E- Surveillance Vis-À-Vis Privacy Rights: An Analysis of Western and the Sharīʿah 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 Muhammad (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 sharīʿah 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 Qurʾān, 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 sharīʿah.

The concept of ‘law’, in both the western and the sharīʿah 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) 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 sharīʿah 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 Muhammad (p.b.u.h), which is eternal, universal and immutable in nature. And the nab objective of the sharīʿah 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-ahkām al-khamsah) which are: (i) obligatory (fard/wājib); (ii) recommendable (mandīb); (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 Qurʾān, rather by the Islamic jurists (jūghāhā) to determine in juristic manuals because all the Qurʾānic commands and injunctions are not necessarily specified and therefore, a command in the Qurʾān sometimes can be evaluated as obligatory, recommendable, permissible or even to some extent prohibited for the Muslim people depending on certain

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circumstances. Undoubtedly, this attribution of the holy Qur’an signifies its flexibility, universality and harmony with the unending validity of applying the shari’ah.

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 conduct, 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’an and guided in the hadith of the Prophet Muhammad (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’anic maxim which is “promotion of good and prohibition of evil” (amr bi’l-ma’rifa wa nahi’ 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.

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

It is also noted that, unlike other divine religious books, the Qur’an, as a scripture, does not only talk 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’an to uphold the dignity of the human being. Although, the word “privacy” may not be found directly in all these verses, however, the implied 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’an, along with the contemporary hadith of the Prophet Muhammad (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 Bible, the Jewish law, substantive protection of privacy in primitive Hebrew cultures, classical Greece and ancient China and the Code of Hammurabi, 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 an as an essential value for society as well.

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’

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2 Ibid.
7 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).
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Moreover, numerous scholars have appreciated this legendary writing by saying that, it was “an unquestioned

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“right to be alone” which further

“realization of one’s personhood requires the recognition of, and respect for, the conditions necessary for
each person to realize her distinct individual identity....”

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-

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.

However, in this twenty-first century, we cannot ignore a century and a quarter back abstraction on
privacy given by Warren and Brandeis 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", “most influential law review article of all”, “most brilliant excursions in theoretical jurisprudence”,
a “a pearl of common law reasoning for creating a tort alone” and many more. Even quite a number of divergent
English court decisions 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 exclusion 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". 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.

5 Ibid.
South Carolina Law Review at 437-438.
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
443;
12 Restatement (Second) Of Torts § 652A (1977), view at http://www.tomswbell.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
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
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 (uşūl al-fiqh).\(^1\) 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 šari‘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.\(^2\) 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.\(^3\)

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).

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”.\(^4\) Furthermore, human dignity in Islam, is an attested, confirmed and established right of every individual heedless of any discrimination.\(^5\) 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”.\(^6\)

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 reckoning 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 affrontment or humiliation in Islam.\(^7\) This can also be evident from a hadīth, where Prophet Muhammad (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?”\(^8\)

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 hadīth, 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 hand s 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”....\(^9\)

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


\(^3\) Weeramantry, J., Islamic Jurisprudence: An International Perspective, Macmillan: Basingstoke (UK), 1988 at 64.


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 Muhammad (p.b.u.h.) in the primary sources (the Qur‘ān & the sunnah) of shari‘ah.

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 greater 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 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).

Even in the Qur‘ān, Allah subhanahu wa-ta‘ala secures household privacy for every people within their family 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 Muhammad (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 hadīth of the Propher 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 hadīth where Prophet Muhammad (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”. In another hadīth, Prophet stated that, “Greetings (taslīm) precedes conversation”.

