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The Basis and Effects of the Division Between Private and Public Law in Classical Islamic Law

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Abstract: The distinction between public law and private law is commonly referred to in Western legal culture and is considered as the basis of the classification of law. When we study whether such a distinction exists in Islamic law, we discover that it particularly resembles the distinction of the rights (claims) of God and the rights of man in Hanafi legal doctrine. The rights of man encapsulate some benefits which are under his exclusive authority. They are related to civil law (mu'amalāt) and some aspects of penal law, such as the right of retaliation (qisās). On the other hand, the rights of God, which resemble public law, are the rights not related exclusively to any one person but to the benefit of all humanity. By means of this distinction between the rights of man and rights of God, Islamic law is divided into two separate areas similar to the division between (Western) Public and Private law. Yet these two branches of law differ from one another in certain aspects. We observe that the area of rights of man (private law) is shaped around the concept of "milk" which is the most significant term indicating exclusivity on a property. The rights in marriage and retaliation (qisās) are also explained under the light of this term. Moreover, we can say that fiqh gives a more extensive place and time to private law, and that the main theories of fiqh are always developed in the field of private law.

Keywords: Private, public, rights of God, Rights of man, Yasa, siyasa, milk, 'urfi law

İslam Hukukunda, Kamu Hukuku- Özel Hukuku Ayırımının Temelleri ve Bunun Etkisi.

Öz: Batı hukuk kültüründe kendisine yaygın olarak atıf yapılan Kamu Hukuku ve Özel Hukuk ayrımı, hukuku iki farklı alana ayırmaktadır. Özellikle Hanefi doktrini tarafından geliştirilen Kul hakkı - Allah hakkı ayırımının İslam hukukunda benzer bir fonksiyonu olduğunu ve bu ayrıma paralel görülebileceğini söyleyebiliriz. Kul hakkı belirli fertlerin inhisar ve ihtisasları altındaki hakları, temel olarak da medeni hukuk terimiyle paralel olan "muamelat" alanındaki yetkileri ve kısas gibi bazı ceza konularını kapsar. Allah hakkı ise belirli kişilerin inhisarı ve ihtisası altında olmayıp kamunun tamamını ilgilendiren, onların yararını içeren haklardır. Özellikle had cezaları ve diğer kamusal hususlar ise Allah hakkı alanına girmektedir. İslam hukukçuları fıkhın bu iki alanını bazı temel kriterler bakımından birbirinden ayırmışlardır. Kul hakkı/Özel hukuk alanının, kulların inhisar ve ihtisasını belirten en önemli terim olan, "milk" kavramı etrafında şekillendiğini ve nikah ve kısastaki hakların da bu terim etrafında açıklandığını görürüz. Ayrıca fıkhın özel hukuka çok daha geniş bir yer ve zaman ayırdığını, fıkhın ana teorilerini hep özel hukuk alanında geliştirdiğini söyleyebiliriz.

Anahtar Kelimeler: Kamu hukuku, özel hukuk, Allah hakları, kul hakları, örfi hukuk, yasa, Cengiz Yasası, siyasa.

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Introduction

This study will focus on searching for evidence of a division between private and public law, originally a product of Western legal culture, within Islamic culture. For this purpose, I will first examine whether a similar or parallel division exists in Islamic law. If such a division exists, what are the main characteristics of these two domains, namely the private and the public? Hence, the approach to the issue in this paper will primarily be from a legal point of view and will examine the issue in Islamic law in general without being confined to a certain period or school.

The roots of the division between private and public law can be found in the *Corpus Juris Civilis*, compiled in the 6th century. As far as we know, the first clear reference to this division in *Corpus Juris Civilis* can be traced to the writings of the Roman jurist, Ulpian, who lived in the second century AD. Ulpian states: 'There are two branches of legal study: Public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individual's interests, some matters being of public and others of private interest. Public law covers religious affairs, the priesthood and offices of state. Private law is tripartite, being derived from principles of *jus naturale*, *jus gentium*,[1] or *jus civile*.'[2]

Although the importance of the division of law into the categories of private and public in Western culture has varied from one century to the next, it regained its importance in the 16th century when studies on international law were revived and modern states were created. Despite some jurists, such as and Duguit, not considering this division to be essential, and although there are disputes among jurists over the criteria, this division is still important in the European legal system.[3] Moreover, the private-public division, which has its roots in legal thought, is also relevant to the fields of sociology and political philosophy.

Division of the Public and Private in Islamic Law

It cannot be argued that similar terms in different legal and cultural systems correspond exactly to the same concept or meaning. However, it can be assumed that any

1 Watson, A. (ed.), *The Digest of Justinian*, Philadelphia, PA: University of Pennsylvania Press -1988, vol. 1, p.1. The Roman jurist Gaius says: Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius (jus) civile* (civil law), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *jus gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of all mankind. Laurens Winkel, "The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law", in *Peace Treaties and International Law in European History*, ed. B. R. Lesaffer, Cambridge: CUP -2004, pp. 222-237, p. 225.

2 Watson, A. (ed.), *The Digest of Justinian*, Philadelphia, 1988, vol. 1, p.1.

3 Özyörük, Mukbil, *Hukuka Giriş*, Ankara, 1959, p. 38-44.

term of one legal system can possess a 'similar and parallel' term when compared with another legal system.

Islamic law, since its formative period, has divisions that can be compared to the private and public domains of the Western legal system. Yet it has been difficult for some Western scholars to accept these kinds of comparisons. Particularly in Islamic jurisprudence, rights (*haqq* pl. *huqūq*) are divided into two domains that express themselves in a well-known and widely-used division as the Rights of God (*Huqūq Allah, Huqūq al-Shar*ʿ) and the Rights of Men/Individuals (*Huqūq al-ʿibād, Huqūq an-nās*).

