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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

W.P. No.18768 of 2019
(Ghulam Mustafa v. Judge Family Court & another)

JUDGMENT

Date of hearing	**7.7.2020**
Petitioner by:	**Malik Muhammad Ahsan, Advocate**
Respondent No.2 by:	**Mr. Nasir-ud-Din Mahmood Ghazlani, Advocate**
Amicus curiae	**Mr. Muhammad Ali Siddiqui, Advocate**

> *"Privacy is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure."*[1]

TARIQ SALEEM SHEIKH, J.- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the "Constitution"), assails the vires of order dated 26.10.2019 passed by the learned Judge, Family Court, Taunsa Sharif, whereby he dismissed the Petitioner's application for medical examination of his wife, Saeed Bibi (Respondent No.2).

2. The facts giving rise to this petition are that on 21.9.2016 the Petitioner and Respondent No.2 got married at Taunsa Sharif. As per *Nikahnama*, the Petitioner promised to give her Rs.5000/- in cash, three tolas gold and a 10-marla house by way of dower. On 15.3.2018, Respondent No.2 instituted a suit against the Petitioner complaining that he had expelled her from his house and sought recovery of dower, maintenance allowance and dowry articles. The learned Family Court

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1. Robert Merton, *Social Theory and Social Structures* 429 (Free Press 1968)

summoned the Petitioner who filed a contesting written statement. He submitted that his *Nikah* with Respondent No.2 was solemnized on 21.9.2016 but *Rukhsati* took place on 19.7.2017. He alleged that Respondent No.2 was "defective", had "no feminine characteristics" and was not fit for marriage. He complained to her parents but they turned a deaf ear to him. He urged Respondent No.2 to get herself medically examined but she put him off on one pretext or the other and eventually left his house on 10.3.2018. The Petitioner contended that Respondent No.2 and her family had played fraud with him and in the peculiar circumstances of the case she was not entitled to alimony. As regards the dower, he stated that he never agreed to give any 10-marla house to Respondent No.2 and the entry in the Nikahnama to that effect was wile. However, he claimed that he had already given her Rs.5000/- and three totals gold. The Petitioner also challenged the list of dowry articles submitted by Respondent No.2 and contended that it was bogus. On 26.6.2018 the learned Family Court framed the following issues from the divergent pleadings of the parties:

1. Whether the plaintiff is entitled to recover maintenance allowance from the defendant? If yes, then to what extent and for what period? OPP
2. Whether the plaintiff is entitled to recover dowry articles as per list attached with the plaint or, in the alternative, their value in the sum of Rs.3,00,000/-? OPP
3. Whether the plaintiff is entitled to recover three tolas gold ornaments valuing Rs.160,000/- and ten marlas house valuing Rs.500,000/- by way of *Haq Mahr* (dower) from the defendant? OPP
4. Whether the plaintiff has no cause of action and this suit is liable to be dismissed? OPD
5. Relief.

The same day the Family Court directed Respondent No.2 to produce evidence to prove her case. However, before there could be any further proceedings the Petitioner moved an application praying for the medical examination of Respondent No.2. The Family Court dismissed the said application vide impugned order dated 26.10.2019 holding that it was *mala fide* and vexatious. Hence, this petition.

3. Malik Muhammad Ahsan, Advocate, the learned counsel for the Petitioner, contended that Respondent No.2 was a transgender and she and her family had tricked the Petitioner to take her as a wife. The marriage between the parties was void *ab initio*. Respondent No.2 was liable to return the benefits received from the Petitioner and was not entitled to any alimony. The learned counsel submitted that the question as to whether Respondent No.2 was a woman or not could only be resolved through her medical examination. He argued that the impugned order was perverse and not sustainable.

4. Mr. Nasir-ud-Din Mahmood Ghazlani, Advocate, the learned counsel for Respondent No.2, vehemently opposed this petition. He contended that the Petitioner's allegations against Respondent No.2 were *mala fide,* false and vexatious. His only object was to humiliate her. On 21.9.2016 the Petitioner married Respondent No.2 and she lived with him and performed her marital obligations until he expelled her. The learned counsel argued that even if one goes by the contents of the written statement one would find that the Petitioner had specifically admitted in his written statement that she lived with him from 19.7.2017 to 10.3.2018, i.e. for about eight months. If she was not fit to be a wife he ought to have sent her packing the first night. There was no reason for him to keep her that long. The learned counsel pointed out that the Petitioner had not divorced Respondent No.2 till now.

5. Mr. Muhammad Ali Siddiqui, Advocate, the learned *amicus curiae*, opposed this petition on two grounds. First, since the Petitioner had pleaded a specific fact, the onus was on him to prove it. For this he had to stand on his own legs and could not ask for medical examination of Respondent No.2. Secondly, the lady had a right to privacy under Articles 9 & 14(1) of the Constitution. Therefore, the Family Court could not compel her to undergo medical examination if she was not inclined.

6. Arguments heard. Record perused.

7. This case involves the following moot points:

I. Whether Respondent No.2 has a fundamental right to privacy under the Constitution of Islamic Republic of Pakistan, 1973?

II. Whether the Family Court is competent to direct a party to undergo medical examination?

III. Whether the Family Court has rightly declined the Petitioner's request for medical examination of Respondent No. 2 in the instant case?

Moot Point I

8. The concept of privacy is of great antiquity. Anthropologists have found its roots in Hebrew culture, Classical Greece and ancient China. They have also noticed this notion in the thoughts of Greek Philosopher Aristotle. They agree that various religions fundamentally contributed to its growth by not only highlighting its various dimensions but also giving content to it. For example, the Bible implored its followers "to live a quiet life, minding your own business and working with your hands."[2] The Holy Qur'an commanded "do not spy on one another"[3] and "do not enter any houses except your own homes unless you are sure of their occupants' consent".[4] However, today's scholars generally reckon the famous article of two young lawyers, Samuel Warren and Louis Brandeis (who later rose to be the judge of the US Supreme Court), published in Harvard Law Review in 1890[5] in which they described the right to privacy "as the right to be let alone"[6] as the first explicit declaration of the right to privacy.[7]

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2. Thessalonians, 4:11
3. Surah Al-Hujurat (49), Verse 12
4. Surah An-Nur (24), Verse 27
5. Samuel D. Warren and Louis D. Brandies, *"The Right to Privacy"*, 4 HARV L REV 193 (1890)
6. This approach, which focused on protecting individuals, was a response to technological developments of the time such as photography and sensational journalism.
7. According to some scholars, it was Thomas Cooley who adopted the phrase "the right to be alone" in his *Treatise on the Law of Torts* (1888).

9. Originally the right to privacy was set up as a protection against arbitrary intrusion by the police but it has now developed into a general right of privacy and repose.[8] It is also considered essential for "democratic government because it fosters and encourages the moral autonomy of the citizen, as central requirement of a democracy.[9]

10. The international human rights law recognizes the right of privacy as one of the basic human rights. It is enshrined in:

i) Universal Declaration on Human Rights (UDHR)

Article 12

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ii) International Covenant on Civil and Political Rights (ICCPR)

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

iii) Convention on the Rights of the Child (CRC)

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

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8. See Durga Das Basu, *Commentary on the Constitution of India* (8th Edition) p.3257
9. Lawrence Lessing, *Code and Other Laws of Cyberspace*, p.153-55 (1999), approvingly quoted by the Supreme Court of Pakistan in *Justice Qazi Faez Isa v. The President of Pakistan and others* (Constitution Petition No.17 of 2019 etc.)

iv) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

11. The Human Rights Committee (HRC), which has the mandate to give authoritative interpretation of ICCPR, has issued General Comment No.16[10] to elucidate Article 17 of the Covenant. According to it, the said Article envisages that every person should be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. This right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. Every State is required to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to protect this right. The HRC has explained that the term "unlawful" in Article 17 means that a person's privacy cannot be intruded without the sanction of law while the expression "arbitrary interference" postulates that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable. As regards the term "family", the HRC says that the objectives of the Covenant require that it should be given a broad interpretation to encompass all those comprising the family as understood in the society of the State party concerned. It should include the place where a person resides or carries out his usual occupation.

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10. UN Human Rights Committee (HRC), ICCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: https://www.refworld.org/docid/453883f922.html [accessed 16 September 2020]

12. The HRC has clarified that under Article 17 of the ICCPR privacy rights are not absolute. Further, "as all persons live in society, the protection of privacy is relative."

13. At the regional level, the right to privacy is protected by:

i) European Convention on Human Rights (Article 8)

ii) American Convention on Human Rights (Article 11).

14. Other human rights instruments contain similar provisions. The right to privacy is included, for instance, in the following:[11]

i) Cairo Declaration on Human Rights in Islam;

ii) Arab Charter on Human Rights;

iii) African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression in Africa;

iv) African Charter on the Rights and Welfare of the Child;

v) Human Rights Declaration of the Association of Southeast Asian Nations;

vi) Asia-Pacific Economic Cooperation Privacy Framework;

vii) Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;

viii) Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows;

ix) Council of Europe. Recommendation No. R(99) 5 for the protection of privacy on the Internet;

x) European Union Data Protection Directive (since replaced by the General Data Protection Regulation, 2018).

15. Pakistan has ratified the Universal Declaration of Human Rights, the International Covenant on Political Rights and the Convention on the Rights of Child. Further, she has signed the Cairo Declaration on Human Rights in Islam.

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11. See www.ohchr.org >Privacy>Pages

16. In November 2006, a meeting of Human Rights experts was held in Yogyakarta, Indonesia, which adopted the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. The principle dealing with the "Right to Privacy" states:

> "Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others."

