



# THE EFFECT OF ELIGIBILITY CONTRAINDICATIONS ON THE CIVIL CODE (A COMPARATIVE STUDY WITH ISLAMIC JURISPRUDENCE)

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Article history:	Abstract:
<p><b>Received:</b> September 3<sup>rd</sup> 2022 <b>Accepted:</b> October 3<sup>rd</sup> 2022 <b>Published:</b> November 6<sup>th</sup> 2022</p>	<p>For the validity of any legal action requires the availability of the will, which is the main driver of legal and legitimate actions, and therefore the legislator requires that whoever issues it should have a certain share of mental powers, and the person may be fully qualified, yet he has conditions that prevent him from undertaking the actions himself or alone For this reason, the law decides to appoint a person to undertake these actions or assist him in carrying out these actions, and the legislator's failure to organize such cases, as there is no special legal regulation of civil barriers. Eligibility, therefore, the Iraqi legislator must have made the impediments to eligibility within a special section called the impediments to eligibility to distinguish them from others.</p>

**Keywords:** Cinema, art, director, symbol, image, thinking, society, tradition, value

## INTRODUCTION

Human life begins when he/she is born alive and becomes a member of the society as soon as he is born and his/her legal personality is proved. This personality gives him multiple rights, including the proof of his descent from his parents, his right to obtain a name, the right to be a citizen of the country to which he belongs, etc. Human life in general is an equation consisting of rights and duties, as man has many and various rights, he in return also has to perform duties to confirm his belonging and existence, this way the image is complete. The issue of the individual's awareness of his/her duties rights from a legal point of view in particular, varies from one age stage to another, as well as involving other characteristics, such as culture, depth of knowledge and education, with regard to both heritage and acquisition. The issue of the individual's granted rights and required duties is legally called as eligibility, which means the ability of the human being to deal with his/her duties and rights in an organized manner. Eligibility is of two types, the first of which is the eligibility of obligation, i.e. the validity of the human being to enjoy rights and perform commitments, and this type of eligibility is approved for the human being since being a fetus, but it is incomplete until born alive. The second type is the eligibility of performance, which is the ability of a person to practice his rights and perform his commitments in a legally effective manner, whether within the framework of financial, personal or commercial relations. The eligibility of performance is approved for a person when he/she

reaches the age of maturity, which is, according to Iraqi law, is eighteen years old. Before this age, he/she cannot carry out legal acts alone, but carried out on his behalf by a person legally called as the guardian and in accordance with the circumstances established by law. The eligibility of the human being revolves with recognition, whether being existed or not. Whenever the recognition of the human being is complete, he is fully eligible, and whenever he is not recognized, he is not eligible. At that stage, he/she has obligation eligibility only, then incomplete performance eligibility, then full performance eligibility, on condition that there are no eligibility obstacles or barriers. A person may be fully eligible and yet he/she has circumstances that prevent him from initiating actions by himself or individually. Therefore, the law decides to assign a person who shall be responsible for him/her to carry out these acts or assist him in carrying them out. Thus, the problem of the research revolves around the lack of special legal regulation for eligibility obstacles. The Iraqi legislator addressed some of eligibility obstacles with various laws, such as the Iraqi Civil Code No. 40 of 1951, as amended, and the Law on the Care of Minors No. 78 of 1980. The Iraqi legislator also confused in some matters between the barriers of eligibility and the contraindications of eligibility, as the disease that led to death was considered as one of the barriers of eligibility and not its contraindications, while Islamic jurisprudence addressed some of these contraindications but under the name of civil barriers and not contraindications to eligibility. The Emirati and the Algerian legislators did



the same thing. Therefore, we divided this research into two chapters. The first chapter was devoted to the nature of eligibility contraindications, and the second chapter was to show the types of eligibility contraindications.

### **The Concept of Contraindications**

Legibility is a feature of integration for people as it represents stages for human integration in terms of body and mind. In the beginning of integration, a person prepares himself/herself to prove the rights for him/her, and then to prove the rights to him/her. They are like a shadow that grows and expands gradually like all his innate perceptions. The estimate for all this is up to the legislator to assign a degree according to the stages of human integration; at each stage, the legislator legitimates some provisions or consequences rather than others. Eligibility for jurists is a trait that the Sharia values in a person, which prepares him to be fit when the legislator addresses him/her<sup>(1)</sup>. Eligibility is created with the human being like all other instincts and innateness, and its estimate is up to the legislator according to his/her normal or abnormal growth (anomalous), all of which has its provisions according to the law. In this chapter, we will address the nature of contraindications to eligibility in the first section, while the second section was devoted to distinguish the contraindications of eligibility from what might be confused with as follows:

