

HISBAH BILL: THE OBJECTIVE REVIEWED

Reference to be provided by Prof. Khurshid

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Having a look at the objections, which are more in the nature of the specter to raise alarm, and the alarm bells are being sounded since the day the Hisbah Bill was introduced in the Provincial Assembly one feels as if the Hisbah-detractors believe in the Goebbels' dictum that a lie should be repeated so many times that it may sound as true. Still in the spirit of dialogue and understanding we are anglicizing these objections in the following:

- **Violates the Constitution:** The first objection raised is that the Hisbah Bill is in violation of the Constitution. There cannot be a bigger lie than this. The Constitution's Preamble, which contains the Objectives Resolution and now forms part of the substantive provisions of the Constitution as its Article 2-(a), clearly states the following in respect of the State's responsibilities:

"Wherein the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Qur'an and Sunnah"

This has further been explained in Article 31. Article 37(g) seeks to prevent the social and moral ills and Article 38(f) aims at the elimination of Riba.

It has been claimed that the Bill is in conflict with the fundamental rights and in this context Articles 19 and 20 of the Constitution have been mentioned. But the factual position is that these Articles do provide guarantees for Fundamental Rights, but with the Proviso that these were subject to conformity with the State religion Islam and the dictates of national solidarity, security, defence, foreign relations, law and order and the nation's moral conduct.

The Council of Islamic Ideology in its report of September 2004 has opined that the Bill violated Article 175 (c) of the Constitution. The fact of the matter is that the above Article relates to of the separation of the Judiciary from the Executive — a provision still awaiting enforcement. The Hisbah system, on the other hand, is essentially an administrative set-up and is to function in close coordination with the Province's entire administrative machinery, including the Judiciary, while the Judiciary itself would be outside its purview (Article 2/3).

- **Objections on Modus Operandi:** A lot many misgivings are being spread against the modus operandi of the Hisbah system. According to the Bill, the Hisbah Authority is proposed to function in the following manner:
 - i. Education and Persuasion;

- ii. Administrative check and taking measures through concerned department, including the Police and other agencies.
- iii. Investigation and enquiry on the people's complaints, or suo-moto, and taking corrective measures under the law.
- iv. Vigilance against the Provincial Administration, other than the Judiciary and the Assembly, and to check the misuse of power and provide the aggrieved his due. The Hisbah Authority will get the concerned agency do its job by issuing directive, as done elsewhere in the world by the Ombudsman's office, or Administrative Tribunals.

It may be added that the proposed Hisbah system is the exclusive prerogative of the Provincial Assembly under the Constitution. The Federal List of the Constitution includes only the office of the Federal Ombudsman and it is not there in the Concurrent List. The Hisbah system, therefore, comes under the exclusive jurisdiction of the Province and any interference by the Centre in this regard would lend a fatal blow to the provincial autonomy and would have far-reaching consequences.

- **Violation of Privacy:** It is further claimed that the Hisbah system seeks to interfere in the individual's private life. When one goes through the Bill, he finds the apprehensions utterly misplaced and ill-founded. The institution concerns entirely with the social aspect of the people's lives and their fundamental rights. Islam has provided safeguards to the individual's privacy, hearth and home and this is part of the fundamental Islamic values. The Hisbah system is the guardian of the sanctity of this privacy and not its violator. Its responsibilities undoubtedly include the reformation of the social evils and the promotion of healthy conduct. But the real message of the Bill is that the fundamental rights are to be protected, the oppressed are to get their due, the women and children must get fair deal; and above all, the justice is to be quick and cheap and the essential facilities must reach all and sundry wherever they may be. It seeks, therefore, to right the wrong at the district as well as Tehsil levels and promote the time- tested system of Jirga and mutual consultations, instead of the curse of litigations and law-suits.