Defining "Privacy"

17. Despite its deep roots in history and universal recognition, "of all the human rights in the international catalogue, privacy is perhaps the most difficult to define and circumscribe".[12] Technological advancements during the last few decades have aggravated this problem.[13] However, the statement in West's Encyclopedia of American Law,[14] is most comprehensive. It says that "the meaning of the term privacy changes according to its legal context. In constitutional law, it means the right of a person to take

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12. James Michael, *Privacy and Human Rights*, UNESCO 1994 p.1 cited in the report prepared by the Global Internet Privacy Campaign available at gilc.org/privacy/survey/intro.html

13. Rachel L. Finn, David Wright and Michael Friedewald wrote in their paper "Seven Types of Privacy" (available at: https://www.researchgate.net/profile/Michael_Friedewald2/publication/258892458_Seven_Types_of_Privacy/links/Oc9605295d271f157000000/Seven-Types-of-Privacy.pdf?origin=publication_datail]:

    "'Privacy' is a key lens through which many new technologies, and most especially new surveillance technologies, are critiqued. However, 'privacy' has proved notoriously difficult to define. Serge Gutwirth says 'The notion of privacy remains out of the grasp of every academic chasing it. Even when it is cornered by such additional modifiers as 'our' privacy, it still finds a way to remain elusive. Colin Bennett notes that 'attempts to define the concept of 'privacy' have generally not met with any success. Legal scholars James Whitman and Danial Solove have respectively described privacy as 'an unusually slippery concept'. Furthermore, Debbie Kaspar notes that 'scholars have a famously difficult time pinning down the meaning of such a widely used term and … most introduce their work by citing this difficulty'. Helen Nissenbaum has argued that privacy is best understood though a notion of "contextual integrity", where it is not the sharing of information that is a problem, rather it is the sharing of information outside of socially agreed contextual boundaries … Although a widely accepted definition of privacy remains elusive, there has been more consensus on a recognition that privacy comprises multiple dimensions, and some privacy theorists have attempted to create taxonomies of privacy problems, intrusions or categories." (internal citations omitted)

14. 2nd Edition (2008)

decisions in respect of deeply personal matters without government interference. In this sense, privacy is associated with interests in autonomy, dignity and self-determination. Under the common law, privacy generally means the right to let alone. In this sense, privacy is associated with seclusion. Under statutory law, privacy often means the right to prevent the non-consensual disclosure of sensitive, confidential, or discrediting information. In this sense, privacy is associated with secrecy."

18. Westin identified "four basic 'states' of privacy: (i) solitude, where an individual is separated from the group and freed from the observation of others; (ii) intimacy, where an individual exercises seclusion to achieve a closer relationship with others; (iii) anonymity, the freedom from identification and surveillance in public places or while performing public acts; and (iv) reserve, the creation of a psychological barrier against unwanted intrusions."[15] Similarly, the Global Internet Privacy Campaign postulates that the right to privacy has the following facets:[16]

> *"Information privacy*, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
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> *Bodily privacy*, which concerns the protection of people's physical selves against invasive procedures such as drug testing and cavity searches;
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> *Privacy of communications***,** which covers the security and privacy of mail, telephones, email and other forms of communication; and
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> *Territorial privacy*, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space."

19. In ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1] the Supreme Court of India held that "there are nine primary types of privacy: (i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent

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15. Alan F. Westin, *Privacy and Freedom* 7 (1967). Also see: *Robert Sprague, Orwell was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. Marshall L. Rev. 83 (2008). Available at https://repository.jmls.edu/lawreview/vol42/iss1/4.
16. Privacy and Human Rights, An International Survey of Laws and Practice (available at: gilc.org/privacy/survey/intro.html)

others from violating one's body or from restraining the freedom of bodily movement; (ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy; (iii) communicational privacy which is reflected in enabling an individual to restrict access to communications or control the use of information which is communicated to third parties; (iv) proprietary privacy which is reflected by the interest of a person in utilizing property as a means to shield facts, things or information from others; (v) intellectual privacy which is reflected as an individual interest in the privacy of thought and mind and the development of opinions and beliefs; (vi) decisional privacy reflected by an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations; (vii) associational privacy which is reflected in the ability of the individual to choose who she wishes to interact with; (viii) behavioural privacy which recognizes the privacy interests of a person even while conducting publicly visible activities. Behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion; and (ix) informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information."

20. Even though the right to privacy is reckoned as one of the basic human rights, its meaning and scope varies from one jurisdiction to the other. History, culture, religion and constitutional structure of a country play important role in developing and defining its contours. However, no State recognizes it as an absolute right and regulates it by law. This is deemed necessary for "ordered liberty"[17] and to "maintain a decent society."[18]

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17. *Jacobellis v. Ohio*, 378 US 184 (1964)
18. *Palko v. Connecticut*, 302 US 319 (325) (1937)

Islamic perspective

21. One of objectives of Shariah, known as *Maqasid-e-Shariah*, is to better the lives of human beings and guide them to the path of salvation. For this it emphasizes (i) preservation of *Deen* (religion); (ii) preservation of intellect; (iii) preservation of life; (iv) preservation of property and (v) preservation of progeny.[19] Privacy is fundamental to all these principles/values and if that is violated tensions and conflicts occur which destroy the entire social fabric. Therefore, the Holy Qur'an and teachings of the Prophet Muhammad (peace be upon him) lay great emphasis on it. A few examples are as follows:

Privacy of home[20]

22. Islam preserves sanctity of home and prohibits prying into the lives of others. Surah An-Nur (24) Verses 27 & 28 ordain:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَدْخُلُوْا بُيُوْتًا غَيْرَ بُيُوْتِكُمْ حَتّٰى تَسْتَاْنِسُوْا وَتُسَلِّمُوْا عَلٰٓى اَهْلِهَا ۭ ذٰلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ تَذَكَّرُوْنَ ۝۲۷

فَاِنْ لَّمْ تَجِدُوْا فِيْهَآ اَحَدًا فَلَا تَدْخُلُوْهَا حَتّٰى يُؤْذَنَ لَكُمْ ۚ وَاِنْ قِيْلَ لَكُمُ ارْجِعُوْا فَارْجِعُوْا هُوَ اَزْكٰى لَكُمْ ۭ وَاللّٰهُ بِمَا تَعْمَلُوْنَ عَلِيْمٌ ۝۲۸

> O ye who believe! Enter not houses other than your own until ye have asked permission and saluted those in them: that is best for you in order that ye may heed (what is seemly). If ye find no one in the house enter not until permission is given to you: if ye are asked to go back go back: that makes for greater purity for yourselves: and Allah knows well all that ye do.[21]

Again, Surah An-Nur (24) Verse 61 says:

لَيْسَ عَلَى الْاَعْمٰى حَرَجٌ وَّلَا عَلَى الْاَعْرَجِ حَرَجٌ وَّلَا عَلَي الْمَرِيْضِ حَرَجٌ وَّلَا عَلٰٓى اَنْفُسِكُمْ اَنْ تَاْكُلُوْا مِنْۢ بُيُوْتِكُمْ اَوْ بُيُوْتِ اٰبَاۗىِٕكُمْ اَوْ بُيُوْتِ اُمَّهٰتِكُمْ اَوْ بُيُوْتِ اِخْوَانِكُمْ اَوْ بُيُوْتِ اَخَوٰتِكُمْ اَوْ بُيُوْتِ اَعْمَامِكُمْ اَوْ بُيُوْتِ عٰمّٰتِكُمْ اَوْ بُيُوْتِ اَخْوَالِكُمْ اَوْ بُيُوْتِ خٰلٰتِكُمْ اَوْ مَا مَلَكْتُمْ مَّفَاتِحَهٗٓ اَوْ صَدِيْقِكُمْ ۭ لَيْسَ عَلَيْكُمْ جُنَاحٌ اَنْ تَاْكُلُوْا جَمِيْعًا اَوْ اَشْتَاتًا ۭ فَاِذَا دَخَلْتُمْ بُيُوْتًا فَسَلِّمُوْا عَلٰٓى اَنْفُسِكُمْ تَحِيَّةً مِّنْ عِنْدِ اللّٰهِ مُبٰرَكَةً طَيِّبَةً ۭ كَذٰلِكَ يُبَيِّنُ اللّٰهُ لَكُمُ الْاٰيٰتِ لَعَلَّكُمْ تَعْقِلُوْنَ ۝۶۱

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19. *Dr.Muhammad Aslam Khakhi and others v. The State and others* (PLD 2010 FSC 1)
20 See: *Ghulam Hussain v. Additional Sessions Judge* (PLD 2010 Quetta 21)
21. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/24/27-28

> It is no fault in the blind nor in one born lame nor in one afflicted with illness nor in yourselves that ye should eat in your own houses or those of your fathers or your mothers or your brothers or your sisters or your father's brothers or your father's sisters or your mother's brothers or your mother's sisters or in houses of which the keys are in your possession or in the house of a sincere friend of yours: there is no blame on you whether ye eat in company or separately. But if ye enter houses salute each other a greeting or blessing and purity as from Allah. Thus does Allah make clear the Signs to you: that ye may understand.[22]

Similarly, Surah Al-Hujurat (49) Verse 12 commands:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ ٱجْتَنِبُواْ كَثِيرًا مِّنَ ٱلظَّنِّ إِنَّ بَعْضَ ٱلظَّنِّ إِثْمٌ وَلَا تَجَسَّسُواْ وَلَا يَغْتَب بَّعْضُكُم بَعْضًا أَيُحِبُّ أَحَدُكُمْ أَن يَأْكُلَ لَحْمَ أَخِيهِ مَيْتًا فَكَرِهْتُمُوهُ وَٱتَّقُواْ ٱللَّهَ إِنَّ ٱللَّهَ تَوَّابٌ رَّحِيمٌ ١٢

> O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not 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? Nay ye would abhor it...but fear Allah: for Allah is Oft-Returning Most Merciful.[23]

23. Two narrations on the subject may also be cited from Sunan Abu Dawud:[24]

> Book 41, Number 5155:
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> It is reported that a man came to see Prophet Muhammad, peace be upon him, and sought permission for entry while standing just in front of the door. The Prophet said to him; "Stand aside: the object of the Commandment for seeking permission is to prevent casting of looks inside the house."
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> Book 43, Number 5167:
>
> "The practice of the Prophet, peace and blessings be upon him, was that whenever he went to see somebody, he would stand aside, to the right or the left of the door, and seek permission as it was not then usual to hang curtains on the doors."

