

Judicial Opinions in Contemporary Egypt

SAYYID ṬANṬĀWĪ, THE STATE MUFTI OF EGYPT

JAKOB SKOVGAARD-PETERSEN

If a Muslim is in doubt about the rules or the attitude of Islam on a certain issue, he can ask for a legal opinion, a *fatwā*, from a specialist in Islamic Law. This specialist is called a *muftī*. Evidently this task is as old as Islam itself. But with time another more delicate function was added to that of giving *fatwās* to the majority of Muslims; some muftīs were raised to a position where they must give *fatwās* to sanction the politics of the rulers.¹

In Egypt, this role became increasingly institutionalized in the second half of the 19th Century. The *Dār al-Iftā'*, the administration of the Muftī, considers the year 1895 as its founding date.² Since then, all the *fatwās* issued have been registered in protocols. They amount to approximately 70.000. These *fatwās* deal with all conceivable and inconceivable issues (from the specific rules for adoption to the question of whether a Muslim about to starve to death may eat his own hand). Thus, they constitute a well of information for the theological, juridical and social history of contemporary Egypt. However, the *fatwās* are not binding on the recipient, who can be a ministry, a governmental or non-governmental organisation, or simply a private person. Furthermore, the majority of *fatwās* from the *Dār al-Iftā'* are very brief and give only cursory information on the context of the question, or how the conclusion was reached. Therefore, it is often difficult to assess the real *Sitz im Leben* of any given *fatwā*.

As early as 1931 a decree established that the courts were not bound by *fatwās* of any kind.³ Thereby, the office of the State Muftī lost almost all influence on practical legal matters in Egypt. The only specifically legal function he retains is that of examining any death sentence in order to

¹ Tyan, E.: *Historie de l'Organisation judiciaire en pays d'Islam*. Leiden, Brill, 1960, p. 223.

² Jādd al-Ḥaqq, Jādd al-Ḥaqq 'Alī: *Mahāmm Dār al-iftā'*. In al-Majlis al-A'lā li 'sh-Shu'ūn al-Islāmiya (Ed.): *Al-fātāwa al-Islāmiya*. Cairo, 1982, vol. 10, p. 3653.

³ Liebesny, Herbert J.: *Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival*. *The Middle East Journal* 37(2), 1983, pp. 202-17. p. 204.

establish that it does not contradict the principles of Islamic *fiqh*. However, the *Dār al-Iftā'* is still a separate administration under the Ministry of Justice. With the abolition of special Shari'a Courts for personal matters in 1955, additional tasks were transferred to the Mufti, most importantly today the authority to certify the appearance of the new moon and thereby the declaration of the lunar months of the Islamic calendar.

The present Mufti of Egypt, Dr. Sayyid Ṭanṭāwī, was appointed by presidential decree in October 1986. It was by no means an obvious choice since, contrary to his predecessors, Dr. Ṭanṭāwī had not graduated from the Shari'a college, nor worked at the Ministry of Justice before. Being a graduate of the Azhar College of Theology, he had taught Islamic studies at the University of Asiyut and at al-Azhar for twenty years, whilst editing a 15-volume commentary on the Koran.

In an interview in *al-Ahrām* four days after his appointment, Ṭanṭāwī stated his visions for the *Dār al-Iftā'*: 'From now on it was to concentrate on *fatwās* which were of relevance to the Egyptian people. These included an attempt to unify the beginnings of the lunar months, so that for instance Ramaḍān would begin simultaneously all over the Arab world. Other topics, the legality of which must be examined, are the introduction of modern medical techniques and various economic practices, such as *shahādāt al-istithmār*, capitalisation certificates. These were all subjects which had been discussed amongst juridical scholars, in Egypt and internationally, throughout the 1970s and 80s, so far without reaching much substantial agreement. Ṭanṭāwī expressed great optimism on the possibility of co-operation with other *fatwā*-issuing bodies internationally and locally: he expected to have weekly sessions with the *fatwā* council of the al-Azhar University and thought that they might even merge.⁴

Seven years have passed. What of all this has been achieved? Let me begin by asserting that so far, Dr. Ṭanṭāwī has been an extraordinarily active Mufti. How do I know?

