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ABORTION BETWEEN PERMISSIBILITY AND CRIMINALISATION IN ISLAMIC LAW AND ALGERIAN LEGISLATION

BRAHIMI Badea*
Faculty of Law, University of Algiers1 - Saïd Hamdine, Algeria
b.brahimi@univ-alger.dz

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Abstract:
This study interrogates abortion in Sharīʿa and Algerian law, surveying juristic terminology and social ramifications. It highlights grave maternal and public-health risks and threats to lineage, and maps disagreement on the temporal ambit of permissibility, distinguishing pre- and post-ensoulment. It outlines gestational stages and correlative rights, adducing scriptural proofs that safeguard maternal life and foetal life. It also explicates Algerian criminalisation and the necessity-based exception amid contemporary implementation challenges. Methodologically, it integrates classical fiqh hermeneutics with bioethical and medico-legal analysis, advancing calibrated, maqāṣid-grounded policy recommendations.
key words: abortion; foetus; permissibility; criminalisation; ensoulment.

Introduction:

Abortion constitutes an offence of acute gravity against the mother: it may lead to her death, uterine rupture, sexual and reproductive morbidity, or severe haemorrhage culminating in fatality. It also imperils lineage (nasl), for it restricts procreation to the point of threatening the continuity of humankind, thereby contravening the divine command to people the earth and preserve posterity. Furthermore, it endangers society by increasing maternal and foetal mortality in ways liable to unsettle social stability, and it contributes to the spread of vice and the encouragement of *zinā* and other prohibitions.

* BRAHIMI Badea

The rulings of Islamic law seek to combat and prohibit abortion in order to protect mothers and foetuses, preserve humanity, and avoid the interdicted, despite the absence of any Qur'ānic or Prophetic text that speaks with direct, explicit import to abortion as such. The Qur'ān mentions killing in general, condemning the unlawful taking of life, and specifically forbids filicide.

As for the purified Sunna, there are aḥādīth related to abortion, yet they do not contain explicit declarations of its legal ruling; rather, they set out the stages of embryonic development, the formation of organs, and the breathing of the soul, as well as the compensatory liability due from one who causes a foetus to be expelled from the womb. Al-Bukhārī narrates from Abū Hurayra (may God be pleased with him): "The Messenger of God (peace and blessings be upon him) adjudicated, concerning the foetus of a woman from Banū Lihyān that was miscarried dead, that a ghurra be paid a male or female slave". And Muslim narrates from al-Mughīra b. Shuʿba: "A woman struck her co-wife with a tent-pole while she was pregnant and killed her one of them was from Lihyān; the Messenger of God imposed the blood-money for the slain woman upon the ʿāqila of the killer and a ghurra for what was in her womb. A man from the killer's ʿāqila said: 'Shall we pay blood-money for one who neither ate nor drank nor uttered a cry? Such a case should be void!' The Messenger of God replied: 'Do you speak in the rhymed prose of the Bedouins?'—and he imposed the blood-money upon them".

Jurisconsults have employed several terms to explicate the meaning of abortion, such as *isqāṭ*, *ilqāʾ*, and *ṭarḥ*; technically, it is the expulsion by a woman of her foetus, whether by her own act or by another's. The Shāfiʿīs often use the term *ijhāḍ*.

In legal terminology, abortion has been defined as the woman's expulsion of her foetus before the pregnancy term is completed, whether lifeless or born alive but non-viable—its partial formation being apparent—by means of an act such as the use of a drug or otherwise, or by another's act. The Grand Mufti

of al-Azhar defined it as "the delivery of the foetus prior to the completion of its natural development in its mother's womb" (Jadwa, 2009, p. 17).

As for the Algerian legislator, abortion is placed in two principal positions: at times it is considered a crime, and at other times necessity renders the criminalised act permissible—namely, abortion by necessity. It is classified among offences against the family, as set out in Section One of Chapter Two concerning felonies and misdemeanours against the family and public morals, in Articles 304 to 313 of the Algerian Penal Code.

Accordingly, the following research question may be posed: What is the ruling on abortion in Islamic law and in Algerian law? To answer this question, the study is divided into two axes: Axis I: The ruling on abortion in Islamic law. Axis II: The ruling on abortion in Algerian law.

