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# Law and Moral Regulation in Modern Egypt: *Hisba* from Tradition to Modernity

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## Abstract

This article examines the historical roots of juridical moral regulation in modern Egypt, assessing the relationship between modern law and shari'a through the lens of the influence of the Islamic practice of *hisba* on courts and legislators. The article engages critically with scholarship on Islamic law and postcolonial theory regarding the impact of Western colonialism on law in Muslim societies and problematizes the understanding that shari'a was secularized in the Egyptian legal culture through the translation of Western legal concepts. Instead, a different narrative is offered, one that recognizes the agency of local actors in the process of secularization and considers the influence of shari'a in the legal development of contemporary Egypt.

**Keywords:** colonialism; Egyptian law; *hisba*; Islamic law; shari'a

In the years following the 25 January Revolution in Egypt in 2011, there was a notable uptick in the number of individuals sentenced for their sexual orientation, religious beliefs, political opinions, or moral standing. Cases based on both citizen complaints and law enforcement interventions—by the police or prosecution authorities—were brought against writers, activists, artists, and bloggers. The state's prosecution of individuals for their opinions, sexual behaviors, and religious beliefs has been couched using the Islamic principle of *hisba*, a religious concept enshrined in the Qur'an and sunna and debated extensively by Muslim jurists. According to *hisba*, Muslims are required to command right when it is not being observed and forbid wrong when it is being committed.<sup>1</sup> By analyzing court decisions in which *hisba* has been evoked in a number of recent court cases, this article investigates the exact role that *hisba* plays in the Egyptian judiciary, specifically when dealing with cases involving the regulation of morality in criminal and administrative law. In addition, I trace the place of the premodern *muhtasib* (an official exercising the duty of *hisba* on behalf of the state) in Egypt's modern justice system and look at the motivation behind the contemporary application of *hisba*.

Some scholars of Islamic law and postcolonial anthropologists of Egyptian law view the Egyptian legal system as a product of colonialism and the imposition of Western legal concepts onto Muslim legal cultures. According to this understanding, shari'a is viewed as a paradigm of moral inquiry that was relegated to the private sphere of family law after the British occupation of Egypt in 1882 and replaced in civil, administrative, and criminal law by punitive and restrictive French codes.<sup>2</sup> Although it is true that Western legal customs contain numerous contradictions and can accommodate highly repressive and punitive features—features that undermine the supposed neutrality and normativity of modern law and call into question the alleged commitment of Western nations to individual rights—the modernization of the Egyptian legal system was not simply done through a translation of Western liberal legal

<sup>1</sup>Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge, UK: Cambridge University Press, 2001).

<sup>2</sup>See, for example, Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); and Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012).

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concepts into the Egyptian legal culture.<sup>3</sup> Instead, as this article argues, the process of secularization and the bureaucratization of the Egyptian legal system took place from within shari'a itself, as concepts such as the *al-niẓam al-'ām* (public order) and *al-maṣlaḥa al-'umūmiyya* (public interest), which shaped both the performance of juridical entities and their hostile attitude toward personal liberties, were developed prior to colonialism, in the process of state building.

Due to a striking lack of official information, it is difficult to know exactly how many morality cases have been brought before the Egyptian courts. Nonetheless, Egyptian rights groups claim that the number of cases involving charges of blasphemy, homosexuality, breaching public decency, and threatening public order has increased dramatically since 2011.<sup>4</sup> Such cases are sometimes brought directly by public prosecutors. But given that the state does not prohibit individuals from taking others to court for their opinions or way of life, sometimes citizens or lawyers press charges against individuals they believe exhibit Egyptian society's declining morals and religious values.<sup>5</sup> Indeed, the Egyptian authorities actively participate in and encourage this type of litigation. The moral panic that ensues within society helps to distract from the state's own heinous abuses of human rights.<sup>6</sup>

This article is divided into four broad sections. The first section discusses how scholars of Islamic law and postcolonial anthropologists view *ḥisba* and punitive laws in Egypt. Before beginning our analysis of how these scholars understand the practice of *ḥisba* in contemporary Egypt, it will be useful to have a brief look at a legal case in which *ḥisba* played a pivotal role. Following that, the second section turns to the unifying character of law in modern Egypt, which aims at ensuring that the behavior of individuals in the public sphere conforms with the moral system sanctioned by the state. This section analyzes legal provisions and court rulings that illustrate the state's perception (drawn from *ḥisba*) of what are deviant behaviors, particularly in the field of religious belief. The third section traces the development of *ḥisba* from premodern Islamic thought and practice through to modern Egypt. Finally, the fourth section explores the role of the *muḥtasib* in contemporary Egyptian legal practices.

### Shari'a, Moral Regulation, and The State

Targeting individuals for their religious beliefs or moral standing is not unique to postrevolutionary Egypt; this also occurred prior to the revolution. In these cases, even though *ḥisba* might have been at play in the court decision and might have informed the final ruling, often the concept was absent from court documents. The case of Nasr Hamid Abu Zayd, which took place in the mid-1990s, exemplifies both of these phenomena and has been key to the conceptualization of *ḥisba* both in Egypt's contemporary juridical debates and in Western academic writings on the country.<sup>7</sup> The case began when Abu Zayd, in his capacity as a professor of Arabic language and literature at Cairo University, was denied tenure based on a report drafted by the academic committee assessing his scholarly writings. This committee concluded that Abu Zayd's writings amounted to an insult to Islam and undermined his responsibility as a Muslim.<sup>8</sup> Within a few months of this academic decision, the press got wind of the controversy, which

<sup>3</sup>On the contradictions of liberalism, see Uday S. Mehta, "Liberal Strategies of Exclusion," *Politics & Society* 18, no. 4 (1990): 427–52.

<sup>4</sup>"Besieging Freedom of Thought: Defamation of Religion Cases in Two Years of the Revolution," Egyptian Initiative for Personal Rights, 2 September 2014, <https://eipr.org/en/publications/besieging-freedom-thought-defamation-religion-cases-two-years-revolution>; "Creativity Certificates: About the Judiciary Assessment of Creative Works," Freedom of Thought and Expression Law Firm, 24 April 2017, [https://afteegypt.org/en/freedom\\_creativity-2/2017/04/23/12999-afteegypt.html](https://afteegypt.org/en/freedom_creativity-2/2017/04/23/12999-afteegypt.html); and Abdel Hamid, "The Trap: Punishing Sexual Difference in Egypt," Egyptian Initiative for Personal Rights, November 2017, [https://eipr.org/sites/default/files/reports/pdf/the\\_trap-en.pdf](https://eipr.org/sites/default/files/reports/pdf/the_trap-en.pdf).

<sup>5</sup>Declan Walsh, "Protecting His Nation from Puppeteers and Belly Dancers," *New York Times*, 12 January 2018, <https://www.nytimes.com/2018/01/12/world/middleeast/cairo-lawyer-lawsuit.html>.

<sup>6</sup>Mariam Mecky, "State Policing: Moral Panics and Masculinity in post-2011 Egypt," *Kohl: A Journal for Body and Gender Research* 4, no.1 (2018): 95.

<sup>7</sup>Kilian Bälz, "Submitting Faith to Judicial Scrutiny through the Family Trial: The 'Abu Zayd Case,'" *Die Welt des Islams* 37, no. 2 (1997): 135–55; Baber Johansen, "Apostasy as Objective and Depersonalized Fact: Two Recent Egyptian Court Judgments," *Social Research* 70, no. 3 (2003): 687–710.

<sup>8</sup>Charles Hirschkind, "Heresy or Hermeneutics: The Case of Nasr Hamid Abu Zayd," *American Journal of Islamic Social Science* 12, no. 4 (1995): 463.

encouraged some individuals to file a case against Abu Zayd and his wife, Professor Ibtihal Yunis, before an Egyptian court. The plaintiffs called on the court to divorce the couple as the husband, in their view, had committed an act of apostasy through his writings and, as a result he could not be married to a Muslim woman. The court divorced Abu Zayd and Yunis after declaring the former an apostate. However, several courts had to hear the case before this decision was upheld and implemented.

The first case against Abu Zayd was brought before the Giza personal status court by six individuals with an Islamist orientation who demanded the judge declare Abu Zayd an apostate and divorce him from his Muslim wife. Their accusations were based on Abu Zayd's critical academic writings on the Qur'an and sunna, in which the professor argued that Islam should be studied within the context of the social and political events that shaped it and, moreover, that the divine texts should be understood as a product of these events. The plaintiffs argued that Abu Zayd had cast doubt on the integrity of Islam, which rendered him an apostate, and that he should be separated from his wife given that a Muslim woman cannot be married to a non-Muslim man. The plaintiffs provided the court with various *fiqh* (Islamic jurisprudence) opinions, particularly from the Hanafi school, to substantiate their claims. However, the Giza personal status court of first instance dismissed the case, as it found the plaintiffs had no capacity, that is, no direct interest, in the subject matter of the dispute.<sup>9</sup>

The plaintiffs appealed this decision before the personal status chamber of the Cairo appeals court, and in June 1995 Abu Zayd was found to have committed apostasy by his denial of God and the Prophet. Accordingly, the appeals court found for the plaintiffs and ordered Abu Zayd to be separated from his wife. The court rejected the logic of the court of first instance that had judged the plaintiffs to have lacked capacity or direct interest and instead found the claims of the plaintiffs equivalent to the exercise of *hisba*. Crucially, it explained that, given that they were Muslims exercising their duty of commanding right and forbidding wrong, they did have a direct interest in filing the case. The court, after examining excerpts from Abu Zayd's writings, concluded that he had, indeed, insulted Islam and criticized its axioms to an extent that amounted to apostasy. It reasoned, furthermore, that Abu Zayd's writings undermined the public order, as the court considered Islam to be significant to Egypt's public order.<sup>10</sup> The public prosecutor and the separated couple appealed this decision before the court of cassation, but the ruling and separation sentence were upheld.<sup>11</sup> As a result, Abu Zayd and his wife were forced to leave Egypt.

The Abu Zayd case is significant as, among other things, it is one of the few cases in which *hisba* was explicitly cited and used. As the brief summary above shows, the court of appeals based its very logic on the exercise of the duty of the plaintiffs to forbid wrong, that is, to practice *hisba*. In many other cases related to blasphemy, apostasy, censorship, or sexual orientation, although the word *hisba* rarely appears, the logic of *hisba* can easily be detected and seen to shape legal arguments put forward by lawyers and to inform rulings delivered by judges.

