

# THE SCOPE OF PROCEDURAL ACT NULLIFICATION IN THE CODE OF CIVIL AND ADMINISTRATIVE PROCEDURES

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## Abstract

*Nullification is considered one of the most significant procedural sanctions for violations affecting procedural acts. However, its impact has expanded beyond merely annulling the defective procedure to potentially collapsing the entire litigation in most cases.*

*For this reason, the Algerian legislator has undertaken efforts to mitigate the severity of procedural nullification by adopting a set of rules commonly upheld in most legal systems. These include the principle of "no nullification without a legal provision," the possibility of rectifying procedural acts subject to nullification, and the principle of "nullification can only be invoked by the party for whose benefit the rule was established," all while respecting public order principles.*

**Keywords:** Procedural act, nullification, procedural defenses.

## INTRODUCTION

The proper functioning of the judiciary depends on adhering to the procedures, steps, and deadlines established by law for both judges and litigants. This obligation must necessarily be accompanied by sanctions in cases of violation, ensuring compliance with these rules. Nullification is one of the most significant and serious consequences of violating these procedural rules. Its severity lies not only in annulling and disregarding the defective act but also, in some cases, in collapsing the entire litigation, thereby jeopardizing the claimed right.

To avoid complicating procedures, increasing costs, and making it difficult for litigants to obtain their rights due to mere procedural violations, the Algerian legislator has sought to avoid excessive formalism by introducing principles and rules that alleviate the harshness of procedural nullification without obstructing the judicial process. Examples include the principles of "no nullification without a legal provision" and "no nullification without justification."

Balancing the imposition of sanctions for every procedural violation with avoiding excessive formalism raises the following issue:

**To what extent does the system of procedural act nullification operate? What are its requirements? And how closely is it connected to public order?**

To address this inquiry, the descriptive and analytical methods have been employed, along with a comparative approach to the provisions of the Algerian Code of Civil and Administrative Procedures and the French Code of Civil Procedure. This analysis is structured according to the following systematic plan:

**Chapter One:** This chapter delves into the concept of procedural act nullification by clarifying its various forms.

**Chapter Two:** This chapter focuses on examining the scope of procedural act nullification, specifically regarding the defects it may involve, whether formal or substantive <sup>1</sup>.

### Chapter One: The Conceptual Framework of Procedural Acts and Their Nullification

The subject or scope of nullification pertains to procedural acts that deviate from the legal model. Nullification occurs when a procedural act lacks one of its substantive or formal elements<sup>2</sup>.

Therefore, it is necessary to clarify the concept of the procedural act while also explaining the idea of nullification itself. This is because nullification does not apply to the litigation as a whole but rather to the specific procedural act that has been affected by either a formal or substantive defect.

### Section One: Definition of Procedural Act

Definitions of procedural acts vary, but the prevailing trend in legal doctrine largely agrees on defining it as: "an act that the law attributes legal effects to and considers a part of the litigation"<sup>3</sup>. It is also defined as "a legal act whose form, content, and effects are determined and outlined by the law"<sup>4</sup>.

## Section Two: Characteristics of Procedural Acts

The definition of a procedural act highlights several characteristics and features, which can be summarized as follows:

### 1. The Procedural Act is a Legal Act:

This means that the procedural act must produce legal effects and not merely constitute a purely physical act. For example, a judge reviewing the case file is a purely physical act that does not produce legal effects<sup>5</sup>. Furthermore, a procedural act cannot be classified as a legal transaction, as the latter requires the agreement of two wills to achieve a specific legal effect, whereas procedural acts produce legal effects regardless of the intentions of those performing them (judges, litigants, etc.)<sup>6</sup>.

### 2. The Procedural Act is Part of the Litigation:

This implies that the procedural act must fall within the scope of the litigation, both temporally and procedurally<sup>7</sup>. For instance, appointing an attorney or requesting a document from an administrative body to be used in the litigation, as well as non-judicial admissions, are not considered procedural acts.

In application of this condition, legal acts performed by the judge during the litigation—such as issuing judgments, orders, and decisions are considered procedural acts<sup>8</sup>. Similarly, acts carried out by litigants themselves or through their attorneys, as well as investigative procedures, witness testimonies, and the administration of oaths, are all procedural acts because they are integral to the litigation<sup>9</sup>.

### 3. The Procedural Act Produces Immediate Procedural Effects:

A procedural act must produce an immediate procedural effect, whether it involves initiating the litigation, such as filing a judicial claim, modifying it, such as through ancillary requests (e.g., intervention), or even concluding it, such as by rendering a judgment resolving the dispute on the merits, dismissing the litigation, or terminating it<sup>10</sup>.

The immediate effect of a procedural act means that the act directly achieves the goal intended by the party performing it. For example, waiving a lawsuit is not considered a procedural act because its procedural effects are not direct (but rather indirect)<sup>11</sup>.

## Section Three: Definition of Procedural Nullification

There are numerous definitions of procedural nullification. One such definition describes it as: "a legal characterization of an act that deviates from its legal model in a manner that prevents it from producing the effects the law prescribes for a valid act"<sup>12</sup>. Others define it as: "a sanction applied to a procedural act that is defective due to a formal or substantive flaw, resulting in the annulment of the defective act"<sup>13</sup>.

Most definitions emphasize two essential elements of nullification:

- **A formal or substantive defect:** This refers to a lack of conformity between the procedural act and its legal model.
- **Failure to produce legal effects:** This means that the defect prevents the act from producing the effects it would have generated if it were procedurally valid<sup>14</sup>.

