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School of Humanities and Social Sciences

Tradition, Change and Social Reform in the Fatwas of the Imām Muhammad ‘Abduh

A Thesis submitted to

ARIC Arabic and Islamic Civilizations

in partial fulfilment of the requirements for

the degree of Master of Arts

by

Malak Tewfik Badrawi

(under the supervision of Dr. Mohamed Serag)

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PART I - THE BACKGROUND

THESIS ABSTRACT

INTRODUCTION

A BRIEF BIOGRAPHY OF MUHAMMAD ‘ABDUH

MUHAMMAD ‘ABDUH’S ANALYSIS OF THE QUR’ĀN

THESIS ABSTRACT

This thesis proposes to examine some of the fatwas, or legal opinions, issued by Muhammad ‘Abduh, and taken from the manuscript ledgers at *Dār al-Iftā’ al-Miṣriyah*. The fatwas involve official and semi-official issues, problems of personal status, financial matters, and relations with others. They were picked for their clarity, peculiarity, diversity, and will be examined for their relevance to the needs of various groups of society at that time and for the legal argumentation used. The fatwas will be examined to try to determine ‘Abduh’s legal approach, and his methodology when dealing with everyday issues.

Fatwas are also useful tools to gauge different trends and tendencies in a society. The queries reflect some of the preoccupations of individuals. As for the responses, whether these are timely or untimely, or whether they are mundane or peculiar, they demonstrate the degree of empathy of the mufti with the public. Indeed, Muhammad ‘Abduh once observed that the *‘ulamā’*- Muslim religious scholars- of his time, even if they were highly qualified, were totally isolated from the needs of the public, and that the only interaction the community had was with the storytellers that they called preachers at the Friday prayers.¹ Such a statement implied that he considered that the function of the religious scholars was to serve society.

¹ Muhammad ‘Imara, *Al-A‘māl al-kāmila li al-Imām al-Shaykh Muḥammad ‘Abduh*. Cairo: *Dār al-Shurūq*, 1993. Vol. 1, p. 859.

INTRODUCTION

TRADITION, CHANGE AND SOCIAL REFORM IN THE FATWAS OF THE IMAM MUHAMMAD ‘ABDUH

The Imam Muhammad ‘Abduh (1848-1905) is best remembered, from his writings, as a religious, social and political reformer. Yet he served Egypt in a legal capacity in the courts- as chief *qādī* – judge, and then as Grand Mufti of Egypt- *mufti al-diyār al-Miṣriya*. He was also a jurist who had his own approach to solving social problems or issues. During his stint as mufti, - between 1899 and 1905,- ‘Abduh issued over 940 fatwas,² or legal opinions, in response to queries that encompassed a wide range of topics. These included official questions on diverse issues, family or charitable endowments, rules of inheritance, marriages, divorces, applications of the death penalty, business transactions, guardianships, to name but a few. The majority of the fatwas (over 700) dealt with endowments, both family and charitable,³ as well as legacies. The queries came from different sectors of the Egyptian administration and from private individuals; some of them were from outside Egypt, from places as distant as the Transvaal and India. The questioners came from diverse backgrounds, and included Muslims, Christians, Jews, British businessmen, Greeks and Sudanese subjects.

This thesis reviews over sixty-six of the legal opinions issued by ‘Abduh,⁴ and taken from the manuscript ledgers at *Dār al-Iftā’ al-Miṣriyah*. They are examined for their conceptual framework, to try to establish the principles that guided him when issuing his opinions. Each question is dealt with in accordance to its provenance, wording, the generality or specificity of the question, and the legality. The responses are examined for language, comprehensiveness or brevity, to try to determine

² ‘Imara considered there were over 946 fatwas. His estimate is probably accurate since he is thorough. ‘Imara, Volume 2, p. 486. Counting the fatwas is a problem, as various pages from the ledgers available at *Dār al-Wathā’iq al-Miṣriya* are missing. For example, in the first ledger, No. 00002, the *fatwas* are numbered, but whoever numbered them eventually realised that there was a miscalculation, and altered the amount by subtracting 100 from the total.

³ Most of such family endowments were a means to preserve property within a family and to prevent it from being partitioned until it virtually disappeared.

⁴ Some queries mentioned here consist of more than one question. For example, the so called “Transvaal fatwa” is a response to three questions.

whether or how the mufti justified his response, and the sources he used to support his argument.⁵ The analysis tries to decide whether ‘Abduh was in touch with the needs of his times and public, and the legal tools he relied upon to issue his opinions. This was because as a Muslim religious scholar, he was required to abide by the main sources of Islamic jurisprudence - the *uṣūl al-fiqh*, - namely the Qur’ān, the Sunna – including the actions and statements of the Prophet, the *ijmā’* or consensus of the community, and *qiyās*, or analogy, in order to derive, or extrapolate rulings.

The fatwas he gave involved official and semi-official issues, problems of personal status, financial matters, third-party rights, and relations with others. Those selected here were picked for their clarity, peculiarity, and diversity. They are looked at for their relevance to the needs of various groups of society at that time and for the legal argumentation he used. Fatwas are useful tools to gauge different trends and tendencies in a society. The queries reflect the preoccupations of individuals, and the responses, whether timely or untimely, mundane or peculiar, demonstrate the degree of empathy of the *mufti* with the public. Indeed, ‘Abduh once observed that the ‘*ulamā’*- Muslim religious scholars- of his time, even if they were highly qualified, were totally isolated from the needs of the public, and that the only interaction the community had was with the storytellers that they called preachers at the Friday prayers.⁶ Such a statement implied that he considered that the function of the religious scholars was to serve society.

Abduh, however, was also profoundly convinced of the obligation to follow the precepts of the *Shar’* - Islamic religious law, although his approach was distinctly more pragmatic than most of his fellow religious scholars from the Azhar. This may be illustrated in the responses given to a query addressed indiscriminately to these ‘*ulamā’*’ by an Indian Muslim, about a group in India claiming to be Sunni Muslim, and who maintained that they were following the Imams of the four legal schools. The group was striving to achieve accord among Muslims, calling upon rich and affluent people to take up the education of Muslim orphans, and spread Islam, so as to oppose the onslaught of the People of the Book and the gangs of idol worshippers. However,

⁵ The analysis will be modelled to a certain extent on Vardit Rispler-Chaim’s “Postmortem examinations in Egypt,” in Muhammad K. Masud, B. Messick, D. Powers (editors), *Islamic Legal Interpretation Muftis and their Fatwas*. London: Harvard University Press, 1996. pp. 278-285.

⁶ ‘Imara, Vol. 1, pp. 881-882.

in their attempt to support and protect the Muslim community and unite its strength, they were being assisted and supported by non-believers and innovators. The questioner wanted to know whether such assistance was permitted, whether similar situations had existed in the first three praiseworthy centuries after the advent of Islam, and what was to be the judgement given on anyone who attacked these Muslims and accused them of leading people astray?⁷

The Azhar Shaf'i, Maliki, Hanbali and Hanafi jurists' answers to each question were detailed and involved: they included references to the Qur'an, the citation of several Prophetic Hadiths taken from various accepted sources, as well as rulings from their leading jurists, i.e. they did not depart from the prescribed method of giving a legal opinion. 'Abduh responded with verses from the Qur'an, accounts from the life of the Prophet and the early Muslims, and declarations from the jurists, - to substantiate that it was permitted to obtain the assistance of unbelievers and people of no virtue to accomplish what was beneficial and of use to Muslims, and that those who built upon this assistance - so as to unite the word of Muslims, educate their orphans and help these attain what was beneficial to them - were only doing good and following the precedent set by the Messenger of God and by his Companions.⁸ The difference here was that 'Abduh derived his answer from *accounts* of the Prophet's life and of the early Muslims as evidence, rather than through the citing of hadiths.⁹ Moreover, when using *ijmā'* - consensus, which is one of the principle sources of the *Shar'*, 'Abduh referred to the consensus of the early Muslims, or to that of the jurists. The inference from this was that 'Abduh was pragmatic even in his application of the Sunna and that he believed in the value of public welfare – *al-maṣlaḥa al-‘amma*. Indeed, he stressed this value repeatedly, even in his interpretation of some of the verses of the Qur'an. Accordingly, it is not surprising if this concept permeated his legal thought as well.

⁷ *Daftar al-ṣādir ‘an al-Fatāwī al-Shar‘iyya* 00003. Fatwa 264, ledger 00003. 'Imara, Vol. 1, pp. 837-843. 'Imara refers to this as the Indian fatwa – *al-fatwa al-Hindiyya*. The responses of the other 'ulamā' are in Muhammad Rashid Rida, *Tārīkh al-Ustādh al-Imām al-Shaykh Muḥammad 'Abduh*. Cairo: *Al-Hay'a al-Miṣriyya al-‘amma li al-Kitāb*, 2012. Vol. 1, pp. 648-661.

⁸ 'Abduh's complete response is in Rida, Vol. 1, pp. 662-666.

⁹ See footnote 13 on al-Fasi and al-Sanusi in this introduction.

‘Abduh made an impact, and his stature as a jurist was, and continues to be, such that scholars of Islamic Law and academics still refer to him in their works. This may partly be explained by his denunciation of *taqlīd*, i.e. his refusal to imitate, or follow, the doctrines of the predecessors, as well as his willingness to reconsider the text of the Qur’ān, or “the terms of the Prophet’s precedents”¹⁰ and give them a new interpretation more adapted to his times. Thus, Kamali mentions that even though verses of the Qur’ān enjoin Muslims to *ijmā’* - consensus, Muhammad ‘Abduh had pointed out that one of these dealt explicitly with the Prophet during his battle with his opponents, and that this did not imply consensus.¹¹ Also regarding the Sunna, the Imam considered that the Prophetic tradition cited to demonstrate the validity of consensus did not speak of *ijmā’*, nor did it support the notion that the Muslim community was infallible.¹²

As to who may have influenced ‘Abduh’s attitude regarding the *uṣūl*, or sources of Islamic law, it is noteworthy that one reason for his clash with Shaykh Muhammad ‘Ilish¹³ was the latter’s attack on a North African religious scholar,¹⁴ Muhammad ibn ‘Ali al Sanusi.¹⁵ Sanusi, a Maliki like ‘Ilish, had written a juristic

¹⁰ A phrase borrowed from Noel J. Coulson’s *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969. p. 43.

This is clear from ‘Abduh’s interpretation of certain verses of the Qur’ān; for example, verses from the Cow Chapter on affluent members of society helping less fortunate members, for the welfare and benefit of that society. See ‘Imara, Vol. 4, pp. 154, 215, 216.

¹¹ Muhammad Hashim Kamali. *Principles of Islamic Jurisprudence*. Cambridge: The Islamic Texts Society, 2003. Third edition. p. 239.

¹² *Ibid.*, p. 242.

¹³ See about ‘Ilish in following section.

¹⁴ See ‘Imara, Vol. 3, pp. 330-331. The attack on Sanusi is in Muhammad ibn Ahmad ibn Muhammad ‘Ilish, *Fath al-‘Ālī al-Mālik fī al-fatwa ‘ala madhhab al-Imām Mālik*.

¹⁵ Muhammad ibn ‘Ali al-Sanusi al-Khattabi al-Jaza’iri, 1202/11791-1276/1859 was born in Algeria. His teacher was the North African scholar Ahmad ibn Idris al-Fasi, who maintained that *ijtihād* was constant, and that it was both possible and permitted. Fasi influenced Sanusi profoundly. Sanusi argued, like ‘Abduh would subsequently, that every Muslim had to reject *taqlīd* and draw, or derive the *aḥkām*, or legal rulings, from the Qur’ān and authentic hadiths independently, without intermediary, because the jurists were fallible, and the juristic texts had errors and often contradicted themselves, and many of the legal statutes they gave were against or opposed some of the genuine hadiths. Muhammad ibn Ahmad ibn Muhammad ‘Ilish, ‘Ali ibn Nayif al-Shahud (ed.) *Fath al-‘Ālī al-Mālik fī al-fatwa ‘ala madhhab al-Imām Mālik - fatāwī ibn ‘Ilish*. Text published in 1428/2007. See query and response on pp.77-83. Available online at https://archive.org/details/Fath_al_aliyi_almaliki-; Gilbert

text¹⁶ dealing with the ritual aspects of prayer and worship. In this, he declared that it was essential to understand the rules of worship directly from the Qur’ān and the Sunna, because this was the only way for one to form an opinion and possibly disagree with the views of the *mujtahid*.¹⁷ This conformed with ‘Abduh’s views on interpreting the Qur’ān and the Sunna, and with his understanding of the sources of Islamic law. Sanusi’s statement led certain ‘*ulamā*’ from al-Azhar, including ‘Ilish, to declare a bitter war on him, and accuse him of being an innovator.¹⁸ Sanusi, like ‘Abduh after him, favoured following the examples set by the actions of the Prophet and the early Muslims rather than referring or resorting to hadith. Such practice was in line with statements by various early Muslims, including Malik ibn Anas, the founder of the Maliki school, who gave preference to the actions over the sayings of the Prophet and his entourage.¹⁹

Bearing in mind that initially ‘Abduh studied under Shaykh Darwish - who was himself the student of certain North African scholars, - who is to say that Muhammad ibn ‘Ali al-Sanusi, or indeed al-Fasi, was not one of his teachers, especially since they were his contemporaries?

Recent works dealing with Muhammad ‘Abduh’s legal thought include Muhammad ‘Imara’s thorough five volume anthology, in which he presented an assortment of the Imam’s fatwas, preceded by a commentary. The former Mufti of Egypt, Dr Ali Gom‘ah, who had access to ‘Abduh’s fatwas, did not exert himself, but simply published a booklet with a small selection of these.²⁰ Academic pieces involving ‘Abduh’s fatwas include the Master’s thesis of Aswita Taizir in 1994, entitled “Muhammad ‘Abduh and the reformation of Islamic Law.” Taizir discussed

Delanoue, *Moralistes et Politiques Muṣūlmans dans l’Egypte du XXè Siècle 1798-1882*. Le Caire: Institut Français d’Archéologie Orientale, 1983. Vol.1, p.157.

Sanusi was founder of the Sanusiya, a Sufi *tarīqa*.

¹⁶ Entitled *Bughyat al-Maqāṣid fī khulāṣat al-Marāṣid*, also known as *Shifā’ al-ṣadr fī al-masā’il al-‘ashr*.

¹⁷ Kamali describes a *mujtahid* as a legist who is competent and qualified to express “independent tradition based opinions in legal or theological matters.” Kamali, *Principles of Islamic Jurisprudence*, p. 525.

¹⁸ ‘Imara, Vol. 3, p. 331.

¹⁹ See ‘Ilish’s argument, *Fatḥ al-Ālī al-Mālik fī al-fatwa ‘ala madhhab al-Imām Mālik-fatāwī ibn ‘Ilish*. p. 78.

²⁰ See ‘Ali Gum‘ah (ed.) *Fatāwī al-Imām Muḥammad ‘Abduh*. Cairo: *Al-Jam‘iya al-khāriya al-Islāmiya*, 2005.

Muhammad ‘Abduh’s legal thought and his fatwas in several sections, but she did not have direct access to the fatwas, and she focused mostly on polygamy, bank interest and on ‘Abduh’s statements concerning these two issues. Another academic work that examined the Imam’s legal thought was the PhD thesis of Yasir S. Ibrahim, “The Spirit of Islamic law and modern religious reform *Maqāṣid al-Sharī’a* in Muhammad ‘Abduh and Rashid Rida’s Legal Thought.” Ibrahim’s emphasis was on *maqāṣid al-Sharī’ah*,²¹ and he also did not use the fatwas directly, and concentrated instead on published ones, as well as articles written by ‘Abduh.

It is common knowledge that, as a religious scholar, ‘Abduh was inclined towards Imam al-Shatibi’s²² interpretation of *maqāṣid al-Sharī’a*, or the objectives of the religious law. He once advised an instructor of Islamic Law, and specifically on *uṣūl al-fiqh*, Principles of Islamic Law, to use Imam al-Shatibi’s *al-Muwāfaqāt* as a support in his classes;²³ others mention that he recommended its use as a text to teach *uṣūl al-fiqh* to students at al-Azhar.²⁴ ‘Abduh, originally a Maliki scholar, used the *maqāṣid* as evidence to justify the notion of *maṣlaḥa*, or considerations of public interest or welfare. This last notion was relevant years later, when ‘Abd al-Razzaq al-Sanhuri drafted the Egyptian Civil Code with the Sharī’a in mind. A question remains, what other tools did ‘Abduh use, in his interpretations as a jurist?

²¹ *Maqāṣid al-shar’* - the objectives, or purposes, of the Law are very like *maṣlaḥa*, or considerations of public interests or benefits. They are grounded on the premise that the God only wants that which is good for mankind; consequently, the *Shar’*, i.e. the Qur’ān and the Sunna of the Messenger, are intended for the advantage of mankind, and what it forbids is harmful *mafsada* and should therefore be avoided.

Whereas *maṣlaḥa* was a much broader and general concept, the objectives *maqāṣid al-shar’* were derived from certain clear injunctions of the Qur’ān, and the Sunna, that endorsed the protection, preservation and safeguard of five essentials *al-ḍarūrāt*, namely religion, life, intellect, progeny and property. Some jurists included a sixth essential honour, *ird*. There are three categories of *maqāṣid*, ranging from the essential *al-ḍarūrāt*, through to the complementary *al-ḥajjiyāt*, and ending with the desirable *al-taḥsināt*.

²² Abu Ishaq Ibrahim ibn Musa ibn Muhammad al-Lakhmi al-Shatibi (d. 790/1388) was bred and educated in Granada during the reign of Sultan Muhammad V al-Ghani Bi‘Allah, when numerous Muslim scholars from North Africa were in Granada. Shatibi elaborated greatly on the notions of *maqāṣid al-shar’* formulated by Abu Hamid al-Ghazali (1058-1111) in his work *al-Mustaṣfa fī ‘ilm al-uṣūl*.

²³ Muhammad al-Khudari, *Uṣūl al-fiqh*. Beirut: *Dār ṣādir*, 2005. p. 16.

²⁴ In the Introduction and explanation by Shaykh ‘Abd Allah Draz, Abu Ishaq al-Shatibi, *al-Muwāfaqāt*. Cairo: *Dār al-Faḍīla*, 2010. pp. 60-61.

To sum up, the objectives of this thesis are twofold: one, is to try to interpret Muhammad ‘Abduh’s approach to the original fatwas in the light of what is said here about his approach as a Muslim jurist. Thus, in some fatwas ‘Abduh was eclectic and used *takhayyur*, selection, i.e. the rules were selected from the whole corpus of Sharī‘a doctrine as those most suited to modern times.²⁵ Muslim legal scholars who approved of this tool tended to use the word *takhayyur*. Others, who may have frowned upon this expedient, or were more doctrinaire, used the word *talfīq*, which Hallaq defined as amalgamation, and Hourani explained as piecing together.²⁶ It is therefore interesting to look at what ‘Abduh had to say about this. Two, is to try to establish whether or not ‘Abduh was really in touch with the needs of society at that time, given that some of these needs did manifest themselves in the queries presented, and that he was critical of religious scholars who were not.

Part One of this thesis, gives the background, including this introduction, a very brief biography of the Imam, as well as an examination of what he had to say about the Qur’ān –and, more specifically, about the derivation of rules from the Noble Book; this is taken from his interpretation of two verses of the Chapter on Women.

Part Two consists of nine uneven sections presenting the fatwas and responses, which are organised into categories. These cover official queries, faith and ritual; marriage and separation; interdiction or *hijr*; third-party rights, involving inheritance, gifts and endowments - *waqfs*; custody and guardianship; miscellaneous issues, i.e. fatwas which are awkward to classify; and finally, those that refer to penalties, etc.

The conclusion sums up and underlines the findings, and an appendix is attached with the fatwas as they are transcribed in Arabic.

²⁵ This is the definition given by Coulson.

²⁶ Wael B. Hallaq, *Sharī‘ah Theory, Practice, Transformations*. Cambridge: Cambridge University Press, 2009. p. 448; Albert Hourani, *Arabic Thought in the Liberal Age 1798-1939*. Cambridge: Cambridge University Press, 1983. p. 152. On discussing the most effective methods by which positive law was created, Hallaq points out that *takhayyur* is selection. However, *takhayyur* is based on *maṣlaḥa*. Kamali explains that *talfīq* actually combines part of the doctrine of one school or jurist, with part of the teachings of another school or jurist. Mohammad Hashim Kamali. *Shari‘ah Law - An Introduction*. Oxford: Oneworld, 2010. p. 95.

A BRIEF BIOGRAPHY OF MUHAMMAD ‘ABDUH

Muhammad ‘Abduh was born in 1849 in the village of Mahallat Nasr, Shubrakhit - province of Buhayra, to a respected middle class family.²⁷ His family had been forced to relocate several times to escape the exactions of Muhammad ‘Ali Pasha’s tax collectors, and they were only able to resettle in their village after his birth.

He learned to read and write at home; then, in line with the traditions of his time, he learned the Qur’ān from a professional reciter. Perhaps because he was able to memorise it within two years, his father enrolled him when he was around thirteen at the Ahmadiya School in Tanta, the second most prominent religious school in Egypt after the Azhar. After eighteen months or so spent there, he found himself unable to understand anything, because students had to commit unexplained texts to memory. He therefore fled from Tanta and went to live with his maternal uncles for three months, but his brother found him and forced him to return to the school. After some resistance, ‘Abduh returned to his village resolved not to resume his studies, got married, and busied himself farming. However, forty days or so after his marriage, his father arrived, and compelled him to return to the school in Tanta. He therefore boarded the train with a friend but as it was a very hot day, he decided to leave the train at a village on the way to stay with paternal relatives; consequently, he asked his friend to tell to his father he was in Tanta.²⁸

During the fifteen days he stayed at this village, he met an uncle of his father’s, Shaykh Darwish Khidr, a Sufi who had studied under various North African religious scholars. Shaykh Darwish had read Malik’s *Muwattā’*, as well as a number of hadith books. He brought with him letters he had received from his masters, and asked ‘Abduh to read these for him, as his vision was impaired. The youth very reluctantly complied. Notwithstanding, Shaykh Darwish persevered and was disposed to explain difficult words and meanings; thus, he prodded ‘Abduh gently into reading, so that the youth gradually found himself drawn into the different texts the shaykh subsequently brought for him to read.²⁹

After several days of this, someone warned ‘Abduh that his mother intended to pay him a visit in Tanta. He thereupon returned to the Ahmadiya, and it was nearly

²⁷ ‘Imara, *Al-A‘māl al-kāmila li al-Imām*. Vol. 2, pp. 315-316.

²⁸ *Ibid.*, pp. 321-322

²⁹ *Ibid.*, Vol. 2, pp. 324-5.

the end of the school year. He found that his class had been unable to complete two of the required texts, because two of the teachers had faced personal crises. ‘Abduh therefore set about reading the texts, and realised that - thanks to Shaykh Darwish,- he could now understand these. His fellow students, seeing this, gathered around him and they went through the books together.

Shortly after this, in 1864/1382, he went to the Azhar to pursue his studies. He attended classes there, but kept to himself.³⁰ There were two parties at the Azhar at that time; one was ultra conservative, and the other was inclined towards Sufism. Muhammad ‘Abduh was drawn towards the latter.³¹ At the end of each academic year, he would spend two months at Mahallat Nasr with Shaykh Darwish, who would ask him what he had read during that year. They would revise the material together, examine other topics, and continue to study the Qur’ān together.

Darwish encouraged ‘Abduh to acquire some knowledge of science, engineering, and other subjects unknown to the Azhar of that time; the youth was willing, and sought ways of doing this. It was around this time, in 1869/1386, that he met the man who would become his second teacher, Jamal al-Din al-Afghani (1839-1897), who was paying a first visit to Cairo.³² ‘Abduh was riveted by Afghani’s interpretation of certain verses of the Qur’ān. However, it was Shaykh Darwish who drew the youth out of his voluntary isolation, and him forced out into the public sphere. ‘Abduh thereupon began to attend meetings and to participate in debates covering a variety of topics.

It was during Afghani’s second visit to Egypt, in 1871, that ‘Abduh, who was still at the Azhar, became close to him. Afghani attracted the more progressive students at the Azhar, and he soon acquired a following, which included ‘Abduh. The latter attended Afghani’s classes on the mathematical and philosophical sciences. This was to cause problems for ‘Abduh during his years as a student, because as Afghani’s supporter, ‘Abduh once found himself surrounded by students who were followers of Shaykh Muhammad ‘Ilish’, an ultra conservative vociferously opposed to Afghani’s

³⁰ *Ibid.*, Vol. 2, p. 325.

³¹ Delanoue, Vol. 1, pp. 93-95. Delanoue indicates this in his depiction of Egyptian scholars of that period.

³² ‘Imara, Vol. 2, pp. 324-325. Afghani’s first visit to Egypt was short. He returned in 1871, and remained in Egypt until 1879.

teaching.³³ Ilish's students pulled off 'Abduh's turban to insult him for teaching a text they considered was banned at the Azhar. He managed to resist them, and returned to his teaching.³⁴ However, when sitting for the exam to obtain the degree of *'ālim*,³⁵ in 1877, 'Abduh found that most of the members of the exam committee were followers of 'Ilish.

He therefore succeeded his exam with a second rank only in his *'ālimiyya*.³⁶ He subsequently taught the theological and logical sciences at the Azhar, and became a history teacher at *Dār al-'Ulūm* in 1878; this newly established school was intended to contend with the Azhar.³⁷ 'Abduh also taught Arabic at the School of Language and Administration, *madrāsāt al-ʿAlsun wa al-Idāra*.³⁸

Afghani was deported from Egypt in 1879 for his political activities, which included the formation of a political party *al-ḥizb al-Waṭanī al-ḥurr*, the motto of which was Egypt for the Egyptians. 'Abduh, as Afghani's close collaborator, had to quit teaching and forced to retire in his village, Mahallat Nasr. He was then pardoned through the intercession of the Prime Minister, Riad Pasha, who appointed him as an editor of the Egyptian government's official gazette, *al-Waqā'i' al-Miṣriyya*. His articles and his ideas on reform led to his nomination in 1881 as a member of the newly formed Higher Council for Public Education.³⁹

He was sentenced to exile from Egypt in December 1882, - when his party joined 'Urabi's partisans in the 'Urabi revolt in 1881, which brought about the British occupation of Egypt in 1882. 'Abduh was first accused of participating in the revolt,

³³ Shaykh Muhammad 'Ilish, who died in 1299/1882, was Mufti of the Maliki school since 1853. He was opposed to the reform that Shaykh Mustafa al-'Arusi, the Rector of al-Azhar from 1864 until 1870, wished to implement on education at al-Azhar. 'Ilish was intransigent, and an assiduous reader and teacher of hadith.

³⁴ 'Imara, Vol. 1, p.24; Delanoue, p. 135.

³⁵ The degree of *'ālim* was instituted in 1872, when Shaykh al-'Abbasi al-Mahdi was Rector of al-Azhar.

³⁶ The Rector of the Azhar, Shaykh al-'Abbasi al-Mahdi, who was part of that committee, attested he had never seen anyone answer questions in an exam as brilliantly as had 'Abduh. He indicated that had it been up to him, the youth, who was 28 at the time, would have obtained a first with distinction. 'Abduh's allies nevertheless managed to force the others to sign the exam form, thus allowing him to qualify as a religious scholar. Rida, *Tā'rīkh al-ustādh*. Volume 1, p. 103.

³⁷ Rida, Vol. 1, p. 135. Founded in 1872, by 'Ali Pasha Mubarak.

³⁸ *Ibid.*

³⁹ *Ibid.*, pp. 140-141

and gaoled for three months.⁴⁰ Released from gaol, he travelled to Beirut, and then to Paris in 1884, to join Afghani. Together they organised a secret society, *al-'Urwa al-Wuthqa* calling for unity and the reform of Islam,⁴¹ and they issued eighteen of its publications.⁴² After the cessation of these publications, 'Abduh travelled to Tunis, then to Beirut, and became involved in the formation of another secret society aiming at a rapprochement between Islam, Christianity and Judaism.

He was allowed to return from exile in 1888.⁴³ Although he wished to resume his teaching, but his influence was feared. In 1889, he was appointed as a judge in the *shar'ī* courts. By then, he was in his early forties, and he decided to learn French, since many of his fellow judges used the language as the laws were in French, and 'Abduh did not want to be at a disadvantage. He was aware that knowledge of a European language would make him more capable of defending the interests of his nation, "especially since the interests of Muslims around the world had become closely tied to European ones, and [he] could best defend these by knowing one such language."⁴⁴

In 1895, he managed to persuade the new Khedive, 'Abbas Hilmi, to permit him to set up an administrative council for the Azhar, and he was able to carry out some reforms in that institution. He was appointed Grand Mufti of Egypt in 1899,⁴⁵ and the Khedive came to appreciate 'Abduh's suggestions to him on how to deal with Lord Cromer, the British High Commissioner in Egypt.⁴⁶ As Mufti of Egypt, which position he occupied until his death in 1905, 'Abduh was on the Legislative Council, the functions of which were merely to advise and deliberate. His relations with 'Abbas Hilmi were not always cordial. 'Abduh died in the summer of 1905. Through his writings and teachings he acquired as many followers as had his master Afghani before him, and he influenced several generations of Egyptians after him.

⁴⁰ *Ibid.*, p. 149; 'Imara, Vol. 1, p. 27.

⁴¹ *Ibid.*, Vol. 2, p. 343.

⁴² *Ibid.*, Vol. 1, p. 28

⁴³ *Ibid.*, Vol. 1, pp. 29-31.

⁴⁴ *Ibid.*, Vol., 2, p. 329.

⁴⁵ 'Abduh replaced Shaykh Hasunna al-Nawawi, who had resigned in protest over British intervention in Egypt's judiciary system.

⁴⁶ Ahmad Shafiq, *Mudhakkirātī fī niṣf qarn*. Cairo, n.d. First edition. Vol. 2, p. 280.

‘ABDUH’S’ APPROACH TO THE SOURCES OF ISLAMIC JURISPRUDENCE

Before looking into the fatwas selected for this study, it is pertinent to examine briefly Muhammad ‘Abduh’s approach to the application of the *uṣūl al-fiqh*- the roots of Islamic jurisprudence-,⁴⁷ since this helps elucidate the methodology he followed in giving his fatwas, as well as his attitude towards the *uṣūl* and to Muslim religious scholars in general. His interpretation, or *tafsīr*, of the Qur’ān, is relevant and useful to understanding these. In it, he affirmed that there was no disagreement, or difference, between the rulings of the Muslim faith and Islamic Law.⁴⁸ The Book had been revealed to guide the people through its laws and rulings; his interpretation was meant to show it as a religion guiding the people towards their happiness on Earth, and in the Hereafter.⁴⁹ Moreover, he concluded that for the Book to be interpreted properly, the various aspects it comprised had to be treated inclusively, since all were interrelated and equally relevant, and jurisprudence was merely one of these,⁵⁰ so that focusing on any at the expense of the others could lead one away from its purpose.⁵¹

⁴⁷ Coulson explained *fiqh* as being an understanding of the *Sharī‘a*, which he defined as Islamic religious law. Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*. University of Chicago Press: Chicago, 1969. p. 3.

The *uṣūl* (*aṣl* sing.) are therefore the principles, sources, or roots of Islamic religious law. The principal revealed source is the Qur’ān, the legal rulings of which are derived from different verses. These are referred to as *aḥkām*, (sing. *ḥukm*). The second revealed source is the Sunna, which comprises the activities, decisions, and sayings of the Prophet as the leader and ruler of the Muslim community. The third principle, or source is *ijmā‘* – general consensus. *Qiyās*, or reasoning by analogy, replaced *rā‘y*, or human reason, as the fourth principle. It involves the regulation of new cases by applying to them the principles upon which the Divine Revelation had regulated similar or parallel cases. *Ibid.*, p.6. It is based on the assumption that the rules, or laws of the *Sharī‘a* are built on their effective causes - *‘ilal* (sing. *‘ila*). Mohammad Hashim Kamali, *Shari‘ah Law: An Introduction*. Oneworld Publications: New York, 2010. p. 53. Other sources include *istiḥsān* - seeking the most equitable solution; *‘urf* – customary law; *istislāḥ* or *maṣlaḥa*- seeking the best solution for the general interest, or considering the public interest. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p.6.

⁴⁸ ‘Imara, Volume 5, p. 230.

‘Abduh’s interpretation, and indeed his faith, is in line with the principle of *tawḥīd* or unity: God created the universe so that every part of it reflects the unity of its source, and each part is in coordination with the others.

⁴⁹ *Ibid.* Volume 4, p. 7.

