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Public and Private as Viewed through the Work of the *Muhtasib*

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THE *muhtasib* (also called *'amil al-suq* and *sahib al-suq*) was the inspector of public places and behavior in towns in the premodern Middle East and North Africa (and in some communities of Muslims elsewhere).^{*} While the term *muhtasib* is usually translated as “market inspector,” this official’s actual charge was much broader. Based on the injunction “to command the right and forbid the wrong,” the history of which injunction is told with breathtaking scholarship by Michael Cook (2000), the *muhtasib* would patrol public spaces and enforce “laws” wherever he saw a violation. The *muhtasib* therefore gave Islamic law an immediate presence in public space and was an important face of the law in society. The commercial aspects of the *muhtasib* were useful enough that this position continued to exist under non-Muslim rule, as it did in Spain.

Several types of writings are relevant to studying the work of the *muhtasib*, including theoretical writings on the role, function, and tasks of the *muhtasib*, and practical manuals to guide the *muhtasib* in his work in a particular place and time.¹ In this essay we use a passage from a work of the first type, a treatise on ethics and law by the great theologian and jurist, Ghazali (d. 1111 A.D.),² and passages from the practical manual for the *muhtasib* ascribed to Ibn al-Ukhuwah (d. 1329 A.D.)³ to illustrate the divisions between public and private as they appear in the

work of the *muhtasib*. These divisions show that the line between public and private was not rigidly fixed but, rather, shifted according to the relations among the people involved in any particular situation. An impermissible intrusion by one person into the private space of another may be permissible if taken by yet another person. Furthermore, what is considered outside the jurisdiction of the *muhtasib* because it is one person's private space may not be considered private in relation to another official, such as the police (*shurta*) or judge.⁴ Taking this point yet further, this essay shows that relational standing seems the most important key to understanding public and private in Islamic legal thinking.⁵

The Muhtasib and Public and Private Divisions in Ihya' 'Ulum al-Din

Ihya' 'Ulum al-Din (The Revivification of the Religious Sciences) is considered the most significant work of Abu Hamid Muhammad b. Muhammad al-Tusi, al-Ghazali, in terms of both its size and substance. Ghazali intended this text to be a guide for Muslims to all important aspects of religious life, emphasizing that the purpose of religious knowledge and obedience is eternal salvation (*Encyclopedia of Islam*, 1954: "al-Ghazali"). Ghazali meant his book to be a bridge between ethics and law.

In the second of the book's four parts, which covers *'adat* (social customs), Ghazali devoted a lengthy chapter to the order to "command the right and forbid the wrong." The interesting part of this chapter for our purposes is the definition of the scope of behavior to which this order applies.⁶ Ghazali stated that the *muhtasib's* concern is each wrong that is presently existing, manifest to the *muhtasib* without spying (*tajassus*),⁷ and whose wrongness is known without independent legal reasoning (*ijtihad*)⁸ (Ghazali, 1996: 437).

According to Ghazali, "wrong" (*munkar*, literally "forbidden" or "to be forbidden") includes but is larger than the category of "sin-

ful.” If the *muhtasib* sees two insane people having sex he should stop them although neither is legally responsible. We might infer that this is in part because the public is a realm of propriety, and in which the *muhtasib* should discourage the inclination to do wrong. (It might also be argued that the act should be stopped because illegitimate children may result, but Ghazali gives the further instance of a mad man having sex with a large animal.) But Ghazali explicitly says it is not stopped because of the “loathsomeness” (*tafahush*) of the “picture of the act” and its being “in front of people”; if the *muhtasib* came across the act taking place outside of the public view (*fi khalwatin*) he would still have to stop the insane person or persons involved because what they were engaging in is wrong (Ghazali, 1996: 437).

According to Ghazali, the *muhtasib*'s jurisdiction covers both major and minor sins. Exposing one's pudendum (*'awra*) in the bathhouse is a minor sin but one the *muhtasib* should work to stop (Ghazali, 1996: 437).⁹ This reference to the pudendum points to an ongoing concern in which privacy of the body is considered differently according to who is present. Being totally alone allows nudity. In the bathhouse, men (and women, in the case of the women's bathhouse) should cover their pudenda, usually with a towel around the waist. In the street, however, a mere towel would be impermissible dress. The bathhouse was sufficiently private to allow most of the body to be exposed, but sufficiently public as to require covering of the pudendum.

