

Privacy in Afghan Legal System

¹Mohammad Shafiq Wardak ²Zarghuna Jabarkhil

^{1,2}Assistant Professor in press Department, journalism Faculty, Kabul university
Email - shafiq21092@gmail.com

Abstract: *Privacy is the territory of someone's life, where no one can enter or have access to its information without permission (Ansari, 1391, p.1). In the last century, Afghanistan experienced different political systems such as monarchy (absolute and constitutional), liberal democracy, republic, pro-USSR: Union of Soviet Socialist Republics communism, Islamic fundamentalism, and anarchy. Each system was insisting on privacy in a way or another. In the Afghan legal system, privacy has communicative, informative, physical, financial and residential aspects and their protection has admitted as a major human right in different articles of constitutions.*

Key Words: *privacy, Afghan legal system, human life.*

1. INTRODUCTION:

Privacy is a simple and eloquent concept that includes conscience protection, thought freedom, authority over bodies and private information, loneliness at home or private residence, freedom of detection, inspection, robbery, and audio-visual inspection, protection of dignity and prestige and so on. To live based on own favor without the interference of others is called the right of privacy. In other words, privacy is the right through which people can determine the qualitative and quantitative level of information about themselves and others. Considering the above-mentioned points, the lawyers have not reached an agreement on a definition so far to cover all aspects of an individual's life.

1.1. BACKGROUND:

"Media Crimes in Afghan Criminal Law" is the title of an article discussing media crimes in Afghan criminal law in which privacy violation has been considered as a crime. In this article, privacy has been discussed not only in the Afghan legal system, but it has been assessed in criminal law, criminal code, and constitutions, as well. "Basics of Media Law" by Sayeeda Mostafawi is an article in which she has also assessed privacy violations as a media crime. This article discusses the protection of privacy. In my opinion, privacy protection and violation of privacy by media are two different issues in the legal system requiring separate discussions.

2. METHODOLOGY:

The methodology used in this article is descriptive that includes the use of different work done by others and Afghan constitutions. APA system is used for documentation of this research. The present research is based on existence literature reviews and field observation

3. DISCUSSION:

3.1. Privacy in the Afghan legal system:

Since the regaining of political independence by King Amanullah Khan in 1919 from the British Empire and writing the constitution in 1922 the right to privacy was officially approved and protected by law in Afghanistan. The 1922 constitution which was called Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan, ensured basic human rights equally to all Afghans. As article 10 the section on basic rights of citizen's states personal freedom, due to which no can be arrested or punished without a court order. This constitution which is considered one of the most liberal in the region at the time also prohibits the act of slavery and keeps one as a slave. The article says: "The principle of slavery is completely abolished. No man or woman can employ others as slaves." (Arghandawi, 1997 p. 455). Also in article 19 of the same section states on the right of property protection. According to this everyone's property is protected by law and no one including the state can acquire a property in legal possession of someone. Also, in cases where the state has to acquire someone's personal property for the case of public interest, "first the price of the property shall be paid and then it may be expropriated" (Arghandawi, 1997 p 455). The law at the time of King Amanullah Khan goes farther and constitutionalized safety of dwellings as the most important private space against any kind of violation by government or anyone else; without a process of law. The 20th article of the constitution orders on respect to dwellings of Afghan citizens it clarifies that "neither government officials nor others may violate a subject's home without his permission or due process of law."