⁵⁰ ‘Abduh stressed that its interpretation comprised many facets: first, were its style and method, as well as the types of speech it involved; second, were the use of correct

His understanding of two verses, 58 and 59, from the Chapter Women - *Sūrat al-Nisā'* partly tends to sum up his approach to these principles of jurisprudence. The verses say: "God commands you to return trusts to their owners, and when you judge between people, to judge with fairness. Admirable indeed is what God admonishes you to do! God is All Hearing All Seeing."

"O Believers, obey God and obey the Prophet and those set in authority over you. If you dispute among yourselves over any matter, refer it to God and to the Messenger, if you believe in God and the Last Day. This would be best, and best also in consequence."⁵²

The first verse includes two ethical legal regulations: the first enjoins people to act ethically by restoring trusts to those to whom these are due; the second directs those required to adjudicate conflicts between people to be fair and without bias. The Imam mentioned that according to *Asbāb al-Nuzūl*,⁵³ the verse was revealed after the Prophet took Mecca, when he went to the Ka'ba and told its keeper to hand him the

inflection and pronunciation - as these determined the precise meanings; third, were the narratives of the peoples and prophets; fourth, were the obscure passages *gharīb al-Qur'ān*; fifth, was the *fiqh* or jurisprudence pertaining to the acts of worship, as well as interpersonal relations and transactions, and the derivation or extraction of legal rulings from these; sixth, were the references to the origins of the various faiths and creeds and linking these to one another; seventh, were the exhortations or spiritual counsel, as well as the subtleties and niceties; eighth, was the symbolism of the Book which, some people considered, was esoteric.

⁵¹ *Ibid.*, pp. 7-8.

⁵² "Inna Allāh yā'murukum 'an tū'uaddū al-amānāt 'ilā ahlihā wa idhā ḥakamtum bayna al-nāsi 'an taḥkumū bi-al-'adli inna Allāha ni'ammā ya'izakum bihi inna Allāh kāna samī'ā basīrā.

Yā ayyuhā alladhīna āmanū aṭī'ū Allāh wa aṭī'ū al-Rasūl wa ulī al-amr minkum fa'in tanāza 'tum fī shay'in fa-ruddūh ilā Allāh wa al-Rasūl 'in kuntum tū'minūna bi-Allāhi wa al-yawm al-ākhir dhālika khayrun wa aḥsan ta'wīlā." *Qur'ān*: The Women: 4: 58-59.

Tarif Khalidi (trans.), *The Qur'ān*. New York: Penguin, 2008.

The version given by 'Imara is far more dependable than that given by Rashid Rida in *al-Manār*. Rida took bits and pieces, or perhaps all of 'Abduh's interpretation, and interspersed it with his own, adding lengthy comments made by other religious scholars. This was not at all consistent with 'Abduh's method. As a result, Rida's interpretation of those two verses consisted of forty-five pages. 'Imara gave about six pages to these verses, which he probably found among 'Abduh's papers; these were probably remnants of the lecture 'Abduh had given at al-Azhar. 'Abduh does not appear to have devoted more than a few pages to each verse, but he was perfectly coherent, whereas Rida tended to ramble on.

⁵³ *Asbāb al-Nuzūl* - the reasons or motives behind the revelation of a verse.

keys. The man submitted these to him - on the understanding that once the Prophet was through with his visit he would return them. Meanwhile, the Prophet's relative, 'Abdallah ibn 'Abbas, beseeched the Messenger to allow him to take the keys, thus allowing him to become the keeper, as well as the provider of water for the pilgrims. It was at this instance that the verse was revealed and, as a consequence, the Prophet returned the keys to the keeper.⁵⁴

'Abduh remarked that whether or not this account was factual, it did not affect the general ruling *ḥukm* of the verse,- namely that, according to custom, people who entered upon a tacit contract with others – whether this was in the public domain, or in their private dealings - were under the ethical obligation to fulfil their parts, and acknowledge the truth, regardless of whether it was material or moral. He made clear that trusts could be material, as for example, money, or moral, such as learning. Thus, religious scholars who declined, or failed, to impart their knowledge to people were shirking the duty they were required to fulfil, which was to convey the truth to people, as God expected. He cited the verse, “Remember when God covenanted with those formerly entrusted with the Book: ‘That you should proclaim your Revelation to mankind and not conceal it,’”⁵⁵ to support his statements. It was due to the reluctance of religious scholars - '*ulamā*' - to transmit their knowledge that ignorance of the truth became widespread, and evil and heresy came to prevail upon people's minds.⁵⁶ Referring to the continuation of the verse, 'Abduh observed that settling conflicts between people could apply to general governance *wilāya 'āmma*, as well as to taking decisions in court cases, or arbitrating disputes. Thus, God commanded justice and prohibited injustice in several verses. However, He had neither set limits to justice, nor had He defined or interpreted it, just as the Sunna of His Messenger had not defined or interpreted it. This was because the significance of justice was generally understood, and depended upon two principles: the first was that the person in authority had to know the ruling God had given to settle such a dispute – *al-ḥukm alladhī shara'ahu Allāh*.⁵⁷ An example was the verse that urged: “O Believers! Fulfil

⁵⁴ 'Imara, Volume 5, p.224. 'Imara mentions that the text used was 'Abd al-Rahman al-Suyuti's *Libāb al-nuqūl fī Asbāb al-Nuzūl*, p. 66.

⁵⁵ The House of '*Imrān*: 187

⁵⁶ 'Imara, Vol. 5. pp. 225-226.

⁵⁷ 'Imara, Vol. 5, p. 226. 'Abduh stressed that such a person had to understand the decisive factors for legal rulings.

your legal obligations,”⁵⁸ or “Do not consume each other’s wealth in falsehood, nor argue the matter with judges in order to consume a portion of people’s wealth unjustly.”⁵⁹ Fulfilling one’s part of a contract was a duty, and God further prohibited seizing money or giving bribes; moreover, references to bribes also existed in the continuous, or recurrent, Sunna - *sunna mutawātira*. The deciding authority, or judge, was therefore obligated to apply, or implement, decisions in conformity with his knowledge of God’s rulings and with those of His Messenger. Such application could be clear and open, or it could require the need to make an analogy *qiyās*, and to derive, or extract, *istinbāt* a ruling from it, as well as to exert thought *ijhād al-fikr*.⁶⁰

The second was that justice was based on two stipulations: one, the judge had to understand the claimant’s plea as well as the defendant’s response, to enable him to recognize the issue over which there was litigation, with all the evidence presented by both parties; two, the judge had to be upright, unbiased and refrain from showing emotion, or inclination, towards either of the disputants. ‘Abduh therefore considered that the practice of justice entailed the delivery of a fact, a due, or a trust to the person to whom it was due - in the quickest possible way, and this could only be realised on the basis of the two principles mentioned. Anything that transgressed these two limits was unjust, such as, for example, a judge delaying the examination of a case because he was waiting for costs to be settled, or rejecting the testimony of a truthful witness, because the latter’s phrases did not conform with the expressions required by the court – even though the meaning he conveyed was similar.⁶¹ The same thing applied to exchanges between people: whatever prevented people from understanding the *Sharī‘a* was among the causes for injustice,⁶² but there was no excuse for people to be

⁵⁸The Table: 1

⁵⁹The Cow: 188

⁶⁰‘Imara, Vol. 5, p. 226.

⁶¹*Ibid.*, Vol. 5, p. 227

⁶² According to Kamali, the *Sharī‘a*, the sources of which are the Qur’ān and the Sunna, may be defined as “the path to religion.” It establishes the legal rights and responsibilities of individuals, and provides moral guidelines for human comportment in general. Furthermore, it makes available a simple system or “scale of values” whereby human deeds and acts are gauged or classified into five categories. These are mandatory - *wājib*, recommended – *mandūb*; permitted – *mubāh*; unacceptable or reprehensible – *makrūh*; prohibited – *ḥarām*. Mohammad Hashim Kamali, *Shari‘ah Law - An Introduction*. Oxford: Oneworld Publications, 2010. pp. 14, 47.

ignorant of it - since it was their duty to understand it, and eliminate all the difficulties that prevented them from understanding it.⁶³

After giving his explanation of verse 58, ‘Abduh mentioned that he had come across Ibn Taymiyya’s⁶⁴ *al-Siyāsa al-Shar‘iya*, and noted that the latter had devoted this treatise to these two verses, and developed his explanation by citing different types of trust placed in the hands of rulers, or judges. He had also drawn attention to the fact that those placed in positions of authority *ūlū al-amr* could only be the most upright and the most suitable to take decisions, or wield authority, i.e. the best possible person. ‘Abduh observed that Ibn Taymiyya had supported his statements using a great many hadiths, including a well-known one *mashhūr* that said that when matters were left in the hands of those incapable of settling them, it was a sign that the end was nigh. ‘Abduh interpreted this to mean the fall of a nation or community, since each nation had its hour of collapse, or loss of independence.⁶⁵

Verse 59 instructs believers to obey God and to obey his Messenger, and those who are in authority. ‘Abduh explained that the verse had been revealed as a response to those who had received the Scriptures, but who had remained polytheists and idol worshippers.⁶⁶ ‘Abduh stressed that the command to obey God meant acting in conformity with His Noble Book, and the command to obey the Messenger was intended because it was the Messenger who had indicated to the people what was revealed. Moreover, the word ‘obey’ had been repeated to affirm obedience to the Messenger because Islam was a purely monotheistic religion, i.e. God alone could decree or prohibit, legislate or reveal. It was true that such a command seemed to refute the Book’s ruling to obey God alone, but God had decreed that His laws should be brought to people through messengers from among them, and He assured the

⁶³ ‘Imara, Volume 5, p. 227.

⁶⁴ Taqiy al-Din Ahmad ibn Taymiyya (1263-1328) was a theologian and jurist established in Syria during the Bahri mamluk period. A controversial figure, he was the author of several treatises, including *al-Siyāsa al-Shar‘iya*. He was gaoled several times due to his intransigence, and to his rivalry with a leading family of religious scholars. He died in the citadel of Damascus during a sojourn there.

⁶⁵ *Ibid.*, Vol. 5, p. 227.

⁶⁶ ‘Abduh mentioned that the verses had been revealed concerning the people of the Book who had allowed their priests and religious leaders to legislate instead of themselves using, or consulting, their Scriptures. This was because they had considered these priests to be more proficient in their learning and knowledge of the Torah, and therefore more capable of determining the welfare of the community.

purity and incorruptibility of these messengers to reveal His Presence. Consequently, it was necessary to heed what they said about religion and legislation. For example, God had decreed the worship due to Him through the performance of prayers, but the Book did not stipulate how to pray, how many times to bend and bow, or when to pray; all of this had been indicated by His Messenger, - in response to God's command. Furthermore, the verse that said, "Upon you We sent down the Remembrance, to make clear to mankind what has been sent down to them – perhaps they will reflect,"⁶⁷ demonstrated that God had Willed this. Consequently, submitting to it did not contest God's Unity, nor did it refute the fact that the Lawgiver - *al-Shāri'* - was God Almighty.

As to the reference about those in authority, opinions differed concerning these; some considered them to be the military leaders, on condition that these did not decree what was forbidden. Others thought the phrase to mean the obligation to heed the princes, but those who believed this failed to notice that God had said 'set in authority', i.e. from among you. There were also those who considered that those in authority were the religious scholars – yet these disagreed amongst themselves. So who was to be obeyed in matters involving disputes? Those who considered that the people in authority were the religious scholars - '*ulamā'*' - had justified their claim by saying that the scholars were capable of extracting the implicit rulings - *al-aḥkām al-ghayr manṣūṣa* - from those that were expressly cited - *al-aḥkām al-manṣūṣa*. The Shi'a declared that these were the Infallible Imams, but this claim was rejected; there was no evidence, or proof, of this infallibility, so that if they were intended, the verse would have stipulated it. The phrase *ūlū al-amr* - those in authority, signified those required to implement reforms in people's affairs, or look into the welfare of the people, and there were disagreements concerning this as well.

After prolonged reflection, 'Abduh had concluded that the phrase intended a group of those Muslims in charge of resolving and binding matters *ahl al-ḥall wa al-'aqd min al-Muslimīn*; these comprised the commanders-in-chief, governors, religious scholars, commanding officers, as well as all the leaders to whom people resorted to in their affairs and for their welfare. If all of these came to an agreement over a matter, or over a law, they had to be obeyed - provided they were from the people,

⁶⁷ The Bees: 44.

and that they did not contravene the commands of God, or the Sunna of His Messenger. ‘Abduh emphasized that he meant *sunna mutawātira*, i.e. those traditions or practices that were known, established and widely diffused. Furthermore, those in command had to be selective in their scrutiny of matters: the questions they agreed to had to be for the welfare of the public, and these questions had to be those they had the power to implement and authority to enforce.

He was careful to stress that questions involving rites of worship and questions of faith were not the concern of those with the authority to resolve and bind. Indeed, individuals had to settle such questions by referring to the Book and the Sunna of the Prophet, and no person could give an opinion beyond what he had understood of these. But if those with the authority to resolve and bind matters reached a consensus *ijmā‘* over a question related, or pertaining, to the welfare of the community for which there was no Text from the Lawgiver, and no single force was compelling or forcing them into this, they had to be deferred to, since it was correct to say that in such a situation their consensus made them infallible. The order given in the verse was therefore to obey them unconditionally - taking into consideration what was understood of the verse. Examples of this were the *dīwān* and other different measures instituted under ‘Umar ibn al-Khattab, after he consulted the more important Companions. Such measures had not existed under the Prophet, and they were taken to benefit the community, but none of those who understood religion complained.⁶⁸

Hence, the commands of God in His Book, and the established, corroborated and definitive Sunna practiced and acted upon by His Messenger, were the undisputed sources. As for matters pertaining to public welfare for which there was no textual basis, these were to be left for the people in authority to consult, consider and act upon, since the people trusted and obeyed them. They were to be obeyed, if they agreed unanimously over a course of action, but if they disagreed and quarrelled, then they referred to God - by consulting His Book, and the Sunna of His Messenger, because these contained the overall rules and general conduct. Accordingly, it was understood that whatever was in conformity with these sources was beneficial and had to be adhered to, and whatever did not conform was useless and had to be

⁶⁸ ‘Imara, Vol. 5, p. 229.

abandoned; in this way the dispute was settled, and agreement was unanimous. Consulting the sources and extracting, or deriving the correct decision regarding that dispute were among the foundations expressed by the word *qiyās* - analogical reasoning, and prior to it was consensus - which was normally followed. The jurists and religious scholars had set conditions for *qiyās*, stipulating that it was necessary to examine the effective cause *illa*. Thus, the purpose for referring to the Book and Sunna was to avoid a disagreement, or contradiction, in religion and Law, since there was no disagreement between them, nor were there differences in the legal rulings.⁶⁹

‘Abduh’s construal of these verses reflected several things about him as a religious scholar: thus, for example, the way he dealt with the concept of justice mentioned in the first verse indicated that he understood that justice was not merely an abstract, ethical, or religious concept, but also a practical one by means of which the needs of society were fulfilled. He explained the verses in a lecture given to students from the Azhar, and he mentioned that while one of the conditions for dispensing justice was the rapid (and fair) settlement of disputes, in Egypt this was not the case, since judges deferred cases because court charges had not been paid. He then asked the students whether they considered this to be justice, and they exclaimed loudly, “No! No!”⁷⁰

The way he dealt with the command to obey God and obey His Messenger was consistent with his own commitment to these main sources or *uṣūl*, and his absolute aversion to *taqlīd*.⁷¹ However, he qualified obedience to the Messenger by stipulating that the Sunna practiced or consulted had to be *sunna mutawātira*, i.e. actions by the Prophet that were authenticated, established and diffused by his Companions. For ‘Abduh, this meant that a simple individual who wished to understand religion, or interpret, the commands of God or the Sunna of His Messenger, had to revert to the Book and then the Sunna. This condition applied all the more to a religious scholar, especially one qualified to settle disputes, such as a

⁶⁹ *Ibid.*, Vol. 5, pp.229-230

⁷⁰ ‘Imara, Vol. 5, p. 227, footnote 1.

In the draft of his plan for the reform of the national courts, he had declared that some judges shirked their responsibilities, or they were sometimes reluctant to settle a case because court charges had not been paid. See ‘Imara, Vol. 2, p.

⁷¹ He judged that the separation of the system into *madhāhib* i.e. legal schools, was a natural consequence to the differences in opinion in the community or nation, and this was a natural consequence of blind imitation or *taqlīd*. ‘Imara, Vol. 4, pp. 407-408.

qadi, or a mufti. Such a person had to understand the issue presented to him, and know God's commands, stipulations and penalties, as well as the conditions mentioned by His Messenger. Thus, a religious scholar who refrained from following the practices of his predecessors avoided their mistakes - *taqlīd*, and practiced independent judgement.

'Abduh's exegesis of other parts of this verse further revealed that he could work from within the Text to produce an interpretation that was timely, as well as being in line with the required juristic practice. Thus, when faced with the phrase *ūlū al-amr*, the people in authority he observed that these could hardly be the '*ulamā*' - because even when they knew and understood the Text and the Sunna, and belonged to the same school, they disagreed on how they should interpret these. It was evident here that he was talking about consensus - *ijmā'* the third principle of jurisprudence. He then explained that *ijmā'* had only existed under the first two or three generations of Muslims, who had lived in the shadow of the Prophet, remembered the examples he had set, and therefore they had not disagreed about his practice, nor about what would benefit the community.

Consequently, according to 'Abduh's protracted thought - his *ijtihād*, *ijmā'* only came about when the *ūlū al-amr*, whom he saw the leading members of the community, i.e. representatives of the people⁷² - who understood God's commands and prohibitions, and did not transgress these, or the Sunna of His Messenger, came to a unanimous agreement over matters that affected the community. They were then to be obeyed - in accordance to the injunction in the verse. He qualified this further by stipulating that they had to consult with one another, and effectively see that their plans to benefit the community and promote its interests were carried through. And, if

⁷² Given that in the text, 'Abduh rejected leadership by princes or kings, because they were not elected by the people, he was certainly implying the family of Muhammad 'Ali Pasha, and here he may have been calling for the existence of an enlightened, educated, independent, and consultative body which had the power to advise and implement useful and necessary projects. See 'Imara, Vol. 1, pp. 343-344. Article entitled "*al-sulṭa li al-ṣafwa al-mustanīra*."

It may perhaps be relevant to mention here that Sa'd Zaghlul was one of 'Abduh's disciples.

Rashid Rida gave a much longer explanation of the phrase *ūlū al-amr* than that given by 'Abduh.

ever they quarrelled they had to settle their dispute - by consulting the Book and then the Sunna; in this way they avoided strife, which was harmful to the public interest.

Also, ‘Abduh’s rendering of the verses showed the value he placed on *maṣlaḥa*,⁷³ considerations of public interest, - this was consistent with his training as a Maliki scholar. He mentioned that the Companions had carried out actions to help and promote the interests of the community which had not been carried out under the Prophet, such as forming the *diwān*, or collecting the Qur’ān; such actions involved the notion of *maṣlaḥa*, although this term may not have been expressly used in early Islamic times. When ‘Abduh stressed that no one from among the community of Muslims had objected, he meant that while such measures had not been taken by the Prophet, none of the early generation of Muslims had either rejected them or judged them unacceptable. Accordingly, ‘Abduh was consistent in his insistence that decisions taken had to benefit the public, and avoid harm or corruption from settling in.

His training as a religious scholar also affirmed itself in his argument that the *ūlū al-amr* could find solutions to problems through *qiyās* by seeking analogies in situations, provided one knew the *‘illa*, or effective cause, for a ruling.

Finally, his aversion to *taqlīd*, and his integrity did not prevent him from mentioning that he had looked at Ibn Taymiyya’s *Al-Siyāsa al-shar‘iya* - after he had given his interpretation of the verse to the students, nor did it prevent him from admitting that he had believed he was the first to give such a definition for the *ūlū al-amr*, but then he had discovered that another religious scholar had given a similar definition centuries before.⁷⁴

⁷³ Referring to *maṣlaḥa*, ‘Abduh judged that Islam had solved th[e] problem of man’s seeking earthly pleasures and things that were agreeable to him in a way that was not found in any other religion, which was that God only forbade doing what was harmful and commanded doing what was beneficial. He permitted what was not harmful.⁷³ ‘Imara, Vol. 4, p. 297.

⁷⁴ See ‘Imara, Vol.5, p. 230. ‘Abduh was referring to the exegesis of the scholar al-Nisaburi. Imara mentions this was Ibn Rashid Sa‘id ibn Muhammad al-Nisaburi, but this is by no means certain, as several scholars who had the same *nisba* produced exegeses.

What has been dealt with in this section is ‘Abduh’s theoretical approach; the next section of this thesis examines ‘Abduh’s fatwas to determine how he contended with practical issues.

PART II – THE FATWAS

1- OFFICIAL QUERIES

He was asked by the Ministry of Justice to respond to a query from the health administration (which consisted of several of sheets of paper) concerning the possibility of cutting open a dead woman's belly to extract the still living foetus, i.e. was it legally acceptable to extract living babies from the bellies of pregnant women who had just expired?

He responded: According to the religious legal authorities, it was possible to cut open a dead woman to remove the living child whose life one wished to preserve, if it was believed the child could survive, according to *al-Ashbāh*.⁷⁵ It permitted the cutting open of the bellies of deceased women if the children's survival was seen as desirable; moreover, this did not require the consent of her family.⁷⁶

Structure

The question, which came from the health administration, dealt with the permissibility of cutting open the belly of a dead woman to extract the still living foetus. The wording indicated that the question was not general, but concerned the specific benefit that could result from such an action, the preservation of human life. Another issue here was the sanctity, or inviolability, of the dead – was it legitimate to violate a corpse to extract the living foetus?

The mufti responded that according to the religious authorities, it was possible to cut open a dead woman to remove the living child, if it was believed the child would survive. He justified this as one of the objectives of Islamic Law, *maqāṣid al-shar'*, i.e. that of preserving, or safeguarding, life.

This was a short fatwa, and the mufti did not go into too much detail, nor did he cite, or extrapolate, from the Qur'ān or hadith, possibly because he found that the argument in favour of removing the living foetus had already been developed earlier, by the jurists. His fatwa was therefore based on the opinions of jurists- *rā'y fiqhī*. He cited as juristic source *al-Ashbāh wa al-Nazā'ir*.

⁷⁵ The book in question is *al-Ashbāh wa al-Nazā'ir*, and the author is Ibn Nujaym al-Misri, Zayn al-'Abidin ibn Ibrahim ibn Muhammad (died A.H. 970).

⁷⁶ Fatwa No. 111, ledger 000003

As one of the “official” fatwas, sent to him by the health administration, this was a binding opinion.⁷⁷

He was asked to advise the Ministry of War, on April 9 1903, no. 365, about the last part of Article 19 of the code of regulations concerning military conscription, following the official decree of 4 November 1902. This stated: “And when this article becomes effective, the person judged to be legally missing will be considered dead.” And since it had been claimed by some army conscripts that their fathers and brothers were missing, and evidence about their absence was being established by the Islamic courts - *al-maḥākim al-shar‘īya*, with the different periods of absence, which varied between two to three years, or more. The text of the appendix of that article required knowledge of the period of absence that could be applied.

He responded: Paragraph three of the code concerning a woman whose husband was missing mentioned the following: “... or if her husband was legally missing...,” or “...who left her and his whereabouts were unknown”. This indicated that the purpose of the legal absence was another sort of absence, which was not that of a missing person, although the nonappearance of a missing person also counted as a legal absence. That text covered an absence upon which there were legal consequences, and it was considered a genuine absence, whether it was the absence of a living person, or any other absence that could be taken into account legally. The absence of a missing person was the absence of someone whose whereabouts was unknown, and it was not known whether he was dead or alive. And this was what was meant in paragraph three by the phrase, “...or he left her and his whereabouts were unknown.” And whenever this was the situation of the missing person, it was considered a legal absence, *ghayba shar‘īya* regardless of whether the period of absence was an extended or a short one. And among these categories of legal absence, there was what was known as the interrupted absence, *ghayba munqati‘a* - where the missing person was in a place

⁷⁷ Peters mentions that the authority of the Grand Mufti of Egypt greatly increased after the promulgation of the Sharī‘a Courts Ordinance *Lā’ihat al-Maḥākim al-Shar‘īya* of 1880, which granted the mufti authority, under certain circumstances, to issue opinions that were binding. Rudolf Peters, “The Lions of Qasr al-Nil Bridge: The Islamic Prohibition of Images as an Issue in the ‘Urabi Revolt,” in Muhammad Khalid Masud, Brinkley Messick and David S. Powers, *Islamic Legal Interpretation Muftis and their Fatwas*. London: Harvard University Press, 1996. p. 215.

impossible to reach, even if its whereabouts were known- such as India or Morocco for the Egyptians. Such a missing person could not possibly be of any use to anyone who communicated with him on behalf of his wife, or relatives, if it was not absolutely evident that he sent a portion of his livelihood to his relations by any means he chose, and via any method. That sort of absence encompassed that clause, and this was evident from what was stipulated in the third paragraph, as it was stated. And such a person was considered missing, and his status would be, regarding regulations concerning conscription, that of a dead man, but without set or material evidence. Finally, there was the third category, which was that of someone in a country, but at a distance of three days and nights on foot at medium pace, and that absence did not fall under Article 19.⁷⁸

Structure

As a response to an official request from the Ministry of War, this fatwa was instigated by the circumstances surrounding the war in the Sudan. The Sudan was part of Egypt at the time, and this war had resulted in a great many casualties from among the Egyptians, who had been conscripted into the army and sent to the Sudan to terminate the Mahdi's revolt.⁷⁹ This probably reminded many of the fairly recent stories they had heard from their families of the *corvée*, when various Egyptian viceroys ordered the mobilisation of Egyptian youths to dig canals, or go and fight wars in distant places, far from their families and loved ones.⁸⁰ Many sought to escape; now, the war in the Sudan was another such instance, and this fatwa suggests that many were missing in, or from, action.⁸¹

‘Abduh made the necessary distinction between a husband who was missing, and one who was absent. This was important since, under Hanafī law, a wife could not obtain

⁷⁸ Fatwa No. 125, ledger 000003

⁷⁹ According to ‘Imara, Muhammad ‘Abduh had been head of a committee formed on 16 April 1898 to assist the families of those casualties. ‘Imara, Vol. 1, p. 825

⁸⁰ In one of his articles, Muhammad ‘Abduh pointed out that Muhammad ‘Ali had been the only one to benefit from the many wars he carried out to fulfil his ambitions, and that, as a consequence, hundreds of youths had been sacrificed for these. ‘Abduh was attacked for his views on this; nevertheless, he was probably echoing the opinion of many Egyptians.

⁸¹ Several years later, the popular composer Sayyid Darwish composed a song entitled *misāfir al-jihādiya* - I am travelling to join the war. It told the story of a youth who told his mother he was off to war; then he asked her why she was crying; she replied that parting and separation from him was difficult.

a divorce unless her husband had been missing for a period of ninety years, whereas Maliki law granted a divorce to a woman whose husband had been missing for a year.⁸²

The Sudan was, and remains, a large territory; a conscript could thus escape from his regiment, and lie low, intending to resurface and return to his family once the war ended.

The issue here was that of someone who went missing, or whose whereabouts were unknown, i.e. his status as a living person remained suspended. His wife could not ask for a divorce, or be separated from him, until he reappeared, or his body was found. Moreover, a missing person could not inherit, nor could anyone inherit him, until the question of his life, or death, was definitely established.

The Ministry of War delivered a notice to the *Mashyakha* of al-Azhar dated 21 November 1900, number 529, about article 2 of the decree issued on 17 May 1887. This stated that the guarantor of whoever escaped from conscription, or from the army, had to be alerted about this desertion. This guarantor was the head of the family; he was required to look for the deserter and find him within a period of three months from the date in which he received the alert, and if he did not produce him within that period another family member, within the same age range as the deserter, would be taken in his place, and this would be the relative closest to the deserter. And, since it was agreed that there were usually no relatives to those deserters except very distant ones, and since it was not known how distantly related were the agnates or cognates who could be taken, it was hoped that the matter of the identity of the closest relatives were would subsequently become clear.

This notification was transmitted from the *Mashyakha* of al-Azhar with a memorandum, on 5 Sha‘ban 1318, to *Dār al-Iftā’ al-Miṣriya* requesting a clarification of what was needed in the aforementioned notification from the Ministry of War.

He responded: The response from *Dār al-Iftā’* to the *Mashyakha* first pointed out that the closest relations to a person were his agnates, his son, and then his brother’s son; if one moved downwards, there was the father, then the father of the father. After the father and the paternal grandfather, there was the full brother of a father or mother.

⁸² N. J. Coulson, *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 2007. pp. 186-187.

The next closest relatives were those of the womb, i.e. the sons of his daughters, and going downwards the sons of the daughters of the daughters.

That was what the scholars said concerning the relatives of agnates and cognates, and the order in which they were disposed, and the order was that in which was mentioned the surname of the relatives when this was in relation to a statute of Islamic law, such as inheritance, *waqfs* or related matters. It was also quite clear that it was impossible to apply what had been ordered in the decree concerning this, since it was not feasible, for instance, to conscript the father or grandfather of the escaped soldier to replace him, if the latter had no son. Moreover, the decree also stipulated the recruitment of an individual of the required age from the same family to replace him, and it was known that the name of the family was different from that of the relative. Indeed, the word family was specific of those who were closest to one.

The aim of that decree was to encourage those closely linked to the escaped conscript or soldier to look for him until they found him, because if they did not, they faced the likelihood that another member of the family be taken to replace him. Thus, this was really a penalty for feigned negligence; this outcome would apply to the relatives mentioned earlier; and, whenever a relationship extended to two degrees, the relationship became more remote, and relatives who were distantly related did not have to bear the consequences of what others did in such a case.

However, matters related to the family had changed in recent years, because the close relation had become more remote than his most distant relative, and fraternal ties had become worthless. Indeed, sons had abandoned the authority of their fathers, and a son who had escaped conscription would not tell his father where he was. Accordingly, it would be more suited for the purposes of justice, in times such as these, to modify the aforementioned decree, and annul the second clause. This was because the guarantee from the head of the family had as much meaning as its non-existence, and forcing relatives to pay the penalties of those who escaped conscription also became meaningless. The authority of the government was stronger than all that, and therefore it was not appropriate that one person be punished for the sin of another. Thus, if it was absolutely necessary to leave that clause the way it was, the degree of relationship was not to be taken into consideration- except if the family surname was

included, and the name of the relative used in legal matters was not to be looked at, since there was an obvious difference between a family and relatives.⁸³

Structure

The mufti was asked to comment on a proclamation from the Ministry of War concerning the desertion or escape from conscription by Egyptian males, probably on account of the war in the Sudan. The head of the family of an escaped youth was to be notified of this desertion, and required to produce the youth within a period of three months from the time he was alerted, or else he was obliged to produce another family member who was about the same age as the deserter.

By virtue of his knowledge of Islamic jurisprudence and the laws of inheritance and the matters related to endowments, the mufti was asked to designate those relatives who were closest to the missing conscripts.

He pointed out that the closest relatives were first the agnates, i.e. a son, then a brother's son, if one moved upwards. However, going downwards, there was the father, then the father of the father, etc. After the father and grandfather there was the full brother of a father or mother.

He then moved on to the cognates, i.e. the closest relatives to the womb, e.g. sons of a man's daughter, and then the sons of the daughters of the daughters.

After enumerating the relatives in accordance with the stipulations of religious scholars, the mufti mentioned that should an escaped conscript fail to reappear, his family faced the likelihood of having another member of the family taken to replace him, as a penalty for feigned negligence. Of course, it was clear that neither the father nor the grandfather of the missing conscript could be drafted. However, he observed that those taken would be those closest in relation to the missing conscript.

The mufti observed that over recent years, family ties in Egypt had become insignificant, and it was unlikely that the head of a family, whose authority had weakened, knew where his fugitive relative was hiding. The mufti therefore advocated the annulment of this clause, because it was meaningless. He considered it excessive, since it suggested the government needed to assert itself in this question, and this undermined its authority. Yet if it was necessary to keep that clause the way

⁸³ Fatwa 243, ledger 000002

it was, he advised disregarding the degree of relationship, and taking in only a close relative, with the same surname, to replace an escaped conscript.

This fatwa had very little to do with Islamic law, except perhaps to determine who were the closest relations. The government also may have needed a measure of support, or agreement, from the religious institutions in the country to issue such a decree, which explained why al-Azhar and the mufti had become involved in this business. The mufti seemed to consider the measures proposed by the decree were both ludicrous and inapplicable.

He was asked by the Ministry of Justice to respond to a query from the Ministry of the Interior. This concerned a person being treated at the hospital of Girga province who was clearly unable to reimburse the hospital the cost of his treatment. Furthermore, when the patient's father, who was comfortable, was asked to pay the required sum, he held back. Consequently, the question was, was the father legally required to pay for his son's treatment, and if he was, then until what age was he legally required to do so?

