The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding the Evil

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In this article I seek to shed light on how Islamic law controls invasions by the state into what we in the United States would call the "private sphere." I examine two disparate bodies of law for what they may say on this topic. The first is the classical Islamic public law doctrine, particularly as stated in the still authoritative work in that field by Mawardi, a Shafi`i (d. 1058 C.E.).[1] The second is comprised of the contemporary laws and practices of Saudi Arabia, a state that aspires to adhere literally to classical Islamic law among and despite the drastically changed circumstances of today. In both cases I focus on the function of the *muhtasib*, or the state official charged by Islamic constitutional law to carry out the Qur'anic injunction of "ordering the good and forbidding the evil" (*al-amr bi-al-ma`ruf wa-al-nahy `an al-munkar*). The reasons to focus on the *muhtasib* are obvious: an official religious censor, a morals policeman, seems the apotheosis of state invasion of the private realm. Indeed, I focus only on the role of the *muhtasib* as censor of public morals, and ignore certain other more specific functions he assumed under the general head of "ordering the

good," chiefly that of inspector of weights, measures, quality, and trading practices in the markets.

A few preliminaries are necessary to introduce us to some of the legal conceptions and institutions by which Islamic law is applied. These preliminaries will also reveal to us that the protections of the private sphere under Islamic law do not correspond well at all to U.S. notions—for example, sins that in the United States are considered purely a matter of individual concern, or even a human right to commit, can under Islamic law be matters of vital state concern, and even crimes deserving of prosecution and punishment.

As a first preliminary, we should note that in analyzing Islamic constitutional law and practice, it is generally useful to think of the Islamic legal system as consisting of two partly overlapping legal subsystems, each with its own distinct forms of legal authority or legitimacy, legislation, and application. (This distinction is particularly useful in Saudi Arabia, where this dualism in the legal system is very prominent.) Useful labels for these two subsystems are: first, *fiqh,* meaning the body of law elaborated from the revealed texts of Islam by means of the function of interpretation (*ijtihad*) by qualified scholars (ulama); and second, *siyasa,* meaning the authority of the head of state or ruler to act in legal matters (including legislating) in order to achieve the public good consistently with the provisions of Sharia.

Fiqh is law legislated and applied by religious-legal scholars, the ulama, largely independently from the state. It is a "jurists' law." *Fiqh* stems outward from the individual and his or her conscience. Its first concerns are the realm of what we call the "private," governed by "private" law; that is, the laws of religious ritual, family, contract, property, and tort. *Fiqh* does have many provisions applying to public law, the state, and the collectivity as well, but these are also addressed to individuals, the state actors themselves. While in theory *fiqh* has a rule for every human act, this is often true only at the level of highly general norms; for a great many practical issues, *fiqh* provides no detailed rules at all.

Siyasa, which means literally "running things" or administration, is understood as a power that Sharia itself delegates to the ruler by which he creates and applies rules in areas not governed by *fiqh* in detail, and by which he establishes and regulates the means and mechanisms needed to implement or enforce both *fiqh* and *siyasa* rules. Coming from the head of state, *siyasa* addresses not the individual but the people or nation as a whole, and is concerned chiefly with the public sphere and with public law. In the formulation given to *siyasa* by the ulama, a ruler is free to take any legal action as long as it meets two conditions: 1) it serves the general or public interest (*maslaha `amma*); and 2) it gives no offense to a fundamental principle or rule of the Sharia.

As a second preliminary, let us briefly characterize how *fiqh* and *siyasa* regulate state invasions of privacy. First, as to *fiqh,* the governing conception is one of knowledge (or truth, or epistemology). The most basic notion is that no one, including the state or the ruler, may invade the freedoms of another except by warrant of the divine will, or according to the divine law. But it turns out that God's law, at least as humans apprehend it, is rarely fixed and determined. Classically it has been the learned scholars who monopolize power to interpret the divine law. But these scholars have widely divergent interpretations, and *fiqh* grants individuals the right to choose whatever scholar's interpretation they prefer. By what right, then, may the state enforce law on anyone? Why is each individual's chosen interpretation not equal to anyone else's, even the ruler's? Is not a state that seeks to enforce a rule as divine in fact usurping the individual's right to obey God as he or she sees best? Islamic law offers two answers to this puzzle. First, not all Islamic rules are open to difference of opinion. Some are considered to be known as certainty, such as by virtue of an explicit categorical text found in the Qur'an (for example, the texts that require fasting during Ramadan or amputating the hand of a thief; we shall call these "categorical Sharia principles").[2] Enforcing these rules is legitimate and even obligatory for anyone possessing authority over others.[3] Such laws apply

