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The first axis: The conceptual framework for clearing immovable ownership in Arab legislation and the nature of the immovable system adopted.

Title of the presentation:

**Origins of Acquisitive Prescription of Immovable and its Conditions
in Algerian Law**

Abstract:

Acquisitive prescription is the establishment of a certain legal status after a period of time. It has been known and adopted as a means of owning movable and immovable properties since Ancient Civilizations. And even if this institution seems to be a violation of justice and equality, allowing the enrichment of someone at the expense of other's property, acquisitive prescription is well recognized in all the modern legal systems. Algerian law imposed a set of conditions to own immovable asset through acquisitive prescription, in order to make a balance between the old and the new owner.

Keywords : Natural law, Roman law, Possession, Long-term prescription, Short-term prescription.

عنوان المداخلة: أصول التقادم المكسب للعقار وشروطه في القانون الجزائري

الملخص:

التقادم المكسب هو إنشاء وضع قانوني معيّن بعد مرور فترة زمنية محددة. وقد عُرِف واعتمد كآلية لاكتساب ملكية العقارات والمنقولات منذ الحضارات القديمة. وحتى وإن كانت تبدو هذه الوسيلة وكأنها انتهاك لمبادئ العدالة والمساواة، كونها تسمح بإثراء شخص ما على حساب ممتلكات شخص آخر، فإن التقادم المكسب معترف به في جميع الأنظمة القانونية الحديثة. وقد فرض القانون الجزائري مجموعة من الشروط الواجب توافرها لاكتساب ملكية العقار عن طريق التقادم المكسب، وذلك بهدف تحقيق توازن بين المالك القديم والمالك الجديد.

الكلمات المفتاحية: القانون الطبيعي، القانون الروماني، الحيازة، التقادم الطويل، التقادم القصير.

Introduction:

The notion of acquisitive prescription has long been rejected, particularly in the immovable field, due to the importance of “land” for man throughout all civilizations.

Immovable property is often seen as a natural capital, a fortune for its owner, passed down from generation to generation which gives it, in addition to its material value, a moral value.

The right to property is one of the fundamental Human Rights, recognised and set on the Universal Declaration of Human Rights of 1948. Article 17 of the (UDHR) states that: “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”.

The right to property is also one of the most important real rights, due to the large authorities it gives to its owner. However, this property can be attributed to another person due to the fact of possession for a fixed period of time, by acquisitive prescription.

Time and possession are the basis of acquisitive prescription, which may seem unfair at first glance, since it allows people to become owners simply because they have occupied land for a period of time.

But the reality is quite different. The main role of prescription, in general, is to resolve a conflict between ‘a right’ and ‘a fact’¹. And since its first appearance as a legal institution in Roman Empire, acquisitive prescription tries to establish balance between two co-existing legal situations.

According to the Latin expression: *‘Nemo plus juris ad alium transferre potest quam ipse habet’*², which means that it is not possible for a person to use more rights than she/he has over a thing³, acquisitive prescription seems to be an exception.

The aim of this paper is to clarify the origins of acquisitive prescription in the field of immovable, in order to show its true role. And also to remind of its limitation, by discussing its conditions in Algerian law, so it can not be applied towards people’s property in an arbitrary way.

The problematic of this study will be as follows:
How did acquisitive prescription of immovable appear in legal systems? And what are the conditions for its application under Algerian law?

To answer the problematic, this paper will be divided into two parts. In the first part, we are going to review the historical origin of acquisitive prescription of immovable (I). In the second part, we will discuss its conditions according to Algerian law (II).

¹ Latifa ALZAMEL, La prescription civile, étude comparée droit français et droit koweïtien, Thèse présentée pour obtenir le grade de docteur de l’Université De Bordeaux École Doctorale De Droit (E.D.41), Spécialité Droit Privé et Sciences Criminelles, avril 2022, p. 9.

² Expressions et citations latines [Online] <https://www.locutio.net/encyclopedia/nemo-plus-juris-ad-alium-transferre-potest-quam-ipse-habet/> Accessed on 12/10/2023 at 11 :34.

