Chapter 7

The Right to Privacy

To be able to judge the extent to which the individuals in a given society enjoy a good measure of privacy, one has to thoroughly analyze many aspects of social life in that society. One may choose to confine oneself to an inquiry into the extent to which the law governing that society protects the privacy of its individuals. In this case, one must deal with laws governing property, contracts, crime, and other aspects of public and private life in that society. But this should not be limited to an analysis of legal writings directly concerned with the concept of “privacy” if such a concept is part of the legal jargon used by lawyers and jurists in the society. Even total lack of such a concept in the legal jargon does not indicate the absence of law’s protection of privacy. This is hardly a peculiarity in Muslim societies or the Arabic language. The language of ancient Egyptians, whom Herodotus noted were the most religious of peoples, did not possess an equivalent for our word religion.

This chapter will show that this proposition, which I take to have a certain intuitive and logical force, may be strengthened by studying how a given legal system that has not integrated a well-defined concept of privacy into its legal vernacular has offered protection to the privacy of those governed by it. In this case, I mean the Islamic legal system. In the course of the argument, we will note the limitations of a comparativist approach to issues such as privacy, ones that use a concept of privacy that is known in one legal system as a criterion to judge the extent to which privacy is valued in the society and law in another. Let it be clear from the outset, however, that the chapter does not attempt to offer a comprehensive answer to the question of the extent to which Islamic law protects the individual’s privacy.

I shall start by dealing with the conceptual difficulty inherent in addressing the issue of the protection of privacy, a difficulty that has
(chiefly) to do with the elusive nature of the concept of privacy itself. I shall then demonstrate that the right to privacy in Islamic law and the principles that define its boundaries are rooted in the textual sources of Islamic law, the Qur'an and the Sunna (Tradition) of the Prophet Muhammad. I shall also show how the political authorities in the early Muslim state and the Islamic law of evidence have acknowledged this protection for the individual’s privacy.

A Multifaceted Problem

The concept of privacy is admittedly elusive. People would agree that, in a civilized society, the privacy of the individual must be protected, but whether they would agree upon the limits of privacy is a separate question. Neither a universal right to privacy nor one that can be fixed within one society over time is available. A concept of privacy in currency within a given legal system at a given stage in its development must differ not only from the concept of privacy in use by lawyers of another legal system, but also from the concept of privacy known to lawyers of the same legal system at a different stage in its development.

One must simply take for granted the elasticity of the scope of privacy as well as any concept or definition meant to capture its essence. Given the dialectical nature of the relationship between legal rights and the social realities in which they apply, one could safely assume that the elasticity of privacy rights is both a reflection and a source of the elasticity of the limits of private life. A historian of private life has concluded that private life is not something given in nature from the beginning of time. It is a historical reality, which different societies have construed in different ways. The boundaries of private life are not laid down once and for all; the division of human activities between public and private spheres is subject to change. Private life makes sense only in relation to public life; its history is first of all the history of its definition.

Furthermore, disagreement will arise as to what creates a right to privacy: whether it is the occurrence of an act that must be considered private by nature, the fact that this act occurred in a “private” place or something else (perhaps the relationship between those involved in a given act?). (Aries and Duby 1991, 3)

Though fairly plausible, proposing that privacy is a property of certain activities that are, by their nature, “private” faces some difficulties, since frequent occurrence of so-called private acts in public places raises doubts about the adequacy of this criterion. Private acts may be private by nature