The functions of the Provincial Muhtasib (Ombudsman) include the following:

- i. to ensure observance of the Islamic social values at public places;
- ii. to discourage extravagance, specially on the occasions of wedding and family functions;
- iii. to strictly follow the parameters defined by Islam for Dowry;
- iv. to discourage beggary;

- v.** strict observance of the Islamic ethics and values in respect of Iftar and Taravah Prayers;
- vi.** to discourage sports and commercial activities near the places of Jum'ah and Eidain congregations;
- vii.** to check administrative slackness regarding the arrangements for the observance of Jum'ah and Eidain Prayers;
- viii.** to ensure proper maintenance of the mosques;
- ix.** to ensure strict observance of the Azan and Salah timings and proper respect for the Islamic norms and values;
- x.** to prevent misuse of loudspeakers and its abuse in mosques for sectarian purposes;
- xi.** to discourage un-Islamic social customs and traditions;
- xii.** to discourage the incidence of child labour;
- xiii.** to prevent delay in the payment of dues and provide necessary succor;
- xiv.** to prevent cruelty to animals;
- xv.** to prevent the innocent people's exploitation by the sorcerers, palmists, and those who indulge in various un-Islamic superstitious practices;
- xvi.** to safeguard the rights of the minorities' and preserve the sanctity of their places of worship;
- xvii.** to protect and safeguard the women's rights and take steps against the un-Islamic customs of honor-killing, forced and uneven marriages and the incidence of depriving them from their right of inheritance, as also to assure the availability of the rights guaranteed to them by the Qur'an and Sunnah;
- xviii.** to protect the healthy market-values, prevent adulteration and other corrupt practices and supervise the accuracy of weights and measures;
- xix.** to check hoarding and manipulated inflation; and
- xx.** To stop corruption and bribery in Government offices.

Now, it is for everybody to see and then ask: "Are these measures, envisaged under the proposed Hisbah Bill contrary to the human rights and if implemented would they lead to more corruption and oppression, or provide justice and fairplay to the people — men, women and children?"

- **The Talibanization Phobia:** Yet another objection being leveled against the Bill is that it would lead to the Talibanization of the Province. Without entering into any debate about the merits and demerits of the phenomenon called Talibanization, we would like to stress once again that the Hisbāh concept is much older than the Taliban era. As mentioned earlier, the Objectives Resolution of 1949, followed by the Khawaja Nazimuddin Committee Report of 1953, had recommended Hisbāh measures long ago. The latter, in Chapter 2 on the 'Guiding Principles of the State Policy'¹ inter-alia said:
 - i. The state will seek guidance from the principles identified in the Objectives Resolutions for all its activities and policies.
 - ii. Steps as mentioned below will be taken in different spheres of the Government activities to enable the Muslims fashion their individual and collective lives in accordance with the injunctions of the Qur'ān and the Sunnah:
 - a. Facilities will be provided to help them understand what does it mean by leading a life according to the dictates of the Holy Qur'ān and the Sunnah and instructions in the Qur'an will be made obligatory.
 - b. Drinking of wine, gambling and all forms of prostitution will be banned.
 - c. Elimination of Riba (Interest) as soon as possible.
 - d. Propagation and maintenance of Islamic moral values.
 - e. Proper management of Zakah, Auqaf and the mosques.
 - iii. In order to educate the Muslim masses about the Islamic teachings an organization will be set up for 'امر بالمعروف والنهي عن المنكر' (Enjoining the Right and Forbidding the Wrong).

Repeated reference has been made to the CII comments of 2004. We would discuss these in detail later on, but let us see first what the Council of Islamic Ideology has itself earlier said regarding the Hisbāh institution. In its Recommendations of December 1996, submitted to the Parliament, the CII

had proposed the establishment of the Hisbāh institutions not only at the Centre but also at the Provincial level to discharge its responsibilities of الأمر بالمعروف والنهي عن المنكر.

