

MANIFESTATIONS OF THE INFLUENCE OF THE MALIKI SCHOOL ON THE FRENCH CIVIL CODE

Dr. Abdelmadjid Tayebi

Faculty of Islamic Sciences, University of Adrar

Email: [madj.tayebi@univ-adrar.edu.dz] Phone: 0660438792

Received: 09-01-2026 Accepted: 06-06-2026 Published:09-06-2026

Abstract

This article examines the extent to which the French Civil Code was influenced by Maliki jurisprudence, based on the translation commissioned by Napoleon of “Mukhtasar Khalil” by Shaykh Khalil, together with Shaykh al-Dardir’s commentary, following his return from Egypt and prior to the promulgation of the French Civil Code in 1804. The study explores the historical relationship and practical legal provisions that support this proposition. Maliki jurisprudence flourished in Sicily in the East and in al-Andalus in the West, while the codification of legal rules consistent with Maliki jurisprudence can be observed in numerous legal issues. These provisions introduced reforms that departed from the traditions of Roman law regarding formalistic contracts and reinforced the hypothesis of influence discussed in this research. The study also considers the view of those who argue for the independence of French law, emphasizing its own philosophy and legal theories, apart from any assumption of borrowing or influence. It concludes that Napoleon’s translation project was not a mere intellectual exercise; rather, it formed part of a state project pursued for carefully considered objectives, particularly as France was preparing to achieve colonial and military ambitions.

Keywords: Maliki School ,Islamic Jurisprudence ,French Civil Code ,Comparative Law

Introduction

The subject of communication and civilizational interaction among nations constitutes a fertile field of study that attracts researchers seeking to assess the strength, influence, and resilience of civilizational heritage. The body of jurisprudence produced by Islamic civilization to regulate civil life represents a valuable intellectual treasure, the significance of which can be appreciated through an understanding of the legal conditions that governed people's lives during the emergence and flourishing of Islamic jurisprudence, especially in the Christian West, of which France forms a part.

This study addresses a number of indicators and evidentiary arguments advanced by Muslim and Western jurists and thinkers to support the claim that the drafters of the French Civil Code relied on Maliki jurisprudence in formulating its provisions. The importance of this research stems from several aspects, particularly its examination of the role played by Islamic jurisprudence in enlightening the West through flexible legal principles capable of regulating social and economic life, in contrast to the restrictions imposed by Roman law regarding the methods of concluding contractual obligations and the legal rules governing them.

My interest in this topic was prompted by the debate concerning the suitability of Islamic Sharia as a source of legislation, which prevailed throughout the drafting process of the first

Arab legal code, namely the Egyptian Civil Code, during the reign of Khedive Ismail. Ultimately, Islamic Sharia was excluded from the primary sources of law, and its status was relegated to a supplementary source after custom. This development provoked strong objections from advocates of Islamic legislation, who regarded it as a comprehensive legal system far superior to the legal frameworks available in the West. In support of their position, they referred to the translation of “Mukhtasar Khalil” with al-Dardir’s commentary, commissioned by Napoleon during the preparation of the French Civil Code.

This study examines two issues. The first concerns the extent to which the provisions of the French Civil Code were influenced by the civil law rulings contained in “Mukhtasar Khalil” (First Section). The second identifies practical examples of such provisions (Second Section).

First Section: The Extent to Which the French Civil Code Benefited from Maliki Jurisprudence

The question of proving the influence of Maliki jurisprudence on French law, particularly the French Civil Code, has generated extensive scholarly debate and continues to attract the attention of researchers, especially Muslim scholars. They maintain that there is no justification for excluding Islamic law as a primary source of legal rules in Arab legal codes, given its flexibility and comprehensiveness. This section addresses two important issues: first, tracing the historical relationship between Maliki jurisprudence and the French Civil Code (First Subsection); and second, discussing the extent to which the drafters of the French Civil Code were influenced by Maliki jurisprudence.

First Subsection: The Historical Relationship between Maliki Jurisprudence and the French Civil Code

In order to establish the existence of a historical relationship and actual interaction capable of giving rise to influence and legal borrowing¹, researchers have sought to demonstrate communication between the two legal systems through three manifestations, which are presented in the following items.

