ARAŞTIRMA VE İNCELEME RESEARCH

"Aḥkâm al-jiwâr" Influence on Ottoman Mecelle and Napoleon's Civil Code

*"Aḥkâm al-jiwâr"*in Osmanlı Mecellesine Etkisi ve Napolyon'un Medeni Kanunu

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ABSTRACT The influence of Shari'a on the French Civil Code has long been underestimated and is still insufficiently recognised. This study addresses this gap in the literature, focusing on Islamic laws relating to Neighborhood rights ("Aḥkâm al-jiwâr") and the joint ownership. The objective is to corroborate the correlation between Islamic jurisprudence and 19th century civil codes. Although many historians disregarded the contribution of Islamic law, the structural similarity between the articles relating to neighborhood rulings in Napoleon's Civil Code and the Ottoman Madjalla (Mecelle) prompts some reflections on the history and genesis of these two corpora. Through a historical-legal approach, this contribution proposes a comparison of these corpora with "Aḥkâm al-jiwâr", i.e. Islamic jurisprudence disseminated in medieval manuscripts dealing with neighbors and neighborhoods. Findings clearly confirm the influence of Napoleon's Civil Code on the Madjalla, particularly on the codified form of the articles. Furthermore, the construction of the articles within both corpora shows, in many ways, that they were inspired by "Aḥkâm al-jiwâr". The fundamental difference remained that Napoleon's code took reference from the Maliki rite, while the Ottomans based on the Hanafi rite.

Keywords: Napoleon's civil code; Madjalla; Islamic law; civil law; neighborhood rulings

ÖZ İslam hukukunun Fransız medeni hukuku üzerindeki etkisi uzun süredir hafife alınmakta ve yeterince tanınmamaktadır. Bu çalışma, mahalle hakları ve müşterek mülkiyet ile ilgili İslami yasalara odaklanarak literatürdeki bu boşluğu ele almaktadır Amaç, 19. yüzyılda İslam hukuku ile medeni hukuk arasındaki ilişkiyi kurmaktır. Pek çok tarihçi, İslam hukukunun katkısını görmezden gelse de, Napolyon Medeni Kanunu ile Osmanlı Medeni Kanunu'ndaki (Mecelle) mahalle hükümleri ile ilgili ilişkin maddeler arasındaki yapısal benzerlik, bu iki grubun tarihi ve doğuşu hakkında bazı soruları gündeme getirmektedir. Bu katkı, tarihsel-hukuki bir yaklaşımla, bu iki grubu "mahalle hükümleri" ile, yani komşuların hakları ve komşu bina hükümleriyle ilgili Orta Çağ el yazmalarında kaydedilen İslam hukuku ilmi ile karşılaştırmayı önermektedir. Sonuçlar, Napolyon medeni hukukunun Osmanlı medeni hukuku üzerindeki etkisini, özellikle maddelerin kanunlaştırılmasında, açıkça doğrulamıştır. Yazıların içeriğine gelince, her iki grubun da mahalle yargılarından ilham aldığını görüyoruz. Napolyon hukuku Maliki fıkhından, Osmanlı Medeni Hukuku ise Hanefi fıkhına dayanmaktaydı.

Anahtar Kelimeler: Napolyon'un Medeni Kanunu; Mecelle; İslâm hukuku; medeni hukuk, mahalle hükümleri

EXTENDED ABSTRACT

The influence of Islamic law on the French Civil Code has polarized the scientific community working on the history and genesis of law in Europe in general and in France in particular, leading to debate between opponents and adherents for more than a century. This contribution attempts to shed light on the question by targeting the articles regulating joint ownership and neighborhood. The objective is to grasp the relationship between Muslim law and 19th century civil codes both in European and in Muslim countries, and thus contribute in understanding interactions between civilisations. The striking similarity of the articles, in substance and form, between the Civil Code of Napoleon Bonaparte and the Ottoman Madjalla (Mecelle) necessarily questions the sources and the very genesis of the two corpora. The French Civil Code, which influenced many European and some Latin American countries, was drawn up under the reign of Napoleon in 1802. Eighty years later, the Ottomans codified Hanafi Islamic jurisprudence on the French model and published it in 1882 in the Madjalla. This codification influenced several Muslim and Arab countries until very recently. Despite the long time period separating the two corpora, there are several similarities in the field of neighborhood rules and the party wall. This work raises, then, questions on the genesis of this strong similarity. To approach this reflection, we put forth the idea that the Civil Code of Napoleon and the Ottoman Madjalla (Mecelle) drawn from scattered and unpublished manuscripts of the medieval Islamic jurisprudence, known as "Aḥkâm al-jiwâr". This hypothesis is favored by the historical and political context that prevailed in Andalusia, present-day Spain, from the 9th century. Indeed, in the year 200 AH/ 815 AD, the scholar al-Mâlikî Ziyâd ibn Abdul-Rahmân al-Kurtubî, spread the Malekite doctrine throughout the Iberian Peninsula, so that this rite was able to fit into local customs and oral law in the North of France. In 1798, Napoleon Bonaparte was exposed for the first time to Islam, during the Egyptian campaign (1798-1801). His fascination for this religion led him to study the book of Halîl ibn Isḥâk (d. 776 AH/ 1374 AD), dealing with Islamic jurisprudence according to the Maliki rite. This work was then translated into French by Mr. Perron, in 1840, by order of the French government. Through a historical-legal approach, the present study focuses on a comparison between the articles relating to neighborhood within the French Civil Code and the Ottoman Madjalla with the Islamic jurisprudence «Aḥkâm al-jiwâr ", scattered in several manuscripts. This comparative approach seeks to achieve two objectives:

- Explain the genesis of the reciprocal influence of the two corpora
- Elucidate the relationship of modern civil codes with Islamic law.

The results are quite evident. Admittedly, several sources contributed to the development of the French Civil Code, in particular the Roman Corpus Juris Civilis, but the Shari'a was part of it as well. In substance, several articles of the Civil Code, concerning the neighborhood, are similar to the "Aḥkâm al-jiwâr" of the Mâlikî rite. Most often, these were mainly literary translations. As for the form, the articles of the Madjalla only embody a codification of the rules of Hanafî neighborhood under the French model. The relationship between the codes of the different nations is very positive, insofar as it promotes reconciliation between peoples, and eliminates unnecessary cultural confrontations. This contribution wishes to open up other research perspectives in this direction on other legal matters, such as:

- Al-chuf'a (right of pre-emption and expropriation for cause family utility)
- Al ʻuqūd (the contracts)
- Al-charâqa, al-shāriqāt, al-kirâd (right of co-ownership and society)
- Al-mulqiya (property right)
- Al-jansiya (nationality).

