

The Physician's Legal Liability for Abortion Procedures under Algerian Law: Criminalization versus Legal Justification

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Abstract:

Abortion is regarded as one of the illegal and unethical actions that a physician, based on his profession and medical know-how. Subsequently, legal action can ensue against him due to criminal liability, as abortions are generally criminalized under Algerian legislation, or under civil liability, depending on the elements of the case, unless there is a legal provision that permits a physician to perform this action, in which case his liability will be limited.

Keywords: abortion, physician, criminal liability, civil liability, limitation of liability, Algerian legislation.

Introduction:

The medical profession is regarded as one of the noblest professions, as it strives to protect the most basic rights conferred upon human beings by various divine laws and positive legal systems, which are the right to life and the right to health care. This is accomplished by exercising the duty of care mandated by the rules of the medical profession. A medical professional can abandon the noble aim of this medical profession by indulging in some unlawful and unethical activities, taking advantage of his professional position and knowledge in the medical field. This can cause severe harm to the patient on whom these medical actions or procedures are carried out, and the effects may also reach the interests of society at large.

Among the most prominent of such acts are abortion procedures, notably due to their alarming spread in the world, including Islamic countries in general and Algeria in particular. This phenomenon is primordially due to the negative consequences of the developments that have been experienced in the world in various aspects, including the spread of drug addiction in society, especially among the youth, as well as the decline of moral and religious values in the face of the spread of the so-called civilization of the twentieth century. These factors have resulted in the spread of illegal sexual relations, which in most cases lead to unwanted pregnancies. This, in turn, leads to the attempt to terminate the pregnancy, whether by the female herself or by another person, who may be an ordinary person or a person with professional capability, especially physicians, aside from other various reasons that may lead to the termination of the fetus from its mother's womb.

The study of this topic is of utmost importance, particularly in view of the fact that there are multiple reasons for the performance of abortion procedures, in which case the services of a physician as a professional are usually sought. The Algerian legislature's intervention to establish the legal conditions under which the physician's legal liability for abortion procedures is established, and its concern to regulate this issue in different legislative texts, are all evidence of the importance and seriousness of this issue.

In this respect, the objectives of this study are, on the one hand, to highlight the legal foundations upon which a physician's liability for abortion procedures is established, and on the other hand, to identify the circumstances under which the physician's liability for these procedures is excluded, even if the physician has performed them. This will be achieved through the response to the following key research question: **What are the legal foundations upon which a physician's liability for abortion procedures is established? And can such liability be excluded even if the physician has performed these procedures?**

In an effort to address this problematic, this research has been divided into two topics. The first one will examine the legal basis of the physician's liability for abortion procedures, while the second one will identify the exclusion of the physician's liability for abortion procedures. This research employed both the descriptive and analytical methods.

First Topic: The Legal Foundations for Holding the Physician Liable for Abortion Procedures

Legal liability is defined as "the state of a person who has committed an act that entails accountability."¹

Generally, legal liability can be categorized as either civil liability or criminal liability.

There are two categories of civil liability: contractual liability and tort liability. Both are made contingent upon the existence of three essential elements: fault, damage, and link of causality. But they differ from each other in the nature of fault. Liability is contractual when the fault is occasioned by the breach of contractual obligations - namely, when one of the parties to the contract fails to perform an obligation incumbent on him under the contract, as a result of which he causes damage to the other party to the contract. But when the fault is tortious - namely, the breach of a general legal duty to not cause damage to others - the liability is tort liability².

On the other hand, criminal liability is established when an individual commits an act that is criminalized by law and is punishable by specific statutory penalties. In this situation, the individual is held liable in front of society as a whole³.

It is well established that civil and criminal liability can arise simultaneously from the same act if that act is considered a criminal offense and has caused harm to third parties. This

¹Mokhtar Kouadri, *Civil Liability for Medical Error – A Comparative Study, Doctoral Thesis in Sharia and Law*, Faculty of Islamic Civilization and Humanities, Specialization: Sharia and Law, University of Oran, 2009–2010, p. 13.