First of all, Dr. Ṭanṭāwī has been so kind as to let me interview him, and allow me to sit and study the handwritten protocols of his *fatwās* in the new *Dār al-Iftā'*. Secondly, it is possible to follow his doings in detail in the Egyptian press. Here is one of the major developments in the role of the State Mufti: if in Egypt the Mufti has always been somewhat of a public

⁴ *Al-Ahrām*, 1/11 1986, p. 7.

person, this one is eminently so. This can be illustrated by the number of references to him in the index to *al-Ahrām*. While the former Muftī, ‘Abd al-Laṭīf Ḥamza, is referred to twelve times during his four years in office, there are more than 200 references to Ṭaṇṭāwī for the four years 1987-90. And this is in *al-Ahrām* alone! Especially in the Islamic oppositional press he has figured in almost every issue since 1989. This gives us an opportunity to follow the activities of this Muftī and place a number of his *fatwās* in context, thereby greatly enhancing their value as sources for the Islamic legal debate in Egypt today.

Without going into detail, it is easy to discern a pattern in the life of the Muftī. There is the annual pattern: lecturing in the Muslim youth camps in Alexandria in summer, speaking to the new missionaries in October, commemorating the October victory etc. Moreover, there is the Muslim annual pattern: articles and speeches at the birthday of the Prophet, the pilgrimage, and most importantly Ramaḍān, where he features every day with prayers and *fatwās*. Then there are the campaigns against extremism: every year Ṭaṇṭāwī and the Minister of *Awqāf* Muḥammad ‘Alī Maḥjūb spend several weeks touring mainly Upper Egypt and speaking at public meetings to the *shabāb* (young men) about the dangers and mistakes of extremism and about Islam as the religion of tolerance and moderation. This is linked to other social engagements pertinent to e.g. the struggle against drugs, the advocacy of family planning etc. Ṭaṇṭāwī frequently re-iterates his *fatwās* on drugs and extremism, clearly feeling a personal commitment to fight these social evils with the authority of religion. Needless to say, this is appreciated and given full coverage in the semi-official part of the Egyptian press.

Dr. Ṭaṇṭāwī's *fatwās* can be divided into three categories: a) First there are the hundreds and hundreds of very small *fatwās* which require a minimum of research, the bulk of them being questions by private people on standard issues in Islamic inheritance law. These are not prepared by the Muftī himself, but presumably approved by him.

b) Secondly there are the *fatwās* on very uncommon or controversial issues. These *fatwās* are longer and have required a varying amount of research in *fiqh* manuals, as well as an *ijtihād* by the Muftī himself. There are around a hundred of these *fatwās*.

c) Thirdly there are the *fatwās* on major social issues, where there is a well-known disagreement among Islamic legal scholars. These are often issued at a press conference in the *Dār al-Iftā’*. These have also been thoroughly prepared, and in a couple of cases the Muftī has had to

continue investigating the matter in order to defend himself against his critics. To this third group belong the *fatwās* mentioned in the interview with *al-Ahrām*. I shall briefly review them.

The observation of the new moon and declaration of the lunar month is, as mentioned, a prerogative of the Egyptian State Muftī. Nevertheless, this issue has aroused bitter controversy. There are two issues at stake here. One: whether it is permitted to make use of astronomical calculations instead of observation by eye. Two: whether the Egyptians should fast in Ramaḍān if observation of the new moon is reported from afar.⁵ Both issues have been discussed by Islamic legal scholars for centuries, but the discussions received new impetus at the turn of the century with the introduction of the telegraph and improved astronomical calculations.⁶ Indeed, it is no major challenge for astronomers to predict exactly the first night where the new moon is in the horizon after the setting of the sun. On the fourth of March 1989, Ṭanṭāwī issued a *fatwā* stating the rules for the observation of the new moon. In practice, he is relying on astronomical calculations, but maintains that the new moon should still be observed by the human eye, as is stipulated in the Koran.

As for the co-ordination of the Islamic calendar with the other Islamic countries, Ṭanṭāwī insists that it is up to the Egyptian *Dār al-Iftā'* to decide whether or not to follow reports that the new moon has been observed elsewhere, depending mainly on whether the observation can be confirmed by the astronomers.⁷ This may sound trivial, but has acquired a political dimension. As is well known, Saudi-Arabia has since the 1960s appropriated some of the religious responsibilities formerly held by Egypt, such as the fabrication of the *kiswa*, the black cloth of the Ka'ba. Saudi-Arabia has also built an observatory for the observation of the new moons, and nobody denies it the right to declare the beginning of *dhū'l-hijja*, the pilgrimage month.