axiomatically across all spheres of Muslim life, whether the wholly private acts of an individual enforced only by his conscience or the obligations of the community or polity at large. Theoretically, it is only these laws that can define crimes, since only regarding these laws does the individual have no conceivable excuse for disobedience; disobeying them is indisputably disobeying God.[4] The second answer to the puzzle applies when—as is far more common—the revelation does not yield a utterly certain or categorical result. According to the great majority of Islamic thinkers, binding and effective law must exist even in such spheres, since they understood the Qur'an as claiming to reveal law to govern all of human life—indeed, the infinity of human acts for the rest of time. They concluded that, if a concrete legal decision must be taken despite uncertainty about the divine command (such as whenever one must act personally or when a judge must decide a dispute between litigants), then human beings may follow, and enforce, *ijtihad,* meaning a qualified scholar's sincere best effort to determine God's will from the revelation. *Ijtihad* laws, however, can only be produced by scholars, not by the state. Islamic public law practice evolved in such a way to deny the ruler (or state) the power to use *ijtihad* to generate his own *fiqh* rulings to govern a society—that is, to legislate generally binding rules claiming specific divine legitimation. For the state to operate in legal matters, a separate justification was offered, namely our second subsystem of law, *siyasa.*

How does the *siyasa* subsystem understand and regulate the relationship between public and private? We recall that *siyasa* authority is constrained by two conditions: 1) pursuit of a general interest, and 2) noncontradiction with basic Sharia norms, especially categorical Sharia principles.

The first condition distinguishes between private or special (*khass*) interests and public or general (*`amm*) interests in order to ensure that the ruler acts only for the general good. This distinction may tempt us to think that Islamic law shares the American distinction between public and private, or even between

secular and religious. Thus, for example, we might assume that the general interest would not include encouraging the morality of individuals, since this would be only a private value (salvation or spirituality) and not a public one. There emerges here, however, a crucial distinction between classical Islamic and contemporary notions: utility in Islamic law must be judged in view of the ends of the Sharia, which fundamentally include the morality, spirituality, and salvation of all. Thus, *siyasa* acts include arranging for the construction of mosques, the celebration of the religious festivals, the protection of pilgrims to Mecca, upholding morals in the marketplace, and thousands of other worldly instrumentalities of religion.

Note how under *siyasa* the state, or the ruler, acquires legal authority far broader than that of scholars exercising their *ijtihad* and discovering *fiqh*. *Siyasa* laws derive in substance not from *ijtihad*'s painstaking search for divine truth but rather from a mere estimation of what is contingently useful. This is then checked by propositions that are supposed to be universally known and unproblematically true. While a scholar can compel behavior only if he can demonstrate the divine truth of his ruling to some specified degree, a ruler can compel behavior on another ground: the good of the community as a whole (coupled with the religious duty to obey one's ruler). Thus he may convert acts that scholars must treat as legally indifferent into acts that are prohibited and punishable, at least as long as (in the legitimate estimation of one or more scholars) his prohibitions do not offend fundamental Sharia norms.

If the ruler has broad discretion and powers to pursue general utility, and if general utility includes facilitating the morality and religion of individuals, then what can or should constrain a ruler from regulating religion and morality even in their most private spheres? If there is to be such a check, it comes not from the first but from the second of the two conditions on *siyasa:* nonoffense to basic Sharia norms. Is there a basic Sharia norm that defines and protects a sphere of privacy in morality and religion?

Classical Public Law

Let us return to our main concern—how each of the two bodies of law mentioned earlier, the classical public law and contemporary Saudi law and practice, regulates invasions of privacy by the *muhtasib,* the official ordering the good and forbidding the evil ("ordering/forbidding").