If we consider the former hadīth 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 sūrah al-Nūr, āyah: 27-29. Furthermore, in this verse of Qur‘ān, the expression “hatta tasta‘nis ” 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.4 To put in a nutshell, the nab perception of this āyah is to make sure that, the potential visit of an individual would be gratified and 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.5 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‘dāh is the appropriate exegesis of the term “tasta‘nis” mentioned in the Qur‘ān and thus it should be the benchmark in every cases.6 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 cubicule compartment of a public

2 Muslim, Mukhtasar Šaḥīḥ Muslim, hadīth no. 1421.
4 Ahmad, “Islam, Modernity, Violence…”, at 177.
5 Ibid.
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-Ḥujurāt, 49:12).

Prophet Muhammad (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 aversion and hostility against one another. And be fellow-brothers and servants of Allah....”

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.  

In addition, the Prophet Muhammad (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”. This hadīth 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 Muhammad (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 thereeto. This yardstick of Islamic principles undoubtedly have opened a door for reconciling conflicts between the sharī‘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 hadīth of the Prophet Muhammad (p.b.u.h). The ratiocination behind this is, during Prophet Muhammad (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 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 sharī‘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 sharī‘ah, there is a term “tajassus” found in the Qur’ān and the hadīth of the Prophet Muhammad (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 sharī‘ah to convey the mischievous effects of spying against an individual or a country, which is strongly forbidden. “Tajassus” includes any kinds

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

2 Muslim, Ṣaḥīḥ Muslim, Kitāb al-Bīr wa-Sūrat-I-wa-l-Adab, hadīth no. 6214.


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 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-Ḥujurāf, 49:12).

According to Mohammad Hashim Kamali, by using the words “wa-lā tājassāsū” in the above āyah, Allah absolutely proscribed all kinds of spying regardless of background aspiration of conducting this. 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 hisbah (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. Some ‘ulamāʾ 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.

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search for his fault, and if Allah searches for the fault of anyone, He disgraces him in his house…”

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 Ḍiyā al-Rahmān ibn Awtf:

“… 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 Khaṭīb, 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.”

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 āhārim 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 muftis9 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 ‘ulamāʾ (such as: Imam Nawawī, Imam Malik & Auzai, Ibn Al-Qain, 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 shariʿah, there is a precedent of formulating a position known as ‘Muḥtasib’. This was initiated for the first-time officially during the ‘Abbasid periods’. 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 shariʿah 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.5

The classical explication of the powers and functions of a muḥtasib is found from the literature of Imam al- Māwardi.6 According to al- Māwardi, the primary duty and responsibility of the muḥtasib was to adhere people with hisbah i.e. encouraging people for doing good deeds (ma rūf) and prohibiting people from wrongdoing (munkar).7 Imam al-Ghazali compared an act of muḥtasib 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.8 The fountainhead of creating that post was derived from numerous verses 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- Īmān, 3:104).

“… Ye are the best of peoples, evolved for mankind. Enjoining what is right, forbidding what is wrong, and believing in God…” (āl- Īmān, 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 jurisdiction of public places, whose job is to confirm peace and tranquility within the society or in the state.

References

1 Abū Dāwūd, Mukhtaṣar Sunan Abū Dāwūd, ḥadīth no. 2283.
7 Ibid.
Al-Māwardī further opined that, in the public sphere, a muhṭasib 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 muhṭasib. However, exterior of the civic responsibilities, the power of a muhṭasib was rigorously been trimmed like: unnecessary investigation by way of spying (tajamūs) for the purpose of gathering evidence of an offence perpetrated in private. Al- Māwardī beheld that：“...The muhṭasib 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 reveal themselves to us will have God's penalties enforced against them...’”.

It is further important to note that, this curtailment of a muhṭasib’s jurisdiction by Al- Māwardī concerning spying is not substantive but procedural in nature, and thus he (muhṭasib) is not permitted to intervene any offense although criminality persists. Moreover, any potential testimony of an offense collected by a muhṭasib 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. 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.

