



The Legal Nature of the Certificate of Possession Established under Article 39 of the Real Estate Guidance Law.

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ABSTRACT:

Considering the legal status of private property ownership after independence, most properties lack documentation and contracts. To address this issue, the Algerian legislator introduced the Certificate of Possession under Article 39 of Law No. 90-25 on real estate guidance, as amended and supplemented. This allows individuals who possess real estate without a written contract or land survey to obtain a Certificate of Possession, provided they meet certain conditions. This certificate is issued by the mayor of the municipality in which the property is located. The Certificate of Possession also encourages and promotes agricultural investment, as the Algerian legislator has granted the possessor the right to obtain building and demolition permits, as well as bank loans.

Keywords: Certificate of Possession, real estate, private property ownership, land surveying.

Received: 23/06/2025

Accepted: 25/12/2025

Published: 16/02/2026

Introduction

The Algerian legislator established a certificate known as the Certificate of Possession under Article 39 of the Real Estate Guidance Law No. 90/25, dated 18 November 1991. This article states: 'Any person who possesses private property without written contracts and has had continuous, uninterrupted, peaceful and public possession of it without doubt may obtain a possession document called the "Certificate of Possession".' This certificate is subject to registration and property publicity formalities in areas where a land survey record has not been prepared.'

This type of possession differs fundamentally from that previously regulated by the legislator, either in the Civil Code (Articles 808-834) or the Code of Civil and Administrative Procedure (Articles 524-530). Although the legislator named it the 'Certificate of Possession', it grants its holder rights and privileges typically associated only with property ownership. For example, it permits the mortgaging of the property for long- or medium-term agreements, or for financing agricultural or construction projects on the land, as set out in Article 44 of the Real Estate Guidance Law. This is permitted despite Article 884 of the Civil Code explicitly stating in its second paragraph that the mortgagor must be the owner of the mortgaged property. The certificate also enables the holder to obtain a building permit for the land and construct on it, despite Article 50 of the Urban Planning Law¹ stating that construction must be linked to ownership.

In order to address these questions, this research paper is divided into two sections. The first section covers the concept of the Certificate of Possession, and the second section focuses on its effects and disputes.

¹- Article 50 of Law No. 90-29 concerning Urban Planning and Development, dated 1 December 1990 (Official Gazette No. 22, 1990), states: 'The right to build is linked to land ownership and must be exercised in strict accordance with the legal and regulatory provisions relating to land use.'

Chapter One: The Concept of the Certificate of Possession

Any individual who possesses private land for which there are no formal contracts and which has not yet undergone a general land survey, and who has maintained public, continuous and uninterrupted possession of the land for a period of one year, may request the issuance of a Certificate of Possession once the necessary conditions have been met. This leads me to address the definition and characteristics of the Certificate of Possession in Section One, and its conditions in Section Two.

Section One: Definition and Characteristics of the Certificate of Possession

Examining Article 39 of Law No. 90/25 on real estate guidance reveals that the legislator did not define the Certificate of Possession². Instead, the conditions for obtaining it and the methods of preparing and delivering it were specified through Executive Decree No. 91/254, which outlines the procedures for preparing and delivering the certificate³. This necessitates defining the certificate and highlighting its characteristics in the following two subsections.

Subsection One: Definition of the Certificate of Possession

Neither Law 90/25 concerning real estate guidance, nor Executive Decree No. 91/254, which outlines the procedures for preparing and delivering the Certificate of Possession, provide a definition of the Certificate of Possession. Therefore, legal scholars have been tasked with defining it. Various definitions of the Certificate of Possession have emerged. One definition is that it is “an administrative document granted by the mayor of the relevant district based on the request of the possessor or possessors, whose possession period must not be less than one year”⁴.

Others describe it as ‘a nominal possession document prepared by the mayor of the municipal council according to legal formalities and within his authority and jurisdiction, which registers possession based on a declaration request from the possessor, and which is subject to registration and property publicity procedures’⁵. Another description states that it is ‘similar to a contract or administrative decision with an official nature; it is an official document confirming the possessor’s right to possess the property in question, provided that the registration and publicity procedures have been completed. While this certificate does not equate to a title of ownership, it can serve as significant evidence for acquiring ownership through the applicable legal procedures of statutes of limitations’⁶.