We take up first the classical public law as expounded by Mawardi (1978). Mawardi reveals clearly a concern similar to ours: to define a zone of privacy immune from the *muhtasib*'s potentially all-encompassing mission.[5] Mawardi distinguishes carefully between the *fiqh* and the *siyasa* aspects of the *muhtasib*'s position. First, Mawardi takes the crucial step of drastically constraining the *muhtasib*'s powers within the *fiqh* subsystem. He does this by depriving him of the power of *ijtihad,* and thus denying him the power—typically possessed by the judge—to wield binding *fiqh* interpretative authority (Mawardi, 1978: 240; cf. Abu Ya`la, 1966: 285).[6] He goes further and denies him the capacity even to enforce a rule of law that falls within the sphere of *ijtihad;* that is, any rule other than a categorical Sharia principle. Mawardi says explicitly that the reason for this is to create a protected space for *ijtihad* debate and development: "to encourage *ijtihad* by all and in matters differed upon" (Mawardi, 1978: 241, 244; Abu Ya`la, 1966: 288, 289).[7] He states that the *muhtasib* "has no right to force his conviction on the people or to hold them to his opinion in religious matters (*din*), given that *ijtihad* is to be encouraged" (Mawardi, 1978: 244; Abu Ya`la, 1966: 288). In light of the fact that the rules that claim definitive certainty are few (depending on the stringency used in deciding as to certainty), a broad realm for individual moral and legal autonomy is thus theoretically protected.

Not satisfied by this step, Mawardi deprives the *muhtasib* of yet another crucial power of the *fiqh* legal actor—that of weighing, or finding, facts; the *muhtasib* can act only concerning behavior that is "apparent" or "manifest," acts the *muhtasib* directly observes

being committed.[8] If facts need to be found from evidence, witnesses, or the oath (arguably another aspect of the judge's *ijtihad*), the *muhtasib* must refer the case to the judge for trial (Mawardi, 1978: 262; Abu Ya`la, 1966: 286). In other words, in yet another respect the state is constrained to act through the *muhtasib* only in conditions where its right to interfere is categorical and clear.

Now viewing the *muhtasib* from the perspective of the *siyasa* subsystem, Mawardi once again sets out to circumscribe potentially far-reaching powers. We can look at this under two headings: first, how Mawardi's treatment of the *muhtasib* compares with his treatment of the powerful police-court (*shurta*) function, which also straddles the *siyasa/fiqh* divide; and second, whether Mawardi understands the *muhtasib* as a *siyasa* function potentially exercising all the broad and undefined powers of *siyasa,* and, if so, how Mawardi seeks to circumscribe those powers.

As a state official charged with suppressing sinful and criminal acts, the *muhtasib* could potentially assume the broad combined *fiqh* and *siyasa* powers historically exercised by the magistrate of police (*sahib al-shurta*). This official had the power to apprehend criminals, investigate their guilt, pass sentence, and carry out punishments—in other words, to act at once as policeman, prosecutor, jury, and judge. (Elsewhere Mawardi strives to limit this primordially caliphal authority by subjecting it to the same criminal law and procedure rules as apply to *fiqh* judges, with only a few carefully delineated special dispensations.)[9] But when it comes to the *muhtasib* Mawardi ignores any analogy to the *shurta.* Instead, he enjoins six important limitations on the powers of the *muhtasib:*

1) As noted, he denies the *muhtasib* the power even to find facts.
2) While the *muhtasib* has power to "investigate," he apparently investigates only to learn about where manifest sins are occurring that he then can observe directly.[10]
3) He may listen to complainants or informants, but he does so not to take their testimony to try offenders and find

guilt, but only, once again, to help him detect and then observe manifest offenses and offenders (Mawardi, 1978: 240; Abu Ya`la, 1966: 286).