## Section Four: The Legal Nature of the Plea of Nullification

The plea of nullification is classified as a formal defense because it pertains to legal acts that fail to meet formal and substantive requirements. The Algerian legislator has regulated the plea of nullification of procedural acts in Articles 60 to 66 of the Code of Civil and Administrative Procedures. Formal defenses are defined as: "any means aimed at declaring procedural acts invalid, terminated, or suspended"<sup>15</sup>.

From this, it can be inferred that this type of defense is directed at the litigation or one of its procedures<sup>16</sup>, without addressing the substantive right claimed or the benefit the defendant seeks

to obtain. The primary purpose of such defenses is to delay the resolution of the dispute, even temporarily.

Consequently, the plea of nullification for formal procedural defects must be raised during the act's performance and before presenting any substantive defenses. Failure to do so will result in its rejection, as stipulated in Article 61 of the same law, and prior to any plea of inadmissibility, under penalty of inadmissibility pursuant to Article 50 of the same law <sup>17</sup>.

This contrasts with the plea of nullification for substantive procedural defects, which can be raised at any stage of the proceedings. Although the Algerian legislator has not explicitly provided for this in the law<sup>18</sup>, it can be inferred by the opposite interpretation of Article 65 of the Code of Civil and Administrative Procedures.

## **Chapter Two: The Scope of Procedural Act Nullification**

As previously mentioned, the Algerian legislator adopted the French legislator's approach in establishing the principle of "no nullification without a legal provision." Therefore, the grounds for nullifying a procedural act are determined based on the defect invoked, whether it is a formal defect or a substantive one. Accordingly, the discussion will address nullification due to formal defects and nullification due to substantive defects.

### **Section One: Nullification Due to Formal Defects**

A formal defect refers to the failure of a procedural act to conform to its legal model and the subsequent failure to produce its intended legal effects. When the Algerian legislator requires that a procedural act adhere to a specific model, any deviation from that model necessitates imposing a sanction for the violation, namely, nullifying the defective act and preventing it from producing its legal effects. Consequently, the act loses its presumed legal validity <sup>19</sup>.

The plea of nullification for a formal defect is invoked as a response to the violation of formal rules, which are not intended for their own sake but are established to achieve a specific purpose<sup>20</sup>. Therefore, there is an inherent connection between the formal procedural defect and the violation of procedural obligations, leading to the imposition of the sanction of nullification <sup>21</sup>.

#### **Subsection One: Conditions for Nullifying Procedural Acts Due to Formal Defects**

One of the conditions for nullifying a procedural act due to a formal defect is the existence of a violation of the required legal form. However, nullification for a formal defect is distinguished by being subject to several specific conditions, including:

##### **First Condition: The principle of "No Nullification Without a Legal Provision"**

Similar to other legal systems, the Algerian legislator has adopted the principle of nullification only when expressly stipulated by law. Consequently, a judge cannot declare a procedural act null and void unless there is a legal provision explicitly authorizing such nullification. Article 60 of the Code of Civil and Administrative Procedures states: "The nullification of procedural acts due to formal defects shall only be declared if expressly provided for by law."

Accordingly, the Algerian judge is bound by this principle and lacks discretionary power to declare a procedural act null and void unless there is a specific legal provision stipulating such nullification <sup>22</sup>. Once this condition is met, the judge is obligated to issue a ruling of nullification<sup>23</sup>, while also ensuring that the requirement of harm is fulfilled.

This principle appears logical, given that the legislator designs and defines procedural rules for litigants and is therefore best positioned to determine the essential guarantees to be achieved in all cases <sup>24</sup>. Furthermore, this approach reflects the legislator's intention to regulate nullification in a way that prevents excessive judicial discretion and ensures that judges neither overstep nor abuse their authority.

Nevertheless, this provision is criticized for placing a significant burden on the Algerian legislator, requiring a high level of knowledge and competence to foresee and identify all critical procedural forms and explicitly prescribe nullification as a sanction for their violation. This task is exceedingly difficult, if not impossible.

##### **A. The Limits of the Extension of the Principle "No Nullification Without a Legal Provision"**

When establishing the system of procedural act nullification, the French legislator was influenced by criticism directed at Article 1030 of the old French Code of Civil Procedure. This article required

judges to rule on nullification only when explicitly prescribed by law. Critics argued that certain important procedural forms not explicitly addressed by the law could still lead to nullification if violated.

To address this issue, the French legislator revised Article 114 of the French Code of Civil Procedure<sup>25</sup>, stipulating that the principle of "no nullification without a legal provision" does not apply to essential forms and procedures—those related to public order. Consequently, judges may declare such procedures null and void even in the absence of an explicit legal provision.

**Definition of Essential Forms:** Essential forms are defined as: "the conditions or procedures without which the act cannot exist or cannot have the character intended by the law, and without which it cannot achieve the purpose envisaged by the legislator." Another definition describes an essential form as: "anything necessary for the act's validity"<sup>26</sup>.

**Shortcomings in the Algerian Legislation:** The Algerian legislator overlooked this aspect when it verbatim copied Article 114 of the French Code into Article 60 of the Algerian Code of Civil and Administrative Procedures. However, the Algerian text omitted the final clause that exempts essential procedures related to public order from the principle of "no nullification without a legal provision."<sup>27</sup> This omission undermined the intended purpose of the plea for nullification and exposed the Algerian legislator to the same criticisms that French jurisprudence and doctrine directed at Article 1030 of the French Code of Civil Procedure of 1806 prior to its amendment<sup>28</sup> (.

