Beyond Consent: Social Coercion, Gendered Obligation, and Inheritance Gifts in Late Mālikī *Fatwā*s from the Moroccan Highlands

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Abstract

In this article, I examine how Mālikī jurists in the Moroccan Atlas confronted a recurring practice in which women renounced their Qurʾānic inheritance shares in favor of male kin through ostensibly voluntary transfers. I situate these renunciations within a moral economy of family cohesion, modesty, and communal landholding, in which women's proprietary claims were reframed as threats to patrilineal solidarity. Against this background, I analyze how late Mālikī nawāzil *developed evaluative tools for distinguishing formal compliance from legally operative* riḍā *(genuine consent) under conditions of social pressure. The study centers on a* fatwā *by Shaykh al-Kīkī (d. 1185/1772), who invokes the* makhzan/sība *divide to argue that consent produced in tribal settings marked by customary compulsion and weak judicial enforcement cannot be treated as legally dispositive. Through a close reading of al-Kīkī's reasoning alongside earlier Mālikī discussions of* ikrāh *(coercion) and consent, I show how Maghribī jurists rendered non-physical pressures legally salient. By foregrounding the jurisprudential significance of political geography and rural legal practice, I offer an internally grounded account of how Islamic law could accommodate custom while delimiting it when it undermined protected rights.*

Keywords: compulsion/coercion (*ikrāh*), consent (*riḍā*), custom (*ʿurf*), endowments (*waqf*s), inheritance (*irth*, *farāʾiḍ*), judicial opinions (*ʿamal*), juristic opinions (*fatwā*s, *nawāzil*), Mālikī jurisprudence, Morocco (Maghrib), women and gender

Introduction

In the highland tribal societies of Morocco, particularly across the Atlas Mountains, women's "voluntary" renunciation of their inheritance shares in favor of male relatives was a recurring socio-legal pattern.[1] Although such renunciations were typically formalized as *hiba*s (gifts or donations) and recognized as legally valid, they often unfolded within a cultural matrix structured by *ḥayāʾ* (modesty), family cohesion, and the moral economy of tribal solidarity.[2] I argue that, in these contexts, female renunciation functioned less as an expression of individual will than as a normatively encoded obligation to preserve group unity. This pressure was further reinforced by the economic logic of tribal landholding, in which agricultural property was frequently treated as a male collective asset and female ownership was perceived as a threat to patrilineal land tenure.

In this article, I investigate how Mālikī jurists in the Maghrib, particularly those operating in rural and tribal environments, responded to such cases. The study centers on a remarkable *fatwā* by Shaykh Muḥammad al-Kīkī (d. 1185/1772), in which he invokes the socio-political distinction between *bilād al-makhzan* (lands under state control) and *bilād al-sība* (lands beyond it) to argue that, in tribal zones shaped by customary pressure and assumptions of male communal ownership, women's renunciations of inheritance shares cannot be treated as legally valid. I show that al-Kīkī's position reflects a wider juristic sensitivity, evident among some late Mālikī authorities, to forms of social and symbolic coercion that operate even in the absence of physical duress.[3] Read in this light, the *makhzan/*

1 *See* David S. Powers, *Law and Custom in the Maghrib, 1475–1500: On the Disinheritance of Women*, *in* Law, Custom, and Statute in the Muslim World: Studies in Honor of Aharon Layish 25 (Ron Shaham ed., 2006).

2 For analyses of how modesty and renunciation operate as socially enforced norms within honor-based and subsistence communities, see Lila Abu-Lughod, Veiled Sentiments: Honor and Poetry in a Bedouin Society (updated ed. 1999); David D. Gilmore, Honor and Shame and the Unity of the Mediterranean (David D. Gilmore ed., 1987).

3 Here and throughout, I use "late Mālikī jurists" descriptively and as a periodizing label, not as the technical Mālikī distinction between *al-mutaqaddimūn* and *al-mutaʾakhkhirūn* (a divide often dated from Ibn Abī Zayd al-Qayrawānī

sība distinction, rooted in Morocco's political geography, serves as a framework for examining how legal reasoning responds to informal domination under conditions of weak enforcement.

Recent scholarship has begun to address these themes. Notably, Muhammad al-Marakeby analyzes late Ottoman Egyptian Mālikī *fatwā*s on women's inheritance donations, showing how some jurists, such as Muḥammad ʿIllīsh (d. 1299/1882), acknowledged the impact of social norms of modesty and, in certain cases, invalidated women's renunciations when coercion was evident.[4] While al-Marakeby's study demonstrates how Mālikī jurists incorporated social pressure and moral constraint into their doctrinal assessments, it remains situated within an Ottoman Egyptian context marked by relatively stable legal institutions and established mechanisms of adjudication. By contrast, this article turns to the tribal highlands of the Moroccan Atlas, where law and custom often operated amid uneven or intermittent state reach, and where inheritance practices were deeply entangled with political geography, land scarcity, and patriarchal structures.

I base this article on Mālikī *nawāzil* (sg. *nāzila*) texts, which I treat as a genre of responsa literature recording juristic interventions in disputes embedded in particular social worlds. Individual *fatwā*s constitute the basic units through which this *nawāzil* corpus circulated and acquired meaning. As Jocelyn Hendrickson observes, such *fatwā*s are especially valuable for historical research because they served as sites for negotiating moral boundaries and legal change, registering concrete concerns rooted in specific historical and geographic contexts rather than abstract doctrinal principles alone.[5] In rural and Saharan settings, Ismail Warscheid similarly shows that *nawāzil* collections and practices of *iftāʾ* (issuing a *fatwā*) were integral to local social and legal life, mediating between juristic authority

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[d. 386/996] onward). In this article, I use "late" more narrowly to refer to fifteenth-century and later Maghribī *muftī*s and *nawāzil* writers.

4 Muhammad Al-Marakeby, *Women's Gifting of Their Inheritance Share to Male Kin Is Void: A Study of Late Ottoman* Fatwās *on Social Coercion*, 52 British J. Middle Eastern Stud. 867, 867–88 (2025).

5 Jocelyn Hendrickson, Leaving Iberia: Islamic Law and Christian Conquest in North West Africa 21–22 (2021).

and communal expectations in landscapes marked by uneven governance.[6] Building on these insights, I approach the *nawāzil* corpus not simply as a repository of doctrine, but as a record of how Maghribī jurists assessed voluntariness under constraint. Whereas classical *uṣūl al-fiqh* (jurisprudence) often framed coercion (*ikrāh*) through paradigms of physical duress (*mulji*ʾ vs. *ghayr mulji*ʾ), *nawāzil* literature illustrates how emotional, symbolic, and social pressures could become legally salient, particularly in disputes involving women's proprietary claims.

In this article, I synthesize insights from scholarship on symbolic power, gender norms, gift exchange, and the social construction of legal agency. I draw selectively on feminist and anthropological approaches to coercion and consent in order to develop a context-sensitive account of legal voluntariness. This approach allows me to reassess women's inheritance donations not simply as formal legal transactions, but as acts shaped by social expectations and normative pressures that complicate outward expressions of consent.

One of the article's central contributions lies in examining the jurisprudential distinction between tribal and urban legal sensibilities, which I conceptualize as *fiqh al-sība* (juristic reasoning developed in regions operating beyond effective state enforcement) and *fiqh al-makhzan* (juristic reasoning shaped within settings of stable political authority and institutional adjudication). Although this spatial differentiation has received limited sustained attention in the secondary literature, it helps explain why jurists such as al-Kīkī reached divergent rulings based on social conditions of enforcement rather than on doctrinal disagreement. I argue that Mālikī jurists treated law as a responsive interpretive practice, one capable of confronting informal domination and articulating ethical redress within constrained institutional settings.

6 *See* Ismail Warscheid, *Nawāzil de l'Ouest saharien (XVIIe–XXe siècles): Une tradition jurisprudentielle africaine*, *in* Encyclopédie des historiographies: Afriques, Amériques, Asies 1274–76 (Nathalie Kouamé, Éric P. Meyer & Anne Viguier eds., 2020); Ismail Warscheid, Droit musulman et société au Sahara prémoderne: la justice islamique dans les oasis du Grand Touat (Algérie) aux xviie–xixe siècles, 128–54 (2017).

The article is structured in six sections. Section 1 outlines Islamic inheritance law and women's entitlements in order to clarify what is at stake in cases of "voluntary" renunciation. Section 2 introduces the theoretical landscape of symbolic coercion and social domination. Section 3 develops the distinction between urban and tribal legal reasoning in Morocco as a juristic expression of the broader *makhzan/sība* political order. Section 4 traces juristic treatments of coercion (*ikrāh*), contrasting classical legal theory with the situational reasoning found in the *nawāzil* literature. Section 5 offers a close reading of al-Kīkī's *fatwā* as the article's central case study. Finally, Section 6 reflects on how Mālikī jurists, operating under conditions of weak enforcement, recalibrated evidentiary presumptions and standards of validity in order to prevent doctrine from reinforcing structural vulnerability.[7]

Section 1: Islamic Inheritance Law, Women's Shares, and the Problem of Landed Property

To understand why women's "voluntary" inheritance renunciations recurred so persistently in the Moroccan Atlas, it is necessary to begin with the internal architecture of Islamic succession and the tensions that arise when inheritance is closely tied to landed property. Islamic inheritance law operates through a structured hierarchy: heirs with fixed Qurʾānic shares (*ahl al-farāʾiḍ*) take priority, while agnatic heirs (*al-ʿaṣaba*) inherit only what remains.[8] In Sunnī law, Qurʾānic heirs constitute a defined category of relatives, including spouses, parents, daughters, and certain siblings, whose entitlements are specified as fixed shares within the succession scheme.[9]

This structure marked a decisive departure from pre-Islamic inheritance practices in Arabia, which were largely

7 Unless otherwise indicated, all translations from Arabic to English are my own.

8 *See* the Prophetic report: "Assign the prescribed shares (*al-farāʾiḍ*) to those entitled to them; whatever remains goes to the nearest male agnate (*awlā rajul dhakar*)." 8 Muḥammad b. Ismāʿīl al-Bukhārī, *Saḥīḥ al-Bukhārī*, 423 (Dār al-Taʾṣīl 2012).

