Marriage Lacking Capacity in the Personal Status Law"Comparative Study"

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Abstract

Most Arab and foreign laws are included in their general rules to define a legal age that allows a person who has reached that age to marry whoever he wants, provided that the conditions complementing the marriage contract are fulfilled. However, there are exceptions to these rules, as these exceptions authorize marriage at another age less than what is required by the laws to take care of the public interest for those who have not reached the specified legal age or for an urgent need for a minor such as the insane and the imbecile, as the Iraqi legislator did in Article Eight of the Personal Status Law Iraqi No. (188) for the year (1959) and its amendments, and the required and legal conditions for this license. The legislator was not satisfied with the license, but went to reduce the legal age to the lowest cases of incompetence, as the age of puberty that the legislator specified in his legal legislation was lost, Like crazy and idiot.

Keywords: marriage, lack of capacity, puberty, the insane and the insane, mental and Psychological diseases.

Introduction

Marriage of people with incapacity is one of the most important problems facing legal legislation, especially marriage contracts that are concluded outside the court due to the lack of legal age. Restricted, and in order to preserve the rights of both spouses, the legal legislation waived the legally specified age for those who did not reach the age of majority, and at the same time and for humanitarian reasons for legally defined groups such as the insane and the insane, the legislation allowed their marriage according to somewhat complex conditions in order to preserve public order and its basic elements.

First: The Research Problem

Through this research, we raise a number of questions that we tried to answer, the most important of which are:

Did the legal legislation allow the marriage of those under the legal age?

Did the legal legislation give the absolute right to marriage to the target groups such as the young and the insane in marriage?

There are legislative defects, especially for the Iraqi legislator. Have they been avoided in order to preserve the public interest from marriages of those who lack legal capacity, with their various categories and types?

Second: Research Methodology and Structure

We saw the descriptive, analytical and comparative approach in our research, as by extrapolating the legal texts between the legislation in question, we can diagnose the strengths and weaknesses to benefit from them in correcting the legal path, especially for the Iraqi legislator, and in order to know the provisions that dealt with the issue of marriage of deficient persons, we divided our research into two requirements. In the first requirement, marriage lacks legal capacity because of the legal age, and in the second requirement, we discussed the marriage of the insane, the imbecile, and their equivalent.

The First Requirement: Marriage Incapacitated For Those under the Legal Age

Jurisprudents of law go to divide the capacity into two types, the competence of obligation, and the capacity of performance, and the capacity of obligation is meant as: "the capacity of a person to obligate his and his legitimate rights", and the capacity of obligation according to this definition is viewed from a legal point of view to the same person regardless of his actions, whether this person is natural or moral, the legal person has the capacity for obligation, and the capacity for obligation is established for him from his presence as a fetus in his mother's womb until the time of his death if he was natural, and until the end of his moral existence if he was moral, and it may even include him until the liquidation of his money and the payment of his debts. Jurisprudents that if there is no eligibility for obligation, there is no personality with it, such as the birth of a stillborn fetus, or in the case of the deceased after paying his debts, and companies after their liquidation

We have notes on what has been mentioned regarding the definition of the eligibility of obligation, which we list as follows:

1- The definition stated that the capacity for obligation is the capacity of a person to enforce the legitimate rights he has and owes, and this definition cannot include the moral person; By virtue of the

fact that the term human clearly shows the natural living person, and as for the expansion of the content of the definition, it is a control without evidence that cannot be expanded to include the legal (moral) person.

2- Considering the definition of the capacity of obligation to the same person in his power to acquire rights and abide by duties cannot be taken for granted, rather it cannot be used legally, as the division between the capacity of obligation and the capacity of performance is based on certain considerations, and these considerations can be represented by the power of acquisition rights or carrying out duties, or considering the legal or legal age for judging actions or proving rights and duties, and we see that proving these considerations, especially the consideration of its validity, is absurd in the division, by virtue of the fact that the divider must have a common basis, and in order for the division to be beneficial, it must The basis is the goal for which the division became, and it is known that The characteristic that must be observed during the division takes a project for the division, and a general criterion is taken from it in the division, and if we look into dividing the capacity into the capacity for performance and the capacity for obligation, we do not find a characteristic or a basis for the division, and perhaps someone may say that the basis that is taken into account is the validity of the actions, so we say: that This basis is lacking in the capacity of obligation, since the capacity of obligation to divide it has another consideration, which is the competence of the person's soul, and the truth is that the capacity of a person to bear rights and establish obligations is one thing, and judging his actions is something else. Performance and obligation. Rather, we see that the fetus, the young, and the insane can prove the validity of proving the right, in addition to proving the obligations, and all of these are looking at the eligibility of performance.