4) He may question individuals found in suspicious situations, such as a man and woman alone in a place inappropriate for this kind of companionship. But unless their answers reveal a greater guilt, he may rebuke them only for the sinfulness that actually appears—the creating of evil appearances.[11] He is, moreover, enjoined not to indulge in evil suspicion (*su' al-zann*).[12]

5) He may observe behavior only in a public place. The *muhtasib* may not "spy" (*tajassus*) to detect acts occurring in secret, nor may he make such acts public ("drawing aside [God's] veils [*sutur*]") (Mawardi, 1978: 252; Abu Ya`la, 1966: 295). The only exception is when the *muhtasib* is reliably informed that a serious crime, such as adultery or murder, will imminently occur unless he intervenes; in this case he may spy, expose, and search, even entering a dwelling (Mawardi, 1978: 252; Abu Ya`la, 1966: 296). Note that Mawardi is trying to confine this exception to an extreme situation, differing in this from other scholars who allow entrance into a house on hearing a suggestive noise. Note also how the ban on *tajassus* is procedural in that it does not render the secret act no longer a crime; the criminality of the private act persists, but the official is simply barred from interfering in it.

6) If an offender is observed in public committing the act, the *muhtasib,* like the police or the *fiqh* courts, may inflict *ta`zir* penalties: that is, punishments, including lashing, determined at his own discretion. Unlike other authorities, however, he cannot enforce imprisonment or the severe Qur'anic *hudud* penalties (Mawardi, 1978: 240, 251; Abu Ya`la, 1966: 284, 294).

Let us now ask whether Mawardi treats the *muhtasib* simply as yet another *siyasa* function of the state, enjoying all the broad and

undefined powers of *siyasa* to advance the public interest (including a general standard of morality), or whether instead we find him narrowing the *muhtasib*'s *siyasa* writ. Mawardi does clearly associate the *muhtasib* with *siyasa* traits, as in declaring his office to resemble, in displaying the awe-inspiring power of the state, the ruler's function of redressing wrongs (*mazalim*) (Mawardi, 1978: 242; cf. Abu Ya`la, 1966: 286, 287). But, far from assigning the *muhtasib* a general duty to pursue public interest, Mawardi's only references to public interest as a criterion (apart from certain administrative functions of the *muhtasib* with which we are not concerned) occur in two cases where, because of the general interest in observing the prayers, the *muhtasib* may compel prayers in circumstances in which otherwise he would be barred from exercising compulsion—either because of lack of obvious evidence of guilt or lack of certainty of legal rule.[13] To make of these two cases a broad category would render meaningless Mawardi's other limitations on the *muhtasib*'s authority, such as the bar on his using *ijtihad* or enforcing *ijtihad* rules; this hardly seems justified. It seems the *muhtasib*'s *siyasa* character consists only in his exercising the executive function of enforcement and compulsion, always subject to the limitations already stated.

To summarize Mawardi's model of the *muhtasib:* it appears that he is working consciously and carefully to circumscribe the power of the state to invade the private sphere to correct or punish immorality. Whether under the *fiqh* or the *siyasa* subsystems, Mawardi chooses to allot only narrow powers to the *muhtasib* as a policeman of morals, confining him to observing directly and then correcting obviously illegal acts occurring in a public place.

The Saudi Case

Let us now pass to the treatment of this subject in a very different context, twenty-first-century Saudi Arabia. The histories of Hanbalism, of Wahhabism (a certain rigorist trend within Sun-

nism associated with Saudi regimes for 250 years), and of Saudi Arabia offer many colorful episodes of ordering/forbidding.