The *muhtasib* may only address a wrong that is manifest (*zahir*); the *muhtasib* is not permitted to try to gain information about a sin that a person conceals in his home behind a closed door. The classic story told to define the *muhtasib*'s exclusion from the home is about the second caliph, 'Umar b. 'Abd al-'Aziz, who scaled the walls of a house, saw the owner in a reprehensible state and, acting in the capacity of a *muhtasib*, reproved him. The owner replied, “O Commander of the Faithful, if I have sinned once, you have sinned three times.” “How so?” asked 'Umar. The owner replied: “The Qur'an says: ‘Do not spy’

and you have done so. The Qur'an says: 'Come into houses through their doors,' and you have entered over the roof. And the Qur'an says: 'Do not enter the houses of others until you have made yourselves known and greeted the inhabitants,' and you have not greeted me." Totally out-lawyered, 'Umar retreated (Ghazali, 1996: 437).

However, Ghazali, who tells this anecdote, as does practically every other manual on the *muhtasib*, says that there is an exception: when things are known from outside the house such as the sound of wind and string instruments, the *muhtasib* may enter and break up the instruments; action may also be taken if the loud sounds of drunkards are heard (Ghazali, 1996: 438). In these cases, what is visible is not the act of playing instruments or drinking intoxicants, but rather sounds so closely linked with these activities that they are tantamount to the activities themselves. It is as if the offending host's door were wide open, and the *muhtasib* could see the actions from the street. A man's home is still his castle so long as he keeps his sins quiet and hidden behind closed doors.

But what if the noise is not really evidence of a sin? Perhaps it was made by mischievous minors pretending to be drunkards. And what if the *muhtasib* enters the home, mistaking the source of a musical entertainment and believing himself to be acting properly, and then by chance finds the owner having a quiet drinking party with a few friends? In the latter case, the *muhtasib* must stop them and punish them. There does not seem to be a rule that bars the use of evidence obtained wrongly although in good faith. This example is in contrast to the case of 'Umar, who did not pursue charges against the man whose house he had entered improperly.

Ghazali also makes clear that a person carries his privacy with him, and the *muhtasib* can judge only on prima facie appearance. Perhaps someone has a flagon of wine in his sleeve or under his cloak, and circumstances tell the *muhtasib* that it is there (for example, the man is a heavy drinker who has just visited the area

of wine shops in a Christian district). As long as there is no “particular sign” of its presence (*‘alama khassa*), he cannot be searched; circumstantial evidence is not sufficient. But if the outline of the flagon or lute become visible, then he *should* be searched (Ghazali, 1996: 438).

*Public and Private Divisions in the
Muhtasib Manual Ma‘alim al-Qurba fī Ahkam al-Hisba*

The manual *Ma‘alim al-Qurba fī Ahkam al-Hisba* is attributed to Muhammad b. Muhammad b. Ahmad al-Qurashi al-Shaf‘i, known as Ibn al-Ukhuwah. It is the best known *muhtasib* manual of the Egyptian Mamluk period and since it was edited and partially translated by Reuben Levy in 1938, it has been widely cited by scholars.¹⁰ Little is known about the identity of the author, however, except that he died in 1329 and appears to have been an Egyptian.

In this manual the general rules of the public-private distinction as discussed by Ghazali appear in a more detailed and pragmatic form. This is not surprising, since manuals written to guide *muhtasibs*, such as *Ma‘alim al-Qurba*, are a distinct genre of literature, and offer us a perspective different from that of theoretical works like *Ihya’ ‘Ulum al-Din* or from that of historical works that purport to record actual events. The manuals can best be described as something like regulations—in general they present legal rules in a way meant to be accessible to and used by a legal official, the *muhtasib*, who, while perhaps learned, probably did not have the same level of legal education as a judge or a jurist such as Ghazali. And, although many of the provisions reflect an intimate knowledge of prevailing social conditions or market practices of the authors’ particular places and times, such as Mamluk Cairo in the case of *Ma‘alim al-Qurba*, the goal of the authors is to advise how law treats these practices rather than merely to document them.

Ma'alim al-Qurba is comprised of 70 chapters and covers the full range of matters within the jurisdiction of the *muhtasib*. A large part of the manual details the rules to be followed by merchants of food, drink, and medicines, and the *muhtasib* is told how to detect adulteration in these products. Ibn al-Ukhuwah instructed the *muhtasib* how to detect fraud in weights and measures used by merchants, as well as in coins. He detailed rules to be followed by merchants of goods such as cloth and shoes, and outlined permissible and impermissible terms of contracts. Services are also regulated, such as barbers, phlebotomists, and teachers. And the *muhtasib* is told how to regulate behavior in public places such as the bathhouse and mosque. The private-public distinction is best seen in this manual in the provisions dealing with the home, the person, the marketplace, and the mosque.