He responded: The scholars affirmed that it was incumbent upon a free man to pay for the maintenance of different types for his destitute free son. They explained that this was for a child who left its mother's womb until that child became a man, but they did not mention the physician's fees, or the cost of the medicine, although they said that this was unnecessary for the wife. Moreover, if the father was unwell, or he had a chronic illness that made it necessary for him to be served, it was up to his son to do so, and the same applied to the son. When the scholars stipulated that the child was needy, they meant that he had not reached the age whereby he could earn a livelihood; however, when he came of age, his father could find him work, or push him into a craft that provided him with gain, and the father would pay for his costs with his own wages. However, if the son was rich, that is to say, if he owned property or such, the father could sell that to pay his costs, because he could afford to. This was what they had said concerning the child. As for what they said regarding the eldest son, it was that the father had to pay the aforementioned costs of the crippled eldest son if he had a chronic illness or was unable to fend for himself, or if he was one of the *awlād al-kirām*, respectable people, or one of those whom people employed, or a seeker of knowledge unable to provide for himself. In such cases, it was up to the father to

grant him his support, and this was according to *al-Qunya*⁸⁴ and *al-Minah*.⁸⁵ The scholars further stressed that no one was to join in with the father in keeping his needy son, or invalid son, who could not support himself, just as there was a fatwa that if the father was in a bad condition, then it was up to someone else [to help the son] without going back on what was valid. And upon this, it appeared that the son in this situation was a poor child who had not reached the age in which he could earn his livelihood. Consequently, his father was required to support all of his costs, and the fees of the physician, and the cost of the medicine, as it seems, because the fact that the father has to pay, in view of the ties of kinship and consideration between them. Moreover, the spread of diseases and the establishing that these diseases ruin the physical constitution, made it all the more necessary to show mercy and fulfil the obligations of family; this was one of the strongest requirements in a family relationship. Seldom did one now find, even among those who were less attentive, those who denied that the payment of medical treatment was obligatory in a father and son relationship, or between the son and his father. Many of those possessing true knowledge placed medical treatment on a higher level than sustenance such as food or drink and such, especially since one who was ill, and who had a father who was affluent, could not possibly have his medical treatment paid by some stranger, or by a distant relative. Accordingly, whenever the illness and its ill effects on the body became obvious, payment to fend these off fell upon the affluent father, to fight and resist against it, in order to preserve life and protect the parts of the body from collapsing. The father thus had to pay the cost of the treatment and the physician's fees, and any talk regarding the notion that medicine or the costs of treatment were not required (that the person did not need to pay these) only applied if no treatment was necessary, or because there were no suspicions concerning body failure or the collapse of limbs. However, if there were serious suspicions, and these became a reality, and treatment was devised, there was no difference between paying this and providing the cost of food and drink which were required to preserve the build and

⁸⁴ This refers to *Qunya al-munya li-tatmīm al-ghunya* of al-Zahidi, Mukhtar ibn Mahmud ibn Muhammad Abu al-Raja' al-Ghazmini (d. A.H. 658). This is a Hanafi treatise.

⁸⁵ This was a reference to *Minah al-Jalīl – Sharḥ Mukhtaṣar Khalīl* of Muhammad ibn Ahmad ibn Muhammad 'Ilish Abu 'Abd Allah al-Maliki (d. A.H.1299). This is a Maliki source.

strength of the body. Furthermore, if the eldest son was unable to earn a living because he was ill, or because his father was one of those respectable people *awlād al-kirām*, or because no one employed him, or because he was a seeker of knowledge who could not free himself to make a profit, his expenses had to be provided for by his father, even if the father was poor, and even more so if he was rich, as this case showed. He could provide for the doctor's fees and the cost of the medicine, as we said. However, if the description of the son failed to comply with the details in this case, the father was not required to pay for anything. This applied to the price of the drugs, as well as the physician's fees. Also, it was not reasonable that the father should pay the wages of a servant for the son, and yet that he should not pay the costs of treatment and the physician's fees; indeed, these had priority.⁸⁶

Structure

The Ministry of Justice approached the Mufti about his views regarding the need to treat a sick youth - although no funds were available for his care. The boy's father could afford to pay for this treatment but refused to. However, the father was no longer liable for the maintenance of his son, since the latter was an adult.

The mufti considered that the youth's father was required to support his invalid son, even if the youth was an adult. This was because the preservation of health and the prevention of disease, or that of avoiding further deterioration of the condition of the body, were primordial, and, he underlined, were more important than food and drink; the preservation of health and the prevention of disease, were therefore among the objectives of Islamic law. The treatment of disease could only be done through the action of a physician, with the aid of the medicine prescribed, and both of these required resources. He used juristic texts, namely *al-Qunyā* and *al-Minah*, stressing that these treatises stipulated that if on the contrary, a son's circumstances were comfortable, and his father was in dire straits, the son would be required to maintain his father throughout his illness.

The intrinsic message in this fatwa was that family members were required to help each other, but it also demonstrated the importance 'Abduh attached to the family; many of his comments indicated he disapproved the fact that families in Egypt were

⁸⁶ Fatwa 374, ledger 000002

no longer as integrated as they had been in the past, nor did family members help, or care, for one another.

He was asked by the Ministry of Justice concerning a request by the Director of Health, which consisted of 20 sheets of paper, as to whether it was legally permissible to hand in children whose families had great difficulty in nurturing and educating them to whoever desired to take them in to educate them, regardless of whether their parents gave their consent or not, for the reasons which were made clear by the Director of Health in his request.

He responded: After reading the file, and in view of the opinions expressed by the Director of Health in the sheets of paper attached concerning whether it was legally permissible to relinquish children whose parents could not afford to educate them to people desiring to take them in to educate them, regardless of whether their parents agreed or not. According to the views exposed by His Excellency the Director of Health, after the parents delivered the said children to the hospital, it was difficult to determine who their parents were – so as to obtain their consent or disagreement as to whether they were willing to relinquish their children to the custody of others. The mufti therefore concluded that, in such a situation, there was no objection to give these children to trustworthy people capable of protecting them.⁸⁷

Structure

The question from the Director of Health concerned the acceptability for individuals, or families, to take in deprived children to provide for them and educate them. Two issues were involved here: the first was that the parents had to give their consent to such a measure; the second was that any semblance of adoption had to be avoided, since Islamic law expressly prohibited adoption.

The mufti read the report of the Director of Health and concluded from it that there was no objection to this, providing that the families of these deprived children accepted this. His opinion was certainly based on *maslahah*; he probably considered that such a procedure would be useful and beneficial to the children involved, as well as to Egyptian society in general: accordingly, the children would be educated, provided for and nurtured. The mufti stressed that it was important to obtain the

⁸⁷ Fatwa 450, ledger 000002

consent of the children's parents, but he made no mention whatsoever of the child's future status.

He was asked by the Ministry of Public Works, dated 19 Jumada II/ 24 October 1899, No. 3624, about the fact that the burial ground of Muslims had within it thoroughfares for passers-by, and the problem was that some people had built upon sections of these in such a way as to impede or slow down passage through them. The question was, was it legally permissible to consider the aforementioned streets to be of public utility and forbid building upon them? And, was it permissible, or not, to place water pipes in them to allow water, for drinking and for watering, to reach these burial grounds and the areas in their vicinity, since the public interest required this?

He responded: It was mentioned in this question that this burial ground for Muslims had streets as thoroughfares, and that some people built upon sections of these streets, causing traffic problems, and preventing passage over these; the question was whether this was legally permissible, since these aforementioned streets were among the public utilities? And whether or not, it was permissible to place water pipes to transport water for drinking and other purposes because public welfare necessitated this? Since these streets existed in these burial grounds for people to pass through, and people used them, there was no doubt that they were among the public utilities. It was not acceptable for anyone to build upon these when this could harm passers-by. It was therefore up to the person in authority,- the sultan, or his deputy,- to prevent building upon them, since it was not in the public interest of the Muslims. It was also up to the sultan, or his deputy, to permit the installation of the aforementioned water pipes there, if it was in the public interest to do so. The scholars had also declared that it was up to the sultan, or his deputy, to act in accordance to the right of the majority - *ḥaqq al-kāfah*, by doing what would be beneficial for this majority.⁸⁸

Structure

The questioner, a senior employee at the Ministry of Public Works, asked whether it was legitimate for people to obstruct public utilities, such as streets in Muslim cemeteries, by building upon them.

⁸⁸ Fatwa 49, ledger 000002

The mufti's response here strongly reflected the Muslim jurists' considerations of public welfare - *al-maṣlaḥa al-ʿamma*. He reiterated part of the question in his response as though he was underlining that the streets were public utilities, since people used them regularly to go from one place to another. Anything that helped the people or benefitted them in their passage through these streets, such as the placement of water pipes for drinking or cleaning, was beneficial, whereas anything that could hinder the motion of those people, or harm them, was to be avoided. Consequently, building on sections of these streets was not in the public interest; it was not beneficial, and could be harmful, therefore it had to be prevented - in the interests of the people. He further indicated that the ruler, or his deputy, was required to take into consideration the right of the majority, i.e. this was a social issue.

His argument was smooth, clear and to the point. Moreover, he used a traditional tool - the consideration of public interest, to stress his point.

He was asked to advise the Ministry of Justice, through a request dated 23 Muharram 1321, following a query from the Ministry of the Interior, no. 38, and a note attached from the Coptic Patriarchate to return the children of 'Abd Allah Ibrahim, a cashier at Abu Kabir, who took them after becoming a Muslim, to their mother, Mariam bint Hanna. The Ministry of Justice therefore wanted to know what legal action to follow in this case which concerned 'Abd Allah Ibrahim, a Christian, the husband of Mariam bint Hanna, the Christian. He had three children from her, the eldest, a girl, was about fifteen; the second was a boy who was about two, and the third was a baby girl of six months, who was still being suckled by her mother. The husband became a Muslim, and he took these children away from their mother, and she wanted them back. The legal ruling concerning this was therefore required, since she had not remarried.

He responded: The legal judgement in such a case was that the custody of the baby was to be left to the mother, even if she was a Christian, and after the separation, because compassion did not alter with the change of religion. The little boy was to stay with her until it was feared lest he embrace a religion other than Islam, and this was when he was about seven years old; this applied both to the male and to the female. Whenever one of the children reached the age of seven, he had to be taken from his mother to be joined to his father. If it was assumed by any means that he was taking on a religion other than Islam before he reached that age, he had to be

separated from his mother and joined to his father. All of this, of course, was on condition that the mother did not remarry, because if she did, then the children were to be taken from her completely. However, it was the mother's right to have custody of these children, as long as she fulfilled all the necessary conditions for their custody, and as long as nothing of what had been mentioned was to be feared for the children.⁸⁹

Structure

The question here was from the Ministry of the Interior, and it dealt specifically with a query from the Coptic Patriarchate concerning the custody of children whose father had converted to Islam.

The mufti indicated that Islam was a merciful and compassionate religion that took into account maternal emotions; therefore, the mother was allowed to keep the children until the boy was seven years old, and the girl was nine, at which point their father took them.

The mufti further drew attention to the fact that since the father had become a Muslim, the children were therefore to be regarded as Muslim, and that this had to be taken into consideration in their religious instruction. Thus, any measure had to take into account the welfare *maṣlaḥa* of the children, yet he also implied that the mother had to be treated with compassion, a quality required by Islamic Law.

He was asked to advise the undersecretary- *wakīl*- of the treasury at the Ministry of Finance, on 24 April 1901, no. 67, about a problematic question requiring a fatwa, since it was supposed to be resolved in accordance to religious law. This concerned a woman who died leaving only a husband and the treasury - *bayt al-māl*. After she died, her husband claimed that she had rented articles related to clothing from merchants, and that the treasury had to pay half this money. The matter was investigated, and it became clear that the name of the person in the merchant's accounts was that of the husband, and that he had another wife. It was she who was taking clothes from the merchant, not the deceased wife, according to the merchant's statement. Accordingly, in such a situation, the question was whether the treasury was required to pay the husband the price of the aforementioned clothing?

⁸⁹ Fatwa 131, ledger 000003

He responded: Since the merchant said that the person who took the clothing was the second wife, and that you established from your investigation that the person on the merchant's list of accounts was the husband, and that it was not proved legally that the deceased wife owed any money to that merchant, no claim could be made on the treasury, and the aforementioned husband's claim was to be disregarded.⁹⁰

Structure

The question, from an undersecretary at the Ministry of Finance, involved a husband who- together with the Treasury - *bayt al-māl* were the beneficiaries of a dead lady, and the husband claimed his deceased wife had left debts with a merchant.⁹¹ An investigation by the Ministry of Finance revealed that it was the husband's other wife, who was living, who had incurred the debt to the merchant. Given that the issue involved inheritance, the Ministry of Finance required the mufti to clarify the positions of the beneficiaries.

Those entitled to inherit a deceased person are: first, the close relatives, second, those tied by matrimony, and third, are the freed slaves. Two legal schools, the Maliki and the Shaf'i agree that if there are no other heirs, then *bayt al-māl*, i.e. the Treasury, is entitled to its share of the inheritance. However, there are Shaf'i scholars who make it a condition that *bayt al-māl* benefit from such an inheritance only if it is suitably organised. The Hanafi and Hanbali schools reject *bayt al-māl*'s right to inheritance.⁹² This was a traditional fatwa, and the mufti's response was short, matter of fact and specific. He pointed out that since the claim had been proved false, both *bayt al-māl* and the husband received their respective shares of the bequest. He used easy terminology, his explanation was to the point, and he did not go into detail.

Question: After bringing to your notice the contents of the note from the Ministry of the Interior no. 153, that dealt with the harm affecting some of the wives of those who had received prison sentences, from their failure to support their wives, or setting them free from the custody of their husbands *iṭlāq 'iṣmatihin* - and the judge was unable to find an excuse for a ruling in this separating the wife from her husband

⁹⁰ Fatwa 306, ledger 000002

⁹¹ Had the claim been proved true, the debt would have been subtracted from the legacy, and the sum bequeathed to *bayt al-māl* would have depleted.

⁹² <http://www.islamic-fatwa.com/index.jsp?inc=&id17...> *shabakāt al-fatāwī al-shar'īya - asbāb al-irth.*

because and providing the latter with adequate reasons of separating a husband from his wife, because she was present in a place remote from her husband. The aforementioned ministry had requested that Your Reverence suggest a way in which it was possible to separate, or offer a legal ruling that took into consideration the complaints of these women; this was in response to the request made by His Excellency the Inspector General of the Prison Service in note no. 113.

He responded: I read what Your Excellency wrote concerning the inquiry from the Ministry of the Interior regarding the legal means of resolving the grievances of the wives of those condemned to long terms in gaol, or penal servitude, leaving their wives without financial support for them, or for their children, and with no kind of sustenance to depend upon (for their livelihoods). [The mufti] therefore looked into the different aspects that made it absolutely necessary to find a solution, or offer a judicial decision, to the complaints cited by HE the Inspector General of Prison Service in his note to the Ministry of the Interior. This matter comprised a number of issues, the origin of which increased these problems, so that the calamities became general, so that not much time passed before the Ministry of Justice received complaints from all over the Egyptian region, forcing to seek a way to end the harm that afflicted destitute women in their religious faith and lives, as well as the corruption and depravity that faced their children, who grew up to be horrible characters and to carry out evil deeds, because of their upbringing. As a result, as the Inspector General of the Prison Service pointed out in his note, the consequences of this wrought concern and strife in the state of the nation as a whole. It was for that reason that the mufti had seen fit to investigate all the following problems:

The first problem involved the prisoners mentioned in the Inspector General's report. The second involved the husband's inability or failure to pay for the upkeep of his wife, or his abstention, or stubborn refusal to do so; this was the case with most of the individuals of the lower class of nationals, as well as many from the middle and upper classes.

The third problem involved the missing husband of whom there was no news; either because he was far away in a remote place, and he had left no money for his wife or children, or he had left money, but it had not reached her; or his wife needed to appeal to human nature to end her condition, especially if she was young, and this difficulty fell under the category known as the problem of missing persons.

The fourth was that of the husband who harmed his wife, or treated her so harshly in their conjugal life that it was impossible for the two spouses to continue to live together.

All of these questions needed to be examined with equal care, and questions frequently reached the mufti concerning the stipulations in Islamic Law regarding such cases. “And I was asked a few days ago about a woman who had committed apostasy because of her difficulty of living with her husband who refused to divorce her, did not treat her well, and refused to allow her to live with her family. Another intended to abandon her religious faith because she was forced to live with her father’s killer, and she had a court case [pending] at the court of Daqahliya province.”⁹³ And as the mufti was writing these lines, he received a complaint from a woman whose husband was unable to pay for her upkeep, and he would forward it to the Ministry, together with these papers.

With regard to the grievances of the wives of whose husbands went missing, or [those whose husbands] were incapable of paying for their upkeep or maintenance, [the mufti] had received plenty of these and sent some to the Ministry, which was well aware of the situation. What was clear and allowed no doubt, was that the women concerned, in any of the four situations listed, were reduced, by force of necessity, to commit atrocities and act in a way that was against the laws or requirements of every religious faith and ethic, or be destroyed; and there was no way of saving them from either of these two destructive powers [loss of faith or evil character] except that of divorcing them from their husbands. And this was the situation to which people had been reduced from the corruption of faith and evil character. And what was desired of the divorce was unrealistic and impossible to realise. Since the need to divorce them from the husband in the situations mentioned, or to consider him dead - if he was missing, was a condition that could only be denied by someone ignorant of the present condition of Muslims, or by someone who refused to use his mind and feelings. Consequently, whenever necessity became a reality - *mata taḥaqaqit al-ḍarūra*,- it was absolutely essential to consider it with regard to the stipulations of the Book and the Sunna, the consensus of the leaders of the community, as well as the community itself. It was unnecessary to list the stipulations concerning this, since it was known,

⁹³ Parentheses included in the text.

through religion, to be necessary, and the stipulations of what was required were not to be considered *ijtihād*, since that had a scope; however, what was called for was by reason of being absolutely necessary - *ḥukm al-ḍarūra*: it was within the realm of the senses, and there was no point examining it so that it should be considered to include *ijtihād* pertaining to legal rulings. If one were to consider the preferred, or weightier, ruling *al-ḥukm al-marjūh*, the jurists had declared that, [in such a case] a considerable degree of wariness or caution was required, because it was critical, if not absolutely necessary. If it was, the person in authority, who had appointed the judges, needed to be consulted; it would therefore have been correct for the judges, who followed blindly [the rulings of] the school of Abu Hanifa, to give a ruling that was imposed by necessity when such a necessity became evident, after investigating it; and in that way, they would not have departed from the teachings of Abu Hanifa, yet they seem to find this embarrassing. And leading some muftis, out of inadvertence, and heedless of the certainty of religious conviction, to say that it was not permitted to give an opinion or issue a ruling on the basis of necessity when this applied to divorcing a woman from her husband. And, in this way, he harmed his religious faith by condemning whoever gave such an opinion, or issued such a ruling. Moreover, he was unaware that in this way he was actually making it acceptable to commit vulgarities in the name of religion. Moreover, the jurists had declared with regard to the missing person, that it was permitted to give an opinion in line with the school of Malik, in case of necessity. And there was no necessity more evident than the present situation. The jurists of the Hanafi school had great difficulty in giving a ruling that followed by another school, and on whether it was to be acted upon, or not? And most of them agree that it should be acted upon, and there were opinions that followed both these possibilities. And with regard to the way it should be carried out, they presented acceptable evidence. Thus, the author of *al-Fath al-Qadīr*⁹⁴ said, while investigating the possibility of carrying through, or not carrying through, a ruling taken from another school, what could mean that it was permitted to be disposed towards the ruling of others, because the judge was required to consult, and the consultation could bring about an opinion that was in conflict with his. And shortly before that, he said earlier that the *muqallid* - the person who followed blindly and uncritically was

⁹⁴ This is a Hanafi treatise by Ibn al-Hamam, Kamal al-Din Muhammad ibn ‘Abd al-Wahid al-Siwaṣī (d. A.H. 861).

appointed in order to give a ruling in accordance with the practice of Abu Hanifa, for example: it was impossible to contravene such a ruling. He was therefore separated with regard to that ruling. And it became clear from what they said and from the effective causes - *'ilal* - for their rulings, that the differences in opinion (between schools) came from the decision given by the judge that was in keeping with the rulings of another school, if the judge was a *mujtahid*. Or, he was a blind and uncritical follower of the school, if it was contrary to the opinion of the person who placed him in that position, and if there was no urgent need or necessity. But if the ruling was made on the basis of a command from the authority who gave the judge his mandate, or it was given in consideration of a necessity - when it came into being -, there was no conflict in opinions: it was unquestionably accurate and absolutely essential to carry out.

And what the Ministry of Justice needed to know now was a legal approach that would do away with destruction, so that if a princely decree was promulgated by His Highness the Khedive, who was the person who appointed the judges, this signified there would be no difference in opinion between the judges. There was no doubt that this was permissible to His Highness the Khedive; he was the ruler who appointed the judges, and it was he who issued directives to these judges, in the way they were accustomed to, and according to the school they followed. And the point in this matter was that the government could lay down the rulings in such matters, aside from the Cairo Legal Court, since doubts had been expressed that appointments there were within the prerogative of the Khedive. This was because the latter court was under the jurisdiction of HHH the Sultan. Consequently, it was permissible for whoever was within the area of the Cairo *Shar'ī* Courts to raise cases of that sort in front of the judges of Qalyubiyah and Giza, and there was nothing political or legal in that. Moreover, His Reverence the Judge of Egypt would not oppose this, since the question was outside his domain, and besides he was not asked to give his views on this.

Accordingly, for the reasons mentioned, the mufti was of the opinion that it was necessary to go back to the opinions expressed by the Maliki school concerning the rules on (wife) maintenance, with regard to absent husbands, missing persons, prisoners and husbands who harmed their wives. The mufti had therefore extracted from Maliki jurisprudence the stipulations or requirements for obtaining a ruling of

necessity *darūra* in the country; also, he had written to the Rector of the Mosque of al-Azhar – who was also head mufti of the Maliki school, to ask him whether he agreed with his views. The Rector had responded that his opinion was similar to that of the Grand Mufti, and that he considered the present situation was grave and needed to be examined for a way out.

The mufti was therefore sending the draft of the law, signed and approved of by the Rector of al-Azhar, to His Excellency, so that it could be brought to the attention of HH the Khedive, in order for him to issue the necessary decree with the fatwas of the Rector of al-Azhar and the Grand Mufti of Egypt, with the approval of the Minister of Justice, only without sending it to the Consultative Assembly for legislation, since it was unnecessary with regard to *Shar'ī* Law. Concerning the necessity of postulating that the courts issue their judgements in accordance with the aforementioned draft law - and, whether the ruling was to be appealed or not? And before what courts would the appeal be presented? All of this required another draft law presented to, and approved by, the Council of Ministers and through discussions with the Consultative Assembly- because it was a statutory law. And if the Council of Ministers required the participation of the mufti in setting it up it was up to the Council. gIncluded were six sheets of paper on which were the draft law, and this was the copy:

The impossibility of paying for the (wife's) maintenance

1-If the husband refrained from supporting his wife, had visible means to do so, and he did not say that he was in straitened circumstances, or that he was well to do, but insisted on not paying the maintenance, the judge was to divorce him immediately. If he claimed inability, and did not prove this, he was divorced immediately. But if he could establish his straitened circumstances, the judge allowed him a reprieve of one month. If he did not pay the maintenance after that, the judge pronounced the divorce.

2-If the husband was ill or he was in prison, and refrained from paying his wife's maintenance, the judge granted him a period of leave for treatment in the hope for a cure, or until the end of the prison sentence. However, if the illness prolonged itself, or the prison sentence extended itself to the point where there was fear of harm or discord, the judge was to divorce the couple.

3- If the husband had been missing, but for a short time, and he omitted to leave money to support for his wife, the judge excused him, in agreement with traditional ways, and allowed him a period of respite; but if he failed to send her any means of

sustenance, or he failed to put in an appearance to set her right, the judge divorced them at the end of the period of respite. However, if he absented himself over a period of ten days, or more, by boat, or his whereabouts were unknown, and there was evidence that he did not have the financial means to support her, the judge was to divorce the couple.

4- If the missing husband had money due to him from a debt, or he had deposited money with someone, the wife had the right to ask that maintenance be given to her from this money, but she had to provide evidence to whoever denied owing the debt or having the money, and her request was to be fulfilled without a guarantee, and that was after she swore an oath that maintenance was due to her from the missing man, and that he had not left her with any means, and that he had not nominated anyone to support her. The missing man therefore had to provide his own excuse upon his reappearance.

5- The judge's decision to give a divorce for failure to provide his wife with support was not final, and it was up to the husband to bring back his wife, if he could prove he had the means, and he was prepared to spend his money on her during the *'idda*, but if he failed to prove he had the means, or he was not prepared to support her during the *'idda*, the retraction on the divorce was nullified.

6- Should ever anyone go missing in the land of Islam, and his wife received no news of him, she was allowed to raise the matter to the Minister of Justice, and include an explanation of his whereabouts, or where she believed he could be. The Ministry was thereupon required to investigate his location by sending notes to the different governors and policemen. If there was no news of him for four years, his wife prepared a waiting period- *'idda* - of four months and ten days, on the assumption that he was dead, and she was not required to go through the courts. After the waiting period was over, she was allowed to remarry.

7- If the missing person resurfaced, or it became evident that he was alive, and this was before the second husband enjoyed her company, and he was unaware that the man was alive, she remained the missing person's wife- even after the marriage contract was sealed, or even after the second husband had enjoyed her company- on condition that the second husband was unaware that the missing husband was alive. However, if it became clear that the missing person had died during the waiting period, or after, and before the contract with the second husband, or after it- as long as

the second husband had not enjoyed her company while the first husband was alive, she inherited from him. If the missing man died after the second husband had enjoyed her company, and he was unaware that the other was alive, she did not inherit.

8- If one went missing during a battle between Muslims, and it was proved he had been present during this war, his wife was allowed to raise the matter to the Minister of Justice, and after searching for him and failing to find him, his wife went into a waiting period, after which she could remarry, and his money could be inherited just as soon as it was proved impossible to locate him. If it was simply established that he had moved with the army, Clauses 6 and 7 applied.

9- If he was involved a war against Muslims or others, the missing man's wife could raise the matter to the Minister of Justice, and after searching for him, his wife was given a year, and then she went into a waiting period, after which she was allowed to remarry, and his money could be inherited after the year ended. And it was permissible for the missing person's wife to ignore the time limit if, by receiving her due from his money, she could support herself, or she did not fear discord from this, or else she could raise the matter with the judge to divorce her when it was proved she was right.

Disastrous Conjugal Life

10-Whenever the conjugal strife between the two spouses increased, and there was no stopping or pausing it in accordance with the ways prescribed in the Holy Book, the matter was raised before the judge – *qādī* of the locality. It was up to him to appoint two just arbitrators, one from the husband's relatives, and the other from the wife's relatives, and it was preferable if they were [available] nearby. If the two arbitrators excused themselves from this task, the judge was required to appoint two outsiders, and to send these to the spouses. If they succeeded in settling the situation, then that was fine; if not, then the arbitrators were to divorce them and raise the matter to the judge, and at that point he ruled in accordance with their judgement, and the divorce in this case was one clear and decisive, and the arbitrators could not increase that.

11-The wife could ask the judge to divorce her from her husband if he was harming her in any way, and by harm was meant what was not permitted in Islamic law, such as desertion without a legal motive, or beating, insulting or cursing without a legal

motive, and the wife was required to establish or prove this in accordance with the (prescribed) legal methods.⁹⁵

Structure

The question originated from the Egyptian Ministry of the Interior, and it was addressed to the *Muftī al-Diyār al-Miṣriya*. It concerned married women who faced hardship in their marriages, either because their husbands were in prison - leaving them without adequate support, or because the husbands were missing and impossible to trace, or because the husbands were abusing them and making their lives impossible. Rather than being the response to a question from a private individual, this fatwa demonstrates that both the government administrations and the mufti were aware and responsive to the problems facing the Egyptian public in their lives. The question dealt partly with the conditions of wives whose living conditions were rendered impossible because their husbands had failed to provide for them. ‘Abduh genuinely tried to remedy some of the ills in Egyptian society, in line with his discussion with the Ottoman *Sheykh ul-Islam*, and contrary to the ‘*ulamā*’. He criticised these for their ignorance and absence of empathy, and demonstrated he was in touch with the needs of that society. The draft law was originally a response to a note from the Inspector General of the Egyptian Prisons, dealing with the grievances of some women whose husbands faced penal servitude and left the women destitute, with no means of subsistence, either for them, or for their children. As a result, they were driven to do things prohibited by the law, and it was also to be expected that their children should develop into delinquents, or face major difficulties. To this category of women, the mufti had added that of wives abandoned by their husbands and left penniless, because the husbands were missing or impossible to reach, as well as the category of wives so badly abused by their husbands that they could not continue to live together. The mufti considered that these issues deserved careful consideration. He had once declared that the family unit was basic to society,⁹⁶ so that special attention had to be given to it; this was what he was doing in this draft law. He noted that families had broken down, e.g. husbands were harming their wives, leading these to seek desperate measures to get out of their marriages. Other issues, such as those that resulted husbands who were missing, had led to the promulgation of

⁹⁵ Fatwa 178, ledger 000002

⁹⁶ See ‘Imara, Vol. 3, p. 170

a law, perhaps brought about by the war in the Sudan, and the military recruitment of hundreds of Egyptians.

To solve these problems, the mufti believed that it was essential to apply the principles of Islamic jurisprudences, namely the Qur'ān, the Sunna of the Prophet, and the matters upon which the leaders of the community and upon which the community itself agreed upon. However, matters were not made any easier since decisions such as those that concerned missing husbands and divorces had to follow the official school of law, i.e. that of the Hanafī school.⁹⁷ As a result, the mufti resorted to *takhayyur*,⁹⁸ i.e. he chose to go along with the decisions, or rulings, given by the Maliki school in such situations. He observed that most Hanafī jurists were reluctant to follow opinions given by other schools, but that in that case, they were ordered to consult one another and reach a decision accordingly. Since it was necessary to reach a practical solution, 'Abduh had consulted with the head mufti of the Maliki school, who was also Rector of al-Azhar, and together they had decided to issue a ruling by resorting to the expedient of *darūra*, i.e. necessity (to avoid harm), and to have recourse to the opinions of that school concerning wife maintenance, missing husbands, husbands who were in gaol, and those who harmed their wives.

Consequently, a husband who could afford to but failed to maintain his wife was to be divorced from his wife immediately, whereas one did not have enough money was to be allowed a reprieve of one month. If after that, he continued to be unable to pay, he was to be divorced from his wife.

A missing husband who failed to support his wife was granted a period of respite, after which he was divorced from his wife. However, if he had money due to him or

⁹⁷ Traditional Hanafi law does not allow a woman to petition the court to terminate her marriage unless her husband has been missing and nothing has been heard of him for ninety years, counting from the day he was born. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969. p. 51

⁹⁸ Coulson explains *takhayyur* as being a consideration of the dominant doctrine of one of the other three Sunni schools as a conceivable alternative to that already adhered to in a country; for example, Egypt followed the Hanafi rite, but it was very difficult to grant divorces under that rite. 'Abduh therefore "selected" the rule followed by the Maliki school, which was much more liberal because it allowed a wife to base her petition on her husband's refusal or inability to support her, his desertion, his cruelty, or his affliction with a debilitating illness that could harm the wife. Noel. J. Coulson, *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 2005. p. 185.

he had left money for his wife she was permitted to ask to be given her maintenance from this money, but she was required to provide proof that he had not left her funds for her support.

If a husband went missing during a war, the wife was allowed to appeal to the Minister of Justice, and after a year of searching for him, the wife was granted a waiting period of four years,⁹⁹ after which she could remarry.

As for abused wives, they could complain to the judge who appointed two just arbitrators to try to restore harmony to the relationship.¹⁰⁰ If these were not successful then the judge was to pronounce an irrevocable divorce. However, wives who claimed to have been harmed, insulted, beaten, or cursed by their husbands were required to provide evidence of the harm inflicted upon them by their husbands to the judge, and it had to fall under the legal definition of harm.

This draft law shows that ‘Abduh was aware of the problems in Egyptian society at that time, and that he knew, from his spell as a judge, and then as a mufti, that Egyptian women from different classes of society faced marital problems that seemed impossible to resolve. Among these were the wives of men facing prison sentences, those whose husbands failed or refused to support them financially, those whose husbands were missing, and finally those who were being physically harmed, or abused, by their husbands. Egypt followed the Hanafi *madhhab*, so here ‘Abduh evoked the principle of avoidance of *ḍarar*, or harm, which was a Maliki concept. Such problems were not taken into equal consideration by the Hanafi school.