3- In the concept of infringement, the definition excluded unlawful rights, so the term legitimate rights and in the concept of inconsistency mean that there are unlawful rights, and the right is that the term rights cannot be addressed to unlawful and legitimate rights; Because the right is a legitimate interest that is protected by the law, so it was better for the identifier to move away from the term legitimate rights, except God wanted by that the rights that the legislator created and not others, and this also does not fit with the rights, perhaps there were rights that were not provided for by the legislator and were proven to people such as natural and moral rights.

As for those who are by virtue of lacking capacity, such as the insane and the insane, and the insane is the one who has lost his mind since birth or found a symptom, and he is of two types: the first class is the insane, the applied one: the one who does not reason anything, or he is the one in whom the insanity is completely and continuously, the second class is the intermittent insane: he is the one who does not make sense His companion is something, but his madness is not continuous, it afflicts a person at times and rises from him at other times, and if he afflicts him, he loses his mind completely, and if it rises from him, his mind returns to him, so it is the same madness that does not separate from him except in time. However, he does not hit or curse as the insane do, so his nature is calm, unlike the insane, because he is troubled, just as dementia is the result of weakness in the mind, not lack of reason, so it results in weakness in consciousness and perceptions.

The marriage of an undistinguished minor does not mean the real marriage and what is related to it in terms of entry and others, but rather the intention is to conduct the marriage contract by himself, and the marriage contract of the undistinguished minor by himself is prohibited from a legal point of view; By virtue of the fact that legal behaviors that are purely beneficial are the ones that can benefit from the undistinguished young person and with the permission of his guardian, not those behaviors that revolve between benefit and harm, nor purely harmful, and the description of marriage revolves in the circle of benefit and harm, and despite this, the legislation did not address the marriage of the young He is not explicitly discriminated against, nor for the effects of his marriage, since the orbit of his legal actions revolves around existence and non-existence with the capacity established in the general rules in civil laws and others; Accordingly, the ruling is decided to invalidate his marriage contract according to the general rules, as the undistinguished minor cannot do such actions by himself, and if he does so, the invalidity is the effect of his behavior due to his loss of the age of discernment as well as puberty and adulthood.

But if his guardian marries him, then the general legal rules go to the rule of the invalidity contract, by virtue of the attachment of the disposal of others against the minor, revolving between benefit and harm, and this disposal is not permitted by legislation in the peremptory rules; By virtue of the duty placed on the legislator to protect the undistinguished minor from his actions and from the actions of others against him, in order to protect his supreme interest as it prejudices public order; So it was decided to judge the actions that belong to him invalid.

