

Medical errors resulting from transplantation of human organs between criminalization and legal protection under Algerian legislation

الأخطاء الطبية الناجمة عن زرع الأعضاء البشرية بين التجريم والحماية القانونية في ظل التشريع الجزائري

Haouam Khalida

University of El Oued -El Oude-
The Laboratory for International Leg
Studies Transformations and Their Impact
hassane.sid@univ-tebessa.dz

Hassane sid

University of Cheikh L'arbi Tebessi -Tebessa
Research Laboratory for Media and Society
on Algerian Legislation
khalida-haouam@univ-eloued.dz

Date of submission:29/04/2024 Date of final acceptance:06/12/2024 Date of publication :December 2024

Abstract :

The transplantation of human organs is considered one of the most complex and risky surgical procedures, which may be accompanied by medical errors that can affect the lives of patients or donors. The aim of this research is to attempt to understand the general framework of these errors between criminalization and legal protection. The study concluded that legal regulations permit the transplantation of human organs when their principles are respected, and criminal liability ensues in case of violations of the rules governing the transfer and transplantation of human organs..

Keywords : medical error; criminalization; organ transplant; Organ transfer; criminalization; legal protection.

ملخص:

نقل وزرع الأعضاء البشرية تعتبر من أصعب وأخطر العمليات الجراحية والتي يمكن أن تصاحبها أخطاء طبية قد تؤثر على حياة المرضى أو المتبرعين، وهدف هذا البحث الى محاولة معرفة الاطار العام لهذه الأخطاء بين التجريم و الحماية القانونية، وتوصلت الدراسة الى أن القواعد القانونية تتضمن إباحة عمليات زرع الأعضاء البشرية متى تم احترام مضامينها، وترتب مسؤولية جزائية في حالة مخالفة الضوابط التي تحكم نقل وزرع الأعضاء البشرية.

الكلمات المفتاحية: الخطأ الطبي؛ التجريم؛ زراعة الأعضاء؛ نقل الأعضاء؛ التجريم؛ الحماية القانونية.

Introduction:

Over time, organ transplantation surgeries in Algeria have become a convergence point between medicine, ethics, and law, representing not only advanced medical techniques but also a last resort to save many lives. However, these procedures face a variety of ethical and legal challenges in the Algerian context.

Medical errors during organ transplantation surgeries in Algeria constitute a complex and sensitive issue. They not only affect the safety of patients and the overall success of the procedure but also raise ethical and legal questions regarding responsibility and accountability. Unethical and exploitative medical practices that violate patients' interests and erode their trust in the healthcare system must be penalized. At the same time, adequate legal and ethical protection must be provided to donors and patients in Algeria, including ensuring their rights and providing the necessary guidance and support throughout all stages of the process.

The issue becomes even more complicated in the Algerian context due to legal challenges related to organ donation, including the legal authority of donors and procedures for obtaining their consent, in addition to laws regarding protection and safety that should apply to surgical procedures and organ delivery in Algeria. These challenges require a precise legal and ethical framework that maintains a balance between protecting the rights of donors and patients, ensuring the safety of surgical procedures, and combating exploitation and crime in the Algerian context.

Study problem:

This research aims to explore and understand the general rules for defining the concept of medical errors and their challenges, and to analyze the applications of medical errors in the context of human organ transplantation surgeries. This is what this study seeks to answer by posing the following question:

How do criminalization and legal protection measures impact the occurrence and management of medical errors arising from human organ transplantation under Algerian legislation ? and what is the general framework for these errors between criminalization and legal protection?

Methodes :

In order to answer the question, we used the descriptive approach to describe and analyze the concepts and laws relating to medical errors caused by transplantation of human organs, in Algerian legislation.

We divided the study into two Sections:

Section I: The general rules for determining the concept of medical errors .

Section II: the applications of medical errors on human organ transplants.

Section I: The general rules for determining the concept of medical errors

General rules require that errors must be a necessary condition for the establishment of civil liability, but make it the basis on which it is based, as the injured must stick to the mistake of the perpetrator and prove it, and most of the legislation has left the errors to explain the law, because of the requirements posed by this matter about the definition of its concept and types, and this will be the focus of our intervention in this forum, in accordance with the following elements.