SECTION I: THE RULING OF ABORTION IN ISLAMIC LAW

Jurists diverged over the gestational threshold at which abortion becomes prohibited and when it may be permissible. They bifurcated pregnancy into two phases: pre-ensoulment (before the breathing of the soul into the foetus) and post-ensoulment (after the breathing of the soul).

First Requirement: Pre-Ensoulment — Opinions, Evidences, and Rationale

Before ensoulment, the jurisprudential record exhibits positions spanning permissibility (ibāḥa), prohibition (taḥrīm), and reprehensibility (karāha). The dispute is attributable to the absence of an explicit, dispositive text in the Qurʾān or Sunna that rules on abortion *as such*—the Qurʾān proscribes killing a soul without right—and to pre-modern uncertainty regarding embryological staging and the timing of *takhalluq* (formation). With scientific advances, contemporary jurists have enlisted embryology to refine their stances. The principal opinions are as follows.

First Opinion - Unqualified permissibility prior to ensoulment

A current within the Ḥanafī school (in the dominant report) holds that termination is permissible so long as nothing of its formation has appeared, commonly with the knowledge/permission of both spouses (Yāsīn, 1999, p. 197).

By *takhalluq*—whether total or partial—these jurists intended what does not occur before ensoulment; akin views are ascribed to Ibn ʿAqīl (Ḥanbalī) and Abū Isḥāq al-Marwazī (Shāfiʿī) (Thābit b. ʿAzza, 2000–2001, p. 38).

In *al-Badāʾiʿ*: "If nothing of its creation has become evident, there is nothing due therein, for it is not a foetus; rather, a *muḍgha*". *Al-Anhar* states: "It is lawful to abort the child before one hundred and twenty days", and in Ibn ʿĀbidīn's ḥāshiya: "They said: it is permissible to abort the child before four months, even without the husband's permission".

Likewise: "Is abortion permitted after conception? Yes—provided nothing has been formed; and that will only be before one hundred and twenty days", indicating that *takhalluq* was construed as ensoulment.

Al-Ṭaḥṭāwī: "Abortion is permitted so long as nothing has been formed; and that will only be before one hundred and twenty days" (Supreme Council for Islamic Affairs, n.d., Vol. 3, p. 159). Ibn Ḥazm argues: prior to one hundred and twenty nights the conceptus has never lived nor possessed a soul; there is no killing, for it remains semen, a clot (*ʿalaqa*), a morsel of flesh (*muḍgha*), bone, or flesh—a part of its mother; hence no homicide liability applies, and invoking analogy (qiyās) is invalid.

From these Ḥanafī statements: abortion before ensoulment is permitted, with or without excuse, provided spousal awareness exists. Moreover, they equated *takhalluq* with ensoulment, not mere pre-ensoulment depiction—an error (it is argued) in gauging when foetal parts first appear, which Ibn ʿĀbidīn sought to rectify. They therefore fixed the pre-ensoulment window at

under one hundred and twenty days, deeming the conceptus then a *muḍgha* or *ʿalaqa* "with nothing yet formed". On this view, permissibility up to day 120—whether with or without excuse—may, however, open the door to widespread abortions that violate the sanctity of life and promote social corruption by encouraging *zinā* and other prohibitions. Among Shāfiʿīs, al-Qalyūbī states: "Yes, it is permissible to expel it—even by medication—before ensoulment". Al-Ramlī: "The preponderant view is prohibition after ensoulment, and permissibility before it", further contemplating permissibility even where the *nutfah* resulted from *zinā*: "If the *nutfah* is from *zinā*, one might conceive permissibility before ensoulment".

Second Opinion - Conditional Permissibility Subject to a Recognised Sharʿī Excuse

A substantial strand-especially within the Ḥanafī school as reported by Ibn ʿĀbidīn restricts any allowance to legally cognisable excuses (aʿdhār sharʿiyya), and imputes sin in their absence. Select Mālikīs contemplated narrow exceptions (e.g., *zinā* with credible fear of lethal retaliation), while modern fatwas introduce graded evaluations prior to ensoulment (Yāsīn, 1999, p. 601).

