



**RESEARCH PAPER**

**Right of Privacy: The Lacuna in Pakistan and Indian legal Framework**

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**ABSTRACT**

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Right of Privacy is a tricky thing to handle especially at international level as its meaning varies from one jurisdiction to the other. Though the right of privacy is considered as a fundamental right but it cannot be recognized as absolute one. The cultural, religious, constitutional and historical perspectives play significant role in shaping its boundaries. The right of Privacy is the basic block of an ordered and decent society. Surveillance and censorship are to be tolerated only when they are strictly according to the law and the legitimate aim proportionate the damage of the sanctity of the privacy. In this research, researchers aim to provide a summarized version of issues and events relating to privacy in India and Pakistan. Moreover it is an intense study to explore the state of the right of privacy in countries, the measures taken so far and the loopholes.

**Introduction**

The individual autonomy is protected by right of privacy. It is the duty of the state to ensure that rights of citizen should not be curtailed arbitrarily. There is no doubt that right of privacy is a fundamental right, but this right is not absolute. It is the duty of the court to examine privacy dignity with great care and caution and can only be denied if countervailing interest is proved to be superior. The highest level of protection of human dignity and liberty within the prescribed limits of law has been guaranteed by the constitution of Pakistan. The right of privacy is associated with other fundamental rights like right to life, liberty and human dignity. In 1212, British constitutional document Magna Carta protected the fundamental human rights from being ruined in following words

No freeman is to be taken or imprisoned or disseized of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.

The Indian Supreme Court has declared life and personal liberty as “prized possession” of an individual and a basic requirement of a civilized society. Dicey in his treatise on Constitutional Law defined personal liberty as a substance that should not be subjected to arbitrary imprisonment or any physical coercion. Eminent English Judge Lord Alfred Denning explain the concept of liberty as free moment of law abiding citizen without any impediment. The concept has been textualized in Siddharam Satlingappa Mhetre AIR 2011 SC 312 as "Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. This is why "liberty" is called the very quintessence of a civilized existence..." The Article 21 of the Indian Constitution protect the individual liberty in following words

No person shall be deprived of his life or personal liberty except according to procedures established by law.

It is evident by reading Article 21 that right to life includes all aspects of life that make life more meaningful and worth living. The right of privacy is one such aspect. In case of *Kharak Singh v. State*, Supreme Court of India has declared Regulation no 236 of UP police Regulation unconstitutional as it was against the Article 21 of the Constitution. The Supreme court further cleared that right of privacy is included in right of protection of life and personal liberty.

### **Material and Methods**

Legal research is further classified into doctrinal and non-doctrinal methods. Amrit Kharel (2018) 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 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 Pakistan and Indian Laws.

## **Jurisprudence in India**

There is no explicit postulate in the constitution of India regarding rights of privacy. However the Supreme Court under article 21 has included the right of privacy as the right of life. In India for the first the right of privacy was invoked in *M.P. Sharma v. Satish Chandra*. AIR 1954 SC 300. In this case the search warrant was issued and the fraudulent transactions of the board of directors were identified. Later, the prosecution with reference to American fourth amendment and by giving an allusion to *Boyd v. United States* 116 US 616 (1886) questioned the right of search to invoke the right of privacy. Whereas the jury held that it's the power of the state to order for search or seizures for social security. Therefore no importing of American fourth amendment makes sense when the constitution makers have not made any such regulation. After nine years of this case *Kharak Singh* invoked the right of privacy in the case *Kharak Singh v. State of U.P.* AIR 1963 SC 1295. He was acquitted in the case of robbery in 1941 owing to lack of evidence in 1941 but the police maintained his personal record under surveillance, under the Regulation 228 of Chapter XX of the Uttar Pradesh Police Regulations. Consequently his house was secretly enclosed, there were domiciliary visits at night, detailed inquiries were held by officers, constables and guards were to report for the absences from home and all the record was kept on the history sheets including the midnight knocks. In this case Supreme Court passes two judgments. According to one judgment the domiciliary visits at night was held unconstitutional as per article 2. According to the court the term used in the article "personal liberty" must be taken to stand for all varieties of rights which make up personal liberty. However the other stipulations were upheld by the court on the grounds Article 19(1) (d) is not infringed by a watch being kept over the movements of the suspect. Moreover it was reemphasized that right of privacy is not guaranteed under the constitution and therefore to keep a check on the movement of an individual is not an infringement of fundamental right.

