THE JURISPRUDENCE OF TRANSACTIONS: A MODEL OF THE INFLUENCE OF MALIKI JURISPRUDENCE ON ALGERIAN LAW

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Abstract:

This study examines a key aspect in the development of Maliki jurisprudence, through the interaction of jurisprudential rulings with the practical challenges in the field of fatwas and judicial practices, highlighting the prominent role played by "al-Majariyat" as a facet of renewal in the Maliki school of thought. This rule is known for "what has been practiced" and "the jurisprudence of operations."

As Islamic Sharia rulings are a source of reserve law for the Algerian legislator, it is undeniable that Algerian law is influenced by and draws from these rulings, including those related to the jurisprudence of transactions. Therefore, the research aims to establish the jurisprudential basis and its practical application in Algerian law, emphasizing the enrichment of judicial rulings with fatwas related to the jurisprudence of transactions.

Keywords: *Al-Majariyat, jurisprudence of operations, what has been practiced, judicial rulings, Algerian law.*

1. INTRODUCTION:

Upon closer examination of the foundations of the Maliki school of thought, the absence of what has been practiced is noted, as it is considered one of the relied-upon rules in the school. However, it is evident within judicial rulings and fatwas in the Maghreb and Andalusia regions. There is a close connection between practice, fatwa, and the judge's ruling.

It is known that the jurisprudential rulings applied to disputes include both well-established and debated rulings.And it is known that the legal rulings that are applied to disputes are taken into consideration, some of which are well-known and predominant, and some of which are less known. The principle is to apply the strong and predominant ruling, but it is permissible to act upon the less known ruling if there is a reason to do so. This is established among scholars in all schools of thought, especially among the Hanafis and Malikis[1], in an effort to highlight the role of Maliki jurisprudence in establishing judicial rulings. My attempt here is to link between the religious studies and the legal methodology, to prove the existence of following the legal precedents in our jurisprudential heritage and its practical applications in the legal aspect.

The main problem lies in defining the relationship between the facts and the judicial rulings, to what extent can the rulings based on the facts contribute to establishing legal rulings that assist

the judge in resolving legal disputes? The main problem branches out into a series of sub-questions, the most important of which are: What are the facts? What are their requirements? What is their jurisprudential and legal impact? To what extent has the Algerian legislator taken into account their provisions?

The importance of this research lies in: highlighting an important jurisprudential trend in Islamic heritage that has not received its fair share of study, and emphasizing the link between Islamic Sharia rulings as a source of law and judicial rulings that often do not help in resolving disputes, as divergent or weak opinions can be a way to solve people's problems and alleviate injustice. The facts serve as a rich basis for potential juristic efforts that are worth investing in the field of judiciary in this era.

The research aims to bring out the hidden jurisprudential aspects in the Maliki school of thought closely related to judicial work, which can contribute to highlighting the role of the jurisprudence of facts in enriching judicial rulings, in the absence or ambiguity of text, in addition to indicating the richness of our legal system with practical examples of Maliki jurisprudence.

The methodology followed: Understanding the facts and their foundations requires an analytical approach to clarify their essence, principles, and documentation, as well as a descriptive approach that is evident in the practical aspect.

To approach our research topic, we will rely on the following elements:

2. JURISPRUDENTIAL FOUNDATION OF MAGISTRATES:

Magistrates, or what has been done in judicial work, is a rule that responds to the conditions of people, called for by the circumstances of societies in the Western Islamic countries at a certain stage [Omar Al-Jedidi, Investigations in the Maliki School in Morocco, 1st ed., 1993, p. 344.], manifested in the selection of appropriate statements by judges and muftis for the presented facts - even if they are weak - according to certain requirements[2].

