

Property Ownership through Possession between Algerian Law and Maliki Jurisprudence

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Abstract. Possession, when its essential elements and conditions are met, is considered a legal means of acquiring real estate ownership in both Algerian law and Maliki jurisprudence. Both systems aim to promote social stability by protecting established legal positions and ensuring the proper functioning of key property transactions—transactions on which legal systems have relied to prove rights, particularly in the field of real estate ownership. This research seeks to examine possession as a mechanism for acquiring property ownership in both systems by studying its elements, conditions, and effects. It also highlights the similarities and differences between the two frameworks and explores the potential for incorporating Maliki jurisprudential reasoning to enrich the Algerian legislative framework in a manner that aligns with the specificities of its legal and social environment.

1. INTRODUCTION

Possession is considered one of the most important grounds for ownership, particularly in the field of real estate, and legal systems have long relied on it to establish rights. The Algerian legislator has regulated it in Articles 808 to 843 of the Civil Code, under Chapter Two titled “Means of Acquiring Ownership” in the section on property rights, which is the first chapter of Book Three concerning original real rights. Additionally, some rules of possession are addressed in Articles 524 to 530 of the Code of Civil and Administrative Procedure, under the section on possession-related claims. This reflects the legislator's attention to possession as it serves as a strong presumption of ownership and carries significant legal weight, with defined elements and conditions aimed at ensuring stability in property transactions.

Similarly, Maliki jurisprudence has devoted considerable attention to possession, recognizing it as a legitimate means of acquiring real estate ownership and setting forth precise conditions to protect rights and prevent fraud. Despite the relative difference in the legal nature of possession between the two systems, both aim to achieve the same objective: safeguarding existing legal positions and ensuring the proper conduct of transactions.

The central issue of this study is to examine the extent of convergence or divergence between Algerian law and Maliki jurisprudence in their regulation of possession as a mechanism for acquiring property ownership, focusing on the elements and conditions each system relies upon and the legal effects resulting from their application.

The study also aims to explore the potential for Algerian legislation to benefit from Maliki jurisprudential insights in developing possession rules and strengthening their legal framework.

This article seeks to analyze possession as a means of acquiring real estate ownership in both Algerian law and Maliki jurisprudence, by examining the elements, conditions, legal effects, and underlying justifications of each system, while highlighting areas of agreement and difference. It further investigates the feasibility of integrating Maliki jurisprudence to enhance the Algerian legal framework in a manner suited to its legal and social context.

To address the study's main question, we have adopted the following structure:

Chapter One: General Concepts

- Section 1: Definition of Ownership.
- Section 2: Definition of Real Estate.
- Section 3: Definition of Real Estate Ownership.
- Section 4: Definition of Possession.

Chapter Two: Real Estate Ownership through Possession in Algerian Law.

- Section 1: Elements of Possession.
- Section 2: Conditions for Valid Possession in Algerian Law.

Chapter Three: Real Estate Ownership through Possession in Maliki Jurisprudence.

- Section 1: Conditions for Valid Possession in Maliki Jurisprudence.
- Section 2: The Effect of Possession on Acquiring Property Ownership in Maliki Jurisprudence.

Chapter One: General Concepts

This chapter addresses the definitions of ownership and real estate, followed by definitions of real estate ownership and possession.

Section One: Definition of Ownership

Subsection One: Definition of Ownership in Algerian Law

The Algerian legislator¹ defines ownership in Article 674 of the Algerian Civil Code as follows: “Ownership is the right to use

¹ Ordinance No. 75/58 dated 26/09/1975, containing the Civil Code, as amended and supplemented by Law No. 07/05 dated 13/05/2007, Law No. 80/07 dated 09/08/1980, Law No. 83/01 dated 29/01/1983, Law No. 84/21 dated 24/09/1984, and Law No. 05/10 dated 20/07/2005, Official Gazette of the year 1975, No. 78.

and dispose of things, provided that it is not used in a manner prohibited by laws and regulations.”

It is clear from this provision that the legislator lists the powers enjoyed by the owner rather than providing a strict definition of ownership, in line with the view that defining legal concepts is primarily a matter of jurisprudence rather than legislation.

Accordingly, the legislator's definition does not differ significantly from Article 861 of the Libyan Civil Code or Article 768 of the Syrian Civil Code.

Similarly, it aligns with Article 802 of the Egyptian Civil Code, which states: “The owner of a thing alone, within the limits of the law, has the right to use it, exploit it, and dispose of it².”

Dr. Abdel-Razzaq Al-Sanhouri attempted to derive a jurisprudential definition of ownership from this text, stating:

“Ownership of a thing is the right to exclusively use, exploit, and dispose of it permanently, all within the limits of the law³.”

However, the following observations can be made about this definition and the aforementioned legal texts:

1. The rights of exclusive use, exploitation, and disposal are the effects of ownership, not ownership itself.
2. These powers may be hindered by impediments such as minority or insanity; hence, the phrase “unless prevented” should be added⁴.
3. These powers may be granted to someone by proxy, but their exercise does not make that person the owner, so this distinction must be clarified.

Subsection Two: Definition of Ownership in Maliki Jurisprudence

Al-Qarafi, a Maliki scholar, defines ownership as follows:

“The expression that best reflects the essence of ownership is that it is a legal ruling related to an object or benefit, granting the person to whom it is attributed the ability to make use of the owned item and to receive compensation for it as such⁵.”

Ownership is a legal ruling based on two proofs: the consensus of scholars (ijmā‘) and the fact that it follows legitimate (shar‘ī) causes. It is established over property or benefits upon the fulfillment of causes that justify ownership⁶. For instance, tangible items become owned through sale⁷, and benefits through lease and other similar contracts⁸.

The phrase in the definition, “*and compensation for it*”, is included to exclude gratuitous permissions, such as hospitality, which is permitted but not considered ownership in the strict sense. It also excludes special usages such as access to mosques, lodges, railways, and market seating, where there is lawful capacity to use the property but without actual ownership. The phrase “*as such*” serves to include those who are legally incapacitated (e.g., minors, the insane) who may hold ownership but lack the legal capacity to dispose of their property⁹.