Michael Cook has recently written an intellectual history of the doctrine of ordering/forbidding (Cook, 2000). According to Cook, Wahhabism after its early eras developed a stronger than usual penchant for ordering/forbidding, making it a means to maintain political legitimacy, social solidarity, and territorial expansion after its campaigns of *jihad* against back-sliding Muslim neighbors drew to a close (Cook, 2000: 175-192). In present-day Saudi Arabia the office of the *muhtasib* continues to have a very vital function. Various of its classical responsibilities—such as commercial and industrial regulation (weights, measures, and standards), summary enforcement of acknowledged civil obligations, supervision of the probity of religious officials, and exhorting the public to good—have now been distributed to various state agencies, but remain recognizable. The function on which we are focusing, moral policing as we have called it, remains with a single agency called the *al-ri'asa al-`amma li-hay'at al-amr bi-al-ma`ruf wa-al-nahy `an al-munkar* or the General Presidency for Committees of Ordering the Good and Forbidding the Evil, the members of which are also known by the traditional colloquial designation *mutawwa`*.[14] The activities of the committees—policing attendance at prayers, enforcing closure of shops at prayer time, assuring that women are properly veiled, preventing undue mixing of men and women, suppressing licentious acts like drinking or dancing, and banning public services of religions other than Islam—have attracted notoriety and criticism among Saudis and visitors to the kingdom for many years. Much of the criticism is to the effect that the *mutawwa`*s are so ignorant, misguided, and fanatic as to run afoul not only of international human rights standards but also Islamic law. In March 2002 the Saudi public was appalled when members of the committees allegedly blocked the escape of girls from a school fire on the ground that the girls were not properly veiled for appearance in public, tragically causing the deaths of dozens of children.[15] This scandal caused few

changes in the committees, however, revealing the continuing power of the traditionalist religious establishment. Prince Nayif bin `Abd al-`Aziz, the interior minister, who is said to be cultivating a political alliance with religious conservatives, issued a statement minimizing and excusing past errors of the committees, along with some vague promises of improved training and recruitment. He associated attacks on the committees with other attacks on the state and its sovereignty ("Prince Nayif to 'Ukaz, 2002; "Saudi Poet Is Jailed, 2002). Essentially, the committees remain firmly what they have been for decades, and indeed, according to the anecdotal evidence of Saudi residents, are becoming ever stronger and more intrusive.

To return to our legal analysis, the rules under which the committees operate are given in the Law of the Committees of Ordering the Good and Forbidding the Evil (the "Law"), and the implementing regulations adopted by the president of the committees (the "Regulations"). These rules construct the role of the *muhtasib* very differently than did Mawardi or even the common course of Hanbali jurisprudence. The committees are granted much greater and more intrusive authority than Mawardi's *muhtasib*—and this is true as a matter of doctrine, without considering the vast augmentation in surveillance and enforcement powers now available to governments and their agents as compared with their medieval ancestors.

We examine the committees' powers once again according to the two legal subsystems, starting with *fiqh*. What of the crucial restriction found in Mawardi—that only acts that are categorically wrongful, that are not a matter of *ijtihad*, may be reproved? The Law and Regulation fail to make this restriction explicit. Article 4 of the Law gives jurisdiction to the committees over "morals cases and cases of suspicion." Article 9 states that the duties of the committees include

> guidance for the people, advising them to follow the religious obligations determined by the *shari`a* and inducing

> them to perform them, and also the forbidding of evil by preventing the committing of acts condemned or prohibited in the *shari`a* or the following of evil customs, traditions or rejected innovations.

Article 10 requires the committees to perform their duties

> in reliance on the Qur'an, Sunna of the Prophet and his life history, and that of the righteous caliphs after him and the pious early religious legal scholars [*imam*s] in defining obligations and prohibitions, the means for their prohibition, and enjoining on people what is best, pursuing the [five basic] objectives of the *shari`a* in reforming them.

These various catalogs are vague and encompassing, worlds away from any reiteration of the traditional legal test for certainty in legal judgments. Correcting for this somewhat is a Regulation section listing particular moral infractions, the occurrence of which is to be prevented (but it is unclear whether this list limits the generality of the more authoritative Law). The list is as follows:

> prohibited mixing [of sexes] and wanton display [by women, *tabarruj*]; imitation by one sex of the other; proposition by men to women by word or deed; public expressions harmful to modesty or contradictory to morals; operating a radio, television, tape recorders, etc., near to mosques or in a fashion disturbing people at prayer; non-Muslims' manifesting their beliefs or the rites of their religion or demonstrating lack of respect for the rites or laws of Islam; offer or sale of pictures, books, or video or audio tapes contradictory to Islamic morals or to the Islamic creed . . .; offer for sale of corporeal or depraved pictures or the symbols of a religion not Islam . . . ; manufacture of intoxicants or their distribution or imbibing them. . . .; preventing [*sic*] calls to commit scandalous acts such as adul-

> tery, sodomy, or gambling, or running houses or sites for committing forbidden or scandalous acts; evident innovations in religion like glorifying specific places or times for which no revealed authority exists, or celebrating feasts or anniversaries or occasions of un-Islamic innovation; practices of witchcraft or magic and attempts to take people's property under false pretenses; falsifying weights and measures; [un-Islamic methods of slaughter] at slaughterhouses . . .; [improper behavior at] shops and establishments for making women's clothing (Regulation, section 1).

