

FINAL PAPER

CSID Fifth Annual Conference

“Defining and Establishing Justice in Muslim Societies”

Washington, DC - May 28 – 29, 2004

“The Primacy of Privacy in the Assessment of a Justice System for an Islamic Democratic Model”

By: Saeed A. Khan

SK1967@aol.com

Wayne State University, Michigan

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The Institute for Social Policy & Understanding, Michigan

The establishment of democracy within an Islamic framework requires justice as its cornerstone. The foundational aspects of justice must, however, be framed by clear lines of demarcation drawn between the public and private spheres. The individual must be aware of his/her expectations of privacy as codified by Islamic authority. Similarly, the state must define the parameters that constitute its ability to encroach upon the individual's rights and functionality in society. This paper seeks to provide analysis of historical precedent as well as an assessment of Islamic sources of juridical authority to illustrate the key factors involved in developing a functional democratic model. In addition, the underlying privacy considerations within such sources shall be examined. Finally, this paper will examine the challenges affecting the subject of privacy as well as the direction required to be taken to rectify the inherent systemic flaws once such challenges are defined.

The Treatment of Privacy in Modern American Society

Privacy is a fluid, organic phenomenon that is treated differently in the narrative of various societies. In embarking upon an assessment of the contemporary scope of privacy in Islam, it is helpful to study the evolution of privacy issues in recent American historical and legal terms. Some of the most contentious issues in American contemporary jurisprudence involve matters of privacy. An entire corpus of legal precedent stems from the debate over whether the U.S. Constitution in fact provides for an enumerated right to privacy. Although the word, “privacy,” does not explicitly occur in the Constitution, case law demonstrates that an ‘implied right’ to privacy may be correctly read into the Constitution, particularly, the Bill of Rights and subsequent amendments.¹ The United States Supreme Court's decisions,

¹ The 9th Amendment of the US Constitution has been held to contain the “implied” right of privacy as applicable to the rest of the document, especially the 1st, 4th, 5th, 6th and 14th Amendments.

dating to the 1960's,² have furnished the foundational cadre upon which the inflammatory body of abortion law has been established.³ Far from being a resolved issue, the debate raging over the scope of individual privacy relative to state encroachment is as dynamic and polemical a matter as any occurring in American history.

One may properly infer that such fervent debate over privacy is a function and symptom of a healthy, vibrant and open democracy. Yet, such lively discourse also exposes the vulnerability of seemingly established parameters to a myriad of forces, including the exploitation of the democratic process by those motivated by severe political agenda. Current debate over the USA Patriot Act highlights the latest contextual incarnation of the privacy issue- the effort to achieve a balance between preservation of individual freedom and the preservation of collective security, with both arguably at greater risk of erosion than before the task had begun.⁴

Privacy in Islam

Within the Islamic tradition, the concept of individual space is not only honored, it is divinely mandated. The Qur'an admonishes:

Oh 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.
Qur'an 24:27-28

These verses establish the Islamic line of demarcation between public and private space at the front door step of a person's home, and apply as a dictate to individual and state apparatus alike. A profound application of this principle of privacy is found in the treatment of the prosecution of adultery (*Zina*). The evidentiary burden of proof – four witnesses with

² Supreme Court decisions starting with *Griswold v Connecticut*; 381 US 479 (1965) illustrate the privacy debate in modern American constitutional law.

³ *Roe v Wade*; 470 US 113 (1973) and *Planned Parenthood v Casey*; 505 US 833 (1992) are two landmark cases in the abortion debate and, consequently, the privacy debate.

⁴ Please see Cole, David, *Enemy Aliens*. New York: The New Press (2003) for an insightful study of the ramifications of government action, post 9/11, and the ensuing impingement of personal freedoms caused by such action.

an unobstructed view of the actual physical act⁵ - requires either a flagrant breach of privacy by the witnesses or the brazen disregard for the public space such that four people would be empirically privy to the act in question. In either case, a major sin in Islam may not be prosecuted at the expense of privacy interests or respect for the public space.