Notably, all these definitions of the Certificate of Possession focus primarily on its source and beneficiary, rather than its nature or the legal effects arising from it.

Subsection Two: Characteristics of the Certificate of Possession

The main characteristics of the Certificate of Possession can be summarised as follows:

Firstly, the certificate is nominal.

Referring to Article 42 of Law No. 90/25 regarding real estate guidance, we conclude that the certificate is based on the personal status of the possessor and does not automatically transfer to heirs. This distinguishes it from property rights, which transfer to general descendants upon the death of the deceased. Furthermore, the heirs are not required to repeat the investigation into the conditions of possession for the

²- Law No. 90-25, dated 18 November 1990 and published in Official Gazette No. 49 of 1990, regarding Real Estate Guidance.

³- Executive Decree No. 91-294, dated 27 July 1991 and published in Official Gazette No. 36 of 1991, specifies the procedures for preparing and issuing the Certificate of Possession.

⁴- Madjid Khalafouni, *The System of Property Registration in Algerian Law*, 1st edition, National Office for Educational Works, Algeria, 2004, p. 200.

⁵- Abdel Aziz Mahmoudi, *Mechanisms for Purifying and Settling Real Property Ownership Documents in Algerian Legislation*, 2nd edition, Baghdad Publications, Algeria, 2010, p. 203.

⁶- Abdel Hafid Ben Abida, *Proving Real Ownership and Real Rights in Algerian Legislation*, Houma Publishing House, Algeria, 2003, p. 133.

property covered by the certificate; it is sufficient for them to present a documented contract proving their status as heirs, thereby enabling them to inherit by right.

Secondly, the certificate is non-transferable:

According to Article 43, paragraph 2 of the real estate guidance law, there is no possibility of transferring property rights represented by the certificate free of charge or for compensation. Therefore, any action concerning the property in question, such as gifts, wills or endowments — which are essentially actions reserved for the true owner — cannot be performed. The Certificate of Possession was established to primarily achieve goals related to agricultural development. Thus, the privileges granted to the holder of the Certificate of Possession come with constraints, represented by the prohibition against transferring the certificate through sale, exchange or donation⁷.

Thirdly, the Certificate of Possession does not change the legal status of the property.

Referring to Article 43, paragraph 1, and Article 47 of the Real Estate Guidance Law⁸, it is evident that the Certificate of Possession does not grant the holder ownership rights, as the recipient remains merely a possessor until the legal status of the properties covered by the certificate is clarified. This occurs once the general land survey is completed and the property registers are issued, which serve as sole evidence of private property ownership.

Additionally, the holder of the certificate can invoke the statute of limitations for acquiring ownership, starting from the date mentioned in the certificate.

Section Two: Conditions for the Certificate of Possession

To obtain the Certificate of Possession, the possessor must meet the following conditions:

Subsection One: Formal Conditions for the Certificate of Possession

A study of Article 40 of the Real Estate Guidance Law and Articles 6 to 15 of Executive Decree No. 91/254 reveals that the procedures for granting the Certificate of Possession involve various stages at different levels. These can be divided into procedures conducted by the applicant for the certificate, procedures carried out by the mayor of the municipal council and procedures performed by the property registrar.

First: Procedures to be undertaken by the applicant for the Certificate of Possession

The applicant must submit a petition to the mayor of the municipal council, providing essential details about the property, such as its nature, volume, area and boundaries, as well as the possessor's or possessors' identity. This request must be accompanied by a sworn declaration from the applicant, supported by affidavits from two witnesses confirming that the applicant possesses the land in good faith, and indicating the duration of such possession. The witnesses are legally responsible for the accuracy of their statements. Additionally, the petition must include a plan showing the boundaries of the plot of land and its location, as well as the civil status certificate for the applicant(s), and any other documents or evidence that the applicant(s) wish to present⁹.

Second: Procedures to be undertaken by the mayor of the municipal council

Once the application reaches the mayor of the municipal council, the latter undertakes a series of procedures which can be summarised as follows:

⁷- Article 43, paragraph 2 of the Real Estate Guidance Law states: 'However, except for free or compensated transfers, those who legally hold the Certificate of Possession may act as if they were the actual owners, unless the competent court decides otherwise.'

