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MARCH 2019

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HUMANITARIAN LAW IN THE ABRAHAMIC RELIGIONS

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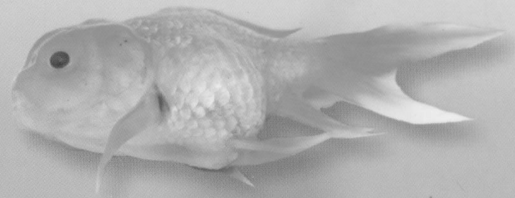
EIGHT QUR'ANIC HUMAN RIGHTS



THE BEST WOMAN

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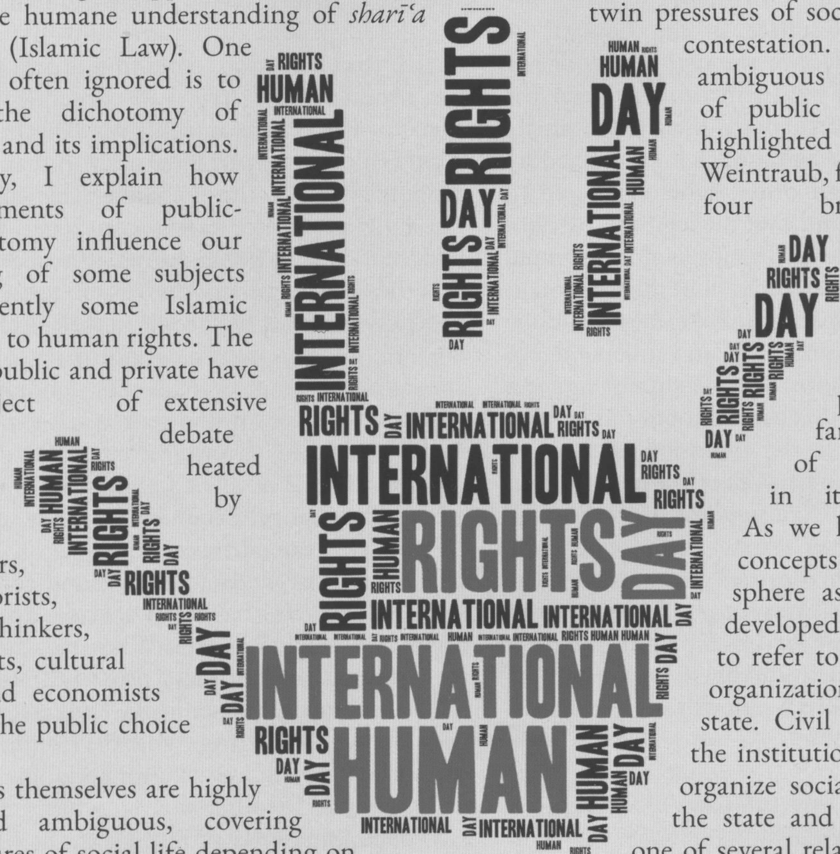
NUWRŪZ, A WORLD HERITAGE

THE PUBLIC-PRIVATE DICHOTOMY AND ISLAMIC HERMENEUTICAL IMPLICATIONS

There is a wide spectrum of ways and methodological approaches for presenting a more humane understanding of *sharīʿa* law (Islamic Law). One way which is often ignored is to understand the dichotomy of public-private and its implications. In this essay, I explain how the developments of public-private dichotomy influence our understanding of some subjects and consequently some Islamic rulings related to human rights. The categories of public and private have been the subject of extensive analysis and debate at times of heated contestation by philosophers, legal scholars, political theorists, feminist thinkers, anthropologists, cultural historians, and economists operating in the public choice tradition.