> *"…There are many respectable arguments by legal historians now to the effect that European international law, including laws of war as well as other legal provisions and even institutions, were inspired by the legal tradition of Islam."*[1] *(Wael B. Hallaq, 2021)*

[1] Andreas Matthias, "Wael B. Hallaq on Islamic Law and Human Rights", *Daily Philosophy,* 2. Sep. 2021, https://daily-philosophy.com/interview-wael-hallaq-islamic-law/

The influence of Islamic law on the French Civil Code has polarized the scientific community working on the history and genesis of law in Europe in general and in France in particular, leading to debate between opponents and adherents for more than a century. This contribution attempts to shed light on the question by targeting the articles regulating joint ownership and neighborhood. The objective is to grasp the relationship between Muslim law and 19th century civil codes both in European and in Muslim countries, and thus contribute in understanding interactions between civilisations[2]. The striking similarity of the articles, in substance and form, between the Civil Code of Napoleon Bonaparte and the Ottoman Madjalla (Mecelle) necessarily questions the sources and the very genesis of the two corpora. Already, since the early19th century, Bonaparte's contributions to the Civil Code during the examination sessions of bills from July 17, 1801, to March 19, 1804, attest the influence of Muslim law, through the Mâlikî rite, on the Civil Code.[3] Towards the end of the 19th century, several Eastern historians and jurists, including Muhamed Kâdrî Pācha and Mahlūf ibn Mohamed al-Miniāwî, and Western ones (Jean Joseph Delsol (1867), tried to shed light on the question. While French jurisconsults, Sidiou and Pesles (1942), affirm it, "*the Napoleonic code is fundamentally inspired by the Shari'a*." Saïd Abdul'lah Ali Hucîne, re-studied the theme in 1923. In 2017, a doctoral thesis entitled "The influence of Mâlikite jurisprudence on French civil law" effectively proved that Napoleon was inspired by the Shari'a to develop the French Civil Code. However, this thesis had no intention of dealing with all the articles of the two studied corpora. It only focuses on those who regulate joint ownership and neighborhoods. The French Civil Code, which influenced many European and some Latin American countries, was drawn up under the reign of Napoleon in 1802. It inspires Belgium, the Netherlands (Dutch Code of 1838), Italy (Italian Code of 1868), Spain, and Portugal, then, later, Greece, Bolivia, and Egypt.[4] In the United States, the State of Louisiana used Napoleon's Code as the basic source for its own code. By 1960, more than 70 different states had modeled their own laws on the Civil Code.[5] As for Islamic jurisprudence, the first codification was not developed until 1882, during the Ottoman era, or 80 years after the development of the French code. Despite the long time period separating the two corpora, there are several similarities regarding neighborhood rules, in particular those regulating party walls.

What is, then, the genesis of this strong similarity?

To answer this question, we put forth the idea that Napoleon's Civil Code and the Ottoman Madjalla (Mecelle) drawn from scattered and unpublished manuscripts of the medieval Islamic jurisprudence, known as "Aḥkâm al-jiwâr". This hypothesis is favored by the historical and political context that prevailed in Andalusia, present-day Spain, from the 9th century. Indeed, in the year 200 AH/ 815 AD, the scholar al-Mâlikî Ziyâd ibn Abdul-Rahmân al-Kurtubî, spread the Malekite doctrine throughout the Iberian Peninsula, so this rite was able to fit into local customs and oral law in the North of France. In 1798, Napoleon Bonaparte was exposed to Islam for the first time during the Egyptian campaign (1798-1801). His fascination for this religion led him to study the book of Halîl ibn Ishâk (d.

[2] R. H. Graveson, « L'influence du droit comparé sur le rapprochement des peuples » (The *influence of comparative law on the rapprochement of peoples)*, *Revue internationale de* droit *comparé,* July-Sept 1958, 10 (3), p. 501-509. Text of the lecture given on April 14, 1958 at the Rome International Institute for the Unification of Private Law; Mohammad Amine Alibhayne, *Islam et Christianisme : Logique de rapprochement* (Islam and Christianity : Logic of rapprochement), M. A. 1ère édition, O.K. printing, 1996. 112 p.

[3] Roger Caratini, *Napoléon, une imposture l'Archipel,* (Napoleon, a fraud), (Details of the sessions for examining bills from July 17, 1801 to March 19, 1804: appendix no. 22, interventions by Bonaparte during the discussion of the Civil Code), Paris, 2002, 556 p.

[4] Xavier Martin, *Nature Humaine et Révolution Française: du siècle des Lumières au Code Napoléon,* (Human Nature and the French Revolution: from the Age of Enlightenment to the Code Napoléon), Dominique Martin Morin editions, Paris, 2004.

[5] Ibid.

776 H.), dealing with Islamic jurisprudence according to the Mâlikî rite. This work was then translated into French by Mr. Perron in 1840, by order of the French government. Through a historical-legal approach, the present study focuses on a comparison between the articles relating to neighborhood within the French Civil Code and the Ottoman Madjalla with the Islamic jurisprudence "Aḥkâm al-jiwâr",[6] scattered in several manuscripts. This comparative approach seeks to achieve two objectives:

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The priority that Islam gave to neighborhood and joint ownership had a direct effect on the abundance of case law dealing with this matter.[7] Neighborhood relations have been greatly favored in the supreme objective of the Shari'a, which is: "*the settlement of the earth and the preservation of the system of cohabitation*" according to the Muslim thinker Allâl el-Fâsî.[8] This is quite reasonable, given that there could be no cohabitation without good neighborly relations.

I. GENESIS OF THE «AḤKAM AL-JIWAR»

Aḥkâm al-jiwâr, is the legal corpus developed over centuries by the fukahâ (Muslim jurisconsults practicing "al-ijtihâd using well-defined legal techniques in Islamic legislation). Islamic law is made up of four fundamental sources: The Kurân, the Sunna, al-Ijmâ' (unanimity), and el-kiyâs (analogy). The two scriptural texts, Kurân and ḥadîth, present the first two sources and contain only a few norms dealing with "*al-Mu'âmalât*"[9] (transactions). The fukahâ often returned to the other six sources, which are not considered as such in all Sunni schools of jurisprudence; such as the urf (custom) and the Istisḥâb which have been used frequently by the Mâlikî fukahâ to promulgate several "aḥkâm" relating to the right of neighbours.[10] The human mind must in no way deliberate without returning to the sacred texts. The Kurân should not be considered as a set of legal texts.[11] It includes very few texts that can be considered as such. Consequently, one should not expect to find in the Kurân, or even in the Sunnah, a body of ready-made rules to regulate joint ownership. Islamic jurisprudence in general was not yet fully constituted after the full revelation of the Holy Kurân. This task will be continued after the death of the Prophet by the jurisconsults. And this, for several centuries. The Koranic verses having a direct relationship with joint ownership are very general, in order to be able to adapt in time and space, such as the following verse: *« And worship Allah and associate naught with Him, and show kindness to parents, and to kindred, and orphans, and the needy, and to the neighbour that is a kinsman and the*

[6] Abderahmane Ibn Faye', *aḥkâm al-jiwâr fi'l-fiqh al-İslamî,* (The right of neighborhood in Islamic jurisprudence), Dâru'l-Andalous al-khadrâ', Djeddah, 1995.

[7] We have noticed the resumption of this theme in several sources dealing with fiqh, for example,
- Mâlik ibn Anas, *«Al Mudawwana al-kubrâ, of al- Imâm Mâlik»,* Sahnoun novel (seventh century), The Saudi Ministry of Awqāf, al-Saada Press, 6 vols, King dom of Saudi Arabia 2014, 3117 p.
- Al-Makdisî, *Al-sharh al-Kabîr,* (the great analysis), edited by Abdullah al-Turkî, Dâr hajar, 32 vols, Cairo, 1993
- Al-Makrizî, *Kitâb Al Mawâiz wa 1-i'tibâr fi dhikr al khitâb wa-l'âthâr.* (Topographical and historical description of Egypt), *Bulâq,* 1858, 2 vol, translator A. Bouriant, Paris, 1900.
- Al-Mawardî A. A., *al 'aḥkâm al-sulṭânīaï*, (Sultan's rulings), Dâr ibn kutaiba, Kuwait, 2014.
- ʿÎsâ ibn Mūsâ, (known as, Ibn al-İmâm), «Des droits et obligations entre propriétaires d'héritages voisins » (Rights and obligations between owners of neighboring inheritances), translator Barbier, *Algerian and Tunisian review of legislation and jurisprudence,* tome XVI, 1901. https://revcoleurop.nakalona.fr/items/show/6771.

