

## Limited capacity between the Algerian Civil Code and the Family Code, with contradiction?

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### Abstract:

The Algerian legislator has regulated the legal capacity issues in the Civil Code and referred some of its issues to the Family Code. This referral creates an explicit contradiction between what was stated in the Civil Code and what was stated in the Family Code regarding the legal capacity. This is what constitutes an obstacle faced by the judge who is always searching for which texts will adopt in judgments. This study came in order to highlight on the areas of contradiction and to find the possible solutions to overcome it in light of the current texts. After a deep analysis of the Civil Code' texts and the Family Code ones which have relation to the issues of legal capacity, the study concluded that it is impossible for the judge to overcome this obstacle. It was found that some legal texts must be amended to get rid of the contradiction that currently exists, with the need to include a text in the Civil Code that determines the reason for referral to the Family Code in issues of the legal capacity, taking in consideration the issue of the difference in the wisdom of legislation according to the type of transactions it regulates

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## Introduction

Knowing what a person enjoys in terms of rights and obligations depends on the availability of legal capacity <sup>(1)</sup>. We will discuss the capacity of the natural person to find out what is meant by the limited capacity because the moral person departs from the framework of our research because once its legal personality is established it has the capacity of obligatory duty and the capacity of full performance, but it can not conclude its transactions by itself, rather it has its legal representative who expresses its will. It is obvious that the moral person does not have a duty capacity like a fetus, and it does not suffer from the symptoms of capacity as a natural person, just as it does not go through the stages of non-discrimination and discrimination because it differs from the natural person who has his human nature.

The Algerian legislator regulated issues related to legal capacity in civil code and referred to the family law in some of these issues, but the legislator failed to put in place a right regulation of capacity, especially with regard to lack of capacity, as he decided in the civil law that the insane and the foolish are incapacitated, and he referred to the provisions of the Family Code to define the types of their acts, where he decided that the acts of the insane, the imbecile and the foolish are null. He widened the circle of incapacity in the Family Code when he included the foolish, and he had decided in the civil law that he has a limited capacity. This confusion results in legal problems concerning the type of the foolish acts, are they null, Do they result in legal effects or that they are voidable? Will we apply civil code to determine who are the persons who have limited capacity or must apply the family law?

In order to solve this problem, it is necessary to analyze the articles related to capacity in the Civil Code, as well as those contained in the Family Code, to determine the areas of contradiction in which the Algerian legislator has fallen, and accordingly we will address firstly the legal capacity while we address secondly symptoms of capacity.

### Firstly: The legal capacity of the natural person

Capacity in the language means competence, so it is said that so-and-so is qualified for what he is doing, and vice versa if he is not qualified for what he does, then it is used in the sense of competence. So capacity for something is validity <sup>(2)</sup>.

Competence in the field of law denotes the same meaning, as it is a power recognized by the law for a person, and it has two meanings. It may be just the power to acquire rights and assume obligations, and it is a capacity that is obligatory <sup>(3)</sup> and this may go beyond the ability to establish rights and obligations by undertaking various legal actions, and this is a capacity of performance <sup>(4)</sup>.

### 1. Duty capacity

We indicated above that the term capacity in the field of law deviates from what it denotes to the capacity of obligation, and it is going to be discussed in the following lines what is meant by it and its scope, then we will talk about its types.

## 1.1. What is meant by the capacity of obligation and its implications

### 1.1.1. What is meant by the capacity of obligation

Islamic jurisprudence defines the competence of obligation as the human's ability to oblige the legitimate their rights, and it is based on the human characteristic without regard to age or intellect, and the capacity for obligation in this sense is the person himself viewed from the legal point of view<sup>(5)</sup>.

The person is viewed by the law on the one hand that he is fit to establish rights for him and assume duties<sup>(6)</sup>, so every human being is a legal person who has the capacity for obligation, and this capacity is proven to him from the time of his birth and even before that sometimes when he is a fetus until the time of his death<sup>(7)</sup>.

