

E- Surveillance *Vis-À-Vis* Privacy Rights: An Analysis of Western and the *Shari'ah* Perspectives

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Abstract :

With the proliferation of digital technologies at the hands of individual and the state, the tension between security and privacy has further escalated. The immense development of information and communication technologies nowadays has become an unavoidable means to help assuring national security by way of electronic surveillance. However, such e-surveillance must be within the domain of necessity and therefore should respect inherent privacy right of every individual and it is a recent-past outcry in the West. Interestingly, this concept of privacy rights had been embraced extensively through Prophet Muḥammad (p.b.u.h) 1405 years back in Islam. Moreover, Islam extremely values and respects individual privacy rights by way of human dignity regardless of race, sex, color and religious belief. Thus this research work is penned to formulate the importance of protecting privacy rights for every individual under the shari'ah point of views and draw a critical analysis of it between Islamic and Western perspectives. This study will also attempt to develop a policy prescription from Islamic management perspective based on the teachings of the holy Qur'ān, the ḥadīth and contemporary Islamic literatures.

Keywords: *E-surveillance, Privacy Rights, Muḥtasib, Islamic law Perspective, Western law Perspective.*

1. Introduction

Islam¹ is a religion which calls people to the direction of peace, harmony and justice. The salient features of Islam direct people towards peace and moral life in both physical and spiritual aspects, from the cradle to the grave, in this world and the hereafter. Another distinctive characteristic of Islam is that, its teaching cannot be confined specifically to a certain group of people or for a distinctive zeitgeist, and this attribution makes Islam omnipresent, applicable to all the eon whatever past, present and future. These concepts are also applied in every layer of Islamic teaching, more specifically, in discussing Islamic law or the *shari'ah*.

The concept of 'law', in both the western and the *shari'ah* perspectives are not equivalent applications in governing and controlling of crimes in the society as well as the state. The philosophy behind the western law (specifically the common law) law is predominantly "*lex-humana*" (man-made law) i.e. a set of certain rules or legal doctrines, based on customs and norms of a state, that is enacted by certain group of people and application of it is only limited to that particular state's citizens which factually differ from other states rules. And the ultimate goal of 'common law' is nothing but to maintain or control of the society by applying of these rules and doctrines.² However, the philosophy of the *shari'ah* is different. Firstly, Islamic law is *lex-divina* (God-made law) i.e. a set of rules and principles that have derived from *Allah subhanahu wa-ta'ala* to His creation (human beings) through Prophet Muḥammad (p.b.u.h), which is eternal, universal and immutable in nature. And the nub objective of the *shari'ah* principles is "to control human actions- all human actions" and the measurement of judging such human conducts can be classified into five certain values (*al-ḥkām al-khamsah*) which are: (i) obligatory (*farḍ/wājib*); (ii) recommendable (*mandūb*); (iii) permissible (*ḥalāl*); (iv) reprehensible (*makrūh*) and (v) prohibited (*ḥarām*).³

It is important to note that, these five values have not been categorized by the holy Qur'ān, rather by the Islamic jurists (*fuqahā*) to determine in juristic manuals because all the Qur'ānic commands and injunctions are not necessarily specified and therefore, a command in the

¹ Islam is an Arabic word, genesis from the root word "*Silm*" which means: peace, purity, submission and obedience. Hussin, Azizah., Ismail, M. Nawi & Ali, M. Zamri., "Islamophobia: Is It A Humanity Issue?", Paper Presented at International Conference on Economics, Education and Humanities (ICEEH'14) Dec. 10-11, 2014 Bali (Indonesia), at 247. Retrieved from <<http://dx.doi.org/10.15242/icehm.ed1214101>>

² Mahajan, V.D., "*Jurisprudence and Legal Theory*", Eastern Book Company: Lucknow, 2006 at 50.

³ Ahmad, A. Atif., "*Islam, Modernity, Violence, and Everyday Life*", Palgrave Macmillan: The U.S.A., 2009 at 174.

Qur'ān sometimes can be evaluated as obligatory, recommendable, permissible or even to some extent prohibited for the Muslim people depending on certain circumstances.⁴ Undoubtedly, this attribution of the holy Qur'ān signifies its flexibility, universality and harmony with the unending validity of applying the *shari'ah*.⁵

As we have seen that, the interest of common law is to control the society and thus legislators in modern common law countries have to focus more on enacting such laws thereto which are essential for dominating society. In this course of action, sometimes individual citizens' rights are neglected by the legislature owing to greater social or security interest of the state. However, Islamic law is always very much conscious on individual activities and the violation of any divine rules (i.e. failed to perform an obligatory conducts, like: 'leave off daily prayer' or perform any prohibited conduct, such as 'drinking of wine'), the individual will be liable to Allah's punishment, which is determined in the holy Qur'ān and guided in the *ḥadīth* of the Prophet Muḥammad (p.b.u.h). Therefore, starting from mere bagatelle rights and duties of an individual onto state's interest, all are the subject-matters of the *shari'ah* and these earthly human conducts are evaluated based on a Qur'ānic maxim which is "promotion of good and prohibition of evil" (*amr bil-marūf wa nahy' an al-munkar*). Ergo, the entire concept of human conduct in Islam in terms of economic, social, political and all other aspects, individual remains the prime thespian, which indeed shows a difference from other scriptures and creeds.⁶

These differences are necessary to be considered before quoting relevant versus of Qur'ān and the sunnah of the Prophet Muḥammad (p.b.u.h) regarding the issue of Privacy in Islam. Because, all the spiritual commands that come from Qur'ān and sunnah incontestably possess the highest priority as a derivation of the root of Islamic law (*u'ūl al-fiqh*).

It is also noted that, unlike other divine religious books, the Qur'ān, as a scripture, does not only talks about the spiritual sides, but also deliver the way of human conduct as the guidance of human being. Therefore, all kinds of earthly human conducts are considered in this holy book regardless of any specific time. The concept of individual privacy has also been alluded concisely in several places of the Qur'ān to uphold the dignity of the human being. Although, the word "privacy" may not be found directly in all these verses, however, the implied

⁴ Kamali, Mohammad Hashim., "*Principles of Islamic Jurisprudence*", Ilmiah Publishers: Malaysia, 2007 at 34.

⁵ Ibid.

⁶ Kamali, Mohammad Hashim., "*The Dignity of Man: An Islamic Perspective*", Ilmiah Publishers: Malaysia, 2002 at xiii.

meaning of it can easily help a prudent person to identify the affinity between the intimate meaning of these verses and the individual privacy.

Throughout this literature, the researcher will testify the existence and the importance of individual privacy rights in Islam by going through the relevant verse of the Qur'ān, along with the contemporary *ḥadīth* of the Prophet Muḥammad (p.b.u.h). Some practices of the companions of the Prophet (p.b.u.h) will also be considered concerning this issue to make the argument strong and acceptable. A concise analysis on the concept of privacy rights in common law aspects shall also be considered to make the research more interesting and comparative.

