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**THE PRINCIPLE OF "ESTABLISHED PRACTICE" (MĀ JARĀ BIHI AL- 'AMAL) IN THE MĀLIKĪ SCHOOL AND ITS RELATION TO JURISTIC CRITIQUE IN JUDICIAL PRACTICE - A STUDY OF THE BOOK "AL-ṬARĪQA AL-MARḌIYYA FĪ AL-IJRĀ'ĀT AL-SHAR 'IYYA 'ALĀ MADHHAB AL-MĀLIKIYYA" AS A MODEL - Hamza Rabah\***

**Abstract.** The study investigates the relationship of jurisprudential criticism in the doctrine of Imam Malik -may God have mercy on him- with one of the well-known principles of the later scholars of the doctrine, namely the principle of "what has become customary practice" by the imams of the doctrine. Due to the many judicial applications of this principle, I tried to illustrate the strong relationship between it and the principle of jurisprudential criticism in the judicial track. The study explains the efforts of Sheikh al-Islam al-Maliki in his time and the Minister of Justice Muhammad al-Aziz Djait -may God have mercy on him- in his revered book "The Accepted Path", and attempts to identify Sheikh Jait's jurisprudential criticism approach by reviewing examples of his application of the rule: "what has become customary judicial practice" in his aforementioned book. Among the most important aspects in which the flexibility of Islamic Sharia and its suitability for various times and places appear is what Islamic jurisprudence is full of, of solutions that keep pace with the descending incidents upon people, walking with reality, and guaranteeing the achievement of good and benefit for mankind in every time and age, and in every region and place, which achieves for them happiness in their lives and afterlife. This is manifested through what the jurisprudential heritage contains of rules, principles, and rulings sufficient to draw from them a complete legislative system, which guarantees organizing the people's affairs in various fields so that happiness is achieved for them in the two abodes.

**Keywords:** Mālikī Jurisprudence, Jurisprudential Criticism, Judicial Customary Practice, Al-Ṭarīqa al-Marḍiyya

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**ПРИНЦИП «УСТОЯВШЕЙСЯ ПРАКТИКИ» (MĀ JARĀ BIHI AL-‘AMAL) В  
МАЛИКИТСКОЙ ШКОЛЕ И ЕГО СВЯЗЬ С ЮРИДИЧЕСКОЙ КРИТИКОЙ В  
СУДЕБНОЙ ПРАКТИКЕ - ИССЛЕДОВАНИЕ КНИГИ «ПРИНЯТЫЙ ПУТЬ В  
ШАРИАТСКИХ ПРОЦЕССУАЛЬНЫХ НОРМАХ СОГЛАСНО МАЛИКИТСКОМУ  
МАЗХАБУ» (AL-ṬARĪQA AL-MARḌIYYA FĪ AL-IJRĀ’ĀT AL-SHAR’IYYA ‘ALĀ MADHNAB  
AL-MĀLIKIYYA)**

**Хамза Рабах\***

**Абстракт.** В данном исследовании рассматривается связь между понятием юридической (фикховой) критики в учении имама Малика (да помилует его Аллах) и одним из наиболее известных принципов, разработанных поздними учёными маликитской школы, а именно принципом «того, что стало устоявшейся практикой» (mā jarā bihi al-‘amal). Ввиду широкого применения данного принципа в судебной практике автор стремится показать его тесную связь с фикховой критикой в судебной сфере. В работе анализируются усилия выдающегося маликитского учёного своего времени и министра юстиции Алжира Мухаммада аль-Азиза Джайта (да помилует его Аллах), отражённые в его почитаемом труде «Принятый путь» (al-Ṭarīqa al-Marḍīyya). Также предпринимается попытка выявить методологию фикховой критики шейха Джайта путём рассмотрения примеров применения им правила «устоявшейся судебной практики» в указанном труде. Одним из наиболее ярких проявлений гибкости исламского шариата и его пригодности для различных времён и мест является богатство исламской юриспруденции решениями, которые соответствуют возникающим жизненным ситуациям, учитывают реальность и обеспечивают достижение пользы и блага для людей во все эпохи и во всех регионах. Это находит отражение в богатом фикховом наследии, содержащем правила, принципы и постановления, достаточные для построения целостной законодательной системы, способной упорядочить общественные дела в различных сферах и обеспечить людям счастье в земной жизни и в жизни вечной.

**Ключевые слова:** маликитская юриспруденция; фикховая критика; устоявшаяся судебная практика; al-Ṭarīqa al-Marḍīyya

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**FORMALAŞMIŞ TƏCRÜBƏ” PRİNSİPİ (MĀ JARĀ BİHİ AL-‘AMAL) MĀLİKİ  
MƏZHƏBİNDƏ VƏ ONUN MƏHKƏMƏ TƏCRÜBƏSİNDƏ FİQHİ TƏNQİDLƏ  
ƏLAQƏSİ - “MĀLİKİ MƏZHƏBİNƏ UYĞUN ŞƏRİƏT PROSESSUAL  
QAYDALARI ÜZRƏ QƏBUL EDİLMİŞ YOL” (AL-ṬARİQA AL-MARDİYYA Fİ AL-  
İJRĀ’ĀT AL-SHAR’İYYA ‘ALĀ MADHHAB AL-MĀLİKİYYA) ƏSƏRİ ƏSASINDA  
TƏDQIQAT**

