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Restrictions on Private Property Due to Neighborhood Law: The Visibility of Women's Domestic Private Spaces (*Maqarr al-niswān*) from the Outside*

Komşuluk Hukuku Sebebiyle Özel Mülkiyete Getirilen Sınırlamalar: Kadınlara Ait Ev İçi Özel Mekânların (*Makarr-ı nisvân*) Dışarıdan Görülmesi

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ABSTRACT

Some limitations may be imposed on property rights in Islamic law. One of the limitations on the disposition of private property relates to spaces where women move freely in the house without wearing the scarf (*hijāb*), which can be seen from the outside. This issue, which was brought up in classical sources of Islamic law as well as in Ottoman fatwā collections, draws attention as an important complaint in the *sharʿiyyah* records. However, despite its significance, there is a noticeable scarcity of independent studies on the subject. To address this gap, this article aims to examine the visibility of women's domestic private spaces (*maqarr al-niswān*) from the outside in the context of restrictions on private property. The study delves into the powers of disposition of people's private property and examines the corresponding changes in the legal system. It aims to determine whether dispositions that violate privacy can be restricted by law while also analyzing how this matter is portrayed in the fatwā collections and how it was implemented in Ottoman practice based on the *sharʿiyyah* records. The findings obtained contribute to a better understanding of the limitations on private property in Islamic law and offer insights into the historical context and application of such restrictions.

Keywords: Islamic Law, Neighborhood Law, Private Property, Restriction, Maqarr al-niswān

ÖZ

İslam hukukunda mülkiyet hakkına birtakım sınırlamalar getirilebilmektedir. Özel mülkiyetteki tasarruflara sınırlama getiren sebeplerinden birisi de kadınların ev içerisinde tesettüre girmeden rahatça hareket ettikleri mekânların dışarıdan görülmesidir. İslam hukukunun klasik kaynaklarının yanı sıra Osmanlı fetvâ mecmualarında da gündeme getirilen bu mesele, şer'iyye sicillerinde önemli bir şikâyet konusu olarak dikkatleri çekmektedir. Ancak önemine rağmen konuyla ilgili müstakil ve nitelikli çalışmalar

yapılmamıştır. Bu makale, söz konusu eksikliği gidermek için özel mülkiyete getirilen sınırlamalar bağlamında kadınlara ait ev içi özel mekânların (*makarr-ı nisvân*) dışarıdan görülmesini incelemeyi hedeflemektedir. Çalışma, insanların özel mülkündeki tasarruf yetkilerini araştırmakta ve konuyla ilgili hukuktaki değişimi analiz etmektedir. Mahremiyeti ihlal eden tasarrufların kanun yoluyla sınırlandırılıp sınırlandırılamayacağını tespit etmeyi amaçlayan çalışma, aynı zamanda bu konunun fetvâ mecmualarında nasıl tasvir edildiğini ve şer'iyye sicillerinden hareketle Osmanlı uygulamasında nasıl hayata geçirildiğini tahlil etmektedir. Elde edilen bulgular, İslam hukukunda özel mülkiyete getirilen sınırlamaların daha iyi anlaşılmasına katkı sağlamakta ve bu tür kısıtlamaların tarihsel bağlamı ve uygulaması hakkında fikir vermektedir.

Anahtar Kelimeler: İslâm Hukuku, Komşuluk Hukuku, Özel Mülkiyet, Sınırlama, Makarr-ı nisvân

Introduction

The visibility of women's domestic private spaces (*maqarr al-niswān*) from the outside is one of the possible limits on one's disposition of private property in Islamic neighborhood law. One of the most important rights of neighbors over each other is to act in a way that does not violate privacy. As a requirement of this, no one can make any disposition in such a way that they can see the spaces where women are present. The visibility of women's domestic private spaces was considered a violation of privacy in Islamic law, and necessary regulations were made to eliminate any situation that violated it. This issue, which was dealt with in the Ottoman fatwā collections, especially under the title of *Kitāb al-Ḥīṭān*, draws attention as an important complaint in the *sharʿiyyah* records.

In this study, we first show whether the powers of disposition in one's private property are limited in Islamic law and the changes in the law on this issue. Then, drawing on sources from the early periods of Hanafī law, we discuss whether actions that cause women's spaces to be seen from the outside can be limited or not. However, a study that does not take into account the practical application of the law would be incomplete. For this reason, we show what is meant by these spaces where women were present, what kind of dispositions-imposed restrictions on private property there were, which demands on the subject were justified, how situations that violated privacy were eliminated, how the parties behaved with regard to this subject, how the issue was reflected in the fatwā collections, and how these were applied in Ottoman practice based on the *sharʿiyyah* records.

1. Property Right and Its Limitations

Property right is a proper right that grants a person full dominance over their property and broad powers. As a requirement of this right, individuals have the right to use, benefit from, and dispose of their property as they wish.[1] Normally, individuals can act as they wish on their own property. For this reason, no one has the right to interfere with another person's property.