2.1. Definition of Magistrates and their types:

2.1.1. Definition of Magistrates

The "Majariyat" is a term derived from their saying: "What happened to the work," and it is considered one of the principles unique to the Maliki school of thought. It showcased the brilliance of the Moroccans in not sticking to theoretical judgments, but adapting them to practical reality. The "Majariyat" originated and settled in the Islamic West and Andalusia, and had several practical applications in the fourth century of the Hijri calendar[3]. It then spread widely in the fifth century in the lands of Andalusia[4] due to the closure of the door of independent reasoning as a barrier to those who might claim it without being qualified. The Maliki school[5] of thought in Morocco opened the door to issuing religious edicts and judgments through the "Majariyat," as new issues arose that needed to be addressed, using abandoned opinions in the Maliki school[6]. As long as the foundations of work based on abandoned opinions are in place, work continues accordingly. If these foundations are removed, the ruling reverts to the prevailing or well-known opinion, as the ruling changes with

its presence or absence. The legal actions: The expressions of scholars in explaining the limit of legal actions have varied, some of them have specified it to judicial work, where Abu Al-Shita' Al-Sanhaji defined it as: "The statement ruled by the judges of justice[7]," as chosen by Al-Ramasi in his commentary[8]. Abdullah bin Biya attributed it to Abu Al-Irshad Al-Ajhouri where he said: "What is meant by what the judiciary has done: what the judges have acted upon and ruled with, so it is part of what is done[9]."

When a judge is presented with a case, if the ruling based on the well-known and predominant opinion leads to corruption or loss of interest, the only way out of this prohibition is to abandon the well-known or predominant opinion and opt for the weaker one. If he does so and other judges follow suit, it results in what is known as judicial precedent. If the other judges do not follow suit[10], the ruling remains an individual ruling, which aligns with the consensus among judges at this time known as judicial precedents.

The actions are not limited to the work of the judges: and there are scholars who considered what was done by someone other than the judges, and among them is Qutb al-Risuni who said: "Abandoning the well-known opinion of the school in favor of a beneficial or harmful action, or a customary practice.[11]" Omar al-Jayyidi defined it as: "Abandoning the predominant or well-known opinion in certain matters in favor of the weaker opinion, for the benefit of the nation and its social conditions[12]." He also said: "Choosing a weaker opinion and ruling by it, and the judges and muftis agreeing to implement it for reasons that necessitate it." Abdullah ibn Biya defined it as: "Adopting a weaker opinion in judgment or issuing a fatwa from a scholar who is trusted in a particular time and place to achieve a benefit or prevent harm, and it may be in accordance with custom or in agreement with the opinion of those in authority[13]." These definitions make it a jurisprudential or judicial choice, with mention of the reason for the change, without limitation We conclude that what happened in this case is a ruling imposed by the multiplicity of circumstances and legal issues, the changing of customs and their intermingling, which necessitates finding solutions for them. This pushes the judge or the jurist to search in the jurisprudential heritage to solve the dilemma at hand. If the predominant or well-known opinions do not help, a search for weaker opinions within the school is conducted. Then, judges and jurists are guided by what has been reached as long as the reason for it exists. This gives the ruling the quality of being authoritative, so it is not permissible to contradict it. Therefore, it is said: "What is based on practice, other than the well-known, takes precedence in adoption and is not abandoned[14]." This is what has been established in the statutory laws regarding judicial precedents exclusively

2.1.2 Types of Legal Opinions:

- Private (Local) Opinion: This term refers to legal opinions and judicial rulings that contradict the predominant or well-known opinions based on a specific custom or tradition in a particular country or region. This type of opinion is specific to that city or region, such as the opinions of Cordoba, the people of Algeria, and the people of Tunisia. It is subject to the laws and judgments of countries that share similar customs and traditions. To consider this type of opinion valid, the custom or

tradition on which the ruling is based must have persisted until the time of the case. Otherwise, the predominant and well-known opinions prevail. This type of opinion is referred to as having been applied in a certain country or region[15].