**Həmzə Rabah\***

**Abstrakt.** Bu tədqiqat İmam Malik məzhəbində fiqhi tənqid anlayışı ilə məzhəbin sonrakı alimləri tərəfindən formalaşdırılmış mühüm prinsiplərdən biri olan “formalaşmış (adətə çevrilmiş) təcrübə” (mā jarā bihi al-‘amal) prinsipi arasındakı əlaqəni araşdırır. Bu prinsipin məhkəmə praktikasında geniş tətbiq sahəsinə malik olması səbəbindən, araşdırmada onun fiqhi tənqidlə, xüsusilə də məhkəmə müstəvisində sıx əlaqəsi izah edilməyə çalışılmışdır. Tədqiqat öz dövrünün Mālikī məzhəbinin görkəmli alimi, həmçinin Əlcəzairin ədliyyə naziri olmuş Məhəmməd əl-Əziz Ceytin (Allah ona rəhmət etsin) “Qəbul Edilmiş Yol” (al-Ṭarīqa al-Mardīyya) adlı dəyərli əsərində göstərdiyi elmi səyləri təhlil edir və müəllifin fiqhi tənqid metodologiyasını, xüsusilə “formalaşmış məhkəmə təcrübəsi” prinsipini tətbiq etdiyi nümunələr əsasında müəyyənləşdirməyə çalışır. İslam şəriətinin çevikliyini və onun müxtəlif zaman və məkanlara uyğunluğunu göstərən ən mühüm cəhətlərdən biri, fiqh elminin insanların qarşılaşdığı yeni hadisələrlə ayaqlaşan, reallığı nəzərə alan və hər dövrdə və hər məkanda insanlara xeyir və məsləhət təmin edən həllərlə zəngin olmasıdır. Bu xüsusiyyət fiqhi irsdə mövcud olan qaydalar, prinsiplər və hökmlər vasitəsilə özünü göstərir ki, onlardan cəmiyyətin müxtəlif sahələrdə işlərini tənzimləyən və insanların həm dünyada, həm də axirətdə səadətini təmin edən bütöv bir qanunvericilik sistemi formalaşdırmaq mümkündür.

**Açar sözlər:** Mālikī fiqhi; fiqhi tənqid; formalaşmış məhkəmə təcrübəsi; al-Ṭarīqa al-Mardīyya

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## **1.Introduction**

All praise is due to Allah and may peace and blessings be upon the Messenger of Allah. As for what comes after:

Among the most distinctive features of Islamic jurisprudence is that it is not rigid jurisprudence, rather, it is characterized by great flexibility. There is nothing clearer in this regard than these tremendous efforts that have been carried- and still are- by an elite group of jurists, in every age and land, trying to purify and sift this great heritage, reading it with purposeful critical eyes, aiming to fix what corruption might touch, or complement what might need to be completed. This appears in what those jurists wrote in books of disagreement and rebuttals, and defending schools of thought, and those books that took care of criticizing doctrinal narrations, and others, which all gather to form a vast heritage that builds a complete system for jurisprudential criticism.

And even though this material is abundant, it still remains scattered and disseminated, missing systematic theoretical studies. Through this research, I wanted to participate in unveiling an aspect where the manifestation of practicing jurisprudential criticism can be seen in the Maliki school- may Allah have mercy on him- in a practical manner, through studying the rule: "What is established by practice in the judicial side" with the notable Maliki scholar in Tunisia in his time, and Minister of Justice: Muhammad al-Aziz Jaait, through his book “Al-Tuhfa al-Mardhiyya.” From Allah, I seek help, and He is sufficient for me and the best disposer of affairs.

### **1.2.The Importance of the Topic and Reasons for Choosing It**

1. The close connection between the subject of jurisprudential criticism and the rule of "What was established by practice," which demonstrates the urgent need to unveil this relationship.
2. What research and writing in the subject of jurisprudential criticism brings about of development to the jurisprudential faculties, which remains an urgent important requirement for every jurist and researcher in this field.
3. The remarkable scientific state of Sheikh Muhammad al-Aziz Jaait, in whom is revealed the personality of a scholar who is skillful in combining theoretical religious knowledge and the direct practical field work. As he is among the great scholars of Al-Zaytuna, he also took on the role of judge and Minister of Justice.
4. Sheikh Jaait's belonging to the Maliki school- may Allah have mercy on him- so that his works in the field of judicial jurisprudence have their original material from the Maliki heritage.
5. The importance of this topic, which still needs serious research papers to complete the existing deficiency in many of its important aspects.

6. The close relationship of Sheikh Jaait with our country Algeria, and this appears through the Algerian students who learned from him at Al-Zaytuna Mosque, as also in his strong support for the Blessed Liberation Revolution on various platforms.

### **1.3. The Research Problem**

Among the most prominent questions that the research aims to find answers for: What is the relation between the principle of "what is established by practice" and jurisprudential criticism in the Maliki school? And what is its effect in the judicial legal field? Did contemporary Maliki sheikhs open themselves to this principle? And what are the features of this criticism in the book "Al-Tariqa al-Mardhiyya" of Sheikh Jaait?

### **1.4. The Research Objectives: Summarized as follows**

1. To contribute in enriching this important matter even by a modest research dealing with some neglected aspects.
2. The judicial field is among the most fertile grounds in which the tendency to doctrinal fanaticism dissolves, through what the judge faces of renewed cases and issues, forcing him to invoke the work with rules and objectives and not be rigid upon texts that may not achieve the legitimate objective in the case he is judging.
3. Unveiling the efforts of some later Maliki jurists in the door of judicial jurisprudential criticism.
4. Loyalty to this science and to the scholar who devoted his life to teaching, authoring, sermonizing, and defending the Sharia.
5. To show that Islamic legislation is a real and practical alternative to the Western laws that have afflicted the Ummah, and is able to keep up with the changes and developments that the Ummah of Islam passes through in the course of ages, through self and objective criticism of the jurisprudential heritage, and acting in a way that matches the spirit of Sharia, its rules, and objectives.

