

THE APPLICATION OF SHARI'A IN EGYPT ACCORDING TO AL-'ASHMAWI

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Abstrak

Kemunculan gerakan Islamis yang dahsyat di Mesir telah menarik perhatian para ilmuwan, sebagai usaha untuk mengontrolnya pada level politik dan kebijakan. Sedikit perhatian diberikan oleh orang-orang yang merespon tantangan ini pada level perdebatan ideologis. Salah seorang di antaranya adalah seorang hakim terkenal, Muhammad Sa'id al-'Ashmawi. Ia beralasan bahwa penyebutan "penerapan *syari'ah*" (*tatbiq al-syari'ah*) atau kodifikasi *syari'ah* (*taqnin al-syari'ah*), semboyan dari gerakan Islamis, sesungguhnya tidak lebih dari sekedar slogan kosong, yang dimaksudkan untuk mendapatkan dukungan rakyat menuju sebuah usaha politik tetapi tidak jelas sama sekali dan secara substansial mungkin tidak signifikan. al-'Ashmawi menjelaskan bahwa pada awalnya istilah *syari'ah* mencakup semua aturan yang berkenaan dengan ibadah dan masyarakat yang ada di dalam al-Qur'an, al-Sunnah. Tetapi dalam perkembangannya selanjutnya, istilah itu melebar sehingga mencakup *ijtihad* para ulamâ. Padahal yang terakhir ini lebih tepat disebut sebagai *fiqh*. yakni serangkaian aturan dan hukum yang difikirkan dan ditetapkan oleh manusia, bukan oleh Allah, untuk mempertemukan kondisi historis masa lalu yang tidak lagi berlaku. Di dalam membahas *ribâ*, al-'Ashmawi sesungguhnya sudah menyimpulkan bahwa baik hukum Mesir yang sedang berlaku saat ini maupun hukum-hukum mesir lainnya sesuai dengan *syari'ah*. Hal yang sama juga berlaku bagi hukum Mesir lainnya.

Abstract

The rise of a vigorous and sometimes violent Islamist movement in Egypt has attracted considerable attention from scholars. Less attention has been given to those who have responded to this challenge at the level of ideological

debate. One of these is a prominent judge, Muhammad Sa'id al-'Ashmawi. He argues that the call for the "application of the shari'a" (*tathbiq al-syar'ah*), watchwords of the Islamist movement, are in reality little more than empty slogans, designed to get popular support for a political venture but extremely vague and probably insignificant in substance. In time, however, its meaning expanded, first to include all of the rules for worship and society found in the Qur'an, then those in the sunna of the Prophet, and finally all the opinions and judgments of the scholars (*ijtihad*). But these opinions and judgments are properly called *fiqh*, and the final result of the development is that in common usage the term *syar'ah* has come to mean *fiqh*. Those who use the slogan, however, are in fact calling for the application of *fiqh*, that is, a set of rules and laws devised by humans, not God, to meet historical conditions of the past which no longer obtain. In discussing *ribâ*, al-'Ashmawi holds that current Egyptian law essentially conforms to the *syar'ah*. The same is true of the rest of Egyptian law.

Keywords

Al-'Ashmawi, shari'a, *fiqh*, Islamist, Egypt, the Muslim Brotherhood.

Preliminary

The emergence of a powerful Islamist movement in Egypt has attracted the attention of scientists, in an attempt to control at the level of politics and policy. Little attention was given by people who respond to these challenges at the level of ideological debate. One of them is a well-known judge, Muhammad Sa'id al-'Ashmawi. At the very least, he participated in a very long debate about the extent to which Islam can truly be said as a complete way of life.

