

**Essay about ; Means of Protecting the General Security
The Action for Non-Enforceability (Paulian Action) and the Action for Simulation as a
Model¹**

العربية	English
الضمان العام	General security (of creditors)
الدعوى البولصية	Paulian action
دعوى عدم نفاذ التصرف	Action for non-enforceability of legal acts
عدم النفاذ	Non-enforceability / Inopposability
عدم الاحتجاج	Non-opposability
عدم المعارضة	Non-opposition
الدعوى غير المباشرة	Indirect action
الدعوى المباشرة	Direct action
دعوى الصورية	Action for simulation
الصورية	Simulation
الصورية المطلقة	Absolute simulation
الصورية النسبية	Relative simulation
العقد الظاهر	Apparent contract
العقد المستتر	Concealed (hidden) contract
ورقة الضد	Counter-letter
المتصرف	Transferor
المتصرف إليه	Transferee
الخلف الخاص	Particular successor
الخلف العام	Universal (general) successor
الغير	Third party
حسن النية	Good faith
سوء النية	Bad faith
الإعسار	Insolvency
الغش	Fraud
الإثراء بلا سبب	Unjust enrichment
ضمان الاستحقاق	Warranty against eviction
فسخ العقد	Rescission of contract
بطلان	Nullity
إبطال	Annulment
تقادم	Prescription / Limitation period
عبء الإثبات	Burden of proof
وسائل الإثبات	Means of proof

¹ - Daoudi, Ibrahim; Ben Aouda, Lazreg.

“Means of Protecting the General Security: The Paulian Action (Action for Non-Enforceability) and the Action for Simulation as a Model,”

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التنفيذ الجبري	Enforcement proceedings
محل التنفيذ	Asset subject to enforcement
التبرعات	Gratuitous acts
المعاوضات	Onerous (reciprocal) contracts
التواطؤ	Collusion
العلم بالإعسار	Knowledge of insolvency
تعارض مصالح الغير	Conflict of interests of third parties

Introduction:

Actions aimed at protecting the general security have occupied a prominent place within legal studies due to the protection these mechanisms provide for creditors' rights against the debtor's fraud or negligence, as well as the equality they ensure among creditors.

Practical life has shown that a debtor's failure—whether intentional or due to negligence—to preserve his general security is quite possible, especially when his financial situation deteriorates.

This outcome does not affect only the class of creditors; its impact may extend to disrupting the civil credit system and reducing the scope of financial transactions. In light of this reality, it became necessary to choose the action for non-enforceability of legal acts and the action for simulation as models for protecting the general security, since many creditors are unaware of these two means for claiming their rights. Moreover, courts sometimes confuse these actions with actions for nullity and annulment.

In this regard, civil law has regulated four types of actions: the indirect action, the direct action, the Paulian action, and the action for simulation. However, what concerns us

In this research, we focus on: the Paulian action (action for non-enforceability of legal acts) and the action for simulation.

Through these two actions, the creditor may either recover what has left his general security by means of the Paulian action (or action for non-enforceability), or retain what has only apparently left his security through the action for simulation. Based on the foregoing, it becomes clear that the subject is of great importance not only from a theoretical perspective—reflected in the multiplicity and diversity of actions aimed at protecting the general security—but also from a practical perspective, by examining the extent to which these two actions are effective and efficient in providing the necessary protection for creditors against the risk of the debtor's assets diminishing or becoming insufficient to satisfy all debts.

Accordingly, the use of these two actions raises several questions regarding their legal nature, the conditions for exercising them, and the legal effects resulting from their use.

To answer these questions, it is necessary to analyze the legal provisions established by the legislator in this regard.

Therefore, I have chosen to address this topic in two sections, according to the order in which these two actions are presented in civil law, as follows:

First Section: The Paulian Action (or Action for Non-Enforceability of the Debtor's Acts)

A debtor may adopt a positive stance and hasten to dispose of his assets, with the intention behind such actions being to remove his property from the scope of the general security of his creditors—for example, by selling some of his assets at a low price or by donating property to others. In this case, we are dealing with a debtor acting in bad faith, whose actions aim solely to deprive creditors of the opportunity to recover their rights by weakening their security. Therefore, it became necessary for the legislator to intervene to protect these creditors from the danger of such harmful acts, which led to the establishment of what is known as the Paulian action.

The Paulian action is not a new or innovative action; rather, it is an ancient remedy known to the Romans, then transferred into the old French Civil Code, and also recognized in Islamic jurisprudence. However, it disappeared for a period of time and remained absent throughout the 19th century until the new Egyptian Civil Code revived it.