³ Adèle SERY, La délimitation du champ contractuel de l’abus de confiance, Mémoire de fin de master 2 - Droit des affaires, Faculté de droit et d’économie – Université de La Réunion, Année Universitaire 2016/2017, p. 5

I. Origins of acquisitive prescription of immovable:

Most authors agree that the origins of acquisitive prescription date back to Roman law (2). But before any legislation, prescription finds its first origin in Natural law (1). Civil law did not create it, it simply regulated it according to society¹.

1. Natural law:

Acquisitive prescription is first of all the result of a natural process, allowing people to own movable or immovable assets, due to the movement of 'time'.

'Time' as a basis of prescription, is a natural factor. That is why acquisitive prescription finds its original source in nature. 'Time' creates a natural relationship between man and things, so that a "true right" is born. And the more time passes, the more authentic the right becomes.

In another context, the right to property is one of the oldest rights known to man, discovered since one said to another, "this is mine and that is yours," and from that day started the talk about the right to property². That is why it is considered as one of the principles of Natural law, which can not be taken away without a legitimate reason. The right to own property is a natural right as well as all Human Rights.

Algerian legislator stipulated Natural law in Article 1 of the Algerian Civil Code (A.C.C) as a source of law, stating that the judge applies Natural law and the rules of equity as a last resort. Natural law is always related to equity.

Natural law is a set of rules that do not change over space or time, based on respect for Human Rights. It is a universal law and often reminds us of justice and equity.

Natural law gathers a number of rights that each individual possesses because of his belonging to humanity and not to the society in which he lives³.

In a traditional vision, Natural law is an ideal law because it constitutes the highest moral principles that humanity seeks to realize. It is an absolute law, the 'Law of Nature' as Grotius wrote⁴. It includes in particular the right to life and health, the right to liberty and the right to property⁵.

Natural law has always been considered as superior to Positive law⁶ which is a set of man-made rules⁷, applied in a specific space and time and subject to permanent modifications according to the evolution of society.

Under Positive law, no one can argue the fact that property right is related to 'equality' as the main aspect of 'justice'. But when Positive law states that after a certain period of time, the right to property will be 'expired' for the benefit of someone else, while Natural law considers the right to property as one of the fundamental inviolable Human Rights, acquisitive

¹ Frédéric LEVESQUE, François TREMBLAY, Caroline LEPAGE, Lorsque le temps est l'ennemi de la justice : Les fondements et les origines de la prescription extinctive des droits personnels, R.D.U.S., (46), 2016, p. 590.

² الجليلي عجة، مدخل للعلوم القانونية، نظرية الحق (الجزء الثاني)، برتي للنشر، الجزائر، 2009، ص 364.

³ Définition de Droit naturel [Online] <https://www.dictionnaire-juridique.com/definition/droit-naturel.php> Accessed on: 06/11/2023 at 08 :09.

⁴ A. G. CBLORO, what is natural law?, THE MODERN LAW REVIEW VOL. 31, Nov. 1958, p. 609.

⁵ Définition de Droit naturel [Online] <https://www.dictionnaire-juridique.com/definition/droit-naturel.php> *Op. cit.*

⁶ A. G. CBLORO, What is natural law?, *Op.cit.*, p. 609.

⁷ Peter BERKOWITZ, On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's "What Is Positive Law?", The Yale Law Journal, Vol. 100, 1990, p. 703.

prescription seems to create a serious conflict between Natural and Positive law, especially when it comes to immovable assets which are the first natural source of fortune to man.

Some Natural law authors consider that prescription is the firmest sanction of property, but “consecrated by time, the property will therefore be deemed legitimate and authentic. Positive law is therefore right to demand here a slight sacrifice to Natural law. Everything must have an end, and the State is interested in ensuring that rights do not remain in suspense for too long”¹.

This means that, if apparently acquisitive prescription seems to work against the natural right to property, a deep view in the issue will easily adjust this erroneous vision. If equality and justice oblige us to respect the right to property as a Human Right, they also oblige us to recognize the right to property to another human who has ‘the right to a stable life’ as one of the fundamental natural Human Rights. Equality and justice also require that the possessor no longer worries about his property after a certain period of time.