The question of whether the right of property can be limited or not, and whether resulting damages give rise to liability for compensation, is a matter of serious debate in Hanafī law. According to early Hanafī scholars (*mutaqaddimūn*), no one can prevent a person from acting on their private property, even if their actions harm others. While they believed that it is a religious obligation to prevent the disposition that harms others, they thought that such behavior could not be prevented from a legal point of view.[2] As a matter of fact, it is clearly stated that

1 Shams al-Aʾimma Muḥammad b. Aḥmad b. Sahl al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 17/91, 15/21-22; ʿAlāʾ al-Dīn Abū Bakr b. Masʿūd al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 6/127, 263-265.

2 Muḥammad b. al-Ḥasan al-Shaybānī, *al-Asl*, ed. Mehmet Boynukalın (Beirut: Dār al-Ibn Hazm, 2012), 3/281; Sarakhsī, *al-Mabsūṭ*, 15/21-22; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6/263-265; Majd al-Dīn ʿAbdullāh ibn Maḥmūd ibn Mawdūd al-Mawṣilī, *al-Ikhtiyār li-Taʿlīl al-Mukhtār* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1937/1356), 2/77, 5/47; Fuḍayl Chalābī, *ad-Ḍamānāt fī al-furūʿ al-Ḥanafīyyah* (Istanbul: Suleymaniye Library, Nuruosmaniye Collection, 1965), fol. 88b, 92a-b.

individuals can dispose of their private property as they wish, and although it is good to avoid actions that harm others, this is not a legal obligation and this disposition is not recorded as on the condition of "*not harming anyone else*" in the early sources of the madhhab.[3] Due to these reasons, early Hanafī scholars stated that individuals could dispose of their own property as they wished and that they would not be responsible for some harmful acts they carried out there. Since the understanding of absolute disposition in private property is dominant, actions that cause damage to others are not considered unlawful and therefore do not produce liability for compensation. However, this view, which states that a person has wide disposition authority over their private property, is mostly valid for adjacent (*jiwâr*) neighbors. This is because, since the early period of the madhab, the idea that harmful acts can be limited in the upstairs-downstairs neighborhood has been dominant. Indeed, as it is clearly seen in the main sources of the Hanafī madhhab, owners can only dispose of their property in the upstairs-downstairs neighborhood as long as they do not involve someone else's rights.[4] In other words, in this type of neighborhood, since neighbors have certain rights over each other, the disposition of private property depends on not violating the rights of another.

As seen, people have a wider disposition authority over their private property regarding their next-door neighbors, whereas they have a more limited authority with their upstairs and downstairs neighborhoods. Therefore, according to early Hanafī scholars, this authority in private property is not conditioned by the requirement of not causing harm to others but by the involvement of certain rights belonging to others in one's own property.[5] In other words, no restrictions are imposed on behaviors that cause damage, since it is assumed that mutual rights do not exist in the next-door neighborhood. However, restrictions are imposed in the case of the upstairs-downstairs neighborhood, since it is assumed that owners have certain rights over each other. This view, which was adopted by early Hanafī scholars and represents the rule of *ẓāhir al-riwāya* in the madhhab, is based on Abū Hanīfa's rule.

However, Abū Yūsuf, one of the leading Hanafī jurists and student of Abū Hanīfa, contradicted this rule of his teacher, adopting the view that acts on private property that cause harm can be

3 Shaybānī, *al-Asl*, 3/281; Sarakhsī, *al-Mabsūṭ*, 23/188; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6/127, 263-265, 7/28-29; Mawṣilī, *al-Ikhtiyār*, 2/77, 5/47.

4 Sarakhsī, *al-Mabsūṭ*, 17/91-92; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6/264-265; Burhān al-Dīn ʿAlī b. Abī Bakr al-Marghīnānī, *al-Hidāya sharḥ Bidāyatal-mubtadiʾ* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), 3/108-109; Mawṣilī, *al-Ikhtiyār*, 2/77. See also Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa-Adillatuh* (Damascus: Dār al-Fikr, 1988), 4/2092-2903.

5 Sarakhsī, *al-Mabsūṭ*, 17/91-92; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6/264-265; Marghīnānī, *al-Hidāya*, 3/108-109. Abū Hanīfa is of the opinion that without the permission of the owners of the apartments on the upper floor, those below can not make any disposition of their own property that would weaken the building and cause it to collapse. According to him, what is essential in the dispositions of persons in condominium ownership is that the owners are prohibited from disposing of the main structure. This is because in a flat or condominium, each flat and part of the structure of the flat or condominium is the right of the other owners. If these dispositions of one's own property cause harm to one's neighbor, people should follow the basic rule (*asl*). For detailed information see Fakhr al-Dīn ʿUthmān b. ʿAli al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq* (Bulāq: al-Maṭbaʿa al-Kubrā al-Amīriyya, 1313), 4/195-196.

limited in certain circumstances. Most of the later Hanafī scholars (*mutåakhkhirūn*) favored the view of Abū Yūsuf and restricted the right of disposition of one's property to the condition of "not harming others," presenting a different attitude from early Hanafī scholars on this issue. According to them, people do not have a wide disposition right on their private property. This is because the authority of disposition of one's private property is restricted on the condition that it does not cause harm to others. Therefore, if people's actions on their property harm others, the owners cannot make such dispositions. If someone takes such action, they must be prevented from doing so; otherwise, they will be liable for damages.