The Islamic treatment of privacy is based upon the religion's recognition of two forms of accountability- spiritual and societal. Each is distinct and, despite some overlap, not always applicable.⁶ Islamic injunctions on personal conduct vary based on the potential for societal harm, this being the dependent variable, as spiritual accountability remains constant, through the concept of *deux et camera*.⁷

The Disfunctionality of Privacy in Western and Muslim Societies

The disjuncture in the West between rights and duties is caused by the absence or paucity of discourse concerning duties of the individual to the collective. The preservation of individual rights within the private sphere has been deemed inadequate; such rights are now expected in the public realm, with little or no regard for the sensitivities of those who do not subscribe to the particular expectation in question. Those areas of personal life previously considered solely private, e.g. sexuality, certain liturgical aspects of religious expression, etc., are no longer left at the front door each morning for retrieval in the evening upon return home. The result is the erosion of the line of demarcation between public and private. But it is difficult to hold the state culpable for its efforts to blur the privacy line when it is has complicity from individuals who voluntarily cede their protections in pursuit of expanding their personal rights into the public space. In the age of voyeuristic entertainment and reality television, there is a definite correlation between a diminished expectation of privacy and a diminished respect for privacy.

Imbalance vis-à-vis privacy also persists in the Islamic world; here, the dilemma is a function of the disparate subordination of individual rights to one's duty to the collective. The primary cause for this phenomenon is political, as the state seeks to centralize, preserve and protect its authority and control. Those actions and behavior of the individual not visible in the public sphere constitute potential subversive and seditious threats to political stability. Invoking the need to uphold national security, the state succeeds in its encroachment into the personal space of its citizenry, often under the guise of harm to the social order.⁸ As Islam is interpreted to be oriented toward duty to the social in favor of the rights of the individual, secular modern society is framed with heavy emphasis of rights, not duties; thus,

⁵ Qur'an 4:15.

⁶ In Islam, spiritual accountability persists despite the transgression occurring in complete solitude, i.e. no palpable societal harm. Such a dichotomy is analogous, for example, to the issue of alcohol consumption in American legal application. Blood alcohol levels and degree of intoxication is not an issue for an individual drinking at home; however, both factors are significant once the individual makes the decision to operate a car.

⁷ "God in the Chamber"

⁸ Ironically, this process has occurred in the United States since September 11, 2001, demonstrating that even countries with a storied history of personal freedoms may not be immune to the imposition of limitations.

the gulf between modernity and traditionalism, or the West and Islam.⁹ The two “worlds” appear to be on different wavelengths.

Challenges in the Debate of Privacy

Two major challenges confront the definition of public and private space, without which no meaningful discussion of privacy may occur; the first is technology. The internet allows for access to the public sphere through heretofore unimagined speed and depth. An individual ensconced in his basement can affect an entire community several thousand miles away. The internet has ensured that the metaphoric front door is no longer the primary portal to the outside world; the internet is the new gateway. The convenience of sitting in one’s own home, yet having the opportunity to delve deep into the public realm (as well as the private realm of others on occasion), is enhanced by the anonymity of the individual, acting as a voyager in a virtual world. He may voluntarily enter the public “debate” through the internet; in doing so, he has voluntarily cast himself into the vortex of the public domain. This action, however, has important consequences for the area of privacy. An individual, who consents, through his own conduct, to enter the public realm, can no longer seek immunity generally afforded the individual in his own dwelling. That the front door was not used to enter the public space does not permit the individual from asserting a right to privacy, the reasonable expectation of which was lost at the computer.