Privacy of family members

24. Islam recognizes that even one's own family members have a degree of privacy which should be respected. Surah Al-Baqarah (2) Verse 189 says:

يَسْـَٔلُونَكَ عَنِ ٱلْأَهِلَّةِ قُلْ هِىَ مَوَٰقِيتُ لِلنَّاسِ وَٱلْحَجِّ وَلَيْسَ ٱلْبِرُّ بِأَن تَأْتُواْ ٱلْبُيُوتَ مِن ظُهُورِهَا وَلَٰكِنَّ ٱلْبِرَّ مَنِ ٱتَّقَىٰ وَأْتُواْ ٱلْبُيُوتَ مِنْ أَبْوَٰبِهَا وَٱتَّقُواْ ٱللَّهَ لَعَلَّكُمْ تُفْلِحُونَ ١٨٩

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22. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/24/61
23. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/49/12
24 See: *Ghulam Hussain v. Additional Sessions Judge* (PLD 2010 Quetta 21)

> They ask thee concerning the new moons. Say: they are but signs to mark fixed periods of time in (the affairs of) men and for pilgrimage. It is no virtue if ye enter your houses from the back; it is virtue if ye fear Allah. Enter houses through the proper doors and fear Allah that ye may prosper.[25]

25. Further, there should be decorum within the family. Surah An-Nur (24) Verses 58 & 59 ordain:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لِيَسْتَاْذِنْكُمُ الَّذِيْنَ مَلَكَتْ اَيْمَانُكُمْ وَالَّذِيْنَ لَمْ يَبْلُغُوا الْحُلُمَ مِنْكُمْ ثَلٰثَ مَرّٰتٍ ؕ
مِنْ قَبْلِ صَلٰوةِ الْفَجْرِ وَحِيْنَ تَضَعُوْنَ ثِيَابَكُمْ مِّنَ الظَّهِيْرَةِ وَمِنْۢ بَعْدِ صَلٰوةِ الْعِشَآءِ ؕ ثَلٰثُ
عَوْرٰتٍ لَّكُمْ ؕ لَيْسَ عَلَيْكُمْ وَلَا عَلَيْهِمْ جُنَاحٌۢ بَعْدَهُنَّ ؕ طَوّٰفُوْنَ عَلَيْكُمْ بَعْضُكُمْ عَلٰى بَعْضٍ ؕ كَذٰلِكَ
يُبَيِّنُ اللّٰهُ لَكُمُ الْاٰيٰتِ ؕ وَاللّٰهُ عَلِيْمٌ حَكِيْمٌ ﴿۵۸﴾

وَاِذَا بَلَغَ الْاَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَاْذِنُوْا كَمَا اسْتَاْذَنَ الَّذِيْنَ مِنْ قَبْلِهِمْ ؕ كَذٰلِكَ يُبَيِّنُ اللّٰهُ
لَكُمْ اٰيٰتِهٖ ؕ وَاللّٰهُ عَلِيْمٌ حَكِيْمٌ ﴿۵۹﴾

> O ye who believe! let those whom your right hands possess 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 undress: 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. But when the children among you come of age let them (also) ask for permission as do those senior to them (in age): thus does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom.[26]

26. Prophet Muhammad (peace be upon him) implored that the brothers and sisters should not sleep together after they attain a certain age (which according to certain traditions is 10 years).

> Sunan Abu Dawud, Book No.2, Number 495:[27]
>
> The Messenger of Allah (peace be upon him) said: Command your children to pray when they become seven years old, and beat them for it (prayer) when they become ten years old; and arrange their beds (to sleep) separately.

Prohibition on eavesdropping

27. Surah Al-Isra (17) Verse 36 reinforces the right to privacy by warning that on the Day of Judgment every person will have to

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25. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/2/189
26. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/24/58
27. https://sunnah.com/abudawud/2/105

account for everything that he saw or heard and for the thoughts that he entertained while in this world.

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهٖ عِلْمٌ ۭ اِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ اُولٰۗىِٕكَ كَانَ عَنْهُ مَسْـُٔوْلًا ۝

> And pursue not that of which thou hast no knowledge; for every act of hearing or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning).[28]

Privacy of correspondence

28. The right to privacy is violated even if one reads private correspondence of another person. According to Hazrat Abdullah bin Abbas, the Prophet said:

> "Whoever glances through the letter of his brother without his permission, glances into fire." (Abu Da'ud Book 8, Number 1480)[29]

Jurisprudence in UK

29. In England, according to the Electronic Privacy Information Center (EPIC), in 1361 the Justices of Peace Act provided for the arrest of peeping toms and eavesdroppers. ***Semayne***'s case [(1604) 5 Co Rep 91a], which related to entry of the Sheriff of London into a property to execute a warrant of arrest, is famous for the words of the Sir Edward Coke who said that "the house of every one is to him his castle and fortress, as well for his defence against injury and violence as for his repose."[30] Then there was ***Entick v. Carrington*** [(1765), 95 ER 807] in which Lord Camden CJ held that "every invasion of private property, be it ever so minute, is a trespass." However, the English law did not recognize any general right or tort of privacy. A person complaining of disclosure of surreptitiously obtained personal information had limited remedy through an action for breach of confidence or trespass.[31] In ***Kaye v. Robertson*** [(1991) FSR 62 (CA)] the plaintiff was injured in an accident and underwent brain surgery in a private hospital. Two

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28. Translation by Abdullah Yusuf Ali: http://www.alim.org/library/quran/ayah/compare/17/36
29. https://sikku.blogspot.com/2007/09/right-to-privacy-in-islam.html?m=1
30. In the United States, this case is recognized as establishing the 'knock and announce rule'.
31. Breach of confidence was more focused on contractual relationship between the parties and trespass on property rights.

journalists posing as doctors came to his room and took his snaps. Kaye sought an injunction restraining their publication. The Court of Appeal held that "in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy." In ***Wainwright v. Home Office*** [(2003) UKHL 53] the plaintiffs claimed damages for being strip-searched when visiting a prison alleging that it constituted a trespass. One of the questions before the House of Lords was whether invasion of privacy could give rise to a cause of action under the English common law. The House recognized personal privacy as an underlying value but held that there was no common law tort of invasion of privacy. Lord Hoffmann said that creation of such a tort required a detailed approach which could only be achieved by legislation.

30. The Human Rights Act, 1998, incorporated the rights set out in the European Convention on Human Rights (ECHR) into UK's domestic law and thereby brought a fundamental change in the aforementioned approach. Article 8 of the Convention declares:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

31. Lord Hoffmann while appreciating the importance of the Human Rights Act in ***Campbell v. Mirror Group Newspapers Ltd*** [(2004) 2 AC 457] observed:

> "What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity … The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control information about one's private life and the right to the esteem and respect of other people. These changes have implications for the future development of the

> law. They must influence the approach of the courts to the kind of information which is entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified".

32. Subsequent legislations on subjects like harassment and data protection have reinforced the right to privacy in UK.

33. Privacy and freedom of expression have equal weight in the English Courts. In order to balance these two rights they seem to apply the following criteria set out by the European Court of Human Rights in ***Satakunnan Markkinaporssi Oy and Satamedia Oy v. Finland*** [App No 931/13 (ECHR 21 July 2015)]:

> "[W]here the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria in the balancing exercise include the following elements: contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed [on the party invoking freedom of expression]."

34. Where the right to privacy of an individual comes into conflict with the community's interest, the following four-fold test is applied to determine whether the interference is justified: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?[32]

Jurisprudence in the United States

35. The US Constitution does not contain the word "privacy" but in a catena of cases the courts have found that it is ingrained in the First, Third, Fourth, Fifth and Fourteenth Amendments. The Ninth

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32. Lady Hale in *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820

Amendment which states that "enumeration of certain rights [in the Bill of Rights] shall not be construed to deny or disparage other rights retained by the people" is also relied upon for expansive reading of the Bill of Rights. The courts hold that the right to privacy is reflected in the concepts of "individualism, limited government and private property and thus essential for enjoyment of personal liberty".[33] In ***Boyd v. United States*** [116 US 616 (1886)] the Supreme Court held that the Fourth and Fifth Amendments create a zone of privacy encompassing an individual's person and property which was prohibited to the government. It could neither compel him to testify against himself nor summon or seize his private books and papers for use as evidence against him in a criminal or quasi-criminal proceeding. Bradley J. said: "The principles laid down in this opinion affect the very essence of constitutional liberty and security ... They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and privacies of life." In ***Griswold v. Connecticut*** [381 US 479 (1965)] the Supreme Court struck down a state law that prohibited possession, sale, and distribution of contraceptives to married couples on the ground that it violated the right to marital privacy. Seven years later, in ***Eisenstadt v. Baird*** [405 US 438 (1972)], the Court expanded the right to privacy beyond the "marital bedroom" to include unmarried people by invalidating a law that prohibited the distribution of contraceptives to them. It ruled that the said enactment violated the Equal Protection Clause of the US Constitution.

