

Foetal Abortion Before and After Ensoulment in Islamic Law and Algerian Legislation

ATIK Nadira^{1*}, KHERISSI Sarra²

^{1,2}University of Skikda, Algeria.

Keywords:

Abortion,
Algerian legislation,
Ensoulment,
Foetus,
Islamic law.

Article History:

Received: 29 / 12 / 2025
Revised: 10 / 02 / 2026
Accepted: 16 / 03 / 2026
Published: 01 / 06 / 2026

Abstract. This study examines the subject of foetal abortion from both a Sharia and a legal perspective, by clarifying the concept of abortion and setting out the rules governing the ensoulment of the foetus. Abortion is a highly sensitive and multi-faceted issue that continues to generate considerable debate, despite the fact that the majority of comparative national laws have criminalised the act on the grounds that it constitutes an assault upon the foetus's right to life. The study accordingly seeks to establish the canonical and legal foundations of abortion before and after ensoulment in Islamic law and in Algerian legislation.

1. INTRODUCTION

Abortion is among the most complex issues and among the questions that have emerged forcefully in Islamic societies in recent years, generating extensive research and scrutiny in both Islamic law and Algerian legislation — against the backdrop of the diversity and divergence of positive law systems in this regard — given that the issue is bound up with the right to life.

There is no doubt that the protection of the foetus from abortion and the reinforcement of the means by which its life is preserved rank among the questions of renewed relevance in our contemporary reality, given the variety and multiplicity of the causes that lead to the act of abortion being committed.

Between those who call for the legalisation of abortion — or, more precisely, for an expansion of the circle of permissibility to encompass circumstances beyond the saving of the mother's life — and those who maintain its absolute prohibition and criminalisation and who seek to protect the foetus from any violation of its inviolability, God created man to enjoy life and no one, regardless of his status, has the right to deprive him of it. It is accordingly the nuanced details of Islamic law and the legal measures of Algerian legislation — both of which came to protect this child's right to come into existence, however his circumstances may be, on the basis that he constitutes a value protected by both Sharia and the law — that this study proceeds to examine in detail, with due consideration for the divergence of perspectives.

If the protection of the foetus — in the broad sense — has been guaranteed by both Islamic law and Algerian legislation, proceeding from the objectives that came to preserve the continued existence of the human being, what concerns us specifically in this context is the abortion of the foetus before and after ensoulment, and the way in which Islamic law and Algerian legislation have addressed this question.

1.1. Definition of Abortion

1.1.1. Linguistic Definition

In Arabic, the word *ijhad* (إجهاد) is the verbal noun of the verb *jahada*¹, meaning the premature delivery of the foetus before it is fully developed. One says 'the she-camel aborted' (*ajhadat al-naqa ijhadan*) when she expelled her foetus in an incomplete form of creation; she is then described as a *jahadh* or *mujhida*. It should be noted that the linguistic meaning does not distinguish between the expulsion of a foetus incomplete in its creation and one incomplete in its gestation period, whether from the woman or from another cause, and whether the expulsion is spontaneous or the result of deliberate action.²

1.1.2. Technical Definition

Jurists of Islamic law have defined abortion as 'the extraction of the foetus before the completion of the gestation period.'³

This does not differ from the scientific definition, according to which abortion in forensic medicine is described as the expulsion of the contents of the pregnant uterus at any time prior to the end of nine months.⁴

It is notable that jurists did not formally define abortion, but expressed it through its component terms — *isqat* (dropping), *ilqa'*

¹Ibn Manzur (Jamal al-Din Muhammad). *Lisan al-'Arab*. Edited by 'Abd Allah 'Ali al-Kabir, Muhammad Ahmad Hasab Allah, and Hisham Muhammad al-Shadhili. Dar al-Ma'arif, Cairo, n.d. Vol. 1, p. 713.

²Al-Fayyumi (Ahmad ibn Muhammad ibn 'Ali al-Muqri). *Al-Misbah al-Munir fi Gharib al-Sharh al-Kabir*. Al-Matba'a al-Amiriyya, Cairo, 5th ed., 1922, p. 156.

³Ibn 'Abidin (Muhammad Amin). *Majmu'at Rasa'il Ibn 'Abidin*. Dar al-Fikr, n.d. Vol. 2, p. 411.

⁴Abd al-Fattah Mahmud Idris. 'Al-Ijhad min Manzur Islami [Abortion from an Islamic Perspective]. *Majallat al-Hikma*, No. 9, Safar 1417 AH, p. 118.

(casting), tarh (discarding), and imlas (premature delivery)⁵ designating it terminologically as 'an offence against an incomplete person' (jinaya 'ala nafs ghayri muktamila).⁶

They also distinguished between spontaneous abortion and deliberate abortion caused by an agent, the latter being considered a criminal offence warranting punishment.

The Algerian legislator, for its part, did not provide a precise definition, confining itself to specifying only the method and manner employed in bringing it about — as defined in Article 304 of the Penal Code⁷

— which led legal commentators to supplement this gap and offer their own definitions, among them: 'Abortion is the expulsion of the foetus from inside the pregnant woman's womb before its completion and before the natural date fixed for its descent and birth, by any means or method whatsoever.'⁸

1.2. The Ruling on Abortion before Ensoulment

The opinions of jurists on the ruling of abortion have differed considerably — a divergence attributable in large measure to the absence of any direct and explicit textual ruling on the matter, which opened the door wide to *ijtihad* (independent legal reasoning) within the bounds permitted by the rules of Islamic law, a fact that testifies clearly to the flexibility of Islamic jurisprudence and its suitability for all times.

The reason for this disagreement lies in the multiplicity of stages of foetal formation in the mother's womb, as jurists accordingly proceeded in their treatment of the relevant rulings in gradations corresponding to the stages through which the foetus passes — stages that may be divided into two phases: before and after ensoulment.

No one can deny the reality of man's creation; he is a composite being of matter and spirit, and the Qur'anic verses that elucidate this reality are mutually reinforcing. These verses delineate the stages through which the foetus passes in its mother's womb, and from them jurists and exegetes have determined the canonical perspective on the time at which life comes to the foetus and the soul is breathed into it.