[8] Allâl el-Fâsî, *Maqâsid al-Shari'a wa maqârimuhā* (The purposes of Shari'a and its merits), 2ème édition, Dâru'l-Garb al-İslamî, Beyrût, 1993.

[9] Abdelaziz ibn Abdallah, *Kitâb ma'lamat al-fiqh al-Mâlikî*, (The book of the Mâlikî fiqh teacher), Dâru'l-Garb al-İslamî, first édition, Beyrut, Lebanon, 1983.

[10] Robert Brunschwig, "Urbanisme médiéval et droit musulman", (Medieval town planning and Islamic law), *Revue des Études Islamiques*, 1947, volume: 15, p. 127-155.

[11] Muhammad Abu Zuhrâ, *'Usul al-fiqh*, (Origins of the fiqh), Cairo, 1957, p. 58.

neighbour that is a stranger, and the companion by your side, and the wayfarer, and those whom your right hands possess. Surely, Allah loves not the proud and the boastful. ».[12] This verse will have great influences on the abundance of ḥadîth and aḥkâm dealing with neighborhood and co-ownership. Similarly, the ḥadîth dealing with co-ownership, only mentioned the situations, which took place in the presence of the Prophet. For example, the ḥadîth of the party wall "A neighbor is not to prevent his neighbor from inserting a wooden beam in his wall". In another version, Abu Hurayra continues: "Why must I see you turn your back on this recommendation? By Allah! I won't stop scolding you about it." (Al- el-Bukhârî and Muslim).[13] The influence of this ḥadîth on the abundance of legal issues concerning the party wall is unquestionable. But this situation is almost impossible to find nowadays because adjoining buildings currently have two separate adjoining walls. The ḥadîth of encroachment. The Prophet said: «Whoever usurps the land of somebody unjustly, his neck will be encircled with it down the seven earths on the Day of Resurrection. »[14]. Although it is in the private or undivided domain, encroachment on the fina', which is a space located in front of one or a group of houses, is prohibited by this ḥadîth which in fact prohibits any form of encroachment. It begins first with the private domain, then evokes the public road and finally the finā', which the legal status is located between the private and public domain, a status that has no equivalent in modern town planning. Another ḥadîth states: « Whoever takes a piece of the land of others unjustly, he will sink down the seven earths on the Day of Resurrection »[15]. A third ḥadîth warns: "Whoever annexes a piece of land without right will carry away his land on the day of resurrection »[16]. A fourth ḥadîth warns: "He, who seizes a span of the public highway, will come and carry it on the day of resurrection »[17]. The jurisconsults take these scriptural texts as the basis for practicing ijtihâd, urf, and istisḥâb and promulgate rules, "aḥkâm al-jiwâr". The accumulation of these rules over centuries gave rise to a genuine corpus of rules relating to neighborhood, which were codified by the Ottomans at the end of the 19th century. The body of this jurisprudence is scattered in several manuscripts, which we will list in the following section as materials used in this study.

II. LITERATURE REVIEW

Since the end of the 19th century, several historians and jurists, both Eastern and Western, have studied the influence of Islamic law on the French civil code. Recently, this theme has triggered considerable controversy between members and opponents. This subject raises several questions today more than ever.

1. EASTERN APPROACH

Since the end of the 19th century, Muhamed Kâdrî Pâchâ (1821-1886), then Minister of Justice of Egypt published his work entitled « Murshid *al- ḥairân ilā aḥwâl banî al-insân* ».[18] This work takes a comparative legal approach between the French Civil Code and Hanafî Islamic jurisprudence which has influenced several modern civil codes in Arab countries. We have consulted chapter II, called « *the*

[12] Surah an-Nisâ' (the women), 4/36.
[13] The collections of el-Bukhârî and Muslim are two collections of hadîth whose authenticity is unanimously considered indisputable.
[14] This ḥadîth is reported by Ibn el-ḥabîb, but does not appear in the Saḥîḥ el-Bukhârî, according to Abou el-Hassan.
[15] Collection of authentic ḥadîths of el-Bukhârî, translation by author.
[16] Ḥadîth recited by Aḥmed and el-Tabarânî translated from Arabic by author.
[17] Ibid.
[18] Muhamed Kâdrî Pâchâ « Murshid *al- ḥairân ilā aḥwâl banî al-insân* » (مرشد الحيران الى أحوال بني الانسان), Bûlâk editon, Cairo, 1891.

reconstruction of undivided property » (imârat al-mulk el-mushtaraq) (عمارة الملك المشترك).[19] For his part, the jurisconsult Mahlūf ibn Muhamed al-Badawî el-Miniâwî, (1819-1878), kâdî at the time of el-hidiwî Ismâîl in Egypt, developed towards the beginning of the 20th century, a comparative approach between the French Civil Code and Malikī jurisprudence (al-fikh al-mâlikî). His work is entitled « *al-Mukâranât al-tashrî'iya bayna al-kawânîn al-wad'iya al-madania wa al-tashrî' al-islâmî* » (المقارنات التشريعية بين القوانين الوضعية المدنية و التشريع الإسلامي)[20]. Mahlūf al-Miniāwî, took a different approach from that of Saïd Abdul'lah Ali Hucîne[21], who re-examined this question in 1947. Saïd Abdul'lah Ali Hucîne devoted eight years for developing his work "*al-Mukâranât al-tashrî'iya*", between 1940 and 1948. The particularity of this book is that it explains the convergences and divergences of the French Civil Code and Islamic jurisprudence. While Mahlūf el-Miniāwî's book only cites the similar articles between the two legal bodies. However, the two analysts agree on the choice of the Mâlikî rite. Saïd Abdul'lah does not hesitate to confirm, with each similarity of articles, the influence of Muslim law on the French Civil Code. The results of these three studies confirmed that the similarity between Mâlikî jurisprudence and the French Civil Code has reached 90%. If these results are reliable, we are currently in the presence of blatant disregard for facts, because the said influence has so far found no favorable echo in the teaching of the history of law[22] in Europe and even less in the legal sources of the French Civil Code. Hence the scientific importance of revisiting this question.

2. WESTERN APPROACH

Several Western scholars, jurisconsults, and historians have also addressed this issue. We list them in chronological order. First, Jean Joseph Delsol (1867),[23] then, the French historian Gustave Le Bon[24] (1884) who revealed in his book "*La Civilization des Arabes*" that the most famous French general, Napoleon Bonaparte, on his return to his country France back from Egypt in 1801, took with him the work of jurisprudence of Imâm Mâlik ibn Anas "*sharḥ el-dardîr*". Therefore, al-fikh el-Mâlikî (Maliki rite) was the first Islamic jurisprudence to be study by the French. This book, says Gustave Le Bon, was the basis of the French Civil Code and one of the most important contributions to the rebirth of the state. Christian Cherfils (1914),[25] confirms for his part: "*Napoleon's French Civil Code seems to be strongly inspired by the Shari'a.* « The work of this historian includes several details on Bonaparte's knowledge of Islam during the campaign. A little later, in 1942, the French jurisconsults Sidiou and Pesles confirmed the contribution of the Shari'a in the Civil Code by stating: « *The Napoleonic code is fundamentally inspired by the Shari'a*[26]*,* the Mâlikî doctrine challenges us in because of the nature of the relations that we undertake with the Arabs of Ifriqiya. *As a result, the French government entrusted Dr. Peyron with the task of translating "The Compendium of the Fikh", of its author Halîl ibn Isḥâk ibn*

[19] Ibid, p. 107 and 108.