⁸- Article 43, paragraph 1 of the Real Estate Guidance Law states: 'The issuance of a Certificate of Possession does not change the legal status of the property.'

⁹- Abdel Aziz Mahmoudi, 'The Limits of the Certificate of Possession in Purifying Private Real Property Ownership', Parliamentary Thought Journal, No. 18, 2007, p. 221.

1. The mayor must open a special register, numbered and signed by the relevant court, to record possession applications in chronological order by date of submission. The applicant should be issued with a receipt indicating the reference details of where the application was recorded, as stipulated in Article 7 of Executive Decree No. 91/254.

2. Within 15 days of receipt, the mayor must publish a summary of this application on a special notice board in the municipality and its public places for a period of two months. According to Article 8 of the same Executive Decree¹⁰, this summary should also be published in a national newspaper at the applicant's expense. Publication in a national newspaper is not mandatory if the property is located in a municipality with a population of 20,000 or fewer according to the latest census. The purpose of this procedure is clear: to enable anyone with an objection to the granting of this certificate to present it in a timely manner (Article 10 of the Executive Decree¹¹).

3. In accordance with Article 9 of the Executive Decree, the mayor of the municipal council must notify the provincial director of national property within fifteen days of the application being registered in the municipal register. This notification requests clarification of the property's legal status, considering the provisions governing national properties, particularly whether it belongs to the municipality. The rationale behind this procedure is that the legislator aims to ensure that the property is not publicly owned; if it were, it could not be the subject of a Certificate of Possession¹².

However, the legislator did not specify how the mayor should undertake this notification. The general wording of the text may allow the mayor to conduct this notification via ordinary mail. However, this could result in the notification being lost in the post, ultimately undermining the legislator's intention in mandating this notification.

4. If no objections are raised by individuals or the national property director within the time limits specified in Articles 10 and 11 of the aforementioned Executive Decree, the mayor of the municipal council will prepare a record of non-objection within eight days of those time limits expiring, as per Article 13 of the Executive Decree. He will then prepare the Certificate of Possession in accordance with the model attached to the Executive Decree, delivering a copy to the possessor after registration and filing in the property publicity records as stipulated in Article 15 of the Decree¹³.

According to Article 12 of the aforementioned Executive Decree, if there are any objections from either private individuals or the director of national properties, the mayor of the municipal council must suspend the procedures for granting the Certificate of Possession and invite the concerned parties to litigate before the competent judicial authorities. Although the legislator's use of the phrase 'the mayor shall invite the concerned parties to litigate' may imply that the mayor is filing the lawsuit and initiating proceedings, the intention is that the mayor should halt the procedures for issuing the Certificate of Possession and refer the parties to the competent judicial authority to resolve the dispute¹⁴.

Third: Procedures to be undertaken by the Director of National Properties

According to Article 11 of Executive Decree No. 91/254, the Director of National Properties must reply in writing to the notification from the Mayor of the Municipal Council, under his personal responsibility, clarifying the legal nature of the property in question within two months of receiving the notification. If the

¹⁰- Article 8 of the aforementioned Executive Decree No. 91-254.

¹¹- Article 10 of the aforementioned Executive Decree No. 91-254.

¹²- Article 9 of Executive Decree No. 91-254.

¹³- Article 15 of Executive Decree No. 91-254 states: 'The mayor of the municipal council shall issue the prepared Certificate of Possession to the applicant once the registration and publicity procedures have been completed.'

¹⁴- Article 12 of the Executive Decree states: 'In the event of a dispute regarding the status of the possessor or possessors, raised within the timeframes specified in Articles 10 and 11, the mayor shall invite the relevant parties to litigate before the relevant judicial authority in order to resolve the dispute.'

director of national properties does not respond within this timeframe, his silence is understood to indicate no objection, which allows the mayor of the municipal council to continue the procedures for granting the Certificate of Possession. However, this could result in personal liability if it is later proven that the property belongs to the state, particularly if the mayor notified the director of national properties by ordinary mail which was subsequently misplaced for any reason¹⁵.