### **Section One**

#### **The nature of eligibility contraindications**

The validity of any legal act requires the availability of the will, which is the main driver of legal and legitimate acts, and the contraindications of eligibility are considered as a restriction against the will. We will address in this section the definition of the eligibility contraindications in the first sub-section, while the second sub-section is to reveal the conditions for the application of the eligibility contraindications as follows:

#### **Sub-section One**

##### **The Definition of Eligibility Contraindications**

The jurists of Islamic Sharia did not know the eligibility contraindications, but they dealt with it in the concept of the eligibility barriers. It seems that the jurists addressed what prevents eligibility from acting while remaining complete under the name of (eligibility contraindications) which are (circumstances that prevent a person from carrying out his legal actions although, he/she is fully eligible, because he/she is an adult and sane. The law then specifies who initiates or assists in the formation of acts for him/her.<sup>(2)</sup> These circumstances do not affect the eligibility of the person, as he/she is fully eligible despite their existence, but rather prevent him/her from initiating

legal acts or make it impossible for him/her to carry them out by him/herself.

Some defined them as (circumstances that prevent a person from his eligibility and make him/her unable to enjoy it although it is complete and undiminished. Thus, they do not deny its existence and perfection, but only prevent its usage completely or partially.)<sup>(3)</sup>

Some writers also defined them as (material or legal circumstances, which affect the person's eligibility and limit the validity of the use of rights in completely or partially without compromising their perfection and integrity.)<sup>(4)</sup>

However, it is noted that this definition was limited to material and legal circumstances rather than natural circumstances. It also referred to the guardian of the person and it is known that the word person refers to the natural and legal person.

The eligibility contraindications in the law are three: a physical contraindication, which is absenteeism, a legal contraindication which is sentencing due to a felony, and a natural contraindication which is a double impairment.<sup>(5)</sup>

1. Absenteeism: An absentee is a person who left the country or has not been known to have a place in it for a period of more than one year although his/her news can be heard and never been cut off and the consequence of which is the disruption of his/her or other's interests. According to article 85 of the Law on the Minors Care Code (an absentee is a person who left Iraq or his place of residence was not known in it for a period of more than one year, although his/her news can be heard and never been cut off and the consequence of which is the disruption of his/her or other's interests.)

The absence ends with the end of its cause, or the death of the missing person or by court's decision to be dead in case there is conclusive evidence of his/her death. He/she is considered dead if four years have passed since the declaration of his loss or if he/she is lost in circumstances in which his/her death is more probable and two years have passed since the declaration of his loss. Anyway, the court should investigate for the missing person in all possible ways to know whether he/she is alive or dead.)

2. Sentence of felony: The sentence of life or temporary imprisonment by law followed by depriving the sentenced person of the management or spending his money starting from the day of its issuance to the date of the end of the sentence execution or its expiry for any other reason without the recommendation and suspension of the court permission.
3. Double impairment or natural disability to express will: In fact, such a person is fully



qualified and recognized, and therefore in order to apply this provision, two of the three impairments must be combined, to be deaf, dumb and blind. The person must also be unable because of that to express his/her will. In order to protect such a person, the Iraqi legislator assigned a guardian for him/her, and the matter for the court in this is permissible and it may determine the actions of the guardian in matters and actions in which it deems necessary for the guardian to intervene. This is what the Iraqi legislator pointed to, in article 104, (if a person is deaf and dumb or blind and deaf and because of that he/she is unable to express his/her will, the court is permitted to assign a guardian for him/her and determine the actions of that guardian).<sup>(8)</sup>

It is noteworthy that the Iraqi legislator, when dealing with the provisions on eligibility, only referred to the manifestations of the impact of the reasons that affect eligibility, without classifying these reasons under the concept of (contraindications to eligibility). Some addressed this issue in Minors' Care Code and others in the Civil Code. Unlike the Emirati legislator, in the Personal Status Law, they dedicated a special section to the obstacles of eligibility<sup>(9)</sup>, which means that the legislator followed the approach of Muslim jurists in terms of dealing with all the reasons that occur to the eligibility of the person under the name of (obstacles of eligibility).

### **Sub-section Two Conditions of Eligibility Contraindications**

Eligibility contraindications are subject to a set of conditions, which are as follows:

1. Contraindications to eligibility should be extraordinary: in the sense that they are exceptional things. Some people are exposed to them but others are not, and they are not ordinary matters that all people share. Otherwise, they do not have the status of a contraindication, if they are one of their supplies.<sup>(10)</sup> Therefore, ineligibility due to young age, and lack of recognition due to sleep, do not fall within the concept of contraindication, since sleep, death and smallness are normal things that every human being goes through.
2. They are adhesive matters to human being affecting initiating his/her actions. As eligibility is connected closely to human trait, so are the contraindications, they are also adjacent to the human being. Consequently, guardianship is approved over those who are affected by one

of eligibility contraindications due to their inability to carry out their actions, similar to what happen to them when they affected by one of the eligibility obstacles.

