

A STUDY OF THE RIGHT OF PRIVACY IN NEW CRIMINAL CODE (2013) AND ITS COMPARSION WITH INTERNATIONAL DOCUMENTS

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ABSTRACT

People in every society are entitled to have certain rights and freedoms according to their social developments and changes and within the framework of their culture and traditions; one of these rights is the right of privacy that has a close relationship with the issue of human dignity. The current research has sought to study various issues regarding the privacy via an analytic and documentary method and finally reached the result that there is no unique definition and notion of privacy and this is because of the differences of cultural, political and social visions of the societies. Iranian laws including constitution and other legal codes have alluded to certain important points as regards this right but one needs to mention that the legislator has not discussed all extensions of privacy in criminal code of 2013 and also in those parts where some issues have been raised as to this right sufficient criminal support has not been offered and from this point of view this code is in conflict with the relevant legal codes of this right in the international documents as in international documents and the Universal Declaration of Human Rights this right has been clearly mentioned. Generally speaking, in the laws of Islamic Republic of Iran no sufficient space has been allocated for the support of the right of privacy and individual freedoms and despite numerous similarities between Iranian laws and international documents there are still major differences as regards the issue of body inspection and the corresponding international legal codes.

Keywords: *Right of Privacy, Criminal Laws, Criminal Code, International Documents*

INTRODUCTION

Privacy as one of the basic needs of humanity that ensures human dignity and is a sphere of every human individual's life where he expects no one to enter without his consent or have access to its relevant information. The right of privacy, as a touchstone for measuring the degree of respect, paid in a society to human basic rights as well as the extent of his capability of determining his destiny by himself. It is also stipulated either in a general form or with details as one of the primary principles of democracy in the constitution of every country. There are numerous international documents that have recognized this right like the Universal Declaration of Human Rights (1948), International Covenant of Civil and Political Rights (1966) and Declaration of Islamic Human Rights (1990). These documents not only force their member states to observe the requirements of this right rather these member states are obligated to plug up the existing gaps in their internal legal codes in this regard. Privacy supporting has become more significant and vital particularly in recent years due to the development of modern communication technologies specially in cyber space; because the possibility of violation of privacy in cyberspace has increased in a considerable scale. While

there is no fundamental and systematic definition of this right and the notions of various individuals vary concerning the aspects of right of privacy. In such a state what needs to be taken into earnest consideration in Iranian legal system by the legislator is understanding the importance of this right and its effects on the relations of individuals with each other and with the government. There are numerous obligatory rules in this regard that have the capacity to change into positive rules. The criminal code adopted in 2013 has supported this right too and paid considerable attention to its various aspects. Thus the current research based on the following question and hypotheses seeks to conduct a comparative study of the place of right of privacy in new Iranian criminal code and in international documents. It is noteworthy that this research is a document and library based type of study and uses analytic, interpretative and comparative methods in a correlative form. The data collection method is document-library based and the tools used for data collection includes notes, relevant books, scientific and research papers and electronic websites.

Main Question of the Research:

What is the status of right of privacy in the 2013 Criminal Code and international human rights documents?

- ***Ancillary Research Questions:***

What are the existing similarities and differences between Iranian criminal system and international regulations?

Whether the observation of the right privacy in Iranian criminal system is consistent with international human rights documents?

Research Hypotheses

Main Hypothesis

The status of right of privacy is researchable in the 2013 Criminal Code and International Documents of Human Rights.

- ***Ancillary Hypotheses***
- Right of privacy in Iranian criminal system has numerous similarities with the international regulations and only there are some differences due to religious considerations taken into account in a number of cases in Iranian criminal system and they are unavoidable.
- The codifiers of Iranian Constitution have taken into consideration the international obligations of the country in the field of right of privacy as stipulated in the international documents of human rights. However, they have not acted according to the principles of human rights in the adoption of ordinary laws in several cases.