Forced labor was the most suffering stroke on personal freedom in backward societies. In pre-1922 Afghanistan, most state works were done under the name of "voluntary or collective work" in which the public was mainly forced to compulsory work for days. Compulsory work was forbidden for the first time by law in the 1922 constitution. The 22nd article of Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan clearly orders that "confiscation and forced labor are absolutely prohibited." Article 11 of 1922 Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan on citizen rights orders regarding personal right, which protects personal freedom against any kind of violation: "No person may be arrested or punished other than pursuant to an order issued by a sharia court or in accordance with the provision of appropriate laws." The article also announces the complete abolishment of slavery principles. It clarifies that "no man or woman can employ others as slaves." Also, the personal properties of Afghans are protected by article 15 of the same law. Where it orders on property protection: "In Afghanistan, everyone's real and personal property in his possession is protected." (Arghandawi, 1997 p.469) There is also an exact clarification about the Afghan owner of real property who is involved in anti-Afghan government propaganda from outside of the country. Article 17 says: "No one's property shall be confiscated except those people living abroad and propagate against Afghan government." Though article 18 of 1923 Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan use a bit of softer language regarding (confiscation and forced labor) by saying "it is prohibited" whereas 1923 constitution use more drastic language, and had used the adverb "absolutely" before declaring it prohibited. Also, in cases where the state has to acquire someone's personal property for the case of public interest, "first the price of the property shall be paid and then it may be expropriated" (Arghandawi, 1997 p 455) The law at the time of King Amanullah Khan goes farther and constitutionalized safety of dwellings as the most important private space against any kind of violation by government or anyone else; without a process of law. The 20th article of the constitution orders on respect to dwellings of Afghan citizens it clarifies that "neither government officials nor others may violate a subject's home without his permission or due process of law."

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3.2. Article 16 orders on dwellings protection:

"The dwellings and homes of all Afghan subjects are sacrosanct and neither government officials nor others may violate a subject's home without his permission or due process of law." King Amanullah Khan is known as the founder of modern Afghanistan, it was during his era that Afghanistan got its well-regulated post and telegraph network. Meanwhile, the King's government assured the protection and confidentiality of correspondence by law. Article 109 of the Afghan State constitution 1928 states that confidentiality of correspondence is a reserved right of people. It says: "The post office or other authorities shall not have the right to inspect correspondence submitted to a post office unless authorized by provisions of the law." After the Amani era, it was during the king Zahir Shah Monarchy on 20/09/1964 that a new constitution replaced and revoked all former Nezam Namas and constitutions. In the new constitution individual freedom, an important part of the right to personal privacy was accepted as a basic right for the first time. The constitution recognized personal freedom and privacy as a birthright. Meanwhile, it was declared as the state duty to support and protect the right.

3.3. Article 26 of the above-mentioned constitution orders:

"Liberty is the natural right of the human being. This right has no limitations except the liberty of others and public interest as defined by the law. The liberty and dignity of the human being are inviolable and inalienable. The state has the duty to respect and protect the liberty and dignity of the individual." The constitution emphasizes that no one can be arrested, but only under provisions of the law. It also states that "no one may be detained except on order

of a competent court." Also, innocence is declared as the original state; according to the law, even "the accused is considered to be innocent unless found guilty by a final judgment of a court of law." The same constitution declares no deed as a crime but "except by virtue of a law in force before its commission." Also, by the order of the same law, the authority to convict an accused person and sentence him/her to any kind of punishment is devoted to "the order of a competent court rendered after an open trial held in the presence of the accused." It also states that "no one may be punished except under the provisions of a law that has come into effect before the commission of the offense with which the accused is charged."

Historically crime of a criminal was not treated as a personal deed in Afghanistan, and its neighborhood. The Pashtoon mejorty FATA Federally Administered Tribal Areas lived under a law where the entire tribe or village was held accountable for the deed of one person from the same time for more than a century up to 2018. Where the Afghan constitution declares crime as "a personal deed. Pursuit, arrest or detention of the accused and the execution of sentence against him does not affect any other person." Also, this constitution prohibits torturing a human being. It clearly states that no one can torture or issue the order to torture someone for seeking information and facts, "even if the person involved is under pursuit, arrest or detention or is condemned to a sentence." The law also, prohibits "imposing punishment incompatible with human dignity is not permissible. A statement obtained from an accused or any other person by compulsion is not valid." Due to this law, "confession of a crime means the admission made by an accused willingly and in full possession of his senses before a competent court concerning the commission of a crime legally attributed to him. Every person has the right to appoint defense counsel for the removal of a charge legally attributed to him. Indebtedness of one to another cannot cause deprivation or curtailment of the liberty of the debtor. The ways and means of recovering debt shall be specified in the law." To stay close to the topic of privacy the constitution of 1964 also values the private space of Afghans and allows no one including the state to enter and search anyone's residence. Article 28 of the constitution states: "a person's residence is inviolable. No one, including the state, can enter or search a residence without the permission of the resident or the orders of a competent court and in accordance with the conditions and procedure specified by the law."