It is enough to have the ability to acquire rights and assume obligations to say that legal personality exists<sup>(8)</sup> even if it is limited only to certain rights and obligations. Legal personality fluctuates between existence and non-existence. It can never happen that a legal personality exist and be incomplete. If it exists nothing affects its existence except the duty capacity<sup>(9)</sup>. If the duty capacity is not exists, no legal personality is exist, as in the case of a fetus who is stillborn, and in the case of the dead person after paying off his debts. The existence of the legal personality becomes available once the duty capacity is available, and we cannot imagine a person existing without duty capacity even if it is limited<sup>(10)</sup>. However, the existence of legal personality does not mean that he has the capacity of performance<sup>(11)</sup>.

### 1.1.2. The capacity criteria for obligation

The capacity of obligation is established for every natural person simply because he is a human being and as soon as he is born alive so that existence and non-existence revolve with life, so its mode is life, i.e. the birth of a person not dead<sup>(12)</sup>.

The capacity for obligation is established for everyone, regardless of discrimination, perception, or freedom of will, and therefore it is called negative capacity because it is not affected by disease, age, or the ability to discern.

## 1.2. Types of capacity

The criterion for the capacity for obligation is life. As soon as a person is born alive, full capacity for obligation is established for him, and this is the principle. However, the legislator and for certain considerations decided for the fetus while he is still in his mother's womb a kind of capacity for obligation, and limited it to certain rights and obligations. Below we will talk about the capacity for full obligation and incomplete or limited obligatory capacity.

### 1.2.1. The full capacity of obligation

The principle in the competence of obligation is perfection, meaning that once a person is born alive, the complete capacity for obligation is established for him<sup>(13)</sup>, so he is qualified to acquire all rights, whether those that do not need acceptance, such as a will, or those that need it, such as a gift and why<sup>(14)</sup>.

The competence of obligation is fully established for every person with his birth alive, and it continues until his death, and is not affected by his age or his mental state, so the person is qualified to bear the obligations whose source is not the will.

The person has the capacity to perform these acts or has been concluded by his guardian on behalf of him<sup>(15)</sup>.

Although the principle is that a person has full legal and obligatory competence as soon as he is born alive, this does not preclude the possibility of restricting it. The legislator intervenes and restricts the capacity of persons with regard to certain rights, such as political rights, and excludes non-citizens from enjoying it<sup>(16)</sup>. It also interferes and restricts the capacity of some people if it comes to acquire certain funds, so their capacity is limited<sup>(17)</sup>. For example, what was stipulated in Article 402 of the Civil Code when it prohibited judges, lawyers, seizure clerks, and notaries from purchasing disputed rights, if the dispute falls within the jurisdiction of the court in which they carry out their work. Their capacity for obligation is restricted to the behaviors specified in this text only. As for the rest of the legal behaviors, they have the complete capacity for obligation<sup>(18)</sup>.

### **1.2.2. The incomplete capacity of obligation**

The incomplete obligatory capacity is an exceptional compulsory capacity decided by the legislator for the fetus in his mother's womb, to protect and care for the interests that he will have after his birth<sup>(19)</sup>. This capacity is established for him from the time his life is confirmed in his mother's womb until the time he is born alive<sup>(20)</sup>. It is limited to his ability to acquire rights whose reason does not need to be accepted, such as the right to inheritance and the right to will<sup>(21)</sup>. It also proves the incomplete capacity of a person's obligation even after his death, until the time of the liquidation of his estate and the paying his debts<sup>(22)</sup>.

## **2. Performance capacity**

If the term capacity was used without specifying its type, what was meant behind it was the capacity to perform, and we will discuss in what follows what is meant by the capacity to perform and its areas, then we will talk about its types.