- Absolute Opinion: These are legal opinions and judicial rulings where judges and jurists have adopted opinions that contradict the predominant or well-known opinions based on public interest or common custom. The acceptance of this opinion applies universally as long as the public interest is being served. This is what is meant by "the opinion has been applied, and the rulings have been settled[16]."

2.2. Basis and Conditions of Legal Opinions:

2.2.1. Basis of Legal Opinions:

the origin of the work stems in many of its forms from the principle of facilitation and alleviation of hardship[17], because if the predominant and well-known purpose of the ruling is not achieved, then the diligent researcher or judge should seek the balanced solutions within the framework of the Sharia. Unless the principle contradicts a legal text or a general rule, and there is no prevailing argument against it or an equal opposing argument, there is nothing to prevent its adoption in issuing religious edicts and judgments[18]. The foundations upon which the work is based are from the principles of the Maliki school of thought, which constitute the reason for the deviation of the work from the well-known practice, until that foundation is removed, then the ruling returns to the well-known practice[19]. The most important of these are:

- Custom: which is the strongest, and what is meant by custom is the correct custom that does not contradict the provisions of Islamic law and is equal in knowledge to the diligent and others[20].

- Sadd al-Dhari'ah: It means closing the door to corruption, and it is one of the most important principles of the Maliki school, expressed in the field of judicial work by addressing the corruption of the time and the fear of discord[21].

- Al-Maslaha: Considering that the Sharia came to bring about benefits, if an unrecognized benefit coincides, the diligent or judge adopts it[22]. This is only possible for those capable of weighing and striving to prevent harm[23].

- Meeting necessity and caring for need: Alleviating the hardships and temporal and spatial needs that people face until the harm subsides and the need increases, returning to the original state[24].

2.2.2. Conditions of the work that took place:

- Verification of workflow: By looking at the books of regulations, judicial decisions, and fatwas, we find that they sometimes take a lenient approach in narrating the work, attributing the work sometimes to the mufti who issued the fatwa, and sometimes simply saying "it has become common in such a way" and "it is common among the scholars" and "the judges allowed" and "they permitted" ... such terms indicating the flow of work[25].

- Distinguishing between local work and public work: This is because work may be specific to a village or a country, and it may be public in all places, and it is not permissible to extend the judgment to areas not designated for it due to the lack of interest in them, unlike if the work is

public, then the judgment of the work is public[26].

- Knowing the timing of events: This principle is manifested in the consideration of the jurists for the element of time, and the consideration of context and its impact on changing rulings[27].

-Qualification and continuity of jurisdiction: Work does not acquire a legal quality unless it comes from a diligent scholar of the school of thought or an experienced judge, as they are qualified to know the interests of people through experience and the ability to discern the situations of disputants or questioners[28].

- Knowing the reason for withdrawal: The condition for withdrawal is that it must be based on the principles of Sharia, and it is not considered as such unless it falls under a valid legal principle[29]

3. THE IMPLICATION OF THE JURISPRUDENCE OF TRANSACTIONS IN ALGERIAN LAW:

The work that has been done is a principle rich in potential for investment in the field of judiciary in this era. It has had a clear impact on the jurisprudence in the Maliki school. Therefore, it is necessary to highlight the role of the jurisprudence of transactions in enriching the judicial system with rulings by highlighting practical examples influenced by transactions.

3. 1. The Maliki jurisprudence as a reserve source for the law:

3. 1. 1. The aspect of renewal in Maliki judiciary through adopting the jurisprudence of precedents:

In the past, the jurisprudence of precedents contributed to renewing the spirit of the judiciary, as it was a manifestation of its dynamism. Judges of the Maliki school boldly embraced applying what had been practiced, contrary to the popular opinion, and working with the weaker argument when necessary. Through this, they were able to resolve many complex cases and difficult situations[30]. It truly reflected the spirit of renewal in the Maliki school in terms of legal opinions and judgments, following the principle of evolving rulings and adapting them to changing circumstances and causes[31].