9 N.J. Coulson, Succession in the Muslim Family 35 (1971).

governed by agnatic principles privileging adult male kin capable of bearing arms and routinely excluding women and minor children.[10] A well-known report concerning Saʿd b. al-Rabīʿ (d. 3/625) illustrates this transformation. Upon Saʿd's death, his brother initially claimed the estate as the nearest male agnate, leaving the widow and daughters without a share. The Prophet's ruling reversed this outcome by assigning two-thirds of the estate to Saʿd's daughters and one-eighth to their mother, leaving the agnatic heir only the remainder.[11]

The significance of this report lies in what it reveals about the priority logic of Islamic succession. Fixed Qurʾānic shares operate as enforceable entitlements that structure the order of inheritance, while agnatic claims are confined to what remains once those shares are satisfied. Through this arrangement, succession integrates fixed rights within an agnatic environment without collapsing into lineage-based monopolization.[12]

Women's inheritance thus forms an integral component of the legal design of Islamic succession as a system of enforceable rights. Sunnī law characterizes the Qurʾānic heirs' shares with specificity and internal calibration through doctrinal rules governing conditional restriction, relative exclusion, and residue.[13] A wife, for instance, inherits one-eighth in the presence of descendants, while daughters inherit one-half (for a single daughter) or two-thirds (for two or more) in the absence of sons; these allocations change when a son is present.[14] Within this framework, women inherit property, including land, as legally recognized heirs, and the succession scheme presumes their capacity to hold inheritable assets in their own names.[15]

The tension, then, arises less from Islamic inheritance law as such than from its distributive effects in contexts where land functions as the material foundation of a patrilineal corporate

10 *Id.* at 30.

11 *See* 3 Muḥammad b. ʿĪsā al-Tirmidhī, al-Jāmiʿ al-kabīr (Sunan al-Tirmidhī), 598 (Bashshār ʿAwwād Maʿrūf ed., Dār al-Gharb al-Islāmī 1996).

12 Coulson, *supra* note 9, at 30; *see also* Richard Kimber, *The Qurʾanic Law of Inheritance*, 5 Islamic L. & Soc'y 291, 291–92 (1998).

13 Coulson, *supra* note 9, at 35–38.

14 *Id.* at 41.

15 *Id.* at 40.

estate. David Powers frames this friction as a tension between "the science of the shares" and local inheritance customs, particularly where property remains under the control of the male patriline.[16] In his account, two recurring pressures drive this tension: the progressive fragmentation of property through fractional succession and the perceived risk of alienation through "out-marrying females."[17]

Powers further suggests that Muslim communities historically responded to these pressures through a range of strategies. Some were social, including kinship arrangements such as cousin marriage that limited dispersal without openly contesting Qurʾānic succession. Others were legal, relying on techniques that shaped inheritance outcomes through lifetime transactions, including gifts, nominal sales, and family endowments. Still others bypassed "the science of the shares" altogether by distributing property according to local custom.[18] For my purposes, the analytical value of this typology lies in how it situates women's "inheritance gifts" within a broader continuum of practices through which families sought to reconcile Qurʾānic entitlements with locally compelling imperatives of preserving land as an undivided family asset.

This dynamic helps explain the salience of *hiba* in rural settings. Because the rules of succession take effect only upon death (or during terminal illness), lifetime dispositions provide a legal space for shaping devolution in advance.[19] *Hiba* thus functions as a central mechanism of estate arrangement.[20] The ethical stakes sharpen, however, where formally valid transfers conceal asymmetries of power and obligation, especially when women are pressured to renounce their shares to preserve family cohesion or to avoid the social costs of disrupting patrilineal landholding.[21]

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16 Powers, *supra* note 1, at 20.

17 *Id.* at 21.

18 *Id.*

19 Coulson, *supra* note 9, at 195.

20 *See* David S. Powers, *The Islamic Inheritance System: A Socio-Historical Approach*, 8 Arab L. Q. 13, 20–24 (1993).

21 One useful conceptual frame for this dynamic is Robert E. Goodin's notion of "asymmetrical exits," which captures how apparent consent may arise in contexts where the social and economic costs of refusal are unevenly distributed. *See*

At this point, it is important to attend more closely to the normative environments in which such transfers occurred. In the Atlas and adjacent regions, customary norms operated not merely as informal social expectations but as articulated normative orders, complete with local institutions, procedures, and vocabularies. As Michael Peyron notes, in the Middle Atlas, customary law was known in Tamazight as *azerf*, while Arabic-speaking communities referred to it as *ʿurf*.[22] Further south, another term appears, *taʿqqit*, and communities could also invoke custom through descriptive expressions such as "the path of the ancestors."[23] This terminology matters for my purposes because it clarifies how communal pressure surrounding inheritance could be experienced by participants within these communities as law-like rather than as interpersonal coercion alone. When women renounced shares through *hiba*, they were not necessarily responding to isolated demands by individual male relatives but navigating a normative landscape in which land was symbolically tied to collective honor and to the survival of the patrilineal unit, conditions that could shape the meaning of apparent "consent" in ways that jurists later sought to assess.

A brief comparative note sharpens the stakes of landed inheritance beyond Morocco. Beshara Doumani's account of family *waqf*s (pious endowments) in Ottoman Nablus shows how endowers sought to constitute the family as a corporate entity, placing a premium on keeping the material base consolidated within the male line.[24] This logic carried clear gendered implications: because family endowers viewed women as potential "transmitters of property," they were likewise a source of

Robert E. Goodin, *Women's Work: Its Irreplaceability and Exploitability*, *in* Illusion of Consent: Engaging with Carole Pateman 119–38 (Daniel I. O'Neill, Mary Lyndon Shanley & Iris Marion Young eds., 2008).

22 Michael Peyron, *Customary Law and Women's Rights among the Imazighen of the Middle Atlas and Southeast Morocco*, *in* Women and Social Change in North Africa: What Counts as Revolutionary? 290 (D.H. Gray & N. Sonnevild eds., 2018).

23 *Id.* at 290.

24 Beshara Doumani, *Endowing Family: Waqf, Property Devolution, and Gender in Greater Syria, 1800 to 1860*, 40 Comparative Stud. Soc'y & Hist. 3, 3–41 (1998).

possible fragmentation of family wealth, what Doumani strikingly describes as the "Achilles Heel" of the corporate unit.[25] I draw on this Ottoman material as a comparative lens to sharpen a problem attested in Maghribī *nawāzil*: while Qurʾānic inheritance allocates property through enforceable entitlements, local strategies for preserving wealth and authority often privilege patrilineal concentration, rendering women's capacity to inherit a recurring focal point of anxiety.[26]

Two further clarifications follow from this discussion. First, tensions surrounding landed inheritance do not negate women's formal legal capacity to inherit. Read in this light, renunciation appears less as the simple forfeiture of a right than as a negotiated practice framed in terms of security and belonging. Second, and crucial for the arguments I develop in subsequent sections, assessing the legal validity of such renunciations cannot rest on outward form alone. Even where parties execute a transfer through a recognizable legal instrument such as *hiba*, the juristic question turns on whether the act reflects meaningful *riḍā* (consent) or merely formal compliance. As Brinkley Messick has shown in another doctrinal domain—marriage contracting—jurists were attentive to the instability of consent as a legal indicator when silence, modesty, or fear shaped outward behavior.[27] In the Atlas materials I examine below, this concern becomes especially acute in rural and tribal environments, where communal expectations surrounding land and lineage raise the social costs of refusal and render acquiescence "natural," even when it remains legally contestable.

Taken together, these considerations clarify the problem I pursue in this article. While Islamic inheritance law recognizes women's claims as enforceable entitlements and

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25 *Id.* at 39–40. For a broader perspective, see Beshara Doumani, *Property and Gender*, *in* Family Life in the Ottoman Mediterranean: A Social History 224–74 (2017).

26 *See* Etty Terem, *Refashioning Notions of Gender and Family*, *in* Old Texts, New Practices: Islamic Reform in Modern Morocco 111–40 (2014) (illustrating, in Moroccan case study, how Qurʾānic inheritance entitlements were rearticulated within strategies of preserving patrilineal property and authority).

27 Brinkley Messick, *Interpreting Tears: A Marriage Case from Imamic Yemen*, *in* The Islamic Marriage Contract: Case Studies in Islamic Family Law 162–63 (Asifa Quraishi & Frank E. Vogel eds., 2008).

treats landed property as inheritable wealth, the distributive effects of *farāʾiḍ* (Qurʾānic shares of inheritance) can generate tension in settings where agricultural land is imagined as the patrimony of a patrilineal collective. It is within this tension that lifetime transactions, especially *hiba*, emerge as a key site for managing inheritance outcomes before succession takes effect. The central question, therefore, concerns how jurists assessed women's apparent renunciations of property: when such acts reflected legally meaningful *riḍā*, and when jurists instead understood them as shaped by *ikrāh* operating through social and communal pressure.[28] The next section outlines the theoretical vocabulary I use to address these non-physical forms of constraint.

Section 2: Theoretical Framework

Women's relinquishment of inheritance shares to male relatives in tribal, highland Moroccan contexts calls for an analytical lens that extends beyond legal doctrine. Although women often carry out such acts through recognizable legal forms, the meanings attached to these transactions emerge within dense social worlds shaped by kinship obligation, reputational discipline, and gendered expectations. This section presents a compact analytical vocabulary for approaching "consent" as a socially mediated condition rather than as a purely interior state.

Pierre Bourdieu's account of symbolic domination provides a useful point of departure. Bourdieu describes domination as operating not only through overt constraint but through the internalization of classificatory schemes that render hierarchy ordinary and legitimate, enabling dominated actors to participate in the reproduction of their own subordination.[29] I draw on this framework to shift the analytical focus toward the social

28 For a feminist legal-theoretical perspective on consent, see Kecia Ali, *Just Say Yes: Law, Consent, and Muslim Feminist Epistemologies*, *in* Jihad for Justice: Honoring the Work and Life of Amina Wadud 121–34 (Kecia Ali, Juliane Hammer & Laury Silvers eds., 2012).

29 Pierre Bourdieu, La Domination Masculine 1–10 (Éditions du Seuil 1998); *Id.*, Outline of a Theory of Practice 164–70 (1977).

conditions that narrow the range of imaginable refusal, even in the absence of explicit coercion.[30]

Anthropological discussions of honor and moral economy illuminate a related dimension of property and inheritance. Julian Pitt-Rivers characterizes honor as publicly recognized moral standing, while James Scott emphasizes the role of reciprocal obligation in communities organized around mutual protection.[31] Together, these accounts show how disputes over property often unfold as moral tests rather than as contests over abstract entitlements. In the contexts I examine here, I use these insights to explain why asserting a legal right may entail symbolic and social costs that exceed its material value, and why compliance can function as a strategy for preserving belonging and security.

Gender theory further clarifies how normative expectations shape women's conduct within these settings. Judith Butler's account of gender performativity explains how modesty, silence, and deference become stabilized as intelligible signs of "proper" femininity, while Saba Mahmood highlights the ethical meanings that an action may carry within normative structures, even under asymmetrical relations of power.[32] I rely on these perspectives to situate women's conduct within moral worlds that remain intelligible to the actors themselves.

An intersectional perspective highlights how these pressures converge. Kimberlé Crenshaw underscores how gendered vulnerability emerges from overlapping structures of authority and marginalization, including kinship discipline, economic dependence, geography, and access to enforcement.[33]

30 Carole Pateman observes that "unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense." Carole Pateman, *Women and Consent*, 8 Pol. Theory 149, 150 (1980).