He proposed, once the circumstances of these women were investigated and found to be true, to allow the judges to give decisions in accordance to the Maliki school, which was much less intransigent regarding separation; there was also the legal notion of avoidance of harm - *daf‘ al-ḍarar*. ‘Abduh was supposed to give a ruling in accordance to the Hanafi school because that was the school followed by the Egyptian government; instead, he gave a juristic opinion borrowed from another school, but he also consulted, consistent with legal requirements, and succeeded in getting the consent of the leader of that other school.

⁹⁹ This was the period required by the Maliki system.

¹⁰⁰ This again was in accordance to the Maliki school.

2 – FAITH AND RITUAL

Hajj Mustafa al-Transvali declared that individuals in the Transvaal wore hats while carrying out their duties and seeking their benefits. The first question was, was that possible? The second question was whether their method of slaughtering was proscribed, since they knocked out their animals with an axe before slaughtering them, and further, were they allowed to slaughter without citing the name of God? The third question mentioned that those who followed al-Shaf'i's school were in the habit of praying during the two feasts behind the followers of Abu Hanifa. Moreover, they prayed without citing the name of God, and it was known that there was a disagreement between the followers of al-Shaf'i's school and those of Abu Hanifa over the citing of the name of God, and over the *takbīr* in the two feasts. Consequently, was it possible for these to pray behind those?

He responded: Concerning the wearing of hats, if it was not the intention of the person wearing a hat to abandon Islam to join another religion, then it was not regarded as leading to unbelief. And if the donning of something was for a purpose, such as shielding oneself from the sun, or averting a harmful thing, or making possible a benefit, then this was not objectionable, since it removed any ambiguity.

Concerning the slaughter of animals, he pointed out that Muslims in those regions had to abide to the text the verse from the Book of Allah when He said: “the food of the People of the Book was made licit for you,”¹⁰¹ and that they followed what the venerable Maliki Imam Abu Bakr Ibn al-‘Arabi said, that the point was that what was slaughtered was eaten by the people who possessed the Scriptures, both priests and lay men, and that the food prepared was for the consumption of all, without exception. Accordingly, whenever it was their custom to kill an animal by any means whatever, and it was eaten, after it was slaughtered, by the heads of their religion, it became permissible for a Muslim to eat it, because he was told he could eat the food of the people of the Scriptures, whenever slaughter was the custom accepted by the heads of their religion. And then the Noble Verse was revealed: “Today made licit to you are good and wholesome foods. The food of the People of the Book is licit to you and your food is licit to them,”¹⁰² to the end, and this verse was revealed after the verse making illicit the eating of carrion and that which was not consecrated in the name of

¹⁰¹ *Qur’ān*: The Table: *al-Mā’ida*: 5

¹⁰² *Ibid*.

God. And it was the same as pushing for those who imagined forbidding the food made licit to the People of the Book, since they believed that Jesus was God, and there were many during the time of the Prophet PBUH, except those who became Muslim from among them. And the phrase the People of the Book was an unconditional, and it was not correct that it should mean those few and rare. Consequently, the verse was clear, binding, and made their food absolutely licit whenever they believed it as a solution in their religion; this was to avoid embarrassment, or problems, in their interaction and in their dealings with one another.

Concerning the prayers of the followers of al-Shaf'i behind those of Abu Hanifa, there was no doubt it was acceptable, because the prayers of the followers of Abu Hanifa were acceptable to his school. Furthermore, the Muslim religion was one religion, and it was up to the follower of al-Shaf'i, to know that his *Imām* or leader, was Muslim and that his prayer was acceptable, without bias towards any imam. Whoever commanded differently considered Islam to be several religions, not one, and it was not acceptable that a discerning person should claim this in a land where all the inhabitants were not Muslim, except for those few wretches.¹⁰³

Structure

The questioner, Hajj Mustafa al-Transvali, asked three questions, each of which dealt either with manifestation or ritual in Islam. Thus, the issue in the first question regarding the permissibility of wearing hats involved the preservation of the Muslim identity - *al-ḥifāz 'ala al-hāwiya*, since the donning of hats was a non-Muslim custom. Here the mufti pointed out that the matter depended on the person's intent; if a person's purpose for wearing a hat was to avoid harm and protect himself from the sun's rays - which could be damaging, there was no harm in wearing a hat. He was alluding to the principle of *daf' ḍarar*, since avoiding harm was more important than seeking a benefit. On the other hand, if wearing a hat was beneficial, since one avoided the harmful influence of the sun's rays, it was also *maṣlaḥa*. This fatwa was eminently practical and original, and the basis of his argument was that, in conformity with a Prophetic *ḥadīth*, intentions were crucial.

¹⁰³ Fatwa 190, ledger 000003

The issue in the second question revolved around the correct Muslim ritual for the slaughter of animals; here the mufti drew attention to the fact that Muslims in South Africa were a minority, the majority being people who possessed the Scriptures; consequently, there was no sin, or harm, in these Muslims partaking from the food of the People of the Book. He cited verses from the Qur'ān that indicated that such food had been made licit for the consumption of Muslims. He was implying that given that Muslims in South Africa were a minority, and that the Qur'ān made the food of the People of the Book licit for them, these Muslims had to partake from it without fuss, to avoid embarrassment. Here again, he was being very practical and pragmatic in his application of applying *maṣlaḥa*.

The third question dealt with the acceptability of allowing the adherents of a Muslim legal school to single themselves out from those from other schools during prayers. The reference was to the adherents of the Shaf'i school, who stood in their prayers behind those of the Hanafi school. 'Abduh observed that since they were all Muslims, their prayers were equal and acceptable, and any bias toward a single Imam was unacceptable, because it suggested that Islam was several religions, which it was not. This combined fatwa was one of the Imam Muhammad 'Abduh's best known ones; it was referred to as the Transvaal fatwa, since the questioner came from a region in South Africa then known as the Transvaal. The fatwa showed the Imam's ability to use his juristic experience to answer questions from places where Muslims were few, and needed to survive. His answer, once again, indicated his practical approach, and his point was in line with a Prophetic Tradition that intentions were more relevant than ritual.

The Head Clerk of the *Shar'ī* Court of the *Liwa'* of Nablus, Shaykh 'Abduh Bakr al-Tamimi, asked about a man who attested that he belonged to the Druze sect, and said that he now wished to abandon the creed and beliefs held by the Druze to join the true Muslim religion which scorned the false religions. So, accordingly, in such a situation, if he produced the two attestations with the statement rescinding all that contravened the religion of Islam, could he be considered a Muslim from the point of view of the *Shar'*, and immediately be treated as a Muslim, without being considered a hypocrite? Moreover, if his conversion to Islam became genuine with this procedure, what was the ruling on those Muslims who did not acknowledge his

having become a Muslim? And, in order to admit him within the Muslim religion, was the condition to be made that he do this officially?

He responded: What the scholars said was that whenever a Druze, or any such sect, came compliantly to announce that he had followed his creed, but that he was now renouncing it, and that he was now free from any religion that violated the Muslim faith, it was necessary to accept his statement. They also said that whoever did not accept the conversion of whoever wished to come into Islam was satisfied with the notion of leaving that person to remain an infidel and blasphemous person. And the last fault about a person refusing to accept such a conversion was that he should be considered sinful and evil. Nonetheless, there was no traditional way we followed on considering a person who converted to Islam as Muslim one of us, having our duties and responsibilities and making us brothers in religion, except the Tradition - Sunna of our Messenger Muhammad, PBUH. And he, the Messenger of God, was in the habit of meeting converts with mercy after their apostasy, and hypocrites with loyalty after their hypocrisy. He had looked at who had attested that there was no God but Allah, and that Muhammad was the Messenger of God, that the Qur'ān was true, that the Hereafter was true, and that all God had made obligatory in His Book was necessary, and that what He had forbidden had to be stopped, except the judgement of one Muslim for another. And he did not discriminate between Muslims in their faith, except when God revealed to him hypocrisy in an individual, or he was shown indubitable signs. The books of Tradition attested to this. Accordingly, how could we fail to be convinced by people when the Messenger PBUH himself was? And how could we demand from them more than he did? And he was the possessor of the Law and it was to him we resorted when disputes occurred?

Now that Druze who acknowledged his contrariness and came, of his own volition, to attest that he would follow the veritable religion and reject any religion that would contravene, had be considered a true Muslim, and whoever did not accept that from him should fear saying so. God save us from that! Let the Muslims fear God and return to God's judgement and that of His Messenger. "And let them not be like those who differed when the Knowledge came to them, out of mutual envy."¹⁰⁴ And God

¹⁰⁴ *Qur'ān*: 42:14

save them from what they had become, and He guides those He wishes to a straight path.

As for considering one who had returned to the true creed a Muslim, it is unnecessary that he should follow an official channel. Indeed, it was enough that Allah should know this. Then, concerning the application of Islamic rulings upon him, he does not need that people should know this from him, and that that his circumstances were made public among those who knew him.¹⁰⁵

Structure

The questioner asked whether the conversion to Islam by a man of the Druze sect was acceptable, then, what was to be done about Muslims who refused to accept it, and if all went well, how was this conversion to become official?

The mufti initiated his discussion describing what the religious authorities said about such a conversion, adding that the man's desire to be free of any religion that violated Islam had to be accepted. He stressed that those Muslims who refused to accept such a conversion were committing the sin of allowing such a person to remain in the state of disbelief. Yet the mufti considered that the best way of accepting that person and teaching him the duties and responsibilities of being a Muslim was to follow the Prophet's tradition, which was to greet converts who had been apostates with mercy, and meet those who had been hypocrites with sincerity and loyalty. By referring to the Prophet's treatment of apostates and hypocrites in this instance, 'Abduh was hinting at analogy - *qiyās* - to bolster his opinion. He also indicated that the Prophet had not discriminated among Muslims in their faith except when there was certainty that they were in error. Thus, if the Prophet had demonstrated such tolerance, how could other Muslims allow themselves to be judgemental, especially after that Druze man had decided, of his own free will, that Islam was the only true religion. Accordingly, who had the right to judge him except God, especially when the Prophet had accepted such conversion?

The mufti concluded with a warning against making such judgements, adding that this man did not need to proclaim his conversion, because it was sufficient that God was aware of his intention.

¹⁰⁵ Fatwa 479, ledger 000002

The mufti's fatwa was consistent with his argument that faith was personal and a matter that was strictly between an individual and God, and that in questions of faith, no one had the right to intervene. Moreover, it was in line with his approach as a jurist, since he first consulted the Qur'ān, and then the Sunna to emulate the actions of the Prophet, and this was one of the rare occasions when he used *qiyās*. However, he was addressing an official, who probably had some knowledge of the *Shar'*, and 'Abduh therefore had to justify his response as thoroughly as possible.

This was one of the few fatwas in which the mufti used verses of the Qur'ān to support his statement, because the question dealt with faith, and he considered that such matters were best left to God's judgement, not to that of humans, since only He could read intentions.

Bearing in mind that Kamali defined a *mujtahid* as a legist who is competent and qualified to express "independent tradition based opinions in legal or theological matters." 'Abduh effectively showed his competence and qualifications to express such an opinion in this fatwa.

3 – MARRIAGE AND DIVORCE

Shaykh Muhammad Hasanayn al-‘Adawi asked about a woman whose father had married off to a slave he owned. When the father died, the slave became the property of the daughter, as he became part of her inheritance. The question was, was her marriage to this slave annulled incontestably upon the father’s death, or was it necessary to obtain the ruling or decision of a judge?

He responded: According to the religious authorities, should one of the two spouses ever become the property of the other, either completely or partly, the marriage was annulled, and this did not require a judge’s decision. Consequently, through her ownership of this slave, the marriage of this wife to him was annulled, and it was unnecessary to obtain the ruling of a court, or the decision of a judge.¹⁰⁶

Structure

The questioner is referred to as Shaykh Muhammad Hasanayn al-‘Adawi, but it is not clear if he is a relative of the lady, a religious scholar, or a *ma’dhūn*.¹⁰⁷ However, his question as to whether the marriage, arranged by a father for his daughter to his slave, remained valid after the father died, since the daughter had inherited from her father, and this slave had become her property strongly suggests that the aforementioned shaykh was aware that the spouse and his bride were not equal in status,¹⁰⁸ so that such a union was invalid in Islamic Law. The shaykh may have needed the authoritative opinion of the mufti to declare its invalidity.

The mufti’s response was brief and to the point: possibly because such a situation was not uncommon. ‘Abduh based his opinion on that of the jurists- *rā’y fiqhī* – who were unanimous in considering such a marriage annulled, without the need to resort to the courts of law.

The jurists considered that such a marriage was to be rescinded, given that marriage was a contract between two parties that gave rise to fruits, so that whenever one of the parties was owned by the other, this prevented the joint sharing of the fruits of marriage.¹⁰⁹ Such a situation involved a conflict of interests.

¹⁰⁶ *Fatwa* 495, ledger 00003.

¹⁰⁷ This is the official responsible for recording or registering marriages and divorces.

¹⁰⁸ *Kafā’a*, or proportionality in marriage, is necessary, since the spouse is required to give his bride *sadāq al-mithl*, i.e. a dower proportional to her status.

¹⁰⁹ Burhan al-din al-Farghani al-Marghinani, *Al-Hidāyah -The Guidance*. Imran Ihsan Khan Nyazee (trans.) Vol. 1, p.483. Ibn Rushd, *The Distinguished Jurist’s Primer* -

This fatwa was a traditional one.

Wife travelling with husband

Ahmad al-Sabi from Dingiway, Gharbiya province, asked about a man who married a virgin girl who had come of age, and who was a noble person. He contracted the marriage in her town, where both had been living. The marriage was consummated, and he lived with her for a whole year, after which he left her to live in another town; he made her follow him there, and she lived there with him for nine months during which he harmed her, caused her damage, took all her possessions and jewellery, treated her badly, threw her out of the house, and forced her into the road, although she was pregnant from him. She thereupon returned to her father's home, in her town, where she was presently living. Her husband had abandoned her with their children without any means or resources. Consequently, in a situation such as this, there was no evading the evils of time, especially since she could not really protect herself from him if she followed him into the town where he was living. Could he therefore make her move to the town where he was by force, the town where he had harmed her and caused her damage and, could he be trusted? And could she request the judge of her district -in her town- where the marriage with her had been contracted, to force him to pay the legal maintenance for her and for her children, since he was residing in another town?

He responded: Whenever a husband could not be trusted to treat his wife properly, it was not right that he should travel with her away from the place where the marriage was contracted. Besides, what the aforementioned husband did to his wife- according to the text of the respective question- for example, taking her money, injuring her and leaving her on the road, indicated that he wished to harm her. Accordingly, she might refuse to travel with him, demand that he pay her maintenance, and do that through the judge of the district where the contract was signed, since that was her real home, especially after both had lived there for a year, and they had not moved from there.¹¹⁰

Structure

Bidāyat al-Mujtahid. Imran Ahsan Khan Nyazee (Trans.). London: Garnet Publishing Limited, 2006. Vol.II, p. 51.

¹¹⁰ Fatwa 114, ledger 000002

The questioner asked about a husband who had forced his wife to live away from her family, abused and harmed her, then seized her jewels and belongings, before he threw her out on the street, and forced her to travel back to her father's house while pregnant with child. Could he, regardless of his treatment of her, nevertheless force her to live with him?

The mufti had no means of verifying the facts placed before him, but he considered that in such a case, there was no justification for the husband to travel with her away from her hometown, where the marriage was contracted. She could therefore refuse to travel with him and demand, through the judge of the district where the marriage contract was signed, that he pay her maintenance.

His opinion was based on the fact that if the husband was causing her harm *ḍarar*, avoiding such harm was therefore justified - *daf' al-ḍarar*.

Obedience

The judge of Hihya Court, on 14 *Dhū al-Qi'da* 1318, in a numberless file, asked the mufti for advice on a question concerning a man from the village of Sandanhur, province of Qalyubiyah, who had taken up residence in the village of al-Ibrahimiyyah. He married there and lived with his wife for a time after the marriage. Then he travelled to the Sudan with the Egyptian army for a year, after which he returned to Egypt, stayed in Urtanah, and demanded through the court that his wife come and live with him in his village of Sandanhur, his village of origin. She refused with the excuse that he had left his birthplace and was now living in Cairo, which was a long distance from her village. He responded that he was demanding that she join him in his village - which was between Cairo and her village, and that the distance between them was less than a *qaṣr*.¹¹¹ Consequently, was the husband's demand to be fulfilled?

He responded: The authoritative texts of the school mentioned that the husband could travel and move with his wife between one village and another, as long as this was not in a foreign land. Some scholars had said that it was permitted as long as the move to a place allowed her to return to her own place before nightfall. Others conceded to moving, and there was a fatwa about this. Based on this, the husband in this case

¹¹¹ A *qaṣr* is about 83 kilometers. It was estimated on the distance covered by a camel in one day, thus permitting the wife to return to her village on the same day.

could move his aforementioned wife from her village to his when the distance between the two was the time taken for the journey, [i.e. a qasr or less], and on condition that by moving her, he did not intend her any harm.¹¹²

Structure

The question came from a judge, who asked whether a husband could demand that his wife join him in living with him in his village, although she claimed that his village was too far from her own. The issue here was recalcitrance or disobedience of the wife.

The mufti pointed out that some juristic texts considered it legitimate for a husband to move from one place to another with his wife, as long as she was not cut off from her own place. Other texts had agreed to the husband's taking his wife wherever he wished - provided that his motive for moving her did not harm her.¹¹³

This was a traditional fatwa. Islamic law required the wife to obey her husband. The *mufti* stressed that as long as the husband did not intend his wife any harm by ordering her to join him, she was required to obey.

Conditions for legality of marriage

Shaykh Ahmad al-Tayyib asked about two men who were sitting together before being joined by a third. One of the men then asked the other to marry off his daughter to him with a certain dowry. The girl's father accepted, and got the third person present with them to witness this; the third person confirmed that he was present with them, adding that there was a fourth man as well, besides those others sitting there, who was with the daughter's would-be suitor. And when they asked him what he had heard, he responded that he had heard nothing of what was said, but he had heard the first man tell the other: "If you allow me to marry your daughter so and so, and you bring her here immediately for me, I will marry her on the spot and give you such and such an amount, and I shall give you my two daughters X and Y, so that you can marry one, and the other will be for your son." Now all three men, the daughter's would-be suitor, the girl's father, and the first witness, were very drunk. The

¹¹² Fatwa 288, ledger 000002

¹¹³ A Muslim wife is required to obey her husband and follow him as long as he pays her dower. However, he is not to move her to a land that is not hers, since being the strangeness of this may be painful to her. Al-Marghinani, *The Guidance - Al-Hidāya*, Vo. 1, pp. 521-522.

daughter's would-be suitor died two years after this episode, and seven years had gone by since it had occurred, but nothing had taken place, or been mentioned, concerning it. The girl had been a minor at the time, but she was now of age, and the son of the would-be suitor wished to marry her. The question was, was she legally accessible to him (because of the agreement between the fathers)?

He responded: Among the conditions for a legal marriage was the presence of two individuals who could hear, or understand, that it was a marriage in conformity with the school of law. If these conditions went unfulfilled, the contract was not valid. And in this case, even though the first witness was present, there was no real second witness. Consequently, the marriage was not valid, considering that the second witness declared that he had not heard the wording of the conversation between the girl's would-be suitor and her father. And citing what was said in the promise and concerning the conditions was useless, since each of the persons present made a different statement concerning what they had witnessed, and their statements could not be taken seriously. Yet nevertheless, the daughter of the aforementioned man was not unlawful - *lā tuḥram* to the son of would-be suitor. The scholars had declared that if the father married off his daughter in the presence of one person, the marriage was contracted if the girl herself was of age and present, because if she heard the words he expressed in his statement of marriage, this was considered a single testimony, together with that of the witness, and the marriage had therefore been contracted with the requisite testimony. But here this was not the case, since the girl was a minor when it took place. The scholars had also stated that if a father ordered a man to marry off his daughter for him, and the man did marry her off to another man, it was a valid marriage – on condition that the man who had received the order was present, because the words he expressed in his statement of marriage were therefore expressed by the person who gave the order, and given that the person receiving the order and the person present at the time were witnesses, this meant that the required testimonies were available, and the father would be the person marrying off the daughter. But again this was not the case, given that the father had not ordered anyone to marry off his daughter for him. Besides, the suitor here had not subsequently declared that he accepted the marriage, yet another absolutely necessary condition for the validity of

the marriage. Consequently, because of the absence of this declaration, the marriage in this case was invalid; moreover, the girl was not legally prohibited to the son.¹¹⁴

Structure

The questioner asked whether a declaration of marriage carried out by a young girl's father to another man was legal, since several of the conditions required for a legal and valid marriage were lacking.

The mufti observed that despite the presence of two other people during this incident, other than the girl's father and the would-be suitor, only one of those present actually heard and understood the conversation during which the would-be suitor asked to marry the daughter of another with the promise of a certain dowry, and the girl's father had promptly accepted. The fact that seven years had passed since this incident took place was irrelevant; what mattered was that the marriage, or intended marriage, was invalid, given that the fourth person present did not specifically hear the terms of the agreement between the two men. The presence of two male adult witnesses was essential for the validity of a marriage contract. After the consent of the girl's father, another essential condition was the public announcement by the would-be suitor that he accepted to marry the girl.

The mufti also pointed out that had the girl not been a minor, and had she been present during the meeting and conversation, her account of the facts of the conversation would have sufficed to validate the marriage, as her statement could count as that of a witness.

'Abduh mentioned that regardless, the would-be suitor's son could marry the girl if he wished, as there was no legal impediment to prevent him from doing so.

Hajj Ibrahim Sayyid Ahmad, a Bedouin Arab of al-Bayyada, asked about a man who married off his daughter, who was of age, to a man without her permission, and without witnesses. Indeed, he married her according to the Bedouin custom. The nature of that was that the father grasped the stalk *-qaṣlah* - of a palm *khūṣ al-nakhl* in his hand, and then extended it to the husband to be saying: "Take the stalks of so and so on the *Sunna* of Allah and His Messenger, and the husband responded: "I accept her stalk on that." So could that be considered a marriage contract?

¹¹⁴ Fatwa 169, ledger 000003

He responded: The scholars declared that a marriage contract not attended by witnesses, or even by one other participant, had no effect, or validity, because the laws regulating marriage did not apply. If these two spouses had not yet separated, it was absolutely necessary to separate them. Thus, even on the assumption that what was mentioned was a marriage contract that was valid to the Bedouins, it was without witnesses, and therefore it was not established in accordance with the laws required for marriage.¹¹⁵

Structure

The question dealt specifically with a marriage carried out without the presence of witnesses, and without the girl's consent, although she was of age.

The mufti promptly warned that such a marriage could not be consummated, since it did not fulfil the necessary conditions for a marriage, namely the presence of witnesses to attest to it, and the girl's agreement.

This case indicated people appeared to follow marriage rituals that had little to do with legal practice. In this case palm stalks replaced the traditional handkerchief, and the tacit agreement between the girl's father and the groom suggested that no witnesses were necessary, since the interested parties- apart from the bride, were in agreement.

He was asked by one Muhammad 'Ali, the cultivator, *al-muzāri*' nearby Niklat al-'Inab, Buhayra province, about two men wishful to establish marital links with one another, in that one took the unmarried daughter of the other - who was of age -, for his son who had also attained his majority. The father of the boy therefore went to the girl's father's home, and asked him for (the hand in marriage of) his daughter, so and so, for his son, so and so. The father submitted willingly and declared distinctly, "I have given you my daughter, so and so, to your son, so and so, for a dowry of such an amount, half of which is to be given in advance, and the other half later." The father of the boy thereupon responded, "And I have accepted from you (the hand of) your daughter, so and so, for my son, so and so, on those conditions," in the presence of suitable witnesses. The father did not ask for the girl's authorisation before the marriage was contracted, but then she heard about the contract and authorised her

¹¹⁵ Fatwa 73, ledger 000003

father's action. Accordingly, was the contract valid legally, so that if the father subsequently desired to ward off the husband in order to marry her off to another, was he to be stopped?

He responded: Our religious scholars have declared that something that was contracted without commission or agency – i.e. *fuḍūlī* - that resulted in marriage without an agent, or guardian, was determined by the person who had the authority, so that if he gave his authorisation, it was effective, and if he invalidated it, then it was invalid. There was consent from the father of the girl- who was of age- and consent from the father of the boy - who was of age. Therefore, if the father's consent was with the agency from his son, and the son authorised it, just as the girl authorised it after the marriage was contracted, it fulfilled all the necessary legal conditions, then it was necessary to carry it out. Furthermore, the girl's father could not keep her away from her husband without a valid legal reason, nor could he marry her to anyone else, if the situation was as described.¹¹⁶

Structure

The questioner asked if a marriage contracted by the father of a girl who was of age (without her authorisation), to another man's son, who had also attained majority, was valid. Neither of the interested parties were consulted, but when told, gave their authorisation. Another issue was whether subsequent to this, the father of the girl could, if he wished, separate his daughter from her husband, say, to marry her off to someone else. The mufti declared that since both parties had given their consent, and both had agreed to the contract, the father could not change his mind, or decide otherwise, without a proper and valid legal motive.

Authority to revoke marriage given to wife

Ahmad Saqr from Mahalla al-Kubra asked about a woman constantly being abused by her husband, and she therefore complained to him of this maltreatment. She wanted him to give her the power to revoke his matrimonial authority *'iṣma* over her. He thereupon told her in the presence of others, "I have relinquished the power to revoke into her hands – *qad salimtu ilayhā amrahā bi-yadihā.*" He added, "And should I ever hit, insult or harm, or even say I divorce her through clear actions or speech, when I

¹¹⁶ Fatwa 201, ledger 000002

address her, then she is free to repudiate me completely - as though I committed a great sin.” The question was, what was the decision in such a case?

He responded: Authoritative texts, such as *Radd al-Mukhtār*,¹¹⁷ stated that whenever the man placed the power to revoke the marriage into his wife’s hands, if ever he mentioned divorce, displayed anger, or the intention to divorce, even in her absence, but in the presence of others, and she got wind of this, she simply had to declare: “I have chosen to divorce you,” in the presence of the same assembly which had witnessed her husband’s statement that he had relinquished to her the power to revoke the marriage. The divorce would thereupon be irrevocable. However, if his statement had a time limitation, whereby he gave her the power to revoke within a limited period, and during that time he was abusive, or he said that he divorced her, even if she was not present, but then she was told, she had the right to act accordingly, and ask for a divorce immediately, if the time period had not run out on her husband’s statement.¹¹⁸

Structure

The questioner was asking about his opinion with regard to a husband who told his wife - in front of others – that she had the right to revoke their marriage if ever he abused or maltreated her in any way.

The issue here was the validity and extent of a husband’s statement before witnesses that he relinquished to his wife the authority to revoke their marriage.

The mufti observed that the jurists had declared that whenever a husband made such a statement, if ever he decided to divorce, or he was angry with her and he mentioned or he did not mention the word divorce, in her presence, or she heard of it, or if he hurt or harmed her, she could divorce him simply by declaring, in front of the same people who heard his declaration (that he gave her the authority to revoke the marriage), that she had chosen to be free of him, provided he had not set a time limitation on his declaration. The husband had also said publicly, that if he ever hit her or insulted her or harmed her through what he said or did divorce with her was irrevocable *al-baynūna al-kubra*.

¹¹⁷ This was *Radd al-mukhtār ‘ala al-durr al-mukhtār* of Ibn ‘Abidin, Muhammad Amin ibn ‘Umar ibn ‘Abd al-‘Aziz ibn Muhammad (A.H.1198-1252), a Hanafi treatise.

¹¹⁸ Fatwa No. 116, ledger 000003

The mufti resorted to two legal texts, namely Muhammad ibn al-Husayn's *Al-Fatāwī al-Anqarawiya* and Ibn 'Abidin's *Radd al-Mukhtār 'alā al-Durr al-Mukhtār*. His response was therefore based on the opinions of Hanafi jurists - *rā'y fiqhī*.

This was possibly the only case in the two ledgers in which a husband granted his wife the right to pronounce her own divorce. Given the numerous instances involving wives who complained of maltreatment, or went to extremes to obtain a separation from their husbands, this one showed an exceptionally tolerant husband.

This was a traditional fatwa.

Validity of separation

Mahmud Salih al-Dabbagh of Cairo asked about a man originally from Aleppo, Syria, who went to live in Egypt, where he married a girl and went to live with her. Then, while living with her, he decided to head back to his country. But before setting off from Egypt he prepared a letter addressed to his brother who also resided in Egypt. In this letter, he mentioned he had set off for his country and that on reaching it he had found that his mother was ill, and that this prevented him from returning to Egypt. Moreover, he continued, the father of his wife Zaynab did not trust him with her, and wished to force him to divorce her. He therefore pronounced the words my wife Zaynab was divorced three times, and then begged his brother to send this letter to her father. The letter was in the husband's handwriting, and it bore his signature. Furthermore, it was sent from Aleppo, although it had been drafted in Cairo. The question was, if such was the situation, was the divorce irrevocable, (i.e. pronounced three times). Moreover, he said that the letter was written without his having pronounced what he wrote. He added that he had taken an oath before writing the letter, and before setting off to Aleppo, saying: "May I be punished three times when I go down to the sea, my wife Zaynab is forbidden to me." It was with the intention of causing the divorce that he took to the sea, as he had not intended to go down to the sea with the purpose of swimming.

He responded: When the man acknowledged that the calligraphy of the text stating that he divorced his wife three times was his, the divorce was final - since his acknowledgment had the same value as a spoken statement.¹¹⁹ Consequently, the wife

¹¹⁹ The intention – *niyya*- is there.

was no longer lawful to him, unless she married another man. Apart from that, the oath he took concerning going down to the sea had no effect, because even though he did take to the sea, this did not take place with the divorce, which was already irrevocable.¹²⁰

Structure

The questioner asked about the divorce of a Syrian man who, before leaving Egypt prepared a letter for his brother - also living in Egypt – informing him that he had gone back to Syria to see his mother who was ill, and was preventing him from returning to Egypt, and that his father in law distrusted him and wanted him to divorce his daughter. He had therefore pronounced the words, “My wife Zaynab is divorced from me,” three times, asked his brother to send the handwritten letter saying this to his father in law, and thereupon travelled to Syria. The questioner wanted to know if such a divorce was valid, given that the man had not pronounced the standard formula to the wife, “I divorce you three times.”

Islamic law gave weight to the pronounced statement, but since the husband’s handwritten letter to the woman’s father had the same value as such a statement, the divorce was irrevocable, since it was so stated in the letter.

Al-Sayyid Mahmud, from Abtihins in Minufiya province, asked about a person named Ibrahim Abu ‘Ali who got married to a girl, and the marriage was consummated. Some time after this, he appeared before the *mā’dhūn* of his area, i.e. the official responsible for legalising marriages, to confess that he was of age, that his age at that time was thirteen and a half, and that his wife had absolved him from paying the second part of her dowry. He therefore divorced completely, and he took the *mā’dhūn* with him to witness that. When the waiting period – *‘idda* subsequently ended, she remarried another man and that marriage was consummated, but the first husband’s father was now claiming that his son was a minor, and that he had not reached puberty, and that the divorce was not legally effective. The question was, could the father’s action be taken into consideration legally?

¹²⁰ Fatwa 463, ledger 000002

He responded: If he stated that he had reached puberty at the aforementioned age in the question, and the condition of his body supported his statement, and appearances were not deceptive before this, the divorce was valid.¹²¹

Structure

The questioner here asked whether the divorce pronounced by a boy, who admitted to having attained puberty, was valid. This was because the boy's father was claiming that the boy was still a minor, and therefore that the divorce he had granted his wife, - which would allow her to remarry after her *'idda*, - was invalid. The mufti declared that if the boy had really reached puberty when he divorced, it was valid.

The case was probably one where the boy's father had contracted the marriage for him when he was a child. The marriage had later been consummated, but the couple subsequently divorced, after the bride accepted to forgo the second part of her dowry in favour of a divorce. The boy had gone to fetch the marriage official to witness his decision to divorce her irrevocably. The father, for reasons of his own, later maintained that the boy had not attained puberty, but the boy was more likely to know whether or not he had.

Separation by Apostasy

He was asked about a woman who renounced Islam with the purpose of obtaining an annulment of her marriage, and she then immediately returned to Islam. The question was, was the marriage really annulled in fulfilment of her purpose, or was it not annulled, and did her purpose remain unaccomplished? Also, if it was annulled, what was the ruling on the dowry? Was the husband required to pay it, or was it her responsibility-since the annulment came from her? The situation was that the husband had now deserted her for three months, and he had not asked about her during all this time.