There is no doubt that the judge's utilization of the jurisprudence of precedents benefits the judiciary according to the Maliki school, as Dr. Raisouni mentioned the benefits of good in three aspects:

- The judge's exploration of research perspectives to find solutions for matters without direct textual evidence, freeing them from the rigidity of following popular opinions that may not meet the needs of the time

-Providing judges with the tools of independent reasoning within the texts of Sharia, and within the limits allowed by the law, because leaving the well-known often reflects a consideration of the specificity of time or place, which affects the intended ruling on the facts, resulting in a practical application of the ruling to achieve benefit or prevent harm.

- Developing the jurisprudential school that the judge adheres to, through grounding practical jurisprudence that takes into account the changes in reality and considers the consequences of matters[32], contributing to consolidating the approved jurisprudential reference in the country and

unifying opinions

The truth is that the judge, within the framework of jurisprudence of operations, balances between the two sides of interests and harms: the first is understanding the jurisprudential intent as rulings and purposes, while the second is the jurisprudence of the changing human reality, and with both jurisprudents together it is possible to connect between the rulings of the Sharia and the reality of people[33].

In this way, it can be said that the jurisprudence of operations is considered one of the tributaries that has given Maliki jurisprudence flexibility, and has contributed to the development of the judiciary in line with the evolution and change of circumstances[34]. It has also assisted the jurist and the judge in finding solutions to the problems and issues presented in a way that does not contradict the principles of Sharia and its purposes, thus becoming a wealth of jurisprudence and judiciary, which we can refer to today as evidence of the richness of rulings and their fulfillment of needs in this time.

3.1.2 Judge's effort is a practical application of implementing Islamic Sharia law as a reserve source: If the judge does not find a rule in the legislation texts by which to judge, he must search for the rule outside these texts, by resorting to other official legal sources. The Algerian legislator stated in the first article of its second paragraph of the Civil Code that: "If there is no legislative text, the judge shall rule according to the principles of Islamic Sharia, and if not, according to custom, and if not, according to the principles of natural law and rules of justice[35]."

It is clear from this article that the legislator has stipulated the restrictions that the judge must adhere to in case a text is not found, by mentioning the sources that the judge must refer to in their order. Therefore, the judge cannot refer back to a source unless it is verified that the ruling was not found in the previous source[36]. Accordingly, in Algerian legislation, the judge, in the absence of legislative text, adheres to the principles of Islamic law first, customs second, principles of natural law third, and principles of justice fourth[37].

The legislator intended with the principles of Islamic Sharia its general rules such as removing hardship, considering necessity, taking into account need and benefit... because referring to Islamic Sharia as a whole makes it a primary source, not a reserve source. It should be noted that the situation is different when referring to Islamic Sharia as a reserve source for civil law, and as a primary source for family law, which states in Article 222 that: "Anything not addressed in this law shall be governed by the provisions of Islamic Sharia[38]."

The Algerian legislator in civil law has sufficed with the principles of Sharia which represent its foundations and general principles, unlike the provisions of Sharia which represent its details and principles, as indicated in Article 222 of the Family Law. As for custom, the judge does not create custom, but rather verifies its conditions and establishes its existence. Custom derives its strength from Islamic Sharia, considering that custom is authoritative, and what is known in custom is like what is stipulated in a condition. It has been previously explained that one of the solid foundations on which the jurisprudence of transactions is based is the consideration of customs, both general

and specific.

The principles of natural law and the rules of justice are not written in a specific reference, and they are not far from what the legal rulings are based on in bringing benefits and averting harm. Therefore, if the judge needs to refer to them, he must determine what he sees as in line with the requirements of the law, and thus, the judge's referral to these principles and rules is intended to obligate the judge to exert his opinion to resolve the case, which is exactly what the Maliki school in Morocco has adopted in relying on the jurisprudence of operations in their fatwas and judgments in consideration of people's rulings

A judge usually makes an effort in two main situations:

- Ambiguity or ambiguity of the text: When the text has more than one interpretation, the judge endeavors to understand the text and determine its meaning, and usually does not resort to the provisions of the Sharia except rarely, as the texts of the law complement each other.