### **Previous Studies:**

I did not find any previous study related to the topic.

### **Research Methodology:**

The nature of the research required me to combine the historical, descriptive, and analytical methods:

**First:** The historical method, in the section related to the biography of the author.

**Second:** The descriptive method, in the section in which I talked about his book: Al-Tariqa al-Mardhiyya.

**Third:** The analytical method, in the section related to the methodology followed by the author in his book "Al-Tariqa al-Mardhiyya," as well as to

clarify the relation between jurisprudential criticism and the rule: what was established by practice in the judicial field.

### **1.5. Research Outline:**

- Introduction
- Preliminary Section: On the concept of jurisprudential criticism and the biography of Sheikh Muhammad al-Aziz Jaait
  - First Requirement: Definition of jurisprudential criticism, and it has two branches:
    - First Branch: Definition of jurisprudential criticism as a compound term.
    - Second Branch: Definition of jurisprudential criticism as a science.
  - Second Requirement: The biography of Sheikh Muhammad al-Aziz Jaait, in four branches:
    - First Branch: His name, lineage, and upbringing.
    - Second Branch: His teachers and students.
    - Third Branch: His positions and most prominent works.
    - Fourth Branch: Sheikh Jaait’s relationship with the Algerian Revolution and his death.
- Second Section: Definition of the rule "Preference according to what was established by practice" among the Malikis, and its relation to jurisprudential criticism
  - First Requirement: Definition of the term "what was established by practice," its types and conditions of its application, in two branches:
    - First Branch: Definition of the term "what was established by practice"
    - Second Branch: Types of what was established by practice and its conditions of application
  - Second Requirement: The relation of the preference rule based on what was established by practice with jurisprudential criticism in the Maliki school.
- Third Section: Definition of the book "Al-Tariqa al-Mardhiyya" and the features of jurisprudential criticism in the book through examples of Sheikh Jaait’s reliance on what was established by practice, in two requirements:
  - First Requirement: Definition of the book "Al-Tariqa al-Mardhiyya" and its author’s method in it, in two branches:
    - First Branch: Definition of the book "Al-Tariqa al-Mardhiyya"
    - Second Branch: The methodology followed by the author in the book
  - Second Requirement: Features of jurisprudential criticism in the book by examples of Sheikh Jaait’s reliance on what was established by practice.
- Conclusion

### **2. Preliminary Section: On the Concept of Jurisprudential Criticism and The Biography of Sheikh Muhammad al-Aziz Jaait**

## **The First Requirement: Definition of Jurisprudential Criticism and Its Types**

### **First Branch: Its Definition as a Compound Term Consisting of Two Words**

The term “jurisprudential criticism” is made up of two words: “criticism” and “jurisprudential”. Below is the explanation of the meaning of these two terms:

#### **A- The meaning of “Criticism”:**

**1- In the language:** Ibn Faris said: “The letters noon, qaf, and dal (ن، ق، د) constitute a correct root indicating the manifesting and appearing of something. Of this: نقَد (naqad) in the hoof, which means its peeling. A hoof described as naqad: peeled. نقَد (naqad) in a tooth: its breaking, which happens by unveiling its surface. Of this root also: نقَد (naqad) of a coin, meaning to reveal its state, in its quality or something else. A coin described as naqad: balanced and good, as if its state has been unveiled and known” [Ibn Faris, 1979, p.467; - Al-Jawhari, 1990, p.544].

**2- Conventionally:** Among the definitions mentioned by researchers for criticism is: “A process to spot the places of error and correctness in a specific scientific subject, after its study and examination, in which the researcher relies on the fixed principles and scientific fundamentals established in the field to which this subject belongs, and that is for the purpose of evaluating and correcting some concepts related to that subject” [Al-Ansari, 2007, p.98].

**B- The meaning of “Jurisprudential”:** ascribed to jurisprudence, which is:

**1- In the language:** understanding, perceiving a thing, and having knowledge of it. It is said: “faqih-tu” (I understood) the hadith, “afqahu” (I understand it). “At-tafaqquh”: learning jurisprudence. “Faqh”: jurisperdent, “faqaha”: to become a jurisperdent, and to have jurisprudence as a trait. [Al-Farahidi, 1987, p. 370 - Al-Jawhari, 1990, p. 2243 - Ibn Faris, 1979, p.442]

**2- In terminology:** Jurisprudence has been defined by many, among the most famous: the knowledge of the practical Sharia rulings gained from its detailed evidences [Al-Subki, 2001, p.28; - Al-Isnawi, 1987, p.50; - Al-Zarkashi, 2000, p.34].

### **Second Branch: Its Definition as a Title**

“Jurisprudential criticism” is a recent term not known among the early scholars. Among the definitions mentioned by contemporaries:

- Dr. Nawwar bin Al-Shali defined it as: “Any kind of difference in showing places of shortcomings or deficiency in it” [Nawwar, 2020, p.14].

This definition is faulted, in that it does not prevent the entry of criticism belonging to other sciences into the concept of jurisprudential criticism.

Some definitions restricted its concept to the field of jurisprudence:

- Dr. Muhammad Al-Muslih defined jurisprudential criticism as: “*Clarifying the sound and weak branches of the madhhab (school of thought) starting by presenting them to its sources, rules, and regulations*” [Al-Muslih, 2011, p.9].

- Dr. Abdul Hamid Achak defined it as: “The research process aiming to clarify the issues of the madhhab, whether from the angle of narrations and statements, or from the angle of directing and deriving from them, by distinguishing the strongest and most correct among them from the weak and less regarded, using known methods and specific terminologies” [Achak, 2021, p.9].

