



RESEARCH PAPER

**Legal Framework of Right to Privacy: A Comparative Analysis of
Western and Islamic Law**

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PAPER INFO ABSTRACT

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| Received: August 24, 2021 | <p>Endeavour of this paper is to grasp the idea of the right of privacy to establish its utility for social conformity and harmony in the postmodern world Islam v modern world. It has so happened in the last few decades that Islamic law and Western ideology seems to be poles apart to a common person but this paper serves to establish that Islam emphasizes as much the sanctity of the right of privacy as does western law. This research explores the importance of the privacy of an individual in Islam and shows that how Islam emphasizes maintaining the privacy of data. This paper is a venture to explore the right of privacy in both Islam and western law and to compare and contrast them to highlight the similarities and differences. The research finds out Western law seem to get swept away with the love of freedom to the extent that differentiating human and animal's life may get difficult whereas Islamic Shariah puts a restriction on individual's privacy where the individual's choice seems to influence the society at large. It is concluded that Islam differs from the Western law on the grounds of homosexuality, abortion, gambling, and addiction. It is recommended that as Right of Privacy has ultimate impact on the Society and when the right of privacy conflicts with the social welfare then it must be curtailed otherwise it may be lead to the collapse and disgrace of the society.</p> |
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Introduction

"Privacy is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure." (Robert Merton, 1968). Globally the 'Right to Privacy' is considered most important as 'right to life' in all

religions, culture, and civilizations. Both Islamic Law and contemporary legal world recognizes privacy as a basic human right, either explicitly or implicitly. It is not only an essential point in the fortification of human dignity but also reinforces other important rights as freedom of information, association, and expression. Internationally, the trend is rising to enact laws regarding comprehensive privacy and data protection. In the present socialized world there is a dire need to regulate the law regarding rights of privacy to protect person's private information that they don't intend to share. It is the arbitrary right of the individual or a social group to keep private information hidden or to expose it selectively as per their choice. Islamic law values it intensely and considers it as an 'independent human right.' The constitution of Pakistan holds it parallel to the idea of human dignity but the statutes' books are rather silent on the topic. Article 14 of the Constitution commands, that the respect of a man and the domestic privacy stays unbreakable and unfringeable. As Pakistan's statutory guidance lacks in the information regarding the right to privacy therefore Pakistan's courts rely on the Islamic Shariah law in this regard. Pakistan's judiciary tries to stand up to the international standards to provide minimum protection to the right of the privacy of the body, territory, and communication. In the present paper researchers aim to gather an all-encompassing information on the Privacy right, whether it be in Islam or Western legal world. Here researchers provide a compact legal analysis of contemporary legal world and Islamic law with respect to the Privacy right.

Material and Methods

Legal research is further classified into doctrinal and non-doctrinal methods. Amrit Kharel (2018) explains differentiates doctrinal legal research from non-doctrinal research in a manner that doctrinal deals with in-depth analysis whereas non-doctrinal research explores social facts, legal doctrines regarding social issues and influence of that law on society. Lawyers, judges and jurists have widely been using doctrinal research as a systematic means of legal reasoning since nineteenth century. In current study researchers have also used doctrinal legal research. Anwar ul Yaqin, (2007) explains that doctrinal research is more of a qualitative research meant to be carried out in the library. In a Qualitative data researcher can benefit from archives, books in libraries and research articles. The present paper is a doctrinal research presenting a qualitative analysis of the materials extracted from Quran, Sunnah, legal dictionaries, case digest, journal articles, legal encyclopedias textbooks, International and Municipal laws to gain an in depth analytical and comparative perspective of right of privacy in western and Islamic Law.

Right of Privacy in International Human Rights Covenants

The international human rights law recognizes the right of privacy as one of the basic human rights. It is enshrined in:

i) Universal Declaration on Human Rights (UDHR)

Article 12

Everyone possesses the right to be protected against any sort of interference in his privacy or family. Similarly everyone has a right not to tolerate the attack upon his honor and reputation.

ii) International Covenant on Civil and Political Rights (ICCPR)

Article 17

1. Everyone has a right to the sanctity of family, privacy, home and communication. Any illegal act on his honor and reputation will be subject to penalty.
2. Every individual enjoys this fundamental right to be protected by law against such meddling or assaults.

iii) Convention on the Rights of the Child (CRC)

Article 16

1. Children are equally protected by the law and according to this article each child enjoys the liberty for his privacy, family home and communication which is not to be interfered by anyone. Nor should their honor or reputation be attacked.
2. The law protects children against such interference.

iv) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 14

Migrants have an equal right to the protection of the law. The privacy of the migrants or any of his family members is not to be interfered with, nor should the family or correspondence be brought under any illegal interference.