- Deficiency in the text or its silence on some issues: when the legislator deals with some issues, but at the same time omits other issues and does not indicate their provisions, and the judge in this case tries to extract from the texts of the legislation or legislation in force the appropriate solutions to the issues on which the legislator is silent, using the methods of interpretation available to him, and often the provisions of the Islamic Sharia are the most appropriate solution.

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If we want to determine the place of the judge's ijtihad, through which he can be enlightened by the provisions of the Maliki school of thought, with different degrees of adoption, whether it is a strong, well-known or weak opinion, and within the limits of what the law allows, it can be said that his field of endeavor:

- Personal Status Law: It has derived many of its provisions from the Maliki doctrine, but it has overlooked many issues, which are not addressed by a legal text, such as the provisions of the will, death sickness ..., and it is original for the judge to refer in the provisions of these matters to the Civil Code, as long as the Personal Status Law does not address them, and if the judge does not find a text in this law, he rules by what is settled from our Maliki juristic heritage, with or without a preponderance.

The Civil Code: The Civil Code is the reference to which the judge refers to in the absence of provisions in other branches of private law, such as personal status, labor and trade law, and where there is ambiguity and the texts of the law are not helpful, the provisions of Islamic law are the solution.

- Criminal law: This is a narrow and sensitive area in this field, but it has received prominent jurisprud

3.2 Selected examples of the jurisprudence of al-Majriyat between Maliki jurisprudence and Algerian law:

In order to emphasize the Maliki jurisprudential reference to Algerian law, I seek through the examples I will present to give practical evidence of the reference of many legal rules to the

provisions of the Maliki doctrine at different degrees, some of which are established according to what has been practiced, and I have tried to diversify the issues to be examples that can open the field of research in the future to expand the circle of jurisprudence based on this evidence

ence due to the ambiguity of the texts on the one hand and the lack of them on the other

3.2.1 mix in the oath:

A- According to the Mālikiyyah: We mean by mixture: It is "a case that is filed after the lawsuit is filed against the defendant, that is[39], if the plaintiffs are known to have a relationship, transaction or accusation between them.[40]"

Ibn Abi Zayd said in his treatise, "There is no oath until there is proof of mixture between him and the plaintiff, so that the lawsuits are not used as a pretext to harm others,[41]" in accordance with what is stated in Al-Muta'ah based on the work of the people of Madinah[42], in accordance with what is stated in Al-Muta'ah[43].

However, the Andalusian monarchs disagreed with the popular opinion, leaving the requirement of the mixture in directing the oath, following the opinion of Ibn Nafi' and Ibn Abdul Hakam in the matter, and this opinion became famous among the latecomers and was practiced by them[44], although the work is done on the weak opinion, in order to close the pretext of harming people of honor by swearing and humiliating them in the judicial councils, and because it is appropriate to their reality and customs, and this is strengthened by evidence that does not deviate from Malik's principles of that:

The practice of leaving the association is only in claims of money, not in claims of usurpation and trespass, in which an oath is required because of the suspicion and accusation.

-Some Andalusian Mālikīs did not apply this rule in its entirety, but rather singled out women who are concealed and men who are reluctant to associate with people, so they are not obligated to take an oath in a lawsuit until after mixing is proven.

-In fatwa books, they require proof of mixing in accordance with the famous madhhab, while in the judiciary, they are credited with abandoning mixing[45].

Some researchers are more likely to follow the popular view because of the following:

The generalities of the Qur'an and Sunnah command the administration of justice and the preservation of rights.

- The requirement of the plan may be a pretext for wasting rights and wasting interests, as the plaintiff may be the owner of a right but lacks evidence to prove it, and there is no contact between him and the defendant, hence the obligation of this condition is conducive to wasting the plaintiff's right.