He responded: It was stated in *al-Fatḥ*¹²² that al-Dabbusi had given his opinion; al-Saffar and some of the people of Samarqand had concluded that separation in a marriage could not be effected through *ridḍa*- apostasy, and other scholars followed what was apparent. Yet they ruled that she had to be forced to renew her marriage to

¹²¹ Fatwa 7, ledger 000003

¹²² This is Ibn al-Hamam, Kamal al-Din Muhammad ibn 'Abd al-Wahid al-Siwaṣī, (d. A.H. 861), author of *Fatḥ al-Qadīr*, a Hanafī text.

her husband. And, forcing people to marry was not simple, nor was it realisable. Since many women had taken religion as a game, abandoning it each time they wished to get rid of their husbands, and this was one of the most tasteless methods of doing so, it had become necessary to close that door in their faces, especially to prevent the application of the ruling on apostasy on them, and it was known. For all these reasons, this marriage was not annulled, nor was their separation effective simply because the spouse apostatized; indeed, she remained her husband's custody, and he was required to pay the dowry since he had married her, and the marriage was not annulled because she had renounced Islam.¹²³

Structure

The questioner asked about the validity of a woman renouncing her Muslim faith to get her marriage annulled, and then immediately returning to her faith. She believed that by declaring herself an apostate, she could terminate her marriage. It seems clear from the mufti's answer, and from Masud's article "Apostasy and Judicial Separation in British India,"¹²⁴ that women resorted to this strategy because they had no other alternative when seeking judicial separation.¹²⁵ According to Masud, the Hanafi school was divided in its views on apostasy; one opinion, which predominated, was that the marriage was immediately dissolved, after which the woman was to be compelled to return to Islam, and forced to remarry the same man. Another view, infrequently followed, was that the apostate wife was to become her husband's slave. The third opinion, given by the mufti here, and similar to that of the scholars from Samarqand, was to the effect that the marriage was not to be dissolved, and it recognised apostasy as a legal device - *hīla*.

¹²³ Fatwa 27, ledger 000002.

¹²⁴ Masud noted that between 1920 and 1930, Christian missionaries were particularly active in India. At that time, Indian women were desperately seeking to obtain divorces, and because most of the judges in the courts were unfamiliar with Islamic law and oblivious to these women's needs, many of these women were encouraged by the missionaries to convert to Christianity as a means of getting out of their marriages. It is noteworthy that the majority of Indians followed the Hanafi school, and Masud observed that Maliki law doctrines might have helped solve these women's problems, but a Hanafi mufti attached to one of the British courts vociferously opposed this. Masud, Messick and Powers (ed.) *Islamic Legal Interpretation Muftis and their Fatwas*, p. 195, 202.

¹²⁵ *Ibid.*, p. 195

The mufti started by citing the juristic texts that stated that apostasy did not dissolve a marriage, and even if it did, she was to be forced to renew her marriage. These included al-Dabbusi, in *al-Fath*, and al-Saffar. But the mufti was aware that forcing people was neither simple nor realisable. Yet although his view was that the marriage was not annulled, and that the wife had to return to her husband, who had to pay her whatever money he owed her, but the mufti subsequently cited this case in his argument that it was necessary to find a way to solve the numerous complaints coming from women who complained that their husbands were treating them badly.¹²⁶

Conditions for *khul'* – redemption in marriage

Ibrahim 'Umar Hijazi, from Minufiya province asked about a wife who freed her husband from the payment of the remainder of her dowry and from her maintenance, in order to obtain a divorce from him. He refrained, did not respond to her request, and departed to go to a town. When he was halfway to his destination, he said in the presence of the men accompanying him: "If she was true in absolving me, then my divorce from her was final." The question was, in such a situation, was the divorce effective?

He responded: It was known from the purpose of the speaker that if he included the words: "I absolve you of these," that he hoped she meant "If you absolved me of these then you are divorced." And the scholars declared that absolving from the payment of the wife's maintenance before that maintenance actually came into existence was invalid. So he was not absolved of it merely because the wife had absolved him of it, therefore the absolution was not genuine, and therefore the divorce did not come into effect. Thus, if the releasing of the husband and the divorce took place together during the same meeting, it was valid. However, if they parted without agreeing to this release, the divorce was not final. Another reason that prevented it from being final was that the absolving was only true if the conditions were fulfilled, i.e. that the husband accepted it, i.e. agreed to the divorce during the meeting, but if he agreed after the meeting, absolving did not work; consequently, the divorce was by no means effective, and the wife remained in the custody - *işma*- of her husband.¹²⁷

Structure

¹²⁶ See section on official fatwas.

¹²⁷ Fatwa 307, ledger 000002

The questioner asked about the validity of a *khul'* declaration made by a husband after he parted from his wife who told him that she would forgo her maintenance if he granted her a *khul'* divorce.

The mufti indicated that the woman had declared she would release him from the condition of paying her maintenance even before the couple had agreed about it, or she had received it; this made her request invalid, since the payment of the maintenance began after the two parties agreed to a divorce.

Moreover, if she had absolved him from paying for her support and he had agreed during the same meeting to give her a divorce, the divorce would then be valid, but he had decided later, after meeting with his wife, and not in her presence, that he was considering the matter. This also rendered the statement invalid.

This was a traditional issue, and the *mufti* did not cite any religious texts.

Muhammad Ghunaym, from Tikh, province of Qaliyubiya, had a query concerning a woman who asked her husband to divorce her –*khul'*, telling him she would absolve him of half the remainder of her dowry and of the costs of her maintenance. He therefore divorced her at her instance, and the wife accepted the *khul'*. She then demanded that he pay her the remainder of her dowry. The question was, was she entitled to this money, since she had lost it when she asked for the aforementioned divorce, and since with the procedure of *khul'*, each of the two parties lost their marital rights over the other, such as the remainder of the dowry, or whatever sum was due and had not been paid after the marriage was consummated, and this included the maintenance?

He responded: Our scholars affirmed that if he accepted the divorce at her instance and she made the condition that he pay her part of the dowry, then this was valid. They also declared that with the *khul'*, one only forwent what was stipulated and that was correct; besides, in this incident there was a contradiction in the fact that he would not be required to pay the maintenance (for the *'idda*), and half the dowry. The reason for this was her phrasing of her request for the divorce. The rest of the dowry would have to be paid to her because her phrasing benefitted her conditions for him to pay her the rest of the dowry. As for the cost of her maintenance prior to the divorce, he had to pay that as well, whether it was a month or beyond. The cost of maintenance had to be paid by the husband, but it was stopped with *khul'*, and since they had not

talked about it in the conditions, then it was not required, since it had neither been estimated by the two spouses, nor agreed to. Consequently, the cost of maintenance was indisputably no longer required, because of the divorce; it could have been required, if she had mentioned it in her statement. There was a known disagreement about it, and in this incident this was acceptable, since it was the wife who had asked for the divorce. It was a divorce at her instance- *khul'*, so it was not to be expected that such a stratagem be used by the husband, i.e. enabling him to avoid the payment of the cost of maintenance, but inducing him to pay the remainder of her dowry through the authorisation of a judge. The scholars had corrected this non-payment of the cost of a wife's maintenance, giving it as justification lest divorce should become a means to destroy the rights of women; but in this incident, it was impossible, because it was the wife who had asked for the divorce.¹²⁸

Structure

The questioner asked whether a woman who told her husband that she would free him from the obligation of paying for the remainder of half her dowry, and the cost of her maintenance if he divorced her, and therefore when he did, was he required to pay her the other half of her dowry?

The mufti considered that the husband was required to pay her half the remainder of her dowry, since he had accepted her conditions, and given her the divorce, even though she had forfeited her right to maintenance. It was the phrasing of her request that enabled her to obtain the remainder of half her dowry.

Guardianship in marriage

One Gum'a Badawi inquired about an orphan girl who was ten years old when her paternal uncle married her off to his young son. The latter was a little over two years old, and still being carried on people's shoulders. Also, the girl's mother was her guardian. The question was, since this young son was still being carried around, was this marriage not considered invalid? And if it was not, did the girl's guardian have the right to ask for the girl's dowry to keep it for her, lest something happen to the uncle? And was the girl to be given maintenance, a servant, and lodging? And was it possible for her, when she came of age, to choose to annul this marriage, given that

¹²⁸ Fatwa 168, ledger 000002

the person who had married her off was neither her father, nor her paternal grandfather?

He responded: As regards the paternal uncle, he could be her *walī*- guardian with legal authority for marriage granted by the *Sharī'a*, i.e. he had the authority to marry her off, and therefore the marriage was not annulled because the husband was a small boy. Furthermore, the guardian or trustee - *waṣī*- i.e. the mother, had the right to take the dowry to save it. The wife could annul the contract when she came of age, as the person who had married her off was neither her father, nor her paternal grandfather. The wife's upkeep was to be paid from the husband's money, if he could afford it, even though he was a small child. However, if he did not have financial means to depend upon, it was up to his father- if he had the means.¹²⁹

Structure

The questioner wanted to know if a marriage between minors could be annulled, especially when the bride was ten, which made her eight years older than the groom who was two years old. The issue here pertained to a marriage between minors, carried out by the *walī* - guardian - the paternal uncle of the bride, and also the father of the groom. It involved the rights, as a bride, of a little girl who was an orphan. An annulment could not be obtained, since both parties were minors: the uncle was *walī al-nikāḥ*, or guardian in marriage, and the girl's mother had been appointed her trustee *waṣī*. The mufti indicated that the girl's maintenance had to be paid out of the boy's money, and that the dowry or *ṣadāq* be given to her mother for safe keeping.

Islamic Law considered a minor unaware of the intricacies of marriage - *nikāḥ*. The authority over a minor was therefore imposed because of the minor's lack of maturity, which became complete on attaining maturity *bulūgh*. According to the Hanafi system, - which was the official school in Egypt, - once she became mature, she was just like a young man, and her capacity for attaining freedom with respect to marriage was equivalent to her freedom to undertake commercial transactions regarding her wealth.¹³⁰ Consequently, once she attained maturity, she could have the marriage revoked.

Such marriages between paternal cousins were, and remain, quite common. It was prompted by the desire to keep family possessions, especially land and property,

¹²⁹ Fatwa 115, ledger 000003

¹³⁰ Al-Marghinani, *The Guidance - Al-Hidāya*, Vol. 1, p. 492.

within the family. Accordingly, the girl was forced, or urged, to marry within her paternal family, and discouraged from marrying an outsider, as this signified enabling that outsider's children to inherit her assets, which would subsequently be passed on in another family.

The mufti was therefore dealing with a traditional situation, which partly explained the mildness of his response to the outrage of the questioner. However, he did point out that when the girl came of age, which would happen before the boy, she had the option of asking for the annulment of the marriage.

If the marriage had been decided by her father, or by her paternal grandfather, it was possible the girl could not have been able to obtain an annulment.

The fatwa was traditional, and the mufti was citing the views of Hanafi jurists concerning this issue.

Mahmud Gum'ah asked about some girls who were under age, and all under the guardianship of their mother. The question was, did she have the authority to marry off any one of the girls whenever she wished, despite the existence of a half-brother on their father's side, who had a reputation? Or was the authority to marry them off up to the judge or his deputy?

He responded: The authoritative texts stated that the person with the authority and responsibility to marry off a girl *walī al-nikāḥ* had to be mature, judicious and comfortable, even if he was licentious in his behaviour, but as long as he was not shameless, or someone incapable of choosing a spouse, or someone dissolute or shameless. According to *al-Fath*,¹³¹ and to *al-Bazāziya*,¹³² if (either) the father or paternal grandfather were licentious, i.e. they did not meet the legal requirements of righteousness, it was up to the judge to choose a suitable spouse whose conduct was unknown - but who was the girl's equal. And in *al-Qahistani*, copied from *al-Kirmani*,¹³³ if it was known that the father made bad choices, or he was known to be dissolute or shameless, concerning his ward's spouse, the imam was not to choose him, and that was the correct ruling. According to *al-Bazazi's* statements, which were

¹³¹ This is Ibn al-Hamam's, *Fath al-Qadīr*, a Hanafi text. Ibn al-Hamam, Kamal al-Din Muhammad ibn 'Abd al-Wahid al-Siwaṣī.

¹³² *Al-Fatāwi al-Bazāziya*, or *al-Jāmi' al-wajīz* of al-Bazazi, Muhammad ibn Muhammad ibn Shihab al-Din ibn Yusuf al-Kurdi, a Hanafi jurist.

¹³³ Al-Kirmani was a Hanafi jurist.

based on al-Kirmani's, what was meant by *fāsiq* was someone who made bad choices for his daughter, so that he married her off to someone who was not her equal, or who did not give her an adequate dowry,- this made the marriage invalid. As for the *fāsiq* dissolute, *mutahatik* impudent, who did not choose badly, if he married her off to someone who was not her equal, and who did not give her a suitable dowry, the marriage was not to be consummated. This was what our scholars had said; from this, it had to be known that if it was known that the aforementioned agnate brother mentioned in the question had a bad reputation, because he was loose, or chose badly, or he was corrupt and shameless, he was not permitted to marry off any one of his aforementioned sisters. And since the persons responsible for the marriage were the agnates, in accordance to the rules and order of inheritance, and in this case there were no available agnates, then the mother was to take responsibility for the marriage, not the agnate brother, as we mentioned. And since there was no one else available among the agnates to precede the mother, therefore it was the mother's responsibility to marry those of her daughters who were minors, as well as for ensuring equality (between spouses), and for obtaining an adequate dowry for them.¹³⁴

Structure

The questioner asked whether a mother of several girls (minors), who was already their guardian *waṣī* - could take over their guardianship in marriage as well, given that the only male agnate existent was a half-brother on their father's side who did not have a good reputation. The issue therefore was the absence of a suitable male agnate to give away girls in marriage.

The mufti began by presenting the conditions necessary for a *walī al-nikāḥ*, which included possessing maturity, judiciousness and economic security. He then listed the defects that had to be absent in such a person, namely shamelessness, self-indulgence, immorality and the inability to choose a husband. This latter was when the *walī al-nikāḥ* selected a husband who was not the girl's equal, or gave her an inadequate dowry. The mufti cited the authors and texts that had stipulated these conditions, namely *Al-Fatāwī al-Bazāziya*, i.e. *al-Bazāziya fī al-Fatāwī*, *al-Fatḥ*, being *Fatḥ Allāh al-Mu'īn 'alā sharḥ al-kinz li al-'alāma Milāmaskīn; Jāmi' al-Rumūz wa*

¹³⁴ Fatwa 268, ledger 000002

ḥawāshī al-Baḥrayn ‘ala mukhtaṣar al-wiqāya; and finally, al-Kirmani, who wrote, among other texts, *al-Fatāwī*.¹³⁵

After building up his argument, and eliminating the half-brother in the process- because he was as unsuitable and had a bad reputation,- the mufti concluded that since there were no agnates available, it was up to the mother to marry off these girls.

He used several juristic texts to bolster his case, perhaps because his opinion did not follow the convention that the responsibility for marrying off the girls was to be given to the brother. He must have decided that since the mother had already been given their guardianship, she possessed all the conditions necessary, except that of being male, but as the mufti was eminently practical, he waived that condition aside as *maṣlaḥa*, i.e. for the girls' welfare.

Muhammad Isma‘il Effendi from Qus asked about a young girl who had neither a father nor a paternal grandfather. She had half-brothers, and she was fifteen and a half years old when her half-brother on her father's side married her off to a relative of his, without her permission or consent. He claimed she was not yet of age, and the official authorised to perform the civil contract- *al-mā'dhūn al-shar‘ī* concurred with him. He therefore signed the marriage contract as her guardian, not as her legal representative *bi-al-wilāyah lā bi-wikālah*. The case being as described, was this marriage to be consummated when she came of age, and without her consent or permission?

He responded: When she reached that age she was considered to have attained the age required, and since the situation was such, and he married her off without her permission or consent, the marriage was not to be consummated, because his guardianship was no longer valid when she came of age, that is to say, if he did indeed have guardianship over her marriage. Also, his claim that she had not yet attained the suitable age was of no legal consequence whatsoever.¹³⁶

Structure

The question was about whether the marriage of a fifteen and a half year old girl, married off without her permission, or consent, by a half-brother on her father's side

¹³⁵ The authors were respectively Muhammad ibn Muhammad ibn Shihab al-Din ibn Yusuf al-Kurdi; Muhammad Abu al-Su‘ud ibn ‘Ali al-Husayni; Shams al-Din Muhammad al-Qahistani; ‘Abd al-Rahman ibn Muhammad Ibn Amirawayh al-Kirmani.

¹³⁶ Fatwa 477, ledger 000003.

was to be consummated. The issue was that, as an orphan, without a father or paternal grandfather, her consent was required.

The mufti declared that fifteen and a half was the age where she gave her consent (by not saying anything), or objected to this marriage; moreover, the half-brother's guardianship was no longer valid, and his statement that she was not of age to give her permission or consent was meaningless.

Isma‘il Muhammad Duwayr, paternal uncle of the husband mentioned below, asked about a girl whose father chose a husband badly for her, as well as being licentious and disobedient *fāsiq*. He married her off to a young boy of seven, and the boy's father accepted the marriage. Then the girl came of age, and when she did, she announced the invalidity of the marriage contract. As for the boy, he was poor and unable to pay either the dowry or her expenses. Consequently, was this marriage valid or invalid? And, if it was invalid, did the separation between them require legal proceedings?

He responded: The poor choice of the father and his licentiousness gave him the status or deprived him of the position of father. Poor judgement and licentiousness weakened the judgement, and the scholars had therefore stated the possibility of allowing the mother [to marry off the daughter], and declared that it was valid. It was also permitted for the husband and wife to choose to annul the marriage when they came of age. The scholars gave as effective cause for this that compassion was in abundance, so that opinion became weak, allowing the possibility of annulment for the minor girl who reached puberty. And regarding the licentious father who made poor choices, had lost commiseration and the ability to discriminate, particularly since he was indifferent to his daughter's future. Jurisprudence differentiated between a person of balanced judgement, who chose with care, and between the licentious corrupt - on the necessity for a contract: yet what was clear from the discourse of the boy's paternal uncle in this case, was that the husband's father was dead, that the boy was penniless, and possessed neither the means to pay her maintenance or her dowry, and that should the girl remain bonded to him by marriage, there was evidence she would be harmed. The groom was not her equal in status, because he was severely poor, and the girl's poverty had nothing to do with equality of status, when it was impossible for him to pay for her support, so that the poor person was not of equal

status if the wife was poor and the daughter of poor people. Indeed, the scholars affirmed that a basic condition of marriage required that the husband pay for his wife's maintenance, so that one who was unable to pay it was incapable or unable to fulfil the right of the bride, and therefore he was not her equal in status. Consequently, the girl had the right, after she decided to annul the marriage to raise the case before the judge so that he might rule accordingly, after he verified that all that was mentioned in the question was accurate.¹³⁷

Structure

The question here concerned the validity of a marriage declared null by the spouse, who had just reached puberty, after her father, - described as disobedient *fāsiq*-, had married her off to an unsuitable husband, a boy who was poor and unable to pay either the dowry or his wife's maintenance.

The mufti declared that since the father was so labelled, his position was weak, and that in such a situation the mother could replace him as marriage guardian *walī al-nikāh*. He indicated that when they reached puberty, either one of the young couple could choose to annul the marriage, in accordance to the opinions of religious scholars. These scholars had stipulated that if a father chose badly for his daughter, and was incapable of discrimination, the girl could choose to annul the marriage by bringing the case before the judge. Moreover, the boy was poor and unable to pay his wife's maintenance, and the scholars asserted that one of the basic conditions of marriage was the husband's ability to support his wife, yet this boy was clearly unable to do so. This further suggested inequality of status, i.e. he was not her equal *kafā'a*, and this also was unacceptable, since his inability to support her could harm her.

The mufti discussed this *fatwa* at length, as though he wished to make it clear that the father's choice had been unsuitable, because of his absence of discrimination, the inequality in the couple, and the boy's inability to maintain his wife. It was therefore permissible for the girl to ask the judge to annul the marriage.

Furthermore, when he mentioned the religious scholars, he did so without naming them, probably because their views were almost unanimous on this issue.

¹³⁷ Fatwa 206, ledger 000003

4 – CUSTODY AND GUARDIANSHIP

He was asked about a man wishing to remove his young orphaned daughter from the custody *ḥadāna* of the person who was her guardian, because the guardianship period stipulated by Islamic Law - *al-Shar‘* had come to an end. However, the person who had custody of her claimed that he was unfit to nurture, or protect her. The question was, should the maternal grandmother be able to prove before a judge that the father was incapable of raising the child, and that she herself was capable of protecting the little girl, could the latter remain with her, and was the father’s request that the child be given to him to be rejected?

He responded: The rules of jurisprudence concerning the safeguard of children and their education required that the relations who took responsibility for the custody of young children were competent enough to protect them physically, safeguard their beliefs and teach them to behave. Religious sources stipulated that if the mother was deceased, or incapable of tending to her infant’s needs, support and custody of the child had to go to the closest relative, or those closest to the closest relative, but the unbeliever and corrupt were excluded. The same rules applied to someone too old to be suckled, or who had an undeveloped mind, or incapable of caring for him or herself. Such a person could not be left alone, and it was therefore the duty of the legal guardians to take the responsibility for him. The conditions were that these legal guardians were not to be corrupt, or dissolute, or persons whose influence was to be feared. In sum, the *Shari‘a* always required the preservation, or safeguard, of bodies and souls. Accordingly, should it be feared that the evil or corruption from someone appointed as guardian to a person could affect the body or the person, the power of guardianship was withdrawn or relinquished from the guardian. Furthermore, if the grandmother succeeded in establishing, or demonstrating, that the father was unable to take custody suitably for the daughter, the judge was obligated to assign her to the custody of the person capable of doing so. Consequently, if the maternal grandmother was qualified, then the judge was justified in leaving the child to her custody.¹³⁸

Structure

The question here revolved around the custody - *ḥadāna* - of a little girl, an orphan. In accordance to Islamic law, a girl who reached the age of nine was removed from the

¹³⁸ Fatwa 83, ledger 00002

custody of the person nurturing her, to that of her father. In this case, the little girl had been in the custody of her maternal grandmother, who was now claiming that the girl's father was unfit, and unsuited to protect her.

The mufti therefore discussed the rules of jurisprudence relating to the safeguard of children. They had to be physically protected, their religious beliefs had to be nurtured and safeguarded, and they had to be taught to behave. If the mother was deceased, or incapable of doing any of these things, custody of the child had to go to the closest relative,¹³⁹ on condition that this person was also capable of transmitting suitable values to a child, and that long-term contact with that person did not harm the child. This meant a competent and responsible person. Naturally, in a case such as this, if the father really was unsuited, he had to be prevented from harming his daughter. 'Abduh invoked *maqāṣid al-shar'* or the objectives of Islamic Law, one of which was protecting life, as well as preserving the child's Muslim faith - *al-ḥifāz 'alā al-hāwiya*.

In his response, the mufti included custody of the insane, because neither category - the children, nor the mentally incapacitated, - were capable of protecting themselves. Therefore they needed to be placed in the custody of one who could protect them;¹⁴⁰ indeed, the mufti mentioned that Islamic law stressed the need to preserve or safeguard bodies and souls, i.e. this was the main objective of Islamic law – *maqāṣid al-shar'*. He also drew attention that the need to push away, or avoid harm.

The mufti appeared to favour the decision of allowing the little girl to remain with her grandmother, but nevertheless he stressed that the grandmother needed to prove, or demonstrate, to the court that the father was inept and incapable of taking care of her. This was probably important, because if the father really was corrupt or incapable, he could marry her off to someone unsuitable, or harm her in another way, and the

¹³⁹ Preference was given to the maternal grandmother- if she was willing and capable of raising the child, and if she was not married to an outsider. The jurists' texts mention that the mother and maternal grandmother had a superior right over custody of the girl until she started menstruating, since she could learn the ways of women either from her mother or grandmother. *Al-Marghinani, Al-Hidāya The Guidance* , Vol. 1, p. 81.

¹⁴⁰ It is perhaps useful here to differentiate between *ḥāḍina*, *walī* and *waṣī*. The *ḥāḍina* (fem.) is the person who has custody of the child because the mother is deceased, or incapacitated. The *walī* is the person, usually a male, granted legal authority by Islamic law over the person and property of a minor. The *waṣī* is the guardian appointed by the *walī*.

prevention of harm was still possible. However, the mufti could only give his learned opinion concerning a case for which he had no real evidence to go by, apart from a possibly biased account.

The mufti developed his argument smoothly, and did not cite any religious texts, perhaps because the issue involved was traditional and involved an issue involving the objectives of Islamic law- *maqāṣid al-shar‘*, involving the child’s life, well-being and education. Moreover, the *fatwa* was not short, suggesting this was an important issue and that he was addressing an educated person; he therefore found it important to develop his argument to justify what was beneficial in such a situation.

He was informed through a writ from the Ministry of Justice, dated 3 *Dhū’l-Qi‘da* 1319, number 3, that the Health Administration raised the issue in a letter, dated January 1st 1899, whether it was legally permissible to cede the child, Sayyida, daughter of Sarah, who was found abandoned in the hospital? Her mother could not afford to raise her, especially after her divorce from her husband, and there were others like her, to those who were willing to take these children in to raise them like foundlings. It would be useful if the Ministry had a judicial ruling concerning this. Attached were seven sheets of paper.¹⁴¹

He responded: This question did not pertain solely to the section concerning the custody of children; indeed, it also fell within the discussion related to the preservation of the child’s life, since the means to support it were not available. When examining the mother’s situation: if she was capable of raising her daughter and supporting her, and the father was incapable of this, it was the mother’s duty to raise her daughter. It was not permissible to abandon the girl to anyone else. But if the mother could not raise or support her, the father was required to do so. And the responsibility for raising and supporting the child was given to the person who came after the mother - if the latter declined the charge. If the father was incapable of paying or disbursing the costs of raising the child, it was useless to try to force him to do so. However, if someone was found who was willing to take responsibility for raising and educating the child, and both parents were willing to abandon her to him,

¹⁴¹ The question for this was supposed to be in page 172 of ledger 000002, which is missing from this ledger. It has therefore been taken from ‘Imara, Volume 2, p. 524. The fatwa, however, is available, in page 173 of the ledger.

it was permitted since it preserved her life. And God knew better. Attached were the seven sheets of paper.¹⁴²

The Director of Health and the mufti dealt with a similar question later, and at length, but it may be this case that triggered such a response.¹⁴³ The question was whether it was acceptable to cede abandoned children to the care of those willing to bring them up and educate them.

The mufti considered that the issue was not merely that of the guardianship of children, for which there were several stipulations, but that it involved the life of abandoned children, who were without protection, or visible support. He then listed those who were directly responsible for the life of the child, and proceeded to eliminate them one by one. He started with her mother, who by abandoning the child in a hospital after her divorce, showed she could not afford, and was incapable of raising her. Then came the father, who was required to provide for his daughter, but given that he had shown no inclination to do this, the mufti reflected that it was useless to try to force him. After excluding the parents, he concluded that if there was someone who was willing to take responsibility for the child, and both her parents accepted this person, there was no harm in handing over this little girl to that person.

The mufti did not cite any sources, but he made it clear that the issue was one of preserving the child's life, which was one of the objectives of Islamic law *maqāṣid al-shar'*, and avoiding possible harm or *daf' ḍarar*.

A question was asked about a man who died leaving offspring. Among these was a young boy, a minor, with a mother who could be relied upon to safeguard his money, and capable of managing his affairs. She had therefore been nominated guardian over her son *waṣīya*, but the aforementioned boy's brother raised an objection, demanding that he himself collect the revenue due to the boy for safekeeping, and denying the mother the guardianship, despite the fact that she had not committed anything reprehensible. The questions therefore were, was his request to be granted? Or, did she have the right to collect the returns due to her son? And, could she nominate anyone she wished to collect these returns? In addition, did she have the right to use his money generously for his expenses, in proportion with his income, without

¹⁴² Fatwa 416, ledger 000002.

¹⁴³ See fatwa 450, ledger 000002.

worrying too much about saving money, and to pay for his expenses in a forthright way? Also, was the financial upkeep of this aforementioned mother to be paid for by her aforementioned son, a minor? Furthermore, did she have the right to ask for a maintenance in accordance with her situation in connection with her aforementioned son, and that she obtain what she asked for, given that her son was affluent, and that his revenue was ample and more than covered his expenses?

He responded: According to the authoritative texts of the school, the person responsible for the administration of the finances of a minor was his father, then his guardian. Moreover, a judge did not have the authority to remove a guardian from his position unless the latter had committed a serious transgression. As for the guardian, he could actually deputise anyone as an agent, to do anything that needed to be done concerning the orphan's affairs. However, he had to avoid being parsimonious with his ward; to allow him all he needed, but without waste. He had to provide him with money in a way that corresponded to what his ward possessed, enable him to spend money according to what was available, and accept the guardian's advice. Furthermore, the ward had to accept his guardian's accounts regarding his expenditure, as long as this latter corresponded with that of others in similar financial circumstances and over the same period of time. Moreover, although the boy was young, he was required to support his mother, if she was poor and unmarried, without recourse to the law. Indeed, every issue could involve the law, given that a human right was a legal duty. Accordingly, the person to whom a right was due could take his due - without resorting to justice - especially when this wealth was of the type that could be spent - such as *dirhams*, and *dinārs*. Thus, what was meant by the expression *yasār al-ḥiṭra* was the fact that a person could afford not to accept charity. Apart from that, the aforementioned brother was not entitled to take responsibility of that minor's assets; indeed, the safekeeping of the minor's money was the mother's duty, since she was his guardian. Furthermore, the authority entrusted with the appointment of guardians for orphans was neither to allow the brother to manage the money, nor to remove the mother from her position as guardian, since she had done nothing to justify her removal. The mother, as the guardian, also had the right to nominate anyone she wished as an agent to manage her son's affairs, and she was required to use the boy's money to pay for his needs, in accordance to his situation, without waste or frugality. Also, she was to be taken at her word when she accounted for her

spending to fulfil his needs, provided she did not exceed the amounts spent by others in similar financial circumstances over the same period of time, and as long as it was clear that she was being forthright in her accounts. Finally, if she was destitute, she could take what she needed from her son's wealth, as long as she was indigent and unmarried, especially if that wealth was disposable, - i.e. it included coins such *dirhams* and *dinārs*, - without recourse to the law for her action.¹⁴⁴

Structure

The questioner asked about the measure of authority and freedom of action granted to a mother appointed as legal guardian - *waṣī*- to her son, a minor, and whether the boy's half-brother could actually challenge her guardianship, so that he could replace her -although she had done nothing reprehensible.

The mufti first cited the jurists' stipulation that the management of a minor's assets was the responsibility of his father, and then that of the person assigned as this minor's guardian. A guardian was certainly chosen for his reliability and capability of looking after the minor's interests, and in this case, the mother was so regarded; the mufti took that into account when he declared that a judge could not remove the mother from that position since she had committed no transgression. He then went on to describe the duties, obligations, and privileges of the guardian. These included the manner in which the guardian provided his ward with money; the amount had to be adequate, so that the ward obtained all his needs, and yet at the same time she had to teach him gently not to be wasteful, but to live comfortably within his means, and to accept his guardian's advice. 'Abduh took this opportunity to point out that the boy also had the duty of supporting his mother, especially if she lived in reduced circumstances; indeed, it was the mother's prerogative to live comfortably, since she was her son's guardian, and he was well-to-do, as long as this wealth was disposable, and did not involve her selling his property to obtain money, particularly since her task was to preserve his money for him. The mother was to be taken at her word when she justified her expenditure, as long as she did not exceed the amount spent by others in similar situations. She could also nominate an agent, if she wished.

The notion that the mother was safeguarding her son's possessions was certainly meant to benefit to this minor's welfare, i.e. *maṣlahā*. Furthermore, the half-brother

¹⁴⁴ Fatwa 362, ledger 000002

was not to be allowed to take over the guardianship, possibly because he could harm the minor.

‘Abduh’s recommendation that the boy had to treat his mother well and that he had to provide for her was probably intended to underline the prominent position that mothers occupied in the Qur’ān and in the Sunna.

This was a traditional fatwa.

Mustafa Effendi al-Dimyati asked about a boy for whom the court had appointed a legal guardian - *waṣī shar‘ī*. This guardian had received all the money due to his ward and remained in charge of that boy’s money until the year that boy became mature *ṣāra rüşdan*, with the acknowledgement of the aforementioned guardian, when this guardian returned to the boy part of the legacy that was due to him. But then this legal guardian died, with the rest of the boy’s legacy in in his possession. Consequently, was that acknowledgement that the boy had come of age evidence *ḥujja* on the part of the guardian, and was this coming of age to be considered in that year - although there was nothing that proved the contrary? Thus, if the guardian had still been alive, and he had claimed after his aforementioned acknowledgement that the boy had attained maturity before that year, he was to be prevented in his claim, consistent with his first statement? And if, after the guardian’s death, the boy demanded the rest of his inheritance from the guardian’s heirs, did the guardian’s heirs have the right to prevent him by saying that he had attained maturity before his majority, and that a period had elapsed and the right concerning it as well, although he attained maturity only in the year in which the guardian acknowledged this?

