

Abuse of Rights: A Comparative Study between Mālikī Jurisprudence & Positive Law

doi [10.15408/ajis.v25i2.44606](https://doi.org/10.15408/ajis.v25i2.44606)

Yassine Chami^{1*}, Dina Imad², Maya Khater³, and Mohamed El Arbi Aoka⁴

^{1,2} Abu Dhabi University, College of Law, UAE, ³ UAE University, College of Law, UAE, ⁴ Université Bretagne Sud, France

✉ yassine.chami@adu.ac.ae*

Abstract

This paper offers a comparative analytical evaluation of the theory of abuse of rights as articulated within Mālikī jurisprudence and in positive law. It highlights the doctrinal foundations of this theory within the Mālikī school, characterized by the extensive application of this concept to encompass all types of harm, supported by evidence from the Holy Quran and *Sunnah*. The research also employs a qualitative method based on a comparative analysis of classic jurisprudential texts, such as *al-Muwāfaqāt*, *al-Furūq*, and *al-Mudawwanah*, while specifically focusing on contemporary positive law, such as the civil codes of Egypt and Algeria. The study demonstrates that there is a high degree of overlap between the core criteria laid down by Mālikī jurisprudence related to the abuse of rights and the related criteria adopted in contemporary positive law, especially concerning three basic criteria: the illegitimacy of the interest; the intent to harm others; and the inconsistency between the interest sought and the harm caused. The study also demonstrates that Mālikī jurisprudence was at the forefront of developing an integrated theory of abuse of rights that carefully balances private interests with broader public-interest principles.

Abstrak

Paper ini menyajikan evaluasi analitis komparatif terhadap teori penyalahgunaan hak sebagaimana dirumuskan dalam fikih Mālikī dan dalam hukum positif. Kajian ini menyoroti landasan doktrinal teori tersebut dalam mazhab Mālikī, yang dikenal penerapannya yang luas sehingga mencakup semua bentuk kemudharatan, didukung oleh dalil-dalil dari Al-Qur'an dan Sunnah. Penelitian ini menggunakan metode kualitatif dengan pendekatan komparatif terhadap teks-teks fikih klasik, seperti *al-Muwāfaqāt*, *al-Furūq*, dan *al-Mudawwanah*, serta membandingkannya dengan hukum positif kontemporer, khususnya dalam kodifikasi perdata Mesir dan Aljazair. Hasil penelitian menunjukkan adanya tingkat keselarasan yang signifikan antara prinsip dasar dalam fikih Mālikī terkait penyalahgunaan hak dan prinsip yang diadopsi dalam hukum positif modern, terutama terkait tiga prinsip utama: ketidakabsahan kepentingan yang diperjuangkan; adanya niat untuk merugikan pihak lain; dan ketidakseimbangan antara tujuan yang ingin dicapai dengan kerugian yang ditimbulkan. Studi ini juga menegaskan bahwa fikih Mālikī berada di garda terdepan dalam merumuskan teori penyalahgunaan hak yang komprehensif, yang mampu menyeimbangkan kepentingan individu dengan prinsip kemaslahatan umum.

Keywords:

Abuse of rights; Mālikī jurisprudence; Positive law; *Maṣlahah Mursalah*; Civil liability

How to Cite:

Chami, Y. et. al., (2025). Abuse of Rights: A Comparative Study between Mālikī Jurisprudence & Positive Law. AHKAM: Jurnal Ilmu Syariah, 25(2). <https://doi.org/10.15408/ajis.v25i2.44606>

Introduction

The abuse of rights theory constitutes a unique intersection between individual legal rights and the broader objectives of justice, fairness and public interest. Both the Islamic and Positive laws have created theories that outline the permissible limits of legal behavior as well as the corresponding legal and moral consequences for violation of these limits. Therefore, in all senses, the Abuse of Rights Theory provides the normative framework through which, both in substance and process, to resolve instances of Abuse of Rights, particularly in situations where Abuse of Rights harms the public good. The first theorization of the abuse of rights came from the Mālikī School of thought, which viewed *maṣlaḥah mursalah* as the highest source of sharia. This enables this School to create extensive and adaptable theories to adapt to a changing modern world. Within Mālikī jurisprudence, considerations of interests constitute a primary goal of sharia and will constitute a primary rationale for all legal decisions.

This stance is completely different from other schools, which may have different opinions, exhibit ambiguity or hesitation when approaching the issue of interest (al-Shātibī, 1997). An example of this is Imām Mālik ibn Anas, who is very well-known for his statement that *al-istihsān* (juristic preference based on public interest or equitable considerations, rather than strict analogy) is “nine-tenths of knowledge.” His statement emphasizes the significance of *ijtihād* (the independent legal reasoning applied by authorized jurists) in changing the rulings in such a way that they are just and serve the community, even if literal analogical reasoning (*qiyās*) could point to a different conclusion.

