

## RIGHT TO PRIVACY: IS IT A FUNDAMENTAL RIGHT IN BANGLADESH CONSTITUTION?

Md. Zahidul Islam,<sup>1</sup> Asma Jahan\*<sup>2</sup>

<sup>1</sup> PhD Researcher, Ahmad Ibrahim Kuliyah (Faculty) of Laws (AIKOL), International Islamic University Malaysia (IIUM), P.O. Box 10, 50728 Kuala Lumpur, Malaysia.

<sup>2</sup> Asma Jahan, (Corresponding Author) Lecturer, Faculty of Laws, International Islamic University Chittagong (IIUC), 154/A, College road, Chittagong-4203, Bangladesh.

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### ABSTRACT

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#### **Keywords:**

*Right; Privacy;  
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Right to privacy is an important part of personal liberties. Human life is not complete without right to privacy. It strengthens human dignity and other values. It is also the ability of an individual or group to seclude themselves, or information about themselves, and thereby express themselves selectively. The aim of this paper is to focus on the right to privacy in Bangladesh Constitution. In the same time, author also focuses the Islamic perspective of right to privacy because most of the people of Bangladesh are following Islam. It is a qualitative research. The information has been taken from many readings, articles, books, newspapers and statutes. Now a day, Privacy has become one of the most important human rights of the modern age and it has been recognized around the world by Constitution.

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## INTRODUCTION

To find a universal definition of privacy is not an easy task. According to Gillian Black “Publicity Rights and Image” proposes that privacy is a desire of an individual to be free of intrusion.”<sup>1</sup> Article 8(1) of *European Convention on Human Rights* “Everyone has the right to respect for his *private* and family life, his home and his correspondence.” Justice Cory says privacy means “... the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion. An important aspect of privacy is the ability to exclude others from the premises. The right to be free from intrusion or interference is a key element of privacy.”<sup>2</sup> In another Justice Dickson said that “*Privacy* may be defined as the right of the individual to determine when, how, and to what extent he or she will release personal information. A reasonable expectation of *privacy* demands that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and that interception of private communications stands to afford evidence of the offence.”<sup>3</sup>

### RIGHT TO PRIVACY IN THE BANGLADESH CONSTITUTION

The Constitution of the People’s Republic of Bangladesh provides a group of provisions, under part III, which contain the fundamental rights. Unfortunately, the right to privacy is not specifically mentioned in any of those provisions. Does it mean the constitution does not regard the right to privacy so fundamental?<sup>4</sup> Some provisions of the People’s Republic of Bangladesh has discussed about privacy indirectly. There could be interpretation on it.

#### **Right to Privacy as a Subset of Right to Life and Personal Liberty**

Article 32 of the People’s Republic of Bangladesh says “No person shall be deprived of life or personal liberty save in accordance with law.” This article is similar with article 21 of the Indian Constitution. *Kharak Singh v State of Uttar Pradesh*,<sup>5</sup> in this case, the Supreme Court of India first recognized that there is a right to privacy under Article 21 of the Indian Constitution. The fact of this case is police went to visit a house of a suspected person at night under police regulation. In the Judgment, the

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<sup>1</sup> Black, G. (2011). *Publicity Rights and Image*, Oxford: Hart Publishing, p. 61-62.

<sup>2</sup> R v Edwards (1996) 1 SCR 128.

<sup>3</sup> R v Duarte (1990) 1 SCR 39.

<sup>4</sup> Zulhuda, S. (2013), Right to privacy: development Cases and Commentaries in Constitutional Law and Human Rights in Malaysia, edited by Khairil Azmin Mokhtar, Malaysia: Thomson Reuters Malaysia Sdn Bhd, p 452.

<sup>5</sup> 1963 AIR SC 1295.