36. Until the mid-twentieth century the US Supreme Court applied the "trespass doctrine" which focused on the individual's house and protection of physical spaces that could be considered private. ***Katz v. United States*** [389 US 347 (1967)] abandoned that doctrine holding that the Fourth Amendment protects people, not places. It restated the scope of privacy protection in the United States

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33. *Robert Sprague, Orwell was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. Marshall L. Rev. 83 (2008). Available at https://repository.jmls.edu/lawreview/vol42/iss1/4.

and formulated the "reasonable expectation of privacy" test in the following terms:

> "...[T]he Fourth Amendment protects people, not places. The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place'. My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

37. Consequent upon the location of the right to privacy in the "person", the American Courts have developed jurisprudence to protect "personal intimacies of the home, the family, marriage, motherhood, procreation, and child bearing."[34] In ***Loving v. Virginia*** [388 US 1 (1967)] the Supreme Court struck down a law criminalizing interracial marriage holding that states could not interfere with a person's choice of a life partner. In ***Stanley v. Georgia*** [394 US 557 (1969)], it unanimously concluded that the right of privacy protected the individual's right to possess and view pornography in his own house.[35] In ***Roe v. Wade*** [410 US 113 (1973)] the Supreme Court extended the right of privacy to include a woman's right to have an abortion with a rider that it could be regulated by the government. In ***Planned Parenthood v. Casey*** [505 US 833 (1992)] it reaffirmed a woman's right to terminate her pregnancy but allowed states to implement abortion restrictions that apply during the first trimester of pregnancy. In ***Cruzan v. Missouri Department of Health*** [497 US 261 (1990)] the Supreme Court declared that competent patients had the right to refuse life-sustaining medical treatment, including artificial nutrition and hydration. In ***Lawrence v. Texas*** [539 US 558 (2003)] the Supreme Court struck down a Texas law

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34. Durga Das Basu, Commentary on the Constitution of India, 8th Edition, p.3257
35. However, in *Paris Adult Theatre I v Slaton* [413 US 49 (1973)], the Supreme Court upheld a state court's injunction against the showing of obscene films in a movie theatre. The Court distinguished the case from *Stanley* on the ground that the principle of privacy of the home could not be applied to commercial exhibition at a theatre.

classifying consensual, adult homosexual as illegal sodomy holding that it violated the privacy and liberty of adults to engage in private intimate conduct. In ***Obergefell v. Hodges*** [576 US 644 (2015)] the Supreme Court ruled that state bans on same-sex marriage and on recognition of same-sex marriages performed in other jurisdictions were unconstitutional as they violated the due process and equal protection clauses of the Fourteenth Amendment.

38. In cases challenging surveillance the US Supreme Court has tried to balance the individual's right to privacy with the country's compelling interest. In ***National Aeronautics and Space Administration (NASA) v. Nelson*** [562 US 134 (2011)], the question was whether background checks of contract employees violated their constitutional privacy right. The Court unanimously held that in the circumstances of the case it did not. It ruled that "the Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974 … satisfy any 'interest in avoiding disclosure' that may arguably have its roots in the Constitution." In ***Maryland v King*** [569 US 435 (2013)] the Supreme Court upheld a statute enacted by the state of Maryland for the preservation of DNA samples of some categories of offenders (e.g. sexual offenders). The Court ruled that the DNA database would benefit the entire community so personal interest, if any, must give way to public interest.

Jurisprudence in India

39. The Constitution of India does not guarantee the right of privacy as an explicit fundamental right. However, the Supreme Court has declared that it is a part of right to life and personal liberty guaranteed under Article 21.

40. The first case in which the question of "privacy" was raised in India was ***M.P. Sharma v. Satish Chandra*** (AIR 1954 SC

300 : 1954 SCR 1077). The Union Government received various complaints against a company whereupon it ordered an investigation into its affairs. The Inspector appointed under the Companies Act reported that the Board of Directors had made an organized attempt to embezzle its funds and caused loss to the shareholders, it had indulged in fraudulent transactions and falsified its records. Consequent thereupon the Registrar of Joint Stock Companies lodged FIR against the members of the Board. On the request of the police the District Magistrate issued search warrants whereupon they seized various records. An objection was raised that a search to obtain documents for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by Article 20(3) of the Indian Constitution which prohibits testimonial compulsion. It was urged that originally the rule against testimonial compulsion could be invoked only in respect of oral evidence but in ***Boyd v. United States*** [116 US 616 (1886)] the US Supreme Court extended it even to documents procured during the course of a constitutionally impermissible search on the ground that it violated the Fourth and Fifth Amendments of the American Constitution. An 8-Judge Bench of the Supreme Court held that there was no contravention as the power of search and seizure was an overriding power of the State for the protection of social security which was regulated by law. It refused to read the principle enunciated in *Boyd* into Article 20(3) holding that in the Indian Constitution there was no fundamental right to privacy analogous to the Fourth Amendment to the American Constitution. The Court said:

> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the [American] Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

41. Nine years later came ***Kharak Singh v. State of U.P.*** (AIR 1963 SC 1295). Kharak Singh, was challaned in a case of dacoity in 1941 but was acquitted due to lack of evidence. The police compiled a "history sheet" against him in terms of Regulation 228 of Chapter XX of the Uttar Pradesh Police Regulations which called for maintenance of personal records of criminals under surveillance. As a result, he was subjected to regular surveillance in terms of Regulation 236 which included (a) secret picketing of the house or approaches to the houses of suspects; (b) domiciliary visits at night; (c) thorough periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and *chaukidars* of movements and absences from home; (e) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history-sheet of all information bearing on conduct, including midnight knocks. Kharak Singh moved the Supreme Court for a declaration that his fundamental rights were infringed. Two judgments (4:2) were delivered. The majority took the view that " 'personal liberty' is used in [Article 21] as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue." It held that sanctity of home and protection against unauthorized intrusion was an integral element of "ordered liberty" guaranteed by Article 21. Hence, the impugned regulation insofar as it provided for "domiciliary visits at night" was unconstitutional. However, it upheld the other stipulations for the following reason:

> "[T]he freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which

> privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

42. On behalf of the minority Subha Rao, J. wrote in his dissent that "no doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." He held that Article 21 embodies the right of the individual to be free from restrictions or encroachments. Although the Constitution does not expressly declare the right to privacy as a fundamental right, such a right is essential to personal liberty. All the six Judges in *Kharak Singh* struck down sub-para (b) of the impugned regulation but Subba Rao, J. joined by Shah, J., struck down the entire regulation as violating the individual's right to privacy.

43. In ***Gobind v. State of M.P.*** [(1975) 2 SCC 148] police regulations regarding surveillance similar to those in Uttar Pradesh were challenged. Mathew, J. noticed multiple facets of the right to privacy and held:

> "Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. 'Liberty against government' a phrase coined by Professor Corwin express this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy … The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely

> throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

He further said:

> "There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test."

44. Albeit *Gobind* did not specifically declare privacy as a fundamental right, in a number of subsequent cases the Court considered that it did. As these decisions were rendered by Benches of a strength smaller than those in *M P Sharma* and *Kharak Singh*, the matter was referred to a larger Bench. While answering the reference, a 9-Judge Bench in ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1] authoritatively held that the right to privacy is protected as an intrinsic part of life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Indian Constitution. The decisions in *M.P. Sharma* and *Kharak Singh* to the extent that they held that the right to privacy was not protected by the Constitution were overruled. The Supreme Court further held:

> "321. Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;
>
> "322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;
>
> "323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public

place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

"324. This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

"325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them;

"326. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual."

45. In ***Navtej Singh v. Union of India*** (2018 AIR SC 4321) 5-Judge Constitution Bench invoking the above principles declared that Section 377 of the Indian Penal Code insofar as it criminalizes consensual sexual acts of adults is unconstitutional. It ruled that "sexual orientation is an essential and innate facet of privacy … The right to privacy takes within its sweep the right of every individual, including that of LGBT, to express their choice in terms of sexual inclination without the fear of persecution or criminal prosecution."

Right to Privacy in Pakistan

46. On the constitutional plane any discourse on the right to privacy in Pakistan must start with Articles 9 and 14 of the Constitution of 1973. Article 9 mandates:

> **9. Security of person.–**No person shall be deprived of life or liberty save in accordance with law.

On the other hand, Article 14 stipulates:

> **14. Inviolability of dignity of man, etc.—**(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.
>
> (2) No person shall be subjected to torture for the purpose of extracting evidence.

47. Article 9 protects the right to life and liberty while Article 14(1) guarantees dignity of man and privacy of home. It is necessary to have a brief discussion on the meaning and scope of these rights before proceeding further.

48. The leading authority on the meaning of the expression "life" is ***Munn v. Illinois*** [(1877) 94 US 113] in which while construing Fifth and Fourteenth Amendments to the US Constitution Field J. observed that it means more than animal existence.[36] According to Fazal Karim, J. both India and Pakistan have adopted and applied this meaning.[37] In our country, in ***Shehla Zia and others v. WAPDA*** (PLD 1994 SC 693) the Hon'ble Supreme Court ruled that "the word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally." The right to life has been expanded to include "all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally",[38] such as the right to bare necessities of life, the right to pure and unpolluted water, the right to livelihood, the right to education, the right to access to justice, the

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36. Also cited by the Supreme Court of Pakistan in *Petition regarding Miserable Condition of the Schools* (2014 SCMR 396).
37. Fazal Karim, *Judicial Review of Public Actions* (Second Edition) p.803.
38. *Arshad Mehmood and others v. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others* (PLD 2005 SC 193), and *Watan Party and another v. Federation of Pakistan and others* (PLD 2011 SC 997).

right to legal aid, the right to speedy trial, and the environmental rights.