Consequently, a jurist within this framework and keeping in mind the concepts discussed above must be very careful about the sharia's goals when dealing with any legal matter. This means recognizing the valid claims that have been ignored or forgotten and taking measures to restore and defend them. *Istihsān* allows for a remedy in the event of loss. Likewise, if there are Islamic legal texts that imply certain things which are harmful or against an interest deemed permissible in Islam, then *istihsān* would argue for a re-interpretation of the text. The same procedure is found in *qiyās*, but if it conflicts with the objectives of sharia, it is better to abandon it up and follow the general rules of Islamic legal reasoning). In this way, *istihsān* is indeed "nine-tenths of knowledge" (Ibn Rushd, 2004).

Al-Shātibī further addressed this notion by stating; "Any legal source that does not have specific text but is in concurrence with the practice of sharia, is legitimate and can be a foundation for subsequent decisions..." He used the case of *al-istidlāl al-mursal* (a methodology of juristic reasoning which utilizes unrestricted legal maxims or general principles of sharia that are not tied to a specific textual source but are in line with its main objectives) and *al-istihsān* as a good implementation of this idea. Besides, he maintained that the use of *al-istihsān* is not simply a matter of personal preference or subjective desire. On the contrary, it is deeply grounded in a thorough comprehension of the basic goals of sharia (al-Shātibī, 1997).

The Mālikī school of thought recognizes *al-maṣlaḥah al-mursalah* (an interest of the public that is not firmly grounded in any particular textual proof but is considered to be in line with the supreme objectives (*maqāṣid al-sharī'ah*) as a legal principle that is valid if it does not conflict with the basic goals and the overall tenets of the sharia. Accordingly, it should be applied and further developed. In fact, when a genuine public interest is clearly established, it is preferable to follow this principle rather than rely on *qiyās*, especially in cases where the two

are in conflict. However, when an interest conflicts with the legal objectives, that interest is rejected, and its consequences are rendered void. An example of this is the prohibition of abusing rights; a jurist might determine that rights are validly established for the rights holder based on given evidence. Yet, when examined in light of the general objectives of sharia, it may be discovered to be inconsistent in some circumstances. Consequently, it requires the restriction of the exercise of that right in a manner consistent with sharia's overarching principles (al-Qarāfī, 2001).

The abuse of rights in the Mālikī school and in positive law is a substantive issue that pertains to the extent to which both legal frameworks can balance individual rights with the public interest. The Mālikī school has developed its own theory in response to this issue by endorsing the doctrine of *al-maṣlahah al-mursalāh*, which establishes particular rules and restrictions on individuals' rights to exercise their liberties. At the same time, various standards for regulating freedoms and preventing harms have evolved in modern positive law. This issue brings to the fore a series of fundamental questions regarding the degree of likeness or unlikeness between the standards set by the Mālikī school and those prescribed by positive law in curtailing the exercise of rights through abuse, as well as the possible impact on the two legal systems of their differences. There are further concerns relating to the basic intellectual and philosophical frameworks of the abuse theories in Mālikī and positive law, and whether the comparison could yield benefits in the form of progress of the modern legal systems.

Method

This research is a significant contribution to the literature, since it is based on an analytical and comparative method that incorporates realism, functionality, and deduction in the evaluation of the theory of abuse of rights. Through this comprehensive method, the theory will be clarified as it is formulated in the Mālikī school and in today's positive law. The first part of the research invites to assess the legal and doctrinal texts from the most reliable sources of the Mālikī school, such as *al-Mudawwanah* by Imām Mālik, *al-Muwāfaqāt* by al-Shātibī, and *al-Furūq* by al-Qarāfī. The research examines the legal texts of the civil law systems of Algeria, Egypt, France, and Germany. The texts are critically assessed to discover the philosophical and intellectual foundations that are lacking in either system as far as the theory of abuse of rights is concerned and the normative rules and criteria that control the issue in both contemporary law and the Mālikī school were also surveyed.

Following the textual analysis, a comparative analysis is conducted in order to explore both the similarities and differences among the two judicial systems, emphasizing at the same time the modes they employ in striking a balance between personal rights and the public interest. The area of this investigation is rather narrow, since it is limited to the theoretical part of the Mālikī school and contemporary positive law, especially the application of the notion of abuse of rights, and it illustrates the experiences in the Arab and European settings.

This paper will significantly develop our understanding of the theory of abuse of rights and clarify the extent to which Mālikī jurisprudence has influenced its application in modern positive law. These new insights will open new research paths, consider comparative studies of Islamic jurisprudence and positive law, and advance a deeper understanding of the implications of these legal traditions.

After considering the past literature on the theory of abuse of rights, it becomes clear that legal research has examined the subject from various and different angles. Contributions such as that by Majidi al-Arabi (2020) highlighted the crucial influence of Mālikī school of thought in the setting up and the laying down of the theory's criteria, marking it as the first to describe the legal ground that disallows the exercise of a right with the express purpose of causing damage or gaining an illegal advantage.

In the framework of contemporary legal foundations, various studies have provided in-depth analyses of legislative developments, such as the study by Bennassi Shawqi (2009) who considered the concept of abuse of rights from the perspective of the newly added Article 124 bis of the Algerian Civil Code and proved that the lawmaker dealt with former criticisms and designed the theory with non-exclusive criteria. Furthermore, the study by Khadem Nabil (2020) contributed to enriching the comparative aspect by analyzing the independence of the theory of unfamiliar neighborhood nuisances from the theory of abuse of rights, with a focus on judicial precedent in Algerian and Egyptian law. As for the practical effects, the study by Rachid Ben Cheikh (2023) addressed the impact of abuse of rights on civil liability in Algerian law compared to some Arab legislations, highlighting its applications in the civil field and family laws.