Al-Jurjānī defines ownership as a relationship between the owner and the owned object, stating:

“In legal terminology, ownership is a lawful connection between a person and a thing that allows the person full discretion over it and prevents others from interfering with it¹⁰.”

According to this definition, ownership is a relationship between a person and a thing, by which the person gains the exclusive right to dispose of that thing and to prevent others from doing so except with permission. This is a relationship founded on law, excluding any unlawful connection such as that between a thief and the stolen item, or a usurper and the seized property.

From the above definitions, it can be concluded that both legal jurisprudence and Maliki jurisprudence focus primarily on the outcomes or benefits resulting from the recognition of ownership rights, rather than on the essence of ownership itself.

For this reason, Professor Abd al-Salam al-‘Abbādī attempted to clarify the true nature of ownership from a legal perspective. After reviewing several definitions from legal scholars and drawing on those from Islamic jurists, he stated that ownership is: “A personal entitlement or exclusivity over a thing, which grants one alone the right to use, exploit, and dispose of it initially, unless prevented, within the limits of the law.”

Despite the merit of this definition, it overlooks ownership by legal entities. Therefore, we propose that ownership in positive law is¹¹:

“An entitlement or exclusivity of a person—not necessarily a human—over a thing, which grants that person alone the right to use, exploit, and dispose of it initially, unless prevented, within the limits of the law.”

Accordingly, ownership in Islamic jurisprudence can be defined as:

“An entitlement or exclusivity of a person over a thing, which grants him alone the right to use, exploit, and dispose of it initially, unless prevented, within the limits of Islamic law.”

Section Two: Definition of Real Estate (Property)

Subsection One: Definition of Real Estate in Algerian Law

Article 683 of the Algerian Civil Code states in its first paragraph:

“Anything that is fixed in its place and cannot be moved without damage is considered real estate; everything else is considered movable property.”

It is clear from this text that the Algerian legislator provides a direct definition of real estate as anything fixed in its location and immovable without damage, such as land and buildings.

Thus, real estate is that which is fixed in its space in such a way that it cannot be moved from one place to another without being demolished or uprooted, and therefore cannot be moved without damage.

It is also noted that the legislator did not define movable property directly as he did for real estate. Instead, he merely stated: “Everything else is considered movable property.”

This implies, by contrast, that movable property is:

“Anything not fixed in its space and not permanently attached to it, which can be moved from one place to another without damage,” such as money, goods, animals, measured and weighed items, vehicles, machinery, and other movable things.

² Al-‘Abbādī, *Ownership in Islamic Sharia*, Vol. 1, p. 169.

³ Al-Sanhūrī, *Al-Wasīṭ (The Intermediate)*, Vol. 8, p. 493.

⁴ See: Abdullah Mukhtar Younis, *Ownership in Islamic Sharia and Its Role in the Islamic Economy*, 1st ed., (Alexandria: Shabab Al-Jamī‘ah Foundation, 1407 AH – 1987 AD), pp. 79–80.

⁵ Al-Qarāfī, *Al-Furūq (The Differences)*, Vol. 3, p. 190.

⁶ The same source.

⁷ The same source.

⁸ The same source, p. 191.

⁹ The same source, p. 216.

¹⁰ Alī ibn Muḥammad ibn ‘Alī al-Jurjānī, *Al-Ta‘rīfāt (Definitions)*, edited by Ibrāhīm al-Abyārī, 1st ed., (Beirut: Dār al-Kitāb al-‘Arabī, 1405 AH), Vol. 1, p. 295.

¹¹ Al-‘Abbādī, *Ownership in Islamic Sharia*, Vol. 1, p. 171.

Subsection Two: Definition of Real Estate in Maliki Jurisprudence

Al-Kharshī defines real estate as:

“Real estate is land and whatever is attached to it, such as buildings or trees...”

Both Al-Dardīr and Al-Dusūqī also defined it similarly:

“Land and whatever is attached to it, such as buildings and trees¹²...”

It is clear from these definitions that the Maliki jurists include within the concept of real estate not only the land itself but also everything permanently attached to it—such as buildings and trees—as long as their existence is tied to the land and fixed upon it. These cannot be separated from their original nature unless their condition changes:

- A tree, once cut, becomes wood.
- A building, once demolished, becomes rubble.

Therefore, they are considered real estate just like land¹³.

Accordingly, real estate in Maliki jurisprudence is:

“Anything fixed and immovable that cannot be transferred or relocated from one place to another while preserving its form and structure,” such as land, buildings, and trees¹⁴.

By contrast, movable property in Maliki jurisprudence is:

Anything that can be transferred or moved from one place to another while retaining its form and structure¹⁵.

In summary, the criterion adopted by the Algerian legislator to distinguish between real estate and movable property is the inherent nature of the object itself. If by its nature it cannot be moved without damage or significant alteration, it is classified as real estate; otherwise, it is considered movable property. This is the same criterion followed by the Maliki school in classifying wealth into real estate and movables. The Malikis expanded the concept of real estate to include, in addition to land, buildings, plantations, and anything fixed to the land that cannot be detached without damage.

Section Three: Definition of Real Estate Ownership

Subsection One: Definition of Real Estate Ownership in Algerian Law

The Algerian legislator provided a specific definition of real estate ownership in Article 27 of the Land Orientation Law, which states:

“Private real estate ownership is the right to enjoy and dispose of real estate property or real rights in order to use such properties according to their nature or intended purpose.”

Although the legislator did not explicitly mention “use” and “exploitation,” the inclusion of the term “enjoyment” alongside “disposal” implies the intended meaning of both use and exploitation.

It appears that the legislator did not rely solely on the definition of ownership given in Article 674 of the Algerian Civil Code, but instead emphasized the social function of ownership. While the Civil Code allows the owner the freedom to exploit or not exploit their property, the Land Orientation Law ties the rights of enjoyment and disposal to actual use that fulfills the purpose of the property according to its nature¹⁶.