Court says that “The fundamental rights of life and personal liberty have many attributes and some of them are found in Article 19. If a person’s fundamental right under Article 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this petition no such defence is available, as admittedly there is no such law. So the petitioner Kharak Singh could legitimately plead that his fundamental rights, both under Articles 19(1)(d) and 21, were infringed by the State. Hence, on these grounds the petitioner Kharak Singh was entitled to issue of a writ of mandamus directing the respondent- State of Uttar Pradesh- not to continue visit to his house.”<sup>6</sup>

In another case, *R Rajagopal v State of Tamil Nadu*<sup>7</sup> was held that “a prisoner convicted of murder wrote an autobiography which described his relationship with a number of senior prison officers, several of whom were his partners in crime. He gave the autobiography to his wife, with the knowledge of the authorities, who then handed it over to the petitioners’ magazine. The prisoner requested the petitioners to publish it, which they agreed to do. The first three installments had already been published when the Inspector General of Prisons wrote to the petitioners claiming the autobiography was false, that publication was against prison rules and threatened legal action if they proceeded with publishing. Fearing reprisals from the police, given that the prisoner described his links with a number of high officials, the petitioners sought a declaration that they had a right to publish. Since neither the prisoner, his wife nor his counsel were parties to the petition, the Supreme Court proceeded on the assumption that the prisoner had neither written his autobiography nor authorized the petitioners to publish the same in their magazine.”<sup>8</sup> In this case the Court says “The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a ‘right to be let alone’. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent -- whether truthful or otherwise and whether laudatory or critical. If he did so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> 1995 AIR SC 264.

<sup>8</sup> Ibid.

<sup>9</sup> Id.

**Right to Privacy as a Subset of Right to Property**

Article 42 of Constitution of People's Republic of Bangladesh discusses about the right to property. Article 42(1) says that "Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law." This article also mentioned right to privacy indirectly. In *Chen Yue Kiew (F) v Angkasamas Sdn Bhd*<sup>10</sup> Court found that a land owner is entitled to an exclusive use of his land and the air space above the land. The court would not hesitate to grant a perpetual injunction against anyone trespassing into the land of another or into the air space above it. Similarly, in the UK, the court in *Baron Bernstein of Leigh v Skyviews and General Ltd*<sup>11</sup> faced with the problem of balancing the right of an owner to enjoy the use of his land against the rights of the general public. In this case the plaintiffs land was flown over and an aerial photograph of his house taken without his knowledge and consent. The plaintiff sued the defendant for trespassing and invasion of privacy. The court held that a landowner's rights in the air space above his property are not extended to an unlimited height. The court also held that the act of taking a photograph from the air space above the ordinary use and enjoyment is not unlawful. However, Griffiths J attributed the act as 'monstrous invasion privacy.' In *Chong Chieng Jen v Mohd Irwan Hafiz bin Md Radzi & Anor*<sup>12</sup>

Court gives a judicial note and approval on the right to privacy and the right to property as the very basic rights of a man. The concurrent mention of right to privacy and the right to property side by side arguably indicates the strong relationship of the two as enshrined in the article 13(1) of the Federal Constitution of Malaysia. Article 13 of Federal Constitution of Malaysia discusses about right to property.

**Right to Privacy as a Subset of Right to Protection of Home**

Article 43 of the Bangladesh Constitution also guarantees the privacy of home and correspondence and in communications.<sup>13</sup> Article 43 say "Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health-(a) to be secured in his home against entry, search and seizure; and (b) to the privacy of his correspondence and other means of communication." In the case of *Bangladesh v. H.M. Ershad*<sup>14</sup> it was held that neither police officer, nor any other public functionary can enter into the house of any citizen and conduct any search or seize anything unless he is duly authorized under any law. If the restriction imposed has no nexus with the specified matters or is in excess of the requirement for

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<sup>10</sup> [2003] 4 MLJ 365.

<sup>11</sup> [1978] QB 479.

<sup>12</sup> [2009] 8 MLJ 364.

<sup>13</sup> Islam, M. (2002), Constitutional Law of Bangladesh, Bangladesh: Mullick Brothers, p. 276- 277.