### **2.1. What is meant by capacity and scope of performance**

#### **2.1.1. What is meant by capacity for performance**

The capacity to perform is the ability of a person to express his will in an expression that produces its legal effects<sup>(23)</sup>. This requires the presence of a conscious will of the legal effects it tends to bring about, and this can only be achieved by perception<sup>(24)</sup>. A person may have the capacity for obligation without the capacity for performance, so he is enjoying the right without being able to use it himself, so the capacity for performance is the power that enables a person to use his right<sup>(25)</sup>.

#### **2.1.2 Performance capacity**

Discrimination is a mental perception, with its availability a person can estimate acts and know whether they are of benefit to him or vice versa, and perception is an ability that grows gradually with the growth of a person's body and mind then reaching the distinction between them and then the full realization when he completes his mental maturity<sup>(26)</sup>.

A person passes through three stages lack of discrimination, discrimination and full maturity, and the discerning person who has not yet reached adulthood is lacking

capacity, and whoever has reached the age of majority and is sane, has full legal capacity

A person may reach the age of discrimination, develop a disease in mind and become non-discriminatory and thus become a person without discernment so his legal capacity becomes limited. Legal capacity affects by discrimination so, a person has full legal capacity if his discernment is complete. When his discernment is limited his legal capacity must be limited<sup>(27)</sup>.

The scope of capacity for performance is determined by legal acts<sup>(28)</sup> The field of capacity for performance is the conclusion of legal actions, whether those actions that require two agreed wills or acts that are issued by a single will. All these actions are based on the human will, and the will is available only to the person with full discernment<sup>(29)</sup>.

## **2.2.Types of performance capacity**

We said that the criterion for competence to perform is discernment, and since discernment is not available to a person all at once, but rather it develops gradually until reaching full realization, then the competence to perform in a person, in turn, is graded according to his age and his ability to discern and comprehend<sup>(30)</sup>.

### **1.2.2.Ineligible performance**

This role starts from the day a person is born and continues up to the age of the Discrimination<sup>(31)</sup> the legislator defined it in article 42 of the Civil Code as the person reaching thirteen full years<sup>(32)</sup>, the incompetence of the undistinguished minor means that he is not fit to engage in any legal act, and the reason for that is the lack of awareness and discrimination he have<sup>33</sup> this is because the exercise of legal acts requires a will that is considered by the law, and the person without discrimination cannot perform any legal act, as long as he does not have the awareness necessary to express his will in an expression that produces its legal effects, and since the person without discrimination does not have the power to perform any legal act, all his acts are null and void never<sup>(34)</sup>, article 82 of the Family Law stipulates that: "Whoever has not reached the age of discrimination due to his young age, according to Article 42 of the Civil Code, all his acts are considered invalid."

### **2.2.2.Incomplete performance capacity**

When he reaches the age of majority, he becomes fully qualified to perform. At this stage, the person is not incompetent, but rather has deficient performance capacity in proportion to the amount of discernment that he has. He becomes fully competent only when he has full discernment<sup>(35)</sup>.

At this stage the discerning boy is not destitute to capacity and at the same time he does not have the full legal capacity, he has just a limited capacity to perform<sup>(36)</sup>. At this stage, the legislator stipulated in article 83 of the Family Code that: «discernment, without being a major within the meaning of article 43 of the Civil Code, are valid in cases where they are profitable to him, and void if they are prejudicial to him.

These acts are subject to the authorization of the legal guardian or testamentary guardian, where there is uncertainty between profit and damage.

In the event of a dispute, it is brought before the courts».

### **3.2.2. Full performance capacity**

This stage begins when the person reaches the age of majority, which is nineteen years, and it is assumed that he has complete discrimination<sup>(37)</sup>. If he reached this age enjoying his mental comprehensions he is fully competent according to what was stipulated in article 40 of the Civil Code, thus he is qualified to undertake whatever legal act, so that they are valid and produce their legal effects<sup>(38)</sup>.

When the person's capacity for performance is complete it remains so until his death provided that he remains enjoying his mental competencies, and nothing happens to his capacity that affects its perfection<sup>(39)</sup>.

