February 23, 2011

Protecting Privacy; A Manifestation of Civic Rights

hossien Maleky Zadeh

Available at: https://works.bepress.com/hossien_malekyzadeh/1/
In His Sublime Name

Protecting Privacy; A Manifestation of Civic Rights

Written by Hossein Maleky Zadeh; PhD student of Criminal Law and Criminology at the National Academy of Sciences of Armenia

Everyone likes to be, in special domains, out of the range of any kind of offensive and control not only by government but also by his most sincere persons; he/she also likes that this right be legally recognized and the violators be punished; such a domain and realm is, in fact, "Privacy"; protecting individuals' Privacy is one of the manifestations of Civic Rights which, by virtue of International and Regional Conventions, has been recognized and is closely linked with keeping man's security, individual freedom and dignity; and private and government people should not normally be allowed to violate this holy domain under deceiving pretexts; among the primary duties of the states is to create immunity for citizens of that country in all dimensions, including individual, psychological, physical and economic immunity; thus, government, should not only establish immunity for the citizens, but also avoid any kind of unjust inspection and search in the affairs of the individuals living in that country; obviously, it is under the patronage of immunity and feeling of immunity in all dimensions that a nation is able to cover the distance of innate and God-gifted growth and exuberance, and achieve high stages of scientific and ethical advancement and perfection.

Owing to the fact that governments have always attempted to meddle in individuals' private affairs under various pretexts like: protecting immunity and public rights, in the recent decades, efforts were made to keep the individuals' privacy immune from the offensive of the statesmen and even private individuals in international and regional important documents and in basic and ordinary laws of the governments.

Following the orders of true Islam, the individuals' privacy has been recognized; however, due to the ambiguity and imperfection of these rules, protecting privacy and more specifically before public and government authorities, has always been (and is still) facing serious challenges; law making concerning the protection of individuals' privacy and completion of the existing laws with the religiously-democratic, and international criteria, is a necessary and inevitable task.

A. Definition of "Privacy" and the Sources Threatening it:

I. Definition of "Privacy": In spite of its deceiving title, no comprehensive and thorough definition of it has yet been proposed; for example, the outstanding American jurist, Louis Brandies, has a famous definition; he defines it as "The individuals' rights for being alone" meaning "confidentiality", that is the right of concealment of some affairs from others, or "the right of being obscure" and "protecting human generosity". Probably "Privacy" can be defined as "Information, Physical, Communication and Local territories of everybody's life which should be legally or commonly secured from any offensive, control, inspection, encroachment and entry". Considering the abovementioned definition, and due to the fact there is not a clear cut borderline between privacy and public domains, comprehensiveness and extensiveness of the words used to define "Privacy", the infringement of "Privacy" has always been conceivable. Therefore, a comprehensive and thorough definition of it and demarcation of its borders and limits are essential in Iranian ordinary laws. (1)
II. The Sources Threatening Privacy:

On the basis of rational distinction (determinism), the breaching and threatening sources of privacy are: 1. **Technology** 2. **Government** and 3. **Private Sector**. (2)

1-2- **Technology**:

In the past, individuals' "Privacy" was mostly breached physically; for example, a person entered another one's house without the permission of law or a competent authority; however, today, thanks to the surprising and strange advancement in the instruments for control, almost in the majority parts of people's individual and social life, the shade of control of these instruments is clearly visible, and the cameras installed in private and public institutes and even photographers and journalist are always preparing news, photos, and films of individuals' most private moments, and broadcast them throughout the world through the most advanced instruments in the shortest time possible, the hunts which have converted the happy private times of some of the statesmen into the most bitter moments of life for them.

2-2- **Governments**:

Governments, specially the despotic ones, have always tended to meddle in peoples' privacy under the pretext of keeping, safeguarding and protecting public domain; that is why, they have always extended the scope of their intervention; for example, frisk in special places, inspection of homes and offices, eavesdrop on telephone and internet conversations, and carrying out genetic examinations, etc.

2-3 **Private Sector**:

In order not to lag behind government section, the private sectors, too, have become active in breaching individuals' privacy in the community; for instance, they eavesdrop on laborers' telephone conversations without the permission of law and install close-circuit cameras in their place of activity.