The Rights of Men refers to worldly interests that are specific to the individual, such as the judgement enacting that 'someone's property is forbidden to another,' or the right of ownership that results from this judgement. Accordingly, judgements that are directly related to ownership fall into the domain of the rights of men. Yet, in private ownership there is a specific rightful owner who holds a specific benefit over a specific subject.

The Rights of God, on the other hand, 'are judgements not related specifically to any person, but to the benefit of all human beings'.[4] The prohibition of adultery, for example, is one of these rights. Here the question that must be asked is why is adultery considered to be one of the rights of God? The answer is that the aim of this prohibition is in the public interest, namely protecting the human race, lineage and genealogy, as well as preventing conflicts that may arise in the community as a result of a dispute between the two parties.

Basic Elements of the Rights of Men and of God

As can be observed from the previous definitions, the basis of both kinds of rights is the concept of 'benefit, interest: *maslaha*'. Hence, it can be understood that *maslaha* is the philosophical basis and essence of rights and judgements in Islamic law. If one right (or judgement) provides a *maslaha* that is specific to the individual, then the judgement that defines these rights belongs to the domain of the rights of men. In this domain, two basic terms are *maslaha*, as previously mentioned, and the term *khāssa* or *ikhtisās*.

Ikhtisās linguistically means specificity, exclusivity or the state of being private; it is the opposite of *ʿāmma,* which means public or publicity.[5] Legally, this term refers to exclusive authority and control over a specific thing that one would rather keep concealed and protected from others or from the public.

Judgements in the area of the Rights of God cannot produce results that give a priority to one person over the other. Here, in a way similar to public benefit, the aim is protecting the interests of all human beings. *Maslaha ʿāmma,* as a term here, literally means public interest. It is impossible for an individual to make this benefit specific to

4 al-Laknawī, *Kamar al-Akmār,* Istanbul, 1986, vol. 2, p. 216.

5 al-Zabīdī, A. *Tāc al-Arūs min gawāhir al-qāmūs*, Kuwait, 1965, vol. 17, 555; al-Fīruzābādî, *al-Qāmus al-Muhīt,* Beirut, 1987, p. 796.

himself and to dispose of it freely.

In spite of the fact that these rights belong to all human beings without specification, they are attributed to God in a metaphorical way. This is because God is beyond the domain of acquiring benefit or succumbing to harm.[6] For this reason, from the viewpoint of benefit or creation nothing can be the right of God. While these rights and benefits belong to the public domain, they are attributed to God, thus indicating that it is important for all people to pay the highest respect to these rights.

Our investigation so far shows that Islamic law, like Roman law, consists of two domains based on *maslaha*. It can be assumed that the dichotomy of *khāssa-āmma*, or the right of God and the right of the individual in Islamic law, most resembles the dichotomy of the public and private, both literally and terminologically. Although these terms are not used in the Qur'an or in the traditions of the Prophet, the rights of God and the rights of man constitute two basic terms in Islamic law.[7]

On the basis of this examination, it can be argued that the division of the rights of God and the rights of men is, in many respects, similar to the private-public law division. For this reason, some contemporary writers argue that the rights of God in Islamic law correspond to public law[8] and the rights of men to private law.[9] Both have similar functions in their own legal systems, such as dividing law into two main sections and determining legal systematics. Therefore, we will attempt to demonstrate the similarities in more detail through a close examination of Islamic legal sources.

From the aspect of the division of the law there is one similarity that we can indicate. The subject matter of Islamic law is divided into three main domains: Prayers (*'ibādāt*), legal interactions (*mu'āmalāt*) and punishments (*'ukūbāt*). In this division, the domain of prayers is considered as belonging to the Rights of God, and to a certain degree, so are punishments. *Mu'āmalāt* (legal interactions, sing. *mu'āmala*), on the other hand, can be considered as corresponding to the term 'Civil Law'. The terms of Civil Law and Private Law are so close in continental legal terminology that it would not be problematical to refer to Civil Law as the essence of Private law. Accordingly, in Islamic law, the domain of *mu'āmalāt* is considered as falling into the sphere of the rights of men. These two terms, *mu'āmalāt* and the rights of men, are used almost synonymously. When we consider the definition, essence and content of *mu'āmalāt*,[10] it is interesting

6 Ibn al-Amīr, *al-Taqrīr wa'l-tahbīr,* Cairo, 1316, vol. 2, p. 104.

7 For an opposing view, see Kadivar, Mohsen, 'An Introduction to the Public and Private Debate in Islam', in *Social Research*, 2003, 70:3, 659-680, p. 660-661.

8 Emon, A.M., 'Huqūq Allāh and Huqūq al-'Ibād: A Legal Heuristic for a Natural Rights Regime', in *Islamic Law and Society*, 2006, 13:3, pp. 325-391, p. 331; Weiss, B. G., *Spirit of Islamic Law* (Athens, 1998, p. 181-184.

9 Hoexter, M., 'Huqūq Allah and Huqūq al-Ibād as Reflected in the Waqf Institution', in *Jerusalem Studies in Arabic and Islam,* 1995, 19, pp.133-156, p.135; al-Sanhūrī, *Masādiru'l-haqq,* (Beirut, 1998, vol.1, p. 47.

10 Ibn Abidīn, *Radd al-Muhtār ala'durr al-muhtār*, İstanbul, 1985, vol. 4, p. 500.

to note that it closely corresponds to the term civil law, both in nature and content. The *muʿāmalāt* sphere, like civil law, consists of property law, law of obligation, family law, inheritance law and civil procedure law. In this domain, the wills of all the legal subjects are considered to be equal and all civil transactions take place between two equal subjects of the law. This is the meaning of *muʿāmala*, which means, both literally and terminologically, civil transaction.