The Noble Qur'an delineates with precision the stages of foetal formation, from dust or clay, and how its creation develops until it emerges from the womb, as God the Most High has said:

[Al-Hajj: 5] (يَا أَيُّهَا النَّاسُ إِن كُنْتُمْ فِي رَيْبٍ مِّنَ الْبَعْثِ فَإِنَّا خَلَقْنَاكُمْ مِّن نُّرَابٍ ثُمَّ مِمَّا يُطْفَأُ ثُمَّ مِمَّنْ عَلَقَةٍ ثُمَّ مِمَّنْ مُضْغَةٍ مُّخَلَّقَةٍ وَغَيْرِ مُخَلَّقَةٍ لَّئِنِ بَيْنَ يَدَيْكُمْ لَشَكٌّ) [Al-Hajj: 5]

'O people, if you are in doubt about the Resurrection, then [consider that] indeed, We created you from dust, then from a sperm-drop, then from a clinging clot, then from a lump of flesh, formed and unformed — that We may clarify [Our power] to you.' This precision in depicting the foetus in the womb is such that science did not attain it until modern times. God's words are true:

[Al-Mu'minun: 12–14] (وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِن سُلَالَةٍ مِّن طِينٍ ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَّكِينٍ ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً عَلَقَةً فَخَلَقْنَا الْمُضْغَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظْمًا فَكَسْنَا الْعِظْمَ لَحْمًا ثُمَّ أَنشَأْنَاهُ خَلْقًا آخَرَ) [Al-Mu'minun: 12–14]

'And indeed, We created man from an extract of clay. Then We placed him as a sperm-drop in a firm lodging. Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation.'

While it is possible — and particularly so in the present day given the advances of science and direct observation — to identify these stages with precision and even to observe them as material phenomena, proceeding from the sperm-drop, then the clinging clot, then the chewed lump,⁹

it is impossible by means of the senses and observation alone to arrive at a knowledge of the reality of the breathing of the soul, since that is a matter in which God has reserved knowledge to Himself; the spirit thus remains unknown in its essence and reality, in accordance with God's words:

[Al-Isra': 85] (وَيَسْأَلُونَكَ عَنِ الرُّوحِ قُلِ الرُّوحُ مِنْ أَمْرِ رَبِّي وَمَا أُوتِيتُمْ مِنَ الْعِلْمِ إِلَّا قَلِيلًا) [Al-Isra': 85]

'And they ask you [O Muhammad] about the soul. Say: The soul is of the affair of my Lord. And mankind has not been given of knowledge except a little.'

The Qur'anic verses set forth in this context do not specify the time of the beginning of life in the foetus, confining themselves to a description of its stages of formation alone. The Prophetic Sunnah, on the other hand, contains hadiths that specify the times associated with these stages. Among them is the saying of the Prophet (peace and blessings of God be upon him):

"Verily, the creation of each one of you is brought together in his mother's womb for forty days as a sperm-drop, then it is a clinging clot for a similar period, then a chewed lump for a similar period. Then God sends an angel, who is commanded with four matters and is told: Write his deeds, his provisions, his appointed time, and whether he is wretched or blessed — then the soul is breathed into him."¹⁰

The apparent meaning of the hadith indicates that ensoulment occurs after the third period of forty days — at the beginning of the fifth month, that is after 120 days — following the mudgha stage, which is the third stage in the gradual formation of the foetus in the womb. This is a position affirmed by the consensus of scholars,¹¹

⁵Ministry of Awqaf and Islamic Affairs, Kuwait. *Al-Mawsu'a al-Fiqhiyya* [The Encyclopaedia of Islamic Jurisprudence]. 2nd ed., 1404 AH/1983 CE. Vol. 2, p. 56.

⁶Al-Zuhayli, Wahba. *Al-Fiqh al-Islami wa-Adillatuh* [Islamic Jurisprudence and Its Evidences]. Dar al-Fikr, Algeria, 1st ed., 1412 AH/1991 CE. Vol. 6, p. 362.

⁷Article 304 of the Algerian Penal Code: 'Any person who performs an abortion on a pregnant woman or a woman presumed to be pregnant, by administering food, drink, drugs, or by employing procedures, acts of violence, or any other means, whether or not with her consent, or who attempts to do so, shall be punished with imprisonment of one to five years and a fine of 500 to 10,000 DZD. Where the abortion results in death, the penalty shall be fixed-term imprisonment of ten to twenty years.' Order No. 66/156 of 8 June 1966 containing the Penal Code, as amended and supplemented.

⁸Najm Muhammad Subhi. *Sharh Qanun al-Uqubat al-Jaza'iri: al-Qism al-Khass* [Commentary on the Algerian Penal Code: Special Part]. Office of University Publications, Ben Aknoun, Algeria, 4th ed., 2003, p. 60.

⁹The *nutf* (sperm-drop) is the seminal fluid — so named owing to its small quantity. The *'alaqa* (clinging clot) is a small piece of congealed blood. The *mudgha* (chewed lump) is a small piece of flesh of a size that may be chewed. Ibn al-'Arabi Abu Bakr Muhammad ibn 'Abd Allah. *Ahkam al-Qur'an*. Edited by 'Ali Muhammad al-Bajawi. Dar al-Ma'rifa, Beirut, 1407 AH/1987 CE. Vol. 3, p. 1271.

¹⁰Agreed upon (reported by both al-Bukhari and Muslim).

¹¹The scholars of all four schools of jurisprudence agreed that the ensoulment occurs after 120 days, and the *Zahiri* school and the commentators on hadith did not dissent from this position. Ibn Nujaym (Zayn al-Din ibn Ibrahim ibn Muhammad). *Al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq*. Dar al-Kutub al-'Ilmiyya, Beirut, 1st ed., 1997. Vol. 3, p. 349. Ibn al-Humam (Kamal al-Din Muhammad ibn 'Abd al-Wahid al-Hanafi). *Sharh Fath al-Qadir*. Dar al-Fikr, Beirut, n.d. Vol. 3, p. 401. Ibn Rushd al-Hafid (al-Walid Muhammad ibn Ahmad ibn Muhammad). *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid*. Dar al-Fikr, Beirut, 1425 AH/2005 CE. Vol. 2, p. 340. Al-Sharbini. *Mughni al-Muhtaj*. Vol. 1, p. 349. Ibn Qudama Muwaffaq al-Din. *Al-*

who did not differ regarding the time at which ensoulment occurs.