B. **Privacy in International Documents**:

In numerous international and regional conventions and declarations, keeping human generosity, removing discrimination and observing human rights, irrespective of their language, race and ethnic group, have been stressed. And the right of life, freedom, personal immunity, prevention from intervention in private life, family affairs, their privacy, immunity of shelter and immunity of private communications have been pointed out. As an example, Articles 1, 3, and 12 of Declaration of Human Rights (1948) and Article 17 of International Pact of Civil and Political Rights (1966) and Articles 6 and 18 of Declaration of Islamic Human Rights (1990) can be enumerated. (3)

C. **Privacy in Islam**:

The purpose of the True religion of Islam is to educate man comprehensively and perfectly in a way that all his existential dimensions both materially and intellectually get flourished; the flourishing of man is materialized when he thinks freely and his privacy be immune from any inspection and unjust encroachment. The holy Koran (Chapter: The Light, Verses 27 and 28), has prohibited willful entry into other people's houses without the permission of the owner of the house; in order to observe moral standards and avoid ethical decadence, it has even prohibited the entrance of the children into their parents' room without their permission in special hours; in the Blessed Chambers of the Holy Koran, verses 11 and 12, God has forbidden people to search in other peoples' states and affairs saying: "La Tajassesso" meaning "Do not search"; and since the Holy Koran has forbidden this act, it is considered a major (moral) sin; considering the above-mentioned verses, entry into peoples' privacy, whether local and information, is forbidden from the Islamic point of view and is regarded an encroachment of privacy.
D. Domains of Privacy and Their Legal Protection

For simplicity, the domain of the issue of Privacy can be divided into four privacies:

   a. Information privacy  
   b. Physical privacy  
   c. Communication privacy  
   d. Local privacy  

We will deal with each one in operative laws of Iran:

Information Privacy:

Individuals' personal information like medical, financial, banking and governmental information, religious and philosophical beliefs, and sex information which should be kept confidential, are called: Information Privacy. In the operative laws of Iran, breaching people's information privacy has not been considered an offensive; thus, it has created a good vacancy for abusers; so it is necessary to consider it an offence; in article 648 of Islamic Punishment Law, punishment has been determined only for those who, because of their professions, are confidant but divulge the secrets; of course, we can point to Principles 15 and 22 of the Constitutional Law by virtue of which people's prestige, life and property are inviolable. According to Article 570 of Islamic Punishment Law, those who breach nation's rights recognized in the Constitutional Law, will be punished; however, as it was said before, legal vacancy is absolutely visible in this part, and the lawmaker should try to identify the broachers' criminal and civil liabilities by his intervention.

Physical Privacy:

Man’s body and physique, because of his/her innate dignity must be immune from offensive and search. Safety inspection may be done friskily, or the person being inspected must take off his/her clothes or the subject matter of the inspection may be his/her internal organs.

Safety inspection friskily on the defendant must be done when reasonable circumstances and resumptions are available, and the officers cannot do physical inspection willfully and whenever and wherever they desire; safety inspection friskily in connection with non-defendants on their arrival at and in their exit from important places with high security coefficient must be done under a rule depending upon the letter of the law.(4)

Because strip search is more advanced than the previous step concerning infringement and infringement of citizens’ rights of freedom, it must be done with more caution, and law must dealt with it more strictly. That is to say, this step must be done by order of competent judicial authority with the purpose of detecting a crime and collecting evidences of commission of crime so that if this search is not done, the evidences of commission of crime may be obliterated, and the proof of the crime becomes logically impossible or very difficult later on. Strip search must be done on the basis of legal grounds and grant of strip search order by judicial authority; the said order must be well-reasoned and justified and the police must not willfully do so; any breach of this order must be received as infringement of privacy and should be reacted by community (punishment); search of internal organs of the body is a clear and thorough interference in one's corporal integrity and must be prohibited as a rule.

Since the inspection of internal organs of the body may inflict injury and also the individuals’ privacy is seriously infringed, strip search like search of genital organs, stomach, intestine, etc. must be done by the order of a specialist physician and only in special cases and after the ruling of the strip search order and the availability of conclusive evidences for commission of crime and concrete necessity for
inspection; finally, in all frisks and strip searches, the gender of the searcher and the person being searched must be the same.

In spite of the importance of individual’s frisks, strip search, and search in man’s internal organs, Criminal Procedure Code of Iran has unfortunately remained silent in this respect, and has not rendered any order; the police and judicial authorities can issue all the three types of search on the basis of their personal view, and the defendant has no way but accepting it. This coincides with the fact that Criminal Procedure Code has engaged in searching places, houses and objects; obviously, individuals’ frisk is much more important than searching places, houses and objects; therefore, it would be necessary for the law to be engaged in the issue in detail, and the silence of the law in this respect seems unjustifiable. (5)

**Communication Privacy:**

Private right of communication including postal communications, long-distance communications, verbal, face-to-face and internet communications, must be immune from any offensive.