It is only in case of crime witnesses that a responsible police officer can enter a residence without the permission of the resident or a written permission of a court, but still, the officer is ordered to get the permission from a court in a limited time. "In cases of witnessed crimes, the responsible officer can enter or search the residence of a person without the permission of the resident or the prior writ of the court on his personal responsibility. the officer is bound to get the order of the court within the time limit set by the law after his entry into the house or its search." After the personal residential space, personal communication is known as the most important part of privacy. Almost all democratic states respect the privacy of communication. The mentioned Afghan constitution recognizes the right to communicative privacy. It states the freedom and secrecy of communication is inviolable. According to this law, the state has no right to search people's personal communication by any medium, such as telephone, telegraph, written letter, etc. Article 30 is clear about communications protection. It says: "The state has no right to search personal communications except by the order of a competent court and in accordance with the provisions of the law." The law also defines the "urgent cases" where officially responsible officers are allowed to search citizen's communication. Article 30 continues as: "In urgent cases, defined by the law, the officially responsible can search communications on his responsibilities, without the prior permission of the court. The official concurrently is bound to obtain, after the search, the decision of the court within the time limit set under the law." The 40 years monarchy of King Zaher Shah was one of the stable eras in Afghan history, but politically the regime went back and forth between absolute and constitutional monarchy from 1933-1973. The 1964 constitution cleared the path for emerging many leftist, Islamist and democratic parties in Afghanistan. The political environment was full of tensions and protests, especially student movement in capital Kabul. Finally, the monarch was thrown away from power by his first cousin Daud Khan, during a bloodless coup in 1973. The new ruler announced a one-party republic government instead of his predecessor's monarchy. He rewrote the constitution on 24, February 1977 Article 35 of the republic Afghanistan constitution related to residential privacy remains untouched and reads the same word by word as it was in the constitution of 1964. Where "the residence of a person is inviolable." The new constitution also prohibits the entry and search of a residence without its resident's permission or procedures defined by law for everyone including the state. The rule for entry to a residence without the permission of the resident or court is also the same where the authorized officers should get the court order in a specified period.

Meanwhile, article 30 of the previous constitution written as article 37 in the constitution of the republic government, also remains the same on the issue of communication confidentiality. This constitution also guarantees the freedom and secrecy of personal communication in all forms and by all means. This article same as the previous constitution prohibits search of personal communication without the defined procedures by law.

Afghanistan wrote its fifth constitution in 1987 after Muhammad Najibullah Ahmadzai became Afghanistan's president. The new government was named the "Republic of Afghanistan" instead of "Democratic Republic of Afghanistan" by dropping the prefix "Democratic". On the matter of privacy and confidentiality, the fifth constitution

also remains more or less the same as the previous constitutions from 1923 to 1987. As article 44 of the constitution states on dwelling protection: "In the Republic of Afghanistan, the inviolability of residence is guaranteed. No person, including a state representative, can enter or search a residence without the permission of the resident and except in circumstances and under procedures prescribed by the law." The next article guarantees the confidentiality of communications and correspondence in all forms and mediums, the law prohibits the intervention of anybody including the state in personal communications. As it states: "No one, including a state representative, shall intercept telephonic and telegraphic communication and control correspondence except under the provisions of the law." The fifth constitution was not applied for a very long period. After the USSR troops left Afghanistan in December 1991, the guerilla warier -called Mujahideen captured Kabul in February 1992. Mujahideen arrested Najibullah Ahmadzai and ended his republic government. The era after this is famous for the anarchy and civil war among warlords in Afghanistan, which was partially ended by a newly reside religious group called Taliban after capturing Kabul in 1996 and instating the "Islamic Emirate of Afghanistan." The new Emirate announced Islamic Sharia as its law system. The Taliban are known for being religious hardliners and violating basic human rights. Legal system during the Taliban Emirate which was based on strict interpretations of Islamic Sharia law. The Taliban government was collapsed by NATO: North Atlantic Treaty Organization forces led by the United States of America: USA in the aftermath of the 11th, September 2001 attack on the twine buildings of the World Trade Centre in New York City and anther targets in the country.