This is also evident in the obligation to exploit agricultural land. Article 33 of the same law stipulates:

“Every activity, technique, or achievement must contribute to increasing the productive capacity of agricultural holdings, regardless of the category of the concerned real estate resources.”

Moreover, the law explicitly considers failure to invest in land as an abuse of rights. Article 48 states:

“Failure to invest in agricultural land constitutes an abusive act in the exercise of rights, given the economic importance and social function of such land.”

In this context, the Algerian legislator adds that actual and direct or indirect investment constitutes a duty upon the owner or possessor of real estate rights, and upon any natural or legal person exercising possession in general. The legislator’s position is rooted in the economic importance and social role of real estate.

Accordingly, based on the relevant provisions of both the Civil Code and the Land Orientation Law—especially those concerning the general concept and social function of real estate ownership—we can define real estate ownership as:

“An entitlement or exclusivity of a person over a real estate property, granting him alone the right to use, exploit, and dispose of it according to its nature or intended purpose, initially, unless prevented, within the limits of the law.”

Subsection One: Definition of Real Estate Ownership in the Maliki School of Thought

The same applies to ownership in Maliki jurisprudence. If ownership is defined as:

“A person’s exclusive entitlement or control over a thing, implying that he alone has the right to use, exploit, and dispose of it initially, unless prevented, within the bounds of Sharia,”

then there is nothing to prevent us from saying that private real estate ownership in Maliki jurisprudence is:

“A person’s exclusive entitlement or control over a real estate property, implying that he alone has the right to use, exploit, and dispose of it according to its nature or intended purpose, initially, unless prevented, within the bounds of Sharia.”

Section Four: Definition of Possession

In this section, we present the definition of possession in both Algerian law and Maliki jurisprudence, in the following two subsections:

Subsection One: Definition of Possession in Algerian Law

The Algerian legislator did not define possession as one of the means of acquiring ownership, which is also the case in many Arab legal systems. However, the Egyptian legislator defined it in Article 1398 of the Draft Civil Code as:

“Possession is a material condition through which a person exercises actual control over an object that may be subject to transactions, or uses a right among the rights.”¹⁷

¹² Muḥammad ibn ‘Abd Allāh al-Kharshī al-Mālikī, Abū ‘Abd Allāh (d. 1101 AH), Sharḥ Mukhtaṣar Khalīl li-l-Kharshī (Commentary on Khalīl’s Mukhtaṣar by al-Kharshī), 8 volumes, (Beirut: Dār al-Fikr li-l-Ṭibā‘a), Vol. 6, p. 164.

¹³ (Aḥmad ibn Muḥammad al-Khalwatī al-Ṣawī, Abū al-‘Abbās (d. 1241 AH), Bulghat al-Sālik li-Aqrab al-Masālik ilā Madhhab al-Imām Mālik, 4 volumes, (Beirut: Dār al-Ma‘ārif), Vol. 3, p. 634.

Muḥammad ibn Aḥmad ibn ‘Arafa al-Dusūqī al-Mālikī (d. 1230 AH), Ḥāshiyat al-Dusūqī ‘alā al-Sharḥ al-Kabīr (al-Dusūqī’s Marginal Notes on al-Sharḥ al-Kabīr), 4 volumes, (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī), Vol. 1, p. 480.

¹⁴ See: Muṣṭafā Aḥmad al-Zarqā, Previously Cited Source, p. 164; and Badrān Abū al-‘Aynayn Badrān, Previously Cited Source, p. 287.

¹⁵ Badrān Abū al-‘Aynayn Badrān, Same Source, p. 286; and Wahbah al-Zuhaylī, Same Source.

¹⁶ See: Laylā Zarūqī and Ḥamdī Bāshā, Real Estate Disputes, (Algeria: Dār Hūmah, 2003), p. 254.

¹⁷ See: Al-Sanhūrī, Al-Wasīṭ (The Intermediate), Vol. 9, p. 784.

This article was later removed because its definition leaned heavily on doctrinal (jurisprudential) reasoning.¹⁸

This concept corresponds to Article 1170 of the Jordanian Civil Code, which defines possession as:

"Possession is the actual control by a person, either personally or through another, over a thing or a right that can be subject to transactions."

From a doctrinal perspective, Hamdi Pasha Omar defined possession as:

"Holding or taking control of real estate for a period sufficient to acquire ownership through prescription."¹⁹

He Ahmad Shawqi Muhammad Abd al-Rahman] defined it as:

"Actual control by the possessor over something that is legally transactable, through carrying out material actions required by the nature of the right, with the intention of acquiring the real right consistent with the powers being exercised."²⁰

Mustafa Abdul Jawad defined it as:

"Actual control manifested through a person's performance of material and legal acts over something that can be possessed, with the intention to own it or to exercise a real right over it—whether this person is the owner or not."²¹

Jurisprudence generally agrees that possession is a factual condition through which a person has actual control over real estate. Therefore, it is neither a real right nor a personal right, but rather a material fact that produces legal effects—among which is that it constitutes a cause for acquiring real property ownership. In this sense, it is:

"Actual authority exercised by a person over a thing in a way that gives the appearance of ownership."²²

Subsection Two: Definition of Possession in the Maliki School

In Islamic jurisprudence, the Maliki school made the most extensive use of the concept of possession. They gave it special attention, particularly in relation to acquiring ownership—especially of real estate—through prescription. This is clear from their definitions. For example:

- Imam al-'Adawi defined it as:

"Taking hold of and disposing of a possessed item as the owner would—through building, planting, demolishing, and other forms of disposition"²³.

- Al-Dusuqi defined it as:

"Taking hold of and dominating an item, and disposing of it through one of several means: residing, renting, planting, exploiting, gifting, giving in charity, selling, demolishing, constructing, cutting trees, etc."²⁴.

- Similarly, in *Al-Sharh al-Saghir*, it is stated:

"Possession is taking hold of and dominating an item, and disposing of it through demolition, construction, gift, charity, planting, leasing, selling, cutting trees, and the like"²⁵.