First Item: Communication through Al-Andalus

Islamic civilization flourished in al-Andalus under Muslim rule for eight centuries, leaving a profound imprint on the organization of civil life among the peoples and states of Europe, particularly Portugal, Spain, and France. This influence was especially associated with the scholars of the Maliki school of jurisprudence. The Maliki school was first introduced into al-Andalus by Ziyad ibn Abd al-Rahman during the reign of Hisham ibn Abd al-Rahman ibn Mu’awiyah in 171 AH, when he encouraged people to adhere to it in place of the school of Imam al-Awza’i in matters of legal opinion and judicial practice². Thanks to the scholars who returned from the Hijaz carrying the teachings of Imam Malik, the teaching of the Arabic language spread widely. Spaniards gradually began to abandon Latin and turned instead to Arabic schools to study various sciences, including the jurisprudence of transactions according to the Maliki school. This tradition became so deeply rooted that it formed an integral part of the life and culture of the people of al-Andalus, including Christians who

¹ Zubair Muhammad, The Influence of Maliki Jurisprudence on the French Civil Code, Journal of the Faculty of Islamic Da’wah, Tripoli, Libya, No. 22, 2005, pp. 61–62.

² Sayyid Abdullah Ali Hussein, Legislative Comparisons, p. 73.

learned the Arabic language and its literature and adopted many aspects of Muslim conduct and culture. It was even said that: “The Christians became ignorant of their own law, and the Latins forgot their language, to the extent that it became difficult to find one among a thousand Christians capable of writing a short letter in Latin to his brother, whereas countless multitude s excelled in displaying the splendor and eloquence of the Arabic language.”

Sources indicate that the use of the Arabic language in certain Andalusian villages continued in the context of contracts and legal transactions until the early nineteenth century. Evidence of this can be found in a collection assembled by a professor at the University of Madrid, comprising 1,151 contract specimens relating to various types of transactions³. Much of the credit may be attributed to the prominent scholars of the Maliki school, such as Ibn Rushd and others, whose influence extended across numerous fields of knowledge. There is no significant scholarly opinion that denies the contribution made by Islamic civilization in al-Andalus through its schools and universities.

Second Item: Communication through Sicily

The Maliki school established its presence in the eastern part of Europe through Sicily, an Italian island located off the southern coasts of both Italy and France⁴. Sicily was conquered in 800 CE by Asad ibn al-Furat, the Qadi of Kairouan and one of the students of Imam Malik. Islam remained the ruling power on the island for nearly three centuries, during which Sicily became a major center of learning attracting Europeans seeking education. Translation activities flourished there, facilitating the transmission of knowledge to the French and other European peoples. However, the Hanafi school ultimately became the dominant school in legal opinions and judicial practice in Eastern Europe, a position it has retained to the present day due to the influence of the Ottoman Empire.⁵

Third Item: Communication through Napoleon’s Expedition to Egypt

The third channel through which Maliki jurisprudence reached Europe was Napoleon’s expedition to Egypt, which coincided with the drafting of the French Civil Code that is commonly attributed to him. During this period, Napoleon ordered the translation of the principal works of Maliki jurisprudence, foremost among them “Mukhtasar Khalil”.

The French historian Gustave Le Bon, in his work “The Civilization of the Arabs”, states that General Napoleon Bonaparte, upon his return to France from Egypt in 1801, took with him a Maliki legal text entitled “Al-Dardir’s Commentary on Mukhtasar Khalil”.⁶

This account was also confirmed by the testimony of certain French orientalists, such as Louis Sédillot (L. Sédillot), who stated: “It is the Maliki school that particularly attracts our attention because of our relations with the Arabs of North Africa. The French government

³ Saeed Al-Rahmani, The Maliki School and Its Influence on the French Civil Code, *Al-Sirat: Journal of Islamic Sciences*, Fifth Year, No. 10, 2004, pp. 186–187.

⁴ Hamza Ben Khedda, The Influence of Maliki Jurisprudence on the French Civil Code: The Contract as a Model, Ph.D. Dissertation in Private Law, Abou Bekr Belkaid University, Tlemcen, 2016–2017, p. 15.