²Ali Ali Suleiman, *The General Theory of Obligation – Sources of Obligation*, University Publications Office, Algiers, 1990, p. 118.

³Salman Boudhiab, *Principles of Civil Law*, University Institution for Studies & Publishing and Distribution, Beirut, Lebanon, 1st ed., 2003, p. 150.

applies to a number of acts⁴, such as the termination of a pregnant woman's pregnancy. This act has been criminalized by the Algerian legislature, whether it is carried out by the pregnant woman herself or by a third person, who may be an ordinary person or a qualified professional, namely a physician. Therefore, the perpetrator, including the physician, incurs criminal liability because the act is prohibited by law unless there is a specific legal provision that allows the physician to carry out the abortion⁵. Moreover, civil liability may also arise because of the existence of a civil claimant in most cases where this act is carried out.

Thus, it may be stated that the liability of a physician in connection with abortion procedures is a type of medical-legal liability, which may arise either in accordance with the rules of criminal liability or in accordance with the rules of civil liability.

First Requirement: The Liability of the Physician for Abortion on the Basis of Criminal Liability

Given the prevalence of abortion and the drastic consequences thereof, which not only affect the personal interests of an individual but also the interests of society at large, the Algerian legislature, adopting the approach of different comparative legislations, has made an intervention in criminalizing the same through the provisions of the Penal Code and different special legislations, such as the law on health and its promotion.

For the criminal liability of a physician to be ascertained in regard to the abortion procedures he carries out, the constituent elements of the crime must be present in the act committed, so that the punishment prescribed by law for the crime of abortion can be applied.

Section One: The Constituent Elements of the Crime of Abortion

For the crime of abortion to be ascertained, the general elements that must be present in all crimes, namely the legal element, the material element, and the moral element, in addition to a specific element imposed by the legislature for the ascertaining of this crime, namely the presumed element.

First: The General Elements for the Establishment of the Crime of Abortion

Abortion is one of the procedures that physicians carry out on a daily basis and for different reasons. This makes it possible to hold them criminally liable for the procedure, since the legislature has, as a general rule, criminalized abortion, if the general constituent elements of the crime are established in the act in question.

A – The Legal Element:

The legal element refers to the fact that a person cannot be held criminally liable for an act unless such an act is criminalized by a legal provision. This is supported by Article 1 of the Algerian Penal Code, which states: **“No crime, no penalty, and no security measure shall exist except by virtue of a legal provision.”** Therefore, it can be said that the criminalized act of abortion is criminalized abortion, which has been criminalized by the legislature through specific provisions and penalties set out in Chapter Two of the Algerian Penal Code.

B – The Material Element:

⁴Abdelrazzak Ahmad al-Sanhuri, *Al-Wasit in the Explanation of the Civil Code – Part One – Sources of Obligation*, Dar Ihya'a Al-Turath Al-Arabi, Beirut, Lebanon, n.d., p. 744.

⁵ Articles 304 to 310 of the Algerian Penal Code, issued under Order No. 66-156 of 8 June 1966, as amended and supplemented by Law No. 20-06 of 28 April 2020, Official Gazette No. 25.

The material element of the crime of abortion is the act or activity committed by the perpetrator that results in the termination of the fetus, either by inducing its miscarriage, by forcing it out of the womb before the time of its natural birth, or by stopping its development and growth in the womb through the use of different means that have the effect of eliminating the fetus. Thus, the material element of the crime of abortion is realized only when the three elements are fulfilled, which are⁶:

1. The Criminal Conduct:

This is any action performed by the perpetrator with the intention of obtaining the criminal result. This action differs from one crime to another, but in all cases, it entails two elements: will and a bodily movement performed to implement the perpetrator's intention. If the action entails the performance of a particular bodily movement, the crime is a positive crime. On the other hand, if the action entails abstinence or omission, it amounts to what is referred to as a negative crime.

Analogously, the criminal conduct of a physician in the case of abortion can be determined whether he performs positive conduct, such as giving particular drinks, food, medicines, or pharmaceutical products to a pregnant woman while knowing that they will lead to the termination of the fetus, or whether he performs other actions that are capable of leading to the same criminal result, such as violence and threats, among other actions. The criminal conduct can also be determined whether the physician abstains from providing treatment and assistance to a pregnant woman who is threatened with miscarriage, notably in consideration of his professional capacity⁷.