In particular, these views on the adjacent (*jiwâr*) neighborhood, which assert that the right to property is not absolute and that the authority to dispose of one's property is limited to the condition of "*not harming others*," were first discussed in the genre of *wāqiʿāt* books and continued to be debated in the same genre for a long time.[6] Although this issue was addressed in the aforementioned works, it did not become part of the doctrine until the time of Zaylaʿī's *Tabyīn al-Ḥaqāiq*.[7] Despite some earlier Hanafī faqīhs discussing and adopting this view, the fact that jurists such as Kāsānī, Marghīnānī, and Mawṣilī, in particular, took a stance for the established view (qiyās) in the madhhab clearly demonstrates this situation.[8]

This view gained authority, as it was repeated in the aforementioned type of books and eventually took its place in later furū' al-fiqh texts of the madhhab and commentaries written on those texts. For example, Zaylaʿī states that according to the established rule in the madhhab, a person can dispose of their property in an unlimited manner. This rule was abandoned due to the principle of beneficence (maṣlaḥa), so it is not religiously permissible to do something that harms someone else.[9] From that time forward, we can easily say that the view of the later Hanafī scholars was preferred and applied and became part of the doctrine.[10] As a result, the rule of the

6 Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī fī al-Fiqh al-Nuʿmanī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1424/2004), 7/388, 517; Ḥasan b. Manṣūr al-Uzjandī al-Farghānī Qāḍī Khān, *Fatāwā Qāḍī Khān* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2009), 3/77-79; Majd al-Dīn al-Usrūshāni, *al-Fuṣūl fī al-muamalāt* (İstanbul: Suleymaniye Library, Nuruosmaniye Collection, 1773), fol. 373a-b; ʿImād al-Dīn al-Marghīnānī, *Fuṣūl al-iḥkām* (İstanbul: Suleymaniye Library, Yazma Bağışlar Collection, 990), fol. 349b-351a; Muḥammad b. Isrāʾīl Badr al-Dīn Ibn Qāḍī Simāwnā, *Jāmiʿ al-Fuṣūlāyn* (Cairo: al-Matbaa al-Azhariyyah, 1300), 2/123-124; Chalābī, *ad-Ḍamānāt*, fol. 88b-90a.

7 For a detailed study on this issue, see Saffet Köse, *İslam Hukukunda Hakkın Kötüye Kullanılması*, (İstanbul: İFAV Publications, 1997), 193-218.

8 Marghīnānī, *al-Hidāya*, 3/249; 4/392, 475; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6/264; Mawṣilī, *al-Ikhtiyār*, 5/47.

9 Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 4/196. Zaylaʿī's statements here are merely a repetition of the relevant fatwās in Burhān al-Dīn al-Bukhārī's (d. 570/1174?) work. Therefore, this situation is a manifestation of the reflection of the opinion that gained a certain authority by being mentioned in the type of wāqiʿāt books, in later texts of furū' al-fiqh. For detailed information, see Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/388.

10 For this, we can refer to Ibn al-Humām's *Fath al-Qadīr*, Ibn Nujaym's *Bahr al-Raʾiq*, Haskafī's *al-Durr al-Muhtār*, and Ibn Ābidīn's *Radd al-Muḥtār*. For detailed information see Kamāl al-Dīn Ibn al-Humām, al-Sivāsī, *Fath al-Qadīr* (Beirut: Dār al-Fikr, n.d.), 7/321-322, 326; Zayn al-Dīn Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Dār al-Kitāb al-Islāmī, n.d.), 7/33; ʿAlāʾ al-Dīn al-Ḥaṣkafī, *al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār*, ed. Abd al-Munʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 1/477; Muḥammad Amīn Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā ʾl-Durr al-mukhtār* (Beirut: Dār al-Fikr, 1412), 5/237, 448.

ẓāhir al-riwāya in the Hanafī madhhab, which initially stated that people have wide authority of disposition of their private property, was transformed by the fatwās and interpretations of the Hanafī scholars to the following statement: "*People can dispose of their property only on the condition that they do not harm others; if their actions on their property harm others, then the damages incurred must be compensated*." Thus, it is clear that by narrowing down the relevant rule in this matter it has become part of the doctrine. This view was also adopted in Ottoman law, where the Hanafī madhhab was practiced in an official capacity.