The domain of *muʿāmalāt* is related in its entirety to private law, while the domain of *ʿukūbāt* (punishments) is partly related. This is because there are three kinds of punishment: *hadd* (religious punishment, pl. *hudūd*), *qisās* (retaliation), and *taʿzhīr* (discretionary punishment). *Hadd* crimes and their punishments are clearly defined and determined by the Lawgiver and they are considered to be the Rights of God. For this reason, in this area, the general rules of the Rights of God are applied. The *taʿzhīr* penalty includes many other crimes and punishments that are not clearly defined by a lawgiver, but are rather left to the state. Since jurists are independent from the state, particularly in the formative period of Islamic legal history, they did not produce exact *taʿzhīr* penalties; these penalties constitute the widest domain of detailed criminal law, and this would be beyond the authority of the jurists. The state has almost complete authority on this domain. While *taʿzhīr* penalties may be part of the rights of men or of God, according to the type of crime, when we come to the punishment of *qisās* we find that in general the rulings of private law are applied to this kind of punishment in Islamic law.

There are two kinds of *qisās* crimes: murder and personal injury. In both, the victim or (in case of murder) his/her heirs have the right to pardon the perpetrator and ask for *diya* (monetary compensation).[11] The main characteristic of *qisās* punishment is to ameliorate the pain of the victim or (in the case of murder) of his/her heirs rather than acting as a deterrence for the community. On the other hand, in religious punishments (*hudūd)*, deterrence is the primary objective. Muslim jurists were aware of the fact that this evaluation makes *qisās* more closely related to property rights and consequently makes it the subject matter of civil law. Receiving compensation from the perpetrator as the result of death or injury is considered analogous to damage to a commodity.[12] However, Muslim jurists do not accept this conclusion as a whole. They try rather to separate *qisās* from the compensation of commodity.[13] It can be claimed that Islamic law has not completed its development in formulating all punishments as public punishment.[14]

In conclusion, except for *hadd* penalties, other subject matters of Islamic law in their essence belong to the category of private law. At the same time, Islamic penal law as a whole is not clearly separated from civil /private law.

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11 Ibn al-Amīr, *op. cit.,* p.111.

12 Messick, B., 'Property and the Private in a Sharī'a System', *Social Research*, 2003, 70:3, pp.711-734, p. 719.

13 al-Sanhūrī, *op. cit.,* v. I, p. 50, 52.

14 al-Sanhūrī, *op. cit.,* v. I, p. 50.

A Comparison between the Basic Characteristics of the Spheres of Rights of Men and of God

An examination of the main characteristics of the spheres of the Rights of Men and of God helps us to compare this division with the private-public arena. Accordingly, the main characteristics of the spheres of the Rights of Men and of God are as follows:

I. Judgements related to the Rights of Men are supported by rational reasons; the legislative intention behind them can be understood by reason.[15] This is known as the principle of ratiocination (*taʿlīl*).

On the other hand, in the domain of the Rights of God, it is difficult to understand the exact reason behind the judgements with reasoning. These judgements are known as *taʿabbudī*, which means that they do not directly address reason, and do not carry a simple legislative intention that is in keeping with human rationality. Here we encounter another dichotomy, namely the *taʿlīl – taʿabbud* dichotomy.

II. In the domain of the Rights of Men, the victim has the right to choose either to forgive or to ask for compensation. Thus, the victim's choice has priority.[16] On the other hand, individuals have no right to act freely in the domain of the Rights of God, since the judgements are decreed to protect public order and religious values. Consequently, one has the right to act freely with his/her property, for example to give or grant it to someone else of his/her own free will, while he/she have no right to act freely sexually, for example to commit adultery by granting his/her 'sexual benefit' to another party without marriage.

III. In the domain of the Rights of Men, the wills of all legal subjects are considered equal and all civil transactions take place between two equal legal subjects. On the other hand, in cases involving the Rights of God, the ruling authority and the individual are not considered to be equal players. The ruler upholds the public interest; while the individual serves it.[17]

IV. In the domain of the Rights of God, especially in *hadd* crimes, it is not only the victim who has the right to sue; everyone has this right.[18] The judge must then act on such a complaint. In the domain of the Rights of Men, the victim themselves have to complain, so that the judge can start a court procedure.[19]

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15 al-Shatibī, *al-Muwāfakāt fī usūl al-Sharī'a*, Cairo: ed.Abdullah Diraz -1975, vol. 2, p. 306, 312, 321

16 al-Laknavī, *op.cit.,* p. 216; al-Shatibī, *op.cit.*, p. 273.

17 Emon, *op.cit.*, p. 332.

18 Kamali, M.H. , 'Fundamental Rights of the Individual; An Analysis of Haqq (rights) in Islamic Law', in *The American Journal of Islamic Social Sciences,* 1993, *10:3,* pp.340-366, p. 350.

19 Ali Haydar Efendi, *Durar al-hukkām şerhu Majallati'l-ahkām*, (Istanbul, 1330), vol.4, p. 383-385.

V. There are differences between the court procedures related to the Rights of Men and the procedures related to the Rights of God. The following table helps to simplify the issue