- If we envision a conflict between the two evils: the evils of wasting rights and the evils of humiliating people of good character by swearing at them, the rule of weighing the lesser of two evils dictates that the lesser harm is wasting improvements related to the dignity of people of good character, in exchange for the necessity of preserving material or moral rights.

-The precaution for the dignity of those with authority cannot be achieved by wasting the rights of

the people, and the precaution can be taken to prevent the unscrupulous people from humiliating the decent people by entrusting the defendant to a lawyer[46].

B. In law: The issue at hand is related to one of the types of oaths stipulated by the Algerian legislator. When the opponent is unable to provide evidence that proves his right, he may resort to resorting to the conscience of the opponent by administering an oath to him, asking him to perform it to resolve that dispute, and this type of oath is called a decisive oath.

- Definition of a decisive oath: [47]It is called the original oath because it is the one to which the mind is drawn at the time of launch, and it is called the lifting oath because it raises the dispute and drops the case, and it is called the obligatory oath because it is obligatory on the defendant if it is requested from him, and it can only be made at the request of the opponent[48].

It is defined as : The oath that one of the litigants directs to the other litigant to prove his right and end the dispute that lacks evidence, and when the other party does not recognize the right of the opponent, the decisive oath is directed to him[49].

The Algerian legislature has stipulated it in Articles: 343 to 347 of the Algerian Civil Code, and its procedural provisions are regulated in arts: 189 to 193 of the Code of Civil and Administrative Procedure: 343 of the Algerian Civil Code: Article 343 of the Algerian Civil Code states: "Each of the two litigants may direct the decisive oath to the other litigant, but the judge may prevent the directing of this oath if the opponent is arbitrary in this regard, and the person to whom the oath is directed may return it to his opponent, but it may not be returned if the oath is based on a fact that is not shared by two litigants, but is independent of the person to whom the oath is directed.[50]"

The Algerian legislator has followed the Maliki doctrine, and this is evident from the conditions he has set for the acceptance of the decisive oath, as well as the manner in which it is administered, and the essence of our question focuses on the conditions related to the person who is the subject of the decisive oath.

- Conditions of the decisive oath: They are of two types

- Conditions related to the person who is the subject of the decisive oath: The person who directs the decisive oath is usually the plaintiff, whether he is an original or subsidiary plaintiff, as he is generally the party on whom the burden of proof rests, as he has the capacity to act[51], as for the person to whom the decisive oath is directed: The person to whom the decisive oath is directed is required to have the same capacity to act, and this capacity must remain until the oath is actually sworn, dismissed or denied[52].

- Conditions related to the incident that is the subject of the decisive oath: It is represented by the fact that the incident does not violate public order and public morals, as evidenced by Article : 190 / 3 of the Code of Civil and Administrative Procedure, and that it is not in matters that cannot be waived or reconciled, and that the incident subject to the oath would lead to the resolution of the dispute between the parties[53], and it is important that the facts relate to the person to whom the oath is directed, as stipulated in Article 344 of the Civil Code.

Through what we have followed from the texts related to the decisive oath, it is clear that the legislator did not require mixing in the oath, but rather gave this right to every plaintiff who was unable to provide evidence of proof, with which he resolved his dispute, relying on the conscience of the opponent.

A - Maliki: It is well known in the doctrine of Malik that a woman is believed in the sickness of her vagina and her virginity, if the husband claims a defect in her or that she is a sheep, and on this Khalil relied in his summary when he said: "This is the opinion of Ibn Habib, but Sahnoun disagreed and advised that it is permissible to look because of the lack of honesty of women[54], as the wife responds with the disease of the vulva and the knowledge of this disease can only be established by looking at women and examining defects, and this is the practice of the late Maliki, explaining that the woman is accused and has the right to defend herself However[55], looking can only be done with the permission of the judge, and he does not accept anyone other than Adoul in the examination of defects, but today the defects of the couple are diagnosed by the doctor[56], and there is nothing wrong with exposing the awrah, as far as the need for treatment or testimony of the defect, and this is based on the prevailing interest[57].