From the above definitions, it becomes clear that jurisprudential criticism is a process of studying and evaluating the jurisprudential output of a madhhab (school of Islamic law). It falls within the framework of jurisprudential methodology, which moves from deduction and reasoning, then branching and derivation, and then comes the stage of criticism as the final study and evaluation of the jurisprudential output. This is done by looking into the branches and legal issues of the madhhab, then comparing them with its sources, rules, or the foundations of ijthihad and reasoning, to know how much they agree or differ. It is thus a process of refining, screening, and sifting the statements, narrations, and reasonings within the madhhab to clarify the sound from the weak [Sarmoum, 2018, p.56].

### **The Second Requirement: The Biography of Sheikh Muhammad al-Aziz Jaait**

There are four branches in this section:

#### **First Branch: His Name, Lineage, Birth, and Upbringing**

He is Muhammad al-Aziz, well known as “Bimohamed Abd al-Aziz or Abd al-Aziz,” the son of the minister Sheikh Yusuf Jaait, the great accomplished scholar, among the advanced notable figures of Tunisia. He was born in the city of Tunis in the last days of Sha’ban 1303 AH, and some sources say the end of Rajab, corresponding to the beginning of May 1886 CE.

His family’s origin goes back to Yemen and it came during the Islamic conquest and settled in the city of Kairouan, then moved to Tunis, and it is a deeply rooted family, having virtue, knowledge, and authority. His father, Sheikh Yusuf Jaait, took over the Grand Ministry in the time when Muhammad al-Nasir Bey ruled.

Sheikh Muhammad al-Aziz Jaait began his studies at home and in the kuttab that was in Souk al-Balaghjiya in Tunis, then he joined al-Zaitouna Mosque in the year 1318 AH / 1901 CE in a time bustling with major scholars and notable figures, who became famous and whose influence reached all corners of the Islamic world. He continued his study there until he graduated with the degree

of “Tatawii” in the year 1907 [Mahfoudh, 2007, p.37; – Bouzghiba, 2020, p.31, 47-54; – al-Zarkali, 1998, p.268].

### **Second Branch: His Teachers and Students**

**First, his teachers:** Abd al-Aziz Jaait studied at al-Zaitouna Mosque under several scholars, among the most prominent of them: [Mahfoudh, 2007, p.37; Bouzghiba, 2020, p.54-77].

- Abu al-Najat Salim bin Umar Bouhajib al-Binili (d. 1342 AH) [Makhlouf, 1994, p.605; Mahfoudh, 2007, p.77].
- Sheikh Muhammad al-Nakhli al-Qayrawani (d. 1342 AH) [Makhlouf, 1994, p.605; Mahfoudh, 2007, p.26]
- Sheikh Ibrahim al-Margani (d. 1349 AH) [Mahfoudh, 2007, p.299].
- Sheikh Muhammad al-Khidr Husayn (d. 1377 AH) [al-Zarkali, 1998, p.113; Mu‘jam al-Muallifin, 1991, p.279]
- Sheikh Salih bin al-Mukhtar al-Sharif, originally from Algeria (d. 1338 AH) [Bouzghiba, 2020, p.64].

**Second, his students:** Generations of students who acknowledge his merit and recognize his wide knowledge graduated under Sheikh Jaait, among them: [Bouzghiba, 2020, p.118-130].

- Muhammad al-Bashir son of Sheikh Ahmad son of Sheikh Muhammad bin Ahmad al-Nayfar (d. 1394 AH) [Mahfoudh, 2007, p.67]
- Muhammad al-Sadiq son of Sheikh Muhammad bin Sheikh Hammouda al-Baleesh al-Sanhaji al-Qayrawani (d. 1384 AH) [Mahfoudh, 2007, p.123].
- Muhammad bin Muhammad Salih bin Qasim ibn al-Hajj Ali al-Jouadi al-Tamimi al-Qayrawani (d. 1362 AH) [Mahfoudh, 2007, p.70]
- Muhammad al-Sadiq bin Muhammad bin Muhammad al-Shatti al-Sharif al-Masakni (d. 1364 AH) [Mahfoudh, 2007, p.196].
- Muhammad al-Sadiq Bassis (d. 1398 AH) [Mahfoudh, 2007, p.98].
- Muhammad al-Salih al-Nayfar (d. 1413 AH) [Bouzghiba, 2020, p.126].
- Muhammad al-Fadil bin Ashur (d. 1389 AH) [Bouzghiba, 2020, p.127].
- Muhammad al-Mukhtar bin Ahmad al-Sallami [Bouzghiba, 2020, p.128].

Among his brightest Algerian students: Ibrahim Abu al-Yaqdhan, Abu Bakr al-Aghwati, Ammar bin Lazaar, Mahdi al-Bouabdelli, and Mouloud Tayyab [Aouimer, 2013], and Idris bin Mahfoudh ibn al-Hajj Ahmad al-Sharif al-Bakri (d. 1354 AH) [Mahfoudh, 2007, p.181].

### **Third Branch: The Positions He Held and His Works**

**First,** the positions he held, summarized in the following points:

- Graduated from al-Zaitouna with the Tatawii degree in 1907 and joined its teaching staff.
- Appointed a teacher at the Sadiki School in 1914.
- Appointed Maliki mufti in 1919.
- Promoted to the rank of professor in 1935.