Subha Rao J. has an opinion different from the researchers. It is argued by him that personal liberty is surely a comprehensive term and freedom to move freely is a part of personal liberty. However researchers do not agree with him and consider both rights to be separate entities. They can be said to be overlapping but it cannot be said that one has been carved out of another. Rao held that Article 21 ensures the rights of the individual to be free. All the judges in *Kharak Singh* did not agree with the regulation but Subba Rao and Shah J disagree with the Supreme Court and consider this regulation to be violating the right to privacy. In another similar situation *Gobind v. State of M.P.* [(1975) 2 SCC 148] police surveillance was challenged. Mathew, J. comments on the right to privacy that individual's life and his personality are free from intrusion unless there is some reasonable basis for it. Moreover though individual gets the right of privacy, freedom of expression and the right to move freely all over India still we cannot say that this right is absolute. Mathew however does not agree that there is a need to be careful only when the countervailing interest is

superior, if a court feels that the right of privacy is expected to be infringed then it must satisfy the compelling state interest test.

In *K.S. Puttaswamy v. Union of India* [(2017) 10 SCC 1] a 9-Judge Bench held that right to privacy is an inherent part of life and individual's liberty under Part III of the Indian Constitution. The Supreme Court holds 321 that the right of privacy is not of the nature that requires amending the constitution nor is court interested in interfering in the function of amending of the constitution which is given to the Parliament.

Accordingly, Privacy is normative as well as descriptive. Normative values include the liberty and interests which are the basic constitutional core of human dignity. The privacy includes respecting personal intimacies, the respect of family life, marriage, home and sexual inclinations. It also includes the right to be alone and personal choices. Privacy plays an important role in maintaining the diversity in society. Privacy cannot be surrendered or ignored just because the person is in public place rather it is the indispensable feature of the dignity of the human being .

There is surely a need for the constitution to evolve with the increasing demands of modern technologies. Advancement in technology has given rise to the concerns which were not there few years ago therefore the constitution and its meaning cannot stay static and get stagnant. The constitution needs to be adaptive and flexible to cope up with the changing times.

Privacy is not to be taken as an absolute right. According to article 21 infringing the privacy require a just and reasonable procedure. Interference into an individual's life must fulfill three requirements of legality, need and proportionality.

Privacy carries both positive and negative content. Where negative content includes a restriction on the state for not allowing it to interfere in the personal liberty of the citizen, the positive side of it makes it incumbent upon the state to ensure the privacy of the individual.

In *Navtej Singh v. Union of India* (2018 AIR SC 4321) 5-Judge Constitution Bench declared that sexual orientation is an important part of privacy. Accordingly it is the right of every individual including LGBT to express their sexual inclinations without any kind of fear of persecution.

### **Right to Privacy in Pakistan**

Article 9 and 14 of the constitution of Pakistan are the important ones regarding the right of privacy. According to Article 9 the security of the person is ensured which includes the right of life and liberty. And this has to be protected by law. According to article 14 the dignity of the man is holy and the privacy of home