The Sanctity of the Home

Ibn al-Ukhuwah followed the same general rule as Ghazali, stating that the wrongs within the *muhtasib's* jurisdiction are those that are manifest (*zahir*) and that the *muhtasib* is not permitted to investigate a wrong being committed at home behind closed doors. Ibn al-Ukhuwah added an important exception to this rule, however: when the situation involves an imminent crime the damage of which will not be remediable, the *muhtasib* may spy in order to investigate. The example given of such a situation is when someone the *muhtasib* believes to be reliable informs him that a man has retreated into seclusion with another man in order to kill him, or is alone with a woman in order to commit fornication (Ibn al-Ukhuwah, 1976: 91).¹¹ Perhaps Ibn al-Ukhuwah's exception, which is not found in Ghazali's text, can be explained by the nature of his manual as a practical guide, and since this exception had a legal basis, he wanted to make it available to the *muhtasib*.¹²

While there may be occasions in which the *muhtasib* is allowed to spy upon, or enter, private homes, there is a clear

rule as to how neighbors should treat one another. Ibn al-Ukhuwah provided that no one is permitted to peer into his neighbor's house from the roofs or windows (Ibn al-Ukhuwah, 1976: 136). There is no exception here for wrongs in progress or on the verge of being committed; a private individual has no right to breach the privacy of another. The *muhtasib*, as an appointed official, would be expected to have a certain level of education and skill and be knowledgeable of the rules contained in a manual such as Ibn al-Ukhuwah's. The *muhtasib* is therefore permitted a certain degree of discretion in intruding upon private space, whereas to permit this to all individuals would destroy the sanctity of the home.

House or home emerges as the most properly private space, whereas the marketplace, which is discussed later in this essay, is the most properly public. Yet these spaces are differentiated further still by who is present. The term *harim* refers to "those parts of a house to which access is forbidden, and hence more particularly to the women's quarters" (*Encyclopedia of Islam*, 1954: "harim"). The sense of a woman's privacy is stronger here than in other parts of the house. In terms of relationships, a woman in the company of her *mahram*—meaning those in a degree of consanguinity precluding marriage—allows ordinary dress; being outside the *mahram* with men (in traditional circles) requires the veil. But this hierarchy should be read in another way as well, since *hurma*, the key word here, derived from the root *haram*, implies both the sacrosanct and the forbidden.

Sanctity of Personal Possession

Ibn al-Ukhuwah followed and elaborated on Ghazali's rules. If a Muslim openly displays or makes manifest the possession of wine, then the wine should be poured out and the Muslim punished. If the possessor is a *dhimmi*, then he should be punished for displaying it, but there is disagreement as to whether it also should be poured out, since wine is permissible for a non-Mus-

lim (Ibn al-Ukhuwah, 1976: 84). These provisions indicate that, for the Muslim, consuming wine at home is considered wrong, but so long as it is done secretly and quietly the *muhtasib* does not have jurisdiction over the wrong. For the non-Muslim, possession and consumption of wine is permissible and not within the *muhtasib*'s jurisdiction simply because it is not wrong. Open public display of wine drinking, however, is considered a wrong and is within the *muhtasib*'s jurisdiction, both procedurally and substantively.

The Public Space of Streets and Markets

The public thoroughfares of the market (*suaq*) are de facto public property, and as such they are accessible to all and no one may appropriate them for personal use. According to Ibn al-Ukhuwah, no merchant may sit in the narrow streets of the market or extend shop benches into passageways beyond the line of pillars supporting the roof of the market since this is bothersome to pedestrians. Tethering of animals in the streets of the market is forbidden except as required for alighting and mounting. Throwing refuse into the middle of the streets, scattering melon rinds, and spraying water in the street is all forbidden because it may lead to someone slipping or falling (Ibn al-Ukhuwah, 1976: 135).

However, at times public streets may take on some characteristics of private space. When women enter the marketplace, for example, they are treated as though they carry some of the privacy of the home with them (above and beyond the general sense of individual privacy that a person carries with him or herself as discussed earlier in the context of wine and musical instruments). Women may also have a corresponding expectation of a certain degree of privacy, even as they enter the public domain.