It can thus be concluded that the legislature has not considered the particular means used by the perpetrator in the execution of his criminal act, provided that the means used are capable of achieving the prohibited effect⁸. This is deduced from Article 304 of the Algerian Penal Code.

This stand is further reinforced by Article 262 of Law No. 08-13 amending and supplementing Law No. 85-05 concerning the Protection and Promotion of Health, which states: **“Any person who violates the provisions concerning abortion shall be punished by the penalties prescribed in the Penal Code.”**⁹

2 – The Criminal Result:

The criminal result is the consequence of the criminal act. In the case of abortion and the pregnant woman, there are several consequences that may arise. It may cause the premature interruption of the pregnancy; it may also cause harm to the mother, both physical and psychological, as well as harm to society in general. But the consequence that is considered by the Penal Code is the premature interruption of the pregnancy. It does not matter thereafter whether the fetus is expelled from the womb dead, whether it stays in the womb for a period before being expelled, whether it is not expelled at all because the mother is dead, or whether

⁶ Mohamed Naguib Hosni, *Explanation of the Egyptian Penal Code, Special Part*, Dar Al-Nahda Al-Arabiya, Cairo, 1993, p. 510.

⁷*Ibid.*

⁸Mustafa Abdel Fattah, *The Crime of Abortion of Pregnant Women*, Dar Awla Al-Nuha, Beirut, 1996, p. 511.

⁹Law No. 08-13 of 17 Rajab 1429 corresponding to 20 July 2008 amending and supplementing Law No. 85-05 of 26 Jumada Al-Awwal 1405 corresponding to 16 February 1985 relating to the Protection and Promotion of Health.

it is born alive as a consequence of an assault committed against the mother before the natural term of delivery¹⁰.

3 – The Link of Causality:

This is the connection between the criminal act—represented by the act of abortion—and the criminal consequence, that is, the effect produced by the act, consisting of the death of the fetus or its expulsion from the womb before the natural time of birth.

C – The Moral Element:

The crime of abortion is not made merely by the existence of the material element; the moral element must also be there. This is called criminal intent, which itself is complete only when its two elements, knowledge and will, are fulfilled.

1. Knowledge:

The perpetrator must know that his act is committed against a pregnant woman and must also know the harmful effects of his act on the fetus. If he does not know about the existence of the pregnancy, he cannot be charged with the crime of abortion because of the lack of criminal intent, although he may be charged with another crime, such as assault and battery or administering harmful substances, unless the pregnancy was evident. However, if there are visible signs that prove the existence of pregnancy, the perpetrator cannot plead ignorance as a defense, especially if the woman is in the last stages of pregnancy and is slender, such that the pregnancy is evident. In this case, the perpetrator will be held liable for the crime of abortion. The knowledge necessary for establishing pregnancy is the knowledge that exists at the time of the act that led to abortion. If the knowledge is acquired after the act that led to abortion, then the intent to commit a crime is not considered to be established¹¹.

It can be argued that this provision applies to common individuals; in the case of professionals, however, it is assumed that they act with the diligence of a prudent person in such a situation. It is obvious that among the professional obligations of any physician is to determine whether a woman is pregnant before proceeding to diagnose her or prescribing a particular treatment for her. Thus, it can be argued that knowledge is presumed in such a case.

2. Will:

The will of the perpetrator must be directed both towards the execution of the act of abortion and towards the accomplishment of the consequent effect, namely the premature interruption of the pregnancy. Criminal intent is therefore ruled out if the act of abortion does not proceed from the free will of the perpetrator, as in the case of force majeure or necessity¹².