2. Roman law:

After Natural law, acquisitive prescription first appeared in Roman law². Romans used to distinguish between ‘the fact’ and ‘the right’, and thus made difference between ‘possession’ and ‘property’, while property is a right, possession is just a fact³.

Possession⁴ is the physical power exercised over a thing, such that it gives the possessor material control over it⁵. It is composed of two elements⁶:

- A material element the ‘*Corpus*’, which is a set of material acts of use, enjoyment, transformation, carried out on the thing.
- An intentional element the ‘*Animus*’, which is the intention of the possessor to act for his own account.

¹ « Consacrée par le temps, la propriété sera par cela même réputée légitime et authentique ... La loi positive a donc raison de demander ici un léger sacrifice à la loi naturelle. ... Tout doit avoir une fin, et l'Etat est intéressé à ce que les droits ne restent pas trop longtemps en suspens ». Cited in : Naoki KANAYAMA, Les civilistes français et le droit naturel au XIX^{ème} siècle à propos de la prescription, Revue d'histoire des facultés de droit et de la culture juridique, du monde des juristes et du livre juridique, 1989, pp. 140-141.

² Unlike acquisitive prescription, and despite the scarcity of historical sources of ancient Greek law compared to Roman law, extinctive prescription of actions was not created by Roman law but by ancient Greek law. For more details, see: Frédéric LEVESQUE, François TREMBLAY, Caroline LEPAGE, *Op. cit.*, p. 590 et seq.

³ Ines BIMAGHRA, Les modes d'acquisition de la propriété immobilière par la possession : En droit romain, droit belge et droit anglais, Travail de fin d'études, Master en droit à finalité spécialisée en mobilité interuniversitaire Année académique 2017-2018, Faculté de Droit, de Science Politique et de Criminologie, Université de Liège, Belgique, p. 10.

⁴ There is no legal definition of possession in Algerian law, but according to Art. 2255 French Civil Code, modified by LAW n°2008-561 of June 17, 2008 - art. 2: ‘Possession is the enjoyment of a thing or right which we hold or exercise by ourselves, or by another who holds it or exercises it on our behalf’.

⁵ Aurélien BAMDE, La possession: éléments constitutifs, caractères, effets et protection, Posted 16 mars 2020 In Droit des biens, Les biens, Possession, Prescription acquisitive [Online]

<https://aurelienbamde.com/2020/03/16/la-possession-elements-constitutifs-caracteres-effets-et-protection/>
Accessed on : 08/11/2023 at 11 : 56.

⁶ Marie-Louis BEAULIEU, Analyse de la possession, Les Cahiers de droit, Vol. 4, n°3, avril 1961, p. 13.

If the possession is based on a right it becomes property. Property¹ is the right to use 'usus', enjoy 'fructus' and dispose 'abusus' of a thing in the most absolute way. Property is also defined as "a right *in rem* and it consists in a direct and immediate power that an individual has towards a thing – material or immaterial, movable or immovable"². Ownership is the right over a certain thing³.

Property is a right *in rem*⁴ which means "a real right", a right that relates directly to something. It is a legal relationship between the person and the thing to which the right of property relates.

Under Roman law, the possessor could become the owner of movable and immovable assets after continuous possession for a specified period of time.

Some authors believe that the origins of prescription go back to the Twelve Tables⁵. Roman law first adopted acquisitive prescription, then extinctive prescription⁶.

Prescription in criminal matters (extinctive), is also of Roman origins. It appeared for the first time during the reign of Augustus with the law which established in 18 or 17 BC a five-year statute of prescription for "crimes of the flesh"⁷.

Acquisitive prescription was known in Roman law, first in a short-term 'usucapio' with two years for immovables and one year for movables⁸. The short-term prescription 'usucapio' was limited only to the Italic funds⁹, it did not apply to the possession of provincial lands¹⁰. Good faith was required in the possessor when taking possession¹¹.

Later, Romans adopted the long-term prescription '*prescriptio longi temporis*', which was applied in the Eastern provinces to resolve problems of acquisition of provincial land, which could not be acquired by Roman citizens¹².

