Introduction

Drawing upon the legal rules and principles either stated in the Qur'ān and the prophetic *sunna* or capable of being derived from these two sources by analogical reasoning (*qiyās*) or juristic consensus (*ijmāʿ*), Muslim jurists have constructed the large and impressive corpus of legal rules and principles known as *fiqh*.[1]

Since the last quarter of the nineteenth century, western scholars have devoted considerable attention to the study of *fiqh* and its relevance to everyday life. An important pioneer in this enterprise was the Dutch Orientalist Snouck Hurgronje, who argued that the *fiqh* was not a system of law, strictly speaking, but a system of religious norms that seeks to promote an ideal society of believers by regulating the moral and ethical behavior of Muslims. The practical relevance of *fiqh*, Snouck Hurgronje said, was applied only to the areas of ritual law, personal status, inheritance and endowments.[2] A generation later the French Orientalist G.H. Bousquet characterized the *fiqh* as a system of religious duties in which human acts are classified as either obligatory, recommended, neutral, disapproved of, or forbidden.[3] These views dominated western scholarship on Islamic law for much of the twentieth century.

Writing at about the same time as Snouck Hurgronje, the Hungarian scholar Ignaz Goldziher advanced the idea that the *fiqh* was a system of law, albeit a "religious" law. Another scholar, the German sociologist Max Weber, characterized the *fiqh* as a "sacred law" that was irrational in two important respects. It was *procedurally* irrational because the tools employed to determine its legal norms (that is, oaths, curses, and the appeal to divine authority) were not subject to human reason; and it was *substantively* irrational because *qāḍī*s, or judges, decided cases according to ethical, political, personal or utilitarian considerations, rather than an established body of legal doctrine. This combination of procedural

[1] Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992). On the sources of Islamic law (*uṣūl al-fiqh*), see also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991); Wael B. Hallaq, *A History of Islamic Legal Theories: An introduction to Sunnī* uṣūl al-fiqh (London: Cambridge University Press, 1997).

[2] C. Snouck Hurgronje, "De la Nature du droit Musulman," in *Selected Works of C. Snouck Hurgronje*, ed. G.H. Bousquet and J. Schacht (Leiden: E.J. Brill, 1957), 256–63.

[3] *EI*², s.v. 'Ibādāt.

and substantive irrationality gave rise to the term "*kadijustiz*" and to the image that has dominated the popular perceptions of Islamic law to this day.[4]

Our current understanding of the nature of Islamic law owes much to the work of another German scholar, Joseph Schacht. Like Snouck Hurgronje and Bousquet, Schacht regarded the *fiqh* as "an all-embracing body of religious duties."[5] At the same time, however, he argued that the *fiqh* is a rational and coherent legal system in which individuals possess rights that make it possible for them to pursue claims against one another in the world of social relations.[6] It was Schacht who placed the study of Islamic law into an historical perspective, constructing a rigorous methodology for tracing its development from the time of the Prophet until the ʿAbbāsid period.[7] The year 287/900 was, for Schacht, a major watershed that marks the boundary between the dynamism of the formative period and the increasing rigidity of the classical and post-classical periods. He associated this watershed with the "closing of the door of *ijtihād*," or independent reasoning.

> By the beginning of the fourth century of the hijra (about AD 900) … the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of *ijtihād*', as it was called, amounted to the demand for *taḳlīd*, a term … which … came to mean the unquestioning acceptance of the doctrines of the established schools and authorities.[8]

For Schacht, it was the transition from a regime of *ijtihād* to a regime of *taqlīd* that explains the "essential rigidity" of Islamic law since the fourth/tenth century and the fact that Islamic law purportedly "lost touch" with subsequent political, social, economic and technological developments.[9] Schacht also knew that Muslim civilization flourished for centuries after the "closing of the door of *ijtihād*." How was it possible for this civilization to retain its dynamism when the legal system according to which it operated suffered from "*ankylose*"?[10] Schacht acknowledged that Muslim scholars living under a regime of *taqlīd* might be as creative as their predecessors who lived under a regime of *ijtihād*, although he qualified this assertion with the caveat that the creativity of scholars living under a regime of

[4] See Max Weber, *Wirtschaft und Gesellschaft* (2nd edn 1925), translated by Edward Shils as *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1959), xlviii–xlix, lv; Bryan S. Turner, *Weber and Islam: A critical study* (London: Routledge and Kegan Paul, 1974), 107–21, at 109; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim* Fiqh (Leiden: E.J. Brill, 1999), 42 ff.