A)The concept of medical errors:

The jurists tried to define the errors, but it was characterized by contrast and keeping up with the developments of society, where he defined the errors as a breach of a previous obligation and limiting the obligations that are considered wrong in four types, namely refraining from violence, refraining from work that did not have the reasons for the strength or skill and vigilance in performing the duty of control of persons and things, and known in another direction as the reluctance of the doctor to make special obligations. It is a matter of principle that the doctor's obligation is to take care of the doctor's obligation to make sincere efforts and vigilance¹, that is consistent with the established scientific principles, which are consistent with the existing conditions in order to heal the patient and improve his health, and any breach of this constitutes a medical errors, which is adopted by the Algerian legislator in the text of article 45 of the doctor's code of ethics (Article 45 of Executive Decree No. 92-276 of July 6, 1992², which contains the Code of Medical Ethics, states: "The doctor or dental surgeon shall, once approved, provide any treatment to his patients with dedication and dedication, conform to modern science data and, if necessary, to competent and qualified colleagues), so the doctor has a responsibility to meet this basic errors, and any breach of this is a doctor's³, ethics code.

Infringement or deviation, defined in the medical field as the doctor's departure from scientific principles, which are those principles and established rules that are theoretically and scientifically accepted among a range of doctors," and it is intended to be a negative or positive deviation, and the moral element and its strength of perception or discrimination, so that the doctor must have the necessary vigilance, awareness and wisdom required by the medical profession, when it is special and has been issued, it is responsible to the patient article 125 of Order No. 75 58 of September 26, 1975, which contains the amended Algerian Civil Code, which is complementary under Law No. 05 10 dated June 20, 2005, Official Gazette No. 44, stating: "No The person who is responsible for the harm caused by his act, his omission, negligence or failure to surround him is asked, unless he is special and the discrimination is related to age, and the Algerian legislator has specified in article 42 of the aforementioned law that he or she reaches the age of 13.⁴.

To assess a doctor's medical errors, jurisprudence initially acknowledged the personal criterion, wherein the doctor is obligated to exercise customary vigilance and foresight commensurate with their scientific and cultural qualifications, as well as the resources available to them. If the doctor could have avoided the attributed errors, they were deemed at fault, and vice versa. However, jurisprudence and justice have since shifted towards an objective criterion. The Algerian legislator has adopted this objective standard, evident in Article 172 of the B.C.⁵, which stipulates that fulfilling an obligation requires the debtor to act with the diligence of an ordinary person, considering the circumstances surrounding the harmful act, while excluding personal factors such as social and health conditions. The most suitable criterion is the standard of good professionalism, where a vigilant and forward-thinking individual in the same profession, aware of the necessary capabilities, is held accountable based on that premise.

B) Types of medical errors:

The determination of the degree of errors achieved by the responsibility of the doctor is important to attract the attention of the law men, given the nature, accuracy and seriousness of the medical work at the same time and for these reasons some went to distinguish between several types of medical errors in the form of:

1- Normal errors and professional errors:

The normal errors includes all that comes from the doctor when practicing his profession, without having to do with the technical assets of the profession, such as the procedure of the operation drunk or negligence in the inaction of the patient before the operation, or forgetting a surgical machine in the patient's body (A decision issued by the Telemcen District Council on 19/01/1992 summarizes its facts and the patient, following a hospital delivery, continued to suffer from vaginal pain, and when she underwent tests she discovered a foreign body, and she underwent surgery on 20/03/1986, where she found a needle in her vagina since the birth, and filed a lawsuit against the hospital administration, where she was awarded compensation by the administrative chamber)⁶ and the criterion of this errors is deviation from the behavior of the average man, but the professional errors is a mistake related to the technical asset

For the profession, such as the doctor's mistake in diagnosing the disease and not taking into account the victim's disease by giving him, for example, a medicine that is not suitable for his disease, which makes him careless and wrong.⁷

In Algeria, if some jurisprudence still seeks to absolve the doctor of liability in the case of minor occupational errors in accordance with article 172 of the Law, the Law on the Protection and Promotion of Health recognizes the doctor's responsibility for any negligence or professional errors during the exercise of his duties or appropriateness, and causes harm to the physical integrity of a person (Article 239 of Order 85-05, dated February 16, 1985, which contains the Health Protection and Promotion Act, amended and complemented by Law 90/17 of July 31, 1990, J.R. No. 35), and the judiciary has followed this trend, and the judiciary has taken this direction, and the judiciary has accepted the doctor's responsibility for his mistake and did not require serious errors, even though he took it in some exceptions.⁸