shall be unfringeable. Moreover none must be tortured for getting evidence from him. One must understand the scope and meaning of these terms for complete comprehension. According to Fazal Karim, J. Pakistan and India adopted the meaning of life described by Fifth and Fourteenth Amendments of the US Constitution. In *Shehla Zia and others v. WAPDA* PLD 1994 SC 693 the Honorable Supreme Court enlightened that the word life is very important and covers all facades of human existence. Though the word life has not been defined in the constitution but it cannot be restricted to the mere existence from conception to death. According to the Supreme Court life for the person born in free country means to live with dignity. In this regard the right to life includes all basic necessities like access to justice, legal aid, environmental rights and the right to get pure and unpolluted water. Article 9 and 4 makes it incumbent upon the state to safeguard the lives of the people within its jurisdiction. In *Mohtarma Benazir Bhutto and another v. President of Pakistan and others* PLD 1998 SC 388 the Supreme Court it was held that the right to life must be considered as sacred right "which cannot be violated, discriminated or abused by any authority." In *Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others* PLD 1999 SC 504 it was declared that this right must not be denied even to the terrorists. Ajmal Mian, C.J. wrote that no patriotic Pakistani would support any of the terrorist or their activity but as taking the life of an individual violates article 9 similarly taking the life of that terrorist will also violate the article 9. The constitution of Pakistan lacks in the knowledge of liberty as its not defined there. If we look into Merriam -Webster Dictionary it states:

Liberty is the quality or state of being free: (a) the power to do as one pleases; (b) freedom from physical restraint; (c) freedom from arbitrary or despotic control; (d) the positive enjoyment of various social, political, or economic rights and privileges; (e) the power of choice.

J.S. Mill has also explained defined liberty as the liberty of conscience, thought, opinion and feeling. However he also refers to the liberty that comes with the responsibility to not harm others. One infers from these definitions that liberty is to be free from thinking, religious and emotional perspective but at the same time it is also noted that state has to keep a check on an individual who may harm others. In the Supreme Court refused to put restraints on the life of the wife whose custody was forcefully given to the husband by the High court. High court held that if given freedom she was expected to live an immoral life but the Supreme Court set aside this decision declaring that only on the basis of this apprehension one's liberty cannot be curbed. In another similar case *Mst. Nazneen v. Judicial Magistrate, Larkana and 2 others* 1999 MLD 1250 the Karachi High Court considered it a restraint on the liberty of the individual that the wife was detained in Darul Aman (shelter house). In *M. Younis Malik v. The State Bank of Pakistan through its Deputy Director, Foreign Exchange, Lahore and 3 others* PLD 1981 Lah. 181 this Court held that Article 9 must also be taken to include the right to possess the passport. It was elaborated that any

executive order which curtailed liberty must be struck down. In *Government of Pakistan and another v. Dada Amir Haider Khan* PLD 1987 SC 504 the Supreme Court held that an individual has a right to travel abroad. It also ensures that a citizen enjoys the right to speech and association. In *Mohtarma Benazir Bhutto and another v. President of Pakistan and others* PLD 1998 SC 388 the Supreme Court held that torture by state, any type of extra judicial killings, arrests are violations of Article 9 of the Constitution. In *Arshad Mehmood v. Commissioner/ Delimitation Authority, Gujranwala and others* PLD 2014 Lah. 221 a Full Bench analyzed the right of liberty from political dimension and held of this Court considered the political dimension of the right to liberty and held that Liberty does not only mean the freedom from government's pressure but also includes that participation in the government. For a citizen it infers the active participation in "collective power".

In *Ameen Masih v. Federation of Pakistan and others* PLD 2017 Lah. 610 the court made an amendment in the Divorce Act, 1869, which curtailed the liberty of a Christian to divorce even though his marriage was broken. The Court held that the requirement to prove the charge of adultery against the spouse perpetuates a dead marriage, impairs the quality of life and curtails the liberty of a person by forcing him to live through an unhappy family life against his free choice.

The importance of the right of liberty has once again been highlighted by the Supreme Court in *Khawaja Salman Rafique and another v. National Accountability Bureau through Chairman and others* PLD 2020 SC 456. In this decision the judge appreciatively quoted an Indian judge in the following words:

Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

Article 9 does not allow the modifications of rights of life and liberty "save in accordance with law." In general sense it means to have practical and substantive procedure of law. In *Khawaja Salman Rafique's case (supra)* the Supreme Court held that any curtailment of the rights of liberty must be justified on the basis of proportionality and necessity. Since it's a fundamental right therefore the curtailing the right of liberty must be proportionate to the benefit achieved.