Interestingly, some Islamic law scholars and postcolonial anthropologists consider this legal dependence on *hisba* to emanate from the imposition of Western laws on Muslim societies through colonialism and other forms of Western influence. Charles Hirschkind, for example, argues that both Abu Zayd and his opponents were committed to a way of thinking belonging entirely to the modern nation-state, not Islamic tradition.<sup>12</sup> Hirschkind notes that Abu Zayd's use of contemporary analytical tools in his analysis of the history of Islamic tradition is a liberal practice of the modern nation-state, and so his analysis is the result of Western influence on Muslim societies. Moreover, Hirschkind posits that the Islamists who opposed Abu Zayd employed the same liberal logic, even if their language highlighted their identity as Islamists.<sup>13</sup> Similarly, Hussein Agrama argues that, although the court and plaintiffs deployed Islamic jurisprudence in the course of litigation, the court's decision to divorce Abu Zayd and his wife was not grounded in shari'a. Agrama declares that the position of the court hailed, rather, from the Western legal tradition, which has only applied in Egypt since the 1890s, after the British occupation

<sup>9</sup>Giza Personal Status Court of First Instance, 1993, case 561, decision 27 January 1994.

<sup>10</sup>Cairo appeals court, judicial year 11, case 287, decision 14 June 1995.

<sup>11</sup>Court of cassation, judicial year 65, cases 475, 478, and 481, decision 5 August 1996.

<sup>12</sup>Hirschkind, "Heresy or hermeneutics," 466.

<sup>13</sup>*Ibid.*, 473.

of Egypt.<sup>14</sup> For Agrama, *hisba* in premodern Muslim communities was merely an exhortative mechanism of self-care and moral criticism aimed at instilling particular virtues in individual Muslims.<sup>15</sup>

This understanding of *hisba* as an exhortative mechanism of moral criticism owes much to the copious writings of Islamic law scholar Wael Hallaq. In his impressive oeuvre, Hallaq considers shari'a in its premodern form as a non-state law and attributes its codified and punitive features to the mode of legislation and adjudication brought about by modernity and Western liberalism. Hallaq argues that in the premodern era shari'a was not state law, but instead a paradigm of moral customs and communal rules developed primarily by the *fuqahā'* (Muslim jurists) who were independent of the state.<sup>16</sup> Furthermore, Hallaq states that the main objective of shari'a was to strengthen and protect communal relations, giving premodern Muslim communities the ability to respond to individual cases, as the state as we know it today did not exist at the time.<sup>17</sup> Hallaq attributes the punitive characteristics of Islamic law to the modern nation-state's encroachment on shari'a; such a state, in Hallaq's understanding, is itself a colonial invention.<sup>18</sup> According to this understanding, modern law permeated Muslim societies through colonialism and Westernization, bringing Islamic legal rules under the full control of colonial and postcolonial state bureaucracies. As a result, after living for centuries as self-ruled communities relying on local customs and shari'a, the role of Muslim communities in handling the moral standing of their members was replaced by the modern, punitive state and its laws, judiciary, and police.<sup>19</sup>

Agrama's argument also builds on older scholarship that understands restrictions on individual liberties within the rubric of religion as an articulation of the project of the nation-state imposed by colonialism. This older scholarship includes Talal Asad, who argues that the relegation of religion to the private sphere is one of secularism's main characteristics.<sup>20</sup> This approach has influenced most historians and anthropologists studying the modern Egyptian legal system. For example, in his analysis of the Western origins of Islamic discourse in Egypt's modern legal thought, Leonard Wood states that his book "is more interested in juridical thought and less interested in juridical practice for the simple reason that during the period under study [the 20th century], the practice of Islamic law became nominally limited to matters of personal status, inheritances, and trusts."<sup>21</sup>

Asad denies that *hisba* and shari'a had a punitive function, stating instead that apart from justiciable matters premodern shari'a was "blaming, warning, advising, urging, and so on, to encourage friends, kin, and colleagues to act in a praiseworthy way."<sup>22</sup> This moral dimension of shari'a was lost, Asad argues, with the advent of secularism, whose purpose, according to him, was not to separate religion from politics, as the secular project claimed, but instead to place religion under the control of the state so that the state might fulfill its governance function.<sup>23</sup> Asad declares that for shari'a to be transformed from a bottom-up law with minimum state interference into state law it had to be confined to the private sphere of family law. The modern nation-state's domination and governmentalizing start at the level of the family; by dominating the family, the state can dominate the entire society.<sup>24</sup>

Saba Mahmood follows this same line of thought in her study of restrictions on religious conversions in Egypt. Indeed, Mahmood argues against the punitive measures practiced in Egypt for those who convert from Islam, contending that—despite use of religious language by the courts—these measures are not grounded in shari'a. According to Mahmood, such punishments stem instead from what she calls the

<sup>14</sup>Agrama, *Questioning Secularism*, 43–47.

<sup>15</sup>*Ibid.*, 55–56.

<sup>16</sup>Wael Hallaq, *An Introduction to Islamic Law* (Cambridge, UK: Cambridge University Press, 2009), 38–56.

<sup>17</sup>Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013), 2–3.

<sup>18</sup>Hallaq, *Introduction to Islamic Law*, 85–115.

<sup>19</sup>*Ibid.*, 8.

<sup>20</sup>Asad, *Formations of the Secular*, 227.

<sup>21</sup>Leonard Wood, *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875–1952* (Oxford, UK: Oxford University Press, 2016), 14.

<sup>22</sup>Talal Asad, "Thinking about Tradition, Religion, and Politics in Egypt Today," *Critical Inquiry* 42, no. 1 (2015): 166–214.

<sup>23</sup>Talal Asad, "Thinking about Secularism and Law in Egypt," *International Institute for the Study of Islam in the Modern World* (2001): 7–8.

<sup>24</sup>Talal Asad, "Responses," in *Powers of the Secular Modern: Talal Asad and His Interlocutors*, ed. David Scott and Charles Hirschkind (Stanford, CA: Stanford University Press, 2006), 227.

liberal legal paradigm, which is derived from Western influence on the Egyptian legal culture. Under this paradigm, the state claims indifference to individual religious beliefs but can still interfere to protect the various manifestations of its sovereign power. This interference, according to Mahmood, primarily occurs under the pretext of protecting the sovereignty of the state's laws and the identity of the majority.<sup>25</sup> Furthermore, Mahmood correctly states that interference in religious liberties has been key to the application of modern law in all nation-states, not just in Egypt or Muslim societies; for example, upholding of bans on the niqab by the European courts on the grounds of protecting public order and the secular identity of society.<sup>26</sup> However, legal culture in a Muslim society like Egypt cannot be fully understood by reducing it to merely Western influence, as one cannot wholly discount the influence of shari'a and the state-building process that preceded colonization.

Asad and his interlocutors make a number of important assumptions about the nature of *hisba*, the pre-modern shari'a, and the process of legal reform that Egypt witnessed in the late 19th and early 20th centuries that have informed Agrama's analysis of the Abu Zayd case. These assumptions are, first, that *hisba*, in essence, is a mechanism of moral criticism that is devoid of punitive measure; second, that the premodern state lacked the punitive capacity of the modern state; and, third, that it was the secular project and the introduction of colonial law in Egypt that caused shari'a to be distorted and *hisba* to acquire such punitive measures as witnessed in the Abu Zayd case. This is why, in Agrama's understanding, the case was examined by the personal status court and not the criminal or administrative court, as the field of personal status law is the only field of modern Egyptian law that is still governed by the principles of shari'a, all other fields having been restructured and subjected to the logic of the Western civil law tradition.

However, this understanding of the Nasr Abu Zayd case and of *hisba* in premodern and modern times overlooks a number of important facts. To start, the reasons the plaintiffs took the Abu Zayd case to the personal status court are complex, raise many questions about their sincerity, and can not be dismissed by relegation of religion to the field of family disputes.

The Egyptian legal system gives litigants various platforms through which they can exercise *hisba*. For instance, Article 98 (F) of the Egyptian Penal Code allows individuals to file cases against public blasphemous content, which is punishable by imprisonment.<sup>27</sup> In addition, the administrative judiciary has the authority to order state agencies to suspend the dissemination of any publications considered to be in contempt of religion. For example, in a case linked to censoring books discussing Islamic principles within a broader discussion of Islamic movements, the administrative court ordered al-Azhar (the official religious institution) to scrutinize the books' contents. This case was not a family dispute, but instead began when an individual filed a petition for the administrative court to order al-Azhar to examine two books on the history of the Muslim Brotherhood.<sup>28</sup> The plaintiff claimed that al-Azhar had a responsibility to correct any distorted understandings of Islam and argued that these two books contained ideas that could harm the image of Islam. The court accepted the case and, based on the judges' reading and the plaintiff's argument, ordered al-Azhar to issue a report on how these books depicted shari'a. Although arguments about the role of the court in protecting the right to freedom of expression were raised during litigation, the court ruled as follows:

The culture of pluralism is based on respecting diversity in opinions. However, pluralism and diversity do not apply to basic values entrenched in the society such as the fact that Islam is the official religion of the state. Also . . . acts considered to be against the normal and reasonable disposition [*al-fitra al-insaniyya al-salima*] are not subject to freedom of opinion.<sup>29</sup>

<sup>25</sup>Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2016), 170.

<sup>26</sup>*Ibid.*, 174–77.

<sup>27</sup>Penal Code, Law no. 58 of 1937, enacted 31 July 1937, published in *al-Jarida al-Rasmiyya* 5 August 1937, entered into force 15 October 1937. A full translation of the code can be found at [https://sherloc.unodc.org/res/cld/document/criminal\\_code\\_of\\_egypt\\_english\\_html/Egypt\\_Criminal\\_Code\\_English.pdf](https://sherloc.unodc.org/res/cld/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf).

<sup>28</sup>The two books were *Mudhakkirat al-Da'wa wa-l-Da'iya* by Hassan al-Banna and *Tarikh al-Ikhwan al-Muslimin*. The name of the author of the latter work is not mentioned in the sources of the case.

<sup>29</sup>Administrative court, judicial year 65, case 4976, decision 24 February 2019.

Although the proceedings of this case never used the word *ḥisba*, its logic is evident in the plaintiff's belief that it is his duty to correct the wrongdoings of these books. Akin to the case of Abu Zayd, the court did not consider the plaintiff to be alien to the situation. In his capacity as a Muslim and citizen, the plaintiff was given the right to be part of the dispute; even though the case did not concern his direct interests, the court considered the plaintiff a representative of the Muslim society whose values were allegedly being violated by the publishing of these books.

