

A STUDY OF LEGAL INNOVATIONS OF CRIMINAL PROCEDURE CODE ADOPTED ON 2014 FEBRUARY 23 CONCERNING OBSERVATION OF PRIVACY AND PRESERVATION OF PERSONAL SECRETS IN THE PORCESS OF CRIMINAL PROCEDURE FROM THE POINT OF VIEW OF CITIZENSHIP RIGHTS RELYING ON QURANIC VERSES AND PROPHETIC TRADITIONS

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Abstract

Privacy and preservation of personal secrets as one of the most important factors of protection of social security as well as the citizenship rights in view of their importance have been taken into earnest in the constitutional laws of the countries and international community insofar as the legislator has adopted new measures in order to protect the citizenship rights and for the sake of better observation of these rights. Thus, some specific laws have been legislated in the area of the rules and formalities of criminal procedure. Formal laws of our national criminal procedure, in the face of the challanging paradox of securing the interests of the convict and preservation of the social interests and of course under the influence of Islamic jurisprudence and trans-national legal codes, have reached the apex of their evolution in the domain of observation of the citizenship rights of the convict who is more than anyone else exposed to the violation of his basic rights. Accordingly, many effective measures have been adopted in the process of criminal procedure particularly for the observation and protection of privacy and respecting the personal secrets of individuals which in the present essay have been enumerated and assayed in view of their jurisprudential foundations.

Key Words: Convict, Citizenship Rights, Personal Secrets, Criminal Procedure Code, Privacy.

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Introduction

Privacy and the secrets of personal life as a domain of life to which one does not want to have access in a wayward manner should be first respected by the judiciary system which is in charge of the implementation of justice.

Criminal procedure law that is known to be the guarantee of decisive rights and freedoms as the most effective practical means for protection of the rights of individuals in the field of criminal procedure has adopted new measures for supporting the citizens against the possible abuses by governmental agents. By this effective legal apparatus the judiciary should, on the one hand, provide the ground for governance as part of the government and in view of the existence of public aspect of many crimes and thus protect the social rights as well as the public peace and on the other hand, for realization of this goal no right or freedom of any of the individual convicts should be sacrificed. Protection of individual interests besides the interests of the plaintiff includes the guarantee of primary rights of the convict insofar as one may claim that in the implementation of the criminal procedure laws the interests of convict are considered more than anything else because the plaintiff has the organizational support of the Justice System for reaching his own goals while the convict is alone before the plaintiff and the judiciary and it is a responsibility of the legislator to guarantee his citizenship rights. To this end, it is feasible to claim that the major goal of the legislator from legislation of the new criminal procedure law has been the protection of citizenship rights of individuals involved in the criminal procedure particularly the convict. In the current essay we have sought to enumerate the innovations of the new criminal procedure code and study their jurisprudential foundations.

1- Explanation of the Right of Privacy and Personal Secrets from the Point of View of Law

Among the rights that protect human spiritual character and play an effective role in one's peace and security in life one can refer to the right of privacy and respect of personal secrets and their immunity against the encroachment of others. All human beings are interested in having independence in their privacy and to be immune against the encroachment of others. Privacy is one of the most valuable concepts in developed legal systems. Right to privacy is among the most significant rights that are closely interconnected with human dignity. Then, protection of human character requires the protection of privacy which in turn leads to the honoring of human character.

Harim in Arabic means prohibition and denial. In Kitab al-'Eyn we read: "Harim is something no one is allowed to contact with it or approach it" (Farahidi, 1989, vol. 3: 222). Harem is called harem because it must be respected and no one has the right to disrespect it. Then, harim refers to the limits and restrictions in those areas that are especially for humans and the entrance of others to that area is prohibited.

No unique and comprehensive definition has been proposed so far of privacy in law which would be endorsed by the thinkers and legal experts. In legal documents instead of explanation of the concept of privacy, the legislators prefer to refer to the clear examples of it like respecting individual dignity and character, right of spiritual integrity, right of controlling one's personal information, having emotional relations with others, being not exposed to the interference of mass media, immunity of private life, picture, information and phone calls. The term privacy represents a right that is given to one person to have his/her own personal space. Thus conceived, person includes the individual himself, his properties, family and all objects related to him. Privacy allows one to hide his own personal affairs from others. Then every action that would lead to the revelation of hidden items is an example of violation of privacy (Soroush, 2014: 11 and 13).

1-1-Definition of Privacy and Personal Secrets in Law:

"Privacy is an area of the personal life an individual where no one has the right to enter or explore and is protected. The extensions of privacy in view of the cases that the legislator has allowed their investigation by the judiciary officials consist of places, cars, post packages and phone calls as well as the computer data and even the clothes that one wears" (Hashemi, 2011: 114).

The right of privacy implies having the right of decision making and one's freedom of administration of all aspects of his private life and one's immunity against the interference of others in this area. According to this right, every kind of investigation concerning the physical state, personal conditions and other affairs, in the form of eavesdropping, personal talks of individuals and their recording, taking personal photo or duplication and releasing it, reopening personal letters and correspondences, and other ways of interference in personal life of individuals is forbidden (Tabatabaei Motamani, 1991: 6).

In Iranian law though there are some parts related to the observation of privacy from which one can infer regulations in this regard, there is no specific definition of this term in the laws. However, Article 2 of the "Act of Protection of Privacy" has defined privacy as follows: "1- Privacy is an area of everyone's life where he normally expects, either based on previous announcement or within the framework of law, others not to enter or monitor without his satisfaction or have access

to the information regarding it or violate it. Body, clothes, personal objects, private places and houses, work place, personal information and private relations with others are all considered to be part of privacy". Then, four extensions of physical integrity⁴, places and objects⁵, personal relations⁶ and information⁷ have been enumerated for privacy.