2- Errors by medical teams and individual errors:

Modern medical activity requires the assistance of the doctor with assistants in different specialties, taking the collective form after it was individual, and this raises real problems in the case of a medical errors, and causing harm to the patient, which we will try to treat below:

2-1 Errors by medical teams:

Due to the complexity of surgical work and in-depth medical specialization, it is imperative for the main doctor in this type of operation to use a group of assistant doctors for him each in his field of specialization, and the Algerian legislator has understood this problem and has taken as a general rule the principle of independence of responsibilities on the basis of the independence of medical specialists from each other.⁹

It acknowledged the responsibility of the doctor under the guarantee of the University Hospital Mustafa Pasha because of a fracture in the left hand suffered by the patient and was left without care or treatment and after four days showed signs of rot in the injured place, which necessitated amputation of the hand, where the Supreme Court said that this negligence is a serious errors establishing the responsibility of the doctor., but if it is not possible to refer the ratio of the damage to a particular doctor within the medical team, it is necessary for the doctor to adhere to the responsibility of the principal who has the supervision and leadership of the supervising team. The process, in accordance with article 124 of the bc j., and when it is not possible, we resort to solidarity responsibility in accordance with the text of Article 126.¹⁰

2-2 Individual errors:

The jurisprudence and the judiciary recognize that the responsibility of the doctor for his personal act is a responsibility of a contractual nature¹¹, whenever there is a contract between the patient and the doctor, and the damage suffered by the latter as a result of the doctor's breach of a contractual obligation, must be adopted only in cases of the absence of a medical contract, such as emergency cases, or intervention in the case of the spread of infectious diseases and epidemics... And so on

2-3 Contractual and Tortious Medical Error:

French jurisprudence and jurisprudence followed the idea of the default nature of medical errors, and considered at the outset that medical responsibility is a default liability for violating the duty not to harm others, based on the established scientific principles of medical science, as they have been based on the basis that the prejudice The idea of the nodal nature of medical errors changed the law and the judiciary in France after the famous ruling of the French Court of Cassation on May 20, 1936. The doctor and the patient, under which the doctor is not obliged to heal the patient, but to provide the care required by the patient's circumstances, which is consistent with the principles of the profession, and the requirements of scientific development, and the breach of this contractual obligation entails the birth of responsibility of the same kind, any contractual responsibility".

Section II: "Medical errors in organ transplant and transplantation operations

After addressing the general rules governing all medical errors, we will in this research to a type of medical operation of great importance, and medical errors that can occur in the form of transplants and transplantation of human organs, as follows:

A) Medical errors in organ transplantation:

The process of the transplant and transplantation of organs from medical work, which has provoked a great controversy between the clergy, medicine and the law, between supporters and opponents, but considering the transplant and transplantation of human organs is one of the most important methods to save the lives of many patients, most legislation authorized the renunciation of human organs, whether from the living or the dead, This is for those who need it, with this legalization restricted by conditions, which the Algerian legislator has adopted in domestic laws¹²

1- Jurisprudential basis for human organ transplantation:

After the great controversy related to the issue of the legalization of transplants and the transplant of human organs, and the final recital to its disclosure, the jurisprudence had to find legal theories based on it, and allow him to benefit from scientific development in this field, and in this context there is a set of legal foundations in the form of theories based on the legality of the legalization of human organ transplants, which are as follows:

1-1 The theory of legitimate cause:

The roots of this theory extend to the French jurisprudence, led by "Décocq", which is the legitimacy of actions that are received against the human body, and is determined by the purpose to be reached by these actions, when the purpose is legitimate by the means of acting legitimate, and this applies to these operations, to save The health or life of the patient who needs the organ transplant red, or the removal of part of the skin of another person to be grafted the place of his disease, has been criticized for not distinguishing between the processes award and non-prize,

which prompted the owners of this opinion to add the condition that the removal is the necessity and the only way to save the life of the patient.¹³

1-2 Case of necessity in human organ transplants:

The content of this basis is that the interest of the patient who needs to transplant the organ in his body must be confirmed, therefore this interest is contrary to the organ donor who exposes his physical integrity to potential risks to no benefit, and therefore the process of cutting the organ from the donor is dictated by the case of necessity, because its purpose is to save the patient's life or health from danger, but this theory Like its predecessor, it has not been spared criticism by jurists, on whether the necessity is a reason for legalization or a prohibition of liability, considering that this leads to the control of doctors and forcing them, for example, to subject any person to surgery to deduct one of his kidneys simply to match his tissues with the tissues of a sick person who needs to transplant this kidney and then this aspect of the jurisprudence considers that the donor's consent should also be involved.