This roots of debate can be traced to the 19th century AD, when Egypt began to adopt European ways and generate, explicitly, secular legislation, the first under itself rule and then under British occupation, when Muhammad Abduh and others looked at how new ways can be attributed to the Islamic tradition.¹

¹ For this issue, see Daniel Crecelius, "The Course of Secularization in Modern Egypt," in *Islam and Development*, ed. J. Esposito (Syracuse, N.Y.: Syracuse University Press, 1980), pp. 49-70; and Hamid Enayat, *Modern Islamic Political Thought* (London and Basingstoke: Macmillan, 1982). For Muhammad Abduh and other scholars, see

The debate has gained shape, as today, after Egypt's independence in 1922 and driven by secularists' reformation in Turkey. The pointer is the book *al-Islam wa Usul al-Hukm* by 'Ali' Abd al-Raziq, who attempted to show, based on the sources of Islamic authority, that political power is not part of the prophetic mission of Muhammad and that religion and government are two separate things in Islam.²

At the opposite position, the Muslim Brotherhood (*Ikhwân al-Muslimîn*),³ which was founded in 1928, calling an Islamic order in which the ideology of Islam must be the ideology of government, the law should be in accordance with the shari'a, while the modernization and nationalization should be under the framework of Islam. This group continues to struggle to establish an Islamic state. According to it, Islam is the religion and government (*dîn wa al-dawlah*).⁴

In an atmosphere of ideological debate about the application of shari'a, in this paper will be presented about the thought of al-'Ashmawi on the shari'a and its application in Egypt.

The Background of Al-'Ashmawi

Al-'Ashmawi was born in Egypt in 1931. He is a graduate of the Faculty of Law at Cairo University in 1954. Later, he became a assistant of district attorney and later served as district attorney in Alexandria. In 1961, he was appointed as a judge and successively became the presiding judge on the Court of Appeal, the High Court of Appeals, the Court of Criminal Appeal, and the High Court of State

Albert Hourani, *Arabic Thought in the Liberal Age* (London: Oxford University Press, 1962).

² About 'Ali Abd al-Raziq, see Hourani, *Arabic Thought*, p. 183-92 and Leonard Binder, *Islamic Liberalism* (Chicago: University of Chicago Press, 1988)

³ Currently in addition to the old Brotherhood, which is called the fundamentalists, there is also a new group called the Islamic neo-fundamentalists. But there is no fundamental difference between the two. See Nazih N.M. Ayubi, "The Political Revival of Islam: The Case of Egypt", in *An Anthology of Contemporary Middle Eastern History*, ed. Syafiq Mughni (Canada: McGill University), p. 571.

⁴ Sana Abed-Kotob, "The Accomodation Speak: Goals and Strategies of the Muslim Brotherhood of Egypt", in *An Anthology of Contemporary Middle Eastern History*, ed. Syafiq Mughni (Canada: McGill University, n.d), p. 546-547.

Security, who has been sentenced to the Islamic radicals in the campaign against the authoritarianism of Egyptian state.⁵

He also developed his expertise in the field of Islamic theology (*ushûl al-dîn*), shari'a, and comparative law. Not satisfied with it, he followed through his studies at Harvard Law School and at various places in the USA in 1978. He developed a career as a lecturer at the American University in Cairo, as well as various universities and institutes in Europe and the United States. During this period, he was known as an outstanding critic of the Islamist tendency, and has written numerous articles and books. Therefore, in 1979 he received death threats from Islamists. The reason, he interprets the Qur'an in accordance with the historical context, which is understood by the Islamists as undermining the validity of religion. In January 1980, the Egyptian authorities asked him to get a police escort.⁶ Since the resignation of a judge in 1993, he continued this effort, although, there are death threats from extremists, so he had to get police protection for 24 hours.

The emergence of the Islamist movement in Egypt has attracted the attention of scientists, in an attempt to control at the level of politics and policy. Little attention was given by people who respond to these challenges at the level of ideological debate. Al-'Ashmawi, at least, have participated in a very long debate about the extent to which Islam can truly be said as a complete way of life.

The roots of this debate can be traced to the 19th century AD, when Egypt began to adopt European ways and produce, explicitly, secular legislation. Firstly under his own rule and then under British occupation, when Muhammad 'Abduh and others looked at how new ways can be connected with Islamic tradition.⁷

⁵ Muhammad Sa'id al-'Ashmawi, *Islam and the Political Order* (Washington: Council for Research in Values and Philosophy, 1994), p. 17.

⁶ A. Dankowitz, "Arab Intellectuals: Under Threat by Islamists", *Inquiry and Analysis*, Number 254 (November 2005), p. 1.