Private secrets to which we referred earlier in this article are in some way part of the privacy of every individual and are considered to be part of everyone's personal life. Committing crime and attribution of the title of convict and guilty to every individual citizen is itself a kind of personal and private secret that should be protected by the judiciary officials against illegal revelation.

2- A Study of the Reasons of Protection of Privacy and Personal Secrets from the Point of View of Islamic Jurisprudence

It should be mentioned that like many other issues there is no independent debate under the title of "privacy" in jurisprudential texts and this term has not been used in Quranic verses and Islamic traditions. To investigate this issue, then, we need to assay its extensions like prohibition of exploration, entrance to houses without getting the permission, eavesdropping, suspicion, slander and backbite, insulting and accusing one of sodomy and fornication, promulgation of prostitution and revelation of secrets, betraying the trusted and the like in jurisprudential works.

The following presents the reasons for protection of privacy and personal secrets from the point of view of Islamic jurisprudence as a whole. It needs to be mentioned that the jurisprudential foundations of every issue will be provided below each discussion.

2-1- Quran:

There are numerous verses in Holy Quran that speak of the prohibition of the interference in people's privacy. For example, God bewares the people of having suspicion of others. These verses introduce suspicion as the major source and root of looking into and inquisition of people's private affairs. This is why people have been ordered to avoid suspicion because it is what primarily triggers investigation of the personal affairs of people. Of course, suspicion can be genuine if it is documented and have its origin in sufficient evidences. In the verse 12 of Surah al-Hujurat the Lord addresses the believers in the following words: "*O you who have believed, avoid much suspicion.*"

⁴ E.g. Immunity of individuals against physical search either with clothes on or after taking off the clothes and doing cavity search.

⁵ E.g. One's house and its internal objects, car, cellphone, various kinds of computer and flash memory.

⁶ E.g. Immunity of phone calls, letters, emails, and satellites connections and telephones.

⁷ The information privacy is the very basic right of individuals in confidentiality and prevention from acquisition, processing and publication of personal data and information like identity.

Indeed, some suspicion is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead? You would detest it. And fear Allah; indeed, Allah is Accepting of repentance and Merciful."

Moreover, in other verses the prohibition of entering other people's property has been highlighted. It needs to be noted that the requirement of the avoidance of investigation of the personal affairs of others and observation of their privacy is the immunity of places and houses that belong to them. In line with this, God states: *"O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants. That is best for you; perhaps you will be reminded"* (Surah al-Nur, Verse 27).

As another example in this regard one can refer to the verses of the prohibition of harassment. The ban on harassing Muslims is one of the admitted principles of Islam and in Quran harassing one without reason has been described as "sin". Harassment has a wide scope and the violation of privacy and entering other people's life and trying to know what is going on in other people's houses is one of the factors that can harass others which is prohibited according to Sharia Law. In Holy Quran the Lord states in this regard: *"And those who harm believing men and believing women for [something] other than what they have earned have certainly born upon themselves a slander and manifest sin"* (Surah al-Ahzab, Verse 58).

It should be noted that Holy Quran has warned the revealers of the secrets very seriously of the consequences of their actions where it speaks of the destiny of two women who revealed the secret of the Prophet: *"If you two [wives] repent to Allah, [it is best], for your hearts have deviated. But if you cooperate against him - then indeed Allah is his protector, and Gabriel and the righteous of the believers and the angels, moreover, are [his] assistants"* (Surah al-Tahrim, Verse 4). Here the negative impact of the revelation of secret on the pure heart of the Prophet is shown insofar as God has defended the Prophet (Makarem Shirazi, 1974, vo. 24: 277).

Quran has prohibited Muslims to be friends with the non-Muslims because this friendship has led to the revelation of the secrets and caused later problems (Tayyeb, 2007, vol. 3: 326). This itself is a sign of necessity of respect and preservation of the secrets of Muslims.

2-2- Prophetic Tradition:

From the traditions of the Immaculate Imams (peace be upon them) various judgements and rules can be inferred as regards privacy. In these prophetic traditions those things that can provide the ground for the violation of privacy have been declared forbidden and due to the extensive scope of the themes, we suffice to recite some examples of the traditions related to the issue.

Among the most popular terms that have been used in the Quranic verses and prophetic traditions regarding privacy one can refer to the prohibition of investigation, prohibition of suspicion, prohibition of backbiting and slander, prohibition of eavesdropping, prohibition of promulgation of prostitution and prohibition of the entrance into strange houses without permission. We will discuss some extensions of these cases for further clarification.

Numerous traditions have been quoted concerning the prohibition of investigation and search among which one can refer to the tradition quoted from Imam Sadeq (peace be upon him) where he states: "ignorance lies in three things: substituting the friends, division and avoidance without expressing the reason and investigation of something of which no investigation is allowed (and there is no benefit in it)" (Harrani, 1975: 330).

In his letter notified to Malek Ashtar when the latter was chosen as the governor of Egypt, Imam Ali (peace be upon him) has also interdicted the governor from the investigation of the people's personal affairs as well as avoiding putting his finger on other people's deficiencies: "*O Malek, the remotest and most hated one of your subjects by you has to be a man who seeks to uncover people's faults, because there are faults in people that are better to be concealed by their ruler. Then do not reveal what is concealed from you as it is upon you to repair every flaw which is noticed by you and God shall judge whatever is concealed from you. O Malek, put cover on what has to be concealed may the Lord keep covered what you want to remain concealed from your people*" (Nahjulbalaghah, Letter 53).