Another hadith must also be mentioned — reported by the Prophet (peace and blessings of God be upon him) — wherein he said:

"When forty-two nights have passed over the sperm-drop, God sends to it an angel who gives it form and creates its hearing, sight, skin, flesh, and bones. Then the angel says: O Lord, is it male or female? And your Lord decrees whatever He wills, and the angel records it. Then the angel says: O Lord, its lifespan? And your Lord decrees whatever He wills, and the angel records it. Then the angel says: O Lord, its provision? And your Lord decrees whatever He wills, and the angel records it. Then the angel departs with the scroll in his hand, and he adds nothing to what he was commanded and takes nothing away."¹²

Scholars have reconciled the two hadiths by interpreting the first in light of the second.

Certain contemporary scholars have gone so far as to argue that the primary reliance in this matter should be upon what medicine says,¹³ and scientific reports in the field of embryology have established the appearance of the limbs and the spinal cord — which carries the nerves — after the sixth week, that is after forty-two days.¹⁴

Accordingly, in the view of these scholars, the first hadith — which mentions the period of ensoulment with precision — is more probable and sounder, and its authority is further confirmed and strengthened by science. The second hadith, to which the majority of scholars subscribe, is, they contend, readily subject to linguistic interpretation.¹⁵

The truth of the matter is that in this particular question it must not be overlooked that the first hadith is the more widely transmitted and has been reported by the greatest number of sources, applied by earlier scholars, and cited in the vast majority of their written works — on the one hand; and on the other, that science and medicine are incapable of determining the time of ensoulment, since that is not a material matter that can be known through material or advanced means. We accordingly adhere to the position of our venerable scholars that ensoulment occurs after 120 days from the moment of conception in the womb.

On the question of abortion, jurists differed in their rulings, and their expressions were divergent, which gave rise to several positions within a single school. This was in part attributable to the fact that the founding authorities of the legal schools did not have defined opinions on this matter, in addition to the absence of direct texts addressing it — which opened the door of *ijtihad* wide among jurists, who studied the question and addressed it in gradations according to the stages of foetal formation. The positions of Islamic jurisprudence on this question may be summarised as follows:

1.2.1. Absolute Prohibition

Abortion is absolutely prohibited, whether before or after ensoulment — the position of the Malikis¹⁶ and some Shafi'is.¹⁷ 'Ulaysh — a Maliki scholar (may God have mercy on him) — said: 'If the womb retains the semen, then neither the spouses, nor either of them, nor the master may take any measure to expel it before formation on the authoritative position, and nor after it by consensus.'¹⁸

Ibn Hazm al-Zahiri (may God have mercy on him) did not express an explicit opinion on this stage, though it appears that he considered abortion before ensoulment to be prohibited; indeed, he held the *ghurra* (indemnity) to be owed in such a case.

Among the arguments cited by this school is that if a pilgrim in a state of ritual consecration (*ihram*) were to break the eggs of game, he would be held liable therefor — and if this is met with requital in that case, in accordance with God's words:

(بِأَيِّهَا الَّذِينَ ءَامَنُوا لَا تَقْتُلُوا الصَّيْدَ وَأَنْتُمْ حُرُمٌ) [Al-Ma'ida: 95]

— then at the very least a woman incurs sin if she aborts her foetus without justification; furthermore, the sperm-drop, once settled in the womb, is in a state preparatory to formation and destined to receive the soul, and therefore no assault upon it is permissible.¹⁹

1.2.2. Absolute Permissibility

This is the position of some Hanafi jurists, whose argument is that the foetus at this stage has not yet been formed and therefore the quality of humanity (*adamiyya*) does not yet attach to it.²⁰

It is also reported of some Malikis that they held permissibility before forty days, with no liability attaching.²¹

1.2.3. Permissibility at Certain Stages Only

Jurists differed here according to the stages of foetal formation. Some held the permissibility of abortion at the sperm-drop stage — the first stage of formation — the position of the Hanbalis,²²

some Malikis, and in one opinion of some Shafi'is — who, while holding it to be disapproved (*makruh*), permitted abortion at the clinging clot stage.

As for the chewed lump stage, the apparent position of the Hanbalis is that they permit abortion at this stage and do not regard it as a criminal offence, since they hold no liability to arise from it — any more than from the sperm-drop or clinging clot stages.

Mughni. *Dar al-Kitab al-'Arabi*, Beirut, 1403 AH/1983 CE. Vol. 9, p. 555.

¹²Reported by Muslim.

¹³Al-'Azazi 'Adil ibn Yusuf. *Fath al-Karim bi-Ahkam al-Hamil wa-l-Janin*. Dar Ibn al-Jawzi, Cairo, 1st ed., 1427 AH/2006 CE, p. 40.

¹⁴Al-Bar Muhammad 'Ali. *Khalq al-Insan bayna al-Tibb wa-l-Qur'an* [The Creation of Man between Medicine and the Qur'an]. Al-Dar al-Sa'udiyya, Jeddah, 5th ed., 1404 AH, p. 395.

¹⁵Abu Lahya Nur al-Din. *Al-Abna': Tarbiyyatuhum wa-Huququhum al-Nafsiyya wa-l-Sihhiyya*, pp. 31–32.

¹⁶Ibn Rushd al-Qurtubi. *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid*. Vol. 2, p. 321.

¹⁷Al-Ghazali Abu Hamid. *Ihya' 'Ulum al-Din*. Dar al-Ma'rifa, Beirut, n.d. Vol. 2, p. 51.

¹⁸'Ulaysh Abu 'Abd Allah Muhammad. *Fath al-'Ali al-Malik fi al-Fatwa 'ala Madhhab al-Imam Malik*. Al-Matba'a al-Kubra al-Amiriyya, Bulaq, Egypt, 1300 AH. Vol. 1, p. 286.

¹⁹Al-Ramli (Shams al-Din Muhammad ibn Abi al-'Abbas Ahmad ibn Hamza ibn Shihab al-Din). *Nihayat al-Muhtaj ila Sharh al-Minhaj*. Dar al-Fikr, Beirut, last edition, 1984. Vol. 7, p. 136.

²⁰Al-Kasani ('Ala' al-Din Abi Bakr ibn Mas'ud). *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*. Al-Matba'a al-Jamaliyya, Egypt, 1st ed., 1328 AH/1910 CE. Vol. 4, p. 94.