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The effect of invalidating the behavior of the undistinguished child or the behavior of his guardian in marrying him off is due to the following reasons:
1- Because of the lack of will in the undistinguished minor; Judging by the fact that marriage requires intent, and intent is with the undistinguished young person, and according to his judgment, it is non-existent.
2- Violating the peremptory and persuasive rules of public order, as attacking them constitutes an assault on the supreme interests and faculties adopted by society, and is something that is rejected by law and Sharia.
3- As for the invalidity of the guardian's disposal; It is caused by the protection given by the legislator to the undistinguished minor from the actions of the guardian that are tainted with harm.
The legislation in question adopted the principle of invalidity in the actions of the undistinguished minor in marriage, with the exception of the French legislator, as he equated the non-discriminatory with the discerning with the title of lacking capacity, and according to the general rules in French civil law, the ruling that applies to the disposition of the lack of capacity and the undistinguished minor is relative invalidity, and it becomes clear This is through the text of Article (1147) of the French Civil Code in its new amendment No. (131) of (2016), as it stipulates: "A contract without capacity is a reason for relative invalidity".
And according to the aforementioned article, we can say: that the French Civil Code equated between the incompetent and the incompetent on the one hand, and on the other hand, the marriage was judged to be valid if there was permission by the family, as stated in Article (148) of the French Civil Code to say: "No Minors can marry without the consent of the father and mother, but in the event of a dispute between the father and the mother, it is necessary to participate between them with consent" while marriage is absolutely prohibited and in the form of imperative by the same person if he has not reached the legal age for marriage, in Article (144) of The same law says: "It is not permissible to enter into marriage before reaching eighteen years of age
The researcher believes that the judgment of invalidity of the marriage contract by the legislation rejecting the behavior of the undistinguished minor, or the behavior of his guardian, is very accurate; The effects of marriage from the moment of its conclusion may lead to harm to the young, even to those authorized by the court, by virtue of the eloquent consequences that result from marriage as well as divorce. This is evidenced by the recent results of early marriage that it is considered a scourge that devastates society. Therefore, we call on the Iraqi legislator to adopt stricter and more deterrent penalties for those who commit such behavior.
Marriage is not limited to full actual capacity, rather it can transgress those who are less than the one who has reached it, as the general rules can be excluded by special rules according to the fundamental rule "There is no general but specific", and since the Personal Status Law with its existing rules regulates the relationships that bind The family, the legal age for marriage must be dealt with in those rules, and the Iraqi legislator did not deviate from this custom in stating the legal age for marriage, as he went in Article Seven of the Iraqi Personal Status Law No. (188) for the year (1959) amended to clarify this age and that By saying: "The completion of the eligibility for marriage requires reason and the completion of eighteen years".
According to the aforementioned article, the eligibility of marriage is clear in terms of the condition that the young person reaches eighteen years of age in full, and it does not mean puberty. In marriage for someone who is below the aforementioned legal age, as stated in Article Eight of the Iraqi Personal Status Law No. (188) of (1959), amended, saying:
1- If a person who has completed fifteen years of age asks for marriage, the judge may authorize it, if it is established that he is competent and physically capable, after the approval of his legal guardian. Considering the judge authorized the marriage.
2 - The judge may authorize the marriage of a person who has reached the age of fifteen if he finds an extreme necessity calling for that, and to give permission is conditional on achieving legal puberty and physical ability.
In order to clarify the aforementioned article, it is necessary to address the matters mentioned therein as follows:
First: That the application submitted to the court is made by the minor himself and no one else, and this is contrary to the directions of the Iraqi legislature and its judiciary regarding accepting and submitting applications by the minor who did not obtain legal permission to complete his eligibility, since before the permission he has no eligibility, and in support of what we have mentioned, you go Article (3) of the Iraqi Procedure Law No. (83) for the year (1969), amending the obligation to accept cases before the Iraqi courts from those who have the capacity to litigate without others, as the aforementioned article stated: "It is required that each of the parties to the case enjoy the necessary capacity To use the rights to which the lawsuit relates, otherwise he must be represented by someone who takes his legal place in using these rights.
On this aforementioned basis in the Iraqi Procedures Law, the Federal Court of Cassation affirmed in its decision that the behavior issued by a person who is not legally qualified according to Iraqi laws is not valid. The legal procedures in cases are considered part of the public order and it is not permissible to violate this law, even if he reached the age of eighteen and got married without the permission of the court, and therefore legal capacity cannot be granted to him; The aforementioned court decided that his behavior by appointing a lawyer to defend him was incorrect, and the aforementioned court required the intervention of a third person (guardian) in submitting a request to the competent court.
If the application submitted to the court is directed by his guardian, two possibilities are required:

1- The request is submitted by the guardian or his legal representative, then there is no need to use the term for the minor to submit a request to the court, so it was more appropriate for the legislator to say and submit a request to the court only without including the minor in submitting the request, because the verdict of the validity of his request depends on his attainment The legal age to enter the pleading.
2- If we go down and say that the request is submitted by the guardian or his legal representative, what is the benefit of including the consent of the guardian or not if the guardian has submitted the request? And if we assume that the guardian submitted the request and did not agree to marry him, then the submission of the request and the consent of the guardian or not becomes a foregone conclusion, so it was more appropriate for the Iraqi legislator to pay attention to the problems that arise from the text of the aforementioned article.
Second: By following the legal text in the aforementioned article, it appears that the minor's capacity has been verified, and the judge's decision is only revealing of it. And that is through the expressions used in the aforementioned text by saying: "If his capacity and physical ability are proven," since the phrase suggests that capacity is established, and the judge does only verify it with evidence that indicates his capacity, and as far as we know, we did not find a judicial decision or directive from One of the judges accepted the method by which his eligibility is inferred, and the judge is supposed to test his eligibility by means of experience, or witnesses, from the soundness of his dispositions regarding the rights and the performance of the obligations assigned to him; By virtue of the fact that capacity is the same in the definition, which is: "the power of a person to relate rights to him or to him, and to carry out the legal and judicial actions related to these rights".
And the eligibility in which the conditions must be met is the legal actions of the person, and those actions do not go outside the circle of benefit and harm. By virtue of the fact that marriage entails financial and social familial consequences that may be harmful to both spouses, or one of them, as is the case with the wife in the presence of financial benefits regarding her dowry, her maintenance, and the gifts and endowments that the spouses may obtain through the contract that takes place between them.
Third: Article (8) of the amended Iraqi Personal Status Law No. (188) of 1959 differentiated in the marriage of a minor between those who have completed fifteen years of age, and those who have reached fifteen years of age, as it stressed the conditions that must be met for those who have completed fifteen of his age, especially those related to his eligibility, while he did not stipulate the conditions that must be met by those who have reached fifteen years of age, as he stipulated in the latter the condition of legal puberty, i. to Islamic law; Because the amended Iraqi Personal Status Law No. 188 of 1959 did not regulate the mechanism by which one who is below the age required for marriage becomes fully aware of the eligibility, and it is a matter of agreement between the different Islamic schools of thought, as the different Islamic schools of thought depend on the signs that pertain to the male and the female, with little difference between them. If the court finds one of these signs, this person is considered an adult, and has capacity, as follows:
1- 1- Sexual dreams and emission of semen.
2- Appearance of pubic and armpit hair.
3- Menstruation for a girl.
4- If these signs are not indicated, the Islamic legislator resorts to specifying a specific age, but it differs according to the different sects and their jurisprudential vision in imitation, as the Hanafi jurists say that the age of puberty is eighteen lunar (lunar) years for males, and for females it is seventeen years, And according to the majority of Muslim jurists at the age of fifteen years, and as for the Malikites, the girl reaches eighteen years of age, and as for the Imami jurists, they mentioned the age of puberty for the male as fifteen years, and for the female nine lunar years.
We believe that it was more appropriate for the Iraqi legislator in the aforementioned personal status law not to differentiate between these two types of minors, i.e. those who have completed fifteen years of age and those who have reached that age, or he could set common conditions between them, and reformulate the legal rule in this regard.
As for the French legislator, he set the age of marriage at eighteen full years for both spouses obligatorily, whether male or female.
As is the case with the Iraqi legislator in the Iraqi personal status law, the French legislator went to the exception in the permissibility of marrying a minor who is not of legal age and granting the right of approval to the Public Prosecutor if he deems that the serious interest is available in both spouses.
The French legislator did not specify in its laws the age of the minor, but it is understood from the legal provisions in the French Civil Code that the minor is someone who has never reached the age of eighteen years.

The Second Requirement: The Marriage of the Insane and the Imbecile

What is certain in the legal legislation regarding the marriage of the insane is that it prevents him from conducting the contract himself, by virtue of his incapacity, by analogy with the minor who is not discerning in his behavior and whose behavior is not counted.
And if he acted, then his behavior is incorrect and invalid due to his attachment to public order, and as for his marriage by his representative, such as the guardian or from others, the legislation varied between acceptance

and refusal to marry him, and the imposition of acceptance of marriage is conditional with somewhat strict restrictions if he must be married.

French legislation prevents the insane person from conducting this marriage contract himself, according to the general rules, because he loses the capacity to dispose of him, so his marriage by himself is invalid; Because it has lost an important and essential element of marriage, which is consent, around which the marriage contract revolves, whether or not it exists in French legislation, by virtue of the fact that marriage in French civil law is a formal consensual contract, as the legislator requires that it be issued by his family as a person who is aware, sane and discerning, and the article mentioned (146) From the French Civil Code, consent is a condition for the validity of marriage for everyone, and if it is lost, the marriage becomes invalid, as it says: "There is no marriage if there is no consent"

The consent of the insane is not available because he has lost the most important characteristic, which is reason in his behavior, and his marriage is considered a violation of French public order.