31 Julian Pitt-Rivers, *Honor and Social Status*, *in* Honor and Shame: the Values of Mediterranean Society 21–23 (Jean G. Peristiany ed., 1965); James C. Scott, The Moral Economy of The Peasant: Rebellion and Subsistence in Southeast Asia chs. 2–3 (1976).

32 Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 25–34 (1990); Saba Mahmood, Politics of Piety: The Islamic Revival and the Feminist Subject 15–22 (2005).

33 Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan, L. Rev. 1241, 1245–51 (1991).

I apply this framework to the rural settings examined here to show how intersecting constraints heighten the social costs of refusal and render acquiescence more readily legible as socially appropriate.

Marcel Mauss's analysis of gift exchange clarifies the social logic of lifetime transfers. Mauss emphasizes that gifts generate obligations that bind participants within enduring social relations.[34] I draw on this account to explain how a transfer may function simultaneously as a legally valid act and as a socially compelled one, where refusal risks rupture, stigma, or exclusion.

Taken together, these approaches provide a focused vocabulary for analyzing consent under non-physical constraint. They highlight symbolic domination, honor-based evaluation, gendered propriety, and moral obligation as forces that shape outward behavior without taking the form of explicit threats. I use this vocabulary to explain why the Mālikī jurists I examine below did not treat *riḍā* as a presumption inferred mechanically from outward compliance but instead scrutinized it in light of social pressure and structural dependence.

This framework serves an instrumental purpose. It functions as a toolbox for reading Mālikī *nawāzil* in their social contexts, where formal legality and lived compulsion intersect in complex ways. In the next section, I turn to the regional jurisprudential settings in which these disputes took shape, with particular attention to the urban–tribal divide and the doctrinal mechanisms through which jurists evaluated custom, obligation, and consent.

Section 3: *al-ʿAmal al-Sūsī* and the Limits of Juristic Protection for Women's Inheritance

Morocco's regional and political geography shaped divergent trajectories in Mālikī legal reasoning, particularly through the category of *ʿamal*, the authoritative practice of local courts and

34 Marcel Mauss, The Gift: The Form and Reason for Exchange in Archaic Societies 13 (W. D. Halls trans., 1990).

communities.[35] Far from being a monolithic tradition, Mālikī law in Morocco developed along urban-tribal lines, producing distinct theories of legal obligation, custom, and juristic authority. This divide, rooted in the historical dichotomy between *bilād al-makhzan* (territories under centralized rule) and *bilād al-sība* (zones of tribal autonomy), generated contrasting expectations about what the law could achieve and for whom. Within these shifting landscapes, *al-ʿAmal al-Sūsī* emerged as a dynamic legal tradition—sometimes accommodating patriarchal norms that constrained women's inheritance rights, sometimes offering flexible tools for adaptation and protection. The tension between these two trajectories, accommodation and juristic protection, frames the analysis that follows.

The French sociologist Jacques Berque described this adaptation of Mālikī legal discourse to Morocco's social, political, and ecological realities, especially in highland and tribal zones, as the "Moroccanization" of Mālikī law.[36] This evolution did not stem from reformist ideology, but from internal shifts within Mālikī jurisprudence, catalyzed by the expanding role of *ʿamal*, understood both as juristic practice and a vehicle for legal localization.[37]

Over time, jurists distinguished between two forms of *ʿamal*: *al-ʿamal al-muṭlaq*, a generalized legal habitus applicable across Mālikī territories, and *al-ʿamal al-maḥallī*, a regionally specific set of normative practices shaped by local conditions.[38] While the former remained relatively stable, the latter proved more responsive to local contexts, becoming a key vehicle of legal adaptation, especially during the Marīnid (seventh–nineth/thirteenth–fifteenth centuries), Waṭṭāsid (nineth–tenth/fifteenth–sixteenth centuries), and Saʿdian (tenth–eleventh/sixteenth–seventeenth centuries) periods, giving rise to

35 On *ʿamal* in Mālikī jurisprudence, particularly in the context of Medinan legal theory, see Yasin Dutton, The Origins of Islamic Law: The Qurʾan, the *Muwaṭṭaʾ* and Madinan *ʿamal* 145–68 (1999).

36 Jacques Berque, Les Nawâzil el Muzâraʿa du Miʿyâr al-Wazzânî 21 (Éditions Félix Moncho 1940).

37 ʿUmar al-Jīdī, al-ʿUrf wa'l-ʿamal fī al-madhhab al-mālikī wa-mafhūmuhumā ladā ʿulamāʾ al-Maghrib 341–49 (Maṭbaʿat Faḍāla 1982).

38 *Id.* at 350–52.

distinct legal sub-traditions in Fez, Marrakesh, Sūs, and the Atlas Mountains.[39]

A key turning point occurred in the late fifteenth century, following the fall of Granada and the influx of Andalusian jurists into Morocco, particularly Fez, which emerged as a center of legal consolidation where jurists systematized and disseminated local precedent, *al-ʿAmal al-Fāsī*. What began as an urban jurisprudence gradually acquired quasi-universal authority, governing matters such as irrigation, market regulation, and inheritance.[40]

In southern Morocco, particularly in Sūs and Darʿa, jurists developed parallel traditions attuned to tribal realities and decentralized enforcement. Scholars like Aḥmad b. Muḥammad al-ʿAbbāsī al-Samlālī (d. 1152/1740) and Abū Zayd ʿAbd al-Raḥmān al-Jishtimī (d. 1269/1853) produced collections of *nawāzil* documenting these responses.[41] This corpus gave rise to *al-ʿAmal al-Sūsī*, a legal tradition grounded in the needs and customs of rural and tribal communities.[42]

One of the clearest expressions of this divergence between northern urban jurisprudence and southern tribal legal practice is the doctrine of *al-kadd wa'l-saʿāya* (the labor-based marital property claim), which granted Sūsī women a share in marital wealth based on their labor contributions, both agricultural

39 *See* al-Mahdī al-Wazzānī, Tuḥfat akyās al-nās bi-sharḥ ʿamaliyyāt Fās 12 (Hāshim al-ʿAlawī al-Qāsimī ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2001).

40 *Id.* at 13–16. For further discussion, see Ari Schriber, *Judicial Practice as Islamic Law: The* ʿAmal *of Fez in Post-Classical Mālikī Legal Tradition*, 78 Asiatische Studien – Études Asiatiques 173 (2024).

41 ʿAbd al-Salām al-ʿAsrī, Naẓariyyat al-akhidh bi-mā jarā bihi al-ʿamal fī al-Maghrib fī iṭār al-madhhab al-mālikī 133 (Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 1996). *See also* Iḥyā al-Ṭālibī, al-Turāth al-nawāzilī wa'l-qaḍāʾī bi'l-janūb al-maghribī: manāhijuhu wa-maṣādiruhu 48–52 (Dār Nashr al-Maʿrifa 2020).

42 Recent editions of *nawāzil* from the Sūs region reflect the formation of *al-ʿAmal al-Sūsī* and offer valuable material on women's legal status, an area that deserves scholarly attention. *See*, *e.g.*, Nawāzil Sīdī ʿAbd Allāh bin Yaʿqūb al-Samlālī, (al-Ḥasan b. Mukhtār ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2022); Ajwibat al-Faqīh al-Ḥuḍaykī (Rashīd al-Yazīdī ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2024).

and domestic.[43] This doctrine stood in contrast to the norms of Fez, where such claims were routinely denied in urban judicial practice. Affirmed by southern jurists, the doctrine shows how *al-ʿAmal al-Sūsī* could at times restructure legal outcomes to enhance, rather than restrict, women's economic rights, a contrast that sharpens when we turn to inheritance practices.[44]

Another salient example of this divergence concerns the use of monetary disciplinary measures (*ʿuqūba māliyya*) in judicial practice. While jurists in Fez generally rejected them for lacking textual basis and falling outside *ḥadd* punishments (fixed Qurʾānic criminal penalties) or *taʿzīr* (discretionary punishments), scholars in Sūs often accepted them as legitimate tools of social control.[45] Crucially, this acceptance was not extralegal pragmatism; rather, jurists drew on a non-dominant Mālikī opinion allowing monetary punishments as a form of *taʿzīr* in contexts in which corporal enforcement was not feasible.[46] In the tribal regions of the south, where state power was weak, such reasoning served as a context-sensitive adaptation, another instance of *al-ʿAmal al-Sūsī* privileging communal stability over strict adherence to legal doctrine.[47]

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43 Ibn ʿArḍūn (d. 992/1584) issued a *fatwā* in which he granted mountain women a labor-based share, endorsed in Sūs but rejected in Fez; his argument anticipates later doctrines like *al-kadd wa'l-saʿāya*. *See* 2 al-Mahdī al-Wazzānī, al-Nawāzil al-Sughrā, 284–87 (Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 1992).

44 Disputes over *al-kadd wa'l-saʿāya* appear in dedicated sections of Sūsī *nawāzil*, often concerning the division of wealth earned through spousal labor. Twelve such cases appear in Nawāzil Sīdī ʿAbd Allāh b. Yaʿqūb al-Samlālī, *supra* note 42, at 257–63. *See also* al-Ḥasan al-ʿAbbādī, ʿAmal al-Marʾa fī Sūs 29–49 (Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2021).

45 *See further* ʿAlī b. ʿAbd al-Salām al-Tusulī, Ajwibat al-tusulī ʿan masāʾil al-amīr ʿAbd al-Qādir fī al-jihād 151–63 (ʿAbd al-Laṭīf Aḥmad al-Shaykh Muḥammad Ṣāliḥ ed., Dār al-Gharb al-Islāmī 1996); Muḥammad al-ʿUthmānī, Alwāḥ jazūla wa'l-tashrīʿ al-islāmī: dirāsa li-aʿrāf qabāʾil Sūs fī dawʾ al-tashrīʿ al-islāmī 207–13 (Dār al-Amān 2017).

46 *See* Ajwibat al-faqīh al-Ḥuḍaykī, *supra* note 42, at 263.

47 Not all scholars accepted this flexibility. Muḥammad b. Nāṣir al-Drāʿī (d. 1085/1674) condemned Bedouin communities that preferred tribal customs and monetary penalties over *sharīʿa* rulings, describing those people as *ʿuṣāt* (sinners) and warning against the normalization of such practices. *See* al-Ajwiba al-nāṣiriyya fī baʿḍ masāʾil al-bādiya 137 (Abū al-Faḍl al-Dimyāṭī ed., Dār Ibn Ḥazm 2012). See also a parallel position in the *nawāzil* of ʿAbd al-Qādir b. ʿAlī al-Fāsī (d. 1091/1680), who rejected the displacement of *sharīʿa* norms by tribal practice; 2 al-Ajwiba al-kubrā, 243 (Jābir b. ʿAlī al-Ḥawsanī ed., Dār Abī Ruqraq 2016).