**Recommended Amendment:** It would have been appropriate for the Algerian legislator to adopt the nullification system introduced by the 1975 amendment to French law. Specifically, Article 60 of the Algerian Code of Civil and Administrative Procedures should be revised to include the following clause: "... except for essential procedural acts or those related to public order."<sup>29</sup>

#### **B. What About Paragraph 2 of Article 358?**

Among the grounds for cassation appeals mentioned in Article 358 of the Code of Civil and Administrative Procedures, the omission of essential procedural forms constitutes one of the reasons for nullification. Any failure to adhere to an essential procedural form is a ground for nullification that can be invoked in a cassation appeal<sup>30</sup>.

This raises a question about the Algerian legislator's position on this issue. On the one hand, Article 60 adopts the principle of "no nullification without a legal provision." On the other hand, Article 358 considers any violation of an essential procedural form as a reason for nullification, even in the absence of a legal provision explicitly declaring such nullification.

**Resolving the Discrepancy:** The best solution to this apparent contradiction between Article 60, paragraph 1, and Article 358, paragraph 2, of the same law is to distinguish between **essential forms** and **secondary forms** (non-essential). The principle of "no nullification without a legal provision" should apply only to secondary forms. However, essential forms should not be subject to this principle.

This approach ensures consistency between Article 60 and Article 358, particularly since the legislator explicitly considers any violation of essential forms as a ground for nullification that justifies a cassation appeal<sup>31</sup>.

#### **Second Condition: The Requirement of Damage as a Basis for Nullification**

This condition is inherent to the first condition, as it is natural for a ruling of nullification (intended to protect private interests) to be contingent on harm to such an interest. If harm is absent, this private interest no longer deserves protection<sup>32</sup>.

The recognition of damage as a condition is based on the idea that nullification is merely a legal remedy, and remedies should only be granted to those who have suffered harm<sup>33</sup>. This is confirmed by Algerian jurisprudence, stating: "Although Article 613 of the Code of Civil and Administrative Procedures specifies the information that must be included in the payment notice, the judge must ensure the existence of harm that has affected the respondent and the extent to which their rights have been violated"<sup>34</sup>.

The issue raised here is: what is meant by damage in procedural nullification? Is it the same as in contractual or tort liability, or is it damage resulting from the failure to fulfill the purpose of the legal form prescribed for the procedural act?

The second paragraph of Article 60 adopts a general phrasing regarding the condition of damage, stating: "The party invoking nullification must prove the damage they have suffered." However, scholars believe that damage, as a condition for nullification, is not the same as damage referred to in civil liability rules under the Civil Code. Rather, it is the failure to respect the requirements of the legal act.

Most legal scholars agree that when the law requires the condition of damage, the intention is to prevent judges from ruling nullification if the purpose of the legal form has been fulfilled despite its noncompliance. Thus, damage as a condition for nullification refers to the failure to achieve the purpose of the legal form <sup>35</sup>, in line with the idea that form is not an end in itself but a means to an end <sup>36</sup>.

The damage justifying the nullification of a procedural act occurs when the purpose intended by the procedural act or form is not achieved, or when a procedural act infringes upon a legal interest established by law in its favor. Conversely, if the purpose of the legal form or procedure is achieved despite its noncompliance, nullification is not ruled <sup>37</sup>.

For example, if the opposing party is officially notified of the judicial ruling, but the nature or number of the document proving their identity is not indicated, and they still file an appeal, the notice of notification is not nullified because the purpose of the form, enabling the notified person to file an appeal, has been achieved <sup>38</sup>.

The judiciary has consistently affirmed this principle in several rulings. <sup>39</sup>For example, it was held that a payment notice, even if it lacks the elected domicile of the requesting party, is not nullified because the appellant (debtor) did not prove harm caused by this omission, as they remain obligated to execute the enforceable title <sup>40</sup>.

This rule applies to formal defects and does not apply to substantive defects. A plea for nullification of a contract or procedure due to a substantive defect is admissible without the condition of proving harm.

### **Third Condition: Timing for Raising the Plea of Nullification Due to a Formal Defect**

According to Article 61 of the Code of Civil and Administrative Procedures, a plea for nullification of procedural acts due to formal defects must be raised during the performance of the act. If it is presented late, after delving into the substance of the case, or if the substantive plea is raised after the defective procedural act, the right to raise it is forfeited, even if it is based on legal grounds <sup>41</sup>. Therefore, a party invoking nullification for a formal procedural defect cannot do so after submitting their claims on the merits. This is a defining feature of formal defenses, distinguishing them from other judicial defenses, as they pertain solely to private interests <sup>42</sup>.

Some jurists—representing the predominant view—permit raising the plea for procedural nullification within the same document addressing the substance, provided it precedes the substantive arguments in the memorandum. The plea is only forfeited if it is presented in a document separate from the substance, and the substantive arguments are addressed before the nullification plea is raised <sup>43</sup>.

The purpose of requiring the plea for nullification of procedural acts to be raised before addressing the substance is to avoid burdening the opposing party (the plaintiff) during the litigation period and to prevent the threat of formal defenses being raised at any stage, potentially leading to the nullification of procedures after the merits of the case have been discussed. This requirement also aligns with the need for the efficient functioning of the judicial system and the principle of resolving cases within a reasonable time frame <sup>44</sup>.

### **Priority Between the Plea of Procedural Nullification and the Plea of Inadmissibility**

The question in this regard is whether the precedence of raising the plea of procedural nullification is limited to substantive defenses or also extends to the plea of inadmissibility. This issue is particularly pressing because Article 61 of the Code of Civil and Administrative Procedures emphasizes the precedence of the plea of procedural nullification over substantive defenses or addressing the merits of the case, without mentioning the plea of inadmissibility.

Some might argue that this issue is resolved by Article 60 of the same law, which mandates that formal defenses, including procedural nullification, must be raised before any substantive defense or plea of inadmissibility <sup>45</sup>. However, Article 60 applies to all formal defenses, and while procedural



nullification falls under this category, Article 61 provides a specific rule governing procedural nullification exclusively, distinguishing it from other formal defenses.

