

## **Sight Restrictions in Maghrib Muslim Architecture**

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**Abstract:** *Sight in Islamic culture is subject to legal restrictions that aim at preserving moral consciousness in Muslim societies. These restrictions have a direct impact on architecture in traditional Muslim cities. Details such as placement of doors and windows, the use of balconies and rooftops, and building heights were shaped by legal reasoning based on sight restrictions. The present study aims at highlighting this legal reasoning system by analysing legal opinions that were continuously advocated by jurists in response to daily practices, and the legal principles on which these opinions were based. This is expected to contribute in developing a new intellectual discourse on Muslim architecture that could go beyond the present design theories.*

Sight in Muslim culture is, like other senses, a faculty that a man is provided with to recognize the reality of existence.<sup>1</sup> This reality which is the substance of knowledge and wisdom can be obtained through continuous observation and contemplation *mushāhadah* in the universe. Consequently, the object of sight embraces all human being; be it man or woman.<sup>2</sup>

However, sight in Islamic social system is bound by a set of rules of conduct that preserve moral values in Muslim society. This morality includes sexual segregation and regulating relationships between men and women, is a preventive measure for the protection of the Muslim community from moral deviation. From a juridical point of view, the restriction of sight is part of a broader legislative framework in which all acts of devotion and codes of morality are preserved: This framework consists of the five main categories known as *kullyāt* or

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*maqāsid*. These are religion (*dīn*), the human soul (*nafs*), reason (*‘aql*), procreation (*nasl aw ‘ird*), and material property (*māl*).<sup>3</sup> Within each of the five categories, the commandments are also gradually classified into three levels in relation to their weight in *sharī‘ah*. Procreation, which is sometimes fused in juridical terms with chastity, includes all restrictions regarding relationships between men and women, including sight restrictions.

A considerable number of commands stemming from this framework are reflected in the daily life of Muslim societies. It is recommended, for example, that boys and girls should be separated from an early age when sleeping.<sup>4</sup> Members of the family living together are also ordered not to enter each other’s rooms during specified times, mainly before sunrise, after sunset prayer and during siesta time, or ask for prior permission.<sup>5</sup> Men are also required not to sit in public places, or at least to cast down their gaze, so as not to cause a nuisance to passers-by.<sup>6</sup>

Among such commandments, women are ordered to be modest in their dress when they leave their home. While there is a wide divergence among Muslim scholars on whether women should cover their faces and hands, all of them agree that the dress should cover the whole body and that it should not attract attention.<sup>7</sup>

The effect of this concern for privacy can be recognized in different aspects of the built environment in Muslim cities such as the inward looking houses, winding streets and distribution of urban activities. By analogy, an observer is struck by the similarity between the dress code of the Muslim women and the form and internal organization of the house.<sup>8</sup> The absence of openings and ornaments on external walls, the use of the lobby entrance and the careful location of guest room, are all architectural expressions that stem from the concept of modesty, in its wider sense.<sup>9</sup> Metaphorically, the word *ḥaram* which literally means a forbidden object, connotes simultaneously women and the intimate part of the house which is reserved for females. In Osmanlı architecture for example, the house was subdivided into two opposite spaces: *haramlik* which was the family area and *salamlik* which means the area reserved for welcoming male guests or the men’s apartment in the household.<sup>10</sup>

### Legal Opinions as a Source of Study

The present study is based on a collection of juridical opinions (*fatāwā*) contained in two different books of Malikī jurists,

Mohammad Ibn al-Ramī (d.1334) and al-Wansharisī (d. 1508). The two books, successively known as *al-Flān bi aḥkām'l bunyān* and *al-Mi'yār al-mu'arrab*,<sup>11</sup> were devoted to collect juridical opinions of Mālikī scholars who lived mostly in North Africa and al-Andalus. Comparing the two documents, *al-Flān* focuses on issues related to construction and on cases that occurred in the city of Tunis during the Hafside period (1229-1574), whereas *al-Mi'yār* comprises a wide range of opinions dealing with different topics and embraces most North African and Andalusian cities such as Cordoba, Grenada, Fez, Tlemcen and Tunis.<sup>12</sup> This could be due to the nature of each of the two authors as Ibn al-Ramī was an expert mason whereas al-Wansharisī was a jurist.

Regarding *fatwā* as a source of study, it is worth noting that a limited number of opinions scattered over time and space do not reflect the entire legal system governing the urban development within which sight servitude is inscribed. From a practical point of view, such opinions were formulated in response to real cases submitted to jurists. Despite the executive character of some of them, as they were issued from courts, they had in most cases a corrective effect in the social value system. In fact daily practices in traditional Muslim cities, as in pre-industrial societies, were bound by a set of norms which were framed by religious and moral values. Legally speaking, such practices, known in Islamic jurisprudence as *'urf* and *istiṣhāb*, were endogenous in character as they were transmitted verbally from one generation to another without intervention of an external party.<sup>13</sup> Only cases of dispute and misunderstanding were submitted to jurists for which reason they were called *nawāzil* (pl. of *nāzilah*).<sup>14</sup> Consequently, the limited number of opinions we are dealing with are only a drop in an ocean of practices that had been daily shaping the city.

In an attempt to identify the characteristics of Muslim cities through Islamic jurisprudence, recent studies focused on the analysis of the physical impact of such opinions, most of which were interpreted graphically.<sup>15</sup> Hakim's study is a case in point in which design guidelines and physical features were set from the analysis of Ibn al-Ramī's manuscript. However, due to the multitude of cases and their tree-like solutions, the study regarding sight restrictions is characterized by its fragmented approach<sup>16</sup> and lack of comprehensive view. Therefore, the present study, in widening the geographic area and adopting a systematic approach to architectural components and

legal principles, aims at contributing to establish a comprehensive legal framework of sight restrictions that applied to cities of the region.