- Tasked with the administration of the Sheikhdom of al-Zaitouna Mosque and its branches in December 1939.
- Named Sheikh al-Islam for the Maliki school in February 1945.
- After two years, he took charge of the Ministry of Justice. While in this role, he carried out several reforms, such as Arabizing the administration and restoring the status of Sharia courts; during this period, he authored the Journal of Sharia Litigations and the Journal of Sharia Rulings.
- In 1950, resigned from the ministry and was content with the position of Sheikh al-Islam.
- Was chosen by the Association of Algerian Muslim Scholars as its honorary president in 1951.
- In 1956, appointed as Mufti of the Republic, remained until his retirement in 1960, but truly he did not retire, rather he was dismissed due to his disagreement with Bourguiba regarding breaking fast in Ramadan [Mahfoudh, 2007, p.37-39; Bouzghiba, 2020, p.160].

Many scholars of al-Zaitouna recognized him as having reached the level of independent *ijtihad* within the *madhhab*. Sheikh Muhammad al-Salih al-Nayfar reported that the scholar Muhammad al-Tahir ibn Ashur once said to Sheikh Jaait: “You are qualified to be a *mujtahid* inside the *madhhab*” [Bouzghiba, 2020, p.258].

**Second**, his most important works. Sheikh- may Allah have mercy on him- left a collection of books, among them: [Mahfoudh, 2007, p.39-41; Bouzghiba, 2020, p.235].

- *Irshad al-Ummah wa Minhaj al-Aimmah*: (a collection of Friday sermons)
  - *Majalis al-Irfan wa Mawahib al-Rahman*: (summary of his sittings explaining the prophetic hadith)
  - Comments on the book *Al-Ishraf* by Judge Abd al-Wahhab, which is lost.
- Among his works in the field of judiciary:
- Journal of Sharia Litigations
  - Table of the Journal of Sharia Rulings
  - Journal of Sharia Rulings
  - *Al-Tariqa al-Mardhiyya fi al-Ijraat al-Shar‘iyya ‘ala Madhhab al-Malikiyya*

Sheikh Muhammad Jaait also left many studies, articles, and *fatawa* published in Tunisian newspapers and the al-Zaitouna Magazine, some of which are kept as manuscripts with his son the minister Kamal al-Din Jaait. [Bouzghiba, 2020, p.244; Bouzghiba, 2020, p.244]

#### **Fourth Branch: Sheikh Jaait’s Relation with the Algerian Revolution and His Death**

**First**, his relation with the Algerian Revolution [Aouimer, 2013]: Sheikh Jaait called for supporting the Algerians in their liberation revolution by every means possible, so that they make up for what has passed in fulfilling the duty and supporting the oppressed. He said in this regard: "It is obligatory on all Islamic peoples to stand together with the Algerian people in their struggle to preserve their religion, Arabness, and freedom, and to regain their sovereignty and strengthen their nationalism, and to provide them with whatever will enable victory and the achievement of their dreams. Supplying the struggling Algerians- the valiant front of liberation- with abundant money and plentiful weapons, is among the best types of jihad, earning the pleasure of Allah and His Messenger on the Day of Resurrection" [Jaait, 1965, p.272].

And Sheikh Jaait urged, in many of his sermons, Tunisians, Moroccans, and Libyans to help thousands of Algerian refugees, host them, and provide for their living conditions. In one of his sermons, he said: "Everyone in the Maghreb must devote his energy to help the Algerian refugees with shelter and cover, food and clothing, treat their wounded, provide them with medicine, and volunteer himself with the strugglers to cut the hand of aggression, and use his tongue and his pen to make known the heinous acts of colonialism, so its echo reaches all places. The Algerians are our neighbors in homeland, our brothers in religion, lineage, and language; we cannot abandon them even if that brings us grief and sorrow, nor can we fall short in resisting the oppression and aggression inflicted upon them" [Jaait, 1965, p.260-261].

**Second**, his death: Sheikh Muhammad al-Aziz Jaait died on 27 Shawwal 1389 AH, corresponding to 5 January 1970, after a life long filled with contribution in teaching, issuing fatwas, serving the religion, defending the rights of Muslims, and supporting their just causes- foremost among them the Algerian cause. He was buried in Jellaz Cemetery in the capital, Tunis.

### **3.The Second Section: The Concept of the Rule "Preference by What Was Established by Practice" Among the Malikis and Its Relationship to Jurisprudential Critique**

#### **The First Requirement: Definition of the Term "What Was Established by Practice," Its Types, and Conditions of Its Application**

##### **First Branch: Definition of the Term "What Was Established by Practice"**

Among the rules of preference with the later Malikis is that they prefer what was established by practice over other positions, and what is meant by it is preferring the weak statement- in application- over the famous one, if the practice agrees with a statement (even if it is odd/irregular) for a reason such as the occurrence of a benefit, prevention of harm, or change of custom. In this case, the senior late scholars of the school may have endorsed certain reports and opinions, departing from the famous view, and with their endorsement,

these positions became what the judges and those who issue fatwas acted upon [Al-Hilali, 2006, p.258; Al-Tasouli, 1986, p.41; Al-Alawi Al-Shinqiti, 1999, p.333].

One of the most significant areas where this principle is activated is the judicial field, where judges find wide gates of *ijtihad* (independent reasoning) in applying the rules written in the school’s sources in a way that could sometimes lead them to act against what’s recorded or famous, if they see it closer to realizing the aim of Sharia. Thus, the judicial practice in its details may oppose what is taken from the jurisprudential books when the required conditions are met, so that what was established by practice primarily becomes a means for preference in judiciary and fatwa [Al-Tasouli, 1986, p.41; Al-Alawi Al-Shinqiti, 1999, p.333; Al-Hilali, 2006, p.258; Ibrahim, 2012, p.396].

