THE HISBA JURISDICTION IN THE AḤKAM SULTANIYYA OF MAWARDI

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THE Ḥisba jurisdiction, which is the subject of the twentieth and concluding chapter of Māwardi's work, is akin to those dealing with the Ḳaḍi and with the Maẓālim tribunal; these have been discussed in the Journal (1910, p. 761, and 1911, p. 635). In the following pages an attempt is made to give, in an abridged form, the substance of the Ḥisba chapter (ed. Enger, Bonn, 1853, pp. 404–31), to be followed by some observations on the working of the rules there laid down, and on their effect in practice.

[p. 404] The Ḥisba jurisdiction is based on the duty imposed on Moslems by the Ḳurān, iii, 100, of enjoining good and of forbidding evil actions, a duty binding on everyone, but operating differently according as the duty be performed voluntarily or in pursuance of official duty, i.e. by the Muḥtasib. He is bound to act by virtue of his appointment; others are only collectively bound; and, unlike the voluntary duty, his duty must not be neglected; it must be based on complaint made, must be accompanied by inquiry, may be supported by force, and may be enforced by punishment short of the fixed penalties (*ḥudūd*), whereas voluntary action neither requires a previous complaint nor admits of the auxiliary remedies.

The official is entitled to a stipend from the treasury; he is, moreover, at liberty to deduce principles of decision from custom (*'urf*), as distinct from revealed law (*shar'*): [p. 405] as for instance in the removal of projections from shops in the markets, which he may either sanction or

forbid in accordance with his opinion so formed, whereas a person acting without obligation (*mutaṭawwi'*) may not do this. Such are the distinctions between their two sets of functions.

The official must be free and competent to act as witness to legal acts (*'adl*), a man of judgment and energy, strenuous in religious matters, and acquainted with what are held to be evil actions. Shafeite jurists doubt his right to enforce his view of what is evil in cases where legal opinion is not unanimous: Abu Sa'īd al-Iṣṭakhri [1] holds the affirmative, which implies that he should be a man competent to decide in cases where the law is doubtful; the other view is that he must not enforce his own opinion, since all men are at liberty in doubtful cases to decide for themselves. On this view the Muḥtasib's legal ability is immaterial; all he needs is knowledge of what is generally reputed evil.

The duties of the Ḥisba are intermediate between those of the Ḳaḍi and those of the Maẓālim tribunals. The jurisdiction corresponds to that of the Ḳaḍi's court in the right to hear and adjudicate on complaints in worldly matters, but only in three classes of cases, viz., those concerned with short measure or weight, with fraud or concealed defect in a thing sold or in its value, and with the withholding of a debt due [p. 406] by one able to discharge it, the ground being that these three classes of complaints imply a clear wrong and are identified with an obvious right, matters proper to be dealt with under a jurisdiction which has for its object to further the observance of duties. To go beyond this would be to encroach on the sphere of legal decisions. And, like the Ḳaḍi, the Muḥtasib may compel a defendant to discharge his liability—not liabilities generally, but only such as can be asserted through his jurisdiction; these, if

[1] Died 328 A.H., Ibn Khall., transl., i, 374. He filled the office of Muḥtasib at Baghdad.

admitted, and if within the defendant's power to discharge, may be enforced in favour of the person entitled, for their non-discharge is a wrong which it is his duty to repress.

In two respects his jurisdiction falls short of that of the Ḳaḍi. He is incompetent to deal with claims which do not result from wrongful acts, whether they arise on contracts (*'uḳūd*), on commercial transactions (*mu'āmalāt*), or on assertions of right and of liability (*ḥuḳūḳ, muṭālabāt*); these the Muḥtasib must not presume to entertain nor to adjudicate on, whatever their magnitude, whether it be one dirham or less, unless it be a case referred to him in express terms (*naṣṣ sarīḥ*) extending his jurisdiction, for he will then combine with his own powers those of a Ḳaḍi, assuming him to be himself judicially qualified (*min ahl al-Ijtihād*); failing this extension of jurisdiction it is for the Ḳaḍi to decide the matter, be it great or small. Secondly, his jurisdiction is restricted to such liabilities as are admitted. If they be denied or disputed he cannot act, for only a judge is empowered to hear evidence and to administer an oath; this the Muḥtasib cannot do, [p. 407] whether for the purpose of establishing a claim or displacing a liability.

In two respects the Muḥtasib's powers exceed those of a Ḳaḍi: he is entitled to examine into matters within his jurisdiction in the absence of a complainant, whereas a Ḳaḍi must have a litigant competent to complain before him, otherwise he is exceeding his jurisdiction. And, for the purpose of repressing wrong, the Muḥtasib is invested with the extreme powers of a sovereign protector, for his authority being based [1] on fear, to enforce it by means of fear is no excess of jurisdiction; whereas the Ḳaḍi's power being based on justice, his characteristic is a sense of responsibility, and for him to wield the stern powers of

[1] For للرهبة the MS. B.M. Or. 3117 reads على الترهيب.

the Ḥisba would be unbefitting. The two offices have different fields of action and their limits should not be transcended.