[20] Mahlūf ibn Muhamed al-Miniāwî, *al-Mukâranât al-tashrī'iya, tatbîk al-kânūn al-madanî 'a la mazhab al- īmām Mâlik* (Legislative comparisons, the Civil Code put to the test by the teachings of the Mālikī school), analyzed and edited by Mohamed Ahmad Sarâg and Ali Guma'a Muhamed, Ed. Dâru'l-Salam, 2 vol., Cairo, 1999, 808 p.

[21] Saïd Abdul'lah Ali Hucîne, *al-Mukâranât al-tashrî'iya* المقارنات التشريعية بين القوانين الوضعية المدنية و التشريع الإسلامي) (Legislative comparisons between civil status laws and Islamic legislation), Daru's-Salam, Cairo, 1947.

[22] Jean-Marie Carbasse, *Introduction historique au droit,* (Historical introduction to law) French University Press, PUF, Paris, 1998; Jean-Louis Halperin, *Histoire du Droit Privé Français depuis 1804 (History of French Private Law since 1804)*, French University Press, PUF, Paris, 2001.

[23] Jean-Joseph Delsol, *Explication Élémentaire du Code Napoléon*, (Elementary Explanation of the Code Napoleon), library of the Council of State, 12. Paris, 1867.

[24] Gustave Le Bon, *civilisation des arabes,* (Arab civilization), Firmin edition Didot, Le Sycomore, Paris, 1990, 551 p.

[25] Christian Cherfils, *Bonaparte et l'islam*, (Bonaparte and Islam). Edition Pedone, Paris. 1914.

[26] Octave Pesle, *La judicature, la procédure, les preuves dans l'Islam malékite* (Judicature, procedure, evidence in Mâlikî Islâm), United printing presses of the "Vigie marocaine" and of "Petit marocain", Paris, 1942 - 159 p.

Ya'kūb (died in 776 h. 1442 AD»[27]. The International Congress of Comparative Law, which held its meeting in Paris on July 7, 1951, affirms on its part that "Muslim Law involves a wealth of legal concepts and remarkable techniques, which allows this law to respond to all adaptation needs, demanded by the modern life.»The most recent Western study on the question remains that of Roger Caratini (2002).[28]

3. RECENT STUDIES

Currently, this theme is totally unknown in Europe, both in teaching and academic research. In 2006, the work of Boutammina Nasr-Eddine confirms that the Napoleon Code finds its origin in the Shari'a and the Fiqh which served as its framework.[29] Recently, in Algeria, a doctoral thesis in law, addressing this question, was defended in 2016 at the University of Tlemcen in Algeria.[30] On the other hand, there is an abundance of research that is only interested in the opposite influence, that is to say the influence of Napoleon's Civil Code on modern civil codes in Europe and Muslîm countries.[31] This is particularly true regarding the Ottoman Mecelle which presented at the end of the 19th century, the codification of Hanafî Islamic jurisprudence, on the model of Napoleon, for the first time in the history of the Islamic world.[32] Therefore, a very precise analytical study is necessary to remove ambiguity from this question.

III. MATERIAL AND METHODS

This study is based on a historical-legal comparative approach between four main sources that will be detailed chronologically as follows:

1. The Roman Corpus Juris Civilis
2. Manuscripts relating to the Mâlikî and Ḥanafî rite
3. Napoleon Bonaparte's Civil Code
4. The Mecelle.

1. THE ROMAN CORPUS JURIS CIVILIS

Roman law evolved over almost ten centuries, beginning with the twelve tables, since 450 BCE and ending with the corpus Juris Civilis 533 CE. At the beginning, only two tables among the twelve dealt with the right of neighborhood in a very limited way.[33] We had to wait ten centuries, until the reign of the Byzantine Emperor Justinian,[34] to see the day of the Corpus Juris Civilis.[35]

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[27] This book is highly regarded in academic and religious circles in the Maghreb countries and in West Africa.

[28] Roger Caratini, *Napoléon, une imposture l'Archipel* (Napoleon, a fraud), (Details of the sessions for examining bills from July 17, 1801 to March 19, 1804: appendix no. 22, interventions by Bonaparte during the discussion of the Civil Code), Paris, 2002, 556 p. Caratini Roger, L'Islam, cet inconnu, (Islam, this unknown), Caratini Roger, Houcine Rais, Initiation à l'Islam (Introduction to Islam), Archipoche, 2005.

[29] Nasr Eddine Boutammina, *La Shari'a prototype du droit Français, le code Napoléon*, (The Shari'a prototype of French Law, the Napoleon code) Collection Shadows and Light. Paris, 2006.

[30] Benkhedda Hamza, *Ta'thîr al fiqh al-Mâlikî 'alā al-kanun al-madanî al-fransî*, (Influence of Mâlikite jurisprudence on French civil law, case of contract) Doctoral thesis in law, University of Tlemcen, Algeria, 2017.

[31] See for example: Alexandra Bell, "The Impact of Napoleon Bonaparte in Egypt", 2021, *Phi Alpha Theta,* 9 ; https://digitalcommons.wou.edu/pat/9 Jacques Maury, « Le Code civil Français et son influence dans le Bassin méditerranéen, l'Orient et l'Extrême-Orient», (The French Civil Code and its influence in the Mediterranean Basin, the East and the Far East), *Revue internationale de droit comparé*, 1950, volume: 2, no: 4, p.771-780. https://www.persee.fr/doc/ridc_0035-3337_1950_num_2_4_6017

[32] For the challenges of the codification of Islamic jurisprudence, see, Sumeyra Yakar, "Review of Rewriting Islamic Law: The Opinions of the ʿUlamā towards Codification of Personal Status Law in Egypt by Tarek Elgawhary", *Journal of the Contemporary Study of Islam*, 2021, volume: 2, issue: 1, p. 80-83. Houcine Abdelmalek, «Aḥkâm el-buniân» and the stakes of their codification *», Journal of Architecture and Planning,* Riyadh, (2022/1443H), vol. 34, issue: 4, p. 441-458.

[33] See both tables: Roman table VI, Ownership and Possession, and Roman table VII, Land rights.

[34] Georges Tate, *Justinien: L'épopée de l'Empire d'Orient*, (Justinian : The epic of the Eastern Empire), Paris, Fayard, 2004

2. MANUSCRIPTS RELATING TO THE MĀLIKĪ AND ḥANAFĪ RITE

2.1. "Kitâb al-jidâr" manuscript drawn up in 996 by ʿÎsâ ibn Mūsâ, (known as, Ibn al-Îmâm). This manuscript is a collection of decisions spawning from the main Mâlikî jurists on various questions of practical law, mainly on reports of neighboring building owners. This first-hand material was translated into French and published by Professor Barbier, entitled "*Rights and obligations between owners of neighboring heritages*", in the Algerian and Tunisian Review of Legislation and Jurisprudence, volume XVI, 1900-1901. The interest of this text is that it brought together several legal deliberations (Aḥkām), relating to construction, originating from almost all the disciples of İmâm mâlik ibn anas. Even in *al Mudawwana al-kubrâ, of al- Imâm mâlik* (the great encyclopaedia) which is the source par excellence for any research on Malikism, there are some excerpts from it - regarding the neighborhood in relation to the mass of documents published by Barbier. *al Mudawwana al-kubrâ*, is composed of six volumes developed by Saḥnūn, disciple of al- Imâm mâlik, in the 7th century.

2.2.« *Kitâb al- ḥitân* » (The Book of Walls), the rules of roads, roofs, doors, waters and walls in Islamic jurisprudence, is a manuscript produced by el-Marǧî Takâfî, (died in 354 HA), edited by Muhammad ḫair Ramadân yūsuf, published by Dâru'l-Fikr al-mu'âsir, Beyrut, 1994, 208 p.