²¹Among those who departed from the Maliki position is Ibn Rushd al-Hafid, who held the permissibility of abortion before ensoulment, thereby dissenting from the authoritative position in the Maliki school, which is prohibition. Ibn Rushd. *Bidayat al-Mujtahid*. Vol. 2, p. 340.

²²Ibn Qudama. *Al-Mughni*. Vol. 9, p. 120.

Some Shafi'is share this position.²³

Abu Hamid al-Ghazali (may God have mercy on him) adopted a distinctive *ijtihad* in this matter, establishing graduated rulings according to the development of the foetus: in his view, when the fertilised ovum is in a state of readiness to receive life, corrupting it is an offence; if it becomes a sperm-drop, the offence is more grave; if the soul is breathed into it and the form is complete, the offence is more egregious still; and the most extreme level of offence is after live delivery.²⁴

All of these opinions may be discussed, and a preference established among them. Against those who permit abortion at these stages, it may be argued that the foetus, as long as it is in its early stages — even if the soul has not yet been breathed into it — is destined to become a human being. Its inviolability and sanctity are accordingly derived from the inviolability of the human being, and abortion is not permissible without a justification assessed as a compelling necessity — proceeding from the canonical rules that recognise such necessity, including the maxim 'Necessities render prohibited things permissible' (*al-darurat tubih al-mahzurat*) and 'Harm shall be removed' (*al-darar yuzal*). The same assessment applies after ensoulment, since at that stage the foetus has already become a human soul and therefore possesses inviolability and sanctity, and no assault upon it by abortion is permissible.

As for those who prohibit abortion absolutely, it is necessary to assess the excuses that render the termination of pregnancy a compelling necessity — particularly where the mother's life is exposed to a certain and definite danger. In that case, the principle is to preserve the origin — namely the mother — and to allow the branch — namely the foetus — to be terminated, in application of the canonical rule that prescribes choosing the lesser of two harms.

The truth is that jurists studied this matter carefully — particularly with regard to the excuses that justify abortion regardless of the stage of foetal formation. What concerns us specifically here is the excuse of fornication and the excuse of poverty.

1.3. The Ruling on Abortion after Ensoulment

The overwhelming majority of jurists hold that abortion after ensoulment is absolutely prohibited. At this stage, the foetus becomes an inviolable human soul, and any assault upon it is a criminal offence warranting both worldly and otherworldly punishment — regardless of the perpetrator and even if it is one of the parents.

The statements of jurists confirm this, proceeding from the mutually reinforcing Qur'anic texts that affirm the inviolability of the human soul and regard its destruction as one of the greatest sins and major transgressions in Islam. God the Exalted said:

(وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ) [Al-Isra': 33]

'And do not kill the soul which God has forbidden, except in [cases of] right.' God the Almighty prohibited the killing of a soul without just cause; if He prohibited assault upon it, then by even greater force is the prohibition applicable to an assault upon its origin — which is the foetus.

The terms of the pledge of allegiance (*bay'a*) that the Prophet (peace and blessings of God be upon him) took from the emigrant women in Medina were founded upon the prohibition of the killing of children. God the Most High said:

(يَا أَيُّهَا النَّبِيُّ إِذَا جَاءَكَ الْمُؤْمِنَاتُ يُبَايِعْنَكَ ... وَلَا يَقْتُلْنَ أَوْلَادَهُنَّ) [Al-Mumtahana: 12]

If the intent of the verse is the prohibition of killing the child, whether male or female, then its application to abortion is even more appropriate than its application to the pre-Islamic practice of female infanticide (*wa'd*), because God addressed the women in this verse, not the men — and it is well known that the burial of female infants alive in the pre-Islamic period of ignorance was carried out by men, not women.²⁵

The Prophetic Sunnah likewise prohibits this act and makes assault upon this soul through killing one of the gravest transgressions. It is reported in hadith that the Messenger of God (peace and blessings of God be upon him) judged in a case involving two women who fought, one of whom threw a stone at the other and struck her in the abdomen while she was pregnant, killing the child she was carrying. The parties brought their dispute before the Prophet, who ruled that the blood-money (*diya*) for what was in her womb was a *ghurra* — a slave, male or female.

The guardian of the woman who paid the penalty said: 'O Messenger of God, how am I to pay blood-money for one who neither drank, ate, spoke, nor gave a cry at birth? Such as this should be considered as nothing.'²⁶ The Prophet (peace and blessings of God be upon him) replied: 'This man is but one of the brothers of the soothsayers'²⁷

— meaning that this man had no knowledge but was merely producing rhymed prose of the kind used by soothsayers to mislead and deceive people.²⁸

What is clear from the hadith is that in the pre-Islamic era the foetus possessed none of the inviolability of a human being, on the grounds that it neither ate, drank, nor spoke. Islam came and elevated this status, through the prohibition of its abortion and the establishment of punishments obligatory upon those who assault it.

Nor did Islam confine itself to this alone; it also obligated the payment of blood-money — which is ordinarily paid in the case of the destruction of human souls — on the basis that the foetus is a protected soul. Indeed, it is entitled to all the rights enjoyed by a living person, including the funeral prayer (*salat al-janaza*) offered over it, since the soul has been breathed into it and it is therefore a human soul. It is established from the Prophet (peace and blessings of God be upon him) that he said:

"...the stillborn child shall be prayed over, and God shall be implored to grant forgiveness and mercy to its parents."²⁹

Imam Ahmad ibn Hanbal (may God have mercy on him) said: 'When it reaches four months and ten days, the soul is breathed into it during those ten days and the funeral prayer is offered over it.'³⁰

Imam al-Shafi'i (may God have mercy on him) did not disagree, holding that the stillborn of four months is entitled to the funeral prayer; if it was lost before that, no funeral prayer is offered, since it is not a deceased being — the soul not having been breathed

²³Al-Sharbini. *Mughni al-Muhtaj*. Vol. 4, p. 104. Al-Ramli. *Nihayat al-Muhtaj*. Vol. 8, p. 442. Ibn Qudama *Muwaffaq al-Din*. Al-Mughni. Vol. 9, p. 539.

²⁴Abu Hamid al-Ghazali. *Ihya' 'Ulum al-Din*. Vol. 2, p. 51.