These regional divergences in legal adaptation, between Fez and Sūs, urban and tribal, did not result in the fragmentation of the Mālikī school. On the contrary, the Mālikī *madhhab*, since its articulation by Imām Mālik b. Anas (d. 179/795) himself, grants wide latitude for the use of *ʿurf* (custom), *maṣlaḥa* (public interest), and *siyāsa sharʿiyya* (pragmatic governance), all of which function as internal mechanisms of juristic reasoning.[48] Thus, jurists in both urban and rural contexts understood their interpretive choices as consistent with the school's methodology, even when they produced dramatically different results.[49] The spectrum of *ʿamal* thus reflects not a splintering of doctrine, but a pluralistic deployment of Mālikī tools to meet the demands of distinct social environments.

The development of *al-ʿAmal al-Sūsī* was closely tied to the decline of the central *makhzan* and the rise of Saʿdian rule in the south during the sixteenth century.[50] As the Saʿdians consolidated power, they fostered legal pluralism by forging alliances with tribal and scholarly elites, and by issuing royal decrees (*ẓahīr*) that codified local inheritance practices.[51] Notably, the sultans Aḥmad al-Aʿraj (r. 923–46/1517–39) and Muḥammad al-Shaykh (r. 946–64/1539–57), in coordination with southern jurists, formalized the exclusion of women from inheriting agricultural land by invoking the notion of *fatḥ ʿanwatan* (land taken by force rather than treaty), treating such property as a *waqf* structured to restrict benefit to male kin.[52] These measures were rigorously enforced, most notably in a *ẓahīr* issued in Dhū al-Ḥijja 963 (October 1556), and justified

48 4 al-Hajawī al-Fāsī, al-Fikr al-sāmī fī tārīkh al-fiqh al-islāmī, 465 (Ayman Ṣāliḥ Shaʿbān ed., Dār al-Kutub al-ʿIlmiyya 1995).

49 *See* Schriber, *supra* note 40, at 175–78; Terem, Old Texts, New Practices, *supra* note 26, at 177–80.

50 On the reliance of Saʿdians on southern jurists, particularly those from Sūs, *see* Luṭfī Bushantūf, al-ʿĀlim wa'l-sulṭān: dirāsa fī intiqāl al-ḥukm wa-maqawwimāt al-mashrūʿiyya, nashʾat al-dawla al-sharīfa fī al-Maghrib 79–119 (2d ed. Dār Abī Ruqraq 2024).

51 *Id.* at 359.

52 *Id.*. A similar use of *fatḥ ʿanwatan* to justify barring women from inheriting land appears in Ottoman Egypt. *See* Muhammad Al-Marakeby, *Could Women Own Agricultural Land? Rethinking the Relationship of Islamic Law and Contextual Reality* (Wāqiʿ), 63 die welt des islams 184, 184–212 (2021).

in royal and juristic discourse through *maqāṣid al-sharīʿa*[53] and *maṣlaḥa*-based reasoning.[54]

The convergence of political, legal, and customary authority under Saʿdian rule helped preserve collective estates and stabilize fragile agricultural economies.[55] In this context, jurists treated custom not merely as a tolerated practice but as a *ḍarūra*, a legal necessity, justifying deviations from Mālikī norms.[56] Although Qurʾānic inheritance law assigns women fixed shares as a baseline, Saʿdian land-inheritance restrictions effectively reconfigured women's access to agricultural land through customary and political rationales. These measures, endorsed amid political consolidation, did not reflect the doctrinal core of *al-ʿAmal al-Sūsī* but rather pragmatic accommodations to tribal pressure and land scarcity, in which jurists mobilized legal reasoning to uphold exclusionary norms under conditions of structural constraint, particularly in matters of women's inheritance.[57]

The logic behind this exclusion was deeply material. In the mountainous south, where arable land and water were scarce, every plot was vital to communal survival.[58] The fragmentation of ownership through female inheritance was widely perceived within tribal communities as a risk.[59] Accordingly, jurists and local power-holders deployed legal tools, often shaped more by tribal priorities than by juristic doctrine, to preserve intergenerational and intertribal balance.[60]

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53 *Maqāṣid al-sharīʿa* refers to the higher objectives of Islamic law, commonly identified in classical juristic literature as the protection of religion, life, intellect, lineage, and property.

54 Bushantūf, *supra* note 50, at 360.

55 *Id.* at 360.

56 *Id.* On custom as legal exigency rather than autonomous source, see Ahmed Fekry Ibrahim, *Customary Practices as Exigencies in Islamic Law*, 46 oriens 222, 222–61 (2018).

57 Bushantūf, *supra* note 50, at 361. Muḥammad b. Nāṣir al-Drāʿī (d. 1085/1674) described the Saʿdian inheritance policies as a collapsing edifice upheld by rulers through taxation and custom. *See* al-Ajwiba al-nāṣiriyya fī baʿḍ masāʾil al-bādiya, *supra* note 47, at 163.

58 Aḥmad al-Tawfīq, al-Mujtamaʿ al-maghribī fī al-qarn al-tāsiʿ ʿashar: 1850–1912, at 83–84 (Mohammed V Univ. 1983).

59 *Id.* at 85.

60 Bushantūf, *supra* note 50, at 361–62.

While *ʿamal* integrated social realities into legal discourse, it could also function to legitimize dominant customary norms, particularly those reinforcing patriarchal or tribal hierarchies. The varied logics of *ʿamal* across Moroccan regions reveal the shifting thresholds at which women's claims were either absorbed into prevailing custom, negotiated within kin-based norms, or upheld through doctrinal rigor. Such tensions lie at the heart of the present inquiry into the legal treatment of coerced inheritance gifts and the capacity of Mālikī jurisprudence to engage with social domination from within its own tradition.

Before turning to al-Kīkī's legal intervention, it is first necessary to examine how Islamic law conceptualized coercion (*ikrāh*), and how later Mālikī jurists gradually expanded this concept to include not only overt force but also the subtler pressures of symbolic and social domination.

Section 4: Coercion, Consent, and the Juristic Expansion of Voluntariness

In Islamic law, valid legal acts, particularly those involving property transfers, require not only formal compliance with the rules of offer and acceptance but also genuine consent (*riḍā*) on the part of the transacting parties.[61] Classical legal theory, especially as articulated in the science of *uṣūl al-fiqh*, typically recognized two categories of coercion (*ikrāh*): *ikrāh mulji*ʾ (compelling physical coercion) and *ikrāh ghayr mulji*ʾ (non-compelling threats or pressures).[62] This distinction, which was originally developed in penal and contractual contexts, laid the groundwork for later juristic inquiry into voluntariness and agency, concepts

61 This principle is grounded in the Qurʾānic requirement of mutual consent, as articulated in Qurʾān 4:29 ("Do not consume one another's property unjustly, except through trade conducted by mutual consent") and 4:4 ("If they willingly remit to you anything of it, then consume it with satisfaction and ease"). *See* 2 Muḥammad al-Zuḥaylī, al-Qawāʿid al-fiqhiyya wa-taṭbīqātuhā fī al-madhāhib al-arbaʿa 819 (Dār al-Fikr 2006).

62 *See* al-Bazdawī, Kanz al-uṣūl ilā maʿrifat al-uṣūl 781–94 (Sāʾid Bakdāsh ed., Dār al-Salām 2021); 4 al-Qarāfī, Nafāʾis al-uṣūl fī sharḥ al-maḥṣūl 1637–39 (ʿĀdil Aḥmad ʿAbd al-Mawjūd & ʿAlī Muḥammad Muʿawwaḍ eds., Maktabat Nizār Muṣṭafā al-Bāz 1995).

that invite renewed attention through the lens of contemporary socio-legal theory.

Unlike *ikrāh*, the Sunnī treatment of *riḍā* in cases of *hiba*, particularly within kinship structures, manifested significant doctrinal divergence. In the Ḥanafī school, a gift is generally revocable even after the recipient has taken possession (*qabḍ*).[63] However, jurists made an exception for gifts to close relatives, which are binding after possession because revocation might sever family ties and disrupt social decorum.[64] Motives such as modesty or moral obligation were not, on their own, sufficient to challenge the validity of the gift unless those constituted *ikrāh mulji*ʾ, an explicit and compelling threat.[65]

The Shāfiʿīs adopted a more rigid position. Once a gift is delivered and received, it is irrevocable, regardless of the relationship between donor and recipient, whether spouse, sibling, or stranger.[66] Only demonstrable fraud or direct coercion justifies nullification. Thus, the Shāfiʿī approach was formalistic and largely indifferent to pressures that might compromise genuine consent.[67]

The Ḥanbalī school also prohibited the revocation of gifts to close relatives.[68] Some early scholars, however, permitted limited judicial discretion in cases in which a gift was

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63 2 Dāmād Afandī, Majmaʿ al-anhur fī sharḥ Multaqā al-abḥur 359 (Aḥmad b. ʿUthmān al-Qarah-Ḥiṣārī ed., Dār al-Ṭibāʿa al-ʿĀmira 1328 AH; repr., Dār Iḥyāʾ al-Turāth al-ʿArabī).

64 *Id.* at 362.

65 10 al-Kāsānī, Badāʾiʿ al-sanāʾiʿ fī tartīb al-sharāʾiʿ 103, 132 (ʿAlī Muḥammad Muʿawwaḍ & ʿĀdil Aḥmad ʿAbd al-Mawjūd eds., 2d ed Dār al-Kutub al-ʿIlmiyya 2003).

66 Mālikī, Shāfiʿī, and Ḥanbalī jurists all recognize one key exception to the rule prohibiting the revocation of gifts: a father may rescind a gift to his child. This exception is based on the *ḥadīth*: "A man is not permitted to take back his gift, except a father [regarding what he gave] to his child." *See* 7 al-Māwardī, al-Ḥāwī al-kabīr 546 (ʿAlī Muḥammad Muʿawwaḍ & ʿĀdil Aḥmad ʿAbd al-Mawjūd eds., Dār al-Kutub al-ʿIlmiyya 1999); 8 Ibn Qudāma al-Maqdisī, al-Mughnī 277–78 (ʿAbd Allāh al-Turkī & ʿAbd al-Fattāḥ al-Ḥilū eds., 3d ed. Dār ʿĀlam al-Kutub 1997); 6 al-Qarāfī, al-Dhakhīra 266 (Muḥammad Ḥajjī, Saʿīd Aʿrāb & Muḥammad Bū Khubza eds., Dār al-Gharb al-Islāmī 1994).

67 7 al-Ruwayānī, Baḥr al-madhhab, 244 (Ṭāriq Fatḥī al-Sayyid ed., Dār al-Kutub al-ʿIlmiyya 2009).