This idea is seen in Ibn al-Ukhuwah's instruction to the *muhtasib* to inspect areas in which women gather, such as the yarn

and flax markets, the banks of the river, and the door of the women's bathhouse (82). If the *muhtasib* sees a young man talking to a woman outside the context of a commercial transaction, or even just gazing at a woman, then the *muhtasib* should punish him and forbid him from standing in that place (82-83). Men would separately be permitted to walk through the market and linger in front of a particular shop, but they cannot do so when it involves infringing on areas in which women are gathered, and specifically on the personal private space a woman seems to carry with her.

The related issue is the permissibility of women entering a predominantly male public area. At this point the woman is farthest from the sanctity of the *harim* or the company of the *mahram*. Does the sense of privacy that a woman carries allow her to enter a busy street in the marketplace, with the burden on the men to respect that privacy? Ibn al-Ukhuwah placed some of the burden on the women. The chapter of the manual dealing with cotton carders instructs them (and the assumption here is that the carders are men) not to let women sit in the doorways of their shops while waiting for the completion of the carding, nor should the cotton carders speak with these women (225). Likewise, flax spinners should not let women sit in the doors of their shops without a need to do so (226).

One last example from Ibn al-Ukhuwah illustrates a dilemma faced by the *muhtasib* as he encountered customary practice that conflicted with Islamic law. Astrology is strictly forbidden according to many Muslim jurists and Ibn al-Ukhuwah says so (275). Yet, his actual instructions are to require the astrologers (as well as the public letter writers—and the professions seem to overlap) to sit in the middle of the highway and not in smaller streets and back alleys. This is because the majority of their customers are women, and men would often gather around them as well simply for the chance to be in female company. The center of the highway was the most public of all places and so it was easier in this setting to

impose some control on these trades, and the behavior they attracted. This regulation implicitly recognizes that as a practical matter, astrology was too popular and deeply rooted to be completely forbidden (275-276).

The Mosque as Public and Private Space

The mosque is a complex arrangement of types of public and private spaces. At times it is the place where all Muslims are called for prayer, but access is not unrestricted. There is also a sense that propriety before God is more urgently felt in sacralized space.

The *muhtasib* is charged with supervising all mosques and ordering their attendants to keep them clean and in good condition. As part of this supervision, Ibn al-Ukhuwah instructed the *muhtasib* to order the mosque attendants to close the doors of the mosques after prayer time. Furthermore, the mosques in general should be protected from boys, the insane, and anyone who eats, sleeps, performs his craft, or sells goods in the mosque. Likewise, searching for stray animals in the mosque or sitting and talking about worldly affairs in it is forbidden (Ibn al-Ukhuwah, 1976: 263).¹³

The mosque encompasses many types of spaces. The prayer area is divided among the legally mandated yet moveable space for women in prayer, the area for the hermaphrodite, standing between women and men in prayer, and the area for men. The space between an individual saying his prayers alone, or the prayer leader, and his or her designated barrier or *hajiz* is private in the sense that if someone should pass between the worshipper and his or her barrier, the prayer is nullified. (Many believers feel this space in front of them to be highly "private.") Interestingly, one usually makes a "retreat" (*i'tikaf*), a pious and personal act of devotion, in the Muslim public space of the mosque. Hence, we have moveable self-constructed private devotional space.

The "enclosure" or *maqsurah* made in mosques for caliphs (and subsequently other rulers) after the murder of 'Ali b. Abi Talib in

661 was a scandal to many Muslims. Why should the caliph have permanently designated private space in a mosque (which was “public” for all Muslims)?¹⁴ Furthermore, in an anecdote from Ghazali, the Caliph al-Mahdi had the courtyard of the Kaabah in Mecca cleared so he could circumambulate alone. ‘Abd Allah b. Marzuq, an officer of the caliph’s army, challenges him to claim any greater right than any other Muslim to this part of the pilgrimage (Ghazali, 1996: 426). One might say that the caliph had privatized what was public Muslim space.