Between the Ḥisba and the Maẓālim tribunal there are points of agreement and of difference. They agree in being both based on the fear associated with the sovereign's authority and energy, and in the right to seek thereby what is conducive to the public good and to strive to repress obvious wrong; they differ first in this, that the Maẓālim tribunal being intended to meet cases which the Ḳaḍi's court is unequal to dealing with, and the Ḥisba to meet cases which it is not severe enough to deal with,[1] it follows that the Maẓālim tribunal ranks highest and the Ḥisba lowest; the former can issue orders on both Ḳaḍi and Muḥtasib, the Ḳaḍi on the Muḥtasib alone, [p. 408] whereas the Muḥtasib cannot issue orders on either of the others. A second difference is that the Maẓālim tribunal may give judicial decisions, which the Muḥtasib may not do.[2]

The Ḥisba duty of enjoining what is right falls under three heads: it may concern what is due to Allah, or what is due to mankind, or it may partake of both. The first may be an obligation enforceable on the community, not on the individual, as, for example, abandoning the Friday prayer in an inhabited place. Here if the number of inhabitants be such as is legally adequate, such as forty and upwards, the duty should be enforced and its omission punished. But when the adequacy of the number is not certain, then if the Muḥtasib's opinion accord with that of the population as to establishing the Friday prayer, he should order it and they should comply with his order, but the penalty for non-compliance should

[1] Perhaps for رفه should be read رفع, i.e. ارتفع, "it is too lofty to deal with."

[2] It likewise came to the assistance of the Muḥtasib in cases he was unequal to dealing with; see Aḥkām, p. 140, and JRAS. 1911, p. 641.

be lighter than in the first case. If their respective opinions coincide against its establishment, then he must not order it, but rather forbid it. If the people wish to establish it and the Muḥtasib be adverse, in this case he should not oppose them, and must neither establish it against his own opinion, nor by forbidding it keep them from performing what they regard as a duty. Again, [p. 409] the Muḥtasib may approve and the people be adverse. Here abandonment, if persisted in, would lead to the Friday meeting being neglected in spite of possible changes consequent on lapse of time and increase of population; and, on the question whether the Muḥtasib ought, under these circumstances, to enforce its establishment two views are held by the Shafeite school. Abu Sa'īd al-Iṣṭakhri holds that he may lawfully act, lest the young should grow up to neglect the observance and imagine that it can be dropped with an increasing just as with a diminishing population. An instance of such a precaution was Ziyād's action in the mosques of Baṣra and Kūfa when those praying in the court were in the habit when rising from their prostrations of rubbing the earth from their foreheads: he ordered the court to be strewn with pebbles, saying that he feared lest in time the young should grow up to think that this rubbing the traces of prostration from the forehead was a constituted practice of prayer. The other Shafeite view is against the Muḥtasib's acting, for he is not entitled to bring people to his way of thinking, nor to enforce his opinion on them in a matter of religion when each may judge for himself, viz. whether the number of worshippers is insufficient for the Friday prayer. He is entitled to order the observance of festivals, but whether to so order be obligatory or permissive depends on the difference of Shafeite opinion as to whether the observance be prescribed as a custom, or be obligatory: if the former, to order it is a laudable act; if the latter, then it is indispensable. Now

the Friday prayer in the mosque and the summons thereto are a part of Islamic rites and signs of worship by which the Prophet distinguished the Islamic community from polytheism, and if the inhabitants of a town or place decide on ceasing the Friday gathering in the mosque [p. 410], and on omitting the call to prayer at the appointed hours, it is a laudable act in the Muḥtasib to enforce these, but whether it be obligatory on him and its neglect a sin, or whether it is laudable and its performance meritorious, depends on the divergent Shafeite views in the case of a population assenting to the omission of the announcement and call to prayer and the Friday gathering, and whether the ruler is justified in using force to compel them. Neglect of the Friday prayer by individuals should not be checked by the Muḥtasib unless practised as an habitual custom, for such attendance is merely commendable and any excuse justifies its omission. But if the neglect have a suspicious character, or by becoming habitual may lead to others acting likewise, then the Muḥtasib should take into account the advantage of checking this contempt for the rules of religion. A warning against neglect of mosque attendance should therefore depend on the circumstances of the case. There is a tradition that the Prophet was once minded to order his followers to collect firewood, and after the call to prayer had been sounded, and prayer made, to go and burn the houses of those who were absent.