As seen, it is clear that the early Hanafī scholars evaluated the religious and legal aspects of the issue differently. In fact, there is no dispute that behavior that causes harm is *haram* and that there is a religious obligation to prevent it or to stay away from such acts. This is the religious aspect of the issue, the early Hanafīs stated that actions that cause harm cannot not be legally limited and there was nothing to be done in such cases because they thought that people could dispose of their private property as they wished. From this point of view, we can easily say that the principle of not harming others was initially addressed as a religious-moral issue, but the legal aspect was evaluated differently. However, changes in the religious and moral fields over time have brought about some changes in the relevant rulings about the adjacent neighborhood. The increasing number of behaviors that violate neighborhood laws has made it necessary to guarantee human rights by law, to prevent such actions, and to impose limitations on the relevant rules.

In conclusion, the view adopted by early Hanafī scholars was based on the established rule of the madhhab (qiyās/asl), while the view preferred by later Hanafī scholars was based on *istiḥsān*. However, as Zaylaʿī stated, the later Hanafī scholars abandoned the established rule in the madhhab due to the principle of beneficence (maṣlaḥa) and restricted the authority of disposition of one's property on the condition of not causing harm to others. This second view, which is the basis of fatwās, was also preferred in Majalla.[11]

2. Restrictions on Private Property Due to Neighborhood Law

As seen above, it is a basic rule in Islamic law that everyone can dispose of their own property as they wish. However, some limitations may be imposed on the right to property when someone else's rights come into play, when the benefits and interests of people are involved, or when harm is caused to someone else. The most important restrictions on the right to property include the pre-emption right (shufʿa), easement rights, and expropriation.

One of the limitations imposed on private property in Islamic law is the limitations arising from neighborhood law. As a requirement of this, no one has unlimited authority over their property. This is because, as can be clearly seen in the relevant rules on the subject, the principle

11 In accordance, we can refer to articles 1197 th to 1203 th of the Majalla. As seen in these articles, if a person's disposition of his/her own property results in harm to others, then the person in question will be prohibited from this disposition. For detailed information, see Ali Haydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* (İstanbul: Matbaa-i Tevsî-i Tıbâat, 1330), 3/464-476.

of not harming others is essential in neighborhood law.[12] If people's actions on their private property disturb their neighbors or prevent them from acting on their own property, or cause them material damage, then the disturbing conditions must be removed, and the damages must be compensated. For example, if the growing branches of a tree in someone's garden disturb their neighbors, or if a later building on someone's private property completely blocks the light or air of another person, they must be partially or entirely removed.[13] As seen in these examples, behaviors that cause harm in neighborhood law may impose some restrictions on private property. However, it is important to consider the extent of the damage in order to limit such actions on someone's property, as every damage does not restrict the property. As a matter of fact, as stated in article 1197 of Majalla, the disposition of people's private property can only be prevented if it causes excessive harm to another person.[14]

In neighborhood law, it is the concept of "*al-ḍarar al-fāhish*" (excessive damage) that usually appears in the limitations imposed on private property and determines responsibility/limitation in this regard.[15] Every kind of action that prevents the actual benefit expected from a commodity or violates the essential and basic needs of individuals is considered to be *al-ḍarar al-fāhish*.[16] However, it is not possible to limit this concept to a specific amount. This concept may vary according to time, place and individuals. What may be excessive for one person may be normal to another. Therefore, when determining the extent of the damage, it is necessary to consider the customs and the conditions of the period. In other words, the main factor that determines the measure here is the custom *('urf*).

We can generally divide the actions that lead to restrictions on private property due to neighborhood law into three categories: the actions that prevent people from disposing of their private property,[17] the structures that violate someone else's rights,[18] and the violations of privacy by observing the private spaces where women are located from the outside.

Since it exceeds the limits of this study and would require a separate study, we will exclude the first two of these reasons from the scope of this article and will only deal with the situation of seeing the private spaces where women are present from the outside.

12 Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/388; Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 4/196; Ibn Nujaym, *Bahr al-Raʾiq*, 7/33; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5/448.

13 Çatalcalı Ali Efendī, *Fatāwā Ali Efendī* (Istanbul: Suleymaniye Library, Pertevniyal Collection, 345), 2/641-643; Ali Haydar, *Durar al-Ḥukkām*, 3/461-462.

14 Ali Haydar, *Durar al-Ḥukkām,* 3/462-463.

15 Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/388; Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 4/196; Ibn Nujaym, *Bahr al-Raʾiq*, 7/33; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5/448. See also Ali Haydar, *Durar al-Ḥukkām,* 3/462-463.

16 Ali Haydar, *Durar al-Ḥukkām,* 3/466-468.

17 The following actions that cause discomfort to others can be given as examples: a bakery is built next to the house and its fumes come into the house, a cook shop is opened in the bazaar of the drapers, a soap house is built in the neighborhood, a slaughterhouse is built near a mosque, noisy shops, such as blacksmith shops or mills, are built near houses and they cause disturbance to the neighbors, the air and sunlight of a neighboring building are completely cut off by the building or the upper floor that is built afterward.