Similarly, contemporary positive legal systems have increasingly advanced the theory of abusive rights to protect procedural behavior as much as substantive rights in civil litigation. Andrienko (2019) claims that the misuse of the procedural rights in civil court cases causes serious injustice and therefore equitable intervention is needed to insure fairness and due process. Buromenska (2021) discusses the prohibition on the misuse of power as one of the basic principles of law that has developed as a norm in civil and administrative law. Moreover, Lazariiev (2023) offers an extensive theoretical analysis of the term, distinguishing natural law and positive viewpoints on the abuse of rights, while proposing a vague boundary between the legal and the illegal. In the same vein, Ivanov (2023) points out the ever-present uncertainty regarding the notion of abuse of rights in different legal systems. He perceives an epistemological difficulty in setting exact conceptual criteria and thus urges a more refined legal application to assure judges' comprehensible and thoughtful enactment.

This work stands apart because it takes a holistic approach, in which the foundations of doctrines and legal applications go hand in hand to provide realistic solutions to current problems and to develop mechanisms of law appropriate to new developments. It thus represents an essential addition to the legal library for research on the abuse of rights and for efforts to reconcile the genuineness of Mālikī jurisprudence with the modernity of contemporary legal applications.

Nonetheless, the gap we see in this research is the lack of a more detailed and complete study of the relationship between the general theory of abuse in the exercise of rights, as developed in the Mālikī school, and its application today in positive law, particularly in light of technological and economic development. Previous studies have examined aspects of the theory exceptionally well (Ireland-Piper, 2013). However, none have comprehensively appraised the doctrinal robustness of the Mālikī understanding and its application in contemporary legal practice. In addition, the existing literature has not effectively addressed how to adapt the conventional standards of abuse of rights to the changes brought about by modernity, particularly in the context of e-commerce, digital financial exchanges, and the

regulation of intellectual property rights (Hurtova, 2024). As a result, this study intends to fill these gaps by providing a legal framework that examines the validity of Mālikī jurisprudence and its modern application in positive law.

Abuse of Rights: Positive Law & The Mālikī Jurisprudential Framework

Abusing rights is a fundamental feature of modern legal systems. Although the notion and implications of abuse vary from jurisdiction to jurisdiction, in general, the idea is the same: an individual cannot rely on their legal rights in a manner that is harmful to another or has an unlawful effect (Ivanov, 2023; Butsan, 2024; Shevchuk, et al, 2021). Legal scholars have sought to articulate the abuse of rights in a way that balances the protection of individual rights with society's collective interests (Ezzarouali & Chami, 2023). Although individualism has raised the importance of the individual and their rights, often at the expense of others who could be harmed, modern legal scholarship has increasingly recognized that we need to limit rights when the exercise of the right conflicts with collective interests or harms third parties (Podkovenko T & Holubieva I, 2022). The law protects individuals in the exercise of their rights; however, this protection is predicated on the fact that such an exercise is aimed at achieving a private interest without harming public interests or causing injury to others. Whenever the right goes beyond the limits set and causes harm to other people the negative effects are categorized as an abuse of rights (al-Sanhūrī, 2003).

Various positive law systems do not disagree but rather admit the existence of immoral acts of exercising rights that may simultaneously inflict harm to others; nevertheless; the interpretation of this concept and its nuances vary so much that different definitional criteria arise. The German law defines abuse as an act of exercising a right with the explicit intention of harming another party. Article 226 of the German Civil Code provides that "the exercise of a right is impermissible if its sole purpose is to harm another". Thus, German jurisprudence uses a subjective criterion to determine abusive practices, focusing on the right holder's intention. Exercise of the right would be abusive if the intent for its practice is to harm another with no legitimate interest in the exercise of such right. The definition, however, grants exceptions if the holder of the right has a legitimate interest in exercising his or her rights, even if the exact cause of injury to third parties (al-Akilī, 2010).

In contrast, the former Soviet civil law model applied an objective or material criterion for abuse. According to Article 2 of the Soviet Civil Code, "the law protects civil rights, except in cases when their exercise conflict with the economic and social purposes they have been designed to serve". This emphasis on the socio-economic environment in which the right is exercised establishes a different perspective for assessing its legitimacy.

Based on the above, abuse is deemed an infringement of the social and economic function of a right if it is used in a way that undermines the public interest or the interests of society, even if it does not harm others. This way of looking at things is very close to the way the Soviets saw social justice based on the idea that all rights are part of a larger goal. In contrast, the Egyptian Civil Code approaches the same issue by using three separate criteria to determine if a person has abused their right. First, it examines whether the right-holder's interest has an unlawful premise; second, it tries to determine if the exercise was intended to harm another; and third, whether the harm to another was intentional and substantially greater than

what the right-holder was seeking to obtain (al-Sanhūrī, 2003). So, the Egyptian law is closer to a holistic approach that can examine both subjective and objective criteria for determining abuse of rights; thus, achieving a better balance in protecting the right-holder's rights while also protecting others' interests.

