the world community but the fact is this world community has been failed to reach on some norms of privacy, accepted by all the nations and states of the world.

The laws of privacy of the individuals, in the western perspective may be conflicting with its idea of ‘freedom of expression and liberty’ which may require public disclosure of information that would otherwise be considered private in other cultures, civilizations and state laws pertaining to right of freedom of expression and liberty.

Privacy fails to get recognition in the US Constitution. However, the US federal Government and most of the states of USA have enacted laws, covering all of the dimensions and aspects of privacy, but have given recognition to some while denying others.

The American Courts have inferred the idea of privacy from the concept of freedom in the broader perspective, which is based on the perception of man’s liberty from government interference, incorporated in the 4<sup>th</sup>, 5<sup>th</sup> and 14<sup>th</sup> amendments to the Constitution and have endeavored much to give recognition to the privacy right and made some landmark decisions in this regard.

The interesting note in the perspective of American law of privacy is that from the same concept of freedom the plea of defense against the right to privacy is taken. Thus the justification to disclose or publish in formations pertaining to the personal and private life of a person is inferred from the concept of right to freedom. Due to

this reason the Informational privacy of the individuals could not be recognized by the courts so strongly.

The United Kingdom denies recognizing any of the fundamental rights of the individuals including the right to privacy. Moreover, the U.K law, sometimes, takes it as a defense that disclosure of private information is in the public interest. Thus according to U.K Law it is not possible to bring an action for invasion of privacy. However, an action may be brought under another tort and privacy must then be considered under E.C law.

The Constitution of Pakistan while recognizing the right to privacy links the idea of privacy to the dignity of person. Besides this the higher judiciary of Pakistan played important role in enhancing and endorsing the right to privacy of the individuals, through many of its decisions, but for all practical purposes no one's respect and honor is cared for.

### ***Privacy: A Shariah Perspective***

Scholars of Islamic Law have paid considerable attention to the topics associated with different aspects of privacy law. In this regard attempts have been made to articulate general principles of classical Islamic Law in a contemporary manner to address challenges emerging from technological developments. In the discourse of Muslim scholars, traditional notions such as bodily privacy, privacy within one's home, or privacy resulting out of private property are received with far less scepticism than more recent aspects of privacy. With the burgeoning increase in information exchange, the ambit of privacy concerns is widened but not always understood. While earlier notions of privacy confined themselves to physical intrusions, it is now possible to invade a person's privacy without physically intruding on their space<sup>44</sup>.

### ***Conclusion***

A study of Islamic Law reveals that the concept of privacy in Shariah law rests considerably within the taxonomy adopted in contemporary law Sources of Islamic Law accommodate concerns surrounding private property, personal autonomy, protection of private communications, domestic life, modesty and the modern idea of surveillance. Moreover, Shariah Rules endorse the idea of a public and private sphere. The public sphere is occupied by society and governmental action and hence it is being liable to scrutiny and observation. While the private sphere is reserved for individual and the divine alone. It is free from any interference except in accordance with principles of Islamic Law. Though the term "privacy" as such cannot be traced explicitly in the *Quran* or *Hadith*, a closer analysis of Islamic Law establishes that privacy as a pervasive theme has been fully considered and discussed.

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