Moreover, as to the prohibition of suspicion Imam Ali (peace be upon him) is quoted to have said: "suspicion ruins the affairs and leads the man towards evil things" (Amadi Tamimi, 1908: 132, tradition: 5575).

The Holy Prophet (peace be upon him) states in this regards: "keep yourself away from suspicion. Verily suspicion is the worst word. Do not poke your noses into the personal affairs of each other and do not be enemies rather behave like friends" (Mohammadi Rey Shahri, 2005, vol. 1: 391). In another tradition quoted from Imam Baqer (peace be upon him) it is stated that: "everyone who enters the house of another man without permission his blood can be shed and his eyes can be blinded" (Horr-e Ameli, 1994, vol. 29: tradition no. 3).

Eavesdropping in the form of secretly monitoring the words and actions of others and without their permission and satisfaction is impermissible in Shariah and eavesdropping is considered to be an example of violation of privacy. The Holy Prophet (peace be upon him) states in this regard: "Anyone who takes a peek at the house of his neighbor in order to see the sexual organ of a man or a woman he deserves to be thrown into the hell fire along with the hypocrites" (Horr-e Ameli, 1989, vol. 14: 141). Sahib Jawahir also says that the house owner has the right to

stone him away and if in this conflict any harm is done to the one who has violated the privacy no one is required to guarantee the recompensation and his blood will be wasted (Sahib Jawahir, 1984, vol. 41: 660).

Some traditions are not directly concerned with the issue of privacy or its violation but can be referred in this discussion in some way. For example, since the violation of privacy causes in practice and in general the annoyance of others then one can consider it to be a sin and one of the extensions of oppression to them and many of jurists believe that what is considered by general public to be an example of oppression is forbidden according to Shariah (Sheikh Ansari, 1995: 265).

The Holy Prophet states in this regard: "Whoever harasses a believer he has harassed me and whoever harasses me he has surely harassed God and whoever harasses God he is certainly cursed according to Torah, Bible, Zabur and Furqan" (Majlesi, 1984, vol. 72: 150).

But as to the protection of personal secrets, as it was mentioned earlier, one should say that it is among those affairs that if others become informed of them they may cause great problems for him and the most striking example of it can be found in the criminal procedure where the witnesses are afraid of the security of their life and property that can be exposed to serious dangers. In many traditions, secrets have been described as trust and the revelation of one's secrets have been considered to be an example of betraying the trust.

Sometimes we see that the witnesses insist their identity not to be revealed to anyone after witnessing before the judge and here the identity information of witnesses turn to trusts. It is in this spirit that the Holy Prophet advises Abuzar as follows: "Private meetings are confidential and you should never betray the secret of your faithful brother and you have to avoid this betrayal" (Allameh Majlesi, 1990, vol. 74: 89).

Imam Ali (Peace be upon him) also states: "the Good of this world and the otherworld lies in two things: protection of secrets and being friend with righteous people and likewise all the evils have come together in two things: revelation of the secrets and being friend with the vicious ones" (ibid, vol. 71: 178, tradition: 17). Moreover, he has stated: "if anyone reveals a secret that has been trusted to him he has betrayed" (Khansari, 1981: 268).

Imam Sadeq (peace be upon him) has also been quoted to have said as to the necessity of the protection of secrets that: "Anyone who reveals what he has heard or seen from a believer to others is among those whom God describes as *those who are interested in the promulgation of fornication...*" (Horr-e Ameli, 1994, vol. 8: 598).

2-3- Reason

In Twelver Shia Islam reason is considered to be one of the sources of religious decrees (Mozaffar, 2008, vol. 2: 120) and in independent form and regardless of Shariah laws it stipulates some decrees like the necessity of paying one's debts, indecency of oppression, decency of justice and so on and so forth. God as the source of absolute goodness would never permit what has been considered indigent. For this reason it is accepted as a general rule that "everything which is endorsed by religion is endorsed by reason too and vice versa" (Sabzewari, 1979: vol. 1, p. 145).

Relying on reason the jurists substantiate some religious decrees, e.g. in the discussion of privacy and impermissibility of revelation of other people's secrets and explanation of its reasons some jurists have said: "The issue of necessity of protection of a Muslim's honor and secrets is among the vital issues... Its necessity is demonstrated based on self-evident, rational and religious reasons" (Montazeri, 1992, vol. 4: 283). Thus, the boundaries of privacy and its respectfulness particularly in a place where it is in conflict with the rights of others or social affairs, can be explained.

3- Convergence with Jurisprudential Principles and Rules:

Protection of privacy of individuals is in line with the general principles and rules of jurisprudence. In other words, necessity of observation of these rights can be inferred from the jurisprudential principles and rules besides the general reasons that have been mentioned.

3-1- Self-control:

Man's control over himself is accepted by the jurists as a rule (Hamedani, 2000: 483). They phrase this principle as follows: "people have control over themselves". In other words, every human individual can decide for himself and everyone is free to make use of his own property in the way he wills because no one is a slave of others and all human beings are born free. Human control over him-self is a rational principle and there is no reason that would deny this rational decree by Shariah. Thus, one can feasibly claim that it is endorsed by Shariah (Eshtahari, 1993: 181).

The aforementioned rule underlines the right of privacy and in doing so, on the one hand, prevents from the irrelevant interferences by others and on the other hand, recognizes the right of people of choosing their life style. Accordingly, having costudianship over other individuals contradicts this latter principle because everyone has control over his own affairs and no one is allowed to interfere in the life of others.

3-2- Principle of "No Harm":

Some of the approved and self-evident rules of jurisprudence are endorsing the prohibition of harassment of others including violation of people's privacy in the form of searching their houses, clothes, bags and personal effects.