Ibn Wahbān and others cite the preservation of a nursing infant as an excuse: if pregnancy would terminate lactation, the father cannot procure a wet-nurse, and the infant's death is feared, abortion may be tolerated to avert the preponderant harm without classifying it as homicide. Shaykh Muṣṭafā al-Zarqā when asked about physician-performed abortion with spousal consent held that abortion may be permissible or prohibited according to circumstances, stressing that it is exceptional and requires a sharʿī excuse.

His grading: within the first forty days, disliked (makrūh); after forty days, prohibition intensifies until four months, where it becomes ḥarām; after one hundred and twenty days, it is impermissible save when the mother's death is credibly feared.

Among the excuses he mentioned:

- fear for the mother's health;
- inability to provide for and rear the child;
- a necessity of travel where pregnancy and existing children are an impediment (e.g., spouses travelling for study) (Thābit b. ʿAzza, 2000–2001, p. 53).

He adds: the further development progresses, the stronger the justificatory excuse must be.

Reviewing such excuses, many are judged non-sharʿī and insufficient to justify extinguishing a life God forbids except with right: inability to provide does not entitle parents to end foetal life—cf. *"Do not kill your children for fear of poverty; We provide for them and for you—surely their killing is a grave sin*". Likewise, *"There is no creature on earth but that its provision rests with God*". Fear of scandal consequent upon *zinā* is also not a warrant to kill an innocent soul (Jadwa, 2009–2010, p. 44).

The Sunna's handling of the Ghāmidiyya establishes the immunity of foetal life: she confessed *zinā*; he (peace be upon him) delayed punishment until she delivered, then until she weaned the child (she returned with the child holding a piece of bread), after which the ḥadd was carried out—thereby safeguarding the child.

Moreover, the Symposium on Reproduction in the Light of Islam concluded consensus prohibition after ensoulment, with disagreement beforehand, affirming the inviolability of foetal life in all stages and permitting abortion only where a sharʿī excuse exists—and then within the first forty days. Likewise, the Council of Senior Scholars, Decision No. 140 (20/06/1407 A.H.), resolved that abortion is prohibited at all stages, except within a narrowly defined necessity to save the mother's life, before ensoulment, and subject to approval by a specialised medical committee (Thābit b. ʿAzza, 2000–2001, p. 56).

Third Opinion - Permission of Abortion in the First Stage of Pregnancy (Before Forty Days)

This opinion is attributed to some Ḥanafī jurists—such as Ibn ʿĀbidīn and Ibn Mawlūd al-Mawṣilī—who argue that formation begins upon the completion of forty days, not upon the completion of one hundred and twenty. It is also reported from some Mālikīs (e.g., al-Khaṭṭāb al-Lakhmī and Abū al-Ḥasan), some Shāfiʿīs, and most Ḥanbalīs. According to some Ḥanafīs, abortion is permitted within the first forty days from the inception of pregnancy—i.e., before formation—and prohibited thereafter; this accords with Shāfiʿī-leaning statements wherein the prevailing view is that if abortion occurs within the first forty days from the start of the *ʿalaqa*, and with the spouses' consent and by a physician-certified method that does not harm the pregnant woman, it is permissible according to some and reprehensible (makrūh) according to others, yet not outright prohibited.

Within the Ḥanbalī school there was a dispute over the time-limit—between one hundred and twenty days and forty days—for the ruling on termination prior to that threshold. Among those who permitted before forty days is Ibn Rajab al-Ḥanbalī, who stated: "Our companions have explicitly declared that once the conceptus becomes an *ʿalaqa*, it is not lawful for a woman to abort it, for it is a child that has coalesced; in contrast, the *nutfah* has not yet coalesced into a child".