<sup>14</sup> Bangladesh v H. M Ershad, 52 DLR (AD) 162.

which it is imposed, or if the object can be achieved by any less rigorous means, or if the law does not provide a way of checking arbitrary or illegal exercise of the power of search and seizure, it will be found invalid.<sup>15</sup> Moreover, in 2011, a woman went to beauty parlour and found a hidden CCTV. A writ petition has been filed by the Bangladesh Human Rights Foundation. In this case, The High Court ordered the government to take out all close-circuit TV cameras from beauty parlours.<sup>16</sup>

### RIGHT TO PRIVACY IN ISLAM

The concept 'right to privacy' is not a new phenomenon. Muslims are practicing right to privacy from the beginning. The right to privacy is recognized in the *Holy Qur'an*.<sup>17</sup> In the same time, it is also recognized by the Hadith of Prophet Muhammad (SM).<sup>18</sup> In *Surah An Nur* ayat 27-28 laid down that-

*"O you who believe! Do not enter houses other than your own houses until you have asked permission and saluted their inmates; this is better for you, that you may be mindful. But if you do not find any one therein, then do not enter them until permission is given to you; and if it is said to you: Go back, then go back; this is purer for you; and Allah is Cognizant of what you do."*<sup>19</sup>

According to this *Qur'anic* verses, *Qur'an* suggest that it will not be fair to implement the privacy of another person without taking the prior permission of that person. Ayat 58-59 of *surah an Nur* also says about privacy. In this ayat it is laid down that-

*"O you who believe! let those whom your right hands possess and those of you who have not attained to puberty ask permission of you three times; before the morning prayer, and when you put off your clothes at midday in summer, and after the prayer of the nightfall; these are three times of privacy for you; neither is it a sin for you nor for them besides these, some of you must go round about (waiting) upon others; thus does Allah make clear to you the communications, and Allah is Knowing, Wise. And when the children among you have attained to puberty, let them seek permission as those before them sought permission; thus does Allah make clear to you His communications, and Allah is knowing, Wise."*<sup>20</sup>

<sup>15</sup>See Islam, n.13 at 277.

<sup>16</sup> News editor. (2011), Persona CCTV Probe Time Extended, *bdnews24.com*, 10 October.

< <http://bdnews24.com/bangladesh/2011/10/13/persona-cctv-probe-time-extended>>

<sup>17</sup> Karim, M. E. (2005), Citizen's Right to Privacy: Reflection in the International Instruments and National Laws, *Bangladesh Journal of Law*, Vol. 9, nos. 1&2, p. 35-68.

<sup>18</sup> Volume 1, Book 10, Number 509 (Sahih Bukhari); Book 31, Number 4003 (Sunan Abu Dawud); book 20, Number 4727 (Sahih Muslim).

<sup>19</sup> M.H Shakir's translation of the *Holy Qur'an*, as published by *Tahrike Tarsile Qur'an, Inc.*, P.O.Box.1115,Elmhurst, New York 11373.

<sup>20</sup> *Ibid.*

In another surah, *Surah al- Hujurat* ayat 12 say that-

*“O you who believe! avoid most of suspicion, for surely suspicion in some cases is a sin, and do not spy nor let some of you backbite others. Does one of you like to eat the flesh of his dead brother? But you abhor it; and be careful of (your duty to) Allah, surely Allah is Oft-returning (to mercy), Merciful.”*<sup>21</sup>

In a hadith reported by Abu Daud and Tirmizi which states to the effect, “O you who embraces Islam only by the tongue, and has yet acquired faith in his heart, do not ever hurt other Muslims, do not underestimate them, and do not spy their private life, for surely those who spy the life of other Muslims, Allah will cause his own matters followed by others.”<sup>22</sup>

The Cairo Declaration on Human Rights in Islam signed by major Muslim countries in 1990 confirms this principle in article 4 which says, “Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death.” In article 18 (b), the Declaration states that Islam recognizes that, “Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name.”<sup>23</sup>

### CONCLUSION

Privacy is not recognized directly by constitution of many countries. But if we see the decision and comment of different Courts, right to privacy is recognized as fundamental right. According to above discussion, we can consider right to privacy in right to property, life and personal liberty and it is a fundamental right. In the same time, right to privacy is recognized by many verses of Holy Qur’an. In addition, Court should play an active role in promoting the protection of citizen’s right to privacy. They can do this by interpreting the provision of Constitution

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<sup>21</sup> Id.

<sup>22</sup> Quoted in Al-Ghazali,(1994), *Huquq al-insan bayna ta’alim al-Islam wa i’lan al-umam al-muttahidah* (Human rights between Islamic teachings and the declaration of the United Nations), Dar al-Tawfiq, Cairo, p. 253.

<sup>23</sup> Sonny Zulhuda, n.4 at 456

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