Second: The Specific Element Required for the Establishment of the Crime of Abortion

Besides the general elements that must be established for the commission of any crime, there must also be a specific element that must be established for the commission of the abortion's crime. This specific element is referred to as the presumed element. This element is linked to the object of the criminal act. It is made up of a legal or factual status that must exist prior to the commission of the crime. In this case, it is the existence of a pregnancy in the womb of the

¹⁰Abdel Nabi Mohamed Mahmoud Abu Al-Einein, *The Criminal Protection of the Fetus in Light of Modern Scientific Developments in Islamic Jurisprudence and Positive Law*, New University Publishing House, Alexandria, Egypt, 2006, p. 174

¹¹*Ibid.*, p. 222.

¹²Jadwi Mohamed Amin, *The Crime of Abortion between Sharia and Law*, Magister's Thesis in Criminal Sciences and Criminology, University of Abou Bakr Belkaid, Tlemcen, 2009–2010, pp. 76–77.

woman undergoing abortion¹³. This is clearly stated in Article 304 of the Algerian Penal Code, which states: **“Whoever causes the abortion of a pregnant woman or a woman presumed to be pregnant...”**.

Section Two: The Penalty Resulting from the Commission of the Crime of Abortion by a Physician

The crime of abortion is one of the crimes for which the legislature has given considerable importance by providing severe penalties for the perpetrators. The penalties differ according to the person who commits the crime. There is a difference between the penalties in cases where the crime is committed by the pregnant woman herself and in cases where it is committed by another person. Again, in the latter cases, there is a difference between the penalties in cases where the crime is committed by a common person and by a person with a professional status, including physicians, due to their professional expertise.

First: The Specificity of the Provisions Applicable Where the Crime Is Committed by Physicians

The medical and technical expertise and proficiency that physicians enjoy make it easy to commit abortion crimes compared to the commission of such crimes by a layman. This explains the specificity of the provisions applicable in cases where the offense of abortion is committed by physicians. Based on the provisions of the Penal Code regarding the commission of the crime of abortion by physicians, it is obvious that the Algerian legislature has waived the general provision set out in Article 42 of the Penal Code, which states that **“any person who assists, even indirectly, or aids the perpetrator in the preparatory or facilitating acts of the crime shall be considered an accomplice.”**¹⁴ In the case of abortion committed by a physician, the legislature has considered the physician a principal perpetrator rather than an accomplice. This is clearly stated in Article 306 of the Algerian Penal Code¹⁵.

Second: The Penalties Prescribed for the Physician in the Case of Committing the Crime of Abortion

The legislator has prescribed a set of penalties for the crime of abortion in general, and more specifically for the crime of abortion committed by physicians as qualified professionals. These penalties are prescribed both under the provisions of the Penal Code and the Code of Medical Ethics.

A – The Penalties Prescribed for the Physician for the Crime of Abortion under the Penal Code

Through the provisions of the Penal Code, it is clear that the Algerian legislator has made provisions for both principal and supplementary penalties in cases where the crime of abortion is committed by persons of professional status, including physicians.

1. Principal Penalties:

¹³*Ibid.*, pp. 64–65.

¹⁴SaadliDharifa, “The Specificity of Algerian Legislation in Aggravating the Crime of Abortion – A Comparative Study,” *Al-Ustadh Al-Bahith Journal for Legal and Political Studies*, Vol. 7, April 2022, p. 439.

¹⁵Article 306 of the Algerian Penal Code: “Physicians, midwives, dentists, pharmacists, as well as medical students, dental students, pharmacy students, pharmacy employees, pharmaceutical preparers, makers of medical bandages, dealers in surgical instruments, nurses (male and female), and masseurs (male and female) **who indicate methods of procuring abortion, facilitate it, or perform it**, shall be subject to the penalties provided for in Articles 304 and 305, as the case may be.”

According to Article 304, paragraph 1, of the Penal Code, a physician is guilty of the crime of abortion, whether the crime is consummated or simply attempted. This is without taking into consideration whether the pregnant woman, or the woman presumed to be pregnant, is a consenting or unwilling party to the abortion. The Algerian legislator has considered the crime to be a misdemeanour, punishable by a prison sentence of one (1) to five (5) years and a fine of 20,000 to 100,000 Algerian dinars.