⁷ For this issue, see Daniel Crecelius, "The Course of Secularization in Modern Egypt," in *Islam and Development*, ed. J. Esposito (Syracuse, N.Y.: Syracuse University Press, 1980), pp. 49-70; and Hamid Enayat, *Modern Islamic Political Thought* (London and Basingstoke: Macmillan, 1982). For Muhammad 'Abduh and other scholars, see Albert Hourani, *Arabic Thought in the Liberal Age* (London: Oxford University Press, 1962).

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He even had debated with al-Azhar University for criticizing legality given to this institution to censor the music, movies, and videos. This criticism has provoked the anger of the al-Azhar 'Ulamâ' so that they banned his books for a while at the Cairo Book Fair in 1992. The ban was withdrawn after intervention Egyptian president Hosni Mubarak. Faced with the bragged situation, he said, "I am sure, I have a mission. I am not at all concerned with Islamic extremists. I believe, the killing to me is a part of my mission".¹⁰

Basic argument of al-'Ashmawi is that Islamism, especially in the more extreme forms, is contrary to Islam. The name he used to Islamism is "political Islam",¹¹ a label given to relativize the Islamist

⁸ With regard to 'Ali Abd al-Raziq and his thought, see Hourani, *Arabic Thought*, pp. 183-92 and Leonard Binder, *Islamic Liberalism* (Chicago: University of Chicago Press, 1988)

⁹ Sana Abed-Kotob, "The Accomodation Speak: Goals and Strategies of the Muslim Brotherhood of Egypt", in *An Anthology of Contemporary Middle Eastern History*, ed. Syafiq Mughni (Canada: McGill University, n.d), pp. 546-547.

¹⁰ *Ibid.*, p. 2.

¹¹ The same name as the original title of the book is written, namely *al-Islâm al-siyâsi*, as in foot note 1. When this work was published in Egypt in 1986, angry conservatives, including the rector of the government-run Islamic University, Shaykh al-Azhar. Instead, the publication of these works make glad the liberals, even opposition groups are rarely sympathetic to senior government officials. see David Sagiv, "Judge 'Ashmawi and Militant Islam in Egypt", *Middle Eastern Studies*, 28: 3 (July, 1992).

claims by arguing that they only show one form of Islam and Muslims are not like that. In their view, the most extreme, the debate is between Islam and *kufur*. Meanwhile, in the view of al-'Ashmawi, the debate took place between "political Islam" and "enlightened Islam".¹²

He argued that the reference to "the application of shari'a" (*tatbîq al-syarî'ah*) or codification of shari'a (*taqnîn al-syarî'ah*), the motto of the Islamist movement, in fact nothing more than an empty slogan, which is intended to support people towards a political venture but it is not clear at all and may not substantially significant. However, an examination of the nature of shari'a indicate that, first, they really are still confused by the term shari'a and *fiqh*, and secondly, that the Egyptian law is consistent with the shari'a. These two points are the core issues that put al-'Ashmawi within the parameters of debate lately.

The View of al-'Ashmawi on Shari'a and Fiqh

Al-'Ashmawi has examined the shari'a term and a few other terms that have the same root in the Qur'an.¹³ He concluded that the shari'a has meaning *thâriq* (street), *Sabil* (way), and *manhaj* (method).¹⁴ Therefore, shari'a can be interpreted as a way or method of Allah or Islam.

Therefore, shari'a can be interpreted as a way or method of Allah or Islam. In this sense, it extends to the rules of law as revealed in the Qur'an, and the rules contained in the *hadîts* (verbal tradition), and, later, interpretations (*tafsîr*), the opinions, and *ijtihâd* (personal opinion), *fatwâ* (religious opinion) of *'ulamâ'*, and the decisions of the judges.¹⁵ In short, it includes all the complements and explains the

¹² William E. Shepard, "Muhammad Sa'id al-'Ashmawi and the Application of the Sharia in Egypt", *International Journal of Middle East Studies*, 28: 1 (February, 1996), p. 43.

¹³ The Qur'an mentions the term shari'a only once, namely in the surah al-Jâtsiyah (45): 18.. Other terms that have the same root with, respectively, contained in surah al-Syûrâ (42): 13, al-Mâ'idah (5): 48, and al-Syûrâ (42): 21.