The renowned prophetic tradition of "no harm and no foul in Islam" has come to be known as the rule of "no harm" in various sections of jurisprudence. This tradition is related to a man called "Samareh Ibn Jundab" who had a palm tree the access to which was merely possible through the house of one of Prophet's disciples. Samareh had to frequently pass through the house of the Prophet's disciple and this caused numerous troubles for the household and finally the man got impatient and complained by the Prophet. Prophet talked to Samareh and promised him to give him a number of extra palm trees instead of that three but none of these worked and Samareh still insisted to have access to his tree without the permission of the disciple. Thus one day the Prophet stated: "You are a harmful man while no one is allowed to cause any harm or foul to any believer" (Mohaqeq Damad, 1984: 137). Then, the Prophet ordered the palm tree to be uprooted and thrown before Samareh. Here Samareh as an evil man did not have any claim of the ownership of the house and even his entrance was not illegal rather what made the house owner uncomfortable was indeed his unannounced entrance and violation of the privacy of the household. Then one can consider this prophetic tradition and principle to be one of the significant jurisprudential principles for protection of privacy in Shia jurisprudence.

Then under particular conditions sometimes the entrance into the property of others and investigation and search are required to be done by force. For example, when a convict is wanted by law and judiciary officials know that he is inside the house they are permitted to enter the house without any coordination in advance based on a legal decree. In some cases the household would be not ready for such an entrance and thus it will be an extension of the prophetic tradition and the principle of no harm.

4- Innovations of Law concerning Protection of Individual Privacy in the Light of Quranic Verses and Prophetic Traditions

As we mentioned earlier, the new criminal procedure code has taken effective steps towards the protection of privacy of individuals and in numerous cases has been committed to its protection. Now we will deal with these cases.

4-1- Prohibition of Entrance into the Property of Others and the Search and Investigation of Individuals and Properties

One of the most striking examples of protection of privacy is the entrance without permission and by force into one's residence or work place and its search as well as the physical search of the individuals. The legislator is required to allow the judiciary officials to do this without the permission in order to discover a crime or the effects of the occurrence of crime or the apprehension of the criminal. But this permission should be given within a determinate framework and by the observation of privacy of individuals and its extensions have been clearly outlined based on the Shariah Law and notified to the judiciary system and other administrative organizations.

The legislator in the Article 137 of the Criminal Procedure Code has added to the conditions that should be studied by the officials in order to issue the permission for investigation and thus it has stipulated that besides the other mentioned conditions they are only allowed to enter and search when there is a strong evidence that shows the presence of the convict or the discovery of the means and reasons of the occurrence of crime.

According to the Article 137 of Criminal Procedure Code: "Investigation and search of personal houses, closed places and also investigation of the objects are conducted based on the permission of the Judiciary system in those cases where there are strong evidences of the presence of convict or discovery of the means and reasons of the occurrence of crime in the place".

The legislator in the Article 137 has ordered the executive officer to record the strong evidences in the file and it is these evidences that strengthen the ordinary suspicion and turn it to certainty. This requirement causes no officer to think of illegal violation of anyone's privacy.

In the previous code there was no such condition as the "strong suspicion" by the executive officers as well as the requirement of recording the evidences in the file. Thus, in invisible crimes whenever the executive officers acquired the permission from the judiciary officials they have the right to enter the personal properties and the judge was not required to observe the levels of the knowledge and merely based on an ordinary suspicion he could issue such a permission. Thus, the rights of many citizens were violated and this legal gap is filled now in the new code.

According to the Article 141 of Criminal Procedure Code, the features of the order of the judiciary official for the entrance into the houses and closed places consist of:

- 1- Occasional state of the order under any title,
- 2- Clarification of the issue for which the investigation takes place: time of investigations, times of entrance, houses and closed places and their address.

On the other hand, the executive officers are required to record the quality of investigation and its results and sign their report and deliver the report to the judiciary officials within 24 hours.

The regulations stipulated in this article are wholly new legislations and for the first time are detailed for supervision of the function of the executive officers and certainty of the exact implementation of the orders of the judiciary officials.

In the same way that the legislator has noted in the article 137 the necessity of the permission of the judiciary officials as well as a "strong suspicion" by the executive officers for investigation of the houses, places and objects, the Article 152 has also stipulated such requirements for the investigation of the post packages related to the convict.

The observation of the right of privacy of individuals has not been directly noted in the jurisprudential sources and the existing Quranic verses and prophetic traditions are individually and in their exclusive way have insisted on the necessity of the observation of this right.

Besides the rational reason to which we referred earlier in our discussions and according to which the protection of honor and secrets of Muslims is among the vital issues. This necessity has its origin in the self-evident, rational and religious reasons. Numerous verses of Quran and Prophetic traditions have underlined the prohibition of the investigation. Thus, all types of violation of this principle should be based on knowledge or strong suspicion of the discovery of the evidences of crime. This requires the continuous and sufficient supervision of the judiciary officials who determine the jurisdiction of the executive officers. These limitations protect the individual privacy against the illegal encroachments. As God has recommended the believers in the verse 12 of Surah al-Hujurat to keep themselves away from suspicion and finally at the end of the verse has ordered the believers in clear voice: "and do not investigate". Moreover in the verse 12 of Surah al-Fath we read: *"But you thought that the Messenger and the believers would never return to their families, ever, and that was made pleasing in your hearts. And you assumed an assumption of evil and became a people ruined."* Basically suspicion and investigation are essentially interrelated and this is of course the reason why they have been simultaneously used in this verse.