⁵ Sayyid Abdullah Ali Hussein, *Legislative Comparisons*, p. 73.

⁶ Nasser bin Mohammed bin Mishri Al-Ghamdi, Maliki Jurisprudence and Its Influence on French Law, *Journal of Peer-Reviewed Islamic Research and Studies*, No. 67, p. 744.

entrusted Dr. Nicolas Perron with the task of translating into French the “Mukhtasar” on jurisprudence by Khalil ibn Ishaq, who died in 1422.”⁷

In his book “Summary of the History of the Arabs”, this orientalist further noted that the legal work brought back by Napoleon was translated upon his orders and served as a basis for French law, which constituted one of the principal factors behind the advancement of the French state, particularly in matters relating to legal rulings, contracts, and obligations.⁸

Researchers have also identified an official document confirming that Dr. Nicolas Perron carried out the French government's decision and completed the translation of “Mukhtasar Khalil” in six (06) volumes. These volumes were published in France in 1855 under the supervision of the French Ministry of Defense. The introductory pages state that: “The French government had, several years earlier, undertaken the translation of this “Mukhtasar” through Dr. Nicolas Perron.”⁹

Building upon this translation project, which accompanied Napoleon’s expedition to Egypt and focused particularly on “Mukhtasar Khalil”, a number of specialists have concluded that the “Mukhtasar” constituted the principal source from which the provisions of the French Civil Code of 1804 were derived. This conclusion is based on the substantial similarity between the Code and the legal rules contained in the “Mukhtasar” and its commentaries,

Especially the commentary of Shaykh al-Dardir. According to these scholars, the degree of similarity reaches nearly nine-tenths of the provisions of the French Civil Code. This is the conclusion reached by Sayyid Abdullah Ali Hussein after completing his study of the subject in his work “Legislative Comparisons”.¹⁰

It may be argued that the delay in publishing the work of the committee until 1855 was intended to facilitate the assimilation of the peoples of the colonized Maghreb and to encourage their acceptance of the French legal system by presenting it as compatible with their Maliki legal heritage.

Second Subsection: The Extent to Which French Law Was Influenced by Maliki Jurisprudence

First Item: Those Who Deny the Existence of Such Influence

Proponents of positive law maintain that law is enacted by a sovereign public institution endowed with legislative authority and not subject to external constraints. Accordingly, they reject the claim that the provisions of the French Civil Code were derived from Islamic jurisprudence. They support their position with the following arguments:

First: The French Civil Code was enacted for the French people and for the European French environment¹¹, which differs from the environment in which Islamic law developed in terms of customs, traditions, and civilizational heritage. Moreover, European societies had revolted against the theocratic system of divine rule; therefore, it would be unreasonable for them to adopt the rules of Islamic legislation.

⁷ Hamza Ben Khedda, op. cit., pp. 15–16.

⁸ Nasser bin Mohammed bin Mishri Al-Ghamdi, op. cit.

⁹ Ibid.

¹⁰ Sayyid Abdullah Ali Hussein, Legislative Comparisons, p. 75.

¹¹ Ibid., p. 50.

Second: It is well established in the history of French law that it was based on multiple legislative sources, including Roman law, Germanic law, Canon law, the law of the absolute monarchy, revolutionary law, and customary law. None of these sources identifies Islamic jurisprudence as one of the foundations or sources of French law.

Third: There is no single explicit legal provision that can be shown to have been directly taken from the jurisprudence of any particular Islamic jurist. This position is supported by the Egyptian jurist Abd al-Razzaq al-Sanhuri, the principal drafter of the Egyptian Civil Code.