Similarly, the aspect of abuse in the exercise of rights has been approached in a similar trajectory by both the Egyptian and Algerian Civil Codes. Article 41 of the Algerian Civil Code sets out three criteria: an abusive exercise of a right is characterized by intent to harm others, disproportionate harm relative to the achieved benefit, or the objective of realizing an unlawful advantage. It is a synthesis of subjective and objective criteria, hence fairer and more protective of the public interest (al-Dawdī, 2011).

While the German law adopts a subjective criterion that focuses on explicit intent to harm, the former Soviet civil law uses an objective criterion that focuses on whether the exercise of the right is in accordance with its socio-economic purpose. The Egyptian and Algerian Civil Codes both define a range of criteria for determining wrongdoing based on intent and the damage caused by the action, both on an objective level and through the evaluation of the individual's harm or benefit. The synthesis of these various forms of analysis provides insight into a new standard of assessing a right-holder's intentionality, along with the potential ramifications of their actions, as both a public and private matter. This evolution within the positive law in Egypt and Algeria represents a growing recognition of the fact that the injury to another person is not merely an individual right held by the victim but that there are multiple parties involved in determining if a particular individual has acted within or outside that individual's scope as a right-holder.

The Islamic Legal System within the Mālikī school, has recognized the concept of abuse of rights as having a far reaching effect and in many respects even beyond those concepts that have been developed by modern legal systems. Although the Arabic word for "abuse" (*ta'assuf*) is neither explicitly nor frequently mentioned in the classical texts of Islamic Law or other classical works of the Islamic tradition, other terms with similar meanings such as "harm" (*idrār*) and "malice" (*muḍārah*) have been used by Mālikī scholars to refer to the wrongful exercise of one's rights.

The Mālikī school of thought uses several terminologies that are interpreted as referring to different aspects of abuse, among which is harm (*al-darār*). Mālikī scholars regard such a practice as the claiming of a right that, although justifiable, inflicts pain on others. A classic instance would be the dissolution of a marriage: if a husband intends to get back his wife during the *'iddah* period solely for the purpose of making her wait longer and inflicting emotional pain on her, then this act is regarded as harm (*maḍārrah*) by the Mālikī school.

Another example is the practice of *Ila'*, where a husband takes an oath that he will not approach his wife for no particular reason, with the intent to causing her mental suffering. Likewise, in the case of animal rental, the tenant is not allowed to impose excessive work on the animal or use it in a way that causes huge suffering, like carrying heavy stones. Such mismanagement of the animal is seen as harm (*maḍārrah*) caused either to the animal or to its owner (al-Dāsuqī, 1997).

Imām al-Shāṭibī defines *ta'assuf* as misusing divine gifts that Allah has blessed us with in ways that are either forbidden or contradictory to the underlying goals of sharia. He states that *sadd al-dharā'ī'* (i.e., obstructing ways to harm) is the guiding principle in preventing

misuse of these Divine gifts. Though scholars agreed on *sadd al-dharā'i'* as a fundamental principle, there is disagreement among them about its exact implementations. The notion of condemned use encompasses any exercise of rights that produces outcomes harmful to the public interest or that contradict the objectives of sharia (al-Shāṭibī, 1997).

The Mālikī school, influenced by the principle of *al-maṣlaḥah al-mursalah*, claims that rights are not absolute but are subject to sharia principles aimed at achieving justice and preventing damage to others. Thus, if the exercise of a right entails a loss of a benefit or brings about a greater harm, then it is classified as a misuse of that right, even though it is not apparent from the outside. An example can be seen with property rights, where if a person builds a structure on their property that completely blocks the adjacent neighbor's air and light, then this person is considered to have misused their rights as a property owner thereby violating the neighborhood's rights and even the neighborhood's well-being. In the same vein, with regard to wills, the Mālikī school allows a testator to leave one-third of his estate to whoever he pleases. Nevertheless, if it is understood that the testator's purpose is to inflict suffering on the heirs by bequeathing so, the act is deemed to be a right's abuse since the very act contradicts with the *maqāṣid al-sharī'ah* whereby proper legislation of wills is based on the good of society.

In divorce and inheritance-related disputes, the heir cannot behave in a manner which would prevent other legitimate heirs from receiving their fair distribution of the inheritance. Such behaviors are considered abusive and against the spirit of equity that *Sharia* aims to establish. The Mālikī school provides an additional and advanced interpretation of this notion; viewing rights as subject to the objectives of sharia. This perspective has many applications, including: 1) Financial transactions 2) Family relationships 3) Neighbours' rights. Therefore, Mālikī jurists have created the principle of a balance between individual rights and community rights, which modern societies are trying to accomplish.