He responded: The legal scholars stated that the claim of an orphan and minor was to be heard when he came of age, and that the claim of the guardian was not to be heard. What prevented the claim of the guardian prevented the claim of the heir, and since this minor attained maturity and the guardian did not declare this maturity in that year, the maturity was not counted at that date. He was considered mature starting that date only- so long as there was nothing to prove the contrary, and his guardian was to be prevented from claiming that he was of age before that time, just as the guardian’s heirs were to be prevented from doing this. At the point when that boy became mature, it was his right – before it being that of his guardian- to demand his legacy

within 15 years from the time he reached his aforementioned maturity, and the guardian's heirs did not have the right to contest his claim to his due.¹⁴⁵

Structure

The questioner inquired about the legal guardian of an orphan boy who, at a certain point in time, gave his ward a portion of his legacy to spend, and told his ward that he had come of age. Some time later, the guardian died, and the questions were whether the boy could be acknowledged to have attained his majority, since the guardian had recognised this and given him a sum of money from his legacy, and what was to be done if the guardian's family was reluctant to acknowledge the boy's maturity, and hand back to him his fortune?

The issue was therefore one of establishing that a young boy, a minor, had attained his maturity, and could be entrusted not to waste, or lose, his inheritance through inexperience.

The method or strategy followed by such guardians was to keep their wards under observation until they reached puberty, when it was time to test them. At this point, the ward received a sum of money and was allowed to act independently, and then left alone, although his guardian still kept a watchful eye to see how quickly the money was spent, and whether it was spent carefully, or foolishly and extravagantly. If the ward behaved consistently and spent his money in a sound, appropriate and consistent manner over a fairly long period of time, the guardian could then declare to him officially that he had reached maturity,¹⁴⁶ and was therefore capable of managing his own affairs.¹⁴⁷

In this case, the guardian had died during the test period, leaving the ward in the period of transition. The mufti declared that when the boy was declared mature, and after that there was no evidence of the contrary, the boy had the right to demand his legacy within fifteen years from the time he had reached his maturity.

He was asked about a guardian appointed by the judge to attend to the property of orphaned minors. This guardian had sold land they owned to exchange it for property

¹⁴⁵ Fatwa 127, ledger 000003

¹⁴⁶ The jurists maintained that the effective factor was the attainment of maturity and discretion- *rushd*. *The Distinguished Jurist's Primer*. Vol. II, p. 337.

¹⁴⁷ *Ibid.*, pp. 338-339.

that would benefit them, and pocketed the proceeds, but he did not buy the property he planned to exchange for it. This guardianship was then removed from him, and another guardian was nominated, replacing the first in controlling the orphans' assets. When the new guardian asked the first one for the money due to the orphans, the latter refused to repay it, claiming that he had spent the sum on their upkeep. Was this claim to be believed, given that these orphans had an adequate income for their expenses? Accordingly, was his claim to be rejected, and was it up to the judge to order him to pay the money to the second guardian?

He responded: If it was true that the first guardian sold the orphans' land to exchange it for property that would benefit them, then his claim that he spent the sum on their upkeep was not to be believed, since it was clear he was lying, given they had other revenue to fall back upon. The judge therefore was to investigate the matter, and if he concluded that this was the case, he had to force the former guardian to pay the new guardian the sum required.¹⁴⁸

Structure

The questioner here wanted to know what was to be done about a guardian *wasī* appointed to administer the affairs of two orphan boys, minors, who had sold property belonging to his wards on the justification that he intended to buy something better for them with the proceeds from that sale. Such a procedure was approved behaviour in Islamic law, since the transaction was beneficial to the wards. However, instead of using the proceeds to buy the property, the guardian had pocketed the money. Then, when the new guardian asked him for this money, he claimed that he had spent it on his wards, which was clearly false, since the boys had other means.

This was a traditional case involving orphans whose money was under the trusteeship of a guardian. The mufti observed that it was clear the first guardian was a liar, because it was very unlikely he had used the money for the boys' upkeep, given that they had other sources of income.

The mufti therefore concluded that the judge had to investigate the matter, and if necessary, he had to force the first guardian to repay the money he had appropriated from his sale of the orphans' property to the second guardian.

¹⁴⁸ Fatwa 4, ledger 000002

Salama ‘Atta Sa‘d of Kafr Hasan Sa‘d, Qalyubiya province, asked about a man who died, leaving his mother, his wife, his daughter from her, who was a minor and about a year old, his two girls from another wife, and his two full brothers. The mother of the baby girl had come to an agreement with the mother of the deceased and the full brothers to take from his bequest six *feddāns* of land for her and for the aforementioned baby daughter. However, that wife was not the guardian of her daughter. Accordingly, was the agreement valid on her and on her baby daughter?

He responded: The agreement that that wife came to concerning the rights of her daughter, a minor, was not legal since she was neither her guardian, nor her trustee. Consequently, if this child had a trustee who could permit this agreement, it depended upon the permission of the trustee. If the trustee permitted it, it was acceptable, and if he rejected it, the agreement was invalid. And with the issue of this agreement from this wife, and the absence of the person who could provide this authorisation, the bequest, or whatever was the legal due of that minor from her deceased father’s property, that agreement did not apply because it was invalid, as one gathered from the scholars’ discourse.¹⁴⁹

Structure

The questioner asked about the permissibility of a woman, a widow, who was not the legal guardian of her child, to come to an agreement with the other heirs of her husband’s estate to cede her and her daughter a portion of this property.

The *mufti* indicated the agreement was invalid, since the woman was not the child’s legal guardian *waṣī*; for the agreement to be valid, she was required to seek that guardian’s authorisation, since only a guardian could take such decisions. If the guardian, or trustee, accepted such an agreement, it became valid. However, in this case there was no legal guardian, so that the only inheritance the little girl was entitled to was that stipulated by Islamic law.

He did not cite any legal texts, but referred to the jurists’ opinions. This was a traditional question.

Muhammad Nassar from Misr asked about a man appointed by the probate court as a guardian *qayyim* over his father and brother, both of whom were irrational, and each of

¹⁴⁹ Fatwa 240, ledger 000002

whom owned a known portion of property. Now the guardian wished to sell these portions to acquire better property that produced more revenue, was better quality land, and was closer to where they all resided. The question was, was this beneficial to the two?

He responded: Among the necessary conditions for those who had custody of the insane, just like those who were guardians over children, was that the guardian's actions were restricted. Besides, the guardian in this case wished to act in a way that was beneficial and useful to the two irrational men - by selling their property and purchasing something that was better and provided more returns. There was no doubt that it was possible for him to do this - the conditions for this included that the price at which he would sell the portions would bring about no deficit- so that he could acquire more profitable and better quality land, and that his acquisition of the land was certain.¹⁵⁰

Structure

The question was about whether a guardian – *qayyim*, i.e. a financial administrator, or a person responsible for financial transactions, was permitted to sell property belonging to his two irrational wards, his father and brother, in order to acquire property for them that was better quality, and gave greater returns.

The mufti pointed out that the jurists agreed that the actions of a guardian appointed to safeguard the interests of the insane or children were restricted to avoiding a loss in his sale of his wards' property, and ensuring that he actually used the money from this sale to purchase better quality land for them. If he really fulfilled these conditions, then it was clear that this guardian was seeking what was beneficial to his wards.

This was a traditional issue, and the mufti based his reasoning on *maşlahā*, i.e. what would benefit the wards, and ward off harm for them *daf' ḍarar*.

He was asked about a man who had been paying a monthly stipend - *nafaqa* - for the upkeep of his children, as minors, and had authorised his wife to borrow money to use it for their expenses. She had then taken these children with her abroad to France, her homeland, without their father's authorisation, and taken up residence there with them. The boy was now over fifteen, the eldest girl was over eighteen, and the

¹⁵⁰ Fatwa 268, ledger 000003

younger girl was over seventeen. In such a situation therefore, if the mother asked for the cost of their upkeep, did she have the right to do so in advance, on the assumption that her time for raising the children was not over? And, until what age did her custody of the boy end? Moreover, was the husband to discontinue the expenses and loans of money that he permitted his wife? Also, was he required to go on paying for the expenditure of his children - who remained abroad with their mother without his permission - after having been under her custody?

He responded: The mother's right to custody *hadāna* over her son ended when he was seven, and that over her daughters ended when they reached nine years old. Once they exceeded those ages, the mother had no right to custody, and the father could take them by force from her and bring them to him. However, if the mother borrowed money after he had taken it upon himself to pay for the children's maintenance, and if the time during which she had the right to custody had lapsed, she had not lost her right to ask the father to repay what she had borrowed, because it was the father's responsibility, given that she was raising their children. Accordingly, the mother's choice of taking the children and travelling with them without their father's permission did not justify her losing the right to these expenses, but she could not, by any means, ask for upcoming expenses even during the period of tutelage. Also, after the boy became seven, and the girl was nine, she lost the remuneration for raising each, and the mother further lost the privileges the father had previously imposed upon himself. Concerning the costs required for the children, these were necessary - since they were with their mother who was raising them during the period of custody, and her entitlement to borrow money was based on the fact that she was raising them, but once her tutelage was over, she was no longer entitled to borrow money for herself after at that point. Consequently, once the tutelage was over, she was not permitted to borrow money to pay for the costs of the children - unless her husband once again renewed his permission for her to do so. The father was entitled to take back his daughters, and pay for their upkeep, whenever he was able to do so, and the mother could not keep them beyond the stipulated period of child custody; he had the same prerogative with his son, until the latter came of age, was sound of mind and capable of fending for himself. The boy could live alone at this time, and his father was not required to support him. All this, of course was understood, although the mother had taken the children with her to a country where it was impossible to

guarantee that the children's faith and religious practices could be assured. As a result, by travelling to such a country, as described in this case, she lost her right to raise them and the costs were paid by the father simply because she had decided to stay in such a country.¹⁵¹

Structure

The questioner wanted to know how long a man was required to maintain his three children, given that he had given his wife access to funds for their upkeep, that she had taken them with her to France, her homeland, and that they had attained puberty there.

The mufti observed that these children had exceeded the ages whereby their mother had right to their custody, which was seven for the boy and nine for the girls. It was true that the father had dutifully paid her the costs of their upkeep and education, but now that they were almost adults, he was no longer required to pay this money.

The mufti further remarked that their mother had taken them, without their father's authorisation, with her to France, where their religious faith was hardly recognised. He was implying that such action on the part of the mother did not concede the need to preserve their Muslim identity - *al-ḥifāz 'alā al-hāwiya*. The notion was implied in his statement, as the safeguard of religion is one of the objectives of Islamic law *maqāṣid al-shar'*. By doing so, the mother's action was detrimental, since she had prevented them from being exposed to their religious faith, and allowed them to remain ignorant of it.

Abu al-'Azm Sulayman 'Ammar, one of the people of the village of Buhayt, Minufiyah province, explained that after requesting the authorisation of the deputy head of Minufiyah court-who had then sought permission from its judge, to allow him to be appointed financial administrator - *qayyim shar'ī* - over the property of his father, Sulayman 'Ammar, an inhabitant of Buhayt, who was missing and without news. The son obtained a document from the court, dated 29 Shawwal 1311, placing him in charge of his father's affairs. He was required to preserve his father's property until the latter returned and reassumed all his acknowledged rights, or until there was evidence of his demise. After the son received that document, he took possession of

¹⁵¹ Fatwa 63, ledger 000002

all that his father owned in that area that would be his due as his father's legal successor, including land and property, but the brother of the missing man, i.e. the paternal uncle of the custodian, 'Awad 'Ammar had seized by force land and property owned by the missing man. As a result, the son and financial administrator of the missing man sought to litigate against his uncle before the court of Minufiya, but the court rejected the financial administrator's request on the grounds that the document appointing the administrator had not been instigated by the judge, and therefore did not give the son the right to litigate against the aforementioned uncle concerning the missing man's possessions. Accordingly, the administrator went to meet the judge of the above-mentioned court, and asked him to grant him permission to pursue the case legally. The judge would not give him this permission, unless His Reverence the Mufti of Egypt issued a fatwa issued permitting the judge to authorise the administrator to pursue the litigation. Given that situation, could the aforementioned judge permit that administrator to pursue that litigation, and was there a legal objection to that?

He responded: According to the scholars, if the missing man had a share in a house that was divided over a time, it was not possible for anyone to dispose of it freely without permission from the judge. And, if anything was taken away from him illegally, it was up to the judge to seize it. If it was the missing man's property, the judge had to take it from him by force: first because the judge had great control over the money of a missing man, although he had very little control over that of an absent one. And, it was also up to the judge to impose a trustee - *waṣī* who would demand the payment of the debts to the missing person, as declared in *Jāmi' al-Fuṣūlayn*.¹⁵² And in *al-Anqarawiya*,¹⁵³ the jurist stated that the judge had to nominate a representative - *wakīl* to attend to all those who had had dealings with the missing man, whether or not the heirs asked for this; it was up to that representative to litigate, collect the missing man's money, and litigate against whoever denied any rights due to the missing person, with an agreement between him and that representative that the latter was not to argue except against those whom the judge instructed him to. And,

¹⁵² *Jāmi' al-Fuṣūlayn* is a Hanafī text combining the *Fuṣūl* of al-'Imadi with the *Fuṣūl* of al-Astrushani. It was compiled by Ibn Qāḍi Samawna, Badr al-Din Mahmud ibn Isma'il ibn 'Abd al-Aziz, who completed it in A.H. 814.

¹⁵³ *Al-Anqarawi*, Muhammad ibn al-Husayn (d. A.H. 1098), author of *al-Fatāwi al-Anqarawiya*.

from what had been mentioned, it was clear that the administrator of the missing man could litigate, receive money, and argue on whatever rights were due the missing man, such as rights that were undeclared, whenever the judge authorised him to go ahead. Also, the deputy head of the court, after obtaining the permission of the judge authorising his custody over the property of his missing and lost father, had nominated the son as custodian in this incident, until the father reappeared, or there was evidence of his demise. Furthermore, the administrator received all the rights announced in that document, yet apart from these rights, he was not allowed to argue, and these clear causes indicated that he was authorised to do so - if the judge gave him that responsibility, and permitted him: at that point, there was no objection that the judge of the above mentioned province permit the administrator to litigate with his aforementioned paternal uncle concerning the latter's seizure of that missing person's property.¹⁵⁴

Structure

The case involved a man who had been authorised by the deputy head of the judicial court of a province to act in lieu of his missing father before the court. The question was therefore whether as administrator to his missing father's property, he was allowed to litigate against his paternal uncle, who had seized by force part of his missing brother's property, given that his status as financial administrator did not authorise him to litigate as well. This youth subsequently went to court to obtain such an authorisation, but he was told to get permission for this from the Mufti of Egypt.

The mufti observed that the judge could take back whatever anyone, including the uncle, had seized illegally, given that he had control over a missing man's property. In such cases, he continued, one religious text mentioned the need on to impose a trustee *wasī*, whereas another suggested nominating an agent *-wakīl* to attend to the missing man's affairs, defend his rights and collect any money due.

This young man, continued the mufti, had obtained an official document from the court authorising him to administer his missing father's property and gave him all the rights stipulated in that document, except that of litigating, unless the chief judge authorised him to do so. He concluded that in such a case, he saw no objection in the

¹⁵⁴ Fatwa 149, ledger 000003

son's litigating with his paternal uncle over the latter's appropriation of his missing brother's property.

This fatwa was explicit, and various texts were cited, namely *Jāmi' al-Fuṣūlayn* and *al-Anqarawiya*, probably to serve as legal justification of the mufti's opinion, which opinion was given at the judge's request.

The mufti was acting to protect the missing man's welfare *maṣlahā*, and, given that the son was the man's heir, it was in his interest to protect his father's property. This was not the case with regard to the paternal uncle, who was trying to seize what was not his.

This was a traditional fatwa.

5- SALES AND FINANCIAL TRANSACTIONS

Agency - *Wikāla*

He was asked by Hasan Ahmad al-Gu‘rani about a man deputised by certain individuals to rent their property for them: this person was receiving a sum of money from the tenants to recompense him for giving them the tenancy- *muftahgiya*, which was also referred to as *ḥulwān* or gratuity. Was this gratuity that the man received to be considered part of the rent he collected, i.e. did he have to give it to the owners?

He responded: Since it was customary, or habitual, for people to pay this money, it did not enter into the rent stipulated by the contract.¹⁵⁵

Structure

The questioner wanted to know whether it was legitimate for the agent - *wakīl*¹⁵⁶ in charge of renting a property for its owners - to receive a gratuity offered to him by the lessees, or whether he was to be required to give this gratuity to the owners.

The question did not indicate whether the lessees gave it to him willingly, as a reward, or whether they were constrained to do so; nevertheless, giving him the gratuity neither ostensibly harmed them, nor the owners.

The mufti’s response was short; he did not cite any sources or texts to back his statement. Clearly, he considered that since it was customary for people to pay a gratuity or *ḥulwān*, it was therefore permissible. This was ‘*urf*’ - customary law,¹⁵⁷ i.e. such transactions or practices were habitual, or common, and the man could therefore keep this *ḥulwān*.

Voluntary payment for such services continues to be common practice.

Commenda - *Muḍāraba*

Mr. Hussard, the merchant from Cairo, asked about a man who had come to an agreement with a group of people that he would pay them a specified sum of money in fixed instalments over a stipulated period of time, and they, as his associates, would

¹⁵⁵ Fatwa 457, ledger 00003

¹⁵⁶ The agent responsible for renting the property of his principals is known as a *wakīl*. His tasks include the avoidance of *gharar*, or undue risk, to his principals. Ibn Rushd, Imran Ahsan Khan Nyazee (trans.) *The Distinguished Jurist’s Primer Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. Vol. 2, p. 364.

¹⁵⁷ Kamali affirms that, “Custom that does not contravene with the principles of Islamic law is valid and authoritative, and it must be upheld by a court of law.” Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*. Cambridge: The Islamic Texts Society, 2003. p.370

use this money to buy and sell goods. The conditions were that, if everything went according to plan, i.e. that he paid all the instalments within the stipulated period, and that they used the money and made a profit, they would return to him his capital together with his share of profits within the specified time. However, if he were to die before he completed payment of the instalments required, and the associates had used his money to buy and sell merchandise for him, they were required to repay to his heirs, or the guardians of these, the capital he had invested, plus the profits from this within the stipulated period. The questions were therefore, was this sort of transaction contravene the *Shar'*, since it was what was considered participation in a *muḍāraba*? And what if the group called it by another name, did it matter, and what if the same sort of transaction was called by another name, was it damaging to the agreement?

He responded: The agreement between the man and the group to pay them that sum of money for use in commercial transactions in the way described as *muḍāraba* business association was accepted by the *Shar'*, and he was permitted to take his due from the profits generated by this commerce at the time specified in the agreement. Moreover, if the group had invested the money after his demise, it was also possible for his heirs or the guardians to recuperate the profits from the sum he had invested, as well as his capital, at the time stipulated in the agreement. Furthermore, calling such an agreement by another name was not harmful in such a situation.¹⁵⁸

Structure

The questioner in this case, a foreigner and *dhimmi* or non-Muslim, was enquiring about whether a transaction involving a sleeping partnership was permitted in Islamic law, and whether it was known as *muḍāraba*. In such a transaction, a person invested a specific sum of money with some people, so that they could buy goods and resell them over a fixed period of time. At the end of the period, if all went well, they returned to him the money he had invested and his share of the profit generated in the transaction.

Muḍāraba was known and had been practiced since pre-Islamic times, and there was no disagreement among the jurists that one person could give wealth to another, who would trade with it. It was considered a speculative partnership, and there was no

¹⁵⁸ Fatwa 107, ledger 000003

liability for the loss of capital on the person who worked it, so long as that person had not transgressed.¹⁵⁹

The mufti declared that if the transaction was in the way described it was a *muḍāraba*, and therefore permitted. Moreover, the recuperation of the capital and profit by the guardian, or heirs, in the case of the investor's demise, was treated like an inheritance. Islamic law did not disapprove of such transactions. The mufti himself appears to have encouraged them as a means of investing capital, and making profit, which was beneficial, or *maṣlaḥa*.

Partnership - *Shirka*

Shaykh Sulayman 'Asfur from Buhayra province asked about a group who set about digging and building a water wheel inside the property belonging to one of them, after they had agreed about this, without this being a sale, or gift, on the part of the owner of the property to his partners. After the project was completed, and a short time after they started making use of it, the owner of the land wanted to seize the water wheel from his partners for his exclusive use, and he wished to compensate his partners by repaying them the amount they spent to build it. The question was, did he have this right?

He responded: This question was not related to matters involving building or planting, which became the property of the owner when the land he leased out to someone was returned to him with buildings or plants. Instead, it dealt in issues of drinking and making use of water. The building of a water wheel here was not the purpose, although it did prevent the spread of dust in the eyes and mud. The specific issue here was one of water, and the three were partners in this project through their toil and expenditure, to complete this project that involved building, and when they got to the source of water, they all became owners through partnership. Consequently, it was not the right of any one of them to prevent the other from taking his due; on this basis, the owner of the land could by no means prevent any of his partners from making use of, or of benefiting from the water wheel. The tradition among people in our country, without exception, was always that such endeavours were not limited by time. Indeed, they were of infinite duration, and they had the same status as ownership pertaining to

¹⁵⁹ Abu al-Walid ibn Rushd, *The Distinguished Jurist's Primer*, Vol. 2, p. 284.

continuation of use. Moreover, it was essential that people bore the burden of their conduct and transactions, and that they acted according to their intentions, in accordance to their traditions. Accordingly, it was fundamental that the ruling here be in accordance to our statement, namely that the owner of the land did not have the authority or right to prevent his partners from making use of the water wheel.¹⁶⁰

Structure

The question concerned three men who came to an agreement and participated in constructing a water wheel on land owned by one of them, and some time after they constructed it, the owner of the land wanted to give himself the exclusive right to it by giving the others the exact sum of money each had spent in building it to buy them out. The questioner wanted to know if he had the right to do that.

The mufti, like all Muslim jurists, was aware that water was always been scarce in that part of the world, and that justice required it that those who took part in digging a well, or elaborating a stream, had certainly done so in accordance to an agreement, and with the expectation of being allowed to make use of the water from this source. either to drink, or to irrigate their own land - this was *maṣlaḥa*, or beneficial. The three had come to an agreement to obtain the water, and their venture was a partnership.

He declared that questions involving water were particular, since water was crucial; consequently, that given that all three had agreed to construct this water wheel, and put toil and capital into it, the benefits from it were to be enjoyed by them, and then by their offspring, *ad infinitum*, since this could by no means be considered a temporary arrangement. The decision here involved *maṣlaḥa* as well as traditional, or customary, law-*ʿurf*. It brings to mind earlier fatwas, cited in al-Wansharisi's *Mi'yār*,¹⁶¹ related to disputes over water.

Muslim Women's Right to Ownership

The lady Nafissa Hamdi, daughter of the late Isma'il Pasha Hamdi, explained that she owned 100 shares of the main shares of the *Compagnie du Canal de Suez*, and that these shares were kept at the headquarters of the administration of the *Compagnie*, but

¹⁶⁰ Fatwa 335, ledger 000002

¹⁶¹ Ahmad ibn Yahya al-Wansharisi, *al-Mi'yār al-mu'rib wa al-jāmi' al-mughrib 'an fatāwi' 'ulamā' Ifriqiyyā wa al-Andalus wa al-Maghrib*. Volume 8, pp. 419-420.

that she retained a receipt in her possession. When she tried to withdraw these shares, the *Compagnie* disallowed her, saying that the wife did not have the authority to dispose of her property without the permission of her husband, in accordance to French law; however, since she was Muslim, and her husband was Muslim, French law had no power over her, as she was not a protected subject. Consequently, did she have the right, in accordance to Islamic Law, to withdraw these shares herself for her disposal, without the intervention of her husband?

He responded: What Islamic - *Shar'ī* law stipulated, in answer to this question, was that since those shares were privately owned by the aforementioned lady, Nafissa Hamdi, she could withdraw them, or retain them for herself, so that whatever she did with them did not require the permission of the above-mentioned husband.¹⁶²

Structure

The issue here was about a Muslim woman's right to ownership, given that at the time this fatwa was issued, which was in 1321/1903, French women were not allowed by law to dispose of their assets without authorisation from their spouses. This was in marked contrast with women in Muslim countries, who could own property and manage it without interference from their husbands; indeed, women entrepreneurs had existed since pre-Islamic times. Besides, Islamic law did not prevent women from engaging in business transactions, so that what they owned was theirs, and it was completely independent of their husbands.

Pre-emption- *Shuf'a*

He was asked about land that was owned, and the owner had sold it for a certain price. The purchaser of this land was subsequently to sell it for a price higher than the first price. The question was, whether the intercessor or pre-emptor, as a neighbour, was to be given the prerogative of forcefully buying it at the initial price at which the original owner sold it to the initial buyer, and the latter could not hold onto the second price over the pre-emptor?

¹⁶² Fatwa 138, ledger 000003

He responded: Yes, the pre-emptor could buy the land at the initial price even if the second buyer was not satisfied. Furthermore, the second buyer had no right to the price at which the pre-emptor was to buy.¹⁶³

Structure

The questioner asked about land that had been sold by the owner at a certain price; the buyer subsequently tried to sell it at a higher price, and the question concerned the possibility of the man in the neighbouring plot, as a pre-emptor, to compel the buyer to sell him the land at the initial price, that which he had paid on buying this land.

The mufti observed that the pre-emptor could buy the land at the initial price, but that this price was exclusively his by pre-emption, as it was his prerogative as pre-emptor to buy it at that price;¹⁶⁴ thus, the initial buyer was required to give him priority, as he was in the neighbouring plot, but that only the pre-emptor could buy it at the initial price. *Shuf'a* or pre-emption was accepted so long as the land was not jointly owned. Once it was partitioned the individual plots could be sold.¹⁶⁵

This was a traditional fatwa.

Khawāga Gabriel Yusuf Dibbana asked about a sale in which the buyer was allowed to choose to pay the price after a fixed period, which was set at five years, on condition that he paid a deposit to the seller; then, if the buyer chose to return what he had purchased, he forfeited the deposit he had paid. The buyer subsequently sold a portion of the material object *'ayn* of what he bought - *shuf'a* to another person, securing from the latter a deposit, with the condition that the second buyer could choose to annul the sale and return the deposit - if his contract with the first seller did not go through. Consequently, was pre-emption the prerogative of whoever had the right to demand it from the second seller, if the sale was valid and necessary? And, was the demand for pre-emption to be granted if he demanded it immediately after hearing about the contract of that sale with its condition that the seller had the right to choose? Accordingly, if he did not demand pre-emption, did he lose his right to obtain it, or was it unnecessary for him to demand the right of pre-emption except after he

¹⁶³ Fatwa 4, ledger 000002

¹⁶⁴ A Prophetic tradition gave preference to the pre-emptor in the purchase of land next to his plot over other buyers. He was allowed to buy this land from the buyer at the same price that

¹⁶⁵ Ibn Rushd, *The Distinguished Jurist's Primer*. Vol. II, p. 307

lost the condition of choice and the obligation of selling, and thus his right to demand pre-emption was preserved and remained until the obligation of selling?

He responded: The condition of choice for a period of five years before paying the price and concluding the sale, or returning what was purchased and leaving the deposit corrupted the first sale; as a result, the first sale was invalid or imperfect. And, in the second sale, when the first buyer stipulated that he could choose whether or not to allow the sale to go through, - if he returned the first contract which permitted him the condition of the five years, and the failure to conclude it if he did not sign it: hence, that sale was corrupt as well. Thus, if the contract of sale was corrupt, it did not give the right to pre-emption for whoever had this right - if the sale was valid, and it did not give the right to pre-emption, unless the corruption was removed, and unless means were found to fulfil the clauses of the contract and prevent annulment of the sale. And thus, unless the corruption was removed in this case, and the second seller lost the prerogative of annulling the contract, - the right to pre-emption was possible, but only after the seller lost his right to choose,- it was not permitted before that. There was no doubt that the pre-emptor was entitled to demand pre-emption until the sale took place, and the element of choice in it was invalid.¹⁶⁶

Structure

The questioner asked about the validity of a sale in which the buyer could pay the price of the object he was purchasing after five years, provided he paid a deposit to the person who sold him the object, which he then forfeited if he subsequently changed his mind about buying this object. Then, in a second part to that transaction, the buyer had sold a part of the pre-empted object of the sale to a third party who had also paid a deposit, but if that third party chose to annul the sale he did not lose his deposit. The question was whether pre-emption could thereby become one of the conditions of the sale of that object.

The mufti mentioned that the condition of five years in which to buy the object given to the first buyer made that first transaction corrupt. This was probably because there was a large measure of uncertainty *gharar* in the length of the period granted him. And, since the buyer had decided to grant himself a period of five years with the right to retract from the sale, the second transaction was corrupt as well, as there was even

¹⁶⁶ Fatwa 405, ledger 000002

greater uncertainty. The mufti stated that if the corruption was removed the transaction became acceptable.

Sale involving interest - *ribā*

‘Abd al-Razzaq al-Shirbini, the agronomist from Shirbin, asked about the clauses of a contract that involved him and the deputy – *wakīl* of the *Bank al-‘Aqārī al-Miṣrī*; this contract involved several clauses: Clause one declared that the *Bank al-‘Aqārī al-Miṣrī* had sold and relinquished its possession of 870 *feddāns* of ‘*ushūri* land near the village of Binsila, with everything on it, including trees, buildings, waterwheels, etc., without exception, the limits of which were established, as well as the known utilities, and in equal parts to ‘Abd al-Razzaq al-Shirbini and to his son Muhammad Tawfiq, a minor. The buyer had accepted this sale with receipts from himself, and as the guardian of his aforementioned son, and the *Bank al-‘Aqārī al-Miṣrī* had specifically sold to the aforementioned ‘Abd al-Razzaq al-Shirbini the house, already prepared for habitation near Binsila, on a piece of land, - the area of which was one thousand cubits -*alf dhirā’*,- and that the facilities and boundaries of this house were recognised. Clause two stated that the bank owned the aforementioned properties in accordance to a decision from the Mixed Court of Mansura, and these properties were duly registered. Clause three indicated that the buyer, in his capacity as such, admitted to having seized the aforementioned properties since April 1886, and he had been making use of them since that time. Clause four signalled that all the money and ‘*ushūr* and the taxes required involving these properties had been the concern of these buyers from the beginning of 1886. Clause five specified that the bank sold the aforementioned land and the house, and that the buyer accepted the sale as a single transaction, without examination or partition, in exchange for the sum of nine hundred and fifty two thousand piasters and nine hundred and seventy two pounds, and ‘Abd al-Razzaq al-Shirbini had offered his guarantee, in his capacity as buyer, that he would reimburse that sum to the *Bank al-‘Aqārī al-Miṣrī* - at its main quarters in Egypt, in yearly instalments, each of which was to be seven hundred pounds, to be paid on 31st December of every year, and that the initial interest rate on the debt, estimated at 5 per cent, would be deducted yearly from these instalments, and deducted from the debt. Moreover, if ‘Abd al-Razzaq al-Shirbini ever delayed in paying a single instalment at the date due, the sale would be considered void of itself,

to the end of what was recorded in the aforementioned contract. The person asking the question wanted to know if there was anything in the contract that could be considered corrupt, or legally questionable, and he asked to be advised through the answer.

He responded: Such a contract could not be considered evidence of ownership of what was sold, because the aforementioned sale itself was corrupt, given that the stipulations of Clause five encompassed what prevented its reliability; accordingly, unless it fulfilled the provisions of reliability, it could not be depended upon legally.¹⁶⁷

Structure

The question involved the legality of a contract for the purchase of property between a private individual and a bank, for an amount payable in instalments.

The contract included five clauses; the first specified the boundaries of the property and the items on the land; the second pertained to the registration of the property in the governorate; the third indicated that the buyer had taken over this property to live in since 1886, and that he had made use of it; the fourth clause indicated that the taxes and returns from this property had been paid by the person who lived in it; the fifth and last clause referred to the sale of the house and property in a single transaction to this man and his son, a minor. Furthermore, that this man would pay an interest rate of five per cent on the debt (since he was paying in instalments).

The mufti mentioned that the final clause, clause five, which involved the payment of interest on the debt, - made the sale corrupt. Consequently, in order for the sale to be acceptable by Islamic law, the notion of interest on the debt owed by the man was unacceptable, since it denoted usury - *ribā*.