2.3. « *el-kisma wa 'usul el-ardîn*», (Division and origins of arḍîn, book on the jurisprudence of Islamic architecture), written by Abu al-Abbās ibn Abi Bakr al-farastâ'î, who died in 504 AH / 1110 AD, verified and edited by Shayh Bakîr bin Muhammad and Dr. Muhammad ibn Salih. Turâth Association, Gurârâ, Algeria, 641 p.

2.4. *« Kitâb al-i'lân bi āḥkâm al-buniân* » (building rules book), developed by Muhammad ibn İbrâhîm el-lakḫmî known as *Ibn ar-Râmî* the Tunisian. This manuscript was written in 1333. The main interest of this document is that it is more practical, since ibn al-Rāmi was a bricklayer expert working closely with Judge 'Abd al-Rāfi' who sought his expertise whenever a misunderstanding arose between neighboring owners. Like Ibn el Imām's manuscript, this book evokes legal consultations based on Mālikī reasoning. Sometimes Ibn ar-Râmî even quotes several texts from ibn al-Imām's manuscript and from al-Gazzâli's book entitled «İhyâu ulûmi'd-dîn» (restoration of religious sciences) consisting of five volumes, written in the 12th century.

2.5. « Tabsirat al-ḥukâm fi 'usūl al-akdia wa manâhij al-'aḥkâm ». Book by judge Burhân ad-dîn İbrâhîm ibn Farḥūn al-Mālikī, written in the early 14th century. It is especially the last chapter of this book, entitled "Jurisprudence concerning daf' ad-ḍarar (removal of harm) which has been used for this study, p. 334-364.

2.6. « *Riyâḍ al-kâsimîn* », (the jurisprudence of Islamic urbanism, through the Ottoman - Algerian archives (1549-1830), manuscript, edited by Benhamouche Mustafâ, "marâsid al-ḥitân, massiâ'IL al ḥitân", all ḥanafī, written by Kâmî M. A, al-ḥanafî, printed and published in 2000, by Dâru'l-bashâ'ir lil tibâ'a wa en-nashr, Beyrût, Lebanon, 2000. The editor has collected and classified questions and jurisprudential opinions of Hanafi masters related to construction and urban planning. Its importance lies in the fact that it is considered one of the few books in this field. The scholar reorganized the chapters of this manuscript according to major axes and interpreted the ambiguous words; He also addressed important questions and linking them with similar points from mâlikî jurisprudence books.

[35] Henri Hulot, *Corpus Juris Civilis*, translated into French, edition of Metz, 1803. The *Corpus Juris Civilis* is made up of four documents: - *The Code of Justinian*, a collection of imperial constitutions (Gregorian, Hermogenian and Theodosian Codes) - *The Digest*, a collection of quotations from Roman jurists of the Republic or the Roman Empire; - *The Institutes*, a work intended for students, which enabled them to learn Roman law; *The Novelles*, a collection of the new constitutions of Justinian I. The Digest is still today the main source of knowledge of Roman law.

2.7. « *Muhtasar el- Cheih halîl* », work of Halîl ibn Isḥâk (died in 776 H.). (Precis of Islamic jurisprudence according to the Mālikī rite). Translated from Arabic into French by M. Perron. Scientific exploration of Algeria during the years 1840, 1841, 1842, by order of the French government. Edition Victor Masson, Langlois and Leclercq, bookstores, in Paris.

3. NAPOLEON BONAPARTE'S CIVIL CODE

Major work[36] initiated by Emperor Napoleon Bonaparte, having as its main objective the unification of law in France, which consisted of two corpora. The first was based on written law governing the South of France, the 2nd on oral law followed in the North, general customary law supplemented by local customs. After several amendments to the bill, this code was finally adopted on March 21, 1804. Several old and recent studies confirm the intervention of the Maliki rite in the development of this code.[37] This thesis is favored by three historical factors:

1. Custom constitutes one of the sources of the civil code. This custom was itself influenced by the "Las Siete Partidas", the first legal code in Europe, written in 1289 AD by the King of Castile Alfonso IX. This code is essentially derived from state law in Muslim Andalusia. Among the particular sources of its 2nd part appear texts of Arab origin known under the name of « *Bocados de oro and Poridad de poridades* ». [38]

2. Napoleon's fascination with Islam during his campaign in Egypt in 1798.[39]

3. Roman law presented several discrepancies and contradictions with Napoleon's code, in particular, concerning the party wall and the damage caused by humidity.[40]

The striking similarity of several articles dealing with neighborhood issues and the dividing wall, between Napoleon's code and the Ottoman Madjalla, challenges "aḥkām al-fiqh" to understand the sources of the right of neighborhood mentioned in the Civil Code. We have dealt with the articles relating to joint ownership, indicated in Table 1

TABLE 1. Neighborhood rules in Napoleon's code.

Parts	Titled	Articles
I.	*Of the Distinction of Property.*	544 à 546
II.	*Of the Right of Accession relatively to Things immoveable.*	552
III.	*Of the Party Wall and Ditch.*	653 à 673
IV.	*Of the Distance and intermediary Works required for certain Buildings.*	674
V.	*Of Views ever a Neighbor's Property.*	675 à 680
VI.	*Of the Droppings of House-Eaves.*	681
VII.	*Of the Right of Way.*	682 à 685

[36] Collective, *Le Code Civil des Français de 1804,* (The Civil Code of the French of 1804), Dalloz, Paris, 2004; Robert Badinter, *Le plus grand bien…,* Fayard, Paris, 2004.

[37] For example, article 1108 when it deals with the essential conditions for the validity of agreements, it sets out exactly the four conditions found in Maliki jurisprudence. See about it, Cherfils Christian, *Bonaparte and Islam*, p. 52.

[38] Colloquium, Calenda, « *Las siete partidas* » (body of law drawn up in Castile during the reign of Alfonso X the Wise between 1256 and 1265), Published in 2017, https://calenda.org/417235.

[39] Fascination attested by several quotes from Napoleon Bonaparte himself and his recourse to the Maliki work of Halil.

[40] In Roman law the co-ownership of the dividing wall is optional. Whereas in the Civil Code, any separation wall is presumed to be adjoining. For humidity, the Civil Code was inspired more by the Maliki rite, which does not tolerate the damage of humidity caused by the neighbor on the party wall than from the Roman corpus where the party wall must be able to support a reasonable quantity of humidity. See; Catherine Saliou, *les Lois du bâtiment: voisinage urbain dans l'Empire romain,* (Building laws: urban neighborhood in the Roman Empire), Doctoral thesis, supervised by J. M. Dentzer, Paris I. 1991, p. 38.

4. THE MECELLE

The fourth primary source is the Mājālāẗ al-āḥkām al-adlya (Journal of Judicial Judgments), elaborated in 1882 by a committee of Ulemas and Fuqahās during the Ottoman Caliphate.[41] The legal body presented in the Madjalla is only a presentation of Hanafi Islamic jurisprudence in the form of codes. Since the revelation of Islam, and for more than 12 centuries, there has never been a codification in the sheer scale of the Mecelle. Its completion was marked by two facts. The first is the influence of the French Civil Code which preceded it by 80 years. The second was about the Russian admiration who asked the Ottomans to do the same, when the latter asked him to codify the Russian rules to properly manage the Muslim subjects who found themselves in the Crimea after the war. We studied the articles concerning the right of neighbour, indicated in Table 2.

TABLE 2. Neighborhood rules in the Madjalla.