B. In law: The Algerian legislator has chosen what has been practiced in the Maliki school, as evidenced by several legal texts:

- Adoption of medical expertise: The Algerian legislature has defined medical expertise as a means of proof in Article 95 of the Code of Medical Ethics[58], where there are many forms of medical expertise, such as reports describing the medical condition of an individual, including a certificate of virginity, but under a judicial order from the judicial police, this certificate is issued in two cases: In cases of sexual offenses and in the case of dissolution of marriage, as the dissolution of the marital bond may occur before entry, the woman can request a certificate proving her virginity to prevent any attempt to tarnish her reputation[59].

Article : 425 of the Code of Civil and Administrative Procedure supports the above, as it states: "The head of the family affairs department shall exercise the powers vested in the urgent judge, and he may, in addition to the powers vested in him in this

The law may order, as part of the investigation, the appointment of a social worker or an expert doctor or resort to any specialized authority in the subject matter for consultation."

3. 2. 3 medical examination before marriage:

Which is emphasized in the content of Art: 7 bis of the 2005 amendment to the Family Code, where the Algerian legislator added this article, which reads: "Applicants for marriage must present a medical document no more than three months old, proving that they are free of any disease or any factor that may pose a risk interfering with marriage. Before drawing up the marriage contract, the notary or civil status officer must ensure that both parties have undergone medical examinations and are aware of any diseases or factors that may pose a risk of interfering with the marriage, and this shall be indicated in the marriage contract. The terms and conditions of application of this article shall be determined by regulation.[60]"

The regulation stating the terms and conditions for the application of Art: 7 bis, through an executive decree consisting of eight articles and an annex that includes a pre-marriage medical certificate form[61].

Thus, those wishing to marry were obliged to take this examination, in addition to providing treatment in the event that any disease is detected, and the doctor was obliged to conduct a comprehensive examination, leaving him free to take what he deems appropriate in order to detect diseases and defects that pose a danger to future spouses or children, as the general principle is that the doctor is free to choose the initial examinations that he deems more appropriate, and this freedom is absolute and unrestricted[62].

I believe that the Algerian legislator has chosen this approach well, because it achieved the interest of preserving the soul and offspring, taking into account the development of time in the possibility of achieving the rights of all parties, without violating the woman's curtain by following the procedural steps that ensure the preservation of the woman.

3. 2. 4 the construction and exploitation of the usurper:

Maliki: Judge Abu Imran al-Mughaili said about what the usurper builds or establishes in order to reconstruct the usurped property: "Whatever the usurper builds or plants, the owner has the option of taking its value after dropping the wage of the person who removes it and vacating the spot, unless the usurper is one who handles it himself, his son or his slaves, and this is for what has value after its removal, and whoever usurps wood, stone, crude or bracelets. The owner has the right to remove it, even if it leads to the corruption of the usurper's building. Ashhab said that it should not be demolished and that he should leave it to the usurper and take its value from him on the day he usurped it, and work on it, and whatever the usurper has caused that he is unable to remove, the owner has the option of taking it and paying the value of what has increased or its value on the day he usurped it.[63]"

The popular opinion in the Mudawana is contrary to what al-Mughaili chose and the practice in his country, which is to take the usurped property even if it leads to the corruption of the usurper's building, which is the opinion of Ashhab and is based on the weak opinion in the madhhab, as stated in Granth al-Jalil: "He may leave it to the usurper and take its value from him on the day he usurped it.[64]" This choice is based on the consideration of preventing the destruction of money by demolishing the building in order to recover the usurped object from the usurper[65].