### **Legal Norms and Architectural Practices**

Intrusion into the private life caused by architectural features of a neighbouring house was considered by Muslim scholars as a nuisance that gives the plaintiff the right to protest, and permitted public action for its removal. The concern for privacy was therefore reflected in the organisation of the house as well as its components. Besides the measures considered vis-à-vis visitors and male/female relationships, a great concern was shown in the relationship of the house to its surrounding.

On defining the scope of nuisance through jurists opinions, one finds that most cases pivot around a limited number of house components and thus can be classified into categories that reflect these sources of nuisance. The sections below will focus on each of these categories

*The Placement of External Doors and Entrances:* Entrances in most Muslim houses are designed in a lobby-like form that protects its inside from the sight of passers-by when the door opens. Despite such a measure, jurists treated numerous cases of intrusions that relate mostly to doors facing each other across a street. Opinions fall into three categories depending on the nature of the street. In the case of a thoroughfare that is used by the general public, proprietors along have the full right to open doors and to choose their placement regardless of the neighbours' entrances.<sup>17</sup> However, in the case of a still open but narrow street it is preferable for a neighbour to avoid facing the existing entrances whenever possible.<sup>18</sup> In the case of a dead-end street, which is considered a common property among dwellers, any neighbour is bound to the consent of the others for opening a new door. In further developing such a case, Ibn al-Ḥājj stated that a proprietor within a dead-end street has the right to relocate his old entrance if he moves it towards the gate of the street but not to a deeper position. Otherwise the new location of the door would increase his share in the common space within the dead-end street and would give him access to a portion of land he didn't have the right to.<sup>19</sup>

One of the direct impacts of such opinions in traditional Muslim cities, where most of the street are narrow for climatic reasons, is that doors rarely face each other. Positions of doors along the streets would

therefore be an outcome of agreements among neighbours on choosing locations in relation to each other without recourse to authorities. Only cases of dispute would be brought before judges.

*Windows, Openings and Balconies:* Windows and openings in urban buildings in the Maghrib region are mainly used for ventilation and lighting as most of the houses are inward looking and depend on their courtyards.

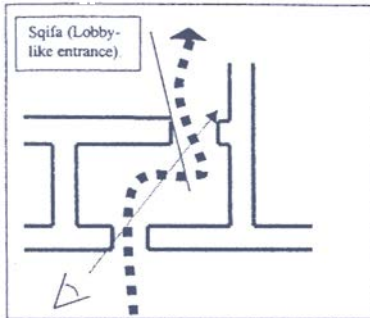


Figure 1

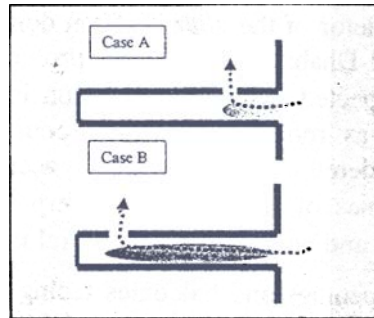


Figure 2

Consequently, windows, openings and balconies are considered potential sources of intrusion. One of the oldest incidents in Muslim urban history related to this issue occurred in the time of ‘Umar Ibn al-Khaṭṭāb, the second caliph. A proprietor of an upper room (*ghurfah*) opened a window giving a view to the inside of his adjacent neighbour’s house. Convinced that the owner did not intend to harm his neighbour, ‘Umar ordered his officer to place a bedstead and stand on it to see whether one could see into the neighbouring house from that window.<sup>20</sup>

Small uncovered openings are considered by some jurists as more harmful than other sources of harm as intrusion could not be detected or prevented.<sup>21</sup> However, in some exceptional situations, openings are permitted. This is mainly the case of old openings that had preceded the other neighbouring houses and openings by a long time. However, the owner of an old opening is, according to Ibn al-Ramī, not allowed to use it in order to look inside his neighbour’s house for the purpose of harming him. In case of necessity, the neighbour should manage to protect himself by elevating his wall to avoid harm. This rule could be

deduced from the previous decision of ‘Umar, in which a window was first ordered to be sealed and then was permitted in order to provide a room with air and light provided that the window was sufficiently elevated.

Openings and windows giving onto streets and backs of the houses were also permitted. The Tunisian judge Abd al-Rafi‘ was once asked about an upper room (*ghurfah*) which opens onto the roofs of the neighboring houses, knowing that such roofs are used for drying clothes and vegetables. He replied that nobody could prevent the proprietor of the *ghurfah* from doing so. In explaining such an answer Ibn al-Dhābit stated that the prohibition of openings should be limited to expected sources of intrusion into living spaces and sleeping areas such as rooms and internal courts. Roofs of houses are thus, not considered as living spaces, according to Ibn al-Kāsim and other disciples of Mālik.<sup>22</sup> This interpretation might be related to specific cities and would not be a general rule as will be seen later on.

Openings and balconies facing each other were also not permitted even with the consent of the proprietors as this would cause a possibility of mutual intrusion which is legally prohibited (see figure 3). In case of dispute, the oldest one could prevail. Otherwise, both of them should be sealed. A case was brought to Saḥnūn who ordered the sealing of both of the windows after hearing each neighbour swear that he didn't intend to harm the other.