Chapter III.	*Walls and neighbours.* في بيان المسائل المتعلقة بالحيطان والجيران	**Articles**
Section I.	*Rules of law relating to property owned In absolute ownership* *في بيان* بعض قواعد أحكام.	1192 à 1197
Section II.	*Relations of one neighbour to another.* في حق المعاملات الجوارية	1198 à 1212
Section III.	*From the public road* في الطريق	1213 à 1223
Section IV.	*Right of way, right of aqueduct, right of flow* في بيان حق المرور المجرى والمسيل.	1224 à 1233

IV. COMPARATIVE LEGAL STUDY

1. PROPERTY RIGHT

All Islamic jurists agree that land owners have the right to benefit from the air of their land in the sky, as well as from their basement. In al-furūq, Ibn el-Karâfî mentioned as early as 1228: « *Whoever owns land has the right to build on it and raise the building as he wishes as long as it does not harm others, and he has the right to dig as he wishes and to deepen as long as he does not harm others».*[42]

Art. 544 of the Civil Code. (1803). Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.

Art. 1192 of the Mecelle. (1883) Each is free to enjoy as he sees fit what is his property; nevertheless, if there is a right acquired for a third party, the owner can no longer enjoy it as he sees fit. Example: The upper floor of a house belongs to one person, and the lower floor belongs to another; the owner of the lower floor has the right to be covered by the upper floor from rain and sun, just as the owner of the upper floor has the right to lean his building on the lower floor; in this case, one of the owners cannot do

[41]Aristarchi Bey (Grégoire), *Législation Ottomane* (Ottoman legislation), Printing, Brethren, Constantinople, 1867. George Young, *Corps de droit Ottoman,* (Body of Ottoman Law, collection of the most important codes, laws, regulations, ordinances and acts of domestic law, and studies on customary law of the Ottoman Empire), Clarendon Press, Oxford, 7 Vol The flight. VI includes the translation of the *Madjalla*, 1905.
Dora Glidewell Nadolski, "Ottoman and Secular Civil Law", *International Journal of Middle East Studies,* 1977, vol. 8, no. 4, p. 517-543.

[42] Abu al-Abbas A. al-Malikī, known as al-Qarāfî (died 684 AH), « anwār *el-burūq fî anwā' el-furūq »,* manuscript edited and checked by Khalil al-Mansour, Beirut, dar al-kutub al-'ilmiya, publication year 1997, number of parts 4*.,* p. 15-16

anything that harms the latter without the authorization of the other owner; and neither of them can demolish his floor.

Art. 552 Civil code. Ownership of the ground entails ownership of what is above and below it. The owner may make upon the ground all the plantings and constructions that he deems proper, unless otherwise provided for in the Title "Servitudes or Land Services." He may make below the surface all constructions and excavations he deems proper and draws from these excavations all the products they can give, subject to the limitations resulting from statutes and regulations relating to mines and from statutes and regulations of police.

Art. 1194 of the Mecelle. Ownership of land entails ownership above and below. Thus, the owner of a piece of land can raise buildings to the height he wishes or dig the ground to make a cellar or a well as deep as he deems appropriate.

The content of these two articles is in accordance with Islamic jurisprudence which preceded them by several centuries. All the studies are unanimous in attesting that the sources of the Mecelle consist essentially of Hanafî jurisprudence. While those of the Civil Code have remained subjects of controversy until today between two groups of historians and jurisconsults. Some include Mâlikî fikh among sources. While the second, more numerous, reject the contribution of the Shari'à in the formulation of Napoleon's Civil Code. So how can we explain this literal similarity in this property law article?

2. THE DIVIDING WALL

Art. 655 of the Civil Code. Repair and reconstruction of a party wall must be borne by all those who have a right to it, and in proportion to the right of each.

Art. 656 of the Civil Code. Nevertheless, any co-owner of a party wall may free himself from contributing to repair and reconstructing by abandoning the right in common, provided the party wall does not support a building that belongs to him.

Art. 1316 of the Mecelle. If a wall jointly owned by two neighbours is destroyed and things are resting upon it, such as a kiosk or the ends of beams belonging to the two, and one of them rebuilds the wall and the other refuses to do so, the one who rebuilds can prevent the other from placing anything on such wall until he has paid his half of the expenses.

Ibn ar-Râmî mentioned: *« If a party wall collapses, and the person who rebuilt it, prohibits his neighbor from using it until after payment of half of the reconstruction costs.* Mālik ibn anas said*: you must tell the one who did not participate, either rebuild with your neighbor or pay him half of the costs. Otherwise, you can only use it after performing one of these two actions. »*[43]. The conservation of the right of joint ownership is subordinated to the participation in the expenses of the reconstruction of the joint wall. The articles of the two bodies of law require the same conditions established in « *al-ḥukm el-Mâlikî*» narrated by Ibn al- Râmî.

Art. 659 of the Civil code. If a party wall is not in a condition to support being raised, the person wishing to raise it must have it entirely rebuilt at his own expense, and any additional thickness must be built on his side.

[43] Muhamed L., (known as Ibn ar-Râmî), *« kitâb al-i'lân bi aḥkâm al-buniân »* (book of declaration the provisions of the building), manuscript, Tunis, 1333, p. 50.

Art. 1198 of the Mecelle. Everyone can raise the fence that belongs to them as much as they want or build on it. His neighbor cannot prevent him from doing so as long as there is no real and considerable damage to him.

Ibn el-ḥabîb said: "I said to Mutraf and Ibn el-Mâdjichūn: What if one of the two neighbors wants to build on the party wall? He replied: he cannot prevent his neighbor from doing the same. I said to him: and what if the wall is fragile and cannot support the new construction and he wants to demolish and rebuild it? He said: yes, he can do it and the other neighbor cannot forbid it. I said to him: and how will the newly rebuilt wall will be? He replied: It will always remain in co-ownership between the two.»[44].

Here too the articles of the two corpora are identical to Islamic jurisprudence. If one of the two neighbors wants to build on the party wall and this wall is fragile to support the new construction, he can consolidate it or demolish it and rebuild it on his own. The other neighbor will always retain the right of joint ownership of the said wall.

In the manuscript of Ibn ar-Râmî (1333): Ibn el-kâsim said: « *Neither of the two associates has the right, without the consent of the other, to establish anything on the wall which may prevent the latter to do the same later; but, each of them, can, without the consent of the other, establish anything which would not obstruct this one, if he wanted one day to put as many on the wall, like a roof or a beam, for example. This ḥukm is the most followed among the Malikites*»[45]. Halîl mentioned another similar ḥukm. Ibn el-Habîb said: "Everything is forbidden about the party wall. That is to say, any neighbor can forbid his co-owner to do anything on the party wall without his consent, as is the case for any co-ownership.[46]

Art. 662 of the Civil Code. One of the neighbors may not make any recess in the body of a party wall, nor apply or support any work therein, without the consent of the other, or without having, if he refuses, have experts arrange the means necessary to ensure that the new work is not harmful to the rights of the other.

Another complementary article states:

Art. 675 of the Civil Code One of the neighbors may not, without the consent of the other, cut in a party wall any window or opening, in any manner whatever, even in fixed fanlights.

Art. 1210 of the Mecelle. A dividing fence cannot be raised by one of the Communists without the authorization of the other; likewise, only one of the co-owners may not build a kiosk or any other construction there. It doesn't matter whether there is damage or not. However, the co-owner of the fence who wants to build on his own land can support his beams there, but since each co-owner can support an equal number of beams, he could only lay half of the total number of beams that the fence can support. Finally, if each co-owner has already leaned an equal number of beams on the dividing fence, one of them cannot increase the number of his beams.

