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## Review Essay : Three Recent Views on the Implementation of Islamic Law

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## Review Essay : Three Recent Views on the Implementation of Islamic Law

Maurits S. Berger

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### RÉFÉRENCE

Sa'îd al-'Ashmâwî, *al-Sharî'a al-islâmiyya wa-l-qânûn al-misrî*, Cairo : Maktabat Madbûlî al-Saghîr, 1996

Târiq al-Bishrî, *Fî-l-mas'ala al-islâmiyya al-mu'âsira. Al-wad' al-qânûnî al-mu'âsir bayn al-sharî'a al-islâmiyya wa-l-qânûn al-wad'î*, Cairo : Dâr al-shurûq, 1996

Muhammad al-Jâbrî, *al-Dîn wa-l-dawla wa tatbîq al-sharî'a*, Beirut : Markaz dirasât al-wad' al-'arabî, 1996

- 1 In the past two decades the movement of « political Islam » – also labeled « resurgence », « revival », or « renewal » of Islam – has dominated the agenda of most Muslim countries. The call for the implementation of *sharî'a* law is one of the tenets of this movement. This tenet, however, suffered from two shortcomings. First, the call for the *sharî'a* turned out to be more a battle cry than a clear program.<sup>1</sup> Many Muslims will agree that the *sharî'a* should be applicable to their daily life, but few will be able to indicate what this means or how this should actually be executed. Second, the discussion has been polarized : it was a « yes » (full implementation of *sharî'a* law) versus a « no » (no implementation of *sharî'a* law). Moreover, the protagonists of *sharî'a* law advocated a revival of *sharî'a* law, the restoration of the *sharî'a* to its old glory. In this clash between supporters and opponents of *sharî'a* law, the moderates who tried to take an inbetween position were either unheard or ostracized. It seems, however, that these moderates are slowly but surely emerging. They are Muslims who support the implementation of the *sharî'a*, but who are in favor of an evolutionary rather than a revolutionary process. In addition, they have specific conceptions on what should be meant by *sharî'a* and to what extent and by which methodologies it should be implemented. Between the two extremes of the « yes » and

the « no », these people have taken the middle position of the « yes, but » : Yes, *sharī'a* should be implemented, but on certain conditions.<sup>2</sup>

- 2 In this review essay, a selection is made among these moderates based on three books published in 1996. The authors are the Egyptian former Court of Appeal and High Court of Security judge Sa'īd al-'Ashmāwī, the Egyptian State Council member Tāriq al-Bishrī, and the Moroccan philosopher Muhammad al-Jābrī. These books are interesting for various reasons. First, their authors do not blindly take a « yes » or « no » position, but break new ground for further developments of the *sharī'a*. Second, it appears that they endeavor to reach a larger audience by abandoning the complex intellectual discourse so common among Arab intellectuals and choosing to write small books in a simple and distinct Islamic prose.

## Sharī'a and Ijtihād

- 3 Before entering into the discussion of these books, some terminology which plays a key role in the arguments of their authors needs to be addressed.
- 4 According to orthodox Islamic dogma, the *sharī'a* is the code of conduct of the Muslim. Its written sources are the Koran (which is the word of God) and the Sunna (the collection of *hadīth*, which are the actions and sayings of the prophet Muhammad). From a legal point of view, this corpus of the *sharī'a* contains very few rules. Less than one percent of the Koran, for instance, can be considered legal rules, mostly dealing with family and inheritance law.
- 5 In the first four centuries of Islam, many legal scholars developed new legal rules and principles, based ideally on the two principle sources, the Koran and the Sunna. The scholarship of deriving these additional rules and principles is called the *fiqh*, which was also the term used for the extensive corpus in which they were collected.
- 6 The individual scholar who, through certain methodologies, derives rules from the two principle sources, is said to practice *ijtihād*. According to orthodox Islamic dogma, this practice was stopped after four centuries (i.e. in the 4th century AH/10th century AD). It was said that « the gates of *ijtihād* are closed ». One of the reasons for the prohibition of further *ijtihād* was that four centuries of legal activity had provided enough rules, and no new rules were needed.
- 7 The main feature of the closing of the gates of *ijtihād* is the cessation of direct access to the two principle sources, and complete reliance on the corpus of *fiqh*. Within the *fiqh*, however, new rules were allowed to develop, but technically speaking, however, this was not proper *ijtihād*. From this period onward, one had to refer to the *fiqh* to know *sharī'a* rules. It is therefore not surprising that the terms *fiqh* and *sharī'a* are often interchanged. Two developments in the history of *sharī'a* are of importance for this review essay : the reopening of the gates of *ijtihād* and the reintroduction of the *sharī'a*. Although modern scholars have reason to believe that the gates of *ijtihād* were never really closed,<sup>3</sup> the possibility of reopening these gates has been a much debated issue among Muslim scholars since the 19th century. Orthodox Islamic dogma, however, has so far not acknowledged the renewed activity of *ijtihād* with regard to the Koran and the Sunna. In Egypt, this has been recently confirmed by the Supreme Constitutional Court in March 1994<sup>4</sup> and in August 1996 by the Court of Cassation in the infamous Nasr Abu Zayd case.<sup>5</sup>