2. Issue of Individual Privacy Right in Common Law & Other Religions

Under common law, the origin of the word 'privacy' is still vague to the majority of the scholars, albeit some exponents think that, it's root is very similar with other words like 'privation' and 'deprivation', which denotes 'not to be involved in public matters or episodes'. 'Privacy' has its own deep roots that embedded in history as well. In particular, abundant of privacy-related references from different scriptures, like the holy Bible⁷, the Jewish law⁸, substantive protection of privacy in primitive Hebrew cultures⁹, classical Greece and ancient China¹⁰ and the Code of Hammurabi¹¹, undoubtedly all these evidences testify the existence of the concept of privacy in the early days of the human civilization. In fact, privacy can be viewed not only as a personal value intrinsically beneficial for preserving of our sense of self, but also as an essential value for society as well.¹²

⁷ Hixson, R., *Privacy in a Public Society: Human Rights in Conflict*, New York: Oxford University Press, 1987 at 3.

⁸ Rosen, J., *The Unwanted Gaze: The Destruction of Privacy in America*, New York: Random House, 2000 at 16.

⁹ Moore. Barrington., *Privacy: Studies in Social and Cultural History*, New York: Random House, 1984.

¹⁰ Jingchun, C., "Protecting the Right to Privacy in China", *VUW Law Review*, vol. 36, ed. 3, 2005, 646–647 (the author states that privacy was protected, to some extent, in ancient China and an awareness of privacy may be found in the Warring States Period, referring to the era of about 475 BC to 221 BC).

¹¹ The Code of Hammurabi is a Babylonian law code dating back to about 1772 BC which details a set of principles meant to guide citizens of Babylonia with various activities such as agriculture, commerce, land rights, and contractual agreements. Article 21 of the Code of Hammurabi states: '[i]f a man makes a breach into a house, one shall kill him in front of the breach and bury him in it.' Article 21, Code of Hammurabi, 1750–1700 BC as quoted in: Lasson, N. B., *The History of the Development of the Fourth Amendment to the United States' Constitution*, Baltimore: John Hopkins Press, 1937, 14–15.

¹² Rengel, Alexandra., "Privacy as an International Human Right and the Right to Obscurity in Cyberspace", Vol. 2, (2014), *Groningen Journal of International Law*, at 37.

However, in general point of view, ‘privacy’ can be defined as: in a situation where populace intimate dealings with their friends and families, shall not be intruded or interfered by others, prior to every individuals’ consent and which shall be guaranteed by that state law. According to the Black’s Law Dictionary, privacy refers to: “... *the condition or state of being free from public attention to intrusion into or interference with one’s acts or decisions*”.¹³ Westin, in his seminal book "Privacy and Freedom" defined privacy as: “*the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behavior to others*”.¹⁴ Correspondingly, Bloustein linked ‘privacy’ with ‘human personality’ and opined that- “autonomy, dignity and integrity” of an individual are depended, influenced and protected by privacy.¹⁵ Kahn appreciates Bloustein’s dogma on privacy by saying that, privacy is the most and the integral part of an individual dignity and identity wherein invasion of such privacy can lead to downgrade individual dignity.¹⁶ He further showed a relationship among privacy, dignity and identity of an individual by asserting that:

*“...it is my assertion that privacy implicates that aspect of dignity grounded in the belief that a full realization of one’s personhood requires the recognition of, and respect for, the conditions necessary for each person to realize her distinct individual identity....”*¹⁷

Considering the above mentioned explanations on privacy right given by different scholars, it is certain that, in one point most of them had a common estimation, and that is- being free from other’s intrusion in every sphere of an individual life.

However, in this twenty-first century, we cannot ignore a century and a quarter back abstraction on privacy given by Warren and Brandeis¹⁸ only because of its bygone age; still it vivids its merits in this modern era. Moreover, numerous scholars have appreciated this legendary writing by saying that, it was "an unquestioned classic"¹⁹, “most influential law

¹³ Garner. Bryan A., *Black’s Law Dictionary*, Ninth Edition, WEST Publishers, 2009 at 1315.

¹⁴ Westin, Alan F., *Privacy and Freedom*, Atheneum: New York, 1967, at 7.

¹⁵ Bloustein, Edward J., “Privacy as an Aspect of Human Dignity” Vol. 39 (1964) *New York University Law Review* 962 at 971.

¹⁶ Khan, Jonathan D., “Privacy as A Legal Principle of Identity Maintenance”, Vol. 33 No. 2 (2003) *Seton Hall Law Review* at 378.

¹⁷ Ibid.

¹⁸ Warren, Samuel D. and Brandeis, Louis D., “The Right to Privacy”, Vol. 4 (1890) *Harvard Law Review* at 193.

¹⁹ Shapiro, Fred R., “The Most-Cited Law Review Articles”, Vol. 73 (1985) *California Law Review* at 1545.

review article of all”²⁰, “most brilliant excursions in theoretical jurisprudence”²¹, “a pearl of common law reasoning for creating a tort alone”²² and many more. Even quite a number of divergent English court decisions²³ have admired this article as one of the momentous, plinth and a brilliant literature in introducing privacy over 120 years. Warren and Brandeis defined privacy as: “*right to be alone*” which further recognized as the ultimate source for formulating the four incursions of privacy torts in today’s large American jurisdictions. This has been mentioned in the *Restatement (Second) of Torts* as follows:- (1) “*Unreasonable intrusion upon the seclusion of another*”, (2) “*Appropriation of the other's name or likeness*”, (3) “*Unreasonable publicity given to the other's private life*” and (4) “*Publicity that unreasonably places others in a false light before the public*”.²⁴ Indubitably, Warren and Brandeis’s groundbreaking literature on privacy has made bedrock for his subsequent scribblers to understand, analyze and expand the notion of privacy. There are some different leitmotifs or unifying ideas that have raised in dissimilar scholarly writings while conceptualizing privacy. These themes are:

- *The right to be alone;*
- *Privacy as an aspect of secrecy;*
- *Privacy as a form of control over personal information and*
- *Privacy as form of human dignity.*

²⁰ Harry Kalven, Jr., “Privacy in Tort Law-- Were Warren and Brandeis Wrong?” Vol. 31 (1966) *Law And Contemporary Problems* at 326- 327.

²¹ Adams, Elbridge L., “The Right of Privacy and its Relation to the Law of Libel” Vol. 39 (1905) *American Law Review* at 37.

²² Gavison, Ruth., “Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech”, Vol. 43 (1992) *South Carolina Law Review* at 437- 438.