As for his marriage by a third party, whether he was a guardian or an agent, the French legislator absolutely prohibited agency and representation in marriage, whether he was sane or insane, so the marriage contract is not valid unless the contract was concluded by the person himself, and he expresses his sound will and expressly in front of the Registrar of Civil Status

The same situation can be observed in the Tunisian legislature, as it prohibited the marriage of the insane by himself, in the text of Article 163 of the Tunisian Status Magazine, in which it was stated: "The actions of the insane are invalid." Tunisian law does not include provisions or provisions relating to the prohibition or acceptance of his marriage.

Whereas the Tunisian legislator contented himself with stipulating the marriage of the ward of the imbecile and the imbecile, and required the consent of the guardian in both of them, and it is not possible to measure it due to the understanding of the person. In the light of this, it is possible to refer to the general rules of obligations in Tunisian legislation to obtain the consent of the guardian or his representative in marrying him.

While the Egyptian legislator went to the permissibility of marrying the insane, however, this permissibility is conditional on the permission of the court, in addition to the medical report supporting his recovery, as Article (19/b) of the Egyptian Personal Status Law stipulates that: "It is forbidden to marry the insane and the insane, male or female, except with permission." court".

And the permission of the court is entrusted to her only, and according to this, the Egyptian judiciary went to this meaning by not marrying without his permission, and his marriage is considered invalid otherwise, as it was stated in one of its decisions the saying: "The marriage of the insane and the insane himself does not take place because his phrases are null and have no effect and no connection arises with it, so it does not As a result, there is no effect of legal marriage on her, and the required permission is exclusively for the court"

It is noticeable that the Egyptian judiciary prevented the contracting of marriage, not because the insane person is not fit to marry or because he is physically capable of marrying. But for another matter, which is the loss of an essential element, which is the expressive will of the intention to marry.

As for the Iraqi law, it went to the marriage of the insane in Article Seven, the second paragraph of the amended Iraqi Personal Status Law No. (188) for the year (1959), as the legislator took into account in the aforementioned article several interests in marrying him, the most important of which are related to the interest of society, the interest of the insane and the interest of the other party, The text of the aforementioned article states: "The judge may authorize the marriage of one of the mentally ill spouses if it is proven by a medical report that his marriage does not harm society and is in his personal interest, if the other spouse expressly accepts the marriage."

The aforementioned text raises a group of observations, as follows:

1- The aforementioned article equated the marriage of the permanent insane and the intermittent insane in the permission for marriage, and did not distinguish between them despite the fact that the chance of the intermittent insane in the event of recovery makes his actions as sane and correct, and it is possible to answer the observation that the legislator made the actions of the insane who is not applied in accordance with the article (108) of the Iraqi Civil Code, by allowing him to act in the event of recovery and counting them valid and producing their effects.

2- The aforementioned article prohibited the marriage of the two parties to the contract if they were both insane, and this is considered one of the good deeds that are counted to the Iraqi legislator. Because their marriage has negative effects on the offspring in the inherited genes; Which pours into the possibility of the birth of a person with an incorrect mentality; The result of this prohibition is the preservation of society from mental illnesses, and with this condition the legislator granted a protective general system from the material elements of public order, which is health in preventing the marriage of the insane.

3- The aforementioned article confirms the validity of the marriage of the insane according to the medical report, and this report is different from the report and the medical certificate in the marriage of those with full capacity, or even incomplete, and the necessity of the report is a very accurate and interest condition; Because of the negative effects of the marriage of the insane, which should be avoided before it takes place, for the benefit