Furthermore, and more substantially, positing shari'a as an exhortative non-state law or paradigm of communal moral inquiry in isolation from the state ignores the fact that shari'a was always under state control in premodern societies.<sup>30</sup> Although it is correct that premodern and early modern Muslim polities lacked the sophisticated juridical tools of surveillance and domination used by the modern nation-state, this does not mean that premodern Muslim states did not possess coercive legal mechanisms or that they were not concerned with regulating the morality of individuals.<sup>31</sup> According to Agrama's approach, if the Abu Zayd affair had taken place in a premodern Muslim community, he would merely have been rebuked for his writings and urged to conform to the prevalent moral order; he would not have been subjected to trial, exile, or forced divorce. These authoritarian measures, Agrama believes, belong only to the modern state: the public order, rule of law, and liberal legality imposed by the West. According to this narrative, the Abu Zayd case was an instance in which shari'a was used outside its epistemological origins and shows that shari'a gained a different meaning after its integration into the apparatuses and institutions of the nation-state, especially the modern judiciary. In this way, Agrama shares Hirschkind's view that the Abu Zayd affair cannot be assessed through the prism of shari'a.

This understanding of *ḥisba* as a communal solution independent of the state's coercive means contradicts the perception of *ḥisba* within the Islamic discursive tradition. For example, in *al-Ahkam al-Sultaniyya*, the Shafi'i jurist Abi al-Hasan al-Mawardi (972–1058 A.D.) defined *ḥisba* as commanding right if its omission has been observed and forbidding wrong if its commission is apparent.<sup>32</sup> Al-Mawardi mentioned several acts that the *muḥtasib* should confront, such as abandoning Friday prayers, failing to pay debts, violating rituals enshrined in the Qur'an and sunna, and placing oneself in a suspect situation such as when a man talks to a woman in an unattended place.<sup>33</sup> Crucially, al-Mawardi contended that the primary responsibility for the practice of *ḥisba* was reserved for state-appointed *muḥtasibs*. Indeed, al-Mawardi, as a jurist, was himself not independent of the state; he served as an official of the Abbasid caliphate. According to al-Mawardi, the *muḥtasib* represented the state in regulating morality of individuals in the public sphere.

Furthermore, the *ḥisba* practiced in the Nasr Abu Zayd case is consistent with the understanding of Abu Hamid al-Ghazali (1058–1111 A.D.) rather than a result of Western intervention. It is well established that al-Ghazali used *ḥisba* and *al-'amr bil-ma'rūf wa-l-nahī 'an al-munkar* (commanding right and forbidding wrong) interchangeably. Al-Ghazali stated that commanding right and forbidding wrong was the greatest axis of religion (*al-qutb al-a'zam fi al-dīn*) and its accomplishment the subject of prophetic messages. If *ḥisba* was neglected, religion would decay, and ignorance and corruption would prevail. Unlike al-Mawardi, al-Ghazali argued that *ḥisba* was the duty of all Muslims, not only the official *muḥtasib*.<sup>34</sup> Al-Ghazali divided the wrongdoings for which *ḥisba* must be practiced into actions that occurred in markets (*munkarāt al-aswāq*), actions in the streets (*munkarāt al-shawāri'*), actions in public bathhouses (*munkarāt al-ḥamāmmāt*), general wrongdoings (*munkarāt 'amma*), etc.

<sup>30</sup>On the religious role of Muslim rulers, see Patricia Crone and Martin Hinds, *God's Caliphs: Religious Authority in the First Centuries of Islam* (Cambridge, UK: Cambridge University Press, 1986). On the role of the state in formulating shari'a in the early Ottoman Empire, see Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, CA: University of California Press, 2003), 116.

<sup>31</sup>For example, James E. Baldwin argues that the resort of 17th-century Cairenes to reconciliation as a communal solution to their disputes instead of litigation did not happen in isolation from the state; rather, the state had to sanction and protect such solutions and force disputants to respect their outcomes; *Islamic Law and Empire in Ottoman Cairo* (Edinburgh: Edinburgh University Press, 2017), 118–35.

<sup>32</sup>Abi al-Hasan 'Ali ibn Muhammad ibn Habib al-Basri al-Mawardi, *al-Ahkam al-Sultaniyya* (Cairo: Dar al-Hadith, 2006), 349–50.

<sup>33</sup>Ibid., 354–63.

<sup>34</sup>Abu Hamid Muhammad ibn Muhammad al-Ghazali, *Ihya' 'Ulum al-Din* (Beirut: Dar Ibn Hazm, 2006), 781–836.

Indeed, al-Ghazali stated outright that Muslims should rebuke their fellow Muslims when they commit wrong. This was only the beginning for al-Ghazali; he continued that if wrongdoers would not heed advice, they must be either stopped from continuing their sinful acts or be subjected to physical punishment.<sup>35</sup>

The understanding of *hisba* that comes across in the writings of Agrama and Asad also has no resonance with the way *hisba* was actually applied in premodern Muslim polities, and more recent studies have approached *hisba* in a way that contrasts with the identitarian approach adopted by those postcolonial scholars. For example, Khaled Fahmy and Rudolph Peters look at law in Egypt from a different perspective, by linking various internal factors and historical eras to provide a coherent narrative of the development of the modern legal context. Peters, a scholar of Islamic law, provides archival evidence of the sophistication of the judiciary and legal institutions—born of the necessity to centralize power and make repression less costly and more socially productive—in 19th-century Egypt, six decades before the British occupation.<sup>36</sup> In the same vein, historian Khaled Fahmy looks at *hisba* in 19th-century Egypt and points to the gradual disappearance of the *muhtasib* responsible for monitoring markets and public morals in the premodern and early modern eras. Fahmy argues against the postcolonial approach put forward by Asad and others, which claims that shari‘a was only secularized and integrated into coercive state mechanisms after the introduction of Western laws, asserting instead that shari‘a and *hisba* have always been under state control in Muslim polities.

In 19th-century Egypt, the nature of the state shifted from dynastic rule (centered around the ruler or his household) to a bureaucratic central state with various administrative organs. Fahmy’s argument, for which he offers archival evidence, is that this transition took place from within shari‘a, not apart from it. He states that the modernization of the Egyptian legal system before 1883 “had shari‘a as its main reference point, both in terms of legislation and court practice.”<sup>37</sup> Using the example of food markets, Fahmy points out that the *muhtasib* did not really disappear, he was simply replaced in the second half of the 19th century by modern medical and security services responsible for monitoring vendors’ compliance with the public health standards set by the authorities.<sup>38</sup> Doctors and police officers who toured markets seizing food to check for public health compliance were the new *muhtasibs*.

Fahmy observes a remarkable shift not only in the position of the *muhtasib*, but in the logic of *hisba* itself: the focus changed from protecting public morals to the preservation of public health.<sup>39</sup> Moreover, at the level of monitoring compliance with religious and moral standards, the *muhtasib* was replaced in the 19th century by the police and city governors, who punished individuals for insulting religion and prevented the dissemination of books containing opinions or information contradicting moral or religious standards.<sup>40</sup> To ensure consistency with shari‘a in legal decisions issued by police and city governors, the Egyptian grand mufti, Muhammad al-‘Abbasi al-Mahdi, in office between 1848 and 1897, was always involved in cases of individuals who joked about religion or insulted the Prophet.<sup>41</sup> This process of abolishing the *muhtasib* and transferring the mandate to doctors, police, and city governors was not intended as an abolition of shari‘a, but it did pave the way for the further bureaucratization of juridical agency tasked with regulating morality in the following decades.

<sup>35</sup>Ibid., 791.

<sup>36</sup>Rudolph Peters, “Administrators and Magistrates: The Development of a Secular Judiciary in Egypt, 1842–1871,” *Die Welt des Islams* 39, no. 3 (1999): 378–97; Rudolph Peters, “Between Paris, Istanbul, and Cairo: The Origins of Criminal Legislation in Late Ottoman Egypt,” in *Studies in Islamic Law: A Festschrift for Colin Imber*, ed. A. Christmann and R. Gleave, (Oxford, UK: Oxford University Press, 2007), 211–33.

<sup>37</sup>Khaled Fahmy, *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* (Oakland, CA: University of California Press, 2018), 123.

<sup>38</sup>Ibid., 179–225.

<sup>39</sup>Ibid., 204–5.

<sup>40</sup>Cases of policing the moral and religious standing of individuals in the public sphere during the 19th century are recorded in Muhammad al-‘Abbasi al-Mahdi’s *al-Fatawa al-Mahdiyya fi al-Waqa’i al-Misriyya*, vol. 5 (Cairo: al-Matb’a al-Azhariyya, 1883), 289–309.

<sup>41</sup>Rudolph Peters, “Muhammad al-‘Abbasi al-Mahdi (d. 1897), Grand Mufti of Egypt, and His ‘al-Fatawa al-Mahdiyya,” *Islamic Law and Society* 1, no. 1 (1994): 66–82.

### Law as a Unifying Social Practice

On 10 September 2014, the Cairo criminal court held a public hearing in the trial of twenty-three defendants charged with participating in an unauthorized protest.<sup>42</sup> The court dedicated the session to examining evidence, including a video the police had found on a defendant's confiscated laptop. The video had no connection to the charges; it only showed the defendant's wife dancing at a private family function.<sup>43</sup> This incident triggered public outrage against the criminal justice system, which was seen to be shaming activists and damaging their reputation.<sup>44</sup> The airing of this video in open court demonstrates more than just a case of police and prosecutor corruption; it also sheds light on a key characteristic of Egyptian modern law: the frequent questioning of morality and the extent to which individuals conform to the moral characteristics, religious beliefs, and sexual behavior deemed socially acceptable. This trend of questioning individual behavior reflects the main feature of modern law in Egypt, which aims to bring the behavior of individuals in line with the moral standards imposed by the state.

In cases related to religion, conformity of individuals to society's moral codes has frequently been questioned. For instance, in September 2012, a group of Muslim citizens in al-Marj district, in eastern Cairo, protested the publication on social media of what they considered content critical of Islam and Christianity in front of the house of a local Coptic family. A member of the family—Alber Sabir—had posted the content. The angry mob then went to al-Marj police station to report Sabir's wrongdoing. Based on their complaint, the police arrested Sabir, searched his house, confiscated his books, mobile phones, and laptop, and referred him to the prosecutor who, in turn, referred him to the al-Marj misdemeanors court on charges of "insulting Abrahamic religions for the purpose of harming national unity." Consequently, the court sentenced Sabir to three years in prison, a sentence that was upheld on appeal.<sup>45</sup> In another case, a mother filed a complaint at the police station against her daughter and her daughter's boyfriend; the couple had publicly stated opinions critical of Islam in the al-Sharqiyya governorate, and the mother accused them of blasphemy.<sup>46</sup>

In addition, individuals file cases to prompt the authorities to ban some forms of artistic expression that, due to content, claimants feel is critical of specific religious principles. In April 2007, for example, a lawyer brought a case before the administrative court calling for the ban of *Ibda'* (Creativity), a magazine published by the Ministry of Culture, after it published a poem that described God as a villager feeding ducks, which allegedly defamed Islam and God. The lawyer filed the case against the Ministry of Culture as the sponsor of the magazine, requesting that Shaykh al-Azhar, Muhammad Sayyid Tantawi, provide his religious opinion to the court. In the hearing on 23 October 2007, al-Azhar submitted its opinion:

After examining the poem, it is apparent that its sentences are meaningless, and the meaning emerges only when the poet insults God Almighty as if insulting God and heresy are the only purposes of publishing this poem. The poet is an infidel promoting heresy and calling [his poetry] creativity.<sup>47</sup>

In April 2009, the court ordered the revocation of the magazine's licenses; the revocation remained in effect until 2015 when the magazine was allowed to resume its activities.