Fourth: Procedures to be undertaken by the property registrar

Once the certificate of possession has been prepared as outlined above, the registration and publicity procedures for this certificate must be conducted before it is delivered to the relevant party. This process is carried out by the regionally competent property registrar. The registrar must examine the document to ensure that it meets all legal requirements. For example, he must verify that the director of state property at the provincial level has been notified. If not, he must do so. They must also confirm that the property is privately owned and that no prior contract has been executed, as a registration cannot be made on another registration. The registration process is then conducted in accordance with Articles 113 and 114¹⁶ of Executive Decree No. 76-63, dated 25 March 1976, which establishes the property register.

Subsection Two: Substantive Conditions

An analysis of Article 39 of the Real Estate Guidance Law and Article 832 of the Civil Code, which references it, as well as Article 2 of Executive Decree No. 91/254 — particularly its second paragraph — allows us to categorise the substantive conditions for the Certificate of Possession into two types: conditions related to the property subject to possession, and conditions relating to the possession itself. This paragraph states that ‘the application will only be accepted if possession has been exercised according to Article 413 of the Code of Civil and Administrative Procedure for at least one year, and concerns privately-owned lands for which no contracts have been issued, and which are located in a municipality or part of a municipality where land surveys have not been conducted’.

First: Conditions related to the property subject to possession

Referring back to Article 39 above, it is clear that the Certificate of Possession can only cover private properties. This excludes publicly owned properties, properties for which no contracts have been issued and properties that have not been included in the general land survey.

1. The property must be privately owned

The Certificate of Possession only covers privately owned properties. This means that properties belonging to the state cannot be the subject of a Certificate of Possession. According to Article 24 of the Real Estate Guidance Law, national assets are defined as public and private properties belonging to the state, the province, or the municipality. These properties cannot be seized, disposed of, or acquired by prescription, as defined in Article 689 of the Civil Code¹⁷. Article 25 of the Real Estate Guidance Law states that ‘public property consists of national assets, which cannot be owned by individuals due to their nature or designated purpose, while other national properties are classified as private’. Furthermore, the property in

¹⁵- Article 11 of the Executive Decree states: ‘The head of the provincial National Property Service shall, under penalty of personal responsibility, inform the mayor of the municipal council of the required legal status within two months of the notification date.’

¹⁶- Article 114 of Decree No. 76-63, dated 25 March 1976 and concerning the establishment of the property register, states: ‘Notwithstanding the provisions of Article 66 of this Decree, in the absence of a land survey plan, every contract or judicial decision subject to publication in the property register must specify the neighbouring owners of each rural property mentioned in the previous Article.’

¹⁷- Article 689 of Ordinance No. 75-58, dated 26 September 1975 and amending the Civil Code, as amended by Law No. 07-05, dated 13 May 2007.

question must not be vacant, as these properties are essentially designated for a perpetual charitable purpose¹⁸.

2. The property must not have previous ownership contracts

Executive Decree No. 91/245 introduced a new condition for possession, which differs from the norms previously established under Executive Decree No. 83/352, dated 1 May 1983. The latter allowed for proof of prescription and preparation of a declaration of ownership, recognising ownership even if the property had previous ownership contracts, whether informal or official. Article 2, paragraph 2 of this decree states that ‘...the matter concerns privately-owned lands for which no contracts have been issued...’ Therefore, privately owned lands for which contracts have been issued are not subject to this certificate. It seems that the legislator intended to prevent disputes arising from the declaration of ownership if a true owner were to emerge. The Supreme Court confirmed this approach in a ruling on 18 June 2006, stating that ‘a Certificate of Possession can only be issued if the possession conditions established in Article 823 of the Civil Code are met and there is no evidence of ownership for the property in question’¹⁹.

3. The property must be located in a municipality or an unsurveyed part of a municipality.

According to Article 2, paragraph 2 of Executive Decree No. 91/254, the land survey process is intended to provide each property with a specific card detailing all legal actions pertaining to it. This card serves as identification for the property. Consequently, each property must have a property register, meaning that no Certificate of Possession can be accepted for that property.

Secondly, specific conditions for possession:

it is evident from the text of Article 39 of the Real Estate Guidance Law that the possession required to obtain this certificate must meet the following conditions:

Article 39 references Article 823 of the Civil Code, which stipulates the necessity of both material and moral elements for possession.

Regarding the material element, this is manifested by the possessor’s physical actions on the property, such as planting, sowing, tilling and building²⁰. These actions should present the possessor as the true owner, so that anyone observing these activities would have no doubt that the possessor is the owner.