In the event that the abortion results in death, the crime is classified as intentional assault and battery that resulted in death, rather than unintentional homicide. In this case, the crime is classified as a felony that is punishable by temporary imprisonment for an indicated period of time ranging from ten (10) to twenty (20) years. In addition to that, if the abortion is performed by a third party who is a habitual offender of abortion, then the indicated penalty is increased by the following means:

- The period of imprisonment indicated under Article 304/1, which ranges from one (1) to five (5) years, is doubled to range from two (2) to ten (10) years.
- In the event that the abortion performed by a habitual offender result in death, then the period of imprisonment is raised to the maximum limit of the indicated period of imprisonment under Article 304/2, which is twenty (20) years of imprisonment.

2. Supplementary Penalties:

The legislator has also provided a set of supplementary penalties. These include the general provisions that apply to all crimes, such as the option to sentence the perpetrator to prohibition of residence for a period not exceeding five (5) years, in accordance with Article 09 of the Algerian Penal Code.

Moreover, there are supplementary penalties that apply in the case that the perpetrator has a professional status, such as physicians, and these include prohibition from practicing the profession, in accordance with Articles 306 and 311 of the Algerian Penal Code.

B – The Penalties Prescribed for the Physician for the Crime of Abortion under the Code of Medical Ethics

From the Code of Medical Ethics, Article 262 of the same code thereof provides the following:

“Any person who violates the provisions relating to abortion shall be punished by imprisonment for a term ranging from one (1) to two (2) years and by a fine ranging from 1,000 to 3,000 dinars or by one of these two penalties. In all cases, the courts shall order the confiscation of the therapeutic products, substances, instruments, and objects seized. Furthermore, they may, in addition, order against the convicted person a temporary suspension or disqualification from practicing the profession through which the misdemeanour was committed.¹⁶”

Second Requirement: Holding the Physician Liable for Abortion on the Basis of Civil Liability

Civil liability, as provided for under the general rules, is governed by the breach of any obligation that is incumbent upon a person. If the basis of such obligation is a contract, it is governed by contractual liability; if it is based upon a legal rule that imposes upon a person

¹⁶Executive Decree No. 92-276 of 6 July 1992 containing the Code of Medical Ethics, Official Gazette No. 52 of 8 July 1992.

the duty not to cause harm to others, it is governed by tortious liability. In the same vein, it is obvious that civil liability arises when there is a breach by the physician of his contractual obligations towards his patients, or when there is a violation of his legal duty not to cause harm to others.

Section One: The Legal Characterization of the Physician's Civil Liability for Abortion Procedures

In reference to the general rules under Algerian law and most comparative laws, it is clear that no specific rules are provided regarding civil liability, notwithstanding its special nature due to the expertise and medical competence that physicians possess. Such a situation only underlines the need for the regulation thereof through specific legal provisions, as contemporary case law and Fiqh of Hadith seek to establish.

This is particularly relevant in light of the existing debate on the nature of such liability, which is contractual or tortious, particularly in light of the distinction that may exist between medical fault and other forms of fault. Indeed, medical fault may be contractual, which, according to certain jurists, constitutes the general principle in medical civil liability. It may be defined as the failure of the physician to fulfil his obligations arising from the contract entered into by him and the patient, resulting in damage to the patient. It may exceptionally be tortious when the physician breaches his duty not to cause damage to another, which is particularly frequent in numerous instances, including when the act that caused the damage by the physician is criminalized by law¹⁷.

By analogy, the physician's civil liability for abortion procedures is tortious in nature, considering that abortion is an act that is criminalized by law. The physician's civil liability for abortion procedures can only arise when the constituent elements thereof are fulfilled in accordance with the general rules.

Section Two: The Establishment of the Physician's Civil Liability for Abortion Procedures

The physician's civil liability for abortion procedures is governed by the general rules, and the physician cannot be held liable to compensate for damages resulting from abortion procedures unless the elements of civil liability are satisfied¹⁸.

First: The Elements of the Physician's Civil Liability for Abortion Procedures

The civil liability of the physician in abortion procedures is based on the fulfilment of its constituent elements, which are medical fault, damage, and the link of causality.