²³ See: *West vs. Media Gen. Convergence, Inc.* [Tenn. 2001] 53 S.W. 3d 640, 642; *Albert D. Seeno Constr. Co. Ltd. vs. Twin City Fire Ins. Co.* [9th Cir. May 27, 1997] No. 94-17024, 94-17039, WL 285930, at 2; *Anderson vs. Romero* [7th Cir. 1995] 72 F.3d 518,521; *Miller vs. State* [Miss. 1994] 636 So. 2d 391, 394; *Griswold vs. Connecticut* [1965] 381 U.S. 479; *Pavesich vs. New England Life Ins. Co.* [Ga. 1905] 50 S.E. 68, 69; *Roberson vs. Rochester Folding Box Co.* [N.Y. 1902] 64 N.E. 442, 443;

²⁴ *Restatement (Second) Of Torts* § 652A (1977), view at <http://www.tomwbell.com/NetLaw/Ch05/R2ndTorts.html>. It is generally held that, Warren and Brandeis’s article played a milestone and fundamental role for formulating the modern Law of Tort on privacy. See: Barron, James H., “Warren and Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation”, Vol. 13 (1979) *Suffolk University Law Review* at 877. (Affirming that there is “*near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy*”); and Kramer, Irwin R., “The Birth of Privacy Law: A Century since Warren and Brandeis”, Vol. 39 (1990) *Catholic University Law Review* at 718-19.

3. Issue of Individual Privacy Rights in Islam

Forthrightly speaking, the appellation ‘privacy’ is neither ingrained directly in the holy Qur’ān nor in the *sunnah* of the Prophet Muḥammad (p.b.u.h), nor even stated firmly in the Islamic jurisprudence (*u ṭl al-fiqh*).²⁵ Notwithstanding, it does not confer that, Islam does not value individual privacy rights or there is no space for privacy rights for a person, as a human being. In this part of discussion, we will see how Islam extremely values and respect individual privacy rights, regardless of race, sex, color and religious belief.

In Islam, individual privacy is considered as the part and parcel of human dignity in family, society and state levels which has been shielded by the *shari’ah*. This has been confirmed by the verse of the holy Qur’ān where Allah lifted human dignity over all other brute creations on the earth by affirming that:

“... We have bestowed dignity (blessings) on the children of Adam... and conferred on them special favours, above a great part of our Creation....” (al- Isrā’, 17:70).

In this verse of Qur’ān, bestowing dignity upon mankind is inherent, intrinsic in nature and not conceded by any sovereign political power. Even, human dignity cannot be withdrawn by any authority for any lame excuse.²⁶ Moreover, this uncompromising inherent dignity of every man (being as a begotten of Adam), becomes milestone for the formation of the concept of ‘human rights’ in this twentieth century.²⁷

Dignity of an individual or group can be afflicted by dint of defamatory, abusive, absurd or sarcastic statement. Allah, the supreme and true law-giver, strongly prohibits this kind of bad deeds, which provokes for downgrading other’s dignity and upholds honour of a man by the following *āyah* of sūra al-Ḥujurāt:

“... O you who believe! Let no man mock another man, who may perhaps be better than himself. Let no woman mock another woman, who may perhaps be better than herself. Do not defame one another, nor call one another by nicknames. It is an evil thing to be called by a bad name after embracing the true faith....” (al-Ḥujurāt, 49:11).

²⁵ Ayub, Zainal Amin., & Yusoff, Zuryati Mohamed., “Leave Me Alone!': Syariah V Civil Law” Vol. 6, No. 99 (2007) *Malayan Law Journal Articles* at 99.

²⁶ Nurbek. Kenjebaev., “Protection of Privacy and the Personal Data in the Information Age: The Malaysian Approach”, (Ph.D thesis, International Islamic University Malaysia, 2008) at 73.

²⁷ Weeramantry, J., *Islamic Jurisprudence: An International Perspective*, Macmillan: Basingstoke (UK), 1988 at 64.

A famous Qur'ān exegesis and companion of the Prophet Muḥammad (p.b.u.h.), Ibn Abbās, narrated that: “*God most high has honoured mankind by endowing him with the faculty of reason*”.²⁸ Furthermore, human dignity in Islam, is an attested, confirmed and established right of every individual heedless of any discrimination.²⁹ Sayyid Quṭb, also showed a similar view of importance of human dignity of a person by saying that- “*Dignity is therefore the absolute right of everyone*”.³⁰

Correspondingly, a momentous face of Islam that distinguishes from other religions is, this assurance of human dignity given to all mankind regardless of status (Muslim or non-Muslim), quality (devout or impious) or condition (famous or notorious) of a person in the reckon of the society. Even, as a criminal, a person should not be undignified and thus the endeavor of executing punishment over a criminal is for retribution or reform and not affrontation or humiliation in Islam.³¹ This can also be evident from a *ḥadīth*, where Prophet Muḥammad (p.b.u.h.) beheld a funeral of a deceased person passing by and he started showing respect to that person death and remained standing until a companion told him that, this funeral was not for Muslim but for a Jew. Upon auditioned the companion's remark, the Prophet rebuked a counter question saying that: “*Was he not a human being?*”.³²

This enunciation of Prophet certainly articulates the equality and universality of Islam as a religion since all human beings are the begotten of Adam. In another *ḥadīth*, Prophet Muḥammad (p.b.u.h.) endorses the dignity of human beings by saying that:

*“...You are most pure and most dignified, but by the One in whose hands Muḥammad's life reposes, the sanctity and honour of a believer, his life and his property, is far greater than in the eyes of God”*³³

²⁸ Maḥmūd al-Alūsī, *Rūḥ al-Ma ānī fī Tafsīr al- Qur'ān al- Aẓīm*, Dār al-Turāth al- Arabī: Bairuth, n.p. Vol.XV at 117. See also: Kamali, “*The Dignity of Man: An Islamic Perspective*” at 1.

²⁹ Muṭafā al-Sibāī, *Ishtirākiyyāt al- Islām*, 2nd Edn., al-Dār al-Qawmiyyah li'l- Ṭibāah wa'l-Nashr: Damascus, 1379/1960, at 66. See also: Abd al-Ḥakīm Ḥasan al-Īlī, *al-Ḥurriyyāt al- Āmmah*, Dār al-Fikr: Cairo, 1403/1983 at 361.

³⁰ Sayyid Quṭb., *al- Adālah al-Ijtīmā'iyyah fī 'l-Islām*, 4th Edn., Isā al-Bābī al-Ḥalabī: Cairo, 1373/1954 at 59.

³¹ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, 3rd Edn., Vol. 8, Dār al-Fikr: Damascus, 1409/1989 at 720.