Perhaps realizing that the declaration of the new moon is an important justification for his own office, Muftī Ṭanṭāwī has grown more reluctant to surrender his final authority on the matter, even if it seemingly goes against the general endeavour to unify the Muslim world. A

⁵ The Muftī's stand on these two issues is discussed, *inter alia*, in *al-Ahrām* 18/5, 7/6 and 17/6 1988.

⁶ Skovgaard-Petersen, Jakob: The Telegraph and the New Moon. In *The Study of Religion in Denmark: an Anthology*. Edited by Geertz/Sinding. Aarhus, 1994.

⁷ *Al-Ahrām* 11/2 and 13/3 1990.

tragic outcome of this symbolic struggle between the *waṭan* and the *umma* was reported from the town Bani Suef in April 1992, when what the Egyptian press labels the extremists had gathered to pray for the feast following the Saudi declaration that Ramaḍān was over, thereby defying Ṭanṭāwī who let the Egyptians fast for another day. This prompted the police to attack the mosque, and four young men were killed.⁸

Another major field are the *fatwās* on new medical techniques. Such *fatwās* have steadily increased throughout the 1980s, and the role of the Muftī here is more or less equivalent to that of the ethics councils set up in several European countries during the same decade.

Dr. Ṭanṭāwī's *fatwās* on new medical techniques are characterised by what could be called a technological approach: what will this technique be used for, – and is there something in this use which goes against a principle in Islamic legal thinking? In other words, every single technique introduced is evaluated like any previous type of technique, without any consideration of possible consequences. The Muftī seemingly does not share our ethics councils' fearful perception of modern medical science as a *system* with its own dynamic which threatens the human condition itself, if it is not subjected to strict control. Consequently, the *fatwās* are rather permissive of these new techniques, as long as they do not infringe upon public morality. I shall mention a couple of these *fatwās*:

a) Artificial insemination. Here it is stressed that children are a blessing, childlessness a shame, and modern science should work to help the fulfillment of marriage, viz. the begetting of children. Thus, it is permitted. However, the Muftī insists that artificial insemination must be restricted to married couples alone, sperm banks can never be allowed.⁹

b) Organ transplantation and death criteria. This is a current debate, involving many analogies to traditional *fiqh* debate on cutting into corpses in order to save an embryo, to save valuables from the belly, and the like. With the establishment in Egypt of blood banks by the beginning of the 1960s, the discussion was extended to the donation or sale of limbs or organs, with the donor's consent. Many scholars argued that this was forbidden on the grounds of the Koranic prohibition against suicide and self-mutilation; the idea being that the human body is not the property of the individual, but of God, and man is therefore not entitled to give it

⁸ *Al-Waḥd*, 5/4 92, *al-Ḥayāt* 8/4 92.

⁹ Unpublished *fatwā* of 11/10 1989. Record 118, fatwa number 132.

away, let alone to sell it. Against this Ṭaṇṭāwī piously states that at the end of the day, everything we trade in is in fact the property of God. Moreover, he applies the principles of, “necessity permits the forbidden things” (within certain limits) and “the lesser damage is to be preferred, if damage cannot be avoided” to advance the position that transplantation is permitted, if the physician can certify that a life can be saved or a disease cured, with no or little harm done to the donor. This is evidently the case with blood and other regenerating parts of the body, but less so with limbs. Much of the *fiqh* discussion is therefore concentrated on making judgments on the impact of loss of specific parts of the body, particularly those of which we have two, such as eyes and kidneys. Again, the Muftī is absolutely firm in his prohibition of any sort of sale or financial compensation related to the transplantation of limbs or organs.¹⁰

Special emphasis in the more recent *fatwās* has been given to the transplantation from dead bodies. From the very beginning, Ṭaṇṭāwī has permitted transplantations from dead bodies though asserting that the dead have a claim to respect equalling that for the living. Within the last couple of years, pressure has mounted for more of these operations, and in May 1992 the Muftī participated in a declaration which called for a re-evaluation of Egyptian law in order to introduce the cerebral death criterion.¹¹

c) The last medical *fatwā* I shall mention, is from 1988 and concerns sex-change surgery. It is connected to a famous case, where a student at the Azhar University after years of psychological treatment was granted a sex-change operation, where his male genitals were removed. The al-Azhar and the Doctors’ Syndicate sued the surgeon on the grounds that there had been no hormonal or physical indications that this operation was necessary. The doctor of the Public Prosecutor, however, accepted the explanation of the psychologists consulted, that there is such a thing as psychological hermaphroditism.¹² During the process the Muftī was

¹⁰ The most elaborate *fatwā*, of 5/2 1989, has been reprinted in Ṭaṇṭāwī: *al-Fatāwā ash-Shar‘īya*. Cairo: Mu’assasat al-Ahrām, 1989.