68 Ibn Qudāma, *supra* note 66, at 278.

the result of modesty or social pressure.[69] Still, Ḥanbalī legal texts neither fully theorized nor consistently institutionalized such considerations.[70]

The Mālikīs developed a markedly different approach. While agreeing that *hiba* is complete upon offer and acceptance, they foregrounded the internal condition of *riḍā* as a doctrinal requirement, especially in contexts in which a woman's decision was influenced by *ḥayāʾ* and kinship obligation. If she made a gift under visible deference, unspoken pressure, or the weight of custom, Mālikī jurists might deem it invalid.[71] This expansive reading of coercion, extending beyond physical duress to include symbolic and emotional constraint, laid the groundwork for *fatwā*s on women's inheritance gifts in tribal settings, where law and custom were deeply intertwined.

Judges and jurists recognized these non-physical forms of coercion in the formative period before the institutionalization of the law schools. The *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī (d. 211/827) preserves numerous reports about the judge Shurayḥ (d. ca. 80/699), who adjudicated cases in which women gifted parts of their dower (*mahr*) or property to their husbands.[72] In these cases, Shurayḥ consistently refused to validate such gifts unless there was clear evidence of genuine consent. In one report, he insisted that the husband bear the burden of proof and required the wife's oath that she had not given the gift "out of fear or humiliation": "Shurayḥ would say: 'Produce your proof that she gifted it to you of her own good will, without coercion or humiliation; otherwise, let her swear by God that she

69 *Id.* at 278–79.

70 *See, e.g.,* al-Qāḍī Abū Yaʿlā, 1 al-Masāʾil al-fiqhiyya min Kitāb al-Riwāyatayn waʾl-wajhayn 444–45 (ʿAbd al-Karīm b. Muḥammad al-Lāḥim ed., Maktabat al-Maʿārif 1985); 3 al-Khalwatī, Ḥāshiyat al-Khalwatī ʿalā muntahā al-irādāt 513 (Sāmī al-Ṣuqayr & Muḥammad al-Laḥaydān eds., Dār al-Nawādir 2011).

71 *See, e.g.,* 4 Muḥammad al-Amīr al-Mālikī, Ḍawʾ al-shumūʿ sharḥ al-Majmūʿ 51 (with marginalia by Ḥijāzī al-ʿAdawī al-Mālikī, Muḥammad Maḥmūd Wald Muḥammad al-Amīn al-Musūmī ed., Dār Yūsuf b. Tāshfīn & Maktabat al-Imām Mālik 2005).

72 8 ʿAbd al-Razzāq al-Ṣanʿānī, al-Muṣannaf 438–39 (2d ed. Dār al-Taʾṣīl).

did not give it to you freely (*ṭayyibat al-nafs*), but rather due to coercion or humiliation.'"[73]

In another report, he declared: "Had she truly been content, she wouldn't have come to demand it back [i.e., the gift]," suggesting that a woman's post-gift claim of regret was legally credible in and of itself.[74]

The early juristic tendency to consider emotional or social coercion, especially in the context of spousal relationships, points to an intuitive recognition that power differentials within the household could undermine voluntariness.[75] These reports also suggest that in the formative period, Muslim jurists recognized a nascent form of context-sensitive jurisprudence (*fiqh al-wāqiʿ*), a pragmatic sensitivity to social circumstances that would later be formalized and expanded in *nawāzil* literature, particularly in the Mālikī school.

This concern for genuine *riḍā* gradually became a defining feature of Mālikī legal doctrine. Drawing on the practice of the people of Medina (*ʿamal ahl al-Madīna*) and favoring substance over formalism, Mālikī jurists developed nuanced tools to assess consent.[76] Over time, they came to recognize that silence, hesitation, and pressure could all signal compromised volition. Their attentiveness to these phenomena laid the foundation for later *fatwā*s addressing coerced inheritance transfers among tribal women.[77]

Late Mālikī jurists refined the doctrine of *riḍā* by addressing cases in which women, particularly in tribal contexts,

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73 *Id.* at 438, no. 17767.

74 *Id.* at 438, no. 17770.

75 Al-Zuhrī said: "I never saw judges rescind a husband's gift to his wife, but they would rescind a wife's gift to her husband." *Id.* at 438, no. 17769. This pattern reflects an early judicial awareness of gendered power asymmetries, shaped in part by the Qurʾānic emphasis on a woman's consent (Qurʾān 4:4).

76 *See* 2 al-Shāṭibī, al-Muwāfaqāt 55 (Muḥammad Mirābī ed., Muʾassasat al-Risāla 2011).

77 *See, e.g.*, 1 Yaʿlā b. Muṣallīn al-Maṣmūdī, Mukhtaṣar Kitāb al-Fuṣūl fī ajwibat fuqahāʾ al-qarawiyyīn fī masāʾil ahl al-bādiya wa-ahl al-jibāl alladhīna lā walīya lahum wa-lā sulṭāna lil-imām 214, 225, 355 (al-Ḥasan Khālid Shujayd ed., Dār al-Fatḥ 2023); 222 Abū Isḥāq Ibrāhīm b. Hilāl al-Sijilmāsī (Ibn Hilāl) al-Nawāzil al-Hilāliyya 395 (compiled by ʿAlī b. Aḥmad al-Jazūlī, Aḥmad ʿAbd al-Karīm Najīb ed., Markaz Najībawayh lil-Makhṭūṭāt wa-Khidmat al-Turāth 2013); al-Ḥuḍaykī, Ajwibat al-faqīh al-Ḥuḍaykī, *supra* note 42, at 315.

remained silent after male relatives had taken possession of their inheritance shares.[78] While some formative Mālikī jurists, including Ibn al-Qāsim (d. 191/809), treated such silence as tacit consent, al-Wansharīsī (d. 914/1508) rejected that inference, insisting that a woman's right "does not lapse by silence even after a hundred years," and citing judicial precedents awarding women their entitlements after fifty years.[79] He further cautioned that inheritance claims by Bedouin women should not be dismissed on the basis of silence, since asserting one's right could trigger social abandonment by one's kin; silence in such circumstances, he argued, cannot invalidate a woman's claim.[80]

Similarly, the Fāsī *mufti* (jurisconsult) ʿAbdullāh al-ʿAbdūsī (d. 849/1445) allowed women to revoke inheritance gifts given to male kin under communal pressure. He affirmed that in many such cases, a woman's initial "consent" was extracted in a social environment that rendered refusal nearly impossible, noting the frequency of this coercive pattern in his time.[81]

The ethical posture taken by such jurists aligned with a broader Mālikī concern for safeguarding *fiqh al-riḍā* (the jurisprudence of consent) against symbolic and social domination. It also reflected an awareness, albeit untheorized, that coercion may be encoded in silence, modesty, or customary norms.[82] Al-Wansharīsī traced this concern back to the Mālikī *uṣūlī* (legal theorist) Ibn al-Qaṣṣār (d. 398/1007), citing his treatise *ʿUyūn al-adilla* to affirm that acts arising from *ḥayāʾ* or social deference lack valid consent.[83] Although al-Wansharīsī did not elaborate on the point, his invocation of Ibn al-Qaṣṣār anchored the argument within classical Mālikī legal theory. This concern

78 Muḥammad al-Barakah, Fiqh al-nawāzil ʿalā al-madhhab al-mālikī: fatāwā al-imām Abī ʿUmrān al-Fāsī 130 (Dār Afrīqiyā al-Sharq 2010).

79 5 al-Wansharīsī, al-Miʿyār al-muʿrib wa'l-jāmiʿ al-mughrib ʿan fatāwā ahl Ifrīqiyā wa'l-Andalus wa'l-Maghrib, 263–64 (Muḥammad al-Ḥajjī ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 1981).

80 *Id.* at 264.

81 4 al-Wazzānī, al-Nawāzil al-ṣughrā, *supra* note 43, at 231.

82 Some jurists described the social pressure exerted on women to forgo their inheritance shares as follows: "the sword of modesty (*al-ḥayāʾ*) is like the sword of usurpation (*al-ghaṣb*)." The analogy indicates that coercion through shame or social stigma is as oppressive as physical force in stripping women of their legal entitlements. *See* 4 al-Wazzānī, al-Nawāzil al-ṣughrā, *supra* note 43, at 221, 225.

83 9 al-Wansharīsī, al-Miʿyār, *supra* note 79, at 153–54.

informed a stream of *fatwā*s that collectively sought to re-center legal agency in contexts of gendered vulnerability.[84] As ʿAbd al-Qādir al-Fāsī (d. 1091/1680) later observed, the validity of a woman's gifts is contingent on social context: whereas in an urban environment such an act might be binding, in a rural or tribal environment, it is presumptively invalid due to the lack of free legal expression.[85]

This Mālikī concern for internal *riḍā* extended to voluntary transfers more broadly, including almsgiving (*ṣadaqāt*). In one *fatwā* preserved in al-Wansharīsī's *al-Miʿyār*, someone asks Abū Saʿīd Ibn Lubb (d. 782/1381) about a woman who donated property out of modesty and embarrassment. Ibn Lubb held that the gift was invalid, stating that it was impermissible for the recipient to enjoy something not offered with genuine willingness. He explained: "The jurists have said that if a donation is requested from a giver, and it is understood from the giver's demeanor that they gave it out of modesty or shyness, or without genuine consent, then it is not lawful for the recipient to keep it."[86] Such rulings reflect a Mālikī effort to expand the legal conception of voluntariness beyond the classical binary of coercion versus free will.[87] They underscore Maghribī jurists' attentiveness to local social conditions, particularly in rural and tribal settings, and their refusal to equate a woman's silence or compliance with meaningful consent.[88] The following section turns to Shaykh al-

84 This concern is exemplified in *fatwā*s by Mālikī jurists such as Sīdī Yaḥyā b. Muḥammad al-Sarrāj (d. 1007/1599), *Muftī* of Fez; Sīdī ʿAlī b. Hārūn al-Muṭghrī (d. 951/1545), also a *Muftī* of Fez; and Muḥammad al-ʿArabī b. Aḥmad Burduʾllah (d. 1133/1721), who served as judge of Fez. *See* 2 ʿĪsā b. ʿAlī al-Ḥasanī al-ʿAlmī, Nawāzil 355 (Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 1983); 4 al-Wazzānī, al-Nawāzil al-ṣughrā, *supra* note 44, at 227; *id.* at 521.

85 2 al-Ajwiba al-kubrā, *supra* note 47, at 388, 486–89, 606–07.

86 9 al-Wansharīsī, al-Miʿyār, *supra* note 79, at 153.

87 *See also*, with respect to *ibrāʾ* (renunciation) and the sale of a woman's inheritance share under social pressure, 1 al-Ajwiba al-kubrā, *supra* note 47, at 170–73, 187–88.