18 We can give the following as examples: The foundation of a construction going under the neighboring building, the eaves of balconies overflowing into the neighbor's courtyard, protrusions, such as bay windows and branches of trees growing in the garden extending into the neighbor's house or garden.

3. The Visibility of Women's Domestic Private Spaces from the Outside in Islamic Law

As mentioned in the previous section, the visibility of women's domestic private spaces from the outside is one of the reasons that could enforce restrictions on private property. As a matter of neighborhood law, nobody can dispose of their property in such a way that they can see spaces where women are present. This is because the construction of buildings in a way that does not violate privacy is one of the most important rights people have over each other. If a person builds a new house or constructs a new window on their property in such a way that they can see the kitchen or courtyard of their neighbors, these dispositions should be prevented, and damages should be compensated. These situations violate privacy.

The issue of whether the acts that cause women's domestic private spaces to be seen from the outside can be restricted or not can be found in the early texts of the Hanafī madhhab. The issue under discussion is whether a person who climbs a mulberry tree in their garden will be prevented from doing so if they can see women on someone else's property. In fact, according to the established view in the madhhab, this action on one's private property cannot be prevented. However, Samarqandī (d. 373/983) says that the person who climbs a tree will be prevented from doing so.[19] Nevertheless, it is not appropriate to completely restrict someone's disposition of another's property to prevent harm to others. The damage suffered by the owners will be greater than the damage incurred by the neighbor. For this reason, the rights of the other party must also be protected while eliminating the damage suffered by the neighbor. Thus, Ṣadr al-Shahīd (d. 536/1141), one of the Hanafī jurists, proposed a view that does not completely prevent people from disposing of their property and protects the rights of the other party. Accordingly, one should inform women in advance of the time when they are going to climb a tree to enable them to cover themselves and take precautions. This view is considered more appropriate for protecting the rights of both parties.[20] In this case, the person is responsible for notifying beforehand when they are going to climb the tree. Otherwise, the judge can prevent this act by court decision.[21] This disposition of someone's property violates the privacy of the neighbor and causes harm to them.

In another example, it is stated that a person who builds a window in such a way that they can see their neighbor's family will be prevented from disposing of their own property. However, some jurists argue that this restriction is only valid if the window overlooks an area designated for women.[22]

19 Abū al-Layth al-Samarqandī, *Kitāb al-Nawāzil* (İstanbul: Suleymaniye Library, Şehit Ali Paşa Collection, 935), fol. 303a; Abū al-Layth al-Samarqandī, *al-Fatāwā min aqāwīl al-mashāyikh fi al-ahkām al-shar'iyyia* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1971), 702.

20 Ibn al-Humām, *Fath al-Qadīr*, 7/327. Ibn al-Humām clearly states that this opinion belongs to Sadr al-Shahīd. However, this view is quoted in other Ḥanafī sources without attributing it to him. For detailed information, see Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 5/409; Hāfiz al-Dīn Muhammad b. Muhammad b. Shihāb al-Kardarī al-Bazzāzi, *al-Fatāwā al-Bazzāziyya*, ed. Salim Mustafa al-Badrī (Dār al-Kutub al-ʿIlmiyya, 1971), 2/475; Zayn al-Dīn Ibn Nujaym, *al-Ashbāḥ wa al-Naẓā'ir* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1419), 73.

21 Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 5/409; Bazzāzi, *al-Fatāwā al-Bazzāziyya,* 2/475; Ibn al-Humām, *Fath al-Qadīr*, 7/327; Ibn Nujaym, *al-Ashbāḥ wa al-Naẓā'ir*,73.

22 Ibn Nujaym, *Bahr al-Ra'iq*, 7/33; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5/448.

As the aforementioned statements reflect more on the theoretical dimension of the subject, it is necessary to reveal how they are applied in practice. In fact, a study that does not take into account the practical application of law will be incomplete in every aspect. Therefore, we will try to deal with concrete examples of what is meant by the spaces where women are present, what kind of dispositions impose restrictions on private property, how the issue is reflected in fatwā collections, and how these were applied in Ottoman practice based on the *sharʿiyyah* records.

4. The Protection of Domestic Privacy in Ottoman Practice: Maqarr al-niswān

4.1. The Spaces Considered as Maqarr al-niswān

The term "maqarr al-niswān" is used in Ottoman fatwā collections and *sharʿiyyah* records to indicate private spaces where women are present. This concept refers to the spaces where women move freely and spend most of their time without wearing the scarf (*hijāb*), such as the kitchen, the wellhead, and the courtyard.[23]

Since the areas defined as *maqarr al-niswān* are limited only to those stated above, it is not considered a violation of privacy to observe every space where women are present from the outside. For example, as seen in the fatwās, the garden of a house is not considered a *maqarr al-niswān*.[24] The fact that women occasionally go out to the garden does not give the owners the right to impose restrictions on someone else's private property. For this reason, a person cannot request their neighbor to "*remove this situation that violates my privacy or take the necessary precautions by putting up a curtain*."[25] However, if the kitchen is in the garden, or if women have to use the well in the garden, then the garden is considered a *maqarr al-niswān*.[26]

The greeting room (selamlık) was also not considered as a *maqarr al-niswān*.[27] The fact that a room that used to be used as a greeting room is later used by women does not change the status of this place. Therefore, property owners cannot demand that their neighbors close the windows or put something that prevents these rooms from being seen, claiming that privacy is violated if these rooms are visible.[28] In such situations, everyone should take their own precautions and solve their own problems. In such cases, the previous status (qadīm) of the buildings is essential. In other words, if a place that was not considered a *maqarr al-niswān* before becomes a place belonging to women afterward, this does not give rise to a right of restriction.