In cases related to the domain of **Rights of God**, namely in *hudūd* crimes and punishments	In the domain of the **Rights of Men**
There is tolerance and flexibility on behalf of the suspect (al-Zarkashi 1982: 59-60; al-Rahyabānī 1961: 594; al-Sarakhsi 1983: 111).[20] In the case of the existence of even the slightest "doubt", punishments are not applied.[21]	There is no tolerance. Even if the evidence is in doubt, the judge gives his verdict according to the predominant evidence, and does not take slight "doubts" about the case and evidence into consideration.
One who witnesses a *hadd* crime in the public domain is advised not to give a testimony in court. This is considered concealment of the error of a Muslim, which is actually a good behaviour[22] (al-Bahūtī 2000 A: 637; al-Rahyabānī 1961: 594). One has right to abstain from giving testimony. The judge alludes, even suggests, that the suspect not confess and the witness not give testimony.	Giving testimony is considered necessary. Refusal to testify is forbidden if this refusal leads to the loss of rights of the rightful party, particularly if there is no other evidence.
The judge cannot give his verdict on the basis of his own knowledge on the case.	The judge can give his verdict on the basis of his own knowledge about the case.
With the lapse of time, cases in the domain of the Rights of God, like *hadd* punishment cases, become null and void.	Cases in the domain of Rights of Individuals are not nullified with the lapse of time.
In this domain the judge brings the case before the court ex officio.	The complainant's case is necessary for hearing the case.
If one confesses one's guilt and then retracts the confession the retraction is considered valid.	If one makes a confession, then retracts it, this retraction cannot be taken into consideration.[23]
If the judge cannot prove guilt on the basis of the evidence, he cannot ask the suspect to take an oath to establish the latter's innocence. [24]	In this case, the judge can ask the suspect to take an oath to establish the latter's innocence.[25]

When we closely investigate this comparison, it can be claimed that there is an in-

20 See: al-Zarkashī, Bedruddin, *al-Mansūr fi'l-Kavāid*, Kuwait -1982, vol. 2, p.59-60; al-Rahyabānī, *Metālibü uli'n-nuhā*, al-Maktaba al-Islamī, vol.6, p.594; al-Sarakhsi, *al-Mabsūt*, Bairut, vol.9, p.111.

21 al-Sarakhsi, op.cit., vol. 9, p.110-111.

22 al-Bahūtī, *Deqāiqu uli'n-nuhā*, Beirut, 2000/1421, vol. 6, p.637; al-Rahyabānī, *Metālibü uli'n-nuhā*, Damascus, 1961, vol.6, p.594.

23 Ibn al-Nücaym, *Fathu'l-gaffār*, Cairo, 1936, vol. 3, p. 60.

24 Ibn Khamzah al-Fanārī, *Fusūl al-Bada'i*, Istanbul, 1289/1872, vol.1, p. 274.

25 Ibn Khamzah al-Fanārī, op.cit., vol.1, p. 274.

consistency in Islamic law judgements in relation to the Rights of God.Namely, crimes that pose a danger to society are considered as belonging to the domain of the Rights of God due to their importance, but their punishments are highly tolerated, as if the crimes were covered up. Islamic jurists claim that in this domain refusing to give testimony does not specifically harm anyone, and so this is in conformity with justice.[26] However, this is a violation of public benefit, and it is this which is trying to be protected. This inconsistency is largely the result of the inadequacy of theories in the Public Law or Rights of God domain in classical Islamic law.

The Relation of the Rights of Men with Private Property

The domain of the Rights of Men is developed on the basis of the term *milk*, which corresponds to the term '*Dingliches Recht*' (or in most cases 'Private property/Ownership') in Continental Legal systems, both in content and essence. In the domain of *mu'âmalāt* (Civil Law), rights of property are referred to as *milk al-māl*, while the marital rights of the husband are referred to as *milk al-nikāh* or *milk al-mut'a,* etc. and the rights of the victim or the heirs over the perpetrator for retaliation are known as *milk al-qisās*. *Milk*, which is the most 'sacred' and most commonly-used term of Islamic law, is a term that denotes almost everything related to the Rights of Men.

It should be emphasized that, as a number of scholars have stated, acceptance of private property in a culture is a prerequisite of the private-public division. As Hannah Arendt mentions, 'to possess something is an expression that denotes the private domain'. According to Arendt, the private domain emerges with the phenomenon of individual property.[27] It is reasonable to say that it is difficult to talk about private law and the public-private division where there is no property. In socialist systems, where only limited personal property is accepted, all areas of law, including civil law, are considered to be public law.[28] Hence, private public division is – to some degree - considered a product of the capitalist system.[29]

From its formative period, Islamic law clearly accepted private property, both as personal estates and real estate, and has established its entire legal system and premises on this concept.[30]

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26 al-Bahūtī, op.cit., vol. VI, p. 637. However if the criminal has a character of bad repute, it is best not to conceal this fact. al-Rahyabānī, op.cit., vol. 6, p. 594.

27 Yılmaz, Zafer, *Hannah Arendt'te Özel Alan-Kamusal Alan Ayrımı ve Modern Cağda Toplumsal Alan*, unpublished Ph.D. thesis, Atatürk Üniversitesi, Erzurum - 2007, p.29, 66.

28 İmre, Z., *Medeni Hukuka Giriş*, Istanbul, 1976, p. 86.

29 Messick, B., op.cit., p.711.

30 Hacak, H., 'Milk', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, vol. 30, p. 62-64, Ankara, 2005, p. 62-64; 'Mülkiyet', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, vol. 31 Ankara, 2006, p. 543-548.

The Priority of the Domain of Private Law over Public Law in the Islamic Legal Culture and the Separation of Private Law from Public Law

As previously discussed above, in Islamic law there is a strong notion of the private domain which arises from the concept of 'private property'; the priority is clearly given to private law in the private law-public law distinction.[31] Although authors of the classical sources of Islamic law address the division of the Rights of God and of Men in many respects, they mainly examined private law and did not pay any professional or profound attention to public legal issues. In spite of the fact that there were some attempts to establish a public law theory in Classical Islamic law, these attempts never resulted in comprehensive literature or extensive, well-processed theories. Only some small attempts to tackle the issues of public law within a literature external to the classical literature of Islamic law have occurred, such as al-Mawardi's and al-Farra's *al-Ahkām as-Sultāniyya*, Ibn Taymiyya's as-*Siyāsa as-Shar'iyya*. These works have never been considered as works on '*Sharī'a* law' or 'Islamic law'. Moreover, even the chapters on *Siyar* in the classical *fiqh* literature, in which some issues on international law (as a branch of public law) are discussed, the language used is that of private law and priority is given to issues of civil law. Consequently, the domain of the Rights of God, as mentioned above, is limited to *hadd* punishment. For this reason, Islamic law seems to be a private law/civil law; compared to public law, private law was extensively developed.