As regards constraint on individuals for delaying prayer beyond the specified hour, this should be noticed and corrected, and the defence taken into account. If the cause be forgetfulness, the Muḥtasib should admonish, not punish; if it be negligence and carelessness, he should punish and compel performance; but delay is not punishable when the specified hour is not yet past, on the ground of the diversity of legal opinion, some holding delay to be meritorious. Where there is a general consensus to delay

prayer to the utmost limit of time, but the Muḥtasib holds it better it should be hastened, the question whether he should enforce his own view admits of two answers; for the consensus may lead to the belief on the part of the rising generation that this, and no earlier one, is the appointed hour [p. 411], whereas if some hasten, those who delay will be left to hold to their opinion. As regards the call to prayer and the supplication standing, one who dissents from the Muḥtasib's view should not on that account be exposed to constraint or probibition if his conduct is lawfully governed by his own judgment, for this case is free from the above stated danger. Similarly, in the case of purification, when performed in a way which is permissible although not in accordance with the Muḥtasib's own view, as for instance the removal of impurity by liquids and ablution with water mixed with powdery substances, or rubbing only a part of the head, or the neglect to remove as much as a dirham weight of impurity,—none of these are matters for constraint or prohibition. To restrain ablution with fermented date juice when water fails may be regarded in two ways, for such use may lead to a man regarding such liquor as always permissible, and ultimately to his intoxicating himself by drinking it. These are instances of the jurisdiction in matters appertaining to religion.

In matters of worldly concern the jurisdiction may have to do with the general public or with individuals. Examples of the former are: failure of water supply, ruinous city walls, or the arrival of needy wayfarers whom the people of the place fail to provide for; in such case, if there be money in the treasury no constraint is needed, and the Muḥtasib may order the water supply to be put right and the walls repaired, and may relieve the wayfarers on their passage, all this being chargeable on the treasury and not on the inhabitants, as are also dilapidations in mosques. But if the treasury be without

funds, then these liabilities [p. 412] fall on all inhabitants of substance, but not on any one of them specifically, and if such persons act the Muḥtasib's right of compulsion is at an end. These need no permission for giving the relief or doing the repairs, but before demolishing the part they propose to repair of the city's walls or its mosque they must procure permission, not from the Muḥtasib but the Governor, who must first take an undertaking from them to do the work. In the case of mosques which are the special property of a tribe or of its subdivision no permission is needed. The Muḥtasib may compel the rebuilding of what has been demolished, but not the completion of works freshly started. If persons of substance fail to act, then if the place be inhabitable and its water supply adequate though scanty, the Muḥtasib should hold his hand, but if the place has been rendered uninhabitable, then if it be a stronghold whose loss would be an injury to Islam the ruler must not allow the population to remove, and he should act as he would in the case of a sudden calamity by imposing the work on all those able to perform it. It is the part of the Muḥtasib to inform the sovereign, and to encourage the action of such persons.

But if the place be not a stronghold and essential to Islamic welfare, then the Muḥtasib's action should be milder and he must not use compulsion on the population, for it is the sovereign who ought to do what is needed. If funds be wanting, let him strive to get them, and let the Muḥtasib tell the people that until funds are forthcoming they are at liberty either to remove from the place or to undertake the repairs necessary to render it habitable. If they accept the burden, it should be a collective one to the extent of each man's willingness; no individual must be compelled to do more, [p. 413] be it little or much; let each be told to disburse what he can and will, and let those without means help by labour.

When an adequate sum is provided, or is assured by the undertakings of persons of substance, then the Muḥtasib may set the work going. And these undertakings, unlike those given in respect of private transactions, may be enforced, for where the benefit is collective the remedy is extended. But although the benefit be thus collective, the Muḥtasib must first procure the sovereign's assent, lest he should be acting against his order, for the work does not come within his special functions. In trifling cases where the assent is difficult to procure, and where delay would be mischievous, he may proceed without it.

In cases between individuals, such as where rights are withheld and debts unpaid without excuse, the Muḥtasib should on complaint made take action, not by imprisoning, which is for the judicial authority, but by constraint (*mulāzama*), for this is a remedy open to the complainant.[1] He cannot compel the support of relations, for it is for the law to decide for and against whom this right exists, but if the law has decided he may enforce the decision. Nor may he enforce the obligation of nurturing (*kafāla*) the young without a legal decree, but to this he may give effect. Bequests and deposits of property he must not deal with as against persons of eminence and importance, but he may as against ordinary people, as an incentive to mutual kindness and confidence. [p. 414] These are examples of how the jurisdiction is to be exercised.

Examples where the rights involved partake of a religious and of a worldly nature are: compelling legal guardians to sanction a widow's remarriage, on request, with a suitable person; securing the interval between a woman's divorce and remarriage, and in this case by punishment, whereas a recalcitrant guardian cannot be

[1] *Mulāzama*, the securing a person's attendance before a tribunal, is referred to in the Maẓālim chapter on pp. 142 and 145; see JRAS. 1911, pp. 642, 643.

punished;[1] enforcing parental duty by punishing one who disowns a lawfully born child, so as to protect his legitimacy; enforcing the rights of slaves, male and female, against their masters by securing that their tasks are not too heavy for their powers, and likewise that beasts are adequately fed by their masters and are not overworked; ensuring the adequate support of a foundling or compelling his being transferred to someone who will undertake this duty, and so of strayed beasts, as against their finder, obliging the transferee to give an undertaking in the case of strayed beasts, but not in the case of foundlings. These are examples of the jurisdiction in mixed cases.