The articles of Napoleon's Civil Code and that of the Mecelle are identical to the mâlikî ḥukm reported by Ibn el-kâsim in the manuscript of ibn er-Râmî.

[44] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 48.
[45] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 49.
[46] Halîl ibn Isḥâk, *Mukhtasar Khalîl*, (in Arabic) edited by Ahmed Djâd, Dâru'l-ḥadîth, 1st edition Cairo, 2005. p.536.

3. THE CONDOMINIUM

Ibn al-İmâm Said: *"Ibn el-Kâsim was asked about the staircase; who should build it, because the co-owner of the ground floor says to that of the 1st floor, it is not up to me to build you the staircase which leads to your floor? He replied: "the staircase is the responsibility of the owner of the ground floor if he has an upper floor and so on.*»[47].

Art. 664 of the Civil Code. When the different floors of a house belong to different owners, if the title deeds do not regulate the mode of repairs and reconstructions, they must be done as follows: The main walls and the roof are the responsibility of all the owners, each in proportion to the value of the floor which belongs to it. The owner of each floor makes the floor on which he walks. The owner of the first floor builds the stairs leading to it. the owner of the second floor makes, from the first, the staircase which leads to his house; And so on.

This article stipulates that each owner must build the staircase that leads to his floor. Just like al-ḥukm mentioned in Kitâb el-jidâr.

4. DISTANCE AND INTERMEDIARY WORKS REQUIRED FOR CERTAIN CONSTRUCTIONS

Art. 674 of the Civil Code. He who has a well or a cesspool dug near a wall, whether it is a party wall or not. He who wishes to build a chimney or a fire-place, a forge, an oven or a furnace, to set a stable against it, or place against that wall a store of salt or a heap of corrosive materials; is bound to leave the distance prescribed by regulations and specific usages relating to those things, or to do the works prescribed by the same regulations and usages in order to avoid injuring the neighbor.

Art. 1212 of the Mecelle. Whoever has incorporated a sewer or a toilet next to a neighbor's well, which corrupts the water of the well, must take the necessary measures to put an end to this state of things, and if this is impossible, one must close the latrine or block the sewer. We must likewise close the sewer whose waters mix with the neighboring spring if it is impossible to prevent this mixing otherwise.

Reported by Ibn er-Râmî, al-tarâr's manuscript pointed out « *whoever establishes a cesspool fairly close to his neighbour's house, or drainage channel by leaving them open to the sky, he must be prohibited or obliged to cover it so as not to harm its neighbor by bad smells. »*[48]. Similarly, for mills, Ibn er-Râmî mentioned "*the one who wants to erect a mill in his house; he must move it away from the party wall by 8 spans from the rotation of the beast. He must then fill this interval with a construction, an air-lock or small chamber or deposit. Because the construction eliminates the harm caused to the neighbor ».*[49] In the book "mu'în el-kudât wa-l-ḥukâm mentioned by Ibn er-Râmî, al-mu'alam Ahmed said: *"one must prohibit the establishment of stables in the vicinity of dwellings because of the damage caused to neighbors, by bad smells and noise day and night. »*[50]

Al-'Atbi said "Saḥnūn said about the one who erects next to the dividing wall the ovens and forges and harms the neighbors; it must be banned. *« I told ibn al-Kāsim if I own a piece of land next to a*

[47] Ibn el-İmâm, *Rights and obligations between owners of neighboring inheritances*, p.151.
[48] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 63.
[49] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 64.
[50] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 67.

neighboring house, and I wanted to build a bath, oven or mill there, and the neighbors are preventing me; are they right? If this causes them harm of smoke or other, they have the right to forbid you, because Malek ibn Anas said one should forbid any harm to neighbors, smoke, smell and noise.»[51]

5. RIGHT OF VIEW OVER THE PROPERTY OF ONE'S NEIGHBOR

Art. 677 of the Civil Code. Those windows or openings may only be made at twenty-six decimeters above the floor or ground of the room to which one wishes to give light, where it is on the ground floor, and at nineteen decimeters above the floor of the upper stories.

On issues of sight, the Madjalla mentioned three additional articles, evoking the concept of "dharar fâḥish" defined in Islamic jurisprudence and translated into the Civil Code by the concept of "excessive damage".

Art. 1202 of the Mecelle. There is real and considerable damage when the places to which women have access, such as the kitchen, the vestibule, and the well, are exposed. Consequently, when, from a newly opened window or from the window of a recently built house, one sees the places reserved for women in a neighboring house, one must put a stop to this damage by erecting a wall or a wooden fence. to the one who opened the window or built the house. We cannot force the latter to close his window. Similarly, if between the cracks of a wooden fence we see places used for the habitation of women, we will have these cracks closed, but we cannot order the demolition of the fence and the construction of a wall.

Art. 1203 of the Mecelle. One cannot order the closing of a day being above a man's height under the pretext that one could, by putting up a ladder, see the places, from the neighbor's house, where the women have access.

Art. 1204 of the Mecelle. The garden is not reputed to be a place where women are usually found. Consequently, the neighbor could not ask for the closing of the views which do not overlook the places where the women usually are nor his garden, claiming that the women could sometimes cross it.

These articles are very similar to several aḥkâm mentioned in Islamic jurisprudence. An individual has built a room and opened a window overlooking his neighbour's house. The caliph 'Umar ibn al-Khattab wrote to them: *« We put a "bed" behind this window, a chair on which an individual stands. If he sees the interior of the neighboring house, he must be forced to raise this window. If the said window does not overlook an intimate space, it is authorized* »[52].

6. ROOF DRAINAGE

Art. 681 of the Civil code The owner must place his roofs so that rainwater falls on his land or on the public highway; he may not have it poured on his neighbor's property.

Art. 1229 of the Mecelle. If rainwater of a house has flowed into neighbour's house of a from remote times, the latter may not thereafter seek to prevent such flow.

Art. 1231 of the Mecelle. No person may cause the water from a newly constructed room to flow into the house of some other person.

[51] Al-Marğî Takâfî, (died 354 h), Kitâb *al-ḥitân,* (The walls book), the rulings of roads, roofs, doors, waterfalls and walls in Islamic Jurisprudence), manuscript edited by Muhammad Khair Ramadan Yusuf, Dâru'l-Fikr al-mu'âsir, Beyrut, 1994, p.195.
[52] Ibn er-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 63.

'Isa ibn Mūsā said: « *We asked for the legal opinion of Mohammad ibn Talīd regarding a person who has a gutter flowing into the dwelling of his neighbor and he wants to raise his house by building a room. His neighbor tells him if you raise your house, you harm me by the water that pours into my house, do you see that he must redirect the gutter towards his house? And how if he replies to him I leave the gutter in its first location and the water pours on your house as before, do you see that he is right? No, even if he leaves it in its initial location, it is a harm that must be prohibited if experts attest to it. Talīd also specifies if an individual has a gutter facing his neighbour, the damage is greater when it is higher from the ground* ».[53]

7. RIGHT OF PASSAGE

Art. 682 of the Civil Code. An owner whose property is enclosed and who has no way out to the public highway, or only one that is insufficient either for an agricultural, industrial, or commercial use of his property, or for carrying out operations of building or development, is entitled to claim over the properties of his neighbors a passage sufficient for the complete servicing of his own properties, provided he pays a compensation in proportion to the damage he may cause

Art. 1225 of the Mecelle. If any person has a right of way over the land of another; the owner of the land cannot prevent him from passing and crossing over the land.