#### **Secondly: Capacity Characteristics**

A distinction must be made between the symptoms of capacity and its impediments. The impediment is what prevents the conclusion of legal dispositions despite the person's complete capacity. It may prevent him from supervising his money and managing his affairs, such as backbiting physical<sup>(40)</sup> the human body may be affected so that it becomes unable to do its own thing, such as the senses, and this is the impediment natural<sup>(41)</sup>.

He may be deprived of his capacity by virtue of the law, and this is the legal impediment<sup>(42)</sup> the impediment prevents the completion of the person's capacity and the exercise of some legal acts as for the incident, it affects the person's capacity, so it is absent or decreased according to the degree of discrimination affected by him, so he becomes incapacitated to undertake all or some of the legal acts.

And since the criterion for the capacity of performance is discrimination, its effect directly affects it, so it becomes non-existent due to its lack, and it decreases if it falls short of the sufficient amount to complete it. There are symptoms that lead to incapacity and others that limit it.

#### **1. Symptoms that disqualify**

Article 42 of the Civil Code<sup>(43)</sup> states in its first paragraph that: "He shall be not eligible to exercise his civil rights if he lacks discernment due to his young age, heedlessness or insanity".

The symptoms that incapacitate in civil law are heedless and insanity.

#### **1.1. Insanity**

Insanity is a pathological condition or disorder of mental powers after completeness, it afflicts a person and makes him lose the ability to discern. The insane loses discernment, and therefore he is completely incompetent, just like a minor featured<sup>(44)</sup>.

It maybe that the person suffers all the time; this is what called the insanity, and he may suffer a period of time and wake up again, this is the intermittent insanity. In the both cases he is disqualified<sup>(45)</sup>. So If the person was insane before reaching the age of majority, the court must decide that the guardianship should continue<sup>(46)</sup>.

## 1.2. Heedless

Heedless is a defect that afflicts the mental powers and weakens them, so that the person becomes of little understanding, mixed speech, and bad management. like crazy<sup>(47)</sup> The lesson in heedless is the weakness of the mental powers, so heedless is not considered a weakness of structure or paralysis, nor is it considered a weakness of memory and a lack of experience in arithmetic. for example<sup>(48)</sup>.

The legislator did not care about the difference between the insane and the heedless, so he equalized in his judgment between them, and interdicted them by a court ruling in accordance with the procedures outlined by the law, and a ruling was lifted if its reasons were removed based on a request submitted by the interdicted person, but he distinguished between the acts of the insane and the heedless before the issuance of the interdiction ruling and those issued after it, so that the state of insanity and heedless is not considered unless it is signed confinement<sup>(49)</sup> The legislator stipulated this in Article 107 of the Family Law, states that: "The acts of the interdicted after the judgment are considered invalid, and before the judgment, if the reasons for the interdiction were apparent and widespread at the time of their issuance."

All the acts that the insane and the insane enter into after signing the interdiction are invalid. As for those that are issued by them before it, they are valid despite their lack of discrimination if the state of insanity and heedless was not common at the time of their conclusion. But if their condition was common or the other party was aware of it at the time, then it is invalid despite issued prior to signing confinement<sup>(50)</sup>.

The confinement is signed by virtue of a judgment judicial<sup>(51)</sup> Taking into account the procedures drawn up by the law, so that a relative, or whoever has an interest, or from the Public Prosecution, submits a request to sign the interdiction, and this is in accordance with the requirements of Article 102 of the Family Law.

Like any judicial request, it must be accompanied by evidence of the reasons for requesting his signature, and taking into account the provisions of Article 105 of the Family Law, the person who is required to be placed under interdiction must be able to present his defence. Expertise is to prove the reasons for interdiction. If the state of insanity or heedless is proven, he issues a judgment of interdiction, and this judgment is subject to appeal in all cases ways<sup>(52)</sup> If the interdict does not have a guardian or guardian<sup>(53)</sup> In the same provision, the judge shall appoint an advance caregiver his affairs<sup>(54)</sup>.