Acts prohibited as evil fall likewise under three heads—those of a religious, of a worldly, and of a mixed character. The religious may relate to worship, [p. 415] to reprehensible acts (*maḥẓūrāt*), or to commercial transactions. Examples of the first class are attacks on the revealed or traditional methods of worship; uttering supplications aloud instead of in silence, or vice versa; additions to prayer or to the call thereto, not sanctioned by tradition; these the Muḥtasib should restrain and punish if persisted in, as not sanctioned by any authorized exponent of the law. So also inadequate purification of the person, garments, or place of prayer should be forbidden when well ascertained, but should not be alleged on mere conjecture or suspicion. There is a story of a Muḥtasib asking a man who was entering a mosque with his shoes on whether he did this in the privy of his own house, and on his denial sought to put him to his oath; in this he showed ignorance, and he exceeded his jurisdiction in yielding thus to suspicion. Similarly, a man must not be accused on suspicion of omitting to remove his own

[1] Shafeite, unlike Hanifite, law requires the guardians' sanction to a woman's marriage; this diversity is mentioned in the Ḳaḍi chapter, p. 118, and JRAS. 1910, p. 76

ceremonial uncleanness (*janāba*), or the duty of prayer and fasting, though he may be admonished against disregard of divine law and ordinance. Eating during Ramadhān must not be punished except after inquiry as to the motive where there is a doubt; often it is illness or a journey. Suspicious indications justify inquiry, and if the excuses alleged be plausible the Muḥtasib should not blame but enjoin secrecy in the eating so as to dispel suspicion, without requiring any oath from doubt as to the statement, for he is reduced to crediting it. In the absence of excuse the disapproval should be open and effective, and the penalty be sufficient to deter. Moreover, where an excuse is present the eating should not take place openly, for it may arouse suspicion and may serve as a precedent to foolish people unable to discriminate when the excuse exists. [p. 416] Withholding the poor rate due in respect of visible property should be dealt with by the supervisor of the rate who is entitled to inflict punishment (*ta'zīr*) for the dishonesty, but if the rate be due from undisclosed property the Muḥtasib would seem to be the person to act, for the supervisor has no right of interference with undisclosed property. Or again, it may be held to be rather the supervisor's concern, as payment to him of what was due would have been a sufficient discharge. The punishment should be such as is suitable to the circumstances under which payment of the rate was refused; if a secret payment be alleged the Muḥtasib must credit the statement.

Begging for alms by one not in want, because possessed of money or of a handicraft, should be prohibited and punished, and this is rather for the Muḥtasib than the poor rate official, for the Caliph 'Omar so acted in the case of mendicants. A beggar who appears well to do should be warned that begging is unlawful in one not in want, but he should not be actually prohibited, as he may be in secret a needy person. A beggar who is sturdy and

able to work should be reproved and told to earn his living by his craft, and if he persist he should be kept from begging by punishment. And where, owing to the persistent begging of one disqualified as above, it becomes necessary that the beggar's money be applied for his maintenance or, if he be a craftsman, that he be hired out and supported out of his wages, in such case the Muḥtasib should not do this himself, as it is a legal matter which concerns the judges; it should be referred to them either to deal with or to depute the duty to him.

Where a jurist or preacher is found to be applying himself to the exposition of revealed law without possessing the requisite ability, so that people are likely to be led astray by some wrong interpretation or misleading opinion, the Muḥtasib should forbid his so doing, and should give public notice of having done this lest people be deceived; [p. 417] but if he be in any doubt he should only do this after inquiry. It is said that 'Ali b. Abi Ṭālib, seeing Ḥasan of Baṣra addressing an audience, tested his ability by ascertaining from him that the prop of religion was temperance and its bane greed, after which he told him that he was free to discourse. If anyone pretending to learning lay down some novel proposition which is contrary to generally received opinion and is repugnant to the revealed word, and if the learned of the day reject it, the Muḥtasib should reprove him, when he will either repent or it will be the sovereign's duty to keep religion pure. And if the expounders of Allah's Book advance an interpretation which abandons the clear revealed word for what is really heresy and involves obscuring its meaning, or if some transmitter of traditions deals exclusively with those of no authority which are repugnant to the mind and corruptive of sound exegesis, this the Muḥtasib ought to prohibit. But he must be in a position to distinguish between the sound and unsound views by one of two methods, either by detecting it by his own legal ability,

or by resting his disapproval on the fact that the learned of the day uniformly disapprove of it as heresy and complain of it; their unanimity will justify his prohibiting it.