¹⁴ It is the meaning of Qur'an raised in Arabic dictionaries. For example, in *Lisân al-'Arab*, said that Shari'ah be interpreted as leading to the water, to give a drink or road or downhill towards the water. See Muhammad Fuad 'Abd al-Bâqî, *Lisân al-'Arab* (Beirut: Dâr al-Fikr, n.d), in the term of *syara'a*.

¹⁵ Muhammad Sa'id al-'Ashmawi, "Syari'ah: Kodifikasi Hukum Islam", in *Wacana Islam Liberal: Pemikiran Islam Kontemporer tentang Isu-isu Global*, ed. Charles Kurzman

fundamental rules is to establish Islamic jurisprudence (*fiqh*), as it has established in history. Thus, in the Qur'an, it does not mean the law (*qânûn*) or legislation (*tashrif*), so the issue of the application of shari'a is nothing but a mere human invention.

Furthermore, al-'Ashmawi explained that, initially, the term of shari'a includes all rules pertaining to worship and a community that is in the Qur'an and Sunnah. But in the further development, the term was widened to include the scholars *ijtihâd*. Whereas the latter is more accurately described as *fiqh*.¹⁶ As such, they are demanding the implementation of shari'a, he said, is not really demanding application of Islam as a whole but requires the application of *fiqh* as listed in the classical *fiqh*.¹⁷

Confusion between the shari'a and *fiqh* means chaos between the will of God and man. This is a problem which he, repeatedly, affirmed. Therefore, we should get back to the proper use, where the shari'a only includes the values, principles, and laws that there are in the Qur'an and Sunnah, as only two are preserved from mistake by God. All deductions or assumptions of both and all comments are based upon it, is a human endeavor that could go wrong and be under the framework of *fiqh*.

(Jakarta: Paramadina, Yayasan Adikarya IKAPI, and The Ford Foundation, 2001), p. 41.

¹⁶ Shepard, "Muhammad Sa'id al-'Ashmawi", p. 43. About the *fiqh*, the 'ulama' define it as a result of the *ijtihâd 'ulamâ'*. Therefore, they sometimes changed according to the argument and also real conditions prevailing in the community. However, this does not mean that the human mind merely product *fiqh* or modified *fuqahâ'*. In interpreting *fiqh*, the 'ulamâ', typically, use two words, namely "*istinbâth al-ahkâm*" or "*ma'rifat al-ahkâm*". See Abu Ishaq Ibrâhîm al-Syirazi, *Syarh al-Luma'*, vol. I (Beirut: Dâr al-Gharb al-Islâmi, 1989), p. 158-9 and Abû Muzaffar al-Sam'ani *Qawâti' al-Adillah fî al-Ushûl* (Beirut: Muassasah al-Risâlah, 1996), p. 33.

¹⁷ The difference between the shari'a and *fiqh* is not the new discourse in Islamic law. The 'ulama had always been made this distinction. The term of shari'a covers all aspects of Islamic teaching, namely *hukm*, *'aqidah*, and *akhlâq*. It became synonymous with Islam. Ibn Athir said, as quoted by Yûsuf Hâmid al-'Alim, shari'a is a provision that is required by Allah over His servants. Based on this definition, the meaning of the shari'a and *fiqh* are equal to the the meaning of Islam. For this issue, see Yûsuf Hâmid al-'Alim, *al-Maqâsid al-'Âmmah li Syari'ah al-Islâmiyyah* (Virginia: al-Ma'had al'Alami li al-Fikr al-Islâmî, 1991), p. 20; Ahmad al-Bayâdî, *Isyarat al-Marâm min 'Ibârat al-Imâm* (Cairo: Dâr al-Jayl, 1949), pp. 28-29; and Mahmûd Syalthûth, *al-Islâm 'Aqidah wa al-Syari'ah* (Cairo: Dâr al-Qalam, 1966), p. 12.

Nevertheless, as a way or method of God, the shari'a includes more flexible things than *fiqh*. Al-'Ashmawi refers to it as a soul, a method, and a movement to appearing for, entering and updating laws but does not hold in it.¹⁸ The shari'a is distinguished not by a particular opinion, but by the dynamic method which can make a person and society be virtuous and righteous. It is the spirit that makes and produces a equality of society before the law and legal principles be applied. Then, implementing the shari'a should be interpreted as adopting the method for most individuals and humanitarian progress.¹⁹

People who use the slogan, in fact, refer to the application of *fiqh*, ie a set of rules and laws are contemplated and defined by humans, not by God, to bring the historical conditions of the past are no longer valid. The *fiqh* is not within the authority of God and do not have the flexibility to provide Islamic solutions on a variety of contemporary needs.