The Public Law-Private Law Distinction in Practice throughout Islamic History

In theory, the division of public and private law, and the fact that Islamic jurists were mainly private law jurists, in practice resulted in the emergence of different legal systems existing in one state: *Sharī'a* and *'urfī* law[32]. The division between these domains of the law may be considered to be the main cause of the separation of private law as *sharī'a* from the public law, or *'urfī* law, in Islamic states. Two different or rival legal systems can be observed in Islamic history. While the private law domain, which is represented by the *qādī*, is generally understood as the domain of *sharī'a*, regulations related to public law are almost completely left to the state and considered – to some extent - as being outside of *sharī'a*. *'Urfī* Law or *siyāsā*, that is the way of actualizing public benefit, is left to the authority of the state.

The separation between these legal systems, *shari'a* and *'urfī* law, has led to some basic consequences which have had effects on Islamic society up until the present

31 Ammann, L., 'Private and Public in Muslim Civilization', in Göle, N. and Ammann, L. (eds.), *Islam in Public,* Istanbul, 2006, pp. 77-125, p. 87.

32 *'Urfī* (in Turkish, *örfi)* literally means customary, derived from the word *'urf* (custom, folkway).

day. Before delineating these consequences, it would be advisable to trace the course of the separation of these two legal domains from one another by summarizing the basic developments in the legal history of Islamic nations/states.

Islamic law, which has been entirely independent from the political authority, has developed as an academic discipline due to the endeavour of Abu Hanîfa (d. 767); this jurist lived at the end of the Umayyad reign and the beginning of the Abbasid. During the Umayyad period, the Islamic caliphate was transformed into a dynastic rule that sought legitimacy outside Islamic law. Islamic jurists preferred to focus on private law instead of public law, as with the latter they were not able to freely or openly discuss matters to the extent they could in private law. Possibly they were worried about their own legitimacy, as the dynasty may have taken objection with their *fatwas*.

In contrast to the Umayyads, the statesmen of the Abbasid period tried to get their legitimacy from religion, and as a result, they attached more importance to the law produced by the Islamic jurists. On the other hand, the jurisdiction system began to split into two different domains: One was *sharī'a*, with the other being jurisdiction emanating from the state authority.[33] Likewise, the caliphate was separated from the sultanate.

This separation deepened, particularly in the Turk – Mongol states. The concept of 'state' had an absolute and superior power over all institutions as a political and executive entity. Accordingly, the enactment of law and legislation came to be really essential to the role of the state and the royal authority. Hence, *'urfī* law, the main priority of which was the needs of the state, was predominant over religious-based law. We can observe the priority of the *Yasa*[34] (literally code, canon) over the *sharī'a* more closely in two Muslim Mongol states. In the Il-khanate and Golden Horde, private law and public law were separated from one another to a greater extent when these two Mongol-Turkic states had accepted Islam. The Il-khanate rulers, beginning with Ghazan Khan in 1295, embraced Islam, making it the official religion of the Il-khanate state. While religious and private law issues were given to the *qādī*, political, traditional, official, military and public law issues were under the authority of the judges who were selected from among the crown princes.[35] In the public domain, the *Yasa* of Genghis Khan was applied to the Muslims, particularly in these two states. The *Yasa* of Genghis Khan was a very powerful institution, and had a deep influence on the Islamic tradition. It constituted the official starting point of the separation of *'urfī* law from the *sharī'a*.[36]

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33 Köprülü, M. F., 'Ortazaman Türk Hukuki Müesseseleri: İslam Amme Hukukundan Ayrı Bir Türk Amme Hukuku Yok mudur?', in İnalcık, H. et al. (eds.), Adalet Kitabı (Ankara, 2012), pp.39-72, p.56

34 Alternatively, *Yasa*, *Yasaq*, *Jazag*, *Zasag*.

35 Yuvalı, A., 'İlhanlılar', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, Ankara, 2000, vol. 32, pp. 102-105, p.104.

36 Köprülü (2012), *op.cit.*, p. 66.

The separation of the *sharīʿa* from the *ʿurfī* law can be observed even more clearly later during the Ottoman Empire. Some scholars have argued that from the beginning of the Ottoman State, the main public foundation of the state was the *ʿurfi* law, which is also the case for the Il-khanate and the Golden Horde states.[37] The *ʿurfī* law-*sharīʿa* division, particularly in the Ottoman and other large Turkic and Islamic states, like the Mamluks, was parallel to the private-public law division.[38] The *ʿurfī* law included areas of public law, such as taxation and administrative law, which were not covered by classical Islamic law.[39] Penal law was left to the *ʿurfī* law as well, although Islamic law has some regulations in that domain.

al-Maqrīzī (d. 1442), an Islamic historian who lived in Mamluk Egypt, made a clear reference to *ʿurfi* law in his work *al-Hitat*. He says:

> The people of our time, in Damascus and Egypt, ever since the Turkish states were established, have perceived that jurisdiction/law is divided into two sections. These are the *sharīʿa* and the *siyāsa* (or *yasa*) law. The *sharīʿa* is that which Allah makes and ordains to us as a religion… And *siyasa* (which literally means politics or public administration) is divided into two categories. One is the 'righteous *siyasa*' which is a part of *sharīʿa* law… The second category is the 'tyrant *siyasa*'… But in our times the word *siyasa* has no relation to this word. The word *siyasa,* which we use in our time, is a different word that comes from Mongol word '*yasa*'. Egyptian people converted it to '*siyasa*' by prefixing to it the letter 'si'.[40]