A – Medical Fault

Fault, as defined by Dr. Suleiman Marqis, is generally: "A breach of a legal duty associated with the awareness of the person committing the breach." This applies to medical fault, which has its own meaning depending on the general idea of fault, as well as the general idea of fault itself. Thus, it has been defined as: "The physician's failure to fulfill the specific obligations imposed upon him by his profession, constituting a breach of the duty to exercise the necessary care toward his patient."¹⁹

¹⁷Meriem Boucherbi, "The Civil Liability of the Physician," *Journal of Law and Political Sciences*, Vol. 2, No. 4, 2015, pp. 160–161.

¹⁸Article 124 of the Algerian Civil Code.

¹⁹Meriem Boucherbi, *ibid.*, p. 155.

Medical fault can be of different types, such as positive fault, which can be the error of examination, the error of diagnosing the illness, the error of providing the proper treatment, etc. Negative fault, which consists of the physician's failure to assist the patient, the physician's failure to intervene in critical situations, etc²⁰.

Thus, medical fault in the abortion procedure can be established in the actions and omissions of the physician, whether intentionally or unintentionally. Intent is not relevant to the establishment of tort liability; it is relevant to criminal liability and is limited to the characterization and the measure of the penalty.

Examples of the situations in which medical fault can be established in the abortion procedure include the physician providing drugs and food to the pregnant woman with the intent to cause abortion; advising the pregnant woman to make movements and acts which would lead to the termination of the fetus; committing errors in the examination and diagnosis of the pregnant woman and in the administration of treatment to the pregnant woman, leading to the abortion of the fetus; and failing to provide assistance to the pregnant woman, resulting in the miscarriage and death of the fetus in utero.

B – Damage

The second element of tort liability, without which the latter cannot exist, is damage. Damage, as a matter of fact, is not only an element of tort liability but, in many instances, the very basis of the latter. It has been defined as follows: "The harm inflicted upon a person in respect of a right or a legitimate interest, whether that right or interest relates to bodily integrity, emotional well-being, property, liberty, honor, or otherwise."²¹

This element of tort liability applies to abortion procedures under the general rules, whether the damage suffered as a result of the act of the physician, which led to the abortion, is of a material nature, such as the loss of the fetus or even the death of the pregnant mother as a result of the abortion, or moral damage. This, of course, in the application of Article 131 of the Civil Code, which refers to the application of Article 182 bis of the same Civil Code regarding the liability in tort, which states: "Compensation for moral damage shall include any infringement of liberty, honour, or reputation."²²

C – The Link of Causality

However, the fact that there are medical fault and damage is not sufficient to found the civil liability of the physician who performs abortion procedures; there must be a link of causality between the medical fault committed and the damage suffered, which is the termination of the fetus.

Second: The Legal Penalty of the Establishment of the Physician's Civil Liability for Abortion Procedures

The legal penalty of the establishment of the physician's civil liability for abortion procedures lies in the right of the injured party to sue the liable physician to receive compensation for the

²⁰Wazna Sayeki, *Proof of Medical Error before the Civil Courts*, Master's Thesis in Law, Specialization: Professional Liability, University of Tizi Ouzou, 2010–2011, p. 21.

²¹El-Arabi Belhadj, *The General Theory of Obligation in Algerian Civil Law*, Part Two, University Publications Office, Algiers, p. 143.

²²Order No. 75-58 of 26 September 1975 containing the Algerian Civil Code, as amended and supplemented.

damage suffered. The amount of the compensation is decided by the trial judge in accordance with the general rules provided in the Civil Code²³.

Second Topic: The Exclusion of the Physician's Legal Liability for Abortion Procedures

Despite the fact that the Penal Code has penalized abortion, imposed severe sanctions for the commission of abortion, characterized the crime of abortion as intentional, which threatens the public interest owing to the threat to the fetus, the mother, the family, public order, and morals, the Algerian legislator, on the other hand, has provided the possibility of the application of the grounds of justification and the grounds excluding liability to the crime of abortion, as with other crimes, subject to the conditions.