A segment of legal scholars responds to this by distinguishing between two types of pleas of inadmissibility: one related to the merits of the case and the other to procedural and formal aspects of the litigation. Consequently, the plea of procedural nullification must be raised before the plea of inadmissibility related to the merits of the case, but not before a plea of inadmissibility concerning procedural matters <sup>46</sup>.

#### **Fourth Condition: Absence of Correction**

The general rule is that a formal defect does not result in the nullification of a procedural act unless the defect persists until the ruling is issued <sup>47</sup>. Conversely, if the cause of the defect is rectified before the ruling, the judge cannot declare nullification. Thus, the conditions for a formal defect, the existence of an explicit provision, and harm are contingent on the defect not being remedied through correction <sup>48</sup>. The correction of a procedural act affected by a formal defect removes its nullification and renders the defective act valid <sup>49</sup>.

Correction serves as a means to ensure the continuation of the litigation, achieve its purpose, and restore the effectiveness of the procedural act to fulfill its intended legal effect. Although the legislator grants the judge the authority to correct and address the defect, this authority is conditional on the absence of any remaining harm after the correction. This is affirmed in Article 62 of the same law, which allows the judge to grant the parties time to correct the defective procedure as long as the harm is remedied after the correction.

It is evident from the text that the legislator aims to limit nullification to ensure the continuation of litigation by eliminating it through the correction of a procedurally defective act. While nullification serves as a remedy, it should not perpetuate the defect <sup>50</sup>. To prevent this, nullification must be used sparingly. The legislator should not expand its application to the extent that formality prevails over substance or that excessive emphasis on formality undermines substantive rights <sup>51</sup>.

To Achieve This Objective, the Legislator Provided Two Methods for Correcting Procedural Nullification:

#### **1. Correction Through Waiver of Invoking Nullification:**

One of the methods adopted by the legislator to mitigate nullification is allowing the litigant, for whose benefit nullification was established, to waive invoking it. Such a waiver removes the nullification's effect on the procedural act <sup>52</sup>.

For example, if a party receives a summons on a weekend—initially considered invalid—but subsequently appears before the court, submits their requests, and does not invoke nullification, the summons becomes valid and protected from procedural nullification. This is based on the principle that the party implicitly waived their right to invoke nullification <sup>53</sup>.

This principle is affirmed in Article 63 of the same law, which states that the right to invoke procedural nullification for formal defects is granted exclusively to the party for whose benefit nullification was established.

The law does not require a specific form for waiving the right to invoke the nullification of a procedural act. Therefore, such a waiver may be made explicitly or implicitly by the party entitled to invoke it. Implicit waiver occurs when the party, for whose benefit nullification was established, exhibits behavior that reveals their intention to waive it. For instance, merely responding to the defective procedure in a way that indicates acceptance of its validity or performing another act or procedure demonstrates the party's intention and desire to waive the right to invoke nullification <sup>54</sup>. For example, the defendant's presence in court, despite a procedural defect in the summons, serves as evidence of an implicit waiver of the right to invoke nullification. Explicit waiver, on the other hand, occurs when the party clearly expresses their desire to waive the right to invoke nullification, either in writing, which is the most common, or verbally before the judge.

#### **2. Correction Through Completion to Avoid Nullification:**

Procedural nullification can be avoided by completing the defective act through the addition of the missing element. This mechanism transforms the defective act into a valid one. For instance, if an attorney's signature is omitted from a memorandum for cassation, the omission can be remedied by

adding the signature <sup>55</sup>. In such cases, the cassation memorandum is protected from nullification through this completion <sup>56</sup>, and the act is considered valid from the time the correction is made<sup>57</sup>.

### **Does Requesting Correction Require Court Authorization?**

According to legal doctrine, the judge does not have the authority to initiate or order corrections of their own accord, regardless of the defect in the procedural act <sup>58</sup>, especially if the defect does not affect public interest or has been remedied before the opposing party raises it <sup>59</sup>.

However, referring to Articles 23, 24, and 27 of the same law, the judge, to ensure the proper administration of justice, may issue an oral order to correct defective procedures within a specified time limit<sup>60</sup>. This is contingent upon the absence of any remaining harm. If the order is not complied with and the specified period expires without correcting the defect, the procedural act is deemed null <sup>61</sup>.

It should be noted that the judge's order to correct the defective act and the granting of a time limit are considered administrative acts performed by judges. These acts are not subject to appeal through any means of legal recourse <sup>62</sup>.

### **Section 2: Nullification Due to Substantive Defects**

When a litigant engages in litigation and performs procedural acts, such acts may suffer from defects not in form but in substance, leading to their nullification without the need to prove harm. Attempts have been made to define substantive defects in procedural acts, one of the most notable being: "It is a sanction for violating substantive rules related to the essence of the act itself and its substantive requirements, rendering it invalid and incapable of producing its effects if this essence is absent or its essential requirements are defective"<sup>63</sup>.

It is notable that nullification for substantive reasons follows a less stringent legal framework compared to nullification for formal reasons. It is not subject to the rules applicable to the latter, as it does not require the existence of a legal provision explicitly declaring the procedural act null, nor does it adhere to the principle of "no nullification without harm."

The Algerian legislator has regulated the plea for nullification of procedural acts on substantive grounds under Articles 64, 65, and 66 of the Code of Civil and Administrative Procedures. Article 64 of the same law specifies such grounds as the lack of legal capacity, whether for the parties or the representative of a natural or legal person, as well as the absence of authorization for the latter.