Individualism, Property Rights, & the Critique of Abuse of Rights Theory

Prior to the establishment of a legal interpretation and practical application of the abuse of rights theory, Western nations had embraced a doctrine of extreme individualism regarding the enjoyment of rights over an individual's property (Chami et al., 2024). Article 544 of the Algerian legal system reflects this doctrine as well: "Property is the right to enjoy and dispose of one's property to the fullest extent, except in cases where this use is prohibited by the laws or regulations." The notion of absolute individualism was also reflected in French law during the early 19th century. That said, while the individualization of rights appeared to favor individual benefit, legal efforts to reinterpret the use of those rights and develop a more abstract understanding of what constitutes an abuse of rights continue to emerge.

Concerning property rights, the individualistic school of thought, especially in legal positivism, emphasizes that the holder of a right is not constrained in the "motivations or intents" with which a right is exercised. Within this theory, the exercising of rights is interpreted narrowly as a right to a tangible good, and liability for any harm caused would come into question only when the right holder exceeds the parameters of the law that delimits the right. In this sense, rights appear to be absolute. There is no questioning of the will of the right holder,

and their acts are lawful insofar as he does not exceed the boundaries of the right holder's rights (Planiol, 1974).

One of the most significant critics of the theory of abuse of rights was the French jurist Planiol, who believed that it rests on a fundamental contradiction. Planiol maintained that the exercise of a right must necessarily be lawful, noting that an act cannot be both lawful and unlawful at the same time. He said in this respect: "An act cannot be consistent with the law and contrary to it at the same time" (1974). He recognized that, while an act may be originally legal, it may become illegitimate if the person exceeds the limits of his/her right or uses it for an illegitimate purpose (Chami & Khater, 2025). In response to Planiol's criticism of the theory of abuse of rights, legal scholars have pointed out to him and others that legality is not only a matter of the nature of the action itself but can also arise from the intention or purpose behind the exercise of a right. Al-Shāṭibī discusses this issue in *al-Muwāfaqāt* when talking about the legality of a prayer performed on usurped land or slaughtering an animal with a knife that was stolen. He notes that while the action itself may be legal, the intention behind it may render it illegitimate.

Germany was among the first countries to practice the idea of abuse of rights in its positive law. This idea stems from the German Civil Code of 1787 and was strengthened by subsequent amendments in 1896. Article 226 of the German Civil Code states: "The exercise of a right is not permissible if its only purpose is to harm others". In this respect, German law adopts a subjective criterion that considers the intent of the right-holder in exercising the right. In other words, if a right holder intends to inflict harm on another party, then this is deemed an abuse of their right, even if the action in itself is within the permissible limits of that right (al-Sha'rawī, 2005).

Legal theorists "Sali" and "Josserand" in France developed a theory of abuse of rights that emphasizes that a right holder who inflicts harm upon others in an abusive exercise of that right is liable. The fundamental notion is that even if a right is exercised within its material boundaries, an exercise of a right that purposely inflicts harm on others is considered immoral. As a result, this may occur as it may entail civil liability vis-a-vis the damaged party (1992). Much Arab legislation in modern legal systems has adopted the theory of abuse of rights. For instance, as stipulated in Article 5 of the Egyptian Civil Code, exercising a right will be considered unlawful if it aims at causing harm to someone, and if there is a disproportion between the gain that the right should attain. Notably, Article 41 of the Algerian Civil Code shows that Algeria adopted the same principle, which stipulates that exercising a right constitutes abuse if it goes against the intention to harm someone and if it aims at an unlawful interest.

This theory of abuse of rights is in development, embracing all the different dimensions beyond the concept of a material right to include the intention of the right holder and the results of the exercise of that right. This concept represents an important turn in legal thought, integrating the respect of individual rights with the need to avoid any violation of other parties' rights. The issue of abuse of rights brought about different schools of thought regarding Islamic law. Shafi'i rejected altogether the theory of abuse of rights.

The Mālikī school commonly refutes harm-causing. At the opposite end, Ḥanafīs hold a contrary position on this issue. According to al-Kasānī, in his "Badā'i' al-Ṣanā'ī," harm will be serious with no specific reason and distinguishes trivial matters from something worth

compensation. A neighbor may allow another person to build something that obstructs light viewing, as long as it is not intended to be a source of nuisance. Evidently, such an approach will better fit with modern legal systems' efforts toward equity.

By contrast, rules set forth by the Shāfi'ī school avoid overstating rights; they rely instead on strict guidelines drawn from what constitutes valid law: once a right becomes properly and validly attained, usage becomes valid as long as it is not specifically and clearly made unlawful within Islam. As al-Nawāwī then explained in “al-Majmū’,” mere intention about causing harm doesn't carry valid law as unlawful, as the ruling depends on actions, not thoughts. Nevertheless, as suggested by Ibn Ḥajar al-Haytāmī, for instance, there is a notion here that disregards morality associated with rights, primarily involving the Prophet's teaching: “Do not do harm and do not return harm”. As for Ḥanbālī school rules, they somewhat share similarities with Mālikī school rules, mainly involving peaceful resolution of conflict as set forth through a Mughnī writ as per Ibn Qudāmāh's works but do not pattern concepts based on societal usefulness as with Maliki's.