3. They are matters that do not affect recognition and reason or adulthood, but rather restrict the actions of a person. Since eligibility is the responsibility of recognition, reason and adulthood for most jurists, it is a must that the contraindication affects these things through one of the reasons of contraindications of eligibility that, if realized, prevents the person from initiating his actions without being due to a mental reason.<sup>(11)</sup>

### **Section Two Distinguishing Eligibility Contraindications from what are confused with**

Eligibility contraindications in some of law's provisions are similar to the eligibility obstacles in terms of affecting the person's will to perform actions. They are also similar to the defects of consent, which are considered temporary matters that occur to the person in connection with a certain behavior that makes his satisfaction defective, so we will explain this in two sub-sections as follows:

#### **Sub-section One Distinguishing eligibility contraindications from satisfaction defects**

Since we defined the obstacles to eligibility as material or legal circumstances that happen to a person's eligibility and limit the validity of the use of rights completely or partially without compromising their perfection and safety. They affect the person's ability to produce the effects of his actions. Due to the absence of this ability in the person, he is put under guardianship and his guardian carries out his actions on his behalf as in the case of double impairment and the sentence of punishment.

As for the satisfaction defects, they are temporary things that occur to the person in connection with a certain behavior that makes his consent defective. The behavior does not produce its effect because of the lack of satisfaction necessary for the validity of the behavior, as in coercion and injustice with deceit, mistake and exploitation. These things, although they affect the behavior, but they do not affect the origin of the person's validity to conduct this behavior because they do not affect reason and adulthood, so a young man whose behavior has a defect affecting his satisfaction will not be put under guardianship.



## Sub-section Two

### Differentiating eligibility contraindications from eligibility obstacles

Eligibility obstacles are cases in which a person's ability to recognize, integrity of his/her will and his/her eligibility perfection are all affected. The eligibility obstacles are four: madness: it is a scourge that affects the mind and goes with it completely leading to perception and recognition loss. This is proven by a report from the people of experience, who are doctors in this case. Through his/her behavior, the mad person loses his/her awareness and recognition, so his/her will is absent, he/she is considered ineligible, and all his actions are invalid. As for dementia: it is a mental defect which is less than madness that affects a person and goes with his/her perception and loses recognition. The moron differs from the mad in his/her calm and non-violent appearance, and the judgment of his actions is the same as the judgment of the actions of the mad man. As for ribaldry, it is a defect that affects the financial behavior of a person and makes him/her waste his money contrary to what is required by Sharia and reason. The judge is the one who appreciates whether the person is a ribald or not in the light of his financial behavior, social status and financial position. Through his/her behavior, the ribald does not lose recognition but merely detracts from it, and this can only be achieved by a decision by the judge to quarantine the ribald. Inattention is a defect in the person's estimation ability, which makes him subject to extreme oppression due to his/her behavior. It is the judge who decides whether or not a person has inattention or not by reviewing his or her actions that are challenged by the stakeholders and who ask the judge to quarantine him, and his actions are judged as same as that of the ribald.<sup>(12)</sup>

From these, it is clear that the eligibility contraindications and obstacles are similar as they both affect and limit eligibility. The court assign a guardian for both of them who manages the person's money and conducts actions on his/her behalf within the framework of the actions specified for him/her. Nevertheless, eligibility contraindications differ from eligibility obstacles, as the latter may affect the human being's mind and reduce or omit it. Eligibility contraindications on the other hand, do not affect the person's mind, as they are cases of prevention between the person and his/her eligibility so that he/she is not able to enjoy it despite its existence in full and undiminished.

### Kinds of Eligibility Contraindications

Islamic jurisprudence did not address eligibility contraindications but only referred to the disease of death as one of the contraindications to responsibility. Instead, it regulated this subject within the obstacles

of eligibility and this is what some Arab laws adopt. The Iraqi legislator referred to them in different laws but not under the name of eligibility contraindications, so in this section, we will address material and legal contraindications to eligibility in the first section, while the second section, we dealt with the emergency eligibility contraindications as the following:

## Section One

### Material and Legal contraindications to eligibility

In this section, we will address material and legal contraindications to eligibility as the following:

## Sub-section One

### Material Contraindications to Eligibility

Material contraindications to eligibility are represented as the missing or the absent: jurists did not agree on a specific definition of the missing, but each sect of them went to a definition different from what others went to. Hanafiya defined the missing as (the absentee whose life or death is not known)<sup>(13)</sup>. Another definition is "the absentee whose place, life and death are not known."<sup>(14)</sup> Al-Sarkhasi defined the missing person as, "The name of an existing person who is basically alive, but with no trace like the dead with consider to his/her money and his/her family are in search to find him/her, as his/her news cut off and his trace hid. With seriousness they may reach hi/her but the meeting may delay until the day of judgement."<sup>(15)</sup>

We note from Al Hanafiya's previous definitions that some of them put ignoring his/her place as a condition while others did not require this condition. So, the idea revolves around the ignorance of his life and death and not his/her place. They made the one captured by the enemy and it was not known whether he/she is alive or dead even though his place is known as the war field, they considered him/her missing.