It should be noted that cases of individual personal liberties being obstructed by agents of the state and members of society and cases of censorship imposed on artistic expression in the name of protecting religion are not unique to Egypt or Muslim societies. Historically, liberal Western nations are known to have engaged in similar practices of censorship. For example, in the middle of the 19th century, Britain witnessed intense legal debates over what should be considered normal behavior and what should be

<sup>42</sup>Cairo criminal court, 2013, case 12058, verdict 23 February 2015.

<sup>43</sup>"Egypt: Wife's Dancing Offered as Evidence on Activist," *New York Times*, 10 September 2014, <https://www.nytimes.com/2014/09/11/world/middleeast/egypt-wifes-dancing-offered-as-evidence-on-activist.html>.

<sup>44</sup>Shadi Zalat, "Ba'da Jalsa Muthira li-l-Jadal: Ta'jil Nazar Qadiyat Majlis al-Shura ila 15 September," *Mada Masr*, 10 September 2014.

<sup>45</sup>Al-Marj misdemeanors court, 2012, case 18377, verdict of court of first instance 12 September 2012, verdict of appeals court 30 January 2013.

<sup>46</sup>Faqus misdemeanors court, 2012, case 7517.

<sup>47</sup>Administrative court, judicial year 61, case 21751, decision 7 April 2009.



criminalized as obscene, which led to legal censorship of artistic works.<sup>48</sup> This repressive attitude was exported by Britain to its colonies in India and Australia, where individuals were referred to court for wearing revealing clothes at certain times and in particular places because it was deemed against public order and decency.<sup>49</sup> Currently, the refusal of some European courts to outlaw the display of Christian figures in the classroom while at the same time banning Muslims from wearing religious clothing in the public sphere reveals the contradictions inherent in liberal claims of secularism, the rule of law, and the neutrality of the state toward personal conscience.<sup>50</sup> These contradictory features of liberal legality have played a role in shaping the Egyptian legal system and its punitive and regulatory features.<sup>51</sup> However, although this approach to the impact of colonial and liberal legality is critical of colonialism and Western domination, it neither considers nor gives agency to the influence of domestic factors, including shari‘a, on the modernization of Egypt’s legal system. The third section, to follow, addresses the role of local legal culture in the modernization of Egypt’s legal system. This section addresses the legal framework governing the *hisba* cases mentioned above.

An analysis of illicit acts that concern the state and society cannot be performed without first exploring the logic of Egypt’s Penal Code. The Egyptian Penal Code was initially enacted in 1883 with the establishment of the national courts and has been amended several times since, including two thorough revisions in 1904 and 1937. The key characteristic of this code is its inclusion of provisions that declare certain behaviors as punishable crimes by deeming them breaches of specific legal concepts, including public order, public morals, public decency, national unity, social peace, and public interest. Of the 400 articles in the code, about half are dedicated to criminalizing acts considered harmful to the so-called public interest (*al-maṣlaḥa al-umūmiyya*), whereas only 122 articles address acts harmful to individual interests. The first set of articles deals with acts ranging from armed activities against the state to publishing content that breaches public decency, and the second set deals with crimes ranging from homicide to defamation.<sup>52</sup> Based on the first set of articles, individuals can be criminally liable for publishing false information if this information is seen to be harming the public interest.<sup>53</sup> A woman can be charged with undermining public decency if she publishes pictures of herself wearing a revealing dress.<sup>54</sup> Furthermore, individuals can be detained for their actual or perceived sexual orientation.<sup>55</sup> In addition, and according to the Egyptian state’s official fatwa body, Dar al-Ifta’ al-Misriyya (the Egyptian Fatwa House), police can interfere if someone eats publicly in the day during Ramadan, as this is not an act of personal freedom but an assault on the sacredness of Islam.<sup>56</sup>

Apart from the Penal Code, the Egyptian legal system contains various provisions for state agencies and individuals to hold to account any person who breaches public order, public morals, public interest, etc. According to Article 25 of Egypt’s Code of Criminal Procedures, any individual with knowledge of a crime is entitled to report it to police or prosecutors.<sup>57</sup> On this basis, citizens not only report conventional crimes—such as theft, robbery, or murder—but also are enjoined to report acts that deviate

<sup>48</sup>Deana Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge UK: Cambridge University Press, 2010), 51–52.

<sup>49</sup>*Ibid.*, 130–31.

<sup>50</sup>Nehal Bhuta, “Two Concepts of Religious Freedom in the European Court of Human Rights,” *South Atlantic Quarterly* 113, no. 1 (2014): 9–35.

<sup>51</sup>Samera Esmeir, “On the Coloniality of Modern Law,” *Critical Analysis of Law* 2, no. 1 (2015): 19–41.

<sup>52</sup>Penal Code, Law no. 58 of 1937.

<sup>53</sup>Penal Code, Article 188; Ruth Michaelson, “‘Fake News’ Becomes Tool of Repression after Egypt Passes New Law,” *Guardian*, 27 July 2018, <https://www.theguardian.com/global-development/2018/jul/27/fake-news-becomes-tool-of-repression-after-egypt-passes-new-law>.

<sup>54</sup>Penal Code, Article 178; al-Masry al-Youm, “Egypt Frees Rania Youssef after Provocative Dress Case,” *Egypt Independent*, 7 December 2018, <https://www.egyptindependent.com/egypt-frees-rania-youssef-after-provocative-outfit-at-film-festival>.

<sup>55</sup>“Egypt: 16 Men Jailed amidst Unprecedented Homophobic Crackdown,” Amnesty International, accessed 5 August 2020, <https://www.amnesty.org/en/latest/news/2017/11/egypt-16-men-jailed-amidst-unprecedented-homophobic-crackdown>.

<sup>56</sup>“Don’t Eat in Public’: Ramadan Edict Angers Egyptians,” *BBC*, 16 June 2016, <https://www.bbc.co.uk/news/blogs-trending-36499488>. On Dar al-Ifta’ al-Misriyya see Jacob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dar al-Ifta* (Leiden: Brill, 1997).

<sup>57</sup>Code of Criminal Procedure, Law no. 150 of 1950, enacted 3 September 1950, issued in *al-Jarida al-Rasmiyya* 15 October 1950, entered into force 14 November 1950.

from accepted moral and religious standards. For instance, Alber Sabir was reported to the police by his Muslim neighbors for publishing videos saying that God does not exist. In the videos, Sabir argued that if God existed, he would have listened to the prayers of believers, but he had not, so he did not. Sabir also rejected the idea that God created humans, arguing instead that humans were created from nature. Finally, Sabir asserted that the Prophet authored the Qur'an, not God, and that Jesus and the Virgin Mary were married. The court that sentenced Sabir to imprisonment found that by publishing these opinions he had committed blasphemy according to Article 98 (F) of the Penal Code. This article calls for up to five years of imprisonment or a fine for anyone who

exploits and uses religion in advocating or propagating by talk or in writing or by any other method, extremist thoughts with the aim of instigating sedition and division or disdaining or showing contempt to any of the heavenly religions or the sects belonging thereto, or prejudicing national unity.<sup>58</sup>

In arguing his case against Sabir, prosecutor Sharif al-Sha'rawi stated:

Each society is founded on certain virtues, and one of the deeply entrenched bases for Egyptian society is religious belief and rituals that must not be insulted. Based on these virtues, the penal code criminalizes blasphemy; and while the crime is a great one given that it constitutes defamation against God Almighty, the punishment is disproportionate. Therefore, the prosecutor through this sacred platform calls on making the punishment for this crime as severe as possible.<sup>59</sup>

Al-Sha'rawi was not worried about the threat Sabir's opinions posed to the national unity between Muslims and Christians living side-by-side in the al-Marj district. Instead, the prosecutor had been busy investigating Sabir's faith, integrity, and moral, intellectual, and religious background. During interrogation al-Sha'rawi asked Sabir, "What did you publish?" Sabir responded that he published information extracted from different comparative studies showing that Islam, Christianity, and Judaism are based on ancient myths. The prosecutor then continued, "How did you reach this conclusion?" Sabir answered that he studied literature on the history of religions. The prosecutor then asked for the titles of these books and ended his interrogation by asking Sabir about his religious beliefs. Sabir objected to this line of questioning, as he thought the subject of the interrogation should be the alleged illegal material acts he was accused of rather than his personal beliefs.<sup>60</sup> However, Sabir's objection swayed neither the prosecutor nor the court. Rather, he was sentenced to three years in prison.<sup>61</sup> Sabir appealed this decision and was temporarily released on bail. During this time, he managed to leave Egypt and seek asylum in a European country. In his absence, his sentence was upheld by the appeals court.

In the case of the al-Sharqiyya couple, the prosecutor asked the female defendant if she prayed regularly. When she responded in the affirmative, he asked if she performed all five daily prayers. When she admitted to not regularly performing all five, he ended the interrogation by asking if she suffered any mental illnesses, which she denied.<sup>62</sup>

Criminal courts are not the only places where morality is adjudicated; individuals also can bring cases before the administrative court, requesting that the state act or abstain from acting in a certain manner. Parties must have personal, direct interest in cases they file before the administrative court or join as civil parties. Given that the administrative court's jurisdiction covers the government's administrative decisions, the notion of "personal and direct interest" is related to the wider concepts of public order and public interest. Therefore, private individuals can bring cases calling on the court to reverse administrative decisions that stand against their interests as individuals or as members of specific social groups, such as Muslims, Egyptians, Arabs, lawyers, or teachers.<sup>63</sup>

<sup>58</sup>Penal Code, Article 98 (F).

<sup>59</sup>This quotation is from the report of charges submitted by the director of the East Cairo prosecution office to the al-Marj misdemeanors court.

<sup>60</sup>Ibid., 1–15.

<sup>61</sup>Al-Marj misdemeanors court, 2012, case 18377.

<sup>62</sup>Faqus misdemeanors court, 2012, case 7517.

<sup>63</sup>Administrative court, judicial year 61, case 21751.