Consent, as evidenced in the aforementioned study of technology, is a weighty component in the privacy debate and one not confined to information access. There is a concern that greater impermeability between the public and private realms may insulate people from prosecution for certain offensive- even criminal- conduct (e.g. domestic abuse and sexual assault). A key distinction, however, must be made when attempting to gauge the state’s right to breach the sanctity of the individual’s home relative to the individual’s right to be free from such intrusion. The lack of consent between two individuals who are party to a particular action creates an implied contract for state involvement. In the case of abuse, violence and assault, it is fair to presume that the victim has not consented to the harm exacted. In the absence of mutual agreement to the conduct at hand, the state may intercede on behalf of the victim even if it warrants a breach of the conventional parameters of privacy.

Intellectual honesty requires precision and objective analysis of the privacy debate. Part of the dilemma of discussing the issue with its deserved cogency is the confusion borne of semantic inaccuracy and misunderstanding. One must understand the nature of the governing forces in various levels of abstraction, perhaps most clearly exemplified by studying the difference between law and ethics. Law may said to regulate society, whereas ethics serve to regulate the individual. Within the Islamic paradigm, the latter is often ignored or simply subsumed into the former. Muslims have neglected to realize that they may, and do, live in non-Islamic legal and social systems without significant compromise to their obligations to praxis or doctrine. Many democratic systems accommodate for the more traditional interpretations of Islam if one is so inclined to follow it. Likewise, Muslims are not compelled to subscribe to those aspects of a permissive society that are inimical to their sensitivities and religious views.

⁹ See Soroush, Abdolkarim, *Reason, Freedom and Democracy and Islam*. New York: Oxford University Press (2000).

The key distinction between Muslim and non-Muslim states regarding the individual is the state's authority and role in enforcing Islamic dictates. No one in the United States who is of age would be coerced into consuming alcohol by the government; the individual's decision to do so would be limited by his own personal ethos. For the Muslim, this is often manifested by his religious orientation superseding society's permissibility on the matter in question. This personal ethos is more accurately defined as personal choice and is something that exists, on several levels, in Muslim societies as well as in the West. No Muslim state, for example, engages in covert surveillance tactics in order to enforce Islamic practices in the home. Whether the issue is adherence to the liturgical obligations of Islam or illicit behavior vis-à-vis alcohol or adultery, the state does not encroach upon the individual's privacy in his own residence.

Conclusion

In conclusion, Islam possesses the necessary tools to ensure the privacy rights of the individual, but this reality is predicated on an analysis at the correct level of abstraction of legal and political traditions within the Islamic paradigm. Islamic political thought places much emphasis on the need for social justice to be extant for a functional, optimal society.¹⁰ Yet, a just society requires attention to be paid on the individual's rights, especially as they pertain to privacy, for social justice to bear any meaningful relevance. Authoritarian regimes are able to oppress their citizenry by abrogating any expectations of privacy. But democratic regimes run the risk of rendering privacy protections hollow by creating the chimera of privacy rights with no mandate for privacy duties. Muslims in the former case must strive to establish the parameters and modalities for privacy to be respected and promoted. In the latter case, Muslims must insist upon the discourse of privacy to be made comprehensive to include both rights and duties. Some issues related to privacy may be, however, antithetical to Islamic tenets, per se. As such, Muslims must be mindful that they approach privacy discourse judiciously and selectively as they decide which issues to embrace and champion, especially in the United States. Muslim Americans may discover their interests are inextricably linked to the privacy interest of other suspect groups that are not within Islamically acceptable modalities.¹¹

As privacy has achieved the status of shibboleth for membership in the club of civilized societies, it is essential to ascertain both the scope and nature of the individual's privacy interest- for its development where it does not exist as well as its restoration where it once did. As justice is a sine qua non for democracy, so too is privacy a sine qua non for justice.

¹⁰ See Sachedina, Abdulaziz, *The Islamic Roots of Democratic Pluralism*. New York: Oxford University Press (2001).

¹¹ The contentious issue of homosexual rights is one of great contemporary interest resulting from the national debate over gay marriage. Many of the recent constitutional decisions regarding homosexual rights have privacy consequences extending far beyond a particular group. See the recent U.S. Supreme Court decision in *Lawrence v Texas*; 539 US ____ (2003).