There are a great number of minor *fatwas*, often to government bodies, forbidding sale of organs and limbs. Moreover, Ṭaṇṭāwī has given statements to the newspapers on the issue, e.g. *Al-Ahrām* 13/7 87, 29/3 88, 24/1 89 (a declaration in Parliament), 9/2 89, 30/1 90, 23/2 90, 28/3 91 and 15/1 92.

¹¹ *Al-Ahrām* 24/5 1992, p. 1.

¹² *Majallat Hay’at al-qaḍāyā ad-dawla*, vol.35,4; Oct.-Dec. 1991, p. 159-69.

asked for a *fatwā* on the matter. Quoting a well-known hadith that God has not sent a disease without providing a cure for it, Ṭaṭṭāwī declared that an operation may be performed on weighty medical grounds, but a mere wish would not be sufficient. This was quoted by the Public Prosecutor as support for the surgeon who had consulted two psychologists before deciding to go ahead with the operation.¹³

Finally, there are the economic *fatwās*. They have become a speciality of Ṭaṭṭāwī's, and one where he has encountered the most outspoken opposition. On September 6th, 1989, Dr. Ṭaṭṭāwī issued a *fatwā* declaring a certain type of capitalisation certificate legal from the point of view of Islamic law.¹⁴ The capitalisation certificates have been issued since 1965 by some of the state-owned banks which invest the savings mainly in housing projects. The investors receive a fixed percentage of interest, besides taking part in a lottery. A few days after the *fatwā* the Minister of Planning, Kamāl al-Janẓūrī, increased the prizes of the lottery, clearly hoping that the Muftī's legalisation would boost this kind of investment for the benefit of public projects.¹⁵

By then, a storm of protests had arisen, which has not yet entirely subsided. The *fatwā* is seen as legalising the exaction of interest, thereby violating the serious Koranic prohibition against usury, *ribā*. A vast number of articles and several books, one of them by Ṭaṭṭāwī himself, have been published for or against the *fatwā*, discussing the precise impact of the Koranic prohibition against *ribā*: does this really mean a general ban on interest of any kind in an age of banking, inflation and so forth?

The *fatwā* was seen as crucial by supporters and opponents alike. In the Islamic press, the Muftī was accused of a general abandonment of Islamic legal principles for the sake of improving government finances. "The *Dār al-Iftā'* has degenerated" declared Shaykh Ṣalāḥ Abū Ismā'īl, MP for the Islamic movement and probably the most brilliant critic of the *fatwā*.¹⁶ By February 1990 the debate even reached the parliament, where Muslim Brotherhood leader Ma'mūn al-Huḍaybī accused the

¹³ Unpublished *fatwā* of 8/6 1988, record 118, p. 290-92.

¹⁴ This famous *fatwā* has been printed several times, for instance *al-Ahrām* 8/9 1989, p. 1 and 13, or in Ṭaṭṭāwī: *Al-Fatāwā ash-Shar'īya*. Cairo: Mu'assasat al-Ahrām, 1989.

¹⁵ *Al-Ahrām*, 12/9 89.

¹⁶ Ṣalāḥ Abū Ismā'īl: "*wa-min al-fatāwā al-Ṭaṭṭāwīya ma yudhḥil wa-yufẓi*" *Al-I'tisām*, October 1989, p. 22-27.

Muftī of being the puppet of the Minister of *Awqāf*.¹⁷ On the other hand, defenders of the Muftī pointed to a number of *fatwās* which conflicted with the interest of the state, most notably the one declaring taxation on inheritance un-Islamic. Moreover, they could claim with some right that several of Ṭanṭāwī's critics amongst the scholars were themselves on the board of the Islamic banks and had great personal interest in denouncing any other form of saving as un-Islamic. Most commentators saw the controversy as an offshoot of the row about Islamic investment companies in 1986-88.¹⁸