The Council in its 1996 Report had interalia said:

“Responsibilities of Hisbāh Institution (CII Recommendation — 1996:

Keeping in view the fact that the basic objective of Hisbah as an institution is to carry out the joint responsibility of the Muslim community (Ummah) and the Islamic state in respect of enjoining the right and forbidding the wrong, and the role that the Hisbah institutions have played in this regard during the various periods of Islamic history, it would be essential to determine the following functions of the institution if established in Pakistan today:

- i. Prevention of the social evils and wrong-doings not covered under Pakistan's Penal and Criminal Laws.
- ii. To make the traders and those engaged in commercial activities at the shopping centers and market places observe the Islamic moral conduct.
- iii. To supervise the observance of collective acts of worship, such as Eidain and Jum'ah Prayers.
- iv. To prevent the activities and measures responsible for the growth and development of the ills and vices disapproved by the Shariah.
- v. Prevention of the evil practices of daily occurrence in commercial dealings, like adulteration, fraudulent activities and mischief.
- vi. To check the people from the oppressive treatment of the weak and those under their charge, including their subordinates, servants and animals."

Hisbah Institution at the Federal Level:

In order to avoid unnecessary duplication and complication, it was recommended in the CII Report of 1996 that: "The name of Muhtasib (Ombudsman) and his Secretariat may be retained for the time being and an independent and autonomous Hisbah set up may be established to look after such matters and petty crimes which have so far gone unnoticed and unchecked.

On the national level, a Federal Hisbah Authority may be set up under the Presidential directive to supervise the work concerning accountability and fulfill the responsibility of coordination and cooperation in this respect. The Authority may be headed by an eminent religious scholar who may be well-qualified for appointment as a Member of the Supreme Court's Shariah Bench, or by some senior judge, with leading Ulama and senior officials of the Federal Government at its panel.

Provincial Hisbah Board:

At the Provincial level, the Governors will set up 'Hisbah Board' in each Province, in consultation with the Federal Hisbah Authority, to look after the responsibilities of Hisbah in the Provinces and for a better coordination and cooperation in this regard and also to establish rapport with the Provincial Government and its various agencies.

The Provincial Hisbah Board may be headed by a qualified religious scholar, capable of becoming the Judge of the Federal Shariāh Court, with senior Ulama as its members. Similarly, *Hisbah* Councils may be set up in each district, to be headed by an eminent local figure and called 'Muhtamim Hisbah'. The District *Hisbah* Council would look after the activities of the Believers in the high of the Islamic social and moral norms and would facilitate the observance of the good and prevention of the bad. Similarly, a 'Tehsil Hisbah Committee' would be set up, which would appoint 'Nazir Hisbah' in sufficient numbers in consultation with the District Hisbah Council. The Nazir Hisbah'; supported by necessary staff, would carry out his function. His staff would also include some armed men, to be called the '*Hisbah Force*'. Nazir Hisbāh ' and his staff members would be treated as public servants, with Nazir enjoying the status of Magistrate Class-III. Nazir Hisbāh would be authorized to use his powers under the law on the complaint of a citizen, the information of some public office-bearer or according to his own information and knowledge in respect of the following matters."

The Council of Islamic Ideology Objections - 2005:

One may easily compare the Hisbāh model contained in the above-mentioned CII Report of December, 1996 and the Draft Hisbāh *Bill* of the NWFP Government. How surprising that the very measures recommended by the Council earlier have now been dismissed as objectionable.

Now, let us examine the CII objections one by one.

The first objection raised is that the proposed Hisbāh Authority, instead of fulfilling the Shariāh objectives may make controversial the injunctions of the Qur'an and the *Sunnah* and instead of resolving the problems open up the doors for more disruption and chaos. But the argument has been substantiated neither from the Shariah point of view, nor rationally. Article 227 (1) of the Constitution makes it clear that for each School of Thought only that interpretation of the injunctions of the Qur'an and the Sunnah would be deemed as authentic which that particular School regards as authentic. Following this explanation, can there remain any cause for controversy over the explanation of 'M'aruf (Right) and 'Munkar' (Wrong)?