Fourth: The closure of the gate of “ijtihād” in Islamic jurisprudence led to its stagnation, confining it within a multitude of divergent opinions and preventing it from responding effectively to the requirements of codifying and regulating life in the modern state.¹²

Fifth: The Muslim world itself abandoned this legal system and turned instead to positive law. Consequently, it is argued that it is difficult to maintain that Western legal systems were derived, even partially, from Islamic jurisprudence.¹³

Sixth: Islamic legislation, according to this view, contains elements of severity and strictness that are incompatible with the legal foundations based on human rights, which are regarded as one of the pillars of modern civilization and progress.¹⁴

Seventh: Even if it is assumed that French law was influenced by Islamic jurisprudence, the latter itself was influenced by the Roman legal tradition that preceded it. Consequently, any influence ultimately traces back to Roman law, which is why Roman law is recognized as a source of French law. The English orientalist Sheldon Amos stated: “Muhammadan law is nothing more than Roman law the Code of Justinian in an Arabic dress, modified in accordance with the political circumstances of the Arab kingdoms.”¹⁵

Eighth: Assessment of the Arguments Advanced by the Opponents

1. As for the claim that there is not a single provision in the French Civil Code derived from Maliki jurisprudence, it is sufficient to refute this assertion by recalling the statement of Shaykh Sayyid Abdullah Ali Hussein: “We do not respond with a single example; rather, in this book (Legislative Comparisons), we present nine-tenths of the provisions of the French Civil Code. To him we say: be patient. The adoption of the Maliki school did not begin in 1805. No, sir; it dates back to the year 200 AH, when its rules were applied in Europe, when al-Andalus was the beacon of knowledge, and when Europe was immersed in profound ignorance. Feudal estates were sold together with the land and the people upon it. A laborer on an estate could not marry a woman until she had first passed through the hands of the seigneur, and the longer she remained in his residence, the greater the honor accorded to her suitor. Amid the depths of ignorance and the darkness of barbarism, Islam entered Europe, governed its peoples, and established its principles of justice. The inhabitants of Europe came to al-Andalus to draw from its light, knowledge, and sound foundations of life. There, sir, the Maliki school was introduced by Ziyad ibn Abd al-Rahman al-Qurtubi, known as Shabtun,

¹² Ibid., p. 52.

¹³ Ibid., pp. 53–54.

¹⁴ Ibid., p. 45.

¹⁵ See: Hamza Ben Khedda, *The Influence of Maliki Jurisprudence on the French Civil Code: The Contract as a Model*, Ph.D. Dissertation in Private Law, Abou Bekr Belkaid University, Tlemcen, 2016–2017, p. 4.

during the reign of Hisham ibn Abd al-Rahman in 171 AH. Before the year 200 AH had arrived, the school of al-Awza'i had receded, and the Maliki school had become predominant in governance and judicial practice.”¹⁶

2. As for the argument that the Muslim nation itself abandoned Islamic legislation, the response is that this abandonment was not a voluntary choice on the part of the Muslim community. Rather, it resulted from coercion exerted¹⁷ by foreign powers, which employed various means to impose the dominance of their legal systems. Each country has its own historical experience regarding the stages through which Islamic Sharia was displaced as a principal source of legislation, as well as the role played by the elites who were mobilized to adopt and draft laws based on Western legal models.

Section Two: Those Who Affirm the Influence

First: Evidence for the Influence of Maliki Jurisprudence on French Law

A. The Independence of Islamic Jurisprudence

Islamic legislation possesses significant characteristics that make it an independent legal system, distinguished by the diversity of its sources, the flexibility of its rulings, and the comprehensiveness of its principles. It was within this framework that Islamic jurisprudence developed and adapted to the various environments into which Islam spread, from different parts of the Arabian Peninsula to the regions opened by the Muslims throughout the world. Foremost among these was al-Andalus, the gateway to Western Europe, which was conquered after North Africa in 93 AH and remained under Islamic rule, both in legislation and adjudication, until the fall of Granada in 897 AH, for nearly eight centuries.¹⁸

This reality was recognized by Western legal scholars and acknowledged in their conferences, symposia, and academic studies. Among the notable examples are the conclusions reached by participants in the First International Congress of Comparative Law, held in The Hague in 1932, where German, English, and French jurists recognized that Islamic law is flexible, capable of development, and able to keep pace with the evolving circumstances of life throughout the world.¹⁹

In 1935, the Washington Conference declared that Islamic law constitutes an independent source of law, distinct from both Greek and Roman law.²⁰

The participants in the Second International Congress of Comparative Law in 1937 further confirmed this distinction after the representative of Al-Azhar presented two papers, one on criminal liability and the other on the relationship between Islamic jurisprudence and Roman law. The conference unanimously adopted the following conclusions:

1. Islamic law should be regarded as one of the sources of general legislation.
2. Islamic law is a living legal system capable of development and adaptation.
3. Islamic law is an autonomous legal system that is not derived from any other legal tradition.