¹⁶⁷ Fatwa 171, ledger 000002

6- THIRD PARTY RIGHTS

BEQUESTS

He was asked to respond to a query from his Reverence the Deputy Patriarch of the Chaldean Church in Egypt, dated 20 May 1904, number 535, the substance of which was that this Christian lady died leaving a mother, a son, two legitimate daughters, and a daughter - who was the fruit of an adulterous relationship. Consequently the question was, did this last child inherit in the same way as the deceased woman's other legal offspring?

He responded: He declared in *al-Baḥr*¹⁶⁸ in the section pertaining to honour - *al-'arā'id* what indicated that the child of *li'ān* and adultery inherited from his mother since, in accordance to their statements, "and the offspring of an adulterous relationship and *li'ān* inherited from his mother alone, since his bonds of kinship with the father were broken, and therefore he did not inherit him." He inherited from his mother, and his sister on his mother's side, in accordance to the Law, and no more. Accordingly, this girl, who was born out of an adulterous relationship, inherited from her aforementioned mother.¹⁶⁹

Structure

The questioner, the Deputy Patriarch of the Chaldean Church in Egypt, wanted to know if an illegitimate child, a Christian, could inherit from his mother. Given that Christians in Egypt were subject to the same personal status laws as the Muslims, the mufti was the person one referred to when asking this sort of question.

He referred to a statement from the legal text *al-Baḥr al-Rā'iq* to the effect that a child for whom the parents had performed *li'ān*, or whose mother was suspected of infidelity, could only inherit from its mother, given that any links with the father were broken. This meant that that little girl, together with the other legitimate children, inherited from her mother.

Hammuda Bey 'Abduh, the lawyer, inquired about a man who had acknowledged that he was the father of a boy of unknown parentage, if this acknowledgement had taken place in front of witnesses, or in the presence of a public authority. Consequently, was

¹⁶⁸ *Al-Baḥr al-rā'iq sharḥ Kanz al-Daqā'iq*, of Ibn Nujaym al-Misri.

¹⁶⁹ Fatwa 302, ledger 000003

such acknowledgement acceptable, or legal, in Islamic Law? And did the making of this acknowledgement entitle this illegitimate child to the different properties in Egypt belonging to this man? And did this decision include all those who worked and lived in Egypt including the protected subjects who were Christians belonging to the Protectorate, and were all these are therefore subject to the decrees of Egyptian law? And, in accordance to Islamic Law- such as that practiced in Egypt, were those illegitimate children - whose fathers acknowledged as their children - entitled to inherit, and did they have the same rights as the legitimate children?

He responded: If a man declared an unknown boy was born to him, and the boy believed him, and expressed himself to this effect, the attestation was evidence of his fatherhood, even if he was ill, and the boy was therefore entitled to inherit like the legitimate children, according to *al-Bahr*. There was no doubt that an acknowledgement of parenthood, as well as a statement from the child, if he expressed himself, did not change according to whether, or not, he was a Muslim. Indeed, such an acknowledgement comprised Muslims and Christians, and thus the Muslim child was permitted to inherit legally from his Muslim father, who acknowledged him as a son and if the acknowledged child believed him, he expressed himself like the rest of the legitimate children. Likewise, the Christian child, whose Christian father acknowledged him, so that the child believed him and expressed himself, - was to be treated just like the rest of the legitimate children. Moreover, if the child acknowledged did not express himself, it was unnecessary for him to believe this merely to demonstrate his filiation upon the father's official acknowledgement. In such a case as well, the child acknowledged was like all the other legitimate children, i.e. the laws of inheritance pertaining to land and property applied to children who were accepted by their fathers, as well as to those whose kinship was recognised without official recognition, and this was applicable both to Muslims and Christians alike.¹⁷⁰

Structure

The questioner, a lawyer, asked about the effective validity of a man's acknowledgement that he was the father of a boy of unknown parentage, and whether

¹⁷⁰ Fatwa 258, ledger 000003

such an acknowledgement entitled that child to inherit, and possess the same rights as legitimate children.

The *mufti* declared that according to *al-Baḥr al-Rā'iq*, if the father made such a statement before the boy, and the latter believed him, that statement was evidence enough for the boy to inherit legally his share of the inheritance, which was equivalent to that of the legitimate children. Moreover, this sort of situation was applicable both to the Muslims and Christians of Egypt and its territories.

He was asked about a Sudanese lady married to a man from whom she had several children. Then he died, but he had other heirs apart from her and her children. However, this Sudanese lady had in her possession a document, or contract, issued by an official administrative centre. Initially, she had been a slave, and now some of the heirs were claiming that she was the property of the deceased man, and that he had children with her without really setting her free. They intended by this claim that she had no right to the inheritance, and they based their claim on the fact that there was no reference to her manumission in the document in her possession. Consequently the question was, in such a situation was this claim acceptable, or was it sufficient to have the testimony of the two witnesses to the marriage as witnesses to this manumission?

He responded: The mere attestation to the marriage contract was not sufficient to establish manumission, since the owner (of the slave) was authorised to marry his slave. Accordingly, a marriage contract was admissible with regard to a slave, but it did not prove or establish manumission. Manumission could therefore not be established through a marriage contract- unless it was precisely stated in that contract, and this was what attested her manumission legally.¹⁷¹

Structure

The questioner asked whether a Sudanese lady who had been a slave, and then had married her owner and had children from him, was entitled to inherit her deceased husband, given that she had a document that testified to this marriage.

The *mufti*, who probably saw the above-mentioned document, declared that it merely showed she had been married to the man who had owned her. He was entitled to marry her, but that did not automatically free her.

¹⁷¹ Fatwa 9, ledger 000002

The irony in this case was that, with her master's death, she became free, but she was not entitled to inherit him, although her children were.

He was asked about a person who died, leaving property and offspring. Some of these subsequently claimed that the property was owned, and not a family endowment, whereas others among the offspring asserted it was an endowment. The case was brought before a judge, and those who declared it was a *waqf* produced a female witness who swore before the judge that she had heard that from numerous sources, to the extent that she said it was almost common knowledge. She added that some were trustworthy people; according to these, the deceased had transformed his property into a *waqf* during his lifetime for his progeny, and then for the progeny of his progeny, and so on. He had made conditions on this property that the earlier generation benefit before the one succeeding it, and so on, until the conditions were fulfilled. As a consequence of that testimony, the judge ruled that initially it was a *waqf* with its conditions. Accordingly, the questions to be asked were, did these conditions constitute proof- simply with the testimony of the witness concerning the original *waqf*? And, was the decision of the judge to be implemented- just as the conditions constituted proof that the property was an endowment?

He responded: After reading the ruling concerning this case, we found that the way in which the testimony was given that lead to it, together with the leniency concerning the conditions of the endowment, were flawed. This was because if the conditions were not established and obeyed, and did not correspond to the time in which the testimony was taken, it was not easy to know these by saying that they were almost common knowledge, or by claiming that they were transmitted reliably. Therefore the judge's ruling on the conditions was not based on a basic statement of Islamic Law; it was flawed and not to be carried out except on the foundations of the endowment.¹⁷²

Structure

The question concerns a disagreement within a family as to whether the property of their deceased relation was to be considered a *waqf*, family endowment, or whether it was to be treated like an inheritance, and divided among the heirs. The matter came before a court, and the testimony of a single witness was heard to the effect that she

¹⁷² Fatwa 88, ledger 000002

had heard from several people that the owner had meant it to be an endowment. The judge had subsequently taken her statement into consideration.

The mufti however, considered that all the conditions surrounding the claim, including the testimony of the witness heard in court - which was not really reliable-, were flawed. For an endowment to be valid, it was necessary that the conditions surrounding it were clearly stipulated, with witnesses attesting to these at the time of the formulation of the endowment. Yet the statements surrounding the endowment in this case were vague and did not fit within a single time frame. Accordingly, it was apparent that none of the conditions for the establishment of an endowment were fulfilled.

This fatwa was indicated that for the mufti, evidence given had to be solid to satisfy any stipulated conditions.

Zaydan Ma'mun from al-Maqtā'iyah, al-Minufiyah province asked about a woman who had a share in a house that was split between her, her brother's son and her sister. The house had not been partitioned between them until the present. Subsequently, in her present state of good health, she donated her unknown portion in the aforementioned house to her daughter's son, and the situation was that the house could be partitioned. Consequently, in such a situation, was her donation void, invalid, so that this portion belonging to her was to be given to her heirs?

He responded: The scholars had stated that if what had been donated was dispersed, and involved apportioning, donations could not be made, and accordingly, the donation mentioned in the question was not legally valid, since this house could be partitioned, and the donated portion of the house became the property of the heirs of the donor after her death.¹⁷³

Structure

The questioner asked about the validity of donating part of a house that was owned by three people, two sisters and their brother's son. The house had not yet been partitioned, yet one of the sisters wished to donate her share to her daughter's son. A gift *hiba* was a form of donative contract, and one of the conditions attached was the specific characteristics, value and measures of the object. Consequently, in a case

¹⁷³ Fatwa 436, ledger 000002

involving property that was not partitioned, this represented great uncertainty *gharar* –and this could eventually lead to discord or dispute among the members of the family.¹⁷⁴

The mufti declared that shared property that had not been divided among the owners could not be bequeathed. This was because it had no set limits for each owner, and therefore the share of each owner was dispersed, so that it was impossible to donate a share of an indeterminate entity.

GIFTS OR DONATIONS – HIBA

Gamil Bey Hamdi asked about a man who was in good health and in full possession of his faculties who took over for himself what he had given to his son as a minor, and this was land with fixed limits that he owned at the time. When the son reached his majority, the father wanted to give him money in place of the land, but the boy refused this and demanded the land. The question was, did the boy have the right to make that demand, and was his father obliged to acquiesce, and give it to him?

He responded: The father was not permitted to take over that piece of land for himself and exchange it for the aforementioned sum of money. Indeed, he was required to return it to the aforementioned son who had now attained his majority, since he had given it to him as a legal donation when he was small.¹⁷⁵

Structure

The question here is that of a gift *hiba* of land given by a father to his son. After the boy had taken possession of this land, the father wanted to take it back, and compensate his son with money. This was not permitted, because possession was a condition of the validity of the gift.¹⁷⁶

ENDOWMENTS - WAQF

He was asked about a man who established an endowment - *waqf*, with the condition that his house, i.e. the home of the endower, remain in the same situation in which it was at the time he established the endowment, i.e. the family living together with the servants, who included paid individuals and slaves, and sharing the same existence in

¹⁷⁴ Hallaq, pp. 244, 245, 246.

¹⁷⁵ Fatwa 165, ledger 000003

¹⁷⁶ Ibn Rushd, Vol. II, pp. 399, 403.

agreement, uprightness and good morality. If one individual chose to leave of his own free will and choice, he would have no right to his share of the endowment; however, if he was forced to break the arrangement and leave for reasons outside of his control, such as being called up for military service, he was not to be deprived of his share in the *waqf*. Now the endower had two houses, one of which was near Bilbays, and the other was in the countryside, and he had it built on his endowed property; therefore, he sometimes lived in Bilbays, and at others he lived in the other house; this was what most people who lived far away from their land did. Also, each house had its own furniture, and it was possible to supervise the cultivation of the endowed land and realise its benefits, from the second house, when one was present there. Now the question was, if the female superintendent of this endowed property made the second house belonging to the endower her residence, because she wanted to assure the revenue from the endowment and supervise the cultivation of the land, could it be said that she had departed from the condition imposed by the endower of the *waqf* and that, as a consequence, she deserved to be deposed from her position as superintendent or not? And, was the house that the endower intended in his condition part of the *waqf*?

He responded: It did not appear from the condition imposed by the endower of the *waqf* that he intended a specific house from the two he lived in during his lifetime as the *waqf*. His real purpose was to preserve the system that existed in his family and those who were part of it in one of the two houses, so that all those who benefitted from the *waqf* remained in the same situation as that in which he left them, and his name remained. Consequently, if they all resided together in one house, united by the solidarity that was the condition, anyone wishing to leave without a powerful motive controverted the condition. And yet, at that, by living in the second house built by the endower of the *waqf*, the superintendent of the *waqf* could not be said to have controverted the condition made by the endower of the *waqf* - since he himself had lived there; in addition, by living there, it was possible to supervise the endowed property and see to its proper administration; therefore this was fulfilling the condition made by the endower. Accordingly, she was not to be deprived of her assigned right to the revenue from the *waqf*, nor was she to be deposed from her superintendence of the endowed property. As for the houses, they were not endowed simply because the endower had made it a condition that the family live in them, but

the condition was that all the beneficiaries live together in one of the houses, and they had the right to sell whatever was not required, of the two houses, since he had not stipulated or endowed any of these, nor did he endow them both together.¹⁷⁷

Structure

The question involved an endowment *waqf* established to maintain the entirety of a household, which consisted of a family with its servants and slaves. The administrator of this endowment, a woman, was obliged to live in the other house in the countryside that was part of this endowment, in order to oversee the cultivation of land and secure the revenue from this estate. The questioner therefore wanted to know whether by living in the second house to carry out her duties, this administrator was failing to fulfil the conditions stipulated by the endower.

The mufti explained that it was apparent that the endower's real purpose for setting up this endowment had been to keep the household together, and maintain the solidarity among the members of this household, allowing them to benefit from the revenue from this endowment. This administrator was required to live in the countryside to perform her duties, therefore she was to retain her position as superintendent of the endowment, and entitled to benefit from the endowment. In contrast, members who left without a good motive, such as serving in the army, relinquished their right to benefit from it.

This was not the only question in the ledgers involving an endowment with such conditions, but it was the clearest and most expressive, and such questions implied that fragmentation was occurring within the large traditional households.

He was asked about a man who owned agricultural land that he transformed into an endowment that would benefit him during his lifetime, and then after he died part of the land in this property would become an endowment to his daughter, as he declared in the official writ *hujja* of his endowment- *waqf*. Now the aforementioned man had bought seeds out of his own money and planted these on the land; as the seeds started germinating, the aforementioned man died, leaving a daughter- who was a minor. The court thereupon appointed a guardian to watch over her interests, but in the meantime, some of the beneficiaries of the *waqf* endowment who had no right to the land from

¹⁷⁷ Fatwa 59, ledger 000002

the *waqf* wanted to take what was their due from the planted crops, and to pay the guardian the equivalent of the rent of the land with the excuse to the guardian that the planted crops were the end result of the seeds, and that the seeds were provided in the *waqf*. Consequently, was the guardian to accept that the heirs wanted a share in the planted crops, and accept the equivalent of the rent of the land without his having committed a transgression for which he could have his guardianship removed through negligence or inability, or what would the judgement be?

He responded: The crops the endower cultivated, the seeds of which were purchased out of his money, and which germinated after his demise, were considered his possessions, and therefore part of his legacy. These crops were therefore not included in the revenue due to the beneficiaries of the *waqf* after the death of the owner. The only money due to the beneficiaries was the rent of the land while it was under cultivation, and the guardian of the minor was required to give the (other) heir who was of age his share of the inheritance, and with that it was not considered a joint donation.¹⁷⁸

Structure

The question concerned an endowment made by a man on agricultural land, which would eventually benefit his daughter, a minor, and others. This man had bought seeds, sowed these on the land, but then shortly afterwards, he died. The other beneficiaries of the endowment, who were not his heirs, wanted to benefit from the new crops, and the question was could the minor's guardian grant them a portion of these?

The mufti pointed out that the beneficiaries of this endowment were only entitled to their due from the rent of the endowment on the land, and no more. Besides, the cultivated crops were not part of the endowment; indeed, the man had bought the seeds, planted them, and therefore the new crops were part of the daughter's inheritance, since seeds were regarded as movable, or disposable possessions, like liquid assets. The mufti had probably read the *hujja*, or writ, concerning the endowment, and therefore knew its terms; he therefore stressed that the guardian was required to give the other heir, who was of age, and of whom there had been no mention in the question, his share of the legacy.

¹⁷⁸ Fatwa 61, ledger 000002

POSSESSION - *ḥikr*

The lady Asma Hanem, daughter of the late Ibrahim Pasha Halim, asked about a man who leased land from the supervisor of an endowment, in an oral transaction, at a price equivalent- *ujrat al-mithl* to what was paid for such land at that time. This land had buildings, each of which was an endowment. The supervisor permitted him to construct, build, establish, renovate and elevate, with the justification that what he built, constructed and established would be his possession, free of problems and utilised for as long as possible, and that he should have the right to decide about that. The leaseholder built, constructed and established until he died, and the supervisor of the endowment entered into a dispute with his heirs on the pretext that the specific rent that was being paid was lower than what others were now paying. The question was, did the return to the equivalent rent mean considering the land vacant of buildings, and that the heirs had the right to remain where they were, paying the equivalent rent for land, and that neither the supervisor nor anyone had the right to object?

He responded: The scholars had declared that exclusive possession- *ḥikr*- of land was to be estimated at the price equivalent to what was being paid for the same sort of land at the same time, because the price of land did not remain constant; indeed, it increased and decreased in rent, and *ḥikr* – exclusive possession changed, consistent with time and place, and the law was clear in taking into consideration any increase or decrease in rent, and exclusive possession- *ḥikr* was responsible in this situation. However, exclusive possession *ḥikr* was solely in connection to vacant land, regardless of what the leaseholder built, so that it could not be taken away from his heirs, so long as they continue to pay the equivalent price, and neither the supervisor nor anyone else had the right to challenge them in that situation.¹⁷⁹

Structure

The questioner asked about whether the rent for land - with buildings on it, to which a man had gained exclusive possession *ḥikr* through an oral agreement with the supervisor of this land, could rise. The person who had gained exclusive possession had constructed and built on it in accordance with his agreement with the supervisor,

¹⁷⁹ Fatwa 88, ledger 000003

but then he died, and the supervisor now wanted to raise the rent, with the claim that the rent for the same sort of land had risen.

The mufti declared, in what was a traditional fatwa, that exclusive ownership had given this man the right to build, construct and raise buildings on the land, and that his heirs could continue to possess this land exclusively, provided they paid the price which others paid for an equivalent plot of land at this time. The supervisor could not do anything about this.

Muhammad Effendi 'Afifi asked about barren land given by the government to an individual; he took possession of it, reclaimed it, and dealt with it by planting it. Was this to be considered a gift (from the government), which could be considered a cause for owning this land or not? And, therefore, did reclaiming the land, and acting in the way mentioned, become a cause for ownership, so that if the owner was subsequently challenged, and the situation was as mentioned, the person who challenged him was to be prevented from doing so?

He responded: The decision, according to the law, was that the reclamation of barren land *ihyā' al-mawāt* gave the person who reclaimed it the right to own the land, and it became a motive for ownership, as the reason he owned it was that he had reclaimed or revived this land. He took possession of it and administered it through the good will of the government; accordingly, no one had the right to challenge him on this land. Besides, in such a situation, this was not a gift, and this was clear.¹⁸⁰

Structure

The question concerned the reclamation of arid land *ihyā' mawāt*, and the entitlement to ownership of the land by the person who had reclaimed and tended it.

The mufti declared that a person who reclaimed land was entitled to own it, because he had brought it back to life. The government had allowed him to take it over to restore it, and he had done this; consequently, no one was allowed to challenge his right to it.

According to an accepted Prophetic Tradition, barren land that was reclaimed became the property of the person who restored it. The jurists stipulated the following conditions for taking over land to reclaim it: it had be infertile, and far from building

¹⁸⁰ Fatwa 472, ledger 000002

developments; moreover, the act of reclaiming it was not to harm anyone, or require permission from the leader of the community.¹⁸¹

¹⁸¹ Abu ‘Abd Allah Muhammad ibn ‘Abd al-Rahman al-Maghribi al-Hattab, *Mawāhib al-Jalīl li-sharḥ mukhtaṣar Khalīl*. Beirut, 2010. Vol. 6, p. 12.

7- INTERDICTION *ḥajr*

He was asked about an affluent man who was spending his money without really harming anyone, so that he enjoyed the comforts and elegance brought to him by his household and servants; yet there was nothing legally reprehensible in his life style; he had neither a wife, offspring, nor needy relatives who could be left destitute after his death, as a consequence of his life style. Moreover, his personal financial ruin was not to be feared, as he had plenty of money. Accordingly, if someone requested placing him under guardianship (for prodigality), was that request to be granted-although there was the testimony of relatives that such guardianship would be harmful to him, since he had no guardian initially?

He responded: It was not permissible to place under legal guardianship whoever was in the condition indicated by this question, since his disposal of his money in the way mentioned did not require him to be protected; consequently, a request that he be placed under guardianship (for prodigality) was not to be admitted.¹⁸²

Structure

The issue here involved the permissibility of imposing interdiction *ḥajr* –on an adult male for prodigality - *safah*. Such a procedure could be endorsed whenever someone failed to display *rushd*, or the capacity to behave in a responsible and constructive manner.¹⁸³ It was imposed on persons who were insane, minors, foolhardy, insolvent. In such cases, a guardian was appointed to scrutinize all his financial actions.

The man involved here appeared to have substantial funds, and reportedly he appreciated a refined life style. Furthermore, he was neither squandering his wealth on things prohibited by Islamic law, nor was he depriving relatives; and, he seemed to have no close relations to inherit his wealth.

The mufti must have concluded that this man did not fit the description of a *safīh*, since the manner in which he was disposing of his wealth was unlikely to cause him harm nor would it harm anyone else - *la ḍarar wa la ḍirār*; therefore, in accordance to the objectives of Islamic Law, one of which was the protection of wealth, such a measure was uncalled for.

¹⁸² Fatwa 82, ledger 000002

¹⁸³ Hallaq, op. cit. p. 239, footnote 4.

The lady Galilah al-Barudiyah asked about a woman who was entitled to a family endowment –*waqf*, the income of which was three thousand pounds yearly. This endowment had no other beneficiaries apart from her and her sister; she had no other family. And, apart from the endowment, there were vast properties. She herself took over all of that, with the income from the endowment and the property, and she squandered her wealth, to the extent that she mortgaged the endowment at the rate of three thousand five hundred pounds, which she spent on a wedding. Then, after getting married, she gave her husband charge of the endowment. By deceit, he rented it to a Greek for an extravagant amount of money over a period of three years, which were not yet over. Accordingly, she was removed from the supervision of that endowment, and someone else took over its supervision, but she was still in possession of the income from it, through an agreement with the Greek man, and she and her husband spent the revenue on things not permissible by Islamic Law, and yet with her consent, and knowledge of the damage caused to her sister by her actions. Furthermore, she no longer disposed of the vast amounts she had possessed. Consequently, was she to be blamed for prodigality, and was it necessary to block her actions?

He responded: The scholars referred to the Companions arguing about placing a responsible person under guardianship by reason of prodigality, and there were fatwas to this effect in *al-Khāniyah*,¹⁸⁴ in al-Qahistani,¹⁸⁵ and in *al-Mukhtār*.¹⁸⁶ They further declared that foolishness- *safah* came about through waste and loss of wealth, and it was in contradiction to common sense or to the requirements of Islamic Law. This included wasting money or extravagant spending, and such a person acted without purpose, or for a purpose disapproved of by the wiser people of religion, such as paying money to singers, or wastrels, or such. On that basis, the actions produced by that lady, mentioned in the question, were to be considered prodigality, and it was necessary to block her because of these.¹⁸⁷

¹⁸⁴ Reference is to the Hanafi treatise known as *Fatāwi Qaḍikhān* by Fakhr al-Din Husayn ibn Mansur al-Awzjandi al-Farghani (d. A.H. 592).

¹⁸⁵ Reference to Shams al-Din Muhammad al-Qahistani, (d. A.H. 950) *Jāmi‘ al-rumūz wa ḥawāshi al-baḥrayn ‘alā mukhtaṣar al-wiqāya*

¹⁸⁶ Ibn ‘Abidin, Muhammad Amin ibn ‘Umar ibn ‘Abd al-‘Aziz ibn Ahmad (A.H.1198-1252), *Radd al-miḥtār ‘alā al-durr al-mukhtār*

¹⁸⁷ Fatwa 239, ledger 000002

Structure

The questioner here asked about a woman with a sibling, a sister; both were the recipients of a rather large yearly income from a family endowment, and they owned property. However, the woman had taken over everything, spent vast sums on her own pleasure, and as a result, she had mortgaged the endowment, and gotten married on the proceeds. She had subsequently placed her husband in charge of the mortgage, and the couple knowingly continued to spend money on futile and forbidden pursuits. In his response, the mufti cited precedents borrowed from the Companions mentioned in *al-Khāniya*, in *al-Qahistani* and in *Radd al-Mukhtār* on the necessity of blocking actions brought about by foolishness that resulted in loss of wealth. He considered that there was no justification for her extravagance. He also drew attention to the fact that since the preservation of wealth was one of the objectives of Islamic law, such a woman was harming herself, and therefore her actions needed to be blocked.

8- PENALTIES

Slander - *Qadhf*

Ahmad Effendi Lutfi, the lawyer, asked about an Egyptian Muslim man, employed as a physician in the Sudan, who married an honourable lady of Sharifan descent, for about four years. He would go and visit this lady every year and reside there for a period of two or three months. During his last stay there he remained for forty-eight days, then he departed with the notion that she was pregnant, and he was proved right. He was very happy, and he looked forward to her giving birth, and continued to be very happy, confessing to all about her pregnancy. Then his wife gave birth, six months and twenty days or so later: it was a baby girl, and he was very grateful, thanked God, asking God to grant her a long life, and to protect her and her mother. Then, a month later after she gave birth, he divorced her, notifying her through the courts, and sending a legal summons from the court at Shindi. Based on this, the lady sent him a memorandum through the Greater *Shar'ī* Court concerning the costs of the *'idda* and the costs of maintenance for her daughter; he received a summons, and a court session was scheduled. As a result, he went to the court at Shindi and issued a public statement denying his paternity of the child, with a legal writ - *i'lām shar'ī* drafted to this effect. He subsequently returned to Egypt days before the court convened, gone to the Greater *Shar'ī* court in Cairo and asked if he could deny the paternity of his child through the performance of *li'ān*. However, when the two plaintiffs faced each other in court, and his untruthfulness was revealed, the judge admonished him and suggested reconciliation; he accepted, admitted to lying, and acknowledged he was the child's father. He was required to pay a monthly sum for her upkeep, and he accepted. The question was, initially, he had denied his paternity at the court in Shindi, and then he demanded to undertake the procedure of *li'ān* as a means to deny his paternity at the Greater *Shar'ī* court of Cairo; he had subsequently gone back on his actions both in Egypt and the Sudan after divorcing her completely; accordingly, was he not to be accused of slander, and punished in accordance to Islamic legal procedure, i.e. the legal punishment for slander? Moreover, although the present policy prevented the imposition of this legal punishment, could he not be punished consistent with the law, given that he accepted to pay the maintenance, or had the fact that he had accepted to pay this maintenance freed him from the charge of slander and from the penalty imposed?

He responded: It was stated in *Kanz al-Daqā'iq*,¹⁸⁸ and in its explanation, *al-Baḥr al-Rā'iq*.¹⁸⁹ that if he acknowledged a child, and then denied his paternity through *li'ān*, imprecation-, or the contrary, if the child was his, he was to be penalised for slander. This was because he had perjured himself, and the *li'ān* was therefore invalid, because the penalty was necessary when there was necessity that involved dishonesty, otherwise the penalty for slander would be applicable - since the principle behind involved the penalty of slander. Consequently, when the lie ended, the truth was revealed and the child was his, so why was he acknowledging it, then denying it then acknowledging it, because he had already done this before, or he would do it afterwards, and *li'ān* was valid without breaking the ties of kinship, just as it was valid without the presence of the child. This was what had been stated in *al-Hindiya* - the Indian fatwas,¹⁹⁰ as transmitted by the *Muḥīt* of al-Sarakhsi;¹⁹¹ so, if there was a son he had acknowledged, and then denied, and then acknowledged, *li'ān* was to be done. And it was necessary, if he denied the child and then acknowledged it, that he submit to the *ḥadd*, i.e. that penalty prescribed in the Qur'ān. Thus, the man in this incident had denied his daughter, and then perjured himself by admitting she was his daughter, he was therefore considered a slanderer, and he was to undergo the penalty for slander, which was whipping. This penalty had been prescribed by the Lawgiver as a punishment to the slanderer for his defamation. The Law also stipulated that the testimony of a person punished for slander was to be excluded permanently, even if he repented, consistent with the verse “And never thereafter accept their witness,”¹⁹² and since, to be complete, the *ḥadd* penalty was to be implemented since he refused, then he remained [a slanderer] after he repented, just as his acceptance to pay the maintenance did not remove the depiction of slanderer, nor did it clear him of the outcome of slander, which was the *ḥadd*, that well-known legal punishment.

¹⁸⁸ *Kanz al-Daqā'iq*, Hanafi text by al-Zayal'i, 'Uthman ibn 'Ali ibn Mihjin al-Bari'i, Fakhr al-Din al-Zayal'i (d. A.H. 743).

¹⁸⁹ *Al-Baḥr al-Rā'iq sharḥ Kanz al-Daqā'iq*, by Ibn Nujaym al-Misri is a clarification of *Kanz al-Daqā'iq*. Ibn Nujaym was a Hanafi jurist (d. A.H. 970)

¹⁹⁰ *Al-Fatāwi al-Hindiya* is a collection of fatwas by Indian Muslim scholars. It is also known as *al-Fatāwi al-ālamkariya*. The scholars were ordered by their Sultan Nizam al-Din al-Balkhi (d. A.H. 1118), a very learned man, to collect his fatwas.

¹⁹¹ *Al-Muḥīt*, Hanafi text by al-Sarakhsi, Radi al-Din Muhammad ibn Muhammad al-Nisaburi (d. A.H. 544)

¹⁹² *Qur'ān*: Light: 24: 4

Furthermore, it was not permissible for anyone to claim that *li'ān* was a civil right which one could have recourse to, or renounce whenever one wished; this was unacceptable, since asking to perform *li'ān*, and then subsequently acknowledging paternity realised the meaning of slander, and it was followed by its penalty. And God knew best.¹⁹³

Structure

The questioner, a lawyer, wanted to know if it was feasible to impose the penalty *ḥadd* for *qadhf* – calumny or defamation against a man who had acknowledged a daughter, and then subsequently gone to court to declare she was not his child.

Probably because the question involved the application of a penalty, that of *qadhf* or calumny, and because the mufti was addressing a lawyer, he initiated his fatwa citing juristic texts such as *Kanz al-Daqā'iq*, and *al-Baḥr al-Rā'iq* to indicate that since initially, the man had recognised the child as his, and then subsequently he had denied his paternity by going to court to swear that the child was not his, he was to be penalised for slander. Moreover, the fact that he had later undertaken the procedure of imprecation *li'ān*,¹⁹⁴ that procedure was invalid, since he had perjured himself. He had then perjured himself once again, the second time he went to court, by admitting that the child was his, and accepting to pay for the child's maintenance. The mufti considered that the penalty for calumny, which was whipping, was justified. He also reminded the questioner that a Qur'ānic verse instructed believers to prohibit the testimony of a calumniator permanently, so that this man's testimony was to be excluded permanently, even if he repented. The mufti also drew attention to the man's abuse of the procedure of *li'ān*, which, he stressed, was not to be used arbitrarily.

It may be relevant to mention that the preservation of honour - *'ird*, is considered by certain jurists as the sixth of the necessary objectives *ḍarūrāt* of Islamic law. This may explain the mufti's firm stance against this father, who had slurred his former wife's reputation, and tried to demean his child. However, it is by no means certain

¹⁹³ Fatwa 307, ledger 000003

¹⁹⁴ The Qur'ānic verse that dealt with *li'ān*- imprecation commanded: "Those who accuse their wives of adultery, and have no witnesses but themselves, let each of them witness four times by God that he is telling the truth, and a fifth time that the curse of God shall fall upon him if he is a liar. They are then to ward off the punishment from her if she testifies four times by God that he is a liar, and a fifth time that God's wrath shall fall upon her if he is telling the truth." *Qur'ān*: 24: 6-8

that the man referred to in this fatwa was ever penalised for calumniating his former wife.