Proponents adduce as evidence the report of ʿAbd Allāh b. Masʿūd (may God be pleased with him), who said: The Messenger of God (peace and blessings be upon him) said: "The *nuṭfah* remains in the womb forty days in its state without change; when the forty elapse, it becomes an *ʿalaqa*, then a *muḍgha* likewise, then bones likewise. When God wills to complete its creation, He dispatches an angel to it; the angel who is adjacent says: 'My Lord, male or female? Wretched or felicitous? Short or tall? Deficient or in excess? Its strength and its term? Sound or infirm?'—and he writes all of that". A man

from the people said, "Then what of deeds, if all of this has been decreed?" He said, "Act, for each shall be facilitated towards that for which he was created". According to this ḥadīth, the *nutfah* remains forty days in the womb unchanged; therefore, abortion is deemed permissible at this stage, but unlawful thereafter. A rejoinder was made that this specific ḥadīth wording is weak; moreover, al-Lakhmī alone among Mālikīs was singular in permitting abortion within the first forty days *(Thābit b. ʿAzza, 2000–2001, p. 42)*.

Fourth Opinion - The Prohibition of Abortion prior to Ensoulment

This is the position of some Ḥanafīs, some Mālikīs, and some Shāfiʿīs. The jurist ʿAlī b. Mūsā states that it is disliked, for once the fluid has settled in the womb its end is life, and thus it acquires the ruling of life, as with the eggs of game in the Ḥaram.

Among some Mālikīs and Shāfiʿīs, the karāha was conditioned by two criteria:

– that the abortion occur within the first forty days—the *nutfah* stage;

– and that the husband consent to the abortion. Another Mālikī group held disliked before forty days and prohibited thereafter.

This view is espoused by many Mālikīs, some Shāfiʿīs (including Imām al-Ghazālī), some Ḥanafīs, Ibn al-Jawzī among the Ḥanbalīs, the Ẓāhirīs, the Ibāḍīs, and the Imāmī Shīʿa. Most Mālikīs prohibit abortion at all stages of pregnancy and are more stringent than others. In al-Dardīr's commentary on Khalīl, with al-Dusūqī's ḥāshiya, it is said: "It is not permissible to expel semen that has settled in the womb even before forty days; and if the soul has been breathed into it, it is prohibited by consensus".

This indicates the prohibition and impermissibility of abortion: for the Mālikīs, the product of conception from its inception has a right to life, even before forty. Ibn Rashīd al-Mālikī, reporting from Mālik, said: "Anything a woman expels prematurely—*muḍgha* or *ʿalaqa*—that is known to be a child entails a ghurra".

Yet al-Lakhmī, a Mālikī jurist, stood alone in allowing abortion in the first forty days. Shaykh ʿAlīsh said: "Once the womb has retained semen, it is not permissible for the spouses—or either of them—to cause its expulsion before formation or after it, by agreement" (Thābit b. ʿAzza, 2000–2001, p. 40).

Among Shāfiʿīs, positions vary as previously noted; however, Imām al-Ghazālī follows the Mālikīs who advocate absolute prohibition at any stage of pregnancy, from the meeting of the spouses' fluids, with the gravity of the prohibition escalating as the foetus develops and its formation advances. The Ḥanbalī jurist Ibn al-Jawzī, as cited by al-Mardāwī, likewise holds prohibition before ensoulment in all stages (Supreme Council for Islamic Affairs, n.d., Vol. 3, p. 162).

As for the Zaydīs, they permitted abortion in the first three stages—*nutfah*, *ʿalaqa*, and *muḍgha*—and prohibited it in the fourth, the stage of ensoulment, as reported in the Encyclopaedia of Islamic Jurisprudence (vol. 3). Dr Yūsuf al-Qaraḍāwī prohibited abortion, arguing that while Islam may allow a Muslim to prevent pregnancy for compelling necessities, it does not permit aggression against an existing pregnancy even if conceived through a prohibited act for the Prophet (peace be upon him) did not accept executing the ḥadd on a woman who became pregnant through *zinā* until she delivered and completed the child's nursing, for the child is guiltless (al-Qaraḍāwī, 1977, p. 166).

What may be distilled from the foregoing is that jurists divide into two camps:

– those who forbid abortion (e.g., the Mālikī school and Imām al-Ghazālī among the Shāfiʿīs), adducing that the *ʿalaqa* or *muḍgha* is a human creation with inviolability and thus may not be aborted nor killed;

– and those who permit, namely the majority of Ḥanafīs, many Shāfiʿīs, and an apparent view among Ḥanbalīs, arguing that before formation the product of conception is a piece of flesh

which may not yet be a foetus and whose human life-status is unknown, and that at this stage the foetus has no life.