- 8 In the 20th century, the debate on reopening the gates of *ijtihād* became overshadowed by the debate on reintroducing *sharī'a* law. In most new Muslim nation-states, much of *sharī'a* law was replaced by western laws and legal systems, and reintroducing *sharī'a* law became a political issue.

## Three Views

- 9 The following paragraphs will present the three authors' arguments, beginning with a brief overview of the history of *sharī'a* law. It will become apparent that the three authors view their past in completely different ways which, in turn, have a definite influence on how they see the future. Finally, a discussion of the main issue ensues : How to implement *sharī'a* law ?

## The Developments of *Sharī'a* Law in the Past

- 10 Both Bishrî and 'Ashmâwî argue that *sharī'a* law has been in decline in the past few centuries ('Ashmâwî, 1996 : 8-9 ; Bishrî, 1996 : 7). Their views on how this deterioration was halted, however, lead to diametrically opposed positions. According to 'Ashmâwî, it was western legal concepts that put the *sharī'a* back on track again and saved it from further decline ('Ashmâwî, 1996 : 8-9).
- 11 Bishrî, on the other hand, argues that western concepts – and western influence in general – are the root of its decline. He argues that the much needed restoration of *sharī'a* was already undertaken by Muslim scholars themselves, by the so-called « renewal » (*tajdīd*) movement of the 18th and 19th centuries (Bishrî, 1996 : 8-12, 110 ff.). These scholars were debating the reopening of the gates of *ijtihād*. These activities were radically interrupted by what Bishrî calls the European « aggression » (*ghazwa*). Instead of concentrating on restructuring Muslim society and its legal system, the renewal movement became submerged in an identity struggle and resistance against westernization. The basis of Bishrî's argument is that the initial activity of the renewal movement should be picked up again and continued.
- 12 Jâbrî sees the developments of *sharī'a* law from another perspective. According to him, the present situation of social turmoil and the call for implementation of *sharī'a* law is just the natural course of Islamic history. Early Islamic society was a coherent social order, he explains, without external influences. The only unrest this young society had to deal with was its search for a unified doctrine of its new religion. The fundamentalist groups and movements that were causing havoc at that time were in disagreement on the doctrine of Islam (*aqīda*), and not the application of the *sharī'a*. Issues were the essence of God, His attributes, divine justice, free will, the nature of creation, and so forth (Jâbrî, 1996 : 152-153). Today, Jâbrî claims, the opposite is the case. The religion of Islamic societies is unified in orthodox Islam, but its social order is disrupted by foreign influences. Islamic societies are forced to reevaluate and determine their own social order. This is a matter of *sharī'a*. Today's fundamentalist groups and movements do not disagree on religious matters, but on the application of the *sharī'a*. Issues include the implementation of Islamic laws, the veil, interest on money, criminal law (Jâbrî, 1996 : 151-155). From these historical developments, Jâbrî deduces an optimistic vision of the present situation : just as religious groups and antagonists in the past found « modern » methods and notions to

« reconstruct » religious dogma and theology, so will the fundamentalist movements vanish when the science of the *sharī'a* is « reconstructed » with modern methods and notions (Jâbrî, 1996 : 156).