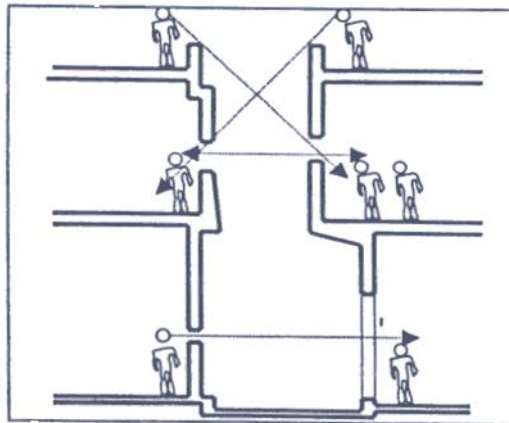


Figure 3

*Roof tops and Building Heights:* Opinions of jurists on rooftops seem to relate to the intensity of use which mainly depends on climatic reasons. Roofs in some Muslim cities are heavily used in some seasons and periods of the day. In regions like the valley of Mzab, south of Algeria, the roof, during summer, is used by night for sleeping and meeting whereas in winter it is used for drying crops and clothes. Due to the difference in temperature between inside and outside, members of the family are in constant migration up and down within the house.

In rural and mountainous areas, houses are generally provided with large courtyards around which rooms are scattered. Pitched roofs that are suited to snowy and rainy weather are useless for domestic purposes. Due to the incremental process of growth, such rural settlements could turn over time into dense urban areas, in which gradual extension of the built-up area would necessitate the use of the roof. Algiers city which passed from a small settlement during the Berber period to a great city during the period of Ottomans is one example.

In case of their intensive use, roofs are generally considered as a potential source of intrusion and thus are surrounded by a parapet that preserves privacy of users. Accordingly dispute often arise due to the absence of the parapet, its height or its ownership.

With regard to the ownership al-Siyurī was asked to give an opinion on the case of two adjacent houses which had uncovered roofs. One of the neighbours had decided to build a parapet and the other refused to contribute. The jurist replied that, in one of the opinions of Mālik, the latter should be compelled to contribute if they both use the roof.<sup>23</sup> In another opinion, he could not be compelled. However, if one of them builds the parapet alone, the other must abstain from using the roof until he pays his part of fees.

Concerning building height, fundamental texts, mainly from the Sunnah<sup>24</sup> present an apparently paradoxical position. From the stand point of piety, Islamic sources consider that raising one's building would stimulate material competition among neighbours and would interfere with other moral values of the religion such as equality, mutual help, unity and humility. It is therefore described in some texts as prohibited. In a message sent by 'Umar Ibn al-Khaṭṭāb to the governor of Kufa, he permitted the residents to (re)build their houses on condition that they do not build excessively high, going beyond their actual practical needs "*wa lā tataṭāwalū fī al bunyān.*"<sup>25</sup>

In another legal source permitting raising building height, the companion Khālid Ibn al-Walīd complained to the Prophet that his house was too small to accommodate his family. The Prophet replied "Build high in the sky and ask God for spaciousness." It seems that the owner of the house, which was close to the Prophet's mosque, had consumed his land entirely, so that vertical extension would be the only solution.<sup>26</sup> Jurists in trying to reconcile the two apparently diverging positions, conclude that prohibition relates to the motive of the owner whether it stems from a real need or from a malicious intention. In other words, raising a building for a pressing need is a reasonable action that does not interfere with the fundamental guidance of the religion.

Among Mālikī scholars, the same opinion has been stated by Ibn al-Ramī. He considers that, "nobody has the right to prevent someone else from raising his building if he does it due to his need for space. But if he raises his building to harm his neighbour without any evident utility he should be prevented from doing so."<sup>27</sup> Likewise Ibn al-Rushd and Ibn al-Ḥājj consider that the owner of a land has the right to elevate his construction as much as he wishes, so far as he does not harm his neighbours.<sup>28</sup>

In spite of the fact that some types of harm due to raising of buildings are tolerated, such as obstructing neighbours access to air and light, intrusion could always be technically avoided by placing windows high in the wall and constructing parapets around roofs and thus, is not accepted by jurists as violation of neighbours rights.

With regard to rural dwellings, known as *abrāj* (pl. of *burj*), which were often erected within private gardens, Mālikī scholars also discussed the practice of opening windows onto neighboring properties. A divergence arose on whether the garden is considered as an intimate space or an external space as it is sometimes visually open to public. According to Ibn al-Ghammāz; and Ibn al-Abdu'l Rafīc, there should be no objection for a proprietor to open windows in his tower giving onto neighbouring properties in which there are no other buildings and only fruit trees or vineyards (see figure 4). This opinion seems to be based on considering intrusion exclusively to be related to the interior of dwelling insides such as living room and bedrooms.<sup>29</sup> In another opposite opinion, Abu Abdallah al-ʿAdil considered gardens as intimate spaces. According to him "an owner would walk within his garden with his wife, sleep under a tree, ...forgetting that he is being watched."<sup>30</sup> (see figure 4)



In some cases of uneven sites such as hills and slopes, properties dominate each other which causes a problem of intrusion. Mālikī scholars discussed similar cases where visual intrusion could be prohibited. Basically, the owner of a higher plot of land, initially used for agriculture, has the right to develop it owing to the right of the property. However, he is supposed not to cause nuisance to the surrounding houses. In case of an undeveloped piece of land overlooking a public fountain reserved for women, (See figure 5) some jurists recommended that the owner, on building his house, should be prevented from opening any window or door on that side if the fountain were within the scope of his sight.<sup>31</sup>