88 *See* Nawāzil Sīdī ʿAbd Allāh b. Yaʿqūb al-Samlālī (d. 1052/1642), where al-Samlālī upholds a local judge's decision to annul a series of property transfers made by a vulnerable widow. The case involved a neighbor who manipulated the woman into gifting away her estate, then coerced her into "renting" her own home and serving him and his household. Al-Samlālī affirms the woman's financial imprudence (*safah*), endorses the judge's intervention, and cites jurists from Jazūla (Sūs) who emphasized the naïveté of women in such contexts. He concludes that her gifts are void

Kīkī's *fatwā*, where these themes receive their most sustained and explicit treatment.

Section 5: al-Kīkī's *Fatwā* and the Ethics of Juristic Resistance

In the eighteenth century, Muḥammad al-Kīkī emerged as a prominent Mālikī jurist in the Middle Atlas Mountains, near Demnat.[89] Though trained in Marrakesh, al-Kīkī chose to reside among tribal communities, where he combined teaching, *iftāʾ* (juristic consultation), and grassroots reform.[90] His scholarly standing was affirmed by contemporaries who regarded him as unparalleled in the Islamic sciences within the region.[91]

Al-Kīkī's *fatwā*, titled *Mawāhib dhī al-jalāl fī baʿḍ nawāzil al-bilād al-sāʿiba wa'l-jibāl* (*Bestowals of the Majestic Lord: Selected* Nawāzil *from the Unruled Lands and the Mountains*), was prompted by a legal query (*istiftāʾ*) yet unfolds as an independent treatise on possession (*ḥiyāza*) and the contested practice of inheritance gifting among tribal women in regions where legal rulings (*aḥkām*) were not effectively enforced.[92]

In its opening, al-Kīkī sets out the aim of the work, explains the juristic disagreements that prompted his intervention,

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and that the neighbor owes her and her daughter compensation for their unpaid labor. Nawāzil al-Samlālī, *supra* note 42, at 277–79. *See also* al-Ḥuḍaykī (d. 1189/1775), who, when asked whether a gift given by a sister to her brother is valid, responded: "It has become the practice of *fatwā* and adjudication to invalidate sisters' gifts and donations to their brothers and male relatives under whose protection they live. This was also the view of Shaykh al-ʿAbbāsī until his death." Ajwibat al-Faqīh al-Ḥuḍaykī, *supra* note 42, at 315.

89 Demnat is a town in Azilal Province (Beni Mellal–Khenifra, Morocco), located roughly 100 km east of Marrakesh on the northern foothills of the High Atlas.

90 *See* al-Kīkī's biography in 6 Aḥmad Al-Samlālī, al-Iʿlām bi-man ḥalla Marrākush wa-aghmāt min al-aʿlām 80 (al-Maṭbaʿa al-Malakiyya 1993); 7 Mawsūʿat aʿlām al-Maghrib 2397 (Muḥammad Hajjī ed., Dār al-Gharb al-Islāmī 1983).

91 2 Muḥammad al-Khalīftī, al-Durra al-jalīla fī manāqib al-khalīfa 409 (Aḥmad ʿAmmālik ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2014).

92 The *fatwā* is published in Muḥammad al-Kīkī, Mawāhib dhī al-jalāl fī baʿḍ nawāzil al-bilād al-dība wa'l-jibāl 25–129 (Aḥmad al-Tawfīq ed., Dār al-Gharb al-Islāmī 1997). The editor introduces the text with a brief preface in Arabic and English.

narrates the dispute that occasioned the *fatwā*, and outlines its structure. He writes:

> The purpose of this work is to examine *ḥiyāza* in lands where legal rulings [*aḥkām*] are not implemented, either because they are devoid of an *imām* [i.e., an effective political ruler] or because oppression and neglect have come to prevail among [local] judges. Closely connected to this issue is the practice of tribal daughters gifting their [inheritance] shares to agnatic relatives, as well as whatever may serve as a model and guidance for people of understanding. Those who have assumed the offices of adjudication and *iftāʾ* in our time have differed in their rulings on these matters, both in judicial judgment and in legal opinion. Their views in such cases have contradicted one another, in affirmation and in negation …. Accordingly, I deemed it fitting to set forth, in this regard, what accords with the authoritative legal texts [*nuṣūṣ*], so that it may be a necklace upon a string, arranged with jewels and facets. And God alone guides to the right path ….
>
> The reason for this *nubdha* [a brief introductory account] is that a questioner asked about a tribal woman whose brother sold a parcel of land jointly owned by them, amid a flare of hostility on his part toward the *shaykh* of the tribe, the one who exercised authority over its affairs. The *shaykh* then placed his hand upon it [i.e., took possession of the land], in accordance with the custom of the people of the rural countryside [*al-bādiya*], until the *shaykh* died, leaving his sons to succeed him in his chieftainship, until they perished in the plague. The seller's sister also died, and her heirs were unaware of what had occurred until their maternal uncle, the seller, told them that their mother's share remained and that he had sold only his own share. They therefore demanded their inheritance from the heirs of the purchaser [the *shaykh*]. Yet the purchaser's heirs possessed no deed of sale, and there was no one to testify that the mother had sold her share.

So, I answered [the questioner] that the mother's share remained her property [and thus remained due to her heirs after her death] for several reasons. [First], the property of tribal daughters is not subject to possession. And even if it were claimed that the brother sold the entirety, how could that be established when it has not been proven? [Second], the custom of this land [i.e., Demnat and its surroundings] is that whenever a co-owner asserts a claim against the purchaser, he takes his share unless he agrees to the sale. This custom has become so widespread and well known that it has, as it were, "filled the ears" of both the elite and the common alike …. [Third], the sister's share was established with certainty, and it cannot be removed except by certainty; yet there is no certainty in the lands of *al-sība* [the unruled lands].

Thereafter, a certain person [i.e., a local judge-*muftī* in Demnat and its surroundings] issued an answer that contradicted the foregoing opinion, supporting it with textual authorities, proofs, and reasons. He held that the woman in question had no claim at all, because she had remained silent throughout the period of possession; that what the first respondent [al-Kīkī] had cited applied only outside these lands; that in these lands, any daughter who asserts her claim takes her right from the hand of her agnatic kin; that dispossession through sale and the like cuts off rights with respect to both kin and non-kin alike; and that women are the full sisters of men in legal rulings, this being the purport of his words.

So, I wished, by God's power, to set forth what is required for these purposes, such that this objection is rendered void. Accordingly, I arranged this work as an introduction, four chapters, and a conclusion containing benefits and counsels for people of understanding. I entitled it *Mawāhib dhī al-jalāl fī baʿḍ nawāzil al-bilād al-sāʾiba wa'l-jibāl*; and, if you wish, you may call it *Maṭāliʿ al-tamām fī ʿadam al-qawl bi'l-ḥiyāza fī al-bilād allatī lā tajrī fīhā al-aḥkām* (*The Dawning of*

Completion: On Rejecting the Recognition of Possession in Lands Where Legal Rulings Are Not Enforced).[93]

This opening accomplishes several things at once. First, it clarifies al-Kīkī's central premise: in regions "devoid of an *imām*" and lacking stable judicial enforcement, silence and non-assertion cannot be read mechanically as forfeiture of rights. Second, it frames the text as a deliberate intervention against what he presents as inconsistent local adjudication and *iftāʾ*, grounded not in moral exhortation alone, but in a tightly constructed Mālikī evidentiary logic. Third, it establishes that the dispute concerns a woman's inherited share in jointly owned land, and a brother who, amid hostility, sold the property to a tribal *shaykh* who then "placed his hand upon it" in accordance with local custom. When the *shaykh's* line later collapsed during a plague and the woman's heirs sought to recover their mother's portion, al-Kīkī squarely rejects the claim that her prolonged silence extinguished her right.

After this opening, al-Kīkī proceeds in a structured manner. He begins by setting out a series of governing principles, before turning to a chapter addressing cases in which women's legal position differs from that of men. He then devotes a chapter to demonstrating that *ḥiyāza* cannot extinguish rights in lands where legal rulings (*aḥkām*) are not enforced, whether due to the absence of an *imām* or the injustice of those in authority. A third chapter challenges the validity of tribal daughters' and sisters' so-called "gifts" to agnatic kin in contexts where custom systematically deprives them of their inheritance. A fourth chapter examines the obligation to account for benefits (*kharāj*) imposed on anyone who exploits jointly inherited property without the consent of the other heirs, whether male or female. The work concludes with a final section of counsels and admonitions.

The governing principles that open the *fatwā* are not incidental preliminaries, but the methodological backbone of al-Kīkī's argument. Above all, they establish that rights and ownership, once fixed, persist by default through *istiṣḥāb* (the presumption of continuity) and are not displaced except by

93 al-Kīkī, *supra* note 92, at 25–28.

definitive proof, and that ambiguous acts, such as merely "placing the hand" on property, cannot override what has been established with certainty.[94]

Al-Kīkī further argues that Mālik and his early disciples recognized *ḥiyāza* as probative evidence under the moral assumptions of their time, when prevailing conditions of religious piety rendered prolonged non-assertion a meaningful indicator.[95] Yet he insists that this reliance cannot be applied mechanically across all times and places. As circumstances changed after Mālik's era, and, in al-Kīkī's own time, as corruption became widespread, he maintains that the probative force of *ḥiyāza* must be restricted, or even denied altogether.[96] He therefore sharply criticizes those who transplant earlier doctrinal formulations from Mālikī legal compendia into social contexts for which their underlying assumptions no longer hold.[97] This critique, in turn, presupposes that both adjudication and *iftāʾ* "turn with custom" in matters that vary by place, such that a judge or *muftī* may not rule without knowledge of the local *ʿurf* in which a dispute arises.[98]

After these preliminaries, al-Kīkī opens with a brief chapter outlining juristic cases (*masāʾil fiqhiyya*) in which women's legal position differs from men's, particularly in matters of worship, contracts, and testimony.[99] I read this chapter as a strategic preface to the dispute that follows. Al-Kīkī's opponent invokes a broad claim of formal parity, "women are the full sisters of men in legal rulings," and deploys it to foreclose scrutiny of women's silence and non-assertion in their social setting. Al-Kīkī does not respond by constructing a hierarchy of legal status. Instead, he advances a narrower methodological claim: legal evaluation does not proceed in the abstract, but within concrete evidentiary contexts, and its meaning may shift with circumstance. This framing, in my view, clears conceptual space for al-Kīkī's subsequent move in the *fatwā.* He refuses to treat

94 *Id.* at 35–36, 38.
95 *Id.* at 37.
96 *Id.*
97 *Id.*
98 *Id.* at 39–41.
99 *Id.* at 49–50.

prolonged silence in *bilād al-sība* as dispositive proof of *riḍā*, insisting that interpretation attend to the conditions shaping both claims and non-claims, including entrenched custom and the absence of enforceable legal procedure.