As for the moral element, it refers to the possessor’s intent to exercise this right. This means that the possessor’s actions should align with their intention to exercise the right they wish to claim²¹. Some views suggest that this element is fulfilled by the possessor intending to utilise the property for their own benefit, effectively using and managing it as a true owner would²².

Additionally, Article 39 specifies a set of conditions that are almost identical to those set out by the legislator in Article 808 of the Civil Code.

1. The possession must be continuous and uninterrupted

This means that the possessor’s tenure of the property must extend over a continuous period without any interruptions. To fulfil this condition, there must be regular and close physical control of the property, as a

¹⁸- Omar Hamdi Bacha, ‘Mechanisms for Purifying Private Real Property Ownership’, Houma Publishing House, Algeria, 2014, p. 70.

¹⁹- Supreme Court ruling dated 18 June 2006, No. 333926, cited in Nabil Saqr, *Judicial Precedents of the Supreme Court: Possession in Supreme Court Decisions*, Dar Al-Huda, Ain Mellila, 2013, p. 23.

²⁰- Madjid Khalafouni, *Real Estate in Algerian Law*, Al-Khaldouniya House, Algeria, 2012, p. 33.

²¹- Abdelrazak Ahmed Al-Sanhouri, ‘The Intermediate Book in Explaining the Civil Law: Grounds of Ownership’, Dar Al-Nahda Al-Arabia, Cairo, 1968, footnote 1, p. 784.

²²- Farida Mohamedi, ‘Possession and Acquisitive Prescription’, University Publications Office, Algeria, 1999, p. 16.

diligent owner would exercise. The possessor cannot neglect the use of the property for an extended period, as a vigilant owner would be careful not to exploit their property. Otherwise, the possession will be deemed non-continuous and will fail to meet the continuity requirement.

2. The possession must be peaceful

It is not sufficient for possession to be continuous; it must also be peaceful, meaning it should not involve coercion. Therefore, if the possessor obtained the property through force or threats and retains it in this manner, the possession is considered to be tainted by a lack of peace. It does not matter whether the coercion was exercised against the true owner or another possessor. There is no distinction as to whether the coercion was applied by the possessor themselves or by others²³.

3. The possession must be public, meaning it cannot be concealed. The possessor must conduct their possession in view of others, or at least in view of the true owner. If the possessor hides their actions from the owner or right holder, so that the owner is unaware that their ownership is being utilised by another, the possession will be deemed tainted by concealment. While concealment generally applies more to movable property, it is practically impossible to hide possession of immovable property. For example, it is impossible to hide farming activities, construction or planting on a plot of land²⁴.

4. The possession must be free from doubt

This means that the possession should not be clouded by ambiguity or uncertainty. Possession may be continuous, apparent and peaceful; however, it can still be tainted by ambiguity or doubt. Possession is considered defective due to ambiguity if the intent behind it can be interpreted in more than one way — for example, if the possessor is holding for themselves, for someone else, or for both at the same time. Dr Al-Sanhouri provides an example of ambiguous possession, describing a scenario in which one partner exercises possession over a jointly owned property. If another co-owner performs actions on the property that mirror those of the possessor and then claims possession, this will have no legal effect due to the ambiguity inherent in that possession²⁵.

Chapter Two: Effects of Issuing the Certificate of Possession and Related Disputes

Once the Certificate of Possession meets the legal requirements and adheres to all the procedures and arrangements set out in Executive Decree No. 91/254, which governs its preparation and issuance, it takes effect. These effects are significant, given both the duration required for issuance and the traditional possession outlined in the Civil Code.

The legislator has gone so far as to treat the holder of the possession document as an owner, granting them substantial powers. These include the right to sign a mortgage for the benefit of lending institutions and to carry out construction and demolition work. Additionally, the issuance of this certificate can give rise to disputes, some of which fall under the jurisdiction of ordinary courts and others under that of administrative courts, as will be clarified in the following sections.

Section One: The Effects of Issuing the Certificate of Possession

If the Certificate of Possession meets the aforementioned conditions, it will have certain effects concerning both the possessor and third parties. We will explore these effects in the following two subsections.