As for Al Malikiya, they defined the missing person as (the one whose news cut off and can be revealed, but not the prisoner of war as his news did not cut off, and brought out the prisoner who cannot be detected).<sup>(16)</sup>

As for Shafi'ia and Hanbala, they adopted the linguistic definition for the missing. Shafi'ia said in their main book that the missing person is (the one who was heard from.)<sup>(17)</sup> The Shafi'ia jurists said that "it is the one who was not heard from and his/her condition was not known whether in travel or present, in a fight or when his ship wrecked and so on, and in this sense, it is the prisoner of war who was never heard from."<sup>(18)</sup>





Hanabilas adopt the same meaning when defining the missing. They said that (loss means if you ask for something and you don't find it, and what is meant here: whoever knows no life or death because there is no news from him/her). They also said that (he is the one whose news hid because of being a captive or a traveler.)<sup>(19)</sup> As for the Imamiya, they tend to consider the person missing when there is ignorance of his death and life. Thus, the missing person is defined as (the one who is absent and it is not known whether he is alive or dead.)<sup>(20)</sup>

As for the missing person, Al Hanafiya defined him/her as (everyone who departed the judgement council).<sup>(21)</sup> Al Malikiya defined it as (The absentee who is absent from his wife and it is known where he is.)<sup>(22)</sup> Al Shafi'ia defined the absentee as (the one whose news is available, known to be alive or his wife knows his place.)<sup>(23)</sup> Al Hanabila defined the absentee as (the one whose news is known, and his letters keep coming.)<sup>(24)</sup> Contemporary Imamiya jurists defined the absent as (the one who does not exist in the country, and cannot be brought in haste to do what the expected rights from him by law and custom of )<sup>(25)</sup>.

Law jurists defined the missing person (a person whose circumstances prevent him from returning to his place of residence and managing his affairs by himself or through an agent for a period of one year or more and his/her absence has caused harm to others).<sup>(26)</sup> It is noted that this definition is not exhaustive because it is limited to a person who is absent by force, while the person who is absent voluntarily is not called an absent. The Emirati Personal Status Law also defined it in article 233 as (a person whose home country or place of residence are not known.). The Iraqi legislator defined the absence in accordance with article 85 of the Minors' Code as (an absentee is a person who left Iraq or his/her place of residence is not known for a period of more than one year while his news is still known and as a result of that his/her or other's interests were disrupted)<sup>(27)</sup>.

It is clear from this text that the Iraqi legislator stipulated that, in order to be considered absent, a person must leave Iraq or not have a place of residence in Iraq for a period exceeding one year. And this case was objected to because the person may be present in Iraq and his place is known, although he is absent in language and custom. A husband who resides in a country other than his wife's home country in one of the cities, villages or neighborhoods is considered an absent, even if he is inside the country and the place of his residence is known.<sup>(28)</sup>

All of the above shows that the missing person is a kind of absentee, and he is absent and his news has been cut off, even if he is in a near absence or inside the country and his news cut off, this is the missing.

The absence is more general and comprehensive than the missing.

### Sub-section Two Legal Contraindication

The penalty can be defined in Islamic Sharia as a punishment decided by the legislator against anyone who violates the provisions of Islamic Sharia, or helps another to violate those provisions. The nature of that penalty varies according to the severity and lightness of the crime. It should be noted that Islamic Sharia has maintained the balance on which punishment must be based by preserving the ratio between offence and punishment. This is what manmade laws have not paid attention to. Islamic Sharia takes into account that punishment is decided in order to preserve social balance, which manmade laws have not considered, but considered it as one of the aspects for which punishment was decided.<sup>(29)</sup> A felony sentence entails the convicted person's ineligibility to litigate before the courts neither as a plaintiff nor a defendant. The civil court of his place of residence is committed in its counseling room to assign the guardian at the request of the prosecutor or whoever has an interest in the adversarial of the sentenced person or his/her personal dispute in the case during an executive period of the sentence without his/her guardian. It leads to the invalidity of the litigation proceedings and the absence of any effect.