In accordance with article 104 of Criminal Procedure Code of Iran “In cases where it is necessary to visit, search and inspect postal letters, telecommunication, audio-visual devices belonging to the defendant in order to detect a crime, the judge will inform the competent authorities to confiscate the a/m objects and send them to him; then the judge will present them in the defendant’s presence stipulating the case in the process verbal…”.

The note under the said article prescribes that “Controlling individuals’ telephone conservation is forbidden unless in cases related to the security of the country, or is found necessary by the judge to recover the individuals’ rights.”

As it was noticed, this article has permitted the judge to control and search postal letters, telecommunication devices, etc. in order to detect a crime; but it has not specified the borders and the scope of this control; for example; it has not specified the length of confiscation and control of letters, eavesdrop on individuals’ conversations, and the frequency of control; but they have been left to the judge’s view. Moreover, it seems that in an important issue like controlling individuals’ letters and telephone conversations, it is vital to issue warrant of distress or eavesdrop on individuals’ telephone conversations in a very substantiated way. In article 582 of Islamic Criminal Code, the Iranian lawmaker has predicted one to three years of custodial sentence (imprisonment) or pecuniary (fine) for government employees and officers who open, control, search, confiscate peoples’ letters, or eavesdrop their telephone conversations without proceeding legal formalities; the lawmaker has remained silent concerning the ordinary people who take measure to confiscate postal letters and eavesdrop on their conversations, etc. without observing legal criteria; and the lawmaker’s silence does not seem justifiable in this regard. (6)

Concerning the Internet Communications, Iranian lawmaker had not enacted a law for computer crimes until 05-03-1388 (Solar Calendar corresponding with 29-05-2009); but at the said date, a law with 56 articles for computer crimes was approved; in the a/m law, unauthorized conversations eavesdropping, unauthorized access to computer system and data, spying, forgery, destructing, and disturbing computer system and data are considered crime; and in this respect, it can be said that the a/law was a comprehensive and complete one for protecting civic rights; ordinary people and officers were prevented from infringement of the internet domain; otherwise, they will be punished.
Local Privacy:

In accordance with principle of 22 of the constitution of Islamic Republic of Iran, the privacy of peoples’ houses and places are immune from any offensive; and in accordance with Article 96 of the Criminal Procedure Code, searching peoples’ houses and places and objects are possible when according to proofs, there exists strong conjecture for detecting the defendant or tools and evidence of crime and at that place; and in accordance with Articles 97, 98 and 99, and 100 of same Code, searching and inspection are possible when an important right is exposed to restriction, and it is necessary to enter the house. Inspection will be done during the day time and in the presence of the house owner, the witnesses and the people involved in the criminal issue unless inspection at night is essential in which case the judge must justify this kind of inspection. And finally, inspecting houses and local domain will be done by drawing up a process-verbal; in accordance with Article 96 of the Criminal Procedure Code, controlling individuals’ objects including cars, must be done by the judge’s order.

As it was noticed, since in the operative laws of Iran, private houses, places etc., have not been explicitly defined, and have not been distinguished from public premises, it is necessary to review the laws in this connection.(7 & 8)

Conclusion:

Although Iranian lawmaker, inspired by Islamic law, has made an effort to deal with privacy, the following weak points are observable in terms of privacy in Iranian Law:

1. Privacy has not been defined in Operative Penal Laws of Iran; thus a comprehensive and complete definition for it is necessary in order to protect it.
2. Concerning the infringement of information, operative laws of Iran have remained silent and only disclosure of its secrets are considered a crime; thus, it is absolutely necessary to approve a law in this connection.
3. Concerning frisk or strip search, and searching individuals’ internal organs, the Criminal Procedure Code of Iran has remained silent; thus, Iranian lawmaker must interfere in this important issue, the way of enforcing inspection, and the necessity of issuing a ruling, etc.
4. Privacy is often infringed for finding evidences of commission of crime in the preliminary enquiries and trial; therefore, it is mandatory to declare these evidences invalid in Criminal Procedure Code of Iran and so un referable in all the stages of trail.
References:

7. Pad, Ebrahim, Private Criminal Law; first Vol. Publisher: Publisher; Tehran University; 1969.
8. Tarkhani, Shahriar, How to Obtain Positive Proofs, Evidences, Signs and indications of crimes and their summon; first Vol. Publisher: Salsabil, 2005