Subsection One: Effects of Issuing the Certificate for the Possessor

We noted that the Certificate of Possession confers on the possessor certain rights typically associated with ownership. This contrasts with the legal norms in place prior to the establishment of this certificate, as stipulated in Article 43 of the Real Estate Guidance Law. According to this article, the holder of the Certificate of Possession may engage in all legal actions permissible for an owner, except for what the

²³- Abdel Razak Ahmed Al-Sanhouri, 'The Reference', p. 852.

²⁴- Same reference, p. 849.

²⁵- Abdel Razak Ahmed Al-Sanhouri, 'The Reference', p. 858.

legislator refers to as 'free or compensated transfer'. Leila Zarouki interpreted 'free or compensated transfer' as meaning 'transfer without consideration or with consideration, including contracts that transfer ownership without consideration, such as gifts, wills or endowments, and contracts that transfer ownership for a price, whether that price is money or something else, such as sales or exchanges'²⁶. Thus, the actions that the owner may undertake can be categorised into two types based on this framework: physical actions and legal actions.

First: Physical actions

This term refers to all actions that may alter the physical state of the property, such as building structures, planting crops, digging wells, maintaining the property with fences, and any other physical work that demonstrates the owner's involvement. The possessor uses, benefits from and interacts with the property in the same way as a true owner would.

However, the most significant physical action that the possessor can undertake is construction on the property. The law permits the holder of the Certificate of Possession to obtain a building permit for the property in question, which contravenes the established legal principle that construction is tied to ownership. Article 50 of the Urban Planning Law²⁷ links the right to build with ownership and the legal frameworks for land use. This could lead to serious disputes between the possessor and the true owner, particularly if the true owner objects to the construction, providing evidence that it is not required or that it causes harm or interferes with their intended projects on the property.

The situation becomes even more complicated if the construction was financed by a loan obtained by the possessor using the property as collateral, in accordance with Article 44 of the aforementioned Real Estate Guidance Law. This raises the question of what will happen to the loan. The critical issue here is that Article 45 of the Real Estate Guidance Law stipulates that a claim regarding the property should not invalidate the mortgage or lead to a reconsideration of other arrangements made by the possessor. This leaves the true owner with a mortgage on their property for a residential building they may not need, which could hinder their own projects.

Second: Legal Actions

The most important legal actions that the possessor can take include mortgaging and leasing the property. Although the legislator explicitly mentioned the possibility of mortgaging the property, they did not address whether it can be leased, raising the question of its permissibility.

1. Mortgaging the property

The holder of the Certificate of Possession may use the property as collateral to secure medium and long-term loans from public credit institutions for agricultural seasons or construction projects on that piece of land, as set out in Article 44 of the Real Estate Guidance Law. However, this contradicts the established legal principle that only the owner can secure a mortgage, as stipulated in Article 884 of the Civil Code, which clearly states that 'the mortgagor can be the debtor themselves or another person providing collateral for the benefit of the debtor'²⁸.

In both cases, the mortgagor must legally own the mortgaged property and be able to dispose of it. The possessor's ability to mortgage the property can create significant problems between them and the true owner. It raises questions about the fate of the loan secured by the possessor on the property. The critical

²⁶- Leila Zarouki, *Real Estate Techniques*, 2nd edition, National Office for Educational Works, Algeria, 2001, p. 30.

²⁷- Article 50 of the Urban Planning and Development Law states: 'The right to build is linked to land ownership and must be exercised in strict accordance with the legal and regulatory provisions concerning land use.'

²⁸- Omar Hamdi Bacha and Leila Zarouki, *Real Estate Disputes*, 13th edition, Houma House, Algeria, 2011, p. 79.

issue here is that Article 45 of the Real Estate Guidance Law²⁹ states that a claim relating to the property should not invalidate the mortgage or result in a re-evaluation of other arrangements made by the possessor. This could leave the true owner in a precarious situation, potentially unable to recover their property when the loan matures and at risk of losing it.

We believe that the legislator has favoured the possessor excessively at the expense of the true owner, as this situation could result in the owner being bound to a mortgage on their property for a loan from which they did not benefit, especially if the possessor defaults on repayment.

It is unreasonable and unjust for someone to take possession of another's property and establish rights to it while shifting the consequences of these actions onto the true owner. The legislator's intention is clear: to alleviate concerns for the possessor and encourage investment without fear of repercussions if the true owner emerges.