The Lord addresses the Holy Prophet (peace be upon him) in the following words: *"They ask you, [O Muhammad], about the new moons. Say, 'They are measurements of time for the people and for Hajj.' And it is not righteousness to enter houses from the back, but righteousness is [in] one who fears Allah. And enter houses from their doors. And fear Allah that you may succeed"* (Surah al-Baqarah, verse 189).

"And it is not righteousness to enter houses from the back" in this verse refers to a ritual of Ignorance Times when if someone intended to visit the House of God in Mecca he never entered the house or tent from the doors rather from the back door or from a hole through the wall and then

this was considered to be an act of righteousness while the latter cited verse prohibits this because of the respectfulness of privacy and due to the fact that entrance to every place requires the permission and satisfaction of the owner of the place.

As we mentioned earlier, one of the major causes of violation of privacy of individuals is the suspicions of them that are supposed to serve as evidences to prove some vicious allegations. There are numerous prophetic traditions in this regard including Imam Ali (peace be upon him) is quoted to have said: "suspicion brings corruption in and results in various types of evils" (Amadi Tamimi, 1908: 132, tradition no. 5575).

In another effective tradition the Commander of Believers (Imam Ali) states: "The man who has suspicion does not have belief" (ibid, vol. 6: 362).

The suspicion that has no evidence and basis is a product of hallucination and grounds every illegal investigation that is forbidden. Then, when someone is arrested this cannot be a permission for entering his privacy. Prohibition of suspicion and invitation to good opinion is indeed for prevention from violation of privacy of individuals.

People's house is the place of secrets and is considered to be a private area and it is forbidden to enter someone's privacy whether in physical form and without permission or in a secret way. These all are forbidden unless in the case of corruption bands or the houses used by terrorist groups that could pose serious threat to the life of people or in those cases where there is a strong suspicion that a crime is about to happen and investigation and search is required for revelation of this. In this regard Imam Musa Kazim is quoted to have said: "When oppression overcomes the justice no one is permitted to have good opinion even if he has a well established knowledge of someone" (Namazi, 1999, vol. 7: 41).

The Holy Prophet (peace be upon him) was in one of his rooms when a man looked at the room through a hole on the wall. Prophet (peace be upon him) stated: "If I was close to that man I would blind both of his eyes" (Horr-e Ameli, 1994, vol. 29, tradition 1).

This tradition clearly shows that looking at the inside of the people's house is forbidden and since this is not an exclusive statement of the house it is also the case with other affairs that are counted to be an example of privacy and looking into the privacy of individuals is the least that has to be done for investigation.

Imam Mohammad Baqer (peace be upon him) is quoted to have said: "Anyone who seeks to have access to other people's privacy his eyes and blood are open to all punishment" (ibid: 67, tradition no. 3).

Some traditions are not concerned with privacy or its violation but are in some way referred in this discussion. For example, violation of someone's privacy can annoy him in practice and in

general and this can be considered to be an extension of sin. It is in this spirit that Imam Sadeq is quoted to have said: "Anyone who harasses my righteous servant he should declare war against me and anyone who respects my faithful servant he should be immune to my anger" (Koleini, 1987, vol. 2: 350).

4-2- Controlling Telecommunications of Individuals

In recent years the new technological developments have made the acquisition and recording of a massive volume of information of individuals possible. This reality is a serious danger because this information not only could harm the individuals at stake rather the society in general can suffer irreparable damages.

The Criminal Procedure Code of 1911 has not spoken of the side effects of controlling the phone calls of individuals because using personal telephones was not then so popular. However, the Criminal Procedure Code of 1999 in the clause of Article 104 has stipulated the following: "Controlling the phones of individuals is forbidden except in those cases that the national security is at stake or the rights of other individuals are trespassed according to the view of the judge".

Article 150 of the new Code reads as follows: "Controlling telecommunications of individuals is forbidden unless in those cases that the national security inside and outside the country is at stake or this is required for the discovery of the crimes stipulated in the clauses A, B, C, and D of Article 302 of this code. In this case the control is conducted upon the agreement of the Head of Justice Office of the Province. Controlling the phone calls of individuals and officials as noted in the Article 307 of this code is contingent upon the approval of the head of the Judiciary and this jurisdiction could not be devolved.

Clause 1- Conditions and quality of controlling telecommunications are determined based on the measures of Council of National Security.

Clause 2- Controlling the telecommunications of the convicts is only possible under the supervision of the district court or the judge in charge of the implementation of decrees".

The previous code has used the stipulation "for reclaiming the rights of individuals" in order to empower the judge to issue the order of eavesdropping of the phone calls of a convict based on every pretext and its limits are not clear and on the one hand, this order is issued by the judge himself. As a result, all judiciary authorities had then the jurisdiction to issue such an order but the new code has confined this jurisdiction to the judge under the supervision of the head of justice office of the province".

It is needless to say that the legislator has restricted the jurisdiction of judiciary officials and executive officers in the domain of communications control and by enumeration of the crimes and order and supervision of the highest judiciary authorities of province has taken more careful actions so that only in emergency cases, e.g. national security related cases, the privacy of individuals to be violated not under any pretext.

"Of course, some objections can be leveled against the clause 1 of Article 150 which has made the conditions and quality of controlling telecommunications contingent upon the decision of National Security Council: e.g. it is not clear what does it mean by decision? Whether it is referring to a set of regulations or not? Needless to say, rules and conditions of controlling telecommunications must be within the framework of some regulations which are prepared in the form of a statute. The most fundamental flaw of this clause is that National Security Council which is a governmental institution is in charge of preparation of the statute while controlling telecommunications of the individuals which is in contradiction with the observation of their privacy should be codified by the Cabinet or at least be ratified by the head of the Judiciary who is the highest judiciary official in the country" (Goldoost Juybari, 2015: 135). Of course, these objections have not overshadowed the positive points of this Article.