And the ruling of confinement must be the subject of publication in the media, pursuant to the provision of Article 106 of the Law family<sup>(55)</sup>.

## 2. Symptoms that lack capacity

The symptoms that afflict a person and affect his capacity without nullifying it are foolishness and negligence, and this is stipulated in Article 43 of the Civil Code, which states that: "Anyone who has reached the age of discernment but has not

reached the age of majority, and everyone who has reached the age of majority and is foolish or inattentive, is incapacitated according to what the law decides.

### **1.2.Foolishness**

Islamic Sharia jurists define foolishness as a condition that afflicts a person and pushes him to spend his money without planning fact<sup>(56)</sup>.

Foolishness does not disturb the mind, rather it touches planning, so the foolish is the opposite of the insane, because he is perfect in reason, but his planning is corrupt, so he is defeated with a whim<sup>(57)</sup>. Therefore, he is prevented from disposing of his money for fear of wasting it on what he does not have benefit him<sup>(58)</sup>.

### **2.2. Heedless**

The heedless is mentioned by the legislator in the article 43 of the Civil Code, but in the Family Code it was not mentioned<sup>(59)</sup>.

The heedless person is the person who does not know how to distinguish between the winner and the loser in behavior, so he is easily deceived because of his naivety<sup>(60)</sup>.

And all the acts of the foolish and the heedless are correct before the interdiction is imposed even if the state of foolishness or negligence is common or known by the other party, because the derogation of capacity can only be by interdiction, except that if it is a result of exploitation or collusion<sup>(61)</sup>, they take the judgment of the dispositions concluded after signing confinement<sup>(62)</sup>.

The legislator did not differentiate between the acts of the foolish and the heedless, as he considered both of them in the ruling of the discerning boy, so their acts after the confinement take the ruling of his acts<sup>(63)</sup> that is because foolishness and heedlessness are not among the symptoms that afflict the mind, and they do not lead to non-comprehension like madness and dementia, for this reason it is not possible to equate between them<sup>(64)</sup>.

However, in his judgment, he equalized between the acts of the insane, the imbecile and the foolish, when he stipulated in article 85 of the Family Code that: "The acts of the insane, the imbecile, and the foolish are considered invalid if they were committed in a state of insanity, imbecility, or foolishness."

It is noticeable that the legislator, by his conduct, has established a double ruling for the same issue, by declaring in the family law that the fool is incompetent, like the insane and the imbecile, while he decided in the civil law that he has incomplete capacity<sup>(65)</sup>.

### **Conclusion**

The study aimed to highlight on the contradictions between the legal texts that regulate legal capacity and to find solutions to overcome these contradictions within the current texts. However, the research and in-depth analysis of these texts results to an impossibility of overcoming the mentioned contradiction.

Several results were reached ; we can summarize them in:



- 1- We found that the Algerian legislator equalized in his judgment between the insane and the imbecile, and stipulated in the civil law that they have no will, so all their acts are null.
- 2- We have found that the person with lacking capacity in the civil law is the discerning boy, and those who are in the same category are the foolish and the heedless, in civil law and therefore his acts take the same ruling as the acts of a discerning boy.
- 3- In family law, the legislator equalized between the insane, the imbecile, and the foolish, and stipulated that they are all incompetent, meaning that he considered the foolish without will, and therefore all his acts are nul, whatever their kind.
- 4- - The legislator, then, included inconsistent texts related to the will, and thus it is difficult to define the circle of those who have lacking capacity, due to the contradiction between the family law and the civil law.
- 5- - If we want to overcome this difficulty and we applied what came in the civil law, which stipulates that those who are deficient in capacity are the discerning boy and those who are similar to him, who are foolish and heedless, then we face another problem, which is that the legislator stipulated that the acts that revolve between benefit and harm emanating from these people have a double rule, as in the civil law they are revocable acts, while in the family law he stipulates that this type of behavior depends on the permission issued by the guardian.
- 6- - Valid dispositions entail all their legal effects from the time of their conclusion until they are finally settled by the issuance of the permit or the decision to revoke it, and thus the disappearance of all the effects it produced. Refusal to leave those behaviors go away.
- 7- If we want to overcome this difficulty, then we say that when the legislative texts related to the same issue contradict, we apply the new text because it is equal to the old text, but this solution will lead us to a new problem, which is that even if the family law and the civil law are of equal degree, they are different. The family regulates personal status transactions, while the civil law regulates financial transactions.
- 8- The Algerian legislator, by including contradictory texts and referring the civil law to the family law, inserted a theory that governs personal status relations within a theory that governs financial transactions