2. Leasing the property

Although the legislator did not explicitly mention leasing the property, we believe there is nothing to prevent it, since leasing is a form of exploitation. The prohibition under Article 43, paragraph 2 applies only to transfers, whether for consideration or not. Leasing is not a transfer, however; it is an administrative action.

3. Acquisition of the Property Subject to Possession through General Survey

Article 47 of the Real Estate Guidance Law states that 'the legal status of the properties concerned by the Certificate of Possession established by this law will be clarified during the work of preparing the general land survey and the formation of the property register in the relevant municipality as per Ordinance No. 75/74 dated 12 November 1975'. This article enables the holder of the Certificate of Possession to benefit from temporary registration for a period of four months. If no objections are made during this time, they can obtain a property register from the property registrar.

As a result, possession, which was previously considered sufficient for acquiring ownership through prescription after 10 to 15 years under the provisions of the Civil Code, can now be reduced to one or two years with this newly established certificate under the Real Estate Guidance Law. This significantly undermines the rationale behind the long prescription period, which is aimed at ensuring transaction stability. A period of 10 to 15 years is generally sufficient for a true owner to take protective action against anyone encroaching on their property. In contrast, the substantially shorter period provided by the legislator in the Real Estate Guidance Law could lead to significant issues between holders of the Certificate of Possession and true owners³⁰.

Second: the effects of possession for heirs and other co-owners

Just as possession has implications for the possessor, it also has consequences for heirs. Article 42 of the Real Estate Guidance Law states: 'The Certificate of Possession is nominal and cannot be sold.' If the holder of the certificate dies, the heirs or other co-owners have up to one year from the date of death to request a new certificate in their names. This certificate includes the right to legally replace the holder(s) of the old Certificate of Possession. If this option is not exercised within the designated period, the aforementioned certificate will be cancelled.'

From this text, it is clear that the Certificate of Possession is not inheritable. If one of the holders dies, their heirs must apply for an individual Certificate of Possession within one year of the date of death; otherwise,

²⁹- Article 45 of the Real Estate Guidance Law states: 'No claim regarding the property shall result in the invalidation of the mortgage or a reassessment of other arrangements made by the lawful holder of the Certificate of Possession within the limits of their authority.'

³⁰- Leila Zarouki and Omar Hamdi Bacha, 'The Reference', p. 82.

the certificate will be cancelled, despite Article 814 stating that possession transfers to heirs with all its attributes³¹.

Section Two: Disputes Arising from the Issuance of the Certificate of Possession

As mentioned, the issuance of this certificate has serious consequences that benefit the possessor and are borne by the true owner if they arise. This can lead to disputes, some of which fall within the jurisdiction of ordinary courts and others within the jurisdiction of administrative courts. We will address this in the following subsections.

Subsection One: Disputes Falling Under the Jurisdiction of Ordinary Courts

Disputes presented in ordinary courts include those adjudicated by the property court and those handled by the criminal court.

First: Disputes Handled by the Property Court

According to Article 12 of Executive Decree No. 91/254, which outlines the procedures for preparing and issuing the Certificate of Possession, if there are objections regarding the status of the possessor(s) of the property within two months of the announcement or publication in national newspapers, the mayor of the municipal council must invite the relevant parties to litigate before the relevant judicial authority to resolve the dispute.

It can be envisaged here that the subject of the dispute will focus on possession and any challenges to it, whether due to the lack of one of its essential elements or conditions.

Furthermore, the Property Court also reviews lawsuits filed by possessors to acquire ownership through prescription, in accordance with the provisions of the Civil Code, provided that the required time period has elapsed since the survey in the relevant area³².

The Property Court is responsible for resolving disputes relating to registration. Properties held by their possessors under a Certificate of Possession are granted provisional registration for a period of four months from the registration date. Any interested party may contest the provisional registration within the specified legal timeframe.

If a third party raises an objection within the four-month period, the property registrar will invite the disputing parties to reach a settlement. If they are unsuccessful, a record of non-settlement will be prepared and communicated to the parties. The complaining party then has six months from the date of notification by the property registrar to file a lawsuit with the regionally competent property court. This court is authorised to hear disputes relating to provisional registration resulting from the initial entry after the survey. The lawsuit must also be published and notification sent to the property registrar within this timeframe in accordance with Article 15 of Executive Decree No. 76/63 on the establishment of the property register³³.