Next as regards reprehensible acts (*maḥzūrāt*). It is his duty to keep people from acts of doubtful character and such as induce suspicion, for the Prophet tells us to abandon what occasions doubt for certainty. He should begin by censuring only, and be slow to punish—witness the story how 'Omar, after he had prohibited men from walking round the Ka'ba with women, saw a man praying with a woman and struck the man with his whip. The man objected that even if he had done wrong he had had no notice, and denied that he was aware of 'Omar's decision on the subject. [p. 418] 'Omar thereupon gave him liberty to retaliate on him, but the man ended by forgiving 'Omar his over-hasty act. A man seen in the company of a woman on a beaten road, and with no circumstance of suspicion, should not be reproved nor hindered, for such an occurrence is inevitable; but if this happen on an unfrequented road, this is a suspicious circumstance, and the Muḥtasib, whilst prohibiting it, should be slow to punish, lest the woman prove to be of the class the man may not marry, in which case he should advise the man not to expose her to suspicion; and if she be a remote relative, to be on his guard against being led into sin, adding a suitable censure. A story is told that Ibn 'Ā'isha, seeing a couple in company together, said that if the woman were of this class it was disgraceful, for it exposed her to scandal, and if she were not of the class it was yet worse. But a set of verses soon reached him suggesting that the occasion of the two meeting was the delivery of a message, [p. 419] and the name of the poet Abu Nuwās appearing thereon Ibn 'Ā'isha disclaimed any intention of interfering with him.[1] Indeed, this act of

[1] The story is told (Aghāni, xviii, 4) of Ibn 'Ā'isha's father, Ḳaḍi of Baṣra.

disapproval was all that could be required from Ibn 'Ā'isha, but it would not be adequate in the case of an official. Nor did Abu Nuwās' statement disclose any immorality, for he might have been referring to a woman within the prohibited degree; nevertheless, the facts, and the sense of what he said, did suggest conduct reprehensible in him, although perhaps not so in a person of a different character.

Where the Muḥtasib comes across something objectionable of this sort he should act deliberately, and make inquiry into the facts of the case before acting. There is a tradition that 'Omar saw a man going round the Ka'ba with an attractive woman clinging to him, the man uttering the while verse expressive of his care for his companion's comfort and safety on her journey to Mecca. 'Omar asked who was this person, the sole object of his thoughts on his pilgrimage, and he answered she was his own wife, but a very stupid woman, whom he did not divorce [p. 420] because of her beauty and of her being the mother of his children, and 'Omar said he could act as he chose with her. Thus he inquired before blaming, and all suspicion being dispelled he was pacified.

Open possession of fermented wine by a Moslem should be punished, and the wine spilt over him, but in the case of a non-Moslem Abu Ḥanīfa is against punishment and against spilling the liquid, on the ground that it is property and entitled to protection, whereas Shāfi'i holds there is no protection for the unbeliever any more than the believer, and that it should be spilt. To openly possess fermented date juice, according to Abu Ḥanīfa, involves neither penalty nor spilling of the liquid, as it is admittedly lawful property, but Shāfi'i holds it to be as unlawful as wine and that to spill it involves no liability (*ghurm*). The Muḥtasib should consider each case, and prohibit the open possession where it belongs to an habitual drunkard, but not spill it over him except by order of

a qualified judge, lest a legal decision involve him in liability. One obviously drunk who talks irrationally should suffer a punishment short of a fixed penalty, as being a weak person without self-control. The open possession of prohibited toys and musical instruments should be punished and the objects reduced to atoms by the Muḥtasib unless they can be put to some other use, but the playing with dolls is no sin but merely a preparation for girls' family duties. Yet it is a practice [p. 421] akin to the delineation of the human species and savouring of idolatry, at times allowable and at others objectionable according to circumstances. The Prophet once found 'Ā'isha playing with dolls, and sanctioned it. The Shafeite jurist Abu Sa'īd al-Iṣṭakhri, when Muḥtasib, under Muḳtadir, suppressed the sale of a certain bitter herb, saying it was solely used to flavour date wine, which was unlawful, but he allowed the sale of toys on the strength of the Prophet's action. In so holding he was practically drawing a legal conclusion, but his view as to the herb was correct, for although used at times as a remedy this is rare. Its sale, therefore, is lawful for those who hold the fermented date allowable,[1] but in one who holds the reverse it is, on the one hand, permissible as susceptible of being used for other objects, but on the other improper, having regard to its habitual use. Abu Sa'īd's prohibition proceeded, not on the sale being unlawful, but on its publicity by reason of the place allotted for the purpose, and on the fact that the lawfulness of the destined user was extended to the sale itself, his object being to make the vulgar apprehend the difference between this and other lawful sales. Publicity in the performance even of lawful acts may be objectionable, as for instance the case of relations between the sexes.