Here al-Maqrīzī narrates the processes of the spreading of the word *yasa* as *siyasa* in the major cities, in particular those in Damascus and Egypt. He tells us that Genghis Khan's descendants believed in the *yasa*, much like the first Muslims believed in the Qur'an, and nearly turned the *yasa* into a religion. He tells us of the

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37 Upon examining the models of rule which lay behind Ottoman legislation Halil İnalcık highlights two models. The first consisted of the traditional Turkish and Mongol tribal models which required the chief to proclaim a set of rules, avoiding arbitrary judgments; such was the *Yasa* of Genghis Khan. The second model was that of the Persian kingdom, adopted by the Abbasid caliphs, that is, the *Mazālim* tribunals and the Divans of the Ottomans. Zubaida, S., *Law And Power In the Islamic World* (London: I.B. Tauris -2005); İnalcık, H. , 'Suleiman the Lawgiver and Ottoman Law', in İnalcık, H. (ed.), *The Ottoman Empire: Conquest, Organization and Economy, Collected Studies* (London: Variorum Reprints -1978), 105-138.

38 For a similar evaluation see Durhan, I., 'Osmanlı Hukukunun Yapısı Üzerine Bir Etüd', in *Atatürk Üniversitesi Erzurum Hukuk Fakültesi Dergisi,* 1999, 3:1, pp. 215-232, p.226.

39 Tursun Beg, an Ottoman statesman and historian, defined the customary law as follows: 'the canon that the magistrate prescribed for World order depending on Reason, called the 'sultanic *Siyāsa*' or 'Padishah's *Yasa/yasak*', while our intellectuals call it '*urf*.' İnalcık, H., 'Osmanlı Hukukuna Giriş, Örfî-Sultânî Hukuk ve Fatih'in Kanûnlari', in-Ari, B. and Aslantaş, S. (eds.), *Adalet Kitabi* (Ankara, 2012), pp.73-103, p.74. In the Ottoman State those who directly represented the executive power and authority of the state were called the *ehl-i örf* (master of 'urf), *Ibid*, 74-75.

40 al-Maqrīzī, A., *al-Hitat* or *al-Mawaʿiz wa'l-iʿtibār bi dhikr al-khitat wa'l-āthār,* reprint, (Cairo: Bulaq, 1854) vol. 2, p. 220. For a similar but more exact analysis of the relation between "siyāsa" and "yasa" words, see, Bursevi, İ. H., *Kitābu'l-furūq* (Kelimeler Arasındaki Farklar, transl. Ömer Aydın) İstanbul, İşaret Yayınları -2011, p.140-141.

process of how Genghis Khan's *yasa* and the *sharīʿa* became rival legal systems in Islamic history, beginning with the Tatar and Turk administrations.[41]

Some written sources of *ʿurfī* law of Ottoman State are extant today, such as the decrees of the head of state, or the *Kanun-name*s (codes) of Mehmet II, Beyazit II or Suleyman the Magnificent. Even though the main private legal structure of the state was shaped in accordance with *sharīʿa* law, the *ʿurfī,* or public law, which is rooted in the very depth of the Volksgeist (national spirit) of the Turkic nation, was a serious rival to the former. In the domain of the *ʿurfī* law, sultans had the right to produce codes in accordance with their supreme will. As a significant example of this fact, Süleyman the Magnificent declared that his codes must be put into effect throughout the land of the entire state and even in the qadi's court.[42] In many respects, these *ʿurfī* codes were similar to modern codes.

As long as they did not contradict the *sharīʿa*, Islamic jurists generally accepted the legal regulations of the sultan as a natural need and necessity. However, in the case of 'border violations' or conflicts, these two legal systems turned into rivals, struggling against one another. Even though the *ʿurfī* law in general was in conformity with *sharīʿa* law, as we said before there were some clear contradictions/conflicts, particularly in the field of penal law. For example, some acts and regulations related to the *hadd* penalties, such as *zinā* (adultery)[43] and *qadhf* (slander/ false accusation of *zinā*)[44] in the *ʿurfī* codes of Mehmet II and others were, to some extent, in clear and direct contradiction of the *sharīʿa*. Similarly, some cases of the imposition of the death or amputation sentence[45] could also be seen to be a violation of the *sharīʿa*.[46]

In the *Tanzimat* Reform era, which was initially a penal law code adopted in 1840, the codification process gained momentum. Following this, the state adopted a new code that regarded *qisās* crimes and punishments as a public issue, which did not take

41 al-Maqrīzī, *op.cit.*, p. 220-221.

42 İnalcık, 'Osmanlı Hukukuna Giriş, Örfî-Sultânî Hukuk ve Fatih'in Kanûnları', p. 85.

43 One of the most famous acts of *ʿurfī* law that contradicts the *Sharīʿa* is the act that concerns adultery and its respective punishment: The punishment for adultery in Islamic law is, if the offender is unmarried, a hundred lashes and if the offender is married, *rajm,* a death penalty. In the code of Süleyman the Magnificent however, punishment by fine was prescribed for the crime as opposed to the previously mentioned punishments prescribed by the sharīʿa; the amount of the fine was determined by the court upon consideration of the offender's financial situation. See Osmanağaoğlu C., 'Klasik Dönem Osmanlı Hukukunda Zina Suçu ve Cezası', *İstanbul Üniversitesi Hukuk Fakültesi Dergisi,* 2008, 66:1, pp.109-178; p.126.

44 Osmanağaoğlu, *op.cit.*, p. 131-132.

45 Osmanağaoğlu, *op.cit.*, p.139, 145, 172.

46 See: for an adultery case in the Ottoman State in which the crime was proven according to the Sharīʿa procedures, but a customary punishment rather than the *Sharīʿa* punishment was imposed, Osmanağaoğlu, *op.cit.*, p.126.

into consideration the will of the victim or his / her heirs in pardoning the criminal, unlike the *sharīʿa*. In 1858, much influenced by the French Penal Code, a new penal code was adopted. Similarly, the commercial code, which entered into force in 1850, was also largely derived from the French code dated 1807. It adopted *al-ribā* (interest) by legitimizing it.