### How Much Further ? What Is Needed Is Renewal, Not Revival

- 13 With regard to the present situation, the three authors are unanimous on a few points. They claim that the call for implementation of *sharī'a* law has nothing to do with religion, but is motivated by social, economic, and political factors ('Ashmâwî, 1996 : 20 ; Bishrî, 1996 : 49,104 ; Jâbrî, 1996 : 129, 133). They also argue that present Islamic society faces many problems, especially the lack of justice. They further agree that the solution to these problems is the implementation of *sharī'a* law ('Ashmâwî, 1996 : 10), provided it is not being revived and restored in its former position, but applied in a renewed form (Bishrî, 1996 : 49 ; Jâbrî, 1996 : 133). Here, the road between 'Ashmâwî on the one hand, and Bishrî and Jâbrî on the other, starts to diverge.

### 'Ashmâwî : the Sharī'a Is Already Applied

- 14 As mentioned above, 'Ashmâwî claims that the implementation of western legal systems and concepts has saved *sharī'a* law from further deterioration. He argues that this implementation does not mean that *sharī'a* law has been substituted by western laws. On the contrary, in Egypt, *sharī'a* law is actually already implemented, infused with western concepts and laws which are not contradictory to *sharī'a* law. « Egyptian law is ninety percent *sharī'a* law » ('Ashmâwî, 1996 : 11).
- 15 'Ashmâwî reasons as follows. Since the sources of *sharī'a* law (the Koran and Sunna) contain so few legal rules, implementation of *sharī'a* law actually means implementation of *fiqh* ('Ashmâwî, 1996 : 25-26). Only the *iiqh* provides the corpus and the framework for a legal system that can be implemented. Within the *fiqh*, it is permitted by orthodox Islam to adapt rules to place and time. It is therefore perfectly admissible and within the scholarly tradition of the *fiqh*, 'Ashmâwî continues his argument, to use western concepts and rules ('Ashmâwî, 1996 : 22).
- 16 He argues also that western influences in present Egyptian law are not foreign to Egyptian society or *sharī'a* law. Most of Egyptian law is based on French law, which is based on Roman law. *Sharī'a* law and Roman law, 'Ashmâwî argues, share the same legal and cultural heritage, and there are quite a few influences of Roman law in *sharī'a* law ('Ashmâwî, 1996 : 31-35).
- 17 Finally, 'Ashmâwî states, the observation that *sharī'a* law is actually already implemented in Egypt is not new. It was the conclusion reached in 1987 by the committee appointed by the Egyptian government to review Egyptian law according to its Islamic value. According to 'Ashmâwî, the committee's conclusion was again confirmed in 1995 by the famous TV-preacher Sha'râwî and the *shaykh* al-Azhar, Gâd al-Haqq ('Ashmâwî, 1996 : 11-12).

### Jâbrî and Bishrî : Reopen the Gates of Ijtihâd

- 18 Jâbrî and Bishrî continue where 'Ashmâwî leaves off: *sharī'a* law still needs to be implemented, albeit in a renewed form. Their concern is not so much with the actual rules of *sharī'a* law, but its methodology. Both advocate the use of the legal theoretical framework of the *sharī'a*, and both argue that it is necessary to regain direct access to the

primal sources of the *sharī'a* in order to formulate new solutions. In other words, the gates of *ijtihād* should be reopened. But these gates are not merely to be opened ; the *ijtihād* advocated by Jābrī and Bishrī needs to be a « renewed » *ijtihād*.