From these definitions, it becomes clear that Maliki possession aligns with the legal definition, in that it consists of a material condition involving actual control over the possessed item. However, unlike legal terminology, Malikis do not describe it as "actual control" per se, but as "taking hold" and "dominating"—through acts commonly performed by an owner, such as building, demolishing, residing, planting, selling, gifting, etc.

Thus, if ownership is a legal authority, then possession is a factual authority, whether based on a legal right or not. The possessor exercises this over something—be it real estate, a movable, or a real right—in a way that externally appears as an act of ownership or of exercising another real right.²⁶

Therefore, possession is not a real right, nor a personal right; it is not a right at all, but a simple material fact that produces legal consequences²⁷—including the acquisition of ownership²⁸.

Section Two: Acquisition of Real Estate Ownership through Possession in Algerian Law

The Algerian legislator has recognized possession as one of the means of acquiring ownership of real estate. However, it is subject to a number of legislative exceptions. Possession does not constitute a means of acquisition in the following cases:

- When the property in question belongs to public or private national domains, or
- When the property is already owned through a registered official deed recorded with the land registry.
- Additionally, properties in areas that have undergone final cadastral surveying are excluded, since cadastral operations serve as a decisive instrument for settling real property rights²⁹.

As a result, accepting possession as a means of transferring ownership in such areas is deemed illogical.

Possession only produces its legal effect in transferring ownership if it meets a set of essential elements and conditions, which will be discussed in the next two subsections³⁰.

Section One: Elements of Possession

From the definition of possession, it is clear that real estate possession relies on two essential elements:

Second: The Material Element

The material element of real estate possession means that the possessor must exercise actual control over the property and physically take hold of it, by performing visible material actions consistent with the type of right sought to be acquired³¹.

¹⁸ See: Same Source.

¹⁹ Al-Ṭayyib al-Fakkī Mūsā, *Possession of Real Estate in Islamic Jurisprudence: A Comparative Study*, 1st ed., (Beirut: Dār al-Jīl, 1411 AH – 1991 AD), p. 67.

See: Ḥamdī Bāshā 'Umar, *Transfer of Real Estate Ownership in Algerian Legislation*, p. 30.

²⁰ () Aḥmad Shawqī Muḥammad 'Abd al-Raḥmān, *Original Real Rights: The Right of Ownership*, (Egypt: Manshat al-Ma'ārif, 2004), p. 250.

²¹ () Muṣṭafā 'Abd al-Jawwād, *Possession in Bad Faith as a Cause for Acquiring Ownership*, (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1994), p. 81.

²² Colin and Capitant, *Traité de droit civil français*, Vol. 2, 1959, by Juliot La Marandière, p. 372.

²³ Al-'Adawī, *Previously Cited Source*, Vol. 2, p. 371.

²⁴ Al-Dusuqī, *Previously Cited Source*, 4 volumes, (Beirut: Dār al-Fikr), Vol. 4, p. 233.

²⁵ Al-Ṣawī, *Previously Cited Source*, Vol. 4, p. 319.

²⁶ Alī al-Khaḥfī, *Previously Cited Source*, p. 255.

²⁷ (See: Al-Sanhūrī, *Al-Wasīṭ*, Vol. 9, p. 785.

²⁸ See: Ḥamdī Bāshā 'Umar, *Transfer of Real Estate Ownership in Algerian Legislation*, p. 30.

²⁹ See: Article 689 of the Civil Code Ordinance, and Article 04 of Law No. 90/30.

³⁰ () See: Simā'īn Shāmāh, *Legal Instruments of Land Policy in Algeria since 1990*, Master's Thesis, Department of Contracts and Liability, (Institute of Law and Administrative Sciences, Ben Aknoun, Academic Year 1998–1999), p. 11.

³¹ See: Al-Sanhūrī, *Al-Wasīṭ*, Vol. 9, p. 792.

If the right in question is ownership, then the possessor must perform all acts commonly carried out by owners in managing their property³². These acts include:

- Using the property.
- Exploiting it.
- Modifying it based on its nature.

For example:

- If the property is a house, the possessor can enter and use it as a residence.
- If the property is agricultural land, the possessor must engage in usual farming activities such as:
 - Plowing.
 - Sowing.
 - Planting.
 - Fertilizing.
 - Harvesting crops.
 - and picking fruits.

These actions serve as indicators of ownership.

It is not required that the possessor perform these actions personally. It is sufficient that they be performed in his name and for his benefit.

Thus, in addition to direct possession, legal texts also recognize indirect or mediated possession, such as:

- A subordinate possessing on behalf of a superior.
- A borrower for the lender.
- A tenant for the landlord.

Mediated possession reflects the benefit of the actual owner—be it a superior, lender, or landlord—and confirms that material control, even if through another person, remains a core foundation of legal possession.

Article 809 of the Algerian Civil Code states:

“A person lacking legal capacity may acquire possession through his legal representative.”

This means that material control can be exercised through a proxy if the person is legally incapable (e.g., a minor or someone under guardianship), through a guardian or trustee.

Article 810 of the same code adds:

“Possession through an intermediary is valid as long as the intermediary exercises it in the name of the possessor and is connected to him in a manner that obliges him to follow the possessor’s instructions regarding the possession...”

Notably, the legislator only mentioned intermediaries who are subordinates, but legal doctrine and case law have established that the intermediary need not always be a subordinate. For instance:

- A tenant or borrower also qualifies as an intermediary, even though they are not subordinates³³.

When doubt arises regarding the nature of possession, apparent possession is presumed to be genuine possession, unless proven otherwise.

In other words, mediated possession is not presumed. The one visibly exercising material control is assumed to be doing so on their own behalf.

Thus, the burden of proof lies with the person claiming to be the real possessor, asserting that the visible actions are carried out on their behalf.

If they succeed in doing so, the law recognizes the possession as being in the name of the claimant, and presumes its continuity.