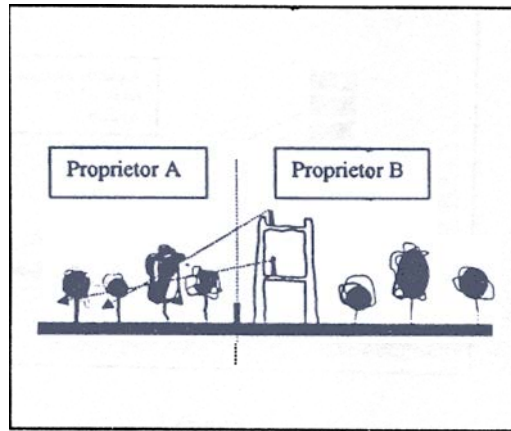
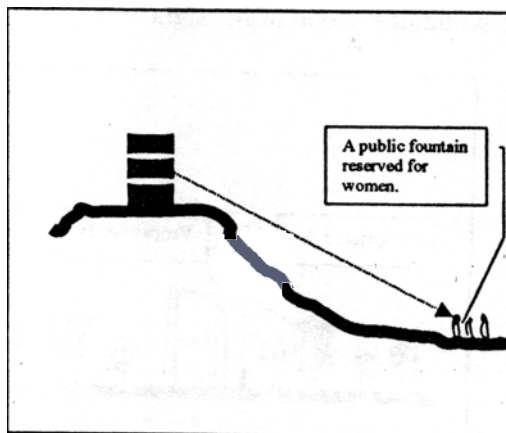


Figure 4

In further restricting the right of property, Saḥnūn stated that the owner should be prevented entirely from building, if there is no pressing necessity for it.<sup>32</sup> This case shows consequently that the servitude of sight could effect land development. In wider terms this could be regarded as a prevention of a harm emanating from a private property that effects public life, *Shops, Mosques and Public Buildings*: Public property could sometimes become a source of intrusion that may harm private properties. In accordance with the principle of balancing the public welfare over private interests, jurists have stated specific guidelines so that action could be taken in favour of private property.

One of the striking features of the traditional Muslim cities is the functional segregation of its urban activities each into specialised areas

within the city. Public facilities and activities such as markets, congregational mosques and craft workshops are separated from residential areas. Hierarchical relationships between these areas regulate infiltration into residential quarters and exclude strangers. Nevertheless, conflict between the need for privacy and requirements of community life have often led to dispute. Most of such cases relate either to private houses that are located on the edges of residential areas giving onto thoroughfares and public spaces, or to amenities that are located within residential quarters.



Figure

Similar to rules applied to private constructions, public buildings located within residential areas are constrained by the servitude of sight in respect to surrounding houses. Ibn al-Ramī relates the case of a dispute between those who adapted the roof of a mosque for additional space for prayer and the proprietor of an adjacent house. Convinced that any person who stood on that roof would see the inside of an adjacent house, Saḥnūn stated that the management of the mosque should be compelled to surround the roof with a parapet and that people should be prevented from praying on that roof until it was screened.<sup>33</sup>

Due to their height, the minarets can sometimes become a source of disturbance to the neighbouring houses. A long debate on this issue took place among jurists in al-Andalus revolving around different legal considerations. In reply to a spectrum of analogies Ibn Rushd stated that the disturbance which emanates from a pre-existing minaret could

not be accepted on the basis of the right of precedence, as this does not apply to public building.<sup>34</sup> The minaret, according to him also differs from the case of the fruit trees to which jurists allow the owners to climb during the season for harvesting on condition that each time he gives notice to neighbours. In the case of the minaret, the muezzin steps up several times a day which makes prevention from sight difficult to enforce. On concluding his opinion he recommended that a screen should be put on any side of the minaret that opens towards neighbouring houses.<sup>35</sup> On commenting on this opinion, Ibn al-Ramī deduced that a minaret could be used if houses around are sufficiently distant so that one could not distinguish faces and bodies within the houses.<sup>36</sup>

It is obvious that such opinions would have turned into technical measures and architectural treatments that preserve privacy of residential areas while erecting public buildings within them. Such legal reasoning would in other words, contribute in interpreting the architecture of minarets in terms of location, height and typology. One of the historical examples in this context is the location of the Great Mosque of Kufa, which was surrounded by a large open area, called *ṣahn*, after which residential areas were planned.<sup>37</sup>

Shops, baths and other basic facilities also constitute a source of intrusion within residential areas. Mālikī scholars diverge considerably in their opinions as regards to opening shops facing house entrances. According to jurists of Fez, shops are considered as more harmful in terms of intrusion than opposing entrances of houses. Residents, especially women entering and leaving their homes, will suffer from constant sight of shopkeepers and clients who would sit nearby for a long time.<sup>38</sup>

In another opinion on which Ibn Rushd from Cordoba and Abd al-Rafiʿ from Tunis agreed, shops are comparable to entrances of houses in terms of potential harm. Previously cited rules thus apply. Accordingly, in situations where a shop is located opposite an entrance within a wide thoroughfare, the objection of residents is not considered as their houses are already exposed to the public to which they would have taken appropriate measures. However, in the case of a narrow public street the owner of the shop should keep his entrance sufficiently away from facing that of the opposing houses to preserve their privacy.<sup>39</sup>

This principle was applied by the judge Abd al-Rafiʿ from Tunis to a case of a shop opened at a T-junction, in which the location faced a

dead-end street. A neighbour living at the end of a dead-end street complained about the new shop claiming that it was facing his entrance. After investigation, the judge was informed that on sitting on the threshold of the shop and facing the dead-end street one could not see the inside of the house but rather a person who is about to leave or enter the house. He consequently, rejected the complaint.<sup>40</sup>

### Legal Principles of Sight Restrictions

Sight servitude in its practical aspect is deeply rooted in the Muslim cities and goes back to the time of the Prophet. Al-Burkhārī narrated an incident in which a person visiting the Prophet was strongly rebuked for looking inside the house from a fissure in the external door.<sup>41</sup> The message of 'Umar to his local governor in the city of Fuṣṭāṭ on the case of the *ghurfah* is another juridical reference in this issue.<sup>42</sup>

Jurists, since the time of the Prophet, have developed a series of principles to which they refer in their opinions. Such principles are mostly formulated in doctrines of *uṣūl al fiqh* and are a common platform for different branches of jurisprudence.<sup>43</sup> Opinions on sight servitude are mostly collected within the rubric of "nuisance," *ḍarar*, but there are several other relevant judicial principles which are described in the sections which follow.