After these results we suggest that:

The legislator add a new articl to the Civil Code that explicitly states that the referral to the Family Law pertains to matters relating to personal status not financial transactions.

The legislator must make an amendment to legal texts related to capacity in family Code and Civil Code in order to eliminate the existing contradiction.

### Footnotes:

<sup>1</sup> Isaac Ibrahim Mansour, *Theories of Law and Right and Their Applications in Algerian Laws*, University Publications Office, Algeria, 2001, p 227.

<sup>2</sup> *Oxford English Dictionary*, volume II, 7<sup>th</sup> edition, Clarendon press, p 432.

<sup>3</sup> Ali Filali, *Obligations, The General Theory of the Contract*, Mofem for Publishing, Algeria, 2012, p 203.

<sup>4</sup> Muhammad Sabri al-Saadi, *Al-Wadih in Explanation of Civil Law, The General Theory of Obligations, Sources of Obligation, Contract and Individual Will, A Comparative Study in Arab Laws*, Dar Al-Huda, Ain Mlila, Algeria, 2012, pp 152, 153.

<sup>5</sup> Boukerzaza Ahmed, op.cit, p 26.

<sup>6</sup> Monia Nanchnash, *Impact of Digital Technology on Assigning Will and Verifying Capacity in Electronic Contracts*, The Journal of Legal and Political Research, Vol 03, No 01, 2018, p 248.

<sup>7</sup> Abd al-Razzaq Ahmad al-Sanhouri, *The Mediator in Explanation of the Civil Law*, Part One, Volume One, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2011, p 266.

<sup>8</sup> Supreme Court, Civil Chamber, judgment dated: 10/10/1984, No. 35511, The Judicial Journal, 1989, Issue 1, p 53.

<sup>9</sup> Ali Filali, *Theory of Right*, Mofem for publication, Algiers, 2011, p 205.

<sup>10</sup> Ishaq Ibrahim Mansour, op.cit, p 228.

<sup>11</sup> Nabil Ibrahim Saad, *Introduction to Law, Theory of Right*, 1<sup>st</sup> edition, Al-Halabi Publications, Beirut, Lebanon, 2010, p 162.

<sup>12</sup> Abd al-Majid al-Hakim, Abd al-Baqi al-Bakri and Muhammad Taha al-Bashir, *Al-Wajeez in the Theory of Commitment in Iraqi Civil Law*, Ministry of Higher Education and Scientific Research, Iraq, 1980, p 63, Isaac Ibrahim Mansour, op.cit, p 217.

<sup>13</sup> Ghaleb Ali Al Daoudi, *Introduction to the Science of Law*, 7<sup>th</sup> edition, Wael Publishing House, Amman, Jordany, 2004, p 250.

<sup>14</sup> Muhamdi Farida Zawawi, *Introduction to Legal Sciences, Theory of Right*, University Publications Office, Ben Aknoun, Algeria, p 75.

<sup>15</sup> Isaac Ibrahim Mansour, op.cit, p 228.

<sup>16</sup> Ali Filali, *Theory of Right*, op.cit, p 204.

<sup>17</sup> Belhadj Al-Arabi, *The General Theory of Obligation in Algerian Civil Law*, Part One, *Contract and Individual Will*, 5<sup>th</sup> Edition, University Publications Office, Ben Aknoun, Algeria, 2007, p 100.