First Requirement: The Foundation for the Exclusion of the Physician's Legal Liability for Abortion Procedures

With regard to the Algerian legislation, it has become clear that the foundation upon which the physician's legal liability for abortion procedures has been excluded lies in the following provisions:

Section One: The Foundation for the Exclusion of the Physician's Legal Liability for Abortion Procedures in the Penal Code

In accordance with Article 308 of the Penal Code, abortion may be performed and will not incur punishment if it is necessary to preserve the life of the mother under circumstances provided by that Article.

Section Two: The Foundation for the Exclusion of the Physician's Legal Liability for Abortion Procedures in the Health Law

In Algerian legislation on health law, abortion that is considered necessary and lawful for the preservation of the health and psychological and mental equilibrium of the mother when threatened by the dangers of pregnancy is referred to as a therapeutic termination of pregnancy and is provided by Article 77 of the Algerian Health Law, which reads: "The therapeutic termination of pregnancy aims to protect the mother's health when her life or her psychological and mental equilibrium are threatened by danger due to pregnancy..."²⁴

Section Three: The Foundation for the Exclusion of the Physician's Legal Liability for Abortion Procedures in the Civil Code

The exclusion of the physician's civil liability for abortion procedures may also be grounded in the general rules set forth in the Civil Code, whether with respect to the state of necessity as provided for in Article 130 of the Civil Code, or on the basis of what is referred to as authorization by law. The latter is derived from Article 308 of the Penal Code and Article 77 of the Health Law, which permit abortion where it is necessary to save the life of the mother.

Second Requirement: The Case and Conditions for the Exclusion of the Physician's Legal Liability for Abortion Procedures

²³ Article 131 of the Algerian Civil Code: "The judge shall assess the extent of compensation for the damage suffered by the injured party in accordance with the provisions of Articles 182 and 182 bis, taking into account the surrounding circumstances."

²⁴ Law No. 18-11 of 18 Shawwal 1439 corresponding to 2 July 2018 relating to Health, as amended and supplemented by Order No. 20-02 of 11 Muharram 1442 corresponding to 30 August 2020, Official Gazette No. 50 of 30 August 2020.

The Algerian legislator has, as a general rule, criminalized abortion and has permitted it only in a single case, subject to the fulfilment of a set of specific legal conditions.

Section One: The Case in Which Abortion Is Permissible

The Algerian legislator has taken a severe stance towards the regulation of the legal provisions related to the criminalization of abortion. This is evident from the absence of mitigating circumstances related to this crime and the restriction of the permissiveness of abortion to only one case. This case is related to the allowance of abortion when it is considered an imperative necessity to save the life of the pregnant mother. This type of abortion is called necessary²⁵, medical, or therapeutic abortion, which aims to preserve the life of the mother or pregnant woman from imminent danger due to the continuation of the pregnancy²⁶.

This exception is provided for under Article 308 of the Penal Code. The pregnant woman may be in a health condition that subjects her to serious danger, which requires the termination of the pregnancy to preserve her life, protect one of her vital organs, or prevent severe complications that may result from diseases that she may be afflicted with, such as AIDS or cancer. In this case, the abortion is necessary, and the fundamental rationale is the preservation of the life of the mother from danger, on the premise that pregnancy may be feasible again in the future.

Moreover, the Algerian legislator has provided the state of necessity as a basis excluding liability as a general rule applicable to all crimes, whereby: “No penalty shall be imposed upon a person who was compelled to commit the crime by a force that he was unable to resist.”²⁷

The legislator has also provided an express provision to clarify the saving of the pregnant woman's life as an act of necessity in which there is no liability and punishment—either for the woman who gave consent to the act or the physician who performed the procedure. This is evident from Article 77 of Law No. 18-11 concerning health, amended and supplemented²⁸.