As for the position of Islamic Sharia, it did not address this situation to the best of our knowledge, but it dealt with the accountability of the detainee. Ibn al-Qayyim defines imprisonment by saying: "It is not confinement in a place, but it is the obstruction of the person, and preventing him from acting by himself, whether he is in a house, or a mosque, or it is by the power of attorney of the opponent, or his agent over him, and his attachment to him". That what Ibn al-Qayyim referred to, and applies to what is known nowadays as house arrest, and the following are the most prominent notes about this definition:

1. This definition was based on what is known in the time of the Prophet (peace and blessings of Allaah be upon him) and the reign of his first caliph, Abu Bakr al-Siddiq – as neither the Prophet (peace and blessings of Allaah be upon him) nor his successor had a building prepared for to be a confinement. Instead, they locked up people in the mosque or in the house and whatever available for them, and according to the situation in their time. Ibn al-Qayyim says: "Thus, imprisonment was in the time of the Prophet (peace and blessings of Allaah be upon him) and Abu Bakr and they did not have a prison intended for the imprisonment of opponents. When there were



many people and many accidents in the time of Umar, he bought a house in Mecca.<sup>(30)</sup>

Imprisonment was also defined as "obstruction to a person who was accused to do a prohibited act on the basis of considerable evidence, and preventing him from acting on his own for a certain period of time by whoever has the authority to do that."

This definition was criticized as it determined the reason for imprisonment as the prohibition, removing from the definition imprisonment resulting from the utterance of prohibited words, which are verbal offences involving, defamation, slander, and insulting the divine, prophets or religions in general. The expression Muharram is also better to be used than forbidden, as the definition deals with imprisonment in Islam, so the terms used in it must be Islamic and Sharia terms. There is no doubt that the Sharia judgement that is appropriate to the prohibition is Tahrim. This definition is also criticized for using a term that belongs to a certain period of time. This restriction produces life imprisonment and indefinite confinement, such as detention until the completion of the investigation procedures. Here, the question arises when is the punishment considered to be an contraindication to legal eligibility, is it from the date of issuance of the sentence or from the date on which the person is imprisoned? If articles 24 and 25 of the Penal Code are punishable by virtue of the Penal Code, any sentence for a felony sentence inevitably followed, by force of law, the convicted person's ineligibility to litigate before the courts, neither as a plaintiff nor as a defendant. Thus, even if the convicted person does not surrender himself, he loses his eligibility and cannot manage his money other than the guardian and endowment money because he is considered ineligible in relation to the mentioned acts. In such case, the court assign a guardian to manage his/her money.<sup>(31)</sup>

Based on the foregoing, the researcher can formulate a definition of imprisonment as follows: "Imprisonment is the detention of a person, preventing him from acting, and restricting his freedom for committing illegal things, whoever has the authority to do so."

## Section Two Emergency Eligibility Contraindications

The emergency contraindications to eligibility are represented in double impairment and the other contraindication is the disease that leads to death, and we will address this in two sub-sections as follows:

### Sub-section Three Double Impairment

This is a natural contraindication that results from its existence that the person cannot initiate legal acts by himself or may be able to carry them out by himself, but he/she fears that he/she does them on his/her own. So, he/she assigns a judicial assistant to assist him in relation to the actions that are decided to help him/her.<sup>(32)</sup> We did not find a jurisprudential judgment as far as we know that the jurisprudence clarified the double impairment within the contraindications to eligibility or the obstacles to eligibility. Hanafiya defined the natural impairment as "the deaf who was born so and is mute, he/she does not hear at all and does not speak"<sup>(33)</sup>. Qurtubi, of Malikiya jurists, defined it as "the mute who does not speak and does not understand " based on the Almighty Allah's words (Deaf, dumb and blind; and they return not)<sup>(34)</sup>. Al Baghawi, from Al Shafiyya, defined the natural impairment and said that Dumb means mute to truth that they do not say, or that they have hidden up contrary to what they have shown as if they have not spoken the truth.<sup>(35)</sup> Some Jurists said that the testimony of the dumb and mute (double impairment) was permitted. Both Malikiyah<sup>(36)</sup> Shafiyya<sup>(37)</sup> in addition to Dhahiriya did not require from witnesses anything but being fair. Therefore, it is permitted for them to the dumb and mute to testify, and they justified this depending on the Sunnah of the Prophet. Aishas said that the Prophet prayed in his house and while he was he was doubtful, he prayed sitting and saw the people behind him standing, so he pointed out to them to sit down)<sup>(38)</sup>. The evidence here is that the sign if understood is equivalent to the phrase. The sign of the Prophet (peace and blessings of Allaah be upon him) did the job of his phrase. This could apply to the dumb and deaf (double impairment).<sup>(39)</sup> Thus, the testimony of the deaf dumb is correct according to the saying of the Almighty (and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose).<sup>(40)</sup> The deaf dumb (double impairment) falls within Almighty's saying (and get two witnesses), as long as he/she is able to express the will.<sup>(41)</sup>

For Al Imamiya shares the same judgement as well. Ali bin Ibrahim from his father, from Yahya bin Abi Imran, from Yunus from Isaac bin Ammar, said: I asked one of them, 129, about the punishment of the dumb, the deaf and the blind, and he said they all could be punished if they know about what they were doing.<sup>(42)</sup> From all above of Muslim jurists' positions regarding



double impairment, it is clear to us that Islamic jurisprudence dealt with dual impairment as fully eligible and committed to rules, and the existence of double impairment does not detract from their eligibility.