49. Article 9 read with Article 4 (which recognizes the right to enjoy the protection of law) requires the State to respect and safeguard the lives of the people within its jurisdiction. In ***Mohtarma Benazir Bhutto and another v. President of Pakistan and others*** (PLD 1998 SC 388) the Supreme Court held that the right to life guaranteed by Article 9 is a sacred right "which cannot be violated, discriminated or abused by any authority." In ***Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others*** (PLD 1999 SC 504) it held that this right cannot be denied even to the terrorists. Ajmal Mian, C.J. wrote:

> "No patriotic Pakistani can have any sympathy with terrorists who deserve severe punishment, but the only question at issue is, which forum is to award punishment, i.e. whether a forum as envisaged by the Constitution or by a Military Court which does not fit in within the framework of the Constitution. No doubt, that when a terrorist takes the life of an innocent person, he is violating Article 9 of the Constitution but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of above Article 9."

50. The Constitution of Pakistan does not define "liberty" either. According to the Merriam-Webster Dictionary (Eleventh Edition), "liberty is the quality or state of being free: (a) the power to do as one pleases; (b) freedom from physical restraint; (c) freedom from arbitrary or despotic control; (d) the positive enjoyment of various social, political, or economic rights and privileges; (e) the power of choice". Similarly, the Black's Law Dictionary (Tenth Edition) describes the said term as "freedom from arbitrary or undue external restraint, esp. by a government". J.S. Mill explained the concept of liberty as follows:[39]

> "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of

39. *J.S. Mill, On Liberty* (1859).

> conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological…Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived … No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government..."

51. Although Mill conceptualized liberty as consisting in doing what one desires, he always believed that an individual must not make himself a nuisance to others. He wrote:

> "The object of this Essay is to assert one simple principle, as entitled to govern absolutely the dealings of society with the individual by way of compulsion and control, whether the means used are physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that … the only purpose for which the power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[40]

52. The above quotations and study of the legal jurisprudence of various countries shows that the expression "liberty" takes within its fold not only freedom from illegal physical restraint but a host of other freedoms, including freedom of association, thought, religion, belief and emotions. However, power is reserved to the State to check an individual who poses harm to others. Our courts have construed liberty in the same terms. In ***Mst. Sahi Bi v. Khalid Hussain and 6 others*** (1973 SCMR 577) the Supreme Court set aside the order of the High Court passed in a habeas corpus petition whereby it gave the custody of wife to her husband against her wishes. There was an argument that she would live an immoral life if she was allowed to move freely. The Supreme Court held that no curbs could be placed on the wife's liberty and the apprehension of immorality was irrelevant in decision of a case under Section 491 Cr.P.C. In ***Mst. Nazneen v. Judicial Magistrate, Larkana and 2 others*** (1999 MLD 1250), which was a case of similar nature, the Karachi High Court

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40. *ibid.*

held that detention of wife in *Darul Aman* (shelter house) was a restraint on her liberty. In ***M. Younis Malik v. The State Bank of Pakistan through its Deputy Director, Foreign Exchange, Lahore and 3 others*** (PLD 1981 Lah. 181) this Court held that the right to liberty in Article 9 of the Constitution of 1973 must be interpreted to include the right of a citizen to ask for and possess a passport, subject to Sections 8(2) and 8(3) of the Passports Act. An executive order which unreasonably or arbitrarily curtailed liberty or went beyond the statutory provisions could be struck down by the High Court in exercise of its power of judicial review. In ***Government of Pakistan and another v. Dada Amir Haider Khan*** (PLD 1987 SC 504) the Supreme Court held that a citizen's right to travel abroad was an important aspect of his liberty and closely related to the rights of free speech and association.[41] In ***Mohtarma Benazir Bhutto and another v. President of Pakistan and others*** (PLD 1998 SC 388) the Supreme Court held that extra-judicial killings or custodial deaths, arrests and torture by the State machinery *inter alia* violated Article 9 of the Constitution.[42] In ***Arshad Mehmood v. Commissioner/ Delimitation Authority, Gujranwala and others*** (PLD 2014 Lah. 221) a Full Bench of this Court considered the political dimension of the right to liberty and held:

> "Liberty means not only freedom from government coercion but also the freedom to participate in the government itself. Benjamin Constant emphasized that the 'liberty of the ancients' consisted of a sharing of a nation's sovereign authority among that nation's citizens. From the citizen's perspective it meant 'an active or constant participation in collective power'. Justice Stephen Breyer explaining his theory of 'active liberty' writes: 'The concept of active liberty refers to a sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people.' Right to liberty under our Constitution includes political liberty which carries political rights like right to participation in political life of a nation, right to self-determination, autonomy, civil rights, sovereignty and self-government."
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> (internal citations omitted)

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41. Also see *Wajid Shamas-ul-Hassan v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad* (PLD 1997 Lah. 617) and *Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others* (PLD 2010 Lah. 230).
42. This view was reiterated in *Watan Party and another v. Federation of Pakistan and others* (PLD 2011 SC 997).

53. In ***Ameen Masih v. Federation of Pakistan and others*** (PLD 2017 Lah. 610) this Court struck down an amendment in the Divorce Act, 1869, which put curbs on the right of a Christian to divorce whose marriage had completely broken down. The Court held that "the requirement to prove the charge of adultery against the spouse perpetuates a dead marriage, impairs the quality of life and curtails the liberty of a person by forcing him to live through an unhappy family life against his free choice."

54. Recently, the Supreme Court once again highlighted the significance of the right of liberty in ***Khawaja Salman Rafique and another v. National Accountability Bureau through Chairman and others*** (PLD 2020 SC 456) while approvingly quoting the following words of an Indian Judge:

> "Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society."

55. As already seen, Article 9 categorically states that the rights to life and liberty cannot be syncopated "save in accordance with law". In common parlance the said expression implies substantive and procedural due process of law but in ***Khawaja Salman Rafique***'s case (*supra*) the Supreme Court explained that "any deprivation of liberty or curtailment of rights guaranteed by the Constitution has to be adequately justified on the touchstone of the principle of proportionately, unreasonableness and necessity. The limitation must be for proper purpose, rational and necessary and the prejudice caused to the constitutional rights thereby must be proportional to the benefit achieved."

56. Now I turn to Article 14(1). It has two parts: the first guarantees the dignity of man while the second sanctifies the privacy of home.[43] Dignity is central value underpinning the whole gamut of

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43. Fazal Karim, *Judicial Review of Public Actions* (Second Edition) p.1090

human rights law. It is invoked in various international conventions and is the cornerstone of the Constitutions of a large number of countries. In ***S v. Makwanyane*** [1995] ZACC 3], speaking for the Constitutional Court of South Africa O'Regan J. said that "without dignity, human life is substantially diminished."

57. Aharon Barak explains the role of human dignity as a constitutional value as follows:[44]

> "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."

58. In ***Fred Khumalo v. Bantubonke Harrington Holomisa*** [2002 (5) SA 401], the Constitutional Court of South Africa held:

> "The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual."

59. Similarly, in ***Liaqat Ali Chugtai v. Federation of Pakistan through Secretary Railways and 6 others*** (PLD 2013 Lah. 413) Syed Mansoor Ali Shah, J. of this Court[45] held that "human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, States, laws, human rights and respect of person originate in the dignity of man or his personhood." Again, in ***Barrister Asfandyar Khan and others v. Government of Punjab and others*** (PLD 2018 Lah. 300) he wrote:

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44. "*Human Dignity: The Constitutional Value and the Constitutional Right*", Cambridge University Press

45. now he is a Judge of the Supreme Court of Pakistan

> "Dignity has its roots in the simple idea that justice consists of the refusal to turn away from suffering. Most central of all human rights is the right to dignity. Dignity unites the other human rights into a whole. The right to dignity reflects the recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends. Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity is infringed if a person's life or physical or mental welfare is harmed."
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> (internal citations omitted)

60. Our Constitution does not define human dignity. It only recognizes it as an absolute right by stipulating that "dignity of man is inviolable". In ***Mst. Shehla Zia and others v. WAPDA*** (PLD 1994 SC 693) the Hon'ble Supreme Court observed that "the fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and found only in few constitutions of the world." In ***Mohtarma Benazir Bhutto***'s case (*supra*) it observed that this right is all the more important for us because we are an Islamic country and Islam lays great emphasis on it. In a *suo motu* case, reported as 1994 SCMR 1028, the Supreme Court declared public hangings a violation of human dignity. It held:

> "According to this provision the dignity and self-respect of every man has become inviolable and this guarantee is not subject to law but is an unqualified guarantee. Accordingly, in all circumstances; the dignity of every man is inviolable and executing in public, even the worst criminal, appears to violate the dignity of man and constitutes, therefore, a violation of the fundamental right contained in Article 14."

61. The Supreme Court ruled in ***Liberty Papers Ltd. and others v. Human Rights Commission of Pakistan*** (PLD 2015 SC 42) that defamatory speech and writing offends the right to dignity of man as it lowers a person in the estimation of the society. In ***Arshad Mehmood***'s case (*supra*) a Full Bench of this Court held that human dignity included the right to demand a political democratic structure of governance where rule of law was supreme and no one was above the law. In ***Haji Junaid Mahmood v. Government of Punjab and others*** (PLD 2017 Lahore 1) this Court held that Fundamental Rights to life, dignity and equality mandated that the State and its organs should make serious efforts to make disabled persons useful and

productive members of the society. This view was reiterated in ***Barrister Asfandyar Khan***'s case (*supra*). More recently, in ***Khawaja Salman Rafique and another v. National Accountability Bureau through Chairman and others*** (PLD 2020 SC 456), the Supreme Court directed that while deciding bail applications the courts must exercise their discretion judiciously because arrest causes humiliation to the accused and impinges upon his right to dignity where it is unjustified.