³² Kamali, “*The Dignity of Man: An Islamic Perspective*” at 2. See also: Sayyid Quṭb., *al- Adālah*, at 30; Abd al-Ḥakīm Ḥasan al-Īlī, *al-Ḥurriyyāt*, at 361; Muḥammad Abū Zahrah., *Tanzīm al-Islām li'l- Mujtama*, Dār al-Fikr al- Arabī: Cairo, 1385/1965 at 28.

³³ Al-Tabrīzī, *Mishkāṭ*, Vol. II, *ḥadīth no.* 2724.

3.1 Principles of Islam for Managing Dwelling Privacy

As it is undeniable that, the notion of ‘Privacy’ and its sphere in our life is very widespread in Islam, which covers all aspects of privacy like: ‘*sanctity at home*’, ‘*private correspondence*’, ‘*intimate conversation*’, ‘*privacy in working affairs*’, ‘*individual financial affairs*’ and so on. In fact, all kinds of fundamental rights that the western jurists had denoted in the last century, have already been enthusiastically cherished and guaranteed fourteen-hundred years back through Prophet Muḥammad (p.b.u.h.) in the primary sources (the Qur’ān & the *sunnah*) of *shari’ah*.³⁴

Correspondingly, Islam always gives high priority in conserving human dignity by buttressing privacy in private dwellings. For instance, a number of āyah of the Qur’ān lucidly stated that, individual private dwelling is immune to encroachment by any means. Strangers who aspire to trespass others house, must greet the denizen of that house and ask permission to gain admittance with admiration and courtesy. Allah addresses the believers in the Qur’ān in this regards as:

“... O you who believe! Do not enter houses other than your own, until you have asked permission and saluted those in them: that is best for you, in order that you may heed (what is seemly). If you find no one in the house, enter not until permission is given to you; if you are asked to go back, go back: that makes for greeter purity for yourselves: and Allah knows well all that you do....” (al-Nūr, 24:27-29).

Indubitably, this verse of holy Qur’ān signifies the sanctity of individual privacy in house. Moreover, whenever a person obtains permission to embark on a house, it is indispensable to enter thereto from the appropriate door. In other words, Islam does not allow any person to enter into another house by crossing the wall or in a way that is not legitimate for him to enter into that dwelling. The Qur’ān asserts that:

“... Righteousness does not consist in entering your dwellings from the back. The righteous man is he that fears Allah. Enter your dwellings by their doors and fear Allah, so that you may prosper....” (al- Baqarah, 2: 189).

³⁴ Between, Mohamed., “The Fundamental Rights: An Islamic Perspective”, Vol. 6 No. 1 (2002), *The International Journal of Human Rights*.

Even in the Qur'ān, *Allah subhanahu wa-ta'ala* secures household privacy for every people within their family members and ordain that, three times, any person including minor children other than married couple, are not allowed to enter their masters private room without taking prior explicit permission. The Qur'ān thus apostrophize to the believers as:

“... O ye who believe! Let those whom your right hands possess (that is: servants and captives), and the (children) among you who have not come of age ask your permission (before they come to your presence), on three occasions: before morning prayer; the while ye doff your clothes for the noonday heat; and after the late night prayer: these are your three times of privacy: outside those times it is not wrong for you or for them to move about attending to each other: Thus does Allah make clear the Signs to you: for Allah is full of knowledge and wisdom....” (al- Nūr, 24:58).

If we consider the guidance of Prophet Muḥammad (p.b.u.h.) concerning individual privacy, we can see that, Prophet's stand was very strict in assuring this right to privacy, more specifically in household matters. Numerous *ḥadīth* of the Propther narrated by different Islamic jurists which articulates the importance of obtaining permission from the dweller prior to enter the house. In fact, this taking of permission from the owner to enter a house should be beseeched thrice, and in the case of refusal, the stranger must depart without further ado. This had been reflected in a *ḥadīth* where Prophet Muḥammad (p.b.u.h.) advised to his believers that: *“Asking for permission (Isti'nās) is [allowed up to] three times. If it is not granted to you, you must return”*.³⁵ In another *ḥadīth*, Prophet stated that, *“Greetings (taslīm) precedes conversation”*.³⁶

If we consider the former *ḥadīth* en-masse with the later one, we can deduce that, two cardinal requirements: *isti'nās* (seeking permission) and *taslīm* (greeting) of familiarization can been seen, that also has been mentioned earlier in the sū'ra al-Nūr, āyah: 27-29. Furthermore, in this verse of Qur'ān, the expression *“hatta tasta'nīs ”* has been expounded as: *“unless you have obtained permission”* or *“until you have made sure that your presence is welcomed by the dweller”* by different scholars.³⁷ To put in a nutshell, the nub perception of this āyah is to make sure that, the potential visit of an individual would be gratified and

³⁵ Muslim, *Mukhta'ar Ṣaḥīḥ Muslim*, *ḥadīth* no. 1421.

³⁶ Muḥammad Abd al-Raḥmān al-Mubārakfūrī, *Tuḥfat al-Ahwāzī Sharḥ Jāmi al-Tirmidhī*, edited by Abd al-Raḥmān Uthmān, (3rd Edn.), Dār al-Fikr: Beirut, 1239/1979, IX, at 170.

³⁷ Ahmad, *“Islam, Modernity, Violence...”,* at 177.

welcomed in an expected pleasant manner by the dweller and that the dweller is in both mentally and physically prepared for welcoming his prospective guests in a proposed time.³⁸ Some *ulamā* (such as- Qatādah ibn Di āmah) are so rigorous in securing and establishing the standard of individual privacy rights that, according to them, seeking triple *isti'dhān* is the appropriate exegesis of the term “*tasta'nis*” mentioned in the Qur'ān and thus it should be the benchmark in every cases.³⁹ The precepts of *shari'ah* concerning individual privacy rights do not only confines to his/her house, but also cater similar privacy in private cars, boats, caravans and cubicle compartment of a public offices etc.⁴⁰

3.2 Principles of Islam for Managing Information Privacy

Like privacy in dwelling, Islam also avows privacy in information paradigm for every individual, what familiar terminology under modern common law is ‘personal data protection’. In Islamic point of view, personal or confidential data or information of an individual should not be divulged to others without obtaining deliberate consent of the person, regardless of the authenticity of the information. Looking it into different way, Islam does not brook any person to disclose personal information of any individual without having overt consent of that person. This rule can also be applied over a private correspondence of an institution where he or she is holding some confidential information by designation. This is outlined based on the injunction of the holy Qur'ān where Allah enjoined His believers:

“... O ye who believe! Avoid suspicion as much (as possible): for suspicion is some cases is a sin (crime). Do not spy on each other, nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Surely you would loathe it. Have fear of Allah. He is forgiving and most Merciful....” (al-Hujurāt, 49:12).