RESEARCH BACKGROUND

The debate of the right of privacy particularly in criminal code (legal procedure) is among the new issues that have been frequently discussed in recent years and despite the studies and research that have been conducted in this regard no complete and comprehensive comparative study has been done on the place of the right of privacy in Iranian criminal code and international documents. The current research is novel and pioneering because it investigates these necessities. Here we provide a report of the studies that have been conducted earlier on this issue.



Zane Farhadi (2012) in a research entitled “foundations of rights of privacy in Iranian legal system” has argued that today the right of privacy is considered to be one of the basic human rights both in international documents and also in the constitutional law of most countries. However, there is no independent law in Iranian legal system that would support this right. The complicated and paradoxical nature of the right of privacy shows that legislation in this area is hard and first we need to assay its foundations to prepare the ground for legislative actions. Thus, in the aforementioned research the author has sought to study this issue through three sections of ontological foundations, foundations of human rights and jurisprudential extensions of right of privacy as a basis for a logical legislation.

Fatemeh Moradi (2011) in a study entitled “comparative study of the place of privacy and its support in Shia and Shafei jurisprudence and Iranian Law” stated that privacy is one of the basic needs of human being and in a sense it is a right according to which individuals can determine the scope of access of others to their personal information. Privacy has a close relationship with the protection of human dignity and social life and thus guarding it against all types of encroachment is a kind of supporting the human dignity. The right of privacy has been highlighted since the dawn of Islam and an emphasis has been laid on the necessity of its observant. Moreover, in most of international documents of the human rights and international positive law the legislators have insisted on the protection of it against all types of violations.

PRIVACY AND CRIMINAL CODE

Privacy

Although privacy has been used in many of legal, political and social debates and even some definition have been offered of it, no clear definition of this term has been yet suggested by the scholars and legal experts have not reached a common ground on which they can seal an agreement of a unique code regarding it and each individual insists on his own definition. Privacy is a domain of an individual's life that he expects no one to have access to any information of it or enter it or supervise it in any form without his permission. In other words, no one should violate this right in any form (Ansari, 1989).

Body, cloths and personal objects, private places and houses, workplaces, personal information and private relations with others are all examples of privacy.

Alan Westin believes that there are four bases for individual privacy:

1- solitude, 2- intimacy, 3- anonymity, and 4- reserve.

Concept of Right in the Field of Privacy

Right to privacy has been defined by legal experts, scholars and researchers in various forms. Some scholars have defined the “right to privacy” as follows: “right of having the expectations that the content of confidential personal information expressed and revealed in a private place not to be exposed to the third party because it can be embarrassing for an ordinary person” (Moosazadeh, 2012).

According to the aforementioned definition: 1- a content is protected when it lies within the domain of solitude and privacy that has been firstly expressed or revealed in a private place and secondly is of a type of information the disclosure of which can be embarrassing or would hurt an ordinary man's feelings. 2- information that has been revealed by the individual himself in a public place in a voluntary form does not lie within the domain of right of privacy



and thus is not supported; private place in this context refers to every place that is normally considered as a private place like house, hotel room, booth and so on and so forth.

In another definition “right of privacy” has been defined as the “the right of confidentiality of the personal characteristics or one’s personal property from the public view” (Carl, 2004).

Foundations of Privacy

Privacy is a part one’s personal and family life that stands aside from the public-social-official realm. Thus, it is founded on the support of individual freedom and independence, personal dignity and support of human innate needs to personal and private issues.

Criminal Code:

The Article one of the legal procedure code of the public and revolutionary courts in criminal affairs adopted in 1999 defines the criminal code as follows: “criminal code is a set of principles and rules that have been codified for the discovery and investigation of the criminals and the legal procedure that should be taken for verdict issuance and appeals and implementation of opinions as well as determination of the tasks and jurisdiction of the judiciary officials”

The Article one of the Criminal Code adopted in 2013 with some modifications defines criminal code as follows: “criminal code is consisted of a set of rules and regulations concerning the discovery of crime, prosecution, preliminary investigations, mediation, peace making between the parties, the process of verdict issuance, appeal procedure, determination of the tasks and jurisdiction of judiciary officials and justice officers and observation of the rights of convict, victim and society”.