62. The second part of Article 14(1) of the Constitution stipulates that, subject to law, the privacy of home shall be inviolable. This fundamental right is based on the Qur'anic Injunction which restrains a person from entering into another's house without his permission (Surah 24: Verses 27-28). "This command", writes Justice Fazal Karim, "becomes in law a prohibition against unjustifiable entry and unreasonable searches and seizures."[46] In ***Mohtarma Benazir Bhutto v. President of Pakistan and others*** (PLD 1998 SC 388) the Supreme Court of Pakistan observed that "privacy is directly linked with dignity of man … If a man is to preserve his dignity, if he is to live with honour and reputation, his privacy whether at home or outside has to be saved from invasion and protected from intrusion. The right conferred under Article 14 is not to premises, home or office but to the person, the man/woman wherever he/she may be." The apex Court added that it cannot be violated even in public places.

63. From the above discussion it follows that the rights to life, liberty and dignity of man enshrined in Articles 9 and 14(1) in our Constitution are of wide amplitude. They often have overlapping areas. This should not, however, surprise us because it is now well settled that fundamental rights are not water-tight compartments. Reference in this regard may usefully be made to ***Rustom Cavasjee Cooper v. Union of India*** [(1970) 1 SCC 248] in which the Supreme Court of India ruled:

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46. Fazal Karim, *Judicial Review of Public Actions* (Second Edition), p.1102

> "In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action— legislative or executive—Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights."

The above view was reaffirmed in ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1].

64. The right to privacy is twined with the rights to life, liberty and human dignity. Privacy safeguards individual autonomy and if that is not protected these rights evanesce. In ***Justice Qazi Faez Isa v. The President of Pakistan and others*** (Constitution Petition No.17 of 2019 etc.) the Supreme Court of Pakistan held:

> "Recognizing and protecting the zone of privacy is the freedom and liberty our Constitution holds dear. Privacy attaches to the person and not to the place where it is associated. Home under Article 14 of the Constitution is not only the physical house but the entire treasure of personal life of a human being. The intrusion by the State into the sanctum of personal space, other than for a larger public purpose, is violative of the constitutional guarantees. Right to privacy is deeply intertwined with the right to life, right to personal liberty and right to dignity. 'Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say.' This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny and protected against 'unwanted gaze,' unless they act in an unlawful manner."

65. But is the right to privacy absolute? In our Constitution the rights of life, liberty and privacy of home are subject to law while the

right to dignity of man is inviolable. Would the fact that the right to human dignity is absolute also make the right to privacy inviolable?

66. Legally speaking, rights are usually not absolute because every right can be abused to harm others. Hence, most constitutions contain limitation clauses. According to Dieter Grimm, "constitutional protection of a right does not mean that it is immune from all restrictions. It only connotes that restrictions need a constitutional justification. Nevertheless, where the constitution expressly declares a right absolute, it does not admit any restriction."[47]

67. According to Halsbury's Laws, "in situations involving competing rights, where the exercise of one right would directly infringe another, the clash may be resolved by taking a closer look at the constitution or the statute, as the case may be. There may be an implicit hierarchy of rights in the instrument: one right may be heavily qualified while the other may contain only narrow exception, making it reasonably clear that one will normally prevail."[48]

68. The High Court of Justice in Northern Ireland while confronted with a question involving two competing human rights observed:[49]

> "Similarly, the principle of open justice must yield to the right to life in the context of the present case. This does not entail emasculation of this supremely important principle. Rather, it involves an adjustment, a limited dilution, which the principle itself permits, necessitated by the court's evaluation of the Article 2 issues. This qualified common law principle, of unmistakable importance, must submit to an absolute human right".

69. On the same issue Delhi High Court held as under in ***Rohit Shekhar v. Shri Narayan Dutt Tiwari*** [2011 (4) R.C.R.(Civil) 459]:

> "In case of conflict between the two fundamental rights, it is the right which would advance public interest and public morality would be enforceable"."

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47. Dieter Grimm, *Dignity in a Legal Context: Dignity as an Absolute Right*. DOI:10.5871/bacad/9780197265642.003.0021
48. Halsbury's Laws of England, Rights and Freedoms, Fifth Edition, Vol. 88A.
49. *ZY v. Paul Higgins* [2013] NIQB 8.

70. Judge Serghides considered the issue of conflict of different human rights in his dissenting opinion in ***Rashkin v. Russia*** (Application No.69575/10). In that case the applicant, who was a Member of Parliament at the relevant time, made a complaint before the European Court of Human Rights that the respondent State had violated his right to freedom of expression under Article 10 of the European Convention on Human Rights by holding him liable for defaming another lawmaker. There was a clash between the applicant's right to freedom of expression under Article 10 and his opponent's right to the protection of his reputation or private life under Article 8 of the Convention. Both the Articles contain limitations. Judge Serghides held that the principle of effectiveness, together with the principle of proportionately should be applied for resolving the conflict. He wrote:

> "The principle of effectiveness as a norm of international law in a Convention provision which secures a human right, in the present case Article 10, which is in conflict with another human right, in the present case the right to private life under Article 8, will assist in determining the extent to which one right could be impaired by the conflict if the other right is to prevail. In this connection, it should be emphasized that a right, the core of which is negated or negatively affected will be subjected to a greater impairment than a right of which only one aspect – a non-essential aspect – is negatively affected … Subsequently, the principle of proportionality will be employed, by weighing in the balance, not the two rights which are equal, but the impairment that each right will potentially sustain in the conflict. Then the conflict can be resolved by finding out which right is affected by the conflict to a greater extent."

71. Despite the fact that the right to privacy is intrinsically linked with the right to dignity of man, it is not absolute under our Constitution for at least two reasons: first, the general rule is that a fundamental right is reckoned as absolute when the constitution specifically describes it as such. The implied rights[50] have the same status as the express or enumerated rights but they are not absolute as

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50. Express rights are explicitly outlined in the Constitution. In contrast, implied rights are suggested or inferred from the text. In the United States the term penumbra is used to describe the group of rights identified through a process of reasoning from the rights protected in the Bill of Rights. Although researchers have traced the origin of this term to the 19th century, it gained significant attention in 1965 when Douglas, J. in his majority opinion in *Griswold v. Connecticut* [381 U.S. 479 (1965)] identified the right to privacy within the penumbra of specific guarantees of the Bill of Rights. He wrote: "specific guarantees in the bill of rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

there is no constitutional stipulation to that effect. In our case also there is no such provision. In ***Sharda v. Dharmpal*** (AIR 2003 SC 3450), the Supreme Court of India held:

> "Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase 'personal liberty' this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash."

72. Secondly, the right to privacy must be subject to restriction on the basis of compelling public interest. In ***Gobind v. State of Madhya Pradesh*** [(1975) 2 SCC 148 at p.157, para 31] the Supreme Court of India held:

> "Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

73. The view that the right to privacy is not absolute also finds support from the recent judgment of larger Bench of the Supreme Court of Pakistan in ***Justice Qazi Faez Isa v. The President of Pakistan and others*** (Constitution Petition No.17 of 2019 etc.) in which the majority held that no claim of privacy or privilege can justify withholding of financial disclosure that is relevant in accountability process.[51]

74. In view of the foregoing, I conclude that Respondent No.2 does have a fundamental right to privacy but that right is not absolute.

Moot Point II

75. Medical examination is quite a broad term. It includes all methods used and procedures adopted to obtain information about a

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51. In his dissenting opinion, Syed Mansoor Ali Shah, J. held that "rights to personal liberty and privacy under Articles 9 and 14 of the Constitution impose a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorizes them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom become absolute and stand to protect the privacy and personal freedom of the citizen."

person's health. It "encompasses health status questionnaires, tests of a predictive nature such as those to measure his medical biology, susceptibility to diseases or consumption pattern (such as for alcohol or drugs). It also includes tests carried out in relation to human procreation and prenatal diagnostics. Following this definition, medical examinations are not always bodily invasive. Medical examinations involve a lot of human rights questions notably those concerning the legitimacy and proportionality of the interference with an individual's privacy as well as with his or her physical integrity."[52] Therefore, the principle of "informed consent" is generally insisted upon which implies that "the person concerned can only give his/her voluntary consent when he/she can exercise free power of choice without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion. Moreover, the individual should have the legal capacity to give consent."[53] The informed consent principle can be by-passed only in exceptional circumstances, for example when the measure is founded on a legal provision, serves a legitimate aim, is proportional, and fulfils a pressing social need.[54]

76. Until 1938 the Federal Courts in the United States were not competent to order mental or physical examination of the parties in civil litigation although a majority of state courts could do so either under a statute or by judicial ruling. The US Supreme Court refused to sanction such procedure for the Federal Courts on the ground that it offended personal liberty and human dignity. In ***Union Pacific Railway Co. v. Botsford***, 141 U.S. 250 (1891), the Supreme Court held:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference … The inviolability of the person is as much invaded by a compulsory stripping as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger,

52. archive.unu.edu/unupress/unupbooks/uu08ie/uu08ie0t.html
53. *ibid*
54. *ibid*

> without lawful authority, is an indignity, an assault, and a trespass…"

77. In 1938, Rule 35 of the Federal Rules of Civil Procedure was adopted which brought a reform. It laid down that in an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to physical or mental examination by a physician. However, such order could be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties.[55] One of the arguments advanced by the proponents of compulsory examinations in civil litigation is that they expose malingering and give both the parties equal access to medical evidence that is usually in the exclusive control of one of them.

78. Issues of mental health and parental fitness frequently arise in the American courts in divorce proceedings and child custody disputes. In most of the states the law allows appointment of mental health experts for the purpose of such litigation whose reports are admitted in evidence subject to cross examination. At times a party would seek to introduce his adversary's previous medical record in evidence. Such a motion is resisted on the ground of psychotherapist-patient privilege. Although law recognizes this privilege, the courts hold that it is not absolute. In ***Re Matthew R.***, 113 Md. App 701, 688 A.2d 955, it was held that an absolute privilege can seriously impact the well-being of children.