Prophet Muḥammad (p.b.u.h.) also admonishes his followers to show unnecessary suspicion over others. He further advised people, which narrated by Abu Hurayrah that:

“...Avoid suspicion, for suspicion is the gravest lie in talk and do not be inquisitive about one another and do not spy upon one another and do not feel envy with the other, and nurse no malice, and nurse no

³⁸ Ibid.

³⁹ Al-Ḥāfiẓ Ibn Kathīr, *Tafsīr al- Qur'ān al- Azīm*, Dār al-Sha b: Cairo, 1393/1973, III at 282.

⁴⁰ Kamali, “*The Dignity of Man: An Islamic Perspective*” at 63. See also: Nurbek, “Protection of Privacy...” at 76.

*aversion and hostility against one another. And be fellow-brothers and servants of Allah....*⁴¹

Correspondingly, information privacy is highly protected in Islam and it is not permitted by a person or an authority to know other's personal information what he or they do not require to know. It is because, any means of information such as: by post, fax or e-mail, are considered as deposits (*wādī'ah*) from the side of sender as well as the legitimate receiver.⁴²

In addition, the Prophet Muḥammad (p.b.u.h.) have accentuated the importance of protecting privacy of individual's correspondence and communication, without viewing the place and situation of conducting it. He further warned the believer of Allah by saying that: "*One who looks into the letter of his brother without his permission, is like looking into the fire of the Hell*".⁴³ This *ḥadīth* implants that, individual privacy does not necessarily bank on the place or situation, rather the traits or essence of the correspondence initiates a privacy right over both parties. And this privacy right is imperative for applying over correspondence which is also *sine qua non* for upholding human dignity.

4. Electronic Surveillance and Islam

Islam is a religion, which controls and guides human conducts in accordance with divine rules and precepts bestowed by Allah upon mankind. These divine creeds are applicable to all human beings and effective for all disciplines. In other words, the beauty of Islamic percepts is, these cannot be restricted with a specific time-span, rather all the Islamic axioms that derived from Allah through Prophet Muḥammad (p.b.u.h.) around fourteen-hundred and five years back, more or less have already accomplished with the contemporary problems and have proven to be susceptible to provide efficacious solutions thereto. This yardstick of Islamic principles undoubtedly have opened a door for reconciling conflicts between the *shari'ah* & modern technologies that erected in different times to accomplish managerial excellence.

The term 'Electronic Surveillance' or in short 'e-surveillance' does not have any trace in any of the Qur'ānic verse or the *ḥadīth* of the Prophet Muḥammad (p.b.u.h.). The ratiocination behind this is, during Prophet Muḥammad (p.b.u.h.), the technology did not reach up to that à la mode or up to date level what today's generation are in. The private as well as the

⁴¹ Muslim, *Ṣaḥīḥ Muslim, Kitāb al-Birr was-Ṣālat-I-wa'l-Adab*, *ḥadīth* no. 6214.

⁴² Kamali, Mohammad Hashim., *The Right to Life, Privacy and Ownership in Islam*, Islamic Text Society: Cambridge, 2008 at 288.

⁴³ Al-Suyūṭī, *al-Jāmī al-Ṣaḥīḥ*, at 165. See also: al-Maqdisī, *al-Ādāb al-Shar'iyyah*, Vol. II at 166.

government of most of the developed countries are reposing their trust on introducing e-surveillance technologies in their premises and public places to ensure national security. Notwithstanding, it does not betoken that *shari'ah* was totally unaware or does not have any ruling about it when it agitates a controversy for the violation of individual privacy right by way of downgrading or compromising human dignity.

In *shari'ah*, there is a term “*tajassus*” found in the Qur’ān and the *ḥadīth* of the Prophet Muḥammad (p.b.u.h.) which literally means: ‘curiosity’, ‘the state of being excited to know someone’s private matters’ or ‘looking secretly about others’ fault’. This term is used in primary sources of *shari'ah* to convey the mischievous effects of spying against an individual or a country, which is strongly forbidden. “*Tajassus*” includes any kinds of conspiracy for the purpose of listening or watching someone’s conversation or activities without getting prior consent of that person which may further degrade individual’s dignity. The holy Qur’ān clearly prohibits these kinds of sinful activities by saying that:

“... O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin (crime). Do not spy on each other, nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Surely you would loathe it. Have fear of Allah. He is forgiving and most Merciful....” (al-Hujurāt, 49:12).

According to Mohammad Hashim Kamali, by using the words “*wa-lā tajassasū*” in the above *āyah*, Allah absolutely proscribed all kinds of spying regardless of background aspiration of conducting this.⁴⁴ This direction of prohibiting spying does not only confine to the private premises, but also outlaws government to do so by means of wiretapping, spying at night secretly, eavesdropping, fitting of CCTV in the public places and so on. Even the *muḥtasib*, who is in charge of ensuring *ḥisbah* (i.e. adherence of goodness and forbiddance of evil) in an Islamic state, is not allowed to do spying with the intention of controlling crime.⁴⁵ Some *ulamā* opined that, *muḥtasib* who act as an inspector in the governmental agencies must take action against any undue exertions based on what he has found on the spot by direct observations, and not by applying any methods of surveillance such as: espionage, video-footage or wiretapping with the intention to gather evidence.⁴⁶ This had also been reiterated by the second caliph of Islam, *Umar ibn al-Khaṭṭāb*, by proclaiming that:

⁴⁴ Kamali, “*The Dignity of Man: An Islamic Perspective*” at 63.

⁴⁵ Ibid.

⁴⁶ Muḥammad Rākān al-Dughmi., *al-Tajassus wa Aḥkāmuhu fi'l- al-Ḥayāt al-khā'ah fi'l- Shari'ah al-Islāmiyyah*, 2nd Edn., Dār al-Salām li'l- Ṭibā ah wa'l-Nashr: Cairo, 1406/1986 at 149.

‘government’s action always on the basis of evidence, one who demonstrate benevolence in character, should not be mistrusted by others. Undoubtedly, Allah is the omniscient about the inner secret of every human beings’.⁴⁷ Numerous *ḥadīth* of the Prophet Muḥammad (p.b.u.h.) have been found as reference to avoid suspecting people which further lead to conduct spying. In particular, Prophet Muḥammad (p.b.u.h.) warned the believers of Allah by saying that:

*“... Beware of suspicion, for suspicion may be totally untrue and may amount to the worst form of lying; and do not spy on one another and do not expose each other’s hidden failings....”*⁴⁸

Correspondingly, peeping into other premises unlawfully is strictly prohibited in Islam. This can also be seen in the tradition of Prophet Muḥammad (p.b.u.h.) where he held that: *“If one’s eye has entered a private place, the person her/himself has entered”*.⁴⁹ In another *ḥadīth* narrated by Abu Hurayrah concerning peeping into other house is that: one day a person was looking into Prophet’s house surreptitiously through a small hole and once Prophet realized this, he then told to the intruder as- *“if I were to know that you had been peeping through the hole, I would have thrust that (a scratching instrument that Prophet was holding at that time) into your eyes”*.⁵⁰ Prophet Muḥammad (p.b.u.h.) further postulated that: *“one who attack and injure an intruder for the purpose of preventing unlawful peeping or spying within his/her own private premises, will not be obligated to punishment due to such attack”*.⁵¹