#### **First: Conditions for Nullifying a Procedural Act Due to Substantive Defects**

For a procedural act to be deemed valid in substance, the following conditions must be met:

##### **Condition 1: Non-Compliance with Substantive Rules**

To rule nullification for a substantive defect, the existence of a substantive violation must be established as the reason for nullification. This violation must occur before the judge rules on it and must remain uncorrected until the ruling <sup>64</sup>. This applies regardless of the severity of the violation and even if the condition of harm is absent.

**The question here is: what are the substantive rules that lead to the nullification of a procedural act?**

##### **A. Lack of Legal Capacity of the Parties**

Legal capacity is an essential condition for undertaking legal procedures. No person may engage in procedural acts without possessing the capacity to litigate <sup>65</sup>. However, the new wording of Article 64 regarding the nullification of non-judicial contracts and procedures has raised two points of contention:

##### **First Issue: The Type of Capacity Referred to in Article 64**

Some argue that the capacity referred to in Article 64 is **litigation capacity** rather than **capacity to sue or be sued**. This is because a lack of capacity to sue or be sued results in the inadmissibility of the case, not its nullification, as the absence of the capacity condition leads to procedural invalidity<sup>66</sup>. Litigation capacity is a condition for initiating the case, not a condition for its existence <sup>67</sup>.

On the other hand, another view holds that the capacity mentioned in Article 64 is expressed in general terms. Therefore, the generality of the legal text requires the presence of both **capacity to**

sue or be sued and litigation capacity. Consequently, the absence of either capacity results in nullification due to a substantive defect <sup>68</sup>.

### **Second Issue: The Nature of the Enumeration in Article 64**

Most scholars agree<sup>69</sup> that the enumeration in Article 64 regarding cases of nullification due to substantive defects is exhaustive and limited to the two cases explicitly mentioned in the legal text. Expanding the cases of nullification would undermine the principle of continuity in litigation <sup>70</sup>.

In France, judicial precedent initially considered the cases listed in Article 117 of the French Code of Civil Procedure as exhaustive <sup>71</sup>. However, the French Court of Cassation later reversed its position due to criticism <sup>72</sup>, allowing certain cases of nullification for substantive defects without being restricted to those listed in Article 117 <sup>73</sup>.

Regarding Article 64 of the Algerian Code of Civil and Administrative Procedures, while the text clearly states that the enumeration of substantive nullification cases is exhaustive—stating: "Cases of nullification of non-judicial contracts and procedures in terms of substance are exhaustively defined..."—the debate remains unresolved.

This ambiguity is exacerbated by the provisions of Article 358, paragraph 1, of the same law, which includes the violation of a fundamental procedural rule among the grounds for nullification justifying a cassation appeal <sup>74</sup>. It appears that the exclusivity in Article 64 is inconsistent with the content of Article 358 of the same law<sup>75</sup>, especially since fundamental rules are a subset of substantive rules in procedural acts, and their violation results in nullification <sup>76</sup>.

Professor Omar Zoudah offers a perspective and solution to this issue, suggesting that, given the difficulty and impossibility of reconciling these two provisions, both should be excluded from practical application under the principle of contradiction, whereby each provision cancels out the other<sup>77</sup>.

By returning to general principles, it becomes evident that the requirements of procedural acts are diverse and varied. Therefore, a party has the right to invoke nullification for substantive defects, even if the law does not explicitly provide for them, without being restricted to the two cases enumerated in Article 64.

### **B. Lack of Capacity and Authorization for the Representative of a Natural or Legal Person**

The legislator requires that a litigant be capable of properly undertaking legal procedures before the courts. This cannot be achieved unless the litigant possesses procedural capacity (capacity to litigate), which is granted only to those who have reached the age of majority, are mentally competent, and are not subject to any impediments to capacity. For legal persons, procedural capacity is only granted <sup>78</sup> through the provisions of their statutory or contractual framework <sup>79</sup>.

However, even if a legal person possesses procedural capacity, it must still act through a representative, as it does not have a will in the practical sense <sup>80</sup>. This is expressed by the legislator as representation by force of law <sup>81</sup>. Representation is a legal mechanism that enables a representative to litigate in the name and on behalf of the principal. If the representative lacks capacity or the authority to represent, this results in procedural nullification due to a substantive defect. This is confirmed by paragraph 2 of Article 64 of the Code of Civil and Administrative Procedures.

Therefore, the situation involves two parties: one who holds the original standing in the case and another who holds procedural standing or the authority to carry out procedural acts on behalf of another, such as the legal representative of a natural or legal person <sup>82</sup>.

However, a close examination of paragraph 2 of Article 64 reveals a certain lack of clarity and ambiguity, which can be detailed as follows:

#### **First: Regarding Natural Persons**

Article 64 uses the term "lack of capacity..."—a term that does not align with the general rules of the legal theory of representation. This theory presupposes the existence of a person who lacks procedural capacity and is therefore represented by their legal representative (e.g., a guardian or trustee). Capacity to sue or be sued is tied to the legal existence of a person, and its absence implies the nonexistence of the person.



For an individual who holds the original standing in the case but lacks procedural capacity (e.g., someone who is entirely or partially incapacitated), the law mandates the appointment of a representative to act on their behalf in procedural matters<sup>83</sup>.

Thus, it is unreasonable to consider that this representative might lack capacity or not exist legally<sup>84</sup> as suggested by the phrase "lack of capacity or authorization for the representative of a natural person...."

#### **Second: Regarding Legal Persons**

A legal person possesses both the capacity to sue or be sued (capacity to litigate) and procedural capacity. The law defines the nature of the legal person and its legal representative, who acts on its behalf in performing procedural acts and litigation. This representative holds procedural standing and must have the authority to perform these acts, meaning they must possess procedural capacity and proper authorization. If either of these is lacking, the procedural act is nullified due to a substantive defect<sup>85</sup>.