While the *ʿurfī* law began acquiring the shape of official legal codes, the *sharīʿa* law was not codified via legislative techniques. The first successful attempt of codification in Islamic history was the *Majalla-i Ahkam-i Adliyye,*[47] the Ottoman Code of Civil Law; this was, in fact, a partial civil code which included the main areas of civil laws, for example, the Law of Persons, Law of Property (Real Law), Law of Obligations and Civil Procedure Law, leaving out Family and Inheritance Law. The *Majalla* was almost entirely based on the Hanafist legal tradition, which enjoyed official status in the Ottoman State. It closely adhered to the Hanafist legal doctrine, but in shape and form it was new and different from the traditional way. In fact, in terms of its content, the *Majalla* was not the same as traditional Islamic law, as the *Majalla* omitted substantial matters of Islamic Obligations Law, such as the prohibition on *ribā* (interest) and the matter of the *al-qardh* loan contract. The question which should be asked is if, by omitting the prohibition on *ribā* (interest), did the *Majalla* violate *sharīʿa* law? And did it, by omitting a strict prohibition, at some degree legitimize it? Eventually, when the new civil code was adopted in 1926, the *Majalla* was abrogated. In this way the Westernization movement encapsulated the arena of civil / private law as well.

In the *ʿurfī - sharīʿa* law division, two separate courts emerged in almost all Islamic states; these were organised separately in separate areas in the field of jurisdiction. The separation occurred between the *qadī* courts in the field of *sharīʿa* law and in the *ʿurfī* law courts in the field of public law. Beginning with the Turkic-Mongol states, in addition to the *qādī* courts, *yargu* or *yasa* courts[48] were established in the main cities of Islamic states. In the Ottoman state, the judicial authority for the statesman and officials (*askerī*) was *Qādīasker*.[49] The *Qādīasker*'s court was authorized to judge many of the private law issues concerning these officials.[50] This court system was a source of rivalry and disputes arose over the areas of the authority and jurisdiction between these two courts.

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47 The *Majalla*, which become the Ottoman official code in 1876, influenced most of the Ottoman's successor states, even today.

48 İnalcık, 'Osmanlı Hukukuna Giriş, Örfî-Sultânî Hukuk ve Fatih'in Kanûnları', p. 79.

49 The *qādīaskars* dealt, in their respective areas of competence, with all personal status matters relating to the *ʿaskerī* class, as distinct from the *reʿāyā* class, whose affairs fell within the competence of ordinary judges. See Zubaida, *op.cit.,* p. 61.

50 İnalcık, 'Osmanlı Hukukuna Giriş, Örfî-Sultânî Hukuk ve Fatih'in Kanûnları', p. 78-79.

Conclusion

The division of the rights, such as the Rights of God and Men in Islamic law, has had some crucial effects on the system and on the basic mentality of Islamic law. In a legal sense, scholars also dealt with the domain of law which consists of the Rights of Man as private law, while the Rights of God were treated as public law. By closely examining these concepts, in terms of quality and content, it is possible to make an analogy and draw a parallel between private law and the Rights of Man. Needless to say, the same parallelism exists between the Rights of God and public law. But while the Rights of Man coincides with almost every branch of private law, the Rights of God cover only certain sections of public law. It is for this reason that public law developed not via the classic *fiqh* literature, but rather via a different literature. While Muslim jurists stress private ownership and private law, public law is not discussed theoretically in *sharīʿa* sources to a sufficient extent, and hence the Muslim approach to this term does not have sufficient theoretical background, unlike private law. The private - public law separation in Islamic legal culture has had some basic effects on the very essence of Islamic law. In this paper I have tried to demonstrate that the separation between *sharīʿa* and *ʿurfī* law is directly connected to the division of the Rights of Man and the Rights of God. While the latter division is theoretical, in historical practice the *sharīʿa* - *ʿurfī* law division is a practical and frequently discussed one. This division, which can be observed in practical law, splits the legal systems of the Islamic states into two sections. The public law issues were generally left to the edicts of the sultan, while private law was considered to be the actual or true Islamic law. The rivalry of these two systems can be observed throughout Islamic legal history.

Since in Islamic legal history the jurists who developed legal ideas and doctrines were independent from the state, they tended to focus on matters of private law. The *qadi*'s main domain was the same. The public cases, such as major crimes, jurisdictions over officials and even some of the *hadd* punishments, gradually drifted away from the *qadi* courts.

Until the end of Ottoman Empire most of the codes in different fields of public law, including the penal code and even commerce law, were obtained from the West and put into application; this did not create any noticeable opposition among the community. Although it is a classic principle of Islamic law that these regulations should not contradict the main principles of Islamic law, if there was a contradiction, the Muslim community never reacted strongly. On the other hand, there was pressure and efforts for the application of Islamic law in the field of private law. For this reason, the translation and application of the Swiss Civil Code in the Turkish Republic was considered as being a move against the *sharīʿa*. As a result, the Muslim community reacted against its application. But it seems that in the Muslim mind

even this was considered to be an outgrowth of the rivalry process between the *'urfī* law or *qānūn* (public) and the *sharī'a* (private).