Reprehensible acts which are not apparent should not be ferreted out by the Muḥtasib: he should not reveal

[1] i.e. the Ḥanifite; see Ibn Khall., transl., i, 200, and note 10.

them, [p. 422] but respect their concealment.[1] The Prophet enjoined that vile acts should be hid, and threatened punishment (*ḥadd*) on anyone who revealed them to him. Cases where the facts raise a presumption that concealment is being practised may be such as involve some outrage to morality which admits of no reparation—for instance, trustworthy information of sexual immorality or of secret murder; in order to prevent this happening investigation by the Muḥtasib is proper and likewise by those acting voluntarily. This was what occurred to Mughīra b. Shu'ba when he was visited by a married woman at Baṣra, and certain persons who knew this watched for and surprised them, and then gave evidence before 'Omar: the story is well known.[2] What 'Omar disapproved was not the surprise; it was the want of evidence which made him inflict on them the fixed penalty for slander. In a case which does not come within this category and involves a less serious offence, investigation and disclosure are not permissible. 'Omar is said to have come on some habitual drinkers in a vintner's shop which they had lit up, and on his reminding them that he had forbidden both the lights and the drinking, they replied that he too had violated the divine prohibition against spying on people, [p. 423] and entering their presence without permission.[3] 'Omar agreed that the acts balanced each other and left them unmolested. The sound of prohibited revelry proceeding openly from an abode should be reproved from outside and without any sudden entering; the mischief is evident, and to inquire further is needless.

Commercial dealings of the forbidden class, such as

[1] The MS. B.M. Or. 3117 has in the text, p. 422, l. 1, الاستسرار, and in l. 3 استتار.

[2] See Aghani, xiv, 145, and Ibn Khall., transl., iv, 255.

[3] For التحسّس in the text read التجسّس. The story is referred to in the Iḥyā al-'Ulūm, ed. Cairo, 1302, ii, 281.

illicit gain (*ribā*),[1] unlawful sales, and anything contrary to revealed law should be prohibited and censured by the Muḥtasib in spite of the parties consenting thereto, if its prohibition command general assent, but punishment depends on the circumstances and on the urgency of its prohibition. If legal authorities are divided on this question, it should not be prohibited unless the dissenting opinion be weak and the dealing be likely to lead to something admittedly forbidden. An instance of this is the profit arising from an excess in quantity of the equivalent on a sale (*ribā al-naḳd*), an act defended on very weak authority [2] and conducive to an act universally disallowed, namely, profit due to deferred payment (*ribā al-nasi'a*). Whether such acts should be forbidden under this jurisdiction or not depends on the degree of assent as above stated.

Akin to commercial dealings, although not actually such, are marriage contracts of doubtful legality. These should be prohibited only if there be practically a consensus of opinion against them, or if they have an admittedly mischievous tendency as leading, for instance, to the temporary marriage (*mut'a*), which in turn leads to unrestrained sexual relations. Prohibition here also depends on the degree of assent, but as against such prohibition all marriage contracts admittedly lawful should be approved.[3]

Other such forbidden dealings are adulteration and fraudulent alteration in prices: these should be repressed

[1] For كالزنا, p. 423, l. 6, read كالربا, as in B.M. Or. 3117.

[2] The authority was the Prophet's cousin, Ibn 'Abbās, but his view was never admitted, and he is said to have retracted it; see Lisān, i, 162, l. 7. كان يرى بيع الربويّات متفاضلة مع التقابض جائزوان الربا مخصوص بالنسيئة.

[3] For وليكن بدل (p. 423, l. 3 a.f.) the MS. B.M. Or. 3117 has ولكن فى بدل.

as the case demands, for the Prophet [p. 424] is reported to have said that a dishonest man was not of his people. And if the dishonesty be practised on an unsuspecting purchaser, it is in the highest degree blameworthy and deserves to be severely repressed and punished. If the purchaser was aware of the fraud, the offence is slighter and the repression should be less, and if the purchaser's object was to resell, then both the seller and the purchaser are worthy of blame, as the second purchaser is ignorant of the fraud, whereas if the purchase was for personal use the seller alone and not the purchaser is blameworthy. The same rules apply in the case of fraud in prices. To allow an animal's milk to collect in the udder in view of its sale is unlawful and a species of fraud: it should be forbidden. And the Muḥtasib is especially charged to restrain deficiency in measures, scales, and weights, which is subject to a divine prohibition; he should punish this publicly and severely. If he suspect a market's measures and scales he may examine and test them, and the safe course would be for him to impress thereon a mark so that the public may recognize and exclusively use these, after which the public user of unmarked weights and measures, if defective, should be restrained on the twofold ground of disobedience in dispensing with the mark prescribed by government, and of the deficiency which is a violation of revealed law; if there be no deficiency, then on the first ground only. [p. 425] Forgery of the mark should be assimilated to forgery of the die for minting coin, and if to the forgery there be added adulteration (of the coin) punishment should be awarded on the two grounds above mentioned, or on the one only, as the case may be. If the extent of the population require official testers for measures, scales, and coin, these should be selected by the Muḥtasib from persons he holds to be trustworthy. They should be salaried from the treasury, and, if funds be lacking, by apportioning among

them the sum available, thus avoiding inequality of remuneration which might give rise to partiality or injustice in their supervision of the measures or weights. These selections and appointments are sometimes made by governors, and the names are officially registered so as to avoid confusion with persons not trustworthy. Such as connive at shortness or excess in measure or weight should be punished by dismissal, and should be disqualified from holding any post in connexion with transactions between people. The same rules should govern the choice of public salesmen: honest men should be appointed and rogues excluded.