B. In law: We note that the Algerian legislator has chosen the settled opinion according to what has been practiced, and this is derived from the context of the provisions of the Civil Code, as he has taken into account the interest of the owner of the land in the first place, without neglecting to pay the harm of damaging the property, even if it is from an aggressor, as he adopted a rule that What is above the land and what is below it belongs to the owner of the land, because the land is the original and everything created on it is a branch, and the branch always follows the original, as stated in Article 675(2) of the Civil Code: "Ownership of the land includes what is above and below it to the extent useful in the enjoyment of its height and depth", as well as Article : 782/1 of the

same code: "Everything on or under the land, whether planting, building or other constructions, is considered the work of the landowner and erected at his expense and belongs to him."

However, this rule has exceptions, as it may be proven that the person who built the installations on the land is not the owner of the land, which confirms the possibility of separating the ownership of the land from the ownership of what is above and below it, which finds its support in the text of Article 675/3 of the Civil Code: 675/3 of the Civil Code: "By law or agreement, the ownership of the surface of the land may be separate from the ownership of what is above or below it," as well as Articles: 784 to 790 of the same code, which relate to the provisions of building on the property of others[66].

Since building on the property of others is a prohibited act, because the right of ownership is legally protected, the legislator has regulated the cases arising from building on the property of others in bad faith in Article: 784 of the Civil Code, where we notice that it protects the right of the landowner as well as the right of the resident of the facilities, as follows[67].

- With regard to safeguarding the right of the landowner: The text of Article 784 gives the right holder one of two options:[68] Either to request the removal of the installations from his land at the expense of the person who built them, with compensation for the damage if the situation so requires, or either to request their retention in exchange for paying their value or value in the case of demolition, or paying an amount equal to what increased due to the presence of the installations in them, and this option of demolition or retention granted to the landowner, must be accepted by the person who built the installations as a penalty for his bad faith and to protect the owner of the land that has been violated, but this right granted to the landowner is limited in time and varies according to the period that has elapsed from the time he learned of the construction on his land[69].

- As for safeguarding the right of the resident: The second paragraph of Article 784 of the Civil Code stipulates: "The person who erected the structures may request their removal if this does not cause damage to the land, unless the landowner chooses to retain them in accordance with the provisions of the previous paragraph.[70]"

The law did not ignore the right of the person who erected the installations, despite his bad faith, but did not treat him in the same way as the landowner, as he was forced to remain silent and wait for the landowner's position, and if the landowner retained the installations, he paid the person who erected them compensation for that, but if he refused to retain them and their removal was It does not cause damage to the land, the owner removes it at his expense, and takes the rubble while repairing the land by restoring it to its status before the constructions were erected[71].

It is noteworthy that the codifier has made a good choice in adopting what has been practiced, because he has thus balanced the various interests and prevented the evils as much as possible.

4. Conclusion:

- Al-Majriyat is a word coined from the saying: "It is one of the rules that are unique to the Maliki school, showing the genius of the Moroccans in not being rigid on theoretical rulings and adapting them to the practical reality.

- This evidence is based on the consideration of the weaker or anomalous rulings, considering that the new ruling corresponds to the interests of the people and prevents them from being harmed.

-This evidence is based on the consideration of purposes, needs and necessities, to which both the mufti and the judge have recourse if the situation requires it.

- The Mālikīs awakened this principle in order to take into account what is new in people's habits, and in order to stabilize the rulings among the public and avoid the confusion resulting from the collision of fatwas in the same country, as the rulings knew stability and stability due to its implementation.

- The Maliki school was and still is the official source of the Algerian state, and in line with this, the Algerian legislator did not content himself with deriving most of his rulings from the Rajah or the famous in Maliki jurisprudence, as we have proved in practice that he applied the rule of "magriyat", which confirms the general legislative pattern that chose the Maliki reference, which proves the rich scope of judicial application of the provisions of Maliki jurisprudence, as well as the smoothness of magriyat doctrine and its absorption of people's conditions.

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