- 19 Bishrī emphasizes that *sharī'a* rules should not be followed blindly, but serve as an inspiration, a divine blueprint for further legislation (Bishrī, 1996 : 124). There is no unique way to implement *sharī'a* law, he says. There are different ways, depending on the Islamic society where it is implemented, just as there are different implementations of « democratic » and « socialist systems in European countries (Bishrī, 1996 : 78).
- 20 According to Jābrī, the « old » *ijtihād* is no longer usable : « The [old] *ijtihād* which has been shaped by life is of no use to the present, and the past has no use for it anymore » (Jābrī, 1996 : 166). The main problem of the « old » *ijtihād* is that it tends too much towards a literal interpretation of the rules of the Koran and Sunna. The changes in « Muslim culture » demand a « renewal of its roots », i.e. renewal « in-depth, but also from depth » (*fi al-a'mâq wa min al-a'mâq*) (Jābrī, 1996 : 134). He advocates a « reconstruction » of the science of the *sharī'a* by means of a modern *ijtihād*.
- 21 Jābrī justifies this adaptation of the « old » *ijtihād* within the context of the *sharī'a*. The method of legal reasoning as prescribed by the « old » *ijtihād* might have become sacrosanct, he argues, but its principles are not prescribed by the Koran or Sunna. They are man-made, developed by the legal scholars in the first centuries of Islam. This means that « nothing prevents us from developing other legal methodologies, as long as they realize the wisdom of the Legislation in a particular period in the best possible way » (Jābrī, 1996 : 179).

### The Immutability of *Sharī'a* Rules

- 22 The relation between *sharī'a* and *fiqh* rules is the most delicate subject in the debate on the implementation of *sharī'a* law. Bishrī and 'Ashmâwî are very explicit in separating the *sharī'a* from the *fiqh*. The *sharī'a* has as sources the Koran and the Sunna. These rules are untouchable. The *fiqh*, on the other hand, is man-made law and adapted to circumstances of time and place ('Ashmâwî, 1996 : 25 ; Bishrī, 1996 : 25-26,35-36,99-100).
- 23 Bishrī takes this distinction literally. The rules of the Koran and Sunna are an untouchable blueprint for eternity and for every place. They are « non-historic and superseding time and place », and they are « the source of legal and institutional legality » (*masdar-al-shar'iyya al-qânûniyya wa-l-nidhâmiyya*) (Bishrī, 1996 : 91). The few rules it contains, such as divorce, inheritance portions, *hudûd*, etc., are therefore immutable (Bishrī, 1996 : 107). Legislative freedom only exists within the context of the *fiql*. « *fiqh* is a positive, historical [corpus] : we take from it and we leave it according to what we perceive in the sources of Islam [i.e. Koran and Sunna] as modern, taking into account that the *fiqh* is a historical expertise which needs to be studied ; it is the experiences (*tajârib*) of the past from which we seek guidance. » (Bishrī, 1996 : 37) It is within this context that Bishrī sees the necessity of practicing a renewed form of *ijtihād* (Bishrī, 1996 : 102).
- 24 According to Bishrī, implementation of *sharī'a* does not mean the implementation of certain rules, but « the return to the source of Islamic legality, to be sovereign, and the standard measure of ruling, and the legislative source for human actions and institutions as well as for values for behavior in accordance with ethics (*akhlâq*) (...). This does not mean seeking laws and orders to replace those promulgated by the state, nor [does it