Within these categories much room for maneuver remains as to practices that are not dictated by categorical Sharia principles but are mere matters of *ijtihad*. Enforcing rules on which there exists difference of opinion and legitimate *ijtihad* has in fact occurred throughout the life of the committees. Clear examples include the committees' stringent standards as to veiling of the face (at least for women who appear to be Saudi) even though on this there is an age-old difference of opinion; and also as to the mixing of the sexes, for which Saudi standards of rigid separation, such as in offices, go far beyond the unquestionable ban on a man and a woman secluding themselves alone. These famous examples have been the subject of outrage not only to foreign Muslims but also to Saudi women from regions where traditions or convictions do not embrace them, such as Hijazi women who historically have not veiled the face or practiced rigid sex segregation.

As for another respect in which Mawardi restricted the *fiqh* powers of the *muhtasib*—by barring him from hearing evidence or finding facts—the Law and Regulation diverge entirely from Mawardi's model. While the infractions listed earlier are made the jurisdiction of the committees only if "observed in the public markets, roads, gardens and other public places" (Regulation, section 1), in other sections the committees gain extensive powers to investigate and try people for these offenses without any cat-

egorical proviso that the offenses are actionable only if observed in public places. Section 4 of the Regulations reads:

> [The Presidency] has jurisdiction to receive reports concerning the prohibited acts stated in section 1 of this Regulation, and it is obliged to investigate them and collect information about them and conduct inquiries in regard to them, all this without contradicting the *shari`a* or public morals and according to what does not infringe the freedoms and rights of individuals . . . .[16]

For such investigations the committees are the officially designated state investigatory body and are entitled to hear informers and even "witnesses" (section 5). If a committee finds that proofs indicate by a preponderance the guilt of an accused, it may arrest him, without noting any requirement that he be observed blatantly and publicly committing the act (section 8). (Although speaking thus about conviction, no section of the Regulation refers in any way to the formalities of the rules of evidence.) Once a person is arrested a committee may search him or her and seize personal effects. It may also search homes and other places to seize prohibited things related to the sins listed above. Such searches must have official approval (analogous to a warrant), and occur in the daytime with certain people in attendance, including the accused if possible; but this is not required if investigators fear loss of evidence or the flight of the accused. Not surprisingly, given this last provision, *mutawwa`*s have often entered houses where noisy parties are under way, hoping to catch people drinking and mixing with the opposite sex. But, given wide public awareness of the Sharia's condemnation of official spying, thanks partly to a well-known story from the lifetime of `Umar bin al-Khattab the second caliph,[17] the public regularly expresses its outrage at such behavior by the committees. In a recent response, Prince Nayif announced that the committees will cease this practice ("Prince Nayif to 'Ukaz," 2002: 3). Investigations are to be concluded within 24 hours, but if the act is a "major" crime (not

defined in this Regulation), this period can be extended on certain showings for consecutive 3-day, 21-day, and 30-day periods. Finally, the committees may (upon finding guilt according to some standard of proof not specified) convict someone of a moral offense, and may at their own discretion administer punishments either of rebuke or of exacting an agreement (not to repeat the act). With approval of the local governor a committee may also administer up to 15 strokes and imprisonment of up to 30 days.

In these provisions concerning investigation and proof, the committees' authority does not correspond to Mawardi's model for the *muhtasib,* or to those of the Hanbalis Abu Ya`la, or Ibn Taymiyyah. Instead, it resembles the age-old police magistrature, the *shurta,* with its all-encompassing and flexible powers to suppress crime. Such a turn is particularly threatening in today's context of the modern state's vastly augmented powers and technologies of surveillance.