Some researchers, like Dr. Muhammad Ibrahim in his book “The School Term with the Malikis,” restricted it to only the judicial field [Ibrahim, 2012, p.396], but in my opinion, this is debatable, as although most applications of this principle are related to judiciary, those who follow the issues brought forth by the jurists can find it outside of this domain as well, in other areas of jurisprudence, such as worship or family law [The closest example of this is the practice that has become established and widely accepted for giving fatwas in Algeria- and in other Islamic countries- permitting the payment of the monetary value for Zakat al-Fitr, or issuing legal opinions based on some of Shaykh al-Islam Ibn Taymiyyah’s choices in certain divorce matters, such as his view that a triple divorce (threefold divorce) pronounced in a single utterance counts as one divorce. Although anyone examining the conditions set by the scholars may notice that some of these conditions are absent in many such issues, and Allah knows best.].

## **Second Branch: Types of “What Was Established by Practice” and Conditions for Its Application**

**First:** Its Types. The Malikis divided this concept into two types [Al-Hilali, 2006, p.41-42; Al-Hajawi, 1967, p.467; Ibrahim, 2012, p.398]:

1. Local practice (al-‘amal al-mahalli): This means legal opinions that were based on what goes against the stronger or famous view due to a custom or habit specific to a country or region. Regions that share these customs are included. To adopt and prefer this practice, it is required that the custom, habit, or particular benefit for which the ruling was based continues until the time of the case; otherwise, it is obligatory to return to the famous and stronger opinions.

2. Absolute practice (al-‘amal al-mutlaq): This means legal opinions adopted contrary to the stronger or famous view but as a result of achieving a general benefit, or blocking a means to evil, or due to a general custom. The preference of this practice applies in all places and times as long as the benefit remains or the preventive cause continues to exist, and this is the one described as: “practice was established upon it, and rulings settled upon it.”

**Second:** Conditions for Applying the Rule of "What Was Established by Practice"

The jurists mentioned five things for this [Al-Hilali, 2006, p.262; Al-Nabigha Al-Ghallawi, 2003, p.110-111; Ibrahim, 2012, p.399]:

1. Establishing that practice was carried out according to that statement.
2. Knowing if that practice was general in a certain country or specific to an area.
3. Knowing its time period.
4. Knowing that those who established this practice were imams worthy of being followed in preference.
5. Knowing the reason for which they left the famous statement for its opposite.

**The Second Requirement: The Relationship of the Rule of Preference by What Was Established by Practice with Jurisprudential Critique in the Maliki School**

For anyone who contemplates this principle, so famous among later Malikis, it is obvious to notice the strong relationship between it and jurisprudential critique. It is, in fact, a manifestation of applied critique, and a form of practical criticism of the accepted opinions in the school, for, in its reality, it means taking up the weak statement and leaving what became famous in an issue for a pressing reason. This is practical criticism of the famous statements, seen in abandoning them and following weaker ones when the need to prefer them arises within certain boundaries and conditions- it may continue, or stay limited to a specific locality or time. Below are the most important justifications for leaving the famous statements and acting otherwise in the school:

**First:** Custom ('urf): Al-Hilali mentioned in "Nur al-Basar" [Al-Hilali, 2006, p.266] that it is the strongest of preference factors, and it is not only limited to preponderating among differing opinions, but it can also be used to found a new ruling opposite to even an agreed-upon one, in rulings that are based on custom; so, if the custom changes, the ruling changes. If the incidental custom is general, the new ruling becomes general, and if limited to a town or people, the rule is limited as well [Al-Hilali, 2006, p.266; Al-Nabigha Al-Ghallawi, 2003, p.121-122].

And in "al-Mi'yar al-Mu'rab" is stated: "*The writings of the later scholars in this respect are unanimous that this is a cause for preference, unless the custom differs between two countries, and then it does not serve as a cause for preference*" [Al-Wansharisi, 1981, p.57].

**Second:** Using it as a means to prevent harm.

**Third:** Using it as a means to attract a benefit.

This is so when preventing harm or attracting benefit arises, and it is needed, and can only be done by leaving the famous statement behind.

And its point: that the Sharia came to repel harms and bring benefits, and if these depend on acting against the famous view, it is more likely that the proponent of the famous view, were he to witness this new era in which the benefit or harm depends upon acting against his statement, would not give except the opposite view [Al-Hilali, 2006, p.271-272; Al-Nabigha Al-Ghallawi, 2003, p.122].

Al-Hilali mentioned in "Nur al-Basar" that giving preference for these two reasons (attracting benefit and preventing harm), the person must be qualified for preference by mastering the necessary tools and rules, because not every perceived benefit or harm is valid from the perspective of Sharia. There must be insight to distinguish between those that are Sharia-recognized and those not, and to know the ranks of interests, what takes precedent in a conflict of interests and preferences, and a thorough understanding of principles and generalities, with sharp intelligence and keenness of soul [Al-Hilali, 2006, p.272; Al-Nabigha Al-Ghallawi, 2003, p.122].

#### **4.The Third Section: Definition of the Book "Al-Tariqa al-Mardhiyya" and Examples of Sheikh Jaait's Reliance on What Was Established by Practice in It**

##### **The First Requirement: Definition of the Book "Al-Tariqa al-Mardhiyya" and the Author's Methodology in It**

I have divided this into two branches:

##### **First Branch: Definition of the Book "Al-Tariqa al-Mardhiyya fi al-Ijraat al-Shar‘iyya ala Madhhab al-Malikiyya"**

Sheikh Jaait experienced the field of judiciary for many years, and this made clear for him the need among students and judges for a work that would be a reference for what was established by Tunisian practice regarding judicial situations and legal issues. He, may Allah have mercy on him, stated in the introduction to the book- clarifying the aim of its writing: "After that, the writing titled 'Al-Tariqa al-Mardhiyya fi al-Ijraat al-Shar‘iyya' had its goal and aim to teach the students of higher education the principles of judicial conduct applied in the Tunisian lands nowadays..." [Al-Tariqa al-Mardhiyya, 2015, introduction].