²⁵Shuman 'Abbas. *Ijhad al-Haml wa-ma Yatarattab 'alayh min Ahkam fi al-Shari'a al-Islamiyya* [Abortion and Its Legal Consequences in Islamic Law]. Al-Dar al-Thaqafiyya, Cairo, 1st ed., 1419 AH/1999 CE, pp. 46–47.

²⁶Yutall means rendered void and not compensated; the second reading — with a fatha on the ba' and light lam — is a past tense verb from *butlan*, likewise meaning rendered void. Al-Nawawi. *Sahih Muslim bi-Sharh al-Nawawi*. Vol. 6, p. 194.

²⁷Agreed upon (reported by both al-Bukhari and Muslim).

²⁸Al-Baji (Sulayman ibn Khalaf). *Al-Muntaqa Sharh Muwatta' al-Imam Malik ibn Anas*. *Matba'at al-Sa'ada*, Egypt, 1st ed., 1332 AH. Vol. 7, p. 80.

²⁹Reported by Abu Dawud, al-Tirmidhi, and Ibn Maja.

³⁰Ibn Rajab al-Hanbali. *Jami' al-'Ulum wa-l-Hikam*, p. 61.

into it — grounding this position in the hadith of Ibn Mas'ud cited above.³¹

1.4. The Ruling on Abortion due to Fornication and Poverty before and after Ensoulment

Women typically abandon infants when they fear shame or destitution, and may regard abortion as a justifiable means of escaping disgrace or of protecting the child from poverty.

The student of Islamic jurisprudence will find that jurists did not neglect to study the question of the excuses that permit a woman to abort. Hanafi jurists permit abortion where there is an acceptable excuse — for example, where the woman's milk dries up following the discovery of her pregnancy and she has a nursing infant, and the infant's father lacks the means to hire a wet nurse and fears for the infant's life.³²

In addition, the excuse of fear for the mother's life — where the danger is certain — is recognised, proceeding from the canonical rule: 'Preserving some is preferable to losing all.'³³

This specific excuse is also recognised by Algerian criminal law as a ground for abortion; Article 308 of the Penal Code provides that no criminal sanction shall apply where the procedure is compelled by the imperative necessity of saving the mother's life from the threat of death.³⁴

If jurists permitted the termination of the foetus where necessity was compelling, they showed extraordinary caution in protecting its right to life — to the point that Maliki jurists held the ghurra to be owed by a woman who miscarried even a clinging clot as a result of a blow, a threat, or the inhalation of a smell — such as the smell of musk, fish, or fried cheese; if she smelled such an odour from neighbours, for example, it was incumbent upon her to request that they cease, and if she did not do so and they were unaware of her pregnancy until she miscarried, the ghurra was owed by her by reason of her negligence and contribution.³⁵

If jurists showed no leniency in preserving this foetus's right to life in such circumstances, they were even more cautious in protecting the life of a foetus born of fornication. They did not, as a general matter, distinguish between a lawful and an unlawful pregnancy, though this particular question was not extensively discussed by earlier jurists — owing to the moral rectitude of their times and the absence of widespread licentiousness — in contrast to what we observe in the present day. Nevertheless, some Shafi'i jurists permitted abortion where the pregnancy resulted from fornication. It is stated in Nihayat al-Muhtaj: 'Yes, if the sperm-drop is from fornication, permissibility may be imagined; but if it is left until the soul is breathed into it, then there is no doubt about the prohibition.'

The justification for the permissibility of abortion in this case is the shame and disgrace that will attach to the child after birth.

It must not be overlooked, however, that a highly significant point arises here: the statement that it is lawful for the fornicating woman who is pregnant through fornication to abort her pregnancy would involve a greater harm. The child of fornication bears no guilt, in accordance with God's words:

(وَلَا تَكْسِبُ كُلُّ نَفْسٍ إِثْمًا عَلَيْهَا) [Al-An'am: 164]

— of which the exegetes have said that this verse informs of the reality on the Day of Resurrection in God's just judgment: that souls shall be recompensed only according to their own deeds — good with good, and evil with evil — and that no one shall be made to bear another's sin. This reflects God's justice, which neither wrongs by laying the sins of others upon a soul, nor diminishes its good deeds.³⁶

There is absolutely no justification — and no canonical sanction — for sacrificing the life of this foetus in order to conceal another's crime, or for holding it accountable for a sin in which it had no part. In this regard we see no distinction between one stage and another — before or after ensoulment. Moreover, we have seen — as discussed in the preceding section — how the Prophet (peace and blessings of God be upon him) protected the life of the foetus in the case of the woman who came requesting the enforcement of the hadd punishment for fornication upon herself; he deferred the punishment until she had delivered and the child's upkeep was guaranteed by one of the Companions, thereby commanding the protection of the child while it was still a foetus in its mother's womb. Any assault upon it in this case accordingly incurs sin.

Some contemporary jurists have addressed this question³⁷ and have considered that the statement holding the permissibility of a fornicating woman aborting her pregnancy from fornication is a manifest contradiction of the dictates of the principle of blocking the means to evil (sadd al-dhara'i'). If the woman is not deterred from fornication by the fear of God, she will be deterred from it by the consequence of disgrace among the people that results from the pregnancy exposing her. If there were a way to be rid of the foetus, she would remove the obstacle that was restraining her from fornication, opening before her an easy path. Furthermore, the ruling of permissibility of abortion held by some jurists during the first forty days of a pregnancy from lawful wedlock was established only as a dispensation (rukhsa),³⁸ and dispensations — as is well known — do not attach to acts of disobedience.³⁹

In addition, the harms and corruptions resulting from opening the door to abortion for this reason are compelling, since reality testifies to the necessity of stringency in this regard — particularly when we observe the constant increase in abortion cases, to the point that it is said that forty million fetuses are killed every year worldwide, and that fifty-six per cent of this alarming number are women who are not married.⁴⁰

A further question arises here: the ruling on abortion where the fornication was not consensual — that is, where it occurred by way of rape.

³¹Al-Shawkani. Nayl al-Awtar Sharh Muntaqa al-Akhbar min Ahadith Sayyid al-Akhyar. Edited by Taha 'Abd al-Ra'uf et al. Maktabat al-Kulliyat al-Azhariyya, Cairo, n.d. Vol. 5, p. 37.

³²Ibn 'Abidin. Radd al-Muhtar. Vol. 4, p. 336.