Al-Kīkī then turns to his second chapter, in which he undertakes to refute the use of long-term *ḥiyāza* as a basis for extinguishing established rights in what he repeatedly describes as *bilād al-sība.*[100] He supports this position by assembling a range of Mālikī *fatwā*s and *nawāzil* addressing such settings, grounding his argument in the premises set out in his opening principles: a right established with certainty does not lapse except through certainty, and presumptive continuity (*istiṣḥāb*) governs wherever proof remains inconclusive.[101] Crucially, al-Kīkī frames this evidentiary critique as inseparable from institutional context. He insists that the probative force of *ḥiyāza* presupposes a setting in which legal procedure functions and rulings are reliably enforced. In *bilād al-sība*, by contrast, where centralized enforcement and judicial oversight are weak or absent, possession becomes an unstable indicator, one that readily consolidates dispossession, especially when local custom already works to prevent women from asserting inherited claims.[102]

Al-Kīkī's insistence on institutional context also reflects the political landscape of eighteenth-century Morocco. The death of Sultan Moulay Ismāʿīl in 1139/1727 ushered in a period of instability and factional rivalry, shaped in part by the power of the Black Guards (*ʿAbīd al-Bukhārī*).[103] A measure of order later returned under Sultan Sīdī Muḥammad b. ʿAbd Allāh (d. 1204/1790), who reasserted central authority in Demnat and other areas of the Middle Atlas.[104] Yet in al-Kīkī's own region, the Keroual mountains, tensions between *al-makhzan* and *bilād al-sība* persisted,[105] and this *borderland* positioning likely informs his sustained attention to what legal

100 *Id.* at 53.

101 *Id.* at 53–61.

102 *Id.* at 57.

103 *See* 7 Aḥmad b. Khālid al-Nāṣirī, al-Istiqṣā li-akhbār dawlat al-Maghrib al-aqṣā 99, 136, 150 (Dār al-Kitāb 1997).

104 8 *Id.* at 3.

105 al-Tawfīq, al-Mujtamaʿ al-maghribī, *supra* note 58, at 8–9.

doctrines can plausibly accomplish in settings where enforcement remains fragile.

Earlier political formations in the Atlas had already produced a long-standing pattern of mediated rule. Berber shaykhdoms in the mountains often functioned as intermediaries of state authority under dynasties such as the Almohads (r. 524–668/1130–1269) and the Marīnids (r. 642–869/1244–1465).[106] When Marīnid power declined in the fifteenth century, highland regions increasingly fell beyond the effective reach of the *makhzan*, and jurists confronted a practical need to distinguish between contexts where formal judicial procedure operated and those where customary authority predominated.[107]

It is within this landscape that al-Kīkī's *fatwā* intervenes. He does not condemn tribal autonomy as such; rather, he directs his critique at local jurists who, in his view, departed from Mālikī norms by treating possession as presumptive ownership without procedural rigor. In regions where political authority had weakened and customary practice already constrained women's inheritance claims, such evidentiary shortcuts operated to consolidate dispossession and normalize *structural injustice.*

Al-Kīkī then turns to the third chapter of his *fatwā*, devoted to establishing the invalidity of inheritance gifts made by tribal daughters and sisters to their male relatives in contexts where custom has become entrenched in depriving women of their rightful shares. He opens this chapter by citing a range of earlier jurists who had already articulated this position, including Ibn al-Qaṣṣār, al-Bājī (d. 474/1081), Ibn Lubb, Ibn Marzūq (d. 842/1438), al-Qūrī (d. 872/1467), Ibn Hilāl (d. 903/1498), al-Wansharīsī, Ibn ʿĀshir (d. 1040/1631) and others.[108] Yet al-Kīkī does not rest his argument on doctrinal authority alone. He reinforces the juristic ruling through first-hand observations of

106 6 Ibn Khaldūn, Kitāb al-ʿibar wa-dīwān al-mubtadaʾ waʾl-khabar fī tārīkh al-ʿarab waʾl-barbar wa-man ʿāṣarahum min dhawī al-shaʾn al-akbar 271 (Khalīl Shaḥāda ed., Suhayl Zakkār rev., Dār al-Fikr 1981).

107 Mālikī awareness of the legal distinctiveness of *bilād al-sība* appears in the late Marīnid period. In one responsum, the Fāsī *muftī* ʿAbdallāh al-ʿAbdūsī (d. 849/1446) argues that the inability to enforce rulings in such regions justifies rejecting possession as proof of ownership. *See* 5 al-Wansharīsī, al-Miʿyār, *supra* note 80, at 264–65.

108 al-Kīkī, *supra* note 92, at 65–72.

women's lived realities in his own time and region, responding to a predictable objection as follows:

> If someone were to say: all that you have mentioned is correct, but it applies to lands other than these [i.e., Demnat and its surrounding High Atlas regions]; as for these lands, matters are not as you describe; rather, the custom of their people is to grant women their rightful shares of inheritance. On this basis, you have placed the texts and reports outside their proper contexts.
>
> We reply: this claim is refuted by direct observation and lived experience. The people of these lands exert themselves, to the extent of their ability, in depriving women [of their inheritance rights], both in the past and in the present, until women have come to despair of obtaining them. At times, this is accomplished by restricting endowments (*waqf*) to males to the exclusion of females. Indeed, we have not encountered a single endowment deed in our region that did not exclude women, including some whose dates exceed two hundred years. At times, it is done by restricting gifts (*hiba*) to males alone; at times through a father's final and irrevocable division (*qismat batt*) of [landed] property exclusively among his male heirs; at times, by preventing women from marriage (*ʿaḍl*) out of fear of inheritance claims; at times, by selling them in markets to those who remove them to distant lands, such that neither she sees her [father or guardian] nor he sees her again until the end of her life; at times, by marrying her off to a man from another tribe on the condition that no inheritance shall pass between them; and at times, she is not married to her male relative unless she first executes for him a formal release (*barāʾa*) of all her rights, down to the clothing on her skin and the necklace around her neck.
>
> We have even witnessed women being compelled to renounce what they would inherit from their father while he was still alive, such being the intensity of people's greed and the extent of their ignorance. At times,

> such a renunciation is demanded of her while she is legally incapacitated and barred from financial disposition, before reaching maturity. All of this is observable reality. Whoever doubts any part of it should live among the common people of the mountains and the Berbers, a population marked by harshness and coarseness of temperament, and he will witness all of this with his own eyes.[109]

Al-Kīkī then continues by describing additional practices through which guardians manipulate marriage arrangements to preempt women's inheritance claims:

> A woman may desire an honorable man who is her equal (*kufʾ*) in status, yet her guardian refuses to marry her [to him], knowing that such a man would not tolerate the forfeiture of her inheritance. Instead, he marries her off to a stranger who is submissive and poor, assuming that he will neither demand her rights nor persist in doing so, given his weakness and humiliation. As for the woman, [her guardian] knows that she herself will not demand her inheritance, even if matters were to lead to her starving to death. We have witnessed women reduced to begging during times of famine, while in the households of their brothers there was wealth enough to "fill the eyes," livestock, furnishings, household utensils, and jewelry, not to mention immovable property, yet she was unable to ask her brothers for what would suffice to meet her most basic needs.
>
> If she does not comply by accepting marriage to someone who is not her equal, whom her guardian has proposed to her, he compels her to pay forty ounces of gold, known as *awāqī al-tabrīʾa* ("ounces of disavowal"). By this they mean that she has disavowed her guardian and he has disavowed her in return, severing ties of kinship with her. As a result, she incurs grave dishonor, particularly among her closest relatives.[110]

109 *Id.* at 73–74.
110 *Id.* at 74–75.

To rebut claims of voluntariness, al-Kīkī turns to cultural evidence. He cites a well-known proverb: "What enmity is there between you and me? It is as though I took your inheritance from you!", a saying that attests to the moral gravity attached to violations of inheritance.[111] For al-Kīkī, such proverbs give voice to a shared moral understanding in which coerced dispossession is recognized as a grave breach of social and familial norms.

He further appeals to human nature. "Do people not love wealth?" he asks, challenging his opponents to explain why, if such gifting were truly voluntary, even their own mothers, sisters, or daughters have not received their rightful shares. In practice, he argues, women receive only token portions, typically when a male relative is moved by shame or religious scruple; more often, their shares are silently absorbed into male holdings.[112]

In a firm assessment, al-Kīkī declares that women in the Atlas Mountain region are effectively excluded from *al-uṣūl*, immovable assets such as land and homes: "There is no way for a woman to obtain her share of it, no matter what."[113] This assessment rests on sustained observation over many years and is offered to dismantle the assumption that isolated instances of renunciation, whether genuine or coerced, can ground a general legal presumption of consent.

To underscore the injustice, al-Kīkī draws a pointed contrast between tribal regions and urban centers such as Fez, where judicial rulings are more consistently enforced and respected scholars uphold procedural safeguards. "Ask about the daughters of Fez," he challenges. "Do you find them renouncing their inheritance to their relatives?"[114] Through this comparison, al-Kīkī makes clear that the systematic exclusion of women from inheritance does not arise from Islamic law as such, but from entrenched custom operating in settings beyond the reach of effective legal enforcement.

Anticipating objections, al-Kīkī cites exceptional cases of women who have voluntarily relinquished their inheritance. "Is she one among a hundred thousand?" he asks. "That

111 *Id.* at 75.
112 *Id.* at 77.
113 *Id.*
114 *Id.*

is rare, and what is rare has no legal force."[115] In so doing, he invokes the legal maxim *al-nādir lā ḥukm lahu* ("the rare has no legal force"), affirming that anomalous cases cannot ground a general legal rule.[116]

Arguably, al-Kīkī's directs his most striking critique, however, at his fellow jurists. He reports that his initial efforts to restore women's inheritance rights bore tangible results: some men repented and returned usurped shares, and public sentiment began to shift toward acknowledging women's claims and reversing entrenched practices of exclusion.[117] This momentum, however, was later reversed by scholars who, in his view, clung to superficial readings of authoritative texts, such as *al-Risāla* by Ibn Abī Zayd al-Qayrawānī (d. 386/996) and *al-Mukhtaṣar* by Khalīl b. Isḥāq (d. 767/1374), using them to justify a return to exclusionary custom.[118] Recalling this reversal, al-Kīkī laments: "I was about to succeed, but one of my antagonists gave people an excuse, causing them to revive their heresy and return to their habitual practice."[119]

This frustration points to a deeper concern: justice in the mountains is obstructed not only by entrenched custom, but also by a fragile and corrupt judicial order, marked by weak enforcement, the spread of bribery, and the complicity of local judges. Al-Kīkī notes:

> The weak are unable to obtain their rights, or obtain only a portion of them, except after losing many times over what they [ultimately] gain. This is due to the injustice of judges, the weak enforcement of rulings, the prevalence of false testimony, bribery, and the forgery of written records, as well as the absence of anyone capable of discerning disputed matters because of widespread ignorance. Because rural judges and their appointed witnesses

115 *Id.*

116 On this legal maxim, *see* 1 Sirāj al-Dīn Abū Hafṣ ʿUmar b. ʿAlī al-Anṣārī (Ibn Al-Mulaqqin), al-Ashbāh wa'l-naẓā'ir fī qawāʿid al-fiqh 506 (Muṣṭafā Maḥmūd al-Azharī ed., Dār Ibn al-Qayyim & Dār Ibn ʿAffān 2010).