This revival came through the introduction of important amendments to the provisions governing the Paulian action, whether with regard to its conditions or its effects, as detailed below:

First Requirement: Conditions of the Paulian Action

From an examination of Articles 191 to 197 of the Civil Code, it becomes clear that the action for non-enforceability of a legal act is more serious than the indirect action, as it results in suspending the effects of a transaction concluded by the debtor with a transferee to the detriment of his creditors. Thus, it directly affects the interests of the transferee.

Therefore, the legislator deemed it necessary to surround the use of this action with strict conditions so that it is not available to just any creditor. Some of these conditions relate to the creditor bringing the action, others relate to the contested transaction, and others pertain to the debtor—this will be clarified throughout the research.

First Subsection: Conditions Related to the Creditor

1. The creditor's right must be due and payable.
2. The creditor's right must precede the contested transaction.
3. The action must be brought within the legally prescribed time limit.

Second Subsection: Conditions Related to the Act Subject to the Action

1. The contested act must be legal in nature.
2. The act must be harmful.
3. The act must not relate to a right attached to the person of the debtor or to assets that are not subject to seizure.

Third Subsection: Conditions Related to the Debtor

1. The debtor's act must lead to his insolvency or increase his insolvency.
2. Fraud or intent to cause harm must be present.

Second Requirement: Effects of the Paulian Action

The action for non-enforceability is neither an action for nullity nor an action for compensation; rather, it is a special type of action aimed at rendering the debtor's acts unenforceable against his creditors. Accordingly, if one of the creditors challenges an act carried out by their debtor to their detriment, and all the aforementioned conditions are met, the court must rule that the contested act is unenforceable against creditors whose rights predate that act.

However, unenforceability does not mean that the act is void; on the contrary, the act carried out by the debtor in favor of the transferee remains valid. The only consequence is that, with respect to those creditors, it is treated as if it had never existed².

Therefore, it is necessary to distinguish between the effect of this ruling with regard to the creditor bringing the action and the other creditors, and its effect on the relationship between the debtor and the transferee.

These effects will be addressed in successive subsections as follows:

First Subsection: The Effect of the Judgment of Non-Enforceability with Respect to the Creditor Challenging the Act

If the conditions of the action for non-enforceability are met, the court must rule that the debtor's act is unenforceable against the creditor. As a result, the creditor is considered a third party, and therefore the contested act does not apply to him. It also follows that the right disposed of by the debtor is treated as if it had never left the creditor's general security, allowing the creditor to initiate enforcement proceedings against it. Moreover, the reintegration of this right into the creditor's security operates retroactively, on the basis that it had never actually left that security.

Second Subsection: The Effect of the Judgment of Non-Enforceability with Respect to Other Creditors

If the creditor who brought the Paulian action proceeds with enforcement measures against the asset that has been restored to the general security, other creditors—whose claims meet the conditions of the action for non-enforceability and predate the contested act—may intervene in the enforcement proceedings and in the distribution of the proceeds. They may

² - Suleiman Marqos, *Explanation of Civil Law*, Parts II, III, and IV: Sources of Obligations, Their Effects, Characteristics, Transfer, Extinction, and the General Theory of Evidence, International Press, Cairo, 1964, para. 691, p. 681.

share with the challenging creditor in recovering their rights from the asset that was subject to the act declared unenforceable, even if they did not intervene during the proceedings of the action itself. It is sufficient that they intervene during the enforcement stage, in accordance with the provisions of Article 194 of the Civil Code.

However, creditors who do not meet the conditions of the action for non-enforceability, or whose rights have become time-barred with respect to bringing such an action, may not participate with the other creditors and do not benefit from the judgment declaring the act unenforceable.

Third Subsection: Effects of the Action for Non-Enforceability with Respect to the Debtor and the Transferee

If the contested act is an onerous contract—such as a sale—there is no doubt that the creditor will be able to recover his debt, since the sale contract is unenforceable against him. However, because the contract of sale remains valid between the debtor and the transferee, the transferee (the buyer) may have recourse against the debtor either through an action for warranty against eviction arising from the contract, or by requesting rescission of the contract. In such a case, the debtor (the seller) would recover the sold asset, and the transferee (the buyer) would be released from the obligation to pay the price.