Therefore, spying committed against other persons is trenchantly forbidden in Islam and thus if a person hit or injured another person owing to defend peeping to his/her premises, shall not be liable for any punishment due to that attack. This prohibition of spying also have prolonged meaning which includes: listening to others conversation by way of wiretapping, eavesdropping or recording covertly by using tape-recorder while conducting electronic surveillance in this modern era. A similar warning has also been erected in the *sunnah* of the Prophet Muḥammad (p.b.u.h.) concerning prohibition of this kind of surveillance. According to this *ḥadīth* narrated by Ibn-Abbā’:

⁴⁷ Al-Ṭabarī, *Ta’rīkh*, Vol. V at 26. See also: Kamali, *“The Dignity of Man: An Islamic Perspective”* at 64.

⁴⁸ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. VIII, *ḥadīth* no. 305.

⁴⁹ Ahmad, *“Islam, Modernity, Violence...,”* at 177.

⁵⁰ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. XI, at 28.

⁵¹ Muslim, *Ṣaḥīḥ Muslim*, Vol. III, *ḥadīth* no. 5371.

“... One who eavesdrops of others and hears what they would not like him to hear, will have scorching lead poured into his ears on the Day of Judgment....”⁵²

In another *ḥadīth* narrated by Hudhayfah that, Prophet (p.b.u.h.) admonished the habitual eavesdropper stay far from doing eavesdropping by saying that: “*the habitual eavesdropped will not enter paradise*”.⁵³ Abu Barzah al-Aslami further narrated that, Prophet Muḥammad (p.b.u.h.) forewarned the false believer by saying that:

“... O community of people, who believed by their tongue, and belief did not enter their hearts, do not back-bite Muslims, and do not search for their faults, for if anyone searches for their faults, Allah will search for his fault, and if Allah searches for the fault of anyone, He disgraces him in his house....”⁵⁴

It is important to note that, once a direction or divine rule was articulated and framed by the *āyah* of the Qur’ān and the *sunnah* of the Prophet Muḥammad (p.b.u.h.), instantly all the companions of the Prophet abide this as a paramount ruling for implementing this in their social and political spheres. Considering the abovementioned anecdote, one of the faithful friend of Prophet and the second caliph of Macca, *Umar ibn al-Khaṭṭāb* also gave ‘individual privacy’ as the highest priority while controlling Muslim community. As reported by Adb al Rahman ibn Awf:

“... I spent a night with Umar on petrol in the city (Madinah). A light appeared to us through the window of a house with its door ajar, from which we heard loud voices and slurred speech. Umar said to me: This is the house of Rabiah ibn Umayyah ibn Khalif, and right now they are in there drinking. What do you think? I replied: I think we are doing what Allah has prohibited us from doing. Allah said not to spy, and we are spying. After hearing this, Caliph Umar accepted that reasoning turned away and left them alone....”⁵⁵

⁵² Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *ḥadīth* no. 1159. See also: Shaikh al-Albanee, *Ṣaḥīḥ al-Jāmī al-Saghir*, Vol. II, *ḥadīth* no. 6028.

⁵³ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. VIII, *ḥadīth* no. 82 .

⁵⁴ Abū Dāwūd, *Mukhtaṣar Sunan Abī Dāwūd*, *ḥadīth* no. 2283.

⁵⁵ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Vol. XI, at 41. See also: Ahmad, “Islam, Modernity, Violence...”, at 178.

Based on the above story of caliph Umar, it can be recapitulated that, Islam gives the utmost respect in ensuring individual privacy rights (in the form of human dignity) of all mankind. Furthermore, this individual privacy rights is so inherent that, in any way and for any purpose, spying cannot be accepted in Islam, even if any *ḥarām* is committed secretly by any person, the followers of Allah and His messenger are not allowed to spy on this. Moreover, most of the Islamic scholars and muftis⁵⁶ have showed a clear abandonment of spying by way of imposing electronic surveillance devices only to quest suspected mistakes done by a particular person. In fact, majority of the *ulamā* (such as: Imam Nawawī, Imam Malik & Auzai, Ibn Al-Qaim, Ibn Taymiyyah etc.) are in common opinion that, the punishment of spying conducted by any means should be death penalty.

5. Jurisdiction of *Muḥtasib* Concerning Individual Privacy Rights

Under the *shari'ah*, there is a precedent of formulating a position known as '*Muḥtasib*'. This was initiated for the first-time officially during the 'Abbasid periods'.⁵⁷ At those times, this post was initiated under the direct appointment and supervision of the king or the Caliph, conferring power to a person who was expert in judging and enforcing *shari'ah* principles. The primary duty of a *muḥtasib* was to check, observe and prevent all kinds of vices done by any citizen of the state or rewards declared for the citizens for their admirable deeds.⁵⁸

The classical explication of the powers and functions of a *muḥtasib* is found from the literature of Imam al- Māwardī.⁵⁹ According to al- Māwardī, the primary duty and responsibility of the *muḥtasib* was to adhere people with *ḥisbah* i.e. encouraging people for doing good deeds (*ma rūf*) and prohibiting people from wrongdoing (*munkar*).⁶⁰ Imam

⁵⁶ Muḥammad Rākān al-Dughmi., *al-Tajassus wa Aḥkāmuhu*..., at 149; Mohammad Hashim Kamali, *The Dignity of Man:...* at 63; Ahmad, "Islam, Modernity, Violence...", at 177-180. See also: Al Imam al Tabari and Dr. Wahbah al Zuhaili's point of views on individual privacy by Qyla, Zam., *Permissibility of Tajassus in implementing Syariah Law and Civil Law of Masalih Murslah, Istihsan and Sad Dhara'i*, at [15:45], <http://prezi.com/wolpbmyid-3q/permissibility-of-tajassus-in-implementing-syariah-law-and-c/>, Retrieved on March 19, 2014.

⁵⁷ Aryani, Lara., "Privacy Rights in Shari'a and "Shari'a-Based" States", Vol. 3 No. 2 (2007) *Journal of Islamic State Practices in International Law*, at 11.

⁵⁸ Ibid. See also: Abdul Al-Autwah., *Muhadarah fi Nizam al-Qada' fi al-Islam*, Maktabah al-Ahkam:Egypt, 1969 at 78.