[5] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), 1.

[6] Johansen, *Contingency in a Sacred Law*, 51 ff.

[7] *The Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press, 1950).

[8] Schacht, *An Introduction to Islamic Law*, 71.

[9] Ibid., 75.

[10] Joseph Schacht, "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam," in *Classicisme et déclin culturel dans l'histoire de l'Islam*, ed. R. Brunschvig and G. von Grunebaum (Paris: Maisonneuve et Larose, 1977), 141–61, at 141.

taqlīd would have been constrained by the "limits" established by the "nature" of the *sharīʿa*.[11] But this begs the question: what are these limits and how is it possible for jurists operating within the constraints of a rigid and unchanging system of law to express legal creativity?

To the best of my knowledge, Schacht never directly and fully addressed the tension between his views of the rigidity of classical Islamic law and the creativity of Muslim jurists living after the year 900. But he was clear about the mechanism by which this tension might be resolved. He wrote, "New sets of facts constantly arose in life, and they had to be mastered and moulded with the traditional tools provided by legal science."[12] These tools, and the methods by which they might be employed to deal with new facts and social change, were the cultural capital of the *muftī*, a specialist in the law who is qualified to issue an expert legal opinion, or *fatwā*, on points of legal doctrine. The fatwās issued by individual muftīs were often put into collections; if the decision of a muftī came to be regarded as correct by subsequent scholars, it would be incorporated into the doctrinal lawbooks of the school to which he belonged. Thus, the doctrinal development of Islamic law in the period following the closing of the door of *ijtihād* owed much to the work of the muftī.[13]

If we want to understand how Islamic law functioned in practice after the fourth/tenth century, we would do well to examine the activity of the muftī, a task that is still in its scholarly infancy.[14] In the present study, I seek to make a small contribution to our understanding of the work of the muftī and its relation to the application of Islamic law in a particular time and place: the Mālikī muftī in the Islamic West in the period 1300 to 1500 CE. On the following pages, I will undertake a close reading of a series of fatwās that were issued in the Islamic West during this period in an attempt to answer the following questions: Was the application of Islamic law limited to the areas of ritual law, personal status, inheritance, and endowments, or did it extend to other areas? What was the nature of the work of the qāḍī and the muftī, and how did the work of one complement that of the other? Did qāḍīs issue their judgments on the basis of ethics, politics, personal expediency, or utility or on the basis of Islamic legal doctrine? Or did they perhaps issue their judgments on the basis of a combination of extra-legal and legal considerations? Is there any evidence of creativity in the opinions of the muftīs? If so, what is the nature of that creativity? How was the office of the muftī regulated? How effective a mechanism was Mālikī legal doctrine in resolving disputes and regulating society? What was the relationship between the legal system and the state?

[11] Schacht, *An Introduction to Islamic Law*, 71–3.
[12] Ibid., 73.
[13] Ibid., 74–5; see now Wael B. Hallaq, "From *Fatwā*s to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society*, 1:1 (1995), 29–65.
[14] See now *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers (Cambridge, MA.: Harvard University Press, 1996). For the Ottoman period, see Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); Haim Gerber, *Islamic Law and Culture, 1600–1840* (Leiden: E.J. Brill, 1999).

al-Wansharīsī and the *Miʿyār*

The fatwās to be analyzed in this book are all found in the *Kitāb al-Miʿyār* of Aḥmad al-Wansharīsī, who was born in 834/1430–31 in Jabal Wansharīs (Ouarsenis), a range of high mountains in today's western Algeria.[15] Political instability forced his family to move to Tlemcen, the capital of the Zayyānid dynasty, in all likelihood when Aḥmad was five or six years old. In Tlemcen al-Wansharīsī studied the Qur'ān, Arabic grammar, and, eventually, Islamic law with distinguished scholars. After completing his studies, he began to teach, issue fatwās, and write juridical treatises – at least five treatises by 871/1466–67. A key turning point in al-Wansharīsī's life occurred in 874/1469, when he was forty years old. For reasons that are obscure, he incurred the wrath of the Sulṭān of the Banū ʿAbd al-Wād, Muḥammad IV, who ordered the plundering of his house. Leaving everything behind, including his books, al-Wansharīsī fled to Fez, where the Waṭṭāsids recently had taken over as regents for the Marīnids. Adopting Fez as his permanent residence, al-Wansharīsī continued his activities as a muftī, teacher, and writer. During his first decade in Fez he wrote four additional legal treatises and by 890/1485 was one of the city's most distinguished jurists.[16]