Retaliation - *Qiṣāṣ* ¹⁹⁵

¹⁹⁵ ‘Abduh noted that the interpreter of *Tafsīr al-Jalālayn* had declared that retaliation – *qiṣāṣ* was required in Judaism and in Christianity. ‘Abduh himself observed that retaliation was imposed on the Jews in the Chapter that dealt with the Exodus in the Old Testament, but that no such condition was mentioned in the Christians’ Gospels, nor were Christians forced to impose or pay the blood money. This had been taken as a recommendation to forgive and there were references to repentance in the Gospels, and acceptance of blood money contradicted this. ‘Abduh remarked that the Arabs had imposed such measures when there were powerful tribes dealing with weaker ones. Whenever some member of a tribe killed a strong man from a more powerful tribe, the stronger tribe would not accept that the blood of a simple member of the tribe be shed in retaliation for the dead man. Indeed, they demanded the life of the leader of the other tribe, and sometimes they demanded the killing of ten members from the other tribe. It all depended on their strength, but if they were not given what they wanted a great deal of blood could be spilt. Such injustice was consistent with the difficult and tough conditions lived by the Bedouins. The Torah, he continued, had imposed the slaying of a killer as a means to check or control such injustice. However, in the present there were legislators who rejected, or denied, the need to punish by killing, because, said they, the death penalty was cruel and vengeful, and such traits became bred into mankind. They considered therefore that the killer who shed blood had to be punished by educating him, not as a means of seeking revenge – which meant not killing him. They insisted on rejecting the death penalty and denouncing those who condemned to death when the crime had not been admitted or irrefutably proved or testified to by witnesses-n who had perhaps given false testimony. Such legislators considered it preferable if the authorities or government taught people mercy. This sort of attitude could perhaps be applicable in a nation where the people were educated and reared in accordance to modern ways, and they were politicised and well prepared, so that it was unnecessary for the guardians or relatives of the murder victim to be affected by the killer or to demand payment in blood.

‘Abduh reckoned that such laws could not become general, nor could they apply to all mankind. A sharp, far-seeing person, conscious and considerate of the welfare of nations, i.e. someone who gauged matters in conformity with the scales of public welfare - *al-maṣlaḥa al-‘amma*, not someone who was swayed by personal emotion, would realise that retaliation that was carried out fairly and justly was at the basis of appropriate education in all nations and peoples. If it was abandoned, it could encourage rogues to dare to shed blood. If fear of prison and hard labour could deter the desire for revenge against murder in the countries where people were predominantly merciful and were indulged, as for example, in some of the European countries, this was not the case in all countries. Indeed, there were people in these countries and in others who were encouraged to commit crimes and found it easy to do so, because the punishment for murder was prison, and some killers found it preferable to home. Thus, in Egypt and Syria, there were reprobates who called prison

He was asked by the National Court of Appeals in Cairo, dated 29 Muharram 1317/8 June 1899, about a file holding 57 sheets of paper, including the court's decision, taken on 7 June 1899, to adjudicate case file 451/867, made by the Public Prosecution against Muhammad Ali Hamid, accused of killing 'Abd al-Warith al-Sayyid, with premeditation and intent. The mufti was therefore to return the file to the court, with his assessment, since this was to be taken into account, as the sentence would be delivered on 5 July 1899.

He responded: After reading the details of the case involving the accusation made against Muhammad Ali Hamid of murdering 'Abd al-Warith al-Sayyid with intent and premeditation, we noted many signs - albeit the vast number of these - indicating to us that they were not enough to pronounce a sentence carrying the penalty of death, since the element of certainty was lacking. Hence, what if the penalty was implemented and subsequent to that, new evidence was uncovered, especially as the attestations for intent were not sufficient, as it was conceivable that the murderer's pulse started to pound when the would-be victim refused to give him the money he asked for? Accordingly, this controverted the notion of intent- since he only knew he would kill the man when the latter denied him the money.¹⁹⁶

Structure

The questioner- the Court of Appeals- wanted the mufti's opinion concerning an accusation of murder with intent and premeditation. The facts of the case, and the evidence against the defendant were collected in 57 sheets of paper submitted to him for examination, because his was supposedly the decisive judgement as to whether or not the defendant was to be executed.

The mufti carefully examined the evidence presented; it demonstrated that the defendant had definitely murdered his victim. However, the mufti was not convinced that the murderer had premeditated his act, because initially he had gone to ask the victim for money, and the victim refused to give it to him. This, the mufti assumed,

a hotel. In Tripoli, Syria, 'Abduh had heard someone say that he would kill a certain person because the sentence was twenty years in prison, but that he would eventually receive an official pardon from the ruler. In Egypt, criminals called the prisons Cook's Hotel because Cook Pasha was the Inspector-General of the Egyptian Prisons. They considered it more agreeable and pleasant to spend a winter than one in their own houses, or in the streets. *Al-A'māl*, Vol. 4, pp. 421-423.

¹⁹⁶ Fatwa 1, ledger 000002

might have infuriated the killer, so that he had precipitated himself on the man and, in an access of rage, he had murdered him. It was therefore very difficult to state categorically that he intended to kill his victim from the beginning. Consequently, the intention to murder might not have been there initially, and no premeditation was involved. This suggested that the penalty of death was unwarranted in such a case. In his fatwa, the mufti drew attention to the fact that it was impossible to back out after an execution.

After giving his opinion, he left the final decision concerning the defendant's execution to the person in authority, *walī al-amr*, the Khedive 'Abbas Hilmi.

He was asked to advise the Cairo Appellate Court, through a note addressed on 3 July 1900, number 284, concerning the Public Prosecution's case number 777 of 1900 in which Mas'ud Su'ud Hasan and others stand accused of murdering Sa'd Sa'd Disuqi with intent and premeditation. The mufti was required to respond promptly, and return the file to the Public Prosecutor's office in accordance to the law.

He responded: After reading the Public Prosecution's case number 777 of 1900 in which Mas'ud Su'ud Hasan and others stood accused of murdering Sa'd Sa'd Disuqi with intent and premeditation, and after considering the evidence here, the utmost it created in anyone who examined it was that of assumption- *al-zann*, and assumption was insufficient to impose the sentence sought after by the Prosecution, in accordance with Article 208 of the section on punishment for crimes and offences, but it was possible to impose the lesser sentence as a means of punishment, on condition that all the conditions fulfilled the requirements required by the law.¹⁹⁷

Structure

This case involved several defendants accused of murdering a man with intent and premeditation.¹⁹⁸ After examining the documents in the case, the mufti found that the

¹⁹⁷ Fatwa 164, ledger 000002

¹⁹⁸ Concerning the murder of one person by a group, there was the famous opinion of 'Umar, according to which he would have put all the people of San'a to death had they conspired in killing the little boy.

Such a ruling was favoured by Muslim jurists because of the consideration of *maṣlahā*: if a group of persons was not put to death for the murder of a single victim, others could try to get away from retaliation by conspiring to kill a person through a group. Ibn Rushd, *A Distinguished* Vol. II, p. 484.

element of certainty was lacking; consequently, all that remained was conjecture - *ẓann* – and this was inadequate- especially when the issue involved a death sentence.

He therefore recommended the lesser sentence as a means of punishment, provided all the other conditions were fulfilled.

Once again, the mufti waived the *ḥadd* penalty because of his doubts, in conformity with the Prophetic tradition - *ḥadīth*.

He was asked to advise the Primary Court on 28 Sha‘ban 1318, Note number 830. This concerned the transfer of the papers regarding case number 156, Serious Crimes, Tukh Centre, in which one Taha Rushdi and others stood accused of killing Hasan Ibrahim al-Ganayni, with intent and premeditation. The mufti was asked to examine the papers covering the case and then return these with his recommendation before Wednesday 2 February.

He responded: On reading the documents in case number 156 Serious Crimes, in which Taha Rushdi and others with him stood accused of murdering Hasan Ibrahim al-Ganayni with intent and premeditation, the mufti noted that the accusation made against Rushdi of having perpetrated the crime was not substantiated by irrefutable evidence. The utmost that could be assumed was that he had participated with the others when the crime was committed. It was therefore not acceptable that he should be sentenced to death and, if careful attention was paid to the testimony of the witnesses for the prosecution, it became clear that it was difficult to establish his participation. As for the other witnesses, it was difficult to accept the testimony of ‘Ali Daud that Farag Muhammad Khalifa had killed the murder victim by grabbing him by the neck, and that as a consequence he was the killer, if that statement was valid. Indeed, the testimonies of the witnesses triggered reservations when trying to establish that the crime occurred in the way the accusation was directed. The utmost that could be demonstrated was the dominance of assumption, and it was not acceptable that assumption should lead to a death sentence on any individual - for fear that the error of the verdict become clear after the sentence was executed. Consequently, the mufti was of the opinion that all three defendants be given the ruling that came after the death sentence, but nevertheless bearing in mind that court

proceedings were valid and in conformity with the principles required by Islamic Law, and enclosed were the papers of case number 830.¹⁹⁹

Structure

This was another case involving several men accused of killing a single victim, and again the mufti questioned the evidence against the principal accused. His experience as a judge also led him cast doubt on the testimony of the witnesses, one of who claimed he had seen another of the accused grab the victim by the neck and choke him, which had led that witness to conclude that that defendant was the killer.

The mufti further considered the testimony of the witnesses so dubious as to trigger doubts about how the crime was committed and about the accusations made. Consequently, because it was not feasible to condemn all the defendants to death on so little evidence and by dint of such garbled accounts from the witnesses, and since it was just as impossible to execute just one of them, the mufti opted for the lighter sentence for all of the defendants.

In a note dated 26 Ramadan 1318 from the President of the Primary Criminal Court, at the Greater National Court of Appeals, the mufti was asked to give his opinion concerning a case. This was the Public Prosecution's indictment of one 'Abd al-Nabi Hasan Mahmud, accused of killing his brother Hasan Mahmud with intent and premeditation. The Mufti was asked to give his opinion to the court not later than eight days.

He responded: On examining the papers of case number 1910, according to which 'Abd al-Nabi Hasan Mahmud was accused of killing his brother Hasan Mahmud with intent and premeditation, it was clear from the statements of the accused that he was irrefutably the killer, despite his assertion that the killing was accidental. Indeed, all the indications and signs were evidence of his lies, including the feud with his brother, and the falling-out between them did not allow one to believe his story that he had submitted his gun to his brother. He had killed with intent, and as regards his premeditation, the proof for that was that he had not spent the night at home as was his wont. He had kept watching his brother until the latter fell asleep, and he knew his brother was a heavy sleeper, because he mentioned it in his statement. This was when

¹⁹⁹ Fatwa 252, ledger 000002

he committed his crime. The sentence stipulated in Article 208 of the Penal Code was therefore justified, and there was no objection to imposing it upon him, provided that the evidence against him and the court proceedings were legitimate.²⁰⁰

Structure

In this case of *qawad* – retaliation, a man was accused of killing his brother with intent and premeditation. After examining the statement of the defendant and the evidence, the mufti concluded that the accused was guilty, because strong doubt was cast upon the man’s statement that the killing was accidental, given that there was a grudge between the brothers. Also, the accused had been in the habit of spending the night at home, but on the night of the incident he was out keeping a watch over his brother. He waited and, knowing his brother was a heavy sleeper, killed him after the latter fell asleep. This showed both intent and premeditation; the mufti was therefore of the opinion that the defendant was to be executed, since both intent and premeditation were reflected in his act.

In a note dated 28 November 1901, number 3958, the Head of the Serious Crimes Cases at the National Appellate Court asked the Mufti to examine the Public Prosecution’s case number 1611 for 1901 against one Bakhit Mahmud, who stood accused of killing his son Ibrahim Bakhit with intent and premeditation. Attached were the papers of the case for the mufti’s perusal; he was therefore asked to examine and return these with his opinion before 11 December 1901, which was the date in which the court delivered its sentence.

He responded: After reading the documents of case 1611 for 1901, the evidence that Bakhit Mahmud killed his son was indisputable. However, imposing the retribution required for murdering his son was not permitted by the Hanafi school, since it did not allow reprisal for the murder of offspring; therefore, there were no reprisals against the father who killed his son. Yet the Maliki school allowed retribution against a father, on condition that the father was desirous of slaying his son, intentionally wishing to separate his soul from his body as though he were separating his head from his body with the aid of a sword, or making him lie down in a reclining position and then slaughtering him just like the incident involving Naguib Mahmud.

²⁰⁰ Fatwa 259, ledger 000002

Now it was well known that the school of law followed in Egypt was Hanafi; for that reason, if the legal conditions of the case were fulfilled, it was necessary to reduce the penalty so as to apply the lesser one. And God knew best.²⁰¹

Structure

The case examined by the mufti involved the killing of a son by his father. From the mufti's description of the incident, the father induced his son to lean forward in a reclining position and then slaughtered him, although he did not clarify what instrument was used to separate the head from the body. The mufti then explained that since the legal school in Egypt was Hanafi, it did not recognise retaliation against a father for the murder of his son. However, the Maliki school did, on condition that there was evidence of intent. Now the situation described, the body reclining and the blow separating the head from the body indubitably indicated the intention to kill. The mufti recommended a compromise between the Hanafi position of no retaliation against a father, and the Maliki opinion of retaliation – provided that the father had shown intent; consequently, the mufti advocated application of the lesser penalty.

He was asked to advise the Head of the Serious Crimes Cases in April 1902, number 1481, with regard the decision taken by the Office of Serious Crimes to submit the papers of the Public Prosecution's case number 2309, which was in the court agenda as number 163 of 1902. This case involved one 'Abd al-Mu'ti al-Sayyid Zahra who stood accused of murdering the girl Zaynab, daughter of Fadl Allah al-Sudani with intent, by strangulation. The mufti was asked to convey his written opinion before 24 April 1902, at which date the court would deliver its sentence.

He responded: After examining case number 162 of 1902, that is forthcoming in the court's agenda, in which 'Abd al-Mu'ti al-Sayyid Zahran was accused of murdering Zaynab, daughter of Fadl Allah al-Sudani, with intent and by strangulation on 29 September 1901, the mufti observed that the evidence that the man had killed with intent was irrefutable. Still, with regard to retaliation in such a case, there were differences in opinion, because, for example, according to Abu Hanifa, there was no retaliation in a killing through strangulation or drowning. Yet his companions considered that there had to be retaliation- similar to that for a murder with a piercing

²⁰¹ Fatwa 397, ledger 000002

object. This was the same opinion as that given by a school that was not Hanafi, towards which the mufti was himself inclined – *argahuhu*, in agreement with the verse: “The prospect of retaliation saves lives,”²⁰² and His saying: “Retaliation for the slain is ordained upon you,” until the end of that verse.²⁰³ And, this was further corroborated by the Sunna, and by what the Imam Ibn Abi Shayba narrated concerning the Messenger of God’s statement that the person killed by means of a stick and a whip was just like a person slayed with intent, and the price was one hundred cattle. Yet the mufti was of the view that this was not accurate enough for one to fall back on, since beating with a stick could be to chastise, discipline, or castigate, but without the intention of killing. However, what the *Shari‘a* required in a case such as this was retaliation; consequently, after all the conditions, terms and evidence in this accusation were met, and these fulfilled the requirements of the Law, the sentence against the killer in this case could be carried out. Enclosed were the papers of the case.²⁰⁴

Structure

The question was about whether to impose the death penalty on a man found guilty of killing a woman by strangling her. However, there were differences in the Hanafi school of law, which was the official school in Egypt, as regards retaliation. Abu Hanifa himself had not regarded murder by strangulation, but his students did, as did the Maliki school; accordingly, the mufti considered that the penalty needed to be applied, since the act of strangling, which was slow and protracted, indicated intention, and he cited as evidence two verses from the Qur’ān in favour of retaliation. The mufti showed that he was faithful in his application of the *uṣūl*, e.g. in this instance, he may have cited the verses on retaliation to stress that the Qur’ān preferred retaliation, even though the leader of the Hanafi school considered there could be no retaliation on strangulation or drowning. ‘Abduh simply extrapolated from the verses.

²⁰² *Qur’ān*: 2: The Cow: 179

²⁰³ “A free man for a free man, a slave for a slave, a female for a female.” *Qur’ān*: 2: The Cow: 178

²⁰⁴ Fatwa 467, ledger 00002

9 – MISCELLANEOUS²⁰⁵

Fatwa on the authority of the Mufti's fatwa

Concerning the fatwa delivered on 3 Muharram 1322, number 258,²⁰⁶ related to a one's acknowledgement of another's child by way of recognition of one's paternity, the *khawāga* Qustandi Kadina asked whether this fatwa was an operative fatwa? And, was it to be implemented by law, so that the fatwa was applicable and did not require the mufti to swear an oath upon it to make it so?

He responded: The fatwa of the mufti was his rendering of the required ruling in a case, and there was no doubt it was acted upon legally, nor was the mufti's oath necessary for it to be operative, because whether there was an oath or not, it was still in force.²⁰⁷

Structure

The questioner, a *dhimmī*, or non-Muslim, was querying the authority of a *mufti's* learned opinion, i.e. of his fatwa, and the person questioned was the Grand *Mufti* of Egypt. The fatwa in question concerned a man's acknowledgement of paternity.

The mufti had stated that if the man had made a declaration that the child was his in the presence of witnesses, and the child in question heard him and accepted the statement, the child acquired the same rights as the man's legitimate children.

The questioner's tone appeared to challenge the mufti's authority to make such a statement.

His response was firm and brief, to the effect that the learned opinion of the mufti was binding.²⁰⁸ Such a statement was effective as a law, and if it were not yet operational, it would become so by setting the fatwa in question as a precedent.

The questioner's name suggests that if he was not an Egyptian, and that he was either Greek or Levantine. If he was an Egyptian, or a resident of Egypt, then he may not have been aware of the extent of the mufti's authority - which was taken into consideration even among the Christians of Egypt with regard to matters of inheritance.

²⁰⁵ This section is so named because of the difficulty of classifying each of the fatwas in a specific category.

²⁰⁶ See fatwa concerning illegitimate child, in the section dealing with inheritance.

²⁰⁷ Fatwa 275, ledger 00003

²⁰⁸ Especially in a situation as delicate as this, involving legitimacy, inheritance, and perhaps someone's honour.

Salama Effendi Mansur asked about two matters. The first involved a little girl who had three full paternal uncles who lived in her town, and who were qualified to marry her off; she also had three maternal uncles, and one of these had married her off to a person who was not her equal. Accordingly, wasn't that marriage invalid? The second question involved a youth and his wife who lived with his father, in a joint household; then, the father and son quarrelled, and the son took an oath that he would divorce three times (irrevocably) rather than live in companionship with his father. He then left the house with his wife and went to live in another place, independent of his father; however, his work involved cultivating his father's land. In this case, the question was, was his working with his father to be considered living in companionship with the latter? And, if the youth wished to return to his father's house to live in companionship with him, would he be breaking his oath or not?

He responded: Concerning the first case, the obligation to marry off the little girl was that of her full paternal uncles, because they were agnates; the maternal uncle had no such right, since he was a cognate and a relative of the womb. The scholars had declared that the duty of marrying off fell within the order and ranks of inheritance, and the relative who took priority prevented any one from a lower rank from taking over. Hence, the agnates preceded the cognates; therefore the marriage, - that the maternal uncle assumed, - of the little girl to someone who was not her equal was legally invalid; it was not grounded on the rules of matrimony, and that little girl was not the wife of that person. Regarding the second question, cultivating land was not to be considered living in companionship, and so his oath remained unbroken. However, if the son returned to live in his father's house, his divorce was final.²⁰⁹

Structure

The mufti was asked two separate questions; one concerned the validity of a marriage carried out by a maternal uncle as marriage guardian, when there were three paternal uncles available to marry off a little girl. Two was about the conditions of an oath of divorce taken by a youth who had quarrelled with his father.

He answered the first question by indicating that in such a case, the little girl could be married off only by a paternal uncle, - an agnate, as opposed to a maternal uncle- a cognate, since agnates had priority over cognates, like the laws of inheritance. Thus,

²⁰⁹ Fatwa 215, ledger 000003

the marriage carried out by the little girl's maternal uncle was invalid, since any one of her paternal uncles had priority over the maternal uncle as a guardian in marriage. In answer to the second question concerning the oath taken by a youth who, after a clash with his father swore he would divorce his wife irrevocably if ever he returned to live in companionship with his father, the mufti indicated that the fact that the youth worked with his father did not constitute companionship, but work. However, if the youth went back to live in his father's house, the divorce became irrevocable.

CONCLUSION

Although the queries presented here were a small fraction of those addressed to the mufti, some could clearly be regarded as contemporary, i.e. asked of a mufti nowadays; others were singular in that they depicted Egyptian society at the turn of the nineteenth century.

Among these latter was the case of the man who established a family endowment with the express stipulation that his home should remain in the same state it had been in when he founded the endowment.²¹⁰ He included the servants and slaves as beneficiaries, with his family, specifying that they all live together and share the same existence- without discord or immoral behaviour. Anyone who left the family home without a valid motive, such as army service, forfeited the right to benefit from the revenue of the endowment. This suggested that it was natural for extended families to live altogether, but that there was already a tendency to break free from such an arrangement.

The existence of slaves in family homes appears to have been quite a common phenomenon among the families with means. However, it could result in a number of issues. For instance, there was the query was from a lady who had been a slave; her master had married her, and she had given birth to his children, who were born free. However, as he did not free her, although she had a document proving he had married her, she remained a slave until his death, when she became free. Thus, she was not entitled to a portion of his legacy, as would a free wife. Then there was the case was that where a father elected to marry his daughter off to his slave, but when the father died, the marriage became invalid, and had to be annulled. This was because the wife now “owned” her husband, and there was an obvious conflict of interests.

It was also clear from the questions that arranged marriages between young children were a common feature of those times. There was the poignant case was that of the young girl, a minor, who was married by her father to a boy who was not her equal. The youth could therefore not afford to support her. Her father being judged dissolute, the mufti condemned his behaviour and declared that when she came of

²¹⁰ The endowments, or *waqfs* established within a family, were intended to preserve family possessions, especially agricultural land and property, from being divided or partitioned among various beneficiaries through bequests, until it eventually disappeared. The establishment of *waqfs* was discontinued around the middle of the twentieth century

age, the girl could choose to annul the marriage, since her father had demonstrated his inability to choose a suitable husband for her. Fatherless little girls, as well, could find themselves married off at a tender age by a paternal relative, - like the ten year old girl married by her paternal uncle to his baby son. This was traditional practice, and it was enforced to guarantee that property, whether it entailed agricultural land or real estate, remained within the family.

While many of the financial transactions could have taken place in the present, two queries in particular stood out as characteristic of those earlier times. The first concerned the Egyptian lady who owned Suez Canal Shares, and wished to sell these, but the company told her that under French law, she was not authorised to sell her shares, because only her husband was allowed to dispose of these. The mufti pointed out that this case was being dealt with in Egypt, where Islamic law allowed women to be owners, and to dispose of their property as they saw fit. The second case was almost as interesting, as it pointed to the incongruity of a non-Muslim foreigner wanting to know whether a *muḍāraba* transaction was permitted in Islamic law.

That customs or rites practiced at that time among certain groups in Egypt were peculiar was demonstrated by the Bedouin style marriage, where the girl's father grasped the stalk -*qaṣlah* - of a palm *khūs al-nakhl* in his hand, then extended it to the future husband and said: "Take the stalks of so and so on the *Sunna* of Allah and His Messenger." The suitor responded to this, saying that he accepted her stalk.

Generally speaking, many of the queries implied that, - at the time, as in the present, - people got married and produced children with a large measure of insouciance. Indeed, the query involving the drunken party showed how men joked among themselves about getting married, whereas the question from the Ministry of Health concerning the children abandoned by parents who could not provide for them substantiated this.

It was also clear that the condition of married women, with no independent means, was not always easy. One instance was that of the wife thrown out of the house by her husband, after he had moved her away from her family, taken her jewels and sold them, abused her, and thrown her out on the street, thus compelling her to return to her father's house; yet despite all of this, he subsequently tried to obtain a court order to force her to return to live with him.

That the mufti was well aware of the many issues facing Egyptian society was apparent from his responses. Indeed, he denounced polygamous marriages in several articles;²¹¹ he also stressed repeatedly that children had to be brought up, educated and cared for properly.²¹² He issued a fatwa declaring it permissible for well-to-do families to take in and nurture the children of needy parents, provided that the parents consented. The rulings he gave were almost always those approved by the Hanafi school, since it was the system followed by the Egyptian administration, and he often cited juristic texts to back his opinion.

Because they reflected a society that was slowly adapting to change, most of the questions asked of the mufti were traditional, and his responses were generally traditional. Moreover, when asked to elucidate a problem, he was careful to give reasons for his opinion and in his explanation, especially when it was a response to a specialised or educated query, or when the issue was intricate, crucial and singular. For instance, when asked whether a certain property was to be considered a *waqf*, or whether it was to be treated like an inheritance, and divided among the heirs, he indicated that the conditions surrounding the claim that it was a *waqf*, including the testimony of a witness who told the court that she had heard from several people that the owner had meant it to be an endowment, were flawed. For an endowment to be valid, he continued, it was necessary that the conditions surrounding a *waqf* endowment were clearly stipulated, with witnesses attesting to these at the time of the formulation of the endowment.

On another occasion, when asked about the validity of a divorce signified by a man in a letter bearing his signature and addressed to his brother, the mufti declared that it was valid. The mufti observed that since the man had conceded that the letter stating that he divorced his wife three times was in his calligraphy, the divorce was final - since his admission had the same value as a spoken statement.

The mufti's opinions were also balanced, measured and fair. Thus, when asked whether it was permissible to place under interdiction an unmarried, affluent man, who was without family or relatives, because he was spending his money

²¹¹ See 'Imara, Vol. 2, p. 76-81; 82-87. Among the points 'Abduh underlined was that polygamous marriages made for storms of contention - '*awāsif al-shiqāq* - within a single family which included several wives, and their different offspring. *Ibid.*, Vol. 2, p. 84.

²¹² See for example in *Ibid.*, Vol. 1, p. 343.

without harming anyone, and doing nothing legally reprehensible, the mufti pointed out that it was not permissible to do so, because the way in which the man was disposing of his money did not require his being protected.

Also when asked whether it was permissible for the mother of a baby girl to make a deal with her dead husband's family allowing her to take from six *feddāns* of land for her and for the baby daughter, the mufti replied that since the mother was neither the girl's guardian, nor her trustee, she could not be party to such an agreement, which depended on the child's trustee. If the trustee permitted this, then the agreement was acceptable, and if he rejected it, the agreement was invalid.

Furthermore, in line with his times, 'Abduh was careful not to rock the boat unduly, as for example when faced with the various queries involving the little girls married off before they had reached puberty; he was always careful to stress that when they did reach puberty, they could always have the marriage annulled. However, he was intransigent when it came to transgressing the *Shar'*, so that when faced by a serious case, namely that of the woman who declared herself an apostate in order to obtain a separation from her husband, he did not hesitate to declare that the divorce was invalid, and that she had to return to her husband. In his response he cited, as justification, the jurists of Samarqand.

Nevertheless, once confronted with the various cases involving abused women, or women facing a life of dissolution because their husbands were in gaol, missing, or had failed to support their wives, 'Abduh set about finding solutions. The impasse, caused by the rigidity of the Hanafi stipulations on divorce, led him to find a way that was in conformity with his approach as a jurist, his training as a Maliki scholar, and his denial that the consensus of scholars existed. Accordingly, he worked from within the *Sharī'a*, by turning to the stipulations on divorce elaborated by the Maliki school- which were much more lenient. This was *takhayyur*, since he took all the stipulations- instead of just taking bits and pieces and then patching them together, which would have been *talfīq*.

He seldom cited the Noble Book or the Sunna in his fatwas, but once, when asked to give his view on the acceptability of stunning animals before slaughtering them, in the famous Transvaal fatwa, he cited a verse from the Qur'ān, which he interpreted to mean that God had made it lawful for Muslims to partake of the foods that had been made lawful to the other people of the Book. He certainly intended to

show that since Islam was a compassionate and practical religion, Muslims who were in remote locations where they were a minority were permitted to eat the food eaten by the people of another monotheistic religion. Another case where he implied the same thing was that of the mother appointed as financial guardian over her son; this minor's half-brother had contested this, leading the mufti to declare that she was his mother, and since it was her duty to preserve his money for him, her appointment as his guardian benefitted the boy. 'Abduh stressed that the half-brother was to be prevented from taking over the guardianship or trusteeship of this boy.

These were among the numerous occasions in which 'Abduh justified action through *maṣlaḥa*. In reference to the abused women, it was necessary, and therefore beneficial to society to find a solution to these women's ills. Concerning the permissibility of eating the food of the People of the Book, the Muslims in Transvaal were a minority, and they needed to blend in with the People of the Book, not draw attention to themselves and become objectionable.

Similarly, when he declared it acceptable that the person responsible for renting property for its owners accept a gratuity since it was customary, or habitual, for people to pay this money, he meant that this was *'urf*, i.e. practice that was generally understood, or established. Accordingly, *'urf* as well fell under the category of *maṣlaḥa*, in this case, a consideration of interests over time. Thus, most, if not all, of the mufti's more significant fatwas sought justification through *maṣlaḥa*. There was the fatwa on the need to install water pipes and taps, and to prevent the public from establishing stalls in thoroughfares that lead to cemeteries.

The mufti also justified many of his fatwas in line with the objectives of the *Shar'*, and very similar to *maṣlaḥa*, but established on the essential necessities *ḍarūrāt*. Indeed, many of his responses to the official queries that reached him from various government administrations were established on the notion of resolving problems or remedying evils legally, and from within the parameters set by the Law. There was the fatwa on the permissibility of cutting open a dead woman's belly to save the life of her yet unborn baby. This conformed with the first of the *ḍarūrāt*, necessities, of the *maqāṣid*, i.e. the necessity to preserve life. The same could be said for the fatwa allowing well-to-do families to take in abandoned children, including little Sayyida, to care for them, nurture them and give them an education. Also, when asked officially whether a father was required to pay the costs of treatment of his

adult, but ailing son, the mufti judged that the father was required to pay for the treatment of this youth until he became well, on the grounds that the *Shar‘* required that the preservation and safeguard of the body. In one fatwa, he favoured leaving a little girl in the custody of her maternal grandmother to safeguard her life, as well as preserve her religious faith. Religion and, by extrapolation, religious faith was the second of the necessities.

Thus, in the Transvaal fatwa, he mentioned that there was no harm in wearing a hat, as long as the intention was to protect oneself from the harmful effects of the sun’s rays. This satisfied the first necessity of preserving, or safeguarding life, by avoiding a harmful situation; yet, more rigid jurists, could have regarded the donning of a hat as signifying the desire to imitate non-Muslims, and perhaps invoked the second of the *darūrāt*, which was the preservation of religion. In another fatwa, ‘Abduh commented about a French mother who had taken her three children from her Muslim husband with her to live in France, observing that it was “a country where it was impossible to guarantee that the children’s faith and religious practices [were] assured.”

No cases involved the need to preserve the intellect, which was the third objective, but there was at least one case related to the fourth, i.e. the need to protect one’s property and wealth. This was the case of the woman who was stupidly squandering the property and money left to her and to her sister. The mufti declared it necessary to impose interdiction *ḥajr* upon her because of her foolish and irresponsible spending. In another fatwa in the category of preserving property, the mufti approved the nomination of a man as guardian over his missing father’s property, to preserve it until the father returned, especially since the son was the missing man’s heir, and because in the missing man’s absence, his brother had unlawfully seized part of his property.

The sixth objective honour, or *ird*, was not recognised by all the jurists. However, ‘Abduh considered it would be useful to impose the penalty for calumny and defamation on the man who accused his wife of adultery, after declaring in court that the daughter he had acknowledged was illegitimate.

Throughout his spell as mufti, ‘Abduh showed not only that he was fair and fully aware of the issues presented to him, but also that he was ready, whenever it was appropriate, to restore rights to those whose rights had been unlawfully taken. His

methods therefore conformed with his theoretical approach as a jurist. One fatwa in particular that he gave showed that he was consistent in insisting, when in doubt, on the need to consult the sources of Islamic law. This was the fatwa on the Druze who had become a Muslim. ‘Abduh replied that there was no traditional way to be followed when considering a person who converted to Islam as Muslim, except the Tradition - Sunna of the Prophet. This was also one of the rare occasions where ‘Abduh used *qiyās* or analogy, when he demonstrated that the Prophet had accepted converts, apostates, and hypocrites, as well as those who attested that there was no God but Allah, and therefore that Muslims were required to do the same. Perhaps because he was addressing a cleric, ‘Abduh continued this fatwa to say that Muhammad was the Messenger of God, that the Qur’ān was true, that the Hereafter was true, and that all that God had made obligatory in His Book was necessary, etc. Possibly because the question dealt with faith, this was one of the few occasions that the mufti actually referred to the Sunna of the Prophet, and cited Traditions, as well as accounts, as evidence. He concluded that only God could gauge intentions, and therefore even if the Muslim community were to reject the conversion of this Druze, it was enough for him to have professed the creed of Islam to himself for the Druze to become a Muslim.

He not only cited the opinions of jurists to back his views, but he was also consistent in working from within the *Shar‘* to apply new, or more timely ways, for example, the objectives of the Law, to deal with old issues; or to find practical and applicable solutions, such as the use of *takhayyur*, because he did not believe in the consensus of the scholars.

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