If the buyer has already paid the price of the sold asset, he may bring an action against the debtor based on unjust enrichment. If the debtor transferred the asset to a buyer who then sold it to a second buyer, the two actions are then directed against different persons: the action for warranty against eviction is brought against the seller, while the action for unjust enrichment is brought against the debtor. The buyer may also choose between the two actions.³

If the debtor's act is gratuitous—such as a gift contract—the donee, after enforcement against the gifted property, has no right of recourse against the debtor by way of warranty unless this is expressly stipulated in the gift contract, in accordance with general rules.

Second Section: The Action for Simulation

The importance of the action for simulation lies in preserving the general security granted to the debtor's creditors when the debtor resorts to disposing of his assets through a simulated transaction that has no real existence in reality, by pretending to remove his assets from his financial estate so that if one of his creditors initiates enforcement proceedings against them, the transferee objects to such proceedings, claiming their invalidity and warning that the property subject to enforcement no longer belongs to the debtor's patrimony.

Although the action for simulation shares the same objective as the indirect action and the action for non-enforceability—namely, preserving the general security of creditors—it differs

³ - Abdel Razzaq Ahmed Al-Sanhuri, *Al-Wasit fi Sharh al-Qanun al-Madani* (The Intermediate Treatise on the Explanation of Civil Law), General Theory of Obligations—Evidence and Effects of Obligations, Parts I, II, IV, IX, and X, Dar Ihya al-Turath al-Arabi, 1952, para. 606, p. 1069.

from them in several respects. This becomes evident when examining its definition, types, conditions, and legal provisions.

First Requirement: Definition of Simulation, Its Types, and Its Conditions

From the above, simulation can be defined as the concealment of a certain reality behind a false legal appearance.

Simulation is divided into absolute simulation and relative simulation. The former refers to a situation where an apparent contract is created that has no real existence. The latter refers to a situation where an apparent contract conceals a hidden contract that differs from it in certain aspects. The contracting parties may aim to conceal the nature of their relationship (simulation by concealment), or they may seek to hide a specific element or condition of the contract (simulation by contradiction), or even conceal one of the parties to the transaction (simulation by interposition).

From the foregoing, it is clear that, for simulation to be legally established, the following conditions must be met⁴:

- There must be two contracts: a real, concealed contract reflecting the true intention of the parties, and an apparent, simulated contract that has no real existence. These two contracts share the same parties and subject matter.
- The intention of the parties must be directed toward concealing the true legal relationship.
- There must be a difference between the two contracts or acts, whether in terms of their nature, elements, conditions, or even the identity of the parties.
- The two contracts must be concluded at the same time, meaning there must be a contemporaneity of intent between them.

Second Requirement: Rules Governing Simulation

To study these rules, they must be examined first in relation to the contracting parties and their general successors, and second in relation to third parties.

First Subsection: Proof of Simulation Between the Contracting Parties and Their General Successors

Since simulation constitutes an exception to the general rule, the party invoking it must prove that there is a real act concealed behind an apparent simulated act. If the claimant (the party alleging simulation) is one of the contracting parties, they must prove the simulation they claim. In this case, proof is governed by the general rules of evidence.

Accordingly, neither the contracting parties nor their general successors may prove anything contrary to what is written except by written evidence, even if the value of the transaction does not exceed one hundred thousand Algerian dinars. The reason is that the claimant

⁴ - Suleiman Marqos, *Explanation of Civil Law*, Parts II, III, and IV: Sources of Obligations, Their Effects, Characteristics, Transfer, Extinction, and the General Theory of Evidence, International Press, Cairo, 1964, para. 696, pp. 685–686; and Mohamed Sabri Al-Saadi, *Al-Wadih fi Sharh al-Qanun al-Madani* (Clear Explanation of Civil Law), General Theory of Obligations—Provisions of Obligations, A Comparative Study in Arab Laws, Dar Al-Huda, Ain Mlila, Algeria, 2010, pp. 163–164.

(alleging simulation) seeks to prove the opposite of what is established in writing; therefore, their claim must also be established in writing⁵:

Accordingly, if the apparent transaction is in writing, the transferor must take precautions and obtain from the transferee a written document (a *counter-letter*) stating the true nature of the concealed transaction and the simulated nature of the apparent one.

However, there are exceptional cases in which proof by testimony and presumptions is permitted even in matters that normally require written evidence. These cases include:

- The existence of a beginning of proof in writing.
- The existence of a material or moral (psychological) impediment preventing the obtaining of a counter-letter.
- The loss of the counter-letter due to an external cause.