¹ Algerian legislator defines property in art. Article 674 of A.C.C., as the right to enjoy and dispose of things, in condition that they are not used in a way prohibited by laws or regulations. The same definition can be found in Art. 544 French Civil Code.

² Maria Tereza LEOPARDI MELLO, "Property" rights and the ways of protecting entitlements – An interdisciplinary approach, Rev. Econ. Contemp., Rio de Janeiro, v. 20, n. 3, set-dez/2016, p. 434.

³ Skender GOJANI and Lirie HOTI, Acquisition of the property right: An overview of prescription method analysis, Corporate Law & Governance Review, Volume 5, Issue 1, 2023, p. 101.

⁴ *In rem* is a Latin term meaning "against a thing". See: Glossary *In rem* [Online] [https://uk.practicallaw.thomsonreuters.com/8-520-2353?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-520-2353?transitionType=Default&contextData=(sc.Default)&firstPage=true) Accessed on 07/11/2023 at 16:22.

⁵ Joseph CABASSOL, Droit Romain De l'Usucapion - DROIT CIVIL FRANÇAIS (Origine, sens et applications de la Règle « En fait de meubles possession vaut titre » Art. 2279- 2280), Thèse pour le Doctorat, Faculté de Droit d'AIX, 1885, p. 3.

⁶ محمد علي الأمين، التقادم المكسب للملكية في القانون اللبناني (دراسة مقارنة)، منشورات الحلبي الحقوقية، بيروت، 1993، ص 211.

⁷ Pierre FARGE, Prescription : Attendre et espérer, AJ Pénal , Juin 2016, p. 292.

⁸ محمد علي الأمين، نفس المرجع، ص 214- 215.

⁹ Joseph CABASSOL, *Op. cit.*, p. 3.

¹⁰ Neil DUXBURY, Acquisitive prescription and fundamental rights, University of Toronto Law Journal, 2016, p. 5.

¹¹ Rafael DOMINGO OSLE, The Law of Property in Ancient Roman Law (June 12, 2017), p. 16. Available at SSRN: <https://ssrn.com/abstract=2984869> or <http://dx.doi.org/10.2139/ssrn.2984869> Accessed on: 10/11/2023 at 11:15.

¹² Rafael DOMINGO OSLE, *Ibidem*.

The period of long-term prescription was ten years if the owner and the possessor resided in the same city, and twenty years if the owner and the possessor resided in different cities, until the adoption of the very long term prescription¹.

Justinian merged '*usucapio*' and '*prescriptio longi temporis*' into one institution, removing any difference between Italian and provincial funds, granted both the same rights and established a uniform period of three years for movables assets, ten and twenty years for immovable assets².

Acquisitive prescription was extended into French law which was inspired by Roman law. Noting that canonists (Canon law), rejected this concept and did not accept that the violation of property was allowed under the name of 'prescription'³.

II. Conditions of acquisitive prescription of immovable in Algerian law⁴:

In order to guarantee a certain level of justice between the old and the new owner (the possessor), a set of conditions is required to apply acquisitive prescription in Algerian law. According to Algerian Civil Code, there is three kinds of acquisitive prescription of immovable: long-term prescription (1) and short-term prescription (2)⁵, in addition to the very long-term prescription (3), each with its own conditions.

1. Conditions of the long-term prescription:

According to article 827 A.C.C:

"Who exercises possession over a thing, movable or immovable assets, or over a real right on movable or immovable assets, without being the owner or holder, becomes its owner if his possession continues without interruption for fifteen years".

In this article Algerian legislator required that the possession lasts for, at least, (15) years to own the property. This is the long-term prescription and it is available for both movable and immovable assets.

It should be reminded that there is no legal definition of acquisitive prescription in Algerian law. Unlike French law, which defined it as a means of acquiring property or a right through possession, without the person alleging it being obliged to provide a title or that the exception deduced from bad faith can be raised against it⁶.

A right arises, because a fixed period of time has passed during which someone who did not have that right acted as if he/she had it⁷.