The book began to be officially taught in the three years of the higher rank in the religious section at the Great Mosque since the reforms made by Sheikh Muhammad al-Tahir ibn Ashur in the general educational curriculum.

Sheikh Jaait printed "Al-Tariqa al-Mardhiyya" twice: the first time was probably in (1358 AH / 1939 CE), without its introduction which he later formulated as clauses [333 jurisprudential clauses] added in the second edition. He was then advised to reprint it, supplementing the original work with an

explanation of its issues in easy wording. He completed this in [1360 AH / 1940 CE], and thus the second edition, which was large-sized, divided the book into two sections: the first section was formulated as juridical clauses comprising a summary of the established jurisprudence, detailed further in the second section. The first section had (61 pages), numbered with Arabic alphabet letters and containing (333 clauses), and the second section contained three chapters totaling (312 pages). [Al-Tariqa al-Mardhiyya, 2015, sections one and two].

It was published in a modern edition by Dar al-Mutawasita in Tunis in [1431 AH - 2010 CE] with authentication and care by Dr. Muhammad Bouzghiba.

- The book was logically divided according to litigation procedures into three chapters:

- First Chapter: On Litigation (al-da'wa)
- Second Chapter: On the Basis of Judgment (mustanad al-hukm)
- Third Chapter: On Judgment (al-hukm)

### **Second Branch: The Methodology Followed by the Author in the Book**

It is not possible- in this brief research- to cover all the details related to the author's methodology; but the main features of the methodology he followed can be summarized in the following points:

- The author's composition of his scholarly material is precise and regulated to suit the nature of these legal writings, with a style that is easy and avoids obscure terminology that may appear in some jurisprudential books.

- The reason for writing "Al-Tariqa al-Mardhiyya" and other codifying works by Sheikh Jaait is the need of the judicial field for a group of works to fill gaps in organizational legal matters.

- The book is a collection of significant judicial issues that were previously scattered in jurisprudence, fatwas, and documentation books. It gathered means of evidence, litigation requirements, rules for testimony, and documentation regulations, as well as the description of the notary.

- Sheikh Jaait relied frequently on what was established by practice among the Malikis.

- Special attention was given by Sheikh Jaait to documentation in his book "Al-Tariqa al-Mardhiyya," mentioning it in several chapters, such as documentation of claims, copying practice, extracting certificates, testimony on handwriting and evidence [Bouzghiba, 2020, p.19-25].

- The methodology he adopted in the second section, where he analyzed issues in detail, is characterized by broad reference to sources, stating differing opinions in the school, clarifying the points of dispute, mentioning consensus when found, then determining and favoring what he considers stronger.

- Sheikh Jaait occasionally refers to cases he either judged himself or witnessed with his teachers.

- If he takes a view opposing what he quotes from predecessors, he often begins the commentary with "I said."
- Sheikh restricts himself to the relevant point in the quotations he brings, avoids lengthy digressions, and focuses on what serves the section at hand.
- He uses abundant references and quotations to precisely establish the issues, often giving the source, and sometimes the page and publishing house.
- He refers back to authoritative sources of the school, and his references are usually to the original source without intermediary.
- In the introduction, Sheikh Jaait mentioned five objectives he intended from the texts he transmitted from earlier scholars:
  1. Strengthening faculties, training the minds, and practicing research and criticism.
  2. Familiarity with the terminology of notaries.
  3. Pointing out useful books for documentation and judgment for those seeking more precision and enlightenment.
  4. Strengthening the bonds and connecting the present with the past.
  5. Guidance to developments in judicial procedures as circumstances change [Al-Tariqa al-Mardhiyya, 2015, introduction].

### **The Second Requirement: Features of Jurisprudential Critique in the Book Through Examples of Sheikh Jaait’s Reliance on What Was Established by Practice**

Sheikh Jaait relied heavily on the rule of "what was established by practice" among the Malikis; so, he would sometimes establish a non-famous opinion just because it was what people were practicing. As has been clarified before, this means departing from the strong or famous position to adopt a weak one for a legitimate reason- such as changing custom, achieving a benefit, preventing harm, and similar reasons [Alawi Shinqiti, 1999, p.333; Al-Zhafiri, 2018, p.210; Bouzghiba, 2020, p.7]. The reason for Sheikh adopting this principle in his book is that considering custom and building judicial rulings upon achieving benefits and preventing harms is among the necessary matters for managing the affairs of the nation and its governance. Rigidly sticking to a statement that scholars of the school made famous- based on facts that increased its fame and practical prevalence- but these same facts might not exist in a different time or in another region, this would actually harm the Sharia by attributing to it inconsistency.

So, going away from the famous statement depends on the reason: if the reason vanishes, you go back to the origin. For that, practice may differ from one country to another, and it could even change within the same country as time changes.

### **Examples of Sheikh Jaait’s Reliance on What Was Established by Practice in Tunisia, Based on the Justifications Mentioned by Jurists:**

### **1. Reliance on Non-Famous Practice to Achieve a Benefit**

For example, in the section on "notification between judges," he explained that notification from one judge to another can be performed in three ways: verbally (face-to-face), by attestation, or by writing. He noted that in Tunisia, notification by verbal communication fell out of use, and the practice settled on notification through attestation or writing, because this is more precise and guarantees rights are preserved [Al-Tariqa al-Mardhiyya, 2015, p.329]. This is an example of preferring local Tunisian practice in this matter, for the sake of the benefit of preserving rights, which is a practical application of critiquing the famous statement, since acting upon it would result in missing a sharia goal.