In the case of the *Ibda'* magazine's license, the administrative court accepted the opinion of the Shaykh al-Azhar—that the magazine had published content that amounted to heresy—and ordered the revocation of the magazine's license. The court argued that although the constitution protected press freedom, this freedom must be exercised within the scope of respecting the basic foundations of Egyptian society, including religion. The court dismissed the Ministry of Culture's argument that the plaintiff lacked a direct or personal interest in the case, stating that, in the plaintiff's capacity as Muslim and citizen, he had personal and direct interest as the magazine was funded by taxpayers' money and had published content that insulted the sacredness of his religion. In all these cases, individual Muslims, the police, and judicial institutions can be described as practicing *hisba* against those perceived as expressing divergent views on religion, literature, or even private behaviors. The purpose is to maintain a certain type of social cohesion between individuals and to expunge any nonconforming presence from the public sphere of this imagined coherent paradigm of Muslim society.

### *Hisba* from Premodern to Modern Times

Postcolonial scholars such as Hussein Agrama and Saba Mahmood argue that concepts of public order and national unity and the distinction between the public and private spheres are modern inventions of the nation-state, the result of secularization, and have no equivalent in premodern Islamic thought or practice.<sup>64</sup> Agrama in particular tries to illustrate this by pointing to the difference between the rigid system of secular legal institutions and practices belonging to the premodern Islamic tradition. He compares the practices of Egypt's personal status court with the *iftā'* (the giving of a nonbinding opinion on a point of law or religion). Agrama describes the personal status court as full of mutual suspicions between judges and litigants, whereas the practice of *iftā'* is characterized by individuals voluntarily seeking religious opinions on private concerns from muftis who work in institutions belonging to the *iftā'* commission of al-Azhar.<sup>65</sup> Agrama shows that people trust muftis and the practice of *iftā'* more than they trust judges and courts, as the former is a moral platform—not a judicial one—that seeks to provide Muslims with religious opinions to assure them of their compliance with shari'a in their daily lives.<sup>66</sup> By contrast, he argues that the personal status courts are not concerned with individuals' moral needs, but with the responsibility of implementing the legal policy of the secular state.

However, in his comparison of *iftā'* and the judiciary, in which solely the former is seen as imbued with morality and ethics, Agrama fails to consider the other roles *iftā'* plays in the legal system. Specifically, he overlooks the authority of the *iftā'* commission of al-Azhar in providing religious opinions in legal disputes. Based on opinions from al-Azhar, courts have ordered the confiscation of books and the revocation of licenses for cultural magazines, as illustrated by the example of *Ibda'* magazine.

Additionally, the *iftā'* commission of al-Azhar is not the only place where *iftā'* is practiced. Dar al-Iftā' al-Misriyya, which is a different institution, provides official religious opinions on public policy and juridical affairs. Far from showing that Islam was relegated to the realm of personal status law, an analysis of the working of Dar al-Iftā' al-Misriyya offers a picture of the central role played by religion in the Egyptian legal system. In the case of a man who had converted to Islam but sought to return to Christianity, the court relied on a fatwa issued by Dar al-Iftā' al-Misriyya denying him recognition as a Christian on official documents. To elaborate on the limits of religious liberty, Dar al-Iftā' al-Misriyya issued a fatwa stating: "Those who embraced Islam voluntarily and without coercion cannot later deviate from the public order of society by revealing their act of apostasy because such behavior would discourage other people from embracing Islam."<sup>67</sup> This institution also offers fatwas to courts in death penalty cases.<sup>68</sup> Unlike the *iftā'* commission of al-Azhar that Agrama chose to study, Dar

<sup>64</sup>Agrama, *Questioning Secularism*, 20.

<sup>65</sup>On the history of *iftā'* in Egypt, see 'Imad Hilal, *al-Iftā' al-Misri min al-Sahabi 'Uqba ibn 'Amir ila al-Duktur 'Ali Jum'a*, 5 vols. (Cairo: Dar al-Kutub wa-l-Watha'iq al-Qawmiyya, 2013).

<sup>66</sup>Agrama, *Questioning Secularism*, 160–87.

<sup>67</sup>Administrative court, judicial year 61, case 1318, decision 8 January 2008.

<sup>68</sup>"Court Seeks Mufti's Opinion on Death Sentence for Brotherhood Supreme Guide, 9 Others in Qalyub Case," *Mada Masr*, 7 June 2014. <https://madamasr.com/en/2014/06/07/news/u/court-seeks-muftis-opinion-on-death-sentence-for-brotherhood-supreme-guide-9-others-in-qalyub-case>.

al-Ifṭā' al-Misriyya is not interested in instilling good virtues in Muslims or helping to maintain their morality; rather, it is concerned with executing the state's legal policy. Agrama sees the simultaneous espousing of religion and state policy to be a result of Western influence after the reformation of the shari'a courts in 1897, which deprived these courts of jurisdiction over criminal, civil, and commercial matters and limited them to personal status issues. This also is the point he makes when discussing how muftis became subject to state control.<sup>69</sup> However, Agrama's account ignores the fact that the Egyptian state controlled *iftā'* and *shari'a* for centuries before 1897. For example, in October 1848, the state appointed Muhammad al-'Abbasi al-Mahdi as Mufti al-Sada al-Hanafiyya (the Official Hanafi Mufti) to offer opinions to juridical and administrative bodies on matters of law and shari'a from the perspective of the Hanafi school, which was considered the official *madhhab* (school of Islamic jurisprudence) of the state.<sup>70</sup> In 1856, a judiciary ordinance was issued instructing all qadis (judges) of shari'a courts to consult with muftis on difficult cases to avoid errors in the application of shari'a.<sup>71</sup> In 1873, another decree assigned Hanafi muftis to important administrative and judicial bodies in Egypt; and two years before the British occupation of Egypt, the khedive issued an edict to regulate shari'a courts (*la'ihāt al-mahākīm al-shar'iyya*), which stipulated that the grand mufti should review all the appealed rulings of the Cairo and Alexandria shari'a courts.<sup>72</sup> These appointments reflect the state's control of matters of shari'a and law many decades before the 1897 amendment of shari'a courts law.

Furthermore, state control of shari'a to unify its practices was not a 19th-century invention of Egypt's ruling class. Indeed, the Ottoman Empire had controlled shari'a since the 16th century, instructing qadis to apply the most authoritative opinions of the Hanafi *madhhab*.<sup>73</sup> The evolution of the state's shaping of shari'a began with the Hanafi *madhhab* being assigned a position above other *madhhabs* and progressed as the Ottoman Empire established Hanafism as the exclusive reference for legal practices in the 19th century.<sup>74</sup> Moreover, this pattern of state control of shari'a and its apparatuses, including *madhhabs* and shari'a courts, predates the Ottoman Empire. Yossef Rapoport contends that Mamluk sultans maintained legal diversity by allowing individuals to seek litigation before judges belonging to different *madhhabs*, which made the law more predictable and standardized. This decision, which allowed litigants to resort to the qadi whose *madhhab* would suit their best interests, was not imposed on Mamluk sultans by jurists or community religious leaders, but was a state policy to enhance the performance of its judicial practices.<sup>75</sup> It is clear that from the Mamluk time until the 19th century shari'a was not simply a community paradigm or a law that belonged to jurists who were independent of the state, as some Islamic law scholars claim. The fact that the premodern and modern state controlled shari'a through directing qadis and muftis and regulating their work counters postcolonial scholars' claims of the correlation between Western influence and the transformation of shari'a from a communal exhortative paradigm into a coercive central legal system.

### *Ḥisba* and *Muḥtasibs* in premodern Islamic thought and practice

In premodern Muslim societies, local communities enjoyed a margin of autonomy in dispute resolution; when state juridical mechanisms could not satisfy community needs, they could rely on communal solutions. Individuals were able to choose the litigation platform that suited their interests, known as forum shopping or legal pluralism in Islamic legal scholarship.<sup>76</sup> In addition, these communal platforms operated in relative independence from the state and relied on a number of solutions in the solving of legal

<sup>69</sup>Agrama, *Questioning Secularism*, 99.

<sup>70</sup>Hilal, *al-Ifṭā' al-Misri*, vol. 3, 1391–1433.

<sup>71</sup>Peters, "Muhammad al-'Abbasi al-Mahdi," 74.

<sup>72</sup>Al-Waqā'i' al-Misriyya, Law no. 11 of 1880, "La'ihat al-Mahakim al-Shar'iyya," issued 17 June 1880.

<sup>73</sup>Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Stanford, CA: Stanford University Press, 1997), ch.1; and Rudolph Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. Peri Bearman et al. (Cambridge, MA: Harvard University Press, 2005), 151.

<sup>74</sup>Peters, "What Does It Mean," 154–58.

<sup>75</sup>Yossef Rapoport, "Legal Diversity in the Age of Taqlid: The Four Chief Qadis under the Mamluks," *Islamic Law and Society* 10, no. 2 (2003): 210–28.

<sup>76</sup>*Ibid.*, 210–28.

disputes, such as reconciliation and arbitration rather than litigation.<sup>77</sup> The role of community in regulating the moralities of its members through local networks such as the family and community leaders was a fact. However, contrary to the opinions of some postcolonial and Islamic law scholars who see this communal dimension as the sole characteristic of Islamic law, this communal feature constituted only one part of the broader legal culture of premodern and early modern Muslim societies. Resorting to advice, reconciliation, and other communal solutions did not replace coercive mechanisms, including the punishment and litigation controlled and employed by the state and its juridical features, but rather complemented them. Reviewing the historiography of Islamic law and *ḥisba* manuals written and applied in premodern Muslim societies confirms this complementarity between the role of the state and the role of the community. This dual character of Islamic law can be detected in contemporary Egypt in the difference between the *iftā'* commission of al-Azhar, which offers advice to Muslims on matters of religion when they seek it, and Dar al-Ifṭā' al-Misriyya, which provides state juridical institutions with opinions and interpretations that ensure the conformity of state legal policy with shari'a, including in matters of criminal punishment and administrative adjudication.