The phrase "lack of capacity or authorization for the representative of a legal person" does not align with the general rules governing the capacity of legal persons as explained above. Interpreting the text literally, particularly the phrase "lack of capacity," would imply that the legal person, which cannot litigate on its own, might delegate a natural person who lacks capacity. Such an interpretation is illogical.

To avoid these complications, the phrase "lack of capacity or authorization..." mentioned in Article 64 should be revised to state: "lack of authority for the representative of the natural or legal person...."<sup>86</sup>.

### **CONCLUSION**

This study concludes that the Algerian legislator has emphasized the necessity of adhering to procedural rules governing litigation, from its initiation until its conclusion with a judicial ruling. This directive is addressed to both judges and litigants. To ensure the proper progression of litigation, the Algerian legislator has imposed specific sanctions for violations of these procedures and deadlines, the most significant and severe being nullification. The legislator allocated a separate section under Chapter Three, concerning means of defense, to address nullification, thereby addressing the shortcomings and gaps criticized in the previous law.

At the same time, the legislator sought to mitigate the severity of procedural nullification by introducing mechanisms to limit its effects, primarily by restricting the application of nullification to cases explicitly provided for by law, under the principle of "no nullification without a legal provision." While distinguishing between general nullification and specific nullification, whose application does not deviate from the principle of "no nullification without proving harm," the following recommendations or proposals can be suggested:

- Allocate a separate section for nullification instead of limiting it to the chapter on defenses, as nullification is not only raised as a formal defense but can also be invoked as a judicial claim during appeals.
- Revise Article 60 of the Code of Civil and Administrative Procedures to read as follows: **"Procedural acts shall not be nullified for formal defects unless the law explicitly provides for such nullification, except for essential procedural acts or those related to public order."**
- Remove the phrase *"exhaustively defined"* from Article 64 of the same law to align it with paragraph 2 of Article 358, which governs cassation appeals.

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## ENDNOTE

<sup>1</sup> Mohamed Fathi Rizq Allah, Procedural Objectives: A Philosophical Study in Egyptian Procedural Law, Journal of Sharia and Law, Issue 34, 2019, p. 1311.

<sup>2</sup> Layeb Leila and Ali Khoudja Khaira, The Legal System of Nullification in Algerian Civil and Administrative Procedure Law No. 09-08, Journal of Law and Humanities, Algeria, Volume 11, Issue 01, p. 539.

<sup>3</sup> Fahmy Wagdy Ragheb, Principles of Civil Litigation, Dar Al-Fikr Al-Arabi, Cairo, 1978, p. 25, Algeria, Issue 01, p. 25.

<sup>4</sup> Nabil Omar, Law of Civil Procedure, Al-Halabi Legal Publications, First Edition, 2008, p. 352.

<sup>5</sup> Fathi Wali, Theory of Nullification in Procedural Law, Al-Halabi Legal Publications, Cairo, 1997, p. 81.

<sup>6</sup> Mohamed Yehia Ahmed Atiya, Procedural Defect and Its Effect on the Validity of Judicial Litigation Procedures, Journal of the Faculty of Islamic and Arabic Studies for Girls, Alexandria, Volume 4, Issue 34, p. 595.

<sup>7</sup> Dhehim Fawzi Al-Rashidi, Nullification of Procedural Acts in Civil and Commercial Procedural Law in Kuwait, Master's Thesis in Private Law, Faculty of Law, Middle East University, Kuwait, 2011, p. 28.

<sup>8</sup> There was a debate in France about whether judicial rulings should be considered procedural acts when interpreting Article 1030 of the old French law. For more details, refer to: BONCENNE (P), Theory of Procedure, Vol. III, Hachette Livre, 2016, p. 251.

<sup>9</sup> For more details, refer to: Suzan Mohammed Shahada Al-Armouti, Procedural Defect and Its Effect on the Nullification of Judicial Procedures, Master's Thesis, Private Law, Faculty of Law, Middle East University for Graduate Studies, Kuwait, 2009, p. 48.

<sup>10</sup> Mohamed Yehia Ahmed Atiya, Previously Cited Reference, p. 595.

<sup>11</sup> For more details, refer to: Fathi Wali, Previously Cited Reference, p. 82.

<sup>12</sup> BROUILLANT (J.P), The Nullities of Criminal and Civil Procedures Compared, Précis DALLOZ, 1996, p. 98.

<sup>13</sup> Fathi Wali, Previously Cited Reference, p. 8.

<sup>14</sup> Ahmed Atiya, Previously Cited Reference, p. 49.

<sup>15</sup> Article 49 of the Code of Civil and Administrative Procedures.

<sup>16</sup> For more details, refer to: Ahmed Abu Al-Wafa, The Theory of Defenses in Procedural Law, Part One, Al-Maaref Establishment, Alexandria, 6th Edition, 1980, p. 22.

<sup>17</sup> The text states: "Formal defenses must be raised simultaneously before making any substantive defense or plea of inadmissibility, under penalty of inadmissibility."

<sup>18</sup> This differs from the French legislator, who explicitly mentioned it in Article 118 of the French Code of Civil Procedure.

<sup>19</sup> Bouasmaha Sheikh and Boujlal Fatima Zahra, Nullification Under the Civil and Administrative Procedure Law, Journal of Research in Law and Political Science, Ibn Khaldoun University, Tiaret, Algeria, Issue 06, 2017, p. 2.

<sup>20</sup> Suzan Mohammed Shahada Al-Armouti, The Substantive Defect and Its Effect on the Nullification of Judicial Procedures, Master's Thesis, Private Law, Faculty of Law, Middle East University for Graduate Studies, 2009, p. 59.