¹⁶ Legislative Comparisons, pp. 50–51.

¹⁷ Ibid., p. 54.

¹⁸ Ibid., pp. 72–73.

¹⁹ Saeed Al-Rahmani, The Maliki School and Its Influence on the French Civil Code, Al-Sirat: Journal of the Faculty of Islamic Sciences, Fifth Year, No. 10, December 2004, p. 184

²⁰ Ibid.

4. B. Recognition by Western Jurists

At a time when many Islamic legal elites are inclined to acknowledge the superiority of the Western legal system and its suitability for regulating the affairs of life, some Western scholars have defended Islamic law and affirmed its superiority and independence. The French jurist (ZEYS) stated:

"When I read the books of Islamic jurisprudence, I feel as though I have forgotten everything I know about Roman law, and I have come to believe that there is no connection between Islamic law and Roman law."²¹

C. Muslim Jurists' Evidence for the Influence of Maliki Jurisprudence on the French Civil Code

1. Reliance on the Study of Shaykh Al-Minyawi

One of the earliest comparative studies between Maliki jurisprudence and the French Civil Code was undertaken by Shaykh Makhlof Al-Minyawi²² at the request of Khedive Ismail. The Khedive instructed him to examine the French Civil Code from the perspective of Maliki jurisprudence in order to identify the similarities and points of agreement between them.

In carrying out this comparison, Al-Minyawi presented each legal provision and then evaluated it according to Maliki jurisprudence by referring to the authoritative texts of the school, such as "Sharh al-Dasuqi" and "Mawahib al-Jalil"²³. He highlighted the areas of similarity and difference following the methodology of (analogous cases and legal maxims).

Although Shaykh Al-Minyawi did not explicitly argue that the drafters of the French Civil Code were influenced by Maliki jurisprudence, the general context in which he was commissioned to undertake this work indicates the existence of a clear vision within the official institutions of Egypt, represented by Khedive Ismail and the institution of Al-Azhar.

2. The Argument of Shaykh Sayyid Abdullah Ali Hussein²⁴ Shaykh Sayyid Abdullah Ali Hussein devoted considerable attention to this subject for two reasons.

²¹Hamza Ben Khedda, The Influence of Maliki Jurisprudence on the French Civil Code: The Contract as a Model, Ph.D. Dissertation in Private Law, Abou Bekr Belkaid University, Tlemcen, 2016–2017, p. 6.

²² Shaykh Muhammad Hasanin ibn Muhammad Makhlof al-'Adawi, widely known as Makhlof al-Minyawi (d. 1820), was an Azhar scholar who served as a judge in Upper Egypt. He made significant scholarly contributions, including his work Legislative Comparisons: The Application of Civil and Criminal Law According to the School of Imam Malik.

²³ Shaykh Muhammad Hasanin ibn Muhammad Makhlof al-'Adawi, widely known as Makhlof al-Minyawi (d. 1820), was an Azhar scholar who served as a judge in Upper Egypt. He made significant scholarly contributions, including his work Legislative Comparisons: The Application of Civil and Criminal Law According to the School of Imam Malik.

²⁴ He was born in the Egyptian village of Kafr El-Sheikh on 5 March 1889 (1309 AH). He studied at Al-Azhar for fifteen consecutive years, from 1902 to 1917. He then worked as a Shar'i lawyer until 1921, when the Egyptian government sent him to France to study law. He returned to Egypt in 1925 after obtaining a Licence en Droit (Bachelor of Laws). He resumed his work as a Shar'i lawyer until 1937, after which he was appointed to the Publications Department of the Ministry of Interior as supervisor of the Eastern Newspapers Division (Arabic Eastern Press). He began work on his book Legislative Comparisons in 1940, and its first edition was published in 1947. Among his other works are Al-Ajwibah al-Taydiyyah fi Madhhab al-Sadah al-Malikiyyah fi al-Tawhid wa al-Fiqh (The Taydiyyah Responses in the Maliki School on Theology and Jurisprudence), Al-Ajwibah al-Fiqhiyyah fi Madhhab al-Sadah al-Shafi'iyyah (Jurisprudential Responses According to the Shafi'i School), and Al-Wafi li Ahkam al-Mirath: Sharh Qanun al-Mirath wa al-Mudhakkirah al-Tafsiliyyah (The Comprehensive Guide to the Rules of Inheritance: Commentary on the Inheritance Law and Its Explanatory Memorandum).