References

al Bahūtī (2000/1421-A), *Deqāiqu uli'n-nuhā*, vol. VI (Beirut: Muassasa al-Risala Nashirun).

al-Fīruzābādî (1987), *al-Qāmus al-Muhīt* (Beirut).

al-Laknavî (1986), *Kamar al-Akmār,* vol. 2 (Istanbul: İhsan Kitabevi).

al-Maqrīzī, A. (1854), *al-Hitat or al-Mawa'iz wa'l-i'tibār bi dhikr al-khitat wa'l-āthār,* reprint, vol. 2, (Cairo: Bulaq).

al-Rahyabānī (1961), *Metālibü uli'n-nuhā*, vol.6 (Damascus).

al-Sanhūrī (1998), *Masādiru'l-haqq*, vol. 1 (Beirut: Manshurat al-Halabī al-Huqūqiyya).

al-Sarakhsi (1983), *al-Mabsūt*, vol. 9 (İstanbul, Çağrı Yayınları).

al-Shatibī (1975), *al-Muwāfakāt fi usul al-Sharī'a*, vol. 2 (Cairo: Abdullah Diraz).

al-Zabīdī, A.(1965), *Tāc al-Arūs min gawāhir al-qāmūs*, vol. 17 (Kuwait: Matba'atu Hukūmet).

al-Zarkashi, B. (1982), *al-Mansūr fi'l-Kavāid,* reprint, vol. 2 (Kuwait: Wazārat al-Awqāf).

Ali Haydar Efendi, (1330), *Durar al-hukkām şerhu Majallati'l-ahkām*, vol.4 (Istanbul: Matbaa-i Tevsi'i Tıbaât).

Ammann, L. (2006), 'Private and Public in Muslim Civilization', in Göle, N. and Ammann, L. (eds.), *Islam in Public* (Istanbul: Bilgi Üniversitesi Yayınları), 77-125.

Durhan, I. (1999), 'Osmanlı Hukukunun Yapısı Üzerine Bir Etüd', in *Atatürk Üniversitesi Erzurum Hukuk Fakültesi Dergisi*, 3:1, (215-232).

Emon, A.M. (2006), 'Huqūq Allāh and Huqūq al-'Ibād: A Legal Heuristic for a Natural Rights Regime', in *Islamic Law and Society*, 13:3, 325-391.

Hacak, H. (2005 A), 'Milk', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, vol. 30 (Ankara: Türkiye Diyanet Vakfı), 62-64.

Hacak, H. (2006 B), 'Mülkiyet', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, vol. 31 (Ankara: Türkiye Diyanet Vakfı), 543-548.

Hoexter, M. (1995), 'Huqūq Allah and Huqūq al-Ibād as Reflected in the Waqf Institution', in *Jerusalem Studies in Arabic and Islam*, 19, 133-156.

Ibn Abidīn (1985), *Radd al-Muhtār ala'durr al-muhtār*, vol. 4 (Istanbul, Kahraman Yayınevi).

Ibn al-Amīr (1316), *al-Taqrīr wa'l-tahbīr*, vol. 2 (Cairo: Bulak).

Ibn al-Nücaym (1936), *Fathu'l-gaffār*, vol. 3 (Cairo: al-Bābī al-Halabī).

Ibn Khamzah al-Fanārī, M. (1289/1872), *Fusūl al-Bada'i,* vol.1 (Istanbul: Matba'at Shaykh Yahya Afandi).

İmre, Z. (1976), *Medeni Hukuka Giriş* (Istanbul: Istanbul Üniversitesi Yayınevi).

İnalcık, H. (1978), 'Suleiman the Lawgiver and Ottoman Law', in İnalcik, H. (ed.), *The*

Ottoman Empire: Conquest, Organization and Economy, Collected Studies (London: Variorum Reprints), 105-138.

İnalcık, H. (2007), 'Osmanlı Hukukuna Giriş, Örfî-Sultânî Hukuk ve Fatih'in Kanûnları', in Arı, B. and Aslantaş, S. (eds.), *Adalet Kitabı* (Ankara: Adalet Bakanlığı Yayınları), pp.73-103.

Kadivar, M. (2003), 'An Introduction to the Public and Private Debate in Islam', in *Social Research*, 70:3, 659-680.

Kamali, M.H. (1993), 'Fundamental Rights of the Individual; An Analysis of Haqq (rights) in Islamic Law', in *The American Journal of Islamic Social Sciences, 10:3,* 340-366.

Kelsen, H. (1945), *General Theory of Law and State*, translated by Wedberg, A. (Cambridge, MA: Harvard University Press).

Köprülü, M. F. (2012), 'Ortazaman Türk Hukuki Müesseseleri: İslam Amme Hukukundan Ayrı Bir Türk Amme Hukuku Yok mudur?', in İnalcık, H. et al. (eds.), *Adalet Kitabı* (Ankara: Ankara: Adalet Başkanlığı Yayınları), pp.39-72.

Messick, B. (2003), 'Property and the Private in a Sharī'a System', *Social Research*, 70:3, 711-734.

Osmanağaoğlu, C. (2008), 'Klasik Dönem Osmanlı Hukukunda Zina Suçu ve Cezası', *İstanbul Üniversitesi Hukuk Fakültesi Dergisi*, 66:1, 109-178.

Özgüdenli, O.G. (2005), 'Moğollar', in *Türkiye Diyanet Vakfı İslam Ansiklopedisi,* vol. 30 (Ankara: Türkiye Diyanet Vakfı), pp. 225-229.

Özyörük, M. (1959), *Hukuka Giriş*, (Ankara: Ankara Üniversitesi Hukuk Fakültesi Yayınları).

Watson, A. (ed.) (1988), *The Digest of Justinian*, vol. 1 (Philadelphia, PA: University of Pennsylvania Press).

Weiss, B. G. (1998), *Spirit of Islamic Law* (Athens, GA: University of Georgia Press).

Yılmaz, Z. (2007), *Hannah Arendt'te Özel Alan-Kamusal Alan Ayrımı ve Modern Cağda Toplumsal Alan*, unpublished Ph.D. thesis (Atatürk Üniversitesi, Erzurum).

Zubaida, S. (2005), *Law And Power In the Islamic World* (London: I.B. Tauris).