*Rights of God and Rights of People:* Jurists consider that commandments of shari'ah could be subdivided into two broad categories, those related to God's rights and others related to people's rights. The first category comprises all obligations and restrictions that relate to piety among which are the sanctions related to adultery. The second category consists of guidelines that deal with practical relationships among individuals such as loans, transactions and agreements among neighbours.<sup>44</sup>

On further distinguishing the two types, al-Qarafī stated that a principle that distinguishes one from the other is the possibility of relinquishment. Any right that a man could renounce is considered as people's right. God's rights are those which cannot be renounced. However, according to al-Qarafī, in some commandments the two types of rights, such as sight servitude, coexist.<sup>45</sup> The enforcement of God's rights is considered among public duties that the Muslim society is in charge of through its ruler and institutions.<sup>46</sup>

Preservation of privacy, according to al-Wansharisī, is primarily God's right as a Muslim, man or woman, is legally not allowed to

relinquish it in favour of others.<sup>47</sup> Consequently, a person who disregards privacy within his home should be ordered to protect himself. In an example of two neighbours in dispute who opened windows onto each other, judge Abd al-Rafi' ordered both windows to be sealed.<sup>48</sup> In another opinion in the case of the minaret, Ibn Rushd argued that the mua'zzin should be prevented from looking unto neighbouring houses even if proprietors showed no objection, as this is right of God.<sup>49</sup> However, in some cases the right of privacy could be preserved by agreements restricting or regulating the mode of use of one's property. A proprietor of a house could, for example, allow his neighbour to open a window on a part of his property, which he intends not to use.<sup>50</sup> However he could not revoke his right in future for any reason, as then another principle would apply. (See figure 6)

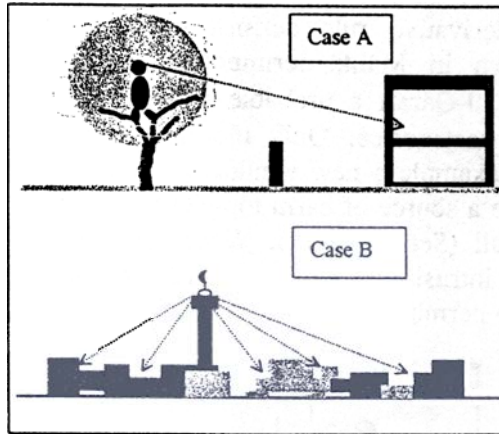


Figure 6

*The Elimination of Harm:* Intrusion is considered by jurists as a type of harm which is prohibited by the principle emanating from the rule preventing harm *lā ɗarara walā ɗirar*.<sup>51</sup> In highlighting the difference between *ɗarar* and *ɗirara*, Mohammed Ibn Abdallah al-Qurṭubī considers that *ɗarar* is an action which aims at taking profit by harming another party. *Dirār* is an action that doesn't show any evident profit though it causes harm to others.<sup>52</sup> In other words, *dirār* could be understood as a malicious action.

Applied to the issue of privacy, opening a shop in a thoroughfare opposite to a neighbor's entrance, despite the fact that it causes

nuisance to him, is considered by some jurists legal, as far as there is no alternative to move it away (See figure 7). Otherwise, preventing someone from using his property would be more harmful.<sup>53</sup> Regarding *ḍirār*, or malicious motive, Ibn al-Ramī considers that elevating ones external wall to protect oneself from intrusion should be limited to the required height. Any excess in height that would cause damage, by preventing air and light to an adjacent property, is regarded as *ḍirār*.<sup>54</sup>

As a derivative rule of this principle, jurists prohibit a damage to be contravened by another damage. In a case submitted to the Tunisian judge Abu Yaḥya al-Nūrī, a person built an upper room and opened a window facing a window his neighbour had opened five years ago, with the only motive to constrain him to close it. The judge consulting other jurists, ordered the two openings to be sealed.<sup>55</sup>

Another derivative rule consists of preventing an anticipated damage known in Mālikī terminology as *bāb sadd al dharāʾiʿ*. According to al-Qaraḥī a probable damage could be classified into three gradual categories. Only the most evident damage requires action.<sup>56</sup> For example a new window that provides air and light to a room could be a source of harm to neighbours depending on its height within the wall (See figure 8). When located far beyond sight the probability of intrusion is very small in the normal course of affairs. It could thus, be permitted.

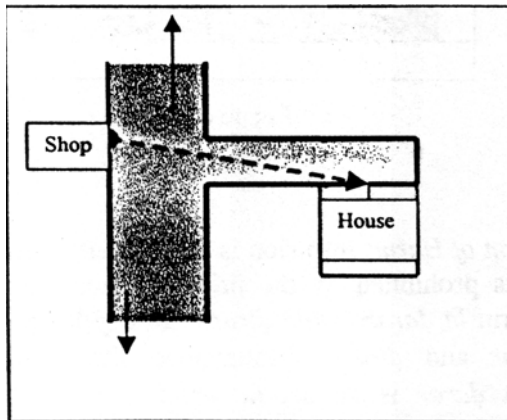


Figure 7

One of the direct impacts of this rule are measures recommended by jurists on sealing openings, doors and shops judged as harmful. In a

decision taken by judge Abd al-Rafīc on a window to be sealed, he specified that its frame be removed and the resulting hole be assimilated into the external wall by using the same material and colour. Otherwise the proprietor or the inheritors after him would re-open it by arguing that the remaining traces are indications for its pre-existence.<sup>57</sup>