Measuring the Implementation of Shari'a in Egypt

Article 1 (a) (2) 1984 Civil Law states that "When there is no applicable legislative decision, the judge will decide in accordance with precedent (example) that have been there, or, if there is no too, was decided according to the principles of shari'a, or when shari'a does not mention anything (silent), judges look for another way to refer to the basic laws and rules".²⁰ In the legislation, for the first time, introduced the phrase "the principles of shari'a". The legislation does not mention what these expressions mean. Nevertheless, the working draft of the Civil Code Act indicates that the purpose of the phrase is a combination of the principles contained in the four Sunni schools of *fiqh*.²¹

Expression of the shari'a principles is stated again in Article 2 of the 1971 Egyptian Constitution, namely , "the principles of Islamic shari'a are the main source of legislation", which is then converted through a constitutional amendment on May 22, 1980 to be, " the

¹⁸ Sagiv, "Judge 'Ashmawi and Militant Islam in Egypt", p. 532.

¹⁹ Shepard, "Muhammad Sa'id al-'Ashmawi", p. 44.

²⁰ Al-'Ashmawi, *Syari'ah, Kodifikasi Hukum Islam*, p. 42

²¹ Al-'Ashmawi, *al-Ribâ wa al-Fa'idah fî al-Islâm* (Cairo: Dâr Sinâ, 1988). See too Shepard, "Muhammad Sa'id al-'Ashmawi", p. 45.

principles of sharia is the main source of legislation".²² Even though the 1971 Egyptian Constitution did not include the explanatory memorandum of intent "principles of shari'a" is, but there is reason to believe that the expression has the same purpose with the 1948 Civil Law and the 1980 constitutional amendment, which is a set of principles that exist in *fiqh* schools.

The term "principles" above is, precisely, shows the essential basics on which something is built, in which the way of Allah is a whole that can not be shared and at the same time include magnitude foundation and construction. As a result, it can be said that the "principles" or the foundations are moral rules or cultural, not legal norms. Therefore, the phrase "the principles of Islamic shari'a", once again, shows the mean set of principles that exist in the *fiqh* schools in Islam.²³

Here, I review the legal norms in the Qur'an and compare it with the Egyptian legislation. In the field of civil law, the Qur'an contains only one paragraph of law, namely: "God justifies the buying-selling and forbids usury".²⁴ This verse does not specifically explain what is meant buying-selling and usury. Although, buying-selling here means common, but there are also buying-selling are prohibited, such as selling all the fruit on the tree (*muzabanah*), sold before harvest (*muzaqalah*),²⁵ and so on.

With regard to usury, it is forbidden, in essence, in just a loan with excess returns, ie by exploiting the needs of the borrower which resulted in him having to pay back the multiplier money from the original loan and could lead him to be a slave if it unable to pay its debts.²⁶

²² Ayubi, "The Political Revival of Islam: The Case of Egypt", pp. 564-565.

²³ Al-'Ashmawi, *Syari'ah: Kodifikasi Hukum Islam*, p. 42

²⁴ The Qur'an surah al-Baqarah (2): 275.

²⁵ Indeed, there is a *hadits* that prohibits buying and selling actually objects or goods that its form has not been there. But the ban is excluded by *istihṣān*, because there are specific text that allow it. In a *hadits* is narrated that when the Prophet Muhammad came to Medina, he saw the people of Medina used to do a buying and selling of fruits that its form is not yet clear, one year to two years. Seeing such a habit of buying and selling, the Prophet said that whoever is doing this kind of buying and selling do to the the terms and period are already known. See Romli SA., *Muqaranah Mazahib fil Ushul*, (Jakarta: Gaya Media Pratama, 1999), pp. 144-145.

²⁶ Al-'Ashmawi, *al-Ribā wa al-Fa'idah*, p. 38.