As for the position of the laws, the Jordanian legislator went on to refer to the Civil Code and amendments No. (43) of 1976 to refer to this in article 132 (If the person is deaf and dumb, blind deaf or blind and dumb and is unable to express his will because of this, the court may appoint a guardian to assist him in the actions in which his interest so requires). In this direction, the Iraqi legislator has introduced the Civil Code in article 104 (If a person is deaf or deaf or blind and is unable to express his will because of this, the court may appoint a guardian on him and determine the actions of this guardian).

As for the position of the laws, the Jordanian legislator tends to refer to the Civil Code and amendments No. (43) of 1976 to refer to this in article 132 (If the person is deaf and dumb, blind deaf or blind and dumb and is unable to express his will because of this, the court may appoint a guardian to assist him in the actions as his interest requires that). In this direction, the Iraqi legislator has introduced the Civil Code in article 104 (If a person is deaf dumb or blind deaf or blind dumb and is unable to express his will because of this, the court is permitted to assign a guardian for him/her and determine the actions of this guardian)<sup>(42)</sup>. In this text, in case two impairments combine together in the human being, it is considered a natural contraindication that prevents the human being from expressing his will, so in order to protect him and preserve the principle of stability of transactions. The court then appoints a guardian for him/her in order to protect him/her and provide stability to transactions. Under article 307 of the Iraqi Code of Procedure, the Iraqi legislator mentioned these two of the impairments mentioned in the Iraqi Civil Code in the text (01) - The judge may impose quarantine when the reasons are available without adversarial to anyone. The opponent in removing the quarantine is the guardian.

2- The judge shall summon the person to hear his statements and defenses regarding his quarantine.

3- Madness, dementia and inability to express the will due to deafness, dumbness or senile dementia are approved by the report of an official medical committee). Undoubtedly, there is a big difference between the contraindications of eligibility and the dementia of old age. The natural contraindication relates to the ability of the person to express his will properly, while the dementia of old age is related to the mental ability of the person. That is why the Iraqi legislator should make the dementia of aging among

the obstacles to eligibility because it relates to the mental ability of the person.<sup>(44)</sup>

#### Sub-section Four The Disease of Death

The linguistic definition of the disease: it is stated in Al Musbah Al Muneer: the disease is out of fatigue, and the disease is a harmful unnatural condition. Ibn Faris said that everything that takes the human being out of the limit of health like an illness, expenditure or negligence in a matter.<sup>(45)</sup> Death is linguistically defined and has many meanings among which are:

Stillness, it is said that fire died twice, i.e. its ashes get cold, there is nothing left of the embers. It is said that the wind died, i.e. it stopped, and it is said that water died in this place, i.e., the land dried up.<sup>(46)</sup> Death is against life.<sup>(47)</sup> As for the position of the Sharia about the definition of disease of death, Al Ahnaf defined it as the one in which the fear of death prevails. The patient is unable to see his/her interests outside his home if he is male, and to see her interests inside her home if she is a female and dies as such before one year of time, whether he is the bed owner or not. This is unless his illness intensifies and his condition changes, as it is considered the beginning of the year from the date of the intensification.<sup>(48)</sup> It is also known as the disease from which death is often feared.<sup>(49)</sup>

As for Malikiyya, the result of what is mentioned in the books of Malikiyya in the disease of death is that (what the people of medicine and experience have judged to be a fearful disease – whether death abounds in it or not)<sup>(50)</sup>

The Shafi'ia school defined the disease of death as (every disease that mostly leads to death)<sup>(51)</sup>.

Hanbala stipulated two conditions for the disease in order to be considered a death disease:

1. Death should be related to disease, and whatever he/she gave in his/her illness and then died afterwards, then the judgment of his/her gift is the right because it is not a disease of death.
2. The disease is fearful, and the fearful disease does not rush the illness of its owner with certainty but is afraid of.<sup>(52)</sup>

As for the jurists of Imamiyya, they defined the disease of death as "the disease that ends with death, whether it is usually feared of or not."<sup>(53)</sup>

The majority of jurists considered the disease of death to be one of the eligibility obstacles on the basis that it changes some provisions related to full eligibility, preventing it from being proven. They did not consider it a real obstacle because it does not affect eligibility in both its types due to the proof of reason. Sharia jurists have restricted the actions of the patient with the disease of death with special provisions on the grounds that in the case of illness the rights of



creditors and his heirs relate to him. The rule is to prevent the patient from any conduct that leads to harm to creditors or heirs, unless the behavior is for his/her own need or is connected with it, at that time he leaves the circle of contraindication such as the necessary expense on himself/herself, and on the person to whom his expenses go to.<sup>(54)</sup>