The *muhtasib* should also exhort the people living in a mosque’s neighborhood to be diligent in attending Friday prayers at the mosque (Ibn al-Ukhuwah, 1976: 263). Beyond this, at the time of the call to Friday prayer, he should watch for the people in the market, who might be tempted to pursue their trades rather than pray. (265). Ibn al-Ukhuwah did not instruct the *muhtasib* to enter into private areas to bring people to the mosque for prayer. As an interesting point of comparison from the western Muslim lands, the author Ahmad b. ‘Abd Allah b. ‘Abd al-Ra’uf, in his medieval *Risala fi Adab al-Hisba wa al-Muhtasib*, instructed the *muhtasib* to check the bathhouses and caravanserais at the time of Friday prayers to make sure people were not lingering inside but were in the mosques, praying.¹⁵

The notions of public and private as reflected in the *muhtasib*’s task vividly illustrate that relational standing is perhaps the most important key to understanding public and private in Islamic legal thinking. The differentiation of space reflects the “relational status” of different members of society. A public street takes on some private attributes when women are gathered in front of a particular shop. And the *muhtasib* may enter the most private space of the home, according to Ibn al-Ukhuwah, when it is necessary to prevent an imminent crime, the wrong of which cannot be later undone. For all that they are relational, a sense of the private and public, and degrees of

definition within those terms, is clearly attested in literature on the *muhtasib*.

More generally, in a sense all mundane space is equal and only relationally attains status as private or public. This relational status even applies to the “sanctuaries” (*haram*) of Mecca, Medina, and Jerusalem, in which there are special rules that further delineate this space. The relational status of these places is “eternal” only because the divine person has chosen to define them as such.

Notes

*Yaron Klein, a current Harvard graduate student, took part in a seminar on the *muhtasib* held two years ago by Professor Mottahedeh. At that seminar he presented a paper that raised some similar issues and reflected points of view to be found in the present essay, which, however, was written without conscious knowledge of Klein's excellent work. His essay will be published in a forthcoming issue of the *Harvard Middle East and Islamic Review*.

¹For a general overview of these two types of writings, see “*hisba*” in the *Encyclopedia of Islam* (1954-).

²For all his prominence, Ghazali is, of course, one of many jurists to deal with this topic from a theoretical perspective. Another in this category is al-Mawardi's classic work of public law, *Al-Ahkam al-Sultaniya*. Chapter 20, entitled “*ahkam al-hisba*,” covers the concept of *hisba* and the specific role of the *muhtasib*.

³Likewise, there are a substantial number of *muhtasib* manuals, many of which are published. For a thorough list, see Dien (1997: 28-31).

⁴If a defendant hides in his house and refuses to appear in court, the judge may be allowed to dispatch a team to enter the defendant's house without permission to search for him. See Ziadeh (1996: 310-11).

⁵Since this essay is an attempt to raise legally interesting issues that—to our knowledge—have not been studied extensively, we have not tried to deal with any of them exhaustively. It could be argued that relational standing remains one of the most important criteria of the “public” and “private” realm.

⁶Cook thoroughly discusses this chapter (2000: 427-468).

⁷The term *tajassus* has the meaning of investigation but with an element of prying or spying. For brevity, we translate it herein as “spying.”

⁸By use of the term *muhtasib*, Ghazali is not referring only to an official appointed to carry out the injunction to command the right and forbid the wrong but rather any Muslim who takes action in this regard.

⁹A *muhtasib* did in fact become involved in this issue. Diya' al-Din was appointed *muhtasib* of Cairo in 1336 and subsequently ordered the bath attendants to use long and loose-fitting towels in the bathhouses; see al-Maqrizi (vol. 2, part 2: 415).

¹⁰An edition was published in Cairo in 1976. References herein are to this edition.

¹¹There are, of course, rules governing accusations of wrongful acts. The slanderous accusation of fornication (*qadhf*) is a *hadd* crime. False accusations in general may also be punishable on a discretionary basis (*ta'zir*). See *Encyclopedia of Islam* (1954: "kadhf").

¹²For example, al-Mawardi's treatise (which Ibn al-Ukhuwah drew upon heavily at several points in his manual) includes this exception. See al-Mawardi (1985: 314).

¹³In the extensive *Encyclopedia of Islam* article "*masjid*," J. Pedersen discussed the development of restrictions on activities and behavior in the mosque. He noted that the increase in sanctity over time "had as a natural result that one could no longer enter a mosque at random as had been the case in the time of the Prophet."

¹⁴For a discussion of the history of the *maqsura*, see J. Pedersen, *Encyclopedia of Islam* (1954: "*masjid*").

¹⁵See Lévi-Provençal (1955: 76). The editor was not able to identify Ahmad b. 'Abd al-Ra'uf more specifically than as an Andalusian medieval author.

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