In premodern and early modern Muslim societies, the state was always present to guarantee security and conformist behavior in the public sphere. In his study of legal processes in medieval Muslim societies, Mohamed Fadel shows that, aside from the plurality of legal forums and community mechanisms for litigants, the state acted in a number of ways to intervene in matters of law, crime, security, and order. This included the *muḥtasib*, the wali *al-mazālim* (official in charge of receiving complaints), and the wali *al-jara'im* (crime investigator).<sup>78</sup> Fadel further states:

In the context of Islamic legal culture, adjudication in the strict sense [*qadā'*] was used to refer to the process that protected private rights, while the imposition of a social standard, whether or not that standard was accepted by the individuals involved in the process, was called *ḥisba*.<sup>79</sup>

It is important to see how *ḥisba* was perceived in premodern Islamic thought and practice. The word *ḥisba* is not mentioned in the Qur'an; instead, the Qur'an contains eight verses calling on Muslims to command right when it is not observed and forbid wrong when it is committed.<sup>80</sup> According to Michael Cook, the debate within Muslim societies regarding the scope of this duty, who should perform it, and who should be its target goes back to the late Umayyad and early Abbasid rules.<sup>81</sup> The earliest known text focusing exclusively on *ḥisba* (not discussing it within the context of other *fiqhī* [jurisprudential] topics) is *Ahkam al-Suq* (Market Rules) by the Maliki jurist Yahya ibn 'Umar (882–901 A.D.).<sup>82</sup> Although Ibn 'Umar did not employ the words *ḥisba* or *muḥtasib* specifically, he did address the regulation of morality in the public sphere, including in the market, the street, and public bathhouses, and *Ahkam al-Suq* is considered the bedrock for later specialized writings on *ḥisba*.<sup>83</sup>

In his writings, Ibn 'Umar was clear that the relevant state authority was responsible for maintaining order in public places. For example, he sometimes referred to this authority as the wali (city governor) and sometimes the sahib *al-sūq* (market governor). He stated that the punishment for violating the rules varied from preventing the wrongdoer from entering the place where the wrongdoing was committed, to damaging the tools used in the commission of the wrongdoing, to beating the wrongdoer as a punishment for the act. Ibn 'Umar's prohibited acts included attending wedding parties where alcohol was offered and musical instruments were played.<sup>84</sup> He stated that women could not attend public bathhouses unless they were ill or in their postpartum period, and that men at these bathhouses must wear

<sup>77</sup>Baldwin, *Islamic Law and Empire*, 65.

<sup>78</sup>Mohamed Fadel, "Adjudication in the Maliki Madhhab: A Study in Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995), 67.

<sup>79</sup>*Ibid.*, 68.

<sup>80</sup>Cook, *Commanding Right*, 13–17.

<sup>81</sup>*Ibid.*, 3–4.

<sup>82</sup>Fahmy, *In Quest of Justice*, 186.

<sup>83</sup>Yahya ibn 'Umar, "Kitab Ahkam al-Suq," ed. M. 'A. Makki, *Sahifat al-Ma'had al-Misri li-l-Dirasat al-Islamiyya fi Madrid 4* (1956): 59–151.

<sup>84</sup>*Ibid.*, sec. 31, 119–20.

towels. If these rules were violated, Ibn 'Umar called for the person in charge of the bathhouse to be punished at the discretion of the ruler and declared that men who attended such bathhouses without wearing towels could not testify in court.<sup>85</sup> In addition, women were prohibited from wearing squeaky sandals in the street because this could attract men's attention; those who violated this rule would be beaten and have their sandals cut.<sup>86</sup>

Ibn 'Umar did not formulate his rules from abstract thought, but according to the social relations in the North African city of Kairouan, where he resided. Kairouan's market governor once asked Ibn 'Umar how Christians and Jews who wore clothes resembling those worn by Muslims should be treated, and Ibn 'Umar answered that they should be beaten, imprisoned, and paraded in Christian and Jewish neighborhoods as a deterrent to others.<sup>87</sup> However, Ibn 'Umar dedicated most of his rules to the appropriate punishments for merchants who cheated when weighing or in the contents of the food or drink they sold in the market. Apparently, Ibn 'Umar's focus on the market stemmed from the fact that this was the public place most attended in Kairouan; this was where the majority of interactions that broke the community's moral norms occurred and therefore required regulation.

After Ibn 'Umar's treatise, al-Mawardi's *al-Ahkam al-Sultaniyya* was the next text that addressed morality in the public sphere in premodern Muslim societies under the explicit rubric of *ḥisba*. In this book, al-Mawardi explained *ḥisba* in relation to the state's authority and coercive measures for maintaining social order, clearly distinguishing between wali *al-mazālim*, qadis, and *muḥtasibs*.<sup>88</sup> He defined wali *al-mazālim* as the person who forces two conflicting parties to reach reconciliation through arbitration when a judicial settlement cannot be reached. To carry out this task, the wali *al-mazālim* relied on his prestige and the respect and fear he engendered within his community.<sup>89</sup> By contrast, qadis were those whom individuals approached to help redress grievances; they considered various circumstances to reach the truth in the cases under their examination. Qadis were to treat people with a certain degree of leniency, as their job was to achieve justice beyond the forbidding of wrong or commanding of right. Finally, *muḥtasibs* fell in the middle between the wali *al-mazālim* and qadis. Whereas *muḥtasibs* could deal with apparent wrongdoings without receiving a complaint, qadis could not hear a case in the absence of a plaintiff or defendant. Furthermore, in dealing directly with alleged wrongdoings, *muḥtasibs* had to maintain an image that instilled fear in people, akin to the wali *al-mazālim*.<sup>90</sup>

Al-Mawardi contended that *muḥtasibs* were allowed to punish wrongdoers by *ta'zīr* (discretionary punishment), which gave the ruler the power to punish illicit acts not explicitly mentioned by the Qur'an.<sup>91</sup> Appointed *muḥtasibs* also could employ assistants to help implement their duties. According to al-Mawardi, volunteers did not have access to such powers, implying that *ḥisba* was primarily a state responsibility.<sup>92</sup>

In *Ihya' 'Ulum al-Din* (The Reviving of Religion's Sciences), Abu Hamid al-Ghazali highlighted *ḥisba* as a coercive practice that forced individuals to behave morally in the public sphere. According to al-Ghazali, the reactions of Muslims to a right not observed or a wrong being committed had different stages, beginning with identification of the wrongdoing without spying on the person subjected to *ḥisba* unless two people told the *muḥtasib* that wrong was being committed in a closed place.<sup>93</sup> Second, the *muḥtasib* should inform the person of the wrong they were committing in case it was unknown to them. Third, the *muḥtasib* should advise the wrongdoer and intimidate the wrongdoer with the divine punishment that awaited if that individual did not abandon these actions. In such cases, the person practicing *ḥisba* must not show religious knowledge arrogantly, but modestly and kindly, otherwise he could not practice *ḥisba*. Fourth, if the wrongdoer ignored advice, the *muḥtasib* could use insults and rebuke

<sup>85</sup>Ibid., sec. 33, 123–24.

<sup>86</sup>Ibid., sec. 36, 126–27.

<sup>87</sup>Ibid., sec. 39, 128; Fahmy, In *Quest of Justice*, 186.

<sup>88</sup>Al-Mawardi, *al-Ahkam al-Sultaniyya*, 352.

<sup>89</sup>Ibid., 130.

<sup>90</sup>Ibid., 352–54.

<sup>91</sup>*Ta'zīr* is the punishment for crimes that do not reach the threshold of *ḥudūd* (punishments) or *qiṣāṣ* (retribution), as well as crimes that are covered by *ḥudūd* or *qiṣāṣ* but do not meet the evidentiary requirements of shari'a.

<sup>92</sup>Al-Mawardi, *al-Ahkam al-Sultaniyya*, 349–50.

<sup>93</sup>Al-Ghazali, *Ihya' 'Ulum al-Din*, 781–836.

(*al-sabb wa-l-tā'nif*). Fifth, the *muhtasib* could change the wrong by “hand” or action, including breaking the tools used to commit the wrong or spilling the forbidden drink. Sixth, the *muhtasib* could beat the wrongdoer without weapons. Finally, and as a last resort, the *muhtasib* could invoke an armed group to command right or forbid wrong.<sup>94</sup> In his *hisba* treatise, the Andalusian jurist Ibn ‘Abd al-Ra’uf (d. 1032 A.D.) stated that the role of the *muhtasib* revolved around maintaining moral order in matters of worship and commercial transaction.<sup>95</sup> Ibn ‘Abd al-Ra’uf contended that the role of the *muhtasib* went beyond regulating morality in the public sphere and included matters of a purely religious nature, such as praying, fasting, zakat, and funerals.<sup>96</sup> For instance, if a man refrained from paying zakat, he should be asked to pay, and the *muhtasib* should incite people in need to ask him to pay.<sup>97</sup> In addition, Ibn ‘Abd al-Ra’uf outlined that the *muhtasib* should stop men and women from praying together in the mosque; male beggars should be deterred from entering the women’s area of the mosque unless they were old and known to be pious, and female beggars should be forbidden from entering the men’s area under any circumstances. In such cases, the *muhtasib* should first warn the person violating the rules and, if the concerned person did not obey, then beat him or her.<sup>98</sup> Regarding commercial transactions, Ibn ‘Abd al-Ra’uf mentioned many examples of when and how the *muhtasib* should punish merchants who cheated when weighing, on the contents of the food or drink they sold, or on the price.<sup>99</sup>

Continuing with *hisba* treatises focusing on markets and commercial transactions, the Syrian jurist and judge ‘Abd al-Rahman al-Shayzari (d. 1193 A.D.) wrote the most famous manual on the subject, *Nihayat al-Rutba fi Talab al-Hisba* (The Highest Rank in *Hisba*). This work was written at the request of a newly appointed *muhtasib* who required a text bringing together the most important rules of *hisba*. Al-Shayzari divided the manual into forty chapters, thirty-five of which addressed practicing *hisba* in the market. In these chapters, he offered detailed instructions regarding cheating, weighing, prices, and tricks used by merchants to deceive buyers. The five remaining chapters focused on the characteristics of the good *muhtasib*, *hisba* against non-Muslims, and *hisba* in public bathhouses.

In the Egyptian context, the Shafi’i jurist known as Ibn al-Ukhuwwa (1250–1329 A.D.) drew on all the above-mentioned sources in his treatise, *Ma’alim al-Qurba fi Ahkam al-Hisba* (Features of Kinship on the Rules of *Hisba*), in which he offered a detailed explanation of commanding right and forbidding wrong.<sup>100</sup> Following al-Mawardi’s methodology, Ibn al-Ukhuwwa stated that there were three types of rights that were subject to *hisba*: *huquq Allah* (claims of God), *huquq al-‘Adamīn* (claims of men) and *mā kana mushtarakan bayna al-ḥaqqayn* (rights that concerned both God and men). Regarding claims of God, Ibn al-Ukhuwwa outlined that *muhtasibs* should punish those who ate during the day in Ramadan if they had no legitimate reason to refrain from fasting. Indeed, Ibn al-Ukhuwwa stressed that practicing *hisba* with regard to fasting was a very important deterrent for others.<sup>101</sup> In addition, contact between men and women was punishable under certain circumstances, such as when a man talked to a woman or looked at her without legitimate reason, or if a man harassed a woman. In such cases, the *muhtasib* should punish the man by *ta’zīr*.<sup>102</sup> Furthermore, the *muhtasib* must immediately interfere in matters considered to be claims of God; however, in matters related to claims of men (for example, debts), the *muhtasib* could not interfere without a request from the one wronged, such as the creditor requesting help to regain the money from the debtor.<sup>103</sup>

In Mamluk Egypt, sultans appointed *muhtasibs* to inspect markets and monitor the behavior of merchants. According to Kristen Stilt, *muhtasibs* in Cairo markets had a stand (*dikka*) from which they

<sup>94</sup>Ibid., 806–10.