The Human Rights Committee (HRC), which has the mandate to give authoritative interpretation of ICCPR, has issued General Comment No.16 to elucidate Article 17 of the Covenant. According to it, the said Article envisages that every individual must be protected against illegal interference in his private life, family matters or correspondence. This is the basic right of every citizen and any such attacks whether by State or other legal authorities are not to be tolerated. It is the prime responsibility of the state to provide protection to this right and to ensure legislative measures to prohibit such meddling and interference in the personal

matters. It has been explained by the HRC that the term 'unlawful' used in Article 17 means that the person's privacy cannot be invaded by anyone except by the sanction of law, similarly the expression 'arbitrary interference' shows that even the interference sanctioned by law should be reasonable and in accordance to the covenant. Moreover the term 'family' has been used in broader sense to include all that can be considered in the family as understood in the society, it may also include the residence of the person or his office. The HRC has clarified that under Article 17 of the ICCPR privacy rights are not absolute." Further, "as all persons live in society, the protection of privacy is relative. Pakistan acknowledges this basic right and has endorsed the Universal Declaration of Human Rights, the International Covenant on Political Rights and the Convention on the Rights of Child. Moreover Pakistan has also signed the Cairo Declaration on Human Rights in Islam.

Jurisprudence in UK

In England, the Justices of Peace Act according to the EPIC (Electronic Privacy Information Center) ordered for the arrest of the observers and listeners who were peeping into other's matters. Sir Edward's Coke's words in the Semayne's case [1604] 5 Co Rep 91a] are quite famous as he said: "the house of every one is to him his castle and fortress, as well for his defense against injury and violence as for his repose." Similarly Lord Camden CJ in *Entick v. Carrington* [(1765), 95 ER 807] held that "every invasion of private property, be it ever so minute, is a trespass." However, the English law did not recognize any general right or tort of privacy. A person complaining of disclosure of surreptitiously obtained personal information had limited remedy through an action for trespassing or breaking the confidence. In *Kaye v. Robertson* [(1991) FSR 62 (CA)] the plaintiff was injured in an accident and underwent brain surgery in a hospital. Two reporters posing as doctors came to his room and took his snaps. Kaye sought an injunction restraining their publication. The Court held that "in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy." In *Wainwright v. Home Office* [(2003) UKHL 53] the plaintiffs claimed damages for being strip-searched when visiting a prison alleging that it constituted a trespass. One of the questions before the House of Lords was whether invasion of privacy could give rise to a cause of action under the English common law. The House accepted privacy as the fundamental right but declared that there was no common law to punish for the interference in privacy. Lord Hoffmann suggested that only legislation could achieve the detailed approach required for such a tort. This approach was changed by The Human Rights Act, 1998, which was included in the European Convention on Human Rights Article 8 of the Convention asserts:

1. Every individual enjoys the right of respect for his privacy, family life and his communication.

2. No one can interfere in this right, not even the public authority unless it is necessary to interfere for economic well-being or for the national safety. Moreover, such interference can only be tolerated to avoid chaos, immorality or crime in the society.

Lord Hoffmann rightly portrays the value of Human Rights Act. He states that Human rights have identified private information as worth protection. This action has provided safeguard against the sharing of personal information in media and such unjustified publications. Hoffman observes that Human rights Act has held human autonomy and dignity esteemed and this will impact the future law making procedure. It will guide the court that what sort of information is required to be protected and in what circumstances interference or publication of personal information can be justified (*Campbell v. Mirror Group Newspapers Ltd.* [(2004) 2 AC 457])

In the following years, there have been various legislations on the subject like harassment in UK and in all of them the right to privacy has been protected. In English courts the right to privacy and the freedom of expression has been on par with each other therefore European courts of Human rights set out criteria to balance them.

Where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria in the balancing exercise include the following elements: contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [App No 931/13 (ECHR 21 July 2015)])

In case there is a struggle between the right to privacy and the well-being of the community then a test has to be applied based on four steps to analyze if the interference would be justified. i. the first thing to be checked is if the action taken is based on legitimate grounds adequate enough to compromise a fundamental right, ii. Secondly it has to be checked if the measure taken has a rationale claim and is connected to the legitimate aim. iii. Thirdly it must be considered that if there is a possibility to avoid interference and to use another measure and iv. Lastly, the consequences of such severe action must be kept in mind and the balance should be maintained between the well-being of the society and the rights of individual.