These appointments are incumbent on the Ḥisba jurisdiction in default of the governor making them, but the selection of valuers for the purpose of partition between those entitled (*ḳassām*) and of land measurers lies rather with the Ḳaḍi than with the Muḥtasib, since they represent for purposes of property the orphan and the absent owner. The choice of watchman for the tribes and for markets rests with the police authority.

When a case of fraud is not admitted, but not absolutely denied, the Muḥtasib may act, but if it be denied the matter is rather for the Ḳaḍi [p. 426] as being a contentious one, whilst the Muḥtasib is the person to inflict punishment; if authorized by the Ḳaḍi he may act, as this invests him with his function.

It is permissible in private and individual cases, but not as a general usage, to sell and purchase by measures and weights which are not in habitual use among the population nor familiar to them, although they may be to people elsewhere. Two persons who so act by agreement should not be interfered with, but any general practice should be restrained, as it may prejudice and deceive anyone not familiar therewith.

Matters of a purely worldly nature, such as encroaching on a neighbour's boundary or on the privacy of his abode

(*ḥarīm*), or extending beams beyond his outside wall, give no occasion for interference until complaint by the neighbour, who alone is entitled either to condone the act or to impeach it, in which case the Muḥtasib may act, provided the two neighbours be not actually at law, and may compel the person at fault to desist and may punish him as the case may require; if they be at law the judge must act. Even when the encroachment has been sanctioned and redress has not been exacted, it may be exacted later and the erection complained of may be removed compulsorily. But if the work has been already begun and the beams are in position with the neighbour's consent, and he then retract it, the other cannot be compelled to undo the work. Where the branches of a tree extend over an adjoining house, its owner may apply to the Muḥtasib for redress against the owner of the tree by compelling him to lop off the excrescence, but no punishment must be inflicted, as the act is none of his doing. Where it is the roots that penetrate the surface of a neighbour's ground there is no redress, but the neighbour cannot be prevented from doing as he will [p. 427] with his land's surface by digging it up. An oven placed so that it annoys a neighbour by its smoke cannot be interfered with nor restrained, nor can a mill or a blacksmith's or fuller's business, for owners are entitled to make what use they please of their property and these are necessary businesses.

If a man hired at a wage complain of non-payment of the wage in full, or to have had imposed on him an excessive task, such acts should be restrained as the case requires, and similarly inadequate work or an excessive claim for wages may be corrected by the Muḥtasib if he be appealed to, but if the parties are at open variance the judge must decide.

Three classes of professional craftsmen need supervision by the Ḥisba: where their avocation requires a special

regard for competency or incompetency, for honesty or dishonesty, or for the good or bad quality of their work. The first class includes medical practitioners and students, for their efforts endanger life and their incompetency may cause death or illness. And the students may, when young, adopt methods from which it may prove difficult to deter them when older: those therefore of capacity and sound method should be approved, and the incompetent should be prevented from practising a business which may be fatal to life and to bodily health. In the second class are included those who practise the crafts of goldsmith, weaver, fuller, and dyer, for these at times make off with other people's goods; the honest therefore should be preferred and the dishonest excluded, and their dishonesty should, moreover, be proclaimed lest the ignorant be deceived in them. These duties have been regarded as falling rather on the police than on the Ḥisba authority, and probably with reason, as dishonesty is analogous to theft. The case of good or bad work [p. 428] is exclusively for the Muḥtasib, and he ought generally to express disapproval of bad work even in the absence of complaint; but where a man employed in a particular task has deliberately done bad and dishonest work, then on complaint made he should visit him with reproof and blame. If the case involve liability, or if an estimate or evaluation has to be made, the Muḥtasib is disqualified, as legal judgment needs to be exercised, therefore the Ḳaḍi must act; but where all that is needed is a reasonable estimate not requiring any judicial effort, the Muḥtasib is competent to enforce the liability by punishing the wrongdoer, for this is an enforcing of equity and a restraining its infraction. The Muḥtasib must not fix the price of food either where prices are low or where they are high, although in the latter case the jurist Mālik holds that he may do this.

Among duties which partake of revealed and of worldly

ordinance is that of not overtopping other buildings. A man who heightens his house is not bound to block the view from his roof, but he is bound not to command a view over another house. Protected non-Moslems must not raise their edifices above those of Moslems, but if they own them they are to retain possession, only they must not overlook their Moslem neighbours; and they must be held to the observance of the terms of the compact as regards wearing their badge, observing a difference in their attire, and refraining from loud speech on the topic of Ezra and of the Messiah. Moslems who seek to molest them on any pretext should be checked, and if they persist, punished.

Should the Imam of any frequented or regular mosque be unduly prolix in his prayer, thereby exhausting the weak and deterring the busy, the Muḥtasib ought to reprove this in him as did the Prophet in a like case, when he inquired of the offender, Mu'āz b. Jabal, whether he was acting as a tester of men's belief (*fattān*). Persistence in this course should be met, [p. 429] not by punishment but by substituting a less prolix Imam.