of society first, and for the interest of the insane second, and this procedure is considered a violation of the family and family public order; Because of the consequences of mental illness that the state should guarantee.
4- As for the content of the medical report, it must include the statement that he will not harm society, and he expects assistance in his marriage to clear him or cure him of madness, and this special care by the Iraqi legislator is considered the pinnacle of humanity; Because the madman is a member of the community; Thus, his care is generally in the interest of society.
5- The family and its members are among the most important concerns of the legislator and should be protected. This protection is part of public order. Therefore, the legislator resorted, in accordance with this article, to protect it by protecting the correct party, as it is one of the parties to the contract, as it is necessary to have prior knowledge of the state of the insane, as well as valid and explicit consent, so silence does not benefit clothing for consent, and consent includes the absolutely correct party, male or female.
6- The Iraqi legislator did not complain that if the valid party lacks legal capacity, will his approval then be taken into account, or will the court need another permission from the guardian?
As for the general observations regarding the laws under comparison, they are as follows:
1- Comparative legislation, similar to the Iraqi legislature, did not care to keep up with the medical developments taking place in terms of mental disorders and mental illnesses that almost constitute a growing danger in destroying the family. Sadism, bipolar disorder, physical paralysis, delayed mental development, and many other diseases, and this point must take a place in the legislation of laws, especially with the modern medical development of mental and psychological diseases.
2- Madness and dementia are terms with broad concepts. Therefore, it is difficult to give them a meaning commensurate with their verbal template, and their meaning may be confused even for specialists. Due to the development and diagnosis of diseases.
Amending the law in accordance with the prevailing general pathological condition is incapable of encompassing all mental illnesses, but this can be addressed by using a term that can collect many of them, as is the case in the term (mental disorders), which includes most mental illnesses such as insanity, dementia and sadism. poor growth, and similar diseases that fall under this meaning; The discretion of this is up to the competent court; The fact that these diseases may lead to the collapse of the family, and this estimate is made after medical confirmation by a qualitative authority, and indicates explicitly in the medical report that the insane in his marriage, even the distant future, does not affect all those associated with the supposed family or society, and the situation is that modern laws strive To protect the family under the public system that restricts the freedoms of individuals, especially in the health field, which is one of the core elements of the public system; So that the family does not suffer from a health disorder, which will have an impact on society, and as a result of this, the legal rules must be amended in accordance with the development taking place.
What is meant in the search for the effect resulting from the marriage of the insane is that the insane is completely insane, and whether the insanity is in the origin of creation or is a symptom of capacity before marriage. .
The insane applied takes the rule of the indistinguishable minor; For his lack of realization and understanding, and the legal protection for him is manifested in either rejecting his marriage absolutely, or allowing him to marry, but with strict conditions in order to take care of society and the correct opposite party, and at the same time protect the insane himself, especially if he has financial belongings that must be preserved, and therefore legal legislation sensed these Care was divided between supporters and opponents of his marriage and the arrangement of the legal effects on him.
As the French legislator refuses to marry someone who does not have an explicit consent emanating from free will, and the issuance of consent must be from a discerning perceiver, and the consent emanating from the insane is not counted. His family, as Article (146) of the French Civil Code went on to say: “No marriage takes place unless there is express consent.
As for his marriage by a third party, because this third party is an agent or representative for the insane, French law does not accept the agency in marriage at all, even if the consent to the marriage occurred outside the legal frameworks followed by the person of full capacity; Because the French legislator requires the presence of the married couple before the civil status registrar for the validity and contracting of the marriage, and any marriage outside the boundaries of the formal registration is considered invalid. (146-1) Saying: “The French citizen must appear before the Registrar of Civil Status even if his marriage took place outside the French territory” and the Registrar of Civil Status will automatically refuse the marriage of the insane, because consent is related to capacity, and the capacity of the insane in French law is considered non-existent due to its connection to public order French; As a result, his marriage was absolutely forbidden by himself or by his deputy.
As for the position of the Egyptian legislator, permission in his marriage is linked to the court, according to the text of Article (19) of the Egyptian Personal Status Law. whose behavior was considered invalid, and this was confirmed by the Egyptian Court of Cassation, as it considered the behavior of the insane by himself in the marriage to be without effect, and his words are considered null and the result of the ruling is that this marriage is invalidated; For the failure of someone on his behalf to marry him.

Or perhaps this was entrusted to Islamic law according to the Hanafi schoo, which permits the marriage of the insane, but with the permission of the guardian, and then his marriage with the permission of the guardian is considered valid; Because its provisions are not related to public order, and in other words, the behavior of the insane by himself is absolutely irrelevant, whether it is in financial transactions or in the event of marriage, as it was stated in Article (110) of the Egyptian Civil Code that says: "The undistinguished minor has no right to dispose of his money, and all His actions are invalid.".

As for what was concerned with the Iraqi legislature, it was clear in explaining the relationship between the marriage of the insane and its rulings. In Article (7) of the second paragraph of the Iraqi Personal Status Law, he indicated: "The judge may authorize the marriage of one of the mentally ill spouses if it is proven by a decision that his marriage does not harm society." And that it is in his personal interest if the other spouse accepts the marriage explicitly.

And it appears through the aforementioned text, and in the sense of violating the text, if it is proven that his marriage can harm society, then the judge must not authorize his marriage; Because it harms society and affects its supreme interest, and the court can raise it on its own.