As a refugee scholar, al-Wansharīsī was dependent on the excellent private libraries of Fez, one of which belonged to his former student, Muḥammad b. al-Gardīs, scion of a family that had been involved in Fāsī scholarship and politics since the time of the Idrīsids (172–314/789–926).[17] Over the course of several centuries, the al-Gardīs family had assembled a magnificent collection of precious Andalusian and Maghribī manuscripts that was especially strong in Mālikī substantive law and jurisprudence. Ibn al-Gardīs opened the doors of the library to his master, giving him unrestricted access to the manuscripts. As al-Wansharīsī moved through the library, he came across thousands of fatwās that had been issued in the Islamic West in the period between approximately 391/1000 and

[15] His full name is Abū al-ʿAbbās Aḥmad b. Yaḥyā b. Muḥammad b. ʿAbd al-Wāḥid b. ʿAlī al-Wansharīsī. On his life and work, see the indispensable articles of Francisco Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida," *al-Qanṭara*, XII (1991), 315–52; idem, "Las obras de Aḥmad al-Wanšarīsī (m. 914/1508). Inventario analítico," *Anaquel de Estudios Árabes*, III (1992), 73–112; idem, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," *Miscelánea de Estudio Árabes y Hebráicos*, XLII–XLIII (1993–94), 317–61; idem, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). II: Contenido," *Miscelánea de Estudio Árabes y Hebráicos*, 44 (1995), 213–46. Cf. Mohamed b. A. Benchekroun, *La vie intellectuelle marocaine sous les Mérinides et les Waṭṭāsides (XIIIe XIVe XVe XVIe siècles* (Rabat, 1974), 395–401. For a convenient summary of the contents of the *Miʿyār*, see Vincent Lagardère, *Histoire et Société en Occident Musulman au Moyen Age: Analyse du Miʿyār d'al-Wanşarīsī* (Madrid, 1995); on the problematic and disturbing genesis of this book, see the review of Francisco Vidal Castro in *Al-Qanṭara*, 17 (1996), 246–54.

[16] Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida," 320–9. For a detailed discussion of al-Wansharīsī's literary *oeuvre*, see idem, "Las obras de Aḥmad al-Wanšarīsī," 73 ff.; cf. Benchekroun, *La vie intellectuelle marocaine*, 398–400.

[17] Abū ʿAbdallāh Muḥammad b. Muḥammad b. al-Gardīs al-Taghlibī (d. 897 or 899/1491–92 or 1493–94). For biographical details, see *Miʿyār*, introduction, iv; Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida," 333.

890/1495. These fatwās represented nearly half a millennium of Mālikī legal activity, which, with regard to the Andalusian material, was drawing to a fast and dramatic close.

I imagine that it was on one of al-Wansharīsī's visits to the library that he conceived the idea of compiling a single, integrated collection of fatwās. Perhaps this decision was motivated by his awareness of the impending defeat of the Naṣrids of Granada (which would occur in 897/1492) and by a desire to preserve an important aspect of the Andalusian cultural heritage. Perhaps he was following a new trend in Mālikī legal scholarship; at least two other collections of fatwās issued by various muftīs had appeared during the middle third of the ninth/fifteenth century.[18] Certainly, he was inspired by his awareness of the potential usefulness of such a collection for contemporary judges and jurists and, perhaps, for posterity.

Some time around 890/1485, al-Wansharīsī began his project. With the permission of Ibn al-Gardīs, he removed from the library several manuscripts, or fascicles thereof, and loaded his cargo on a donkey. He then made his way through the narrow and winding streets of Fez to his house, where he guided the donkey through the entrance and into the courtyard, unloaded his cargo, and arranged the materials into two piles. Once inside the house, the scholar would remove his outer cloak, exposing a wool garment (*qashshāba*) fastened with a leather belt that left his bald pate uncovered. With an inkwell hanging from his belt, a writing instrument in one hand, and a piece of paper in the other, he would walk back and forth between the two piles, selecting individual fatwās for transcription.[19] One imagines that the toils of transcription were eased by his interest in the texts, which gave access to the litigants' lives and to the jurists' wisdom, against which he tested and honed his own legal skills. In this manner he toiled, at what pace we do not know, for eleven years.[20] In the colophon to the finished work, al-Wansharīsī indicates that he completed the text on Sunday, 28 Shawwāl 901 (10 July 1496).[21] But he continued to make corrections and revisions and to add new material until his death in 914/1508, nearly a quarter of a century after beginning the project.[22] The preface to the *Miʿyār* contains the following brief statement of purpose:

[18] See al-Burzūlī (d. 841/1438), *Jāmiʿ al-masāʾil mimmā nazala min al-qaḍāyā biʾl-muftīn waʾl-ḥukkām*, and Abū Zakariyāʾ Yaḥyā b. Mūsā b. ʿĪsā al-Maghīlī (d. 883/1478), *al-Durar al-maknūnā fī nawāzil Māzūna*.

[19] The use of "Rūmī" paper was itself the subject of a fatwā issued by Abū ʿAbdallāh Ibn Marzūq (d. 842/1439). See al-Wansharīsī, *Miʿyār*, vol. I, 75–104. I hope to analyze this fatwā in a subsequent publication.

[20] Upon the death of Ibn al-Gardīs in either 897/1491–92 or 899/1493–94, al-Wansharīsī presumably secured permission for the continued use of the library from his former student's heirs.

[21] Ibid., vol. 12, 395.

[22] Although the private library of Ibn al-Gardīs was al-Wansharīsī's primary source for the fatwās of al-Andalus and the far Maghrib, it was not his only source. Other texts, in other libraries, provided him with fatwās from the Near and Middle Maghrib, Ifrīqiya, and Tlemcen. Especially important in this regard were the *Masāʾil* of al-Burzūlī and *al-Durar al-maknūnā fī nawāzil Māzūna* by al-Maghīlī (see above, note 18). On the sources of the *Miʿyār*, see Vidal Castro, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," 323–36.

> … This is a book that I have entitled *al-Miʿyār al-Muʿrib wa'l-jāmiʿ al-mughrib ʿan fatāwī ʿulamāʾ Ifrīqiyā wa'l-Andalus wa'l-Maghrib* [The Clear Measure and the Extraordinary Collection of the Judicial Opinions of the Scholars of Ifrīqiya, al-Andalus, and the Maghrib].[23] In it I have assembled responses [issued by] modern and ancient [scholars], those which are the most difficult to find in their sources and to extract from their hiding places on account of their being scattered and dispersed and because their locations and the access to them are obscure. [I have assembled the book] in the hope that [it] will be of general utility and that the [heavenly] reward that results from it will be augmented. I have organized it in accordance with the categories of the law in order to facilitate its use by whoever examines it, and I have specified the names of the muftīs – except on rare occasions. I hope that God – praised be He – will designate it as one of the means for obtaining happiness and as a road leading to a happy outcome and increase. For He – may He be magnified and exalted – is the one from whom one inquires with regard to the most abundant reward and guidance towards the truth.

The voices that dominate the remainder of the text are those of hundreds of muftīs who lived in the Islamic West between 1000 and 1500 CE. Only on rare occasions does the reader discern the presence of the compiler and copyist, as, for instance, when al-Wansharīsī makes certain editorial remarks relating to the identification of documents that he has transcribed, offers a brief comment on a fatwā with which he disagrees, or inserts one of his own fatwās into the text (as he does twenty-seven times, by my count). In terms of modern notions of authorship, al-Wansharīsī's subordination of his own voice is striking when one considers the enormous labor – both mental and physical – involved in the compilation of the *Miʿyār*.[24]

The size, geographical range, and chronological parameters of the *Miʿyār* set it apart from most other fatwā collections. Although the individual responses in the lithograph and printed edition of the *Miʿyār* are not numbered, I estimate that there are approximately 6,000 fatwās in the text.[25] Muḥammad Ḥajjī, the modern editor of the *Miʿyār*, has compared the collection to a bottomless ocean that easily swallows anyone who penetrates its depths, observing that it was the legal text that he feared most as a student.[26] Further, whereas fatwā collections compiled prior to the ninth/fifteenth century generally incorporate the relatively limited output of a single muftī living in a particular time and place, the *Miʿyār* contains fatwās issued

[23] Note the minor discrepancy between the title that al-Wansharīsī gives to his book and its modern title (*ahl* versus *ʿulamāʾ*). For a discussion of variants in the title, see ibid., 321.