³³Al-'Aziz ibn 'Abd al-Salam. Qawa'id al-Ahkam fi Masalih al-Anam. Dar al-Ma'rifa, Beirut, n.d. Vol. 1, p. 74.

³⁴Article 308 of the Penal Code provides: 'No penalty shall apply to abortion where it is necessitated by the imperative of saving the mother's life from danger, provided it is performed by a physician or surgeon openly and after notification to the administrative authority.' Article 72 of Law No. 85/05 of 16 February 1985 on the Protection and Promotion of Health further provides: 'Abortion for therapeutic purposes is recognised when it is necessary to save the mother's life from danger or to preserve her threatened physiological or psychological equilibrium; it shall be performed in a specialised facility following a medical examination conducted jointly with a specialist physician.'

³⁵Al-Dasuqi. Hashiyat al-Dasuqi. Vol. 4, p. 268.

³⁶Ibn Kathir Abu al-Fida'. Tafsir al-Qur'an al-'Azim. Mu'assasat al-Mukhtar, Cairo, 3rd ed., 1423 AH/2002 CE. Vol. 2, p. 201.

³⁷Al-Ramli. Nihayat al-Muhtaj. Vol. 8, p. 442.

³⁸Al-Nu'awashi Majid Husayn. 'Hukm al-Ijhad fi al-Shari'a al-Islamiyya [The Ruling on Abortion in Islamic Law]'. Majallat al-Shari'a wa-l-Dirasat al-Islamiyya, Year 16, No. 44, Dhu al-Hijja 1421 AH/March 2001 CE, p. 193.

³⁹Al-Qarafi. Al-Furuq. Difference No. 58. Vol. 2, p. 39.

⁴⁰Abu Lahya Nur al-Din. Al-Abna': Tarbiyyatuhum wa-Huququhum al-Nafsiyya wa-l-Sihhiyya, p. 23.

Some contemporary jurists have permitted abortion in such cases⁴¹

regardless of the stage of the foetus. It is apparent that this question is highly sensitive and continues to require the *ijtihad* of jurists and a weighing of the competing interests and harms, and a preference established among them. Nevertheless, by reference to the universal principles of this religion — and through consideration of the objectives with which Islamic law came, as established by an inductive reading of its particulars and detailed evidences — we find that God is the One who decreed life for this foetus, and that depriving it of this right may thus fall within the category of contravention of the textual provisions of the law.

As for abortion motivated by fear of poverty, Islamic law prohibits it and does not regard poverty as a justifying cause for criminal assault upon the foetus in this manner. God the Most High said:

(وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ سَحَنُ نَزْرُقُهُمْ وَإِيَّاكُمْ) [Al-Isra': 31]

'And do not kill your children for fear of poverty. We provide for them and for you.' The Algerian legislator did not depart from this position when it criminalised abortion regardless of the cause — paying no heed to the motivations behind the abortion, whether personal to the child, the mother, or society — except in the case of necessity, that is where the foetus poses a danger to the mother's health and life.

V. Sanctions for Abortion in Islamic Law

Islamic law has deterred against the termination of the foetus through two categories of legal provisions: the first relates to the rights of human beings through material compensation for the harm arising from the criminal offence; the second is devotional and relates to expiation (*kaffara*). Jurists have addressed these provisions in detail in the chapters of criminal jurisprudence; these rulings constitute, in essence, punitive rights vested in the foetus — as a form of protection against assault upon it.

1.4.1. Material Sanctions

These revolve in Islamic jurisprudence — across its various schools — around three sanctions:

1.4.1.1. The Ghurra (Special Indemnity)

Jurists are agreed that the liability arising from a criminal assault upon the foetus resulting in its stillborn expulsion from its mother's womb is a special blood-money designated the *ghurra* — whether the foetus is male or female, and whether the act is intentional or erroneous.⁴²

Numerous canonical texts establish its obligation, among them the hadith: 'The Messenger of God (peace and blessings of God be upon him) judged in a case involving two women who fought, one of whom threw a stone at the other and struck her in the abdomen while she was pregnant, killing the child she was carrying; they brought their dispute before the Prophet, who ruled that the blood-money for what was in her womb was a *ghurra* — a slave, male or female.' It is noted in commentary on this hadith: 'This is a firmly established and sound text on the point of disagreement, which establishes the ruling.'⁴³

As to the assessment of the *ghurra* — which, as stated in the hadiths, is a slave, male or female — since slaves no longer exist in present-day societies following the elimination of slavery, the majority of scholars have permitted its substitution with a financial equivalent. Ibn Qudama Muwaffaq al-Din said: 'If one wishes to pay its equivalent and the recipient agrees, that is permissible since it is a right of a human being, and whatever they agree upon between them is valid.'⁴⁴

Its value is one-half of one-tenth of the full blood-money, that is 1/20 of the full blood-money of a free Muslim male; it is owed for both male and female foetuses. The blood-money of a male foetus is estimated at one-half of one-tenth of the full blood-money, and that of a female foetus at one-tenth of the mother's blood-money. Since a woman's blood-money is one-half of a man's, the blood-money of a female foetus is one-half of one-tenth of the full blood-money — there is therefore no difference between a male and a female foetus.⁴⁵

Jurists agreed that the *ghurra* is also owed by the mother herself if she caused the assault — or by the father if the assault originated from him. A subtle but important point must be clarified here: since the foetus cannot be conceived of as benefiting from the *ghurra*, the question of who receives it arises. If the mother is not the cause of the foetus's death, it goes to her. If she caused the foetus's death by aborting it to be rid of it, she is entitled to nothing from it — for the killer does not inherit from the killed, and criminal acts must not be made a means of benefit. It therefore passes to the foetus's heirs, with the ruling of blood-money. This is the position of Malik, al-Shafi'i, and Ahmad ibn Hanbal (may God have mercy on them).⁴⁶

1.4.1.2. The Full Blood-Money (Diya)

The basis of the blood-money is the Qur'anic verse:

(وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَاً وَمَنْ قَتَلَ مُؤْمِنًا خَطَاً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ) [Al-Nisa': 92]

The majority of jurists hold that if a criminal assault upon the foetus results in the foetus being born showing signs of life — such as crying or weeping — and then dying from the effects of that assault, the full blood-money is owed, since the foetus in that case is treated as a complete human being and not merely as a foetus. The consensus of jurists on this point has been transmitted, as stated in *Al-Mughni*.⁴⁷

⁴¹Sheikh Muhammad Tantawi, the Grand Imam of al-Azhar, issued a fatwa permitting abortion where pregnancy results from rape, a ruling that sparked considerable controversy among al-Azhar scholars. The fatwa stated that a rape victim has the canonical right to abort at any stage upon discovering her pregnancy, and that she bears no sin for terminating the fruit of this heinous crime — invoking the canonical doctrine of lawful excuses. The fatwa also stressed that this ruling applies exclusively to rape victims and does not extend to those who commit adultery voluntarily. Fatwa of Sheikh Tantawi on the Abortion of Rape Victims. Available at: www.islamonline.net. Accessed 1 January 2008.