The categories themselves are highly complex and ambiguous, covering different features of social life depending on the framework adopted, while the distinction between public and private can by no means be conceived as a simple opposition or dichotomy, but must be viewed as multifaceted and protean, comprising a family of distinctions that are constantly shifting under the twin pressures of social changes and political contestation. The complex and ambiguous nature of the categories of public and private has been highlighted by some scholars. Jeff Weintraub, for instance, has identified four broad frameworks in which different notions of public and private play an important role. Needless to say, the classification of public/private in this sense is far from the dichotomy of public-private spheres in its Habermasian sense. As we know the closely related concepts of civil society and public sphere as Habermas conceives it developed in the early modern era to refer to capacities for social self-organization and influence over the state. Civil society usually refers to the institutions and relationships that organize social life at a level between the state and family. Public sphere is one of several related terms that denote an institutional setting distinguished by openness of communication and a focus on the public good rather than simply compromises among private goods. Located

in civil society, communication in the public sphere may address the state or may seek to influence civil society and even private life directly.[1] The categories of public and private in the sense we are talking about here have played, and continue to play, a central role in structuring human activities and delineating the main boundaries of social life.[2]

The distinction between the public and private spheres amounts to a distinction between the political and the personal and, in some views, between what falls under the law and what falls outside the law. The state and social power should not apply to the private sphere, which is the limit of the public institutions of law. Traditionally, the family, home, and personal taste and preference are private or domestic matters. Religion sometimes joins these other concerns and is a sign that the distinction is not absolute. Whatever the boundaries, the invasion of the private sphere is considered shameful.

In contrast, the public sphere is the domain of relationships that are subject to the regulations of law and political authority. The distinction between the public and the private is particularly essential for liberal theory to maintain the privacy-based rights and freedom of the individual (although other rights are based in the public sphere) and to indicate the legitimate extent of political authority. This distinction is not respected in fascist and totalitarian systems. The distinction is challenged by many feminists who describe the public sphere as one of justice, autonomy, and independence and the private sphere as one of care, nurturing, and bonding. Feminists claim that the distinction is gender-based, that it legitimatizes the exclusion of women from the public. Even some versions of the demarcation can be criticized from an Islamic point of view based on the fact that Islam has often insisted upon the implementation of some virtues and values in both the public and private spheres. Even having different levels of insistence upon values and virtues depending on their belonging to the public or private sphere may result in a type of hypocrisy which is often seriously condemned in Islamic teachings.

1. Calhoun, C., (2001), *Civil Society and the Public Sphere: History of the Concept*. In *International Encyclopedia of the Social & Behavioral Sciences*, Holland: Elsevier Inc, vol. 3, p. 1897.

2. For some clarifications on public and private spheres in this sense see: Duglas Crow, K., (2009), *Islam, Cultural Transformation, and the Re-emergence of Falsafeh*, Tehran: Iranian Institute of Philosophy, pp: 112-140.

The dichotomy of public-private is generally accepted in almost all civilizations and cultures including Islam within a specific framework. What is public and what is private, however, is a matter of social culture. It is rooted in the mindset of individuals and the community as a whole. Universal Human Rights is not capable of imposing its own hegemony upon different cultures and civilizations. The developments of the dichotomy are also accepted in a specific framework and indeed when it contradicts no *sharīʿa* rules. This means that not only the demarcation itself but also the dynamic and changeable nature of the demarcation might be welcomed by *sharīʿa* law. In other words, current attitudes of *sharīʿa* law to the dichotomy are not the same ones which were dominant at the time of the Prophet (P.B.U.H. & H.H.) and infallible Imams (P.B.U.T.). Common sense or the manner of rational people is among the sources of *sharīʿa* law. Therefore, the developments of the public-private dichotomy and in particular those related to considering something as public or private are not necessarily negative and consequently prohibited. Some of these developments may be the very result of a kind of evolution and maturity in man's thought and rationality. Only those changes that are explicitly or implicitly prohibited can be considered as negative and unacceptable. To some degree, it is because of the fact that the Holy Legislator does not require us to behave in the frameworks of the people in the age of the Infallibles (P.B.U.T.), i.e. the people whose main social character according to the Qur'an was ignorance (*Jāhilīya).* The validity of common sense (*Banā al-ʿUqal*ā) is not limited to those who were contemporary at the age of the Infallibles (P.B.U.T.) and accepted by them. Surely, among the changes occur in social life are those related to public-private demarcation.

It seems that some Islamic laws and rulings regarding some subjects are based on specific understanding of them as public or private. When this attitude changes in a way that contradicts no *sharīʿa* rule, all related texts and rulings should be understood based on considering this change and development. Indeed, it would be a paradigmatic error to ignore developments of this kind. In other words, when inferring *sharīʿa* law, paradigm shifts should be at the focus of jurists. These paradigmatic shifts are not, of course, limited to the public/private demarcation. The paradigm shift

from a duty-based language to a right-based language is another significant paradigm shift which should be taken into account.