Jurisprudence in the United States

The word "privacy" is not clearly mentioned in the US constitution but Courts consider it entrenched within the First, Third, Fourth, Fifth and Fourteenth Amendments. Moreover the Ninth Amendment is also relied upon for extensive understanding of the bill of rights. It states that: "enumeration of certain rights [in the

Bill of Rights] shall not be construed to deny or disparage other rights retained by the people." Furthermore courts rightly believe that the concepts of "individualism", "limited government", and "private property" ultimately implicate the right of privacy. One such case is of *Boyd v. United States* [116 US 616 (1886)], here the Supreme Court held government could not interfere in person's property and his private zone is protected by the Fourth and Fifth Amendments. Either in criminal or quasi-criminal proceedings he could not be forced to testify against himself or his commodities like books or papers could not be confiscated to provide evidence against him. This opinion of Supreme Court is esteemed by the critics of law as Bradley J. calls it an effective opinion that impacts the essence of constitutional liberty and it protects man's domestic life and the sanctity of private life from the governments' invasion. Similarly in another case *Griswold v. Connecticut* [381 US 479 (1965)] the Supreme Court went against that law that stopped buying and selling of contraceptives to married couples owing to the fact that it violates the boundaries of privacy. After few years the court broadened the scope of this law to include unmarried people as well respecting their privacy, (*Eisenstadt v. Baird* [405 US 438 (1972)]). The ruling postulated that the law that stopped people from contraception goes against the equal protection clause of the US constitution. Gradually "trespass doctrine" was formulated that refers to one's house and his physical space as a private entity. However this doctrine was rejected in *Katz v. United States* [389 US 347 (1967)] on the pretext that fourth amendment provides protection to the people and not to the places. Accordingly:

...a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Consequent upon the location of the right to privacy in the "person", the American Courts have developed jurisprudence to protect "personal intimacies of the home, the family, marriage, motherhood, procreation, and child bearing." In *Loving v. Virginia* [388 US 1 (1967)] the Supreme Court challenged the law that considered interracial marriage as a crime. The court stated that the choice of the life partner is individual's choice and state has no right to interfere in that. The laws in this regard continue to evolve and then it was decided in *Stanley v. Georgia* [394 US 557 (1969)], that viewing pornography within his house is the private right of an individual. Then it was added on that having an abortion is a private right of a woman (*Roe v. Wade* [410 US 113 (1973)]). Moreover women were given right to abortion but few restrictions were maintained that were applied during the first trimester of pregnancy in *Planned Parenthood v. Casey* [505 US 833 (1992)]. The individual has been given the right to decide if he needs to stop life sustaining medical treatment

which may include hydration and artificial nutrition, in *Cruzan v. Missouri Department of Health* [497 US 261 (1990)]. In *Obergefell v. Hodges* [576 US 644 (2015)] the Supreme Court declared that bans on homosexuality and same-sex marriages are unconstitutional.

In cases challenging surveillance the US Supreme Court has tried to balance the individual's right to privacy with the country's compelling interest. In *National Aeronautics and Space Administration (NASA) v. Nelson* [562 US 134 (2011)], the question was whether background checks of contract employees violated their constitutional privacy right. The Court unanimously held that in the circumstances of the case it did not. It ruled that "the Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974 satisfy any 'interest in avoiding disclosure' that may arguably have its roots in the Constitution." In *Maryland v. King* [569 US 435 (2013)] the Supreme Court supported the statute enacted by the state of Maryland regarding storage of DNA samples of sexual offenders. The Court ruled that the DNA database would benefit the entire community so personal interest, if any, must give way to public interest.

Islamic Perspective

Mohammed Ali Al-Bar and Hassan Chamsi-Pasha (2015) explained aim of Islamic shariah is to better the life style of human beings and to guide them to the path of salvation. For this reason it focuses on protection of rights, conservation of life, preservation of intellect, safeguarding the religion, and protection of the offspring. The social fabric is closely knit based on these principles and incase of any conflict in these private matters the social fabric is likely to be destroyed. There are different examples in respected book Quran and Ahadees (the preachings of Prophet Muhammad (peace be upon him) which put great emphasis on the right of privacy, Surah An-Nur (24) Verses 27 and 28 order:

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

Again at different points Surah An-Nur people have been given a liberty to feel free to eat and rest in their own houses or in the house of their parents of which they may have possession. They have a right to be with their family or without them. (24) Verse 61 says:

...ye should eat in your own houses or those of your fathers or your mothers or your brothers or your sisters or your father's brothers or your father's sisters or

your mother's brothers or your mother's sisters or in houses of which the keys are in your possession or in the house of a sincere friend of yours: there is no blame on you whether ye eat in company or separately.

Similarly, Surah Al-Hujurat (49) guides people to avoid eavesdropping, not to spy, and not to gossip about other's personal matters. Verse 12 commands one in the following words:

O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother?