⁵⁹ Abū al-Hassan Ali bin Muḥammad al-Māwardī., *The Ordinances of Government (Al-Ahkam al-Sultaniyya w'al-Wilayat al-Diniyya)*, translated from Arabic by Wafaa H. Wahaba (Lebanon: Garnet Publishing, 1996).

⁶⁰ Ibid.

al-Ghazali compared an act of *muhtasib* similar with the exertion of an inspector of public places, whose job is to confirm peace and tranquility within the society or in the state.⁶¹ The fountainhead of creating that post was derived from numerous verses⁶² of holy Qur'ān concerning admonition of *hisbah*, which read:

“... Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: they are the ones to attain felicity....” (āl- Imrān, 3:104).

“...Ye are the best of peoples, evolved for mankind. Enjoining what is right, forbidding what is wrong, and believing in God....” (āl- Imrān, 3:110).

Therefore, a community's acceptance or dignity towards Allah, depends on two core elements: faithfulness of community people towards Allah and the firm adherence to *hisbah* as a whole, and thus Abū Zahrah portrayed Muslim community as “*Ummah fāḍilah*” (praiseworthy community).⁶³

Al-Māwardī further opined that, in the public sphere, a *muhtasib* preserves a wide spectrum of administrative and judicial magistracy powers over state administrative authorities, so that, no one shows overbearing or harshness against another innocent people and therefore considering both major and minor sins can fall under the jurisdiction of a *muhtasib*.⁶⁴ However, exterior of the civic responsibilities, the power of a *muhtasib* was rigorously been trimmed like: unnecessary investigation by way of spying (*tajassus*) for the purpose of gathering evidence of an offence perpetrated in private.⁶⁵ Al- Māwardī beheld that:

“...The muhtasib is neither entitled to spy on prohibited acts that are not openly committed, nor to make them public, for the Prophet, God bless him and grant him peace, said, 'Let whoever attempts any of this rubbish hide himself from view as God admonished, for those who

⁶¹ Ayub, Zainal Amin., & Yusoff, Zuryati Mohamed., “Leave Me Alone!...”, at 106.

⁶² Sūrah al-Mā'idah, 5:87-88; Sūrah al- Ḥajj, 22: 41 and Sūrah al-Tawbah, 9:71.

⁶³ Abū Zahrah., *al-Mujtama' al-Insānī fī Zill al-Islām*, 2nd edn, Dār al-Ṣu'ūdiyyah: Jeddah, 1401/1981 at 137. See also: Mohammad Hashim Kamali, “*The Dignity of Man: ...*” at 48.

⁶⁴ Abū al-Hassan Ali bin Muḥammad al-Māwardī., “*The Ordinances of Government...*” at 273.

⁶⁵ Vogel, Frank F., “The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding the Evil”, Vol. 7 (2003) *Social Research* at 749-751.

reveal themselves to us will have God's penalties enforced against them...".⁶⁶

It is further important to note that, this curtailment of a *muḥtasib*'s jurisdiction by al-Māwardī concerning spying is not substantive but procedural in nature, and thus he (*muḥtasib*) is not permitted to intervene any offense although criminality persists.⁶⁷ Moreover, any potential testimony of an offense collected by a *muḥtasib* by way of unauthorized searching will not be accepted to the court, even he can be asked by court for the infringement of individual privacy rights.⁶⁸ In fact, in anyway, if the court discovers this contravention of privacy rights after ruling of a particular case, then the ruling will eventually be set-aside or nullified, and the defendant is allowed to a new trial.⁶⁹

Imam al-Ghazali and Ibn al-Ukhuwah also show a similar point of views concerning the authority of a *muḥtasib* by remarking that: the jurisdiction of a *muḥtasib* is extended only to the wrongs, which is manifested (*zahir*) to him. It is however noted that, there is only a special ground where *muḥtasib* is exempted from this prohibition, and that is, when there is involvement of a forthcoming offence and the damage of which can never be curable or soluble, once committed by the offender.⁷⁰ Crimes such as: adultery or murder can fall under this category and a *muḥtasib* is allowed to spy for the purpose of investigation.

6. Approbation for Conducting E-Surveillance under the Islamic Law: Alleviating Conflicts between the *Shari'ah* & Modern Technology

As we have seen that, the conduct of spying (*tajassus*) is trenchantly prohibited in Islam in conjunction with a number of Qur'ānic and the *sunnahtic* allusions. Moreover, this kind of provision of physical spying shall also be applied in electronic and virtual paradigms. Furthermore, numerous contemporary Islamic scholars also have given similar point of views in prohibiting suspicion over Muslim of one another. In fact, Imam al-Khataabi annotated a *ḥadīth* of the Prophet Muḥammad (p.b.u.h.) whereby, he opined that: the expression "*do not*

⁶⁶ Abū al-Hassan Ali bin Muḥammad al-Māwardī., "*The Ordinances of Government...*" at 262.

⁶⁷ Vogel, Frank F., "The Public and Private..." at 756.

⁶⁸ Aryani, Lara., "Privacy Rights..." at 12.

⁶⁹ Sherif, Adel Omar., "Generalities on Criminal Procedure under Islamic Shari'a" in *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, edited by Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels, (I.B. Tauris & Co Ltd: London, 2003) at 11.

⁷⁰ Ibn al-Ukhuwah, Muḥammad b. Muḥammad b. Ahmad al-Qurashi., *Kitab Ma'alim al-Qurba fi Ahkam al-Hisba*, al-Hai'a al-Misriya: Cairo, 1976 at 9. See also: Aryani, Lara., "Privacy Rights..." at 12.

be inquisitive on one another”⁷¹ Prophet Muḥammad (p.b.u.h.) did not ordain to his followers to not only to show suspicious attitudes towards others but also includes all kinds of examinations or investigations done by a Muslim for the sake of finding out faults of others by using any of the four senses such as: sighting, hearing, tasting, or by touching.⁷² Therefore, it is pertinent to proclaim that; Islam always put human dignity at the highest level of priority for every individual and consequently culminates all means (i.e. spying or showing suspicious attitudes towards others) that is responsible for degrading individual privacy.

Notwithstanding, all the contentions purported earlier relating to the protection of privacy rights by interdicting *tajassus* in *shari’ah*, it cannot be professed firmly that, this privacy right of every individual is absolute and exhaustive in nature. There are some anomalous circumstances specified in the *shari’ah*, whereby *muḥtasib* or law enforcement agents are allowed to intrude into another’s premises without securing prior permission from the owner or spying for the purpose of criminal investigation. This are:

6.1 Populace Interest at large: There are some circumstances where individual privacy rights requires to be compromised owing to conducting spying for the purpose of upholding peoples’ interest and to maintain peace and tranquility in the society. To illustrate, in a condition where contrivance is going on with the intention to drug smuggling or any other corrosive substances, which if materialize, shall eventually affect the social tranquility. Furthermore, if such abusive drugs become available and spread within the society, then it also have adverse effect on the society as well as to the young generation. Therefore, for the greater interest, spying by any means can be conducted by the law enforcement agents to shield populace interest.