As to the prohibition of eavesdropping Holy Quran states: "*They pass on what is heard (They are eavesdropping), and most of them are liars*" (Surah al-Shuara, verse 223). This verse and the verse before it introduce those to whom the devils descend and express their specific features so that the people know that the Holy Prophet (peace be upon him) is not part of these individuals and then Holy Quran is not Satanic Verses.

The above quoted verse speaks of the devils that were deprived of hearing the heavenly tidings due to the shooting stars and what they heard was defected and for this reason they were imbued with lies. "Most of them are liars" implies that the majority of devils is liars and never tell the truth.

As this verse suggests, secret listening or eavesdropping is a Satanic act and then it is evil and forbidden (Ahmadlou, 2013: 120 and 121).

Numerous traditions have been narrated as regards the prohibition of eavesdropping. The Holy Prophet has been quoted to have said: "Anyone who secretly listens the talks of others without their permission in the Doomsday boiling lead will be poured into his ears" (Horr-e Ameli, 1989, vol. 12: 221).

5- The Innovations of the Legislator as regards the Right of Protection of Personal Secrets of Criminals and Other Individuals Involved in the Criminal Investigation in the Light of Verses and Traditions

5-1- Confidentiality of the Primary Investigations

Prosecution of criminals and investigation of them are among the responsibilities of the justice department and judges. Certainly these require the collection of existing evidences and documents, listening to the statements of the parties and the right of inquisition from the convict, and in many cases the victims are forced to present some evidences in order to prove their claims. Finally, it is the judge who takes the decision and announces his own opinion of the acceptance or denial of the claim. All documents that constitute a criminal file including complaint of the plaintiff and the presented reasons by the plaintiff or the statements of the witnesses as well as the defenses of the convict or other documents related to the case either in the form of recorded films or voice or information of bank accounts are part of personal secrets which are required to be protected by the judiciary system.

The previous code has not alluded to the confidentiality of the investigations and only in an implicit fashion in the Article 73 an allusion has been made to this significant feature of the initial investigation. According to this Article: "Plaintiff has the right to introduce his own witnesses as well as the reasons during the investigations and he can also have a copy of the report of the initial investigation if there is no confidentiality related problem".

But the legislator in the Article 91 of the new code has clearly stipulated this feature of the initial investigations: "Initial investigations are conducted in confidential manner except those cases where the law speaks the other way. All individuals who are part of the initial investigations are required to protect these secrets and if they violate this confidentiality they shall be punished because of the revelation of professional secrets".

Confidentiality of initial investigations refers to the prohibition of the circulation of the information related to this stage. In other words, no one can reveal the information related to the case before the adoption of final decision by the authorities. Confidentiality in this stage implies observation of the principle of innocence and giving the name of no possible convict who can be exonerated. The legislator in this article has ordered all people who are involved in the course of initial investigations to protect the secrets otherwise they would be punished due to the violation of the principles stipulated in the article 648 of Islamic Penal Code.

Article 96 of the code has no legislative background and is indeed a newly legislated theme in this regard reads as follows: "Publication of the picture and other information related to the identity of the convict by media, police authorities and the judiciary is forbidden in all stages of the initial investigation except the following individuals whose identity is uncovered upon the request of the attorney and agreement of district justice:

A- Convicts accused of committing the intentional crimes enumerated in the clauses A, B, C and D of Article 302 who are wanted and there are sufficient reasons for proving their crimes and the access to them was not possible in another way but publication of their picture.

B- Arrested convicts who have confessed by the attorney to have committed numerous crimes against countless people and their pictures are released upon the agreement of the attorney for identification by the victims."

In this Article the prohibition of the publication of the picture or other details of the information related to the convict in all stages of the initial investigations by the media, police authorities and the judiciary is taken for granted as an expression of confidentiality of the initial investigations. It should be noted that the general rule is the prohibition of the publication of picture and information regarding the identity of the convict and the two exceptions are only valid in the stage of initial investigations not the court.

In line with the confidentiality of the initial investigations the legislator has made all types of taking photos, recording films and voice forbidden from the court sessions. This measure lacks any legislative background. According to the Claus A of Article 353: "All types of taking photos and recording films or voice recording of court session are forbidden. But the court president can order all details or part of the trial to be recorded under his supervision".

5-2- Confidentiality of the Identity of Victim

Among the other protective measures that have been adopted by the legislator and do not exist in previous code one can refer to the policy of confidentiality of the identity of victim in the stage of initial investigations and court sessions in those cases where the revelation of the identity of plaintiff can pose serious dangers to his life and honor by the convict. Organized crime cases represent one of the latter cases where the life of victims and witnesses is seriously threatened. In the Criminal Procedure Code of Iran as well as other lawas there is no clear text of the prohibition of the revelation of the identity of victims and witnesses. Of course, in a weaker form in the Clause 1 of Article 188 and Article 255 of Criminal Procedure Code an allusion has been made to this issue. Clause 1 of Article 188 does not declare the publication of the details of the trial sessions

before the finalization of the verdict because revelation of details can defame the convict who might be exonerated. According to the final part of the Article 255, releasing the details of the court through mass media or through filming and revelation of the identity of child are forbidden. In previous code this prohibition of the revelation of the identity of victims and witnesses had not been stipulated and this posed serious threats against them. For example, Article 190 of previous Criminal Procedure Code allowed the convict to have the details of the case after the completion of the investigations. But according to the Article 101 of Criminal Procedure Code the rights of victims and witnesses are taken into account. According to this article: "Attorney is required to adopt the necessary measures in order to prevent from the revelation of the identity and information related to the victim including the first name, last name, address and telephone number that are possible threats to their physical integrity and honor. This can be done during the trial upon the discretion of the court president".