Second Subsection: Rules of Simulation with Respect to Third Parties

A distinction must be made here between third parties in relation to the effects of simulation and third parties in relation to the proof of simulation.

First: Third Parties with Respect to the Effects of Simulation

“Third parties,” in terms of the effects of simulation, refers to any person who is harmed by establishing the simulated nature of a transaction and whose interest lies in invoking the apparent transaction. This category includes the creditors of the transferee and his particular successors⁶. This is the group referred to by the legislator in the general wording of the relevant legal provision.

Second: Third Parties with Respect to the Proof of Simulation

“Third parties,” in relation to proving simulation, refers to any person other than the contracting parties whose interest lies in invoking the real, concealed transaction.

This category includes the particular successor of the transferor and his creditors, as well as the heirs of the transferor. From the wording of Article 198 of the Civil Code, it appears that the Algerian legislator has unified the rule concerning the interests of the creditors of the transferee and his particular successors with those of the creditors of the transferor and his particular successors, granting all of them—provided they are acting in good faith—the right to rely on the apparent transaction.

⁵ - Yaseen Mohammed Al-Jubouri, *Al-Wajeez fi Sharh al-Qanun al-Madani Al-Urduni* (Concise Explanation of the Jordanian Civil Law), Part II: Effects of Personal Rights (Provisions of Obligations), A Comparative Study, International Scientific Publishing House and Dar Al-Thaqafa.

⁶ - Suleiman Marqos, *Explanation of Civil Law*, previously cited, para. 702, p. 692.

However, the second group, which the legislator did not explicitly address in the aforementioned provision—namely, the creditors of the transferor and his particular successors—does not have an interest in relying on the apparent simulated transaction. Rather, their interest lies in invoking the real, concealed transaction.

Nevertheless, while the legislator addressed the interests of the creditors of the transferee and his particular successors by allowing them to rely on the apparent transaction, he overlooked the interests of the creditors of the transferor and his particular successors in invoking the concealed transaction. Therefore, in the event of a conflict between the interests of these two groups—such as when some rely on the apparent simulated transaction while others rely on the real concealed one—which group should be given priority? Should preference be given to the first group, which relies on the apparent transaction, or to the second group, which relies on the concealed real transaction?

This issue is known in legal doctrine and jurisprudence as the principle of conflict of interests among third parties, a matter that the Algerian legislator also failed to regulate in Article 198 of the Civil Code.

Third Subsection: Conflict Between the Interests of Third Parties

Since third parties have the right to rely either on the apparent simulated transaction or on the real concealed transaction according to their interests, it is natural for a conflict to arise between these interests. Given that it is impossible to give effect to both transactions simultaneously, it is impossible to give effect to both the simulated transaction and the real transaction at the same time or to reconcile between them. Therefore, it becomes necessary to sacrifice one of the two transactions in favor of the other and to prioritize the interest of one group over the other.

This is what the Egyptian legislator did in the second paragraph of Article 244 of the Egyptian Civil Code. It provides that, in the event of a conflict between the interests of concerned parties—namely, the interest of some third parties in invoking the apparent simulated transaction and the interest of others in invoking the concealed real transaction—priority must be given to the interest of those who rely on the apparent transaction over those who rely on the concealed one.

In other words, when an exception conflicts with the general rule, and one group of third parties relies on the apparent simulated transaction while another relies on the real concealed transaction, preference is given to the party invoking the apparent transaction.

This is the approach that the Algerian legislator should adopt, especially considering that a review of Article 198 of the Civil Code reveals no provision addressing this issue (conflict of interests among third parties). Therefore, it is necessary to follow the solution adopted by the

Egyptian Civil Code, particularly since this rule is the prevailing one in French legal doctrine and jurisprudence⁷.

Conclusion:

Through our study of actions for the protection of the general security in civil law, as well as in some comparative legislations, we have reached a set of conclusions that can be summarized as follows:

I. With regard to the Paulian action (action for non-enforceability of the debtor's acts), its main features can be highlighted as follows:

- The Paulian action, as established in legal doctrine and jurisprudence, is neither an action for nullity nor an action for liability; rather, it is a personal action aimed at preserving the general security. Its mechanism for achieving this objective is to render the acts of an insolvent debtor unenforceable against his creditors.
- In terms of admissibility, the Paulian action is accepted in all cases where transactions are challenged against a transferee without consideration. Conversely, it is not admissible when directed against a transferee who provided consideration in good faith.
- Algerian law, like other Arab legal systems, considers acts classified as gratuitous (such as donations) as a presumption of fraud in themselves. Therefore, the creditor bringing the action for non-enforceability is not required to prove the debtor's fraud. In contrast, French civil law requires proof of fraud on the part of the debtor.
- The Algerian legislator has broadened the scope of legal acts that may be challenged through the Paulian action. It is not limited to acts that diminish the debtor's assets but also extends to acts that increase his obligations.