It is clear from the position of the jurists that the disease of death is not an obstacle to eligibility as long as it does not affect reason or adulthood. The patient's behavior is considered correct and effective even if he spends all his money if he does not have heirs and creditors. If preventing him/her is due to a defect in his eligibility, his conduct would not have been authorized, whether he had heirs and creditors or not. As for the position of legislations, the Iraqi legislator did not define the disease of death explicitly, but referred to it in some articles such as article 35 of the Personal Status Law and article 52 of the same law and referred to the disease of death in the Iraqi Civil Code, article (1109)<sup>(55)</sup> and did not make it one of the contraindications to responsibility. Emirati Personal Status Law defined the disease of death as (a disease in which a person is unable to track his normal business and in which death prevails and dies as such before one year of time. If his illness extends to one year or more in the same status without increasing, his actions are considered as the right ones.)<sup>(56)</sup> The Emirati legislator considered the disease of death to be one of the obstacles to eligibility and not its contraindications. We go on to consider the disease of death as one of the contraindications to responsibility and not its obstacles because it does not consider it a real obstacle because it does not affect eligibility in its both types due to the proven reason of the patient of the disease of death.

#### Epilogue

This legal and jurisprudential study actually aimed to reach an idea which as clear and accurate as possible, on the subject of finding the Sharia roots of eligibility contraindications. Throughout the research, we have seen how important this topic is, as we can focus in this conclusion on the most important findings and recommendations, which can be summarized as follows:

#### First: Conclusions

1. The Iraqi legislator did not define the eligibility contraindications independently, but referred to them by various references that were not under a special section called the eligibility contraindications.
2. The Iraqi legislator pointed out that the disease of death is considered an obstacle not a contraindication to eligibility.

3. Islamic jurisprudence did not define the term obstacles to eligibility, but referred to some types of contraindications to eligibility under the name of eligibility obstacles.
4. Eligibility contraindications are circumstances that affect the eligibility of the person and limit his/her validity to use the rights in completely or partially.
5. Eligibility contraindications require a set of conditions, including that the contraindications of eligibility are extraordinary, as well as they should be close to the personality of the human being, do not affect his mind and thinking.
6. The contraindications of eligibility are distinguished from the defects of satisfaction, as that the latter are temporary matters that occur to the person in connection with a certain behavior that makes his satisfaction defective. The contraindications of eligibility differ from the obstacles of eligibility as the latter may infect the human being in his mind reducing or ending his/her will.
7. Eligibility contraindications are divided into legal, material and emergency contraindications and each of these types of contraindications is characterized by certain qualities and features.

#### SECOND: SUGGESTIONS

- 1- To urge the Iraqi legislator to make the eligibility contraindications within a special section called the eligibility contraindications in order to distinguish them from others.
- 2- To make the disease of death one of the eligibility contraindications and not its obstacles.
- 3- We call the Iraqi legislator to state explicitly that a person's will should be bounded and he/she is not permitted to act except by means of guardian and endowment money as soon as the sentence is issued and he/she is not required to be imprisoned to restrict his will.
- 4- We call the Iraqi legislator not to require the person to leave Iraq in order to be considered absent, or not be known to have a place in Iraq for more than a year because the person may be present in Iraq and his place is known, although he is absent in language and custom.
- 5- To amend article 307 of the Iraqi Code of Procedure and make senile dementia an eligibility obstacles and not an eligibility contraindication.





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- 25) Sayyid Muhammad al-Sadr, Beyond Fiqh, vol. 9, vol. 3, Dar al-Muhabin, Qom, 2007, p. 82.
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- 27) The Personal Status Court was formed in Meshkhab on 26/6/2004 by Judge Mr. Amer Hussein Hamza, who is authorized to judge in the name of the people, and issued its decision as follows:  
Plaintiff / (F.H.P.)  
Defendant/Director of Minors Care in Najaf in addition to his job  
Resolution/  
The plaintiff claimed that her son, K.J.A., was missing on 27/3/1982 in the Iran-Iraq War, and that his news cut off since that date and until now. It requested that the defendant should be invited to plead and rule to prove the death of her mentioned son, to plead in public presence and to brief the court on the document of guardianship numbered 15/1984 in 11/1/1984 issued by this court. It includes making the plaintiff as a guardian on her son Kazem Jawaid Obaid for being missing in the battle of Qadisiyah Saddam. The court's access to the copy of the plaintiff's registration and her missing son issued by the cases of al-Mashkhab Register