Where a Ḳaḍi denies litigants an audience and avoids deciding their cases, so that justice is delayed, and they are prejudiced, the Muḥtasib should, with a full apology, enforce on him his duty of hearing litigants and of deciding their disputes, nor should the Ḳaḍi's dignity be a bar to disapproval of his shortcomings. Ibrahīm b. Buṭuḥā, Muḥtasib for both East and West Baghdad, when passing by the house of the Chief Ḳaḍi 'Omar b. Ḥammād [1] saw the litigants at his doorway awaiting the legal sitting at an hour when the day was already far advanced and the sun was high, so he halted, summoned the doorkeeper, and told him to inform the Chief Ḳaḍi that the litigants were waiting at his door and were thereby

[1] Appointed 325 A.H. (Tajārib al-Umam, Gibb Facsimile, v, 552; on Ibn Buṭuḥā, ib., 340, and 'Arīb, 157).

suffering inconvenience, and that he ought either to sit or let them know what hindered him so that they might go away and return.

Where slaves are worked by their masters beyond their strength, the Muḥtasib can prevent this only by disapproval and exhortation until complaint made by the slaves; then he can proceed to censure and prohibition. Owners of cattle who overwork them can be restrained by the Muḥtasib without the necessity of a previous complaint. If the owner allege that the beast is equal to his task the Muḥtasib may make an inquiry, for even if this involve a judicial pronouncement the question is one of custom, and it can be decided on that apart from law. Where a slave complains that his master is keeping him deprived of clothes and of sustenance the Muḥtasib may use compulsion on the master, [p. 430] but if the complaint be one of inadequacy the Muḥtasib cannot act, for the determining what amount the master should provide would involve a legal solution, whereas that is not true of the actual obligation, inasmuch as the obligation is based on an explicit statement of the revealed law, whilst the extent of his obligation has no such basis.[1]

Owners of ships, etc., should be forbidden from overcrowding them to the risk of their being wrecked, and also from putting out to sea in a gale of wind; and when men and women are carried together a partition should separate them, and where space allows of it conveniences should be provided for the women. The Muḥtasib should supervise the conduct and trustworthiness of persons in the markets who have specially to do with women, and if satisfied confirm them in their duties, but when in doubt or convinced of their bad behaviour he should remove them and disqualify them from having dealings with women.

[1] The text, p. 430, l. 3, should run, as in B.M. Or. 3117: لان التقدير غير منصوص عليه ولزومه منصوص عليه.

This has been regarded as more properly police business, being akin to immorality. The reserved sites in the markets should be inspected, those that occasion no inconvenience to passers-by being sanctioned and the others not, and for this no complaint is required, although Abu Ḥanīfa holds the contrary. Any building on a frequented road should be prohibited, even though the road be a wide one, and the building should be ordered to be pulled down, even if it be a mosque, since a road is intended for the benefit of passers-by and not of buildings. If goods or building materials be deposited in roads, streets, or markets for convenience and for gradual removal, this should be allowed provided no inconvenience be caused thereby, and similarly in the case of extensions of buildings, covered ways over roads, watercourses, and privies. And the question of inconvenience is one on which the Muḥtasib may form an opinion, [p. 431] as it turns on custom and not on revealed law, this being the test of whether or not in any given case the Muḥtasib is competent to form a decision.

It is the Muḥtasib's duty to prevent the removal of a corpse from its grave when the burial has taken place in privately owned ground, or by permission of the owner, except in the case of ground wrongfully possessed, for the real owner may order those who buried the corpse there to remove it elsewhere.[1] Whether such removal is allowable from land invaded by a flood or by rain is doubtful; Al-Zubairi allows it, others not. The castration of human beings and of animals should be forbidden and punished, and any rights of retaliation or of bloodwit should be given effect to in favour of the person entitled, provided no legal proceedings are pending.

The dyeing of grey hair black should be prohibited

[1] For من دفنه فيها, p. 431, l. 7, the MS. B.M. Or. 3117 has من دُفِن فيها.

except to those engaged in fighting the infidel; anyone who does this in order to win a woman's favour[1] should be punished; but dyeing red with henna, and again with another herb to turn that red to black, is allowable. To make profit by divination or by forbidden amusements is unlawful, and the wrongdoer and his customer should both be punished.

But this is a branch of the subject which, if extended, would run to great and excessive length, for wrongful acts are beyond number, and the foregoing examples give suggestions for such as have been omitted.

The Ḥisba is a form of civil government, and the early Imams executed its duties in person to the public advantage and to their own special reward. But the office declined in people's estimation when rulers neglected it and conferred it on men of no repute whose object was to profit and get bribes. Yet the decay of an institution does not imply its abrogation; the neglect of jurists in expounding its principles is not warranted by such decay; and this chapter is intended to supply their shortcoming. Its length is due to the quantity of material that they have either left aside or inadequately treated; this we have dealt with thoroughly. And we pray Allah to graciously further our purpose and intent, for He is our all-sufficient Protector.

[1] For يضبغ, p. 431, l. 12, read يصبغ.

(To be continued.)