A last and crucial question: Are the committees granted a *siyasa* jurisdiction to defend the general interest in any sense? No explicit provision seems to create this right, except insofar as the committees are granted a roving jurisdiction to prevent, prosecute, and punish vaguely defined sets of immoral acts. Perhaps, under these provisions, the committees consider themselves empowered by the king to prevent even acts falling within the realm of *ijtihad* uncertainty. More likely, however, given the committees' strong identification with the religious-scholarly establishment, the ulama, they act under another head. They may be justifying their acts using certain *siyasa*-like, utilitarian forms of reasoning sometimes deployed by *fiqh* and by Saudi ulama to disapprove of, even condemn, behavior that otherwise would be legally neutral. An example is the notion of "closing off of expedients" leading to evil (*sadd al-dhara'i`*), which is in fact the justification for certain Saudi *fiqh* opinions wholly lacking textual support, such as the ban on women driving,[18] a norm that the committees would no doubt enforce as part of its duties to prevent "wanton display" by women. The issue of women's driving is

an apt example of how Saudi ulama, acting putatively in a purely private and religious capacity, sometimes assume legislative and administrative functions that properly belong to the ruler and his delegates and pertain to *siyasa* and its power to define and enforce utilitarian measures. In this case the scholars' private opinions that women's driving is inadvisable were for years enforced as government policy, even without a formal enactment. Seemingly the committees represent the agency that, on behalf of both the ulama and a complicit government, enforces morality on largely utilitarian, *siyasa*-modeled, grounds. Again, if instead *fiqh* is offered as the justification for such enforcement, this obviously implicates the committees in enforcing prohibitions based only in *ijtihad*.

Conclusion

We are now far from Mawardi. Reading him carefully reveals his conscious and sustained effort to preserve a zone of freedom and moral autonomy and to fend off laws or moral strictures defined too rigidly, inspired too puritanically, or enforced too intrusively. The Saudi Law and Regulation—and the practice of the committees under them—do not observe Mawardi's restrictions and are open to strong objection under classical Islamic law. Even if the responsibility of the committees is to suppress immorality by any means, to be constrained by the state acts must under the majority view offend categorical Sharia principles and not mere *ijtihad*. This is unless the committees have decided to arrogate to themselves authority to ban, in pursuit of the general interest, acts otherwise permissible. This could be either by *siyasa* on the ruler's behalf or under exceptional *fiqh* doctrines; again, the model would be the prohibition of women's driving. If they do so, however, they adopt, with ulama cooperation, a pattern of state intrusiveness into moral and private matters not at all common in the Islamic past. And then there are questions about the means of

enforcement to consider. One of the key principles used by Mawardi to construct his system—the ban on spying—may itself be among categorical Sharia principles, and thus demand universal respect, whether under *fiqh* or *siyasa* conceptions.

Overall, it seems that, in terms of the Islamic law Saudi scholars themselves profess, the Law and Regulation ought to be reinterpreted consistently with at least the two most basic provisions with which Mawardi set out to constrain the *muhtasib*—the restriction to sins categorically forbidden by the Sharia, and the ban on spying on private infractions.

Notes

[1]I compare Mawardi's statements to those by a Hanbali author al-Qadi Abu Ya`la Ibn al-Farra', who died in 1066, whose work is highly imitative of Mawardi's. The Hanbali school is the one generally followed in Saudi Arabia, not the Shafi`i school to which Mawardi belonged. Apart from mentioning Hanbali opinions in lieu of Shafi`i ones, differences from Mawardi are minor. Relevant ones are noted in this paper. In any event, Mawardi's book is more famous and has more influence than Abu Ya`la's, even among Saudi Hanbalis. A genuine examination of peculiarly Hanbali views on issues at stake would take us much further afield. Yet, Mawardi's work remains a valid reference point, particularly as an initial orientation.

[2] Ironically, it is often a difficult and debated point whether a particular rule is categorically known and indisputable. Many assume that the test for this is whether scholars have agreed upon the rule, by consensus or *ijma`*. But others, including especially Hanbalis like Ibn Taymiyya or Ibn al-Qayyim, point out that opinions can be wrong and rejected even if some or even many reputable scholars uphold them. This position is to be explained by the Hanbalis' heavy weighting of revealed texts over other sources of law such as *ijma`*. This factor no doubt partly explains why the Saudi *muhtasib* is often found enforcing rules with which other scholars have disagreed. But as we shall see, there are other, probably stronger, reasons why we find Saudi *muhtasibs* enforcing rules on which disagreement exists.