Because only the last paragraph containing the objective norms of civil law, then all the terms of the relationship between people (*mu'âmalah*) must be arranged in Islamic jurisprudence (*fiqh*). That is why the Board of Egypt Legislator can show, in the working draft of the Civil Law, that most of the character of the law can be easily derived from "different *fiqh* schools", especially the four Sunni schools of *fiqh*.

In the discussing usury, al-'Ashmawi had actually been concluded that both Egyptian law currently in force and other woods Egyptian laws in accordance with the shari'a, in the sense of shari'a principles derived from the various provisions contained in the various *fiqh* schools. Indeed, there are similarities among the legal systems due to the similarity of human nature and the basic needs of people everywhere, especially in certain cultural areas, such as the Arab world.

In addition, there is also a historical link between the Code Napoleon, where legal reform in the last century in Egypt are based,²⁷ and the *fiqh*. Code Napoleon has historical roots in the Code of Justinian, and *fiqh* also has similarities with the Code of Justinian, because *fiqh* evolved in a region where the Code of Justinian was valid, so that *fiqh* is directly affected by the Code of Justinian, or at least respond the same cultural conditions. Code Napoleon was introduced because *fiqh* is not codified, and it can be introduced because it is essentially no different from the custom in Egypt.

Egyptian legislators have used *ijtihâd*, by making changes to the legal decision in accordance with the conditions prescribed. In the area of civil law, they had been selecting various *fiqh* decisions in accordance with the public interest. With regard to the legitimacy of this, al-'Ashmawi illustrate the modification of the law by 'Umar

²⁷ Napoleon Bonaparte invaded Egypt in 1798, and in a moment he controlled almost the whole of Egypt. The era of Napoleon managed to slowly shift position and the role of scholars (*'ulamâ'*) in important decision-making in government, including the introduction of the Napoleonic Code. Previously, the scholars' became the determinant group controlling the government, even they performed actively in political life. See Afaf al-Sayyid Marsod, *Egypt in the Reign of Muhammad 'Ali* (Cambridge: Cambridge University Press, 1984), p. 3-5.

regarding the three times divorce.²⁸ This was done, although there are provisions in the Qur'an, in response to evolving circumstances. Far from violating shari'a, *ijtihad* through spending or taking the opinion follows the needs of social development is the meaning of the shari'a, nota bene it is the purpose of the religion and High Legislators".

The only decision of shari'a in the areas of civil law is the various provisions relating to usury, which is being discussed. While, in the criminal law, specific provisions of shari'a include the *hadd* and *qishâsh* punishment. In addition *qishâsh* is based on the Qur'an, the jurists' (*fuqahâ'*) expand it to include elements of the Taurah, and part of this system is an issue of *fiqh*, not shari'a.

Conclusion

The thought of al-'Ashmawi about shari'a is a form of resistance against the view of *Ikwân al-Muslimîn*, which was founded by Hasan al-Bannâ. It requires above all that the ideology of Islam must be ideology of the government, the laws must be in accordance with the shari'a, while the modernization and nationalization should be under the framework the Islamic teachings. This group continues to struggle to establish an Islamic state. According to it, the Islam is religion and government of (*dîn wa dawlah*).

According to al-'Ashmawi, the mention of "the application of shari'a", the motto of the Islamist movement, in fact nothing more than an empty slogan. More precisely, according to him, it is the application of *fiqh*, ie a set of rules and laws are contemplated and defined by humans, not by God, to bring the historical conditions of the past that no longer applicable.

²⁸In addition to the problem of three times *thalaq*, other rules are modified by 'Umar is with regard to *ghanîmah* (spoils of war). At the time of the Prophet, four-fifths of the spoils of war were distributed to soldiers involved in the battle and another fifth to the welfare of others, as mentioned in the Qur'an sura al-Anfal (8): 41, that is to God, the Apostle, Apostle relatives, orphans, the poor, and *ibn sabil*. 'Umar ibn al-Khattab in a war in Iraq and Sham opening not handing out the spoils of land as mentioned in the earlier paragraph. He argues that the future of Muslims in the country -in the public interest (*mashlahat al-âmm*), administration, financed by government soldiers and employees, must be rethinking. Further, see Mun'im A. Sirry, *Sejarah Fiqh Islam; Sebuah Pengantar* (Surabaya: Risalah Gusti, 1996), pp. 40-43.

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