<sup>18</sup> Muhamdi Farida Zawawi, op.cit, pp 75, 75.

<sup>19</sup> Article 25 of the Civil Code in its second paragraph said that: "A person's personality begins with the completion of his birth alive and ends with his death, provided that the fetus enjoys the rights defined by the law, provided that it is born alive."

<sup>20</sup> Nabil Saqr, *Encyclopedia of Legal Thought, Family Law in Text Jurisprudence and Application*, Dar Al-Huda, Ain Melilla, Algeria, 2006, p 382.

<sup>21</sup> Ghaleb Ali Al Daoudi, op.cit, p 247.

<sup>22</sup> Abd al-Razzaq Ahmad al-Sanhouri, op.cit, p 266.

<sup>23</sup> Boukerzaza Ahmed, op.cit, p 26.

<sup>24</sup> Nabil Ibrahim Saad, op.cit, p 167,

<sup>25</sup> Abd al-Razzaq Ahmad al-Sanhouri, op.cit, p 268.

<sup>26</sup> Ali Filali, *Theory of Right*, op.cit, p 209, Muhammad Saeed Jaafour, *Financial Acts of Lack of Capacity in Algerian Civil Law and Islamic Jurisprudence*, Dar Houma, 2002, p 11.

<sup>27</sup> Nabil Ibrahim Saad, op.cit, p 175.

<sup>28</sup> Isaac Ibrahim Mansour, op.cit, p 228 et seq.

<sup>29</sup> Guerehad Hatem Hussein, *Exhibits of Civil Responsibility, A Comparative Analytical Study*, Al-Halabi Publications, Beirut, 1<sup>st</sup> Edition, 2014, p 130.

<sup>30</sup> Ali Filali, *Theory of Right*, op.cit, p 209.

<sup>31</sup> Ghaleb Ali Al Daoudi, op.cit, p 251.

<sup>32</sup> The age of discrimination in the Algerian Civil Code was set at sixteen years before Article 42 of it was amended by Law 05-10 of June 20, 2005.

<sup>33</sup> Abd al-Majid al-Hakim, Abd al-Baqi al-Bakri and Muhammad Taha al-Bashir, op.cit, p 66.

<sup>34</sup> Ghaleb Ali Al Daoudi, op.cit, p 252.

<sup>35</sup> Muhamdi Farida Zawawi, op.cit, p 77.

<sup>36</sup> Article 43 of the Civil Code states that: "Anyone who has reached the age of discernment but has not reached the age of majority, and everyone who has reached the age of majority and is foolish or inattentive, is incapacitated according to what the law determines."

<sup>37</sup> Supreme Court, Civil Chamber, judgment dated: 05/15/2001, No. 238252, Judicial Journal, 2002, p 284.

<sup>38</sup> Muhamdi Farida Zawawi, op.cit, p 78.

<sup>39</sup> Ghaleb Ali Al Daoudi, op.cit, p 253.

<sup>40</sup> It is the absence of a person so that he cannot conduct his legal acts in a way that disrupts his interests and harms him, and absence is not considered a material impediment that prevents the person from conducting legal acts himself, unless a period of one year or more has passed since his absence, and that this results in disrupting his interests so that it is impossible for him to take charge of his affairs by himself, in this case the court appoints an agent for him to conduct legal acts on his behalf, or proves the agent who was appointed by the absent if he fulfills the conditions that must be met by the guardian. article 31 of the Civil Code states that: "The provisions prescribed in family legislation apply to the missing and absent.". See Bouderbala Mouni, PhD Thesis, University of Constantine 1, 2017, p 29.

<sup>41</sup> A person may have two physical impairments stipulated in Article 80 of the Civil Code, which are deaf, dumb and blind, so that he is unable to properly express his will. In this case, the court may appoint a judicial assistant to assist him in the acts required by his interest. If a person has one of these disabilities, or other disabilities other than those specified in the law, judicial guardianship is not decided for him. See Bouderbala Mouni, op.cit, pp 28,29.