[24] Lithograph, 12 vols, Fez, 1314–15 [1897–98]; new edition, 13 vols, Rabat, Ministry of Culture and Religious Affairs, 1401–03 [1981–83]. The lithograph was produced on the basis of five manuscripts by a committee of eight jurists under the supervision of Ibn al-ʿAbbās al-Būʿazzāwī. The Rabat edition is essentially a transcription of the lithograph produced by a committee of seven scholars under the supervision of Muḥammad Ḥajjī. It contains many typographical errors and should be used with caution. All references to the *Miʿyār* in this book are to the Rabat edition. For further details on the publication history of the *Miʿyār*, see Vidal Castro, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," 344–7.

[25] I arrived at this figure by muliplying the number of fatwās that I have determined to be included in volume seven (480) by the total number of volumes in the collection (twelve).

[26] Wansharīsī, *Miʿyār*, vol. 1, 7:D.

by hundreds of muftīs who lived in the major towns and cities of Ifrīqiya, the Maghrib, and al-Andalus over nearly half a millennium.[27]

As al-Wansharīsī indicates in his preface, one of the underlying motivations of his project was to create a collection of judicial opinions that would be of practical use to judges. A judge who was confronted with a difficult case might want to consult a fatwā issued previously in a similar case; this judge would have been interested in the underlying legal issues of the earlier case, not its specific human details. It was for this reason that fatwās such as those included in the *Miʿyār* generally underwent a process of editing and abridgement. W. Hallaq, describing this process, distinguishes between primary fatwās and secondary fatwās. A primary fatwā is one that mentions the names of the litigants, the location of the dispute, and the date of specific events; it may also include a transcription of one or more legal documents relating to the case. These details were eliminated when the primary fatwā was transformed into a secondary fatwā. This process involved two steps: (1) the stripping away (*tajrīd*) of concrete historical details such as the names of people and places, the omission of words and phrases that were not of direct legal relevance, and the omission of documents attached to or embedded in a primary fatwā; (2) the reduction of the length of the fatwā through summary (*talkhīṣ*). As a result of this two-step process, a narrative dealing with a specific and historically contextualized situation was transformed into an abstract case that refers to one or more nameless individuals living in an unspecified place at an undetermined time.[28]

The following *istiftāʾ*, or request for a fatwā, addressed to Sīdī Miṣbāḥ al-Yāliṣūtī (d. 750/1349), is an example of a fatwā that has undergone the process of editing and abridgement:

> He was asked about a man who died leaving a specific number of heirs, according to the witnesses who testified on their behalf. Then, some time after [the man's] death, a ruddy-face youth claimed that he was a child (*walad*) of the aforementioned deceased by a concubine named So-and-So who [had served] in his presence; and that [the deceased] had acknowledged this [fact] during his lifetime. However, no testimonial evidence was given with respect to the [alleged] acknowledgement, except that witnesses testified on behalf [of the youth], on the basis of hearsay knowledge (*samāʿ*) – the duration of which was not specified as being long-standing – that the claimant was a son of the deceased, although [the identity of the mother] was not known; nor were they eyewitnesses [to the alleged acknowledgement]. This was established in the presence of the local qāḍī.
>
> One of the deceased's heirs countered that it had never been reported (*lam yusmaʿ min*) about his father that he had impregnated a concubine; that [such an assertion] was

[27] For mention of other fatwā collections, see Ḥajjī Khalīfa, *Kashf al-ẓunūn ʿan asāmī al-kutub waʾl-funūn*, 2 vols (Istanbul: Maarif Matbaasi, 1941–43), vol. 2, 1218–31; C. Brockelmann, *Geschichte der arabischen Litteratur* (Leiden: E.J. Brill, 1937–49), supplement III, index, s.v., *fatāwā(ī)*; Fuat Sezgin, *Geschichte des arabischen Schrifttums*, 9 vols (Leiden: E.J. Brill, 1967–), vol. 1, 393–596, passim.

[28] Hallaq, "From *Fatwās* to *Furūʿ*", 43–8.