This disparity among Muslims indicates that Maliki's approach is not defective, instead, it is a careful choice rooted in Medinan traditions, which they viewed as a practical embodiment of the Prophet's example within the community. Some jurists in the Ḥanafī school of law state that abuse only extends to cases of significant injury. The Mālikī school, however, has taken an expansive view of the idea: all injury should be prohibited (Onwuazombe, 2017), regardless of severity. The Mālikī scholars apply the principle of preventing injury more broadly than other schools do.

Even when the harm inflicted does not rise to the level of significant injury, it is still not permissible for a right holder to act when the intention is to harm others. This view further demonstrates that the Mālikīs do not limit the prohibition against harm to severe injury but extend it to cases where there is intent to harm others or where the harm caused is disproportionate to the benefit accruing to the right holder. The Mālikī rejection of the abuse of rights rests on several legal evidences from the Quran, including various verses that prohibit causing harm to others. One such verse provides: "And so, when you divorce women and they are about to reach the end of their waiting-term, then either retain them in a fair manner or let them go in a fair manner. But do not retain them against their will in order to hurt [them]: for he who does so sins indeed against himself." (al-Baqarah: 231, Trans. Muhammad Asad).

Ibn al-‘Arabī pointed out that revocation (*raj'ah*) after divorce was only allowed if it was for a good purpose. An intention to hurt would make the act unfair (Ibn al-‘Arabī, 2000). Additionally, the Quran says: "No mother or father should be made to suffer for their child" (al-Baqarah: 233). This verse goes very far in the matter of rights. Malik ibn Anas says that any action to harm another is not accepted by sharia (Mālik ibn Anas, ND). In this context, it is mentioned in the Quran: " And if the debtor is in a hard time (has no money), then grant him time till it is easy for him to repay, but if you remit it by way of charity, that is better for you if you did but know" (al-Baqarah: 280). Here, mercy and justice in money matters are underlined especially in cases of poor people (Ibn Kathīr, 2000). Another verse that advocates for this principle is: " And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt"

(al-Nisā: 12). In his interpretation, Ibn Rajab indicated that if a bequest is intended to harm the heirs, it is considered illegitimate.

In *al-Sunnah al-Nabawiyyah*, many hadiths emphasize the prohibition of harm in all its forms. One of the most well-known is the hadith: "There should be neither harming nor reciprocating harm", which constitutes strong evidence against any action intended to harm others (Ibn Rajab, 1968). Among the hadiths is the story of Samura ibn Jundab, who asked the Prophet Muhammad (peace be upon him) to compel his neighbor to sell him his palm tree, as it was causing him harm. The Prophet replied: "*Anta muḍār*", which means: "You are causing harm," and ordered him to uproot the tree (al-Shātibī, 1997).

The hadith of Abu Huraira also mentioned that the Prophet Muhammad (peace be upon him) said: "No one should prevent his neighbor from inserting a wooden peg into his wall." This indicates that it is unjust to deny someone their rights

The prophetic guidance above depicts a legal principle that is at the core of Islamic law: rights are sharing, not owning. The right of the owner over his wall is a real one, but at the same time, it is limited by the neighbor's rightful need. This is similar to the proportionality test in modern civil law where the act is judged not only by the formal entitlement but also by the way the competing interests are balanced. In both systems, the law does not come in to cancel out rights, but rather, it helps measure their use in the common social area. The Mālikī jurists applied this balancing act by using *maṣlahah*, thus preventing private behavior from being a factor in the disruption of community peace. The prohibition of harm, therefore, acts as a portal through which divine morals and secular legalities meet—each individual's freedom being in harmony with social duty. This coming together of the two systems indicates that the theory of rights abuses is not a new legal fiction, but a universal normative way of dealing with the contradiction between freedom and justice that is present in every age.

A neighbor cannot prevent another from using their property so long as it does not cause harm. Additionally, an example cited by the Mālikīs regarding the prohibition of abuse in exercising rights is the case of Uthman ibn Affān inheriting the divorced woman during his illness. Here, the divorce aimed to deprive her of her inheritance rights (See Mālik ibn Anas, reported by Mālik: *Kitāb al-Aqdiyyah*, Chapter on Judging in Facilities, No. 1469, Vol. 2, p. 745).

Based on these legal evidences from the Quran and the Sunnah, it can be concluded that the Mālikīs hold that individuals do not have absolute freedom to exercise their rights; they must consider others' interests and avoid causing them harm. In this particular aspect, Imām al-Shātibī points out: "[The] pursuit of what is permissible to be instituted is to be proportional not just to the rights of Allah but equally to the rights of creation." This reflects the Mālikī viewpoint, which rejects any action that causes harm to others, regardless of whether the person is acting in accordance with the law and exercising a legal right. Additionally, the Mālikī school has even broadened the definition of harm to include any harm, rather than limiting it to greater harms. This exemplifies a deep understanding of justice and the need to protect others' rights in Islamic law, and thus represents one of the most holistic legal stances on the subject.