23 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 2/626-643; Sheikh al-Islam Feyzullah Efendi, *Fatāwā Feyziyye* (Istanbul: Suleymaniye Library, Pertevniyal Collection, 347), 503-508; Yenişehirli Abdullah Efendī, *Bahjat al-Fatāwā* (Istanbul: Suleymaniye Library, Pertevniyal Collection, 327), 569-577; Durrīzāde Mehmed Arif Efendī, *Natījat al-Fatāwā* (Istanbul: Suleymaniye Library, Pertevniyal Collection, 354), 545-550; Ali Haydar, *Durar al-Ḥukkām*, 3/473-476.

24 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 2/630. See also Ali Haydar, *Durar al-Ḥukkām*, 3/473-477.

25 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 2/630.

26 Ali Haydar, *Durar al-Ḥukkām*, 3/474.

27 Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573; Ali Haydar, *Durar al-Ḥukkām*, 3/477.

28 Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573.

4.2. The Protection of Privacy and Elimination of Violations

The construction of buildings in a way that would not violate the privacy of neighbors was considered one of the most important rights of neighbors over each other in Ottoman society. For this reason, Ottoman jurists attached great importance to the protection of domestic privacy and made the necessary regulations to eliminate any situation that violated it. The situation was handled so sensitively that it was stated that if the call to prayer (*adhān*) was recited from the minaret, it would be more appropriate to recite it from below in case the women in the quarter could be seen.[29]

It is an undeniable fact that some violations occur when new buildings or extensions or additions are constructed on one's private property. If such activities violate the privacy of women in spaces considered *maqarr al-niswān*, this situation leads to the right to demand and sue for the removal of the disturbance. As seen in the examples of fatwās, if the neighbor's *maqarr al-niswān* is visible due to the construction of a new building (such as an inn, bathhouse, mill, slaughterhouse, garden, etc.), the addition of windows, balconies, and roofs to the existing building, the construction of a high floor, or the collapse of a wall, the neighbor's right to demand the prevention of the inconvenience caused is the most natural right of the harmed neighbor.[30]

When violations of privacy were identified during rebuilding processes, parties sometimes resorted to agreements, and sometimes the disturbing situations were removed. For example, in a court record dated 1667, it was decided to close windows that had been built later and overlooked the neighbor's *maqarr al- niswān*.[31] In another case dated 1741, it can be seen that the neighbors agreed among themselves regarding the parts of the building that had been built higher than before and violated privacy.[32] In such cases, the opinions of the experts at the end of the investigation and examination played an important role in determining the decision. In fact, in a case dated 1730, the court ruled that the claim was justified at the end of the investigation and ordered the removal of the windows.[33] In another case example dated 1740, it was discovered that the claim regarding the visibility of the *maqarr al- niswān* did not reflect the truth. It was decided that the chimney, which had been built later, should remain as it was.[34]

The spaces where the *maqarr al-niswān* can be seen are not limited to adjacent neighbors. Examples in fatwā collections show that neighbors across the street are also included, along

29 *İlmiye Salnamesi* (İstanbul: Matbaa-i Âmire, 1334), 390.

30 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 626, 627, 628, 630; Feyzullah Efendi, *Fatāwā Feyziyye* (Pertevniyal, 347), 504; Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573-574; Durrīzāde, *Natījat al-Fatāwā*, (Pertevniyal, 354), 548.

31 *İstanbul Kadı Sicilleri Bab Mahkemesi 3 Numaralı Sicil,* ed. Mehmet Akman (İstanbul: İSAM Publications, 2011), 17/819-820.

32 *Diyarbekir Şer'iyye Sicilleri Amid Mahkemesi 3754 Numaralı Sicil,* ed. Ahmet Zeki İzgöer (Diyarbakır: Dicle University Faculty of Theology Press, 2014), 525.

33 *İstanbul Kadı Sicilleri Bab Mahkemesi 150 Numaralı Sicil,* ed. Coşkun Yılmaz (İstanbul: Kültür AŞ. Publications, 2019), 527.