Article 14 (1) also ensures the dignity of man's life and the privacy of home. Dignity is the central point around which the discourse of human rights is knitted. In *S v. Makwanyane* [1995] ZACC 3], speaking for the Constitutional Court of South Africa O'Regan J. said that "without dignity, human life is substantially diminished." Aharon Barak also elaborates the constitutional value of human dignity.

He refers to the normative role of human dignity which unites the human rights. Moreover it acts as a principle to determine the scope of constitutional rights and determines the proportionality of the law which limits the constitutional right. In *Fred Khumalo v. Bantubonke Harrington Holomisa* [2002 (5) SA 401], the Constitutional Court of South Africa held that human dignity affirms the worth of human being in social setup. It not only refers to the "self-worth" but also the public's assessment of value of an individual.

Similarly, in *Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others* PLD 2013 Lah. 413 Syed Mansoor Ali Shah, J. of this Court held that

human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, States, laws, human rights and respect of person originate in the dignity of man or his personhood.

Again, in *Barrister Asfandyar Khan and others v. Government of Punjab and others* PLD 2018 Lah. 300 held that dignity is the central human right and shows that human is a free being who has a right to develop his body and mind as he wishes. In other words dignity provides an opportunity to the person to shape his identity. Accordingly, human dignity stands infringed if a person's physical or mental health is harmed.

Though there is no clear definition of human dignity in the constitution of Pakistan but it has been recognized as an absolute right by specifying that "dignity of man is inviolable". In *Mst. Shehla Zia and others v. WAPDA* (PLD 1994 SC 693) the Honorable Supreme Court observed that "the fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and found only in few constitutions of the world." In *Mohtarma Benazir Bhutto's case* (supra) it observed that this right is all the more important for us because we are an Islamic country and Islam lays great emphasis on it. In a suo motu case, reported as 1994 SCMR 1028, the Supreme Court declared public hangings a violation of human dignity. It held that in all circumstances the dignity of every man is inviolable and executing in public violates the dignity of man and ultimately violates the right mentioned in Article 14.

In another case, *Liberty Papers Ltd. and others v. Human Rights Commission of Pakistan* PLD 2015 SC 42 the Supreme Court held that any speech meant to defame an individual ultimately offends the right of dignity by lowering the person's reputation in society. In *Arshad Mehmood's case* (supra) a Full Bench of this Court held that demanding the rule of law is also a part of human dignity. In *Haji Junaid Mahmood v. Government of Punjab and others* PLD 2017 Lahore 1 and also in *Barrister Asfandyar Khan's case* (supra) court held that right to life dignity and equality are the fundamental rights that need to be safeguarded by the state and special efforts must be done to help disabled persons become fruitful for the society.

In a relatively recent case of *Khawaja Salman Rafique and another v. National Accountability Bureau through Chairman and others* PLD 2020 SC 456, it was directed that courts must make decisions judiciously as an arrest causes humiliation and infringes the right to dignity.

The other half of the article 14 is inspired from Quranic teachings which forbid a person from entering into someone's house without permission. (Surah 24: Verses 27-28). In Justice Fazal Karim's words, "This command becomes in law a prohibition against unjustifiable entry and unreasonable searches and seizures." Privacy was directly linked to the dignity of the man in *Mohtarma Benazir Bhutto v. President of Pakistan and others* PLD 1998 SC 388. Here the Court held that to live life with respect and dignity a person needs to save his life and home from invasion and intrusion. Moreover it's added that the right is not conferred to the premises whether it be house or office but to the person and therefore this right should not be violated even if the individual is at public place.

It gets vivid from the discussion that right to life, privacy, liberty and dignity are overlapping and cannot be compartmentalized. In this regard *Rustom Cavasjee Cooper v. Union of India* [(1970) 1 SCC 248] the Supreme Court enlightens us:

In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.