The legal experts have divided criminal laws to two groups of formal and essential. The essential criminal laws deal with the essence of crime, crimes penalties, penalty mitigation and intensification, determination of convict and the limits of criminal liability of the individuals involved in the crime. On the contrary, formal laws including the law of criminal code (legal procedure), outline the legal procedure proper to the investigation of the crimes. In other words, criminal code as a bridge between crime and punishment regulates this reaction (Khaleqi, 2013).

In fact, criminal code is one of the branches of public law that is considered to be an example of the binding and formal regulations and is concerned with the public order. This branch of criminal law outlines the procedure of investigation of a criminal case from its very beginning to its end. In criminal law in limited sense of the term crime and social reaction to it is discussed while the criminal code stipulated the details of the legal procedure that is taken for the prosecution. The procedure of the discovery of crime, prosecution, investigation, criminalization, final opinion, competency of the judge and judiciary officials for implementation of criminal verdicts are among the issues that are dealt with in the criminal code. Generally speaking, criminal code pursues two goals: one is the restoration of the order that has been damaged by the crime through organization of the institutions in charge of criminal justice; the second goal is the preservation of the basic rights and freedoms of the individuals through regulation of the reaction of the society before the criminal action. These two goals are of an equal importance and the criminal code regulations seek to keep the balance between them (Khaleqi, ibid).

Thus, negligence of the defendant rights under the pretext of guarding the public order is not desirable in the same way that any negligence regarding the preservation of public order in the



name of supporting individual rights and freedoms is blameworthy (ibid, p. 13). According to some legal experts, the goal of codification of criminal code is distinguishing between the right and wrong charges, prevention of judiciary mistakes and finally the peace of citizens (Ashuri, 2010: 12).

Privacy in Various Laws

As to privacy various points have been highlighted in Iranian laws, Criminal Code adopted in 2013, Constitution, Islamic Penal Code, Law of Freedom of Information, Universal Declaration of Human Rights and international documents.

Here we review some articles of the 2013 criminal code and constitution. It is noteworthy that in the current research due to the scope limitations we cannot mention all relevant legal codes. The readers who are interested in these articles can refer to the criminal code and other related documents.

• *A Short Review of Some of the Articles of the 2013 Criminal Code*

Article 4 of Criminal Code adopted in 2013 states that “Innocence should be presumed. Then, no one has the right to restrict anyone’s freedom or enter anyone’s privacy unless under the supervision of the judiciary and based on law and in any way these actions should not cause any damage in any form to the dignity of the individuals”

Some of the points that have been highlighted in the aforementioned law consist of:

1. Insistence on the Article 37 of the Constitution, i.e. innocence is presume. In other words, everyone is innocent unless there are evidence according to which the person is found guilty. This is to say that criminal prosecution needs substantial evidences and mere charges raised by the plaintiff or justice attorney are not sufficient for the start of a criminal prosecution and it is needless to say that the plaintiff or justice attorney are responsible for substantiation of the evidences. Thirdly, the innocence principle should be observed in all stages of the criminal legal procedure and it is presumed until the final verdict is issued. Fourthly, the other meaning of the innocence principle is that if there are doubts of the criminal nature of an action, the innocence should be presumed and this is also endorsed by the religion.
2. In the second part of the Article according to the Articles 22-25-32-33 of the Constitution it is emphasized that every action as regards restriction of the individual freedom in the legal procedure requires legal basis. In other words, any judicial decision that may lead to one’s detention should be preceded by substantial legal basis. In the Articles 237-238-239 of the new criminal procedure code have provided the legal bases in this regard. The important point is that any action that could restrict one’s personal freedom like travel ban should be authorized by the judicial authority even if there is enough legal ground. On the other hand, the action that restricts one’s freedom should be the only possible way (cf. Articles 247-248-250 Criminal Code). Moreover, entering one’s privacy in the form of inspection of one’s house, workplace, car, correspondences and electronic posts or asking for the detailed report of one’s personal calls or eavesdropping personal calls is forbidden and is only possible based on the law and the order of judicial authority. Of course, there should be also sufficient evidence proving the incidence of a crime. Individual privacy not only includes his personal life and workplace rather, it also covers all types of personal information related to bank accounts, relations and relevant documents even if they are registered in public offices.