Considering the dichotomy of public-private may help us have a more humane understanding of *sharī'a* law. Just to give some examples, we can mention wife-beating. Wife-beating is often permitted in traditional jurisprudence. Its permissibility comes from the apparent meaning of a verse in holy Qur'an saying, "Admonish those women whose surliness you fear, and leave them alone in their bed, and [even] beat them. If they obey you, do not seek any way against them. God is Sublime, Great." (4: 34).

Commentators have taken different ways in interpretation of the verse. From early time until now traditionalists and textualists have tried to permit wife-beating according to the external and surface meaning of the verse.

Some others tried to interpret the verse in another way. Some have limited the permitted beating in the verse to a slight one which causes no harm. Others added that light disciplinary action in order to correct the moral infraction of a wife is only applicable in extreme cases and it should be resorted to only if one is sure it would improve the situation. However, if there is a fear that it might worsen the relationship or may wreak havoc on him or the family, then he should avoid it completely. According to some, the command allowing beat is addressed to the society as a whole which manifests in the state not to the husband, because it is unjust to allow a man who is the plaintiff and a party of an action to act as the judge and performer of the punishment.

In my opinion, a very basic and helpful way of understanding these sorts of verses is to pay adequate attention to the public/private demarcation. In earlier times, wives used to be conceived as a part of husband's personal and private affairs, thus he could treat her as he saw fit. The wife was a dependent and non-autonomous agent of the husband. Nowadays, the problem is quite reversed. Family relations are not part of the man's private affairs. Indeed, the foundation of the conviction in the

verse is changed. The verse and narration interpreting it should be understood in the light of this paradigm shift. This approach can help us understand many other family relationships. Rereading of the traditional Islamic family law from this single point of view may create many changes and new developments.
In traditional jurisprudence murder and other crimes against persons are often evaluated as having no public aspect. They are greatly under the decision of the offender and victims or his/her relatives. The traditional Islamic law views not only murder but all kinds of serious bodily crimes as private matters. Whatever liability is incurred through them, be it retaliation or blood-money or damages, is the subject of a private claim. Nowadays, this understanding of punishment is quite reversed. Crimes against persons, and in particular murder, are amongst the most severe crimes. These crimes are considered to be more against the society as a whole rather than against individual victims. The result is that no one is allowed to punish others arbitrarily. All narrations regarding the authority of victims' relatives in the case of murder should be regarded in the light of this development. The concrete result is that arbitrary punishment is not allowed and punishing offenders is under the authority of the state as the representative of the society.
Another example we can refer to is backbiting. Backbiting is strongly condemned and prohibited. On the other hand, commanding good and prohibiting bad which sometimes manifests in criticizing public authorities is not only a right but also a very significant social responsibility. Hence, these two concepts may appear to contradict one another. Differentiation between public and private aspects of the case, however, can help us understand the question. Moreover, talking about public authorities might be quite different from talking about intimate friends. The public-private dichotomy concept helps us not to consider the prohibition of backbiting to be an obstacle for freedom of expression and critique of public authorities in the public sphere. Even though the moral sentiment of backbiting in the eye of the Holy Lawmaker still supports the idea that we should be cautious even when backbiting is connected to the public sphere and public authorities.
Another example is the age of maturity and responsibility. In the very traditional view, a girl of 9 lunar years and a boy of 15 lunar years have been assumed as mature and therefore responsible for their behaviors. In addition to the necessity of contextualization of *ḥadīths* suggesting this idea, one may argue that due to the necessity of differentiating between public and private affairs it is possible to distinguish between age of maturity in private issues like daily prayers and fasting in one hand and civil and criminal capacity and/or responsibility on the other. Liability and responsibility from the latter dimension is a public and social matter and therefore to some extent left to the authority of the state to decide about. Considering the public nature of crimes against persons, , it seems that it is among the authority of the state to decide about the age of maturity and responsibility even when the crime is the subject of retaliation *(qiṣāṣ).*
The list of the examples is not, of course, limited to the above-mentioned examples.

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