In another opinion related by Ibn al-Ramī a proprietor of an undeveloped land has the right to object on any opening from adjacent neighbours from which he expects intrusion in the future when he builds his house. According to the same jurist, any opening onto other properties should be sealed regardless of its being a new or an old one.<sup>58</sup>

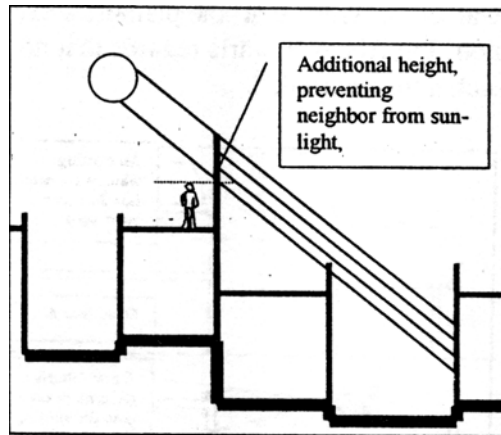


Figure 8

*Right of Precedence & Prescription:* Jurists consider that a pre-existing condition or that for which a starting date is unknown should prevail over any other condition occurring afterwards.<sup>59</sup> Applied to the concern for privacy, a pre-existing window looking into the inside of an adjacent house could not be sealed. Obviously, this principle goes hand in hand with the incremental process of urban development. On building his house, adding a room or opening a window one should take into consideration the existing situation which becomes a series of constraints to deal with.

The allowance to cause damage is also acquired through prescription which is connected to a certain period of time, known as *ḥiyāzat al ḍarar bi al-taqāddum*. This occurs when a proprietor either

agrees verbally or does not protest on an infringement on his privacy such as opening a door facing his house for a certain period of time. (See figure 9) In a case submitted to Abd al-Rahman Ibn al-Mukhlid, "a plaintiff complained about his neighbour who opened doors in his upper room from which he could look inside his house. Recognising that this had happened ten years ago and in his presence, he claimed that he was very busy as he was dedicated to pious affairs and charity, and thus, he could not argue with his neighbour. He added however, that the defendant promised him to seal the doors and that witnesses had been informed on the dispute." The jurist seemingly doubtful about his opinion, submitted the case to three other scholars who formulated two diverging opinions. In the first one, Ibn Zarb and Sa'id Ibn Abd Rabbiḥī considered that the doors should be sealed as the defendant was warned provided that the plaintiff's excuse was true. In the second opinion, Ibn Abi al-Fawāris regards that no excuse could be accepted after such a long period.<sup>60</sup>

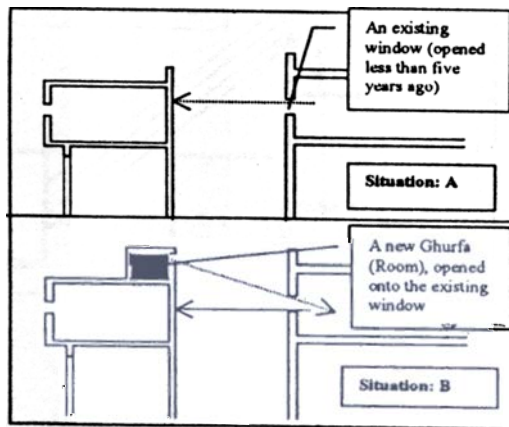


Figure 9

Regarding the period of acquisition *ḥiyāzah*, which applies to many other branches of the Islamic law, jurists estimate it in the case of intrusion ranging between ten and twenty years. In treating a case of dispute between a man who had a twenty years old window opening onto his sisters' house, Ibn al-Ḥājj replied that the stated principle applies regardless of kinship.<sup>61</sup>

Other opinions show that the principle applies to relationships of



private-to-private ownership and does not extend to damage emanating from a public property on private ones. In the case of a minaret overlooking surrounding houses, Ibn Rushd considers that the mua'zzin, as a public agent, does not own the minaret and thus, could not acquire the right of precedence over neighbouring houses.<sup>62</sup> Similarly, a private owner can not acquire the right of precedence over a public utility however long the source of damage had pre-existed. Another rule in Islamic jurisprudence which gives precedence of public interest over private ones applies.<sup>63</sup> As was the case above, a private window giving onto an exclusively female area, such as a fountain or a public bath, would be sealed .

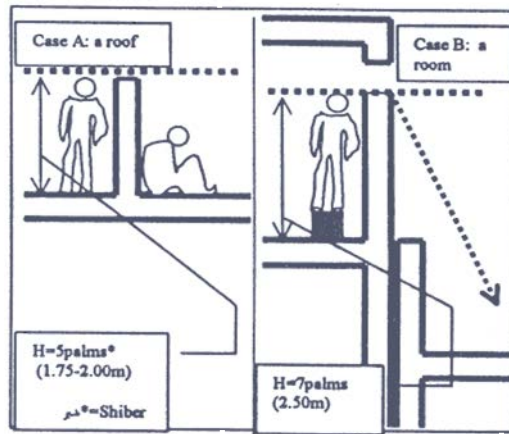


Figure 10

*Measurement of Harm and Technical Norms:* Jurists developed criteria and measurement techniques for assessing damage related to sight. In order to introduce a degree of objectivity, such criteria and techniques were related to human characteristics such as the scope of sight, the height of a human being and the expected behaviour of ordinary people. In the case of a roof for example, it was recommended that the height of the parapet should slightly exceed that of a standing person. Whereas for a window providing air and light, it should be as high as a person standing on a chair which is estimated to 7 cubits (approximately 3.5m).<sup>64</sup> This explains the total or partial absence of windows on external walls in Muslim cities.