According to the Criminal Procedure Code the parties including the plaintiff and defendant and their lawyers have the right to study the information presented in the case. Before the inclusion of the latter article the victim was always afraid of being exposed to dangers that can threaten his life and honor on the behalf of the defendant. For this reason, in some cases people refused to complain and they turned a blind eye to their rights due to this legal gap. Here the legislator has not adopted a sufficient measure that could address the details of the protection of the identity of victim. It seems that one of the ways in which we can prevent from the revelation of the personal information of the convict is keeping the complaint letter and the statements of the plaintiff inside an independent file outside the case whose details can be included in the main file later. Finally, if the case is referred to the justice department for the apprehension of the convict both files can be dispatched independently and in this way the information of convict and plaintiff remain confidential.

The legislator in the Article 353 of the new code has accepted the revised regulations of the clause 1 and underlined the confidentiality of the details of the initial investigations for the sake of protection of the identity secrets of the convicts and its sanction could be the punishment of the one who illegally divulges the information.

In normal life the information related to one's identity is not included among the secrets of an individual while when a man is involved in a conflict which is associated with revenge and spite it is totally natural people insist to keep their identity and other details of their personal life confidential. All cases which were mentioned in this regard endorse the confidentiality of judiciary investigation particularly in the initial stages in order to protect the vital information that could put one's life and fame in danger. Since the jurisprudential foundations of all discussed cases are

common here and all insist on the protection of the secrets of others even those of the convict then they were collectively discussed and now we express their jurisprudential foundations.

Revelation of other people's secrets has been frequently prohibited in Islam; no matter if these secrets are related to the identity of the plaintiff or the witness or even the information regarding the identity of convict to which the Article 96 has already referred. As to the prohibition of revelation of secrets, Imam Ali (peace be upon him) states: "Do not betray the one who trusts you even if he has already betrayed you and do not divulge his secrets" (Majlesi, 1983, vol. 72: 210).

The Holy Prophet (peace be upon him) stated: "meetings are trust and their divulgence is betrayal" (Ibid, vol. 74: 89).

In some prophetic traditions the immaculate leaders have used a partial expression as regards the protection of secrets of Muslims that if we contemplate on them they would help us to learn how to keep the information confidential and it is "silence". Imam Ali (peace be upon him) stated: "Silence is the best way to keep one's secrets while idle talk and revealing the secrets of other people are not repairable in the same way that no one can bring the water poured on soil back to the bowl" (Nahjulbalaghah, Letter 31). Accordingly, quoting others even if it is not sin or an example of promulgation of fornication has been prohibited because it can put someone's life in danger.

Zeyd has quoted Imam Sadeq (peace be upon him) to have said: "no believer has the right to divulge his fellow's flaws and shortcomings" (Kuleini, 1987, vol. 2: 359).

Ibn Abi Meqdar in a tradition that contains a quotation from the last will of Imam Ali (peace be upon him) to Imam Hassan (peace be upon him) reads as follows: "Do not betray the one who has trusted you even if he has already betrayed you and do not divulge his secrets even if he has divulged you secrets" (Ibn Tавus, 1992: 159).

6- Conclusion

Paying attention to the privacy and personal secrets of individuals as one of the major examples of human rights has its origin in the attention to human dignity and the values based on the freedoms. This issue has changed today to one of the important debates in information community and the rights related to it. Privacy is considered to one of the rights with which all individuals in all governments should be familiar because having been conscious of privacy one will observe the citizenship rights and finally this will lead to the mental peace of the general public and their psychological security. Today following the expansion of mass media and use of such

facilities as social networks, the boundary between private and public spheres as well as the personal private secrets has become slim. Such an incident in a traditional society like Iran in which privacy of individuals is so important is the source of sensitivity.

To observe this important point in the first stage, the legislator should adopt the laws in a way that the ground is paved for punishing those who violate privacy. We should not forget that the violation of privacy has been considered to be a red line particularly in Islam and the respect to privacy is now part of the world legal literature.

On the other hand, in the Constitution of Islamic Republic of Iran there are various principles regarding the privacy and protection of personal secrets by which the judiciary system, police and intelligent services are required to protect the privacy of citizens.

In intelligent activities including investigation, prosecution and apprehension, interrogation, interview and so on and so forth, which are conducted for the sake of collection of documentable reasons the immunity of the personal life of the convict and providing his citizenship rights should be taken into earnest account by the intelligent service agents (executive officers); because even the slightest negligence in collection of reasons and discovery of the crime can result in the violation of the basic rights and freedoms of the convict.

Citizenship rights of the convicts when they are disposed by the intelligent service and executive officers for investigation, interview and interrogation should be respected based on the Quranic verses, prophetic traditions and jurisprudential rules. In fact, citizenship rights of the convict is the boundary of the application of sciences and techniques of crime identification that should be taken into consideration so that these rights not to be violated by the slogan of discovery of crime and observation of public interest.