34 *İstanbul Kadı Sicilleri Bab Mahkemesi 172 Numaralı Sicil,* ed. Coşkun Yılmaz (İstanbul: Kültür AŞ. Publications, 2019), 558.

with adjacent neighbors.[35] If the *maqarr al-niswān* is visible from the opposite side of the street, then the distant neighbor must change their window or wall in a way that women are not visible or take necessary precautions to prevent it.[36]

There is no religious difference in this regard, as non-Muslim citizens have the same rights as Muslims in matters of transactions (*muʿāmalāt*). For example, if a window or balcony built by a Muslim neighbor causes their non-Muslim neighbor's *maqarr al-niswān* areas to be seen, the non-Muslim citizen can demand that this inconvenience be eliminated. Therefore, a Muslim who causes a disturbance cannot say to their non-Muslim neighbor whose privacy is being violated, "*You have no such right*."[37] As seen, the violation of privacy protects the rights of non-Muslim citizens as well as Muslims. The result does not change even if the party who suffers harm due to the sighting of the *maqarr al-niswān* is a non-Muslim or if the incident is entirely between non-Muslim neighbors. The court records in the books known as the *sharʿiyyah* records confirm this situation.[38]

As seen in the fatwās, it also does not matter whether the buildings that violate women's privacy belong to a private person or a foundation. This does not change even if these buildings were built for the public benefit. As a matter of fact, in a related fatwā example, it is stated that if a person builds a dervish lodge for endowment that overlooks someone else's *maqarr al-niswān*, then the neighbor has the right to demand that this situation be remedied.[39]

4.3. The Requests for Elimination of Privacy Violations

The person who violates someone's privacy is obliged to eliminate any discomfort that has occurred in any case. For this reason, if someone is harmed because of the visibility of their *maqarr al-niswān*, they are not obliged to do so themselves, even if they can relieve their discomfort with their own ability. In fact, in one of the related fatwās on the subject, it was stated that the person who violated the privacy of their neighbor across the road with a window they had built on their own property is obliged to compensate for the damage.[40] This case shows that the fact that the house is on the opposite side of the road does not change the result. Especially in the fatwā that immediately follows this example, it is clearly stated that the person who caused the damage cannot demand the other person to repair the damage by saying, "*Since your house is on the opposite road, then put a cage on the windows, so that your maqarr al-niswān cannot be seen*." They must thus do it themselves.[41]

35 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 628; Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573.
36 Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573. For detailed information, see Ali Haydar, *Durar al-Ḥukkām*, 3/474.
37 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 628; Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 574. For detailed information, see Ali Haydar, *Durar al-Ḥukkām*, 3/475.
38 *İstanbul Kadı Sicilleri İstanbul Mahkemesi 25 Numaralı Sicil,* ed. Coşkun Yılmaz (İstanbul: Kültür AŞ. Publications, 2019), 80; *İstanbul Kadı Sicilleri İstanbul Mahkemesi 137 Numaralı Sicil,* ed. Coşkun Yılmaz (İstanbul: Kültür AŞ. Publications, 2019), 85-86.
39 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 628.
40 Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573.
41 Yeni Şehirli, *Bahjat al-Fatāwā* (Pertevniyal, 327), 573.

In the case of the visibility of spaces defined as *maqarr al-niswān*, it is the most natural right of the harmed neighbor to demand the elimination of the inconvenience that has occurred. However, whether a person is justified in complaining about the violation of privacy is shaped according to the old status (*qadīm*). Thus, it is crucial to determine when the buildings or construction activities that violate women's privacy were built. The solution to the problem and the determination of who is responsible depends on this. The building must have been constructed later for the person who suffered damage to make a demand and prevent the neighbor's disposition. Otherwise, the fact that someone builds a house next to structures that have existed for a long time does not produce a right to demand the prevention of the violation of privacy. For example, according to a fatwā on the subject, a house built later was situated below the neighbor due to the difference in elevation, which caused visibility of the *maqarr al-niswān* in the new building. In this example, the fatwā states that the person who built their house afterward cannot demand the closure of their neighbor's windows or take the necessary precautions to justify the current situation.[42] This is because the other neighbor's house has existed for a long time, whereas the damaged person's house was built later. In such cases, the person should resolve their problem themselves.[43]

As seen in the case examples in the *sharʿiyyah* records, the complaints were justified if the buildings that were constructed and expanded differently from the old ones could see spaces that were the *maqarr al-niswān*. In such cases, the situation of the privacy-violating spaces results in the decision to demolish or restore them to their previous status or to build a wall or put up a curtain. For example, in a court record dated 1662, it was decided to demolish a balcony that was added to a building later because it had a view of the *maqarr al-niswān*.[44] In another example of a lawsuit dated 1696, the plaintiff was found to be right after the discovery, and it was ruled that ten windows of a house that were built afterwards and overlooked the *maqarr al-niswān* should be closed.[45]

In cases where the *maqarr al-niswān* is seen, it is necessary not to overdo it when repairing the damage. For example, if the damage can be remedied by installing a curtain or building a wall to block the view of the area where women are, it is not necessary to completely close the window.[46] Similarly, if a person claims that women can be seen through gaps in a fence wall, they can only request that the gaps be closed, and cannot request that a stone wall be built instead.[47] An example of a case dated 1560, which deals with the situation of brothers who built an attic over their houses in a way that they could see the *maqarr al-niswān* of other