- mean] the call to set its laws aside. (...) The aim is a situation in between » (Bishrî, 1996 : 124).
- 25 'Ashmâwî takes a more liberal view with regard to the *sharî'a*. As demonstrated above, 'Ashmâwî argues that the call for the application of *sharî'a* is actually the call for the application of the *fiqh* - ninety percent of which is implemented in Egypt. The *sharî'a* might come back into the picture with the remaining ten percent. In that case, 'Ashmâwî argues, *sharî'a* rules should not be applied literally. The *sharî'a* is not only rules and principles but it is first (...) a general atmosphere which rules the community. » ('Ashmâwî, 1996 : 73) *Sharî'a* law should only be applied « within the framework that is wished by the Great Legislator » ('Ashmâwî, 1996 : 91). With regard to the *hudûd*, the criminal offences described in the Koran, for instance, he argues that they are limited by the *fiqh*, and are only applicable in a community of believers. Society, therefore, should first be changed in accordance with the spirit of Islam before the *hudûd* are implemented ('Ashmâwî, 1996 : 72).
- 26 Jâbrî takes an even more liberal view and advocates a complete renewed approach : « What is needed today is a renewal, not based on the continuation of *ijtihâd* in the *furû* » [i.e. *fiqh*] but on resourcing the sources (*i'âdat ta'sîlal-usûl*) [i.e. the *sharî'a*] and on reconstructing them » (Jâbrî, 1996 : 157). Like 'Ashmâwî, Jâbrî argues that when practicing *ijtihâd*, one should focus on the meaning of the rules of the Koran and *sharî'a* rather than on the literal text. The legal reasoning should be inspired by the *sharî'a* in order to « realize God's wisdom. » But Jâbrî continues his argument by stating that the general purpose of the *sharî'a* - or God's wisdom - is the common interest of a society (*maslaha*) (Jâbrî, 1996 : 52-53, 164-165, 169-172). This legal concept was developed by the Muslim scholar al-Shâtibî in the 8th century AH<sup>6</sup> and is vehemently rejected by Bishrî (Bishrî, 1996 : 130).
- 27 In addition, Jâbrî advocates that *sharî'a* rules be seen in a historical and social context. He gives the example of the *hadd* punishment of cutting off the thief's hand. This punishment was justifiable in a Bedouin nomadic society which lived in harsh conditions, without jails, police or central power. Today, Jâbrî argues, the social context has changed, and although a thief still needs to be punished, modern means and institutions have made the *hadd* punishment obsolete (Jâbrî, 1996 : 175).

## Conclusion

- 28 The call for implementation of the *sharî'a* is as old as Islam itself, and is not a whim of the 1970s and 1980s. The implementation of *sharî'a* does not exist. This review essay shows that there are many possible views between the extreme position of full unconditional implementation of the *sharî'a* and complete rejection of it.
- 29 The views of the three Muslim Arab authors discussed in this essay are interesting for a number of reasons. They are the vanguard of Muslim « moderates » that dare to speak out in the vicious battle between opponents and proponents of implementation of *sharî'a* law. Their maxim is : Yes, the *sharî'a* should be applied, but on certain conditions. All three agree that implementation should take place not by revolution, but by an evolutionary process through legislation. Their main concern is that Islamic society benefits from this implementation. Implementation, therefore, should take place in a new adopted form.

The authors also agree that the necessary changes in society cannot come about by legislation alone, but need to come from within society.

- 30 The conditions by which *sharī'a* law should be implemented is also an issue of contention between the authors. 'Ashmâwī argues that *sharī'a* law is in effect already implemented in Egypt, since Egyptian law in most cases does not contradict *sharī'a* law. Jâbrî and Bishrî argue that *sharī'a* law still needs to be implemented, and both advocate the reopening of the doors of *ijtihâd*. But where Jâbrî advocates a liberal interpretation of *sharī'a* rules based on the common interest of the community, Bishrî takes the conservative view that *sharī'a* rules are not to be altered.

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## NOTES

1. See Ayubi, Nazih (1991), *Political Islam: Religion and Politics in the Arab World*, London : Routledge ; Roy, Olivier (1994), *The Failure of Political Islam*, London : I. B. Tauris (original French version : 1992).
  2. See for an overview and classification of these thinkers Ayubi (1991 : 201-213). In this article I deliberately use the vague term « moderate » to avoid discussion of rather unclear definitions such as « neo-Islamist, liberal Muslim », or « reformist ».
  3. See for instance Hallaq, Wael (1984), « Was the gate of *ijtihâd* really closed ? », *International Journal of Middle Eastern Studies* 16 : 3-41.
  4. Dupret, Baudoin (1997), « À propos de la constitutionnalité de la *sharī'a* », *Islamic Law and Society* 4(1) : 91-113.
  5. See Berger, Maurits and Dupret, Baudoin (1998), « Extraits de la jurisprudence Abû zayd », in this issue.
  6. See for instance, Masud, M. K (1995), *Shatibi's philosophy of Islamic law*, Islamabad : International Islamic University.
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**Mots-clés** : loi islamique, *sharī'a*

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