1-3 The theory of social benefit:

The proponents of this theory call for the behavior of the donor of his organs with awareness and free will, in which support for the social benefit, by improving the health status of the patient, one of them donated his kidney

For a person with a kidney failure, this increases the overall social benefit compared to the donor and patient status prior to the procedure¹⁴

This theory criticizes this theory that the idea of individual benefit is ambiguous and dangerous, and may lead to the waste of individual rights, especially in authoritarian regimes, such as forcing a simple worker to give up one of his kidneys for the benefit of a scientist suffering from kidney failure, and the idea of social function and the associated duties and obligations is broad and changing for individuals at maturity and youth, and gradually decreases with ageing, and it is not possible to say that the patient's condition improves after the operation, because human mental health is affected by different circumstances and unpredictable factors.¹⁵

1-4 The theory of donor consent:

The point of this theory is that the consent of the donor is the basis for the authorization of the deduction of the organ from his body, and in this sense the theory is related to the extent to which the consent of the donor may be considered a reason for the permissible and the jurisprudence confirms that this consent is tantamount to a waiver of the right to physical integrity, and they add that the issuance of consent from the victim falls the legal duty placed on It is the responsibility of others to respect their rights and interests, it is a legal act issued by the donor, and it is considered a license from it to others to harm his physical integrity, and from the criticisms that have been directed at her is that it is unrealistic in view of the subject and place of the right, the nature of the human body and its dignity is priceless, as is being dealt with other things that are subject to financial rights

1-5 "Legal basis for human organ transplants:

In view of the shortcomings of previous theories, this trend, which aims to establish a legal basis for these processes, has emerged by stating the legal requirements that must be met in case of necessity and the consent of the donor and patient, and the requirement that they be aware of the

potential risks of these operations, in order to put The legal and legal controversy that characterized the transplants of human organs, in order to keep pace with the rapid development of this field, was reduced by the intervention of the legislators in the states to expressly provide for the authorization and legalization of these acts and to establish controls that must be respected to protect all parties involved in these medical interventions

B) Conditions for transplantation of human organs:

Human organ transplants require a set of conditions to ensure that medical mistakes are not made and hence the order of legal responsibility on the shoulders of the doctor and the hospital under which he works, and these conditions generally require the distinction between two types of

Operations, in terms of their conditions when transporting and transplanting organs from the living, and their conditions when transporting and transplanting from the dead, according to the following two sections:

1- Conditions for living organ transplants :

Due to the seriousness of the transplantation of human organs, it is permissible to extract or transplant tissue, or human organs, except for therapeutic or diagnostic purposes in accordance with the conditions stipulated in the law, as stipulated in article 161 of Law No. 85/05 on the protection and promotion of health.

1-1 Consent of donor and recipient:

The consent of the first person in accordance with article 162/01 of the aforementioned law shall be written and this consent shall be released in the presence of two witnesses and deposited with the director of the institution and the doctor head of the department and the donor may not express his consent until the doctor informs him of the possible medical risks that may be caused by the extraction process, and the donor may retract his consent.

Accordingly, the doctor who performs the process of excision and transplantation of human organs and tissues without the free and informed consent of the donor and the patient, otherwise his conduct is flawed and contrary to the rules of law.¹⁶

This is expressed by the commitment to inform the patient in medical work in order to protect people from dangerous therapeutic methods that cause harm to patients, so i made preventive rules impose themselves in order to safeguard the safety of the patient, whether on his body or his mind diagnosis and treatment,¹⁷ it is a prior obligation of contracting between persons imposed on the contractor either the law expressly or the contract to be concluded or the general principles of the¹⁸ as the principle of good faith before contracting, the doctor must take note of the nature of the treatment and the risks of surgery may be the same treatment method but the results vary from patient to patient, depending on the psychological and physical condition of each patient¹⁹, and the extent of the reactions expected from the patient's body, so the doctor should have the right and duty to surround him with all the patients. The necessary information concerning his health²⁰