61 AD folio 61 and the letter of the Primary Health Care Center in Meshkhab No. 517 on 24/5/2004. It includes the non-confirmation of the death of Kazem Jaweed, and the court considered the personal evidence supporting the plaintiff's claim and to the statements of the brothers of the missing person who were admitted by the court for clarification and the statements of the judicial assistant in this court, which was present on behalf of the defendant according to the letter of the Directorate of Minors' Care in Najaf No. 328/on 24/5/2004, which agreed to answer the plaintiff's claim if proven, on him and for all the foregoing and on request, the court decided to prove the death of the missing person (K.J.A.O.) because more than two years have passed since the loss and in circumstances that predominate the death in the Iraqi-Iranian war and to consider the date of issuance of the decision as the date of death and shall be indicated in the official records and the notification of the competent authorities thereof after the decision has acquired the final degree on which the case shall be sent to the Court of Excellence for discriminatory audits on the basis of the provisions of article 309 of the Code of Civil Procedure and the decision was issued on the basis of the provisions of articles 156, 161, 166, 203 and 309 Civil Proceedings and articles 86, 87 and 94 of the Law on the Minors care as a cassation and publicly understood judgment on 14/6/2004.

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Sentence Number ::8904/Eligibility/2012  
Date of Sentence ::12/12/2012  
Issuer::Federal Court of Cassation  
Upon scrutiny and deliberation, it was found that the cassation appeal was filed within the legal period and decided to accept it in form and upon consideration of the distinctive judgment it was found to be incorrect and contrary to the provisions of the Sharia and the law, and that the penalty of life imprisonment imposed on the privileged person entails by law the deprivation of the sentenced person from managing or disposing of his funds without recommendation and suspension based on

the provisions of Article (97) of the Penal Code. i.e., it is considered a sentence of ineligibility in relation to the acts, in which the court appoints a trustee to manage his money, but the case in question does not fall within the foregoing and the sentenced person retains his legal personality, so he decided to revoke it and return the case to its court to follow the above, provided that the discrimination fee remains dependent on the result and the decision was issued by agreement on 27/Muharram/1434 AH corresponding to 12/12/2012.

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Issue / 2545 / Civil Property / 2008  
T / 3244

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Cassation claimer / E e C / Her Attorney's Agent A F

Cassation against / p e c and his group

The plaintiffs' agent (distinguished by them) at the Court of First Instance of Najaf claimed that the defendant had exploited their son (H.C.) to lose eligibility for his old age and illness by signing the gift of the house to her No. 10406/2 and belonging to him, so he requested her invitation first / and the ruling to annul the gift located on the property in question II - Placing a sign of non-disposition on the property above until the decision and for the purpose of paying the fee, he evaluates the property in the amount of two hundred million dinars and charges the expenses, fees and attorneys' fees The trial court issued the number 698 / b / 2008 and date 10/8/2008 in person stipulates the annulment of the registration of the property 2 / 10406 Al-Houra Zainab

neighborhood in Najaf and registered in the name of the defendant E H C with the number 36 / AB / 2004 Skin number 992 and the re-registration of the property as 27 shares, of which 10 shares to the defendant E.H.C. These shares represent a third of the estate of her heir the late H C M plus what affects her from the rest of the property in question and 2 shares to each of (as stated in the lawsuit petition) Notification to the Directorate of Real Estate Registration in Najaf of the implementation of this after this judgment acquires the degree of bits and the defendant is charged with judicial expenses, including the attorneys' fees of the plaintiffs' agent, and because the plaintiff is not convinced of the ruling, her agent has distinguished him by requesting its reversal of its regulation dated 7/9/2008.

#### Decision

. . . / Upon scrutiny and deliberation, he found that the discriminatory appeal fell within the legal period and decided to accept it in form and upon consideration of the distinctive judgment he found that it was correct and in accordance with the law for the reasons and reasons on which it was based, as it was proved from the ongoing investigations in the case and from the filing of the case numbered 519 / B / 2005 the beginning of Najaf related to the same parties that ended with the response from the adversarial side to file the lawsuit without a legal opponent and from the report of the Medical Committee No. 903 of 29/1/2006 Issued by the Psychiatric Medical Committee of Najaf and medical reports that the inheritance of the parties before the donation of the property in the name of Al-Mumayazah located on 2/8/2004 was suffering from brain atrophy leading to dementia and the inability to realize his behavior and unaware of his illness and he died on 8/6/2005 That is, ten months and six days after the donation was made, so his disposition of the gift is considered an act added to the death and takes the judgment of the will because it is intended for donation and favoritism (Article 1109 of the Civil Code) and because there are no real estate for the heirs of the parties other than the property in question, the court hired a judicial expert For the purpose of calculating one third of the property of the defendant and distributing the remainder to the heirs to all heirs and for the approval of



the decision to the law, he decided to ratify it, dismiss the discriminatory appeal and load the distinctive discrimination fee and the decision was issued by agreement on 16 / Dhu al-Hijjah / 1429 AH corresponding to 14/12/2008 AD.

Article (173) F(3) of the UAE Law

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