To put it otherwise, any piece of information that is not revealed to the public consists part of one's personal privacy.

Article 137- Inspection of houses, closed places and also inspection of objects in those cases where there are strong evidences that suggest the presence of the convict or the discovery of tools, means and evidences related to the occurrence of crime are done upon the the order of the attorney and based on strong evidences in the file.

Article 138- The permission for inspection of the house, workplace or offices of persons or officials as well as the subject of the articles 307 and 308 and also the suspects of the crimes delineated in the clause d of the Article 302 should be endorsed by the head of the provincial judiciary and is enforced by the judicial authorities.

Article 139- If the inspection is in conflict with one's personal rights it can be allowed only if it is more important that the personal rights.

Article 140- House inspection is done during the day and only in emergency cases it can be done at night. The attorney will explain the reasons of the emergency in his report and if it is possible he should be present in the place.

Article 152- Inspection of mailed packages related to the suspect is done in those case that there are strong evidences that substantiate the crime detection. Thus, the attorney will ask the authority to apprehend the mailed packages and send for the attorney. If the apprehension is not possible, the officials will report this to the attorney and wait for his decision. After the apprehension the attorney opens and inspects the apprehended piece in the presence of the suspect or his lawyer and every single detail is reported and after getting the signature of the suspect the apprehended piece is kept in a safe place. The suspect's refusal from signing the report will be reported too. If the apprehended piece contains insignificant objects it will not be kept in a safe place and will be returned to the owner.

EXTENSIONS OF PRIVACY AND THE PERMISSION OF ITS VIOLATION

Extensions of Privacy in International Documents and Criminal Code

The right of security is one of the basic rights of the citizens and all governments are obliged to adopt required measures for ensuring the security of the citizens' lives, properties and dignity. Due to the emergence of new forms of crime and their impact on the global order, the governments consider themselves more obliged to provide the security. To ensure the security some of the classic principles are weakened and in some cases even are left aside. Following this transformation in the criminal law, a similar transformation has occurred in the criminology (Ahmadi, 2008: 95). On the other hand, situational prevention associates the fight against crime with the costs like delimitation of individual rights, freedoms, changing life style, setting some restrictions on the work and social presence of individuals and changing the hours of daily activities and commutation places regardless of certain interests and wishes. Thus, we review some of the cases where the privacy is violated:

- **Body Inspection:**

No special consideration has been included in the new criminal code regarding the process of body inspection of the arrested suspects in visible crimes and only in the Article 57 the legislator has sufficed to mention that the judicial authorities are in charge of adopting necessary measures as to preservation of the tools, means, effects, signs and reasons of the crime.



- *Inspection of Properties, Objects and Places*

According to the Article 137 of the Criminal Code inspection of houses, places and objects is done in those cases where there are strong evidences of the involvement of the suspect in the crime. In other words, if there is no strong evidence for the possibility of discovery of the suspect or the tools related to the crime no inspection should be done otherwise the judge will be sued. It is needed to be mentioned that this article refers also to object inspection.

- *Encroachment to Information Privacy*

“Information privacy refers to the immunity of the data regarding individual lives from any form of unauthorized disclosure or processing” (Aslani, 2005: 92). In the domain of information and communication technology and cyberspace this is referred to as the data security. The information limits require some special laws to be adopted in which certain measures are proposed for the security of individual financial, medical and other types of information. This area is also known as “information security”.