79. In U.K., in early times there were isolated examples of courts making orders for medical examinations. As regards blood

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55. Rule 35 has since been amended. It's clause (a) now reads as under:

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition – including blood groop – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order:

(A) May be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) Must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

tests, it was thought that they amounted to battery which could not be authorized by any court.

80. Under the common law two principles developed: first, the court could draw an adverse inference against a party if it failed to give or call evidence on an important point. Second, the court could stay the proceedings if the claimant did not consent to medical examination where it was necessary to establish his claim. However, in ***Lacy v. Harrison*** [(1992) 11 BMLR 75], the High Court went a step further and ordered the defendant to subject to medical examination or else his defence would be struck off.

81. Statutory reforms have now permitted the courts to direct a medical or other examination of a party to a *lis* in certain situations. For example, section 20 of the Family Law Reforms Act, 1969, provides that in any civil proceedings in which the parentage of any person is required to be determined, the court may, either of its own motion or on an application by any party give a direction for the use of scientific tests. However, Section 21(1) ordains that no bodily sample shall be taken from the concerned person without his consent. Where a person is under the age of sixteen years, the person who has his care and control may give the requisite consent and, if he does not, the court make an order that the minor's bodily sample be taken if it is in his best interests. Where the person lacks mental capacity (within the meaning of the Mental Capacity Act, 2005), consent may be given on his behalf by the court or the appointed authority. Section 23(1) of the Act provides that if the Court's direction is not complied with it may draw such inference as appears proper in the circumstances.

82. In ***Anderson v. Spencer*** [(2018) EWCA Civ 100], one of the questions before the Court of Appeal was whether, in the absence of statutory provisions, the High Court had inherent jurisdiction to order posthumous DNA test of a deceased person to determine paternity. The court approved the following passage from the judgment assailed before it:

> "Taking all these matters into account, my conclusion is that the High Court does possess an inherent jurisdiction that it can properly deploy to direct scientific testing to provide evidence of parentage in circumstances falling outside the scope of FLRA.[56] If the court was unable to obtain evidence of the kind, severe and avoidable injustice might result. Awareness of the implications of ordering testing without consent and of the wider public interest does not lead to the conclusions that the jurisdiction does not exist, but rather to the realization that it should be exercised sparingly in cases where the absence of remedy would lead to injustice."

83. The jurisprudence under the European Convention on Human Rights holds that although an individual has the right not to be subjected to compulsory physical interventions and treatments, every such measure does not necessarily involve an interference in his private life. In ***Peters v. The Netherlands*** [77 A DR 75 (1994)] the applicant was convicted for drugs offences and sentenced to six years imprisonment. His behaviour in the jail suggested that he was using drugs so the authorities ordered him to give a sample of his urine for examination. The applicant refused to co-operate whereupon a five days confinement in his own cell was imposed on him the same day as a disciplinary measure. He complained that the direction for urine test violated his right to physical integrity. The European Commission of Human Rights rejected the complaint holding that the alleged interference was necessary in a democratic society for the prevention of disorder or crime and thus justified under Article 8 para 2 of the ECHR.

84. In India there are a number of statutes which contain provisions for compulsory medical examination. In ***Gautam Kundu v. State of West Bengal and Another*** [(1993) 3 SCC 418 : AIR 1993 SC 2295] the Supreme Court of India while dealing with a question about the paternity of a child noticed the provisions of Section 112 of the Indian Evidence Act and held that the presumption arising thereunder could only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It extensively examined the case-law on medical examinations and ruled as under:

> "(1) the courts in India cannot order blood test as a matter of course;

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56. Family Law Reforms Act, 1969.

> (2) wherever applications are made for such prayers in order to having roving inquiry, the prayer for blood test cannot be entertained;
>
> (3) there must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the [Indian] Evidence Act;
>
> (4) the court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (5) no one can be compelled to give sample of blood for analysis."

85. In ***Sharda v. Dharampal*** (AIR 2003 SC 3450) an order of the civil court was assailed which directed medical examination of wife in divorce proceedings to ascertain her mental condition. Upholding the order the Supreme Court of India ruled:

> "(1) A matrimonial court has the power to order a person to undergo medical test.
>
> (2) Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution
>
> (3) However, the Court should exercise such a power if the applicant has a strong *prima facie* case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

86. In 2013, in the case reported as ***Lillu alias Rajesh & another v. State of*** **Haryana** (AIR 2013 SC 1784) the Indian Supreme Court held the two-finger test as violative of rape victim's right to privacy, physical and mental integrity and dignity. The Court ruled:

> "12. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.
>
> "13. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity."

87. In Pakistan the Code of Criminal Procedure, 1898 (Cr.P.C.), and the Code of Civil Procedure, 1908 (CPC), which are the general laws relating to courts of criminal and civil judicature respectively, do not contain any specific section authorizing medical examination but that authority can be read into some of the provisions. For example, Order XXXII Rule 15 CPC can be construed to sanction the same when it obligates the court to satisfy itself as to whether the party before it suffers from mental illness for the purpose of appointment as a guardian. Similar interpretation can be placed on Article 3 of the Qanun-e-Shahadat, 1984 (the "QSO"), that requires the court to determine whether a witness is competent to testify. One may also argue that Section 151 CPC, which saves the inherent powers of the court, can also be invoked in appropriate cases for the ends of justice. Nevertheless, there are some special laws that allow medical examinations.[57] The matters falling within the ambit of those enactments are dealt with accordingly.

88. Jurisprudence on compulsory medical examination in Pakistan has mostly developed around DNA tests. An in-depth study of the case-law shows that the courts have a different approach for criminal and civil cases. In criminal prosecutions ***Salman Akram Raja and another v. Government of Punjab through Chief Secretary, and others*** (2013 SCMR 203) is the lodestar case in which the Supreme Court of Pakistan held that in sexual offences the victim cannot be forced for DNA or other medical test as it would infringe his/her personal liberty. These tests can only be done with his/her consent. Nevertheless though this benefit cannot be extended to the accused. However, the hurt cases are treated as a distinct category. Here, the prosecution is required to prove that the alleged victim received injuries at the hands of the accused. If there is no medical evidence the criminal court draws an adverse inference against it. On the civil side, the issue of medical examination/DNA test arises mostly in cases involving paternity/legitimacy of children. The courts

57. See for example, The Punjab Mental Health (Amendment) Act, 2014.

are consistent that it can be ordered in the rare of the rarest cases and that too with the consent of the party concerned. In ***Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan and another*** (PLD 2015 SC 327) the man filed a declaratory suit denying paternity of two children imputing unchastity to his ex-wife. During the course of proceedings before the trial he moved an application for DNA test of the children which was allowed. The Supreme Court of Pakistan noticed that Article 128 of QSO stipulates that a child is legitimate (and it is a legitimate proof of his legitimacy subject to a couple of exceptions) if he is born during the continuance of valid marriage between his parents and not earlier than expiration of six lunar months from the date of marriage, or within two years after its dissolution (the mother remaining unmarried).[58] It held that since the law had termed it a conclusive proof of legitimacy, no evidence could be allowed to disprove it. The Court added that in cases where paternity is in issue DNA test cannot be ordered without the participation and involvement of the children whose legitimacy has been denied. Mere consent of the mother does not suffice. Accordingly, the order was set aside. In ***Mst. Laila Qayyum v. Fawad Qayum and others*** (PLD 2019 SC 449) also there was a dispute over paternity. The respondent denied that the petitioner was his real sister. The Supreme Court ruled that a free lady could not be compelled to give a sample for DNA testing as it would violate her liberty, dignity and privacy guaranteed under the Constitution. The cases reported as ***Malik Muhammad Rafique v. Mst. Tanveer Jahan and another*** (PLD 2015 Islamabad 30), ***Mst. Shamim Akhtar v. Additional District Judge, Gujranwala and another*** (PLD 2015 Lah. 500), ***Mst. Rubina Kausar v. Additional Sessions Judge and others*** (PLD 2017 Lah. 604), and ***Mst. Safia Bibi and another v. Muhammad Akbar and others*** (PLD 2018 Lah. 758) iterate the same principles.

89. The cases that come up before the Family Courts (which have special jurisdiction under the Family Courts Act, 1964, over the

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58. As per clause (2) of Article 128 of QSO this provision does not apply to a non-Muslim if it is inconsistent with his faith.

subjects mentioned in the Schedule thereto) are of diverse nature. They are sometimes confronted with disputes which may not involve determination of paternity/legitimacy of children but medical examination of a party may still be relevant. In this context, the following observations of the Andhra Pradesh High Court in ***G.Venkatanarayan v. Kurupati Laxmi Devi*** (AIR 1985 AP 1) are quite instructive:

> "There is close affinity between law and medicine which is demonstrated by medical jurisprudence. The physician as an expert witness has become a common and welcome feature in courts ranging from opinions on nature and degree of injures to the proximate cause of death in criminal cases, assessment of insanity and several other situations ... When there is a dispute between the wife and husband about the potency of either of them their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence."

90. Calcutta High Court expressed a similar view in an earlier case reported as ***Birendra Kumar Biswas v. Hemalata Biswas*** (AIR 1921 Calcutta 459), while relying on the following passage from the judgment of Lord Stowell in ***Briggs v. Morgan*** [161 E.R. 1339 : (1820) 3 Phill 325]:

> "It has been said that the means resorted to for proof on these occasions are offensive to natural modesty, but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own."