117 al-Kīkī, *supra* note 92, at 78.

118 *Id.*

119 *Id.*

> [ʿ*udūl*] lack endowments assigned to their offices [and receive no fixed revenues], they exercise judicial authority out of necessity, presiding over litigants who are compelled by circumstance to seek judgment before them. As a result, they [i.e., judges and their appointed witnesses] have grown accustomed to accepting bribes in exchange for issuing rulings and forging documents. They sometimes justify this by claiming that the property of the common people is licit to them on the grounds of *istighrāq al-dhimma* [i.e., that all of the people's property is forfeit] or by asserting that they possess outstanding claims against the populace that have yet to be fulfilled, along with other corrupt forms of justification ….
>
> This situation has reached the point that even men have come to fear bringing claims before their courts, let alone women. A man may sell his principal asset [land or house] through a *bayʿ al-thunyā* [a conditional sale allowing the seller to reclaim the property upon repayment of the price], and then, when he becomes able to reclaim his asset, he hesitates and delays doing so for many years, knowing with certainty that the buyer will not permit redemption except through litigation before the courts. One may say to the seller, "Why do you not reclaim your property?" and he replies, "Until I can gather enough money with which to litigate against the buyer." So what hope is there for the poor woman, who cannot confront the one who has usurped her inheritance, let alone bring him before the courts? Such a practice has never been customary among us, and I have never seen a single woman summon her relative before judges.[120]

This reflection leads al-Kīkī to a pointed question. If jurists invalidate women's gifts on the grounds of coercive social norms, should the same reasoning not apply to men who are subject to comparable pressures arising from weak judicial enforcement, corruption, and the practical barriers to litigation? "Do we confine the invalidity of the gift to women alone," he asks, "or does

120 *Id.* at 78–80.

it apply to men as well, given the generality of the cause?"[121] Although he acknowledges the absence of explicit precedent for extending the ruling in this way,[122] the question reveals a broader concern in his reasoning: juristic evaluation must attend to lived conditions of vulnerability and constraint, rather than proceed solely from formal legal distinctions.[123]

Al-Kīkī further extends this reasoning beyond gifts to other ostensibly voluntary dispositions. He treats testamentary bequests (*waṣiyya*) extracted from women under familial pressure as invalid, grounding this legal reasoning in the same dynamics of shame and fear of social rupture.[124] He applies the same logic to property relinquished by women in exchange for permission to marry, to the appropriation of a woman's *mahr* by her guardian,[125] and to waivers of marital rights solicited during a husband's illness.[126] In each case, al-Kīkī insists that apparent consent, when produced under conditions of vulnerability and moral coercion, cannot sustain legal validity.

In the fourth and final section of his *fatwā*, al-Kīkī turns from invalidating coerced dispositions to establishing liability to account for benefits (*kharāj*) derived from the unauthorized exploitation of inherited property. This obligation is owed by anyone who benefits from jointly inherited assets without right.

121 *Id.* at 80.

122 *Id.*

123 In a case concerning a woman who sought marriage in the absence of any guardian other than a paternal cousin, al-Kīkī affirmed the validity of her marriage when officiated by a qualified judge who satisfied the legal requirements of integrity and knowledge. He added, however, a significant caveat: "As for most judges in the *bādiya* today, given their ignorance and disregard for the legal conditions of marriage, they do not possess such authority." *See* Muḥammad al-Kīkī, ʿUnwān al-shirʿa wa-burhān al-rifʿa fī tadhyīl ajwibat faqīh drajja 304 (al-Saʿīd Wadīdī ed., Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya 2021). This distinction underscores al-Kīkī's concern with judicial legitimacy in marginal settings, where formal roles alone cannot sustain legal validity in the absence of effective enforcement

124 al-Kīkī, *supra* note 92, at 80.

125 Al-Kīkī emphasizes that women must personally receive their *mahr*, particularly when it consists of tangible goods such as livestock or household items. In a *fatwā* concerning a widow's claim against her husband's heirs, he states: "In *bilād al-sība*, it is imperative, for it is customary among them that a woman's guardians appropriate her *mahr* as a matter of course." *See* al-Kīkī, ʿUnwān al-shirʿa, *supra* note 123, at 302.

126 al-Kīkī, Mawāhib dhī al-jalāl, *supra* note 92, at 80–81, 83–85.

He holds that such liability attaches whether the exploiter is a co-heir or a purchaser who entered the transaction in the absence of any plausible legal ambiguity (*shubha*).[127] He organizes this inquiry into four distinct scenarios, each calibrated to the prevailing customs of the rural contexts he describes.

In the first scenario, a co-heir exploits the inherited property while retaining possession of it. In such cases, al-Kīkī maintains that *kharāj* is owed by the exploiter unless the remaining heirs can demonstrate genuine acquiescence.[128] While verbal acquiescence may carry probative weight when it comes from male heirs, al-Kīkī emphasizes that claims of *ḥayāʾ* advanced by women, particularly tribal women, remain valid grounds for later recovery.[129] As for tacit acquiescence inferred from silence, he deems it weak and unreliable in his regions, since prevailing custom dictates abstention from claims out of shame and fear of social stigma, even among men.[130] He stresses that this pattern is widely observable and denied only by those unfamiliar with social realities or acting in bad faith.[131]

In the second scenario, male heirs partition and exploit the inherited property while their sister remains silent. Al-Kīkī holds that she retains the right, upon later asserting her claim, to invalidate the partition, to recover her share of the property itself, and to demand from her brothers the *kharāj* owed to her for the period during which they exclusively benefited from the shared asset.[132]

In the third scenario, a woman's male relative sells only his own share of jointly inherited property, yet the purchaser takes possession of the entire estate in accordance with rural custom, without the woman's sale or consent. If she later asserts her claim, the purchaser is liable to her for the *kharāj* corresponding to her share, since he entered the transaction without legal ambiguity (*shubha*). Al-Kīkī notes that this very scenario constituted the *nāzila* that prompted the composition of his *fatwā*.

127 *Id.* at 91.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* at 96.

In the fourth scenario, the brother sells the entirety of the jointly inherited property. Al-Kīkī distinguishes four sub-cases. If the purchaser was unaware of any co-ownership and reasonably believed the seller to be the sole owner, no liability arises and the yield remains with the purchaser. The same applies if the purchaser knew of the co-ownership but reasonably assumed the woman's consent. Liability for the yield owed to the woman attaches, however, if the purchaser knew that the seller acted against his female co-heir without her consent. In the most difficult case, where the purchaser knew of the co-ownership but it remains unclear whether he knew of the injustice inflicted upon the woman, al-Kīkī inclines toward treating the seller as a usurper, reasoning that the notorious custom of depriving women of inheritance in rural regions renders such ignorance implausible.

Al-Kīkī then states:

> All that we have set out in the preceding sections applies to regions beyond effective judicial enforcement (*bilād al-sība*), as opposed to cities and villages where judgments are implemented. If such cities or villages come, for a period of time, to be devoid of effective adjudication, then their legal status becomes that of the countryside (*al-bawādī*), because [the same] operative cause is present [i.e., the absence of judicial enforcement and the breakdown of effective adjudication]. It is this cause that must be taken into account in every time and place. Attend carefully to this principle and observe it, for by doing so you will be rightly guided in your judgments, God willing.[133]

Read in this light, al-Kīkī's *fatwā* articulates a distinctly Mālikī approach to *riḍā*, one that remains firmly grounded in doctrine while insisting that consent be evaluated in relation to conditions of enforcement and social constraint. Across his treatment of gifts, bequests, marital arrangements, and liability to account for benefits (*kharāj*), al-Kīkī consistently refuses to infer legal

133 *Id.* at 112.

validity from outward compliance alone. Instead, he ties the assessment of consent to the operative causes that structure legal life in contexts of weak adjudication, where coercion, vulnerability, and the deprivation of rights routinely distort formal transactions. In doing so, his intervention exemplifies a mode of Mālikī juristic reasoning that confronts entrenched custom without abandoning legal method, and that seeks to preserve substantive justice where the law's institutional guarantees remain fragile.

Conclusion

In this article, I have argued that Mālikī jurists articulated a legally rigorous and context-sensitive understanding of *riḍā* that cannot be reduced to outward compliance or formal expression. Consent, in Mālikī legal reasoning, was not a static doctrinal prerequisite, but a condition whose legal significance depended on the social, institutional, and evidentiary contexts in which legal acts were performed, especially in settings marked by weak adjudication and entrenched customary pressure.

Through a close reading of doctrinal discussions alongside applied Moroccan *fatwā*s, I have shown that Mālikī law neither accommodated custom (*ʿurf*) uncritically nor opposed it in the abstract. Instead, jurists evaluated custom relationally: it could function as a stabilizing legal resource when it facilitated orderly transactions, but it became subject to heightened scrutiny when it operated as a mechanism of exclusion or dispossession, particularly in disputes over women's inheritance gifts. In such cases, consent was not inferred mechanically from silence, acquiescence, or formal declarations, but assessed in light of operative factors such as shame, fear of social rupture, economic dependence, and the practical inaccessibility of judicial remedies.

Al-Kīkī's *fatwā* crystallizes this mode of reasoning with particular clarity. Writing in a context characterized by fragile enforcement and contested authority, al-Kīkī neither rejected custom wholesale nor relied on moral exhortation. Instead, he worked squarely within Mālikī doctrinal categories—*riḍā*, *ḥiyāza*, *istiṣḥāb*, and *kharāj*—to recalibrate evidentiary presumptions and standards of validity in response to endemic coercion.

His intervention illustrates how juristic reasoning adapted to the breakdown of adjudication without abandoning the epistemic commitments of the school.

Taken together, the materials examined above point to a Mālikī jurisprudence of consent that was acutely responsive to conditions of enforcement. Jurists operating in environments of weak judicial authority distinguished between formal acts and legally operative will by attending to the causes shaping legal behavior on the ground. This approach complicates accounts that privilege either formal doctrinal compliance or custom as sufficient grounds of legal validity and instead reveals a Mālikī jurisprudence capable of recalibrating legal presumptions in order to prevent law from becoming complicit in structural harm.

By foregrounding juristic assessments of consent under conditions of pressure and institutional fragility, this study contributes to broader discussions of legal agency and evidentiary reasoning in Islamic law. More fundamentally, it underscores the importance of reading *fatwā*s as situated legal interventions, responses to concrete configurations of power, enforcement, and vulnerability, rather than as abstract doctrinal statements detached from social life. In doing so, it highlights how Mālikī jurists confronted the limits of law not by suspending doctrine, but by rethinking how doctrine operated under constraint.