Another similar view is seen in *K.S. Puttaswamy v. Union of India* [(2017) 10 SCC 1]. It is stated that the rights of liberty, life and human dignity are twined with the right of privacy. As privacy protects the autonomy therefore it directly impacts these rights. Similar thoughts echo in the decisions of Pakistan's Supreme Court in



Justice Qazi Faez Isa v. The President of Pakistan and others (Constitution Petition No.17 of 2019 etc.) It is held that

Recognizing and protecting the zone of privacy is the freedom and liberty our Constitution holds dear. Privacy attaches to the person and not to the place where it is associated. Home under Article 14 of the Constitution is not only the physical house but the entire treasure of personal life of a human being. The intrusion by the State into the sanctum of personal space, other than for a larger public purpose, is violative of the constitutional guarantees. Right to privacy is deeply intertwined with the right to life, right to personal liberty and right to dignity. 'Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say.' This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny and protected against 'unwanted gaze,' unless they act in an unlawful manner.

From legal perspective it is clear that laws cannot be absolute and every right might be misused to harm others. Dieter Grimm explains it interestingly that constitutional protection does not mean that right is free from all restrictions rather it shows that restrictions require constitutional justification except where the constitution announces the right as absolute.

According to Halsbury's Laws, In case of clash between different rights the constitution and statute must be explored deeply to identify the hierarchy of rights. Such scrutiny will help in concluding that which rights will supersede. Similar situation occurred in Northern Ireland and The High Court held that "the principle of open justice must yield to the right to life in the context of the present case... This qualified common law principle, of unmistakable importance, must submit to an absolute human right". Dehli High Court also gave a similar verdict in Rohit Shekhar v. Shri Narayan Dutt Tiwari [2011 (4) R.C.R.(Civil) 459]:

"In case of conflict between the two fundamental rights, it is the right which would advance public interest and public morality would be enforceable."

It gets clear here that the right to privacy is not an absolute right though it is twined with right to dignity. It has neither been described as absolute by the constitution nor is it among the explicit rights. It is an implied right<sup>50</sup> and may enjoy the same status but cannot be taken as absolute. In *Sharda v. Dharmpal* (AIR 2003 SC 3450), the Supreme Court of India held:

Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase 'personal liberty' this right has been read into Article 21, it cannot be treated as

absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash.

Furthermore when it comes to the public welfare and interest then the right to privacy must be restricted. In *Gobind v. State of Madhya Pradesh* [(1975) 2 SCC 148 at p.157, para 31] the Supreme Court of India held: "Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest." Pakistan's Supreme Court also holds similar opinion in *Justice Qazi Faez Isa v. The President of Pakistan and others* (Constitution Petition No.17 of 2019 etc.) where majority claimed that the plea for right of privacy cannot be entertained to justify the withholding of financial information that is required for the accountability process.

### **Conclusion**

Privacy is the basic fundamental right along with the right to life, liberty and dignity. It is an implied right and therefore not an absolute one. Moreover these rights cannot be separated into compartments rather they overlap each other. In case of conflict between these basic rights constitution and statute is invoked to analyze the superseding right. Freedom and rights are enjoyed with a certain burden of responsibility. Therefore certain restrictions are required to curtail people from harming others and the peace of society. The restrictions are applied proportionately to the benefit of the society. The right of privacy encourages the moral autonomy of the citizen. Pakistan and India have worked on these basic rights in the last few years to come upto the international standards. They have sanctioned the Universal Declaration of Human Rights, the International Covenant on Political Rights and the Convention on the Rights of Child. Pakistan has also signed the Cairo Declaration on Human Rights in Islam. However there is still a need in both countries that their state ensures the right to privacy to all citizens equally. Educating the masses and spreading the knowledge through media can acquaint public with their basic rights and develop an understanding. Seminars and awareness sessions may also prove fruitful for this purpose. Undue infringement of this right by the State needs to be checked by the legislators by regulating further laws. There is a need to set parameters that allow for peeping into the personal information or data of an individual. Unfortunately it is noted in this research that Pakistan lacks in data protection legislation. Pakistan and India usually lack in budget management and their Government needs to set the budget to frame policies to tackle the issues regarding right of privacy. Establishing independent accountability mechanism and adopting comprehensive data protection law can ensure the protection of the personal data of the citizens.

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