And unlike French legislator, Algerian legislator did not provide express conditions for acquisitive prescription. But, since the basis of the concept of acquisitive prescription is a

¹ محمد علي الأمين، مرجع سابق، ص 215-216.

² Joseph CABASSOL, *Op. cit.*, p. 5.

³ محمد علي الأمين، مرجع سابق، ص 217.

⁴ Algerian legislator regulated acquisitive prescription in articles 827 to 836 of III on Effects of possession - Acquisitive prescription, of Section VI on Possession, of Chapter II on Methods of acquiring property, of Title I on Right to property, of Book III on Principal real rights, of Algerian Civil Code.

⁵ We can easily notice that they are almost the same '*prescriptio longi temporis*' and '*usucapio*' in Roman law.

⁶ Article 2258 French C.C. : « La prescription acquisitive est un moyen d'acquérir un bien ou un droit par l'effet de la possession sans que celui qui l'allègue soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi ».

⁷ Neil DUXBURY, *Op. cit.*, p. 4.

possession that lasts for a period of time. We can deduce that ‘possession’ and ‘time’ are the main requirements for acquisitive prescription of immovable in Algerian law.

a. Possession:

Possession is the first condition for long-term prescription. Possession must be continuous, which means that there must be a continuity in the performance of the right. However a permanent performance at all times, is not required¹.

Possession must be legal, with its material and intentional elements². The possessor must act as a true owner, otherwise the possession will lose its continuing character³.

The possession must be peaceful without violence or strength. It must be free from vices and of any hiding or confusion⁴.

In the long-term prescription, possessor’s good faith is not required. Acquisitive prescription is fulfilled, whatever the intention of the possessor⁵.

b. A period of time:

The second condition for long-term prescription is time. In Algerian law, the period fixed for the possessor to claim acquisitive prescription is fifteen (15) years. Noting that article 322 A.C.C states that:

“We cannot renounce the prescription before having acquired the right to claim it, nor agree with a period other than that which is fixed by law...”.

According to this article, the period of long-term acquisitive prescription is from public order, so it is not possible to agree on another period.

2. Conditions of the short-term prescription:

Short-term prescription is provided in article 828 A.C.C. which states that:

“If possession is exercised in good faith and by virtue of a title to an immovable assets or to a real right on immovable assets, the acquisitive prescription is ten years.

Good faith is only necessary at the moment of the act transferring the right.

Just title is an act emanating from a person who is not the owner of the thing or the holder of the right to prescribe. It must be published”.

According to this article, if the possessor were in good faith and able to invoke a just title, he could own the property after only (10) years.

Algerian legislator limited the short-term prescription to immovable and real rights on immovable. Movable assets are not included in this article, because in case the possessor of movable were in good faith, he would be subject to the famous rule : ‘In fact of movable, possession gave title’⁶.

In order to apply short-term prescription, some conditions must be met: a just title, good faith and a period of time.

a. A just title:

¹ My-Kim YANG-PAYA and Hakim ZIANE, La prescription acquisitive en matière immobilière : l’accession à la propriété par la possession de l’immeuble, ACTES PRATIQUES & INGÉNIERIE IMMOBILIÈRE – REVUE TRIMESTRIELLE LEXISNEXIS JURISCLASSEUR - JUILLET-AOÛT-SEPTEMBRE 2013, p. 20.

² فريدة محمدي، الحيازة والتقادم المكسب، ديوان المطبوعات الجامعية، 2000، ص 89.

³ My-Kim YANG-PAYA and Hakim ZIANE, *Op. cit.*, p. 20.

⁴ فريدة محمدي، مرجع سابق، ص 90.

⁵ عمار رواينية، التقادم المكسب، مجلة المحكمة العليا، الاجتهاد القضائي للغرفة العقارية، الجزء الثاني، 2004، ص 98.

⁶ See Art. 835 A.C.C.

A just title is, according to article 828/3 A.C.C., an act emanating from a person who is not the owner of the thing or the holder of the right to prescribe. The just title must be published.