It may be added that the Hisbāh Bill has clearly specified "the uncontroversial rights and obligations" proposed to be enacted. As for the question of the abuse of power for political purposes, its most glaring example are the present CII comments, in which the Council has negated, without assigning any reason, its own official stand of 1996.

The second objection raised by the CII relates to what has been seen as the inclusion of extraneous matters not directly related to *Hisbah* into its jurisdiction. The CII has, however, been unable to identify those matters and on what legal (Shariah) grounds, they consider these to be outside the purview of the *Hisbah* system.

The CII has also observed that instead of setting up a new institution, the existing laws could be made use of. But this observation is in the nature of an administrative advice and has no relevance with the main issue, i.e. whether the proposed Bill is in consonance with the *Shariah* or in conflict with it. It is beyond the purview of the Council of Islamic Ideology to comment on the organizational or administrative aspects of a case sent to it for review. Its sole responsibility is to offer its considered opinion about a certain legislation being in conflict with the *Shariah*, or not.

There exists not a single point in the CII observations to confirm that the Draft *Hisbah Bill* violates even slightly any injunction of the Islamic *Shariah*. It may not be out of place to recall that in its 1996 Report, the CII had advised for setting up the *Hisbah* institution both at the Centre and in the Provinces, side by side with the existing *Muhtasib* Secretariat. So far as the Frontier Province is concerned, they do not have even the *Muhtasib* set-up and their keenness to establish a broad-based *Hisbah* apparatus is, therefore, but natural.

One is at a loss how to describe the professional and religious standing of the Honorable Judge who wrote the CII report. He observes that there are no injunctions concerning *Hisbah* in the *Jafari Fiqh* (School of Jurisprudence). The 1996 Report of the CII was based on the recommendations jointly formulated by the Sunni as well as the Shia Ulama. During the *Safavid* and *Ismaili rule*, the *Hisbah* institution was functioning in Iran the way it was operational in the Ottoman and Tughlaq Empires. It has existed all along in Iran, Yemen, Syria, Iraq, Turkey and the Trans-Oxus region, as also in Egypt and the North African principalities of *Maghreb*. The system was lauded by all Muslim thinkers from Imam Gazza to Nizamul Mulk Tusi. What historical evidence the Honorable Judge, who wrote the CII remarks, can claim to have to support his statement? Moreover, the *Shariah* Council of the NWFP has on its panel both the Sunni as well as the Shia Ulama, who were jointly engaged in the preparation of the Draft of the *Hisbah Bill*.

Yet another objection raised by the Council concerns the question of the Governor's consent with the Chief Minister on the appointment of the *Muhtasib*. This has been claimed to be in conflict with the Objectives Resolution and Article 175 (3) of the Constitution. There can perhaps be nothing more funny than this observation and that too from a Judge on the panel of the Council.

Firstly, according to the basic principle of the Parliamentary system, the Governor is bound to consult the Chief Minister in all matters except for the discretionary powers granted to him in certain cases. Even if it had not been written in the *Hisbah Bill*, the Governor would have been bound under Article 105 of the Constitution to consult the Chief Minister. Secondly, the three Provinces where the institution of *Muhtasib* is functioning, his appointment is made by the

Governor, but in consultation with the Chief Minister, as required under Article 105. If the independence of the Judiciary from the Executive is not affected there, how can this be affected in case of the NWFP? Perhaps the Honorable Judge has forgotten that the Judges are appointed both at the Centre and the Provinces not through any independent judicial channel, but it is done by the President in consultation with the Prime Minister. The President appoints the Chief Justice and he is not bound in this by any order of seniority. He has to consult the Chief Justice for the appointment of the judges, but then who does not know how our judges are inducted. Even in the United States the judges are appointed on the recommendation of the President, while the Senate, which is again a political body, ratifies their appointment. If the Judiciary has not been made independent of the Executive in all such matters, why ask for an exception in case of the *Hisbah Bill* and why the provision of the Governor consulting the Chief Minister for the appointment of the *Muhtasib* be taken as a political intervention?