<sup>42</sup> The legal impediment is achieved for those who have been deprived of their capacity by court ruling or by law, such as those who have been sentenced to a criminal penalty

execution, life or temporary imprisonment from 5 to 20 years, so they are prevented from exercising their financial rights, i.e. they are prohibited by force of law in accordance with the provisions of Article 7 of the Penal Code, which stipulates that: "Legal interdiction is the deprivation of the convict during the execution of the original sentence against him from exercising his financial rights, and managing his money is in accordance with the conditions prescribed in the case of judicial interdiction. And legal confinement is a consequential punishment that is applied by the force of law and is a consequence of the original punishment, according to Article 4/3 of the Penal Code, which states that: "The punishment is consequential if it follows from the original punishment and the judgment is not issued by it, but rather it is applied by the force of the law. It applies during the period of the convict's imprisonment and ceases when the impediment is removed". Ibid

<sup>43</sup> Article 42 of the Civil Code

<sup>44</sup> Ali Filali, *Theory of Right*, op.cit, p. 219.

<sup>45</sup> Boukerzaza Ahmed, op.cit, p. 43.

<sup>46</sup> Muhamdi Farida Zawawi, op.cit, p. 79.

<sup>47</sup> Ghaleb Ali Al Daoudi, op.cit, pp. 253, 254, Nabil Ibrahim Saad, op.cit, p. 174.

<sup>48</sup> Abad Al-Majid Al-Hakim, Abdul-Baqi Al-Bakri and Muhammad Taha Al-Bashir, op.cit, p. 72.

<sup>49</sup> Ali Filali, *Theory of Right*, op.cit, pp. 220, 221.

<sup>50</sup> Muhamdi Farida Zawawi, op.cit, p. 80.

<sup>51</sup> Supreme Court, Civil Chamber, Decision dated: 05/21/1990, No. 59327, Judicial Magazine for the year 1993, Issue 1, p. 116.

<sup>52</sup> Article 106 of the Family Code.

<sup>53</sup> Whoever is incompetent or deficient due to his young age, insanity, imbecility or foolishness, he is legally represented by a guardian, custodian or provider, and the guardian of the minor is the father and after his death the mother takes his place legally, and the father or grandfather may appoint a guardian for the minor child, if he does not have a mother to take over. If there are multiple guardians, the judge may choose the most suitable of them. If the incapacitated or deficient person does not have a guardian or trustee, the court shall appoint a guardian for him at the request of a relative, or someone who has an interest in that, or the Public Prosecution. See Nabil Saqr, op.cit, pp 289,290.

<sup>54</sup> Article 104 of the Family Code.

<sup>55</sup> Ali Filali, *Theory of Right*, op.cit, p. 221.

<sup>56</sup> Nabil Saqr, op.cit, p. 286.

<sup>57</sup> Ali Filali, *Theory of Right*, op.cit, p. 224.

<sup>58</sup> Mohamed Saeed Jaafour and Fatima Isaad, *The Circumstance between Benefit and Harm in Algerian Civil Law*, Dar Houma, Ai Mlila, Algeria, 2009, pp 22,23.

<sup>59</sup> Ali Ali Suleiman, *The General Theory of Obligation, Sources of Obligation in Algerian Civil Law*, Algerian Publications Office, Ben Aknoun, Algeria, 2003, p 55.

<sup>60</sup> Nabil Ibrahim Saad, op.cit, p. 175.

<sup>61</sup> Muhamdi Farida Zawawi, op.cit, p. 81.

<sup>62</sup> Abd al-Razzaq Ahmad al-Sanhouri, op.cit, p. 282.

<sup>63</sup> Muhammad Sabri Al-Saadi, op.cit, p 157 - 158.

<sup>64</sup> Ibrahim Antar, *Foolishness in Islamic Jurisprudence and Law*, Tikrit University Journal of Legal and Political Sciences, vol 01, num 02, p 19.

<sup>65</sup> Article 43 of the Civil Code.