The first was the profound impact that the exclusion of Islamic Sharia as a primary source of legislation had on him during the drafting and enactment of the Egyptian Civil Code. This was one of the main motivations behind his authorship of the book “Legislative Comparisons”, through which he sought to demonstrate the superiority of Islamic legislation and its influence on other legal systems.

The second reason related to his defense of Islamic law in response to what he observed during his legal studies at a French university, where Europeans often disparaged Islamic law despite benefiting from it. In this regard, he stated: “The strongest and most compelling motive, from which I found no escape, was what I observed and witnessed in European academic circles: they would borrow rulings from Islamic law and then present them as defects to be attributed to Islam, although Islam is innocent of such allegations. The sons of Muslims would then receive these poisonous ideas from them, unable to repel them because of their ignorance of their religion and its legislation.”²⁵ His interest in the subject intensified after discovering what astonished him, given his specialization in Islamic jurisprudence as an Azhar-trained scholar. He wrote: “The further I advanced in my studies at their university, the more I found the texts to be the very same texts; indeed, even the reasoning underlying legal rulings was the same as that found in Islamic legislation, particularly in the school of Imam Malik, may Allah be pleased with him. ... Thus, I translated the jurisprudence of the French Civil Code and compared its principles and rules with those that corresponded to or differed from the school of Imam Malik. This became evidence for my claim that the French Civil Code which constitutes the foundation of modern statutory legislation was derived from the school of Imam Malik ibn Anas.”²⁶

In a letter addressed to King Farouk on 13 February 1946, he further defended this view, stating: “The Muslim legislators left us a legacy of legal principles and foundations of legislation that remain a source of pride for all time. Scholars of positive law adopted these principles from them and continue to draw from them whenever the complexities of life present new challenges. They then return these principles to nations deprived of self-determination and afflicted with foreign legislation, presenting them as products of their own knowledge and thought. Yet God knows that they are, in fact, the principles of Islam and the doctrines of the juristic scholars. Thereafter, they reached a tacit consensus not to acknowledge this divine legislation, out of rancor concealed within their hearts.”²⁷

He also addressed direct appeals to the committee responsible for drafting the Egyptian Civil Code, headed by Shaykh Abdel Razzaq Al-Sanhuri, as well as to the Grand Imam of Al-Azhar at the time, Mustafa Abd al-Raziq, members of the Egyptian Parliament, judges, religious scholars,

and legal jurists. He urged all of them to base the provisions of the Civil Code primarily on Islamic jurisprudence rather than on Western laws.²⁸

²⁵ Sayyid Abdullah Ali Hussein, op. cit., p. 61.

²⁶ Ibid., Vol. 1, pp. 61–62.

²⁷ Sayyid Abdullah Ali Hussein, *Legislative Comparisons between Positive Civil Laws and Islamic Legislation*, p. 36.

²⁸ Al-Hamrani Mohammed bin Saeed Mohammed, *The Emergence of Legislative Comparisons in the Egyptian State: A Historical Study*, *Al-Manzuma Journal*, Vol. 64, p. 166.

Section Two: Manifestations of the Influence of the Maliki School on French Law

This section presents practical examples illustrating the extent to which the French Civil Code corresponds with Maliki jurisprudence. Despite the abundance of examples, it will suffice to discuss one fundamental issue concerning the means and methods of expressing intent. This topic is divided into two subsections: the first addresses the flexibility and breadth of the means of expressing intent, while the second examines the legal status of silence and the circumstances under which it may constitute an expression of intent.