> not widespread among the neighbors; [that his father was not known to have] affiliated the claimant to himself in terms of paternity; that [the deceased] was not known to have had a concubine with whom he had sexual intercourse [at any point in his lifetime]; and that the affiliation of the … [claimant to the deceased] after his death was merely a result of the fact that [the claimant] was subject to his guardianship (*tawliyatihi*), together with his [true] sons. This was established on the basis of [the testimony] of witnesses.
>
> [It was also established] that … [the female slave] who allegedly gave birth to the claimant had remained the private property of the deceased's daughter, So-and-So, who had reached puberty and attained mental discernment; and that when [the female slave] died, [she was] still the private property of [the daughter of the deceased, although in the meantime the daughter] had married [the female slave] to a man; and that she had given birth to the claimant, and that there was no knowledge of [the daughter's] having sold the two of them [viz., the mother or the child] until the time of … [the mother's death]; [nor was there any knowledge regarding the alienation] of her child after [his mother's death] until the moment when he brought the testimony [on his behalf] …[29]

Because the muftī to whom the *istiftā'* was addressed is well known, we can establish the year 750/1349 as the *terminus ad quem* of the events mentioned in the summary narrative. But we do not know the identity of the female slave, her master, her son, indeed of anyone mentioned in the *istiftā'*. Nor do we know the identity or status of the person who solicited the fatwā, the location of the dispute, or its chronological parameters. If this secondary fatwā were the only available evidence, we would have no contact with the lives that gave rise to this case. Many facts that would be of interest to the historian have been eliminated so as to focus on the underlying legal issues: must a widespread rumor be of long-standing duration in order to serve as probative evidence in a lawsuit; is the testimony of large numbers of non-professional witnesses acceptable; and must the witnesses have been present at the event about which they are testifying?

Fortunately, however, this secondary fatwā is not the only available evidence. One feature of the *Miʿyār* that sets it apart from other fatwā collections is that it includes a small number of primary fatwās that have escaped editing and abridgement. Some of these primary fatwās contain transcriptions of documents giving the names of the parties, the locations of transactions, and the dates of legal events. These transcriptions – precious artifacts of Islamic court practice of which little evidence has survived for the period prior to the Ottomans – include bequests, endowment deeds, gifts, oaths, acknowledgements, marriage contracts, dower agreements, deposits, appointments of agency, and judicial certifications. Al-Wansharīsī's inclusion of these documents in the *Miʿyār* demonstrates that the fatwās contained in the collection, although generally formulated in abstract and hypothetical terms, are in fact responses to real-life situations; they are not hypothetical answers to hypothetical questions, as some scholars believe to be true of this and other collections.

[29] *Miʿyār*, vol. 10, 360. Note: I have modified the text slightly for heuristic purposes.

The above-mentioned paternity dispute was the subject of a second fatwā preserved in the *Miʿyār* that, for whatever reason, was not subjected to editing and abridgement. The *istiftā'* mentions the name of the *mustaftī*, and it includes a transcription of several legal documents in which the names of the protagonists in the dispute are preserved, the location of the dispute is identified (albeit in general terms), and exact dates are specified. In this particular instance, the "deceased man", to whom the plaintiff sought to affiliate himself as a son, was a well-known person about whom additional information is available in other sources. The presence in the *Miʿyār* of primary fatwās such as this one opens up new avenues of investigation into the history of Islamic law in the Maghrib, making it possible to observe how the law was applied and to analyze the complex interplay between legal doctrine and social practice.

The Scope of The Book: Six Case Studies

For the greater part of the twentieth century, western students of Islamic law focused their scholarly energy and attention on *uṣūl al-fiqh* (Islamic jurisprudence) and *fiqh*.[30] It was only during the last quarter of the century that historians devoted increasing attention to fatwās in general and to the *Miʿyār* in particular, in large part because of their conviction that these texts bring us closer to social practice than other sources do – a conviction which I share. A pioneer in the study of fatwās was Hady R. Idris, who, using the *Miʿyār* as his primary source, produced a series of important studies on family law,[31] maritime commerce,[32] and the status of non-Muslims.[33] V. Lagardère has written several studies on judicial administration[34] and water law.[35] Others have written about women and property, child marriage,

[30] Schacht, *An Introduction to Islamic Law*, 209.

[31] Hady R. Idris, "Le mariage en occident musulman d'après un choix de *fatwā*s médiévales extraites du *Miʿyār* d'al-Wanšarīsī," *Studia Islamica* 32 (1970), 157–67; idem, "Le mariage en occident musulman: analyse de *fatwā*s médiévales extraites du "*Miʿyār*" d'al Wancharīchī," *Revue de l'Occident Musulman et de la Méditerranée*, 12 (1972), 45–62; 17 (1974), 71–105; and 25 (1978), 119–38.