This is what the legislator meant in the second paragraph of the previous article by stating:

“In case of doubt, the person exercising possession is presumed to be doing so for themselves. If it is a continuation of a previous possession, it is presumed to be on behalf of the one who began it.”³⁴

Second: The Moral Element

Material control alone is not sufficient for the establishment of possession by a property holder; it must be accompanied by the intent to own and the appearance before others as the owner³⁵. Generally, this means the intention to appear as someone exercising ownership rights for oneself and on one’s own behalf. Accordingly, the tenant, the borrower, and the depositary do not possess the element of intent, as they do not use the property on their own behalf, but rather on behalf of the lessor, the lender, or the depositor³⁶.

Since intent is a psychological matter, it is originally required to be present in the possessor personally, and they must be of sufficient capacity to understand what they are possessing and the legal consequences of such possession. However, this has not prevented the legislator from allowing possession by those who are partially or wholly lacking legal capacity, by instead considering the intent of their legal representative³⁷.

Based on the above, possession cannot be established through actions carried out by another person under mere license, or through actions tolerated by the owner; because in the first case, both the material element (physical control) and the moral element (intent) are absent, and in the second case, intent is lacking³⁸.

Section Two: Conditions for Valid Possession in Algerian Law

It is not enough for possession of property to involve both material and moral elements in order to confer ownership; it must also fulfill certain conditions, namely: absence of defects, good faith, a legitimate cause, continuous possession throughout the

³² See: Muḥammad Ṭāhā al-Bashīr and Ghanī Ḥassūn Ṭāhā, Previously Cited Source, p. 199.

³³ See: Muḥammad Ṭāhā al-Bashīr and Ghanī Ḥassūn Ṭāhā, Previously Cited Source, p. 199.

³⁴ See: Al-Sanhūrī, Al-Wasīṭ, Vol. 9, p. 797.

³⁵ See: Ḥamdī Bāshā ‘Umar, Mechanisms for the Purification of Private Real Property Ownership, (Algeria: Dār Ḥumah), p. 22.

³⁶ See: Al-Sanhūrī, Al-Wasīṭ, p. 803.

³⁷ See: Article 809 of the Algerian Civil Code.

³⁸ See: Article 808 of the same Code.

limitation period without interruption, and the possessor's claim of ownership over the possessed property.

Below we present these conditions briefly, as a more detailed discussion would require a separate study, which is beyond the scope of this context.

First Subsection: Absence of Defects

The Algerian legislator specified in the second paragraph of Article 808 the defects that must be absent from possession in order for it to produce legal effects. These defects are coercion, concealment, and ambiguity, as stated:

"If possession is accompanied by coercion, or occurs in secrecy, or is ambiguous, it shall have no effect against the person subjected to coercion, or from whom the possession was concealed, or to whom the matter appeared ambiguous—except from the time such defects are removed."

Thus, for possession to be valid, it must be peaceful and free of coercion—that is, without trespass, usurpation, or threats from the possessor. If the possessor seized the property by coercion, trespass, usurpation, or threats, the possession is defective due to coercion.

Possession must also be public and not hidden, as it represents the appearance of having a rightful claim. Therefore, it should be exercised by the possessor openly before the public, or at least in front of the property owner or rightful holder³⁹. If it is concealed—for instance, if someone possesses an adjacent part of a neighbor's agricultural land without the neighbor noticing—then the possession is defective due to secrecy and has no effect, regardless of the duration.

Possession must also be clear and unambiguous. The possessor must be holding the property for themselves alone, with no confusion that they might be holding it for another. If the nature of the possession allows for the possibility that the possessor is acting on someone else's behalf, then the possession is defective due to ambiguity and will have no effect, no matter how long it continues⁴⁰.

Similarly, if one of the co-owners takes possession of commonly owned land—especially when the co-ownership results from inheritance and the heirs have not yet divided the land—the possessor may claim that they hold the land for their own benefit exclusively. However, at the same time, they carry out material acts of the kind typically performed by a co-owner. These acts, although similar to those of an exclusive owner, are carried out by a co-owner with the understanding that others share the ownership.

In such cases, ambiguity arises in the co-owner's possession of the undivided land if they claim to possess it exclusively. This is because the nature of their possession could indicate either that they hold it solely for themselves or jointly with the other co-owners. Thus, the possession is tainted by the defect of ambiguity and uncertainty, and consequently, it does not produce any legal effects.

It should also be noted that under Article 808 of the Algerian Civil Code, the legislator considers the aforementioned three defects—coercion, secrecy, and ambiguity—to be temporary defects. These defects prevent possession from producing its legal effects as long as they persist, but once they are removed at any point in time, the possession becomes valid and produces its effects from the date of their removal.

Second Subsection: Good Faith

Article 828 of the Civil Code states:

"If possession occurs over real property or a real right in immovable property, and is accompanied by good faith and at the same time based on a valid legal title, then the acquisitive prescription period is ten years."

Accordingly, a possessor of real property cannot acquire ownership through the shorter limitation period of ten years unless the condition of good faith is met.

According to Article 824, good faith means ignorance of infringing upon another's right. That is, the possessor believes they have dealt with someone legally authorized to transfer the real right, whether for consideration or not, and everything—agreements, appearances, and external indicators—confirms they were dealing with a rightful owner. In this case, the possessor is considered to be in good faith, which is judged by a subjective standard supported by all reasonable grounds.

Good faith is negated when the possessor's ignorance stems from gross negligence⁴¹—for example, if upon receiving the property deed from the seller, they failed to verify whether the seller actually owned the property, despite being able to discover the truth with minimal investigation, but proceeded carelessly with the purchase.

The law presumes good faith in the possessor unless proven otherwise. And if the possessor is a legal entity, the intent of its legal representative is what counts⁴².

Article 825 of the Civil Code also states that the possessor loses the status of good faith from the moment they become aware that their possession infringes on another's rights, or that their possession is defective. Moreover, anyone who seizes another's possession by force is considered to be in bad faith.

Third Subsection: Valid Legal Cause

The Algerian legislator refers to this as the *valid title*, which is specifically required for *short-term acquisitive prescription*. Article 828 of the Civil Code defines it as follows:

"An act issued by a person who is not the owner of the thing or the holder of the right sought to be acquired by prescription, and the title must be registered."