<sup>21</sup> Aghlis Bouzid, Proof of Damage from Procedural Defects Leading to Nullification of Investigation Procedures in Administrative Justice Disputes, Doctoral Thesis, Faculty of Law and Political Science, Mouloud Mammeri University, TiziOuzou, 2016, p. 23.

<sup>22</sup> Examples of provisions explicitly addressing nullification include Articles 95, 152, and 275 of the Code of Civil and Administrative Procedures.

<sup>23</sup>Omar Zoudah, The Nullification System in the Civil and Administrative Procedure Law, Supreme Court Journal, Documentation Section, Algeria, Issue 02, 2012, p. 17.

<sup>24</sup>Additionally, the legislator aims to regulate nullification in a way that avoids excessive judicial discretion and prevents judges from overstepping or abusing their authority.

<sup>25</sup>"No procedural act may be declared null for a formal defect unless the nullity is explicitly provided for by law, except in cases of failure to comply with a substantive formality."

<sup>26</sup>CREMIER (L), Theoretical and Practical Manual of Civil Procedure, Vol. 2, Paris, 1924, p. 312. Cited from: Fathi Wali, Previously Cited Reference, p. 239.

<sup>27</sup>Article 1030: "No exploit or procedural act may be declared null unless the nullity is explicitly pronounced by law."

<sup>28</sup>For more details on these criticisms, refer to: Solon (V.H), Theory on the Nullity of Agreements and Acts of All Kinds in Civil Matters, Vol. 2 (Classic Reprint), Paperback, 2020, p. 88.

<sup>29</sup>See also: Omar Zoudah, Previously Cited Reference, p. 20.

<sup>30</sup>For a detailed explanation, refer to: Boudeif Adel, Previously Cited Reference, p. 372.

<sup>31</sup>For further elaboration, refer to: Abdel Rahman Barbareh, Explanation of the Civil and Administrative Procedure Law, Baghdadawi Publications, Algeria, 2009, p. 266.

<sup>32</sup>Fathi Wali, Previously Cited Reference, p. 268.

<sup>33</sup>SOLON, Previously Cited Reference, p. 288.

<sup>34</sup>Supreme Court, Civil Chamber, Case No. 109772, Supreme Court Journal, Issue of 2016, p. 41.

<sup>35</sup>See: Aghlis Bouzid, Previously Cited Reference, p. 440, and Fathi Wali, Previously Cited Reference, p. 270.

<sup>36</sup>Abdel Hakim Fouda, Procedural and Substantive Nullification in Civil and Commercial Procedural Law, Dar Al-Fikrwa Al-Qanun, Egypt, 1999, p. 240.

<sup>37</sup>In France, there was a debate regarding the concept of harm, with jurisprudence divided between two approaches: the first accepted any harm, while the second required harm to affect or compromise the right to defense. For more details, refer to: Fathi Wali, Previously Cited Reference, p. 348.

<sup>38</sup>See: Omar Zoudah, Previously Cited Reference, p. 27, and Fadhel Aich, Previously Cited Reference, p. 85, and Aghlis Bouzid, Previously Cited Reference, p. 444.

<sup>39</sup>Refer to paragraph 06 of Article 407 of the Code of Civil and Administrative Procedures.

<sup>40</sup>Supreme Court, Civil Chamber, Case No. 1106589, dated 23/06/2016, Supreme Court Journal, Algeria, Issue 1, 2016, p. 45.

<sup>41</sup>Badawi Ali, Legal Defenses Under the Civil and Administrative Procedures Law, Supreme Court Journal, Issue 2016/02, p. 111.

<sup>42</sup>Boudeif Adel, Previously Cited Reference, p. 112.

<sup>43</sup>Elias Abu Ubaida, Procedural Defenses in Civil and Criminal Litigation, Zain Legal Publications, Egypt, 2006, p. 119.

<sup>44</sup>BlaileaMaamar, Procedural Defenses in Civil Matters, Paper Presented at a Research Seminar Organized by the Legal and Judicial Research Center, 10/06/2021, p. 16.

<sup>45</sup>A plea of inadmissibility is aimed at preventing the court from considering the case brought before it, based on the lack of the right to litigate, such as the absence of standing, interest, statute of limitations, or the expiration of the time limit, as well as the res judicata principle. This is confirmed by Article 67 of the Code of Civil and Administrative Procedures.

<sup>46</sup>Refer to: Boudeif Adel, A Concise Explanation of the Civil and Administrative Procedures Law, Volume One, First Edition, 2012, Click Publishing, Algeria, p. 112.

<sup>47</sup>The Supreme Court went further by ruling that a defective procedural act could be corrected not only up to the time of the ruling but also during the appeal stage, as long as the formal defect (e.g., a defective summons) did not affect the contested ruling. Refer to: Supreme Court, Civil Chamber, 25/09/1968, Judges' Bulletin, Issue 01, 1969, p. 41.

<sup>48</sup>Refer to: Mostafa Magdy Harja, Defenses in Procedural Law, Mahmoud Publishing House, Cairo, 2016, p. 158.

<sup>49</sup>See: Omar Zoudah, Previously Cited Reference, p. 28.

<sup>50</sup>Ahmed Maher Zaghloul, Previously Cited Reference, p. 67.

<sup>51</sup>Ahmed Muslim, Principles of Procedure and Judicial Organization, Dar Al-Fikr Al-Arabi, Cairo, 1980

<sup>52</sup>The Algerian legislator explicitly provided for waiving nullification through acceptance of requests, as stated in Article 237 of the Code of Civil and Administrative Procedures: "Acceptance is the relinquishment by one party of the right to object to the other party's request or to a previously issued ruling..." Article 238 adds: "Acceptance of the other party's request constitutes acknowledgment of its validity or a waiver by the defendant."