So a just title must accomplish the following conditions¹:

- The act must transfer ownership or the real right subject to possession².
- The act must legally exist. It cannot constitute a just title for a void act in content or form.
- The act must be issued by a person other than the owner or proprietor of the real right subject to possession. And herein lies the defect of the just title, because if the act were issued by the true owner, the person to whom it was transferred would become the owner without the need for possession or prescription³.
- According to Algerian law, the transfer of immovable property only takes place from the day of its publication⁴, so the act must be published.

b. Good faith:

Good faith is the second condition for the short-term prescription. Good faith means that the possessor must have the complete and firm belief that the person who transferred the property to him is the true owner of the property or right transferred. The slightest doubt denies the existence of good faith⁵.

According to article 824 A.C.C., the possessor of a right who is unaware that he is infringing the rights of others is presumed to be in good faith, unless this ignorance is the result of a serious fault.

Good faith is only required at the moment of transfer of the right (art. 828/2 A.C.C.). This means that possessor's good faith must only exist at the moment of publication, and it does not matter if he acts in bad faith later.

c. A period of time:

If the possessor were in good faith and able to invoke a just title, the period is reduced to ten (10) years. This period is from public order, so it is not possible to agree on a longer or shorter period (art. 322 A.C.C.).

3. Conditions of the very long term prescription:

In addition to the long-term and short-term prescription, Algerian legislator provided for a third type of prescription in article 829 A.C.C. which states that:

“In all cases, inheritance rights can only be prescribed by possession for thirty-three years.”

¹ يراجع مؤلف: عائشة حجاب، آليات تطهير الملكية العقارية، مجلة الحقوق والعلوم الإنسانية، 2018، ص 15.

² للمزيد من التفاصيل، يراجع مؤلف: أحمد ضيف، السند الصحيح كسند لاكتساب العقار بالتقادم العشري، مجلة تطوير العلوم الاجتماعية،

العدد الثالث عشر، ديسمبر 2015، ص 165.

³ فريدة محمدي، مرجع سابق، ص 110.

⁴ According to art. 15 of Ordinance No. 75-74 of November 12, 1975, establishing the general cadastre and instituting the immovable book, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 92, of November 18, 1975, amended and supplemented: “Any property right, any other real right relating to an immovable, only exists with regard to third parties by the fact and from the date of publication in the immovable file. However, transfers by death take effect from the day of death of the holders of real rights”.

⁵ عمار رواينية، مرجع سابق، ص 102-103.

Some Algerian authors¹ consider that this article contains a mistake, because inheritance rights can be only subject to extinctive prescription (limitation) and not to acquisitive prescription. Contrary to inherited funds, which can be owned by long-term or short-term prescription.

Conclusion:

In conclusion, we can say that acquisitive prescription is a natural result of the passage of time. And although it was criticized by some jurists at its beginnings, as it appears to be a means of usurping property in the name of law, which constitutes a violation of the property right as a fundamental Human Right. Acquisitive prescription is, in fact, an equitable institution and a fair process allowing possessors to own abandoned properties, since strict conditions are to be established.

Today, acquisitive prescription is present and regulated in all legal systems as a 'necessary' institution, with almost the same primary characteristics taken from Roman law. Algerian law, as any other legal system, imposed limitations and conditions for its application.

Our suggestion, and since 'time' is the basis of acquisitive prescription. The period of acquisitive prescription of immovable in Algerian law seems to be short comparing to the acceleration of the actual time, as a consequence of modernity. We all notice that everything becomes more and more faster.

In our view, a longer period of acquisitive prescription in Algerian law would be in accordance with the acceleration of time, especially in the long-term prescription where the possessor is not required to be in good faith.

A legal revision in favour of a longer period of prescription in the field of immovable, will ensure more justice for the old owner. This adjustment will allow this very controversial notion to be better accepted by its critics.

¹ فريدة محمدي، مرجع سابق، ص 88.

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II. In French :

1. Theses and memories :

a. Theses :

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V. Legal texts:

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2. Ordinance No. 75-74 of November 12, 1975 establishing the general cadastre and instituting the immovable book, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 92, of November 18, 1975, amended and supplemented.
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