91. As already discussed, although the right to privacy is a fundamental right, it is not absolute. In the above-mentioned situations, the court must reconcile the competing interests and balance them. It must be emphasized that the court should not allow itself to become a tool in the hand of unscrupulous persons and order medical examination of a party only in exceptional circumstances when no alternative is available. Roving inquiry is not permissible. There must be sufficient material before the court to justify such an

order. If the concerned person refuses to comply with the direction it cannot compel him. It would only draw such inference as may be appropriate on the facts and in the circumstances of the case.

92. I have purposely avoided using the expression "adverse inference" in the preceding paragraph because the question as to what inference would be appropriate "depends on the evidence that is available, the burden of proof and the circumstances of the case."[59] A party's refusal to cooperate may very well indicate that it has no answer to the assertion of its rival but the court is obliged to consider whether there is an explanation for the lack of cooperation. In ***Re: A (A minor) (Paternity: Refusal of blood test)*** [(1994) 2 Family Law Reports 463], the alleged father refused to provide blood samples for testing. Lord Waite said:

> "...the inference that he is father of the child should be virtually inescapable. He would certainly have to advance very clear and cogent reasons for this refusal to be tested – reason which it would be just and fair and reasonable for him to be allowed to maintain."

93. The reasons advanced need not be sufficient. In ***R v. Inland Revenue Commissioners, ex parte TC Coombs & Co.*** [(1991) 2 AC 283 at page 300], Lord Lowry explained:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

94. Further, the court should specifically put the non-cooperating party on notice about the consequences of its conduct and warn it what adverse inference may be drawn against it.[60]

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59. *UK Social Security and Child Support Commissioners' Decisions* [2005] UKSSCSC CCS_3757_2004 (02 February 2005).
60. *Mona Al-Khatib v. Dr. Abdulla Masry* [2002] EWHC 108(Fam).

95. I, therefore, conclude that the Family Court is competent to direct a party to undergo medical examination but that power is subject to the conditions mentioned above.

Moot Point III

96. Admittedly, marriage is a contract which entails various rights and obligations. In Islam these, *inter alia*, involve dower, maintenance and sexual relationship. However, they can only be enforced if there is a valid marriage – just as other contracts are enforceable if they are valid.

97. The classic Islamic law recognizes four genders among human beings: male, female, *Khunsa* (translated as 'intersex' or 'hermaphrodite', i.e. a person who has both male and female anatomy), and the *Mukhannath* (an effeminate male, i.e. a man who resembles women). Khunsa are of two types: *Wadhih* (discernible) and *Mushkil* (problematic/intractable). The former is a person with both male and female genitals but specific gender can be assigned to him on the basis of the attributes of the dominant sex. For example, if that person urinates from penis, ejaculates semen, or grows facial hair, he can be regarded as male. On the other hand, if that person develops breasts and mensuration, she would be regarded as female. In contrast, Khunsa Mushkil is a person who cannot be categorized either as male or female. Islamic jurists made the classification of Khunsa on the basis of the knowledge available in their times. "Today doctors are capable of determining a Khunsa's sex by investigating his karyotype, gonadal tissue histology and internal reproductive organs. They do not depend on the appearance of the external genitalia."[61]

98. Section 2(1)(n) of the Transgender Persons (Protection of Rights) Act (XIII of 2018) enacted by our Parliament defines a transgender person as follows:

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61. Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients With Disorders of Sex Development*. Published online 2016 Apr 21. DOI: 10.1007/s10508-016-0754-y.

(n) "transgender person" is a person who is –

(i) intersex (khusra) with mixture of male and female genital features or congenital ambiguities; or

(ii) eunuch assigned male at birth, but undergoes genital excision or castration; or

(iii) a transgender man, transgender woman, Khawaja Sira or any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

99. Act XIII of 2018 does not contemplate any screening committees to determine identity of the transgender. It rather recognizes an individual's self-perceived gender. Section 3 mandates:

3. Recognition of identity of transgender person. – (1) A transgender person shall have a right to be recognized as per his or her self-perceived gender identity, as such, in accordance with the provisions of this Act.

(2) A person recognized as transgender under sub-section (1) shall have a right to get himself or herself registered as per self-perceived gender identity with all government departments including, but not limited to NADRA.

(3) Every transgender person, being the citizen of Pakistan, who has attained the age of eighteen years shall have the right to get himself or herself registered according to self-perceived gender identity with NADRA on the CNIC, CRC, Driving Licence and passport in accordance with the provisions of the NADRA Ordinance, 2000 (VIII of 2000) or any other relevant laws.

(4) A transgender person to whom CNIC has already been issued by NADRA shall be allowed to change the name and gender according to his or her self-perceived identity on the CNIC, CRC, driving licence and passport in accordance with the provisions of the NADRA Ordinance, 2000 (VIII of 2000).

100. Act XIII of 2018 prohibits all types of discrimination against transgender individuals and seeks to ensure their basic fundamental rights mentioned in Part-II of Chapter I of the Constitution of 1973. More importantly, the Act also ensures right of inheritance (s.7) to these people in accordance with law as per the gender declared on the computerized national identity card issued by the National Database & Registration Authority. This legislation has made Pakistan "something of a global leader in discussions of

(trans)gender and (trans)gender rights."[62] However, it has left unanswered the crucial question relating to marriage of these people.

101. According to some scholars,[63] a Khunsa Wadhih (whose gender has been established) can contract a valid marriage with the opposite sex but Khunsa Mushkil is prohibited from marrying any one. In the instant case, if the medical examination of Respondent No.2 reveals that she lacks femininеness, it would have bearing on the marriage between the parties and impact their rights and obligations arising therefrom, including the claim of Respondent No.2 for recovery of dower and alimony.

102. Admittedly, the Petitioner lived with Respondent No.2 for quite some time. According to the learned counsel for Respondent No.2, it was eight months. More importantly, he has not divorced her to-date. This gives rise to a presumption that the marriage between the parties was valid. The said presumption is, however, rebuttable by strong and weighty evidence, which can be oral or documentary or both. In an online article published by New Jersey Law Journal, Joel R. Brandes summarized the principles of burden of proof in matrimonial actions as follows:[64]

> "The burden of proof in an action is determined by the public policy of the law to which the action relates, while a presumption relieves a party from having to actually prove a fact. Unlike most other types of actions, the parties to a matrimonial action have many different burdens of proof to meet, depending upon the ancillary relief they seek, or oppose. The plaintiff in a divorce action has the burden of proof with regard to the allegations of her complaint for divorce and her requests for ancillary relief, such as maintenance, custody, child support, equitable distribution and counsel fees. The defendant has the burden of proof with regard to his affirmative defenses, counterclaims, and requests for ancillary relief. ... A presumption does not affect the ultimate burden of proof. It places a burden on the adversary to come forward with evidence to the contrary. The burden of going forward with evidence to rebut the presumption is upon the adversary."

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62. Jeffrey A. Redding, *The Pakistan Transgender Persons (Protection of Rights) Act of 2018 and its Impact on the Law of Gender in Pakistan*, Australian Journal of Asian Law, 2019, Vol.20 No.1, Article 8:1-11.
63. *Dawn*, June 27th 2016 https://www.dawn.com/news/1267491
64. Joel R. Brandes, *The Burden of Proof and Presumptions in Matrimonial Actions*, New Jersey Law Journal.

103. As regards the standard of proof the House of Lords in ***Re B (Children) (FC),*** [2008] UKHL 35, held that in civil cases there is only one standard of proof – the proof that the fact in issue more probably occurred or not. The seriousness of an allegation does not make any difference to the standard of proof to be applied "in determining the truth of the allegation. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

104. The Petitioner had specifically questioned the gender of Respondent No.2 in his written statement. Since the latter had denied the allegation and the matter goes to the root of the case, it was incumbent on the Family Court to frame an issue in that respect and require the Petitioner to produce evidence to prove his assertion. The Petitioner could move an application for medical examination of Respondent No.2 only after getting his evidence recorded and bringing material which could persuade the Court that an order therefor was absolutely necessary. As already discussed, such an order cannot be passed in routine. Inasmuch as the suit was at the nascent stage, the Petitioner's application was premature.

105. Albeit the Family Courts, by virtue of Section 17 of the Family Courts Act, 1964, are not bound by the technicalities of the Code of Civil Procedure, 1908 (except Sections 10 & 11) and the Qanun-e-Shahadat, 1984, the above principles fully apply to the instant case.

Order of the Court

106. In view of what has been discussed above, this petition is accepted subject to the following:

(i) The impugned order dated 26.10.2019 is set aside and the Petitioner's application for medical examination of Respondent No.2 shall be kept pending for the time being.

(ii) The Family Court shall frame an additional issue (Issue No.1A) in the following terms:

1A. Whether the marriage between the parties is void because the plaintiff lacks feminine characteristics? OPD

(iii) After the parties have got their evidence recorded the Family Court shall take up the Petitioner's aforementioned application and pass a fresh order thereon keeping in view the guidelines given in this judgment. It shall order medical examination of Respondent No.2 only if it is unavoidable and absolutely necessary.

(iv) If the Family Court accepts the Petitioner's application it shall require him to deposit Rs.30,000/- as security with it. In case the medical report disproves the Petitioner's allegations, the said security shall be forfeited and paid to Respondent No.2 as compensation. This is necessary to protect Respondent No.2 and other women in similar circumstances against illegal harassment.

(v) Respondent No.2 shall not be forced for medical examination. If she refuses the Family Court shall draw such inference as may be just and proper. In such eventuality the security deposited by the Petitioner shall also be returned to him.

(TARIQ SALEEM SHEIKH)
JUDGE

ANNOUNCED IN OPEN COURT ON 26.11.2020.

JUDGE

APPROVED FOR REPORTING

JUDGE

M.Khalid