- *Violation of the Communication Privacy*

- ✓ *Violation of the Private Internet Communications*

Private internet communications refer to any communication that is made inside Iran and the user expects his message only to be read by the target person. These communications include email and internet phone calls.¹

The emerging communication technologies thinktank of the research center of Parliament has pathologically studied the conditions of the privacy in cyberspace and states that the privacy of individuals can be violated by the executive authorities, the network services providers and other people. Because many of the individuals and their private data are reported to the legal authorities for crime prevention purposes and if there is no clear rules for the use of these data this will be an example of violation of individual privacy.

- ✓ *Eavesdropping and Inspection of Letters and other Mails*

One of the other things that is done for situational prevention of crime is eavesdropping and inspection of letters and other mails. One of the requirements of the personal freedom is the immunity of the correspondences, phone calls, telegraphic communications and telex and in general all personal secrets. The Article 25 of Constitution, Article 12 of the Universal Declaration of Human Rights, and the clause b of the Article 18 of Islamic Declaration of Human Rights have declared eavesdropping forbidden. Also according to the Article 150 of Criminal Code adopted in 2013 “control of individual telecommunications is forbidden unless in those cases where the national security is threatened or for discovering the crimes stipulated in the clauses a, b, c, d of the Article 302.” In such case, upon the agreement of the head of the provincial office of judiciary the times and exact number of eavesdropping will be determined. The control of personal phone calls and the premises of the subject of the Article 307 of this law is hinged upon the agreement of the head of the provincial office of judiciary and this jurisdiction can not be transferred to any other person.

Violation of Privacy

It is needless to say that as regards privacy the basic presumption is the key role of the government in providing the individual rights and freedoms. However, it is far too clear that regardless of the basic rights that are so important that cannot be breached easily,



¹ This definition has been offered based on the clause of the Article 65 of the bill of support of privacy.

unconditionally of other rights is almost impossible. In the codification of such form of law some regulations are needed to be observed. In every legal and intellectual system, the scope of the intervention of the government in each single one of the individual rights and freedoms is clearly delimited.

Conditions of Violation of Privacy

A review of the global and regional documents and treaties of human rights show that most of them have enumerated human basic rights and freedoms and binded the member states to recognize these rights and freedoms for those who live within their territories. The majority of these international documents recognize the right of privacy for all human individuals and announce that every human individual should be protected against any form of dictatorial meddling (Article 18 of Islamic Declaration of Human Rights), arbitrary interventions (Article 12 of Universal Declaration of Human Rights and Article 11 of American Convention of Human Rights). No public authority has the right to intervene in the actions related to this right unless based on a law and requirement of the democratic society. Accordingly, conditions of violation of privacy can be summarized in three cases: 1- legality, 2- unarbitrariness, 3- necessity.

DISCUSSION AND CONCLUSION

The studies conducted on the safeguarding of the right of privacy the following results reached: the place and status of the right to privacy in a legal system of a country can be considered from two points of view: one from supportive point of view; that is to say, by criminalization of the behaviors that stand in conflict with this right and certain judicial actions for battling with those who encroach into other citizens' private life. Secondly, from the point of view of intervention and intimidation; i.e. the government may set certain restrictions on the privacy of the citizens in the form of state interventions or through criminal inspections of judicial authorities for detecting the crime related affairs. Or even some interventions may be required in the privacy for the sake of prevention of crime incidence or preservation of social, moral, health and political order.

As to the intervention of government in individual privacy one need to say that according to the procedures of the international institutions, the states have a relatively wider option to interfere in personal privacy. Nevertheless, their intervention should be firstly according to law and such a legal code must be precise and transparent, and secondly, the intervention should be towards the fulfillment of a legitimate objective. Such an objective might be national security, prevention of crime and chaos, protection of health, morality or other people's rights and freedoms. Thirdly, every intervention must have necessity. An intervention is necessary when it can establish a fair balance between public interests and individual interests that in turn needs precise, sufficient and relevant reasons otherwise the government would take arbitrary actions and encroach to the individual privacy.