Conclusion

Through its analytical and comparative study, this paper reveals the divergence between the legislative and jurisprudential systems on the issue of the concept of abuse of rights. While the positive law adopts a flexible approach to regulating individuals in their right to act by their own will and restricting that right in some cases to prevent harm to others, the Mālikī scholars have shown clear expansion in this regard. They do not limit themselves to classifying only severe actions; they include any action that harms others as a result of exercising one's right, regardless of the severity of the harm. This stance is based on the purposes of *Sharia* with its emphasis on realizing justice and balance between the right of the individual and that of society, consistent with the public interest and the protection of all rights. Thus, whether the exercise of a right constitutes an abuse of it will depend on the extent to which the action falls within the established legal and rational parameters designed to prevent harm and safeguard society as a whole.

In this context, Mālikī jurisprudence emerges as one of the most expansive in its application of the concept of abuse of rights. Scholars within this tradition assert that the protection of others' rights transcends the threshold of egregious harm, encompassing any potential harm regardless of its gravity.

Accordingly, this study reveals that Mālikī scholars have established three primary criteria for determining the abuse of rights. The first criterion concerns the legitimacy of interest, which evaluates whether the rights holder's purpose in exercising their right is lawful and consistent with justice. If the objective pursued is unlawful or unjust, the exercise of that right may be considered abusive. The second criterion relates to the intent to harm another person. When an individual acts to cause harm, their exercise of rights is deemed improper, even if the action itself does not exceed the physical or formal limits of their rights. This criterion emphasizes the moral dimension of rights, focusing on the implications of intent in their exercise.

The third criterion considers the proportionality between the harm inflicted on another and the benefit gained by the rights holder, assessing whether the harm is disproportionate to the benefit. These jurisprudential principles closely align with provisions in various modern legal systems, such as Articles 5 and 41 of the Egyptian and Algerian Civil Codes, respectively. Both of these legal frameworks similarly emphasize the importance of delineating the boundaries of rights, ensuring that individuals do not inflict unjust harm on others without legitimate justification.

From a comparative analysis of the Mālikī school and positive legal systems regarding the theory of abuse of rights, several recommendations and key findings are manifested. First, it has been deduced that the Mālikī school has a highly efficient approach to this theory by broadly and flexibly applying its criteria. Secondly, the positive legal frameworks have shown a significant shift from an absolute individualistic approach to one that considers the public interest. Finally, the study further recommends developing legal doctrines that stipulate more specific texts on abuse, especially in new developing contexts such as e-commerce and intellectual property. This study also recommends the creation of legal jurisdictions to address the abuse of rights, including the development of training programs for qualified judges to handle this specific problem. Finally, enhancing legal awareness of the concept of abuse of rights and its practical applications is very important. In addition to this study's contribution to

the development of legal thought, its findings have clear political dimensions that could support legal reform paths in countries with mixed judicial systems, such as Algeria and the United Arab Emirates. First and foremost, there is a need for judicial training programs to include educational modules that combine Islamic jurisprudence with comparative legal approaches, enabling judges to acquire cognitive and ethical tools that help them issue more balanced and fair rulings in civil cases characterized by legislative or factual complexity.

It also becomes necessary to encourage legislators to explicitly include the three criteria derived from the Mālikī school of thought — namely, illegitimate interest, intent to harm, and disproportionate harm — as interpretive guiding principles in civil procedure laws. This step is particularly important in legal contexts where strategic disputes abound, such as intellectual property, family issues, and digital contracts.

Nevertheless, the application of interest-based reasoning mechanisms to the system of administrative law would provide the judiciary with a means of supervision over the regulatory decisions which have been made within the legal framework and which, even though formally legal, may still be imposing unreasonable burdens on the people. The refusal of a local government to issue a building permit due to the influence exerted on that decision by a rival company might be an arbitrary ruling open for appeal, irrespective of the fact that it is made by virtue of the power vested in the local authority by law, to that extent, it can be said that the decision is legal and then it is very much a matter of interpretation. Thus this study will direct researchers' attention to a number of significant issues that need to be tackled. One of these, amongst others, is the questioning of the extent to which Arab courts refer to Article 41 of the Algerian Civil Code or its equivalent in Egyptian law; and if Mālikī principles are explicitly mentioned in the decisions or if they operate in the background as disguised normative principles. The collaboration of case law analysis with judges' field interviews can produce the necessary link between theoretical jurisprudence and realistic practice and can be done by issuing guidance manuals for lawyers as one of the means of that link.