Most jurists agree that ensoulment begins before the lapse of one hundred and twenty days from the start of pregnancy—that is, before four lunar months from the union of the spouses' fluids. Some jurists deem abortion permissible prior to ensoulment—i.e., before four months (120 days)—as among the Ḥanafīs and some Shāfiʿīs; others among the Ḥanafīs and Shāfiʿīs allow it only with a sharʿī excuse, otherwise it is disliked. Most Mālikīs and Imām al-Ghazālī hold that abortion before ensoulment is absolutely prohibited, even before forty days, because the *ʿalaqa* or *muḍgha* is a human creation that may not be killed except with right, in light of the Almighty's words: *"Do not kill the soul which God has forbidden except with right*". Some Mālikīs nevertheless permitted abortion before forty days when the pregnancy is from *zinā* and the woman fears being killed.

Most contemporary jurists, influenced by scientific advances—especially embryology demonstrating that the foetus is living and in continuous development from its inception—have tended to prohibit abortion at all stages, permitting it only where the pregnancy endangers the mother's life. A minority has allowed it in the nutfah stage. All agree on prohibition after ensoulment (Thābit b. ʿAzza, 2000–2001, p. 59).

Synthesis (as stated):

– Pregnancy proceeds through four stages:

1. First forty days (nutfah): permitted by most Ḥanafīs, Shāfiʿīs, Ḥanbalīs, and al-Lakhmī among Mālikīs.
2. Second forty days (ʿalaqa): permitted by most Ḥanafīs, Shāfiʿīs, and Ibn ʿAqīl among Ḥanbalīs.
3. Third forty days (muḍgha): permitted by most Ḥanafīs, the majority of Shāfiʿīs, and Ibn ʿAqīl among Ḥanbalīs.
4. Post-ensoulment (after 120 days; the "taswiya" stage): prohibited by consensus.

– The foetus, even in its first stage, is a human creation

that will, by God's leave, become a person; aborting it is corruption and harm that injures the woman and society. Abortion without a sharʿī excuse or an overriding necessity—namely, a threat leading to the mother's death, and only after consultation with physicians who determine the harm should abortion not occur—is prohibited.
– Abortion before ensoulment constitutes an objection to the Divine will. The law grants the foetus numerous rights—e.g., inheritance, lineage, and bequest—so how are such rights affirmed while its most fundamental right, the right to life, is nullified? Had abortion been permissible before ensoulment, the Prophet (peace be upon him) would not have delayed enforcing the ḥadd on the Ghāmidiyya—pregnant through *zinā*—until she delivered and completed nursing; he did not instruct her to abort for fear of execution because the child was born of *zinā*, nor did he deem that a sharʿī excuse permitting abortion.
– Abortion engenders numerous social and legal problems, harming society and women alike; it also impacts lineage (nasl) and contradicts the five universal necessities (al-ḍarūriyyāt al-khams): life, religion, intellect, lineage, and property.
– Encouraging abortion contributes to an increase in *zinā*, for it facilitates the concealment of its effects.

Second Requirement: The Ruling of Abortion After Ensoulment — Definition, Timing, and Scriptural-Ethical Foundations

This requirement defines ensoulment as the conferral of Adamic identity, describes the corresponding developmental phase—termed by scholars ṭawr al-taswiyah (the "stage of proportioning")—and establishes its temporal inception and legal consequences, adducing Qur'ānic and Prophetic proofs and relevant medico-embryological observations.

The soul is the principle by which the foetus acquires human identity. In this phase, capacities of sensation, volition, and

cognition take shape. Scholars term this ṭawr al-taswiyah, commencing at the beginning of the fourth lunar month—that is, after one hundred and twenty days from conception—and extending until birth. Muslim jurists have consensually held that ensoulment occurs after 120 days from fertilisation (Jadwa, 2009–2010, pp. 5–6), adducing the sound ḥadīth narrated by Ibn Masʿūd (may God be pleased with him): the Messenger of God (peace and blessings be upon him), the truthful and believed, said: *"Each of you is assembled in his mother's womb for forty days as a drop (nutfah), then becomes a clot (ʿalaqa) for a like period, then a morsel (muḍgha) for a like period; then God sends an angel who is commanded concerning four matters—his provision, his lifespan, his deeds, and whether he is wretched or felicitous—then the soul is breathed into him"*.