The great importance of the public interest of society that the Iraqi legislator attached to the marriage of the insane appears through the medical report. The duty then requires the judge to prevent the marriage of the insane; Because it protects the interest of society in the spread of insanity, and this protection is at the heart of public order, as health is one of the basic elements of public order, and the duty of the state in its joints is to protect society from epidemics and diseases.

As for the level of personal protection, the aforementioned article guarantees protection for the insane; Being a member of the family, and protection in this regard is the protection of his personal interest, as the Iraqi legislator has shown his humanity and the extent of his interest in this group of society, especially if the marriage is in his interest and his innocence and recovery from disease, and at the same time the legislator granted protection to the right party through the express approval of his acceptance Marriage and his knowledge of the insanity of the opposite party, as by virtue of explicit consent, the intent is confirmed and the apparent and inward wills of the correct party coincide, and this is a good deed that is counted for the Iraqi legislator.

According to the aforementioned, observations are recorded on Article (7) of the amended Iraqi Personal Status Law No. (188) for the year (1959), as follows:

1- The Iraqi legislator was not subjected to the penalty or penalty resulting from violating the aforementioned article in the event that the insane person was married off without the permission of the court and without a medical report, due to the existence of privacy in the matter of his marriage as it violated public order.

2- The legislator did not specify the competent authority that issues the medical report, and this authority must have a very precise jurisdiction. In view of the consequences of the insane marriage of the effect that can be transmitted to the offspring.

3- The legal conditions for the marriage of the insane may be available and the judge allows it, but the legislator did not deal with a state of interruption and the end of the marital relationship between the insane and the healthy party, and what is the mechanism by which divorce takes place and the consequent guarantee of his rights and protection, and this is a deficiency in the legislation that must be remedied and paid attention to him, due to his attachment to the public system.

And it appears from the foregoing that the comparative legislations went to the inadmissibility of the undistinguished minor because his marriage is related to the capacity, which is considered part of the public system, and it cannot in any way be given to those who do not deserve it, in addition to that the rules of capacity as stipulated by all laws are among the rules specific to the system year.

As for the marriage of the insane, and despite its disqualification, the laws were divided in his marriage into several directions:

The first: preventing him from marrying him, as the French legislator went to; Because the condition of express consent in the marriage contract, presence, and expression of free will must be required before the civil status officer, and these two things cannot be met in the person of the insane, and these conditions are considered from the French public system.

And the second: Permissibility in his marriage, but with the restriction of the permission of the court, as in the Egyptian legislation, which made Islamic law and according to the Hanafi school of reference for it, and in turn permitted the marriage of the insane, but he was entrusted with expressing his will through the guardian or whoever takes care of his affairs.

The last of these trends stressed the conditions and restrictions, as did the Iraqi legislator, who stipulated several conditions, taking into account three interests: the first is the interest of society, which is considered part of public order, the second: the interest of the insane, and the third: the interest of the right party, however, Iraqi legislation needs to clarify the provisions related to the marriage of the insane more accurate and objective; Because of the humane consideration for him and its attachment to the general system of society.

Results and Recommendations

Results

The non-discriminatory and those who judge them as insane are among the categories most attached to public order, in terms of provisions. The laws under comparison were concerned with protecting their actions, especially in matters of marriage and divorce. Accordingly, the laws under comparison were divided between those who oppose their marriage in order to protect them and care for the interest of society, and those who are supportive in Their marriage, but on special conditions.

- Comparative legislation, like the Iraqi legislature, did not care to keep up with medical developments in terms of mental disorders and mental illnesses that almost constitute a growing danger in destroying the family. , bipolar disorder, physical paralysis, delayed mental development, and many other diseases.

Recommendations

- With regard to the marriage of the mentally ill, the validity of the marriage of the insane is entrusted to the special medical report, and the Iraqi legislator mentioned it, and this report is not similar to the report and the medical certificate in an ordinary marriage, and since it was not referred to the authority authorized to issue it, we suggest that it be included in the Iraqi courts, the authority The authorized woman if it is necessary to marry him off, according to the conditions mentioned in Article (7) of the Iraqi Personal Status Law.
- The legislator must take into account the scientific development in diagnosing new pathological conditions in the enactment of his laws, especially with the modern medical development of mental and psychological diseases.

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