Thus, if real estate is transferred into someone's possession through a legal cause that ordinarily mandates such transfer—such as a legal act of transfer like sale or will—but this act does not transfer ownership to the possessor because it was issued by someone other than the rightful owner, it would have transferred ownership had it been issued by the actual owner⁴³.

Accordingly, a more precise definition of *valid legal cause* in short-term prescription is:

"A legal act issued by a non-owner that would have transferred ownership had it been issued by the rightful owner."

The combination of such a valid cause with good faith creates a presumption that the possession was established without force or encroachment⁴⁴.

Since this legal act is issued by someone who is not the owner, it does not transfer ownership to the possessor. Therefore,

³⁹ See: Al-Sanhūrī, Al-Wasīt, Vol. 9, p. 803.

⁴⁰ Al-Ṭayyib al-Fakkī Mūsā, Previously Cited Source, p. 198.

⁴¹ See: Article 809 of the Algerian Civil Code.

⁴² Same Source.

⁴³ See: Al-Sanhūrī, Al-Wasīt, Vol. 9, p. 1084.

⁴⁴ See: Ahmad Barādī, Acquisition of Ownership through Usucaption and Its Impact between Islamic Law and Algerian Civil Law, Master's Thesis in Sharī'ah and Law, (University of Algiers, Faculty of Islamic Sciences, Department of Sharī'ah, 2008–2009), p. 114.

short-term acquisitive prescription was established to protect the good-faith possessor who received such a valid cause. While the possessor cannot acquire ownership through this legal act alone, they may acquire it through short-term prescription of only ten years, as a safeguard for their good faith.

It is important to clarify that the *title* mentioned in the article does not refer to a written document proving the legal act issued to the possessor. Rather, it refers to the legal act itself on which the possession is based—such as a sale through which the possessor purchased the property in question.

Based on the above, the *valid legal cause* must meet the following conditions:

- It must be a legal act transferring ownership issued to the possessor in their capacity as a specific successor⁴⁵.

Thus, material facts do not constitute a valid legal cause, as they are not legal acts. Likewise, legal acts that merely establish personal obligations, or those that do not transfer ownership but only reveal it, do not count as valid causes. However, judicial decisions that transfer ownership, such as judgments granting preemption rights (*shufa*) or awarding property through a public auction, are considered equivalent to legal acts. Therefore, if it becomes clear that the person from whom the property was taken was not the owner, the beneficiary of preemption or the auction winner has the right to acquire ownership through short-term prescription.

In addition, the act must be issued to the possessor as a specific successor; thus, the possession of an heir, who is a universal successor, is regarded as a continuation of the possession of the deceased. In this case, the heir does not acquire ownership through possession unless the title of the deceased is also examined.

- The legal act must be issued by someone who is not the owner; if it were issued by the owner, ownership would be transferred without the need to rely on prescription⁴⁶.

Before moving on to the final condition, it is worth reiterating that Algerian law requires both good faith and a valid legal cause for short-term prescription, whereas these are not required for long-term prescription. In this regard, Article 827 states: *"Whoever possesses a movable or immovable property or a real right therein, without being its private owner, shall become its owner if their possession continues uninterrupted for fifteen years."*

Fourth Subsection: Continuity of Possession for the Prescriptive Period

The Algerian legislator, in Article 827 of the Civil Code, requires that the possession of real estate must continue for fifteen years without interruption, which is the period of long-term prescription.

Additionally, Article 828 requires that possession must continue for ten years, which is the period of short-term prescription, if it is coupled with good faith and based at the same time on a valid title.

Possession is presumed to be continuous unless evidence to the contrary is provided. If possession is proven to have existed at a certain time in the past and is also shown to exist at present, this serves as a presumption that it continued during the interval. Whoever claims otherwise must prove their assertion.

As for the rules governing this prescription, Article 832 of the Algerian Civil Code provides:

"The rules of extinctive prescription apply to acquisitive prescription with respect to the calculation of time, suspension and interruption of prescription, invoking it before the judiciary, renouncing it, and agreeing to modify the time period, to the extent that these rules do not conflict with the nature of acquisitive prescription..."

Chapter Three: Ownership of Real Property Through Possession in Mālikī Jurisprudence

Most Mālikī jurists agreed that valid possession of real estate, fulfilling its necessary conditions, constitutes a cause for acquiring ownership of that property. However, they differed regarding the effect of such possession on the actual transfer of ownership. This issue will be addressed in two subsections: the first will explore the conditions for valid possession, and the second will address the effect of possession in acquiring ownership.

Section One: Conditions for Valid Possession in Mālikī Jurisprudence

Al-Māzarī states the conditions for possession as follows:

"Possession is valid with seven conditions: the act of holding (*hawz*), i.e., placing one's hand on the possessed object so that it is attributed to him; that he acts with it as an owner does with his property; that the duration is extended; that there is no dispute over the possession during this time; and that the possessor is present, knowledgeable, mature, and rational, with no impediment preventing him from asserting his rights⁴⁷."

It is noted from the above that al-Māzarī considers possession—the act of placing one's hand on the object—as a condition, i.e., external to the essence of ownership. However, the correct view is that it is in fact a pillar (*rukn*) and part of the essence. He also refers to the intent to own—the mental aspect of possession—as the attribution of the object to the possessor. As for the remaining conditions, if any or all of them are absent, the possession does not benefit its holder, and ownership is not acquired thereby, no matter how long it lasts. These conditions are detailed below.

First Subsection: Acts of the Possessor with the Property

What is meant by the possessor's acts with the property is their undertaking of actions indicating ownership⁴⁸, such as building, demolishing, planting, cultivating, inhabiting, leasing, gifting, selling, and other such acts typically performed by property owners⁴⁹.

These are the material acts that establish physical control, known in civil law as the material element (*rukn māddī*) of possession. In contrast, actions like gifting and selling are legal acts, and a possessor usually performs them only when they intend to present themselves as possessing for themselves and in their own interest, with intent to own—which corresponds in civil law to the mental element (*rukn ma'nawī*).