After ensoulment, the foetal organs are completed by the end of the fifth month; nevertheless, extra-uterine life is not yet viable owing to the immaturity of the lungs and digestive system. By the sixth month, imaging depicts a fully articulated skeleton. Modern medicine holds that the minimum gestational age at which a neonate may survive if delivered is six months, though specialised care is required. If pre-ensoulment abortion was a matter of juristic disagreement—permissible, disliked, or prohibited as previously detailed—the jurists unanimously judged intentional abortion without excuse after ensoulment to be unlawful.

There is no disagreement among jurists regarding the prohibition of abortion after ensoulment absent a sharʿī justification; they establish this by Qur'ān and Sunna. Some jurists posit that foetal life begins with the breathing of the soul; the timing of ensoulment is evidenced by revelation. The Qur'ān delineates the succession of embryonic stages—*nutfah*, then *ʿalaqa*, then *muḍgha*—in His saying: *"We created man from an extract of clay; then We placed him as a drop in a secure resting-place; then We created the drop into a clot, and We created the clot into a morsel, and We created the morsel into bones, and We*

clothed the bones with flesh; then We produced him as another creation—so blessed be God, the best of creators". (Sūrat al-Muʾminūn, verses 11–14).

Also: *"Do not kill the soul which God has made inviolable, save with right."* (al-Isrāʾ, 33). And: *"Do not kill your children for fear of poverty; We provide for you and for them …"* (al-Anʿām, 151).

The Sunna likewise attests to the sanctity of life: al-Bukhārī and Muslim narrate from Ibn Masʿūd the very report detailing the three forty-day stages and the subsequent ensoulment. Moreover, in the ḥadīth: *"Avoid the seven ruinous sins … associating partners with God, sorcery, killing the soul which God has made inviolable except with right, consuming usury, consuming the property of the orphan, turning one's back on the day of battle, and slandering chaste, believing, heedless women",* the prohibition of killing—and, by extension, foeticide after ensoulment—is emphatically affirmed.

Classical jurists agreed on the prohibition of aborting the foetus once 120 days have elapsed from the beginning of pregnancy—the post-ensoulment stage—on the basis that it has become Adamic; and the Sharīʿa does not permit the killing of a human being, even where the continuation of pregnancy is alleged to endanger the mother's life. They regarded post-ensoulment abortion as homicide, declaring that one may not sacrifice one life to save another, and held that a person compelled to kill may not do so regardless of the degree of coercion. They reasoned thus in part because of limited diagnostic certainty in pre-modern medicine: the inability to gauge risk to the mother and the absence of techniques to mitigate it by the least harmful means.

Modern jurists likewise treat post-ensoulment abortion as the killing of a protected soul. Dr Yūsuf al-Qaraḍāwī writes that it is not lawful to commit aggression against an existing pregnancy, even if conceived through prohibited means. Shaykh Muṣṭafā al-

Zarqāʾ states: *"The ruling culminates in prohibition when the pregnancy reaches four months"*.

Yet some contemporary jurists record a narrow exception: if a reliable medical source establishes that the continuation of pregnancy will inevitably lead to the mother's death, then abortion may be permitted. The scholarly committee of the Kuwaiti Ministry of Awqāf's Encyclopaedia of Fiqh resolved that termination is permissible even after ensoulment where it is the only means to save the mother from certain death, and where maintaining the pregnancy constitutes a grave danger.

Dr al-Qaraḍāwī, citing Shaykh Shaltūt, states: *"If, by a trustworthy route, it is established that the foetus's remaining after life is confirmed will inevitably lead to the mother's death, then the general principles of the Sharīʿa command the commission of the lesser harm ... so its termination in that case becomes determinate, and she is not to be sacrificed in order to save it"* (Supreme Council for Islamic Affairs, n.d., Vol. 3, p. 57).