UM ESTUDO DE INOVAÇÕES JURÍDICAS DO CÓDIGO DE PROCESSO PENAL ADOTADO EM 23 DE FEVEREIRO DE 2014 RELATIVO À PROTEÇÃO DA PRIVACIDADE E À PRESERVAÇÃO DE SEGREDOS PESSOAIS NOS MECANISMOS DE PROCESSO PENAL DO PONTO DE VISTA DOS DIREITOS DA CIDADANIA BASEADOS NOS VERSOS CORÂNICOS E NAS TRADIÇÕES PROFÉTICAS

Resumo

A privacidade e a preservação de segredos pessoais como um dos fatores mais importantes de proteção da seguridade social, bem como os direitos de cidadania, em vista de sua importância, foram levados em consideração nas leis constitucionais de diversos países e na comunidade internacional, na medida em que o legislador adotou novas medidas para proteger os direitos de cidadania e para uma melhor observação desses direitos. Assim, algumas leis específicas foram

legisladas na área das regras e formalidades do processo penal. As leis formais de nosso processo penal nacional, diante do paradoxo desafiador de garantir os interesses do condenado e da preservação dos interesses sociais e, é claro, sob a influência da jurisprudência islâmica e dos códigos jurídicos transnacionais, atingiram o ápice de sua evolução no domínio da observação dos direitos de cidadania do condenado, mais do que ninguém exposto à violação de seus direitos básicos. Consequentemente, muitas medidas efetivas foram adotadas no processo penal, particularmente para observação e proteção da privacidade e respeito aos segredos pessoais de indivíduos que, no presente ensaio, foram enumerados e testados em vista de fundamentos jurisprudenciais.

Palavras-chave: Condenado, Direitos da Cidadania, Segredos Pessoais, Código de Processo Penal, Privacidade.

References

- 1- Ahmadlu, Mona. (2013). Privacy in Jurisprudence and Iranian Law, Tehran: Majd Press.
- 2- Amadi al-Tamimi, Abu al-Fath, Ghurar al-Hikam and Durar al-Kalim. (1908). Qom: Dar al-Kutub al-Islami.
- 3- Ansari, Sheikh Morteza, Kitab al-Nikah. (1985). Qom: Majma al-Fikr al-Islami.
- 4- Eshtahari, Ali Panah. (1983). Taqirrat Thalath, Qom, Islamic Press.
- 5- Farahidi, Khalil Ibn Ahmad, Kitab al-Eyn. (1989). Qom, Dar al-Hijrah.
- 6- Goldust Juybari, Rajab. (2015). Criminal Procedure Code, Tehran, Jangal Press.
- 7- Hamedani, Haj Aqa Reza. (2000). Hashyah al-Makasib, Qom, Setareh Press.
- 8- Harrani, Hassan. (1975). Tuhaf al-Uqul an Al-e Al-Rasul, Tehran: Islamyah Press.
- 9- Hashemi, Hamid. (2011). Judiciary Officials and Citizenship Rights, Moraberan Press.
- 10- Holy Quran
- 11- Horr-e Ameli, Mohammad Ibn Hassan. (1979). Wasael al-Shiah ela Tahsil Masael al-Shariah, Qom: Al-e Al-Bayt.
- 12- Horr-e Ameli, Sheikh Mohammad Ibn Hassan. (1984). Wasael al-Shiah, Qom, Al al-Bayt Press.
- 13- Ibn Tavis, Razi al-Din Ali Ibn Musa Ibn Jafar. (1982). Kashf al-Mahajah le-Thamarah al-Mahajah, Qom, Maktab al-Alam Al-Islami Press.
- 14- Khansari, Aqa Jamal. (1981). Sharh al-Ghurar al-Hikam and Durar al-Kalim, Tehran: Chap va Enteshar Press.
- 15- Kuleini, Muhammad Ibn Yaqub, Al-Kafi. (1987). Dar al-Kutub al-Islamyah, Tehran.
- 16- Majlesi, Mohammad Baqer, Bihar al-Anwar. (1983). Beirut: Dar al-Ehya al-Turath al-Arabi.

- 17- Majlesi, Mohammad Baqer, Bihar al-Anwar. (1990). Beirut: Publishing Center.
- 18- Majlesi, Mohammad Baqer. (1984). Mirat al-Uqul fi Sharhi Akhbar Al-e Rasul, Tehran: Dar al-Kutub al-Islamyah.
- 19- Makarem Shirazi, Naser, Tafsir-e Nemuneh. (1974). Tehran: Dar al-Kutub al-Islamyah.
- 20- Mohammadi Rey Shahri, Mohammad, Mizan al-Hikmah. (2005). Tehran: Dar al-Hadith.
- 21- Mohaqeq Damad, Mostafa. (1984). Principles of Jurisprudence, Islamic Sciences Press.
- 22- Montazeri, Hossein Ali. (1992). Jurisprudential Principles of Islamic Government, translated by Abulfazl Shakuri, Tehran: Tafakur Press.
- 23- Mozaffar, Mohammad Reza. (2008). the Most Complete Transaltion and Explanation of Principles of Jurisprudence, Qom, Islamic Law Press.
- 24- Nahjulbalaghah
- 25- Namazi, Al-Sheikh Ali. (1999). Mostadrak Safinah Al-Bihar, Qom: Islamic Press.
- 26- Sabzewari, Seyed Abd al-Ali. (1979). Tahzib al-Usul, Qom, Al-Minar.
- 27- Sahib Jawahir, Mohammad Hassan. (1984). Jawahir al-Kalam fi Sharhi Sharaye al-Islam, Beirut, Dar al-Ehya al-Turath al-Arabi.
- 28- Soroush, Mohammad. (2014). Foundations of Privacy (Based on Islamic Principles), Qom, Hawzeh va Daneshqah Institute.
- 29- Tabatabaei Motameni, Manuchehr. (1991). Public Freedoms and Human Rights, Tehran: Tehran University Press.
- 30- Tayyeb, Seyed Abd al-Hosseini. (2007). Atyab al-Bayan fi Tafsir al-Quran, Qom: Sebtin Institute.

Trabalho recebido em 14 de novembro de 2018

Aceito em 09 de fevereiro de 2019