Second Subsection: Presence of the Original Owner and His Silence Without Hindrance

The Mālikīs agree with the Algerian legislator that, among the conditions of possession that leads to ownership of real estate, the original owner (*al-maḥwūz 'anhu*) must be present, not absent, witnessing the possessor taking possession of the property and acting with it as an owner would with their own⁵⁰.

⁴⁵ See: Al-Sanhūrī, *Al-Wasīṭ*, Vol. 9, p. 1091; and see: Muḥammad Ṭāhā al-Bashīr and Ghanī Ḥassūn Ṭāhā, *Previously Cited Source*, p. 199. see: Article 830 of the Algerian Civil Code.

⁴⁶ See: Article 830 of the Algerian Civil Code.

⁴⁷ Muḥammad ibn Aḥmad ibn Muḥammad Abū 'Abd Allāh al-Fāsī, known as Mayyārah (d. 1072 AH), *Al-Itqān wa al-Iḥkām fī Sharḥ Tuḥfat al-Ḥukkām*, commonly known as *Sharḥ Mayyārah*, 2 volumes, (Beirut: Dār al-Ma'rifah), Vol. 2, p. 165.

⁴⁸ See: Al-Aṣbahī, *Previously Cited Source*, Vol. 4, p. 49; and Al-Ḥaṭṭāb, *Previously Cited Source*, Vol. 6, pp. 221, 229.

⁴⁹ Al-Dusūqī, *Previously Cited Source*, Vol. 4, p. 233.

⁵⁰ See: Al-Aṣbahī, *Previously Cited Source*, Vol. 4, p. 49.

In other words, the possession must be public, not concealed from people, including the person from whom possession is being taken, and must be carried out openly in his presence.

In addition to the requirement of presence, possession is not valid unless the original owner remains silent and does not object to the possessor's control of his property without a legitimate impediment, whether by word or deed⁵¹. If he objects during the period of possession, his claim is admissible, and the possession becomes invalid⁵². The same applies if he remains silent due to a valid excuse, such as fear, coercion, minority, insanity, or mental incompetence, and the like. Hence, the Mālikī scholars agree with the Algerian legislator in stipulating that possession is not valid if accompanied by coercion, fear, or similar factors. This is reflected in Article 808 of the Algerian Civil Code, which requires that possession be peaceful, without trespass, usurpation, or threats from the possessor.

Third Subsection: The Original Owner's Knowledge of His Ownership and of the Possessor's Act

Mālikī jurists unanimously agree that possession is not valid if the original owner is unaware of both his ownership of the property and the fact of the possessor's possession of it. Ignorance of these facts places him, in legal effect, in the position of an absent person, even if physically present⁵³. It is not sufficient for him to know one without the other⁵⁴.

There was disagreement among the Mālikī scholars concerning whether the original owner's claim should be accepted if he asserts that he was aware of his ownership of the property but only obtained evidence to prove it after the possession period had elapsed. The majority held that such a claim is not excused, and his case is not accepted. However, a minority held that such a person is excused and his claim may be accepted⁵⁵.

Further disagreement arose among Mālikī scholars regarding who bears the burden of proving that the original owner was aware of the possessor's occupation of the property. They formed four opinions⁵⁶:

1. The original owner is to be believed if he swears an oath.
2. The possessor bears the burden of proof, as the original owner, though present, is presumed to be unaware — this is the view of Ibn Farḥūn.
3. The original owner bears the burden of proof, since he is presumed to be aware — the view of Ibn Rushd.
4. The burden is on the possessor if the original owner is an heir, and on the original owner if he is not an heir.

Dr. Muḥammad 'Abd al-Jawwād favored the opinion that the possessor must prove that the original owner was aware of the possession. He based his view on the position of Ibn Farḥūn, as expressed in his book *Tabṣīrat al-Ḥukkām fī Uṣūl al-Aqḍīya wa-Manāḥij al-Aḥkām*, a practical judicial work aimed at guiding judges in dispute resolution. Dr. 'Abd al-Jawwād argues that this view aligns with the strict approach of Mālikī jurisprudence regarding the conditions of possession, which heavily favors the rights of the original owner and seeks to close any loopholes that might be exploited by the possessor to cause harm⁵⁷.

Fourth Subsection: Continuity of Possession for a Long Period

The Prophet (peace be upon him) did not differentiate in his saying: "*Whoever possesses something for ten years, it belongs to him*"⁵⁸ between movable and immovable property, considering that the term "thing" includes both. Thus, it is understood that the period of possession is ten years, whether the possessed thing is real estate or movable property.

However, despite the apparent meaning of the hadith, Imam Mālik did not specify a fixed period for possession⁵⁹. In one narration attributed to him, the determination of the period is left to the discretion of the judge⁶⁰. Meanwhile, the majority of Mālikī scholars hold that ten years is the period of possession between strangers for immovable property only, not for movable property⁶¹.

Fifth Subsection: The Possessor's Claim of Ownership

Mālikī jurists require that, for possession to be valid and for its legal effects to arise, the possessor must also claim ownership. Al-Dusuqī stated this condition saying: "*There remains a fifth condition, which is that the possessor, at the time of dispute, claims ownership of the possessed thing. If he has no evidence except mere possession, it does not benefit him*"⁶². Accordingly, mere possession alone is insufficient unless the possessor expressly claims ownership. It suffices that he asserts ownership during the dispute, without requiring continuous claim since the beginning of possession.