In case of a dominating position such as a minaret or a house located on top of a hill the distance required to avoid intrusion into surrounding houses should be beyond the scope of sight that would permit distinguishing details of human faces and bodies. This distance according to Ibn al-Ramī is between one and two *ghulwā*, which is equivalent to, one to two hundred cubits.<sup>65</sup> It is obvious that in a dense urban environment such a measure could not be met without recourse to an inward looking architecture and a low rise residential areas. Exceptional elements such as the minaret would require a special treatment.

Concerning harm emanating from external doors and shops, the type of street on which they are located is important, in view of jurists. A street is considered a thoroughfare if its width exceeds seven cubits (approximately 3.5m). If less than that, a proprietor who opens a shop or a new entrance is recommended to place it away from the existing ones, which is called *tanqīb*.<sup>66</sup>

In some cases, harm is measured by applying geometrical techniques related to the visual angle from the expected source of intrusion. This was particularly the method applied by the Tunisian judge Abd al-Rafīc to determine harm from a newly opened shop. The plaintiff was asked to open wide the door of his house and stand on the threshold, while the witness was standing close to the door of the shop. The case was then reported to the judge who rejected the complaint, as there was no harm.<sup>67</sup>

In particular cases where harm could not be measured by quantitative means, jurists managed to find more appropriate methods. In a case submitted to Ibn Ziadatallah, a proprietor of a house located on a thoroughfare extended his upper story over a cantilever giving on his opposite neighbour's wall. And he re-opened a window on his new external wall. The neighbour claimed that the window came closer to his wall and would harm him. Reasoning logically, the jurist replied that the closer the window to the opposite wall, the lesser the scope of sight would be, and the more protection to the opposite house. In other words, he decided in favour of the defendant.<sup>68</sup> In another case, a person refused to contribute with his neighbour towards building a partition wall that would enable them to use their roofs mutually. The judge convinced that he could not oblige him to do so, ordered him not to use his roof, as he didn't actually need to do so.<sup>69</sup>

One of the architectural issues that relate to the servitude of sight is the height of buildings in traditional Muslim cities. Despite the absence

of fundamental texts prohibiting elevation of buildings or limiting their height, houses in most Muslim cities are dominated by a low-rise, high-density type of houses, that gives an homogenous aspect to the city. In fact Ibn al-Qāsim stated that he heard Mālik Ibn Anas saying "One has the right to raise his edifice, but he should be prevented from inflicting damage." It could be seen therefore that limiting stories in Muslim cities is the result of a social consensus which might have become *urf* over centuries, that aimed to mutually preserve privacy within the city. This hypothesis can be further strengthened by the nature of the social system within each quarter, which was based on kinship and tribal spirit.

### Conclusion

Sight servitude is one of the principles that shaped architecture in Muslim cities. It reflects the high concern of jurists and Islamic society for privacy. Being a constant rule of conduct to individuals and to the community in Muslim society, concern for privacy took several social forms including the limitation of relationships between the two sexes. On the architectural level, such a social conduct expressed itself in physical forms through the domination of blind walls giving on to streets, simplicity of façades, inward looking and low-rise type of housing.

On analysing opinions of jurists regarding sight servitude one may conclude that servitude of sight had developed over time in response to daily practices through a dynamic problem-solving process. Techniques and criteria for identifying and measuring disturbance have been developed with reference to broader principles of *sharī'ah*.

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### Notes

1. Al-Qur'ān, 17:36, which could be translated as "And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing or (of feeling) in the heart will be inquired into (on the day of reckoning)."
2. Al-Qur'ān, 51:21, which could be translated as, "As also in your own selves, will ye not then see?"
3. Abū Ishāq al-Shātibī, *al-Muwāfaqāt fi uṣūl al sharī'ah* (Beirut: Dār al-Ma'rifah, n.d.), Vol. 4; Muḥamad Ṭaḥir bin 'Āshūr, *Maqāṣid al sharī'ah*, (Tunis: Al-Sharikah al-Tunisīyah Littawzī', 1978), 73.
4. Yaḥya Ibn Sharaf al-Nawāwī, *Riyāḍ al-ṣāliḥīn*, (Ḥadīth no. 306).

5. Al-Qur'an, 24:58, which can be translated as "O ye who believe! Let those whom your right hands possess, and the (children) among you who have not come of age, ask your permission (before they come to your presence), on three occasions: before morning prayer; the while ye doff your clothes for the noonday heat; and after the late-night prayer. These are your three times of undress."

6. al-Nawāwī, *Riyāḍ al-ṣāliḥīn*, (Ḥadīth no. 1631).

7. Charis Wadi, *The Muslim Mind* (London: Longman, 1982), 64.

8. A similar analogy between the human body and the city was developed by Ikhwān al-Ṣafā (946-1055A.D.). See, *Rasā'il ikhwān al-ṣafā wa khillān al-wafā* (Beirut: Awidat, 1995), 295-302.

9. The companions of the Prophet were ordered not to talk to women of the Prophet unless behind a curtain. See al-Qur'an, 33:53.

10. Davis Fany, *The Ottoman Lady: A Social History From 1718 to 1918* (Westport: Greenwood Press, 1986), 124.

11. Abul 'Abbās Aḥmad Ibn Yaḥya al-Wansharisī, *al-Mi'yār al-mu'arrab wa al-jamī' al-maghrib 'an fatāwā ahl Ifriqiya wa al-Andalus wa al-Maghrib*, (Beirut: Dār al-Gharb al-Islami, 1981); Muhammad Ibn al-Ramī, "Al-I'lān bi aḥkām al-hunyān" in *Majallāt al-fiqh al-Mālikī*, issues 3, 4 and 5. The present study is based on 36 *fatwās* contained in volumes 7,8 and 9 of *al-Mi'yār*, and sections contained in *al-I'lān* between pp. 310-326.