[3]Enforcement also raises issues about the degree of certainty surrounding the facts on which a judgment or ruling is based.

[4]In actuality, criminal law was, as in other areas of law, subject to much difference of opinion, and yet was enforced. The nuance was that the enforcer at least had to believe the criminal laws to be enforced were established to much higher degree of certainty than were ordinary rules, even if other equally qualified scholars wholly disagreed with his conclusions.

[5]For purposes of narrative ease, I write as if Mawardi invented this doctrine. He had predecessors, of course, and centuries of history to draw on, but this work remains one of unique originality. A recent translation is Wahba (1996).

[6]Abu Ya`la is more categorical on this than Mawardi.

[7]Mawardi (1978: 253) discusses an exception, where the *muhtasib* can restrain use of a slenderly supported *fiqh* opinion (such as allowing barter of the same species of goods in unequal amounts) when used as a devious means (*dhari`a*) to achieve something wholly unlawful (exchanges of goods with delay involving usury). Abu Ya`la (1966: 297) offers some interesting additions, declaring certain practices open to sanction though they are matters of disagreement, including the Shiite-supported temporary marriage (*mut`a*) and even the treatment of a triple divorce as single.

[8]Mawardi repeatedly uses the term *zahir,* meaning "manifest," which restricts the types of transgressions the *muhtasib* may deal with. See Mawrdi (1978: 240, 252). Cf. Abu Ya`la (1966: 284, 293, 295).

[9]See Mawardi (1978: 219-221), translated and analyzed at length in Vogel (2000: 232-236).

[10]See Mawardi (1978: 240) on investigating "evident transgressions." Also Abu Ya`la (1966: 284).

[11]See Mawardi (1978: 250) on "should investigate and consider the circumstantial evidence"; Abu Ya`la (1966, 294).

[12]See Mawardi (1978: 47) and cf. Abu Ya`la (1966: 292), discussing giving the suspicious person good counsel and warning him of God's punishment.

[13]Mawardi (1978: 244-5): overruling under certain conditions individuals' otherwise admissible choice to neglect certain ritual practices that are not absolutely obligatory; requiring a community to cease delaying prayers toward the end of the permissible time, even though delay is not forbidden or possibly even disapproved. Cf. Abu Ya`la (1966: 287-288).

[14] See Cook (1989: 672), noting it apparently meant a local religious leader, usually an imam. It was also used for missionaries for the Wahhabi state. One cannot help but think that the term has its origins in the term *mutatawwi`*, literally "volunteer," used to refer to the private indi-

vidual undertaking ordering/forbidding, in distinction to official practitioners of the duty such as the *muhtasib* (or members of the commission). See, e.g., Mawardi (1978: 240); Abu Ya`la (1966: 292).

[15]See "Religious Police Reportedly Thwart Girls' Rescue in Fire" (2002). After investigation the Committees' members were reportedly absolved of blame. See "Religious Police Cleared in Saudi Fire" (2002).

[16]It explicitly may not investigate crimes other than those in section 1, and must refer those to other agencies. Regulation, section 3.

[17]One version of the story is told in Mawardi (1978: 252-253); Abu Ya`la (1966: 296-97). Mawardi (253) says that the *muhtasib* is to reprimand the inhabitants from the street, relying on what is made manifest of their wrongdoing, namely the sound, but nothing else. Interestingly, Abu Ya`la would also allow the *muhtasib* to assemble the neighbors to threaten the inhabitants. Abu Ya`la (1966: 297).

[18]Such utilitarian weighing of advantages and disadvantages is a common approach in the writings of Ibn Taymiyya and Ibn al-Qayyim, the two Hanbalis most influential for Saudi public law. See, e.g., Ibn Taymiyya (n.d.: 22-25) and Ibn Taymiyya (1982: 80-81).

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