Accordingly, all jurists agree upon the prohibition of abortion after ensoulment; some modern authorities permit it only where the mother's life faces certain peril. The preponderant view holds prohibition at all stages—even early—in light of modern embryology evidencing foetal life from the earliest days; yet they register exceptions where necessity exists, prioritising the mother's safety over the foetus, or, in some formulations, in cases of rape or proven severe malformation. All agree that once four months are reached, abortion is ḥarām, and may be contemplated only if trustworthy medical proof attests that continuation will result in the mother's death, applying the juristic maxim of weighing harms and choosing the lesser.

Second Requirement: Constituent Elements of the Crime of Abortion in Algerian Law

The Algerian legislator classifies abortion among offences against the family and public morals, set out in Section One of Chapter Two concerning felonies and misdemeanours, Articles

304–313 of the Penal Code. While recognising the family's and society's right to procreation and reproduction, the law places abortion in two principal positions: at times it is a crime, and at other times necessity renders the criminalised act permissible-namely, therapeutic abortion to save the mother from death.

First: The legal (statutory) element and enumerated pillars

Positive-law systems, in concord with Islamic jurisprudence, uphold the principle nullum crimen, nulla poena sine lege-no crime and no punishment without a text. The punishable abortion is the criminal abortion typified in Articles 304, 306, 309, and 310 of the Algerian Penal Code. Under Article 304, the constituent elements comprise: the existence (or presumption) of pregnancy; the abortive act and its means; and the criminal intent.

Second: The material and moral elements; causation and intent

The material element (actus reus) consists in conduct by the perpetrator bringing about the deleterious result-the termination of pregnancy—together with a causal nexus between the conduct and the result. The moral element (mens rea) requires intent: abortion is an intentional offence, and the physician's criminal intent must be established. A physician is not deemed to have committed the offence where, through fault, he causes the miscarriage of a pregnant woman by administering therapeutic medicines; in such a case, the specific intent to procure abortion is lacking.

Third Requirement: Special Status, Proof, and Sanctions - Aggravations, Misdemeanour/Felony Thresholds, and the Necessity Exception

Article 306 identifies professionals falling under the sanctions of Articles 304 and 305(Būsqīʿa, 2012–2013, pp. 64–65), as the case may be. They may be punished with deprivation of professional practice, and may also incur a ban on residence. Where such persons perform, assist, or direct a pregnant woman for the first time towards means that cause abortion, they are

punished under Article 304; if they habitually perform such operations, Article 305 applies.

If, during a lawful (permitted) abortion, the physician commits error that harms the mother or leads to her death, he is not liable for abortion, but remains liable for fault under Article 289: where the fault results in injury, wound, or illness causing total incapacity for work exceeding three months, the penalty is imprisonment from two months to two years and a fine from 500 DZD to 15,000 DZD, or either penalty. In case of death, Article 288 applies (homicide by negligence): imprisonment from six months to three years and a fine from 1,000 DZD to 20,000 DZD.

The reason for aggravating penalties on such persons is that their professional capacity equips them to know abortive means, how to use them, how to conceal traces, and to profit illicitly; abortion is a clandestine crime, difficult to detect, and its commission violates medical laws and professional ethics. The aggravating circumstance is realised even if the accused physician performed the abortion gratis or while temporarily suspended from practice; however, if he loses the professional status, the aggravation no longer attaches. Anyone who participates in causing the abortion with the physician-even if not a physician, surgeon, pharmacist, or midwife-incurs the same penalty if he knew of the physician's status and purpose.

Abortion ends foetal life before the natural term of birth, whether effected by the pregnant woman herself or by another; it is thus an offence against life. The Algerian legislator criminalises abortion and imposes deterrent penalties because the foetus has a right to life and development (Article 304). Where abortion results in the woman's death, the conduct is treated as a felony (jناية) rather than a misdemeanour (جنحة), and, as the text states, carries "life imprisonment from ten to twenty years" together with a possible residence ban-a measure prohibiting presence in specified places, not to exceed five years for

misdemeanours and ten years for felonies, unless otherwise provided by law.