42 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 629.
43 Ali Haydar, *Durar al-Ḥukkām*, 3/480.
44 *İstanbul Kadı Sicilleri Eyüb Mahkemesi (Havass-ı Refia) 74 Numaralı Sicil*, ed. Coşkun Yılmaz (İstanbul: İSAM Publications, 2011), 28/276-277.
45 *Istanbul Sharī'iyya Register*, no: 22, 85b/1 (13 Şaban 1107/18 Mart 1696).
46 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 629; Feyzullah Efendi, *Fatāwā Feyziyye* (Pertevniyal, 347), 503.
47 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 629; Ali Haydar, *Durar al-Ḥukkām*, 3/473-476.

houses in the neighborhood, confirms this approach. In this case, it was stated that instead of demolishing the entire building, it was only necessary to demolish the attic floor that caused the disturbance.[48] In another example dated 1664, a lawsuit was filed due to the fact that some of the windows made later in a three-story building saw the *maqarr al-niswān*. As a result of the investigations, it was decided to eliminate the disturbance by placing wooden curtains in front of the windows.[49]

In order to limit people's property due to *maqarr al-niswān*, the essence of the right to property must not be touched, the person's enjoyment of the property should not be completely prevented and any request in this regard must also be reasonable. As seen in one fatwā example on the subject, if a person builds a house near another person's field, this person cannot prevent their neighbor from cultivating their field by saying to the land owner, "*The areas of my house that are maqarr al-niswān can be seen from your land*."[50] First of all, the landlord has no right to prevent this because the house in this example was built later. On the other hand, while eliminating the damage of one neighbor, the property rights of the other cannot be completely prevented. This is because the damage suffered by the owner of the land in this way is greater than the damage incurred by their neighbor. Therefore, while eliminating the damage, the rights of both parties must be protected.

Conclusion

The visibility of the spaces where women move freely in the house without wearing the scarf (*hijāb*) was considered a violation of privacy in Islamic law. If people's actions on their private property violated women's privacy, then the inconveniences were attempted to be eliminated by legally restricting the actions that caused the harm.

The term that is usually encountered in the limitations imposed on private property in neighborhood law and that determines the responsibility in this regard is the concept of "*al-ḍarar al-fāhish*" (excessive damage). As seen in the examples in the fatwā collections and *sharʿiyyah* records, all kinds of construction activities that are conducted in a manner allowing a view of the *maqarr al-niswān* are considered to be excessive damage.

The term "*maqarr al-niswān*" is mostly used to indicate the spaces in the house where women move around without wearing the scarf (*hijāb*) in Ottoman fatwā collections and the *sharʿiyyah* records. This concept refers to the spaces where women move freely and spend most of their time without wearing the scarf, such as the kitchen, the wellhead, and the courtyard. The examples related to the subject show that the garden of the house and the greeting room (selamlık) were not considered as *maqarr al-niswān*. The decision is made by looking at the previous status of the structures. In other words, the fact that a space that was not considered a *maqarr al-niswān* before is later used by women does not change the status of this space.

48 Presidency of State Archives Ottoman Archive, *Cevdet Belediye*, C.BLD, 32/1560, H-29-12-1255.
49 *Evkâf-ı Hümâyûn Müfettişliği Shar'iyya Registers*, no: 54, 139a/4 vd. (10 Safer 1075/2 Eylül 1664).
50 Çatalcalı, *Fatāwā Ali Efendī* (Pertevniyal, 345), 630.

Ottoman jurists attached great importance to the protection of domestic privacy and made the necessary regulations to eliminate any violation of this right. When such violations were detected, the jurists sometimes resorted to the agreement of the parties and sometimes to the removal of the disturbing situations (by closing them, building walls or putting up curtains in front of them).

It was observed that it does not matter whether the buildings or structures that violate women's privacy belong to a private person or a foundation. Even if these buildings were built for public benefit, this does not change the ruling. There is also no difference in religious identity in this matter. As a matter of fact, the court records show that non-Muslim citizens had the same rights as Muslims in this regard, and the outcome remained unchanged.

Whether the person is right or not in the complaints about the *maqarr al-niswān* was resolved by examining the previous status (*qadīm*) of the buildings. The actions causing the damage must have been done later to allow people to make a demand in this regard and to prevent their neighbor's dispositions. Otherwise, the fact that someone builds a house next to structures that have existed for a long time does not produce a right of demand to prevent the violation of privacy.

As seen in the court records in the *sharʿiyyah* records and fatwā examples regarding the visibility of maqarr al-niswān, it should not be exaggerated while removing the damage. The rights of property owners should be respected, and their ability to use their property should not be excessively limited. Additionally, any requests to address the issue should be reasonable.

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