Art. 1227 of the Mecelle. If any person has right of way over a defined pathway on the land of some other person, and the owner of the land erects a building on such pathway with the permission of the owner of the right of way, the latter loses his right of way, and has no right of disputing the matter with the owner of the land. (See Article 51).

All these provisions regarding the right of way have been extensively discussed in Aḥkâm al-jiwâr. Al 'Utaibî said: Malik was questioned about the one who owns the passage in an unfenced land and its owner wants to fence it and close it with a gate. Malik said : « *he can only do so if he is authorized by the one who has the right of way. Because he could no longer access his house as he wants. He may come at night and find no one to open the door for him. And what if open a passage in the fence with no gate? No, he can't do that either. Because he can in the long run make his neighbor forget the right of way and put a gate that will prevent him to access his property* »[54].

Here again, the right of passage mentioned in both corpora is similar to Islamic jurisprudence.

V. RESULTS / DISCUSSION

The comparative study of the neighborhood rules mentioned in Napoleon's Civil Code and the Madjalla with « *Aḥkâm al-jiwâr* », shows the strong similarity of the articles with Islamic jurisprudence on the subject. The French Civil Code was mainly influenced by the Mālikī rite; while the Ottoman Madjalla by the Hanafi rite. This study summarizes the similar neighborhood rules among these three bodies of law as follows:

1. No one should raise his building so high that it harms his neighbour.

2. It is forbidden to overhang the neighbour's house if it causes him harm. The ban will be canceled when the damage is lifted.

[53] Ibn ar-Râmî, *kitâb al-i'lân bi āḥkâm al-buniân*, p. 135.
[54] Al-Marğî T., Kitâb *al-ḥitân*, p. 287.

3. The digging of excavations causing unacceptable damage to the neighbour's house is prohibited. However, lesser harm is tolerated.

4. No one can take benefit from his property so as to affect the benefit of his neighbor's property. Overhanging tree branches must be cut or held in place with tie rods. A tree can overhang neighbour's property only after his consent.

5. One is held responsible for water and fire damage in two cases:

a. provocation, negligence or unusual activities,

b. with knowledge that this will spread to neighboring properties.

However, when we use water and fire for domestic needs and following regular habits, we are not responsible for the damage caused to neighbors.

6. If a wall or structure is on the verge of collapsing and leans on the neighboring house or on the public road, its owner is responsible for all the damage which could occur, warned or not.

7. One can insert beams on the party wall up to his part of the joint ownership, to allow the neighbor to hang his beams there if necessary. But if the wall belongs entirely to a single neighbour, he must first be asked for permission.

8. The passage of water drainage channels in the neighbour's property is tolerated if it does not cause him harm. The flow bed can only be changed after mutual agreement.

9. If the ground floor collapses, its owner is obliged to rebuild it to allow the owner of the 1st floor to rebuild his own floor. If he refrains, the cadi authorizes the 1st floor owner to rebuild the structure of both floors. However, he only authorizes the ground floor owner to enjoy his property only after paying construction costs of the ground floor.

10. On the other hand, if the first floor collapses and leads to the demolition of part of the ground floor or its roof, its owner is not required to rebuild it or repair the damage caused to the ground floor.

11. If two neighbors claim a former right of use, the thing must be preserved in its former state. The seniority of enjoyment is considered as proof of the legality of the right. The impasse is considered as a private property belonging to all residents with open doors to the impasse.

12. If people do not live in an impasse and want to enjoy it by passing through or opening windows and doors, they can only do so with the consent of all the residents of the impasse.

13. The inhabitants of the impasse can move their door or open others, provided they do not cause harm to the inhabitants of the impasse.

VI. CONCLUSION

This article discusses the broad range of similarities that exist between Ottoman Madjalla (Mecelle) and Napoleon's civil Code in comparison with manuscripts from medieval Islamic jurisprudence. It focus only on legal rulings in connection with neighbours and neighbourhoods. Although tracing the roots of ideas remained a difficult job to achieve, the results obtained in this study establish clearly that there were patterns that are indicative of the deep knowledge of both civil codes writers regarding Islamic jurisprudence, including Napoleon's civil Code. The Ottoman Madjalla is based primarily on Islamic jurisprudence of Hanafi rite. As for the form, it reflects a codification based on the model of Napoleon's

code, as is the case of several civil codes that followed this latter in European and Muslim countries. Moreover, the very founder of the Civil Code, Emperor Napoleon, did not hide his fascination for the prescriptions of the Muslim religion. During the campaign in Egypt, he studied the work devoted to the Mālikī rite elaborated by Halīl. Later, in 1840, this book was translated into French by order of the Ministry of War as part of the scientific exploration of Algeria. Therefore, the Maliki rite was the first Islamic jurisprudence to be studied by the French. In this regard, several French scholars acknowledged the inspiration Napoleon's civil Code derived from the Malikite rite, namely: Gustave LeBon (1884), Christian Cherfils (1914), Sidiou and Pesles (1942). By targeting neighborhood rules, particularly the dividing wall, view over the neighbor's property, and right of passage; this study demonstrates that Napoleon's code includes several aḥkām borrowed from the Mālikī rite. In some questions relating to the party wall, for example, the Civil Code preferred the prescriptions of "aḥkām al-jiwār, over those of the "paries communis", indicated in the Roman *Corpus Juris Civilis.* Indeed, any dividing wall in the Civil Code is presumed to be an adjoining wall, it is up to the other neighbor to prove the opposite. The Civil Code drawn from proofs and cues widely discussed in the Maliki rite about the claim of the separation wall. In contrast, in Roman law, the party wall can either be co-owned by the two neighbors and then constitute a *paries communis*, or belong to a single owner and possibly be encumbered with easements for the benefit of the neighboring property. The co-ownership of the party wall in Roman law is therefore optional. Dealing with the question of sources, historians and jurisconsults indicate the custom without questioning its genesis.

The explored case studies have opened up a new window of ideas to help understand the genesis of some of 19th century civil codes. The historical-legal comparative approach is positive insofar as it promotes closeness between peoples by a greater understanding and prevents cultural clashes between dissimilar cultures. This contribution only covered neighborhood rights. It opens up other research perspectives in this direction on other areas of law between the two corpora such as:

- Al-chuf'a (right of pre-emption or expropriation for family utility)
- Al 'uqūd (the contracts)
- Al-charāqa, al-shāriqāt[55], al-qirād (right of co-ownership and society)[56]
- Al-mulqiya (property right)[57]- Al-jansiya (nationality)[58]

The study of all these legal matters in the field of comparative law can therefore contribute to explaining the genesis and metamorphosis of several rules within contemporary civil codes, given that Napoleon's code has influenced several countries around the world. It can also explain their mutual interactions and evolutions by revealing their striking similarities.

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[55] Saïd Abdul'lah Ali Hucîne, *al-Mukâranât al-tashrî'iya*, op, cit.
[56] David Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita,* (institutions of Malichite Muslim law with regard also to the Sciafi system), Library of Congress, Rome, 1925; Octave Pesle, *Judicature, procedure, evidence in Mâlikî Islâm*, op, cit.
[57] Saïd Abdul'lah Ali Hucîne, *al-Mukâranât al-tashrî'iya,* op, cit.
[58] Al-Nawawī Yahya, « *al-taqrīb wa taysīr li ma'rifat sunan al-bachīr al-nadhīr »,* (Bringing closer and facilitating the knowledge of the traditions of the Prophet), Edited by Muhamed Othman published by Dār al-Kitâb al-Arabî, 1985; Abbâs ibn İbrâhim, *al-i'lâm biman halla Marâksh*, (Information for the visitor to Marr*ā*kesh), 1993.

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