6.2 Ensuring National Security: Individual privacy rights can also be compromised in Islam when it comes to the issue of national security. The *shari’ah* also allows the *muḥtasib* to conduct espionage in order to understand the situation and confidential tricks of the enemies during war times. A caliph, as a leader of the Muslim state can conduct espionage or assign anybody to do so, on behalf of the Muslim army and this is sometimes seems obligatory (*wājib*) to vanquish the war. History advocates that, during war-times more specifically: before conquering Macca, Prophet Muḥammad (p.b.u.h.) appointed some trustworthy and righteous companions to espionage the activity of

⁷¹ Muslim, *Ṣaḥīḥ Muslim*, *ḥadīth* no. 6214.

⁷² *Muslim and Spy!*, at [12:24], < <https://islamics.wordpress.com/tag/at-tajassus/> > viewed on 21 March, 2014.

ka'fer.⁷³ In fact, those who work as espionage for the greater interest of Islam, were dignified as protagonist or hero (*mujahid*) of the war.⁷⁴

Correspondingly, a number of righteous companions had been acclaimed and distinguished by Prophet Muḥammad (p.b.u.h.) for their contributions to Islam in this respect. Among these, the notable chosen sahaba's were: Ḥudhāyfah, Nu'āym bin Mas'ūd, 'Abdullāh bin Unays, Kḥawāt bin Jubair, 'Amr bin Umāyyah, Sālim bin 'Umayr etc.⁷⁵ Furthermore, privacy by way of correspondence, can also be compromised in the ground of public interest. It has been reported that, due to the breach of *Hudaibiah treaty* (a treaty that formulated between Madinah's Prophet Muḥammad (p.b.u.h.) and the *ka'fer's* of Macca), Prophet decided to attack and conquer Macca. Hatib bin Abi Balta'a, a spy on behalf of the *ka'fer's* of Macca, covertly wrote a letter to inform the Macca people about the impending attack to Macca. A woman, Umma Jamil by named, was assigned to convey this letter to the Macca people. After perceiving this incident, Prophet Muḥammad (p.b.u.h.) dispatched Ali bin Abū Tālib and Zubāyr bin al-Awam to intercept the letter. Even though, Umma Jamil initially denied revealing the contexts of the letter, she disclosed meanwhile due to turbulent threats by the companions.⁷⁶ Important to note that, all these happened with the implied consent of the Prophet Muḥammad (p.b.u.h.).

This ḥadīth advocates that, a latter that belongs to a third party can be unfastened without prior consent of the owner only in the ground of national security or for the state interest. This doctrine shall also be applied in electronic mails, faxes, web-pages or any other means of social Medias and modern technologies.

6.3 *Necessity (Darūrah)*: As we can see that, a number of *āyah* of the Qur'ān and the *sunnah* of the Prophet Muḥammad (p.b.u.h.) have been found, that acknowledge the importance of individual privacy rights and its implementation thereto in our daily life. However, this privacy rights can be rescinded temporarily in the ground of necessity (*darūrah*). This is based on a well-established maxim in Arabic literature, that is: '*necessity justifies, what is lawful and what is unlawful*'. In other words, all the abominable conducts that are considered as prohibited (*ḥarām*) in the *shari'ah* in general, can be accepted to perform

⁷³ Muḥammad Rākān al-Dughmi., *al-Tajassus wa Aḥkāmuhu...* at 135-136.

⁷⁴ Ibid., at 136.

⁷⁵ Id.,

⁷⁶ Nurbek, "Protection of Privacy..." at 82.

in the ground of necessity.⁷⁷ Majority of the contemporary Islamic scholars are agreed to apply this principles of *ḍarūrah* to make up leeway under the circumstances where a Muslim is unable to avoid taking or performing of something which is prohibited in the reckon of the Islamic principles and if refrain from doing so, then there is a strong plausibility of irreparable loss or damage suffered by that Muslim in consequence. Furthermore, this principle has been legalized by the verses of sūra al-Baqarah (2: 173)⁷⁸ whereby Allah allows Muslims to eat- carrion, blood, the flesh of swine and alcohol only in the ground of *ḍarūrah*. As this *āyah* opens a door for reconciling a *ḥarām* becomes *ḥalāl* in the ground of necessity, therefore undoubtedly it will also apply in the privacy issues. To give a factual example- in a situation where information received from a staunch source compels a reasonably prudent person, a *muḥtasib* or a law enforcement agent to be believed that a person is planning to move towards another person with the intention to kill, then the *muḥtasib* or the authority can intrude into the most private place of a dwelling to refrain or forestall that person from committing that grievous hurt.

7. Conclusion

Based on the above-mentioned elucidation about the notions of privacy and e-surveillance under both western (common law) and Islamic perspectives, it is pertinent to deduce that security, more specifically in national levels, has always got the highest and uncontested preference under the western laws; in fact, most of the developed and developing countries in the world at present. Furthermore, it is too sensitive to the extent that, some privacy related constitutional rights (such as: right to life; right to liberty; freedom of movements and protection of home and correspondence etc.) can be compromised or suspended only owing to the demand of national security. Interestingly, a hot debate is on the table of intellects as well as in the parliaments as to what extent, citizens' privacy rights could be trimmed by dint of e-surveillance for national security matters?

⁷⁷ Asmak Ab Rahman., "Exploring Sharia`Ah Views on the Practice of Takaful Company Reinsuring with Reinsurance Company", Paper Presented at ISRA Shari'ah Conference on Takaful 2009, at 19. See also: Al-Suyūṭī., *a l-Ashbah wa a l-Naza'ir* , Muassasah al-Kutub al-Thaqafiyyah: Beirut, 1994 at 112-113; Ibn Nujaim, Zainal `Abidin Bin Ibrahim., *al-Ashbah wa a l-Naza'ir* , Dār al-Kutub al-`Ilmiyyah: Beirut, 1993, at 85-86; Muhammad Sidqi bin Ahmad al-Burno., *Mausu`ah al-Qawa'id al-Fiqhiyyah*, Dar Ibn Hazm, 2003 at 263.

⁷⁸ Allah states that: "*He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without willful disobedience, nor transgressing due limits, - then is he guiltless. For Allah is Oft-forgiving Most Merciful*".

However, Islam is such a comprehensive and complete religion, where there is no conflict found between Islamic scholars concerning understanding and explaining the concept of privacy. This consensus and cooperative attitudes among *ulamā* help the head of an Islamic state to protect privacy rights and reconcile it with national security issues by applying e-surveillance. By balancing these two battling issues under the *shari'ah* principles, undoubtedly signifies the completeness and perfection of Islam, as a religion.

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