As a misdemeanour, penalties are set out in Articles 304, 305, 306, 307, 308, 309, and 310, subject to satisfaction of the elements in Article 304. The law does not require the accused to be a physician, surgeon, pharmacist, or midwife; these capacities may or may not be present. Anyone who indicates to a pregnant woman a means of abortion is punishable even if she does not use it. Where it is proven that the accused habitually engages in the acts described in Article 304, the penalties are doubled: imprisonment from two to ten years and fines from 40,000 DZD to 200,000 DZD; if the pregnant woman dies, the penalty becomes life imprisonment for life, as stated in Article 305.

The Algerian legislator criminalises abortion but permits it in one case only, where necessity so requires, subject to the following conditions:

– The mother's life is in danger, necessitating termination (Article 308 of the Penal Code); or abortion is necessary to preserve non-biological and mental equilibrium at risk, pursuant to Article 72 of the Health Law;

– The procedure is performed by a specialist physician, openly, and in a public health facility;

– The administrative authority is notified.

Conclusion:

Abortion constitutes a gravely serious offence: it may lead to the mother's death, uterine rupture, contraction of certain sexually transmitted diseases, or fatal haemorrhage; it also contributes to the diffusion of vice and the encouragement of *zinā* and other prohibitions. For these reasons, the rulings of the Sharīʿa seek to combat it and proscribe it, in order to preserve humankind and avert the forbidden.

Yet jurists differed in calibrating the gestational term at which abortion becomes prohibited or permissible. Accordingly, they

divided pregnancy into two phases: the phase before ensoulment and the phase after ensoulment.

Disagreement—extending even within a single madhhab owing to pre-modern uncertainty about embryonic stages and the timing of formation—spanned permissibility, prohibition, and reprehensibility. Some Ḥanafī jurists permitted abortion prior to ensoulment unconditionally, provided nothing of formation had appeared and with the spouses' consent.

Shāfiʿī jurists likewise differed regarding abortion before ensoulment: al-Qalyūbī and al-Ramlī allowed it; and among the Ḥanafīs there were those who permitted termination for an excuse.

Some Mālikīs held that abortion could be licensed before ensoulment where the foetus resulted from *zinā*, especially if the woman feared being killed upon the discovery of pregnancy.

A third opinion allowed abortion in the first forty days of pregnancy; a fourth maintained either reprehensibility before ensoulment or absolute prohibition. Thus, some Ḥanafīs, some Mālikīs, and some Shāfiʿīs deemed it disliked subject to conditions, whereas the preponderant view among Mālikīs and some Shāfiʿīs—most notably Imām al-Ghazālī—together with some Ḥanafīs and Ḥanbalīs, was prohibition throughout pregnancy. Dr Yūsuf al-Qaraḍāwī likewise prohibited abortion even where the pregnancy arose through a prohibited act, adducing that the Prophet (peace be upon him) did not apply the ḥadd to a woman pregnant from *zinā* until she had delivered and completed nursing, for the child bears no guilt.

As for the second phase—after ensoulment—jurists concurred that it commences at the beginning of the fourth lunar month (i.e., after one hundred and twenty days from the start of pregnancy) and continues until birth.

There is no disagreement among jurists about the prohibition of abortion after ensoulment absent a sharʿī justification; they adduce the Book and the Sunna, for by then the foetus is Adamic,

and the Sharīʿa does not accept killing a human being-even if his remaining were said to endanger the mother's life.

Modern jurists have likewise deemed abortion after ensoulment to be the killing of a sanctified soul—as stated by al-Qaraḍāwī and Muṣṭafā al-Zarqāʾ.

However, some contemporary jurists posited a single exception: if a trustworthy source establishes that the continuation of pregnancy will undoubtedly lead to the mother's death, abortion may be permitted pursuant to the juristic maxim of committing the lesser of two harms. The Algerian legislator has adopted this: abortion is permitted where necessity demands it—namely, where the mother's life is in danger requiring termination of pregnancy.

From the foregoing it is evident that Algerian law accords with Sharīʿa in prohibiting abortion, aiming thereby to protect the foetus, safeguard human life, encourage procreation, and vindicate the right to life. It is immaterial whether the foetus results from a lawful marriage or otherwise. Nevertheless, the Algerian legislator has not addressed other necessity cases—such as rape or proven foetal malformation—and has permitted abortion in one case only: where a trustworthy source confirms that continuation of the pregnancy will inevitably result in the mother's death.

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