Sunanh Abu Dawud also provides narrations in this regard. Once a companion has been reported to be guided by the Prophet (PBUH) to "stand aside," while seeking permission to enter the house (Book 41, Number 5155). Similarly Book 43 narrates Prophet's practice in the following words:

The practice of the Prophet, peace and blessings be upon 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. (Number 5167)

People have also been warned of the consequences to spy over each other. "And pursue not that of which thou hast no knowledge; for every act of hearing or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning)." Even one is not allowed to read the private correspondence. Hazrat Abdullah bin Abbas reports that, the Prophet said:

Whoever glances through the letter of his brother without his permission, glances into fire. (Abu Da'ud Book 8, Number 1480)

Islam respects and recognizes the privacy of family members. One has been guided not to spy over the family members even and to enter into the house from the front door to avoid inconvenience for family members.

"It is no virtue if ye enter your houses from the back; it is virtue if ye fear Allah. Enter houses through the proper doors and fear Allah that ye may prosper (Surah Al-Baqarah (2) Verse 189)"

Moreover Islam guides the manners and grooming pattern for the kids at home. In Surah An-Nur (24) Verses 58 & 59 People have been advised to guide their children to learn to knock at the door before entering the room.

...But when the children among you come of age let them (also) ask for permission as do those senior to them (in age): thus does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom.

Furthermore it has been guided that siblings should not sleep together beyond a particular age. Sunan Abu Dawud, Book No.2, Number 495:

The Messenger of Allah (peace be upon him) said: Command your children to pray when they become seven years old, and beat them for it (prayer) when they become ten years old; and arrange their beds (to sleep) separately.

Therefore we see that in Islam there are certain bindings on an individual to groom them to be better as adults in the society. Similarly quite contrary to the western law Islam does not give freedom to the individual to indulge in homosexuality. All the scholars unanimously agree that Quran does not allow homosexuality, gambling or adultery. In a verse Hazrat Lut has been reported to have said:

‘Of all the creatures in the world, will you approach males, and leave those whom Allah has created for you to be your mates? No, you are a people transgressing (all limits)!’ Qur’an 26:165-166

Moreover Islam does not allow Man or woman to abort the child of their own will unless it’s mandatory to save the life of the mother so on and so forth. In case someone aborts the baby and realizes the mistake then Allah's Messenger (ﷺ) guided them to release a slave. (Hadith – Sahih al-Bukhari Book 87, Hadith 47,[6] Narrated Abu Hurairah).

Conclusion

Actual and legal persons both are privileged to enjoy the right of privacy. This right of privacy is not only a personal privilege but it is also required for the smooth working of the social structure. It assists in inculcating self-respect among individuals. The violation of this right can lead to the exposure of the data in public which should have remained hidden. Pithily, one may infer that the right of privacy is a basic right and demands freedom for an individual to hide certain information that they don’t want to share. Islam and contemporary law both respect this right, though there are certain prohibitions in Islam. Western law seems to get swept away with the love of freedom to the extent that differentiating human and animal’s life may get difficult whereas Islamic Shariah puts a restriction on individual’s privacy where the individual’s choice seems to influence the society at large. Islam differs from the Western law on the grounds of homosexuality, abortion, gambling, and addiction. It is generally evaluated that these above mentioned menace leads to the collapse and disgrace of the society. These rights have ultimate impact on the Society

and as discussed above when the right of privacy conflicts with the social welfare then it must be curtailed. At the same time there is a need to guide the masses regarding their rights and to regulate laws to make sure individual's right to privacy. Seminars and conferences can help in spreading the knowledge to the common man. Legal authorities must also be on the guard and make laws to support the right of privacy and to avoid any sort of undue intervening even from the state agency. For this purpose government needs to set a separate budget to facilitate the law enforcing agencies to keep individual's privacy sacred. To provide fast relief to the grieved facilitation centers can also assist. Privacy as a fundamental right gained much importance in the last years and is central to any democratic society. Moreover it assists other rights like freedom to express oneself and right to information but at the same time curtails them where one person's freedom begins to intervene into other person's private domain. Such interference can only be tolerated if it is protected by law and is needed for a certain legitimate purpose. Modern devices and technology has made it convenient to record and trace data but at the same time right to privacy has also evolved to avoid undue interference of the state in person's personal matters. The world at international level has postulated many principles in this regard to make them a part of national law as well. It has been discussed in the paper that Islam pays special attention to the right of privacy and both Quran and Sunnah emphasize upon maintaining a particular decorum even in the house to maintain 'individual's privacy.' Muslims need to respect other's privacy as a part of their religion and an obligation. Islam guides Muslims to avoid assumption and not to spread rumors about others. Islam believes in the innocence of the people and mere suspicion is not enough to cast accusations. It is incumbent upon the Government to guarantee the privacy of the citizens and to provide protection to them but at the same time no one should take the privilege of this right to harm the benefits of the Nation. Therefore when it comes to the general well-being of the society then Government has the right to intervene and set things right even if it means intervening into personal space.

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