⁴²Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, p. 539.

⁴³Ibn 'Abd al-Barr. *Al-Tamhid lima fi al-Muwatta' min al-Ma'ani wa-l-Asanid*. Edited by Muhammad al-Fallah. Ministry of Awqaf and Islamic Affairs, Kingdom of Morocco, 1400 AH/1980 CE. Vol. 6, p. 486.

⁴⁴Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, p. 540.

⁴⁵Jurists examined the *ghurra* at length in all its particulars. As to its value, the majority — Hanafis, Malikis, Shafi'is, and in one opinion Hanbalis — agreed that it equals one-twentieth (1/20) of the full blood-money, equivalent to five camels. Ibn al-Humam. *Sharh Fath al-Qadir*. Vol. 10, p. 300. Ibn Rushd. *Bidayat al-Mujtahid*. Vol. 2, p. 340. Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, p. 541.

⁴⁶Ibn Rushd. *Bidayat al-Mujtahid*. Vol. 2, p. 291. Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, p. 557.

⁴⁷Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, pp. 550–551.

The Ibadi school also held the blood-money owed — with the distinction that they required the blood-money, and nothing else, where the foetus had exceeded four months, with various gradations for a foetus of lesser term.

The justification provided by jurists for the blood-money is that the foetus died from the assault after birth at a time viable for survival — which cannot be realised unless the foetus has reached six months or more, since if the assault occurred before that time, the *ghurra* is owed and not the blood-money, on the grounds that the foetus's continued survival could not have been anticipated. This is the position of some Shafi'is and the Hanbali school.⁴⁸

Others hold that there is no minimum period for the pregnancy; whenever the foetus is assaulted, the blood-money is owed — the position of Imam al-Shafi'i. A distinction must be drawn between the blood-money for a male and that for a female, the former being double the latter.

1.4.1.3. Retaliation (Qisas)

God the Almighty prescribed retaliation as a deterrent to punish the offender in kind:

(يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى) [Al-Baqara: 178]

Al-Tabari stated: 'God has made retaliation a source of life and a deterrent, and a lesson for the foolish and ignorant among the people; many a man has intended an outrage but was prevented by the fear of retaliation.'⁴⁹

The community has reached consensus on the obligation of retaliation, and reason likewise supports its legislation — whether on grounds of justice, in that the killer is dealt with as he dealt with his victim, or on grounds of public benefit in providing security, protecting blood, preserving lives, and deterring offenders.⁵⁰

As to retaliation in the case of assault upon the foetus, the Zahiri school held it to be obligatory even where the mother is the assailant — provided the foetus has exceeded four months, that is 120 days. This is because the offender in such a case has assaulted an inviolable soul intentionally, and therefore retaliation is the appropriate sanction. The Zahiris did not distinguish between erroneous and intentional killing; their criterion is ensoulment.⁵¹

This position is reported of some Malikis as well.⁵²

1.4.2. Devotional Sanctions: Expiation (Kaffara)

This sanction consists in expiation, a measured penalty constituting a right of God the Almighty. It is a devotional sanction enacted as an atonement for the sin and a seeking of forgiveness and pardon from God the Most High. Its basis is God's words:

(وَمَنْ قَتَلَ مُؤْمِنًا خَطَا فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَّةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ) [Al-Nisa': 92]

Jurists differed on the obligation of expiation. Imam Malik (may God have mercy on him) held it to be only recommended, not obligatory,⁵³

a position shared by some Hanafis.⁵⁴

The Shafi'is and Hanbalis, however, held it to be obligatory alongside the *ghurra* — since it is owed as a right of God and not a right of the human being, and since the foetus is a soul secured by blood-money, making expiation obligatory; the omission of any mention of expiation does not preclude its obligation.⁵⁵

The Zahiri school expounded at length on the obligation of expiation where the foetus has exceeded four months, citing reports from some Companions and their successors.⁵⁶

VI. The Ruling on Abortion in Algerian Legislation

The Algerian legislator dedicated the first division of Chapter Two of the Penal Code — which concerns felonies and misdemeanours against the family and public morals — to the offence of abortion, through nine articles running from Article 304 to Article 313. The act of abortion was treated as a criminal offence punishable by law, and although the legislator did not define the act, it regarded this offence as arising in every case where a pregnancy terminates by non-spontaneous means.

A reading of these articles reveals that the Algerian legislator extended its absolute protection to the foetus by criminalising the act of abortion whatever the cause — on one hand — and on the other regarded the pregnancy as existing from the moment of fertilisation, without regard to whether the foetal formation is complete, whether the soul has been breathed into it, whether it is in the earlier stages of formation, or whether the pregnancy is in its initial months. The legislator did not confine itself to this, but also penalised the attempt to abort — out of a desire to eradicate and combat this phenomenon.⁵⁷

It is no surprise that the legislator exercises caution in this matter by establishing deterrent penalties — particularly given the alarming escalation in figures that portend a violent moral explosion in society.⁵⁸

The legislator penalised the act of abortion and enumerated the forms of this offence across three scenarios: the woman who aborts herself; the abortion of a woman by a third party; and the incitement to abortion — carrying penalties of imprisonment ranging from two months or six months to two or three years, in addition to a fine that may reach 10,000 DZD.

These penalties apply only if the offence is established through its material element — assault consisting in abortion or its attempt through the employment of the means that cause the foetus to be expelled from the womb before the natural date of its birth — its moral element consisting in criminal intent, and its subject, namely the existence of the pregnancy.⁵⁹

⁴⁸(No additional reference cited in the original text for this footnote.)