<sup>95</sup>Ahmad ibn ‘Abd Allah ibn ‘Abd al-Ra’uf, “Risalat Ahmad ibn ‘Abd Allah ibn ‘Abd al-Ra’uf fi Adab al-Hisba wa-l-Muhtasib,” in *Thaathat Rasa’il Andalusiyya fi Adab al-Hisba w-al-Muhtasib*, ed. Levi Provencal (Cairo: Matba’at al-Ma’had al-‘Ilmi al-Faransi li-l-‘Athar al-Sharqiyya, 1955), 68–116.

<sup>96</sup>Ibid., 70–79.

<sup>97</sup>Ibid., 79.

<sup>98</sup>Ibid., 74.

<sup>99</sup>Ibid., 90.

<sup>100</sup>Muhammad ibn Muhammad ibn Ahmad al-Qurashi, *Ma’alim al-Qurba fa Ahkam al-Hisba* (Cairo: al-Hay’a al-Misriyya al-‘Amma li-l-Kitab, 1976).

<sup>101</sup>Ibid., 78.

<sup>102</sup>Ibid., 83.

<sup>103</sup>Ibid., 76.

observed and whipped those who cheated when weighing their goods.<sup>104</sup> *Muhtasibs* were instructed to parade cheaters publicly as punishment and, at the same time, to deter other merchants from cheating. Indeed, *muhtasibs* had detailed manuals to guide them in carrying out their duties, including information on merchants' tricks.<sup>105</sup>

From the above brief analysis, one can detect three common features shared by all *hisba* treatises, from Yahya ibn 'Umar to Mamluk Egypt. First, the public sphere, that is, the market, street, mosque, bathhouse, or funeral, was the main spatial focus of *hisba*. Second, although the *muhtasib* was urged to first advise the wrongdoer to cease the reprehensible act, in most instances he also was authorized to use physical force against the individual. Third, the aim of a *hisba* punishment was not only to correct deviant behavior in one individual, but also public deterrence. It also should be noted that review of the treatises of Ibn 'Umar, al-Ghazali, and Ibn 'Abd al-Ra'uf illustrates that the idea of communal moral criticism against deviant behavior in the public sphere did exist. This exhortative dimension of *hisba* can be inferred from the advice given to the wrongdoer as a first response by the *muhtasib*. However, this friendly advice coexisted with the infliction of punishment in cases of disobedience. This premodern understanding of *hisba* aimed to prevent wrongdoing through any means, including resorting to coercive tactics, which stands in stark contradiction to Agrama's contention that violence in the application of *hisba* in modern Egypt is an invention of the nation-state.

The fact that *hisba* was a coercive measure in premodern Muslim societies does not mean that it has survived for centuries without change. In the next sections I will clarify the shifts that took place in the concept and practice of *hisba* after the modernization of the Egyptian legal system in late 19th and early 20th centuries.

First, it is helpful to understand the relationship between *hisba* and other legal mechanisms, such as *qaḍā'* (adjudication), in premodern Muslim societies. In practice, the boundaries between the jurisdictions of *qaḍā'*, *hisba*, and *mazālim* differed and overlapped over place and time. The difference between acts handled by qadis and those that fell under the jurisdiction of *muhtasibs* is that the former were crimes and disputes that required strict procedures and had a certain threshold the criminalized act must reach and clear evidentiary requirements, especially witnesses and confession. Qadis dealt with crimes defined by the Qur'an and sunna, that is, *hudūd* crimes (sing. *ḥad*) such as theft and adultery. On the other hand, *muhtasibs* were instructed to deal with offenses that did not reach the threshold of crime. This difference between crimes and less serious offenses can be inferred from comparing how Islamic law determined legal actions against adultery with the response of *muhtasibs* to suspicious behaviors by women and men in the public sphere. As noted above, Ibn 'Umar banned women from attending public bathhouses unless they were ill or in their postpartum period. He also forced men to wear towels while in bathhouses. Women were banned from wearing squeaky sandals that would attract men's attention. In the same vein, al-Mawardi stated that the *muhtasib* intervenes when a man talks to a woman in an unattended place. These acts by men and women did not belong to the *hudūd* category of crimes. However, and according to the logic of al-Mawardi and Ibn 'Umar, if these women and men were left to behave as they pleased without intervention, they would be seduced to commit more serious acts that reached the threshold of crime, such as adultery. This space of less serious offenses than crime defines the role of the *muhtasib*.<sup>106</sup> It is sufficient for the *muhtasib* to see any man or woman in one of the above-mentioned situations to intervene. However, in the case of adultery the matter is completely different. According to al-Mawardi, the authority responsible for trying such crime cannot hear the case unless the defendant describes in detail what happened during intercourse, and the defendant's description must meet the shari'a definition of adultery for the *ḥad* punishment to be applicable. If the defendant denies the deed, there must be witnesses who meet certain requirements, otherwise the act under examination by the qadi does not amount to the crime of adultery punishable by *ḥad*. From this perspective, Fadel notes that procedural restrictions on the practice of *qaḍā'* gave *muhtasibs* broad discretion to deal with acts that fell outside the jurisdiction of qadis.<sup>107</sup> Although these were minor

<sup>104</sup>Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford, UK: Oxford University Press, 2012) 49–50.

<sup>105</sup>Ibid., 56.

<sup>106</sup>On restrictive procedures when handling crimes, see al-Mawardi, *al-Aḥkam al-Sultaniyya*, 322.

<sup>107</sup>Fadel, "Adjudication in the Maliki Madhhab," 68.



infractions compared to the crimes of theft, adultery, or homicide, they were more numerous, and intervention by *muhtasibs* did not need to be justified by restrictive procedures.

### *Hisba* in 19th-Century Egypt

The *muhtasib* in Egypt survived until the 19th century. The practice of *hisba* was employed by Mehmed Ali (r. 1805–49) to control prices and the quality of goods and commodities. To understand how the *hisba* institution developed during the Pasha's rule, consider the juridical scene during this era. The early efforts of Mehmed Ali to codify law is evidence of the state's focus on the public sphere, including public order, public money, and public officials. Indeed, all of Mehmed Ali's legislative orders are classified as *siyāsa* codes in the historiography of Egypt's 19th-century legal system. *Siyāsa* is an Islamic concept that refers to the ruler's right to employ his own discretion in taking certain administrative or legal actions when faced with a judicial matter that cannot be appropriately handled through *fiqh*.<sup>108</sup> Mehmed Ali established new judicial entities called *siyāsa* councils that were responsible for applying these new codes. The *siyāsa* councils served a number of purposes: dealing with legal matters that could not be resolved in shari'a courts for lack of a legal framework; overcoming obstacles related to the strict evidentiary requirements of shari'a that relied primarily on witnesses and confession; and allowing the state to maintain public order through its power to sanction.<sup>109</sup> However, according to Khaled Fahmy, *siyāsa* councils were not secular entities that marginalized shari'a; rather, they were Islamic legal forums that exercised *ta'zīr*, giving the state discretion beyond the limited legal resources of shari'a courts. Within this dual system of *siyāsa* councils and shari'a courts, *hisba* belonged to the *siyāsa*, as it was within the state's purview to maintain social order.

It should be noted that the position of the *muhtasib* was affected by social and bureaucratic changes during the 19th century. In 1830, Mehmed Ali issued a law on price setting that limited the power of *muhtasibs* to act according to *ta'zīr*; this law outlined fixed punishments for merchants who charged more than the state-authorized prices.<sup>110</sup> Prior to this, *muhtasibs* in Cairo could use their own discretion to determine punishments. Between 1816 and 1817, the *muhtasib* decreed that merchants who price gouged be punished by piercing their noses and hanging the overpriced commodity from the nose.<sup>111</sup> In 1835, Mehmed Ali issued a law imposing even further restrictions on the power of *muhtasibs* to punish wrongdoers by limiting corporal punishments to a maximum of fifty lashes, thereby eliminating the broad discretion *muhtasibs* had previously enjoyed.<sup>112</sup>

In 1837, Mehmed Ali issued a *siyāsa* code that completely abolished the *muhtasib* offices in Cairo and Alexandria and transferred their duties to police and the health administration in the two cities.<sup>113</sup> Then in 1841 he issued a new decree, this time to deal with the outbreak of plague in Alexandria. This decree confirmed transfer of the duties of the *muhtasib* to physicians and the police, reducing the *muhtasib*'s role to merely informing on incidents related to the application of the decree.<sup>114</sup> Another important development was the shift in the focus of *hisba* from monitoring public morals in markets to public health and hygiene.<sup>115</sup> To support these claims, Fahmy provides archival evidence that the Egyptian public health system witnessed comprehensive development in this time. Such developments included the establishment of the Qasr al-ʿAyni chemical-pharmaceutical lab, which coordinated everything related to drugs, chemicals, and the investigation of food quality. The Department of Health Inspection of Cairo, along with its ten offices, worked alongside the lab and provided a monitoring system through its doctors, who toured the city checking on the cleanliness of the streets, the disposal of refuse, and

<sup>108</sup>Fahmy, In *Quest of Justice*, 81–131.

<sup>109</sup>Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge, UK: Cambridge University Press, 2009) 12–16.

<sup>110</sup>Imad Hilal, *Wathā'iq al-Tashrī' al-Jinā'i al-Misri: Sijil "Majmu' Umur Jinā'iyya"* (Cairo: Dar al-Kutub wa-l-Wathā'iq al-Qawmiyya, 2011), 27.

<sup>111</sup>Ibid., 28.

<sup>112</sup>Ibid., 37–38.

<sup>113</sup>Fahmy, In *Quest of Justice*, 202.

<sup>114</sup>Ibid., 181.

<sup>115</sup>Ibid., 204–5.

the quality of food. Police toured with these doctors, providing them with the force necessary to implement their mandate; for example, seizing samples of suspect food.<sup>116</sup>

The marginalization of the *muhtasib* role in 19th-century Egypt was not a result of the abolition of shari'a, but instead due to social developments, including the expansion of Cairo and the increase in commercial transactions that rendered the traditional role of the *muhtasib* insufficient.<sup>117</sup> The value of *muhtasibs* who knew their neighborhoods well and could obtain information about wrongdoings in markets through small social networks became redundant. The duties they had performed were not lost, but instead bureaucratized and integrated into the new state administrative system that included physicians, chemists, police, the grand mufti, and city governors.

### Moralities of Criminal Law in the Late 19th and Early 20th Centuries

In 1883, new national courts were established and the *siyāsa* councils' jurisdiction over criminal and administrative matters was transferred to these new courts: a move that can be seen as the final stage in the development of Egyptian law and served to usher in the legal system still operating today.<sup>118</sup> The new courts imposed their jurisdiction over all criminal, civil, commercial, moral, and administrative legal disputes.