⁷ - Giving precedence to the apparent transaction over the concealed one means that the creditor of the buyer—even if his right arose after the simulated sale—will be preferred over the creditor of the seller in satisfying his claim.

The rationale behind allowing the buyer's creditor to rely on the apparent transaction is to protect him from being misled by that apparent act, which he trusted and upon which he based his dealings, believing it to be genuine. This constitutes an exception to the general principle that the concealed transaction—intended by the contracting parties—should prevail.

However, in practice, the creditor of the seller may, in such a case, refrain from invoking simulation and instead treat the simulated sale as a genuine contract in order to more easily challenge it through an action for non-enforceability.

- The legislator has adopted a more flexible approach to rules of evidence, easing the burden on creditors in proving the debtor's fraud and insolvency.
- The Algerian legislator has settled the issue of a debtor favoring one creditor over others, whether by payment or by granting a cause for prescription. Payment made before maturity is treated as a gratuitous act, whereas payment made at maturity is treated as an onerous act, and challenging it requires proof of collusion—unlike the general rule for onerous transactions, where mere knowledge of insolvency is sufficient. The same rule applies to the debtor's granting of securities to certain creditors.
- Unlike French civil law and the Lebanese Code of Obligations and Contracts, Algerian law provides that the effect of a judgment declaring the debtor's fraudulent act unenforceable benefits all creditors who meet the conditions for exercising the Paulian action. In this respect, it aligns with Roman law, although it differs in that, under Roman law, proceedings were collective in nature.
- The legislator has set the limitation period for this action at three years, starting from the date the creditor becomes aware of the reason for non-enforceability; in all cases, it is barred after fifteen years.

On the other hand, we have identified certain shortcomings that the Algerian legislator should address, which can be summarized as follows:

- Remedying the deficiency in Article 192(3) of the Algerian Civil Code by aligning it with Article 233 of the Egyptian Civil Code. Article 192(3) does not explicitly state that proof of the debtor's fraud is not required, as it lacks the concluding phrase found in Article 233(3) of the Egyptian Civil Code, which provides: "even if it is established that the debtor did not commit fraud..."
- There is a need to standardize and unify legal terminology. It is noticeable that the Algerian legislator used the term "non-enforceability" in Article 191 of the Civil Code, then shifted to the term "non-opposability" in the last paragraph of Article 192, and later replaced it with "non-admissibility (or non-opposition)" in Article 194. This inconsistency contrasts with the French version of the text, which uses a single term: "*inopposabilité*" (non-enforceability). It would have been preferable for the legislator to avoid using multiple terms and to consistently retain the term "non-enforceability" in Articles 192 and 194, given its precision and clarity—following the example of the Egyptian legislator, who uses the term "non-enforceability" throughout all provisions governing the Paulian action. As Dr. Abdel Razzaq Ahmed Al-Sanhuri aptly stated: "*It is foolish to squander a wealth we have acquired and to demolish a structure that has been completed in order to build another that may lack the refinement of the one destroyed.*"
- It would have been more appropriate for the Algerian legislator to follow the example of the Egyptian legislator in regulating civil insolvency, in order to address the difficulty of initiating the Paulian action, whose conditions are rarely met in practice.

II. Based on the above observations, we propose that the legislator intervene to amend the provisions of Article 198 of the Civil Code in two respects:

1. Amending the wording of the first paragraph of Article 198 by including the category of third parties who rely on the concealed transaction (namely, the creditors of the

transferor and his particular successors), granting them the right to invoke the real transaction and to prove the simulation of the act that harmed them by all available means of evidence.

2. Adding a second paragraph to address the issue of conflicts between the interests of third parties. Accordingly, Article 198 of the Civil Code would read as follows:
3. “If a simulated contract is concluded, the creditors of the contracting parties and the particular successors, provided they are acting in good faith, may rely on the apparent (simulated) contract. They also have the right to rely on the concealed contract and may prove the simulation of the contract concluded to their detriment by all means of proof.
4. In the event of a conflict of interests among the parties concerned—where some rely on the apparent contract and others rely on the concealed contract—preference shall be given to those who rely on the apparent contract.”