For this reason, the obligation to inform requires conditions by the doctor for the direction of his patient, and the constituent and producing parties in the medical contract, as follows:

1-2 Information must be simple and understandable:

The desired benefit of medical work, that the patient be aware of the nature of the treatment proposed to him and the risks and damages surrounding him, and in order not to submit to him by a flawed decision wrong, the doctor must understand his patient in a simple language, easily understood and clearly indicative in the statement of the state of diagnosis and treatment and the risks involved so that he can know the risks to him if he does not follow the instructions and instructions contained in addition to the doctor is obliged to take into account personal circumstances. When informed about the level of culture, age, gender and severity of the disease, the patient is informed.

1-3 Information must be sufficient, complete, and clear :

This requirement requires that the information given by the doctor to his patient must be simple and can be understood, honest and approximate ²¹, but there are other cases that require full and detailed information, in cases of the transplant of human organs and abortion, and it should be noted that it prevents the extraction of organs from young children and adults deprived of the ability to discriminate, and also prevents the extraction of organs or tissues of persons with diseases of nature that harm the patient or the donor . ²²

1-4 The donated organ must be a paired organ:

And prove that the remaining organ is able to perform the function performed by the removed organ, and the doctor should perform preliminary medical examinations of the patient and the donor before performing the removal and transplantation, in order to ensure the safety of the tissue or organs of the donor from infectious diseases that can be transplanted from one person to another and that the doctor's negligence to perform such tests is an error on his part. ²³

1-5 The benefit must be significant for the patient:

In order to be so, the transplant must be the only way to save the patient's life, but from the donor side it is not permissible to remove an organ or tissue from his body until it is confirmed that the practical benefits are more than harmful, and that the interest to be achieved and protected is greater than the interest sacrificed, the doctor should

Ensure that the tissue is compatible, and the validity of the organ to be transplanted, to perform the purpose and achieve the goal envisaged in the body of the recipient, and to take all necessary precautions during the implementation of the removal process, or during the transplant, and any breach of these obligations is a mistake on the part of the doctor to assume his civil responsibility.

1-6 Removal of organs or tissues without charge:

Because the organs of the body cannot be sold or purchased in accordance with article 161/02 of law 85/05, the doctor's extraction of a tissue or organ of the human body in exchange for money to plant it for another person is a mistake on his part. ²⁴

2- Conditions for organ transplants from the deceased:

The removal of organs from the body of the deceased is not permissible as a general principle, because the origin of protection should be attached to the human body even after his death, yet the

clergy and jurists have authorized the possibility of harming the body for therapeutic and scientific considerations with the need to adhere to certain conditions, which are :

- It is not permissible to remove organs from the body of a deceased unless the deceased expresses his consent in writing and if this does not happen, it is not permissible to extract it only with the consent of the members of his family ²⁵, and if the deceased does not have a family requesting permission from the legal guardian, and not to take the consent of the family if the deceased opposes the subject during his life is a mistake on the part of the surgeon.

-It is not permissible to remove tissues and organs from deceased persons until the medical and forensic proof of death, in accordance with article 164/01 of law 85/05, and the doctor shall be wrong when any organ or tissue of organs and tissues is removed, if the deceased has already expressed his rejection.²⁶

- Not to reveal the identity of the donor to the beneficiary and the identity of the beneficiary to the family of the deceased donor, in order to maintain the psychological balance of the patient and to take into account his feelings so that this patient who was treated through transplantation does not live with another mental illness that keeps him at the mercy of the donor family ²⁷

Conclusion:

The purpose of this research was to study and comprehend the general rules that govern the definition of medical errors and their difficulties, as well as to analyze the implications of medical errors in the context of human organ transplantation surgeries. By using the descriptive approach to describe and analyze the concepts and laws relating to medical errors caused by transplantation of human organs, in Algerian legislation.