The current Egyptian Penal Code, Law no. 158 of 1937, is based on the first comprehensive penal code issued in 1883, which was amended in 1904. These codes criminalize acts of defamation of religion and acts against public decency, public interest, and public order. The way in which these codes textualize the criminalization of such acts is interesting. Although the 1883 Penal Code criminalizes acts that breach public decency through Article 256, we find that Article 245 criminalizes the sale of contaminated food, drink, or medicine harmful to public health. This raises questions about the relationship between public decency and the sale of food and drink. The relationship becomes clearer in a later section of the code that deals with contraventions punished by fines and short-term imprisonment. This includes contraventions that occur in certain places or against certain interests or individuals, including contraventions on highways, against public safety and tranquility, against public health, against public decency, against public authorities, and in the marketplace. Article 341 of this section prohibits putting items on the road that would bother pedestrians and punishes those who use sick animals for transportation or burden them with heavy weights; Article 348 fines those who sell perished food or drinks; and Article 350 punishes those who appear in the public thoroughfare wearing clothes not in line with public decency, who wash in the public thoroughfare wearing these clothes, or who are caught in a state of drunkenness. This section of the 1883 Penal Code deals not only with reprehensible acts committed in violation of rules established to maintain the public sphere, but also with abstaining from necessary acts. For instance, Article 343 outlines a fine of up to 75 piasters for those who are able to but do not help in cases of drowning, fire, flood, robbery, and the like.

Upon close inspection, these provisions illustrate that the essence of *ḥisba* is retained in modern Egyptian law, as the penal and moral dimensions of law are interwoven into one code. The idea of criminalizing acts that violate public decency or morals is not merely aimed at eliminating controversial behavior, such as drinking alcohol in public; rather, this prohibition is entangled within a wider moral system. Offering help to a drowning person carries the same weight and responsibility as refraining from wearing revealing or indecent clothing in public spaces. This moral dimension of criminal law is not free of coercion, as it subjects individual morality to criminal trial and punishment.

This is not a system imposed on Egypt by Western liberalism; it is derived from shari'a. It should be noted that although many scholars have argued that the 1883 Penal Code was derived from the French Napoleonic Penal Code, Philippe Jallad in his comparison of the two shows that most provisions that deal with contraventions were not, in fact, influenced by the French code, unlike the provisions in the felonies

<sup>116</sup>Ibid., 217.

<sup>117</sup>Ibid., 218–24.

<sup>118</sup>“La'ihat Tartib al-Mahakim al-Shar'iyya, Amr 'Ali,” issued in *al-Waqa'ī al-Misriyya*, 5 June 1897. Article 16 restricted the jurisdiction of shari'a courts to matters of waqf, marriage, divorce, child custody, dowry, etc.

and misdemeanors sections.<sup>119</sup> Consider the section including Articles 328 through 347 of the 1904 amendment on the 1883 Penal Code. Of these twenty articles, only seven were influenced by the French code; the remaining thirteen were introduced by the Egyptian legislature. Moreover, these thirteen articles bear an uncanny resemblance to the spheres where *ḥisba* should be applied according to al-Ghazali's *Ihya'* *ʿUlum al-Din*, namely, actions that occur in markets (*munkarāt al-aswāq*), actions in the streets (*munkarāt al-shawāri'*), actions in public bathhouses (*munkarāt al-ḥamāmmāt*), and general wrongdoings (*munkarāt ʿamma*).

The penal codes of 1883, 1904, and 1937 involved criminalizing acts previously under the purview of *muḥtasibs*. From 1883, newly established national courts superseded the *muḥtasib* in applying these codes and, in turn, judges became responsible for examining cases that involved breaches of public decency, defamation of religion, cheating related to food and drink, and other wrongdoings that were the target of *ḥisba* prior to the abolition of the *muḥtasib* office. The inclusion of the rules of *ḥisba* in the 1883 Penal Code was an important step in the history of modern Egyptian legislation. From that moment onward, *ḥisba* played a central role in the transformation of reprehensible acts to crimes investigated by the police and prosecutors, punished by codified laws, and tried by judges. The role of private individuals who bore the duty of commanding right and forbidding wrong according to the premodern understanding of *ḥisba* also witnessed change under the modern Egyptian legal system. Private individuals can still bring before the criminal and administrative judiciary claims against fellow citizens suspected of committing acts in violation of certain religious or moral standards or claims against government decisions perceived to deviate from shari'a. However, whereas the court in Nasr Abu Zayd's case understood the plaintiffs' claim to emanate from a Muslim's duty to command right and forbid wrong, in other cases, especially those examined by the administrative judiciary, this duty is not the threshold that determines if the court accepts or dismisses the claim. In December 1997, the Supreme Administrative Court delivered its decision in a case filed by an Islamist plaintiff against the Ministry of Health regarding a decision issued by the latter prohibiting female genital mutilation in public and private medical facilities and criminalizing the procedure if it was conducted by non-physicians. The claimant argued that female circumcision was a religious ritual and that its abolition violated Article 2 of the Egyptian constitution, which stipulates that shari'a principles are the main source of legislation. The court dismissed this substantive argument on the ground that the decision did not violate a universally recognized rule of Islamic law, given that female circumcision, although recognized as a meritorious act by some traditional Islamic law scholars, is not given the same importance by other scholars. However, the court did not dismiss the right of the plaintiff to challenge the decision in the first place. The court did not perceive the plaintiff as a Muslim who bore the duty of commanding right and forbidding wrong, but as a Muslim who had the right to know if Egyptian law permits or prohibits female circumcision.<sup>120</sup> This shift from the concept of commanding right and forbidding wrong to the concept of a Muslim's right to challenge certain legal developments because of their inconsistency with shari'a does not mark a discontinuity in the Islamic tradition of *ḥisba*, but rather reflects the reconfiguration of this tradition within the modern Egyptian legal system. This reconfiguration is not a result of the Egyptian state's abandonment of shari'a, but a consequence of its tendency to reconcile the premodern Islamic legal tradition with the exigencies of modernity and power centralization.<sup>121</sup>

## Conclusion

The manner in which the 1883 Penal Code divided the contraventions that the modern criminal justice system deals with—such as contraventions on highways, against public safety, against public health, and related to public decency—is remarkably similar to the way al-Ghazali divided the wrongdoings *muḥtasib* should confront into *munkarāt al-aswāq*, *munkarāt al-shawāri'*, *munkarāt al-ḥamāmmāt*, and *munkarāt*

<sup>119</sup>Philippe Jallad, *al-Qamus al-'Am li-l-Idara wa-l-Qada'*, vol. 7 (Cairo: Matba'at al-Ma'arif 1908), 121–26.

<sup>120</sup>Mohammad Fadel, "Judicial Institutions, the Legitimacy of Islamic State Law and Democratic Transition in Egypt: Can a Shift toward a Common Law Model of Adjudication Improve the Prospects of a Successful Democratic Transition?" *International Journal of Constitutional Law* 11, no. 3 (2013): 646–65.

<sup>121</sup>Ibid., 649.

*amma*. This similarity is unsurprising when one recognizes that the modern Egyptian legal system derives several of its main characteristics from shari'a. Shari'a that operated in the country for centuries before colonialism continued to contribute to the formulation of legal policy in modern and contemporary Egypt. Although European influence on Egyptian law and legal institutions is undeniable, this influence is not enough to explain how the law's penal and moral dimensions were interwoven into the same legal system. The introduction of new courts and legal codes in 1883 did not constitute a separation of religion from the state as Islamists and postcolonial scholars have argued; rather, religion has been bureaucratized in the laws and courts. This bureaucratization of shari'a is not only traced through analyzing Islamic legal thought, as Leonard Wood argued, but also by studying the legal practices of criminal and administrative courts as well as the legal opinions of al-Azhar and Dar al-Ifta' al-Misriyya.

Furthermore, modern law and legal institutions in Egypt can be understood as a coercive set of structures that seek to unify Egyptian society under a specific system of moral concepts. The lack of distinction between such practices as cheating in the marketplace, drinking alcohol publicly, and expressing a controversial opinion about religion (all acts criminalized under the state penal system) is based on this logic.

As seen in this article's review of the treatises of premodern Muslim societies, *hisba* has always been a state penal mechanism, not simply a system of care for the self. This is true in both premodern and modern Muslim societies. The main difference between these eras is the reconfiguration of modern society through the marginalization of community and the replacement of qadi courts and *muhtasibs* by a modern criminal justice system of judges, police officers, and prosecutors that appropriate the jurisdiction of all former mechanisms.

Moreover, within the modern state's juridical structures, the individuals who reported Alber Sabir's controversial expressions to the al-Marj Police Station did not have to use the word *hisba*. Nevertheless, as Muslims keen on stopping what they perceived as a wrongdoing, their motivation was consistent with the state's tendency to invite society to purify itself from elements threatening its alleged cohesion. Likewise, the lawyer who sued *Ibda'* magazine and the Islamist litigant who sued the Ministry of Health over female circumcision were aware that they were practicing *hisba*, even if the court did not recognize their capacities to file the cases as emanating from the duty of commanding right and forbidding wrong. In these cases, shari'a shaped and led to the state's concrete actions of sentencing Sabir, revoking the license of *Ibda'*, and dismissing the female circumcision case. Furthermore, the prosecutors and judges who question the beliefs and moral values of defendants, examining how they fit into a socially acceptable mold, also practice a different form of *hisba*, a form whose focus shifted in the 19th century from monitoring public morals in the market to maintaining public health. *Hisba* in the 20th and 21st centuries is concerned with the protection of the public order.

This public order, which involves conceptions pertinent to the public sphere such as public interest, public decency, and national unity, shapes Egyptian social life in its entirety, regardless of religious, sexual, or political differences: there are certain characteristics by which all must abide to be acceptable in the public sphere. The design not only forbids individuals from committing certain acts, but, more importantly, it constructs a specific image of the ideal citizen, instills certain moralities, and instructs the citizen to behave in a specific way. These moralities seek to unify Egyptian society under a certain narrative and require individuals to perceive themselves not as men and women, Muslims and non-Muslims, rich and poor, or conservative and open minded, but as Egyptians first and foremost. The state does not impose this unifying paradigm by treating citizens as equal, irrespective of difference, but instead by restricting difference; it does not only apply direct repression on individuals, but guards these moralities by eliminating distinction between the state and society and allowing individuals to participate in the protection of this moral system. This *indistinction* between state and society in guarding the moral order can be considered the goal of Egypt's secular project. However, as my article's review of the development of the Egyptian legal system has demonstrated, the process of secularization did not occur simply through the introduction of Western liberal legal thought, but more significantly within the local state-building process, through the centralization of power since the 1820s in tandem with the juridical aspects of shari'a as state law, not merely an exhortative moral paradigm.