Section Two: The Conditions for the Realization of the State of Necessity in Abortion

While the Algerian legislator has allowed therapeutic abortion to save the life of the mother if her life is in peril, this is subject to the satisfaction of certain conditions. These conditions are provided in Article 308 of the Penal Code, which specifies the requirements to satisfy the state of necessity in the act of abortion to exclude the liability of the perpetrator. These requirements are the following:

First: The Performance of the Abortion by a Physician–Surgeon

This law also requires that the person who performs this crime is a specialist in this field. Thus, this authorization is exclusively for physicians and surgeons. This requirement is based on the expertise, knowledge, and competence of physicians who can perform this sensitive

²⁵ A state of necessity is defined as a set of circumstances that threaten a person with harm from which there is no means of escape except by committing the offense. See: Samira Sayed Suleiman Bassiouni, *Abortion and Its Effects in Islamic Sharia*, Dar Al-Tiba'a Al-Muhammadiya, 1st ed., Egypt, 1989, p. 26.

²⁶*Ibid.*

²⁷ Article 48 of the Algerian Penal Code.

²⁸ Law No. 18-11 of 2 July 2018 relating to Health, as amended and supplemented.

operation under proper conditions with proper means and adequate techniques that can help them execute this crime successfully²⁹.

It is worth noting that the legislature has exhaustively specified this authorization for a category of people, namely a physician-surgeon. Thus, this crime is punishable if it is practiced by other people, even if they work in the medical field such as nurses, midwives, or medical students. They cannot be exempted from the penalty, even if their purpose is to save the mother's life.

Moreover, the woman must give her consent to the procedure before the abortion is performed. This stipulation is clearly expressed by the legislator in the following terms: "Any medical act involving serious risk to the patient shall be subject to the patient's free and informed consent or to the consent of persons authorized by him or by law."³⁰

Second: The Abortion Procedure Must Be Performed in a Public Hospital Institution

Furthermore, the legislator stipulates that the procedure of abortion, or the therapeutic termination of pregnancy, must be performed only in public hospital institutions and not anywhere else. This stipulation is expressed clearly in the following terms of Article 78 of Law No. 18-11 related to health: "The therapeutic termination of pregnancy may only be performed in public hospital institutions."

Conclusion

Based on the findings of this study, the following conclusions have been reached:

First: Findings

1. Abortion is one of the acts that the Algerian legislator has criminalized due to the serious effect it has on the life and health of individuals and the interests of society at large.
2. Physicians are among the persons who may commit this crime, which is why the question of their legal liability for the perpetration of this act is justified, either through criminal liability based on the presence of the constituent elements of the crime, or through the obligation to provide compensation based on the assessment of the civil judge, provided that there is a civil claimant and based on the general rules of civil liability provided for under the Algerian Civil Code.
3. The Algerian legislator has also aimed to take into account the nature of the crime of abortion committed by the physician, especially to regulate the legal rules accordingly. This is evident through the following rules: the categorization of the physician who participated or directed the abortion as a principal rather than an accomplice; the absence of aggravating circumstances that may be applied to this crime; and the restriction of the legality of this crime to only one situation, which is the situation of necessity to save the life of the mother.
4. Even though the legislator aimed to take into account the nature of the physicians who committed the crime of abortion through the regulations of the aforementioned provisions, the legislator failed to provide aggravated penalties for the crime of

²⁹Omar Al-Saeed Ramadan, *Explanation of the Penal Code, Special Part*, Dar Al-Nahda Al-Arabiya, Egypt, 1986, p. 323.

³⁰Article 44 of the Code of Medical Ethics.

abortion committed by physicians but rather kept the same penalties applied to other offenders.

5. In spite of the specific nature of physicians' civil liability arising from the distinction between medical fault and ordinary fault, as well as from the physician's expertise and knowledge in comparison with ordinary persons, the Algerian legislator, like other legislations, was content with applying the general rules of civil liability without establishing specific rules of medical liability.

In light of the above findings, the following recommendations are suggested:

1. The necessity to intensify efforts to combat this crime through the promotion of awareness among all layers of society, whether they are ordinary people or professionals, about the perils of this crime, via the organization of conferences, lectures, and awareness events among different social groups.
2. The need to review the sanctions that must be applied in the event that this crime is committed by physicians, by imposing stricter sanctions in consideration of their expertise and the material resources available to them, which could facilitate the commission of these acts.
3. The need for the Algerian legislator to keep pace with the latest jurisprudential and judicial trends to lay down special rules regarding civil liability in the medical field, which differ from the general rules of civil liability set forth in the Civil Code.

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