The other point is that the human rights committee in its interpretation of the Article 17 of international covenant of civil and political rights has clearly announced that: "In body inspections some effective measures to make sure that these inspections should be done in a way that is not violating the dignity of the individuals who are inspected. Those who are inspected by the police officers or medical staff representing the government should be inspected by the same sex. In the US although the courts prefer the inspectors to have their



permission before doing the physical inspection they still confess that there is not enough time for earning permission. However, the criminal code of 2013 has not considered the body inspection in an independent way rather it has sufficed to the discussion of the relevant examples of the house and place and object inspection.

The Article 17 of the Covenant of Civil and Political Rights has asked the member states to mention their local meaning of the such concepts as house in their report. As to the things that are in the possession of someone two separated rights can be envisaged. The right of ownership and the right of privacy. The Universal Declaration of Human Rights in the Article 17 announces: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”

The article 21 of American Convention of Human Rights discusses the right of ownership as follows: “1. Everyone has the right to the use and enjoy of his property. ...2- No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

While in the criminal code of 2013 in the Articles 137 to 155 similar ideas in line with international documents of human rights have been noted as regards the house and places inspection. One of the other actions that is taken for situational prevention of the crime is eavesdropping and inspection of letters and other mails. Personal freedom requires the immunity of the correspondences, phone calls, telegraphic communications and telex and in general all personal secrets. The Article 25 of Constitution, Article 12 of the Universal Declaration of Human Rights, and the clause b of the Article 18 of Islamic Declaration of Human Rights have declared eavesdropping forbidden. Also according to the Article 150 of Criminal Code adopted in 2013 “control of individual telecommunications is forbidden unless in those cases where the national security is threatened or for discovering the crimes stipulated in the clauses a, b, c, d of the Article 302.” These actions have to be taken under the direct supervision of the head of provincial judiciary. However, in the international document particularly in German legal system G10 as regards privacy was revised in 2001 to bind the internet services providers to cooperate with security officials in order to enforce the law. Of course this was objected by the supporters of the data privacy.


In Iranian legal system privacy has not been supported in a concrete fashion. Privacy rights and freedoms are discussed and supported in an implicit way in other codes. Thus, Islamic Penal Code and Criminal Code and other relevant laws discussed in this research have explicitly and implicitly supported of some extensions of the privacy. Generally speaking, one can state that the legislator firstly, has not discussed the concrete extensions of privacy like body inspection and even in those parts that such discussion is raised no necessary criminal support is done. The violation cases can be seen in the Articles 648, 694, 698, and 582 of the punishment section of the Islamic Penal Code. In the Article 648 only the disclosure of the secrets by the people having a job or vocation has been criminalized and there is no word on the other cases. In the Article 694 some words have been stated of breaking into other people’s house with force and threat but nothing has been said of the penalty. The Article 580 is also just concerned with the state officials or those who are supported by the government. In the Article 582 only state agents are discussed and nothing is said about the nongovernmental individuals.



Although the current legal codes have supported privacy in some cases there is no sufficient support still of physical privacy, home privacy, staff privacy, personal information privacy, internet communication privacy and individual privacy over against the media disclosure of secrets. There are no dependable judicial support of the privacy against the new appliances that are used for secret disclosure.

Finally, one needs to mention that in Iranian laws and regulations there is limited criminal support of various aspects of privacy. In the Criminal Code of 2013 in many articles the protection and respect of the privacy has been taken into account but this has not been processed in a way that there is no detailed discussion of special cases and the way that physical inspection should be conducted. Only in the Article 57 it is stated that judicial officials are in charge of preservation of the crime related tools and evidences and to our surprise no single reference has been made to the physical inspection. To fill this gap one may say that objects inspection in the Article 137 of Criminal Code covers this point too. However, we should also take into account that this aligns man with objects and this is a disgrace and the current silence over this issue could have grave consequences. In general, rights and freedoms are not welcomed in the laws of Islamic Republic of Iran.

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