The objections raised by the CII are mostly of administrative nature. Some of these were already taken into consideration during the *Hisbah Bill's* review by the Provincial Government, while some may be useful for future guidance. But I would reiterate once again and with all humility that these recommendations are entirely administrative in nature, while the Council's responsibility under the Constitution's Articles 229 (b) and 230 is only to determine and identify if a proposed legislation is in consonance or in conflict with the Islamic injunctions. And this opinion too cannot be offered in the form of '*obiter dicta*' every premise or objection has to be supported by the argument in favour or against from the *Qur'an* and the *Sunnah*. Surprisingly, the 11- point CII Report is supported by no argument from the *Qur'an* and the *Sunnah*, neither explicitly nor implicitly. It is difficult to decide, therefore, if the Council's Report could be taken as academic, legal, or political?

The Powers of the *Muhtasib*:

There has also been some criticism of the *Hisbah Act's* provisions to give the *Muhtasib* the same powers in respect of the contempt of court as available to the superior courts. Attempts are being made, on the other hand, to deny him even those basic rights, which the country's other courts routinely, enjoy. It is feared that if given those powers, the *Hisbah* Authority may give rise to fascist tendencies and oppression. Misgivings such as these are based on no reasonable grounds, but ill-will and are very much subjective in nature.

Let us take for example the Federal Ombudsman Act-1983. Its Article 14 provides all powers to the Ombudsman for access to information and cross-examination of the witnesses. Article 15 deals with the 'search of premises' and Article 16 with the 'power to punish for contempt'. The Article 29 on 'Bar of Jurisdiction' provides immunity to the Ombudsman disallowing any court or authority to issue stay order or take any measures against the decree issued by him. Article 37 has the clause on the 'order to override other laws'. The Punjab Office Ombudsman Order (1997) too includes all these Articles and clauses. The Baluchistan and Sindh Ombudsmen rules are also no different.

In addition to the authority and powers enjoyed by the offices of the Ombudsmen at the Centre and the three Provinces, similar provisions have been made in other legal bodies, like the Banking Tribunal and the Labour Tribunal. The Parliament and its Committees too have been given exclusive powers and exemptions from the jurisdiction of the superior courts. The Parliament is passing dozens of similar legislations every year providing for the 'Exclusion of Jurisdiction', or 'Overriding of Jurisdiction of Courts' in a number of cases. Under Act No VII of 2004, even President Musharraf has been given the extraordinary and extra-constitutional powers of exemption from the jurisdiction of the Superior Courts to simultaneously retain both the offices of the Army's Chief of Staff and the President and it can be challenged under no law, Constitution, or the court. The Article 270 (a) of the Constitution also provides total amnesty to the President from all legal actions and nothing he does can be challenged in the country's any court of law.

If multitudes of such Articles and clauses elsewhere do not give rise to fascism or oppression, how can we expect the skies to fall by the *Hisbah Bill* alone?

It is very much evident from this review that the objections being raised against the *Hisbah Bill* have no leg to stand on. It is also confirmed that the provisions of the *Bill* are not at all in violation of any existing rules and regulations. There is definitely a room to further improve the *Bill* and we are sure that the NWFP Government, as well as the Provincial Assembly would not be unmindful of that. There is, nevertheless, no justification whatsoever for such a unilateral and extremely biased propaganda against the *Bill*. It is very much evident that the country's secular lobby, as well as the Federal Government is hell-bent to prevent any real headway towards the program of Islamic reforms as envisaged by the *Hisbah Bill*. The Federal Government is also motivated by a sense of revenge against the electoral defeat of its favorites in the NWFP at the hands of the MMA candidates. Let me tell them plainly that they are playing a dangerous game with the Constitution and the law, which would prove too costly for them. The MMA will not compromise on principles and would valiantly challenge its detractors in this politico- legal war. I am sure the right would win over might. *In Shad Allah!*