Second: Disputes Handled by the Criminal Court

Referring to Article 46 of the Real Estate Guidance Law, which states the following:

‘Anyone who deliberately provides false declarations or testimonies, or presents or alters false papers, documents or contracts to obtain or attempt to obtain a Certificate of Possession without justification, or uses or attempts to use a cancelled certificate, shall be punished with imprisonment of between one and five years and a fine ranging from 2,000 to 10,000 Algerian dinars.’

³¹- Omar Hamdi Basha, ‘The Reference’, p. 103.

³²- Same reference, p. 110.

³³- Decree No. 76-63, dated 25 March 1976, concerning the establishment of the property register (Official Gazette No. 30, dated 13 April 1976).

Furthermore, anyone who obstructs or prevents the issuance of a Certificate of Possession through fraudulent manoeuvring or arbitrary objection shall be punished by a fine ranging from 1,000 to 5,000 Algerian dinars.’

A complaint can be filed by the true owner, the mayor of the municipal council or the head of the national property service.

Furthermore, as the article does not require a complaint to initiate public litigation, the holder of a fraudulent certificate can be prosecuted by the public prosecutor ex officio if they become aware of it. Upon conviction, the latter loses all rights associated with the certificate.

Subsection Two: Disputes within the Jurisdiction of the Administrative Courts

As previously noted, a certificate that does not comply with the aforementioned conditions is considered invalid. In this case, the true owner has the right to contest it, particularly if they possess a written and registered deed, as there has been a violation of the law by either the mayor of the municipal council or the property registrar. Here, we identify two scenarios:

First Scenario: The Local Chamber

This chamber adjudicates disputes brought against the mayor for issuing this certificate to someone who is not entitled to it. In this case, the true owner has the right to claim compensation for damages resulting from this action, particularly with regard to the effects that this certificate has had on the possessor, for which the true owner is liable.

Second Scenario: The Regional Chamber

This chamber is responsible for hearing disputes filed against the property registrar. For example, this would apply in cases where the registrar publicised this certificate after registering it, despite knowing that the true owner possesses a registered deed. In this situation, Articles 23 and 24 of Ordinance No. 75/74, dated 12 November 1975, regarding the general survey and establishment of the property register, apply. If the property registrar is proven to be at fault, the state is obliged to provide compensation and retains the right to seek recourse against them³⁴.

Conclusion:

In conclusion, we note that the legislator has introduced a new system of possession through the Real Estate Guidance Law that did not exist prior to this legislation. This new type of possession far exceeds the rights previously conferred by possession, which were primarily aimed at protecting it in the event of infringement. These protections are termed ‘possession claims’, including the claim for recovery of possession, the claim to prevent interference and the claim to stop new constructions.

By contrast, the Certificate of Possession grants its holder many rights similar to ownership rights, including the right to carry out all physical actions on the property subject to possession, as well as certain legal actions such as mortgaging the property, building on it and leasing it out. Such powers are usually only permitted under ownership rights. Thus, we can conclude that the Certificate of Possession represents a new legal system combining certain ownership features with possession characteristics.

It seems that the legislator had two main objectives: firstly, to encourage citizens to settle in rural areas by enabling them to access these lands quickly and easily; and secondly, to alleviate the housing crisis Algeria has experienced since gaining independence, a real concern for officials throughout this time.

The topic could be further developed by addressing some of the ambiguities and clarifying certain details, as follows:

³⁴- Article 25 of Ordinance No. 75-74, dated 12 November 1975, regarding the general land survey and the establishment of the property register, states: ‘Decisions of the property registrar may be contested before the competent judicial authorities.’

- Encourage the use of the Certificate of Possession, particularly for land that has not been surveyed, and make it easier for holders to obtain bank loans for agricultural investment.

Despite the benefits conferred by the Certificate of Possession to private property rights, there are inconsistencies in Article 41 and subsequent articles of the Real Estate Guidance Law. Article 41 makes the certificate nominal and prohibits transferring it for one year, whereas Article 43 allows the certificate holder to act as a true owner. Additionally, Article 44 permits the holder to create a mortgage on the property covered by the certificate. How can the certificate holder mortgage the property when the law does not permit its sale?

Therefore, the legislator must resolve the contradictions surrounding the Certificate of Possession.

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