Subsection One: Expression of Intent

It is well established among legal scholars that Roman law, to whose tradition the West takes pride in belonging, did not recognize the mere concurrence of the contracting parties' wills as a sufficient element for the formation of contracts. Rather, it tied the validity of contracts to formal requirements from which they could not be separated, such as verbal declarations or written forms. In contrast, contemporary legal systems generally recognize that an obligation is formed simply through the meeting of the parties' wills²⁹. Among the major legal systems that recognize intent as the source of the creation of a contract or obligation is the French Civil Code, which broadened the means of expressing intent to include express declaration, implied declaration, and silence. An expression is considered explicit when the person expressing it intends to disclose what he or she desires through means commonly understood among people, whether by speech, writing, gesture, or any other method, whether directly or through an intermediary. In certain cases, the law may require an explicit declaration in consideration of particular legal consequences. When referring to "Mukhtasar Khalil", one finds the same flexibility in its broad recognition of consensuality in contracts as an essential element in their formation. In the chapter devoted to the rules governing sales, Khalil states: "A sale is concluded by anything that indicates mutual consent, even through mutual exchange ..." What indicates consent may originate from the seller in the form of an offer or from the buyer in the form of acceptance. Expressions indicating consent include statements such as "I sell to you," "I give to you," or "I transfer ownership to you for such-and-such a price," matched by the buyer's statements such as "I purchase," "I take," "I acquire ownership," and similar expressions. Consent may also be indicated through actions, such as (exchange by delivery), whereby the buyer hands over the price of the goods and the seller delivers them without any verbal offer or acceptance.

The Maliki school broadly recognized contractual formation through an offer without distinguishing between items of minor value and those of substantial value.

Shaykh al-Dardir states: "Consent may also be established through exchange, whereby the buyer takes the sold item and pays the seller the price, or the seller delivers the item and the other party pays its price, without speech or gesture. This applies even to items that are not of insignificant value, and the sale becomes binding through mutual delivery and receipt."³⁰

Subsection Two: The Legal Effect of Silence**First Item: The Position of Law Regarding Silence**

²⁹ Ahmed Mahmoud Abdel Moneim Mahmoud, *The Role of Will in the Formation of Contractual Obligations in Roman Law*, p. 159.

³⁰ Hashiyat al-*Dasuqi 'ala al-Sharh al-Kabir* (Al-*Dasuqi's Gloss on Al-Sharh al-Kabir*), Vol. 3, p. 3, *Dar Ihya' al-Kutub al-'Arabiyyah*.

Silence is a passive and non-expressive stance; therefore, it cannot be conceived as constituting an offer. The question arises, however, with respect to acceptance, when one person addresses an offer to another and the latter responds with silence.

Reference to French law reveals a general rule that silence, by itself and apart from the surrounding circumstances, does not constitute an expression of intent. French jurisprudence has supported this principle, notably in a decision of the Court of Cassation concerning an individual who remained silent in response to a letter in which the sender considered him a shareholder in a company and informed him that the value of the shares attributed to him had been entered into his account.³¹

Exceptions to this rule are limited and arise either by virtue of statutory provisions or judicial interpretation. Among the statutory exceptions is the continuation of a lease where the tenant requests to remain in possession of the leased property and the lessor remains silent. Article 1738 of the French Civil Code provides: "If the tenant remains in the premises after the expiration of the lease term without objection from the lessor, this shall be deemed a tacit renewal of the lease under the same conditions, but for an indefinite period."

Another example concerns secured creditors when the possessor of a mortgaged property seeks its liquidation and offers them the value of the property. Their silence is deemed acceptance if a period of two months elapses without any of them expressing a desire to request a higher amount.