Sixth Subsection: Swearing an Oath by the Possessor

Mālikī scholars differ on whether swearing an oath is required in possession disputes⁶³. The majority require that the possessor swear an oath for the court to grant him ownership. Al-Ḥaṭṭāb clarified this view, relying on what Ibn Rushd transmitted, saying: "*Ibn Rushd said, following the opinion of earlier scholars who heard from Ibn al-Qāsim in the book of entitlement: possession does not transfer ownership from the original owner to the possessor by consensus, but it indicates ownership like opening the curtains... and similar things. Thus, the possessor's claim accompanied by his oath is decisive, in accordance with the Prophet's saying: 'Whoever possesses something for ten years, it belongs to him.' The meaning among scholars for 'it belongs to him' is that the ruling is established in his favor through his claim. If a man possesses another's property for a period in which possession is effective—ten years—and claims it as his own through purchase, gift, or donation, his claim accompanied by his oath must be accepted.*"⁶⁴

Accordingly, according to the majority of Mālikī scholars, possession does not benefit the possessor unless it is accompanied by an oath; for the ruling found in the Prophet's (peace be upon him) hadith: "It belongs to him" is understood by them to mean that the judgment of ownership is only established after the possessor claims ownership accompanied by his oath. This view is also based on the well-known principle in the school that whoever is granted a judgment over something is obligated to swear an

⁵¹ Same Source, p. 222.

⁵² Al-Dusuqī, Previously Cited Source, Vol. 4, p. 234.

⁵³ Al-Ḥaṭṭāb, Same Source, Vol. 6, p. 222.

⁵⁴ Ibn Farḥūn, Al-Tabsirah, Vol. 2, p. 99.

⁵⁵ See: Al-Ḥaṭṭāb, Previously Cited Source, Vol. 6, p. 223.

⁵⁶ See: Al-Ḥaṭṭāb, Previously Cited Source, Vol. 6, p. 223.

⁵⁷ Muḥammad 'Abd al-Jawwād Muḥammad, Possession and Prescription in Comparative Islamic Jurisprudence and Positive Law, (Alexandria: Manshat al-Ma'arif, 1397 AH – 1977 AD), p. 127.

⁵⁸ Abū Dāwūd, Al-Marāsīl, edited by Shu'ayb al-Arnā'ūt, 1st ed., (Beirut: Mu'assasat al-Risālah, 1408 AH), p. 850.

⁵⁹ See: Al-Aṣḥabī, Previously Cited Source, Vol. 4, p. 49.

⁶⁰ Ibn Farḥūn, Al-Tabsirah, Vol. 2, p. 99.

⁶¹ Same Source.

⁶² Al-Dusuqī, Previously Cited Source, Vol. 4, p. 234.

⁶³ Al-Ḥaṭṭāb, Previously Cited Source, Vol. 6, p. 221.

⁶⁴ Al-Ḥaṭṭāb, Previously Cited Source, Vol. 6, p. 221.

oath⁶⁵. Mālikīs also consider that possession fulfilling its five conditions is equivalent to the testimony of a single witness, which is the customary practice, and the oath in this case acts as the second witness, thus completing the quorum of testimony, leading to a judgment in favor of the possessor.

Second Section: The Effect of Possession in Acquiring Ownership of Real Estate in Mālikī Jurisprudence

Mālikī scholars differ regarding the effect of possession in transferring ownership of real estate into two main positions: one holding that possession merely indicates ownership, and another holding that possession transfers ownership. We will discuss these in two branches:

First Subsection: Possession as Indicative of Ownership

Most Mālikī jurists hold that possession of real estate does not transfer ownership to the possessor but only indicates it. This is based on the principle that the person placing his hand on the property must claim ownership and swear an oath affirming the truth of his claim⁶⁶. Thus, possession is like a witness to ownership, not a transferor of it. The possessor's oath in this case serves as the second witness, completing the required testimony quorum, and thus a ruling is issued in favor of the possessor.

Second Subsection: Possession as Transferring Ownership of Real Estate

Supporters of this view argue that legitimate possession transfers ownership from the original owner to the possessor⁶⁷. They interpret the hadith about possession, in its three versions — “*Whoever possesses something for ten years, it belongs to him*”, “*He is more entitled to it*”, and “*He is more entitled to it than the other*” — as indicating that a negligent owner abandoned his property while another person acquired possession and exercised ownership acts over it for ten years, meeting the legal conditions of possession, thus becoming the rightful owner.

According to this position, the possessor is not required to swear an oath, as the majority say, because when the valid legal conditions of possession are met and the prescribed time passes, ownership transfers to the possessor and the former owner's right is extinguished.

Based on the above, it can be said that Islamic jurisprudence generally, and Mālikī jurisprudence specifically, were among the earliest schools to analyze the effects of possession and detail its rules precisely. This confirms the flexibility of Islamic law and its ability to accommodate new issues, making it suitable for application in all times and places due to its detailed rules that consider human realities and interests.

2. CONCLUSION

In conclusion, and in light of the detailed comparison between the regulation of possession as a means of acquiring real estate ownership in Algerian law and Mālikī jurisprudence, the main findings can be summarized as follows:

- Both systems agree that possession is a strong presumption of ownership provided its essential material and moral elements are fulfilled; however, Mālikī jurisprudence establishes stricter conditions such as requiring knowledge of the owner, an oath, and a claim of ownership, whereas Algerian legislation adopts a more practical approach embedded in modern legislative frameworks by defining limitation periods, document authentication, and defects systems.
- Mālikī jurisprudence excels regarding possession as a means of owning real estate in terms of the variety of juristic opinions, depth of conditions, and detailed analysis, which can enrich the legal framework through:
 - Diversifying methods of proving the owner's knowledge, such as oath imposition or court inquiries inspired by juristic evidence.
 - Enhancing judicial discretion in extending possession periods in disputes over durations or breach of conditions.
 - Broader regulation of the concept of “appearing as the owner” to include additional physical and moral manifestations, thereby reinforcing the supremacy of rights and reducing conflicts.
- The harmony between juristic rigor and legislative flexibility contributes to consolidating the security of real estate transactions and protecting all parties—the possessor and the original owner alike.

Therefore, it is advisable for the Algerian legislator to benefit from Mālikī jurisprudential models of conditions without abandoning its national legal heritage, to achieve better balance between legal security and social stability in the system of real estate ownership.

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⁶⁵ Ibn Farḥūn, Al-Tabsirah, Vol. 1, p. 68.

⁶⁶ Al-Ḥaṭṭāb, Previously Cited Source, Vol. 6, p. 221.

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