⁴⁹Al-Tabari. *Jami' al-Bayan*. Vol. 2, p. 67.

⁵⁰Al-Zuhayli Wahba. *Al-Fiqh al-Islami wa-Adillatuh*. Vol. 6, p. 262.

⁵¹Ibn Hazm (Abu Muhammad 'Ali ibn Ahmad ibn Sa'id al-Andalusi). *Al-Muhalla bi-l-Athar*. Edited by Dr. 'Abd al-Ghaffar Sulayman al-Bandari. Dar al-Kutub al-'Ilmiyya, Beirut, n.d. Vol. 11, p. 262.

⁵²Al-Mawwaq. *Al-Taj wa-l-Iklil*. Vol. 6, p. 258.

⁵³Malik ibn Anas. *Al-Mudawwana al-Kubra*. Edited and hadith-referenced by Muhammad Muhammad Tamir. Maktabat al-Thaqafa al-Diniyya, Cairo, 2004. Vol. 4, p. 730.

⁵⁴Al-Kasani. *Bada'i' al-Sana'i'*. Vol. 7, p. 326.

⁵⁵Ibn Qudama Muwaffaq al-Din. *Al-Mughni*. Vol. 9, p. 557.

⁵⁶Ibn Hazm. *Al-Muhalla*. Vol. 11, pp. 236–239.

⁵⁷Frijja Husayn. *Sharh Qanun al-'Uqubat al-Jaza'iri* [Commentary on the Algerian Penal Code]. Office of University Publications, Ben Aknoun, Algeria, 2006, p. 125.

⁵⁸The latest statistics indicate that 80,000 abortions occur annually in Algeria, against 77,500 births — of which 7,000 occur outside wedlock — with the abortion rate standing at 10.5% per 100 births. Na'ila B. 'Al-Ijhad fi al-Jaza'ir: al-Jarima al-Sirriyya [Abortion in Algeria: The Secret Crime]. *Al-Shurouq al-Yawmi*, Sunday, 4 February 2007, No. 1908, p. 11.

⁵⁹These elements may be inferred from a reading of Article 304. See also: Dardus Makki. *Al-Qanun al-Jina'i al-Khass fi al-Tashri' al-Jaza'iri* [Special

The legislator requires these elements to be established in accordance with Article 304 of the Penal Code for trial judges to be capable of pronouncing a conviction on the charge of abortion; otherwise, they risk being overturned by the judges of the Supreme Court.⁶⁰

Certain international instruments also did not deviate from the criminalisation of abortion, regarding foetal termination as a punishable offence on the grounds that the foetus's rights are criminally protected. The preamble to the Convention on the Rights of the Child states: 'The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.' Article 24 of the same Convention recognised the right of the mother to special care and protection, including pre-natal care; Articles 5 and 6 of the International Covenant on Civil and Political Rights likewise prohibit the execution of a death sentence upon a pregnant woman.

What is nonetheless observable is the limited content of international instruments regarding the criminalisation of abortion; they addressed it in a restrained manner that has not been positively reflected in the domestic legislation of the states signatory to those instruments — particularly given their failure to establish deterrent penalties for this offence, which constitutes an assault upon another's life. Some domestic legislations accordingly adopted different solutions, revealing a fragility in certain systems that permit abortion for social reasons, including fornication.⁶¹

Nor should the orientation of international law be overlooked in this regard: the provision of the necessary protection for every pregnant woman — particularly where the pregnancy is outside wedlock — under the designation of 'reproductive health,' by permitting abortion and establishing legal protection therefor and providing all assistance and care. This orientation regards abortion through the lens of the mother's personal freedom, not through the lens of the foetus's right to life.⁶²

2. CONCLUSION

Abortion is a multifaceted subject with numerous ramifications that has provoked sharp debate among various legal systems — a debate bound up with the state's position on individual conduct and the degree of latitude it accords to personal freedoms. Were the doors of individual freedoms opened without any restriction or condition, we would be faced with a society dominated by chaos, corruption, and moral dissolution. It is for this reason that the Algerian legislator surrounded the foetus with criminal protection by prohibiting abortion — even where it is the pregnant woman herself who commits the act; she does not have the right to end her foetus's life.

Divine wisdom, which ordained that the growth of creation should extend to an appointed term, likewise ordained the protection of that growth in its fullness from assault. God has accordingly prohibited killing in all its unlawful forms. Divine wisdom further ordained the protection of that growth prior to its fullness, prohibiting the killing of the foetus — for it is in the ruling of a believing soul whose status God has elevated, whose killing He has prohibited, and without the preservation of foetuses in their mothers' wombs and the prevention of any assault upon them, souls would never have attained their level of completeness and existence. This would amount to a departure from obedience to God and a contradiction of His wisdom in creation and the population of the earth.

It is clear that abortion in this era constitutes one of the social problems confronting many countries — particularly voluntary abortion, such as the assault upon the foetus by its mother, or by a physician, or by others — which necessitates the imperative of expediting the issuance of legislative texts consistent with the provisions of Islamic law.

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Criminal Law in Algerian Legislation]. Office of University Publications, Constantine, Algeria, 2005. Vol. 2, pp. 103–104.

⁶⁰The Supreme Court, Criminal Chamber, issued Decision No. 252408 of 12 February 2001, which stated: 'Convicting the accused of the offence of abortion without establishing the elements of the charge and proving the genuine intent to carry out the attempt to abort constitutes an absence of legal basis.' La Revue Judiciaire, No. 2, 2002, pp. 550–551.

⁶¹For example, France enacted a law in 1975 permitting abortion for any reason up to the tenth week of pregnancy where the pregnancy poses a danger to the mother, while simultaneously allowing the actual reasons behind the request to go unexamined. 'Alwan Muhammad Yusuf and al-Musa Khalil Muhammad. Al-Qanun al-Dawli li-Huquq al-Insan: al-Huquq al-Mahmiyya [International Human Rights Law: Protected Rights]. Dar al-Thaqafa, Amman, 1st ed., 1428 AH/2007 CE. Vol. 2, p. 157.

⁶²By way of example, paragraph 106 of the Beijing Platform for Action (1995) provides: 'In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family planning services should be offered promptly, which will also help to avoid repeat abortions.' These formulations reflect an orientation that regards abortion through the lens of the mother's personal freedom rather than the foetus's right to life.

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