Judicial decisions have also recognized examples in this context. Thus, where a merchant sends goods to a customer to whom he customarily dispatches merchandise without awaiting a response, the customer's silence is regarded as acceptance.³²

Second Item: The Legal Effect of Silence in Maliki Jurisprudence

Islamic jurisprudence established centuries earlier the general legal maxim: "No statement is attributed to one who remains silent." Accordingly, the prevailing principle is that intent must be expressed either explicitly or implicitly. An exception to this principle is embodied in the second part of the maxim: "Silence, where there is a need for clarification, constitutes a form of declaration." Numerous examples

are cited in this regard. Among them is the sale by an unauthorized person of property belonging to another while the owner remains silent. Shaykh al-Dardir, may Allah have mercy on him, stated: "The sale remains non-binding with respect to the owner if it was conducted in his absence. However, if it took place in his presence, the sale becomes binding upon him as well. Likewise, if it occurred in his absence but later came to his knowledge and he remained silent for a year, the sale becomes binding. He is not excused on the ground of ignorance if he claims it as a justification for his silence."³³

This correspondence between the position adopted by French law and that established in Maliki jurisprudence regarding the expression of intent whether explicit, implicit, or even through silence is presented as evidence that the former drew from the latter. In support of this claim, Shaykh Sayyid Abdullah Ali Hussein stated: "The French Code, compiled in 1804,

³¹ Hamza Ben Khedda, op. cit., p. 211.

³² Hamza Ben Khedda, op. cit., p. 44.

³³ Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir (Al-Dasuqi's Gloss on Al-Sharh al-Kabir), Vol. 3, p. 12.

introduced what its commentators claim to be a novelty in legislation. They say that under earlier legal systems, contracts required specific formulas, prescribed writings, and numerous formal acts, whereas now mere agreement of wills is sufficient; for example, in a sale, once the object sold and the price are determined, the contract is concluded.”

He then comments on the failure of those commentators to acknowledge the influence of Maliki jurisprudence, stating: “This is either ignorance of the laws that preceded the Code of 1804, including divine law (Islamic legislation), or a deliberate reluctance to mention it. Yet it was the first system to establish ease and simplicity in transactions, where, in a sale, it is sufficient to say: ‘I have sold’ and ‘I have purchased.’”

Conclusion

Having examined the subject in both its theoretical and practical dimensions, it may be concluded that the hypothesis that the drafters of the French Civil Code were influenced by Maliki jurisprudence is supported by various indications, circumstantial evidence, and individual (rather than institutional) acknowledgements. This hypothesis is further reinforced by the similarity of legal rulings in numerous practical matters.

In addition to the examples discussed, such similarities extend to issues relating to the formation of contracts, their effectiveness, execution, and dissolution. This reality opens broad prospects for further in-depth comparative studies devoted to the practical relationship between Maliki jurisprudence and the French Civil Code.

References

1. Zubair Muhammad, The Influence of Maliki Jurisprudence on the French Civil Code, Journal of the Faculty of Islamic Da‘wah, Tripoli, Libya, No. 22, 2005, pp. 61–62.
2. Saeed Al-Rahmani, The Maliki School and Its Influence on the French Civil Code, Al-Sirat: Journal of Islamic Sciences, Year 5, No. 10, 2004.
3. Hamza Ben Khedda, The Influence of Maliki Jurisprudence on the French Civil Code: The Contract as a Model, Ph.D. Dissertation in Private Law, Abou Bekr Belkaid University, Tlemcen, 2016–2017.
4. Nasser bin Mohammed bin Mishri Al-Ghamdi, Maliki Jurisprudence and Its Influence on French Law, Journal of Peer-Reviewed Islamic Research and Studies, No. 67.
5. Sayyid Abdullah Ali Hussein, Legislative Comparisons between Positive Civil Laws and Islamic Legislation: A Comparison between French Law and the School of Imam Malik (may Allah be pleased with him), edited and verified by the Center for Jurisprudential and Economic Studies, Dar Al-Salam for Printing and Publishing, 1st ed., 1421 AH / 2001 CE, Vol. 1.
6. Al-Hamrani Mohammed bin Saeed Mohammed, The Emergence of Legislative Comparisons in the Egyptian State: A Historical Study, Al-Manzuma Journal, Vol. 64.
7. Ahmed Mahmoud Abdel Moneim Mahmoud, The Role of Will in the Formation of Contractual Obligations in Roman Law.
8. Hashiyat al-Dasuqi ‘ala al-Sharh al-Kabir (Al-Dasuqi’s Gloss on Al-Sharh al-Kabir), Vol. 3, p. 3, Dar Ihya’ al-Kutub al-‘Arabiyyah.