12. On the biography of some Mālikī jurists, see S. Power, "The Mālikī Family Endowment" *International Journal of Middle Eastern Studies* 25 (1993): 379-406.

13. 'Urf is literally a custom and an ordinary conduct within a given society whereas *Istiṣḥāb* is the legal principal that permits the continuity of a previous situation in the present time as far as there is no juridical objection, see M. Abu Zahra, *Uṣūl al-fiqh* (Cairo: Dār al-Fikr, 1958), 73.

14. *Nāzilā* literally means a fact that happened. In juridical terms it means a real case that was submitted to a jurist in contrast to hypothetical cases. This is one of the principal divergence between Ḥanafī and Mālikī schools of law.

15. See J. Akbar, *Crisis in the Built Environment: The Case of Muslim City* (Singapore: Concept Media, 1988); Besim S. Hakim, *Arabic-Islamic Cities* (London & New York: Kegan Paul International, 1988); S. Hathloul, *The Arab-Muslim City* (Riyad: Dār al-Sahan, 1996).

16. Hakim, *Arabic-Islamic Cities*, 33-39.

17. al-Wansharisī, *al-Mi'yār*, 9:19.

18. *Ibid.*, 9: 21.

19. *Ibid.*

20. Ibn al-Ramī, *al-I'lān*, 316.

21. al-Wansharisī, *al-Mi'yār*, 8:452.

22. *Ibid.*

23. *Ibid.*, 8:444.

24. Deeds and sayings of the Prophet.
25. According to al-Ṭabarī, the third khalif ordered people to build no more than three rooms and avoid over-elevation. See al-Ṭabarī, *Tarīkh al-umam wa al mulūk* (Beirut: Dar Iḥyā' al-Turāth, 1904), 191.
26. Cited in Hathloul, *The Arab Muslim City*, 103.
27. Ibn al-Ramī, *al-I'lān*, 315.
28. Ibid.
29. al-Wansharisī, 8:450.
30. Ibid., 8:451 and Ibn al-Ramī, *al-I'lān*, 318.
31. Ibn al-Ramī, *al-I'lān*, 318.
32. It thus remains for agricultural purposes. See Ibn al-Ramī, *al-I'lān*, 318.
33. Ibid., 320.
34. See section below on the Right of Precedence.
35. al-Wansharisī, *al-Mi'yār*, vol. 9, 23 and Ibn al-Ramī, *al-I'lān*, 320.
36. Ibn Ramī, *al-I'lān*, 320.
37. Al-Ṭabarī, *Tār ikh al umam wa al mulūk*, 191.
38. al-Wansharisī, *al-Mi'yār*, 9:19.
39. Ibid., 8:454, 9:19, 9:56 and Ibn al-Ramī, *al-I'lān*, 323.
40. al-Wansharisī, *al-Mi'yār*, 8:454.
41. A. A. Q. al-Mundhiri, *Al-Targhib wa al-tarhib minal ḥadīth al-sharīf* (Cairo: Maktabat Dār al-Ḥayāt, 1991), Vol 2.
42. Al-Ṭabarī, *Tār ikh al-umam wa al mulūk*, 191.
43. These are the basic theories of Islamic jurisprudence that are extracted from the broad aims of sharī'ah. See for example, M. Abu Zahra, *Uṣūl al fiqh*; A. al-Zarqā', *Al qawā'id al fiqhīyah* (Beirut: Dār al-Gharb al-Islamī, 1983); M. S. al-Khinn, *Athār al ikhtilāf fī al-qawā'id al uṣūliyah* (Beirut: Mu'assasāt al-Risālā, 1985).
44. Afzalur Rahman, *Islam: Ideology and the Way of Life* (London: Muslim Schools Trust, 1980), 65.
45. Ahmad Ibn al-Idrīs al-Sanhajī al-Qarafī, *al-Furūq* (Beirut: Dār al-Ma'rifa, n.d.).
46. A.M.A. Shushtery, *Outlines of Islamic Culture* (Bangalore: Bangalore Press, 1954).
47. al-Wansharisī, *al-Mi'yār*, 8:472.
48. Ibn al-Ramī, *al-I'lān*, 316.
49. al-Wansharisī, *al-Mi'yār*, 8:472.
50. Ibid.
51. Ibn al-Ramī, *al-I'lān*, 299.
52. Ibid.

53. Ibid., 314.

54. Ibid., 315.

55. al-Wansharisī, *al-Mi'yār*, 9:21.

56. al-Qarafī, *al-Furūq*; See also M.H. Burhanī, *Sadd al-dharā'ī fi al-sharī'ah al-Islamiyah* (Beirut: Maṭba'āt al-Rayḥanī, 1985).

57. Ibn al-Ramī, *al-I'lān*, 316.

58. Ibid., 309.

59. A.A. al-Nadawī, *Al-Qawā'id al fiqhiyah* (Damascus: Dār al-Qalam, 1986).

The principle is stated as *Al qadīm yutraku 'alā qidamihi*.

60. al-Wansharisī, *al-Mi'yār*, 9:56-57.

61. Ibid., 9:21.

62. Ibid., 8:472-478.

63. A.A. al-Nadawī, *al-Qawā'id*. The principle states that *Yutaḥammalu al ḍarar al khas liman'ī 'al ḍarar al 'am*.

64. Ibn al-Ramī, *al-I'lān*, 308. Whereas the required height for a partition wall between two roofs which is called *sutra* could be 5 palms (approximately 1.75m).

65. Ibn al-Ramī, *al-I'lān*, 319.

66. The measure was fixed according to a saying of the Prophet in this regard. See S.A. Hathloul, *The Arab-Muslim City*, 108-109.

67. Ibn al-Ramī, *al-I'lān*, 325.

68. al-Wansharisī, *al-Mi'yār*, 8:446.

69. Ibid.