[32] Idem, "Commerce maritime et *qirāḍ* en Berbérie orientale d'après un recueil de *fatwā*s médiévales," *Journal of the Economic and Social History of the Orient*, 4 (1961), 225–39.

[33] Idem, "Les tributaires en Occident musulman médiéval d'après le 'Miyār' d'al Wanşarīsī," *Mélanges d'Islamologie. Volume dédié à la mémoire de Armand Abel*, 3 vols (Leiden, 1974), vol. 1, 172–96.

[34] Vincent Lagardère, "La haute judicature à l'époque almoravide en al-Andalus," *Al-Qanṭara* 7 (1986), 135–228; cf. David S. Powers, "On Judicial Review in Islamic Law," *Law & Society Review*, 26:2 (1992), 315–41.

[35] V. Lagardère, "Droit des eaux et des installations hydrauliques au Maghreb et en al-Andalus au XI^{e} et XII^{e} dans le *Miʿyār* d'al-Wanşarīsī," *Les Cahiers de Tunisie*, 37–8 (1988–89), 83–122; idem, "Moulins d'occident musulman au Moyen Âge" (IX^{e} au XV^{e} siècles): al-Andalus," *Al-Qanṭara*, 12:1 (1991), 59–118; idem, "Agriculture et irrigation dans le district (*iqlīm*) de Vélez-Málaga. Droits des eaux et appareils hydrauliques," *Cahiers de Civilisation Médiévale*, 35:3 (1992), 213–25.

endowments (*aḥbās*), and even Christian festivals.[36] As a group, these scholars generally treat the *Miʿyār* as a source from which they "extract" information – usually from the *istiftā'*; this information is then processed according to the conventions and methods of historical investigation. In this manner, the *Miʿyār* has served as a useful auxiliary to one or another type of investigation.

However, these scholars have based their research largely on secondary fatwās; primary fatwās have not been the object of concentrated study. It is important to recall that the *Miʿyār* was compiled by al-Wansharīsī so that it might serve as a collection of *legal opinions*, and we must ask ourselves what approach to this corpus will be most faithful to its essential nature. The present study seeks to shift the scope and scale of the scholarly investigation of Islamic law to the scrutiny of individual cases. To this end, I have chosen for analysis seven primary fatwās (I will analyze two fatwās in chapter six). In each instance I shall attempt to treat the fatwā in its entirety, both the *istiftā'* and the *jawāb*, as a cultural artifact that reflects the often complex and dynamic interplay between the legal and social values of the society in which it was produced.

The six cases to be analyzed here unfolded at different times during the Marīnid period (614–869/1217–1465) and deal with a broad range of legal issues. These cases will be presented in roughly chronological order. In chapter one I will analyze the above-mentioned paternity dispute in which the son of a female slave struggled to establish his filiation to the man whom he regarded as his biological and legal father. In chapter two I examine the case of a well-known and popular jurist whose unorthodox views and un-Islamic behavior resulted in his being flogged, imprisoned, and eventually exiled. Chapter three presents a dispute over the allocation of water rights between the inhabitants of two villages in the Middle Atlas mountains, a dispute that lasted a century and a half. Chapter four focuses on wealthy proprietors who sought to ensure familial continuity when faced with the ravages of the Black Death. In chapter five I explore the character of a muftī who endeavored to restore communal harmony after it had been sundered by an ugly verbal altercation between two jurists, one a distinguished *sharīf*, the other a Berber. Finally, in chapter six I compare two cases in which a father allegedly sought to disinherit one or more of his children.

I have chosen these six cases because it is possible to situate them in their historical context and because the surviving documentation permits a case-method

[36] Maya Shatzmiller, "Women and Property Rights in al-Andalus and the Maghrib: Social Patterns and Legal Discourse," *Islamic Law and Society* (1995), 219–57; Harald Motzki, "Child Marriage in Seventeenth-Century Palestine," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, 129–40; David S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practice," *International Journal of Middle East Studies*, 25:3 (1993), 379–406; idem, "A Court Case from Fourteenth-Century North Africa," *Journal of the American Oriental Society*, 110.2 (1990), 229–54; idem, "*Fatwā*s as Sources for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez," *al-Qanṭara*, 11 (1990), 295–341, esp. 332–8; F. de la Granja, "Fiestas cristianas en al-Andalus (Materiales para su estudio). II: Textos de Ṭurṭūšī, el cadí 'Iyāḍ y Wanšarīšī," *al-Andalus*, 35 (1970), 119–42.