References

- Al-Akilī, A. H. (2010). *Nazariyat al-Ta'ssuf fi Istimāl al-Ḥaq fi al-Qānūn al-Madanī*. Amman: Dār al-Thaqafah.
- Al-Dāsūqī, M. bin A. (1997). *Hashiyat al-Dāsūqī 'alā al-Sharḥ al-Kabīr*. Beirut: Dār al-Fikr.
- Al-Dawoody, A. (2011). *The Islamic Law of War. Justifications and Regulations*. Palgrave Macmillan, Amman, Jordan: Dar al-Nasher.
- Algerian Civil Code. (1984). *Legal provisions*. Algiers: Dar Houma.
- Al-Mudawwanah al-Kubrā*, Imām Mālik, edited by Muhammad Fuad Abdul-Baqi. (n.d.). Dār Ihyā' al-Turath al-Arabī.
- Al-Qarāfī. (2001). *Al-Furūq* (A. Al-Judai, Trans.). Riyadh: Dār Alam al-Kutub.
- Al-Sanhūrī, A. R. (2003). *Al-Wasīt fi Sharḥ al-Qānūn al-Madanī*. Cairo: Dār al-Nahḍah al-'Arabiyyah.
- Al-Sha'rawī, H. (2005). *Dirāsāt fi al-Qānūn al-Madanī: Al-Mas'ūliyyah al-Madaniyah* (Studies in civil law: Civil liability). Cairo: Dār al-Fikr.
- Al-Shātībī. (1997). *Al-Muwāfaqāt fi Uṣūl al-Sharī'ah* (M. Hassan Salman, Trans.). Riyadh: Dār Ibn Affān.
- Andriienko, I. S. (2019). *Abuse of procedural rights in civil proceedings: Some issues*. *South Ukrainian Law Journal*, 3, 96–99.

- Benassi, Shawqi. (2009). *Abuse of Right in Light of the Newly Introduced Article 124 bis by Law 05-10 Amending the Civil Code*.
- Ben Chweikh, Al-Rachid. (2023). *The Abuse of Right and its Effect on Civil Liability: A Study in Algerian Law Compared to Some Arab Legislation*
- Buromenska, N. L. (2021). *The concept and legal nature of the principle of prohibition of abuse of power* [Candidate dissertation, University of Economics and Law "KROK"].
- Butsan, E. Y. (2024). *Genesis of the abuse of right concept: The proprietary aspect (on the example of the Roman legal tradition)*. *Law and Politics*, 5, 38–41.
- Chami, Y, et al.,(2024). Admissibility of lawsuits based on interest under Algerian civil and administrative procedures. *Jambura Law Review*, 6(2), 286-303.
- Chami, Y & Khater, M. (2025). The influence of Mālikī jurisprudence on the French civil law in terms of the opposability of the relative effect of contract to third parties: A comparative study. *Malaysian Journal of Syariah and Law*, 13(1), 123–133.
- Egyptian Civil Code. (1985). Legal provisions. Cairo: Dar al-Shorouk.
- Ezzerouali, S & Chami, Y. (2023). *Inclusion of Definitions in Legislative Drafting: A Necessity or a Luxury?*. *Mazahib*, 22(1), 37-64.
- Hurtova, K. M. (2024). *Some aspects of the abuse of rights in civil and economic proceedings*. *Law & Safety*, 23.
- Ibn al-‘Arabī, (2000). *Al-Qabas fī Sharḥ Muwatta Mālik ibn Anas*. Amman, Jordan: Dār al-Fikr.
- Ibn Kathīr (2000). Interpretation of Ibn Kathīr, Dār al-Salām.
- Ibn Rajab (1968), *Jami' al-Ulūm wal-Hikam*, Rufoof
- Ibn Rushd. (2004). *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*. Beirut: Dār al-Fikr.
- Ireland-Piper, D. (2013). *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*. *Utrecht Law Review*, 68-89.
- Ivanov, V. (2024). To the definitions of the concept of abuse of rights. *Pravova Derzhava*, 35, 822–830.
- Ivanov, V. P. (2023). Evolution of the institute of abuse of right. *Yearly Journal of Scientific Articles: Almanac of Law*, 14, 453–457.
- Khadem, Nabil. (2020). *The Independence of the Theory of Unfamiliar Neighborhood Harms from the Theory of Abuse of Right: A Study in Light of Algerian and Egyptian Jurisprudence*
- Lazariev, V. V. (2023). *Concepts of understanding the essence of the "abuse of rights" category*. *Law and Safety*, 88(1), 179–189.
- Majidi, Al-Arabi. (2020). *The Role of the Mālikī Jurisprudence in Building and Establishing the Standards of the Theory of Abuse of Right: A Study in Light of the Law*.
- Mālik, I. A. (N. D.). *Al-Mudawwanah*, Dār Iḥyā Turāth, Beirut.
- Onwuazombe, I. I. (2017). *Human rights abuse and violations in Nigeria: A case study of the oil-producing communities in the Niger Delta Region*. *Ann. Surv. Int'l & Comp. L.*, 22, 115.
- Planiol, M. (1974). *La théorie de la responsabilité en droit civil français*. Paris: Éditions La Fontaine.
- Podkovenko, T., & Holubieva, I. (2022). *Abuse of law: general theoretical aspects*. *Actual problems of law*, (3), 22-28.
- Sali, M & Josserand, C. (1992). *Beginnings of Village Life in Eastern Mesoamerica*. *Ancient Mesoamerica*, 3(1), 132-142.
- Sharif, A. T. (n.d.). *Abuse of rights: Mālikī heritage - A comparative study between positive law and Mālikī jurisprudence*. University of Adrar.
- Shevchuk, S., Melnikova, M., Komarevceva, I., Savina, V., & Kashurin, Y. (2021). Abuse of right: On legal regulation issues. *Laplage em Revista*, 7(Extra-A), 552–556.

The Algerian Civil Code
The German Civil Code
The Soviet Civil Code