This study concluded that the legal and doctrinal context permits such operations, and does not mind the deduction of human organs, whether between the living or the dead, when it is intended to treat the patient by transplanting an organ from a surviving person or a deceased human being, but only by subject to many legal rules that ensure that these operations are permitted when respected, and arrange medical errors in the case of the violation, which are :

1- Conditions for living organ transplants:

- The consent of both the donor and the future patient of the organ informing should be simple, and understandable to the patient
- The informing should be sufficient, complete and non-ignorant:
- The donated organ should be a double organ in the body
- The benefit resulting from organ transplantation for the patient must be significant
- Removal of organs or tissues from the human body without financial charge

2- Conditions for organ transplants from the deceased :

-It is not permissible to remove organs from the body of a deceased unless the deceased expresses his consent in writing and if this does not happen, it is not permissible to extract it only with the consent of the members of his family

-It is not permissible to remove tissues and organs from deceased persons until the medical and forensic proof of death, and the doctor shall be wrong when any organ or tissue of organs and tissues is removed, if the deceased has already expressed his rejection.

-Not to reveal the identity of the donor to the beneficiary and the identity of the beneficiary to the family of the deceased donor

Based on what is stated in the content of our research, we may suggest some of the recommendations of the following:

The scientific development witnessed by the transplant and transplantation of human organs has led to the development of new crimes such as trafficking and theft of these organs, and therefore it requires monitoring the extent of their implementation in accordance with the requirements of the laws and ethics of the medical profession, exerting intensive efforts between states and enshrining the principles of international cooperation, and approving international and regional seminars and conferences to combat these organized and transnational crimes of the state.

In the text of article 162 of the Health Protection and Promotion Act, the Algerian legislator ordered that the organ donor's approval be issued in the presence of two witnesses, but did not specify who these persons were, and this should be remedied by the Algerian legislator.

Some researchers believe that the issuance of approval by the donor, a great burden on doctors if necessary, so that they cannot obtain it, the authorities in the state can use the identification card identification of the concerned, so that the doctors will simply review it to know the opinion of the person about the possibility of removing an organ of his organs, and this is to make a profit in time.

Considering that the sale of human organs is not permissible in accordance with national legislation and even in Islamic law as it does not pay for money, but this does not prevent the introduction of the idea of preserving these organs after they have been removed, and keeping them in banks for the preservation of human organs, with the need for the intervention of the legislator to protect these behaviors

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- 5- The Algerian legislator has adopted the objective standard, which is clearly reflected in the text of Article 172 of the B.C., which states that "the obligation to act if the debtor is required to maintain or administer the object and to be careful in the implementation of its obligation, the debtor shall have fulfilled the obligation if it takes care of all the care of the ordinary person, if the intended purpose is not achieved unless the law or agreement otherwise stipulates that the debtor remains responsible for his fraud or gross mistake)
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 - 17- Hossam Zidan Shukr,op.cit,p92.
 - 18- (Article 163, followed by Executive Decree No. 92/276, which contains the Code of Medical Ethics, and the second paragraph of Article 162 of the 85/05 Act on the Protection and Promotion of Health provides for the donor's ability to retract his consent with the text: At any time, the donor can retract his previous approval.
 - 19- Mansour, M. H. (1999). Medical Responsibility. Egypt: The New University Publishing House Alexandria.p42.
 - 20- Ibid, pp. 43-44
 - 21- Mohamed, op. cit.p.160.
 - 22- (Article 163 of the Health Protection and Promotion Act).
 - 23- Mohamed, op. cit.p.288
 - 24- article 161/02 of law 85/05, the doctor's extraction of a tissue or organ of the human body in exchange for money to plant it for another person is a mistake on his part.
 - 25- (The order in article 164/02 of the 90/17 Act shall be taken into account The modified and complimentarily of the Health Protection and Promotion Act is: father or mother, husband or wife, son or daughter, brother or sister).
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 - 27- Mohamed, op. cit.p.289.

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- 13- dated February 16, 1985, including the Health Protection and Promotion Act, amended and complemented by Law 90/17 of July 31, 1990, J.R. No. 35.
- 14- Executive Decree No. 92-276 of July 6, 1992, which contains the Doctor's Code of Ethics.
- 15- Order No. 55 of 26 September 1975 contains the Algerian Civil Code amended and complemented by Law No. 05 10 dated 20 June 2005.
- 16- Supreme Court Decision - Chamber of Misdemeanors and Offences - 30/05/1995 - File-118720-B.C.-2-1996.
- 17- Supreme Court decision - Chamber of Misdemeanors and Offences - 30/05/1995- File-118720-B.C.-No.2-1996, 179 and beyond.
- 18- Supreme Court decision of October 29, 1977".
- 19- The Supreme Court's decision of October 29, 1977