<sup>53</sup>For criticism of this view "appearance substitutes notification" refer to: Mohamed Yehia Ahmed Atiya, Procedural Defect and Its Effect on the Validity of Judicial Litigation Procedures: A Comparative Study in Egyptian and Omani Law, Faculty of Islamic and Arabic Studies, Alexandria, Volume 34, Issue 02, p. 91.

<sup>54</sup>Dr. Ahmed Abu Al-Wafa provided an extensive critique on implicit waiver. Previously Cited Reference, p. 106.

<sup>55</sup>Abdel Salam Dhib, The Code of Civil and Administrative Procedures: A Translation for Fair Trials, 3rd Edition, Moufem Publishing, Algeria, 2012, p. 86.

<sup>56</sup>Supreme Court, Civil Chamber, Case No. 674159, issued on 07/04/2011.

<sup>57</sup>The final paragraph of Article 62 of the Code of Civil and Administrative Procedures states: "The effect of this correction shall apply retroactively from the date of the defective act."

<sup>58</sup>Omar Zoudah, Previously Cited Reference, p. 31.

<sup>59</sup>Ahmed Abu Al-Wafa, Previously Cited Reference, p. 110.

<sup>60</sup>Refer to Article 62 of the Code of Civil and Administrative Procedures.

<sup>61</sup>Article 71 of the Code of Civil and Administrative Procedures discusses coercive fines as a sanction, while Article 23 stipulates the exclusion of the document or record in the event of non-compliance.

<sup>62</sup>Refer to: Supreme Court, Civil Chamber, Decision No. 180881, dated 25/02/1998, Judicial Journal, Issue 01, 1998, p. 5.

<sup>63</sup>Suzan Mohammed Shahada Al-Armouti, The Substantive Defect and Its Effect on the Nullification of Judicial Procedures, Doctoral Thesis, Faculty of Law, Middle East University for Graduate Studies, 2009, p. 62.

<sup>64</sup>Omar Zoudah, Previously Cited Reference, p. 33.

<sup>65</sup>Litigation capacity refers to the individual's eligibility to undertake legal procedures before the court, which requires reaching the age of legal majority unless incapacitated. On the other hand, capacity to sue or be sued is merely the ability to acquire rights and bear obligations without granting the right to initiate legal action. Refer to: Bashir Mohand Amokran, Civil Procedure Law: The Theory of Litigation, University Publications Bureau, 2001 Edition, p. 74.

<sup>66</sup>Refer to: Boudeif Adel, Previously Cited Reference, p. 14.

<sup>67</sup>For a more detailed critique, refer to: Fathi Wali, Previously Cited Reference, p. 303.

<sup>68</sup>Omar Zoudah, Previously Cited Reference, p. 34.



<sup>69</sup>Ahsan Rafi' Dabbah, Procedural Nullification's Connection to Public Order in the Civil and Administrative Procedures Law, *Journal of Algerian and Comparative Public Law*, Volume 10, Issue 01, July 2024, p. 192.

<sup>70</sup>Layeb Leila and Ali Khoudja Khaira, Previously Cited Reference, p. 546.

<sup>71</sup>Civ, 2e, 24 Feb. 1983, J.C. 1983. I.V. 145; March 1989, D. 1989.

<sup>72</sup>For more details, see: Fathi Wali, Previously Cited Reference, p. 428.

<sup>73</sup>CREMIER (L), Previously Cited Reference, p. 318.

<sup>74</sup>Refer to: Omar Zoudah, Previously Cited Reference, p. 42.

<sup>75</sup>The Supreme Court, in its decision dated 10 September 2015, concluded that the two texts were contradictory, and reconciling them was impossible. Real Estate Chamber, File No. 944059, *Supreme Court Journal*, Issue 2, 2015, p. 113.

<sup>76</sup>MaamarBlailea, Previously Cited Reference, p. 14.

<sup>77</sup>Omar Zoudah, Previously Cited Reference, p. 38.

<sup>78</sup>Mohamed Yehia Ahmed Atiya, Previously Cited Reference, p. 597.

<sup>79</sup>Mohamed Al-Sabri Al-Saadi, *Explanation of Algerian Civil Law: General Theory of Obligations*, Dar Hudda Publishing and Distribution, Algeria, 2004, p. 61.

<sup>80</sup>Nabil Saqr, *The Intermediary in Explaining the Civil and Administrative Procedures Law*, Dar Al-Huda, Algeria, 2009, p. 41.

<sup>81</sup>Article 50 of the Civil Code. Refer to: Khalil Ahmed Hassan Qadada, *Concise Explanation of Algerian Civil Law*, Volume 1, University Publications, Algeria, 2nd Edition, 2005, p. 43.

<sup>82</sup>Hilal Al-Eid, *Concise Explanation of the Civil and Administrative Procedures Law*, Dar Houma, Algeria, 2017, p. 52.

<sup>83</sup>For further details, refer to: Shaimaa Mohammed Mustafa, *Procedural Standing*, no publisher or publication year, p. 439.

<sup>84</sup>For more details, refer to: Hajji Hayat, *Formal Defenses Under the New Civil and Administrative Procedures Law*, Lecture Delivered as Part of Continuous Judge Training, 2009, p. 16.

<sup>85</sup>For further details, refer to: Hamza Hamza, *Legal Personality*, *University of Damascus Journal*, Volume 17, Issue 2, 2001, p. 502.

<sup>86</sup>Refer to: Omar Zoudah, Previously Cited Reference, p. 42.