Hamid Karzai started work as president of an Interim Administration known as Afghanistan Interim Administration: AIA in Kabul on 22, December 2001. His six-month new authority was the result of an agreement among the anti-Taliban Afghan leaders in the presence of diplomats from different countries during the first Bonn Conference in Germany. Due to agreement, the AIA had to invite a Loya Jirga (a grand council of Afghan known men and women) to rewrite a new constitution for Afghanistan. The Loya jirga was invited in late December 2003, where a majority of the 502 members of the council meeting singed a new constitution of Afghanistan on 5th January 2004. The new constitution which as looked at as a great achievement in the country after a civil war and the Islamic Emarat of the Taliban, protects all the basic rights equally for men and women. It recognizes liberty as a birthright and accepts no boundaries for it unless affecting other's liberty due to law. Article 24 states: "Liberty and dignity of human beings are inviolable. The state has the duty to respect and protect the liberty and dignity of human beings." Also, the constitution is clear about the right to privacy, as the article 37 says: "Confidentiality and freedom of correspondence and communication whether in the form of letters or through telephone, telegraph and other means, are immune from invasion. The state does not have the right to inspect personal correspondence and communication unless authorized by the provisions of law." The 2004 constitution has adopted all the articles about privacy written in previous constitutions. It repeats the article related to private residency immune and as its 38th article which sstates that "no one including the state, are allowed to enter or inspect a private residence without prior permission of the resident or holding a court order." The case of an evident crime require the same process for searching a private residency as written in previous constitions. "In case of an evident crime, an official in charge of the situation can enter or conduct a house search prior to the permission of the court. The official involved in the situation is required to obtain a subsequent court order for the house search within the period indicated by law."

Farther the constitution protects private property and declares it "immune from invasion." Article 40 also states: "No person shall be forbidden from acquiring and making use of a property except within the limits of law. No body's property shall be confiscated without the provisions of law and the order of an authorized court. Acquisition of a person's property, in return for a prior and just compensation within the bounds of law is permitted only for securing public interests in accordance with the provisions of law. Inspection and disclosure of private property are carried out only in accordance with the provisions of law." In the post-2004 legal system of Afghanistan, not only the constitution recognizes the right to privacy as a basic right of citizens, but the penal code of the country also states clear punishment for those who are founded convicted of the violation of the right. The articles 445 and 446 of the Criminal law of Afghanistan emphasize that secrecy and confidentiality of communications and correspondences shall be protected. The article 445 of penal code states clearly that in case "a person who discovers, through his job, occupation, profession, or nature of work, a hidden fact (of knowledge), and reveals the discovered fact contrary to the provisions of the law or uses this fact for his own or someone else's benefit shall be sentenced to medium imprisonment of not more than two years or would be fined an amount not exceeding twenty-four thousand Afghanis." Meanwhile, there are exceptions from punishment for those who either are legally permitted to reveal the information or the revelation is information about an act of felony. The same article states farther as: "in the cases where concerned authorities have the permission for a revelation of the secret or the purposes of the revelation of the secret is informing of an act of felony or misdemeanor, the offender shall not be punished." The penal code also raises the importance of people's private and family life and suggests punishment of imprisonment for those who are found guilty of reaching someone's family secrets and share it with others on any of the platforms. The article 446 of the code writes that "the following persons shall be sentenced to short imprisonment or shall be fined an amount not

exceeding twelve thousand Afghanis: A person who reveals someone else's family secret through news, pictures, or charts. A person who learns, through telephone or letters, a hidden fact (of knowledge and reveals the fact for the purpose of inflicting damage."

4. CONCLUSION:

The legal system in Afghanistan has been almost been ruling for a century now. During this period, the laws, rules, rulers, and governing systems have changed due to differences in policies, politicians, and ideologies, but each system has clearly supported the right to privacy at least for the sake of writing it down in constitutions and laws. Privacy Protection in the Afghan legal system includes five aspects such as dwelling, communication, information, physical and financial privacy.

5. RECOMMENDATION:

- ✓ The Afghan legal system has supported privacy protection in its written rules and law, but much in practice. It is recommended that the implementation of the laws should be considered by the courts. The police and judiciary bodies of the state pay serious attention to protect the right to privacy from violations under any circumstances in their decisions.
- ✓ In Afghanistan, privacy is mostly violated by social media. There is a great need for sufficient attention from the state.

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