Imam al-Ghazali and Ibn al-Ukhwah also show a similar point of views concerning the authority of a muhṭasib by remarking that: the jurisdiction of a muhṭasib is extended only to the wrongs, which is manifested (zahir) to him. It is however noted that, there is only a special ground where muhṭasib 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. Crimes such as: adultery or murder can fall under this category and a muhṭasib 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 (tajamūs) 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 Muhammad (p.b.u.h) whereby, he opined that: the expression “do not be inquisitive on one another”8 Prophet Muhammad (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. 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 sharī‘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 sharī‘ah, whereby muhṭasib 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

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5 Aryanī, Larā., “Privacy Rights…” at 12.
8 Muslim, Ṣaḥīḥ Muslim, hadīth no. 6214.
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 *sha'i'ah* also allows the *muhtasib* 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 (*wa'ijd*) to vanquish the war. History advocates that, during war-times more specifically: before conquering Macca, Prophet Muhammad (p.b.u.h.) appointed some trustworthy and righteous companions to espionage the activity of *ka'fer*. In fact, those who work as espionage for the greater interest of Islam, were dignified as protagonist or hero (*mujahid*) of the war.

Correspondingly, a number of righteous companions had been acclaimed and distinguished by Prophet Muhammad (p.b.u.h.) for their contributions to Islam in this respect. Among these, the notable chosen sahaba’s were: Ḥuḍayfah, Nu‘aym bin Mas‘ād, ʿAbdullāh bin Unays, Khawāt bin Jubair, ʿAmr bin Umāiyah, Sālim bin ‘Umayr etc. 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 *Hudaiyah treaty* (a treaty that formulated between Madinah’s Prophet Muhammad (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 Muhammad (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. Important to note that, all these happened with the implied consent of the Prophet Muhammad (p.b.u.h.).

This ḥadith 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’an* and the *sunnah* of the Prophet Muhammad (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 (*harām*) in the *sha'i'ah* in general, can be accepted to perform in the ground of necessity. Majority of the contemporary Islamic scholars are agreed to apply this principles of *darūrah* to make up leeway under the circumstances where a Muslim is unable to avoid taking or performing of something which is prohibited in the reckoning 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) whereby Allah allows Muslims to eat- carrion, blood, the flesh of swine and alcohol only in the ground of *darūrah*. As this *āyah* opens a door for reconciling a *harām* becomes *halāl* 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 *muhtasib* 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 *muhtasib* or the authority can intrude into the most private place of a dwelling to refrain or forestall that person from committing that grievous hurt.

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2. Ibid., at 136.
3. Id.
4. Nurbek, “Protection of Privacy…” at 82.
6. 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”. 

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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?

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 ʿulamā 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 sharīʿah principles, undoubtedly signifies the completeness and perfection of Islam, as a religion.

References
Al-Qur'ān:
Sūra al-Baqarah, (2: 189); (2: 173).
Sūra Āl- ʿImrān, (3:104); (3:110).
Sūra al-Ḥujurāt, (49:11); (49:12).
Sūra al-Nūr, (24:27-29); (24:58).
Sūra al-Māʾīdah, (5:87-88).
Sūra al-Tawbah, (9:71).
Sūra al-Isrāʾ, (17:70).

Al-Ḥadīth:
Abū Dāwūd, Mukhtaṣar Sunan Abī Dāwūd, Ḥadīth No. 2283.
Al-Bukhārī, Ṣaḥīḥ al-Bukhārī, Vol. VIII, No. 82.
Al-Tabrīzī, Mishkāt, Vol. II, Ḥadīth No. 7274.
Muslim, Mukhtaṣar Ṣaḥīḥ Muslim, Ḥadīth No. 1421.
Muslim, Ṣaḥīḥ Muslim, Kitāb al-Birr-waṣ-Sāḥeb, Vol. VIII, Ḥadīth No. 82.
Muslim, Ṣaḥīḥ Muslim, Vol. XI, at 28.
Muslim, Ṣaḥīḥ Muslim, Vol. XI, at 41.

Books & Journal Articles:
Anderson vs. Romero [7th Cir. 1995] 72 F.3d 518, 521.
Law Journal Articles. 6 (99), 99.