### **2. Reliance on Non-Famous Practice to Prevent Harm**

For instance, in the section on enforcement, Sheikh Jaait showed that a sale by "kamsheh" (a handful, an unknown measure) is invalid among the Malikis due to ignorance of the price [Jaait, 1965, p.225], but organizational needs dictated that if a Hanafi judge ruled the sale valid and enacted it, the disagreement on this particular issue ceased. It became a case of a previously-invalid sale that has since become necessary to continue. One of the results is enabling the partner to exercise pre-emption (*shuf'a*) at market value. He said that if a ruling meets the legal conditions, it must be enforced on the defendant, and that what is practiced in Tunisia is executing the judgment of the first judge, even if the doctrine of the second judge (the executor) is different. Not carrying it out would be like nullifying it, which is not allowed. This is to avoid the harm of instability in judicial rulings: if every judge would overturn his predecessor's ruling, people's affairs would never be organized, and rights would not be secured. The known maxim is "ijtihad is not nullified by another ijtihad." He reported that this practice was followed by Tunisian judges before him, and referred to Judge Muhammad Tahir ibn Ashur (d. 1284 AH) [Jaait, 1965, p.225-226].

### **3. Reliance on Non-Famous Practice Due to Change in Custom Across Regions**

For example, in the section on property seizure (*al-'aqila*), he noted that the practice in Tunisia is that if a litigant requests seizure of a disputed item, their request is not fulfilled merely based on the claim; but he mentioned that the practice in Fez was to stop (the disposition) based merely on the claim, and if the claimant brings proof, their request is granted [Al-Tariqa al-Mardhiyya, 2015, p.75].

Another example, in the section on claims: he said that the practice in Cordoba is to combine multiple claims for one individual into a single oath, and not to multiply oaths for each claim; while the practice in Qayrawan is

to multiply oaths for each claim, even if for just one person [Al-Tariqa al-Mardhiyya, 2015, p.20-21].

### **Issues Where Sheikh Jaait Disagreed with Local Practice in Tunisia:**

- In the section on acknowledgment of lineage: he said that if a man acknowledges someone as his cousin with no other heirs and bears witness to that, then dies- the doctrine of Ibn al-Qasim is that lineage is not established by this acknowledgment, and the money is left for some time; if no claimant arises, the one acknowledged can take it with an oath. He indicated that this was also the view of Ibn Habib, Ibn al-Majishun, and Asbagh bin al-Faraj; then mentioned Ashhab’s doctrine: inheritance is not gained except for one whose lineage is established, and by the usual methods confirming lineage. He added: *“Ashhab’s doctrine is most thoughtful and logical, but the practice followed is Ibn al-Qasim’s”* [Al-Tariqa al-Mardhiyya, 2015, p.103-104].

- He opposed Tunisian practice and adopted that of Fez regarding the requirement of multiplicity for accepting witnesses: the testimony of non-adl (lesser-integrity) witnesses is accepted if there are no adl witnesses, provided they are discreet (covered) and not fewer than six [Al-Tariqa al-Mardhiyya, 2015, p.144].

### **5. Conclusion**

Among the most important results I have reached through this research are the following:

- Jurisprudential critique is the process whose purpose is to refine, sift, and scrutinize the statements, narrations, and reasonings within the school in order to clarify the sound from the weak; it is among the difficult ranks that only those of penetrating sight and precise understanding attain.

- Sheikh Muhammad al-Aziz Jaait is an outstanding scholarly figure who has not received sufficient study. He is one of the few contemporary personalities in the Maghrib (North Africa) region who combined theoretical religious knowledge with direct practical work in the judicial field.

- Sheikh Jaait made great efforts to make Islamic jurisprudence the source of legislation in Tunisian law, and his writings are among the most important produced in juristic codification according to the Maliki school in the modern era.

- The principle of “what was established by practice” means preferring the weak opinion in practice over the famous one if the practice conforms to a weak or odd view, for a reason requiring that—such as achieving a benefit, preventing harm, or change of custom—and it is among the well-known principles with the late imams of the school.

- Most applications of this principle relate to the judiciary field; however, those who trace the issues cited by the jurists find that it can be applied outside the judicial domain to other categories of jurisprudence.
- The principle of “what was established by practice” is closely connected to jurisprudential critique; it is, in fact, a practical manifestation of this latter field.
- Sheikh Jaait’s character as a critical scholar is manifested throughout his books, writings, and fatwas, and especially in his work “Al-Tariqa al-Mardhiyya fi al-Ijraat al-Shar‘iyya ala Madhhab al-Malikiyya.”
- Sheikh Jaait activated the principle of “what was established by practice” in many judicial topics in his book “Al-Tariqa al-Mardhiyya,” and demonstrated through this activation the connection between this principle and the practical aspect of jurisprudential critique.

### **Key Recommendations**

- The methodology of scholars in jurisprudential critique remains one of the most fertile domains for research in this valuable and beneficial field, and many scientific figures worthy of study are still waiting for someone to take up this task.
- It is necessary to pay attention to contemporary scholars and to study their approaches and efforts in critiquing the madhhab.
- The reprinting of Sheikh Jaait’s writings, publishing those that have not yet been printed, and conducting in-depth studies of his scholarly character are needed.
- The establishment of specialized labs and research centers devoted specifically to the project of jurisprudential critique.

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