In any event, the *fatwā* destroyed whatever hopes Ṭanṭāwī may have nourished about close co-operation with international bodies of Islamic *fiqh*, or the Azhar University, since both have stood aloof from the Muftī ever since. The relationship between Ṭanṭāwī and *Shaykh al-Azhar* Jādd al-Ḥaqq, himself a former Muftī, is notoriously bad. In 1992 Jādd al-Ḥaqq announced that al-Azhar will set up regional *fatwā*-committees, clearly an attempt to curb the influence of the Muftī.¹⁹

This, by the way, is one of the more important points to notice in the attacks upon the Muftī. Several of his opponents have stressed that with the increasing specialisation and complication of life today, *fatwās* should no longer be issued by single individuals, but only by committees of scholars. The modern means of communication have opened the era of collective jurisprudential decision-making (*al-ijtihād al-ijmā'ī*).²⁰

To sum up, the Muftī has delivered the *fatwās* he promised when taking office. However, they have no doubt led to more controversy than he anticipated in 1986. The office of State Muftī has become increasingly politicised during the 1980s. This is due, on the one hand, to Ṭanṭāwī's success in promoting the *Dār al-Iftā'*, but on the other hand to the ever-growing self-confidence of the Islamic movement in Egypt. The Muftī has been put under pressure in a number of ways: by a daring Islamic press, by a clamorous Islamic representation in parliament, by a parliamentary commission for religious questions, and by the various projects for Islamisation of the laws connected to the 1980-amendment of the Constitution. Even those in the Islamic movement, like Fahmī Huwaydī, who do not doubt Ṭanṭāwī's sincerity, assert that a politically

¹⁷ *Al-Ahrām* 30/1 1990.

¹⁸ See for instance *Rose al-Yussuf*, 18/9 89, p. 14-18.

¹⁹ *Rose al-Yussuf*, 30/3 1992.

²⁰ Fahmī Huwaydī in *al-Ahrām*, 3/10 1989. 'Alī Salūs in *Nūr*, 15/11 1989.

independent State Muftī is an illusion.²¹ Consequently, *fatwās* published by independent scholars such as *Shaykh* Kishk, Yāsīn Rushdī, or Yūsuf al-Qaradāwī enjoy a wide readership in Egypt. In the more scholarly circles, al-Azhar seems recently to have reinforced its stand on a number of social issues, and on subjects like the capitalisation certificates pressure can also be felt from international scholarly organisations. The divisions and animosity amongst the scholars are there for all Egyptians to see.

The *fatwās* by Dr. Ṭanṭāwī do not differ substantially from those of his predecessors, although he tends to consult specialists in the various fields before issuing them; “Question the people of the the Remembrance, if you do not know”, says the Koran.²² This is a favourite quotation for scholarly self-legitimation throughout the ages, but Ṭanṭāwī sees in this a justification for consulting economists and medical researchers.²³

Apart from that, there is a strong tendency to rely on the most general principles of *fiqh*, like the ones mentioned about the “lesser damage” or the “public interest”. This is a fairly standard argument in the *fatwās* from the *Dār al-Ifṭā’*. The interesting question, and this is where the personality of the Muftī may be detected, is what is perceived as the public interest?

In the *fatwās* of Dr. Ṭanṭāwī one can observe a strong interest in protecting the poor and weak in Egyptian society. A telling example are the *fatwās* on third part liability insurance for medical doctors from 1989. After declaring them un-Islamic because of the element of gambling involved in insurance, Ṭanṭāwī received a letter from the Doctors’ Syndicate expounding the principles of this type of insurance and stressing that the insurance would ensure that the injured patients received their compensation. Three weeks later he issued a new *fatwā* permitting them.²⁴

Many of the economic *fatwās* reveal a suspicion of private enterprise and a support for state control and regulation. The responsibility for the well-being of the poor is mainly seen as incumbent on the state. In this respect, Sayyid Ṭanṭāwī seems to be a good example of what Olivier Roy has dubbed the “social-democratisation” of Islamic intellectuals.²⁵

²¹ Fahmī Huwayḍī in *al-Ahrām*, 3/10 1989.

²² Koran 21:7.

²³ The *fatwā* on capitalisation certificates, *al-Ahrām* 8/9 1989, p. 13.

²⁴ Unpublished *fatwās*, record 118, number 123 (14/5 1989) and 131 (15/8 1989).

²⁵ Roy, Olivier: *L'échec de l'Islam politique*. Paris: Seuil/Esprit, 1992, p. 102-37.

